
Expression
Copyright

# Copyright Infringement Analysis, Exclusive Rights

Eric E. Johnson

ericejohnson.com



## Elements of prima facie case for copyright infringement (for reproduction right)

1. it's a copyrighted work
   (copyrightable subject matter)
2. copying
3. substantial appropriation

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## 17 U.S.C. § 106

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

## Elements of prima facie case for copyright infringement (for reproduction right) [EXPANDED LIST]

1. it's a copyrighted work
   (copyrightable subject matter)

   + the plaintiff has standing to sue because they own the copyright—either all of it or the applicable stick in the bundle (e.g., exclusive license for reproduction by DVD/Blueray/home-video in the U.S.)

2. copying

   can be proven by:

   - direct evidence
   - indirect evidence (access and probative similarity)

3. substantial appropriation

   This means enough of the work was taken to amount to infringement.

   The test is "substantial similarity," which can be called *appropriative* substantial similarity for clarity.

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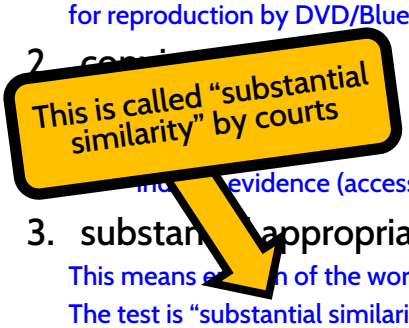


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Courts often say "substantial similarity" for this also

This is called "substantial similarity" by courts

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## copying – direct or indirect evidence

The plaintiff may satisfy his first-step burden by either direct or circumstantial evidence. Plagiarists rarely work in the open and direct proof of actual copying is seldom available. To fill that void, the plaintiff may satisfy his obligation indirectly by adducing evidence that the alleged infringer enjoyed access to the copyrighted work and that a sufficient degree of similarity exists between the copyrighted work and the allegedly infringing work to give rise to an inference of actual copying. See *Lotus v. Borland*. We have referred to that degree of similarity as "probative similarity." See, e.g., id. (admonishing that "probative similarity" requires that the two works are "so similar that the court may infer that there was factual copying").

Johnson v. Gordon, 409 F.3d 12, 18 (1st Cir. 2005)

## "substantial similarity" vs. "substantial similarity"

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Johnson v. Gordon, 409 F.3d 12, 18 (1st Cir. 2005)

(This and other case quotes slightly altered in terms of limiting or shortening citation.)

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## Appropriative substantial similarity

'the test for infringement of a copyright is of necessity vague ... (and) decisions must therefore inevitably be ad hoc.' *Peter Pan Fabrics v. Martin Weiner Corp* (2d Cir. 1960) (L. Hand, J.). It is well established, however, that in order to sustain a claim of copyright infringement the claimant is required to demonstrate a substantial similarity between the copyrighted work and the alleged copy. This is a factual question and the appropriate test for determining whether substantial similarity is present is whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.

Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021, 1022 (2d Cir. 1966)

## Appropriative substantial similarity

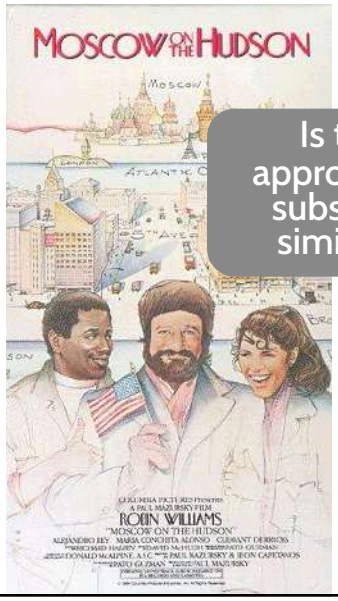
The substantial similarity requirement focuses holistically on the works in question and entails proof that the copying was so extensive that it rendered the works so similar that the later work represented a wrongful appropriation of expression. ...

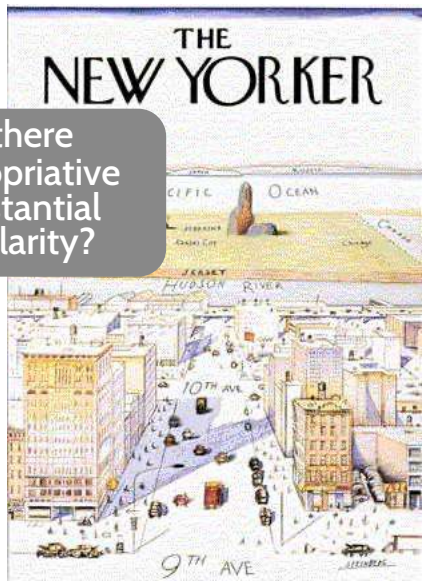
The "ordinary observer" test ... supplies a framework for gauging substantial similarity. Under that metric, the defendant's work will be said to be substantially similar to the copyrighted work if an ordinary person of reasonable attentiveness would, upon listening to both, conclude that the defendant unlawfully appropriated the plaintiff's protectable expression. Works can be substantially similar despite the presence of disparities. The key is whether "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard [the works'] aesthetic appeal as the same."

Johnson v. Gordon, 409 F.3d 12, 18 (1st Cir. 2005)

# Realotheticals

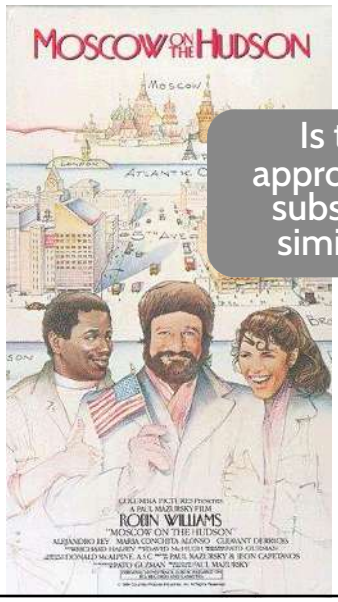
## Steinberg v. Columbia Pictures (S.D.N.Y. 1987)




Is there appropriative substantial similarity?

# Steinberg v. Columbia Pictures (S.D.N.Y. 1987)



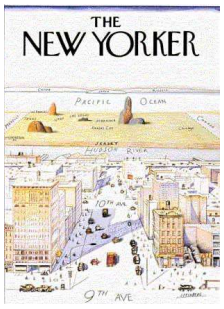


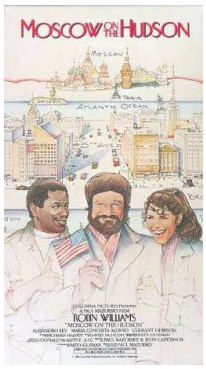
Is there appropriative substantial similarity?

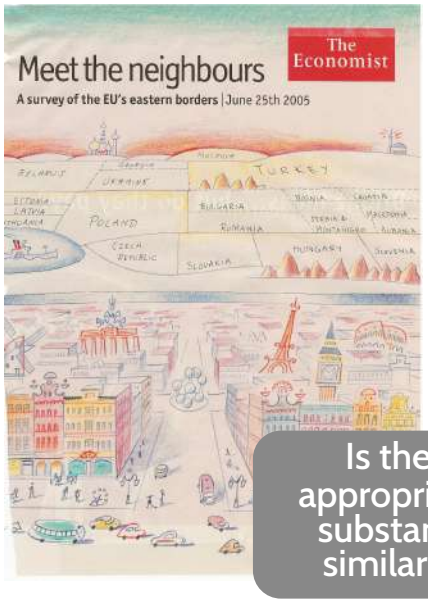
Held: **Yes.**

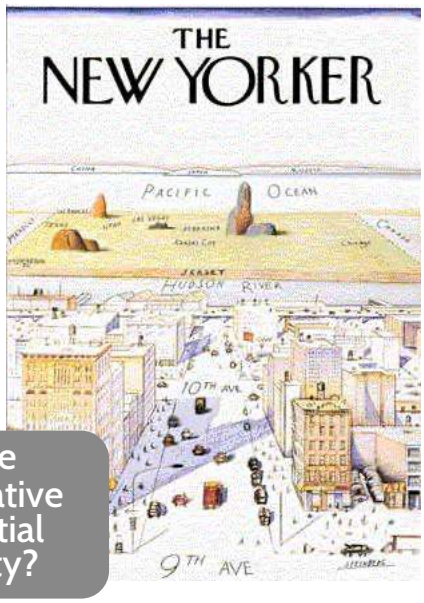
Even at first glance, one can see the striking stylistic relationship between the posters, and since style is one ingredient of "expression," this relationship is significant. Defendants' illustration was executed in the sketchy, whimsical style that has become one of Steinberg's hallmarks. Both illustrations represent a bird's eye view across the edge of Manhattan and a river bordering New York City to the world beyond. Both depict approximately four city blocks in detail and become increasingly minimalist as the design recedes into the background. Both use the device of a narrow band of blue wash across the top of the poster to represent the sky, and both delineate the horizon with a band of primary red. The strongest similarity is evident in the rendering of the New York City blocks. Both artists chose a vantage point that looks directly down a wide two-way cross street that intersects two avenues before reaching a river. Despite defendants' protestations, this is not an inevitable way of depicting blocks in a city with a grid-like street system, particularly since most New York City cross streets are one-way.

Steinberg v. Columbia Pictures (S.D.N.Y. 1987)

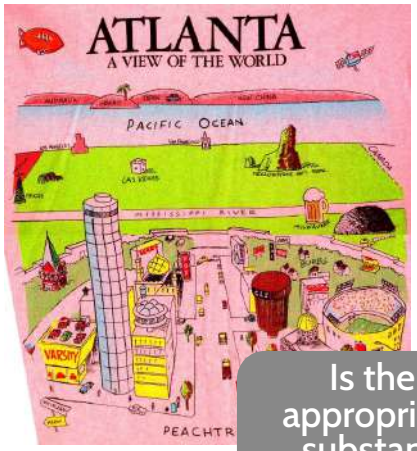


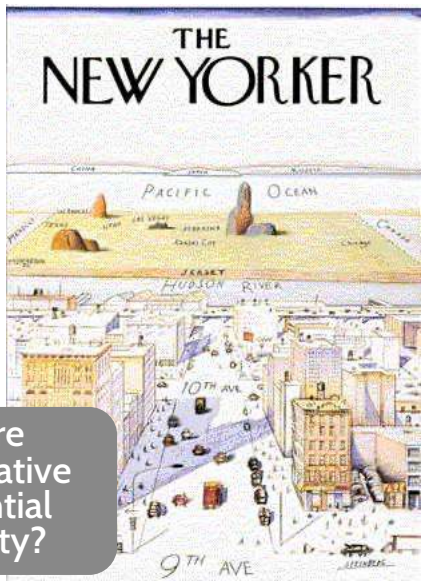






Is there appropriative substantial similarity?




Is there appropriative substantial similarity?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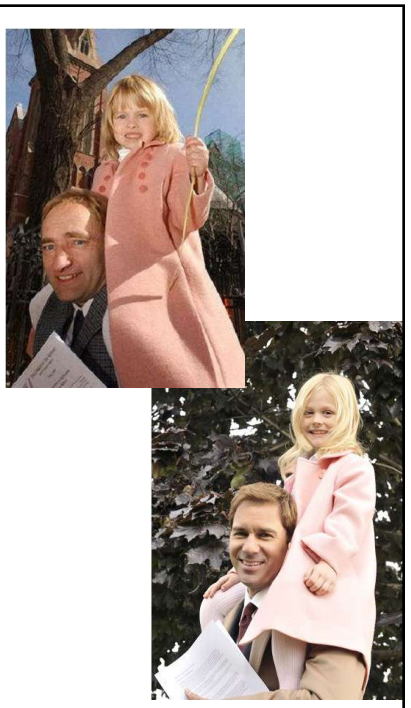
Is there appropriative substantial similarity?
Held: No.

Harney's creation consists primarily of subject matter—"facts"—that he had no role in creating, including the central element of the Photo: the daughter riding piggyback on her father's shoulders. ... Sony copied little of Harney's original work—only the placement of Gerhartsreiter and Reigh in the photograph—and no jury could conclude that the similarity resulting solely from that copying is substantial. Moreover, given the differences in background, lighting and religious detail, a reasonable jury comparing the entirety of the two works could not conclude that the ordinary observer would "regard their aesthetic appeal as the same."

Harney v. Sony Pictures Television (1st Cir. 2013)



Is there appropriative substantial similarity?

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Held: **Yes.**

[McDonald's would have us] dissect further to analyze the clothing, colors, features, and mannerisms of each character. We do not believe that the ordinary reasonable person, let alone a child, viewing these works will even notice that Pufnstuf is wearing a cummerbund while Mayor McCheese is wearing a diplomat's sash. ... We have viewed representative samples of both the H. R. Pufnstuf show and McDonaldland commercials. It is clear to us that defendants' works are substantially similar to plaintiffs'. They have captured the "total concept and feel" of the Pufnstuf show.

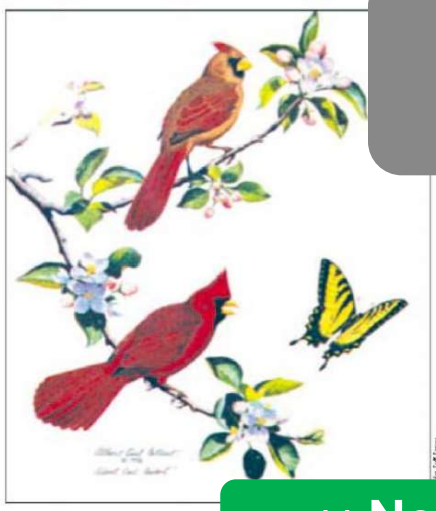
Sid & Marty Krofft Television Prods v. McDonald's 562 F.2d 1157 (9th Cir. 1977)

Plaintiff's

Defendant's

Is there appropriative substantial similarity?

Is there probative substantial similarity?



Is there probative substantial similarity?

Held: **No.**

***Note: Both paintings were by the same artist! He transferred the copyright in the first to the plaintiff, then painted the second one for a different project.***

"substantial similarity to show that the original work has been copied is not the same as substantial similarity to prove infringement. ... [With apparent regard to copying:] There are indeed obvious similarities. Both versions depict two cardinals in profile, a male and a female perched one above the other on apple tree branches in blossom. But there are also readily apparent dissimilarities in the paintings in color, body attitude, position of the birds and linear effect. In one, the male cardinal is perched on a branch in the upper part of the picture and the female is below. In the other, the positions of the male and female are reversed. In one, the attitude of the male is calm; in the other, he is agitated with his beak open. There is a large yellow butterfly in [one,] and none in [the other.] Other variances are found in the plumage of the birds, the foliage, and the general composition of the works. Expert testimony described conventions in ornithological art which tend to limit novelty in depictions of the birds. For example, minute attention to detail of plumage and other physical characteristics is required and the stance of the birds must be anatomically correct.

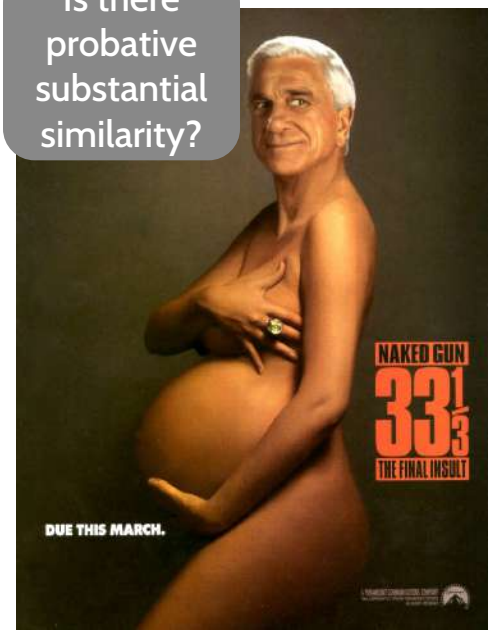
Franklin Mint v. Nat'l Wildlife Art Exch. (3d Cir. 1978)

[Apparently with regard to appropriation:]

We have examined the two paintings and based upon our own observations and impressions, we conclude that while the ideas are similar, the expressions are not. A pattern of differences is sufficient to establish a diversity of expression rather than only an echo.

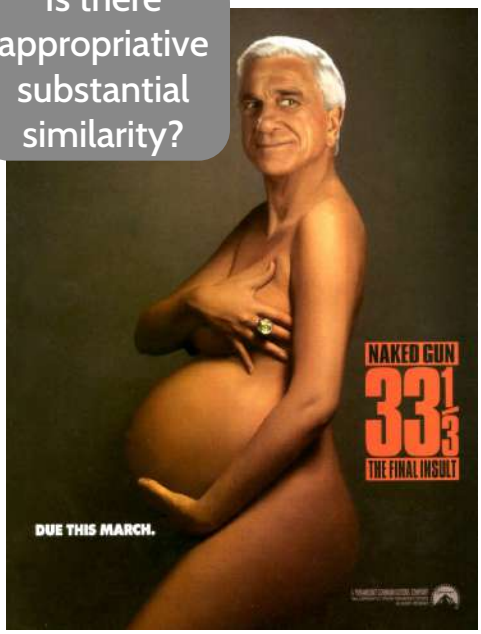
Franklin Mint v. Nat'l Wildlife Art Exch. (3d Cir. 1978)

Is there probative substantial similarity?





Is there appropriative substantial similarity?




Plaintiff's



Not plaintiff's




Is there appropriative substantial similarity?





Is there appropriative substantial similarity?

Held: **No.**




Is there appropriative substantial similarity?

Richard Prince rephotograph
from Jim Krantz Marlboro work

Is there appropriative substantial similarity?

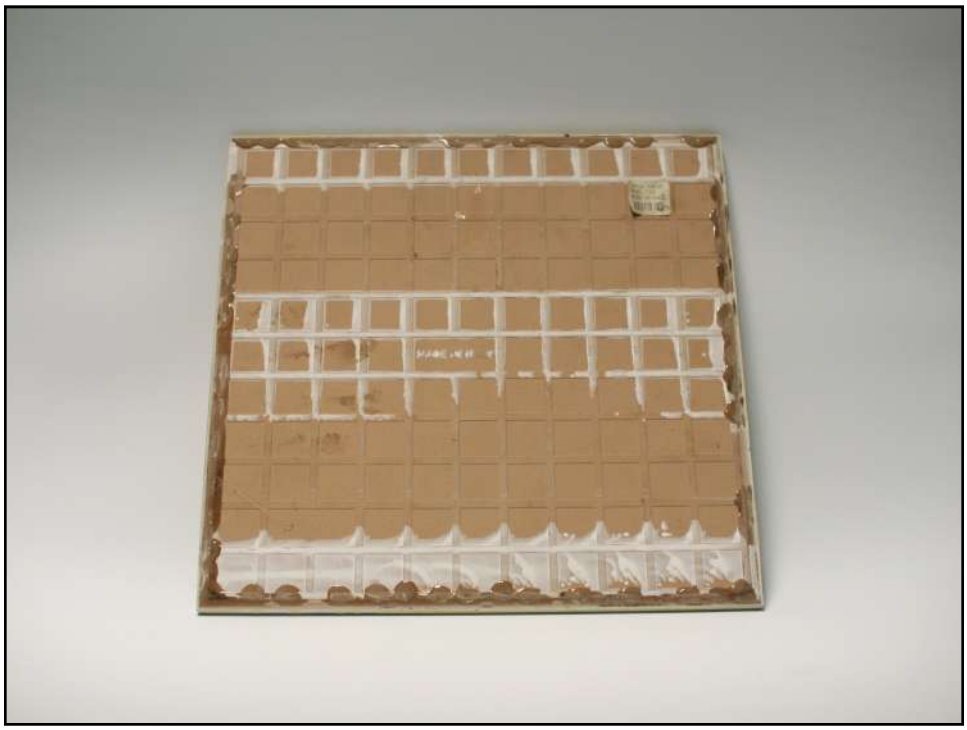
## "Untitled Cowboy," Richard Prince

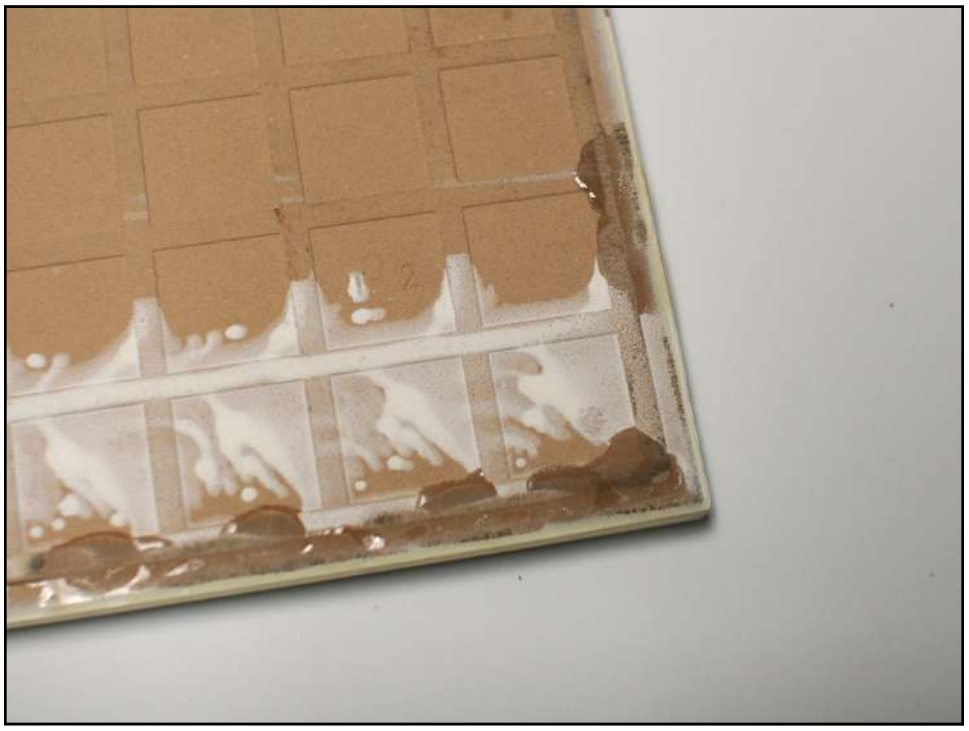
Is there appropriative substantial similarity?


Is there appropriative substantial similarity?

Mirage Editions v. Albuquerque A.R.T., 856 F.2d 1341 (9th Cir. 1988)

Lee v. A.R.T., 125 F.3d 580 (7th Cir. 1997)






Pages were razor-bladed out of a coffee-table book, then mounted on a tile and shellacked.
Is this a derivative work?
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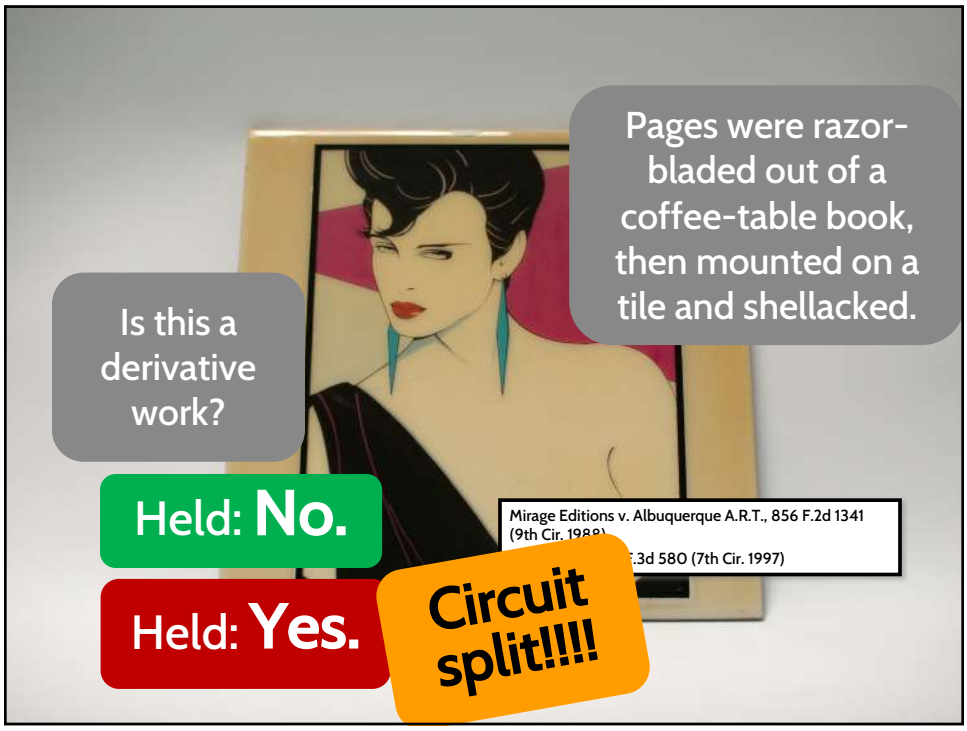
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Held: No.
Held: Yes.
Circuit split!!!!
Mirage Editions v. Albuquerque A.R.T., 856 F.2d 1341 (9th Cir. 1988)
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