Judging Similarity

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Copyright law's requirement of substantial similarity requires a court to satisfy itself that a defendant's copying, even when shown to exist as a factual matter, is quantitatively and qualitatively enough to render it actionable as infringement. By the time a jury reaches the question of substantial similarity, however, the court has usually heard and analyzed a good deal of evidence: about the plaintiff, the defendant, the creativity involved, the process through which the work was created, the reasons for which the work was produced, the defendant's own creative efforts and behavior, and on occasion the market effects of the defendant's copying. Despite having this large body of evidence before it, the jury is required to answer the question of substantial similarity through a mere comparison of the two works. In this Essay, we report results from a series of experiments in which subjects were presented with a pair of images and asked to assess the similarity between the two works using the criteria ordinarily given to fact-finders for the substantial similarity determination. When provided with additional information about the simple fact of copying, or about the amount of creative effort that went into the protected work, we saw an appreciable variation (i.e., upwards) in subjects' assessments of similarity between the works, suggesting that fact-finders are sensitive to additional information about the two works and the creators who produced them, contrary to what current law assumes. Our study suggests that the availability and salience of such additional information actively distorts fact-finders' assessments of the similarity between the two works, calling into question the purported objectivity of the substantial similarity requirement as a whole.

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