CONSILIENCE IN COPYRIGHT, OR, SUBSTANTIAL SIMILARITY IS A MISNOMER FOR THE SAME REASON THE DERIVATIVE RIGHT DOESN'T VIOLATE THE IDEA/EXPRESSION DICHOTOMY

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ABSTRACT

I argue that the convoluted jurisprudence of copyright infringement boils down to this: D's work infringes P's work if P's work is a *necessary* cause of D's work. That is, P's work is protected only against works that include material that can be caused by nothing other than P's work. If the material in D's work can be caused by something else, D will prevail – even if the material in D's work was actually caused by P's work in the case at hand, i.e., even if D actually copied from P.

Necessary causation is the underlying standard for infringement. Courts apply this standard circuitously through a combination of the substantial similarity standard (with its various sub-tests and accompanying principles), the limiting doctrines, the originality requirement, and the requirement of proof of actual copying.

By itself, substantial similarity is an under- and over-inclusive measure of infringement. "Similarity" connotes resemblance in overall form and function, which has long been under-inclusive and has always been very over-inclusive, and which has become ever more under- and over-inclusive.

Similarity has long been under-inclusive because courts have long regarded some accused works as infringing even if they are merely *congruent* with P's work. Since 1870 a dramatization of a novel has been deemed to infringe the novel even though the dramatization is more accurately described as congruent with the novel than similar to it. A movie based on a novel consists of moving pictures and sound, whereas the novel is stack of bound paper marked with symbols static and silent. Or, consider the unauthorized *Seinfeld* trivia book held to infringe the *Seinfeld* sitcom in *Castle Rock Entertainment v. Carol Publishing* (2nd Cir 1998). The trivia book is more accurately described as congruent with the sitcom than similar to it.

Similarity has always been very over-inclusive in that many works are more similar to works they do *not* infringe than to works they infringe. The *Seinfeld* trivia book, for instance, bears more similarity in form and function to perhaps every trivia book in the world than it bears to the sitcom. The primary way that courts correct for the over-inclusiveness of similarity is by tacitly requiring that material in D's work be similar to (or at least congruent with) material in P's work that is likely to be unique, i.e., likely to be a one-of-a-kind. If P's material is a one-of-a-kind, and if the material in D's work is sufficiently similar to (or sufficiently congruent with) P's material, then P's material is likely the only thing that can cause the material in D's work.

Recognizing that necessary causation is the underlying standard for infringement also paves the way to seeing why the derivative right does not violate the so-called idea/expression dichotomy. At first glance, the derivative right seems to cast a broader net than the reproduction right, by conferring protection against works that differ greatly from P's. This sparks the question: how is the derivative right distinct from protection for an idea, given that protection for

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an idea embodied by P's work would likewise confer protection against works that differ greatly from P's?

But this is not the real question. The premise that the derivative right casts a broader liability net than the reproduction right is false. For both rights the standard for infringement is the same, as most commentators acknowledge. Thus, for protecting a work against infringement, the derivative right and the reproduction right are the same right -- the right to be protected against works that satisfy the infringement standard. The real question, then, is how protection against works that satisfy the infringement standard is distinct from protection for an idea?

The answer is that the infringement standard only protects against works necessarily caused by P's work, whereas protection for an idea would protect against *all* works that embody the idea embodied by P's work regardless of whether they were necessarily caused by P's work. To put it figuratively, an idea is like a sphere that encompasses all works that embody the idea in question (regardless of whether they are necessarily caused by P's). In contrast, the infringement standard is like a connect-the-dots inside the sphere that extends only to those works connected by causal arrows that necessarily originate from P's work.