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For Marion, Shelly, and Kelley,
who sacrificed the most so that we could write this book;
for Anna;
and for Lars, who, to his father’s great joy,
looks just like his grandfather.
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Preface

Substantial similarity is a sine qua non of every determination of copyright infringement. It is that part of an infringement claim that addresses the question: What constitutes wrongful copying? Yet, despite substantial similarity’s importance in copyright infringement litigation, it remains one of the most elusive concepts in copyright law. Judge Learned Hand’s pronouncement more than fifty years ago that substantial similarity decisions must “inevitably be ad hoc”\(^1\) rings as true today as it did then. Part of the difficulty results from a lack of uniformity in judicial language addressing the subject. More confusion arises from the lack of a single substantial similarity test employed throughout the circuits. Added difficulty results from physical differences in copyrightable subject matter; materials as diverse as plays, music, computer programs, and literary characters cannot be compared in exactly the same way.

The purpose of this book is to present an organized approach to the analysis of substantial similarity, focusing on the key factors courts use to compare works in copyright infringement litigation. Chapter 1 focuses on substantial similarity as a concept and how it differs from probative similarity and striking similarity, two related but different principles. Chapter 2 distinguishes similarities that bear upon a finding of substantial similarity from similarities that must be disregarded. Chapter 3 addresses the circuit peculiarities in approach and language to allow the practitioner direct access to the guiding principles in each circuit.

Chapters 4 through 16 discuss substantial similarity with respect to various types of specific copyrightable subject matter, such as music, audiovisual works, books, and computer programs. The discussion in those chapters draws upon authorities from all circuits. Chapter 17 addresses the way substantial similarity is proved, including the role of expert testimony in the presentation

\(^1\) Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).
of the proof. Chapter 18 discusses appellate review of district court substantial similarity determinations.

We have collected and included as appendices examples of the works at issue in certain cases discussed in the text and several examples of jury instructions that we hope practitioners will find useful.