

# *Substantial Similarity, from Equity to Legal Process*

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Ever since *Arnstein v. Porter*, the standard test for copyright infringement is said to comprise two parts: copying of the constituent elements of the plaintiff's work that are original, and a substantial similarity between the defendant's work and the plaintiff's. That second part has been notoriously difficult to pin down. Courts vacillate, often unknowingly, between treating substantial similarity as a simple measurement of the amount of copying, and viewing it as a holistic assessment of the combined question of law and fact determining liability. That ambiguity is the result of three contemporaneous developments that made the *Arnstein* test almost instantly problematic: the merger of law and equity, which was still playing out in the 1940s and 1950s; the rise of the Legal Process School as a replacement for legal realism; and a nearly complete generational turnover of the judges on the Second Circuit. The frustration of substantial similarity comes from the fact that it is an equity-based enigma wrapped inside a process-based riddle.