

## Court Sets 'Substantially Similar' Threshold at 70% in Web-Based Infringement Dispute

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To sustain an action for copyright infringement, the similarity between two web publications of a copyrighted compilation must exceed 70%, the U.S. District Court for the Southern District of California held Aug. 16. *BensBargains.net, LLC v. XPBargains.com*, [2007 ILRWeb \(P&F\) 2453](#) [SD Cal, 2007].

The court said that a discount list published by a web site was only "substantially similar" to that of a competitor when the two shared at least 70% of their content. The court held that the lists were eligible for copyright protections, but declined to find infringement where similarities fell short of the 70% threshold.

**Allegedly Infringing Discount List.** The plaintiff made a business of trolling the Internet for discounts on various merchandise, then creating lists of these deals and publishing them to his web site, [www.BensBargains.net](http://www.BensBargains.net). The plaintiff suspected that a competing bargain site, XPBargains.com, was re-publishing his lists, and he began registering his lists for copyright protection. Eventually, he sued XPBargains for infringement.

XPBargains moved to dismiss, arguing first that the lists were ineligible for copyright protection, then that lists, even if protected, lacked the "substantial similarity" required for success on an infringement action.

The court granted the motion for all but three lists on the basis of similarity. Lists with a more than 70% similarity qualified as "substantially similar," but the rest, the court said, did not.

**Substantial Similarity Required.** A compilation enjoying copyright protections pursuant to the 1976 Copyright Act, 17 USC §101 et seq., can form the basis of an infringement action when three conditions are met: the plaintiff must prove (1) ownership of the work in question; (2) access to the work by the defendant; and (3) substantial similarity of both the general ideas and the expression of those ideas.

The court said that the plaintiff's discretion and creative selection in his lists qualified them for copyright protection. The only issue in dispute was how similar his lists were to those of the defendant.

The court assessed similarity by studying the relevant pool of information and analyzing how many unique items each list contained.

Rather than serving as a complete directory of Internet deals, the plaintiff's lists were intentional selections from a "vast" pool, the court said. The court declined to narrow its consideration of the pool to those items which the plaintiff claimed as "exclusives."

On this reasoning, the court distinguished *Schoolhouse, Inc. v. Anderson*, [9 ILR \(P&F\) 742, 275 F3d 726](#) (8th Cir 2002), where the court held that even a 74% similarity between two lists was not enough when the list at issue was "comprehensive," listing nearly all potential selections.

"This case is distinguishable from *Schoolhouse* because the universe of deals from which Plaintiffs and Defendants can select is vast," the court said. "Under the facts of this case, Defendants' copying of 74% of Plaintiff's deals, without significant additional selections, would be sufficient to raise a triable issue as to infringement."

The court looked also to *Kregos v. Associated Press*, 937 F2d 700 (2d Cir 1990), which held that a 67% similarity between lists was likely not enough for infringement when the alleged infringer had added nearly as many items as he had allegedly copied.

The court ultimately determined that 70% was a workable medium.

"[T]he court finds that there is insufficient similarity to survive summary judgment where either the percentage of Plaintiff's deals that were copied or the percentage of Defendants' deals that were derived from Plaintiff's website is less than 70%," the court concluded. Only three of the plaintiff's registered compilations met this requirement.

Jonathan Hangartner of La Jolla, Calif., represented XPBargains.com. Joshua A. Ridless of the Law Offices of Joshua A. Ridless, San Francisco, represented BensBargains.net, LLC.