1. **Survey evidence insufficient to establish substantial similarity within copyright infringement.**

[Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693 (2d Cir. 1992)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992218838&pubNum=0000350&originatingDoc=I1dd18b9c5b7811e0a8a2938374af9660&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=8cf30475369f4a7c91139bea7119e673&contextData=(sc.Keycite))(suggesting that many areas tested by the reasonable person standard in the substantial similarity test are too complicated for the lay person)*.*

* “Historically, *Arnstein* 's ordinary observer standard had its roots in “an attempt to apply the ‘reasonable person’ doctrine as found in other areas of the law to copyright.” 3 Nimmer § 13.03[E][2], at 13–62.10–11. *That approach may well have served its purpose when the material under scrutiny was limited to art forms readily comprehensible and generally familiar to the average lay person* . . . [i]n making its finding on substantial similarity with respect to computer programs, we believe that the trier of fact need not be limited by the strictures of its own lay perspective.” (emphasis added)

[Warner Bros. Inc. v. Am. Broad. Companies, Inc., 720 F.2d 231 at 245 (2d Cir. 1983)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1983148435&pubNum=0000350&originatingDoc=Ib5709f8a94c711d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=56e73ae4f42b4d20b2f165b4566f14f2&contextData=(sc.Search)).

“The ‘substantial similarity’ that supports an inference of copying sufficient to establish infringement of a copyright is not a concept familiar to the public at large. It is a term to be used in a courtroom to strike a delicate balance between the protection to which authors are entitled under an act of Congress and the freedom that exists for all others to create their works outside the area protected against infringement. *We need not and do not decide whether survey evidence of the sort tendered in this case would be admissible to aid a jury in resolving a claim of substantial similarity that lies within the range of reasonable factual dispute.* However, when a trial judge has correctly ruled that two works are not substantially similar as a matter of law, that conclusion is not to be altered by the availability of survey evidence indicating that some people applying some standard of their own were reminded by one work of the other.”

1. **A survey cannot be used to determine parodic transformative use.**

[Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 801 (9th Cir. 2003)](https://1.next.westlaw.com/Document/Id634e7f989f311d9b6ea9f5a173c4523/View/FullText.html?transitionType=Default&contextData=(oc.Default)).

* “We decline to consider Mattel's survey in assessing whether Forsythe's work can be reasonably perceived as a parody.” Id. at 801.
* “Use of surveys in assessing parody would allow majorities to determine the parodic nature of a work and possibly silence artistic creativity. Allowing majorities to determine whether a work is a parody would be greatly at odds with the purpose of the fair use exception and the Copyright Act. *See generally* [*Campbell,* 510 U.S. at 583, 114 S.Ct. 1164](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994058334&pubNum=0000708&originatingDoc=Id634e7f989f311d9b6ea9f5a173c4523&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=535028708c614e13b3a19ad84a4cb3f3&contextData=(sc.Default)).” *Id.*