Substantial Similarity

Copyright Law – Professor Grimmelmann
Class 16 – October 28, 2008

recap

- infringement = ownership of valid copyright + violation of exclusive right
- violation of exclusive right = copying-in-fact + improper appropriation + (106 elements)
- show copying-in-fact with direct evidence or with access + (probative) similarity
- copying need not be conscious to infringe

questions to watch for

- copying or independent creation?
- *de minimis* or substantial similarity?
- copying of expression or only of ideas?
- role of judge, jury, and appellate review?
- burdens of proof?
- role of expert testimony, if any?

improper appropriation

- this is *Second Circuit* law
  - terminology and tests vary by circuit
  - most are similar, but the Ninth is craaazy
- also called "substantial similarity"
- *de minimis* = not similar enough to infringe
  - test is qualitative and quantitative

plan of attack

- *Arnstein* redux: stating a test for the jury
- *Steinberg*: applying the test to facts
- *Boisson*: filtering out ideas
- *Altai*: the limits of the approach

Arnstein, word-by-word

- what would be "permissible copying?"
- what is the test?
- and who applies it?

jury instructions?

- you're trying a copyright case, and the judge asks you to submit your proposed jury instructions tomorrow. what do you do?

jury instructions

- "whether defendant took from plaintiff's work so much of what is pleasing to the ears of lay listeners, who compromise the audience for whom such popular music is composed, that defendants wrongfully appropriated something which belongs to the plaintiff" (*Arnstein*)

jury instructions

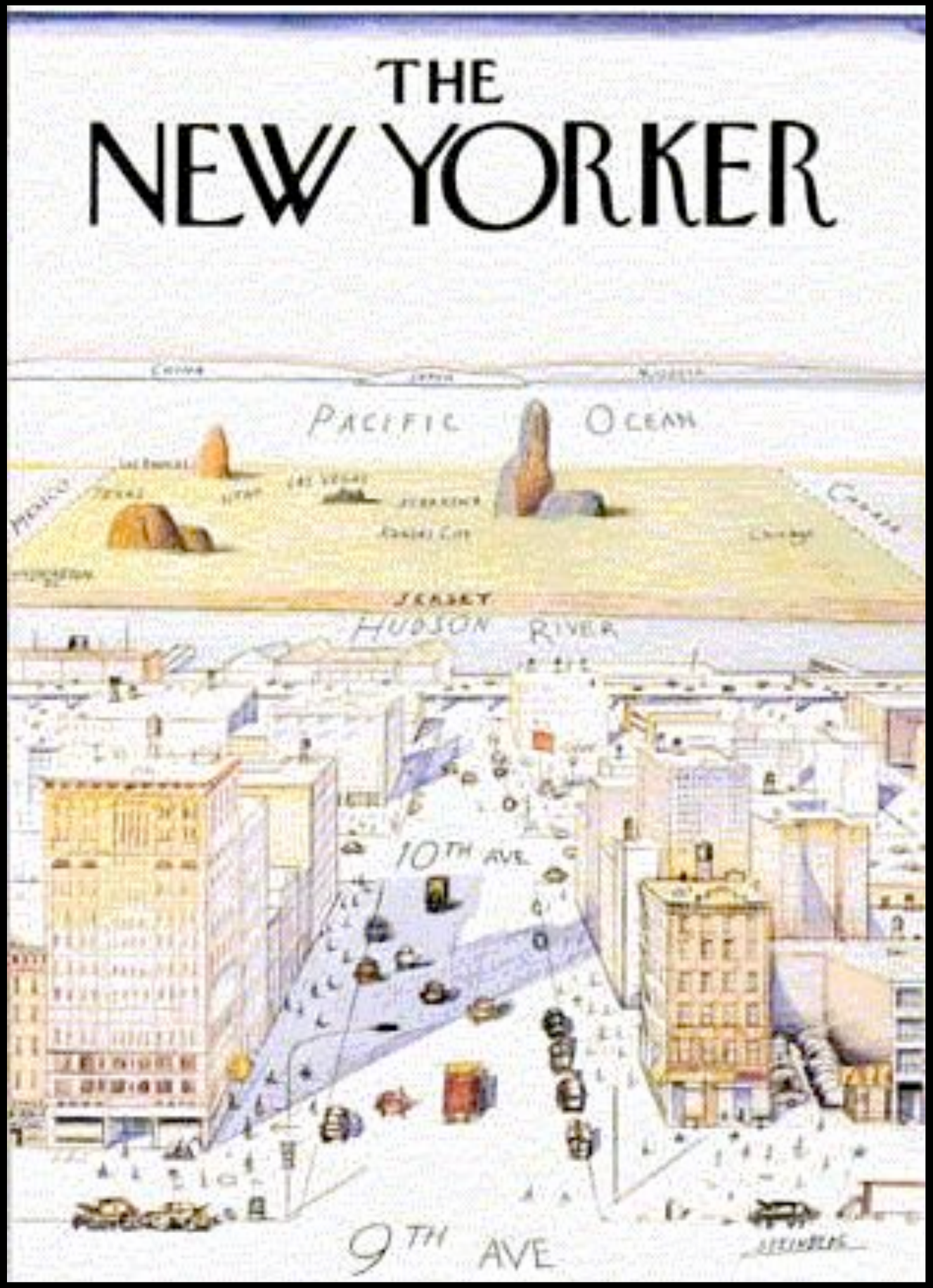
- “an ordinary observer observing the two works would conclude that the original elements of plaintiff's works and the corresponding elements of defendants' works evoke a substantially similar total concept and feel that arises from a common creative arrangement and interaction of the original elements” (Nimmer on Copyright)

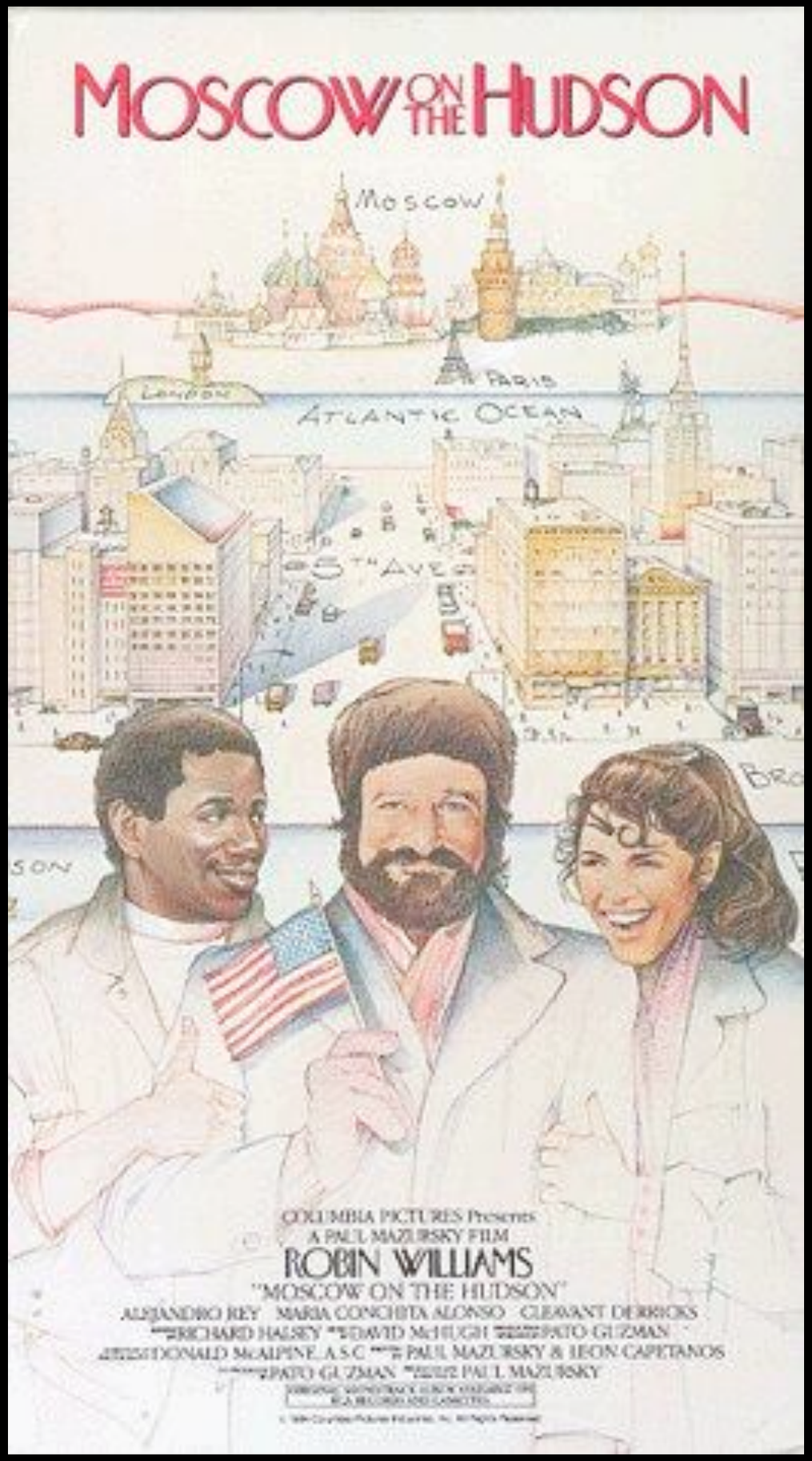
jury instructions

- "whether an ordinary reasonable person would find the total concept and feel to be substantially similar" (Sand et al., *Modern Federal Jury Instructions*)

what's a jury to do?

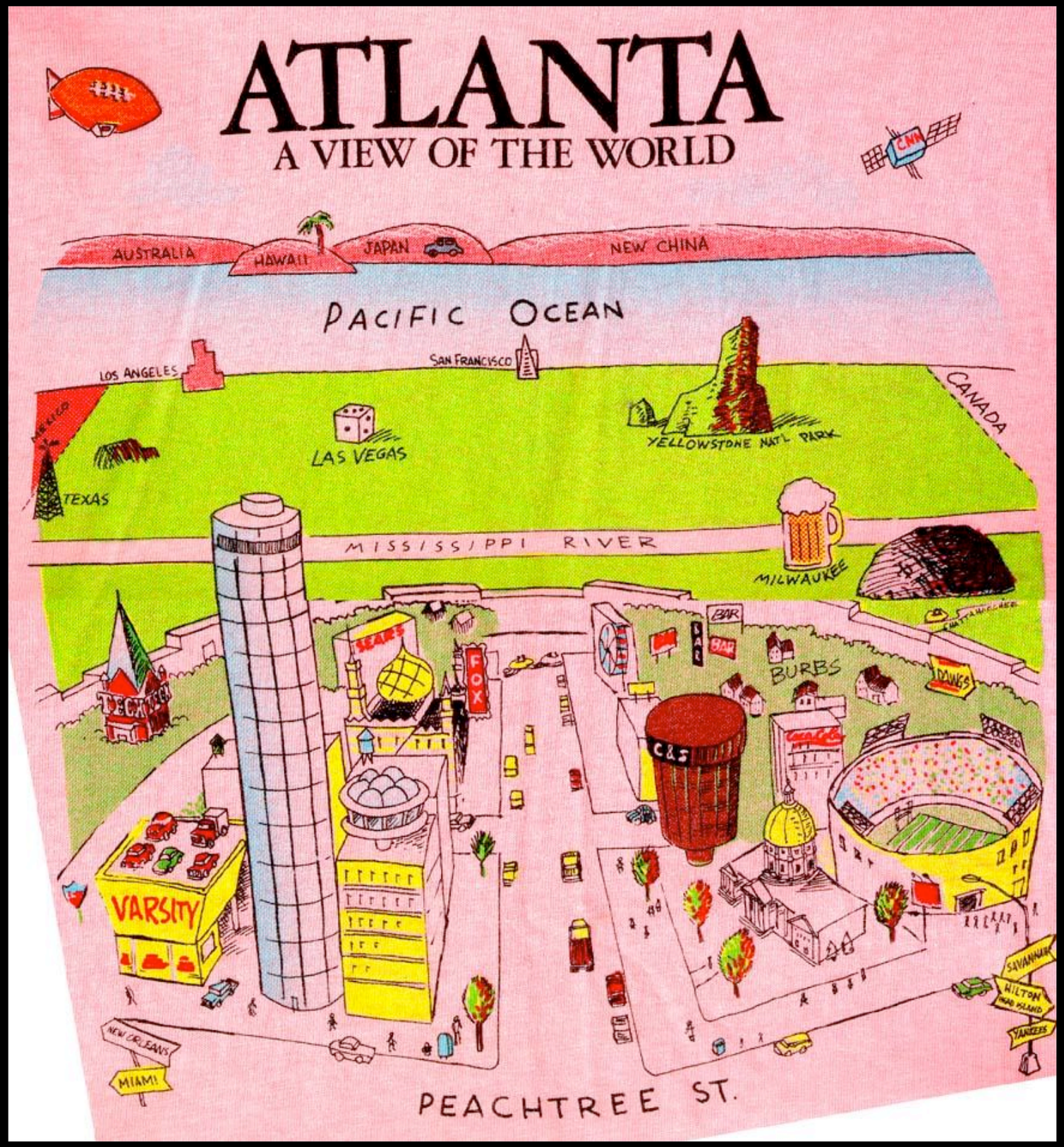
- why is "dissection" inappropriate?
- why exclude the tone-deaf from the jury?
  - hint: is it about the jury's own reactions?
  - what if the works were children's songs?
- why play the songs for the jury?
- could expert testimony ever be useful?

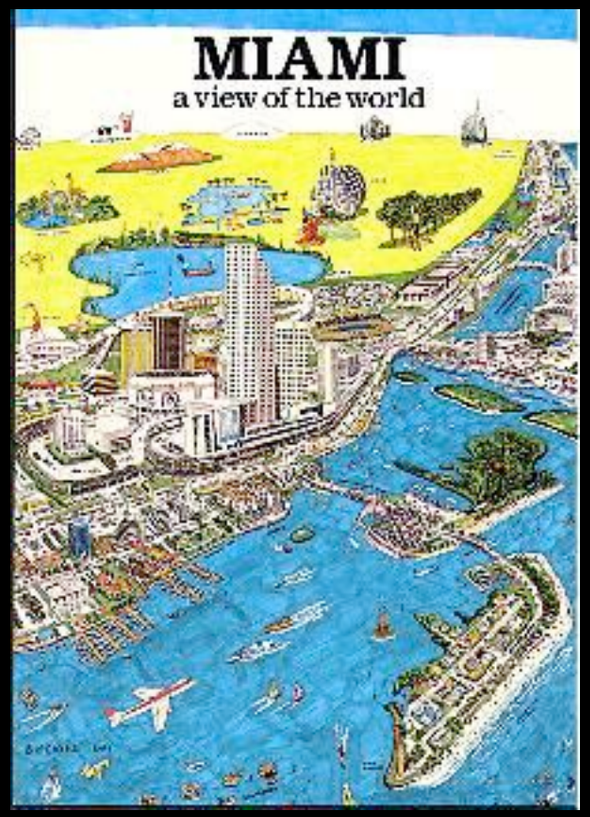

THE
NEW YORKER
PACIFIC OCEAN
JERSEY
HUDSON RIVER
10TH AVE
9TH AVE

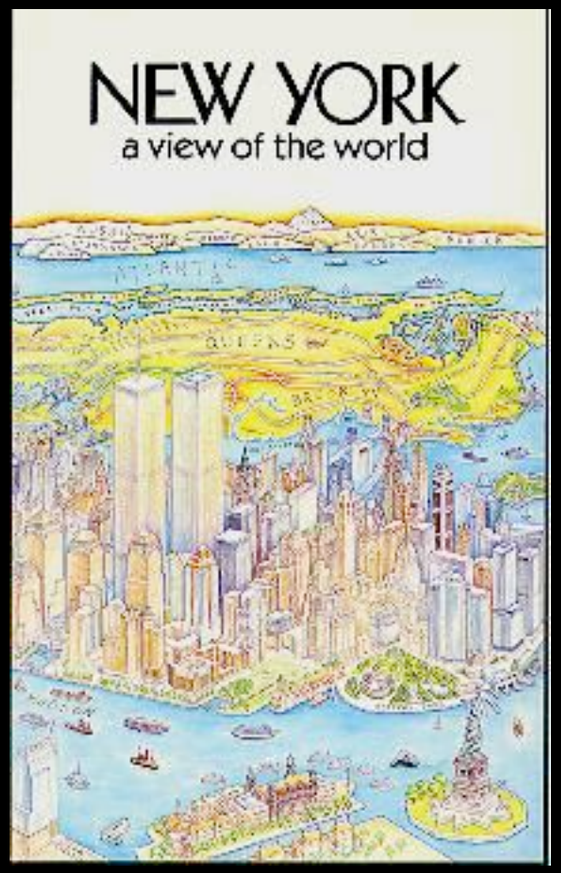

MOSCOW ON THE HUDSON
MOSCOW
PARIS
LONDON
ATLANTIC OCEAN
85TH AVE
COLUMBIA PICTURES Presents
A PAUL MAZURSKY FILM
ROBIN WILLIAMS
"MOSCOW ON THE HUDSON"
ALEJANDRO REY MARIA CONCHITA ALONSO CLEAVANT DERRICKS
RICHARD HALSEY EDWARD McHUGH PATO GUZMAN
DONALD McALPINE, A.S.C. PAUL MAZURSKY & LEON CAPETANOS
PATO GUZMAN PAUL MAZURSKY

Steinberg

- what's similar about these two works?
  - what's in the New Yorker cover that's not in the movie poster? And vice-versa?
  - do these differences matter? How?
- do these works *feel* too similar to you?
- ultimately, is there infringement?


ATLANTA
A VIEW OF THE WORLD
AUSTRALIA
HAWAII
JAPAN
NEW CHINA
PACIFIC OCEAN
LOS ANGELES
SAN FRANCISCO
CANADA
LAS VEGAS
YELLOWSTONE NAT'L PARK
TEXAS
MISSISSIPPI RIVER
MILWAUKEE
SEARS
FOX
BAR
BURBS
C&S
VARSITY
NEW ORLEANS
MIAMI
SAVANNAH
HILTON HEAD ISLAND
YANKEES
PEACHTREE ST.

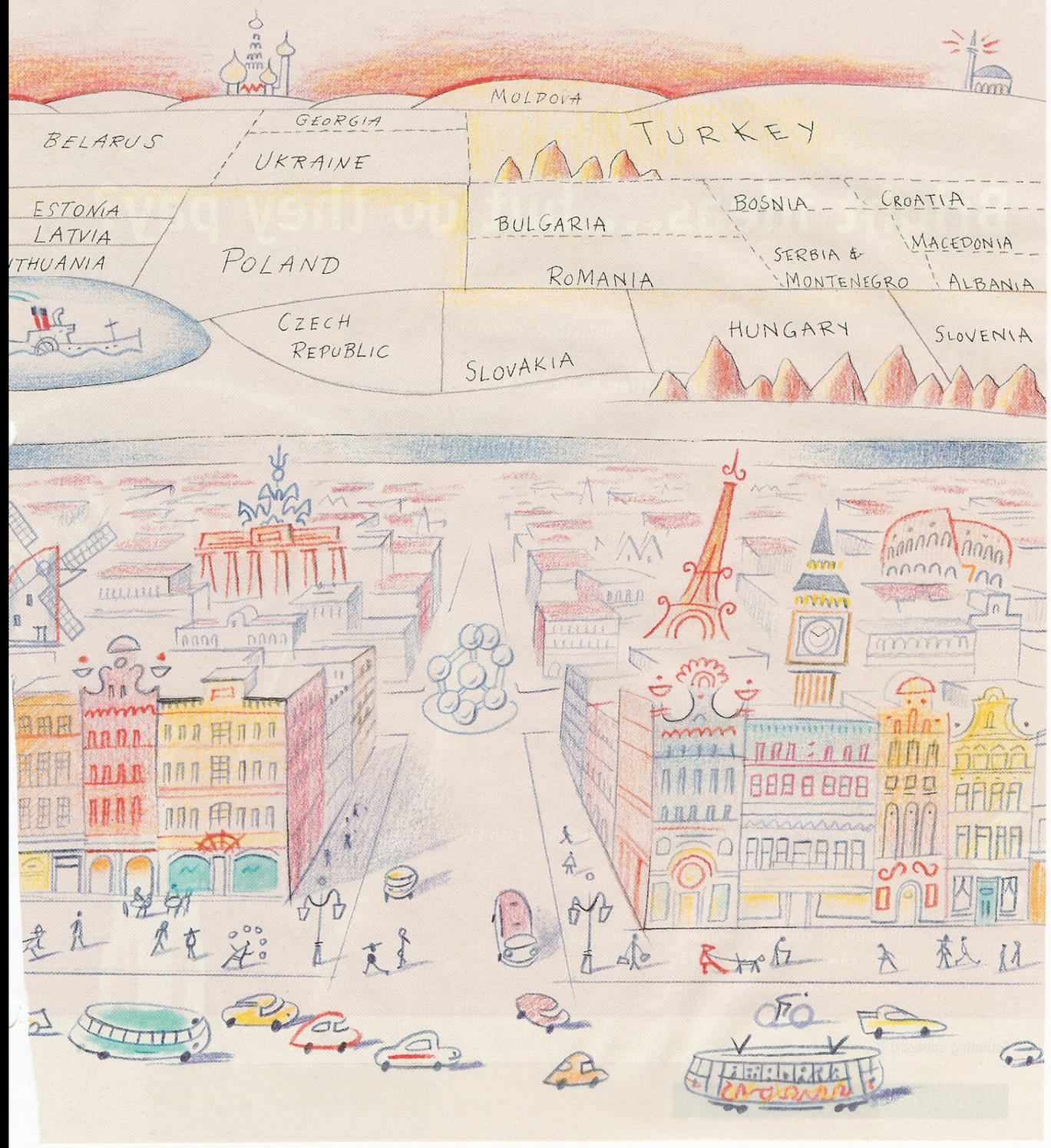

MIAMI
a view of the world


NEW YORK
a view of the world

Meet the neighbours

The Economist

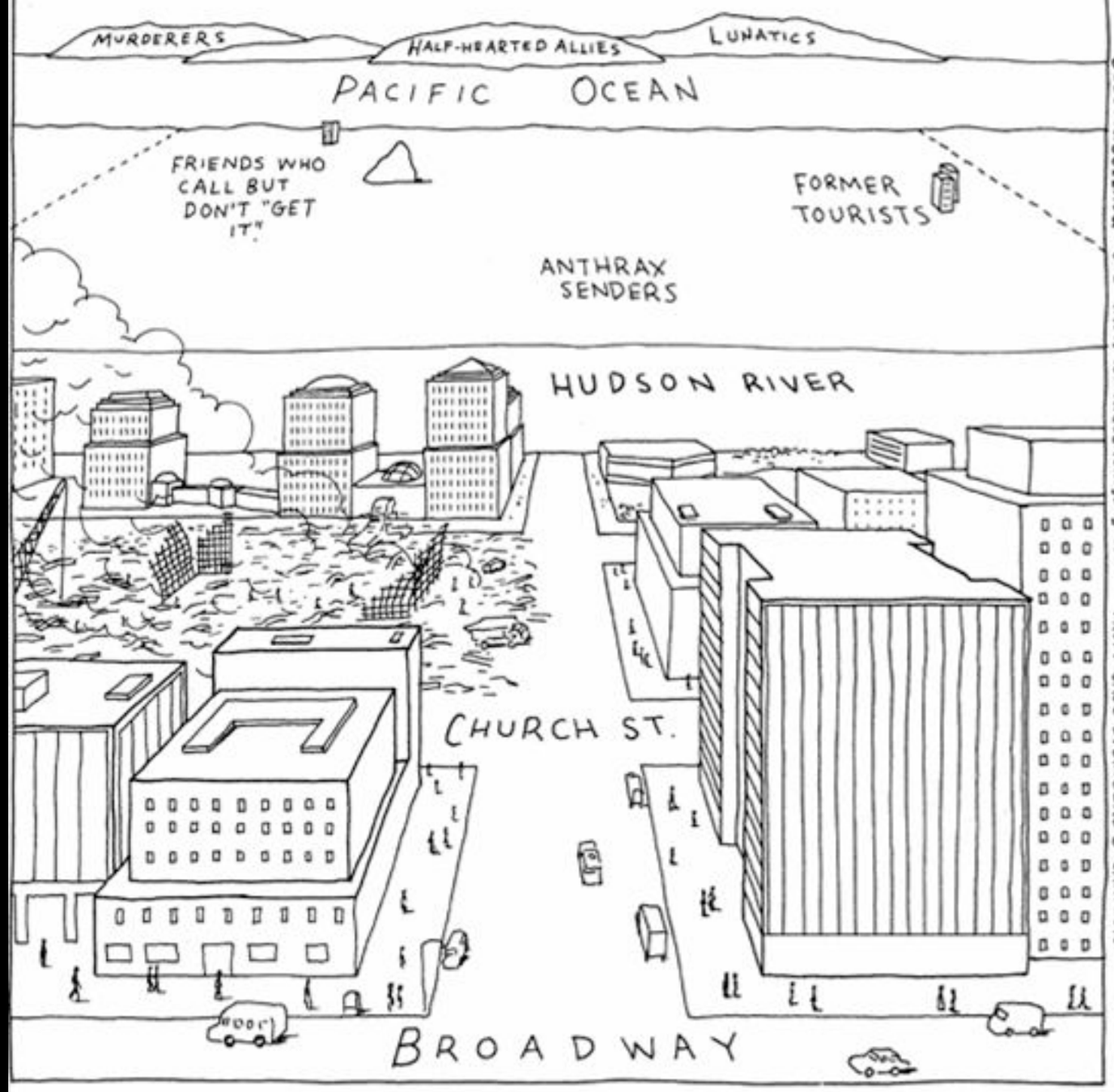
A survey of the EU's eastern borders | June 25th 2005



TOM the DANCING BUG

by RUBEN BOLLING

THE NEW NEW YORKER



©2001 R. BOLLING - 572- www.tomthedancingbug.com FROM SAUL STEINBERG'S CARTOON

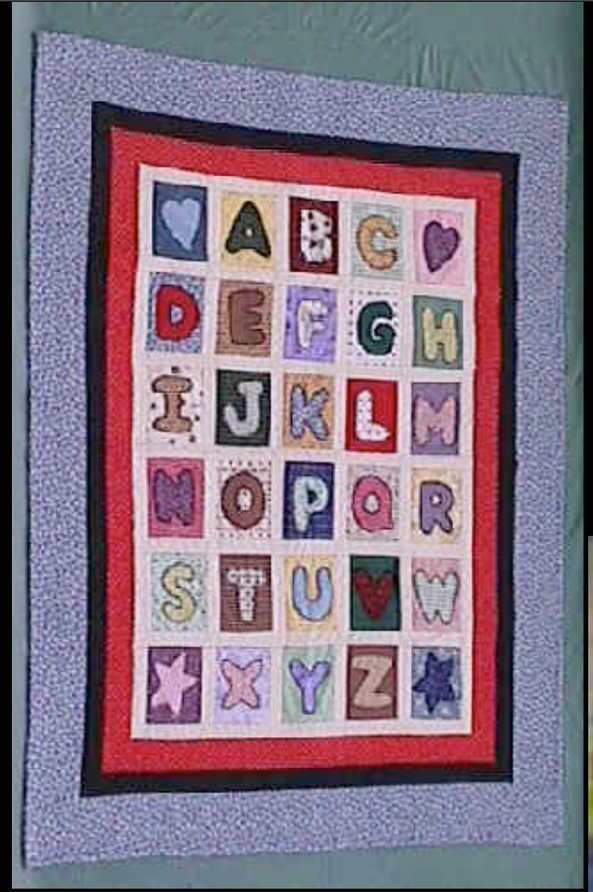
Boisson

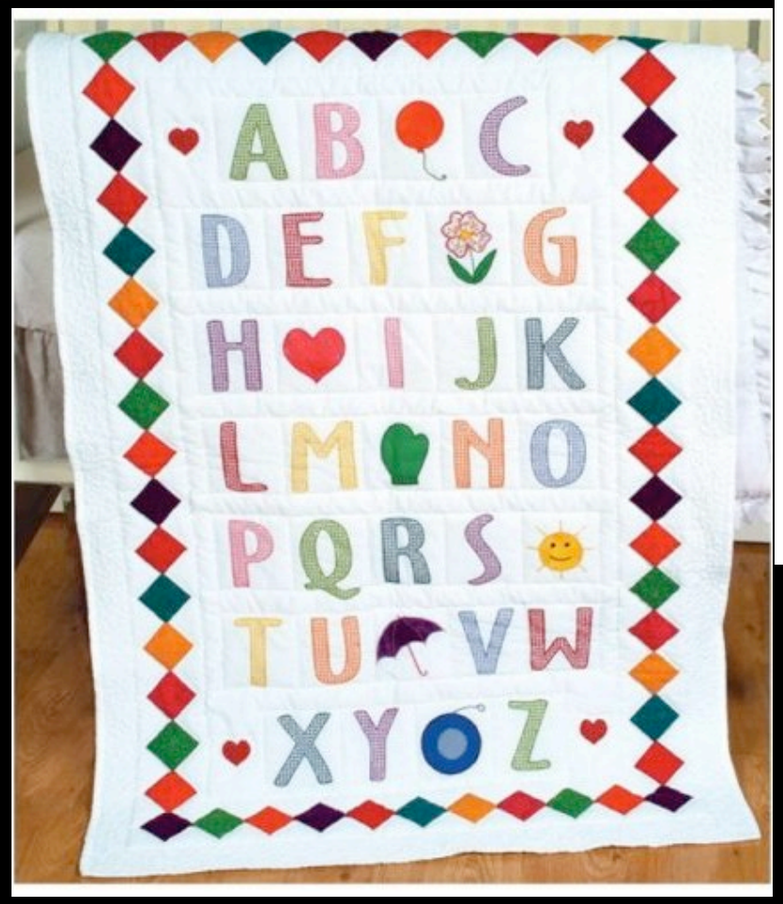
A B C D E
F G H J
K L M N O
P Q R S T
U V X Y
Z

A B C D
E F G H I
J K L M
N O P Q R
S T U V
W X Y Z

Boisson

- What in Boisson's quilts is copyrightable?
  - What's wrong with "total concept/feel?"
  - What's wrong with counting squares?
- What should a trial judge tell the jury?
- How should the judge review the verdict?





Altai

- Why does the "more discerning observer" hit a wall for computer software?
- Procedural responses: expert testimony and bench trial
- Substantive response: filtration
- What do you think of these modifications? How are they justified?

BEJEWELED
SCORE
00000340
NEW GAME
SIMPLE
TIMED
+100
UPGRADE
BONUS

DIAMOND MINE
score
2697
NEW GAME
NORMAL
TIMETRIAL
OPTIONS
+60
QUIT GAME
40
20
3

BOUNCE OUT
SCORE
60
LEVEL
1
BALLS TO GO
44
MOVES LEFT
PANIC
PAUSE

Ulraka
L5
48 of 63
Helping Hand
Gemberry
Channel Air
Entangle
Calm
Forest Fire
Eat Skulls
Turn: 9

takeaways

- *Arnstein*'s "ordinary observer" is good law
- experts only for technical subject matter
- consider both quantitative and qualitative similarities
- filtration of idea from expression is a recurring problem; "more discerning observer" may be the best we can do

next time

reproductions and derivative works