# Proving Copying

Copyright Law – Professor Grimmelmann
Class 15 – October 23, 2008

# six exclusive rights

- reproduction
- derivative work (or “adaptation”)
- public distribution
- public performance
- public display
- public digital audio transmission

# 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?

# the basic two elements

- ownership
  - attach registration
  - document any transfers to plaintiff
  - assert validity if necessary
- infringement
  - name the right infringed

# pleading infringement

- some details vary with the right at issue
- but two things are common to all
  - copying in fact: copied from Π
  - improper appropriation: copied too much
- plaintiff must establish both
- today: focus on copying in fact

# proving copying in fact

- what would be *direct* evidence?
  - how likely is the plaintiff to have it?
- what would be *circumstantial* evidence?
  - "access"
  - (probative) "similarity"

# *Arnstein v. Porter*

# *Arnstein v. Porter*

- infringement = “copying” (in fact) + “improper appropriation”
- copying proven with access + similarities
  - no similarities = case over (why?)
  - access + similarities = ?
  - no access + “striking” similarities = ?

# *Arnstein* subtleties

- what's "dissection" and how is it relevant to copying-in-fact? why is it appropriate to take expert testimony?
- why does Arnstein get to the jury?
  - similarities? access?
  - is there the "slightest doubt as to the facts?"

*Three Boys Music Corp.*

*v.*

*Michael Bolton*

# *Three Boys Music Corp.*
# *v.*
# *Michael Bolton*

# *Three Boys Music Corp.*
# *v.*
# *Michael Bolton*

# *Three Boys Music Corp.*
# *v.*
# *Michael Bolton*

# *Three Boys Music Corp.*
# *v.*
# *Michael Bolton*

# *Three Boys*: procedure

- what's the procedural posture?
  - what's the standard of review on the copying-in-fact finding?
  - *if* copying-in-fact is proven, do the facts support a finding of infringement?

# *Three Boys*: substance

- how similar are the songs?
- "chain of events" vs. "widely disseminated": what's the difference?
  - which is being offered here? what's the evidence for it? are you convinced?
- does it matter that Bolton has no recollection of ever hearing the Isley song?

# *Selle v. Gibb*

# *Selle v. Gibb*

# *Selle v. Gibb*

# *Selle v. Gibb*: procedure

- what's the procedural posture?
- what evidence did the Bee Gees offer?
  - did they need to offer any?
  - what's the effect of their evidence?
  - could the defendant's evidence on copying-in-fact ever be conclusive?

# *Selle v. Gibb*: substance

- is this a chain-of-events or a widespread-dissemination theory? why?
- is Selle's theory of access possible? likely?
- how does Selle show probative similarity?
  - what about his "striking similarity" claim?
- is this case distinguishable from *Three Boys*?

# *Ty v. GMA Accessories*

Squealer

Preston

# *Ty v. GMA*

- How hard would it be to show access on one of the theories from *Three Boys*?
- Why is Ty arguing *similiarity* in response to a claim of lack of *access*?
- Why might works be similar even though the defendant didn't copy from the plaintiff?
- Are any of those scenarios in play here?

# null hypotheses

- the works aren't actually similar
- plaintiff copied from defendant
- defendant copied from the public domain
- the works are similar due purely to similarities in uncopyrightable ideas
- pure coincidence

# summary (1)

- 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

# summary (II)

- access can be via a chain, or via widespread dissemination (facts are often a hybrid)
- no similarity = game over for plaintiff
- weak (no?) evidence of access can be overcome via striking similarity
- unless proof (or disproof) of copying-in-fact is compelling, the jury sorts it out

# next time

improper appropriation