

Class 11: Copy-In-Fact and Misappropriation

Section 106

Text 

Prima Facie Case of Infringement

1. Ownership of a Valid Copyright

2. Violation of a 106 right

1. Copying in Fact

"Probative Similarity"

Direct

Circumstantial

Access

Similarity

Sliding Scale

2. Improper Appropriation

Sometimes called:

Improper copying

Substantial Similarity

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Copying In Fact

When Arises

Point of test

Preliminary question in prima facie prong above (106 right)

Compared to "substantial similarity"

Often: Not in doubt

Literal infringement

Direct proof of copying

Errors copied

Prior license gone bad
Admission

Feist

Circumstantial Evidence cases are harder

Holdings described with probabilities, not proof

Two general classes of cases arise

The unsolicited submission

Patriots and Ravens logo cases

"Wide dissemination": The very famous work that someone in Def's position could not have avoided.

Harrisongs
Bolton

Note B3: Is access always met in such a case?

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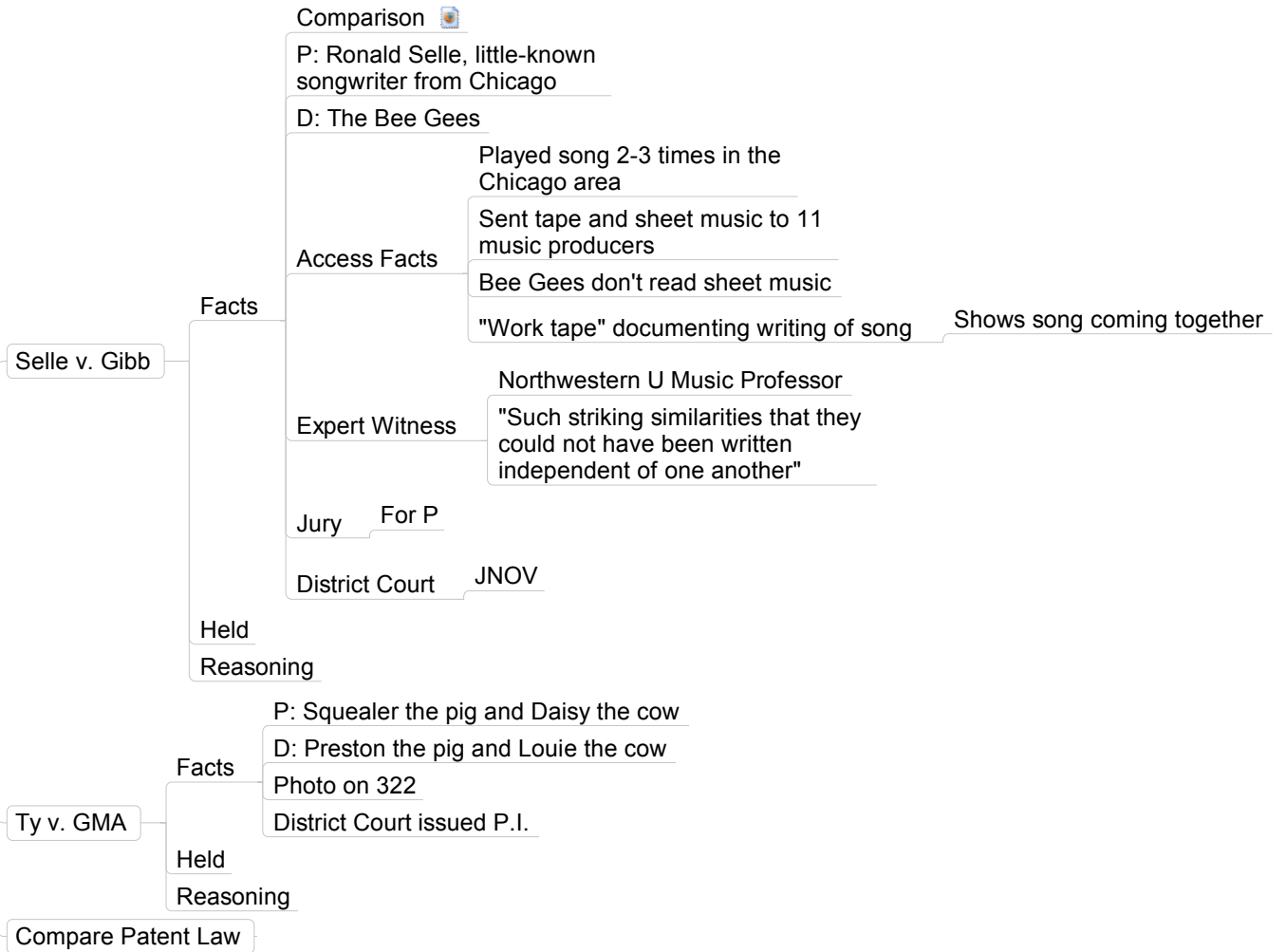
Copying In Fact

Three Boys Music v. Michael Bolton



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Copying In Fact



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Misappropriation / Substantially Similarity

Basic Idea

Once we've established copying, we must judge whether what was taken is protected by copyright.

Test: Did D copy a sufficient amount of protectable elements of P's copyrighted work as to render the two works substantially similar?

Or: Did D take too much of P's work?

Substantial Similarity

Don't be confused by how this relates to the copying-in-fact prong

Nichols v. Universal Pictures Corp.

Arnstein v. Porter

Sid & Marty Krofft v. McDonald's