

COPYRIGHT

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SLIDES 15: COPYRIGHT INFRINGEMENT: ELEMENTS & ANALYSIS

Class Outline

- Elements of a Copyright Infringement Case (501)
 - (1) Must show copying
 - (2) Copying must be improper
- Substantial similarity analysis:
 - (1) Copying/unlawful appropriation
 - (2) Extrinsic/intrinsic
 - (3) Abstraction/filtration/comparison
- Types of substantial similarity
 - (1) Comprehensive Nonliteral Similarity
 - (2) Fragmented Literal Similarity

Recap

- Subject matter: What types of works are and aren't copyrightable (and elements of copyrightability)
- Ownership: Who can own a copyright (individuals, co-authors, works for hire, orphan works)
- Rights: What that copyright gets you (Section 106 exclusive rights - reproduction, derivative works, distribution, public performance, display)

Section 501

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 . . . is an infringer of the copyright or right of the author, as the case may be...

(b) The legal or beneficial owner of an exclusive right under a copyright is entitled...to institute an action for any infringement of that particular right committed while he or she is the owner of it. The court may require such owner to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright.



Elements of infringement

[Ownership & registration of copyright in a work], then, if works are similar as a matter of law, P must show:

1. Copying (aka “copying in fact” or “actual copying”)

- Direct and circumstantial evidence (access / probative similarity)
- Expert testimony allowed
- Question of fact

2. Improper appropriation

- Was the taking “enough” to be wrongful
- Lay listener/observer standard
- Also a question of fact

Proving “copying in fact”

1. Direct evidence (e.g. in *Mannion v. Coors*)

2. Circumstantial evidence

a. Access: defendant had been exposed to plaintiff's work

a. General popularity (e.g. *Bolton*)

b. More specific evidence

c. (sometimes) Corporate receipt

d. (sometimes) Timing; AND

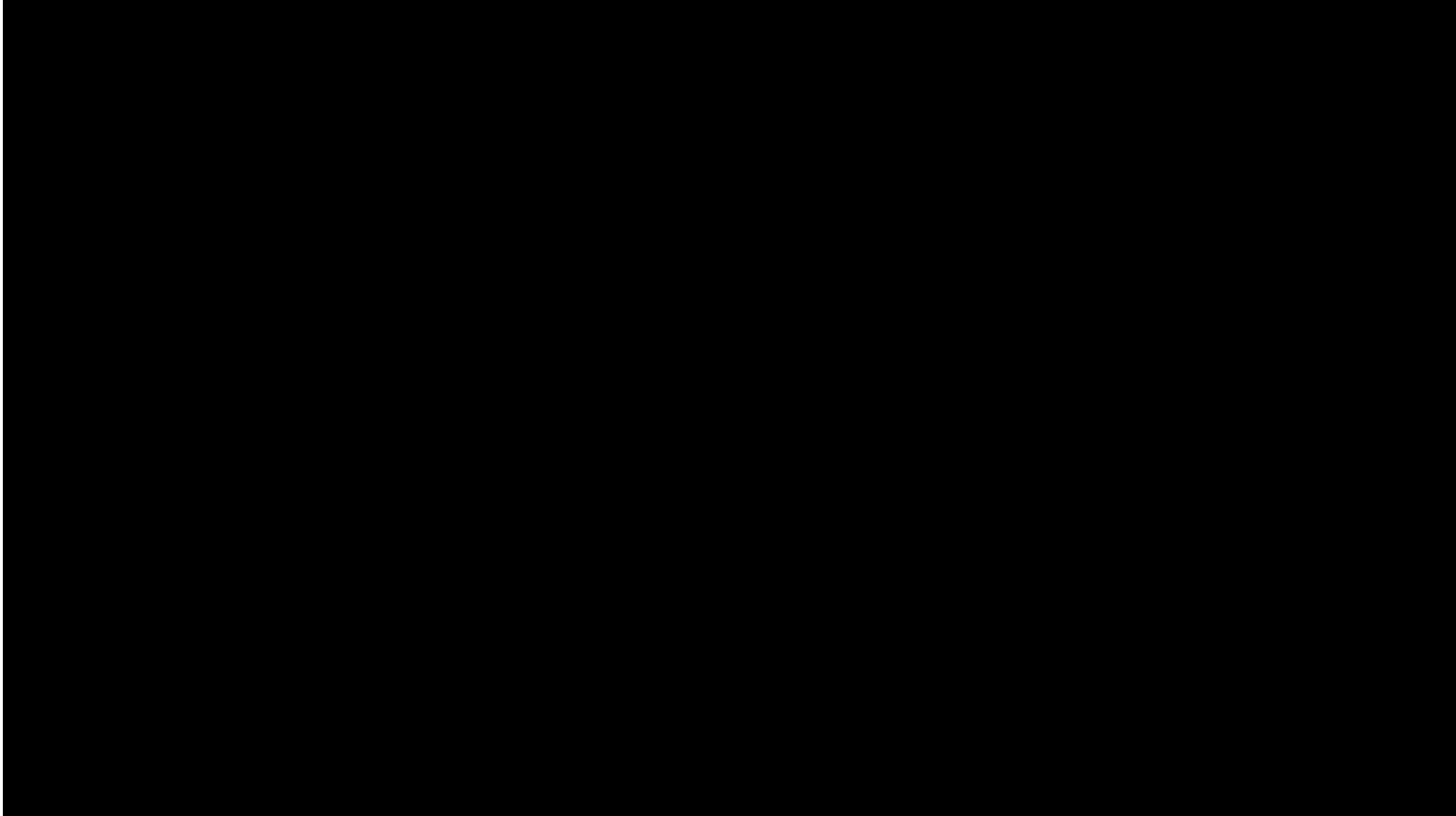
b. Probative similarity

If no evidence of access → “striking similarity” required

Probative similarity: similarities that are otherwise unlikely

- Similarity as to mistakes, defects:
Feist and fake phone listings

Campbell Charles & Kathleen
Rt Woodston 994-6388
Campbell Joan Lenora 567-4345
Cannon Howard Cedar 697-2292
Caplinger James
Car Phone 567-4751
Car Phone 567-4769
Capstick Frances Mrs
Prairie View 973-2338







“He’s So Fine”



“My Sweet Lord”





- 1 – Do we have a registered, copyrighted work? +
 - 2 – Is there some allegedly similar work that might be infringing?
- If so...

- (1) Do we have copying?
- Direct and circumstantial evidence (access / probative similarity)
 - Expert testimony allowed
 - Question of fact

probative similarity analysis



If so...

(2) Was the copying improper?

- Was the taking “enough” to be wrongful
- Lay listener/observer standard
- Also a question of fact

“substantial similarity analysis”



1 – Do we have a registered, copyrighted work? +
2 – Is there some allegedly similar work that might be infringing?
If so...

(1) Do we have copying? (← copying-in-fact)



If so... “similarity probative of copying”

(2) Was that copying improper? (← unlawful appropriation)

“substantial similarity analysis”



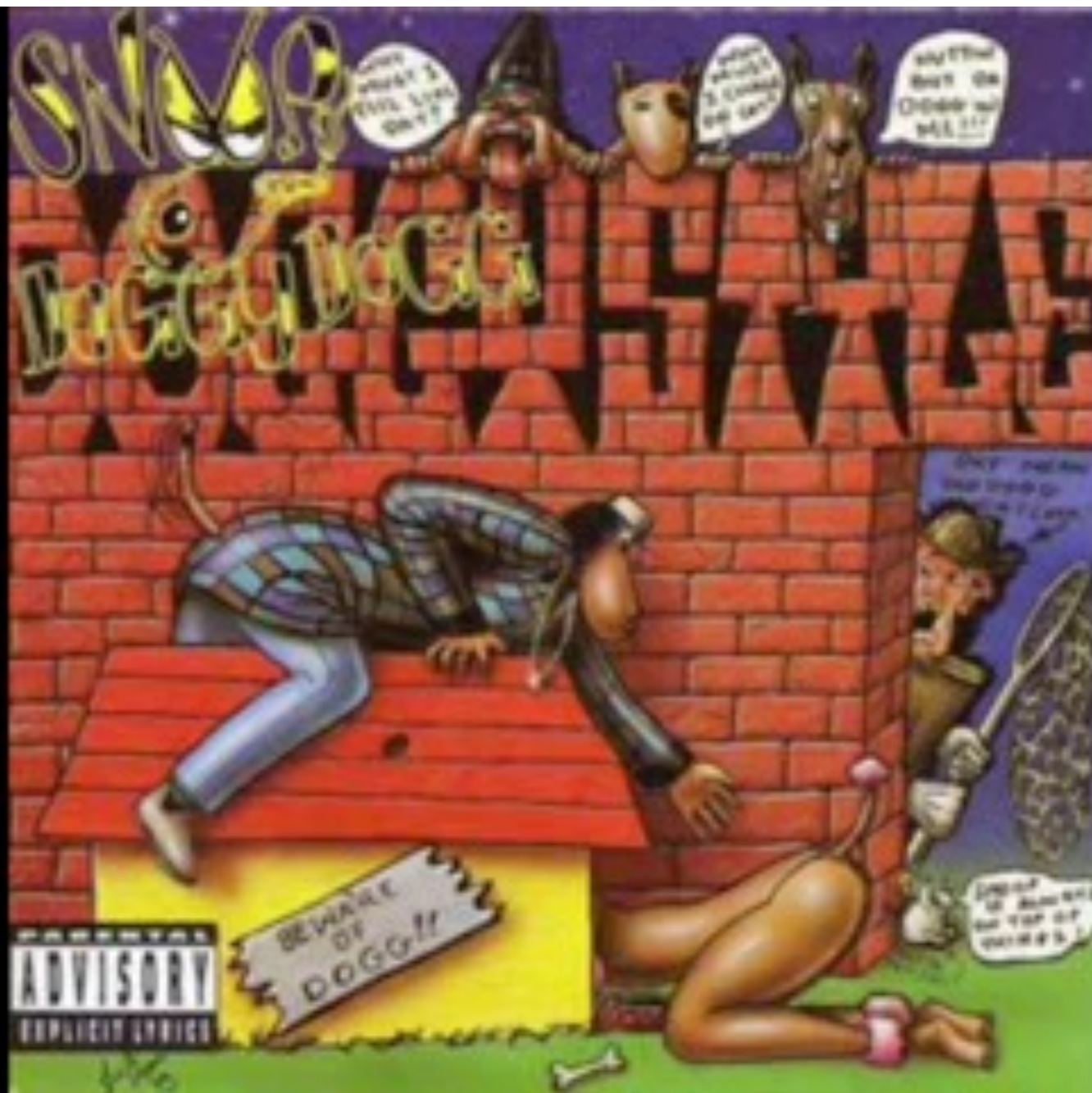
3 Types of “Substantial Similarity” Analysis:

- (1) ** Copying/Unlawful Appropriation - This is the test from *Arnstein*, developed in the 2nd Circuit; key is the lay observer standard (followed by the 1st, 2nd, 3rd, 5th & 7th Cir.) **
- (2) Extrinsic/Intrinsic - This test comes from *Krofft* in the 9th Circuit; key is objective, followed by subjective, analysis of expression (followed by the 4th, 8th, and 9th Cir.)
- (3) Abstraction/Filtration/Comparison - this test was developed in the 10th Cir, and is also followed by the 6th - key is a filtration of the protectable and nonprotectable elements; other circuits use this type of analysis only for cases involving computer programs



Two types of Substantial Similarity:

- (1) Comprehensive Nonliteral Similarity – where the fundamental essence of a work is copied, even though the exact words (pictures) may not be. In other words, paraphrasing won't preclude a finding of substantial similarity simply because the words aren't identical.
- (2) Fragmented Literal Similarity – where a nearly word-for-word similarity exists (say, copying of a paragraph verbatim) but not the overall essence of the work (so that the question becomes whether the small portion taken was qualitatively important).



Snoop Dogg, Dr. Dre & Suge Knight Are Being Sued For "Ain't No Fun" 20 Years Later

August 6, 2016 | 12:37 PM

by [Henry Mansell](#)

