

COPYRIGHT

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CLASS 10:
THE REPRODUCTION RIGHT – COPYING IN LAW

Class Outline

- Exclusive rights of copyright holders (§106)
 - The Reproduction Right (§106(1))
- Copying in Law
 - The *de minimus* copy
 - The exact copy
 - The substantially similar copy

§106: Exclusive Rights in Copyrighted Works

[T]he owner of copyright... has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

To prove © infringement, you must show BOTH:

1. Copying in fact (aka “actual copying”); and
2. Copying in law (aka “substantial similarity”)

3 Types of Copies-in-Law:

- (1) Exact
- (2) De Minimus
- (3) Substantially Similar

America's Most Beloved Story of Young 'n Laughin' Love!

"Abie's Irish Rose"

5 Years on Broadway—32 Merry Months on the Air!

It's The All-Time Laugh Hit... Streamlined For Now...

ON THE SCREEN

Big Screen Producers Inc.
 ANNE NICHOLS'
"ABIE'S IRISH ROSE"
 MICHAEL CHERKOV
 JOANNE DRU'
 RICHARD NORRIS
 Produced and Directed by A. Edward Siffertland



AN UNBROKEN KNOCKOUT! — A THOUSAND HEARTY LAUGHS!

CARL LAEMMLE
**THE COHENS
 AND KELLYS**
 CHARLES MURRAY
 GEORGE SIDNEY
 AND VERA GORDON
 HARRY POLLARD
 PRODUCTION

3/7/26



Learned Hand in *Nichols*:

“Upon any work ... a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out.”

“[T]here is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his ‘ideas’

“Nobody has ever been able to fix that boundary, and nobody ever can.”

Plot, Theme and Abstraction

Stories about ethnic/religious conflict between American immigrant groups

•
Stories about such conflict in NYC featuring romance between a boy and a girl who belong to such groups

•
Stories about such conflict and romance in NYC between Irish Catholic and Jewish families featuring a secret marriage and a happy ending

•
Stories about such conflict, romance etc. . . . Featuring a scene in which a Jewish wedding arranged by the boy's father is interrupted by the girl's father accompanied by a priest

“The idea of an Irish-Jewish marriage in a play may be borrowed. With this theme, some resemblance in characters and situations is inevitable, but the line of infringement may not yet be crossed. On the other hand, the pattern of the play – the sequence of events and the development of the interplay of the characters – must not be followed scene by scene. Such a correspondence of pattern would be an infringement although every word of spoken dialogue was changed.”

-- Zechariah Chafee, Jr., Reflections on the Law of Copyright: I (1945)



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

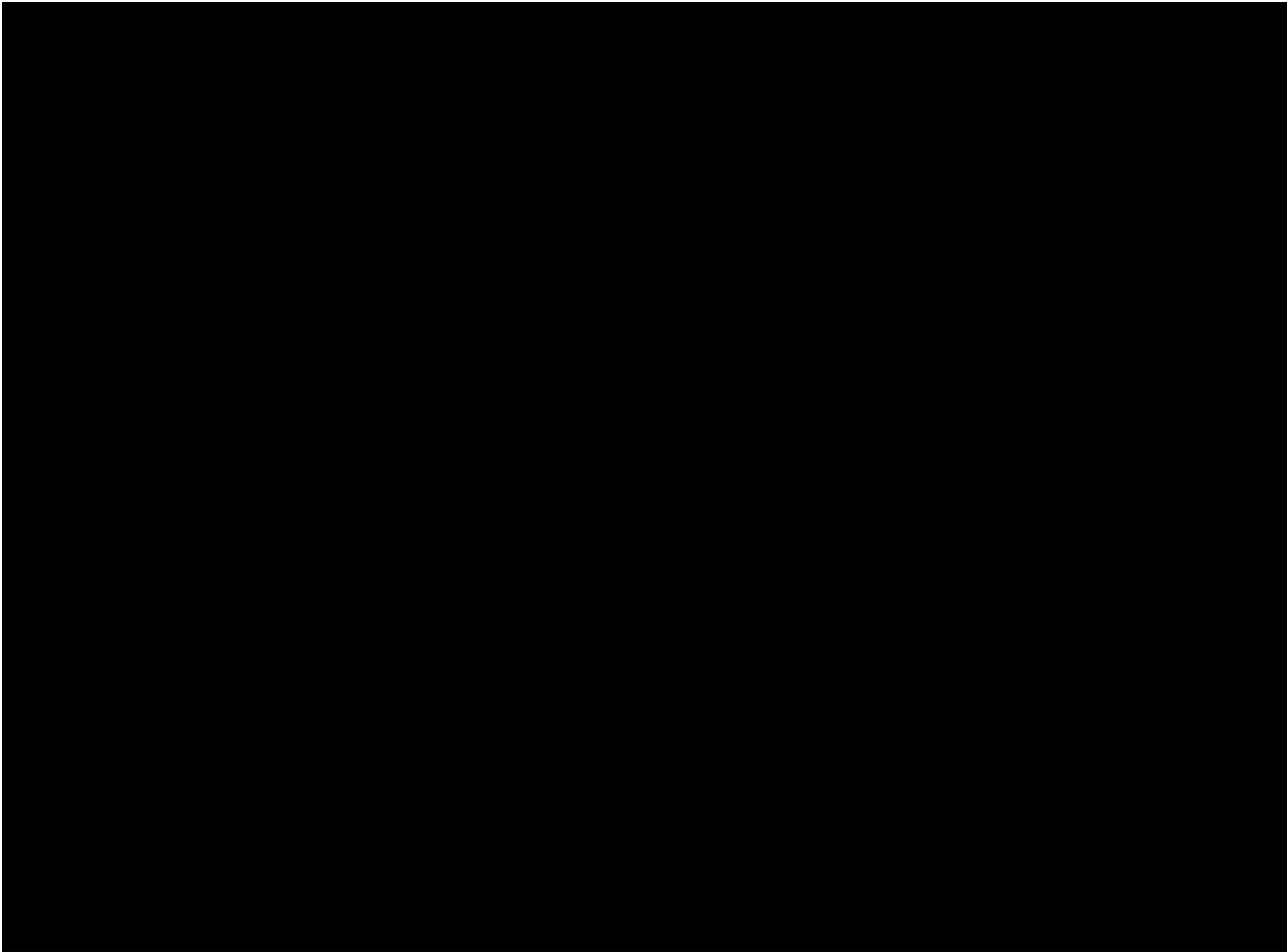
If no evidence of access → “striking similarity” required

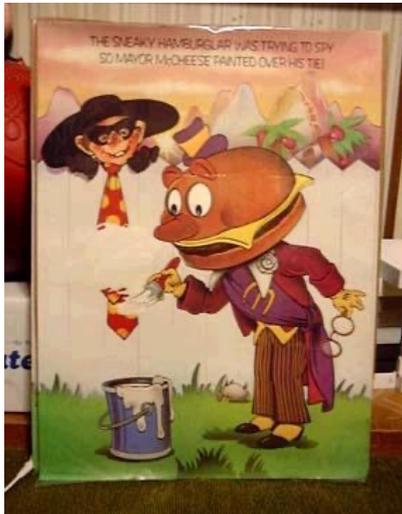
Probative similarity: similarities that are otherwise unlikely

- 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









The 9th Circuit's Intrinsic-Extrinsic Test

(1) the extrinsic test: determines whether there is a similarity of ideas, is often a Q of law (for judge), expert testimony is appropriate, specific (legal) criteria are considered. IF FOUND, go on to...

(2) the intrinsic test: turn to jury so that an “ordinary reasonable person” can determine if there is substantial similarity in expression. No expert testimony on this question.



Rentmeester's photograph



Nike's photograph



Nike's Jumpman logo

1. Analysis #1: Rentmeester has demonstrated that he has a valid copyright.
2. Analysis #2: Rentmeester has made a plausible showing of “copying” by demonstrating access (Nike conceded access to photos under limited license) thereby establishing a presumption against independent creation.
3. Analysis #3: Has Rentmeester shown unlawful appropriation; i.e. has he shown substantial similarity with respect to protected elements?
4. Analysis #4: [In the 9th Circuit], application of intrinsic-extrinsic analysis.
 - a. Court filters out unprotected elements (ideas, public domain material, scenes a faire)
 - b. Court applies extrinsic analysis (a matter of law) to the rest.
 - c. Then, only IF FOUND, send to jury for intrinsic analysis (we never get there in this case).

Ordinary Observer Test for Substantial Similarity

The alleged similarity must be such that “the ordinary observer, unless [they] set out to detect the disparities, would be disposed to overlook them.”