CLASS 9:
The Reproduction Right – Copying in Fact
Class Outline

• Exclusive rights of copyright holders (§106)
  – The Reproduction Right (§106(1))

• Copying in Fact
  – (Mostly) Access
To claim © infringement:

1. Show valid ownership of a copyrighted work; and

2. Show defendant infringed that copyright.
§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”)
“Love Is a Wonderful Thing”

Isley Brothers

Michael Bolton
Factual Copying

→ Asks: Did the D actually copy P’s copyrighted work?

There are 2 parts to this Q:

1 – access

(2 – probative similarity)
Two ways to show access:

1 – Present direct evidence of D accessing P’s work; this is rare/difficult; or

2 – Present circumstantial evidence by showing that the D had access to the P’s work
“He’s So Fine”
“My Sweet Lord”
“Photograph”

“Amazing”
Selle, “Let It End”

Bee Gees, “How Deep Is Your Love?”
Color:

Body = white
Hands + feet = pale pink
Nose = pale pink
Outside ears = white
tail = white

Fill with beads.

Black thread for nostrils

End of ear is folded over + sewn to check.

Knotted cord for tail.

Pink satin bow.

Appendix—Continued
The sub-questions of copying-in-fact:

(1) Did the alleged copier have access to the work they are claimed to have copied?

(2) Did the alleged copier use that access to copy the plaintiff’s copyrighted work?