

**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

Preliminary question in prima facie prong above (106 right)

Often: Not in doubt

Literal infringement

Direct proof of copying

Prior license gone bad

Admission

Errors copied

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?

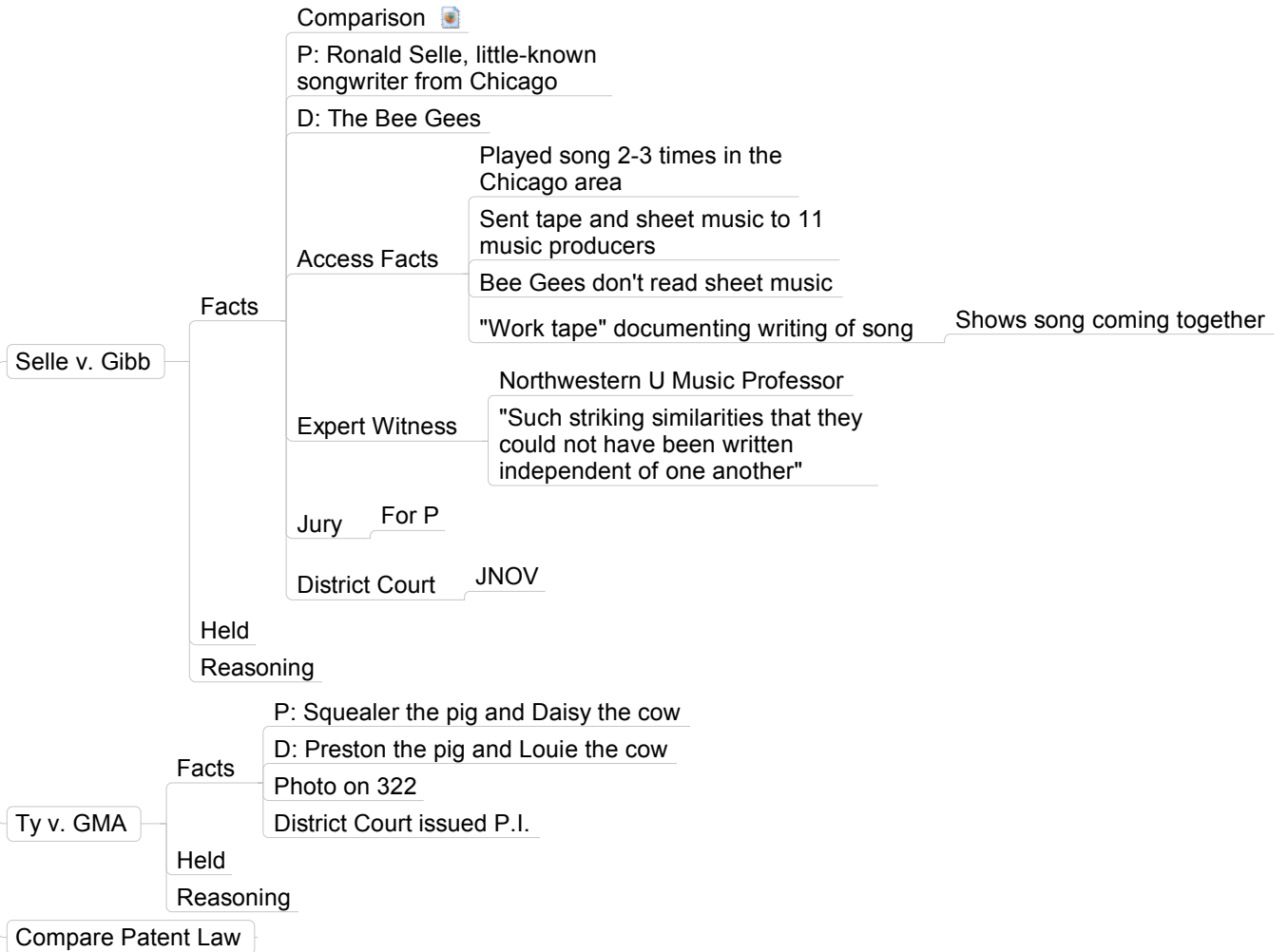
Compared to "substantial similarity"

Point of test



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**Copying In Fact**



## Class 11: Copy-In-Fact and Misappropriation

### 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