

# Quantitative Empirical Analysis of Copyright Infringement Case Law

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with Barton Beebe, Jeanne Fromer, and  
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1. What tests do courts apply?
2. Case outcomes
3. Types of works and identity of parties
4. Sub-doctrines, like total concept and feel
5. Filtering out unprotectable elements
6. Expert testimony
7. Do defendants admit copying?

# Prima Facie Copyright Infringement

1. Ownership of a valid copyright in the work alleged to be infringed
2. Defendant's conduct [PFIDC]

# Prima Facie Infringement Defendant's Conduct [PFIDC]

1. Exact copying of entire work
2. Comprehensive nonliteral similarity
3. Fragmented literal similarity

# Two Approaches

## 1. Second Circuit (Arnstein)

1. Copying in fact
2. Wrongful copying

## 2. Ninth Circuit

1. Extrinsic test
2. Intrinsic test

# Criticism

1. Pamela Samuelson, A Fresh Look at Tests for Nonliteral Copyright Infringement, 107 Nw. U. L. Rev. 1821 (2013)
2. Mark Lemley, Our Bizarre System for Proving Copyright Infringement, 57 J. Copyright Soc'y USA 719 (2010).

# Principal Calls for Change (Samuelson and/or Lemley)

1. More analysis and filtration at wrongful copying/intrinsic test stage
2. More expert testimony at wrongful copying/intrinsic test stage
3. No infringement absent commercial harm
4. Inverting the two stages

# Two Approaches

## 1. Second Circuit (Arnstein)

1. Copying in fact
2. Wrongful copying

## 2. Ninth Circuit

1. Extrinsic test
2. Intrinsic test



# **Often no distinction between copying in fact and wrongful copying, even in Second Circuit**

- copying
- “unauthorized” copying
- copying protectable expression

# Copying in Fact Factors

1. The alleged infringer actually copied or copied in fact from the copyright owner's work
2. There is evidence (whether direct or circumstantial) that the alleged infringer has copied from the copyright owner's work
3. The alleged infringer had access to the copyright owner's work
4. There is substantial similarity between the works that constitutes circumstantial evidence that the alleged infringer copied from the copyright owner's work
5. There is "probative similarity" between the alleged infringer's work and that of the copyright owner
6. The alleged infringer copied "ideas and expression" from the copyright owner's work
7. The alleged infringer did not independently create his work without copying from the copyright owner's work
8. None of the above

# Wrongful Copying Factors

1. The alleged infringer wrongfully copied or wrongfully appropriated the copyright owner's work
2. The material that the alleged infringer copied is copyrighted or protectable
3. The alleged infringer engaged in some quantum of copying that is more than minimal or "de minimis" (but *not* including statements that literal or near literal copying of the copyright owner's entire work establishes PFIDC)
4. The alleged infringer copied the most important or most valuable aspects of the copyright owner's work (e.g., that the alleged infringer copied "the heart of" the copyright owner's work)
5. The response of the lay observer or audience is that the copying is wrongful
6. Substantial similarity establishes wrongful copying or wrongful appropriation (as opposed to a statement that substantial similarity is circumstantial evidence of copying in fact)
7. None of the above : The court does not make clear that anything other than simply "copying" is required for a finding of PFIDC
8. None of the above, but the court makes clear that some other element beyond simply "copying" is required for a finding of PFIDC.