

Note: This document illustrates an example of one of the options for how you might take notes as you work through the MPT packet. With this option, you create your document as you outline. Alternatively, you may choose to create a less detailed outline on scratch paper to use as a guide when crafting your final document.

Preliminary Information from Task Memo

- **Client:** Al Gurvin
- **Task:** Client letter
- **Issue:** Evaluation of likelihood of success of client’s copyright infringement claim against ProBall, assistance with settlement offer, and recommendation of settlement vs. litigation
- **Posture:** Objective

(1) Copyright infringement claim against ProBall	
<u>Oakland Arrows</u> (U.S. District Court, District of Columbia, 1998)	
Holding	Court will not compel registration of copyright where team’s new logo, a simple multicolored triangle, was not an original work of authorship
Rules	<ul style="list-style-type: none"> • Copyrightability under 17 U.S.C. § 102 requires originality/original works of ownership • “Creative spark” necessary (citing <u>Feist</u> (U.S. 1991))
Rule Explanation	<ul style="list-style-type: none"> • Simple multicolored triangle (three colors) • Familiar symbols • “Mere variation in coloring” not enough originality
File	<ul style="list-style-type: none"> • Gurvin sketch is a hand outlined from the wrist up, holding four cards fanned out: (L-R) ace of diamonds, clubs, hearts, spades (Gurvin fax) • Franklin Aces logo: hand is outlined somewhat differently; otherwise, logo is the same (description) • Hand holding four aces is a familiar image that the designer saw on many clip art collections online, none of which are protected by copyright; the designer used those images for inspiration (Dean affidavit) • Conclusion: Unclear whether design is original/copyrightable
<u>Savia</u> (U.S. District Court, District of Franklin, 2003)	
Holding	No copyright infringement even though songs were virtually identical because there was no plausible evidence that the defendant had access to the plaintiff’s work

Rules	<ul style="list-style-type: none"> • Direct evidence of copyright infringement is rare; circumstantial evidence is necessary • Two-prong test for copyright infringement: <ol style="list-style-type: none"> (1) Are the works “substantially similar”? (2) Did the alleged infringer have access to the copyrighted work?
Rule Explanation	<ul style="list-style-type: none"> • Prong 1 met because melodies were virtually identical/substantially similar • Prong 2 not met because there was weak evidence of access: <ul style="list-style-type: none"> ◦ The melody was in an NC-17 rated movie released when the defendant was 4 years old, the movie had not been shown since, and the melody had not been recorded
File	<ul style="list-style-type: none"> • Prong 1 is arguably met • Prong 2 is not met because there is no evidence of access <ul style="list-style-type: none"> ◦ Sketch faxed only to Mr. Luce, CEO of Franklin Sports Authority (client interview) ◦ Luce saw the fax but believes he tossed it in the trash (Luce affidavit) ◦ No access between Franklin Sports Authority, ProBall, and Forward Design/designer Monica Dean because they are all on separate floors and are separate entities (Luce affidavit) ◦ Dean has a friend in the Franklin Sports Authority transportation department but has no other connection (Dean affidavit) ◦ Dean does not recall seeing any sketch of any idea for the logo (Dean affidavit) • Conclusion: Unlikely to establish copyright infringement because no evidence of access
<p><u>Herman</u> (U.S. District Court, District of Franklin, 2009)</p>	
Holding	<p>Author who proved copyright infringement was entitled only to actual damages and the infringer’s profits because the copyright was not registered, and the infringer made no profit</p>
Rule	<p>A copyright can exist without registration, but if there is infringement of a copyright before the copyright is registered, the copyright holder gets actual damages and the infringer’s profits but no attorney fees</p>

Rule Explanation	<ul style="list-style-type: none"> • The defendant infringer used the plaintiff's screenplay as the basis for its own screenplay • The plaintiff had sent the defendant the screenplay but had not registered it with the copyright office before the defendant's infringement • Because the screenplay was not registered, the defendant had not yet made the movie, and the defendant had not realized any profits, no actual damages could be awarded • The court awarded the plaintiff the highest amount the defendant would normally pay for a screenplay because there was no question actual infringement occurred
File	<ul style="list-style-type: none"> • Discussions will begin later this year with merchandise manufacturers; consumers will not be able to purchase gear featuring the logo until next year (Gurvin fax) • Design firm fee was \$10,000 (Dean affidavit) • Conclusion: \$10,000 is max amount recoverable through litigation, minus attorney fees
(2) Assistance seeking a settlement (offer already received)	
File	<ul style="list-style-type: none"> • Offer from Pro-Ball: ticket for single seat in prime location for all home games during the team's first season, valued at \$5,500 (Alvarez letter) • Client's request: \$20,000 (Gurvin transcript) • Would "give my eyeteeth" to see game in person (Gurvin transcript) • Gurvin told Luce he wanted nothing in return for the drawing except maybe some tickets (Gurvin fax)
(3) Recommendation as to litigating or accepting settlement offer	
<ul style="list-style-type: none"> • Unlikely to win litigation • Will incur registration fees and attorney fees • Maximum that could be received through litigation is \$10,000, less costs • Settlement is certain for \$5,500 value of tickets • Tickets have additional meaning • Conclusion: Highly recommend accepting the settlement offer 	