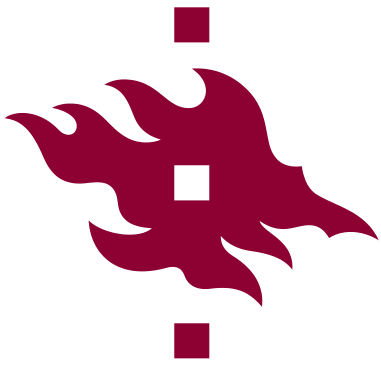


Substantial Similarity in Copyright Infringement Judgments

Transparent Process or Just a Vague Feeling as a Judgment

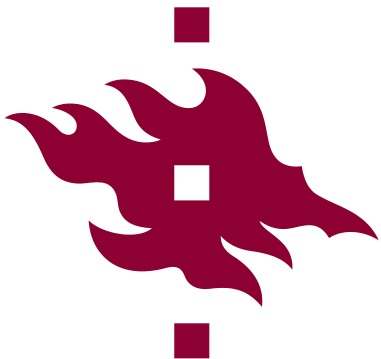
Timo Enroth



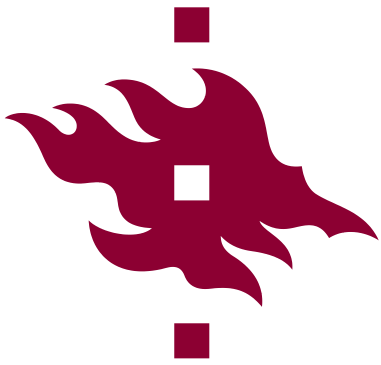
Substantial Similarity in Copyright Infringement Judgments

Transparent Process or Just a Vague Feeling?

- Research problem
- Research question
- Research methods
- Have I chosen the right method for empirical testing?



Research problem

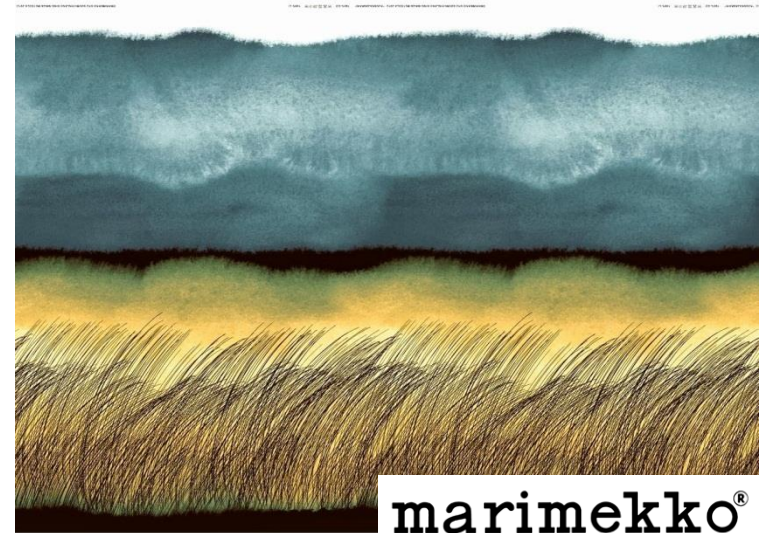


Research problem

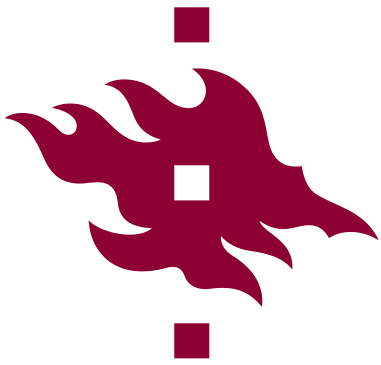
Transparent Process or Just a Vague Feeling as a Judgment



Pictures: Finnish Broadcasting Company

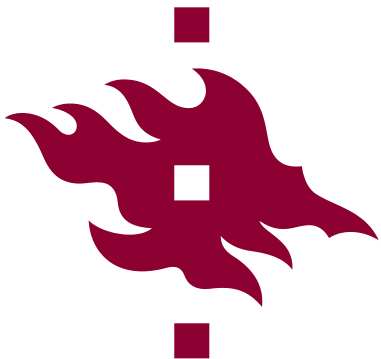


- Heljä Liukko-Sundström vs Marimekko Oyj in 2013

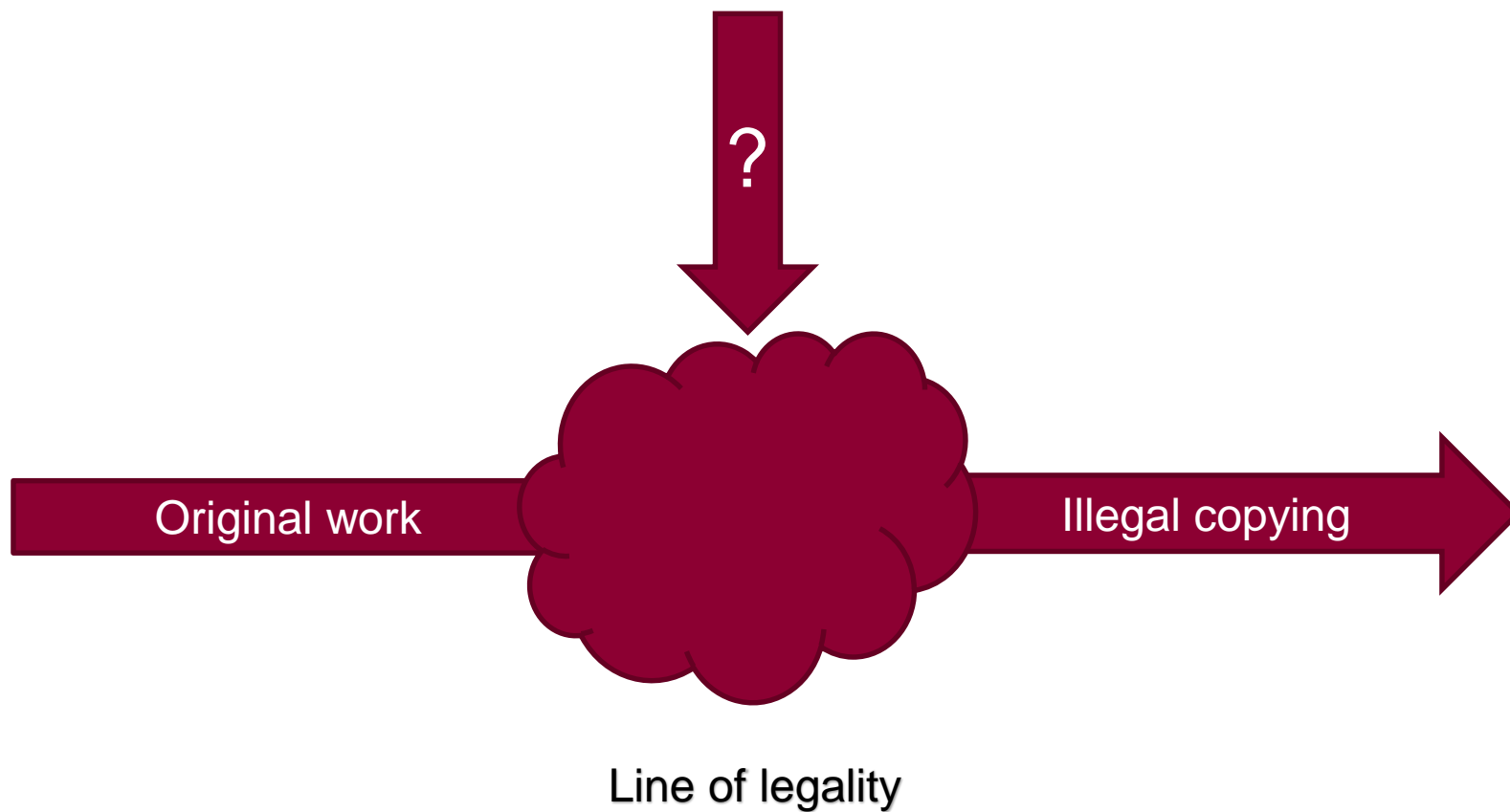


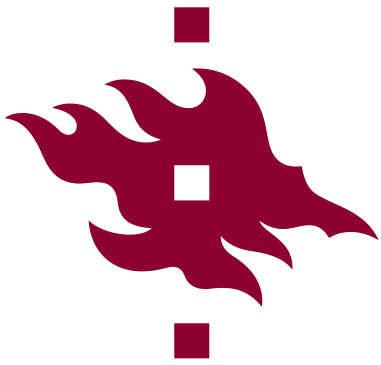
Research problem

- Vague reasoning in copyright infringement judgments
- Especially in art and design related infringement cases
- Problem regarding legal protection and enforcement
 - Parties end up settling disputes to avoid the high uncertainty of the legal actions



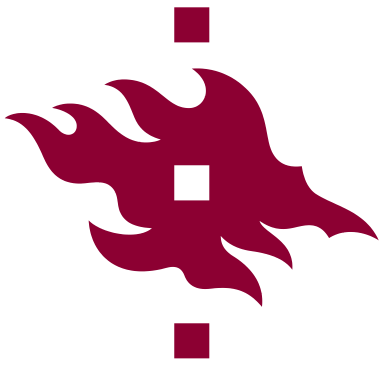
Research problem



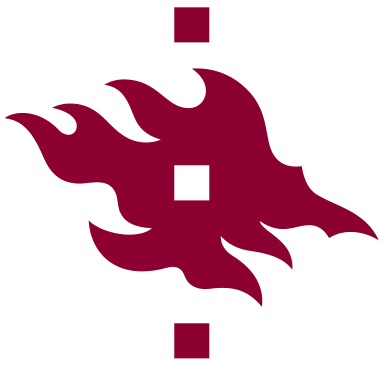


Research problem

- Typical structure in reasoning in Finnish copyright infringement judgments:
 - Quantity of similarities in expression
 - General impression
- Supreme court: 1979-II-64 "Photograph"
 - A had painted a portrait using a photograph taken by B as an example in his work. The painting was considered as an original work."

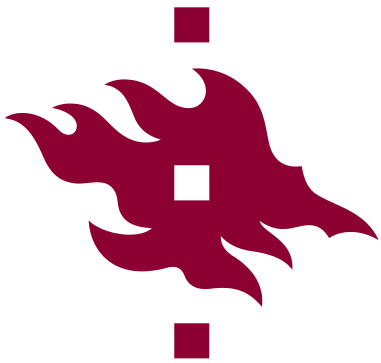


Research question



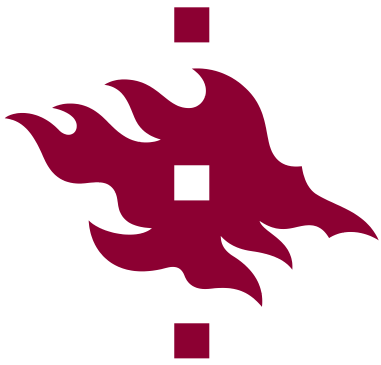
Research question

- What is the part of reasoning which is not written in the judgments?
- Could the judgments be more transparent?
- Is there a substantial similarity “test” in Finland?



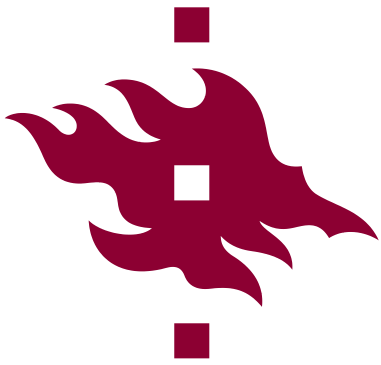
Research question

- Distinction between "discovery" and justification
 - How a judge actually reaches a tentative decision
 - How a judge publicly justifies a decision
- Discovery
 - Subjective data processing
 - Psychological process
- Can we get inside the judges mind?



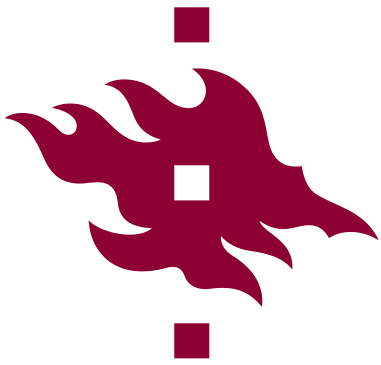
Research question

- Is there same kind of testing as in the US
 - The total concept and feel test
 - Pattern test
 - Abstraction-filtration-comparison test
- Is the Finnish decision process just a subjective impression + obligation to give a ruling

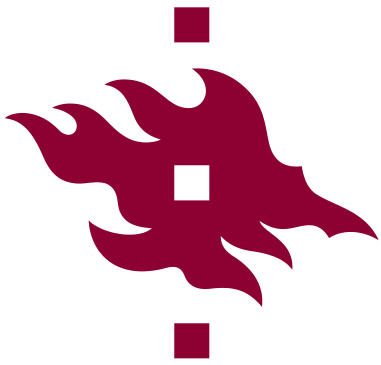


Research question

- Creator's point of view
 - What does the design industry / professional see as infringing copying?
 - Does this reflect in the judgments?
 - The copyright protection is neutral when it comes to aesthetic quality – or is it?
 - Should the designers' view matter legally?

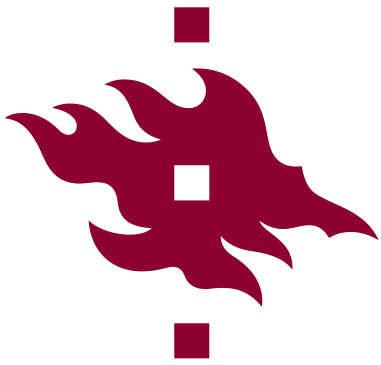


Research methods: answering the research question



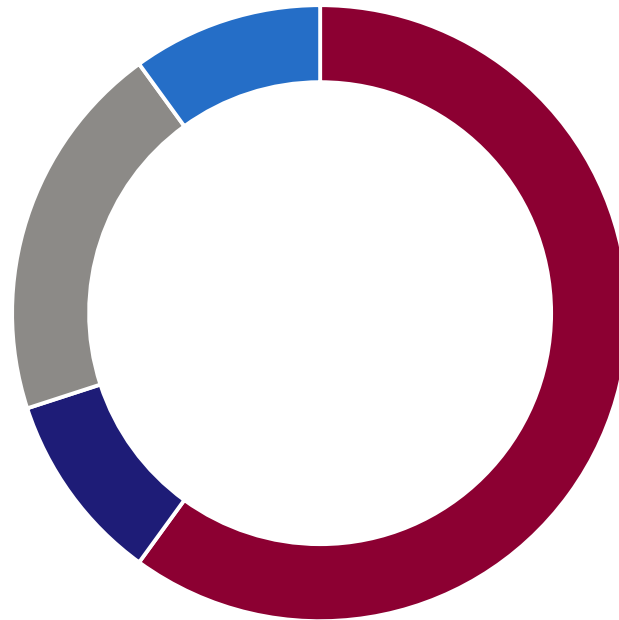
Research methods: answering the research question

- Legal dogmatics
 - Legal framework and case law in Finland
 - Judgment as a process in the case law
 - Substantial similarity test in the US doctrine
- Legal psychology / empirical testing
 - Investigating the subjective "discovery" in judgments
 - Cognitive psychology methods
- Legal theory
 - What is the core exclusive right in copyright



Research methods: answering the research question

Is there a substantial similarity test in Finland? Creator's point of view in the judgments? What is the process that is not written in the reasoning?

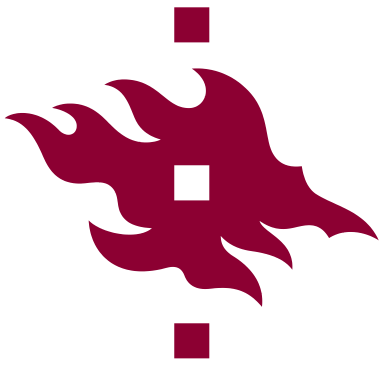


■ Legal dogmatics

■ Art and design point of view

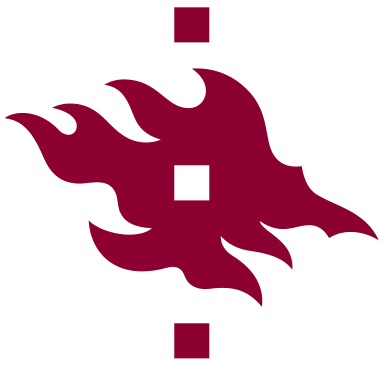
■ Legal psychology

■ Legal theory



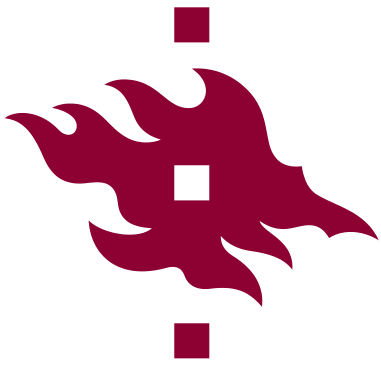
Research methods: empirical testing

- Cognitive psychology: "looking into judges mind"
 - Gestalt psychologists in the 19th century:
 - Human experience as a process
 - Seeing form + 'comparing with earlier experiences and biases + filling the gaps not seen = human knowing
 - Especially when processing visual material
 - Variety of art and design research from this starting point
 - Mostly user experience and marketing research

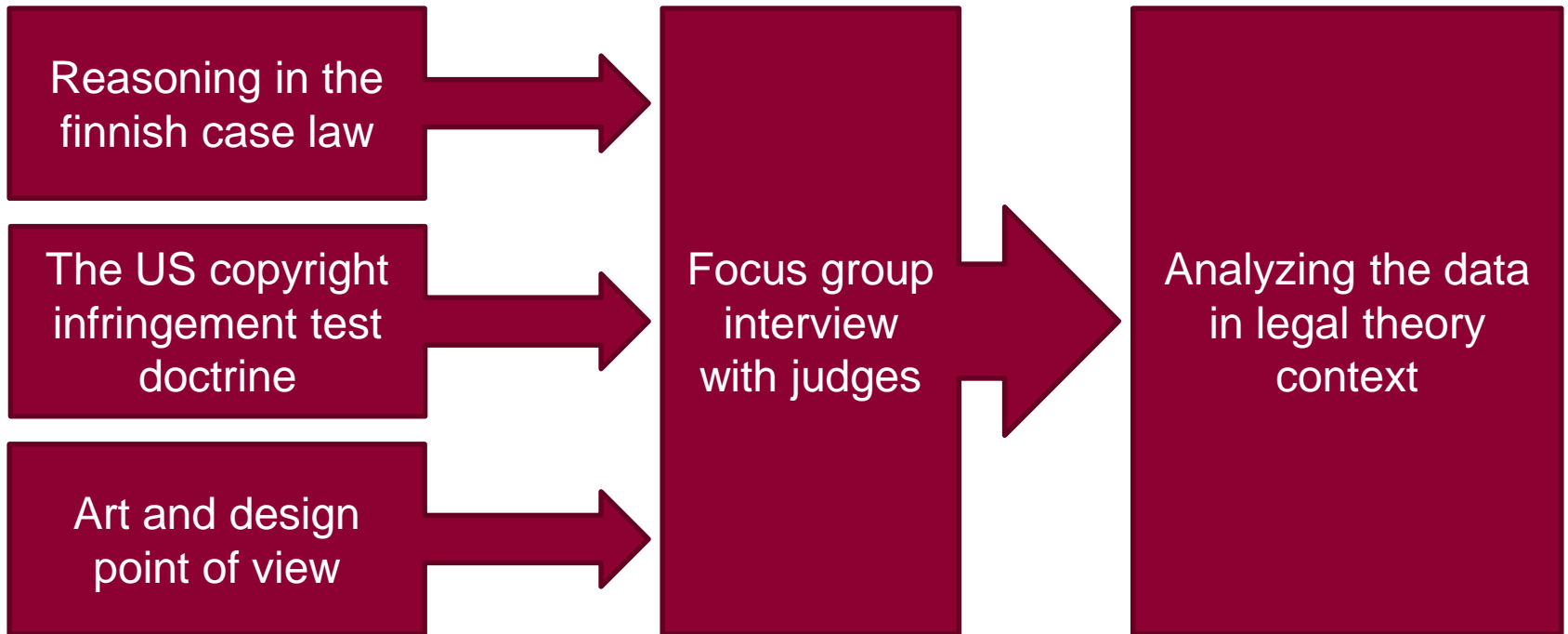


Research methods: empirical testing

- Cognitive psychology research
 - Underlying premises:
 - Repeating elements / arguments in the Finnish copyright infringement judgments
 - US substantial similarity test doctrine
 - Creator's point of view
 - Focus group interview with judges

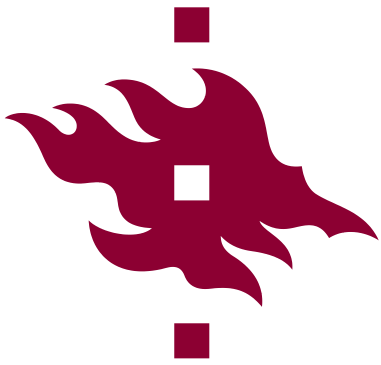


Research methods: empirical testing





Possible research results

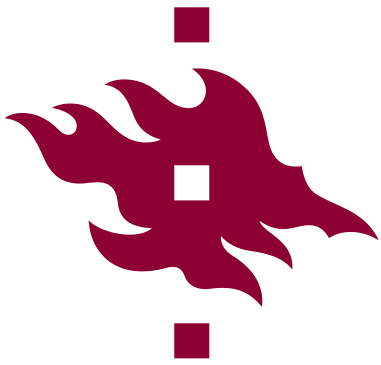


Possible research results: Understanding the discovery process

1. There is a prevailing process of discovery -> it should be written to the justification part of the judgments
2. The discovery is not a analytical process

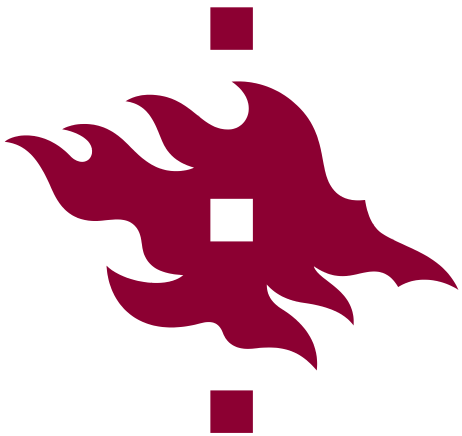
In any possible outcome:

- Better understanding of the substantial similarity as a process of discovery would
- Help the judge to en in just conclusions
- Help the judge write more transparent reasonings



Possible research results

- More transparent judgments
- Increased predictability
- Better understanding about the object of protection



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