COPYRIGHT LAW

AUTUMN 2013 CARDOZO SCHOOL OF LAW JUSTIN HUGHES

Take Home Examination

Introduction

This is a twenty-four (24) hour, take-home examination. You have 24 hours from the time you access this examination to submit the answers online.

Conditions and your professional commitments

Once you have received this examination, you may not discuss it with anyone prior to the end of the examination period. Nor may you discuss the examination at ANY time with any student in the class who has not taken it. You may NOT collaborate on the exam.

Professor Hughes permits you to use any and all inanimate resources. **The only limitations on outside resources are those established by the law school for take home examinations.**

By turning in your answers you certify that you did not gain advance knowledge of the contents of the examination, that the answers are entirely your own work, and that you complied with all relevant Cardozo School of Law rules. Violations of any of these requirements will lead to discipline by the Academic Standing Committee.

The Examination consists of two parts. Part I is a set of true/false questions. Part II consists of two essay problems with an 2,000 word limit (total). Professor Hughes takes on no obligation to read beyond each essay's upper word limit. **The Exhibits appear at the end of this document**.

GOOD LUCK

Happy holidays ans safe travels to all -- thanks for a fun class.

I. TRUE/FALSE QUESTIONS

(25 points)

This part of the exam is worth 25 points. Each answer is worth 1.5 points. There are 19 questions, so in the same spirit as the LSAT and other standardized tests, you can get two wrong and still get a maximum score (25 points) on this section.

Since this exam is being administered online, please provide your answers to this section as a single column series, numbered 1 to 19, with "T" or "F" beside each number. Make sure these T/F answers are on a separate page from the essays.

If you are concerned about a question being unclear, you may write a note at the end, but only do so if you believe that there is a fundamental ambiguity in the question.

01. Under the "abstraction, filtration, comparison" analysis elaborated in *Computer Associates v. Altai,* if the defendant's software has no source code that is the same as plaintiff's source code, there can be no infringement.

02. In *Capitol Records v. Redigi* (SDNY, March 30, 2013), the court concluded that the first sale doctrine could not apply to Redigi transfers of iTunes files because a new phonorecord was created with each transfer and that it was "besides the point that the original phonorecord no longer exists."

03. Disagreeing with the decision in *Lotus Development Corp. v. Borland International* (1st. Cir. 1995), the 10th Circuit in *Mitel, Inc. v. Iqtel, Inc.* (1997) concluded "that although an element of a work might be characterized as a method of operation, that element may nevertheless contain expression that is eligible for copyright protection."

04. The originality requirement of American copyright law means that a work will not be protected by copyright unless it has substantial creativity and is not "crude, humble, or obvious."

05. In *Bleistein v. Donaldson Lithographic Co.* (1903) Justice Holmes explained the idea/expression dichotomy noting "although the 'proprietor's' monopoly extends beyond an exact reproduction of the words, there can be no copyright in the 'ideas' disclosed but only in their 'expression.' Obviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea' and has borrowed its 'expression.' Decisions must therefore inevitably be *ad hoc*."

06. In *Magic Marketing v. Mailing Services of Pittsburgh* (W.D. Pa. 1986) the court held that Magic Marketing's envelope designs could not be protected by copyright law because they lacked "a sufficient degree of creativity" and did not show more than "trivial variation" on previous works.

07. In *A&M Records v. Napster* (2001), even though "Napster users get for free something they would ordinarily have to buy" the court held that the activity in question was a non-commercial use under the second factor of the fair use test in 17 U.S.C. § 107.

08. The Second Circuit panel in *Cartoon Network v. CSC Holdings* (2008) concluded that copying a work into a computer buffer for no more than 1.2 seconds failed to meet the Copyright Act's "fixation" requirement on the grounds that the duration was only "transitory."

09. Section 115 of the Copyright Act establishes a compulsory licensing system for public performance of musical compositions at concerts and of dramatic works in theatres.

10. In *Feist Publications v. Rural Telephone Serv.* (1991) the U.S. Supreme Court held that the 1976 Copyright Act codified the "sweat of the brow" doctrine that courts had developed under the 1909 Copyright Act.

11. If a band does a "cover" version of a Bob Dylan song and release the sound recording under a 17 U.S.C. §115 compulsory license, the same license will entitle them to stream the sound recording to their fans from their official website and put a live-concert performance of the Dylan song on YouTube.

12. In the case of parody, the fact that a "parody's humor, or in any event its *comment*, necessarily springs from recognizable allusion to its object through distorted imitation" affects the analysis under the third factor of the fair use test in 17 U.S.C. § 107.

13. In considering copyright for useful items, it is easier to see the "conceptual separability" of the aesthetic aspects of the Vaquero and Winchester belt buckles at issue in *Kieselstein-Cord v. Accessories by Pearl* (1980) then the conceptual separability of the aesthetic aspects of Mara, the hungry-look mannequin head in *Pivot Point International v. Charlene Products* (2004).

14. The Supreme Court's decision in *Sony Corporation v. Universal City Studios* (1984) establishes that all "private copying," that is copying done by private individuals for their personal use, is protected by the fair use doctrine.

15. Based on the "abstraction, filtration, comparison" test in *Computer Associates v. Altai,* if the overall structure of the plaintiff's software is completely original and not dictated by functional considerations (including efficiency, interoperability, and industry standards), and if a defendant copies that overall structure, then the defendant may be liable for infringement.

16. Generally speaking, characters can be protected under copyright law if they are "sufficiently distinctive" (*Gaiman*) or have enough "specificity" (*Anderson*), but as Learned Hand observed in the 1930 *Nichols* decision "the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly."

17. In considering copyright protection of a lamp in the shape of a dancer, the Supreme Court in *Mazer v. Stein* (1954) rejected the Copyright Office's standard that copyright should extend to "works of artistic craftsmanship, in so far as their form, but not their mechanical or utilitarian aspects are concerned . . ."

18. As discussed in *Magic Marketing v. Mailing Services of Pittsburgh* (W.D. Pa. 1986), the U.S. Copyright Office does not consider "names, titles and slogans" to be subject to copyright.

19. *Apple Computer v. Franklin Computer* (3rd Cir., 1983) held that while source code for computer programs can be protected under copyright law as a "Writing," the object code cannot be protected because it is just a string of zeros and ones.

COMMENTS on FUNDAMENTAL AMBIGUITIES? Note them with your T-F answers!

II. Essay Question
(75 points)

There is one question with two parts, i.e. two essays. Please make sure that you use 1.5 line or double line spacing and include a header or footer that has the page number **and the exam number** on each page.

Please make sure each essay starts on a separate page (so I cannot see my notes on your T/F or other essay when I read each essay).

At the end of each essay, please provide the essay's word count.

NIGHT AT THE MUSEUM STORE
With apologies to Ben Stiller, Dick Van Dyke, and Shawn Levy

The newest addition to New York's arts scene is the Museum of Consciously Hip Art (MoCHA); the director of MoCHA is the dynamic and brilliant Hariko Manjitu. Ms. Manjitu has retained the head of your law firm's IP department, Mona L. Jaconde, to represent MoCHA in copyright matters.

Taking a break from her busy schedule of fundraising, cocktail parties, and gallery openings, Ms. Manjitu decided to do some holiday shopping at the MoCHA Museum Store. Having taken a copyright-for-museum-directors seminar, she came out of the store very concerned. She has brought two of the items to your law firm. Mona has promised to meet with Ms. Manjitu tomorrow – in fact, 25 hours from now. Mona needs a short memo, 2,000 word memo from you explaining the important issues, arguments, and questions for each object. The memo has to be short – no more than 2,000 words – so Mona can read it quickly and be prepared for the meeting.

MRS./MS. BUTTERSWORTH

(50 points -- suggested 1250-1500 words)

One of MoCHA's current exhibition features the work of The Artist Formerly Unknown (first year law school students might call him "TAFU," but we will just call him "The Artist"). The Artist has revived Marcel Duchamps' idea of "readymades" – choosing existing manufactured items and displaying them, with little or no modification, as "art."

(Duchamp is famous for signing a urinal "R. Mutt" and displaying it as a sculpture "Fountain." It is NOT necessary to know anything about Duchamp's work for the exam, but if you are interested, see http://www.metmuseum.org/toah/hd/duch/hd_duch.htm, http://en.wikipedia.org/wiki/Marcel_Duchamp.)

A centerpiece of The Artist's exhibit at MoCHA is a bottle of Mrs. Butterworth's syrup. On the back of the bottle, he has signed "*T. ARTIST*" on the label. The signed bottle sits alone in a glass display case; the display case is labeled "Ms. Butterworth, by The Artist (2013)".

The Mrs. Butterworth bottle used in the exhibit is the current bottle sold and was introduced in 2003 (the prior bottle had been rounder). The bottle – as used by The Artist and as it appears in grocery stores all over America – is shown in Exhibit A. (The label varies in the exhibit photos, but the bottle is the same.) You can also find it when you go to the grocery story or at http://mybrands.com/Brands/Mrs-Buttersworths/Mrs-Buttersworths-Original-Syrup-24-oz (zoom for close-up of bottle). By the way, the first thing Wikipedia notes about Mrs. Butterworth's syrup is that it "come in distinctive bottles shaped in the form of a matronly female, Mrs. Butterworth." http://en.wikipedia.org/wiki/Mrs._Butterworth's

The Artist's signature on the the bottle back is shown in Exhibit B.

As part of the exhibit – and a good way for The Artist and MoCHA to make money – the MoCHA Store is selling Mrs. Butterworth bottles with The Artist's signature on the back. The MoCHA Store sells two kinds of these bottles:

[a] authentic Mrs. Butterworth bottles (plastic), still filled with syrup, which The Artist signed. These were bought for $5.75 a piece and are sold, with The Artist's signature, for $500 a piece.

[b] exact copies of the Mrs. Butterworth bottle, in blown glass by Brooklyn artisans, with exact copies of the labels. These bottled are also signed by The Artist; they are numbered in a limited edition of 500. These sell for $2,500.00 a piece.

The MoCHA Store has not had any communication or interaction with Pinnacle Foods, the company that owns Mrs. Butterworth's. Assume that Pinnacle owns any copyright interests in the Mrs. Butterworth's product.

Ms. Manjitu wants to know who, if anyone, has any copyright interests in this situation, whether MoCHA Store is violating anyone's copyright rights, and whether MoCHA Store has any defenses.

MELTING CLOCKS

(25 points -- suggested 500-750 words)

One of the most famous paintings in another New York museum, MoMA, is *The Persistence of Memory* (1931) by Salvador Dali (1904-1989). The painting is probably the world's best known and most celebrated Dadaist artwork. The painting is shown in Exhibit C.

The "melting" clocks in the painting have been interpreted as representing the malleability of (Einsteinian) time, but Dali himself gave the simpler explanation that many of his works were "hand-painted dream photographs." http://www.moma.org/learn/moma_learning/1168-2

Assume that the painting is still protected by copyright, which is owned by the Gaia-Salvador Dali Foundation.

Hariko Majitu discovered that the MoCHA Store is selling a working, three-dimensional "melting clock" as shown in Exhibit D. Absolutely nothing on the product packaging indicates that it is licensed by the Gaia-Salvador Dali Foundation, so Ms. Manjitu would like your analysis on whether the MoCHA Store has any potential liabilities.

END OF WRITTEN EXAMINATION – EXHIBITS FOLLOW

EXHIBIT A – different images of MRS. BUTTERWORTH bottle

EXHIBIT B – The Artist's signature on the back of "Ms. Butterworth" and each bottle sold at the MoCHA Store

EXHIBIT C – Salvador Dali's "The Persistence of Memory," Museum of Modern Art, New York

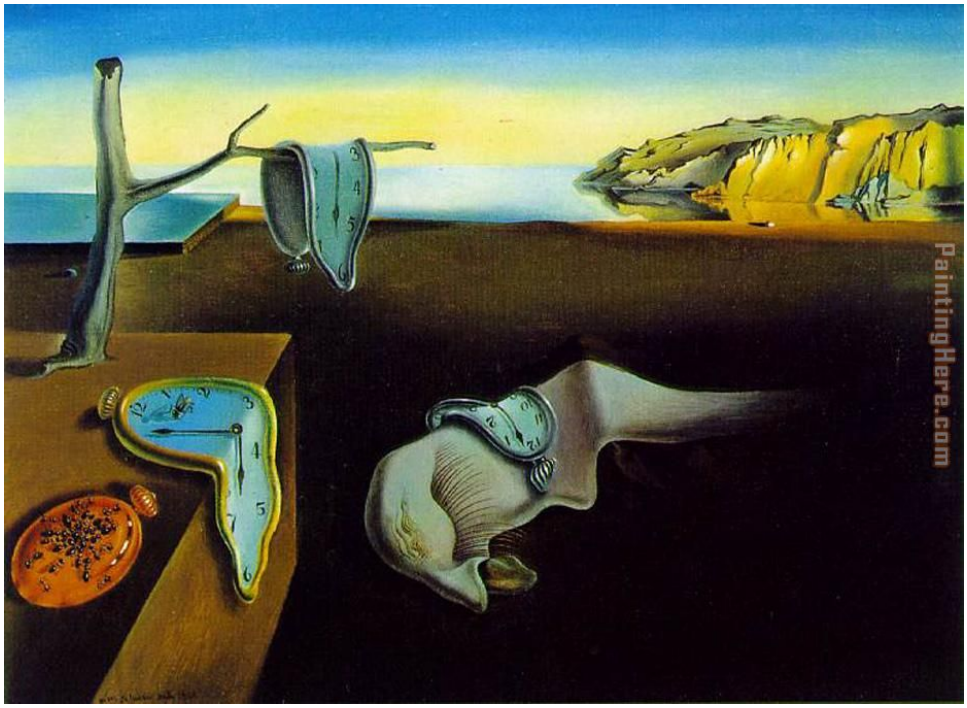

EXHIBIT D – melting clock sold in the MoCHA Store (Ms. Manjitu bought this one and displayed it in her office for these photos.)

Exhibit D continued

End of Exhibits – end of examination # # # #