

COPYRIGHT LAW

AUTUMN 2014

LOYOLA LAW SCHOOL

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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. You are to access this particular examination and provide your answer by whatever means is designated by the Registrar's Office.

Conditions and your professional commitments

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

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 Loyola Law School rules..

The Examination consists of two parts. Part I is a set of true/false questions. Part II consists of one essay problem with a 2,000 word limit. The Exhibits appear at the end of this document.

GOOD LUCK

Happy holidays to all -- thanks for a fun class.

I. TRUE/FALSE QUESTIONS

(30 points)

This part of the exam is worth 30 points. Each answer is worth 1.5 points. There are 22 questions, so in the same spirit as the LSAT and other standardized tests, you can get two (2) wrong and still get a maximum score (30 points) on this section.

Please provide your answers to this section as a single column series, numbered 1 to 22, with “T” or “F” beside each number. Make sure these T/F answers are on a separate page from the essay.

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. In *Magic Marketing v. Mailing Services of Pittsburgh* (W.D. Pa. 1986) the court held that Magic Marketing’s envelope designs could be protected by copyright law because they showed “a sufficient degree of creativity” by having “trivial variation” on previous works.
02. If a band does a “cover” version of a Leonard Cohen musical composition and distributes the sound recording under a 17 U.S.C. §115 compulsory license, the same license will entitle the band to perform the musical composition in concert and stream a recorded concert performance of the Cohen song on YouTube.
03. In *A&M Records v. Abdallah* (C.D. Cal. 1996), the court concluded that Mr. Abdallah’s specially tailored cassette tapes could not be considered staple articles of commerce under the doctrine announced in *Sony v. Universal City Studios*.
04. According to the House Report for the 1976 Act, “fixation” sufficient for copyright protection occurs when the work “can be reproduced, distributed, or publicly performed, either directly or with the aid of a machine or manufacture.”
05. In *Bleistein v. Donaldson Lithographic Co.* (1903) Justice Holmes used the examples of the painters Goya and Manet to support his belief

that “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”

06. In *MGM v. Grokster* (2005) the Supreme Court criticized the Ninth Circuit for reading the *Sony* decision “as limiting secondary liability quite beyond the circumstances to which the case applied” and the Court clarified that the *Sony* “staple article of commerce” doctrine concerns “liability resting on imputed intent” not “liability on any theory.”
07. Copyright protection of the “Winchester” and “Vaquero” belt buckles was rejected in *Kieselstein-Cord v. Accessories by Pearl* on the grounds of the test proposed in the NIMMER ON COPYRIGHT treatise, i.e. that ““a sculptural feature incorporated in the design of a useful article is conceptually separable if it can stand on its own as a work of art traditionally conceived and if the useful article in which it is embodied would be equally useful without it.”
08. The fact that the defendant had written completely different computer code for its “Virtual Game Station” was important for the fair use analysis in *Sony Computer Entertainment v. Connectix* (9th Cir. 2000).
09. Section 115 of the Copyright Act establishes a compulsory licensing system for digital audio transmission of musical compositions.
10. Silk screen designs on t-shirts and patterns on fabrics for clothing are not copyrightable because clothes are “useful items” under copyright law.
11. Although Justice Blackmun was in the dissent in *Sony v. Universal City Studios*, his distinction between “productive” and “purely consumptive” uses – with the former being favored by the fair use doctrine – may have influenced the Court’s later views on “transformative uses” in the *Acuff-Rose* litigation.

12. In both *Fonovisa v. Cherry Auction* and *A&M Records v. Napster* the courts found the defendant to be providing the “site and facilities” for direct infringement, that the defendant met the requirements for vicarious liability, and that the defendant also met the requirements for contributory liability.
13. Section 109’s first sale doctrine did not shield Redigi, the first company to attempt an integrated system for reselling digital music files, because the court found that Redigi’s system violated the copyright owner’s section 106 right of reproduction.
14. In *Stewart v. Abend* (1990), the Supreme Court affirmed the rule first crafted by the Second Circuit in *Rohauer v. Killiam Shows* that the owner of a the copyright in a derivative work may continue to use the existing derivative work according to the original grant from the author of the pre-existing work even if the grant of rights in the pre-existing work lapsed.
15. In order to assign an entire copyright or grant an exclusive license, section 204(a) requires that the assignment or license “is in writing and signed by the owner of the rights conveyed or such owner’s duly authorized agent”
16. *Apple Computer v. Franklin Computer* (3rd Cir., 1983) held that computer program object code is always a derivative work based on the source code from which it is “compiled.”
17. Section 302 of the Copyright Act establishes that anonymous works created after 1 January 1976 enjoy a copyright term of 95 years from the date of publication and works made for hire enjoy a copyright term of 120 years from the date of publication.
18. In *Brandir International v. Cascade Pacific* (2d Cir. 1987), the undulating design first introduced as a sculpture and later sold as a bike rack was considered unprotectable under copyright law on the grounds that when “design elements reflect a merger of aesthetic and functional considerations, the artistic aspects of a work cannot be said to be conceptually separable.”
19. Learned Hand established the “story being told” test to determine whether specific fictional characters are protected by copyright.

20. In *A&M Records v. Napster*, the Ninth Circuit determined that “repeated, exploitative copying of copyrighted works” will only be commercial use if the copies are “offered for sale.”
21. If an employee working within the scope of her employment prepares a Spanish translation of her company’s Human Resources Department Manual, that translation will be a work made for hire under the statutory definition in 17 U.S.C. 101.
22. In several of the cases we discussed – *Gracen v. Bradford Exchange*, *Effects Associates v. Cohen*, and *Oddo v. Ries* – a party’s actions become the basis for the court to infer an implied license or implied permission to exercise some section 106 right.

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

II. Essay Question

(70 points)

[suggested 1500-2000 words; 2000 word *limit*]

Please make sure that you use 1.5 line or double line spacing and include a header or footer **on each page** that has both the page number **and the exam number**. Please make sure each essay starts on a separate page (so I cannot see my notes on your T/F when I read the essay).

HOMAGE ART

The newest addition to the Los Angeles arts scene is the Museum of Consciously Hip Art (MoCHA); the General Counsel of the museum is the dynamic and brilliant Mona L. Jaconde. You are interning for Ms. Jaconde.

Mona thinks you know a lot about copyright law (one of her weak spots) and has called you into her office – she has one really tough problem for you.

MoCHA has tentatively agreed to a fall 2015 exhibition of a fascinating series of photographs done in collaboration by photographer Sandro Miller and actor John Malkovitch. In these photos, Malkovitch “becomes” the character of famous photographic or artistic images – Einstein, Mapplethorpe, a woman in the Depression, a beekeeper, Hemingway, Andy Warhol, Salvador Dali, Che Guevara, and, yes, Marilyn Monroe. Sandro Miller and his team arranged all the backdrops, props, and other participants for the photos.

The photographs were first publicly exhibited in a show called “Malkovich, Malkovich, Malkovich: Homage to Photographic Masters” at an important gallery in Chicago. Mona recommends that you read two stories here [but the stories are not necessary to a successful essay]:

<http://www.chicagotribune.com/entertainment/ct-john-malkovich-sandro-miller-photos-20141105-column.html#page=1>

<http://www.businessinsider.com/iconic-photographs-john-malkovich-sandro-miller-2014-9?op=1>

Please do not do other internet research; there is truly no need.

The Miller/Malkovitch photographs have been initially printed on museum quality 100% cotton fibre paper in a limited run of 25 images, each one signed by Sandro Miller. The individual copies are sold for \$10,000 each. MoCHA will exhibit a complete, signed “A.P.” [artist’s proofs] set of the images.

MoCHA is negotiating the final contract for the exhibition with Sandro Miller’s agent. The agent has proposed that, as part of the exhibit, MoCHA permit Miller/Malkovitch to sell postcards, mousepads, and other giftware in the MoCHA Shop with three images from the series: “Migrant Mother,” “Andy,” and “Pink Marilyn”. MoCHA would receive 30% of the retail sale price of each item sold.

A member of the MoCHA Board has insisted that Mona Jaconde do a thorough copyright investigation of the whole project; Mona will meet with the board member 36 hours from now and she wants to seem well-informed about potential copyright problems.

Jaconde has asked you to do a preliminary, but comprehensive memo (of 1500-2000 words) analyzing the copyright issues surrounding the three Miller/Malkovitch works proposed for postcards and MoCHA giftware (“Migrant Mother,” “Andy,” and “Pink Marilyn”). Mona suggests – but it is your decision – that the memo could be organized profitably into the following issues:

- + authorship of the Miller/Malkovitch images generally;
- + originality, possible infringement, and other issues related to “Migrant Mother” and the pre-existing photo on which it is based [Exhibit B, based on Exhibit A];
- + originality, possible infringement, and other issues related to “Andy” and the pre-existing photo on which it is based [Exhibit D, based on Exhibit C];
- + originality, possible infringement, and other issues related to “Pink Marilyn” and the pre-existing photo on which it is based [Exhibit F, based on Exhibit E];
- + If the Miller/Malkovitch photos potentially infringe pre-existing works, you should decide whether to discuss possible defenses under each photograph or discuss possible defenses in one section of the memo;
- + issues related to the proposed sale of art postcard, mousepads, and other giftware.

As background, Dorothea Lange’s “Migrant Mother” (Exhibit A) was shot in 1936; the circumstances of its creation are described by the Library of Congress here: http://www.loc.gov/rr/print/list/128_migm.html. The image is in the public domain because Ms. Lange shot the photograph while working as an employee of the U.S. Government [This is correct under 17 U.S.C. 105]. Andy Warhol’s “Self-Portrait” (Exhibit C) is a 1986 screenprint of a photograph Warhol took augmented with acrylic painting; the painting is in the Tate Gallery in London. “Marilyn Monroe with Pink Roses” (Exhibit E) is a 1962 photograph taken by Bert Stern at the last photography sitting Marilyn ever did, at the Hotel Bel-Air.

END OF WRITTEN EXAMINATION – EXHIBITS FOLLOW

EXHIBIT A – “Migrant Mother” (1936) by Dorothea Lange

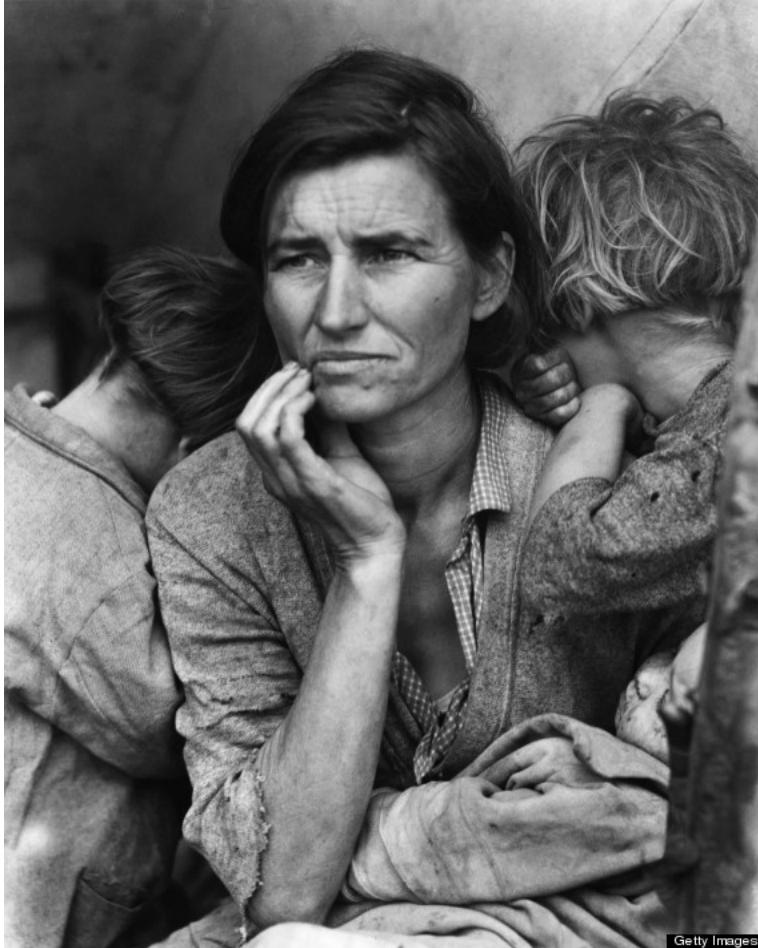


EXHIBIT B - "Migrant Mother" (2014), Miller photographing Malkovitch

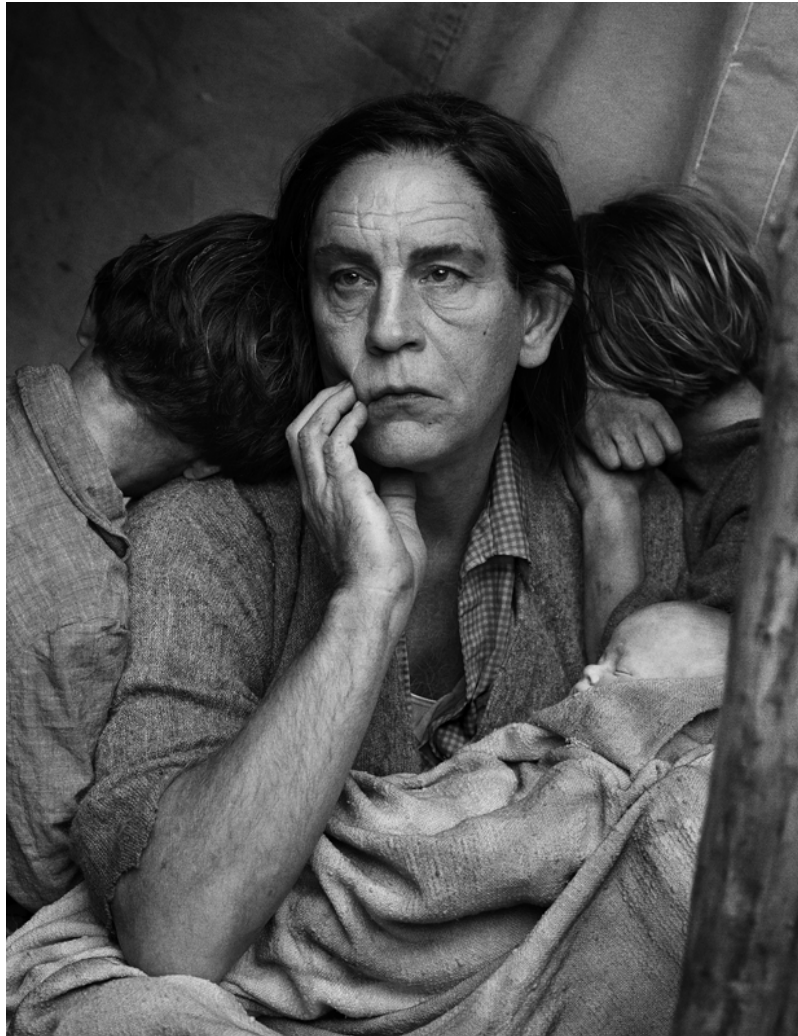


EXHIBIT C – Andy Warhol, *Self-Portrait* (1986)

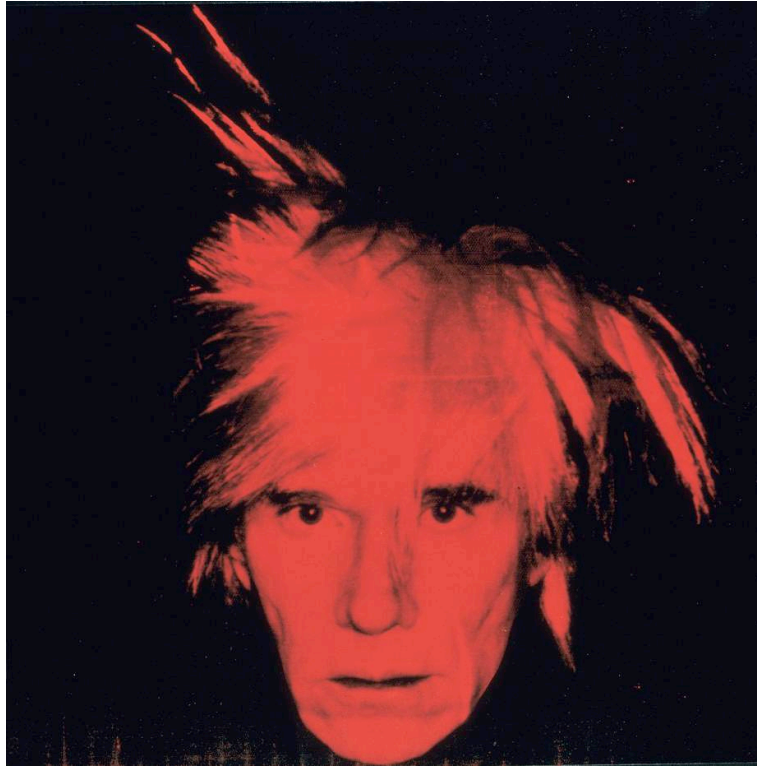


EXHIBIT D – “Andy” (2014), Miller photographing Malkovitch

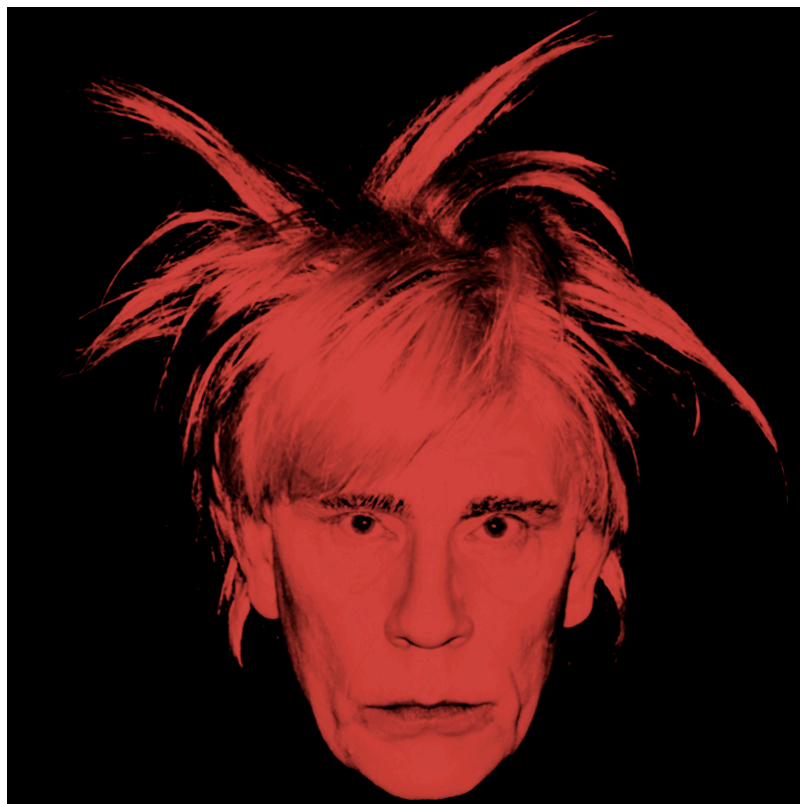


EXHIBIT E – Marilyn Monroe with Pink Roses (1962)



EXHIBIT D - "Pink Marilyn" (2014), Miller photographing Malkovitch



End of Exhibits - end of examination #####