

COPYRIGHT LAW

AUTUMN 2015

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 pick up this examination at the Registrar's Office to submit your answers back to the Registrar's Office.

Conditions and your professional commitments

Once you have received this examination, you may not discuss it with anyone prior to the end of the LLS examination period. Nor may you discuss the exercise at ANY time with any student in the class who has not taken it (in case a student gets a special dispensation to take an exam later). 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.

However, you should NOT do additional factual research for the questions you are given. The examination's fact patterns may be based on real circumstances, but they are *hypothetical* and you should treat the "facts" as limited to what you are told in the examination.

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

*Thank you for an enjoyable class. Happy holidays
and may you have a 2016 full of good health, adventure, and meaning.*

I. TRUE/FALSE QUESTIONS

(40 points)

This part of the exam is worth 40 points. Each answer is worth 2 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 (40 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.

SOME GENERAL QUESTIONS

01. In *CCC Information Systems v. Maclean Hunter Market Reports* (2d Cir. 1994), the court determined that while the used car valuations were not “facts” in the sense of *Feist*, the valuations were ideas subject to the merger doctrine.
02. *Mitel, Inc. v. Iqtel, Inc.* (10th Cir. 1997) and *Lotus Development Corp. v. Borland International* (1st. Cir. 1995) take different approaches to the question of copyright protection of original expression where the original expression may also be characterized as a method of operation.

03. The modicum of creativity requirement for copyright protection may be met by originality in a work's selection from pre-existing material.
04. Because the 1976 Copyright Act "does not expressly render anyone liable for infringement committed by another" the Supreme Court has refused to establish any type of secondary liability for copyright infringement.
05. Learned Hand is famous for his insights on copyright, including his observation that a copyrighted work is "the personal reaction of an individual upon nature" and that "[p]ersonality always contains something unique. It expresses its singularity even in handwriting and a very modest grade of art has in it something irreducible which is one man's alone."

IT MIGHT HAVE HAPPENED

For the past decade, Marc Pepperman's play "Tin Pan Alley Rag," has been performed successfully in many prestigious theaters, including the Greenhouse Theater (Chicago), the Laguna Playhouse, Playhouse in the Park (Cincinnati), and off-Broadway at the Roundabout Theater in New York. The play centers on a 1915 meeting of two of the most important composers in American history: Irving Berlin (1888-1989), at the peak of Berlin's songwriting career, and Scott Joplin, just two years before Joplin died (1867-1917).

There is no direct historical evidence that such a meeting ever occurred.

In the play, the two central characters – Berlin and Joplin – talk about their respective lives, frequently interspersed with their original songs. The play occurs principally in Irving Berlin's music publishing office in New York.

Of the over 1000 musical compositions known to have been written by Berlin, Pepperman's play uses 6 songs; of the 75+ musical compositions known to have been written by Joplin, Pepperman's play uses 7. For the Berlin songs that are still protected by copyright, the Berlin estate is represented by ASCAP [Mr. Berlin was one of the founders of ASCAP].

A small Seattle theater has just opened a new play "Titans of Ragtime" by Minnie Headroom, a playwright who also often writes reviews of musical theater. "Titans of Ragtime" is also about a meeting between Scott Joplin and Irving Berlin, late in Joplin's life.

If Pepperman sues Headroom for infringement of "Tin Pan Alley Rag," which of the following are true and which are false?

06. If it is shown that 40% of the lines that the Joplin character says in the Headroom play are the same – either exactly or with minimal changes – as lines said by the Joplin character in Pepperman's play, all things being equal, this will strengthen Pepperman's case.
07. If either play uses any Irving Berlin songs still protected by copyright, as long as the theater has an ASCAP license there will be no infringement of the Berlin estate's rights because ASCAP and BMI licenses cover "grand" performance rights.
08. If it is shown that Headroom's play uses the same six Irving Berlin songs Pepperman used and six of the seven Joplin songs that Pepperman used, all things being equal, this will strengthen Pepperman's case.
09. If it is shown that Pepperman's play was promoted in one city as "a historical re-enactment" and the flyers for another production said "learn the true story," all things being equal, this will strengthen Pepperman's case.
10. If Headroom testifies that she does not remember ever seeing or reading "Tin Pan Alley Rag," this will defeat any possible inference of copying.

THE DONALD AT THE DO-DAH

Responding to presidential candidate Donald Trump's criticisms of Mexican immigrants, noted piñata artist Arturo Derecho recently created a new *El Donald – boca abierta siempre piñata*. (The Spanish means "mouth always open.") Produced by Derecho and workers in his studio in an edition of 2000 copies, the high quality piñata has received extensive press coverage. The piñata is shown below as **Exhibit A**.

With exams approaching, a dozen Loyola Law School students decided to have some fun by participating in Pasadena's unconventional "Do-Dah" parade, (<http://pasadenadoodahparade.info/>). The students purchased a few elephant masks and a matching number of Hillary Clinton masks from a local costume store (shown below as **Exhibits B and C**); they then purchased 5 *El Donald* piñatas from Derecho's studio. At the Do-Dah Parade, the formed three teams – one person holding the piñata on a long pole, one person in a elephant mask trying to hit the piñata and failing; one person in a Hillary mask trying to hit the piñata and occasionally succeeding, and one person holding a stick and, in Charlie Chaplin style, inviting people along the parade route to try to hit "El Donald."

Of course, a few *El Donalds* were destroyed along the way and the students returned to campus with only one piñata intact.

One of the students had a nice camera – a Pentax K-S1 – and they decided to take a group portrait. Wearing their masks and holding the one remaining *El Donald* the students made an impromptu formation around the sculpture next to Merrifield Hall, Claes Oldenburg's *Toppling Ladder with Spilling Paint* (**Exhibit D**), they then asked a passer-by to take some pictures. The passer-by agreed, said "say 'cheese!'", and rapidly took 5-6 photos.

The passerby happened to be famed photographer Annie Liebovitz, who was meeting with the dean to discuss a photo shoot of the law school's celebrated Frank Gehry campus.

11. Because piñatas are intended for destruction, *El Donald – boca abierta siempre* cannot be considered to be "fixed in a tangible medium of expression."
12. If the students chose their own positions around the Claes Oldenburg sculpture and Liebovitz gave them no more direction than "say 'cheese!'" all things being equal, this would weaken Liebovitz' claim to any copyright in the photographs.
13. Whoever created them, there cannot be any claim to copyright in the elephant and Hillary Clinton masks because masks are useful

items lacking original expression “that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.”

14. Depending on the composition of the photos, Claes Oldenburg may be able to claim that the photographs are unauthorized derivative works.
15. Depending on the composition of the photos, if *Toppling Ladder with Spilling Paint* and *El Donald – boca abierta siempre* are barely visible in the photos, any infringement claims by Oldenburg or Derecho, respectively, may be defeated by the *de minimis* doctrine.
16. Derecho cannot have any copyright in *El Donald – boca abierta siempre* because the piñata design was an unauthorized derivative work on Donald Trump’s face.
17. If it is established that Liebowitz took the photos from exactly the spot where the student handed her the student’s Pentax K-S1 camera, all things being equal, this would strengthen Liebowitz’ claim to any copyright in the photographs.

SOME MORE GENERAL QUESTIONS

18. According to section 101 of the Copyright Act, a public performance includes a performance “at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.”
19. In *Capitol Records v. ReDigi Inc.* (SDNY, 2013) the court concluded that because it “is simply impossible that the same ‘material object’ can be transferred over the Internet,” the operation of the Redigi system violated the copyright owners’ rights of reproduction, derivative works, and public performance.
20. In *MGM v. Grokster* (2005) the Supreme Court clarified that the *Sony* “staple article of commerce” doctrine concerns only “liability resting on imputed intent” and not “liability on any theory.”

21. The staple article of commerce doctrine from the *Betamax* case will protect a defendant from secondary liability for copyright infringement even “where evidence . . . shows statements or actions directed to promoting infringement” by the defendant.
22. In *Sega Enterprises v. Accolade* (9th Cir. 1992), the court was concerned that if disassembly [or decompiling] copyrighted object code was not considered fair use, then the owner of a software copyright might gain a *de facto* monopoly over functional, unprotected aspects of the software.

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

II. Essay Question

(60 points total)
[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 the essay starts on a separate page.

Be sure to include the word count at the end of the essay.

HEROES, SUFFRAGETTES, AND THE THIN WHITE DUKE

David Bowie is one of the great musicians of the 20th century and his business manager has come to your boss, Mona L. Jaconde, with a “little problem” involving one of Bowie’s classic songs and one of his equally classic album covers. Here’s the problem as summarized by Mona’s notes from her conference call with the manager:

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Bowie’s 1972 song “Suffragette City” appeared on his album of the same year, *The Rise and Fall of Ziggy Stardust and the Spiders from Mars*, ranked the 35th most important album of all time by ROLLING STONE. “Suffra-

ette City” has be “covered” by dozens of bands and singers including Duran Duran, Franz Ferdinand, Boy George, The Horrors, Sue Jorge, and the Red Hot Chili Peppers. [Whether any of these artists used the section 115 compulsory license or a “Harry Fox” license is not important.]

Five years later, Bowie’s 1977 album *Heroes* had a title track of the same name; the song “Heroes” is consistently named as one of the most important rock songs of all time; in ROLLING STONE’S 500 “Greatest Songs of All Time” the song placed 46th. The cover of the *Heroes* album is arguably the most elegant and dramatic of all Bowie’s cover art. The album cover is shown in Exhibit E.

The photograph for the album cover was taken by the photographer Masayoshi Sukita at a photo shoot in 1977. The photo shoot was at Sukita’s studio. Masayoshi Sukita was selected, hired, and paid by Bowie, but Mr. Bowie does not remember any written agreement about who owns the copyright. Over time, Bowie and Sukita worked together again and again, but the *Heroes* cover remains their most iconic collaboration. Although Sukita took dozens of pictures of Bowie at the photo shoot, the particular pose for the photo used on the album cover was Bowie’s idea. In fact, in a recent interview, Sukita described the 1977 photo shoot this way:

“They called me up for an hour photo shoot each, so it didn’t start off as an album cover, it was just a general photo session. I didn’t think of any creative settings for David, everything just came out of the nature of David, he was just sitting or standing, or making a move. Then I realized, taking a portrait as a natural being was more interesting than making a creative setting. Instead of giving him directions, I just captured the nature of Bowie. I sent a bunch of contact sheets I picked to David and a month later, he told me that they’d use that photo as the album cover, I was really happy about it.”

<http://time.com/4117090/sukita-david-bowie-photos/>

At the same time, Bowie has been effusive in his praise of Sukita’s work. In October 2015, Bowie described Sukita this way: “This is a committed artist, a brilliant artist, I would call him a master.” <http://time.com/4117090/sukita-david-bowie-photos/> Bowie himself chose the typeface and placement of the album name on the *Heroes* cover.

Recently Bowie discovered a German punk band from Nuremberg called “The Penetrators” that did a cover of “Suffragette City.” The manager knows that “The Penetrators” did not get permission to use the composition from Bowie’s music publishing operation, but does not know if the German band applied for a compulsory license. As the cover for their *cover*, The Penetrators did an imitation of the *Heroes* album as shown in Exhibit F (or see <http://www.discogs.com/Penetrators-Der-N-Rat-Suffragete-City-Lady-Grinning-Soul/release/2292620>). Bowie’s manager says Bowie is not amused; he is angry because no one else has done “covers” of Bowie songs AND also mimicked Bowie artwork. Bowie thinks this goes too far.

Bowie is also unhappy because of the changes that the Penetrators have made to “Suffragette City.” The original, enigmatic lyrics are reproduced in Exhibit G. It is widely thought that the original lyrics describes sexual desire – a man who is powerfully attracted to a woman called the “suffragette” – as against the man’s desires for drugs (“henry” was a nickname for heroin in the 1960s and 70s). Commentary of the original song usually describes the woman (the “suffragette”) as controlling the man who is singing. Bowie thinks the Penetrators’ version is all about yuppie economic angst and economic role reversal; the Thin White Duke apparently complained “those fricking Nuremberg punkers have ruined the song!” The lyrics, as sung by the Penetrators, are reproduced in Exhibit H.

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Assume that the copyrights in the 1972 and 1977 works are still secure; do not worry about any procedural problems, i.e. the statute of limitations for a possible infringement dating back to 2008. Mona just wants a straightforward, detailed analysis of the substantive copyright issues assuming that 1976 Copyright Act controls, including, but not limited to. what options are open to Bowie, what rights he has, what defenses the Penetrators can raise if Bowie sues, etc.

Mona thinks you know a lot about copyright law and since she’s got to be in SF tomorrow for meetings, she has assigned you to prepare a memo figuring out the issues here. Giving you her wry little smile, she reminded you: **absolutely no more than 2000 words**. She’s scheduled a conference call with Bowie’s team 30 hours from now; she needs your memo prepping her in 24 hours, absolutely no more. – END --

EXHIBITS START ON PAGE 11.

EXHIBIT A

El Donald – boca siempre abierta (2015) by Arturo Derecho



EXHIBIT B

Elephant mask bought at local costume store

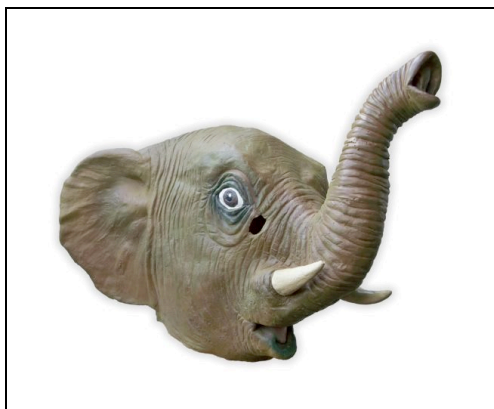


EXHIBIT C

Hillary Clinton mask bought at local costume store

**EXHIBIT D**

Toppling Ladder with Spilling Paint (1986) by Claes Oldenburg



EXHIBIT E

Cover of David's Bowie's 1977 album *Heroes*

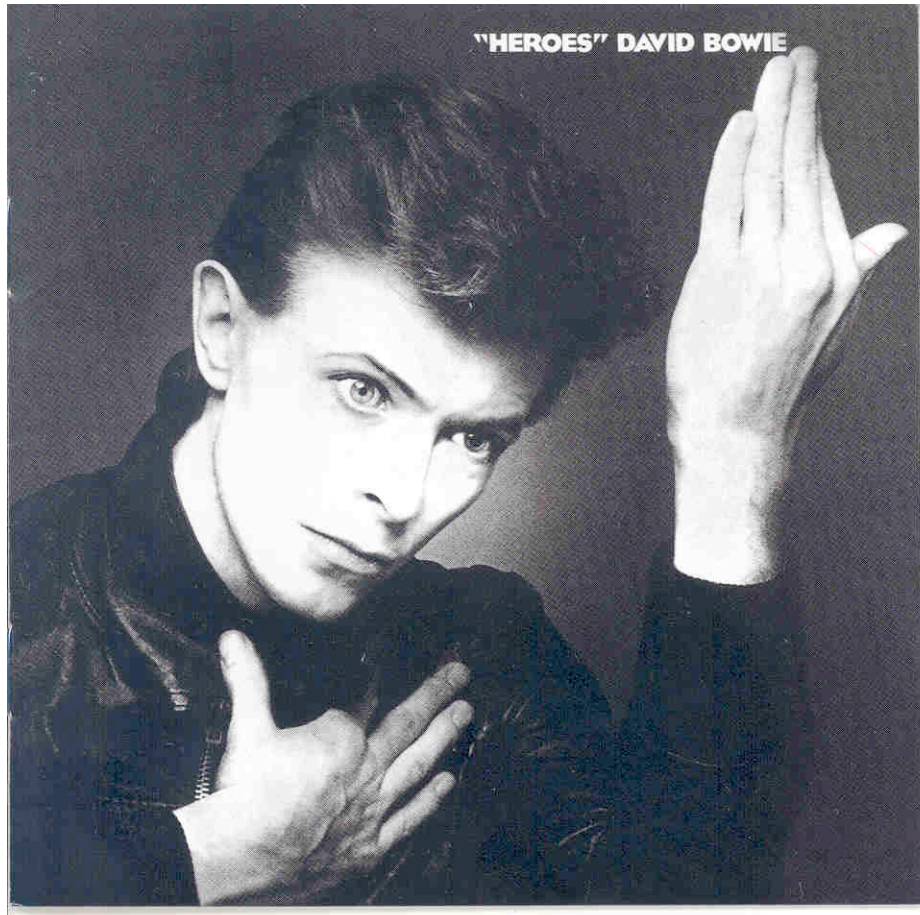


EXHIBIT F

Cover of The Penetrators' 2008 single *Suffragette City*

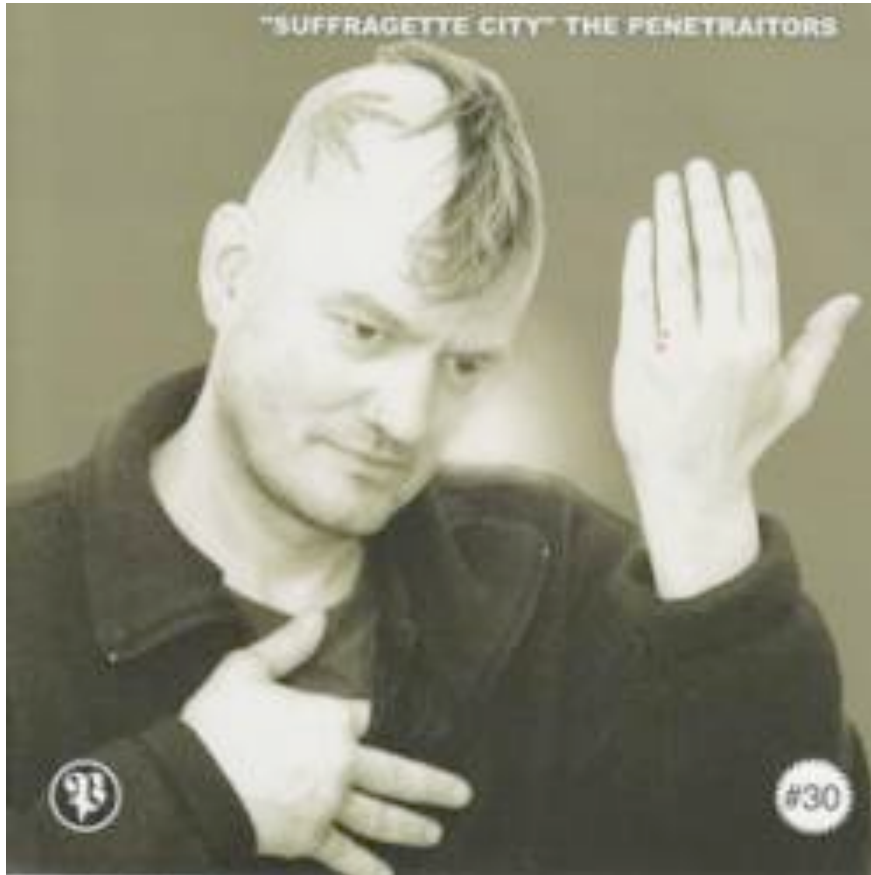


EXHIBIT G

Original lyrics to "Suffragette" City" by David Bowie

(Hey man) oh leave me alone you know
(Hey man) oh Henry, get off the phone, I gotta
(Hey man) I gotta straighten my face
This mellow thighed chick just put my spine out of place

(Hey man) my schooldays insane
(Hey man) my works down the drain
(Hey man) she's a total blam-blam
She said she had to squeeze it but she... and then she...

[Chorus:]
Oh don't lean on me man, cause you cant afford the ticket
I'm back from suffragette city
Oh don't lean on me man
'Cause you ain't got time to check it
You know my suffragette city
It's outta sight... she's all right

(Hey man) Ah Henry, don't be unkind, go away
(Hey man) I can't take you this time, no way
(Hey man) Doogie don't crash here
Theres only room for one and here she comes, here she comes

[Chorus]
Oh don't lean on me man, cause you cant afford the ticket
I'm back from suffragette city
Oh don't lean on me man
'Cause you ain't got time to check it
You know my suffragette city

[Chorus]
Suffragette city, suffragette city
Suffragette city, I'm back

Oh, wham bam thank you ma'am!
A suffragette city, suffragette city, suffragette city
One, two, three...
Suffragette!

EXHIBIT H

Modified lyrics in The Penetrators' version of "Suffragette" City"

(Hey girl) you just can't leave me alone
 (Hey girl) you tell me not to get stoned?
 (Hey girl) I gotta straighten up my act
 This world aint got no place for losers?

(Hey girl) my school work's a pain
 (Hey girl) my prospects down the drain
 (Hey girl) unless I work my ass off, here and now,
 Everybody's getting squeezed ...

[Chorus:]

Oh don't lean on me, friend, cause I cant afford the ticket
 Ok, I'm stuck in suffragette city
 Oh don't lean on me friend
 'Cause I can't afford my bills
 You know my suffragette city
 She pays the bills, so she's all right

(Hey girl) don't be unkind, I can't go away
 (Hey girl) I can't take more rejects, no way
 (Hey girl) Pay day is far away
 Theres only room for one and here she comes, here she comes

[Chorus]

Oh don't lean on me, friend, cause I cant afford the ticket
 Ok, I'm stuck in suffragette city
 Oh don't lean on me friend
 'Cause I can't afford my bills
 You know my suffragette city

[Chorus]

Suffragette city, suffragette city
 Suffragette city, I'm back

Oh, wham bam thank you ma'am!
 A suffragette city, suffragette city, suffragette city
 One, two, three...
 Suffragette!

End of Exhibits – end of © examination, autumn 2015 #####