

COPYRIGHT LAW

SPRING 2017

LOYOLA LAW SCHOOL

JUSTIN HUGHES

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 and Appendix appear at the end of this document.

GOOD LUCK

Thank you for an enjoyable class. Congratulations to those graduating.

I. TRUE/FALSE QUESTIONS

(40 points)

This part of the exam is worth 40 points. Each answer is worth 2.5 points. There are 17 questions, so in the same spirit as the LSAT and other standardized tests, you can get one (1) 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 17, 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. Under 17 U.S.C. § 102, for a work to be protected by copyright the work must be fixed in a “tangible medium of expression” from which it “can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”
02. In *A&M Records v. Abdallah* (C.D. Cal 1997) the court determined that while Mr. Abdallah’s “time-loaded cassettes” were capable of substantial non-infringing uses, the cassettes were not “staple articles of commerce” entitled to the Sony defense.

03. Article I, section 8, clause 8 of the United States Constitution requires Congress to grant “Authors” exclusive rights “for limited Times” over their “Books.”
04. In *Capitol Records v. Redigi* (S.D.N.Y. 2013), the court concluded that even though the Redigi system erased the digital sound recording on the computer “selling” the copy of the sound recording, there was still a violation of the copyright owner’s right of reproduction because “[i]t is besides the point that the original phonorecord no longer exists. It matters only that a new phonorecord has been created.”
05. If a group of friends picnicking in Griffin Park bring an old-fashioned “boombox” and play Leonard Cohen’s last album, *You Want It Darker*, over and over – loud enough for lots of other people in the park to hear – they will violate the § 106 public performance rights in both the musical compositions and the sound recordings on *You Want It Darker*.

PARABLE OF THE SEQUEL

In the early 1990s, the famed science fiction writer Octavia E. Butler completed her novel, *Parable of the Sower*, the story of an African-American teenager, Lauren Oya Olamina, who leads a group of people from a dystopic southern California toward a new life in the north. Ms. Butler assigned “all rights, title and interest” in the book to Seven Stories Press in a properly signed written contract. Seven Stories published the book in 1993. Butler’s second book featuring the character Lauren Oya Olamina was written and published in 1998 as *Parable of the Talents*; it was published under an agreement in which Butler kept the copyright and the publisher received only “first publication in book format” rights. Ms. Butler passed away in 2006 and never finished the intended third novel in the Lauren Olamina story, *Parable of the Trickster*.

Pursuant to a signed and witnessed Last Will and Testament, Ms. Butler’s copyright interests passed to the “Octavia Butler Fund for Emerging Writers” (the Fund) and Ms. Butler’s personal papers were donated to the Huntington Library in Pasadena; those papers include several of her draft starts of the *Parable of the Trickster* novel.

06. Under the reasoning in *Nichols v. Universal Pictures* and *Anderson v. Stallone*, the character Lauren Oya Olamina is very likely sufficiently “delineated” to be original expression protected by the copyright in the books in the *Parable* series.
07. A court following the analysis in *Warner Bros. Pictures v. Columbia Broadcasting* would conclude that Octavia Butler had no right to feature the character Lauren Oya Olamina in another novel after Ms. Butler assigned her rights in *Parable of the Sower* to Seven Stories Press.
08. Under 17 U.S.C. § 204, it is likely that the copyright interests held by Octavia E. Butler when she died were properly transferred to the Fund.
09. The character Lauren Oya Olamina will enter the public domain in 2076.
10. If a researcher at the Huntington Library secretly copies the draft starts of the *Parable of the Trickster* novel and publishes them online without permission of the Fund, the Supreme Court’s analysis in *Harper & Row v. The Nation* and the wording of 17 U.S.C. § 107 foreclose any possibility of a fair use defense.

A PLAIN WHITE CHEERLEADING UNIFORM

As you know, on March 22, the Supreme Court issued its decision in *Star Athletica v. Varsity Brands*, a case in which Star Athletica challenged Varsity Brand’s copyright in many designs for cheerleading uniforms. People continue to disagree strongly on how to characterize the designs at issue: were they designs *on* cheerleading uniform or *cheerleading uniform designs*? Appendix 1 (at the end of this exam) has approximately 1,200 words of excerpts from the majority opinion in the case. [This is the same summary as distributed on 1 May on TWEN.] Based on those excerpts and the case law that we studied in class, answer the following T/F:

11. The *Star Athletica* majority strongly endorsed the “process-oriented” approach to determine conceptual separability as discussed in

Brandir International v. Cascade Pacific (2d Cir., 1987) and proposed by Professor Denicola in a 1980 law review article.

12. The “separability” test adopted by the *Star Athletica* majority that “a feature of the design of a useful article is eligible for copyright if, when *identified and imagined* apart from the useful article, it would qualify as a pictorial, graphic, or sculptural work . . .” (emphasis added) may be compatible with the “‘mind’s eye’ of the beholder” test recommended by Judge Newman in his dissenting opinion in *Carol Barnhardt* (2d Cir. 1985).
13. The *Star Athletica* majority adopted and endorsed the test proposed in the Goldstein treatise [and discussed in *Pivot Point* on page 246-247 of the case book] 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.”

SOME MORE GENERAL QUESTIONS

14. Under the doctrine established in *Apple Computer v. Franklin Computer* (3rd Cir., 1983), copyright law protects source code as original expression, but does not protect object code.
15. In *MGM v. Grokster* (2005) the Supreme Court clarified that the Sony “staple article of commerce” doctrine concerns “liability on any theory.”
16. In *Computer Associates v. Altai* (2d Cir., 1992) the appellate panel reasoned that since computer programs are protected under copyright law as “literary works,” copyright can protect some “non-literal structures of computer programs” in addition to protecting against any verbatim copying of software code.
17. In *Baker v. Selden* (1879), the Supreme Court concluded that a copyright in an accounting book did not give the author “the exclusive right to the use of the system or method of book-keeping which the said book[s] are intended to illustrate and explain.”

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

II. Essay Question

SKITTLES ARE CANDY, REFUGEES ARE HUMANS

(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.

Mr. Hariko Manjitu is the new General Counsel of Flickr, an image and video hosting website that is wholly owned by Yahoo!. Flickr has almost 100 million users, hosts billions of photographs, and calls itself “one of the largest worldwide photo communities.”

Mr. Manjitu is looking for new outside counsel, particularly on intellectual property problems. With that in mind, he met with your law firm’s star IP litigator, Mona L. Jaconde, to ask for her evaluation of a problem Flickr faced last year.

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

Below are the details of the problem from notes Mona took in her first phone conversation with Mr. Manjitu.

== From Mona’s notes ==

Photographer David Kittos posts many of his images on Flickr, along with short descriptions of how he achieved his work. In January

2010, Kittos took a photograph of a simple white bowl filled with “Skittles” candies (“Kittos Skittles photograph”). The Kittos Skittles photograph is shown in **Exhibit A**. Mr. Kittos posted the image (cropped to be square) on Flickr; it can be seen there at https://www.flickr.com/photos/david_kittos/4276832395/in/photostream/. An uncropped version of the Kittos Skittles photo is shown in **Exhibit B**.

On his Flickr account, Mr. Kittos provided details of the camera (Olympus E-30), camera settings, lens, and lighting set-up he used for the photograph. Those detail include the following:

Experimenting with the Strobist \$10 DIY Macro Studio. . . . DIY Macro studio box on table top: I used white tissue as a diffusion material on the sides and on top. White bowl with Skittles inside the box.
To the left of the box: bare Nikon SB28@1/8 power
To the right of the box: bare Nikon SB28@1/8 power
Triggered with Cactus v2s
PP in ALR 2.4 and PS CS 3

In an interview, Mr. Kittos also stated that he and his assistant, Arturo Derecho, arranged the Skittles visible on the top of the bowl so that it was a good mix of colors having a central emphasis on a vibrant green with yellow and red skittles dominating the sides. In the interview, Kittos commented “yea, Arturo didn’t think the purple skittles would photograph well and he moved them all around quite a bit until he was happy with the colors; he also thought the green ones would ‘pop’ visually and they do.”

In 2016, in a new infamous Twitter post, Donald Trump, Jr. – and the Trump/Pence campaign – used Kittos’ photograph in a comparison to terrorists among refugees. With the photograph as the center of the post, the statement read:

“If I had a bowl of skittles and I told you just three would kill you. Would you take a handful? That’s our Syrian refugee problem.”

The Twitter post can be seen in **Exhibit C**. (Never mind the bad grammar – there should not be a period between “you” and “would”.)

When David Kittos discovered that his photo had been used by Trump without authorization, Kittos immediately complained to Twitter. The Twitter people deleted the tweet, pursuant to copyright law’s “notice and take down system” (17 U.S.C. § 512). You do NOT need to know and should NOT discuss the § 512 system in this analysis.

Flickr allows its account holders to control who can download images. **Exhibit D** shows the webpage on Flickr where an account holder can control this. As shown, the default is that “anyone” can download images on Flickr. Internal use data shows that only 7% of Flickr users visit this page when they open a Flickr account and that only 12% change the setting to a more restrictive setting during the first three years of having a Flickr account. When you use the download function on any Flickr image, Flickr gives you a choice of the “original” file size OR different file sizes. Flickr does not allow a Flickr account holder to restrict the size of downloadable files. **Exhibit E** shows the different download options for another photo of Skittles; the page also shows that after the Kittos/Trump problem, the owner of that photo has banned downloading completely.

Internal investigations at Flickr concluded that the Kittos Skittles photograph was downloaded by six (6) other Flickr account holders and *reposted to Flickr on their own accounts*. This is contrary to the “Flickr Community Guidelines,” which provide:

Only upload content that you have created.

Respect the copyright of others. This means don't steal photos or videos that other people have shared and pass them off as your own. (That's what favorites and galleries are for.)

<https://www.flickr.com/help/guidelines/>

Internal investigations have also revealed that the Trump/Pence campaign did not download the Kittos Skittles photograph from David Kittos’ Flickr account, but from the account of another person who had uploaded the photo without authorization from Kittos.

== end of Mona’s notes ==

Mr. Manjitu says that he would like a complete analysis of that 2016 situation to evaluate your firm’s expertise in copyright law –

including, but not necessarily limited to, did Kittos or anyone else have a copyright in the Kittos Skittles photograph?, did Donald Trump, Jr. infringe?, did Flickr do anything wrong?, should Flickr change any of its policies to avoid copyright liability?, and, of course, any other copyright law issues you want to flag?

~ END - exhibits follow

EXHIBIT A

David Kitto's 2010 photograph of a bowl of Skittles (cropped)

**EXHIBIT B**



David Kitto's 2010 photograph of a bowl of Skittles (uncropped)



EXHIBIT C

Donald Trump, Jr.'s Twitter post


The image is a screenshot of a Twitter post from Donald Trump Jr. (@DonaldJTrumpJr). The post includes a profile picture, the name "Donald Trump Jr." with a verified badge, and the handle "@DonaldJTrumpJr". To the right of the name is a gear icon and a blue "Following" button. The text of the tweet reads: "This image says it all. Let's end the politically correct agenda that doesn't put America first. #trump2016". Below the text is a large image of a white bowl filled with multi-colored Skittles. The image is overlaid with two text boxes: a red one at the top with white text and a dark blue one below it with white text. At the bottom of the image is a red banner with the "TRUMP PENCE 2016" logo and the slogan "MAKE AMERICA GREAT AGAIN!".

Donald Trump Jr. 
@DonaldJTrumpJr  [Following](#)

This image says it all. Let's end the politically correct agenda that doesn't put America first.
#trump2016

If I had a **bowl of skittles** and I told you just **three would kill you**.
Would you take a handful?

That's our **Syrian refugee problem**.



TRUMP PENCE 2016 MAKE AMERICA GREAT AGAIN!

EXHIBIT D

“Who can download your images . . .” webpage from Flickr

Flickr: Who can download your images (including originals)?

5/1/17, 11:44 AM

flickr
You
Explore
Create

Your account / Who can download your images (including originals)?

This setting applies to all content in your account, except items you've licensed with **Creative Commons** (because doing that means you're okay with people downloading them).

Please note: Some cameras including camera phones include information about your camera settings, camera type, location and other information in the original file. If you don't want this to be available to people you should restrict who can download your originals.

This setting lets you choose who can view and download your original image *files*.

Restricting this setting also places deterrents to discourage downloading of your other sizes. (And we really do mean "discourage." Please understand that if a photo can be viewed in a web browser, it can be downloaded by a knowledgeable user.)

Who should be able to view and download your original image files and other sizes without deterrents?

- Only you
- Your friends and family
- People you follow
- Any Flickr member
- Anyone (Recommended)

SAVE
CANCEL

EXHIBIT E

Example of different download sizes available with a typical Flickr photo


All sizes | Skittles | Flickr - Photo Sharing! 5/1/17, 11:48 AM

flickr You Explore Create

License [© All rights reserved by babydollcake](#)

Download The owner has disabled downloading of their photos

Sizes [Square 75](#) (75 x 75) [Small 240](#) (240 x 160) [Medium 500](#) (500 x 333) [Large 1024](#) (1024 x 683)
[Square 150](#) (150 x 150) [Small 320](#) (320 x 213) [Medium 640](#) (640 x 427)
[Thumbnail](#) (100 x 67)



Looking for the HTML code and photo file link? Check out [this FAQ](#).

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Privacy	Terms	Yahoo Safety	Help	Flickr, a Yahoo company						

<https://www.flickr.com/photos/babydollcake/5890906112/sizes/> Page 1 of 1

End of Exhibits – APPENDIX 1 follows

APPENDIX I

STAR ATHLETICA, L.L.C. *v.* VARSITY BRANDS, INC., ET AL.

JUSTICE THOMAS delivered the opinion of the Court.

Congress has provided copyright protection for original works of art, but not for industrial designs. The line between art and industrial design, however, is often difficult to draw. This is particularly true when an industrial design incorporates artistic elements. Congress has afforded limited protection for these artistic elements by providing that “pictorial, graphic, or sculptural features” of the “design of a useful article” are eligible for copyright protection as artistic works if those features “can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.” 17 U. S. C. §101.

We granted certiorari to resolve widespread disagreement over the proper test for implementing §101’s separate-identification and independent-existence requirements. 578 U. S. ___ (2016). We hold that a feature incorporated into the design of a useful article is eligible for copyright protection only if the feature (1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated. Because that test is satisfied in this case, we affirm.

....

The statute provides that a “pictorial, graphic, or sculptural feature[e]” incorporated into the “design of a useful article” is eligible for copyright protection if it (1) “can be identified separately from,” and (2) is “capable of existing independently of, the utilitarian aspects of the article.” §101. The first requirement—separate identification—is not onerous. The decisionmaker need only be able to look at the useful article and spot some two- or three- dimensional element that appears to have pictorial, graphic, or sculptural qualities. See 2 Patry §3:146, at 3-474 to 3-475.

The independent-existence requirement is ordinarily more difficult to satisfy. The decisionmaker must determine that the separately identified feature has the capacity to exist apart from the utilitarian aspects of the article. See 2 OED 88 (def. 5) (defining “[c]apable” of as “[h]aving the needful capacity, power, or fitness for”). In other words, the feature must be able to exist as its own pictorial, graphic, or sculptural work as defined in §101 once it is imagined apart from the useful article. If the feature is not capable of existing as a pictorial, graphic, or sculptural work once separated from the useful article, then it was not a pictorial, graphic, or sculptural feature of that article, but rather one of its utilitarian aspects.

....

The ultimate separability question, then, is whether the feature for which copyright protection is claimed would have been eligible for copyright protection as a pictorial, graphic, or sculptural work had it originally been fixed in some tangible medium other than a useful article before being applied to a useful article.

....

In sum, a feature of the design of a useful article is eligible for copyright if, when identified and imagined apart from the useful article, it would qualify as a pictorial, graphic, or sculptural work either on its own or when fixed in some other tangible medium.

The majority then expressly rebuffed some arguments made by the Petitioner and by the U.S. Government. Two of these points are below:

....

Petitioner and the Government raise several objections to the approach we announce today. None is meritorious.

1

Petitioner first argues that our reading of the statute is missing an important step. It contends that a feature may exist independently only if it can stand alone as a copyrightable work *and* if the useful article from which it was extracted would remain equally useful. In other words, copyright extends only to “solely artistic” features of useful articles. Brief for Petitioner 33. According to petitioner, if a feature of a useful article “advance[s] the utility of the article,” *id.*, at 38, then it is categorically beyond the scope of copyright, *id.*, at 33. The designs here are not

protected, it argues, because they are necessary to two of the uniforms’ “inherent, essential, or natural functions”— identifying the wearer as a cheerleader and enhancing the wearer’s physical appearance.

[Similarly, US Government suggested that a plain white cheerleading uniform would still be a cheerleading uniform]

The debate over the relative utility of a plain white cheerleading uniform is unnecessary. The focus of the separability inquiry is on the extracted feature and not on any aspects of the useful article that remain after the imaginary extraction. The statute does not require the decisionmaker to imagine a fully functioning useful article without the artistic feature. Instead, it requires that the separated feature qualify as a nonuseful pictorial, graphic, or sculptural work on its own.

Of course, because the removed feature may not be a useful article—as it would then not qualify as a pictorial, graphic, or sculptural work—there necessarily would be some aspects of the original useful article “left behind” if the feature were conceptually removed. But the statute does not require the imagined remainder to be a fully functioning useful article at all, much less an equally useful one.

Because we reject the view that a useful article must remain after the artistic feature has been imaginatively separated from the article, we necessarily abandon the distinction between “physical” and “conceptual” separability, which some courts and commentators have adopted based on the Copyright Act’s legislative history. See H. R. Rep. No. 94-1476, p. 55 (1976). According to this view, a feature is *physically* separable from the underlying useful article if it can “be physically separated from the article by ordinary means while leaving the utilitarian aspects of the article completely intact.” Compendium §924.2(A); see also *Chosun Int’l, Inc. v. Chrisha Creations, Ltd.*, 413 F. 3d 324, 329 (CA2 2005). *Conceptual* separability applies if the feature physically could not be removed from the useful article by ordinary means. See Compendium §924.2(B); but see 1 P. Goldstein, *Copyright* §2.5.3, p. 2:77 (3d ed. 2016) (explaining that the lower courts have been unable to agree on a single conceptual separability test); 2 Patry §§3:140–3:144.40 (surveying the various approaches in the lower courts).

The statutory text indicates that separability is a conceptual undertaking. Because separability does not require the underlying useful article to remain, the physical-conceptual distinction is unnecessary.

2

Petitioner next argues that we should incorporate two “objective” components, Reply Brief 9, into our test to provide guidance to the lower courts: (1) “whether the design elements can be identified as reflecting the designer’s artistic judgment exercised independently of functional influence,” Brief for Petitioner 34 (emphasis deleted and internal quotation marks omitted), and (2) whether “there is [a] substantial likelihood that the pictorial, graphic, or sculptural feature would still be marketable to some significant segment of the community without its utilitarian function,” *id.*, at 35 (emphasis deleted and internal quotation marks omitted).

We reject this argument because neither consideration is grounded in the text of the statute. The first would require the decisionmaker to consider evidence of the creator’s design methods, purposes, and reasons. *Id.*, at 48. The statute’s text makes clear, however, that our inquiry is limited to how the article and feature are perceived, not how or why they were designed.

###

End of Appendix– end of © examination, spring 2017 ###

Have a good summer.