

COPYRIGHT LAW

FALL 2017

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.

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 exam 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 have been changed into *hypotheticals* and you should treat the "facts" as limited to what you are told in the examination.

Remember that your submitted examination answer MUST have only your LLS ID Number and may not have your name on any pages. Please make sure that the examination answer has page numbers, preferably with your LLS ID Number AND the page number in the footer on each page. (This ensures that if any pages get detached, they can be properly credited.)

By turning in your answers you certify that you did not gain advance knowledge of the contents of the exam, that the answers are entirely your own work, and that you complied with all Loyola Law School rules.

The Examination consists of two parts. Part I is a set of true/false questions. Part II is an essay problem with a 2,000 word limit.

The Exhibits appear at the end of this document.

GOOD LUCK

I. TRUE/FALSE QUESTIONS

(35 points maximum)

This part of the exam is worth 35 points. Each answer is worth 2 points. There are 19 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 (35 points) on this section.

Please provide your answers to this section as a single column series, numbered 1 to 19, with “T” or “F” beside each number, i.e.

- 30. True
- 31. False
- 32. False
- 33. True

This list should come BEFORE your essay answer and BE ON A SEPARATE PAGE FROM YOUR ESSAY ANSWER.

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

SOME GENERAL QUESTIONS

- 01. In *Gaiman v. McFarlane* (7th Cir 2004) the court determined that the Count Cogliostro character in *Spawn* was sufficiently distinctive to be copyrightable and was not merely a stock character.
- 02. In *CCC Information Systems v. Maclean Hunter Market Reports* (1994), the district court determined that the used car valuations were uncopyrightable, pre-existing facts, like the telephone numbers that Justice O’Connor described in the *Feist* decision.

03. The largest “performing rights societies” in the United States – ASCAP and BMI – have the exclusive right to grant licenses for public performance of their members’ musical compositions on movie sound tracks when those movies are shown in cinemas and movie theaters.
04. The Tenth Circuit in *Mitel, Inc. v. Iqtel, Inc.* (1997) disagreed with the approach taken by the 1st Circuit in *Lotus v. Borland* (1995) in that while the First Circuit had found that if something “functions as a method of operating [a] computer” it is “uncopyrightable,” the Tenth Circuit concluded that “although an element of a work may be characterized as a method of operation, that element may nevertheless contain expression that is eligible for copyright protection.”
05. In *ABC v. Aereo, Inc.* (2014), the Supreme Court concluded that Aereo had not violated the “Transmit Clause” of the public performance right because “each time Aereo streams a program to a subscriber, it sends a private transmission that is available only to that subscriber.”

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 northward in search of a new life. In *Parable of the Sower*, Lauren Olamina starts formulating and preaching (to those who travel with her) a new religion which she calls “Earthseed.” The religion centers on the idea “God is change.”

Ms. Butler assigned “all rights” in *Parable of the Sower* 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, Endo Press, received only “first publication in book format” rights. Ms. Butler passed away in 2006, leaving only incomplete drafts of several chapters for a 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 her friend George Jettison and Ms. Butler’s personal papers were donated to the Huntington Library in Pasadena; those papers include the draft chapters of the *Parable of the Trickster* novel.

A PhD student doing research at the Huntington, Jordan Vandevir, happened upon the *Parable of the Trickster* drafts, secretly copied them, and read them. Enraptured by the idea of “Earthseed,” Vandevir decided to ‘finish’ the novel, calling his version *Toward a New Parable*.

06. A court following *Warner Bros. Pictures v. Columbia Broadcasting* would conclude that Octavia Butler had no right to use the character Lauren Oya Olamina in another novel after Ms. Butler assigned the rights in *Parable of the Sower* to Seven Stories Press.
07. If Vandevir publishes his ‘completion’ of Butler’s third book in the Lauren Olamina series, *Toward a New Parable*, George Jettison will be able to sue him for infringement of §106 rights, but Seven Stories Press will not be able to sue him for infringement of §106 rights.
08. Considering the current statutory language in §107, if Vandevir posts on his blog one of Butler’s incomplete draft chapters for *Parable of the Trickster* along with his own lengthy commentary on the chapter (including its likely meaning and how it related to Butler’s life) he may have a viable fair use defense despite *Harper & Row v. Nation*.
09. Because of their extensive use in *Parable of the Sower* and *Parable of the Talents*, the word “Earthseed” and the phrase “God is change” are protected by copyright law.
10. For Smash Media to do a single film version of the Lauren Olamina story, combining *Parable of the Sower* and *Parable of the Talents*, Smash Media should get those rights from Seven Stories Press and Mr. Jettison, not Endo Press and the Huntington Library.

ART TRAIN

American artist Sarah Morris has unveiled the 54-meter-long train, titled *Monarch* (2017), which will transport commuters and tourists on one of Switzerland's most scenic routes for a few months this winter. According to artsy.net, the *Monarch* art train is "a train that doubles as a work of art." A picture of the train is shown in **Exhibit A** at the back of the exam. A story on the train can be found at:

<https://www.artsy.net/article/artsy-editorial-sarah-morris-made-art-train-beautiful-route-alps>

Assume that after the train's limited run this winter in Switzerland, it is going to be imported to the United States and will serve as a commuter train in Anaheim, California.

11. Justice Thomas' analogy in *Star Athletica* to "a design etched or painted on the surface of a guitar" is probably applicable to the *Monarch* art train in that "[i]f that entire design is imaginatively removed from the [train's] surface" and placed on a gigantic canvas, "it would still resemble the shape of a [train]. But the image on the [canvas] does not 'replicate' the [train] as a useful article."
12. Because the train will still be equally useful as a train without Ms. Morris' design, the *Monarch* art train meets the test adopted by the *Star Athletica* majority that a pictorial, graphic or sculptural feature is copyrightable if the feature "can stand alone as a copyrightable work and if the useful article from which it was extracted would remain equally useful."
13. Justice Ginsburg probably would not even consider the *Monarch* art train under the useful articles separability test because she would probably conclude that the artist's "designs are themselves copyrightable pictorial or graphic works reproduced on [a] useful article[s]."

SOME MORE GENERAL QUESTIONS

14. The work-for-hire doctrine applies only to works arising from employee/employer relationships as defined by state law and twelve (12) statutorily enumerated contract or commission relationships when the work-for-hire status is acknowledged in a contract that would be binding under the applicable state law.
15. *Bright Tunes Music Corp. v. Harrisongs Music* (SDNY, 1976) establishes that a defendant must consciously intend to copy the plaintiff's work in order to be found liable for infringement of the plaintiff's copyright.
16. In *MGM v. Grokster* (2005), the Supreme Court concluded that the “staple article of commerce” doctrine does not require “courts to ignore evidence of intent if there is such evidence, and the [Sony] case was never meant to foreclose rules of fault-based liability derived from the common law.”
17. “Probative similarity” is the term used to describe the similarity being analyzed in the first half of the *Arnstein* framework, in which the court must determine whether the defendant copied from the plaintiff's work.
18. In *Roth Greeting Cards v. United Card Co.* (1970), the trial court held that the text, arrangement of text, and artwork considered as a whole was copyrightable and that the defendant had copied the “total look and feel” of plaintiff's cards.
19. If a group of friends picnicking in MacArthur Park bring an old-fashioned “boombox” and play Donna Summer's 1979 album *On the Radio* (loud enough for lots of other people in the park to hear), they will violate the § 106 public performance right in the musical compositions, but not the § 106 public performance right in the sound recordings on *On the Radio*.

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

II. Essay Question

This part of the examination has ONE essay problem. 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 that the essay starts on A SEPARATE PAGE from the true/false section. Be sure to include a **total** word count for the essay.

Again, you should NOT do additional factual research for the questions you are given. The examination's fact pattern is based on real circumstances, but the story has been changed and you should treat the "facts" available to you as limited to what you are told in the examination. Of course, as a good lawyer you may identify additional facts your law firm should learn to analyze the issues fully.

THE TANGLED, BEWITCHING WEBS WE WEAVE

(65 points total)

[no more than 2,000 words]

Mona L. Jaconde, the head of the IP department at your law firm, met today with a new potential client, author L.K. Rigel. Mona took careful notes of Ms. Rigel's situation.

Mona thinks you know a lot about copyright law and, because she's got to be in San Diego today for meetings, she has assigned you to prepare a memo figuring out the issues. Giving you her wry smile, she reminded you: really, absolutely no more than 2000 words. She's scheduled a conference call with Ms. Rigel team 30 hours from now; she needs your memo prepping her in 24 hours, absolutely no more. As she runs out the door, Mona hands you her notes, which include some quick thoughts on the issues. Here is what the notes say:

Nathalia Suellen is an artist, based in Rio de Janeiro, Brazil, and New York, who works in a surrealist style she herself calls the "Lady Symphonia Digital Art style." Suellen's work is characterized by Gothic-inspired imagery, fairytale characters, and strange, supernatural light. In Suellen's own words, "[h]er main characters are often captured in scenes

where something sad is about to happen, as if they were trapped in a bad dream.” For a gallery of her work, see <http://gallery.nathaliasuellen.com>.

One of her best known images, “Sorrow,” is shown in **Exhibit B** (below).

L.K. Rigel is a California-based author of romances, usually in fantasy or science fiction settings. She self-publishes many, if not all, of her books and seems to do quite well. (<https://www.lkrigel.com>) Her “Apocalypto” series had three novels: *Space Junque*, *Spiderwork*, and *Firebird*.

For the cover of *Spiderwork*, Rigel got the rights to “Sorrow” from Nathalia Suellen, obtaining a written, signed assignment that gives Rigel “the assignment of all copyright rights to ‘Sorrow’ relevant to any use as cover art for any book, magazine, periodical, or other type of publication.” The resulting cover for *Spiderwork* as it was released on the market is shown in **Exhibit C** (below).

Tripleday Publishing in New York was so impressed with the *Spiderwork* cover-art that they contacted Nathalie Suellen and asked if they could also license “Sorrow.” She declined (without providing an explanation), but offered to create a ‘similar’ image working with her full-time assistant and protege, Hariko Manjitu.

Tripleday, Suellen, and Manjitu entered into a contract in which Suellen and Manjitu agreed to “create, execute, and finish a work, tentatively entitled ‘More Sorrow,’ as a work-made-for-hire for Tripleday Publishing to be used as a supplemental work in conjunction with the publication of a Tripleday book.” Suellen and Manjitu further agreed to “the permanent, world-wide assignment of any and all rights in ‘More Sorrow’ to Tripleday Publishing.”

Suellen and Manjitu did their job, working in Suellen’s studio. They delivered “More Sorrow” to Tripleday on schedule. Tripleday was quite pleased and used it as the cover for a book they published shortly thereafter, Alex Flinn’s *Bewitching*, as shown in **Exhibit D** (below).

The audience for sci-fi and fantasy romances is well-defined with many blogs, listservs, and other social media. Very quickly Tripleday came under criticism for “ripping off” *Spiderwork*. *Bewitching* author Alex Flinn publicly apologized to L.K. Rigel; Flinn said she had nothing to do with Tripleday’s actions.

Eventually Tripleday and Rigel separately decided to change the covers on new copies of their respective works being sold, but at least 25,000 copies of the original printing of *Bewitching* were distributed and images of the original *Spiderwork* and *Bewitching* covers often appear on-

line, especially in conjunction with the sale of used books. Rigel remains unhappy and would like to know what her rights are.

So, we've got to figure out . . . + who has what rights, + what claims can Rigel bring and against whom? + what are the possible defenses for different parties? How do we sort out this tangled web?

[Assume there is no statute of limitation problem and that all the actions described are recent enough to survive challenges based on statute of limitations, estoppel, and laches.]

~ END - exhibits follow

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EXHIBIT A

Sarah Morris' painted train, *Monarch* (2017)



EXHIBIT B

Nathalia Suellen's original painting "Sorrow"



EXHIBIT C

L. K. Rigel, *Spiderwork*



EXHIBIT D

Alex Finn's *Bewitching*

End of Exhibits – End of Examination/ Copyright Fall 2017