

# COPYRIGHT LAW

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FALL 2018

LOYOLA LAW SCHOOL

JUSTIN HUGHES

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## Take Home Examination

### *Directions, conditions, and your professional commitments*

This is a twenty-four (24) hour, take-home examination. You have 24 hours from the time you pick up this examination at the Office of the Registrar to return your completed examination answer back to the Office of the Registrar.

Remember that your submitted examination answer **MUST** have only your LLS ID Number and shall 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.

Once you have received this examination, you may not discuss it with (1) anyone prior to the end of the examination period or (2) at ANY time with any student in the class who has not taken it. You may **NOT** collaborate on the exam.

**This is an open book, take home examination.** Professor Hughes permits you to use any and all inanimate LEGAL resources. However, you should **NOT** do additional factual research for the question. The examination's fact patterns may be based on real circumstances, but changed into *hypotheticals* 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 Loyola Law School rules. Violation 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 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 *Vernor v. Autodesk, Inc.* (9<sup>th</sup> Cir. 2010), the court concluded that a user of software is a licensee, not an owner of that copy of the software, where the copyright owner specifies that the user is granted a license, the copyright owner restricts transfer of the copy of the software, and the copyright owner imposes notable use restrictions on the software.
- 02. In *Anderson v. Stallone* (C.D. Cal. 1989), the court concluded that in the *Rocky* films the individual characters “Adrian,” “Apollo Creed,” “Clubber Lang,” and “Paulie” were each sufficiently delineated to garner copyright protection individually.
- 03. The “abstraction, filtration, comparison” test we use for evaluating substantial similarity in computer software cases is a modern development from Justice Holmes’ observation in *Bleistein* that

“[u]pon any work . . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out.”

04. According to the Supreme Court, the proper interpretation of the “Transmit Clause” (in the § 101 definitions) is that an entity may engage in public performance by transmitting a performance through a single broadcast that reaches thousands or by “transmit[ting] a performance through multiple, discrete transmissions.”
05. In *Fonovisa v. Cherry Auction, Inc.* (9<sup>th</sup> Cir. 1996), the appellate court determined that while Fonovisa adequately alleged that Cherry Auction had the “element of knowledge” and made the “material contribution” necessary for contributory liability, the facts alleged by Fonovisa did not show the kind of direct, substantial financial benefit from infringement required to support a claim of vicarious liability.

#### VENTRILLOQUISM

This year, the R&B artist Me’Shell Ndegeocello released her 11th studio album, a collection of “covers” of R&B and pop classics. Ndegeocello’s album is aptly named *Ventriloquism*. Here is what NPR had to say about the album:

As with most cover sets, the story is in the song selection. What may at first seem like a random mix of one-off hits from beloved-but-unsung artists (Force MDs, Lisa Lisa & Cult Jam, Surface, Al B. Sure!) and influential megastars (George Clinton, Tina Turner, Janet Jackson, Sade) is actually a carefully curated homage to some of the era's definitive sonic innovators. It's a perfect collection for an artist whose genre-bending fusion of rock, soul, funk and R&B befuddled an industry still beholden to racially-coded designations (i.e. "urban") when she entered the scene.

<https://www.npr.org/2018/03/08/590336350/first-listen-meshell-ndegeocello-ventriloquism>

Ndegeocello and her band recorded *Ventriloquism* in Los Angeles; she described the album herself by saying “I liked the idea of turning hits I

loved into something even just a little less familiar or formulaic.” The “covers” have some differences from the original sound recordings in arrangement, vocals, cadences, and style.

*Pitchfork* gave *Ventriloquism* a glowing review. Here are some excerpts from their review, including the end, discussing Ndegeocello’s cover of Prince’s haunting “Sometimes it Snows in April”:

Over the last 25 years Ndegeocello has merged soul, rock, and hip-hop to make a kind of R&B that is at once cerebral and interstellar. Ndegeocello’s newest record, *Ventriloquism*, adds 11 new R&B and R&B-adjacent covers to her catalog; in its song selection, it examines a period of music from 1982 to 1994, during which the genre expanded and contracted itself into several different forms—disco shrank down into boogie, new jack swing slit electro-funk into narrow strips and stapled them back together out of order. The songs Ndegeocello studies on *Ventriloquism* aren’t deep cuts. They’re radio hits . . .

\* \* \*

The greater transformations on the record are structural, as on Al B. Sure!’s “Nite and Day,” a breezy, fluttery new jack swing song that Ndegeocello converts into an ocean. She softens the hits of percussion until they glow and tremble like distant beacons. Without the discrete drum-machine thwacks establishing the song’s boundaries, it flows shapelessly into the space beyond them. It’s as if Ndegeocello picked up on the song’s inner buoyancy, tore out its floor, and installed a pool.

\* \* \*

The most striking variation on the record is one in which Ndegeocello’s adjustments are minor but mood-expanding. Her recording of “Sometimes It Snows in April” is relatively faithful to Prince’s original; it merely transposes the notes Prince played on the piano, each of which sounded gently stirred out of sleep, to the electric guitar, which makes the song not only blurrier but somehow lonelier. “April” is a different song now. It changed when it migrated from Prince’s mind to the piano, and it changed again when Prince died almost two years ago. When I listen to it now, it sounds like a monument to a suddenly blank space. Ndegeocello’s cover is first and foremost a recording of this change. “Always cry for

love,” she sings, and then her voice drops, loosening from the rhythm of the verse and slowing into speech, as if the song were too painful to resume singing. “Never cry for pain,” she says, her voice crumbled into a trembling husk. Throughout the length of *Ventriloquism*, in Ndegeocello’s hands, no cover is ever mere lip service. A cover is an act of scholarship, an act of criticism, an act of intimacy. An act of love.

You don’t need to do any additional research on *Ventriloquism* or the extraordinary Me’Shell (but if you don’t know her music, someday you might want to make that acquaintance).

06. Ndegeocello could be authorized to make, reproduce, and distribute these “covers” (sound recordings) either by getting permission from the copyright holder for each musical composition, by getting an appropriate Harry Fox license for each musical composition, or getting §115 compulsory licenses, assuming she meets the conditions of §115.
07. If Ndegeocello recorded all her cover versions under a §115 compulsory license, then if Arcade Fire wants to use Ndegeocello’s arrangement of “Nite and Day” in their concerts, Arcade Fire will need Ndegeocello’s permission under §106(4).
08. If next year the band Warpaint releases an album called *Warpaintism* with their own covers of the same 11 songs in the exact same order, Warpaint will likely violate Ndegeocello’s copyright in *Ventriloquism*.
09. If Ndegeocello recorded all her cover versions under §115 compulsory licenses, the compulsory licenses will permit her to print all the lyrics of the songs in the CD and vinyl liner notes.
10. If Dean Waterstone includes Ndegeocello’s version of “Sometimes It Rains in April” on a mixtape of his favorite tracks that he plays at a big picnic for LLS alumni in Griffin Park, under §106 Waterstone will need both permission from Ndegeocello and the Prince estate.

## LET THEM EAT CAKE

The following story entitled *Trump’s inaugural cake was commissioned to look exactly like Obama’s, baker says* by journalist Amy Wang appeared in the *Washington Post* on January 22, 2017:

“Amid the glitz of President Trump’s inaugural festivities, one item stood out in particular late Friday night: a spectacular nine-tier cake that the new president and Vice President Pence cut into with a sword.

To pastry chef Duff Goldman, the cake seemed a little too familiar — because it looked almost exactly like one he had made years earlier for Barack Obama’s second inauguration as president.

Just after midnight, the Food Network personality posted a side-by-side comparison of the two cakes on his Twitter account.”

Here is the side-by-side comparison. This photo is also reproduced in color as **Exhibit A** at the end of the exam:



According to the *Post*, the Trump cake “appeared nearly identical to Goldman’s cake from four years ago, right down to the colors, the

patriotic bunting and the placement of several small silver stars and seals.”

Indeed, the Washington bakery that made the Trump cake posted a picture of it on Instagram with the following: “While we most love creating original designs, when we are asked to replicate someone else’s work we are thrilled when it is a masterpiece like this one. @duff\_goldman originally created this for Obama’s inauguration four years ago and this year’s committee commissioned us to recreate it.”

Based on this information and assuming an edible cake is a “useful article,” answer the following T/F:

11. Even if Duff Goldman’s cake was cut, served, and eaten within a short time after its completion, it met the fixation requirement for copyright protection.
12. Because the *Star Athletica* Court embraced the U.S. Government’s argument that in order for artistic elements in a useful article to have a copyright the useful article must “remain similarly useful” after the artistic elements are removed, copyright protection for Goldman’s design depends on whether the cake would remain “fully functional” after Goldman’s design is removed.
13. Because “[t]he ultimate separability question, then, is whether the feature for which copyright protection is claimed would have been eligible for copyright protection . . . had it originally been fixed in some other tangible medium other than a useful article before being applied to a useful article,” if Goldman’s particular combination of shapes, colors, and designs could have been created as a modern sculpture, his cake is entitled to copyright protection.
14. Justice Thomas’ analysis in *Star Athletica* suggests that Goldman’s cake would be protectable under copyright because “[i]f that entire design is imaginatively removed from the [cake’s] surface” and placed on a gigantic canvas, “it would still resemble the shape of a [cake]. But the image on the [canvas] does not ‘replicate’ the [cake] as a useful article.”

## SOME MORE GENERAL QUESTIONS

15. In *MGM v. Grokster* (2005), the Ninth Circuit Court of Appeals concluded that the “staple article of commerce” doctrine “was never meant to foreclose rules of fault-based liability derived from the common law” and that Grokster could be held liable based on either its actual knowledge of infringement or its intent to induce infringement.
16. An unauthorized device that speeds up the play of a videogame *while the game is being played* will not, without more, create a “derivative work” under the requirement described in *Micro Star, Inc. v. Formgen* (9th Cir. 1998) that a derivative work must be in “concrete and permanent form.”
17. In *Childress v. Taylor* (1991) and *Thomson v. Larson* (1998), the Second Circuit interpreted the statutory requirement that joint authors act “with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole” to mean that the parties must “entertain in their minds the concept of joint authorship,” although they don’t have to be legal experts on what joint authorship means under copyright law.
18. In *CCC Information Systems v. Maclean Hunter Market Reports* (2<sup>nd</sup> Cir. 1994), Judge Leval determined that while the used car valuations were not *Feistian* facts, they were opinions subject to the merger doctrine because of the very limited number of way one can express car valuations.
19. At least one court has concluded that the limitations on the first sale doctrine imposed in § 109(b) (reflecting the Record and Software Rental Amendments, 1984 and 1990) do not apply to audio-books.

***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 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 question; additional factual research is more likely to be detrimental to your grade and detracts from time spent on legal analysis. The essay's fact patterns may be based on real circumstances, but changed into a *hypothetical* and you should treat the "facts" as limited to what you are told in the examination. Of course, you may identify additional facts your law firm should learn to analyze the issues fully.

### INTO THE STORM

(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, Montana-based photographer Shawn Heavy. Mona took careful notes of what Heavy described as the facts and circumstances involved.*

*Mona thinks you know a lot about copyright law and, because she's got to be in San Jose today for meetings, she has assigned you to prepare a memo figuring out the issues. Be sure to tell her what additional information we will want to get from the client – and, if we litigate, in discovery.*

*Mona has scheduled a conference call with Mr. Heavy and she needs your memo prepping her in 24 hours, absolutely no more. Giving you her wry smile, Mona handed you her notes and reminded you: really, absolutely no more than 2000 words. Here is what the notes say:*

Shawn Heavy is a noted outdoor photographer based in Montana; he has worked for a variety of advertising and editorial clients throughout the world, including Apple, Random House, Time Books, *USA Today*,

*National Geographic*, *The Daily Mail*, National Public Radio, and The Nature Conservancy.

One of Mr. Heavy's most striking works is "The Mothership," a 2010 photograph shown in **Exhibit B**. Mr. Heavy says that *The Mothership* and other photographs he has made in that same style are the result of much trial and error to achieve the perfect result. Heavy told Mona, "I engage in a lot of experimentation with various framing, exposure, shutter speed, and movement options. I consider the process very creative." For *The Mothership*, Mr. Heavy says he followed the storm "for hours across a great distance," searching for the right framing, lighting, etc. *The Mothership* photo "itself was made by shooting four photos in portrait orientation and then stitching them together into the supercell panorama."

When he is not out photographing nature, Mr. Heavy is a big fan of Netflix and one day he saw some cloud images in the Netflix show *Stranger Things* that seemed very reminiscent of *The Mothership*. Mr. Heavy believes that *The Mothership* was copied and used as the basis for storm cloud formations in Netflix's hit original series, *Stranger Things*. Indeed, a separate Netflix program called *Beyond Stranger Things* – a behind-the-scenes look at how the show is created – featured a *Stranger Things* 'concept art' storyboard shown in **Exhibit C**. (Because the storyboard was concept art, it may not represent what was actually seen on the *Stranger Things* show; on the other hand, the story board itself exists and was broadcast on *Beyond Stranger Things*.)

In the words of a photography website, Petapixel, the cloud in the *Stranger Things* concept art "had apparently been extracted from one of Heavey's 2010 photos, titled 'The Mothership'" and "[c]omparing the two images reveals the identical features of both clouds." The Petapixel side-by-side comparison is shown in **Exhibit D**. But theirs is just one opinion.

Mr. Heavy *believes* that Netflix artists *may have* found his photographs via a web service called "ShanZhaister." ("Shan Zhai" is the Chinese phrase for copycat culture – counterfeits, style copies, and even parodies.) ShanZhaister invites people to download its software and thereby become "members." Here is what the home page for [www.shanzhaister.ru](http://www.shanzhaister.ru) says:

In a rush to find some images for your presentation? At a loss for new ideas for your client? Need to get some storyboards done right away – and don't have time to sit pondering what will both be *creative* and *sell*?

SHANZHAISTER is here to help. With SHANZHAISTER you can find relevant, unappreciated images that can help your work. Indeed, we specialize in finding and indexing evocative images that are unknown, obscure, or forgotten – often by the people who created them! In short, we help you find material that can inspire you – *without fear that your audience will think you're stale, uncreative, or ripping someone off.*

How does SHANZHAISTER work? When an SHANZHAISTER member encounters an interesting image online – *anywhere online* -- the SHANZHAISTER app automatically prompts the user to type in some relevant keywords – i.e. “kitten” “colorful” “sail boat” “waves” “purple” “baseball” “convertible” etc. SHANZHAISTER records these keywords, the image, and the URL location of the image [the link]. Then SHANZHAISTER algorithms further study the tagged image, augmenting and refining the keyword list, so that an image initially designated as “convertible” might also get designations for “Corvette” “classic car” “red,” etc. SHANZHAISTER also deletes entries from well-known media services and websites – *your audience has already seen those!* For the remaining images, SHANZHAISTER then deletes the copy it made on our servers and saves only the link. When a SHANZHAISTER user wants to find an image – say “classic car” or “white fluffy kittens” – SHANZHAISTER generates a search results page of images via the links. If the user

wants a particular image, they go to that website and, respecting any applicable copyright law, obtain a copy of the image.

**Get SHANZHAISTER today – and make your artwork projects so much easier!**

We don't know anything more about "ShanZhaister" than that the advertising-supported website appears to be based in Russia.

Ms. Jaconde needs a memo - no more than 2,000 words - describing what copyright claims might be made, how a court would analyze those claims, against whom Heavy could bring the claims, what defenses might be raised, and what additional information we need. *[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**

EXHIBIT A  
*Let Them Eat Cake*



EXHIBIT B

Shawn Heavy's *The Mothership*



EXHIBIT C

*Stranger Things* "concept art" produced by Netflix



EXHIBIT D

Petapixel side-by-side merger of images



End of Exhibits – End of Examination/ Copyright Fall 2018