

# COPYRIGHT LAW

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FALL 2019

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.**

You may not discuss the contents of this exam with (1) anyone prior to the end of the exam 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.** However, you should NOT do additional factual research for the question nor look for any case law or court decisions outside what we studied in the course. The examination's fact patterns may be based on real circumstances or incidents, but changed into *hypotheticals*. So, you should treat the "facts" as limited to what you are told in the examination. **Finally, this exam may refer to pop cultural works that were the subject of prior questions, but, if so, the questions this year will be completely different.**

**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.**

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, stapled separately**  
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. As the first modern copyright law, England’s Statute of Anne expressly protected “books, maps, and charts,” in that order.
- 02. A “derivative work” is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.
- 03. Despite choreographic works being eligible for copyright protection, in *Bikram’s Yoga College of India v. Evolution Yoga* (2015) the Ninth Circuit concluded that “the Sequence” of yoga poses and breathing exercises was barred from copyright protection under §102(b) because “the Sequence is a ‘system’ or a

‘method’ designed to ‘systematically work every part of the body . . .’”

04. In *Computer Associates v. Altai* (2d Cir., 1992) the appellate panel used a three-step analysis in which the first two steps, “abstraction” and “filtration,” determine what elements in plaintiff’s computer program are protected by copyright and “comparison” determines whether the defendant copied those protected elements.
05. The following is an explanation of the fact/expression dichotomy: “When the uncopyrightable subject matter is very narrow, so that ‘the topic necessarily requires, if not only one form of expression, at best only a limited number, to permit copyrighting would mean that a party or parties, by copyrighting a mere handful of forms, could exhaust all possibilities of future use of the substance.”

#### BEAUTIFUL VENTRILOQUISM

In 2018, 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 – recorded in Los Angeles – is aptly named *Ventriloquism*.

The album was nominated for a 2019 Grammy in the “urban contemporary album” category. *Slant* magazine said *Ventriloquism* “turns commonly held conceptions of canon on their head, implicitly asks for a more inclusive understanding of song craft, and—most of all—celebrates a group of songs that resonate in a variety of contexts and arrangements.” And 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 . . . 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.

*Pitchfork* gave *Ventriloquism* a glowing review, saying “Meshell Ndegeocello treats the practice of covering another’s songs as an act of intimacy and empathy.” Here is how the *Pitchfork* review ends, discussing Ndegeocello’s cover of Prince’s haunting song “Sometimes it Snows in April” (“Sometimes it Snows in April” was composed by Prince [with Wendy & Losa] and is owned by the Prince estate; it was released by Prince on his 1986 album *Parade*):

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.

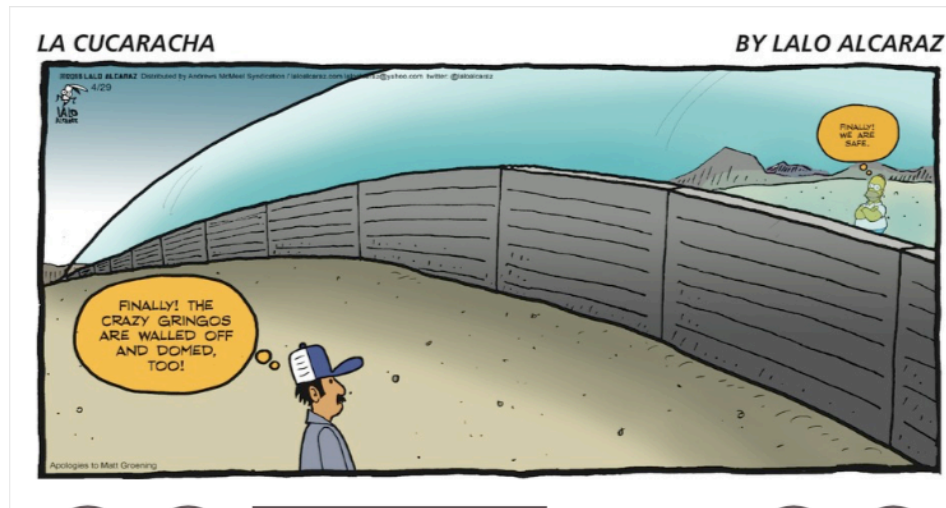
You don’t need to do any additional research on *Ventriloquism* or the extraordinary Me’Shell Ndegeocello (but if you don’t know her music, someday you might want to make that acquaintance).

06. If Ndegeocello’s selection and ordering of the 11 songs is, as NPR says, “a carefully curated homage,” this increases the likelihood that she will have a copyright in *Ventriloquism* as a “collective work” or “compilation.”

07. According to the reasoning in *ABKCO Music v. Stellar Records* (2d Cir. 1996), if Ndegeocello recorded all her cover versions under a §115 compulsory license, the compulsory licenses will permit her to print the lyrics of the songs in the CD and vinyl liner notes.
08. If Ndegeocello recorded all her cover versions under a §115 compulsory license, the compulsory licenses will extend to the distribution of “digital phonorecord deliveries” of her covers sold on iTunes, Amazon, etc.
09. If Ndegeocello has a copyright in the selection and arrangement of the 11 songs on *Ventriloquism*, then if at Coachella 2020 the band Warpaint performs all 11 musical compositions in the same order as *Ventriloquism*, Warpaint will violate Ndegeocello’s §106(2) right to prepare derivative works because courts have concluded that a derivative work under §106(2) does not have to exist in a concrete and permanent form.
10. If a DJ plays Ndegeocello’s version of “Sometimes It Rains in April” at a “grand reunion” of 200 LLS alumni in a tent on the basketball court at the law school, under 17 U.S.C. §106 the DJ will need permission from the Prince estate but not from Ndegeocello.

### **CRAZY GRINGOS**

“La Cucaracha” [“The Cockroach”] is a politically-oriented comic by Lalo Alcaraz that addresses current events, typically from a Latino, especially Mexican-American, perspective. In April 2018, *La Cucaracha* featured this single-pane comic:



The comic is reproduced in color at **Exhibit A**.

The character on the left of the cartoon is unquestionably “Homer Simpson” from *The Simpsons*. The American side being both “walled” and “domed” is a reference to the “Dome” that was placed over Homer’s hometown, Springfield, by the Environmental Protection Agency (EPA) in *The Simpsons Movie*. For more on that, including pictures of the Dome, see: <https://simpsons.fandom.com/wiki/Dome> The film’s plot – centered on the Dome – is available on Wikipedia, [https://en.wikipedia.org/wiki/The\\_Simpsons\\_Movie](https://en.wikipedia.org/wiki/The_Simpsons_Movie).

11. The cartoon character Homer Simpson is almost certainly protectable expression under the “sufficient delineation” test developed by Learned Hand in *Nichols v. Universal Pictures* (1930).
12. Even if Lalo Alcaraz’ use of Homer Simpson and the Dome was unauthorized, under the court’s reasoning in *Ringgold v. Black Entertainment Television* (2d Cir. 1997), the appearance of Homer Simpson and the Dome in *La Cucaracha* will almost certainly be considered *de minimis*.
13. The Homer Simpson character would be protected under both Judge Posner’s test for a “graphic expression” in *Gaiman v.*

*McFarlane* (7th Cir 2004) and the Ninth Circuit's three part test for protecting characters developed in *DC Comics v. Towle* (2015)

14. The use of the Homer Simpson character (and the Dome) in *La Cucaracha* cannot be fair use because the *La Cucaracha* cartoon is a commentary on American immigration policy and not a parody of Homer Simpson, the Dome, or *The Simpsons*.

#### SOME MORE GENERAL QUESTIONS

15. In *Schrock v. Learning Curve* (2007), the Seventh Circuit Court of Appeals concluded that "a heightened standard of originality applies to derivative works."
16. In *ABC v. Aereo* (2014), the Supreme Court relied on statutory language in § 101 to support its holding that an entity may engage in § 106 public performance by transmitting a performance through a single broadcast or by "transmit[ing] a performance through multiple, discrete transmissions."
17. In *L. Batlin & Son v. Snyder* (2d Cir. 1976), the majority held that for a derivative work to have a copyright "there must be at least some substantial variation, not merely a trivial variation" from the pre-existing work, while the dissent believed the derivative work could have a copyright if there was "distinguishable variation" from the "prior art."
18. Nike cannot get a copyright on their slogan "Just Do It" because the Supreme Court has told us that copyright does not apply to single "[w]ords and short phrases, such as names, titles, and slogans; familiar symbols and designs; mere variations on typographic ornamentation . . . ."
19. *Bright Tunes Music Corp. v. Harrisongs Music* (SDNY, 1976) establishes that a defendant can be found liable for copyright infringement even when their copying is unintentional and/or subconscious.

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

**II. Essay Question**  
(65 points maximum)

**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 research for the question; additional 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.

**RIFFINGS WITH THE 20TH CENTURY MASTERS**  
**[no more than 2,000 words]**

*Mona L. Jaconde is the head of the IP department at your law firm; one reason she is so respected – both in and outside the firm – is that she works hard to pro-actively identify potential problems for her clients.*

*As part of her practice, Mona Jaconde represents a few famous artists as well as the estates of famous artists.*

*Mona has scheduled back-to-back conference calls for tomorrow with the two clients mentioned below 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:*

The newest addition to Los Angeles' vibrant arts scene is the Museum of Consciously Hip Art (MoCHA); the director of MoCHA is the dynamic and brilliant Hariko Manjitu. In 2018, MoCHA announced a competition for one of its 2020 exhibitions, to be entitled



“Riffing with the 20<sup>th</sup> Century Masters.” MoCHA’s announcement of the exhibition stated the following:

**Submit to “Riffing with the 20th Century Masters”**

**No question about it: *art comes from art.***

- + **We invite artists to create - and submit for consideration -- works that are inspired *by*; derived *from*; are transmutations, adaptations, and descendents *of*; and are hommages to GREAT PIECES OF 20<sup>TH</sup> CENTURY VISUAL ART.**
- + **We want new *works* that our audiences will recognize as *old friends*; images that will be very familiar, yet challengingly different.**
- + **Each artists selected for the “Riffing with the 20<sup>th</sup> Century Masters” show will receive an honorarium for their work’s presence in the show -- \$5,000.00 for most works; \$10,000 for pieces deemed by the selection committee to be “key riffs” of the exhibition; and an additional \$3,000 for works especially created for the exhibition.**

**So bring us *your* “Picasso,” *your* “Arbus,” *your* “Rivera” or “Kahlo,” *your* “Frankenthaler” or “Koons.” (We don’t think Koons will mind - and he certainly can’t complain!)**

**. . . . . Show us how you recode the classics**

“Riffing with the 20<sup>th</sup> Century Masters” will open on 2 February 2020 and MoCHA has just announced the winning submissions for the exhibition. Mona is concerned with two:

[1] TAFU  
“This is Not a Shovel”

One of the paintings that will be featured in “Riffing with the 20<sup>th</sup> Century Masters” exhibition is *This is Not a Shovel* by an anonymous artist who goes by “The Artist Formerly Unknown” or “TAFU.” *This is Not a Shovel* is **Exhibit B**. *This is Not a Shovel* will also be reproduced on a full page in the exhibition catalog

No one knows where TAFU lives, although the artist is rumored to be a woman working from her studio in the Pacific Northwest. What we do know is that *This is Not a Shovel* was clearly inspired by and based on *The Treachery of Images* (1929), arguably the most famous painting by the Belgian artist Rene Magritte (1898-1967). Indeed, TAFU “signed” *This is Not a Shovel* “Magritte.”

Magritte’s *The Treachery of Images* is **Exhibit C**. Assume that the copyright in *The Treachery of Images* is still in effect. The Los Angeles County Museum of Art [LACMA] has *The Treachery of Images* painting in its permanent collection, but copyright in the image belongs to the Magritte estate.

We also know that TAFU especially prepared *This is Not a Shovel* for MoCHA’s “Riffing with the 20<sup>th</sup> Century Masters” show. TAFU is quoted in the exhibition catalog as saying “I am thrilled that *This is Not a Shovel* was chosen as a key riff for the show – this was exactly what I hoped for when I read the MoCHA announcement and decided to answer their call.”

The Magritte estate is a client of Mona Jaconde.

[2] Sandro Miller and John Malkovich  
“Mapplethorpe Self-Portrait”

Another of the pieces that will be featured in “Riffing with the 20<sup>th</sup> Century Masters” exhibition is *Malkovich Mapplethorpe Self-Portrait* at **Exhibit D**. This photograph features the actor John Malkovich and the photograph was taken by photographer Sandro Miller. *Malkovich Mapplethorpe Self-Portrait* will also be reproduced on a full page in the exhibition catalog.

Robert Mapplethorpe was a famous New York photographer of the 1970s and 1980s known for his provocative, often very explicit

imagery. *Malkovich Mapplethorpe Self-Portrait* was clearly inspired by Robert Mapplethorpe's 1983 *Self-Portrait*, at **Exhibit E**.

*Malkovich Mapplethorpe Self-Portrait* was one of a series of iconic photos "recreated" by Sandro and Malkovich in which Malkovich played Mick Jagger, Andy Warhol, Marilyn Monroe, Muhammad Ali, Ernest Hemingway, Salvador Dali, Albert Einstein, Bette Davis, etc. As the *Chicago Tribune* described the project, "Miller and his team of set builders, make-up experts and costume designers – and Malkovich, transforming for each shot – recreated to an eerie, exacting degree classic photos."

But only *Malkovich Mapplethorpe Self-Portrait* will be in the MoCHA show. Assume the authors of *Malkovich Mapplethorpe Self-Portrait* retain its copyright.

To the best of our knowledge, Sandro and Malkovich were in the process of planning the photograph series when MoCHA announced the "Riffing with the 20<sup>th</sup> Century Masters" exhibition.

The Mapplethorpe estate is a client of Mona Jaconde.

Because the Mapplethorpe estate is headquartered in New York and the Magritte estate is headquartered in Brussels, Ms. Jaconde is concerned that they do not know about the MoCHA show and she wants to brief them on both the facts above and a preliminary legal analysis.

That preliminary legal analysis – in a memo of no more than 2,000 words – should describe what copyright claims might be brought, against whom they would be brought, and how a court would analyze those claims, including what defenses might be raised by various defendants. Of course, your memo should also describe any additional information that is needed or would be important to the analysis.

– END OF EXAMINATION QUESTIONS  
EXHIBITS FOLLOW AND ARE STAPLED SEPARATELY

**A BLANK PAGE SEPARATES PAGE 11 AND PAGE 12**

**EXHIBIT A**  
*La Cucahara*

**LA CUCARACHA**

**BY LALO ALCARAZ**



**EXHIBIT B**

“This is Not a Shovel” (2019)



**EXHIBIT C**

Rene Magritte (1898-1967)  
“The Treachery of Images” (1929)



**EXHIBIT D**

“Malkovich Mapplethorpe Self-Portrait” (2019)



**EXHIBIT E**

Robert Mapplethorpe (1946-1989)  
“Self-Portrait” (1983)



**END OF EXHIBITS – END OF EXAMINATION/ Copyright Fall 2019**