

# COPYRIGHT LAW

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FALL 2020

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 download the examination from the "Copyright Law -Take Home Exam..." TWEN course to upload your completed answer to the same TWEN course. You should place your 7-digit LLS ID in the top right header on ALL PAGES of your answer. Your answer should be submitted as a .pdf or .doc/.docx file (you do NOT use Examplify for this exam).

Once you have received this examination, you may not discuss it with anyone (other than the Registrar's Office) prior to the end of the LLS examination period. Nor may you discuss the examination at ANY time with any student in the class who has not taken the examination (in case a student has an accommodation to take the exam later). **You may NOT collaborate on this work. You may NOT receive assistance on the substance of your answers from any other person.**

**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 works that were the subject of questions in prior years, but, if so, the questions this year will be 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.**

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 as a single column series, numbered 1 to 19, with “True” or “False” 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.

**SOME GENERAL QUESTIONS**

- 01. In *ABC v. Aereo* (2014), the Supreme Court reasoned that since the “Transmit Clause” in the statutory definitions in § 101 says that a public performance can occur “whether the members of the public capable of receiving the performance . . . receive it . . . at the same

time or at different times,” it must be possible for an entity to engage in § 106 public performance by “transmit[ting] a performance through multiple, discrete transmissions.”

02. In *Brilliance Audio v. Haight Cross Communications* (6<sup>th</sup> Cir. 2007), the court concluded that “sound recordings” in §109(b)(1)(A) includes “sound recordings of literary works.”
03. While ASCAP and BMI issue blanket licenses covering the *right of public performance* for musical compositions that they represent, the new “Mechanical Licensing Collective” established under the 2018 Music Modernization Act will issue “mechanical licenses” for *the right of reproduction and distribution* in relation to digital phonorecord deliveries related to music streaming.
04. Under 17 U.S.C § 101 every compilation is a collective work, but not every collective work is a compilation.
05. In *Star Athletica v. Varsity Brands* (Supreme Court, 2017), the majority held that – in the context of a “useful article” ~ a pictorial, graphic or sculptural feature is copyrightable if and only if the feature “can stand alone as a copyrightable work *and* if the useful article from which it was extracted would remain equally useful.”

### **UNDER PRESSURE IN THE COVID STORM**

“Under Pressure” is a musical work composed by David Bowie and Queen at a jam session in Montreux, Switzerland; during the jam session, Bowie is reported to have taken over the writing of the lyrics. Bowie and the members of Queen then recorded the song. The David Bowie/Queen sound recording of “Under Pressure” was released in 1981. It peaked at #1 on the UK charts and has become a classic of pop music. VH1 ranked the song as #31 of the best rock and roll songs of all time; *Rolling Stone* readers voted it the second best collaboration in the history of rock music. On 20th March 2018, “Under Pressure” was certified two times “Platinum” in the USA by the RIAA for over two million digital download equivalent units.

The lyrics of the song are here:

<https://www.azlyrics.com/lyrics/queen/underpressure.html>

If you want to see a fantastic live version of the musical composition, here is Annie Lenox and David Bowie performing it at a stadium concert:

<https://www.youtube.com/watch?v=fCP2-Bfhy04>

On 28 October 2020, Karen O and Willie Nelson released a cover version of “Under Pressure.” You can listen to it here:

[https://www.youtube.com/watch?v=MEU-7uga\\_4A](https://www.youtube.com/watch?v=MEU-7uga_4A)

The Karen O/Willie Nelson cover is sung with a slower tempo and less instrumentation. And, during the COVID pandemic, many of the song’s lyrics have particularly poignancy – like “love dares you to change our way of caring about ourselves.”

06. If Willie Nelson is invited to perform at Coachella music festival in 2023 in honor of his 90<sup>th</sup> birthday, then he and Karen O can perform “Under Pressure” at the music festival under the §115 compulsory license.
07. If the Karen O/Willie Nelson uses an acoustic guitar playing in a country style to sustain the musical composition’s unchanged melody, this would be a permissible change under § 115(2).
08. If KKKGO, FM 105.1, Los Angeles’ leading country music station, plays the Karen O/Willie Nelson version of “Under Pressure” on their regular radio broadcasting and that same program is also webcast at [www.gocountry105.com](http://www.gocountry105.com), according to a Copyright Office rulemaking, KKKGO will have to pay the compulsory license rate for §106(6) digital audio transmission of the Karen O/Willie Nelson sound recording.
09. If a DJ plays the Karen O/Willie Nelson version of “Under Pressure” at a President Biden inaugural ball attended by 100 socially-distanced people, under 17 U.S.C. §106 the DJ will need permission from Karen O and/or Willie Nelson, but not from the David Bowie estate or Queen.
10. If the David Bowie estate wants to license the creation of a derivative work version of “Under Pressure,” either as a new musi-

cal composition and/or a new sound recording outside what would be permissible under § 115(2), the Bowie estate may do so without the permission of Queen and subject only to the obligations to account to Queen for any profits from the licensing.

### **BLUE DRESS, YELLOW DOG, RED KISS**

Walter Mosely is one of America's most famous crime novelists. His first crime novel was *Devil in a Blue* (1990) and introduced readers to his character Ezekiel "Easy" Rawlins, an African-American from Houston living in Los Angeles. Easy Rawlins is both the narrator and the main character of the book. Just as Rawlins loses his job at an aviation defense plant, he meets a mysterious man named DeWitt Albright who hires Rawlins to find a young French woman named Daphne Monet. While finding Daphne and discovering what all this is about, Rawlins deals with different friends and frenemies in south-central Los Angeles, dubious bankers who live on Sunset, and Rawlin's loyal, but mercurial pal "Mouse." Eventually we learn that "Daphne" is neither French nor white; her real name is Ruby and she's also from Texas. In several chapters of the book, Rawlins and Daphne/Ruby are working together - with DeWitt Albright, the LAPD, and an assortment of other characters ready to kill or, at least, betray them.

*Devil in a Blue Dress* was published by W.W. Norton & Co. under a written, signed agreement in which Mosely kept the copyright and W.W. Norton received only "first publication in book format" rights. *Devil in a Blue Dress* was a considerable success; in 1995 it was made into a film starring Denzel Washington as Easy Rawlins - with Don Cheadle playing "Mouse." Walter Mosely has since written over a dozen Easy Rawlins mysteries, the most recent is *Blood Grove*, due to be published in 2021.

Walter Moseley has also authored other detective series, including three "Socrates Fortlow" mysteries. Socrates Fortlow debuted in a book called *Always Outnumbered, Always Outgunned* (1997). That book was also published by W.W. Norton & Co, but pursuant to a signed, written contract in which Mosely assigned "all rights, title and interest" in the book to Norton. *Always Outnumbered, Always Outgunned* was made into a film starring Laurence Fishburne in 1998.

11. Under the reasoning in *Nichols v. Universal Pictures* and *Anderson v. Stallone*, the character Ezekiel “Easy” Rawlins is very likely sufficiently “delineated” to be original expression protected by the copyright in the Easy Rawlins crime novels.
12. If Monkeypaw Productions wants to make a “pre-quel” film about the life of Daphne Monet/Ruby leading up the events in *Devil In a Blue Dress*, Monkeypaw will need permission from W.W. Norton & Co.
13. A court following the analysis in *Warner Bros. Pictures v. Columbia Broadcasting* would unquestionably conclude that Mosely transferred any and all copyright interests in the character Socrates Fortlow to W.W. Norton & Co.
14. If Hello Sunshine Productions wants to make a “buddy” film in which Easy Rawlins teams up with Socrates Fortlow to solve a series of grisly murders in southern California, Hello Sunshine will definitely need permission from Walter Mosely, regardless of whether they will need permission from W.W. Norton & Co.

#### **SOME MORE GENERAL QUESTIONS**

15. In *Columbia Pictures v. Aveco* (3d Cir. 1986), the court concluded that the “first sale doctrine” excused Aveco from any liability for unauthorized public performance of the films it rented to people on VHS tapes.
16. In *Authors Guild v. Google* (2016), the Second Circuit reiterated its view in the earlier *Authors Guild v. HathiTrust* (2014) decision that the creation of a full-text searchable database of library books “is a quintessentially transformative use” because “the result of a word search is different in purpose, character, expression, meaning, and message” from the book(s) on which the word searches are based.
17. 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 eligible for copyright protection as a choreographic work.

18. In *Sheldon v. Metro-Goldwyn Pictures* (2d Cir. 1936) and *Bright Tunes Music Corp. v. Harrisongs Music* (SDNY, 1976) the courts tell us that copying protected expression can still be copyright infringement even when the copying is unconscious, subconscious, and/or unintentional.
19. The performing rights society ASCAP represents composers of musical compositions who join ASCAP and, according to *Ocasek v. Heggland*, can act as “attorney-in-fact and to litigate and take all necessary legal actions to prevent unauthorized public performance of the member’s copyrighted musical works”

**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 some 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 one should learn to analyze the issues fully.

**SOMEBODY’S GOT YOUR GOAT?**  
**[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 visual artists as well as a few galleries. A friend, Joan Houston, who runs a gallery and directs an artists’ collective has called her with a complex problem. Mona took careful notes of what she was told, but has to prep for a big video deposition tomorrow and cannot work on this before she has to Zoom with Ms. Houston in two days to discuss the matter.*

*Giving you her wry smile, Mona handed you her notes and reminded you: a clear memo explaining all the issues with really, absolutely no more than 2000 words – and she needs it in 24 hours. Here is what the notes say:*

Brian McManly is a noted outdoorsman, explorer, environmental activist, blogger, and social media presence. He supports himself on lecture fees, book royalties, and advertising on his blog. In his books, lectures and blogging, he promotes environmental stewardship and fighting climate change through the perspective of an angry, anti-elitist hunting and fishing enthusiast. His publisher, Harper & Row, has announced a new McManly book, *Brian McManly Walks on the Wildside*, slated for release in late 2021. McManly has also co-written two environmentalism-themed episodes of *Star Trek: Discovery*; based on that, he has given talks at Comic-Con, the big annual convention for fans of science fiction, fantasy, and comic books. Like most speakers at Comic-Con, he autographs his photos for a fee.

Two years ago, McManly decided he needed a new photograph of himself for promotion purposes; Harper & Row agreed to split the costs of the photo session and that McManly’s choice of photo would (subject to their final approval), be used on the back cover of *Brian McManly Walks on the Wildside*. McManly hired noted photographer Hariko Manjitu to take the photograph, but chose the location of the shoot – a particularly rugged section of Griffin Park. In an email to Hariko, McManly said “Don’t



worry about anything but bringing yourself and the camera; I'll want to pick the right time of day in terms of lighting and I'll take care of my clothes, haircut, etc."

Hariko and McManly met at the agreed time and place for the photo shoot on April 4, 2018; the resulting photograph – after color adjustments and cropping by McManly – is shown at Exhibit A. McManly paid ½ of Hariko's fee with a check with a notation that said "for photo work for self-portrait"; Hariko signed and cashed the check. Harper & Row paid ½ of Hariko's fee with a check with the notation "In consideration for a work-for-hire photograph as a contribution to a book"; Hariko also signed and cashed the check.

McManly has given the photo the title *Ready for Anything*. McManly immediately posted the photo on his blog and began using it as his official photo for lectures, talks, and book signings.

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Meanwhile, Joan Houston is the director of a loose artists' collective called Social Pretense Takedown (SPT), a group dedicated to skewering the public images of celebrities, politicians, and other social personalities. SPT runs a gallery space in east L.A.

Inspired by what she considers *Elle* magazine's obsession about celebrities and their dogs (see, for example, <https://www.elle.com/uk/life-and-culture/g29808827/celebrity-dogs/>, but there are many such stories in that magazine), Joan has decided that for SPT's 2021 show, they will do paintings of celebrities and animals that are symbolically representative of the celebrity. At a summer 2020 meeting of the SPT collective, Joan announced the new project to the assembled artists and handed around a bunch of 8" by 10" glossy photos of different celebrities; one of the photos was *Ready for Anything*.

Jessica Shankar is a visual artist who belongs to SPT and attended the meeting. She was inspired by "Ready for Anything" and read lots of writings by and about Brian McManly; she found she agrees with many of his environmental positions, but dislikes his anger and harshness. By October, she had finished the painting shown in Exhibit B. She has entitled the painting *McManly, yes, but I like it too*.

Of course, the title of the painting is a play on the most famous line of dialog from a series of television commercials from the 1970s and 1980s for a brand of soap called "Irish Spring." These commercials played to extreme stereotypical gender roles of the period [and you can find videos criticizing the ads on that account]. In each of the commercials of this

period, after one or more men discuss the virtues of Irish Spring soap, a woman intervenes, often grabbing the bar of soap, and says “Manly, yes, but I like it too.” Here is an example of one of their 1980 ads:

<https://www.youtube.com/watch?v=sQk-imB1m2k>

After Shankar finished her painting, she put an image of it on her artist’s page on the SPT website.

Joan Houston is concerned that there may be some copyright law problems related to the *McManly, yes, but I like it too* painting. She called her old friend Mona Jaconde and explained everything here. Mona has agreed to have a Zoom meeting with Joan to discuss the situation in two days.

Mona needs a short memo from you guiding her through all the relevant issues, including copyright, authorship, and ownership of the *Ready for Anything* photo; potential infringement of the photograph by Jessica Shankar’s *McManly, yes, but I like it too* painting – and, of course, relevant defenses; and what potential liability in this situation exists for Jessica Shankar, Joan Houston and the SPT collective.

**-- END OF EXAMINATION QUESTIONS**

**EXHIBITS FOLLOW SEPARATELY**

**EXHIBIT A**

*"Ready for Anything"* - a photograph of outdoor explorer and blogger Brian McManly



**EXHIBIT B**

*“McManly, yes, but I like it too”*



### END OF EXHIBITS