

COPYRIGHT LAW

FALL 2021

LOYOLA LAW SCHOOL

JUSTIN HUGHES

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 Exemplify 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 your answers from any other person.**

This is an open book, take home examination. However, you should NOT do additional factual research for the questions 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 *Sony Corporation v. Universal City Studios* (1984) and *MGM v. Grokster* (2005), the Supreme Court established that the “staple article of commerce” doctrine is a complete shield from secondary liability in copyright law.
- 02. In *Capitol Records v. ReDigi*, the court determined that in the digital network environment the first sale doctrine applies to both the right of distribution and the right of reproduction.
- 03. While all streaming constitutes *public performance* of the musical compositions streamed, the Music Modernization Act (or a portion called the “MWMA”) provides that *interactive* streaming entails re-

production and distribution of the musical composition, subject to the compulsory license issued by the new “Mechanical Licensing Collective”; in contrast, if a streaming service is classified as non-interactive, the streaming service will only have to pay for public performance licenses for the musical composition.

04. In the case of sound recordings, §114 limits the §106(1) right of reproduction to phonorecords that “that directly or indirectly recapture the actual sounds fixed in the [protected] recording” and there is no liability for sound recordings “that consists entirely of an independent fixation of other sounds even though such sounds imitate or simulate those in the copyrighted sound recording.”
05. In *Feist v. Rural Telephone* (1991), the Supreme Court held that copyright does not extend to “[w]ords and short phrases, such as names, titles, and slogans; familiar symbols and designs; mere variations on typographic ornamentation”

TATOO YOU

Chad, an aspiring actor, visited a local tattoo parlor and paid tattoo artist Helga Headroom to draw an elaborate tattoo on Chad’s upper arm. It is the first and last time Chad visits the tattoo parlor or sees Helga Headroom. A few weeks later, Chad is asked to star in an independent film. He agrees and, because Chad wears a tank-top shirt for many scenes, the tattoo is clearly visible in several close-ups in the film, totalling 4 minutes of the film’s 105 minutes running time; these are mainly scenes where Chad is sitting at a table in a diner talking with friends. If Helga sues Chad and the filmmaker for copyright infringement, which of the following are true and which are false?

06. If Chad brought his own original hand-drawn design to the tattoo parlor and he directed Helga in exactly how to copy the design onto his arm- with her at his elbow (literally) – Chad is likely the author under the analysis in *Andrien v. Southern Ocean County Chamber of Commerce*.

07. Even if Helga owns the copyright in the tattoo design, because Chris owns this particular copy of the design and has the right to display his copy publicly, when the film is screened in cinemas across the country, public display of the tattoo as seen in the film will be permitted by §109(c) of the Copyright Act.
08. As a “work,” the design tattooed onto Chad’s arm is definitely fixed in a tangible medium of expression.
09. Separate from all other issues, if Chad and Helga orally agreed that the tattoo would be a work-made-for-hire, Chad was probably the “author” of the tattoo under the work-made-for-hire doctrine.
10. Separate from all other issues, following *Ringgold v. Black Entertainment Television* the filmmaker will likely prevail in arguing that there is no infringement because the appearance of the tattoo in the film is *de minimis*.

LET’S DANCE

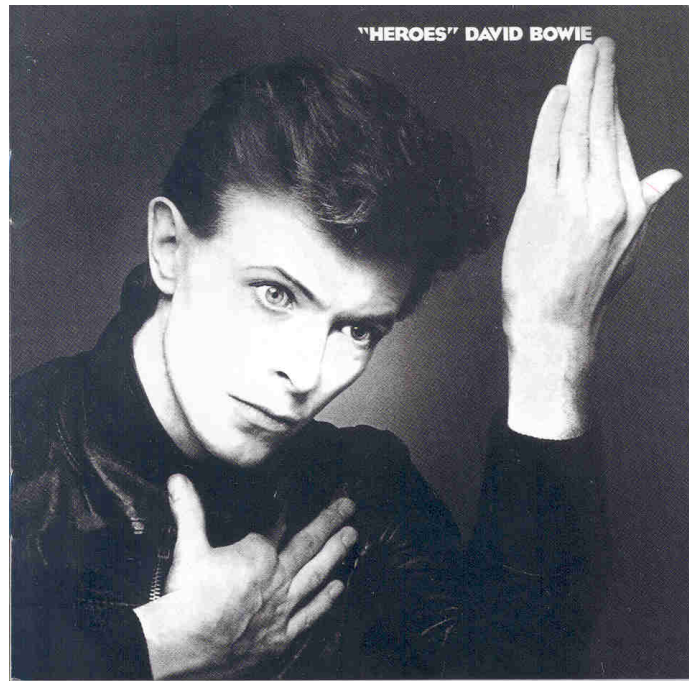
Since David Bowie died in 2016 there have been a wide variety of tribute shows and cover recordings of his classic songs. In May 2021, a new tribute album was released called *Modern Love*.

The *Modern Love* album was put together by Peter Adarkwah, founder of BBE Music, and music exec Drew McFadden with the intent of showing how Bowie was influenced by R&B, funk, soul and jazz. A wide variety of artists contributed covers of Bowie classics to *Modern Love* including Meshell Ndegeocello, Helado Negro, Kit Sebastian, We Are KING, Portuguese artist Sessa, and Matthew Tavares of Badbadnotgood. All the musical compositions on *Modern Love* were composed by Bowie with the exception of “Heroes,” which was written by Bowie and Brian Eno. Assume the authors are still the copyright owners of the musical compositions.

Here is the *Modern Love* album cover:



Of course, this is a derivative work on the classic cover of David Bowie's 1977 *Heroes* album:



The *Heroes* cover art was a photograph taken by photographer Masayoshi Sukita in Sukita's Tokyo studio in April 1977. Sukita gave a signed, written exclusive license to Bowie's record label, RCA Victor, to "exercise all §106(1) and (3) rights to reproduce and distribute the photograph as cover art for a record album to be released by David Bowie."

For the 2021 *Modern Love* album, each musician chose their own Bowie musical composition to record. For example, Meshell Ndegeocello recorded "Fantastic Voyage," Kit Sebastian recorded "Lady Soul Grinning," and Matthew Tavares recorded "Heroes."

11. If it is true – as one reviewer wrote –that Bowie's "Lady Soul Grinning" was "turned inside out by Kit Sebastian. Rather than a soaring piano ballad, the tune is turned into a pulsing dance track that has some of the coolest clavinet to turn up in a song in many years," this will have no impact on whether a §115 compulsory license is available under the requirements of §115(a)(2).
12. If a DJ plays the Matthew Tavares sound recording of "Heroes" at a wedding reception attended by 250 people, the DJ will need public performance rights from the Bowie estate and/or Brian Eno, but not from Matthew Tavares.
13. Peter Adarkwah and DJ Drew McFadden will need the permission of RCA Victor, not Sukita, to reproduce and distribute the new, hand-drawn album cover for *Modern Love*.
14. When Meshell Ndegeocello's sound recording of "Fantastic Voyage" is streamed on an interactive music service like Spotify, the owner of the copyright in the Ndegeocello sound recording will be paid for the §106(6) digital audio transmission under whatever contractual terms are agreed by Spotify and the copyright owner.

SOME MORE GENERAL QUESTIONS

15. In *London-Sire Records v. Does* (D. Mass. 2008) the court concluded that a digital download of a sound recording can violate the right of reproduction because "[t]he electronic file (or perhaps more ac-

curately, the appropriate segment of the hard drive)” is “a ‘phonorecord’ within the meaning of the statute.”

16. In *Bleistein v. Donaldson Lithographic Co.* (1903), Justice Holmes cautioned that federal judges should not judge the “worth of pictorial illustrations, outside of the narrowest and most obvious limits” and believed that copyright protects works with just “a very modest grade of art.”
17. In *Schrock v. Learning Curve* (7th Cir. 2009), the court followed the Second Circuit’s requirement – established in *L. Batlin & Son v. Snyder* (2d Cir. 1976) that derivative works meet an express higher threshold of originality in order to be protected by copyright.
18. In *Fonovisa v. Cherry Auction* (9th Cir. 1996), the appellate court determined that while Cherry Auction was contributorily liable for the infringement occurring at its flea market, Cherry Auction could not be held vicariously liable because it did not have a “direct financial interest” in the infringement as it would if it received a percentage from each infringing tape sold.
19. In *CCC Information Services v. Maclean Hunter* (2d Cir. 1994), the appellate court reasoned that application of the merger doctrine was most important with “those ideas that undertake to advance the understanding of phenomena or the solution of problems” and that it was not necessary to apply the merger doctrine to expressions “that merely represent the author’s taste or opinion.”

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 spacing. 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.

IT NEVER RAINS IN SOUTHERN CALIFORNIA**[no more than 2,000 words]**

Mona L. Jaconde is the head of the IP department at your law firm.

As part of her practice, Mona Jaconde represents a few famous Hollywood people – actors, screenwriters, directors, etc. One of her clients, Joan Archworth, has come to Mona with a complex problem. Mona took careful notes of what she was told, but she has client meetings all day today and tomorrow. She needs you to do a background memo to prep Mona for a Zoom with Ms. Archworth 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:

ONCE UPON A TIME IN HOLLYWOOD

Over the years, Joan Archworth has enjoyed a successful career as a Hollywood screenwriter, known for her witty romantic comedies. But her secret passion is science fiction, especially dystopian futures in which lone individuals and small groups struggle to survive (think of *Terminator* or

Quiet Place films or *The Road*, based on Cormac McCarthy's 2006 book of the same name).

As a side project, Archworth wrote a complete, 136-page film script entitled *Rubicon Crossing*. *Rubicon Crossing* is set in a near future in which climate change has decimated humanity, official governments have little power, and bands of humans migrate in search of food, fuel, and supplies; the action takes place in western North America – from Alaska and Canada (where there is still water in the form of snow) to the ruins of what once was Guadalajara, Mexico. The central character of *Rubicon Crossing* is named “Loretta Gonzalez,” a woman who leads a para-military team of survivalists who have been hired to get two children from coastal Mexico to a their family’s ‘safe house’ near Dawson Creek, Yukon.

Archworth developed a rich backstory for the Loretta Gonzalez character, who is called “LoGo” by her team members. Indeed, *Rubicon Crossing* is written as the first of many possible installments in a franchise focused on LoGo’s life.

In 2018, Archworth decided that she needed “visuals” to pitch *Rubicon Crossing* to production companies and decided to provide a graphical representation of LoGo to accompany her script and other pitch materials, entitling the whole package “the *Rubicon Crossing* project.” Archworth bought the character’s outfit and equipment, then hired for a one day shoot actress Delia Ibarra, make-up artist and stylist Ixie Ortega, and noted photographer Hariko Manjitu. The four of them went out to some locations chosen by Archworth where she directed the photographing of “Loretta Gonzalez” in action scenes and quiet moments. At the end of the shoot, Ibarra asked if she could keep some of the clothes and props. Archworth said “sure.”

Archworth later selected the best photos; she and Manjitu cropped the photos. Just three of the resulting photos of “Loretta Gonzalez” are here:



In October 2018, Archworth posted these photos and the entire complete “set” of LoGo character photos on her Instagram account; Archworth also posted these pictures on her own website JoanofArch.com, along with a five page summary of the plot and characters in *Rubicon Crossing* that included this description of LoGo:

The *Rubicon Crossing* team is led by Loretta Gonzalez, known as “LoGo” to her friends and as trouble to her enemies. Loretta is introverted, intense, and an expert marksman -- but also prone to occasional practical jokes. She is the daughter of a Green Beret and a scientist who worked at the Jet Propulsion Lab (JPL) in Pasadena. Until her parents were killed in the infamous terrorist attack on JPL, Loretta had a happy childhood, maybe a little too focused on her martial arts team and science classes, but she always had time for her brother, Tuck, who had been born deaf. In more reflective moments, she would tell friends that having a deaf brother had made her look at – and communicate with – the world in a different way. Her team members believe she is both able to sense things in natural environments most humans cannot and to get prisoners to ‘talk.’ After the explosion that killed Tuck and – ironically – left LoGo deaf in one ear, LoGo became an expert in explosives, including defusing bombs and warheads.

The JoanofArch.com website says “Full script and other information available on request.”

Additionally, Archworth has distributed at least 100 copies of the full *Rubicon Crossing* script to directors, producers, and studio executives. She has also distributed copies of the full *Rubicon Crossing* script to many friends and the script has had at least two public work-shop “readings” by actors, one in Culver City and one in North Hollywood.

MEANWHILE, ON THE OTHER SIDE OF TOWN

Arts Industrial (“AI”) is a medium-sized videogame company based in El Segundo. In 2016, they launched “Cry of Battle,” a first-person shooter videogame in which you, as the player, are part of a team trying to achieve some goal in a chaotic environment of opponents (trying to ‘kill’ you); the game includes several characters who are your “team members” (who are also trying to help you kill the opponents). In “Cry of Battle” the player gets to choose which of five team members he or she wants to be.

“Cry of Battle” is set in an unidentified dystopian future Earth in which the player’s weapons are familiar (enhanced rifles, bazookas, hand guns, etc.), but the opponents can be human, semi-human, or robotic. After a couple successful years, “Cry of Battle” sales began to drop off and AI began development of a couple variations of “Cry of Battle II.” In one version, “Cry of Battle II ~ Every Drop Counts,” the player and his/her team are in the same dystopian environment, but this time working to secure water resources.

The AI team also realized that for “Cry of Battle II” they needed to diversify the characters who are team members to include more women, persons of color, LGBTQ persons, and people of different faiths.

AI has pledged that all the profits from “Cry of Battle II ~ Every Drop Counts” will go to the Nature Conservancy, a 501(c) charity. In fact, before the 2021 release of “Cry of Battle II ~ Every Drop Counts,” AI held a press event in which, in order to show its commitment to environmental non-profits, it assigned the copyright in “Cry of Battle II ~ Every Drop Counts” to the Nature Conservancy. Nonetheless, AI and the Nature Conservancy entered a contract in which AI retains control over all distribution, sales, modification of, and development of derivative works from “Cry of Battle II ~ Every Drop Counts.” Per the contract, AI also gets a “sales fee” for each copy of the videogame sold.

In October 2021, AI finally released “Cry of Battle II ~ Every Drop Counts” and the videogame includes a new team member, “Lora.” Lora looks stunningly like LoGo. Study **Exhibits A-F** below.

And AI's press release description of the Lora character sounds a lot like the LoGo character:

Deadly to her enemies, loyal to her friends, Lora is an trained sniper and an expert in martial arts, remote explosives, and interrogation. Lora is haunted by the death of her parents, who were in the military and died in a terrorist attack on one of the United States' advanced weapons labs. Lora had a little brother, Jamie, who was born blind. Jamie went missing in the attack and Lora harbors hopes of finding him someday – after she has secured the water supply being fought over in . . . *Cry of Battle – Every Drop Counts*.

When the similarity between “Lora” and “LoGo” was brought to Archworth's attention, Archworth bought a copy of “Cry of Battle II” and played the videogame, both as Lora and other characters [to better see Lora in the third person]. Concluding that Lora is the same character she envisioned for LoGo, Archworth then got in contact with Delia Ibarra. Ibarra said, yes, that AI had contacted her saying “we saw your amazing pictures on Joan Archworth's Instagram account” and offered to pay her for a two day photo shoot. Ibarra accepted. The night before the shoot, an AI person called and said “hey, if you have any of those clothes you wore and props, can you bring those with you?” Ibarra did and – per the direction of the AI photographer ~ she wore the same clothes for the AI shoot as she had for Archworth's shoot. It appears that the photos taken at that photo shoot were the sole basis for AI engineers to create the digital avatar of Lora in “Cry of Battle – Every Drop Counts.”

Joan has asked Mona to help her sort all this out – and whether she can successfully sue AI for infringement. Mona needs you to give her a careful, thoughtful 2,000 analysis.

EXHIBITS FOLLOW

A posted LoGo photo from Archworth's *Rubicon Crossing* [Exhibit A]:



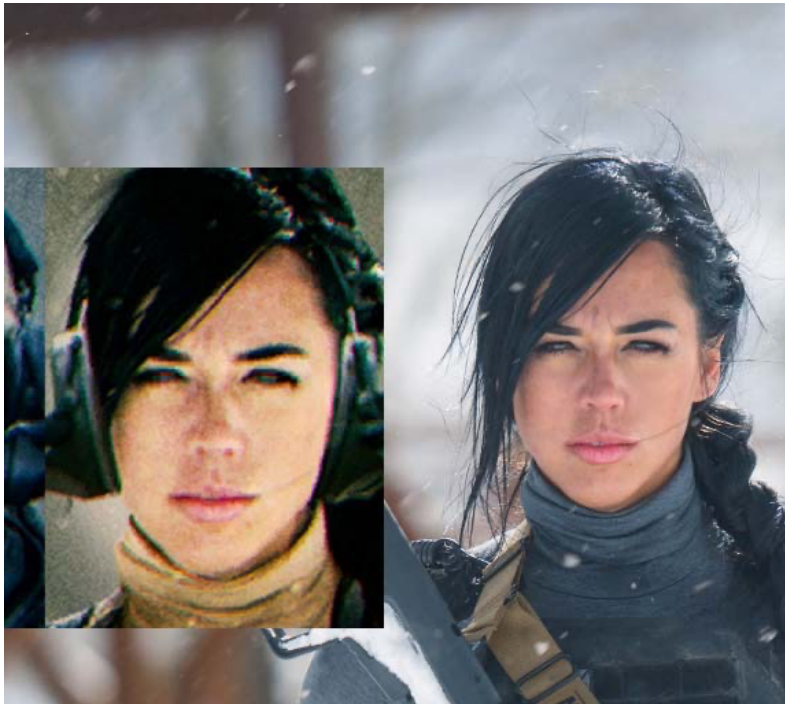
A “Lora” still from AI’s “Cry of Battle II: Every Drop Counts” [Exhibit B]:



Another comparison of LoGo and Lora, from posted *Rubicon Crossing* project photos and “Cry of Battle II” respectively [Exhibits C & D]:



A comparison of a facial close-up of LoGo posted with Archworth’s *Rubicon Crossing* project and “Lora” and she appears in “Cry of Battle II” [Exhibit E]



Screenshot of a promo for Cry of Battle II: Every Drop Counts [Exhibit F]



-- END OF EXAMINATION MATERIALS --