

A MODEL ANSWER TO © LAW, FALL 2021 EXAM - 1,973 words

This memo describes the copyright rights of our client Joan Archworth, the claims that might be brought against Arts Electronic (AI), AI's possible defenses, and whether there could be any secondary liability for the Nature Conservancy.

I. Rights

a. *Rubicon Crossing* script and five-page summary

Assuming Archworth independently wrote the 136-page *Rubicon Crossing* script, the script is a dramatic work protected under §102 because it is an original work of authorship fixed in a tangible medium of expression, exceeding the minimal degree of creativity necessary for originality (*Feist*). The work is fixed and directly perceived in script form. Archworth owns the copyright to *Rubicon Crossing*, and holds exclusive §106 rights.

Same analysis for the five-page summary of characters and plot (summary) that Archworth posted her website, JoanofArch.com. Assuming the summary was a derivative work on the script, Archworth has a separate copyright on the summary as an authorized derivative work (*Gracen*).

b. LoGo Photos

Collectively and individually, the photos of the Loretta Gonzalez character ("LoGo") are also fixed in a tangible medium of expression and have a modicum of creativity sufficient for copyright protection (*Feist*). The photos are the products of a specially-created photo shoot, similar to the photo of Oscar Wilde in *Burrow-Giles*.

If the LoGo photos are derivative works on the script, they were authorized by Archworth and can have their own copyrights (*Gracen*). As the visual version of the script's literary description of LoGo, the LoGo photos contain "sufficient nontrivial expressive variation" making them "distinguishable from the underlying work in some meaningful way" (*Schrock*).

The real issue is whether Archworth is the sole author of these photos.

While Ibarra, Ortega, and/or Manjitu may try to claim ownership of the photo, we know Archworth chose the model, costumes, props, and location for the photos; she also directed the photo shoot. Based on these facts, we should argue that no one other than Archworth made any independently copyrightable contribution, Archworth was the sole author, and photographer Manjitu was only an amanuensis (*Lindsay v. Titanic, Adrien*).

If, on the other hand, it is shown that Manjitu, Ortega, and/or Ibarra made some non-de minimis independent copyrightable contribution to the photos, we will argue that there is no evidence that any of them and Archworth intended to be joint authors (*Thompson*). Instead, from the facts we know it is evident that Archworth was the mastermind behind the photographs (*Aalmuhammed*) and she clearly superintended production of the photographs by controlling the wardrobe, location, photography, and cropping (*Richlin*). Under these precedents, she is the sole author.

Lastly, it might be necessary to argue that Archworth is the sole author on the basis of the work-made-for-hire doctrine, which applies if a work was made [a] by employees in the scope of employment or [b] by independent contractors, falling under certain statutory categories, and is expressly agreed in writing (§101). The CCNV factors lean towards finding Ibarra, Ortega, and Manjitu were independent contractors; the skill required by a make-up artist, noted photographer, and actress is high; it appears Manjitu provided her own equipment; and the relationship each had with Archworth lasted for one day, implying they were independent contractors. If the three were independent contractors, we would have to argue that the photos fall into one of the statutory categories: it may be credible to argue that they are either “a contribution to a collective work” or “as a part of a motion picture or other audiovisual work (§101). If we overcame that hurdle, we would still need for there to be a written agreement between Archworth and each contributor. This is something we need to ask the client.

In the worst case scenario, Archworth would be a joint author of the LoGo photos and, as such, still retains the full set of §106 rights, but other joint authors would also have a full set of §106 rights to the LoGo photos, subject only to an accounting. (*Thompson*)

c. LoGo character

Under the different tests used by federal courts, the character LoGo is a protected element in the script, five-page summary, and photos. Under *Nichols*, LogGo is protected since she is a sufficiently delineated character with many details of her personal history, psychological characteristics, and physical attributes established in the script and summary. The rendering of the LoGo character as a visual image may automatically make her “sufficiently delineated” (*Gaiman*). Should a court use the minority “story being told” test (*Warner Bros. v CBS*), LoGo arguably meets this test as well, since the *Rubicon Crossing* focuses on her leadership of a para-military team and

Archworth intends *Rubicon Crossing* as the first of many installments in a franchise centered around LoGo (much like “Rocky” in *Anderson v. Stallone*).

In addition, if a court used the framework provided by the Ninth Circuit in *DC Comics v. Towle*, LoGo would be protected since she has physical as well as conceptual qualities (seen through the distinct photos and LoGo description); she is sufficiently delineated to be recognizable whenever she appears even if the character does not have a consistent appearance (LoGo’s appearance may vary in the different photos); and she consists of very distinctive, if not unique “elements of expression.” [Note the *Towle* framework applies to a character that has appeared in many works over years – which does not describe LoGo yet.]

II. Primary Infringement

Archworth can bring claims against AI and its “Lora” character for [a] infringement of the LoGo photos, and [b] infringement of the LoGo character.

In each case, Archworth can claim infringement of both the §106(1) right of reproduction and the §106(1) right to prepare derivative works. The distinction is whether AI’s work has enough originality to be a derivative work. Whether or not “Lora” is a derivative work should not be relevant to our client, as infringement of either right is analyzed under the *Arnstein* two-prong test.

The first *Arnstein* prong establishes copying, either by direct evidence or circumstantial evidence. We may not have direct evidence of copying, although AI hiring Ibarra and asking her to wear the same clothes may border on an admission of copying the LoGo photos. Regardless, there is extensive circumstantial evidence of copying (of both LoGo photos and LoGo character), such evidence being a combination of access and probative similarity.

As to access, the LoGo photos were publicly available on Instagram JoanofArch.com. While the *Rubicon Crossing* script is not published, the five-page summary was also available online. The script has been distributed to many people in southern California’s entertainment industry and was the subject of two workshop readings, one just a short distance from AI’s southern California headquarters. It is easy to imagine that AI, a company that must keep current with modern “story-telling” in relevant genres like future dystopias, would have encountered Archworth’s script (*Arnstein, Harrison*).

As to probative similarity, the striking similarity of the LoGo photos and “Lora” in *Cry of Battle II - Every Drop Counts* speak for itself. Indeed, AI went out of its way to base Lora’s visuals on the same model (Delia Ibarra) wearing the same clothes in which Archworth had outfitted her to represent LoGo - same model, same clothing, same dirty face, same tattooed arm, same hairstyle, same poses, same facial expression, and same camera angles regarding the photos. The press release prose description of Lora is eerily similar to the summary description of LoGo on JoanofArch.com. With such striking similarity, courts could infer copying even without evidence of access (*Gaste*) or that the striking similarity is evidence of access (*Ty*).

The second prong of Arnstein is substantial similarity in protectable expression. To prove improper appropriation of the protected expression, the works must be substantially similar to the ordinary lay observer (*Peter Pan*). Here the similarities between LoGo and Lora are so strong that a lay observer - one of Archworth’s friends - brought the problem to her attention.

Whether considering infringement of the LoGo photos or the LoGo character, there is both fragmented literal similarity and comprehensive non-literal similarity (*Steinberg*) between LoGo and “Lora”: expertise in martial arts and explosives; interrogation skills; military and scientist parents who died in a terrorist attack on a weapons lab; disabled brother; character’s physical appearance (see above). In fact, this situation is akin to *Sheldon v. Metro-Goldwyn* where the similarities as to plot and action were piled on one another - gaucho song, strychnine poison, etc. In short, Archworth would be likely to prevail in establishing a prima facie violation of her §106 rights.

In addition to §106(1) and §106(2), Archworth should also allege that the continued distribution and play of *Cry of Battle II - Every Drop Counts* featuring “Lora” infringes Archworth’s §106(2) right of distribution and §106(5) right of public display.

III. Defenses

If AI could establish that Ibarra was a joint author of the LoGo photos, AI could argue that Ibarra gave them permission to prepare the derivative works (photos) leading to “Lora.” This argument will likely fail [Ibarra was probably not a joint author, as described above], but even if successful this argument could not shield AI from an infringement claim of the LoGo character.

As to infringement claims on both the LoGo photos and the LoGo character, AI may argue fair use, requiring analysis under the four §107 factors.

First, as to the purpose and character of AI's use, although AI has arranged ownership such that profits from *Cry of Battle II - Every Drop Counts* go to the Nature Conservancy, AI receives a sales fee for each copy sold, control distribution, and has rights to further derivative works. So, this remains a largely commercial use. AI will argue that their use is "transformative" because a new product (and allegedly new character) has been created, but, compared to LoGo, "Lora" does not provide any new meaning or message (*Campbell*).

Second, the nature of Archworth's copyrighted work highly favors Archworth. *Rubicon Crossing* is at the core of what copyright intends to protect and the LoGo photos, given Archworth's direction and their expressive value, are towards the middle of the spectrum. More significantly, while Archworth posted a summary on JoanofArch.com, *Rubicon Crossing* is unpublished (*Harper & Row*). While the script has been distributed, since Archworth's goal is the creation of a major audiovisual work, AI's use of "Lora" arguably frustrates Archworth's right of first publication.

Third, the amount and substantiality of AI's portion used in relation to Archworth's copyrighted work as a whole weighs against fair use. Qualitatively, AI took the whole reason a publisher would want the *Rubicon Crossing Project*: LoGo, who was the heart of the project (*Harper & Row*).

Finally, as to the effect on the potential market for the original work and derivative works, the presence of "Lora" in a popular videogame may suppress the ability of Archworth to ever sell *Rubicon Crossing* as a feature film, anchoring a franchise based on LoGo. Archworth can also argue that videogames based on feature films are part of the normal licensing market for derivative works to which Archworth is entitled, not a "transformative work" (*Campbell, Authors Guild v. Google*).

IV. Secondary Liability

Cry of Battle II - Every Drop Counts was wholly prepared by AI, but the transfer of ownership to Nature Conservancy raises questions whether the Conservancy or AI would be primarily liable for continued distribution of *Cry of Battle II*. If AI remain primarily responsible for this infringement, it is *possible* that we could argue Nature Conservancy is secondarily liable under vicarious, contributory, and/or inducement liability. As to vicarious liability, while the Conservancy has a direct financial interest in the infringement, the Conservancy likely lacks the requisite control unless they can contractually stop further sales of the game (*Fonovisa*). There is

nothing to indicate that the Conservancy makes a “material contribution” to the continuing infringement (*Sony*). Nor is there any evidence that the Conservancy “induced” AI to infringe Archworth’s rights under the standards in *Grokster*.

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