FALL 2018 COPYRIGHT EXAM
MODEL ESSAY ANSWER #1
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ESSAY -- INTO THE STORM

A. Ownership of a Valid Copyright

Heavy most likely has a valid copyright in the photograph entitled *Mothership*: photographs are protected subject matter under 102(a)(5) and the photograph was independently created with the modicum of creativity necessary under copyright's low originality threshold (*Bleistein, Feist v. Rural Telephone*). Furthermore, it has been undoubtedly fixed in a tangible medium of expression, whether by physical film-development (Sarony) or as a digital file (*London Sire Records*).

The biggest hurdle, if any, would be challenges to the photo's originality. Netflix will argue that the photograph is a mere mechanical reproduction of physical features and Heavy must prove his original expression. Moreover, like the photo in *Leigh v. Warner Bros*., pictures of nature are afforded thinner protection because of the photographer's limited control over the subject matter. Thus, what Heavy controls—shutter speed, timing, framing, exposure, stitching of images, etc.—garner protection as original expression; other aspects that are not under Heavy's control, like the rural background or natural cloud formations, are not protected.

It would be helpful to get more facts as to what artistic expression Heavy controlled, other than camera operation. For instance, if "stitching" incorporates a variety of angles to produce a more dynamic cloud cylinder than what otherwise forms naturally, then the resulting image is due stronger protection because of Heavy's influence. However, if stitching was merely adjoining sequential, uniform photos then there would be less original expression in the *Mothership* photograph.

B. Primary Infringement

Assuming *Mothership* is protected under copyright, Heavy has exclusive control over the associated 106 rights, particularly *reproduction, derivative works,* and *distribution*.

1. Infringement under §106(1) & (2)

Either Netflix reproduced or created a derivative of Heavy's *Mothership* in both *Stranger Things*, and *Behind Stranger Things*. If we argue violation of §106(2), it is because the new image, although based upon Heavy's, appears to incorporate its own original expression. Ultimately, analysis of violation of §106(1) and §106(2) is the same, i.e., whether the works are substantially similar" in protectable expression. (*Horgan*) The *Arnstein* framework requires (a) copying of the plaintiff's work, and (b) improper appropriation of protected expression from that work.

First, regarding *Arnstein*'s copying requirement, the best evidence is direct evidence showing Mothership was copied—whether an admission by a designer or person who knew. If no such direct

evidence is found, we must rely on circumstantial evidence. Given that Petapixel's comparison of how the cloud formations overlay perfectly, coupled with *Mothership* being Heavy's—an established photographer—most striking piece, copying will likely be met through access and probative similarity.

The Petapixel comparison shows identical cloud formations, which if considered "striking similarity," may be enough in-and-of itself (*Gibb*) to establish access. However, the Second Circuit, requires some evidence of access unless similarity is "overwhelming" (*Gaste*). Given the cloud's subtle difference of opaqueness and color contrast, we may be unable to establish "overwhelming" similarity. Therefore, facts establishing the fame or notoriety of *Mothership* and the likelihood it was known to Netflix's artistic team will support an "access" argument if needed.

We must be cognizant of "pre-existing exemplars" in the public domain (*Herbert Rosenthal*). To the extent the cloud formation that makes up *Mothership* is a standard formation that could easily be viewed on its own, there is less support that the reproduction was done based on Heavy's expression as opposed to freely viewable, common formations. (*Ty v. GMA, Herbert Rosenthal*). Thus, understanding the formation and its commonality as well as Heavy's expressional influence will help determine whether Netflix accessed and appropriated images other than Heavy's photo.

As to the second prong of *Arnstein*, improper appropriation of protected elements is also likely met under either a §106(1) or §106(2) claim. Work must be substantially similar to the protected expression in the eyes of the ordinary observer (*Peter Pan*), with court's utilizing fragmented literal similarity, comprehensive non-literal similarity, or both. Under the fragmented approach—the stronger argument—the distance of the clouds, viewing angle, moment of capture depicting the exact cylindrical cloud layering with light emanating from the center and cascading rain cascading are prevalent in both photos; all of which are a product of Heavy's expression. (*Steinberg*) Moreover, the Petapixal comparison shows that the lowest cloud formations are identical. The differences observed are in coloring and background—an open field with clearing skies in the distance, compared to a dilapidated wooded town in expansive darkness. Alternatively, under the comprehensive non-literal approach, the images have an undeniably powerful overall likeness (again *Steinberg*) despite the *Stranger Things* image being much darker with a bleak setting being engulfed by a frightening storm.

2. Infringement under §106(3)

Heavy also has exclusive control over *Mothership's* right to be distributed by sale, lease, rental, lending, etc. This right is likely violated given the popularity of *Stranger Things*—one of Netflix's most popular shows—and the likelihood that its subscribers have downloaded the show to watch on devices

not linked to the internet. Our strongest claim of a distribution violation requires establishing that users downloaded (as opposed to streamed) the program in full to a device. (*London-Shire*). Alternatively, if the programs are only available through streams (i.e., no download), or the file is made available and no download occurred, courts are split as to whether distribution occurred. Because Netflix's content, is predominantly accessed through streaming, but downloading shows may be an option for active accounts, it may be important to get Netflix's user download rates in order to strengthen our claim for unauthorized distribution.

We should also be mindful of a potential *de minimis* defense focused on Netflix's quantitative use. In *BET* the entirety of the copyrighted work was used (high qualitative) but was observable on air for only a short time (low quantitative) and in the background, thus raising the prospect that the use wasdeemed *de minimis*. It is highly possible that the image in *Beyond Stranger Things* was fleeting, with the use in the series being more quantitative, which supports a violation in only the latter. Ultimately, we can't know without more facts. However, if we can show the prominence of the image's use within these programs, it will help undermine a de minimis arguments.

Defense – Fair Use: Netflix may argue fair use. Under the first fair use factor, the commercial nature of the use weighs against fair use. But Netflix will argue that their use is transformative: the use in *Beyond Stranger Things* may be modestly transformative, but the is no obviously new message (*Campbell v. Acuff-Rose*) or purpose (*Google Books*) in the *Beyond Stranger Things* storyboard. This factor probably favors Heavy.

Second, we look to the nature of Heavy's work—the more expressive, the more value afforded. (*Campbell*). Photography can be very expressive when the photographer has a lot of control. It can also be non-expressive that isn't afforded protection. Given the scenic nature of *Mothership* along with the controls of the photographer, its expressive value likely falls in the middle of the spectrum. Weight of this factor favors Heavy slightly, and facts finding more protected expression will further tilt this factor in Heavy's favor.

Third, we look to the amount and substantiality of the portion used by an infringer in relation to the copyrighted work. In the instance of Stranger Things, the Heavy's image was not used in its entirety, just the cloud formation. However, similar to *Harper & Row v. Nation*, even if the cloud formation is proportionally one-third of the entire image, it is the heart of the expression through the culmination of perfect timing, camera settings, angle and stitching of images. Additional facts relating to Netflix's quantitative use of the image will further instruct the weight of this factor, which currently favors Heavy.

Finally, we must weigh the effect on the potential market for the originals work and derivative works thereof (*Campbell*). We will argue that the preparation of derivative works such as paintings, etchings, and storyboards based on dramatic photographs is a normal licensing market to which Heavy is entitled. Netflix will argue that Heavy's primary markets – the sale of art gallery quality photographic prints, posters, use of photographs in newspapers and magazines – are completely untouched by Netflix using *Mothership* as inspiration. This factor could go either way and may turn of Heavy's licensing activities to date.

C. Secondary Liability - Shanzhaister

If we establish primary infringement by Heavy or allege primary infringement by other third persons, ShanZhaister may be held liable for secondary infringement under vicarious, contributory, and/or inducement liability.

Vicarious Liability: The ShanZhaister website appears to have the requisite control and financial benefit to be vicariously liable. Just as *Cherry Auction* controlled the swap meet grounds, Shanzhaister controls its website—reviewing images and modifying keywords associated with images, and deleting others it determines to be too common. This control is extensive and more similar to the dance-hall cases than the landlord-tenant situations. Moreover, with ad-support, it likely generates money through user clicks, creating a direct financial interest in maximizing users through the availability of infringing material. (*Cherry Auction*).

Contributory Liability: Unlike vicarious liability, contributory liability has a knowledge requirement as well as requiring a material contribution to the infringing activity. More facts are needed to determine if Shanzhaister has actual knowledge of the infringing uses. Similar to *Sony*, Shanzhaister will argue that it doesn't know what users are going to link and that it warns users to respect "any applicable copyright law." In Shanzhaister's favor, courts will not impute the necessary level of "knowledge" when the technology is capable of both infringing and non-infringing uses (*Sony*). Here the non-infringing use is public connection to rarely seen photos that are in public domain and that have been made freely available by copyright owners. However, unlike *Sony*, where it truly didn't know what a user was going to record, Shanzhaister is intimately involved in the linking and review of images and keywords, storing the image on its server and running algorithms before the image is purged with only its link and keywords remaining. Facts about the algorithm, keywords used (e.g., work titles like *Mothership*), and information associated with each image will be helpful in establishing actual knowledge.

If actual knowledge is established, material contribution will likely be found on the same rationale as *Cherry Auction* and *Napster*: just as Napster users could not find relevant files without Napster's involvement; Shanzhaister's users rely on Shanzhaister to link them to relevant images.

Inducement Liability: To the extent we cannot meet the knowledge requirement above, there still may be an inducement argument. In *Grokster*, the court imputed knowledge when affirmative actions and intent of the party showed that it intended to induce illegal activity. While Shanzhaister exclaims a need to follow copyright laws, we can argue that this is mere window-dressing for otherwise dubious intent to provide a system to rip-off photos. Of the statements provided, there is an obvious push for expediency and utilizing other artists' creativity to essentially "look good." Evidence such as Internal communications and external statements supporting or even celebrating misuse, will augment an inducement claim. (*Grokster*).

D. Direct Liability - Shanzhaister

Based on the facts we currently have, Shanzhaister also engages in copying photographs onto its own servers; Shanzhaister eventually deletes these copies and has only links, but the copies appear to fixed on the servers long enough to count as unauthorized reproductions under §106(1).

In response to a §106(1) claim, Shanzhaister would likely argue fair use (*Google Books*). For this §107 analysis, the second factor would be the same as the §107 analysis for Netflix. Under the third factor, Shanzhaister will have copied the entirety of *The Mothership* and any other photograph in its search system (before deleting those copies). The key issue will be whether the court views Shanzhaister's copying as serving the transformative purpose of providing a searchable database of hard-to-find images (under the first factor) or is instead hurting the market for licensing of photographic images by providing an easy-to-source for unauthorized copies (fourth factor).

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