

COPYRIGHT LAW

AUTUMN 2012

CARDOZO SCHOOL OF LAW

JUSTIN HUGHES

Take Home Examination

Introduction

This is a twenty-four (24) hour, take-home examination. You have 24 hours from the time you access this examination to submit the answers online.

Conditions and your professional commitments

Once you have received this examination, you may not discuss it with anyone prior to the end of the examination period. Nor may you discuss the examination at ANY time with any student in the class who has not taken it. You may NOT collaborate on the exam.

Professor Hughes permits you to use any and all inanimate resources. **The only limitations on outside resources are those established by the law school for take home examinations.**

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 relevant Cardozo School of Law rules. Violations of any of these requirements will lead to discipline by the Academic Standing Committee.

The Examination consists of two parts. Part I is a set of true/false questions. Part II consists of two essay problems with an 1,900 word limit (total). Professor Hughes takes on no obligation to read beyond each essay's word limits. **The Exhibits appear at the end of this document AND/OR clearly marked separate downloads.**

GOOD LUCK

Happy holidays and safe travels to all -- thanks for a fun class.

I. TRUE/FALSE QUESTIONS

(25 points)

This part of the exam is worth 25 points. Each answer is worth 1.5 points. There are 19 questions, so in the same spirit as the LSAT and other standardized tests, you can get two wrong and still get a maximum score (25 points) on this section.

Since this exam is being administered online, please provide your answers to this section as a single column series, numbered 1 to 19, with “T” or “F” beside each number. Make sure these T/F answers are on a separate page from the essays.

If you are concerned about a question being unclear, you may write a note at the end, but only do so if you believe that there is a fundamental ambiguity in the question.

01. The Second Circuit panel in *Cartoon Network v. CSC Holdings* (2008) concluded that copying a work into a computer “buffer” for no more than 1.2 seconds met the Copyright Act’s “fixation” requirement, both as to “embodiment” and “duration.”
02. In *Steinberg v. Columbia Pictures* (SDNY 1987) the court used both “fragmented literal similarity” and “comprehensive non-literal similarity” in its analysis of the movie poster’s substantial similarity to the iconic NEW YORKER cover by Steinberg.
03. A work meets the originality standard when it “can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”
04. In *Fonovisa v. Cherry Auction, Inc.* (9th Cir. 1996), the court held that Cherry Auction could not be held contributorily liable because there were many vendors at the swap meet who engaged in legal activities and the swap meet, therefore, was capable of substantial non-infringing uses.
05. It is black letter law (a very clearly established legal principle) that “to varying degrees, copyright protection extends beyond a literary work’s strictly textual form to its non-literal elements.”

06. Before and after *Feist*, the *Wainwright Securities* and *CCC Information Services v. Maclean Hunter* decisions held that judgments, analysis, estimates, and predictions do not count as unprotected “facts”.
07. Section 115 of the Copyright Act establishes a compulsory licensing system for public performance of sound recordings.
08. In *Carol Barnhart v. Economy Cover* (1985), Judge Newman suggests that sufficient “conceptual separability” to support copyright in a useful item occurs “whenever the design creates in the mind of the ordinary observer two different concepts that are not inevitably entertained simultaneously.”
09. *Mitel, Inc. v. Iqtel, Inc.* (10th Cir. 1997) and *Lotus Development Corp. v. Borland International* (1st Cir. 1995) take different approaches to the question of protectable expression in an element of a work that might be characterized as a method of operation.
10. Section 109(b) – discussed in our readings on pages 732-734 – gives copyright owners of software, audiovisual works, and sound recordings additional distribution rights to control “rental, lease, or lending”
11. In *Bleistein*, Justice Holmes advocated a low originality standard for copyright, reasoning that “a very modest grade of art has in it something irreducible, which is one man's alone.”
12. In the second part of the abstraction/filtration/comparison test from *Computer Associates v. Altai* a court uses a substantial similarity inquiry to determine “whether the defendant copied any aspect of th[e] protected expression as well as an assessment of the copied portion's relative importance with respect to to the plaintiff's overall program.”
13. In their economic analysis, Landes and Posner believe that there are several factors that may allow authors to recoup the cost of creating works without copyright law.

14. Probative similarity is similarity between two works that allows a court to infer copying under the first prong of the *Arnstein* test separate from the question of appropriation of protectable expression.
15. Vicarious liability in copyright law impose liability on “[o]ne who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another.”
16. In *Anderson v. Stallone* (C.D. Cal., 1989) the “sufficient delineation” and ‘story being told” tests for copyright protection of characters produced different results in relation to the character “Rocky.”
17. According to Copyright Office regulations “[w]ords and short phrases, such as names, titles, and slogans” are entitled to copyright protection only if they meet the heightened originality standard of a derivative work.
18. Section 115(a)(2) permits "arrangement of the work to the extent necessary to conform to the style or manner of interpretation of the performance involved" but the "arrangement shall not change the basic melody or fundamental characteristics of the work"
19. *L. Batlin & Son v. Snyder* (2d Cir. 1976) holds that “trivial variation such as might occur in the translation to a different medium” will not be enough originality to copyright a derivative work.

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

II. Essay Questions (75 points)

There are two essay questions. Please make sure that you use 1.5 line or double line spacing and include a header or footer that has the page number **and the exam number** on each page.

Please make sure each essay starts on a separate page (so I cannot see my notes on your T/F or other essay when I read an essay).

At the end of each essay, please provide the essay's word count.

Essay A
(1000-1200 words – 50 points)

“ I SHOOT PEOPLE”

“Batman” is probably the world’s single most valuable superhero property. Batman is owned by DC Comics, a subsidiary of Time/Warner. Although Batman was created in 1939, the “darker” Batman dates from the mid-1980s. According to Wikipedia, “[t]he comic books of this dark stage culminated in the acclaimed 1986 miniseries *The Dark Knight Returns*, by Frank Miller, as well as *Batman: The Killing Joke* by Alan Moore and *Arkham Asylum: A Serious House on Serious Earth*, among others.” These comic books were hugely influential in establishing the troubled, dark world of “Gotham City” seen in the Tim Burton and Christopher Nolan films [“Batman” (1989), “Batman Returns” (1992), “Batman Begins” (2005), “The Dark Knight” (2008), “The Dark Knight Rises” (2012)]

Exhibit A is the cover the Alan Moore’s *Batman: The Killing Joke*. Assume that all rights to the cover art are owned by DC Comics. The cover features “The Joker,” probably Batman’s best known and most interesting opponent.

“The Secret Life of Toys” is a project of artist Marcos Minuchin, who uses real toys and action figures as well as figurines he makes to create humorous images. <http://www.thesecretlifeoftoys.com/index.html> **Exhibit B** is one of Minuchin’s works, “I Shoot People.” Minuchin sells small versions of the work for \$25 and large versions (20” by 30”) on museum quality stock for \$400. (He also has several other works featuring the Joker.)

Assume that Minuchin constructed and painted the Joker model in the photograph – it is not a toy purchased by the artist. He then arranged the model and shot the photograph.

Write a 1000 – 1200 word essay analyzing possible infringement claims that DC Comics would have against Minuchin and possible defenses he might raise.

Essay B
(600-700 words – 25 points)

www.swapinfringement.com?

Professor Hughes has taught Copyright Law eight times, both at Cardozo and UCLA. Each year, he has used the (then) current GORMAN & GINSBURG, COPYRIGHT – CASES AND MATERIALS case book. The case book is largely public domain materials (court opinions and statutes) selected, edited, and arranged by the case book authors with their additional explanations, analyses, and questions.

He prepares lecture notes based on the case book and then lectures in class. Sometimes he records the lectures to make them available to students later. Students take notes based on his lectures. **Exhibit C** shows some pages from Professor Hughes' own lecture notes for 2005. In 2005, he recorded 1/3 of his classes and posted the recordings on ANGEL.

Swapnotes (www.swapnotes.com) is a site where students exchanges class notes from university classes. **Exhibit D** shows the Swapnotes pages for Professor Hughes' classes at Cardozo.

Exhibit E shows some pages from the CopyrightHughesOutline1.pdf file (the third entry in the swapnotes list for Professor Hughes). This is an outline done by "AG". These pages correspond roughly to the pages in Hughes' lecture notes in **Exhibit C**, particularly on the "requirement of originality" discussion. Assume that the pages from AG's outline are exemplary of the quality and accuracy of student outlines for Professor Hughes' classes that are on www.swapnotes.com.

Write a 600-700 word essay analyzing copyrightability and infringement issues for Hughes, AG, and Swapnotes.

END OF WRITTEN EXAMINATION – EXHIBITS FOLLOW

EXHIBITS

EXHIBIT A

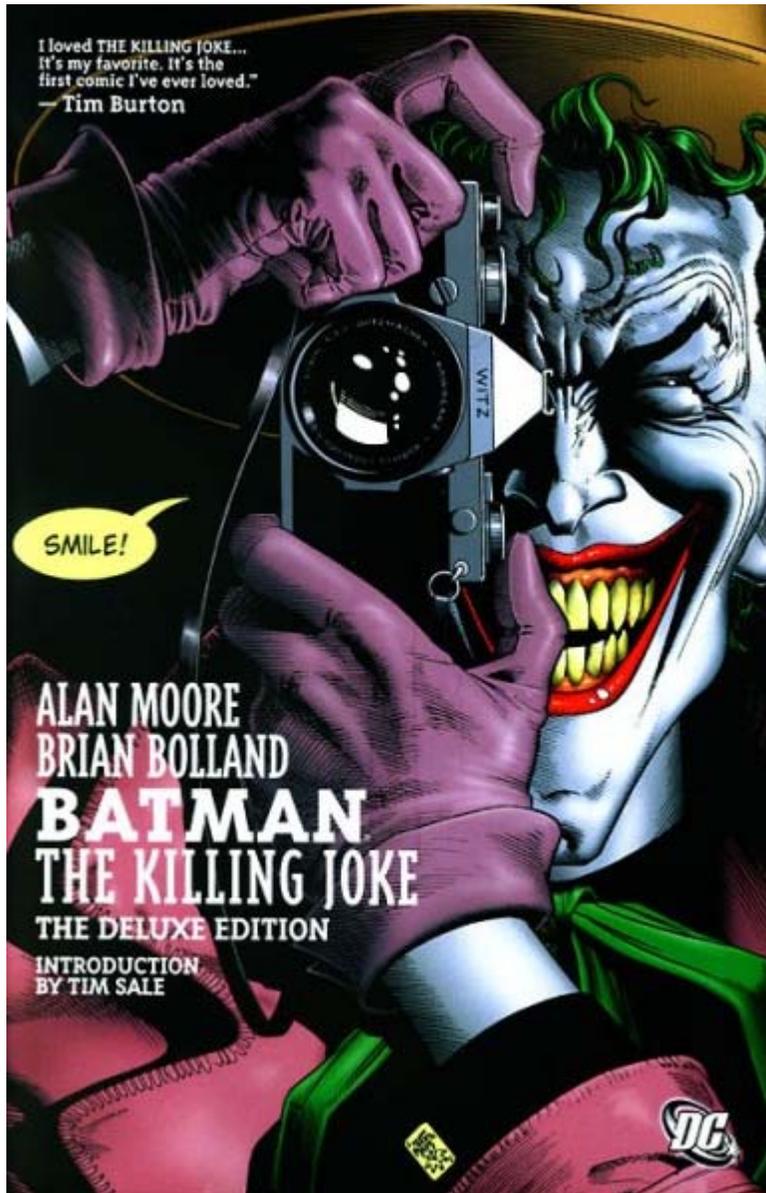


EXHIBIT B



EXHIBIT C

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THE REQUIREMENT OF ORIGINALITY [at 75]

- We go back to section 102 -- it says copyright applies to "original works of authorship".
- + Is there a definition of this fundamental notion?
 - + NO, not in section 101; in 1976 Congress intended to capture courts' definition of originality [at 75, **middle]**
- In the *Feist* case, which we study in detail, later, the SC is very clear that "originality" has two components [at 75-76]:

BOTTOM OF PAGE 75

 - 1. INDEPENDENTLY CREATED BY THE AUTHOR [AS OPPOSED TO COPIED FROM OTHER WORKS]**
 - 2. POSSESSES SOME MINIMAL DEGREE OF CREATIVITY, "NO MATTER HOW CRUDE, HUMBLE, OR OBVIOUS" NIMMER [at 76, top]**
- **How does this connect to Section 8, clause 8, of Article 1? Is this just a statutory requirement or is it a Constitutional requirement?**

- *Feist* court says it is a constitutional requirement, but what in the language would make you think that?

--- the words "creativity" and "originality" don't appear in the clause. [at 12]

--- *argument from "Authors"*

--- ***argument from the general intent to promote "Progress" in the useful arts.***

- ◇ **Magic Marketing v. Mailing Services of Pittsburgh**
(1986) [at 76]

VOLUNTEER – what's the issue in the case?

Claimed copyright over what?

- + envelopes with slogans [at 77, middle]

- ◇ **Is it clear to everyone that these are the obnoxious "OPEN NOW" and fake "TELEGRAM" envelopes that junk mail so often comes in? And then there is "GIFT CHECK ENCLOSED".**

Court's conclusion? "American Paper contends that the envelopes lack the level of originality to warrant copyright protection. We agree." [at 77, middle]

What do we learn about the originality standard?

- + "product of independent creation" [at 77, bottom]
 - + but "low threshold"
 - + but "more than a trivial variation"

We also learn something else in this case – that "fragmentary words and phrases" are exempt from copyright protection. [at 78, middle]

Quotation from Copyright Office regulations:

"Words and short phrases, such as names, titles, and slogans; familiar symbols and designs; mere variations on typographic ornamentation" [at 78]

are all outside copyright in the US.

- + Note they could still be protected by trademark law.

brief excerpt from Benjamin Kaplan's classic book [at 80-81/81]
-- the **COPYRIGHT TURNSTILE** on page **81/81** -----

- **Bleistein v. Donaldson Lithographic Co. (1903) [at 34/33]**

- This is one of the seminal cases of U.S. copyright law and it can teach you a great deal through Holmes' pithy, memorable summaries of principles of law – BUT admittedly difficult.
- **What is the issue? The D claims that posters for the advertisement of a circus are not copyrightable -- apparently because, well, they're just advertisements and posters.**
- First, Holmes says that copyright obviously covers things which are artistic, even though the Copyright Clause refers to the "useful arts." Holmes says **"The Constitution does not limit the useful to that which satisfies immediate bodily needs." [at 35, top/34, top]**
- Even if the graphic art is taken from something in real life -- like a portrait or a scene of a circus -- that does not mean that the graphic art is unprotected. Holmes says: **"Others are free to copy the original. They are not free to copy the copy." [at 35, top/34, middle]**

- Holmes put forward the idea that even the most simple or the most realist art embodies originality and creativity:

"The copy of the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting and a very modest grade of art has in it something irreducible, which is one man's alone." [at 35, middle/34, bottom]

- Obviously the issue in this case is that the posters are alleged to have no creativity, but Holmes is clear that:

"[T]he least pretentious picture has more originality in it than directories and the like, which may be copyrighted." [at 35, middle/34, bottom]

Holmes also addresses another potential argument against copyright – commercial use:

"A picture is none the less a picture and none the less a subject of copyright that it is used for an advertisement." [at 36, top/35, toward the bottom]

And KEY, KEY, KEY:

"It would be a dangerous undertaking for persons trained only in the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits." [at 36, middle/35, bottom]

- Just four years before Picasso's "Les Demoiselles d'Avignon" -- talk about Manet being refused at the Paris Salon and Holmes' recognition that lay people may not appreciate art.
- So, *Bleistein* establishes that the amount of creativity is very low because that is all the Constitution requires for something to be in the "useful arts" and because we don't want judges making decisions about art anymore than we want them making decisions about religion.

But let's go back to the **Magic Marketing** case on **page 76** for a moment.

One of the things discussed on page 78 is that

- **directions/instructions**
- **lists of ingredients.**

Are OUTSIDE copyright.

Not only do these things usually lack a minimum amount of creativity, but think of the competition/ market access problems. . . .

- **LIKE MAI V. PEAK, WHAT WAS THE PLAINTIFF IN MAGIC MARKETING REALLY TRYING TO DO?**
- What would be the result if we granted a copyright to Slim-Fast for the list of ingredients on the back of this can?
Or the cautionary language?
- Even if there were not competition problems, would it be a “creative” list?

LET'S LOOK AT THE QUESTION AT THE BOTTOM OF PAGE

81/top of 82.

The Originality problem also has implications for what we have called “DERIVATIVE WORKS”

- *In our discussions last week we went for a quick grasp of the idea of "derivative work" BUT we did not make it too big a concept*
- + WHAT distinguishes a run-of-the-mill "copy" and a DERIVATIVE WORK?

PRACTICALLY, a derivative work is *different*.

DOCTRINALLY, A DERIVATIVE WORK can have its own copyright and, therefore, must have *its own originality* – no different than a work in relationship to the public domain:

So, to get a better understanding of this, let's turn to

- **L. Batlin & Son v. Snyder** (2d Cir. 1976) [at 165/164]
 - This is quite an interesting case because a lot of important policy issues are brought to the fore.
 - Keep in mind the context for this case is that "sculptural" works are copyrightable -- *whereas most of our focus in this course is on literary, dramatic, music, and AV works.*

VOLUNTEER?

- Snyder orders plastic Uncle Sam banks from HK for the bicentennial -----
 - + *what did he or his people do?*
- + *what was his originality?* [p. 166, just above photos/164, toward bottom] "sketch[ing] from an iron bank and then designed a plastic prototype which Snyder approved."
 - + **Snyder then gets a copyright registration. DISCUSS.**
- Defendant Batlin ordered 30 cartons of cast iron Uncle Sam banks from Taiwan. [at 166] BUT he has problems with U.S. Customs because of Snyder's copyright registration [at 167, top/164, bottom]
 - Batlin sues to have Snyder's copyright voided.

□ Trial and appellate court agree -- although Snyder claims "differences . . . in a number of [other] very minute details" there is not enough original creation for a separate copyright.

+ On **page 167, middle-top/165 only para.** you get some of those differences VOLUNTEER.

+ DOES THAT STRIKE YOU AS ENOUGH ORIGINALITY?

“many of these differences are not perceptible to the casual observer.” [at 167, middle/165 bottom]

What is the standard announced by the Circuit Court? Notice that it is a standard that they apply to “reproductions of a work of art” [at 167, bottom] –in this case, a work in the public domain – but it is a general standard that can apply throughout copyright law

the work must contain “substantial, not merely trivial originality” [at 168, top/166 middle]

"[We] follow the school of cases in this circuit and elsewhere supporting the proposition that to support a copyright there must be at least *some substantial variation*, not merely a trivial variation such as might occur in the translation to a different medium." [at 168, top/166 middle]

SOOOOOO, MAJORITY SAYS " *some substantial variation*" TEST

- But what's the problem with this line of reasoning that is immediately recognized by the majority?
 - + The *Alva Studios* case, where copyright was recognized in a "scale reduction of a great work with exactitude" -- if it has "exactitude," where is the originality? [p. 168, bottom/168 top]

"The court, indeed, found the exact replica to be so original, distinct, and creative as to constitute a work of art in itself." [at 168, bottom]

SO, WHAT IS GOING ON TO EXPLAIN THESE TWO RESULTS?

- + buried in the mythology of the artist?
 - *in contrast*, the Hong Kong person took 1.5 days, doesn't seem like an artist, and wasn't trying for exactitude
- + majority gives policy reason for wanting exact reproductions of – thus "adequate public access" to – works of great art. [at 169, top/168, middle]

- + Discuss the timing of the *Alva Studios* result – 1950s.

Back to the present and BAITLIN –

major policy reason for not "extending copy-rightability to minuscule variations" in order to prevent attempts at "appropriating and monopolizing public domain works" [at 169/168 bottom]

- + Santa Claus or Robin Hood problem.
 - + How many public domain images are out there?
 - + How many protected images.
 - + What would you say to a client who wants to do a Santa Claus or Robin Hood sculpture? movie?
 - What does dissent say? That the standard should be "distinguishable variation" on the "prior art" [at 169, middle/168 bottom]
- >>> do you think that is better from a policy point of view?

In the discussion on **pages 170-171**, the casebook authors point out that *Batlin* seems to establish a stiffer

standard of originality for a derivative work than for other works.

--- but notice, that requires having a clear category of “derivative works” and usually that’s easy, but every work is “derivative” from prior material – both nature and other works, some in the public domain, some protected.

□ Let's look at the Paddington Bear examples on **page 172/171**. Is “B” a separate derivative work – with its own originality – on “A”?

+ The court said yes – discussion on **page 171, bottom/171 middle** – **“the changed proportions of the hat, the elimination of individualized fingers and toes, the overall smoothing of lines.”**

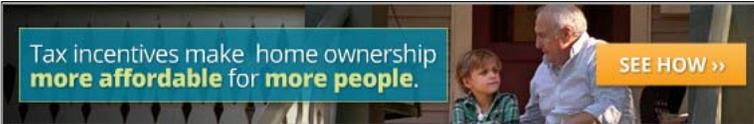
+ Thus, “C” was held to infringe “B”

+ But let’s change the facts a little bit. If “A” were in the public domain, would “C” infringe on “B”? Then it looks like the Batlin case.

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EXHIBIT D

SWAPNOTES web page for Professor Hughes on **NEXT PAGE**



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03/22/2008	Copyright Outline.doc		Fall - 2007	Notes		0	0.0	265	
11/25/2007	Copyright outline.doc		Fall - 2006	Notes		0	0.0	114	
10/02/2006	CopyrightHughesOutline1.pdf		Fall - 2005	Notes	Notes, taken in outline form. 87 pages	2	5.0	399	
10/02/2006	CopyrightHughesOutline2.pdf		Fall - 2005	Review	16 page outline for Copyright, by the same author as the 87pg notes	0	0.0	178	
11/22/2006	Eileen's Hughes Copyright Outline - Fall 2003.pdf		Fall - 2003	Review		0	0.0	44	
11/22/2006	Hughes Copyright Outline Fall 2003.pdf		Fall - 2003	Notes	another outline from Fall '03	0	0.0	50	
11/22/2006	Hughes OUTLINE Copyright - Fall 2003.pdf		Fall - 2003	Review		0	0.0	43	
09/18/2006	x-03Copyright-1.doc		Fall - 2003	Exam	Old Exam	0	0.0	72	

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EXHIBIT E

Pages in AG's outline roughly corresponding to Exhibit C on

NEXT PAGE

4. Consequentialist foundation: Copyright is about Promoting human progress

C. Arguments against Copyright

- i. Lead-time: protects the publisher (not true in age of digital tech).
 1. EX: NY Times, handout/sell copies instantly, and it takes a while for a pirate to reproduce it. People who wants the news instantly will pay their 50 cents.
- ii. Prestige of producing a work is enough of an incentive (magnificent painting).
- iii. Imposes cost on the next generation of creative works: In area such as music sampling, must pay for the snippets of work you use.

II. The Scope of Copyright

- A. § 102: “Copyright protection subsists...in **original works** of authorship **fixed** in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”

B. **THE FIRST REQUIREMENT: The Fixation** (Embodiment, Preservation, Finalized) **Requirement**

- i. If something is on TV, House Report says not fixed, but this is an open question. H/r, if the program appearing on the screen is recorded simultaneously, then it is fixed.
- ii. If fixation is done w/out knowledge or consent, it is NOT your fixation, and thus NOT protected.
- iii. **MAI v. PEAK (1993)**
 1. MAI, a manufacturer of computers and who put its software in its RAM, is claiming PEAK infringed its copyright on MAI software by copying it onto RAM then displaying it on screen. PEAK maintains MAI computers.
 2. Copying for purposes of copyright law occurs when a computer program is transferred from a permanent storage device to a computer’s RAM.
 3. By showing that Peak loads the software onto the RAM and then is able to view the system error log and diagnose the problem with the computer, MAI has adequately shown that the representation created in the RAM is “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”
 4. PEAK argues that the copy in the RAM is not “fixed” (under § 102).
 5. Court holds in favor of MAI, stating that something is fixed when a human can perceive, reproduce or otherwise communicate it. Here, PEAK uses the info stored in the RAM (looking at the error

- log to diagnose the problem) so it is adequately permanent to be perceived, or communicated for MORE than transitory duration.
6. PEAK caused a copy of the software to be made and is liable for violating the right of reproduction.
 7. Loading of the software constitutes an act of copying (under §117 *customer* can copy for archival purposes). What does this mean for a copy on a server connected to the internet? When you get an e-mail, it has been copied many times in the form of packets.
 - i. (See #1 p. 88) Yes: all your e-mails, the minute you write them are copyrighted—it is adequately fixed definitely when you hit the send button, perhaps before.
 - ii. (See #3 p. 88) Lecture is not protected b/c it is not fixed. Also, if the lecture is recorded w/out the consent of the professor, then no © work b/c it was not fixed at the professor's direction.
 1. w/ live musical performers, have §1101 rights to the fixation of their performances.
 - iii. What about 95% accurate notes? If Hughes took lecture from written notes, the lecture could be a dramatic work of notes, and your notes would be a derivative work and he may have an infringement claim against you, if no consent
 - i. If he does not have notes and does not consent, Prof. has NO claim, not fixed.

C. THE SECOND REQUIREMENT: The Originality Requirement in a "Work"

1. The 1976 Act does not define "an original work of authorship." Meant to codify judicial doctrine
2. The Constitution does NOT mention the word "original," but the terms "promote progress" and "author" suggest an originality requirement. Work must be original for protection, but need not be "novel." A work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.
 - b. 2 requirements about "**originality**" in 1976 Act. Set-out by **Feist**:
 - i. Work must be **independently created** by the author as opposed to copied by the author
 - ii. Work must possess some **minimal degree of creativity**: Originality threshold (all that is needed to get copyright protection is a "**Modicum of Creativity**").

1. Original contribution must be more than a trivial modification of what existed before (Balint).
2. BUT the degree is very low, it does not matter how crude, humble, or obvious
- iii. **Names, Titles, Slogans, Familiar Symbols or Designs and directions/Ingredients are NOT protected: OUTSIDE copyright law.**
 1. Monopoly concerns
 2. Edge of originality threshold is the HAIKU rule (smallest amount of poetry protected by copyright law)
 3. Minimum size principal, even if a 3 word title is creative and original, it is too short to cross the threshold of originality
- c. **Magic Marketing v. Mailing Servs. of Pittsburgh**
 - i. Company makes envelopes w/ certain fragmented sentences on it. Competitor is doing the same thing.
 - ii. Court holds that envelopes with the words, “Urgent, Open Now” FAIL to cross the originality threshold. In other words, they lack the amount of originality required to be determined copyrightable
 - iii. Fragmentary words and phrases are NOT protected—“urgent” does not cross the threshold AND you want to avoid giving individuals/corps a monopoly over frequently used terms (ie, Slim Fast Can: no © on ingredients list, or else anyone with similar ingredients couldn’t sell it, would be no Nestle Sweet Success)
 1. That was Magic Marketing’s goal: when companies try to use © to leverage themselves into a monopolistic position, they usually fail.
- d. **Bleistein v. Donaldson Lithographing Co.**
 - i. P Bleistein prepared three chromolithographs for advertisements of a circus owned by Wallace. P’s allege D’s infringements consisted in the copying in reduced form of the three chromolithographs. Dist Ct and CofA ruled for D on the ground that the chromolithographs were not w/in protection of the copyright law.
 - ii. SC reverses, with Holmes holding that posters, even advertisement posters, should be copyrightable. He gives natural rights justification: no matter how low

the grade of originality, as long as there is something human manifested in the work, it is original because “The copy is the personal reaction of an individual upon nature. Personality always contains something unique.”

- iii. Slogans, etc. not included because such things do not reflect personality or humanity
- iv. Holmes set the bar of originality LOW. Set the bar low not only as a matter of policy, but also b/c if there was a higher threshold, would put Judges in the dangerous spot of judging art. Never know what is going to be considered fine art in 100 years.
- v. Also rejects the argument against the poster because it is an ad: “A picture is nonetheless a picture and nonetheless a subject of copyright that it is used for an advertisement.” Distinction b/t commercial and non-commercial use is irrelevant.

3. Derivative Works (1)

- e. When is there a **derivative work** and when is there simply a **copy**?
 - i. A copy of the original work, but also containing elements not included in the original work.
 - 1. ie-turning a book into a movie.
 - ii. Simple infringement of an original work is a copy and complex infringement of an original work is a derivative work
 - iii. Requirements: In order to get a copyright for a derivative work, must have 1) permission of the original © holder (unless it is a “fair use”), 2) originality, and 3) fixation.
 - iv. However, if the original work is in the public domain and you make a copy and in doing so cross the originality threshold, you can get a copyright.
 - v. There is tension in the originality standard: **Alva Studios** and **Gracen**, w/ the former saying an exact duplicate is enough for © (artistry) but with the latter saying that it is TOO much like the original. Don’t seem reconcilable.
 - vi. Changes which are a matter of NECESSITY (Batlin, costume cases) aren’t measures of originality/creativity. Variations are **trivial**.
- f. **L. Batlin & Son v. Snyder**

- i. Object in question is the sculptural work, “Uncle Sam Bank.” It is in the public domain at the time of this case and Snyder wants a copyright of his plastic versions of the original bronze bank. He gets a registration from © office. Batlin now is trying to make cast iron Uncle Sam banks and S claims B is infringing his copyright. B sues S arguing that what S did with the bank was not original enough to cross the originality threshold in order to get ©
 1. Registration from © office means little in court, they do not really conduct an investigation
 2. **There is an interesting “who is the author” question here because S has an engineer, who works for a corporation make a prototype of the bank—who owns it, S, the corporation, or the engineer?
 3. Issue here is whether Snyder’s plastic reproduction has sufficient differences from the Uncle Sam bank in the public domain to warrant copyright protection...
 4. Court says although there are differences in minute details, **they are not enough to cross the threshold**, saying that many of the differences are not perceptible to the untrained eye. Majority raises the bar, creating the substantial variations test—Dissent thinks only distinguishable variation should be the standard
 - a. **Substantial Variation Test**: In the context of Derivative Works, the work must contain some **substantial, not merely trivial originality**, as might occur in the translation to a different medium...”
 5. Majority does not want to tie up something in © that should be available in the public domain. Would be able to “gum” up works.
- ii. **Alva Studios v. Winninger** (“hand of god”)
 1. Rudan sculpture itself is ©, and an *exact* downscaled reproduction is made. Reproduction is afforded protection.
 2. Court in Batlin distinguishes this case by saying the mini Rodin sculpture took a great