

COPYRIGHT LAW

FALL 2011

Cardozo School of Law

CRN 80907

Take Home Examination

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INTRODUCTION

This is a take-home examination.

Conditions and your professional commitments

Once you have picked up this examination, you may not discuss it with anyone prior to turning in your answers. Nor may you discuss the examination at ANY time with any student in the class who has not taken it. Nor may you collaborate on the exam.

Professor Hughes permits you to use any and all inanimate resources. **The only limitations on outside materials and 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 have complied with all relevant Cardozo School of Law rules.

You have 24 hours from the time you receive this examination until you return your answers to the “drop box” on the ANGEL system.

The Examination consists of two parts. Part I is a set of true/false questions. Part II consists of one essay problem with an 2000 word limit. With the Part II essay, Professor Hughes takes on no obligation to read beyond the word limit. **The illustrations appear at the end of this document AND/OR in separate documents called EXHIBIT A&B and EXHIBIT C.**

GOOD LUCK

PART I. TRUE/FALSE QUESTIONS

This part of the exam is worth 30 points. Each answer is worth 1.5 points. Note that there are 22 questions, so in the same spirit as the LSAT and other standardized tests, you can get 2 wrong and still get a maximum score 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 22, with “T” or “F” beside each number. Make sure these T/F answers are on a separate page from the essay.

If you are concerned about a question, you may write a note before your essay answer concerning that question [mark the section “True/False Comments”], but only do so if you believe that there is a fundamental ambiguity in the question.

SOME GENERAL QUESTIONS

01. In *Magic Marketing v. Mailing Services of Pittsburgh*, the court cites approvingly the U.S. Copyright Office's regulations concluding that words and short phrases, such as names, titles, and slogans, are not protectable under copyright law.
02. As discussed in class and on page 542, "fragmented literal similarity" is a kind of substantial similarity between two works in

which the defendant's work copies the structure, plot, or organization of the plaintiff's work, but does not directly copy or quote small elements of the plaintiff's work.

03. The "de minimis" doctrine is a special application of the fair use exception in 17 U.S.C. § 107.
04. In *Lotus Development Corporation v. Borland International*, the court concluded that while the Lotus menu command hierarchy was the means by which users controlled and operated Lotus 1-2-3, that command hierarchy was not an unprotected "method of operation" under copyright law.
05. In a 1903 decision, Justice Holmes cautioned judges in copyright cases that it would be a "dangerous undertaking" for them to try to make judgments of artistic merit or "worth" beyond what is absolutely necessary for determinations of originality.

A IS FOR ADELE

The clean-cut, gay, country western band, "The Indigo Boys" have released a new album of country western "covers" (re-recordings) of pop songs from Lady Gaga and Adele; the album is called "Adult, 21 – and born this Way". The album includes covers of Lady Gaga's *Born This Way* and Adele's *Rumor Has It*. Of course, in the Indigo Boys' cover versions there are often small word changes. "DJ Deadly Buda," a popular Los Angeles party DJ, is a big Indigo Boys fan and has sampled The Indigo Boys' sound recordings of both *Rumor Has It* and *Born This Way* in his own dance mixes. DJ Deadly Buda has released one of his dance mixes as a free download with the title *L'amour a besoin la foi* ("Love needs faith" in French).

06. If it is shown that the only changes in the *Rumor Has It* lyrics relate to changing the gender of the object of affection, this will help Indigo Boys establish their right to a compulsory license under 17 U.S.C. §115 for the *Rumor Has It* musical composition.

07. If DJ Deadly Buda can prove that his dance tracks are so heavily remixed that less than 10% of listeners can recognize the five (5) note sample he took from the Indigo Boys' *Born This Way* sound recording, this will provide a defense against a claim for infringement of the Indigo Boys' sound recording.
08. If the Indigo Boys qualify for a compulsory license under 17 U.S.C. §115 for their sound recording of *Rumor Has It*, then they are also entitled under §115 to stream this sound recording to their fans from their official website, www.indigopedia.com.
09. Even if the Indigo Boys are successful in their claim to a compulsory license for *Rumor Has It* under 17 U.S.C. §115, under the holding in *ABKCO Music v. Stellar Records, Inc.*, they will not be entitled to include the *Rumor Has It* lyrics in their CD liner notes.
10. Since "*L'amour a besoin la foi*" is a lyric from Lady Gaga's musical composition *Born This Way*, Lady Gaga will have a strong copyright claim against DJ Deadly Buda for the title he gave his free download.

B IS FOR BOWIE

In 1977, Mr. Bowie released an album called "*Heroes*". "*Heroes*" is one of his most influential albums and has been continuously available in record stores and online since its initial release. The cover of the "*Heroes*" album is **Exhibit A**; the album cover comes with downloads at iTunes and other internet vendors.

The photograph for the album was taken by the photographer Hariko Manjitu at a photo shoot early in 1977. Manjitu was hired and paid by Bowie, but Mr. Bowie does not have any written agreement about who owns the copyright. Although Manjitu took dozens of pictures of Bowie at the photo shoot, the particular pose for the photo used on the album cover was Bowie's idea. When Mr. Bowie sent Manjitu a copy of the album (Bowie is a very thoughtful guy), Manjitu sent back a note that said:

Dear David,

Congratulations and thanks for the chance to work with you. It's really a splendid photo – and you deserve all the credit. It was your amazing pose – the hands, the gaze, the fantastic jacket you selected. You really are the “hero” of that photo session.

Hariko

Mr. Bowie just became aware that a couple years ago a white rapper "Cex" released an album with the title "*being ridden*": the album cover is shown in **Exhibit B**. As with the album cover of "*Heroes*," the album cover of "*being ridden*" comes with downloads at iTunes and other internet vendors. It is also displayed when tracks from "*being ridden*" are played on streaming services.

[Assume that the copyright in the Manjitu photo/"*Heroes*" cover were properly secured under the pre-1976 Act rules.]

11. Under the analysis used in *Burrow-Giles Lithographic Co. v. Sarony*, the photo of Bowie taken by Manjitu will be copyrightable.
12. Using the reasoning in cases like *Arnstein v. Porter* and *Bright Tunes Music v. Harrisongs Music Ltd.*, a court will conclude that Cex had access to the album cover (and photograph) of "*Heroes*."
13. The facts available to us establish that Hariko Manjitu is the "author" of the Bowie photograph for purposes of copyright law under the analysis used in *Lindsay v. R.M.S. Titanic* and *Andrien v. Southern Ocean County Chamber of Commerce*.
14. If Cex is sued for infringement of the Manjitu photo/"*Heroes*" cover, then if there is no direct evidence of copying, the doctrine of "probative similarity" will be relevant to establish copying.
15. Even if the "*being ridden*" cover infringes the copyright in the Manjitu photo/"*Heroes*" cover, display of the cover over internet streaming services will not violate any 17 U.S.C. §106 rights.

C IS FOR COPENHAGEN

Copenhagen is a play by Michael Frayn that debuted in London in 1998 and then opened on Broadway in 2000. It ran for over 300 performances in each city; since then, the play has been staged in regional theaters in the US and UK. In 2002, the play was adapted into a BBC television movie starring Daniel Craig and Stephen Rea; the BBC obtained rights only to make one television movie and Frayn retained all other audiovisual rights.

Copenhagen is based on a World War II meeting that occurred in 1941 – in German-occupied Denmark -- between German physicist Werner Heisenberg and Danish physicist Niels Bohr. Heisenberg's intent in the meeting has been a subject of historical speculation: was he trying to send a message to the Allies (through Bohr) about the German effort to build an atomic bomb? Was he telling Bohr that he was intentionally slowing the German effort (by doing bad science)? Or was he trying to recruit Bohr? The Frayn play is set in "heaven" where Heisenberg, Bohr, and Bohr's wife – who was also present at the enigmatic meeting – try to decide what really happened. In the research for his play, Frayn studied memoirs and letters and other historical records of the two physicists.

A small-budget independent film has just opened in New York called *When Others Listen*,¹ both written and directed by Helga Headroom. The film is a fictional version of the 1941 meeting between Heisenberg and Bohr, then the Allies' interrogations of Heisenberg after the war. Many of the things said by Heisenberg and Bohr in *When Others Listen* are extremely similar to lines of dialogue in the Frayn play. If Frayn sues the Helga Headroom (and her production company) for copyright infringement, which of the following are true and which of the following are false.

16. If it is shown that the discussion between Bohr and Heisenberg in *When Others Listen* follows the same order of topics and Bohr's

1 The name refers to the fact that Heisenberg was afraid that the Nazis were monitoring him and this contributed to the enigmatic, mysterious nature of what he was willing to say to Bohr.

wife enters into the discussion between Bohr and Heisenberg at approximately the same points as in *Copenhagen* and if there is no historical evidence as to what really happened on these specifics, this will increase the likelihood that a court will find infringement.

17. If Frayn confidently claimed in a 2003 interview that his research was so thorough that "[t]he actual words spoken by [the] characters are entirely their own," this will be helpful to his case against Headroom for infringement based on similarity of the dialogue between *Copenhagen* and *When Others Listen*.
18. If it is shown that Frayn's play was billed in one city as "a historical re-enactment" and the flyers for another production said "learn what really happened," all things being equal, this is helpful to Frayn's case against Headroom.
19. Based on the available facts, the BBC has their own copyright in the television film *Copenhagen* as an authorized derivative work.

SOME MORE GENERAL QUESTIONS

20. Under the "abstraction, filtration, comparison" test elaborated in *Computer Associates v. Altai*, considerations of efficiency, interoperability, and industry standards can all limit the protectable expression in a computer program.
21. In *Fonovisa, Inc. v. Cherry Auctions, Inc.*, the swap meet operators were not held vicariously liable because, although they suspected infringing activity, they had no particularized knowledge of infringements as they occurred and the swap meet stalls had "substantial non-infringing uses."
22. Under the "abstraction, filtration, comparison" test elaborated in *Computer Associates v. Altai*, there may be infringement when the defendant copies the original structure, organization, and/or sequence of the plaintiff's software, even if the defendant copies neither source nor object code.

If you are concerned about a T/F question, you may write a note at the before your essay answer concerning that T/F question [mark the section “True/False Comments”], but only do so if you believe that there is a fundamental ambiguity in the question.

PART II – A BAD APPLE?

(70 points – 1700-2000 words)

Apple not only has fantastic products, they also have superb manuals, designed and assembled by top-notch teams of artists, graphic designers, and copy writers. The 2010 manual for the MacBook Air is exemplary of this. Exhibit C shows the first fourteen (14) pages of the MacBook Air 2010 Manual (hereinafter “the Manual”), which is more than enough for you to conduct this analysis.

Assume that Max Headroom (brother of Helga) was the team manager for creation of the Manual. The Manual’s drawings were all done by graphic artist Takila Mockingbird while the copy (the prose) was written by Max. The layout [arranging the drawings and prose on each page of the Manual] was done by Bonnie Sélavy.

Max has been a salaried employee of Apple for five years; he has a bi-weekly salary, health care benefits, and a pension plan. Takila and Bonnie have regularly done projects for Apple for six and eight years respective, but neither receives a salary, health care coverage or pension benefits. Each is paid per-project, although each has an assigned cubicle at Apple’s Cupertino headquarters and did most of their work on the Manual on Apple equipment at Apple’s headquarters. Max has found a written, signed agreement between Bonnie and Apple in which Bonnie states “I agree that all my work for Apple in relation to the Manual will be a work-made-for-hire.” He has not found the corresponding agreement for Takila, although accounting found the cancelled check showing her payment for “MacBook Air Manual drawings.”

The Manual is given to every purchaser of a MacBook Air. It is also available free to anyone – regardless of Apple computer purchase -- at http://manuals.info.apple.com/en/macbook_air_users_guide.pdf

Apple protects its brand vigorously. With the tremendous success of the iPod, iPhone, iPad, and MacBooks, Apple has doggedly pursued a number of companies engaged in dubious practices that might deceive customers or cut into Apple's sales (and profits).

Fruit Basket Computers ("Fruit Basket") is a company that buys used Apple computers, repairs and refurbishes them, then resells them. Apple has determined that it has no cause of action that can directly stop Fruit Basket from these repair and resale activities.

When it resells a used MacBook Air, Fruit Basket provides the purchaser with a new paper copy of the Manual, reproduced by Fruit Basket on top quality imported paper [indeed, better than the paper Apple uses]. To make these high quality copies, Fruit Basket uses an internet service called Popular Bindings ("Popular"); Popular provides an interface where a customer can upload any .pdf file, establish all kinds of printing and binding parameters, and order a specified number of copies – all with a credit card. Popular does not ask its customers any questions about copyright in the uploaded .pdf files.

Apple would like a legal assessment of whether they can successfully use copyright law to stop reproduction and distribution of the Manual by Fruit Basket (and Popular). From prior interaction with Fruit Basket, Apple believes that Fruit Basket will resist vigorously and that Fruit Basket's lawyers will use every available argument to contest [a] the copyright in the Manual, [b] Apple's ownership of the Manual, and [c] Fruit Basket's infringement of the Manual. They expect Popular will be equally vigorous in their arguments. So, Apple want a short, preliminary memo assessing the situation based on your expertise in all these areas of copyright law.

END OF EXAMINATION

Thanks for an enjoyable class. Happy Holidays to all.