

- Problem One: Penny and the DNC
 - Valid Copyright?
 - Possible Works
 - Photo
 - Letter
 - Because the letter as work was pretty buried, don't penalize too much for omitting it.
 - One point for spending any time at all on originality and fixation of letter, which are easy. 1
 - Originality 1
 - Independent Creation
 - One point for flagging, but not in issue
 - Modicum of Creativity
 - One of the most detailed issues in problem.
 - Issue 1: Sufficiently creative during snapping of photos? 5
 - 5 = very deep analysis; 4 = good args for both sides; 3 = good args but incomplete; 2 = decent args but missing something; 1 = minimal discussion.
 - Arguments against modicum of creativity
 - "Blind" in two senses (no glasses and held camera aloft) so not even the typical "framing" of a photographer.
 - Three photos per second suggests little discretion.
 - Should fact that she won Pulitzer matter???
 - Arguments in favor of modicum of creativity
 - Burrow-Giles (Oscar Wilde case)
 - "Expensive" digital camera could cut both ways.
 - Expensive may be code for "fully automated" => fewer authorial choices.
 - Expensive may be code for "much more control to you" => more authorial choices.
 - Moved throughout crowd, so some creative choices.
 - Issue 2: Sufficiently creative during computer session? 3
 - Don't confuse sweat of the brow.
 - But Feist: Selection, Coordination, Arrangement.
 - Selection: 100 of 30,000 is tiny %.
 - Subsequent editing
 - Cropping, brightness, tint. An hour of work.
 - But might be a derivative work copyright (?) so maybe require Gracen-like originality
 - Fixation 1
 - Not much of an issue. Fixed in digital camera. Fixed again when printed.
 - Type of Work 1
 - PGS
 - Subtotal 12

- **Infringement**
- **Note: This question is ripe for some implied license / contract questions, but we didn't cover it this year, so assume those away.**
- **Potential Acts of Infringement with 106 Rights implicated** 3
 - **Third point for especially clever issues spotting about 102/103 rights infringed**
 - **Demetrius publishes story, allegedly infringing letter**
 - **Reproduction**
 - **Adaptation**
 - **Clever twist: text of article adapts photo?**
 - **Distribution**
 - **Public Display (in newsstand)?**
 - **Demetrius publishes photo, allegedly infringing photo**
 - **Reproduction**
 - **Adaptation**
 - **Distribution**
 - **Public Display (in newsstand)?**
 - **Demetrius hangs photo in gallery and sells print.**
 - **Public Display**
 - **Must discuss "public" which should be clear here.**
 - **Distribution**
- **Reproduction Analysis is Key. If infringes this right, probably adaptation and distribution as well.**
- **Copying Prong is conceded for both.** 1
- **Improper Appropriation?**
 - **Letter** 1
 - **We need many, many more facts.**
 - **But probably a loser?**
 - **Photo** 1
 - **Literal reproduction, so not really at issue except...**
 - **Only one-quarter of photo.**
 - **Also, likely smaller, much less quality.**
 - **But these are really both better analyzed in Fair Use**
 - **Still, probably prima facie infringement**
- **Defenses other than Fair Use and First Sale?**
 - **De minimis/Ringgold for both letter and photo** 1
- **Subtotal** 7
- **Fair Use**
 - **1. Purpose and Character of the use** 3
 - **News reporting (in preamble)**
 - **Fact that story has transfixed nation makes this stronger first amendment argument than Ford memoir.**

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Points

- Then again, this is just a story about a human-interest story, so maybe not within core. (Third point probably requires this bullet point)
- **Transformative Use**
 - Not simply "consumptive".
- **Commercial**
 - Esp. if front page story, so marketing.
- **2. Nature of the Copyrighted work** **2**
 - **UNPUBLISHED and First publication rights marketed.**
 - Must discuss Harper & Row
 - **Factual, so outside core of copyright**
- **3. Amount and substantiality of the portion used** **2**
 - **One-half of photo but easy to make out.**
 - **No facts about heart.**
 - **Miniaturized (gone from "large print" to photo near article.)**
 - Maybe turns on whether online version allows you to enlarge?
- **4. Effect of the use on the potential market** **2**
 - **Easy to measure: Actual effect. \$15k contract lost replaced by \$5k contract.**
 - **Should it matter if the NYT overreacted? Maybe this peek doesn't satiate public desire.**
- **Point for deciding who wins each factor and for who wins overall especially well** **1**
- **Point for analyzing letter as well** **1**
- **Subtotal** **11**
- **First Sale**
 - **Two section 109 defenses** **1**
 - **Get point only for mentioning both**
 - **Display: 109(c)**
 - **Sale: 109(a)**
 - **Main Issue: These defenses available only to "owners"** **2**
 - **Again, we didn't really discuss implied license, but two points because they should be able to start to flesh out the idea.**
 - **Trick Question: The Frame** **1**
 - **If a frame is an adaptation, may lose first sale.**
 - **But all of the circuits have agreed that framing does not make a DW, even though it's hard to tell why not in the 7th Circuit?**
 - **Point for noting that Denver Post won't be liable for any of these acts, which seem not to fit within respondeat superior nor any other theory of third-party liability** **1**
 - **Don't give the point if they conclude otherwise, unless they lay out a good case for ruling the other way.**
- **Subtotal** **5**
- **PROBLEM TOTAL** **35**
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- Problem Two: The Sampsons
 - Key Organizational Points
 - The copyrightability of characters comes up in both sub-parts. You can either discuss the general concept at the outset, or discuss the different rules in each subpart
 - Bonzo is about visual depiction (mostly)
 - Cosmo is about character traits (mostly)
 - For these questions, it doesn't really make sense to assess copyrightability in a vacuum, because it's the parts in common that matter.
 - But for Cosmo, need to discuss originality plus in a vacuum.
 - Points in Common
 - Valid Copyright
 - Fixation 1
 - Should not be a problem. Movie and drawings in a portfolio. Both fixed.
 - Originality for Characters
 - Independent Creation
 - Subsumed in the Infringement analysis for both.
 - Characters can have copyright 1
 - In Visual Depiction
 - In Character traits
 - Bonzo
 - Originality 4
 - More on this in the infringement/improper appropriation section (but can pick up the points in either place)
 - Visual Depiction
 - Almost certainly detailed enough to be copyrightable
 - Cartoon characters are easily sufficiently creative to satisfy modicum test.
 - Character
 - More developed, the more they can be copyrighted
 - May say something about Gamin
 - Talk about story-being-told test
 - Also, talk about how this is merely one character among huge cast, so less likely distinct enough?
 - A little odd that my facts say she included "drawings of an alcoholic clown"
 - Mixing the character and the visual.
 - Seems a little indistinct (alcoholic circus clown who lives under a bridge)
 - Drawings...probably not copyrightable
 - Idea/Expression or Merger -- only so many ways to draw a clown's face.
 - Also, alcoholic => under a bridge.
 - Might need more facts
 - Type of Work 2

- PGS
- Literary (character)
- NOT a motion picture
 - Donna's is a MP.
 - But Betsy's is not (no impression of motion).
- SUBTOTAL 8
- Infringement
 - 106 Rights Implicated 2
 - Reproduction
 - Adaptation
 - Distribution
 - Public Performance
 - For character only
 - Public Display
 - Character and PGS
 - Copying Prong
 - *** Key to problem.
 - Access 4
 - Four for deep analysis; Three for good analysis; Two for good but lacking analysis; One for minimal analysis.
 - Test: (Note 5 in copying section)
 - Mere possibility not enough; reasonably possible that the paths of the infringer and the infringed work crossed
 - Courier with successful delivery
 - But who signed for them? Not in facts.
 - Delivery to Agent
 - Like Sayles case or Bouchat.
 - Delivery to Home
 - Probably stronger than the agent cases.
 - Probative Similarity 4
 - Four for deep analysis; Three for good analysis; Two for good but lacking analysis; One for minimal analysis.
 - Should discuss rule
 - Probably need some description of what the test is.
 - MUST discuss **sliding scale** for most of the points.
 - May be in access or may be separate section
 - Expert testimony is allowed
 - Applied: uncanny resemblance
 - Probably dispenses with a lot of access requirements.
 - Applied
 - Should make a convincing case for probative similarity
 - Best answers will cite cases like Ty or Gibbs
 - Maybe even striking?

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Points

- Even if some of the facts/other uncopyrightable aspects present, still can go to probative similarity.
- **Improper Appropriation Prong** 4
 - **Experts**
 - Some courts allow experts to analyze the "protected expression" analysis but not the "substantial similarity" analysis.
 - **Rule**
 - Some attempt to state it.
 - **Relevance of part not taken?**
 - Body and clothing bear no resemblance.
 - Best answers will deal with this, perhaps comparing Steinberg.
- **SUBTOTAL** **14**
- **Cosmo**
 - **Originality**
 - **Type of Work** 2
 - Motion Picture
 - Literary Work (character)
 - PGS(cartoon)
 - Key: ** DW -- derivative of material in public domain
 - **Visual Depiction / Character** 1
 - Most of what is said for Bonzo applies here, but one point if something additional and interesting said here.
 - **Derivative Work Originality Plus** 5
 - Five for deep analysis; Four for good analysis; Three for good but lacking analysis; Two for flawed analysis; One for minimal/bare analysis.
 - **Key to problem.
 - Gracen-like situation
 - The visual depiction sounds a lot like 12th C. Merlin.
 - So what about snack-eating, nervousness, Britain/Long Island, Hogwarts line?
 - Talk about Gracen standards (and Posner standards in note following)
 - **Best answers will discuss**
 - Why we require originality plus (prevent overlapping claims)
 - How standards differ or don't differ because based on public domain.
 - should or should not.
 - overlapping claim concern decreases, but lets Cisneys of world take things out of PD.
 - **If any copyright, probably thin.**
 - **SUBTOTAL** **8**
 - **Infringement**
 - **Copying**
 - **Access** 1

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Points

- Students will probably assume that Cisney = Disney => very famous, but not really in facts.
- So most you can say is we need to see more.
- **Probative Similarity** 2
 - Few facts to discuss.
 - Stating rule, this sure seems like it's sufficient, because the list of four things is pretty improbable.
 - But maybe a bonus point for talking about how they really aren't that surprising (e.g., all wizards would hate Hogwarts' sell-outs!)
- **Improper Appropriation** 4
 - If any copyright, thin.
 - For substantial similarity, look at the list of four things in common and ask whether it would be copyrightable
 - Levels of abstraction test may come in
 - Best answers will talk about how probative similarity not the same as substantial similarity in this example.
 - Under subjective/market for the original work, hard to believe that Cosmo diminishes Cisney's market for Merlin (e.g., DVD sales)
 - Might also talk about whether the overlap (four things) is itself copyrightable
 - Perhaps discuss story-being-told test.
- **SUBTOTAL** **7**
- **PROBLEM TOTAL** **37**
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- **Problem Three: Fair Use Reform**
 - **Factor to remove** 5
 - **Factor to add** 5
 - **Writing style** 5
 - **PROBLEM TOTAL** **15**