

FINAL EXAMINATION
COPYRIGHT
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Instructions:

Please read these instructions carefully before proceeding.

1. The examination consists of four (4) pages, including this one. You will find three questions. Please make sure that your copy is complete and that you answer all three questions.
2. You have three hours (180 minutes) to complete the exam, and the exam is worth 180 total points. You should devote approximately one hour to each question. **Each question is worth 60 points or one-third of the total score.**
3. Answers will be graded based on content, clarity of expression, and organization. I suggest that you spend time outlining your response before you start to write. Where information is not provided that would be relevant to the analysis, feel free to explain how different facts would lead to different outcomes.
4. Assume that all cases that were pending when we discussed them in class are still undecided. If any cases have been decided or statutes have been changed during the course of the semester, you are not responsible for knowing the final rule, result or reasoning, and you will gain nothing by talking about the new decision or statute.
5. Since this is a class about entertainment and technology, some of the fact patterns may be based on real creative content, technology, and products. You will not be rewarded or penalized for facts about the actual content, technology, and products that are not presented in the exam questions. Feel free to add these types of details if you think they improve the readability of your answer.
6. In answering these questions, you may consult any written materials you wish.
7. Please type your answers or write them neatly. Mark your answers with your exam number, not your name. If you are handwriting the exam, please write on only one side of each page.
8. You must turn in these questions with your answers.
9. Good luck!

PROBLEM ONE (One Hour)

Penny is a freelance photojournalist. In August 2008, she attends the Democratic National Convention in downtown Denver on a press pass. During the convention, multiple, large-scale protests erupt into violent clashes between protesters and police in the streets around the convention hall. The nation is transfixed by the stories and images of the conflicts, which dominate national news the entire week.

On the final night of the convention, Penny is outside the hall, snapping photos, when she is knocked to the ground. The force of the fall knocks her glasses off of her face, destroying them. Nearly blind, she manipulates the settings on her expensive digital camera to give her the best chance of capturing fast motion in low light. She also sets the camera for “rapid fire mode,” meaning it will snap three photos per second when the shutter is depressed. Then, she spends hours pressing the shutter, often stretching her arm up to get the camera above the crowd. After three hours of doing this, moving to various spots in the crowd, she ends up with more than 30,000 images.

That night, she spends hours at her computer poring over the photos. She finds about 100 photos that are excellent, and she identifies one in particular that is incredible. The photo is a bit off-center, so she uses a photo-editing program to crop it, and she also adjusts the brightness and tint. After an hour spent editing the photo, it is perfect, the best photo Penny has ever produced.

Penny is worried about sending digital copies of the print to newspapers, because she has had problems in the past with digital files getting leaked to bloggers on the web. To try to avoid this, she makes ten large prints of the photo. She sends three of these prints via bike messenger to three Denver-based newspapers. She ships the remaining seven prints via Fed Ex to national newspapers. With every photo, she sends a cover letter, describing the unusual story about how the photo was made, and offering to sell the first publication rights to the photo. The newspapers recognize the quality and significance of the photo, and a bidding war begins. The New York Times bids the most, offering to pay \$15,000 to Penny for the rights.

An editor at the Denver Post named Demetrius is disappointed to have lost the bidding contest, but he thinks that the tale of the creation of the photograph and the way it had been marketed to avoid web piracy is itself a story that would interest his readers, especially given the public’s insatiable interest in anything having to do with the convention clashes. He quickly writes an article, publishing it the next day in the print and online versions of the Denver Post. Along with the story, he publishes a photo of himself, sitting at his desk. In the photo, a copy of Penny’s print sits atop the desk. The print takes up only one-fourth of the area of the photo, and half of the print is obscured under Demetrius’s arms, but the exposed part is clear and easy to make out.

Once the New York Times learns about the Denver Post article and photo, it cancels its contract with Penny. Although Penny argues to them that the small, partially-obscured view of the photo in the Denver Post does not diminish the value of the photo, the Times disagrees, telling Penny that she can no longer live up to her promise of first publication rights. Other newspapers evidently agree with the Times, offering far less money in the second round of bidding. Finally, the Chicago Tribune agrees to pay \$1,500 for the rights to the photo.

In the meantime, Demetrius frames the copy of the print in his possession and hangs it in a photo gallery in downtown Denver for three weeks. A buyer offers to pay Demetrius \$2,500 for the print, and Demetrius agrees to sell it.

Later that year, Penny wins the Pulitzer prize for journalism for the photo. Despite this great success, Penny still harbors ill will toward Demetrius and the Denver Post. She hires the law firm where you work as a junior associate. She wants to sue both Demetrius and the Denver Post for copyright infringement. The partner managing the case asks you to write a memo assessing the strength of both her claims and any defenses which may be raised. **Do not discuss remedies.**

PROBLEM TWO (One Hour)

Donna is the creator and sole producer of a smash-hit television cartoon called “The Sampsons” about the travails of a dysfunctional family in a small town. The show has run for five years. It is best known for its huge cast of oddball characters. Although Donna is the primary creative force behind The Sampsons, a controversy has recently arisen about the authorship of two characters:

Bonzo. Bonzo is an alcoholic circus clown who lives under a bridge. Ever since Bonzo first appeared on the show in season three an aspiring cartoonist named Betsy has claimed that Donna stole Bonzo from her. A few months before Bonzo’s debut, Betsy had sent two copies of her portfolio to Donna, one to Donna’s house, the other to Donna’s talent agency. According to courier records, both packages containing the copies of the portfolio were successfully delivered. The portfolio highlighted several drawings of an alcoholic circus clown sitting beneath a bridge. Experts have remarked that the face of Bonzo bears an uncanny resemblance to the face of the clown in Betsy’s portfolio, but these experts have also concluded that Bonzo’s body and clothing bear no resemblance whatsoever to Betsy’s creations.

Cosmo. Cosmo is the town wizard. He wanders around town wearing a flowing white beard, purple robes and a pointed hat, casting spells and giving sage advice. Donna says that Cosmo was modeled after Merlin, the wizard from the ancient legend of King Arthur. Visual depictions of Merlin wearing a flowing white beard, purple robes and a pointed hat date back to the twelfth century. Merlin has appeared in many works since then, most famously in a feature-length cartoon movie called “The New Adventures of Merlin” produced a decade ago by the Cisney Corporation. Cosmo and Cisney’s Merlin have many distinctive features in common, but most of these shared features are also present in the ancient depictions of Merlin. Some features shared by Cosmo and Cisney’s Merlin have never before appeared in depictions of Merlin: both eat snacks (cookies for Cosmo, brownies for Merlin) when they are nervous, were born in Britain but grew up in Long Island, New York, and refer to the wizards at Hogwarts School as “sell-outs.”

Donna has made millions from the show, and Betsy and the Cisney Corporation sue her for copyright infringement. Donna has hired your firm to defend her. The partner on the case asks you to write a memo assessing the likelihood Donna will be found liable in the two suits. Another associate has been assigned to write a separate memo with **four issues that you should not address** in your memo: fair use, remedies, laches, and the statute of limitations.

PROBLEM THREE (One Hour)

In 17 U.S.C. § 107, courts considering the fair use defense are instructed to consider at least four factors: “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.”

First, if forced to choose, which factor would you remove from the list? Next, write a new factor for courts to consider. Defend both of your choices. The point of the question is for you to identify flaws in the way fair use is defined and administered, and to recommend improvements.