

EXAM NUMBER: \_\_\_\_\_

## Problem One: Wordsmith v. Newbie

### Call of the Question

We represent Newbie for defense.

Form: Memo to Partner, so tone matters.

But because asked to assess the strength of William's case, no need to be persuasive.

*Objective memo.*

No Fair Use

### Protectible Copyrighted Work

#### Identifying works

**[One point]**

*Suit is only about character, but one point for noting possible confusion over which work embodies the character:*

Synopsis (before Newbie got involved, so in WW's interest to focus on it at trial, before joint work issues arise.)

Final screenplay

Finished movie

#### Type of work

**[One point]**

*Must discuss at some point (many options for placement) how characters are copyrightable.*

Both on page and screen, but just the character is at suit.

#### Originality

##### *Independent Creation and Fixation*

**[One point]**

*Must discuss both*

Although some confusion about authorship (see following), nothing to suggest failure of these prongs.

##### *Modicum of Creativity / Idea-Expression*

**[Four points]**

*Competing tests*

CA9: Story being told (Sam Spade)

CA2: Character delineation test

*Applied*

Story being told

Sure seems like.

Movie is all about him

*Placed in elaborate, slapstick murder mystery plot, but that's allowed.*

*Delineation*

Sure. Says so right in facts: "very distinctive, very memorable."

Some of it is like other eccentric millionaires

*Scenes a faire*

Fourth point only if comparison directly to James Bond. (e.g. he's a spy, but unlike most spies...; ours is a millionaire, but unlike most millionaires...)

Facts: hands clapping; inexplicable accent.

Or, if you mention list from MGM: Rocky, Sherlock Holmes, Tarzan, Superman

Or, if you mention TBS/Wrestling case

**[Subtotal for Protectible Copyrighted Work]**

#### Authorship

Joint Work/Co-authors?

Comment [Ohm1]:

1

Comment [Ohm2]:

1

Comment [Ohm3]:

1

Comment [Ohm4]:

4

Comment [Ohm5]:

7

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**Probably the most important set of issues being tested.**

**Intent of Co-authors**

[Five points for entire discussion]

Mini-Rubric

*In-depth; beautifully organized; well-written; convincing = 5*  
*Really well done, but at least one major, conspicuous omission or flaw = 4*  
*Hits most of the key points, but glosses over almost things too quickly = 3*  
*Misses at least one big argument, but otherwise competent = 2*  
*Barely mentioned joint work = 1*

Tests:

*Section 101, Definition of "joint work": "with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole"*

*Lee: Both parties must intend each other to be joint authors.*

Facts here very similar to *Lee* (Malcolm X case) and *Larson* (Rent case): Bad for our client

*Dramaturg/Movie consultant similar in mentor/protégé relationship to auteur.*

Facts to Apply

*Facts good for our client*

*Facts call him a "collaborator." And "good team."*

*Different skills to process.*

*Seemed collaborative.*

*Niels' contribution seems important/non-trivial.*

*Very little fleshed out until Niels joined.*

*Wordsmith hadn't had a hit in years. Well past his prime.*

*NN named him Worthalot.*

*Facts bad for our client*

*Billing test: billed to Wordsmith alone. "Assisting Mr. Wordsmith."*

*Our client didn't object, but maybe should have.*

*Niels never made this much before on a single job. (And cashes the check)*

*No additional compensation.*

*Award winning/Talent/Fame versus young and promising.*

*Unknown facts*

*Decision making authority (seems shared here)*

**Requirement of Independently Copyrightable Contribution**

[Two points]

Majority rule is each must bring something independently copyrightable. Some courts have held otherwise.

Here: Analysis will build on general discussion of copyrightability of characters.

*So if not yet discussed, some of these points may go elsewhere in outline.*

*Niels contributed: depth, detail, and complexity.*

*These sound like they are copyrightable, given low standard for creativity.*

*Wordsmith contributed broad strokes of character and plot.*

*If anything, these sound like ideas, not expression. WW might be in more trouble (but not likely) that our client under this part of test.*

**Work for Hire?**

**Alternative one: Employee/CCNV**

[Two points]

Test relies on common-law notion of agency (CCNV)

Probably not even close.

Some key facts

Comment [Ohm6]:

5

Comment [Ohm7]:

2

Comment [Ohm8]:

2

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Place of work: Sometimes at WW's estate  
Sometimes by fax and email  
Writer is a skilled position  
No benefits or taxes  
Payment at the very end/lump sum  
Single project  
Large payment  
No other facts present.  
But entire tone seems collaborative, not employer/employee.  
**Alternative Two: Specially ordered or commissioned.**

[One point]

Can't satisfy this alternative, because no contract.

*Check being cashed doesn't count, and doesn't say anything about W4H anyway!*

Still can salvage the one point for discussing motion pictures under this alternative.

*Part of express list.*

*Lee talks a little about it.*

*Also, this is the script and character, which isn't really the movie itself.*

**[Subtotal for Authorship]**

### Infringement

Potential Acts of infringement with 106 rights implicated

[Two points]

**Newbie writes new one-man play**

106(1) Reproduction in copies

106(2) Preparing Derivative Work

106(3) Distribution (assuming distributed)

**Newbie performs one-man play**

106(4) Public performance

*Small issue: Does character fit within list in 106(4)? Almost definitely: Literary; dramatic; motion picture*

**Infringed?**

**Copying prong will be conceded so no points**

**Substantial Similarity?**

[Two points]

How much did Newbie take?

Lots of new details but "No plagiarist can excuse . . . by what he hasn't taken."

*Also why "Rave Reviews" doesn't help.*

**Possible Implied License?**

[One point]

*Perhaps NN had some implied license to do this kind of thing, but without more facts, not much to go on.*

*But because this isn't really in the facts, only give the point if done with great specificity and care.*

**[Subtotal for Infringement]**

**[Total for Problem One: Newbie]**

Comment [Ohm9]:

1

Comment [Ohm10]:

10

Comment [Ohm11]:

2

Comment [Ohm12]:

2

Comment [Ohm13]:

1

Comment [Ohm14]:

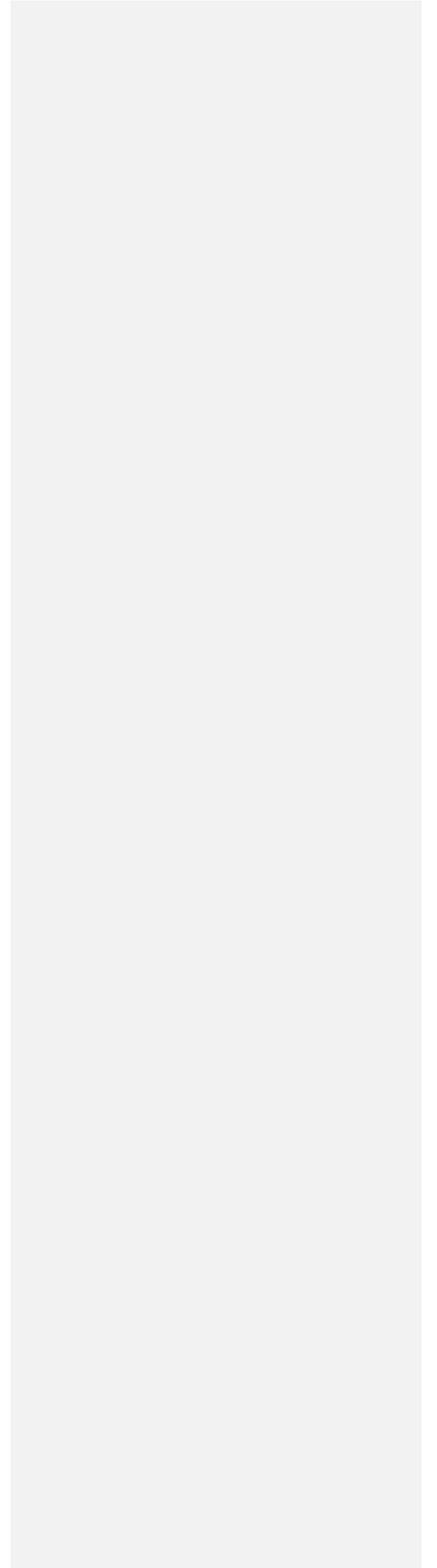
5

Comment [Ohm15]:

22

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\_\_\_\_\_



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## Problem Two: Waldorf v. FashionHound

### Call of the Question

Clerk for District Court Judge

Form: Memo assessing strength of E's case. Form: Memo to Judge

Because asked to assess the strength of Eleanor's case, no need to be persuasive.

*Objective memo.*

Remember that E has asked for damages and injunction, so include remedies discussion

### Important Prefatory Note about Technology

At several key junctures, students were likely confused about how the website worked, so be generous about awarding full points if the only reason for a misanalysis was a technical misunderstanding

### Protectible Copyrighted Work

Identifying works

**[One point]**

**(A) Clothing and Accessories**

As depicted in photos found on:

*Her website*

*Fashion Magazine websites*

*Gossip websites*

**(B) The Photos on her website**

Section 102 Categories for Work

**[One point]**

**Clothing/Accessories (A)**

PGS

**Photos (A)**

PGS

Originality

**Originality (Independent Creation) and Fixation**

**[One point]**

*Must discuss both*

Nothing to suggest failure of these prongs for either class of works (A) or (B).

**Modicum of Creativity and Idea/Expression**

**[Two points]**

But second point only if more than merely flagging.

For photos

*Some are copyrightable*

*Depends on how many creative choices are made.*

*With "carefully-crafted contexts," we'd expect some creativity. Also, Million-dollar budgets suggests lots of creative choices (one hopes)*

For clothes?

*Perhaps some point about the simple trends of modern fashion?*

**For Clothes and Accessories (A), Useful Article Doctrine**

**[Two points]**

*Test: Section 101 definition of "useful articles"*

*Physical Separability*

*Conceptual Separability*

*Because we don't have any facts about what these look like, not much to say.*

Comment [Ohm16]:

1

Comment [Ohm17]:

1

Comment [Ohm18]:

1

Comment [Ohm19]:

2

Comment [Ohm20]:

2

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Second point only for finding something relevant to say, particularly if they cite Kieselstein-Cord and Carol Barnhart, both of which involved fashion to some extent.

**Authorship**

**[One point]**

One point for noting that although EW doesn't own the copyright to the photos found on other sites, she does continue to own the copyright in the clothes themselves.

Comment [Ohm21]:

1

**Work for Hire**

**[Two points]**

Not many facts on which to comment.

But some facts seem relevant to deciding employer/employee relationship under CCNV

Comment [Ohm22]:

2

*Pro Employment*

Huge budget (\$1M) (which way does this cut?)

Use of word "hiring"

"Carefully crafted contexts" and "expensive photo shoots"

*Anti Employment*

Highly skilled professions (photographers and models)

Maybe something about industry custom with photographers (freelancers) and models?

**[Subtotal for Protectible Copyrighted Work]**

Comment [Ohm23]:

10

**Direct Infringement and Defenses**

**Organizational Point**

*Some might order third-party liability before direct liability (because so predominant in facts)*

*Others might order direct liability (including fair use) before third-party liability.*

*Both okay.*

**Potential Acts of Infringement with 106 rights implicated**

**[Three points]**

One for each action, but not enough simply to flag it; must note most of the 106 rights properly

**User uses scissors to upload copy of image to virtual closet.**

"On the Internet, everything is a copy"

106(1) Reproduction in copies

106(2) Preparing Derivative Work

106(3) Distribution

**User uses D's software to build a fashion collage**

106(1) Reproduction in copies

106(2) Preparing Derivative Work

Extra point if here or anywhere else says something about mash-ups and derivative works

**User publishes completed fashion collage to personalized page on D's website**

106(1) Reproduction in copies

106(2) Preparing Derivative Work

106(3) Distribution

106(5) Public display

**Infringed?**

*Copying prong will be conceded so no points*

*Substantial Similarity?*

Comment [Ohm24]:

3

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[One point]

Probably conceded, but perhaps not if it's just a slice of the photo or just a part of an article of clothing.

**Defense: Fair Use**

*The factors probably need to be assessed slightly differently for each work (photos vs. clothes) but maybe also for each infringing act (upload, collage, publish).*

**Factor One: Purpose and Character of Use**

[Three points]

Transformative?

*Sure seems like it.*

*Both in the "transforms the thing itself" sense*

*Whole point of collage*

*And also the "transforms the purpose" sense a la Perfect 10*

*No longer about advertising at all.*

*Counter: Same exact purpose—showcasing the clothes*

Commercial?

*It's complicated.*

*For the users, mostly noncommercial.*

*Maybe some of the most famous ones turn this into revenue.*

*For FH, it's commercial, but is this relevant to the fair use defense of users?*

*Good place to spotlight the interplay between third-party defenses and fair use.*

Bad Faith?

*Scissors might suggest bad faith.*

Criticism and Commentary

*Akin to Parody.*

**Factor Two: Nature of the Copyrighted work**

[One point]

Shares features in common with both fictional (fanciful) and non-fictional works (cuts in favor of FU)

Thin (cuts in favor of FU)

**Factor Three: Amount of Substantiality of the Portion Used in Relation to the Copyrighted work as a whole**

[One point]

Probably takes most of P's work.

*Unless "work" is defined as a season's collection or an entire photo.*

But ends up in a collage, and some courts (Harper & Row) look at how much of D's work is infringing.

Also, 10,000 collages have her designs

*Not the same as saying 10,000 works have been used.*

Qualitative: The heart?

**Factor Four: Effect of the use upon the potential market for or value of the copyrighted work**

[Three points]

What is the market?

*You're not in the market of selling these images at all!*

*You pay people to make them so that you can advertise, but you're not an advertising service.*

*Is market for clothing relevant?*

*E doesn't sell clothes on her website, so her photos are primarily marketing tools to drive people to the boutiques*

Comment [Ohm25]:

1

Comment [Ohm26]:

3

Comment [Ohm27]:

1

Comment [Ohm28]:

1

Comment [Ohm29]:

3

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*Traffic driven away from EW's site?*  
*Final possibility: market for clip art images to sell for use in fashion collages.*  
*Like in the Google Image Search case*  
*One can imagine some click-to-pay scheme.*

Effect on market

*For clothing*

*It is complicated. Do people who see the clothes "in tawdry association with dept. store fashions" go to boutiques less?*

*And is this a Campbell effect on the market that's akin to parody and thus can't count against fair use?*

*Might this drive some people TO the stores?*

*For clip art?*

*Is this a "traditional, reasonable, or likely to be developed market" (Texaco)?*

*Some talk of circularity*

### Other Defenses

#### First Sale?

*[One point]*

Some of the gossip and fashion magazine websites might fall under 109(c) because the celebrities (definitely) and the fashion magazines (maybe) own the clothes they display.

*But 109(c) applies only to public display NOT the many other 106 rights listed above.*

### **[Subtotal for Defenses for Direct Infringement]**

### Third-Party Liability

#### Vicarious Liability

##### Right and Ability to Control the Infringing Activity

*[Two points]*

Much more control than dancehall cases or swap meet (Fonavisa)

You get them to install the software and you maintain the virtual closets and you allow the posting of the finished collages, so seems like plenty of opportunity for control.

*Be very generous grading allowing all sorts of misunderstandings about the technology.*

##### Direct Financial Interest/Benefit

*[Two points]*

If they pay, they get unlimited virtual closets, meaning more infringement.

*Seems at least as direct as Fonavisa, and probably much more so.*

*Entire pricing scheme seems to provide benefit to D for more infringement.*

### Contributory Infringement

#### Knowledge

*[One point]*

Probably indisputable here.

#### Induces, contributes, or materially contributes to the infringing conduct

*[One point]*

Also hard to dispute

Without FH, no way to do any of this.

#### Sony: Staple article of commerce

*[Two points]*

Test: Widely used for legitimate, unobjectionable purposes...merely capable of substantial noninfringing uses.

Here:

*Lots of designers seem not to mind (free advertising) just like Mr. Rogers in Sony*

Comment [Ohm30]:

1

Comment [Ohm31]:

13

Comment [Ohm32]:

2

Comment [Ohm33]:

2

Comment [Ohm34]:

1

Comment [Ohm35]:

1

Comment [Ohm36]:

2

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*Some go further ad advertise—pay FH—for use.*

**Grokster/Inducement**

**[Two points]**

**Student might put this under Contributory Infringement instead Knowledge Plus Inducement, which requires intent.**

**On these facts**

Not enough to know whether inducement is present.

Maybe make something of the scissors image?

Grokster talked of “staggering” infringement. Does 6M users equal staggering infringement?

**[Subtotal for Third-Party Liability]**

**Remedies**

**Damages**

**Actual Damages**

**[One point]**

*Be generous with these points, because we barely covered this in class.*

*Suffered by P: Hard to say.*

*D's profits?*

10,000 premium users \* \$40/year = \$400,000/year

But how much of that is attributable to copies of E's works?

And how many of E's works?

Also: banner ads from other designers

**Statutory Damages**

**[One point]**

*\$750 - \$30k per work (up to \$150k if willful)*

*Key issue here: What is a work?*

**Injunction**

**[Two points]**

**Post-EBay, no presumption.**

**Four factor test.**

1. *Irreparable harm: Seems like a stretch? Reputational harms are hard to remedy later?*

2. *Remedies at law inadequate?*

3. *Balance of hardships*

Here's where D wins: seems very onerous to shut down entire site for this.

4. *Public interest disserved by injunction?*

D has colorable argument this injunction would hurt P.I. (talk of all of the benefits users are experiencing.)

**[Subtotal for Remedies]**

**[Total for Problem Two: FashionHound]**

**Comment [Ohm37]:**

2

**Comment [Ohm38]:**

10

**Comment [Ohm39]:**

1

**Comment [Ohm40]:**

1

**Comment [Ohm41]:**

2

**Comment [Ohm42]:**

4

**Comment [Ohm43]:**

36