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## Spring 2011 Copyright Final Exam Professor Ohm

### Problem One: The Veridian Map

#### Call of the Question

Memo to prospective plaintiff/client about the strength of his case.

Objective memo. No need to make slated arguments.

No Fair Use

Do discuss remedies

#### Protectible Copyrighted Work?

##### Identifying Works

*Suit is only about Phil's version of the map, a combination of two other maps, with personal style touches added.*

##### Type of work

*[One point]*

*PGS*

*And Derivative Work*

##### Useful Article

*[One point]*

*One point for mentioning/flagging useful article doctrine.*

*Not at issue here, because only "useful" feature is to convey information.*

##### Originality

##### *Independent Creation and Fixation*

*[One point]*

*Can get point for discussing only one of these two topics.*

*Independent Creation*

*"Drawn with own hand" so no problem.*

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

*[Six points]*

*Mini-Rubric*

*In-depth; beautifully organized; well-written; convincing = 6*

*Really well done, but at least one major, conspicuous omission or flaw = 5*

*Hits most of the key points, but glosses over almost things too quickly = 4*

*Misses at least one big argument, but otherwise competent = 3*

*Misses at least two big arguments, but otherwise competent = 2*

*Barely mentioned modicum of creativity = 1*

##### *Map/Compilation Issues*

*Might also fit into other rules:*

*Merger*

*Scenes a faire?*

*Maps are copyrightable (in fact, listed in very first version of Copr. statute)*

*Facts are not copyrightable. Like a compilation of facts.*

*Might discuss S/C/A.*

*Should probably discuss Mason v. Montgomery Data*

*but okay if not in depth due to limited in-class focus.*

*Held: combining sources, reconciling inconsistencies, selection, are together enough for S/C/A.*

*Probably decent for Phil, but not as strong.*

Comment [Ohm1]:

1

Comment [Ohm2]:

1

Comment [Ohm3]:

1

Comment [Ohm4]:

6

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*Sweat of the brow*

Many of the facts can't contribute to creative choices, because uncopyrightable sweat of the brow.

Painstaking rotations and transformations

Three years

Every spare moment

*Derivative Work issues*

Derivative work of two prior works

Veridian Map

*Public Domain*

Topographical Maps of floor of the Pacific

*Not clear if under copyright.*

*Maybe wonder whether it is a U.S. Govt. work?*

Perhaps originality plus is required.

Batlin: Substantial Originality

ERG: Must not in any way affect scope of underlying copyright

*Not really at issue here with underlying topographic maps, because this is just one spot on floor of pacific.*

*Not like "de facto monopoly" on character costumes in that case.*

*Creative Choices*

Typefaces, colors, shading

Pretty slight list

But standard is merely "modicum", so maybe enough.

*Conclusion?*

Close case. Maybe not

Copyrights in such things are thin.

**[Subtotal for Protectible Copyrighted Work]**

**Infringement**

Potential Acts of infringement with 106 rights implicated

**[Two points]**

**A: 18 ten-minute viewings of map in private living rooms or home offices**

106(5) Public Display Right

**B: One ten-minute viewing in darkened booth at back of near-empty restaurant**

106(5) Public Display Right

**C: Single photocopy**

106(1) Reproduction

106(3) Distribution

**Private Home Viewings**

**[Three points]**

**Display almost certainly not in issue.**

**No 109(c) defense akin to first sale**

Because L is almost certainly not an "owner."

**Is this public under definition of section 101?**

Open to the public? Clearly not.

Any place . . . substantial number of persons outside of a normal circle of a family and its social acquaintances?

*Probably not, because this says "any place" which suggests one simultaneous group, not a serial showing.*

*Distinguish Redd Horne and Cartoon Networks: That involved a transmission.*

*And most of Cartoon Networks inapposite because no transmission.*

Comment [Ohm5]:

9

Comment [Ohm6]:

2

Comment [Ohm7]:

3

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**Restaurant viewing**

**[Two points]**

**"Darkened booth"**

"Open to the public"

*Restaurants are, and nothing in facts suggest otherwise.*

Also, booth isn't separate place, because sounds like Redd Horne, so likely still public.

Does near-emptiness of restaurant matter?

*Shouldn't. Nothing in statute suggests this is so.*

**Comment [Ohm8]:**

2

**Photocopy**

**[Two points]**

***Pretty clearly infringing unless defense.***

***Distribution: No First Sale defense.***

Two reasons:

*Not the owner, which is limit of 109(a).*

*Wouldn't protect the unlawful copy anyway.*

**Comment [Ohm9]:**

2

**Defense: License**

**[Three points]**

**Mini-Rubric**

In-depth; beautifully organized; well-written; convincing = 3

Really well done, but at least one major, conspicuous omission or flaw = 2

Cursory or seriously incomplete = 1

***Clearly some license granted here.***

Oral statement: "You may make a single copy, which you must return to me as soon as you complete your assessment."

Scope?

*On face, doesn't seem to restrict uses. So maybe public viewings are allowed?*

*But spirit of entire negotiation and context suggest implied limits.*

This was supposed to be only about making an independent assessment of the map.

These viewings might exceed this scope.

Maybe inquire what academics typically do and say.

***Oral is fine, because not an assignment. Nonexclusive license.***

**[One point]**

***Conclusion: Maybe a defense to viewing. Definitely NOT for the copy.***

**Comment [Ohm10]:**

3

**[Subtotal for Infringement]**

**Comment [Ohm11]:**

1

**Remedies**

**Actual Damages**

**[Two points]**

***Second point only if they took some stab at the math.***

***Not clear what P's losses were.***

***But can also obtain D's profits, under section 504(b)***

\$100,000 for photocopy

\$18,000 for home viewings

\$2,000 for restaurant viewing

Total: \$120,000

D can deduct expenses, but not likely to be many here. (one photocopy?)

**Comment [Ohm12]:**

**13**

**Comment [Ohm13]:**

2

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**Statutory Damages**

*[Two points]*

*Assessed "per work" so probably just one award.*

*\$750 - \$30,000*

*\$750 - \$150,000 for willful*

Clearly willful here.

But not much more than maximum, and possibly less.

Probably best to elect actual damages.

**Comment [Ohm14]:**

2

**Injunction**

*[Two points]*

*What might you enjoin?*

Return the one copy to me. Possibly.

CANNOT enjoin the competing treasure hunters, even though that's what client probably most wants.

*Might have stepped through four factors instead.*

**Comment [Ohm15]:**

2

**Other Remedies**

*[One point]*

*One point for mentioning any one of these.*

*Costs*

*Fees*

*Destruction and impoundment under section 503*

Might get the one photocopy back.

Possibly might get any notes taken (advanced, obscure point, so +1 bonus for spotting and doing thorough job with it.)

**Comment [Ohm16]:**

1

*[One point]*

**[Subtotal for Remedies]**

**Comment [Ohm17]:**

1

**[Total for Problem One: Veridian Map]**

**Comment [Ohm18]:**

8

**Comment [Ohm19]:**

30

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## Problem Two: P. Day Nalamayhs

**Note:** Probably should have allowed a few hundred words more.

### Call of the Question

Clerk for District Court Judge

Memo to judge based on complaints weighing strengths of P's cases.

Because need to advise judge how he should rule, no need to be persuasive. Objective

Memo

### Preface

Almost no points available for discussing copyrightability issues. Focus almost entirely on the two defendants, with much more on defenses than infringement.

### Plaintiff's Work and Other Issues Common to Both D's.

What Works?

**[One point]**

*Many choices*

Movie

Screenplay

Direction

Production

Characters

Audio soundtrack

Copyrightability?

**[Three points]**

*Three points available for addressing some of the following, including the sub-bullets:*

**Fixed: Clearly**

**Independent Creation: Yes, writer, director, producer**

Maybe some time spent on authorship issues, with Aalmuhammed as possible cue.

**Modicum of creativity**

Pretty clearly yes

Maybe one point for talking about how this seems formulaic after four prior movies.

*Perhaps phrased as scenes a faire for what had become a stock device.*

*But surely tons of creative choices still left.*

License?

**[Two points]**

**Notice Placed**

**"For voting members of the Academy only."**

**Three places**

**Outside envelope**

**DVD label**

**Displayed on screen.**

**Satisfies writing requirement?**

**Scope?**

Doesn't seem to limit at all. Just about the person.

Might be some implicit limitation to scope?

License for downstream copies and DWs?

**Exclusive License, Nonexclusive License, Assignment, or something else?**

Does it make Ds owners for 109 purposes?

Since so much of the downstream acts rely on more than just this license, shouldn't be dwelled on for too long.

**[Subtotal for Plaintiff's Work and Common Issues]**

Comment [Ohm20]:

1

Comment [Ohm21]:

3

Comment [Ohm22]:

2

Comment [Ohm23]:

6

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## Defendant One: Diane, the Furbish Speaker

### P's Case-in-Chief

#### Potential Acts of infringement with 106 rights implicated

[Two points]

Two points only if they get most of the following. One point for missing more than a few.

106(1) Reproduction in copies

Screenplay transcribed

Lines recorded synchronized to visuals

Stitched audio/video back together

Copied to DVDs

106(2) Preparing Derivative Work

Same acts

106(3) Distribution

Mailed to all 100 speakers

106(4) Public performance? (Not likely)

#### Infringed?

Copying-in-Fact and Misappropriation?

[One point]

Since there is so much intentional, literal copying here, probably not worth much discussion.

Here (and for Dakota too) WAY too much by students on 2d Cir./9th Cir. tests!

Distribution?

[One point]

No 109(a) defense. Not owner. Also, these copies weren't lawfully made.

### Defense: Fair Use

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

[Three points]

Gift to the Furbish community.

Let them see Hollywood films.

Help preserve the language?

Maybe teaching (preamble)

Both seem pretty public-interest minded. Good for D.

Transformative?

Somewhat

Translation into Furbish requires creative changes.

But D1 is striving for faithful translation.

Parody?

Doubtful

Commercial?

Most likely not. Shipped for free.

But seems odd to have such a commercial thing (Hollywood movie) turned into something so opposite.

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

[One point]

Fictional (cuts against FU)

Limited Release (cuts against FU) (+1 bonus if spotted)

Comment [Ohm24]:

2

Comment [Ohm25]:

1

Comment [Ohm26]:

1

Comment [Ohm27]:

3

Comment [Ohm28]:

1

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

[Two points]

All visuals and every line (albeit translated.)

Seems like a ton. But much less than whole movie. Half?

But given purpose, is this the minimum necessary?

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

[Two points]

No lost sales, because no Furbish speaker would ever pay for a ticket to see a Hollywood movie!

*Not plausible that lost sales due to this!*

But derivative market for Furbish translations?

*No!*

*Not traditional, reasonable, likely to be created market*

*Such a small market, unlikely anybody would ever arise to create it.*

[Subtotal for Diane]

Comment [Ohm29]:

2

Comment [Ohm30]:

2

Comment [Ohm31]:

12

**Defendant One: Dakota, of SkipTheTheater.com**

P's Case-in-Chief

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

[Two points]

*Two points only if they get most of the following. One point for missing more than a few.*

106(1) Reproduction in copies

*New screenplay created*

*New, puppet-version of the movie*

*Copy to upload to website*

*Copy made with each viewing*

*Copies characters*

106(2) Preparing Derivative Work

*Same acts*

106(3) Distribution

*Copy to upload to website*

*Copy made with each viewing*

106(4) Public performance? (Arguably)

*Copy made with each viewing*

**Infringed?**

Copying-in-Fact and Misappropriation?

[Two points]

*Probably an easy win for P. Lots copied here.*

*But facts leave a little left to debate: Ten minute version: Entire scenes and characters cut out*

*Probably a loser: ten minutes is plenty. Final three minutes intact.*

*"entire lines, the emotion used, action, staging, scenery, etc."*

**Defense: Fair Use**

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

[Three points]

Transformative?

*In the slice/dice sense, definitely.*

Comment [Ohm32]:

2

Comment [Ohm33]:

2

Comment [Ohm34]:

3

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*Two hours down to ten minutes  
But not in the other sense.  
Seems to serve the exact same purpose. Entertain; tell this particular story.  
In this specific case: Surprise with twist ending.*

Parody? Other Commentary?

*Plausible argument.*

*Test: Parodic purpose may reasonably be perceived*

*"Because life is too short to watch long movies."*

*Specifically here: P is a one-trick pony and you only need ten minutes to get the trick.*

*But presence of so many other movies suggests that this isn't focused on this one movie maker. Good for P.*

*Also: Parody of the thriller genre*

*Using puppets makes it light and funny. Criticizing thrillers for seriousness.*

*Also: Parody of Acting/Characters (Puppets can do it)*

Commercial?

*Yes. Ad-based video sharing site.*

*Thousands of dollars.*

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

As above. Don't double count. Award only once.

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

[Two points]

This might have been fleshed out more in the misappropriation prong; if so, give full points here.

Only ten minutes. Small percentage

But clearly the heart: final three minutes

*But if Parody, then heart is okay.*

Also: lines, emotion, action, scenery, staging.

*So maybe more than counting minutes matters*

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

[Three points]

Perceived dip in sales

First weekend was better-than-expected

Final tally was much worse than expected

Less than last five.

But good for D: Still a "qualified" theatrical success.

*Millions of views on video sharing site*

This will very likely satiate demand for a movie that is all about the surprising final 3 minutes!

Possibly, this might be the kind of harm from parody that Fair Use doesn't take into account.

*But will require more evidence/experts to see if this is cause.*

[Subtotal for Dakota]

[Total for Problem One: Nalamayhs]

Comment [Ohm35]:

2

Comment [Ohm36]:

3

Comment [Ohm37]:

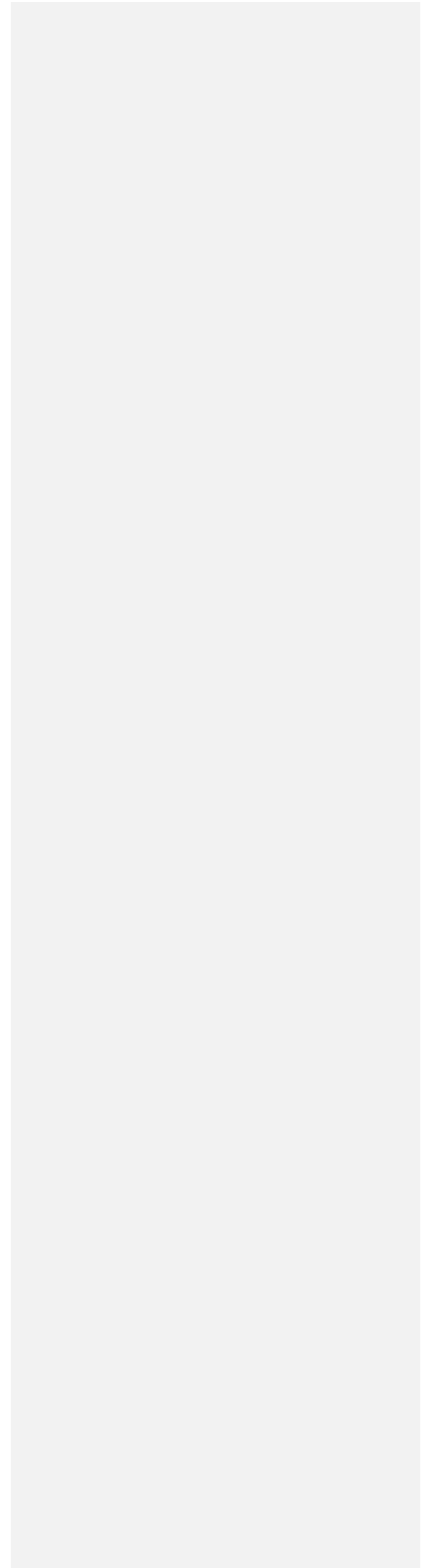
12

Comment [Ohm38]:

30



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