

- Problem One: Sonny v. Chomsky Gnomes
 - TOTAL SCORING
 - Call of the question
 - Sonny asks for advice from attorney for copyright claims against the Chomsky Gnomes _only_.
 - Liability of Cher not relevant
 - Copyrightability
 - Copyrightability Requirements
 - Fixation 1
 - Fixed in a tangible medium: Clearly
 - Originality 1
 - Independent creation: Yes
 - Modicum of Creativity: Clearly
 - Did Cher's changes affect this at all? Render his part insufficiently creative or original? Doubtful.
 - Type of Work (Might come much later)
 - Musical Work 1
 - As originally sent to Cher: Sheet music with lyrics
 - As ultimately posted to his website as a recording.
 - Sound Recording 1
 - As posted to his website as a recording.
 - Possibly Literary Work
 - For Lyrics
 - Infringement
 - This might come AFTER ownership/license, but since those act like a defense in this case, makes sense to do infringement first. Fine either way.
 - Possible infringing acts
 - [*] Cher downloads song, burns a CD, and sends recording from website to CG
 - * Cher isn't a defendant, so they should do no more than flag these.
 - [1] CG record a new version of the song. 1
 - 106(1) Reproduction
 - 106(2) Prepare Derivative work
 - Applies only to MW not to SR
 - Two prongs 1
 - Copying
 - Improper Appropriation
 - Not really point of this question, so only one point for discussing
 - [2] CG sell a few hundred copies of the track online 1
 - 106(3) Distribute phonorecords to the public by sale
 - Maybe
 - 106(1) Reproduction (to deliver track online)

Copyright 2007 Grading Rubric -- STUDENT ID:

Points

- Applies only to MW not to SR
- **[3] CG performs the song at a friend's house.** 1
 - 106(4) Public Performance
 - Is a house party public? Are 50 people outside of a normal circle of a family and its social acquaintances? 1
 - Applies only to MW not to SR
- **Possible Compulsory License Exception**
 - **Prerequisites of Section 115** 1
 - Nondramatic musical work
 - "Have been distributed to the public in the US under the authority of the copyright owner"
 - Yes. Sonny posted it to his website. That's probably good enough for distribution
 - **May Make and Distribute phonorecords**
 - So covers [1] (insofar as not DW) and [2].
 - **WOULD NOT COVER [3]** 1
 - **WOULD NOT COVER** production of derivative work [1]
 - Is a Calypso version / identical lyrics / readily identifiable of a Rock ballad a derivative work? (May also be in discussion of adaptation right) 1
 - Cite Gracen
 - Cite Ringtones opinion
 - **102(a)(2): Musical Arrangement** 1
 - "Musical Arrangement"
 - defined in ringtones opinion
 - "extent necessary to conform it to the style or manner of interpretation"
 - Is a Calypso version / identical lyrics / readily identifiable of a Rock ballad within this test? 1
 - Does it change the basic melody or fundamental character of the work?
 - **It's not a total defense -- 115(b) and (c)** 1 (for flagging either one of following)
 - Was the email message sufficient notice under 115(b)?
 - Depends on regulation we didn't study.
 - 115(c)
 - They haven't started paying yet, so maybe we'll still get a remedy (see (5) for due dates and (6) for notice we need to write)
- **Ownership / License**
 - **Question 1: Does Cher have the authority to license the song? Is the work a joint work? (May come under the originality discussion)**
 - **Childress v. Taylor-type analysis** 4
 - Prong one: each independently contribute something copyrightable?
 - Prong two: intention that contributions be merged into inseparable or interdependent parts of a unitary whole?

- Problem Two: CU Law Outline Bank
 - **TOTAL SCORING**
 - Copyrightability 14
 - Infringement 8
 - Defenses 7
 - Third Party Liability 4
 - Points Possible 33
 - Basic points
 - Copyrightable?
 - Professor Curmudgeon
 - What are his possible copyrighted works? 1
 - 1 Point only if spot both!
 - [A] His lecture notes
 - [B] His in-class, spoken lectures
 - Originality- Various Topics 5
 - (5 points doled out based on how much of the following they discuss: Rough rubric-in-rubric)
 - at least four of six and well-discussed: 5; 3/6 = 5; 2/6 = 3; 1/6 = 2 (-1 from above is cursory)
 - First: Independent creation? The casebooks (which I had intended to say weren't written by him) are separate copyrighted works. Argument that he did not independently create his lecture notes or his lectures.
 - Second: might try to salvage it by saying that he had a protectable derivative work
 - Gracen: Originality plus
 - Not really enough facts to assess
 - Third: Idea / Expression or Merger
 - (Might bring this up under infringement analysis)
 - Law lectures are really just a set of ideas that you're trying to impart; the expression ain't so important.
 - Particularity with the notes. [A]
 - But also with the lecture itself [B]
 - Especially when you compare this (as we will) with the notes the students take.
 - i.e., not improper appropriation to take what they have taken.
 - Fourth: Facts / Research
 - Lots of facts in law lectures. Not copyrightable.
 - Fifth: Modicum of Creativity?
 - Not enough facts to know for sure
 - Maybe a point if you really develop this well: the fact that he does the same thing, year after year, may suggest that this is no longer sufficiently creative?
 - May turn on whether it's socratic or lecture-style.
 - Sixth: Counter-argument: Feist. This is S/C/A. Compilation.

- **Fixation** 2
 - [A] definitely is.
 - Is [B]?
 - No facts to suggest taped / broadcasted
 - The lecture notes themselves might make this technically fixed.
 - Especially given the rigidity with which he seems to adhere to them -- not an impromptu speech here.
 - The students tapping away at their keyboards might make this technically fixed.
 - Clearly "with authority of the author."
- **If so, what kind of work is this? (no points)**
 - Literary Work [A] and [B]
 - Dramatic work? [A] and [B]
 - Derivative work (see above)
- **Ownership?** 1
 - Maybe a point if really develop the idea that the class as a whole creates the work together -- Socratic
- **Joe Student**
 - **Everything said about Professor Curmudgeon**
 - **Maybe his is a compilation** 1
 - Borrows from: PC's lectures, the casebook
 - If so, maybe he won't have a Copr. if his use was unlawful 1
 - **Separate "independent creation" problem**
 - Is this Joe's work? Seems difficult under Gracen. 1
 - Policy justification: We won't know whether Diana's users took from Joe or from Professor Curmudgeon
 - **Key fact: his 15 phrases.** 1
 - Short phrase rule, but in total, S/C/A
 - Is this "originality plus"? Probably not (discussing some cases)
 - **Fixation** 1
 - Easier than for PC.
- **SUBTOTAL: COPYRIGHTABILITY** 14
- **Infringement**
 - **Professor Curmudgeon**
 - **KEY: Diana is only possibly liable as third party. SO: relies on infringing acts of users** 2
 - (1 point for noting she's a third-party. 2 points ONLY if says that her liability turns on acts of her users)
 - **106 Rights possibly implicated** 1
 - (Need not get all of these for point)
 - Reproduction (not literal); distribution; adaptation; public display?
 - **Prima Facie** 1
 - (Most of these points are above: idea/expression, merger, etc.)
 - (Also, some points also with Joe)

- Copying?
 - Would be conceded
- Improper Attribution
 - This is where all of those facts about idea/expression and merger and Feist, etc. may come in.
- Joe Student
 - Same as said above for PC with following important differences:
 - Prima Facie
 - Copying? 2
 - (2 points for good discussion; 1 point for flagging issues)
 - Access + Probative Similarity?
 - Access is moderate -- he sells outlines for \$15/copy -- 12 copies out there.
 - Probative similarity: Probably
 - the e's.
 - his phrases.
 - Maybe even striking similarity?
 - Improper Attribution 2
 - (2 points for good discussion; 1 point for flagging issues)
 - Subtractive phase
 - Most of this isn't his.
 - This isn't a literal copy.
 - The short phrases and S/C/A is slight.
 - Totality Phase
 - Audience: law students
 - likelier to spot similarities?
 - But so much of it is unprotectable
- SUBTOTAL: INFRINGEMENT 8
- Defenses
 - Professor Curmudgeon
 - Fair Use 4
 - (4 is great; 3 is good; 2 is a little thin; 1 is barely flagging)
 - 1. Purpose of Use
 - Sharing
 - Education
 - Fits within preamble (also: scholarship / research)
 - Non-commercial
 - 2. Nature of copyrighted work
 - Not at core of Copr.
 - Factual.
 - Maybe some Harper & Row
 - 3. Amount and Substantiality
 - Probably a lot

- for P.
- **4. Effect of use on potential market?**
 - Odd to call it a market!
 - Possibly: some kind of future commercial outline?
 - Seems awfully speculative and attenuated
- **Public Benefit**
 - Maybe a point for talking about this in depth
- **Difference in Factors for Joe** 2
 - 1. Purpose of use
 - Not parody
 - Not commercial
 - Not really transformative (somewhat for students)
 - BUT: research / scholarship / teaching
 - 4. Effect of use on potential market?
 - Worries it will cut into or kill sales
- **Implied License** 1
 - Prof knows that students will be making copies / derivative works.
 - But it's the distribution that seems maybe to fall outside
 - Then again, students share notes and profs know this.
- SUBTOTAL: DEFENSES 7
- **Third Party Liability for Diana?**
 - **Vicarious** 1
 - Right and ability to supervise
 - Not really. More like Grokster.
 - Financial benefit
 - None.
 - **Contributory** 1
 - Material contribution
 - Yes.
 - Knowledge or Intent
 - Hard to say, because D knew that copying would occur, but more like Sony:
 - Sony: capable of subst. noninfringing uses? 1
 - Sure. Fair use.
 - **Inducement** 1
 - (1 point only if particularly good discussion)
 - Probably not.
 - Then again, entire point was to _induce_ copying. Is that the test?
 - SUBTOTAL: THIRD PARTY 4
 - **TOTAL POINTS** **33**