

CopyrightX Online Sections: Final Examination

Spring 2016

Professor William Fisher

Instructions

This is an “open-book” examination. When preparing your answer, you may read, watch, or rely on any material you wish. However, you may not consult in any way with any other person concerning any aspect of the test.

The exam will be distributed at 1300 UTC on April 27, 2016. All answers must be submitted by 1300 UTC on May 1, 2016. No answers will be accepted after that time.

The procedure for distributing the exam and for collecting answers is as follows:

- At 1300 UTC on April 27, a link to the exam will be posted on <http://copyx.org/sections/exam/>.
- Soon after 1300 UTC on April 27, each student in the CopyrightX online sections will receive an email containing a link to the exam. That email will also contain a link to a unique instance of an online text editor (a “pad”) that the student will use to submit her responses. Each link is unique to its recipient; thus, students must not share the links they receive.
- The pads that students must use to submit their answers are similar to the “Google Docs” software. Students will be able to enter, edit, and format text within their pads. The pads automatically save their contents frequently (every few seconds).
- By default, new text will appear highlighted. The highlighting feature can be turned off by clicking this button at the top of the pad: .
- Students must enter their responses into their pads before 1300 UTC on May 1. (Please note that there is no “submit” button, and you will not receive an automated confirmation of the submission of your exam. Rest assured that any text that you enter into your pad will be automatically saved and delivered to the course team. However, you should not close the browser window in which your pad is open immediately after entering your text.)
- At 1300 UTC on May 1, the pads will stop saving changes to their contents. (A pad open in a webpage at that time will display an error message that says, “trying to re-connect.” After approximately thirty seconds, the pad will display a notice indicating that the pad has been disconnected. Refreshing the page will result in the display of a message that says that the pad is no longer accessible because the exam window has closed. Anyone who clicks on the link to a pad after 1300 UTC on May 1 will be taken to a page with the same message.)

We strongly suggest that you write and save your responses offline, especially if you have an unstable Internet connection. Even though your pad will auto-save every few seconds, please take extra precautions to save your work as you progress. Writing and saving your responses offline will also enable you to keep track of the number of words contained in your responses – and thus enable you to abide by the word limit for each question.

During the examination, all of the course materials (including the assigned readings, recorded lectures, maps of copyright law and theory, and discussion forums) will remain available at <http://copyx.org>. However, between 1300 UTC on April 27 and 1300 UTC on May 1, you are forbidden to post to the online discussion forum or to discuss the exam anywhere else. If during that time you submit comments or questions of any kind to the online discussion forum, you will automatically fail the exam and the course. After 1300 UTC on May 1, you are free to discuss the exam in the online forum or anywhere else.

Neither the course team nor your teaching fellow will respond to questions concerning the exam unless those questions involve emergencies. If an emergency does arise, please email copyrightx@cyber.law.harvard.edu, providing details. Someone will respond as soon as possible.

If you find any aspect of the exam's content or instructions to be ambiguous, do not request a clarification. Instead, develop your own interpretation that resolves the ambiguity and make that interpretation explicit in your response.

The exam contains four questions. You must answer all four. Your answers to the four questions will be given equal weight in the grading of the exam.

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Question #1

Since 1998, Miguel has been a freelance photojournalist. He lives in Wellfleet, Massachusetts (a prosperous tourist town on Cape Cod), but spends at least half of his time travelling for work. He earns a good income, but he is bored. When taking photographs of politicians giving speeches, he concentrates on making images that he will be able to license to newspapers. But, to keep himself amused, he also looks for opportunities to take unusual or irreverent photos, which he does not offer to newspapers. Instead, he prints and frames those photos – and then offers the prints for sale in a small gallery adjacent to his house.

Among the photos on sale in Miguel’s gallery in the summer of 2015 were some images he had taken of politicians manifesting surprise or alarm. Copies of a few of these are set forth below:



The politician who appears in the photograph in the lower right corner of this array is Hillary Clinton. Over the course of the summer, Miguel sold five copies of the photograph of Clinton, each for \$300. He did not keep a record of the names or addresses of the purchasers.

On April 7, 2016, Miguel was in Houston, Texas, covering the Presidential primary elections in that state. Outside a polling place, he encountered a group of men holding up signs that made clear that the men supported Donald Trump, a candidate for the Republican nomination. Most of the signs were conventional, but one poster caught his eye. A copy of it appears below.



Miguel recognized, of course, that the poster used the color scheme and motif of the famous Obama “Hope” poster (a copy of which appears at right). But something else about the “Stop” poster intrigued and annoyed him. So he took a photograph of it.



A week later, back in Wellfleet, Miguel was reviewing the photos he had taken in Texas and came upon his image of the “Stop” poster. Suddenly, he realized why it had struck him: the image of Hilary Clinton contained in the poster resembled the photograph of Clinton that appears on page 1 – which he himself had taken. The more he compared the two images, the more convinced he became that the poster had been derived without permission from his own photograph.

Miguel does not have strong political affiliations, but he loathes Donald Trump. The possibility that one of his photographs was being employed to aid Trump’s campaign infuriated him. So he set out to find its source. Using the Google “image” search function, Miguel located a website, www.trumpbros.org, that offered to send a copy of the “Stop” poster free of charge to anyone who expressed an intention to vote for Trump. The website provided contact information for its founder and operator: Tom Triumph, 2506 Main Street, Billings, Montana.

Miguel is considering taking legal action against Tom. Write Miguel a letter, assessing his legal options. If you need additional information to provide him guidance, say what that information is and why it matters. Your letter may not contain more than 1200 words (including any footnotes).

[All of the events described in this question are fictional. The photographs used to illustrate the fictional narrative were derived from: <http://thewealthwatchman.com/wp-content/uploads/2015/06/ele-3.jpg>; <http://o.aolcdn.com/dims-shared/dims3/GLOB/crop/3618x2377+0+144/resize/1028x675!/format/jpg/quality/85/http%3A%2F%2Fhssprod.hss.aol.com%2Fhss%2Fstorage%2Fmidas%2F412881lead399834c83648a6e4ae2443%2F201094415%2Fceb353062d2742c0954b52cfa2ea4039.jpeg>; <http://poorrichardsnews.tumblr.com/post/45126739890/surprise-obama-white-house-aids-owe-333485-in>; and http://www.slate.com/articles/news_and_politics/politics/2015/09/democrats_have_the_right_to_be_angry_with_hillary_clinton_her_email_scandal.html.]

Question 2

Ann and Bill Hampden live and work in Greendale, Iowa – a small town near the middle of the state. They met in 1990, while both were students in the Musical Theatre Writing Program at New York University. Ann was training to be a playwright; Bill was training to be a composer. They decided to collaborate in writing a musical for their final project. Their product received a good grade. Soon after graduation, Ann and Bill married and moved to Greendale. Between 1991 and 2014, they wrote 20 additional musicals together. Most were only mildly successful, but one was produced on Broadway. Ann and Bill receive license fees each time one of their plays is produced, but those fees are insufficient to support their lifestyle. To make ends meet, both are employed as teachers in the drama department in the Greendale High School (GHS).

In recent years, the budget for GHS has been reduced sharply. In September of 2015, the administrators of the Greendale School District announced that, to save money, they planned to eliminate the GHS drama department at the end of the school year in June 2016. Dismayed, the teachers and students in the department developed a plan to stave off the closure. The essence of the plan: They would create and produce (in the school’s auditorium) a serious original musical. Instead of charging nominal ticket prices (as is typical for high-school drama performances) they would charge substantial amounts -- \$50 for premium seats near the stage; \$40 for regular seats. The money raised from the ticket sales would be used to help fund the drama program, and the quality of the production would convince the townspeople of the importance of keeping the program.

Ann and Bill offered to write the musical. In October, November, and December, they spent many evenings working closely together in their home, creating a grim drama about a group of alienated young adults in a rural community beset by an epidemic of heroin addiction. Most of the songs that interspersed the action were laments or expressions of anger. By Christmas, the play, entitled “Their Town,” was complete. When GHS classes resumed in January 2016, Ann and Bill spent many afternoons at the school, working with their students, rehearsing the play and preparing the sets. The male lead was assigned to James Cannel, a glowering junior who had tried heroin and who the previous year had considered dropping out of school. His anguished, smoldering persona fit the character well.

Performances of *Their Town* were scheduled to begin on March 1 and end on April 15, 2016. The drama department placed several advertisements for the play in the Greendale Ledger, the local newspaper. The Ledger faced a budget crisis of its own, but still enjoyed a substantial base of subscribers in Greendale and the surrounding towns. Ticket sales for *Their Town* were brisk.

The play was very well received. A lead article in the Ledger described it as “gripping,” “disturbing,” and “eye-opening.” The student actors – and Cannel in particular – were praised as “brilliant” and “precocious.” Word of the quality of the production spread. People began driving long distances to see the performances.

On March 15, the Ledger carried a full-page advertisement, which had been placed by Apple Computer, Inc.. A copy of the advertisement appears below.

The all-new iPhone 6s Plus



Lights. 4K camera. Action.

The game-winning shot. The impromptu dance party. The first ride without training wheels. Your daughter's first lead role. Some things are meant for video. Now you can record those events in resolution that's four times higher than HD video. You can zoom in on those 8 million pixels while you're shooting or playing your 4K videos. And with the iPhone 6s Plus, optical image stabilization is now available for videos in addition to photos. So you can shoot smooth, beautiful videos in lower light.

When this amazing recording power is combined the iPhone 6s Plus' new custom-designed 64-bit A9 chip and LTE Advanced WiFi connectivity, the possibilities become endless. Imagine that a business trip prevents you from attending your daughter's dance performance. No problem. Your husband can take his phone to the recital and stream it to you in real time – and in brilliant quality. You may not yet be able to have it all, but with the iPhone 6S Plus, you can come close.

James Cannel's parents, Kathy and Larry, are divorced but remain on good terms. Kathy, a real-estate agent, lives in Greendale; Larry, a banker, lives in California. James visits his father each summer but sees little of him during the rest of the year.

In a phone conversation with Kathy on March 20, Larry apologized for his inability to travel from California to Iowa to see James' performance. Kathy, who had recently read the advertisement set forth above, suggested to Larry a solution: They could both buy new iPhone 6s Plus phones. Kathy would take hers to the final production of *Their Town* (on April 15) and would stream the performance live to Larry in California. He happily agreed. James, informed of this arrangement, gave his best performance on that night. Larry, sitting alone in an outdoor café in Los Angeles, watched and listened to the entire performance on his new iPhone.

During the performance, Kathy occasionally typed into her own iPhone brief comments concerning the quality of the music or the acting. These comments appeared at the bottom of Larry's screen while he watched. He found them distracting but did not object.

Without telling Kathy, Larry activated the "record" function on his own iPhone when the play began, enabling him to record the entire streamed performance. He later transferred the recording to his laptop computer. He has thus far watched the recording three times.

On April 20, 2016 Larry sent Apple a letter, describing how he and Kathy had used their new phones, praising the technology. Apple, in turn, posted a copy of the letter as a testimonial on its website. Ann happened to read the letter. Initially, she was pleased. But as she thought about the Cannells' conduct, she became more angry. In a conversation with Bill on April 22, Ann argued that Kathy and Larry plainly were not poor – evidenced by the fact that they had just spent almost \$1500 for two new iPhones. But Larry had paid nothing for the right to watch the show. Even more galling, in her view, was the role played by Apple. Not only had the company made the Cannells' conduct possible, it was now encouraging other purchasers of its products to engage in similarly parasitic behavior. She suggested to Bill that a successful copyright infringement lawsuit against Apple, Kathy, or Larry might enable them to recover enough money in damages to sustain the GHS drama department for years. Bill doesn't much like the prospect of litigation, but is willing at least to consider Ann's plan.

Write Ann and Bill a letter addressing the following questions:

- a) What claims, if any, could they assert against Kathy? What defenses to those claims would be available to Kathy? In a suit against Kathy, who would likely prevail?
- b) What claims, if any, could they assert against Larry? What defenses to those claims would be available to Larry? In a suit against Larry, who would likely prevail?
- c) What claims, if any, could they assert against Apple? What defenses to those claims would be available to Apple? In a suit against Apple, who would likely prevail? If Ann and Bill prevailed in a suit against Apple, what remedies would be available to them?

If you need additional information to answer these questions, say what that information is and why it matters. Your letter may not contain more than 1200 words (including any footnotes).

Question #3

Select one of the following dimensions of copyright law:

- a) joint authorship;
- b) fair use; or
- c) moral rights.

Briefly describe how the issue is addressed under the law of the United States and how it is addressed under the law of one other country or region (such as continental Europe or Latin America). Which of the two approaches, in your judgment, is superior? Why? Your answer may not exceed 1200 words.

Question #4

Select one of the following dimensions of copyright law:

- a) formalities;
- b) circumvention of technological protection measures;
- c) the scope of copyright protection for musical compositions;
- d) the scope of copyright protection for sound recordings; or
- e) traditional knowledge.

Then select one of the four intellectual-property theories that were examined in this course. What insight into how copyright law should address the dimension you select might be derived from the theory you select? How does your analysis illuminate the strengths and weaknesses of the theory? Your answer may not exceed 1200 words.

End of Exam