

Copyright

Professor Grimmelmann

Final Exam – Spring 2008

Take-Home and Open-Book

This exam consists of THREE (3) questions. Each question is worth 33 points, for a total of 99 points. (Everyone gets the 100th point for free.)

You have 24 hours to complete this exam; you can choose when to take it. You must pick this exam up *in person* from the Registrar's office, at any time *after* Monday, May 5 at 9:00 AM and *before* Thursday, May 15 at 5:00 PM. You must then return it either in person or via email (to submitexam@nyls.edu) within 24 hours.

Please type your answers in 12 point Times or Times New Roman, double-spaced, using 8.5"x11" paper, with one-inch margins and numbered pages. Be sure to **put your exam number on each page. DO NOT PUT YOUR NAME ANYWHERE ON THE EXAM.**

Maximum page counts are indicated for each question (using the formatting given above). These are maximum lengths, not target lengths; you do not need to make your answer that long to receive full credit. I will strictly enforce the page limits.

This is an open-book exam. You may use any materials that you wish to answer the questions, though you need not consult any sources other than those we used for class. You may not discuss this exam or your answers with anyone under any circumstances until after the final day of the exam period, which is May 16. **Your work must be exclusively your own.**

I will not be available to answer questions about the course after Monday, May 5 at 9:00 AM, since at that point I won't know who has picked up the exam and who hasn't.

Please pay attention to the questions being asked and answer them. Support your answer with detailed analysis, reference to specific statutes and cases as appropriate, and an explanation of how you have applied the law to the facts. Keep references simple; bluebook/ALWD format is not required. Feel free to shorten your answers by using an outline format and stating your arguments in bullet point format, so long as the substance of your points is clear.

If anything about a question is ambiguous, say what you think it means, and answer accordingly. If you need to assume additional facts to answer a question, say what those facts are and how they affected your answer. No reasonable resolution of an ambiguity will be penalized.

This exam has **6 pages total**, including this cover sheet.

GOOD LUCK!

(1) **Old Hickory** (33 points, maximum of **5 pages**)

You represent Kilgore Trout, the author of several highly successful historical novels about the early American republic. Trout's formula has been to find some well-known person or event, and then write a fictional treatment that plays up the violence and the sex. His novels include *Bastard of the Treasury* (about Alexander Hamilton, whose career included affairs, blackmail, and duels), *Rhode Island Rebellion* (about Dorr's Rebellion in 1842, which led briefly to the state's having two competing governments), and *Old Hickory* (about Andrew Jackson). He has come to you in your New York offices, seeking advice regarding possible infringement of *Old Hickory* by the Galactic Cinema Corporation.

Old Hickory was published approximately a year ago. Shortly after its release, Trout was contacted by Paul Slazinger and Malachi Constant, producers with Galactic. They told him that Galactic had been working on a Jackson movie for the past few years, that filming was about to commence, and that they would be interested in hiring Trout as a script and historical consultant to the project. Trout flew to Los Angeles, where Galactic put him up in a hotel for two weeks. He had a series of meetings with Slazinger and Constant to negotiate possible terms for his consulting work. No contract was signed, however, and after a period of four days with no word from anyone at Galactic, Trout was contacted by Lionel Jones, the new head of project development for Galactic, who informed Trout that both Slazinger and Constant had been fired, that the Jackson movie was being "taken in a different direction" and that the studio was no longer interested in retaining him. Trout returned to his home in Manhattan.

Yesterday, Trout saw a two-minute trailer for *Young Andrew Jackson*, a forthcoming Galactic movie. The trailer is primarily a montage of Jackson orating, romancing, and fighting. It opens, however with a 30-second scene involving Jackson's 1806 duel with Charles Dickinson:

- In real life, Dickinson shot first, hitting Jackson in the ribs—but Jackson covered the wound with his free hand and calmly aimed and fired. He hit, severing an artery and killing Dickinson.
- In Trout's novel, Jackson's injury is so serious he falls over. Dickinson walks over to see the man he thinks he has killed, but Jackson, from the ground, raises his pistol and shoots Dickinson in the chest at point-blank range, saying "Hickory . . . dickory . . . dock."
- In the trailer, Jackson falls to the ground, Dickinson walks over, and Jackson fires the fatal shot, but says "Hickory . . . dickory . . . dead."

The movie is scheduled for general theatrical release in three weeks, and its \$25 million national promotional campaign is well underway. Eighteen months ago, when he completed the manuscript, Trout registered it with the Copyright Office. Sixteen months ago, Trout assigned "all right, title, and interest" in *Old Hickory* to Trowbridge Holdings, the LLC he uses to manage his rights. Trowbridge then assigned "exclusive print publication rights" to Rosewater Books, in exchange for an advance and a standard royalty on all books sold or licenses issued.

Write a memo advising Trout on the procedural, substantive, and remedial issues a suit against Galactic would raise. You should describe a litigation strategy, discuss its likelihood of success, and explain what relief (if any) Trout is likely to obtain.

(2) **Mock Band** (33 points, maximum of **5 pages**)

You are law clerk to Judge Sheindlin. The Judge is currently presiding over a consolidated collection of copyright suits involving the wildly popular video game *Mock Band*. In the game, which is made by the company Videlectrix, up to four players use imitation musical instruments to “play along” to prerecorded music. As a song plays, the game shows players sequences of colored dots that correspond to buttons on the fake guitars, to pads on the fake drum set, or to the pitch the vocalist should sing at. If a player misses a note, his or her part of the music drops out briefly.

Mock Band comes with approximately 50 songs. For purposes of this question, you should focus on the copyrights related to the following two:

- “The Ground Beneath Her Feet” (music by Vina Aspara, lyrics by Ormus Cama) is published by Leonard Link Music and administered by ASCAP. It was recorded on the Eurydike Records label by the band VTO (which consists of Cama, Aspara, and Rai Merchant). Eurydike Records agreed to license the VTO sound recording to Videlectrix for use in *Mock Band*.
- “Because, It’s Midnite” (music and lyrics by Limozeen) is published by Burninator Music and administered by BMI. The version used in *Mock Band* is based on a cover version recorded by Slosly on the Blue Laser record label. Blue Laser refused permission to use the Slosly version, so Videlectrix employees recorded a version that sounded as close as possible to the Slosly version. Videlectrix then paid the statutory royalty as directed in section 115, treating each shipped copy of *Mock Band* as one “phonorecord” for purposes of computing the royalty.

Once it had the sound recordings to work with, Videlectrix’s employees split them apart into separate guitar, drum, vocal, and miscellaneous tracks, created dot sequences at multiple levels of difficulty, and added animation instructions that told the players’ on-screen characters how to dance around, gesture, and move their mouths during the performance of the song.

Recently, players have been adding a new twist: filming themselves playing. Here are three typical videos:

- David, Nigel, and Derek point the camera at themselves while they play “The Ground Beneath Her Feet,” to show how hard they’re rocking out. In addition to their whoops, grunts, and singing, the audio track of their video clearly contains the game’s audio (except for the gaps where one of them misses a note).
- Barry points the camera at the screen while he plays “Because, It’s Midnite” on drums at the hardest difficulty. He replaces the game audio with a running commentary on the dot sequences, and the drumming techniques he used while playing.
- Jake and Elwood point the camera at the screen while they play “Because, It’s Midnite.” In addition to the game audio track, they overdub themselves making deliberately inane comments in the banal style of large-market corporate radio DJs.

All of these videos, along with tens of thousands of similar ones, have been uploaded to YouToo.com, a web site that lets users watch video clips uploaded by other users. *Mock Band* fan videos make up roughly 0.02% of the total videos on YouToo, and *Mock Band* videos have been viewed roughly two million times overall. Seeking to take advantage of this popularity, 24Frames.com, another video sharing web site with similar technology, has downloaded every single *Mock Band* fan video it could find on YouToo and uploaded them to its own site in a special dedicated archive.

It was somewhere around then that the copyright lawyers showed up.

Ten minutes ago, Judge Sheindlin came into your office and said:

“This case is a mess! I’ve just read the pleadings and they’re no help: the lawyers threw in everything but the kitchen sink. I need you to sort out who’s got viable claims against whom. I don’t care how the genuinely disputed issues will come out; you never know the full story this early in the case. I just want to know what we’re up against, so I can write an appropriate case-management order.”

Write a memo for the Judge mapping out the parties, claims, and defenses.

(3) **Michael Caravaggio's Diet Secrets** (33 points, maximum of 5 pages)

Michael Caravaggio was a famously obsessive, famously self-destructive performance artist and musician. He was publicly known during his life for his flamboyantly wasting-away appearance, which was the result of a combination of deliberately cultivated image, severe anorexia, and ongoing heroin addiction. He also kept a highly detailed diary of his daily activities. Interspersed with his caustic commentary on life and the universe was a highly specific log of his eating habits. (E.g. “3:30 PM: Hostility and self-loathing are the only motivations of any importance in all human history. 4:03 PM: eight treasonous grapes, two sips water. 4:07 PM: one grape. 4:45 PM: Hate all sentient life.”)

Caravaggio died in 1997 of a multiple-drug overdose. His parents used his estate to create the Caravaggio Trust, which provides free drug-addiction and body-image counseling to the performing arts community. The Trust also funds a national “More Food, Fewer Drugs” ad campaign to convince others not to follow in Caravaggio’s footsteps.

To raise more money, the Caravaggio Trust also took the 10,000 pages of diary entries Caravaggio wrote and prepared high-quality digital reproductions of them. The Trust put the digital images on a CD-ROM in encrypted form, along with a viewing program. Each copy of CD-ROM cost \$30 and came in a package with a decryption key. Upon being launched, the viewing program asked the user (a) to enter the decryption key, and (b) to click on a button indicating agreement with a set of “Terms and Conditions.” Those terms and conditions included:

“You agree not to assert any first sale, fair use, invalidity of copyright, or other defenses to infringement not specifically allowed by this Agreement.”

“You are granted a limited, non-transferrable license to view the Work for personal entertainment purposes only.”

“You may not display, reproduce, or use the contents of the Work in any fashion whatsoever except by means of the Viewing Program.”

“You may not sell, rent, lend, donate, or abandon the CD Media, or dispose of it by any means other than complete destruction.”

Geraldine Koh, a computer programmer and journalist, bought a copy of the CD-ROM, and clicked on the “I Agree” button to launch the program. She spent four months laboriously clicking from page to page, reading off from each page the details of Caravaggio’s meals and copying down the information, by hand, onto a thick stack of yellow legal pads, replacing his descriptions with standard notations for various food items (e.g. “eight treasonous grapes” became “8 gps”). She then used these notes to create a spreadsheet showing caloric and nutritional information on a day-by-day basis.

Using the spreadsheet, she then wrote a book entitled *Michael Caravaggio's Diet Secrets*. A printout of her spreadsheet, which like the diaries is arranged chronologically, accounts for the last 300 pages of the manuscript. The first 600 pages contain an analysis of Caravaggio’s eating habits, in the form of an argument that Caravaggio had found a perfect diet for a super-slender look

without sacrificing health (Koh blamed Caravaggio's death entirely on the drug abuse), and a collection of diet plans and sample menus based on his food choices.

Your firm represents Venal & Sons, a publisher considering whether to publish Koh's manuscript. The marketing department thinks that it could be a crossover best-seller that appeals to a demographic group not usually interested in diet books. **Write a memo to the client discussing any copyright issues raised by Venal's publication of *Michael Caravaggio's Diet Secrets* and recommending whether or not Venal should proceed.** (Another lawyer has been assigned to look into the trademark and right of publicity issues, including the effects of copyright preemption, so you do not need to discuss them.)