Copyright

Professor Grimmelmann

Final Exam - Spring 2008

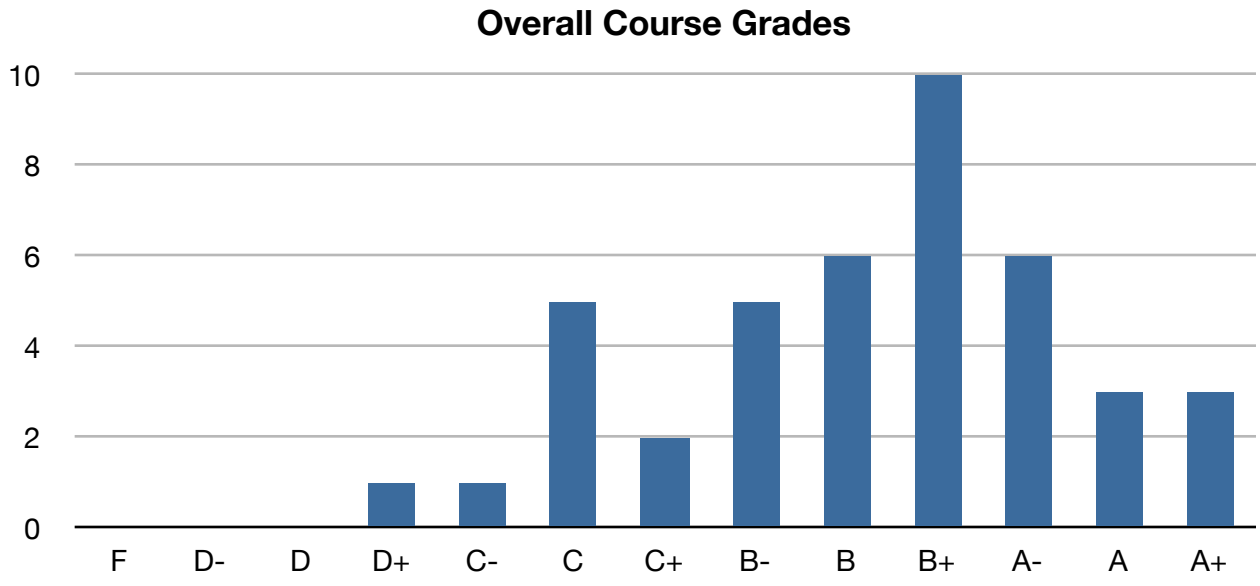
I graded the three problems by creating a thirty-three-item checklist for each. You got a point for each item (e.g. "Trowbridge is the current owner of the copyright in *Old Hickory*.") you dealt with appropriately. I gave out frequent bonus points for creative thinking, particularly nuanced legal analyses, and good use of facts.

The exam, like the course, was hard. You were an extraordinarily engaged and strong class, so the exam was accordingly long and subtle. You were more than up to the challenge, so the grades are correspondingly high. If you'd like to discuss your exam, the course, or anything else, please email me and we'll set up an appointment. If you have exam questions, please read through this memo before getting in touch.

It's been a pleasure and a privilege to teach you and learn from you. May you enjoy the best of luck in your future endeavors!

James

	Old Hickory	Mock Band	Diet Secrets	Total
Mean	20.0	17.9	16.4	55.3
Median	20.0	18.0	16.5	55.5
Std. Dev.	3.7	3.6	3.8	10.3



(1) **Old Hickory**

This question was generally straightforward. I wanted you to walk through the considerations that a copyright litigator in real life would deal with in considering whether and how to bring suit. The scores here were highest; you saw how this one fits together and gave appropriate advice.

Procedure

Trout has registered, so he can file suit immediately. He's also well within the statute of limitations (since he learned about possible infringement last week.) Trowbridge is the current owner of the copyright and will ned to be joined as a plaintiff. The problem was ambiguous on Trowbridge's management and ownership, but the most plausible reading was that Trout controls it, so this is no problem. (You got full credit either for assuming that he could or for noting the ambiguity, however you dealt with it.) Rosewater owns the print publication rights, but those wouldn't be infringed by the defendants' movie. Bottom line: Trout has or can easily clear all the procedural hurdles.

Copyrightability

Old Hickory is fixed in the original manuscript and in the printed copies (it's a literary work, though that's not critical to note). The historical events of Jackson's life are facts, and therefore aren't copyrightable. Trout's description of those facts may well be original, and the changes he makes to the history certainly are. There's probably no estoppel problem; Trout doesn't hold out his changes as being factual. Trout almost certainly can't argue that he's a joint author of the movie, but Galactic also can't show a valid work-for-hire agreement or transfer of copyrights to it.

Infringement

Galactic has possibly infringed one or more of the reproduction, derivative, distribution, and public performance rights. Copying-in-fact shouldn't be hard to prove. Galactic had access to *Old Hickory*, based on both its wide distribution, and, more tellingly, the negotiation process. The similarity of the phrase "Hickory . . . dickory . . . dock/dead" is highly telling and strongly suggests that Galactic copied at least this detail from Trout.

But even if they copied from him, was it improper appropriation? The most important detail to get right here is that the historical facts of Jackson's life count as ideas, rather than expression, and must be excluded from the infringement analysis. In the 2nd Circuit, this would be handled under some variant of the "more discerning observer" test and the *Nichols* abstractions analysis; in the 9th, the reformulated extrinsic test would do this work.

That leaves the "Hickory . . . dickory . . . dock/dead" phrase and Jackon's ha-ha-I'm-not-dead trick (which may well be a *scène à faire*). Quantitatively, this is almost nothing. It's three words and one plot twist. On the other hand, qualitatively, this is a major incident in the story—as evidenced by the fact that Galactic considers it important enough to put in the trailer. I think it's a reach, but I gave full credit for any bottom line supported by your analysis.

Fair Use

Yes, there is a fair use issue. In copyright, there's always a fair use issue. Galactic will almost certainly defend on fair use grounds if sued; defendants almost always argue fair use in the alternative. It's not a very interesting fair use analysis; this is straightforward literary copying, defended on the ground that the defendants didn't take very much. Trout has a strong fourth-factor argument, though, that *Young Andrew Jackson* will preempt any market for the movie rights to his book.

Remedies

Trout will want an injunction to stop the release of the movie. Especially with its $25 million advertising campaign, this would be a powerful weapon, and he could basically hold the film hostage to force a settlement. But for that very reason, would Trout really get one? You should mention the equitable issues involved.

Trout would probably also be happy to get defendant's profits. The films revenues should be huge, so he'll be starting from a high baseline. But there are going to be very significant valuation problems; what, exactly, is the contribution of this one scene (and of Trout's version of this one scene) to the movie? He may have an easier time showing lost licensing revenues. Trout could more easily find evidence of the range of prices that movie studios pay historians and historical novelists whose work is incorporated into historical epics. Statutory damages are available (since Trout has registered), but he probably would hope to recover more even than the $150,000 willful damage amount he theoretically could.

Strategy

I hoped you'd ask whether Trout should sue in New York, with Second Circuit law, or in Los Angeles, with Ninth Circuit law. My sense is that the vagaries of the extrinsic/intrinsic test give Trout a little more room to get in front of a jury and rub the "hickory-dickory-dock" line in their faces repeatedly. I also hoped you'd counsel Trout to find out as quickly as he can whether the rest of the movie has more infringing material in it. If he can find other scenes that resemble his book more than their common source alone would suggest, his case is much stronger. And finally, I hoped you'd think about whether Trout should sue immediately or wait until the film has been released. One nice point in one of your answers was that Trout should contact Slazinger and Constant, who may have dirt to dish on Galactic.

Question Sources

The names in the problem—Kilgore Trout, Paul Slazinger, Malachi Constant, Lionel Jones, Trowbridge (Helicopter), and (Eliot) Rosewater—are taken from Kurt Vonnegut's novels. Andrew Jackson's life was even more colorful than the problem suggests. he fought 13 duels, and the bullet from the duel with Dickinson was lodged in his chest until his death—39 years later. Alexander Hamilton was also quite a character, and Dorr's Rebellion really did take place.

(2) **Mock Band**

This was a *hard* problem. There weren't that many difficult legal issues (and I told you to avoid resolving them, an instruction that some of you disregarded to your detriment), but there were a lot of parties and interlocking issues kicking around. Organization was at a premium; I had a pretty good idea who took the time to chart the issues out before starting to write and who didn't. Careful organization is an important legal skill, and this fact pattern was downright simplistic compared to the messes you'll need to sort through in practice.

Ownership

If the parties here followed standard industry practice, Leonard Link owns the musical work copyright in "The Ground Beneath Her Feet" ("Ground") and Burninator owns the musical work copyright in "Because, It's Midnite" ("Because"). Similarly, according to standard practice, Eurydike owns the sound recording copyright in "Ground" and Blue Laser owns the sound recording copyright in the Sloshy version of "Because." ASCAP and BMI, respectively, effectively control the public-performance rights in the musical works.

Subject to the rule that infringing derivative works are not copyrightable (*see Pickett v. Prince*), Videlectrix owns a copyright in the audiovisual work that is *Mock Band*. (Its elements of originality include the dot sequences and the animations.) Videlectrix also owns the sound recording copyright in its employees' cover version of "Because" (which was almost certainly a work made for hire).

The fan videos are also copyrightable by their respective authors, again subject to the infringing-derivatives rule. David, Nigel, and Derek (DND) are probably joint authors with each other, as are Jake and Elwood (JE). The three groups, however, are not joint authors with each other. JE's and Barry's authorship is clearer than DND's., though their performance is probably still enough to pass the low threshold of originality. YouToo might have a compilation copyright in the collection of uploaded videos, but we'd need to know more about how they're arranged to say for sure.

Which Rights

Making *Mock Band* triggers the reproduction and derivative work rights. Selling it triggers the distribution right. Making the fan videos triggers the reproduction and derivative work rights. Uploading them triggers reproduction; each download may be one or more of a reproduction, a distribution, and a public performance (via a digital audio transmission, in the case of the sound recording copyrights). Since the videos have been downloaded, there's no *Hotaling* issue.

Infringement by Videlectrix

Videlectrix has not infringed Eurydike's copyright in the sound recording of "Ground"; it had a license from Eurydike. But Videlectrix also needs permission from Leonard Link, which it didn't get. (Per *Newton v. Diamond*, Videlectrix's use of the whole song is not *de minimis*.) Section 114 tells us that Videlectrix has not infringed on Blue Laser's sound recording copyright in "Because" by

recording a sound-alike. But the Section 115 compulsory license that Videlectrix relied on is no good; that license only covers "phonorecords," which Section 101 says don't include sounds accompanying audiovisual works. Thus, copies of *Mock Band* aren't phonorecords and aren't covered by the Section 115 license. (In copyright, you should always check your definitions, and over a third of you did.)

Infringement by Users

DND's video includes the audio of "Ground" and therefore *prima facie* infringes both the musical work (Leonard Link) and sound recording (Eurydike) copyrights. JE's video includes the *Mock Band* audio of "Because" and therefore *prima facie* infringes both the musical work (Burninator) and sound recording (Videlectrix) copyrights. Barry's video doesn't include any game audio and therefore can't infringe the "Because" sound recording copyright, but query whether the dot sequences (and animations) are a derivative of the musical work (Burninator) and might therefore infringe. Barry's and JE's videos include the game's video and therefore *prima face* infringe the audiovisual copyright (Videlectrix).

None of the users are likely to be able to rely on the licenses from Eurydike and Burninator (via Section 115) to Videlectrix; they're probably not intended beneficiaries. They'll all raise fair use defenses, pointing especially to their noncommercial use. The key point to make here is that the three groups are differently situated; JE and Barry may have better claims to be making transformative uses than DND.

Infringement by the Web Sites

Videos uploaded to YouToo include the audio of both songs, possibly infringing both musical work and sound recording copyrights (Leonard Link, Eurydike, Burninator, and Videlectrix). They also include gameplay video, possibly infringing the audiovisual copyright in the game itself (Videlectrix). The videos, of course, also contain elements added by the users, but YouToo's uses may be with user permission; further facts are needed. YouToo has an excellent Section 512(c) defense to copyright claims in the music and game elements, since the material was uploaded by third parties (the users). That defense is qualified by the conditions in 512(c)(A) (quasi-contributory infringement) and 512(c)(B) (vicarious infringement); the facts in the problem make things look good for YouToo, but more development of them will be needed. It probably has a fair use defense, though fair use may not stretch beyond what 512 shields.

24Frames is subject to every lawsuit that YouToo is, *plus* a lawsuit by YouToo based on its compilation copyright. 24Frames doesn't have a 512 defense, since it itself uploaded the videos. It also probably can't clam the benefit of the license granted to YouToo by the users when they uploaded the videos.

One might also ask whether any of the people who *downloaded* the videos from these sites might be an infringer, though none of them are currently in front of the court.

Question Sources

Mock Band is based, of course, on the hit video game *Rock Band*. You can find plenty of fan videos online. The other names are a tribute to some of the great fictional bands of all time.

- *Ormus Cama* and *Vina Aspara*, both of *VTO*, come from Salman Rushdie's novel *The Ground Beneath Her Feet*. The novel, a loose retelling of the story of Orpheus and *Eurdike*, is narrated by *Rai Merchant*, although he's a photographer, not a musician.
- *Limozeen* and *Sloshy* are both fictional bands in the Homestar Runner universe, and yes, Sloshy did cover Limozeen's "Because, It's Midnite." *Videlectrix* (a videogame company), Trogdor the *Burninator* (a man, or maybe a dragon man, or maybe just a dragon), and *Blue Laser* (an evildoing organization), are also from Homestar Runner.
- *David* St. Hubbins, *Nigel* Tufnel, and *Derek* Smalls are Spinal Tap.
- *Barry* Worm is the drummer for the Rutles.
- *Jake* and *Elwood* Blues are the Blues Brothers.

YouToo is YouTube, *24Frames* is just a name I thought up, and "Judge Judy" Sheindlin is a 1965 graduate of NYLS.

(3) **Diet Secrets**

This problem produced the lowest scores: its subtleties aren't obvious on the first read. Again, jumping into issue-spotting did you no favors. Your client is Venal, and it was important to look at the problem from its perspective. It was also easy to get carried away talking about non-issues having to do with the derivative work right. The book easy passes the *Mirage/Lee* threshold; *Castle Rock* does not repeal the ordinary requirement that the the defendant must have copied original expression from the plaintiff to be found an infringer.

Copyrightability

Something I didn't intend to be hard, but that some of you flagged, was the question of whether the trust properly owns the copyright in Caravaggio's diaries. There's an obvious chain of title, but it's not explicitly spelled out. In practice, a good defense will want to raise this issue if possible, so I gave a bonus point for noting it.

The facts of what Caravaggio ate aren't copyrightable. (Or are they? He was an artist; maybe he was creating a work by choosing what to eat! It's a stretch, I'll admit.) Arranging them chronologically is probably also unoriginal, nor is there evidence that he selected which ones to include. But his annotations (e.g. those "treasonous" grapes) and the visual appearance of the pages are copyrightable.

Infringement

Viewing the diary pages created RAM copies of them. Those definitely included some copyrightable material. That use may have been licensed; per *Sega*, they're also definitely fair use if the final result is a fair use. The same probably goes for her notes. As for the manuscript, I *told* you that Koh copied. There is no plausible way to argue that copying-in-fact is at issue here. If Venal publishes the manuscript, it will do so knowing that it copied from the diaries but alleging that such copying is not infringement. The defense to improper appropriation is that the manuscript copies (unoriginal) facts and (unoriginal) arrangement, but not (original) annotations.

I also wanted you to note that Venal & Sons, your client, *is not liable* for any acts of infringement committed by Koh. By choosing to publish her book, it might put itself on the hook for *future* infringement (reproduction, derivative work, and distribution), but there is no way to stretch either contributory, vicarious, or inducement liability to cover actions taken by third parties before the defendant entered the picture.

Fair Use

There's a good fair use defense here. The use is one of the favored class of uses—to inform the public and to comment on public figures—and also significantly transformative, both in content and in purpose. The plaintiff's work (at least the part being copied) is substantially informational. The amount copied is quantitatively small (at most 300 pages out of 10,000), and, qualitatively, seems to be not the part that people would buy the diaries for. And finally, they're in completely

different markets, nor is it common for diary authors to write tie-in diet books based on the diaries.

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The diaries were protected by encryption, which satisfies the definition of a technological measure that effectively controls access. But what Koh did is probably not circumvention; she used a key given to her by the work's copyright owner. The Trust has an argument that she misused the key by acting in a way that they didn't authorize, but courts have generally rejected such arguments.

The Terms and Conditions

So far, the entire analysis has proceeded on the assumption that *everything Koh did was utterly unauthorized*. The fact that there were terms and conditions involved could do two things. First, it could give her *more* rights by making some unauthorized activities authorized. The second term is a license grant. It doesn't cover what Koh did, since her use will be commercial. Thus, it leave the game unchanged. If her actions were noninfringing, they remain so. If they're infringing, they remain so.

The second thing the terms could do is constitute a contractual promise by Koh not to do certain things. The first term is clearly such a promise, and it would appear to waive her two best defenses above. I wanted you to say two things here. First, might this promise be preempted? (The question was ambiguous about preemption; I meant you not to discuss preemption of false designation of origin or right of publicity. But some of you thought I meant not to discuss preemption at all. Result: full credit on the preemption issue for everyone in the class.) *ProCD* might say not, except that it's one thing to promise to do something, and another to try to contract into copyright. This is a hard, hard issue, and I didn't expect a definitive answer.

Second, I wanted you to remember that *Venal is not a party to any contract formed by Koh*. There's a very strong argument that nothing in the T&Cs is binding on Venal. It's not conclusive; perhaps Venal might be considered her agent, or vice-versa, and there are doctrines of interference with contract to worry about. But still: you should be skeptical about the reach of these provisions.

And another thing: especially the third and fourth terms are awfully broad. We're potentially getting into copyright misuse territory. The misuse could make the Trust's copyrights unenforceable. (Venal shouldn't entirely rely on misuse, since the Trust could purge the misuse by stipulating not to enforce those terms against anyone.)

Koh's Copyright

As a publisher, not only do you want to worry about committing infringement, you also want to make sure the manuscript you're publishing is properly copyrighted. The facts of Caravaggio's diet are no more copyrightable by Koh than they are by the Trust. The spreadsheet doesn't sound like it's arranged in a way sufficiently original to be copyrightable. But the first 2/3 of the manuscript are definitely original and therefore copyrightable.

Strategy

I think Venal is probably in the clear. I was happy with any recommendation you gave, as long as you gave a recommendation and it was supported by your analysis. The Trust, I hoped you'd point out, is going to be furious about this book. Given their "more food" campaign, they're going to fight tooth and nail against a Michael Caravaggio diet book. Especially if the Trust is controlled by his parents, they'll have noneconomic reasons to want to stop the book project; that Venal has good defenses may not head off the lawsuit. (There may also be no room for a negotiated settlement here.) One answer brilliantly suggested advising Venal to drop the spreadsheet from the book; doing so gives the Trust far less to work with.

Question Sources

Michelangelo Merisi da *Caravaggio* was an early Baroque painter whose canvases and life are both notable for their shadows. Théodore Géricault (sorry, bad pun) was a 19th-century painter whose *The Raft of the Medusa* depicts the emaciated survivors of a notorious shipwreck. V*enal & Sons* is the publisher of the multi-volume *The Laundry Lists of Hans Metterling* in a short story by Woody Allen.