

Copyright

Professor Grimmelmann

Final Exam - Fall 2008

Take-Home and Open Book

This exam consists of THREE questions. Each question is worth 33 points, for a total of 99 points. (Everyone gets the final point for free.) The exam counts for 100% of your grade in the course.

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 *after* the start of exam period on Wednesday, December 10, at 9:00 AM. You must then return it either in person or via email (to submitexam@nyls.edu) *within* 24 hours and *before* the end of exam period, on Friday, December 19, at 5:00 PM.

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. 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 end of exam period. **Your work must be exclusively your own.**

I will not be available to answer questions about the course after the start of exam period, since at that point I won't know who has picked up the exam and who hasn't.

Please pay attention to the specific questions being asked and to the roles the questions place you in. Support your answers with detailed analysis, reference to specific statutes and cases as appropriate, and explanations of how you applied the law to the facts. Keep your citations 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 analysis is clear.

If anything about a question is ambiguous, say what you think it means, and answer it 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 **FOUR pages total**, including this cover sheet.

GOOD LUCK!

(1) **Who Dat Ninja?** (33 points, maximum of 5 pages)

You are the head of legal affairs at TGS Pictures, a movie production company. TGS's latest project, *Who Dat Ninja?*, has completed production. You have a meeting scheduled with the director, the executive producers, and the rest of the studio brass. At this meeting, you will be asked to give a "go-or-no-go" opinion on whether TGS can sign the papers committing it to *Who Dat Ninja?*'s scheduled release date in 60 days. (The final print will need to be delivered 21 days prior to release to allow time for duplication.) You will also need to provide a proposed course of action for dealing with any outstanding legal problems. The following issues have been brought to your attention:

- The lead actor, Leo Spachemann, claims that he is owed a further \$1.2 million under his contract.
- *Who Dat Ninja?* has not been registered with the Copyright Office.
- The closing credits of *Who Dat Ninja?* are accompanied by the song "Muffintop." This version was recorded by Bianca Donaghy; the song was written and produced by Dennis Duffy. TGS has obtained a license from Duffy's publishing company.
- Some party or parties unknown have leaked a working cut (made sometime in the last two months). It has been uploaded to GlueTube, a popular video-sharing site, by someone with the username "Toofer."
- During an exterior crowd scene, a number of advertising billboards are visible in the background, including ones for Hardy Boy Cola. TGS has no contractual relationship of any sort with Hardy Boy.
- The Gold Case publishing company has sent you a letter alleging that *Who Dat Ninja?* was based on Tobias Spurlock's short story "Urban Fervor" without permission. "Urban Fervor" was published in 1940 and registered for copyright by Spurlock in that year. The only other document on file at the Copyright Office associated with "Urban Fervor" is an agreement transferring "the motion picture rights" in the story to Gold Case. This document is dated 1946 and was recorded with the Copyright Office in 1985.

It is now 9:00 AM. The meeting with the executive team is scheduled for 2:00 PM. Note that you have a few hours in which to check TGS's files or to make some phone calls, but that at 2:00 you will need to walk into the conference room with a plan. **Write the presentation you will give to the executives, explaining whether TGS should go forward with the scheduled release and what other actions (if any) it should take.**

(2) **Chocolate Celebrities** (33 points, maximum of 5 pages)

You are a law clerk to Judge Sheindlin, who is presiding over a copyright infringement suit filed by Ray Marcel, an artist, against June Whiteread, one of his former assistants. Whiteread's reply claims uncopyrightability, lack of ownership, non-infringement, express license, and fair use.

Marcel and Whiteread have stipulated to the following facts:

Marcel creates art installations based around small hollow statues of celebrities made out of chocolate. Each statue has an identical five-inch base (produced from a standard mold that Marcel designed and executed) and a three-inch oversize head. The heads are sculpted on-site by Marcel and his assistants. As each statue is completed, it's placed in front of a bright photographer's spotlight, causing it to melt in short order. Marcel takes pictures of the melting statues as though he were a fashion photographer.

According to an affidavit filed by Marcel as part of the lawsuit:

Marcel's works are a commentary on the ephemeral nature of fame and the way that the public creates and destroys spiritually empty celebrities. Marcel paid each of his assistants a flat \$250 for an evening of sculpting, told them which figures to sculpt, and supplied them with chocolate. About six months ago, Whiteread ceased working for Marcel and opened a business that creates ice sculptures for catered parties. Her ice sculptures strongly resemble the chocolate sculptures she produced while working for Marcel.

Marcel has also produced an undated document, signed by Whiteread, which reads:

"In return for the sum of \$250, I, June Whiteread, acknowledge that Ray Marcel will have ownership of all work I create in the course of the Gunningham Gallery show, and that such work will be considered a work made for hire."

According to Whiteread's affidavit:

The ice sculptures do not have any visual similarities to the chocolate sculptures. While working for Marcel, Whiteread provided her own spatulas and chisels. Marcel supplied his assistants with reference photographs to work from, taken primarily from celebrity magazines. Whiteread creates some of her ice sculptures from the photographs Marcel gave her, and some from photographs she's clipped on her own. Because ice is harder than chocolate but also less stable at room temperature, she uses very different sculpting techniques to produce them. She also sculpts her own distinctive bodies, although she does use the same 5"/3" body-to-head ratio that Marcel used. She has never seen the Gunningham Gallery document.

Marcel and Whiteread have filed cross motions for summary judgment on the basis of the above affidavits. **Write a memorandum to the Judge, explaining which issues (if any) she should decide on summary judgment, and which issues (if any) she should set for trial.**

(3) **One-Tap Tappet** (33 points, maximum of **5 pages**)

Your firm represents the Soterios Press, publisher of the Terry Tappet series of mystery novels. Soterios is concerned about something called the “One-Tap Tappet Zap-lication” (or “One-Tap” for short) and would like your advice.

Terry Tappet is a gruff but appealing private investigator who searches for missing heiresses and deadly con men in L.A.’s seedy underbelly. You’d have thought that Raymond Chandler and Dashiell Hammett worked this territory over pretty thoroughly, but apparently not: there are currently 158 novels in the series, and counting.

The ZapPhone is an internet-enabled cellular phone, sold by the Zap Computer Corporation. Zap runs an online “Zap-lications” store, where users can purchase programs that run on their ZapPhones. Zap keeps 25% of the purchase price and gives the other 75% to the application’s developer. The contracts between Zap, its users, and the application developers give Zap the unilateral right to deactivate any application—even after it has been installed—and issue a full refund. If it does, Zap bears the full cost of the refund. Application developers, on the other hand, have no right to deactivate an application once it has been sold and installed. The actual technological means of deactivation (if they indeed exist) are a closely-held trade secret of Zap.

One-Tap, developed by Brannigan Enterprises, sells for \$9.99. It contains a list (which it updates monthly from Nile.com, see below) of the novels in the Tappet series. When the user clicks on a title in the list, One-Tap fetches information about that title from a variety of web sites, and assembles a page where the user can browse information about the book. One-Tap does not appear to store permanently any information other than the list of titles. In particular, it assembles information from the following sources:

- *Spoileriffic.com*: This general-purpose site contains one-paragraph plot spoilers for all sorts of books, including most of the books in the series.
- *Nile.com*: This online bookstore has publication data about various books, including the title, publication date, page count, sales figures, and the back-cover text from the book (written by Soterios.) It also has the cover art for the books, which One-Tap scales down to fit in one half of the ZapPhone screen.
- *TappetsBrothers.com*: This fan-produced site contains ten-page analytical essays about each book in the series. The essays are written by many different readers, but all feature plenty of sarcasm, long digressions about factual inconsistencies and geographic inaccuracies, and strange, in-joke names for the characters.
- *Commonplace.com*: This site lets users upload quotations of 250 or fewer words from books, tagged with the book and page number. Some of the Tappet books aren’t represented here at all, most have half a dozen short quotations, and a few have quotations from almost every page.

Soterios doesn’t have a lot of spare cash, and is primarily concerned about the effects that One-Tap and these websites may have on sales of its most popular series. Of course, any steps it takes should be cost-justified. **Write a memorandum on Soterios’s legal options and recommend a course of action.**