Copyright

Professor Grimmelmann

Final Exam - Fall 2008

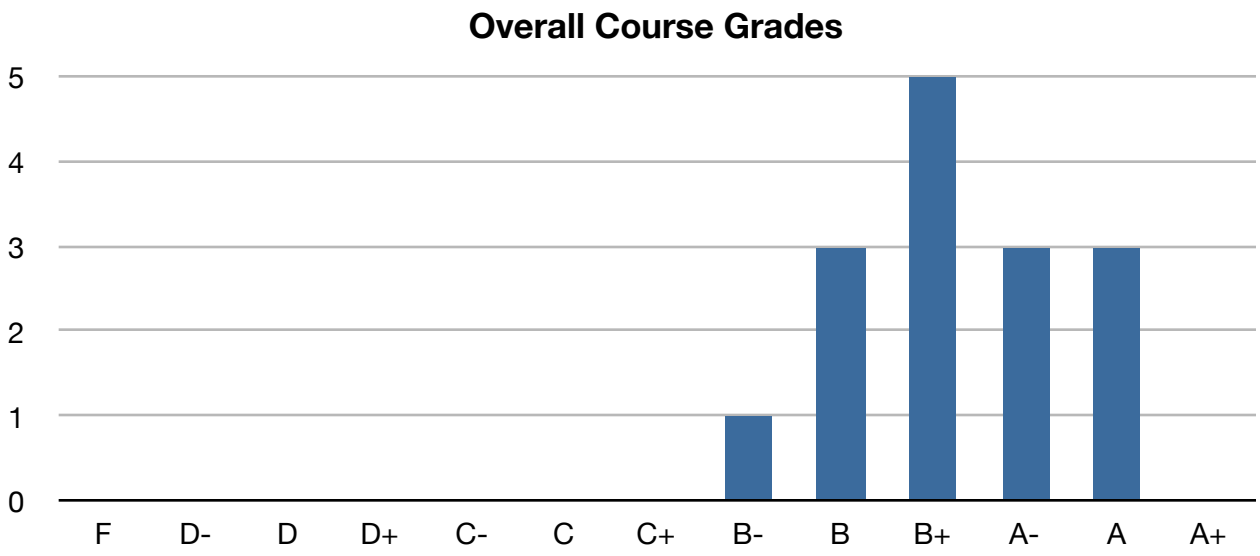
I graded the three problems by creating a thirty-three-item checklist for each. You got a point for each item (e.g. "*Who Dat Ninja?* is eligible for preregistration under § 408(f).") you dealt with appropriately. I gave out frequent bonus points for creative thinking, particularly nuanced legal analyses, and good use of facts.

The exam was moderately hard, but not excessively so. You were all able to see your way around the problems and to structure your analyses well.The differences between the decent exams and the excellent exams were primarily in degree, rather than kind: the top-range exams were written more precisely and used the available facts more effectively. 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

	Ninja	Chocolate	One-Tap	Total
Average	19.0	21.2	20.7	61.9
Median	20.0	22.0	21.0	62.0
Std. Dev.	4.3	3.4	3.8	7.0



(1) **Who Dat Ninja?**

This question was generally straightforward. The question put you in a role requiring you to be both prudent (many millions are at stake) and decisive (the studio need an up-or-down decision from you today). This combination is characteristic of many in-house and entertainment law practices. The correct bottom line was "Yes, TGS can go forward. Here are the issues that will need to be dealt with, here's how, and here's why none of them will delay the release."

There were six main issues in the problem, helpfully called to your attention by distinct bullets. They were mostly—but not completely—independent.

Leo Spachemann

If all Spachemann brings to the table is a contractual claim, he poses no threat to the film's release. He almost certainly can't get an injunction for breach of contract. Does he potentially have a copyright claim? It seems unlikely, per Aalmuhammad, that he's a joint author of the film. Even if he is, he can't sue to stop a co-owner from exploiting the work, only to get an accounting of any profits. You have five hours until the meeting; it would be sensible to check your files to make sure that his contract contains a work-made-for-hire clause.

Sensible bonus-point suggestions here included making sure his contract didn't give him creative control over the character ,trying to figure out whether you TGS does actually owe him $1.2 million, and trying to calm him so he doesn't trash the film publicly. I also liked the point that while this is an important issue that will take up your time in the upcoming weeks, it's not an issue affecting release timing.

Registration

Registration is good. It's no problem that the film hasn't yet been registered, but you should register as soon as possible. Per § 409(f), you can even preregister it, since the film is being "prepared for commercial distribution." That'll enable you to file suit (important in light of the GlueTube upload) make statutory damages available, etc. Some of you worried about the fees; for a multi-million-dollar movie, Copyright Office fees aren't even pocket change.

Muffintop

You've got a license to the musical composition; publishing companies are typically the parties that you get such licenses from. That's good, but it's not enough. You also need a license to the sound recording. (Keep in mind that these two copyrights are distinct.) It's *possible* that the license from Duffy's publishing company suffices, as some of you speculated, but unlikely, since publishing companies rarely touch sound recording copyrights. Donaghy or her record label probably owns the sound recording copyright, and you're going to need a license to it to release the movie.

I saw some clever arguments about musical copyrights in here. Most of them were wrong. The § 115 compulsory license won't help you here; movies aren't phonorecords, since they're audio*visual*

works. Nor will the limitation of sound recording copyrights not to incldue a public performance right help you. Each print of the movie is a distinct copy, so you also need to worry about the reproduction right.

That said, this isn't an issue that should hold up the release. You can go to Donaghy to negotiate, but if she refuses, you can just recut the closing credits. (You might hire someone to record a cover version—you do have a license to the musical composition, after all—or you might just replace it with a different song.) 39 days is plenty of time to carry out that negotiation, with a cushion to redo the edit.

GlueTube

Toofer is obviously a copyright infringer. His upload definitely resulted in an unauthorized copy on GlueTube's servers, he's possibly also engaged in public distribution. per *London-Sires*. Any possible fair use defense is pathetically weak: this is a completely nontransformative use with a serious effect on the market. Toofer is also a criminal infringer, per § 506(a)(1)(C), so you might be able to convince the feds to take an interest in him. Before you can bring suit, or threaten him into silence, you first need to figure out who he is. GlueTube might have some information that could help you, or you might also want to undertake some internal investigations to figure out the source of the leak.

As for GlueTube, filing lawsuits here isn't really a high priority. You want that leaked copy offline *now*. Send a DMCA § 512 takedown notice to GlueTube; maybe pick up the phone to them, too. If they comply with the notice, they're almost certainly immune from copyright liability, but you've gotten what you need. Many answers had extensive speculation about secondary liability for GlueTube. I ignored all of it. I gave you no facts suggesting involvement or knowledge on GlueTube's part. As an in-house lawyer, you're just wasting TGS's money if you pursue scorched-earth litigation against GlueTube once the leaked copy is offline.

Of course, worrying about leaked copies is no reason to hold up the release. If anything. delaying the release will make the problem of Internet leaks worse.

Hardy Boy Cola

Hardy Boy's billboard is probably a copyrightable pictorial or graphical work. Including it in the movie is a *prima facie* infringement. You've got a decent fair use defense. After our fair use unit, though, do you really want to rely on fair use? If Hardy Boy were to get an injunction against the movie, TGS would probably have to pay through the nose. Otherwise, the huge costs of the marketing campaign would be squandered.

Again, though, this isn't a showstopper. Go to Hardy Boy and negotiate for a license. You could probably start from the position that Hardy Boy should pay TGS, not the other way around. Even if that doesn't work and Hardy Boy names a price that's too high, just have the CGI experts go into the exterior scene and replace the billboard with something else. You've got enough time before the release to deal with this.

Urban Fervor

This one should have been easy. Urban Fervor was a work published before 1978, Under the 1909 Act, its copyright expired after 28 years unless it was renewed. But the Copyright Office has no record of a renewal. That means it's in the public domain. The transfer agreement is a red herring.

Question Sources

This was a *30 Rock* question, except for "GlueTube," which is just a bad pun. *TGS* is the show-within-a-show; Dr. Leo Spaceman (pronounced "*Spa-che-mann"*) is a recurring character. Tracy starred in *Who Dat Ninja?* (the poster is visible in many scenes in his office); Jenna had a minor hit with the song *Muffintop*. She also starred in a movie based on the novel The Rural Juror, whose sequel was *Urban Fervor*. *Bianca Donaghy* is Jack's ex-wife; *Dennis Duffy* was Liz's ex. *Toofer* is one of the writers; his Confederate ancestor was *Tobias Spurlock*. And finally, *Gold Case* was the name of the disastrous game show Kenneth pitched to the network brass.

(2) **Chocolate Celebrities**

This problem was conceptually uncomplicated; the key was to make good use of the facts provided. I was generally happy with how you applied the summary judgment standard, and I was especially pleased with your fair use analyses. Your attention to the overall originality of the chocolate sculptures was surprisingly thin, however. In general, I was tolerant of multiple possible correct answers on whether to grant summary judgment on particular issues. It made sense to break down your answer according to the issues Whiteread raised.

Copyrightability

The statutes are clearly proper subject matter; they're sculptural works. There's a potential useful-article issue here, one I didn't expect you to spot. Those of you who noticed that the sculptures might be useful *as food* got a bonus point. In context, that seems like a weak argument against copyrightability, but it's an interesting one to flag.

Fixation is also, I think, easy. It's true that the chocolate sculptures melt, but only under high heat, and they do last long enough to be photographed. Under *MAI*, and probably even under *Cablevision,* they're fixed.

Originality is subtler. Some aspects of the sculptures are clearly uncopyrightable. The 5/3 ratio is similar enough to that of a bobblehead not to be original. The process of creating them is uncopyrightable, and so is the idea of spiritually empty celebrity. The individual heads, to the extent that they resemble celebrities, aren't original to Marcel and his assistants. (A question no one asked: are these sculptures infringing derivative works of the celebrity photographs?) But to the extent that they add their own details in the process of chocolate-carving, those changes are copyrightable. Think of *Alfred Bell*.

Three aspects of the work are definitely copyrightable by Marcel. First, he picked out which celebrity photographs to use. That *might* support a selection and arrangement copyright in the compilation. Second, he designed and sculpted the standard base. That sounds copyrightable to me. Third, his photographs of the melting sculptures are copyrightable pictorial works; he chose the subject, the arrangement, the lighting, and the timing.

All in all, the best answer here is that Marcel should be granted summary judgment on copyrightability. The evidence on originality could be stronger, so I also gave credit for recommending summary judgment for neither side, provided you backed it up with good reasons.

Ownership

Let's start with the undated document. I was hoping you'd notice that you can't just blindly accept its validity, since Whiteread claims never to have seen it. (One might legitimately question whether that claim is plausible.) There's a nice ambiguity here, which some of you noted, in that the Gunningham Gallery show may or may not have involved all the sculptures at issue.

The document, by itself, can't actually make the sculptures Whiteread executed into works made for hire. Sculptures aren't one of the designated classes of works in 101(2), which rules out the signed-agreement independent-contractor route to works made for hire. The document might, however, be treated as a transfer of copyright after ownership vested in Whiteread. "Will have ownership" of is ambiguous, but it could be read as a transfer.

Marcel might claim ownership over Whiteread's work by claiming she was an employee. That required you to set up the *CCNV* factors. I hoped you'd notice: that Whiteread supplied the tools but Marcel supplied the chocolate; that she was paid for the evening, not on a salaried basis; and that the work was highly skilled but Marcel exercised fairly close control over it. Those factors could go either way, but remember that *Aymes* said that failure to pay benefits and taxes almost always means a finding of independent contractor status.

Whiteread might also argue that the sculptures were a joint work. (Ask yourself why it's Whiteread making this argument, not Marcel.) I didn't ask for much here, just to flag either the separately-copyrightable-contributions issue, the intent-to-merge issue, or the overall-superintendence issue.

Bottom line: Ownership probably has to go to the jury. The most plausible route out would be to hold that there is no *genuine* issue as to whether Whiteread signed the document and that the document is a transfer. If you accept that argument, then summary judgment on ownership for Marcel would be proper.

Infringement

On the facts before you, the question of access is indisputable. Of course Whiteread had access to Marcel's chocolate sculptures; she made many of them herself. Given that there are some minimal similarities between them—same proportions, some of the same celebrities—copying in fact has been all but conclusively proven.

As for improper appropriation, it turns on whether his sculptures and hers are substantially similar. I gave you directly contradictory statements in the affidavits. Marcel claims the chocolate and ice sculptures "strongly resemble" each other. Whiteread claims they "do not have any visual similarities." Of course the two sides will say that. What else would you expect? You pretty much need to disregard both of these statements; assessing the actual degree of similarity is going to be a jury issue.

Whiteread can make some arguments here: she didn't copy the bodies, and she used a different technique. Marcel can counter that she may have copied some of his selection copyright in choosing which celebrities to sculpt, and that she may have copied some of the visual details in resculpting them. Are those similarities are enough to infringe? Send it to the jury. Some answers thoughtfully considered the question of jury instructions (e.g. "total concept and feel" or "more discerning observer"), though it wasn't strictly necessary given the procedural posture of the question.

Express License

Whiteread is just making this one up. There's no document in evidence that could be construed as a license; nor has she testified that Marcel gave her a license orally. With no evidence at all, she's failed to contest a genuine issue of material fact on this legal question, and summary judgment for Marcel is appropriate.

Fair Use

First factor: Whiteread's work is commercial. It's definitely transformative as to the actual authorship in the works, though by how much is a disputable question. This factor could swing from favoring him to favoring her, depending on how you answered it.

Second factor: Marcel's works are published (shown publicly, which is good enough for fair use purposes) and expressive. He wins, for whatever this factor is worth.

Third factor: Hard to say how "much" she copied without exemplars of the work and a lot more facts. I saw plausible arguments both ways in your answers, which goes to show that this is not an especially clear factor.

Fourth factor: It seems unlikely that Whiteread's catering business is cutting into Marcel's avant-garde gallery shows. More that that, though we simply don't have enough facts in evidence to know about market effects. Perhaps there's a licensing market to worry about as well, but facts there are equally nonexistent.

Bottom line: summary judgment for neither side. The facts are ambiguous.

Big Picture

This case isn't going away yet. Marcel might deserve partial summary judgment on some of the copyrightability and ownership subissues; Whiteread might deserve partial summary judgment on the work-made-for-hire issue. But even granting that much, the core infringement and fair use issues are still very much on the table.

Question Sources

Most of the names come from the art world. Man *Ray* and *Marcel* Duchamp were leaders of the Dadaist movement. Nam *June* Paik was a pioneer of video art; Rachel *Whiteread* is a modern sculptor. Robin *Gunningham* is better known as Banksy, a playful graffiti artist. Judith "Judge Judy" *Sheindlin*, NYLS '65, wouldn't have much patience for any of them.

(3) **One-Tap Tappet**

This was your strongest question; that was a bit of a surprise to me, because I also thought it was the hardest. I expected the web sites and application to be factually confusing, but you tended to have little trouble making good distinctions among the various sites and developers. The most logical way to proceed was to analyze each web site independently, and then to ask about secondary liability for Zap and for Brannigan.

I graded with a premium on strategy. Especially good answers realized that it makes no sense to sue Nile, since they're doing your client a favor by selling more copies of the novels. Similarly, DMCA notices and strongly worded letters might take care of some issues without the expense of a lawsuit, and it's worth thinking about how to preserve good relations with Tappet fans. I'm happy to report that every single exam got at least one of the strategy points.

Spoilleriffic.com

The spoilers don't copy the text of the mysteries, but they do constitute nonliteral copies (perhaps derivative works) of the plots. The hard question here is whether the spoilers are so short, and mystery plots so standardized (think of *Nichols*, and the introduction's reference to Chandler and Hammett) that one-paragraph summaries copy only uncopyrightable ideas. Similarly, on a fair use analysis, the amount copied may be quantitatively miniscule. Then again, it might constitute the "heart" of the work, per *Harper and Row*. Good answers noted that Soterios might well fear that having spoilers online would cut into sales; how many of you have looked at a mystery in a bookstore, flipped to the last page, and then put it back on the shelf once you knew how it ended?

Nile.com

Most of what Nile copies is uncopyrightable: the page count, publication date, and sales figures are all facts. The titles contain a little originality each, but titles and short phrases are generally considered too small to copyrighted. (Unless, perhaps, there's a compilation copyright in the list of 158 of them . . . .) The back-cover texts are probably pretty short, but they might contain enough originality to be copyrightable. The cover art is almost certainly expressive enough to be copyrightable. Nile potentially has a fair use claim, but the better way to go was to point out that Soterios benefits directly from Nile's actions and has no reason to object.

TappetsBrothers.com

The problem here is the exact opposite of the problem with Spoileriffic. Here, the amount of copying (of plot, character, etc.) is large, but the essays are stuffed full of other matter, much of it critical commentary of the sort that's favored under fair use. They're doing almost everything right under the *Rowling v. RDR* analysis. The site is also clearly run by enthusiastic fans, and it makes sense not to antagonize this community unless necessary. Some answers noted that the site's user-produced nature gives it a § 512 immunity; that means that a takedown notice might be a cheaper option than a lawsuit. All in all, given the strong transformative fair use case, it's probably best not to poke this hornet's nest.

Commonplace.com

This site directly infringes on the reproduction right. Should you be bothered? As to the books with quotations from almost every page, perhaps. It may be that the site lets people more or less read the book online. There's a fair use case, and I hoped you'd remember *Rowling* in saying that the analysis proceeds work-by-work. That is, the site may be a fair use as to some of the Tappet books and not fair as to others.

One-Tap Users

Assuming that at least one of the sites above is infringing—and there's a strong argument that Commonplace is—One-Tap users infringe the reproduction right when they use the application. There's a potential fixation issue, since the page isn't stored permanently, but it seems to be sufficiently stable for the users to look at and browse the information. (There's also a possible fair use defense, but the relevant facts might need to be teased out . . . .)

Zap Computer

Zap isn't a direct infringer; it just makes phones. It's also not, on the facts given, an inducing infringer. It has an outstanding *Sony* defense to contributory infringement, since the ZapPhones can be used as phones and to run all sorts of noninfringing Zap-lications. It's potentially vulnerable, however, to a vicarious infringement claim. It seems to be able to deactivate any Zap-lication, even one that's already in use by customers. That gives it the right and ability to control the infringements taking place by means of One-Tap Tappet. The direct financial benefit is a little tricky—is the 25% of $9.99 a "direct" benefit?—but this claim seems quite plausible.

Brannigan Enterprises

Brannigan is also neither a direct nor inducing infringer. Some answers assembled an argument that the design of One-Tap is inducing. I don't buy it, since so many of the sources it assembles are non-infringing. I gave partial credit for making the argument and full credit for then shooting it down.

Unlike Zap, Brannigan doesn't have as much exposure to vicarious liability, since it can't shut down the application once it's in use. One-Tap, however, materially contributes to infringement, and it seems trivial to impute knowledge of infringement. There's a *Sony* defense to consider; it's weaker than Zap's (since the application can do much less than the ZapPhone can), but it's not frivolous.

Question Sources

Some of the names come from NPR: *Soterios Johnson* is a reporter, and Click and Clack, the *Tappet Brothers*, are the hosts of Car Talk. *Zapp Brannigan*, meanwhile, is the hilariously incompetent space captain from Futurama. Spoileriffic was inspired by TheMovieSpoiler.com; Nile.com by Amazon.com; and TappetsBrothers.com by Television Without Pity. Commonplace is loosely based on QuoteDB and WikiQuote; the ZapPhone is, of course, an iPhone clone.