

Law 633

Handout

For discussion in class on Wednesday April 22

This Handout is NOT one of the documents you may consult during the examination.

1. This handout contains a near-final draft of the instructions for your final take-home exam, along with actual questions from past exams and some notes on what I was looking for when I graded them.

2. Here is a list of the 54 statutory sections assigned this semester (it should be identical to the sections listed on the syllabus):

17 USC §§ 101, 102, 103, 104, 104A, 105, 106, 106A, 107, 109, 110, 111, 113, 114, 115, 117, 120, 121, 201, 202, 203, 204, 301, 302, 303, 304, 305, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 501, 502, 503, 504, 505, 506, 507, 512, 602, 1001, 1002, 1003, 1008, 1201, 1202

The exam will not involve all or even most of them, but you should consider anything covered by these 54 sections to be fair game, with the following exceptions: I do not expect you to know the details of the statutory licenses in sections 111, 114 115, and 1003, or of copyright restoration under section 104A, although you should know in general what those sections do.

3. The earliest work at issue in this year's exam was first fixed in tangible form in the early 1970s.

Law 633 Copyright
Professor Litman
Final Examination – Winter 2015

This is a 48 hour take-home examination

MATERIALS ALLOWED:

- Casebook
- 2013 Case Supplement with 2014 Update
- A Copy of the Copyright Act
- Handwritten or typed (*not* taped) class notes or course outline prepared by you
- English language dictionary

During the examination, you may not refer to any hornbooks, F.A.Q.s, books, CDs, DVDs, audio recordings, films, television shows, commercial study aids, case reports, Lexis, Westlaw, cTools, Wikipedia, any other source available over the Internet, another student's class notes, or any other material not listed above. You may not discuss the examination with anyone. You should observe the word limits for your answers to each question. Detailed general instructions for taking the examination are on page 5.

This examination consists of two files. This file contains the instructions and questions one, two and three. The second file contains appendices that you might find useful to answer Question I. Check now to make sure that you have both files.

Include your assigned Exam ID number for this course (**not** your name) as a running header in your exam answers file. Include the word counts for your answer to each question at the end of that answer.

IV. TAKE-HOME EXAMS

The Law School's online take-home exam system is accessible from the Law School's Office of Student Records' website. To download take-home exam questions and upload take-home exam answers:

- Go to the Law School website (www.law.umich.edu)
- Click on Current Students
- Click on Office of Student Records
- Click on Exams
- Click on Take-Home Exams Login
- Enter your unique name and password at the login page
- Click on "My Exams/ExamIDs"
- Look under "Current Exam Information" for links to the download/upload page for each of your take-home exams for the term

2. The link to a take-home exam's download/upload page will be active during an exam's designated Start date/time (e.g., the first day of the exam period or study days at 8:00 a.m.) and End date/time (e.g., the last day of the exam period at 5:00 p.m.). Within a take-home exam's Start and End dates/times, the exam must be downloaded, completed, and submitted within the exam's designated time-length (e.g., 4 hours, 8 hours, 24 hours, etc.). A student must upload their take-home exam answers within exactly the designated time-length for that exam.

3. The timing of each student's take-home exam begins when the student initiates the download of the exam packet.

4. A student's allotted exam time may be reduced if a student downloads the exam packet too close to the exam's End date/time. For example, if a student downloads an 8-hour exam when there are less than 8 hours left before the exam's End date/time, the student is required to upload their exam answers by the exam's End date/time.

5. Receiving the exam packet involves the download of a ZIP file using your Web browser. Many browsers have security features that require you to confirm that a download is approved. Before initiating the download, please make sure that you know how to download a file using your browser. If you encounter any difficulty with the download, please use the "Report Problem" link in the lower-right corner of the take-home exam's download/upload page to notify the Law School's exam administrators.

6. The password to open the file(s) in the exam packet will be displayed on the screen immediately after the exam download process is initiated. The exam packet may be re-downloaded, if necessary.

7. Do not use Electronic Bluebook (EBB) exam software to write take-home exam answers.

8. Take-home exam answers must:

- be uploaded in either Adobe Acrobat (.pdf) or Microsoft Word (.doc, .docx) format. Please note that some professors may request one format or the other. So, please be sure to follow the instructions in the exam.
- be submitted as one file (not multiple files). New exam answers may be uploaded until a student's exam time has expired, but each uploaded file replaces the previously uploaded file.
- include the student's assigned Exam ID number for the course ("E" followed by 5 digits) as a running header on each page.
- include the word count(s) if required by the professor

9. Students are allowed to save and print the file(s) in the exam packet to use only for the purpose of writing their exam answers. As soon as a student's allotted exam time has expired, the exam-packet file(s) must be deleted and any printouts of the exam-packet file(s) must be disposed of by shredding or tearing into multiple pieces (so as to be unreadable by others).

10. During your exam time, please keep track of any printouts of the exam materials. If you do not, other students who have not yet taken the exam may inadvertently find them.

11. Do not delete your exam answers! Retain your exam answers indefinitely (or at least until you have received a grade in the course). If there is a problem with your exam submission, you will be contacted by a Law School exam administrator. You should be prepared to provide your exam answers to a Law School exam administrator upon request.

12. Students who use laptops, word processors, desktop computers, etc., to write take-home exams do so at their own risk of mechanical failures. If you have a mechanical failure, contact Assistant Dean David Baum (734.764.0516), Director Darren Nealy (734.615.0019), or Jane Ozanich (734.763.3419) as soon as possible.

13. It is strongly recommended that students frequently back-up their exam answers to an external saving device such as a flash drive and/or print their take-home exam answers as they write.

14. Please use the "Report Problem" link in the lower-right corner of the take-home exam's download/upload page to notify the Law School's exam administrators of any take-home exam problems. If you encounter a problem uploading your exam answers (or alternatively if the website is down), please also email a copy of your exam answers to lawrecords@umich.edu. Please note that if a problem occurs outside of normal business hours (8am-5pm; M-F), it is unlikely that you will receive a prompt response. Therefore, please record the time that the problem started, when it was resolved (if it was resolved), and any additional details that might be relevant. By no later than the next business, the Office of Student Records will review your exam and all available documentation to determine how to provide the best possible solution.

15. Be careful to follow the professor's formatting and other special instructions (e.g., line-spacing requirements; inclusion of a word count) before uploading your exam answers into the take-home exam system. The Law School's Office of Student Records will not replace take-home exam answers that have already been submitted with a corrected version.

Law 633 Copyright Final Examination

Winter 2015

Professor Jessica Litman

GENERAL INSTRUCTIONS

This is a limited open-book, 48-hour take-home examination. You may consult your casebook, your copy of the copyright statute, and your 2013 Case supplement with 2014 Update. You may also refer to a dictionary, your own class notes, and a course outline prepared by you. You may not consult *any* other material. (You may not, for example, consult any hornbook or secondary source, any print-out or photocopy of any case, statute, or bill, any notes or outlines created by another classmate or by a member of a prior year's class, any newspaper, magazine, television show, audio recording, CD or DVD, podcast, online or downloaded copy of any statute, case, or bill other than the current copyright statute. You may not consult any material whatsoever via the Internet.) You are forbidden to ask anyone for assistance, suggestions, ideas, or inspiration, or to collaborate with anyone on any part of the exam. If I discover that you have violated any of these rules, you will receive a failing grade.

I have strict word limits for your answers, and I will not give credit for any portion of any answer that exceeds the word limit for that part of the answer to that question. Write the number of words in each of your answers immediately following that answer. Upload your completed examination answers no later than 48 hours after downloading the exam.

The Registrar's guidelines instruct you to keep a copy of your answers until you receive a grade in the course. During the rest of the exam period, please keep very close track of that file, to avoid exposing your classmates to unreasonable temptation. You are responsible for ensuring the security of your answers. If I discover that someone has copied part or all of an answer from another student's exam, I intend to give both students a failing grade on that question, so carelessness with your exam file may put you at serious risk.

There are three questions. I have included further instructions with each question. Please read them carefully. You should spend *much* more time thinking about the questions than you do writing your answers. In order to stay within the word limits, you will need to decide which of the issues raised in the questions require extensive discussion and which need only cursory mention. I do not give any credit for unresponsive descriptions of general legal principles or for faithful transcriptions of my own remarks, so avoid the temptation to rewrite your course outline in your answers or to feed me back the opinions I have expressed in class. I will subtract credit for flatly incorrect legal statements, so if you must guess, guess carefully.

The questions are drawn from real situations that have occurred in real locations. Nonetheless, I do not expect you to apply the law of a particular Circuit to cases brought in its courts. For the purposes of the exam you should assume that all cases in your

casebook are persuasive authority to all courts on all relevant issues, but that more recent cases may have modified the law articulated in older cases.

[Grading Note: You don't need to distinguish among Circuits, and may rely on any case in the Casebook or Supplement, but you should recognize that some cases are no longer good statements of current law. Here's an example of what I mean: Harper & Row v. Nation Enterprises (Casebook at 535) says both that commercial uses are presumptively unfair and that fair use is rarely if ever available for unpublished material. The first of those presumptions was rejected in Cambell v. Acuff-Rose (Casebook at 542); the second was rejected by Congress, which amended section 107 to include a statement that the fact that a work is unpublished does not bar a finding of fair use. Similarly, at least some of the Second Circuit's opinion in Cartoon Network LP v. CSC Holdings (Supplement at 66) has been called into Question by the Supreme Court's more recent opinion in ABC v. Aereo (Supplement at 70).]

Exam Questions from Prior Years' Exams

Note: Every class is different. I try to tailor the exam to the class. That means that exams given in prior years may cover issues that we haven't spent any time at all discussing this year. Usually the reason for that is different emphases in different years; sometimes the law or the Casebook changed between years. That said, I do expect you to have read all of the assigned pages in the casebook and supplement, and all of the assigned statutory sections. Anything raised by the assigned material, whether or not we discussed it in any depth in class, is fair game for the exam. I tend to ask three sorts of questions: statutory drafting questions, questions drawn from actual filed but not yet decided cases, and made up stories that pose questions of ownership, contract interpretation, and compliance with copyright formalities. I have included three examples of each type of question from past examinations.

Type I: Statutory Drafting Questions

(from Winter 2012)

Question 3

Word Limit: 1400 words

In 2012, you graduated from law school, took the bar exam, and went to work in the Office of the General Counsel at Sony Music Entertainment ["SME"], the second-largest record label in the United States. Over the past several years, SME has received an alarming number of notices from recording artists purporting to terminate the assignments of sound recording copyrights under 17 USC § 203. The first group of such terminations purport to take effect next year (in 2013), and covers some of SME's most valuable sound recordings. The Senior Vice President and Corporate Counsel of SME is considering whether and how it might make sense to litigate the validity of the purported terminations, but is worried about the massive expense involved in litigating so large a number of individual cases. She has asked you to try your hand at coming up with a possible legislative solution to the problem.

Part A:

400 words

Draft an amendment to the Copyright Act that, if enacted by Congress in November of 2012, would prevent or significantly reduce the harm SME fears it will suffer because of the termination of assignments of its valuable sound recording

copyrights. For this part of the question, use statutory language rather than describing what you propose.

Part B:

400 words

Explain what your amendment does, how it would work, and how it would protect SME's interests.

Part C:

600 words

You have a meeting tomorrow morning with Susan Meisel, Senior Vice President and Corporate Counsel of SME. Meisel has asked you for your candid opinion on whether SME should make enactment of your bill its top legislative priority, and why. What will you tell her?

Grading Notes:

When I ask you to draft a bill on the final exam, I am looking for how well your amendment or bill would work, whether it would do what you say that it would do, whether it demonstrates solid understanding of the assigned statutory sections in the current law or betrays basic misunderstandings of the current statute, whether your amendment would make a mess elsewhere in the law that you don't recognize, whether it will meet the needs of the client (if any) for whom you are working, and whether your arguments are persuasive. It is usually a bad idea to cut and paste a section from the current law into your exam answer and then revise it. Students who do that usually end up including some language that they don't understand well, and their explanation of how their amendment will work almost invariably reveals that they don't understand it well. You have enough time to type your own words, and the answers are usually stronger when you do so. At the margin, more elegantly phrased bills may get slightly higher grades than less elegantly phrased bills.

Here's another example of a statutory drafting Question:

(from the Fall 2007 Exam)

Question 2

Word Limit: 1300 words

It is 2009. You have a one-year fellowship with a think-tank staffed by smart people who share most of your views. Your organization has received a foundation grant to study the question of copyright reform, and you've been assigned to the group working on that project.

Your project leader directed all of the people working on the project to make an intensive study of the current law's provisions. The working group then held meetings in which all of you hashed out what reforms you believed would be desirable, and reached a consensus on what a new, improved copyright statute would look like. Your project leader has now assigned each working group member a section of the statute to redraft in a way that will reflect the improvements that the group has decided would be wise.

Your assignment is to redraft the provisions currently found in section 106.

Part A:

Word limit: 300 words

Draft a replacement for the current §106 of the copyright statute that reflects your (and your project's) conclusions. Your draft may, if you choose, represent a single section or multiple sections of a proposed new copyright statute, but each section should be complete – do not turn in any section fragments. In addition to addressing all issues currently governed by section 106, you may, but need not, choose to include issues that are addressed elsewhere or nowhere in the current statute. You should assume that the other members of your group will be redrafting other parts of the current statute in a way that will be consistent with the changes that you're making.

Part B:

Word Limit: 1000 words

I'm not a member of your think tank, so I didn't get to attend the meeting. Explain to me what you've done, how it would change things, how it would fit into the statute the group is proposing, and why it's a good idea.

Grading Note:

This Question gave students a lot of room to do whatever struck them as wise – since section 106 represents the core of the current statute, any fundamental change in how copyright law works would need to start here. In grading the answers to this Question, I looked at whether the language students drafted would do what they claimed it would do and whether either the draft or explanation revealed significant misunderstandings about the current statute and how it works. I also gave more credit for bold proposals than for minor ones – people who drafted changes that would make big differences got higher scores than people who, e.g., simply tacked on a clarifying sentence and otherwise kept the language of the current section 106 intact. In particular, people who elected to keep the language of section 106 essentially unchanged got very little credit absent a compelling explanation demonstrating that the current language was not susceptible of improvement.

Here is a third example:

(From the Winter 2014 Exam)

Question 2

Part 1:

You graduated from law school, passed the bar exam, and began work at your job at White-Blackling, a lobbying firm with offices in Denver, Los Angeles, New York, San Francisco, Palo Alto, Seattle, Tallahassee, and Washington DC. One of White-Blackling's smaller clients is the Consumers' Digital Property Alliance [CDPA]. CDPA, founded in 2002, seeks to advance the interests of consumers in copyright and intellectual property reform. Here, from CDPA's website, is its manifesto:

Today, we see a renewed attack on the rights of consumers by big business. Overreaching copyright laws bar consumers from “unlocking” a cell phone or severing the device from its original wireless carrier. Music services and ebook sellers urge consumers to “buy” songs and ebooks, but prohibit them from reselling their used, no-longer-wanted recordings and books. Software companies insist that consumers who purchase expensive software products don't actually own them. Motion Picture companies claim that consumers who make backup or format shifting copies of purchased DVDs are pirates.

Such restrictions not only limit the rights of consumers but threaten to stifle old-fashioned tinkering and innovation. It is as if Ford told customers that they can't pop the hood of their car and mess around its inner workings (which is how the world got NASCAR, incidentally). How far should a phone company's power extend into our personal lives when we purchase one of their products? When you buy a phone or a digital copy of a work, is it really yours—or has a company just loaned it to you with a laundry list of stipulations and provisos? The age of cloud computing is upon us, and soon most of our books, movies, and musics might have no material form. We may discover that buying something no longer means owning it in any meaningful sense—and our stuff isn't really ours anymore.

We founded the Consumers' Digital Property Alliance to remind Congress that citizens who buy digital music, ebooks, software, movies, cell phones and media players are also property owners, and that the constitutional purpose of copyright law is to “promote the Progress of Science and useful Arts,” not to make Hollywood and Silicon Valley rich. Intellectual property rights should never be so broad that they extinguish the personal property rights of consumers. Our goal is to restore the balance of copyright law so that artists and creators can prosper while consumers have flexibility to use content in fair and legal ways.

Now that the House of Representatives and the Copyright Office are thinking seriously about copyright reform, CDPA would like to present a friendly member of Congress with a bill that would amend the copyright law in accord with CDPA's agenda. Your boss at White-Blackling asks you to draft such a bill. She advises you that rather than try to cram CDPA's entire agenda into a single piece of legislation, it makes more sense to choose a single significant goal that the organization wishes to pursue and draft legislation that would accomplish that goal. She'd like it on her desk by tomorrow morning.

Part I.A.

Word Limit: 400 words

Draft the bill. For this part of your answer, include only the actual language of your bill, and do not explain what it is intended to do

Part 1.B.

Word Limit: 600 words

Write a short memo to your boss explaining what the bill would do, how it would do it, and why it would accomplish a significant CDPA goal.

Part 2.

Word Limit: 300 words

Instead of taking the job with White-Blackling, you chose instead to work as a staffer for a freshman member of the House of Representatives who shares your political views but knows nothing about copyright law. The CDPA bill from part 1 has been introduced in the House and referred to the House Committee on the Judiciary. Your boss is a member of that committee. She asks you whether she should support or oppose the bill, and why. Advise her.

Grading Note:

As with other statutory drafting questions, I graded the answers to this question based on what they revealed about what students knew about the provisions of current law, whether the amendments would accomplish what they claimed for them, whether the bills' language contained internal inconsistencies or would cause problems elsewhere in the statute, and whether they would materially further any of CDPA's stated goals. Other things being equal, more ambitious proposals got higher scores than amendments designed to accomplish only minor tweaks or modest clarifications, and elegantly worded amendments earned more points than awkwardly worded amendments.

Type 2: Questions based on real cases

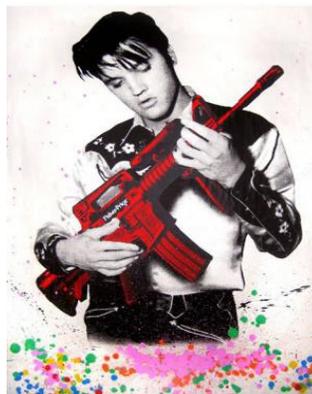
(from *Winter*, 2011)

Question 1

Word limit: 1600 words

Exit through the Gift Shop, nominated for an Oscar for best documentary film, tells the story of amateur filmmaker Thierry Guetta, who set out to make a documentary movie about the street art movement. Street artists combine graffiti, of stickers, stencils, and paint, to create art works and post them on streets, billboards, bridges, signs, buildings, and other public urban spaces. Street art is countercultural and often illegal. One man's creativity is another man's trespass and vandalism.

Guetta never completed his documentary. Although he shot thousands of hours of footage showing street artists at work, he had no real experience, skill, or talent as a filmmaker. Very little of the footage turned out to be usable. In the process of filming, though, Guetta befriended important street artists and began to dabble in making street art himself. He asked a friend to create an image for a sticker derived from a photo he took of himself holding a camera, and snuck around at night posting copies of the sticker all over Los Angeles. Encouraged by his artists friends to continue to try to make art, Guetta reinvented himself as street artist "Mr Brainwash." Guetta had no art training and little skill, but he had lots of ideas. He rented a studio and hired a staff of artisans and graphic designers. Guetta selected pictures, paintings, and photographs from books, purchased old photos from flea markets, or downloaded pictures from the Internet, and came up with ideas for changing them or juxtaposing them with other images. Guetta's staffers scanned the images and then used photoshop to make changes according to Guetta's instructions. An early work began with a photo of Elvis Presley with his guitar. Guetta's artisans replaced the guitar with a brightly colored Fisher Price toy machine gun. Guetta named the picture *Don't Be Cruel*:



Another early work, named *Bat Papi 1893*, superimposed a Batman cowl over the face of an antique photo of man:



Once Guetta finds an image that pleases him, he creates multiple variations on the theme. He reproduced the Elvis work as a stencil with toy guns in different colors:



Similarly, after hiring an artisan to build him a giant spray can, and instructing a graphic artist to paint a label for it resembling a Campbell's soup label, Guetta asked his workers to make different versions of the Campbell Tomato Spray-labeled can:



Guetta remortgaged his home and a vintage clothing store he owned in downtown Los Angeles, and used the money to finance his art. He rented a huge abandoned warehouse and used it to mount a free-to-the-public showing of his street art. Guetta asked his artist friends for quotes about him and his work, and made posters featuring the quotes, which he plastered them across billboards all over Los Angeles. LA Weekly interviewed Guetta and put his picture on the cover. When Mr. Brainwash's show, "Life Is Beautiful," opened in the summer of 2008, 4000 people came to see his work. Over the course of the next month, Guetta sold \$1,000,000 worth of art. Private collectors showed interest in Mr. Brainwash's work. Individual Mr. Brainwash pieces have sold from between \$800 and \$20000 apiece. Both Eric Clapton and Madonna commissioned Mr Brainwash to create art for their album covers. Critics and fellow artists agree that Mr. Brainwash's work isn't especially good, and say they are amazed and a little appalled at his stunning commercial success.

One of the images featured in Mr. Brainwash's first show was based on a 1985 photograph of Joseph Simmons, Darrell McDaniels, and Jason Mizell, the three members of the hip hop group Run DMC. Mr Brainwash found the image on the Internet:



Guetta conceived and his workers executed four different works incorporating this image.

For *Fluorescent Graffiti Stencil*, Guetta's workers created a stencil from the image. They then lay the stencil over a canvas painted with colorful graffiti, and used black spray paint to paint the stencil onto the canvas.





For *Run DMC Old Family*, Guetta's workers scanned an old photograph of a family that he had purchased at a flea market in Paris, replaced two of the family members with two members of Run DMC, and placed the black Stetson hat of the third member of the group on the head of one of the original faces, so that his style of clothing would match. Guetta made postcards of this work, and gave them away as souvenirs to people attending the "Life is Beautiful" show.

For the *Broken Records Work*, Guetta's staff used editing software to remove everything from the photo except for a high contrast outline of the three members of the group. They then projected the resulting image onto a plywood sheet, and painted the image onto the wood using black paint. Workers then glued more than 1000 small fragments of broken records onto the painted wood, to create a 3-dimensional image made entirely of the fragments of broken records.



For the *Run DMC Painted Banner Work*, Guetta's workers projected the same image onto an 80" by 50" canvas banner, and then hand-painted the image onto the canvas. Guetta sold this work for \$14,000:



The original of the photo Guetta used had been shot by Los Angeles photographer Glen E. Friedman. Friedman became famous as a teenager in the 1970s for photographing skateboarders. (At 14, he was the youngest paid staff member of *Skateboarder* magazine.) In his late teens, Friedman discovered punk rock and began photographing punk groups. Soon, he was shooting album cover photos for punk and hip hop groups. In 1985, Friedman (then 23) traveled to Queens, NY for a photo shoot for an album cover for Run DMC's 1986 album, *Raising Hell*. Friedman walked with the members of Run DMC around their neighborhood. He selected a variety of different sites within walking distance of Simmons' home. The image later used by Guetta came from this photo shoot. The wall the three of them are standing in front of in this particular photo appealed to Friedman because it had a more urban look than much of the rest of the neighborhood. The record label did not choose this shot for the album cover, but used a different one from the shoot. Friedman printed a large copy of the photograph and displayed it in several gallery shows. In 1994, Friedman published a coffee table book, *Fuck You Heroes*, containing a retrospective of 126 of his photographs taken between 1976 and 1991 (that is, from age 14 through age 29). The photograph of Simmons, McDaniel and Mizzell appeared on page 83; it was one of eight different shots of the members of Run DMC included in the book.



Friedman didn't get around to registering the copyright in his book until 2003. Registration issued on March 23, 2003.

Friedman heard about the Mr Brainwash show from friends. Last fall, Friedman went to see *Exit through the Gift Shop*, caught sight of one of the works derived from his photograph, and hit the roof. This past January, he sued Guetta for copyright infringement. A very speedy bench trial followed. You are a clerk for the district court judge assigned to the case. You can find larger reproductions of the images at issue in appendix A. Draft an opinion.

Grading Note:

This question was based on Friedman v. Guetta, No. CV10-0014 (C.D.Cal. 2011). I drew the facts from the parties' summary judgment motions and a viewing of Exit Through the Gift Shop. I asked students to write an opinion resolving the case. Because this was a bench trial, it wasn't appropriate to leave unresolved questions for the jury – students needed to act as triers of fact as well as law. Guetta concedes copying in fact, so they needed to decide (1) whether Guetta copied copyrightable expression; (2) whether Guetta copied sufficient copyrightable expression to support liability for infringement; (3) whether Guetta is entitled to a fair use defense under section 107. Good answers identified the copyrightable and uncopyrightable elements of the photograph and determined whether each of Guetta's uses was fair. About as many answers upheld Guetta's fair use defense as denied it; I think either result was reasonable. In the actual case (decided after the exam), Guetta lost. Whether the analysis in Cariou v. Prince, if the court were to follow it, would lead to a different result is an interesting question. That case, of course, had not yet been decided.

(from 2007)

Question 3

Word limit: 1000 words

Hula Kahiko is the ancient traditional form of Hawaiian hula dance; it originated as a form of religious worship and dates from long before Westerners came to Hawaii. Briefly banned by the Hawaiian royal family in the early 19th Century at the behest of the newly arrived Western missionaries, hula resurfaced in the 1870s when King David Kalakaua encouraged the rediscovery of traditional Hawaiian culture. The King formed his own *Hula* troupe and insisted on learning the old dances.

More recently, in the 1970s, a general interest in Hawaiian cultural revival sparked renewed popularity for ancient hula forms. Today, many Hawaiians pursue the study of *Hula Kahiko*. Unlike the modern hula dances familiar to tourists, traditional *Hula Kahiko* is the subject of serious historical, cultural and artistic exploration. In addition, images of traditional hula

dancers are popular subjects for local art and tourist souvenirs. Many hula schools throughout Hawaii teach both the traditional form of the dance and the more modern adaptations.

Hula Kahiko dancers pride themselves on recreating historically authentic dances, made up of traditional movements performed to historic hula songs (*mele*) or chants (*oli*), accompanied by traditional percussion instruments. Each of the traditional movements has meaning, so a classic *Hula Kahiko* dance will tell a story. The customary historical *Hula Kahiko* costume for a woman was a short wrapped *pa'u* skirt, no top, and multiple flower leis around the neck, wrists and ankles; traditional costume for a man was a loincloth, or *malo*, and leis. Contemporary *Hula Kahiko* dancers wear historically faithful costumes.

Kim Reece is a photographer. He had some difficulty studying art in college because he is colorblind, so he turned to black and white photography. In the early 1980s, Kim began to photograph Hawaiian dancers. He was inspired by the recent resurgence of interest in *Hula Kahiko*, and began to research traditional hula dance forms and costumes so that he could recreate them in his photographs. He traveled with the Hawaii State Foundation of Culture and Arts to work with dancers from different Pacific Islands. Reece has developed a distinctive photographic style, with sepia-toned images depicting dancers in historic costumes performing traditional hula movements on sandy ocean beaches. Many of his images show hula dancers partly in and partly out of the water. Although the photographs appear to capture dancers in motion, performing hula dances, Reece in fact uses trained hula dancers as models, posing them as if they were in the middle of traditional *Hula Kahiko* movements.

Reece's photographs have brought him great success. He owns two galleries and has sold thousands of prints, lithographs, posters, teeshirts, and greeting cards. Reece has also licensed his images to the producers of other products, and has published two coffee table books of photographs of *Hula Kahiko*, both of which made it onto Hawaiian bestseller lists.



Representative Kim Reece photos of *Hula Kahiko*

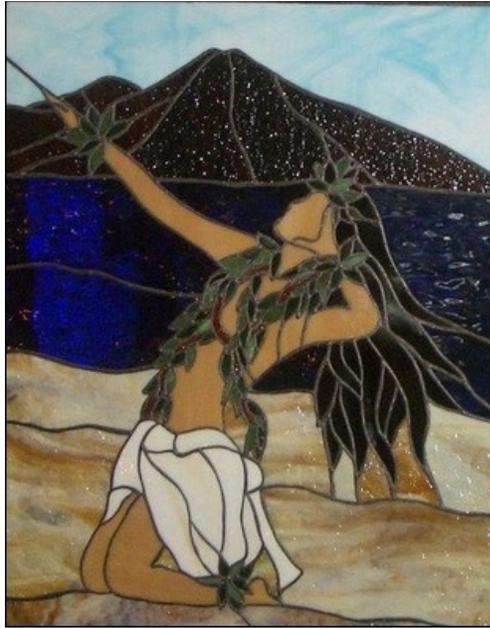
In 1988, Reece took a photograph he calls "*Makanani*." The sepia photograph shows a hula dancer wearing a traditional *pa'u* skirt and flower leis and bracelets, performing an *ike* movement in the kneeling, or *noho*, position. An *ike* movement calls for the dancer to reach up and out with one arm, open palm down, while bending the other elbow and holding that hand so that the palm is between the ear and the eye, facing the outstretched hand, with the thumb pointing downward along the jaw. The *ike* movement signifies looking or viewing, and is a traditional *Hula Kahiko* movement dating back hundreds and perhaps thousands of years.



Makanani

Reece initially published the photograph in January of 1988 as a poster. He later sold the image on teeshirts, greeting cards, and as a framed print. He licensed it to Diamond Head Frames to use as the image in its koa wood picture frames, sold at Kmart and Walmart stores throughout Hawaii. *Makanani* has been used as an image for posters advertising Hawaiian cultural events, and has appeared in ads in the *Honolulu Star Bulletin* and the *Honolulu Advertiser*.

Lei Colucci is a 57 year old, native Hawaiian who has been studying hula dance since she was a child. Colucci lives with her mother and serves as her mother's full-time caretaker. She also works part-time as a stained glass artist and art teacher. Many of Colucci's works depict traditional Hawaiian themes. In 1998, Colucci created a stained glass work that she named "Nohe" after her niece Nohe. The brightly colored work depicts a hula dancer wearing a traditional *pa'u* skirt and flower lei and bracelets, performing an *ike* movement in the *noho* position. Colucci claims that she created the work based on a sketch that she made, imagining her niece Nohe performing an *ike* movement during the traditional hula dance "Hanalei Moon." The *ike* is Colucci's favorite hula motion, and she believes that her niece performs it particularly well; "Hanalei Moon" was one of the *Hula Kahiko* dances performed at Colucci's wedding.



Nohe

Colucci displayed *Nohe* at the glass studio where she teaches. In 2004, she brought it and several other stained glass works to Island Crafts & Souvenirs, a gallery in Honolulu, which agreed to sell them on a consignment basis. *Nohe* has not yet been purchased.

Earlier this year, Kim Reece was walking by Island Crafts and Souvenirs and spied *Nohe*. He concluded that Colucci copied his *Makanani*, and consulted a copyright lawyer. The following week, Reece registered his copyright in *Makanani*. The day he received his registration certificate, Reece filed a copyright infringement suit against Lei Colucci and the Island Crafts & Souvenirs gallery for copyright.

You are a clerk to the district judge assigned to the case. Your judge held a bench trial last week; the evidence tended to support the facts recounted above. Write a memo to your judge explaining the issues posed by the case and recommending how each one should be resolved. Do not squander scarce words on issues arising under the trademark statute or state common law.

Grading Note:

*This question was based on a simplified version of the facts of Reece v. Island Treasures, 468 F. Supp. 2d 1197 (D. Hawaii 2006). On this version of the facts, both Colucci and her studio are arguably liable for an infringing public display, but Reece had a notice problem. *Makanani* was first published in 1988, before the ratification of the Berne convention made notice optional. Publication of copies without statutory copyright notice caused the work to enter the public domain unless the problem was “cured” under 17 U.S.C. § 405. The copies of *Makanani* included with the exam lacked notice, and nothing in the facts demonstrated any attention to the statutory formalities at the time of initial publication. Reece failed to register his copyright within five years to perfect a “cure” under section 405(a)(2), so his best fallback argument would be (and was) that notice had been omitted from a relatively small number of copies, under section 405(a)(1). What*

the students ended up doing with the notice problem depends on the burden of proof and his or her judge's exercise of judicial discretion. Had Reece managed to register his copyright within five years of publication, the certificate of registration would have served as prima facie evidence of the validity of the registration under section 410(c), and defendants would be required to demonstrate that the prior publication of copies without notice forfeited the copyright. Since Reece failed to register within the five year window, however, the judge has discretion to determine whether and how much evidentiary weight to accord it. Again, because this is a bench trial, the question cannot be left to a jury.

Even if the student advised his or her judge to rule that the photo was in the public domain, the judge might not agree, so I expected students to also discuss the merits, and all of them did so.

In the actual case, Reece lost a preliminary injunction motion because the judge concluded that even if the notice issue were cured, his copyright probably did not extend to the traditional Hulu poses and costumes his photographs depicted. Reece then conducted extremely aggressive discovery and the case ultimately settled in his favor.

Here is another example of a Question based on a real case:

(from Winter 2014)

Question 1

Word limit: 1300 words

Kelly Wilson is a young independent filmmaker. After graduating from college with a degree in film and television, Wilson spent two years creating a short animated film. The film, which Wilson named *The Snowman*, is a charming 5-minute, 2-dimensional computer-animated cartoon about a snowman. The *Snowman* begins with a winter scene and a shot of an awkward, clumsy-looking snowman. A bird lands on the snowman's carrot nose, and knocks the carrot off the snowman's head. The snowman tries unsuccessfully to pick up his nose. Four rabbits appear, and show interest in the carrot. The snowman tries again to grab his nose, and he and the carrot fall down a hill of snow and onto a frozen pond. The carrot lands in the middle of the pond. The rabbits chase after the carrot and end up sliding on the pond past the carrot to the snow bank on the opposite shore. Both the snowman and the rabbits try to get the carrot, but the ice is very slippery and neither one of them can reach the carrot, which is sitting atop the ice at the middle of the pond. The rabbits knock down a tree and place logs on the ice to make a pathway. The snowman grabs nearby branches and uses them as skis to ski down the ice bank onto the frozen pond. The snowman and the rabbits reach the carrot at almost the same moment, but the snowman grabs the carrot first. The ice under the rabbits cracks and one of the rabbits falls into the water. In order to save the rabbit, the snowman uses his carrot nose to pull the rabbit out of the pond. The rabbit then returns the carrot to the snowman and hops away.

Eight different film festivals screened *The Snowman* in 2011 and 2012, and it won

several awards. At the 2011 San Francisco film festival, Wilson and employees of Pixar (a subsidiary of the Walt Disney Company) spoke together on a panel about young filmmakers, in the course of which they watched and discussed several short animated films including *The Snowman*. Wilson posted the film on the Internet to Vimeo.com, youtube.com, imdb.com and her personal home page. Between 2010 and 2012, Wilson applied for four different jobs with the Walt Disney Company. Each time, Wilson submitted a copy of *The Snowman* as part of her portfolio in support of her job application.

In the fall of 2013, the Walt Disney Company released the animated film, *Frozen*, and the movie quickly became the highest grossing animated movie of all time. *Frozen* is a 3-D, computer-animated, musical movie loosely based on the Hans Christian Andersen fairy tale, *The Snow Queen*. The film tells the story of Queen Elsa, who cannot control her ice magic and inadvertently freezes her kingdom into persistent winter. Elsa's non-magical sister, Anna, must undertake a dangerous quest to save the kingdom, accompanied by Kristoff, a handsome and sincere ice cutter. Kristoff's best friend, a reindeer named Sven with whom Kristoff shares carrots, and a talking snowman named Olaf come along on the journey. After perilous adventures and several catchy songs, Anna saves the day and everyone lives happily ever after.

Disney advertised the film with a series of trailers and previews, beginning with a 90-second teaser trailer released in June of 2013. The teaser contained a scene that was not in the movie, showing an encounter between Olaf, the talking snowman, and Sven, the reindeer.

The teaser begins with a shot of Olaf walking past a flower that is peeking through the snow. He sniffs the flower, and then sneezes. The sneeze blows off his carrot nose, and the carrot flies onto the middle of a frozen pond and lands with a clatter. Sven, the reindeer, hears the noise, looks up, sees the carrot and tries to run to where it is lying, but slips on the ice. Olaf tries to go get his nose, but he, too, slips on the ice. Olaf and Sven try different tricks to get to the carrot before the other. Sven tries using his front legs to pull the rest of his body, and then swims over the ice making breast-stroke-like motions. Olaf tries to use one of the sticks that form his arms to pull himself along; he rearranges his head, middle and bottom as an inchworm and then as a scooter, and finally as a catapult, and he catapults his head to the center of the pond. Sven has gotten there first, but his long reindeer tongue is frozen to the ice. Olaf manages to pull the carrot out of Sven's mouth and throw it back onto the shore on his side of the pond. Sven runs across the ice toward the shore. Olaf hitches a ride by grabbing Sven's tail. Sven reaches the carrot first. Olaf looks on sadly, but Sven runs back to him with the carrot in his mouth and put the carrot back on Olaf's face. Sven jumps up and down and pants like a dog, and Olaf smiles and pets him, and then realizes that the reindeer fur is going to make him sneeze. Olaf holds his carrot nose tightly. Then he sneezes, and his head blows off his body. The screen then says "Disney / FROZEN" and then "Thanksgiving / Real 3D."

The teaser received a lot of media attention. Some news media criticized it as misleading, because it nowhere revealed that *Frozen* was in fact a movie musical about

princesses. Several bloggers noted the similarity of the trailer to Wilson's short film.

As soon as she saw the trailer, Wilson registered her copyright in *The Snowman* and called a lawyer. Wilson then filed suit for copyright infringement, alleging that the *Frozen* teaser trailer infringed the copyright in her film. The parties agreed to bifurcate the trial, and try issues surrounding liability and injunctive relief to the court first, and then try any issues surrounding monetary relief to a jury if the court concluded that defendant was liable for infringement. A speedy bench trial followed, at which the evidence tended to show the facts recounted above.

You are a clerk to the district court judge assigned to the case. Still images extracted from both films appear in the Appendix to this exam. You may, but need not, view the films themselves at <http://www.umich.edu/~jdlitman/633W14/index.html>. Write an opinion, resolving all issues.

Grading Note:

This question is based on Wilson v. Walt Disney Co., No. 3:14-cv-01441-VC (N.D. CA). We watched these films in class. The case is still in the discovery mode, but the judge has set a tentative trial date for the fall of 2015. In the hypothetical bench trial, Kelly would need to have shown ownership of a valid copyright, copying-in-fact, and infringing similarity (copying of enough copyrightable expression to constitute infringement). To answer that question, students needed to analyze the similarities in the two films to ascertain which of them represented copyrightable expression. I think the trier of fact could come out either way on these facts and gave credit for either result so long as the answer's reasoning and analysis supported its conclusion.

Type 3: Questions either invented by me or based on fact patterns inspired by real events and then significantly revised by me

(from Winter 2014)

Question 3

Word Limit: 1300 words

During the 1930s, Jack Kirby and Joe Simon worked as free lancer writers and artists for a variety of comic book publishers in New York City. In 1939, both Kirby and Simon were employed as staff writers and cartoonists at Fox Feature Syndicate for a weekly salary of \$15, while doing freelance comic book in their spare time. Kirby and Simon decided to try working together as a team, and worked together on Simon's superhero comic *Blue Bolt*, published by Novelty Comics. Together, the team created the

comic book superhero Captain America, a once ordinary young man who was transformed by an experimental serum into a nearly perfect human being with peak strength, agility, stamina, and intelligence. Kirby and Simon wrote, drew and inked an initial issue of *Captain America* and then shopped it around to comic book publishers. Timely Comics orally agreed to buy Captain America for a fixed page rate of \$5 per page, plus 25% of the comic book's profits. The first issue of Captain America appeared in December 1940 with a March 1941 cover date. Simon and Kirby created the nine subsequent full issues of Captain America and orally assigned their interests in the comics and the character to Timely. Timely published those issues in 1941, and registered the copyright in all ten issues, listing itself as copyright owner and Simon and Kirby as the authors. There was no written agreement.

During 1941, both Simon and Kirby worked on other comics for Timely, but also worked for National Comics and Fawcett Comics. In 1942, Simon enlisted in the U.S. Coast Guard; in 1943, Kirby was drafted into the Army. Timely continued to publish Captain America comics written, drawn and inked by other writers and artists. It also licensed a black-and-white film serial based on the character.

After the war, Simon and Kirby reunited, and created a wide range of comic books for publishers Harvey Comics, Hillman Periodicals, and Crestwood Publications. In 1954, Simon and Kirby founded their own comic company, Mainline Publications, catering to grown up readers instead of children and teenagers. In 1955, Mainline folded. Kirby went back to work for Timely, now known as Atlas Comics. Simon left the comic book field and pursued a career in advertising and commercial art. In the 1960s, Atlas rebranded itself as Marvel Comics. Atlas, and then Marvel, had discontinued the Captain America comic book in the mid-1950s, but reintroduced the character as one of Marvel's Avengers in the 1960s. It produced an animated television series, *Marvel Super Heroes*, that included Captain America and four other Marvel characters. It also licensed the publication of a print novel, *The Great Gold Steal*, about the character.

In 1968, Simon advised Marvel that he and Kirby intended to renew the copyright in Captain America in their own names. He complained that Marvel and its predecessors had consistently failed to pay the authors the 25% of the profits they had agreed to, and Simon believed that they could make a better deal if they took the character to a new publisher. Marvel responded that Captain America had been created as work made for hire, so neither Simon nor Kirby had any right to renew the copyright. After difficult negotiations, Simon and Kirby reached an agreement with Marvel. Simon and Kirby each signed a document that assigned "any and all right, title and interest he may have or control, or which he has had or controlled in Captain America comics books and the Captain America character," and also acknowledged that his contribution to Captain America "was done as an employee for hire of Timely Comics." Marvel filed a timely renewal application for the Captain America comic books published in 1940 and 1941.

In the 1970s, Marvel reintroduced Captain America as the star of his own comic book. The character also appeared in two live action television movies. In the 1980s, the character was a guest star in episodes of the animated Spiderman television series. In 1985, Marvel licensed the character for a big-budget Broadway musical, which never

made it to Broadway. In the 1990s, Marvel licensed a feature length, live action film named *Captain America*, which received scathing reviews. The *Captain America* comic book has, with short hiatuses and a couple of stories killing off the character only to bring him back later, been published essentially continuously since 1971. Jack Kirby moved to California, where he died in 1994, at the age of 76.

In December of 1997, Joe Simon served a termination notice on Marvel Comics, purporting to terminate his assignment of the copyright in *Captain America*, effective January 1, 2000. Independently, in January of 1998, Jack Kirby's surviving widow and his four children served a termination notice covering *Captain America*, effective February 1, 2000. Marvel filed independent lawsuits in different federal courts seeking declaratory judgments that the termination notices were invalid. Simon and Kirby's heirs filed counterclaims seeking declarations that their termination notices were valid. Discovery disputes, interlocutory appeals, and fruitless settlement negotiations delayed both lawsuits. Marvel, confident of prevailing eventually, continued to exploit the *Captain America* character, releasing two feature-length films starring actor Chris Evans as *Captain America*, and several others in which Evans appears as *Captain America* in a supporting role. Joe Simon died in New York City in 2011. His children continued to pursue the lawsuit on his behalf.

Eventually, both district courts granted summary judgment to Marvel on the ground that the plain language of the 1968 settlement agreements established that *Captain America* was a work made for hire. Both families appealed to the relevant Courts of Appeals. In Simon's case, the Court of Appeals reversed, and ruled that Simon's termination notice was valid, and had vested him with ownership of one half of the copyright in *Captain America* as of January 1, 2000, subject to a derivative works exception for works created before that date. The court reasoned that Marvel did not dispute that Simon was an independent contractor rather than an employee, and that he and Kirby had created a prototype of the first issue of *Captain America* before selling it to Timely Comics. Therefore, the work was not initially a work made for hire, and an agreement signed years later could not retroactively convert it into a work made for hire. The 1968 agreement, therefore, insofar as it purported to prevent Simon from exercising his statutory termination right, was an invalid "agreement to the contrary" under 17 USC § 304(c)(5).

In Kirby's case, the Court of Appeals affirmed the judgment for Marvel. This court reasoned that whether Kirby's contribution to *Captain America* was a work made for hire in 1940 was controlled by the provisions of the 1909 Act. The 1909 Act addressed works made for hire in section 62, where it provided only that "in the interpretation and construction of this Act ... the word "author" shall include an employer in the case of works made for hire."¹ Decisions of that Court of Appeals under the 1909 Act had

¹ Section 62, in its entirety, provided:

SEC. 62. That in the interpretation and construction of this Act "the date of publication" shall in the case of a work of which copies are reproduced for sale or distribution be held to be the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority, and the word "author" shall include an employer in the case of works made for hire.

concluded that a work was made for hire whenever the hiring party retained the right to control the work. Timely Comics had the right to control all aspects of the Captain America comic book, so the comic book was a work made for hire. The 1968 agreement, therefore, merely memorialized the understanding of the parties in 1940 that Timely Comics would be the author of the comic book series and own the copyright as a work made for hire.

Jack Kirby's family has petitioned for certiorari in its case against Marvel comics (now owned by Disney). Marvel has petitioned for certiorari in its case against Joe Simon's family.

You are a clerk to the Supreme Court Justice of your choice. Supreme Court Justices ask their law clerks to write memos on petitions for certiorari, evaluating the cases's importance and the relative strength of the parties' arguments and advising the Justices whether to vote to grant certiorari. A little research confirms that the 1909 Act mentions works made for hire and employers only twice: in the definition of author in section 62, and in the renewal provision in section 23, to say that:

“That in the case... of any work copyrighted ...by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright”²

Further research reveals that the Supreme Court did not address the meaning of work made for hire under the 1909 Act, and that, at the time Congress enacted the 1976 Act, the various courts of appeals had adopted a range of interpretations of the phrase. Both of the constructions applied by the Courts of Appeals in the Captain America cases find

² The text of section 23 in its entirety is:

23. Duration; renewal. — The copyright secured by this title shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: *Provided*, That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright : *And provided further*, That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work when such contribution has been separately registered, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication.

support in decisions of that court prior to the enactment of the 1976 Act.
Write the memorandum.

Grading Note:

This question was a mashup of two Second Circuit cases, Marvel Characters v. Simon, 301 F.3d 280 (2d Cir, 2002), rev'g 62 U.S.P.Q.2d (BNA) 1650 (SDNY, 2002), and Marvel Characters v. Kirby, 726 F. 3d 119 (2d Cir 2013), aff'g 777 F. Supp. 2d (SDNY 2011). I messed around with the dates in the story to make the cases seem to be more nearly coming up at the same time on the same facts. In the real cases, Joe Simon successfully sought to terminate his share of the transfer of the Captain America copyright; Jack Kirby missed the termination window for Captain America but later sought to terminate the copyrights in Spiderman, the Fantastic Four, The Incredible Hulk, Ironman, the X-Men and the Avengers. The different tests for whether a work was made for hire actually applied by the two courts were not the same tests as recounted in the question. I substituted a couple of conflicting tests that received attention in the casebook for the ones in the real cases. As in the Question, though, Simon won and Kirby lost. At the time of the exam, Jack Kirby's petition for certiorari was pending. After it attracted high-powered amicus support, the parties settled on the eve of the scheduled Supreme Court conference to decide whether to grant the petition.

The inconsistent interpretations of the scope of works made for hire under the 1909 Act and the meaning of "agreement to the contrary" under section 304(c)(5) is a significant problem that has been creating both conflicting rulings and forum shopping in connection with terminations of transfers under section 304. Listing the policy reasons the Court should consider in deciding whether to address the problem is easy; figuring out what approach the Court should take is much more difficult. While the number of tests for works made for hire under the 1909 Act are legion, Congress addressed that problem in 1976 by repealing and replacing the statute. When Congress adopted the 1976 Act definition of "work made for hire," it didn't indicate any intention that the definition should be retroactive. It's easy to see why not: Congress presumably wouldn't have wanted a result that caused a bunch of copyrights that had been owned by one party as of midnight on December 31, 1977 to suddenly fly like butterflies to belong to a different person at the moment the 1976 Act took effect. At the same time, the many inconsistent court interpretations of the scope of the 1909 Act's works made for hire provision is unquestionably undermining the certainty and policy objectives that Congress sought to achieve. One approach the Court might plausibly take would be to apply the same canon of construction as it applied in CCNV v Reid, and hold that when Congress failed to define "employer" and "work made for hire" in 1909, it intended to adopt the established common-law meaning of those phrases. (Neither the Restatement 2d of Agency, adopted in 1958, nor the Restatement 3d, adopted in 2006, would shed much light on what the settled common law meaning of the term "employer" was back in 1909, but the question is susceptible to legal research.) Another approach would be to choose one of the various extant constructions of the words. The scope

of the meaning of the phrase “agreement to the contrary” seems at first to be a cleaner question in the sense that it doesn't require the Court to construe a repealed statute. But one can't really figure out whether an agreement is contrary to the provisions in section 304 without figuring out who the author was under the 1909 Act
High scoring answers to this question explained why both the inconsistency in the construction of “agreement to the contrary” under section 304(c)(5) and the differing tests for works made for hire under the 1909 Act posed obstacles to Congress's goals in enacting the termination provisions of the 1976 Act, and suggested a possible approach the Court might take toward figuring out a workable answer.

(from Winter 2006)

Question I

Word Limit: 800 Words

In the mid 1970s, David DaSilva, an unemployed talent manager with a degree in secondary education, decided to write a play set in the New York City High School for the Performing Arts, a public magnet high school in Manhattan for teenage actors, dancers and musicians. A magnet school, DaSilva thought, would provide the opportunity for a play featuring interaction among kids from all walks of life. DaSilva wrote a synopsis of the play, which he titled “Hot Lunch,” and tried without success to interest New York theatrical producers in developing it. When he couldn't persuade any producer to invest in the stage show, he took his synopsis to MGM. MGM bought “Hot Lunch” and agreed to make a movie based on DaSilva's synopsis. The contract DaSilva signed with MGM provided that DaSilva would serve as executive producer for the film, and assigned MGM all of DaSilva's rights in “Hot Lunch” with the exception of live stage and dramatization rights. The contract provided that DaSilva would retain the live stage rights in the property.

MGM hired Alan Parker to direct the film and novice playwright and screenwriter Christopher Gore to write the screenplay. At Gore's suggestion, he and Parker spent months hanging out at the High School for the Performing Arts while they worked on the screenplay. They ultimately came up with a mock documentary that followed one class of high school student characters from their initial auditions to get into the high school until their graduation four years later. The screenplay featured a Latina singer/songwriter/actress named Coco Hernandez, an illiterate African-American dancer named Leroy Johnson; Leroy's girlfriend, a blond ballerina named Antonia Franceschi from a wealthy family; a gay acting student named Paul Montgomery; a young composer named Bruno Martelli whose father drives a cab; a fledgling standup comic named Raul Garcia who insists on being called “Ralph Garcy” and worships actor Freddie Prinze; and Raoul's girlfriend, a shy acting student from Brooklyn named Doris Finsecker. The film follows these seven students through their four years at the High School, showing personal and scholastic crises and triumphs. It culminates in the final

High School graduation ceremony in which everyone sings and plays music that Bruno has written for the occasion.

After completing most of the principal photography, Parker was unable to get copyright licenses for the music that cast members had danced to or sung during the shooting. He therefore hired songwriter Michael Gore (no relation to the screenwriter Christopher) to write songs in the same mood and tempo as the songs he couldn't use. Michael Gore wrote several songs, including "Hot Lunch," a song Coco and her classmates sing in the cafeteria; "Fame," a song supposedly written by Bruno that the entire student body sings, plays, and dances in the streets of New York; and "Out Here on My Own," a ballad that's supposed to have been written (and is sung) by Coco, with lyrics that include "*Sometimes I wonder where I've been/ Who I am/ Do I fit in?/ Make believin' is hard alone,/Out here on my own.*" Parker reshot scenes where necessary to incorporate the new songs. Meanwhile, MGM discovered that a recently released pornographic film already had the title Hot Lunch, so it renamed the movie Fame.

MGM released Fame in the summer of 1980 to critical and popular acclaim. The film was nominated for six Oscars and won two of them. MGM registered the copyright in Fame as a work made for hire. It also registered copyrights in each of the individual songs written by Michael Gore as works made for hire. MGM later developed a television series based on the movie, which ran on NBC for six seasons, from 1982 until 1987, and repeated the characters of Coco, Bruno, Leroy and some of their teachers. The only music carried over from the movie was the title song, "Fame." DaSilva was listed as a "consulting producer" on the TV show's credits, and was paid a small percentage of the profits, but had no creative input. MGM registered the copyrights in each of the individual episodes of the television series as a work made for hire.

After NBC canceled the television show, DaSilva decided to pursue the story's live theater potential. He envisioned it as a musical that would be edgier and more contemporary than the 1980 movie or the TV series, and that would deal with the real problems high school students grappled with. DaSilva decided that he would license the title song, "Fame" from the movie/TV show because audiences would expect to hear it, but that he would otherwise use entirely new music. DaSilva hired playwright Jose Fernandez to write the book of the musical. He hired Steve Margoshes, who had done the orchestrations for Michael Gore's songs in the Fame movie, to write the music for sixteen new songs. DaSilva hired Jacques Levy to write the lyrics. All three writers signed contracts requiring them to assign the copyrights in their contributions to DaSilva.

Fame the Musical is set in 1981 to 1984, after the release of *Fame* the movie. It follows students from a particular class through their years at the High School for the Performing Arts. The characters include Carmen Diaz, a Latina singer/songwriter/dancer; Tyrone Jackson, an illiterate African-American dancer; Tyrone's blond ballerina girlfriend, Iris Kelly (the daughter of a chauffeur); a young composer named Shlomo Metzenbaum, whose father is a famous violinist; a fledgling standup-comic named José Vegas who insists on being called "Joe" and worships actor Freddie Prinze; an acting student named Nick Piazza; his girlfriend, Serena Katz; and Mabel Washington, an overweight dance student with an eating disorder.

The broad plot outlines are similar to those in the movie, but the language and

situations are more adult. José/Joe, when asked in acting class to describe an embarrassing situation, sings “Can’t Keep It Down,” a song about his inability to control his erections. Tyrone expresses his frustrations with learning classical ballet movements by singing “Tyrone’s Rap:” *“Don't need no rich bitch, to tell me which / Fork to use, I paid my dues / In a rap-trap building called New York / Livin' off beans, greens, and pork / In a basement, tenement, / no one's got to tell me what it meant / To be black, jack / Ace of spades / All the car-wash washers and day-work maids / Can't wash it off, it never fades, / It's who you are until you're dead / Now ain't that a kick upside the head?!”* Carmen drops out of school when a man claiming to be a Hollywood producer offers her a part in a film. She travels with him to LA, where she becomes a drug addict and works as a stripper. Disillusioned, Carmen leaves LA to return to New York. Schlomo sees her hanging around the high school, and she assures him that her life has been a great success. When Schlomo leaves, though, Carmen sings “In LA,” a bitter song about her LA experience. We learn at the very end of the play that Carmen has died of a drug overdose. The final musical number shows the students’ graduation, where they all sing a song that Schlomo wrote with Carmen before she dropped out of school.

DaSilva arranged for an initial production in Miami, followed by a second production in Philadelphia. Critics complained that the musical’s characters were stock characters and that the new score was uninspiring. DaSilva’s investors were not sufficiently interested to finance a New York production, so the play closed in Philadelphia on without making it to Broadway. DaSilva registered the copyright in the musical in 1991. He then decided to assign exclusive print publication and public performance rights to Music Theatre International (MTI), a theatrical licensing agency. Founded in 1952, Music Theatre International helps playwrights and composers license their shows for live stage performance to schools, community theatres and professional theatres around the country. Playwrights assign their publication and performance rights to MTI in return for royalty payments for each performance that MTI licenses.

MTI maintains a catalog of hundreds of plays and musicals. It grants nonexclusive performance licenses to theater groups, giving them the right to perform and present musical theatre works as live stage productions. MTI also provides, on a rental basis, all scripts, librettos and sheet music necessary to produce the work. MTI licenses over 12,000 productions a year by professional, amateur and educational organizations around the world, including elementary, middle and high schools, colleges, universities, civic groups, religious groups, youth theatres, tours, summer stock companies, dinner theatres, regional theatres, symphony orchestras, cruise ships, casinos, and hotels. License fees vary according to the size of the audience, the price of tickets, and whether the licensee is a for-profit or non-profit entity. MTI’s standard form license for all its scripts includes the following language:

All music, lyrics and dialogue are the property of the Authors and are fully protected by copyright. You are not permitted to make any changes to the music, lyrics or dialogue of the Play, including the interpolation of new material and/or the exclusion of existing material. Any changes shall constitute willful infringement of said copyright and will subject you to all the criminal penalties and civil

liabilities under the United States Copyright Act.

MTI requires licensees to rent scripts, librettos and music scores. If any script is not returned, or is returned in damaged condition, the licensee forfeits a substantial deposit. By keeping control of all scripts and sheet music, MTI believes that it deters copying and makes unauthorized productions much more difficult.

Fame The Musical proved to be a popular production in Europe, and, after successful runs in Stockholm and London, the play finally opened off Broadway in New York, where it played for several months. Since then, Fame: the Musical has become one of MTI's most popular properties for high school and summer camp productions. MTI advertises Fame as suitable for groups with young actors or audiences: *"With its topical subject matter, multi-ethnic cast of actors, singers, dancers and instrumentalists and high-energy, contemporary pop score which includes the hit title song, "Fame—The Musical" is an ideal musical for high schools, colleges or any theatre with young performers or audiences."*

One of MTI's long-time clients is the Wisconsin Youth Players in Madison, Wisconsin. The Wisconsin Youth Players (WYP) is a theater group for kids from first grade through high school. WYP is incorporated as a section 501(c)(3) tax-exempt non-profit corporation, and is run by a volunteer board composed of parents of WYP actors. The Players perform four productions each year, typically three musicals and one non-musical straight play. Each production is cast in auditions open to any Madison-area residents of appropriate age. WYP hires a director and music director from the Madison community for each production. Often, directors and music directors are either students in the University of Wisconsin theatre department, or actors from one of the small professional and semi-professional theater companies in the Madison vicinity. WYP pays directors \$1200 for all work associated with a single production, and musical directors \$1000. If a production requires a choreographer, WYP will pay him or her \$800. In appropriate cases, it will also pay professional musicians \$100 per performance to play in the production orchestra. All other labor is provided by parent volunteers. For each production, one parent volunteer acts as the show's "producer." The producer schedules rehearsals, rents the performance space, writes all of the checks, and coordinates all other parent volunteers to ensure that crucial jobs are staffed.

Rehearsals take place in WYP's studio space. The typical WYP rehearsal period is 11 weeks, and results in four performances. The Players rent an auditorium from the Madison Area Technical College, a community college in Madison, for eight days, so that they can have four rehearsals on Sunday through Wednesday, followed by performances on Thursday through Sunday. Renting the auditorium costs about \$2000 for each production. Licensing fees to MTI typically run between \$2000 and \$3000 for each production. WYP spends another \$2000 to \$5000 to rent microphones and other equipment.

WYP funds its productions through membership fees, foundation grants, ticket sales, ad sales in its production programs and donations. In addition, it charges all actors cast in its shows a \$200 "studio fee" to help cover some of the expenses of that

production.

The volunteer parent board selects the plays for each season in consultation with the directors it anticipates hiring to direct the productions. Music Theatre International will, if asked, send examination copies of the scripts in its catalog, and sometimes the board requests them. Because the parents tend to be pretty familiar musical theater, though, and because the board is often behind schedule in getting its productions staffed and announced, the board sometimes forgoes the option of reading scripts before selecting them. This occasionally makes problems: six or seven years ago, the Board announced a production in reliance on the director's representations and the familiarity of two board members with the original cast album. Only after receiving the scripts in preparation for auditions did members of the board conclude that the show was inappropriate for children. The Players ended up substituting a different show at the last minute. The substitution, though, caused a fair amount of trouble.

WYP's 2005-06 season consisted of productions of You're a Good Man, Charlie Brown, The Sound of Music, Shakespeare's Midsummer Night's Dream, and Fame. The Players licensed all of the shows except for the Shakespeare play through MTI. The license for Fame, like all of MTI's licenses, required the Players to rent scripts and sheet music from MTI, and to pay a substantial deposit to ensure the return of all scripts in good condition.

The Players selected Fame on the recommendation of Martha Margolis, a local voice teacher who had performed a small role the previous season in a musical staged by the Madison Repertory Theater, and who had written and directed a short musical play for very young actors in WYP's 2004-05 season. WYP hired Martha to direct the show. The Players hired Alison Abt, a former WYP Player who had recently graduated from high school and was now a student at the University of Wisconsin-Madison, as choreographer. Steve Winston, the volunteer treasurer on the WYP board, agreed to act as producer. Steve was a solo tax law practitioner, and the father of Emmy and Esther Winston, two 11 year old twins who regularly auditioned for WYP productions. Paul Justin, a music teacher at Emmy and Esther's school, agreed to come aboard as musical director. He was confident he could play all of the music on his keyboard, so there would be no need to hire musicians for the performances.

Steve Winston set up auditions for mid-January. He advertised in the local newspaper, and sent email messages announcing the auditions to everyone who had participated in any WYP production the previous year. The week before auditions, Steve sat down and read the script for the first time. What he read disturbed him. He didn't think that his daughters should be exposed to songs about teenage boy's erections, high school students' drug use, or working as a stripper. Moreover, the audience for most WYP productions included young children, who would find the death of a major sympathetic character very disturbing. He called Martha and voiced his concerns. Perhaps the Players should substitute a more appropriate play for FAME.

Martha disagreed. She felt that youngsters who watched prime time television were exposed to material that was far more disturbing than anything in Fame. The season had been advertised, and young actors had already signed up to audition. Besides, the Players had already paid Music Theatre International for the rights to Fame

and had already received the rented scripts and scores. MTI does not offer refunds to theater companies who decide not to perform a show after paying for and ordering the scripts. There would be no money to fund an alternate musical, and the company was already using a Shakespeare play to fill out its season. Martha told Steve that she appreciated his concern about “Can’t Keep it Down,” José Vegas’s song about his erections, but luckily, MTI had supplied alternate lyrics for a G-rated version of the song called “Can’t Keep it Cool.” Perhaps, as soon as auditions were over, she and Steve could sit down and identify whether there were other problems that could be solved with small cuts or substitutions. Steve remained concerned, but agreed to go ahead with the auditions. He did, however, discourage his daughters from trying out for a part.

In past productions, both African American and Hispanic youngsters had auditioned and been cast in leading roles. None of the fifth- through tenth-grade students who auditioned for Fame, however, were either African-American or Hispanic. Martha, therefore, decided to cast roles strictly on the basis of voice and dance talent. She cast a blond 9th grader, Sophie Star, as Carmen Diaz, and Alex Cohen, a Jewish 8th grader, as Tyrone Jackson. She was concerned about the racial insensitivity of allowing a white student to play a black student, so she decided to have Alex play Tyrone as a poor white student, and cut the song “Tyrone’s Rap” from the production. The final cast of 27 included two fifth graders, nine sixth graders, four seventh graders, eight eighth graders, two ninth graders and a tenth grader.

Steve and Martha then met to decide which, if any, portions of the script remained problematic. Steve was adamant that Carmen’s death would be too upsetting for the youngest members of the audience. Since Carmen dies offstage, and her death is only briefly discussed, Martha agreed that they could simply cut the lines that reference it. She and Steve both felt, though, that leaving Carmen’s song about drugs and working as a stripper in LA in the show if she didn’t die would send the wrong message to the young actors in the play. Martha proposed that they delete that song, and Steve agreed that that was the best solution. When Martha looked at the scene without the song, though, she concluded that it didn’t really work. The missing song left a big hole. Besides, the girl she had cast as Carmen has a really good singing voice, and it was a shame to take away her best song. Nonetheless, it seemed like the best solution under the circumstances.

Steve emailed everyone who had auditioned, announcing the cast of the show and its rehearsal schedule. As is traditional for WYP productions, Steve summoned the parents of all cast members to a mandatory parents organizing meeting the Monday evening before the first rehearsal. Then he sat down with a libretto and penciled in the cuts that he and Martha had agreed on. MTI requires that all scripts be returned in useable condition, and warns actors:

Notice: Do Not Deface

•Should you find it necessary to mark cues or other cuts, use a soft black lead pencil only.

Steve realized that even if the troublesome parts were cut from the production, all of the youngsters in the show would be able to read them in their copies of the libretto, and would probably ask uncomfortable questions about the deleted material. He thought that that would cause problems. He took a libretto into his office that evening, taped white paper over the excised material, and then used his office photocopy machine to make 30 photocopies of the libretto for the 27 young actors, the director, the choreographer, and the musical director. He reasoned that an additional advantage would be that WYP could keep the rented librettos safe and wouldn't need to worry about someone's losing one or ruining it through mistreatment.

In the mandatory parent meeting the following Monday, Steve and Martha explained that parents who were familiar with the show from other productions and had worried that it might not be appropriate family fare could feel comfortable with this production. "Our production," Martha explained, "is G-rated. In our production, Carmen doesn't die." Steve revealed that he had personally gone into his office and photocopied the scripts to avoid cast members' even seeing the material that he and Martha had decided to cut. One of the parents objected that her son had already heard all of that material on the cast album. "The older children may be familiar with the show," Steve responded, "but the younger children may not have run into it. This way seemed to me to avoid trouble all around. Martha won't have to keep explaining why this line or that line isn't in the show."

Rehearsals began the following week. The scene in the second act in which Carmen was supposed to sing "In LA" simply didn't work. Sophie asked Martha to put the song back in. Martha explained to Sophie why she and Steve had decided the song had to go. Sophie then suggested that if she couldn't sing "In LA," she should sing a different song. None of Carmen's other songs really fit in that spot, but Sophie suggested she could sing "Out Here on my Own" from the Fame movie. Martha objected that they didn't have sheet music for "Out Here on My Own." But Sophie had come prepared: she had purchased the sheet music for the song over the Internet with her own money, and she'd memorized the song, so Paul Justin could have her copy and use it to play the song. Martha agreed to try the scene with "Out Here on My Own." The lyrics to the song didn't make a lot of sense in the context of the scene, but Sophie sang it so beautifully that you almost didn't notice, so Martha agreed to keep the new song in the show.

As the weekend for performances approached, Steve called a friend of his who worked as a reporter for the Entertainment pages of the Wisconsin State Journal, and suggested she do a feature on the WYP production of Fame. The reporter came to view a rehearsal, and spoke afterwards with both Sophie and Alex about WYP, their work in Fame, and their appearances in other productions in the Madison area. Her article came out in the Wisconsin State Journal the Sunday before the first performance, and was picked up the following day by the Journal-Sentinel, a newspaper in nearby Milwaukee.

MADISON —Sophie Star began to sing in her church choir when she was eight years old. Alex Cohen started acting in when he starred in his first grade class play. This weekend, Sophie, Alex and 25 other young performers ranging in age from 10 to 16 are bringing their youthful talents to the Wisconsin Youth Players' production of Fame: The Musical at the MATC

Copland Auditorium. Director Martha Margolis has ignited the enthusiasm of this talented group in a foot-tapping, song-humming, rollicking live theater version of the long running television series about New York's High School for the Performing Arts. The young actor-dancer singers are terrific. And, those of you who may have seen Fame: The Musical elsewhere and might be concerned about bringing the entire family will be relieved to learn that you have nothing to worry about. Director Margolis has excised from the production any material that might be unsuitable for young children. Indeed, because some of the cast members are only ten or eleven years old, the director has them working from photocopied scripts that omit inappropriate material. "Martha explained that the Board was concerned that 'In LA' might not be appropriate for all audiences," explains Sophie, who plays Carmen, "so, I'm singing 'Out Here On My Own' instead." This promises to be a terrific, family-friendly production, so bring everyone down this weekend to see Fame: The Musical.

What: "Fame: The Musical"

Where: Madison Area Technical College Copeland Auditorium

When: Thursday, Friday and Saturday evening performances at 7:30 pm, Sunday matinee at 2 pm

How much: Tickets \$7 (students and seniors \$5)

The production opened on Thursday evening. WYP sold tickets at the door for \$7 for adults and \$5 for children. Alex Cohen's older sister, Roberta, was a journalism student at nearby University of Wisconsin-Madison, and she persuaded a friend to review the production for the Madison Badger-Herald, a student newspaper. The review was kind:

... Three minutes into this effervescent high-energy show, I knew I was enjoying myself. After enduring horridly annoying retreads of rocking movie musicals lamely adapted for the stage, I was prepared for the worst. But, wondrously, the Wisconsin Youth Players have brought it off. Fame: The Musical is a terrific stage adaptation that matches the challenges of the live medium, presenting a gallery of interesting, convincing characters, singing and dancing in a manner that soars the spirit and soothes the soul as well.

While the opening song, "Pray I Make P.A." sung by hopeful freshman students to New York's High School of Performing Arts in a series of isolated spotlights, does start with repetitive and monotonous utterances, this lackluster device in no way reflects the sparkling show to follow. ...

The reviewer went on to praise the believable casting of middle- and high-school students to play teenaged characters, and to complain about some choppiness and incoherence in the play's plot, especially in the second act. The young actors, the reviewer felt, were less believable as the high school's teachers. "But the singing is top notch," the review continued. "Sophie Star has a terrific voice, and when she sings 'Out Here On My Own' she makes you feel as if her heart is breaking..."

After the final performance on Sunday afternoon, WYP had sold a total of \$3800 in tickets, which, when combined with the studio and membership fees paid by the cast and the ads sold in the program, almost covered the costs of the production. Steve returned

all librettos and sheet music to MTI the following week. He did not ask any cast members to return or destroy their photocopied scripts.

Music Theatre International pays a clipping service to forward it reviews and feature articles about any MTI-licensed production, so that it can use them for blurbs on its website and to promote its plays in other ways. The clipping service monitors local newspapers nationwide for any mention of MTI properties.

You are a copyright lawyer in MTI's legal department. This morning, the Wisconsin Journal/Milwaukee Journal Sentinel and Madison Badger-Herald clippings about the Wisconsin Youth Players' production of Fame landed on your desk. This afternoon, you received an angry letter from composer Michael Gore, who has learned that his song, "Out Here on My Own" was apparently performed as part of an MTI-licensed production of Fame: the Musical. Gore's letter reminds MTI that it has no rights in "Out Here On My Own," and has no business licensing it to a theater company in Wisconsin. Unless MTI immediately offers to pay him a share of the royalties it charged for that and any other production interpolating the song, and gives him believable assurances that no subsequent productions will include any unlicensed songs, he will explore filing a copyright infringement suit against MTI. Pages from the *Fame Libretto*, pages from the photocopied libretto distributed to the WYP cast and the lyrics to *Out Here on My Own* appear in the appendix.

Write a memorandum analyzing the legal issues and making recommendations for how MTI should proceed.

Grading Note:

This Question was a slightly fictionalized account of something that actually happened once in a youth theatre group; WYP is made-up, but the complicated history of who owns what in which version of Fame is real. The incident never came to MTI's notice, so MTI didn't have to figure out whether to take action. Here the job was to figure out who owned what rights in what, come up with sensible constructions of the language of the relevant contracts, identify WYP's possible infringing behavior, figure out whether any of the exceptions in section 110 shielded the theatre company's actions, and advise your boss at MTI whether going after WYP would be a good idea or a bad one.

(From Winter 2013)

Question 1

Word Limit: 750 words

In the 1970s, Alison Ammer was a modestly successful actor who played leading roles in minor productions, supporting roles in major productions, guest-star stints on a few television series, and was featured in commercials for cat food, laundry detergent, juice drinks, and running shoes. In 1977, Alison decided to write and star in a one-woman show about the pilot Amelia Earhart. After working on the idea for several

months, though, she gave up on the project.

In January of 1980, Alison met Beatrice Bogle, a young playwright. The two got to talking about Alison's Earhart project, and Beatrice expressed interest. "Oh, I'd love you to write it," Alison said. "I'd pay you everything I earn from the Tide[®] commercial I shot last week – that's my biggest commercial yet."

Beatrice and Alison met the next week at Alison's apartment. Alison retrieved her notes from a drawer and explained her ideas. The notes were a disorganized collection of single sentences, short paragraphs, and Earhart quotations written on scraps of paper. Beatrice said she wasn't sure when she'd have the time, but she'd put something together and bring it back to Alison. She took Alison's notes with her. On her way home, she stopped at the public library and checked out a couple of biographies of Earhart.

A year later (in January of 1980), Alison ran into Beatrice in a coffee shop. Beatrice said, "Oh! I've been meaning to call you. I finished that script for you a couple of months ago. Listen, I'm on my way out of town, but I will mail it to you." The script arrived in the mail about a week later, along with a letter from Beatrice explaining that she was off to do a playwriting residence in Melbourne, Australia, but would be back in five months, and could be reached by mail in the interim.

Alison loved the script. She immediately wrote a check for the \$6000 she had earned so far on her Tide[®] commercial, and mailed it to Beatrice in Australia, along with a note promising to send checks each time she got paid for that commercial. Alison then asked a local theater company whether she could perform the one-woman show, which Beatrice had titled "The Real Amelia," at the company's theater on Mondays and Tuesdays, when the theater was normally dark. The company was happy for Alison to use the space in return for 25% of any ticket sales. Alison sold tickets for \$15, and performed "The Real Amelia" Monday and Tuesday evenings for six weeks during March and April of 1981. In the final week of the show, she asked her friend Sam to film her performance. Sam used a video camera to record the two final performances and edited the videotape into a tape of the entire one-woman show. He made a title card for the tape that said:

Alison Ammer
In
The Real Amelia
an original one-woman show
about
Amelia Earhart

Sam included the title at the beginning of the recording. He then made 50 copies on videocassettes, and labeled each one "Alison Ammer/The Real Amelia." Alison paid all of Sam's expenses and bought him a fancy dinner to say thank you. In June of 1981,

Alison mailed videocassettes of “The Real Amelia” to ten major New York theatre producers, suggesting that they produce “The Real Amelia” on Broadway. None of them responded.

Over the next few years, Alison received six further checks for her Tide[®] commercial, and mailed checks for the amounts reflected in each of them to Beatrice at her then-current address. She also gave several videocassettes to her agent to send to casting directors, and sent out some to friends and admirers. Beatrice, meanwhile, moved to Hollywood, where she became a successful screenwriter. By the mid-1980s, Alison's Tide[®] commercial was no longer running and she received no further checks. She figured she had kept her promise to pay Beatrice all of the money she earned from the commercial, and didn't worry about it. In 1988, Alison performed “The Real Amelia” for two weekends to sold-out houses at the Reston Community Theater. She used Sam's videocassette to make a 30-second commercial promoting the show. The commercial ran on a local television station and may have boosted ticket sales. The same year, Alison did a television commercial for Mr. Clean[®] and played Lady Macbeth in the Reston Community Theater's production of “Macbeth.”

In the early 1990s, Alison married one of her biggest fans and retired from acting. In 1997, as a birthday present, Alison's stepson, Doug, transferred one of the “Real Amelia” videotapes to DVD and made his stepmom 100 copies. At her birthday party in a friend's backyard, Doug played the DVD for an enthusiastic audience of Alison's friends. In 2009, Doug's daughter uploaded the video of her grandma being Amelia Earhart to YouTube. A producer for TBS saw the video on YouTube and admired it. Last week, he got in touch with Alison asking to buy the rights to the script for a television movie. Also last week, Alison received a notice of termination from Beatrice Bogle purporting to terminate Alison's copyright interest in “The Real Amelia.”

You are Alison's lawyer. In response to your questions, she tells you that she never registered any copyrights in anything, never put a copyright notice on anything, and never took credit or gave Beatrice credit for writing the script. Explain to Alison what the notice from Beatrice means, and advise her about her options.

Grading Note:

You should recognize this Question from the Problem Set we worked on in class. I made every single thing up. Students needed to figure out whether the original script is solely authored, jointly authored, or a work made for hire, and depending on the answer to that question, how to characterize Amelia's and Beatrice's interests in the script. They also needed to resolve whether copies were published without notice and if so, whether that forfeited the copyright, whether Beatrice is entitled to terminate a transfer, and what, if anything, Alison would be able to do with the work after termination.

