COPYRIGHT LAW – winter 2013
ANSWER OUTLINE

I. (~~30~~ 45 min.)

Copyright notice

- required before 3-1-89; not required thereafter for protection – implied from "may" language in § 401(a).
    - cannot presume from absence of notice that work is not copyrighted and is in the public domain.
    - format of copyright notice is: "Copyright © [year of publication][name of author]". § 401(b)
    - that format was used.
- *periodical blanket copyright notice* – copyright notice borne by collective work protects the separate contributions by their authors. § 404(a).
- here, there was a valid blanket copyright notice affixed to each newspaper, and all authors therein are protected.
- however, no notice was required for protection.

Registration

- registration not required for protection, beginning 3-1-89. § 408(a).
    - registration can be obtained at any time during pendency of copyright. § 408(a).
- but, American authors must register before filing suit for infringement. § 411(a).
- here, newspapers did register within the three-month grace period.

Infringement

- copyright holder has several exclusive rights, including those listed in § 106.
- these rights include the rights to control reproduction. § 106(1), (2).
- here, the copying of entire news articles without permission of the respective authors violates the exclusive right of reproduction.

Fair use doctrine

- § 107 – 6 purposes listed:
    - *news reporting* – one of the listed purposes for fair use.
- courts consider the four factors listed in § 107:
    (1) purpose and character of use.
    (2) nature of copyrighted work.
    (3) amount and substantiality of the portion used in relation to the copyrighted work as a whole.
    (4) effect of the use upon the potential market for or value of the copyrighted work.
- none of four factors dominates the others.
- other factors to consider:
    - amount and substantiality of the copied material to the infringing work as a whole.

- motive for the copying.

- here:

(1) purpose of copying was to make articles available to party members & supporters.

(2) works copied were published newspaper articles.

(3) the entirety of each newspaper article was copied.

(4) most party members & supporters probably would not buy the original newspapers. So, copying did not affect market for original newspapers. But copying without licenses & royalties may have reduced the newspapers' derivative work market somewhat.

- the party's electronic newsletter consisted almost entirely of copied newspaper articles.

- copying entire articles is almost never fair use, because the amount of copying is excessive.

Work-for-hire

- issue is whether news reporters or the newspapers are the proper plaintiffs.
- the copyright in works created by employees belong to the employer. § 201(b).
- "work for hire" definition: "work prepared by an employee with the scope of his or her employment". § 101.
  - specially ordered or commissioned work category of work-for-hire doesn't apply.
- *"employee"* – common law of master-servant relationship determines who is an employee.
- here, the news reporters are "staff writers" for their respective newspapers; thus, they are employees.
- therefore, the newspapers are the proper plaintiffs, not the individual news reporters.

Remedies

- injunction barring continued unauthorized reproduction of articles.
- compensatory damages for past unauthorized reproduction [§ 504(a)-(b)]:
  - (1) lost profits, plus (2) other consequential damages (loss of future value of copyright; fair market value of reproduction license).
- here, reproduction was done after publication of newspapers – no lost newspaper sales.
- here, could affect back issue sales – not likely to be worth much.
- might affect reproduction licensing – again, not likely to be worth much.
- statutory damages [§ 504(c):
  - alternative to compensatory damages when actual damages cannot be calculated, or where there is no actual damage.
  - $ 750 to $ 30,000 for single infringement, as court considers just.
  - copyright owner must elect between compensatory damages or statutory damages.

Result

II (~~60~~ 45 min.)

*Note: While the facts were intended to imply that BoatHenge was man-made, creation by natural causes is an acceptable conclusion.*

A. *Photographing and selling images of BoatHenge?*

- *copyright infringement:*
  - copyright owner has exclusive right of reproduction. §106.
  - taking photograph is a form of reproduction, and is a derivative work.
    - taking photographs from public places is fair use.
      - *note:* natural objects are *per se* public domain photographic subject matter.
      - manmade objects customarily are fair use photographic subject matter.
        - except copyrighted buildings. *See AWA*, below.
  - selling copies of photograph is distribution of a derivative work reproduction.
    - not protected by fair use doctrine.

- *violation of VARA:*
  - VARA applies to works of visual arts.
    - sculpture is a type of visual art.
    - applies only to works in limited editions (<200). § 101.
    - BoatHenge is a type of sculpture – while the individual boat hulks are manufactured items and not independently works of visual art (no independent artistic existence), the arrangement of the boat hulks is an artistic creation.
  - visual artist has right of attribution. § 106A(a)(1)(A).
  - BoatHenge photograph has no attribution of artist who created BoatHenge.

- *violation of Architectural Works Act:*
  - protects expression in "buildings". § 102.
    - but allows photographs from public places. § 120.
  - "building" is a humanly habitable structure. 37 CFR § 202.11(b)(2).
  - AWA doesn't apply.

- result: copyright infringement & VARA right of attribution violations.

B. *Copying BoatHenge?*

- *copyright infringement:*
  - copyright owner has exclusive right to authorize reproduction.
    - "reproduction" is duplicating, transcribing, imitating, or simulating the original in a fixed form.
  - only expression is protected by copyright, not concepts or ideas.
  - sculptures are protected works. § 102(a)(5).
  - infringement occurs when second work is substantially similar to the original work.
    - substantial similarity requires similarity in appearance.
      - similarity must show duplication of unique characterisitics, which creates

the impression of the original.
- to the ordinary observer.
- similarity in concept is not protected.
because ideas are not protected by copyright, only expression.
- comparison of protected expressive elements is made.
- creator of second work must have access to original work.
- here, Jones had access to BoatHenge.
- here, use of wrecked boat hulls creates similarity in appearance.
- but arrangement in an octagon is not similar to arrangement in an arc.
- probably, substantial similarity exists.
- thus, access + substantial similarity are established: HullHenge infringes on BoatHenge.

C. *Demolishing BoatHenge?*

- *violation of VARA:*
- visual artist has a right of integrity. § 106A(a)(3)(B).
- if it has "recognized statute".
- does BoatHenge have recognized statute?
- prohibits intentional or grossly negligent destruction. § 106A(a)(3)(B).
- result.
- *violation of Architectural Works Act:*
- protects site-specific art affixed to "buildings". § 120.
- "building" is a humanly habitable structure. 37 CFR § 202.11(b)(2).
- BoatHenge is not a "building".
- AWA doesn't apply.
- *state sovereign immunity:*
- state cannot be sued in federal court without its consent (11th Amendment).
- since VARA is part of Copyright Act, it is subject to the federal suit prohibition recognized in *College Savings v. Florida*.
- violation of copyright is not "taking" of "property" under the 5th & 14th Amendments.
- state can be sued in state court for "taking" of "property"
- is violation of VARA right of integrity a "taking" of "property" under state constitutional law? Who knows?
- *direct taking:*
- BoatHenge trespasses on state-owned land.
- owner can remove unauthorized objects/structures on its land.

III. (30 min.)

- portrait photographs are copyrightable.
    - portrait photos contain artistic expression, such as lighting, pose, background selection. [*Sarony* (Oscar Wilde photo)]
        - such photos probably contain a minimum amount of expression, but enough to make the work copyrightable; the poses, lighting and background choices are rather generic and appear in many photographs.
- copyright is separate from title in the physical copy of the copyrighted work. § 202.
    - thus, purchase of a portrait photograph does not carry ownership of the copyright with it.
    - here, ownership of the copyright is retained by National Portrait.
- *work-for-hire:* the copyright in works prepared by employees belongs to the employer. § 201(b).
- since 3-1-1989, a copyright notice need not be affixed; copyright protection is automatic.
    - so, the photos are validly copyrighted. *See* § 401(a) (by implication).
- *fair use:* can an individual copy a copyrighted photo he purchased for personal use?
    - personal use is not one of the listed purposes for fair use copying. *See* § 107.
    - but custom may allow such copying (but only in limited numbers).
        - by loose analogy, multiple copying of a single photograph is allowed for educational purposes. *See* PUBLISHERS' GUIDELINES.
- but, here, person ordering the copying is an employee/agent of National Portraits.
    - lawful owner of a copyright cannot infringe his own copyright.
    - but, here, the investigators actions were part of enforcement activity.
        - [such activity has been upheld by case precedent.]
- Shoreline Photo cannot avoid liability with the indemnification agreement.
    - Shoreline knew or should have known of National Portraits copyright notice.
- thus, the copying by Shoreline Photo was copyright infringement.

IV. (30 min.)

A..

- model railroad airport scene is a work derived from the AP photograph.
- infringement by a work in another medium is based on substantial similarity.
- the similarities must be of expressive elements, not public domain elements.
- hence, the physical objects and people in the photograph are not protectible elements.
- expressive elements include physical location relationships at the moment the photograph was taken (pose), lighting, framing, etc.
    - there is very little in the photograph that is expressive.
- here, the 3D scene can be viewed from several directions, so that the similarity to the 2D photograph is apparent only from one viewing angle.
    - only the physical location relationships were the same as in the photograph; there is no copying of lighting.
- thus, one could argue that the model railroad scene does not reproduce much of the limited expressive elements in the photograph.
- *result:* no infringement.

B.

- *misappropriation:* taking of work product of another by a competitor for commercial advantage.
    - a list of prices/values of used model railroad equipment is a compilation of public domain data.
        - the data is not protected by copyright (fact, not expression).
    - compiling those values is work product.
    - Greenberg and Brown are competitors.
    - taking of Greenberg's data would reduce the cost and effort of acquiring the data by Brown; this gives Brown a commercial advantage.
- taking of public domain data/facts is protectable by misappropriation only if it is "hot news". *Barclays*.
- *but*, otherwise, prices/values is unprotectable public domain data; state misappropriation law is preempted by Copyright Act.
    - § 301(a) preempts all state laws which which are equivalent to exclusive rights specified in § 106; state law cannot protect that which federal law places in the public domain. *Feist*..
- similarity of prices/values in both catalogs reflects actual prices/values.
- organization of both catalogs, while different, reflects the limited number of ways a user can find the data in the catalogs.
- [facts state that Brown's photos are different from Greenberg's.]
- *result:* no infringement; misappropriation preempted.

V. (30 min.)

Briefly define the following terms:

(1) first sale doctrine – purchaser of copyrighted work has right to dispose of a lawfully acquired physical copy, but not to reproduce it.

(2) "time-shifting" – temporary copying video work in order to watch it at a later time.

(3) parody – form of fair use commentary or critique which mimics the original in order to make fun of the original.

(4) originality – independently created by author, composer, or artist, not by someone else (need not be novel) [Copyright Act § 102(a)].

(5) work for hire – (1) prepared by employee within scope of employment, or (2) specially ordered/commissioned work, provided parties so agreed in a written agreement (applies only to 7 categories of works) [§ 101] – belongs to employer or commissioning person, not creator of work [§ 201(b)].

(6) composite work – prepared by 2 or more authors without original intent to merge their contributions into a unitary whole. [§ 101].

(7) "take-down" notice – notice under DMCA demanding OSP remove or block access to infringing work.

(8) copyright misuse – copyright holder's anti-competitive licensing/permission behavior by restricting access to public domain material or using typing or exclusive rights contracts as a condition to obtaining a license/permission.

(9) derivative work – work based on a prior work, but with added original material; it is recast, adapted, transformed from the original work.

(10) blanket license – licenses of music from ASCAP or BMI authorizing public performance of all works within their catalogs.