

FINAL EXAMINATION

COPYRIGHT LAW

P.N. Davis

Thursday, May 16, 2002

8:30 - 11:00 AM

THIS IS A TWO HOUR AND 30 MINUTE EXAMINATION.

THIS EXAMINATION CONSISTS OF FOUR (4) PAGES (not including this page).

THIS EXAMINATION CONTAINS FOUR (4) QUESTIONS.

I = 30 min. II = 60 min. III = 30 min. IV = 30 min.

FILL IN YOUR EXAMINATION NUMBER ON THE BLUEBOOK STICKER.

* * * * *

YOU MAY BRING INTO THE EXAM YOUR COPY OF THE STATUTORY

SUPPLEMENT, with any notations in the margins and blank pages you care to make, but no page inserts.

* * * * *

Instructions:

1. These questions will be graded on the basis of the times indicated with each questions. The indicated time for the questions total 2½ hours. You will be given 2½ hours to write the examination. Budget your time carefully or you may not finish.
2. Be sure to state a result whenever a question asks for one. Merely stating the arguments on both sides of a legal issue will result in only partial credit because you will not have completed the analysis required by that type of question.
3. If you find it necessary to make factual assumptions in order to answer a question, be sure to state the assumption.
4. Do not assume additional facts for the purpose of avoiding a legal issue or making its resolution easier.
5. Comment briefly on each legal issue reasonably raised by the questions and on each reason for your answer, even when you decide that one legal issue or reason controls the result.
6. The difference between triumph and disaster may lie in a **careful** reading of the questions.

I.

(30 minutes)

Bailey is a professional photographer. Cohen is the author of numerous books and calendars featuring photographs of memorabilia. In 1992, Cohen proposed that Bailey photograph vintage television sets for use in a book he hoped to publish. Bailey agreed. Cohen arranged to photograph a collection of television sets at a science museum. He and Bailey traveled together to the museum for the shooting. Bailey and Collins collaborated in the photography session, cleaning and setting up the television sets and props. Before Bailey triggered the camera shutter for each photograph, Cohen viewed a preliminary Polaroid test photograph of each image and made suggestions regarding any changes he thought appropriate. After the shoot, Bailey developed the photographs into transparencies and delivered them to Cohen for a mock-up book.

Cohen incorporated, arranged, and enhanced some of the photographs for inclusion in the book. He sought out a publisher, and in 1997, he entered into a publishing contract with Acme Publishing Company [APC]. On November 27, 1998, *Yesterday of Television* was published, giving Bailey sole attribution credit for the photographs. The copyright notice was in APC's name.

Bailey had contacted Cohen a number of times between 1992 and 1998 to inquire whether Cohen had yet found a publisher for the book. Cohen did not contact him at any time prior to or following the agreement with APC, and Bailey was not aware of the book's publication until he received a copy from APC. After receiving a copy of *Yesterday of Television*, Bailey registered a copyright on December 30, 1998, for color photographs entitled "Compilation of Television Set Photographs," listing 1998 as the year of completion. He did not list any co-authors.

Bailey then filed suit against Cohen and APC for copyright infringement, for wrongfully publishing and marketing his photographs. Bailey defended on the ground that he was a co-author of the photographs, and moved for summary judgment.

Should the court grant or deny the motion for summary judgment? Discuss all relevant legal issues. State a result.

II.

(60 minutes)

Innovative Law Students, an informal cooperative proprietorship, employs students to take detailed notes in the larger law classes. They then type up those notes into course outlines, reproduce them, and sell them to course members; these outlines track the subject matter order of the course lectures and discussions. They do not add any material gleaned from commercial course outlines. The purpose is to reduce the burden on students of course note-taking.

The various law faculty members give their course lectures and discussions from extensive written notes they prepare themselves. These notes vary in levels of detail. The faculty members' lectures and discussions vary in the degree they literally follow their notes.

Several faculty members became incensed when they learned of ILS's course note service. They plan to bring suit against ILS and its individual members for an injunction against future reproduction and sale or distribution of course notes.

In what court should they file this suit? What theories should they assert in this suit? Do ILS and its members have any defenses? Discuss all relevant legal issues. Discuss the probable success or failure of the various suit theories and defenses. State a probable result for each theory.

III.

(30 minutes)

Stuart Gilbert was hired by the City of Boonville to paint a large oil painting of the demolition of the old U.S. 40 bridge at Boonville, which occurred in 1998. The agreement between Gilbert and the city was oral, but was memorialized in a city council resolution.

Gilbert painted a dramatic depiction of the moment when explosives severed the bridge from its piers, with fire and smoke at each girder intersection. He signed and dated the completed painting in the lower right-hand corner, according to the custom of painters. He did not affix any other identification or notice on the front or back of the framed painting.

Upon completion, Gilbert transferred possession of the painting to the city by delivering it to the city manager's office. A few days later, the city mailed a check to Gilbert in payment of the agreed upon fee. The completed painting was hung in the Boonville City Council chamber.

The public reacted so well to the painting that the city decided to have a postcard publisher sell postcards of the painting. The first that Gilbert heard about this plan was when the postcards went on sale at stores throughout the city and at the casino.

Does Gilbert have any basis for suing the city? What remedies, if any, would be available to him? Discuss all relevant legal issues. State a result.

IV.

(30 minutes)

Briefly define the following terms:

- (1) duration of copyright for works created after January 1, 1978
- (2) right of paternity
- (3) originality
- (4) deposit requirement
- (5) parody
- (6) compilation
- (7) composite work
- (8) derivative work
- (9) public performance
- (10) first sale doctrine

COPYRIGHT LAW

May 16, 2002

I. (30 min.)

exclusive rights

- copyright owner has exclusive rights to contract for publishing & marketing of work

joint work

- two or more authors are joint authors where they intend initially to prepare components of a unitary whole
- each must make a copyrightable contribution to the work

copyrightable contribution

- a copyrightable contribution must involve originality and fixation
- here, Bailey as photographer clearly made copyrightable contributions to each photograph
 - discuss *Oscar Wilde* photograph case
- here, Cohen contributed to selecting and arranging the subject matter, the composition and camera angles, and the lighting
 - by commenting on and making suggestions with respect to each test photograph, which were used to fix those elements in each final photograph

authorship

- three factors of authorship:
 - (1) creator of the idea and control over the work
 - (2) making objective manifestations of share intent of coauthors
 - (3) whether audience appeal of work turns on contributions of both authors
- *artistic control*: here, while Bailey exercised ultimate artistic control of each individual photograph, Cohen contributed to artistic creation by inspiring the basic idea, located & obtained permission to use the vintage television sets, contacted Bailey to collaborate, helped arrange the composition of each photograph, solely selected which photographs to use in the book, and did the image enhancement work.
 - Cohen was, in fact, the art director of the shoot; this was more than Bailey's merely consulting with Cohen and deciding to adopt his suggestions; Cohen inspired and directed the production.
- *objective manifestations*: here, Bailey agreed to collaborate on Cohen's project, deferred to some of Cohen's suggestions, delivered the transparencies to Cohen for the book mock-up, and listed the completion date on the copyright registration form as 1998 (the year of book publication) rather than 1992 (the year of the shoot).
- thus, Bailey and Cohen are joint authors

rights of joint author

- one joint author can arrange for publication and marketing of their joint work; that arrangement is binding on the other joint author(s)

II. (60 min.)

statutory copyright infringement

- federal copyright protection extends to works in a fixed medium of expression (§ 102)
 - there is no federal copyright protection of oral works
- while the faculty members' notes are written, the texts of the lectures & discussions are not (few faculty members read their notes verbatim in class)
- since the ILS & members did not copy the faculty members' notes directly or indirectly, they are not copying something that is in a fixed medium of expression
- **no federal copyright infringement**

state or federal court?

- federal court can be used only for statutory copyright infringement
- otherwise, common law copyright and misappropriation are state law theories
- **case must be brought in state court**

misappropriation

- definition: taking of work product of another without consent for commercial advantage
- *work product*: here, the faculty members' work products (results of their course note preparations) are taken
- *without consent*: facts do not indicate consent was obtained; faculty reaction when they learned of course note service indicates no prior consent was given
- *for commercial advantage*: ILS sold course notes
- **thus, there is a cause of action for misappropriation here**
- [no federal preemption, because there is no federal statutory copyright protection available here]

state common law copyright infringement

- *Hemingway* suggests there may be common law copyright protection of oral works
- it is the lectures & discussions that were copied (but not literally), so copying of oral works is what is alleged here
- *Hemingway* suggests that only delineated oral works are copyrightable
- that delineation must be expressed by the utterer, unless the delineation is obvious
- course lectures & discussions would be obviously delineated, without expressly so stating
 - they are, in a manner of speaking, a performance, delineated naturally by the beginning and ending of classes
- copying a copyrighted work without consent is infringement

copying?

- definition: literal reproduction or reproduction is "substantially similar" form
- for copying to exist, there must be both access to the copyrighted work and substantial similarity between the copyrighted work and the accused work
- since ILS members/note takers did not have access to the faculty members' lecture notes, they were not copied
- obviously, ILS members/note takers did have access to the lectures/discussions themselves, since they were in class
- thus, the issue here is substantial similarity
- *substantial similarity*: copying or mimicry of expression, not mere similarity of a few words
- since ILS members & contractees took detailed lecture notes, there would be substantial similarity between the lectures/discussions and ILS's reproduced course notes

idea/expression dichotomy

- copyright protects only expression, not ideas, theories, facts, etc. [§ 102(b)]

- courses notes would include copious amounts of ideas, theories, case descriptions, etc., which are not protected by copyright
- only to the extent that the course notes included literal copying of lecturers' expressive language, in addition to their substantive content, would there be infringement

fair use defense

- purpose of fair use doctrine is to allow public to copy small amounts of copyrighted material without consent of copyright owner for various culturally/socially beneficial purposes
 - such as, teaching, research & scholarship, criticism, news reporting, etc.
 - fair use doctrine defines the upper limit on the quantity of copying permitted without consent (on a case-by-case basis)
- [§ 107 provides for a fair use defense – this includes copying for teaching & scholarship]
- state common law copyright undoubtedly recognizes fair use defenses
 - but it doesn't necessarily adopt the federal statutory gloss
- clearly, an individual student can copy any part of an oral lectures for personal educational purposes
 - one might even argue there is an implied license to do so
- that individual student right would not carry over to a commercial course note service
- [state common law copyright would not necessarily formally adopt the 4-factor analysis of § 107; but probably would use an analogous type of analysis]
- a commercial course note service could be analyzed as:
 - (1) *purpose and character of use*: it has a commercial purpose, albeit in an educational setting; it is a partial substitute to students' taking their own notes
 - there are several course outline series already available commercially; ILS's service is similar, but specifically tailored to a specific law school
 - (2) *nature of copyrighted work*: oral lecture, resulting from extensive work effort by faculty member; lectures are for dissemination in class, but not for public at large
 - (3) *amount and substantiality of portion used*: entire lectures were copied; there is no additional material added to ILS's course notes
 - (4) *effect of use on potential market of copyrighted work*: ILS course note service destroys faculty members' ability to serve same market; also it impairs the pedagogical benefits of students' taking their own notes
- faculty copyright owner has exclusive right to decide when to reproduce his lectures/discussions [analogously to § 106]

result

- there is a state common law copyright cause of action
 - it applies to oral utterances (and other non-fixed works)
- the oral work probably needs to be delineated
 - class lectures/discussions are naturally delineated
- there was copying, even though the course notes do not literally track the lectures/discussions
 - there would be close paraphrasing
- there is not a fair use defense, because too much was reproduced
- open issue is whether the course notes contained mostly ideas, theories, facts, and case descriptions
 - how much can be characterized as expression?

III. (30 min.)

ownership of copyright

- federal copyright law applies, because the painting is in a fixed medium of expression (§ 102)
- author/artist has initial ownership of the copyright in a work (§ 201)
- *severability*: transfer of the work to another does not include transfer of ownership of the copyright (§ 202)
 - absence a written copyright assignment, or written memorandum thereof (§ 204)
 - there was none here

affixation of copyright notice

- since 1989, the Act has not required affixation of copyright notice (“may” - § 401(a))
 - the Act was amended in 1989 to incorporate the Berne Convention’s policy that affixation of a copyright notice cannot be a prerequisite to copyright protection
 - a valid copyright is presumed in the absence of evidence of dedication to the public domain

work-for-hire (§§ 101, 204)

- copyright ownership belongs to a person commissioning a work in either of 2 circumstances:
 - (1) employer-employee: prepared by employee within scope of employment
 - (2) pursuant to a pre-creation written work-for-hire agreement, where work falls within one of 7 statutory categories
- *employer-employee*: here, Gilbert was an independent contractor, not an employee
- *commissioned work*: here, agreement was oral, not written
 - council resolution would not constitute a sufficient writing, because it is not signed by Gilbert (§ 202(b))
 - also, painting does not fall within any of 8 work-for-hire categories
 - contribution to collective work, movie/audiovisual work, translation, supplemental work, compilation, instructional text, test or answer material, atlas (§ 101)
- **thus, copyright is retained by Gilbert as author/artist**

substantive rights of copyright owner

- copyright owner has exclusive right to reproduce & distribute the copyrighted work (§ 106(1), (3))
- owner of the material object does not have these rights (§ 202)
- **thus, reproduction by city is copyright infringement**

remedies

- the copyright owner is entitled to an injunction against future infringement (violation of any exclusive rights) (§ 501(a))
- also, he is entitled to damages for past infringement (either city’s net profits, or his own lost income, but not both) (§ 502, 504(b))
 - here, statutory damages are not available, because actual damages can be computed (*see* § 504(c))

IV. (30 min.)

briefly defined the following terms:

- (1) duration of copyright for works created after January 1, 1978
- (2) right of paternity
- (3) originality
- (4) deposit requirement
- (5) parody
- (6) compilation
- (7) composite work
- (8) derivative work
- (9) public performance
- (10) first sale doctrine