

Copyright

Spring 2019

Professor William Fisher

This examination has two parts. Part I is a three-hour in-class test, which will be administered from 2:00 p.m. to 5:00 p.m. on May 1, 2019. Part II is an unlimited-time “take-home” essay, due at 4:30 p.m. on May 10, 2019. Your responses to the two parts will be given equal weight when determining your grade.

Instructions for Part I

Part I of the exam consists of two questions, which will be given equal weight. You must answer both.

The exam mode, for this portion of the exam, is CLOSED. This means that you will not have access to the hard drive of your computer or to the Internet. Nor will you have access to your answer once you have submitted it.

This portion of the exam is also “closed-book.” You may not bring into the exam room any written material, paper, or electronic devices other than your computer. (The only exception to this rule is that a student who is not a native speaker of English may bring into the exam room a paper copy of a dictionary enabling him or her to translate English words into his or her principal language.) The proctors will supply scrap paper that you may use to take notes during the exam. In preparing your answer, you may not consult in any way with your fellow students or with any other person.

Exam4 will automatically put your Anonymous ID and word count on the exam copy. Do not write your name on any part of your response. To preserve the anonymity of your response, avoid including any information that would enable the instructor to identify you.

Until 5:00 p.m. on May 10, please do not discuss Part I of the exam with your classmates or submit to an online discussion forum any comments or questions that refer to any part of the exam. The reason for this request is that, until May 10, one or more of your classmates may be taking the exam on a delayed basis, and students in some of the other courses affiliated with CopyrightX will be answering questions identical or similar to those contained in the Harvard Law School exam.

DO NOT TURN TO PAGE TWO UNTIL THE PROCTOR TELLS YOU TO BEGIN.

Part I

Question 1:

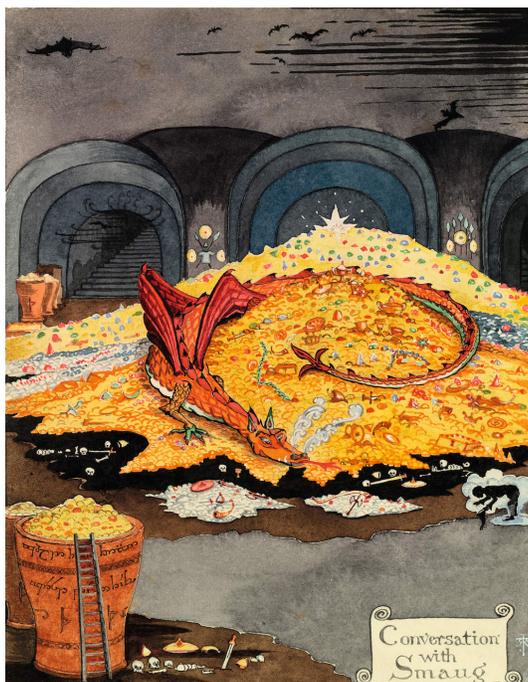
Dragons have appeared in many stories. Famous dragons include the one guarding the golden fleece in *Argonautica* (third century BC); the one slain by St. George in *The Golden Legend* (1260); and the seven-headed dragon who appears in one of the *Grimm's Fairy Tales* (1812).

Most dragons have been unnamed. An exception is Smaug, the principal villain in J.R.R. Tolkien's novel, *The Hobbit*, published in 1937. The passage from the novel in which Smaug is first described is set forth below:

There he lay, a vast red-golden dragon, fast asleep; a thrumming came from his jaws and nostrils, and wisps of smoke, but his fires were low in slumber. Beneath him, under all his limbs and his huge coiled tail, and about him on all sides stretching away across the unseen floors, lay countless piles of precious things, gold wrought and un-wrought, gems and jewels, and silver red-stained in the ruddy light.

Smaug lay, with wings folded like an immeasurable bat, turned partly on one side, so that the hobbit could see his underparts and his long pale belly crusted with gems and fragments of gold from his long lying on his costly bed. Behind him where the walls were nearest could dimly be seen coats of mail, helms and axes, swords and spears hanging; and there in rows stood great jars and vessels filled with a wealth that could not be guessed."

Unlike most of his predecessors, Smaug has some traits more often associated with humans: intelligence, greed, and vindictiveness. Tolkien's own illustration of him follows.



In 1995, Warner Bros. Pictures produced an authorized movie adaptation of *The Hobbit*, called *The Desolation of Smaug*. Three of the many images of Smaug that appear in the movie are set forth below:



Game of Thrones (GOT) is a popular television series produced by Home Box Office (HBO). The series started in 2011; it is now in its final season. GOT is based upon *A Song of Ice and Fire*, a series of novels written by George Martin starting in 1996. HBO bought the movie rights from Martin and continues to pay him substantial license fees.

Among the many characters in Martin's books and GOT are three dragons, who are depicted as the children of Queen Daenerys Targaryen. Although loyal to the queen, they are otherwise destructive and uncontrollable. In a recent GOT episode, one character asks the queen, "What do dragons eat?" She responds, "Whatever they want."

To give the dragons as much personality and texture as possible, HBO hired Anger in Motion (AIM), an independent computer animation company, to create the images that appear in GOT. The AIM animators claim never to have seen *The Desolation of Smaug*. Instead, they say that that they modeled the GOT dragons on vultures.

Screenshots of the GOT dragons appear below.



Link is a tattoo parlor in New York City. Like many parlors, it offers tattoos containing images drawn from famous television series and motion pictures – but has not obtained licenses for the use of those images. Recently, tattoos containing images that appear in *Game of Thrones* have been especially popular among Link’s customers. The most popular of all have been images of the GOT dragons.

The New York Times recently described this aspect of Link’s business:

[A]bout 30 people, mainly women in their 20s, [stood] in a line [outside Link] to get “Game of Thrones” tattoos.... The show, a fantasy epic produced by HBO, is in its final season.

[M]any standing in line spoke passionately about how “Game of Thrones” had inspired them....

Even the oldest fans in the line, [John and Lisa,] both 43, ... said the show’s characters meant a lot to them. [Both were getting dragon tattoos. John’s tattoo was fairly simple, but Lisa’s included all three dragons accompanied by an image of Queen Targaryen.]



“Daenerys, she’s come from nowhere to where she is now,” [John] said. “She’s been through so much. That’s inspiring.” “That’s one reason I’m getting it,” he added. “Oh, and because dragons are cool.” ...

[Another customer waiting to get a dragon tattoo explained the appeal of Queen Targaryen:]

[She] sets slaves free, and “wants to crush the oppressive system of the monarchy.” “That speaks to me a lot,” he said. He added, however, that he was not against Britain’s queen. Daenerys Targaryen wasn’t “against monarchies, just oppression in general,” he said. “Fighting injustice is really inspiring.”

Has anyone in this sequence of events engaged in copyright infringement? If you need any additional information to answer the question, say what that information is and why it matters. Your answer may not contain more than 1200 words.

[This question contains a fictionalized composite of several true stories. Most of the statements made in the question are true, but others are “alternative facts” – i.e., either distortions of true events or outright fabrications. If you happen to know (or learn) about aspects of the true stories that are inconsistent with the narrative set forth above, you should ignore that knowledge when framing your answer.]

Question #2

In 1984, Bruce Springsteen composed and recorded the ballad, “Born in the USA.” Some of the lyrics of the song are set forth below.

Born down in a dead man's town
The first kick I took was when I hit the ground
End up like a dog that's been beat too much
Till you spend half your life just covering up

Born in the U.S.A., I was born in the U.S.A.
I was born in the U.S.A., born in the U.S.A.

Got in a little hometown jam
So they put a rifle in my hand
Sent me off to a foreign land
To go and kill the yellow man

Born in the U.S.A., I was born in the U.S.A.
Born in the U.S.A., born in the U.S.A.

The fast tempo and seemingly upbeat chorus have led many listeners to misinterpret the song as patriotic.

In January 2016, Donald Trump, a candidate for the presidency of the United States, instructed Corey Lewandowski, his campaign manager, to find “a patriotic song we could play at my campaign rallies.” Lewandowski selected “Born in the USA.” He bought a compact disc (CD) containing a recording of the song. At each campaign event, Lewandowski used the CD to play the song over a loudspeaker system immediately prior to Trump’s appearance.

In February 2016, Springsteen learned that the song was being used by the Trump campaign without his permission. He wrote Trump a letter, demanding that he cease the practice immediately and issue a public apology. Otherwise, Springsteen said, “I will use every legal weapon available to me.”

After he read the letter, Trump handed it to Lewandowski, saying simply, “Take care of this.” Lewandowski met with his staff, one of whom was a lawyer familiar with copyright law in the United States. The group discussed three options: ignore the letter and continue playing the recording at campaign rallies; cease playing the recording and apologize to Springsteen; or ask Ted Nugent (a singer who supported Trump) to perform and record Springsteen’s composition and then play Nugent’s recording at campaign rallies.

Lewandowski asked the lawyer:

- (a) Are we doing anything illegal when we play at our events the CD containing Springsteen's recording?
- (b) If so, who is liable for the illegality?
- (c) If we continued to play Springsteen's recording, he sued us, and we lost, what remedies would be available to him?
- (d) Could we avoid liability by commissioning and using a recording of the song by Nugent?

Had you been that lawyer, how would you have answered Lewandowski's questions? Your answer may not contain more than 1200 words.

[Like the preceding question, this question contains a fictionalized version of a true story. If you happen to know (or learn) about aspects of the true story that are inconsistent with the narrative set forth above, you should ignore that knowledge when framing your answer.]

End of Part I

Part II

This portion of the exam is open-book, and the exam mode is TAKEHOME. In preparing your answer, you may read any material you wish. You are also free to discuss your answer with your classmates or other persons. However, you must indicate in your answer the sources of any ideas you have derived from others.

Answer one and only one of the following three questions:

- (A) In April 2009, the Economist magazine organized an online debate concerning the merits and demerits of the copyright system. Participants included Justin Hughes (Professor at Loyola Law School and a treaty negotiator on behalf of the United States), John Kennedy (Chairman of the IFPI), Dale Cendali (Partner at Kirkland & Ellis and Adjunct Professor at HLS), Jennifer Urban (Director of the IP and Technology Law Clinic at USC), Jessica Litman (Professor at the University of Michigan Law School), David Lammy (Minister for Higher Education and IP, United Kingdom), and William Fisher. Read the contributions to the debate: http://cyber.law.harvard.edu/people/tfisher/cx/Economist_Debate_2009.htm. Then draft your own contribution. Your answer should include a discussion of whether changes in the social, economic, or technological environment since 2009 should alter our assessment of the copyright system.
- (B) Set forth on the following page is a table showing how each of the four theories of intellectual property that you have studied in this course might be applied to some of the dimensions of copyright doctrine. Discuss four cells in this table. The ways in which you might do so include (but are not limited to): (1) expand the table by adding a new row (representing a dimension of copyright doctrine not included in the current list) and then showing how each of the four theories might be brought to bear on that dimension; (2) discuss how one of the theories might be applied to four doctrinal dimensions; (3) criticize or supplement the arguments offered in four of the cells that are already filled in; (4) comment upon the inferences that might be drawn from four of the completed cells concerning the merits or demerits of one or more of the theories.

Your answer to this Part of the exam may not exceed 2000 words (including any footnotes or references). You must submit it before 4:30 p.m. on May 10, 2019, to the Registrar's Office using the Exam 4 software.

	Fairness	Personality	Welfare	Cultural
<i>Originality</i>	Protect all works that (a) are not copied and (b) originate in effort, including "sweat of the brow"	Protect all works that (a) are not copied and (b) reflect creators' expressive choices	Protect only works that (a) are not copied and (b) would not be created in the absence of the incentives associated with copyright	Protect a work if it (a) is not copied and (b) produces on a reasonable person an overall impression different from that produced by any other single work that had been publicly available prior to the creation of the work at issue
<i>Educational Uses</i>				Liberalize TEACH Act; More DMCA exceptions for teaching; Curtail the first-sale doctrine with respect to educational materials and tools
<i>Idea/Fact/Expression</i>	Protect collections of facts gathered with effort		In borderline cases, define as ideas or facts things whose protection would generate more social harm than social benefit	Language or material essential to civic engagement should be deemed either facts or ideas
<i>Fair Use</i>	Emphasize factor #4 (ensure creators have appropriate rewards); Narrow conception of "potential market" (no reaping where one has not sown); Reorient factor #1 to focus on defendant's labor (parasite vs. contributor); Deemphasize factor #2 (journalism is as worthy labor as writing fiction)	Factor #1: "transformation" should weaken, rather than strengthen, argument for fair use; Factor #2: hostility to disclosure of unpublished works; Factor #4: Do not penalize artists for refusing to license uses of their works; "harms" should include tarnishing	Activities with high incentive/welfare loss ratios = unfair; activities with low ratios = fair -- treat as "fair" uses with high positive externalities (e.g., parody) -- treat as "fair" socially beneficial activities that would be blocked by transaction costs -- track popular attitudes (avoid negative "psychic externalities")	Substitute "adverse impact on a just and attractive society" for "welfare loss" in the incentive/loss ratio --transformative uses should be given more latitude than consumptive uses of copyrighted materials; --uses that either constitute or facilitate creative engagement with intellectual products = fair; --generous treatment of commentary and criticism
<i>Moral Rights</i>		Extend rights of integrity and attribution to all types of artistic works; eliminate exception for WFHs		Reduced protection for the right of integrity; Enhanced protection for the right of attribution
<i>Libraries</i>				No public-lending rights in developing countries; Opt-out regime for Google books
<i>Formalities</i>				Reinstate notice requirement; Comprehensive mandatory registration system
<i>Compulsory Licenses</i>	Avoid CLs, because they encroach upon creators' natural property rights	Avoid CLs with respect to copyrighted works expressive of their creators' personalities	Employ CLs only when the net social benefits do not exceed transaction costs	Generalize section 115 to cover other types of follow-on innovation; More CLs for educational activities (percentage of profits)
<i>Differential Pricing</i>				<i>Kirtsaeng</i> was wrongly decided; Protection for DRM that facilitates global geographic differential pricing

Appendix

To save time and space, you may use any of the following abbreviations in your responses to any of the questions in the exam:

P	plaintiff
D	defendant
Code	The U.S. Copyright Statute
©	copyright
MW	musical work
SR	sound Recording
PGS	pictorial, graphic, or sculptural work
FUD	fair use doctrine
TK	traditional knowledge
Aalmuhammed	Aalmuhammed v. Lee, 202 F.3d 1227 (9 th Cir. 1999)
Authors	Authors Guild v. Google, 804 F.3d 202 (2 nd Cir. 2015)
Abend	Stewart v. Abend, 495 U.S. 207 (1990)
Aereo	American Broadcasting Companies v. Aereo, Inc., 134 S.Ct. 2498 (2014)
Alexander	Alexander v. Haley, 460 F.Supp. 40 (S.D.N.Y. 1978)
Avtec	Avtec Systems, Inc. v. Peiffer, 21 F.3d 568 (4 th Cir. 1994)
Baker	Baker v. Selden, 101 U.S. 99 (1879)
Blanch	Blanch v. Koons, 467 F.3d 244 (2 nd Cir. 2006)
Bleistein	Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903)
Bolton	Three Boys Music Corp. v. Michael Bolton, 212 F.3d 477 (9 th Cir. 2000)
Campbell	Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994)
Cariou	Cariou v. Prince, Docket No. 11-1197-cv (2 nd Cir. 2013)
Castle	Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc., 150 F.3d 132 (2 nd Cir. 1998)
CCNV	Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989)
Connectix	Sony Computer Entertainment, Inc. v. Connectix Corp., 203 F.3d 596 (9 th Cir. 2000)
Corley	Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2 nd Cir. 2001)
Dastar	Dastar Corporation v. Twentieth Century Fox Film Corporation, 539 U.S. 23 (2003)
DCComics	DC Comics v. Towle, 802 F.3d 1012 (9 th Cir. 2015)
Eldred	Eldred v. Ashcroft, 537 U.S. 186 (2003)
Fantasy	Fantasy, Inc. v. Fogerty, 94 F.3d 553 (9 th Cir. 1996)
Feist	Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991)
Frank	Frank Music Corp. v. Metro-Goldwyn-Mayer Inc., 886 F.2d 1545 (9 th Cir. 1989)

Gaylord	Gaylord v. United States, 595 F.3d 1364 (Fed. Cir. 2010)
Golan	Golan v. Holder, 2012 U.S. Lexis 907 (2012)
Grokster	Metro-Goldwyn-Mayer, Inc. v. Grokster, 545 U.S. 913 (2005)
Hoehling	A.A. Hoehling v. Universal City Studios, Inc., 618 F.2d 972 (2 nd Cir. 1980)
Hotaling	Hotaling v. Church of Jesus Christ of Latter-Day Saints, 118 F.3d 199 (4 th Cir. 1997)
Kirtsaeng	Kirtsaeng v. John Wiley & Sons (U.S. Supreme Court 2013)
Lindsay	Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic, 52 U.S.P.Q.2d 1609 (S.D.N.Y. 1999)
Lee	Lee v. A.R.T. Company, 125 F.3d 580 (7 th Cir. 1997)
Lotus	Lotus Development Corporation v. Borland International, Inc., 49 F.3d 807 (1 st Cir. 1995)
Mannion	Mannion v. Coors Brewing Co., 377 F.Supp. 2d 444 (S.D.N.Y. 2005)
Martin	Martin v. City of Indianapolis, 192 F.3d 608 (7 th Cir. 1999)
Micro	Micro Star v. FormGen Inc., 154 F.3d 1107 (9 th Cir. 1998)
Moran	United States v. Moran, 757 F.Supp. 1046 (D.Neb. 1991)
Nichols	Nichols v. Universal Pictures Corp., 45 F.2d 119 (2 nd Cir. 1930)
Oracle1	Oracle v. Google (Fed. Cir. 2014)
Oracle2	Oracle v. Google (Fed. Cir. 2018)
Perfect10	Perfect 10 v. Amazon, 508 F.3d 1146 (9 th Cir. 2007)
Pivot	Pivot Point, Int'l v. Charlene Products, 372 F.3d 913 (7 th Cir. 2004)
Rentmeester	Rentmeester v. Nike, Inc. (9 th Cir. 2018)
Salinger	Salinger v. Colting, 607 F.3d 68 (2 nd Cir. 2010)
Shine	Shine v. Childs, 382 F.Supp.2d 602 (2005)
Star	Star Athletica v. Varsity Brands (US Supreme Court 2017)
Steinberg	Steinberg v. Columbia Pictures Industries, Inc., 663 F.Supp. 706 (S.D.N.Y. 1987)
Swirsky	Swirsky v. Carey, 376 F.3d 841 (9 th Cir. 2004)
Tasini	New York Times Company v. Tasini, 533 U.S. 483 (2001)
Viacom	Viacom v. YouTube, 676 F.3d 19 (2 nd Cir. 2012)