

CopyrightX: Final Examination

Spring 2017

Professor William Fisher

Question #1

The motif known (in English) as “paisley” originated in Persia. It resembles a fig, a twisted teardrop, or (by some accounts) a bent cedar tree. It was first used in conjunction with the Zoroastrian religion, but later appeared in garments and other fabrics used in many cultures in the Middle East and South Asia. Some early examples of paisley are set forth below:

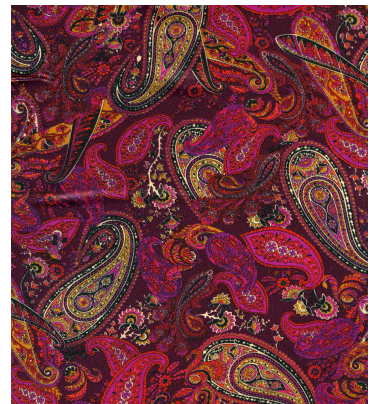


Persian silk brocade



Handstamp for textile printing, Iran

Shawls and other articles of clothing featuring this motif were popular in Europe in the 17th through 19th century. Its use then waned until the 1960s, when, partly because of the influence of The Beatles, it became associated with the counterculture in the United States and England – and specifically with the use of psychedelic drugs. Some examples of modern fabric designs that include the paisley motif appear below:



John Jones has two passions: fashion and music. As a young man, he pursued both. During the day, he worked for Vera Licensing, designing silk scarves. At night, he played lead guitar for a rock-and-roll band. In the 1970s, the increased popularity of the band – and the associated increase in his income – prompted him to quit his job with Vera. He did not abandon craftsmanship altogether, however. When not on tour, he spent some of his spare time making custom electric guitars in a workshop adjacent to his home. He has sold a few of his guitars, but has kept most of them for his own use. One of his favorites is a guitar he made in 1980, which features a black-and-white paisley pattern he created himself. It is depicted below:



Many photographs of John playing this guitar during performances by his musical group can be found on the Internet.

At the time he made his guitar, John had never seen a black paisley guitar. Since then, he has encountered only a few. Last Saturday, at a music festival in Chicago, he was appalled to find that three of the other participants in the festival were using guitars with faces featuring black-and-white paisley patterns. Karl Kastle was playing one manufactured by Fender. Louise Larkin was playing one manufactured by Rebel Guitars. Finally, Mary Marbury was playing a guitar

that (to John) looked especially similar to his own. Photos of the three instruments appear below.



Karl Kastle's guitar, made by Fender



Louise Larkin's guitar



Mary Marbury's guitar

Mary's guitar was the only one that lacked a visible trademark identifying its manufacturer. So, after Mary's performance at the festival, John approached her and asked where she had purchased it. Mary told him: from Nick Nockleby, a custom guitar maker in Seattle.

When he got back to his hotel room that night, John was in a foul mood. He turned on his laptop computer, typed "Nockleby guitar" into a search engine, and quickly located the website for "Nick Nockleby, Luthier." John called the telephone number listed on the website, and Nick himself answered. "Hey, did you by chance recently make a black paisley guitar?" John asked. Nick responded: "Sure did. Mary Marbury, one of my regular customers, sent me a photo last year and asked me to make an exact copy of the guitar shown in the photo. I thought the request was a little odd; I'm not a fan of paisley, especially in black. But I did my best. She paid me \$5,000 for it." "Do you happen to have a copy of the photo Mary sent you?" John asked. "Sorry. I threw it away after I finished the guitar. But I can send you a picture of the guitar." "Nevermind," said John and hung up.

You have known John for many years. He knows that you have recently completed a course on copyright law. This morning, you received an email message from John in which he recounted these events and asked your advice. His message concludes: "All of these folks – Karl, Fender, Louise, Rebel, Mary, and Nick – are blatantly ripping off my design. Isn't that against the law? If I sue them and win, will they have to pay me? At least can I make them stop using knockoffs of my guitar in their performances?"

Write John an email message containing no more than 1200 words, answering his questions. If you need additional information to provide him guidance, say what that information is and why it matters.

(Most of the events described in this question are fictional. Some, however, are based on actual events. If you happen to know more about the events at issue, you should ignore that knowledge when preparing your answers.)

[The photographs used to illustrate the question were derived from:

https://upload.wikimedia.org/wikipedia/commons/0/0c/Persian_Silk_Brocade_-_Paisley_-_Persian_Paisley_-_Pahlavi_Dynasty.jpg;

https://upload.wikimedia.org/wikipedia/commons/7/7d/Printed_Tissue_Stamp.jpg;

<https://www.google.com/url?sa=i&rct=j&q=&esrc=s&source=images&cd=&ved=0ahUKEwiCtM3hhLPTAhWJ7CYKHxo6BrgQjRwIBw&url=http%3A%2F%2Fwww.paisley2021.co.uk%2F&psig=AFQjCNG8uQOVhx0zJPTogZg2SMJm0OTVwQ&ust=149277775662483&cad=rjt>;

<https://www.pinterest.com/pin/33988172168017207/>;

https://www.google.com/url?sa=i&rct=j&q=&esrc=s&source=images&cd=&ved=0ahUKEwjGx6qcxLXTAhWE5yYKHxO9D_oQjRwIBw&url=http%3A%2F%2Fwww.joann.com%2Fsimply-silky-prints-berry-paisley-charmeuse%2F1597822.html&psig=AFQjCNEtGNQkpV_Y7EG8UQyKVflyFq0qSw&ust=1492863423065376;

<https://www.vintageandrare.com/product/Zeal-Guitars-Black-Paisley-2014-Paisley-Fabric-36739>;

<https://www.vintageandrare.com/product/Zeal-Guitars-Black-Paisley-2014-Paisley-Fabric-36739>;

<https://uk.pinterest.com/pin/81909286951867584/>; <http://rebel-guitars.com/preowned-crook-custom-guitars-black-white-paisley-t-style/>;

<http://www.guitar-planet.co.uk/zeal-black-paisley/>.]

Question #2

Annie Leibovitz is a famous portrait photographer. In 1975, she was employed by the Rolling Stones to document the group's concert tour of the United States. One evening, after a performance, she took the following photograph of Mick Jagger, the lead singer of the group:



Leibovitz later wrote about the circumstances surrounding the making of this image:

The photograph that is emblematic of the 1975 tour for me is the one of Mick in the elevator. It was toward the end of the tour, and he was not on the ground. He was flying. From another world. He was the most beautiful object. Like a butterfly. Ethereal. After all the time on the road, his dancing was very loose. It was almost surreal. I was always aware of where Mick was. What might have seemed like a nuisance to him became a source of comfort. To know that I was somewhere nearby. It was a subject-photographer relationship of an obsessive kind.... The picture was taken on the way up to Mick's room. He and I were

alone. We were on some level out of it. Not because of drugs, but because of all that travel, and sleep deprivation, and the exertion of the performances.¹

To this day, the photograph of Jagger remains one of Leibovitz' best known and most admired portraits.

David Downing has spent much of his illustrious career as an artist making what today would be called "appropriation art."² In the 1970s, he lived and worked in New York City. Andy Warhol was a close friend and occasional collaborator. Eccentric and reclusive, David rarely sold his works. Partly for that reason, his creations were (and are) highly valuable.

In the early 1970s, Ellen Evers lived in Los Angeles, pursuing a Masters Degree in Fine Arts at UCLA. Her specialty was photography. In one of her classes, she learned of David's work, which she found fascinating. Upon graduation, she traveled to New York, approached David, and offered to work for free as his apprentice. He agreed. They did not memorialize their agreement in any written document.

Every weekday between 1975 and 1980, Ellen went to David's studio and did whatever jobs he assigned her. Initially, the tasks were menial, but David gradually gave her more responsibility and taught her more skills.

One afternoon in 1977, David was glancing through a book on contemporary portrait photography, when he came upon an (authorized) copy of Leibovitz' photograph of Jagger in the elevator. He said to Ellen: "Check out this picture of Mick Jagger. I love it. It's so intense. The haunted, beaten look. The hint of an emaciated body. It reminds me of Velázquez' depiction of Christ. You know that painting?" Ellen did not, so David pulled off the shelf a book featuring the work of Diego Velázquez and showed her the painting reproduced on the following page.

¹ *Annie Leibovitz at Work* (2008).

² Two complementary definitions of appropriation art appear below:

"Appropriation Art borrows images from popular culture, advertising, the mass media, and other artists and incorporates them into new works of art." William M. Landes & Daniel B. Levine, *The Economic Analysis of Art Law*, in 1 HANDBOOK OF THE ECONOMICS OF ART AND CULTURE 211, 217 (2006).

"Appropriation art generally refers to the 1980s school of art that probed questions of authenticity, originality, institutional authority, and authorship through the appropriation of existing images." Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559, 571 n. 42 (2016).



Diego Velázquez, *Christ Crucified* (1632)

David continued: “Hey, why don’t we put Velázquez and Leibovitz together? Here’s what I want you to do: Take this book to Kinko’s³ and ask them to make a large color copy of the Velázquez painting. Then, using that fancy camera of yours, take a close-up photo of the portion of Leibovitz’ portrait that shows Jagger’s face. Just tear out the page from the magazine and photograph it. Then add some color to your photo so that it more-or-less matches the hues of the Velázquez painting. I know that’s hard to do, but you learned the technique at UCLA, right? Feel free to use my darkroom downstairs. After you’ve colorized it, print a copy of the image of Jagger’s head and paste it onto the copy of the Velázquez painting so that it covers Christ’s face. Shellac the whole thing, and you’re done.”

“What exactly would the combination of these two images convey?” Ellen asked. “Silly question,” David answered. “Just do what I suggest.”

³ “Kinko’s” was a chain of copy shops popular in the 1970s. It is now part of Federal Express.

A week later, Ellen presented David with the finished work:



“Great job,” exuded David. I’ll call it: “V/L.” He put it in a closet.

In 1980, David concluded that he had taught Ellen all he could. It was time, he suggested, that she establish her own career. When they parted, David handed her a large package wrapped in brown paper. When she returned to her apartment, Ellen opened the package and found V/L, now nicely framed. Written on its back was the following statement:

Ellen, my dear, I give this to you to commemorate our glorious time together.
You really created it anyway. I wish you the best. Affectionately, D

Ellen subsequently had a reasonably successful career as an artist, but never reached the heights attained by her mentor. She had intended to keep V/L as a memento of her time with David. However, in 2010, she decided to sell it to cover her mounting debts. The Andy Warhol Museum⁴ in Pittsburgh offered to buy it for \$200,000, but only on the condition that she also assign to the Museum any copyright interests she had in the work. She reluctantly agreed, and the sale and assignment were consummated.

Patrick Moore was recently named director of the Warhol Museum. He is considering publishing a book entitled, “Warhol’s Influence,” which would document the impact that Warhol had on many other artists. He would like to include in the book a copy of V/L. A preliminary investigation of the history of the work has revealed the facts set forth above. Moore is not a lawyer. He worries that, without the permission of David, Leibovitz, and/or the Rolling Stones, the reproduction of V/L in the book would expose the museum to liability for copyright infringement. Write an essay containing no more than 1200 words providing Moore advice.

[All of the events described in this question are fictional. The photographs used to illustrate the fictional narrative were derived from: <http://tmlarts.com/wp-content/uploads/2016/10/e4290d3203c9720a00b12d38ce914b6f.jpg>; and https://upload.wikimedia.org/wikipedia/commons/d/d7/Cristo_crucificado.jpg.]

⁴ The Andy Warhol Museum, located in Pittsburgh, Pennsylvania, describes itself as “the global keeper of Andy Warhol’s legacy.” Its collection includes “900 paintings; approximately 100 sculptures; nearly 2,000 works on paper; more than 1,000 published and unique prints; and 4,000 photographs” as well as many materials related to Warhol’s life and art.

Question #3

Select one of the following dimensions of copyright law:

- a) originality;
- b) fair use; or
- c) moral rights.

Briefly describe how the issue is addressed under the law of the United States and how it is addressed under the law of one other country or region (such as continental Europe or Latin America). Which of the two approaches, in your judgment, is superior? Why? Your answer may not exceed 1200 words.

Question #4

Select one of the following dimensions of copyright law:

- a) secondary liability;
- b) circumvention of technological protection measures;
- c) the scope of copyright protection for musical compositions;
- d) the scope of copyright protection for sound recordings; or
- e) traditional knowledge.

Then select one of the four intellectual-property theories that were examined in this course. What insight into how copyright law should address the dimension you select might be derived from the theory you select? How does your analysis illuminate the strengths and weaknesses of the theory? Your answer may not exceed 1200 words.

End of Exam