

342241

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Institution **Harvard Law School**
Course / Session **S21 Fisher Copyright**
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Exam Mode **TAKEHOME**
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Count (s)	Word (s)	Char (s)	Char (s) (WS)
Section 1	1997	10437	12439
Section 2	1907	10989	12902
Total	3904	21426	25341

Answer-to-Question- 1

(1) Ostensibly, **June Baum** has inherited a copyright in the Wicked Witch. This character is fixed in Baum's book, and sufficiently original to merit Copyright protection (*Feist*). Although "witches" have been around for millenia, and thus might be considered *scenes-a-faire*, the specific characteristics of the Wicked Witch: her distinctive aversion to water, her history *re* falling houses, etc, should make her unique enough as a character to satisfy either the disfavored "Sam Spade" test or the "Well-deliniated character" test (*Towle*). In either case, she remains subject to § 102(a) copyright, as a fictional character.

Furthermore, although Baum licensed the film-rights to his work to MGM, his heirs should still retain standing to sue. As *Towle* makes clear, even if the infringement here was based upon one of the witches' iterations in film (e.g. the 1989 Batmobile), Baum still owns the rights to the *original character*, and thus would at least theoretically be able to pursue DaCorte on § 106(1), § 106(2), and § 106(5) claims (*see infra*).

But there's a problem. Baum's character, created in 1900, has fallen into the public domain (it was even published before the 1909 Act!). As a result, while June might have once held a copyright interest in the "Wicked Witch," that interest has expired.

The case involving **MGM** is potentially more problematic. Like Baum, the representation of the "Wicked Witch" in *The Wizard of Oz* is subject to Copyright protection. It is fixed and has elements of original depiction (most notably: lime-green skin, combined with warted-nose, aversion to water, &c) which satisfy the loose *Feist*

requirement, and go beyond “traditional” depictions of witches in popular culture. True, this was a licensed derivative work from Baum; but licensed derivative works are also entitled to Copyright protection, and their copyright-holders can bring infringement suits.

Given the age of the Wizard of Oz, Copyright is likely still in effect. In 1930, notice was required in order for Copyright to hold, as was registration (which was also a prerequisite for renewal). Assuming that these requirements were satisfied (the alternative is unthinkable, in the case of MGM’s most valuable non-Bond property), and the work was duly renewed before expiry, the Copyright is valid in 2021. The “authorship” question should also not pose any difficulties. MGM, the producer of the film, retains ownership of the Copyright.

DaCorte almost certainly infringed MGM’s § 106(1), § 106(2), and § 106(5) rights.

Proving copying in this case is trivial; DaCorte professed that he was dressing up as the Witch with the express intent of recreating Margaret Hamilton’s appearance on *Sesame Street* (meaning the copying was not just of Baum’s character, but of MGM’s *rendition* of that character, using MGM’s actor). His film is also “fixed” (*Cablevision*).

DaCorte’s turn as the witch is also “substantially similar” to MGM’s depiction. Although DaCorte can argue that he is only deressing up as a *witch*, not the *Wicked Witch*, this claim will be rebutted by any “more discerning observer” or “abstraction-filtration” style analysis. In an *Altai* framework, DaCorte’s turn is *so* similar that *any* independently copyrightable elements of MGM’s witch should filter through to his

depiction (e.g. her green skin, exact wardrobe, etc). So, too, with the “more discerning observer,” or “extrinsic/intrinsic” test, both of which would find essentially *verbatim* copying of MGM’s rendition.

§ 106(2) is often co-extensive with § 106(1), so this right is also infringed. The § 106(5) right of display may be implicated, insofar as DaCorte’s performance is an “individual image[] of a motion picture.” However, VARA protections under § 106A don’t apply--the corporate owners of this work aren’t shielded by § 106A (§ 101).

The crux of the matter will turn on whether DaCorte can successfully claim a § 107 “fair use” defense. I think he can.

“Fair use” will turn on the first factor, which evaluates the “transformative” nature of the use (*Campbell*). DaCorte can make two arguments: first, that his use is parodic. The Witch--depicted in the original film as relentlessly cruel--is represented here along Sesame Street characters, as essentially “misunderstood,” and a “queer archetype.” This may be a stretch for parody--and is a harder case than *Campbell*. But the Courts have been flexible about more circumspect forms of parodic commentary (“Wind Done Gone,” Family Guy case)

Alternatively, DaCorte could argue that the purpose of his use was fundamentally different from the purpose of the original MGM creation. Where that work told the story of Dorothy’s repeated trauma at the hands of a supernatural being, “Rubber Pencil Devil” uses the witch as an element in a larger cultural pastiche, to rehabilitate the

witches image. This “appropriation”-style argument is somewhat disfavored today (*Warhol; but see Cariou, Blanch*). Consequently, insofar as DaCorte’s argument will be succesfull, it should emphasize the “parodic commentary” it makes on the original.

Prong two of fair use will favor the plaintiff (this is a creative work, although it’s published); factor three may also favor MGM, insofar as the Wicked Witch is at the “heart” of the *Wizard of Oz* (*Harper & Row*). But the fourth factor, again, should favor DaCorte: it’s hard to emagine that his work would at all *usurp* the market for *The Wizard of Oz*. If anything “Rubber Pencil Devil” is trying to *rehabilitate* the characteristic of the witch; and even if it negatively affected people’s thoughts on the film, this would be “destruction” of the market, not “usurpation” (and thus not cognizable under factor four).

Ultimatley, Da Corte **infringes** MGM’s § 106(1), § 106(2), and § 106(5) copyrights, but is narrowly **protected** by fair use.

2) Like the Wicked Witch, *Big Bird* is an original, fixed work of authorship (*Feist*). Also like the Wicked Witch, PBS can assert a copyright in the *character* of Big Bird, using the “well-deliniated character” test (*Towle*). And, like MGM, they are able to bring a Copyright suit, so long as they attached notice to their work, duly registered it, and renewed it 28 years after the expiry of the first copyright term. Assuming these formalities have been met, PBS has a valid copyright in Big Bird, and can sue for legal and equitable relief, including statutory damages and attorney’s fees.

Similarly, DaCorte has *prima facie* infringed their Copyright. This sculpture violates the § 106(1), § 106(2), and § 106(5) rights of PBS (no VARA issues arise, since this is a corporation that owns the copyright).

The success of the § 106(2) and § 106(5) claims will turn on the § 106(1) claim of “reproduction.” DaCorte admits to copying “Big Bird” in the New York times, establishing that this was “copied” (it’s “strikingly similar” in any event) and his work is fixed atop the Met. Furthermore, his work is “substantially similar” to Big Bird. Although Big Bird, in DaCorte’s vision, is blue and sits on a mobile, either the “more discerning observer” test, or the Second Cir.’s “Altai” test show infringement (in the alternative, Da Corte’s bird might be a *verbatim* copy of the Brazilian “Garibaldo,” which PBS likely also owns the Copyright in).

The novel question presented is: the case of secondary liability against the Met. Assuming DaCorte’s work “infringes,” the Met could be sued for *contributory* infringement (insofar as they had *actual* knowledge of infringement, and materially supported the § 106(5) violation by providing a place for Blue Big Bird to be displayed -- *Fonovisa*). A case for *vicarious* infringement would be harder to make out--some sort of “financial benefit” would have to be shown (none was in the fact pattern), plus some additional ability to “supervise” the work. The *Grokster* theory of *inducement* is also weak: it’s not clear the Met *induced* DaCorte’s infringement.

The best chance for the Met and DaCorte to survive liability, is fair use. Unlike the

Wicked Witch, there's no "subversive" or "quasi-parodic" element to hang onto in a prong one. Instead, Da Corte just seems to pay tribute to Big Bird--and per *Warhol*, the mere imposition of a "different artistic style" is not enough to qualify as transformative. Big Bird is also published, creative work (slightly favoring plaintiff), who lives at the heart of *Sesame Street* (*Harper & Row*). The fourth factor, though, may favor DaCorte: it's hard to see this sculpture usurping the market for Big Bird--it might reinvigorate it (*see* the vendors, *infra*). All said, though--especially given the new *Warhol* and *Dr. Seuss* verdicts--I think the fair use defense fails.

PBS could sue for actual damages, as well as any additional profits of the infringer. In this case, actual damages are limited: DaCorte and the Met aren't clearly profiting from the infringement (if this display is being *sold*, the portion attributable to the *infringement* needs to be allocated and can be recovered; *see Koontz*). But PBS could receive whatever license fee they would have charged DaCorte for making his imitation (*see Oracle v. SAP*, "value of use"). They could also sue the Met for non-duplicative lost profits: if the big blue bird atop the museum increased museum traffic (unlikely during pandemic) PBS might be entitled to this additional value. And, assuming the work is registered, they may receive attorney's fees (discretionarily awarded, *Fogerty*), and statutory damages: which are variable, but probably on the lower end of the § 504(c)(2) spectrum (as little as \$200) since Da Corte could show that he had a reason to believe that his use was "fair."

PBS could also try to enjoin the sculpture. This is more challenging since the *eBay* verdict: in order to succeed, PBS would have to show that they were likely to suffer

irreparable injury, that monetary damages would be inadequate, that the balance of hardships favors them, and that the public interest wouldn't be disserved (along with a likelihood of success on the merits). Whether the injunction is granted is a toss-up: the Court might hold that this burdens PBS's First Amendment right "not to speak" and thus that they *are* suffering "irreparable harm" (*Salinger*); contrarily, they might argue that granting the injunction would burden the right to speak by DaCorte (*Salinger*), or that the injunction would frustrate the goals of Copyright (see generally *Tasini, Abend*).

3) Three issues prevent DaCorte from claiming a copyright. First: his sculpture is likely an unauthorized reproduction, meaning that it's not entitled to copyright protection. Second, it's not sufficiently original to satisfy the *Feist* requirement. The only difference between DaCorte's sculpture and Big Bird proper is the "blue" coloring: not an independently protectable element.

Third, it's not clear this sculpture is the work of DeCorte's authorship. DeCorte exhibited less *control* than was present in the *Titanic* case--he was not present on premises of the creation and Miranda made a number of independent creative contributions (facial expression, plumage, etc). DaCorte could claim that this was "joint authorship" under § 102(a): but that would require showing that each contributor had *independent copyrightable contributions* as well as manifested an intent to create a joint work (*Larson, Alamuhammed*). This likely fails the first requirement: insofar as the sculpture is a replication of Big Bird, there are no "independent" copyrightable contributions by either artist. Alternatively, DaCorte could argue that Miranda's work

was “for hire.” But, under *CCNV*, she seems more like an independent contractor than an employee, and their work doesn’t fit into any of the other § 101 exceptions.

Because of the lack of originality, any claim for violation of § 106(1), § 106(2), § 106(3), or § 106(5) is likely to fail. While the works *may* be “substantially similar,” any *Altai* or *more discerning observer* test will filter out *all unprotected elements* (shared imitations of *Big Bird*, the color blue), which will leave nothing to protect. This will also prevent DeCorte from bringing any VARA § 106A claims.

The street vendors would likely *not* be able to claim “fair use”: their work is *commercial* (*Sony*), not at all transformative (except to the extent they are commercial), and could genuinely usurp the market for Big Bird plush toys. But these defenses should be raised against PBS, not DeCorte, who has no valid infringement claim.

Answer-to-Question- 2

The current scope of § 512(c)'s liability shield for online service providers is overly broad, and in contravention of the personality, fairness, and "cultural" theories of Copyright. It should be judicially re-interpreted or repealed.

The Nature of § 512 & Its Rationale

As it currently stands, § 512 creates a large liability shield for those online service providers which facilitate access to copyright infringing materials. The relevant portions of the 1998 DMCA are: § 512(a), which provide immunity from Internet Service Providers (e.g. Comcast, Verizon)-- and, more controversially, § 512(c), which provides immunity for so-called "Online Service Providers": sites that cache and store information (think: YouTube, TikTok, Vimeo, etc).

Fortunately for creators, the liability shield is not absolute. In order to qualify for protection, "online service providers" must lack "actual knowledge" of illegality, or the "facts or circumstances" which make this "infringing activity" apparent. (§ 512(c)(1)(A)(i-ii)). Furthermore, upon receiving such "actual knowledge" they must expeditiously attempt to remove the relevant material (§ 512(c)(1)(A)(iii)). OSPs must also not receive

financial benefit directly attributable to the infringing activity (§ 512(c)(1)(B)), a provision that has been interpreted to require *more* than the kind of “supervisory” relationship necessary in order to yield liability for vicarious infringement (*Viacom v. YouTube*). Finally, OSPs must comply with the general provisions of § 512(i), including providing account-holders information about takedown policies.

From the perspective of some theorists and stake-holders, the liability shield of § 512 may seem both attractive and desirable. Most notably, this shield will almost increase access to copyrighted works--especially internationally. By protecting OSPs from potential secondary liability, the OSPs themselves have a lower incentive to self-police. In fact, in recent case-law, it even seems like *self-policing* could create “actual knowledge” that punctures the liability shield in the first instance, discussed *infra*(see *Mavrix*; but see *Downs v. Oath*).

The consequence of § 512(c), then, is that a large number of Copyrighted materials become accessible to consumers, many of whom would not have otherwise had access to the work (either because they would not have paid for the works at their market rate, or because they lived internationally, in a place where the works are not distributed; *cf. Kirtsaeng*). Insofar as this “consumer” surplus does not notably deter the creation of more copyrighted works--and I know of no empirical research which suggest that it does (especially given the potentially irrational motives that might attach the content-creation business -- see Jollis, Sunstein & Thaler’s work on “bounded rationality”), **Welfarists** should be pleased with § 512(c)’s protections. More people have access to entertaining and valuable materials, without a concomitant reduction in the creation of creative works.

The Copyright system, on this view, is doing its job: creating a monopoly *small* enough that it allows place access, but not so small that it deters creation in the first instance.

§ 512(c) might also be defensible from certain “**cultural theory**” quarters.

Increasing the flow potentially infringing works may genuinely benefit some of the stated premises of “cultural theory”: including *semiotic engagement*, *self-expression*, *diversity* and *connection with others*. The cultural case-study of TikTok provides a perfect example. Through dissemination of potentially infringing materials, creators have been able to develop, iterate upon, and ultimately enhance the aesthetic richness of the current culture. What’s more, previously under-represented groups--many of whom are Black and Latinx--are given access to creative tools that might otherwise only be accessible by well-heeled corporations, willing to pay substantial license fees (in the case of sampling, for instance). Repealing § 512(c) would increase TikTok’s concern about secondary or vicarious liability, and would subsequently curb an attractive and desirable feature of our current socio-aesthetic paradigm.

Problems w/ § 512(c)

However, while there are intelligent reasons for preserving § 512, I believe that many of the values attributable to § 512 could accrue more naturally, through other interventions in copyright law. In other words, § 512(c)’s liability shield is a *blunt instrument* to achieve the end of a generally less protective copyright regime--and one that works to the systemic advantage of corporate creators and executives.

For one, from a **personality** or **fairness** theory of copyright, § 512(c) trammels on the ability of artists to capture the value accruing to their work. One of the greatest critiques of § 512, from the ranks of creatives, has been the claim that it essentially permits huge amounts of Copyright infringement. These problems occur in two distinct ways. First, since § 512(c)(1)(A) *punctures* immunity for “actual knowledge,” sophisticated corporate actors (the relevant owners of OSPs, for instance) have no reason to actually try and *remove* infringement, absent a specific “takedown” request. The result is the system of perverse incentives seen in *Mavrix*: employing moderators, or other forms of independent, could establish liability for the OSP, where no liability would otherwise exist. The resulting regime is essentially a form of corporate “Don’t Ask, Don’t Tell”: So long as an OSP is not alerted to infringement, the OSP is happy to allow this infringement proliferate and thrive (*see* the general strategy adopted by *YouTube* in the *YouTube v. Viacom* record).

Second, due to the essentially anonymous nature of infringement, copyright-owners are left with essentially no recourse. It’s wholly inadministrable, for a copyright-holder--even one with a robust in-house legal department like *Viacom*--to litigate against each individual who infringes on their work by reproducing it on YouTube. As a result, the person or entity who invests in producing the creative work, has no ability to capture the value from that work. That seems to precisely repudiate the fundamental principle of the **fairness** theory, which suggests that the value produced by creative labor should be captured by the creative laborer.

The problem becomes even more severe, moreover, in the context of **personality** theory--where artistic expression is the function of a form of genuine self-realization (*see* Kant, Hegel). In these cases, unauthorized distribution may not only violate some essential notions of “fairness”--but may even inflict real *psychic harm*. Think about the consternation of the *Huston* estate, resulting from “colorization” in *Turner v. Huston*. The consequences of that infringement would be significantly worse in the context of OSPs, where any hope of enjoining a modification of a relevant work would be eliminated by the hydra-like proliferation of additional infringements (for each unauthorized modification taken down, three will arise in its palce).

What’s perhaps more surprising is how problematic § 512(c) may be from the **cultural theory** perspective. Indeed, while sites like YouTube and TikTok allow greater distribution of works, which increases diversity, equity, and semiotic democracy, the § 512(c) liability shield also proliferates certain forms of social *injustice* in at least two distinct ways. First, by privileging the interests of corporate OSPs against copyright-holders, § 512(c) allows some of the largest and most powerful coproations in the world (Google, Facebook, ByteDance) to *benefit* from the labor of independent copyright-holders. True, not all of these copyright-holders are especially sympathetic--it’s hard to shed many tears for *Viacom*. But others: including thousands of independent songwriters, film-makers, producers, and visual artists--are having the value of their labor captured by the advertising revenues pulled in by OSPs. This is not only unfair--it aggregates corporate wealth and influence in a way that stratifies society and undermines civic democracy.

§ 512(c) also allows a form of *internal* infringement to proliferate on common websites. Again, TikTok provides a stellar example: in its current iteration, a number of black and LatinX artists innovate dances, songs, and “trends,” that could be subject to independent copyright protection. These “trends” are then taken over by white creators, who often reap the reward of this creative innovation (*see* Addison Rae’s performance on Jimmy Fallon). Since TikTok itself remains immunized from any liability for these acts, this form of infringement is allowed--and perhaps even encouraged--to proliferate, by the site’s algorithm. The result, in other words, may contribute to shared “semiotic democracy”--but, in the process, it *marginalizes* the voices and rights of discrete and insular minorities, who, once again, have their voices and their contributions appropriated by elites and corporate interests. The result could frustrate efforts towards democratic and social justice goals.

Reforms to § 512(c)

The question then becomes: how can § 512 be modified, in order to *limit* the forms of inequity and unfairness that the current liability regime allows.

One simple answer would be legislative: to repeal the provision altogether. Although this might seem attractive in certain radical quarters, this would entail its own series of harms. By making OSPs entirely liable (at least in the current copyright regime), corporations might engage in *over-censorship*--a form of “prior restraint” which would

chill all sorts of creativity, even those that might otherwise be protected by the current copyright regime (e.g. “fair uses.”)

Two alternatives are ultimately more attractive. One would be a judicial reinterpretation of the existent provisions of § 512(c)(1)(B). In particular, rather than the *Viacom v. YouTube* framework, which requires some greater amount of “control” than that exerted in *Viacom v. YouTube*, this new interpretation would focus on the “financial benefit” element of the statute. In other words, any case in which the OSP derives direct financial benefit from infringing material on their site would puncture the liability shield.

This would give OSPs two options. One, would be to engage in a more robust restraint of infringing material. This is suboptimal, but would at least protect the rights of copyright-holders. Alternatively, this interpretation could allow OSPs to preserve immunity, merely by avoiding any *direct* financial benefit on infringing material--e.g. not running ads on material that is likely to be infringing. Admittedly, this solution is somewhat inelegant, and may bring considerable administrability challenges of its own. At the very least, though, it would address some of the “Fairness” and personality” theory concerns raised above--those associated with *corporate profiteering* from individual creative labor. This option would also bring corporate OSP incentives closer in line to creative incentives: the corporation would no longer have a *financial* interest in allowing infringing work to proliferate without their “actual knowledge.” Thus, from a **welfare** perspective, this would force the OSPs to, if not internalize, then at least not benefit from the infringement of their users.

A second option would reach outside the ambit of § 512 reform. Instead, it would couple a more legislative repeal of § 512(c) with a stronger and more predictable “fair use” defense--one that allows for a more liberal understanding of “transformation” than what’s currently doctrinally permitted in *Warhol* and *Dr. Seuss*. Allowing, for instance, any use which is non-commercial, and makes a “creative contribution” to the original to stand as presumptively fair would allow the socially desirable modifications to proliferate, without allowing companies like YouTube or TikTok to profit from uncreative, verbatim dissemination of copyrighted works (e.g. clips of television shows, unlicensed, full-length reproductions of songs, etc). From a **fairness** perspective, this would decrease the unjust profits accruing to corporate OSPs, and from a **cultural** theory perspective, this solution preserve the benefits of participatory engagement in semiotic democracy, without the concomitant risks of broader forms of non-creative rip-offs (for instance: this concept of fair use would probably not protect YouTube’s clips of Viacom shows, *or* Addison Rae’s appropriation of black Tik Tok dances on Jimmy Fallon).

Ultimately, then, while § 512(c) poses serious problems to the copyright regime, the solution to those problems may not actually involve a rewriting of § 512--but a *re-interpretation* of the safeguards Congress has already imposed, or (more radically) a rethinking of how the fair use regime interacts with our 21st century, digital democracy.

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