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Course **S21 Fisher Copyright**

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Count(s)	Word(s)	Char(s)	Char(s) (WS)
Section 1	**1937**	**9063**	**11045**
Section 2	**1583**	**8286**	**9911**
Total	**3520**	**17349**	**20956**

Answer-to-Question-_1_

Dear Da Corte:

(1)

Baum created the Wicked Witch of the West ("WWW") with a modicum of creativity. *Feist*. One might argue that she only demonstrates conventional tropes: green skin, warts, riding a broomstick. It is unclear whether Baum describes her in this fashion or in the way the illustration depicted, which in several ways subverts these characteristics with the triple braids and eyepatch. However, even with the more typical MGM version, she is greater than the sum of her scenes a faire parts. She is angry that a house fell on her sister, she is pursuing Dorothy, and she looks nothing like some other witches - say the one from the North. She is a well-delineated character. *DC Comics.* Both versions of WWW are fixed.

Baum is a sole author. It makes sense that the © descends to his daughter at the time. *Abend*. At this point, his work is in the public domain due to its age. Since he licensed his work to MGM in the 30s, MGM would need to timely renew its © in the 28th year. So the movie version is still protected until 2034, presuming MGM, as a large studio, filed all the formalities correctly. With respect to the film itself, only the producer owns the ©. While Margaret Hamilton's contribution is undeniable, it is a WFH. Baum's claim drops out, and only MGM can continue to pursue its claims for its version of the

WWW.

You are probably on the hook for a 106(1) violation. There was access and probative similarity, to which you even testify in your Vimeo video. *Three Boys*. The inverse ratio approach is no longer in favor, *Rentmeester*. Nevertheless, it is easy to prove that you are copying and that your copy is fixed. This is apparent appropriation - an average lay observer would recognize the characters as the same. Since we are dealing with a west coast studio, you may have to factor in the extrinsic/intrinsic approach. Though an expert will probably testify that the two characters are substantially the same. Your version is fixed. You created the video for the Biennale.

The original lives on in a derivative work. Because you run afoul of 106(1), you are also on the hook for 106(2).

You have multiple 106(4) problems. The first is for Venice and now, subsequently, for all of the copies you have online. You transmitted the character in a very public manner to a substantial number of people. *Aereo*. You don't fall under any of the statutory exceptions. §110. MGM could even bring a public display claim against PBS, unless the show licensed the appearance of the WWW for her single episode appearance.

If you are held liable for any of the above violations, your creative team would be contributorily liable, since they had knowledge that the character you were representing was not one you had invented. They would also be vicariously liable, since they benefited

materially from your video.

You would turn to a fair use defense, where you would likely succeed. The purpose and character of your work is socially beneficial. *Google*. You are harnessing elements of mainstream culture to engage with the deep challenges wrought by the global pandemic. The work is highly transformative. Though MGM might argue that they had previously licensed the WWW to appear alongside Sesame Street characters, and so you weren't imagining her in an original setting, your purpose is highly transformative. If this were the panel that decided *Warhol*, we might have an uphill battle. But, your work is in critical dialogue (albeit with Sesame Street), which the panel argued was lacking in *Warhol*. But, bracketing that decision, your purpose, while commercial in part, is creative and transformative.

The Wizard of Oz is creative and published, so the second factor does not incline towards one side over the other. You took a great deal, quantitatively, of the MGM character, appropriating her likeness. However, qualitatively they are very different. It is not clear that MGM's WWW is "a queer archetype and protector of queer spaces" or that she likes to sing into a fan. It is likely you did not take "the heart" of the character. *Harper*. It is far from clear that MGM ever engages with the conceptual art market. If you entered your work into the cinema competition, it is possible you competed with an MGM work. This would weigh against you on the fourth factor. However, your transformative work - that carries with it social utility, might even out this analysis. You would probably win on the first factor.

(2)

Big Bird ("BB") is creative, original, and sufficiently well-delineated. There are not so many 8'2" birds that are naïve and teach kids. PBS owns the © and Carrol Spinney had a WFH contract. Renewal was automatic, so protection is still ongoing. It is likely that PBS, similarly to MGM, was well-positioned to register properly to bring a suit.

PBS would likely be able to show copying here. Your profile in the NYT supplies direct evidence of comprehensive copying. The only difference is that your BB is blue, which definitely passes the threshold on substantial similarity tests. There is an open question as to PBS's relationship with "Vila Sesamo." Perhaps PBS licenses BB to the Brazilian version. You might argue that you were copying only the South American version, which is in America's public domain. However, *Golan* brought those works back within the ambit of © protection. Furthermore, a court would still find your scultpure substantially similar to BB. Even taking into account the Calder mobile, the sculpture is an ethereal configuration that could be out of an imaginative scene in Sesame Street meant to teach kids about mobiles.

Since you would have a 106(1) violation, you would also have a 106(2) one. We could make an argument that your work is so transformative that it isn't even derivative. *Lee*. You are placing your version on the rooftop of the Met, so you are also publicly displaying the work. There is a good argument that the Met is both contributorily liable,

since they know the work is of BB, and vicariously liable since they had the ability to supervise the display and benefit financially from it.

You would again argue fair use. Your purpose is again socially beneficial and transformative. You have a different, creative purpose: to grapple with hope post-pandemic, to engage with the emotions behind different colors (cf. Vimeo video). You are intending to comment, which isn't even necessary to win on this factor, *Cariou*. Furthermore, this is "homage." While no cases have been litigated on this category as of yet, this is a good place to be the first one to try.

The rest of the FU factors weigh against you, but hopefully you can win on factor 1. BB is fictional and published, which is a wash. You did arguably take the heart of the character and style. *Cat Not in the Hat*. But this is not decisive, as your transformative purpose counterbalances this. *Google Books*. Your market is rather different: art-goers in NY city versus the children who watch cartoons. If Sun wasn't well-positioned to enter the mobile space, PBS probably was not about to have an exhibit on the roof of the Met.

The Met can argue it lacked even constructive knowledge sufficient for contributory infringement. Maybe they only commissioned a work from you, unaware of what the final product would look like. But, since they had to construct it on the roof, at that point they would be vulnerable to a willful blindness argument. *Aimster.* There is insufficient evidence to conclude there was any kind of inducement, or that the Met courted you by requesting a BB sculpture. With respect to vicarious liability, the Met would have a more difficult time. They control the entire premises on which your work

stands, and they sell tickets to people who want to come up to see it.

I am not sure how much you made from the work. But, if you lost, PBS could seek damages or an injunction with respect to your BB work and your video with the grouch that mimics a Sesame Street episode. With respect to damages, they could likely demonstrate what you would have been willing to pay for a license (value of use). Since "Rubber Pencil Devil" contains the WWW and other vignettes, you could subtract out the profits you made from those portions of that work, and would only need to pay the amount of profits that are traceable to BB. *Frank.* With respect to BB, PBS likely hasn't lost profits from your work so they would target your revenues. You could retain the amount of your revenue that is attributable to your reputation as an artist (Koons puppies scultpture). It is likely PBS complied with formalities, so they could pursue statutory damages and attorney's fees. Your infringment was willful, so those could be assessed at anywhere from $750 - $150,000.

After *eBay*, courts are more reluctant to issue injunctions. They must find that PBS is likely to suffer an irreperable injury, along with the other factors of equity. Here an injunction would frustrate the goals of © to promote progress and the public interest would be better served by accessing your art. So damages are more likely. But ideally you would win this lawsuit on FU.

(3)

If you lose to PBS, you do not have any © protection in your infringing work. Assuming you win, your work is creative and original so it is subject to ©.

However, it is not so clear you own the work. Sculptures are not one of the 9 types of commissioned works by independent contractors that qualify as a WFH. We have to apply the *CCNV* factors to determine whether Miranda was an employee creating the work within the scope of employment. You sent the prototypes, but left nearly everything else up to her. None of the factors is determinative, but the fact that she could hire assistants, set her own hours, and construct it in the manner she wanted weigh against you. If you fail on WFH, you could try to at least argue that you have JA. You were the overall mastermind (*Aalmuhammed*) and there is no other demonstration of both of your intent for joint authorship, so this likely would not succeed either.

Assuming you prevail on WFH, you would need to register prior to bringing suit. It would be easy to demonstrate that the vendor was violating one of your rights. He is right near the Met, so he has access and probative similarity. His plushies are also tangible. However, he has a good argument that the portion copied is just a fact or idea - a blue BB. He might be more liable to Vila Sesamo or PBS than he is to you. His toys do not have the total concept and feel of your work, so you would likely lose on substantial similarity.

If he were infringing, he would also be violating your rights of display and distribution. He could argue that his copying is de minimis or that he prevails on FU. The

plushy's purpose is to be a fluffy friend to children and it is qualitatively taking very little of your work. *Harper*. But it is a market you would likely enter, so his FU argument would fail. You could secure an injunction if you win, but you are not likely to do so.

Answer-to-Question-_2__

Option B

It is imperative that the Biden administration join this multilateral treaty mandating enhanced legal protection for traditional cultural expressions ("TCEs"). All theories of copyright justify a stance that is more protectionist than the status quo. Under our current regime, big pharma companies in the west can pilfer traditional knowledge from around the world with impunity. They can then harness this knowledge to manufacture vaccines which they in turn sell to only the richest buyers. The system not only transfers wealth to the western companies, but results in death and suffering in poorer countries, where the knowledge for the vaccines can originate. While this is a stark and dire portrayal, it accurately depicts what must also be going on with traditional cultural expressions.

On a fairness perspective, the biomedical example helps illuminate the TCE argument. Generations of people who determine the therapeutic effects of a plant deserve an entitlement for their trials and learnings. There is a second-level Lockean argument lurking, in that pharmaceutical companies expend a great deal of labor seeking out traditional communities, testing in labs and in trials, synthesizing the final product.

However, these companies did not find prophylactic properties in the commons through their own hard work. They built on the property of others.

Furthermore, Lockean provisos might be invoked to override the latter claims. The duty of charity requires that such companies waive their IP rights, or at least significantly reduce the price of remedies to poorer countries, in the face of public health crises. Right now, in the U.S., we are experiencing a form of spoilage wherein many vaccines are just sitting on the shelves with a large percentage of country refusing to even get one. Let alone our stockpile of vaccines that are not even approved for domestic use. Between charity and knowledge, there is an onus on such companies to at least make accessible the final products they built using traditional knowledge.

The same arguments translate somewhat haltingly to cultural expression. A creator might rely on a certain fairytale to create a novel or a show. The creator could then, by Lockean provisos of charity or spoilage, send extra copies to the community that inspired the work, at a severely reduced price. This has the added benefit of enouraging a forma of differential pricing and reducing deadweight loss.

In practice, there is an administrability problem with the fairness theory. Many of those who contributed to traditional cultural expression have passed away. On the fairness theory, it might make most sense to establish trusts for local communities, under the management of some heads of that community. Since, in the Anglo-Saxon property tradition, real property descends to heirs, so, too, ought the royalties payout for traditional cultural expression go to the descendants within that community.

A welfare theory would appeal to the greatest number of stakeholders. Traditional cultural expressions are public goods in the sense that they are nonrivalrous and nonexcludable. Annyone could show up in a dance hall in a specific region and perhaps partake of a traditional dance. Unlike traditional public goods though, the problem with traditional cultural expressions is not that they will be underproduced but that they will disappear altogether. The goal is not to produce them, but to perpetuate them through protections. One of the joys of even leaving one's home could to some degree be attributable to TCEs. If cultures continue homogenizing worldwide, the world will become an increasingly disinteresting place. This might call for greater government subsidies for specific groups, to ensure protection of the expression.

Governments could create compulsory licensing regimes, such that appropriation is widespread but at least some money flows to the communities of origin. While usually beneficial, in the case of TCEs they could lead to government graft or communities cashing in on, and diluting, important heritage.

Government protection might give rise to worries about paternalism and what the proper crieria are for protecting certain groups. The most marginalized groups will be persecuted even by their own governments, and a protectionist regime that hinges on government subsidies might actually be a lever, for vindictive governments, to obliterate those who need such protections the most.

On a very straightforward wellness theory approach, we would want a scenario

like the Tibetan rugs, wherein market forces initiate a drive for heritage and authenticity, which drive demand among discerning consumers from other cultures. This is the quintessential success story. It alone would provide a strong basis to sing on to the treaty.

However, this approach hangs its hat on the commodification of cultural expression. Not all TCEs lend themselves to storefronts, and new media like broadcasting or social media might prove far less lucrative for dissemination. It might become useful here to decouple welfare theory from capitalism (to the extent possible). One could lean on Mill for the proposition of maximizing overall wellbeing, not output of goods or acquisition of dollars. This assessment would come out similarly to the heterogeneous one: collective welfare is maximized with greater protection of TCEs than it is if one can purchase $20 dresses with a traditional print from Zara.

A welfare theory, like fairness, might lead to an argument in favor of differential pricing. It would be an inverse of *Kirtsaeng* - just as one-way parallel importation should not be allowed, such that poorer countries can have as much access as possible to educational goods, so too should richer countries pay a premium to consume the culture of others. If Chanel wants to use a certain traditional pattern, it should pay more than should a fashion house in that same country's capital.

Personality theory is seemingly the least supportive of signing such a treaty. Romantic justifications demand the autonomy to express oneself as one wishes. If one is inspired by a traditional cultural expression, one should be able to grapple and explore those ideas in a distinct way.

But two aspects of the personality theory counsel enrolling in such a treaty. First, the moral rights that necessarily follow from the personality theory lend themselves easily adoptable in a traditional culture setting. The right of attribution is an easy one to apply. If a high fashion label nicks a traditional pattern, a multilateral treaty ought to force disclosure and inform users of the origin of the work.

Second, the privacy interest and concomitant right of withdrawal demand respect for traditional cultural expression. If the high fashion house disrespectfully puts a holy pattern on the bottom of a sandal, a traditional community should have a veto right to prevent a diminution of expressions central to the community's conception of personhood.

This latter point potentially presents a holdout problem. Communities that have a veto right could potentially refuse to ever let anyone use the expression, even a Hollywood studio that seeks to make an authentic film that seeks to accurately portray the community in question. But the strong holdout problem might actually encourage contracting or profit-sharing, where there currently is only exploitation.

The culture theory presents the strongest basis for joining such a treaty. On a eudaimonist view, culture is a condition necessary for human flourishing. It also takes into account distributive justice, which would aim to correct the discrepancy of wealth and exploitation on the side of those who would more appropriate TCEs.

On a culture theory, such a treaty might limit the feasability of consumptive fair use arguments. If a creator appropriates a TCE, there must be a large public benefit at stake to justify winning on a fair use defense.

One could argue that, in the culture theory, some of the many values at play often collide. In the case with the Wandjina, the psychological considerations to the Mowanjum properly leads to a ban on appropriative art. Yet semiotic democracy in that case might demand that different people engage with other cultures. The criticism might be that culture theory is overprotectionist. The strongest response likely dictates an underinclusion of protection for TCEs. There must be some backstop, such that artists can engage in dialectic across time and culture to the benefit of all. We want George Harrison to play the sitar and I.M. Pei to create a pyramid in Paris.

To reconcile these irreconciliables, we might want the most privileged or advantaged creators to create a work in a location, or on the behalf of, or in a trust in the name of, the group that created the TCE. If Beeple's NFT auction contributes so much to climate change that the ecosystem of islands will most certainly be altered to some degree, perhaps Beeple should compensate communities when he uses their locations as settings for his works.

All four theories of copyright offer aspects to support an argument for the Biden administration to join such a multilateral treaty. There will be many private interests aligned against the above argument. And copyright law only moves in the direction of interests. However, since all four theories are in play, hopefully individuals from different

locations on the ideological spectrum can see the benefit of such a treaty. It should be noted that, once we do sign on, only one of the theories should predominate in actually structuring the text. Current copyright laws are partially so messy because different portions are born from different theories, and none of them is consistent all the way through. If we want to adequately safeguard TCEs, we must do so deliberately.