

## Copyright

Spring 2022  
Professor William Fisher

This is an eight-hour take-home examination. It may be downloaded from exam4.com starting at 8:00 a.m. EDT on April 28, 2022. Your answer is due eight hours after you download the exam or by 4:30 p.m. EDT on April 28, whichever is earlier.

The exam contains two Parts; you must answer both. Part I has several questions; you must answer all of them. Part II has three options; you must answer one and only one. The two Parts will be weighted equally in the grading.

The exam mode is TAKEHOME. During the exam, you may consult any written or recorded material you wish. However, during the exam, you may not consult in any way 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 May 15, 2022, please do not redistribute this examination to anyone or submit to any publicly accessible website any comments concerning it. The reason for this request is that, until that date, students in some of the other courses affiliated with CopyrightX will be answering questions identical or similar to those contained in this exam.

*By submitting your exam answer, you acknowledge the above instructions, and certify that the work you are submitting is your own, that you have not received unauthorized assistance on the exam, and that you have followed applicable rules, including rules for accessing reference and other materials during the exam.*

**Part I**

*Question 1*

Agnes was born and raised in Atlanta, Georgia. Starting in 2013, she attended Fordham University in New York City, where she specialized in choreography. Despite her considerable talent, she was unable after graduation to find work as a choreographer. To support herself, she took a job as an aerobics instructor at a health club in New York City. In March 2020, the start of the pandemic forced the health club to shut down, and Agnes was laid off. Frustrated, she moved back to Atlanta, where the COVID infection rate was lower.

Alone in her apartment, Agnes spent much of the next year trying out different combinations of exercise routines and dance sequences. Eventually, she developed a specific sequence of positions and movements that she called Modancercise (a contraction of Modern Dance Exercise). When performed three times – first slowly, then at medium speed, then rapidly – the routine both provided her a good workout and (in her judgment) was beautiful.

In May of 2021, when the pandemic began to ease, Agnes showed the routine to some friends, who praised its combination of grace and fitness training. Encouraged, she opened a small studio, offering Modancercise classes. Her clientele gradually grew.

When Agnes was attending college in New York, Brad attended Georgia Tech University, where he specialized in photography. After graduating, he established a small studio in Atlanta. Brad considers himself a fine-art photographer, but to support himself he creates advertising brochures for small businesses.

In August of 2021, Agnes hired Brad to produce a brochure for her Modancercise studio. To gather material for the brochure, he visited Agnes' studio and, with her permission, took several hundred digital photographs of students performing the Modancercise sequence of positions and movements. He selected the photographs that he thought were most flattering and intriguing – and used them to create the brochure set forth on the following page.

**Modancercise!**

A magical and rejuvenating combination of modern  
dance and fitness



Classes offered hourly 10-5, every day (except Mondays)  
383 Marietta Street NW, Atlanta  
Reservations: [Modancercise.com](http://Modancercise.com) or 404-668-2218 `

Starting in September of 2021, Agnes placed copies of the brochure in hotel lobbies and sororities in the area. Her business boomed.

In November of 2021, Carol took several classes at Agnes' studio. Captivated by the practice, Carol opened a studio of her own in a different neighborhood of Atlanta, offering classes that used the sequence of positions and movements that Agnes had developed.

In February of 2022, Brad had an idea for a new photography exhibition. Entitled, *Deb(i)ased*, it would highlight the corruption of the fine arts during the 21<sup>st</sup> century by commerce and the fitness fetish. To create the exhibit, he combined photographs that he had taken during several previous assignments. Among them were three photographs that he had taken in Agnes' studio when preparing her brochure. Instead of flattering images, they showed students in awkward or bizarre poses. The photos in question are reproduced below, along with the captions Brad applied to them.



“Modancercise 1”



“Modancercise 2”



“Modancercise 3”

In March of 2022, the head librarian of Georgia Tech University invited Brad to display *Deb(i)ased* (including the three photos reproduced above) on the walls of the mezzanine level of the main university library. The exhibition proved to be popular among both students and visitors to the university.

Dan operates a small business in Atlanta, which offers “virtual tours” of art museums and galleries in the city. His principal customers consist of residents of retirement communities and persons who are immunocompromised or otherwise unable or unwilling to leave their residences. Each customer pays Dan \$50 per month.

On April 25, 2022, Dan went to the mezzanine level of the Georgia Tech Library and conducted a virtual tour of *Deb(i)ased*. To do so, he stood for roughly five minutes in front of each of the 20 photographs in the exhibition, holding up his smartphone and pointing its camera at the photo. Using a broadcasting application on the smartphone, he transmitted simultaneously to all of his

subscribers an image of whichever photo he was viewing at the time. To enrich the tour, Dan spoke into the microphone of the smartphone, offering his own opinion of whichever photo he was showing.

Midway through the tour, a librarian approached Dan and asked what he was doing. He explained. The librarian smiled, but asked him to keep his voice down. Dan agreed and, during the remainder of the tour, spoke more quietly. When Dan finished, he received several text messages from his subscribers, thanking him and praising Brad's photographs.

Agnes is upset. She believes that Carol has stolen some of her customers, and she fears that widespread dissemination of the unflattering photographs taken by Brad will further damage her business.

Brad is equally upset. He believes that fine art can only be appreciated by viewing it in person and thus that "virtual tours" are abominations.

In an essay containing no more than 1500 words, answer the following:

- (a) Would Agnes prevail in a suit against Carol?
- (b) Would Agnes prevail in a suit against Brad?
- (c) Would either Agnes or Brad prevail in a suit against Dan?
- (d) If the answer to (c) were yes, would Georgia Tech be liable for secondary copyright infringement?

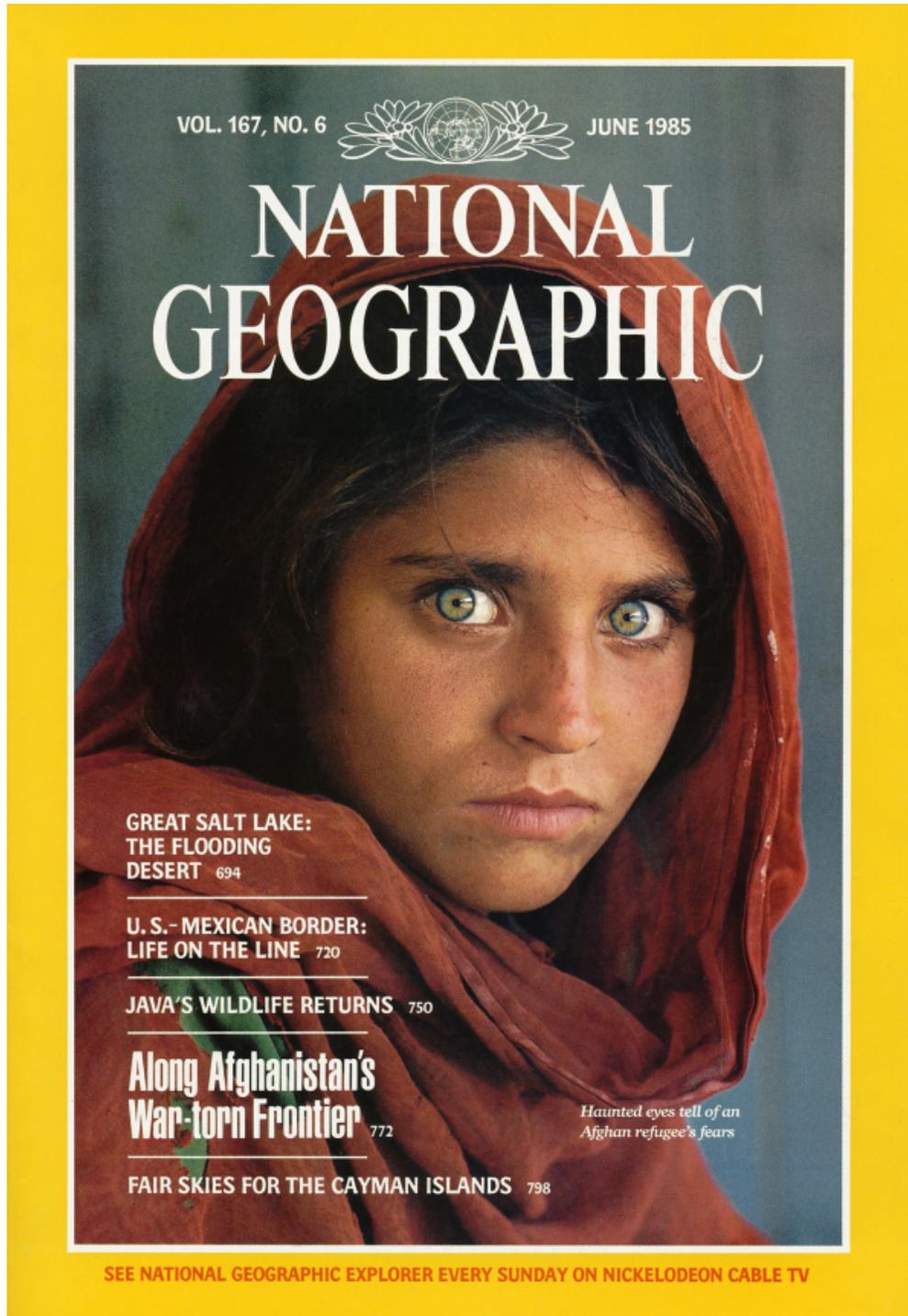
In answering these questions, you should confine your analysis to potential claims arising under the copyright law of the United States. If you need additional information to answer confidently, say what that information is and why it matters.<sup>1</sup>

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<sup>1</sup> All of the events described in this question are fictitious. The photos used to illustrate the question were derived from <https://mydancemakers.com/class-curriculum/modern-dance-lanham-md/>; <https://dancemagazine.com.au/2020/03/new-release-the-essential-guide-to-contemporary-dance-techniques/>; <https://www.liveabout.com/what-is-contemporary-dance-1007423>; <https://www.wellnessevolution.it/en/difference-dance-modern-dance-contemporary/>; <https://dance.lovetoknow.com/image/53691~Famousmoderndancers.jpg>; and <https://www.atd.ahk.nl/en/dance-programmes/expanded-contemporary-dance/>.

Question 2

The cover of the June 1985 issue of the National Geographic magazine is set forth below:



The photograph on the cover was taken by Steve McCurry in Pakistan in 1984. The woman it depicts is Sharbat Gula.

McCurry owns the copyright in the photograph. He granted National Geographic the exclusive right to reproduce the photo in magazines and books but, since 1985, has not granted any other licenses to use it. Instead, McCurry earns roughly \$10,000 per year by selling large “fine-art prints” of the photo through his personal website: <https://www.stevemccurry.com/fine-art-prints>.

Jane Perkins uses “found objects” (“anything from toys, shells, buttons, beads, and jewelry”) as materials to create unique works of art. In 2020, while living in New York City, Perkins created the following work, which she called “Eyes Wide Open”:



In 2021, Perkins sold “Eyes Wide Open” to a private collector for \$100,000.

Last week, McCurry learned about “Eyes Wide Open.” He believes that it is a desecration of his famous photograph.

In an essay containing no more than 750 words, answer the following questions:

- (a) If McCurry brought a copyright infringement suit against Perkins in the Southern District of New York, would he prevail?
- (b) If so, what remedies would likely be available to him?

If you need additional information to answer these questions, say what that information is and why it matters.

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

## Part II

Select one and only one of the following three options. Your response may not contain more than 2000 words.

- (A) “The theories of copyright law upon which legislatures should rely are different from the theories upon which courts should rely. When adopting or amending a statute, a legislature should strive to shape the copyright system in a way that will improve society as a whole. For that, the Welfare Theory and the Cultural Theory are most appropriate. By contrast, a court, when deciding a dispute involving copyright law, should strive to promote justice in that particular case. In the subset of cases in which the court has discretion, it should look to Fairness Theory or Personality Theory, both of which are focused on individualized justice, rather than aggregate welfare.” Do you agree?
- (B) In what ways, if any, should the Visual Artists Rights Act be amended?
- (C) This coming year, the United States Supreme Court will consider the case of *Warhol Foundation v. Goldsmith*. Select a person or organization likely to be affected by the Court’s decision and draft an *amicus curiae* brief on that party’s behalf.

End of exam