

376170

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Institution **Harvard Law School**  
Course / Session **S22 Fisher Copyright**  
Extegrity Exam4 > 21.10.4.0

Exam Mode **TAKEHOME**  
Section **All** Page **1** of **20**

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Event **NA**

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Exam ID **376170**

Count (s)	Word (s)	Char (s)	Char (s) (WS)
Section 1	<b>0</b>	<b>0</b>	<b>0</b>
Section 2	<b>1344</b>	<b>7040</b>	<b>8363</b>
Section 3	<b>654</b>	<b>3345</b>	<b>3986</b>
Section 4	<b>1839</b>	<b>9961</b>	<b>11787</b>
Total	<b>3837</b>	<b>20346</b>	<b>24136</b>

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Answer-to-Question- \_I-1\_

**(a) A may not prevail against C.**

A likely does not own a copyright in A's studio routine because it is likely unprotected. Choreography is copyrightable **subject matter**. 17 U.S.C § 102(a)(4). Though choreography is undefined in the statute, A's routine may qualify as choreography. The functional aspect of the routine does not affect its copyrightability, Bleistein, but the mixture of art and function may result in thinner protection as artistic materials receive thicker protection than utilitarian ones. If the routine was not videotaped or notated down, the routine is **not fixed**, hence copyright, if any, is forfeited. Even if the routine is fixed by video or notations, the protection, if any, is thin as most elements are likely from the **public domain**. Haley. The only copyrightable elements are those independently created by A and show minimal creativity. Feist.

To infer choreography from the photos, all but "Mondancercise 1" suggest **scenes a faire** in modern dance or workout exercise and lack required originality for the routine to be copyrightable. "Mondancercise 1" suggests sufficient **creativity** in its unusual contrast of an upper body in a strong athletic runner pose with the crippled look of the lower body. However, this awkwardness is most likely accidental unless it is part of A's routine or the student's creative contribution--unlikely as the pose easily leads to injury. Though A or

the student may claim **inadvertent originality**, relying on the Alfred Bell case (dictum, “bad eyesight or defective musculature, or a shock caused by a clap of thunder”), the court will most likely decide that the creativity goes to B due to **timing** of his photograph. Though original combination of unprotectable elements may be copyrightable if fixed, combining exercise routines and dance sequences for studio workouts and performing them multiple times at various speed are unprotected **ideas** or **method of operation** or **scenes a faire** of studio routines; the performance sequencing also falls under **merger**.

Even if A has a copyright in the choreography: A must prove C’s **copying** by direct evidence, access and probative similarity, striking similarity, or common errors. It is unclear what and how much C took from A. C did not violate A’s §106(1) reproduction rights or 106(2) rights to prepare derivative works if C’s copying does not create a **copy**, i.e., no **fixation** by video or notations, or the protected expression C copies does not amount to **improper appropriation**. A may prove improper appropriation by showing comprehensive copying, fragmented literal similarity, or substantial similarity. To determine **substantial similarity**, the court may adopt totality approach, filtration approach, or more discerning observer test. If C violates A’s §106(4) **public performance** rights, **fair use** may favor C. Though commercial, C’s work may be transformative. Public interest favors C as it is socially beneficial to increase availability and variety of studio exercises. C is not affecting A’s potential market as they offer in-person classes in different neighborhoods though A may argue that her potential market includes virtual classes and if widespread, there will be substantial harm, but **custom** of studio instructors’ eclectic approach favors C.

**(b) A may not prevail against B.**

The photographs are likely copyrightable as they are **original**-- independently created and shows minimal creativity in **rendition** and **timing**. §102(a)(5); Rentmeester; Mannion.

B owns the copyright of the photographs and the brochure as the **sole author** of the photographs and the brochure. §201(a). The photographs and the brochure are **not WFH**. §§201(b),101. B was an **independent contractor** as A did not exercise enough control over B. CCNV. The photographs do not fall within any of the WFH categories. Even though the brochure may be considered a “compilation,” A & B did not agree in writing, e.g., commission contract, that the brochure was WFH. B did not **assign** the copyrights to A. A did not exercise enough creative **control** to be an author. Lindsay. A was **not a joint author**. A & B did not intend to be JA. Larson. A did not make independently copyrightable contribution to the photographs; nor was A a mastermind. Aalmuhammed. A only has a **license** to use the photographs, the brochure, and potentially other related uses within the scope of the commission. Copyright is sticky, and B retains copyright in the photographs and the brochure. B exercised his exclusive §106(1)(2)(3)(5) rights to reproduce, modify, distribute, and publicly display the photographs for the new photography exhibition.

Even if A owns copyright in the choreography and B violates A’s reproduction, modification, or public display rights, as a still photograph of a ballet may be

infringement, **fair use** favors B. The title, the captions and the awkward and bizarre images support a finding of **parody**, which is privileged, Campbell, unlike post-hoc justifications in Castle Rock. B is not liable even if B's criticism eliminates A's market. Campbell.

**(c) B, not A, may prevail against D.**

A may not prevail against D because A likely does not own copyright interests in the choreography, the photographs, or the exhibition.

D violates B's exclusive §106(1)&(5) reproduction & public display rights in the photographs and the exhibition. By streaming each photograph for about 5 minutes, D arguably created **copies** that are **fixed** for sufficient duration, unlike the buffering data lasting less than a second in Cablevision. By transmitting an image at a time to all his subscribers simultaneously, he **displayed** the copies **publicly**, given the expansive interpretation of "public" in the Transmit Clause. Aereo.

D's **use** is likely **not fair**. D copied the entirety of protected works. D's streaming while commenting is commercial. The subscribers do not have a **pre-existing relationship** to the exhibition. Aereo. Though the exhibition was free and open to the public, and it is customary for viewers to take photos or even videos at exhibitions, that **implied license** is usually limited to personal, nonprofit uses. Though Dan may argue that **spaceshifting**, like timeshifting, Sony, augments access and is socially beneficial for people unable or unwilling to leave their residences, other factors weigh against fair use.

If viewers must buy tickets for the exhibition and the subscribers purchased tickets, D's conduct would likely be deemed fair use as spaceshifting. Dish.

D cannot claim any § 109 or 110 exemptions.

D may claim **estoppel** or **implied license** as he reasonably relied on the librarian's (L) acquiesce. Depending on the contract between GTU and B, it is unclear whether GTU or L had the authority to approve D's conduct on behalf of B. Equitable considerations similar to fair use analysis weigh against estoppel.

**(d) GTU may not be secondarily liable.**

Assuming librarians are employees, the librarian (L) who smiled at D acted within the scope of employment.

GTU is **not contributorily liable**. Though L knew D was conducting a virtual tour, it is unclear whether L knew D was charging a fee. A free virtual tour may be fair use unless all virtual tours are prohibited in GTU's contract with B or GTU Library's policy. Though GTU had **constructive knowledge** imputed by L's actual knowledge of D's conduct, it is unclear whether GTU knew it was infringement. Smiling does not amount to "**willful blindness**" in Aimster. Even if GTU knew constructively of D's infringement, GTU did not **materially contribute** to it, unlike Cherry Auction. Though the broad rule in Cherry Auction of "material contribution" as providing the site and facilities for known infringing activity may reach GTU, GTU may assert an analogous Sony COSNU defense

that most visitors and virtual tour guides are privileged and allowing virtual tours is **socially beneficial**. Perfect 10.

GTU is **not vicariously liable**. Though GTU had the right and ability to **supervise** D, GTU did not **benefit financially** from D's direct infringement. Cherry Auction.

GTU is **not** liable for **inducement**. GTU did not advertise such commercial virtual tours or target tour guides or viewers known to engage in such infringing conduct. Nor does GTU's commercial sense of the enterprise, if any, depend on such infringing uses. Smiling is insufficient as inducement. Though GTU failed to adopt infringement reducing technology, this is insufficient on its own.

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Answer-to-Question- \_I-2\_

SDNY may follow Warhol and M may prevail.

### **Fair use**

Following Warhol, SDNY is more protective of a plaintiff's exclusive modification rights in **fair use** analysis and may find for M.

SDNY may find no fair use because "Eyes Wide Open" (EWP) is a readily identifiable derivative work from the Photo. EWP simply translates the Photo into a different medium like Koons. Similar to Warhol's process, P created EWP simply by "removing certain elements from [the Photo] and embellishing the flattened images with loud, unnatural color[ful found objects]." Similar to Warhol's, P's modifications serve chiefly to "magnify some elements of the photo and minimize others." The Photo is a creative work that enjoys thick protection. EWP copied significantly both quantitatively and qualitatively, including its "heart," or rather, "eyes." EWP is commercial. EWP does not obviously comment on the Photo, and P's assertions and subjective intent of adding something new or different purpose is itself insufficient. If P's conduct is widespread, harm to the Photo's primary (e.g., private collector) and potential derivative (e.g., licensing) markets will be substantial. The fact that M has not licensed the Photo since

1985 does not harm M's damages claim on potential licensing market. Salinger. Even if the Photo's and EWP's markets may differ, potential harm is still significant.

SDNY may find **substantial similarity** for M as a matter of law due to overlapping factors with fair use. SDNY adopts the **ordinary observer test**, as photographs receive thick protection.

M owns a valid copyright in the Photo. All requirements easily satisfied. The rendition and timing that produced the "haunted eyes" show sufficient creativity. M must register before filing suit. M may argue that P violated his exclusive rights of reproduction, modification, and distribution.

M can prove that EWP is a copy, P created it by copying, which amounts to improper appropriation, shown by substantial similarity. M can prove copying by striking similarity, access (famous, widely circulated) and probative similarity, or direct evidence. Since SCOTUS granted cert. to Warhol, M may want to rush to the courthouse.

## **VARA**

M's website shows the prints are printed on demand, inspected, signed, dated, and numbered by him. If they are limited under 200, §101, and P created EWP by purchasing a copy and altering it, M may have a VARA claim. M must prove that P's modification is prejudicial to his reputation. §106A(3)(a). Magazine cover may make VARA not applicable. Unclear whether M waived his VARA rights in licensing agreement with

magazine. If he did, P might be considered 3rd party beneficiary, hence no VARA violation.

### **Remedies**

M may request injunction, damages, fees and costs. §§502-505.

Courts now are more reluctant to grant injunctions. eBay. Irreparable injury to M's reputation may be difficult to show. There is no bad faith, Castillo. P may argue that custom in art gave her an implied license and EWP is a parody that perhaps exceeded the scope of fair use. Campbell (dictum). Injunction may frustrate the goal of copyright law. Tasini. EWP is already sold to a private collector, and damages are more appropriate than destruction.

M may get actual damages and P's non-duplicative profits. §504. To prove actual damages, M may provide evidence of lost sales (if any) and loss of goodwill (maybe speculative). Causation may be difficult to prove. M would not have granted a license to P, so M may not rely on the value of use theory. Gap. No collateral injuries as M did not alter products or lower prices to compete with EWP.

It may be easier to get P's profits. M only need to prove P's gross revenue attributed to EWP, \$100,000. Burden shifts to P to prove deductible expenses and profits attributable to factors other than the Photo. P's related revenue attributable to EWP may be difficult to prove.

If M registered his copyright before P's infringement, M may get statutory damages, between \$750 and \$150,000.

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Answer-to-Question- II(B)\_

VARA protects visual artists' moral rights, rather than economic rights, in the US. §160A. VARA only applies to a "work of visual art," defined as a painting, drawing, print, sculpture, or still photographic image produced for exhibition purposes only and signed by the author, existing in a single copy, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author. §101. VARA thus applies only to copyrightable fine art. VARA does not apply to WFH, useful arts, or audiovisual works. §101. VARA rights endure for a term consisting of the life of the author or the life of the last surviving author in the case of joint authorship. §160A(d). VARA rights may not be transferred, but may be waived if the author expressly agrees to such waiver in a written instrument signed by the author. §160A(e)(1). VARA rights are sticky. §160A(e)(2).

VARA should be overhauled together with a reform of fair use (at least in the visual art context), as §106A is subject to §107, with an expansion of the registration system provided in §113(d)(3), and with the establishment of a specialty visual art court or administrative or arbitration procedure and an art fund ("Fund").

The bundle of copyrights should be disentangled. Right of attribution (RA) and right of (just) compensation (RC) should be enhanced, while right of integrity (RI) should

be limited .

The purpose of copyright is to stimulate creativity. US Constitution, Art.I, s.8 (“to promote the progress of science and useful arts” ). Copyright law and VARA should strike a socially optimal balance between protecting authors to encourage creativity and allowing creativity from others. The current copyright system is overprotective of authors to the point that it impedes creativity from others.

Current copyright law and VARA lag behind contemporary art practice and criticism. The idea of originality and the Romantic image of artist as individual genius have been demystified. Creativity in secondary works has been theorized, and the tradition of borrowing, remaking, and collaboration has received recognition in all arts, including visual art, literature, film, and theatre. Appropriation art has been part of mainstream fine art practice for decades. In other arts: Sampling is common in rap music. Textualism in literature and “the Death of the Author” deprive authors of authority. Postcolonial writers and female writers constantly engage in rewriting. Theatre sees many adaptations and revivals. A new generation of filmmakers reject the auteur theory and the “film by” credit to celebrate the collaborativeness of filmmaking. The ideas of “secondary” and “derivative” have received much critical attention especially in gender and postcolonial theories.

It is against this background that the balance between modification rights and fair use must be adjusted. §106A(a)(3) protects the author’s personal connection to their works, supported by the personality theory of copyright. §106(2) protects the copyright

owner's monopoly in fully exploiting the works, supported by the fairness theory of copyright. Current overprotection is perhaps good for authors and copyright owners, but not socially optimal from the perspectives of the welfare and the culture theories of copyright.

To achieve socially optimal outcome, exclusive modification rights should be reduced in scope or in duration. "Derivative" in §106(2) should be construed narrowly and limited to secondary works with minimal additional creativity, such as mere translation of the original into a different medium or minimal modification. Accordingly, any secondary works that is "transformative" in the sense of "creative," i.e., adding sufficient creativity, should be fair use, and §106A(a)(3) "intentional distortion, mutilation, or other modification" should not apply. Alternatively, the bundle of copyrights should be disentangled. Authors may enjoy exclusive §106(2) modification rights for a much shorter term, e.g., 5 years. This shorter term gives authors and copyright owners incentives to further exploit the works sooner and allows competition when it expires, which is likely to stimulate creativity from both authors and others and produce more and better works.

Preservation of art is still a good principle, but it should apply differently and take advantage of modern technology. §106A(a)(3) should be relaxed for reproducible works and public art. Subsequent artists (A2) should have the privilege to copy the singular and limited-number artworks by original artists (A1) for the purpose of making creative secondary works. Copies made by A2 in the process of and for the purpose of making creative secondary works in good faith are fair use--A2 do not need the permission of A1

and do not violate §106(1) or §106A(a)(3) as long as A2 do not make and keep more than necessary copies. This will greatly facilitate the creation of creative secondary works by digital means or assisted by other modern technology such as 3D printing or AI.

Public art, by being in public space (“public” should be construed broadly, similar to the meaning of “public” in the Transmit Clause), should allow and encourage public participation because public art often serves important discursive and political functions. Temporary, easily reversible modifications do not violate §106A(a)(3), e.g., Snow (tying ribbons on geese sculptures to celebrate holidays). Derivative works in the form of photographs or videos that attempt to capture the public art in its public space, e.g., Gaylord (stamps of sculptures), do not violate §106(1) or (2) as long as A1 enjoys RA & RC. Projection artists are privileged to project their artworks onto public artworks for a reasonable period as long as their projections do not constitute public nuisance. This will expand creative and discursive spaces in public space.

The decrease of A1’s RI protection will be balanced by the increase of A1’s RA & RC protection. The consequences of “fair use” should be different. A1 should enjoy RA and RC in all creative secondary works, i.e., deemed fair use, where A1’s contribution is not de minimus. §106A(a)(1)(2) should be modified as follows: A2 must attach proper attribution and credit information to their creative secondary works, unless A1 object, in which case, such attribution must not be attached. A system of symbols like © can be developed to indicate the attitude of A1 toward secondary works made by A2, such as positive, neutral, negative, no comment, or unavailable for comment. A2 must make a good-faith effort to seek A1’s comment. At the request of A1, A2 must also attach



additional information provided by A1, such as a tirade on A2's secondary works. This will facilitate creative conversations and debates.

Such extensive information ("paratext") around artworks will be made possible by blockchain technology. Every piece of artworks will be accompanied by a unique NFT that carries the artwork's paratext perpetually despite sale, licensing, copying, appropriation, modification, etc. Such NFTs will also facilitate art history research and art collecting.

In the visual art context, §113(d)(3) registration system will expand to record all visual artworks. The registration system should also use blockchain technology. Artists, sellers, and buyers, are encouraged to register their works and deposit a digital copy of their works, e.g., photographs that document their works, 3D models, analogous to writers depositing a copy of their book with Library of Congress. Such digital copies must satisfy certain standards and will form the basis of the record in the event of any lawsuits, adjudications, or arbitrations. Institutional intermediaries such as auction houses, museums, and galleries are required to deposit such digital copies. Such digital copies facilitate artists' RI in preservation. Anyone has the privilege to make them for the purpose of depositing them with the registration database as long as they satisfy the required standards and do not duplicate existing records. They are freely accessible online for browsing, research, and education. They may be freely reproduced for academic publications. They may be used to create creative secondary works as long as A2 follow procedures that protect A1's RA & RC.

Before making a secondary work, A2 must make a good-faith effort, i.e., a search in the registration database and a reasonable online search, to locate the copyright information of A1's work. In case of orphan works, A2 can use them to make secondary works but must attach a notice that says something like "This artwork may contain part of someone else's copyrighted work. The rights owners please contact me or the registration office for fair compensation." Once A1 is identified, A1 enjoys full RA and RC retroactively.

A1 is entitled to RC in all secondary works, including resales, where A1's contribution is not de minimus. Just compensation is calculated at a percentage of gross revenue (with a discount) proportional to the value of A1's contribution in the entire work. Absent special circumstances and exceptions, gross revenue with a discount rate is used instead of profits to reduce administrative cost and avoid accounting misrepresentations on expenses and profits.

Parties can choose to negotiate compensation or use a standard schedule of fee and profits participation. If parties cannot agree, a specialty visual art court or administrative agency or arbitration body will determine the compensation.

Bleistein cautions that "it would be a dangerous undertaking for persons trained only in law to constitute themselves final judges of the worth of pictorial illustrations." To avoid that danger, one approach is aesthetic neutrality and avoidance of judgment. However, VARA contradicts this neutrality by requiring determinations of "a work of recognized stature." Besides, this neutrality is often tacitly violated in various cases.

Another approach is to embrace interdisciplinarity by establishing a specialty visual art court or administrative agency or arbitration body (similar to the special court/agency that sets compulsory license fees in music, or Writers' Guild arbitration), having judges trained in both art and law, and updating laws to follow contemporary art practice and art criticism.

An art Fund ("Fund") should be established and run like a low-risk investment fund. Compensation for using orphan works will be paid into the Fund. Artists who do not register forfeit their rights to participate in the determination of compensation. Instead, it will be determined by the specialty visual art court or administrative agency or arbitration body. All of such orphan works have a limited time, e.g., 5 years, to claim the compensation. When the limited period expires, the money and profits from the Fund will be used to support new artists and non-mainstream art forms and maintenance of the database.

Injunctions should be rarely granted. A proper example for injunction may be a case where AI objects for political or religious reasons and does not want their work to be used to support a political or religious cause that they do not approve. Just compensation should be favored in most cases to promote semiotic democracy, artistic freedom, and flourishing of culture and creativity.

As more and more repetitive manual labor becomes automated in our society, more people may be able to become artists and engage in creative activities that lead to a happier life, and the legal system should facilitate it. While the legal reform may be

difficult, perhaps we can start from changing the culture and how people think about IP and private property. Building a culture that is more open and collaborative may help effect such changes politically and legally.