Institution **Harvard Law School**
Course **S22 Fisher Copyright**

Event **NA**

Exam Mode **TAKEHOME**

Exam ID **564004**

Count(s)	Word(s)	Char(s)	Char(s) (WS)
Section 1	**1497**	**8220**	**9622**
Section 2	**740**	**3904**	**4617**
Section 3	**1999**	**11114**	**13065**
Total	**4236**	**23238**	**27304**

Answer-to-Question-_1_

Agnes v. Carol

1. Protection

Agnes independently created Modancercise. The individual exercises/moves are unprotectable ideas (or public domain) without modicum of creativity (Feist).

Her compilation of is system/method with physical/health benefits. Factual compilation is unprotectable (recipes; Bikram). The grace/beauty of compilation is not basis for protection(Bikram).

Modancercise is probably not choreography. Agnes represented Modancercise as exercise, thus night be collaterally estopped from asserting otherwise (Nash). While functional physical movements(e.g., yoga, aerobics) might be choreography, "general-exercise routines" are excluded (Copyright Office). Even if court recognizes choreography, copyright is thin; must filter out exercises and dance-moves from public domain (Bikram).

Photos fixed choreography, but doubt about whether entire sequence is fixed.

2. Ownership

Agnes is sole author (Titanic) and created Modancercise in 2020 (life+70). Because she runs a small studio, I doubt she registered or gave notice, which affects infringement

suit, statutory damage, other fee.

3. Rights Violation

I doubt Carol fixed her classes. If fixation met, Carol violated §106(1). Carol took Agnes' classes and "stole" exact sequence, which's direct evidence of copying (Mannion), or access+probative (ThreeBoys). Comprehensive literal copying.

But if Carol didn't change anything, she didn't recast/transform/adapt original work, so no §106(2) violation.

Carol's studio is open to public, so performance violates §106(4). §110 exemptions don't apply because no lawfully-prepared copyrighted materials, no distance teaching, no non-profit.

She potentially violated §106(3) and §106(5), depending on whether performing the sequence is a display of copy.

4. Fair Use Defense

Modest chance that Carol will prevail.

Carol had same commercial purpose as Agnes (Betamax). Carol might claim time/space shifting, but it's commercial and her students didn't have ownership of copies (Dish). Carol took Agnes' entire work without any changes/comment/transformation

(Campbell). No apparent social benefits. Bad faith cuts against fair use (Harper&Row).

Agnes' work is published, at least partially factual (Blanche).

After filtering out unprotectable elements discussed above. Uncertain how much protectable elements left. We only know Carol took all protectable elements.

Whether there is great adverse impact depends on one's definition of market. Breyer probably thinks the impact on market is minimal unless Agnes proves she is financially capable of opening a second studio in a different neighborhood (Oracle); allowing copying brings huge health benefits to the public. On the other hand, Carol did exploit a market that Agnes will likely develop a few years down the road. Widespread unauthorized use will prejudice Agnes' teaching and potential licensing markets (Koons; Seltzer).

5. Remedies

If Agnes prevails, she can collect §504(b) actual damages in the form of lost profits (e.g., lost customers to Carol's studio), and Carol's non-duplicative profits given direct relation to infringement (Frank). Or, Agnes can elect for willful statutory damages for her one piece of work, up to $150,000 (§504(c)). Given Agnes' thin copyright and modest strength of fair use, no other awards will be granted (§505).

Agnes can't get injunction because money can compensate her harm, not irreparable (BlurredLine).

Agnes v. Brad

1. Protection

Because Brad only used 3 photos that didn't show sequence, Agnes can only argue copyright in photos. Rendition/timing comes from Brad (SkyVodka). She might claim originality in composition (she staged and arranged the subject matter by giving instructions to students; Jumpman), but a strong argument that her composition is scènes à faire (Fairey).

2. Ownership

Not sure whether whether Brad or Agnes is the sole author. Both exercised some controls – Agnes directed subjects and hands-on work is not required, Brad used his photography skills to take photos (a lot of artistic inputs). Both transposed ideas (Titanic). Brat is the author if a court considers the work fine-art. (Artist' intent is not dispositive). Otherwise, Agnes owns copyright.

If Agnes is owner, her commercial use of photos violated students' publicity/privacy right unless signed model release. Brad used photos for art, shielded by First Amendment.

Work was published in 2021. Photos are fixed. I hope they complied with notice/registration/deposit.

3. Rights Violation

If Brad owns copyright, no violation.

If Agnes owns, Brad violates §106(1)(mechanism reproduction).

For §106(2), the first question is whether the copy was lawfully obtained. Brad will argue he had authorization to take photos, but Agnes will argue that she didn't authorize derivative or any other uses. Scope of authorization must be determined first. If copy was lawfully obtained, even CA7 wouldn't think Brad made a derivative by merely adding captions (Lee).

Violation of §106(3) again comes down to whether physical copy Brad distributed was authorized (Hotaling). (I assume that Brad probably can view the digital version, but here he printed out physical version. It's the physical copy that's being disputed here.) If it was not authorized, first sale doctrine won't protect Brad because the copy wasn't made with authorization and Brad want the lawful owner of that copy – he's not even a licensee (Autodesk). More information, including photography custom, is needed.

Brad violated §106(5) by showing a full copy in a public place (main university library) with substantial number of people (students and many visitors). Because it's possible that the copy was unlawfully obtained, no §110 exemption will save him.

No VARA violation because Agnes is not the artist.

4. Fair Use Defense

Likely successful defense. Brad commented on corruption of fine arts by fitness fetish, and transformed the photos from original advertising purpose of showing beauty/grace. But artist intent isn't dispositive (Warhol). Court might think objective manifestation of the original photos is that they are ugly; Brad make them look uglier. Instead, Brad should push for his different, non-commercial purpose, in which case he needed to take the entire image to serve his purpose of commentary (Nunez). Adverse impact on Agnes' business is minimal because injuries from criticism are generally excluded. Bottomline being, the predominant welfare approach (Oracle) generally assumes significant social benefits from commentary and satire.

5. Remedies

I don't think Agnes will win. If she does, she gets injunction by showing irreparable harm to her business reputation. Taking down 3 photos is not undue hardship. Public interests can be served by Brad's other remaining photos. Because Brad didn't make money from the exhibition, Agnes should go for statutory damage for 3 pieces of work.

Agnes/Brad v. Dan

As shown above, either Agnes owns thin copyright in composition, or Brad owns thin copyright in timing/rendition, which is enough here because Dan used entire image.

Dan violated §106(1) by making copy (comprehensive, mechanical copying). His recording can be a derivative violating §106(2) (Mirage). No VARA violation because no prejudice to Brad's honor (subscribers praised photos), no distortion/mutilation/modification (§106A(a)(3)(A)). No first sale doctrine to save §106(3) violation because copy wasn't obtained lawfully.

Dan violated display right. Because he added his opinion vocally to visuals, he publicly transmitted audiovisual work to successive viewers at different times through the same facility (Redhorn). (Caveat: if he only transmitted his audio without visuals, it's not a violation.) No exemption for digital transmission; he charged $50 (not nonprofit). No §115 compulsory license because not sound recordings alone for webcast, public broadcasting, etc.

4. Defense

EU exempts disability access, but not US.

Strong case for fair use because he facilitated augmented access, arguably non-consumptive uses by allowing disabled people who otherwise wouldn't have seen it to view it (Sony). But viewers here didn't have prior ownership of copies & Dan charged $50 (commercial) . Breyer in Oracle would find providing such access to be socially beneficial (AuthorsGuild). Take entire images is necessary for that purpose (Perfect 10). Impact on market is small because it's for disabled people, but non-disabled can also subscribe. Brad's non-commercial use cuts against fair use, but Carol's commercial use

wouldn't.

4. Damages

Brad has no existing profits in the first place, but perhaps actual damage is the amount he's willing to license (SAP). Dan owes his non-duplicative profits (Frank). Statutory damages are available for the multiple pieces. Injunction is improper because no irreparable harm.

GIT secondary liability

GIT might have contributory liability. It had actual knowledge of infringement. Even if only the staff knows, but GIT is the employer (superior respondeat). But difficult argument about whether allowing Dan to continue access/shoot is material contribution (Cherry). No COSNU defense given actual knowledge (Napster).

GIT had the ability right & ability to stop direct infringement by expelling Dan, but didn't and it profited from reputation/popularity/attractiveness from more online views (Cherry), so it can be found vicariously liable (Viacom). Though GIT couldn't really supervise Dan.

GIT might have induced Dan/ Clear expression to foster infringement can be inferred from "librarian smiled," signaling acquiesce and consent (Grokster).

No safe harbor defense because not OSP/ISP (§512).

Answer-to-Question-__2_

1. Protection

McCurry independently created. Originality comes from rendition and timing. More information is needed to know whether he had originality in composition (e.g., did he staged the girl, arranged scene?). If none, his copyright is thin, which Perkins work probably didn't violate given her recreation. Any protection must filter out unprotectable elements. Showing a scared woman's headshot might be one of the few ways to express the idea of Afghan refugee (Oracle), or is so indispensable in genre that it constitutes scènes à faire or comes from public domain (Haley/Nichols). The work is fixed.

2. Ownership

Copyright usually vests in the author. The original photo in National Geographic is news (First Amendment!), but the subject (Sharbat Gula) can retroactively have rights after McCurry sold copies. However, 2 year statute of limitation has passed.

McCurry is the sole author (Titanic). The photo was taken in 1984 and published in 1985, duration is life+70 if McCurry gave notice within 5 years. Assume he properly registered and deposited for litigation and damages purposes.

Since National Geographic license is about magazines and books, it is not implicated here.

3. Rights Violation

§106(1): Perkins actually copied, given the striking similarity. Perkins's work is tangible/fixed/intelligible. This is a case of substantial similarity. It's good to file in SDNY because CA9 uses a stringent filtration test for photos (Jumpman). Under Mannion, SDNY might still compare only the protectable elements. We need more info to know what was scenes a faire in 1984 (Oracle). Perkins might argue that her photo has different concept/mood – McCurry evoked fear, but she created concept/mood of exposure to a new world ("Eyes Wide Open"; Krofft). But McCurry will argue for apparent appropriation, pointing to similar style, perspective, layout (Steinberg).

Because Perkins recast/transformed work and distributed/displayed to public, she violated §106(2), §106(3), §106(5).

Still photo produced for exhibition is eligible for VARA protection if McCurry didn't sell any fine-art prints until 1990 and sold less than 200 copies. McCurry can assert §106A(a)(1) right of attribution against work he didn't create if people are confused about authorship. McCurry can argue Perkins intentionally distorted/mutilated/modified his work in prejudice to his honor. If repainting suffices, reconstruction surely suffices (Allegheny County; §106A(a)(3)(A)).

4. Fair Use Defense

Fair use favors Perkins. Her work is transformative because she used different materials, imbued the work with new meaning (Eyes Wide Open, compared to refugee fear; Campbell). The original work had some purpose for news/magazines, but Perkins work is entirely about art (eBay). McCurry's photo had thin copyright because it's published, and is a photo. However, Perkins didn't need to take the whole work to show a refugee with wide-opened eyes. But she will argue it's necessary for her "found objects" transformation of famous photographs (contra Koons). Because Perkins only sold one work, it doesn't have huge adverse impact on McCurry's fine-art photography market, and the audience are likely overlapping but mostly different. This argument has less force if it turns out that Perkins made more copies of this exact work. Under Oracle, we can find huge social value in fostering creation.

5. Remedies

Assume fair use didn't excuse violation. Because McCurry makes only $10,000 and assume Perkins only made one work, then his lost profits is $10,000. I don't know whether his sales next year will be affected or if he will cut price to compete – this requires more proof. Perkins made $100,000, so the non-duplicative profits will be $90,000. McCurry can argue other indirect revenue, e.g., enhancement of goodwill, but it can be too attenuated. Perkins needs to prove her deductible costs, e.g., materials, tax, portion of the revenue that's due to her reputation (Koons: notoriety in art world is deductible).

If McCurry can show willful violation, he can get up to $150,000 in statutory

damages, which can potentially be more than actual damages. Because this is a pretty close case and we have appropriation art case pending in Supreme Court, other monetary awards are not possible (§505).

He might argue for injunction, e.g., ordering recession of sale and no future display of Perkins' piece. But for that he needs to show irreparable harm to his reputation. I personally don't think he will prevail. Public interests in follow-on creation is great. Because the property has passed title, the hardship for Perkins is huge.

Answer-to-Question-_3__

Agree and disagree.

My counter-proposal: "When legislature seeks to shape copyright system, cultural theory enjoys supremacy over all other theories. Welfare theory might be used to supplement cultural theory whenever appropriate, but can't contradict it. Courts may resort Fairness and Personality in close cases if and only if copyright system already sufficiently embodies Cultural Theory."

To support my proposed revision, I will (1) explain why cultural theory deserves supremacy over other theories in shaping copyright system, (2) illustrate what cultural theory supremacy will entail, (3) address two objections/difficulties in applying cultural theory.

(1) Supremacy of Cultural Theory

In my view, cultural theory should be the umbrella theory because it not only reaches the entire culture, but considers individuals as passive constituents and active

shapers of culture. Beyond its obvious of promoting life/health/autonomy/engagement/self-expression/etc(Fisher), the most important feature is its embrace of fluidity and avoidance of entrenchment.

Culture/society is a fluid construct that evolves over time. Entrenching one view undermines development, and creates concentration problem. One example is Romanticism, which was born out of the repressive Middle Ages that had no innovation or creativity, when conformity to earlier texts were expected from authors (Fisher). Back then, romanticism was a rebellious cultural force. Creators proudly declared their individualism & deviation from earlier texts.

Romanticism explained why the personality theory was attractive at the time. In the words of Kant/Hegel, "by inventing a natural object with purpose, an individual becomes aware of the priority of will… he ceases to regard himself as a mere animal part of nature and begins to take seriously the special and distinctive features of rationality, purpose, and will" (Fisher).

Ironically, romanticism, originally a rebellious force against entrenchment, has become the source of entrenchment in modern copyright system. For example, US is uneasy about acknowledging multiple authors. Sole authorship is the predominant trend. Unlike UK system, US joint authorship stringently requires showing of objective manifestation of intent (Larson). While exclusive entitlement is central to glorification of authors back then (Woodsy/Boil/Yazee), society has changed. Nowadays, works often require the inputs of many. As a result, producer gets all the copyright, while important

collaborators such as actors, directors are work-for-hires who have no copyright. Producers and studios profit from subsequent licenses (e.g., rental/performance, compulsory for cable, merchandise derivatives, online or physical copies).

Such entrenchment and concentration causes more types of abuses. While fair use is quite generous in commentary/transformative-use (GTWT), it also means major creators are in better positions to exploit the little guys(I find Cariou and Richard Prince especially egregious). Companies like Google spends millions to litigate issues, hoping to reshape copyright for its selfish purpose. The result is, big guys like Google gets fair use, small guys either lose or can't afford to sue. The powerful lobbying leads Congress to adopt more laws that leads to a vicious circle of entrenchment and stifles creativity. For example, despite economists' argument that long duration does more harm than good, Eldred held otherwise. Further, the anti-circumvention rules prevents many productive uses of copyrighted materials, e.g., for educational or transformative purposes (§1201).

Such exploitation fails every theory of copyright, not just cultural theory. The purpose of Art I, Sect 8 is such that creators can recoup their investment, but the current system allows them to maintain monopolist position forever, recouping far from that what they deserve, thus failing Welfare Theory. They didn't leave enough goods for the public to use and didn't meet their duty of charity, thus failing Locke's provisos (Fairness Theory). Personality justifies the artist's continuing control over creations, but artists don't have copyrights if they are work-for-hires.

Such is the harm that comes from entrenchment of one theory & concentration of

power. Cultural theory's fluid view avoids entrenchment.

Yet, any benefits derived from cultural theory will be disappear if courts are empowered to freely use the personality theory to make culturally harmful shift. A perfect illustration is 5Pointz. To me, graffiti and romanticism are similar in that they both rebel against their social/cultural context, the institutional recognition of which saps its vitality/vibrancy and causes rigid entrenchment. Cohen started 5Pointz from run-down buildings infested with rats and built it into a graffiti haven where artists create aerosol art in an organized manner; the community follows strict social norms of authorship (rule against appropriation) and expectation of destruction (Grais). The community held public events and were widely appreciated by society at large. However, when CA2 were called upon to adjudicate VARA claims, it defined the relevant community as "artistic community, comprising art historians, art critics, museum curators, gallerists, prominent artists" (Castillo). While the court thought it avoided the pitfall of court's personal judgment, it inevitably entangled this art form with the institutions – the "mainstream."

The legal system lent its imprimatur to graffiti, only to the detriment of aerosol art. Tocqueville said the worst thing that can happen to populist democracy is the inertia of the people: When a people "have been rendered so dependent on the central power" that they "soon become incapable of exercising the great and only privilege which remains to them," thus "vices of rulers and the ineptitude of the people would speedily bring about its ruin" (Tocqueville). The same goes for populist culture. The creators of aerosol art, once being recognized by artistic and governmental institutions, have nothing to rebel against. (To me, this almost seems like the dominant culture is "taming" the "best.") The

public at large, once finding out that they could rely on institutions to know what is art, have no use for their thinking faculties.

This case would've been different under the cultural theory, which would at least maintain some dis-entanglement or dis-engagement from this subculture of aerosol art and where the natural course of things takes this subculture. However, courts should not be entrusted with applying cultural theory in the first place, especially with little guidance from the legislature. While §106A(a)(3)(B) appeared to have embraced a cultural theory approach, it is most appropriately invoked, for example, in situations where the last Van Gogh pieces will soon be destroyed, in which case we really need to protect something significant to our culture. But frankly, a thriving subculture like 5Pointz doesn't need protection. These kinds weighing requires extensive fact-finding, something that the legislature is more capable of.

Thus far, I have explained my disfavor of the personality theory and with court applying the cultural theory with little guidance. Now I will briefly assess the other two theories.

I wish to subordinate the welfare theory to the cultural theory for two reasons. First, incommensurability. Many important objectives, such as justice and autonomy can't be put in monetary term (Sen). Second, numbers can be wrong. This is especially the case when innovators and consumers don't rationally react to financial signals as model projected (Fisher). Economists can try their best to account for bounded rationality (e.g., prospect theory, endowment effect, lottery effect), but every model has its limitations.

Thus, strict adherence to welfare theory is not ideal. Rather, the theory becomes useful when we use it to supplement the cultural theory, e.g., to measure the positive and negative impact of price discrimination and adopt policies to allow differential pricing to advance educational and egalitarian goals (Kirtsaeng is wrong!), while preventing such pricing strategy from becoming overly excessive.

The fairness theory, on the other hand, is too ambiguous for policymaking. Thus far, we don't know what sort of labor is worthy of reward, what is proportional, what is laborer entitled to (money or more?), and how is the theory consistent with idea/expression distinction (Fisher).

(2) Application of Cultural Theory

The class materials have shown many insightful applications of the cultural theory, e.g., liberalize TEACH Act, less protection for integrity and more for attribution, generalize §115, fair use should favor commentary / non-consumptive use / augmented access (Fisher). I will not repeat those arguments in the interest of word limit.

In my mind, adopting cultural theory entails an overhaul of the entire IP system (and perhaps other sets of law as well) to align it with distributive justice, and reduce legal intervention when other means are available (e.g., social norms, professional self-regulation, NGO).

First, copyright law must act in concert with other sets of laws. Otherwise, other legal entitlements will interfere with copyright system. While property law was not implicated in 5Points due to prior consent, it's obvious that property law can be relevant in many other cases. Another example is privacy/publicity law. In White v. Samsung, CA9 expanded its statute to protect anything that evoke a celebrity's persona (Fisher). Kozinski (Dissent) persuasively argued that the majority dangerously created a new category of IP right without limitation. Cases like this illustrate the necessity of concerted reform.

Second, the distributive justice's goal of universal basic capabilities (Nussbaum/Sen), sufficientarianism (Frankfurt), and egalitarianism (Anderson) should determine when and where the law will intervene, and when it should disentangle itself from culture. This principle will leads to different outcomes in the treatment of traditional knowledge. For example, the Mayan Weavers faced the demise of heritage when young girls refuse to learn weaving for lack of economic prospect, as well as the injunction threats from fashion designers (Fisher paper). The law should intervene here because the Guatemalan community had less than sufficient, had no capability to fulfill reasoned ends, and heightened racial inequality. The Tibetan weavers are doing alright with the aid of Swiss NGO, so the law should not intervene. The same goes for aerosol art in 2021.

Those are all easy cases. A difficult one is graffiti in the 70s when Lindsay/Koch declared war on graffiti. One might argue that the perilous circumstances merited intervention, but history showed us that this was not a storm that aerosol artists couldn't weather. It is in those cases that the courts are most helpful. Once Congress passes

statutes embracing cultural theory with sufficient guidance, and the courts determine that neither parties are at serious risk of distributive injustice and deciding in favor of either party won't undermine conditions for just and attractive culture, then the court may resort to other theories (e.g., personality/fairness) for help.

Lastly, using social norm instead of copyright system is not unheard of in the US. High-end architects, for example, rarely resort to litigation (Shipley). When Libeskinds publicly denounced Raggatt's copying, the director of the Australian Museum put up a public statement admitting fault. Professional self-regulation is also a viable option, provided that they don't violate other laws (see Fashion Originators (1941): boycotting dressmakers that copied).

(3) Response to Objections

I address two objections.

First, how will legislature know what is good for the culture? A feature of cultural theory is that "people are not always the best judges of their own interests" (Fisher). What makes Congress the best judge? Congress can potentially look to artistic community, sampling of the larger population, and other theories to infer what is best for culture. My honest opinion is that no one can say for sure what is best for the culture. Most situations have a clear-cut answer (e.g., Mayan weavers). In difficult cases (aerosol in 70s), perhaps no one can tell, ex ante, what is best for that subculture. However, other theories won't provide better answers either.

Second, what happens when the interests of two subcultures clashes with each other? E.g., Mowanjum's interests in group identity and cultural diversity against aerosol community's interests in creative self-expression. One tentative solution is to adopt a comparative impairment approach. Start by (a) listing the kinds of interests/conditions that we accept important for culture (see Fisher's table in article), (b) identifying what interests/conditions are implicated here, (c) comparing which party's interests/conditions will be more impaired had we not found in favor of that party.