Copyright

Spring 2018

Professor William Fisher

This examination has two parts. Part I is a three-hour in-class test, which will be administered from 9:00 a.m. to noon on May 2, 2018. Part II is an unlimited-time “take-home” essay, due at 4:30 p.m. on May 4, 2018. Your responses to the two parts will be given equal weight when determining your grade.

Instructions for Part I

Part I of the exam consists of a single question. Your answer to the question may not contain more than 2500 words (including footnotes). The exam mode, for this portion of the exam, is CLOSED. This means that you will not have access to the hard drive of your computer or to the Internet. Nor will you have access to your answer once you have submitted it.

This portion of the exam is also “closed-book.” You may not bring into the exam room any written material, paper, or electronic devices other than your computer. (The only exception to this rule is that a student who is not a native speaker of English may bring into the exam room a paper copy of a dictionary enabling him or her to translate English words into his or her principal language.) The proctors will supply scrap paper that you may use to take notes during the exam. In preparing your answer, you may not consult in any way with your fellow students or 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 5:00 p.m. on May 6, please do not discuss Part I of the exam with your classmates or submit to an online discussion forum any comments or questions that refer to any part of the exam. The reason for this request is that, until May 6, one or more of your classmates may be taking the exam on a delayed basis, and students in some of the other courses affiliated with CopyrightX will be answering questions identical or similar to those contained in Harvard Law School exam.

DO NOT TURN TO PAGE TWO UNTIL THE PROCTOR TELLS YOU TO BEGIN.
Part I

Rabbits have been central characters in children’s books for many years. Prominent examples include the mischievous Peter (the central figure in Beatrix Potter’s 1901 book, *The Tale of Peter Rabbit*) and the passive stuffed rabbit who ultimately comes to life in Margery Williams 1922 book, *The Velveteen Rabbit*. (Copies of the covers of those two books appear below.)

![The Tale of Peter Rabbit](image1)

![The Velveteen Rabbit](image2)

Mike Pence is currently Vice President of the United States. He has long opposed both gay marriage and initiatives to strengthen the legal rights of lesbian, gay, bisexual, and transgender people. In 2006, he supported an amendment to the U.S. Constitution that would have prohibited gay marriage, arguing that “societal collapse was always brought about following an advent of the deterioration of marriage and family.”

Mike and his family own a real rabbit, which they have named Marlon Bundo. A photo of Mike, his wife (Karen), and the rabbit appears on the following page.
On Christmas Day in 2017, Charlotte Pence (the daughter of Mike and Karen) gave her father, as a present, a homemade book containing a children’s story that Charlotte had written, in which a rabbit named Marlon Bundo played a central role. Charlotte had illustrated the story with a few quickly drawn illustrations. Mike was charmed by Charlotte’s story and asked her if she’d be willing to publish it. Karen, a highly skilled painter, offered to paint some watercolors, which might be used instead of Charlotte’s sketches to illustrate the story in the published version. Mike offered to find a publisher. With some trepidation, Charlotte agreed to the plan.

The next day, Mike called a friend at Regnery Publishing, who quickly agreed to publish the book. Karen spent a month completing the paintings. By the end of January 2018, the book was finished. In February, Regnery Publishing sent advance copies to critics and began a promotional campaign. The book was scheduled to go on sale to the public on March 19, 2018.

Selections from the book appear on the following pages.
Marlon Bundo’s
A Day in the Life of the Vice President

Written by Charlotte Pence
Illustrated by Karen Pence

Allow me to introduce myself—
I am Marlon Bundo Pence.
I live with my family here
At the vice president’s residence.

Some people call me BOTUS—
A name any bunny would love.
It means “Bunny of the United States”—
A job I am very proud of!
As the official bunny in residence here,
I help out whenever I can.
So Grampa and I get ready for
The busy day we have planned.

Grampa says goodbye to Grandma,
And we head to the motorcade.
He grabs some freshly brewed coffee
From the Naval Enlisted Aides.

I hop up into the black limo
To make sure I get a good seat.
I want to see all the people
Who will soon be lining the streets!

Each day as we drive to the White House,
We see people waving their flags.
Grampa always gives them a thumbs-up,
And I give my tail a nice wag!
Grampa has lots of meetings
And other important events,
But the most important meeting is first,
That’s the one with the president!

Then we race off to the Capitol—
Where Grampa presides over a vote;
He is the president of the Senate,
Which is very important to note.
As we go back down to the residence,
I'm very glad to be home.
But as we pass by Grampa's office,
I hear the ringing of the phone.

I tell Grampa, 'his day's not done
By tugging on his shoe.
He picks up the phone—it's the president!
Grampa gives him the day's review.

At last Grampa gets out his Bible,
And he quietly bows his head.
I place my paw on his hand
For one little prayer before bed.

I think of all our adventures today,
From the White House to the Capitol dome.
And I remember how blessed I am
to call this great nation my home.
John Oliver is a comedian, who has been sharply critical of President Trump and Vice President Pence. Since Trump’s election, his weekly television show, Last Week Tonight, has become increasingly popular. When Oliver learned of the impending publication of A Day in the Life of the Vice President, he asked two members of his staff, Jill Twiss and E.J. Keller, to write and illustrate another children’s story, entitled, A Day in the Life of Marlon Bundo. Oliver worked closely with Twiss and Keller in producing the manuscript. The cover and excerpts from the book that they created together appear below.
Hello. My name is Marlon Bundo, and I am a bunny.

I live with Mom, Grandma, and Grampa in an old, stuffy house on the grounds of the U.S. Naval Observatory. That's because my Grampa is the Vice President. His name is Mike Pence.

My Very Special Day started out like every other day.

I woke up all alone.

Then I ate a fine bunny-breakfast all alone,

while I watched the news... all alone.

You see, sometimes old, stuffy houses are also lonely.

After breakfast, Grandma suggested I go with Grampa to his office. But the office, I know, was even more stuffy and lonely than the house. So I said no, and went out to the garden instead.
That is when I saw Him. He was a big, fluffy bunny with the floppiest floppy ears and the bushiest bushy tail. He was bunny-beautiful.

I was standing still. But being near him made me feel like my heart was still hopping.

Wesley and I hopped together all around the garden. We hopped over daisies. We hopped over tiny carrots that weren’t ready to grow up and be lunches yet.

We hopped over Phil and Dennis.

“My name is Marlon,” I said. “But my family calls me BOTUS. It’s short for ‘Bunny of the United States.’ It’s a long story.”

“My name is Wesley, and my family calls me Wesley,” said Wesley.
Once we had hopped through every part of the garden, we didn’t want to stop hopping. So, we hopped right inside the old, stuffy house.

We hopped up and down the creaky stairs and made beautiful, creaky stair-music together.

We hopped through the kitchen and maybe left a few bunny prints.

At the end of our hop, I said, "Wesley, I don’t want to hop without you ever again."

And Wesley said, "That’s funny, because I never want to hop without you, Marlon Bando, ever again."

It was a very good hop. It was the Beat Hop. And I realized something: when I hopped with Wesley, my old, stuffy house didn’t feel lonely anymore.

And we both said, "We will get married and hop together Forever."
“Wait!” said a scary voice.

“You can’t get married!”

We looked around and saw that the scary voice was coming from The Stink Bug.

Let me tell you a little bit about The Stink Bug. The Stink Bug was in charge. He was important. None of the other animals could quite work out why he was in charge or how he was important, but he was. And that meant he made the rules. That meant all the animals listened to him even though he was—and this is true—very stinky.

“Boy Bunnies Don’t Marry Boy Bunnies!” said The Stink Bug.
“Boy Bunnies Have to Marry Girl Bunnies.”

“But this is the Bunny I Love,” said Wesley.

“And this is the Bunny I Love,” said me, Marlon Bando. Just being next to Wesley made me a little braver.

“Too bad,” said The Stink Bug.
“Everyone is different. And different is not bad,” said Scooter who is a turtle. “Different is Special.”

And on this Very Special Day, all the animals voted on who they wanted to have In Charge.

“Wait!” said Mr. Paws who is a very good dog and also a very smart dog. “Wait a minute! We get to decide who is In Charge. We get to decide who is Important. We can vote!”

They chose . . .

... NOT The Stink Bug.

“NO!” boomed The Stink Bug. “Boy Bunnies Can’t Marry Boy Bunnies—”

“YOU ARE NOT IN CHARGE!”

“Hooray!” said me, Marlon Bundo.

“Hooray!” said Wesley.

“Hooray!” said all of our friends. Because that is what friends say.
In early March of 2018, Oliver entered into confidential negotiations with Amazon.com concerning publication and marketing of *A Day in the Life of Marlon Bundo*. After considerable discussion, Amazon agreed to sell both print and Kindle versions of the book, to promote it aggressively, to donate all of the profits from sales of the book to charities selected by Oliver, and to keep both the book and the marketing plan secret until March 19. In return, Oliver agreed not to sell the book through any other booksellers and to indemnify Amazon if Amazon were held liable for copyright infringement.
Most of Oliver’s television show on the evening of March 18 was devoted to criticism of Mike Pence’s politics. Near the end of the show, Oliver briefly discussed the impending publication of *A Day in the Life of the Vice President*. He held up an advance copy of the book and read a few passages from it. He then held up a copy of his own book. He praised the Pences’ book, describing it as a “fun sweet book about a rabbit,” but argued that his own product was superior, calling it a “better bundo book.” He urged viewers to buy his own product instead of the Pence book in order “to send Pence a message.”

In the following days, a large number of viewers did indeed order copies of *A Day in the Life of Marlon Bundo* from Amazon, many more than purchased copies of *A Day in the Life of the Vice President.*
Between March 19 and May 2, Amazon maintained on its website a special “Marlon Bundo Page,” where it featured – and juxtaposed – the two books. A screenshot of the page appears below.

In a press release on March 20, a spokesperson for Regnery Publishing sharply criticized Oliver’s book, commenting, “It’s unfortunate that anyone would feel the need to ridicule an educational children’s book and turn it into something controversial and partisan.” By contrast, Charlotte and Karen Pence responded to the publication of Oliver’s book with equanimity and grace. Charlotte even purchased a copy of Oliver’s book.

Charlotte remains bemused and untroubled to this day. However, as sales of Oliver’s book rose and sales of the Pences’ book stagnated, Karen’s attitude began to change. Karen began discussing with her advisers and friends a lawsuit against all parties involved in the creation and distribution of A Day in the Life of Marlon Bundo. Recently, Karen’s ruminations became public, when, in a televised interview, she stated:

“John Oliver has cavalierly stolen crucial pieces of our story and my art. Plagiarism of this sort would get you thrown out of school – and I won’t stand for it either. Unless he publicly apologizes and immediately ceases selling that disgraceful piece of propaganda, I’ll see him in court.”
Some of Oliver’s advisors are worried. “You’ve made your point,” one of them suggested. “Why not apologize and let it go?” Oliver, however, remains committed to maximizing the public profile of his book and insists that he will never apologize.

In a memorandum containing no more than 2500 words, analyze the following questions:

(a) What aspects of *A Day in the Life of the Vice President*, if any, are subject to copyright protection?
(b) Who owns the relevant copyrights?
(c) Have Oliver and his team and/or Amazon.com violated any of the exclusive rights enjoyed by the copyright owners?
(d) If so, could Oliver and his team and/or Amazon.com successfully invoke any affirmative defenses to justify their actions?
(e) If not, what remedies would be available to the copyright owners if they pursued the litigation to its conclusion?

If you need additional information in order to address any issue confidently, say what that information is and why it matters.

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

End of Part I
Part II

This portion of the exam is open-book, and the exam mode is TAKEHOME. In preparing your answer, you may read any material you wish. You are also free to discuss your answer with your classmates or other persons. However, you must indicate in your answer the sources of any ideas you have derived from others.

Answer one and only one of the following three questions:

(A) In April 2009, the Economist magazine organized an online debate concerning the merits and demerits of the copyright system. Participants included Justin Hughes (Professor at Loyola Law School and a treaty negotiator on behalf of the United States), John Kennedy (Chairman of the IFPI), Dale Cendali (Partner at Kirkland & Ellis and Adjunct Professor at HLS), Jennifer Urban (Director of the IP and Technology Law Clinic at USC), Jessica Litman (Professor at the University of Michigan Law School), David Lammy (Minister for Higher Education and IP, United Kingdom), and William Fisher. Read the contributions to the debate: http://cyber.law.harvard.edu/people/tfisher/cx/Economist_Debate_2009.htm. Then draft your own contribution. Your answer should include a discussion of whether changes in the social, economic, or technological environment since 2009 should alter our assessment of the copyright system.

(B) How, if at all, should the current legal rules governing traditional knowledge be modified?

(C) What should be the scope of intellectual-property protection for three-dimensional articles that are both useful and attractive? Illustrate your argument by providing or referring to four examples of such articles. (Appendix B contains photographs of several articles you might use as such examples; you may refer to them by case name. If you refer to examples not included in Appendix B, you should provide the URLs of photographs of them that are accessible on the Internet.) Your answer should reflect familiarity with at least two of the theories of intellectual property we have considered in this course.

Your answer to Part II of the exam may not exceed 2000 words (including any footnotes or references). You must submit it before 4:30 p.m. on May 4, 2018, to the Registrar’s Office using the Exam 4 software.

End of Exam
Appendix A

To save time and space, you may use any of the following abbreviations in your responses to any of the questions in the exam:

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>P</td>
<td>plaintiff</td>
</tr>
<tr>
<td>D</td>
<td>defendant</td>
</tr>
<tr>
<td>Code</td>
<td>The U.S. Copyright Statute</td>
</tr>
<tr>
<td>©</td>
<td>copyright</td>
</tr>
<tr>
<td>MW</td>
<td>musical work</td>
</tr>
<tr>
<td>SR</td>
<td>sound Recording</td>
</tr>
<tr>
<td>PGS</td>
<td>pictorial, graphic, or sculptural work</td>
</tr>
<tr>
<td>FUD</td>
<td>fair use doctrine</td>
</tr>
<tr>
<td>TK</td>
<td>traditional knowledge</td>
</tr>
<tr>
<td>Aalmuhammed</td>
<td>Aalmuhammed v. Lee, 202 F.3d 1227 (9th Cir. 1999)</td>
</tr>
<tr>
<td>Authors</td>
<td>Authors Guild v. Google, 804 F.3d 202 (2nd Cir. 2015)</td>
</tr>
<tr>
<td>Abend</td>
<td>Stewart v. Abend, 495 U.S. 207 (1990)</td>
</tr>
<tr>
<td>Avtec</td>
<td>Avtec Systems, Inc. v. Peiffer, 21 F.3d 568 (4th Cir. 1994)</td>
</tr>
<tr>
<td>Blanch</td>
<td>Blanch v. Koons, 467 F.3d 244 (2nd Cir. 2006)</td>
</tr>
<tr>
<td>Bleistein</td>
<td>Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903)</td>
</tr>
<tr>
<td>Blizzard</td>
<td>Blizzard Entertainment, Inc. v. Jung, 422 F.3d 630 (8th Cir. 2005)</td>
</tr>
<tr>
<td>Boisson</td>
<td>Boisson v. Banian, Ltd., 273 F.3d 262 (2nd Cir. 2001)</td>
</tr>
<tr>
<td>Bolton</td>
<td>Three Boys Music Corp. v. Michael Bolton, 212 F.3d 477 (9th Cir. 2000)</td>
</tr>
<tr>
<td>Cariou</td>
<td>Cariou v. Prince, Docket No. 11-1197-cv (2nd Cir. 2013)</td>
</tr>
<tr>
<td>Castle</td>
<td>Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc., 150 F.3d 132 (2nd Cir. 1998)</td>
</tr>
<tr>
<td>Connectix</td>
<td>Sony Computer Entertainment, Inc. v. Connectix Corp., 203 F.3d 596 (9th Cir. 2000)</td>
</tr>
<tr>
<td>Corley</td>
<td>Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2nd Cir. 2001)</td>
</tr>
<tr>
<td>Dastar</td>
<td>Dastar Corporation v. Twentieth Century Fox Film Corporation, 539 U.S. 23 (2003)</td>
</tr>
<tr>
<td>DCComics</td>
<td>DC Comics v. Towle, 802 F.3d 1012 (9th Cir. 2015)</td>
</tr>
<tr>
<td>Fantasy</td>
<td>Fantasy, Inc. v. Fogerty, 94 F.3d 553 (9th Cir. 1996)</td>
</tr>
<tr>
<td>Law School of Harvard University / 2017-2018</td>
<td>Exam ID: ________________</td>
</tr>
<tr>
<td>------------------------------------------</td>
<td>--------------------------</td>
</tr>
<tr>
<td><strong>Frank</strong></td>
<td>Frank Music Corp. v. Metro-Goldwyn-Mayer Inc., 886 F.2d 1545 (9th Cir. 1989)</td>
</tr>
<tr>
<td><strong>Gaylord</strong></td>
<td>Gaylord v. United States, 595 F.3d 1364 (Fed. Cir. 2010)</td>
</tr>
<tr>
<td><strong>Hoehling</strong></td>
<td>A.A. Hoehling v. Universal City Studios, Inc., 618 F.2d 972 (2nd Cir. 1980)</td>
</tr>
<tr>
<td><strong>Hotaling</strong></td>
<td>Hotaling v. Church of Jesus Christ of Latter-Day Saints, 118 F.3d 199 (4th Cir. 1997)</td>
</tr>
<tr>
<td><strong>Kirtsaeng</strong></td>
<td>Kirtsaeng v. John Wiley &amp; Sons (U.S. Supreme Court 2013)</td>
</tr>
<tr>
<td><strong>Lindsay</strong></td>
<td>Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic, 52 U.S.P.Q.2d 1609 (S.D.N.Y. 1999)</td>
</tr>
<tr>
<td><strong>Lee</strong></td>
<td>Lee v. A.R.T. Company, 125 F.3d 580 (7th Cir. 1997)</td>
</tr>
<tr>
<td><strong>Martin</strong></td>
<td>Martin v. City of Indianapolis, 192 F.3d 608 (7th Cir. 1999)</td>
</tr>
<tr>
<td><strong>Micro</strong></td>
<td>Micro Star v. FormGen Inc., 154 F.3d 1107 (9th Cir. 1998)</td>
</tr>
<tr>
<td><strong>Nichols</strong></td>
<td>Nichols v. Universal Pictures Corp., 45 F.2d 119 (2nd Cir. 1930)</td>
</tr>
<tr>
<td><strong>Oracle1</strong></td>
<td>Oracle v. Google (Fed. Cir. 2014)</td>
</tr>
<tr>
<td><strong>Oracle2</strong></td>
<td>Oracle v. Google (Fed. Cir. 2018)</td>
</tr>
<tr>
<td><strong>Perfect10</strong></td>
<td>Perfect 10 v. Amazon, 508 F.3d 1146 (9th Cir. 2007)</td>
</tr>
<tr>
<td><strong>Pivot</strong></td>
<td>Pivot Point, Int’l v. Charlene Products, 372 F.3d 913 (7th Cir. 2004)</td>
</tr>
<tr>
<td><strong>Salinger</strong></td>
<td>Salinger v. Colting, 607 F.3d 68 (2nd Cir. 2010)</td>
</tr>
<tr>
<td><strong>Shine</strong></td>
<td>Shine v. Childs, 382 F.Supp.2d 602 (2005)</td>
</tr>
<tr>
<td><strong>Star</strong></td>
<td>Star Athletica v. Varsity Brands (US Supreme Court 2017)</td>
</tr>
<tr>
<td><strong>Steinberg</strong></td>
<td>Steinberg v. Columbia Pictures Industries, Inc., 663 F.Supp. 706 (S.D.N.Y. 1987)</td>
</tr>
<tr>
<td><strong>Swirsky</strong></td>
<td>Swirsky v. Carey, 376 F.3d 841 (9th Cir. 2004)</td>
</tr>
<tr>
<td><strong>Tenenbaum</strong></td>
<td>Sony BMG Music Entertainment v. Tenenbaum, 660 F.3d 487 (1st Cir. 2011)</td>
</tr>
<tr>
<td><strong>Viacom</strong></td>
<td>Viacom v. YouTube, 676 F.3d 19 (2nd Cir. 2012)</td>
</tr>
</tbody>
</table>
Appendix B: Samples of Useful Articles

Universal Furniture

Brandir

Bonazoli

Progressive Lighting

Pivot Point

Kieselstein

Galiano

Barnhart

Star

Jovani

©2018 by the President and Fellows of Harvard College.