

- Problem One: Penny and the DNC
  - Valid Copyright?
    - Possible Works
      - Photo
      - Letter
        - Because the letter as work was pretty buried, don't penalize too much for omitting it.
        - One point for spending any time at all on originality and fixation of letter, which are easy. 1
    - Originality 1
      - Independent Creation
        - One point for flagging, but not in issue
      - Modicum of Creativity
        - One of the most detailed issues in problem.
        - Issue 1: Sufficiently creative during snapping of photos? 5
          - 5 = very deep analysis; 4 = good args for both sides; 3 = good args but incomplete; 2 = decent args but missing something; 1 = minimal discussion.
          - Arguments against modicum of creativity
            - "Blind" in two senses (no glasses and held camera aloft) so not even the typical "framing" of a photographer.
            - Three photos per second suggests little discretion.
            - Should fact that she won Pulitzer matter???
          - Arguments in favor of modicum of creativity
            - Burrow-Giles (Oscar Wilde case)
            - "Expensive" digital camera could cut both ways.
              - Expensive may be code for "fully automated" => fewer authorial choices.
              - Expensive may be code for "much more control to you" => more authorial choices.
            - Moved throughout crowd, so some creative choices.
        - Issue 2: Sufficiently creative during computer session? 3
          - Don't confuse sweat of the brow.
          - But Feist: Selection, Coordination, Arrangement.
            - Selection: 100 of 30,000 is tiny %.
          - Subsequent editing
            - Cropping, brightness, tint. An hour of work.
            - But might be a derivative work copyright (?) so maybe require Gracen-like originality
    - Fixation 1
      - Not much of an issue. Fixed in digital camera. Fixed again when printed.
    - Type of Work 1
      - PGS
  - Subtotal 12

- **Infringement**
- **Note: This question is ripe for some implied license / contract questions, but we didn't cover it this year, so assume those away.**
- **Potential Acts of Infringement with 106 Rights implicated** 3
  - **Third point for especially clever issues spotting about 102/103 rights infringed**
  - **Demetrius publishes story, allegedly infringing letter**
    - **Reproduction**
    - **Adaptation**
      - **Clever twist: text of article adapts photo?**
    - **Distribution**
    - **Public Display (in newsstand)?**
  - **Demetrius publishes photo, allegedly infringing photo**
    - **Reproduction**
    - **Adaptation**
    - **Distribution**
    - **Public Display (in newsstand)?**
  - **Demetrius hangs photo in gallery and sells print.**
    - **Public Display**
      - **Must discuss "public" which should be clear here.**
    - **Distribution**
- **Reproduction Analysis is Key. If infringes this right, probably adaptation and distribution as well.**
- **Copying Prong is conceded for both.** 1
- **Improper Appropriation?**
  - **Letter** 1
    - **We need many, many more facts.**
    - **But probably a loser?**
  - **Photo** 1
    - **Literal reproduction, so not really at issue except...**
    - **Only one-quarter of photo.**
      - **Also, likely smaller, much less quality.**
      - **But these are really both better analyzed in Fair Use**
    - **Still, probably prima facie infringement**
- **Defenses other than Fair Use and First Sale?**
  - **De minimis/Ringgold for both letter and photo** 1
- **Subtotal** 7
- **Fair Use**
  - **1. Purpose and Character of the use** 3
    - **News reporting (in preamble)**
      - **Fact that story has transfixed nation makes this stronger first amendment argument than Ford memoir.**

| <u>Copyright 2008 Grading Rubric -- STUDENT ID:</u>  | <u>Points</u>    |
|--|------------------|
| <ul style="list-style-type: none"> <li>• Then again, this is just a story about a human-interest story, so maybe not within core. (Third point probably requires this bullet point)</li> <li>• <b>Transformative Use</b> <ul style="list-style-type: none"> <li>• Not simply "consumptive".</li> </ul> </li> <li>• <b>Commercial</b> <ul style="list-style-type: none"> <li>• Esp. if front page story, so marketing.</li> </ul> </li> </ul>   |                  |
| <ul style="list-style-type: none"> <li>• <b>2. Nature of the Copyrighted work</b></li> <li>• <b>UNPUBLISHED and First publication rights marketed.</b> <ul style="list-style-type: none"> <li>• Must discuss Harper &amp; Row</li> </ul> </li> <li>• <b>Factual, so outside core of copyright</b></li> </ul>   | <b>2</b>         |
| <ul style="list-style-type: none"> <li>• <b>3. Amount and substantiality of the portion used</b></li> <li>• <b>One-half of photo but easy to make out.</b></li> <li>• <b>No facts about heart.</b></li> <li>• <b>Miniaturized (gone from "large print" to photo near article.)</b> <ul style="list-style-type: none"> <li>• Maybe turns on whether online version allows you to enlarge?</li> </ul> </li> </ul>  | <b>2</b>         |
| <ul style="list-style-type: none"> <li>• <b>4. Effect of the use on the potential market</b></li> <li>• <b>Easy to measure: Actual effect. \$15k contract lost replaced by \$5k contract.</b></li> <li>• <b>Should it matter if the NYT overreacted? Maybe this peek doesn't satiate public desire.</b></li> </ul>   | <b>2</b>         |
| <ul style="list-style-type: none"> <li>• <b>Point for deciding who wins each factor and for who wins overall especially well</b></li> </ul>  | <b>1</b>         |
| <ul style="list-style-type: none"> <li>• <b>Point for analyzing letter as well</b></li> </ul>  | <b>1</b>         |
| <ul style="list-style-type: none"> <li>• <b><u>Subtotal</u></b></li> </ul>   | <b><u>11</u></b> |
| <ul style="list-style-type: none"> <li>• <b>First Sale</b></li> <li>• <b>Two section 109 defenses</b> <ul style="list-style-type: none"> <li>• <b>Get point only for mentioning both</b></li> <li>• <b>Display: 109(c)</b></li> <li>• <b>Sale: 109(a)</b></li> </ul> </li> <li>• <b>Main Issue: These defenses available only to "owners"</b> <ul style="list-style-type: none"> <li>• <b>Again, we didn't really discuss implied license, but two points because they should be able to start to flesh out the idea.</b></li> </ul> </li> <li>• <b>Trick Question: The Frame</b> <ul style="list-style-type: none"> <li>• <b>If a frame is an adaptation, may lose first sale.</b></li> <li>• <b>But all of the circuits have agreed that framing does not make a DW, even though it's hard to tell why not in the 7th Circuit?</b></li> </ul> </li> <li>• <b>Point for noting that Denver Post won't be liable for any of these acts, which seem not to fit within respondeat superior nor any other theory of third-party liability</b> <ul style="list-style-type: none"> <li>• <b>Don't give the point if they conclude otherwise, unless they lay out a good case for ruling the other way.</b></li> </ul> </li> </ul> | <b>1</b>         |
| <ul style="list-style-type: none"> <li>• <b><u>Subtotal</u></b></li> </ul>   | <b><u>5</u></b>  |
| <ul style="list-style-type: none"> <li>• <b><u>PROBLEM TOTAL</u></b></li> <li>•</li> <li>•</li> </ul>  | <b><u>35</u></b> |



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- Problem Two: The Sampsons
  - Key Organizational Points
    - The copyrightability of characters comes up in both sub-parts. You can either discuss the general concept at the outset, or discuss the different rules in each subpart
      - Bonzo is about visual depiction (mostly)
      - Cosmo is about character traits (mostly)
    - For these questions, it doesn't really make sense to assess copyrightability in a vacuum, because it's the parts in common that matter.
      - But for Cosmo, need to discuss originality plus in a vacuum.
  - Points in Common
    - Valid Copyright
      - Fixation 1
        - Should not be a problem. Movie and drawings in a portfolio. Both fixed.
    - Originality for Characters
      - Independent Creation
        - Subsumed in the Infringement analysis for both.
      - Characters can have copyright 1
        - In Visual Depiction
        - In Character traits
  - Bonzo
    - Originality 4
      - More on this in the infringement/improper appropriation section (but can pick up the points in either place)
      - Visual Depiction
        - Almost certainly detailed enough to be copyrightable
          - Cartoon characters are easily sufficiently creative to satisfy modicum test.
      - Character
        - More developed, the more they can be copyrighted
          - May say something about Gamin
          - Talk about story-being-told test
          - Also, talk about how this is merely one character among huge cast, so less likely distinct enough?
        - A little odd that my facts say she included "drawings of an alcoholic clown"
          - Mixing the character and the visual.
        - Seems a little indistinct (alcoholic circus clown who lives under a bridge)
          - Drawings...probably not copyrightable
        - Idea/Expression or Merger -- only so many ways to draw a clown's face.
          - Also, alcoholic => under a bridge.
        - Might need more facts
      - Type of Work 2

- PGS
- Literary (character)
- NOT a motion picture
  - Donna's is a MP.
  - But Betsy's is not (no impression of motion).
- SUBTOTAL 8
- Infringement
  - 106 Rights Implicated 2
    - Reproduction
    - Adaptation
    - Distribution
    - Public Performance
      - For character only
    - Public Display
      - Character and PGS
  - Copying Prong
    - \*\*\* Key to problem.
    - Access 4
      - Four for deep analysis; Three for good analysis; Two for good but lacking analysis; One for minimal analysis.
      - Test: (Note 5 in copying section)
        - Mere possibility not enough; reasonably possible that the paths of the infringer and the infringed work crossed
      - Courier with successful delivery
        - But who signed for them? Not in facts.
      - Delivery to Agent
        - Like Sayles case or Bouchat.
      - Delivery to Home
        - Probably stronger than the agent cases.
    - Probative Similarity 4
      - Four for deep analysis; Three for good analysis; Two for good but lacking analysis; One for minimal analysis.
      - Should discuss rule
        - Probably need some description of what the test is.
        - MUST discuss **sliding scale** for most of the points.
          - May be in access or may be separate section
      - Expert testimony is allowed
        - Applied: uncanny resemblance
          - Probably dispenses with a lot of access requirements.
      - Applied
        - Should make a convincing case for probative similarity
        - Best answers will cite cases like Ty or Gibbs
        - Maybe even striking?

**Copyright 2008 Grading Rubric -- STUDENT ID:**

**Points**

- Even if some of the facts/other uncopyrightable aspects present, still can go to probative similarity.
- **Improper Appropriation Prong** 4
  - **Experts**
    - Some courts allow experts to analyze the "protected expression" analysis but not the "substantial similarity" analysis.
  - **Rule**
    - Some attempt to state it.
  - **Relevance of part not taken?**
    - Body and clothing bear no resemblance.
    - Best answers will deal with this, perhaps comparing Steinberg.
- **SUBTOTAL** **14**
- **Cosmo**
  - **Originality**
    - **Type of Work** 2
      - Motion Picture
      - Literary Work (character)
      - PGS(cartoon)
      - Key: \*\* DW -- derivative of material in public domain
    - **Visual Depiction / Character** 1
      - Most of what is said for Bonzo applies here, but one point if something additional and interesting said here.
    - **Derivative Work Originality Plus** 5
      - Five for deep analysis; Four for good analysis; Three for good but lacking analysis; Two for flawed analysis; One for minimal/bare analysis.
      - \*\*Key to problem.
      - Gracen-like situation
      - The visual depiction sounds a lot like 12th C. Merlin.
      - So what about snack-eating, nervousness, Britain/Long Island, Hogwarts line?
        - Talk about Gracen standards (and Posner standards in note following)
      - **Best answers will discuss**
        - Why we require originality plus (prevent overlapping claims)
        - How standards differ or don't differ because based on public domain.
          - should or should not.
          - overlapping claim concern decreases, but lets Cisneys of world take things out of PD.
    - **If any copyright, probably thin.**
  - **SUBTOTAL** **8**
  - **Infringement**
    - **Copying**
      - **Access** 1

**Copyright 2008 Grading Rubric -- STUDENT ID:**

**Points**

- Students will probably assume that Cisney = Disney => very famous, but not really in facts.
- So most you can say is we need to see more.
- **Probative Similarity** 2
  - Few facts to discuss.
  - Stating rule, this sure seems like it's sufficient, because the list of four things is pretty improbable.
    - But maybe a bonus point for talking about how they really aren't that surprising (e.g., all wizards would hate Hogwarts' sell-outs!)
- **Improper Appropriation** 4
  - If any copyright, thin.
  - For substantial similarity, look at the list of four things in common and ask whether it would be copyrightable
  - Levels of abstraction test may come in
  - Best answers will talk about how probative similarity not the same as substantial similarity in this example.
  - Under subjective/market for the original work, hard to believe that Cosmo diminishes Cisney's market for Merlin (e.g., DVD sales)
  - Might also talk about whether the overlap (four things) is itself copyrightable
    - Perhaps discuss story-being-told test.
- **SUBTOTAL** **7**
- **PROBLEM TOTAL** **37**
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- **Problem Three: Fair Use Reform**
  - **Factor to remove** 5
  - **Factor to add** 5
  - **Writing style** 5
  - **PROBLEM TOTAL** **15**