

- **Problem One: Sonny v. Chomsky Gnomes**
  - **TOTAL SCORING**
  - **Call of the question**
    - **Sonny asks for advice from attorney for copyright claims against the Chomsky Gnomes \_only\_.**
    - **Liability of Cher not relevant**
  - **Copyrightability**
    - **Copyrightability Requirements**
      - **Fixation** 1
        - Fixed in a tangible medium: Clearly
      - **Originality** 1
        - Independent creation: Yes
        - Modicum of Creativity: Clearly
        - Did Cher's changes affect this at all? Render his part insufficiently creative or original? Doubtful.
    - **Type of Work (Might come much later)**
      - **Musical Work** 1
        - As originally sent to Cher: Sheet music with lyrics
        - As ultimately posted to his website as a recording.
      - **Sound Recording** 1
        - As posted to his website as a recording.
      - **Possibly Literary Work**
        - For Lyrics
  - **Infringement**
    - **This might come AFTER ownership/license, but since those act like a defense in this case, makes sense to do infringement first. Fine either way.**
    - **Possible infringing acts**
      - **[\*] Cher downloads song, burns a CD, and sends recording from website to CG**
        - \* Cher isn't a defendant, so they should do no more than flag these.
      - **[1] CG record a new version of the song.** 1
        - 106(1) Reproduction
        - 106(2) Prepare Derivative work
        - Applies only to MW not to SR
        - **Two prongs** 1
          - Copying
          - Improper Appropriation
          - Not really point of this question, so only one point for discussing
      - **[2] CG sell a few hundred copies of the track online** 1
        - 106(3) Distribute phonorecords to the public by sale
        - **Maybe**
          - 106(1) Reproduction (to deliver track online)

**Copyright 2007 Grading Rubric -- STUDENT ID:**

**Points**

- Applies only to MW not to SR
- **[3] CG performs the song at a friend's house.** 1
  - 106(4) Public Performance
    - Is a house party public? Are 50 people outside of a normal circle of a family and its social acquaintances? 1
  - Applies only to MW not to SR
- **Possible Compulsory License Exception**
  - **Prerequisites of Section 115** 1
    - Nondramatic musical work
    - "Have been distributed to the public in the US under the authority of the copyright owner"
      - Yes. Sonny posted it to his website. That's probably good enough for distribution
  - **May Make and Distribute phonorecords**
    - So covers [1] (insofar as not DW) and [2].
    - **WOULD NOT COVER [3]** 1
    - **WOULD NOT COVER** production of derivative work [1]
      - Is a Calypso version / identical lyrics / readily identifiable of a Rock ballad a derivative work? (May also be in discussion of adaptation right) 1
        - Cite Gracen
        - Cite Ringtones opinion
  - **102(a)(2): Musical Arrangement** 1
    - "Musical Arrangement"
      - defined in ringtones opinion
    - "extent necessary to conform it to the style or manner of interpretation"
      - Is a Calypso version / identical lyrics / readily identifiable of a Rock ballad within this test? 1
        - Does it change the basic melody or fundamental character of the work?
  - **It's not a total defense -- 115(b) and (c)** 1 (for flagging either one of following)
    - Was the email message sufficient notice under 115(b)?
      - Depends on regulation we didn't study.
    - 115(c)
      - They haven't started paying yet, so maybe we'll still get a remedy (see (5) for due dates and (6) for notice we need to write)
- **Ownership / License**
  - **Question 1: Does Cher have the authority to license the song? Is the work a joint work? (May come under the originality discussion)**
    - **Childress v. Taylor-type analysis** 4
      - Prong one: each independently contribute something copyrightable?
      - Prong two: intention that contributions be merged into inseparable or interdependent parts of a unitary whole?



- Problem Two: CU Law Outline Bank
  - **TOTAL SCORING**
    - Copyrightability 14
    - Infringement 8
    - Defenses 7
    - Third Party Liability 4
    - Points Possible 33
  - Basic points
  - Copyrightable?
    - Professor Curmudgeon
      - What are his possible copyrighted works? 1
        - 1 Point only if spot both!
        - [A] His lecture notes
        - [B] His in-class, spoken lectures
      - Originality- Various Topics 5
        - (5 points doled out based on how much of the following they discuss: Rough rubric-in-rubric)
          - at least four of six and well-discussed: 5; 3/6 = 5; 2/6 = 3; 1/6 = 2 (-1 from above is cursory)
        - First: Independent creation? The casebooks (which I had intended to say weren't written by him) are separate copyrighted works. Argument that he did not independently create his lecture notes or his lectures.
        - Second: might try to salvage it by saying that he had a protectable derivative work
          - Gracen: Originality plus
            - Not really enough facts to assess
        - Third: Idea / Expression or Merger
          - (Might bring this up under infringement analysis)
          - Law lectures are really just a set of ideas that you're trying to impart; the expression ain't so important.
            - Particularity with the notes. [A]
            - But also with the lecture itself [B]
            - Especially when you compare this (as we will) with the notes the students take.
              - i.e., not improper appropriation to take what they have taken.
        - Fourth: Facts / Research
          - Lots of facts in law lectures. Not copyrightable.
        - Fifth: Modicum of Creativity?
          - Not enough facts to know for sure
          - Maybe a point if you really develop this well: the fact that he does the same thing, year after year, may suggest that this is no longer sufficiently creative?
            - May turn on whether it's socratic or lecture-style.
        - Sixth: Counter-argument: Feist. This is S/C/A. Compilation.

- **Fixation** 2
  - [A] definitely is.
  - Is [B]?
    - No facts to suggest taped / broadcasted
    - The lecture notes themselves might make this technically fixed.
      - Especially given the rigidity with which he seems to adhere to them -- not an impromptu speech here.
    - The students tapping away at their keyboards might make this technically fixed.
      - Clearly "with authority of the author."
- **If so, what kind of work is this? (no points)**
  - Literary Work [A] and [B]
  - Dramatic work? [A] and [B]
  - Derivative work (see above)
- **Ownership?** 1
  - Maybe a point if really develop the idea that the class as a whole creates the work together -- Socratic
- **Joe Student**
  - **Everything said about Professor Curmudgeon**
  - **Maybe his is a compilation** 1
    - Borrows from: PC's lectures, the casebook
    - If so, maybe he won't have a Copr. if his use was unlawful 1
  - **Separate "independent creation" problem**
    - Is this Joe's work? Seems difficult under Gracen. 1
      - Policy justification: We won't know whether Diana's users took from Joe or from Professor Curmudgeon
    - **Key fact: his 15 phrases.** 1
      - Short phrase rule, but in total, S/C/A
      - Is this "originality plus"? Probably not (discussing some cases)
  - **Fixation** 1
    - Easier than for PC.
- SUBTOTAL: COPYRIGHTABILITY 14
- **Infringement**
  - **Professor Curmudgeon**
    - **KEY: Diana is only possibly liable as third party. SO: relies on infringing acts of users** 2
      - (1 point for noting she's a third-party. 2 points ONLY if says that her liability turns on acts of her users)
    - **106 Rights possibly implicated** 1
      - (Need not get all of these for point)
      - Reproduction (not literal); distribution; adaptation; public display?
    - **Prima Facie** 1
      - (Most of these points are above: idea/expression, merger, etc.)
      - (Also, some points also with Joe)

- Copying?
  - Would be conceded
- Improper Attribution
  - This is where all of those facts about idea/expression and merger and Feist, etc. may come in.
- Joe Student
  - Same as said above for PC with following important differences:
  - Prima Facie
    - Copying? 2
      - (2 points for good discussion; 1 point for flagging issues)
      - Access + Probative Similarity?
        - Access is moderate -- he sells outlines for \$15/copy -- 12 copies out there.
        - Probative similarity: Probably
          - the e's.
          - his phrases.
        - Maybe even striking similarity?
    - Improper Attribution 2
      - (2 points for good discussion; 1 point for flagging issues)
      - Subtractive phase
        - Most of this isn't his.
        - This isn't a literal copy.
        - The short phrases and S/C/A is slight.
      - Totality Phase
        - Audience: law students
          - likelier to spot similarities?
          - But so much of it is unprotectable
  - SUBTOTAL: INFRINGEMENT 8
- Defenses
  - Professor Curmudgeon
  - Fair Use 4
    - (4 is great; 3 is good; 2 is a little thin; 1 is barely flagging)
    - 1. Purpose of Use
      - Sharing
      - Education
        - Fits within preamble (also: scholarship / research)
      - Non-commercial
    - 2. Nature of copyrighted work
      - Not at core of Copr.
      - Factual.
      - Maybe some Harper & Row
    - 3. Amount and Substantiality
      - Probably a lot

- for P.
- **4. Effect of use on potential market?**
  - Odd to call it a market!
  - Possibly: some kind of future commercial outline?
    - Seems awfully speculative and attenuated
- **Public Benefit**
  - Maybe a point for talking about this in depth
- **Difference in Factors for Joe** 2
  - 1. Purpose of use
    - Not parody
    - Not commercial
    - Not really transformative (somewhat for students)
    - BUT: research / scholarship / teaching
  - 4. Effect of use on potential market?
    - Worries it will cut into or kill sales
- **Implied License** 1
  - Prof knows that students will be making copies / derivative works.
  - But it's the distribution that seems maybe to fall outside
    - Then again, students share notes and profs know this.
- SUBTOTAL: DEFENSES 7
- **Third Party Liability for Diana?**
  - **Vicarious** 1
    - Right and ability to supervise
      - Not really. More like Grokster.
    - Financial benefit
      - None.
  - **Contributory** 1
    - Material contribution
      - Yes.
    - Knowledge or Intent
      - Hard to say, because D knew that copying would occur, but more like Sony:
      - Sony: capable of subst. noninfringing uses? 1
        - Sure. Fair use.
  - **Inducement** 1
    - (1 point only if particularly good discussion)
    - Probably not.
    - Then again, entire point was to induce copying. Is that the test?
  - SUBTOTAL: THIRD PARTY 4
  - **TOTAL POINTS** **33**