

Copyright

Spring 2017

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 April 27, 2017. Part II is an unlimited-time “take-home” essay, due at 4:30 p.m. on May 5, 2017. 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 two questions. You must answer both. You have three hours to complete your answers to the two questions. Neither of your answers may contain more than 1200 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 answers, 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 5, 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 5, 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

Question 1

The motif known (in English) as “paisley” originated in Persia. It resembles a fig, a twisted teardrop, or (by some accounts) a bent cedar tree. It was first used in conjunction with the Zoroastrian religion, but later appeared in garments and other fabrics used in many cultures in the Middle East and South Asia. Some early examples of paisley are set forth below:



Persian silk brocade



Handstamp for textile printing, Iran

Shawls and other articles of clothing featuring this motif were popular in Europe in the 17th through 19th century. Its use then waned until the 1960s, when, partly because of the influence of The Beatles, it became associated with the counterculture in the United States and England – and specifically with the use of psychedelic drugs. Some examples of modern fabric designs that include the paisley motif appear below:



John Jones has two passions: fashion and music. As a young man, he pursued both. During the day, he worked for Vera Licensing, designing silk scarves. At night, he played lead guitar for a rock-and-roll band. In the 1970s, the increased popularity of the band – and the associated increase in his income – prompted him to quit his job with Vera. He did not abandon craftsmanship altogether, however. When not on tour, he spent some of his spare time making custom electric guitars in a workshop adjacent to his home. He has sold a few of his guitars, but has kept most of them for his own use. One of his favorites is a guitar he made in 1980, which features a black-and-white paisley pattern he created himself. It is depicted below:



Many photographs of John playing this guitar during performances by his musical group can be found on the Internet.

At the time he made his guitar, John had never seen a black paisley guitar. Since then, he has encountered only a few. Last Saturday, at a music festival in Chicago, he was appalled to find that three of the other participants in the festival were using guitars with faces featuring black-and-white paisley patterns. Karl Kastle was playing one manufactured by Fender. Louise Larkin

was playing one manufactured by Rebel Guitars. Finally, Mary Marbury was playing a guitar that (to John) looked especially similar to his own. Photos of the three instruments appear below.



Karl Kastle's guitar, made by Fender



Louise Larkin's guitar



Mary Marbury's guitar

Mary's guitar was the only one that lacked a visible trademark identifying its manufacturer. So, after Mary's performance at the festival, John approached her and asked where she had purchased it. Mary told him: from Nick Nockleby, a custom guitar maker in Seattle.

When he got back to his hotel room that night, John was in a foul mood. He turned on his laptop computer, typed "Nockleby guitar" into a search engine, and quickly located the website for "Nick Nockleby, Luthier." John called the telephone number listed on the website, and Nick himself answered. "Hey, did you by chance recently make a black paisley guitar?" John asked. Nick responded: "Sure did. Mary Marbury, one of my regular customers, sent me a photo last year and asked me to make an exact copy of the guitar shown in the photo. I thought the request was a little odd; I'm not a fan of paisley, especially in black. But I did my best. She paid me \$5,000 for it." "Do you happen to have a copy of the photo Mary sent you?" John asked. "Sorry. I threw it away after I finished the guitar. But I can send you a picture of the guitar." "Nevermind," said John and hung up.

You have known John for many years. He knows that you have recently completed a course on copyright law. This morning, you received an email message from John in which he recounted these events and asked your advice. His message concludes: "All of these folks – Karl, Fender, Louise, Rebel, Mary, and Nick – are blatantly ripping off my design. Isn't that against the law? If I sue them and win, will they have to pay me? At least can I make them stop using knockoffs of my guitar in their performances?"

Write John an email message containing no more than 1200 words, answering his questions. If you need additional information to provide him guidance, say what that information is and why it matters.

(Most of the events described in this question are fictional. Some, however, are based on actual events. If you happen to know more about the events at issue, you should ignore that knowledge when preparing your answers.)

[The photographs used to illustrate the question were derived from:

https://upload.wikimedia.org/wikipedia/commons/0/0c/Persian_Silk_Brocade_-_Paisley_-_Persian_Paisley_-_Pahlavi_Dynasty.jpg;

https://upload.wikimedia.org/wikipedia/commons/7/7d/Printed_Tissue_Stamp.jpg;

<https://www.google.com/url?sa=i&rct=j&q=&esrc=s&source=images&cd=&ved=0ahUKEwiCtM3hhLPTAhWJ7CYKHxo6BrgQjRwIBw&url=http%3A%2F%2Fwww.paisley2021.co.uk%2F&psig=AFQjCNG8uQOVhx0zJPTogZg2SMJm00TVwQ&ust=149277775662483&cad=rjt>;

<https://www.pinterest.com/pin/33988172168017207/>;

https://www.google.com/url?sa=i&rct=j&q=&esrc=s&source=images&cd=&ved=0ahUKEwjGx6qcxLXTAhWE5yYKHxO9D_oQjRwIBw&url=http%3A%2F%2Fwww.joann.com%2Fsimply-silky-prints-berry-paisley-charmeuse%2F1597822.html&psig=AFQjCNEtGNQkpV_Y7EG8UQyKVflyFq0qSw&ust=1492863423065376;

<https://www.vintageandrare.com/product/Zeal-Guitars-Black-Paisley-2014-Paisley-Fabric-36739/>;

<https://uk.pinterest.com/pin/81909286951867584/>; <http://rebel-guitars.com/preowned-crook-custom-guitars-black-white-paisley-t-style/>;

<http://www.guitar-planet.co.uk/zeal-black-paisley/>.]

Question 2

Annie Leibovitz is a famous portrait photographer. In 1975, she was employed by the Rolling Stones to document the group's concert tour of the United States. One evening, after a performance, she took the following photograph of Mick Jagger, the lead singer of the group:



Leibovitz later wrote about the circumstances surrounding the making of this image:

The photograph that is emblematic of the 1975 tour for me is the one of Mick in the elevator. It was toward the end of the tour, and he was not on the ground. He was flying. From another world. He was the most beautiful object. Like a butterfly. Ethereal. After all the time on the road, his dancing was very loose. It was almost surreal. I was always aware of where Mick was. What might have seemed like a nuisance to him became a source of comfort. To know that I was somewhere nearby. It was a subject-photographer relationship of an obsessive

kind.... The picture was taken on the way up to Mick's room. He and I were alone. We were on some level out of it. Not because of drugs, but because of all that travel, and sleep deprivation, and the exertion of the performances.¹

To this day, the photograph of Jagger remains one of Leibovitz' best known and most admired portraits.

David Downing has spent much of his illustrious career as an artist making what today would be called "appropriation art."² In the 1970s, he lived and worked in New York City. Andy Warhol was a close friend and occasional collaborator. Eccentric and reclusive, David rarely sold his works. Partly for that reason, his creations were (and are) highly valuable.

In the early 1970s, Ellen Evers lived in Los Angeles, pursuing a Masters Degree in Fine Arts at UCLA. Her specialty was photography. In one of her classes, she learned of David's work, which she found fascinating. Upon graduation, she traveled to New York, approached David, and offered to work for free as his apprentice. He agreed. They did not memorialize their agreement in any written document.

Every weekday between 1975 and 1980, Ellen went to David's studio and did whatever jobs he assigned her. Initially, the tasks were menial, but David gradually gave her more responsibility and taught her more skills.

One afternoon in 1977, David was glancing through a book on contemporary portrait photography, when he came upon an (authorized) copy of Leibovitz' photograph of Jagger in the elevator. He said to Ellen: "Check out this picture of Mick Jagger. I love it. It's so intense. The haunted, beaten look. The hint of an emaciated body. It reminds me of Velázquez' depiction of Christ. You know that painting?" Ellen did not, so David pulled off the shelf a book featuring the work of Diego Velázquez and showed her the painting reproduced on the following page.

¹ *Annie Leibovitz at Work* (2008).

² Two complementary definitions of appropriation art appear below:

"Appropriation Art borrows images from popular culture, advertising, the mass media, and other artists and incorporates them into new works of art." William M. Landes & Daniel B. Levine, *The Economic Analysis of Art Law*, in 1 HANDBOOK OF THE ECONOMICS OF ART AND CULTURE 211, 217 (2006).

"Appropriation art generally refers to the 1980s school of art that probed questions of authenticity, originality, institutional authority, and authorship through the appropriation of existing images." Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559, 571 n. 42 (2016).



Diego Velázquez, *Christ Crucified* (1632)

David continued: “Hey, why don’t we put Velázquez and Leibovitz together? Here’s what I want you to do: Take this book to Kinko’s³ and ask them to make a large color copy of the Velázquez painting. Then, using that fancy camera of yours, take a close-up photo of the portion of Leibovitz’ portrait that shows Jagger’s face. Just tear out the page from the magazine and photograph it. Then add some color to your photo so that it more-or-less matches the hues of the Velázquez painting. I know that’s hard to do, but you learned the technique at UCLA, right? Feel free to use my darkroom downstairs. After you’ve colorized it, print a copy of the image of Jagger’s head and paste it onto the copy of the Velázquez painting so that it covers Christ’s face. Shellac the whole thing, and you’re done.”

“What exactly would the combination of these two images convey?” Ellen asked. “Silly question,” David answered. “Just do what I suggest.”

³ “Kinko’s” was a chain of copy shops popular in the 1970s. It is now part of Federal Express.

A week later, Ellen presented David with the finished work:



“Great job,” exuded David. I’ll call it: “V/L.” He put it in a closet.

In 1980, David concluded that he had taught Ellen all he could. It was time, he suggested, that she establish her own career. When they parted, David handed her a large package wrapped in brown paper. When she returned to her apartment, Ellen opened the package and found V/L, now nicely framed. Written on its back was the following statement:

Ellen, my dear, I give this to you to commemorate our glorious time together.
You really created it anyway. I wish you the best. Affectionately, D

Ellen subsequently had a reasonably successful career as an artist, but never reached the heights attained by her mentor. She had intended to keep V/L as a memento of her time with David. However, in 2010, she decided to sell it to cover her mounting debts. The Andy Warhol Museum⁴ in Pittsburgh offered to buy it for \$200,000, but only on the condition that she also assign to the Museum any copyright interests she had in the work. She reluctantly agreed, and the sale and assignment were consummated.

Patrick Moore was recently named director of the Warhol Museum. He is considering publishing a book entitled, “Warhol’s Influence,” which would document the impact that Warhol had on many other artists. He would like to include in the book a copy of V/L. A preliminary investigation of the history of the work has revealed the facts set forth above. Moore is not a lawyer. He worries that, without the permission of David, Leibovitz, and/or the Rolling Stones, the reproduction of V/L in the book would expose the museum to liability for copyright infringement. Write an essay containing no more than 1200 words providing Moore advice.

[All of the events described in this question are fictional. The photographs used to illustrate the fictional narrative were derived from: <http://tmlarts.com/wp-content/uploads/2016/10/e4290d3203c9720a00b12d38ce914b6f.jpg>; and https://upload.wikimedia.org/wikipedia/commons/d/d7/Cristo_crucificado.jpg.]

⁴ The Andy Warhol Museum, located in Pittsburgh, Pennsylvania, describes itself as “the global keeper of Andy Warhol’s legacy.” Its collection includes “900 paintings; approximately 100 sculptures; nearly 2,000 works on paper; more than 1,000 published and unique prints; and 4,000 photographs” as well as many materials related to Warhol’s life and art.

To save time and space, you may use any of the following abbreviations in your responses to the questions in Part 1:

| | |
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| P | plaintiff |
| D | defendant |
| Code | The U.S. Copyright Statute |
| © | copyright |
| MW | musical work |
| SR | sound Recording |
| PGS | pictorial, graphic, or sculptural work |
| FUD | fair use doctrine |
| TK | traditional knowledge |
| Aalmuhammed | Aalmuhammed v. Lee, 202 F.3d 1227 (9 th Cir. 1999) |
| Authors | Authors Guild v. Google, 804 F.3d 202 (2 nd Cir. 2015) |
| Abend | Stewart v. Abend, 495 U.S. 207 (1990) |
| Aereo | American Broadcasting Companies v. Aereo, Inc., 134 S.Ct. 2498 (2014) |
| Alexander | Alexander v. Haley, 460 F.Supp. 40 (S.D.N.Y. 1978) |
| Avtec | Avtec Systems, Inc. v. Peiffer, 21 F.3d 568 (4 th Cir. 1994) |
| Baker | Baker v. Selden, 101 U.S. 99 (1879) |
| Blanch | Blanch v. Koons, 467 F.3d 244 (2 nd Cir. 2006) |
| Bleistein | Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903) |
| Blizzard | Blizzard Entertainment, Inc. v. Jung, 422 F.3d 630 (8 th Cir. 2005) |
| Boisson | Boisson v. Banian, Ltd., 273 F.3d 262 (2 nd Cir. 2001) |
| Bolton | Three Boys Music Corp. v. Michael Bolton, 212 F.3d 477 (9 th Cir. 2000) |
| Campbell | Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) |
| Cariou | Cariou v. Prince, Docket No. 11-1197-cv (2 nd Cir. 2013) |
| Castle | Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc., 150 F.3d 132 (2 nd Cir. 1998) |
| CCNV | Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989) |
| Connectix | Sony Computer Entertainment, Inc. v. Connectix Corp., 203 F.3d 596 (9 th Cir. 2000) |
| Corley | Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2 nd Cir. 2001) |
| Dastar | Dastar Corporation v. Twentieth Century Fox Film Corporation, 539 U.S. 23 (2003) |
| DCComics | DC Comics v. Towle, 802 F.3d 1012 (9 th Cir. 2015) |
| Eldred | Eldred v. Ashcroft, 537 U.S. 1 86 (2003) |
| Fantasy | Fantasy, Inc. v. Fogerty, 94 F.3d 553 (9 th Cir. 1996) |
| Feist | Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991) |
| Frank | Frank Music Corp. v. Metro-Goldwyn-Mayer Inc., 886 F.2d 1545 (9 th Cir. 1989) |

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| Gaylord | Gaylord v. United States, 595 F.3d 1364 (Fed. Cir. 2010) |
| Golan | Golan v. Holder, 2012 U.S. Lexis 907 (2012) |
| Grokster | Metro-Goldwyn-Mayer, Inc. v. Grokster, 545 U.S. 913 (2005) |
| Hoehling | A.A. Hoehling v. Universal City Studios, Inc., 618 F.2d 972 (2 nd Cir. 1980) |
| Hotaling | Hotaling v. Church of Jesus Christ of Latter-Day Saints, 118 F.3d 199 (4 th Cir. 1997) |
| Kirtsaeng | Kirtsaeng v. John Wiley & Sons (U.S. Supreme Court 2013) |
| Lindsay | Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic, 52 U.S.P.Q.2d 1609 (S.D.N.Y. 1999) |
| Lee | Lee v. A.R.T. Company, 125 F.3d 580 (7 th Cir. 1997) |
| Lotus | Lotus Development Corporation v. Borland International, Inc., 49 F.3d 807 (1 st Cir. 1995) |
| Mannion | Mannion v. Coors Brewing Co., 377 F.Supp. 2d 444 (S.D.N.Y. 2005) |
| Martin | Martin v. City of Indianapolis, 192 F.3d 608 (7 th Cir. 1999) |
| Micro | Micro Star v. FormGen Inc., 154 F.3d 1107 (9 th Cir. 1998) |
| Moran | United States v. Moran, 757 F.Supp. 1046 (D.Neb. 1991) |
| Nichols | Nichols v. Universal Pictures Corp., 45 F.2d 119 (2 nd Cir. 1930) |
| Oracle | Oracle v. Google (Fed. Cir. 2014) |
| Perfect10 | Perfect 10 v. Amazon, 508 F.3d 1146 (9 th Cir. 2007) |
| Pivot | Pivot Point, Int'l v. Charlene Products, 372 F.3d 913 (7 th Cir. 2004) |
| Salinger | Salinger v. Colting, 607 F.3d 68 (2 nd Cir. 2010) |
| Shine | Shine v. Childs, 382 F.Supp.2d 602 (2005) |
| Star | Star Athletica v. Varsity Brands (US Supreme Court 2017) |
| Steinberg | Steinberg v. Columbia Pictures Industries, Inc., 663 F.Supp. 706 (S.D.N.Y. 1987) |
| Swirsky | Swirsky v. Carey, 376 F.3d 841 (9 th Cir. 2004) |
| Tasini | New York Times Company v. Tasini, 533 U.S. 483 (2001) |
| Tenenbaum | Sony BMG Music Entertainment v. Tenenbaum, 660 F.3d 487 (1 st Cir. 2011) |
| Viacom | Viacom v. YouTube, 676 F.3d 19 (2 nd Cir. 2012) |

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 two 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.
- (B) Should tattoos enjoy copyright protection? If so, what should be the ambit of that protection? Should the scope of the fair-use doctrine, the work-for-hire doctrine, or the rules governing secondary liability be different with respect to tattoos than with respect to other types of copyrighted works? Your response should reflect familiarity with at least two of the four theories of copyright examined in this course.

In preparing your essay, you might find it helpful to consult the following articles, which describe some recent controversies surrounding copyright protection for tattoos:

- Aaron Gordon, “Who Owns Tattoos?,” https://sports.vice.com/en_us/article/who-owns-tattoos;
- Lisa Johnson, “Before the Ink Dries,” <https://www.legalzoom.com/articles/before-the-ink-dries-copyright-law-tattoos>;
- Shontavia Johnson, “Why Your Tattoo May Leave You Open to a Copyright Infringement Suit,” <http://www.rawstory.com/2016/08/copyright-and-trademark-laws-mean-your-tattoo-may-leave-you-open-to-an-infringement-lawsuit/>;
- Nicole Martinez, “Who Owns the Copyright in Your Tattoo Art?” <http://artlawjournal.com/who-owns-the-copyright-in-your-tattoo-art/>.

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 5, 2017, to the Registrar’s Office using the Exam 4 software.

End of Exam