EXAM #_____

Franklin Pierce Law Center
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Professor Jon M. Garon
Final Examination

Exam Instructions:

The test consists of three fact patterns. Question 1 has multiple questions; questions two and three each have a single question. You have three hours to complete the examination. Remember to answer the questions as they are presented, including related issues, but not to answer questions which are not asked. **You may use any of the materials you have brought with you into the examination, but you may not use the materials brought by any other student.**

Please write legibly, skipping every other line and writing on only one side of the page in the bluebook. You may use as many bluebooks as you require. Please number the answers to correspond with the questions presented below. **Take time to organize and outline your answer before you begin writing. Good Luck.**

Question 1 (Weighted as approximately 60% the examination score)

In July 1998, Dr. J.P. Ling wrote a draft of a children's story entitled "Homecoming." After showing the Homecoming manuscript to a number of editors, Dr. Ling was encouraged to add illustrations and resubmit the story as a series of illustrated books. Dr. Ling refused to share ownership of the book by adding an illustrator as co-author. Instead, Dr. Ling researched children's literature from the Nineteenth Century to find historical drawings. Ling selected thirty-three black-and-white line drawings published by Ben Stein in 1893. She also found and used three additional drawings made by Stein at the same time but never published. With these thirty-six drawings, Dr. Ling resubmitted her children's story.

Annandale Publishers, Inc. ("Annandale") accepted Dr. Ling's manuscript and illustrations for publication. It contracted with Dr. Ling for the exclusive rights to publish the story in hard cover and paperback in exchange for $3,000 and a royalty of 10% of the retail sales price of the books. The contract also provided that all publishing rights and derivative rights in Homecoming for all other media is subject to good faith negotiation between Annandale and Dr. Ling. In the absence of any other agreement, Dr. Ling agreed to pay Annandale 3% of her income from sales or licenses of any rights (as defined in §106) to the manuscript and illustrations in any other media.

In the publishing agreement, Annandale reserved the right "to modify, edit or alter the text and illustrations of the work as necessary to promote the commercial success of the work." Although Annandale had the obligation to consult with Dr. Ling, Dr. Ling had no power to reject the changes of Annandale.

Unhappy with the book's illustrations, Annandale hired Bo Jensen, a free-lance graphic artist to revise the black-and-white illustrations by updating them and adding color. Jensen signed an agreement with the following clause: "Jensen acknowledges that any illustrations are made as specially commissioned works created exclusively for the benefit of Annandale which shall be

the property thereof." The contract covered illustrations for Homecoming. It did not include other projects or work.

Jensen met with Dr. Ling to consult on the best way to update the illustrations. After a successful meeting, Dr. Ling approved Jensen's design concept. Jensen continued to consult with Dr. Ling as she modified the Stein drawings. Three times during the process, Dr. Ling provided Jensen comments on the colors and other changes to the illustrations. Two months later Jensen delivered a series of thirty-six new designs that incorporated Stein's black-and-white drawings into bold, brightly-colored and highly stylized drawings.

Dr. Ling's book was successfully produced and sold by Annandale. In the first year of sales, Dr. Ling received $75,000 in book royalties. Unfortunately, Dr. Ling's other manuscripts were not well received by Annandale, ruining the relationship between Dr. Ling and Annandale. Although Annandale continued to pay Dr. Ling royalties for the book, no further agreements were reached between Dr. Ling and Annandale regarding new work or publishing of Homecoming in other media.

In July 2000, Dr. Ling was approached by Multi-Media Publishing, Inc. ("MMP") for the rights to publish a series of computer software games and a children's cartoon based Dr. Ling's book. Dr. Ling agreed to sell her television and software rights in the book to MMP. As a condition of the agreement, MMP required an exclusive assignment of the rights to the illustrations in the book, because MMP recognized the designs were more important to exploit the television series and software than was the original story drafted by Dr. Ling.

Annandale, believing that 3% of Dr. Ling's royalty was insufficient, sought to renegotiate the agreement with Dr. Ling. When Dr. Ling refused, Annandale asserted its exclusive copyright ownership of the book illustrations. Dr. Ling also asserts copyright ownership of the illustrations.

1. You are counsel for MMP. MMP requires that it own all rights to the illustrations on an exclusive basis. To answer its concerns, first separately analyze the claim of (i) Stein, (ii) Jensen, (iii) Annandale, and (iv) Dr. Ling in the illustration copyrights. Based on that analysis, (v) please inform MMP which party or parties must enter into the license agreement in order to perfect an exclusive license.

Question 2 (Weighted as approximately 20% the examination score)

For this question only, please include all the facts discussed above and add the additional facts. In October 2000, Jensen has identified twenty-five additional black-and-white drawings published by Stein in 1922. Jensen has applied the same style and techniques to these drawings, again transforming each drawing into a brightly-colored, highly stylized illustration. She has sold her twenty-five drawings as artwork for a children's calendar. The calendar exclusively uses Jensen's twenty-five drawings and no other illustrators. Annandale (on its own and on behalf of Dr. Ling) has sought to enjoin the publication of the calendar. Please analyze the possible copyright claim and explain whether it can successfully enjoin the publication of the calendar.

Question 3 (Weighted as approximately 20% the examination score)

You are a legislative advisor to a United States Senator. She has received the following information and requests that you provide a briefing on the proposed legislative change. The proposal suggests a change to the duration of copyrights that were recently lengthened under the terms of the Sony Bono Copyright Term Extension Act ("Extension Act"). The proposal would repeal the Extension Act term extension for works that are not affirmatively renewed. The proposal was offered as a compromise between large commercial publishers and the library coalition (which also includes free-press consumer advocates). The proposed change to Section 304 is below. New language is underlined and deleted language is ~~stricken~~.

§ 304. Duration of copyright: Subsisting copyrights

...

(b) Copyrights in Their Renewal Term ~~at the Time of the Effective Date of the Sonny Bono Copyright Term Extension Act~~ as of January 1, 2006. Any copyright still in its renewal term as of January 1, 2006 ~~at the time that the Sonny Bono Copyright Term Extension Act becomes effective~~ shall have a copyright term of ~~95 years from the date copyright was originally secured.~~
(b)(1) in the case of a work that is not a "United States work" as defined in Section 101, the work shall have a copyright term of 95 years from the date copyright was originally secured; or
(b)(2) in the case of a work that is a "United States work" as defined in Section 101, the work shall have a copyright term of 75 years from the date copyright was originally secured.
(b)(3) If at any time prior to the expiration of the renewal term, the copyright holder shall again renew the work, the work shall have a copyright term of 105 years from the date copyright was originally secured.

1. Please explain the meaning and purpose of the proposed change to Section 304(b).
2. Please advise the senator of your preferred position on the proposed change to Section 304(b), explaining the reasons for your preferred position. Feel free to suggest alternatives.

Additional background information: The history of the Extension Act includes the following technical explanations of the changes to Section 304 (17 U.S.C. §304 (2000)).

> The Copyright Renewal Act of 1992 amended section 304 by substituting a new subsection (a) and by making a conforming amendment in the matter preceding paragraph (1) of subsection (c). Pub. L. No. 102-307, 106 Stat. 264. The Act, as amended by the Sonny Bono Copyright Term Extension Act, states that the renewal and extension of a copyright for a further term of 67 years "shall have the same effect with respect to any grant, before the effective date of the Sonny Bono Copyright Term Extension Act [October 27, 1998], of a transfer or license of the further term as did the renewal of a copyright before the effective date of the Sonny Bono Copyright Term Extension Act [October 27, 1998] under the law in effect at the time of such grant." ... In 1998, the Sonny Bono Copyright Term Extension Act amended section 304 by substituting "67" for "47" wherever it appeared in subsection (a), by substituting a new subsection (b) and by adding subsection (d) at the end thereof. Pub. L. No. 105-298, 112 Stat. 2827. ...

END OF EXAMINATION