Franklin Pierce Law Center
COPYRIGHT Spring 2001

Professor Jon M. Garon

Final Examination
(Essay Only, With Analysis)

Exam Instructions:

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.**

The test consists of two parts. Part I is a series of multiple choice questions. Please provide the best answer for each question. Part I represents approximately 1/3 the final examination score (which is the equivalent of 1/4 the course grade).

Part II is an essay examination consisting of one fact pattern, with three questions associated with that fact pattern. Part II represents approximately 2/3 the final examination score (which is the equivalent of 1/2 the course grade).

Good Luck.

* * *

Answer Outline: The following provides a suggested outline of issues to the essay question. The question and the essay are provided below. Part I of the Spring 2001 Examination, consisting of 30 multiple choice questions, is not available for review.

Part II

Question:

In October 1998, Jeni Yen wrote a twenty-two page monologue that she hoped to use as a one-person theatrical play. The play was based on a series of letters written by Sharon Jones, a military nurse who was stationed in Germany following the end of World War II. Jones had written a number of friends, and the letters were archived at a university library that collected War documents. In the play, the actress read two of the letters aloud as part of the dialogue. Yen rehearsed the play for approximately two months under the direction of Fred Stone, but was unhappy with the quality of her performance and did not publicly perform the work.

Stone suggested that Yen allow another actress to try the part. Yen agreed. Stone produced and directed Susan Rae in the part. Rae rehearsed for three weeks and then began small, public performances. In these small performances, Rae began to improvise, changing dialogue and

adding material as she felt it was appropriate. After each performance, Rae would meet with Stone and they would discuss what new material worked and which materials were not appropriate. After two more months, Stone typed up a copy of the script as it was currently being presented. The play began to attract larger crowds, eventually become a hit show touring the country. Yen received sole credit as author of the play as well as a 3% royalty on all box office revenue for all performances. There was no written agreement between any of the parties (Yen, Stone, or Rae). Rae had been paid a fee of $500.00 by Stone to undertake the part. Stone receives 10% of the gross box office income from which he pays Rae 2% while retaining 8%.

As originally written by Yen, the play was only 65 minutes in length. Although successful, Stone felt it was important that a second act be added to the performance, so that it would run at least 95 minutes. He outlined a second act, which used the same characters in similar situations ten years later. Rae began to improvise dialogue and action based on the outline. Stone then wrote the full dialogue of second act based on his outline and Rae's improvisations. Yen attended a production of the play which included the new second act and improvised material. Yen informed Stone that she was very disappointed in the revisions, but took no other action. Playhouse Publishers contacted Yen and agreed to publish the play. In the publishing contract between Yen and Playhouse Publishers, Yen transferred all her exclusive publication rights. She represented that she is the sole author of the play with exclusive rights to all the material contained in the play. Yen first submitted the original draft of the play, but Playhouse Publishers insisted that it would publish only the version currently being performed on stage. Yen obtained a copy of the updated version (including the second act) and submitted it to Playhouse Publishers. Playhouse Publishers began publishing and distributing the script to theatrical book shops.

1. After hearing about the play, Sharon Jones brings a lawsuit against Jeni Yen (as author) and Fred Stone (as producer) of the play, seeking to stop the unauthorized use of her letters and monetary damages for prior use of the letters. Discuss the merits and likely outcome of her lawsuit.

2. Susan Rae and Fred Stone have each separately filed a lawsuit against Playhouse Publishers for publishing the revised version of the play. Each claims to be the sole author of the material added to Jeni Yen's original script. Discuss the merits and likely outcome of each lawsuit.

3. Playhouse Publishers sues Jeni Yen as a result of the claims discussed in questions 1 and 2. Discuss the merits and likely outcome of the lawsuit by Playhouse Publishers against Jeni Yen.

1. Jones v. Yen; Jones v. Stone
   - A. Ownership of a valid copyright. Jones wrote the letters to various friends. Letters are works of expression fixed in a tangible form, subject to copyright. Ownership of the letters does not transfer copyright, so Jones remains copyright holder of her letter. No fact suggests the letters were ever published, so they were protected under common law until 1978 and remain protected by copyright under §303(a) for the remainder of Jones' life plus seventy years.

B. Copying. The "copying" is shorthand for any of the exclusive rights. Here, §106(5) public performance is being violated through the performance, and §106(1) reproduction rights by including the letters in the published script or §106(2) creating a derivative work of the letters.
   1. Access: Yen had access to the letters from the university library.
   2. Substantial Similarity: In the play, the actress read two of the letters aloud as part of the dialogue. The performed letters were verbatim copies of the letters.

C. Correct Defendants.
   1. Yen as author of the infringing work is directly liable for any infringement she caused in the reproduction of the letter in the script.
   2. Stone as producer is both vicariously liable and liable as a contributory infringer for the public performances.
      a. Vicarious liability because Jones had the right to supervise and control the public performances, which he demonstrated by recasting the show and adding a second act. He had direct financial interest because it made its money off the ticket sales.
      b. Contributory Infringement is available against Jones because there was knowledge of the infringing activities and action that "induces, causes or materially contributes to the infringing conduct." He was substantially involved in the violation because he produced and promoted the public performances. Such participation must be substantial.

D. Defense: Fair Use. §107. Equitable balancing test. The proper method to use the test is to analyze each of the four prongs separately and then apply a rule of reason to the conduct as a whole.
   1. Purpose & Character of use, including whether commercial nature or nonprofit educational use. Here, the play is a commercial telling of the story which militates against fair use.
   2. Nature of copyrighted work is that of private letters. The unpublished nature should not be taken directly into account (See the last sentence of §107, but cf. Sallinger.) Letters are highly expressive and provided the fullest degree of copyright protection, unless used factually as part of a biography. The play is "based upon" these letters and could be deemed biographical in part. Still, the nature of the letters suggests this is not fair use.
   3. Amount and substantiality of the work taken. If the "work" was Jones' entire body of letters, then the use of two might not be that large a taking; however, each letter was separate. Copying two of them verbatim is an extremely large amount of the work taken.
   4. Effect on market. Here is the one test that defendants do not lose. The play, although commercial in nature, does not usurp an existing or proposed use of the letters. The letters were sitting in a research library more than half a century after they had been written. There is no effect on the market for the letters, unless to stir new interest in the dormant subject.

5. On balance, while usage of smaller portions of the letters would probably be fair use given the lack of any market impact, the public performance of two entire letters exceeds fair use.

E. Remedies
   1. Injunctive relief is available if a final judgment is rendered under §502. (This is a likely case for summary judgment since no disputes of fact exist.)
   2. For a preliminary injunction, the court would balance the harms to the two parties. The likelihood on the merits favors the plaintiff, but the harm to the plaintiff is not great. The harm from continuing booked performances is more modest and the court might allow some performances to be completed. The publishing of the play poses a much greater harm to the plaintiff, however, since once published it cannot easily be undone, and the court would be likely to enjoin publication.
   3. Unless the unpublished letters were registered (which is not stated nor likely), then no statutory damages or attorneys fees are available pursuant to §412.
   4. Actual damages are highly speculative, but profits to the defendants are not.
      a. The income earned by Yen and Jones will be the damages sought.
      b. The defendants can establish that some portions of the income was due to other portions of the play, not merely the two letters.
      c. The court has discretion to award any reasonable apportionment of the damages.

2. Susan Rae and Fred Stone have each separately filed a lawsuit against Playhouse Publishers for publishing the revised version of the play. Each claims to be the sole author of the material added to Jeni Yen's original script. Discuss the merits and likely outcome of each lawsuit.

Rae v. Playhouse Publishers; Stone v. Playhouse Publishers

A. Ownership of a valid copyright by Rae. This is the primary issue.
   1. Yen is the author of Act I. She did not participate in Act II, but it is "the same characters and similar situations."
   2. Rae improvised, "changing dialogue and adding material as she felt it was appropriate." If these changes were sufficiently substantial, they would constitute original authorship, fixed in a tangible form.
      a. Derivative work. If authorized, then the new version of the play could be deemed a derivative work requiring permission of each author. In this case, Rae would have a valid claim of authorship.
         (1) Fixation for Rae - that Stone typed her first act changes does not make him the author. They were created by her and fixed, so the would meet the test if authorized.
         (2) If unauthorized, however, Rae cannot claim any copyright because §103(a) would preclude her from claiming

copyright "to any part of the work in which [copyrighted] material has been used unlawfully." Under §103(a), Yen may still be able to claim independent authorship in Act II, if the second act would not be deemed an infringing work on Act I. While there are not sufficient facts to determine this, the characters and situations suggest that it would be an infringing work, unless authorized.

b. Joint Author. If intended by the parties to be a merged, unitary work, the revised Act I would become a work of joint authorship. Certainly they were intended to merge together and there was authorship by both parties. Yen received sole writing credit, suggesting that Rae understood her work to be part of Yen's. Yen's statement that she was disappointed in the revisions does not clarify her intent, but could be an acquiesce to the joint authorship.

c. If Rae is a joint author, she cannot enjoin the publication, but can seek an accounting for an equal portion of the income. If she was not a joint author, she infringed Yen's copyrighted work in creating her own work and cannot receive a copyright in that work.

3. Stone was merely the technical scribe for the changes to Act I and has no claim to authorship for his work typing up the changes.

a. His ideas and discussions generally would not be sufficient authorship (in all but the 9th Circuit) to rise to joint authorship if there was intent.

b. Stone outline and later wrote most of Act II. As with Rae, §103(a) will preclude him from claiming authorship if it would have infringed Yen's copyright. (Anderson v. Stallone)

c. Stone's best claim is joint authorship. He worked with Yen from the start, and when she saw the revisions she expressed disappointment but did not demand the dialogue be removed. Her submission of the updated version might also be used to suggest her intent to treat the work as a unified whole and the others as joint authors, but the contractual statements that she was "sole author with exclusive rights" undermines this contention.

d. Implied Licensee. Stone and Rae might at least claim an implied non-exclusive license to redraft the work based on Yen's knowledge of the changes, failure to object, and continuing receipt of profits from the revised play's performances. If so, then that implied license to Stone and Rae would not transfer publishing rights to the derivative work created.

e. Stone might assert that Rae was his employee, improving his claim of authorship and cutting Rae out of her claim. He paid her as producer and she was under his direction. (CCNV v. Reid) The nature of the work, the inability to add additional work, the lack of traditional salary all suggest that she was not an employee in a work-for-hire setting.

4. Claim for liability. A narrower reading of §103(a) would preclude Stone or Rae from exploiting the new material, but treat the new material that was separable from Yen's work as still protected by copyright. Under this approach, Act II would be sufficiently separable to preclude Yen from using it without Stone and/or Rae's authorization without risking liability.

B. If either Stone or Rae have a valid copyright, then the remaining analysis is the same as for question 1, above.

3. Playhouse Publishers sues Jeni Yen as a result of the claims discussed in questions 1 and 2. Discuss the merits and likely outcome of the lawsuit by Playhouse Publishers against Jeni Yen.

A. Valid Contract. (Although you don't need it for this answer, to be a valid contract there must be offer, acceptance and consideration.) Yen transferred her exclusive publishing rights to Playhouse publishers in exchange for their agreement to publish the play.

B. Yen is in material breach of her representations.

1. Exclusive rights to all material in the play. The play was based on historical letters. Assuming Yen's use of the letters is fair use, she never has had any exclusive right to those letters. Incorporation of public domain material or material used through fair use cannot be exclusive.

2. Claim of Sole Authorship. Yen was the sole author of the first version of the play, but not the second.

a. If portions of the second version are not protected by copyright because they were not authorized, then the infringers do not have valid claims to argue authorship. (Whether a Lanham Act claim could be sustained by Rae or Stone is outside the scope of this class, but if they were found to have infringed, it is unlikely.)

b. If either Rae or Stone or both are deemed joint authors, then the representation to Playhouse Publishers is not correct. This will be deemed material (for reasons described below) resulting in a breach of the contract.

3. Exclusivity of transfer. If either Rae or Stone or both are deemed joint authors, then Yen can only transfer a non-exclusive right. Only through a unanimous grant, can joint authors transfer an exclusive right. This is why the claim of sole author is critical to the publishing contract - either Rae or Stone can grant non-exclusive publishing rights to other publishers.

C. The proper measure of damages in a breach of contract action are lost profits, if not too speculative. The publisher is more likely to seek recission and return of any advances paid. This is often the accepted measure of damages.

Grading and Scoring:

Description of the legal and factual analysis graded on the essay portion of the examination:

> You should apply the legal analysis to the facts presented in an accurate, objective fashion that properly identifies the issue presented, the scope of those issues, and a reasonable interpretation of the facts within the context of the law discussed during the semester. You should present the analysis with specific, logical, and well-crafted interpretations of each statement or proposition presented. You should avoid emotional arguments and unsupported conclusions. Instead, the student should use only statements that have specific legal and factual support. In addition, you should organize the written project in a manner appropriate for the purpose of the question. You should employ a clear, logical structure to your answer, within each question and within each paragraph. You should use a structure that reflects the importance of the analysis to the outcome, the logical relationship between the topics presented, and the readability of your answer.

The scoring for the legal and factual analysis breaks down as follows:

4 – Excellent Performance: Demonstrated mastery of the legal and factual analysis necessary; used the legal and factual analysis accurately in all or almost all cases; and used the information gathered from the analysis in an effective and creative manner. The response represented a thorough, accurate, and thoughtful analysis of the entire question presented.

3 – Satisfactory Performance: Consistently demonstrated the legal and factual analysis necessary; used the legal and factual analysis accurately in most cases; and used the information gathered from the analysis in the proper manner. The response represented a thorough, accurate, and thoughtful analysis of a substantial portion of question presented.

2 – Marginally Unacceptable Performance: Occasionally demonstrated the legal and factual analysis necessary, but often failed to demonstrate those techniques; used the analysis inaccurately; or did not use the information gathered from the analysis in the proper manner. The analysis is often incomplete, lacking or superficial. This is often caused either by a failure to fully identify the legal issues, a failure to apply the facts specifically rather than generally, or to generalize about the specific language of the statute.

0-1 – Not Acceptable Performance: Demonstrated little or no use of the legal and factual analysis.

Question 1 was worth 20 points reflecting a score from 0-4 multiplied by 5; Question 2 was worth 16 points reflecting a score from 0-4 multiplied by 4; and Question 3 was worth 12 points reflecting a score from 0-4 multiplied by 3.