Exam No. _____

COPYRIGHT LAW, FALL SEMESTER, 2004
FINAL EXAM

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Directions: The following exam is scheduled for three hours. It is divided into Parts I, II and III. No blue books should be used.

Part I is comprised of fifteen true/false questions or statements. Please indicate in the space provided after each question whether you think the statement is answer is True or False (T/F). Each correct answer is worth 2 points for a total of 30 possible points in Part I.

Part II contains ten multiple choice opportunities. Please circle the answer (a) – (d) that best completes the question. Each correct answer is worth 3 points for a total of 30 possible points in Part II.

Part III involves a fact situation which traditionally is hypothetical, but this semester relates to a "live case". There are 8 questions that follow the "case". Please answer each question as directed. A total of 5 points is possible for each question. Reasoning points may be awarded even where the answer is incorrect. Total possible score on Part III is 40 points.

Materials: You may use your Copyright statute during the exam if you wish.
Note: All statutory sections (§) cited in the Exam are references to the Copyright Act of 1976 unless specifically identified otherwise.

PART I: Please identify the following comments as True or False (T/F). Total possible score on Part I = 30 points

1. If Blitzen, an illustrator of Christmas cards, draws a rendering of Santa's sleigh on October 1st and Rudolph, also an illustrator of Christmas cards, draws an identical rendering on November 1st, although Rudolph was unaware of Blitzen's drawing, his rendering is not copyrightable since only the first drawing meets the originality requirements for copyrightability. _____

2. In order to calculate the term of copyright protection for the periods established under §§302-304 of the Copyright Act of 1976, it is not always necessary to know when a work was created. _____

3. The renewal of copyright, although important in determining the length of copyright protection under the Copyright Statute of 1909, became immaterial as of January 1, 1978 because of the change in the term of copyright brought about by the Copyright Act of 1976. _____

4. If W Widow wishes to terminate an assignment by her late Husband A of his letters in 1968 to the Dartmouth library, she may not do so beginning in 2024 if A, by will in 1980, left his letters to Harvard. ____

5. Although the Copyright Act of 1976 eliminated the date of first publication as the commencement of federal copyright protection for a work, publication remains an important factor in U.S. copyright law since if a work is not published, its author cannot sue a person reproducing the work without authorization for copyright infringement. _____

6. If Pogo, while watching a video of the Boston Ballet Company's 2003 production of *The Nutcracker* ballet on his TV set, bounces on his pogo stick around his living room copying the dancers in the video, he has infringed the public performance copyrights held by the dancers. ____

7. In establishing whether a plaintiff author's adaptation right had been infringed, it would be necessary to show only that the defendant's work contained a modicum of originality. _____

8. According to prevailing case law, the copyrightable elements of a computer program will be protected against unauthorized use by developers of second generation works (new work) except where those copyrightable elements are not visually perceptible. _____

9. A showing of substantial similarity between a sketch produced in water color and a like image produced on a bird house is not sufficient to find that infringement of copyright has occurred. ____

10. The "four-factor" test commonly used by U.S. courts today in considering whether or not a defense of fair use will be successful as against a claim of copyright infringement has its origin in §107 of the Copyright Act of 1976. _____

11. It is evident that the finding against the fair use defense in ***American Geophysical Union v. Texaco, Inc.***, would have been different if the articles copied by *Texaco* had been used for the Purpose of teaching *Texaco* engineers instead of archiving them to use in future research. _____

12. The role of the "ordinary observer" in determining whether one work infringes another is to provide evidence of the extent to which the two works are different and consequently proof of copying has not been established. _____

13. If Pirate Pete buys popular CDs from Dora Download to which new labels are attached that read "*Dora's Delights*" and resells them in his store Cheaper by the Dozen, it will be easier for the record companies to show that Pete is a contributory infringer than a vicarious infringer. _____

14. While a finding of "transformativeness" in determining the outcome of a four-factor test analysis applied to a defendant's fair use defense is generally viewed in favor of the defendant, a finding of literal copying will always weigh against the defendant's claim of fair use. _____

15. A high school rock band whose song is infringed by Jammin' Jimmie, an international rock star, will be entitled to Jimmie's profit from his infringing uses of their song despite that fact that the high school rock band's own earnings from the song, if any, would be minimal. _____

PART II. MULTIPLE CHOICE

Please circle the letter below (a) – (d) that best completes the question or statement. Total possible score on Part II = 30 points

1. Bob Broker has developed a computer program that is useful in appraising the value of properties that he has listed for sale. The program is driven by an algorithm that uses square foot measurements of the house, age of the house, lot size and the same data on comparable homes that have sold within the last 12 months. One of the utilities of Bob's program is to predict what a property will most likely sell for in the current market. This helps Bob and his clients determine the initial price they will ask for the house. Bob is concerned that while he is the only one who can run the data since his program is proprietary, once the data is published, others copy it. Bob wonders if he can claim copyright protection for the computer-generated information he publishes. You advise him that:

   a. None of the information can be protected (17 USC §102(b))
   b. Under the Supreme Court's ruling in ***Feist Publications, Inc. v. Rural Telephone Service, Co., Inc.***, none of the data generated by the program is protectible because it lacks originality
   c. Because the algorithm is unique, all of the data can be protected under the rationale of ***Apple Computer v. Franklin Computer Corp.***

d. Based on ***CCC Information Services v. Maclean Hunter Market Reports***, Bob may be able to claim copyright protection for his computer printout if it includes the predicted sale price of the property.

2. In 1968, A wrote a children's story about a girl dressed in a red cape who becomes lost while walking in the woods. A assigned all rights under copyright in the story to Kindergarten Press in that year. In 1970, Kindergarten Press published the book under the title "Red Cape". In 1972, Kindergarten Press issued a license to the Boy Scouts of America to publish during the term of copyright and any renewal thereof a derivative work entitled "Tracking Red Cape". The derivative work was published in the same year. A died in 1980, leaving her entire estate, including any rights in copyright, to her husband H. In 1995 H, unhappy with recently published revised editions of both works, seeks your advice as to if and when he can terminate the rights of the Kindergarten Press and the Boy Scouts of America. You tell H:

a. he is entitled to all rights of copyright as to both publishers beginning in 1998
b. he will have a right to terminate beginning in 2026 as to the Kindergarten Press and 2028 as to the Boy Scouts of America
c. he cannot terminate as to the Boy Scouts of America since they own all rights in Tracking Red Cape as a derivative work
d. if he is going to claim all rights granted as to both publishers he will need to register a certificate of renewal in 1997

3. If Martha copies portions of a floral handbag design to which Vera holds all exclusive rights of copyright as decoration on a cake she has baked and exhibited in the county fair, Martha has infringed Vera's exclusive rights of:

a. Reproduction
b. Reproduction and public display
c. Reproduction, public display and adaptation
d. None have been infringed because Martha's cake decoration is *fair use*

4. Pablo the Painter, an artist of some fame for his original works, is also known as a superb imitator. That is, he is able to reproduce the "old masters" using not only the original style of the master painters, but also the particular quality of the paints they used. This allows him to recreate works that are difficult to tell from the originals except that Pablo (i) always signs his name at the bottom of each work; (ii) sells his "old masters" recreations only as framed unique one-of-a-kind works; and (iii) secures certificates of copyright registration for each of his works. The Museum of Old Masters has purchased one of Pablo's recreated works to display in its collection "Old Masters, New Faces", a collection dedicated to modern artists who do the kind of recreation that Pablo does. Without getting permission from Pablo, the Museum's Art Shop has advertised Pablo's work for sale in poster form in its Christmas Catalog. In advising Pablo what his rights might be, you advise him that:

a. he will be able to obtain a preliminary injunction to stop the sale of the posters since he has a certificate of registration of copyright for his painting

b. he probably cannot prevent sale of the posters since they are not original enough to qualify as derivative works and therefore are without copyright protection
c. following the court-established ***Pushman rule***, the Museum, as purchaser of Pablo's painting, owns all rights of copyright in it and can sell reproductions of it as posters without Pablo's permission
d. he will be able to prevent the sale of his work in poster form under §106A of the Copyright Act of 1976 (as amended)

5. Photo Phil, an aerial photographer, has been hired by Custom Construction Co. (Custom) to take aerial photographs of a building project. The agreement between Photo Phil and Custom includes a set fee for each flight made by Phil in his plane and an extra fee for prints of each photo taken by Phil that Custom orders. From Phil's shots, Custom selected 350 photos for its files paying the extra fee. Pursuant to a contract dispute over the building project, Custom has sued the developer. As part of evidence to use in presenting its case, Custom has asked Phil for multiple copies of the photos, which Phil agreed to provide at an extra price. Unhappy with the price, Custom goes to a nearby You Copy Shop and makes its own copies. In a subsequent suit for copyright infringement brought by Photo Phil against Custom, Custom's attempt to assert a fair use defense will most likely fail because:

a. Custom's copying has impaired Photo Phil's market for the photographs
b. Custom's "use" is not an enumerated use found under Sec. 107
c. The fair use defense is never applicable where a copyright holder has offered to license the work to a defendant
d. It is never an infringement to make use of copyrighted materials in a legal proceeding; therefore, the defense of fair use is not appropriate

6. Annie Artist who holds the copyright to a design that was placed on T-shirts sold by New York Nick, a street vendor, without her permission, believes she is entitled to damages for injury to her reputation as a consequence of Nick's demeaning her work by reproducing it on T-shirts. Annie's best chance of recovering damages to her reputation will be by:

a. Entering into evidence the number of T-shirts bearing her design sold by Nick
b. Suing Nick under Section 106A of the Copyright Act of 1976
c. Showing a loss in licensing revenue once Nick began selling the infringing T-shirts
d. She cannot recover since Nick's use of her design is parody and qualifies as fair use

7. Patsy Purple, a noted dress designer, has learned that a dress very similar to her award-winning creation, "Foxy Roxy" is being sold by Bloominghills. The dress was apparently sold to the store by designer, Greta Garment. Patsy cannot prove 100% that Greta copied her Foxy Roxy design, but given Greta's past history as a design duplicator Patsy is certain that Greta had access to Foxy Roxy and has copied it. Patsy will most likely be able to show that Greta has engaged in improper appropriation if she:

a. presents testimony from the noted designer Gloria Glitz that the two dresses are so similar that they could not have been independently created.
b. presents evidence that her dress had been modeled at the NY Annual Fashion Show four months before Greta's dress was first sold to Bloominghills.

c. secures testimony from the ladies in her book club that they believe Patsy to be the designer of the both dresses
d. overcomes Greta's defense that the dress is a useful article and the design utilitarian

8. Graffiti Giants, Inc., located in New York City, specializes in painting designs on building walls for clients who wish to promote their structures or to send a message out to the public. Usually, the walls are private property belonging to Graffiti Giant's clients. Commissioned to decorate a wall with a sunflower patch, Graffiti Giants paid a local art school student a flat fee to do a rendering of a sunflower patch the student has displayed in her website. Freelancer Freddy makes his living taking interesting camera shots and selling them to web design companies. Walking along 5th Avenue, Freddy comes upon the wall and finds it eye-catching. He takes a picture of it which he sells to Web Worms, Inc. Web Worms uses it for a webpage it is designing for Sunflower Supersite, Inc., ("SSI) which runs website devoted to growing sunflowers. SSI's use of the photo comes to the attention of Graffiti Giants. The company files suit for copyright infringement in Federal District Court naming Freddy, Web Worms and SSI, as defendants. Graffiti Giants' best opportunity to recover damages will be against:

a. Freelancer Freddy
b. Web Worms
c. Sunflower Supersite, Inc.
d. No one, since Graffiti Giants does not have standing to sue

9. Matt, the mapmaker, has established his copyright ownership to a number of maps he has made traveling the route of Lewis and Clark on their historical 1804-1806 expedition. The History Gazette, under the mistaken impression that maps are not copyrightable, included Matt's maps in a work it published on the Lewis and Clark expedition ("*Mapping Lewis and Clark*"). Matt successfully sued the History Gazette for copyright infringement and elected statutory damages to the exclusion of actual damages and profits. In calculating the amount of an appropriate statutory damage award, the court will:

a. Correctly award Matt a minimum of $750.00 for each of Matt's maps reproduced in each copy of *Mapping Lewis and Clark* sold by the History Gazette
b. Have the discretion to award Matt up to $30,000 for the nonwillful infringement of each of Matt's maps published by the History Gazette
c. Reduce any damage award to $200 because the History Gazette thought maps were not copyrightable subject matter
d. Have the discretion to award Matt $30,000 for each copy of *Mapping Lewis and Clark* sold by the History Gazette

10. For Mikey J to be successful with a motion for a permanent injunction against Carlos the Copier for copyright infringement of Mikey J's latest music video, Mikey J must show:

a. Copying
b. Similarity
c. Improper appropriation
d. Access and substantial similarity

Part III. Please review the fact situation below. It is a summary of a complaint filed recently by Marvel Enterprises against two defendants and is timely in bringing up issues that we have been reviewing in Copyright class. At the conclusion of the BACKGROUND OF CASE, you will find 8 questions to answer in the space provided. If more space is needed, please use the reverse sides of the exam and be sure to number your answers correctly so there is no confusion as to what answer applies to what question. Each question is worth a total of 5 points for possible score of 40 points in Section III. Have fun!

In the U.S. District Court for the Central District of California:
Marvel Enterprises, Inc. and Marvel Characters, Inc. v. NCsoft Corporation and Cryptic Studios, Inc.

BACKGROUND OF CASE: On November 10, 2004, Marvel Enterprises, Inc. and Marvel Characters ("Marvel") filed a complaint against NCsoft Corporation and Cryptic Studios, Inc., ("Defendants") for, among other things, direct, vicarious, and contributory copyright infringement of certain Marvel characters through the role-playing computer game "City of Heroes" -- a game played online by the Defendants' subscribers once the game is loaded onto the subscribers' PCs. Although the "City of Heroes" software does not create heroes itself and does not use, by name, any of the characters to which Marvel claims it holds copyrights, the software through a character called "Creation Engine" permits players to create their own "hero", name their "hero" and join other player-created "heroes" in a central location called "Paragon City" hosted on the Defendants' servers. The characters created, their attributes, names and locations selected are choices made by the players. The Defendants advertise the game as "bringing the world of comic books alive" but the Defendants, themselves, own no comic book characters. Marvel alleges that the Defendants directly, contributorily and vicariously infringe upon Marvel copyrights by providing, marketing and distributing a host environment for players to create "heroes" which infringe Marvel's copyrights in its characters. The Plaintiffs claims for relief are based on the Defendants' (i) direct copyright infringement, (ii) contributory copyright infringement; and (iii) vicarious copyright infringement. The Plaintiffs also request the Court to issue temporary, preliminary and permanent injunctions, restraining the Defendants' further infringements.

Question 1: If you are representing Marvel in this case, to be successful on the claim of *direct infringement*, given the facts above, you will most likely attempt to show the Defendants have infringed Marvel's rights of:
Check appropriate box(es)

- ☐ Reproduction
- ☐ Adaptation
- ☐ Distribution
- ☐ Public Performance
- ☐ Public Display

The rationale for your choices would be: _____

Question 2: Continuing your representation of Marvel, in order to convince the Court that the Defendants have directly infringed your client's copyrights in its characters, you will have to provide evidence of activities on the part of the Defendants that leads to improper appropriation. Please explain the elements you would have to show and, given the facts above, how you would go about it.

Question 3: Still representing Marvel, you know you will have to provide the court with precedent for your position with respect to the direct infringements of the Defendants in developing the City of Heroes software and providing its subscribers with access to it. The most relevant case(s) you have studied and the arguments for using them would be:

Question 4: As attorney for the Defendants, you will argue that your client's software does not directly infringe the copyrights in the Marvel characters because its activities do not meet the requirements for infringement: The most relevant case(s) you will rely on and arguments for using them are:

Question 5: As required under §§411 & 412 of the Copyright Act of 1976, in order to bring suit for infringement and claims for statutory damages, Marvel has attached copies of certain copyright registrations. Will Marvel's copyright registration for an audiovisual work be sufficient to provide *prima facie* evidence of copyrightability of particular characters first appearing in the work?

Check one: ☐ Yes , ☐ No, ☐ It Depends

Please explain your answer:

Question 6: To win claims of relief for *contributory* and *vicarious* infringement, Marvel will have to prove that the Defendants activities met certain tests that have been generally applied by the courts. Please explain the tests and in representing Marvel, how you would argue that the Defendants actions meet those tests.

Contributory infringement: _____

Vicarious infringement: _____

Question 7: In addition to its claims for damages, profits or statutory damages, Marvel is also seeking injunctions to halt the Defendants infringing activities (§502(a) of the Copyright Act of 1976). Using the tests applied by the 2nd Cir., 9th Cir., or more generally by the majority of the Circuits, explain what Marvel's attorneys will be required to establish to persuade the court to grant a preliminary injunction and, based on the facts above, how they will argue it.

Question 8: In its prayer for relief, Marvel has petitioned for a judicial declaration that Defendants claim that they are shielded from liability by the "safe harbor" provision of the Digital Millennium Copyright Act of 1998 (DMCA) as an Internet Service Provider (ISP) is inapplicable since Defendants do not qualify as an ISP and even if they do, they do not qualify under the "safe harbor" provision. As the judge in this case and referring to §§512(a) and 512(k)(1) of the Copyright Act of 1976, how would you rule on the Plaintiff's petition? Grant _____; Not Grant _____

Please explain the basis for your ruling: _____

END OF EXAM ☺