Exam No. _____

COPYRIGHT LAW, SPRING SEMESTER, 2004

FINAL EXAM, WEDNESDAY, APRIL 28, 2004

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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 hypothetical fact situation. 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. While it is true that the early development of copyright law in the U.S. was largely influenced by principles found in British copyright law, the emphasis on protecting the economic rights of publishers found in early British statutes did not carry over to early U.S. copyright law. _____

2. Section 102 of the U.S. Copyright Act of 1976 is helpful in understanding the subject matter of copyright since it provides an exhaustive list of categories of works that qualify. The result is that works that do not fall into one of these categories are not eligible for copyright protection. _____

3. "Conceptual separability" is a concept that is used to describe the protectible elements of a derivative work from a pre-existing work. _____

4. Despite the requirements of originality, authorship and fixation under U.S. Copyright law, it is not true that a photographer will be unable to obtain copyright protection for her photographic work unless she is the person who has also operated the camera. _____

5. Under current U.S. copyright law it is generally accepted that the author of a derivative work will not be able to establish copyright protection for her work unless she can show substantial difference from the pre-existing work. _____

6. Since joining the Berne Convention in 1989 the United States has had to adhere to a number of limitations imposed by the Convention upon its members. As a result, the fact that a work does not carry a copyright notice on it is no longer relevant in determining whether the work in question is validly copyrighted._____

7. The key to overcoming the decision in *Feist Publications v. Rural Telephone Service* denying copyrightability is to follow the principles defined in *Morrissey v. Procter & Gamble, Co.* _____

8. Computer programs are considered copyrightable subject matter only if the literal elements serve some purpose other than solely to give instructions to the computer. _____

9. Although a sound recording may result from the fixation of a series of musical sounds, that does not mean the composer of the underlying musical composition holds the copyright in the recording. _____

10. In determining whether a work copyrighted in 1976 was still protected in 2004, it would not be important to know when copyright in the work was renewed. _____

11. The Copyright Term Extension Act (CTEA) was responsible for adding 70 years to the copyright term for works whose copyrights had not expired as of the effective date of the Act. _____

12. An author who wants to make sure that his heirs have a right of termination to a transfer of copyright made to a publisher in 1987 will need to make sure that his will specifies the heirs' rights of termination. _____

13. Sarah Silly, who wishes to parody the first telecast episode of the TV show "The Apprentice", will not necessarily lose her fair use defense because she engages in excessive copying. _____

14. If on comparison the Defendant's work is determined by reasonable people to be strikingly similar to the Plaintiff's work, and not to anything in the public domain, this is enough to prove the Defendant has infringed the Plaintiff's work. _____

15. It is true that a plaintiff's damages may in fact exceed the defendant's profits and, nevertheless, a plaintiff may still be awarded a defendant's profits. _____

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. Vionarda La Dinci independently creates a sculpture and eventually sells it to a local museum. If the museum decides that the sculpture is too boring, disassembles the sculpture's arms, legs and head and reinstalls them with gears so that they can move to music, the museum:

   a. Has violated La Dinci's public performance rights under copyright
   b. Has violated none of La Dinci's copyrights because of the right of first sale
   c. Can be required to remove the placard carrying La Dinci's name as sculptor placed next to the sculpture
   d. Cannot resell the sculpture to the Museum of Modern Art (MOMA) without permission from La Dinci as co-owner of the joint copyrights in the work.

2. Junior Silky, an enthusiastic young professor who recently graduated from FPLC, teaches a course on "Intellectual Property and Traditional People and Knowledge" at Wayward University Law School. He also works as a consultant for Promoting World Understanding, Inc., (PWU) an international organization dealing with the same subject matter. He is a dedicated teacher who wants his class to have the latest information available on the topics he is teaching. Shortly before class, while sitting in his office at PWU, he discovers an interesting new and very relevant article. He immediately photocopies two pages from the article and makes copies on the PWU copy machine to distribute to his class of 50 students. To persuade the court to rule that Prof. Silky's infringing activity does not qualify as improper appropriation you would use the argument made in:

a. *American Geophysical Union v. Texaco*
b. *Princeton University Press v. Michigan Document Services*
c. *Sony Corp. of America v. Universal City Studios*
d. *Ringgold v. Black Entertainment Television, Inc.*

3. A Concord High School student assigned to write for the school newspaper seeks and is granted an interview with the Concord, New Hampshire, Police Chief regarding his department's policies in dealing with teenagers who skateboard in public parking lots. The issue has been a controversial one, so, the Police Chief insists that the student submit his written questions to the Chief a week ahead of the interview. The Chief has the Police Department's Public Relations Director draft responses to the questions, and the Chief reviews the written responses. On the day of the interview, the Chief responds orally to the questions posed by the student, summarizing the responses drafted by the PR Director. The enterprising student decides to sell the interview to a national skateboarding enthusiasts' magazine, *On Boardz.* The biggest obstacle to a successful suit for federal copyright infringement by the Concord Police Department against the magazine is:

a. The inability of the Concord Police Department to be an author under §105.
b. The fact that the Chief s oral responses were a performance and therefore not fixed for purposes of copyright protection.
c. The fact that the Chief s oral responses merely summarized departmental policies and hence are not copyrightable under *Baker v. Selden*
d. None of the above.

4. The children of an author of a U. S. copyrighted work, first published with notice and federally registered in 1972, wish to terminate an assignment of the right of distribution that had been granted in 1975 by the author. The author and his wife died in an automobile accident in 1995. When may the author's surviving children effect their rights of termination?

a. Beginning at the end of 2028 for a period of five years provided the heirs renewed the copyright prior to December 31, 2000.
b. Beginning at the end of 2028 for a period of 5 years
c. Beginning at the end of 2010 for a period of 5 years
d. The heirs have no right of termination because of the grant made by the author while he was alive.

5. Gustaffson Roqueferot, a very famous movie director and producer of international fame, asks Qute Red to lay down the soundtrack for his new movie entitled "An Evening in Buenos Aires". Red, a well-known sound engineer in her own right, but who is very opposed to hiring a lawyer to do what she can do, writes up the following agreement on a napkin while having lunch with Roqueferot. "I agree that the soundtrack I record for the film 'An Evening in Buenos Aires' shall be considered a work for hire."

Signed: Qute Red Signed: Gustaffson Roqueferot, Film Producer

a. The soundtrack is a work for hire owned by Roqueferot.
b. The soundtrack is not a work for hire because a work can only be a work for hire if written or created by an employee.
c. The soundtrack is not a work for hire because the soundtrack wasn't a specially ordered or commissioned work.
d. The soundtrack is owned by Qute Red because the transfer of copyright ownership in the work was incomplete since the signatures of the parties were not witnessed.

6. Hilda Henny and Patsy Penny have worked together over the years compiling recipes for a cookbook published as *Farmyard Fancies*. The cookbook has gone through a number of revisions with recipes added as well as recipes revised. Unfortunately, Hilda and Patsy's culinary relationship was severed over whether one or two teaspoons of vanilla was the proper measurement for one of their most creative cakes, "the Rooster Riot". Hilda has decided that she will continue with a new edition of *Farmyard Fancies* on her own and notifies her publisher, Barnyard Books, Inc., that she is submitting a new edition of the work. Barnyard Books' legal department, concerned about the copyrights in the new edition, reviews the applicable case law, and decides to go ahead with publishing Hilda's new edition based on their reading of:

a. *Thomson v. Larson*
b. *Sherry Manufacturing v. Towel King of Florida*
c. *CCC Information Services v. Maclean Hunter Market Reports*
d. *Childress v. Taylor*

7. Hatstack Co. manufactures hat and coat racks, free standing as well as the type that can be fastened to a wall. Hatstack's best-selling design is little more than a straight, thick tension pole that can be wedged between the ceiling and floor. The pole is covered from top to bottom in an adhesive fabric to which coats and hats immediately attach when they come into contact with the fabric and easily detach from the fabric with a slight pull. The benefit of this particular rack is that it can be utilized in small rooms and other areas with limited space. In addition, the rack is particularly useful for sloppy people because they can hang up their outerwear by flinging it in the direction of the rack without having to place the item on a specific hook. Upon discovering that a competitor is selling copies of its pole design, Hatstack files a copyright infringement suit against the competitor, asserting that the pole design is the proper subject of copyright under §102(a)(5). If the court adjudicating Hatstack's claim applies the test for conceptual separability utilized in *Carol Barnhart Inc. v. Economy Cover Corp.*, Hatstack will:

a. not prevail because the fabric-covered pole cannot be unscrewed from the top of the rack.
b. prevail because this is a novel and artistic design for a hat and coat rack
c. prevail because the rack can be used in large open spaces by people who are not sloppy.
d. not prevail because the form of the hat and coat rack has been influenced by how one uses it.

8. Silent Bob is a popular mime who specializes in live performances on the streets of Boston. Because he does not employ speech or music of any type, Silent Bob's performances are silent and limited to movement. Silent Bob's performances are spontaneous and are not choreographed beforehand. Early this year, he authorized the videotaping of one his performances by WGBH in Boston for digital transmission accessible through a WGBH website entitled "Boston Street Art". Copycats, Inc. owner of a web page devoted to performance art copied the performance from WGBH's website and posted it to their own web page without obtaining permission from either Silent Bob or WGBH. When he learned of the uauthorized reproduction of the video, Silent Bob sued Copycats, Inc. for federal copyright infringement. In the lawsuit, Silent Bob is likely:

a. To lose because his performance constitutes a general publication divesting Silent Bob of all copyright rights and injecting his performance into the public domain
b. To lose because WGBH owns the copyright in the videotape
c. To prevail because public performance of a work does not constitute publication
d. To prevail because his §106(5) right has been infringed.

9. Cora Copyright has successfully sued Isabel Infringer for infringing her rights of reproduction and distribution for a line of exclusive hat designs to which Cora holds valid copyrights. In the damages and profits phase of the law suit, Cora seeks (i) compensation for lost sales in the amount of $40,000 upon showing that Isabel's distributors and outlets had sold 1000 copies of Cora's hats which Cora could have sold at a profit of $40.00 per hat; (ii) Isabel's profits earned from the sales of the infringing hats calculated at $20.00 per hat or $20,000 and (iii) all of Isabel's compensation as profit earned from her $50,000 per year contract with Hats 'R Us, Inc., for doing TV advertisements for the company. Under §504 of the Copyright Act of 1976, Cora is likely to:

a. Be entitled to recover $40,000 in lost sales as damages, but not an additional $20,000 representing Isabel's profit
b. Not be entitled to recover any of Isabel's revenue derived from her advertising contract
b. Be awarded a total of $110,000 for all claims
d. Be entitled to an extra $300,000 in statutory damages since Isabel's 1000 copies infringed Cora's copyright on 10 hat designs.

10. A copyright holder trying to establish vicarious liability for copyright infringement on the part of an Internet Service Provider (ISP) as a result of the infringing activities of the ISP's subscriber, Bad Buddy, would be likely to prevail by showing that:

a. the ISP knew or had reason to know of the infringing activity taking place over its network
b. he had served the ISP with a proper notice for take down under the Digital Millennium Copyright Act (§512(c)(3)

c. subscribers whose accounts were subject to monthly review by the ISP for nonpayment were subscribing to the ISP's services in order to access Buddy's site.
d. more than 50% of the material on Bad Buddy's site was infringing.

Part III. Please review the hypothetical fact situation below. At the conclusion of the fact situation, 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 Federal District Court of New Hampshire:
Felony Publishers, Inc. and Crime Network, Co. v. Perilous Pictures, Inc. and Molly Sue Morgan

BACKGROUND OF CASE: In 1963, Molly Sue Morgan, hereafter called "Mobster Moll", was convicted of a string of interstate bank robberies and sentenced to 40 years in federal prison. Her activities as a bank robber were legendary and she was often compared to such notable figures as Bonnie Parker (of Bonnie & Clyde fame). While in prison, Mobster Moll using a scrapbook containing various articles about her life compiled a history tentatively titled "The Life and Times of Mobster Moll" ("the Work"). She was fortunate to find a publisher and in 1968 assigned to Felony Publishers, Inc. all right, title and interest, including all rights under copyright, in and to the Work. Felony Publishers published the first edition of the Work in 1970 with great success due to the publicity surrounding Mobster Moll. In 1998, Perilous Pictures approached Mobster Moll through her literary agent with a proposal to acquire the film rights to a story of her life. Seeing an opportunity to benefit her heirs, Mobster Moll agreed to assign all right, title and interest, including copyrights which she might hold in the story of her life to Perilous Pictures for the sole and exclusive purpose of making a motion picture film based on her life. Felony Publishers, unaware of the agreement between Mobster Moll and Perilous Pictures, entered into an agreement in 1999 with Crime Network to produce a made-for-television movie based on the Work. Just prior to the scheduled first showing of Crime Network's made-for-television movie, Perilous Pictures released the film version of Mobster Moll's life to a limited audience in three cities, including Concord, New Hampshire. Upon learning of the release of the film, Felony Publishers and Crime Network filed suit in federal district court in New Hampshire to enjoin the further public distribution of the Perilous Pictures film on the basis that the film infringed the copyrights exclusively licensed to Felony Publishers by Mobster Moll. The plaintiffs further asserted that release of the film by Perilous Pictures would cause substantial harm to themselves and to Crime Network's advertisers by diminishing the viewing audience for the TV movie about to be released by Crime Network.

Question 1: As the judge in this case, you know that courts sometimes apply different standards in deciding whether to grant preliminary injunctions; however, the two requirements that are most generally required are:

_____

_____

_____

Question 2: As the judge, based on the facts presented, would you grant a preliminary injunction in this case? Yes ____ No ____

Question 2. continued . . .

Hoping not to be reversed on appeal, the basis for your decision would be: _____
_____
_____
_____
_____

Question 3: If you are representing Felony Publishers in this case, what is the major issue presented by the facts that you will have to overcome in proving infringement of your client's exclusive rights of reproduction: _____
_____
_____
_____
_____

Question 4: As attorney for Perilous Pictures you are interested in what affirmative defenses might be available to you. In researching similar cases, you find that your strongest defense is most likely to be:
_____

Why: _____
_____
_____
_____

Question 5: This particular case is not without its interesting elements. Perilous Pictures believes it has a strong countersuit against Felony Publishers for its role in licensing film rights to Crime Network. Representing Perilous Pictures, you file a counterclaim against Felony Publishers is for: vicarious infringement: ____ contributory infringement: ____

Explain why:
_____
_____
_____
_____
_____

Question 6: Mobster Moll is hopping mad at the way she is depicted in the Crime Network film as a misunderstood and wayward youth. She has decided that she will file her own copyright infringement suit against Crime Network for infringement of her derivative works right under §106(2) of the Copyright Act of 1976. Can she sue Crime Network for infringement of her copyrights under §106(2)? Yes ____ No ____

Question 6 continued . . .

Why or why not? _____
_____
_____
_____

Question 7: Mobster Moll, aware that she may be unable to personally profit from her felonious activities, nevertheless, hopes that her heirs may be able to reap some benefit. Consequently, she drafts a will leaving to her son and her daughter, in equal shares, all royalties due her from any and all depictions of her life story. Whether or not any royalties ever come to her heirs, nevertheless, they will have the right to effect termination of assignments and licenses granted by Mobster Moll assuming she died in 1985 as follows:

As to Felony Publishers beginning: _____
As to Perilous Pictures beginning: _____
(Half credit given for one right answer)

Question 8: Before trial begins and after checking all of the records at the Copyright Office and documents produced in this case, including carefully reviewing the materials contained in the Work, the Judge feels she has no choice but to grant the defendant's motion for a summary judgment in its favor based on:
a. _____; b. _____; c. _____; d. _____ (check one)

a. Failure of the Plaintiff, Felony Publishers, to renew copyright in the Work before the end of 1996
b. A registration for copyright in 1966 in a compilation entitled "The Complete Collected Works on the Life of Molly Sue Morgan", Annie J. Oakley, editor.
c. The fact that Mobster Moll shared with her fellow inmates numerous copies of the final manuscript of the Work sent to her by Felony Publishers for approval before any copyright notices were applied to the work.
d. Failure of the Plaintiff, Crime Network, to register the copyright on the TV movie adaptation of the Work within three months of its first broadcast.

_____ **END OF EXAM** ☺ _____