Exam No. _____

COPYRIGHT LAW, SPRING SEMESTER, 2005
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. Circle the answer (a) – (d) that best completes the question. Each correct answer is worth 3 points for 30 possible points in Part II.

Part III sets out a hypothetical fact situation. There are 8 questions that follow the "case" asking for an analysis from you either as representing the plaintiff/appelleet (copyright holder) or the defendant/appellant (infringer). 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. Provided the student disk jockeys at Neverland University use their boom boxes for playing recorded music over the college radio station, they will be protected from infringing any of the music copyright holder's rights of public performance under Aiken exemption (§110(5)(A)). _____

2. If Edward, a graduate student at UNH, finished his thesis entitled *New Hampshire Bugs That Bite* on May 31, 1940 but did not register for copyright renewal before May 31, 1968, anyone copying Edward's thesis after that date would not be infringing Edward's copyright._____

3. If A leaves her copyright in her novel (the Work) to B by will and upon A's death in 1990, B assigns his rights in the Work to publisher C, publisher C's rights are not terminable by A's children. _____

4. As long as Sue is licensed by Tom to prepare a derivative work of Tom's play entitled *Tall Tales*, it will be proper to place a copyright notice on Sue's derivative work, *Tall Tales Two*, identifying the derivative as a joint work of Sue and Tom. _____

5. The exclusive rights under copyright as enumerated in Sec. 106 of the Copyright Act of 1976 may be exercised and enforced only by the author of a work or by individuals to whom the author has transferred exclusive rights. _____

6. Rip Van Winkle wrote a play entitled "The Longest Sleep" in 1920. The play, however, was never published because Rip fell asleep for 60 years shortly after finishing his work. If Rip awakes in 1980 and publishes his play in 1981, he can claim copyright protection in the work for life plus 70 years. ____

7. According to case law, a registration for renewal of a copyright filed by an assignee of the copyright is ruled to be invalid. _____

8. If Scrivener creates a work in 1985 and transfers it to World Books Publishing, Inc. in 1990, Scrivener's widow and children will be entitled to send World Books notice of intent to terminate beginning in 2015. _____

9. A defendant in a copyright infringement suit is never successful in asserting a fair use defense if she takes more from the plaintiff's work than the amount necessary to meet her purpose. _____

10. An important rule handed down by the Learned Hand cases concerning findings of improper appropriation is that taking the plaintiff's expression is always improper appropriation. _____

11. It is true that where a copyright holder has not suffered lost sales on account of a defendant's infringing activity, the defendant will be more likely to be successful in pleading a fair use defense. _____

12. If Mary is defending against a claim of contributory infringement brought against her because she is holding a garage sale at which her children are selling cd's that they have illegally downloaded from the Internet, she is more likely to rely on *Sony Corp. of America v. Universal City Studios, Inc.* than on *Fonovisa, Inc. v. Cherry Auction, Inc.* _____

13. Under the Copyright Act of 1976, a plaintiff who is unable to show actual damages will nevertheless always be entitled to recover some measure of statutory damages from the defendant so long as he makes his election to do so prior to final judgment in the suit. _____

14. The primary reason that Napster, Inc. was unable to avoid a grant of a preliminary injunction against its continuing delivery of file sharing services to its users in the case of *A & M Records ,Inc. v. Napster, Inc.* was not because Napster was found to be a vicarious or contributory infringer but because Napster failed to establish fair use. _____

15. If MGM Studios wins its appeal to the Supreme Court against Grokster and Streamcast (*MGM Studios, Inc. v. Grokster, Ltd. et al*) and also wins on remand to the District Court, it will be able to claim actual damages only if it can prove the number of sales lost on account of exchange of music enabled by use of the Grokster and Streamcast software. _____

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. The widower and children of Angelique, a world-famous storyteller, have come to your office in 2005 inquiring as to whether they can reclaim by termination any of the rights to Angelique's stories appearing in a biography titled, *Angelique the Storyteller.* You learn that the biography was first published in 1948 by Literary Legends Publishing Company, the copyright holder by assignment from Angelique's biographer, Gracie Gump. Of the following facts, you decide that the one that is not relevant is:

    a. Whether Angelique died prior to 1976
    b. Whether Gracie renewed the copyright in the biography in 1976
    c. Whether Angelique left a will
    d. Whether Gracie, the biographer, was commissioned by Literary Legends to write the biography

2. Sandy Cocker has accumulated many years of experience as a dog groomer. He believes that he has developed several unique and useful techniques for grooming dogs that are superior to those used by other groomers. If Sandy wishes to enhance his reputation as a groomer through writing and publishing a book describing his unique dog grooming methods, as his copyright attorney you will advise him that:

    a. He will not be able to copyright his book because the techniques that he describes are excluded from copyright protection under Sec. 102(b) of the Copyright Act of 1976.
    b. He should not transfer all of his rights in the book to a publisher since if he does he will be unable to practice his grooming techniques without the publisher's permission
    c. He can use pictures of dogs that people have sent him over the years in his book because he is the owner of the photographs
    d. He is likely to be able to prevent groomers who purchase his book from making copies of his drawings that demonstrate his grooming techniques.

3. Betsy Bookseller has just found a rare edition of a book written in 1982 that Carl Collector has commissioned her to find. The book is considered rare because it was self-published by the author who had funds to publish only 100 copies. Moreover, because the author had limited funds, the book was published only in soft cover form using very light paper. The copy that Betsy has found is falling apart. Before selling the book to Carl, Betsy would like to copy it onto stronger paper so that it does not crumble in Carl's hands. Besides, she hopes Carl will pay her more for the book if it is in reasonable condition. As a bookseller in Los Angeles, Betsy is well aware of the copyright laws of the United States. However, she feels that making a copy will not be infringing because:

    a. The work was self-published by the author in only 100 copies and therefore is an unpublished work, not protected by federal copyright law.
    b. The author has omitted the copyright notice on all 100 copies

c. The condition of the original copy is so poor, she is entitled to make a back up copy under fair use
d. She plans to destroy the tattered copy that she bought once she copies it.

4. While visiting New York City in March, 2005, Eric Entrepreneur was fortunate enough to visit Central Park to view *The Gates* project of the artist, Christo and his wife. Eric was also fortunate to have his new digital camera with him and took a perfect photograph of the exhibition. Once back home in Peoria, Eric decided to transfer his photograph to T-shirts and sell them outside the Peoria Museum of Art to all of the art-lovers in Peoria who had never been to New York City. If you were representing the artists, you would file a copyright infringement complaint in federal district court against Eric on the basis of:

a. Infringing the Cristos' right of public display and adaptation
b. Infringing the Christos' right of reproduction and distribution
c. Infringing all of (a) and (b)
d. You would not file suit since the photograph was taken in a public place.

5. As copyright attorney for Terrific Toys, Inc. you have just discovered that Timeless Toys Company has begun marketing a toy steam-shovel called the Big Yellow which looks very similar to Terrific Toys' Red Raider - a toy Terrific Toys has been marketing for many years. Both toys are battery-operated and designed to imitate their life-size counterparts. As you research the law in deciding whether to file a copyright infringement suit against Timeless Toys, you make your decision to go forward with filing suit based on your reading of:

a. *Ty, Inc. v. Publications International, Ltd.*
b. *Batlin v. Snyder*
c. *Ty, Inc. v. GMA Accessories, Inc.*
d. *Carol Barnhart v. Economy Cover Corp.*

6. Gil Bates has developed a computer program that will analyze any new video game device that comes on the market and develop a flow chart that will instruct video game cartridge manufacturers as to the elements necessary to produce cartridges that can be played on the new device. While Gil plans to market his software to video game cartridge manufacturers, he does not plan to manufacture video cartridges, themselves. Gil has asked you, senior copyright lawyer in the firm of Originality, Authorship & Fixation, LLC, to advise him as to whether any of the video game device manufacturers will be successful in suing him for copyright infringement. After careful study of the question you advise Gil that:

a. he is likely to be liable for contributory infringement if he markets his software
b. since he copies any protected code of the device maker only once as an intermediate step and his own software will not contain any code protected by the device manufacturers, he doesn't need to worry
c. his disassembly of the device code is most likely fair use since it is the only way for him to develop noninfringing software
d. since the purpose of his software is to enable direct competition with the device manufacturers who market their own cartridges, Gil cannot assert a fair use defense

7. Juliet is the director of the Happy High School drama club. The performance she has chosen for Happy High's spring production is a little-known off-Broadway play which she thinks will provide an educational opportunity for her blossoming actors and actresses. In conversing with the producer of the play, who also holds the copyright to it, Juliet is dismayed to learn that he is unwilling to grant a license to the play for high school productions on the basis that amateur productions will adversely effect the play's reputation. Juliet's best argument for avoiding liability for copyright infringement on the part of Happy High if she decides to use material from the play is:

    a. The school as a public entity cannot be sued in federal court
    b. Since the school will not charge an admission fee for the play, there is no infringement of the public performance rights in the play.
    c. Any play performed by a high school is educational and qualifies as fair use
    d. None of the above

8. George Gamester, a noted developer of children's educational games, has come to your office demanding that you immediately file suit in federal district court in Boston against one Penny Player and her parents, Charles and Camilla Player. Penny, a 12-yr old girl scout, is selling a game she claims to have created on her own at the same time that she goes door-to-door selling girl scout cookies. There are so many elements of Penny's game that are similar to George's newest board game "Camping Adventures" that he is convinced that Penny has copied from it. In order to successfully file a motion for a preliminary injunction to stop Penny's sales, you know that you will be required to:

    a. show that Penny had access to "Camping Adventures"
    b. provide evidence to the court that 12 yr. old girls are buying Penny's game instead of George's game
    c. convince the court that elements of George's game are copyrightable
    d. convince the court that Penny's parents are vicarious infringers

9. Snowbank, a village located in northern New Hampshire, has managed to raise enough money to buy baseball caps for its little league baseball teams. To heighten competitive spirit between the teams, the town would like to order caps with emblems on them that are representative of existing major league baseball teams, although the colors for the caps will not match those of the major league teams. As Snowbank's town counsel, and a graduate of Franklin Pierce Law Center with knowledge of intellectual property law, you will advise the good people of Snowbank that the town does not need to worry about a suit for copyright infringement since its use of any copyrighted design of the major league baseball teams is:

    a. *de minimus*
    b. transformative
    c. nonprofit
    d. not a derivative work

10. Arturo, a contemporary artist, while visiting a shop that sells various games, has discovered that a company, Renoir Cards, Inc., is distributing a new line of playing cards that have on their non-numbered side a design that looks very much like a painting he previously sold to the

Museum of New Art (MNA). Since his paintings are abstract using common lines and colors he cannot be sure that his work has been copied and consults you, a copyright lawyer, as to what rights, if any, he might have against the MNA and/or Renoir Cards. You tell him that:

a. If his work is accomplished with only common used lines and colors, it is not copyrightable and he cannot sue anyone.
b. He can file a motion for a preliminary injunction and stop Renoir Cards from distributing the playing cards based on their similarity to his work.
c. He will need to find a poker player to testify that he bought the playing cards because he saw Arturo's painting at the MNA and thought the cards were a copy.
d. He may be able to sue the MNA as a contributory infringer

Part III. Please review the fact situation below under BACKGROUND OF APPEAL. Follow the directions at the conclusion of the Background section in answering 8 questions that will give you a chance to apply what you've learned. Check boxes according to the directions and explain your reasoning for your choices in the space provided. If more space is needed, use the reverse sides of the exam but be sure to number your answers correctly so there is no confusion as to what answer applies to what question. Checking more than one box will gain you nothing since the grader of this exam will consider only the first box you check (in descending order) ☺. Citing relevant sections of the U.S. Copyright Act of 1976 or applicable case law is encouraged. Each question is worth a total of 5 points for possible score of 40 points in Section III.

APPEAL TO THE U.S. COURT OF APPEALS, 1ST CIR., BOSTON

POTTERY SHED, INC. APPELLANT
ORANGE CRATES AND MORE, COMPANY, APPELLEE

BACKGROUND OF APPEAL:

Part 1 of Appeal: Pottery Shed, Inc. ("Pottery Shed") has been found to have infringed copyrights of Orange Crates and More, Company ("Orange Crates") by using in its 2003 summer product catalog ("PS 2003 Summer Catalog") one or more copyrights held by Orange Crates either as the copyright holder or by license to articles, photographs and text appearing in Orange Crates' 2002 Winter Catalog ("OC 2002 Winter Catalog"). As a consequence of the finding of infringement in the District Court, a judgment has been entered for Orange Crates. As part of the judgment, Pottery Shed has been permanently enjoined from further distribution of the PS 2003 Summer Catalog, either by mail or on-line. Further, it has been ordered to pay Orange Crates $1.0 million dollars in lost profits, $1.5 million dollars in damages and $200,000 in court costs and attorneys fees. The copyrights which Pottery Shed is found to have infringed by copying them in its 2003 Summer Catalog consists of:

1. A dinnerware set exclusively made for Orange Crates by the Italian company, EuroDish, S.p.A. ("EuroDish"), consisting of a four pieces, a dinner plate, a salad plate, a coffee cup and a saucer, all of which were designed by EuroDish and which Pottery Barn used in an advertisement for a dining room table in its 2003 Summer Catalog

2. A set of towels bearing an Andy Warhol design which Orange Crates sold in its 2002 Winter Catalog

3. A photograph of a couple having a picnic at sunset used by Pottery Shed to display a picnic basket sold through the PS 2003 Summer Catalog which was similar to a picture used by Orange Crates in the OC Winter 2002 Catalog to show thermos bottles sold by Orange Crates ("*picnic picture*").

4. The layout of text and images on page 43 of the OC 2002 Winter Catalog which has been duplicated by page 64 of the PS 2003 Summer Catalog

Part 2 of Appeal: A second judgment of the District Court from which Pottery Shed appeals concerns a motion for summary judgment made by Pottery Shed in response to a motion for a preliminary injunction by Orange Crates seeking to enjoin Pottery Shed from continuing to offer, as on on-line service, a swap shop for customers who were not happy with purchases they made from made from Pottery Shop's catalogs and wished to see if other Pottery Shed catalog customers were interested in exchanging their unwanted purchases. All purchases involved in this motion were also made from the PS 2003 Summer Catalog. The court denied Pottery Shed's motion for summary judgment and entered an order for a preliminary injunction, finding a likelihood of contributory and vicarious infringement on the part of Pottery Shed.

For the following questions, please choose the argument you wish to make, check the box, and explain your reasoning.

Question 1: In representing Pottery Shed, your best argument in defense of your client's use of the EuroDish dinnerware set is that:

☐ The dinner set is not copyrightable
☐ Orange Crates cannot sue Pottery Shed since it does not hold the copyright in the dinner set
☐ Pottery Shed bought a set of the EuroDish dinnerware from Orange Crates and photographed the purchased set
☐ Pottery Shed's use of the dinnerware was fair use

Reasoning: _____
_____
_____
_____
_____
_____

Question 2: In order for Orange Crates to sustain its claim of copyright infringement of the depiction of the Andy Warhol designed towels in its catalog, Orange Crates will have to convince the Court that:

☐ As the owner of the towel set, it has the right to control the copyrights in it
☐ It is the author
☐ It has acquired a transfer of copyright in the design

☐ The towels in the PS 2003 Summer Catalog are substantially similar to the towel set shown in the OC 2002 Winter Catalog

Reasoning: _____

Question 3: Pottery Shed's best argument for overturning the lower court's finding that it has infringed Orange Crates' copyright in the *picnic picture* will be:

- ☐ A couple watching the sunset is not protectible expression
- ☐ The *picnic picture* is not copyrightable due to the merger principle
- ☐ The picture of the couple and sunset was taken in a public place
- ☐ Pottery Shed has a First Amendment right to use the *picnic picture* in its advertising

Reasoning: _____

Question 4: Citing case law precedent will be important as part of Pottery Shed's argument for overturning the District Court's decision as to Pottery Shed's infringement of the Page 43 layout in the OC Winter 2002 Catalog. The best precedent and argument for Pottery Shed to use is:

- ☐ *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*
- ☐ *CCC Information Services v. Maclean Hunter Market Reports*
- ☐ *Baker v. Selden*
- ☐ *Morrissey v. Procter & Gamble Co.*

Reasoning: _____

Question 5: Orange Crates will be able to sustain the lower court's finding of contributory infringement by Pottery Shed as a result of its on-line swap shop provided it can show:
[NOTE: for questions 5 & 6 only, please check the two boxes that are relevant]

- ☐ Pottery Shed charged a fee for its customers' use of the on-line swap shop
- ☐ Orange Crates had sent Pottery Shed written notice of its claimed infringements

☐ Pottery Shed had the ability to terminate its customer's use of the swap shop
☐ Customers participating in the swap shop downloaded pictures of the items they wished to swap from Pottery Shed's on-line catalog

Reasoning: _____

Question 6: Orange Crates will be able to sustain the lower court's finding of vicarious infringement by Pottery Shed as a result of its on-line swap shop provided it can show: **[check the two boxes]**

☐ That upon notification of infringing activities by Orange Crates, Pottery Shed turned a "blind eye"
☐ Pottery Shed's customers made purchases from the PS Summer 2003 Catalog due to the swap shop
☐ Pottery Shed is the copyright holder of the software that runs its on-line catalog ordering service
☐ Pottery Shed's "taking down" of the on-line swap shop will prevent all future on-line infringements

Reasoning: _____

Question 7: Pottery Shed will be able to get a reversal of the lower court's order for a preliminary injunction based on the likelihood of finding that Pottery Shed is a contributory and/or vicarious infringer due to its customers' use of the on-line swap shop if it can show:

☐ It is an internet service provider (ISP)
☐ The swap shop is used for lawful purposes
☐ It is registered with the U.S. Copyright Office as required by the Digital Millennium Copyright Act
☐ The swap shop is a transformative use of the copyrights in the OC Winter 2002 Catalog

Reasoning: _____

Question 8: In its appeal of amounts of damages, lost profits, costs and attorneys fees awarded to Orange Crates, Pottery Shed has a likelihood of success if it can show:

☐ That the court has failed to take into account when assessing Pottery Shed's profits that Orange Crates had licensed rights to its catalog copyrights to Loomingdales for a license fee of $100,000.

☐ Since all of the alleged infringements resulted from use of one catalog, the court should have awarded damages only on the basis of one infringement
☐ Attorneys fees should not have been awarded because Pottery Shed's infringements were not willful
☐ The $1.0M award based on profits should be reduced since Orange Crates failed to show that Pottery Shed sold any picnic sets through its catalog sales

Reasoning: _____

END OF EXAM ☺