

FINAL EXAMINATION

COPYRIGHT LAW

P.N. Davis

Friday, April 28, 2000

8:30 - 11:00 AM

THIS IS A TWO HOUR AND 30 MINUTE EXAMINATION.

THIS EXAMINATION CONSISTS OF FIVE (5) PAGES (not including this page).

THIS EXAMINATION CONTAINS FIVE (5) QUESTIONS.

I = 60 min. II = 20 min. III = 25 min. IV = 25 min. V = 20 min.

FILL IN YOUR EXAMINATION NUMBER ON THE BLUEBOOK STICKER.

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YOU MAY BRING INTO THE EXAM YOUR COPY OF THE STATUTORY SUPPLEMENT, with any notations in the margins and blank pages you care to make, but no page inserts.

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Instructions:

1. These questions will be graded on the basis of the times indicated with each questions. The indicated time for the questions total 2½ hours. You will be given 2½ hours to write the examination. Budget your time carefully or you may not finish.
2. Be sure to state a result whenever a question asks for one. Merely stating the arguments on both sides of a legal issue will result in only partial credit because you will not have completed the analysis required by that type of question.
3. If you find it necessary to make factual assumptions in order to answer a question, be sure to state the assumption.
4. Do not assume additional facts for the purpose of avoiding a legal issue or making its resolution easier.
5. Comment briefly on each legal issue reasonably raised by the questions and on each reason for your answer, even when you decide that one legal issue or reason controls the result.
6. The difference between triumph and disaster may lie in a **careful** reading of the questions.

I.

(60 minutes)

A freelance photographer seeks your advice on the following question.

She proposes to photograph the stained glass windows in several churches in mid-Missouri. Each window is unique. In 2001, she will author and publish selected photographs in a book on church stained glass windows. The photography will be done from the interior of the churches. She intends to mention the names of the artists who designed and constructed each group of windows. In all cases the photographer will be given permission to photograph the windows by the respective churches. The question is whether the photographer must also obtain permission from the artists who designed and constructed the stain glass windows.

Windows in three (3) churches are involved. The first is a church whose windows were installed in 1935. The second had its windows installed in 1985. The third had its windows installed in 1995. Assume also that the windows had never previously been photographed or published in a book. Assume in each case that the respective churches did not specify the subject matter of the stained glass windows, but did approve their final designs, and did not supervise the construction or installation of the windows. Assume that the contracts between the respective churches and respective stained glass window creators dealt only with payment.

With respect to each of the three (3) groups of stained glass windows, discuss all relevant legal issues. State a result for each group of windows. Is there any additional information you need to obtain to be able to reach a legal opinion with respect to each group of windows?

II.

(20 minutes)

If a member of Mid-Missouri Railfans Club shows a copyrighted railroad video at a club meeting, is he violating any rights of the copyright owner? The videos are produced by specialty companies in the railroad video market and sold for about \$20 to \$30 in boxes marked on the outside "for home viewing only" [there is no further elaboration about this inside the box]. The member whose video is shown is not reimbursed for the cost of purchase. Club meetings typically have about 15 persons in attendance and are held either in a meeting room in a community center or in an alcove of a hobby shop (in view of other customers). The owner of the meeting place does not charge a fee for its use. The TV and VCR used to show the video is provided by the owner of the meeting place. Members have known each other for many years, but generally do not socialize together except at club meetings and shows. A few of them get together fairly frequently to build their individual model railroad layouts, but that is not regarded as a club activity. The public is invited to attend Railfan meetings in meeting notices sent to the media, but rarely do nonmembers attend. The club is a nonprofit unincorporated society. Its understood objective is to provide programs on railroad/railfan subjects for their own enjoyment and for edification of the public. While annual membership dues (\$12 per year) are collected to defray the cost of a monthly newsletter and of refreshments at meetings, no admission fee is charged to attend meetings.

Discuss all relevant legal issues. State a result.

III.

(25 minutes)

In 1989, while vacationing over the Labor Day weekend, four couples created a mythical family with the surname "Schitt." The Schitt family, whose members evoke rather inelegant images, initially was only an inside joke between the couples. But over the next year they determined that the Schitt family had marketable potential. They evolved a family tree design (in the form of a willow tree with names of family members printed on boards langing from various tree limbs) and a geneology text. They decided to market a t-shirt with the family tree design on the front and the text on the back of the shirt.

They formed a partnership called *Treedreams*. When they had perfected their design and text, they hired Jim Tyler to prepare the silkscreens needed to printed the design and text on t-shirts and to produce the t-shirts. Using the partners' design and text, Tyler made only minor alterations to them necessary to enable good reproduction by silkscreen technology. The partners gave Tyler permission to market the t-shirts in his store, while they sold the t-shirts in bulk to retailers in other cities.

After a couple of years, the partners decided to have another company print their t-shirts and terminated their agreement with Tyler. A few months later, they discovered that Tyler was still printing their t-shirts from the original silkscreen and selling them in his t-shirt store. Furthermore, Tyler had placed on the bottom of the front and back of the shirts the notation, "© 1996 Jim Tyler." The partners had not placed a similar notation on their shirts either while Tyler was producing them or later. After obtaining a copyright registration in 1998 for design and text on the front and back of their t-shirts, the partners sued Tyler for copyright infringement. It was at this time that the partners discovered that Tyler had registered his copyright in 1996.

Should the court grant damages against Tyler for past production of the Schitt family t-shirts and an injunction against future production? Or should the court grant damages and an injunction against the partners? Discuss all relevant legal issues. State a result.

IV.

(25 minutes)

KVVV-TV produces four local news broadcasts each day, and places a notice of copyright at the end of each newscast. A news program consists of several self-contained news stories originating outside the studio and linked together by live commentary by the anchor persons, along with a weather report and shorter news reports originating within the studio. KVVV-TV records the entire program on videotape and audiotape. It keeps a written transcript of each program for a year and the audiotape for an indefinite period of time. It also retains videotape copies of all the news stories taped before the newscast and of all stories originating live from outside the studio. But the station erases the videotape of the entire newscast a week after the program is aired; that practice destroys any record of the visual element of the newscast broadcast live from the studio (such as the commentary and short news stories by the anchors).

While KVVV-TV does not market videotape copies of its news stories, it will provide videotape copies on request for \$100 each. That revenue comprises a very small part of KVVV-TV's total profits.

TeeVee News Clips videotapes newscasts from several TV stations and sells videotape copies of portions of those newscasts. It has developed a substantial business of selling these TV newsclips as part of its larger newspaper clipping service. Tapes cost between \$ 35 and \$ 65, depending on their length. TeeVee does not seek permission of any TV station before selling those videotapes and it does not place a notice of copyright on the tapes. A label on each tape says that the tape is "for personal use only, not for rebroadcasting." TeeVee retains its videotapes for a year before erasing them.

After registering its copyright on several tapes sold by TeeVee, KVVV-TV sued TeeVee News Clips for copyright infringement. Should the court grant damages and an injunction to KVVV-TV? Discuss all relevant issues. State a result.

V.

(20 minutes)

Briefly define the following terms:

- (1) compilation
- (2) originality
- (3) derivative work
- (4) termination
- (5) first sale doctrine
- (6) contributory infringement
- (7) statutory damages

COPYRIGHT LAW

P.N. Davis
Winter 2000

I. (60 min.)

- artist has exclusive right to reproduction
 - publication of photographs is reproduction
 - if the artists' copyrights are still in force, the photographer must obtain the artists' permission to publish the photographs
- stained glass windows are unpublished
 - publication requires reproduction in multiple copies in a fixed medium of expression
 - there was no reproduction here – each window is unique
 - the windows are publicly displayed (like a painting in a gallery), not published
 - public display is not the equivalent of publication
 - thus, the copyright rules to be discussed are those involving unpublished works

1935 windows:

- copyright on unpublished material is governed by state common law
 - 1909 Copyright Act governs material created prior to Jan. 1, 1978
 - 1909 Act covered only published material
 - *note*: duration of copyright for published works is 28 years, renewable for an additional 28 years
 - the second term was extended by the 1976 Act to 47 years (for a total of 75 years)
 - the second term was further extended by the 1998 Amendment to 67 years (for a total of 95 years)
- duration of a common law is perpetual, or until published (when it fell under the 1909 Act)
- transfer of common law copyright is impliedly transferred with transfer of the physical work of art (*Pushman* rule)
 - unless express contract provides otherwise
 - here, there is no express contractual provision providing that artist retains copyright
- thus, permission of artist is not required

1985 windows:

- 1976 Copyright Revision Act was extended to unpublished material in a fixed medium of expression [§ 102(a)]
 - Act covers works created on or after Jan. 1, 1978 [§ 301(a)]
 - stained glass windows are graphic works [§ 101] in a fixed medium of expression
- duration of copyright in works created under 1976 Act (*i.e.*, in 1985) is life of author/artist + 50 years [former § 302(a)]
 - extended by 20 years in 1998 Amendment [current § 302(a)]
- thus, the copyright will still be in force in 2001
- creator of graphic work has exclusive right to reproduce the work [§§ 106(1), 113(a)]

- 1976 Act reversed the *Pushman* rule and provides that transfer of the physical work of art does not imply a transfer of the copyright to the purchaser [§ 202]
 - a written assignment of copyright is required to transfer the copyright [§ 202]
 - there was none here
- thus, the artist retains the copyright in the windows
- 1976 Act provides for work-for-hire transfers of title in limited situations [§ 201(b)]
 - they includes works created by (1) employees, and (2) certain commissioned works
 - artist here was not an employee
 - § 101 provides that work-for-hire doctrine can apply to parts of collective works, movies, translations, supplemental works, compilations, instructional texts, tests & answers, and atlases
 - if artist & buyer enter into a copyright assignment contract before the physical work is transferred
 - stained glass windows do not fall into any of those categories
 - in the case of all other commissioned works, the artists retains the copyright
 - thus, the artist here retains the copyright in the windows
- Act in 1985 required affixation of a copyright notice to published works as a prerequisite to protection [former § 401(a)]
 - the question does not say whether a notice was affixed to each of the windows or its frame
 - if no copyright notice was affixed, the work is presumed to be in the public domain
 - (the 5-year grace period for curing failure to affix a notice has elapsed)
 - (this rule was abolished on Mar. 1, 1989, when U.S. adhered to Berne Convention)
- HOWEVER, the notice affixation rule applies only to published works; no notice need be affixed to an unpublished work [former § 401(a)]
- thus, permission of the artist is required

1995 windows:

- the same rules applying to the 1985 windows apply to the 1995 windows
 - in 1989, the notice affixation rule for published works was abolished; affixation now is optional [current § 401(a)]
 - but rule doesn't apply here anyway, because there is no publication
- Visual Artists Rights Act of 1992 creates artists' moral rights -- integrity, paternity, nonattribution [§ 106A]
 - here, the Act will not be violated: the photographer/author will mention who designed & constructed each group of windows; the other rights are not involved
- *bonus*: Architectural Works Act of 1990 creates copyright in buildings [§ 102(a)(8)]
 - applies prospectively only to buildings constructed after effective date of Act
 - Act applies to building interiors, including stained glass windows
 - architect's permission is needed
 - however, provision covers only overall design, and does not cover individual standard design elements (such as, windows) [§ 101]
 - since windows are unique, there are part of the building's overall design; copyright in windows would belong to architect, but only if architect designed the windows
 - but, here, the windows were designed by the stained glass window artist, not the

architect

- *note*: general license to make pictures of paintings of building exterior, if visible from a public place [§ 120(a)], does not apply; photographs will be made from interior
- if church has any copyright interest, it has given permission
 - but here, only windows are being photographed, and architect does not own copyright in the windows
- thus, only artist's permission is needed
- *note*: fact that photographs will themselves have originality does not negate their potential to infringe on the copyright in the windows
 - since they will be derivative works [§§ 101, 106(2)]

II. (20 min.)

- copyright owner has exclusive right to perform the work [§ 106(4)]
- showing of a video is a performance
- issue is whether showings at meetings are public performances
- public performance occurs
 - (1) at a place open to the public, or
 - (2) before a substantial number of persons outside the normal circle of family & social acquaintances [§ 101]
- right is not limited to "for profit" public performances
- copyright owner can control nonprofit performances
 - unless excepted by § 110
 - the exceptions include, *inter alia*, teaching activities at nonprofit education institutions, nonprofit public performances
- nonprofit public performance exception [§ 110(4)(A)] may apply, since:
 - there no direct admission charge
 - nonmembers are charged no fee at all
 - membership dues are not used to reimburse the cost of the video purchase or showing
 - the owner of the meeting place receives no fee for its use
 - the copyright owner's right to bar the exemption does not apply
 - facts do not indicate that the required 7 days' notice prior to the performance was given
 - the "home use only" notice on the video box does not constitute such a notice since it does not address a specific performance
- BONUS: fair use doctrine [§ 107] probably does not apply
 - use does not fall within any of the 7 listed types of fair use (criticism, comment, news reporting, teaching, scholarship, research)
 - see 4 factors described in Question IV
- BONUS: "shrinkwrap" license rule does not apply
 - no license contained within box
 - not software
- RESULT

III. (25 min.)

- affixation of a copyright notice has not been a prerequisite to copyright protection since Mar. 1, 1989 [§ 401(a)]; protection exists from the time of creation even in the absence of notice affixation
 - here, the family tree design and text were created after Mar. 1, 1989
- registration is not a prerequisite to copyright protection (and was not even before Mar. 1, 1989)
 - registration is a prerequisite for domestic copyright owners for access to the federal courts for enforcement [§ 411(a)]
 - registration creates a rebuttable presumption of validity [§ 410(c)]
 - here, Tyler benefits from that presumption; partners must affirmatively disprove validity of Tyler's copyright
- registration does not involve any examination
 - so it is possible for two claimants to ownership of a copyright in the same work to register
 - first registrant gets the benefit of the rebuttable presumption of validity
- copyright ownership goes to the creator of the work [§ 302(a)]
- if two or more persons intend to create a unitary work, they are joint creators [§§ 101, 302(b)]
 - they must intend to merge their inseparable or interdependent contributions into a unitary whole [§ 101]
- BUT, a person who merely "performs the mechanical tasks of putting the material into the form distributed to the public" is not treated as a joint creator [*Andrien*]
- here, the concept of the family tree design, basic art work and selection of text was done by the partners, not by Tyler
- thus, this is not a joint work with Tyler
- copying is proved by showing (1) access, and (2) substantial similarity between the copyrighted and alleged infringing works
 - as preparer of the silkscreens and original producer of the t-shirts, Tyler clearly had access
 - since the t-shirts Tyler produced were identical to those he originally prepared under contract, they were more than substantially similar
- Tyler copied and infringed; partners are entitled to damages and an injunction

IV. (25 min.)

- copyright subsists only in "works ... fixed in a tangible medium of expression." [§ 102]
 - fixation must a permanent and stable form "to permit it to be perceived, reproduced, or otherwise communicated." [§ 101]
 - fixation of a transmission can be done simultaneously with the transmission [§ 101]
 - thus, videotape made simultaneously with a TV broadcast is "fixed"
- erasure of the videotape does not cause loss of copyright
 - fixation launches the copyright; Act does not provide that the fixed form must continue to exist for entirety of copyright term
- copyright owner has exclusive right to reproduce its work [§ 106(1)]
- copier may have a defense under fair use doctrine

- there are 7 listed types of fair use (criticism, comment, news reporting, teaching, scholarship, research) [§ 107]
- but there could be other types of fair use
- TeeVee can argue that its service enhances access to the news
- but it is not reporting the news, but providing *ex post facto* copies
- analysis of fair use is done considering the four factors listed in § 107
 - *purpose & character of use*: TeeVee's is commercial, but does enable *ex post facto* access to news stories; it is not a productive or creative use of the news stories, but literal copies
 - *nature of copyrighted work*: KVVV-TV's newscasts have only short-term marketability
 - *amount & substantiality of portion used*: TeeVee copies entire news stories; if a newscast is thought of as a compilation of copyrighted shorted news stories, then TeeVee has copied entire works. If KVVV-TV's newscasts are considered single works, TeeVee copies entire newscasts for future exploitation.
 - *effect on potential market*: TeeVee takes advantage of a market that KVVV-TV has chosen not to serve, but which it could serve very easily; thus, KVVV-TV's potential market may be harder to enter.
- RESULT

V. (20 min.)

Briefly define the following terms:

- (1) *compilation*: work formed by collection & assembly of preexisting material/data coordinated to form an original work
- (2) *originality*: created by author's independent expression
- (3) *derivative work*: work based on 1 or more preexisting works
- (4) *termination*: right of copyright owner to terminate a derivative work license between 35th and 40th year of license
- (5) *first sale doctrine*: owner of lawfully acquired physical copy is entitled to sell or dispose of possession
- (6) *contributory infringement*: knowingly aids another in infringement
- (7) *statutory damages*: alternative to actual damages, when they cannot be calculated or are inadequate