Answer-to-Question-_1_

(a)

Dear Lance,

You probably have a valid copyright in the eagle helmet graphic. Although you drew inspiration from Rockefeller's drawing, you have independently created the work by substantially modifying his design (Feist). Your work also satisfies the modicum of creativity standard because of the aesthetic choices necessary to convey ferocity and patriotism (Feist).

Your work most likely enjoys only thin copyright protection, however, because of the public domain elements involved (Boisson). You cannot copyright the image of an eagle or red stripes. However, the combination of these elements and the stylized depiction of the eagle can be copyrighted. Merger probably does not apply because as the other helmets attest, there are myriad ways in which an eagle may be depicted on a helmet, so granting you a copyright will not stifle other artists (Morrissey). Even if a court holds that the proper level of abstraction dictates that a "defiant, patriotic eagle" is an unprotectable idea, trope, or scenes a faire (Hope Poster), there is still sufficient expression in your work to give it some protection (Nichols).

One concern, however, is that you have drawn on potentially copyrighted works yourself, in which case your design will lose protection for the copied elements (Prince). I discuss

the Rockefeller drawing in detail below. Ultimately, you have not infringed on Rockefeller's copyright, and even if you did, a court would probably deny protection only to the portions pervaded by infringement. Those portions were unprotectable ideas anyway.

Your work is painted on a helmet, satisfying fixation.

The defendants may argue that your work qualifies as a useful article because you needed a design that would fit the helmet's shape, which meant your aesthetic choices were constrained by function (Pivot Point). But this goes too far, because at the first step of the useful article test, the only function of a painting on a helmet is to display itself (Pivot Point, Taxidermy case). Your work is visual art, one of the most protected categories.

You almost certainly own the copyright in your work. Welker has claimed joint authorship, but simply requesting a "hot" design means that she lacked creative control over you (Titanic). You occupy the status of the "master mind" behind the work (Aalmuhammed), and the two of you never agreed to be joint authors (Thompson). Simply saying "it's my eagle" after the work was completed cannot satisfy the requirement that joint authors objectively present themselves as such. Nor does work for hire apply, since you are not Welker's employee under agency law, and visual art is not an enumerated work for hire category (CCNV).

Brain Buckets may also assert ownership under work for hire, but you did not create the helmet within the scope of your employment (Avtec). You completed the project after

hours, and like the Avtec employee intended to hide the project from your boss. Although you did not intend to defraud your employer, you at least were not serving Buckets' purposes. Finally, although this is the same type of work you were employed to do, you could argue it was more challenging and thus categorically different.

(b)

You are most likely to prevail in a suit against the Figure 9 helmet, which mimics both the eagle and the red stripes of your design. However, you should assert that each defendant has violated your rights of reproduction, derivative works and distribution (106(1-3)). Since the right to produce derivative works replicates the reproduction inquiry, I consider both together (see Castle Rock).

The manufacturers most likely copied your work. The copying was not mechanical, but rather we will allege conscious or subconscious copying (My Sweet Lord). It is unlikely that we could obtain direct evidence of copying. We could prove that the manufacturers had access to your work because Welker wore the helmet on national television, and helmet manufacturers are likely to watch their products in action (Three Boys Music). The access claim is even better than in Three Boys because here the time gap between the display of your helmet on television and the copying is minimal, whereas the Three Boys court held that even decades was not too long. Even if access is questionable, the helmets are probatively similar, which will diminish the need to show access. We would not prevail on striking similarity because given the number of fierce eagles in the public domain, copying is not the only way the manufacturers arrived at their design (Nimmer).

There might even be some common errors in Figure 9.

The defendants' helmets are tangible, intelligible, and fixed for more than a transient duration, and therefore qualify as copies (Cablevision).

We must be careful about which jurisdiction we file in, because we stand a better chance at proving substantial similarity in courts that rely on ordinary observers. Under the total concept and feel test, all of the helmets are substantially similar to yours (Mannion). The apparent appropriation test is more demanding, and I suspect that a jury would not immediately sense that the Figure 10-12 helmets necessarily appropriated your work (Steinberg). We would almost certainly lose on the more discerning observer test because once the public domain elements are brought to the jury's attention, the similarity between fierce eagles in this particular pose falls out of the inquiry (Boisson). The abstraction-filtration-comparison test would be even worse because there the filtration would be more pronounced and the jury would be even less reliant on its immediate sense of similarity (Altai). Fortunately, this test is usually only applied to software. Finally, the extrinsic/intrinsic test will not help us because your work seems to lack any nuanced technical elements that are not immediately obvious to the jury (Swirsky). You could of course correct me on this point, as I am not a painting expert.

None of the defendants is likely to prevail on a fair use defense. The nature of their use is commercial, unless these helmets were made for free for amateur sports (Harper and Row). More importantly, none of these designs is transformative (Campbell). They are not parodying your work, and in fact they are conveying the same idea--ferocity and

patriotism in competition--as your work (Gaylord, Castle Rock). They are even being used in the same setting, namely professional sports. Arguably, the nature of the use differs depending on the sport; an eagle in a sport centered on speed is not the same as an eagle in sports with a focus on aggression. But this is not the kind of different use that courts have held to be fair (Cariou, Green Day). Nor is the use socially beneficial (Google Books). Although the copying was probably innocent and not "shady," the nature of the use favors you overall (Harper).

The amount of copying is near-total except in Figure 11. But this factor favors you because, since the defendants used your work commercially and not in a transformative manner, any amount of copying is probably too much. Your work was published but creative, so this third factor is neutral or slightly in your favor.

The defendants have likely had a strong impact on your potential market. You were quite likely to license your artwork to other helmet manufacturers, and indeed an artist can expect demand for their work once it is showcased on national television. The defendants will argue that you had no intent to commercialize your design and wanted to keep the project from your boss, but this does not mean you lacked a *potential* market for your design.

The defendants will also assert various idea/expression defenses similar to those I detailed in the "originality" section. Again, their claim will be that there is no way to convey the idea of a patriotic eagle without approximating your design as they have (Morrissey). Additionally, they will argue that the only reason the designs appear similar

is that they are located on helmets, and the idea of placing an eagle on a helmet is not copyrightable.

If the helmets are found substantially similar, the defendants have violated your right of distribution. First sale does not apply, and the manufacturers are liable even if they are overseas (109, 609).

The defendant manufacturers are in no way liable for secondary infringement. Anyone wearing their helmets is not infringing on your right of public display because they are simply displaying the design at the location of the copy. Without anyone else directly infringing, the manufacturers cannot be secondarily liable (Betamax).

Nor will you win on a moral rights claim. Although you fall under VARA, there has been neither misattribution or mutilation of your original work.

(c)

It is highly unlikely that you would prevail against Atlantic. You could allege that the photo violates your rights of reproduction, derivative works, distribution, and public display, but to no avail.

Atlantic has probably violated your right of reproduction. The photo mechanically reproduces your design. Access need not be proven because this is clearly a photo of your design (Three Boys). Finally, the photo is certainly substantially similar to your design in

that it depicts the design as it is worn by Welker. Merely reproducing a work in a new medium does not excuse this kind of copying (Koons, couple on bench sculpture). Moreover, Atlantic has distributed the work via its magazine.

I cover these arguments briefly because Atlantic would probably concede these points but win on fair use. As a preliminary matter, it seems unlikely that photographers are liable for incidentally capturing copyrighted material while photographing something else, here Welker.

As to fair use, the photo is transformative because it combines your design with other images to convey the idea of "A New Cold War." The photographer had to use an image of an American olympic athlete to adequately express this idea, just as the Koons defendant had to use a typical commercial image for satire. This kind of use is socially beneficial in that it helps the public understand global politics (Google Books). You may argue that the photo conveys the same idea as yours, namely patriotism or ferocity, but this idea is modified by the surrounding Cold War context (Gaylord). Thus, while this is a commercial use, the nature of use factor favors Atlantic.

The amount of copying is permissible because it was necessary to convey the photo's point (Koons). The nature of the original factor is neutral, as above. Finally, the impact on your potential market is minimal. As noted, your primary market is helmet manufacturers, not photographs of the helmet (Gaylord). Even if you were likely to license such photos, this factor weighs against you because any impact on your revenue is minimal.

Because Atlantic wins on fair use, you lose on the other 106 claims.

(d)

You may be entitlted to damages against the manufacturers. Statutory damages are unavailable because you probably have not registered your work, though you should register now in case the manufacturers continue infringing (Hipple). You have no actual damages because you were not selling your design. The defendants' profits are your best bet since many helmets have likely been sold. You need only show their gross revenue, and the manufacturers will deduct their costs. Unlike in Koons, almost all of the income is attributable to your creative work; the defendants' reputations probably have minimal effect on the price of the artwork.

The defendants may argue that their profits are attributable to NBC, which did the bulk of the work in popularizing the helmet. Similarly, Welker's fame and performance helped popularize the helmet. However, non-creative work is given little weight in comparison to creative work (Frank Music). Thus although NBC and Welker contributed non-creatively by advertising your work, the court will probably attribute a substantial portion of the profits to you.

A permanent injunction against at least the Figure 9 manufacturer is possible. A preliminary injunction is less likely because any harm can be rectified at final judgment (Salinger). However, under the new eBay standard, a court may note that damages are

sufficient to compensate you. You have done no work to sell your design, and the defendants likely infringed innocently, so an injunction may be a windfall to you (cf. Abend). The balance of hardships is in your favor, however, and public policy probably favors a strong remedy for "starving artists" such as yourself against manufacturers.

Attorney's fees and costs are likely, depending on the level of damages you receive (Gonzales). Once again, copyright policy demands that "starving artists" have the incentive and means to bring suit (Fogerty). My only concern is that the case may be so close that the defendants appear innocent, causing the court to exercise its discretion against you on costs.

(e)

First, we must ask if anyone owns a valid copyright in the Rockefeller work. The drawing sounds stylized enough to be original (Feist), and qualifies as a visual work (102). The idea/expression analysis essentially repeats what I have mentioned about your own work: A fierce eagle is an idea, but aesthetic choices beyond this are expression (Nichols, Boisson).

We need to research what happened to the copyright in this drawing. It seems likely that Rockefeller sold his copyright in toto to Madison or Harvard. In this period, contributors to a collective work had to assign all of their rights (Tasini). Harvard probably also obtained the renewal rights, which it may still possess unless Rockefeller died before the renewal term, in which case his heirs own it (Abend). The drawing may have lapsed into

the public domain in various ways; perhaps Harvard never obtained the renewal right, or no one exercised the renewal right. Rockefeller, Madison, or Harvard may have published without notice, though as sophisticated parties this is unlikely. Rockefeller did not "generally" publish his work by showing it to the Post Office.

Even assuming that someone owns the Rockefeller copyright, you have not infringed because your works are not substantially similar. You had the work in mind when producing your own (My Sweet Lord). Access would be difficult to prove unless a defendant subpoenaed your library records, and the works may only be mildly probatively similar (Three Boys). I may have an ethical duty to admit access. Striking similarity is unlikely. The works are substantially similar under a subjective test (Mannion, Steinberg), but once public domain elements are taken into account, your modifications render your work dissimilar to Rockefeller's (Boisson, Swirsky). This is because all the expressive elements of the work are different, while the idea of a fierce eagle is the same. The pose is identical, but merger may apply because there are few other poses by which to convey a fierce eagle (Morrissey). Finally, you have added red stripes, which likely weighs in your favor although defendants cannot escape liability by showing how much they did not copy.

Your design probably does not qualify as fair use, primarily because it is not transformative (Campbell). You are conveying the same patriotic ideal that Rockefeller intended (Castle Rock). Impact on the potential market is high because the owner was likely to license works such as yours.