

## Copyright Exam 2013

### Question #1

#### Model Answer A

Hi Luke,

The first thing we need to analyze is whether you have a valid copyright and, if so, what the extent of that right is. As you know, the Hamsa design is very common and has been in existence for a long time. However, that does not prevent you from getting a valid copyright as long as your creation was independently created and has the minimal level of creativity necessary to qualify for protection (Feist). I would want to know whether anyone helped you create the design, as that person might want to claim joint authorship, or whether you created it as an employee within the scope of your employment, as this would be a work for hire. From the looks of it though, you created it yourself and independently of other works. There is a bit of a difficulty with the requisite creativity, because the elements that make up the design itself have been around for a long time as well and would most likely be considered scenes a faire, such as the overall curvature of the hand, an eye in the palm, and various decorative flourishes. Nevertheless, a combination of unprotectable elements is indeed copyrightable (Boisson) and, combined with your political twist on the classic symbol, is likely going to be enough to get you protection. Note, however, that this protection is likely to be thin for this very same reason--your work is heavily based on public domain elements.

Second, we want to determine what kind of work this is. Your design would be a pictorial or graphic work under 102(a). The earring made by Carol is also likely to fall under this category as well. Although the possible defendants would most likely claim the earring is a "useful article," and thus would have to undergo the physical or conceptual separability tests, the earring does not have

a utilitarian purpose besides displaying its own appearance--as a fashion accessory, this is exactly what it is supposed to do. In any event, it would bring protection of your underlying design with it (an infringement of her work would also be an infringement of yours).

It also looks as though the design was fixed in a tangible medium before you brought it to Carol. You have a valid copyright, but I would want to know if you have registered the copyright, which is a prerequisite to bringing suit and would give your design presumptive validity in court.

Finally, I would want to know if Carol made any other copies of such earring, the relevance of which will be discussed shortly.

### **Possible Infringements**

I would like to mention up front that you probably don't have a claim against Katherine, the Globe photographer. Though your design was recreated when the photo was taken and disseminated, thus implicating 106(1) and 106(3), you almost certainly gave the newspaper an implied license. Even if you didn't, however, their use would likely be considered fair, as it is for purposes of news reporting (one of the illustrative uses listed in 107), and your earring is an important piece of the story on which they were reporting. I would not pursue a claim against the Globe.

Your most lucrative claim would be against the Acme Amulet Company. First, the fact that they reproduced and manufactured left-handed earrings that are similar to yours would implicate the 106(1) reproduction right, as well as the 106(2) right to prepare derivative works. Since 106(2) is coterminous with 106(1) in this case, I will only analyze the first.

Against Acme, you will have to prove that 1) what they created was a copy, 2) that they created it by copying yours, and 3) that they improperly appropriated copyrighted elements from your

work. The first is clearly met--the earrings Acme made are concrete, fixed, and intelligible. The second is less clear, however. Do you have any evidence that they did in fact copy? If not, we would most likely need to prove a combination of access and probative similarity between the two works. Since access can be proven either by evidence showing the defendant actually viewed the work, or by general dissemination of the work (Three Boys), I would want to know what evidence you have. For example, how popular was the Boston Globe story? It is certainly a newspaper that reaches audiences around the world, and publishes stories on the internet as well, so it might not be hard to show access. Though a higher showing of access lowers the bar for probative similarity, courts have often held that the opposite is not true (Three Boys). In other words, once you prove even thin access, all that is needed is probative similarity. Even without access, you could argue striking similarity, but that is likely not availing here because striking similarity looks at whether, as a logical conclusion, the only way the product could have been created is by misappropriation (Nimmer). Your addition of political commentary and the transformation of the hand into a left-handed version are creative, they are not novel ideas. And, indeed, the works that they are based on are both culturally ubiquitous and in the public domain. It is possible, in other words, that someone could have independently created these--so access and probative similarity is your best bet. Since probative similarity looks at all aspects of the work, it is most likely met by the products created by Acme. The test of substantial similarity for comprehensive nonliteral similarity looks at whether the defendant improperly appropriated protectable aspects of your work.

This is your biggest hurdle. There are a variety of approaches that courts use in determining substantial similarity, from the "ordinary observer" looking at the "total concept and feel" of the work (Peter Pan Fabrics) on one hand (no pun intended) to an abstraction test on the other (Nichols). Though the ordinary observer test would be

the most helpful for you, your copyright contains a mixture of protectable and unprotectable elements--indeed, the protection consists of a combination of unprotectable elements-- and thus the works would most likely be examined according to a "more discerning viewer" test (Boisson). This is going to be a close call because it is often difficult to apply in the context of culturally ubiquitous forms that have been altered slightly. Furthermore, Acme is going to claim that the conversion of the symbol into a left-hand represents an "idea," not protectable expression. I hate to say it, but the court is most likely to agree with them. Converting the Hamsa into a left-hand is creative, but an idea nonetheless due to merger doctrine--like an extremely short word. The example is somewhat analogous to scenes a faire doctrine as well. In other words, if one wanted to add political commentary to the Hamsa symbol, using a left-hand or a right-hand might be necessarily incidental or indispensable to that idea. However, it is likely that you would prevail on at least some of the Acme earrings, because the overall combination of elements is substantially similar, as in Figure 2. Like in all visual art, the analysis is likely to turn on the fact-finder's personal conceptions about what the pieces in front of them are saying (Mannion), and thus it is hard to predict. This would essentially have to be done piece by piece, and work by work.

Even so, Acme might have a fair use defense, especially in the earring designed to look like an elephant. The first factor, the character and purpose of the use, asks whether the use is commercial--which it is here--and whether the use is transformative. In *Campbell*, the Court held that a parody comments on the original work in some way, and that comment must be perceptible. The Court further held that parodies are transformative, and that the commercial presumption does not apply. As you yourself stated, you felt that the purpose of the elephant work was to "repudiate the symbolism" of your image. In other words, it parodies your work, even if it doesn't necessarily

use humor. For this reason, the fact that they essentially took the "heart" of your design is not conclusive (factor 3). Your work is creative, and therefore "closer to the core of intended protection," but it is also published in the Globe article, so factor 2 weighs slightly in your favor. While one might say that the potential market for your work was harmed (factor 4), the court in Campbell noted that the plaintiff cannot generally count the deprivation of a parody market for parodies as a harm for the fourth factor. This analysis, like substantial similarity, would have to be done for every design that Acme produces. We will want to argue, at all points, that the works do not constitute parodies so as not to get the protections afforded by the Court's analysis in Campbell.

If Acme is liable for 106(1) and 106(2) infringements, they are likely liable for 106(3) as well, for distributing the copies to vendors, as well as 106(5), for displaying the products on their website--and thus displaying them in a transmission to the public.

The vendors would also be liable for violating 106(3) by selling the products, as well as 106(5) for displaying them on the street. They would claim 109(c) real world display exception, but this only applies to ownership of works "made lawfully under this title," which does not apply to these works.

Finally, you might have a claim against the website for vicarious liability of 106(1) and 106(3), as well as direct liability for 106(5). Because the website gets a commission on the sales, they benefit financially. It is unclear, however, whether simply being able to remove the hyperlinks is enough ability and control to prevent the infringement itself (Napster). Even so, they might be saved by the DMCA's 512 provisions. On the 106(5) claim, they would likely prevail on the "server theory" that saved Google in Perfect 10-- the images themselves are not stored on their server, and thus they are not displaying a "copy."

You have another potential claim against Acme, stemming from

the Visual Artist Rights Act. If you produced less than 200 of your design, and numbered and signed the ones you did produce, you might be able to "prevent mutilation or modification" to your work that is prejudicial to your honor or reputation. This is a tough claim to win on, for a few reasons. First, the act generally applies to the actual works themselves, not derivatives or unlicensed reproductions. Second, it is hard to prove that these works are "prejudicial to your honor or reputation," especially if you are not necessarily known as an artist in the community. Third, 106A specifies that these rights are "subject to 107," and thus the same fair use analysis might excuse the behavior anyways.

## **Remedies**

### Injunctive Relief

You would have to prove irreparable injury, that damages would be inadequate (probably not true here), the balance of hardships weighs in your favor, and the public interest would not be disserved by an injunction. After eBay, courts are less willing to give injunctions, and this really isn't the type of case in which you are likely to get one in the first place; but we could try.

### Damages

Since you never attempted to sell these, actual damages would be hard to prove in court. You have no way of showing how much you would have sold and at what price, and value of use theory would be very speculative in retrospect. Your best bet would be claiming the defendant's revenues that are reasonably related to their infringing activity. This is likely to be a large amount, and would place the burden back on the defendants to show both their costs and any ways in which the profits they made were attributable to factors other than infringement. Statutory damages are based on the number of works infringed--one, here--and so would not be helpful. You are unlikely to get attorney's fees,

although it is up to the court's discretion to award them.