

395853

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Institution **Harvard Law School**
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Course / Session **S15 Fisher - In Class - Copyright**
NA
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Count(s)	Word(s)	Char(s)	Char(s) (WS)
Section 1	2500	12995	15465
Total	2500	12995	15465

Answer-to-Question-_1_

(a) If Doisneau brings an infringement suit against Red Envelope ("RE"), she will likely prevail. "The Kiss by the *Hotel de Ville*" is a expressive work of art that is covered by the subject matter of copyright and is sufficiently creative in composition, rendition, and timing to meet Feist's minimal standard (Oscar Wilde case). Although the idea of "a kiss" is uncopyrightable and is indeed a popular trope, this precise *expression* of the idea is protectable.

Likely Annette Doisneau owns the copyright in the work as her father's heir. Her father was likely the sole author of the photograph and he explicitly retained the copyright in the photo from *Life* (unnecessary because a photograph does not fall into one of the 9 categories of independent contractor WFH, nor was Doisneau an employee of *Life*). The only question is if Doisneau correctly renewed the copyright in the photo, as it was created under the previous Copyright regime. Because she is still licensing the photo commercially, it is safe to assume her continued ownership and proper registration/deposit.

The photo by RE violates Doisneau's exclusive right of modification/derivative work (106(2)). She could prove copying either through access and probative similarity (Bolton), or striking similarity. The original image is so famous that access is a given, and the photo is so similar as to pass "striking similarity," which would of course also pass "probative similarity." Doisneau would then have to prove improper appropriation via substantial similarity of the protectable features of her father's image. The "total concept and feel" (Columbia Pictures) of the two photographs, despite the color and slight differences, is of the same work. Any ordinary observer would immediately spot

the overwhelming similarities of the shots (angle, pose, background/foreground). As Robert Doisneau is dead, there are no moral rights.

If RE was not the entity to take the infringing photo, it could still be contributorily liable for printing/distributing the image with knowledge of its nature, and vicariously liable for financially benefiting from the image, which they had a right to control (Cherry Auction).

RE's only hope, then, would be an affirmative defense. It could plead independent creation, but the widespread use of the original image makes this unlikely. None of the specific defenses seem to apply here, which leaves only fair use. To apply the factors:

- 1) The nature and purpose, the most important factor post-Sony, of the second image is clearly not transformative. The image adds little to the original and does not comment on or criticize Doisneau's (Campbell). It is also a commercial use as an advertisement. This factor weighs against fair use.
- 2) The nature of Doisneau's image was expressive, and thus closer to the heart of copyright's intended protection. The image was published, but this factor still probably weighs slightly against fair use.
- 3) RE took the entire "heart" of the original (Harper&Row). It is difficult to weigh quantity, but this factor also weighs against.
- 4) The impact on the market for the original is limited as the RE image is not meant as art and, like the imitators of Ansel Adams, is not as good. This factor is neutral.

Therefore, weighing the four factors in light of copyright's purpose to protect works to spur the continued creation of works that add to society's benefit, no fair use defense.

(b) No matter the "author," Parker's sculpture could be copyrightable. The only issue would be if Parker's derivative work infringed the original piece. But because the original Rodin sculpture is out of copyright (1882), it thus has no remaining economic rights and as the artist is dead, there are no moral rights either. Even if this were not the case, Parker's work might plausibly be a fair use, as her style of "art intervention" by definition is intended to comment on the original (Green Day) and arguably "transforms" it in the same way as the "appropriation art" that courts have upheld before (see, Cariou, Blanch). Otherwise, the sculpture falls under the subject matter of copyright and although intended to be transitory, undoubtedly there are several photos documenting its existence and fulfilling a fixation requirement. The sculpture is sufficiently original because it is minimally creative and independently created (Feist). Although the idea of lovers tied together is too general (Nichols), this particular expression should qualify for some protection. Under the current (1976) copyright regime, no further action is necessary for protection.

As to *who* exactly could claim the copyright, it is likely only Parker, as neither intended to be joint authors. The question turns on whether or not Parker's sculpture was a WFH: if yes, AU owns it, if no, Parker owns it. There are only two ways for this to be the case: if Parker was an employee working within the scope of her employment or if she was an independent contractor working within one of 9 statutory categories, with a signed agreement calling the relationship a work-for-hire. The latter option is impossible, as sculpture is not one of the statutory categories. The remaining option is thus whether Parker was an employee (CCNV) and whether she created the work within the scope of her employment (Avtec). Both questions require more information, as both must be true for AI to own the copyright. It is clear that creating "art intervention" work as an artist in

residence is the type of work Parker was authorized to do, and it seems clear that she was probably motivated at least in part to serve her employer, but we need information as to whether the work occurred substantially within the time and space requirements normal to AI employees. But she would need to be an employee. There are several factors that help us discern Parker's status, including who supplied the tools; if AI was free to assign (more) work; who decided where, when, and how Parker worked; if Parker could hire assistants; the tax status of Parker to the museum; employee benefits; and control. The only information we have is that Parker seems to have been paid a lump sum of \$100,000 and only spent 50% of her time as AI's "artist in residence." The prompt also implies that the work was Parker's idea (the AI "permitted Parker") and Parker agreed only to "explor[e] the aesthetic and social dimensions..." These factors lean away from employee status, but the others could compensate were we to have more information.

(c) Johnson has likely infringed Sec.106(1), 106(5), and 106A(a) by reproducing Parker's sculpture on film. The change of medium does not protect Johnson (Gaylord).

Johnson's photograph is a "verbatim" reproduction of Parker's sculpture which he admits to taking. Thus he "copied" the work. There exist probably several fixed copies of the image on Johnson's harddrive and on the Greenframe server. The photograph is an improper appropriation because of its comprehensive literal copying of the original sculpture--Johnson changed only the medium of presentation. He has thus violated 106(1).

He has also violated the right of display. 106(5) bans displaying/showing a copyrighted work to the public. Hosting an image online that is most likely searchable and "open to the public at large" violates this right. The fact that potentially no one other

than Parker has seen the image is of no account: simply displaying the image where the public *could* see it is enough.

Finally, Johnson has violated Parker's 106A(a) right of attribution. Sculptural works fall under VARA (fine art, in single copy for museum exhibition), which entitles Parker to certain moral rights, including attribution. By refusing to acknowledge Parker's authorship, Johnson violates this right. Although the US does not cover the right of withdrawal, Parker could also potentially argue a violation of her VARA right of integrity--that the photographic representation of her supposedly-ephemeral sculpture has destroyed/damaged the work to the detriment of Parker's honor/reputation--but the case is weaker there.

Johnson does not qualify for a Sec.110 exception, so his only hope is fair use. To go through the factors again:

- 1) The character and purpose of Johnson's photograph is seemingly non-transformative and intended to be commercial (despite his inability to actually sell the image). The image offers no commentary or criticism (nor does he present the image as "newsworthy," but compare with the "Miss Puerto Rico" case study) on the original work, nor does it add anything. The only original contribution Johnson could claim would be originality of rendition: he decided to take the photo at the angle and time that he did. This is likely not enough for fair use.
- 2) The nature of Parker's sculpture is expressive, and thus more amenable to protection than a factual work. The work was quasi-published, as it was open to the public, but only in a limited way (Sallinger). This factor leans against fair use, then.
- 3) Johnson has taken a photograph of the entire sculpture, more or less supplanting the original. Although one angle does not showcase the entire work, he has taken the "heart"

of the piece. This factor weighs against fair use.

4) The impact on a market is difficult to discern here, as Parker's art is not intended to last beyond its original exhibition. There is thus no real "market" harm for the sculpture, but there is potentially harm to a derivative market of licensed images, should Parker change her philosophy on art. This factor is thus neutral.

Additionally, although "bad faith" is not supposed to impact a fair use analysis, cases like Harper&Row illustrate the judicial and jury disdain of "bad guy" uses, further limiting Johnson's claim (in practice).

(d) Parker and/or the Art Institute have several remedies in theory but few in practice available to them.

The first type would be monetary damages. Within damages, a plaintiff may request actual damages and/or defendant's profits (so long as there is no overlap, and thus double recovery). Although such estimates need not be perfectly precise, the plaintiffs here would have a hard time quantifying and justifying a monetary amount by which they were hurt: since Parker refuses to sell or even photograph her works, there is almost no conceivable market for products. It is possible that Parker's reputation has been injured, but this is unlikely, as her policy on no permanence has not been violated of her own accord. Similarly, Johnson has made no direct profits on his allegedly-infringing image. The only opportunity here would be with the possibility of indirect/incidental profits (Kismet case) if Johnson's hosting of the Parker sculpture image increased traffic on his Greenframe profile and boosted sales of other images. From these profits would be deducted reasonable costs Johnson incurred, such as hosting fees or equipment expenses, so there is probably little true recourse here.

A second type of potential damages are statutory. These are only available to works that have been registered before the alleged infringement, which is an open question here. It is unlikely, though, given Parker's artistic philosophy, that she would have properly registered and deposited her ephemeral work. The same registration problem would dog a request for fees. So the only possible money available would be to ask for costs in the event that Parker/The Art Institute won their case, but even that is at the discretion of the court. If, however, Parker *did* register her work, she could elect to pursue statutory damages within the range of \$750-\$30,000 per work. If the court were to find Johnson's conduct "willful" (i.e. "knowing"), which it might based on his illicit use of a photograph despite the museum's signs to the contrary, the statutory range could increase to \$150,000. If, however, his wholesale declaration of copyright ownership on Greenframe suggests to the court that Johnson truly thought he was innocent, the minimum penalty would decline to \$200/work. This is a wide range of possibilities with little reassurance of recovery.

It is more likely that the artist would wish to pursue an injunction. At the outset, Parker would ask for a temporary injunction, pleading irreparable harm if the image continues to be accessible. A *prima facie* case of infringement used to imply such harm, but recently courts have shifted further from semi-automatic injunctions. Still, since she has a pretty good chance at succeeding on the merits based on the above analysis, and because the balance of equity does not burden Johnson much, Parker may get her temporary injunction. If she or AI wishes to pursue a permanent injunction, they will have to meet the eBay standards and additionally prove that their harm cannot be fixed with monetary damages, the balance of the equities is in their favor, and that granting the injunction would not harm society. This is a close case, but the above discussion of

monetary damages as well as the artist's established policy of transitory art might persuade a court to grant one.

A further option I would not recommend would be to ask the state to bring criminal charges against Johnson. This is overkill because Johnson is not the cause of major and widespread infringement, nor is the value of his alleged infringement more than \$1000.

(e) Potential rights against Greenframe partially depend on whether the site is DMCA compliant or not. If Greenframe has registered a designated DMCA agent, a copyright policy that users are required to follow, and if they quickly remove flagged content, they probably qualify under Sec.512(c) for safe harbor status from third-party content. If this is the case, Greenframe would not be treated as the creator or publisher of Johnson's content and would thus be immune from a suit implicating it along with Johnson. If this is the case, Parker and/or the Art Institute can thus contact Greenframe's agent and request a takedown of the image, which is exactly what Parker wanted in the first place.

Without a safe harbor, Greenframe might be found liable for direct infringement for publicly displaying an infringing image in contravention of 106(5). They could also be secondarily liable, assuming the predicate direct infringement of Johnson. The copyright owner could plead both vicarious liability and contributory infringement. For the former, Greenframe's \$30 subscription fee likely serves as enough financial incentive to qualify the first prong of a vicarious liability test. The question that would remain is Greenframe's supervisory/control power over the works on the site. Since they probably may control the approval of accounts and generally monitor the site, there is a good argument that this case would come out like Cherry Auction. As for contributory

infringement, Parker or AI would have to prove that Greenframe had knowledge of, and directly contributed to the infringement. Knowledge may be actual or implied, but we do not have enough information to determine if either exists. It does seem likely, though, that they materially contribute to potential infringement through their purchasing and hosting software, which allow potential violations of 106(2) and 106(5). Greenframe might be able to rebut an accusation of inducing/aiding infringement, though, with a COSNU (Sony) or HOSNU (Aimster) defense, as many users are undoubtedly lawful. This would also minimize the likelihood of proving actual knowledge.