

Copyright

Spring 2016

Professor William Fisher

This examination has two parts. Part I is a three-hour in-class test, which will be administered from 9:00 a.m. to noon on April 27, 2016. Part II is an unlimited-time “take-home” essay, due at 4:30 p.m. on May 6, 2016. Your responses to the two parts will be given equal weight when determining your grade.

Instructions for Part I

Part I of the exam consists of two questions. You must answer both. You have three hours to complete your answers to the two questions. Neither of your answers may contain more than 1200 words (including footnotes). The exam mode, for this portion of the exam, is CLOSED. This means that you will not have access to the hard drive of your computer or to the Internet. Nor will you have access to your answer once you have submitted it.

This portion of the exam is also “closed-book.” You may not bring into the exam room any written material, paper, or electronic devices other than your computer. (The only exception to this rule is that a student who is not a native speaker of English may bring into the exam room a paper copy of a dictionary enabling him or her to translate English words into his or her principal language.) The proctors will supply scrap paper that you may use to take notes during the exam. In preparing your answers, you may not consult in any way with your fellow students or with any other person.

Exam4 will automatically put your Anonymous ID and word count on the exam copy. Do not write your name on any part of your response. To preserve the anonymity of your response, avoid including any information that would enable the instructor to identify you.

Until 5:00 p.m. on May 6, please do not discuss Part I of the exam with your classmates or submit to the online discussion forum for the course any comments or questions that refer to any part of the exam. The reason for this request is that, until that time, one or more of your classmates may be taking the exam on a delayed basis and students in some of the other courses affiliated with CopyrightX (all of whom have access to the online discussion forum) will be answering questions identical or similar to those contained in Harvard Law School exam.

DO NOT TURN TO PAGE TWO UNTIL THE PROCTOR TELLS YOU TO BEGIN.

Part I

Question 1

Since 1998, Miguel has been a freelance photojournalist. He lives in Wellfleet, Massachusetts (a prosperous tourist town on Cape Cod), but spends at least half of his time travelling for work. He earns a good income, but he is bored. When taking photographs of politicians giving speeches, he concentrates on making images that he will be able to license to newspapers. But, to keep himself amused, he also looks for opportunities to take unusual or irreverent photos, which he does not offer to newspapers. Instead, he prints and frames those photos – and then offers the prints for sale in a small gallery adjacent to his house.

Among the photos on sale in Miguel’s gallery in the summer of 2015 were some images he had taken of politicians manifesting surprise or alarm. Copies of a few of these are set forth below:



The politician who appears in the photograph in the lower right corner of this array is Hillary Clinton. Over the course of the summer, Miguel sold five copies of the photograph of Clinton, each for \$300. He did not keep a record of the names or addresses of the purchasers.

On April 7, 2016, Miguel was in Houston, Texas, covering the Presidential primary elections in that state. Outside a polling place, he encountered a group of men holding up signs that made clear that the men supported Donald Trump, a candidate for the Republican nomination. Most of the signs were conventional, but one poster caught his eye. A copy of it appears below.



Miguel recognized, of course, that the poster used the color scheme and motif of the famous Obama “Hope” poster (a copy of which appears at right). But something else about the “Stop” poster intrigued and annoyed him. So he took a photograph of it.

A week later, back in Wellfleet, Miguel was reviewing the photos he had taken in Texas and came upon his image of the “Stop” poster. Suddenly, he realized why it had struck him: the image of Hilary Clinton contained in the poster resembled the photograph of Clinton that appears on page 2 – which he himself had taken. The more he compared the two images, the more convinced he became that the poster had been derived without permission from his own photograph.



Miguel does not have strong political affiliations, but he loathes Donald Trump. The possibility that one of his photographs was being employed to aid Trump’s campaign infuriated him. So he set out to find its source. Using the Google “image” search function, Miguel located a website, www.trumpbros.org, that offered to send a copy of the “Stop” poster free of charge to anyone who expressed an intention to vote for Trump. The website provided contact information for its founder and operator: Tom Triumph, 2506 Main Street, Billings, Montana.

Miguel is considering taking legal action against Tom. Write Miguel a letter, assessing his legal options. If you need additional information to provide him guidance, say what that information is and why it matters. Your letter may not contain more than 1200 words (including any footnotes).

[All of the events described in this question are fictional. The photographs used to illustrate the fictional narrative were derived from: <http://thewealthwatchman.com/wp-content/uploads/2015/06/ele-3.jpg>; <http://o.aolcdn.com/dims-shared/dims3/GLOB/crop/3618x2377+0+144/resize/1028x675!/format/jpg/quality/85/http%3A%2F%2Fhssprod.hss.aol.com%2Fhss%2Fstorage%2Fmidas%2F4128811lead399834c83648a6e4ae2443%2F201094415%2Fceb353062d2742c0954b52cfa2ea4039.jpeg>; <http://poorrichardsnews.tumblr.com/post/45126739890/surprise-obama-white-house-aids-owe-333485-in>; and http://www.slate.com/articles/news_and_politics/politics/2015/09/democrats_have_the_right_to_be_angry_with_hillary_clinton_her_email_scandal.html.]

Question 2

Ann and Bill Hampden live and work in Greendale, Iowa – a small town near the middle of the state. They met in 1990, while both were students in the Musical Theatre Writing Program at New York University. Ann was training to be a playwright; Bill was training to be a composer. They decided to collaborate in writing a musical for their final project. Their product received a good grade. Soon after graduation, Ann and Bill married and moved to Greendale. Between 1991 and 2014, they wrote 20 additional musicals together. Most were only mildly successful, but one was produced on Broadway. Ann and Bill receive license fees each time one of their plays is produced, but those fees are insufficient to support their lifestyle. To make ends meet, both are employed as teachers in the drama department in the Greendale High School (GHS).

In recent years, the budget for GHS has been reduced sharply. In September of 2015, the administrators of the Greendale School District announced that, to save money, they planned to eliminate the GHS drama department at the end of the school year in June 2016. Dismayed, the teachers and students in the department developed a plan to stave off the closure. The essence of the plan: They would create and produce (in the school’s auditorium) a serious original musical. Instead of charging nominal ticket prices (as is typical for high-school drama performances) they would charge substantial amounts -- \$50 for premium seats near the stage; \$40 for regular seats. The money raised from the ticket sales would be used to help fund the drama program, and the quality of the production would convince the townspeople of the importance of keeping the program.

Ann and Bill offered to write the musical. In October, November, and December, they spent many evenings working closely together in their home, creating a grim drama about a group of alienated young adults in a rural community beset by an epidemic of heroin addiction. Most of the songs that interspersed the action were laments or expressions of anger. By Christmas, the play, entitled “Their Town,” was complete. When GHS classes resumed in January 2016, Ann and Bill spent many afternoons at the school, working with their students, rehearsing the play and preparing the sets. The male lead was assigned to James Cannel, a glowering junior who had tried heroin and who the previous year had considered dropping out of school. His anguished, smoldering persona fit the character well.

Performances of Their Town were scheduled to begin on March 1 and end on April 15, 2016. The drama department placed several advertisements for the play in the Greendale Ledger, the local newspaper. The Ledger faced a budget crisis of its own, but still enjoyed a substantial base of subscribers in Greendale and the surrounding towns. Ticket sales for Their Town were brisk.

The play was very well received. A lead article in the Ledger described it as “gripping,” “disturbing,” and “eye-opening.” The student actors – and Cannel in particular – were praised as “brilliant” and “precocious.” Word of the quality of the production spread. People began driving long distances to see the performances.

On March 15, the Ledger carried a full-page advertisement, which had been placed by Apple Computer, Inc.. A copy of the advertisement appears below.

The all-new iPhone 6s Plus



Lights. 4K camera. Action.

The game-winning shot. The impromptu dance party. The first ride without training wheels. Your daughter's first lead role. Some things are meant for video. Now you can record those events in resolution that's four times higher than HD video. You can zoom in on those 8 million pixels while you're shooting or playing your 4K videos. And with the iPhone 6s Plus, optical image stabilization is now available for videos in addition to photos. So you can shoot smooth, beautiful videos in lower light.

When this amazing recording power is combined the iPhone 6s Plus' new custom-designed 64-bit A9 chip and LTE Advanced WiFi connectivity, the possibilities become endless. Imagine that a business trip prevents you from attending your daughter's dance performance. No problem. Your husband can take his phone to the recital and stream it to you in real time – and in brilliant quality. You may not yet be able to have it all, but with the iPhone 6S Plus, you can come close.

James Cannel's parents, Kathy and Larry, are divorced but remain on good terms. Kathy, a real-estate agent, lives in Greendale; Larry, a banker, lives in California. James visits his father each summer but sees little of him during the rest of the year.

In a phone conversation with Kathy on March 20, Larry apologized for his inability to travel from California to Iowa to see James' performance. Kathy, who had recently read the advertisement set forth above, suggested to Larry a solution: They could both buy new iPhone 6s Plus phones. Kathy would take hers to the final production of *Their Town* (on April 15) and would stream the performance live to Larry in California. He happily agreed. James, informed of this arrangement, gave his best performance on that night. Larry, sitting alone in an outdoor café in Los Angeles, watched and listened to the entire performance on his new iPhone.

During the performance, Kathy occasionally typed into her own iPhone brief comments concerning the quality of the music or the acting. These comments appeared at the bottom of Larry's screen while he watched. He found them distracting but did not object.

Without telling Kathy, Larry activated the "record" function on his own iPhone when the play began, enabling him to record the entire streamed performance. He later transferred the recording to his laptop computer. He has thus far watched the recording three times.

On April 20, 2016 Larry sent Apple a letter, describing how he and Kathy had used their new phones, praising the technology. Apple, in turn, posted a copy of the letter as a testimonial on its website. Ann happened to read the letter. Initially, she was pleased. But as she thought about the Cannells' conduct, she became more angry. In a conversation with Bill on April 22, Ann argued that Kathy and Larry plainly were not poor – evidenced by the fact that they had just spent almost \$1500 for two new iPhones. But Larry had paid nothing for the right to watch the show. Even more galling, in her view, was the role played by Apple. Not only had the company made the Cannells' conduct possible, it was now encouraging other purchasers of its products to engage in similarly parasitic behavior. She suggested to Bill that a successful copyright infringement lawsuit against Apple, Kathy, or Larry might enable them to recover enough money in damages to sustain the GHS drama department for years. Bill doesn't much like the prospect of litigation, but is willing at least to consider Ann's plan.

Advise Ann and Bill concerning their legal options. If you need additional information to provide them guidance, say what that information is and why it matters. Your response to this question may not contain more than 1200 words (including any footnotes).

End of Part I

Part II

This portion of the exam is open-book, and the exam mode is TAKEHOME. In preparing your answer, you may read any material you wish. You are also free to discuss your answer with your classmates or other persons. However, you must indicate in your answer the sources of any ideas you have derived from others.

Answer one and only one of the following two questions:

- (A) In April 2009, the Economist magazine organized an online debate concerning the merits and demerits of the copyright system. Participants included Justin Hughes (Professor at Loyola Law School and a treaty negotiator on behalf of the United States), John Kennedy (Chairman of the IFPI), Dale Cendali (Partner at Kirkland & Ellis and Adjunct Professor at HLS), Jennifer Urban (Director of the IP and Technology Law Clinic at USC), Jessica Litman (Professor at the University of Michigan Law School), David Lammy (Minister for Higher Education and IP, United Kingdom), and William Fisher. Read the contributions to the debate: http://cyber.law.harvard.edu/people/tfisher/cx/Economist_Debate_2009.htm. Then draft your own contribution.
- (B) What should be the purpose(s) of copyright law? Describe how, if copyright law were reformed so as to advance more effectively the purpose(s) you have identified, the rules governing two of the following sectors would change:
- 1) copyright protection for “useful articles”;
 - 2) formalities as preconditions for copyright protection;
 - 3) termination rights;
 - 4) appropriation art;
 - 5) traditional knowledge;
 - 6) the “safe harbors” provided by section 512.

Your answer to Part II of the exam may not exceed 2000 words (including any footnotes or references). You must submit it before 4:30 p.m. on May 6, 2016, to the Registrar’s Office using the Exam 4 software.

End of Exam