

102579

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Institution **Harvard Law School**
Exam Mode **Closed**
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Course / Session **S16 Fisher - In-Class - Copyright**
NA
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Event **NA**

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Count(s)	Word(s)	Char(s)	Char(s) (WS)
Section 1	1196	6406	7576
Section 2	1200	6193	7364
Total	2396	12599	14940

Answer-to-Question-_1_

Miguel,

I would advise you not to bring a copyright claim because Tom Triumph's behavior is likely excused by fair use. Additionally, even if Tom Triumph (Triumph) was infringing, your remedies would be limited and probably not worth bringing a lawsuit.

Copyrightable?

The threshold question is whether your photograph of surprised/alarmed Hillary Clinton (Clinton) is copyrightable. It is, although it only enjoys thin protection.

Photos are copyrightable subject matter, and are “fixed.” This is probably also an independent creation of yours, as you took the photographs not to emulate anything, but to amuse yourself.

As for the originality requirement, you displayed originality in the timing, and maybe in the rendition of your Clinton picture. Unfortunately, however, you do not have originality in the composition of the picture because you didn't arrange for Clinton to be in a surprised/alarmed pose.

Thus, because your originality comes from the timing and possible rendition of the picture, you only enjoy thin protection. Some courts have even said that only verbatim

copies can be held to be infringing for photographs that only have timing originality.

Your claim to copyright is further weakened by claims that the surprised/alarmed expression is uncopyrightable because it is an idea, and there is only one way for humans to express surprise or alarm through their facial expressions -- implicating the merger doctrine.

Furthermore, the surprised/alarmed expression could be considered a standard pose and age-worn trope, thus implicating scenes a faire.

Assuming that there is more than one way to express surprise/alarm (thus defeating the merger doctrine), assuming that your photograph was an expression of the idea of surprise or alarm, and assuming that the surprised/alarmed expression is not scenes a faire, you would have thin copyright protection in your Clinton photo.

Do you own the copyright?

Since you are the “author” by taking the photograph, copyright vests in you. The fact that you sold copies of the Clinton photo does not mean you lose your copyright, since copyright protection is sticky. No formalities bar your claim to copyright.

The newspapers do not own the copyright because this is not work for hire. You were not doing this with the purpose of helping the employer, so you weren’t acting within the scope of your employment. Furthermore, you would likely be considered a

contractor, not an employee.

Did Triumph Infringe?

If you were to bring a claim against Triumph, you would allege that he violated 106(1), 106(2), 106(3), and 106(5) of the copyright statute, either directly or secondarily. You would claim that he violated 106A by mutilating the picture and not attributing the work to you.

106(1):

To prove a 106(1) violation, you would need to prove that Triumph copied your Clinton picture -- this could be done by showing direct evidence of copying, access and probative similarity, common error, or striking similarity. You're most likely to show access and probative similarity or striking similarity.

If you could somehow show that Triumph had access to your photo (maybe he visited the gallery), then you could probably satisfy the probative similarity requirement.

Both parties would concede that the fixation requirement is met, so Triumph's posters constitute a "copy."

You would have a hard time proving improper appropriation. Since this is an example of comprehensive non-literal similarity, you would have to prove that there is

“substantial similarity” between your work and Triumph’s. Since the Clinton photo contains both unprotectable ideas and protectable expression, the Court would likely look through the eyes of a “more discerning observer.”

If the court is generous, it will employ the “total concept and feel” test, in which case you’d probably win. If the court employs the *Swirsky* or *Altai* tests and filter out unprotected elements, then you would probably lose. Assuming the court takes the middle road and uses the apparent appropriation test, you may win since a discerning observer may believe that Triumph improperly appropriated from you.

106(2):

If the court finds that there is a 106(1) violation, it will almost certainly find a 106(2) violation.

106(3):

If there is a 106(1) violation, then Triumph would likely be liable for 106(3) violation.

106(5):

Triumph may also be liable for displaying your work if the court finds a 106(1) violation. He could defend by saying that it’s excused by the nonprofit exception, 109(c),

or that the servers on his site didn't actually have the image.

Fair Use:

Triumph's activity would likely be excused under fair use. Triumph's purpose is non-commercial. He also transformed your Clinton photo by changing an amusing photo into a biting political message. Not only does Triumph's image have a different purpose, but it is also arguably a socially beneficial part of our democracy.

The amount Triumph took from your work was justified by his transformative purpose, and you only had thin protection due to the nature of your copyrighted work anyways.

Furthermore, there was probably minimal harm to your potential markets. Using the "traditional, reasonable, or likely to be developed" standard, you probably weren't reaching out to a large market, but were only selling those photos to the small gallery near your house.

Secondary Liability:

If the image is infringing, the protestors who display the infringing image violate 106(5) (109(c) doesn't cover unlawfully made copies). Triumph could be secondarily liable for those 106(5) violations. Additionally, if Triumph claimed that a third-party made the allegedly infringing image, you could still claim that Triump is liable for

106(1), 106(2), 106(3), and 106(5) violations through contributory liability and inducement theories (vicarious liability likely wouldn't work because Triumph was probably not benefitting financially).

These theories, again, probably wouldn't work because secondary liability requires infringement, and the third-party's image is probably excused by fair use for the reasons explained above.

Thus Triumph probably wouldn't even need to rely on the 512 safe harbor -- if there was no fair use defense for the third party, however, 512 wouldn't cover Triumph's inducement of the violation.

VARA:

You could also try a 106A claim by arguing that Triumph/third-party mutilated or manipulated your Clinton photo in a manner that harms your honor or reputation, citing your political beliefs. Ironically, the fact that Triumph didn't attribute the work to you probably weakens your claim (and you wouldn't want attribution anyways). Honestly, this is a stretch and you probably won't find VARA helpful.

Remedies

Assuming that you didn't register your work prior to the alleged infringement, you would not be able to obtain statutory damages or attorney's fees. You should register if you plan to bring suit.

The court is unlikely to grant an injunction even if you succeed on the merits. Even if you could prove that you were irreparably harmed in a manner that can't be compensated by money (unlikely), the balance of equities and public interest would still militate against you, since freedom of speech is strongest for political speech, and this is political speech.

Triumph, since he gave away the posters for free, wouldn't have much profit to give you, and your claims for actual damages would be speculative and difficult, especially considering the fact that you never licensed these photographs (so no hypothetical license theory) and your market was a small gallery adjacent to your house.

Answer-to-Question-_2__

Ann and Bill,

You could pursue a claim against Apple under the inducement theory.

Copyrightable?

The threshold issue is whether “Their Town” is copyrightable. The plot of “Their Town” and the well-delineated characters are.

Plots and fictional characters are copyrightable subject matter, and are sufficiently fixed (you wrote it down on paper).

The copyrightability of plots is analyzed under the *Nichols* test. The high-level ideas like drug problems or alienated young adults may be “above the line,” and thus not copyrightable, but your plot -- “alienated young adults in a rural community beset by an epidemic of heroin addition” -- probably is specific enough to be “below the line” and copyrightable.

As long as your fictional characters are sufficiently well-delineated and not stock characters, they can be copyrightable. Courts have been lenient with character copyrightability. Thus, your male lead with an anguished, smoldering persona probably could be copyrightable, notwithstanding protests of scenes a faire or that it's a stock character idea.

In writing the play, you two independently created a work that probably has sufficient creativity to be deemed "original."

Who owns the copyright?

No formalities bar copyrightability, though you two should register your copyright before bringing suit (if you decide to bring suit).

First, we have to identify if your work was a "work for hire (WFH)" for the school, in which case the school would own the copyright. Assuming that there was no agreement between you two and the school to designate the work as WFH and you didn't assign the copyright to the school, then you probably own the copyright. Additionally, you two were probably not working within the scope of your employment as teachers in the drama department in writing the musical. The typical job duties of drama teachers do not involve actually writing the musical, and you worked mostly from your home and on your own time.

Next we have to determine whether you two are joint authors of the plot and characters. Joint authorship is a *very* high bar, but because the two of you (1) independently created copyrightable works and were equally masterminds of “Their Town,” and because a court could probably identify objective evidence to support (2) your subjective intent that your works be merged into a unitary whole (and you two could testify that this was your intent), you two could probably be joint authors of “Their Town.”

Next, you should note that there is a possibility that each of the actors who played their characters may have a copyright in their own independent contributions. For example, James Cannel may have a copyright in his own contributions to his character, unless you two sufficiently delineated James’s character and supervised his rendition of the character to such a degree that James exercised very minimal creative control over the artistic direction of his character.

Infringement?

Kathy:

By streaming the performance to Larry, Kathy could have infringed 106(1), 106(2), 106(3), and 106(4) of the copyright statute.

106(1): If streaming involved reproducing temporarily on Kathy’s phone, this could be a case of comprehensive literal similarity (improper appropriation requirement met).

Kathy also clearly copied. Kathy's only defense would be that any reproduction was not fixed for more than a fleeting moment, and thus would not constitute a "copy." Because Kathy was not merely time-shifting something she could validly watch, her defense may not be adequate. Kathy could also argue that the copying was de minimis.

106(2): By writing in her own comments, Kathy may have been creating a derivative work.

106(3): Kathy may also have distributed the work by making it available to Larry.

106(4): Kathy may have publicly performed the work by transmitting it to Larry while Larry is in a public cafe. Whether or not there is liability may depend on whether Larry took adequate measures to prevent others from seeing the performance on his phone.

Kathy could try the homestyle or nonprofit exceptions to defend, and the strength of that defense would depend on whether the court believes Apple iPhones qualify as a "homestyle" device.

Lary:

By recording the stream, Larry could have infringed 106(1) and 106(2) of the copyright statute.

106(1): The case for a 106(1) violation is stronger for Larry than it is for Kathy. There is no question that the duration element is met to deem the reproduction a “copy.” There is no question there was copying. And there is no question that there was improper appropriation because there was comprehensive literal similarity. Larry could argue that this was de minimis.

106(2): Larry, by immortalizing Kathy’s comments that were supposed to be ephemerical, may have created a derivative work analogous to the permanent expurgated copies that courts have found to be violations of 106(2).

Apple:

Apple could be liable under secondary liability theories.

Contributory liability: You could argue that Kathy and Larry infringed, Apple knew about the infringement, and Apple contributed to the infringement. The hardest part about this claim is the knowledge element, because Apple likely did not have *timely* actual knowledge, nor did it have constructive knowledge since the iPhone’s recording device is capable and has substantial non-infringing uses. Apple would probably win here.

Vicarious Liability: You could argue that Kathy and Larry infringed, Apple benefitted from the infringement, and Apple could have prevented the infringement. The hard part about this claim would be proving that Apple could have stopped the recording. Apple would probably win here too.

Your best bet is inducement theory: Since Apple encouraged the infringing use in its ad, and since the ad targetted a group of people who had the ability to do the infringing use, Apple probably could be liable here.

Fair Use:

Kathy and Larry:

Kathy and Larry would probably win on fair use. Although they took a large amount of a work that is very copyrightable by nature, their use was for personal purposes, and was unlikely to harm your potential markets.

Remedies:

You probably could not pursue remedies against Kathy and Larry, and, in any event, you probably couldn't collect enough money from them to sustain the department since they didn't profit and you didn't suffer much harm (if any).

You can't collect statutory damages or attorney's fees because you didn't register the copyright.

An injunction for Apple to stop selling iPhones is unlikely, given that the public interest would probably be disserved and the balance of equities does not favor an injunction.

Your best best would be to try to collect your actual damages -- perhaps by using the value-of-use theory and looking at your history of licensing plays -- to argue that you should receive the amount that you would have charged to license the play.

In terms of Apple's profits, you probably couldn't collect Apple's profits from *all* sales of iPhone 6s. In fact, a court would be generous to allow you to use Apple's iPhone 6 sales in Iowa as the gross revenue (people did drive long distances to see the performance). Apple would argue that this is too speculative, and whatever profit the court decides, Apple will deduct their costs and any profit that came from the value of their own contribution (apportionment -- and this would probably be a lot).

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