

142400

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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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Count(s)	Word(s)	Char(s)	Char(s) (WS)
Section 1	1187	6040	7217
Section 2	1196	6090	7274
Total	2383	12130	14491

Answer-to-Question-_1_

First, your photograph is sufficiently **original** to be copyrightable. Courts require a modicum of originality. They consider three facets of the photo (Mannion). Composition, *no* originality because you did not stage it. Rendition, originality because the angle, contrasts, and lighting are all your work. Timing: original because you got it at that moment. The photo was also an **expression**, not an idea. The photo was not **scene-a-faire** for surprised politicians (or surprised Hillary) because creativity comes out in rendition and timing clearly.

Second, you owned the copyright, as you are a freelancer who took the photo (**sole authorship**). Buying copies does not give customers copyright ownership.

Third:

The posters **reproduce** your pictures (courts would likely not call it **derivative**). The poster is a tangible copy. No *direct evidence* of copying, nor *access*(as only five copies sold to unknowns), nor do there seem to be any *common errors* (this is a photo), but there is definitely *striking similarity*--it is obvious. Tom probably lacks evidence of *independent creation*. You could then win improper appropriation by demonstrating *literal fragmented* copying -- there are portions of the borders of your photograph he did not take (though some courts might consider this close enough to *direct reproduction*). You probably win because he likely ripped off your image and just changed the color scheme and added the word STOP at bottom (and adding new material makes no

difference)--and adding the Hope portions might itself be a copyright infringement (so courts might look unfavorably on that; or discount it for substantial similarity--see analysis below on that). But if not, you would win under *substantial similarity*, probably at summary judgment (though that's harder in CA9, whose extrinsic-intrinsic test requires you convince a jury). Courts use a variety of techniques to adjudicate substantial similarity, this is an easier case than Steinberg where there was only mere resemblance, not ripping na underlying photo. (All this is moot though if he is not the one actually making the posters: from what you said, all we know is that he owns the website.)

He is **distributing** copies. He could only get around this if, it turned out that he was not actually making the posters but was purchasing them from somebody else (**first sale**).

Public display: he must display image on website because it shows up on Google; which is a public display (Perfect 10), and no 110 exceptions apply.

Secondary liability is unlikely. The primary infringement element, absent other evidence you know of concerning primary infringement, would be a public display violation against people who hold signs at rallies. This probably falls under a 110 noncommercial *exception* though, and *fair use* as courts tend to protect as transformative (and therefore fair use) acts with public benefits, and holding signs at a political rally seems like they should count under this because it's political speech (it's also noncommercial--and those are the most important factors). If you get past that issue (or find a different violation), you would have a strong secondary claim against Tom. There is likely no contributory infringement claim because, though he probably *knows* people

have them at rallies, and he gives them the tool to infringe with (*material contribution*), people could keep signs in privacy of their own home (*COSNU*). But you probably could show he was inducing people to violate your copyright, as he is probably targeting people who intend to display this publicly and wanting them to do it--but you need more facts in discovery to support this

Moral rights: You could, but probably do not want, seek an injunction to have the image *attributed* to you (VARA, as you made only 5 copies. More useful, would be an *integrity* claim for intentionally distorting your work. Winning this might be tricky though, because you would need to show some substantial harm to your reputation. If you took either route, that would be another hook to get a public display violation (Buchel). Massachusetts which has some strong state law protections for artist's moral rights, but we need more info on MA law and whether VARA preempts.

Fourth, fair use. The purpose/nature of the use probably cuts in his favor. There is *no commercial benefit* to Tom it seems. Plus, this photo seems *transformative*: he is using a picture of Hillary to portray her in a bad light with a political message. The connection to political speech would probably lead courts to consider this public benefit, which they tend to consider transformative (e.g. Author's Guild). If not though, they would find you had *the same purpose*--to portray Hillary irreverently. How this factor goes depends on which approach courts take. As for your photo's character, it was somewhat factual (portraying an actual person), but had elements of creativity, and was published. I think this leans slightly for fair use. He took a large portion of the photo and its the heart (H&R), so the third factor goes against fair use. Fourth, there are limited potential

markets for licensing the use of your photo, but those markets don't really exist (you don't sell license them), so this doesn't help you much. Overall, it turns on the which approach the court takes to transofmrativity. This analysis controls for all of your claims, which all turn on his illicitly taking/altering the photo.

Fifth, you should probably request statutory damages, and probably will not get an injunction.

Absent a VARA injunction mentioned above, you probably could not get an **injunction**, despite damages being inadequate to comepnstate you (as explained below), because of the trickiness of the fair use issue, making it hard to demonstrate you are likely to succeed on the merits (Salinger). Plus, the fact that you would be silencing political speech implicates public interest against you (see Salinger discussion of First Amdt).

Request either **statutory damages** (though you only can if you registered) or **damages + non-duplciative profits**, whichever is greater--probably the *former*. This probably was willful--so you can get between 750-150,000 (he only violated one of your works, and the award is per work). If it was innocent it's 200-30,000). It'll probably go to jury, as either party can request that, and the amount is up to their discretion. If you go for the *latter*, you probably won't be able to recover much. There is no evidence this harmed your reputation (he doesn't attribte it to you) or deprived you of profits (you don't license these images, so at most you could ask for the \$300 you charge everyone else); and he doesn't seem to profit from this either.

It's within court's discretion to award **costs**, but I suspect they would because of the low expected recovery -- plus, judges probably don't like Trump supporters. You might also be able to hope for **fees** for the same reason: it's in the discretion, but they tend to award if they think damages might otherwise be lower. This might prompt Tom to **settle** (unless Trump pays his legal fees); and given that he isn't profiting from this, he might be unable to pay much in damages, so you might be able to force him to agree to stop doing this.

Answer-to-Question-2

The musical was expressive, original, and therefore copyrightable. Ann and Bill seem to have been **joint authors**--they worked together, have written these pieces in the past together, and both intended for their efforts to merge into a completed project with them equally responsible. This was likely not a **WFH** for the school/town even though they were employees of the school, they acted probably outside their scope of employment: they worked at home, this was not the sort of work they were employed to do (they were employed to teach, not write independently), and though they wanted to help the school by charging more money, that seems too ancillary to fall under traditional agency law's interpretation of scope of employment. That they want to donate money they earn to the school is their own business. They shouldn't be punished for their generosity in that, or failing to seek license fees from the schools. So they probably can bring suit.

Primary claim against Kathy:

This is tricky, because it's space-shifting (Dish), though to a different person while she watches, contra Dish. Getting her for public performance is probably impossible, as she set up the connection to stream only to her ex-husband and not made available to the general public (unlike Aereo). Perhaps the technology requires the making of copies in order to stream, but there is probably no reproduction problem because brief copying in

the context of streaming is not fixed enough to qualify as a copy (Cablevision). Nor would a court find the addition of comments appearing at the bottom of Larry's screen to count as making his streamed version a derivative work: if making the copy isn't an issue, they won't penalize her for adding her own critical commentary.

A **distribution** claim might be possible. This is possible for distribution of electronic copies (Tasini). Arguably streaming a copy in real-time is not distribution of a tangible copy--as there would be no copy if Larry did not press record. But for something to be fixed, it only needs to be tangible enough that it could be recorded, so a court could find this was distribution. Courts might differ.

She probably could not raise a fair use defense against this by just adding the comments. Purpose/nature of the use: she's not streaming in order to send the copies; the copies just appear at the bottom of the screen. Plus, the issue here is not the comments, it's the copying, and the purpose/nature of the use was to send along a version to Larry who could watch it. And even if not, a tiny number of changes to an otherwise perfect copy that barely affects it is not transformative (Cariou--for the few claims remanded). That it is not commercial probably matters little. The second factor cuts in favor of fair use: the play seems to have been unpublished and is very creative. The third factor cuts against fair use: she copied the entire thing and the heart of it. The fourth factor likely favors fair use because her streaming is not undercutting any market. However, that this was a dramatically successful play that got a lot of national attention: perhaps allowing people to stream these performances will undercut the ability to license off streaming, or cut-off the national audience. After all, A and B have succeeded on Broadway before.

But this all seems speculative as of yet, far too speculative to count for enough here. So overall, the factors caution against fair use.

Granted, Harpers&Row said that courts should consider custom when adjudicating fair use, and parents often record (or maybe stream) school performances. That said, usually that's for smaller children than high schools, which often sell authorized copies and ask people not to record. So probably no fair use.

Primary claim against Larry:

Recording is illicit reproduction, but this is a fair use because it is time-shifting alone (Sony). Ditto with copying to laptop. Watching privately is not **public** performance, but cafe may be sufficiently public if others present (unclear).

Kathy cannot be sued for the secondary claim because the primary claim against Larry does not stand because his use is fair use. Even if not, no contributory because lacked knowledge. No vicarious because she didn't control him.

No contributory against Apple because iPhone is COSNU (which also likely means there is no vicarious infringement)

Apple induced Kathy because it encouraged people to record their children's performances and its ads use of that encouragement seemed to target parents who want to record their children. Apple could respond that their ad was targeting a more narrow group of people who watch pre-k children--cases where it's generally believed that

recording is ok, as evidenced by the young child on the advertisement. That argument probably will not work though, as they posted Kathy's letter as example of what they were advertising. Courts might also weigh against Apple the fact that L/K got the idea from APple ad (illustrating clear causation).

A fair use defense based solely on the first transformative issue (arguing that there was a real public benefit from developing streaming technology) would not succeed because the issue was encouraging infringing uses, not the tech development, so that argument would fail. DMCA probably does not apply because APple isn't managing the network Kathy streamed over and thus isn't a service provider.

Remedies:

Kathy already infringed (so no equitable relief possible); and no injunction against Apple to change the ad/technology: there is no balance of hardship against you as of yet; and high enough damages could get Apple to change the technology; and damages from Apple seem like they would be sufficient to compensate you and deter further abuse. Those factors probably preclude equitable relief. Public interest in new tech development weighs against an injunction to change technology.

Request either **statutory damages** (though you only can if you registered) or **damages+non-duplicative profits**, whichever is greater--probably the *former*. This probably was willful on both Apple and Kathy's part--so you can get between 750-150,000 (if it was innocent it's 200-30,000). It'll probably go to jury, which has discretion. If you go for the *latter*, you probably won't be able to recover much from

Kathy: there was no profit; at most you could get the cost of a ticket Larry might otherwise have bought (but likely would not have; unclear that he would have traveled for the performance, no matter how good his son's performance). Getting profits from Apple is more likely, as their ads likely help sales, but you would need to find evidence of this; with unclear matters getting resolved in your favor.

It's within court's discretion to award **costs**, but they likely would because of the low expected recovery. You might also be able to hope for **fees** for the same reason: it's in the court's discretion, but they tend to award if they think damages might otherwise be too low to adequately deter or compensate. Judges would be especially likely to award this against Apple, for fear that other people are using this streaming technology for similar illicit purposes so as to discourage Apple from such inducement again. This will likely cause Apple to settle and change its ads quickly.