

## FINAL EXAM

Copyright, Fall 2012

Three Hours

### General Instructions:

This exam has three parts. The first part consists of 24% of the total grade, the second part 27%, and the third part 49%. It is recommended that you spend no more than 45 minutes on Parts I and II, leaving at least 90 minutes for Part III.

### Part I: Short Answer

24% of total grade.

Answer eight (8) of the following questions. Each answer is worth three (3) points. Try not to spend more than 45 minutes on this Part.

1. If Congress repealed 17 U.S.C. § 107, would fair use likewise disappear? Why or why not?

2. *John and the Ram* is an orchestral musical work composed in 1936 by the Russian composer Sergei Puriskov, who was then a resident of the Soviet Union. The work never received copyright protection in the United States because, under the Copyright Act at the time, residents of the Soviet Union were not among those eligible for copyright protection. It is currently protected by Russian copyright law. *Ron and the Jam* is a jazz-like work by the American composer George Schwinn, also composed in 1936. It was published without notice in 1937, placing it immediately into the public domain. Are either of these works now protected by U.S. copyright? Why or why not?

3. A work was created and published with notice in 1975. The author transferred the copyright in the work to BigCo in 1979. The author is still alive. When must the author give BigCo notice of his intent to exercise his termination rights? Briefly explain how you arrived at your answer.

4. A work was created and published with notice in 1975. In 1976, the author transferred the copyright in the work to SmallCo. The author is still alive. When must the author give SmallCo notice of her intent to exercise her termination rights? Briefly explain how you arrived at your answer.

5. John bangs out some awesome computer code for his employer NimbleCo in 2007. NimbleCo promptly and properly registers the copyright in the code. Under current law, when does the copyright in the code expire?

6. LegacyCo sells computerized assembly units (sometimes known as “robots”) that help build cars. It owns the copyright in the software that controls the units. CarCo has purchased a number of these units. The sales documents make clear that LegacyCo is licensing the software to CarCo. The sales documents provide that only persons authorized by LegacyCo may service the units, and it specifically conditions the copyright license on this provision (*i.e.*, the license terminates if CarCo violates this provision). Is this provision enforceable? Why or why not?

7. Same fact pattern as No. 7 above. Sales documents forbid transfer of the license but do not otherwise restrict how CarCo may use the units or the operating software. May CarCo re-sell the units without LegacyCo’s permission?

8. You own the copyright in a published novel that is properly in its second (renewal) term as of 1978 and would have expired in 1982 under the old 1909 Copyright Act. When did/does the copyright expire? Briefly explain your reasoning.

9. You purchase a painting by a local artist. May you display it in your home? May you display it at a shopping mall? May you take a digital photograph of it and upload it to Facebook for your friends to see (“Look at this awesome painting I just bought!”)? Briefly explain your answer.

10. You are preparing a complaint for copyright infringement. The copyright in question was timely registered. In addition to facts you allege constitute infringement, what jurisdictional and factual elements must you sufficiently allege to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6)? What if the copyright in question had not been timely registered?

11. Which of the following has standing to enforce a properly and timely registered copyright, where the alleged infringement consists of illegal distribution of digital copies of the work over the internet to every state in the United States? Assume *London-Sire v. Doe 1* governs. (a) one with a perpetual, world-wide non-exclusive license; (b) one with a one-year exclusive right to distribute copies of the work in Tennessee; (c) one who receives royalties from sale of the work; (d) a 10% owner of the right to distribute copies of the work; (e) one who has purchased the right to sue from that 10% owner. Briefly explain your choice or choices.

12. What is the Essential-Step Defense, and on what key legal issue are courts split?

## **Part II: Short Essay:**

27% of total grade.

Write short essays—the equivalent of three solid paragraphs or so—on any three (3) of the following topics. Unless specifically requested, **you should not perform a fair-use analysis on any of the topics, no matter how tempted!** Unless specifically told

otherwise, assume all copyrights have been properly and timely registered. Each essay is worth nine (9) points. Try not to spend more than 45 minutes on this Part.

-1-

Lana Hitchcock and Peter Gonzales are a song-writing team. She writes lyrics; he writes music. Together, they've written about 100 songs, including "Smells Like Love." Lana sells her copyrights to the music publisher Lazy B Music, LLC, in exchange for 50% of royalties received by Lazy B Music, via a writing that identifies the songs, signed by Lana. Peter, by contrast, holds onto his copyrights. Both Lana and Peter are members of ASCAP and register their works with the Harry Fox Agency ("HFA"). Note that HFA represents songwriters' interests, not artists' or music labels'.

Luckily, "Smells Like Love" is a really good country song, and it came to the attention of country-music star Kenny Cheeze, who both sings and plays guitar. His music label is Stiff Board Entertainment, LLC ("Stiff Board"), and pursuant to Cheeze's contract with Stiff Board, Cheeze transfers all of his copyrights to Stiff Board Entertainment in exchange for a 25% share in all profits made by Stiff Board Entertainment from Cheeze's work. Stiff Board contracted through HFA for the right to record and distribute "Smells Like Love." Cheeze and his four-member band recorded "Smells Like Love" on Cheeze's album, *Mild Country*, which has ten songs on it total, all of which are performed by Cheeze and his band. Stiff Board manufactures and distributes to the public CDs of *Mild Country*.

Stiff Board also licenses each song of *Mild Country*, including "Smells Like Love," individually to Banana Corp., to be sold as digital downloads through Banana's "iTunes" service. Pursuant to that license, Banana pays Stiff Board 50 cents for every digital download.

"Smells Like Love" is a hit, and many radio stations play it several times a day for a few months. Sales of *Mild Country* are also brisk.

Answer the following questions, with a brief explanation of your reasoning:

A. After taking its cut, ASCAP distributes \$100,000 in royalties to all rights holders of "Smells Like Love." What exclusive right or rights is/are implicated? Of this \$100,000, how much does Lana, Peter and Cheeze each receive?

B. Stiff Board makes \$1,000,000 profit from sales of *Mild Country* CDs, and HFA, pursuant to its agreement with Stiff Board, is ready to distribute \$100,000 (after taking its cut) related to "Smells Like Love." What exclusive right or rights is/are implicated? How much does Lana, Peter and Cheeze receive, and from whom?

C. You operate a small record store, purchase 100 *Mild Country* CDs from an authorized distributor with the intent to sell them the public for a profit. Do you need a license to do so? If so, from whom?

D. If Banana sold 10,000 digital downloads of “Smells Like Love,” what exclusive rights are implicated? Will Lana and Peter be receiving royalties via HFA, ASCAP, both or neither?

E. If, after *Mild Country* has been released, filmmaker Hiro Hideki was making a short movie, *Viva Nashvegas*, and wanted to use about 45 seconds of “Smells Like Love” from *Mild Country* as background music, for which exclusive rights would Hideki need to obtain licenses, and from whom, to use the song this way?

F. How, if at all, would your answer change if Hideki’s friend, Benny Whizz, recorded a version of “Smells Like Love” that sounds nearly identical to Cheeze’s version, and Hideki used that version in *Viva Nashvegas*?

G. Hideki ends up making *Viva Nashvegas* with the Cheeze version of “Smells Like Love,” and he successfully obtains the necessary licenses, which are NOT transferrable. In exchange for a cut of revenues, Hideki licenses *Viva Nashvegas* to VideoBee, LLC, for on-demand streaming. VideoBee is savvy, wants to “play it safe” and has long since learned that its revenue model effectively prevents it from taking advantage of any of the DMCA safe harbors. If you were advising VideoBee, for which exclusive rights, if any, and from whom, if anyone, would you advise VideoBee to obtain licenses related to “Smells Like Love”?

-2-

Henry starts a retail business selling vintage hipster clothing in Nashville, Tennessee, called “Hipchic.” His girlfriend, Sheila, is a free-lance web designer, and Henry asks her to make a website for his business. She consults with Henry regarding what he wants the webpages to look like and what functions he wants them to perform (*e.g.*, a map function, to show where his store is located, and a “shopping cart” functionality). Based on that consultation, as well as on her capabilities and Henry’s budget, she presents him with a number of design and function options that Henry can mix and match to some extent. Henry, again with Sheila’s consultation, makes his choices, and Sheila gets to work.

Normally, to create these webpages, Sheila would need to compose a good deal of HTML code (for the design features) and Javascript code (for the special functions). You can think of the HTML and Javascript code for each webpage as a separate program. Fortunately, she doesn’t have to because there is made freely available “modules” of such code that will enable all of the design features and all but one of the special functions. All Sheila needs to do is arrange the modules within the larger webpage-program. Most of Sheila’s programming peers would agree on the best way to arrange the modules.

The exception is a feature that allows visitors to the website to click on a picture of an item of clothing and rotate the picture as though it were three-dimensional (the “3D

Rotation Feature”). There was no freely-available module of Javascript that performed exactly that function, so she wrote the necessary Javascript herself, with some difficulty. But, in the end, she was successful.

The website is successfully implemented, and Henry is very pleased. The website is hosted by a third party, but Sheila kept a copy of the webpage programs (i.e., all of the HTML and Javascript code), which is a normal practice among web designers. Later, however, Henry and Sheila break up, and Sheila uses the Hipchic website’s HTML and javascript to make and place online a website that is nearly identical to the Hipchic website, but subtly mocks Henry for his supposed shortcomings as a boyfriend. It does NOT mock his business, merchandise or business skills—her site is purely a personal attack.

May Henry enjoy the mock-Hipchic website? May Sheila enjoy Henry’s real Hipchic website? Is there anything Sheila might need to do first before she can enjoy Henry’s website? Is there anything, short of taking down his whole website, that Henry could do to protect himself? Assume proof of irreversible harm in both cases.

-4-

Slick Productions, LLC, produces “skins” for smart phones, like the iPhone and Galaxy. The skins serve several practical functions: they protect the phone and make it easier to grasp. But they also look nice, with cool, hip and/or retro designs printed on them. Slick Productions’ “skins” are made from molded plastic, and fit the form of the phone for which they’re designed. However, Slick Productions has recently introduced a new line of “skins” called “3D” that still fit the phone snugly but also have design elements protruding from the skin. Two of these designs are:

- a. The “Shark Skin”: This skin has a shark-like dorsal fin sticking out of the side of the skin. Its printed design consists of numerous fluorescent dots evenly spaced against a lime-green background.
- b. The “Chibi Cat Skin”: This “skin” has two cat-like ears sticking out of the top of the skin. Its printed design is a cheerful pink with the image of a happy, cute cartoon kitten on the back.

These designs have been fairly popular, though some customers complain that the shark fin makes it hard to fit in their pockets.

Knockoff Productions, LLC, is now selling exact duplicates of the shark-like and cat-like skins, including the cat-like and shark-like protrusions. Meanwhile, Offknock Productions, LLC, is selling skins that duplicate the imagery of the skins but not the cat-like and shark-like protrusions.

Slick Productions, sues both Knockoff Productions and Offknock Productions. Assuming irreparable harm, assess the strength of Slick Productions’s claim for permanent

injunction against both defendants as to the “Shark Skin” and the “Chibi Cat Design.” Assume that your circuit has applied both the *Kieselstein-Cord* and the *Brandir* tests, but not any of the others.

-7-

George Kearns is well-established portrait artist who lives in Germantown, Tennessee, a wealthy suburb of Memphis, Tennessee. He is popular among both “new money” and “old money” in and around Memphis. He has become a big fan of the new television show *Memphis*, which is about the music industry in Memphis and its intersection with local corrupt politics. *Memphis* is produced by Local Trousers, LLC, and carried by the major network, XYZ Broadcasting, which is owned by Lerner Corp.

One of the main protagonists of *Memphis* is Mary Bell, an aging blues singer who remains popular but whose star is fading, in part because her preeminence is being challenged by a more “urban” and younger blues singer. On the show, “Mary Bell” still lives well, with a nice house, and in her bedroom are two portraits of girls who are supposed to be “Mary Bell’s” daughters. George is a fan of the show. One evening while watching the show, he nearly fell out of his chair when he recognized one of the portraits because he had painted it!

George’s work was called *Portrait of Laura Snowe*, a portrait of a little girl. He painted it several years ago and sold it to Hank Snowe, the man who commissioned it and the little girl’s father. Hank Snowe has never made any copies of *Portrait of Laura Snowe* and has never displayed it outside his home.

The child of the *Memphis* painting was different, but everything else in the painting was **exactly the same** as *Portrait of Laura Snowe*. The *Memphis* painting was on-screen for perhaps 2 seconds, and it’s a little out of focus, but George had no trouble recognizing it immediately.

George called XYZ Broadcasting and learned that Local Trousers uses an artist, Susan Lax, for the show’s paintings. Lax swears that she’s never seen George’s original *Portrait of Laura Snowe*, and she has never visited Hank Snowe’s home (Hank can confirm that). George does use a digital copy of *Portrait of Laura Snowe* on his website to promote his talents, and he wonders if that’s how Lax got a copy of it. It is not very difficult to use computer software to modify to replace the subject of a portrait with a different subject.

Unfortunately, until recently, George never knew it was a good idea to register copyrights. His lawyer has now registered the copyright *Portrait of Laura Snowe*, using an expedited process. If George sues Lax, Lerner Corp. and Local Trousers, how strong would you assess his copyright claims to be? Assuming George does not wish to pursue a preliminary injunction, what remedies would you say are available against each?

### **Part III: Long Essay:**

49% of total grade.

Write long essays on both of the following topics. Essay No. 1 is worth 22 points. Essay No. 2 is worth 27 points. It is suggested you budget about 40 minutes on Essay No. 1, and 50 minutes on Essay No. 2.

The fact patterns for these essays are lengthy and contain numerous legal issues, some more important than others to your task, and some requiring more analysis than others. Not every single fact is significant, and there are some red herrings, but most facts are significant in some way.

If you are pressed for time, it is recommended that you go for breadth over depth at first, making sure you've identified as many issues as you can and have described their general analytic contours, then perform as much in-depth analysis as you can. Also, choose substance over form. Organization and clarity are important, but getting your substantive thoughts down is even more important (provided you are clear and organized enough to be understood by the grader!).

-1-

Tommy Tuffguy is a professional mixed-martial artist. Five years ago, he was at a tournament in Colorado Springs, Colorado, where learned of a revered tattoo artist, Joey Tatman, who worked there. After the tournament, Tuffguy paid Tatman a visit. Tatman showed Tuffguy a number of black-and-white tattoo designs. Tatman made clear that these designs were just a starting point, and that he could and would make substantial free-hand changes to the designs. In addition, the tattoo could be in color, so colors would need to be selected. After the examining the designs, Tuffguy picked out a design of a serious-looking male lion that looked as though it were about to pounce. Tuffguy indicated that he would like the tattoo across his chest, about five times bigger than the design. Tatman said he could do that and asked if Tuffguy had any other instructions. Tuffguy said that he trusted Tatman's judgment with regard to any other changes. Then they discussed colors. Tuffguy suggested a scheme of blue, green and red, but Tatman said in practice those colors would look terrible. Tatman suggested a scheme of blue, green and purple, and Tuffguy agreed. Tatman then applied the tattoo across Tuffguy's chest. He deviated from the design in three significant respects. First, he filled in much of the empty space (the result of increasing the size of the design) with additional detail, for example, the nap of the lion's fur. Second, he changed the lion's expression from serious-looking to snarling. Third, he made the mane appear as though it were being blown by a breeze. Tuffguy was pleased with the results and paid Tatman his fee. Before Tuffguy left, Tatman took a photograph (with permission) of Tuffguy with the tattoo. That photograph still hangs in Tatman's studio.

Tatman's designs come from a variety of sources. The pouncing-lion design was from a book of designs produced and distributed by Tats-R-Us, Inc., which specializes in

distributing tattoo designs. Tatman purchased the book about ten years ago. No license accompanied the book.

The pouncing-lion design was made by a freelance artist named Leon Corgar. He was not an employee of Tats-R-Us. Instead, he “sold” the design to Tats-R-Us, along with a number of other tattoo designs. Among Tats-R-Us’ files is a “memorandum” on Tats-R-Us letterhead that names Corgar, lists a number of tattoo designs and sets forth a single dollar amount. At the bottom of the document is a section entitled “acknowledgement” signed by Corgar that states: “I hereby sell these designs to Tats-R-Us.” The document is dated 20 years ago. Corgar died several years ago intestate with three children. Under the laws of Corgar’s state of residence, his three children inherited equal shares of Corgar’s estate. The three children are all alive and can be located with some effort.

Corgar’s pouncing-lion design is nearly identical to a photograph of a lion first published in a 1902 edition of *National Geographic*. The pose is the same, but for obvious reasons the design is less detailed, and Corgar used some artistic stylization to suggest some of the lost detail. For example, Corgar did not portray every hair of the lion’s mane, but portrayed it as silhouetted mass of hair. (Ironically, Tatman would portray individual strands of hair on Tuffguy’s tattoo.) Twenty-two years ago, this picture was included in a properly authorized collection of *National Geographic* wildlife photographs called *National Geographic’s Greatest Wildlife Photos*. This book was available at Corgar’s local library. In fact, library records (obtained through subpoena) show that Corgar checked this book out several times before and after the time he made the pouncing-lion design.

Since getting the tattoo, Tuffguy has risen in prominence in the sport and, for about the last year, could truly said to be a “star.” Though he has several tattoos on his body (as do most mixed-martial artists), the pouncing-lion tattoo has become strongly associated with Tuffguy. Among mixed-martial arts aficionados (*i.e.*, well-informed fans), the pouncing-lion tattoo immediately makes one think of Tuffguy. It is difficult to think of Tuffguy without the tattoo.

Video Game Concepts (“VGC”) is a designer, manufacturer and distributor of computer games. One of its most popular game franchises is a mixed-martial arts game called *Blood Sport MMA* in which players control fighters in fairly realistic matches, either against the computer or against a friend. The fighters in *Blood Sport MMA*—known in the business as “avatars”—are based on real, professional mixed-martial artists. To make these fighters, VGC places the real person in a CAT-scan-like machine that makes a 3D model of the person’s body, then converts the 3D model to a format that can be used by the video game’s “game engine.” VGC always gains all necessary permissions from the professional mixed-martial artists it uses. About a year ago, VGC was developing *Blood Sport MMA IV* and asked Tuffguy to “be” one of the “avatars.” VGC and Tuffguy negotiated a contract whereby Tuffguy gave VGC permission to use his image for the game, in exchange for a royalty. VGC made a very realistic “avatar” of Tuffguy. This “avatar” prominently includes the lion tattoo on Tuffguy’s chest. When you play “Tuffguy” on *Blood Sport MMA IV*, the lion tattoo is clearly visible. However, much



of the fine detail, such as the strands of the lion's mane and the nap of the lion's fur, is either missing or blurred. The lion is clearly snarling, though, and the mane retains its overall shape. Tuffguy is one of ten such "avatars" in *Blood Sport MMA IV*, all of whom are based on real mixed-martial artists.

*Blood Sport MMA IV* was released three months ago and was a success. In just those three months, VGC made \$250,000 profit on \$1,000,000 revenues. When all is said and done, VGC reasonably expects to make an additional \$1,000,000 in profit on \$4,000,000 revenues.

Tatman enjoys playing *Blood Sport MMA* and bought *Blood Sport MMA IV*. Playing it, he recognized the lion tattoo and thought it wasn't fair he wasn't compensated for it.

Little Billy is a child who lives in Tatman's neighborhood. Tatman hates Little Billy. Tatman knows that Little Billy owns a copy of *Blood Sport MMA IV* and has "played" the "Tuffguy" on the game.

Tatman did not register the copyright in the lion tattoo, but has applied for registration, which has yet to be granted. He used a copy of the signed photograph of Tuffman as the deposit.

Tatman sues VGC and, for the heck of it, Little Billy. He does not move for a preliminary injunction and seems more interested in money. He is, however, not above threatening other remedies to improve his bargaining position for settlement. You represent VGC and Little Billy (with any conflicts having been properly waived). In discovery, you learn about Corgar.

A. Assess the strength of Tatman's case against VGC, and of VGC's affirmative defenses.

B. Assess Tatman's remedies against VGC.

C. Assess the strength of Tatman's case against Little Billy, and of Little Billy's affirmative defenses.

D. Assess Tatman's remedies against Little Billy.

E. Short of stopping sales of *Blood Sport MMA IV*, what steps might you take to strengthen your clients' cases and bargaining positions for settlement (or, conversely, weaken Tatman's case and bargaining position for settlement)?

-2-

Deborah Doolittle was a starving single mother in 1999 when she sat down and penned *Larry Gardner and the Wizard's Staff*. Although Doolittle is a U.S. citizen, she set the novel in Great Britain. It was about an English eight-year-old orphan, with an odd

birthmark, forced to live with his vile relatives, who treat him horribly, but who is whisked away to a special school for sorcerers, called Mugworts.

One arrives at Mugworts via a magical train. Mugworts is very much like an English public school, with “houses” that compete against each other, including an exciting and dangerous game played on flying broomsticks. Larry makes friends with a boy who is incompetent at magic but of a respected sorcerous lineage, and with a girl who is excellent at magic but of no sorcerous lineage. Larry himself discovers that his own lineage is mixed—also that he is somehow a special actor in a greater struggle between good and evil (which also explains the birthmark). Larry makes friends with several other employees and teachers who are at the margins of Mugworts’ hierarchy, such as the gameskeeper, who naturally raises all manner of fantastic beasts. Larry is not so well liked by the faculty, who regard him as entitled and/or dangerous—with the exception of the headmaster, who subtly aids Larry in his endeavors, even as Larry flouts certain school rules.

The plot of *Larry Gardner and the Wizard’s Staff* revolves around the three friends’ attempt to recover the Wizard’s Staff, which is hidden somewhere on Mugworts’ grounds. Larry desires the staff because it will help him learn more about his real parents, but the main villain also desires it for his own nefarious ends. To keep the staff out of the main villain’s hands (or tentacles or whatever), the faculty of Mugworts has hidden the staff at the end of a series of diabolical and deadly traps: a club-wielding giant; a massive game of checkers, which will stomp the unwary if one is “jumped”; and a self-aware magician’s hat that casts any number of violent spells. With his friends’ aid and many injuries, Larry reaches the staff, just in time to confront, and defeat, the main villain’s powerful lackey, who was disguised as one of the teachers. After saving the day, some of the teachers decide Larry isn’t so bad, but others become embittered against him.

In a sub-plot of *Larry Gardner and the Wizard’s Staff*, Larry and the gameskeeper enter a nearby enchanted forest in search of “magic mushrooms.” Before they find any, the gameskeeper is gored by an angry unicorn (he survives), and Larry would have been killed except he was rescued by a pretty nymph who appears to be exactly his age (though she is immortal). She reveals much secret information about Mugworts, the ongoing struggle between good and evil, Larry’s place in that struggle, a tantalizing morsel about his parents, and the nature and importance of the Wizard’s Staff. Because of her apparent knowledge regarding his parents, Larry becomes obsessed with seeing her again. He tries to enter the enchanted forest again later in the book but is chased out (to somewhat comic effect) by the same angry unicorn.

Between 1999 and 2008, Doolittle will write a total of seven *Larry Gardner* novels, one for each year that he attends Mugworts. With each book, Larry learns a bit more about his parents and comes closer to playing a decisive role in the battle between good and evil. Larry makes new friends and new enemies. He also loses an important ally when the headmaster is killed (it’s all somehow part of a wider plan). Also, a love-triangle

develops between Larry, the nymph (who appears to age along with Larry) and an equally pretty classmate.

The book was not very popular. Even so, it came under some criticism from fans of a previous series by Wynne Davies about a “school for wizards,” which included a sport played on broomsticks, a “chosen-one” type of main character, his friendship with two contrasting schoolmates, a secretive headmaster, and a war of good and evil wizards, which included some of the teachers. Davies has made it clear, however, that she regards these elements not to be “hers” but available to fantasy artists everywhere.

Doolittle’s agent is Molly Doerr. Doerr really believed in *Larry Gardner* and worked very hard to promote the novels, with only mild success. She also tirelessly shopped the novels to movie studios and game designers, with no success. Doolittle didn’t have enough money to pay Doerr, so instead, in 2007, she transferred a 25% interest in the copyright of every novel to Doerr (including future novels). The transfer was properly documented by a signed writing.

Finally, in 2010, Doerr had success: a movie studio, Nightmare Studios, expressed interest. Doerr sold her interest in the copyrights to the novels to Nightmare Studios for \$100,000, which was much more than she thought she’d ever receive (and much more than what Doolittle owed her). Unfortunately, the stress of constantly starving was too much for Doolittle, and she went a little mad and had to be hospitalized. Nightmare Studios was unable to contact her, even with Doerr’s help, and never reached any kind of agreement with her.

To make the movie, Nightmare Studios hired a well-known producer, Gene Scott. Under the contract between Scott and Nightmare Studios, Scott was explicitly authorized to make a movie based on *Larry Gardner and the Wizard’s Staff*, and the resulting movie was to be a “work made for hire.” Because Scott believed Nightmare Studios owned the copyright to the novel, he did not insist on an indemnity clause.

To adapt the novel, Scott turned to Ann Rowls. In the contract between Scott and Rowls, Rowls was authorized to produce a screenplay based on the novel and that the resulting screenplay would be a “work made for hire,” to be owned by Nightmare Studios. The contract was otherwise silent about licensing and copyright ownership. Rowls duly wrote a screenplay based on *Larry Gardner and the Wizard’s Staff*. In doing so, she naturally consulted with Scott, who wrote no lines of dialogue but did provide advice about ordering of scenes. She departed from the novel in one major respect: she cut the entire sub-plot involving the angry unicorn and nymph. Any important plot points revealed by the nymph in the novel were placed in the mouths of other characters and sprinkled throughout the movie.

Scott then hired Joan Brooks to direct the movie, which was to be called *The Adventures of Larry Gardner, Part I: The Secret of the Wizard’s Staff* (“*The Adventures*”). Brooks followed Rowls’ script pretty faithfully, but she made all decisions about camera angles, lighting and so forth, as well as directing the actors’

performances. In her agreement with Scott, she was specifically authorized to direct the movie and that the resulting movie would be a “work made for hire,” owned by Nightmare Studios.

The movie was released in December 2011. To say it was a huge success is an understatement. It broke all box office records and has achieved a following similar to *Star Wars*. Nightmare Studios immediately made plans to turn the remaining Larry Gardner Novels into movies, at rate of one every other year.

Based on the success of *The Adventures*, Ronald Ray-gun (a pen name, obviously) produced a short film that he termed “a parody” of the movie. Ray-gun’s work is called *Larry Has a Big Staff*. *Larry Has a Big Staff* tracks the plot of the movie, but Larry and his friends are rather older (but still school-aged), and every event is given a ribald and/or sexual flavor, and most names are changed (including Mugworts, which is called Warthogs instead). Also, Ray-gun’s film spends much less time on Larry’s miserable pre-Mugworts life. His friends do not search for a Wizard’s Staff—Larry is given the staff on the train, and the staff’s powers appear limited to gaining the admiration of girls. *Larry Has a Big Staff* isn’t very funny, and almost everyone agrees it’s in very poor taste. Although no sex is depicted, just lots of nudity and sexual puns and jokes, sex is clearly implied. It was never shown in theaters, but Ray-gun made it available on an online video hosting service operated by Puerile Humour, LLC. Both Doolittle and Doerr are outraged by *Larry Has a Big Staff*, but Nightmare Studios really doesn’t care about it.

Puerile Humour is generally aware that a good deal of its content is unauthorized, but much, if not most, of it (like *Larry Has a Big Staff*) is authorized. Puerile Humour prefers to host original content and works fairly hard to discourage unoriginal content. Before one can upload a video to Puerile Humour’s site, one must represent that one has the necessary authorization to upload the content. Puerile Humour offers subscribers two levels of access: ordinary access, which is free, and “premium access,” which costs a monthly fee but gives the subscribers “advance screenings” of content, higher quality streaming, and freedom from online advertising. Puerile Humour also makes money from advertising. Its written terms of use informs subscribers that they will be banned from using the site if they attempt to upload more than two videos that turn out to be unauthorized, and it has, in fact, banned subscribers for violating that policy. Puerile Humour also has an employee whose job it is to receive, respond to and act on takedown notices, and to track and remove unauthorized uploads.

In 2012, Nightmare Studio’s competitor, Daygelding Studios, made a movie called *Georgina Henderson and the Philosopher’s Stone*. In that movie, the protagonist is a pretty American teen-aged girl with a strand of bright violet hair that she can never, ever dye a normal color and has difficulty hiding. She lives with her parents in a boring middle-class existence in a bland suburb. Because of her hair, she suffers mild teasing by her peers at school (her name doesn’t help). She is whisked off to “Mother Gowdy’s Institute for Higher Magicks” via a magic jumbo jet. At the school, she makes friends with a somewhat snobby girl who is proud of her magical heritage (and who is perfectly competent at magic) and a scruffy boy who is naturally gifted at magic but was nearly

homeless when he was taken to the school. Georgina learns that she is a “chosen one,” on whom the fate of the magical world hinges, and that the main villain wishes to subvert her to his side. Though she loves her new existence at the school, certain injustices that she witnesses (usually directed at her scruffy friend) make her reconsider her allegiances. She also becomes attracted to a handsome centaur who is a fellow student and lives out of doors in specially-designed stables. The plot of the movie revolves the recovery of a Philosopher’s Stone, which is greatly desired by the main villain because it will help him dominate the world. It is hidden on school grounds by the faculty for reasons just and unjust, and it is protected by three barriers: a dragon, a complex mechanical lock, and a mirror that shows the viewer what he or she most desires. Georgina is tricked by the main villain’s powerful lackey, who has been impersonating one of the teachers, into recovering the stone. With the help of her snobby and scruffy friends (who learn to look past appearances and like each other), Georgina recovers the Stone. Georgina, fortunately, sees through the deception in time to withhold turning over the stone to the lackey. However, when the lackey reasons with her and appeals to her sense of justice, she nearly hands the stone over voluntarily. As she wavers, her centaur friend appears and explains the villain’s true nature. The lackey tries to dispute the centaur’s account by belittling the centaur personally, but this only ends up making Georgina angry. She refuses to turn over the Stone but destroys it instead. The lackey attacks Georgina and her friends, and they are very nearly defeated when the school’s faculty shows up and saves the day. The faculty members come to understand how certain of the students have been mistreated and resolve to reform the school. Georgina and her centaur friend embrace and say something witty.

*Georgina Henderson and the Philosopher’s Stone* was distributed by Daygelding Studios to a number of first-rate cinemas, including a chain operated by Zyzzy Cinemas, Inc. Pursuant to Zyzzy Cinema’s contract with Daygelding Studios, Daygelding Studios agreed to indemnify Zyzzy Cinemas against any intellectual-property claims.

Doolittle has since recovered from her bout of madness, but she remains reclusive and doesn’t like to communicate with the outside world much, not even with Doerr. However, last week, Doerr managed to contact Doolittle and explain about the success of *The Adventures*, the awfulness of *Larry Has a Big Staff*, and the Daygelding Studio’s “rip-off.” Doolittle contacted you immediately and tells you she wants to sue “everyone” except Doerr. You’ve managed to read the novels, watch *The Adventures*, sit through *Larry’s Got a Big Staff* and enjoy *Georgina Henderson and the Philosopher’s Stone*; and you’ve interviewed Doerr and done some online research, enough to learn all of the foregoing facts. It is now time to report to Doolittle.

Assume you are in a circuit that follows *UMG Recordings, Inc. v. Shelter Capital Partners LLC* (the “Veoh” case), not *Viacom Int’l, Inc. v. YouTube, Inc.* Assume also that your circuit uses the “holistic” approach for determining infringement.

A. For each the following individuals and entities, assess the strength of Doolittle’s claims, if any, against the individual or entity, taking into account any defenses. If you don’t think Doolittle has a claim against one of the individuals or entities, briefly explain

why not. In the case of Puerile Humour, what else do you need to know before you can definitively assess claims against it?

Nightmare Studios, Gene Scott, Ann Rowls, Joan Brooks, Ronald Ray-gun, Puerile Humour, Daygelding Studios, and Zyzzy Studios.

B. During your phone conversation with Doerr, Doerr expressed disappointment about her deal with Nightmare Studios, given how much money *The Adventures* made. She asked you if there was anything she could do about the deal. You told her that you don't represent her. But if you could answer her question, what would you tell her?

C. Do Scott, Rowls or Brooks have copyright claims against anyone? If so, state against whom they do. If not, explain why not.