

FALL 2004 EXAM

FACT PATTERN

Nov. 9, 2004

Introduction

The following fact pattern will form the basis for much of the December 9, 2004 examination in Copyrights. However, I may make changes to the facts in the course of asking questions on the exam proper. For example, dates may be changed in the questions (e.g., "Assume the events in paragraph 29 happened 10 years earlier."); or other information may be changed or added to make the question more clear or pointed or precise. For example, information about specific claims or defenses raised may be provided.

Despite the likelihood of additional facts being provided which may require you to consider issues from a different angle than that intimated by the basic fact pattern, you should be fully familiar with this fact pattern by the time of the examination because most of the exam points will be based on questions derived directly from it. Thorough knowledge of it and of the issues reasonably raised by it should help you do well on the exam.

I may ask a question not arising directly out of this fact pattern.

The exam will be open book. You should bring with you to the exam the copyright textbook and supplement and the handouts including in particular the Eldred case and the Grokster case. You will need the statutes not only because this is mostly a statutory course, but also because there will be at least one question requiring close examination and explanation and application of statutory provisions. There will be time pressure on the exam so you should not plan on being able to look things up (other than express statutory language) during the exam.

In preparing for the examination, I recommend that you work in groups. Try to spot issues in the fact pattern and make sure you know the law in that area and can explain your reasoning fully. You need to know the various tests for various aspects of copyright. Some tests have discrete elements; others have multiple factors. We have spent time in class on how to approach analyzing certain sorts of issues. You should be versed in those and be able to apply them to the questions raised by the fact pattern.

My office hours for the reading and exam period will be posted on my website and outside my office. I generally will be available by email before the exam as well, but I do not take questions the day before the exam is given.

I have reproduced a sample cover page for the exam proper on the next page. Please note that the final examination instructions are likely to vary with respect to points, number of questions, time allotted, and so on. This sample page is provided in order to acquaint you with the format I use.

You may find it helpful to look up some of the references in the fact pattern in the event you are not familiar with them. Knowledge of them is not necessary for succeeding on the exam, but it may help to know just a bit more about them than is included here.

Fall 2004 Final Exam Sample Instruction Page

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December 9, 2004

General Instructions

1. You have **three (3) hours** for the exam.
2. Times noted for the questions reflect the amount of time I estimate it would take to answer each question. They do not add up to 3 hours, but you have 3 hours for the exam. Please note that although the time noted for each question does relate somewhat to the points for that question, it does not do so in a strict one-to-one fashion.
3. There are three (3) questions each worth 100, 150, and 50 points for a total of 300 possible points.
4. Write only on one side of each page in the bluebook.
5. Write legibly and clearly in blue or black ink.
6. Use headings as appropriate.
7. **Respond to the question asked, not to questions that might have been asked.** Even within your responses, do not spend time on matters that are not issues just to show me how much you know. This exam tests professional judgment as well as knowledge of copyright law.
8. Be sure to consider all facts in the fact pattern. Paragraph indicators for each exam question are intended to provide helpful guidance, and are not necessarily exhaustive of what should be considered in answering the question.

Permissible exam materials

1. This exam is completely open book. You may use any materials you bring with you to assist you during the course of the exam including but not limited to the text, handouts, commercial outlines, personal outlines, notes, hornbooks, pre-prepared answers, etc. You may use laptops, but you are not to connect to any network and you are not to communicate with others during the exam.
2. The exam consists of the exam fact pattern attached hereto (which is the version posted on the course website on December 4, 2004), this instruction page, and 3 questions on the 1 page following these instructions.

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FALL 2004 EXAM
FACT PATTERN

Walker's Adventure in Copyright World

A City Walk

1. It was one of those fall days. You know the ones – where the leaves had recently been blown from the trees, but the sun was still high enough in the sky to feel warm. One of those brisk days, but not uncomfortable, except, perhaps, to those who come from Florida or the Islands.
2. As Walker left his brownstone row house, he took a great breath of air – no pollution today – just a lovely Saturday with a wind that blew all the smog away.
3. As he headed toward the park, he couldn't help noticing the sameness of the century-old row houses lining the streets, with their postage stamp yards and worn facades. Not quite the sameness of early suburbs like Levittown, perhaps, like where he grew up, but a sameness nonetheless.
4. A couple of blocks from his front stoop, he passed a Madison Public Library – one of the many built all around the country in the late 19th and early 20th centuries, just as public education was taking hold. All seemed to share that same neo-classical style borrowed throughout the country, but especially in Washington, DC, from the Greeks and Romans.
5. But what fascinated him about this one was the addition to it. The addition was built just about a decade ago to serve the community better by providing better access to technological resources including the internet, computer labs, printers, and the like. To reflect this connection to the old (literally) as well as the function for the present, the architect had designed a building with classic clean lines, but in place of Doric or Ionic columns were simple vertical lines created by alternating white marble and dark glass.
6. Walker had long had a fascination with architecture, and liked the play of light on this building – the mixture of the old and new – especially as seasons changed and the angle of the sun changed and the amount of shade and shadow changed. This morning he took another set of photos because

of the way the building cast shadows on itself and the way the tall oak trees, now leafless, cast gnarled shadows from their twisted branches. To highlight the aspects of light, Walker took the pictures only in black and white.

7. Walker was planning to make a collage or perhaps just a collection of photos of this building that he had taken over the last couple of years. He planned to call the collection simply “Reading Seasons.” The name didn’t make much sense, but he liked the sound of it and it did evoke in some way the fact that it was a library and the pictures were taken in different seasons.
8. “Reading Seasons” was to part of a gallery exhibit showcasing local photographers and their photographs of the city. Walker had been invited to submit up to 20 works for consideration for inclusion in the exhibit, and had been guaranteed that at least one of his works would be shown.
9. Walker continued down the street until he came to an intersection with a small park in the center of the traffic circle. In the center of the traffic circle was a sculpture of President Teddy Roosevelt. The sculpture had been commissioned in 1915, but was not completed until well after WWI. The sculptor, Scully Scallen, finished the work in 1924 and gave it to the city in 1925. It was officially dedicated and installed in the traffic circle park in August 1925.
10. Walker was drawn to Roosevelt for his seemingly curious combination of conservationist and warrior – curious in the modern age when environmentalism is less associated with hunters and others who appreciate the outdoors for hunting and trapping and more with vegans and “tree-huggers.” Walker thought of himself as an urban hunter – a hunter of images with his camera as his weapon.
11. The light and shadows created a good picture of the sculpture, backlit, in silhouette. Only the shape was visible, and the shadow. None of the features or details of the sculpture could be seen because of the way Walker took the picture. But there was no mistaking Roosevelt – the posture, the “big stick,” and the wire-rim glasses were all evident both in the silhouette and in the shadow.
12. As he was taking the pictures, he noticed a crowd was beginning to form on part of the circle. As he approached, he noticed that Avery Pleks, a renowned actor of stage and screen, was scheduled to give a talk on behalf of a senatorial candidate in half an hour. Walker positioned himself to get a good picture, thinking he might sell it to the newspaper or a magazine if something newsworthy happened.
13. As things turned out, Walker was in luck: Pleks was campaigning on behalf of a person who supported gay rights and was attacked with water balloons filled with malodorous fluids. Pleks was not hit or hurt, but the stage did smell and Walker did get some good shots of the attackers being apprehended by the crowd and then the police.

14. He also got a picture of Pleks as he was speaking and some of him just after the balloon attack. He looked quite shaken in the latter photos.
15. Walker did sell the rights to display and reproduce the photos to the local daily newspaper and to the TV news stations that did not have camera crews covering this low-level event. He granted each a non-exclusive license to display and reproduce the images only for one week.
16. Over the next week the images actually went national with the Walker pictures of Pleks being shaken getting a lot of play. Pleks was known as an action hero who beat up folk on screen at the slightest provocation and so the incongruity of him appearing shaken from a few water balloons made the cover of a number of tabloids and made the press for a few days.
17. Artistically, Walker thought most of the photos were not much. But there were four that he thought told a good story standing alone: first a front-on picture of Pleks speaking forcefully; then a picture the crowd taken from behind Pleks with Pleks in silhouette; then just arms pitching the balloons (cropped from much larger images); and finally Pleks visibly shaken.
18. Walker put those four images together in one frame and decided to submit it for possible inclusion in the gallery show, even though he was really known for taking cityscapes and city images, not so much for taking pictures of people. He called this set of photos “Americans United.” (Titles were not his strong suit.)
19. Immediately after the incident in the park, Walker hurried home, got on the internet, and shopped around his photos. He put the digital images (smaller versions) up on a website and sent messages to his various media contacts. The terms of the license were posted online and if the parties agreed to the terms of the license, they were free to get access to the full-size, full-quality files for downloading. Billing was by credit card.

Downtown

20. Walker then caught a cab downtown because there was a big unveiling of a new multi-player video game to be played either online or using the new technologies available on the latest handhelds – phones, pda’s, or whatnots. Indeed the whole impetus for the video games was the connectedness of people through such wireless devices.
21. For part of the trip, the taxi played a radio station playing a type of what is often referred to in today’s marketing parlance as “world music.” Actually, since the driver was Punjabi, he was playing music from India. When the special world music program ended, the driver inserted a CD of Ravi Shankar playing the raga Bhairab Kalyan on the sitar.
22. The Shankar recording was made in 1969 in Delhi, India. Only recently (4 years ago) was it issued on CD in the United States. The performance is entirely improvised – there is no written music or composition on which it is

- based. Instead, it is based entirely on a scale and set of rules established some 400 years ago in the time of Akbar's reign in North India.
23. The cab pulled up to a 30 foot tall, all black circular structure on the plaza of the I-V Games, Inc., office building downtown. I-V Games (the "I-V" stands for "intra-venous") has been in business just 3 years, but has already made a huge splash in the multi-player, interactive video game market selling a variety of games both for multi-controller home play and for online play.
 24. Now, in conjunction with a major wireless communications company, X-Cing, I-V and X-Cing are launching a new set of products including enhanced wireless service, better phones, better pda's, and a new set of wireless devices that are for images, video, voice, text messaging, email, and instant messaging. Though the price of the units themselves tends toward the high end and the initial main target markets are executives and professionals, they plan to make a splash by getting gamers to use the devices to stay online on multi-player games anywhere. The long term market will be for the 20-somethings and 30-somethings 5 and 10 years from now. The joint venture does not expect to turn a profit on this product line for 3 years. However, they do expect to get a lot of press and use this as the lure for people to buy there other, lower end traditional wireless products and services.
 25. Walker entered the mysterious black universe through what can only be described as portal. The entrance is intended to convey the impression of being transported to another world. The tunnel uses sensor-activated lights and sound as you walk through it to give you the sense of passage through time and space.
 26. Upon emerging from the portal, Walker looked up, expecting to see the sky. Instead, he saw a night sky from space. All around him, in a 360 degree montage, were screens projecting images from the ongoing interactive multiplayer game interspersed with logos and images of people playing the games on the new handheld-wireless devices. As he came in, he was given one of the devices and invited to begin playing.
 27. He did so. As he started out, he was pleased with how intuitive the game was – no instructions needed, really – if you had ever played an interactive multi-player game online before. Even if you hadn't, Walker thought it would be easy to pick up. Indeed he marveled at its ease.
 28. Soon he had joined the fray. From time to time he looked around and noticed that he was pretty much the only one looking up from his wireless device. He also noticed that his player was shown on the big screens from time to time. Though the unit came with headphones, everyone was simply immersed in the sound from the complete environment all around.
 29. Unbeknownst to any of the players, they and their avatars (the alter egos in the game world) were being recorded for later use in commercials to be televised through regular broadcast, cable, and satellite TV as well as online.

30. The main game that people were playing was called “Samsara.” Each player created his or her own avatar or character. Players could also create their own worlds or arenas or games within the game. These worlds could either be stand-alone or integrated into the larger world of Samsara. They could be controlled where you were let in only with permission of the creator or manager of the game or were open to anyone.
31. When you first logged onto the game, a screen popped up which required your to agree to a license. No one reads the license of course, but this is what it says:
 32. By clicking “agree” you agree to all of the terms of this license.
 33. This software is not sold but only licensed to you for your use.
 34. This software allows users to create worlds, characters and to make other enhancements to the game. All of these enhancements are the exclusive property of I-V Games and the user assigns any and all such enhancements, avatars, characters, worlds, or any other software related to his game to I-V Games in exchange for being permitted to play the game.
 35. The user agrees not to take any of the aspects of this game in order to create a competing game whether on line or for game consoles or any other technology now known or hereafter developed.
 36. The user agrees to make available any worlds or modules or enhancements created in part or solely by the user to others only through I-V Games.
37. An undocumented feature (i.e., a feature not advertised by I-V Games) is that users can bring into Samsara any worlds, modules, avatars or characters, and weapons from any other game system and Samsara will convert those items to be able to be used in Samsara.
38. Walker played the game for a few minutes. The a few minutes more. Then some more. Before he knew it, a few hours had gone by. He had used the new handheld wireless device to access one of his own files from another game and downloaded his character (Darin, a fighter), and his favorite weapons and was using them in the medieval setting or “world” within Samsara. Finally, he pulled himself away, and exited through the exit portal which was much like the entrance portal in terms of how it looked and worked.
39. He was surprised to see a sunny day, still, so lost had he been in the dimmed world of Samsara. But it was no longer morning; indeed the late afternoon shadows were lengthening as the sun headed toward its early sinking in the west.
40. As he left, he was accosted by two people simultaneously. Both were dressed in full body costumes (which included padding as well as just clothe) of the main villain in Samsara, Rabid Ravana, (misspelled in the

same way the game misspells it) a larger-than-life demon with extra arms, vampire teeth, and a terrible visage. One of them seemed to be trying to get him to answer some questions like Did he like the game? Would he buy it? Would he play it? Would he buy the wireless control device?

41. The other kept interrupting and tried to pull him away. Finally Walker got tired of answering the survey questions, the exit poll, if you will, and turned toward the other and asked, "Who are you guys anyway?" The second one answered, "He is just an I-V hack hired to do a market survey. I'm trying to scare you straight."
42. "Huh?" replied Walker, somewhat perplexed at just what he needed to be straightened out of.
43. "I'm Ravana, the Hindu demon god, here to save you from the addiction of video gaming."
44. "I'm not addicted," replied Walker indignantly. "It's just fun stuff."
45. "These games are evil!" said Ravana sharply.
46. "That's rich, coming from a demon."
47. "No, no, no! You don't get it. I'm just dressed up like this to get your attention. These games are evil and I can prove it!"
48. "Ok, ok, you've got my interest," said Walker with more than a touch of laughter in his voice. "Though I don't know why I have a soft spot for talking to you religious types," he continued, ". . . or are you the anti-religious religious type?"
49. "Well, let's go over here where I can take off this mask and we can talk," replied Ravana somewhat haltingly, not accustomed to this sort of seemingly easy success with those accosted.
50. Some 20 feet away was an open booth with a table and anti-gaming literature decrying it as the work of the devil. As they approached the table, "Ravana" removed his full head mask and introduced *herself* as Celestia Heaven.
51. Good enough looking, thought Walker, but not quite up to such a name as "Celestia Heaven"! "Maybe she's a porn star," was the next thought that popped randomly into his head.
52. "Celestia. That's quite a name," Walker opined.
53. "It was given to me by my religious order, Jason's Heavenly Stars," she replied. She added, "The Stars are part of Jason's Truth. We do his bidding."
54. "Sounds to me like you might be getting fleeced," Walker replied, impressed with his own wit.
55. "What?" she responded cluelessly, not catching the allusion at all.

56. “Nevermind. So tell me first something about Jason’s Truth, then you can convince me why playing video games is so evil.”
57. So Celestia began to talk and show Walker the basic public documents of Jason’s Truth. The gist of it was that only Jason’s stories were true and that all fiction that distracted one from that truth was to be stamped out. Video games were the worst because they really (according to Jason) transported one to other fictional, but somehow real, places. After about half an hour, she thought he showed real promise and so invited him behind the curtain to see the Holy Relic. Walker could not pass this up.
58. Behind the curtain was, yes, of course, a fleece. And not just any fleece. This one was gold. And not just gold, but it was folded or molded or strung or kind of all three into a special shape. Walker asked permission to touch it, and of course it was not really gold. When asked about this, Celestia explained, “Of course the real golden fleece is kept at our holiest temple.”
59. “And the Argonauts? Where are they?” asked Walker.
60. “You know of them already!, cried Celestia, aghast. “Are you one sent to test me?”
61. “No, no, not at all,” Walker assured her. “Just curious and the story seems familiar, that’s all. Mind if I take a picture of the fleece?”
62. “It is forbidden by our laws,” she answered.
63. So Walker took a few pictures surreptitiously, grateful that he had his silent shutterless camera with him as well as his SLR.
64. He then asked her what the shape was and what it symbolized. She explained, not very helpfully to Walker, that it was a three dimensional approximation of a four dimensional Klein bottle which is like a three dimensional Mobius strip. It symbolizes the portal to the other side. The one who has the real Golden Fleece, Jason, can actually travel there and back again according to Celestia.
65. “Well, that explains the curious, intricate shape. It did somewhat remind me of a bottle, though an impossible one, like M.C. Escher might draw.”
66. He then thanked Celestia for her wonderfully entertaining stories and went out, saying, “Salaam, Scheherazade,” leaving her with a puzzled look on her face.

That Evening Online

67. Later that evening, after he had returned home, Walker went online and looked up information about Jason’s Truth. He discovered that there was only spare information about the group and not much about its actual beliefs. Its main religious text, “The Way of the Fleece,” cannot be obtained online or purchased through stores. It is only available to initiates who agree to keep it secret and who agree never to disclose its contents to anyone

who is not an initiate. This secrecy agreement applies even if they leave the sect.

68. "The Way of the Fleece" was written by Jason in the United States in 1980. All of the copies of it have the notice "© 1980 Jason" inside of the book on the page facing the title page. However, Jason never registered the book with the copyright office and never deposited a copy of it.
69. In 1996 a former member of Jason's Heavenly Stars, Cassiopeia ("Cassie" for short), broke off from the group and started her own group using "The Way of the Fleece" plus her own commentary on it, "The Huntress," as the religious texts. Jason sued Cassie in federal court to stop her from using "The Way of the Fleece" for her religious group claiming (1) that her reproduction of it and distribution of the copies violated his copyright in the book, (2) that her actions violated the non-disclosure agreement, and (3) that the contents of the book were a trade secret and her use and disclosure of the information to others violated trade secret law.
70. Cassie defended on the grounds (1) that the first sale doctrine protected her using the information in the book, (2) that the first sale doctrine plus fair use permitted her to make copies to distribute to her followers, (3) that the information could not be separated from the expression of the information since the words themselves were holy and so the merger doctrine bars copyright from attaching to the work, (4) that the first amendment guarantees of free speech and freedom of religion require that the work be able to be used and copied and distributed in the limited way that she is doing, (5) the nondisclosure agreement is void as against the policy of the copyright act, and (6) the nondisclosure agreement is void as against public policy in general.
71. The court ruled for Jason on all issues. Cassie did not appeal. She explained that as a result of the court case, her eyes were again opened by The Most Holy and she wrote another book, "The Voyage of the Vessel," which became the core book of her sect.
72. The "Voyage of the Vessel" retells the story of "The Way of the Fleece" from the perspective of a second seeker of the fleece, in this instance, a woman whereas "The Way of the Fleece" has as its central figure a man.
73. Later that evening Walker watched Comedy Central's "The Daily Show" starring Jon Stewart. The Daily Show is a news satire show on which fake news is "reported" and on which actual news events are given a satirical twist. It is to TV news reporting as political cartoons are to news reporting in a newspaper or news magazine.
74. That night Walker found the ongoing satire, "Mess-o-potamia" (about the Iraq war), particularly funny and pointed. Using his technical prowess Walker recorded the show, screen-captured the logo for "Mess-o-potamia," took his favorite quotes, and put them on the web. He created his own webpage and bought the url for <http://www.messopotamia.com/> and put up quotes in text and sound and video recordings of parts of the show.

75. Most of the content he put up was indeed factual, as is most of the information used on The Daily Show, but it was taken verbatim from the show in order to capture the satire and implicit and explicit commentary in what and how the information is presented.
76. While he was online, Walker stumbled across a news story that said a new copyright law was likely to be passed. Upon further investigation, he found that the Intentionally Inducing Infringement Act (IIIA) would amend the Copyright Act through enactment of a new subsection (g) to Section 501. The proposed new subsection reads, in full, as follows:

(g) Intentionally Inducing Infringement.

- (1) In this subsection, the term “intentionally induces” means intentionally aids, abets, induces, or procures, and intent may be shown by acts from which a reasonable person would find intent to induce infringement based upon all relevant information about such acts then reasonably available to the actor, including whether the activity relies on infringement for its commercial viability.
- (2) Whoever intentionally induces any violation identified in subsection (a) shall be liable as an infringer.
- (3) Nothing in this subsection shall enlarge or diminish the doctrines of vicarious and contributory liability for copyright infringement or require any court to unjustly withhold or impose any secondary liability for copyright infringement.

Months Later

77. A few months later Walker had become quite adept at Samsara and he, together with two other gamers, known online as Runner and Sprint, had built a world and a number of characters and weapons that had become the most popular Samsara world. The three of them published a CD with their world, characters, weapons and two other popular Samsara worlds and sold it online for \$12.00 per disk. After 1000 sales, I-V Games sued to for damages and an injunction against the three from copying and distributing their disk and cut them off from playing the game online again.
78. Walker, Runner, and Sprint had imported files from Sony and Nintendo games to make the development of their Samsara worlds better and faster. Some of the files they imported were files they had created to play on those games (like avatars). Others were characters and weapons that were created by and copyrighted by Sony and Nintendo, respectively.