
HOWARD UNIVERSITY SCHOOL OF LAW

COPYRIGHTS

Professor Steven D. Jamar

202-806-8017

SPRING 2015 COPYRIGHTS
FINAL EXAM INSTRUCTIONS

April 27, 2015

General instructions

1. You have 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 may 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 3 questions worth 70, 40, and 40 points respectively for a total of 150 possible points.
4. Type your answers using your laptop, as instructed by the proctor.
5. For those not typing the exam, write legibly and clearly in blue or black ink.
6. Use headings as appropriate.
7. Respond to the questions 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 how much you know. This exam tests professional judgment as well as knowledge of copyright law.
8. When questions identify particular paragraphs in the fact pattern, you should emphasize those and limit your discussion to issues presented by the facts in those paragraphs. Nonetheless, you may need to use facts from other portions of the fact pattern in your answer to a limited extent.

Permissible exam materials

This exam is completely open book. You may use any materials you bring with you to assist you during the exam including but not limited to the text, statutory supplement, handouts, commercial outlines, personal outlines, notes, hornbooks, pre-prepared answers, etc. Cell phones, electronic communications devices, and other electronic devices are not allowed except laptops using HUSL-approved software for writing your exam answers.

Communication with anyone during the exam about anything about the exam is a violation of the academic code of conduct.

Exam components

The exam consists of (1) this instruction page, (2) the exam questions on the two pages following these instructions, and (3) the fact pattern attached hereto. Although the fact pattern attached to this exam is substantially the same as the one previously distributed to the class, be sure to use the exam fact pattern attached hereto in answering the questions because some of the paragraphs have been slightly edited.

HOWARD UNIVERSITY SCHOOL OF LAW
COPYRIGHTS

Professor Steven D. Jamar

SPRING 2015 FINAL EXAM

April 27, 2015

Question 1. 70 points. Estimated time: 70 minutes.

Paragraphs 112-121. Assume that Teri's heirs and PUNK have both filed suit alleging copyright infringement and that Nspire has just moved for summary judgment on all issues against both. For this question assume that Teri's heirs are the proper plaintiffs to assert Teri's rights and that Teri clearly owns the copyright in the musical composition and PUNK owns the copyright in the sound recording.

Assume you are a law clerk for the district court judge to whom the case has been assigned. Write the memo to the judge explaining the applicable law and recommending a course of action on the summary judgment motion.

Question 2. 40 points. Estimated time: 40 minutes.

Paragraphs 1-11 (especially ¶¶ 10-11).

PUNK claims it owns the copyright in "Teror Walk" as a work made for hire. Evaluate that claim.

Question 3. 40 points. Estimated time: 50 minutes.

The Performing Student Organization (PSO) at the University School of Music wanted to raise some money to support scholarships for students with financial need. To that end it decided to hold a benefit concert. Zounds, a local bar frequented by students from the School of Music, agreed to make its facilities available to the PSO for this function. Zounds waived its normal cover charge that it required when there was live music and agreed to donate 15% of Zound's gross sales for that evening to the PSO Scholarship Fund.

At the door the Zounds and PSO had posted a sign asking for a "suggested donation" of \$10, the amount of the typical cover charge of Zounds for most live music. All of the donations at the door went directly to PSO.

The PSO held its benefit at Zounds on a Wednesday night, April 22, 2015. Zounds is typically open on Wednesdays when it holds an open mic night where anyone can perform. Wednesday nights were typically quiet, but sometimes students from the School of Music or other musicians would perform. On Thursday, Friday, and Saturday nights, Zounds typically had live music or a disc jockey.

The performers at the benefit were all students or alumni of the University School of Music and they all donated their time. The music they performed included a few original compositions by the performers, but most were covers of popular music.

i. Do the student performances (and the concert as a whole) come within the public performance right exception of §110(4)?

HOWARD UNIVERSITY SCHOOL OF LAW

COPYRIGHTS

Professor Steven D. Jamar

202-806-8017

SPRING 2015 COPYRIGHTS
EXAM FACT PATTERN
APRIL 27, 2015 EDITION

I. Mine Again

The Terors

1. Teri Teror was a punk rock composer and lead signer for the 70's punk music group The Terors.
2. The Terors were not incorporated and did not have a written agreement among themselves. They performed together and each contributed to the total sound of and thus the success of the songs. But there was no doubt about who the driving creative force and leader was – Teri.
3. The Terors had a series of middling hits in the late 70's, including "Terible Times" (a hit in 1976), "Trembling Teror" (a hit in 1978), and "Teror Walk" (composed, recorded, released, and became a hit all in 1980).
4. Teri wrote "Terible Times" and "Trembling Teror" herself before 1978. She composed the music on her guitar and made up lyrics as she played. She never wrote down the music, but did write down the lyrics and titles of the songs.
5. The chord progressions and melodies were quite simple, but the sound the group created was distinctive and the melodies were not copied from any other source, intentionally or subconsciously. They were pretty standard punk rock fare, but sufficiently original to be copyrightable as compositions.
6. Teri is the one who formed the group and it was the energy in her singing that audiences responded to and, together with Betz, really formed the core of The Terors.
7. The Terors recorded for a small record label, PUNK, which provided studio time and equipment, including in particular recording equipment on which all The Teror's music was recorded.
8. PUNK had a form contract it required all musicians to execute before PUNK would give them studio time, do the recordings, and promote the recordings. The Terors jointly as a group and each of the members of The Terors separately entered into a recording contract relationship with PUNK in 1978.
9. The contract included the following provisions (among many others):

- a. The artist [the contract referred to the party other than PUNK as “the artist”] agrees that all works recorded by PUNK are works made for hire and that the copyrights in the works are owned by PUNK.
 - b. The copyrights in the sound recordings are owned by PUNK as works made for hire.
 - c. The copyrights in the musical compositions are owned by PUNK unless the copyright has been registered by someone else prior to the work in the studio.
 - d. If the artist owns the copyright, the artist assigns the copyright and any renewals thereof to PUNK.
 - e. PUNK has exclusive rights to license the publication, reproduction, distribution, and performance of the music and the sound recordings except as to the artist having permission to perform the music.
10. “Teror Walk” was actually developed in the studio in 1980 after the Terors had recorded the set of songs they had come in to record. The Terors’ bass player, Sarah, just started playing a basic walking blues baseline. Then the drummer, Kelly, added a funk beat, taking Clyde Stubblefield’s “Funky Drummer” rhythm (see <http://www.youtube.com/watch?v=Z3xSXcivv5I>) as her source (she played it sometimes exactly like he laid it down and other times did some variations). Then the guitarist, Betz, started doing some riffs over it. It really was Betz on the guitar that gave The Terors their distinctive sound, though they all contributed to the total sound. Finally, Teri did some ad lib lyrics.
11. All of the process of creation of the song “Teror Walk” was in fact recorded on tape by the studio engineer, and employee of PUNK, who had learned from experience that sometimes the best stuff comes unscripted after the main session is over.
12. On January 1, 2013, Teri sent PUNK a notice of termination of the license for all of her compositions. The notice read in total: “The licenses I gave and The Terors gave to PUNK for all of my compositions and sound recordings are hereby terminated.”

II. Tell Me a Story

Arthur Alex

13. Arthur Alex wrote comic books (later known as illustrated stories) from the late 1960’s through the 2000’s. Two of his continuing characters were Mari Wanna and Polly Titian.
14. Mari Wanna was created in the 1970s while Alex was in college. While in college from 1970-1975, he wrote several comic book length stories about Mari Wanna, but mostly Mari showed up 4 times a year in a 12 panel story in the college newspaper. Alex was noted as the author, and the college newspaper, the *Zona Ozone*, did, surprisingly enough, actually include a copyright notice which included the copyright symbol, the date of publication, and identified the copyright holder as Zona College.

15. The *Zona Ozone* editors deposited with the copyright office the entire annual volume of the newspaper (which had been published in the form of two dozen separate issues for the academic year) at one time and sent in the registration paperwork and fee at that same time.
16. Alex graduated in 1975. In 1976 Alex was hired by Mazing Comix, an underground or alternative comic book publisher, to write Mari Wanna comic books that Mazing Comix would publish.
17. In 1978 Alex created a new character, Polly Titian, and started writing Polly Titian comics during what Alex called his own time at home, but while he was still employed at Mazing.
18. The contract between Alex and Mazing included in part the following provisions:
- a. Alex is hired as an employee and all work done in the field of writing comic books including creation of comic book characters is owned by Mazing as a work made for hire whenever and wherever Alex creates the comic books and comic book characters for the duration of his employment by Mazing.
 - b. Alex agrees not to compete with Mazing during the time of his employment and for one year after leaving employment at Mazing for any reason.
 - c. During the duration of this agreement, the copyrights in any comic books or comic-book type characters created by Alex that may be deemed by a court not to be works made for hire are hereby assigned to Mazing.
19. Mari Wanna became very successful (for an underground comic). It was so successful in fact that in 1980, Ralph, an enterprising former editor of *Zona Ozone* collected all the Mari Wanna comics from the *Zona Ozone* and from any other source he could find, including comics that had been submitted to the *Zona Ozone* but that it had not published and others that Brent, a roommate of Alex, had kept (Brent had made Xerox copies of the originals with Alex's permission). Ralph then published the collection under the title of *Mari Wanna's First Puff* and began selling it through head shops and independent record stores (back when there were record stores).

III. Make It Move

Arthur Alex & Teri Teror

20. In 2005 Alex and Teri got together to do a musical short animated film called *Puff Politics* using both Polly and Mari to satirize politics and the news media. Teri contributed the music, which was all newly composed by her, and also contributed somewhat to the story line of the film. Alex did the main story line and the computer graphics work.
21. They created the film themselves using computer software Alex had a license to use. They published *Puff Politics* first on YouTube. It went viral for a few weeks and then died out.

22. They didn't make any money on it. They did not make it in order to make money, but rather made it to comment on politics, especially on how U.S. Presidents have deceived the American public into going to war, particularly President Lyndon B. Johnson (Gulf of Tonkin Resolution for Vietnam) and President George W. Bush (weapons of mass destruction in Iraq).
23. Alex died in 2010. Teri Teror died 5 years later.
24. Curiously, in 2040 this film, *Puff Politics*, and a few others with the same general theme (i.e., short, satirical films showing how the people have been manipulated by politicians), became popular again in a retro sort of way in part because politicians really had not changed all that much.
25. Teror's heirs started to exploit the film financially. They registered the copyright in 2040 properly in both Alex's and Teror's names. They then began to charge royalties for showing it and took it down from free parts of YouTube and the internet. They had it available on a website, but had it set it up such that you could only view it by paying a license fee. They also were licensing it through iTunes (assume that YouTube and iTunes and other such companies still exist in 2040 and that things then are much as they are now in terms of distribution of media – not a very realistic assumption, I know).
26. In 2041 Alex's heirs sent a notice of termination to Teror's heirs stating that their (Teror's heirs) right to use Polly and Mari were thereby terminated and that Teror's heirs should not show the film in the future without their (Alex's heirs) permission as the copyright holders in the Polly and Mari characters.
27. Alex's heirs sent the termination notice on January 15, 2041 with the termination to take effect on January 16, 2043.

IV. Make Me a Model

Gracie Graphonen

28. Graphonen does graphic work for online use, or rather, she wants to get into that business. However, the field is crowded with good people, some are established, but many more are like her—just trying to get a break.
29. As a way to draw attention to her work and her abilities and her business, Graphonen has made a catalog of her work and posted it on her website and on various blogs and other sites around the internet where she hopes the right people will notice her work.
30. Some of her work is original from the start and some of it is based on other works. She has done some works just in the style of others; some of her works could best be described as “inspired by” rather than really using much of the underlying work; some of her works are in the nature of collages which use part of the works of others in her own work; and some of her works are modifications of other's graphic works she obtained online.
31. Graphonen's day job (which pays the bills) is as a graphic artist for a large architectural firm, NMI LLC, which has her prepare two and three-dimensional renderings of architectural designs. While modern architectural programs do much of the work of the rendering automatically, it takes a lot of

training and experience to do it well. Her job is to make the automatic renderings look more realistic and enticing through adding color, texture, shadows, and other details the automatic renderings omit or do poorly.

32. In 2006 one of Graphonen's projects at her work was for a new Metropolis Museum of Modern Art (M3A) wing being designed by NMI. After doing the renditions requested by NMI, Graphonen exported the graphics file to a format that allowed her to work on it at home on software she had a proper license to use (she cannot afford the more powerful CAD software the firm uses).

33. Working at home, after business hours, and using her own software, Graphonen made what amounts to a movie of the new wing design. However, she played with it. It changes colors, some rooms seem to be breathing, others have other visual distortions, and some magic doorways have been inserted that take you instantly outside from an interior room or to another part of the building entirely. Some of the film is seen from a person's eye level in a sort of walk around (outside) and walk through (inside) and some is done as more of a fly-around or fly-through from different perspectives like from a small bird flitting about.

34. She added renderings of famous paintings and sculptures, all which were in the public domain, to the walls and floors of the space, respectively, and they too were viewed in perspective and 3D as appropriate as one moved around the rooms. However, since the wing was designed to display modern art, and the works of art she put in the galleries were all in the public domain, all of the works were published before 1923 and thus are not really "modern" and so are not really what the museum was designed to display.

35. Graphonen thought this 4 minute video was really good and wanted to show it to the world, but she thought it needed music. So she went online and listened to lots of lesser known or unknown works. She came across a work from 2000 by a Teri T who it turns out, unknown to Graphonen, is Teri Teror.

36. Teri had long since dropped the "Teror" which was, like "T", a stage name anyway. Teri had also long since moved on from punk to other sorts of avant garde music. She had validly terminated her contract with PUNK in 1984 and had worked independently since then.

37. Teri's music chosen by Graphonen was entitled "Baroque Break" and was based on the famous Toccata and Fugue in D Minor by Bach. While it was recognizably that famous Bach work, Teri had modified it with many, many distortions in sound, rhythm, and instrumentation as she played it on her synthesizer keyboard and later modified it with post-recording touches. It was the combination of the familiar and the distortions that appealed to Graphonen.

38. As she did with much of her post PUNK work, Teri distributed "Baroque Break" herself online.

39. Graphonen revised her video with scene changes to fit the changes in Teri's sound recording of "Baroque Break" so when the music seems to breathe, her rooms do as well, and when other distortions are put in the music, other distortions show up in the design. When instrumentation changes, the colors change.

40. When it was ready, Graphonen posted it on YouTube, on March 16, 2008, in honor of St. Urho's Day (Graphonen is of Finnish descent and the dominant color in the video is purple). It took awhile for it to get noticed and mentioned on art, music, and architectural blogs, but once it did, it went viral with millions of hits in just a few weeks.
41. Graphonen called the work "*Filigree*."
42. Someone at M3A saw the work and contacted Graphonen to ask if they could showcase the work as part of M3A's forthcoming exhibit on animation artists. She of course agreed and the show opened on January 1, 2009.
43. Graphonen registered and deposited the work with the copyright office on June 1, 2008, immediately after she was contacted by M3A. She also included a copyright notice on the work that read "© Gracie Graphonen 2008." Previously she had not included a copyright notice, but had included a title page on the video that read, "*FILIGREE. A NEW WORK BY G2.*"
44. After her work had gone viral, many other people online captured the video feed and began to make various versions of it.
45. One replaced the Teri version of the Bach with the Virgil Fox organ version. Another with the Stokowski version used in Disney's "Fantasia." Others used other versions.
46. Some put it to different music entirely such as Led Zeppelin's "Stairway to Heaven" or even rap music.
47. Still others introduced different colors and distortions to the graphic aspects.
48. In addition, similar sorts of works began being posted where people took either building plan renditions and made similar sorts of musical walk-throughs or in some instances just did actual walk-throughs with a video camera and then digitized and modified that video file and put it to music. The best one of these used video taken at an actual museum set to the Fritz Reiner's Chicago Symphony 1957 recording of Ravel's 1922 orchestral arrangement of Mussorky's 1874 piano piece, *Pictures at an Exhibition*, reproducing almost exactly the paintings shown at the exhibition Mussorky immortalized in his composition.
49. Another particularly successful one had a very dreamlike archi-scape set to the 1959 guitar instrumental pop hit *Sleep Walk*.
50. All of these works were done by users just for the sake of doing it and not by professionals for commercial purposes. Some had few hits; some many. The success of some of these works resulted in people seeking out the original, *Filigree*, with the result that every time a new video version of it came out, *Filigree* itself experienced a bump in hits.
51. Graphonen made no money from the YouTube hits, but, of course, YouTube did (from the advertising on the landing webpage of *Filigree*).
52. When doing her own completely original work, that is, art not based on directly on something else, Graphonen has a particular, identifiable style that might be characterized as somewhat surrealistic three dimensional distortions of common works creating sort of a watercolor-wash effect, but with

surprisingly vivid colors. Those who know her work can instantly identify her original work by the very distinctive style. When she bases the work on works by others, she is more chameleon like, regularly changing her technique and style to fit the underlying work better.

53. Three months after *Filigree* became a hit, Nuke M took the video and made it into a short interactive first-person shooter video game in which the person controlling instead of a gun proper a drone that flies through much like the little bird view in the movie. The shooter maneuvers the drone into position and targets various sculptures and other works of arts for points. It is not a very complex game by today's standards, but the ability to play it on smartphones as an app or on the iPad or on computers made it a good seller – easy, cheap, and doesn't take long to master or play so it works just as a short term diversion. Nuke M calls the game *Rip Art*.

54. Three months after Nuke M's game was issued, Edie Kator saw another potential for an adaptation of *Filigree* and *Rip Art*—that of making an educational game where instead of blowing up art one wanders through the space tagging particular styles of art and particular artists. Though not too popular compared to the original *Filigree* and the shoot-em-up versions, this too did well enough to net Edie some money when sold as an app.

V. Mash It

User Undone

55. Yama Yoozer is a college student who loves fan fiction and is a regular contributor to the genre. He not only writes his own versions of *Harry Potter*, *Game of Thrones*, and many other fan fiction favorites, but also illustrates them with his own graphic works.

56. His graphic illustrations are typically done in a particular imitative style such as cubist after Picasso, or anime, or pointillist after Seurat, or impressionist. Yama will do one whole graphic work in one particular style and then change styles for the next one.

57. In 2012 Yoozer took one of Alex's 1980 stories about Polly Titian and updated it to fit the presidential election of 2012 between Obama and Romney. (It was written in fan-fiction style drawing upon many of the elements of Polly Titian including plot, characters, and of course Polly Titian herself.) Yoozer also re-illustrated it (it was a comic book remember) it in the style of Graphonen (as described in paragraph 52 for her original works not based on other works).

58. Yoozer then posted it online first just for friends/circles on Facebook and Google+ and on fan fiction-specific sites. While many nerds who do fan fiction are in fact apolitical, many others are in fact very politically involved, and it was a hit among that group. At urging of his politically aware friends, Yoozer posted it on various fan fiction sites. He titled it "*PoliPain*."

59. *PoliPain* eventually got noticed by an online political blogger who found it clever and who wrote: "*PoliPain* captures the essence of the election this year in a fresh new way that will appeal to the younger voter."

60. Yoozer's lover at the time, a woman musician named Onry, suggested that they could collaborate on a short musical work, using the basic story and using the comic book version of *PoliPain* as done by Yoozer as the images for a music video. Yoozer liked the idea and a month later they had the music version done and posted it on Onry's music site and various other alternative and new music sites. They called it simply "*PoliPain–The Musical.*"

61. Then it went viral. When it hit 300,000 hits, someone else, Frilo, copied it and put it on YouTube. Before posting it on YouTube, Frilo replaced Onry's specially written music with The Teror's *Terrible Times* which fit the story in the illustrated novel (comic book) strangely well. Frilo's copy had advertising from which Frilo profited.

62. In response, Yoozer and Onry reworked the music on their version to be a mashup of Onry's song and *Terrible Times*. They called the new video "*Teribl PoliPain*" and posted this new version on YouTube, but without any advertising revenues coming to them.

63. The success of Yoozer's video spurred renewed interest in the work of Teri and Graphonen and as a result their works started selling again. They were contacted for interviews and did some paid for appearances at various events. They also were commissioned to do new works as a result of this renewed notoriety.

VI. Picture This

Digi Foto

64. Foto is a professional nature photographer. She posts her pictures online as a way to market hard copy prints of them that people can buy and to market her annual hard copy nature calendars which, of course, use her pictures. The calendars often have themes (big cats, safari, Galapagos, mountains, etc.).

65. All of Foto's pictures have a copyright notice with a date, copyright symbol, and her name on them or embedded in the metadata with the image. She also has certain "nonsense" code that she includes in each image so that she can track them if someone copies the electronic version.

66. One of Foto's most popular works is a nature print collage which is a picture of one northern lake shore, but it blends seasons from left to right from winter to spring to summer to fall to winter again such that if you wrapped it into a tube it would be a seamless picture. Into each scene Foto has inserted pictures she took of various animals appropriate to the scene, season, and location. For example in late spring/early summer there are geese with goslings; in fall there is a deer with antlers; and in winter a weasel has its winter white coat. Foto called it "Lake Seasons."

67. Ashok Deriv, a professional computer programmer and amateur photographer, recently took some of the electronic images from Foto's website and made a similar scene, only it is of a southern Africa watering hole with the seasons being essentially two: wet and dry. Deriv inserted pictures of animals taken in Africa by Foto, but some of the animals are not actually from that location and some of them are placed improperly as to season. That is, some of the animals that only would be seen in the wet season are

shown in the dry season part of the collage. Deriv named his work “Safari Wet and Dry.”

68. Deriv posted *Safari Wet and Dry* on Deriv’s own professional website and on his own facebook homepage. He granted permission to everyone to download the image and use it for their personal use such as a screensaver or as their desktop photo. Deriv did not explain how he created the work nor did he credit Foto for the images used.

69. The way Deriv used his software to make *Safari Wet and Dry* removed all of Foto’s copyright notice information and the embedded code. Deriv was unaware of the removal of this information from the electronic versions (the software code) of the images.

70. Cy Fy saw the Deriv work and thought he’d do something similar. He went to the NASA website, and downloaded the NASA Hubble image of Orion, reproduced below.



71.

72. Fy then populated the image with ghostly pictures of aliens from sci-fi movies ranging from *Star Wars* to *Star Trek* to *Mars Attacks* and many, many more. Fy obtained from various online sites movie and sci-fi interest sites. He made the images partially translucent and matched the pallet of the NASA picture so the images truly seemed to be floating in space and emerging from Orion. Fy called his work “*Frontier No More.*”

73. Par O. Dee found *Frontier No More* online and thought it pretentious and absurd. So Par took the same NASA picture and where Fy had aliens, Par inserted animal pictures that she found on the U.S. National Zoo site and at various other places around the net, including some of the humorous pet pictures that get posted. The animals ranged from domesticated cats and dogs to farm animals to wild animals held by the National Zoo, including the pandas. Par called her picture “*Frontier Amore.*”

74. Anne Dee, Par’s sister, was a visual artist. She found one of Foto’s animal pictures particularly compelling:



75.

76. Anne made a Warholesque collage based on this, similar to Warhol's homage to Marilyn Monroe reproduced below. Anne did not have permission from Foto to use the picture. Anne called it simply "Croc."



77.

78. Then Anne made another work where she replaced every other Marilyn with the corresponding croc picture and she called this one "Maneater."

VII. A Movie Experience

Di Violet Dee

79. Anne and Par's cousin, Di (pronounced "dee"), made a video documentary on problems of internet access among historically marginalized communities and released it in DVD and Blue Ray formats. The production was funded primarily by grants from the Access and Empowerment Foundation (AEF) with lesser grants from smaller organizations.

80. The documentary was called "*Empowering through Access*."

81. Di and the AEF distributed the documentary through typical channels such as university organizations, community organizations, and through public TV stations. They also posted it online, which was, as they realized, ironic since the main target market they were trying to empower would not have access to it online – that was the problem.

82. Di held the copyright in the work and all original contributions by others were done under a written contract as independent contractors who agreed it was to be a work made for hire with Di owning the exclusive copyright in it the finished product.

83. In making the documentary, Di used clips from hip hop music which had sampled other music; images from popular films and TV shows that referenced the contributions of marginalized groups to culture and development; and clips from various interviews done on TV by news and other shows. In particular she used portions of this clip about the Harlem Shake, unedited, except as to length. <http://www.youtube.com/watch?v=ESlmaIkWfio> . She did not obtain permission for the use of any of these items.

84. Di had granted a broad license which provided that anyone could show the DVD publicly or privately, but which prohibited the making of any derivative work or of showing parts of the documentary out of context. The DVD was also protected by standard DVD encryption.

85. P. I. Rat obtained a DVD of *Empowering through Access* and by using DeCSS, he created a copy of the documentary that was no longer copy protected. He then made an audiovisual work using the video portion of *Empowering through Access*, but changing the audio narration to something that satirizes libertarians by urging all of those without access to simply quit complaining and make video games or iPhone apps or something productive. The tone was clearly satirical and the target of Rat's work was not *Empowering through Access* itself, but rather those who argue that neither the government nor society in general should do anything to help anyone else collectively and that the poor are that way for a reason.

86. Rat posted the work called "*Empowering the (M)Asses*" on YouTube.

87. Di does not like Rat's work and complained to him and told him to stop showing it and threatening him with legal action to make him stop.

88. Di also accused YouTube of infringing her copyright.

VIII. To the Theater

Doug Deiper

89. Di Violet Dee sued P. I. Rat and YouTube for copyright infringement. The case wound its way through the courts, ultimately being argued at the U.S. Supreme Court in one of the rare copyright cases heard by the court.

90. The primary issues concerned violations of the derivative work right, performance, take-down notices, and fair use.

91. Di was represented by Iam Loyir and Rat was represented by I. Ben Atty. Both Loyir and Atty wrote out arguments for their oral argument at the Supreme Court.

92. All arguments at the court are audio recorded by the court, transcribed, and published online.

93. Loyir read from her oral argument notes for 5 minutes at which time she was interrupted by the court and for the remaining 40 minutes was peppered with questions. Some of her answers tracked very closely with her prepared speech, but many of them were more impromptu. All of her responses were tailored to the question asked by the Justice, so even when her answers tracked with her prepared speech, they were not identical.

94. Atty, on the other hand had a different experience. He spoke uninterrupted for 30 minutes, reading from his prepared speech and then had 15 minutes of questions for which his prepared speech did not provide material for the answer. Being well prepared, he answered capably anyway.

95. The remarks made by the justices and the answers of the attorneys were generally insightful, and sometimes clever and even witty. There were remarks about the copyright statute, constitutional implications for free speech, and more.

96. A journalist, Doug Deiper, had been following the case and after oral arguments was inspired to prepare a theatrical work based on it. He took the transcript of the oral arguments and used many portions of it verbatim, though he rearranged the order so that the two advocates seemed to be engaging each other more directly. He added additional scenes to provide more context for the audience to follow the case more easily. These scenes explained the factual background of the case and included cuts from the works at issue and fictional dialogue of a confrontation between Dee and Rat. He also cut some of the material from the oral arguments as too repetitive or convoluted and unclear.

97. Deiper called the play "*Empowering Arguments*." It was performed first by a small, independent, semi-professional theatrical troupe in the District of Columbia (the thinking being that the number of attorneys interested in copyright and the supreme court in the area would provide an audience for the show).

98. Deiper did not obtain permission from anyone involved (the parties, the attorneys, the judges, etc.) in the case for his play.

IX. Booking It

EBR

99. Electronic Book Reader, Inc., (EBR) created a book reader like the Barnes and Noble Nook, the Amazon Kindle, or the Apple iPad.

100. EBR called its book reader EBRT (pronounced “ebert”) for “Electronic Book Reading Technology.”

101. EBR purchases used books in hard copy (some are out of copyright, some not) and acquires new books from publishers in electronic form. It also acquires, whenever it can, used books in electronic form, but that has proven to be more difficult due to format incompatibilities, copy protection schemes, and other digital rights management (DRM) efforts which limit the user’s ability to sell or transfer or copy the books they acquire, including licensing limitations (electronic books are not sold, they are licensed).

102. EBR obtains licenses to copy and distribute the books that it obtains from publishers, but not for the hard copies it digitizes itself.

103. EBR does not sell the EBRTs, but rather just licenses them to users. The transaction works much like a sale, with a single payment, transfer of possession, and no end date or date to return the EBRT to EBR, but is called a license and purports only to license possession and use of the EBRT.

104. The license from EBR to possessors users of the EBRTs provides as follows:

- a. This EBRT and all content on it obtained from EBR is licensed to the user on the following terms and conditions:
 - i. The user agrees never to sell or transfer or sublicense the EBRT or any of the content on it obtained from EBR;
 - ii. The user agrees not to circumvent any of the copy protection technology;
 - iii. The user agrees not to reproduce or distribute any of the works obtained from EBR; and
 - iv. The user agrees not to copy, use, modify, incorporate into another work in any manner whatsoever any work obtained from EBR and subject to this license without further express permission from EBR on a case by case basis.
 - v. The user agrees to return the EBRT to EBR if any of the provisions of this license are violated.

105. Kelly obtained the EBRT reader from EBR complete with a number of public domain works (such as Jane Austen’s novels and historically important works that are in the public domain such as Frederick Douglass’s *Narrative of the Life of Frederick Douglass, an American Slave*) that come with the EBRT.

106. Over the next year she also downloaded movies, TV shows, music videos, magazines (including in particular the *New Yorker*), and numerous books including among many others *1Q84* by Haruki Murikami (published in the U.S. in 2011), and *A Tale of Two Cities* by Charles Dickens (published in 1859), from various sources. Some of the books are still in copyright, some not.

107. All of the books and most of the movies and TV shows were acquired from and downloaded from EBR for use on her EBRT. *The New Yorker* was purchased as a subscription from *The New Yorker*. Each *New Yorker* issue had to be converted (using EBR conversion software licensed to Kelly) from its iPad-compatible format to the EBRT format to be readable on the EBRT. EBR made the conversion software without *The New Yorker's* permission.

108. Kelly also downloaded all of the works mentioned by all of the authors noted above in paragraphs 1-88. Kelly was writing a magazine article about the problem with U.S. copyright law regarding derivative works and was using some of the works and events described above as examples.

109. After that year, Kelly wanted to get the iPad because it has a bigger screen with higher resolution and has more apps she is interested in using. She had also recently converted to a Mac computer and the integration of the iPad with the Mac was easier than the EBRT, a feature particularly compelling for her work as a sometimes blogger and freelance writer.

110. Kelly went online and obtained software that allowed her to back up all of the files from her EBRT, to convert those files to a form useable on her iPad, and to transfer the files to her new iPad, which she then did.

111. Kelly then sold, on eBay, her EBRT complete with all of the files on it.

X. I Like the Sound

Nspired

112. In 2015 Nspired recorded a song that became a number one hit that year—"Move It." In an interview after the song was a hit, Nspired was quoted as saying, "I really liked the punk sound, especially Teri and the Terors. So I wanted to create a song, sort of, you know, like a tribute to Teri, and tried to capture some of that raw punk sound of her early stuff, especially 'Terrible Times.' Tragic how she died this year." [see paragraph 23]

113. In 2016 Teri's heirs sued Nspired for copyright infringement based on the music for "Terrible Times" and PUNK sued on the sound recording copyright for the same song.

114. At trial Nspired's digital expert, Coy P. Abit, testified that no sampling of the sound recording had occurred and that none of the sounds from the sound recording had been used directly in "Move It."

115. Nspired's recording engineer, Tek Ears, who had actually recorded the performance also testified that he did not sample any sounds but rather just "played with the settings" until he got the sound he wanted which was intended to sound as much like the sound of the Terors as possible.

116. Peter Unkton, founder, owner, and chief sound engineer of PUNK, testified that he was sure that the sound recording itself had been sampled because it had been so hard to create in the studio, using all sorts of special analog equipment he had back then. Unkton testified that in his opinion the use of the sounds he created had to have been sampled, but then were digitized and so their true source was masked. He demonstrated and explained in court how this could be done.

117. Abit and Ear both testified in rebuttal testimony that they were just that good that they could recreate any sound digitally without any sampling of the original sounds themselves.

118. Teri's heirs' musicologist, Des Kordant, testified in summary as follows:

- a. The music of "Terrible Times" and "Move It" were in the same musical key.
- b. They had similar deep structures in terms of the flow of the music from one section to the next using the chord progression ii-V-I, and in terms of the relationship of the chorus to the verse with respect to pace and inversion of key musical phrases.
- c. The two songs also share bass line built around just three notes of an E major chord. The rhythms were similar as well. In "Move It" the bass generally played on beats 1, 3, and 4 ½, while in "Terrible Times" the bass generally played on beats 1, 4, 4 ½. And sometimes the exact notes were different and the order of the notes in the two songs were different, but for the most part they were much the same.
- d. Both used the same rhythm a syncopated 4/4 time.

119. Nspired's musicologist, Heerit Kaant, basically agreed with the analysis of Kordant, but opined that for this type of music such similarities were common and indeed to some degree defined the genre – sort of an alternate rock/punk fusion. Furthermore, the exact features of these two compositions were to be found in hundreds if not thousands of songs, especially the bass lines and the transitional chord progression ii-V-I.

120. Kaant showed how the bass line was really a sort of homage to the bass lines in "Oh Pretty Woman" and "Day Tripper" and that the latter was in fact an homage to the bass line in "Oh Pretty Woman." Kaant noted that in fact those two sources were more complex than the ones in either "Terrible Times" or "Move It," but that that sort of simplification of musical ideas and structure were just part of what made punk music punk music. "A loud, driving simplicity," Kaant labeled it.

121. When listening to the two recordings, "Terrible Times" and "Move It," they do indeed sound similar but are clearly not the identical.

122. [See <http://musicologynow.ams-net.org/2015/03/blurred-lines-ur-lines-and-color-line.html> for a discussion of the "Blurred Lines" – "Got to Give It Up" expert dispute.]