
HOWARD UNIVERSITY SCHOOL OF LAW

COPYRIGHTS

Professor Steven D. Jamar

202-806-8017

SPRING 2016 COPYRIGHTS
FINAL EXAM INSTRUCTIONS

April 25, 2016

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 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 45, 60, and 50 points respectively for a total of 155 possible points.
4. Type your answers using your laptop, as instructed by the proctor. For those not typing the exam, write legibly and clearly in blue or black ink.
5. Use headings as appropriate.
6. 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 me how much you know. This exam tests professional judgment as well as knowledge of copyright law.
7. 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. An exam question itself may provide additional facts or change a fact or facts. In such a case use the fact as stated in the question.

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 concerning 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 relating to the specific questions asked have been edited and a few facts added, changed, or clarified.

HOWARD UNIVERSITY SCHOOL OF LAW
COPYRIGHTS

Professor Steven D. Jamar

SPRING 2016 FINAL EXAM

April 25, 2016

Question 1. 45 points. Estimated time: 40 minutes.

Paragraphs 14-34 (especially ¶¶ 25-27).

A partner in the firm has asked you to evaluate this situation to explain whether Butohr has the right to make and distribute multiple copies. Do so.

Question 2. 60 points. Estimated time: 60 minutes.

Paragraphs 26 & 58-61. There may also be some relevant facts in other paragraphs, but the noted ones are the core paragraphs for this question. Your response to this question will be based in part on your evaluation of the problem posed in Question 1. You may be well advised to evaluate this question assuming each of the possible outcomes from Question 1 separately.

Teri posted the song “End Times” on her own music site and on YouTube. Marley sent a take-down notice to both Teri and YouTube specifically identifying the song “End Times” as infringing Marley’s copyright in the images used (from Marley’s paintings).

Evaluate the rights and possible courses of action of all concerned including responses that Teri, YouTube, and Butohr could make to the take-down notices and what rights, if any, Marley would have if Teri and YouTube do not take down the “End Times” video.

Question 3. 50 points. Estimated time: 45 minutes.

Paragraphs 14-34 (especially ¶¶ 33-34).

Assume that Marley owns the copyright in affected works; that she had not assigned the copyright to Butohr; and that Butohr’s actions in paragraphs 33-34 would be found to be infringing on Marley’s copyrights.

Calculate and explain Marley’s potential entitlement to damages under copyright Act § 504 for the actions of Butohr in paragraphs 33 and 34.

HOWARD UNIVERSITY SCHOOL OF LAW

COPYRIGHTS

Professor Steven D. Jamar

202-806-8017

SPRING 2016 COPYRIGHTS EXAM FACT PATTERN

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. Teri Teror formed the band, The Terors, in 1974.
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 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. She usually worked alone when composing 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. The energy in Teri's singing was what audiences really responded to.
7. The lead guitarist for the group was Betz; she and Teri really formed the core of the group which was rounded out with a drummer, bass player, and keyboardist.
8. Beginning in 1978, 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. Prior to 1978, The Terors had recorded at PUNK's studios, but had just purchased time in the studio and did not have a recording contract with PUNK.
9. PUNK had a form contract it required all musicians to execute once PUNK agreed to put the group under contract. PUNK would give them studio time, make 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.
10. 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 has permission from PUNK to perform the ARTIST’s music.
11. “Teror Walk” was 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=Z3xSXc1vy5I>) 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 (along with Teri’s singing) that gave The Terors their distinctive sound, though they all contributed to the total sound. Finally, Teri did some ad lib melody and lyrics. The keyboard player, Pat, wasn’t at the studio that day, but added her track to the song later that week.
12. 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.
13. 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. Seascape Portraits

Marley

14. Marley is a painter from the Florida Keys. She mostly works in acrylics and water colors, but sometimes would do charcoal drawings as well.
15. As with most artists, she had to work a day job in order to make ends meet. She worked as a cook for a small café that would sell works of art on the restaurant walls from local artists.

16. She also would exhibit and sell her works at local and regional art fairs. Her work was first discovered by an art dealer, Distri Butohr, at a spring art festival in Miami in February 2010.

17. Distri Butohr thought Marley's work was interesting and would have a bigger market in Spain, Morocco, and New York than in southern Florida where her art, though excellent, was not as distinctive because of other lesser artists doing much the same style.

18. So Butohr bought six of Marley's seascape portrait paintings for a total of about \$900.00 (\$150.00 each) and sent two each to associates in Barcelona, Spain; Rabat, Morocco; and New York. In New York each piece sold for about \$3000.00 each; in Barcelona for about \$1500.00 each; and a collector in Rabat paid \$9000.00 for the two of them sent there.

19. Distri Butohr realized he had a good thing on his hands and after getting paid his 50% commission on the sales, he made out very well.

20. In April 2010, Butohr tracked down Marley's studio in Key West. Marley said she generally did about four of the seascape/portraits each year – impressionist seascapes were more her thing, but she had 6 seascapes she had painted over the years in her studio. Butohr bought the remaining 6 of the seascape/portraits which Marley had in her possession, plus 6 other more typical seascapes for a total of \$3600.00.

21. Butohr sent them to the same dealers in Barcelona, New York, and Rabat where the seascape portraits again sold for about the same prices in Barcelona and New York. In Rabat the same collector did not buy them, but rather someone else in the collector's circle of friends did so. She paid prices more in line with those in New York. The more typical seascapes sold much more slowly and for only about \$600 each, which was still about double what Butohr paid for them which meant that given his commission, Butohr basically broke even on them.

22. A few months later, in September 2010, Butohr returned to Marley to see if there were any more of the portrait-seascapes to sell. When he arrived, Marley was happy to see him and Marley informed Butohr that her works were now selling in the Miami area for about \$250-\$350 (up from \$100-\$150) each. Marley also said it was the "wrong season now to paint those works because the light was wrong" and to come back in six months. She had painted one other seascape portrait last April "before the light changed" and after Butohr had visited, and would sell it for \$1000.00. Butohr negotiated the price down to \$600.00, which was still double what he'd paid last time.

23. Distri Butohr did not want to have Marley's works off the market for six months, so sent this one remaining painting he had purchased to Spain to make a dozen giclée prints. He checked with his contact in Rabat who said they only would want originals there; prints would not sell for enough to make it worthwhile. So six of them he had shipped back to his New York connection to be sold there and the other six he left with his dealer in Barcelona to sell them there.

24. Butohr's New York connection, SoHo NuVeau Gallery (SNG), told Butohr that they were sure the prints could be sold, but they would be worth more if they were signed and individually numbered. Butohr did not explain why they were not.

25. Six months passed before Butohr returned to Marley's studio in March 2011. On this trip, Butohr decided to get a contract in writing with Marley for the seascape/portraits and a right of first refusal on any other works that Marley painted. They discussed the opportunity presented by having giclée prints made, but Marley did not want multiple copies of her works made and marketed like that and so refused that part of the deal.

26. The terms of the contract included the following terms (along with other provisions):

- a. Subject to paragraph c, Butohr has a right of first refusal for all of Marley's acrylic paintings;
- b. Butohr was the exclusive agent for handling the sale of all of Marley's works outside of Florida;
- c. Marley would continue to paint and sell as she pleased in Florida;
- d. Butohr would pay Marley \$1000.00 per month for two years with an option for Butohr to renew at \$2000.00 per month for another two years;
- e. Butohr would pay Marley \$500 per painting plus 20% of his commission on any works sold – Butohr commission was 50% of the sale price in galleries;
- f. Marley assigned the copyright to Butohr in the works she sold to Butohr.

27. The contract was silent about making copies for marketing purposes or postcards or note cards or giclée prints for sale.

28. By the March 2011 visit from Butohr, Marley had painted only three seascape portraits. Butohr bought them for a total of \$1500.00 and sent them, one each, to Rabat, Barcelona, and New York where they each sold for \$3000.00. This meant that Butohr's commission was \$4500.00 in total for the three paintings.

29. In March 2012 Butohr returned to Key West and paid Marley \$6000.00 total for the 8 seascape/portraits Marley had painted while the winter light was right. Butohr was disappointed there were not more paintings, but he knew he would come out well because the value of Marley's work had increased dramatically so that each of these paintings would now sell for between \$8000 and \$20,000.

30. Unknown to Marley, and without his agreement, Butohr took two of the paintings and had 30 giclée prints of each made, again in Barcelona. Butohr planned to distribute them through dealers in many additional cities to test the wider market.

31. The experiment paid off. The giclée prints sold for about \$2500 each, or about a fourth of the then going price, on average, of the originals. The giclée prints cost only about \$100 each to make, plus another \$100 each for shipping, so it was a very profitable move for Butohr. With his 50% commission, Butohr made about \$1000 per print in profit, or about \$30K. If he gave Marley a 20% cut, that would be about \$6K profits on the prints

alone. He did not give Marley a cut because if he did so, she would find out that Butohr had made the copies against her wishes.

32. In March 2013 Butohr again returned and purchased the six paintings done by Marley over the past six months, this time for \$12,000. He also paid Marley \$9000 which represented the 20% commission on the sales from the original paintings from the year before. From this, for the first time, Marley learned that her work was selling well internationally for from \$10K to \$20K per piece. Butohr did not provide an accounting on the giclée prints because Marley had not approved of him doing that and would not agree to it.

33. Butohr decided to take a gamble and to try to hit while the market was hot. This time he placed only one each of three of the originals with the dealers in New York, Barcelona, and Rabat and had 4000 giclée prints made of each of the other three paintings. He had 1000 of the prints of each of the three other paintings sent to dealers in select cities around the world. Most of them sold well for good prices.

34. The rest of the prints he took to Home Shopping Network to sell through TV marketing. He set the price at \$500.00 each. He waited four months until most of the dealer-distributed works had been sold, so as to not undercut the price in the dealer shops. He was now able to say during the sales pitch on TV that these were works that sold from \$1500 to \$2000 for the giclée prints and up to \$20,000 for the originals. He sold out within a month. He made about \$300 per print or about \$900,000 on the 3000 he sold this way.

III. Marketing Art

35. In September 2013 the contract between Marley and Distri Butohr was due to expire, unless it was renewed. Of course Butohr exercised his option and renewed.

36. Butohr again tried to get Marley to agree to selling limited edition signed prints of her work, and she again refused. He also asked her to consider licensing the work for making postcards, notecards, mugs, and other uses—and she again refused.

37. Marley was unaware of the mass marketing or the Home Shopping Network sales because she never watched HSN. Butohr was also careful to say that the prints were not available for sale in Florida in hopes that Marley would not find out by accident what he was doing.

38. As a result of Butohr's actions the demand for Marley originals, especially in New York, skyrocketed. SoHo NuVeau Gallery (SNG), the gallery through which Butohr sold the paintings in New York, wanted to do a show just of Marley works, but wanted her to come for some social events around the show. Her original works were now selling for at least \$50,000 at SNG in part because they had become more popular as a result of the mass marketing by Butohr.

39. Butohr never told Marley of these developments and just said that Marley was a recluse and would never come to New York.

40. Butohr decided it was time to go all out. He entered into licensing agreements for notecards, mugs, placemats, pens – all sorts of consumer

items. He had high-quality posters made to be sold in museum stores and other stores around the country. He had lesser quality posters made to be sold in Target and such stores. And he went online with SoHo NuVeau Gallery to sell the works.

41. Online SNG and Butohr sold electronic versions of scanned Marley paintings as well as giclée prints and poster-quality prints.
42. In a year Butohr personally made over \$2,000,000 on the Marley works.
43. None of this was explained to Marley. In March 2014 she just received a very large check and paperwork relating to the sale of the originals.
44. And she again sold her six seascape portraits to Butohr.

IV. Local Work

45. After a visit to SNG in October 2014, Mae Faire, a Miami art dealer, thought she recognized Marley's work from the various art fairs she attended around Dade County from time to time. So she sought Marley out and found her at her studio at Key West. She was surprised to find that Marley was unaware of what a sensation she had become and that she was completely unaware of the sale of the prints, other marketing ventures, and the online versions of her works.
46. Marley was stunned and angry and shouted at Mae to get out, feeling that all of the corrupt art world had betrayed her – not just Distri Butohr.
47. A week later, she had calmed down a bit, and called Mae to see if she would want to display and sell one of her seascape portraits. Mae said “yes” enthusiastically and immediately. Without telling Butohr, Marley delivered a painting to Mae Faire to sell on consignment under which Marley would receive 70% of the proceeds and Faire would receive a 30% commission on the sale. The painting sold for \$100,000 – the largest price yet for a Marley.

V. Falling Out

48. Butohr heard about the sale in Miami, of course. But was not sure what to do, so he did nothing until March 2015. He then visited Marley who accepted the check, demanded payment for all of the prints sold, and cancelled the contract with Butohr.
49. Nothing Butohr could do would convince Marley to change her mind.
50. Butohr continued to have prints made and sell them online.
51. He also started to have giclée prints made of some of the works he had been selling, but now they were being printed using different colors. Instead of the pastel blues of the Caribbean Sea and the vibrant colors use for the portraits, he had the seascape rendered in oranges and violets and the people rendered in somewhat washed-out pastels. The effect was to change the balance of a person and seascape being in cosmic balance to that of a person being swallowed by an imposing world.

VI. Moving Paint

52. Through Mae Faire, Marley got connected up with a webmaster and decided to do two sorts of works—those which she would sell only as originals and those for which she would sell online. For the online versions she had a watermark added and identifying information that she owned the copyright. She also began to register her copyright in all of her works – something she had never done before. Butohr had done that for the works he had purchased from her – registering the copyright in the works in Marley’s name, but also registering himself as the assignee of the copyright in accordance with the contract paragraph f (see ¶ 26 above).

53. Of more interest, though, was that someone wanted to build an animated story around several of Marley’s works and put it to music and an audio-visual short work.

54. Marley was intrigued. She agreed that Avi Anlyne could make such a work and that she (Marley) would pay for the development of it (she was now quite well off from the sales of her works for the past few years, especially through her arrangement with Mae Faire).

55. Avi selected three portraits he found particularly compelling from the seascape portraits. Two were from Marley’s works from 2012 and one was a new work from a painting that had not yet been taken out of the studio or put on sale.

56. Avi was a skilled animator and made a 7 minute short film that told a story based on those three portraits and characters he made up concerning them based on the look of the portraits. He used the ocean scenes and the actual portraits as the basis for his work—the very images were scanned and manipulated. The resulting work, “Sea Blue,” was nominated for a 2017 Oscar for the work made in 2016.

57. When Butohr found out, he sent a takedown notice to YouTube, where Avi and Marley had posted “Sea Blue.”

VII. Sound and Fury

58. Teri (remember Teri?) saw the versions of Marley’s work as modified by Butohr (see paragraph 51) and was inspired to write music based on them. The result was an 8 minute musical ballad entitled “End Times.” “End Times is perhaps best described as apocalyptic punk.

59. She contacted Butohr who gave her permission to use copies of the original-colored prints as well as modified-colored prints in her music video accompanying the song, “End Times.”

60. Teri used the original versions and the modified color versions and had them flash back and forth in the music video giving a positive-negative effect.

61. Teri also used a modified version of the video in her live performances, showing the images on screens onstage as she sang “End Times.”