
HOWARD UNIVERSITY SCHOOL OF LAW

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Professor Steven D. Jamar

202-806-8017

SPRING 2007 ALTERNATE FINAL EXAM INSTRUCTIONS

April 30-May 3, 2007

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 2 questions worth 190 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.

Permissible exam materials

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. Computers, cell phones, electronic communications devices, and other electronic devices are not allowed.

Exam components

The exam consists of (1) this instruction page, (2) the 2 questions on the 1 page 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 distributed in class several weeks ago, 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.

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Question 1. 120 minutes. 120 points.

Using the law, policies, purposes, and principles of copyright law, consider the copyright issues relating to the events described in paragraphs 66-67 and 69-74 (the play “Producing Torture”). Do not consider non-copyright rights such as publicity rights.

Question 2. 50 minutes. 50 points.

Assume Sela Fone attends the play described in paragraphs 66-75 and surreptitiously uses her cellphone’s video feature to share the show live with her friend who had purchased a ticket, but could not come at the last minute because she became ill. Analyze Fone’s actions, and only Fone’s actions, under §1101 of the Copyright Act. Do not consider any other copyright issues raised by the facts.

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SPRING 2007 EXAM FACT PATTERN

Publishing Torture

This fact pattern is a work of fiction. Nearly all of the names are made up and most of the events. The photos are real enough and the events around which this fictional story is based are all too real.

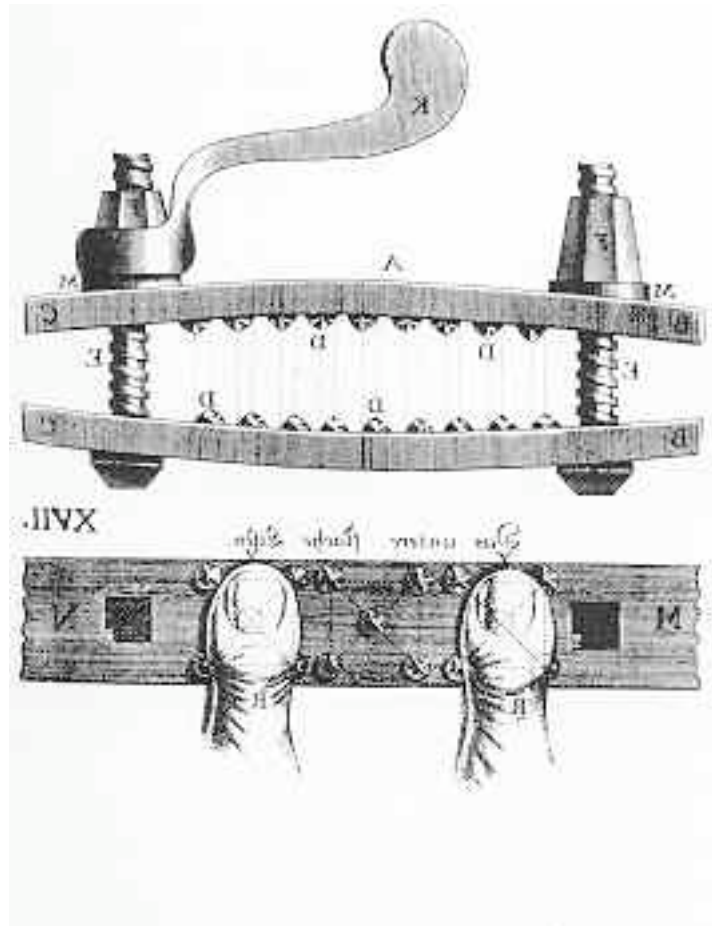
1. Condit Publishing publishes anthologies. It has recently hired Megan Sahara to write an anthology on torture.
2. Under the contract, Condit has the final say on the exact content of the book, including whether any particular item gets included. However, if Condit does reject an item, Sahara has the right to use that item in any other work she may author.
3. Sahara provided her own laptop, thumb drive, paper, etc. for doing the draft of the work, but she would not do the final layout and publishing on her own equipment—that will be done by Condit on its own equipment.
4. The work necessarily requires that Sahara travel to some degree, though much of the work can be done online from her home and in local libraries.
5. This is the first (and so far only) project that Sahara is doing or has done for Condit.
6. The book has a tight deadline, being due in 9 months with monthly meetings of Sahara with the Condit editor for the first 6 months, then biweekly thereafter.
7. Sahara is to do the work essentially unsupervised, except for meetings with her editor as noted above.
8. Sahara will receive a monthly payment while writing the book. Condit, as is its normal practice with authors, will deduct taxes and pay benefits including life and health insurance for Condit for a year from the signing of the contract.
9. Sahara will also get a percentage commission on the sales of the book.
10. Sahara sets her own work hours and pace of work, subject, of course, to the final deadline.

11. Condit will pay reasonable expenses of acquiring rights to other works for inclusion in the book and for Sahara's travel and travel-related expenses.
12. Sahara plans to call the book "Torture over Time," but Condit has final say over the title.
13. The book will include some parts written by her and other materials written by or otherwise authored or created by others.
14. Sahara wants to make a website using some of the information from the book so that the information is more widely available to the public at no or low cost.
15. Sahara first set out researching the history of torture. After reviewing about 150 books and articles on the subject, she decided to write the historical part of the book herself. She included no footnotes, but did include a short bibliography of the dozen sources she considered best or most useful.
16. Not satisfied with the resources online or in libraries, Sahara decided to travel to China, Egypt, and Iran. In China she visited the ancient capital of Xian where the First Emperor made his home. She marveled at the terracotta army and other extravagances, but found little in the way of information about torture there.
17. But she did meet Shao Lin there, who teaches at Xian University and is an expert in ancient Chinese history. He took her to Beijing where they toured the Forbidden City and several museums. There he showed her archeological evidence for ancient Chinese tortures including in particular thumbscrews.
18. They also saw evidence of other torture devices which one museum described this way in its English-language guide pamphlet:
 - a. In imperial China judges tortured witnesses and suspects. Among the methods of torture were beating with bamboo sticks, postural harshness such as being forced to kneel for extended periods (stress positions) or being suspended by their arms. Use of stocks was used for prisoners. And "death by a thousand cuts" was another frequently used torture.
19. Sahara fell in love with Shao Lin. Given her ironical and somewhat twisted sensibility, she thought to herself, "this is a sort of torture in and of itself!" – particularly since Shao Lin had no interest other than academic in Sahara.
20. Shao Lin translated several Chinese passages from ancient Chinese texts about warfare and torture in ancient China for Sahara, but would not accept any payment for doing so. He wanted only to be credited in the book with the translations he did.
21. Shao Lin's area of expertise included contacts between ancient China and the West, particularly with ancient Persia via the Silk Road. He suggested they travel to Iran overland. Sahara cashed in her Beijing to Tehran airline

ticket and off they went, taking the northern route along the Tarim Basin, through the Hindu Kush Mountains into Afghanistan and then into Iran.

22. As one of the world's foremost experts on the Silk Road, it is not surprising that Shao Lin knew Persian, both ancient and modern. Finding good sources was harder in Tehran and other Iranian cities, but they did manage to find some ancient descriptions in some historical texts dating from the pre-Muslim period. Lin translated these for Sahara as well.
23. After bidding a sad farewell to her unrequited love, Sahara went to Egypt. There she found a variety of Greek texts describing torture from Hellenic and Roman times in Egypt as well as texts purporting to describe torture before the conquest of Egypt by Alexander the Great. These Sahara could and did translate herself.
24. In the first chapters of the book, Sahara included the Lin translations from ancient Chinese and Persian as well as her own translation of Greek and Latin. All of the original sources dated from between 500 BCE to about 500 CE.
25. Sahara also relied on other sources which had been published in 1973 for translations of additional Chinese, Persian, Egyptian, and Sanskrit torture quotations. She quoted those translations verbatim. Those sources were published with a notice that read "© 1973 University Press," copies were deposited with the Library of Congress, and the works were duly registered with the copyright office in November 1973. The book, "Ancient Violence," was authored by Babette Salonge, a French woman, and was written originally in French and published in France in 1964, without a copyright notice. The English translation was done by Marie Toinette.
26. Moving from ancient times to Medieval times, in succeeding chapters Sahara described the torture devices used by kings, dukes, and other nobles (or others working on their behalf) as well as torture devices and methods used by the Catholic Church in those days. She found a medieval book published toward the very end of the medieval period shortly after the inventions of the printing press and printing with removable type by Gutenberg in 1445. The medieval text includes descriptions of how to use various apparatuses and includes illustrations of some of the devices including the rack, the iron maiden, thumbscrews, shackles and chains for hanging prisoners, and others.
27. Sahara translated the Latin text herself and included several exact copies of illustrations from the medieval texts in her manuscript.

28. One of the illustrations was of thumbscrews:



b.

29. She also included photographs of devices that have been preserved in museums and castles in Europe or reproductions of the original devices which reproductions are on display in castles in Europe.
30. Iron maiden (1952 reproduction of 13th century original) photographed by Sahara herself in a museum in France in 2006):



c.

31. The rack (photographed in France in 2006 by Mick Click, a photographer hired by Sahara specifically for the purpose of getting this picture)



d.

32. She wanted to get a picture of a castle with dungeons and torture devices. So she went online and found this picture. She doesn't know whether there really are torture devices in the castle or not.



e.

Warwick Castle, Warwickshire

Photo © Risto Hurmalainen

33. She also had Mick Click take a picture of a European castle dungeon showing some of the torture devices. Click was specifically hired by Sahara for this purpose. The contract with Click for all pictures he took for her was oral and provided that the work was a work made for hire (Sahara had heard

this term before), and that all of the copyright in the photos belonged not to Click but to Sahara, and that she could reproduce them in the book and on a website.

34. Sahara included several famous photographs by a freelance photographer (Trin Tranh) from the Vietnam war showing torture facilities. The photos by Trinh were taken in 1976, shortly after the war ended. These photos had been published repeatedly over the years in magazines, books, and some are available online. Here is a photo of one of the “Tiger Cages” with people posing as prisoners.



f.

35. Sahara also included pictures of the infamous Abu-Ghraib torture and degrading treatment of prisoners in Iraq. These were widely distributed on the Internet and published on TV and in print news reports. These photos were taken by U.S. military personnel (prison guards) in Iraq.



g.

36. Sahara quoted descriptions of the torture conducted in Abu Ghraib. The descriptions were given by witnesses at a United States court martial of one of the guards. Sahara obtained a transcript of the trial (remember – this is fiction) from the military court reporter, Isa Repter, who claimed copyright in the transcripts and gave it to her to read, but explicitly said that she could not reproduce any of it without express permission from him. Sahara did not obtain express permission for the parts quoted in the manuscript.
37. Sahara has included published accounts of treatment of prisoners in Guantanamo. The accounts were all based on interviews with the prisoners,

but were not verbatim recordings of the statements of the prisoners. Sahara copied the published versions verbatim (she did not rewrite, edit, or paraphrase them). The accounts came from a variety of sources:

- h. Some are from official reports written by government officials tasked to do so.
 - i. Others are from copyrighted stories in newspapers. In all cases the stories in the newspapers were written by full-time employees of the newspapers.
 - j. Others are from copyrighted stories in magazines. In all cases the stories from the magazines were written by freelance writers who placed their articles in the magazines. The freelance writer's works were not works made for hire but rather were published under a license from the particular writer to the particular magazine.
 - k. Still others are from investigations by NGOs (non-governmental organizations) like Amnesty International written by volunteer investigators who submitted their written reports to the relevant NGO.
38. Another part of the book includes various official documents including all or parts of the following:
- l. United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
 - m. Geneva Conventions
 - n. International Covenant on Civil and Political Rights
 - o. Inter-American Convention to Prevent and Punish Torture
 - p. Eighth Amendment to the United States Constitution
 - q. "Torture Victim Protection Act of 1991," 106 Stat. 73 (1991), 28 U.S.C.A. § 1350 (2004)
 - r. War Crimes Act, 18 U.S.C. § 2441 (Supp. III 1997)
 - s. Memo of January 22, 2002, from Jay S. Bybee, Office of the Legal Counsel of the Department of Justice, to Alberto R Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, entitled "Application of Treaties and Laws to Al Qaeda and Taliban Detainees," which provides in part as follows:

"You have asked for our Office's views concerning the effect of international treaties and federal laws on the treatment of individuals detained by the U.S. Armed Forces during the conflict in Afghanistan. In particular, you have asked whether certain treaties forming part of the laws of armed conflict apply to the

conditions of detention and the procedures for trial of members of al Qaeda and the Taliban militia. We conclude that these Treaties do not protect members of the al Qaeda organization, which as a non-State actor cannot be a party to the international agreements governing war. We further conclude that that [sic] President has sufficient grounds to find that these treaties do not protect members of the Taliban militia.”

39. Other documents generated by the Bush administration regarding torture and aggressive interrogation techniques such as water boarding were included in the book as well.
40. Sahara included information about torture over the last five decades from all around the world including certain regimes in China, Africa, South and Central America, and Saudi Arabia. She wrote the text herself from published news reports, court decisions (including both domestic and international tribunals), reports from NGOs (Non-Governmental Organizations), and reports from official governmental investigations.
41. Sahara included excerpts from some of the more graphic portions of testimony from South Africa’s Truth and Reconciliation Committee.
42. Included with the book is a DVD. Unlike the material in the book proper which is factual, the DVD includes numerous video clips from “24,” “Apocalypse Now,” “L.A. Confidential,” and many other fictional TV shows and movies which depict scenes of torture. The clips range in time from 20 seconds to 3 minutes in length taken from TV shows and movies ranging in length from 42 minutes (excluding commercials) to 150 minutes.
43. A chapter in the book explains what the video material is and why it is included with the book.
44. All of these commercial films and TV show video clips were obtained from DVDs which were protected against copying by CSS technological protection. Sahara used DeCSS which she obtained from a website in the island country of Tuvalu to unlock the video clips and load them onto her book’s DVD without any copy protection. The Tuvaluan website was run by Free Information Foundation (FIF), a U.S. NGO (non-governmental organization).
45. FIF does not have advertisers on its website and does not receive payment or otherwise charge for access to its website or for downloading software from it. FIF’s homepage on that website provides as follows:

“Free Information Foundation believes that information is the common heritage of all humankind and therefore needs to be free and freely available. In order to facilitate this freeing of information, we have collected software which allows users to view, listen to, or otherwise use programs in a lawful way which would otherwise be kept away from them and their use for

personal viewing, educational use, criticism, or other permitted, lawful uses.”

46. The DVD also includes footage of actual incarceration facilities such as Auschwitz after liberation and various prisoner of war camps in Vietnam. The Holocaust footage was taken by U.S. military camera crews at the direct order of General Eisenhower. The POW camp film from Vietnam was taken by various NGOs over the last 30 years. This information was not protected by any technological means and was downloaded from a website (avtorture.com) which did not give a notice of copyright in the audio-visual works, though the website as a whole did have copyright notice.
47. Following the chapter explaining the DVD films clips, Sahara summarizes psychological aspects of torture based on the studies of psychologists and psychiatrists who have studied the subject. All of these studies were published. Some of them are classic studies dating from the 50s and 60s, but most are more recent, dating from the mid-1990s. All of them were published by magazines, in hard copy, with copyright notices affixed and were registered, and copies deposited.
48. In addition, Sahara quotes the entire two page synopsis of a longer article that has not yet been published. It does not have a notice of copyright and it has not been registered or deposited. It was written in 2007 by Professor Torgard and is currently being peer reviewed for publication in *Psyche's Work*, which, despite its name, is the premier academic journal for psychologists. He gave a copy of it to Sahara when he found out she was doing this book. When he sent it to her, he did so as an email attachment in PDF format. The email read in part:

“I hope you find this useful. It has not yet been published since it is being peer-reviewed for publication in a professional journal next winter (2008). If you want to use anything from it, please check with me beforehand. I don't want any of the actual words published before it comes out in the journal. They get a bit touchy about stuff like that.”
49. The book came out before the *Psyche's Work* published the article. Indeed, *Psyche's Work* had accepted it for publication and the article had passed peer review when the book came out first. *Psyche's Work* then cancelled the contract with Torgard to publish the work asserting that Torgard had breached his contract with them. The contract provided in part: “The Author agrees not to publish the article or any part of it prior to publication in *Psyche's Work*.”
50. The DVD includes some recordings of songs protesting U.S. policy of torture and prisoner abuse. One was an original work written and performed by Yikes McGee.
51. Another performer on the DVD, Tor Turé, took an old Tom Paxton song “Ain't That News,” from the 1960s and changed the lyrics from being against the Vietnam war as in the original, to satirizing the Bush

administration's stance on torture and prisoner abuse. Turé is the singer of the song.

52. Another song used the tune from "When Johnny Comes Marching Home Again," a Civil War era song, and put new lyrics to it. The lyricist for this song was Holly Phar and the singer was Joli Beck.
53. Sahara also included an original anti-police violence rap song by TuSharP. TuSharP's piece uses three 4-second samples from three other sound recordings to create the beat and music under his rap. The samples are distinctive, despite being so short in length, and their source is easily identifiable.
54. One of the video clips is essentially a music video taking TuSharP's piece and playing it with random clips of violent torture from the library of video clips from the fictional works on the DVD. The clips change quickly with no clip showing more than 5 seconds in the music video. This music video was made by Clive Colber, a well-known producer and director of music videos. He did the work himself. Colber works for the company, Music with a Message, Inc., as a full time employee. However, he did this work after hours on his own time, albeit on company equipment.
55. The book includes a chapter which are excerpts from interviews on television and in print media with various public officials making statements about torture. In each case, the excerpt includes the question by the reporter and the answer by the public official.
56. The book also includes a series of photographs of a buildings in which in which torture by the CIA allegedly took place in Miami and in various places in Europe. These photos were all taken in 2005 and 2006. The building in Miami was designed and built in 1980. The ones in Europe date from the 1950s.
57. The book uses a picture of President Bush with Vice President Cheney and Secretary of Defense Rumsfeld on the cover.



t.

58. Soon after the book was published, Condit sponsored a book signing at a hotel ballroom with a capacity of 300. On the walls were greatly enlarged pictures of the photos in the book. Played over the sound system in the room were the assorted music recordings from the DVD, plus a number of other works not on the DVD. In a corner of the room the video clips of the fictional TV and movie torture scenes were being shown on a 60 inch plasma screen TV (without sound).
59. At the book-signing event, Sahara signed books and gave a brief, impromptu speech. She started her speech with a tasteless gallows-humor-type joke about torture. Someone in the room, without her knowledge, recorded it on her cell phone and later that night her joke was not only on youtube, but, as with Michael Richards' meltdown, this video was on all the news programs. Although this notoriety caused Sahara a great deal of personal embarrassment, it helped book sales tremendously as these sorts of incidents sometimes do and she was immediately invited to push her book on all the talk shows.
60. On each of the talk shows the show's producer would show a clip from the DVD. Typically they would show TuSharP's rap video with the video collage of fictional torture scenes being the visual part of the video. Some of these shows were cable only (e.g., "The Daily Show"), but others were on broadcast TV.
61. After the book was published, with the DVD included with the book, Sahara made a website using the material from the book as well as about 10 times that amount of information that she had gathered in her research.
62. Sahara is seeking funding to create a database of torture information – photos, stories, fictional works, law, legal cases, bibliography, and more. Sahara has approached several foundations to fund the creation of such a database, but has been unsuccessful in getting the large sum necessary to do the programming to make it easily accessible and searchable. Part of the problem, she's been told by the foundations, is the uncertainty of protection for the database itself, and the problem of including the information in the database in the first place because of copyright concerns.
63. The book sold reasonably well for a book of this sort, helped immensely by the inadvertent youtube publicity.
64. A year later Sahara discovered that Professor An Ti Tor, a faculty member at a Eastern State University, was using the book and the DVD for her class. At first she was pleased about this, but then she learned that the DVD was available online for all class members (80 students) and that the students were not required to buy the book. Instead, it had been digitized and was available on electronic reserve in the university library. Only students with student IDs could access the electronic reserve.
65. Sahara also learned that Prof. An Ti Tor was on the lecture circuit using Sahara's DVD to illustrate parts of her anti-torture lecture. In particular, the TuSharP rap video was used and clips from the various TV shows and

movies were used. Tor gave her lecture at Eastern University, other public universities in other states, and at private universities. She also gave the lecture upon invitation by religious organizations and private clubs. She had her expenses paid plus she often, but not always, received a modest honorarium for her speeches.

66. Two years after publication of the book, a play appeared off Broadway in New York. The play used the personal stories from the book and wove a story around them to thread them together. The sets were derived from the pictures of the torture equipment and locations. Showing soundlessly in the background throughout the play was an extended set of clips from TV and movies, including all of the ones from the DVD, plus many others. About 30% were from the DVD. The others were available from Sahara's website.
67. The play was the conception of Hy Art and listed him as the author, director, and producer. However, the play was in fact developed by the ensemble cast of 7 actors who read the stories and built improvisations from them. The story line evolved over a three month creative period. All will agree that Hy Art imposed some order on the story line, but his contributions were marginal other than in that one respect. He did not write any of the words of script; he just organized it and helped describe the plot around which the stories were being told and had the actors improvise or otherwise develop the lines. Hy Art originally thought it would be like "Vagina Monologues," without a unifying story line, but while seeing the actors improvise around the stories, he came up with the plot.
68. At various points in the play, entitled "Producing Torture," the show uses some of the music from the DVD. At other points it uses recordings of helicopters, Wagner's operatic Ring cycle first published in the 19th century, Mussorsky's "Night on Bald Mountain," also first published in the 19th century, and various other pieces of music, popular and classical.
69. The story thread traces the loss of innocence of two guards/torturers who, in the play, are present in a variety of settings ranging from ancient times to modern times at Abu Ghraib and Guantanamo, using a plot device not unsimilar to that of "By the Skin of Our Teeth" by Thornton Wilder (a play published in 1943 and performed as a staple for rep theater and secondary schools since then).
70. The guards bear a striking resemblance to two soldiers, Specialist Charles Graner, and his former fiancée, Pvt. Lynndie England who were convicted of torturing victims at Abu Ghraib.



u.

71. The guards start out as relative innocents, but then become brutalizers in a surprisingly short time.
72. This progression is consistent with academic studies including in particular the famous 1971 Stanford prison study conducted by Dr. Philip G. Zimbardo in which two dozen college students were randomly selected to play the roles of prisoners or guards in a simulated jail. The guards began abusing the prisoners within 36 hours.
73. The willingness of people to torture others when authority figures told them to do so was the subject of Dr. Stanley Milgram's equally famous study in the 1960s involving people administering electric shocks to others (the shocks were faked).
74. The play weaves these ideas into the story line, using "flashback" scenes that recreate the experiments. The scenes are nearly literal reproductions taken from the films and videos taken of the experiments by Milgram and Zimbardo. Those films were intended for academic use and were not issued as parts of documentaries for many years. However, they were used in classroom instruction by Milgram and Zimbardo, respectively using their own works, and they showed them at various academic conferences. Neither one registered the works or took other steps to copyright them until they were included in a 1995 documentary on torture. At that time both Milgram and Zimbardo registered their earlier research video and film works with the copyright office which registered them.
75. The play ends with a scene with characters dressed up as the crew from the original Star Trek series, complete with Spock's ears, and with the entire crew being subjected to electro-shock or some sort of plasma-jolt torture repeatedly.