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BAUM
FALL 2001

FINAL EXAMINATION
593-002 COPYRIGHT LAW

This is a three-hour examination. There are three questions worth a total of 300 points. The first question is worth 150 points, the second is worth 100 points and the last is worth 50 points. You should allocate your time based on the point value per question. Two **optional** bonus questions can be found at the end of the exam.

This exam is open-book. You may refer to any print materials including your casebook, statutory/casebook supplement, your class notes, your course outline, and the outline you prepared for question one. You may **NOT** use electronic databases or other research materials.

In your answers, you are to apply the law to the facts and to provide specific citations to and analysis of relevant provisions of the Copyright Act and relevant case law to demonstrate your reasoning and to support your conclusion. References to case names and code sections are sufficient as citation.

If you find any ambiguities in the facts or questions posed, identify the assumptions you make to resolve the ambiguities and then proceed with your answer.

Your answers are to be concise and directly applicable to the problems presented. Page limitations for answers are provided for questions 2 and 3. Answers beyond the page limits will **NOT** be considered in grading. If handwritten, your answers are to be single-sided. If typed, your answers are to be single-sided and double-spaced with 1" margins at tops, bottoms and sides of pages.

You are to return your exam questions with your answers.

QUESTION ONE
150 points ⁴

Instructions: In answering this question, you may use the outline of the answer you prepared. You are not to bring a completed answer and use a completed answer in the exam. This question is worth 150 points, which is one-half of the exam total.

You have been hired as a copyright law consultant by the legislature of the newly formed country of Utopia. The Constitution of Utopia includes the following:

“The Legislature shall have power to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.”

You are responsible for recommending, but not drafting, legislation that will implement the Constitutional provision. You are to prepare your discussion of law and policy in the general form of the “White Paper.” You are to identify essential legislative elements to be included in Utopia’s copyright law and to provide supporting reasons for including those elements. You are to refer to specific provisions in the U.S. Copyright Law or international agreements when making your recommendations. You should also include specific citations and discussions of holdings/rationales in U.S. case law which you think should be incorporated into the statutory scheme or which should be prevented in Utopia by statutory measures. You are to provide explanations and policy considerations for each provision you identify.

Your report will be evaluated on the breadth and depth of copyright concerns addressed, the reasons provided for inclusion of various provisions, and the supporting information incorporated from current U.S. and international law.

QUESTION TWO*

100 points

Plaintiff, Susan Wakeen Doll Company ("Wakeen"), sculpts, designs, and markets collectable dolls. Wakeen is suing Ashton-Drake Galleries ("Ashton") for copyright infringement for allegedly copying the head design used in one of Wakeen's most popular dolls, the "Love Me Tender." (Photos of illustrative dolls are attached.)

A baby head doll sculptor sculpts in a pliable clay called plasticine. After sculpting the clay, the artist puts the clay into a plaster mold. The artist then makes a porcelain model of the baby head by pouring liquid porcelain into the plaster mold and firing the head in a kiln. The artist paints the hardened porcelain head and adds hair and a body. Next, the artist does a wax casting of the plaster mold and sends it to a mold maker, who submerges it into a liquid of copper and nickel in order to create a metal mold. This metal mold is used to make a "master skin," or vinyl head. The best master skins become the actual production heads that become the dolls.

In 1989, Susan Wakeen, a reputed sculptor and designer of baby dolls, sculpted the original "Love Me Tender" ("LMT") doll head design and registered its copyright in 1991. The design received a national award of excellence and was a commercial success. As a result, it has been used in approximately forty different dolls marketed by Wakeen.

In 1990, Wakeen hired Marlene Sirko ("Sirko") to design a head for a "relative" of LMT--a baby doll head that looked like it was in the same family as LMT. Susan Wakeen told Sirko that she would supply her with a master skin of LMT to use as a reference. Susan Wakeen claims that she sent Sirko the LMT master skin via UPS, though Sirko denies that she ever received it. Wakeen has a UPS receipt that indicates that her company sent a package to Sirko on the day that Wakeen claims to have sent the master skin to Sirko but does not have any records from the company shipping department or a transmittal letter showing that the master skin was sent to Sirko. The UPS receipt does not describe the package's contents.

Susan Wakeen was not pleased with the sculpt that Sirko produced, calling it "cartoonish" and "oversized." In the fall of 1990, Wakeen and Sirko's relationship ended.

Ashton also markets collectable dolls, though its dolls are created by independent artists. In 1993, Sirko supplied Ashton with a clay sculpt that Ashton later marketed as a doll entitled "The Little Drummer Boy" ("Drummer"). Sirko was unable to produce any other marketable sculpts for Ashton, and, therefore, Ashton terminated its relationship with Sirko on October 21, 1993. Despite this, Ashton began marketing and selling Drummer at the end of 1994.

The similarities between Drummer and LMT were brought to Susan Wakeen's attention by several Wakeen employees who had seen advertisements for Drummer and by a professional doll buyer who stated that she had seen Drummer and thought that it looked like LMT. As a result, Susan Wakeen attempted to create the Drummer head using the LMT master skin. She made a mold from the master skin, poured porcelain into the mold, and shrank it two generations to match the size of the Drummer head. She then modified the head by shaving off a small amount

of porcelain in a few places. When she finished, she concluded that the shrunken and modified head was identical to the Drummer head.

Wakeen wrote to Ashton on July 19, 1995 and informed it of the alleged copyright infringement. Ashton wrote to Sirko, asking her to explain the "extreme similarities between the two sculpts." Sirko responded that she had created the head that became Drummer independently in early 1993, using a photo that she had taken at her son's nursery school as her reference. Sirko's former boarder, another of her friends, and her husband all confirmed that they had seen her work on her own freehand plasticine clay sculpture during late 1992 or early 1993. They saw her using the reference photo as she was working on the sculpture and did not see an LMT master skin in Sirko's studio. Ashton then wrote to Wakeen, assuring them that "the trail of development of the Little Drummer Boy is complete, from dated photo references of the child who was used as a model for the doll to pictures of the work in progress." Ashton also informed Wakeen that Kathy Schultz, the Program Manager in charge of Drummer, "worked with [Sirko] in the development of the sculpt."

A doll-expert consulted by Wakeen noted that the external structures of the doll heads are identical. After comparing the Sirko head to a plaster-filled master skin of LMT, Wakeen's expert concluded that the dimensions and placement of the dolls' facial features were virtually identical. The expert also found that, although some of the features were different between the two dolls, Sirko had most likely made minor modifications to the LMT master skin in order to disguise her copying.

Ashton's doll-expert determined that Drummer's features – specifically its nose, cheeks and lips – were different than LMT's. He found the distances between facial features on the LMT plaster-filled skin and on the Drummer plaster were different. He noted that Wakeen's demonstration of modification of the LMT head is misleading because Wakeen is using a head made from porcelain rather than an LMT head made of vinyl as Sirko would have had available.

Susan Wakeen is able to physically demonstrate how quickly Drummer could be created from a reduced LMT head. Wakeen also claims that, based on her experience with Sirko's work, Sirko did not have the skill to independently create a doll head like Drummer's.

Ashton has continued to sell dolls using the Drummer head, generating revenues to date of \$10,000,000. Ashton's costs of manufacturing the dolls with the Drummer head total \$4,000,000. Ashton's total annual revenues from all of its products equal \$120,000,000. Ashton's general advertising costs and overhead expenses for all of its products total \$30,000,000.

In 1997, Ashton entered an exclusive agreement with Hallmark and its Internet subsidiary "E-cards R Us" to create a greeting card featuring the Little Drummer Boy doll and the Holy Family dolls. Ashton provided the photographs from which Hallmark illustrators created a watercolor rendering for mass production in print and in electronic form. The agreement with Hallmark has produced \$650,000 in revenues for Ashton.

You represent Ashton. Draft the discussion section of an objective memo, identifying and discussing all issues presented. In your memo, you must include discussion of Wakeen's case for violations of copyright law, including potential damages and remedies that might be sought, as well as all aspects of your client's case, including all defenses and challenges that might be offered. Also discuss any other potential actions against Ashton that might arise from these facts. Be sure you discuss all alternative results and avenues, even if one approach would seem to decide the case. Your answer is to be no more than 20 hand-written, single-sided blue-book pages (or no more than 6 typed, single-sided, double-spaced pages with 1" margins).

QUESTION THREE*
50 points

Susan Nicholson Hofheinz is the widow of James Nicholson, executive producer and copyright owner of the 1956 science fiction movie "It Conquered the World." Nicholson registered his copyright in the movie in 1956. Upon Nicholson's death in 1972, Hofheinz inherited Nicholson's copyright interests in the movie.

On April 4, 1997, as part of the "Biography" series, A&E broadcast the program, "Peter Graves: Mission Accomplished," a biography of the actor Peter Graves. The program was produced by Weller/Grossman, a California-based production company that specializes in documentaries, biographies and historical programs. Brief clips from several of Peter Graves' earliest motion pictures were shown as part of the program. One of the clips showed Graves in "It Conquered the World," in which he played a leading role as a scientist. The showing of this clip served to illustrate Graves' point, which he explained on camera, that "[y]ou had to pay the rent and buy the groceries... And also, I always felt that they or most anything else I did—was good training to get to learn more about acting." Hofheinz has filed a copyright infringement complaint against Weller/Grossman and A&E for the use of the film clip in the biography of Peter Graves.

You are the clerk to the judge hearing the case of Hofheinz v. A&E and Weller/Grossman Productions. Draft the opinion for review by the judge. Your draft opinion is to be no longer than 6 hand-written single-sided blue-book pages (or no more than 2 typed, single-sided, double-spaced pages with 1" margins).

* Facts taken from recent copyright cases but embellished for improved examination purposes.

BONUS QUESTIONS

The two bonus questions which follow are optional.

B1. When will the copyright for "It Conquered the World," the movie from question 3 above, expire? Explain your answer. Provide code section references in your explanation. (10 points)

B2. The Law Library display case includes two hand-drawn cartoon figures. One is a round-headed boy with very little hair and the other is a boy sucking his thumb and holding a blanket. The bubble over the blanket-holding boy says, "Have you considered using the law library, Charlie Brown?" As a representative of Charles Schulz' estate, you are to send a cease-and-desist letter to the Law Library explaining the specific copyright issues arising from the Library's use of the figures in their display. (25 points)



Susan Wakeen dolls

http://store4.yimg.com/I/twodaydreamers_1664_18851648

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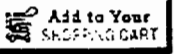
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Drummer Boy

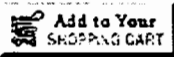


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The Holy Family



Price:US\$149.99

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