

Student Exam # \_\_\_\_\_

FINAL EXAMINATION  
For Law 278.31 Copyright Law

INSTRUCTIONS:

This is an open book exam. You can use the casebook, the statutory supplement, the additional readings, and your notes in responding to the questions posed in the exam.

There are three questions on this exam. All three will be given equal weight in grading each exam. Please allocate the time you spend answering the questions according to the weight they will be given. (Over-answering one question will not counterbalance under-answering another.)

Substantive analysis will be the main basis for judging the excellence of answers, but sound structure and good exposition will count as well, so think through your answer before starting to write and take care with your words.

Please read each question very carefully and make sure that you answer the questions I actually asked, rather than questions I might have asked but chose not to. Your answers should be as concise as possible while at the same time being as detailed as is feasible given the constraints of the exam genre. Please also make sure to answer each subpart of each question. Trust your judgment about which subparts can be answered more concisely than others.

Except when I specifically ask you otherwise, you needn't cite any case names or other authorities to do well on this exam. Certainly you should not cite a case (or some other authority) instead of explaining the principle or concept that you think this authority stands for. Where a question calls for analysis of a complicated factual situation, it is often a good idea to make pro and con arguments about how it might be resolved and consider the policy implications of alternative outcomes, but when the question calls for a resolution, make sure you offer your conclusion. Where relevant, you should cite or quote statutory provisions. As will be true in your practice, some questions call for a straightforward right/wrong answers and some call for your best judgment.

It was great fun to teach this class and to have you as a student in it. Best wishes on the exam and with the rest of your life. I promise to read the exam answers when I am in a good mood.

## QUESTION 1:

ReDigi has built a platform through which owners of digital music purchased from iTunes can resell that music to other music lovers. To initiate this process, prospective resellers must download ReDigi software and designate files they want to resell. ReDigi's software checks to make sure the files are eligible for transfer (e.g., that they were purchased from iTunes) and then migrates the data files for that music from the reseller's computer to cloud storage. ReDigi's client-side software deletes the data from the reseller's hard-drive as the data is migrated to cloud storage. Once in the cloud, that music is available for purchase by other ReDigi users.

Those who purchase music through ReDigi can maintain it in personal lockers in the cloud and access it there through streaming. ReDigi makes no new copy of the resold music; it simply updates its database about who owns that music. Alternatively, a purchaser can download resold music to his or her computer. Downloading music purchased through ReDigi migrates the digital file from cloud storage to the purchaser's hard-drive. ReDigi keeps a share of the resale price and provides credits to resellers so that they can purchase more music from other resellers on the ReDigi platform. ReDigi also encourages its users to make more music available through the service by offering discounts on future purchases or prizes to those who use the service to buy music.

Capitol Records has sued ReDigi for copyright infringement, claiming that ReDigi makes infringing copies of sound recordings in which Capitol owns copyrights: One copy is made in transmitting the music to the cloud, another when storing the music in the cloud, and a third when purchasers download the resold music. A second claim is that ReDigi infringes Capitol's exclusive right to distribute copies to the public. Capitol argues that this occurs when ReDigi software transmits music files from the reseller's computer to the cloud and then when the ReDigi software transmits those files to purchasers' computers. In addition, Capitol asserts that ReDigi is indirectly liable for infringements committed by its customers who resell and purchase music through ReDigi's services. The uploaders are said to be unlawfully distributing the music, while those who download or access music in the cloud are alleged to be making unlawful copies of the music. Capitol charges that ReDigi induces these user infringements, knowingly contributes to them, and financially benefits from infringements it could have prevented and that "Redigi is [] a clearinghouse for infringement and [has] a business model built on widespread, unauthorized copying of sound recordings" owned by Capitol and others.

ReDigi's main defense is based on the first sale rule. It relies on a 1973 Texas case, *C.M. Paula v. Logan*, in which the defendant, after purchasing copies of the plaintiff's greeting cards, used a technical process to transfer the designs onto ceramic tiles for resale as art work. Paula argued that this infringed its reproduction right. The court ruled that no duplication had taken place. The copy Logan purchased was simply transferred to another medium.

Capitol claims that ReDigi is ineligible to raise a first sale defense and argues that *Paula* is not good law after the Ninth Circuit's ruling in *Mirage v. Albuquerque A.R.T.* It also

characterizes as "semantic machinations" and "technological smokescreens" ReDigi's characterization of its process of transferring digital music files from one computer to another as migrating data by moving it in blocks to other computer memory. Migrating data involves copying, plain and simple, which Capitol claims to be entitled to control.

a) Please assess Capitol's direct infringement claims and ReDigi's first sale defense.

b) Please assess Capitol's indirect infringement claims and ReDigi's best defense as to those claims.

## QUESTION 2:

The J.R.R. Tolkien Trust has brought a copyright infringement lawsuit against Warner Brothers Entertainment (WBE) and certain entities that WBE has licensed to produce merchandise connected with *The Lord of the Rings* and *The Hobbit* movies. The complaint also alleges a breach of contract. The Trust seeks \$80 million in damages and an injunction that would require the defendants to withdraw unlicensed merchandise from the market and further require WBE and its licensees to cease use of Tolkien characters and story elements in videogames and gambling systems.

The most relevant passages from the complaint are these:

"5. When plaintiffs' predecessors-in-interest sold the film rights to *The Lord of the Rings* and *The Hobbit* in 1969, they also granted defendants' predecessors-in-interest limited merchandising rights. Specifically, defendants' predecessors-in-interest obtained the **limited** right to use the characters, places, objects and events referred to in *The Lord of the Rings* and *The Hobbit* 'solely and only upon and in connection with the manufacture, sale and distribution of ... any and all **articles of tangible personal** property, other than novels, paperbacks and other printed published matter...' (emphasis added). The original contracting parties thus contemplated a limited grant of the right to sell consumer products of the type regularly merchandised at the time (such as figurines, tableware, stationery items, clothing, and the like). They did not include any grant of exploitations such as electronic or digital rights, rights in media yet to be devised or other intangibles such as rights in services. To emphasize the limited nature of the grant, plaintiffs' predecessors-in-interest specifically reserved 'the right to utilize and/or dispose of all rights and/or interests not herein specifically granted.'

....

7. [I]n recent years, and particularly in the aftermath of the unprecedented financial and critical success of the Films, defendants have, with increasing boldness, engaged in a continuing and escalating pattern of usurping rights to which they are not entitled — rights which belong exclusively to plaintiffs. For example, although their limited merchandising license only gives them the right to sell *tangible* merchandise, defendants have developed, licensed and/or sold (and continue to develop, license and/or sell) downloadable video games based on *The Lord of the Rings* and *The Hobbit*, available only by downloading and/or access via the Internet, via mobile apps, tablet apps or other similar digital distribution channels, or through other online interconnectivity such as

Facebook. There is no physical or tangible item of merchandise sold to the consumer with these games. Defendants also have asserted and continue to assert that they have rights relating to a wide variety of goods and services beyond 'articles of tangible personal property' ... including without limitation hotels, restaurants, travel agencies, ringtones, online/downloadable games and housing developments — categories of rights which plainly have not been granted to them.

8. To make matters worse, plaintiffs discovered that defendants have, in excess of the limited rights granted to them, begun licensing the production and distribution of gambling games (both over the Internet and in brick-and-mortar casinos) featuring characters and story elements from *The Lord of the Rings*. Gambling constitutes a further category of rights which have never been granted to defendants (and which plaintiffs themselves would intend never to exploit). Not only does the production of gambling games patently exceed the scope of defendants' rights, but this infringing conduct has outraged Tolkien's devoted fan base, causing irreparable harm to Tolkien's legacy and reputation and the valuable goodwill generated by his works. Fans have publicly expressed confusion and consternation at seeing *The Lord of the Rings* associated with the morally questionable (and decidedly non-literary) world of online and casino gambling. Rampant are comments such as 'I actually feel angry about this...this insults Tolkien...[and] is a nasty, greedy, ugly act...Whoever is responsible should be ashamed of themselves,' and 'if this isn't prostituting art, I don't know what is.' The damage to the goodwill that plaintiffs have painstakingly cultivated over the decades is patent."

a) Does the court have subject matter jurisdiction over this lawsuit? Why or why not? Is there any reason to question this?

b) Assume that the court does have subject matter jurisdiction, which exclusive rights are most plausibly implicated by the alleged misconduct by WBE and its licensees?

c) What do you expect WBE's main defense will be?

d) Assume for the sake of this subpart that the court finds that some infringement took place, is the harm to the Trust irreparable (and if so in what respect) and should an injunction issue?

### QUESTION 3:

Please assess TWO of the four copyright reform proposals (shown below) published by the Republican Study Committee (RSC) in a November 2012 report. Insofar as you think the recommended changes are a good idea, please explain why; insofar as you think they are a bad idea, please explain why; and insofar as the proposals are lacking in detail, offer suggestions about how the reforms should be accomplished. Do not discuss the political feasibility of the proposals, but only your substantive analysis of the desirability of the changes.

The four proposals are these:

- a) Reform copyright statutory damages so that they do not have a chilling effect on the development of new technologies or impose undue burdens on individuals.
- b) Fix fair use law so that it is easier for DJs and performing artists to remix and sample from existing works in creating new ones, so that scientific works can be made more widely available, and so that a digital public library can be created.
- c) Punish false copyright claims. (This would include those who claim copyright in public domain works as well as those who improperly send take-down notices to ISPs.)
- d) Limit copyright terms and disincentivize copyright renewals by charging maintenance fees for those who do renew. All works will qualify for an automatic term of 12 years of protection, as long as they are registered with the Copyright Office. (Existing works would have to register to qualify for a transitional 12 year term.) Thereafter, copyrights could be extended for another 12 years as long as the rights holder paid a fee equivalent to 1% of gross revenues for its exploitation in the first 12 years. Two further 6 year renewals would be possible, as long as the rights holder paid 3% of its revenues for the previous period as a maintenance fee. A final ten year renewal would be possible upon payment of a renewal fee constituting 10% of the previous period's revenues.