

## **Copyright**

Spring 2021

Professor William Fisher

This is a four-hour take-home examination. It may be downloaded from the Office of the Registrar starting at 12:01 a.m. EDT on May 5, 2021. Your answer is due four hours after you download the exam or by 11:59 p.m. EDT on May 5, whichever is earlier.

The exam contains two questions. You must answer both. Your answers will be weighted equally in the grading. Neither of your two answers may exceed 2000 words.

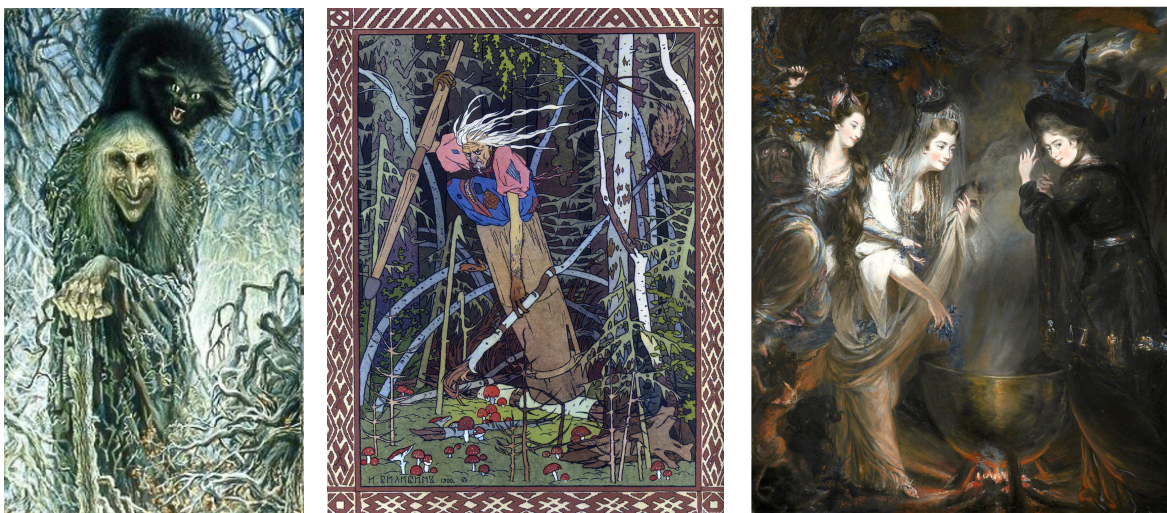
The exam mode is TAKEHOME. During the exam, you may consult any material you wish. Exam4 will automatically put your Anonymous ID and word count on the exam copy. Do not write your name on any part of your response. To preserve the anonymity of your response, avoid including any information that would enable the instructor to identify you.

In preparing your answers, you may not consult in any way with any other person.

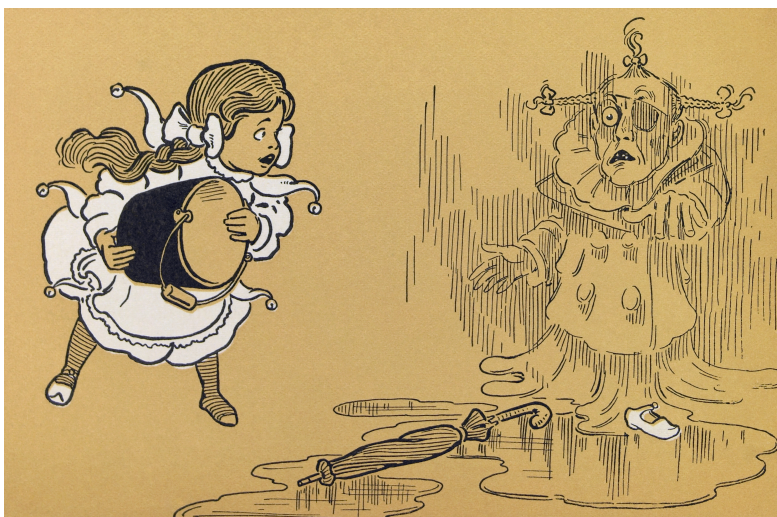
**Until May 11, you may not redistribute this examination to anyone or submit to any publicly accessible website any comments concerning it.** The reason for this requirement is that, until that date, students in some of the other courses affiliated with CopyrightX will be answering questions identical or similar to those contained in the Harvard Law School exam.

### Question #1

For centuries, witches have figured prominently in folk tales, fiction, and popular culture. A few examples appear below.



In 1900, Frank Baum published *The Wonderful Wizard of Oz*. The book describes the efforts of a girl, Dorothy, and her dog, Toto, to escape from the magical land of Oz, to which they have been transported by a tornado. In the climatic scene, Dorothy tosses water upon her captor, the Wicked Witch of the West. The witch melts, enabling Dorothy and Toto eventually to return to their home in Kansas. The illustration of this scene that appeared in Baum's book is reprinted below.



Baum retained the copyright in the story. Upon his death, all of his intellectual-property rights passed to his daughter, June.

In the late 1930s, Metro-Goldwyn-Mayer (MGM) obtained a derivative-work license from Baum and then produced *The Wizard of Oz*, a film that has now been watched more times than any other in history. The plot of *The Wizard of Oz* tracks the plot of Baum's book closely. The role of Dorothy is played by Judy Garland; the role of the Wicked Witch of the West is played by Margaret Hamilton. A still shot from one of the scenes in which the two characters interact appears below.



Since 1969, the Public Broadcasting Service (PBS) has produced and broadcast *Sesame Street*, a popular show for children. One of the main characters in the show is Big Bird, an eight-foot-tall anthropomorphic bird. An image of him appears below.



In the show, Big Bird is depicted as talented and kind, but also as naïve and prone to mistakes and misunderstandings. PBS holds the copyrights on all of the Sesame Street episodes.

Alex Da Corte is an American conceptual artist. According to the Metropolitan Museum of Art, “Working across a range of media including film, performance, painting, installation, and sculpture, Da Corte’s practice is invested in deconstructing and reinventing those objects and cultural icons that are not only familiar and beloved, but also contested.” On April 2, 2021, the New York Times published the following story (written by Tess Thackara) describing Da Corte’s most recent project.

Among the characters that the artist Alex Da Corte has transformed himself into for his video work and installations are Eminem, Mister Rogers and the Wicked Witch of the West. In his Technicolor universe, American cultural icons share screen time with mascots from famous commercials, and even slasher-movie psychopaths are lovingly brought to life, with hours of prosthetics and tender, surgical-like observation. It’s a big-tent worldview that he shares, curiously, with “Sesame Street,” in which monsters, kids and grouches coexist — and in which he has discovered the subject for his latest artwork....

During the pandemic, ... it is Big Bird, an 8-foot-2 model of empathy and earnestness, that has been [most] on [Da Corte’s] mind. When I found Da Corte, 40, in his Philadelphia studio, he was preparing to give Big Bird perhaps the most elevated stage of its five-decade journey through the American imagination — the roof of the Metropolitan Museum of Art. (While Big Bird traditionally takes the male pronoun, Da Corte prefers not to impose a gender.) On April 16, Big Bird will ascend to the top of the Met in the form of a sculpture, [which Da Corte has titled,] “As Long as the Sun Lasts.”....

“When I think of Carrol Spinney,” Da Corte said, referring to the actor who brought Big Bird to life for decades, “I think what a selfless labor of love — how beautiful. To do that all of your life. It’s difficult to run around with these young people and ask questions and educate them. That brings me hope. That’s something I want to be a part of.”

Da Corte’s Big Bird will be as you know it, but with a twist. The metal and fiberglass bird will appear perched on a crescent moon, ... suspended on a Calder-inspired mobile that sways and rotates in response to air currents. And Big Bird is not yellow, but blue – a reference to the show’s Brazilian version, “Vila Sésamo,” which Da Corte watched in Venezuela; this Latin American big bird is blue and called Garibaldo. (Da Corte, born in Camden, N.J., lived in Venezuela until he was eight.)

It’s also a homage to “Sesame Street Presents: Follow That Bird,” the 1985 film in which Big Bird is coerced by social workers into leaving Sesame Street to live with a suburban family of Dodo birds in Illinois — “his own kind.” Having nothing in common with the conventional Dodos except feathers, Big Bird flees back to New

York, is kidnapped by traveling circus owners, painted blue, caged and forced to sing a sad song for cash.

“Right now Big Bird is coming across the country in this box, and it’s killing me because it’s so poetic,” Da Corte said. [To create the sculpture, Da Corte] worked with [Miranda Martin,] a fabricator in California.... The sculpture is making the journey to New York from California in the back of a truck. When it arrives on the Met rooftop, it will, figuratively speaking, be set free. Da Corte has placed a ladder in Big Bird’s hands, suggesting the opportunity for transcendence or escape. “We wanted Big Bird to have agency,” Da Corte says. “Will Big Bird stay or go?”



A prototype of Big Bird in Da Corte’s studio. On April 16, the gentle giant and children’s icon will ascend to the top of the Met in the form of a sculpture titled “As Long as the Sun Lasts.”  
Christopher Leaman for The New York Times

If Da Corte is paying homage to “Sesame Street,” he also views it through a critical lens. The Wicked Witch of the West, for instance, has a special place in the Sesame Street pantheon: She was excluded from it. When the actress Margaret Hamilton appeared in an episode as the witch, her character in the “Wizard of Oz,” it drew such vitriol from angry parents, afraid that the show would scare children and promote Wiccan ideas, that the episode aired just once before being taken out of circulation. So Da Corte ... reimagined [the witch’s] cameo alongside Oscar the Grouch in his video “Rubber Pencil Devil,” [a film containing] a series of vignettes and tableaus featured in the 2019 Venice Biennale. The witch, a queer archetype and protector of queer spaces, according to the artist, is also “misunderstood — and she’s got something to say,” he added. “I appreciate her.”...

The various elements [of “As Long as the Sun Lasts”] took shape during the height of the lockdown, and Da Corte’s experience of that is baked into this project’s DNA. He sees the work as embodying the transitional state that our culture finds itself in at the tail end of a yearlong global shock wave that promises to transform us in ways we can’t yet see. “Developing this project throughout the pandemic has been so intense, because you’re thinking of the state of the world and how heavy it is,” he said, “and how do you even exist outside of yourself to look thoughtfully at what’s happening in the moment?”

Could Big Bird offer us some deliverance — some passage to stable ground? “There’s nothing miraculous about this and there is no landing,” Da Corte said... “It’s just onward. There’s much labor. There’s much thought. There’s work to be done as long as the sun lasts.”

“Rubber Pencil Devil,” the film produced by Da Corte to which the foregoing article refers, was first presented to the public in Venice in 2019, but was subsequently distributed widely in the United States. It is now available at many sites on YouTube. In the film, Da Corte appears dressed as the Wicked Witch of the West (among many other characters). A screenshot from the film is set forth below.



A two-minute video in which Da Corte explains the genesis of this portion of the film can be watched at <https://vimeo.com/544241198> or <http://ipxcourses.org/C/witch.mp4>.

Da Corte has neither obtained nor sought a license to use Big Bird or the Wicked Witch of the West in any of his installations or films.

On April 16, Da Corte's sculpture was installed on schedule on the roof of the Met. Two photos of the completed installation appear below.



Last night, you happened to be seated next to Da Corte at a dinner party in New York City. You mentioned that you had read the New York Times article concerning the genesis of “As Long as the Sun Lasts” and were curious about how exactly the altered image of Big Bird was made. He responded that he’s honestly not sure. Because of the pandemic, he was unable to travel to California to oversee Miranda’s work. He commissioned her to make the sculpture, emailed her a photograph of the prototype in his studio to show what he wanted, but left all of the details concerning materials, plumage, and facial expression in her hands.

You then mentioned that, on your way to the dinner party, you noticed that a street vendor near the Met was selling (for \$20) toys that appeared to be blue versions of Big Bird. You showed Da Corte a photograph of one of the toys that you took with your smartphone:



Da Corte expressed outrage and indicated that he might bring a copyright-infringement lawsuit against the vendor. In response, you suggested that that might be unwise, insofar as he himself might have violated some provisions of U.S. copyright law – and indeed that the Metropolitan Museum (Met) might also be in trouble. Concerned, he asked you to elaborate. You suggested that it would be infeasible to provide him a confident answer over dinner, but offered to prepare a short written document assessing the situation. He gratefully accepted your offer.

Draft a memorandum containing no more than 2000 words, answering the following questions:

- (1) What claims, if any, might June Baum or MGM assert against Da Corte arising out of his use of the Wicked Witch of the West? What defenses might Da Corte assert in response? What is the probability that Baum or MGM would prevail?
- (2) What claims, if any, might PBS assert against Da Corte or the Met arising out of Da Corte's use of Big Bird? What defenses might Da Corte or the Met assert in response? What is the probability that PBS would prevail against each defendant? If PBS did prevail, what remedies would likely be available to PBS?
- (3) What claims, if any, might Da Corte assert against the street vendor? What defenses might the vendor assert in response? What is the probability that Da Corte would prevail?

If you need additional information to answer any of these questions, say what that information is and why it matters. You should limit your answer to claims and defenses that might arise under the copyright law of the United States.

*[This question contains a fictionalized composite of several events. Most of the statements made in the question are true, but a few are “alternative facts” – i.e., either distortions of true events or outright fabrications. If you happen to know (or learn) about aspects of the actual events that are inconsistent with the narrative set forth above, you should ignore that knowledge when framing your answer.]*



## Question #2

In an essay containing no more than 2000 words, answer one and only one of the following questions:

Option A: On April 23, 2021, the Andy Warhol Foundation (AWF) filed a petition for a rehearing *en banc* in the case of *Warhol v. Goldsmith*. AWF requests that the Court of Appeals for the Second Circuit reconsider its ruling in the case in light of the Supreme Court's subsequent ruling in *Google v. Oracle*. Imagine that the petition is granted and that you are hired as a law clerk for one of the Second Circuit judges. She asks you to draft a memorandum answering the following questions:

- Should the panel's ruling in favor of Goldsmith be overturned?
- How, if at all, should the analysis of the fair-use doctrine in the panel opinion be modified?

Option B: What position should the Biden Administration take with respect to a potential multilateral treaty mandating enhanced legal protection for traditional cultural expressions? Your answer should reflect familiarity with at least two of the four general theories of copyright law considered in this course.

Option C: In what ways, if any, should section 512(c) of the Copyright Act be revised? Your answer should reflect familiarity with at least two of the four general theories of copyright law considered in this course.