

502205

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Institution **Harvard Law School**  
Course / Session **S21 Fisher Copyright**  
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Exam Mode **TAKEHOME**  
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Count (s)	Word (s)	Char (s)	Char (s) (WS)
Section 1	<b>1999</b>	<b>10157</b>	<b>12137</b>
Section 2	<b>1999</b>	<b>10743</b>	<b>12738</b>
Total	<b>3998</b>	<b>20900</b>	<b>24875</b>

## Answer-to-Question-\_\_1\_\_

1.

### **Protection**

The Wicked Witch of the West (WWW) is copyrightable. Any protection would filter out uncopyrightable elements, like scenes-a-faire and public domain elements from old witches in folk tales. There may also be a merger claim because there are only so many ways to portray witches. Baum's WWW is probably sufficiently delineated, or constitutes the story being told. *DCComics*. WWW meltsand in the picture shown almost looks robotic, has an eye patch and pig tails, which are distinctive for witches. In this regime, Baum must have given notice upon publication, and renewed after 28 years(1928).

Assuming he or, in the case that he died before renewal, his daughter did, the license to MGM was lawful. The derivative work of WWW changes the character dramatically, now she is green, has a pointy nose and a hat. These all seem like scene-a-faire now, but that's probably because the popularity of the movie made this the de-facto style of witch in America. Scenes-a-faire analysis is conducted at the time of creation *Oracle* (CAFC), and while genericide arguments have been proposed, they haven't been accepted by courts. The derivative WWW also gets protection.

### **Ownership**

Assuming one of the Baums renewed in 1928, they owned the original copyright to WWW. When lawful derivative works are made, the original lives in the derivative work.

However, Braum's original is now out of copyright and was elevated to the public domain. MGM owns the copyright to WWW under a WFH agreement. Assuming they renewed (gave notice, complied with formalities, etc.), MGM's WWW is still in copyright for another 5-10 years.

### **Claims**

First a claim of unlawful reproduction 106(1) of the derivative WWW (again, Baum's original lives on in this work, but that's out of copyright). There is clearly copying here, direct evidence in the video, and striking similarity. The copy is fixed in Rubber Pencil Devil (RPD).

There is improper appropriation here. For substantial similarity, under 2nd Circuit's more discerning observer test (*Mannion*) or the Ninth Circuit's extrinsic/intrinsic test (*Rentmeester*), a court would filter out the unprotectable elements of the WWW derivative. Again, its hard to know what was scenes-a-fair at the time of the creation (was all black, black hat, green makeup, common place in the 1930s?) or if that became scenes-a-faire because of *Oz*. Whatever protectible traits are left over, under same aesthetic appeal or look-and-feel type test, a court/jury would find substantial similarity. If there is 106(1) violation, 106(2) would also be found in violation.

The film, including the infringing WWW, was distributed widely, and thus 106(3) is violated.

This was shown to the public in Venice, so it is also a 106(5) violation. (If "Venice" means the Venice Film Festival, maybe its a closer case because its a private function, but still that's a substantial number of people outside of normal circle of social acquaintances,

probably still public).

YouTube could be found vicariously liable for hosting the video, as there was direct infringement (demonstrated above), YouTube profits from the infringement, and YouTube has the right and ability to stop the video, by taking it down, and didn't (assuming ContentID didn't flag, remove these videos upon upload).

## **Defenses**

### *Fair Use*

1. Purpose. Da Corte can say this is transformative. It probably doesn't qualify as a parody, *Campbell*, because Da Corte is not specifically criticizing/mocking WWW/Oz. Da Corte says that he's using WWW because she's misunderstood, and a queer archetype and protector. However, subjective intent does not matter in factor 1. *Warhol/Prince*. Still, objectively, WWW in Oz is a scary, villainous character in a blockbuster film. In RPD, she is singing and dancing with Oscar the Grouch, the situation is humorous and transformative. If this is considered appropriation art, *Warhol* and *Dr. Suess* are unkind, but I think this is closer to commentary, and Da Corte could even say *Oracle* supersedes those cases. There may be some commercial value here (he distributes the movie) but that matters less. Factor one for defendant
2. WWW is a core creative work (though fictional characters are newer to the game) but published. Natural
3. Da Corte uses the entirety of WWW, but looking to context, I don't know how he could use less. This isn't a case of "taking too much, doing too little" (Cendali). Defendant

leaning, maybe neutral.

4. This use is not going to affect any current or derivative market MGM is in for WWW. Nor is it this type of "high-art" the type of potential market MGM is likely to develop. *Galoob/Texaco*. More, there is a low welfare ratio here. *Oracle*. MGM is not going to stop creating these types of big budget hollywood movies if this is deemed fair use, and there is a public benefit in this type of art. Favors defendant.

In sum, fair use.

If fair use, YouTube won't be liable. If no fair use, going to probably safe under the 512(c) under the *Viacom* interpretation.

If infringement not excused, MGM can go for damages or injunction. Da Corte's work does not seem very commercial, so statutory damages seems most lucrative (assuming registration before infringement). This would probably be default because Da Corte might have assumed excused under fair use. I think based on factors such as deterrence, nature of hte work, and evidence actua damages, a judge or jury would give a low amount.

Attorney's fees would be unlikely for MGM because they don't have that strong of a case, if Da Corte won would probably get fees.

Under *eBay*, MGM will not get an injunction. There is no irreparable harm and public interest is in favor of allowing this type of hart. At best, judicial compulsory license for MGM.

2.

Protection

Big bird(BB) is a protectable character, its a highly distinctive 8-foot-tall anthropomorphic bird that demonstrates kindness, loves kids, and is naive. While "kindness" is probably scenes-a-faire for children show characters, the combination of elements here is enough for protection. Feist. I assume Vila Sesamo and Follow that Bird are lawfully licensed derivative works. Meaning Blue BB is also protected expression.

### Ownership

PBS owns the copyright to the original BB (assuming WFH here, would need more facts to dispute this), and BB is in copyright until 2064. The original lives on in the derivative, so if Da Corte infringes on the derivative, PBS has a claim regardless of ownership of those derivatives.

### Claims

PBS can claim that this is a unlawful reproduction under 106(1). Da Corte had direct access to both original BB and Brazilian BB. It's sufficiently fixed. It's substantially similar. Even if were just comparing the original BB to the Da Corte's work, an ordinary observer would find the same aesthetic appeal (Boisson). But factoring in Brazilian BB makes the case even stronger. If there is a 106(1) violation 106(2) follows.

The facts get a little tricky here. Did Da Corte give this copy to the Met? If so, it's distribution not covered by the first sale doctrine because its an unlawfully made copy.

Is the display public? Depends on whether the roof of the met is a place where a substantial number of people gather. It's hard to tell from the facts. A court might also

consider whether or not people from other New York sky scrapers could see the top of the Met. If this is public, its a violation of 106(5). If the Met is deemed to be displaying the work, they may argue real space display, but this is an infringing copy and won't be privileged.

The Met, beyond its potential for direct infringement, might be held secondarily liable under contributory infringement. Da Corte infringed. Did they have actual knowledge? Depends on how the court interprets it. The Met might think this is fair use (analysis below). Vimeo. But if a court takes a Redigi-type approach, they could be found to have actual knowledge. The Met makes a material contribution by providing the site *Cherry Auction*. They could also be held vicariously liable because there is direct infringement, there is a financial infringement (makes the Met more attractive) and they had the right and ability to stop the display and didn't

Defense

Da Corte/Met will claim fair use.

Like RPD, Da Corte's intent is vague. It seems like he wants to give a similar message that Sesame street did: hope, big-tent inclusion, homage. But there are also elements of deliverance, pandemic-related, transcendence and escape. But again, only objective manifestations of purpose matter. *Prince; Warhol*. Under *Warhol* this needs to be an "entirely distinct artistic purpose entirely separate from its source material." This is not a kind standard to appropriation art, but this should still qualify.

Creative and published, favors neutral.

Entire work, whether or not this is transformative will inform whether or not Da Corte took too much and did too little. If necessary to the artistic purpose, taking all of BB is necessary. Neutral.

Low welfare ratio here- PBS's incentive to make Sesame Street is not going to lessen because these types of art exhibits are deemed fair use. Oracle. Possible that PBS has or would license life-like sculptures of Big Bird. But this is just one sculpture on top of the MET. Probably not going to harm any potential market too much. Favors defendant.

Slightly favors defendant, depends on how narrowly or broadly *Warhol* is interpreted in light of *Oracle*.

If infringement, could get proximately caused profits

for Defendants. Statutory Damages might be best because D's not selling this. If get injunction (hard post-*eBay*) don't destroy it immediately. *5pointz*.

3.

The work will only get protection insofar as its not deemed infringing. *Prince Guitar*.

The protectable elements must also be separated from the original and derivative BBs.

Would also have to filter out elements of Calder that are either public domain or belong to him. Whatever protection the installation gets, it will be thin.

Da Corte owns any copyright. Martin helped, but joint authorships are exceedingly rare.

Da Corte is the one doing interviews, talking about its meaning, getting top billing, and seems like he had veto power Larson. It's probably sole authorship, it's not necessary that

Da Corte create the work with his hands, and he is the mastermind behind this project.



Titanic. If not, it would then be deemed a WFH under the CCNV factors.

Da Corte could claim 106(1) 106(2) and 106(3). There is not evidence of copying, but this is strikingly similar to Da Corte's. Its fixed. But is it substantially similar? Under extrinsic/intrinsic or more discerning observer, filter out the many unprotectable elements. It's unclear what is left. Given the thin protection Da Corte has, I do not think a court would find substantial similarity after filtration. This doesn't seem to be a case where 106(2) is broader than 106(1), so if no 106(1) no 106(2)(and vice versa). If vendor violates 106(1), he's violating 106(3), but if he's not, the distribution here is ok.

As a visual work, Da Corte has VARA rights. But street vendor is not modifying Da Corte's original, so not implicated.

If infringing, not likely to be fair use.

This is commercial (not that important but still matters) whatever transformation is minimal. Fans of Da Corte's work will buy this Seinfeld. Plaintiff.

It's creative and published. Neutral.

It takes all of it, but isn't doing anything more than selling copies of it. Plaintiff

Figurines are a likely or potential market Da Corte could exploit. Da Corte has the right not to enter the potential market. Seinfeld.

If infringement, Da Corte could get the vendor's revenues of the sales minus any costs.

Might also be able to prove proximate damages (ie if vendor's sales went for other products because people attracted by BB figurine). Probably no skill or reputation to take into account.

Or, if Da Corte registered work before infringement, could get statutory damages, might get willful damages per work. COuld also get attorney's fees. Injunctions are more difficult. If Da Corte can establish irreparable harm, and show he doesn't want any circulation, a court may order the destruction of figurines.

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Answer-to-Question- 2

### Current Complaints

The Current DMCA 512(c) regime is not satisfactory for anyone, save the OSPs. OSPs like YouTube host and profit from copyright infringing content, which would normally be contributory or secondary liability, but is shielded by the DMCA safe harbor.

Copyright owners, particularly record companies, and those with large, lucrative copyright portfolios, argue that the current incentives create a sort of "value gap." That creators are not being justly compensated for their work. This type of argument is explicitly fairness-based, that the labor that went into the work should be justly compensated. However, the fairness rationale is undercut by those who are making the argument, its the large movie studios and record companies who are making these arguments, because they are the ones who stand the most to gain. From an equity theory perspective, these co-contributors still would not be receiving their fair share even if 512(c) were shrunk.

Calls for shrinking 512(c) can also be justified under welfare theory. The argument goes, as creators receive less and less money from their works because of infringing content on YouTube, they have less incentive to create, and therefore DMCA 512(c) has led to below socially optimal levels of artistic creation. A similar criticism could be levied from cultural theory, that the current incentive structure on YouTube leads to a less than

optimal cultural necessary for human flourishing. These latter arguments are empirical claims, and the jury is still out. For example, the rise of Napster and music piracy led to a similar scenario, where there was less money to be made from music due to the industry's stubbornness in licensing music for digital streaming. Did this lack of revenue disincentivize potential artists or would be artists to stop producing? While a definitive answer is unknown, it seems likely. Thus we should take seriously claims that unpoliced infringement is hurting creativity from welfare and cultural perspectives.

#### Potential solutions

Governments around the globe have been grappling with how to answer these problems that implicate fairness and incentives. The US Copyright Office has suggested that Congress tweak 512(c) to lessen the stiff requirements for proving sufficient knowledge and sufficient control. Currently, OSPs can adopt a see-no-evil whack a mole strategy. They simply don't investigate infringing products and only take it down once its brought to their attention. The EU, in response, has completely flipped the burdens and presumptions given to OSPs. Now, OSPs must attempt to reach licensing agreements with these rightsholders, and if they cannot, make best efforts, in accordance with industry standards, to make unavailable specific infringing works. This may not initially seem like that dramatic of a change. But many believe that industry standards will require upload filters along the lines of YouTube's ContentID. ContentID allows rightsholders to register their works on YouTube. A hash of the video is then uploaded to a server, and if any element of that hash is detected in another work (essentially fragmented literal similarity) the second work is flagged. Once that happens, the original rightsholder can

monetize that secondary work or remove it. In effect, ContentID and any other type of upload filters act as extra-judicial copyright enforcement mechanism that can enjoin works or provide damages or licenses for the original creators. The problem is that these enforcement mechanisms are extremely crude. First, fragmented literal similarity does not alone mean unlawful appropriation. First, there could be de minimis exceptions. While the sound recording de minimis exception is contested compare Ninth Circuit (finding a de minimis exception), with the Sixth Circuit (holding no de minimis for sound recordings), de minimis exceptions do exist for musical compositions, even if they are plaintiff protective.

Even if the upload filter correctly establishes that there is unlawful appropriation, the real problem stems from assessing fair use. As this course has demonstrated fair use analysis is hard. The doctrine is constantly in flux (Compare Cariou with Warhol), and while some cases like parody may be prima facie presumptively fair use, making these decisions requires context. Algorithmic upload filters simply are not equipped to evaluate context. There is no suggestion that machine learning will be able to distinguish between privileged and unprivileged copying any time soon. While YouTube purports to abide by the fair use doctrine, many creators don't understand its technicalities, and just assumed that when their video is claimed, they've done something wrong. Or they simply don't have the time, money, or resources to fight the long arduous battle required to protect their videos. As a result, an application of welfare theory to upload filters is fraught. While it may incentivize original authors to create, as they will ultimately make more money under a filtering regime, upload filters also chill core welfare privileged fair uses with high externalities, like parody. Likewise classic examples of fair use favored under a cultural theory, like commentary, criticism, and education, may be chilled under a

filtering regime.

### My Solution

I propose a solution that goes beyond simply tweaking 512(c), and requires an overhaul of how we think about copyright online. It draws heavily from past proposed alternative compensation models that are grounded in welfare and cultural theories.

First, we should conceded that at the rate digital media is uploaded to the internet, particularly on the biggest websites like YouTube, SoundCloud, Twitter, human moderation and review of infringing content is infeasible. Thus, for the largest companies we should require some sort of heightened obligations in the way of automated filtering. Smaller companies should not have to do engage in automated moderating, as it may be too burdensome, and from a cultural theory-distributive justice based approach, we might worry about legislation that entrenches dominant players like YouTube, leading to more concentration, winner take all economies, and wealth inequality (this assumes that a Mavrix-like regime has been repudiated, and smaller companies can engage in good-faith human moderation without worrying about liability).

In a world with upload filters, the licensing fees go up, and we probably return to a log-based innovation lottery type distribution of revenue. In this regime, the Taylor Swifts of the world get the money they "rightly" earned, and the value gap is closed to a certain extent. But follow on-creation is still harmed, and we may worry that this type of regime only heightens the exacerbates the log scale. From a welfare theory, this isn't necessarily

a good think. Sunstein and Jolles tell us that artists are skewness, lovers, that suffer from an extreme case of overoptimism bias, and are incentivized more when the pot at the end of the road is bigger, regardless of the amount of money they make. This is an untested hypothesis, it's not clear that that starving artists are skewness lovers any more than regular folk. And as demonstrated, there is significant overoptimism bias in settlement disputes, so its not clear how much more overoptimism there is in creative worlds. But even if this is all true, we should still be concerned about preying on the vulnerabilities those with bounded rationality to serve our overarching goal of socially optimal creativity levels. True, the Constitution treats copyright as a necessary evil, and as an incentive to create art. But it does not require Congress or the Courts to manipulate creators as if they are indebted gamblers at a slot machine. Instead, the cultural theory should guide us, and elements of distributive justice should inform our decisionmaking. The Googles, Amazons, and Facebooks of the world have substantially gained from the limited liability regime of the DMCA (and its speech analog in section 230). Its no coincidence that under this regime these companies went from small start ups to 3 of the 5 biggest companies by market cap. They have profited enormously, and even under an upload filter regime, they will continue to profit (YouTube already does). Thus, borrowing from alternative compensation regimes, we should tax these large companies who stand to continue to profit from the uploading of digital media that drives engagement on their sites. Large rightsholders also stand to gain from an upload filter regime. Under the current 512(c), companies like YouTube/Google have immense bargaining power, because after the Viacom decision, they are close to impervious against infringement claims. If record companies or movies studios don't agree to their licensing terms, YouTube can always walk away, and allow infringement to continue. But under a regime that mandates upload

filtering, and removes many of the DMCA safeguards once in place, YouTube loses much of its bargaining power. Licensing fees go up, and the big studios and record companies win big. Thus, they too should be taxed on the deals they do with big OSPs.

Where does this new taxed money go? In adhering to cultural theory, providing a safety net for smaller digital creators. How could this be accomplished? First, an overhaul of current fair use treatment on these websites. Taxes could aid administrative costs, allowing for more efficient and specialized review of flagged content. The money should also be used to mandate awareness of the copyright doctrine, so that creators feel equipped to take on these challenges. Money could also be provided for smaller creators to take on lawyers' fees when disputing takedown claims that eventually wind up in court. Finally, money could be used to give established, but still small-time creators a safety net, to help professionalize a class of full time creators using digital media. This would

Finally, established creators with good reputation should be given presumptions in fair use cases. If they rarely have issues with takedowns, the video should be left up until manual review determines it not to be fair use. If certain creators frequently deal with issues of parody, criticism, or commentary, they should be able to establish that ahead of time so they are not constantly having their content flagged and takedown. Finally, any wrongful takedowns or monetization should be mean that the wronged creators are given backpay, and even some sort of damages if it hurts their reputation.

While alternative compensation systems are both welfare and culturally grounded, my proposal is explicitly more cultural theory based. Under the ACS model, taxes act as a



sort of prize to stimulate innovation, instead of copyright. In the US, the most likely scenario would be that payments are based on popularity. This clearly comports with the log-based innovation lottery type scenario that welfare theory is based upon. By contrast, I am not suggesting that copyright should be discarded online. Rather, I am encouraging stricter enforcement of copyright and the shrinking of platform safe harbors. Moreover, the taxes that I propose will not explicitly go to the most popular, though popular creators will still fare better, as they will receive better deals based on better licensing agreements due to better bargaining power. Instead, my system would explicitly give a safety blanket, which both rewards the labor (Locke) and acts as distributive justice. This safety net would also encourage more access to diverse art, and privilege educational fair-use content, which are explicitly privileged under a cultural theory. Thus my reform to DMCA 512(c) would also serve as a large scale, potentially empirical test of behavioral economic critiques of creative skewness lovers. Will this safety net, and the shrinking of the the log function, stimulate or hurt creativity? My guess is that it will not have nearly the detrimental impact that behavioral economists might think. If any thing, the ability to have stability for creators( not having to have second jobs, being able to focus on their work alone) might lead to a cultural boom. But even if there is a decrease in creativity, cultural theory suggests that creativity-based welfare incentives are not the only consideration. Government policy should be about promoting the good life. And while some may argue that this is undue government interference and unwanted paternalism (*See Frankfurter*), I believe such a safety net for creators will in the long run promote conditions that better promote human flourishing. While beauracatic hurdles could doom the project, I believe it is worth trying.