

**Massachusetts School of Law
Publishing and Entertainment Law
Final Exam – Spring 2008
Professor Paul Auffermann**

You are a country lawyer in the small town of Backwater, MA. Upon your arrival back in your office from a much needed two week vacation, your office waiting room is filled with the following potential clients and their sad stories of injustice. Your clients names are shown **highlighted**.

Deke's planned to open the Turn of the Century Pub ("TCP") as soon as construction was completed. TCP was decorated on the walls inside with over 200 newspaper headlines **Deke** had collected from newspapers published from 1890 to 1910. The themes of the headlines were selected by **Deke** to match the theme of each room in the pub. Crosscut, **Deke's** general contractor, was working on finishing the interior of the pub and took photographs of the unique wall decorations before the opening of TCP to the public. Crosscut was responsible for the placement of the headlines on the walls. Crosscut sold the pictures to Rip two months prior to the opening of the pub for the sum of \$1,000 with a receipt saying "Payment of \$1,000 is acknowledged. Ownership of the photos is here by transferred to Rip" (Signed by Crosscut). Rip reproduced the photos for public display.

Alicia wrote down the musical score and lyrics for her favorite music published prior to 1920. She then organized a band to play the tunes at the high school foot ball field, and hired Rambo, a prominent event promoter, to make all necessary arrangements for her performance. Rambo handled the permits, police detail, refreshments, ticket sales and seating. Alicia also offered for sale CD recordings of the music. Local radio station WTRU , broadcasting from the football field, broadcast 5 minutes of the live performance (without Alicia's permission) during the 6:00 p.m. news. (WTRU is a talk and news station and is not a licensee of ASCAP or BMI). WTRU also bought a CD recording of the music from **Alicia** and made copies to give away as prizes to listeners. In order to encourage television and radio stations to broadcast from town facilities, a town ordinance provides:

Anyone bringing a legal action in law or equity in opposition to broadcasting live entertainment from town facilities shall be required to pay the defendant's legal fees, in the event that the defendant shall prevail in such action.

Alicia and her band also arranged and performed music composed and recorded by the rock group, Global Warming (the music had previously been sold on CDs in Canada and the U.K. and was available for downloading worldwide for free by charitable organizations). She and her band also made CD copies of the performance and offered them for sale. Proceeds collected from the audience and CD sales were used to pay the cost of permits and other expenses, and the balance was donated to a charitable fund for the prevention of air pollution.

Donnie, a renown and widely publicized war veteran, visited Marie, a real estate broker he had used to buy his house, in her office and discussed his experiences in Iraq. He told her in detail about his experiences during 10 days of captivity and his daring escape. Marie was so impressed with the story that she wrote and published a novel based upon a dozen of the specific experiences reported by **Donnie**. Marie purchased a copy of memoirs published by **Donnie** and posted it on her web site. She invited website visitors to compose and post to her website other fictional accounts incorporating **Donnie's** work. **Donnie** objected in writing to Marie about the material posted on her website.

Victor founded an Internet service called "Froogle" to search online content and help prospective buyers find and purchase books of interest. Froogle would hack past the online security of publishers' database to access the text of books sold by the publishers. Froogle customers would provide book quotes or keywords. Froogle would scan publishers databases and compare the search terms to published and unpublished book content. The Froogle service would then purchase the matching books from the publishers, and highlight the search terms in each book. The books would then be sold to customers at a markup of 50% over the publisher's price. Froogle would also make the highlighted books available for reading online by the purchaser. The purchaser could make further edits to the online version of the book, and give others access to read the edited book online.

Alfonse has posted several photos of landscapes on his website and is claiming infringement of his photo titled "Running Water" by Bravo's abstract work titled "Streaks of Blue". Expert analysis of the pictures showed that both used all the same shades of color, and each had 15% red, 20% blue and 25% yellow. Individuals who saw the pictures side by side commented that "Either one would look great in our living room.", and "I can't put my finger on it, but these pictures just have the same look and feel.". Although Streaks of Blue did not actually depict the same water scene as Running Water, many observers would agree that it had captured the "mood and feeling" of Running Water. (The "issue" in this case should include a discussion of whether either party is entitled to a summary judgment by the court, as well as a discussion of the merits of the case at trial).

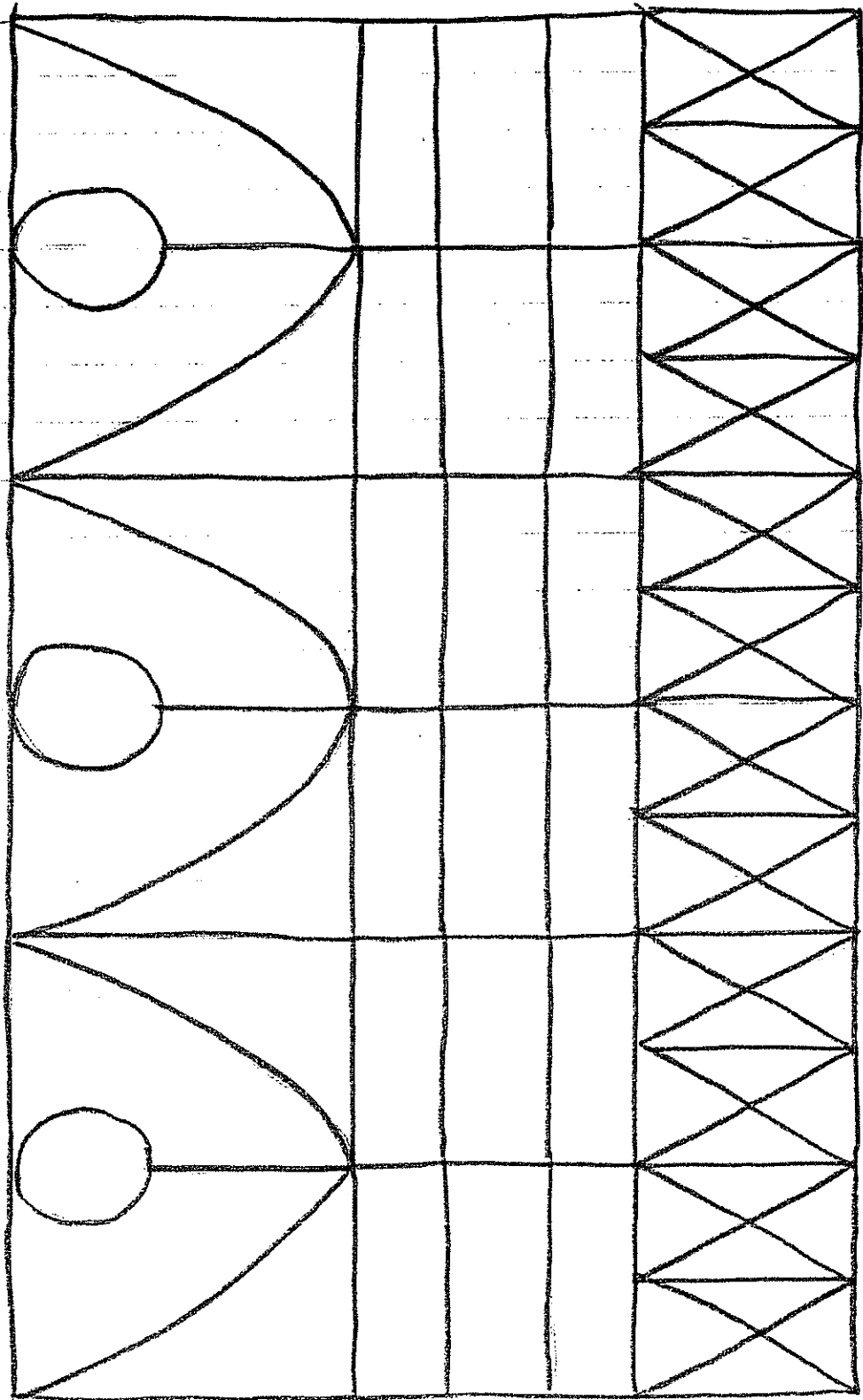
Fritz operated an anti violence website, which targeted primarily the publishers of materials directed towards children, that emphasized violence. In particular, **Fritz** made copy of particularly violent scenes produced for television by Gore and Suspense Productions ("GASP") and joined the scenes together into a 45 minute video titled, "The Worst of GASP". **Fritz** included in the video 20 minutes of commentary by a noted child psychologist, Dr. Zigmund, on the harm that the particular scenes were doing to children. **Fritz** also included in the video an advertisement for his for profit movie production company. It was determined that children watching the video's scenes of non stop violence would soon stop watching GASP productions (much to the dismay of GASP). **Fritz** sold the video for \$9.99 (a profit of \$3.00 per video) and provided it free of charge for non profit use by schools and churches. Dr. Zigmund, without permission from anyone, made copies of the video and sold it to his patients.

Ian, a noted fence designer, was aware of the problems local residents were having with animals attacking their crops. Also, he was aware that the local zoning board would not permit fences in town which did not meet the approval of the local town aesthetics committee. **Ian** did research on the critters which caused most of the damage in town and also studied popular wrought iron sculptures. As a result, **Ian** designed the fence shown in Figure A which provided a "variable density" design having bars closer together at the bottom and farther apart on top, to keep out both small and large animals, while allowing a graceful open look and the maximum light to pass through. **Clem**, a competing fence manufacturer, copied the design and sold virtually identical fences. Purchasers, having seen **Ian's** fences around town, assumed that **Clem's** fence was actually made by **Ian**.

QUESTION

Please discuss the rights or liabilities arising with respect to each of your clients. Particular attention should be given to a thoughtful analysis of the facts and a concise application of the legal principles learned in class.

FIGURE A



Ground

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Andover General Hospital (AGH) has recently retained your services, and its General Counsel has described the following facts to you.

Dr. Bones, a former orthopedic surgeon at AGH, had taken a set of x-rays of patients' bone injuries in 1935 and displayed the negatives on the wall of the staff room where doctors and other hospital employees would gather to relax. No copyright notice or other indication of ownership was marked on the negatives. Doctors were encouraged to photocopy the negatives, however the negatives were not otherwise distributed. Dr. Bones sold the x-rays to Doctor Femur and executed a written instrument transferring "any and all of my reproduction rights therein". Doctor Femur made colorized prints from the x-rays and sold them as part of a text book on treating bone problems in 1945. Copyright in the book was registered in 1945 but was not renewed.

In 1997, Doctor Clavicle used the colorized prints to make a set of slides. Doctor Rontgen, author of "Radiology for Dummies", approached Doctor Clavicle and suggested that they should "work together" to produce a seminar on radiology practices which would integrate Doctor Clavicle's slides and Doctor Rontgen's text book. (Doctors Clavicle and Rontgen have no relationship with IDG Books, publisher of the well known consumer oriented "_____ for Dummies" series with over 100 "Dummies" titles ranging from "Art for Dummies" to "Computer Networks for Dummies".) Dr. Clavicle videotaped the seminar and sold copies of the tape for training doctors in remote areas who could not attend the seminars.

To celebrate the 75th anniversary of the founding of AGH, the hospital organized a vocal group, "Crash Cart". The group recorded an album, titled Clinical Scare, which contained re-arrangements of public domain songs from the 1920's and a work titled "Contusions" composed by Nurse Jones, a member of the group. "Contusions" was recorded by Nurse Jones but the recording was never distributed to the public.

"Crash Cart" performed Clinical Scare in the park adjacent to the hospital. The performance ended with a two minute laser light and smoke display which was computer controlled. AGH had commissioned Byte to write the program for the

software. AGH provided Byte with a description of the visual effects it wanted to create and a deadline for finishing the software. Also, Byte was required to submit periodic progress reports to AGH. Clinical Scare and the entire light show was videotaped by WZAT TV and shown on the 6:00 p.m. news.

AGH opened a medical museum and gift shop. The gift shop purchased copies of Clinical Scare and offered it for sale for the first time. The gift shop had a policy of selling the album for \$30 with a 90% refund if the tapes were returned within 15 days. The tapes could also be purchased without the refund option for \$5.

AGH had a room in the shop where customers could listen to Clinical Scare before purchasing it.

AGH placed the following newspaper ad:

AGH wishes to acquire novel craft items for sale in its gift store. Top prices paid.

Sketch brought in several hand drawn charcoal sketches he made which commemorate great moments in medicine. The pictures were numbered 1-99 and each was signed by the author.

AGH purchased all the pictures. AGH commissioned Splash to use water colors to touch up and brighten pictures 1-50 and he mounted all the pictures on colored backs, sprayed each with a sealer and framed the pictures. AGH offered the pictures for sale in the store.

Also, in response to the advertisement, Thermo submitted a model of a cigarette lighter made in the form of a thermometer. The bulb shaped end of the thermometer was replaced by a thumb wheel for activating the lighter. AGH made several changes to Thermo's design to make the lighter easier to cast in miniature and to serve as a more efficient fluid holder. AGH sold the lighter without any payment to Thermo. Copy Cat, when he saw the lighter (as redesigned by AGH) in the gift shop, made copies and sold them.

On weekends, Nurse Critique would dress in hospital scrubs and apply make-up to appear as a fictional character, "Doctor MalCon". She would perform songs composed by the popular rock group "Analgesia" and substitute lyrics which were disparaging of the country's current health care system. Nurse Critique always wore a distinctive vest as a part of her costume, which was ornately embroidered with

charts and graphs depicting the portions of the population which did not receive adequate medical services.

Vid, a video technician, made a recording of Nurse Critique's performances at a local city park and sold it under title "Doctor MalCon Speaks Out".

A city ordinance provided:

No public music performance is permitted on city property unless a letter from the composer authorizing such performance is on file with the city.

AGH used microphones to pick up performances by "Crash Cart" and Nurse Critique in the park and played them on surplus military sound amplifiers and six speakers mounted in the walls of the gift shop to attract customers. The shop's business boomed during the performances.

Scribe, an author of local history books, interviewed several physicians who had practiced at AGH and heard their anecdotes of events taking place at the hospital over the past 50 years. The interviews were videotaped by Scribe (without the physicians' knowledge). Scribe added background music, which he composed, to the tapes. Portions of the interviews were published in his book, "Fifty Years at AGH". The name and likeness of one of the doctors, Doctor Albert Swizzler, was used by Scribe in promotions for the book. Doctor Swizzler was world famous for his work on the damaging effects of alcohol.

Drama Tist secretly obtained a copy of the taped interviews and created a play based upon the tapes. The play comprised all original dialog but included all of the incidents described by the doctors. Drama Tist also rearranged the music on the tapes and played the taped interviews and rearranged music for the audience during intermissions of his play.

Scribe also interviewed patients leaving AGH and recorded their comments on the quality of medical care provided by physicians at the hospital. On the basis of their responses, Scribe published a directory of physicians, arranged by specialty and a rating of A-F corresponding to the level of satisfaction expressed by the patients for each physician. Andover Magazine received a copy of the directory and published an alphabetical directory of physicians practicing at AGH.

Discuss the rights and liabilities of the parties.

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Flash, a self-employed photojournalist, had taken a set of photographs of European landmarks in 1939 and displayed prints of the photographs on the wall of his brother's art gallery that year. Flash made black and white reproductions of the photos and sold them as posters in 1945. Copyright in the posters was registered in 1945 but was not renewed. Flash executed the following bill of sale in 1946 to Trooper, who was on his way home from Europe:

"For good and valuable consideration, I transfer to Trooper the attached photographs and all of my right to publish the photographs." (Signed, Flash)

Flash died in 1965 and left all his estate to Heir. Trooper left his estate to his son, Vet, when Trooper died in 1980.

Vet used the photographs to make a set of slides. He would show the slides to veterans in their homes and ask them to discuss their wartime experiences associated with the various scenes. Vet would make an audio recording of his recollection of the interviews the next day after each interview.

Vet was recording an audio/video tape monologue as the introduction to his slide show. It was 10:30 at night and the rock group "Dawn's Early Light" was performing loudly in a studio next door. Vet asked the group to stop playing because it was getting late; they rudely refused. A city ordinance prohibited loud noises after 10:00 p.m. Vet went back to his store and finished recording his tape with the band playing in the background. Vet played the tape before each slide show.

To celebrate the 50th anniversary of V-E Day, Vet formed a vocal group, "The Rockets Red Glare". The group recorded an album, titled Sea to Shining Sea, which contained public domain marches and songs and a work titled Battlin' Bugles written by George M. Calhoun. Battlin' Bugles was first

published by Calhoun on February 18, 1995 and copyright for the tape was registered on May 15, 1995. Battlin' Bugles was arranged from sheet music and recorded by "The Rockets Red Glare" on February 1, 1995.

"The Rockets Red Glare" performed Sea to Shining Sea in the park behind the store. Each show ended with a two minute laser light and smoke display which was computer controlled to insure uniformity of the show. Vet had commissioned Byte to write the program for the software. Vet provided Byte with a description of the mood he wanted to create and a deadline for finishing the software. The entire light show was videotaped by WZAT TV and shown on the 6:00 p.m. news. In addition, WZAT played copies of Sea to Shining Sea.

Vet opened a store on May 1, 1995 to sell products, including the first sales of Sea to Shining Sea, commemorating WW II. He had a policy of selling the album for \$30 with a 90% refund if the tapes were returned within 15 days. The tapes could also be purchased without the refund option for \$5.

Vet had a room in the store where customers could listen to Sea to Shining Sea before purchasing it. Vet, by mistake, handed a customer, Norman Dee, a copy of one of his interview tapes. Norman Dee listened to album at the store, realized the mistake, and bought the tape. He sold the tape to the Daily Blab newspaper which printed excerpts from the text.

Vet placed the following newspaper ad:

US veterans are invited to bring in novel products commemorating America's contributions to freedom in Europe. Top prices paid.

Sketch brought in several hand drawn charcoal sketches he made of GIs on leave in European cities. The pictures were numbered 1-99 and each was signed by the author.

Vet purchased all the pictures. He used his water color kit to touch up and brighten pictures 1-50 and he mounted all the pictures on colored backs, sprayed each with a sealer

and framed the pictures. He offered the pictures for sale in the store.

Dodger, who had avoided military service, submitted a drawing of a cigarette lighter made from a model of the Statue of Liberty, the "Liberty Lighter". The statue's crown was replaced by a thumb wheel for activating the lighter and the torch was replaced by a holder for a wick and flint to ignite the flame. Vet made several changes to Dodger's design to make the lighter easier to cast in miniature and to serve as a more efficient fluid holder. Vet sold the Liberty Lighter without any payment to Dodger. Dodger, when he saw the lighter on the market, made copies and sold it himself.

The back of Vets store adjoined a town park where amateur music groups would often play. Vet used surplus military microphones to pick up music played by the group "Waves of Grain" in the park and played it in his store. Sarge aimed the microphone and installed the equipment in the store. The music was barely audible in the adjoining stores. Vet's business boomed during the "Waves of Grain" concerts.

On weekends, Vet would dress in a fictitious military uniform as "Sgt. Bivouac Barnes" and perform the songs of an anti-military rock group, "NonCom Formist". He would substitute lyrics which were disparaging of the group's political views. Sgt. Barnes always wore a straw hat as a part of his uniform. The hat was made in accordance with drawings provided by Vet to students majoring in basket weaving at a Florida university. Vet designed a unique vent which he placed in the front of the hat which appeared to be a military insignia but which also included a pattern of small openings to ventilate the hat.

A city ordinance provided:

No public music performance is permitted on city property unless a letter from the composer authorizing such performance is on file with the city.

"NonCom Formist" vowed to take whatever steps were necessary to enjoin performances in the park by Vet (as Sgt. Barnes) and "The Rockets Red Glare".

Knock-Off bought copies of the hat from the students and sold it as the Knock-Off brand, Sgt. Barnes hat. Knock-Off used the promotional line, "Look Like Sgt. Barnes".

Vet purchased 100 books of sketches of novel aircraft designs (sketches drawn by Messr. Schmidt) from a close out wholesaler, Surplus USA, for \$10 each. He sold each book for \$75 with a coupon for five model building classes. At no additional charge, Vet provided the supplies and instructions to enable purchasers to build models of the aircraft sketched in the book. The cost of materials for each course was \$35 and his overhead expenses (i.e. insurance, utilities and permits) for all the classes was \$1,500. The books could be purchased for \$25 from any retail store.

Vet hired Sarge, a retired army veteran, to stock shelves in the store. Sarge, who had served as a personal driver for officers during WW II, told Vet (based on his personal experience) that the allied generals, Bradley, Eisenhower, Montgomery and Patton each had his own distinctive personality and way of solving problems. He explained in detail many examples of each general's unique characteristics.

Inspired by Sarge's comment, Vet wrote a cartoon series about conditions of public concern during the period 1940-1945. He called the characters Brad, Ike, Monty, and Patty. They acted out civilian issues related to rationing, air raids, and sabotage; the "persona" of each character was based upon Sarge's observations. The setting for the characters, chosen by Vet, was a residential neighborhood in Boston, in a multifamily house; the characters "worked" for the Public Works Administration.

Anzio, a pizza delivery man, found a draft of the cartoon series left by mistake in a storage cabinet where Vet usually left money for pizza deliveries. Anzio read the draft and wrote a play based on the same characters, only changing the residential setting to a condominium development in a 1990's Boston suburb and the workplace to a defense contractor; the highlighted issues were crime, drugs and unemployment.

In 1918 Kilroy, Vet's grandfather, a famous WW I hero, had written a fictitious account (titled Blue Bivouac) of his experiences training to be a soldier. Kilroy sold all his copyright to the work to Pub, a book publisher, in 1928. Pub licensed Mogul Pictures to do a movie version of the work. The movie, also named Blue Bivouac, was released in 1932. Kilroy left his estate to Trooper in 1952.

Now, in 1995, Vet wants to include much of the material from Blue Bivouac in an autobiography of his father's life, titled Bivouac Blues. Vet is being approached for movie rights by Docudrama, Inc.

Discuss the rights and liabilities of the parties. Include in your discussion reference to any required ASCAP or Harry Fox (section 115) licenses.