

Intellectual Property
Fall 2022
Final Exam Memo

I graded your essays as follows:

- Correct and complete legal analysis: 70%
- Strategic advice: 15%
- Clarity and organization: 15%

The bullet points in the following outline do not directly correspond to my grading rubric, but they do reflect the overall weight I put on different parts of the analysis. I awarded full credit for identifying an issue and analyzing it carefully even if you reached a different conclusion than I did. Indeed, in several cases I awarded bonus points for spotting an issue I missed, or for surprising me with an argument I had not thought of.

I will of course be happy to discuss your essays and your grades with you if you have any questions.

Distrust, but Falsify

Your answers to this question were quite strong, and the overall scores were among the highest to any final-exam question I have given in the decade and a half I have taught this course. There are obvious copyright issues involving the poster, trailer, music, and plot elements — so obvious that they risk obscuring the trademark and right-of-publicity issues, which are also important. The key to this question was to focus on the IP *claims* other parties could make against your client's proposed films, rather than falling down the rabbit hole of assessing others' potential IP *liabilities*.

Copyright: Documentary

Ambrosini and Ice Pick Clock have no IP rights that Lo Straniero needs to worry about, but their *Gorbachev* documentary is a good place to start.

- The facts of Gorbachev's life and appearance are not original and are not the subject of a copyright owned by Ice Pick Clock (or anyone else).
- Nonetheless, the documentary is protected by copyright. It includes original elements in the direction, editing, narration, and interviews.
- Ice Pick Clock is most likely the copyright owner (per work-made-for-hire standard practices in the motion picture industry), or is at least the right party to contact with any licensing questions.
- Lo Straniero has no particular need to use any original elements from the documentary, so it faces no copyright risks.

Copyright: Poster

Shepherd's poster contains original elements that Lo Straniero could consider licensing.

- The poster is not substantially similar to the original elements of the documentary. While it refers to Ambrosini and to historical figures including the Gorbachevs and the Reagans, these references contain only historical and biographical facts, not anything copyrightable.
- Even if the poster were substantially similar, it would be a non-infringing fair use. It is a transformative parody, which copies only mi-

nor elements of the informational documentary, and is unlikely to affect the market for the documentary.

- A similar analysis applies to the photographs that Shepherd uses
- Thus, even if the poster is a derivative work that draws in part on reality or on the documentary, it is probably copyrightable. *See Keeling v. Hars.*
- The idea of a crime drama with Gorbachev and Reagan is an uncopyrightable idea; it is not part of the copyright in the poster and Lo Straniero is free to make a crime drama expressing this idea.
- If Lo Straniero wants to use a poster in the style of Shepherd's, it could license the poster from her and modify it — or hire her to create a poster for the completed film. Alternatively, because she was inspired by the *scènes à faire* of crime-drama posters, Lo Straniero could make a poster also inspired by that genre of poster that has a different layout, uses different fonts, etc.

Copyright: Twitter Posts

The plot elements, characters, settings, themes, etc. from Twitter are important to Lo Straniero but not easy to license.

- The individual tweets may be copyrightable literary works (some may be too short, but others may be sufficiently creative). To the extent that they are similar to the documentary or poster, they are probably noninfringing fair uses, and thus copyrightable.
- Many of these elements are uncopyrightable ideas (Gorbachev and Reagan as crime bosses) or *scènes à faire* within the crime drama genre (characters running angles of their own).
- Thus, Lo Straniero is probably free to reuse many of these ideas. To be safe, however, it should try not to draw too closely on any one user's specific suggestions.
- It is extremely hard to determine what constitutes the relevant work and who are the authors. This could be analyzed either as thousands of independent works that are derivatives of each other and of the

poster, or as contributions to a joint work. Licensing will be impractically difficult.

Copyright: Musical Suite

Keitel's music is copyrightable and should either be licensed or not used.

- The musical suite is an original copyrightable musical work. Keitel's performance is an original copyrightable sound recording.
- Although the suite is in a loose sense inspired by a fictional crime drama and in an even looser sense by the poster, the documentary, and reality, it is not a derivative work of any of them because it does not copy any copyrightable expression.
- As with Shepherd, Lo Straniero can approach Keitel for a license, hire him to compose for its own movie, or hire a composer to write an original score that is not based on Keitel's.

Copyright: Trailer

Cazale's trailer is copyrightable and should either be licensed or not used.

- The trailer is a copyrightable audiovisual work whose original elements include the editing and the narration.
- There is yet another derivative-works copyright issue involving the music, the movie clips, the tweets, etc. Again, it is probably a fair use, although it is a more complicated question because of the extensive incorporation of Keitel's music. (Keitel is unlikely to sue Cazale, another fan of a fictional movie, but he might look less favorably upon Lo Straniero, which wants to make a commercial use.)
- Lo Straniero probably does not want to use the narration verbatim, and it will cut together its own trailer with clips from the actual movie. As long as it does not instruct its editors to create a trailer directly based on Cazale's, there is little risk of infringement. Once again, it might consider hiring Cazale to work on the actual movie.

Right of Publicity

The right of publicity will not substantially interfere with Lo Straniero's plans.

- The Gorbachevs, Reagans, and other historical figures have a right of publicity in their names and likenesses. The four of them are deceased, but most states recognize a postmortem right of publicity, owned by their heirs.
- The use of an actual person's likeness in a film without their consent ordinarily infringes (Eric Johnson calls this "virtual impressment"). Ronald Reagan, in particular, was an actor before entering politics. (Recall the Arnold Schwarzenegger bobblehead problem.)
- In this case, however, to the extent that the film depicts these figures consistently with reality, it is protected by the newsworthiness defense. (Compare the Rosa Parks plaque.) To the extent that the film makes up a crime drama about them, it is likely protected by the transformative-use test. This is not completely a sure thing (compare the California cases with the Tony Twist problem), but it is strong enough that Lo Straniero should be able to proceed.
- As for the actors, Bob Hoskins and Estelle Getty are deceased, but Clint Eastwood and Jane Birkin are living and could be cast in the movie if they consent. Given that they are now over thirty years older than during the events of the actual Gorbachev's political career, this is probably not Lo Straniero's preferred course of action.
- It is fine to cast actors who have similar appearance or speaking style; actors do not have a right of publicity against others who look or sound the same.
- The poster for Lo Straniero's film, however, should accurately identify the actors who actually appear in it, rather than the actors in the fictional *Gorbachev* from Twitter lore.

Trademark

There are no trademark rights in GORBACHEV that would substantially interfere with Lo Straniero's plans.

- GORBACHEV is a surname and as such is presumed to be merely descriptive without secondary meaning.
- (I gave a bonus point to those of you who pointed out that RONALD REAGAN is a near miss to the deceased-former-presidents special case in Lanham Act § 2(c), but as Nancy Reagan is also deceased, the “during the life of his widow” clause no longer applies.)
- The title *Gorbachev* of the Ambrosini documentary is the title of a single creative work, and as such is not registrable.
- As for the various Internet memes and jokes, there are no underlying goods or services for the mark GORBACHEV to be attached to in a way that generates goodwill.

Lightning Round

Your answers to this question were also strong (particularly your trademark analyses for INFERNOS), although they trailed off noticeably on the final sub-part. There were no curveballs here; each sub-part did what it said on the tin.

Figment

- Yes, the band can sell covers of Figment songs. The compulsory mechanical license in § 115(a) allows the band to distribute new recordings of Figment's musical works, as long as they pay the appropriate royalty. The license only applies to songs that Figment has publicly distributed, and it only applies where the cover does not fundamentally alter the expression in the song. But since the band wants to record covers that are as close as possible, this will be fine. The band should be able to obtain a license by way of the Harry Fox Agency. There is no need to obtain a license to the sound recording copyrights, because sound recordings have no exclusive right against soundalikes.
- Yes, the band can perform Figments covers on tour. Here, the appropriate license to the musical work copyright comes from the appropriate performing rights organization (e.g., ASCAP or BMI), assuming that Figment has licensed its catalog to one, as most bands do. Where the venues have blanket licenses already, no additional license is required; alternatively, the band can obtain its own license for the tour. Again, no sound-recording licenses is required, because sound recordings have no exclusive right against in-person performances.
- No, the band cannot call itself Figments. The existing band Figment likely has a trademark in FIGMENT. The mark is arbitrary as applied to musical recordings and performances. Although Figment no longer records or tours, its continued sales and fandom indicate that the mark is not abandoned and retains goodwill. There is a high likelihood of confusion between FIGMENT and FIGMENTS: near-identical marks for near-identical services, and a court might even find bad faith intent to confuse from the deliberate similarity. Nor can FIG-

MENTS raise a nominative-fair-use defense; there are other and better ways to describe itself that would make the relationship clearer, e.g. “Imagination Scraps: a Figment cover band.”

BlockHead

- Yes, BlockHead can make laser scans of existing busts. These famous historical figures’ rights of publicity have long since ended — indeed, all of them died before there was such a thing as a right of publicity. Similarly, all of the busts it wishes to scan are long out of copyright. (The current cutoff in the United States is that works published 1927 are in the public domain.) One challenge is that the owners of the physical busts must give their consent in order for BlockHead to obtain the physical access needed to make the scans in the first place.
- Yes, BlockHead can probably use machine learning to create 3D models found on the Internet. Some of these portraits will be out of copyright, but others may have been made more recently. As to these new portraits, however, there is a strong argument that this machine learning is fair use. The purpose is not to extract the copyrightable authorship in any one artist’s expression, but rather to reconstruct the uncopyrightable facts about what historical figures looked like in reality.
- No, BlockHead will probably not be able to stop others from duplicating its busts created by laser scans, but yes, it may be able to stop others from duplicating busts produced by machine learning. The difference is originality. In the former case, an exact replica of an existing bust adds no new copyrightable expression. It is possible that BlockHead could enter into exclusive contracts with the owners of the physical busts to prevent anyone else from scanning them, but this will be a fragile process that could easily fail. In the latter case, the machine-learning output will potentially be different from any existing portrait and will reflect various creative choices made BlockHead about how to train the algorithm and assemble the portrait data for a particular person. The algorithm itself cannot be an “author,” but the humans who use the algorithm to generate busts can be.

- No, BlockHead cannot stop others from creating busts of the same people. None of the historical figures have a right of publicity, and even if they did BlockHead would not own it. The facts of what they looked like are uncopyrightable.

Ramirez Snacks

- Yes, Ramirez can call its spicy corn chips Infernos. There is no trademark in *Infernos of Passion* under the single-creative-work rule and the goods are completely dissimilar. There is no likelihood of confusion with BLOCH INFERNO as the goods are completely dissimilar and the Bloch mark is never used without the overall brand mark BLOCH. And there is no likelihood of confusion with BLORBOS as the marks are completely dissimilar.
- Yes, Ramirez can call its spiciest corn chips Infernos Extra. The word EXTRA is descriptive or generic for goods that have more of something than the regular version. Blorbos has no trademark rights in EXTRA by itself, and that is the only similarity between BLORBOS EXTRA and INFERNOS EXTRA.
- Yes, Ramirez can sell Infernos Extra in a fire extinguisher bag. It's distinctive trade dress, and it does not constitute false advertising. No reasonable consumer would think that the bag actually is a fire extinguisher.
- No, Ramirez cannot stop others from selling spicy corn chips. It has no IP rights over the recipe or the type of goods.
- Yes, Ramirez can stop others from selling spicy pretzels called Infernos. The mark INFERNOS is suggestive for spicy snacks; it implies that there is something very hot about them. Pretzels and corn chips are closely related goods and the likelihood of bridging the gap is high. The combination of an inherently strong mark, identical marks, and similar goods is likely to be infringing.

Cable City

No, Cable City probably cannot sell Earsplitter-compatible cables. Some of you suggested that Cable City could sell cables by making them a differ-

ent shape other than triangular. *This does not work*: only triangular plugs will fit the triangular sockets on Earsplitter devices.

- The '805 utility patent covers proper subject matter (a physical cable). It may have some validity issues (e.g., is the idea of triangular plug end obvious?) but it is hard to say much about them without more details. If the patent is valid, then it will absolutely bar Cable City from selling triangular-ended cables during the term of the patent.
- The '410 design patent also absolutely bars selling triangular-ended cables if it is valid. A cable is an article of manufacture, and a triangular plug is ornamental. The only possible validity challenge on the facts provided is functionality. But it is likely that the triangular design is not functional as the term is used in design patent; it is not the only possible shape for a plug. (It is the only possible shape for a plug that fits an Earsplitter socket, but that is not the right question!)
- Earsplitter may have a copyright in the triangular plug shape. Under the *Star Athletica* test, the aesthetic aspects of the triangular plug shape can be perceived even if its functional aspects are ignored. That said, the triangular shape may be too simple to be copyrightable. Even if it is copyrightable, Cable City may have a good fair use defense under *Google v. Oracle* to sell interoperable cables.
- Earsplitter may be able to claim that the triangular shape is protectable trade dress. The triangular shape is not inherently distinctive (because under *Samara Bros.* product design can never be inherently distinctive). But it is possible that Earsplitter's uniform use of a triangular plug and socket shape has acquired second meaning. A better defense is that the triangular shape is functional. Under the *Traffix* test, the triangular shape is essential to the cable's function: the socket-plug compatibility is an essential aspect of the design.