Answer-to-Question-_1_

Lance,

If you can establish your authorship and ongoing ownership of the copyright, you would likely prevail against the helmet manufacturers, but lose against The Atlantic. However, I advise you not to sue as you likely infringed the illustration you used as a model.

Question (a):

To own a copyright in the helmet, you must satisfy requirements for authorship (as well as continued ownership), originality and fixation — the last of which is undisputed.

For authorship, you will have to show that you did not create the helmet as a work for hire for either Brain Buckets or Wendy or transfer your copyright to Wendy through your written correspondance. Another party can assume authorship status over your work if (1) you are the party's employee and you created the work within the scope of your employment, or (2) you signed a written contract to create a work falling within covered forms, including visual art like this.

You are admittedly the employee of Brain Buckets, for which you design similar helmets, but a court is likely to fine that you created this helmet outside the scope of your employment since you did it at home during off hours, beyond your employer's

supervision and for reasons other than effectuating the purpose of your employer. A court will probably also reject an employment relationship between you and Wendy. The situation doesn't exhibit any of the tells of employment like wages, benefits, supervisory control or the ability to assign more work. She commissioned a single piece for a set price and didn't even demand to approve the illustration before you applied it to her helmet.

The court could alternatively find that your written correspondance with Windy constituted a written agreement creating a work for hire, or more likely, transferred ownership of the work to Wendy. However, since you wrote after creating the work, it is almost certainly not a WFH. And copyright transfers must be explicit provisions in written agreements, so your casual "it's all yours," which could have referred to the physical copy and not the IP rights, won't suffice to block your claim.

As for originality, a court might scrutinize your drafting process for the independent creation requirement. Since you clearly modeled your illustration after another's, the court will consider whether you sufficiently diverged from the model so that your version contains independent copyrightable expression. This bar is even higher if the copyright in the original work is still valid, which given its creation date is very likely, since if the court finds that the essence of the original pervades your version, yours could be an unauthorized derivative work barred from copyright even if it contains independent expression. We should closely compare your work with Rockefeller's to see if there is substantial similarity, which could also expose you to liability (section e).

You could have an independent copyright in the illustration, but since you want to preclude use of eagles on helmets, we must analyze the work as a useful article, which have higher originality standards. To gain copyright over a useful article, you must show conceptual separability between the functional traits and design elements. Most court assess the creator's intent, granting copyright when he designed the aesthetic elements primarily for their visual appeal rather than function. You plainly satisfy this test as your purpose was to make a statement through visual representations invoking abstract concepts like patriotism and aggressiveness. Under more objective tests, such as ornamental purpose or separate artistic impression, you also prevail since The Atlantic photo and imitation helmets demonstrate that people notice the helment for its visual quality first.

Question (b):

You could prevail against the manufacturers of all four helmets for violating your right of reproduction through comprehensive nonliteral copying. You must show actual or probative copying, substantial similarity and no fair use.

To defeat the defense of independent creation, you must show that the manufacturers copied your specific work. You can do so through evidence of actual copying (witnesses, depositions, emails), evidence of access with similarity, or striking similarity. Since your work was portrayed in news media across the world in a high profile event, a court is very likely to find that the manufacturers copied your work, or another unauthorized imitation of your work, which counts. Figure 9 would almost

certainly get in on striking similarity alone as the eagles are almost identical.

Next, you must show substantial similarity between the protectable expression in your helmet and the parallel traits in theirs. Your specific illustration has an independent copyright, precluding copies lacking the helmet or flag. This would likely be enough to get Figures 9 as it is nearly identical in the facial features, differing minorly in feather delineation and color.

As for the other eagles, you would likely have to rely on their placement on helmets and flags. Copyright law protects expression but not ideas, so the court could attempt to filter out unprotectable ideas and scenes a fair that belong to the public domain before assessing. This approach disfavors you because a bald eagle justaposed with the American flag is a wellworn trope, which is unlikely protectable. Further, the placement of an eagle's head on the helmet likely doesn't contain enough creativity to be protectable alone. Depicting animals on helmets, and eagles specifically, is a common scene a fair — and there are only so many places on a helmet to place the animal, so the merger doctrine would suggest thin protection. You could more easily argue that the eagle's confrontational demeanor — as conveyed through direct eye contact and furrowed brow — is the protectable element.

However, copyright protects arrangements of unprotectable elements, which probably includes your arrangement of forward-facing eagle head flag backdrop and helmet. The father-made hockey helmet is a rare exception to the conclusion that this arrangement is novel. The more prominent, and plaintiff-friendly, test of total concept and feel would

likely cut for you, as an ordinary observer would likely notice the similarities over the differences initially. The exception under both of these tests might be Figure 11, since it lacks the flag element, but the sharp beak and angry eyes, along with the helmet placement, might be enough.

If you prevail on similarity, you would have to defeat claims of fair use, which you likely would. The character and purpose of their uses are likely all commercial (sold to athletes/teams) and not transformative in purpose (helmet ornament). The nature of your work would go for you; illustrations are sufficiently expressive, and if the court accepted that your helmet contained enough originality to find a copyright and substantive copying, you're fine here. The amount is almost total quantitatively and qualitatively, as they appropriated the main appeal to a viewer. And the last favor likely also cuts for you because, as a professional helmet maker, you could feasibly create helmets for theses manufacturers' customers yourself, or license the image if that is customary in the industry.

Question (c):

You would also have a claim against The Atlantic for violating your reproduction and distribution rights. By publishing a photo of your exact work, the magazine definitely made a tangible, fixed copy, which they distributed to the general public through print editions and online. However, The Atlantic will likely escape liability through fair use.

The court would likely find the character and purpose of The Atlantic's use

transformative as it seeks a far different purpose — illustrating a news analysis — in which the court is likely to find significant social value. While the story may not be directly about Wendy or your helmet (justifying fair use for newsworthiness (*Nunez*) or critique of the original), she and your helmet represent the competitive and contentious relationship between the U.S. and Russia. Therefore, the court could also find that The Atlantic reproduced your work, with its American patriotism and"martial spirit" displayed promenantly in Sochi, to comment on the broader "Cold War" phenomenon of which it is a part (*Blanche*). Further, the nature of your work is likely to hurt you here, as you made a helmet to be used in an international newsworthy event, where you must have known thousands of cameras would capture your helmet — including professional photo journalists. Therefore, the court will likely find that you implicitly consented to this use. That The Atlantic copied all is negligible, especially since the fourth factor also cuts against you. The Atlantic photo only bolstered your work's reputation, far from causing market loss.

Question (d):

If you were to prevail on the claims above, you would be entitled to actual damages and defendant's profits, or if you registered the copyright before infringement, statutory damages as an alternative, as well as attorneys' fees. You may also be able to convince the court to grant an injunction.

You stand to get far more from the helmet manufacturers than The Atlantic. Actual damages include revenues you lost because the infringer took your business, but this is

undercut by the fact that your work was a one-off commission (worth only $500) rather than your actual business. Defendant's profits would likely earn you more considering they sold to many athletes. The court would deduct defendants' costs and apportion the profits to reflect how much value is attributable to your work. But since the reputation and recognition your work received during the Olympics likely sparked the trend you could argue that your expression is responsible for all the earnings. If you qualify for statutory damages, you could elect those instead, receiving $200-$30,000 per work (1) for innocent infringement, and $750-$150,000 for willful. Be cautious that juries are unpredictable in what they award. After the e-Bay patent case, courts in copyright suits are disinclined to grant injunctions unless the plaintiff can show irreparable damage, the weighing of burdens harm him more than defendant, and no harm to the public good. Here, you could possibly show irreparable harm considering your employment in the field of helmet design, but the less serious nature of your employment might not overcome the burden on plaintiff of having to halt larger scale production. There isn't a real public good consideration, but the impediment on production might sway a court to grant you a compulsory license, based on industry custom if there is one, to allow the manufacturers to continue to use their designs.

Against The Atlantic, you could not collect actual damages because that free publicity did not cause you revenue loss or prevent you from exploiting an available market. You could maybe get defendant's profits, but you would have to show that a percentage of The Atlantic's earnings from the online article and that month's edition is attributable to your work, which would be very difficult considering the reproduction was only a tiny part of the story and edition. You might qualify for statutory damages as

explained above. The court would not grant you an injunction because no irreparable monetary harm.

Considering the authorship question, you likely didn't register prior to the infringement. You will need to register in order to bring suit.

Question (e):

Of course, you might want to avoid bringing any suit if you are vulnerable to an infringement suit for copying Rockefeller's illustration. If your work is found to be an unauthorized derivative work, or comprehensive nonliteral copying, you would have no copyright to sue on, and you may have to pay damages.

First, we should attempt to identify who holds the copyright in the illustration you used as a model. The work was created in 1970, and the copyright was transferred to Harvard University Press for at least use in the compilation in 1974, which means the copyright is rule by the pre-1976 regime. This might have implications for Rockefeller's termination rights, as the book contained reprints rather than commissioned works for hire. If Rockefeller had transferred his full copyright, he or his heirs may have terminated. But if he may have retained an individual copyright in the illustration outside of the book, which would mean that not even Harvard could copy it outside of standard revisions and rereleases of the compilation (Tahini). Therefore, we should analyze the case under Rockefeller's apparent circumstances.

While I have not seen Rockefeller's version, it sounds like you did not alter the work enough to avoid infringing his right of modification if you were to have only created an illustration outside the context of the helmet. You would have to admit to actual copying, and the slight changes in coloration, feathers, face width and beak size still recreates the militaristic essence of Rockefeller's piece — which is the audience appeal, as demonstrated by your own attraction to it and the Post Office's reluctance to use it in war time. Your additions of the flag doesn't impact this analysis. You do not have a good fair use defense to allow you to claim a copyright and escape liability.

You could argue that you put the illustration to a transformatively drastic use by placing it on the helmet of an Olympian, but it is still primarily an illustration of a confrontational eagle, which was Rockefellor's purpose. Plus, the court could find bad faith in your process of copying the illustration for a commercial venture. The nature of his work is a highly creative stylistic illustration, so no merger defense. You copied the most important part of a bald eagle, which is its signature white head. And as his past attempt to license to the Post Office for stamps shows, there is a market for licensing such illustrations for useful articles. Therefore, you are likely liable.

The court may make you forfeit your $500 to Rockefeller, or slightly less if apportioned for your contributions of placement and flag background. If you gave up all your earnings, you likely wouldn't have to pay the customary license fee as that would be redundant. The court is unlikely to order the destruction of the helmet through injunction.