(A)

You likely have a copyright in the image on the helment.

The image is **fixed** because it appears in "a permanent version."

Originality requires "independent creation" and "a modicum of creativity" (Feist). You arguably did not create the eagle image independently, because you searched for images from the Iconography, selected one, and copied it. However, you thought of using an eagle independently, and the drafts each deviated more from Rockefeller's until you reached a very different final image, with independently added features. The bar for creativity is low and the stylized face, choice of palette, and wavy stripes all likely meet it.

The **idea/expression distinction** is probably tougher. The *idea* of an angry USA-themed eagle is not copyrightable. Arguably, the "idea" of the American eagle merges with its expression and the image is therefore not protected. A related idea would be that juxtaposing an eagle with an American flag is a cliche, especially in a nationalistic context. Thus, the doctrine of scenes a faire would bar protection. However, some elements of your image are protected. It's not necessary to give the eagle green wide-set eyes, a sharp pointed beak, and definition of the feathers around the face. Nor is it necessary or even customary within that theme to include only the head and place it right on top of red and white wavy stripes in a flag design. The image at least should receive thin protection for the elements that are creative expression.

The helmet could also be protected as a "**useful article.**" Its utilitarian properties are conceptually separable from its aesthetic appeal. It is likely still marketable as art (for collectors of American souvenirs?) (Nimmer). You "intended" to create something "dazzling" to embellish the helmet (Cf. Pivot Point). Similarly, the form (the eagle) was not dictated by the function (protection) (Cf. bike rack); though you picked an aggressive beast because of the competitive context, that's not the same as the form dictating the function. An average person would probably first notice the eagle, then notice its utilitarian function. Finally, the image stands on its own as a work of art. The primary function of the helmet is probably not asthetic, so hopefully they wouldn't use that test. Overall, the helmet is likely protected as a useful article.

It is likely that **you own the copyright** since you created the image. Yes, you were inspired by Rockefeller's drawing, but rather than merely creating a "slavish copy" (cf. Meshworks) you significantly deviated from the original. Wendy did not provide the requisite level of control to claim that she was the actual author (Cf. Titanic).

Wendy may claim **joint authorship**, but wouldn't prevail. She didn't make an "independently copyrightable" contribution. She contributed a blank helmet; nothing suggests she should own a copyright in that. She would also have to prove that both authors intended there to be joint authorship--that your contributions be merged into a unitary whole. However, you had broad latitude and control over the design. The fact that you did not respond to her assertion that the eagle was "hers" could weigh against you (i.e. it could suggest you didn't disagree), but courts would be unlikely to read in such

intent simply in the absence of a response.

Wendy could argue that she owns the copyright because the helment is a **work for hire**; it wouldn't work. You weren't her employee; you supplied the tools (except the blank helmet), set your hours, are highly skilled, are not subject to additional assignments, didn't receive employee benefits, didn't have taxes withheld, and weren't paid a salary. You were an independent contractor (CCNV). Sculpture/helmets do not fall within the 9 factors for works for hire. Wendy could try to argue that the helmet was commissioned as part of a collective work (i.e. her uniform) but such an argument seems stretched. Moreover, the parties did not agree in writing that the work was a work for hire.

Brain Buckets could try to argue that it owns the copyright (again as a **work for hire**) because the helmet was the "type of work that you're employed to do." However, that isn't sufficient; you did the work substantially outside the hours of employment, at home, using your materials, and the helmet was not created "in furtherance of" Brain Bucket's purposes. (Avtec)

Wendy could try to argue that you **transferred** your copyright in the image to her when you said that she could "do whatever [she] want[s] with it." However, transfer of possession is not the same as transfer of the copyright, which requires a signed writing. A court would be unlikely to construe that brief email as a transfer of copyright in the image, though it would probably read in an implied license to "display" the image to the public (since she would be wearing it at the Olympics, where it would be captured by cameras and transmitted to the public).

If a court found that the eagle image on the helmet were an **unauthorized derivative**, the image would not be protectable (Sylvester Stallone); I do not think this is the case (see below).

(B)

You'd likely prevail against 9, but not 10, 11 and 12.

In order to file suit, you'd have to have **registered** the copyright. Nothing in the facts suggests that you did that.

You could claim that your **reproduction right** was violated. You can show the allegeldy infringing helmets are **copies** because they are fixed in the form of the helmets. You'll then need to show that **"actual copying"** occurred. Since there was no direct admission of copying, you can prove access plus probative similarity. Since the image was broadcast all over the world from Sochi, you can easily show that the manufacturers had access to the work (Cf. Bolton) The probative similarity can be shown by pointing to the theme of the eagle with American flag designs (unprotectable ideas can be compared at this stage), with similar placement of the eagle's face on the front of the helmet, similar anger/focus, etc. The manufacturers would likely argue that they were inspired by the earlier use of eagles on helmets or that they took the trope of USA/Eagle from the public domain, but the timeline favors you.

You also need to prove "**improper appropriation**" by showing "substantial similarity." You should ask the court to use the "total concept and feel" test, wherein a court would ask whether a reasonable person would see that the images were apparently appropriated (Columbia Pictures). For 9, this would almost certainly show appropriation because of the placement of the flag, the shape of the face and beak, and theoverall layout and appearance of the design. This could also work for 11 even without the red/white flag, but for 10 and 12 it would be more difficult because the shape of the beak is so different, the eyes are a different shape, the feathers aren't as defined, etc. The manufacturers would ask the court to use the Nichols abstraction/filtration test, wherein the court would filter out the unprotectable elements of the design (the USA/eagle trope, the use of an eagle on a helmet) and then compare the protectable elements--here there might be very little left to compare! You could argue that this test doesn't recognize that original compilations of unproctable elements can be protected. You could get expert testimony from art experts to show the extrinsic similarities, then apply a more subjective test (extrinsic/intrinsic). Because of the numerous unprotectable elements, a court might use the "more discerning observer" test (Banion). Under that test, I think 9 would still be a copy, but the others are too different.

Any claims for **creation of derivative works** would need to show substantial similarity through the analysis described above. If the helmets are copies, you have a claim for **unauthorized distribution**. It appears from the images that the manufacturers were making the copies available for **public display** without your permission, so if they are creating copies you likely can show unauthorized display.

None of the 110 exceptions apply, so the manufacturers would argue **fair use.**

The **purpose and character** of the infringing helmets is commercial. I assume commercial because I assume the manufacturers were profiting from them. However the more important question is whether they are transformative and I argue that 10, 11 and 12 are transformative. They do not parody, satirize or comment on your design (Campbell, Blanch), though it's not necessary that they comment on the design itself (Blanch), only that they add some new "expression, meaning or message" (Green Day, Cariou). On the one hand, 10, 11 and 12 all have different aesthetics. 10 has a cartoonish beak and a different color scheme. 12 has a narrow beak, different proportions, and a less preciese look. 11 appears to have added a new meaning through its different flag. If lozenges and a different palette are transformative (Cariou) these arguably are as well. On the other hand their purpose is exactly the same as Lance's--to provide patriotic sports fervor on the face of a helmet, which weighs against fair use (except for 11, which appears to be for a non-American)(Cf. Gaylord). Figure 9 looks like a poor replica of yours and does not have enough difference in aesthetic to be transformative. I think Factor 1 weighs in favor of fair use for 10, 11 and 12.

Your helmet was **creative but published.** It did include many unprotectable features, however, so factor 3 is neutral.

If the helmets are copies, then what was taken for 9, 10 and 12 was the **whole image** and for 11 it was most of it. This weighs against fair use but this factor is not as important where the use is transformative.

Market effects: on the one hand the manufacturers could argue that you made a one-off project and thus there is no market for your works. Their helmets are for different sports, not skeleton racing so there is no usurpation (Cf. Cariou, Blanch, where the class of art buyers was different). But you would, in general, seek to develop or license the image for helmets, especially given its popularity after Sochi-- but now the market has been eroded. Blackmun would say that even if the manufacturers created the market for the helmets, you can still consider the market they created in evaluating harm. This factor tilts slightly against fair use for all of the helmets because in general you would likely seek to develop this market given your skills and the image's popularity.

Overall, because 10, 11 and 12 are transformative, they are likely fair uses; you would probably prevail against 9.

(C)

You could claim that Atlantic made a copy of your image when it took a photo of the helmet (assuming they took the photo). However, it seems that when you surrendered the helmet for use at the Olympics, you gave news outlets an implied license to photograph it and include photos of it in their reporting. You could also claim that they distributed a copy of the image by printing it on the cover of their magazine.

If Atlantic did not take the picture and it is infringing, you could sue for secondary liability. For **contributory infringement**, the direct infringement would have been

committed by the photographer. It would be difficult to prove actual or constructive knowledge, because there is no notice on the image itself, and the numerous public domain elements. For material contribution, Atlantic presumably paid the photographer for the photo. To prove **vicarious liability**, again the direct infringement was committed by the photographer. The financial benefit would come from sales of their magazine increasing due to the image. And finally Atlantic could ask photographers it licenses pictures from (or its employees) to prove or verify that the images it is using are not infringing--it does have the right and ability to control this behavior.

Atlantic would successfully argue fair use. News reporting is specifically listed in the statute. The **purpose and character of their use** is transformative. It's commercial because the magazine is for sale, but it adds a totally new political meaning to the image (cf Green Day) and places it alongside other images in a collage (cf Blanch, Cariou). This weighs in favor of fair use. Factor 2 is as above, as is Factor 3. You'd be hard pressed to show negative market effects from the inclusion of the image in the article. The factors weigh in favor of fair use.

(D)

To get an **injunction**, you have to show that irreparable harm, that money would not be enough to rectify the harm, that the balance of the equities tips in your favor, and that the public interest would not be harmed by an injunction. Even though copyright cases used to get injunctions pretty easily, that isn't the case anymore and a court would consider all four factors.

Helmets: Hard to show irreparable harm that money can't fix here. You can't really compete on the same scale as the competitors, but damages would fix this as well as an injunction.

The Atlantic: Hard to show irreparable harm, and moreover, the public interest would be harmed by suppressing creative news reporting.

To get **actual damages**, you would have to show that you suffered damage, which would be hard because you weren't (yet) trying to sell helmets. You could try to disgorge the manufacturers' profits, minus costs. For Atlantic, it would be difficult to show what % of their profits were due to the inclusion of the helmet in the magazine.

You probably could not get **statutory damages** because you did not timely register your copyright. Since it is now April and the helmet was created before November, it is now past the grace period for registering. If you did and it just wasn't mentioned, the damages could go as low as $200 because of the lack of a copyright notice on the image.

(E)

Be worried! First, you made a verbatim copy of a page from the Iconography--classic copyright infringement. Since the book was published in 1974, it's probably still under copyright, though we don't know whether the publisher complied with the requisite formalities to bring suit. You also made a photocopy of Rockefeller's design. We don't

know if Rockefeller complied with formalities, whether the design is under copyright, or who owns the copyright, but it wouldn't be hard to make out a prima facie case of infringement.

Finally, it is possible that your design is an unauthorized derivative of Rockefeller's drawing. What you took (the idea of the angry eagle; its focused expression) was likely not protectable on its own--the final image is probably distant enough from the original to either be a wholly original work or at the very least a transformative fair use. Even if the owner of the copyright in Rockefeller's drawing could get you to admit copying, that wouldn't necessarily be dispositive because your ultimate image was unique enough (Blanch, Cariou; Cf. McDonalds).