Institution **Harvard Law School**
Course **S15 Fisher - In Class - Copyright**

Event **NA**

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Count(s)	Word(s)	Char(s)	Char(s) (WS)
Section 1	**901**	**4710**	**5604**
Section 2	**573**	**2828**	**3398**
Section 3	**175**	**948**	**1122**
Section 4	**483**	**2376**	**2856**
Section 5	**365**	**2019**	**2379**
Total	**2497**	**12881**	**15359**

Answer-to-Question-_1_

Doisneau's photograph is **original**. Though he might have known of prior works involving kisses, *independent creation* doesn't require novelty, all that's needed is a *modicum of creativity*, met here (*Feist*.)

For photographs, there are three kinds of creativity: *timing*, *rendition* and *composition* (*Mannion*). Though it initially appeared, that Doisneau only had timing and rendition, which would only give him a thin copyright in his photograph and not the subject matter, his admission that he posed the individuals in the photograph meant he had protection in his subject matter. I would ask whether he just posed the pair or all the individuals in the photo. If he just posed the two, he only has protection to subject matter of the two, if he posed all of them, he has fulfilled composition entirely in the photo.

Though he has a copyright, his copyright is thin. He cannot hold a copyright of the **idea** of a man and woman kissing at a photograph's center. Kisses are customary and necessary to the romanticism genre and consequently *sense a faire*. (*Haley*; *Kate Spade*). Kisses are also one of the only ways to express love and affection and therefore, the expression may *merge* with the idea.

This photograph is **fixed**.

It appears that this work was **generally published** (*MLK*). One could argue that because it was only sent to a limited audience for a limited purpose (magazine

purchasers) and it was implied that they not have the right to copy it, it was only specifically published, but that would likely fail. Assuming that this photograph was generally published in 1950, the photograph would have needed to have been released with proper *notice* or else it's in the public domain. Given that *Life* produced it, it likely had notice. The work also needed to be properly *renewed* after 28 years by Doisneau. If it wasn't, it's fallen into the public domain. In order to be properly renewed, it must have been registered and deposited.

Assuming all of the above, Doisneau would argue that Red Envelope (RE) violated her **106(1)** right. RE's work is a *copy*. RE likely *copied-in-fact*. Doisneau could prove that through direct evidence of copying (witness, deposition, email) or through *access plus probative similarity*. Doisneau could prove access by stating that there were over one million copies of this print in *Life* and nearly another disseminated. The wide dissemination of these photographs would likely prove access. (*But See Three Boys* noting that having a song that was 110, on the charts, CDs distributed etc. was a weak case of access). It's true that this copy occurred decades later, but so did *Three Boys*. If you could prove access, you could prove probative similarity (it's more likely that the work was plagiarized than it was independently created). If the access is too attenuated, you could try a case of striking similarity, but this would likely fail as the only explanation isn't misappropriation. If the other party has evidence of *independent creation*, it will prevail. Once you prove copying-in-fact, you will have to prove *improper impropriation*. This is a case of comprehensive non-literal similarity (substantial similarity). Because there are protectable and nonprotectable elements in the photograph, the court will likely use a *more-discerning observer* or *filtration* test. A

more-discerning observer test, comparing the protectable elements under a more skeptical glance through a total concept-and-feel test, will likely show they're not substantially similarity. (*Boisson*). *Boisson* warns against a filtration test that would filter out the non-protectable elements because it fails to protect compilations of unprotectable elements (*Feist*). If the court did that, we are less likely to win. Doisneau's best bet would be under one of the ordinary observer tests but the court isn't likely to use those.

If she is able to prove that RE violated the 106(1), she will also be able to prove RE violated **106(2)** and **106(3)**.

Doisneau doesn't have a **VARA** claim. This isn't a visual work because it's not exclusive or limited edition (many reprints). Also VARA tends to refer to the original work, not a derivative one

Even under the expansion definition of **fair use**, RE probably won't win. The work, most importantly (*Campbell*) isn't transformative. It's clearly not parodying the work (*Campbell, Foresyth, Liebovitz*), commenting on it (*Lennon*), satirizing (*Blanch*), or providing a new aesthetic, message, meaning (*Cariou, Seltzer*). RE could argue that it has a different purpose the purpose being to inspire people to give gifts (*GoogleBooks, Perfect10*), but it's more likely that they, as they admit are "celebrat[ing]...relationship" arguably what the photo itself doing. (*Gaylord*). They will argue the present addition shows a clear purpose to sell and is transformative. (*Seltzer*) The work is commercial (*Harper*), though that's no longer central to the inquiry. It's infringing an expression, the heart of copyright, against RE, though it was published in favor of RE. It copied the heart

of the work (*Campbell*) (which wouldn't matter if it's transformative because you can copy as much as reasonable/necessary) and may have supplanted Doisneau's potential market of licenses (not including the one to RE). If it's transformative, it likely did not supplant the market. Assuming it's not transformative, Doisneau would prevail.

Note: If this photograph infringed any works before it, doesn't seem to have, if the original work pervades Doisneau's, he will forfeit copyright protection in his work. If Doisneau would have died before 1978, there would have been an *Abend* problem with *Life*.

Answer-to-Question-___

The statue fulfills the **originality** and **subject matter** criteria. Though the parties cannot have a copyright in the **idea** of a statute encased in kite string, it can have a copyright in that version.

There's a question as to whether it fulfills the **fixation** criteria. In order to be fixed, a work needs to be *embodied* for more than a *transitory duration*. (*Cablevision*). This exhibit was up for a week, long enough, as can be seen from Johnson's ability to reproduce it. It was fixed.

The first question is who is the author of the sculpture.

This might be a WFH. Path 1: we first need to determine if Parker was an employee of the Art Institute (AI). According the 2nd circuit, its most important to look at her tax treatment, benefits, skill, ability to control, and AI's ability to assign her additional projects. It would cut against her if the materials she used and the location she did them was at the AI and would the duration and that it was within the scope of AI's business. If she can hire her own assistants that might help her. (*CCNV*). She seems like an employee and that it's within the scope of her employment. Given that it was conduct that she was employed to perform, it was significantly within the time and hours of employment and

was in part to serve her master (AI told her to spend 50% of her time on this) (*Avtec*). This is likely a WFH. However, courts still have romantic conceptions of artists and will occasionally rule that it's not a WFH when it's in their eyes "true art" (*Toms*). The opposite is also true. (*Firefighter&Baby*) (Contrary to *Bleistein*).

AI could also argue this is a **joint** authorship. It would argue it and Parker were the authors, both made **copyrightable contributions** (it provided the statue), and both had the **intent** that it merge into a unitary whole. AI wouldn't live up to the 9th circuit's standard for author (*Alamuhammed*).

Though it's true that Parker/AI would have violated Rodin's **VARA** rights (*right of integrity*-cannot intentionally distort the work if it prejudices artist's reputation), they'll get out under fair use. Note: because they violated Rodin's VARA right, the work is an unauthorized work and they also, violated his **106(5)** and **106(2)** rights. **109(c)** will not save Parker/AI because the work is unauthorized.

Fair use will save AI/Parker. Their use of the work is *transformative*. An expansive view of transformative is now the heart of fair use (*Campbell*). The point of art intervention is to "comment[] on the original work." Assuming that the string was intended to parody the original piece (*Foresyth, Liebovitz, Campbell*), comment (*Lennon*), satirize society (*Blanch*) or even to provide new meaning, aesthetics, or understanding (*Seltzer, Cariou*), it should be safe. The work is commercial, but that's not the heart of the inquiry. (*Campbell*) Its fictional nature and use in entirety cut against fair use, but you can use as much as required/necessary for transformativeness. Assuming that

it has a transformative purpose, it's unlikely to supplant the market for the original work (*CastleRock*). These factors are non-exclusive and many courts look at whether the use benefits society (*Perfect10*, *GoogleBooks*). If art intervention benefits society, that will help a fair use case. Furthermore, courts seem to find fair use when they think it's good art; if this is deemed good art, it should win under fair use. (Against *Bleistein*)

Answer-to-Question-___

Johnson has infringed **106(1)**. He made a copy, mechanically copied, and improperly appropriated. If he violated 106(1), he is also violating 106(2), 106(3) (though hyperlinks are not enough, *Perfect10*, the actual image is,) and 106(5). He modified the work and the original work fully pervades his so he forfeits copyright(Rocky). He didn't infringe the VARA right of misattribution/lack of attribution because this was a WFH. Even if it wasn't a WFH, VARA rights aren't violated (*Tango*).

If Parker, instead of AI, holds the copyright, she might argue that AI is secondarily liable. Her best argument is vicarious liability (unless they knew of the specific acts) because they clearly weren't inducing, but there was direct infringement and they were receiving a financial benefit. The question is whether they had the legal right and practical ability to control the infringement. Without knowledge, I would argue they didn't.

Before bringing a suit against, Johnson, be sure to register and deposit your work. If you registered within five months of publication or before that's prima facie evidence for copyrightability.

Answer-to-Question-___

AI's best bet would be to get an **injunction** against Johnson. After *eBay*/*Salinger*, it's much harder to get an injunction. AI would need to prove irreperable harm, uncompensatable through monetary means, balance of hardship in favor of AI, society would not be injured by an injunction, and if AI wanted a preliminary one, likelihood of success on the merits. AI would argue that seeing the work via photography, instead of the live 3D, 360 version, would cause irreperable harm that money couldn't compensate. However, society would be favored by exposure to the photograph. Given that AI will win on the merits and Johnson likely acted in bad faith as there was a sign instructing him not to take photographs (not one of the factors but something that might lead to a compulsory license, *Abend*), an injunction is possible.

AI could ask for **actual damages**, but would have a hard time. They couldn't ask for *profits lost* by the decrease in viewership because the photograph was taken after the work was disassembled. They could try under the *value-of-use* theory. Perhaps, their photographer had a license to take a picture, they could argue the amount that license would cost is how much Johnson owes. Even if they would have never licensed it, they can assert this, but they would need to assert non-speculative evidence which would be difficult (*SAP*). We would need to look at industry custom, how much they've licensed in the past for similar uses, and anything that might tip the scale.

AI could try to ask for Johnson's **non-duplicative profits**, but no one has purchased it, so any profits would need to be indirect profits (his increase in fame etc.) In order to get indirect profits, he would need to prove a nexus of causation, which would be difficult. (*Fred*).

If AI *registered the work prior to infringemen*t, it could get **statutory damages** and/or **attorneys' fees**. There's no evidence that it was, but if it was, do this instead of the damages/profits. There is only one work and statutory works are *per work*. But there's a chance that this infringement was willful. After all, there was sign that instructed him not to take photographs. Under the 2nd circuit's defition of willful, reckless disregard even if someone thought it was fair use, Jackson would certainly fail. Under the ninth circuit's definition of intentional, Jackson wouldn't be willful as he didn't know he was infringing (letter). Even if he is found willful, unlikely, AI could make as little as $750 (as much as $150,000, but unlikely). This reward wouldn't be worth the attorneys' fees unless, you registered the work prior to infringement in which case the court could give you attorneys' fees particularly if recoup little (*Gonzalez*). If you haven't registered the work, but have a photograph or some way of doing it, do it now in case someone infringes in the future (*Hippple*).

Answer-to-Question-___

Greenfame may be liable for **direct infringement 106(3) and 106(5)**, but the infringment is likely excused under fair use. Google (*Perfect10*) also held unlawful thumbnails on its site but was excused under **fair use** for different purpose. The same is likely to happen for Greenframe. Its purpose is to help artists, research, sell, etc. not display art.

Greenframe might be liable for **seondary infringement**.

In order to be liable for secondary infringement, there must be a *direct infringement*, which there is (c).

Contributory infringement also requires *knowledge* (constructive of actual) and a material contribution. The COSNU/HSNU (*Betamax, Aimster*) defense will protect Greenframe from constructive knowledge. So unless, they know of specific incidents of infringement or are willfully blind, unlikely, there is no CI.

Vicarious infringement also requires *financial benefit* and l*egal right and abiltiy* to control. Greenframe receives a financial benefit; the more photographs are up, the more

people join and the more money they make. (*Fonovisa*-attracts more people, financial incentive). Greenframe also seems to have the legal right and ability to control. They can cancel users accounts and remove the pictures off the servers. (Napster). Greenframe has likely VI.

Inducement is purposeful, culpable conduct to encourage or intend someone to infringe. (*Grokster*) Greenframe doesn't seem to have advertised infringing uses, instructed how to infringe or targeted infringing customers and isn't liable for inducement.

Greenframe may fall into the *512* safe harbor. It seems it has no actual knowlede of specific infringement, red flag knowledge, or willful blindness. (Viacom). If it does and has the proper requirements of an agent, policies for removal etc., and removes it expiditiously upon knowledge, it's still arlight. However, it's possible that it doesn't fall under 512 because of its amount of control and financial incentive. Viacom tells us that in order to fall outside the safe harbor, you need less than knowledge of specific infringment, but more than the level of control needed for VI. It suggests inducement will get you into this category, as well as instructions specifying what you can and cannot put up, aesthetics etc. The fact that the software helps customize the photographs, and consummate sales, might be enough control to fall outside the safe-harbor.