

Copyright

Spring 2014

Professor William Fisher

This examination has two parts. Part I is a three-hour in-class test, which will be administered from 2:00 p.m. to 5:00 p.m. on May 1, 2014. Part II is an unlimited-time “take-home” test, due at 4:00 p.m. on May 8, 2014. Your responses to the two parts will be given equal weight when determining your grade.

Instructions for Part I

Part I of the exam consists of a single question. You have three hours to complete your answer. The exam mode, for this portion of the exam, is CLOSED. This means that you will not have access to the hard drive of your computer or to the Internet. Nor will you have access to your answer once you have submitted it.

This portion of the exam is also “closed-book.” You may not bring any written materials into the exam room. In preparing your answers, you may not consult in any way with your fellow students or with any other person.

Be sure to include in your response your six-digit Exam ID number. Do not write your name on any part of your response. To preserve the anonymity of your response, avoid including any information that would enable the instructor to identify you.

Part I

Portions of the following narrative are loosely based on real events. However, all of the persons and most of the actions are fictional. In addition, the chronology of the real events has been altered. If you happen to know or learn something about the events upon which the narrative is founded, you should ignore that knowledge when you answer the question.

Skeleton is a winter sliding sport, usually performed on a bobsled course. Competitors lie face down on steel sleds and try to complete the course as quickly as possible. Speeds of over 80 miles per hour (130 kilometers per hour) are common. The sport was invented in Switzerland in the late nineteenth century but, until recently, was little known in the United States. Since 2002, when it first became a regular part of the Olympics, its popularity has grown rapidly.

Skeleton racers typically wear skin-tight suits and helmets. Both are designed to reduce air resistance. Most of the men and women who compete in the sport are extroverted, even flamboyant. In recent years, they have begun emblazoning their helmets with dramatic designs. Examples appear in Figures 1 and 2.



Figure 1



Figure 2

Wendy Welker is one of the best skeleton racers in the United States, indeed in the world. She lives in Park City, Utah, and regularly practices on the nearby bobsled course (originally built for the Salt Lake City Olympics). In the summer of 2013, Wendy was selected for the United States

skeleton team, which in February of 2014 would compete in the Winter Olympics in Sochi, Russia.

Lance Lawrence is one of Wendy's friends. In the spring of 2011, Lance graduated from Yale University with a GDMFA (Masters in Fine Arts, Graphic Design). He tried to obtain a job in one of the advertising agencies in New York City, but was unable to find a position. Reluctantly, he moved home to Utah. Since September of 2011, Lance has been employed by Brain Buckets, a small company located in Salt Lake City that designs and manufactures custom motorcycle helmets. As a result of his job, Lance has become adept at "airbrushing" onto helmets unique graphic designs (most often involving skulls or action figures), but he yearns for more challenging work.

Lance was thus relieved when, on September 1, 2013, Wendy sent him the following email message: "Hey, I'd like to make a splash in Sochi. Could you make me a really hot skeleton helmet? I'll send you a plain white one. Can you do something to make it dazzling? As you know, I don't have a lot of money, but could pay you \$500." Lance wrote back: "Sure. It would be a fun project. But let's keep this confidential, OK? I'd rather my boss not know." Wendy responded: "Fabulous. I need it by November. I can't thank you enough." A few days later, Wendy sent Lance a generic white skeleton helmet that already had been fitted to her head and tested for aerodynamic efficiency.

During September, Lance spent a few evenings at home, working on the project. He first considered a variety of abstract designs, but soon decided that the helmet would be more striking if it depicted an animal. Both the nature of skeleton racing and Wendy's personality, he concluded, suggested that the animal should be aggressive and fearless. He sketched a design based upon a grizzly bear, but found that it did not fit well the shape of the helmet. A second design depicting a wolf likewise proved unsatisfying. One Saturday in early October, while Lance was hiking in the Wasatch Mountains, an eagle flew overhead. "Aha!," he thought. An eagle's head, he realized, would conform well to the shape of the helmet. And the image, he thought, could be both fierce and patriotic. (The bald eagle is the national bird of the United States.)

That evening, Lance went to the Salt Lake City Public Library and browsed the section on birds, looking for photographs or drawings he might employ as reference works. None of the contemporary books proved helpful, but an older book contained just what he was looking for. "The Iconography of Raptors" (written by Mark Madison and published by Harvard University Press in 1974) reprinted myriad depictions of eagles, both realistic and stylized. Lance spent an hour flipping through the book and finally selected one drawing that he thought would be perfect. It depicted the head of a bald eagle, with a "facial" expression that seemed both focused and angry. The book explained that the drawing had originally been created in 1970 by Russell Rockefeller, who had hoped to license it to the United States Post Office as the design for a stamp. The Post Office, apparently fearing that the image would suggest endorsement of the War in Vietnam (a contentious issue at the time), had rejected it. However, the martial spirit of the drawing suited Lance just fine. He carried the book down to the basement of the library,

where there was a high-quality coin-operated color copier. He used the machine to make a single copy of the page containing Russell's image, returned the book to the shelf, and departed.

Lance spent the following morning in his workshop at home, sketching eagle designs for Wendy's helmet. He taped the copy of Russell's drawing to the wall over his workbench and referred frequently to it when making his sketches. Lance tried to retain the simplicity and the overall mood of Russell's eagle. However, in each successive draft, he deviated further from Russell's drawing. The eagle that appeared in Lance's final draft differed from Russell's eagle in the following respects: the "face" was wider; the beak was larger; the "eyebrows" were darker; the feathers were more sharply defined; and the eyes were green, rather than yellow. Finally, Lance added wavy red-and-white stripes to cover the portion of the helmet not occupied by the eagle image.

When Lance was satisfied, he discarded his copy of Russell's drawing and all of his preliminary drafts. He then spent the afternoon (using his own paints, solvents, and tools) airbrushing onto the helmet a permanent version of the image. His final product is shown in Figure 3.



Figure 3

At the time, Wendy was practicing in Lake Placid, New York, so Lance mailed her the finished helmet. When Wendy opened the box, she was elated. She sent Lance a check for \$500, along with a note that simply said, “Intense!” Lance wrote back: “So glad you like it! Do whatever you want with it; it’s all yours.” During all of her subsequent training runs and during the Olympics itself, Wendy wore the helmet proudly. The photographs in Figures 4 and 5 show her during two of her runs in Sochi.



Figure 4



Figure 5

Unfortunately, Wendy did not do as well in the Olympics as she had hoped. She finished fourth in the women’s event, narrowly missing out on a bronze medal. Despite this disappointing result, her races were featured in NBC’s televised coverage of the Olympics. As a result, millions of viewers of NBC’s broadcasts in the United States saw several images of the helmet.

A few weeks after Wendy returned home from the Olympics, similar helmets began to appear in a variety of contexts. To be sure, eagles had been drawn on helmets for many years. For example, for decades the Philadelphia Eagles professional football team had used a helmet design featuring stylized eagle wings on the sides. (See Figure 6 on the following page.) And, on occasion, the heads of bald eagles had been placed on helmets – for example on the welding helmet shown in Figure 7 on the following page.



Figure 6



Figure 7

But prior to March of 2014, it had been highly unusual for the “face” of a bald eagle to appear on the “forehead” of a helmet. A rare example is the hockey mask depicted in Figure 8 – which had been created in 2001 by a father for his son, who played goalie for a high-school team in Boston.



Figure 8

By contrast, starting in March of 2014, such helmets suddenly began to appear in many settings in the United States: in ski races (Figure 9); on professionally manufactured hockey masks (Figure 10); on bicycle helmets (Figure 11); and on baseball “catcher’s” masks (Figure 12).



Figure 9



Figure 10



Figure 11



Figure 12

As helmets of these sorts proliferated, Lance became increasingly angry. On April 25, 2014, he wrote Wendy an email with the subject line: “Everyone is stealing my eagle!!!” Wendy wrote back: “Hey, it’s my eagle as much as yours. But I agree, it’s an outrage! What should we do?”

On April 27, while Lance was mulling over how to respond to Wendy, the Atlantic magazine published an article on the growing tension between the United States and Russia over the instability in Ukraine. The title page of the magazine story is shown in Figure 13.



Figure 13

Lance is a friend of yours. Knowing that you recently completed a course on copyright law, he writes you, asking for advice. Specifically, Lance wants to know:

- whether he has a valid copyright in the image that appears on Wendy’s helmet;
- assuming the answer to (a) is yes, whether he would be likely to prevail in a lawsuit against any of the manufacturers of the helmets depicted in Figures 9, 10, 11 and 12;
- assuming the answer to (a) is yes, whether he would be likely to prevail in a lawsuit against the Atlantic magazine;
- if the answer to either (b) or (c) is yes, what remedies would be available to him; and
- whether he should be worried that he himself has engaged in copyright infringement.

Write Lance a letter containing no more than 2500 words (including any footnotes) answering his questions. If you need additional information to answer confidently, say what that information is and why it matters. (For the purposes of this question, you may ignore the prohibition on practicing law without a license.)

Part II

This portion of the exam is open-book, and the exam mode is TAKEHOME. In preparing your answer, you may read any material you wish. You are also free to discuss your answer with your classmates or other persons. However, you must indicate in your answer the sources of any ideas you have derived from others.

Select one and only one of the following options:

- (A) In April 2009, the Economist magazine organized an online debate concerning the merits and demerits of the copyright system. Participants included Justin Hughes (Professor at Cardozo Law School and representative of the United States before WIPO), John Kennedy (Chairman of the IFPI), Dale Cendali (Partner at Kirkland & Ellis and Adjunct Professor at HLS), Jennifer Urban (Director of the IP and Technology Law Clinic at USC), Jessica Litman (Professor at the University of Michigan Law School), David Lammy (Minister for Higher Education and IP, United Kingdom), William Fisher, and several members of the online audience. Read the contributions to the debate: <http://www.economist.com/debate/overview/144>. Draft your own contribution.
- (B) What should be the purpose(s) of copyright law? Describe how, if copyright law were reformed so as to advance more effectively the purpose(s) you have identified, the rules governing two of the following sectors would change:
- 1) copyright protection for “useful articles”;
 - 2) the “work-for-hire” doctrine;
 - 3) termination rights;
 - 4) the meaning of “public performance” (in particular, the legal status of the Aereo system);
 - 5) appropriation art;
 - 6) traditional knowledge;
 - 7) technological protection measures; or
 - 8) the processes by which multilateral copyright treaties are negotiated.

Your answer may not exceed 2000 words (including any footnotes or references). You must submit it before 4:00 p.m. on May 8, 2014, to the Registrar’s Office using the Exam 4 software.

End of Exam