

Question One (1) (Essay)

Nelson Mandela (N) is outraged that Nelson Mandela's Closet (C) is selling his paintings and donating the profits to white supremacists groups, whose values are directly against his lifelong efforts to ensure equality for blacks.

N may use copyright law to stop C.

Copyright law gives authors and artists rights to copy, reproduce, and make derivative works. Right holders may sue infringers for unauthorized copying. N must be prove in an infringement action that (1) he had a valid copyright; (2) C had copied his work; (3) and the copying was improper appropriation. ✓

Valid Copyright (CR)

N probably has valid **copyright**. CR is vested in the author or creation of an expression with modicum of originality and fixed in tangible medium of expression. N's Paintings are fixed on canvas or other artistic medium and is tangible because C bought them and now has them. The modicum of originality is very low threshold to cross, even vests in a telephone book (Feist) which consists of mostly facts. Original paintings most likely passed this threshold. Even if N was copying other famous **artworks** such as Monet, his rendition of the subject matter would be slightly different, and likely enough to render the CR. ✓ His CR has not expired because N is still alive, unless South Africa has very different CR laws. Even if South Africa laws are different, if N choose to sue in the U.S., the local CR law may apply instead.

C has copied the work

In order to post onto eBay, C had taken photos of the pieces for sale and transferred them to the internet. In so doing C had created a fixed copy (albeit electronic). ✓

Congress in revision of the CR law had expressly said that fixing includes a machine readable format. Here a digital photo is machine readable. Copying can be proved by direct and indirect ways. Here the evidence of direct copying is available for everyone to see so no proof of indirect copying is needed. The picture on the web and the actual paintings should be almost perfectly similar to each other. C may argue that no one saw him took the digital photos or actually upload the pictures onto the internet so no proof of direct copying exists. N can in the alternate use indirect proof of access and substantial similarity. C definitely had access of the paintings to photograph. The comparison of the photo with the actual painting would show substantial, if not perfect similarity. So either way, N would be able to prove copying. ✓

Improper Appropriation

So even if C had copied the paintings, did he take so much of it so that it was not allowed? The courts often use three tests to find the difference between copying ideas (which was allowed) and copying expression (not allowed). These tests are levels of abstraction test, the pattern test, and total concept and feel test. In this case the entire work was copied: ideas, expressions, all of it. So the tests are not necessary to decide which part taken was inappropriate because all of it was taken. Therefore, N can prove all three elements of infringement. ✓

Defenses of Fair Use

C would argue that taking photos of the paintings in order to sell them on the internet is fair use. Fair use defense analysis looks at the purpose & character of use, nature of ✓

work, portion used, and the effect on market. The purpose and character of use here is likely legitimate. C bought the paintings from N. C has every right to sell the paintings. However it is unknown if C is only selling the paintings. If C is selling t-shirts with painting on them, or prints from the paintings, then the purpose of the use is not fair. Here I will assume C only sell the paintings then the purpose and character of the use is fair. Under nature of the work, because N had sold his paintings, he gets less protection than an unpublished work. However, paintings are highly creative so he would get more than some compilation of facts. This factor is likely to come out in N's favor. The portion used, as said above, is almost all of it, so this factor would go against C. Lastly and most importantly, the effect on the market. Although N sold the physical painting, N still owns the CR. N can sell t-shirts, prints of his painting, and any other derivative work that he wishes. He can even make them into screen savers if he wishes. C's act of distributing the paintings through eBay posting likely diminishes N's ability to create and sell those derivative works. The market for his work is affected greatly. C would argue that once N parts with the original painting, the market for the original painting is no longer his. Only C may choose to create a market (by selling it) or not. However N's derivative market argument is very strong and recently in Campbell, the courts considered the market effect on the derivative of the CR. Because the factors 2, 3, 4 comes out in N's favor, C's fair use defense is likely to fail.

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Merger doctrine

C would argue under merger doctrine. When there is only one or but a few ways to express an idea (here the idea is the selling of the painting), then courts will find the idea merges with its expression. Although this is a validity argument, C may use in that

how else would he be able to show customers what the paintings look like without showing them a digital photo? Without a photo, **C** is limited in use of language to describe what the painting looks like and the customers are unlikely to buy a painting sight unseen from the internet. This is very similar to the nominative use under trade mark where the the court figures out if only enough of the TM is used to identify the product. However, this argument would require **CR** to borrow from the TM defense of nominative use or extend the merger doctrine to include infringement defense. The courts are unlikely to do this.

A.
yes!

Lastly N may have a good argument under **DMCA** take down clause for eBay to take action. The ISP safe harbor of the **DMCA** allows holder to ask **ISPs** to take down infringing material. The bar of proof is very low where N only need to tell who posted content, and have eBay remove the content. eBay is likely to oblige to such a court order because of the controversy. **C** would argue here that eBay is not an ISP because they do not provide internet access. But eBay has power over the products posted on its site, so it may decide to comply even if it is not deemed an **ISP** under **DMCA**.

✓

Trademark Law

N can also sue **C** for TM infringement for the name "Nelson Mandela's Closet". He needs to move that he had a valid mark, that it would be confusing to the consumers.

N's mark here is his name, which is a **non-functional** description that identify the source of goods. Here **the** source is that he had **painted** these paintings. As a **personal** name he may have to prove secondary meaning that his name is associated with his painting.

✓
✓

about Mandela's utility to the community and that idea can only come about in response to Mandela's work so the court should reconsider notions of prior use. And because Mandela is unlimited public figure, the protections for free speech are greater than if he were a private figure. Also, there is the issue of parody as a defense. If the collector can properly frame his sending profits to white supremacists as a comment upon Mandela himself, then he might prevail as Aqua did in the **Mattel** case. The collector's use is potentially not purely commercial, in that he is sending the profits to the organization, and he is sending them not just to any organization but to an organization antithetical to Mandela's beliefs and work.

As explained above, Mandela's misappropriation of good will argument seems stronger than his likelihood of consumer confusion argument. With courts moving more to protecting the property side of trademark, Mandela could also bring up trademark dilution and that the collector's store no longer just conjures up the seniors mark anymore. Now the public will associate the paintings with this racist's store and the donated profits. Dilution theory is not fully developed but it could be another avenue for Mandela. However, all of the above factors suggest that Mandela may not prevail under trademark law.

Copyright claim

NM can also go after the collector on a copyright infringement claim. The collector is making posting photographs of Mandela's work on the Internet. The paintings seem to easily meet the requirements of a valid copyright. I'm assuming the paintings are themselves original works expressing more than a modicum of creativity and

independently created. And once on the canvas, they are fixed in a tangible medium of expression. The posted photographs are clearly copies and there is likely to be direct evidence here. The **collectors** owns the original works and many JPEG files contain information of the camera used to make the images, the owner of the camera etc. The collectors act of uploading the photographs is likely to prove this was direct copying. Even so, the amount of access to the original paintings the collector had, coupled with the mechanical duplication of the images would also provide indirect proof. NM has the right as the copyright owner to make these reproductions and it seems likely that the collector can only "display" the works were they are originally housed - in his store - not also on the Internet. The improper appropriation seems strait **forward** enough since the collector is not just appropriated facts or idea but the expressive images of the work of the author.

The collector is left to argue a fair use defense of these images. He probably doesn't fit into the traditional guidelines of criticism, commentary, news reporting, teaching or research. Following Sony, he may argue that he is merely space **shifting** - moving the works from his closet to his online e-Bay listings. However, there is the hurdle of personal use here. Unlike taped programs, the images are not just for the collector to enjoy online but for all others. Also, the photographs are taking not just the heart of the work but the whole thing. The JPEGS are not transformative in any way and there may be a real market effect here related to the resolution of the photographs. Are they of such high resolution that people could download them and print them out as effective copies of the original? Photographs are different **from** canvas paintings but NM still has ownership over derivative works and reproductions. While the **collector** may be using

the images simply to sell his products, bolstering the purpose and character of the fair use, the quality of the images may determine whether this was fair use. If they are simply thumbnails used to inform the consumer the collector may prevail but if he is offering high-res images that can be downloaded by Internet users, the market effect is probably too great to defeat NM's infringement claim. The collector will try to argue that art collectors, the ones who are actually going to buy NM's (presumably) expensive paintings, are not going to settle for Internet images of them. So sadly, it seems that considering the purpose of the copies and the potentially small market effect, NM is not likely to prevail on his copyright claim either.

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Question Three (3) (Essay)

The playwright should bring a claim under the Copyright Act for infringement. In order to have a valid copyright you must have an original work of authorship fixed in a tangible means of expression. Because she is American and first published her work in the US, she must have registered her copyright. The author has the **exclusive** right to use her work and any make any derivative works.

The test for infringement is whether a valid copyright exists and if the constituent elements of that work have been copied. There is no information to suggest that the Author did not create an original work and it is in written form. She qualifies for protection. The question is whether there has been copying.

Determininn Copying

Different courts have employed **different tests** to determine if a copy has been made. The three tests to look at are the levels of abstraction test, the **structure/pattern** test and the total concept and feel test. In all of the tests the intent of the alleged infringer is not relevant. No bad acts are required.

Under the levels of abstraction test the court looks at the two works side by side and makes a chart. At the center is infringement at the outer levels are general **ideas**. In this case at the outer levels would be two stories about **spouses** who are widowed. This is a broad general theme and will not derive any protection under copyright law. The next level would be works that contain a scene with friends discussing the death. **This too** is very general. At the **most** specific level the scene where the **spouse** does not want to deflate the balloon because it contains the deceased spouse's breath. At **this** level of **abstraction** the TV show looks like a copy. The idea was **original**, it is not factual and it is not a **common scene** that is in the public

? ~~copying~~ This is idea v. expression test

excellent

domain.

Under the structure/pattern test the court looks at a work element by element to see if there are similarities in the patterns. In this case in both works there is a conversation between two friends. The conversation is about dealing with the death of their spouse. The culmination of the scene ends with the beach ball story. Using this test the scene looks to be copied. It has the identical theme and structure to the play.

Under the total concept and feel test the two works would be evaluated from the consumer perspective. The TV show will argue that there show is about cops and that audiences won't perceive the scene as being similar. The Playwright will argue that any person seeing the two works would know that they were identical. Both sides would put on evidence about what ordinary people would think after viewing both and ultimately the jury would decide if they thought the TV show was a copy.

Proof of Copying

Part of determining copying is showing that the alleged infringer had access to the original work from which to copy. The Court in **Arnstein v. Porter** laid out the method for determining if a work is based on a copyrighted original. The simplest manner of doing this is through direct proof. The alleged infringer admits that they saw the work or an eyewitness testifies that they saw it. A person might admit this when they believe they did not copy or have a fair use defense. In other cases the plaintiff will show that the defendant had access to the work and the infringing work bears a substantial similarity to the original. In this case the play was performed off Broadway for six months. The TV show is about NY cops. It is possible that they have people in New York who contribute to the show who saw the play. It is possible that the play was described in a review in the newspaper that the TV writer read. Since the play was open to the public it is likely that the defendants had access to it. In terms of substantial similarity, the three tests noted above show how similar the works are. Under all of the tests

the two screens look identical. Even if the court finds that there is not enough evidence to prove access, the scenes are substantially similar on their face and the court will probably find for the Playwright.

Idea/Expression Distinction

Copyright law protects an **author's** original expression but it does not protect ideas and facts. The TV show may argue that they used different words and sequences to portray this scene and therefore they have not taken the authors expression merely the idea which is unprotected. This argument will be rebutted **because** there are many ways that the TV writers could have expressed ~~the~~ idea of spousal **grief** besides this depiction. The depiction is the author's expression.

Defenses

The first two defense that the TV show will use are that the work was not original and that there use was a fair use. ^{really?} If **the show** can prove that the playwright did not think up the scene than it **would** not be an original work and she would have no protection. The fair use doctrine usually applies because of public policy. Fair use exceptions are allowed for things like newspaper reporting, teaching and research. The **N** show may argue that the copied portion of the work was so small that it should be allowed. The court will look at the fact that the TV show is a profitable enterprise (they make money selling ads) and the work is an original work and not historical **or** fact based so it has full protection under copyright law. In terms of the amount and substantiality of the portion taken it is impossible to evaluate this based on the facts. Although it is only one scene of an entire play, it may be the most critical scene. The **Court** in Harper and Row, stated that the **portion** taken must be evaluated as in relation to its **impact** on the work as a **whole**. If this is the definitive scene in the play it may be very substantial. Finally, the **author** could have sold her story line to the show or other shows and thus the infringement destroyed **the** market for her derivative work.

The show might also claim that they did not infringe the work because the work they produced was not fixed in a tangible medium. It was broadcast over the airwaves. IN Galoob v. Nintendo the Court held that a derivative work that was not fixed in a permanent copy was not an infringement. This argument will probably fail because TV broadcasters typically tape their shows so that they can gain copyrights to them.

Another claim the show could make, although far fetched, was that the show was actually a parody of the play. They could claim that the scene was so over the top that they wanted to poke fun at it. This probably would not succeed either since most people would not know the original and thus would not know that the TV show was a parody.

END OF EXAM

Question Three (3) (Essay)

Playright (P) v. TV (TV)

Copyright Infringement

P could sue TV for copyright infringement, which requires that P have ownership of a valid copyright and proof that TV copied **constituent** elements of P's work that are original. P would easily prove that her play was original because the modicum of creativity requirement is a very low threshold to meet. Feist. **Clearly**, the foreward of a phone book can be considered creative for purposes of copyright, then so too can P's play. Additionally, P's play would be protected under section **102(a)** as a literary or dramatic work. The question here is whether P's play is copyrightable subject matter.

Section 102 codifies the idealexpression dichotomy. It states that no copyright protection attaches to any idea, procedure, process, etc., regardless of the form in which it is embodied. However, the statute itself is not self-defining. See also Feist. One test to determine whether the concepts in P's play are protectible is Judge Learned Hand's Levels of Abstraction Test. We focus on the patterns of increasing generality. At the outer edges are unprotectible ideas, and at the center is infringement. **Here**, the plays encapsulation of death and grieving are most likely unprotectible ideas. These two ideas play a role in everyone's life, and so it's hardly possible for one person to corner the market on them. The cleaning out the closet part is a **little** closer to the center. But, this metaphorical device used to delve into a character's past is a relatively

common one. The breath in the beach ball bit might be specific enough to meet this test. The general concept of holding onto some possession of one's deceased loved one is a common one, but the particular expression in the form of breath in a beach ball is a unique expression, and one that should be protectible.

*lit. elem
analysis*

Under the pattern test, we look at the sequence of events and the interplay between the characters. First, P's play deals with two women characters, but TV's show involves NYC cops. Although the main character in each is dealing with a similar emotion, the biological (and perhaps emotional) differences between a woman and a street-hardened cop would create a very different type of tone for each work. Second, the fact that both involve the deaths of loved ones argues in favor of P, but this is a feature which many movies and plays include. Third, the cleaning out the closet bit in the TV show tracks the play's development exactly. Finally, the beach ball feature also tracks P's play exactly. Although the interplay between the cops and the two women might be different, the sequence of the events seem identical. This test would argue strongly in favor of P.

Under the 9th Circuit's total concept and feel test, we ask whether two people would subjectively experience the work in the same way. A viewer of both the play and the TV show would no doubt feel a general sense of depression and perhaps a great sense of empathy for the protagonists in the respective works. There might be a difference in degrees of depression experienced, depending for instance on the gender of the viewer, whether the viewer was employed as a police officer, or whether the viewer had recently experienced the death of a loved one. It is difficult to determine how two

viewers would subjectively appreciate each work because **movie/play** interpretation is based so much on the viewer's experience and perception. I would argue that only in a very general sense would the total concept and feel of these works be the same for **two** viewers. Additionally, the details provided seem like only a snippet of the larger film, so I would need to know what happened in the rest of the works. For example, did the women in the play ultimately overcome her depression after being visited by the ghost of her deceased husband? Did the police officer turn to a life of crime after his idiot partner deflated the beach ball? These aspects would clearly change a person's perception of the works.

All three of these tests are mealy-mouthed tests that are very difficult to define with any precision. Nonetheless, P would have a pretty strong argument that the breath in the beach ball part was sufficiently expressive to be protected under copyright.

TV might counter that under the Scenes a **Faire** doctrine, copyright does not protect incidents, characters, settings that are indispensable or at least standard in the treatment of a given topic. Atari. Like the German beer hall revelry, **P's** play was not the first to depict a person working through the death of a loved one. The digging up of past memorabilia is indispensable in framing the story and conjuring up memories of the deceased. Otherwise, **TV** can argue, it would have to rely on those trite "flashback" scenes. But again, the breath in the beach ball seems sufficiently unique, and not indispensable for developing the story line.

P would also have to prove that **TV copied** her play. Direct evidence might be hard to

establish, but she could argue that TV had access to her play, and that the TV show was substantially similar to her play. In terms of access, although the TV show takes place in NY, it is most likely produced in LA. P's play was performed off-Broadway for only six months, which seems to indicate that the play was not terribly successful, and argues against a finding of access. Nonetheless, P might argue that there is a nexus between LA and NY in terms of its creative markets, and it is likely that at least one person involved in the creative production of the TV show saw the play and coopted the idea, whether intentionally or unconsciously (e.g., Chiffons v. George Hanison case). Assuming that like NYPD Blue, the show is filmed on location in NYC, P has a stonger argument for access.

If, as in Arnstein, we could show a striking similarity, we may not be required to prove access. Even if the court did require a showing of access, the threshold is low like in Arnstein, where the plaintiffs theory was that a band of thugs snuck into his house at night and stole his copyrighted work.

P would also have to show improper appropriation. This determination would also depend on the ideadichotomy distinction as discussed above.

Fair Use Defense

really?

TV might argue fair use in its defense. The non-exclusive factors of fair use include (1) purpose and character of use, (2) nature of the copyrighted work, (3) amount and substantiality of portion used in relation to CR work as a whole, and (4) effect on

potential market for value of the copyrighted work.

A parody argument would not likely fly here as the **N** show doesn't seem to be making fun *of/commenting* on the work itself. The play probably wasn't well known enough to be made fun of by the **N** show. Also, fair use does not apply to satire, so even if the TV show were poking fun at this melodramatic topic by using some elements of P's work, TV could not use it as a defense.

Purpose and character: The **N** show has a commercial purpose which argues against fair use. But this is only 1 factor in the analysis.

Nature of the copyrighted work argues against a finding of fair use because the work involves creative expression.

The amount and substantiality of the work taken argues for P because it seems like the most important parts were taken (breath in ball), if not a good portion of the play itself.

The effect on the potential market of copyrighted work. **N** has effectively cut off P's ability to shop her play around to **N** stations and movies. In other words, TV has limited P's right to make derivative products of her work. We should look at all potential derivative markets under Sega, even though Galoob looked only at the market for derivative games as opposed to the device itself.

*Use Harper Row
to argue ~~that~~ ^{the} heart has
been taken for
ideal expression.*

Question Two (2) (Essay)

In order to have infringement there must first be a valid CR and the copying of the copyrightable elements of the work. The question states that we have a valid CR. Therefore, we **move** on to whether it has been infringement because those elements of the work that are copyrightable have in fact been copied.

CR protects work that are original. Its protection is limited to that what is original to the author. Limits are sometimes phrased in terms of the idea expression dichotomy. Ideas themselves are not protectable, but the expression of those ideas is. Because the goal of CR is to promote the progress of the arts, one wants to avoid protecting ideas, making them off limits to other authors. Much progress occurs because authors build upon the works or ideas of those that have come before them. If this **building** were stifled, progress would be seriously curtailed. However, CR law does want to **incentivize** creation, so it will offer to the particular expressive component of the work. A balance has been struck between individual incentive and the greater good, and that balance falls along the idea-expression line.

However, this line is quite difficult to find. There are some basic rules. Facts are not protectable. These are ideas, and such ideas are free to all men. Thus in FEIST, the court stated that the personal information in phone books was not protectable, even though it took a considerable amount of work to prepare. There, that modicum of creativity was lacking. On the other end of the spectrum would be a piece of artwork. This is highly expressive and all original aspect of it would be protected.

Several tests have been formulated in order to draw the line between idea and expression. Judge Learned Hand first put forth the levels of abstraction test. Here, one is to look at the levels of abstraction in order to see where idea begins and ends. This is a difficult test to apply, and has been a bit refined by the pattern test. Here, one looks to the **interaction** between the characters, the plot line, etc. to see if the works are simply too similar. Lastly, the 9th circuit has come up with the total concept and feel test. Here, one sits back in the position of the view and ask whether or not these two works feel as if they are the same thing. The imprecise **nature** of the tests reflects the difficulty of drawing this line.

In the instant matter, the facts tell us that the book features a young orphan girl with no magical powers who lives among magicians and has to use technology to **survive**. If we take the pattern test or levels of abstraction, we can see some similarities. It is true that both of the works involve magic, orphans, the orphan living among magicians. Also there is the idea of using resources to try and survive in a competitive magical **world**. But there are differences as well. Harry Potter is about a boy who is a very gifted magician, he doesn't have to resort to technology to compete. As to total concept and feel, it is difficult to say without reading the books. But generally it seems that the idea of magic is pretty commonplace, as stories about children as orphans. Additionally, there are pretty big differences as well. So, it doesn't seem like the book is overreaching, it appears that it is just taking general ideas from the book, if taking them from there at all. Is this not like Oliver? An orphan who relies on his skills to **survive**? Are we copying that as well?

Even if this were found to be copying, one could argue fair use. In *ACUFF ROSE*, the court **found** that parody in those circumstances constituted fair use. There,

the band 2 Live Crew had used the underlying beats of Roy Orbison's Pretty Woman in order to create a rap song. The court found that 2 Live Crew was using the song in order to make a comment on the underlying ideas of the Pretty Woman song and to contrast those ideas with the rough life of the street. Therefore, a **parody** was involved-it used the original only to make fun of the original.

Therefore, we will look at the factors of fair use analyzed in ACUFF ROSE. First is the nature and the **character** of the use, including whether or not it is commercial. In ACUFF ROSE, the fact that ~~the~~ use was commercial was not fatal. In fact, most parodies are commercial. The real question was whether the use was transformative, in the sense that it did not displace it, but added something new. Here, our book makes fun of the **simplistic** ideas put forth in Harry Potter, the poor orphan fitting the good fight against evil in a competitive world. Here, we are not copying the original, but making fun of those simple ideas of good v. evil, a harsh world, the cliché orphan**child**. Because one is transforming the work, this factor does not weigh against us. (If the court could find that that rap song was a parody, we might have a good chance here).

Many **courts** have also considered the public benefit as a factor. It is important for the public to have new works, and it is especially important to encourage a critical eye in the public. Criticism or mockery is healthy, especially in light of the already **strong** power CR holders have. Shedding a new light on the silly ideas of Harry Potter is maybe a **desirable** thing, especially for the youth.

The second factor is the nature of the CR work. Generally, factual works are accorded much less protection than fictional ones. Here, this **falls** within the core of CR protection. But, the fact is not of much help though in any parody case since parodies almost **always** invariably copy publicly know expressive works.

The third factor asks whether the amount and substantiality of the portion used in relation to the CR work as a whole are reasonable in relation to the purpose of **CRing**. Humor of parody necessarily springs from recognizable allusions. Here, we need to use the magician and orphan theme or else no one would get the joke. But, from the limited facts we have, that is all that we have taken—very general and very limited ideas, only enough necessary to invoke the idea of Harry Potter. Other elements have been added or changed, underscoring that we only took what was needed. For example, we changed the boy to a girl, and replaced his powers with those of technology. In the case involving *Gone With the Wind*, many of the characters and the scenes were replicated. The 11th circuit acknowledged that the borrowing constituted a large amount. However, the court found that the book would likely succeed. It was told from a different perspective and shed light on the original work. Here, much less has been taken and it similarly works to shed light on the flaws in the original work.

The last factor is the effect of the use upon the potential market for or value of the CR work. Here, we don't consider only market **harm** but what would occur if activity of this sort were widespread. What must be recognized is that this is not **direct** competition. With parody, we are not trying to replace the product, we are transforming the work into a new product. It is possible that after reading our work, which sheds new light on the silliness of Harry Potter, people will stop reading those books. But this factor is simply not concerned with that kind of effect. Criticism and comment that may affect the value of the book are not included, **only** the replacement of one work for another and this is not the case here.

Question Two (2) (Essay)

Question 2

In order to claim Copyright (CR) infringement, the copyright holder (here, "Harry") must **prove** that she has a valid CR, that there was actual **copying** of the original elements. Under Feist, we know that in order to get CR protection a work must be independently created and **contain** a "modicum of originality." Here, Harry wrote her books - they were independently created by her, and arguably, as they have spurred a literary boom of Harry Potter fans and movie creations, her books contain more than a minimum degree of creativity. Second, under section **102(a)**, the work must "be fixed in any tangible medium of expression*" - and words on paper satisfy this element. These books also maintain the idea expression dichotomy and are a work "of authorship." Finally, Harry is still alive and suing, so her CR duration has not yet expired. Since Harry is the actual writer and did not complete these series as a work for hire, she is the owner of her valid CR.

Next to prove there was copying, Harry can either use direct or circumstantial evidence. Since **Grotter** (the other author) is not admitting she copied and nobody actually saw it happen, we can consider circumstantial evidence. The majority uses a sliding scale to determine copying - if there is zero similarity, the courts will not care how much access you have - there is no copying; if there is some evidence of access and similarity, then you can get to a jury who **will** decide if there is copying; and if you cannot prove any access, but the works are strikingly similar that it precludes the **possibility** the

second work was independently created, then there can be copying. In addition, the minority test of Selle v. Gibb says that there must be sufficient evidence of access or the jury will not be able to infer access based on speculation and there will not be copying.

Here, access is not so much of an issue considering the vast amount of public access that **Harry's** books have had. The issue of access is much less questionable than Arnstein v. Porter, which found access based upon publication of plaintiffs works, only 2000 sold copies of one work, and 1 million sold copies of another; if there has been lots of public access to a work. then access exists. Here, Harry's books have been sold worldwide, so access is obvious and sufficient. Furthermore, the works do seem similar (although **embarrassingly** enough I have never read a Harry Potter book, but will this summer) - while Grotter is about a young orphan girl with no magical **powers** who lives among magicians and **uses** technology to **survive**; Hany is about a young orphan boy with magical **powers** who lives among magicians and uses magic to **survive** (emphasis added). Both books have similar plots, although clearly there are differences within the story. So, the works are not really so substantially similar to prove copying alone; but, with the vast public access plus the substantial similarity - this is circumstantial evidence of copying. And although Grotter could try to claim unconscious copying - that she never heard of, read, or saw anything relating to Hany Potter - this is irrelevant in CR law. and unconscious copiers are still liable (see case of "she's so fine").

no proof you only need to know the facts you list here and act
you can do the same with even less.

Finally. **Harry** needs to prove that Grotter misappropriated **copyrightable**, creative elements. The courts will consider three tests to determine if Grotter's work is a copy. First, under the levels of abstraction test, the court will consider the different patterns of

increasing generality that can be used to describe a creative work. At the center of a work are specific elements that are not abstract - these are **copyrightable** expression and will be protected. At the outer edges is something that is **clearly** abstraction, merely ideas, that are not copyrightable and will not be protected. **Harry** will argue that Grotter's book is exactly the same as hers at the center, where the elements are not abstract. Harry can argue that the center of both works include orphan children, dealing with magical powers either directly or by the **people** around them while they live in a world of magicians - that this is infringement. Grotter will counterargue that she has only used Harry's general ideas - the **abstract** of her work is the same - an orphan, magic, magicians (all orphans dream of magic, right?), and using something beyond her normal powers to survive - but that **Grotter's** use of expression and creativity among those ideas is **completely distinct** - that this is not infringement. Just as the courts would not likely find infringement between West Side Story and Romeo & Juliet under this test, the courts **will** not likely find infringement here.

On the other hand, the court might use the pattern test - **looking** at the pattern of the work, the way in which the plot falls, the sequence of events, and the interplay of characters; if the accused work has the same pattern, this **will** be infringement. Here, Grotter has used almost identical characters for her book - like Harry she has an orphan and magicians (boy vs. girl seems immaterial). In addition, they both live among magicians - which as said above, is arguably stock, **b/c** that could be the typical dream world of many orphans; nonetheless, here, the pattern is the same. **Although** the girl has no magical powers while the boy does have magical powers, that is merely technical - a **simple** direct switch of facts in the second work. And both characters use something beyond their human skills to **survive** - one uses magic, one uses **technology**

-- and w/ today's technological innovations, magic and technology are arguably the same. So, **although** Grotter will argue that the different choices of ideas in her work alter the pattern as compared to Harry's work, the court's will likely find infringement as they would when comparing West Side to Romeo. Here, the patterns of both works are the same and arguably it takes less than a modicum of creativity to make slight changes to a work in order to create a new one. ✓

Under the third test - the total concept and feel test (which is better suited for sculptures and musical works than for books and plays), the court would ask if, from the subjective view of the audience, reading the **two** works feels like you are reading the same thing. Here, there would probably not be infringement because although the plots are similar - the differences that Grotter **incuded** in her work allow **the** audience to feel they are reading something else. It might feel like a sequel or like a related work, maybe about Harry Potter's long lost sister; but the works **don't** feel the same. Hany ✓
might argue that people **would** confuse this work for her own, but source **confusion** is a TM claim and does not belong in a CR action. So under this test, there would not be infringement. } good point

In response to this suit, Grotter can claim defenses in fair use and parody. Under a Fair use (FU) defense, if Grotter was using the work for criticism, commenting, newsreporting, teaching, scholarship, or research, then she could present **teh** four factors of FU (purpose and **character** of her use, nature of Harry's work, amount **used**, and effect on the market) to show that it was a fair use. Here, Grotter does not seem to be using the work for any of the enumerated purposes, although she could argue it is fair that she use her work to give the public more literary choices. Here, the nature and character of her use of Harry's work furthers **the** goals of CR law by adding to the

progress of the arts. Maybe her work could be used for **educationa** purposes - comparing and contrasting analyses in an English class for example. Her work is **commerca** because it was written for profit, but it is not as if she is standing to gain a lot without paying any price - she did put lots of labor into her own work. The **CR'd** work by **Harry** is a creative work, which does weigh against Grotter. However, Grotter did not use a large portion of Harry's work; in fact, she only incorporated three or four ideas, and wrote **100s** of pages on her own. However, as in Harper & Row, **Harry** can argue that she took the heart of the work. Finally, although Grotter's book will likely affect the market of Harry's book, suppressing the market is different than supplanting the market. ✓

Grotter has essentially created a derivative work, which under Seaa v. Accolade is subject to FU defense. She can **aruge** that she didnt intend to exploit the creative **content** of **Harry's** work, which creates a presumption of unfairness; however, the courts will see that the **simiarity** counters that point. Because of Harry's fame more people are **likley** to read Harry's book **and** even if people pick up **Grotter's book** instead, that is competition and CR law is not designed to suppress competition. So, based on these factors, Grotter could prevail **on** a FU defense. ✓

Moreover, Grotter could prevail on a parody defnese. **L**ike teh court in Acuff Rose, which found fair use at least for **2 Live Crew's** use of **Pretty Woman's** lyrics in order to create a parody of the work. Here, Grotter's use was blatantly **commercial**, as it was for **2 Live**; but you can overcome commercialism if your work is transformative - **Grotter's** work arguably adds something new since aside from teh key characters and central plot she created an entirely new story. Again, Harry's work was clearly expressive, **BUT** most parodies are creative works, so that helps **Grotter's** case. ✓

Although Harper precluded a finding of FU partly based on the **takin** of the heart of the work, here, you need to take the heart of teh work to do a parody. And finally, although a biting parody may make the original sound so ridiculous that it ruins public demand for the original; here. Grotter does not ridicule **Harry**, she just works off similar ideas to create her own entertaining expression - so the market will not be destroyed for Harry. Likely, Grotter **willl** prevail on a FU defense.

Good Answer, but you
need to explain why
this might or might not be parody
Also is it better described as
a satire?