

Harry Potter and Tanya Trotter

There were 2 key issues in this hypothetical: 1) did the Trotter book take protected expression or only unprotected ideas; and 2) is the Trotter book a parody, a satire or neither one. On the question of whether the Trotter book has taken protected expression, one would have to apply the 3 tests for the idea/expression distinction that we discussed. I gave you very few facts about the Trotter book in order to highlight the point that based on the facts given, it would be difficult to find that the Trotter book appropriates protected expression. If all that is similar between the two works is the notion of orphans and the fact that the book places magicians and nonmagicians together, it would be difficult to argue that the similarities rise to the level of abstraction necessary to constitute protected expression. The fact that the title and the names of the main characters are quite similar might factor into the subjective experience of the audience for the total look and feel test, but as a general rule, titles are not protectible under copyright. Naturally, I would have expected you to take a stab at the other side of the argument as well, that protected expression is taken, but it is a tougher road.

On the parody question, one needed to find a way to explain how Trotter's book serves as a parody, rather than simply assert that if it is a parody, the following tests would apply. (Remember that a parody comments on the copyrighted work while a satire comments on something else such as society at large.) For example, one could argue that the Trotter book is a parody of Harry Potter because it makes fun of the story of a boy's need to rely on magic for coming of age by presenting a girl who survives by her brains and her techno-savvy. In response, one could argue that the Trotter book is merely a satire because it makes fun of society's fascination with things ancient and magical. Finally, one could try to spin out the argument that the Trotter book is not sharply focused enough to be a parody or a satire but is merely an attempt to benefit from children's fascination with the Harry Potter series.

I also hoped that students might notice the potential conflict between presenting a defense based on noninfringement and a defense based on parody. The more one argues that the Trotter author tried to create a parody, the harder it is to argue that the works are not similar. In other words, it is tricky to argue that the works aren't similar if you are also arguing that the author tried to conjure up the image of the original work to make fun of it. One can always argue in the alternative, for example, I created a parody, but if you don't believe that it is a parody, I am still innocent because I did not take more than unprotected expression. One would, however, have to navigate this presentation carefully.

The Inflated Ball Question:

For this question, I have also posted a sample answer from a student the year that this was an actual exam question. You can find that posted on the class website as well. The document includes that student's answer to a question related to Nelson Mandela, which you may want to use as you are doing other practice exam questions. The following also provides some general information about answering the inflated ball question:

The question concerned the scene in which a widow explains that she was cleaning out a closet, found an old beach ball, and couldn't bring herself to deflate it because it held her husband's breath. Recall that the elements of copyright infringement are a valid copyright + copying + improper appropriation. The most subtle point concerned the question of improper appropriation. Assuming that the first 2 elements have been established such that we believe the T.V. series copied the scene, was there improper appropriation? Many students did an excellent job analyzing what portion of the scene might constitute unprotectable idea and what portion might constitute protectable expression. One might also have considered the following issues: Even if the scene contained protectable expression and the T.V. show took all of that protectable expression, would it have constituted improper appropriation. On the one hand, the scene presumably is part of a larger dramatic work. On the other hand, the scene might be the most striking and memorable part of the work. (It is, indeed, a heart stopping image.)

We did not look at any authorities analyzing whether taking a small portion of the whole constitutes improper appropriation, but one might at least examine the question. In addition, the Harper & Row case could make a useful analogy for arguing that taking the heart of a work should constitute improper appropriation. It would be important to note that the most relevant portion of the Harper & Row case concerns the fair use doctrine, which our case does not. Nevertheless, it might form the basis of an interesting analogy which one could have set out.