This examination consists of a two essay questions that you are to answer in bluebooks or by computer. The total exam time is 2 hours. The problems will be weighted equally in determining the grade on the exam, but you may allocate your time to the problems as you choose.

You are permitted to have with you and to use during the examination your textbook, the statutory supplement or other printed version of the Copyright Act, any class handout materials (including materials printed from the Course Materials web page for the class), your class notes, and any other written materials made by you or your study group (not photocopied from printed materials). You may also make use of materials that are stored on the computer you are using to write the exam answers. During the examination you are permitted to visit the class web page at http://homepages.law.asu.edu/~dkarjala/Copyright/Syllabus.htm, including any links from that page, but visiting any other internet site during the examination will be considered a violation of the College Honor Code. Be sure to save your exam often while you are writing, and after the exam be sure your exam gets transcribed to the registrar’s thumb drive (if that is the method employed this year - in any event, make sure the registrar gets a copy somehow).

Base your answers SOLELY on the materials that were assigned on the Syllabus or discussed in class. Please remember that your answers should RAISE issues, not eliminate them. Even if you are quite sure that your resolution of one issue eliminates the need to consider others, where significant issues arise with another initial resolution, try to deal with those issues on the assumption that the first issue is resolved contrary to your own approach to it. This is especially the case if there are facts in the problem that are relevant only to these subsidiary issues and that you have not made use of in resolving the primary issue. This is an EXAM, not real life! Furthermore, do not give abstract lectures on copyright law (and, in particular, do not give back to me lengthy quotes concerning what you think I said in class). In applying copyright law to the facts of a given problem, be sure you make full use of the facts that are given. If you have not used all the facts, you are probably missing an issue that you are expected to consider.

If you write your answers in longhand, please write legibly, double space, and ON ONE SIDE OF A BLUEBOOK PAGE ONLY. If you type or use a computer, try to type enough of the letters of each word correctly to make the words decipherable. Your score will be based on what is actually on the paper, not my guess as to what you might really have meant.

GOOD LUCK!
Problem 1

The Reverend David Dogood (DD) is a revivalist preacher with a large national following. He is the founder of the Church of Ethical Enterprise (CEE), and in the name of CEE DD travels the country holding revival and prayer meetings, counseling CEE members, and seeking to instill CEE’s ethical message in people of all beliefs. DD also has a weekly television show that is watched by millions. DD uses the live revival and prayer meetings and his television show also to solicit money from the faithful for the benefit of CEE.

Pentler Magazine (PM) recently did a parody ad purporting to feature DD in what would be for anybody, and particularly for him, an awkward situation. The ad was an original creation of PM and had DD “reminiscing” about the first time he had sexual relations, namely, with his mother in an outhouse. Needless to say, DD was not amused. In response, CEE made several million copies of the ad and mailed a copy to everyone on its subscription list, showing how the “devil’s workers” were trying to undermine the good efforts of the Church and asking for donations to combat “the filth and lies being propagated by the forces of evil.”

PM sues CEE for copyright infringement. CEE raises the defense of fair use. Evaluate the strengths and weaknesses of this defense. Do not attempt directly to apply any law concerning the First Amendment.

Model Answer

The cases make clear that bad taste, even obscenity, does not disqualify a work for copyright protection. Therefore, PM has a valid copyright in the ad, which is PM’s original creation. This question thus deals with the issue of CEE’s making millions of copies of a copyright-protected ad and not with the quality or content of the ad, except insofar as those notions bear on the fair use analysis. In particular, that the ad is or may be itself a parody is wholly irrelevant except as it factors into the analysis of CEE’s potential fair use defense to its copying and distribution of the ad. Such copying and distribution are independent prima facie infringements of PM’s copyright under §§ 106(1) and 106(3). However, the same fair use arguments apply to each.

Does CEE’s action fit into any of the supposedly preferred categories of uses set out in the preamble to section 107, namely, criticism, comment, news reporting, teaching, scholarship, or research? Given the intended audience for the copies, namely, faithful followers of the Church and DD, there is clearly an implicit criticism, as well as negative commentary and perhaps even news reporting (“Look at what the other side is trying to do to us!”). Perhaps whatever elements of criticism or commentary are present could have been effected by simply informing people of the general content of the ad, but arguably there is no substitute for the original in a case like this to give the full impact. In any event, the preambular factors are not determinative of fair use.

Factor 1 is the purpose and character of the use. Important here are whether the use is commercial and whether the use is transformative. A stated purpose of the use is to raise money to combat what CEE sees as evil in the world and to promote its ethical message. This is a commercial use – raising money by direct and unauthorized use of a protected work. The
“educational” aspect (letting the flock know about the evil outside) is more in the nature of makeweight and could have been effected without copying the entire ad verbatim. Moreover, the ad itself has not been transformed in any way but has been fully and exactly reproduced in its entirety. Courts have not always required transformation of the work, however, in finding a transformative use under Factor 1. The Bill Graham Archives case (text p. 843), for example, found that use as an historical artifact rather than for the posters’ original esthetic purpose contributed to favoring fair use under Factor 1. Similarly, the Google imaging case (Perfect 10 v. Amazon, text p. 902) treated exact, reduced-quality copies of photographic images as part of a transformative use because of the necessity of copying for digital search purposes. In this case, the original purpose was entertainment – amusement of PM readers who in general, presumably, are not fans of CEE or DD. CEE’s purpose was nearly the opposite, namely, to show its members the degree of depravity to which the nonbelievers had sunk and to emphasize the importance of renewing their own ethical message. Factor 1 is a close call, but it may weigh slightly in favor of fair use because of the different audience to which it is aimed and different function of the work. It is also not a use that the copyright owner would be expected to exploit.

Factor 2 is the nature of the copyright-protected work. Here the ad is an original pictorial and literary work, but it borders on – if it does not actually cross over into – the scatological. While this is not a factor in determining whether the ad is copyright protected, the Devil’s Films case (text p. 299) shows some courts’ willingness to exercise their equitable discretion in the degree to which they will enforce copyright in such works. Certainly, a scatological work of this type is not too near to traditional “core” of copyright protection. The main content value in the work is likely not its artistic or literary quality but rather the supposedly humorous idea of a religious leader engaging in the activity portrayed. To the extent copying took this underlying idea, there cannot even be infringement. Factor 2 therefore arguably favors fair use.

Factor 3 is the amount of the protected work that is used, which in this case is the entire work, verbatim. That alone modestly counts against fair use, but Campbell (text p. 807) makes clear that we must measure substantiality in relation to the purpose of the copying. Here, the purpose was to raise money from people opposed to the “message” of the protected work. It may have been possible to use less than the entire work to achieve this purpose, but it was also necessary to use enough of the original that the audience for the copies would get the full effect of how “bad” the ad was. If we assume Factor 1 favors fair use, copying the entire ad does not work against a finding of fair use and may slightly favor it, for the same reason. On the other hand, if the commercial purpose of raising money outweighs the transformative nature of the use, verbatim copying would also weigh against fair use under Factor 3.

Factor 4 is the effect of the use on the potential market for and value of the work. There is likely little overlap between PM’s normal market for the magazine and the devout recipients of CEE’s solicitation letter, so no one receiving a copy of the ad from CEE would likely have purchased a copy of the magazine (or an individual copy of the ad) but for the CEE solicitation. Nor is there any reason to think that PM might lose subscribers as a result of CEE’s solicitation. In this case, moreover, it is unlikely that PM would have licensed CEE’s use (at least, at a reasonable price), so we may well have a case of market failure, which would favor a finding of fair use. On the other hand, there is no evidence that CEE even attempted to negotiate a license, and making millions of copies goes well beyond the numbers found in cases like Princeton University Press (text p. 881) and Texaco (text p. 894), which found no fair use. In addition,
while there is no evidence that Pentler participates, the existence of the Copyright Clearance Center suggests that there may be a market for reprints of individual pages from magazines. On the other hand, there is also no evidence that Pentler licenses now or has licensed in the past individual pages from its works. Pentler still claims that it is entitled to a share of the revenues earned by CEE from this massive exploitation of its work. CEE would argue that it is circular to treat its use as market-injuring if CEE is itself the only market in question. Both *Texaco* and *Princeton University Press* rejected the circularity response, however, and this case seems a fortiori, given that the copying was so much more extensive than in those cases.

Pentler would also argue that there is no market failure as long as issues of the magazine are available for sale to the public: CEE could simply have gone out an bought as many issues as it wanted (assuming there were millions of issues still unsold, but it might still have purchased all it could have found), torn out the offending ad, and mailed the original to its members—all with the blessing for the first-sale doctrine. Consequently, Pentler would claim that it has massively lost sales due to the infringement. Even assuming, however, that a sufficient number of issues of the magazine were available, CEE would have had to purchase the entire magazine (and endure looking at much more presumably offensive material) just to get the single page it needed. If a fair royalty would have been, say, $0.10/page and the magazine costs, say, $4 at the newsstand, it does not seem reasonable to leave purchase of the entire issue as CEE’s sole legal recourse.

Overall, I conclude that Factor 4 goes against fair use—CEE sought to raise lots of money based on its massive unauthorized copying of Pentler’s protected work. Even if we assume that Pentler would have refused to license, the court may deny the fair use defense and require CEE to share some of the proceeds from its exploitation with Pentler, the author of the work CEE exploited. The Supreme Court has made clear in *Campbell* (footnote 10) that in close cases a court may deny fair use but also deny an injunction, allowing the copyright owner the equivalent of a compulsory license. Here, of course, an injunction would do little good, as the unauthorized copies have already been made and distributed, but the principle remains the same: Money has been raised from a massive exploitation of a protected work, so the copyright owner should have a piece of the action. Therefore, even granting that the first three Factors may mildly favor fair use, I would hold that this use by CEE was not fair and have an evidentiary hearing on the amount of the appropriate royalty.

Problem 2

In January 1978, author/singer A wrote a song (“Song”). In June 1978 A arranged with Record Company RC to record the song for distribution on phonorecords (the “Recording”). The recording session lasted 2 hours on a single day in June 1978, and otherwise A has had no relationship whatsoever with RC. In connection with the recording session, A transferred all of her copyright rights in Song and in Recording to RC. The transfer agreement, signed by both A and RC, provided that RC would be the owner “of all rights of copyright in Song and in Recording anywhere in the world, for as long as the copyright endures.” The transfer agreement also provided that both Song and Recording were to be consider “works made for hire” so that RC was “the sole author of both Song and Recording.” In exchange for these considerations, A is entitled under the transfer agreement to receive, and has duly received, a royalty of 10% of all sales of phonorecords of Recording and 50% of the gross income from any licensing of Song.
A has recently heard something about copyright termination rights and has come to you seeking advice concerning whether she has any such rights against RC. Advise A both as to her termination rights and the effects of exercising such rights, if any.

Model Answer

[NOTE: Although the point was hammered at in class many times, a large percentage of answers failed to distinguish at all, or failed to distinguish clearly, between the two copyrights involved, namely, copyright in the musical work and copyright in the sound recording. This led to generally muddled thinking on most of such answers.]

A has no termination rights if either work – Song or Recording – is a “work made for hire” (WMFH), so it is easiest to dispose of that issue first. It is clear from the facts presented that A is not an employee of RC, given that her only relationship to RC was the 2-hour recording session. Song itself was created before any relationship with RC was even formed, so A could not possibly have been an employee at that time. As for Recording, we are not told whether taxes have been withheld on the royalties paid to A, but otherwise none of the factors normally associated with “employment” are present. The facts do no suggest the presence of any employment benefits like vacation time or health care, nor that A was subject to any supervision by RC other than activities incident to the common goal of producing the Recording of Song. RC did not have the right to assign A to sing or record other songs. The question, therefore, is whether Recording or Song is a WMFH under the other prong of the section 101 definition. Here, Song is a musical work and not within any of the nine categories of works that might qualify as WMFHs under the second prong. Moreover, Song was created before any transfer was envisioned by either of the parties (so it could not have been commissioned for use in a motion picture or collective work), and the cases make clear that, at a minimum, the WMFH agreement must be made at least orally (later confirmed in writing) before the work is created. Therefore, notwithstanding the transfer agreement signed by A and RC that Song was to be considered a WMFH, it simply does not qualify. The cases, and the statute itself prohibiting “agreements to the contrary,” make clear that parties cannot make a work a WMFH simply by signing an agreement to that effect. Furthermore, sound recordings are not among the nine categories, either. Conceivably, a given sound recording could be commissioned to be part of a larger collective work, such as an album, but the facts give no such indication here. The single Song was recorded into the single Recording without reference to any collective work. None of the other categories apply. Therefore, Recording cannot be deemed a WMFH, either, notwithstanding the transfer agreement and even if the transfer agreement was signed or agreed to prior to making Recording.

Because neither work is a WMFH, A has termination rights with respect to the copyright interests she transferred to RC after January 1, 1978. That includes all of the copyright interest in Song, as A is the sole author of Song. A, however, is not the sole author of Recording. Rather, A and RC are joint authors of Recording. A has termination rights only as to her half interest, which she transferred to RC under the 1978 transfer agreement. To exercise these termination rights, A must send a statutory notice to RC at least 2 years before the termination date. A had
the right to terminate as early as June 2013 (35 years after the transfer), but it is already December 2011, so the earliest she can terminate is December 2013. If A is to terminate at all, it is in A’s interest to execute the termination notice as soon as possible.

Once termination is effective, A will become the sole copyright owner of all U.S. rights in Song. RC will no longer be authorized to license new recordings of Song or any other use of Song (such as in a movie or for public performance at entertainment venues). However, A’s licensees will be permitted to continue to exploit the derivative recordings they have made under license from A, and under the Mills Music case (text p. 486) RC can retain 50% of the royalties paid by such licensees. It is important to advise A that termination does not affect the transfer of rights in other countries. The Siegel case (text p. 454, 470) makes clear that termination recaptures only the U.S. domestic rights and has no effect on rights to exploit the work abroad that have been previously transferred to RC. This follows directly from section 304(c)(6)(E) of the Copyright Act.

Termination of A’s transfer of her interest in Recording is more complex, because A is only a joint author of Recording together with RC. Because RC remains a joint author, RC can exploit the Recording in any way even after termination, subject only to accounting to A for any profits made. (Technically, RC’s continued exploitation of Recording will inevitably involve exploitation of Song as well, and RC no longer has any copyright interest in Song. However, Recording is almost surely a derivative work based on Song, so termination of RC’s rights in Song should not affect RC’s right to continue to exploit Recording. Section 115 denies derivative-work status to sound recordings made under the compulsory license, but that has no direct bearing on the issue of whether an expressly authorized recording is a derivative work.) Under the transfer agreement, A has been receiving 10% of the gross income from phonorecord sales of Recording, and now A will be entitled to 50% of the net income as a joint author. Depending on RC’s costs, this may work out better for A, but maybe worse: Much will depend on how “profits” are defined and whether RC can include production and marketing costs incurred while the license was in force against income from sales after termination. Indeed, there may be an argument that the transfer agreement – providing for 10% of sales – remains in force, as an indication of how the parties viewed a fair split of such proceeds. This argument runs against the grain of the termination right, which is designed to give authors a new bargaining position, but we must recognize that A is only a joint author and that RC has every right to exploit the Recording as it chooses. Whether these complex issues would be worth litigating is something about which A should be advised. It is indeed conceivable that it would be better for A not to terminate as to Recording and stick with A’s 10% return from gross sales. A careful calculation of the various possibilities, based on the underlying economic facts, must be undertaken before A can be advised properly.