

LAW 7822: ADVANCED SEMINAR ON COPYRIGHT LAW

LITIGATION EXERCISES

Prof. Bell
Fall 2011

1. Background Facts

In May 1988, Cal Player, a U.S. citizen residing in California, conceived an idea for a board game that would allow law students to learn the rules of civil litigation in a fun, competitive format. He discussed the idea with his friend, Viv Traveler, a citizen of Great Britain also residing in California. Over the course of the next week, in a variety of draft documents, the two friends worked out such details as the name of the game (“Sue Me!”), its rules, and the sort of art work they would need.

As neither Cal nor Viv had the knack for drawing, they hired Art Solo, a local citizen and professional illustrator, to prepare a variety of humorous illustrations for the game’s rules, board, and accompanying cards. Their short written agreement with Art specified that “all art work produced under this contract will belong to Cal and Viv.” After Art delivered the drawings, Cal paid him with a check that included a note saying, “for drawings made under hire.” Art countersigned the check and deposited it.

By July 1988, Cal and Viv had produced a draft version of the game. They made 5 copies, each of which they gave to law students with a request that the students try out the game and fill out a survey on whether it was fun and educational. None of those copies carried a copyright notice. Cal and Viv collected the surveys but let the students keep the draft games as a token of their appreciation.

In August 1988, Cal and Viv used the law students’ comments to create a polished version of the game. They made 5 copies of that improved version, each of which they submitted to a different toy company. None of the games carried copyright notices. The cover letter attached to each copy of the game made clear that it was being offered in hopes of securing a production agreement, and concluded, “Please return the game if it does not suit your needs.” None of the five game companies ever replied or returned the games.

In February 1989, Cal and Viv decided to produce and sell Sue Me on their own. In February 1989, they made 100 copies and distributed them to various toy stores and locations where law students were likely to shop for books and study aids. By June 1989, they had sold 75 of the games. The stores shipped back the remainder of the works. Only then did Cal and Viv learn about the importance of copyright notices. They printed “Copyrighted by Cal Player and Viv Traveler” on slips of paper and pasted them on the sides of the boxes containing the 25 unsold games. Because sales had slowed to a trickle, and the enterprise had not proved especially profitable, the friends turned their minds to other matters.

In 2010, Gabby Lex, a U.S. citizen and law student, purchased a copy of the draft version of “Sue Me!” at a garage sale held by one of the then-law students who had tested the game in July 1988. After playing the “Sue Me!” with her friends, Gabby decided to

create a similar game, updated to reflect current law and with other improvements, to sell over the Internet. She called her game, “Civ Pro Slugfest.”

Unlike Cal and Viv, and thanks to the Internet, Gabby had could easily make her game available to students across the nation, allowing her to make many more sales than her predecessors. “Civ Pro Slugfest” generated enough profit for Gabby to branch out. She created new games, called “Torts Attack” and “Crime War,” that followed the same general design of her first game and used many of the same rules. The games needed all-new sketches, so she hired an illustrator to mimic Art Solo’s style. Sales proved brisk.

Cal learned of the game from a news story about Gabby’s successful enterprise and purchased a copy “Civ Pro Slugfest.” He found suspicious similarities between Gabby’s game and “Sue Me!” The wording of most of the rules came close to duplicating those in the older game, for instance, and all of the original sketches reappeared, unchanged. Cal registered “Sue Me!” with the Copyright Office, listed himself and Viv as joint authors, and together with his old friend Viv, hired an attorney to sue Gabby for copyright infringement.

2. Assignments

The documents you prepare—two letters and one bench memo—need not adopt any particular format, though each should look and read like professional work. You may use headers within each document to delineate arguments. Please double-space the text.

I will give a copy of your demand letter to another, randomly chosen student for him or her to use in writing a reply letter, and will give the resulting pair of letters to yet another randomly chosen student for him or her to use in writing a bench memo. Restrict your analysis to U.S. copyright law and, insofar as it applies, California state law. Ignore other areas of law, such as unfair competition or trademarks.

a. Demand Letter

Assume that your clients are Cal Player and Viv Traveler. On their behalf, write a demand letter of at least six double-spaced pages to Gabby Lex.¹ Explain why Cal and Viv believe that Gabby’s game infringes their rights and specify the measures that Gabby must take in order to avoid a lawsuit.

b. Reply Letter

Assume that your client is Gabby Lex. On her behalf, write a reply letter of at least six double-spaced pages to the attorney for Cal and Viv, from whom you will have

¹ You can make up an address for her. I suggest something along the lines of “1 Loser Lane.”

received a demand letter. In your letter, explain why Cal and Viv have no claim against your client under applicable law. Be sure to describe how your client plans to respond and consider specifying the measures, if any, she is willing to take in order to settle. You may anticipate and respond to arguments not raised by the demand letter.

c. Bench Memo

Assume that, notwithstanding the parties' correspondence, *Gamer & Traveler v. Lex* has been filed in the U.S. District Court for the Southern District of California. Discovery has been completed and the parties have cross-moved for summary judgment. At the request of Judge Able Solomon, for whom you clerk, write a bench memo of at least six pages suggesting the proper disposition of those motions. Please note that for this exercise you will not have the parties' pleadings, but rather will have to draw the facts from the recital above and the arguments from parties' demand and reply letters. You may take judicial notice of arguments not raised by the parties if you think doing so would help resolve their dispute.

3. Grading

The demand letter and the reply letter will each count for 35% of the grade you receive for the written work you prepare for this course. The bench memo will count for 30% of that same grade.

I will grade the letters primarily for content but also for organization, tone, grammar, and persuasiveness. Content here includes not just legal analysis but also strategic thinking; you should ask yourself, "How can I best serve my client's needs?" I will grade the memorandum following similar guidelines, but will look for fairness to the parties in place of persuasiveness; you should think about how best to serve your boss, Judge Solomon, and the U.S. system of justice.

Each page of double-spaced, 12-point text that you hand in for these three projects will go toward the 25 pages of text that you must complete if you plan to have your work for this course satisfy the school's practical or scholarly writing requirement.

Please make a good faith effort to safeguard your identity. Use your exam number or a unique pseudonym for each project and use only it on what you hand in. In turn, I will try to avoid learning your identity, but we should not let that goal get in the way of my giving you useful feedback on drafts.

4. Deadlines

Hand in three copies of your demand letter at or before the beginning of class on Tuesday, Oct. 25.

Hand in two copies of your reply letter at or before the beginning of class on Thursday, Nov. 17.

Hand in one copy of your bench memo before 5 p.m. on Tuesday, Nov. 29.

Please note: You will lose .1 points from your final course grade for every day that you miss any of the above deadlines.