

Copyright

Spring 2015

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 April 30, 2015. Part II is an unlimited-time “take-home” essay, due at 4:30 p.m. on May 7, 2015. 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 into the exam room any written material, paper, or electronic devices other than your computer. (The only exception to this rule is that a student who is not a native speaker of English may bring into the exam room a paper copy of a dictionary enabling him or her to translate English words into his or her principal language.) The proctors will supply scrap paper that you may use to take notes during the exam. In preparing your answers, you may not consult in any way with your fellow students or with any other person.

Exam4 will automatically put your Anonymous ID and word count on the exam copy. 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.

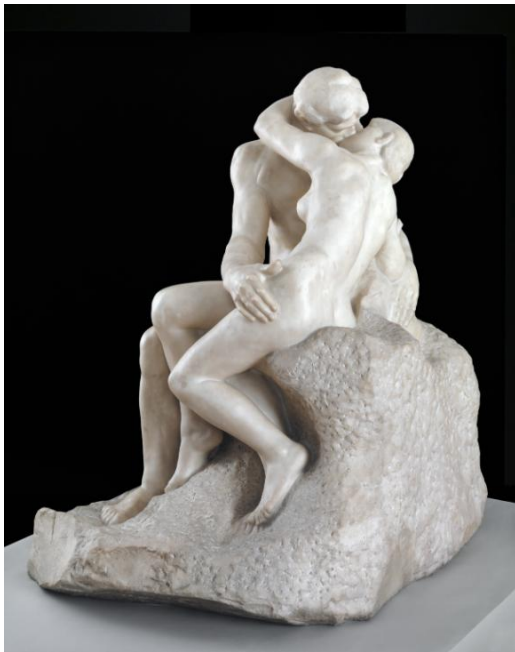
After 5:00 p.m. on April 30, you are of course free to discuss Part I of the exam with your classmates. However, until 6:00 p.m. (Eastern time) on May 4, please do not submit to the online discussion forum any comments or questions that refer to Part I of the exam. The reason for this request is that, until that time, students in some of the other courses affiliated with CopyrightX (all of whom have access to the online discussion forum) will be answering an identical question.

DO NOT TURN TO PAGE TWO UNTIL THE PROCTOR TELLS YOU TO BEGIN.

Part I

The following narrative is a mixture of fact and fiction. The details and dates of some of the real events have been altered; other aspects of the story are entirely fictional. When answering the question, you should assume that all statements made in the narrative are accurate. If you happen to know something about the events upon which the narrative is founded, you should ignore that knowledge.

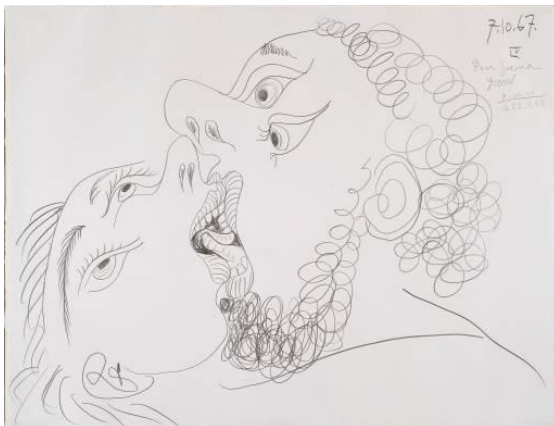
For centuries, artists, working in a wide variety of media, have been depicting kisses. A few of the major works in this tradition are shown below.



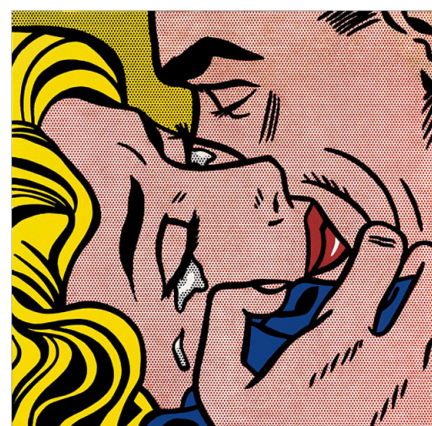
Auguste Rodin, *The Kiss* (1882)



Gustav Klimt, *The Kiss* (1908)



Pablo Picasso, *The Kiss* (1967)



Roy Lichtenstein, *Kiss V* (1964)

The photograph shown below was taken by Robert Doisneau in 1950 in Paris.



Doisneau, “*The Kiss by the Hotel de Ville*” (1950)

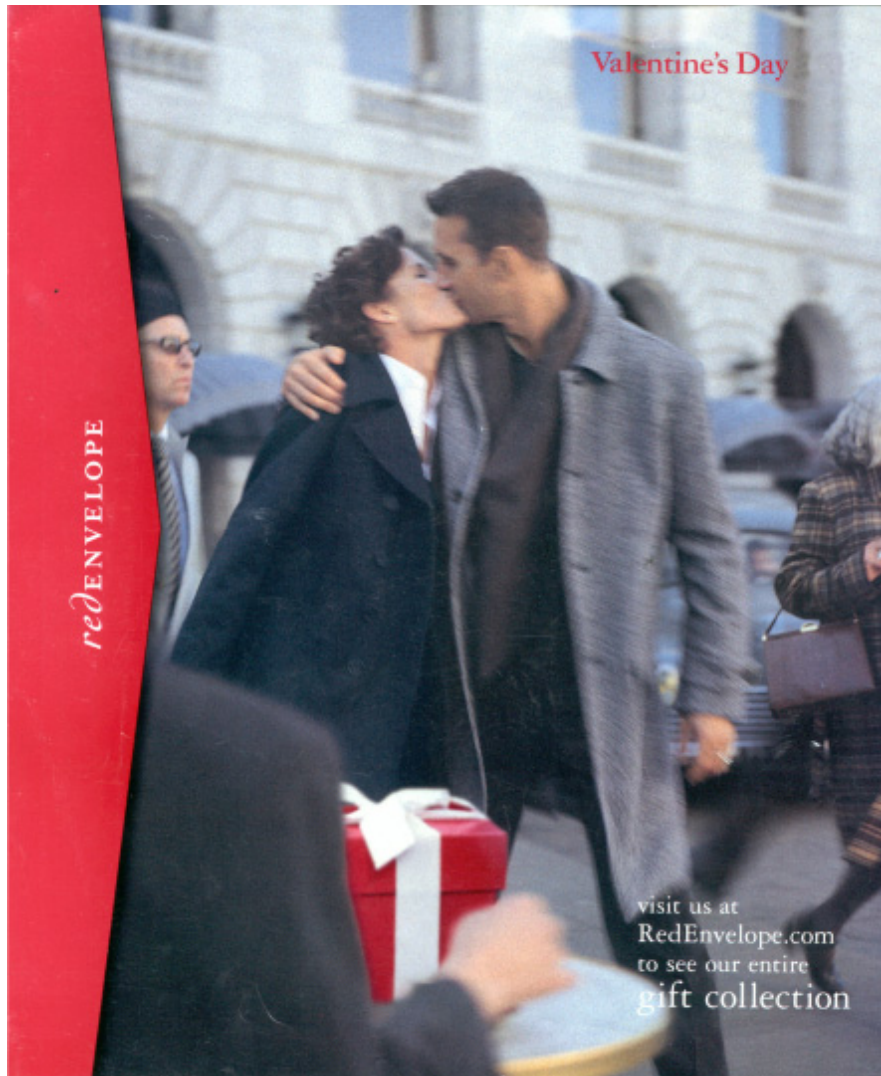
The photograph had been commissioned by *Life Magazine* for a story about young lovers in Paris. (At the time, *Life* was a popular and prestigious American weekly magazine, concentrating on photojournalism. Over one million copies of the magazine were sold in the United States each week.) *Life* permitted Doisneau to retain the copyright in the photo, although it forbade him to reprint it (or to authorize reprinting it) until 1955.

For decades, it was widely assumed that the scene captured in the photograph was spontaneous – and Doisneau encouraged this assumption. However, in 1993, he revealed that the man and woman in the center of the photo – Françoise Delbart and Jacques Carteaud – had been aspiring actors, whom he had asked to pose in that position. In a subsequent interview, Ms. Delbart said, “The photo was posed, but the kiss was real.”

Doisneau died in 1994. He left his entire estate to his only child, Annette. Soon thereafter, Annette emigrated from France to the United States. Since 1955, Doisneau’s photo has been reprinted on more than 500,000 posters and 400,000 postcards, and Doisneau and his daughter have earned substantial license fees from those reproductions.

Red Envelope is an upscale online retail store, based in San Francisco, “dedicated to inspiring people to celebrate their relationships through giving.” In January of 2013, approximately

100,000 residents of the United States received in their mail a catalogue produced by Red Envelope, offering for sale a wide variety of products related to Valentine's Day. The cover of the catalogue is shown below.



A copy of this catalogue recently came into the hands of Annette Doisneau. Furious, she is exploring her legal options.

“Art intervention” is a controversial form of artistic expression that involves engagement with existing works of art, sometimes for the purpose of commenting on the original works. Frequently the interventions entail temporary or permanent modification of the affected works. Two decades ago, art interventions were regarded with disdain by most major art scholars and museum curators, but the practice is gradually becoming more respectable.

In December of 2013, curators at the Art Institute (a major museum in Chicago) decided to devote a significant portion of their discretionary resources for the following calendar year to exploration of this phenomenon. As part of this plan, they persuaded Cornelia Parker, an English sculptor and installation artist, to serve as an “artist in residence” at the Institute for the year. The curators agreed to pay Parker \$100,000; she agreed to spend 50% of her time during 2014 “exploring the aesthetic and social dimensions of art intervention.”

During the summer of 2014, the Art Institute presented a small exhibition on nineteenth-century French sculpture. The most famous of the works displayed in the exhibition was one of the four marble versions of Auguste Rodin’s “The Kiss” – which the Art Institute had borrowed from the Tate Gallery in the United Kingdom. (A photo of this particular version of Rodin’s sculpture appears on page 2 of this exam.) During the final week of the exhibition, the Art Institute permitted Parker to stage an “intervention” with the sculptures. Some of the sculptures she illuminated with garish colored lights. Others she partially obscured behind translucent screens. The most elaborate of the interventions involved Rodin’s “Kiss,” which she wrapped with one mile of white kite string. At the entrance to the room housing the exhibition was a prominent sign indicating, “Photography Strictly Forbidden.” At the end of the week, the string and all of the other material added to the sculptures by Parker were removed; none of the sculptures had suffered any damage.

Parker’s interventions attracted considerable attention. The number of people who visited the Art Institute during the final week of the exhibition was substantially larger than usual; the increased traffic, in turn, enhanced the revenue earned by the Institute from entrance fees. Some of the visitors were enthusiastic, particularly about Parker’s treatment of Rodin’s sculpture; others were sharply critical.

One of the visitors was Jack Johnson, who recently graduated from Northwestern University with a degree in art history. Johnson currently works in a Chicago restaurant, but hopes to become a professional photographer. Johnson brought with him to the exhibition a small but high-quality digital camera. Surreptitiously, he took the photograph that appears on the following page, which shows Rodin’s sculpture encased in Parker’s string.



Greenframe is a company, based in Hawaii, that provides professional (and semi-professional) photographers a web-hosting service, enabling them to display on the Internet copies of their works. Subscribers pay Greenframe a fee of \$30 per month, in return for which they are permitted to upload to the Greenframe servers an unlimited number of photographs, use Greenframe's software to customize the way in which those photographs are displayed, and use other software provided by Greenframe to negotiate and consummate sales of high-resolution versions of those images to customers. Greenframe does not receive a commission on those sales.

Johnson recently subscribed to Greenframe. In January of 2015, he uploaded to his Greenframe website a copy of the photo that appears above. Using the Greenframe software, he added the following caption to the photo: "Jack Johnson, *The Bonds of Love*. © 2014. All rights reserved." Nowhere on Johnson's Greenframe website is there any reference to Rodin, Parker,

or the Art Institute. The website is open to the public at large, but as yet no one has offered to purchase a copy of this particular image.

On April 1, 2015, Parker learned of Johnson's Greenframe website. She wrote Johnson a letter, demanding that he immediately remove from the site the copy of the photograph of the Rodin sculpture wrapped with string – and then destroy all other copies of the photograph in his possession. In the letter, Parker explained: "All of my art is intended to be ephemeral. For that reason, I never allow any reproductions of it." On April 15, Johnson wrote back, rejecting Parker's demands. "That photo is my art," he insisted. "I can do whatever I want with it." On April 25, Parker wrote to Greenframe, demanding that Greenframe remove the copy of the photograph from its servers. Greenframe has not yet responded.

Please answer all of the following questions:

- (a) If Annette Doisneau brings a copyright-infringement suit against Red Envelope, who will prevail and why?
- (b) Can Cornelia Parker or the Art Institute (or both) successfully assert a copyright in the string-encased version of Rodin's sculpture?
- (c) Assuming that the answer to question (b) is yes, has Jack Johnson infringed that copyright?
- (d) Assuming that the answers to questions (b) and (c) are both yes, what remedies could Parker and/or the Art Institute obtain by bringing a lawsuit against Johnson?
- (e) Assuming that the answers to questions (b) and (c) are both yes, what rights, if any, do Parker and/or the Art Institute have against Greenframe?

With respect to each one of these questions, if you need additional information to answer confidently, indicate what that information is and why it matters.

The essay in which you answer all of these questions may not contain more than 2500 words (including any footnotes).

[The images used in this exam question were derived from:
<http://www.tate.org.uk/art/artworks/rodin-the-kiss-n06228>;
<http://flavorwire.com/149349/the-10-best-art-kisses-of-all-time/view-all>;
<http://dulwichonview.org.uk/2011/05/20/cornelia-parker-at-dulwich-picture-gallery/>;
<https://iconicphotos.wordpress.com/2009/05/08/le-baiser-de-lhotel-de-ville/>;
and a paper copy of the Red Envelope catalogue.]

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.

Your answer may take one of three forms. First, you may write an essay addressing one of the following two topics:

- (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 Loyola Law School and a treaty negotiator on behalf of the United States), 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), and William Fisher. Read the contributions to the debate: http://cyber.law.harvard.edu/people/tfisher/cx/Economist_Debate_2009.htm. Then 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 way in which copyright law treats photography;
 - 3) the “work-for-hire” doctrine;
 - 4) termination rights;
 - 5) appropriation art;
 - 6) traditional knowledge;
 - 7) technological protection measures.

Second, instead of addressing one of the topics set forth above, you may propose a topic of your own. It must enable you to address in some way the relationship between copyright law and the policies that copyright law does or might advance. Proposals for topics of this sort must be submitted (via email) to Prof. Fisher by 5:00 p.m. on April 17. If you are considering this approach, you are encouraged to consult with Prof. Fisher prior to April 17.

Finally, instead of writing a single essay, you may contribute to the discussion forum accompanying the course a set of short comments that, in combination, manifest insight into the relationship between copyright law and the policies that copyright law does or might advance. If you elect this option, you should create a compilation of your submissions to the forum and indicate the context in which each submission appeared.

Regardless of which of these three formats you select, your answer to Part II of the exam may not exceed 2000 words (including any footnotes or references). You must submit it before 4:30 p.m. on May 7, 2015, to the Registrar's Office using the Exam 4 software.

Although you are required and expected to write only one answer in response to Part II of the exam, you may submit two answers (on different topics, of course). If you elect to do so, you must submit the first of your two answers to the Registrar's Office (as indicated above) and email the second of your two answers to Kathy Curley (curley@law.harvard.edu) before 4:30 p.m. on May 7, 2015. The answer you email to Kathy Curley should contain your exam ID number, but not your name. Prof. Fisher will grade your two answers separately. You will receive the higher of the two grades for Part II of the exam.

End of Exam