

Media & Entertainment Law

Eric E. Johnson
Associate Professor of Law
University of North Dakota School of Law

FINAL EXAMINATION – MODEL ANSWER

Show Choir!

NOTE: This model answer contains material amalgamated from the work of multiple students. Because of the cherry-picking involved, this model constitutes an answer that is better than any individual answer that was received for the semester. It is also true, however, this answer, like student-drafted work done under deadline pressure, is not perfect. Analysis and issue coverage could be better in places. In fact, I could quibble with it in many respects. But, all things considered, it's very good. What this all means for you is that you should be circumspect about comparing your own response to this one as a way of gauging your preparedness for the exam. In fact, I'm dubious that it's useful for that purpose at all. Also in that vein, note that course coverage varies from year to year, so this answer may, in important ways, not correspond to the material taught and emphasized in a different semester. (As one example, in this semester, regarding taxation, we studied *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, but not *Leathers v. Medlock*; if we had the analysis in this model answer surely would have been different.) There are lessons to draw, however. One thing this response does well – which is instructive for any semester – is the way the law is applied to the facts: Rather than cut-and-pasted blackletter law or reiterated facts, this exam response concentrates on providing analysis, and good analysis is the key to doing well. Also laudable, and universally applicable, is the sense of judgment this exam response displays with regard to conclusions: Close calls and toss-ups are presented as such, while rock-solid conclusions are made without hedging.

QUESTION 1 (worth approximately 1/12th of your exam grade)

Flag any drafting issues you see for Gulp of Genius with the portion of its contract with WXP-TV that is reproduced in the facts. What would you change? In answering, it's a good idea to refer to lines by number. For this question, limit your response to discussing drafting issues. Issues concerning the substance of the deal should be discussed in the context of the next question.

QUESTION 1:

Line 1 & 2: Capitalization of "episodes" is inconsistent. If it is a defined term, it should be capitalized everywhere. If not, it should not be capitalized.

Line 1: Change "will" to "shall".

Line 2: The time reference is ambiguous as to time of day and time zone. Add "p.m." and either the relevant time zone or, if this meant to apply to stations other than WXP, a clarification that the show must be aired at 8 p.m. local time (and, perhaps, 7 p.m. Central, if applicable).

Line 7: Change the disjunctive "or" to "and".

Line 9-10: The representation as to "no current contractual obligations" should be revised to include a forward-looking covenant to protect GG from deals with any of GG's competitors being concluded after this deal is signed.

Line 11: Change "including" to "including, but not limited to,".

Line 12: Change "and/or" to "and".

QUESTION 2
(worth approximately 11/12ths of your exam grade)

Analyze the parties' legal positions. Discuss relevant rights, liabilities, and prospects of adverse action that entities would be legally entitled to pursue. Organize your response according the following structure, clearly labeling the subparts. For each subpart, omit discussion of any subject matter called for in a previous subpart.

Subpart A: Discuss the legal situation revolving around Enormo Entertainment's planned production of a motion picture version of *Show Choir!*

Subpart B: Discuss the prospects for Ashley Arnseth and WXP-TV in legal action stemming from what was published by the Post Press, both online and on paper.

Subpart C: Discuss Ashley Arnseth's and WXP-TV's legal prospects in facing adverse action that stems from the production and distribution of *Show Choir*.

Subpart D: Discuss all remaining issues.

A few things to keep in mind: The subparts will not all be given equal weight. The subpart structure is provided for organizational purposes only. Pace yourself appropriately, and plan ahead to put information where it belongs.

Some suggested abbreviations for your answer:

AA	Ashley Arnseth	II	Ike Inez
BB	Bob Barnes	KK	Kevin's Kartel
CCC	Coolwater Community College	JJ	Julius Jwibiand
DD	Don Dynsaid	LL	Larry Lidson
EE	Enormo Entertainment	MM	Marv Minstark
FF	Frank Fenstrel	PP	Post Press
GG	Gulp of Genius	SSS	Sheriff Stu Shermer
GOV	Governor Ozzy Verne	TT	Trixie Trellian
HH	Holly Hosterval		

Also, feel free to refer to *Show Choir!* simply as "the musical," and *Show Choir* as "the series."

QUESTION 2:

SUBPART A:

Copyrights can be validly assigned, if in writing. Assuming there was a writing signed by both JJ and EE, then EE has a valid copyright. The consideration of \$25 is actually irrelevant. Since this work was created under the 1909 Act, then the work will have entered the public domain unless the copyright was renewed. EE and/or KK can check with the Copyright Office records to find out. If it was renewed, EE has the right to make a movie, which is an exercise of the exclusive right to make derivative works, a right belonging to the copyright owner. But EE must work quickly, since KK has a right to terminate the assignment under 17 U.S.C. §304(c). The first termination window comes up at the 56th year, so, that means the window may open soon. (The facts don't say when the copyright was obtained by publication, but if it were in 1956, then the termination window comes up in 2012.) After termination, EE can continue to sell already-made derivative works. So if the movie is made at that point, EE is fine. But the assignee has no right to make new derivative works after termination, so if EE waits to make the movie, they may lose their rights. Termination is not automatic, so KK will have to affirmatively exercise his rights. Of course, if he doesn't know about them, he can't exercise them. That being the case, EE may want to sit and wait to see if KK sleeps on his rights. If so, EE has some breathing room, as another termination window doesn't come along until the 75th year.

Trademark may be a problem for EE. Trademark rights are established by use, not conception. EE never had trademark rights to "Show Choir!". Regardless, they are lost through abandonment, and EE has certainly not continued to use the mark. Moreover, names of one-off productions are generally not trademarkable. Series titles, on the other hand, are trademarkable. Thus, WXP probably has a trademark right to "ShowChoir," which would allow them to sue to stop EE from releasing a movie with the name "Show Choir!" on the basis that the similarity is likely to confuse audience members into thinking the commercial source of the movie and the series is the same. Thus, EE may need to pick another title. On the other hand, the phrase "show choir" could plausibly be considered generic, in which case it is not trademarkable, and EE could use it.

In producing the movie, EE may also have to be careful not to infringe on the copyright of the series. As long as EE is faithful to JJ's script, then they will be fine, since they have the right to make a derivative work, and they won't be copying the series. But if they tweak the script to make it closer to the series, then they will be copying the series, and if they copy closely enough to meet the threshold of substantial appropriation, WXP will have a good claim of copyright infringement against EE. Since EE intends to capitalize on the success of the series, this is a concern. They should be careful to document the creative process of developing the script in order to fend off infringement liability.

SUBPART B:

AA could have a claim against PP for defamation. First we should determine if AA is a public figure. It seems likely she is, because she has achieved fame, and at least from the article, she seems well known throughout the community as the manager of a high-profile business. Assuming she is a public figure, then the First Amendment provides some extra hurdles to her case. She will have the burden of showing that any statement that is the basis for a defamation claim is false. She can do this as to several statements (secret deal with alcoholic beverage maker, wanting to open up minds of youth to drugs, etc.). Another burden placed on her because of her public-figure status is showing that PP acted with malice. This can be shown by the PP's reckless disregard for the truth of the matter by relying on a source, MM, that was known to PP and FF to be untrustworthy since MM had a grudge against AA. It also would have been easy for PP to check MM's information against other sources, including AA herself, before printing it.

Having cleared the threshold Sullivan/Gertz constitutional hurdles, we still need to analyze whether AA has a good common-law case for defamation. We must ask whether the falsehoods are defamatory - that is, reputation-harming. PP can argue that AA's reputation is already trashed because she is a criminal defendant, and thus the article did no damage to her reputation on top of what was already done. PP cannot posit as a defense the fair-reporting privilege, as this only protects the media when the media is honestly reporting allegations from official/government sources or records, and MM is not such a source. Nor can PP use the neutral-reportage privilege, since MM is not a public figure and is not named in the story, so this is not an example of some public spat between public figures that is being reported neutrally by PP. PP could argue a defense of substantial truth - after all, AA did want to "shake things up in her hometown." But that's not substantially the same as wanting to open up the minds of area youth to drugs, alcohol, and pre-marital sex. The difference between those statements is a defamatory one in the sense that the strict truth is not reputation-harming while the PP's statements would tend to lower AA's reputation among a morally respectable segment of the population.

AA can also sue MM for defamation. There are just a few differences in the analysis. First, AA needs to find out who MM is, which will be initially difficult since MM is an anonymous source. PP will claim reporter's privilege to refuse to reveal MM's identity. But reporter's privilege and shield laws are generally not usable to frustrate defamation plaintiffs. So AA will likely find out the identity of MM through the discovery process of suing PP for defamation. Once AA has identified MM, she can sue him for slander, since his publication of falsehoods was oral and not written. This introduces an extra hurdle to a common-law defamation case, as AA will need to show actual damages or, alternatively, that the defamation falls into one of the per se categories. She can't show actual damages based on anything in the facts, but MM's statements do fit into the per-se category of concerning her business/trade/profession, since they impugn her work as the manager of WXP.

Just as AA has claims for defamation, she also has claims for false light. The differences are that there is no need for reputation-harming content, just content that is highly embarrassing. But desire to corrupt youth works both ways. Also, the publication must be to the public as a whole, as opposed to just one person for defamation. PP publishes to the public, so that's not a problem. Although MM could argue that he published to just one person - the reporter at the PP, MM's intent was to spread this to the public through the newspaper, so MM would likely be on the hook for false light as well. The same First Amendment safeguards apply for public figures for false light as for defamation, but they are overcome for the same reasons (malice, provable falseness).

For the same reasons that AA could sue for defamation, WXP can also sue for defamation if they can show damages by way of lost business with sponsors. PP might argue substantial truth as a defense, claiming that the statement about the more-than-a-million-dollar deal being substantially the same thing as a million-dollar-deal. They would be right in that regard. Doing a deal with an energy drink maker, however, is not substantially the same as doing a deal with an alcoholic beverage maker, especially where much of the target audience and characters on the show are underage.

With regard to the 11:07 reader comment, AA likely cannot sue PP for defamation, false light, or public disclosure, because of the safe harbor of 47 U.S.C. §230. The facts say that the site allows readers to leave comments about the stories - so that means this is an interactive computer service covered by the statute, meaning the comments of readers are not treated as the speech of PP for purposes of state-law liability.

AA can, however, sue Anonymous Reader (AR), if she can find out AR's identity. To the extent that a court might consider online communications not to have the permanence needed to qualify as libel, the statements meet the per-se categories for slander: a slew of STDs qualifies under loathsome diseases; money laundering for the mafia goes to adverse to profession and crimes of moral turpitude - tax evasion also.

Floribama's anti-SLAPP statute will not prevent AA or WXP from bringing any meritorious claims; instead, it would allow PP a procedural shortcut to use against any non-meritorious claims. To the extent AA and WXP could probably succeed in a defamation suit, the anti-SLAPP statute won't be of any use to PP. However, the anti-SLAPP statute would be able to be used to strike a claim against PP for AR's posted comment, since it is permissible under the §230 safe harbor. In that case, PP would be able to collect attorneys fees and costs, as provided for in the statute.

SUBPART C:

Payola:

Because no disclosure was made about the produce-placement deal for GG in the series (in fact, it was contractually required to be kept confidential) WXP would be liable for violations of § 317 of the Communications Act by failing to provide the required sponsorship identification when airing the product placement for GG. Both AA and GG had an obligation to inform WXP about the sponsorship under § 507 of the Communications Act, but it seems that base was covered, since the deal was negotiated by AA and AA is the general manager. These violations can lead to fines, jail time, and failure to renew the station's license.

FTC Act § 5:

AA's testimonial about GG on the website is not subject to FCC regulation, but it is subject to generally applicable advertising regulation. The money GG is paying to the station for AA's testimonial is a fact that affects how viewers of the website would evaluate AA's endorsement, and therefore, under FTC guidelines interpreting FTC Act § 5, it must be disclosed. Since it was not disclosed it may be construed as a violation of § 5's prohibition on unfair and deceptive trade practices. This could be punished with a fine.

Obscenity:

SSS has arrested AA for violation of a county ordinance prohibiting obscenity for the steamy scene between BB and DD on the series. To the extent there were obscenity, this would be an FCC violation as well. Either way, the controlling law is the First Amendment and the Miller v. California test, which is coextensive with the FCC ban and represents the outer bounds on the permissible extent of any local ban. The BB/DD scene cannot constitute obscenity under Miller, and thus AA will not be convicted, and the FCC will not take adverse action. It's doubtful that a "steamy" scene with shirts-off/pants-on, would be found to appeal to the prurient interest or be patently offensive. On the other hand, these first two prongs of the test apply contemporary community standards, and we know that this community is very conservative. After all, at least SSS thinks there's a case. Regardless, there still can be no finding of obscenity, because the third prong is not calibrated to an individual community. Since the television episode "taken as a whole," cannot be said to lack serious literary, artistic, or political value - it tackles issues of teenage strife and incorporates musical numbers meant to call to mind the "power of music" - there is no chance at all this can pass the Miller test. The series is protected by the First Amendment.

Indecency and Profanity:

One might argue that the steamy scene is indecent, since, short of being obscene, it does have a sexual element. But the scene, as described, is not explicit, nor is it primarily used to titillate viewers. On the other hand, it does seem that it was included in part for its shock value - since AA wanted to shake things up - and shock value does militate in favor of a finding of indecency. Also, from the description, it seems to have gone on for a substantial duration, which would also tend toward indecency. The fact that there was "grinding" seems to suggest that this content was outside the norm of prime time fare. On the other hand, this is nothing like the explicitness that was involved in the KRON case. All in all, I think there is a chance that there could be a finding of indecency, but it is not likely.

As to profanity, there is no doubt that the FCC will find the use of the word "fuck" to be profane. While the FCC has no list of forbidden words, recent actions have made it clear that the F bomb is considered per-se profane. WXP could argue that the word was used in a lexicographical sense, talking about how the use of the word could cause a teacher to get fired. That's a good argument, but one that will probably be ultimately unavailing to the FCC. The recent trend is that the FCC has been pursuing a zero-tolerance policy. Also, the fact that this was a pre-recorded show, and not live, will militate in favor of a finding of profanity.

The use of the word "asshole" is a closer call. There is no clear guidance from the FCC on this word, but it certainly is not common for broadcast television. Moreover, it is used not used in a nominative sense, as the F-word was. So there's a chance the use of "asshole" would lead to FCC action.

Since the show aired at 8 p.m., the broadcast safe harbor is inapplicable.

Music:

Another legal issue facing AA and WXP is the use of music throughout the show, particularly the Bob Dylan song. The mechanical license obtained by AA under 17 USC § 115 allows the re-recording of the song, and would allow her to eventually print CDs or make a soundtrack album. But the extent of her reliance on the mechanical license is misplaced. Putting the song into the television show as was done here requires a synchronization license. Without that, Dwarf Music can sue for infringement for the copyright on the composition.

Sony Music Entertainment, Inc., as owner of the sound recording (circle-P) copyright, has no cause of action here because the series did not use the master recording.

TT's Fall:

AA and WXP face a potential tort action from TT's fall out of the rafters. These kinds of tort cases, however, are generally barred by the First Amendment. Cases have required that the television show at issue meet the incitement test of Brandenburg to overcome a First Amendment defense, and TT cannot do this. There was no direct incitement. As with the Ozzy case, this is not a live speech, thus there is a disconnect between the speech and its effect, creating a lack of immediacy - which is required for incitement. Moreover, it will be hard or impossible to show that the episode was directed at having viewers smoke marijuana and expose themselves to the potential for serious falls. Also, cases in this vein impose a high burden for showing a duty of care or a breach of the duty of care. It will likely be found to not be foreseeable that a viewer would smoke marijuana and climb to a high place as in fact happened.

SUBPART D:

The SLEET tax levied on the station appears to be similar in nature to the tax levied on the newspaper in the Minneapolis Star Tribune case, where the tax singled out large newspapers, exempting others. Something similar happens with the SLEET, since almost everyone who is not a broadcast station is exempted from the tax. Thus, WXP has a strong argument for having the tax declared unconstitutional.

Floribama's FOIA act should allow for the meeting minutes to be released because they do not seem to fall within any of FOIA's exceptions. It is also worth noting that if Floribama has

an open-meetings act similar to the federal version, the newspaper may be allowed to attend future meetings of the film commission.

LL faces liability for procuring show-business employment for II. LL would have to be a registered talent agent in California to seek employment for II, and since LL apparently is not, he risks forfeiture of his five-percent contingency fee. Five percent is within the 10-percent limit, but that doesn't matter if LL isn't registered.

II may be in trouble with SAG for disobeying Global Rule One by working on a non-union production, which the series is. II's sanctions could include being kicked out of SAG, which could be devastating for his acting career. Neither WXP nor AA face any liability from SAG. Since neither have entered into an agreement with SAG, SAG has no authority over them. The misfortune is II's to bear, although he may of course sue LL for malpractice to the extent LL, as II's attorney, assisted him in doing something so contrary to his self-interest. LL should have advised II to elect financial-core status, which would have allowed II the flexibility of working on a non-union production while preserving his eligibility to do work on SAG productions going forward.

KK will have an opportunity to recapture the copyright to the musical - I covered this under Subpart A above.