

LARW 2025S

Multistate Performance Test

Your exam number/name (whichever your section is using): _____

INSTRUCTIONS

These are the generic instructions that appear on every MPT on the bar exam.

Don't waste your time reading them—today or on the actual bar exam!

If you don't know the instructions by exam day, you're already in trouble!

1. You will have 90 minutes to complete this assessment. This assessment is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.
3. You will have two kinds of materials with which to work a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.
4. The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this assessment. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.
5. In answering this performance test, you should concentrate on the materials provided in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
6. Although there are no restrictions on how you apportion your time, you should be sure to allocate ample time (about 20 minutes) to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the packet.
7. This assessment will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

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File

Dewey, Cheatham & Howe

One Portland Place
Centralia, Franklin 33204

MEMORANDUM

To: Applicant

From: Holly Howe

Date: February 28, 2025

Re: Patel v. IBI

We have been retained by Sumitra Patel, a local graphic artist, for advice regarding a possible copyright infringement claim against InGen Biotech, Inc. (IBI). Patel created an animated cartoon character, "Genie," for use in Internet advertisements for *NextGen*, IBI's high-tech do-it-yourself-at-home genetic sequencing device. IBI and Patel later entered into a marketing services agreement whereby Patel was to lead a *NextGen* multimedia marketing campaign using Genie. But IBI abruptly cancelled the agreement when it established an in-house marketing department.

IBI is paying Patel the agreed-upon compensation through the end of the agreement's term and plans to continue using Genie in its multimedia campaign. Patel contends that she alone owns the copyright to Genie and has not given permission to IBI to use Genie without her involvement.

Genie qualifies for copyright protection under 17 U.S.C. § 101 (the Copyright Act) as part of an "audiovisual work." We need to determine whether Patel or IBI owns the copyright to Genie under the Copyright Act and (assuming Patel owns the copyright) whether IBI has exceeded the scope of the implied license Patel granted to IBI. To help me advise Patel, please draft a memorandum analyzing the following:

1. Does Patel own the Genie copyright, or does IBI own Genie as a "work made for hire" or as the result of a transfer of ownership?
2. Assuming that Patel owns the copyright:
 - a. Did Patel grant IBI permission, via an implied nonexclusive license, to use Genie?
 - b. Is IBI's use of Genie in its multimedia campaign within the scope of any such implied nonexclusive license?

Do not write a question presented, short answer, or separate fact section, but be sure to explain how the facts and the applicable legal authorities affect our client's interests. Use detailed headings at the beginning of each section of your analysis.

Interview Notes—Sumitra Patel

February 25, 2025

Sumitra Patel, a freelance graphic artist specializing in cartoon animation, entered and won a competition to create a character to be used in animated Internet advertisements to promote IBI's new high-tech do-it-yourself genetic testing device, the *NextGen*. Patel worked on the character, Genie, for at least three weeks before submitting her final animated design to IBI. (Patel states she has digital files that will establish beyond any reasonable doubt her authorship of the Genie concept, prototype, and final artwork during the pre-submission time period.) When she submitted the computer file containing Genie, Patel included the notation "© (2024 Sumitra Patel)," and registered the work with the United States Copyright Office, naming herself as "author" and "copyright claimant."

Patel then signed a separate marketing services agreement with IBI (per Ralph Cabot, IBI's Director of Marketing) to develop and produce a multimedia marketing campaign for the *NextGen* using Genie. The agreement was not dated and signed until early November, but its terms stated that it commenced on October 30, a few days before Patel actually delivered her digital file of Genie to IBI on November 2, 2024. The marketing services agreement was to run for six months and could be extended by the parties. All communications with IBI (i.e., Cabot) were via e-mail, up to the day Cabot called and left a voicemail telling Patel that she had won the contest and that he (Cabot) would be sending Patel a marketing services agreement for Patel to review and sign. (Patel has provided us with copies of e-mails and related documents.) Patel and Cabot had a few telephone conversations after this agreement was signed regarding the timing of the Internet advertisements. On several occasions Cabot orally told Patel how pleased IBI was with her work and that Patel would "make a lot of money as the *NextGen* takes over the market in genetic-testing products."

Patel explained that graphic artists enter these competitions to develop promotional materials in the hope that, if they win, they will be selected to develop and lead full marketing campaigns and will later transfer their rights to the work to the requesting company in return for royalty payments or a lump sum. Patel said it is common for the artist to be separately compensated for the marketing services and for the transfer of the copyright in the work to the company.

Here, compensation for Patel's further services in developing the multimedia marketing campaign was set at \$7,000 per month, and she was paid for one month at the time the agreement was signed. Patel says that this rate of pay would be the

appropriate market rate for the type of services that she expected to provide. The agreement between Patel and IBI has a “work made for hire” provision (§ 1.03 of agreement). But Patel claims she was never paid to transfer the rights to Genie to IBI and that she reminded Cabot (in an e-mail) that such a transfer was yet to be completed. Cabot never responded to Patel’s e-mail.

Last week IBI notified Patel that it was terminating their agreement as a result of IBI’s decision to create an in-house marketing department for all *NextGen* advertising as it rolls out multiple products using the new technology. IBI intends to continue using Genie, the character Patel created, even though Patel will have no further involvement in the marketing campaign. In fact, Patel has heard from friends in the advertising industry that IBI plans to produce a plush toy version of Genie. Patel will be paid through the remainder of the six-month agreement term and has already been paid \$28,000 to date.

Patel believes she owns the copyright to Genie and is asking for our legal opinion regarding whether she has a viable action alleging copyright infringement against IBI.

IBI/Patel E-Mail File

From: Ralph Cabot	To: Sumitra Patel
Sent: 10/05/2024 1:07 pm	Subject: Request for artwork proposal

Dear Ms. Patel:

On behalf of InGen Biotech, Inc., I invite you to submit a proposed animated cartoon character for use in Internet ads for an exciting new product. IBI will soon introduce to the market an at-home genetic sequencing device (the *NextGen*) that allows consumers to perform genetic tests at home, quickly and confidentially. Indeed, a highly respected international research center has identified over one hundred applications in a dozen industries where the IBI *NextGen* will significantly advance current technology.

To identify our new product, we are looking for a character as recognizable as “Mr. Peanut” to be used in animated Internet advertisements. IBI has invited five other graphic artists to propose an animated character that will identify our breakthrough product in a commercially appealing and exciting way. If you are interested in submitting materials that may address our needs, please let me know, and I will forward you a more detailed description of the *NextGen*. We will most likely hire the winner of the competition to perform substantial additional work, on an ongoing basis, in a multimedia marketing campaign that we plan to undertake depending on the product’s success.

Sincerely,

Ralph Cabot, Director of Marketing
InGen Biotech, Inc.
1001 University Drive
Plymouth, Columbia 22121
rcabot@IBI.com | www.IBI.com

-----<Reply from Sumitra Patel>-----

From: Sumitra Patel	To: Ralph Cabot
Sent: 10/07/2024 8:44 AM	Subject: Proposed IBI Product Character

Dear Mr. Cabot:

Thank you for your e-mail dated October 5, 2024. I am interested in participating in IBI's competition to design an animated character that will commercially identify the *NextGen* in Internet advertisements. Please forward material that describes the product and let me know if there are any specific competition rules or conditions.

Sincerely,

Sumitra Patel

12 Design District Drive
Centralia, Franklin 33212

sumitra.patel@millennialdesigns.com | www.millennialdesigns.com

-----<Reply from Ralph Cabot>-----

From: Ralph Cabot	To: Sumitra Patel
Sent: 10/08/2024 9:07 am	Subject: Development of Product Character

Dear Ms. Patel:

We're pleased you are interested in submitting a proposed character for the IBI vision chip animated Internet advertisements. As promised, I am attaching a general description of the *NextGen* and its applications. If you have any questions, please let me know.

There are no special rules or conditions applicable to the competition. We want to give you the widest possible latitude in design and originality. The IBI leadership team will review the proposals of all six graphic artists on November 12, 2024. Therefore, we must receive your submission no later than November 5, 2024.

Sincerely,

Ralph Cabot, Director of Marketing
InGen Biotech, Inc.

-----<E-mail from Sumitra Patel>-----

From: Sumitra Patel	To: Ralph Cabot
Sent: 11/02/2024 8:44 AM	Subject: Proposed IBI Product Character

Dear Mr. Cabot:

I am pleased to submit for your consideration the attached animated cartoon character. I believe it simply and memorably captures the remarkable capabilities of IBI's *NextGen*. I am excited about the possibility of developing your multimedia marketing campaign. I look forward to your reactions.

Sincerely,

Sumitra Patel

Attachment: Genie file

-----<E-mail from Ralph Cabot>-----

From: Ralph Cabot	To: Sumitra Patel
Sent: 11/16/2024 9:07 am	Subject: Development of Product Character

Dear Sumitra:

This is to confirm the voicemail I left you earlier today advising you that we have selected Genie, your cartoon character, to represent the *NextGen* and to be the central theme of our animated Internet advertisements with which you will be involved. I have sent via express mail a signed marketing services agreement with the terms described in my voicemail. Please endorse the agreement and fax it to me. We are delighted to be working with you as we launch the *NextGen* and usher in a new era in vision technology!

Sincerely,

Ralph

Ralph Cabot, Director of Marketing
InGen Biotech, Inc.

-----<E-mail from Ralph Cabot>-----

From: Ralph Cabot	To: Sumitra Patel
Sent: 01/26/2025 10:27 am	Subject: Development of Product Character

Dear Sumitra:

The IBI Leadership Team is thrilled with the material you have produced to market the *NextGen*. The Internet and social-media advertisements are smashing. The ads have been running for just over a month and folks are already talking about that lovable little character, Genie!

We look forward to receiving your submissions for a full-scale, multimedia coordinated national marketing campaign.

Sincerely,

Ralph

Ralph Cabot, Director of Marketing
InGen Biotech, Inc.

-----<Reply from Sumitra Patel>-----

From: Sumitra Patel	To: Ralph Cabot
Sent: 01/26/2025 2:15 pm	Subject: Transfer of Product Character

Dear Ralph:

Glad to hear that the *NextGen* marketing is off to a good start. I'm going forward, using Genie to develop the complete multimedia marketing campaign under our services agreement. However, we need to talk about when I'm going to transfer my copyright to Genie to IBI and the royalty I will receive in return for the transfer of copyright.

Sincerely,

Sumitra

-----<E-mail from Ralph Cabot>-----

From: Ralph Cabot	To: Sumitra Patel
Sent: 02/23/2025 10:27 am	Subject: IBI-Patel Contract

Dear Sumitra:

I'm sure you've read in the business press that IBI has recently established its own marketing department. IBI plans to launch several consumer, business, and healthcare products featuring *NextGen* technology, making Genie a household name. Handling our marketing in-house is the most effective way to move ahead.

Unfortunately, this decision means that IBI's relationship with you must be terminated as the new department will be taking over all *NextGen* marketing immediately, targeting each of the many product lines in multi-faceted campaigns ranging from packaging to TV commercials.

I assure you that you will not suffer, either financially or professionally, as a result of the change in our business plan. We will pay you the full fee under the agreement even though you no longer will be involved in *NextGen* marketing. Moreover, IBI intends to continue the *NextGen* product branding using Genie, thereby solidifying your reputation as a leading commercial graphic artist.

I am disappointed this means we will not be working together, at least in the near term. I look forward, however, to renewing our relationship sometime in the future. Thanks for all of your help in launching the *NextGen*.

Sincerely,

Ralph Cabot, Director of Marketing
InGen Biotech, Inc.

Excerpts from Patel-IBI Marketing Services Agreement

InGen Biotech, Inc.
1001 University Dr., Plymouth, Columbia 22121
www.IBI.com

Sumitra Patel
12 Design District Drive
Centralia, Franklin 33212

Dear Sumitra:

This will serve as the Marketing Services Agreement (Agreement) between InGen Biotech, Inc. (IBI), and you (Patel), by which IBI is engaging you to perform the Services defined below.

1.01 Term of Agreement. This Agreement is effective as of October 30, 2024, and shall continue in effect up to and including May 2, 2025 (the Term), a period of six months, but shall not extend beyond the latter date except by a subsequent written agreement signed by Patel and IBI.

1.02 Scope of Services. Subject to the terms and conditions provided in this Agreement, IBI agrees to retain Patel during the Term to perform the following marketing Services: Patel will create a multimedia marketing campaign using Genie, including creating all audiovisual works, and will supervise creation of all broadcast and other marketing materials for IBI's NextGen products.

1.03 Work Made for Hire. Any work performed by Patel in connection with the performance of the Services as defined in § 1.02 shall be considered a work made for hire under copyright law. All designs, original compositions, radio, television, and Internet advertisements, and all other work and materials prepared by Patel for IBI shall be considered IBI's property.

....

2.01 Compensation. As consideration for Patel's performance of the Services, IBI shall pay to Patel compensation in the aggregate amount of \$42,000.00 (\$7,000.00 per month for 6 months). By signing below, Patel hereby acknowledges receipt of the sum of \$7,000.00, representing the first installment of the Services fee, with the balance to be paid in monthly installments beginning on November 30, 2024.

....

Please confirm that the foregoing is in accordance with your understanding and indicate your approval of this letter agreement by signing below and returning a copy to me.

Sincerely,

Ralph Cabot, Director of Marketing

InGen Biotech, Inc.

IBI: Ralph Cabot
Date: November 16, 2024

Sumitra Patel: Sumitra Patel
Date: Nov. 17, 2024

Library

**UNITED STATES CODE
TITLE 17. COPYRIGHTS**

CHAPTER 1—SUBJECT MATTER AND SCOPE OF COPYRIGHT

§ 101. Definitions

“Audiovisual works” are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

A **“transfer of copyright ownership”** is an assignment, mortgage, exclusive license, or any other conveyance . . . of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.

A **“work made for hire”** is—

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

* * * *

CHAPTER 2—COPYRIGHT OWNERSHIP AND TRANSFER

§ 201. Ownership of Copyright

(a) Initial Ownership. Copyright in a work protected under this title vests initially in the author or authors of the work.

(b) Works Made for Hire. In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

§ 204. Execution of Transfers of Copyright Ownership

(a) A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent.

Wilkes v. Monterey Festival, Inc.
United States Court of Appeals (15th Cir. 2015)

This is an appeal from the Franklin district court's decision granting summary judgment in favor of defendant Monterey Festival, Inc., in an action for copyright infringement.

Cleary Magnuson, production director of the Monterey International Pop Festival, invited Tom Wilkes, along with other graphic artists, to "audition" for the design of a graphic character to be used in TV commercials for the Festival. Magnuson told each of the invited artists that the winning submission would be a "work made for hire" and that the artist would be paid \$5,000.

In response, Wilkes created a proposed graphic character at his own studio, used his own equipment, controlled when and how long he worked, and had discretion over matters ranging from artistic design to hiring assistants.

Wilkes sent the character he prepared to Magnuson and was later notified that his submission had been selected. Magnuson then sent to Wilkes a check for \$5,000 and a letter that stated in part: "Pursuant to our understanding, your design is a work made for hire and is the property of the Festival, a fact you acknowledge by signing and returning to me a copy of this letter." Wilkes signed and returned to Magnuson a copy of the letter.

That year the Festival organizers used the character in Festival publicity. The character proved to be such a popular identifier that the organizers decided to make it the Festival's permanent symbol. Other artwork, however, would be commissioned each year as the Festival theme changed.

When the organizers used the character designed by Wilkes in advertisements in the Festival's second year and as the symbol that still dominates its web page, Wilkes filed this action claiming copyright infringement of the character.

Wilkes raises two arguments in his appeal challenging the award of summary judgment in favor of the Festival. First, he claims the district court erred when it concluded that his character design was a "work made for hire" under § 101 of the Copyright Act. Second, even if the doctrine applies to his design, Wilkes asserts that a written work-made-for-hire agreement must be executed *prior* to the creation of the material subject to copyright.

1. Graphic Characters as Works Made for Hire

Section 101 of the Copyright Act limits work made for hire to “work prepared by an employee” within the scope of employment and to specified works created by others. Wilkes correctly argues that he was not an employee but an independent contractor. Thus, to be a work made for hire, the character he created for the Festival must be covered by the second clause of the § 101 definition. Wilkes asserts that the character he produced is not part of a collective work, a compilation, or any of the other items listed in the subsection. We disagree. Because the character was to be used in a television commercial, it is a “part of a motion picture or other audiovisual work” under the § 101(2) definition, and therefore, the work is subject to the work-made-for-hire doctrine.

2. Execution of the “Work Made for Hire” Agreement

Section 101(2) of the Act states that “the parties [must] expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.” Wilkes argues that this language requires that the writing must be executed *prior to* the creation of the copyrighted material. There is support for Wilkes’s position. A written work-made-for-hire agreement, signed after the creation of the material, ordinarily does not meet the statutory mandate. The writing requirement is intended to protect against false claims of unwritten copyright agreements. It is designed to provide definitive evidence of the ownership of intellectual property to insure that such property is marketable.¹ To allow after-creation writings would foster confusion and undermine the goals of the Copyright Act.

However, the writing requirement may be met by a document signed by both of the parties and executed *after* the work is created *only if* the writing confirms a prior agreement, either explicit or implicit, made before creation of the work protected by copyright.

When Wilkes responded to the “audition” invitation, which included Magnuson’s statement that submissions were “works made for hire,” he implicitly acknowledged that his character design, if selected by the Festival, would be a work made for hire. By signing the letter agreement, Wilkes fulfilled the statutory requirement in § 101(2) and his character design is a work made for hire and, therefore, the Festival’s property.

¹ While the Festival argues that the character must be a work made for hire because Wilkes submitted it without attaching a copyright notice (©), we note that copyright notice is entirely permissive (i.e., not required) and therefore not dispositive on this issue. Nevertheless, had Wilkes included a copyright notice with his submission, it would have been evidence of his intent regarding ownership of his work when he entered the contest.

Because Wilkes failed to establish ownership of a copyright in the character design, we do not address the Festival's alternative theory of an implied nonexclusive license.

Affirmed.

Atkins v. Fischer d/b/a Red Barn Brewing Co.
United States Court of Appeals (15th Cir. 2021)

This is a copyright infringement action. Atkins, a graphic artist, develops brand identities for products. Fischer is the originator of a product concept called “Red Barn Beer.” Fischer contacted several graphic artists, including Atkins, about obtaining preliminary sketches of a packaging design for Red Barn Beer to use as a sales tool at a beer distributors’ convention.

Fischer and Atkins entered into an agreement for Atkins to create product designs involving two stages of work: Stage one called for production of a preliminary graphic packaging design for Red Barn Beer; stage two involved final design development and the production of camera-ready art. The fees for the two stages of work were \$2,000 and \$4,500, respectively. Both parties understood that neither was obligated to proceed with the second stage of the agreement.

The agreement contained the following provision: “Ownership and possession of all underlying creative work developed and supplied by Atkins shall remain the exclusive property of Atkins.” Atkins testified at deposition that she believed this provision allowed her to retain the rights to her creative work and to set a price for future use of her design. Atkins also testified she charged Fischer a discounted fee, with the understanding that she would receive royalties for the use of her work.

Shortly before Fischer left for the convention, Atkins delivered initial sketches of a packaging design. In a note with the sketches, Atkins stated, “I’m glad we’re finally going to design a look for Red Barn Beer.” Fischer selected a graphic work featuring a red barn with six silos and paid Atkins in full for the first phase of the contract. The second phase of the contract was never performed because Fischer declared that he was unhappy with Atkins’s designs.

Fischer subsequently incorporated his enterprise under the name Red Barn Brewing Company and asked Atkins to execute a work-made-for-hire agreement regarding the Red Barn graphics. Atkins refused to sign the agreement.

When Red Barn Brewing began selling and distributing its beer with a package featuring the red barn with six silos, Atkins filed suit against the company, alleging copyright infringement. Red Barn Brewing answered, claiming an implied license to use the design on its packaging, and filed a motion for summary judgment.

The lower court concluded that Red Barn Brewing held an implied nonexclusive license to use Atkins's work that included the right to use Atkins's design in the commercial production of Red Barn Beer. Atkins appeals.

Section 204 of the Copyright Act invalidates transfers of copyright ownership made without a writing. However, § 101 of the Act excludes nonexclusive licenses from the definition of "transfer of copyright ownership." Thus, a nonexclusive license permits a licensee to use the copyrighted material, but does not transfer ownership. Such a license may be expressly granted orally or may be implied from the conduct of the parties.

An implied nonexclusive license will arise where (1) a person (the licensee) requests the creation of a work, (2) the creator (the licensor) makes the particular work and delivers it to the licensee who requested it, and (3) the licensor-creator intends that the licensee-requestor copy and distribute his work. Since a nonexclusive license does not transfer ownership of the copyright from the licensor to the licensee, the licensor can still bring suit for copyright infringement if the licensee's use goes beyond the scope of the nonexclusive license, that is, beyond the licensor's intentions regarding the copying and distribution of the work by the requestor.

Here, as with the majority of cases, the only disputed issue regarding the implied nonexclusive license is the scope of the rights granted to the licensee. This is an objective fact-dependent inquiry. While there is no precise test, relevant factors may include: (1) the amount of consideration exchanged and/or the licensor's economic investment in the product; (2) the expectations expressed during negotiations and the parties' subsequent conduct, especially if the licensor knew of and acquiesced to uses that are later claimed to be infringing; (3) whether the agreement was task-specific or if future involvement by the licensor was assumed; (4) any advisements indicating that the licensor intended to retain control of the work; and (5) evidence of custom or practice that may serve to clarify the terms of the implied license. Such considerations should be evaluated in their totality to determine whether a licensee has overstepped the boundaries of the implied license.

Our examination focuses on whether Atkins's conduct during the creation or delivery of the copyrighted material indicated that use of the material without her involvement or consent as its creator was permissible. In other words, we consider

whether and for how long Atkins intended that Fischer copy and distribute her work.

Atkins acknowledges that she delivered her designs with the understanding that Fischer would use them as a sales tool at the convention. She argues, however, that Fischer's actions in marketing the product exceeded the scope of his license to use the designs and that, at a minimum, a genuine issue of material fact exists with regard to the parties' intent. In response, Fischer claims he holds an implied license to use the first-stage artwork for the full-scale marketing of Red Barn Beer. Fischer points to Atkins's note that accompanied the delivery of the first-stage sketches to support his theory that the parties intended the first-stage designs to be used in the commercial production of Red Barn Beer.

The written agreement between the parties sheds little light on whether completion of the first stage of the agreement implied a grant of a nonexclusive license to use Atkins's copyrighted designs for commercial production or to use the designs only as a sales tool at the convention. The existence of the second stage of the agreement suggests that the parties contemplated that the designs, created during the first stage, would be used in the second stage to create camera-ready art suitable for commercial production. On the other hand, Atkins's acceptance of the relatively small payment of \$2,000 for the use of her copyrighted designs supports a finding that the parties' intent was to convey only a limited license. In *Effects Associates, Inc. v. Cohen* (9th Cir. 2000), the court placed significant weight on the fact that the licensee paid almost \$78,000 for special effects footage for a movie. The court said that the claim the licensor did not convey a license to use the footage in the movie "can't be squared with the almost \$78,000 it was paid for this footage." *Id.* The below-market \$2,000 fee in the present case will not support the same sort of reasoning.

Nor does the parties' conduct conclusively establish whether Atkins intended for Fischer to use her design further in the commercial production of Red Barn Beer without additional compensation. The statement in Atkins's note ("I'm glad we're finally going to design a look for Red Barn Beer") does not indicate whether this "look" would be used simply as a sales tool at the convention or in commercial production.

In addition, Atkins testified that Fischer told her several times that "there would be plenty of money later on." Such a statement is relevant evidence in determining

whether Atkins intended to grant Fischer an implied non-exclusive license to use her designs in the commercial production of Red Barn Beer, but it is far from conclusive.

Summary judgment was inappropriate. The issue of whether the scope of the implied nonexclusive license included use of Atkins's design in the commercial production of Red Barn Beer should have been submitted to the jury because of the conflicting inferences that may be drawn from the facts.

Reversed and remanded.

Notes

Notes