



Strathmore
UNIVERSITY

**SCHOOL OF LAW
MASTER OF LAWS
END OF JANUARY MODULE EXAMINATION
LLM 8109: SOCIAL MEDIA LAW**

DATE: **Thursday 11TH April 2019**

Time: 2 Hours

Instructions

1. This examination consists of **THREE** questions.
2. Answer **ALL QUESTIONS**

Question 1

Otile has just opened Ad Sense, a sizzling café in Hurlingham, which is the talk of town. Knowing that social media is now the perfect platform for brands to inform and engage their customers in real time, Otile is keen on using these mediums to publicize Ad sense even further. Some of the young waiters are known to snap photos of the "on-goings" and posting them on social media. This adds to the buzz, in fact, #AdSenseHappyHour was trending on Twitter last Friday! One of the viral posts taken by Kevo a waiter at Ad Sense, featured a local celebrity Akoch. Akoch was there to 'hone in on' the buzz' with a few of her friends, with the tweet captioned, "Akoch digz Ad Sense, you should too!" Later that night, one of Akoch's associates Vanity, sees the trending photo and tags her friend. Akoch is, unfortunately, not amused by her portrayal in the photo. She calls her lawyer Akili Media to pursue Otile for damages. Akili Media writes to Ad Sense demanding that they pull down the photo from Twitter immediately. Otile panics and tries to find out who among the waiters took the photo. He learns that Kevo was a temp who had since left the job after the HR manager found a permanent replacement. Otile orders the hiring manager to locate Kevo as soon as possible. Meanwhile, he directs his lawyers, Total Socio Advocates to respond to Akili Media. Total Socio revert to Akili Media and claim as follows *inter alia*: "Ad Sense does not in any way claim responsibility, ownership or endorsement of the alleged photo [which was taken by an individual within the premises]. Ad Sense did not sanction the photo neither does it appear in any of the establishment's social media handles."

(20marks)

- a) Using emerging jurisprudence and legal provisions related to social media law, discuss any reasons why Akoch has a claim against Otile
(7marks)
- b) You are a senior associate at the Media Tech and Law department of Akili Media: Outline the steps that Otile can take to remove the picture
(5marks)
- c) The senior partner has asked that you urgently draft a notice and take down letter requesting for a takedown of the photo
(8marks)
(20marks)

Question 2

Fortnite is an online video game developed by Epic Games and released in 2017. There is growing controversy over Fortnite's use of viral hip-hop dances, which Fortnite uses to customize their avatars in the game. Many are saying a move called *the swipe it* in Fortnite is clearly *the Milly Rock*, a dance introduced by rapper 2Milly in 2014, and now seen in the halls of high schools across the US. Today hip-hop heavyweights like Chance the Rapper are calling out the game for not crediting or paying the artists who are responsible for popularizing the *Milly Rock* and other viral dances e.g. *the shoot dance*, *the poison dance* etc. But do these artists have a case? Could Fortnite be held legally accountable for making money of their dances? Beyond the courtroom is it just ethically wrong and can you copyright a dance move? This question has become a topic of debate with the rise of Fortnite, the third-person shooter game that has taken over the gaming market. Since its launch in September 2017, *Fortnite Battle Royale* has earned its owner Epic Games over 1 billion dollars in revenue. That money has come entirely from optional in-game purchases. Fortnite players can trade in real world money for a virtual currency called V-bucks. They can spend V-bucks to unlock extras for their Fortnite avatars including special missions, cosmetic items and special dance animations called *emotes*. These emotes are often based on real world dances that were created by music artists especially artists in hip-hop. A genre in which many dance trends actually begins. The *swipe it* first appeared in season 5 of Fortnite in 2018 under a new name *swipe it*. 2 Milly says, "I was doing the same moves 7 years ago. Ever since then I've been Milly Rocking everywhere, it never had a name, never had even a thought process, it was just like fun." The *Milly Rock* was also used in the NBA 2K18 game. The backlash to Fortnite monetizing what appeared to be the *Milly Rock* was overwhelming with high profile figures arguing that Fortnite's game makers are profiting of the creations of black artists without giving them fair credit or compensation. This includes the *Milly Rock*, *The Shoot Dance* attributed to Blackboy JB from his 2017 single, *shoot*. Blackboy brought the *shoot* into the mainstream when he performed the dance with Drake in their music video, "Look Alive". Two months later, Fortnite added *the shoot* to its season 4 emotes, calling the dance, *the hype*. Terrence "2 Milly" Ferguson filed a lawsuit on 6th of December 2018 against Epic Games for using and selling his "Milly Rock" dance in the game without permission. Less than a week later, Ribeiro and Anita Redd — acting on behalf of her son Russell "Backpack Kid" Horning — filed

two more suits. All three are being handled by Pierce Bainbridge Beck Price & Hecht LLP. All three suits use the same boilerplate with a specific breakdown of the different plaintiff's moves in the suits. Beyond copyright law, many people see this as a bigger ethical issue, one that raises important racial, cultural and economic concerns. It is said that as Fortnite keeps breaking its own records for revenue, other games may look to copy their in-game purchasing model going forward, making the controversy over monetized dance animations even more relevant in the future. The foregoing narrative begs the question, when is a dance a dance and not just a move, and can you copyright it?

- a) Argue the case for copyright **(8marks)**
 - b) Argue the case against copyright **(8marks)**
 - c) Apply the four fair use defenses to this scenario **(4marks)**
- (20marks)**

Question 3

Amani, Fadhili and Drake were longtime friends and engineering students at Mt. Kiriinyaga University in Kenya. They launched a fast food delivery startup app, *dishispidi* from their dorm room. It was just as a way to earn some extra cash on the side. Amani and Fadhili would cook while Drake made the deliveries and handled social media. Unknown to them, the service was in demand owing to the University's remote location away from the popular fast food restaurants. 5,000 students signed up within the first 5 weeks. They had to hire more staff and move to a bigger premise on the outskirts of the University. They soon graduated from engineering school and continued to operate the business, but Drake had to leave, he had won a masters scholarship at a university in Nairobi. A week later, he changed the twitter handle from @dishispidi to @Drake_in_Nai. The account now had 23,000 followers. Amani and Fadhili reached out to Drake asking him to turn over the access information but he declined

- a) Would Amani and Fadhili prevail against Drake, discuss **(10marks)**
 - b) Amani and Fadhili are now more reflective and ask you to draft a social media policy for them so they can better manage social media campaigns **(10marks)**
- (20marks)**