

FINAL EXAMINATION
INTRODUCTION TO INTELLECTUAL PROPERTY
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May 1, 2006

Instructions:

Please read these instructions carefully before proceeding.

1. The examination consists of four pages, including this one. You will find three questions. Please make sure that your copy is complete and that you answer all three questions.
2. You should devote approximately ninety minutes (one hour and a half) to the first question, and forty-five minutes each to the second and third questions. The recommended amount of time for each question matches the number of points each question is worth: The first question is worth ninety points (or one-half the total) and the second and third questions are worth forty-five points (one-quarter) each.
3. Answers will be graded based on content, clarity of expression, and organization. I strongly suggest that you spend sufficient time outlining your response. Where information is not provided that would be relevant to the analysis, feel free to explain how different scenarios would call for different outcomes.
4. Assume that all cases that were pending when we discussed them in class are still undecided. If any cases have been decided during the course of the semester, you are not responsible for knowing the final result or reasoning, and you will not gain points by talking about the new decision.
5. Since this is a class about entertainment and invention, some of the fact patterns may be based on actual creative content, technology, and products. You will not be rewarded or penalized for facts about the actual content, technology, and products that are not presented in the exam questions. Feel free to add these types of details if you think they improve the readability of your answer, but do not worry if you do not know whether the facts are real or fabricated.
6. In answering these questions, you may consult any written materials you wish.
7. Please type your answers or write them neatly, and leave at least a one-inch margin on the left hand side. Mark your answers with your exam number, not your name. If you are handwriting the exam, please write on only one side of each page.
8. You must turn in these questions with your answers.
9. Relax and good luck!

Problem ONE (1 Hour, 30 Minutes and 90 Points)

American Idol ("IDOL") is a TV reality show in which wannabe superstars sing songs each week before a large studio audience. The songs are always Top 40 tunes from the past few decades for which IDOL has obtained any necessary copyright licenses. Each performance lasts two to three minutes. The singers perform on an elaborate, glitzy, shimmering set. After each broadcast, viewers of the program can vote for their favorite performers, and the lowest vote getter is kicked off the show. Each week, the entire process repeats with the surviving performers.

The show features three judges who have no official vote in the outcome, but who orally review each performer. To some, these three are the true stars of the show. They are: a former musician and current record producer who often compliments performers for "keeping it real, dawg", a former dancer/songwriter who brings tears and emotion to every episode, and a caustic Brit who ridicules almost every performance. The show is in its fifth season and has developed an enormous following, with tens of millions of viewers tuning in to each episode.

NotRealityTV.com, a company which runs a small website, begins to produce an Internet-only video program that they call "American Idle" ("IDLE"). The "show" is published to the web a few days after every broadcast of American Idol has aired. In each episode of IDLE, the previous episode of IDOL is mimicked. Each IDOL performance from the most recent episode is recreated on IDLE in two ways: First, actors/singers sing short (1 minute) renditions of each performance. Owing to the low budget of the show, most of these performers have no singing ability and their performances are mere caricatures of the actual competitors, although some look and sound a tiny bit like the IDOL singers they represent. The IDLE performers sing in a cheaply constructed "studio" that bears a passing resemblance to the set of IDOL. Second, short video clips (no more than 30 seconds each) from each performance of IDOL are replayed on IDLE, after their respective in-studio renditions.

After each rendition, the performances are reviewed by three judges: a clown (complete with makeup and wig) who compliments performers for "keeping it fake, dog" and occasionally juggles while talking, a badly-performed, hand-puppet princess who cries mock tears at the end of every review, and a caustic Aussie who ridicules almost every performance. Because IDLE is an Internet program unregulated by the FCC, the judges lace obscenities throughout their reviews. The reviews are marked by their venom and harshness, and almost every performance is ridiculed mercilessly.

NotRealityTV.com displays ad banners below the video window during viewings of IDLE and also includes a "Tip Jar" link where people can donate money using a credit card. NotRealityTV.com also sells T-Shirts that say, "American Idle" on the front and "Since 2006...Keeping It Fake, Dog!" on the back. Although IDLE lacks the viewership of IDOL, IDLE becomes a minor Internet sensation, attracting as many as 10,000 viewings of the video each week.

The Producers of IDOL own the copyrights and trademarks associated with their show and they sue NotRealityTV.com. In their complaint, they allege copyright infringement, trademark infringement, and trademark dilution. You are a law clerk for the federal district judge presiding over the case, and the judge has asked you to prepare a bench memo in which you assess the likely success of the three alleged causes of action.

Problem TWO (45 Minutes and 45 Points)

Decades ago, researchers from the 3M Corporation invented the Post-It Note. Post-It Notes are small sheets of paper that have adhesive strips on the underside of one of their edges. At the time of invention, the adhesive used was innovative because it adhered lightly enough not to harm surfaces but strongly enough to stay attached. Post-It Notes come in various sizes. 3M patented the invention and has sold millions of Post-Its over the years.

Earlier this year, 3M developed the Post-It Flag. Post-It Flags are much, much smaller than the smallest Post-It Notes. They were designed to be used as bookmarks, a use for which they were well-suited because they were made out of a clear, thin film which allowed the print under the bookmark to be seen during use.

Patent attorneys for 3M applied for a patent for the Post-It Flag. In the patent specification, they cited the Original Post-It Note as prior art, and described the Post-It Flag's improvements over the Post-It Note. The broadest claim, independent Claim 1, was originally drafted as follows:

1. An adhesive bookmark comprising a piece of clear, flexible paper or paper-like material having a top side and a bottom side, said bottom side coated along one edge with a lightly-binding adhesive.

A few days after the application was sent to the Patent and Trademark Office (PTO), the patent attorney realized that his legal assistant had mistyped Claim 1. She omitted the critical word, "small," from the claim. The attorney quickly filed a "preliminary amendment," which is the name given an amendment filed with the PTO before the first office action. The PTO received the amendment and processed it before the patent had even been assigned to a patent examiner. The PTO accepted the amended Claim without objection. The amended Claim 1 appeared as follows:

1. An adhesive bookmark comprising a small piece of clear, flexible paper or paper-like material having a top side and a bottom side, said bottom side coated along one edge with a lightly-binding adhesive.

As amended, the Patent Examiner allowed Claim 1 and a patent issued to the inventors of the Post-It Flag and was assigned to 3M.

After the patent had issued, a 3M competitor, the Pennsylvania Paper Products Corporation ("3P"), began to make and sell a new product they called the "Sticky Mark".

A Sticky Mark is a small piece of thin plastic, coated with a lightly-binding adhesive along one edge, designed to be used as a bookmark. Sticky Marks come only in one size, which is twice as large (in area) as the Post-It Flag and somewhat smaller than the Post-It Note. The plastic used is somewhat opaque, so that anything covered by it is partially obscured. 3P markets the Sticky Mark as "made of a special material that is less likely to rip or crease than the competition's adhesive bookmark".

After finishing your district court clerkship, you take a job as a junior associate in the law firm that represents 3M. A partner asks you to write a memo assessing whether 3M will prevail if it sues 3P for infringing Claim 1 of the Post-It Flag patent by making and selling the Sticky Mark. She tells you to focus only on literal infringement, infringement under the Doctrine of Equivalents, and defenses to infringement. She specifically tells you not to address the validity of the patent, an issue assigned to another associate.

Problem THREE (45 Minutes and 45 Points)

You leave the firm to become the new legislative aid in charge of Intellectual Property issues for a U.S. Senator. One of the Senator's colleagues, Senator Buck Rogers, has been complaining on the Senate floor about the inability of unskilled Judges to deal with the important intellectual property questions of the day. "Too often, the wheels of innovation, creativity, and commerce are ground to a halt by judges who don't understand the facts of the cases before them," is a typical quote. He has called for legislation to remedy these concerns.

Your Senator has yet to take a position on whether to support or oppose Senator Rogers and has asked you to bring him up to speed on the issues. He asks you to write a memo describing a few intellectual property rules that are designed to account for the fact that most Judges aren't trained inventors, authors, artists, or businesspeople. Finally, he asks you to assess whether these rules are enough to address Senator Rogers' concerns or whether new rules are needed, and if so, to propose some.