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C. Instructions Specific to this Particular Exam

1. Structure

The final examination is designed to be three (3) hours in length. It consists of three sections, each of which presents an independent problem, issue, or opportunity to discuss policy (or, some mixture of all three). Each section has a particular unique focus, and is worth a different amount of the total points available on the examination. The point weights are given in the table of contents immediately above on this page.

2. Suggested Time Allocation

The emphasis of this examination is roughly proportional to the emphasis of the areas of international intellectual property law covered in class.

Given the point percentages for the three sections disclosed above, one logical division of time in a three hour (3) examination is to spend 30 minutes reading the examination sections and planning one’s answer. Then, the remaining time would be spent as follows: 68 minutes writing the analysis for the first section worth 45% of the points; 45 minutes writing the analysis for the second section worth 30% of the points; and 37 minutes writing the analysis for the third section worth 25% of the points.

If one instead reads each section and wrote the answer for that section before going on to the next section, the suggested total time allocation for each section would be: 80 minutes for the first section worth 45% of the points; 55 minutes for the second section worth 30% of the points; and 45 minutes for the third section worth 25% of the points.

3. BlueBook Use

Start a new bluebook before beginning your analysis of each major area or logical subdivision. This means that you should use a new BlueBook (or, if typing and allowed by the exam taking software, use its mechanisms to create a page break) before your analysis of each section.

Remember to put your personal identification number on the cover of each bluebook.

4. *Read the Assignment Section in Advance*

It is **highly recommended** that you read the “Assignment” section first, before reading the other sections of the examination, and before you begin. The “Assignment” section is the portion of the examination made available before the exam date via the class web page.

5. *Starting and Stopping the Exam*

The actual examination sections describing the case/dispute/problem/issue has six (6) pages, numbered pages 1 to 6.

Without looking at the content of the examination problem(s), please count your pages now to ensure that your examination is complete. If not, notify the proctor immediately.

A proctor will provide “warning” that the end of the exam period is approaching by writing on the board in the exam room(s) the amount of time remaining at approximately the five minute mark.

When time is called, stop writing immediately.

DO NOT TURN THE PAGE UNTIL YOU ARE INSTRUCTED TO DO SO.

II. ISSUE ANALYSIS SECTION (45%)

Senator Spark wants you to evaluate whether her proposed change to U.S. copyright and patent law will be subject to attack by opponents on the basis that the changes will not comply with U.S. obligations under the TRIPS treaty, Part II.¹ Spark's changes relate to free and open source software (FOSS): software under a license requiring (i) source code availability and (ii) no payment of royalties for use. In essence, the software can be used for free by anyone, and the source code is available, allowing the user to modify the software. Moreover, the FOSS licensing approach requires the software to stay free and open as it flows from user to user. This is in contrast to proprietary software companies that use trade secret law to protect the source code as undisclosed information by keeping it secret and distributing only object code in exchange for a royalty payment. For a variety of reasons, individual programmers as well as companies sometimes decide to make software (computer programs) available under a FOSS license, although they may not provide customer support the way a proprietary software vendor would. Because it is free, Spark wants to encourage generation/donation of FOSS and its use by entities and governments. Thus, her law, called FOSS-Spark, would: (i) allow any FOSS user/programmer to require any proprietary software provider to disclose up to ten percent of the source code for a proprietary computer program (the "interoperability source code") in order to facilitate interoperability; (ii) once the interoperability source code is disclosed, the FOSS user/programmer is allowed to, regardless of copyright, copy and distribute it along with the FOSS so long as the FOSS actually interoperates with the proprietary software through, using or supported by the disclosed interoperability source code; and (iii) FOSS-Spark deems that there is no infringement of any patent that would otherwise be infringed by the combination of the FOSS

¹ Spark instructs you to exclude Articles 39 and 40 from the analysis.

with the proprietary software, when such patent would not be infringed by either the FOSS or proprietary software alone. The FOSS user/programmer does not need to make any payment to the proprietary software company copyright holder for the disclosure, or to any patent holder.

To qualify for FOSS-Spark, the FOSS software has to be licensed under one of about sixty FOSS licenses listed by the nonprofit Institute for Free Software and Open Software (“IFSOS”). IFSOS evaluates licenses against criteria to determine a license’s “freeness” and “openness.” Licenses have to be truly free and really open for listing by IFSOS.

The worldwide software market breaks down into two submarkets: (1) servers; and (2) desktops. In the server market, 90% of all software is proprietary, while 10% is currently FOSS. Five years ago, 1% of the server market was FOSS, but five years from now it is expected that 25% of that market will be FOSS. The desktop market is currently only 2% FOSS, but is expected to climb to 5% in five years.²

Spark estimates that her FOSS-Spark law will double the projections concerning the amount of FOSS in each market in five years: greater interoperability will allow more FOSS programming, enabling FOSS products to gain a toehold and compete with proprietary software.

² Assume for purposes of the analysis for Senator Spark that until 5 years ago that it was universally accepted in the U.S. that the source code for a computer program could be reversed engineered, that is, discovered or decoded by experts, under U.S. copyright law’s fair use doctrine. However, further assume that during the last 5 years, half of the U.S. appellate courts issued case law allowing proprietary software providers to prohibit reverse engineering through contract. Since then, virtually all proprietary software providers revised their contracts to prohibit such reverse engineering.

Proprietary software vendors complain that for each one percent of growth in FOSS market share that they have to reduce their prices by one percent, reducing their incentive to improve their products. Spark retorts that these effects are part of an industrial shakeup made possible by the Internet which allows wide-spread FOSS programmers to develop software products rivaling proprietary software. The proprietary software vendors also note that source code licenses are often ten to one hundred times the license price for an object code license. As a result, while opposed to FOSS-Spark, the proprietary software vendors claim that FOSS-Spark should include a payment of such magnitude if the vendor's normal commercial expectations are to be met when disclosing source code protected by intellectual property.

Feeling frustrated with the proprietary software lobby, Senator Spark commissions a survey showing that forty percent of all proprietary software companies use some FOSS in their operations, presumably in order to reduce cost. Spark notes: "This shows you that FOSS is good for all companies, especially for software companies who don't need support, and that FOSS is good for the public, who can get good software for free." The proprietary software companies respond that while FOSS might minimally reduce their operating costs, FOSS really does them no good because they can't use the FOSS source code in their own proprietary products. Moreover, they note, no other country has anything like FOSS-Spark.

Assume that FOSS-Spark is enacted into U.S. law. Articulate the likely analysis of FOSS-Spark by a WTO DSB panel, assuming a challenge by a WTO/TRIPS member country whose nationals have significant activity in the U.S. Consider that the U.S. as "defendant" will assert in the alternative that: (i) the FOSS-Spark does not violate any TRIPS articles; or (ii) that if it does, that the violation is justified and within the U.S.'s rights. Treat all elements of any "3-step" tests that may apply.

III. DOCTRINE-APPLICATION "IRAC" SECTION (30%)

Mr. Guajordo owns and operates a gourmet spaghetti restaurant in north-east Germany called Gaine Plaisir.³ The restaurant is well known in northern Germany and Poland. Mr. Guajordo regularly travels to Atlanta, Georgia where he has relatives. During every visit to Atlanta, he meets with a few spaghetti restaurant chefs and provides them with an apron and chef's hat having the name of his restaurant. He also gives them a special package of spices used by Gaine Plaisir chefs to integrate a German flavor into spaghetti sauce. The package of spices is an item that the restaurant sells in Germany and Poland under the restaurant name, but for which it has not established a U.S. distributor. As a result of the chefs using the spices, and gifting the spice package to others in downtown Atlanta, the package became popular under the restaurant name. Atlanta residents traveling to Germany and Poland always purchased a large supply of the spice packets to bring back to Atlanta to use as gifts. Guajordo recently filed a CTM registration for Gaine Plaisir. The mark issued to Guajordo before the facts below. He never registered the mark in the U.S.

Frank Fretful has a street-cart barbeque stand in downtown Atlanta. He has noticed a few chefs downtown wearing hats with the phrase "Gaine Plaisir" on the hat. Fretful always wanted to open a pizza restaurant, and he liked the elegant-sounding name, so he opened a downtown Atlanta pizza restaurant under the name. Fretful doesn't like lawyers, so he didn't perform any trademark due diligence. After a year or two of very successful operation,⁴ however, Fretful's

³ In French, the translation for the phrase "gaine plaisir" is "spaghetti delight."

⁴ Fretful expanded the pizza restaurant into a side-business selling cooked, frozen spaghetti meatballs to customers across the Southeast U.S.

friend convinces him to file a U.S. Patent and Trademark Office registration for the pizza restaurant mark. That registration is currently pending.

Fretful's friend is a U.S. national and citizen, but the friend decided he would like to see the world and traveled to southern France, where he established a restaurant serving Italian-themed food such as pizza and spaghetti under the name Gaine Plaisir. The friend had Fretful's permission to use that name.⁵ Germans traveling to southern France, however, occasionally ask the friend's employees if the friend's restaurant is the company behind that great spice pack they have purchased in the past in Germany.

Guajordo seeks to stop Fretful's U.S. registration for Gaine Plaisir. Evaluate Guajordo's chances, assuming that Guajordo has no problems to bring an opposition or cancellation proceeding in the appropriate forum. Guajordo also seeks to stop Fretful's friend's use of Gaine Plaisir in France. Again, evaluate Guajordo's chances. If needed, any likelihood of confusion analysis under French law should be evaluated as if France used the U.S. eight-factor test for likelihood of confusion.⁶

⁵ Guajordo has not sold its spice packages in southern France. In recent unrelated litigation, Guajordo admitted that its mark was not well known in southern France. Also, assume for purposes of this examination that the CTM conversion procedure would not be available to Guajordo for Gaine Plaisir.

⁶ Guajordo disclaims any dilution-like protection that might be available under French or European law. The eight-factor likelihood of confusion test is given on class overheads 6.1.c through 6.1.e.

IV. POLICY ANALYSIS SECTION (25%)

Law Professor Melander has been worried about her perception of a loss of U.S. competitiveness in the international database market, especially in light of the EU's directive on the legal protection of databases. In light of Articles 1(2), 7, & 10(3), and preamble point 56, of the directive, Melander proposes a new U.S. database right to prohibit knowingly "making available in commerce to others" of a database without authorization. The new right would apply when what is made available is "a quantitatively substantial part of the information in a database generated, gathered, or maintained by another person." The database needs to have been generated through a substantial expenditure of financial resources or time. To be actionable, the "making available" needs to (i) occur in a time-sensitive manner (evaluated by the temporal value of the information within the context of the industry sector involved), (ii) inflict an "injury" on the database (meaning that the "making available" serves as a functional equivalent or substitute, disrupting sources of licensing and other revenue), and (iii) "so reduce the incentive to produce the database that its existence or quality would be substantially threatened."

Melander is convinced that her proposed U.S. database right will help the United States' position on the worldwide database market, and also create a better mix of incentives for database investments locally.

<p>Critique from a policy and legal perspective Melander's proposal. Would you endorse it, reject it, or implement it in altered form?, and if so, how would you alter it? Will it solve, in part or in whole, at a policy level or a legal level, the problem(s) that concern Melander?</p>
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V. THE ASSIGNMENT

Write an analysis for each of the issue(s) raised by the facts or information enumerated in the examination sections. At the end of each section the focus or “call” of the question is given in a short paragraph enclosed in a rectangle.

Organize your written answer logically by the three sections of the examination. Your written answer does not need a general introduction. Proceed immediately to analyzing the issues, problems or questions in each section

The sections vary in the degree to which they suggest incorporating policy analysis. One section, the third, overtly suggests policy analysis. Another, the second, explicitly suggests traditional IRAC analysis: Issue, Rule, Application and Conclusion. The first section calls for elements of both types of analysis within a particular framework studied in class.

Organize your answer for each section in a logical, orderly way. In most cases that means you won't organize your answer explicitly using the questions/assignments in the rectangle as headings for your answer. Your answer should address the questions/assignments in the rectangle containing the “call” of the question, but typically the questions/assignments themselves do not make a good organizational vehicle.

1. *“Policy” Analysis*

The policy oriented section is designed to allow one to employ some of the various policy arguments that arose during the class. These arguments include, without limitation: institutional considerations for the various treaties, structures and organizations underlying the international IP system; effects and causes of these structures and systems; efficacy, reliability, fairness and justification of the international IP system; and the impact of all this on individuals, companies, countries, and regional trade groupings or other regional divisions. This listing, however, is not necessarily a good way to organize the analysis. A productive organization of the analysis depends on the context of the problems, disputes or questions posed in the policy-oriented section.

Application and deployment of these and other arguments is the emphasis of the “policy” section. Some may view the question(s) in the “policy” section as having two “sides” along political or other ideological lines. Even assuming this view, however, an answer does not earn points by picking the “right” or “best” side of the issue, but rather by effectively marshalling arguments for the two (or many) facets of the issue.

The “policy” section, however, is not completely divorced from the doctrine studied in class. Question(s) in the “policy” section may require the application of, or recognition of, the doctrine studied in class to specific fact patterns.

2. *Issue and IRAC Analysis*

The analysis in these sections should communicate the following as briefly as possible based on the facts available and the law, principles and policy discussed in class: (i) discuss the

arguments, positions or IP rights that should be asserted, or have been asserted,^a by the parties; (ii) evaluate the arguments and substantive merits from each party's perspective, articulating defenses and counter-arguments each should/might assert; (iii) assess the strength of each party's arguments; and (iv) determine for each issue who is likely to prevail and explain why. Your written answer, however, should not be organized according to these four points.

Rather, for each issue, your analysis should communicate the issue, and then state/apply the law (element by element) to the issue's facts (applying counterarguments as well), and then conclude on the issue. An exception to this is that there is no need to restate a legal test that has already been stated; simply refer to the previous statement of the rule. For example, if there is a second trademark infringement issue, and you have already related the infringement likelihood of confusion factors for an earlier issue, you can abbreviate your analysis by directly applying the law to the facts and concluding. Another way to say this is that if a second issue arises where there is a need to apply a legal test already related and discussed, you may analyze the second issue by exception, i.e., discussing the differences in application and outcome.

If you believe that there are any additional critical yet unsupplied facts that would materially impact the outcome of a particular issue, you should note what such facts would be. In such case, *briefly* describe how such critical facts might impact the outcome, i.e., indicate *at most one and only one* differing result that would ensue from different reasonable factual assumptions about such unsupplied facts.^b

In addition, as a general matter, discuss any invalidity/protectability issues that may be presented before any infringement issues. For example, if you find yourself discussing a patent law infringement issue, discuss any invalidity issues before any infringement issues.

If the facts note that any issues are to be adjudicated in a U.S. court, the location of final jurisdiction and/or venue for the expected case/dispute is unknown at this time, except that it will be in federal court.

You should analyze clearly presented (either explicitly, or by the facts) infringement issues in the case/dispute even if your analysis determines that the relevant item of intellectual property is invalid, unenforceable or not properly the subject matter of protection. An example of this principle in trademark law is the assertion of product shape/design as a mark, but where the trademark defendant might have a functionality defense. In a real court opinion, if the court holds that the defendant wins on the functionality issue, the court might not analyze the

^a The examination question in certain sections is written in such a way that certain issues are clearly "in" the problem or case/dispute because they have been articulated or strongly suggested by the facts. You should analyze these issues, but there may be other issues to be analyzed as well because the examination question is silent about whether they have been, will, or will not be asserted by either side. In addition, the examination question in these sections may also indicate that certain other possible issues are "out" and not to be analyzed because the parties disclaim certain issues or protections.

^b Please note that if you find yourself discussing alternative outcomes for supposedly critical yet unsupplied facts for every issue you analyze, you are probably engaging in too much analysis of such alternative outcomes.

likelihood of confusion test to determine if the accused product shape infringes the product shape/design allegedly functioning as a mark. Your analysis, however, unless the facts clearly indicate otherwise, should evaluate both the functionality defense and infringement if clearly presented: even if you conclude that the shape/design is functional and thus not the proper subject matter of protection as a mark, go on to analyze whether the likelihood of confusion test is met for infringement of the shape/design mark. Similar examples exist within other areas of IP.