

FINAL EXAMINATION
DIGITAL TRANSACTIONS
PROF. VETTER

1. *Take Home Written Exam*

This examination consists of two sections, each of which presents an independent (i) problem, (ii) issue, or (iii) opportunity to discuss the course materials and perspectives arising therefrom; or presents some mixture of these 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 heading for each section in the exam problem, repeated here for clarity: Problem One (50%); and Problem Two (50%).

2. *Open Materials*

This is an “open materials” exam. You may use course notes or outlines (prepared by yourself or others) and other similar materials. You may not communicate or collaborate with anyone in writing your examination answer or obtain direct or indirect assistance from anyone.

3. *Word Limit per Section and Format Requirements*

The maximum number of words allowed in your submitted answer for each section is 1,500 words, inclusive of footnotes. Using less words in one section does not provide additional words for another section. In total, the Microsoft Word document you submit should have no more than 3,000 words inclusive of footnotes.

Please note that with these Microsoft Word settings (1 inch margins, 12 point Times New Roman font for main text and footnotes, single spaced lines within paragraphs with 6 points after the paragraph) a single page takes about 500 words, inclusive of footnotes.

Your examination answer should be formatted as described above for Word’s default settings. The electronic document you submit as your answer should be a Word file. Implement pagination so each page gives a page number at its bottom in the footer.

4. *Time Frame*

This examination problem will be distributed at 9:00 a.m. CST on Monday, November 30, 2015. Your answer will be due before 10:30 a.m. CST on Thursday, December 3, 2015.

5. *Answer Submittal*

To submit your answer, send an email to Ms. Robin Huff, the secretary for the MPS office suite, attaching your examination answer Word file. Please send your email with sufficient time for delivery so Ms. Huff receives it before the deadline. She will provide you with an acknowledgement email in response.

The email address for Ms. Huff is: rrhuff@central.uh.edu

Please name your submitted file in this form: DigTransactions_WXYX.docx, where “WXYZ” is replaced with your examination number.

Do not identify yourself inside the Word file. Remove from the Word file any metadata that might give identification.

Please run Word's spell check and grammar check mechanisms against your file. Specifically check the count of the number of words for each section in your answer, and the total word count for the file, using Word's mechanism to assess word count inclusive of footnotes.

6. *Anonymity*

Ms. Huff will keep the relationship of your identity to the Word file secret until after I have submitted grades to the Law Center's student services group.

The course web syllabus stated: "Superior class participation can boost your grade one level, for example, from B to B+." This adjustment will be implemented without breaking anonymity for the baseline final examination answer submitted by students.

7. *Source Names for Assigned Materials and Information about how to Cite*

Cites for your propositions that need cites should come only from the course materials. This can include the remarks from the lectures. Citing other material is prohibited. Your inferences, conclusions, arguments or observations are items that do not need cites.

When citing to remarks made by Professor Vetter during class lectures cite by his last name, but indicate the date of the lecture: "Vetter on Nov. 10, 2015."

If citing to the casebook, use this form: "Casebook, at ##" where "##" gives the page number(s). If citing to the course overheads, use this form: "Slides, at ##" where "##" gives the slide number(s). If citing to the Peppett article, use this form: "Peppet, Regulating the Internet of Things, at ##" where "##" gives the page number(s) from the posted .pdf file.

Bluebook rules for citing for propositions generally apply. The use of bluebook rules includes giving pinpoint cites to the page numbers for materials that are paginated.

Give cites in numbered footnotes. Pay attention to BlueBook rule 1.2 for the signal to use depending on the directness of the support from the source.

As to whether to cite, please see the last paragraph of page 6 here:

<http://www.law.uh.edu/faculty/gvetter/documents/MyExams.Prof.Vetter2b.7.8.2005.pdf>

If an entire paragraph is supported by a single source, cite the entire paragraph with one footnote, indicating multiple page locations if applicable.

When citing the instructor, do not concern yourself with indicating the time mark within the presentation for a pinpoint cite.

8. *Evaluation Factors*

I will grade your answer assigning points against each of the factors given below.

Factor	Approximate % of Total
Compliance with time deadlines	5%
Following procedures and instructions	5%
Coherent organization	10%
Quality of writing (including proofreading and bluebooking)	20%
Thorough, understandable and persuasive analysis	20%
Integration of course materials showing applied comprehension	30%
Serendipity / unanticipated perspectives	10%

Write your answer with Professor Vetter as your direct audience. Thus, terms of art and other baseline knowledge do not need definition or explanation if you are confident it is something this audience knows.

Easily correctable errors in writing, such as misspellings or grammar problems, will quickly bring down the score for the “quality of writing” factor above.

9. *Use of the phrase “Analysis and Outcome” in the boxes giving the questions for each section*

Each of the two sections provides a series of questions in a box to focus your analysis. The phrase “Analysis and Outcome” in those questions should be taken broadly: there might be subsidiary issues or defenses that need to be discussed to give a full account of the “Analysis and Outcome” triggered by the facts given in the problem. Thus, you need to “spot” those related issues.

Typically, the best way to approach the “Analysis and Outcome” is to identify those subsidiary issues or defenses, and along with the primary issues, treat each of these in an IRAC format: your analysis should be structured to communicate the issue, and then state/apply the law to the issue’s facts (applying counter-arguments as well), and then conclude on the issue (it is alternatively appropriate to present the issue and the conclusion bundled together, followed by the rule(s) of law applied to the facts, although in this alternative approach the law applied should be made clear). There is no need to restate a legal test that has already been stated; simply refer to the previous statement of the rule.

10. *Hints on organizing your answer*

Within each section of your answer, it is helpful if your answer proceeds in the order of the sequence of questions given in the box at the end of each section.

11. *Examination Facts*

The sections may state facts that might not be true in real life, but please take those facts as true for purposes of this examination. The best example of this is that the examination might say that someone or some entity owns a domain name, but that domain name might not exist in real life, or might be owned or used by someone else.

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 situations, 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.

12. If there is a need for clarification

If you see a need for clarification about some aspect of this examination, email your query to Robin Huff. She will provide it anonymously to me. Please make your question as clear as possible.

Any response I might make will be provided to everyone in the class, either via an email, or via the course web page.

HONOR CODE: Turning in an examination answer to this final examination is deemed to be a pledge under the Law Center honor code that the exam taker has complied with the honor code in all respects in relation to this examination.

(the examination problem starts on the next page)

A. *Problem One (50%)*

Nose, Inc. (“Nose”), a corporation formed under the laws of the United States state of Washington with its headquarters in that state, sells the SNIFFER[®],¹ a wearable electronic device that continuously monitors the environment in a way that one’s human nose does. After wearing the device for a while, a SNIFFER user plugs the device into a computer USB port on a regular basis to update the device software via a download from Nose, and to upload information to SnifApp. SnifApp is the software Nose created to run on the user’s computer and receive SNIFFER information generated or collected by the device.

There are four software components that run on the SNIFFER device: (1) its operating system; (2) ScentSence, which records smells; (3) ScentAction, which enables SNIFFER to vibrate, make sounds, or project mini-holograms; and (4) MusicMash. The MusicMash component saves music it hears in the ambient environment in association with a smell profile. For example, the user might configure SNIFFER to save music when it smells the scent of a rose, where the music saved is any songs about a rose (such as the song “The Yellow Rose of Texas”).² The songs saved by the device are uploaded into the user’s computer via SnifApp, and are available to be used as music files on that computer, or used in music libraries, such as the user’s iTunes music library. The music files created by SNIFFER have no encryption or digital rights management (DRM) “locks” to disable them from being freely copyable.³ Because the SNIFFER-generated music files are recorded in the ambient environment, they are readily recognized by forensic analysis.

Over the last several years the Recording Industry Association of America (RIAA) has been concerned about increasing numbers of SNIFFER-generated music files appearing on peer-to-peer file sharing services. Users upload the files to the services, enabling many thousands of unpaid and unlicensed downloads by the general public. The RIAA thinks this is music piracy, but cannot effectively sue the services because they are outside the United States.

SNIFFER must have SnifApp to be initially configured. A SNIFFER device won’t work until it has connected at least once to SnifApp for initialization and user setup. Upon installing SnifApp, the user receives a license screen presenting the Microsoft EULA, given at pages 618-622 of the Casebook, but with Nose, Inc. in place of Microsoft. The license screen clearly states that the EULA applies to SnifApp and to all four software components on SNIFFER.

¹ It is customary to indicate that a trademark is federally registered in the United States the first time that the trademark appears in a writing, but thereafter not continue the indication.

² As a default matter, the MusicMash software is loaded into SNIFFER when it is initialized by the user, but it is turned off by default. The user must decide to turn it on and configure a smell profile before SNIFFER will automatically sense and record music matching the profile. When the user turns on MusicMash, SnifApp displays a message as follows: “Respecting copyright in music is your responsibility, use MusicMash with care.” The user must acknowledge this statement with an “I agree” click before SnifApp will turn on MusicMash.

³ Technologists would all agree that DRM or encryption to restrict the SNIFFER-recorded music files to the same computer running SnifApp is a trivial functionality to implement.

SnifApp will not install or work unless the user clicks a button that says “I accept and agree to all terms in the EULA displayed above.”⁴

ReScent is a technology company and it purchases a SNIFFER. It installs SnifApp in the normal way and connects the SNIFFER to the computer with SnifApp. It monitors the communications over the USB cable between SNIFFER and SnifApp and from this information it reconstitutes the actions and responses taken by the ScentAction software component. From these it determines the algorithms and source code sequence of ScentAction. ReScent programs its own software to replace ScentAction in a SNIFFER (called SenseDanger1), and is able to sell SenseDanger1 along with the capability to bypass SnifApp and load SenseDanger1 into a SNIFFER (overwriting ScentAction). The SNIFFER thus configured is then used as an industrial safety monitoring device.⁵ After several hundred SenseDanger1-configured SNIFFER devices are deployed into the market, a government safety agency discovers their use and fines Nose, Inc. because the devices were not submitted through the proper channels for approval as safety monitoring devices. This is a complete surprise to Nose, Inc. because it did not know about the SenseDanger1-configured devices enabled by ReScent (although Nose is happy about the additional several hundred unit sales of SNIFFER devices).

ReDo is a technology company and it purchases a SNIFFER. It never installs SnifApp but discovers that it can connect the SNIFFER to a computer via the USB cable and then send random signals to the SNIFFER from the computer and eventually prompt the SNIFFER to make responses. From these responses ReDo reconstitutes the actions and responses taken by the ScentAction component. From these it determines the algorithms and source code sequence of ScentAction. ReDo programs its own software to replace ScentAction in a SNIFFER (called SenseDanger2), and is able to sell SenseDanger2 along with the capability to bypass SnifApp and load SenseDanger2 into a SNIFFER (overwriting ScentAction). The rest of the story with ReDo is the same as the story for ReScent.

What action(s) should the RIAA bring against Nose, and what is the likely analysis and outcome of that legal action(s)?⁶
What action(s) should Nose bring against ReScent and ReDo, and what are the likely analysis and outcomes of those legal action(s)?⁷
For all questions in this box, do not concern the answer with addressing jurisdiction.

⁴ The SNIFFER packaging, while stylish and elegant, does not anywhere tell the user that accepting the terms of a license will be necessary to use the product. It simply says that SnifApp needs to be installed to use SNIFFER, and to connect SNIFFER to SnifApp for initialization.

⁵ ReScent sells ScentDanger1 as a downloadable software item, and instructs the purchaser to separately purchase the SNIFFER device.

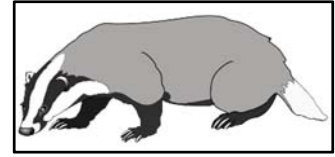
⁶ Among the three doctrines of secondary copyright liability, the RIAA will not assert vicarious liability or inducement. For purposes of the examination, the RIAA has standing to bring the lawsuit.

⁷ Software experts would say that SenceDanger1 and SenceDanger2 are each substantially similar to ScentAction based on a comparison of the source code. This substantial similarity is with respect to the expressive aspects of structure, sequence and organization in the source code.

B. Problem Two (50%)

The facts in this Section B continue from the facts of Section A, building on them.

Nose commissioned an artist to draw the representation shown to the right as a symbol of the SNIFFER product.⁸ Dave is an animal lover who dislikes the use of animals as corporate symbols. Dave believes that allowing animal images, or representations of animals, to be used in this way facilitates a callousness within society for the plight of animals. For Dave, this issue is political and one of public policy.



Dave registered these domain names: (i) sniffer.org (and .com, .net, .info); (ii) snuffer.org (and .com, .net, .info).⁹ Dave registered these domain names a month after he noticed the initial SNIFFER product announcement by Nose (Nose had not yet registered any domains for SNIFFER, although it had its corporate domain name: www.noseinc.com). That announcement included the SNIFFER trademark, an image of Sniffer, and a link to the first YouTube video about Sniffer.¹⁰

On the sniffer domains, a few days after registration, Dave posts a four-page essay about the evils of animal representations for corporate imagery. The web page is otherwise completely static and has no graphics. At the bottom of the essay, the page gives Dave's full name and his personal email address. Nothing on the page refers to Nose or the SNIFFER device.

Dave turns management of the snuffer domains over to his brother Fred. Dave and Fred both grew up in New Mexico in the United States and have never left that state. The domain registration company they use operates only in New Mexico and all of the other information technology resources Dave and Fred use are in New Mexico.¹¹

On the snuffer domains, a few weeks after registration, Fred posts content for persons who are interested in learning about the smokeless tobacco product called "snuff." This product is consumed by inhaling it through one's nose. Fred purchases a list of email addresses for persons

⁸ Copyright experts would all agree that the static image has sufficient original expression to be protectable under copyright as a pictorial work. Additionally, each month Nose releases a twenty-minute animation video on YouTube about the adventures of "Sniffer" – the name given to the animated version of the animal in the image. Sniffer, the animated character, is also protectable under copyright as a richly developed character.

Within this Examination, the word "Sniffer" in mixed case refers to the image or the character, whose copyright is owned by Nose; the word SNIFFER in all-caps refers to the trademark owned by Nose; the word sniffer in all lower case refers to domain names.

⁹ For the sniffer domains, Dave used his truthful personal information as the contact and registration information for the domain. For the snuffer domains, Dave used an identity protecting service so that a public inquiry to find the owner of the snuffer domains does not yield identification.

¹⁰ At the time Dave registered the domains the mark SNIFFER was not famous. Several years later, however, at the time of this Examination, the mark SNIFFER has become famous.

¹¹ Both Dave and Fred track web traffic at the domains. Dave has never had any visitors to his web page from the state of Washington. About ten percent of the traffic at the snuffer domains managed by Fred comes from viewers in the state of Washington.

in the pacific northwest of the United States and sends unsolicited emails to those persons.¹² Fred includes in the email an image of Sniffer that he scanned from a print magazine page. The snuffer domains also prominently display the scanned Sniffer image. Both the emails and the web site give this statement:

“Our friend Sniffer enjoys smelling the world, you can enjoy the world better if you add the great smell of smokeless tobacco, historically called ‘snuff,’ – learn more about this great product at www.snuffer.com”

At all of the snuffer domains Fred hosts third party ads such that Fred makes several thousand dollars a month from the snuffer domains. Unbeknownst to Dave, about a month after Fred initially posted the content to the snuffer domains, Fred sent a letter to Nose offering to sell the domains to Nose for \$10,000 each.¹³ That letter was lost by the postal service, however, and was never delivered to Nose, and Fred did not send another. In the emails, and on the snuffer domains, Fred has links to various Sniffer YouTube videos.

Fred sends emails to the purchased list each month. The emails correctly identify the snuffer domains as the source of the emails, and include a functioning link near the bottom of each email for the recipient to request to not receive the emails in the future. Fred, however, never bothers to remove persons from the list who click on that link, of which there are several hundred each month, many of whom are making the request for the second time or more.

Nose is negotiating with SoftEdit, Inc., a software development company. Nose wants SoftEdit to program a new module/component in a future version of SnifApp. Among the issues in the negotiation is the indemnification clause; the parties started with a clause identical to that of Section V.4 of the Model Software License in the Casebook at pages 622 to 635 (the Vendor would be SoftEdit, Client would be Nose). SoftEdit insists on revision of this clause in the third and fourth lines: “infringe a copyright, patent, or other intellectual property right” should be replaced with “infringe a copyright or other non-patent intellectual property right.”

Can Nose bring suit against Dave in the state of Washington for Dave’s actions with the sniffer domain names? What about Fred for the snuffer domain names? What action(s) should Nose bring against Dave and Fred, and what is the likely analysis and outcome of that legal action(s)? (ignoring issues of jurisdiction)¹⁴ What analysis and outcome might result if Nose complains to the Federal Trade Commission? What input would you give Nose about SoftEdit’s desired change to the indemnification clause? Further, given that the software SoftEdit might develop will be distributed to end users by Nose as a part of SnifApp, what other revisions might you suggest to Nose for the indemnification clause? Do not draft new language for the clause, but describe structurally the changes you might advise Nose to negotiate for during its discussions with SoftEdit.

¹² The list had 50,000 email addresses, 45% of which were email addresses for persons living in the state of Washington.

¹³ Dave thought Fred was going to promote Dave’s animal welfare message at the snuffer domains, but Dave did not monitor Fred’s activity.

¹⁴ Nose for sure understands that it wants to bring UDRP and ACPA actions.