

IP SURVEY PRACTICE FINAL PROBLEM

PROF. GREG R. VETTER

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Examination No. _____

IMPORTANT NOTES:

(i) This Practice Final Problem contains prototype exam instructions. I contemplate that the ultimate exam instructions will be substantially similar to these instructions, however, I reserve the right to change these exam instructions in any way.

(ii) Given the need to keep this Practice Final Problem manageable and the fact that we have not finished the trademark section of the class, the distribution of issues on this Practice Final Problem is not representative of the distribution I intend for the actual final. The distribution on the actual final will roughly approximate the amount of time devoted to each of the four areas of intellectual property.

(iii) Students have until midnight, November 30, 2002, to send in an answer or partial answer to the professor. This is optional for students; no grade or goodwill penalty will be incurred for not responding. Students may work in groups to generate an answer and submit it as a group answer. Partial answers should analyze thoroughly one or more, but not all, of the areas of intellectual property. If I receive a sufficient number of submitted answers, I will compile an aggregate answer from student responses and annotate the aggregate answer. In any event, I will also supply a model answer that I have written. Please note that I will not be "grading" these submittals in the traditional sense, but will simply be reviewing them to generate an aggregate annotated answer.

(iv) All answer submittals should be sent as Microsoft Word documents via email. Page margins must be one inch all around. Use twelve point Times New Roman font. Single space paragraphs; use one space between paragraphs. Maximum length is three pages. While this may be insufficient to write a full answer, the purpose of this Practice Final Problem is to generate exposure to my examination style and answer preferences.

(v) This Practice Final Problem is posted on the class web site. The model answer will be posted on the class web site on December 2, 2002. Any resulting aggregate annotated student answer will be posted sometime during the week beginning December 2, 2002.

(vi) Some issues on this Practice Final Problem require law from the reading assignments for November 20 & 21, 2002.

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I. INSTRUCTIONS

A. *Generally Applicable Instructions*1. *Conventions*

By convention, these instructions use the word “examination” to refer to this document. The word “exam” refers to the event of taking this test, as in “exam room” “exam taker” or “exam time.”

2. *Identification*

Identify yourself only by your personal identification number as set forth below. Do not identify yourself in any other fashion.

If you are an L.L.M. student, write "LLM" after your personal identification number.

a. Bluebook Exam Takers

- (i) write your personal identification number on the cover of *each* of your bluebooks; and
- (ii) write your personal identification number on the top right-hand corner of the cover page of this examination and on *every* page of the examination problem itself (but not on these seven preliminary pages i to vii).

In addition, write the number printed near the bottom of the cover page of the examination on the cover of *each* of your bluebooks.

b. Typing Exam Takers

- (i) type your personal identification number in a prominent place on the first page of the typed answer; and
- (ii) write your personal identification number on the top right-hand corner of the cover page of this examination and on *every* page of the examination problem itself (but not on these preliminary pages i to vii).

NOTE – append “-T” to your personal identification number that you write on the examination cover and pages. Thus, a typing exam taker with a personal identification number of “1234” would write “1234-T” on the indicated pages of the examination.

In addition, type the number printed near the bottom of the cover page of your examination in a prominent place on the first page of the typed answer.

NOTE: There may be additional instructions concerning identifying materials for typing exam takers.

3. *Prohibited actions: copying, reproducing, or memorializing this examination; or taking this examination from the exam room*

I have not determined whether I will make this final examination available to students in the future. Accordingly, I am prohibiting this examination from release. It is an honor code violation to take any action designed or intended to cause all or any portion of this examination to be released. ***Copying, reproducing, or memorializing this examination or any of its contents in any form or fashion will be treated as a violation of the Honor Code and will be punished accordingly. Taking notes about any portion of this examination is expressly prohibited under this rule.***

4. *Hand-Writing Your Answer*

Write legibly. I cannot grade what I cannot read. Skip every other line and write only on the right side of the page (i.e., skip every other page). You are only permitted to submit what you have written in the exam room during the exam time. Previously-drafted attachments of any sort may not be submitted for grading.

5. *Typing Your Answer*

You are permitted to type your answer to the examination. If you type your answer, it is your responsibility to be back in the main exam room before time expires. Double space your answer and type only on one side of the page. You may not use the memory capabilities of your typewriter or computer in any manner.

For students typing their answer on a computer, the student is responsible for compliance with the various technical requirements and other mechanics for using the exam taking software, Examssoft. In particular, the student is presumed to be on notice of the information available under the links at the web page maintained by the Law Center's information technology department:

<http://www.law.uh.edu/lit/exams/examssoft/examssoft.htm>

In particular, students should review carefully the Frequently Asked Questions (FAQ) list posted at this web address. The professor is not undertaking any action to be in a position to provide any technical assistance with Examssoft.

6. *Materials Allowed*

This is an "open materials" exam. You may use class notes or outlines (prepared by yourself or others), commercial outlines, and other similar materials. You may not communicate or collaborate with anyone during the exam about the examination or obtain direct or indirect information or assistance from any person; except for questions to the professor in the case of a severe discrepancy, defect, issue or similar problem with the examination. You may not receive any assistance from any live or electronic retrieval/computer source during the exam. You may not do any library research or access the internet once the exam has begun.

7. *Collection of Examinations and Materials*

The examinations, bluebooks, and scratch paper will be collected at the end of the designated time. ***You will not receive a grade in the class unless you turn in:***

- (i) your entire examination with your personal identification number written on the top right-hand corner of the pages indicated above;
- (ii) your bluebooks with your personal identification number and examination number written on the cover of each bluebook, ***or*** your typed answer with personal identification number and examination number typed in a prominent place on the first page of the typed answer; and
- (iii) ALL scratch paper that you have used.

Scratch paper will neither be read nor graded. Nevertheless, you must turn in ALL of your scratch paper at the completion of the exam. You MAY NOT leave the exam room with any scratch paper that you used. You may mark on the examination itself.

a. Those Hand-Writing their Answer

Assemble your materials for collection by ordering your bluebooks sequentially, then place all scrap paper or other materials beneath the bluebooks, and then take the bluebook from the top of the stack, open it, and tuck all the other materials (including the examination) inside the first bluebook.

b. Those Typing their Answer

{ forthcoming }

NOTE: There will be more specific instructions concerning the collection of materials for typing exam takers.

8. *Restroom*

You may leave the exam room to visit the restroom. If you leave the exam room, you must leave your examination, any scrap paper, and your bluebooks with the proctor. If the proctor is not present, you must leave your examination, any scrap paper, and your bluebooks on the desk at the front of the room. You may not discuss the examination with anyone or consult any materials while you are out of the exam room.

If you leave the exam room, you must exercise a very high standard of care in exiting and entering the room in order to minimize disruption and noise that will distract other students.

9. *Makeup Exams*

Because certain members of the class may be taking a makeup exam, it is a violation of the Honor Code to discuss this examination with any class member who has not yet taken it. Do not discuss this examination with any students not in this class until after the makeup exam period is over. Do not discuss this examination with any student in the class without first asking him or her whether she has taken the exam. Abide by the Honor Code in this and in all other particulars.

10. *Compliance*

Failure to follow any of the directions provided with this examination will result in such penalty as I deem appropriate to the nature and degree of the violation. *The spirit of these instructions will be enforced as well as their letter.*

11. *Pledge*

In placing your identification number on your bluebook covers or typed answer, and on the examination pages, you are pledging that you have not received or given any unauthorized aid in preparing for or taking this examination or violated any of the instructions given here. Such behavior is grounds for the imposition of a variety of sanctions, including expulsion from law school.

*B. Instructions Specific to this Particular Exam**1. Structure*

The final examination is designed to be two hours in length. It consists of one integrated fact pattern and an assignment from a law firm partner relating to that fact pattern.

2. Suggested Time Allocation

NOTE: The instruction below is only applicable to the actual final, not to this Practice Final Problem, which does not follow an ideal distribution of issues.

The emphasis of this examination is roughly proportional to the emphasis of the four areas of intellectual property law covered in class. Our class coverage by time is approximately: fifteen percent (15%) trade secrets; thirty percent (30%) patents; thirty percent (30%) copyright; and twenty-five percent (25%) trademarks.

3. Materials Needed

To take this examination, you may/will need a copy of the assigned casebook and supplement. I also recommend that you have a dictionary. Bluebook exam takers will also need a pen and bluebooks.

According to the Examsoft FAQs, typing exam takers should also have bluebooks and writing instruments as a backup mechanism in the case of technical difficulty.

4. Applicable Law

The law applicable to this examination is the law covered in this class from: the assigned reading from the casebook and supplement, the primary statutory provisions relating to the assigned reading materials, and the law provided in the class overheads (collectively, the "Materials"). Be sure to answer all questions on the basis of the law provided in the Materials.

There are some situations where the Materials provide alternative rules or tests for resolving a specific legal issue. In these instances, except for trade secret issues (see below) the "majority" rule is the rule or test relied on by the majority in a primary case in the casebook/supplement. Any other different tests or rules, whether mentioned by the majority opinion, offered in a dissent, described in the notes to the case, or given in the overheads, are alternative or "minority" rules. Please note that for a small number of issues the overheads give additional law beyond that provided in the casebook/supplement. This instruction does not necessarily mean that issues exist in this examination requiring the application of alternative or minority rules. Nor will it always be necessary to analyze any or all such alternative or minority rules depending on the facts provided.

With respect to trade secret issues, the provisions of the Uniform Trade Secrets Act ("UTSA") are the "majority" rule, whereas the law in the Materials based on the common law of trade secrets, derived primarily from the Restatement, when different, is the "minority" rule. However, the common law cases are strong persuasive authority for the UTSA majority rule.

5. *Recommendations for Exam Taking*

Grades for this examination will be based upon both the correctness of answers and the quality of discussion, including articulating arguments on both sides of an issue. Issue spotting is important to your performance. Many, but not necessarily all, of the facts in the examination problem(s) are relevant to an issue arising under the examination's fact pattern. References to relevant primary statutory provisions and cases will be marginally beneficial, but only if the reference is correct. Even more important than citing a source for a rule, is to correctly state the rule that you apply to an issue.

Plan out your answers, at least briefly, before you start to write, so that they are clear, well-organized, and succinct. Relevancy of discussion is more important than length of discussion - although the examination will be time-pressured and factually dense, the best answers are not necessarily those that contain the longest discussion. On the other hand, it is to your benefit to demonstrate your reasoning, especially in order to allow me to account for partial credit when only part of the analysis of an issue, test or rule is correct. Stick to the problem's facts and be judicious and even-handed in the factual inferences you draw. Write your answer based on the problem's facts, not based on an alternative hypothetical set of facts of your own creation.

Abbreviations can be useful when writing an exam answer because they save time and allow one's thoughts to not be interrupted writing a long phrase such as "person of ordinary skill in the art." Writing POSITA is much more efficient. However, students should be careful in use of abbreviations. They should always be defined on the student's answer. They should not be overused. The best choice for any abbreviation is one that you know the professor is familiar with, say, for example, because the professor used the abbreviation in overheads or in a model answer.

Budget your time to discuss and resolve the most prominent issues arising under the facts. It is better to ensure that you cover all the major issues before spending time on minor issues or minority rules. The discussion of issues raised by this examination should roughly approximate the percentage of time spent covering each area of intellectual property. Budget your time accordingly.

6. *Starting and Stopping the Exam*

Excluding the cover page, there are seven (i - vii) preliminary pages to this examination. The actual examination problem(s) section has two (2) pages. 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.

When time is called, stop writing immediately.

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

II. PRACTICE FINAL PROBLEM

A. *The Background*

Ron Redolent makes scents that he sells in mass merchandise room air fresheners. His lab is located in a wing of his house. Redolent hired Tim Carpenter to build shelves in Redolent's house, asking Carpenter to stay in the area of the house where the shelves were located. One afternoon when Redolent is out, Carpenter strolls around the house to stretch his legs. He wears a tool belt around his waste. He wanders into the lab, entering through a door with a deadbolt, but which is not locked. The lab windows are all covered by internal shades. Carpenter sees a display that says "Free Samples of the Summer Breeze[®] Scent" that has small vials of a liquid. The display is for a shopping mall promotion Redolent will shortly attend, but Carpenter thinks it is an invitation to try the scents, which he wrongly presumes to be cologne. He applies some to himself and turns to leave the lab. As he turns, his tool belt bumps a nearby table. A small flat bottle falls into a pouch in Carpenter's tool belt. Carpenter does not know that the flat bottle is in his tool belt. The flat bottle has a label. The label is a sketch drawn by Redolent in pastel colors showing an assortment of vegetables. The flat bottle's cap has an irregular, knobby, bulbous shape. Redolent whittled the cap, roughly intending it to resemble broccoli, but knowing that the shape would facilitate a better grip. The air scent Carpenter applied to himself contains two active ingredients. The flat bottle contains "active ingredient one" ("AI1"). Redolent does not let AI1 out of his lab. All AI1 flat bottles have the same label. Redolent has a U.S. patent that covers active ingredient two ("AI2"). When both active ingredients are mixed with other inactive materials into the final Summer Breeze scent, it is extremely difficult and very costly for the best experts to determine the makeup of AI1.

Later that evening, Carpenter's girlfriend, Fran Fragrant, gets a good whiff of the air scent Carpenter applied to himself. With exposure to the atmosphere, the smell of the scent has gotten stronger during the day, a unique and marketable characteristic of Redolent's air scent. Carpenter explained how he had the opportunity to try the scent at his job that day. Fragrant then sees the flat bottle with the funny broccoli cap in Carpenter's tool belt. When Carpenter is not in the room, she takes the flat bottle, opens it and smells AI1, and immediately recognizes it as a part of the scent on Carpenter. She puts the flat bottle in her purse. Fragrant later asks Carpenter whether he obtained anything at his job that day. Carpenter says he was working at Redolent's house, but that Redolent was not at home to give him anything nor had he taken anything. Fragrant, who works in the perfume industry, has heard of Redolent for his eccentric habit of keeping his secret ingredients in bottles with funny vegetable caps.

During prosecution of Redolent's patent he amended a portion of claim one, written in open-ended format and describing the makeup of AI2, from "having 2-5% of AI2 derived from a mash of beets with a root part having a substantially red or substantially purple color" to "having 2-4% of AI2 derived from a mash of beets with a root part having a substantially red or substantially purple color." The written description of the patent explains that Redolent's embodiment of AI2 makes the mash from the beet plant roots, but does not mention the leaves. Redolent amended not in response to prior art, but because he discovered during experiments after filing for the patent that with five percent of AI2

derived from the mash there was a tendency for the air scent to stain items, and he thus considered 2-4% his invention.

B. The Dispute

Several months after Carpenter built the shelves, Redolent's adult son is out shopping. He has seen the flat bottle label only a few times over the last few years. Redolent's son notices a birthday card with a black and white outline of an assortment of vegetables. The assortment looks familiar to him, so he buys the card and gives it to Redolent, who compares it to the AI1 flat bottle label. The exterior border of the black and white outline matches perfectly, but there are only some internal black lines separating the vegetables. The internal lines, however, match exactly with the boundaries between certain vegetables in the pastel-colored label. The back of the card has a company name of Fragrant Enterprises, Inc. Redolent sues Fragrant Enterprises, which is owned by Fran Fragrant. During discovery the following additional facts are discovered: (i) Fragrant mass produces and sells a low-end perfume in a bottle with a cap that has exactly the same shape as Redolent's broccoli cap, but is twice as large and is colored fluorescent orange; (ii) Fragrant makes a new name for her perfume, Somber Eaze™; (iii) Fragrant's perfume is made from the same materials in the same proportions as Redolent's air scent except Fragrant's version of AI2 is only 1.95% derived from a mash of the leaves of beet plants having the root part of the beet colored in various shades of the color orange, and Fragrant's perfume has small bits of ground-up bay leaves; (iv) the scent of Fragrant's perfume is substantially similar to Redolent's air scent; (v) Fragrant keeps separate accounts for her perfume and card business, the only card she sells is the card Redolent noticed, and Fragrant gives seventy percent of her card profits to a bona fide charity that rents space in a building Fragrant owns; and (vi) customers have come to know Fragrant's perfume by its funny broccoli cap.

C. The Assignment

You are an associate in a law firm representing Redolent. To amend the complaint to respond to the additional facts uncovered thus far in discovery, the partner wants an informative memo that does the following: (i) discusses all the claims Redolent should bring or consider bringing (including any claims Redolent may have brought in the original complaint); (ii) evaluates the legal basis of each claim from Redolent's perspective and Fragrant's perspective, articulating defenses and counter-arguments Fragrant might assert; (iii) assesses the strength of Redolent's and Fragrant's arguments; and (iv) determines for each issue whether Redolent or Fragrant is likely to prevail and explains why.

Since discovery is ongoing, if there are any additional facts that would materially impact the outcome of a particular issue, the partner would like you to note what such facts would be. In such case, briefly describe how such facts might impact the outcome, i.e., indicate the differing results that would ensue from different reasonable factual assumptions.

The partner would like the memo organized by area of intellectual property law; however, the memo does not need a general introduction. The location of final jurisdiction and/or venue for the expected trial is unknown at this time, except that it will be in federal court. Thus if there are any relevant and significant outcome-determinative differences in majority/minority rules, the partner would like these briefly noted and briefly analyzed if the facts are available to do so.