

## FINAL EXAMINATION

## INTERNET LAW

## PROF. VETTER

*1. Essay Exam*

This examination consists of three sections, each of which presents a (i) problem, (ii) issue, or (iii) opportunity to discuss policy; or presents some mixture of these three. The sections may or may not build upon each other's facts (each section will signal whether it does so). 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: Section A (45%); Section B (30%); Policy Analysis Section (25%).

*2. Open Book*

This is an "open materials" exam. You may use course 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 or obtain direct or indirect information or assistance from anyone. You may not use any live or electronic retrieval/computer source during the exam.

*3. Single-Part, Multi-Section Exam*

This is a single-part examination. If you finish the analysis for a section, go immediately to the next section.

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.

*4. Time Allotted*

The final exam is three (3) hours in length.

*5. Page Length*

The problem and fact pattern is six (6) pages in length, pages 5 to 10 herein.

*6. Release Prohibited*

I have not determined whether I will make this examination available in the future. Accordingly, I am prohibiting it from release. Please return all problem pages. Copying, reproducing, or memorializing the problem in any form or fashion is prohibited.

*7. Other Instructions*

If using a blue book, please write on only one side of the page. Put your Exam Number on each blue book.

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Please bring your copy of the assigned casebook to the examination. Besides the course casebook and assigned supplemental materials, also bring the following to the examination in printed form: the course overheads.

The law applicable to this examination is the law covered in this course from: the assigned reading from the casebook and any assigned supplements on the course web page, and additional law (if any) provided in the course overheads (collectively, the “Materials”). In my upper level Intellectual Property courses the Materials also include the primary statutory, regulatory, or treaty-based provisions relating to the assigned reading materials. Be sure to answer all questions on the basis of the law provided in the Materials.<sup>a</sup>

Write an analysis for each of the issue(s) raised by the facts or information enumerated in the examination sections. Even if the facts build from some real-world events, persons or situations, use the facts as given. 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.

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.

The policy oriented section is designed to allow one to employ some of the various policy arguments that arose during the course. These arguments include, without limitation: institutional considerations for the various structures and organizations underlying the internet and the laws relating to it, including the intellectual property system; effects and causes of these structures and systems; efficacy, reliability, fairness and justification of the regimes that might regulate or impact the internet and commerce over it; and the impact of all this on individuals, companies, countries, society, and culture. 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 problem(s), dispute(s) or question(s) posed in the policy-oriented section.

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<sup>a</sup> There may be some situations where the Materials provide alternative rules or tests for resolving a specific legal issue. In these instances, the “majority” rule is the rule or test relied on by the majority in a primary case (or the primary cases) in the casebook/supplement. Any other different tests or rules, (which could be multiple) 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. This instruction does not necessarily mean that issues exist in this examination requiring the application of alternative or minority rules. And, it may or may not be necessary to analyze any or all such alternative or minority rules depending on the specific examination instructions and/or the facts provided. Finally, some areas of doctrine don’t have a “majority” rule as presented in the casebook.

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 facets of the issue.

The “policy” section, however, is not completely divorced from the doctrine studied in the course. Question(s) in the “policy” section may require familiarity with or recognition of the doctrine studied in the course in the context of specific course cases and examples.

For the non-policy sections, write a short analysis for each of the issues raised by the facts enumerated in the examination question, **based only on the law from the Internet Law course**. Given the course focus, most issues are instances of some type of infringement or other violation of law relating to the internet. The analysis should communicate the following as briefly as possible based on the facts available: (i) discuss the arguments, positions and rights that the plaintiff/initiator should assert, or has asserted,<sup>b</sup> against the defendant(s)/respondent(s); (ii) evaluate the arguments and substantive merits from each side’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 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 copyright issue, and you have already related the elements of a test 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 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.<sup>c</sup>

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<sup>b</sup> The examination question may be written in such a way that certain issues are clearly “in” the case/dispute because they have been asserted by either party. 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 may also indicate that certain other possible issues are “out” and not to be analyzed because the parties disclaim certain issues or protections.

<sup>c</sup> 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.

As a general matter, the course Materials did not focus on invalidity/protectability issues within the intellectual property regimes studied in relation to the internet. Thus, while intellectual property infringement doctrine and issues are clearly important, not all basis for invalidating the relevant intellectual property were studied. Thus, for example, if a mark is at issue, proceed directly to any infringement issues and treat invalidity issues only in the context of a defense, and only for any invalidity basis actually studied in the course. As a general statement, invalidity basis were treated to a greater degree in studying the law of marks in relation to the internet than during the study of copyright in relation to the internet.

Your written answer does not need a general introduction. Proceed immediately to analyzing the issues. The location of final jurisdiction and/or venue for the expected case/dispute is not a part of the analysis except where clearly indicated in the call of a section's question(s).<sup>d</sup>

Apply the majority rules from the applicable law. Thus, your analysis can ignore any significant outcome-determinative differences in majority/minority rules and need not supply/apply minority rules. In some instances there is no clear "majority" rule in internet law, so apply the rule given greatest emphasis during class discussion, recognizing that virtually all the points can be earned on an issue with such ambiguity in the doctrine by application of one of the dominant approaches. Probably the main way in which minority rules or dissents are relevant is that they sometimes provide inspiration for counterarguments.

You should analyze clearly presented (either explicitly or by the facts) issues in the case/dispute even if your analysis determines that the relevant item of intellectual property is invalid, recognizing that invalidity analysis was not an emphasis in the course. In a real court opinion concerning trademark, for example, if the court holds that the defendant/respondent wins on an invalidity issue, the court might not analyze the infringement test to determine if the accused product/use infringes the mark. On this examination, the infringement analysis is paramount.

**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)*

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<sup>d</sup> Analyze and discuss the probable ultimate outcomes under the substantive law studied. Do not analyze any intermediate standards, such as likelihood of success in obtaining a preliminary injunction. In addition, we did not study the details of potential remedies or damages, so do not discuss these items in detail.

A. *Section A (45%)*

Danielle White was an assistant host for a popular television game show that aired during the late 1980s and early 1990s. Her on-air name was “Vanta” White. The family-appropriate game show was called “Reeling in Fortune”. Her fame came from her beauty and style while on camera. During the height of her popularity, she was on the cover of a 1987 Playboy magazine monthly issue. Her contract with Playboy (a company) designated her as the “May 1987 Playboy Magazine Cover Girl.” Her fame expanded in the late 1980s when a consumer electronics company, SanStruck, depicted her as a futuristic robot in a series of television and print commercials. Danielle’s public career under the name Vanta White ceased in the early 2000s as the game show concluded<sup>1</sup> and she otherwise diminished her public appearances.

In 2005, Danielle registered the domain name “playbot.com”<sup>2</sup> and established a web site: “www.playbot.org”. The passive content therein began with this title for the main page:

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<sup>1</sup> Playboy purchased all interest in Reeling in Fortune when the show concluded, and, beginning in 2003, it began selling a traditional board game styled after the television show.

<sup>2</sup> Danielle also registered the .com, .net, .biz and .info top level domains (TLDs) for playbot. All these TLDs resolve to www.playbot.com, were she has different content compared to www.playbot.org. The .com site: (i) has many dozens of often-clicked ads from a third-party ad-serving network (“TPASN”); (ii) three links; and (iii) a link to the site terms of use, which include a privacy policy promising to keep all transactional data entered on the site private. Danielle created some software technology such that her .com site only brings forward Playboy ads from the TPASN. Thus, all of the many dozens of ads are from Playboy or its subsidiaries.

*From your favorite game show hostess and Playboy Magazine Cover Girl,  
this site is dedicated to commentary about how modern media robotizes women*

The main page listed eight links to material about how the media portrays women, with three of the links to documents hosted on the site, authored by Danielle, with the other links to similar essays on third-party web sites. The www.playbot.org site metatags included “Playboy”. Danielle purchases keyword advertising from Google where she specifies the word “Playboy” as a keyword, with the linked results going to either her .org site or her .com site based on parameters she configures in the Google algorithm.

Danielle likes playbot because on a standard keyboard the “T” is to the left of the “Y”. Thus, many users go to the .com web site when they meant to type in playboy. Each morning, for several hours, she leads an internet chat room group, called “Kumbaya”, comprised of “one thousand of her closest friends,”<sup>3</sup> to www.playbot.com, where she clicks happily and steadily on the ads, cheering all of Kumbaya to do the same with pithy text messages to the chat group. She once said to a friend: “Kumbaya is great exercise for my hand, arm, and soul, but I also really like the fifty percent increase in ad revenue it brings to my .com site.”

To protect her interest, Danielle registered PLAYBOT as a mark in Tunisia even though she has never been to that country. Playboy initiated a UDRP arbitration against all of Danielle’s playbot TLDs. Despite minimally crediting Danielle’s Tunisian mark, the UDRP panel did not transfer the playbot TLDs to Playboy, declining to find that Danielle used or registered them in bad faith. In her responses to the UDRP panel, Danielle did not discuss Kumbaya, but merely

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<sup>3</sup> Actually, Danielle knew none of the thousands of persons on the chat room, but this was her colloquial phrase to help her feel a sense of community with the internet chat room.

described the .com site as a web site carrying some content and some advertising. She noted that one of the three links on the .com site was to www.playbot.org, which provides commentary.

Of the other two .com site links, one goes to a scanned copy of a 3-page article that Danielle hosts on her site. The article is by a Playboy reporter and appeared in a 1989 edition of the Playboy magazine. It discusses the Reeling in Fortune show. Danielle never asked Playboy about posting the article, but simply scanned it herself and posted it.

The last of the three links presents a page where Danielle's .com site sells used copies of the Reeling in Fortune board game. The transaction can be completed on her site after entering demographics and a credit card. The computers handling the transactions are located in Oklahoma. Danielle doesn't know this because she outsources her e-commerce processing to a third-party. She ships the used games via Federal Express, but wraps the original game in a container of her own design showing her smiling face with a cartoon bubble exclaiming: "Enjoy your new game from the Playboy Cover Girl who ornamented the original."

Playboy sues Danielle for trademark likelihood of confusion for PLAYBOY<sup>®</sup> based on her web uses. It brings an ACPA action to transfer all the playbot TLDs to it.<sup>4</sup> Separately, Oklahoma has a tortious injury law that might be satisfied by the game repackaging (i.e., the repackaging injures Playboy), so it wants to evaluate state long-arm and constitutional jurisdiction over Danielle in Oklahoma (OK).<sup>5</sup>

<sup>4</sup> Analyze the trademark, ACPA, and any fraud or other actions, without regard to jurisdiction. The ACPA action is timely with regard to the UDRP.

<sup>5</sup> Besides the facts herein, Danielle has no other contacts with OK, except board game sales into OK. OK's long-arm statute is as described for Virginia at pgs. 380-81 in the casebook.

*B. Section B (30%)<sup>6</sup>*

After years of selling used Reeling in Fortune board games, Danielle has a database of aficionados for the game. Playboy heard rumors that some companies had this database (which allowed them to out-market Playboy to that group with other game-themed merchandise), so Playboy hired a private investigator who approached Danielle, offering to buy all the .com site transaction records with complete personally identifiable information for used game sales. Danielle sold the information, remarking to the investigator that he was her 23<sup>rd</sup> such sale.

Playboy holds the U.S. copyright in the musical work entitled “Time in the Mansion,” which it released in 1997 on CD through a major record label company as performed by the Heffner Singers in 1997 (they assigned any copyright interest they might have to Playboy). With her beautiful singing voice, in early 2006, Danielle performed the work under conditions qualifying for the 17 U.S.C. § 115 “compulsory mechanical license.” She paid the ASCAP/BMI license fees for any internet broadcast of the musical work and modified her .org web site so that as soon as a visitor arrived at the site it alternatively played her performed version and then the Heffner Singers performed version. It would continually alternate for however many hours a visitor remained at the site. Danielle also registered for and paid the fees for the compulsory license of the digital transmission performance right under 17 U.S.C. § 114.

Danielle programs a software add-in for popular web browsers. The add-in facilitates specialized internet searching for images from Playboy’s magazine or its online materials. The add-in is capable of discovering even images scanned from old Playboy paper magazines. She adds a 4<sup>th</sup> link to her .com site, leading to an ad-free page where users can download the add-in.

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<sup>6</sup> The Section B facts build on the Section A facts.



The download page (and the help files for the add-in) has information sufficient to allow someone to send a valid § 512(c)(3) notice to Danielle, although both also contain strong warnings against downloading infringing material. The add-in search results always list the following as the top line: “results brought to you by www.playbot.com – the internet’s hottest site!”<sup>7</sup> Danielle programmed the add-in to check results against a centralized “blocking list” she keeps on her servers before showing results to the user. Any material prohibited by a valid § 512(c)(3) notice is given in the list, which thus acts as a filter of the results before display to the user. Danielle typically waits about 2 months after receiving such a notice to place the links in her blocking list. She remarks: “that delay ensures a return on my investment in programming the add-in because it allows more user traffic to land on www.playbot.com.”

Playboy asks the Federal Trade Commission (FTC) to proceed against Danielle, reporting to the FTC what the private investigator discovered. Playboy sues Danielle for copyright infringement of works related to the activity with “Time in the Mansion.” With respect to her browser add-in, Danielle claims that she is not inducing any copyright infringement, and, alternatively, that she is covered by 17 U.S.C. § 512(d).

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<sup>7</sup> Danielle programmed tracking capabilities in the add-in, so she knows that 30% of the users, upon first use of the add-in, navigate to her .com site, and half of them click on one or more of the ads she displays there from the TPASN. The tracking capability also lets her estimate that about one-third of the material discovered by her add-in is infringing. She was shocked to discover that the percentage was so low; her original estimates before deciding to create the add-in were in the 75-90% range.

C. *Policy Analysis Section (25%)*<sup>8</sup>

Senator Smith reads the Laudon article on pages 451-52 in the casebook. As a result, he proposes the following:

(i) that the U.S. Department of Commerce pressure ICANN to cause the mandatory promulgation of a web term statement (“WTS”) in such a way that it appears in every statement of terms of every web site on the internet;<sup>9</sup>

(ii) the WTS states: “persons visiting this site, whether individuals or entities, own their information, whether entered into the site in any way, or whether derived by the site from the person’s activity on or in relation to the site”; and

(iii) that the FTC advertise to the general public the existence of the WTS, hoping to promote a norm in the surfing public to assert ownership in their information.

Critique from a policy and legal perspective Smith’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 likely concern Smith?

**END OF EXAMINATION**

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<sup>8</sup> This section is independent of the prior two sections.

<sup>9</sup> The ICANN promulgation would be similar to the requirement that domain registrars require implementation of the UDRP, but would extend to the affirmative obligation to incorporate the WTS into all site terms if that site wants to use the domain name system (which all sites must, in effect, do).