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C. Instructions Specific to this Particular Exam

1. Structure

The final examination is designed to be two hours in length. It consists of two sections.

a. “Policy” Section

The first section is policy oriented. It is designed to allow one to employ 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.

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 application of the class doctrine to specific fact patterns.

b. IRAC Section

The second section contains a partially integrated fact pattern designed to raise issues for resolution using the traditional “IRAC” format (Issue-Rule-Application-Conclusion).

2. *Suggested Time Allocation(s)*

The emphasis of this examination is roughly proportional to the emphasis of the areas covered in class.

Specifically, the IRAC section is worth approximately fifty percent (50%) of the raw points available, and the “policy” section is worth approximately the other fifty percent (50%).

Each section has some number of clearly separate components. The examination indicates the approximate percentage of total points each component is worth.

3. *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 component of each section*

Start a new bluebook before beginning your analysis of each major area or logical subdivision. Remember to put your personal identification number on the cover of the bluebook.

Specifically, start a new bluebook, or if typing – create a page break, for each clearly separate component of each section.

4. *It is **strongly recommended** that you read the “Assignment” section before you begin*

No matter what you do, please read the “Assignment” section before you begin writing. Further, it is **highly recommended** that you read the “Assignment” section first before reading the question section(s) of the examination.

5. *Starting and Stopping the Exam*

The actual examination problem(s) section has a total of four (4) 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.

“Warning” that the end of the exam period is approaching will be given by the proctor writing on the blackboard 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. POLICY SECTION

C. *Tripping up TRIPS (approx. 25% of the total points)*

Senator Bessie Smelms is dissatisfied with TRIPS for the following reasons: (i) U.S. losses before DSB panels in IP cases; (ii) the continuing U.S. trade deficit, which IP exports have not alleviated; (iii) her perception that TRIPS is unfair to the U.S. because least developed countries (LDCs) have implementation delay accommodations and other special provisions; and (iv) concerns about loss of U.S. sovereignty and self-determination.

Sen. Smelms is the most powerful person in the U.S. Senate.¹ As a result, everyone takes notice when she floats an idea for new legislation. To remedy the problems she perceives with TRIPS, Sen. Smelms has recently proposed the following as possible legislation:

- (i) That the U.S. negotiate a withdrawal from TRIPS, and seek to dismantle TRIPS.
- (ii) To replace TRIPS, the U.S. should negotiate with its trading partners and create multiple bilateral treaties for IP protection and enforcement.
- (iii) The U.S. should impose reciprocity obligations in the new treaties so that the U.S. provides to foreign IP works only the rights that the foreign jurisdictions provide to U.S. IP works; after all, as Sen. Smelms said in a recent speech: “There is no reason they should get better from us than what they give to us.”
- (iv) As a backup plan to enforcement provisions in the new treaties, to enable real enforcement of IP rights, enact legislation to make U.S. courts available for adjudication of IP disputes for acts anywhere in the world, and make U.S. law applicable to such acts. In a recent speech Sen. Smelms criticized U.S. courts: “Cases such as Subafilms in the scandalous Ninth Circuit show that our Federal courts have been timid and spineless in enforcing IP rights violations overseas.”

¹ Many other Senators owe her favors. She controls several key committees and has the longest tenure of any current U.S. Senator.

D. Digitizing Professors (approx. 25% of the total points)

Sen. Smelms generally dislikes Federal judges. She is, however, a big fan of Judge Poser, of the U.S. Federal Court of Appeals for the 13th Circuit. Six years ago, while on the 13th Circuit, Judge Poser authored a copyright opinion where he articulated the contours for Professors' Digital Fair Use ("PDFU"). The PDFU doctrine defines a certain type of educational fair use as follows: It is presumptively fair use for University and community-college professors to convert analog-fixated copyrighted works into digital format when (i) such analog works are lawfully made or acquired, (ii) the amount that is converted is limited to the amount of the work necessary to be performed, displayed, or reproduced for student use, in the course of the professors' regular classroom instructional activity, (iii) all non-purely-digital works listed under 35 U.S.C. § 102 qualify for PDFU, and (iv) the sole use of the converted works is for the professor to post the materials to a restricted-access class web site for viewing and downloading by the students prior to the class in which the works are to be used or taught.

Judge Poser justified the PDFU doctrine using economic analysis demonstrating how the aggregate increase in societal wealth resulting from better education would compensate content-holders for any perceived short-term loss. A better educated populous would produce more customers for the content-holders' products. During the first four years after the PDFU opinion issued, only three 13th Circuit district court cases relied on it to exonerate professors. During that time, however, two other Courts of Appeals for other Circuits refused to follow the PDFU opinion, calling it bad law.

Two years ago, Sen. Smelms had the PDFU doctrine enacted into U.S. copyright law. She said "we must support U.S. education and cannot deprive students of foreign works that are priced too high." Since the PDFU doctrine arose, only 5% of professors could rely on it because the rest lacked digital scanners. However, in the next two years, 55% will have scanners.

Worried about material being scanned and made available to students, a consortium of European content-holders caused the EU to cause the WTO DSB to create a panel to review this dispute.² The consortium alleges that since the PDFU doctrine arose it has violated TRIPS.

III. IRAC SECTION

C. Trademark Issue(s) (approx. 30% of the total points)

Mr. Wonder solely owns Wonka Chocolate, Inc. (“WCI”), a Canadian company. WCI makes exquisite chocolate. Since the early 1980s it sold its chocolate in Canada and in European countries under the mark “Wonka Chocolate.” WCI, however, did not sell in the U.S. until the late-1990s because, as Mr. Wonder said, “the Americans do not appreciate our fine chocolate.”

While the word “wonka” has no meaning in any English-speaking country, Mr. Wonder discovered when traveling in Indonesia in the late 1970s that a small company there (“Disputant1”) sold in the local market a chocolate-like sweet treat under the mark “WONKA.” Liking the name, immediately upon his return to Canada in 1980, Mr. Wonder founded WCI and begins selling a chocolate formulation of his own devise under the mark “Wonka Chocolate.” WCI regularly advertised “Wonka Chocolate” in radio and print mediums that were received in the U.S. although primarily intended for the Canadian marketplace. In 1992, Disputant1, in the process of expanding its business, sold its first shipment of its sweet treat to a U.S. distributor and later that year filed for a U.S. trademark for WONKA for the treat. In 1993, WCI filed for a U.S. trademark for “Wonka Chocolate,” claiming a date of first use in the mid-1980s based on his extensive evidence of media exposure in the U.S. and some U.S. customer recognition of the mark. WCI also obtained a legal opinion that its use in Canada of the word “Wonka” did not violate Disputant1’s rights. The U.S. PTO surprisingly allowed both marks. Later Disputant1 discovered the “Wonka Chocolate” mark and sought to cancel the mark in

² Before PDFU, approximately 25% of these content-holders’ analog-works annual sales were to U.S. professors. Adjusting for all other causal factors: (i) since the PDFU decision, this percentage has dropped 1% per year; and (ii) since the PDFU enactment, this percentage has dropped 3% per year.

U.S. district court.³ Among other contentions, Disputant1 alleged that even if the Canadian advertising was U.S. use, it was bad faith use of an appropriated mark in Canada.

To support its European exports, WCI registered the mark “WONKA-CHOC” in Denmark in 1995. In 1999, WCI applied for a CTM registration for “WONKA-CHOC,” claiming that the mark was distinctive. The OHIM (“Disputant2”) rejected the registration in early 2003 as descriptive because in one of the non-english speaking, non-danish speaking EU members states the word “wonka” meant “wonderful.” The OHIM reasoned that due to the pervasiveness of English use, the mark portion “CHOC” would be universally recognized to mean chocolate, and thus the mark was descriptive.

D. Patent Issue(s) (approx. 20% of the total points)

Mr. Wonder reformulated his chocolate in 2001, adding an ingredient called MI1. He holds valid patents to MI1 in all countries that offer patent protection for compounds.

Over the last 3 months a near-epidemic has developed in the Southwestern U.S., Brazil, and Mexico. Health officials call the deadly, spreading malady Severely Enhanced Acute Respiratory Syndrome (“SEARS”). A California doctor discovers that a ward of SEARS patients recover after a friend sends some reformulated Wonka Chocolate and they all partake. Further tests show that MI1 is a cure for SEARS. Eager to use her power for some positive public relations, and before anyone contacts WCI, Sen. Smelms causes a U.S. (“Disputant3”) law to be enacted that authorizes companies in the U.S., for the next 5 years, to manufacture MI1 for use in the U.S., Mexico and Brazil. She says: “Mr. Wonder and WCI would not sell us their supposedly exquisite chocolate for many years, so I expect that they would not sell us MI1 in this time of national emergency, and, anyway, we don’t have time to negotiate with the Canadians.” Brazil cannot manufacture MI1, but Mexico can. Given the effectiveness of MI1 against SEARS, officials estimate that SEARS will be eradicated in 1-2 years.

WCI causes Canada to cause the WTO DSB to appoint a panel to review the allegation that the U.S. law violates TRIPS.

³ On facts not related here, jurisdiction over WCI is proper in this U.S. Federal district court.

IV. THE ASSIGNMENT

The answer to either section does not need a general introduction. Please proceed immediately to analyzing the issues.

C. Policy Section

To answer the question(s) in the policy section, your role is that of an attorney with a Non-Governmental Organization (“NGO”). The NGO monitors the Senator’s activity. In particular, the NGO comprehensively reviews the Senator’s activities with respect to International IP. You have been asked to evaluate the proposal floated by the Senator and evaluate the dispute associated with the recent enactment secured by the Senator. Your evaluation is to be **based only on the policy and doctrine from your Spring 2003 International IP class**.

The NGO wants analysis that reviews both sides of the issue(s). It values both policy and doctrinal arguments bearing on the issue. It wants to know: what existing doctrines and well-known policies argue for and against the Senator’s proposal and enactment? The primary concern is with the merits of the proposal, its underlying bases, and likely effects.

The NGO is not interested in an analysis of the political viability or probability of the proposal or enactment. Nor is the NGO interested in whether particular branches of government have the power to implement the proposal or enactment. It may be that your analysis can only narrow certain issues based on the information in the section, but even if that is all that is possible, the NGO finds such narrowing useful.

D. IRAC Section

You are an associate in a multi-national law firm representing ____ (the “Plaintiff”). A firm partner wants you to write an analysis for Plaintiff’s problems with each of the Disputants enumerated in the section, **based only on the law from your Spring 2003 International IP class**. The analysis should do the following as briefly as possible: (i) discuss the arguments and positions that Plaintiff should assert or take, or consider asserting or taking, against each Disputant; (ii) evaluates the arguments and substantive merits from Plaintiff’s perspective and each Disputants’ perspective, articulating defenses and counter-arguments each might assert; (iii) assesses the strength of each party’s arguments; and (iv) determines for each issue who is likely to prevail and explain why.

If there are any additional critical 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 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.

Thus if there are any relevant and significant outcome-determinative differences in majority/minority rules or other variances in the applicable law, the partner would like these briefly noted and briefly analyzed if the facts are available to do so, but again only to the degree of one and only one alternative per any such issue.

Finally, the partner would find it useful if you would organize your answer according to the Disputants. Place your discussion for each Disputant under a separate section with its own heading.