

Civil Procedure
Midterm Examination
Fall 2009
Professor Davies

N.B. Multiple-choice questions omitted herein;
only the essay and short-answer portions of the exam are included.

EXAMINATION COVER SHEET

Student Examination Number: _____

**Midterm Examination
Friday, October 23, 2009
Autumn 2009**

⌚ Time Allowed: 1 hour, 30 minutes

Authorized Materials: This exam is open book. You may consult any hard copy written materials, but you may not receive assistance from other people.

Special Instructions: This exam consists of five parts:

- Fact Pattern
- Short Answer Question
- Multiple-Choice Questions
- Essay Question
- Bonus Questions

The exam is being graded on a 100 point scale. The bonus questions at the end are worth up to a total of 3 additional points. The point value of each section in percentage terms is as follows:

Short Answer Question – 20%

Multiple-Choice Questions – 20%

Essay Question – 60%

The **Fact Pattern** provided at the beginning of the exam is common to all questions. You may answer the question sections in any order you choose, but a grasp of the **Fact Pattern** is necessary for each section (excepting the bonus questions).

With respect to the short answer and multiple-choice questions, record the question numbers and your answers to each *in your word-processed answer*

or, if you are using one, *your Bluebook*. Do not write your answers on the examination itself.

You will be graded both on your ability to spot the issues of law, fact, and policy presented and on the quality of your analysis of those issues. Organize your answer before you begin to write. Concise expression and clarity of analysis will be rewarded in grading.

The essay question may fail to provide some information that you consider important. Should you find it necessary to make assumptions beyond those stated in the question, clearly explain your assumptions and their significance in your answer.

There are 12 pages to the exam, not including this cover sheet. Make sure you have all of them.

When time is called, you must stop working on your exam immediately and turn in your copy of the exam and your answers.

Good luck!

GENERAL INSTRUCTIONS FOR ALL EXAMS:

1. Exams do not leave the exam room! Write your exam number on your copy of the examination questions, and return it to the proctor at the end of the exam.
2. Students may NOT take any bluebooks or scratch paper from the examination room, whether blank or used. Return to proctor.
3. If you are using a bluebook print your exam number, the title of the course and the instructor's name on the front of each bluebook.
4. Number each bluebook (1 of 3, 2 of 3, 3 of 3, etc.) and place all bluebooks and examination questions inside the first numbered bluebook.
5. If the examination utilizes a computer answer sheet (Scantron):
 - You must use **BLACK** or **BLUE INK** only; no pencils
 - You may use **CORRECTION TAPE** only; no liquid paper
 - Print your examination number in the box found in the lower left-hand section of the form. Write the number in the first 4 spaces, and zero-fill any remaining spaces.

For example, if your examination number is 2983:

IDENTIFICATION NUMBER

2	9	8	3	0	0	0	0
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Fill in the bubbles corresponding to the numbers written.

Fact Pattern

Miley Cyrus is an extremely popular “country-crossover” music star who was launched to fame by the Disney entertainment juggernaut, in her role on the cable television masterpiece *Hannah Montana*. Now, however, Miley is striking out on her own. She scored a risqué photo shoot for *Vanity Fair* magazine. She has a new tour and her own album—sans any “Hannah” songs. And she has a budding romance with fellow pop star, Justin Bieber, the 15-year-old Canadian wunderkind behind the smash hit song, “One Time.”



Miley Cyrus



Justin Bieber

Miley’s new single is a song entitled “Party in the U.S.A.” Social and media magnate, Jay-Z, a rap icon with albums such as *Reasonable Doubt*, *Kingdom Come*, and *The Blueprint* to his name, is driving through Brooklyn in his new Toyota Prius flipping radio stations. Jay-Z’s radio lands on FM 107.8, “The Late Greats,” when the announcer shouts, “Next up, baby, baby, baby, Miley’s new cut, the super sweet, super hot, hot, hot, we diggin’ it, ‘Party in the U.S.A.!’” Jay-Z, feeling a bit dejected because his new album is not selling and because he has just come to grips with the fact that he is now best known as “Beyoncé’s husband,” is too listless to change the station. When he hears the first of Miley’s song, however, he is incensed. The first verse and chorus to the song are:

I hopped off the plane at LAX, with a dream and my cardigan
 Welcome to the land of fame, excess
 Am I gonna fit in?
 I jumped in the cab
 Here I am for the first time
 Look to my right, and I see the Hollywood sign
 This is all so crazy; everybody seems so famous
 My tummy’s turnin’, and I’m feelin’ kinda homesick

Too much pressure and I'm nervous
Then the taxi man turned on the radio
And a Jay-Z song was on
And a Jay-Z song was on
And a Jay-Z song was on

So I put my hands up
They're playin' my song
The butterflies fly away
I'm noddin' my head like "Yeah!"
I'm movin' my hips like "Yeah!"
I got my hands up
They're playin' my song
I know I'm gonna be OK
Yeah! It's a party in the U.S.A.!
Yeah! It's a party in the U.S.A.!

"How can that [expletive deleted] say my song is her favorite?!" Jay-Z incants, pounding his fist on the dashboard. "A corporate patsy like that has no idea what my music is really about. This is slander, defamation, libel! I'm going to sue!"



Beyoncé Knowles



Jay-Z (a.k.a. Shawn Carter)

Jay-Z then dials his attorney, Barry Zuckerkorn, and leaves the following message: "Barry, Jay-Z here. I just heard this Miley song on the radio. She says my tunes are her favorite. This is bad. Bad! Bad as in actually bad, not good! We've got to sue. Someone like that shouldn't be able to dig my stuff. Saying she does hurts. Hurts! I know it's hurting sales of my new disc. Sue her. Yo, get on it, dog. Peace—and word to your mutha."



Barry Zuckerkorn



Ally McBeal

The next day, Zuckerkorn files suit in the United States District Court for the Southern District of New York. The suit is against Miley Cyrus on Jay-Z's behalf. It is served personally on Ms. Cyrus while she is on tour. After the caption and headings, the complaint states:

Plaintiff Jay-Z, a resident of New York, by his attorney, Barry Zuckerkorn, complains against Miley Cyrus, a resident of Tennessee, and states in support:

1. Miley Cyrus has taken actions to destroy my career. The assertion in her song, "Party in the U.S.A.," that my songs make her feel better, settle her tummy, and comfort her have eroded sales of my new record, *The Blueprint 3*. My prior records all have gone platinum in a matter of mere days. My new album, however, because of Defendant's insidious insinuation in her song, has not.
2. It is patently false that one of my songs could comfort a teeny bopper like Defendant.
3. It is patently false that one of my songs could be a favorite tune of a teeny bopper like Defendant.
4. The falsehoods stated in her song, "Party in the U.S.A.," namely that my song is one of her favorites and that hearing my song comforts her, have caused me harm, pain and suffering, damaged my business reputation, and harmed my business proceeds and profits.
5. Defendant's actions described in the foregoing paragraphs were negligent.

6. Defendant's actions described in the foregoing paragraphs were intentional and/or reckless.
7. Based on the foregoing, Plaintiff states a cause of action against Defendant for defamation.
8. Based on the foregoing, Plaintiff states a cause of action against Defendant for slander.
9. Based on the foregoing, Plaintiff states a cause of action against Defendant for libel.
10. Based on the foregoing, Plaintiff states a cause of action against Defendant for negligent interference with business relations.
11. Based on the foregoing, Plaintiff states a cause of action against Defendant for intentional infliction with business relations.

Wherefore, Plaintiff respectfully requests that the Court enter judgment against Defendant and award the following relief:

- A) Compensatory damages, in an amount to be proven at trial;
- B) Punitive damages, in an amount to be proven at trial;
- C) A permanent injunction barring any further copying, distribution, sale, or performance of the song "Party in the U.S.A.," coupled with a recall order to all stores currently possessing copies of the song and a cease and desist order to all radio, television, internet, and other media outlets foreclosing them from playing the song; and
- D) All other relief that the Court may deem just and reasonable.

/s/ Barry Zuckerkorn

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Attorney for Plaintiff

The substantive law applicable to the causes of action raised by Jay-Z's complaint is:

New York Code § 580A. Defamation Of Public Official Or Public Figure

One who publishes a false and defamatory communication concerning a public official or public figure in regard to his conduct, fitness or role in that capacity is subject to liability, if, but only if, he (a) knows that the statement is false and that it defames the other person, or (b) acts in reckless disregard of these matters.

New York Code § 568. Libel And Slander

(1) Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words.

(2) Slander consists of the publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than those stated in Subsection (1).

(3) "Defamatory" under this title means the act of harming the reputation of another by making a false statement to a third person or, with respect to a statement damaging a business, "defamatory" means the act of diminishing the reputation of that business with a false statement.

New York Code § 709. Engaging In Business For Purpose Of Causing Harm

One who engages in a business primarily for the purpose of causing loss of business to another and with the intention of terminating the business when that purpose is accomplished is liable to the other for the loss so caused. This liability may sound in intentional interference of business relations but not in negligence.

Part I – Short Answer Question (20 points)

Miley Cyrus has retained you and your law partner, Ally McBeal, to represent her in the lawsuit filed by Jay-Z. Ms. McBeal, however, is currently unavailable, as she is on an important archaeological excavation. You thus have decided to dig into the case by drafting an answer to Jay-Z's complaint. Please do so now.

(Because you have not yet decided whether to file the answer, you need not worry about the case caption, etc. Draft only the body of the answer.)

[This space left intentionally blank.]

Part III – Essay Question (60 points)

Following the court's ruling on your motion to dismiss, you and Ms. McBeal answer the complaint. Then, in a turn of events you have long been waiting for, the local CW affiliate offers you a job as an in-house legal commentator, and you accept. Accordingly, you leave your partnership with Ms. McBeal to become "the Dahlia Lithwick of Poughkeepsie," as the advertisements for your arrival at the station put it.

Ms. McBeal continues to push on with the case, which now has proceeded to discovery. In discovery, McBeal propounds the following interrogatory on Jay-Z:

Defendant's Interrogatory No. 23:

Describe in detail your record sales for each major full-length album ("LP") you have released. With respect to each album, state:

- (1) The date the album was released;
- (2) The total number of units sold;
- (3) The breakdown of that total by digital sales and in-store sales;
- (4) The number of units sold within 1 month of the album's release;
- (5) The number of units sold within 2 months of the album's release;
- (6) The number of units sold within 3 months of the album's release;
- (7) The number of units sold within 6 months of the album's release;
- (8) The number of units sold within 12 months of the album's release.

Zuckerkorn responds to this interrogatory with the following answer:

Plaintiff objects to this interrogatory on the grounds that it (1) calls for irrelevant information, (2) would be excessively costly and unduly burdensome to collect all the information requested, especially since Plaintiff has released no less than eleven best-selling blockbuster albums, (3) violates the Federal Rules of Civil Procedure because it combines more than one interrogatory into a single question. Moreover, all the information requested is available for a \$1,200.99 monthly subscription to Billboard.com's Insider Database. We are under no obligation to let you use our subscription, which we paid for with our own money.

McBeal calls Zuckerkorn in an attempt to convince him to provide the information, but to no avail. “Ally,” he says, “you know I’m not going to give that stuff to you. It’s a pain. Plus, we’re taking you and your corporate sycophant client down in this case.”

Meanwhile, in response to separate interrogatories they each had propounded previously, plaintiff and defendant learn the following information: (1) “Party in the U.S.A.” was written by Miley’s dad, Billy Ray, not by Miley herself, and (2) Jay-Z and Beyoncé last year secretly released an underground “mash-up” of their songs, “Izzo (H.O.V.A.)” and “Halo,” with Miley’s song, “Best of Both Worlds.”

As a result of these revelations, the court now has pending before it three separate motions:

- (1) Jay-Z’s motion to amend his complaint to add Billy Ray Cyrus as a defendant, based on the same causes of action sounding in the original complaint;
- (2) Miley Cyrus’ motion to amend her answer to add counterclaims against Jay-Z and Beyoncé for copyright infringement due to their use of her song in the mash-up that Jay-Z and Beyoncé released on the internet; and
- (3) Miley Cyrus’ motion to compel production of the information sought in her interrogatory number 23.

Both sides have vigorously opposed each other’s motions.

The court is set to rule, and your station’s news program wants you to do a live report from the courthouse predicting what might happen and commenting on what does. You, however, are very concerned with establishing credibility in your new profession as a reporter. Particularly since you were involved in this case previously, you do not want to seem biased in any way. Accordingly, you spend the evening before working through the legal issues, so you can make as fair and accurate an assessment as possible of where the court should come down.

Please reproduce those conclusions, with the supporting analysis, now.