

Submitted 10/25/00
original

**University of Utah
College of Law
Examination Cover Sheet**

Student Examination Number: _____

Intellectual Property

Reusch/Poulter

May 8, 2000 8:30 a.m. - Noon

Spring Semester 2000

Time Allowed: 3 1/2 hours

Special Examination Instructions: Open book

General Examination Instructions:

1. Print your Examination Number, the title of the course and the instructor's name on the front of every bluebook used.
2. 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.
3. Students **must submit the examination questions with the answers.**
4. Students who are typing must use the yellow paper provided.
5. Students may not take any bluebooks or scratch paper from the examination room, whether blank or used.
6. If the examination utilizes a computer answer sheet, print your Examination Number at the top of the front side of the computer answer sheet in the space provided. Complete the space marked "Identification Number" (on the back of the computer answer sheet) by filling in four zeros followed by your Examination Number. For example, if your Examination Number is 99999 fill in 000099999.

INTELLECTUAL PROPERTY

SPRING 2000

FINAL EXAMINATION

This examination consists of two sections, a short answer (Part I), worth 160 points (20 points per question) and an essay section (Part II), worth 80 points. You have three and one half hours to complete the exam. If you are handwriting the exam, write your answers in the space provided (you may use the back side of the page, but you should not need to). Use a bluebook for the essay. If you are taking the exam on computer, the short answers should be no more than ½ page each.

This exam is open book, defined as follows: you may bring into the exam the course text and supplement, print versions of any additional materials placed on the course web page, the statutory supplement, and any materials (ie, outline) that you have prepared yourself. You may not bring in photocopied or downloaded material from other sources. No electronic versions of any material may be accessed during the exam.

PART 1 — Answer EIGHT of the following nine questions:

The following facts will govern the first two questions.

Prue Jenks is a professor of art history at Podunk U. Over the years, she has collected reproductions of works of fine art from the major art museums in the United States. These prints generally are faithful reproductions of public domain works. All of them contain a copyright notice on the back. Last year, Prof. Jenks developed a web -based art history course, designed to be used in Podunk U's growing distance education program. The web page consists of much original content (historical narratives and analytical commentary), and links to other sources. She has also digitized a large number of her art reproductions and placed them on the web page.

1. One of the museums from which her reproductions were purchased has written to Prof. Jenks and demanded that she remove its copyrighted reproductions from her web page. Does the museum have a protectable interest in its reproductions? Why or why not? What counter arguments might Professor Jenks raise?

2. One of the links on Prof. Jenk's site is to another web site that has a very rich collection of digitized reproductions of modern art (post 1975). It is Prof. Jenk's understanding that this web site was built in the same manner as hers, ie, by digitizing prints obtained from various museums across the country. One of these museums has also written to Prof. Jenks demanding that she remove the link to this site. What might be the basis for the museum's demand? What possible responses might Prof Jenks make to this demand?

3. Pat Roberts has been in the coffee house business for years. About three years ago, he opened a little coffee bar across the street from the federal courthouse in downtown Salt Lake City and called it Federal Espresso. Judges and lawyers pack the place most of the time, and it has become highly successful. Roberts has just received a letter from the shipping giant Federal Express demanding that he cease and desist using the name Federal Espresso for his coffee bar. What would be Federal Express' basis for this demand? What are the chances that Pat Roberts will have to change the name of his shop?

4. Plaintiff Ale House, Inc., is an operator of a small chain of facilities selling food and beer in the southeast, primarily in Florida. Each of its facilities has very similar faux English pub exterior and interior decor, and each is named for its geographical location followed by "ale house" (e.g., Orlando Ale House). Ale House does not have a federal registration for its service mark. It has begun plans to expand its chain further across the southeast. Defendant Raleigh Ale House has just opened its doors in Raleigh, North Carolina. It is also a food and beer establishment and also uses an English pub type decor. Plaintiff Ale House has brought suit to enjoin use of the Raleigh Ale House name and for infringement of the decor trade dress. The judge has ruled in favor of the defendant. What might be the court's rationale for its ruling?

5. Jane Doe is a single mother of two young children. She has established a preschool in the basement of her split level home called "Fun 'n Games". It is in the first year of operation and she has obtained the necessary licensing and done some advertising, but it is definitely not yet paying the bills: so far the enrollment consists of her own two children, her nephew, and three neighbor children (the only paying enrollees). The enrollees range in age from 2 to 5 years. The daily routine at Fun 'n Games consists of morning outdoors play, weather permitting, arts and crafts, and group activity. Following lunch and naptime, they watch a video — usually a Disney or other cartoon, either from her own collection of videos or checked out of the library or rented from the local video store. Jane Doe has been informed by one of the parents that showing these videos is "illegal." Is it? Why or why not?

6. Ebay.com, the popular internet auction site, has initiated actions against two other e-auction web sites claiming that the other sites have blatantly imitated the look of the ebay site (see attached), including use of the "categories" and "what are you looking for" and "featured" items sections on the main page. Briefly evaluate the strength of Ebay's claims under copyright, trademark and misappropriation law.

The following facts govern questions seven and eight.

Jack Herman obtained a patent on a waterproof sock, designed to be worn inside a running shoe. He has sued the Brooks Athletic Shoe Company for making a waterproof sock he claims infringes the patent. The Herman patent claims a lightweight waterproof sock, having a heel and toe region, made of a “single-layer of light-weight flexible material” that is “substantially waterproof, to prevent the passage of water into the interior of the sock-type article through said material.” The material is also referred to in the claim as “moisture vapor permeable to allow passage of evaporated perspiration,” and as “breathable.” Various drawings show the sock as having seams, but the claim states only that there are “no seams in the sole and heel regions” of the sock.

In the infringement litigation, Brooks presented evidence of a prior art patent, the Bradley patent, which describes a seamless tubular sock, having a heel and toe region, designed to be worn inside a boot or shoe. The Bradley patent describes its invention as lightweight, “liquid impermeable” and “preferably air permeable.” Its purpose is to keep water from penetrating the sock, while allowing perspiration to evaporate through the sock.

7. Assuming the Bradley patent is prior art for the Herman patent, what is Brooks’ best argument that the Herman patent is invalid? Explain briefly.

8. Assume further that Brooks is making a lightweight, waterproof sock consisting of 2 laminated layers, a material type that was unknown when Herman applied for his patent. Is the sock made of this new 2-layer material infringing? What is Herman's best argument that it is? Explain.

9. E-Bay appears to have been the first internet auction website. Visitors go through a specific series of steps to search for and bid on items offered for sale. Could E-Bay get a patent on its auction software if it filed in a timely fashion (so as not to be barred by 102(b)). Why or why not?

Part 2 — Essay

1. You are inhouse counsel for Intermountain Health Clinics, Inc., a medium size HMO serving the intermountain west. The CEO of IHC comes to you with the following problem:

Jane Swenson, a computer professional and registered nurse, is an employee of IHC working in the patient records department. Her responsibilities include development and maintenance of patient records management systems. She has approached the CEO of IHC with an idea for a new venture that may or may not be developed within IHC or separately.

The proposed venture will be called Healthware. Jane believes that she can tap into the current health/diet/fitness/computer craze by developing a user friendly computer program that would monitor the user's diet and fitness activity. The user would input information on his or her health (age, weight, medical history, dietary restrictions, etc.). Each day, the user would input information on diet and exercise. The program would have simple pull down menus for making this quick and easy. The program would include a database of nutritional information on most foods. The program would provide an analysis of the user's health, as well as suggestions for achieving the user's goals (weight or blood pressure reduction, general fitness or general health improvement, etc.). It could provide periodic reports that could be brought to annual medical physicals. Other sub-routines could be developed for pregnant and lactating women, the elderly, diabetics, vegetarians, athletes, etc.

Jane believes that it would take a team of people to pull together this venture: programmers, a nutritionist, a physician, a fitness consultant. She has asked the CEO if he would support this effort, claiming it could be a great development within the IHC organization.

The CEO is quite interested in pursuing this. His question to you is how to proceed with the development of Healthware and how to protect IHC's interest in it? What about Jane Swenson's interests? What if she leaves IHC to try to develop this venture on her own? Discuss the pros and cons of pursuing various forms of protection for the Healthware project.

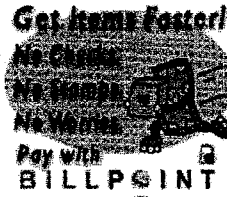


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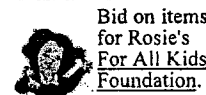
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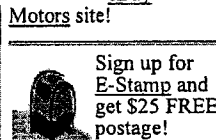
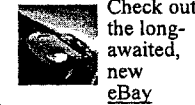
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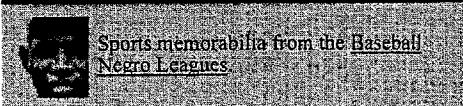
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