Intellectual Property

Professor Grimmelmann

Final Exam – Spring 2008

May 14, 6:00 PM – Open Book

This exam consists of TWO questions. Each question is worth 50 points, for a total of 100 points.

You have THREE hours to complete this exam.

Please write your answers in the space provided. Each question is followed by EIGHT blank, ruled pages. All answers must be written to fit on those pages. **Additional bluebooks will not be provided**, and the proctors have been instructed not to bring them to the exam. Be sure to **put your exam number on each page. DO NOT PUT YOUR NAME ANYWHERE ON THE EXAM**.

This is an open-book exam. You may use any *written* materials that you wish to answer the questions, though you need not consult any sources other than those we used for class. You may not use computers or other electronic devices while taking the exam.

You may not discuss this exam or your answers with anyone under any circumstances until after the end of the exam. **Your work must be exclusively your own**.

Please pay attention to the questions being asked and answer them. Support your answer with detailed analysis, reference to specific statutes and cases as appropriate, and an explanation of how you have applied the law to the facts. Keep references as simple as possible; bluebook/ALWD format is not required. Feel free to shorten your answers by using an outline format and stating your arguments in bullet point format, so long as the substance of your points is clear.

If anything about a question is ambiguous, say what you think it means, and answer accordingly. If you need to assume additional facts to answer a question, say what those facts are and how they affected your answer. No reasonable resolution of an ambiguity will be penalized.

Professor Grimmelmann will not answer ANY questions pertaining to exam content during the administration of the exam. If there are errors in the exam, it will nonetheless be fairer and less disruptive if all of you have exactly the same experience taking it.

This exam has **19 pages total**, including this cover sheet and the pages for your answers.

GOOD LUCK!

(1) **Pleistocene Park**

You are outside counsel to Spielberg Genetics, a biotechnology firm. In 2001, Spielberg's arch-rival, Crichton Industries, launched an effort to clone a wooly mammoth (an elephant-like mammal that became extinct about 3,500 years ago) from scattered preserved DNA fragments. Crichton made only slow progress at first; the available mammoth DNA fragments were too short and too numerous to fit together using standard DNA-matching methods.

Then, on April 2, 2004, Crichton's lead researcher, Laura Attenborough, attended a lecture given by mathematician Rube Goldblum discussing efficient ways to arrange books in libraries. Attenborough realized that the method Goldblum was describing could be used to rearrange DNA sequences and look for matches. Attenborough returned to her lab at Crichton and immediately set about using the technique. Using Goldblum's technique, on May 12, 2005, Crichton's team came up with a complete mammoth DNA sequence. On August 20, 2005, they used standard, well-known techniques to impregnate a modern elephant with an embryo containing the DNA sequence.

Meanwhile, Goldblum published (on December 12, 2004), an academic paper explaining how to apply his book-sorting method to the problem of DNA matching. Sam Knight, an executive at Spielberg, read the paper and by remarkable coincidence had the idea of using the methods to clone a mammoth. Operating in secret and using Goldblum's methods, Spielberg produced its own complete mammoth DNA sequence on June 15, 2005. Because the two companies started from different fragments, their sequences were only about 98% identical. Spielberg's scientists rushed to implant the sequence in an elephant, but because of unexpected difficulty in preparing an appropriate laboratory facility for elephants, they did not do so until December 2, 2005.

Crichton's mammoth was born on March 18, 2007. The next day, March 19, 2007, Crichton held a press conference to announce its mamoth-cloning effort, explaining in detail how they had done it. The day after that, March 20, 2007, Crichton filed a patent application which disclosed its complete DNA sequence and contained four claims:
    (1) "a wooly mammoth"
    (2) "the wooly mammoth of claim 1, containing the DNA sequence [disclosed in the application]"
    (3) "a process for DNA matching, comprising applying the Goldblum algorithm to a multiplicity of DNA fragments
    (4) "the process of claim 3, wherein the multiplicity of DNA fragments consist of wooly mammoth DNA"
Sadly, Crichton's mammoth developed a respiratory infection and died on March 23, 2007. Spielberg's mammoth was born on September 29, 2007. The USPTO issued Crichton's patent, without amendment, on January 12, 2008.

Spielberg is considering cloning more mammoths (using the DNA sequence it already has) and using the same techniques to find the DNA sequences of mastodons (another extinct elephant-like species). **Write a memo explaining whether Spielberg has violated any of Crichton's intellectual property rights, or would if it carries out its proposed plans**. Your memo SHOULD NOT discuss any of Spielberg's own IP rights.

(2) **The Truth About Rock Morris**

Rock Morris is an actor, best known for a number of mid-budget martial arts action movies he made in the 1970s and 1980s. Wiry and compact, he played taciturn square-jawed tough-guy heroes who faced unambiguously bad guys and solved most problems through a liberal application of violence. He stopped getting new parts in the early 1990s, and settled into a comfortable semi-obscurity.

In 2002, Morris began selling a line of hot sauces: e.g. Rock Morris's Fire (habanero); Rock Morris's Lava (cayenne); Rock Morris's Fury (chipotle), and so on. He holds a federal registration on the marks ROCK MORRIS and ROCK MORRIS SAUCES, for use on food products, specifically sauces and other condiments. Total sales have been about $250,000, mostly through grocery stores in southern Texas, where he lives.

Recently, for reasons no one is quite sure of, people have started inventing "Rock Morris facts": short and pithy sayings about Morris's extraordinary toughness. The phenomenon seems to have started on various chat rooms and discussion boards on the Internet, where people would post increasingly outrageous and silly Rock Morris facts in threads devoted to them.

In February 2007, entrepreneur Jeremy Hawke noticed this trend. He registered the domain name RockMorrisFacts.com and created a web site at that domain with two features: a form that let users upload "Rock Morris facts" and a button that would display a random fact.

Among the site's users were two law students, Paris and Nicky, who spent an afternoon taking turns at the keyboard thinking up and entering facts for the site. They can't remember who wrote which ones. Here are some of the facts they wrote:

> "The period for adverse possession by Rock Morris is however long it takes you to reach the boundary line from the moment he tells you to get off his new land."
> "Rock Morris's hot sauce is regulated by the EPA, not the FDA."
> "Rock Morris's underwear reads: "res ipsa loquitur.""
> "Rock Morris is single-handedly responsible for the drop in the rate of crime: his right hand."
> "Rock Morris knocked over Mrs. Palsgraf."

Three months ago, Hawke went through the site's list of 3,500 user-submitted Rock Morris facts and assembled 500 of the funniest ones (including the five listed above) into a manuscript. He took the manuscript to an editor at Arbitrary House, which offered him a book contract and scheduled the book for fast-track publication under the title "The Truth About Rock Morris!" The book is scheduled to be published next month.

Jay Sherman, a book reviewer, received a prepublication copy of the manuscript. Sherman, who is a Rock Morris fan, was offended by some of the cruder "facts." He made a photocopy of the manuscript and sent it to Morris. Morris is furious, and everyone involved has lawyered up. **Write a memo assessing the parties' legal rights and liabilities**.