

Intellectual Property

Professor Grimmelmann

Final Exam – Fall 2009

Take-Home and Open Book

This exam consists of **THREE** equally-weighted questions.

You have 24 hours to complete this exam; you can choose when to take it. You may download the exam from the Exam4 web site at any time *after* the start of exam period on Tuesday, December 8, at 9:00 AM. You must then return it via the Exam4 web site *within* 24 hours and *before* the end of exam period, on Friday, December 18, at 5:00 PM.

Please type your answers in 12 point Times or Times New Roman, double-spaced, using 8.5”x11” paper, with one-inch margins and numbered pages. Put your exam number on each page. **DO NOT PUT YOUR NAME ANYWHERE ON THE EXAM.**

There is a page limit of **FOUR** pages per question.

This is an open-book exam. You may use any 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 discuss this exam or your answers with anyone under any circumstances until after the end of exam period. **Your work must be exclusively your own.**

I will not be available to answer questions about the course after the start of exam period, since at that point I won't know who has picked up the exam and who hasn't.

Please pay attention to the specific questions being asked and to the roles the questions place you in. Support your answers with detailed analysis, reference to specific statutes and cases as appropriate, and explanations of how you applied the law to the facts. Keep any citations as simple as possible (e.g. “Feist”). 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 analysis is clear.

You should assume that the IP laws in force at all relevant times were identical to their current versions.

If anything about a question is ambiguous, say what you think it means, and answer it 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.

This exam has **FOUR pages total**, including this cover sheet.

GOOD LUCK!

(1) **The Roasterator**

In 1999, the Alighieri Corporation introduced the “Roasterator,” a sealed grill that to cooks food under extremely high air pressure, a process that results in unexpectedly flavorful roasted meats. It filed for and received a patent, number 8,200,213, (the “‘213 patent”), issued in 2001, on the system of valves used to maintain high air pressure while keeping oxygen levels normal. The patent features twelve claims, of which Claim 1 is the only independent claim. It reads:

An apparatus for high-pressure roasting, comprising a sealed cylindrical container, a horizontal rack positioned longitudinally within the sealed cylindrical container, means for interiorly heating the sealed cylindrical container, a tank containing pressurized oxygen, a tank containing pressurized nitrogen, and a valve controlling the entry of oxygen and nitrogen into the sealed cylindrical container.

Alighieri sold the devices as “The Roasterator,” in a design that featured a black cylindrical grill with bright orange flames painted on the sides.

In 2003, the competing Beatrice Company introduced a competing high-pressure grill. Beatrice called its grill the “Roast-a-ma-rator,” and sold it in a design that featured a black cylindrical grill with bright green concentric circles painted on the sides. Beatrice’s grill featured a single tank containing a high-pressure mix of oxygen and nitrogen, rather than separate tanks.

Unfortunately, the financial crisis hit Alighieri hard. One of its banks revoked a crucial line of credit, causing Alighieri to be unable to pay its suppliers or make payroll. Alighieri stopped making new Roasterators, and sold off its existing supply at a steep discount. Desperate to raise cash, it sold the ‘213 patent to Beatrice.

You are general counsel to Virgil’s Infernos, a maker of grills and other outdoor cooking equipment, which has been a bystander to the Alighieri/Beatrice grill wars. Virgil’s is considering making a bid to purchase “all remaining assets, including any and all forms of intellectual property” from Alighieri. The CEO would like to know whether this purchase would legally enable Virgil’s to start making and selling Roasterators. **Advise Virgil’s whether it would face any intellectual property risks from entering the market, and if so, the extent to which those risks could be mitigated by changing the design or marketing of the Roasterator.**

(2) **Magazines for You!**

You are outside counsel to the Haverbrook Company, a major magazine publisher. You have recently become aware that Brockway Newsstands, a chain of roughly a dozen New York-area newsstands, is offering its customers a new “Magazines for You!” service.

As new magazine issues arrive each week, Brockway’s flagship main newsstand pulls aside one copy of each from the piles being sent out to the satellite newsstands. It removes the staple or glue from the binding, leaving a stack of flat sheets. It then feeds those sheets through a high-speed scanner, producing high-quality digital images of each page from each magazine. It uses these images to create a database, refreshed every week, of what the magazines that week are writing about. The stack of pages then goes in the recycling bin.

At each of Brockway’s newsstands, employees have access to the database. Brockway uses this to offer its patrons Magazines for You! Customers who ask an employee for help can provide a topic they’re interested. The employee then searches in the database and gets a list of magazines out that week that discuss the topic. The employee can then, without leaving the computer, look at images of the pages, and thus tell which celebrity magazines have extensive features on Robert Pattinson and which merely mention him in passing. The employee is thus able to offer the customer highly specific advice on which magazines to buy.

Further investigation has revealed that Brockway’s employees now use the database to read magazines while they wait for customers, rather than flipping through magazines borrowed from the shelves. Brockway’s overall orders from Haverbrook are up by 20% since Magazines for You! debuted; orders from other newsstands are flat. It also appears that the number of copies of magazines that Brockway needs to discard because they have become too tattered to sell is down substantially.

Haverbrook’s executives are both fascinated and frightened by Brockway’s system. They’re interested in using a hybrid of digital technologies to sell more physical copies, but they’re also concerned that the system isn’t under their control. Haverbrook has tried for some time to build a good digital index of its 100+ magazines, without success.

Write a memorandum to Haverbrook discussing the intellectual property issues raised by Brockway’s Magazines for You! system. Does Haverbrook have a basis for suing Brockway? Does Brockway have any intellectual property rights that Haverbrook will need to steer clear of? And what’s your business advice for how Haverbrook should deal with Brockway and its new system?

(3) **Minting Money**

John Montagu is a professional poker player best known for making unpredictable, odd-sized bets and for obsessively popping breath mints. About four years ago, as he started achieving national fame, television commentators named two of his unusual betting combinations “Raiding the Mint” and “Minting Money.”

Montagu recently published a book entitled “Minting Money at Poker with John Montagu’s Trademark Plays.” In it, he describes substantial elements of his poker strategy. After a brief introduction, the book is organized by poker hands, arranged in order from the ones Montagu says to play aggressively on from the ones you should play conservatively. Each hand is followed by a short slogan (e.g. “If you bet this one, get your breath checked!”), a couple of paragraphs explaining the right betting strategy, and a longer, first-person story about a time that Montagu played this hand at a tournament. The book has sold modestly: about fifteen thousand copies. This year, Montagu also applied for a patent on his playing style; it’s still undergoing examination.

A month ago, the Runyon Press published another poker book, this one entitled “Raiding the Mint: How to Play Poker the John Montagu Way.” In smaller print at the bottom of the front cover, it says “UNOFFICIAL: Not endorsed or approved by John Montagu.” The introduction to the book explains that it is based on an analysis of how Montagu actually bets, based on thousands of hands. It orders hands from the ones he plays most aggressively to the ones he plays most conservatively, determined from an exhaustive statistical analysis of his poker play. The order presented in the Runyon Press book is similar to that in Montagu’s book, but different in many places (apparently, Montagu doesn’t always follow his own advice). Each hand is also followed by a phrase that Montagu uses regularly (about half of the slogans from Montagu’s book, being things he frequently says in interviews, also appear in the Runyon book) and by stories about times Montagu has played this kind of hand in real life. Some of the stories describe the same hands Montagu described in his book, although most don’t. They’re all written from a third-person point of view and discuss more strategy and fewer colorful anecdotes about the bizarre personalities of the professional poker circuit.

A number of up-and-coming players on the poker circuit have started playing Montagu-style poker, betting in ways similar to the ways that Montagu does. After losing at one event to Blaise Bayes, who copied not just Montagu’s play style but also his breath mint habit, Montagu decided he’d had enough. He filed suit against Bayes and Runyon, alleging every form of intellectual property infringement he could think of.

You are clerking for Judge Carla Carlson, to whom the case has been assigned. **Write a memorandum to the judge assessing Montagu’s likelihood of prevailing on his claims against Bayes and Runyon.** The judge would also like to know whether you think Montagu’s patent might issue, and whether, if granted, it would affect the analysis; do your best, recognizing that the details are necessarily hypothetical. You should ignore any potential right of publicity issues.