

Intellectual Property

Professor Grimmelmann

Final Exam – Spring 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 must pick this exam up *in person* from the Registrar's office *after* the start of exam period on Tuesday, May 5, at 9:00 AM. You must then return it either in person or via email (to submitexam@nyls.edu) *within* 24 hours and *before* the end of exam period, on Friday, May 15, at 5:00 PM. If you submit your exam via email, include all three answers in a single file.

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, using the formatting above. I will strictly enforce it.

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 Shambling Horror**

You represent Persephone Wright, a computer programmer. In December 2007, Wright wrote a video-editing program. The program automatically recognized faces and human figures in videos, then changed their skin color and digitally added lesions, pus, and rotting bits. The result was that all the people in the video look like zombies.

Wright asked three friends to come to her house in January 2008 and play around with the program. For a long weekend, they filmed each other with a digital camcorder, then used the program on Wright's computer to assemble a crude, homemade horror movie. They watched the movie several times, and the friends pointed out ways in which the "zombies" looked unrealistic, primarily that they still moved quickly, like real people. Wright spent the next few months adding a "shamble mode" feature; the program would smooth out sudden movements to make the "zombies" appear to shuffle and twitch aimlessly. She finished implementing shamble mode in July 2008.

Wright started selling the program, which she now called "Shamble," over the Internet for \$19.95. It has sold approximately 10,000 copies.

Recently, Wright has become aware of two things. First, Romero Media, a large software company, has announced plans to add "zombie skin" and "shambling mode" features to its own Cut-And-Run video-editing software. Second, some unknown Shamble users have started a fad of taking popular music videos, feeding them through Shamble and posting the results online. Apparently, people enjoy seeing the Jonas Brothers look even less life-like than usual.

Wright has come to you for legal advice. She's concerned that Cut-and-Run might undercut the market for Shamble, and she's concerned about being sued by the music industry (which she's heard has a reputation for being litigious). **Prepare a memorandum advising Wright about her potential intellectual property rights and liabilities, including any steps she should take to secure those rights or protect herself from legal risk.**

(2) **He's on Fire!**

You are vice president and general counsel at Mad Flats, a shoe company. Mad Flats has developed a new twist on the old idea of shoes with lights in them. Since September 2006, Mad Flats has manufactured and sold a line of “Firework Kicks” sneakers. Each sneaker contains a small, pre-programmed LCD panel (approximately 2” by 1”) that wraps around the heel of each sneaker. The panel displays a looping 30-second animation of an athlete on fire as he runs, dribbles a basketball, and climbs a rock face. The shoes are otherwise all black. Mad Flats sells its sneakers through five independent shoe stores in the New York metropolitan area. It has sold approximately 1000 pairs of Firework Kicks a year since launching them in 2006.

Mad Flats has recently received a demand letter from Velocity Footwear, a larger, competing shoe manufacturer. The letter explains that Velocity has sold its own line of “Fireworks” shoes since July 2007. Fireworks shoes contain a row of lights along each side of the shoe from the heel to the front. When the wearer steps down on the heel, the lights go on, quickly, in sequence, from the back to the front; a set of a dozen lights across the front and toe of the sneaker then flash. Since the sneakers are colored black, the result is that it looks (kind of) like fireworks are being launched from the heel to the toe of the sneaker..

Velocity has sold Fireworks through over a hundred retail stores in twelve states in the Upper Midwest and Rocky Mountain states. Total sales since 2007 have been approximately 20,000 pairs of shoes. Velocity received a federal trademark registration on the FIREWORKS mark in January 2008. It applied for a patent in July 2007; U.S. Patent No. 9,025,812 issued in January 2009, with the following claims:

- 1) “a shoe containing a plurality of lighting elements”
- 2) “the shoe of claim (1), wherein the plurality of lighting elements are illuminated in a predefined sequence that gives the appearance of a moving object”

Velocity alleges that Mad Flats’s line of Firework Kicks shoes infringes the ‘812 patent, infringes Velocity’s trademark rights in the FIREWORKS mark, and infringes Velocity’s trade dress and copyrights in the design of the Fireworks shoes. The letter demands that Mad Flats immediately cease selling Firework Kicks shoes and destroy all remaining inventory. **Write a memorandum to the Mad Flats CEO that explains what Mad Flats should do in response to Velocity’s demands and sets forth the legal basis for that response.**

(3) **The Tractors of Williamsburg**

First it was skateboards. Next it was Vespas. Then it was kick scooters, and then fixed-gear bicycles. Now all the hipsters are into tractors. For the same inexplicable reasons that made big pants and massive sideburns the “in” things in their days, the ineffable arbiters of cool have decided that the must-have item of the season is a vintage PullMaster 302 tractor.

Of course, the supply of actual PullMaster 302 tractors in New York is rather limited; there aren’t many left, and farmers are using most of them. But the Underground Motors Company had a bright idea; it could make retro-style tractors based on the original 1970 model, kit them out with iPod docks and a hook to hang a messenger bag on, and sell them to the hipsters. Underground bought a few PullMaster 302s, tore them apart to see how they worked, and cranked out a few hundred new tractors to the original specifications. Each tractor Underground sells comes with a photocopy of the original repair manual.

The Grantwood Corporation, which made the original PullMaster line, isn’t amused. Grantwood is run by a bunch of deeply serious agricultural types, who deep down can’t escape the feeling that all those hipsters are somehow making fun of them. Grantwood first started selling the original PullMaster 301 in 1965; the PullMaster 302 sold from 1970 to 1975. Grantwood hasn’t made or sold a PullMaster since 1983 (the Pullmaster 306 was such a flop that Grantwood got out of the tractor line of business and today sells only ThreshMaster combines). At county fairs and trade shows, Grantwood sometimes gives out keychains that say “Grantwood: A Tradition of Quality from PullMaster to ThreshMaster and Beyond.”

Back in the day, Grantwood acquired six patents—issued between 1960 and 1968—on the Pullmaster’s engine. It also registered the PULLMASTER mark federally in 1965.

Grantwood has sued Underground for everything it can think of. You’re a law clerk to Judge Froessel, who has been assigned the case. Grantwood has moved for a preliminary injunction against further sales of what Underground describes as its “Vintage Underground Motors Replica 1970 PullMaster 302.” **Write a memorandum advising the judge of whether Grantwood, on the facts given, has demonstrated a likelihood of success on its claims.**