

## Intellectual Property Fall 2016 Final Examination

This examination consists of **one question** and **three pages**, including this cover page. There is a word limit of **1,500 words**. Submit your answer by email to Tamika Morales by the deadline of **5:00 PM on December 15**. Please make sure that your answer contains **no identifying information**.

This is an **open-book** examination. You should not need to consult anything beyond the coursepack and your notes, but you can if you wish. You are free to discuss the general legal principles we covered this semester with anyone, including each other. But **you may not discuss the examination** or pose exam-related questions to anyone else until after the examination period. Your work on this examination is subject to the Cornell Code of Academic Integrity, the Law School Code of Academic Integrity, and the Campus Code of Conduct.

The question puts you in a role, but the genre for your answer should be "**law school examination**." Use **simple citations** (e.g. "*see Feist*") where appropriate. I include **spelling, grammar, clarity, and organization** in my grading. I appreciate the use of headings to organize your answer, but they're not required. If you find the question **ambiguous** or need to **assume additional facts**, state your assumptions explain how they affect your answer. No reasonable resolution of an ambiguity will be penalized.

To help ensure uniformity in my grading, please use the following **formatting**: 13-point Palatino, 1-inch margins, double-spaced, bold for any major headings and italics for any minor headings. I will provide Word and Pages templates you can use if you wish.

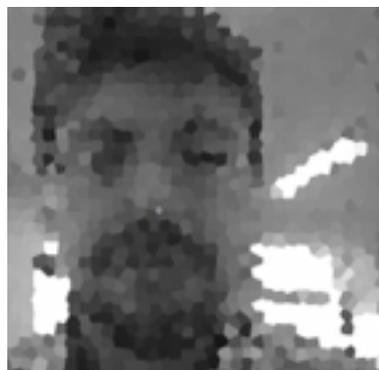
The problem is set in the (fictional) American state of Roosevelt. Assume for purposes of the examination that present-day law has been fully in effect at all relevant times, that Roosevelt has enacted the Uniform Trade Secrets Act, and that it recognizes a common-law right of publicity.

Unless otherwise noted, all names are fictitious. Please disregard any resemblance to actual persons, places, or institutions—living, dead, or nonexistent.

## Pattern Recognition

Your client is Zach Dorian, MD, FANA, a neurologist and entrepreneur, who is attempting to develop rapid diagnostic tools for various kinds of brain injuries. In particular, he has been exploring the use of optical phenomena to identify normal versus abnormal brain function. This by itself is not new: there is peer-reviewed experimental evidence that people suffering from schizophrenia are less susceptible to the hollow-mask optical illusion (see [Dima et al 2009](#)) but more susceptible to the Müller-Lyer illusion (see [Shoshina et al. 2011](#)).

Dorian has been focusing on a specific type of damage to the visual cortex – uniformly referred to as “Espinosa-type lesions” in the medical literature because Judy Espinosa first identified them in a 1996 article. The pioneering work here was done by Donald Turk, who published a series papers in 2004 showing that patients with Espinosa-type lesions are almost always incapable of perceiving the face in the image to the right (the “Mosaic Image”). Turk generated the



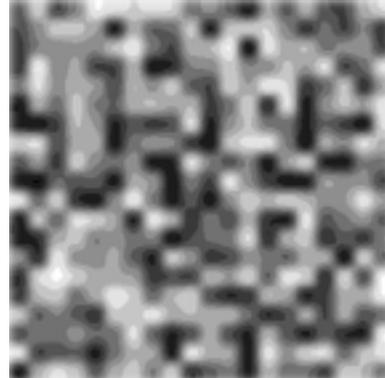
Mosaic Image by taking a photograph of one of his lab assistants, Perry McGinley, and distorting it in ways that strain the visual cortex’s ability to detect edges. Only 2% of the patients with Espinosa-type lesions saw the face, while 70% of patients without Espinosa-type lesions saw it. Turk and McGinley are the named inventors on U.S. Patent 9,603,441 (filed June 24, 2002, issued July 8, 2003) which includes the Mosaic Image in its specification and whose sole claim reads:

1. ... a method of diagnosing Espinosa-type lesions, comprising presenting a patient with a suitable test image, wherein a patient’s ability to perceive a face indicates the absence of such a lesion and a patient’s failure to perceive a face indicates the presence of such a lesion.

Turk holds U.S. Design Patent No. D794,260 (filed June 24, 2002, issued January 28, 2003) on “an ornamental design for an optical illusion card”: the sole claim depicts the Mosaic Image on a rectangular card. He also

holds a copyright registration on the Mosaic Image. Turk sells rectangular cards bearing the image for use by neurologists under the name of “The RIDE Test” (where RIDE is short for “Rapid Illusion Diagnosis of Espinosa-type lesions”) and holds a federal trademark registration on RIDE TEST.

Dorian thinks he can improve on the RIDE Test by using multiple images. The RIDE Test can be finicky because of its high false-positive rate (as noted above, only 70% of patients without Espinosa-type lesions saw the face). Given the rarity of Espinosa-type lesions (less than 5% even among patients who have already been flagged by the standard clinical screening test), this makes the RIDE Test useful at ruling out Espinosa-type lesions but not as effective at confirming



them. In preliminary clinical trials involving 120 patients and conducted between April 2015 and the present, Dorian has identified another candidate image (shown to the right) (the “Tile Image”). Here, 85% of patients with Espinosa-type lesions perceive a face, while only .5% of patients without them see the face. Using the two illusions in combination means that patients who see a face in the Tile Image but not the Mosaic Image almost certainly have Espinosa-type lesions.

Dorian has written up his results in a paper he’s titled “Don’t Get Taken for a RIDE: Better Diagnosis of Espinosa-Type Lesions Through Multiple Optical Illusions,” which he would like to submit for publication. In addition, he would like to incorporate the combination of the Turk and Tile Images into his clinical practice, and to the extent possible to commercialize the combination of the two for other physicians to use. He’s suggested calling it the “Double RIDE Test.”

**What are the potential intellectual property obstacles in Dorian’s way, what forms of intellectual property can Dorian employ, and how should Dorian proceed?**