

INTRODUCTION TO INTELLECTUAL PROPERTY

Professor Wendy Seltzer
Final Exam - Summer 2006

General Instructions

1. This is an open-book exam. You may use any written or printed materials that you wish.
2. You have **three hours** to complete the exam.
3. This exam contains two essay questions. Each question counts equally toward your grade. Please read the questions carefully and allocate your time and effort accordingly.
4. Answer all questions in bluebooks, starting each question in a new bluebook. Please write legibly. Label each bluebook with your anonymous exam number, the number of the question you are answering, and the number in sequence, if you use more than one bluebook for a question. I recommend that you skip lines and write on only one side of a page.
5. You must return the exam questions with your bluebooks.

If relevant matters of fact are not stated, indicate what they are and what their relevance is. If a question is ambiguous, decide what you think is meant, tell me what you think is meant and answer the question accordingly. No reasonable resolution of an ambiguity will be penalized.

Support your answer with analysis, reference to specific statutes and cases, as appropriate, and an explanation of how you have applied the law to the facts. Keep references simple (e.g. Feist); blue-book format is not required.

If you recognize an issue that you are unable to resolve or that requires further research, it will be useful to indicate the issue and the appropriate lines of inquiry.

Even if you conclude that an issue is dispositive, if there is a substantial argument to the contrary, you should go on to consider further issues that will clearly be presented if the former issue comes out the other way.

GOOD LUCK!

Question 1: To the dogs

Along with Americans' fascination with their pets seems to go an unlimited spending capacity. Recognizing this trend, entrepreneur Jane Dane set out to design a new dog toy.

Jane turned to her collected back-issues of "Animal Science" magazine and found a 1998 article, "Canine stimulation by random light pulses," which found that dogs will spend much longer pursuing randomly blinking light sources than steady light or dark objects. The researchers described findings based on tests with blinking flashlights at the ends of ropes. Inspired, Jane started experimenting in March 2005 with flashing dog toys of various shapes and sizes. Each day in the lab, she made up combinations of flashing lights and shapes (tennis balls, ropes, dog bones). Each evening, after locking the lab, she brought the toys home to test their effect on her pets Spot and Rover.

After several months, she determined that the optimal combination for exercising Spot and Rover was a bone shape with a flashing light embedded at one end. When Jane threw a bone, her dogs would retrieve it and continue to run with it. After running with one of these toys until tired, her dogs would behave much better than usual for several days.

In September 2005, Jane bought bone-shaped cookie molds and flashing battery-powered LEDs and made a dozen sample toys. She brought these to the dog run in a nearby park and used them to exercise Spot and Rover, occasionally tossing bones to the other dogs there as well.

By March 2006, Jane had perfected the mass-production of her dog toy, a hard rubber bone-shaped toy with a flashing LED embedded at one end. Squeezing the bone would turn the light on or off. She packaged these in clear plastic on a green cardboard back with the name "LiteBonz." Under the name, the package pictures a dog on a green lawn jumping for a bone. Text on the front of the package says "Exercise your dogs with LiteBonz for calmer, healthier pets."

Jane convinced online retailer Amazon.com to feature the LiteBonz product in April 2006 and was soon doing a brisk business, selling LiteBonz at \$15 apiece. Customers wrote favorable reviews, including a dog trainer who said, “In my decades of professional experience, I have never seen an exercise toy as effective as LiteBonz.” Jane hired extra employees to keep up with the demand.

Earlier this month, however, Jane noticed a drop-off in sales. Searching online for “Lite Bonz,” she saw an advertisement for a website, <http://bonelights.com/>, that was selling flashing tennis balls and bone-shaped dog toys with lights in one end. Looking more closely, she saw that the bone toys were offered in green packages, labeled “Bone Lights.” Text on the website and product packaging read, “Exercise your dogs daily with Bone Lights for calmer, healthier pets. Bone Lights are as effective as LiteBonz, for half the price.” Jane ordered one and saw that it was smaller than her LiteBonz and used a different color LED, but was otherwise nearly identical. Based on similarities in the light switch mechanism, Jane suspects that the maker of Bone Lights took apart one of the LiteBonz and copied it.

Jane comes to you for advice (July 2006) asking “What are my rights? What can I do? What should I do? Do I need to act quickly?” Draft a letter answering her questions by explaining her options and the likelihood of success of each.

Question 2. Virtual Stars, Virtual Wars?

NeverRest Online (“NRO”) is a massively multiplayer online role-playing game, a virtual environment where players can go on quests, build out parts of the online space, and interact with one another. Players pay a monthly subscription fee to NR Corp., the game’s maker. To make it appear that users are together, NR Corp. has massive computer servers that record players’ actions and creations and play them back simultaneously to the other players in the same part of the virtual space. Objects the players build remain in the space even after the builder turns off his or her machine. Many of NRO’s players are extremely creative.

One group of players, calling itself the Playwrights’ Guild, builds elaborate “sets” where its members act out theatrical and film scenes to an audience of other players. Playwrights’ Guild does not charge real or virtual money for the performances. They are currently promoting their latest production, “Star Wars Episode 3 ½: Attack of the Groans,” on in-game posters, saying “George Lucas’s Jar Jar Binks meets George W. Bush’s cabinet. See it, starting August 1.” (Recall that Jar Jar Binks was a much-disliked character introduced in George Lucas’s 1991 film, “Star Wars Episode I: The Phantom Menace.” Lucasfilm Ltd. holds the Star Wars films’ rights and guards them zealously.) The set, as depicted on the Playwrights’ Guild posters, appears to replicate the Galactic Senate scenery from the Star Wars films.

NR Corp. management have not yet seen the “Attack of the Groans” production, which is in “previews” now. They know that previous productions by the Playwrights’ Guild have been highly entertaining, however, and they also know that the “Star Wars” films have a huge and devoted audience. NR Corp. thinks it can attract more paying subscribers to NRO by using the Playwrights’ Guild’s posters to advertise the upcoming “Attack of the Groans” show on websites and offline. “This will make us tons of money,” says CEO I.N. Vincible.

You are intellectual property counsel to NR Corp. Knowing only these facts, how do you advise NRO Corp. to proceed? Does NR Corp. risk liability to anyone now or in the future? If you would recommend investigating additional facts, how would they shape your analysis?

When you're done giving legal advice, CEO Vincible says "Gosh, it would be a lot easier for us to do business if your pesky intellectual property laws didn't apply online." Do you agree or disagree? Explain your view of the best policy for intellectual property on the Internet, with reference to a range of issues that might be relevant to NR Corp.

End of Exam