

FINAL EXAMINATION

INTERNET LAW

PROF. PINSKY

1. Essay Exam

This examination consists of three sections, each of which presents a (i) problem, (ii) issue, or (iii) opportunity to discuss policy; or presents some mixture of these three. The sections may or may not build upon each other's facts (each section will signal whether it does so). Each section has a particular unique focus, and is worth a different amount of the total points available on the examination. The point weights are given in the heading for each section in the exam problem, repeated here for clarity: Section A (45%); Section B (30%); Policy Analysis Section (25%).

2. Open Book

This is an "open materials" exam. You may use course notes or outlines (prepared by yourself or others), commercial outlines, and other similar materials. You may not communicate or collaborate with anyone during the exam or obtain direct or indirect information or assistance from anyone. You may not use any live or electronic retrieval/computer source during the exam, but you may prepare your answers either by hand using initially blank bluebooks that you supply or with the aid of a personal laptop computer that is restricted to using the Law Center-supplied software only. You may not access any features on your personal laptop that are not included in that Law Center-supplied software

3. Single-Part, Multi-Section Exam

This is a single-part examination. If you finish the analysis for a section, go immediately to the next section.

Given the point percentages for the three sections disclosed above, one logical division of time in a three hour (3) examination is to spend 30 minutes reading the examination sections and planning your answers. Then, the remaining time would be spent as follows: 68 minutes writing the analysis for the first section worth 45% of the points; 45 minutes writing the analysis for the second section worth 30% of the points; and 37 minutes writing the analysis for the third section worth 25% of the points.

4. Time Allotted

The final exam is three (3) hours in length.

5. Exam Page Length

The problem and fact pattern is six (6) pages in length, pages 5 to 10 herein.

6. Release Prohibited

I have not determined whether I will make this examination available in the future. Accordingly, I am prohibiting it from release. Please return all problem pages. Copying, reproducing, or memorializing the problem in any form or fashion is prohibited.

7. *Other Instructions*

If using a blue book, please write on only one side of the page. Put your Exam Number on each blue book, and preferably use a separate blue book for each section of the exam. You may use more than one blue book for a single section if necessary.

Please bring your copy of the assigned casebook to the examination. Besides the course casebook and assigned supplemental materials, you may also bring the course overheads to the examination in printed form.

The law applicable to this examination is the law covered in this course from: the assigned reading from the casebook and any assigned supplements on the course web page, and additional law (if any) provided in the course overheads this may also include the primary statutory, regulatory, or treaty-based provisions relating to the assigned reading materials. Be sure to answer all questions on the basis of the law provided in the Materials.^a

Write an analysis for each of the issue(s) raised by the facts or information enumerated in the examination sections. Even if the facts build from some real-world events, persons or situations, use the facts as given. At the end of each section the focus or “call” of the question is given in a short paragraph enclosed in a rectangle, however, you should still seek to set out individually each separate issue that you see in addition to addressing this “call.”

Organize your written answer logically and separately for each of the three sections of the examination. Your written answer does not need a general introduction. Proceed immediately to analyzing the issues, problems or questions in each section. The sections vary in the degree to which they suggest incorporating policy analysis. One section, the third, overtly suggests policy analysis.

The policy-oriented section is designed to allow one to employ some of the various policy arguments that arose during the course. These arguments include, without limitation: institutional considerations for the various structures and organizations underlying the internet and the laws relating to it, including the intellectual property system; effects and causes of these structures and systems; efficacy, reliability, fairness and justification of the regimes that might regulate or impact the internet and commerce over it; and the impact of all this on individuals, companies, countries, society, and culture. This listing, however, is not necessarily a good way to organize the analysis. A productive organization of the analysis depends on the context of the problem(s), dispute(s) or question(s) posed in the policy-oriented section.

^a There may be some situations where the Materials provide alternative rules or tests for resolving a specific legal issue. In these instances, the “majority” rule is the rule or test relied on by the majority in a primary case (or the primary cases) in the casebook/supplement. Any other different tests or rules, (which could be multiple) whether mentioned by the majority opinion, offered in a dissent, described in the notes to the case, or given in the overheads, are alternative or “minority” rules. This instruction does not necessarily mean that issues exist in this examination requiring the application of alternative or minority rules. Further, it may or may not be necessary to analyze any or all such alternative or minority rules depending on the specific examination instructions and/or the facts provided. Finally, some areas of doctrine don’t yet have a clear “majority” rule as discussed in the casebook.

Application and deployment of these and other arguments is the emphasis of the “policy” section. Some may view the question(s) in the “policy” section as having two “sides” along political or other ideological lines. Even assuming this view, however, an answer does not earn points by picking the “right” or “best” side of the issue, but rather by effectively marshalling arguments for the facets of the issue.

For the non-policy sections, write a short analysis for each of the issues raised by the facts enumerated in the examination question, **based only on the law from the Internet Law course**. Given the course focus, most issues are instances of some type of infringement or other violation of law relating to the Internet. The analysis should communicate the following as briefly as possible based on the facts available: (i) discuss the arguments, positions and rights that the plaintiff/initiator should assert, or has asserted,^b against the defendant(s)/respondent(s); (ii) evaluate the arguments and substantive merits from each side’s perspective, articulating defenses and counter-arguments each should/might assert; (iii) assess the strength of each party’s arguments; and (iv) determine for each issue who is likely to prevail and explain why. Your written answer, however, should not be organized according to these four points.

Rather, for each issue, your analysis should communicate the issue, and then state/apply the law to the issue’s facts (applying counterarguments as well), and then conclude on the issue. An exception to this is that there is no need to restate a legal test that has already been stated; simply refer to the previous statement of the rule. For example, if there is a second copyright issue, and you have already related the elements of a test for an earlier issue, you can abbreviate your analysis by directly applying the law to the facts and concluding. Another way to say this is that if a second issue arises where there is a need to apply a legal test already related and discussed, you may analyze the second issue by exception, i.e., discussing the differences in application and outcome.

If you believe that there are any additional critical yet unsupplied facts that would materially impact the outcome of a particular issue, you should note what such facts would be. In such situations, **briefly** describe how such critical facts might impact the outcome, i.e., indicate **at most one and only one** differing result that would ensue from different reasonable factual assumptions about such unsupplied facts.^c

As a general matter, the course Materials did not focus on invalidity/protectability issues within the intellectual property regimes studied in relation to the Internet. Thus, while intellectual property infringement doctrine and issues are clearly important, not all bases for

^b The examination question may be written in such a way that certain issues are clearly “in” the case/dispute because they have been asserted by either party. You should analyze these issues, but there may be other issues to be analyzed as well because the examination question is silent about whether they have been, will, or will not be asserted by either side. In addition, the examination question may also indicate that certain other possible issues are “out” and not to be analyzed because the parties disclaim certain issues or protections.

^c Please note that if you find yourself discussing alternative outcomes for supposedly critical yet unsupplied facts for every issue you analyze, you are probably engaging in too much analysis of such alternative outcomes.

invalidating the relevant intellectual property were studied. Thus, for example, if a trademark is at issue, proceed directly to any infringement issues and treat invalidity issues only in the context of a defense, and only for any invalidity basis actually studied in the course. As a general statement, invalidity bases were treated to a greater degree in studying the law of trademarks in relation to the Internet than during the study of copyright in relation to the Internet. On this examination, the infringement analysis is paramount.

Your written answer does not need a general introduction. Proceed immediately to analyzing the issues. The location of final jurisdiction and/or venue for the expected case/dispute is not a part of the analysis except where clearly indicated in the call of a section's question(s).^d

HONOR CODE: Turning in an examination answer to this final examination is deemed to be a pledge under the Law Center honor code that the exam taker has complied with the honor code in all respects in relation to this examination AND this course including the mandatory minimum class attendance requirements.

(the examination problem starts on the next page)

^d Analyze and discuss the probable ultimate outcomes under the substantive law studied. Do not analyze any intermediate standards, such as likelihood of success in obtaining a preliminary injunction. In addition, we did not study the details of potential remedies or damages, so do not discuss these items in detail.