

Intellectual Property

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30/45 FORMAT PRACTICE FINAL ESSAY EXAM - MODEL ANSWER

Sentiments and Serendipity

PRACTICE EXAM NO. 1 FROM "BAD DAYS FOR GOOD CHEER"

NOTES:

The practice exam facts are a subset of the facts used on the Spring 2012 IP exam, "Bad Days for Good Cheer," with slight modifications. The model answer produced below comprises the relevant portions of the publicly released model answer for that exam, with slight modifications.

The following notes accompany the "Bad Days for Good Cheer" model answer: *This model answer contains material amalgamated from the work of multiple students. Because of the cherry-picking involved, this model constitutes an answer that is better than any real response that was received. So, in some ways, it is better than the best. But it is also true that this model answer is not perfect. Student-drafted work done under deadline pressure, of course, never would be perfect. Analysis and issue coverage could be better in places, and I could quibble with various aspects. But, all things considered, it's very good. What this all means for you is that you should be circumspect about comparing your own response to this one as a way of gauging your preparedness for the exam.*

What are good lessons to draw from this model? One thing this response does very well is the way in which the law is applied to the facts. Rather than cut-and-pasted blackletter law or needlessly reiterated facts, this exam response focuses on providing analysis. That's excellent, because the analysis is the key to doing well on the exam. Also laudable, and universally applicable, is the sense of judgment this exam response displays with regard to conclusions: Close calls and toss-ups are presented as such, while rock-solid conclusions are made without hedging.

QUESTIONS

Provide analysis as follows. Keep your answer confined to United States law.

1. Analyze copyright issues.

As part of your response, be sure to discuss whether Vasarelski infringed copyright by copying the material from the DVD, including to what extent that material is copyrightable. Also, explain whether the hotel has run afoul of copyright law by lending DVDs to guests.

2. Analyze trade secret issues.

As part of your response, be sure to cover whether the various types of information on the disc count as a protectable trade secrets and whether there was an actionable misappropriation.

Note that the questions will not be weighted. Instead, they are cumulative and will be graded together. So divide your time among the questions according to which ones require the most discussion and analysis. Plan ahead to put information where it belongs. Also, do not repeat the exact same analysis over again in a different context (for example, by using copy and paste). If analysis of an issue is similar to but not exactly the same as what you have written previously, then I suggest you note your prior analysis and go on to discuss any differences.

RESPONSE

1 – COPYRIGHT

There are close copyright issues to analyze with regard to the data DVD. First, could the data DVD be copyrightable as a whole? Probably yes, because even though most of the information on the disc is likely not copyrightable, a compilation of non-copyrightable information can itself be a copyrightable work of authorship. But this would mean only that the compilation itself – the ordering and grouping – cannot be copied; copying the constituent data is not, by itself, infringing. The facts say Vic Vasarelski "copied everything to a flash drive," which may or may not mean he copied the compilation, as such. However if he did, and perhaps if he redistributed it as such, there's a plausible infringement action on that basis.

Now let's move to the categories of files on the DVD:

The audio chip designs (ACDs) may be copyrightable if they are more than industry-standard blueprints. The graphics could reflect expressive choices as to color and style of the graphics, angles from which they are drawn, etc. But if these graphics files are better characterized as engineering output, then they would lack the requisite degree of creativity required for copyright. Facts, ideas, systems, etc., aren't copyrightable, and a straight-forward graphical means of conveying them would likely be held to merge into an uncopyrightable whole, analogous to the contest-instruction case. Another way of thinking about this – that reaches the same result – is that whatever expressive content there is in the graphics files is likely not conceptually separable from the functional aspect of the graphics, meaning that the ACD files constitute uncopyrightable subject matter by application of the functionality doctrine.

The distribution negotiation spreadsheets (DNSs) are potentially copyrightable, but they have the same issues as the ACD designs - expressive content is limited, and therefore the DNSs may be uncopyrightable for the same reasons. With DNSs in particular, the precedent of Feist and the accounting-forms case suggests noncopyrightability. Even if there were copyright protection, it would be extraordinarily thin – so thin as to likely be useless to SS. At least insofar as these facts go, the analysis for the "financial data" on the DVD would be exactly the same.

One additional note on the ACDs. If the "original sound recordings" were encoded within the graphical files – such that they are machine readable – then we have music (an expressive work) fixed in a tangible means of expression. This means that even if the ACDs themselves are not copyrightable as such, reproducing them would constitute infringement of the copyright in the sound recordings.

The hotel did not violate the presumptively valid copyright in "Working for the Devil" by lending out the DVD. The hotel is protected by the first-sale defense. And allowing guests to view the DVD in their rooms would not count as public display anyway, so no exclusive rights were violated.

2 – TRADE SECRET

ACD, DNS, and the confidential financial data (FD) are potential trade secrets. ACDs and DNSs are straightforward as trade-secret subject matter – they have independent economic

value that derives from their secrecy. For instance, if the squeal points were generally known, then the negotiation edge would be blunted vis-à-vis other competitors. The FD may or may not be considered a trade secret. Probably not; the FD would still have value to Sapindale Sentiments in managing the business even if no longer secret. But courts have gone different ways on this.

Even if these items are trade-secret subject matter, they will not be valid trade secrets unless they are subject to reasonable efforts aimed at maintaining secrecy. We don't know how this information wound up in the Atomic Avalanche DVD case. It tends to lead one to believe that Sapindale wasn't being very careful, but this could have been a error that happened despite strong safeguards generally. It's notable that the data DVD didn't have any encryption, which would have been a good safeguard. Overall, Good Cheer has a pretty good argument that there were no reasonable protections, and therefore no trade secret.

Additionally, a trade secret must actually be secret. It could be argued that once the DVD was in a lending library, it was no longer secret. That could be a close question. If no one other than Vasarelski had yet seen the DVD, there's a good argument the secret hadn't spilled at that point.

A misappropriation claim here requires that the acquisition of the trade secret be somehow improper in violation of law or ethics. Did that happen here? Vasarelski wasn't even trespassing; all he was doing was reading a disc that he picked up innocently. On the other hand, his continued exploration of it and his copying of it was not inadvertent. Also, he seemed to think he was doing something shady, since he wiped it down for fingerprints. This could indicate a transgression of accepted norms of business ethics. Arguably this is more wrongful and culpable than the conduct in the DuPont-flyover case, so there is a strong likelihood this could be considered misappropriation.