

Introduction to Intellectual Property
Professor Ohm

Fall 2006
Final Exam Grading Rubric

What follows is the (slightly modified) grading rubric I created and used for grading final exams in Intro to Intellectual Property for Fall 2006.

The heart of the document is a detailed outline listing almost every possible issue that could have been spotted in my exam questions that semester. In the right column of the rubric, I specified how many points were available for each particular issue. Some issues were worth one point, meaning the student got the point for noting the issue or didn't otherwise. Other issues (usually issues that demanded a lengthier analysis) were worth more than one point, and in those cases I used a somewhat subjective (but hopefully consistent) assessment to decide how many of the available points a particular answer earned. In some cases, an issue was worth one or more points and a sub-issue of that issue was worth one or more additional points. For example, students were awarded one point for noting that Copyrights need to be valid, and one additional point each for discussing the Originality and Fixed in a Tangible Medium requirements.

DO NOT USE THIS RUBRIC AS A SUBSTITUTE FOR YOUR OUTLINE. The rubric is incomplete, both because it focuses only on the issues raised by the fact pattern and also because I write the rubric before grading, and sometimes I spot issues while grading that I hadn't foreseen.

The answers are divided into subtopics, and the Subtotal for each subtopic is underlined.

IMPORTANT CAVEAT FOR COPYRIGHT STUDENTS

This is a final for Intro to IP. In that class, we spent only nine days on Copyright. Our coverage was less broad and less deep than in the dedicated class. Accordingly, you will probably spot issues that were not mentioned in the grading rubric. This says **NOTHING** about my approach to grading. It's just a difference in course coverage.

As one specific example, the grading rubric never mentions the various section 102 and 103 subject matter categories. We barely covered those categories in Intro IP, but I would expect a Copyright student to discuss them.

- Problem One: Ray v. Replicant
 - **TOTAL SCORING RUBRIC:**
 - Copyright: 35
 - Trademark: 18
 - TOTAL POINTS POSSIBLE: 53
 - **Copyright**
 - Many, many ways to organize it.
 - My preferred way:
 - First, list the various aspects of the copyrighted work that may have been infringed (Validity)
 - Then, list the possible plaintiffs.
 - For each plaintiff, list each possible infringing act.
 - Then, look for third-party liability.
 - Finally, talk about fair use.
 - **Valid Copyright? (1)** 1
 - **Fixed (1)** 1
 - Absolutely. A published book.
 - The rest of validity (original/sufficiently creative/idea-expression) will turn on what part was allegedly infringed. Many ways to approach it, but they need to do all of the following.
 - Modicum of Creativity / Idea-Expression / Merger discussion for each of the four subparts
 - [1] Recipe titles (2) 2
 - Any single one is too short. (Short phrase rule)
 - BUT: Taken together, they probably amount to a text -- like a poem.
 - Especially given her use of cutesy phrases.
 - Also, even if recipe titles are mere facts (Chicken Stroganoff), this might be like the White Pages
 - Selection - Tons made
 - Coordination - How are they ordered?
 - Arrangement - How are they arranged?
 - Close call, but probably protectable?
 - [2] List of Ingredients (2) 2
 - Possible merger with idea.
 - The list is dictated by the title/recipe.
 - There is some notion of creativity here (cilantro in a dessert?) but is this the kind of creativity Copyright is meant to protect?
 - Cannot be useful article, because no functionality/useful article doctrine for literary works.
 - [3] Directions (1) 1
 - Probably more use of creative phrases, more expression, less merger with idea.
 - But, the facts are lacking. If she really used plain, direct language, more like the contest directions in Morrissey?
 - Perhaps not, because of cutesy phrases and wit throughout.

Final Exam Solution Key -- Fall 2006 Intro IP: Student ID

Points

- [4] Prefatory Paragraphs (1) 1
 - Absolutely creative enough and no merger problems likely.
 - Clearly creative. Long enough.
- Somewhere there should be a conversation about the special nature of cookbooks, capturing some of these nuances (1) 1
 - Cookbooks are mostly "facts". Lots of merger.
 - Protecting a recipe through Copyright would possibly give a monopoly on a never-before seen type of recipe. Not what copyright is about.
 - Recipes at the very least should have thin copyrights.
 - BUT: maybe the compilation brings in more S/C/A facts.
- Infringement?
 - Again, I'd probably structure this plaintiff-by-plaintiff and then alleged infringing act by alleged infringing act, but there is much possible variation here.
 - NOTE: For all of these, the Copy prong need not be discussed, because it is so clearly met. However, one extra point if they talk about the prong globally or with each plaintiff. (1) 1
 - Plaintiff 1: Replicant Books
 - Act 1: Entering [1][2][3][4] into the MS Word Document (2) 2
 - Even though it's an employee, respondeat superior. (1) 1
 - Implicates 106 rights: Copy and Derivative Work
 - Misappropriation
 - Despite all of the hard questions, no doubt too something copyrighted here.
 - Outcome: Probably infringing.
 - Act 2: Sending copies of Word Document to 10,000 people (2) 2
 - May be merged with Act 1 (sent copies to 10,000 people). Still possible to get all points if done this way).
 - Implicates 106 rights: Copy and distribution
 - Misappropriation?
 - Clearly.
 - Clear infringement.
 - Plaintiff 2: Le Chef
 - Act 3: Le Chef created own version of book and published and sold it (2) 2
 - Implicates 106 rights: Copy, Derivative Work, Distribution
 - Misappropriation
 - BUT: Only thing taken was [1]
 - This may be part where they discuss validity of [1] as copyright.
 - Probably NOT infringement.
 - Plaintiff 3: Bell
 - Act 4: Cooking rocks. (2) 2
 - Implicates 106 rights: Copy, Derivative Work, Distribution
 - Misappropriation
 - Took: [1], most of [2], most of [3], most of [4]

- Probably took too much.
 - Some words were taken, but very slight variations.
 - Extra point for mentioning the "substantial similarity" test (which would be met here).
- **COPYRIGHT PRIMA FACIE SUBTOTAL** **19**
- **Fair Use?**
 - **This might be discussed after each plaintiff/act above OR it might be a separate section.**
 - **Note: I don't list conclusions here. But they should probably draw some (because call of question is memo to judge)**
 - **P1/Act 1 (creation of word document) (1)** **1**
 - Must discuss how this has no effect on market (fourth prong).
 - Intermediate use mention is good.
 - **P1/Act 2 (distribution to 10,000 "contestants) (2)** **2**
 - Can get all three replicant points just for saying "Repl doesn't have a very good fair use argument"
 - 1. Purpose and Character: non-transformative; attenuated commercial.
 - 2. Nature of work: Creative/with some facts.
 - 3. Amount and substantiality taken: Almost 100%
 - 4. Effect on market: Gigantic and actually measured. These people aren't required to be contestants. Impossible to justify.
 - **P2/Act 3 (Le Chef Manuscript) (2)** **2**
 - 1. Purpose and Character: Parody / Commentary / Most-favored uses.
 - But commercial
 - 2. Nature of work: Not very creative. Just recipe titles.
 - 3. Amount and Substantiality Taken: Very little. Just the titles. Tiny portion. That taken may be necessary for parody.
 - 4. Effect on market: Stated in facts, but any effect from this book probably the result of the effectiveness of the critique.
 - **P2/Act 4 (Bell manuscript) (3)** **3**
 - The most interesting one for fair use.
 - 1. Purpose and character
 - Not clear whether this is parody or satire (tests given) (1) **1**
 - First in series, so maybe this has nothing to do with Ray.
 - But inspired by title, so maybe a slight parodic point
 - Courts won't evaluate these claims.
 - Commercial
 - But possibly only educational.
 - 2. Nature of work: creative + facts.
 - 3. Amount and Substantiality Taken: 99%
 - Was the heart taken? (1) **1**
 - Pro: Sure, 99% has to include the heart.
 - Con: But she "disabled" the recipes. Not the heart at all. In fact, everything but the heart.

Final Exam Solution Key -- Fall 2006 Intro IP: Student ID**Points**

- Plus: For parody, you have to take the heart.
 - Bottom line: They must discuss more than one of these to get this point.
- **4. Effect on Market.**
 - Seems huge and established (large drop in sales).
 - But confounded by Le Chef book at same time.
 - Parody effect?
 - Weaker argument than for Le Chef -- not really parodic.
 - Effect on Derivatives market for geologic-ulinary works?
 - Hah!
 - Should marketing channels matter?
 - Probably not: Point is potential effect on market IF THIS BECOMES widespread. (1)
- **FAIR USE SUBTOTAL** **11**
- **Third-Party Liability?**
 - **Issue: Is Replicant liable for LeChef's and Bell's Acts? (1)** **1**
 - **Answer may vary because Bell didn't publish with Replicant.**
 - **Tests**
 - Somewhere, they should list the tests for vicarious and contributory
 - Vicarious: (1) right and ability to supervise and (2) direct financial interest in the infringement (1) **1**
 - Contributory: (1) Induces, causes, or materially contributes to the infringement (2) with knowledge. (1) **1**
 - Grokster: One way to prove knowledge is through evidence of actual purpose to cause infringement
 - **Liability through LeChef (2)** **1**
 - **No Vicarious: No ability to supervise.**
 - Perhaps post-contest, but not in facts.
 - **Possibly Contributory**
 - Materially contributed to infringement.
 - Clear knowledge.
 - Invited infringement, in fact.
 - Maybe analogous to the mix-tape record store case.
 - **Liability through Bell (2)** **1**
 - **Very similar to LeChef.**
 - **But lose a point if they don't discuss effect of not closing the publication deal.**
 - Probably shouldn't matter, because the contributory part was complete long before that.
 - But maybe liable for copying only, not distribution.
- **THIRD-PARTY SUBTOTAL** **5**
- **COPYRIGHT POINTS: Prima Facie 19 + Fair Use 11 + Third-Party 5** **35**
- **Trademark**
 - **Valid Marks? (3)** **3**

-
- Problem Three: Utilitarian Balance and the Public Domain
 - **TOTAL SCORING RUBRIC:**
 - Discussion of current doctrine: 10
 - Recommendations: 5
 - TOTAL POINTS AVAILABLE: 15
 - **Possible rules to discuss**
 - Trademark rules seem a poor fit, because they're not really about balance and they're not really about utilitarianism and they're not really about the public domain.
 - I'm happy to be proven wrong, but students citing TM better be convincing and detailed!
 - Trade Secret: Reverse engineering prohibited in some places?
 - Point: Question suggests *recent* changes (Today's IP) so pointing to centuries old examples aren't valid.
 - Patent: Subject Matter extensions to Business Methods, Software, etc.
 - Copyright: Sonny Bono Copyright Extension Act
 - Copyright: DMCA
 - But we didn't really talk about this much in class.