

**FINAL EXAMINATION
INTRODUCTION TO INTELLECTUAL PROPERTY
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Instructions:

Please read these instructions carefully before proceeding.

1. The examination consists of four pages, including this one. You will find three questions. Please make sure that your copy is complete and that you answer all three questions.
2. You have three hours (180 minutes) to complete the exam and, not by coincidence, the exam is worth 180 points. You should devote approximately eighty minutes (one hour and twenty minutes) to the first question, sixty minutes (one hour) to the second question, and forty minutes to the third question. The recommended amount of minutes allotted to each question matches the number of points that question is worth: **The first question is worth eighty points (or about 44% of the total), the second question is worth sixty points (about 33%), and the third question is worth forty points (about 22%).**
3. Answers will be graded based on content, clarity of expression, and organization. I strongly suggest that you spend time outlining your response before you start to write. Where information is not provided that would be relevant to the analysis, feel free to explain how different scenarios would call for different outcomes.
4. Assume that all cases that were pending when we discussed them in class are still undecided. If any cases have been decided or statutes have been changed during the course of the semester, you are not responsible for knowing the final rule, result or reasoning, and you will not gain points by talking about the new decision or statute.
5. Since this is a class about entertainment and invention, some of the fact patterns may be based on real creative content, technology, and products. You will not be rewarded or penalized for facts about the actual content, technology, and products that are not presented in the exam questions. Feel free to add these types of details if you think they improve the readability of your answer.
6. In answering these questions, you may consult any written materials you wish.
7. Please type your answers or write them neatly. Mark your answers with your exam number, not your name. If you are handwriting the exam, please write on only one side of each page.
8. You must turn in these questions with your answers.
9. Relax and good luck!

PROBLEM ONE (80 Minutes)

Rachael Ray ("Ray") is a wildly successful celebrity chef. She stars in and produces numerous successful television cooking shows and has published two-dozen best-selling cookbooks, including a million-plus seller called "Cooking Rocks!" Audiences like her simple approach to cooking instruction, which empowers even the clumsiest novice chef, and her wit and charm. As an example of her famous wit, Ray is known for using "cutesy" terms in place of traditional cooking terms, and with her rising fame, these terms have become famous in their own right. For example, she calls thick soups, "stoups," extra virgin olive oil is "E.V.O.O.," and mashed potatoes are "smashed potatoes."

The people at Replicant Books ("Replicant"), a small, independent book publisher with no business relationship to Ray, try to cash in on her popularity with an innovative idea. They set up a contest through which they challenge people to "remix" Rachel Ray's famous recipes. First, an employee buys one copy of Cooking Rocks!, and enters into a Microsoft Word document the following information for every recipe in the book: (1) the title of the recipe; (2) the list of ingredients, including the amount of each ingredient needed; (3) the verbatim step-by-step directions for making the recipe; and (4) the short prefatory paragraph (three or four sentences) found before every recipe in which Ray describes her motivation behind or love for the recipe. All four categories of information include Ray's cutesy phrases. The employees do not enter any illustrations, photos, or the introduction from Ray's book.

Next, Replicant advertises in a few cooking magazines that it is looking for people who can put a "fresh spin on Rachael Ray's famous Cooking Rocks! recipes." Replicant promises the winner a book deal to publish and market his or her winning entry. About ten thousand people respond to the ad and each is e-mailed a copy of the Word document containing the recipes. About forty of the respondents send back their remixed versions of Ray's recipes, and Replicant selects two winners. They are:

Gustave Le Chef ("Le Chef") is a classically-trained French chef who bristles at Ray's fame. Le Chef believes that Ray's cooking is sub-par, her love of publicity to be pandering to the lowest common denominator, and her untrained techniques a dangerous example for newcomers to the trade. With this motivation, Le Chef writes a manuscript he entitles, "On the Criminally Suspect Techniques and Inferior End Products of the American Cooking Personality, Rachael Ray."

In his manuscript, Le Chef creates what he call "upgrades" to each recipe in Ray's book. Each recipe in Le Chef's manuscript corresponds to a recipe in Ray's book: the titles of the recipes are identical and the recipes are presented in the same order. However, Le Chef promises "tastier, more aromatic, and lovelier" versions of Ray's dishes, and all of his versions vary widely from Ray's versions both in ingredient list and in step-by-step instruction. Le Chef replaces Ray's prefatory comments with short essays about how, in his opinion, his recipes are better than Ray's "abominations."

Alexis "Graham Cracker" Bell, a scientist by training and an avid novice cook, creates a manuscript she calls, "Cooking Rocks." In it, she tries to make as few changes as possible to each recipe (either the ingredient list, the step-by-step instructions, or both) in Ray's book to render the resulting dish a hard, preferably gray, inedible substance. Her stated goal is to "show the world how fine is the line between cuisine and geology." She envisions this as the first in a series of geologi-culinary books, each one mimicking a different chef.

As does Le Chef, Bell adopts the order and exact recipe titles from Ray's book. In addition, she includes Ray's prefatory remarks before each recipe almost verbatim. Although Bell's recipes vary from Ray's in only the slightest details, one change made throughout the manuscript is that, whenever possible, Ray's words are replaced with geology-related puns ("lime" becomes "limestone", "hummus" becomes "humus", "salt" becomes "basalt," "fava" becomes "lava," etc.).

Le Chef agrees to have his manuscript published and sold by Replicant. Tens of thousands of copies of the book are sold, and Replicant splits the profits with Le Chef. Bell refuses the book deal and publishes her manuscript on her own as a self-produced pamphlet that she ships to specialty science bookstores around the country and chain and independent bookstores in her hometown. She sells about a thousand copies. In the months following the announcement and start of the contest, sales of Ray's cookbook experience an unexpected decline. After the publication of the Le Chef and Bell books, sales of Ray's cookbook drop even more sharply and unexpectedly.

Ray sues Replicant, Le Chef, and Bell in Federal Court alleging copyright infringement and trademark infringement. Trademark dilution is **not** alleged. You are the law clerk to the judge assigned the case. The judge has asked you to write a memo, based on the complaint alone (which recites the facts above), assessing the relative strengths of the claims and possible defenses in this case.

PROBLEM TWO (60 Minutes)

After finishing your clerkship, you open a solo practice of law. One day, a woman in a lab coat enters your office holding a small, plastic box full of soil. On closer inspection, you notice little mushrooms growing in the soil.

"These will replace dental floss," she says. Seeing your puzzled look, she adds, "Trust me. Chew one and see what happens."

You're very suspicious, but you're also in need of a new client, so you hold your breath, cross your fingers, and start chewing one of the mushrooms. Sure enough, the mushroom breaks down and acts like an adhesive strong enough to dislodge three-week-old food particles that have evaded your twice daily traditional flossing but weak enough not to stick to or between your teeth.

"I'm a chemist, and my cousin is a rancher," the woman continues. "He has a horse, and that horse has the cleanest teeth I have ever seen. I watched that horse for three months, and the only unusual thing he did was constantly chew on these little mushrooms. Unfortunately, the mushrooms did nothing for me, so I brought them into the lab and started trying to replicate the conditions in the horse's mouth.

"My first idea was to soak the mushrooms in the horse's saliva, but that still did nothing. It took a lot of trial and error to replicate the precise temperature, humidity, pH, and soaking time conditions, but when the precise conditions were present, the mushroom/saliva mixture began to work as floss replacement. Unfortunately, it smelled and tasted horrible."

"I spent another month in the lab working on the saliva, removing impurities and improving the flavor. I also broke down the saliva's chemical composition, which wasn't difficult, and I can now manufacture synthetic saliva in large batches for very little money." Your excitement about the prospect of this new client is tempered a little by the thought of the horse-saliva-soaked mushroom remains in your mouth.

"So that's my idea. These mushrooms soaked in synthetic, purified horse saliva to create an improvement on dental floss. I want to start selling it, but I am hoping I can somehow stop the big floss players from ripping off my idea. Can you help?"

You tell her that you'll be in touch. Write her a memo, explaining all of the forms of Intellectual Property she may be able to use to protect the mushrooms, the synthetic saliva, or anything else that may be protectable. Point out the relative advantages she may enjoy from each approach and the significant risks or limitations she may encounter. Assume that nothing mentioned in this question would qualify for a plant patent.

PROBLEM THREE (40 Minutes)

Consider the following statement:

"Intellectual Property law is supposed to balance rewards for invention and creation against the protection and maintenance of a vibrant public domain from which inventors and creators can draw. If the balance is struck well, IP law will create incentives for new invention and creation. Today's IP law is imbalanced, with too much reward and not enough protection of the public domain."

Write an essay in support of this statement (even if you personally disagree with it). Give some examples of IP rules that reflect this alleged imbalance. Propose some reforms that would help correct the imbalance.