

- Problem One: Prentice v. Davis (began 3:12pm)
 - **TOTAL SCORING RUBRIC:**
 - **TM: 13**
 - **Copyright: 7**
 - **Writing Style Bonus: 3**
 - **Total Points Possible: 23**
 - **Trademark**
 - **Valid mark?**
 - **Two possible marks** 1
 - Get one point even if just focusing on dress
 - Three lines in frosting (mark)
 - The shape of the cookie itself (dress)
 - **How distinctive is this?** 3
 - [One point for decent discussion; Two if engages in raising difficulties with non-word marks; Three only if they hit many subtleties and/or discuss difference between lines and mugs in depth]
 - **Mark (three lines)**
 - Didn't really intend to test this separately when I wrote the Q, but give a point for students who addressed this above/beyond trade dress.
 - Pretty simple
 - Facts aren't clear whether secondary meaning for the lines
 - **Dress (mug)**
 - This is product design not packaging
 - From Samara Bros: Not inherently distinctive.
 - So secondary meaning is needed.
 - Seems pretty simple.
 - As an analog to the word mark scale? 1
 - [One bonus point if they explicitly note that Zatarain's word scale isn't directly applicable]
 - Simplicity may not defeat you. It's the connection between the mark and the product.
 - Here, there's nothing "descriptive" about cookies and coffee mugs.
 - Davis himself has twenty other designs.
 - Maybe "suggestive" because coffee and cookies?
 - So perhaps distinctive enough.
 - And evidence of secondary meaning.
 - But bonus point for spotting the fact that it might turn on how many passersby the reporter stopped before finding the three. 1
 - **Functional TM?** 1
 - **Are parts of this functional?**
 - Test: affects cost or quality or essential to the use or purpose?
 - Cookies are meant to be eaten, but none of these serve that purpose.
 - Also: the handle can be grasped for dunking.
 - So seems to affect quality?

- Somewhat strained argument: you can dunk the big, fat substantial part and not get your fingers wet?
 - **Maybe an aesthetic functionality argument?**
 - But few points, because I expressly told some students not to focus on this.
 - If functional, can you separate out the handle from the rest of the cookie?
 - Likely held: Not functional.
- **Secondary Meaning?** 1
 - We need to test it.
 - The anecdotes from the news report are good. So it looks good.
 - Esp. because these were people in Gotham, not Metropolis.
- **Regional Rules** 1
 - **No mention of federal registration.**
 - **Question: Are these the same market?**
 - Three people know Penelope's in Gotham so encouraging fact.
 - 30 miles. Both large cities.
 - Local advertising, but not clear whether both cities served by paper.
- **Likelihood of Confusion?** 3
 - **[One if bare mention; two if some detail; three if very sophisticated]**
 - **Threshold Test: Do the products directly compete?**
 - Cafes and cookie stores.
 - But cookies are sold in both.
 - So possibly just similarity.
 - Then again, if speed boats and recreation boats don't compete, maybe these don't.
 - **Strength**
 - Somewhat
 - **Proximity of the goods.**
 - Very similar channels.
 - **Similarity of the marks.**
 - Close, but differences.
 - Green vs. blue. Small vs. large. Rounded vs. squared.
 - **Actual confusion.**
 - Some.
 - **Channels**
 - Parallel?
 - Maybe cafe customers eat in while cookie store customers eat out?
 - **Type of goods**
 - Not much care.
 - **Intent**
 - Unclear
 - **Expansion?**
 - Sure. Possible.

<u>Final Exam Solution Key--Fall 2007 Intro IP: Student ID:</u>	<u>Points</u>
<ul style="list-style-type: none"> ● Maybe confusing? ● Dilution? ● Famous Mark? <ul style="list-style-type: none"> ● Probably not, so nothing else needs to be discussed. ● No points if they don't discuss famousness requirement regardless of how deep they get with blurring/Nabisco/etc 	1
● <u>TRADEMARK SUBTOTAL</u>	<u>13</u>
● Copyright	
<ul style="list-style-type: none"> ● Valid Copyright? ● Independent creation and modicum of creativity? ● Fixed and PGS <ul style="list-style-type: none"> ● [one point for mentioning either or both] ● Yes. ● Extra point for discussing useful article in any depth, especially if conceptual separability is handled. ● Very, very simple. ● Lines ● Square ● Handle ● See NY Arrows case. Analog to short phrases. ● Also: Idea Expression <ul style="list-style-type: none"> ● Idea of a coffee cup embodied here <ul style="list-style-type: none"> ● Particularly when you compare the things they have in common. ● Merger / bumblebee example ● Levels of Abstraction ● Might include discussion under Misappropriation prong 	1 1 1 1
● Infringed?	2
<ul style="list-style-type: none"> ● [One for barely flagging the following; two for slightly more depth] ● Possible rights infringed <ul style="list-style-type: none"> ● reproduction, derivative work, public display, distribution ● Copying <ul style="list-style-type: none"> ● Unclear from facts. ● Some level of access (newspaper ad, 30 miles away) ● Some similarity. ● Misappropriation <ul style="list-style-type: none"> ● No. ● Might include idea/expression discussion here. 	
● <u>COPYRIGHT SUBTOTAL</u>	<u>7</u>
● <u>Bonus points for quality of response</u>	<u>3</u>
●	
●	
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- **Problem Two: Traveling Saleswomen**
 - **SCORING BREAKDOWN:**
 - **Trade Secret: 11**
 - **Patent: 6**
 - **Writing Bonus: 3**
 - **TOTAL POINTS POSSIBLE: 20**
 - **Trade Secret**
 - **Two secrets** 2
 - [One point for noting the twin secrets; second bonus point for analyzing the two separately]
 - **Formula**
 - **Itinerary**
 - **Protectable?** 1
 - **Secret? (Bonus for catching one of the advanced thoughts below)** 1
 - Not many facts. But presumably so.
 - Itinerary is just tossed in the trash, so maybe not?
 - But article reveals a lot.
 - Court might frown on this.
 - **Valuable?**
 - Definitely.
 - **Reasonable steps to protect secret against disclosure by TS owner** 2
 - [Two for most of following; One for less]
 - **May be in the "secret" prong above.**
 - **Presumably so.**
 - Particularly because it's so hard to get itinerary data.
 - But it may turn on what others in industry do
 - **Can you really protect the secrecy of a public itinerary?**
 - Maybe inherently unprotectable? Not like a customer list.
 - **Misappropriation?**
 - **Improper Means?**
 - [For each, one for cursory analysis; two for more careful analysis and comparisons with facts of cases.]
 - **Digging through trash?** 2
 - Seems unseemly
 - Quote about Business Morals
 - Compare need to shred versus business morals with analogous discussion in Dupont
 - might turn on laws about trash digging
 - **Tailing with PI?** 2
 - Analogous to overflight case?
 - Probably bad?
 - But public streets.
 - **Reverse Engineering Defense?** 1

- Yes, for the formula.
- Maybe for the PI tailing?
- **TRADE SECRET SUBTOTAL** **11**
- **Patent**
 - **Novelty?** **3**
 - More than one year since published.
 - BUT: didn't disclose everything in the article, so probably not barred
 - Bonus point for discussing how four years of use is fine if you're the only one using it. **1**
 - But policy of sleeping in rights maybe implicated
 - **Patentable Subject Matter?** **2**
 - **Process**
 - **Mathematical formulae: State Street: useful, tangible, concrete result?**
 - Sure. Next city to visit.
 - **Rest aren't explored: Non-obviousness, WD/Enablement/Best Mode, Utility.**
 - **Conclusion**
 - Probably patentable, depending on statutory bar.
- **PATENT SUBTOTAL** **6**
- **Bonus points for writing style** **3**
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- **Problem Three: Corporations vs. Individuals**
 - **TOTAL SCORING RUBRIC**
 - Discussion of three rules (3 x 3): 9
 - Reforms: 5
 - Writing Style: 5
 - **TOTAL POINTS AVAILABLE: 19**
 - **Possible doctrines:**
 - Work for Hire
 - Term for Copyright
 - Fair Use / Market definition?
 - Patent thicket production?
 - Defensive patenting.
 - Blocking patents.
 - Cost of prosecuting a patent.
 - Statutory damages for Copyright