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Section 1	**6831**	**32097**	**39141**
Total	**6831**	**32097**	**39141**

Answer-to-Question-_1_

1(a) Oliveri may own blackacre by adverse possession. Adverse possession requires use that is open and notorious, actual, continuous, hostile, exclusive for the entire statutory duration It is clear since Leeton got a "valid" title from Dessem that he owned blackacre and assuming Leeton recored this title before Oliveri did he would be the rightful owner (depending on whther the jurisdiction was notice, race or race-notice). Generally AP asks whether the adverse possessor is using the land like atrue owner would. It seems generally in this case that this is true since Oliveri build a house and for all practical purposes thought this was a place she could live and was doing so. The house helps with the open and notorious element because all the world can see a house probably from the undeveloped road. It is not necessary that L knew she was there so long as a reasonably attentive land owner would know. If O paid taxes on the land this would also be open and notorious. O also had actual physical possession and she had color of possession in that she believed it was hers due to receiving the property in a will. Color of title may give her constructive possession over all of the property including the unused area; in some states however, she would only be able to adversely possess the area she was actually using which would not include the unused area. It seems as though O's use was also continuous since she was living there like a resident and there are no facts to the contrary. There are multiple approaches that courts take as to whether O was establishing hostility or a "claim or right." The majoriyt, objective approach asks how an objective observer would evaluate O's actions and for all practical purposes she seems to be living on the land like a TO; often merely being in possession satisfies the requirement. Other states use a good faith view in which the APer must have honest belief it is hers, and Oliveri did. Other courts require and intent to claim and oliveri did that. There is no evidence that her ownership was not exclusive and that she would not have exercised her right to exclude had she been given the chance One problem is with for the entire statutory duration. Under common law the time period was twenty years, which certainly was not met in this case. In most states, like missouri the time period is 10 years. Express permission by the owner will break the hostility element and L may argue that he gave D permission to retain possession for five years after L took possession. This would mean that there would only have been 9 years of AP, which would be below the statutory minimum. O could argue to the contrary that that express permission was not enforceable since it did not satisfy the statute of frauds, which requires transfers of land to be in writing and the agreement was oral. There is no problem of O assuming the term of AP from D because this is called tacking and successsive APers may tack years so long as there is a reasonable connection b/w them and here there was transfer through a will so they would be in direct privity. Color of title for O may also shorten the stautory period in some states. The fact that O build a house may enable her to recover for her cost of the improvement minus amount due for "quazi rent" should the AP claim fail. For the wild land the open lands docrine says that so long as it was used

consistend with the best use of the land, the APer may get tile. Perhaps O coudl argue that there really was not much use for the wild area and she should be entitled to colllect. The burden of proof for all these elements would be on O.

(14)

1(b) Generally whoever has first possession of an object has better claim than all those who come after and this applies even to thieves (Armory). Since J stole the rung from H, he would have void title and H could take the ring back at any time form him. The first question is what kind of finders property does the ring count as. Abandoned property is shown by an intent to abandon by the true owner; it is not clear if J intended to abandon but because of the value of the ring it seems unlikely; abandoned property belongs to the finder. Lost property is where the owner intentionally and involuntarily parts with ist possession and does not know where it is; this does not seem to be the case here since J buried it on purpose (would go to the finder though once statutory procedures followed). Mislaid property is when the owner voluntarily put it in a certiain place by the owner, who forgets where it is or overlooks where it has been placed; this seems to be the case here since J seems to have voluntarily and intentionally buried the ring. Mislaid property belongs to the premises owner once the statutory period has been followed. Some jurisdictions add another element, treasure trove which deals with coins/currency that were concealed by the owner and include an element of antiquity. This would not be the case here because there is no element of antiquity and J is still alive for all we know (msut be buried so deep that there is no way true owner is still alive).

Since this is likely mislaid property, the question becomes who is the "owner" of the road/easement. As a general rule in most cases if something is found upon private land, it is awarded to the landowner; this rule does not apply to trespassers unless they are on very open land, but G was a guest and does not seem to be on very open land. The question is then who does the road belong to. O would argue that it is her land that she merely allows L to use for egress and ingress. L would argue that although it was O's land he has a property interest in the land and when the ring was found the easement was being used for his purposes (guest). O could argue that looking for and finding treasure on the easment was outside of its scope as an easement appurtenant and going beyond that scope would be trespass; the easement was only supposed to be used for ingreass and egress.

Either way, the ring probably does not belong to G because it was mislaid and belonged to either L or O. She may claim that she had a derivative property interest in the easement as a guest of L but this ~~probably will not fly.~~ Her failure to give the ring to the proper person according to finder law may make her a thief, she might argue it gives her voidable title. The title is likely void regardless because H is still the true owner (johnsen only had void title) and you cannot give more than you have according to the rule of derivative title. The title could be cleanded potentially if the statutory procedures of notice and statute of limitations were followed, but they clearly were not in this case. IN all likelyhood the ring's title is

still void when it was sold to the jeweley. When the jewler sold it to C, despite being a BFP who does not seem to have knowledge of the title's non perfect status and likely paid fair consideration (jeweler also a merchant dealing in rings and could clean voidable title through the UCC or entrustment rule), C probebly still has void title. The givt to esbeck woudl be legitimate as an intervivos gift if it met the requiremetns of intent, acceptance and delivery (seems to have), but esbeck would still probably have void title. H would therefore be able to repossess the ring from esbeck since the voidness of the ring was never cleaned. Esback really could not sue anyone because he received the ring as a gift and did not pay consideration. C could sue the jeweler if H came after C for money, the jewler coudl sue L. J would be liable for theft and perhaps G as well.

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Question 2

As joint tenants in common, C&L share a unity of current possession and whoever outlives the other takes full possession; the first death person's interest evaporate. The JTwRoS requries that the four unities of Time, Tilte, Interest and Possession stay intact for the survivorship interest to remain. If they are ever broken, a tenancy in common is created instead which does not have survivorship rights, when one co owner dies, his portion simply passes to his heirs.

Powel has a term of years lease lease because it has a definite ending date five years later and periodic paymets of $30k per year. There is conflict as to whether the overall lease is commercial or residential. The lease to Walker itself says it will be a residential lease and courts often defer to what the elase says. On the other hand, the overall lease to Powell has a percentange rental provisions clause where the tenant must pay some profits in addition to rent and these provisions naturally apply to commercial leases when money is being made within the apartment.

Walker also has a term of years lease because there is a defininte ending date of two years later and $12,000 per years payments. This is a sublet because Powell can reenter after two years and thus is not giving ut the entirety of his remaining interest to the area. As a sublettor, Walker has privity of estate and contract with Powell, but neither of those with C&L.

Assume you survived

When powel abandons, Walker has a number of options. He could accept P's surrender, terminating the lease (really a K route) and sue P for the present value of the remaining rent plus any rent that was already due and had not been paid. As a K theory of recovery, W would have to make reasonably efforts to find a new tenant (duty to mitigate) because under contract law you cannot recover in damages those that you could have avoided. There may be some question as to how diligent W was in trying to find a new tenant since it took him two months so find S, but generally this seems like a reasonable amount of time. If P was wrong to abandon, W would get money for the two months rent before S moved in, any costs of finding S (including advertisements). Walker could also relet on P's behald being sure not to impliedly accept surrender (best done by clearly communicating to P that he

would be reletting on P's behalf and not accepting surrender); this is more of a property law theory of recovery and P would still be liable for rent as it came due. In most residential leases in the US, the LL still has a duty to mitigate in these situations. P could argue that the lease was actually commercial, in which case it is less likely he woudl have a duty to mitigate, but W could retort that the lease between the two of them clearly indicates it is a residential lease. W could have simply ignored P's absense, but it woudl be unwise since most states have a duty to mitigate.

P could respond with the defense that W vilated the implied covenant of quiet enjoyment because of W's interference with her use of the apartment she was renting. P could claim she was constructively evicted which would require intentional, substantial and perminent interference with her use of the apartment by W. If successful, she would be relieved of future obligations under the lease to W. P would argue first that is was clearly not his fault that W was having health problems since W was the one using incense in the first place; this is a strong argument. W could argue that P's failure to improve the ventilation system was intentional since clearly he knew she was having problems and didn nothing about this, but that is a stretch. Generally courts are more likely to apply the CoQE in situations where the LL has acted instead of failed to act. There is also a question of whether the eviction was substantial and deprived W of her bargained for exchange. You could consider how frequently tenants used incence and how important proper ventilations was in general for an apartment. Without propert ventilation there coudl be problems with heating cooling, mold build-up etc. W could argue. It does seem like the "interference" was perminent since P refused to fix it. In many states, courts require a T to give notice of the problem to the LL and the LL fail to cure; the fact that powel refused to fix the problem indicates that W satisfied that frequent requirement. The final requirmetn for constructive eviction is that W vacate within a reasonable time. W began having health problems a few months into her lease but did not move out until a year after her lease started. This would be strong evidence in favor of P that there was not constructive eviction (not substantial enough for W to move out quicker). P's strongest argument woudl be that it was P who was causing the problem in the first place by burning incense and in the CoQE LL's are not responsible for the actions of anyone other than themselves. The ICoQE is generally applied to both commercial and residential leases so any debate as to whether this was actually a commercial or residential lease would have not effect. This covenant cannot be contracted out of in most jurisdictions.

W could also raise the affirmative defense that W had breached the implied warranty of habitability which is only for residential leases. P has an obligation to ensure that the premises are fit for basic human habitation and no chronically unsafe or unsanitary conditions persist. This would be easier for W to win on since a breach does not require a LL to be at fault. W could argue that poor ventalation is unsafe and unsanitary for reasons such as fire danger (clearing out smoke), mold build up, weak heating/cooling, carbon monoxide buildup, etc. W should look to local housing codes to see if poor ventaliation is a breach of any because most courts will strongly consider this in evaluationg whether a

breach had occurred. A minority of states require a housing code violation before they will say there has been a breach, but the majority can still imply a breach absent a housing code violation. Courts more regularly apply housing code violations to be breaches when there are fewer in the jurisdiction, those that are present are for more serious breaches (safety-related usually). May courts woud require W to have notified P of the breach and him failed to fix, which seems to be the case here. It is not necessary for W to have moved out within a reasonable amound of time, depending on the state, she could have a few options; move out and terminate the lease (which she did); remain in possession and sue for damages (she may be able to get damages for decrease in the value of the property due the its inhabitability); fix the problem and deduct the cost of fixing fromt he rent (trend in courts); or reduce/withold the rend, put it in an escrow accound and wait for a court's decition.

This issue is very similar to the one raised in the case of Poyck where a T raised the affirmative defense that her apartment was uninhabitable because of second hand smoke from another tenant. The court looked to a number of things in concluding there was no breach. First the court concluded that there were no rules against smoking in the apartment (in the case of W, it is not certain if there were any rules against burining incense; there may have been since it is a known fire hazard); the court also looked at a cost benefit analysis as to how much it woudl cost the landlord to fix the problem in comparison with the amount of harm it was causing the tentant. In W's case P woudl have a strong argument that the "major renovations" would be very expensive and the cost of doing so, which woudl be transferred to tenants through rent, could drive him out of business (in doing do potentially limit the amout of space available to people wanting to live in apartments in the area). W could argue against that and appeal to courts' typical favoratism towards tenants, especially residential tenants and say that this was a building that seems to have been constructive for wealthy lawyers and therefore P should bear the cost of making the place more habitable instead of placing that burden on tenants like herself who have less access to money (distribution of wealth; egalitarian argument).

There is also another issue in the background in that perhaps C&L should be the ones fixing the problem. This may depend on the terms of the lease b/w P and C&L and C&L could argue that this was mostly a commercial lease and under commercial leases tenants do not have the same court protections as residential leases and often have to bear the burden of repairs and improvements either implicitly or explicitly in the case of a tripple net lease where T payds the taxes, insurance and maintentance. P could argue that replacing the ventalation system would be however unexpected and not contained within any such triple net lease providtion as a commercial T did in the case of Hadian when faced with the burden of seismic retrofitting, which cost a huge amount of money. In general, for either commercial or residential tenants, courts are hesitant to place a large burden on the T, which would be P in this case. A court would also look at the long-term benefit of a new ventilation system which would end up serving C&L much more than P/W since they could enjoy its use long after the T's leases had expired and woudl

also likely increase the value of the property. C&L could simply argue they have no duty to fix the ventalation for W because they are neither in privity of estate or K with W (since W is a sublessor and not an assignee (as an assignee W woudl be in privity with C&L)).

Since S rented for the same rent as W did, there are no issue with who of P or W bears the burded of the "implied subleasor" (in the relet on T's behalf case") paying less than the previous rent, or benefit if the second paid more.

All of these leases in this question must be in writing to fulfil the statute of frauds since all are leases of more than one year.

There is no indication that Spieler actuall moved in since all the drama happened right about the time she was "actually going to live in the apartment." By the rule of derivative title, P could not give her more of his lease than he had and so therefore the lease may be voidable. Any claims brought by Spelier against other parties could point that out and it would be a strong argument, but S would have a good cause of action against P for selling her a bad lease.

When L sells his interest in the building, it breaks the four unities of time and title of the JTwRoS he holds with C and therefore T and C become tenants in common without survivorship interest. There are two types of partition, in kind and by sale. Partition may be done when parties cannot agree how to use the property concurrently and in this case T clearly is at odds with C as to how to use the property the best because of the suit. Court prefer in kind partition (physical) there are fewer transaction costs than partition by sale because partition by sale requires an auction, which costs money. It is very difficult in general to physically divide real estate and especially a building. In many inscances courts will only allow partition by sale after a showing that partition in kind is not possibl (e.g. Popov - splitting a baseball in half would essentially destroy it); in this case physcially splitting the building would substantially reduce its value if not destroy it. The court potentially could split it by floor and use owely to have the person who got the more valuable piece pay compensation to the other. With partition by sale, courts will sell by auction; in some states the sellers can bid in the auction, but in others they cannot (only able to set a reserve price).

Generally, a land lord can only sell the land subject to the lease, and so whoever came out with the building ownership would still be subject to valid leases outstanding. The new owner woudl be in privity of estate with the old owner. Powell therefore cannot claim eviction or any other violation due to the change in ownership unless his lease with C&L said somethign about it. C&L will probably be on the hook with P even after either one of them no longer has ownership of the property because they still woudl be in privity of K with him. Powel's claim that he agreement was only with C&L would probably fail since he would automatically be in privity of estate with the new owners and besides, he would now have two people he could sue if anything went wrong instead of just one. When P left, likely without justification, the same options (discussed above) for whoever ended up being land lord would apply. The

LL could accept surrender, relet on the tenants behalf or ignore the lease. In this situation ignoring the lease may be a viable option because the lease with P is arguably commercial and a duty to mitigate is not imlied, however the fact that people also live in teh property would be strong indication it was residential. Contract law generally reigns in commercial leases and in contracts there is a duty to mitigate, that woudl be a good argument for the LL.

S may have a claim against P for breach of the implied warranty of title, that seller holds title or has rights to transfer title (since P did not have rights to transfer more of the lease than he himself had). This may also be a breach of the CoQE since S may not be able to enter the property since her lease is voidable, but P could argue that since it was voidable, this covenant does not apply.

Lease to S when P abandons

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Question 3.

3(a)(1) Freehold estates usually only apply to land. A fees imple determinable is in the for of "to A so long as" and in this case what Apple would likely follow it with would be "this phone is never jailbroken." In this case theoretically if anyone ever jailbroke the phone, the estate in the phone would automatically transfer to Apple. This would present a problem with adverse possession of personal property since Apple might very well not know that the phone had been jailbroken and the statute of limitations for adverse possession of personal property would start to run (the time period is typically shorter than that for land; somewhere between 2-6 years usuall; on the high end, the way technology/phones are progressing these days this may not be a worry for Apple because after two years they will have come out with something better). At common law, adverse posession would start when all the elements of adverse possession would be met. There woudl be a big question of open and notorious in this case becasue often the rule is if the true owner would not expect the use to be hostile or adverse, the adverse possesssor must do something to show that it was adverse. No reasonable person seeing someone useing an apple phone would automatically consider it to be being adversely possessed. The modern approach to adverse possession of personal property is that the statute of limitations starts to run when the true owner knew or should have known that is was being adversely possessed by someone or where it was. If apple could tell when phones were jailbroken a FSD approach would work, otherewise they may want to use a fee simple subject to condition subsequent approach so they will have a right of reentry when the phone is jailbroken and no adverse possession would be available since the phone's user would retain title until Apple decided to take it back.

Apple would also have to consider that the restriction on not jailbreaking the phone may be an unlawful indirect restraint on alienability. The modern rule is that restraints on alienability are ok unless the substantially reduce the property's value. It is unclear whether not allowing jailbreaking would substantially reduce a property's value. If a lot of people value jailbroken I-Phones and woudl pay more for them, such a restriction may be said to substantially reduce its value. A minority of courts woudl also

look to the test from the case of Alby and consider a number of factors in assessing the reasonableness of a restriction including its scope, purpose, duration, whether there was consideration paid for it and also the effect on its property value. The downside of a court using this standard is it reduces the predictabiliy of when somethign iwll be called unreasonable, which could hurt commerce and drive up legal fees, lawsuits. Int erems of scope, the scope seems relatively narrow, only restricting somethign very technical that could be done with the phone; Apple seems to have good purpose for doing so in protencting its technology and livelihood; duration is potentially forever which would not help apple; and Apple could put something in the K with buyers (perhaps a discout in price) for the condition on a phone and so consideration would be met. One generally problem apple woudl face is that courts generally believe that former owners (Apple) of property should not be allowed to tell current owners what to do with their property (purchaser) because the current owner is in the best position to know what the best, most efficient use of that property is. If a lot of people want to jailbreak their phones, that is an indication that society would be most beneficial if the phones could be used to their true capacity, and the cost to apple would not be worth the benefit to phone users.

One more problem with a FSD is that it woudl make valuation hard in some sense. Who is to say when a phone would be jailbroken? How does one determine this likelihood and then quantiify that in an appropriate way when determining the amount to pay for the phone?

Another problem with this set up could be caused by the doctrine of waste in that users of the phones would be under a duty not to waste the phone (alter its condition) or Apple would have a cause of actaion against them. Waste is a COA by a future interest holder against a present possessor. Reversionary interests, like the one that apple would have would be considered vested. This really pushes against the common belief that when you are purchasing something you get full unrestricted ownership to do what you want with it, such as destroy, change modify or add to it. Apple may be able to claim voluntary/affirmative waste if the holder of the phone decreases its value in any way; permissive waste if the user abandons the phone or fails to maintane/preserve it; or ameliorating waste (rarely sued upon) if a user decides to change the phone in such a way to increase its value (courts may allow if it would deprive apple of its expectation in someday possibly getting the phone back).

Because people can only transfer the interest they have in property by the rule of derivative title, any purchaser of the phone after the original would only be able to get the FSD present possessory interest and not the enire thing held in FSA; this would work to Apple's advantage; but may give court reason to find the restraint unreasonable since it potentially lasts forever and times may change very much in the future to the point where the restriction no longer makes any sense at all. If apple were ever to reposess a phone (without it being jailbroken) through the doctrine of merger, it woudl own the phone again in FSA and could do whatever they wanted with it; a slight but relevant upside.

It makes sense for apple to structure the sale of its product in this way.

3(a)(2)

Unliek a grant of a freehold estate (FSD), a promissory servitude does not allow another to obtain full rights to another person's property, instead if allows one person to have some control over what another person either does or does not do with his or her property through the use of either an injunction (property rule) or damages (contract rule). There are two types of promissory servitudes, equitable (can obtain only an injunction) or reasl covenant (can obtain monetary damages or an injunction). The first requirement of either promissory servitude would be easy for apple to meet (original parties intended the servitude to bind successors) in that Apple cout structure it in with the original contract that both buyer and seller agree that the negative (owner must AVOID some action) restriction that does not allow jailbraking will pass on to the next purchaser and the next (successors). Traditionally courts are more favorable towards negative servitudes beacuse they do not have the possibiility of divesting someone of their money by merely doing nothing; instead they must do something to be liable. The next requirement that the restriction "touches and conerns" the property woudl be more difficult to meet and could be more easily broken. According to garland restrictions that are purely protective of one party's financial interest do not touch and concern the land. In Apples' case they woudl have a hard time showing that there was any mutuality of burden/benefit under the Neponsit Test since after perhaps an initial sale with consideration for the burden, the holder of the phone would get nothing in return for the burden. The Restatement of Property's approach Apple coudl argue shoudl apply instead. Apple would argue the restriction is certainly not arbitrary, spiteful or capricious (they have a legitimate business interest to protect); but owners woucl counter that the burden imposes an unreasonable restraint on alientation (see discuttion above for FSD) and on trade. Modern courts that typically hold a servitude unreasonable only if it was unconscionable or condictions have changed so that it would no longer be reasonable may agree with apple that the restraint is ok as a means to allow Apple to protect its interest.

Another problem Apple would run into would be the issue of privity of estate if it wanted to be able to obtain monetary damages from jail breakers instead of just injunctions for them to stop using jailbroken phones. The tradictional rule is that there must be horizontal privity between the original covantors, which would be no problem in this case since all courts hold that successive interests (grantor/grantee relationship) is sufficient to establish horizontal privity (some courts say that mutual interest e.g. easement, LL/T, CO-Owners is insufficient). Vertical privity would probably also not be an issue since whoever sold the phone (or if Apple got bought out) woudl be successors in interest to the phone (this normally requires transfer of the entire estate, which would happen in this case because usually a phone is only usable if it is in one whole piecce). So long as no one adveresely possessed the phone, there would likely be vertical privity between the parites. The burden/benefit restriction would not cause any problems for apple because we can assume that the original covantors had horizontal privity beacuse of the contract and there would be vertical privity between successors in interest of the phone (for

a burden to bind a successor there must be both horizontal and vertical privity). There are many proposals to eliminate this requirement altogether anyway and the Restatement takes this view. The hardest thing for apple in trying to create an valid promissory servidute would be ensuring that successors in interest took possession with notice of the restriction. Perhaps every time the phone number was changed the phone could ask you to accept a license agreement. If the successors did not take with notice, they woudl not be bound.

To enforce an equitable servitude, no privity of estate would be required, but apple would only be able use injunctions to stop.

The promissory servitude route may be a better one for apple beacuse it allows phone's users to have full title in fee simple absolute whereas the FSD route would not allow this. It would probably affect sales badly if people knew their shiny and expensive macintosh divise could be taken from they by the company who just robbed them of their money if they did something they were not supposed to with the thing they just legitimately purchased.

3(b)

There is a question of individual basic liberty here in that one should be allowed to do what they want with the things they purchase in order to maximise their own self interest. Indeed courts often rely on the fact that current owners are in the best position to decide what to do with the property to maximise their owns self intrest in light of present circumstace whereas past owners cannot predict what the future will bring and how societal needs and individual needs might be negatively affected by restrictions made that continue into the future. This is party of the reason courts established the RAP to avoid "dead hand control." Fromt he other perspective though, an individual or company who creates a product should have the liberty to disperse it into society in the best way that it sees fit. This encourages ingenuity and investment into research and development because one can rest assured that they alone will reap the benefit of their labor. On the other hand there is an inherent tension, especially in intellectual property law, between encouraging innovation by protecting ingenuity and allowing low-cost access to that ingenuity so that others can explore and develop the technology on their own. In many ways the decision boils down to a cost benefit analisys taking into considerations the winers and losers of such a restriction. Apple is clearly the winnder in that it benefits in its contracts with particular carriers and gets to decide what it does with its own creation. The losers in this case are the customers, who are not able to transfer networks, and also the other phone companies who not get the benefit of users being able to use IPhones on their networks (which would be a good boost for their busienss since the Iphone is such a desirable product).

There are also concerns with the distribution of wealth as it is reflected in such a restriction. There are two competing philosophies about the distribution of wealth; those of a meritocracy where one by his

own hard work an effort has a right to rise above others (and apple has certainly risen above); such a view promotes companies to work hard and continue to produce the best and most efficient devices for their cuscomers, however it could allow apple to dominate the market in such a way that would drive out other companies, stifle competition and inevitably make apple's products worse (since competition forces companies to do well and produce the best products or go under). On the other side of the equation is the egalitarian view in which an uneven distribution of wealth accross people/companies or wireless cariers is not desirable because some companies by mere unfortunate circumstances cannot compete with apple; not allowing the restriction would allow other cell companies to use the IPhone which would level out the playing field and generally make things more "fair."

Another issue from a policy perspective is the problem of administrabiliy. The mere fact that a jailbreaking restriction is in place does not mean that people will follow it. As current "jailbreaking" goes as far as I know a lot of people do it. It would be hard for apple to find out who is doing this. Such a restriction may also weight on courts who may frequently have to resolve disputes between apple and users about who owns the phone and who has a right to use it and in what way (what if, for example a theif stole your phone and then jailbroke it). Such a rule may also open the floodgates for other companies to impose similar restrictions on their products, which could slow down commerce and ingenuity overall since people woudl be restricted in the creative things they could do with the items they purchased. It woudl be easier for courts to just say that no restriction is allowed and apple would have to deal with the problem of jail breakers on its own.

As a policy matter it seems more fair to require Apple, the one with the huge resources, to shoulder the burden of jailbroken phones instead of the customers, who have less money. This gets back to the distribution of wealth argument and the meritocratic/egalitarion conflict.

To allow such a restriction may also cause problems with consistency in the laws; for some products such restraints would not be allowed, but for others they would be. Where is the line? Potentially courts could adopt a "reasonableness" requirement for restraints, but this would require a case-by case analysis and could impede judicial efficienty. A firm rule would be better.

Anotehr consideration would be the unfairness of change or stare decise, in which it is unfair to start holding people liable for jailbreaking phones if they had not been liable for doing so in the past.

Apple could say that, in terms of a cost/benefit analysis, the best use of their phones is on a particular network anyway and so the courts should enforce the restriction merely because it represents what is most efficient for socitye.

Another issue woudl be what type of enforcement mechanism would be used? A liability mechanism which seems likely because Apple seaks to create a contract would mean that Apple gets fair market compensation if anyone uses the phone jailbroken; how would one quantify the damage that has been done to Apple. This may be like the case in which there was trespass but no damages. Can one

user really have a substantial enough effect on Apple's bottom line to justify monetary damages? On the other hand, apple could appeal to a property means of protection, in which it sought an injunction to stop jailbroken phones once they began to be used; if a poor family happens to have an Iphone however, and can only use one carrier, this seems unfair. The cathedral model analyzies the affects of choosing either a liability or property based method of enforcement. The coase theorum basically says it should not matter assuming transaction costs are low which is taken becuse parties will themselves balance out the cost and benefit. In this case the transaction cost of suing for damages seeims high whereas an injunction seems lower (apple coudl just shut down the phone, but this begs the question of isnt apple then interfering with someone else's property).

There is a big question about possession itself raised by this issue. One of the fundamental tenants of property law is the reight to exclude others fro inerferring with your possession (Jaques) and allowing apple to intrude upon iphone user's use would contradict that. Also, people must work very hard to be able to afford an IPhone and their labor will not be as much rewarded if they cannot reap full contol over their purchase.

Perhaps it woudl be best to let the legislature decide this issue and a court should refrain from making a firm decision. The legislature as representatives of the people has a better idea of the desires of individuals.

Lastly, there is a fundamental question of the institutional role of courts in such a commercial issue. Who is to say they should get involved in the first place. The commercial world arguably works best when buyers and purchasers are allowed to contract freely as they best see fit to maximize their own efficiency and in such a world arguably the "invisilble hand" raises all boats.

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