

FINAL EXAMINATION
INTELLECTUAL PROPERTY

P.N. Davis

Tuesday, December 8, 2009

8:30 - 11:30 AM

THIS IS A THREE (3) HOUR EXAMINATION.

THIS EXAMINATION CONTAINS SIX (6) PAGES.

THIS EXAMINATION CONTAINS FIVE (5) QUESTIONS.

I = 30 min. II = 60 min. III = 40 min. IV = 20 min. V = 30 min.

FILL IN YOUR EXAMINATION NUMBER ON THE BLUEBOOK STICKER.

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YOU MAY BRING IN YOUR STATUTORY SUPPLEMENT, BUT NOTHING ELSE.

You may write/print anything in the margins and on the blank pages of the supplement. You may add tabs to the supplement. You may not cover up any printing in the supplement.

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Instructions:

1. These questions will be graded on the basis of the times indicated with each questions. The indicated time for the questions total 3 hours. You will be given 3 hours to write the examination. Budget your time carefully or you may not finish.
2. Be sure to state a result whenever a question asks for one. Merely stating the arguments on both sides of a legal issue will result in only partial credit because you will not have completed the analysis required by that type of question.
3. If you find it necessary to make factual assumptions in order to answer a question, be sure to state the assumption.
4. Do not assume additional facts for the purpose of avoiding a legal issue or making its resolution easier.
5. Comment briefly on each legal issue reasonably raised by the questions and on each reason for your answer, even when you decide that one legal issue or reason controls the result.
6. The difference between triumph and disaster may lie in a **careful** reading of the questions.

I.
(30 minutes)

Acme Auto Parts, Inc., a retail auto parts chain, began business in New Jersey in 1952. It gradually opened additional stores, first in New Jersey, later in neighboring states (beginning with Pennsylvania, New York, Delaware, Maryland, and District of Columbia). In 1959, after it was operating stores in three states, it filed for and obtained a federal trademark registration for the name “Acme Auto Parts.”

In 1973, Reliable Auto Parts, a local auto parts retailer, opened its first store in Columbia, Missouri, using the name “Acme Auto Parts.” After opening its first store, Reliable obtained a Missouri state trademark registration for “Acme Auto Parts,” giving it statutory rights to exclusive use of that name in Missouri. At that time, Reliable’s lawyer determined that the closest store operated by Acme was located in Wheeling, West Virginia., and that it did not operate any stores in the midwest.

By 1995, Reliable was operating three stores in Columbia, Missouri, using the name “Acme Auto Parts.” It had no stores elsewhere in Missouri. At that time, Acme had several stores in Illinois, Iowa, Wisconsin, and Kentucky, but none in Missouri or to the south or west of Missouri.

In 2007, Acme decided to open a couple of stores in St. Louis and Kansas City, Missouri. It sued Reliable in federal district court for an order requiring Reliable to stop using the name “Acme Auto Parts” on its stores in Columbia, Missouri. Reliable counterclaimed that it had the right to the “Acme Auto Parts” name throughout Missouri and for an order forbidding Acme from using that name on its stores in Missouri.

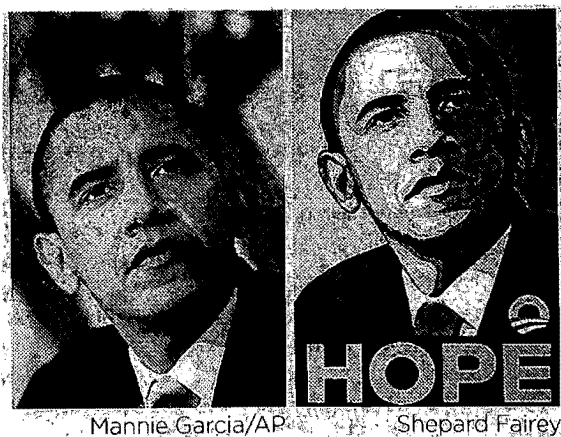
How should the court rule on these requests? Discuss all relevant legal issues. State a result for each request.

II.
(60 minutes)

[NOTE: This is an actual case which has not yet been decided. You be the judge.]

Shepard Fairey, created a poster of President Barack Obama, using as his basis and inspiration a photograph taken by Mannie Garcia, an Associated Press photographer. The photograph was taken in April 2006 at the National Press Club while Obama (the Senator) was there to give a speech to reporters. Fairey created the 4x8 foot poster by image manipulation in January 2009. Within days thereafter, he reproduced his poster in many copies and began selling them.

In February 2009, Fairey sued AP for a declaration that his poster was lawfully created. AP counterclaimed in March 2009 that Fairey violated its rights in the photograph.



A.

Does AP have a valid copyright in the photograph? [Assume that Mannie Garcia properly assigned whatever rights he had in the photograph to AP.]

B.

Does President Obama have any rights in the photograph?

C.

Does Fairey have any rights in his poster?

D.

Has Fairey violated any of AP's rights in the photograph?

E.

Does Fairey have any valid defenses?

F.

Has Prof. Davis violated any of AP's or Fairey's rights in the photograph and poster by reproducing their images in this examination?

Discuss all relevant issues. State a result for each subquestion.

III.
(40 minutes)

Premier Web Technologies was assigned the '400 patent which claims methods of managing bulk e-mail distribution to groups of targeted consumers. It was filed on April 13, 2000, when the Internet was in an early stage of rapid development. In describing "opt-in bulk e-mailing services," the patent explains that distributors access lists of customers who express subject matter preferences for commercial e-mail. The patented invention involves comparing the number of successfully delivered e-mail messages in a bulk delivery against a predetermined desired quantity (the unsuccessfully delivered e-mail messages are returned to the sender by the ISP (internet service provider), and if the delivery does not reach the desired quantity, repeating the process of selecting and e-mailing a group of customers until the desired number of delivered messages has been achieved.

Claim 1 claims:

1. A method for managing bulk e-mail distribution comprising the steps:
 - (A) matching a target recipient profile with a group of target recipients;
 - (B) transmitting a set of bulk e-mails to said target recipients in said matched group;
 - (C) calculating a quantity of e-mails in said set of bulk e-mails which have been successfully received by said target recipients; and,
 - (D) if said calculated quantity does not exceed a prescribed minimum quantity of successfully received e-mails, repeating steps (A)-(C) until said calculated quantity exceeds said prescribed minimum quantity.

In an infringement suit against E-Mail Deliverers, Inc., the uncontested evidence showed that Steps (A)-(C) were practiced in public by several e-mail distributors since 1996. However, up to the time of the invention, the industry had relied on "oversending" an excess of e-mail messages to ensure successful delivery to the desired quantity of recipients. This wasted resources (including internet access charges) and annoying consumers without guaranteeing successful delivery of the desired quantity of e-mail messages.

In the infringement suit, E-Mail Deliverers, Inc., asserted that Premier Web Technologies's patent was invalid. Should the court declare the patent valid or invalid? Discuss all relevant legal arguments. State a result.

IV.
(20 minutes)

In 2007, Robert Evans established a rental trailer business in Clolumbia, Missouri, using the service mark “Haulmark.” In 2008, he opened a second outlet in Springfield, Illinois. He then sought a federal registration for his service mark. The trademark examiner approved it for registration and caused it to be published for opposition in the *Official Gazette*.

Hallmark Cards of Kansas City, Missouri, filed an opposition. Hallmark is the long-established national greeting card company, and has had a federal registration for *Hallmark* for greeting cards for many decades.

A.

Should the PTO grant the opposition and deny registration of “Haulmark”, or not? There is no evidence about why Evans selected his service mark. Discuss all legal issues. State a result.

B.

If the PTO denied the opposition and made the “Haulmark” registration final, could Hallmark successfully sue Evans in 2010 to prohibit Evans’s use of the “Haulmark” mark? Discuss all legal issues. State a result.

V.
(30 minutes)

Briefly define the following terms:

- (1) secondary meaning
- (2) prohibited marks
- (3) originality
- (4) derivative work
- (5) concreteness
- (6) anticipation
- (7) reduction to practice
- (8) diligence
- (9) operativeness
- (10) function of a machine bar