INTRODUCTION

Student evaluation (i.e., assigning grades) is an unpleasant but unavoidable business. In the following pages, I've tried to make the grading process as transparent as possible.

As a general matter, I was quite pleased with the results from the exam. It was clear that most students grasped the basics of what I was hoping the course would offer. I got several excellent exam papers, and many that were very good.

Methodology

Each question was graded individually, and read multiple times to ensure consistency (if you see “scratchings” on your exams, it probably means a score was adjusted for consistency). A raw score total for each exam was created by adding the point totals from each question. The total available points on the exam was 100 points.

Each individual student was assigned a class participation score out of a total 100 points, based on notes I'd kept throughout the term and participation in the online discussion board.

The exam and class participation scores were weighted according to the advertised formula (85% for the exam, and 15% for the class participation). Thus, a “final score” was created, out of 100 total points.

The class was then separated according to the Law School grading scale, with the following exception: I gave a 5% “boost” above the standard curve to all students, meaning there were 5% more As and 5% more B+s than there would have been under the normal Law School curve. As a practical matter, this meant that there were 4 more As and 3 more B+s than would have otherwise occurred. I did this because of my general satisfaction with your overall performance, as well as recognition that studying for the first exam a professor offers is more difficult.

Results

Your total score and grade is marked at the end of your exam. The mean total score was 51. The high was a 76, and the standard deviation was just under 12. The A scores ranged from 76 to 60, the B+ scores ranged from 59 to 50, the B scores ranged from 49 to 39, the B- scores from 36 to 30, and the C's from 29 on down. The “box score” is as follows:

<table>
<thead>
<tr>
<th>A+</th>
<th>A</th>
<th>B+</th>
<th>B</th>
<th>B-</th>
<th>C</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>15</td>
<td>22</td>
<td>23</td>
<td>6</td>
<td>4</td>
</tr>
</tbody>
</table>
**Model Answers**

The balance of this document will offer some model answers to the exam questions.

As a general point, the exam was designed to test both: your knowledge of the legal issues we discussed in class; and your ability to apply those legal principles to new technologies and situations. In particular, the two essay questions offered examples of technologies that, while not entirely fanciful, nonetheless were not ones we had discussed in class. I was looking for answers that both identified the issues, as well as provided some analysis of how the legal principles we discussed in class might apply. The short answer questions were intended to be relatively difficult to simply “look up” the correct answer (and except for question 5, I think they were), and to make you think.

**SHORT ANSWER QUESTIONS**

1. The DMCA, while generally prohibiting the circumvention of trusted systems (and the distribution of circumvention technology), requires that the underlying work be protected by Copyright law. See 17 U.S.C. § 1201(a), (b) (2000). Under *Feist v. Rural Telephone Systems*, telephone directories are *not* protected by the Copyright law. Thus, Sally has not violated any provisions of the DMCA.

   The average score on this question was 2, indicating that many people did not spot the *Feist* issue.

2. Administrators point towards the ICANN root servers to ensure that their users have access to the most complete DNS data. Because, for largely historical / customary reasons, everyone has coordinated to use the ICANN root servers, their use is the only way to guarantee the best DNS data.

   If administrators did not point towards ICANN servers, their users might not be able to use the DNS system properly. They would still, by using IP addresses, have full access to the Internet, but it would lack the convenience of the DNS system.

   Answers that correctly explained the operation of the DNS system, without addressing the coordination issues, got 2 or 3 points, depending upon the quality of the explanation.

   The average score on this question was a 3.
3. Alice is almost certainly right. While Maryland has enacted UCITA – which specifically allows parties to specify a choice of law (subject to certain conditions as enumerated in UCITA § 109) – the State of Iowa, as we discussed in class, has enacted a law that makes contract clauses specifying a UCITA state as the source of law “voidable,” as to Iowa residents, and specifies that the agreement is to be interpreted according to Iowa law.

Answers that noted that Maryland was a UCITA state got 2 points of partial credit, even if the ultimate conclusion was incorrect.

The average score on this question was a 2.

4. Pursuant to 15 U.S.C. § 1125(d)(2)(A) (2000), “[t]he owner of a mark may file an in rem civil action against a domain name in the judicial district in which the domain name registrar, domain name registry, or other domain name authority that registered or assigned the domain name is located.”

Since until very recently, the “domain name authority” responsible for the .com TLD is Network Solutions / NSI and is located in the Eastern District of Virginia, the United States District Court for the Eastern District of Virginia will certainly be able to hear such a dispute, under at least the in rem proceeding. (A few answers correctly noted that the in rem proceedings require that personal jurisdiction cannot be maintained elsewhere against the registrant/defendant – those answers received full credit.)

The ICANN/WIPO arbitration proceeding is (1) not a court, and (2) not a “sure thing” – as it requires that the registrant of bestbuysucks.com have agreed to the mandatory arbitration agreement that was implemented in late 1999. The question doesn’t reveal when bestbuysuck.com was registered.

The average score on this question was a 3.

5. (a) Senate Bill 2928:

Yes. The safe harbor of S. 2928 requires (1) adherence to a private party “seal” program or guidelines, (2) notice, and (3) an opportunity to opt-out of PII transfers.

Since E-Company will be able to meet the standards for the TRUSTe seal program, provides notice, and allows opt-out of PII transfers, the policy meets the S.2928 safe harbor.

(b) the US Department of Commerce safe harbor provisions of the European Union Data Directive:

No. The Safe Harbor Program for the EU Data Directive requires that any privacy policy have an enforcement mechanism. The E-Company
policy does not specify an enforcement or dispute resolution mechanism.

The Program also requires that any onward transfer of PII be conducted with third parties who adhere to the Safe Harbor provisions or an equivalent level of privacy. The E-Company policy does not limit the scope of transfers.

(c) the TRUSTe seal program; and

Yes or No. As we discussed in class, the TRUSTe program (in the past) required full and complete notice, and little more. E-Company will meet this requirement.

Unfortunately, between the time we discussed TRUSTe in class and the time that I re-checked my answer key for grading the exams, the TRUSTe program requires an opt-out opportunity for “internal secondary uses” (i.e., online profiling) as well as transfers to third parties. Although E-Company won’t meet this requirement, I’m uncertain when this provision was implemented. Accordingly, I accepted either answer.

(d) the Better Business Bureau (BBBOnline) seal program.

No. The BBBOnline program requires an opt-in for the transfer of “sensitive data”. E-Company allows an opt-out, and thus does not meet the requirements of this program.

There were four parts to the question, but the answer was worth five points. Thus, I gave everyone who answered any part correctly the extra point.

The average score on this question was a 4.

6. As we discussed in class, IP addresses and domain names can be associated with geography (specifically, with latitude and longitude). Therefore, Yahoo! could simply implement technological measures that would identify the geographic location of the user, and limit access to certain parts of the site accordingly.

Many answers suggested the use of a terms of service or contract to require French users to self-identify. This, however, is not a “technological tool.”

Credit was given for answers that identified both IP addresses and geographic information.

The average score was a 3.
Question 7

The question asks for analysis on three related legal issues: (1) Charles’ use of the domain name officetraining.com; (2) Charles’ use of the OtherNames alternative DNS system; and (3) Charles’ registration of the officetraining.biz domain name.

Bigsoft’s best (and probably only) avenue to challenge Charles’ use of officetraining.com is via the ICANN dispute resolution procedures (UDRP). Because Charles registered the domain name in January 2000, the UDRP applies to him – it went into effect in late 1999. Under the UDRP, Bigsoft must show that (i) officetraining.com is identical or confusingly similar to a Bigsoft mark, (ii) that Charles has no legitimate rights to officetraining.com; and (iii) that Charles registered the domain name in bad faith. See UDRP § 4(a). Bigsoft will claim that officetraining.com is confusingly similar to its “Office” trademark; because the UDRP does not specify where the mark has to be registered or the quality of the mark, this will probably be a successful argument, even though the term “Office” is quite generic. Because Charles registered the domain name while his business was named something else, he may have a hard time showing his legitimate interest in the domain name. The close question here is with respect to the “bad faith” factors found in UDRP § 4(b). There is no mention that Charles is attempting to sell the officetraining.com name or is seeking to prevent Bigsoft from using its marks for domain names. Thus, the resolution probably turns on UDRP § 4(b)(iv) -- whether Charles is using the name “officetraining.com” to attract visitors due to its association with the Bigsoft Office product. This is a close call, and as we discussed in class, the UDRP decisions are quite unpredictable on this score.

Bigsoft has little hope of prevailing in either a claim based on Federal trademark infringement, dilution, or on based on the Anticybersquatting Consumer Protection Act (ACPA). Bigsoft has not succeeded in registering the term “Office” as a trademark in the U.S., and can thus only argue that the use of officetraining.com is dilutive or confusingly similar to “Bigsoft Office”. This seems extremely unlikely, as U.S. courts are going to be very reluctant to limit the use of the term “office,” where Bigsoft doesn’t have a trademark on that term standing alone. Further, as we noted in class, the Federal domain name cases appear to turn on whether the court believes that the domain name holder (defendant) is a “cyber-pirate”, as in Panavision v. Toeppen, etc. Charles does not appear to be a cyber-pirate.

The OtherNames system (based on the real-life RealNames system – see http://www.realnames.com/) is not related to domain names, so the UDRP and ACPA proceedings do not apply here. Bigsoft’s primary claim will be that Charles has infringed its trademark by purchasing the “rights” to the phrase “bigsoft office training” (the other words Charles purchased are highly generic, and thus do not raise serious trademark infringement questions). Here, Bigsoft can proceed under either a likelihood of confusion analysis or dilution.

The strongest argument for Bigsoft is that the transfer of users to Charles’ web site will result in “initial interest confusion”. See Brookfield Comm., v. West Coast Ent. That is, the question will be whether users of the OtherNames system would...
have believed that typing in the phrase “bigsoft office training” would lead them to a site produced by Bigsoft rather than Charles, and whether the reluctance of web surfers to search further will harm Bigsoft. Under the broad Brookfield Communications reasoning, Bigsoft seems likely to win. Charles’ best arguments are: (1) that his use of the Bigsoft mark was a fair use, intended only to properly describe his web site, see Bihari v. Gross, Playboy v. Netscape; (2) that Charles may not compete directly with Bigsoft, which was an essential element of the Brookfield case; (3) that initial interest confusion is not a generally-accepted theory of trademark infringement, see Bihari v. Gross (discussing that only the 9th Circuit has accepted the theory in the internet context); and, (4) that the OtherNames system is but one of many ways people search for sites on the internet, so that the possibility that any significant traffic will be diverted from Bigsoft’s web sites is relatively slim.

Bigsoft’s dilution argument will suggest that the use of the phrase “bigsoft office training” blurs the relationship between Bigsoft and its “Bigsoft Office” trademark. Although Charles adds the word “training” to his search phrase, the resolution would depend upon whether Bigsoft can prove that the public’s association between the mark “Bigsoft Office” and the Bigsoft product has diminished as a result of Charles’ OtherNames scheme. This is a factual question, but Charles will argue, as above, (1) that the OtherNames system is but one of many ways that users search the internet; and (2) that the use of Bigsoft Office is descriptive of the products Charles offers, not suggestive of a link between Charles and Bigsoft. The dilution argument is less likely to succeed than the initial interest confusion argument.

Charles may well be able to keep officetraining.biz. The key to this question is to recognize that Charles registered officetraining.biz after he formally changed his business name to “Office Training.” This alters the analysis from officetraining.com in a significant way: Charles now has evidence, according to the UDRP, of his legitimate interest in the domain name. See UDRP § 4(c). This is probably enough to enable him to keep the name, irrespective of any findings related to bad faith.

Grading Notes

The question was worth 35 points. Because the officetraining.biz part required very little additional analysis, I graded it as worth less than the other two parts. The breakdown of points was as follows (the numbers indicate the maximum points awarded for a complete analysis of each topic). Note that points were given based on the quality of discussion and analysis, not based on whether I thought you reached the “correct” result.

<table>
<thead>
<tr>
<th>Domain Name</th>
<th>Points</th>
</tr>
</thead>
<tbody>
<tr>
<td>officetraining.com</td>
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</tr>
<tr>
<td>UDRP</td>
<td>10</td>
</tr>
<tr>
<td>Fed. Trademark</td>
<td>5</td>
</tr>
<tr>
<td>(infringement, dilution, ACPA)</td>
<td></td>
</tr>
<tr>
<td>total points available</td>
<td>15</td>
</tr>
</tbody>
</table>
OtherNames system

“initial interest confusion” 8

dilution theory 4

inapplicability of UDRP/ACPA 3

===

total points available 15

officetraining.biz

UDRP 5

===

total points available 5

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grand total of points available 35

The average score on this question was a 17 of the total possible of 35, with a wide range, which was expected. The standard deviation was about 4.6, so the vast majority of the answers were in the 12 to 23 point range.

Most answers correctly analogized the OtherNames system to the metatags cases, but the most common mistake was not addressing the dilution theory against the OtherNames system as well. Relatively few answers explicitly noted that the OtherNames system was outside the scope of the UDRP or the ACPA. A surprising number of answers failed to address one or more of the three major points asked.

The best answers spent little time on the details of the caselaw and statutes (reciting the full facts of each relevant case is a bad idea on an exam) and instead focused on an analysis of Charles’ situation, and how the law applied. The organization of the answer was critical; its length was not.
Question 8

This question asks for analysis of two distinct scenarios: (1) whether Amazon.com can successfully sue to stop the WebNotes system from being used in relation to Amazon.com’s web site; and (2) whether NetPost can be prevented from accessing the WebNotes database.

1

Amazon.com has two possible approaches: (1) copyright infringement; and (2) trademark infringement. Of the two, the copyright theory seems stronger, though it is far from clear that Amazon.com will prevail. A trespass theory is inapplicable here.

According to the question, the WebNotes database contains the user-entered notes plus the “target” web sites in question. Amazon.com will argue that the WebNotes system commits copyright infringement by storing (i.e., “reproducing,” in the language of 17 U.S.C. § 106) its web site. There is little question that the WebNotes software has reproduced the Amazon.com web site. (Indeed, in copyright terms, WebNotes appears to create a “derivative work” by combining the web sites and the user notes.) Pat’s best arguments against copyright infringement are: (1) that WebNotes, by supporting criticism and commentary on the web sites, is making fair use of the copyright material; and (2) that only the users of WebNotes create the copyright infringement -- by selecting web sites to post notes on. The fair use argument is much stronger. First, Pat can point out that commentary and criticism is a strong argument in favor of fair use. Second, Pat can argue that the reproduction does not harm Amazon.com – instead, the web sites are simply “shifted” to a location that is more convenient for WebNotes users. See, e.g., Sony v. Universal Studios (time-shifting for user convenience is fair use). Unfortunately for Pat, however, the WebNotes system is a commercial operation, and many courts will view such a commercial use as falling outside fair use. Accordingly, while Pat has some good arguments, Amazon.com is likely to prevail here.

Next, Amazon.com can claim that Pat’s company is committing trademark infringement or dilution. Amazon.com will claim that the disparaging remarks posted by WebNotes users (and seen by other WebNotes users) are confusing the public, or tarnishing (or, perhaps, blurring) various Amazon.com trademarks. Amazon.com will have to prove, as a factual matter, either: actual confusion; or that the value of the Amazon.com marks has been diminished as a result of the WebNotes system. Pat can argue that: (1) because WebNotes is an entirely separate system (available only to those who explicitly request WebNotes software, and unavailable to ordinary web surfers), those users that see the “notes” will be fully aware that they are not posted by or associated with Amazon.com, and thus unlikely to be confused; and (2) that the disparaging remarks, especially if critical of Amazon.com, are fair use of the Amazon.com marks, see Bihari v. Gross. Because WebNotes is still a relatively small system (only 20,000 users), and so clearly separate from ordinary web surfing (requiring special software), it seems unlikely that Amazon.com could convince a court that there has been any real damage to the Amazon.com marks. Further, because the “disparaging” remarks are quite likely to contain information critical of Amazon.com itself, most courts would be reluctant to prevent such information from being disseminated. On balance, it appears that Pat will have the better arguments here.
Note, however, that even if Amazon.com does convince a court that the WebNotes system is acting impermissibly, it may not be able to convince a court that Pat’s company must be ordered to rewrite the software that runs the WebNotes system, as the current system cannot prevent notes from being posted on particular pages. As we discussed in the Napster v. Universal context, and as seen in the Sony v. Universal case, courts are typically reluctant to order significant changes to technological systems. A court may instead decide that Amazon.com’s only remedy is some form of damages.

A trespass approach is unavailable here. According to the question, the “notes” do not actually exist on the Amazon.com web server – instead, they exist in a central database hosted by Pat’s company. Without actual, systematic access to the Amazon.com system, the WebNotes system cannot be guilty of trespass. Cf. eBay v. Bidder’s Edge.

Here, Pat’s company can probably proceed on as many as three theories: (1) trespass; (2) copyright infringement; and (3) (possibly) patent infringement.

First, Pat’s company can argue that NetPost is trespassing on the server holding the WebNotes data. This claim would be very similar to the eBay v. Bidder’s Edge case. Pat would claim that the access by users of NetPost was (a) unauthorized, and (b) harming the WebNotes system by slowing it down, reducing the bandwidth, etc. Given that in the eBay case, very little actual “harm” was required to succeed on the trespass claim, Pat seems to have a strong case. One possible problem is that the question does not mention whether Pat has taken any steps to try to exclude the NetPost users (such as the robots.txt file in the eBay case). One reading of the eBay v. Bidder’s edge case is that it turns on the failure of the Bidder’s Edge robots to adhere to the robots.txt file. Under this reading, Pat would have to show that steps were taken to prevent NetPost’s access to the database.

Pat would also be able to claim that the NetPost system, by displaying the “notes” created by WebNotes users and stored in the WebNotes database, was committing copyright infringement. Pat would argue that the “notes” were copyrighted (by either Pat’s company or by the individual WebNotes users) and that the use of those notes by NetPost was an impermissible reproduction and distribution of that material. See 17 U.S.C. § 106. NetPost might argue that such use is a “fair use”, but given that NetPost is a corporate entity and that all of the “notes” are apparently being reproduced, the 17 U.S.C. § 107 factors would appear to weigh against NetPost. Accordingly, Pat also has a strong case here.

In either the trespass or the copyright context, Pat would have to contend with the fact that the default condition on NetPost software is that the WebNotes server is not accessed. This raises the question of whether NetPost can be held liable for contributory infringement or trespass. In the Copyright context, NetPost might claim that, under the Sony v. Universal precedent, it need only show a “substantial noninfringing use”. Pat can argue, however, that Sony is inapplicable in cases where NetPost has full control over the use of its product (i.e., it would be trivial to disable the access to WebNotes). This is a very close call, but the fact that NetPost so clearly has the capability to prevent its users from committing trespass or copyright infringement violations suggests that most courts would find the company liable.

One final possibility is that Pat may be able to obtain a patent on the WebNotes system. The question indicates that Pat’s company was the first to develop the system, and that NetPost appears to have copied them. By obtaining a patent...
patent, Pat might prevent NetPost from operating a similar system at all, much less accessing the WebNotes database. To proceed under this theory, Pat would first have to apply for and obtain a patent – an expensive and time consuming proposition. Whether this approach would ultimately be successful depends upon a number of factors, including how original the WebNotes system really is (i.e., whether it is eligible for a patent), and whether the NetPost system is so similar as to infringe the issued patent.

The bottom line here is that Pat has several viable options for challenging NetPost.

Grading Notes

The question was worth 35 points. Part 1 – the Amazon.com question – was assigned 17 total points. Part 2 – the NetPost question – was assigned 18 total points. The point breakdown was as follows:

Amazon.com
- Copyright 7
- Trademark 7
- Inapplicability of trespass 3

total points available 17

NetPost
- Trespass 10
- Copyright 4
- Patent 4

total points available 18

grand total 35

The average score on this question was again about a 17 out of 35. The standard deviation was higher than for Question 7, however, at just under 7 points. Accordingly, the spread for this question was wider. The high was a 33, and the low was a 2. Almost all the answers were in the teens and twenties.

The most common “mistake” made was a failure to address all of the issues. Many answers selected either copyright, trespass, or trademark for the Amazon.com issue, and failed to consider other avenues. I was pleased with the ability of many students to analogize the WebNotes technology to framing, deep linking, or other issues we’d addressed in class.

Because this question in particular was designed to encourage “out of the box” thinking, I gave “extra” points for strong discussion of (plausible) approaches other than what I expected. Several answers suggested that Amazon.com might sue for defamation, which was perhaps plausible. (Note the question says “derogatory,” not “defamatory,” however.) Some answers incorporated discussions of click-wrap contracts in clever ways.