

Intellectual Property

Professor Grimmelmann

Final Exam - Spring 2012

Take-Home and Open Book

This exam consists of three equally weighted questions. There is a page limit of four pages per question. It will be enforced strictly; extra space from one question may not be used on another.

You must upload your answer via the portal by **5:00 PM on Friday, May 18**.

Type your answers in 12 point Times or Times New Roman, double-spaced, using 8.5"x11" paper, with one-inch margins and numbered pages. Put your exam number on each page. Do not put your name anywhere on the exam. Upload your answers as a single file.

This is an open-book exam. You may use any materials that you wish to answer the questions, though you need not consult any sources other than those we used for class. You may not discuss this exam or your answers with anyone under any circumstances until after the end of exam period. **Your work must be exclusively your own.**

Please pay attention to the specific questions you are being asked and to the roles the questions place you in. Support your answers with detailed analysis, reference to specific statutes and cases as appropriate, and explanations of how you applied the law to the facts. Simple citations (e.g. "Feist.") are appreciated but not required. Basic headers to organize the different parts of your answer are also a good idea. Spelling, grammar, clarity, organization, and good advice to your client are all parts of the grading.

If anything about a question is ambiguous, say what you think it means, and answer it accordingly. If you need to assume additional facts, say what those facts are and how they affected your answer. No reasonable resolution of an ambiguity will be penalized.

You should assume for purposes of the exam that the America Invents Act has fully entered into effect.

This exam has **FOUR pages total**, including this cover sheet.

**GOOD LUCK!**

## Question 1: Crass Effect

Mofonic Games is the creator of the highly successful fantasy epic Stormcrasher. It follows the adventures of Thessia, a dragon trainer and mercenary, who travels between human and otherworldly realms to prevent the complete destruction of the world. The game is available exclusively on the Degenatron gaming console, has sold over 5 million copies, and retails for \$50.

The game lets players customize literally every aspect of Thessia's appearance, from the shape of her nose to the depth of the wrinkles that appear at the corners of her eyes when she laughs. This is particularly striking in the "cutscenes," non-interactive portions of the game that serve to advance the plot by playing short high-resolution videos of important dialogue or dramatic events. In these cutscenes, Thessia appears exactly as designed by the player.

Roberta Buntin, the voice actress who plays Thessia, is brilliant at her work: Buntin's line readings have a perfect mix of toughness, wry humor, and enthusiasm. She spent six weeks in a recording studio rented by Mofonic, working eight hours a day, recording line after line of dialogue. Sometimes she nailed it on the first take; other times the game's producers would work with her to record take after take in different styles, then select the most effective one. She was paid a flat fee of \$50,000 for the work, plus a contractual bonus of \$100,000 when sales passed one million copies. Her contract with Mofonic is silent as to the ownership of any relevant intellectual property.

Although Stormcrasher has been highly popular with players, a substantial minority of them have expressed disappointment with the ending cutscene, which they consider too much of a downer. (Spoiler alert: Thessia dies.) A few months ago, a fan named Steve Schaeffer created a video of a revised ending to the game. He started by playing through the game using a version of Thessia designed to look exactly like Buntin. He got the eyes, the nose, the face shape, and everything else exactly right: the resemblance is uncanny. Schaeffer then spliced together video clips of the game, using scenes from all over the game, to make a new ending in which Thessia doesn't die—instead, she is named Supreme Emperor and given a birthday cake. Schaeffer's editing was extremely precise; he generally took no more than two or three words at a time from any one scene.

Schaeffer posted the video to several popular Stormcrasher fan sites. Numerous fans posted comments agreeing that the revised ending was better, although many others responded that it was a jarring departure from the generally dark tone of Stormcrasher. Inspired by the reaction, Schaeffer posted to the fan sites offering to provide what he called "Stormcrasher: The Supreme Emperor Edition." He asked anyone who was interested to send him their original copy of the Stormcrasher game disc and \$10. He then mailed them back a Degenatron disc containing a version of Stormcrasher in which the original ending cutscene was replaced with his video. (He kept the original Stormcrasher discs, which he used to make coasters, wind chimes, and other craft projects.) He bought 500 blank Degenatron discs for \$1000, and filled 300 orders from players, at \$4 postage each.

Mofonic Games and Roberta Buntin have independently sued Schaeffer. You are serving as law clerk to the judge hearing the case. ***Write a memo to the judge explaining the intellectual property claims Mofonic and Buntin can bring, any defenses Schaeffer can raise, and the remedies, if any, that Mofonic and Buntin might be entitled to.***

## Question 2: Dancing with the Starchitects

You have been retained by VitruviX, a startup with the goal of making it easier for homeowners to hire good architects for renovations. Because public building-permit files contain the names of the architectural firms responsible for the plans, along with numerous details about the proposed construction, it's possible to reconstruct, in some detail, which architects are doing what work. VitruviX supplements its examination of the public files with surveys that it sends to homeowners whose names it gathers from the files. These surveys contain twenty-four questions (such as "How satisfied were you with the architect's availability to answer follow-up questions?") each to be filled in with a numerical answer on a scale of 1 star ("not at all satisfied") to 5 stars ("extremely satisfied").

VitruviX averages the answers for each question, and then combines the twenty-four averages into a single overall score for each architect on a scale of 15 to 75. The precise method for combining the answers is mathematically complicated— VitruviX's CEO, Stanford Greene, holds a Ph.D. in statistics and the company employs three full-time statisticians. They spend their time trying to use additional data (such as home prices, architects' age, and average local temperature) to predict customer satisfaction with architects. They currently look to a dozen factors beyond the surveys, and tweak the weights assigned to each factor and survey question on a weekly basis.

VitruviX publishes these scores on its website with the slogan "VitruviX: The home of the 15-to-75 architect scale." The site has a search engine which lets users search for firms by name, and also a browseable directory that groups firms by city and by rating (e.g. "65 and over," "55–65," "45–55," and so on). A subscription costs a homeowner \$50 for a year and allows for unlimited access to the website. The website launched publicly six months ago, and since then has been moderately successful. Greene has consulted you, however, because he is worried about the following:

- Another startup, with the name Palladion, started offering its own architect-recommendation ratings website a month ago. Palladion's ratings also range from 15 to 75, but they are frequently different from VitruviX's. It is not clear how Palladion calculates its ratings.
- The Des Moines architectural firm of Gehry and Gropius has posted to the front page of its website a statement reading, "We have a VitruviX rating of 70—the highest in Des Moines! Come see why VitruviX recommends us so highly!" Greene has checked, and this is true: no other architect in Des Moines has a score in the 70s, although there are several 68s and 69s.
- Lloyd Wong, a homeowner in New York and a subscriber to the website, has posted the ratings of every architect in New York, New Jersey, and Connecticut to his blog.

Greene is concerned that these activities may be threats to VitruviX's subscription revenue, and would like your advice on the extent to which intellectual property law could help. ***Advise Greene on what forms of intellectual property rights VitruviX has or could obtain, what steps need to be taken to secure those rights, and the extent to which they would be effective in preventing the actions of Palladion, Gehry and Gropius, Wong, and others like them.***

### Question 3: Jetpack Allosaurus<sup>1</sup>

Othniel Toys is the maker of the surprise breakout hit toy of the 2011 holiday season: the Terror Dactyl. Based on a detailed study of academic scholarship on pterodactyls, Othniel found a way of making a battery-powered flying toy that folds and flaps its wings in the same manner that pterodactyls did. The Terror Dactyl comes with a remote control and is capable of remarkable swoops and dives in the hands of a skilled operator. It has dark green scaly skin with yellow lightning bolts painted on each wing. The Terror Dactyl was featured on all of the network morning shows and became a must-have for dinosaur-loving children and status-conscious parents, despite its daunting \$150 price tag.

Othniel filed for a patent in 2009, which issued in February 2011. It contained three claims:

1. A flying toy, comprising a body element, a motor, and a plurality of wing elements, wherein said wing elements have substantially the form [detailed description of pterodactyl wing structure.]
2. The flying toy of claim 1, wherein said body element has the form of a dinosaur.
3. The flying toy of claim 2, wherein said dinosaur comprises a pterodactyl.

You are General Counsel to Barnum Toys, a competitor of Othniel. Barnum's CEO has asked you to investigate intellectual property issues relating to the Terror Dactyl. You have discovered a video, posted to YouTube in August 2007, of a man wearing an oversize suit whose wings have the same structure as the wings of the Terror Dactyl. You have also discovered that the Cope Company company sold a pterodactyl toy with an archaeologically accurate design between 1985 and 1993.

Barnum is determined to find a way to cash in on the sudden flying-dinosaur toy craze. The CEO has floated several plans for your consideration:

- Barnum could sell a line of flying mythical creatures under the combined name Terror Creatures. There would be a blue dragon, a white pegasus, etc. Each of them would have the same wing design and motor as the Terror Dactyl.
- Barnum could sell a flying allosaurus toy under the name Allo-SOAR-Us. It would consist of a rubber allosaurus with moveable head and tail and a quadrotor helicopter attached to its back.
- Barnum could sell a motorless pterodactyl toy with non-moving wings, with green scaly skin and yellow lightning bolts painted on its wing, and call it The Amazing Pterodactyl.
- Barnum could write and sell a book called The Terror Dactyl Stunt Guide, which would be an extensive how-to book of detailed instructions for how to perform various tricks with a Terror Dactyl, printed on high-quality glossy paper with lavish full-color illustrations of Terror Dactyls in flight.

***Advise Barnum's CEO as to which, if any, of these plans would be legally feasible, along with any recommendations for how to minimize the legal risk associated with any that are worth pursuing.***

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<sup>1</sup> [Hint: Make sure you understand what pterodactyls, allosaurs, quadrotors, etc. look like before you start writing out an answer. Google Image Search is your friend.]