

Fundamentals of Intellectual Property

Spring 2015

Prof. Ford

In-Class Final Exam

This in-class final exam is worth 60% of your course grade. It will be administered on Tuesday, May 5, 2015. You have three hours to complete the exam (or 4.5 hours if you have been granted an accommodation by the Registrar's Office).

At the conclusion of the exam, responses must be emailed to the Registrar's Office at registrar@law.unh.edu.

Please do not put your name or any identifying information on your exam. Instead, place only your assigned exam number on the top right corner of your answers.

Please format your responses similarly to this document: **single-spaced, with 1.5-inch margins, and empty space between paragraphs.** Use 12-point Century, Palatino, Constantia, Book Antiqua, or Cambria; please do *not* use Times New Roman. Number your pages.

You may consult **any existing material** you wish while completing this exam. This specifically includes online research tools like Google and Lexis, though I do not recommend relying on such tools. Answers discussing cases, doctrine, and principles that were not assigned or discussed in this course will receive no credit. **You may *not* discuss the exam with anyone else while it is being administered,** including other students, attorneys, or participants on online discussion boards. Please type at the top of your exam the following sentence:

I affirm that I have not discussed this exam with other students or anyone else during its administration.

This exam consists of **four questions.** The first two are each worth 30% of the grade, while the last two are each worth 20% of the grade; you should allocate your time accordingly. The first three questions are directed to doctrine, while the last question is directed to policy considerations. There is no word limit.

If any of the questions are unclear, or don't provide necessary information, state explicitly any assumptions you make and answer the questions given those assumptions.

Good luck!

Question 1 (30%)

McDonald's Corp. is an internationally famous restaurant chain that operates and licenses thousands of restaurants selling hamburgers, fries, chicken nuggets, and other fast-food staples. One of the company's less-famous products is the Filet-O-Fish sandwich, which its website describes as "wild-caught fish from our sustainable fishery, topped with melty American cheese, creamy tartar sauce and served on a soft, steamed bun."

McDonald's Corp. has registered numerous trademarks. Among those marks is the basic word mark "MCDONALD'S" (sometimes registered as "MC DONALD'S"), which has been registered for use in commerce in connection with the following goods and services, among many others:

- "restaurant services";
- "franchise services, namely, offering technical assistance in the establishment and/or operation of restaurants"; and
- "ready-to-eat hamburger, cheeseburger, and fish sandwiches, french fried potatoes, hot coffee, fresh milk, and milkshakes."

McDonald's has also registered the mark "FILET-O-FISH" for use in commerce in connection with "restaurant services" and "sandwich for consumption on or off the premises." And it has registered these design marks for similar uses:



All of these marks have become incontestable.

Amanda Henderson and Tomás Lyon, restaurateurs and business partners, plan to open a fish market, a retail store that sells whole fish and fish portions for customers to take home and cook. It will not operate as a restaurant or serve cooked food, either for dining in or for take-out. They want to call the market MacDonald's Premium Fish Market, named for a long-dead great-uncle of Lyon's who was, according to family legend, a fisherman. They have designed a logo, which would be used on packaging, signage, and other typical contexts:

MACDONALD'S
Premium Fish Market

Would McDonald's Corp. have a meritorious claim against MacDonald's Premium Fish Market for trademark infringement? For dilution? Explain.

Question 2 (30%)

NewsDrones is a company that uses drones—small remote-controlled helicopters, equipped with small cameras and operated in real time by nearby specialists—to capture aerial footage of news events. NewsDrones’ business model is to license its footage to local TV stations, national cable-news networks, and news websites for their use in covering the events NewsDrones captures. Some news outlets have standing non-exclusive license agreements that cover any footage



A NewsDrones copter.

NewsDrones captures; others license footage on a per-incident basis. NewsDrones owns valid copyrights in its footage, which is registered with the Copyright Office of the Library of Congress.

After police shot an unarmed man in Minneapolis, community protests grew and eventually turned violent. NewsDrones sent cameras and drone operators to the protests, where they captured video of protesters throwing makeshift bombs at police and police responding with teargas and stun grenades.

NewsDrone’s footage aired first on several news outlets with which it had standing agreements, including CNN. Other news outlets then aired the footage, some after licensing it from NewsDrones (including MSNBC) and others by recording another station’s coverage and re-airing the footage (including Fox News and *The Daily Show* on Comedy Central). Fox News used the footage as part of a story reporting on the protests and arguing that they were a symptom of decaying social order and moral decline; *The Daily Show* used the footage to mock Fox News’ coverage as racist. CNN, MSNBC, and Fox News are all 24-hour cable news networks and close competitors; *The Daily Show* is a topical comedy show that does not compete directly with the others.

Is Fox News’ use of the NewsDrones footage a fair use under 17 U.S.C. § 107? Is *The Daily Show’s*? Explain.

Question 3 (20%)

Scientists at Dow Corning have developed a new kind of glass that better resists shattering, due to its unusual structure. The glass consists of numerous thin layers, alternating between layers of standard aluminosilicate sheet glass and layers that have been doped with rubidium or another heavy alkali metal atom. (In chemistry, doping is the process of introducing a trace impurity to alter the properties of a substance.) Because rubidium atoms are larger than sodium and potassium ions traditionally used to make shatter-resistant glass, the layers have high residual compressive stress and are able to withstand impacts that would shatter standard glass. But because the atoms are so large, the layers of doped glass must be very thin.

The structure of the claimed material is shown in Figure 3 of the application, which became Figure 3 of the patent:

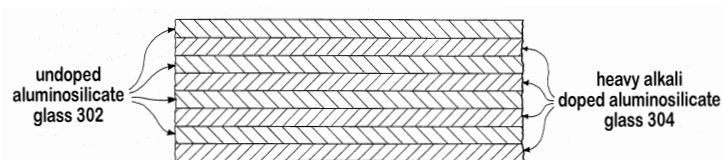


Fig. 3

The inventors applied for a patent. Claim 1 of the original application read:

1. A composition of glass comprising a plurality of alternating layers, each of said alternating layers being less than 0.050 mm thick, with said first alternating layers comprising undoped aluminosilicate glass and said second alternating layers comprising aluminosilicate glass doped with heavy alkali metal atoms.

The patent eventually issued with the following claim 1 (differences underlined):

1. A composition of shatter-resistant glass comprising a plurality of alternating layers, each of said alternating layers being between approximately 0.020 mm and approximately 0.040 mm thick, with said first alternating layers comprising undoped aluminosilicate glass and said second alternating layers comprising aluminosilicate glass doped with alkali metal atoms selected from the set of potassium, rubidium, and cesium atoms.

A competitor sells a glass consisting of alternating thin layers of undoped and doped glass that average 0.042 mm thick. Because of natural variance in the manufacturing process, however, the layers vary randomly between 0.037 mm and 0.046 mm thick. (Each layer has one uniform thickness throughout that layer.) For instance, one piece of glass might have layers with thicknesses 0.039 mm, 0.038 mm, 0.043 mm, 0.040 mm, 0.041 mm, 0.046 mm, 0.038 mm, 0.043 mm, and 0.042 mm, in that order; another piece of glass will be different. Moreover, the doped layers are doped with a mixture of potassium and sodium atoms.

Does the competitor's product infringe claim 1? Explain.

Question 4 (20%)

Most local governments award what are called franchise agreements, or franchises, to cable-TV providers; these franchises authorize providers to build infrastructure and offer services within those municipalities. The Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521–73, authorizes and regulates these franchises; among other provisions, it prohibits a provider from offering cable service without a franchise and limits a municipality's authority to deny renewal of an existing franchise. In many cases, a municipality awards just one franchise, which gives the cable company an effective monopoly on television services within that municipality (setting aside satellite TV, over-the-air TV, and so forth).

A franchise is not a form of intellectual property, but the franchise system has some economic similarities to the intellectual-property system. How is it similar and how is it different? What does intellectual property tell us about whether franchise agreements are a good idea?