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BAUM
SPRING 2006

FINAL EXAMINATION
692-370 INTELLECTUAL PROPERTY LAW

This is a three-hour examination. There are two questions worth a total of 350 points. The first question is worth 250 points and the second is worth 100 points. You should allocate your time based on the point value per question.

This exam is open-book/open-outline/open-code. You may refer to the following print materials ONLY: your casebook, your statutory supplement, and the course outline you prepared yourself. **YOU MAY NOT USE ANY OTHER MATERIALS OR ELECTRONIC OR HUMAN RESOURCES**

In your answers, you are to apply the law to the facts and to provide specific citations to and analysis of relevant provisions of the statutes, uniform acts and/or Restatement and relevant case law to demonstrate your reasoning and to support your conclusion. References to case names and code sections are sufficient as citation.

If you find any ambiguities in the facts or questions posed, identify the assumptions you make to resolve the ambiguities and then proceed with your answer.

Your answers are to be concise and directly applicable to the problems presented. If handwritten, your answers are to be single-sided. If typed, your answers are to be single-sided and double-spaced with 1" margins at tops, bottoms and sides of pages.

You are to return your exam questions with your answers.

QUESTION ONE
250 points

You are in-house IP counsel for Mattel's® Barbie®¹ division and handle all legal matters related to the copyrighted, trademarked doll and its relatives and friends. You arrived at work to find the following documents in your inbox. For each item in your inbox and for any other situations that are brought to your attention today, identify and evaluate the IP issues, **describe the issues, set out your analysis with application of the law to the relevant facts and state a clear conclusion. You also are to draft an appropriate response to the party that submitted the issue or question to you telling them what action to take or what action you will take.** (For purposes of this exam, you are in a time warp which has prevented any courts from addressing any of these issues (i.e., you should not use your knowledge of outcomes to short-cut the evaluation of each issue).)

¹ Barbie is an 11-1/2" doll of unnatural proportions. See the picture attached as Figure A.

MESSAGE ONE

TO: Counsel's Office
FROM: Marketing Department
RE: Packaging

As usual, this past weekend, we perused the shelves of the nearby toy stores, scoping out the competition. We found a doll similar in size to our line of dolls in a rectangular box with a vinyl covering. The colors on the box are fluorescent with quite a lot of hot pink. The most troubling thing is the hot pink box on the front of the package with the name of the doll. It looks like this:

Those letters are in the same bubble cursive font we use and the letters are white on hot pink background. What should we do?

MESSAGE TWO

TO: Counsel's Office
FROM: Attorney for Katherine Walter d/b/a Pearl Beach
RE: Cease and desist

We hereby inform you that you must cease and desist from any further use of the name Pearl Beach Barbie and the shell design in your product line. (See Figure B.) Our client, Ms. Katherine Walker, is a commercial illustrator who has been doing business for decades as Pearl Beach. Her business logo is viewable at her website, www.pearlbeachgraphics.net. (See Figure C.) Your immediate removal of the Pearl Beach Barbie from production and from store shelves will prevent your involvement in litigation over this issue. If we do not hear from you by the end of business on Tuesday, May 2, 2006, we will file our complaint.

MESSAGE THREE

TO: Counsel's Office
FROM: Personal Friend in the Customs Office
RE: Kenner doll

Hey, friend. Guess what's coming through Customs right now? A Miss America Pageant Doll made by Kenner. Didn't you guys do a Miss America Barbie? This looks an awful lot like one of yours. What do you think? (See Figure D.)

You decide to check this one out. When you "google" "Miss America doll," you come across the "Marl and B Simply the Best in Fashion Dolls" web site. The pictures across the top of their pages are of your Barbie and Midge dolls from different decades. The first picture is of the original Barbie from 1951 while the other two are from the 60s. The other thing you notice is that the page is advertising "Vintage Barbie Dolls –Miss America Barbie" but the doll is not from Mattel. It's special promotional doll done by Kellogg's Company. (See Figure E.)

MESSAGE FOUR

TO: Counsel's Office
FROM: President, Mattel
RE: Stop these artists any way you can!

Have you seen this so-called art work by this guy Crudo? He's using our classic American icon to further his own tawdry career. Take a look at these pages from his exhibit, "Life and Death of America's Plastic Princess." He's actually cut her apart as if he's dissecting her, blood and all. And, he can't really make clocks out of our girls, can he? But the final straw is this one that he cut in half—Lilli, indeed! What are you going to do about this?

When you go to look at the web pages (see Figures F, G and H), you discover that Figure H actually is a picture of a German doll that preceded the manufacture of Barbie. The doll, Bild-Lilli, was based on a bawdy cartoon character and was sold before 1951. You actually have a couple of these dolls in your collection. (See Figure I.)

MESSAGE FIVE

TO: Counsel's Office
FROM: Your child
RE: Great exhibit at school

Hey, parent! Any chance you can come up and see this great art exhibit at school. It's called "Plastic Princess: Barbie as Art." My favorite is "Bulemia." You can see it on the web site for the gallery. (See Figure J.)

Oh, BTW, is the check for tuition coming soon? Thanks. Luv ya. Kiddo

You are starting to regret opening any of your emails this morning but you decide to keep going through them. You see one from your good friend, Dolly Parton.

MESSAGE SIX

TO: Counsel's Office
FROM: Dolly
RE: Free legal advice for an old friend?

Howdy, buddy! You know all about dolls and law, right? Well, guess what I just found on the web. I had licensed my image to Goldberger dolls (the non-Barbie company) and they've been selling the Dolly (see Figure K) all over the world. Well, imagine my surprise to find that there is some other doll maker out there making a Dolly doll. (See Figure L.) And, it looks awful! What can I do about this? (And, please don't give me song and dance you give me at parties about how there's conflict of interest and I need my own lawyer, blah, blah, blah.) Thanks, hon. Talk to you soon.

As you step out of your office for a short break, you hear this song coming through the speakers on your assistant's computer. You can't believe you're hearing correctly. The lyrics are something like, "*Hi, Barbie! Hi, Ken! Do you wanna go for a ride? Sure, Ken! Jump in... I'm a barbie girl, in a barbie world. Life in plastic, it's fantastic!*" You know that you have to do something about this before the President hears about this one. You get all the relevant information about the group Aqua and the song "Barbie Girl" from your assistant and head back to your email, figuring it's not safe to actually take a break.

MESSAGE SEVEN

TO: Counsel's Office
FROM: R&D Department
RE: Employee problem

Remember that new guy I was so high on a few months ago? Well, it turns out he used information about Fisher Price's plans for new product lines in developing our new younger kids' products. Also, turns out that he had signed a non-disclosure agreement with Fisher Price when he was hired, stating that he would not share any information regarding any Fisher Price products with anyone outside that company. Well, he hasn't actually shared the information with us but he has based his work on their plans and designs. What do we do? Can we salvage anything from this? We're already in production.

You look back at your archived emails and find the previous message from R&D. Ahhh, the good old days, when there was at least one good news email.

TO: Counsel's Office
FROM: R&D Department
RE: New employee from Fisher Price

Hey, remember that new employee we hired away from Fisher Price a few months back? Turns out he's a real genius. We've been trying to figure out how to develop a series of learning toys for the younger kids to get them started on Barbie earlier in their lives. He's developed some excellent ideas for a Barbie Dream House that's educational—you know, the doorbell rings, the door says things like open/closed, the mailbox opens and plays the alphabet song, stuff like that, all in a nice compact child safe design. Genius, I say, Genius!

Your computer dings to tell you another email has come in. It's one of your associates passing along a case regarding a web site.

MESSAGE EIGHT

TO: Counsel's Office
FROM: Associate
RE: www.barbiesshop.com and www.barbiesclothing.com

Do we want to do anything about these web sites? The first one is owned by Barbara Anderson who runs a small adult retail store called Barbie's Shop. She registered the Internet domain name "barbiesshop.com" and sells some her adult products through the web site.

The other web site is registered to Adventure Apparel, which sells swimwear and tanning sessions. The owner of the company registered "barbiesclothing.com" but it has been "parked" at his "adventureapparel.com" site ever since registration so a web searcher who searches for "barbie clothing" will be pointed to Adventure Apparel's web site. We haven't gotten any letter from him asking for payment in exchange for the web address so I guess he just plans to use it to get his own business.

QUESTION TWO
(100 points)

You have been hired as an intellectual property law consultant by the legislature of the newly formed country of Utopia. The Constitution of Utopia includes the following:

“The Legislature shall have power to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.”

Although the Constitution of the Utopia provides for rights for authors and inventors, the national government and the governments of each province would like you to offer recommendations on all forms of intellectual property protection and to flesh out the rights of authors and inventors. You will need to identify types of intellectual product or creative activities to be protected or excluded from protection, methods for establishing protections (e.g., automatic or formalities), ownership of the works or the rights, minimum standards works must meet to obtain protection, types of protections or rights to be provided, types of remedies, terms of protection, assignability or transferability of rights, actions or non-actions that can result in loss of protection, and jurisdiction for claims (province/federal). You are to support your positions with authoritative statements, by analogizing or distinguishing U.S. law or by arguing policy based on problems you see with the U.S. regime. You are to provide explanations and policy considerations for each provision you identify.

Your report will be evaluated on the breadth and depth of concerns addressed, the reasons and argumentation provided for inclusion or exclusion of various provisions, and the use of supporting information incorporated from current U.S. and international law.