COPYRIGHT, PATENT AND TRADEMARK

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This is a FOUR HOUR examination, consisting of THREE questions. You should allocate 75 MINUTES to each question, and reserve 15 MINUTES for additions and corrections. The examination is OPEN BOOK, but you are to take it IN CLASS.

Please organize your analysis carefully before you begin to write, and strive for conciseness as well as completeness. If you think additional facts are necessary, you should state briefly what facts you would like to know and why you think they would be relevant. Whenever you discover an arguable issue in these cases, you should state carefully the best arguments that can be made on either side, and then continue your analysis in the alternative. Finally, you should be careful to consider all aspects of intellectual property law which might be applicable to the present problems, e.g., Copyright, Patent, Trademark, and Related State Doctrines.

Problem One

In 1981, the Thompson Toy Co. designed a new toy airplane, which it called the "Air Coupe." In many ways the Air Coupe resembled other toy airplanes then on the market. It was based on the design of the Beechcraft 224, which is a single-engine low-wing retractable-wheeled aircraft with a single stabilizer. However, the Air Coupe was stubbier and fatter and had much shorter wings than the Beechcraft 224, or any other existing airplanes, either toy or real. The main reason for this difference in design was economics. It turned out that the shorter, stubbier airplane would fit into a smaller box than conventional toy airplanes of the same overall size, and this resulted in substantial savings in transportation costs. The Thompson Toy Co. put its Air Coupe on the market, with copyright notice properly affixed, in 1981, and the toy was an immediate success. Apparently, the short, stubby design was just unusual enough to attract a loyal following
among toy airplane fanciers, most (but not all) of whom were children. Of course, the success of the Air Coupe soon invited competition: in particular, the KayPro Corporation, which brought out a similar toy airplane in 1983, calling it the "BobCat." The BobCat was also a single-engine low-wing retractable-wheeled aircraft with a single stabilizer, like the Beechcraft 224, except that it was stubbier and fatter and had much shorter wings, like the Air Coupe. To be sure, there were many small differences in detail: the labels and coloring, the method of wheel assembly, the shape of the cabin enclosure. But to a casual observer, the KayPro BobCat looks very much like a slightly larger version of the Thompson Air Coupe.

In the past few months, the Thompson Toy Co. has noticed that its sales of the Air Coupe have levelled off, while the sales of the KayPro BobCat have been increasing, and they have contacted your law firm for advice. They would like to remove the BobCat from the market entirely, if possible. As an associate in the firm, you have been asked to draft a preliminary memo addressing several key questions: Based on the facts you know so far, would Thompson have a cause of action against KayPro (1.) for copyright infringement? or (2.) for unfair competition? and (3.) would a state remedy, such as unfair competition, be subject to preemption in this case by either the copyright or the patent system? Draft the requested memo.

Problem Two

Assume you are an associate with the law firm representing Wean Ditter, Inc., the brokerage company. In the late 1970's, all the leading brokerage houses in the U.S. were diversifying their operations and racing against each other to be the first to offer an integrated financial package to their customers. The winner of the race was your client's largest competitor, Lyrrill Mench, Inc., which announced its Cash Management Account ("CMA") in 1979. The CMA provides a combination of three financial services which were previously only offered separately: (1.) a "Securities Account," which is a standard margin account for the purchase of stocks and bonds; (2.) a "Money Market Account," which is a standard no-load mutual fund investing in a portfolio of money market securities; and (3.) a "VISA Account," which is a standard charge card and checking account. The principal features of these three accounts are described in a document entitled "CMA Money Trust Prospectus" which was filed, as required by law, with the Securities and Exchange Commission on June 5, 1979, but the CMA was not itself available to the public until January, 1980. From that date to the present, the Cash Management Account has been an
enormous commercial success: Its assets have more than doubled every six months since its inception. In the meantime, starting in 1981, your client, Wean Ditter, has been marketing its own integrated package of financial services, as have several other firms in the industry. It appears that Wean Ditter's integrated financial account is virtually identical, in function, to the original Cash Management Account of Lyrill Mench.

Recently, on August 24, 1984, the financial industry was startled to learn that the United States Patent and Trademark Office had issued U.S. Patent No. 4,346,442 on a "Securities Brokerage–Cash Management System," with Lyrill Mench, Inc., as the assignee. The patent, which was filed on October 22, 1980, essentially claims and describes the computer program which underlies the Cash Management Account. Although the patent specifications concede that the three individual components of the system, the Securities Account, the Money Market Account, and the VISA Account, are all part of the prior art, the combination of the three is said to be novel and synergistic. First, the specifications say, because of the integrated system, the money generated by the Securities Account can be automatically invested within a week in the Money Market Fund, thus saving the customer the losses due to idle cash deposits. Second, the credit limit in the VISA Account can be automatically adjusted according to the number of shares in the Money Market Fund and the loan value in the Securities Account, thus providing the customer with the maximum leverage for his invested assets. And third, because of the integrated system, the customer can receive a unitary monthly statement for all of his transactions. The patent claims themselves were drafted as "means for" apparatus claims, as permitted in the last sentence of Section 112 of the Patent Act. The following two claims are representative:

1. In combination in a system for processing and supervising a plurality of composite subscriber accounts each comprising a margin brokerage account, a charge card and checks administered by a first institution, and participation in at least one short term investment administered by a second institution, said system including brokerage account data file means for storing current information characterizing each subscriber margin brokerage account of the second institution, manual entry means for entering short term investment orders in the second institution, data receiving and verifying means for receiving and verifying charge card and check transactions from said first institution and short term investment orders from said manual entry means, means responsive to said brokerage account data file means and said data receiving and verifying means for generating an updated credit limit for each account, short term investment updating means responsive to said brokerage account data file means and said data receiving and verifying means for selectively generating short term investment transactions as required to generate and invest proceeds from subscribers' accounts, wherein said system includes plural such short term investments, said system further comprising means responsive to said short term
investment transactions among said plural short term investments, and communicating means to communicate said updated credit limit for each account to said first institution.

2. A combination as in claim (1) where said updated credit limit generating means comprises means for accumulating the amount of charge card usage and checks for each subscriber, means responsive to said brokerage account data file means for generating a subscriber updated credit limit measured by the difference between the limiting residual subscriber brokerage account securities loan value augmented by the value of the subscriber's short term investment, decremented by the value of the subscriber's aggregate expenditures and funds required for brokerage account purposes, and means for reporting said updated credit limit to said brokerage account data file means.

On September 15, 1984, Lyrmill Mench sent notice to Wean Ditter that it considers the continued operation of Wean Ditter's integrated financial system to be an infringement of U.S. Patent No. 4,346,442, and it demanded that Wean Ditter cease and desist such operation immediately. In addition, Lyrmill Mench has accused Wean Ditter of infringing its trade secrets in the Cash Management Account by hiring away several key employees during a critical period in the development of the system. On this latter point, Wean Ditter has checked its personnel records very carefully, and it has discovered that it did, indeed, hire one security analyst and two computer programmers from Lyrmill Mench in late 1979. Wean Ditter has now contacted your law firm for advice, and you have been asked to prepare a memo on several points: (1.) What are the prospects that Lyrmill Mench could sustain the validity of its patent under Sections 101, 102 and 103 of the Patent Act? (2.) Based on the facts you know so far, what are the prospects that Lyrmill Mench could prevail in a trade secret action against Wean Ditter? Draft the requested memo.

Problem Three

In 1978, Ray Peterson, as author, and Ridge Press, as publisher, produced a copyrighted paperback book entitled A Trivial Pursuit. The book consists of numerous facts from history, geography, the arts and sciences, and American popular culture, all arranged in a question-and-answer format. Many of the questions cover familiar topics (the state capitols, the largest lakes, the actors and actresses in famous films, etc.), but some of them are quite unusual. For example, the book contains the following:

Q: On what month and day did Thomas Jefferson, John Adams and James Monroe die?
A: July 4th.
Q: Who forfeited the 1936 Miss Hungary title because she was underage?
A: Zsa Zsa Gabor.
Q: Where are a cow's sweat glands located?
A: On the nose.

Although the book does not claim to be a game, per se, it does suggest several parlor games that could be played using the published facts, most of them modeled after familiar television quiz shows. The sales of A Trivial Pursuit were disappointing, however. The book sold an initial press run of 5,000 copies in 1978–79, mostly in drugstores and airport newstands, and then its sales tapered off to about 500 copies per year.

In 1983, as everyone knows, Selchow & Righter marketed a game entitled Trivial Pursuit which became one of the biggest fads of the year. Trivial Pursuit is constructed as a board game, but the heart of the game is a set of cards containing over 6,000 questions and answers in six categories: geography, entertainment, history, arts and letters, science and nature, sports and leisure. Selchow & Righter has not attempted to copyright the content of its game, but it has obtained a federal trademark registration for its title: Trivial Pursuit. However, Ray Peterson no claims that Selchow & Righter has copied a substantial percentage of its questions and answers from Peterson's copyrighted book. By Peterson's analysis, almost 30% of his book appears in Selchow & Righter's game in one form or another, and some of the questions and answers are direct paraphrases. For example, the Selchow & Righter game contains the following:

Q: What month and day did Thomas Jefferson, John Adams and James Monroe all die on?
A: July 4.
Q: Who had the 1936 Miss Hungary title taken away from her because she was underage?
A: Zsa Zsa Gabor.
Q: Where are cows' sweat glands?
A: The nose.

Ray Peterson and Ridge Press are outraged at this blatant piracy, and they have contacted your law firm for advice. You have been asked to prepare a memo on the major issues: (1) Can Peterson succeed in an action for copyright infringement against Selchow & Righter? (2) Alternatively, can Peterson attack the validity of Selchow & Righter's registered trademark on the name Trivial Pursuit? Draft the requested memo.
END OF EXAMINATION