

Civil Procedure
Professor Sachs
Final Exam, Summer 2014

The final exam will be on **Friday, August 1, at 8:30 a.m.** The proctor will administer the exam. You should write your answers in the Electronic Bluebook software. To preserve anonymity, please *don't* include your name.

The exam is five hours long. Should anything untoward occur—computer malfunction, sudden illness, etc.—alert the proctor, who will direct you to the Registrar's Office.

The software will be in the “unblocked” setting. Feel free to use any electronic or print materials you like: the textbook, the coursepack, your notes, other people's notes, commercial outlines, etc. (This includes an English translation dictionary, whether electronic or on paper.) You shouldn't contact other people or use the Internet for research during the exam, so please make sure you download relevant materials *in advance*.

If a particular legal standard hasn't received any substantial attention either in the book or in my lectures, it's unlikely to be tested. That said, the exam is open-book and could require close parsing of a rule or statute. As noted on the syllabus, the exam doesn't ask things like “how would this case have been decided in 1872?” It only tests on the law as it stands today.

The exam has three questions. Each is accompanied by a point value (out of 100) and a recommended time allocation. These time allocations assume that you take twenty minutes at the beginning to read through the whole thing, as well as fifteen minutes at the end for proofreading. Make sure that you read the questions carefully. I also recommend that you spend up to a half-hour sketching out answers with pencil and paper before actually starting to write. If you just dive in, you'll get lost halfway.

Organize your answers clearly. You don't need to follow the IRAC format with rigor, but you should identify an applicable legal standard before applying it. Stating your conclusions upfront will be helpful to me when grading. Mentioning individual rules or statutes can be useful, but chapter-and-verse citations aren't necessary; it's more important to state the substance correctly. The same is true for relevant cases. There are no page or word limits, though brevity is appreciated.

Unless you're given specific details, you should assume that every party is properly served with process, that every pleading is properly pleaded, that all filings are timely filed, and that every motion or brief presents the best arguments available. Don't try to invent new and helpful facts not mentioned in the exam. If there are issues that you're not sure of or that require more information than the exam gives, say so. (Some of them are intentional.)

Also, when listing reasons why a particular result would be legally correct, *don't give just one*; give as many as are correct, even if just one of them would be enough to win or lose on that issue. Don't assume that I'll know you know the basics; show me that you do!

In general, please review and follow the advice given in John H. Langbein's *Writing Law Examinations* (available on the course website, under "Resources"). Answers will be graded on your understanding and analysis, as well as on clarity of exposition. Individual questions will be curved, to reward those who do well on harder questions, and then the exam as a whole will be curved. Final grades will be calculated in compliance with Duke's grading policies.

Good luck!

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(SO HERE'S A PICTURE OF A GUINEA PIG
IN A RADIO FLYER WAGON.)



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Question 1. (64 pts, ≈ 2 hr 55 min)

Hakeem Seriki is a celebrated American musician. He resides in Houston, Texas, and performs under the stage name “Chamillionaire.” That name is a portmanteau of the words “chameleon” and “millionaire.” (A portmanteau is a word created by combining other words or parts of words; for example, “motel” from “motor” and “hotel,” or “sharknado” from “shark” and “tornado.”)

Seriki’s debut studio album was released on November 22, 2005. Its most popular song, “Ridin’,” reached number one on the charts and earned a Grammy award. “Ridin’” is best known for its chorus:

They see me rollin’
They hatin’
Patrollin’
And tryin’ to catch me ridin’ dirty

Seriki’s music publisher, EMI April Music Inc., registered the copyright to “Ridin’” with the U.S. Copyright Office on Jan. 26, 2006 (Reg. No. PA0001163331). By agreement with EMI, Seriki receives royalties from each licensed sale or performance of the song. Seriki also registered “Chamillionaire” as a trademark with the U.S. Patent and Trademark Office on May 16, 2006 (No. 76638911).

Seriki’s song has inspired a number of parodies. Perhaps the most famous was written by noted satirist Alfred “Weird Al” Yankovic, who released an album containing a “Ridin’” parody on September 26, 2006. Litigation quickly ensued, with Seriki accusing Yankovic of copyright infringement in the U.S. District Court for the Central District of California. Yankovic defended on the ground that his version of the song was sufficiently transformative as to be noninfringing, and also that Seriki had signed agreements with EMI effectively transferring

away the copyright and eliminating his right to sue. After a full trial on disputed facts, the jury rendered a general verdict for Yankovic on August 3, 2010, and the clerk accordingly entered judgment that afternoon. Seriki timely filed a motion for a new trial, citing improprieties by the jury. After further procedural wrangling and an evidentiary hearing, that motion was denied. Seriki's appeal of the judgment is still pending in the U.S. Court of Appeals for the Ninth Circuit.

In addition to parodies, "Ridin'" has also inspired a series of "memes," popular phrases or images that are passed around the Internet. One such "meme" is the following:



This image was uploaded to the “meme” database of the Seattle-based Cheezburger Network on January 23, 2010, by user “GuineaPigChester.” It thereafter “went viral.” The pictured guinea pig, assumed to be named Chester, became known on the Internet as “Chestrillionaire.” Another parody of “Ridin’,” purportedly sung by “Chestrillionaire” in a high-pitched voice, was uploaded to YouTube and reached an audience of millions. In the hubbub, Seriki’s original song was forgotten, and sales and licensed downloads of “Ridin’” largely ceased.

Seriki began to prepare for litigation against the anonymous uploader of the “meme.” To discover its origins, his lawyer, Caroline Vinsky, hired the computer forensic firm of eForensics LLP, a limited liability partnership based in Houston with field offices in Los Angeles, Boston, and Oklahoma City.

The eForensics investigation revealed that the underlying, uncaptioned photograph of a beige-and-white guinea pig in a tiny wagon was uploaded on December 5, 2009 to a guinea-pig themed website, the Texas Guinea Pig Forum (TGPF), by user “MarySueFranklin.” The caption was added at some point before the image was uploaded to the Cheezburger database the next month. Although TGPF regularly auto-deletes its access logs, the December 2009 logs had not yet been destroyed, and TGPF helpfully provided eForensics with a copy of that month’s records before their automatic deletion a few days later. eForensics then sent a report to Vinsky containing a copy of the access logs, along with an analysis of the logs suggesting that “MarySueFranklin” was actually a guinea pig enthusiast in El Paso, Texas, by the name of Mary Sue Franklin. The cell-phone-camera geolocation data encoded in the original, uncaptioned image also showed that the photo had been taken from inside Franklin’s El Paso home.

By contrast, the Cheezburger Network refused to provide eForensics or Vinsky with any information on the captioned

“meme” image or the user “GuineaPigChester.” Data publicly accessible on its website, however, indicated that the captioned image was uploaded from a computer in El Paso running Windows 2000 and Internet Explorer 6. According to the TGPF access logs, the uncaptioned photo had been uploaded using the same browser and operating system. At the time, only 0.5% of all U.S. computers used that combination of software.

Vinsky wrote a memo to Seriki that included both a factual description of the available records and her thoughts on their usefulness in the litigation. Seriki chose to sue. On the last day of the relevant limitation periods, he filed a complaint against Franklin in the U.S. District Court for the Western District of Texas, El Paso Division. The complaint accused Franklin of uploading the captioned photo and thereby infringing Seriki’s copyright in the song’s lyrics under 17 U.S.C. § 106(2). It also accused her of conspiracy to violate his trademark in the phrase “Chamillionaire,” raising claims under the federal Lanham Act and analogous Texas statutes. Seriki’s process server delivered a copy of the complaint and summons to Franklin’s house. When Franklin’s 17-year-old son answered the door, the process server gave him the documents and explained their contents.

Franklin promptly moved to dismiss the Texas-law claims for lack of subject-matter jurisdiction. The court postponed any ruling on that motion. As discovery proceeded, Franklin sent a Rule 34 production request to Seriki for the eForensics report and for Vinsky’s subsequent memo. Seriki refused to provide these items, and Franklin filed a motion to compel. Seriki noticed a deposition and sent a subpoena to the Cheezburger Network, requiring them to send a representative to be deposed in El Paso and to bring along “copies of network access logs for all periods of the Cheezburger Network’s operation, from its founding to the present day.” Cheezburger responded by filing a motion to quash in the district court.

After the close of all other discovery, the parties filed multiple motions under Rule 56. Relying on the evidence above, and with appropriate affidavits from eighteen independent computer forensics technicians, Seriki's motion sought partial summary judgment on the issue of Franklin's liability for all claims.

For her part, Franklin filed two motions, also for partial summary judgment. The first asserted that Seriki's loss in the Yankovic litigation barred his copyright claims under the doctrines of claim and issue preclusion. The second sought partial summary judgment on the issue of liability for all claims, but in Franklin's favor. Along with appropriate citations to the record, it was accompanied by Franklin's handwritten affidavit, which repeated the following passage from her answer:

Yes we did adopt a guinea pig but his name is Randolph and not Chester. I took his picture and sent it to the guinea pig website. Is that illegal? I didn't add words to it and I don't know how to do things like that. My son Chester knows how to edit photos, he and his friend Rick Smith are always using our computer. They just turned 18 and are going off to college in the fall.

While these motions were pending, Seriki filed a motion for leave to amend his complaint by adding Chester and Rick as defendants, alleging in the alternative that if Mary Sue Franklin didn't upload the captioned photo, the two of them did. Franklin opposed this motion on the grounds that it was untimely and prejudicial, that Seriki's claims against her and against the new defendants would be misjoined and mutually contradictory, and in any case that the relevant statutes of limitations had lapsed since the case began.

That same day, the court received a motion to intervene. The motion was ostensibly filed on behalf of the *Société*

languedocienne pour la défense des porte-manteaux, an informal association of furnituremakers in southern France. (The French use “porte-manteau” to mean “coat rack,” and they are incensed by its repurposing.) The motion, signed by the group’s founder and most active member, argued that Seriki’s adopted name of “Chamillonaire” was in tension with the Hague Convention for the Global Restriction of Neologisms, a multilateral treaty that the United States ratified in 1978. Popularly known as the “Haguevention,” the treaty is designed to prevent the creation of new and ugly words. It is purely aspirational and has no legal effect. That said, the Haguevention Implementation Act of 1979 (“Hagimpact”), a federal statute, provides that “when registering trademarks, the Director [of the U.S. Patent and Trademark Office] shall give due consideration to the spirit of the Haguevention and to whether a new word or combination of words is unusually awkward.” The motion asks that the *Société* be allowed to intervene in the case as a defendant and to oppose Seriki’s federal trademark claims.

Now pending before the court are: (1) Franklin’s motion to dismiss the state-law trademark claims; (2) Franklin’s motion to compel production by Seriki; (3) Cheezburger’s motion to quash the subpoena; (4,5,6) the parties’ motions for partial summary judgment; (7) Seriki’s motion for leave to amend; and (8) the motion to intervene. All eight motions have been fully briefed and are ready for the court’s disposition.

What is the proper ruling on these motions, and why? (Assume that the court addresses the motions in the order above. Ignore any possible effects of earlier motions on later ones—that is, don’t just say that “motion *X* comes out this way, so motions *Y* and *Z* are moot.” If you’re not sure of something, or need information you don’t have, just say so.)

Question 2. (18 pts, ≈ 45 min)

Below are five pairs of things that may seem similar, but aren't. **For each pair:**

1. *briefly* describe each member of the pair;
2. explain how the two are different; and
3. discuss what role each plays in the law (that is, why we have the two of them around).

You *will* lose points if you don't do all three for each pair!

- A. Personal jurisdiction *in personam* and *in rem*.
- B. Default judgment and entry of default.
- C. Class actions and mass actions.
- D. 54(b) certification and 1292(b) certification.
- E. Forum selection and arbitration.

(PS: A few sentences would be enough. So, if the pair were “Compulsory and permissive counterclaims,” an answer might read: “Compulsory counterclaims have to involve the same transaction or occurrence as the initial claim. If not raised, they're lost forever. Other counterclaims are permissive; you can raise them if you want, but it won't hurt you if you don't. We make you raise compulsory ones to avoid extra suits; the court can deal with everything involving the same parties and events at the same time. We let you bring permissive ones because you've already been dragged into court by that person anyway, so we might as well hear your claims against them.”)

Question 3. (18 pts, ≈ 45 min)

An amendment to Rule 23 has been proposed that would cause the Rule to read as follows. (Deleted text is in ~~striketrough~~; added text is in *italics*.)

Rule 23. Class Actions

...

(e) SETTLEMENT, VOLUNTARY DISMISSAL, OR COMPROMISE.

The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised *as in other types of cases; but any such settlement, voluntary dismissal, or compromise shall have preclusive effect in future cases only on the named parties and not on the absent class members.* ~~only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:~~

~~(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.~~

~~(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.~~

~~(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.~~

~~(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.~~

~~(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.~~

How would this amendment change the law? What would the practical consequences of these changes be? Would the amendment be a good idea? Why or why not?