1. This is an open book examination. You may refer to your casebook, your casebook statutory supplement, the Mueller text, your class notes and any outlines to which you have made a significant contribution.

2. The examination consists of two sections. Every section must be completed in its entirety. 300 points are available in this examination. Those points are allocated among the sections as follows: Section I: 200 points Section II: 100 points (50 points for each question).

3. If you are handwriting the exam, write your answers in one or more bluebooks legibly in ink. Use only one side of each page in your bluebook (except for additional remarks made on the blank facing page, so long as you indicate where they fit on the opposite page).

If you are taking the exam on computer, your answers must be double-spaced.

In your answers, support your analysis/argument, where possible, by referring to the relevant authorities in so far as they apply by analogy to the situation discussed. You will not be penalized for not remembering case names; if you cannot remember case names, refer to them by briefly describing their leading facts. If you need to know additional facts, tell me what they are, and why and how they would facilitate your analysis/argument.

4. Do not put your name on your exam; make sure you simply use your identification number.

5. Carefully read the instructions provided in each section (they may simplify your life!). Suggested times are listed at the beginning of each section.
Section I  
(200 points. Recommended time 2.5 hours)

For purposes of this exam, use all current legal standards and statutes. Assume that all legal standards and statutory provisions we discussed were in force throughout the entire period for this fact pattern. For example, if a statute was passed in 2000 but events took place in 1990, before the statute was enacted, treat the problem **as if the statute were in effect in 1990.** In other words, it is not an acceptable response to say “that statute was not enforce at that period of time, so there is no issue.”

You are an associate at Holbrook, Dinwoodie and Hulbert. You represent the Company Zoltan’s Deck Building Co. At present, Zoltan does not actually build patio decks and, indeed, it is a corporation in name only. Its sole shareholder is Billy Bob Burton (BBB), who created the invention in U.S. Patent No. 5,831,831 (the ‘831 patent), which Bob assigned to Zoltan’s. BBB is hoping to use the patent to get investors to back his business venture so that, at some point in the future, he can start building and selling decks using his invention.

BBB is not the most sophisticated inventor. He has absolutely no evidence, other than his patent application, of when he came up with his idea nor when he first created these boards.

The '831 patent issued on December 12, 1995 based upon a non-provisional application filed on July 13, 1992. The patent issued without any amendments whatsoever. The examiner allowed the patent based on the originally filed application, so there is public record to note.

The patent discloses a uniquely shaped board for use in constructing exterior flooring surfaces (such as outdoor decks, porches, docks, etc.) that has a slightly rounded or curved top surface that enables the board to shed water, and bottom surface with a concave configuration which allows multiple boards to stack easily. In other words, the board has a convex top and a concave bottom and, in exaggerated form, looks like the following;
The patent is reproduced below:

ABSTRACT

A board for use in constructing exterior floors has a rounded or curved convex top surface to shed water, and a complementally shaped rounded or curved concave bottom surface for nesting engagement with the top surface of an adjacent board so that a plurality of the boards may be stacked in stable relationship.

BACKGROUND OF THE INVENTION

A variety of specialized flooring materials have been developed for interior and exterior use. Wood flooring materials for exterior use, such as in decks and the like, have undergone very little change since their introduction. Up until fairly recently, wood flooring for exterior use was typically found on covered porches, and was not used in constructions fully exposed to weather conditions. The same boards might even be used both indoors and outdoors, for example, with a painted surface on the boards used outdoors to aid in resisting weather.

Construction materials and methods for exterior decks and porches changed dramatically with the advent of chemically treated lumber, which enabled exterior structures to be fully exposed to the weather. However, very little change has been made in the basic structural design of the wood building materials used in such exterior constructions. All of these flooring materials are essentially rectangular in cross-sectional configuration.

In all conventional flooring materials known to applicant, the top and bottom horizontal surfaces of these flooring materials are flat and planar. As a result, water tends to stand on the surface of the decking material, causing it to deteriorate more quickly than it otherwise would. Heretofore, the solutions to this problem included spacing the decking boards so that water can drain between them, and frequent treatment with water-proofing materials. Further, the process used to cut such lumber from logs can produce inferior product on the outermost boards, often leading to scrap.

Consequently, there is need for an exterior decking board that is shaped to shed or drain water, and which possesses all the desirable attributes of conventional decking materials, such as ease of use and handling, low cost, and comfort, and which at the same time can result in better utilization of material as the boards are cut from a log.

SUMMARY OF THE INVENTION
Accordingly, it is an object of this invention to provide a board for use in constructing flooring, wherein the board is shaped to shed water from its upper surface and which, at the same time, is comfortable to walk and stand on.

Another object is to provide a decking board for use in exterior deck constructions, wherein the board has a convex upper surface to shed water, but which at the same time is comfortable to stand and walk on, and which includes a concave configuration in its bottom surface to facilitate stacking of the boards one on top of the other during storage and handling.

A further object of the invention is to provide a decking board which is shaped to shed water from its upper surface, and which also yields a superior product when cut from a log, reducing the amount of scrap in the outermost boards cut from a log.

These and other objects and advantages of the invention are achieved by shaping the top surface of a board through cutting or milling and the like, so that the board has a very slightly rounded convex upper surface sloping off to each side of the board for shedding water. Also, the board has a concave bottom surface shaped complementally to the top surface to facilitate stacking of the boards on top of one another. The shaped top surface also results in a board configuration which enables more usable boards to be obtained from a log, and the shaped bottom surface lends a slight cushioning effect to the board. In another form, the board has stress-relief channel means formed in its bottom surface to prevent warping of the board.

DETAILED DESCRIPTION OF THE PREFERRED EMBODIMENTS

Referring more specifically to the drawings, a board in accordance with the invention is shown generally at 10 in FIGS. 1-3. In FIG. 1, two such boards are shown in stacked relationship one on top of the other. The board of the invention has a slightly rounded upper surface 13 that slopes gradually off to either side of the center of the board, defining a convex surface that promotes the running off of water.

Further, the board also has a complementally shaped concave bottom surface 14. When stacked on top of one another, as shown in FIG. 1, the boards essentially nest within one another, with the two side panels on a top board resting on the curved outer edge portions of a subadjacent board to produce an arrangement that enables multiple boards to be stacked with essentially the same stability as conventional, flat boards.

In use, the boards are installed in close-fitting, side-by-side relationship to
one another on a frame. As depicted in FIG. 3, a small clearance space S is provided beneath the boards when they are installed, which provides a slight cushioning effect to the flooring surface made with the boards.

While the invention has been shown and described in detail, it is obvious that this invention is not to be considered as being limited to the exact form disclosed, and that changes in detail and construction may be made therein within the scope of the invention, without departing from the spirit thereof.

What is claimed is:
1. A board for use in constructing a flooring surface for exterior use, said board having a top surface, a bottom surface and opposite side edges, said top surface being manufactured to have a slightly rounded or curved configuration defining a convex top surface, and said bottom surface having a concave configuration.

2. A wood decking board for use in constructing a flooring surface for exterior use, said decking board having a convex top surface, a bottom surface, opposite side edges, and curved growth rings, said top surface being smoothly and symmetrically curved from a longitudinal center line thereof downwardly to each side edge, and said convex top surface is formed in the board so that the growth rings are oriented in the same general direction as the curvature of the top surface, thereby insuring that the hoard will always be installed with the growth rings properly oriented to minimize the effect of cupping.
One of Zoltan’s potential competitors, Imre’s Outdoor Structures, builds decks and patios. The boards are only component of the ultimate deck structure itself. The boards that Imre uses to make the decks have the identical shape as the ones disclosed in the patent. Imre’s board is, however, is known as a “composite” board because it is made from a mixture of sawdust\(^1\) and plastic. These materials are mixed, heated, and extruded (not cut from lumber) to produce the composite board with the required curved top and bottom. This composite material was known (i.e. in existence) when the ‘861 patent was filed, but at that time there was no known process or method to shape the composite material into the curved shape of the ‘831 patent. Imre discovered the process in 2000 to allow the processing of the composite material into the curved shape, and the company actually has a patent on it.

We contacted Imre last week about taking a license for the ‘831 patent. While Imre concedes that the composite structure is insubstantially different from our

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\(^1\) Sawdust: fine particles (as of wood) made by a saw in cutting.
claimed invention in its function, manner of operation, and ultimate results and that it would be interchangeable with ours, there is a dispute about whether our patent covers their composite structure.

Zoltan wants to sue Imre for infringement. The hope is that taking an aggressive litigation posture will bring value to the patent and encourage backing of Zoltan by investors. We want to get a preliminary injunction to stop Imre from selling any more decks. Write a memorandum discussing our ability to get the preliminary injunction. We will only assert claim 1 in the litigation and will not assert claim 2.

There are a couple of possible wrinkles. There is an inventor in France, Paris Hilton, who invented a roof covering made of slate with a flat top and a curved bottom. It allows water to flow under the slate roof while maintaining a flat appearance on the roof’s surface. A diagram of the slate piece is below:

![Diagram of slate piece]

The patent refers only to roofing materials and makes no reference to floors or floor materials. The patent makes no reference to using it as a flooring material, although it does note that persons walking on the roof should be careful because the slate can be slick and can chip easily if too much pressure is placed on it.

Paris Hilton filed an application in the French Patent Office on January 1, 1991. Subsequently, Paris filed an international application under the Patent Cooperation Treaty on January 1, 1992. The application designated the United States and was published in English on July 1, 1992. The national application was then transmitted to the USPTO on September 1, 1992. Paris decides on September 5, 1992, not to pursue the U.S. patent, so a patent never issues in the U.S. nor is the application published. The French patent issued on November 4, 1994, and it is entirely in French. All of Paris’s activities took place in France. We only recently became aware of this invention.

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2 Slate: a piece of construction material (as laminated rock) prepared as a shingle for roofing and siding. Slate is not made of wood.
Finally, we are aware of a person in rural Iowa who owns a farm in the middle of nowhere. Farmer Jane Altrade built a wooden deck attached to her farmhouse. In building the deck, she used boards with a convex surface and flat bottom:

Jane built her deck in June 1991, and it worked perfectly from the minute it was created. She never had to check on it or inspect it. Only Jane and her family of three – husband John, son Johnny and daughter Janey – use the deck. The live miles from anyone, and never have guests. The mailman stops by daily but has never been on the deck itself. He has spoken to Jane while Jane was on the deck, and Jane did not chase him away. The deck is not visible from their neighbors’ houses either. A neighbor, Did Lee Squat, has seen the deck while flying a crop duster but has never actually been on the deck.

We only know of the deck because Altrade contacted us about possibly pursuing a patent on deck structure, and disclosed the design to us in confidence. This contact occurred after the ‘831 patent issued. We declined to pursue the patent application due to a potential conflict with Zoltan, but we are still obligated by the non-disclosure obligation. We disclose it to you maintaining this duty of secrecy.

The following dictionary definition may or may not be helpful:

**Board:** (1) a piece of sawed lumber of little thickness and a length greatly exceeding its width; (2) a flat usually rectangular piece of material designed for a special purpose; e.g. SPRINGBOARD, SURFBOARD, BACKBOARD, SKATEBOARD.

Assess the availability of a preliminary injunction to Zoltan. Only discuss issues that are implicated by the fact pattern. If the facts state that something is conceded, then there is no need to discuss that issue.

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3 **Crop duster**: (noun): a person who sprays crops with fungicidal or insecticidal dusts from an airplane; also : the airplane used for such spraying
Section II (recommended time 1 hour)

Question 1. U.S. patent owner Attila holds a patent that covers a system with a central computer where music and video files are stored. New videos can only be added to the central computer by the host who controls the central computer. There is no remote access by users. Remote users, via the internet, can access the central computer to stream the videos or music to their own computers. Remote users can neither upload any files nor download permanently any files. The claim is drafted to cover the central computer, the Internet connection, and the remote users’ computers.

Bela operates a system that contains all of the limitations of Attila’s patent. The central computer is located in Hungary, however. It has the claimed central computer, and the only way that files can be added to the system is by Bela doing so in Hungary. Anyone with computer access can reach his system, including users in the United States.

Will Attila be successful in suing Bela for infringement of the U.S. patent? Address the legal standard for assessing infringement in this context and whether it would be met. Is this standard good or bad as a matter of patent policy? Why?

Question 2. Now assume that instead of a system claim, Attila’s patent only covers the method with the following steps:

1. Upload video and/or music files onto a centralized computer
2. Access the video and/or music files on the centralized computer from a remote location via the Internet

Geza has such a system within the United States. Again, Geza is the only person who can upload the videos and/or music files, and remote users access the files. The remote users cannot upload any files, nor does Geza actually use his own personal computer to access the files.

Against whom could Attila assert a claim of infringement? What problems will arise if he tries? (Yes, there are problems). How, as a matter of claim drafting, could you try to avoid this problem?

END OF EXAM.