

**Final Exam –Remedies Fall Semester 2015
December 1, 2015, at 2 p.m.**

Instructions:

The total time permitted for the exam is 3 hours. An extra 30 minutes will be allowed to allow you to read carefully and take notes. Do not begin writing your answers during the reading time.

The exam is open book exam. The exam comprises two questions. Both are of equal value. You should then allocate equal time to both. In **Question 2**, the weighting of each of the **four sub-questions is provided in the square brackets**. Allocate your time accordingly. You may refer to your materials, i.e., **your** books, notes and outlines. You may not refer to commercial outlines, other outlines not generated by you, your hard drive, or the internet. **You will have to take the exam “Blocked”. You are bound by the Honor Code.** Remember to read the question carefully and answer only the question posed. Most points are allocated for analysis, so organize carefully to show this analysis.

For those using exam books: if more than one exam booklet has been used to answer the question, be sure your examination number appears on each booklet indicating the total number of booklets utilized by the individual number of each book. (E.g., #1 of 2, #2 of 2.) The only identification permitted to appear on the blue book is the examination number which has been assigned. Please do not indicate anything else on the blue books that will identify you.

Before you begin working on the exam, check that you have **Question 1 and 2, pages 1-3.**

The Law School has requested that the following statement be included on all exams:

“I acknowledge that in this, as in all other Law School activities, I am bound by the Emory Law School Professional Code.”

Please sign with your **exam number, not your name.**

HAND IN ALL YOUR PAPERS.

GOOD LUCK!

QUESTION 1

Patricia Parent in 1945 wrote a fictional book, based on her life as a young lawyer representing the desperate and dispossessed during the dust bowl in Oklahoma during the great Depression in the early 1930s. Although the book found critical acclaim it generated little wide interest because the public's attention was focused on the Second World War. In the prosperous post war years few were interested in the gritty lives of the "dust bowlers."

However after Parent's death in 1990 the book was discovered by producers of the Netflix Corporation in 2010 and used as a basis for its miniseries, "Dust Bowl Law". The miniseries enjoyed great success once Netflix went to its streaming format. Prior to producing the series Netflix tracked down Parent's heirs and beneficiaries of her estate who were entitled to revenues flowing from the use of copyright attaching to the book. It found her son and daughter, Donald and Evelyn, now in their eighties, who were living in a retirement community "Happy Valley" in Georgia. Netflix drafted and presented to Donald and Evelyn an agreement to waive any rights they had to revenues stemming from the miniseries. The agreement also provided that Happy Valley receive 1% of the net profits in return for rent free living for the balance of their lives. The director of Happy Valley had befriended and advised Donald and Evelyn over the years they had been in residence. Under this arrangement Happy Valley had received \$500,000, \$200,000 of which was used to pay off a mortgage over the property. The remainder was used to build two separate units in the community that had been bought by newcomers. Happy Valley has declared bankruptcy. Donald and Evelyn each had daughters, respectively, Fiona and Gina who were not notified of these events.

Netflix had created a subsidiary corporation Netflix Management Holdings Ireland (NMHI) that charged Netflix for the costs of production, distribution and licensing fees for their products and management expenses of Netflix growing empire, leaving the US based profits modest.

Fiona and Gina, with the authorization of Donald and Evelyn, come to you for advice. You conclude that Donald and Evelyn have a good action for infringement of copyright unless those rights had been otherwise assigned. You also note that the Copyright Act (17 USC section 507 (b)) provides that "no civil action shall be maintained under the [Act] unless it is commenced within 3 years after the claim accrued." Note that every copyright infringement constitutes a fresh cause of action accruing at the time of the breach. Forensic accountants also report that the net profits of the Netflix group (that is of Netflix and NMHI) relating to "Dust Bowl Law" were \$10M since inception, and in the last 3 years, \$3M. Expected future profits are estimated at \$30M. You have discovered also that revenues from "Dust Bowl Law" miniseries have been invested in other Netflix ventures some successful, others failures. Moneys were and continue to be remitted to NMHI. Records of the distribution of funds from the "Dust Bowl Law" miniseries are critical to establishing the flow of money through accounts and substantiating any claim of, and priorities in the Happy Valley's bankruptcy for, Donald and Evelyn.

QUESTION 2

Scientists have recently discovered a method of inserting a gene in salmon that causes a faster maturity thus allowing them to be brought to market in half the time of other salmon. The FDA has approved the technique for commercial use allowing sales of the genetically modified (GM) fish to the public.

Jeremy Fisher has bought the license to exploit the patent from Exemplary University for \$550M. Fisher owns salmon farms and other aquaculture; oyster farms, clams beds, and sea cucumber lots and the like, in the United States and South East Asia. He recognizes that the exploitation of the patent will be controversial. Opponents say among other things that the fish may escape to the wild and interbreed passing on the gene. He has invested millions to devise ways to sterilize the fish to render them incapable of breeding.

To counter public reaction and to bolster marketing he proposes to enter a joint venture with two retailers namely, Sound Harvest (SH) and Natural Foods (NF) to produce, promote, and retail the salmon to the public. He wants also to shore up his investment against competition from an Australian company, Ozfish that holds a separate patent for manipulating fish genes to promote growth. Ozfish has had success in the Pacific/Asia market and is beginning to plan a foray into the US market.

Fisher conceives that a joint venture with SH and NF would provide for exclusive marketing of his salmon as the sole farmed salmon in their stores nation-wide. Fisher would like a 10 year contract that would ensure a share of Fisher's profits for SH and NF. SH and NF would be advisors in the business and have an equal membership on the board established to run the joint venture. SH and NF would be required to invest in research and development for Fisher's other aquaculture products. They would have access to Fisher's knowhow in the entire business. Fisher suggests that SH and NF mount advertising campaigns that promote the healthfulness of the salmon, emphasizing that Ozfish have farms in Asia with "abysmal" environmental standards and are connected with reported human rights abuses of Thai workers in fish farms. (There is no substantiation of those allegations).

Fisher comes to you for advice specifically on the following matters:

1. SH and NF have expressed concern about the potential liability they face to other salmon producers if salmon should escape in any locality. [15%]
2. How can the contract for the joint venture be drafted to secure, so far as it is possible, that SH and NF are tied to the joint venture for its term? Can Fisher be assured that they will not decamp to Ozfish? He also fears that persons connected with SH and NF will use his secret knowhow to enter the aquaculture. He says to you: "I want to make sure that the joint venture people stay with me for 10 years by which time I can clear a good profit. Lets hit them in the pocket if they defect." [50%]

3. In a remote Oregon site Fisher has set up a farm on the coast near a golf course Abandon Doons. The local municipal council approved the farm. The owners of Abandon Doons have brought suit to stop the running of the farm because of its potential impact on its business. Golfers like to view the wild Pacific rather than miles of metal cages in the nearby ocean. What information would you require to better advise on this matter? **[15%]**

4. Ozfish has brought an action in Federal District Court challenging the patent as infringing its registered patent. The court has issued a preliminary injunction ordering Exemplary University and its licensee Fisher from exploitation of its technologies until the issue of infringement can be fully litigated. Fisher wants to know whether he can ignore the injunction given “the obvious fact”, he says, that the technology used by him does not infringe the Ozfish patent. He is anxious to finalize the deal with SH and NF before Ozfish can mount an imminent counteroffer. He says further that the bond ordered by the court of \$10,000 does not begin to cover the losses he would suffer from a delay in getting his salmon business going. **[20%]**