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Instructional Memorandum

Fm: Senior Partner
To: Junior Associate Applicant
Re: *Placebo v. Dan de Studt*
Date: Dec. 6, 2008

We appreciate your coming in, especially on a Saturday, to complete this Performance Test exercise. We are among the growing number of law firms that use this device to help screen applicants during the associate interviewing process. We do not expect you to use any particular format for your response. Please feel free to employ the “IRAC” format you probably used in law school.

Assume that the case in this exercise was filed in a federal court in the hypothetical State of Columbia in the United States. (The other hypothetical U.S. state in this exercise is the State of Pennsylvtucky.) Your task is to argue on behalf of the assigned party. You’ll be changing hats—as specified immediately below—resulting in your arguing on behalf of the assigned position. There are no waiver issues.

Please complete the following tasks:

- (1) Write Defendant Solomon’s **opposition to** the Attachment Application (see page 3).
- (2) You are now, instead, the trial judge’s law clerk. Advise the judge on whether the **affirmative defenses** (see page 4) should, or should not, succeed. Allocate about one-half of your exam response to these stated defenses.
- (3) Write the argument for the plaintiff **in opposition to** the Defendant’s transfer motion (see page 4).
- (4) Write the argument **in favor of** Kristen Yang’s Motion to Intervene (see page 5). Do not discuss jurisdiction.
- (5) Write a defense argument **in opposition to** the plaintiff’s Amendment, wherein Carlos seeks class action status (see page 5). Do not discuss jurisdiction.

While completing the respective tasks above, assume that all dispositive motions that could end this lawsuit are denied—thus resulting in this case remaining in the federal court in the State of Columbia (for the purposes of discovery and trial).

This exercise consists of six (6) pages. Be sure to read the matters presented in the attached document FILE and law LIBRARY (which does *not* contain all applicable laws/rules). Not every scrap of information will necessarily be relevant to an issue within this exercise.

Good luck—I’m sure you’ll soon be working here at Dewey, Cheatem, Bilkem & Howe!

Glem Gaddittlehopper

FILE

Carlos Placebo, Plaintiff) v.) Dan de Studt, Defendant, and) Dill Solomon, Defendant)	UNITED STATES DISTRICT COURT Federal District for the State of Columbia Civil Action: File Number 654321-EBG COMPLAINT FOR MONEY DAMAGES Filing Date: September 1, 2008
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DIVERSITY

1. Carlos Placebo was born in Mexico. He has lived in the State of Columbia most of his life. He became a U.S. citizen when he was a child. Last year, he was a first-year student at Western-Jefferson School of Law. It is located in the State of Columbia (in the western U.S.).
2. Dan de Studt is now a first-year law student at Western-Jefferson. He is still domiciled in his home state of Pennsylvania (in the eastern U.S.). Dill Solomon is a long-time professor at Western-Jefferson.
3. Carlos did well last year at Western-Jefferson. He created a Civil Procedure course outline entitled *Placebo on Civil Procedure*.

FEDERAL QUESTION

3. Defendant Professor Dill Solomon falsely claimed that he had authored the above-referenced outline. Co-defendant Dan de Studt is Solomon's research assistant. Dan helped Solomon market the *Placebo on Civil Procedure* outline authored by Carlos.
4. Plaintiff thus prays for a judgment in the amount of \$7,500.00 in damages.

Signed: Clem Caddittlehopper
Clem Caddittlehopper
Dewey, Cheatem, Bilkem & Howe
Attorneys for the Plaintiff

Carlos Placebo, Plaintiff) v.) Dan de Studt, Defendant, and) Dill Solomon, Defendant)	UNITED STATES DISTRICT COURT Federal District for the State of Columbia Civil Action: File Number 654321-EBG APPLICATION FOR ATTACHMENT ORDER Filing Date: September 1, 2008
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1. Defendant, Professor Dill Solomon, is on sabbatical in Kosovo (eastern Europe).
2. Plaintiff thus prays for an order, seeking to attach the equity interest in Solomon's home in the forum State of Columbia.

Signed: Clem Caddittlehopper
Clem Caddittlehopper
Dewey, Cheatem, Bilkem & Howe
Attorneys for the Plaintiff

Carlos Placebo, Plaintiff) v.) Dan de Studt, Defendant, and) Dill Solomon, Defendant)	UNITED STATES DISTRICT COURT Federal District for the State of Columbia Civil Action: File Number 654321-EBG MOTION TO INTERVENE AS A CO-PLAINTIFF Filing Date: September 8, 2008
<p>1. Kristen Yang is domiciled in the State of Columbia. She seeks permission to intervene, as of right, as a co-plaintiff in this action.</p> <p>2. Yang, a student at Western-Jefferson, is Professor Dill Solomon’s former Research Assistant. Ms. Yang—who is keenly aware of the facts of this case—is the true author of the outline <i>supposedly</i> created by either Carlos Placebo or Professor Solomon.</p> <p>3. Yang thus prays for an order authorizing her to intervene into this law suit, so that she may be aligned by the court as the only deserving plaintiff in this action.</p> <p style="text-align: right;">Signed: <u><i>Kristen Yang</i></u> Law Student & outline author Appearing in propria persona</p>	

Assume the court allows Kristen Yang to intervene. Carlos Placebo’s lawyer Clem next files the following document:

Carlos Placebo, Plaintiff) v.) Dan de Studt, Defendant, and) Dill Solomon, Defendant)	UNITED STATES DISTRICT COURT Federal District for the State of Columbia Civil Action: File Number 654321-EBG AMENDMENT TO COMPLAINT SEEKING CLASS ACTION STATUS Filing Date: October 1, 2008
* * *	
<p>5. Plaintiff’s Original Complaint seeks money damages from the individual defendants. Plaintiff’s herein Amendment to this Original Complaint differs only by the addition of this single (fifth) paragraph:</p> <p style="margin-left: 40px;">(a) Plaintiff prays that his case will be certified as a class action.</p> <p style="margin-left: 40px;">(b) Plaintiff does not seek money damages via this amendment.</p> <p style="margin-left: 40px;">(c) Plaintiff seeks only injunctive relief against all persons—in the proposed defendant class—who might now have, or in the future purchase, unlicensed copies of the <i>Placebo Civil Procedure Outline</i>. All defendants in this class would have to destroy their copies of this outline, and purchase it only from Carlos Placebo or his designated agent.</p> <p style="text-align: right;">Signed: <u><i>Clem Caddittlehopper</i></u> Clem Caddittlehopper Dewey, Cheatem, Bilkem & Howe Attorneys for the Plaintiff</p>	

[End of File]

LIBRARY

CASE:

T. B. HARMS CO. V. ELISCU
339 F.2d 823, 828 (1964), cert. den'd 381 U.S. 915 (1965).

Mindful of the hazards of formulation in this treacherous area, we think that an action 'arises under' the Copyright Act if and only if the complaint is for a remedy expressly granted by the Act, e.g., a suit for infringement or for the statutory royalties for record reproduction, or asserts a claim requiring construction of the Act, ... or, at the very least and perhaps more doubtfully, presents a case where a distinctive policy of the Act requires that federal principles control the disposition of the claim. The general interest that copyrights, like all other forms of property, should be enjoyed by their true owner is not enough to meet this last test.

STATUTES:

COLUMBIA CODE OF CIVIL PROCEDURE

§100: A court of this state may exercise jurisdiction only in the circumstances specified in this section:

- (a) a tort committed within this state;
- (b) a contract that is entered into within this state;
- (c) a contract that is breached within this state;
- (d) an act occurring outside of the State of Columbia that has a substantial effect with it.

FEDERAL JUDICIAL CODE

§1338. Patents, plant variety protection, copyrights, mask works, designs, trademarks, and unfair competition

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.

(b) The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trademark laws.

FEDERAL RULES OF CIVIL PROCEDURE

RULE 23 CLASS ACTIONS

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all only if:

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) * * *

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

RULE 24 INTERVENTION

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.***

[End of Library]

<p>(1) D Oppo Attachment [by D]</p> <ul style="list-style-type: none">* <u>Due diligence</u> IPJ<ul style="list-style-type: none">* attach sought day filed* Dill out US ± auto no IPJ* <u>Presence</u>⁺<ul style="list-style-type: none">* house unrelated* long-time prof forum* = gen IPJ* arose forum* <u>Oppo heard?</u><ul style="list-style-type: none">* @ & Applica filed same day* proc'al DP-> prompt Answer <p>(2) D Affirmative Defenses [clerk ct]</p> <p>SMJ?</p> <p><u>Div</u></p> <ul style="list-style-type: none">* fraud/conspiracy/tort case* no P, no D, same state<ul style="list-style-type: none">* US citizen when child* lived Columbia most life* Dan student rule apply?<ul style="list-style-type: none">* Dan remain dom Pennsylvucky* Dill resides Kosovo/sabbatical<ul style="list-style-type: none">* Dill long-time prof forum* sabb = intent return completion <p><u>Amt</u></p> <ul style="list-style-type: none">* Div 75k<ul style="list-style-type: none">* legal certainty outline ± min 75k?* no amt stated* 7,500 below 75k* 7,500 both? <p><u>Fed Quest</u></p> <ul style="list-style-type: none">* 1338(a) subject matter<ul style="list-style-type: none">* <i>TB Harms</i>: just b/c “related ©”* (c) unfair competition claim?* lack charging allega ± substantial FQ* appears outline ripoff* <u>FQ</u> no min* 7,500 ok <p>IPJ?</p> <p><u>Long-arm</u></p> <ul style="list-style-type: none">* Dill general juris* non-res D, look state long-arm* Dan resides in forum (law school)* §100 limited bases* “tort”/”k” unclear* ± act outside <p><u>Fed DP</u> ✓</p> <ul style="list-style-type: none">* D ties forum (M/C)* Dan ties = resides forum (law school)* Dill ties = long-term prof + house* All relevant events occurred forum	<p>FAILED CLAIM?</p> <ul style="list-style-type: none">* Note pldg standard<ul style="list-style-type: none">* prof & R.A. likely know* cross line to plausibility* no charging allega* if Div fraud, heightened pldg rqmt* FQ: 1338 speculative basis <p>NEC/INDISP?</p> <ul style="list-style-type: none">* nec for complete adjud<ul style="list-style-type: none">* KY not joint TF* join KY ± impact diversity* Yang filed Sept. 8 [b/t @ & Answer]* <u>feasible</u> join Yang?<ul style="list-style-type: none">* Yang dom State of Columbia (~ Carlos)* proceed w/o Y (can bring own S²)* <u>interest</u> subject matter litga = <i>Placebo</i> author<ul style="list-style-type: none">* shape relief avoid prejudice (± bound) <p>(3) P Oppo Transfer Motion [by P]</p> <ul style="list-style-type: none">* <u>might brought</u>—<ul style="list-style-type: none">* reside/arose (1391)* reside: not <i>all</i> Ds reside forum* Dill “sabbatical” Kos* arose: all relevant acts in Columbia* no IPJ Carlos PennTucky* <u>convenience</u>—<ul style="list-style-type: none">* both Ds outside Columbia* all relevant evid in Columbia* P's choice = presumption <p>(4) Support KY Intervention [by KY]</p> <ul style="list-style-type: none">* <u>timely</u>—<ul style="list-style-type: none">* Mo filed w/i week filg @* <u>int relating</u> prop/xaction—<ul style="list-style-type: none">* Yang claims authorship outline* <u>practical impede protect</u>—<ul style="list-style-type: none">* jmt w/o real author estab owner (stare) <p>(5) D Oppo C/A Amendment [by Ds]</p> <ul style="list-style-type: none">* (a) <u>Numerous</u>—<ul style="list-style-type: none">* <i>all</i> purchased/used now/future* difficulty ascertain class members* unlic copyholders ± likely found* being marketed ± hoards (lots competition)* 7500 may = 25 minimum* <u>Common Q</u>—<ul style="list-style-type: none">* have v purch v ripoff v gift v now v future* orig Ds = ripoff; rest class ± nec'y know* 2 Ds owners / rest innocent buyers* <u>Typical claim</u>—<ul style="list-style-type: none">* used; purchased; now; future too sprawling* <u>Adequate rep</u>—<ul style="list-style-type: none">* diff conduct w/i class (ripoff/innoc Ds)* C/A counsel req experience?* (b)(3) <u>Superior method?</u>
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