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Count(s)	Word(s)	Char(s)	Char(s) (WS)
Section 1	**812**	**4314**	**5124**
Section 2	**228**	**1069**	**1297**
Section 3	**369**	**1791**	**2156**
Section 4	**152**	**719**	**869**
Section 5	**1959**	**10832**	**12799**
Total	**3520**	**18725**	**22245**

Answer-to-Question-_1A_

This essay will first establish the validity of devises/conveyances as well as any non-possessory interests on the land before discussing the implications of the 2020 activities.

Validity of Devises/Conveyances

Upon Owen's death, TE's right of survivorship passes on his share of the farm to Paula regardless of Illinois' intestate laws. Paula's will is valid and passes on the farm to Talia (no challenges available for relatives).

Asset status is determined by state of martial domicile at acquisition time. Since California is a CP state, and Talia inherited the farm, the farm is SP and thus alienable unilaterally. Thus sale to Dan is valid.

Agreement to extend driveway is valid as an affirmative covenant/equitable servitude but does not appear to run with the land (Sam doesn't need to maintain). Use by Dan of the driveway is an affirmative easement in appurtenant which runs automatically.

The promise to only use for "residential purposes or farming" is valid as a **negative covenant** (instantaneous privity at sale) or **equitable servitude**, with intent to run ("on behalf..."). The burden "touches and concerns" both estates (since enjoyment/burden is location-dependent). However, the agreement does not appear to be recorded and Sam does not have notice (did not participate in talks) so it may not run as an equitable servitude.

Finally, Talia's will is valid so Sam owns the farm/land in FS.

Fishing

Illinois is a riparian rights state for non-navigable streams. If fishing is a part of the quantity/quality of the water, then a judge under the reasonable use rule (*Evans*) may determine Sam's attempts at diminishing the amount of fish to be unreasonable depending on quantity and possibly spite (though less likely, cf. *Fontainebleau*). Though the fact that Sam is using it at least partly productively, while Ellen is merely catching-and-releasing, may cut against Ellen.

Note, if it were a prior-appropriation state, fish and release is likely not productive and thus Sam wins (Coffin).

Trespass/Prescription for Ellen's walking-in

It does not appear that Talia gave Ellen permission to fish. If she did, then Sam's revocation is valid.

Otherwise, Ellen walking in to fish-and-release is trespass but has gone on since 2004. It may thus meet the requirements of a prescriptive easement:

- Hostility and Claim of Right: Use was not permissive. It is thus established unless Illinois is a good faith state.
- Actual Use: Frequent fishing in the evenings after sessions likely meets it.
- Open & Notorious Use: Unclear if reasonable title holder would be on notice, though

the fact that Sam demanded Ellen cease coming onto the land shows that he did have actual notice.

- Continuous Use: Easement claimed would only be for after sessions so it is met.

Statutory Period: She has done so for 17 years, which may be enough depending on Illinois' statutory period.

Note, fact that Talia owned the land until recently does not seem to be relevant (see *Palco Hats*). Thus Ellen may have an easement.

"Home Schooling"-breach of covenant

While it violates Talia's agreement (only residential/farming), Sam did not appear to have notice, thus it is unenforceable as an equitable servitude and an injunction cannot be sought. However, since there was vertical (Dan-Ellen, Talia-Sam) and Horizontal (here:instanteous) privity, Ellen can request damages as a covenant.

Possible Nuisances

Manure piling: is an intentional private nuisance per accidens. Applying the McCue factors, noxious smells are (1)problematic in nature, (2)may prevent "quiet enjoyment" as harm to Ellen, (3) potentially severe, (4) not particularly efficient since can be piled elsewhere, (5) but may be custom in farming since the area is rural. Ellen does not appear to be unusually sensitive (Prah dissent) and there was no "coming to the nuisance" (Spur). Thus Sam may be enjoined. Note: liability remedy (Boomer) or purchased-injunction (Spur) less likely due to spiteful behavior and lack of economic justification.

Social Irresponsibility in maskless home-schooling: Same kind of nuisance. If the

decrease in property value is real and the court considers her distain to be reasonable rather than idiosyncratic (*Prah* dissent) then Sam may be enjoined as in the *Arkansas Release* case.

Yet the court less likely to consider her concerns reasonable rather than unusually sensitive given the fact that many of her neighbors are not taking COVID seriously and have kids at the "home-school". In fact, the court might consider under *McCue* the fact that home-schooling is economically efficient, and that the virus concerns are unusually sensitive even from a scientific perspective given the low possibility of transmission outdoors. They may thus do a purchased-injunction or liability remedy instead-if ruling it a nuisance at all.

House in garish colors

Possibly cognizable if there are aesthetic zoning requirements (*Stoyanoff*) or potentially under some version of the spite fence doctrine. Yet the American emphasis on privilege to do what you want on your own property renders it less likely.

But House in need of repair is likely not cognizable.

Answer-to-Question-__1B_

Frank has a term of years with Sam, who has an RV. Illinois is likely to be a state with IWH but it is unclear whether they in the half of states that allows for waivers. Even if they are, it is unclear if "as is" with "no obligation..." is sufficient, or if instead the explicit phrase "I waive IWH" is needed (cf. laws for JTs)(Though in contracts, "as is" is often enough).

If there is a non-waivable/not waived IWH, then Frank can stop paying rent as a remedy and Sam is obligated to repair the toilet (or Frank can repair then charge Sam) (*Hilder*). Sam more generally has to fix the heating and bring it up to livable condition, although not necessarily to code (and code-compliance is not sufficient) (*Hilder*). Expectation/tort/punitive damages may also be available (*Id.*). And Sam cannot evict Frank in retaliation.

Depending on the jurisdiction, Frank would likely have to notify Sam. He may also need to, pursuant to an LPO, deposit rent with the court if he seeks to assert IWH in a lawsuit/for a jury trial. Note: He can invoke it "deliberately" and "in good faith" given the horrifying conditions that are far beyond *Hilder*'s de minimus exception.

If there is no/waived IWH, then Sam has no obligations and can evict Frank. This can occur within 37 days given the accelerated process.

Answer-to-Question-_1C__

Revised interests

Sam: now has an LE. "Natural life" not vague enough to be construed as FS (unlike *White*).

Rebecca and Quentin: If Illinois has a wait-and-see statute then the two (and any of Talia's other descendants) have CRMs conditioned upon graduating from a fine arts program before the wait-and-see statutory limit (cf. 90 years in Mass from creation of the interest).

Otherwise, under the common law RAP, the "then to the first..." is struck due to the possibility of Rebecca/Quentin having a child then dying such that it is not vested within 21 years of the deaths of all lives-in-being. Then the two (and other descendants) get nothing.

Talia's Heirs: Likely Rebecca and Quentin, gets an RV regardless of whether the second clause is kept due to the possibility of none graduating from a fine arts program (or alternatively if only the LE remains).

Impact on Sam-Waste

Sam's cutting down the 35+ year old trees for grazing land (and possibly farm expansion

and hayfield revival) is likely ameliorative waste. Yet as the area has not permanently changed (instead remaining rural), this would not be allowed under even the looser American rule (*Melms*).

While Quentin is supportive, Rebecca is not as the other CRM/likely-RV so the activity is likely not excused. Note, Rebecca is unlikely to be able to sue as a CRM holder prior to the interest's vesting upon her (likely) graduation. But Talia's Heirs (possibly Rebecca) (as represented by the executor?), as the holder of the RV may be able to sue for damages/enjoin further waste.

Impact on Ellen

While Ellen likely obtained a prescriptive easement previously, it is no longer clear whether the easement will now extend past Sam's death. This depends on how Illinois treats the separation of interests after the start of the prescription process. For example:
- If the statute of limitations is only 5 years, she would have gotten the easement before Talia's passing (and thus get it on the FS).
- However, if she only met the period after it split then she might only get it for Sam's LE.
- Finally, if there was a requirement for the RVs/CRMs to monitor, then she might still get it for the FS.

Answer-to-Question-_1D__

The *Evans* case on riparian rights contemplates essential/natural uses which it defined to include domestic purposes, livestock, but not irrigation. For these uses, the upstream user may supposedly use up the entire stream. Yet while livestock is included, it is unclear whether the court will apply it literally.

The fact that Sam has 10 cows and 20 chickens may suggest more of a commercial use such that the court may rule water for livestock non-essential in his case. Irrigation for Sam is also out of the question.

Thus Ellen may sue to enjoin Sam's water use (at least for irrigation).

Here, Ellen cannot use her pool either as it is obviously non-essential, even less so than the livestock. There is no situation where she would be allowed to have a swimming pool but he would not be allowed to give his cattle water. Also there may be further downstream users.

Answer-to-Question-__2_

Question (b)

IP Reform: an Utilitarian Approach as informed by Distributive Justice

The statement reflects the grave need for IP Reform in our system and is an apt, if vague, comment regarding the subjects where reforms should be initiated. This essay seeks to apply Utilitarian analysis, as informed by Distributive Justice, to elucidate the particular reforms that should be made. While doing so, this essay will distinguish other reforms prescribed by alternative theories that are in fact problematic. Here, the liability rule (*Boomer*) is emphasized as a compromise that resolves the tension between Labor theories and Utilitarianism (as modified by distributive justice).

The benefits of such a rule is most easily observed in the context of software protection, with further applicability into fictional characters. Finally, the principles behind such a rule may assist in resolving some aspects of the complex issue of traditional knowledge.

Software Protection Reform: What Kind?

The SCOTUS's recent moves in *Alice* and *Google* appears to have cabined software protection in both Patents and Copyright. *Alice* has produced an inconsistent rule that seemingly favors gadgetry (see CAFC ruling on CardioNet, 2020) rather than innovative

ideas like Geolocation. And *Google* has effectively made APIs uncopyrightable (see Thomas dissent). Yet while reforms appear required, Labor and Utilitarian theories appear to prescribe widely differing remedies.

After all, Labor theory would emphasize desert for Oracle and Alice. Oracle invested into Java and deserve control over it, and Alice the same. Yet property rights as Thomas seems to suggest in *Google* would eviscerate software development (*see* Computer Scientist Amicus). And while Thomas may counter that Coasian bargaining is always on the table ("Oracle could have licensed its code"), behavioral economics suggests that endowment effects may impede such trades. And the fact that Google failed to have licensed it four times before, while potentially reflecting bad faith on the part of Google and their intent to own the ecosystem (see Google's Strategy), may also be an example of the problems associated with relying on Coasian bargaining. Programming standards such as the Java language are too important to computer science for us to rely on such an uncertain process.

Yet Thomas and the statement is right. Google is huge and has been unjustly enriched, with the current rule further potentially leading to too much, rather than too little, copying (economically speaking). Here, the liability rule is a good compromise that will allow for copying, while paying back companies that innovate.

Such a rule also gets around the broader problem of providing the lengthy protection associated with copyright to a dynamic and innovation driven field like software. After all, with the TRIPS agreement, America cannot merely stop providing copyright

protection, despite the flaws of "life of the author + 50 years protection" for what is effectively a tool. Here, with liability rule, courts have the flexibility of gradually decreasing the liability as the copyright becomes less based in innovation, and more based on prevalence and genercity (cf. Trademark protection).

That is not to say that labor theory and utilitarianism is completely incompatible. After all, stronger patent protection for an even shorter period of time may be compatible with both theories. Here, labor theory is satisfied as the creator obtains that property protection that they so desire, while utilitarianism is satisfied as the even shorter term promotes innovation and commercialization rather than the potential sitting around associated with copyright. Yet such compatibilities decrease as we move to fictional characters.

Fictional Characters: Circularity and liability

Fictional characters are currently heavily protected through trademark, copyright, and potentially right of publicity. Such protections powerfully reflect the American ideas of controlling one's own property and the desert associated with one's labor. Yet such practices fail to reflect the reality of cultural practices and innovations. It also fails to acknowledge the circularity of such protections.

As mentioned in class (by Arabi?), an aspect of Los Angeles' culture is the presence of character impersonators and custom rides. So too are comic book conventions, costume parties, and even fan fiction, a reflection of modern culture. Yet under the fair use doctrine (as applied in *MGM*), it seems that the faithful reproductions most valued in parties/conventions are those most likely to be struck down as not a fair use.

Simulteanously, fan fiction, a vibrant part of internet culture, likely qualifies as a derivative work that can also be enjoined. These expressions of modern culture are made illegal by copyright/trademark law.

And justly so if labor theory is applied. After all, impersonators and fan fiction authors are seen as parasites leeching off of the original author's work (ie. Trademark justification). Here, a reform in favor of culture is one against desert.

liability rules offer a compromise solution. At least as the default rule, people should be allowed to make use of fictional characters in costumes as well as fan fiction amongst other uses. Any damages (cf. *Vincent*) or commercial gains (as with the above software reform) should then be subject to liability rule and paid to the original creator. Property rule remedies such as injunction instead become the exception (flips the status of Boomer) with egregious cases of reputation damage amongst other harms being cause for enjoining the defendant.

This rule further takes advantage of the partial circularity of copyright/trademark protection. The *DC Comics* court expanded copyright to effectively cover the abstract concept of "high-tech car that fights crime" in an effort to protect DC Comics' ability to control their brand as reflected in the Batmobile. Yet if Batmobiles are freely producible as in the liability rule system, no one will be confused. Here, liability rule as the default creates an opportunity for modern culture to flourish.

Such issues of moral rights and cultural flourishing come head to head with traditional

knowledge. There the principals behind liability rules may be one aspect of the solution.

Traditional Knowledge: Complexity and the need for protection

Whereas previous examples showcase the power of liability rules and an emphasis on utilitarianism, traditional knowledge showcases its limits - at most being one part of the solution. As a complex international issue with dimensions of biology and culture in addition to competing considerations, there has been competing positions on whether additional protections are needed at all in addition to what forms they might take. Here, I agree with the statement and will first counter the argument that no protections should be afforded to TK before then discussing some ideas for protections.

Arguments against augmenting TK protections include impediments to the development of beneficial knowledge, culture, as well as autonomy and democracy. Yet most of such criticisms apply to property rule protections rather than liability rule protections or creative solutions such as the TK label (Prof. Fisher).

The primary critique against liability rules seems to be by Munzer and Raustiala who argue: the practical difficulties of identifying claimants, the inequities of only paying indigenous peoples, as well as the need to balance royalties with competition (in their example of imitators). While such claims appear to be compelling at first glance, they are flawed.

First, the counter argument to practical difficulties (note they do raise a common fund as a counter-example themselves) is that fact that "0" is a number and "no one" is a choice.

They seem to assume this is the default without commenting on alternatives such as 10% (or any other judge determined amount) or first 5 groups to show evidence of development (think the race recording system in property).

Second, the inequities of only paying indigenous peoples can be addressed by expanding payments to other oppressed groups (for example, African Americans whose music has been culturally appropriated by White Americans per Andrew's Example in class). Alternatively, corrective justice suggests, given the past exploitations of indigenous peoples, that they should at least get something.

Finally, while Munzer and Raustiala make an analogy for their final argument, the analogy is flawed. When other companies copy Starbucks, they are not taking advantage of the brand built up by Starbucks. Yet fashion designers who copy Mayan weave explicitly promote their Mayaness and capitalize on their history (pg. 9 of package). The point of all this is to demonstrate that some protections should be justified.

The limits of analysis instead comes with the sorts of protections that are needed. While there are significant considerations from all dimensions, an attempt to apply utilitarianism as informed by distributive justice does present at least one proposal.

Traditional Knowledge: Proposal for Reform

At least for genetic information, liability rules are superior to the property rules promoted in the Nagoya protocol. After all, they produce the right balance between access to socially beneficial knowledge and equity/labor theory concerns. While property rules

should only be limited to closely held TCEs. Finally, the TK label should be promoted for non-closely held TCEs.

First, the Utilitarian argument of the need to develop socially beneficial knowledge is most powerful for genetic information. Quassia Amara has the power to save lives and thousands may die if the indigenous group chooses to block it, as they can with Nagoya and Prof. Okediji's suggestion for closely held knowledge (cf. Her Hoodia example). Here, the counter argument for Coasian bargaining is flawed given the potential for endowment effects or indigenous preferences for maintaining traditional practices secret. Yet corrective and distributive justice concerns demands that they should at least receive something. Thus a liability rule may be helpful, especially given the difficulties of applying the more flexible TK label approach to essential medicines where customers have less choice. Note, in this scenario indigenous peoples may still keep it secret as a practical matter and I would be uncomfortable with a Hohfeldian duty to reveal information.

Second, property rules should be limited to closely held TCEs. This protects the indigenous groups' valuable cultural practices that may cause substantial psychic harm if appropriated, while frankly being less valuable than medical treatment from a societal perspective. While TK label may be more effective here than with genetic information, the mere availability of products based on such knowledge may present significant psychic harm (ie: Wandjina). We should thus not risk the uncertainties of the market on such knowledge.

Finally, for non-closely held TCEs, where there is less psychic harm from their mere use (ie: Mayan weavers) but still inequities (distributive justice), we have the TK label, a flexible approach that most effectively balances the nuances associated with varying uses. Such an approach also accommodates the development of culture by being at its core a form of attribution for little financial cost.

This combination has its own problems, particularly in terms of determining what qualifies as closely-held as well as the amounts that should be provided with the liability rule. Furthermore, it would be difficult to implement any of the proposals for great protection at the global level.

This proposal is one which attempts to balance the ideas of labor theory, distributive justice, and utilitarianism. Yet it also reflects the difficulties of TK reforms given the fact that the only international agreement with any teeth right now is the Nagoya Protocol: an idea which implicitly yet flawedly assumes the availability of coasian bargaining to solve access issues for the most societally valuable knowledge. We can only hope that superior proposals appear in the future.

Conclusion

This essay attempted to apply utilitarian analysis, as informed by distributive/corrective justice, as a method of describing the types of reforms that are needed in the subjects that the statement so aptly identified. In particular, the liability rule (*Boomer*) is emphasized as a method of reconciling various concerns in each of the three subjects. Ultimately, reforms range from (relatively) straight forward (in software), to exceedingly complex

and multi-faceted (in TK) and this essay is merely a demonstration of the implications of an specific approach on such subjects.