

Final Examination

Patent Litigation (LAW 875-C)

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Spring 2006

1. You have **two (2) hours** to complete this exam.
2. This is an **open** book exam.
3. This exam consists of three essay questions with point allocation as indicated on the examination. Please allocate your time accordingly. Please write your response in the blue books provided. Please write clearly. Write on every other line and every other page to permit instructor comments.
4. Write your exam number on your exam envelope. Put your correct student exam # at the top of this page, each page of questions and each blue book. **Do not** use your name, student ID number or Social Security Number on any exam materials.
5. At the conclusion of the exam, return all test materials, including blue books, scratch paper, and this exam packet to the envelope and submit it to the proctor. **DO NOT** seal the envelope. Students who do not return all exam materials at the end of the exam may not be graded.

GOOD LUCK!

Facts

PoochCo. (P) markets the PoochBed, which is covered by P's U.S. Patent No. 5,765,502. The 502 patent claims an improved pet bed. The specification of the 502 patent discusses a number of prior art beds, and points out that pets prefer beds with a surrounding wall which gives the pet a sense of security and also provides a place for the pet to rest its head, but that such beds are difficult to clean. The 502 patent is intended to solve those problems with prior art pet beds.

As shown in the attached Figs. 1-5, the 502 bed **1** includes an outer covering **2** which covers a removable bottom cushion **4** inside bottom pocket **12**. The outer covering **2** also holds removable bolster **6** in bolster pocket **10**. The specification describes the removable bolster **6** as more cylindrical or banana-shaped than flat, and more like a pillow than a wall. As Fig. 4 shows, the bolster is held in place inside the bolster pocket **10** by fasteners

or straps **8** located in the interior of bolster pocket **10**. As Fig. 5 shows, both the bolster **6** and the bottom cushion **4** can be removed from outer covering **2** for cleaning through opening **11** which can be sealed by optional zipper **7**.

Claim 1 of the 502 patent provides:

1. A **pet bed** comprising:

An **outer covering**;

A removable cushion disposed within the outer covering to form a cushioned bottom portion; and

A **bolster** removably affixed within the interior of the outer covering and substantially all of said bolster disposed exteriorly about at least a portion of the perimeter of the bottom portion, the bolster being **removably secured in position by securing means**.

The PoochBed has been a great success in the market since its introduction in 1998, and has created a new niche of luxury pet bed selling for \$100-\$200. A number of companies have tried to enter that market selling copies of the bed, but have, by agreement, stopped making and selling the beds.

Two years ago, Dogbert Co. (D) decided to develop a pet bed like the PoochBed, but which would sell at a much lower price. After rejecting several designs as too close a copy of the PoochBed, D finally developed a satisfactory version which it has introduced, as the K-9 Kot (Kot). D started selling the Kot for \$50 last month.

The Kot differs from the disclosed 502 embodiment in several respects. In the 502 specification, the outer covering is a single open compartment containing both the bottom cushion and the bolster. In the Kot, the bottom cushion and the bolster are each enclosed in a fabric covering each with a zippered opening. The covers are stitched together to create a single unit. Thus, there are two separate compartments, one containing the bottom cushion and the other the bolster. Unlike the 502 preferred embodiment, there are two openings in the Kot, one for each compartment, and the bolster and the bottom cushion cannot be removed through the same opening. Finally, in the 502 preferred embodiment, the bolster is held in place by Velcro straps (See Fig. 4). In the Kot, the bolster is held in place by its cover, which is stitched to the cover of the bottom cushion.

As soon as D released the Kot for sale, P filed suit against D alleging infringement of the 502 patent, and has moved for a preliminary injunction.

D opposes the motion for a preliminary injunction, contending that (a) P cannot show a probability of success on the merits, and (b) cannot show irreparable harm.

Defendants also present the following alleged prior art:

1. The 981 patent to Chew (Chew), which discloses a pet bed with an outer covering with a removable bottom cushion and a removable padded wall, which is disposed within the outer covering which can be washed.
2. The 044 patent to Arft (Arft) which discloses a hospital pillowcase with a pocket secured on top of a conventional pillowcase. The pillowcase holds a conventional pillow. The pocket on top of the pillowcase holds a cylindrical orthopedic neck roll or bolster in place on the pillowcase to encircle the head and provide neck support. The cylindrical bolster does not form a complete circle, but has an opening for the neck.

The parties have provided the following list of disputed claim terms and their proposed interpretations:

Claim Term	P's Construction	D's Construction
Pet bed	A claim limitation .	Not a claim limitation.
Outer covering	A cover, which may be formed of separate parts and which may contain separate pockets or compartments for the bottom cushion and bolster.	A single article for receiving and enclosing both the removable bottom cushion and the removable bolster within a single interior space.
Bolster	An article more cylindrical or banana-shaped than flat, and more like a pillow than a wall.	A soft or padded structure on which a head can rest.

The parties also agree that removably secured in position by securing means is a means-plus-function term and that the corresponding structure is the straps shown in Fig 4, and described in the specification as a plurality of fasteners or straps, preferably Velcro, although other fasteners would perform adequately.

The following additional evidence is offered in connection with claim construction:

- a. P offers testimony that one of ordinary skill would understand that the outer cover could be formed of more than one piece, and that it would not be practical to form an outer covering of the shape shown in the 502 drawing out of a single piece of cloth.
- b. D offers the testimony of an expert in pet beds that in the pet bed field the terms bolster and wall are often synonyms where the back

section of the pet bed serves both as a barrier and as a cushion. D also offers several patents in the field that use the terms as synonyms. P offers testimony of an expert in pet beds that bolster and wall have different meanings, and that a padded wall is not a bolster.

- c. Dictionaries define wall as a vertical barrier, and bolster as a long pillow or cushion often used as a head rest.

Questions

Please discuss the following in the context of a preliminary injunction:

Question 1 (35 points)

Claim construction. Please state both P's and D's arguments as to the construction of the following terms and explain which party you believe has the stronger argument and why. Include a brief discussion of how the claim construction urged by each party would impact the issuance of a preliminary injunction, if adopted by the court.

- a. Pet bed
- b. Outer covering
- c. Bolster

Question 2. (30 points)

Section 112, 6 equivalence. Regarding the means plus function claim of removably secured in position by securing means, D claims there is no infringement because the Kot does not use fasteners or straps (the securing means disclosed in the specification), but instead stitches together the separate covers for the bottom cushion and the bolster. P contends that the stitching in the outer coverings performs the claimed function of securing the bolster in position and is an equivalent to the disclosed structure. Please set forth both P's and D's arguments as to whether the Kot's securing means is equivalent under 112, 6 and explain how each party's argument will affect the issuance of a preliminary injunction, and why.

Question 3. (35 points)

Preliminary injunction. Who should win the preliminary injunction motion, and why? Please give the arguments that each side should make, and the conclusion the court will reach.

END OF EXAM