

MEMORANDUM

TO: Remedies Class Fall 2006

FROM: Mike Allen

DATE: December 2006

SUBJECT: Thoughts Concerning Final Examination

This memo sets forth my thoughts concerning the questions posed on the final examination this semester. I have not attempted to be comprehensive in this memo. Rather, I simply wish to give you a sense of the issues I would have expected that you would have discussed. I can assure you that if you raised points that were correct and relevant you received appropriate credit even if I did not discuss something in this memorandum.

Section I

Section I set forth a standard law school hypothetical that raised a number of issues. You were called on to discuss remedial issues concerning four different entities that had some sort of dispute with Wind Works. The most logical organizing scheme was to address each of these entities separately. I follow that approach in this memorandum.

Claims Concerning Polly

The remedial issues concerning Polly all relate to damages in one form or another. First, Polly is claiming that she was injured as a result of Wind Work's negligence in manufacturing the SuperChute. Thus, the claim sounds in tort. If Polly is successful in her lawsuit as to liability, she would be able to recover the economic and non-economic damages proximately caused by Wind Works' breach of duty. She would have the responsibility to prove both these types of damages with reasonable certainty.

In this case, it appears that Polly would easily be able to prove economic damages of \$25,000 in lost wages and \$100,000 in medical expenses. It does not appear that either of these types of economic damages is uncertain or speculative. She would also be entitled to recover, and would likely be able to prove with reasonable certainty, damages based on the pain and suffering she has experienced as a result of the accident. A jury would be constrained by reasonableness in its determination. But these damages would be capped at \$250,000 pursuant to the Stetson Tort reform Act. Thus, while one could not predict with certainty the exact amount of likely damages, they would no more than \$375,000.

The analysis is not complete at this point. There are also deductions that could be made from this upper limit of economic and non-economic damages (as already constrained by the Stetson Tort Reform Act). One such deduction concerns Stetson's

statute dealing with collateral sources. Under that statute, Polly will be required to deduct from the damages to which she would otherwise be entitled payments that she received from her medical insurer. The statute would not have required a deduction if in fact the insurer had a right to be repaid out of any damages payments. However, the facts indicated that Polly's insurer did not have such a provision in its contract. Polly would receive a credit under the statute for the \$10,000 premiums she paid in order to secure her insurance payments. In total, then, Polly would need to subtract \$90,000 from her damage award (\$100,000 in payments less \$10,000 in premiums paid).

The second issue concerns another potential off-setting benefit. The general rule is that a plaintiff must subtract from her award of damages benefits that also flow from the defendant's wrong. The common law collateral source rule is actually an exception to this basic off-settling benefits rule. In this case the potential off-settling benefit is the \$75,000 Polly received for writing her book concerning the accident. I would not have expected you to resolve whether in fact this benefit should be deducted under the rule. This is a difficult question because it would only be treated as an offsetting benefit if it was deemed to be a benefit that inures to the same interest as the interest the defendant harmed. However, you should have raised the point as a potential issue.

The final issue you should have discussed concerning Polly concerned punitive damages. The availability of punitive damages in Stetson is governed by Stetson Statute #3. You should have recognized that there were two levels of issues associated with the punitive damages assessment. The first one was whether any actor's conduct satisfies the standard in sub-section (2) of Stetson Statute #3.¹ The prong concerning intentional misconduct is not satisfied here. For example, the statute requires that the intentional conduct at issue be focused on *the claimant*. There is no evidence here that Wind Works was intentionally targeting Polly in any respect.

The better argument concerns whether the statutory definition of "gross negligence" is satisfied. The statute defines gross negligence as "that the defendant's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct." In this case, one could make a strong argument that the Director of Engineering's failure to act on Underdog's warnings concerning the ripcord satisfies the gross negligence standard. He or she consciously disregarded information about the safety of a mass produced article in a situation in which the alleged defect in the product would subject persons using the product to a high risk of death or serious injury.

Meeting the standard of sub-section (2) of the statute is only the first step. One then needed to address whether Wind Works, a corporate entity, could be liable for punitive damages under the facts you had been given. This issue implicated sub-section

¹ You may also have wished to explain the pleading rule set forth in sub-section (1) of Stetson Statute #3. Specifically, because this case is pending in a Stetson state court, Polly would not be able to seek punitive damages until she submitted record evidence to the court indicating that she would be entitled to be awarded punitive damages under the statute. The rule would be different in a federal court under Federal Rule of Civil Procedure 8(a)(3).

(3) of Stetson Statute #3. The stronger argument is that Wind Works would be liable for the imposition of punitive damages under these facts. First, one could argue that the Director of Engineering is a senior enough corporate manager that his actions constitute the actions of the corporation itself. Thus, sub-section (3)(a) or (3)(c) of the statute would apply. However, if one concluded that the Director was not a sufficiently senior corporate official, we do not have enough information to conclude that Wind Works itself should be held liable for punitive damages under the terms of Stetson Statute #3.

A distinct issue concerning punitive damages that you should have discussed was the range of amount that Wind Works could potentially be required to pay. Stetson Statute #4 concerned this issue. The key provision of the statute was sub-section (a). Under this section, Wind Works' total liability for punitive damages would be limited to three times compensatory damages or \$500,000 whichever is greater. In this case the compensatory damages awarded would at most be \$285,000 (\$375,000 in compensatory damages (both economic and non-economic²) less the \$90,000 under the collateral source rule). That figure could be reduced even further based on your analysis concerning the general off-setting benefit argument concerning the book payment. If that payment was also subtracted the top award would be reduced to \$210,000. Thus, the maximum punitive damages award would likely range from \$855,000 (3 x \$285,000) to \$630,000 (3 x \$210,000).³

Finally, you might have mentioned, although I would not have spent much time discussing, the potential constitutional limitations that would also apply to any award of punitive damages. This part of the discussion would have allowed you to discuss the "guidepost test" the United States Supreme Court developed in Gore and Campbell. There would no be a strong argument that any award a jury rendered in conformity with the statutory definitions above would be considered constitutionally excessive under the guideposts. In brief, the ration would be 3:1, well-within the range of reason the court articulated. Moreover, the reprehensibility guidepost would suggest that an award even at the maximum statutory amount of 3:1 would be constitutional. This case concerned personal injury (not only economic harm). The conduct at issue showed a reckless disregard to the safety of others. Moreover, it exposed a large number of people to the danger at issue (e.g., we know that 1,000 SuperChutes were manufactured in the relevant period). We are not given any information concerning comparable sanctions, but given the analysis under the other two guideposts, it is difficult to see a serious constitutional analysis to any award rendered within the statutory guidelines.

² You might have discussed whether the triple damage provision of the statute applied to the damages as capped by statute or whether one could award punitive damages based on a jury's determination of non-economic damages before the cap was imposed.

³ You might also have discussed whether one could satisfy section 1(b) of Stetson Statute 4. To do so, one would have to establish that the conduct at issue was motivated solely by unreasonable financial gain. That standard might be met in this situation, but we would need additional information to make that determination. If the standard was satisfied, the statutory amount of punitive damages would be 4-time compensatory damages or \$2 million, whichever was greater.

Issues Concerning Roberts, Inc.

Wind Works specifically asked you to address potential claims for both breach of contract and negligence in connection with Roberts' provision of a defective (or negligently designed or manufactured) Chute-O-Matic. I would have addressed the two potential claims separately.

Starting with the contract claim, you should have stated up front that the baseline rule for contract damages is expectancy. That is, Wind Works would be entitled to damages putting it in the place it would have been if Roberts had fully performed under the contract. That being said, you should have also recognized that parties to a contract may agree to modify the types of damages and other remedies to which they would otherwise be entitled. In this case, the contract between Roberts and Wind Works contains a clause purporting to preclude the recovery of consequential damages. Such clauses will be enforced unless they are unconscionable.⁴ There is no indication of overwhelming bargaining power or "take it or leave it" behavior under the facts we have been given.

Having set forth the basic rules, one should then have applied them to the facts you were given. In this case, if Wind Works were to receive its full expectancy it would come in two parts: the \$5,000,000 in profits it would have earned from the Navy over the term of the cancelled contract and a refund of the \$100,000 it paid for the defective machine (or the difference in value between the machine as delivered and the what it paid for which would likely be near \$100,000 in any event). There is nothing in the contract that would preclude the recovery of the \$100,000 for the defective machine, or the equivalent market-based measure of recovery mentioned above.

The real issue arises with respect to the \$5 million lost profit in connection with the Navy contract. First, these damages are consequential. Why? You should have chosen a definition of consequential damages that explained your conclusion. My preferred definition of such damages is "damages that are proximately caused by the defendant's wrong but that do not always flow from the wrong." Another way to define – or describe – consequential damages is to say that they go to income interests as opposed to interests in capital. However you define the term, the \$5 million would be a consequential damage. Absent any contract provision, the \$5 million would be recoverable under the contract because they were proximately caused by the breach and Roberts was aware of the Navy contract at the time of entering into the contract with Wind Works. The issue here is that the contract does contain the enforceable consequential damages exclusion. As such, Wind Work will not be able to recover the \$5 million in lost profits under the Navy contract.

The bottom line result concerning the contract claim makes the analysis concerning the negligence claim even more important. If Wind Works is able to frame its breach of contract claim as one of negligent manufacture or design, then it might be in a

⁴ You might also have mentioned here the theory behind enforcing these contracts: allowing the parties to allocate risks associated with non-performance for a variety of reasons.

better position to recover the \$5 million lost profit. Under the negligence claim, damages would be designed to put Wind Works into the position it would have occupied absent the defendant's wrong. This standard would capture both the difference in market value of the defective machine from a non-defective one (presumably \$100,000) as well as the \$5 million in lost profits that was in the contemplation of the parties at the time of contracting.⁵

The difficulty with the negligence claim, however, comes as the result of the economic loss rule. The economic loss rule captures different concepts in different jurisdictions. However, one can divide the purposes of the rule into two general areas: preserving the line between contract and tort; and drawing lines akin to foreseeability. In this case, if Stetson has adopted a version of the economic loss rule whose purpose is to preserve the line between tort and contract, Wind Works will be foreclosed from a tort recovery under these facts.

When preserving the line between tort and contract, the economic loss rule can be said to preclude the recovery in tort between parties in privity of contract of purely economic loss absent physical injury or damage to property other than that subject to the contract. In this case, Wind Works and Roberts are in privity of contract. Wind Works is seeking the recovery of purely economic harm without a physical impact to a person or property of than the Chute-O-Matic, the property that is the subject of the contract. As such, the economic loss rule – if adopted by Stetson and if meant to preserve the line between tort and contract – would preclude Wind Works from recovering in tort under the facts presented here.

Issues Concerning American Mental Health Inc.

This part of the question concerned injunctive relief. The question indicated that AMH had agreed not to proceed with the opening of the mental health clinic until the issue with Wind Works was resolved. As such, the relevant injunction was a permanent one. There was no need in this question to discuss a preliminary injunction.

There is a three part standard for a permanent injunction. The standard assumes that Wind Works has won on the merits of its substantive claim. The injunctive elements are: (1) the plaintiff has no adequate remedy at law (or phrased differently, the plaintiff will be irreparably harmed);⁶ (2) the balance of the equities does not tip substantially in favor of the defendant; and (3) granting the injunction is in the public interest.

In terms of the first prong, it is a close question whether Wind Works could satisfy the prong. On the one hand, its claims do concern real estate – a subject deemed

⁵ There would be no reasonable prospect of punitive damages under the standard set forth in Stetson Statute #3 even if we considered the tort independent of the breach of contract for punitive damages purposes.

⁶ You might have noted that if Stetson adopted the federal injunction standards, these two items might be considered as distinct. It is unlikely that Stetson would have adopted the federal standard given its recent appearance out of the blue at the federal level. Moreover, even if Stetson had adopted the new federal standard, it seems unlikely to make a material difference in this particular factual scenario.

unique in the law. However, its particular claims are tied very closely to loss of money – the reduction in property value and lost sales. Its strongest arguments would probably be that the irreparable harm is that these claimed damages will be difficult to calculate if the harm is allowed to occur. This is particularly the case with respect to the lost profits from the sales. The latter argument could swing the court on this issue.

The second prong requires that the harm to AMH if the injunction is granted be substantially greater than the harm to Wind Works if it is not granted. It seems on these facts that the harm to the two entities is similar in nature (i.e., harm to business). Moreover, if anything the harm to Wind works could be greater because this is its only location. What seems certain is that the harm to AMH is not *substantially* greater than the relevant harm to Wind Works.

The most significant obstacle under the three prong approach would be a consideration of whether the injunction would be in the public interest. Courts are concerned in cases in which citizens attempt to block societally useful but unattractive activities about the so-called NIMBY problem – “not in my backyard.” Mental health clinics need to go somewhere. Moreover, this area is zoned to allow this type of activity which suggests that the political branches of government have weighed the global pros and cons to society in making a sighting decision. There would be a strong argument here that granting the injunction would not be in the public interest.

Finally, you should have discussed an addition potential impediment to issuing the injunction Wind Works seeks in this case. Wind Works seeks a preventative injunction. In other words, Wind Works seeks an injunction that would prevent harm from occurring in the future in a situation in which no harm has occurred in the past. One issue that is potentially relevant in all such preventative injunctions is ripeness. That is, we must ensure that the dispute between the parties is real and not imagined. In this case, there is no problem with ripeness narrowly construed: AMH is certainly going to open the clinic.

The issue here is better thought of along the lines we described in class as “uncertain consequences.” See Nicholson. The concern here is that while the opening of the clinic is certain to occur we are uncertain about the way in which it will be operated. Operating a mental health clinic in this area is not *per se* illegal. Rather, it could be unlawful *if* it is operated in a certain way. In Nicholson the Connecticut Supreme Court held that the operation of a halfway house was not *per se* unlawful and there was no evidence to suggest with sufficient certainty that the halfway house would in fact be operated in an unlawful manner. The trick in this question was to address whether there is anything to distinguish the AMH situation from that concerning the halfway house. In this regard, we do have some additional information that could be significant. In our case, we know that AMH has had problem in the past concerning the escape of patients. No harm has come from these incidents, and we know nothing about the specific facts that underlie them. The key is that you noticed the issues and raised the possibility that these past escapes – if we got more information – could provide a basis upon which to avoid the uncertain consequences issue.

Issues Concerning Frodo Enterprises

There were a number of issues to discuss in terms of Frodo's claims against Wind works.⁷ A minor issue concerned a potential claim concerning compensatory damages. I would not have spent much time on a compensatory damages remedy here because it is unlikely that an award on this basis would be certain enough. The basis idea is that Frodo could argue for a reasonable license fee (i.e., what it would have agreed to license or sell the technology to Wind Works in a voluntary transaction) as the means to put it in the position in which it would have been absent the wrong. In concept this is a fine theory. The difficulty is that there is much speculation associated with this claim for damages. Would, in fact, the parties have ever reached a deal? More importantly, at what amount would the deal have been made? We are not provided with any information to suggest that Frodo is in the business of selling the technology. Indeed, if anything the facts suggest that this would not be likely to occur because Frodo and Wind Works are said to be competitors in the parachute business.

The better place to have focused your energies concerning monetary recovery in this scenario was on a claim that Frodo could have to recover in unjust enrichment or restitution. The basic notion in restitution is that we will transfer from the defendant (here Wind Works) gains that it received unjustly at the plaintiff's expense. Here, if in fact Wind Works stole the computer program, there is no question that the "unjust" element is satisfied. Moreover, on these facts there does not appear to be any question that Wind Works was enriched in at least some amount as a result of the illegal conduct. Thus, the sole question is how much of Wind Works' enrichment can be said to flow from the plaintiff (Frodo).

The answer to this question comes as a result of a multi-step process. First, Frodo as the plaintiff would have the burden to establish Wind Work's gross profits from the unlawful activity. In this case, that is easily done. The only one of Wind Works products that is implicated in the wrongdoing is the HighFlyer. We know that the revenue for this line is \$250,000.

At this point, the burden shifts to Wind Works to provide deductions from this figure. Wind Works would be able to show first that the \$250,000 is a gross one – that is that it has not been reduced by expenses. Then, Wind Words would be able to subtract that expenses that were tied only to the HighFlyer (so-called variable expenses). In this case, the only variable expense we are given is the \$100,000 for silk. Based on the facts, silk used only for the HighFlyer. You should also have noted that Wind Works would get no credit in any respect for the government contract expenses on these facts because there is no indication that the HighFlyer was implicates in this activity at all. Thus, after deducting the expenses for the silk we are left with revenues of \$150,000.

There are still three other categories of expenses (electricity, advertising and canvas) that appear to be implicated in the manufacture of the HighFlyer. In this context,

⁷ Remember that the call of the question specifically instructed you not to discuss punitive damages. Accordingly, I have not discussed them in this memorandum for this question.

these categories of expenses are overhead or fixed.⁸ The key would have been for Wind Works to come up with some reasonable means of allocating these expenses among the three products.⁹ Before discussing these potential allocation methodologies, you may have noted that a minority of jurisdictions do not allow allocation of any overhead. If Stetson were such a jurisdiction, we would stop at the \$150,000.

Working under the assumption that Stetson would allow some allocation of overhead to the production of the HighFlyer, the key is to determine on what basis to make such an allocation. The total expenses with which are concerned is \$375,000. Based on the facts we have been given, it seems that there are three reasonable arguments for allocation:

1. One argument is that overhead be allocate based on the number of products. Under this approach 33.3% of the overhead would be allocated to the HighFlyer.¹⁰ This would yield a total of \$124,875 to be subtracted from the \$150,000 profit. The result is \$25,125 in net profits for the HighFlyer.

2. A second argument is overhead be allocated based on revenues. In this approach, 31% of expenses are allocated to the HighFlyer. The result of this approach if \$33,750 in net profits.

3. A final approach is to allocate overhead by sales. This would yield 20% of overhead allocated to the HighFlyer. The net result of this approach if \$75,000 in net profits.

While a determination of which approach would actually be used is subject to many factors, it seems likely that the court would opt for option #3 because Wind Works will have been held to be an intentional wrongdoer. Moreover, from a planning perspective it is wise to consider a realistic worst case scenario.

But we are still not finished. We know that the net profits for the High Flyer are \$75,000. But the entire High Flyer was not wrongfully taken. Rather, only the computer program used to run the machine was wrongfully taken. In these facts, that is not sold separately. Therefore, we must engage in the so-called factors of production approach to determine what percentage of these net profits are attributable to computer program compared with all other factors of production. This was the issue discussed in Sheldon.

The most common form of evidence concerning the factors of production is expert testimony. Given the facts we have it appears that the experts are divide concerning the percentage of profits that would be attributable to a computer program.

⁸ That is not entirely true with respect to the canvas, but the same logic would apply in this situation. I would not have expected you to parse the accounting definitions of fixed and variable expenses.

⁹ I am assuming that the limited production run of the parachute under the Navy contract is negligible.

¹⁰ Given the facts, I am assuming that a single allocation method would apply to all categories of overhead. If you concluded that one allocation method apply to one category and a different one to another that was fine. The key would have been to explain why you made the decision you did.

The range of estimates is from 25% to 60%. In these types of cases, courts tend to use expert testimony really as a means to set a “good enough” standard. Thus, in this case it seems likely that the court would use 60% of the net profits as attributable to the wrongful act, although one could also support even slightly more. But assuming the 60% figure and assuming that a court adopted allocation methodology #3 above, the bottom line figure that Wind Works would need to pay Frodo on this claim is \$45,000 (60% of the \$75,000 net profit on the line).

All of what has been discussed above with respect to Frodo concerns the past. There is also an issue concerning remedies concerning the future. This point raises issues concerning injunctive relief both preliminary and permanent. The facts indicated that Frodo would seek an order stopping Wind Works from using the program during the pendency of a lawsuit. This argument concerns a preliminary injunction, for which there is a four part test: (1) the plaintiff must show that it has a likelihood of success on the merits; (2) the plaintiff must show that it will be irreparably harmed without the injunction; (3) the defendant must not be harmed in a greater amount by the granting of the injunction than the plaintiff would be by its denial; and (4) the injunction must be in the public interest. On these facts we assume that the plaintiff would be likely to prevail. I would have expected you to spend your time discussing the other parts of the analysis.

In terms of irreparable harm, the relevant period is from the time Frodo seeks the injunction through the time of trial. The compensatory damages concerning this period is an difficult to calculate as it is during any other period. The restitutionary measure of recovery is better, but as discussed above, there are still a number of difficulties associated with it (e.g., allocation percentages and the factors of production approach). In addition, to the extent one considers the computer program to be a form of property (which is almost certainly the case), a key component is the right to exclude. That is lost here in some respects. Of course, it may be the case that the difficulties in calculating the unjust enrichment award over the long haul are sufficiently minimized in the much shorter period relevant to the preliminary injunction.

The next factor to consider is the balance of the equities. Here, the black letter rule is that the preliminary injunction should be denied if the harm to Wind Works from granting the injunction is greater than the harm to Frodo from denying the injunction. In this case, there does not appear to be a strong reason why one would say that the harm to Wind Works is likely to be greater under this standard. The disputed computer program is sued on only one of the three Wind Works’ products. Moreover, the products with the most sales and revenue (the StandardChute) would be unaffected by the injunction. Finally, for Frodo the denial of the injunction would aid a competitor while simultaneously gutting Frodo’s ability to control its own business.

The public interest would not seem to be implicated in any great respect in terms of the preliminary injunction. There do not appear to be any significant third party impacts that are worthy of note. For example, it does not appear that Wind Works would need to lay off workers if the injunction were entered. Indeed, if anything the public interest cuts in favor of the injunction to the extent the court believes there is a high

likelihood of success on the merits. This is so because the public has an interest in reducing the intentional theft of property such as the computer program.¹¹

In the end, you should have come to a conclusion concerning the preliminary injunction. You should have then turned to Frodo's request for a permanent injunction. I discussed the legal standard for the issuance of a permanent injunction above in connection with the AMH mental health clinic. The same standard would apply here.¹² At the permanent injunction phase, we assume that Wind Works has been adjudged a wrongdoer in connection with Frodo's claims.

In terms of the irreparable harm element, it seems fairly certain that the standard would be satisfied here. In the long term (as opposed, perhaps, to the shorter term relevant to the preliminary injunction), monetary relief would not be the preferred remedy. As alluded to in the preliminary injunction discussion, damages are highly speculative and counterintuitive. In addition, restitutionary measurements over the long run pose the problems identified in connection with the unjust enrichment discussion above. Finally, denying the injunction would require Frodo to file repeated lawsuits as well as lose control of a portion of its business (i.e., engage in the equivalent of a forced license transaction).

The balance analysis would also certainly cut in favor of an injunction.¹³ When considering a permanent injunction, the issue is whether Wind Works would be *substantially* more burdened if the injunction were granted than Frodo would be if it were denied. It seems unlikely that Wind Works would be able to prevent the issuance of the injunction on this basis. It will have trouble arguing that it will be burdened more than Frodo at all for many of the reasons discussed above.

Finally, the injunction would be in the public interest. In this respect, Wind Works will have now been adjudicated an intentional wrongdoer. Therefore, the public interest in deterring such wrongful conduct will be brought into play. Moreover, there is little supervision required of the court under this injunction and so that issue will not be a reason to deny the request for an injunction. Thus, the permanent injunction is likely to be granted.¹⁴

¹¹ This latter point would have allowed a student to discuss the sliding scale approach to preliminary injunctions that was presented in the NFL case we discussed in class. The basic idea is that, for example, if the court concludes that there is an extremely high likelihood of success on the merits it might require a lesser showing on other of the preliminary injunction requirements. In addition, you could have discussed the issue in more economic terms along the lines of Judge Poser. Under this approach, the central issue in a preliminary injunction situation is reducing the risk of an erroneous decision. This concept is captured under the traditional test, but it is below the surface.

¹² You might have noted that there would be no issue concerning ripeness or uncertain consequences with respect to Frodo's claims. The injunction at issue here is reparative in nature.

¹³ You might also have noted that a court might not engage in any balancing to the extent that it concluded that Wind Works was an intentional wrongdoer. Courts are split on this issue. You should have noted the possibility that there would be no balancing but probably would have wanted to discuss how the balancing would play out if a court engaged in the exercise.

¹⁴ You might also have noted in your discussion of injunctive relief the importance of scope. That is, the scope of the injunction that ultimately was granted needed to match the scope of the violation found. Thus,

Section II

Section II contained two questions. You were only required to answer one of them. The questions in Section II were different than those set forth in Section I. The Section II questions called on you to use your knowledge of remedies at a more theoretical level. Question 1 concerned punitive damages. Question 2 dealt with the economic loss rule. There was no “right” answer to either of these questions. So long as you supported your position with relevant analysis and argument, you should have done fine.

it would be inappropriate to enter an injunction saying simply “do not manufacture the HighFlyer.” That would be “too much” injunction. Rather, the injunction would be framed as “do not use the wrongfully obtained computer program for any purpose.”