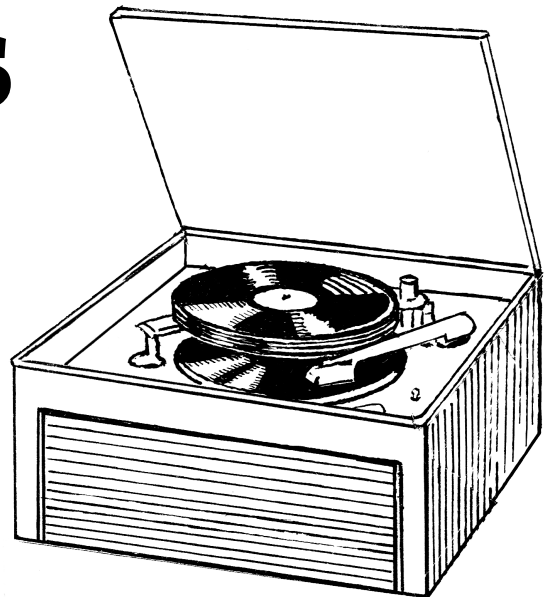


INTELLECTUAL PROPERTY
MULTIPLE CHOICE

12 Additional Multiple Choice Questions



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Recommended time as a practice exam: 30 minutes

From the Fall 2020 final exam in
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Available in Prof. Eric E. Johnson's Exam Archive at:
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MULTIPLE-CHOICE PORTION

1. Which of the following is the subject of current copyright protection?
 - (A) **A poster depicting a unicorn jumping over a rainbow**, given the following: The poster was published in 1969 with only the following notice: “Copymark ® Mythical Arts 1970.”
 - (B) ***Alien Space Bats Forever***, given the following: *Alien Space Bats Forever* is an unauthorized derivative work of *Alien Space Bats*, which was a major motion picture released in 1991 by Enormo Entertainment. Both *Alien Space Bats* and *Alien Space Bats Forever* carried properly formatted copyright notices.
 - (C) **The 2014 edition of the Institutional Meat Purchase Specifications (IMPS)**, given the following: The IMPS is a series of meat product specifications that were developed as a voluntary consensus among relevant stakeholders, and which are used by large-volume purchasers of meat, including federal, state and local government agencies, schools, restaurants, and hotels. While the substantive contents of the IMPS is dictated by stakeholder consensus, the exact wording and phrasing of the specifications is the result of the work of the Agricultural Marketing Service, an agency within the United States Department of Agriculture, which compiles and publishes the IMPS. The IMPS was published in 2014 with no copyright notice.
 - (D) ***The Taverner’s Trail***, given the following: *The Taverner’s Trail* is a book that was first published in the United States in 1919 with a proper copyright notice and which has been sold by the original publisher, with continuously updated copyright notices, every year since.
 - (E) **The 2015 California Driver Handbook**, given the following: The 2015 *California Driver Handbook* was authored by the California Department of Motor Vehicles, which is the official source of information for persons applying for a driver’s license in the state of California. The *Handbook* contains the following: “© Copyright, Department of Motor Vehicles 2015 All rights reserved. This work is protected by U.S. Copyright Law. DMV owns the copyright of this work. Copyright law prohibits the following: (1) reproduction of the copyrighted work; (2) distribution of copies of the copyrighted work; (3) preparation of derivative works based upon the copyrighted work; (4) displaying the copyrighted work publicly; or (5) performing the copyrighted work publicly. All requests for permission to make copies of all or any part of this publication should be addressed to: Department of Motor Vehicles Legal Office, MS C128, PO Box 932382, Sacramento, CA 94232-3820.”

2. In an application for a utility patent, which of the following appears most susceptible to a rejection on the basis of a lack of utility?
- (A) a chemical, which, at the time of the filing of the patent application, is known only to catalyze a Haber-Bosch reaction for forming anhydrous ammonia – a purpose better served by numerous other agents – but after the time of filing is found to turn recycled paper fibers into burnable synthetic petroleum
 - (B) a chemical with no known, practical use at the time of discovery, but which, prior to the filing of the application, is found to selectively kill samples of cancerous human B-cell lymphocytes (a type of white blood cell) in a Petri dish without killing non-cancerous forms of the lymphocytes
 - (C) a method of producing a hitherto unknown chemical, which, according to the application, is useful “in demonstrating many principles of chemical reactions, including the use of aqueous solutions, mixing techniques, etc., to students of chemistry and the like”
 - (D) a “beverage delivery system” comprising a hard hat of the type used by construction workers, structures attached to either side of the hat for holding aluminum beverage cans, and a system of tubes for sucking the beverage out of the cans into the hat-wearer’s mouth
 - (E) a new type of aluminum beverage can, which, the inventor-applicant admits, is not as easy to open nor is as cheap as prior art models
3. Which of the following is least likely to be held protectable trade-secret subject matter?
- (A) A method of choosing potential well sites for petroleum exploration and extraction
 - (B) A recipe for cookies sold at a local bake shop
 - (C) An algorithm that uses a database of past customer purchases to suggest new items to customers
 - (D) Attorney-client communications between the chief financial officer of a technology corporation and a tax attorney regarding whether the corporation can lawfully avoid tax liability by re-characterizing the value of certain assets
 - (E) The temperature at which rubber is cured for a racing tire

NOTE THE FOLLOWING FACTS FOR QUESTIONS 4, 5, AND 6:

Patrice Palworthy is painter. At the age of 23, Patrice painted *Despair of the Dancers* and sold the painting to the Duffsten Gallery for \$80. After she did so, the Herntender Museum of Contemporary Art exhibited the work, and it caused a sensation in the art world, with art critics calling it one of the most important paintings of the new millennium. This year, the Duffsten Gallery made limited-edition prints of *Despair of the Dancers* and sold them for thousands of dollars apiece. Last month, the Duffsten Gallery put *Despair of the Dancers* up for auction, and it was purchased for \$3.1 million by Trina Farn, an angry-at-the-world cable-television baron with an eccentric taste for indiscriminate vengeance. Farn announces to the world that she hates the painting, and, as an act of performance art, she will publicly destroy it by dousing it in gasoline and setting it on fire.

Patrice comes to you for advice.

4. Patrice asks you, "If I sue the Duffsten Gallery for their making and selling of the prints, is that lawsuit I am likely to win?"

Which among the following is the best answer to her question?

- (A) "Yes. You have a very good claim. Barring something strange, you'll win."
- (B) "No, because the first-sale doctrine will allow the Duffsten Gallery to prevail."
- (C) "No, because the Duffsten Gallery will likely succeed with a fair-use defense."
- (D) "No, because you didn't register your copyright before the alleged infringement took place."
- (E) "No, because you do not own the copyright, since it was transferred to the Duffsten Gallery by operation of law when you sold the painting."

5. Patrice asks, "If I sue Farn to prevent the destruction of *Despair of the Dancers*, is that a lawsuit I am likely to be able to win?"

Which among the following is the best answer to her question?

- (A) "Yes, because the Visual Artists Rights Act gives you a good claim here."
- (B) "Yes, because the destruction of the painting would constitute trademark infringement."
- (C) "Yes, because you can use an equitable application of misappropriation doctrine."
- (D) "Yes, because the destruction of the painting would infringe your right of publicity."
- (E) "No, you don't have a good claim here."

6. Patrice now comes to you with a different question. She has become aware that another painting of hers, *Remembrance of Gravity*, appears in a big-budget movie from Enormo Entertainment. The feature-length film is a fictional spy thriller that was shot on location at the Montecito Museum of Modernity. *Remembrance of Gravity* is on display in the museum, and it appears in a museum-interior scene in which two spies swap briefcases. The painting appears in the background for about 20 seconds, during which it never takes up more than a small portion of the screen, but it is clearly visible and recognizable. Patrice painted *Remembrance of Gravity* less than a year ago. She still owns it; it was merely on loan to the museum. Patrice asks you, “Can I successfully sue Enormo Entertainment for copyright infringement?”

Which among the following is the best answer to her question?

- (A) “Yes. You have a good claim. Barring something strange, you’ll win.”
- (B) “No. There is not a good cause of action here. Barring something strange, you would lose.”
- (C) “Maybe. The key question will be whether Enormo has met the elements of copyright infringement. Copyright infringement requires both copying and appropriative similarity. Here, it is clear that Enormo ‘copied’ the painting in a way that is actionable under copyright law, but it is not clear – in fact, it is unlikely – that there is the requisite level of appropriative similarity.”
- (D) “Maybe. The key question will be whether Enormo has met the elements of copyright infringement. Copyright infringement requires both copying and appropriative similarity. Here, it is clear that there is the requisite level of appropriative similarity, but it is not clear – in fact, it is unlikely – that Enormo ‘copied’ the painting in a way that is actionable under copyright law.”
- (E) “Maybe. You will very likely be able to establish a prima facie case of copyright infringement, but Enormo will counter with a fair-use defense. They will have a strong argument that their use was a fair one. There is, however, some reason to believe that the fair-use defense will not prevail in a case like this.”



7. Banjo is a famous fictional cartoon monkey that has been featured in four major motion pictures and 200 television episodes. Carter is a suburban homemaker; he is an ordinary citizen and not famous in any way. Desilou was a famous dancer of international renown; she died nine years ago. Last summer, GigantoMart ran a series of billboard ads throughout five states featuring Banjo, Carter, and Desilou - making it appear that they endorsed shopping at GigantoMart. Which of the following is correct regarding potential right-of-publicity liability?
- (A) Under any given state's law, there might be a right-of-publicity cause of action based on the depiction of Carter, but no state's law will allow a right-of-publicity cause of action based on the depiction of Banjo or Desilou.
 - (B) Under any given state's law, there might be a right-of-publicity cause of action based on the depiction of Desilou, but no state's law will allow a right-of-publicity cause of action based on the depiction of Banjo or Carter.
 - (C) Under any given state's law, there might be a right-of-publicity cause of action based on the depiction of Banjo or Carter, but no state's law will allow a right-of-publicity cause of action based on the depiction of Desilou.
 - (D) Under any given state's law, there might be a right-of-publicity cause of action based on the depiction of Carter or Desilou, but no state's law will allow a right-of-publicity cause of action based on the depiction of Banjo.
 - (E) There will not be a viable right-of-publicity cause of action based on the depiction of any of Banjo, Carter, or Desilou.
8. Which of the following is most clearly implausible?
- (A) A company received protection for a sexually reproducing variety of soybeans, evidenced by a certificate obtained through the U.S. Department of Agriculture.
 - (B) A company won a design patent infringement lawsuit on the basis of a determination that the defendant's accused product was too visually similar to the drawings of the plaintiff's design patent.
 - (C) A company received a design patent on a purely ornamental aspect of a product, where the product as a whole was functional but the patented aspect was not dictated by function.
 - (D) A company received protection for the functional shape of the hull of a boat, evidenced by a registration obtained through the U.S. Copyright Office.
 - (E) A company received protection for a database of factual information, where there was no expressive choice in the arrangement or presentation of the information, evidenced by a registration obtained through the U.S. Copyright Office.

9. Consider the following acts of Congress:
- I. An act extending existing copyright terms – i.e., lengthening the duration of protection for works that were written and published prior to the passage of the act
 - II. An act restoring copyright entitlements for works that previously had entered the public domain
 - III. An act prospectively decreasing the term of copyrights to life of the author plus 20 years – or 40 years for works of non-natural persons, anonymous authors, and pseudonymous authors – applicable only to works first fixed in a tangible form subsequent to the effective date of the act, which is the one-year anniversary of the passage of the act

Which are clearly unconstitutional?

- (A) II, but not I or III
 - (B) III, but not I or II
 - (C) I and II, but not III
 - (D) I, II, and III
 - (E) Not any of I, II, or III
10. Which of the following is most clearly inaccurate?
- (A) Research pharmaceutical companies face a significant barrier to patenting in terms of the utility requirement, but this can be overcome at a pre-clinical testing stage by showing a specific biological activity that correlates, at least reasonably, with some disease condition.
 - (B) At the earliest phase of clinical testing of an investigational new drug, the research emphasis concerns validating safety. Compounds often pass this phase, a fact that can be attributed in substantial part to testing on animal models and/or cell cultures that is done as part of pre-clinical research, the results of which are used to form a basis for regulators' approval of a program of initial clinical testing.
 - (C) In giving approval to pharmaceutical manufacturers to market drugs, the U.S. Food and Drug Administration's rules are concerned with safety and efficacy of drugs and not with (1) providing economic incentives to invest in research or (2) otherwise overcoming perceived economic problems in the provision of nonrival/nonexcludable goods.
 - (D) Research pharmaceutical firms frequently engage in patenting strategies to extend monopoly power beyond the expiration of the original patent covering the active compound of a drug; techniques include filing for patents on new dosage schedules and new methods of use.
 - (E) Research pharmaceutical companies can plausibly increase revenue by billions of dollars by seeking and obtaining "weak patents" that are unlikely to survive a validity challenge in litigation.

NOTE THE FOLLOWING FACTS FOR QUESTIONS 11 AND 12:

The band Tygürr (pronounced “tiger”) plays glam metal music, a style of rock music that rose to popularity in the 1980s. Combining elements of heavy metal and glam rock, the music is characterized by power guitar chords, backing keyboards, harmonies, and shred guitar solos. Some famous bands of the era are Def Leppard, Ratt, and Mötley Crüe. Glam metal became unpopular as the 1980s ended, when audiences rejected the genre’s perceived silliness, embracing instead the supposed authenticity of grunge rock.

Tygürr, unfortunately, was late to the glam metal scene. Formed in Temecula, California toward the end of 1990, the band released its masterpiece single “Hot Love Tonight” in 1992 at the height of the grunge era. Except for a few spins on a low-wattage community college radio station in Temecula, California, the song received no radio airplay in the months after its release. Most copies were destroyed when they were returned to the record distributor.

The label on copies of the original recording of “Hot Love Tonight” provides the following notices: © 1992 Razzle Records; © 1992 Ziny Vajopy Ltd. The label lists the songwriters as Ziff, Nyne, Valentine, Jones, and Pytorrsen. You can assume the label information is correct. The publisher of “Hot Love Tonight” is a member of performance-rights society ASCAP, with which “Hot Love Tonight” is registered.

11. Noah works for Rhino Records, which does compilation albums of oldies, out-of-print tracks, and other back-catalog music needing a second chance. Noah wants to know what licensing he’ll need, if any, to include Tygürr’s 1992 original recording of “Hot Love Tonight” on a Rhino compilation album of behind-its-time music. The Rhino album will be released on compact disc, vinyl, and, in a limited-run collector’s edition, cassette tape. Which of the following is the best advice for Noah and Rhino Records?
- (A) “You will definitely need a license from Ziny Vajopy Ltd, but not Razzle Records.”
 - (B) “You will definitely need a license from Razzle Records, but not Ziny Vajopy Ltd.”
 - (C) “You will definitely need a license from both Ziny Vajopy Ltd and Razzle Records.”
 - (D) “You will definitely need a license from either Ziny Vajopy Ltd or Razzle Records, but not both. You might as well go with whomever will give you a license on the best terms at the lowest price.”
 - (E) “You will need a license from any one of the songwriters – Ziff, Nyne, Valentine, Jones, or Pytorrsen. You might as well go with whomever will give you a license on the best terms at the lowest price. You won’t need a license from Razzle Records.”

12. A tribute band called Lionn is aiming to bring back the golden days of 1980s glam metal with live performances of great songs from that era. After purchasing a rare used copy of the original 1992 vinyl record of “Hot Love Tonight” from an area thrift store, Lionn is extremely impressed by the song. They are determined to perform it live on stage (that is, perform it with their own instruments and voices, not by playing the original sound recording through speakers). Through a friend of a friend, Lionn may get the chance to play the song on stage at The Rattlesnake Room, a well-known nightclub on the world-famous Sunset Strip in Los Angeles, California. The Rattlesnake Room has an ASCAP blanket license. It has no blanket licenses with any record labels.

A timid bunch when it comes to possible legal liability, the members of Lionn are worried about the copyright implications of their prospective Rattlesnake Room gig. Which of the following is the best legal counsel for Lionn regarding playing “Hot Love Tonight” live on stage at The Rattlesnake Room?

- (A) “You must obtain a license for the sound-recording copyright from the owner of that copyright. You may have to pay out of pocket – that’s what bands usually have to do for staging live performances of other people’s work.”
- (B) “You must obtain a separate license for the musical-composition copyright from the owner of that copyright. You may have to pay out of pocket – that’s what bands usually have to do for staging live performances of other people’s work.”
- (C) “You must obtain a license for the musical-composition copyright, but you can either get that from the copyright owner, or, alternatively, you can get a compulsory license under 17 U.S.C. §115. And you can get this compulsory license – what you might call a ‘cover-version license’ – even if the copyright holder objects. There are fees you must pay, but once you have that, you’re covered.”
- (D) “You don’t need to worry about obtaining a license because The Rattlesnake Room has a blanket license with ASCAP, and that covers your playing ‘Hot Love Tonight’ on stage at the Rattlesnake Room.”
- (E) “Because of your transformative intent to bring back an old form of music that didn’t reach popularity when originally released, the fair-use rationale here is very strong, and on that basis you can be confident that you are in the clear. Another, independent reason you don’t need a license is the first-sale defense, which will apply since you own a legally purchased copy of ‘Hot Love Tonight.’ Thus, my legal advice is that you don’t need licenses for any live gigs where you perform this song.”

