STUDENT NO. _____

General Instructions

There are 12 pages in this examination. Be certain that you have all of the pages that make up the examination. This examination is composed of two parts: an essay portion, and a multiple-choice portion.

The essay part has a single fact pattern and at least one question to be answered. Note, on the off chance that there is some technological fact that you do not understand, don't panic. Simply write what you *think* the fact means (*i.e.*, give me your "assumption"), and apply your assumption consistently as a fact. I just need to know that you're thinking so that I can determine whether you applied the law to the facts correctly. **Write legibly**. You will not get the benefit of the doubt. If I can't read your handwriting, I can't give you points! The essay question is worth 50% of your grade.

The multiple choice part is a set of 20 multiple choice questions. Each question has four potential responses. Chose only one of the four response by designating the appropriate letter in your Blue Book. The multiple choice portion of the exam is worth the remaining 50% of your grade.

Allocate your time as you see fit. BE CERTAIN TO READ THE ENTIRE QUESTION. Leave nothing to chance. Put ALL of your answers (including the answers to the multiple choice part) in your written/electronic Blue Book. You have two hours to complete the examination.

DO NOT TAKE THE EXAM HOME WITH YOU.
RETURN THE EXAM TO THE PROFESSOR OR THE PROCTOR.

Good luck. I hope you have a healthy and enriching career.

Essay Question (*not* based on a true story)

Joe Smowe, a California-based developer employed by Amazon.com (incorporated in the State of Washington), was watching a podcast featuring Philip Rosedale of Second Life (http://www.secondlife.com, which is a 3-dimensional virtual world imagined and created by its residents). Specifically, Mr. Rosedale discussed the limitations of the web in general, and by example Amazon.com in particular, namely that multiple shoppers could be viewing the same web page and not be able to interact with each other -- unlike participants in Second Life. Mr. Rosedale argued that this made the Second Life experience superior to that of Amazon.com.

Mr. Smowe is a software developer for Amazon.com and his contract has a provision requiring assignment of intellectual property rights for ideas and inventions to Amazon.com while in Amazon's employ. Upon hearing Rosedale's presentation, Smowe became incensed and endeavored to remedy the shortcomings in the Amazon.com website. Smowe came up with the idea of using Google Chat code to allow users of the Amazon.com website to see other viewers of the same web page in "real time". Google Chat is a feature of Google Mail ("Gmail") that allows fellow Gmail users to chat (*i.e.*, exchange text messages) with each other when both are logged into their respective Gmail accounts. When logged into a Gmail account, the user can see a box on their screen listing fellow Gmail users available for Google Chat. A color-based button beside their name indicates their connection status with Gmail (*e.g.*, a green button indicates that the fellow Gmail user is logged in and available for a chat session with the user). Google.com, the owner of Gmail and Google Chat, is a California corporation. This feature of Gmail has been in use for more than one year, and certain elements of Gmail are covered by multiple U.S. patents.

Mr. Smowe was in a hurry and didn't want to waste time making his own version of Google Chat. Unfortunately, the code for Google Chat is not available under any license. Smowe's hacking skills weren't good, so he befriended an ex-phone phreaker who used the alias "Lieutenant Crunch". A phone phreaker is someone who takes delight in breaching telecommunications systems, such as the one at Google. Smowe convinced Lieutenant Crunch to call the secretary of a Google Chat engineer and pose

as a representative of Google's Security Department. Crunch sweet-talked the secretary into giving him the username and password of the Google Chat engineer's account. Smowe used the username and password provided by Crunch to access the Google servers and obtain a copy of Google Chat in a manner that didn't arouse suspicion within Google. Smowe then combined the Google Chat code with the far larger amount of Amazon website code and, *viola*, the chat feature was made available to Amazon.com customers. The new feature was an instant commercial success. Amazon.com executives are ecstatic and want to file a patent application on Mr. Smowe's invention. The executives also want to make a press announcement to boost the stock price.

1. You are the General Counsel for Amazon.com, and the CEO of the company has just called you with the news, and asks: “Do you have a problem with this?” Discuss any potential liabilities for the company and (separately) for Mr. Smowe.

Multiple Choice Questions

1. Hundreds of years ago, William Shakespeare wrote: “The first thing we do, let's kill all the lawyers”. (Henry IV, Act IV, Scene II). If, in class, Prof. Chichester says, “To paraphrase a warning by William Shakespeare: 'The first thing they do after a revolution is kill all the lawyers'”. Such an utterance in class would be protectable (by Prof. Chichester) under which intellectual property regime:
   A. Trade secret, because the behavior is known only to lawyers.
   B. Copyright (specifically a derivative work).
   C. Trademark, because when you hear such utterances, you immediately think of Prof. Chichester as the source.
   D. None of the above.

2. Your client is an online software company that distributes a software application called EMACS that is available (from a variety of sources) under an open source license, specifically the GNU Public License (“GPL”) version 2. To distinguish themselves from other developers that also distribute EMACS and to enable them to charge money to unsuspecting customers, your client wants to call their copy of EMACS something else. One of your client's developers is fond of animals, and settles on “ocelot” as a mascot and the new name of your client's copy of EMACS. Note, ocelot's have nothing to do with EMACS, nor are they the name or mascot of any other software application. Your client wants to adhere to all of the conditions of the GPL, and you advise her:
   A. She should file a trademark application for “OCELOT” in International Class 42 (development of custom software for others) because it can be used as a trademark to identify your client as the source of the software application.
   B. She should file a trademark application for “OCELOT” in International class 9 (software) because it can be used as a trademark to identify your client as the source of the software application.
   C. She can't distribute the code under the name “OCELOT” because OCELOT is the exact same application (EMACS) that she obtained under the GPL, and changing the name of the application would violate the GPL.
   D. She would need to modify EMACS in some way before she could rename it and distribute it (with modified source code) as OCELOT.

3. Your opponent is a mid-sized company selling human-implantable light bulbs that owns (and uses) a domain edison.com (Thomas A. Edison being the famous inventor of the light bulb). Paul Fishbaum, an environmentalist and amateur astronomer who is sensitive to light pollution, is enraged by your client's activities. Upon learning of edison.com, Fishbaum registers the domains edeson.com, edson.com, and edisn.com with the intent to convince your client's potential customers that implanting light bulbs is ecologically unsound. Your opponent has instituted an ICANN proceeding to shut down your client's websites and obtain the domain names. During the pendancy of the ICANN proceeding, Fishbaum gets cold feet, and wants to offer to sell the domains to Edison at cost in the hopes of settling the suit. You tell Fishbaum that:
   A. This is a good idea because it is the legally and morally right thing to do.
   B. This is *not* a good idea because such an offer can be evidence of "bad faith" that can be used to hurt his case.
   C. This is *not* a good idea because the cost of litigating an ICANN proceeding is such that selling the domains to Edison for a *profit* is still less expensive than the ICANN proceeding so your client should charge a higher price.
   D. None of the above.

4. Which of the following is correct:
   A. Software licensed under the GNU General Public License ("GPL") cannot be sold for a profit.
   B. The rights granted by the GNU Lesser General Public License ("LGPL") do not necessarily extend to a software application that dynamically links to the LGPL'ed library (i.e., the resulting code is not one single binary file).
   C. Code licensed under the BSD license cannot be released without also releasing the source code.
   D. All of the above.

5. A signal from a user's laptop computer indicating that a user launched a particular software application at a particular time is:
   A. Copyrightable, and the copyright would be owned by the user of the laptop computer.
   B. Copyrightable, and the copyright would be owned by the owner of the laptop computer.
   C. Copyrightable, and the copyright would be owned by the owner of the software program that sent the signal.
   D. Not copyrightable.

6. Mr. Steven P. Ammer is a U.K. resident who writes software with which to "touch someone with messages of peace and joy" that works by sending email messages over the Internet. Mr. S.P. Ammer is enamored with the idea of touching as many people as possible. In the past, Mr. Ammer simply sent the messages from his home PC to everyone on his Outlook Address Book. Unfortunately, many people were annoyed with these messages and told him so, which made Mr. Ammer all the more determined to reach as many people as possible. Mr. Seamus O'Der is an employee of Megasoft Corporation of Oregon. Mr. O'Der writes software designed to ensure the security of the worlds best selling operating system "Curtains." Mr. Ammer heard of Mr. O'Der, and the former called the latter on the telephone from England. Mr. Ammer wanted Mr. O'Der to create a loophole in the security system of Curtains that Mr. Ammer could use to send more messages. Unlike virtually everyone else, Mr. O'Der was bewitched by Mr. Ammer's message of peace and love, and agreed to put the loophole into the next update of Curtains. Mr. Ammer then wrote a virus that exploited the loophole and the virus subsequently installed itself on millions of machines running Curtains. Your company was infected with the virus and the IT department spent nearly $100,000 dollars cleaning up the mess. As General Counsel of the infected/affected company, should you:

A. Recommend that the company file a civil suit against Mr. Ammer for trespass of chattles, violations of the Digital Millennium Copyright Act, and the Computer Fraud and Abuse Act.
B. Recommend that the company ask their district attorney to file a criminal suit against Mr. O'Der for violations of the Digital Millennium Copyright Act, the Computer Fraud and Abuse Act, and Wire Fraud.
C. Both A and B above.
D. Neither A or B above.

7. When considering cost shifting in lawsuits involving electronic information, a court should consider:

A. The likelihood of discovering relevant information.
B. The availability of such information from other sources.
C. The amount in controversy a s compared to the total cost of production.
D. All of the above.

8. An “open document format” enables users and third-party software applications to access data without having to go through proprietary software applications. Microsoft has adopted an open document format for the latest version of MS Office (which includes Word, Excel and PowerPoint). Microsoft applied for a patent on the format, which later issued as U.S. Patent No. 9,941,570. In short, you can see your data with a simple text editor, but the format used to store your data is patented, and the patent covers use of that patented data structure to extract and use the user's data. Your Texas-based client has written a software application that translates (and thus extracts and uses) the data stored in Microsoft's patented format. Your client admits that the code in her software reads on the claims of the Microsoft patent. Microsoft requires the signing of a closed-source license agreement for any software application that reads or manipulates data stored in the patented format. The license agreement stipulates that a modest royalty must be paid for each copy of the software, which has the practical effect of precluding distribution of her code under the GNU Public License (“GPL”). Your client wants to publish her software under the GPL, but doesn't want to be sued by Microsoft. You tell her that:

A. Her code infringes U.S. Patent No. 9,941,570, but she is free to distribute her software outside of the United States, and she is also free to assign the copyright to the software to someone in the United States.
B. Her code infringes U.S. Patent No. 9,941,570, but she is free to use her software in a web-based application in the United States that does not require the distribution of copies of the software to others.
C. She can distribute the code within the United States if she restricts her claim of ownership in the code to the copyright only.
D. None of the above.

9. Your client wants to apply a digital rights/restriction management (“DRM”) technique to the content that her customers download in order to preclude any use besides viewing of the content. You tell her that:

A. Use of such DRM violates the Copyright Act because citizens have a right to make “fair use” of the copyrighted material.
B. Use of such DRM violates the Copyright Act because read-only distribution is not one of the exclusionary rights enumerated under §106.
C. There is no such thing as “fair use” under the Copyright Act.
D. Use of the DRM technique is perfectly acceptable.

10. Your client is an Internet-based company that wants to provide users with “artistic content that fits the mood”. The company doesn't make any of the content. Instead, they searched Google Images (http://images.google.com) and gathered high-resolution images that fit certain pre-defined criteria (e.g., soothing, anxious, etc.). The users access your client's website to download the content from his web pages where he sells ad space to other companies. You tell him that:

A. There are no problems with this business model.
B. He shouldn't store any of the content, but it would be acceptable to use a thumbnail (reduced size/resolution) version of the image and insert a hyperlink to the full-size image on the web page identified by Google.
C. He shouldn't store any of the content, but it would be acceptable to use a thumbnail (reduced size/resolution) version of the image and insert a hyperlink to the full-size image on the web page identified by Google *after first obtaining permission from the owner of the full-sized image*.
D. He can't do this because it is blatantly illegal under the Copyright Act because he doesn't own the content displayed/downloaded.

11. Pavlovich, an engineer and resident of Texas posted on his website the source code of a program that allows movies on DVDs to be ripped (extracted). Pavlovich realized that the ripped movies may be copied to other via using peer-to-peer software via the Internet. The plaintiff, a California corporation representing the entertainment industry, claimed that Pavlovich was subject to personal jurisdiction in California because his posting activities in Texas harmed the California recording and entertainment industry by allowing the “pirating” of copyrighted material. While his website is certainly accessible from California, Pavlovich had never traveled to California, had made no Internet contacts in California, his website had no interactive features, he had made no telephone calls to California, and he did not know that the plaintiffs owned a license for the program that protected access to DVDs. Indeed, this license was obtained after the code was posted on Pavlovich's website. Pavlovich certainly doesn't want to travel to California to litigate the suit. Your best single course of action is to:

A. Not contest jurisdiction (as he would surely lose because the loss to California was substantial and easily shown by the plaintiffs) and to simply file a *forum non conviens* motion to have the case tried in Texas.
B. Make a special appearance in California to contest jurisdiction based on the fact that Pavlovich had no contacts with California, and that mere foreseeability of harmful effects in California is not enough to justify long-arm jurisdiction over a Texas resident.
C. Make a special appearance in California to contest jurisdiction arguing, using the Zippo line of cases, that his website lacked sufficient interactivity to allow long-arm jurisdiction over a Texas resident.
D. Throw himself upon the mercy of the plaintiffs.

12. Your client is a for-profit software company. They want to use a embedded database in their product, but don't have the money to create one. To make an embedded database, one obtains the database source code and compiles it into the main software application so that the user sees only one single binary executable (.exe) file. The embedded database would add about 40% to the size of the application. The client wants an embedded database for technical and business reasons, namely so that they can charge money for the binary executable and have complete control over the database. Oracle (the leading software company) provides suitable database software code and an amendable closed-source license, but it is too expensive. There are several open source database applications, notably PostgreSQL. The client wants their customers to sign a closed-source license similar to the end user license agreement ("EULA") for Microsoft Vista. If PostgreSQL is available under a BSD license, you should advise your client to:

A. Go ahead and incorporate the code into your software and use a Vista-like closed-source license for profit.
B. Go ahead and incorporate the code into your software and use a Vista-like closed source license for profit, but include a copyright notice about PostgreSQL in your splashscreen.
C. Split the software application into two parts (one for the database, and another for the main application) and charge money for the main application only.
D. Don't incorporate PostgreSQL. Instead, bite the bullet and pay Oracle.

13. Same fact scenario as in question 12. This time, however, PostgeSQL is released under the GNU Public License (GPL), so you should advise your client to:

A. Go ahead and incorporate the code into your software and use a Vista-like closed source license for profit, but include a copyright notice about PostgreSQL in your splashscreen.
B. Split the software application into two parts (one for the database, and another for the main application) and charge money for the main application only and have one EULA (for the main application).
C. Split the software application into two parts (one for the database, and another for the main application) and charge money for the main application only and have two EULA's (a GPL consent agreement for PostgreSQL and the another Vista-like one for the main application).
D. Don't incorporate PostgreSQL. Instead, bite the bullet and pay Oracle.

14. Your client provides copyrighted software applications to users for free via the Internet. After accepting a click-through closed-source license agreement, the user installs the software onto their own computers. Periodically, the software accesses a third-party website and obtains information about local weather for display to the user. The software has a built-in "browser monitor" that records the user's web surfing activities and uploads that activity-information onto a database hosted by your client. The software comes complete with a "rootkit" that makes it virtually impossible for users to remove the software from their computers. Your client wants to sell three-month's worth of information contained within the database to a marketing company. The marketing company wants to include a representation by your client in the sale agreement stating that your client owns the copyright to the content within the database and indemnifying the purchaser for any liability for copyright infringement. Your client isn't familiar with these kinds of representations and warranties and seeks your advice. You tell should him that:

A. He cannot make the representation because his company does not own that data, the respective customers do.
B. He can make the representation because his company owns the copyright to the data in the database.
C. He can make the representation because his company would own the copyright to the data *if* he disclosed the gathering of the data in the click-through agreement to which the user assented.
D. He can make the representation because his company would own the copyright to the data *if* he put a provision in the license agreement that stipulated that the user assigned the copyright to their data to his company in consideration for their use of that software.

15. Same fact scenario as question 14, *supra*. Your client wants to know if the use of the rootkit is legal. You should tell him that:

A. The rootkit likely violates the federal Computer Fraud and Abuse Act.
B. The rootkit likely violates the federal Computer Fraud and Abuse Act as well as one or more state anti-spyware statutes.
C. The use of the rootkit would not violate the federal Computer Fraud and Abuse Act if the user has never tried to remove the software and thus never had cause to encounter the rootkit.
D. The use of the rootkit is acceptable and assent to the presence of the rootkit by the user is not required.

16. Same fact scenario as in question 14, *supra*. Here, the client wants to know if the customer should be bothered with the fact that his/her web surfing habits will be recorded. You should tell him that:

A. The recordation will be permissible in any case, so there is no point in notifying the user.
B. The recordation will be permissible if the user is notified through statements made in the click-through agreement.
C. The recordation will not be permissible because such actions will violate the Computer Fraud and Abuse Act, even if the user assents.
D. The recordation will not be permissible because such actions will violate the Computer Fraud and Abuse Act and one or more state anti-spyware statutes, even if the user assents.

17. Same fact scenario as in question 14, *supra*, except that in this case, the client's marketing department doesn't want the user to go through the hassle of a click-through agreement (which may deter some customers). Instead, the user is referred to a browser-wrap agreement (via hyperlink) on a post-installation startup-splashscreen rather than a pre-installation, click-through agreement. The browse-wrap agreement contains a clause stipulating that "by using the software, the user assents to all terms and conditions of this browse-wrap agreement." Even though the user doesn't have to view the browse-wrap agreement prior to installing the software, the client wants to know if the he can still record the user's web surfing habits. You should tell him that:

A. The recordation will be permissible in any case, so use of a browse-wrap agreement is irrelevant to this particular issue.
B. The recordation will be permissible if the user is notified through statements made in the browse-wrap agreement.
C. The recordation will not be permissible because such actions will violate the Computer Fraud and Abuse Act, even if the user has seen the browse-wrap agreement.
D. The recordation will not be permissible because such actions will violate the Computer Fraud and Abuse Act and one or more state anti-spyware statutes, even if the user has seen the browse-wrap agreement.

18. Under 17 U.S.C. 107 (the Fair Use section of the Copyright Act) what factors should be considered in determining if the use is allowed?

A. Whether all of the work was used.
B. The effect of the use on the market for the work.
C. Both of the above.
D. Neither of the above.

19. A closed-source software application can be protected using which of the intellectual property mechanisms:

A. Trademark.
B. Trade Secret.
C. Copyright.
D. All of the above.

20. Your client wants to offer a software application that is intended to help operate large oil refineries and ensure compliance with federal laws. Faults in your client's software carries many risks, both monetary and physical. Your client wants limit their liability for unintended mistakes in the software application. To limit his liability, you suggest:

A. They adopt an Application Service Provider ("ASP") business model, where the source code resides on your client's server, and the user only interacts with the code through a web browser like Internet Explorer. This way, their users never get a copy of the code, and hence there is no liability for your client.
B. They distribute the software application in the normal fashion (e.g., give a copy to the customer) with a clause disclaiming all warranties (including the warranty of merchantability and warranty of fitness for a particular purpose) using a click-through agreement.
C. Since they built the software application with these critical features in mind, they can't disclaim the warranty of fitness for a particular purpose, so the client should obtain sufficient insurance.
D. None of the above.