

CopyrightX

Spring 2013

Professor William Fisher

Final Examination

Instructions

This is an “open-book” examination. When preparing your answer, you may read, watch, or rely on any material you wish. Once the exam has begun, however, you may not consult in any way with any other person concerning any aspect of the test.

The exam will be distributed at noon GMT on Saturday, May 11, 2013. Your response is due no later than noon GMT on Sunday, May 12.

You may not submit any comments concerning the exam to the EdX discussion board or any other forum between noon GMT on May 11 and noon GMT on May 12. However, after noon GMT on May 12, you are free (indeed, encouraged) to submit such comments to the EdX discussion board. (EdX participants who have arranged to take the exam at a later date may not consult the discussion board between noon GMT on May 12 and the time at which they submit their final answers.)

You must prepare your answer using one of the following file formats: .doc, .docx, .pdf, .odt, or .fodt. (If you do not currently have a word-processing program capable of generating files in one of these formats, such a program can be downloaded for free from: www.libreoffice.org/download.) Please use the Times New Roman 12-point font and 1.25” margins. Please use the following convention to name the file containing your answer: "Section#_LastName_FirstName." For example, if you are a member of Section A1 and your name is Andrea Jones, then your answer should be saved as a file named: "A1_Jones_Andrea."

You must submit your answer by attaching it to an email sent, prior to noon GMT on May 12, to copyrightx-exam@cyber.law.harvard.edu. Soon after you send your email to that address, you should receive an automated reply, which will serve as a confirmation that the course team has received your exam. If you do not receive such an auto-reply, please re-send your email to the same address. If you still do not receive an auto-reply, please email a copy of your answer to nlevy@cyber.law.harvard.edu.

Neither the course team nor your teaching fellow will respond to questions concerning the exam unless they concern emergencies. If an emergency does arise, please email copyrightx-exam-emergency@cyber.law.harvard.edu, providing details. Someone will respond as soon as possible. If you find any aspect of the exam’s content or instructions to be ambiguous, do not

request a clarification. Instead, develop your own interpretation that resolves the ambiguity and make that interpretation explicit in your response.

The exam contains three questions. You must answer all three. Your answer to the first question may not exceed 1500 words. Your answer to the second question may not exceed 1000 words. Your answer to the third question may not exceed 1000 words. These length limitations will be strictly enforced.

Your answers will be weighted as follows:

Question #1: 40%

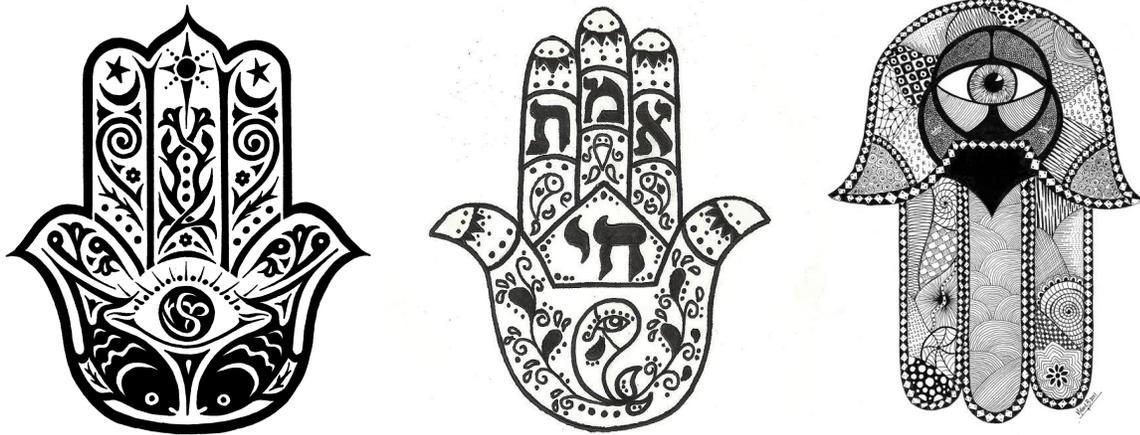
Question #2: 30%

Question #3: 30%.

Question #1

Assume the following facts:

The Hamsa is an ancient image that continues to be widely used in the Middle East and North Africa. It consists of a stylized depiction of an open palm. It symbolizes, among other things, protection, fertility, and sexuality. All of the major Western religions use variants of the image. In Islam, it is known as the Hand of Fatima; in Judaism, as the Hand of Miriam; in Christianity, as the Hand of Mary. Three examples of the image are set forth below:



Although, as you can see, the image is conventionally presented as symmetrical, it is widely understood to represent the palm of a right hand.

Luke Lukacs is an agnostic, left-handed, Caucasian college student living in Massachusetts in the United States. In 2008, Luke campaigned actively for Barack Obama. Luke was deeply disappointed, however, by Obama's performance during his first term as President of the United States. In the summer of 2012, Luke decided not to campaign for Obama's reelection. He did not support Mitt Romney, Obama's opponent, but he wanted somehow to express his disillusionment with Obama. For this purpose, he designed a modified version of the Hamsa image, depicting the open palm of a left hand. (The significance of this design will become apparent shortly.)

Carol is a friend of Luke's. She makes jewelry as a hobby. In September of 2012, Luke gave Carol a detailed drawing of his design and asked her to fabricate out of sterling silver an earring incorporating the image he had created. A week later, she gave him the earring depicted in Figure 1 on the following page.



Figure 1

Pleased with Carol's creation, Luke began wearing it every day in his left ear. When friends or strangers asked him about the unusual shape of the earring, he explained: "It represents my deep commitment to the political Left and my anger at Obama's betrayal of Progressivism. It also represents my condemnation of all forms of discrimination. Discrimination against left-handed people like me is of course trivial, but I mean to associate myself with everyone working to combat more fundamental forms of discriminatory treatment." Most of the people to whom Luke expressed these views dismissed them as simplistic. A few people, however, were supportive or sympathetic.

In October of 2012, John, a reporter for the Boston Globe, the leading newspaper in Massachusetts, interviewed Luke for a story about college students who no longer supported Obama. Katherine, a photographer working for the Globe, took Luke's picture. The Globe published the story just before the November election. In the accompanying photo, Luke's face was turned slightly to his right, enabling the viewer to see clearly his distinctive earring.

Obama's reelection in November of 2012 did little to alter Luke's views. During March of 2013, he visited relatives in New York City. He happened to notice, on a street vendor's rack of inexpensive jewelry, a necklace containing a pendant that, to his eye, looked remarkably like his earring. The pendant is shown in Figure 2 on the following page.



Figure 2

Suspicious that someone had “stolen” his design, Luke checked the displays of other street vendors and searched the Internet for “left-handed hamsas.” He was dismayed to find many. Some were identical to the pendant shown in Figure 2. Luke grudgingly acknowledged that others, like the ones shown in Figure 3 and Figure 4, deviated from his design in more significant ways.



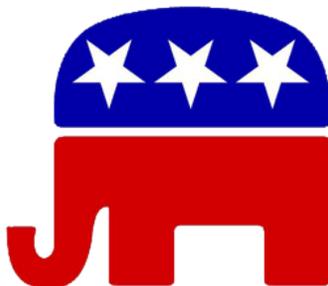
Figure 3



Figure 4

The pendant that Luke found most offensive seemed to replicate his design verbatim except for two modifications: the image was “flipped” horizontally so that it depicted the palm of a right hand instead of a left hand; and the thumb was altered to represent the trunk of an elephant.

(To understand Luke’s anger, it may help to know that the Republican political party is the more conservative of the two major parties in the United States and that the mascot for the Republican party is an elephant. A typical rendering of that mascot is set forth below:



Luke assumed that the purpose of whoever had designed the elephant-shaped version of Luke's original image was to allude to the Republican party and thus to repudiate the ideals for which Luke had intended to express support.)

By questioning street vendors and calling the operators of websites selling these various products, Luke soon ascertained that all of the products had been manufactured by one firm – the Acme Amulet Company, located in San Jose, California. He also learned that none of the products had been manufactured by Acme prior to January of 2013. In other words, all had been created after the publication of the Boston Globe article in which his photograph appeared.

After he returned to school in late March, Luke happened to notice a classmate wearing a necklace containing the pendant depicted in Figure 4. When he asked her where she had found it, she responded that she had purchased it from a website to which she had been referred by the Jewish Museum Shop (JMS), an organization based in New York City. Luke investigated further and discovered that the website of the JMS contains brief descriptions of a small number of consumer products related to Judaism. The JMS does not itself sell those products, but provides hypertext links to other websites from which the products can be purchased. Each time a consumer follows such a link and buys a product, the JMS receives a small commission from the seller.

You have known Luke since childhood. He approaches you, recounts the foregoing story, and asks whether any of his legal rights have been abridged and, if so, what remedies might be available to him. Write Luke a letter containing no more than 1500 words. Your letter should address at least the following issues:

- (a) Does Luke's design enjoy any protection under copyright law? If so, what aspects of the design are protected?
- (b) Does Carol have any rights under copyright law?
- (c) Assuming that Luke's design enjoys some protection under copyright law, has the Acme Amulet Company violated any of the rights embodied in Section 106 of the U.S. Copyright Act?
- (d) If so, may the Acme Amulet Company avoid liability by invoking the fair-use doctrine?
- (e) If Acme may not avoid liability for direct copyright infringement, is the Jewish Museum Shop (JMS) secondarily liable?
- (f) If Acme or the JMS is deemed to have violated the Copyright Act, what remedies would be available to Luke?

If you need more information to answer any of these questions, say what that information is and why it matters.

You may assume that the correct answers to all of these questions depend entirely upon U.S. copyright law. In other words, for the purpose of this question, you need not discuss the contents of any international treaties or the copyright laws of any countries other than the United States.

You may also assume that the United States does not accord legal protection for most forms of “traditional knowledge.” As a result, the ancient Hamsa image – exemplified by the designs reproduced on the top of page 3 of this exam – are in the public domain in the United States. However, you may assume that no one prior to Luke had created a left-handed Hamsa.

Finally, when preparing your answer to this question, keep in mind that Luke is interested only in what rights and remedies he might have under current U.S. copyright law. He is not interested in your opinion concerning what the law should be. In your responses to questions #2 and #3, below, you will have ample opportunity to express opinions of that sort.

Question #2

Select one of the following dimensions of copyright law:

- (a) the requirement of originality;
- (b) fair use;
- (c) moral rights;
- (d) traditional knowledge.

Briefly describe how the issue is addressed under the law of the United States and how it is addressed under the law of one other country. Which country's approach, in your judgment, is superior? Why? Your answer may not exceed 1000 words.

Question #3

Select one of the following dimensions of copyright law:

- (a) the idea/expression distinction;
- (b) copyright protection for innovations in fashion;
- (c) joint authorship;
- (d) termination rights;
- (e) appropriation art;
- (f) digital sampling of sound recordings;
- (g) circumvention of technological protection measures; or
- (h) the rights and privileges of libraries.

Then select one of the four intellectual-property theories that were examined in this course. What insight into how copyright law should address the dimension you select might be derived from the theory you select? How does your analysis illuminate the strengths and weaknesses of the theory? Your answer may not exceed 1000 words.

End of Exam