

Copyright

Spring 2013

Professor William Fisher

This examination will be administered in two parts. Part I consists of a three-hour in-class test, administered from 9:00 a.m. to 12:00 p.m. on May 7, 2013. Part II consists of an unlimited-time “take-home” test, due at 4:00 p.m. on May 8, 2013.

Instructions for Part I

Part I of the exam consists of two questions. You must answer both. You have three hours to complete your answers.

The exam mode, for this portion of the exam, is CLOSED. This means that you will not have access to the hard drive of your computer or to the Internet. Nor will you have access to your answer once you have submitted it.

This portion of the exam is also “closed-book.” You may not bring any written materials into the exam room. In preparing your answers, you may not consult in any way with your fellow students or with any other person.

Be sure to include in your response your five-digit Exam ID number. Do not write your name on any part of your response. To preserve the anonymity of your response, avoid including any information that would enable the instructor to identify you.

Your answers to the questions in the exam will be weighted as follows:

Part I, Question #1: 35%

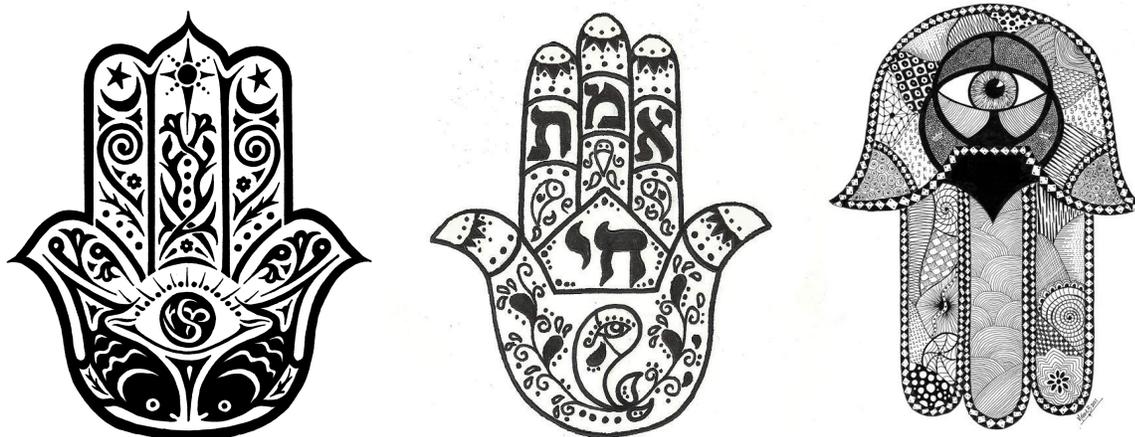
Part I, Question #2: 15%

Part II: 50%

Part I

Question #1

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 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, 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 self-important or simplistic. A few, however, were supportive or sympathetic.

In October of 2012, John, a reporter for the Boston Globe, interviewed Luke for a story about college students who no longer supported Obama. Katherine, a Globe photographer, 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 the right, enabling the viewer to see clearly his distinctive earring.

Obama's reelection did little to alter Luke's views. During spring vacation in 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 appeared to replicate his design verbatim except for two modifications: the image was “flipped” horizontally so that it depicted the palm of a right hand; and the thumb was altered to represent the trunk of an elephant. Luke assumed that the purpose of both changes was to allude to the Republican political party and thus to repudiate the symbolism of the image he had created.

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.

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). 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 2000 words. If you need more information to answer his questions, say what that information is and why it matters.

Question #2

In what ways does copyright law in the United States accept and in what ways does it reject the system of moral rights developed and applied in continental Europe? Provide examples of types of disputes in which the distinctive features of the U.S. approach would make a difference. Your answer may not contain more than 750 words.

Part II

This portion of the exam is open-book. In preparing your answer, you may read any material you wish. You are also free to discuss your answer with classmates or other persons. However, you must indicate in your answer the sources of any ideas you have derived from others.

Select one and only one of the following options:

(A) In April 2009, the Economist magazine organized an online debate concerning the merits and demerits of the copyright system. Participants included Justin Hughes (Professor at Cardozo Law School and representative of the United States before WIPO), John Kennedy (Chairman of the IFPI), Dale Cendali (Partner at Kirkland & Ellis and Adjunct Professor at HLS), Jennifer Urban (Director of the IP and Technology Law Clinic at USC), Jessica Litman (Professor at the University of Michigan Law School), David Lammy (Minister for Higher Education and IP, United Kingdom), William Fisher, and several members of the online audience. Read the contributions to the debate: <http://www.economist.com/debate/overview/144>. Draft your own contribution.

(B) Select one of the following dimensions of copyright law:

- the idea/expression distinction;
- copyright protection for “useful articles”;
- copyright protection for innovations in fashion;
- joint authorship;
- termination rights;
- appropriation art;
- traditional knowledge;
- technological protection measures; or
- the rights and privileges of libraries.

Then select two of the four intellectual-property theories we examined this semester. What insight into how copyright law should address the dimension you have selected might be derived from each of the two theories? How does your analysis illuminate the relative strengths and weaknesses of the two theories?

Your answer may not exceed 2000 words (including any footnotes or references). You must submit it before 4:00 p.m. on May 8, 2013, to the Registrar’s Office using the Exam 4 software.

End of Exam