

THE UNIVERSITY OF BRITISH COLUMBIA
PETER A. ALLARD SCHOOL OF LAW

FINAL EXAMINATION – APRIL 2020

LAW 422.001
Intellectual Property

Jon Festinger, Q.C.

EXAMSOFT PASSWORD:
EXAMSOFT RESUME CODE:

TOTAL MARKS: 100

WRITING TIME ALLOWED: 3 HOURS
PREPARATION TIME ALLOWED: 10 MINUTES

Preparation Time has been given to download/print/set up for your exam once the exam has been made available online through Canvas. This time cannot be used for writing exam answers. All exam answer uploads will be monitored to ensure that typing of answers only occurred for the allotted Writing Time.

This is an open book examination, meaning that you can refer to class notes, the course casebook (Canadian Intellectual Property Law: Cases and Materials (2nd Ed.)), the course PowerPoint slides, and other class readings. The use of library books, or books other than the course casebook are not permitted.

Any exam answers that raise suspicion of breaking any restrictions outlined on this cover page may be subject to being processed through academic integrity software.

If you think you have discovered an error or potential error in a question on this exam, please make a realistic assumption, set out that assumption clearly in writing for your professor, and continue answering the question.

*****PLEASE READ THE BELOW CONFIDENTIALITY REGULATIONS CAREFULLY*****

As this exam is being written off-campus and is unsupervised, any communication whatsoever (including but not limited to in person, telephone, e-mail, text, social media etc.) concerning the contents of this examination with anyone (other than your instructor or staff of the Allard School of Law) is strictly prohibited.

In the event any information comes to your attention regarding a breach of these regulations (by others, or inadvertently by you), please immediately contact Student Academic Services (studentservices@allard.ubc.ca) and make full disclosure.

A breach of these regulations may constitute student misconduct and you may be subject to penalty or discipline under UBC's Academic Misconduct policies.

What Do I Do If:

- **I cannot access the exam questions on Canvas**

If you experience technical difficulties accessing the exam questions on Canvas, email studentservices@allard.ubc.ca and the exam questions will be emailed to you. Please provide your phone number when emailing Student Services.

- **I'm experiencing technical difficulties DURING THE WRITING of the exam**

If you experience technical difficulties with Exemplify at the very beginning or during an exam, we encourage you to spend NO MORE THAN 5 MINUTES attempting to troubleshoot your technical difficulties with Exemplify by restarting your computer. You will NOT BE GIVEN ANY EXTRA TIME to complete the exam if you experience technical difficulties with Exemplify.

If your attempt to solve the technical problem is unsuccessful, or if you choose not to make such an attempt, you MUST immediately begin typing your exam answers in a word processing software (i.e., MS Word, Apple Pages). Only if your computer or word processing software is not working, should you begin hand-writing your exam using paper and pen.

When you have finished writing the exam, you must upload via Exemplify any exam answers that you were able to complete in Exemplify, if possible. See below for technical support contact information if you cannot upload your Exemplify file.

You must also upload to Canvas any exam answers that you completed in a word processing software or via hand-writing. Please convert your word processing software file into PDF format, or take a picture or scan of your handwritten pages putting them into one folder. Upload the answer file/folder into the "Exam Answer File Submission (Word Processor or Hand-written ONLY)" link in the Law Exams – April 2020 course on Canvas. Your answer file/folder should be named, and the coversheet of your answers should be titled with:

Your Exam Code, Course Number, Name of Course, and Instructor Name
i.e., **9999 LAW 100.001 Law of Exam Taking (Galileo)**

- **I'm experiencing technical difficulties EXITING and UPLOADING the exam**

If you experience any difficulty exiting and uploading your Exemplify exam answers, you must wait until the allocated time period specified on the coversheet of the exam has ended, then email Bernie Flinn, flinn@allard.ubc.ca, and he or another IT Support staff person will help you to upload your Exemplify exam file. Please provide your phone number when emailing Bernie.

If you had to type using word-processing software or hand-write some or all of your answers, and experience difficulties uploading your exam answer file/folder to Canvas, email your exam answer file/folder to studentservices@allard.ubc.ca.

- **I fall ill in the middle of an exam, or am otherwise interrupted such that I'm unable to continue writing my exam**

Please stop writing, note the time that you stopped, and email studentservices@allard.ubc.ca immediately to notify them and discuss options. Please provide your phone number when emailing Student Services.

This examination consists of THREE (3) questions to be answered. Note that the second question gives you a choice of two possible questions to choose from. You may only answer one of those two possible questions.

Unless otherwise indicated, assume the applicable laws are the laws of British Columbia and Canada.

Question 1 [60 marks, 108 minutes]:

Young Albert Weber-Eisenstein is a true genius. Albert, a third year UBC psychology student had two previously unrelated hobbies. He loved barbecuing food, and he loved 3D printing various objects. Self-taught in engineering, it occurred to Albert one fine spring day that he might “self-actualize” by combining his greatest passions. And so, he built a BBQ that through entirely innovative heat manipulation techniques engineered by Albert, could draw a 2D image on whatever food was being BBQed. Knowing he had invented something cool, and wanting to follow in the footsteps of Silicon Valley entrepreneurs young Albert sought his fortune.

During the development phase Albert had demonstrated his BBQ to a group including close friends, and members of his family. He even gave away several pre-production iterations of his BBQ to some members of this small circle. As a result, Albert was able to self-finance quite comfortably with just the help of friends and family, and with some further technical refinements started producing a small number of his first-generation BBQ’s. Serendipitously, just as Albert was starting out, you became an associate specializing in copyright, trademark and passing-off law at the Vancouver based law firm of “Ladner, Ups” that does the legal work for Albert’s company “Weber-Eisenstein Inc.”, of which Albert is the controlling shareholder and CEO.

Over just a few short years, you have been asked to give opinions on the following several scenarios where all of the relevant actions took place in Canada by parties over the age of majority and would be decided pursuant to current Canadian law.

Albert wanted to call Weber-Eisenstein Inc.’s first commercial drawing BBQ the “Genesis” as a tribute to the beginning of his business. Albert’s VP Marketing felt that the product name “Weber-Eisenstein Genesis” was too long and unwieldy. Albert agrees to use only “Weber”, the first of his hyphenated last names to market the product itself, but insists that on all advertising, announcements, correspondence, and websites the corporate name “Weber-Eisenstein Inc.” must appear. Albert’s company produces their first one-hundred Weber Genesis BBQ’s and are able to sell them very quickly to various commercial establishments for resale to consumers. Weber-Eisenstein Inc. does not have, nor at this time need to have a consumer-facing website. However, some of the hardware stores the one hundred BBQ’s were sold to do advertise through various media that they have for sale “Weber Genesis BBQ’s” that create art food while BBQing.

The first one hundred BBQ’s sell out very quickly and you are asked to prepare a trademark application. Before your trademark applications can be filed a letter is received from counsel to Weber-Stephen Canada Company and its affiliates (collectively “Weber”) who manufacture, market and sell Weber BBQ’s in Canada, including one model currently named the “Weber Genesis II”. The letter from counsel threatens trademark and passing off litigation against your firm’s client, Weber-Eisenstein Inc.

Weber-Stephen Canada Co. is the Canadian subsidiary of Weber-Stephen Products LLC, a privately held company headquartered in Palatine, Ill., U.S.A., who is at the time the world's premier manufacturer of charcoal, gas and electric grills, grilling accessories, and award-winning cookbooks and mobile applications. Weber-Stephen Canada Co. commenced operations in September 2014 with the goal of expanding Weber's presence in a growing Canadian retail grilling business and to strengthen existing retail and consumer relationships. Weber's products are sold worldwide at select national home centers, specialty hardware stores, patio stores and other retail outlets. In 2018 Weber's estimated annual revenues (\$144.5M USD) were roughly three times those of their closest competitor Napoleon Grills ((\$50M USD estimated). At the time Albert commenced his BBQ grill business, Weber had the strongest customer support program in the industry.

1. You are asked to provide your views on:
 - a. Your client's prospects in defending such legal proceedings against them. Specifically, you are asked to outline possible defences and the prospect of success of those defences based on the Trademarks Act, the law of Passing Off, and related judicial decisions.
 - b. The prospects of successful trademark applications being filed for "Weber-Eisenstein Inc." and "Weber Genesis Art BBQ".
 - c. Possible branding strategies that might diminish the prospects of success of any legal proceeding commenced by Weber-Stephen Canada Company, and enhance the prospects of success of the Trademark Applications you are intending to file.
2. Albert's BBQ's became a huge hit with consumers. The original model described above had a limited number of 30 drawings of fairly generic scenes that were pre-programmed and the consumer could simply dial in. The drawings were done by a friend of Albert's who was paid by Weber-Eisenstein Inc. and who provided all copyright clearances in return. After further research and development, the precision of the BBQ heat manipulation techniques engineered by Albert improved dramatically allowing for a number of artistic possibilities for the second generation of the BBQ. There are two systems that will be built into the BBQ for different markets:
 - a. The first system would be contained in a reasonably priced consumer-grade BBQ aimed at the mass-market and would allow the owner of the BBQ to upload any image from their personal computer or smartphone (including any image from the internet) to the BBQ and have the BBQ recreate that image on the food being BBQed.
 - b. The second system would be professional grade and only sold to restaurants. It would have the same capabilities as the first system (a. immediately above) but also have a computer effectively built into the BBQ so that no smartphone or other computer device would have to be attached to achieve the same BBQ art.

You are asked for your legal opinion only with respect to the second professional grade system (b. immediately above). Beyond the various expected copyright infringement questions, you are also asked to consider what impact the fact that the "food art" is usually consumed reasonably quickly after being BBQed might have in law.

3. Sales of the second-generation computerized art BBQ go extremely well for your client. Albert's brilliant ability to innovate continues as well. He successfully patents a fully indoor Art BBQ that requires no additional venting or airflow. As a result Weber-Eisenstein Inc.'s BBQ's become the leading BBQ in the world, finding a place in over 40% of homes in North America and Europe. Albert's former VP Marketing is now the Chief Marketing Officer of Weber-Eisenstein Inc. and proposes a seemingly elegant plan for the third generation BBQ now that they had such massive market penetration. She proposes the Weber-Eisenstein Inc. should build a network and that connects all Weber-Eisenstein Inc. BBQ's so that their owners can communicate in real time with each other through by video, audio, text and could readily share content with each other directly from BBQ to BBQ or through Weber-Eisenstein Inc. now massive website presence. This would be known as the "Weber-Eisenstein Inc. Art BBQ Platform". The Chief Marketing Officer even believes that this kind of platform architecture may even have advantages for the company from a legal liability perspective. You are asked for your opinion on the "platform" idea, and whether it would indeed be helpful from a legal liability perspective for the company to position the networking Art BBQ's as a "platform". You are also asked for your advice (related to intellectual property law issues only) on what steps Weber-Eisenstein Inc. could take to minimize potential legal liabilities if the "platform" path were chosen.

4. Now slightly older, Albert's BBQ adventures have mostly allowed him to follow in the footsteps of the Silicon Valley entrepreneurs he so admired. One day, however, while reading an article about how Steve Jobs triggered the re-building of Apple by launching a product called the iPod which changed the music industry forever, Albert had another big idea. He wondered whether he could somehow modulate the sounds that a BBQ makes to result in musical notes. And he built exactly that. There were some limitations. Only the instrumental parts of songs can be replicated, and fidelity to the notes of the original musical composition averaged only about 70%. The "BBQ Music System" would be installed on both consumer and restaurant art BBQ's, and content could and would be shared across the now thriving Weber-Eisenstein Inc. Art BBQ platform so that even if a song originated in Montreal it could be heard via the Weber-Eisenstein Inc. networked platform the speakers built into a Weber Art BBQ residing Vancouver backyard.

You are asked for your views on whether any parts of this plan would infringe provisions of the Copyright Act.

5. SOCAN, the Society of Composers, Authors and Music Publishers of Canada, feel strongly that musical features now contained in Weber-Eisenstein Inc. Art BBQ's are unfair to their members. Among other steps, they launch a website intended to look very much like the Weber-Eisenstein Inc. website mentioned in Part 3 above. In particular they always put the "f" ahead of the words "art BBQ", have mock flames with the words "Burn Baby Burn" coming out of every BBQ depicted on the website, and have changed the corporate logo from "Weber-Eisenstein Inc." to "We're no – Einstein Inc.". With only the three exceptions mentioned, the ACTRA version of the Weber-Eisenstein Inc. website and the actual Weber-Eisenstein Inc. website are nearly identical.

You are asked for your views as to whether a trademark action against SOCAN would likely succeed.

Question 2 [25 marks, 45 minutes]:

Answer one of Question A or Question B

- A. You are a patent and trademark lawyer. You are approached by U.S. neuro-physicist Dr. T.H.E. Borg. Dr. Borg and his consortium of like-minded scientists wish to patent a cyborg technology they have developed. Their technology (which they have apparently tested on themselves) has many groups of minuscule, flexible electrode "threads" implanted into the human brain by a neurosurgical robot. These threads detect and record the electrical signals in a person's brain, and can transmit this information outside the body to an extraordinarily powerful quantum computer which is linked back to that person, and that can also be networked in real time to up to 999 other individuals, each of whom is linked to their own external quantum computer. Dr. Borg explains that through this method, not only is there an extremely high-bandwidth brain-machine interface (BMI) system that will enhance an individual's own brain and endow it with superhuman intelligence via a symbiosis with artificial intelligence (A.I.), that experience can be exponentially scalable. Dr. Borg further explains further explains that such scalability is potentially infinite. Though current experimentation can link up to a 1,000 such "Hu-ters" (named by combining the word "Human" and the word "Computer"), it is expected that the networking limitations can quickly be overcome to allow for 10,000, then a 100,000, and then a million interconnected Hu-ters. "We won't even feel remotely human anymore, I guarantee it" exclaims Dr. Borg. Which is why Dr. Borg wishes to market his technology, once patented, under the brand "Beyond Human".

Dr. Borg has come to you for your views on whether his consortium's creation is patentable in Canada. Please provide your opinion.

OR

- B. Cheating in videogames has changed a lot over the years. Today with the huge growth of esports and online multiplayer and massively multiplayer games, videogame cheats have become a serious problem for game developers and the entire video-game industry.

Gamers with the intent to cheat and a decent knowledge of computer coding can modify videogames, giving themselves an edge, or they can sell their cheats to others. Videogame cheats are not unlike professional quarterbacks who deflate footballs beyond the rules of the game so that they can grip the ball better and throw it more accurately. Professional sports cheating can also be as technological as in videogames, witness the Houston Astros elaborate scheme steal the catchers sign for which baseball pitch was about to be thrown and transmit that information to their hitter via a secret buzzer system worn by hitter on their body. Videogamers willing to break the rules can improve their accuracy with aimbots (a software tool used in first-person shooting games that allow the player to shoot enemies without having to aim their weapon), or triggerbots (a cheat that automatically shoots for a user when a crosshair is placed over an enemy), see their enemies behind terrain using wallhacks (a software patch enabling a player to cheat by

modifying the properties of walls, as by making them transparent or nonsolid), or in strategy videogames eliminating "fog of war" to get advanced knowledge of their opponent's previously hidden units and terrain. With the growing rewards available in esports competitions or through building a following as a streamer, the incentive to cheat is stronger than ever. Game makers have always been concerned that cheaters will negatively impact the enjoyment and/or trustworthiness of their games, but never more so than today.

Developers have tried many ways to eliminate cheating, and gamers have seemingly come up with just as many workarounds. Some jurisdictions have even criminalized certain forms of cheating.

The question in Canada is whether videogame cheating in Canada can be considered fair dealing (a user's right)? What do you think and why? Do you see differences between cheats that alter game code and cheats that do not? Discuss, supporting your position, with reference to fair dealing jurisprudence.

Question 3 [15 marks, 27 minutes]:

Discuss the case that you read this semester in this course that has most influenced your thinking about intellectual property law and explain why.

END OF EXAMINATION

Stay safe and take care of yourself over the summer break.