

Intellectual Property
Fall 2025
Final Exam Memo

I was pleased with your answers, which were generally good. I will of course be happy to discuss your exams and your grades with you if you have any questions.

The sample answers that follow are not meant to be exhaustive discussions of every nuance in the questions. Instead, they have two things in common: (1) they are substantially under the word limit, and (2) they would have received full credit for the question.

True/False

6 questions, 5 points each (30 points total) / 50 words each

Answer each of the following questions with "true," "false," or "it depends." Justify your answer in a sentence or two.

1. Kermit is considering the mark EASY BEING GREEN for a public-awareness campaign to encourage recycling. True or false: Kermit will acquire trademark rights in the mark as soon as he starts using it, without needing to wait to prove secondary meaning?

True. EASY BEING GREEN is a suggestive mark because it does not literally describe Kermit's services but instead suggests something about them. Suggestive marks are protectible immediately without secondary meaning.

2. Rowlf uses his cell phone to record himself improvising a jazz piano song. True or false: Rowlf's song is not yet copyrightable because he has not written it out as sheet music?

False. Copyright subsists in a work when it is "fixed in any tangible medium of expression." 17 U.S.C. § 102(a). The cell phone is a tangible object in which the song is fixed.

3. Camilla has filed a utility patent application claiming a binding agent for making juicier hamburgers. A Swedish chef has been serving meatloafs including this binding agent in her restaurant for five years. True or false: The meatloafs count as prior art for purposes of novelty under § 102?

True. The meatloafs are "on sale" and "in public use." 35 U.S.C. § 102(a) (1) and they are prior to Camilla's filing date.

4. Regardless of your answer to (2), assume for purposes of this question that the answer was "true." True or false: The meatloafs count as prior art for purposes of nonobviousness under § 103?

True. The meatloafs are analogous art because they are in the same field as hamburgers (ground meat-based foods).

5. Rizzo acquires coffee-table art books, cuts out the photographs, mounts them in frames, and sells them to the public. One of the pub-

lishers sues him for violating the public distribution right. True or false: *Rizzo's conduct constitutes copyright infringement?*

False. Rizzo is protected by first sale. He is the "owner" of the art books, and so he can sell the pages from the books without infringing the distribution right. 17 U.S.C. § 109(a).

6. Janice uses the ELECTRIC MAYHEM trademark on January 1. Zoot files an application for a federal registration for the mark on February 1. Janice files an application on March 1. Zoot uses the mark on April 1. True or false: *The USPTO should grant Janice's application?*

True. Janice is the "owner" of the mark and has common-law priority as senior user. Zoot's earlier application is invalid because he has not yet used the mark in commerce.

Short Answer

6 questions, 15 points each (90 points total) / 250 words each

7. Gonzo has come up with an elegant new juggling pattern, in which each hand alternates in front and in back and the balls alternate passing over his left and right shoulders. *Which body or bodies of IP law, if any, can Gonzo use to secure effective protection for the pattern?*

Trade Secret: Not useful. A skilled juggler could watch Gonzo's routine and reverse engineer the pattern.

Utility Patent: The pattern is a patentable "process," 35 U.S.C. § 101 and it is not an abstract idea under *Alice*. It is useful for entertainment purposes. The ability to describe the steps of the pattern (throw from left hand, catch with right hand, etc.) makes it sufficiently definite to be claimable.

Copyright: The pattern is original and it might be regarded as expressive. But it is an uncopyrightable "procedure, process, system, [or] method of operation," 17 U.S.C. § 102(b). Gonzo could try to argue that his copyright involves only the visual display, but the utility patent (or even the possibility that he could get one) will weigh against him.

Trademark Not useful. The pattern is aesthetically functional.

False Advertising: Not useful. Someone who performs the pattern is not making any false claims about it.

Right of Publicity Not useful. Someone else could perform the pattern without purporting to be Gonzo.

Design Patent: Not useful. The pattern is not a protectable “article of manufacture.”



8. In 2024, the operators of Metropolitan Oakland International Airport (airport code: OAK) announced that it was changing its name to San Francisco Bay Oakland International Airport. The operators of San Francisco Airport (airport code: SFO) sued for trademark infringement and unfair competition under § 43(a). Neither airport is in the city of San Francisco; both airports are adjacent to San Francisco Bay, on op-

posite sites, eleven miles apart. (See map above.) *Who should win this suit, and why?*

SFO has the better argument. SAN FRANCISCO AIRPORT is a descriptive trademark—it describes the airport’s location—but it has substantial secondary meaning. SFO is not literally in San Francisco, so it is literally misdescriptive, but consumers probably recognize that it is *near* San Francisco, so it is not deceptive. OAK’s proposed new name is highly similar in sight, sound, and meaning; the distinguishing features (“BAY,” “OAKLAND,” and “INTERNATIONAL”) appear in the middle and are easy to overlook. Given the close proximity of the services, consumer confusion is likely.

OAK’s best argument is that its own name is (geographically) descriptive fair use. The airport is adjacent to San Francisco Bay. This might be a case, however, where a court finds that consumer confusion is so likely that the defense fails. A court could also find that the name change was made in bad faith deliberately to trade on SFO’s name recognition.

OAK’s other good argument is that the airport codes (SFO vs. OAK) are the main way travelers identify airports and that they are very unlikely to be confused. This argument, however, proves too much, because it would let OAK change its name to anything, even “San Francisco Airport.”

9. “Miss Piggy” (a pseudonym) is a makeup influencer who posts tutorials to YouTube. Her videos are filmed in front of a swirly pink background; her hair is always dyed in two contrasting colors; she frequently uses French phrases; and she sometimes interrupts her videos to demonstrate martial-arts moves. Recently, another influencer, “Annie Sue,” has started posting makeup product reviews to YouTube. Annie Sue’s videos are are filmed in front of a swirly pink background; her hair is always dyed in two contrasting colors; she frequently uses French phrases; and she sometimes interrupts her videos to demonstrate martial-arts moves. *Can Miss Piggy use IP law stop Annie Sue from using a similar aesthetic in her videos?*

Copyright: An “aesthetic” (or style) is not a copyrightable work of authorship. Instead, Annie Sue infringes if her videos are substantially similar to Miss Piggy’s videos. Many aspects (background, hair color, French, martial arts) are the same, although Annie Sue posts product reviews rather than tutorials. None of the similar aspects is infringing by itself, but the combination might be, especially because none of them is a *scène à faire* for makeup videos. Overall, Miss Piggy should at least be able to get to a jury on the issue of infringement.

Trademark: Miss Piggy could argue that the style of her videos is protectable as an indication of their source (her). Certainly some of the video aspects could be distinctive and source-indicating. Annie Sue could reply, however, that these aspects fail to function as a mark or are aesthetically functional—they are part of the entertainment and tutorial services that Miss Piggy offers, not service marks for those services. Overall, Annie Sue has the stronger argument and a trademark suit is likely to fail.

False Advertising: There is no false advertising claim, because Annie Sue is not making any false statements about Miss Piggy, the makeup, or her own videos.

Right of Publicity: Unless viewers think that Annie Sue *is* Miss Piggy or that her videos are endorsed by Miss Piggy, there is probably no right of publicity claim here.

10. When OpenAI launched its Sora video creator tool to the general public, it prevented Sora users from creating videos of living people, but allowed Sora users to create videos of dead people. A month later, OpenAI reversed this policy and restricted Sora users from creating videos of dead “historical figures” unless their estate representatives consented. *Was the old policy or the new policy more consistent with what the right of publicity allows and disallows?*

Neither policy is perfectly consistent with the right of publicity, but the new policy comes closer. Most states have a postmortem right of publicity, which can be owned by the person’s heirs. The old policy’s categorical exemption for dead people would allow users to create videos that violate those rights. Some of those videos would be legal because they

show long-dead people (whose rights have expired) or because they make newsworthy uses (*Parks Institute*) or transformative uses (*Comedy III*). But many other videos would still violate the rights of the people they depict.

The new policy recognizes that dead people can still have rights of publicity. But the “historical figures” test is strange. It is unclear which deceased people are “historical.” It is also unclear when, if ever, this restriction expires, even though the postmortem right of publicity usually has a finite term (ranging from about 0 to 70 years after death). Private citizens have a right of publicity too, even if they are not “historical.” Newsworthy and transformative uses are forbidden under the policy but would still be allowed by the right of publicity.



11. Campbell’s sells a well-known line of soups in cans with red-and-white labels (above, right). Shelby Campbell, a candidate for Congress, used a red-and-white soup-can design on her campaign website, yard signs, and flyers (above, left). *If Campbell’s (the company) sues Campbell (the candidate) for trademark infringement, who should win and why?*

Campbell’s should probably win. Campbell’s use of the image and “CAMPBELL” marks is commercial enough for the Lanham Act to apply. Purely political uses like campaign slogans are not commercial, but if she is fundraising using these images, that is commercial. (Cf. *Blinded Veterans Association*.) There is no likelihood of consumer confusion

about source; no one will think that a political candidate is selling soup. But Campbell's has a reasonable argument under § 43(a) that consumers will be misled into believing that Campbell's has endorsed Campbell and/or approves of her message. There is no absolute right to use one's name when consumer confusion is likely (*Findlay v. Findlay*) and by using the soup-can logo, Campbell has gone well beyond using just her name.

Campbell's best defense would be that she is making a parody of the soup-can logo. But the point of her use is to gain general awareness, not to comment on Campbell's or its products. After *Jack Daniel's*, she cannot argue that she is making an expressive use subject to the *Rogers* test because she is using the design as a mark for her campaign. This is not a descriptive fair use because the red-and-white design does not describe Campbell, and it is not a nominative fair use because she can describe herself and her candidacy without using the design to refer to Campbell's soups.

[In real life, the lawsuit settled. Campbell agreed not to use the logo in her campaign materials, but reserved the right to use the term "soup".]

12. Sam recently published a book, *120 Patriotic Poems*, ranging in length from 3 to 30 lines. Statler and Waldorf are professional content creators who posted a series of 120 "reaction videos" to TikTok, each of which consists of one of them reading aloud one of Sam's poems, followed by a sarcastic joke from the other about how bad the poem is. *If Sam sues Statler and Waldorf for copyright infringement, are the videos a fair use?*

Probably, but this is a close issue.

Factor 1: Statler and Waldorf's use is for a favored purpose ("criticism, comment"), and it is moderately transformative (they are discussing Sam's poetry and putting it in a negative light). But they don't change the wording of the poetry, and their use is commercial.

Factor 2: Sam's poetry is published (favors no one) and it is expressive (mildly favors Sam).

Factor 3: The videos each use an entire poem, and the overall series uses Sam's entire book. This is both quantitatively and qualitatively significant. In addition, they use more of the poetry than is necessary for

the criticisms they are making of it. They could quote excerpts from the longer poems, and make videos reading only some of them.

Factor 4: Some viewers might watch the reaction videos instead of buying the book, but because the videos are so critical, these are unlikely to be the same audiences. Lost sales due to criticism are not something an author has a right to prevent.

Long Answer

60 points / 1500 words

13. Two inventors, Dr. Honeydew and Dr. Beaker, have filed applications with the USPTO relating to making carrots magnetic so that they stick to your fork. The timeline of events is:

- January 1: Henson Co., a large food-sciences supply company, releases WILKINS, a flavorless food-safe liquid that is high in iron, and markets it for use as an ingredient in foods for people with low iron levels.
- February 1: Muppet Labs, another food-sciences supply company, releases the ML-108, a machine that uses infuses liquids into vegetables.
- March 1: The USPTO grants Muppet Labs patent # 8,435,200 on the arrangement of valves in the ML-108.
- April 1: Honeydew has the idea to use the ML-108 with WILKINS and vegetables, and use an electromagnet to magnetize the iron-infused vegetables. He buys an ML-108 and begins experimenting.
- May 1: Beaker has a similar idea, constructs a device in his lab that functions identically to the ML-108, and begins experimenting.
- June 1: Beaker files a provisional application, describing the process but not including specific numerical values for the iron concentration.
- July 1 Honeydew succeeds in magnetizing a carrot by using an iron concentration of 200 mg/mL.
- August 1: Beaker succeeds in magnetizing a potato by using an iron concentration of 250 mg/mL.

- September 1: Honeydew files a non-provisional application with one claim to “a magnetic carrot.” The specification details the process, including an iron concentration of 200 mg/mL.
- October, 1: Beaker files a non-provisional application, relating back to his earlier provisional application, claiming “(1) a method of magnetizing a vegetable, comprising ... [the steps of the process with] an iron concentration between 100 and 300 mg/mL ... (2) the method of claim 1, wherein the iron concentration is 250 mg/mL”

Which claims in Honeydew and Beaker’s applications, if any, should the USPTO grant a patent on? Has either of them infringed on any IP rights?

Both applications pass most of the thresholds for patentability. They are proper subject matter because they claim a product or composition of matter (Honeydew’s claim) and a process that transforms a physical object (Beaker’s claims). They are useful because magnetic carrots stick to your fork, making them easier to eat. Both applications appear to be sufficiently definite on the given facts, and the fact that both investors succeeded and both applications describe the process suggests that the applications are sufficiently enabled. Thus, we turn to novelty and nonobviousness, which requires an assessment of prior art.

Beaker’s priority date is June 1, the filing date of his provisional application. His subsequent nonprovisional application is entitled to that priority date. Thus, the relevant prior art consists of WILKINS, the ML-108, the ’200 patent, and his and Honeydew’s prior activities. Assuming normal lab conditions, neither Beaker nor Honeydew engaged in public use, and neither has placed the invention on sale. None of the other prior art combined a high-iron liquid with the ML-108 infusion process, so both of Beaker’s claims are novel. Whether they are obvious is not possible to determine on the given facts; the fact that both inventors were working simultaneously is mild evidence that they are, but on the other hand, nothing in the prior art suggests magnetizing vegetables. **Both of Beaker’s claims should issue.**

Honeydew’s priority date is September 1. Beaker’s application is prior art as against Honeydew. The only novel element of Honeydew’s *claim* is a “carrot” as opposed to the process of infusing vegetables (but

not specifically carrots) described in Beaker's provisional application. The product of the process (the magnetized vegetable) is inherent in the process itself (the infusion); anyone who practices the infusion process necessarily ends up with the magnetized vegetable. The claim to a "carrot" is novel; disclosure of a genus does not anticipate a species within the genus. There is, however a strong argument that given a process for magnetizing vegetables it is obvious to apply the process to carrots. Carrots do not differ in any essential or unpredictable way from other vegetables, so far as we know. Honeydew's application should be denied.

Honeydew has not infringed on any third-party IP rights. Muppet Labs's rights in the '200 patent are exhausted as to the ML-108 that Honeydew bought. Beaker, however, infringes the '200 patent by making and using his own version of the ML-108, including its patented valve arrangement. Beaker has infringed the '200 patent but Honeydew has not.