

# INTELLECTUAL PROPERTY

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## AMALGAMATED RELEASED MULTIPLE-CHOICE QUESTIONS

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**Updated April 13, 2017.**

**This document contains all released multiple-choice questions useful for studying for the Intellectual Property survey course.<sup>1</sup>**

**Answers for these questions are in a separate document in the Exam Archive at [ericejohnson.com](http://ericejohnson.com).**

### *Some Typical Notes and Instructions:*

1. Answer the questions based on the general state of the common law and typical statutory law in the United States, including all rules, procedures, and cases as presented in the course, as well as, where appropriate, the theory, history, and skills covered in the course. Your goal is to show your mastery of the course material and your skills in analyzing legal problems. It is upon these bases that you will be graded.
2. All facts take place in the United States, unless otherwise noted. Assume that today's date is *[today's date]*, unless indicated otherwise.
3. Any reference to a "patent" is a reference to a utility patent, unless otherwise specified.
4. Any reference to a patent application is a reference to a nonprovisional application, unless otherwise specified.
5. Unless otherwise specified, the term "trademark" is used in the common-law sense and, for instance, includes service marks.
6. Each question has one correct answer. Choose the correct answer based on the materials assigned and information presented in the course.
7. Each correct answer is worth one point. There is no penalty for incorrect answers.
8. A reference to "can sue," "can bring an action," "has a claim," etc., refers to a plaintiff's ability to properly allege and plead a claim with some substantial promise of success.

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<sup>1</sup> There are a few additional publicly released questions from the practice exam for the 2006 course Patent Law (available in my Exam Archive online). But I don't recommend using that document for the contemporary survey course in Intellectual Property. What questions there are in that document that would be useful for IP students have already been incorporated (with slight modification) into this document as questions 36-38.

1. Hexetron Systems, Inc. manufactures and sells a line of hand-held radiation detectors. The plastic and metal housings of all of Hexetron's detectors have a distinctive dark purple color.

Which of the following regimes offers Hexetron the best prospects for intellectual-property protection for the dark-purple color scheme for hand-held radiation detectors under these facts?

- (a) copyright
- (B) trademark
- (C) patent
- (D) right of publicity
- (E) trade secret

2. Hexetron Systems, Inc. has developed lengthy software code for a computer program that uses mathematical modeling to analyze the stress placed on aircraft wings during atmospheric turbulence. In order to satisfy regulators and others about the efficacy of the software for deriving useful engineering results, the software source code has been made open to inspection. Based on their review, experts have agreed that the software correctly applies well-understood mathematical analysis in modeling materials dynamics.

Which of the following regimes offers Hexetron the best prospects for intellectual-property protection for the software code under these facts?

- (A) copyright
- (B) trademark
- (C) patent
- (D) right of publicity
- (E) trade secret

3. Hexetron Systems, Inc. has produced a training film that demonstrates safety procedures when dealing with radioactive materials.

Which of the following regimes offers the best prospects for intellectual-property protection for the film under these facts?

- (A) copyright
- (B) trademark
- (C) patent
- (D) right of publicity
- (E) trade secret

4. A researcher for Hexetron Systems, Inc. was reading printed volumes of *The Alaska Journal of Aerospace Metallurgy*, a journal which was only published during a brief span from 1972 to 1973. Within the fragile, dusty pages, the researcher came across a formula for creating a titanium-aluminum alloy with incredible properties of strength, durability, and resistance to corrosion. Despite the fact that this alloy would represent an incredible breakthrough for the aerospace industry, no one has used the formula. Apparently, no one ever noticed the write-up in this obscure journal.

Which of the following regimes offers Hexetron the best prospects for intellectual-property protection for the alloy formula under these facts?

- (A) copyright
- (B) trademark
- (C) patent
- (D) right of publicity
- (E) trade secret

5. The name and a photograph of Wilford X. McStanley, the founder of Hexetron Systems, Inc., was featured in a full-page magazine advertisement for Glen Gàidhlig, a brand of scotch whisky. The ad claims that McStanley drinks Glen Gàidhlig scotch regularly. And, in fact, he does.

Which of the following intellectual-property regimes offers the best prospects for a cause of action brought by McStanley against Glen Gàidhlig?

- (A) copyright
- (B) trademark
- (C) patent
- (D) right of publicity
- (E) trade secret

6. An engineer for Hexetron Systems, Inc. figured out a clever new way to shape the lid for the battery compartment on hand-held radiation detectors such that the lid can easily be unlatched and opened, or closed and secured, even when the operator is wearing heavy lead-shielded gloves.

Which of the following regimes offers the best prospects for intellectual-property protection for the shape of the battery compartment lid under these facts?

- (A) copyright
- (B) trademark
- (C) patent
- (D) right of publicity
- (E) trade secret

7. Which of the following constitutes patentable subject matter?
- (A) a toxin – where such toxin is found on the skin of a previously unknown tree frog of the Amazon basin, which, when administered to patients with mesothelial-cell cancer, causes a substantial reduction in the number of cancerous cells
  - (B) an idea – where such idea is that there is a mathematical relation among (1) the exposure time of a tumor to a specified alpha-radiation emitting source, (2) the size of the tumor in cubic centimeters, and (3) the success rate of the procedure as determined by survival rate at five years
  - (C) kidney cells – where such cells are found in wild pigs of the genus *Hylochoerus*, which, when injected into a human tumor of cholangiocellular carcinoma, cause a strongly beneficial immune-system response in the patient without offsetting pathological effect
  - (D) a laparoscopic surgical technique – where such technique is one in which the renal vein, reached through the retroperitoneum, is clamped for approximately 30 seconds or less while cancerous glomeruli belonging to the juxtamedullary nephrons are resected
  - (E) a phrase – where such phrase is “Cancer Schmancer” for a series of irreverent television commercials touting the research achievements of a pharmaceutical company
8. The power of Congress to create the current scheme of federal trademark law derives from which of the following?
- (A) the power of Congress to regulate interstate commerce, as provided by the U.S. Constitution
  - (B) the U.S. Constitution’s specifically enumerated grant of power to Congress “[t o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”
  - (C) the tax-and-spend power provided under the U.S. Constitution
  - (D) the supremacy clause of the U.S. Constitution
  - (E) the inherent sovereignty of the federal government, cognizable through the Statute of Monopolies
9. If a trademark is federally registered on the Principal Register today, how long will trademark protection last under current federal trademark law, assuming renewal?
- (A) 20 years from the date of the application
  - (B) 28 years, plus a renewal term of an additional 28 years, for a total of 56 years
  - (C) the life of the registrant plus 70 years
  - (D) 295 years
  - (E) potentially forever, if there is continued commercial use

10. If a work is written and published today by a natural person under that person's real name, how long will copyright protection last under current federal copyright law?
- (A) 20 years from the date of the application
  - (B) 28 years, plus a renewal term of an additional 28 years, for a total of 56 years
  - (C) the life of the author plus 70 years
  - (D) 295 years
  - (E) potentially forever, if there is continued commercial use
11. If a patent is obtained on a useful, nonobvious article of manufacture, machine, or process, how long will patent protection last under current federal patent law, assuming maintenance fees are paid?
- (A) 20 years from the date of the application
  - (B) 28 years, plus a renewal term of an additional 28 years, for a total of 56 years
  - (C) the life of the author plus 70 years
  - (D) 295 years
  - (E) potentially forever, if there is continued commercial use
12. Sharon Myrnezicke runs a small hairstyling salon downtown. She sells a brand of shampoo called Myrnezicke's Moisture Maintainer. A 16-ounce bottle sells for \$80. Sharon has a secret: The bottles labeled Myrnezicke's Moisture Maintainer contain plain, unadulterated Herbal Essences Hello Hydration shampoo, which can be purchased in regular grocery and drug stores everywhere. Afraid that her clientele might get suspicious if they see her buying large quantities of Herbal Essences Hello Hydration, Sharon has her husband, a long-haul trucker, buy up dozens of bottles when he is out on the road, at least a few states away.
- Herbal Essences Hello Hydration is manufactured and distributed by Proctor & Gamble. Which of the following is the best cause of action for Proctor & Gamble to allege against Sharon in a lawsuit?
- (A) passing off
  - (B) reverse passing off
  - (C) copyright infringement
  - (D) patent infringement
  - (E) mask-work infringement
13. Which of the following remedies are not available for patent infringement?
- (A) damages in the amount of the profits the patentee would have received but for the infringement
  - (B) damages in the amount of the defendant's profits that result from the defendant's infringing activity
  - (C) damages measured by computing reasonable royalties
  - (D) an injunction prohibiting further manufacture of a claimed invention
  - (E) an injunction prohibiting further use of a claimed invention

14. Note the following:

- I. the shape of light bulb, where the shape functions to make the light bulb more energy-efficient and also serves to identify the commercial source of the light bulb
- II. the term “Comfortable Shoes” for shoes that have just been introduced to the market
- III. the made-up term “Sviflux” for a brand of microprocessor

Which of the following describes what is protectable as a trademark?

- (A) I only
- (B) II only
- (C) III only
- (D) I, II, and III
- (E) None of I, II, or III

NOTE THE FOLLOWING FOR QUESTIONS 15 AND 16:

Greta is a website designer based in North Dakota. She was hired by the California law firm of Luong & Lopez LLP to design a new firm website. After discussing L&L’s needs with its managing partner – the one clear command was to not use music or sound effects – Greta designed several mock-ups with various colors and design themes for L&L to consider. Greta overnighted these mock-ups to Luong & Lopez on a CD-ROM. The law firm’s partners, after several long and contentious executive-committee meetings, picked their favorite scheme and informed Greta. For 40 days, while the law firm waited anxiously, Greta coded and bug tested. When she was through, she uploaded the new website to the firm’s server, and the response was overwhelmingly positive. Everybody loved it. Back when she was hired, and before she began consulting with the managing partner, Greta signed a letter agreement stating that she “agree[d] that all rights in the website will belong exclusively to Luong & Lopez LLP.”

Harold is the recruiting coordinator at Luong & Lopez. It’s a stressful position. Harold is expected to attract top students to become associates at the firm, despite the fact that not only does L&L pay some of the lowest wages in the market, but L&L also has the highest billable-hour requirements west of the Mississippi. Even worse, partners at L&L are famous for screaming at subordinates. Harold’s situation is particularly bad, since his office is right next to the office of the managing partner. She has often screamed at Harold right through the wall. It’s a miserable place, but it is Harold’s job to make it look alluring to law students. One day, in a flash of genius, Harold realized he could try to attract law students by playing up the “prestige” of a career at L&L. This morning, he drafted a brochure along these lines and, just a few moments ago, he e-mailed it to the managing partner. He’s not sure what she’ll think – she often reacts badly when Harold does things on his own like this – that is, without acting on specific instructions that she’s given him. At this very moment Harold is clutching his lucky bottle cap and taking his ninth antacid tablet of the day.

India is a first-year associate at Luong & Lopez. In her spare time, she has written a book about warm, cuddly kittens. It's called *Let's Think Happy Thoughts*.

15. Note the following:

- I. The website Greta designed and coded.
- II. The brochure Harold drafted.
- III. The book India wrote.

For which of the above numbered items is Luong & Lopez LLP the author under the "work for hire" provisions of federal copyright law?

- (A) I only
- (B) II only
- (C) III only
- (D) I and II only
- (E) I, II, and III

16. Note the following:

- I. Design patent
- II. Trade secret
- III. Prima-facie intellectual property right

Which of the above could be awarded for Harold's idea of doing brochures aimed at law students emphasizing the prestige of a career at a certain law firm?

- (A) I only
- (B) II only
- (C) III only
- (D) I or III, but not II
- (E) None of I, II, or III



17. The power of Congress to create the current scheme of federal copyright law derives from which of the following?

- (A) the power of Congress to regulate interstate commerce, as provided by the U.S. Constitution
- (B) the U.S. Constitution's specifically enumerated grant of power to Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"
- (C) the tax-and-spend power provided under the U.S. Constitution
- (D) the supremacy clause of the U.S. Constitution
- (E) the inherent sovereignty of the federal government, cognizable through the Statute of Monopolies

18. Everstan Amusements, LLC operates a wild-west-themed amusement park called "Buckaroo Gulch." Under which of the following circumstances is Everstan Amusements, LLC ("EA") most likely to not have enforceable trademark rights to the term "Buckaroo Gulch"?
- (A) EA fails to register "Buckaroo Gulch" on either the Primary Register or the Secondary Register.
  - (B) A judge issues a decision finding that "Buckaroo Gulch" is a suggestive term that lacks secondary meaning.
  - (C) EA manufactures souvenir sheriff badges using a variety of designs and logotypes, and there is no consistent type-style or font used for the words "Buckaroo Gulch" on the merchandise.
  - (D) EA licenses a t-shirt manufacturer, T&E Enterprises, to manufacture up to 50,000 t-shirts bearing the name "Buckaroo Gulch" through September 15, 2012 on the condition that "T&E shall manufacture and sell such t-shirts only insofar as the t-shirts are, in the reasonable opinion of T&E, of a high quality, and only insofar as T&E pays EA a five-percent royalty on the wholesale price of all units sold."
  - (E) EA uses different sources for the faux leather material that goes into EA's "Buckaroo Gulch" logo-bearing cowboy vests.

19. Note the following:

- I. The use was non-commercial.
- II. Only a small portion of the plaintiff's work was used.
- III. The plaintiff has long exhibited a lackadaisical attitude toward the enforcement of this particular copyright.

Which of the above tend toward a finding of fair use, as a defense to a claim of copyright infringement?

- (A) I and II only
  - (B) I and III only
  - (C) II and III only
  - (D) I, II, and III
  - (E) None of I, II, or III
20. Which of the following is not copyrightable?
- (A) a false biography that defames its subject
  - (B) a true biography that does not defame its subject
  - (C) a database of real phone numbers
  - (D) the instruction booklet for a useful process that converts complex carbohydrates to simple sugars
  - (E) an opera that contains dramatic as well as musical elements

NOTE THE FOLLOWING FOR QUESTIONS 21 AND 22:

Mallory lives in Maine. She owns a hardware store in Kennebunkport, Maine. On March 21, 2010, Mallory invented a new kind of pry bar that more effectively removes nails from wood. The pry bar works entirely by virtue of its shape: It has no moving parts, requires no special manufacturing techniques, and is made from ordinary materials. On July 3, 2010, Mallory began test marketing the pry bars by setting them out for sale in her hardware store, although she did not, in fact, sell any. On August 4, 2010, she sold her first pry bar. On August 24, 2010, Mallory signed a sales contract with retail giant Grout, Spackle & Beyond requiring her to deliver 100 pry bars to Grout, Spackle & Beyond's New England distribution center in Massachusetts by February 18, 2011.

Today Mallory comes to you seeking advice; she wants to protect her invention. She knows a little about patent law, and she is worried that her invention will be deemed obvious, based on the design of pry bars already on the market.

For these facts and related questions, assume that today's date is February 3, 2011, and choose your answers based on the state of the law prior to its amendment by the Leahy-Smith America Invents Act of 2011.

21. Which, among the following, is the best advice (or least worst) that you could give Mallory?
- (A) Apply for a copyright on the pry bar design, and refrain from selling any more pry bars until the copyright registration is obtained.
  - (B) Apply for copyright, but continue selling the pry bars in the meantime, since a common-law copyright becomes effective upon fixation in a tangible form.
  - (C) Apply for a patent, and, in the meantime, ramp up marketing efforts with the hope of, later in the prosecution process, helping to establishing nonobviousness through a demonstration of commercial success.
  - (D) Forgo a patent application and depend, instead, on trade secret protection for the invention.
  - (E) Simultaneously use patent law and trade secret doctrine to protect the pry bar invention.
22. If Mallory decides to apply for a patent, under 35 U.S.C. § 102, which of the following is effectively the last day that Mallory can apply for a patent?
- (A) February 18, 2011
  - (B) March 21, 2011
  - (C) July 3, 2011
  - (D) August 4, 2011
  - (E) August 24, 2011

23. Which of the following doctrines of intellectual property is not generally recognized in the United States?
- (A) database rights
  - (B) vessel hull design rights
  - (C) design patents
  - (D) plant variety protection certificates
  - (E) rights of publicity
24. Consider the following:
- I. Two legal persons may be independent co-owners of the same copyright.
  - II. Two legal persons may be independent co-owners of the same patent.
  - III. Two legal persons may be independent co-owners of the same trademark.
- Which of these statements are correct?
- (A) I, II, and III
  - (B) I and II, but not III
  - (C) I and III, but not II
  - (D) II and III, but not I
  - (E) not any of of I, II, or III
25. Which of the following most accurately orders intellectual property entitlements from longest duration to shortest? Assume that whatever needs to be done to maintain protection (payment of maintenance fees, continuous use, renewal, etc.) is done.
- (a) design patents, copyrights, utility patents
  - (B) utility patents, design patents, copyrights
  - (C) mask-work protection, software patents, trademarks
  - (D) trademarks, copyrights, utility patents
  - (E) vessel hull designs, utility patents, copyrights
26. The power of Congress to create the current scheme of federal patent law comes from which of the following?
- (A) the power of Congress to regulate interstate commerce, as provided by the U.S. Constitution
  - (B) a specifically enumerated grant of power in the U.S. Constitution to provide a limited term of exclusive rights to inventors
  - (C) the tax-and-spend power provided under the U.S. Constitution
  - (D) the supremacy clause of the U.S. Constitution
  - (E) the inherent sovereignty of the federal government

NOTE THE FOLLOWING FACTS FOR QUESTIONS 27 THROUGH 30:

Hexetron Supercomputing Systems creates a unique hexagonal frustum shape for its new supercomputer, the Gigagadget 3000. As supercomputers go, the shape is both new and strange. Certainly no one has ever thought to make a computer in such a shape before. While the shape results in some wasted space and makes cooling the processor core slightly more difficult, it does have the advantage of being “cool looking.” (Those are the words of Hexetron’s designers and marketing people.)

On December 3, Hexetron unveiled the supercomputer and offered it for sale. On December 4, Hexetron sold one unit to the U.S. Department of Energy for \$1.7 million.

The following illustration shows the Gigagadget 3000 side-by-side with IBM’s Blue Gene supercomputer at Argonne National Laboratory:



27. Suppose that on December 5, Hexetron applied to the USPTO for trademark registration on the shape of the supercomputer. Which of the following is the most plausible?
- (A) The examiner will reject the application because there has not been the requisite use in commerce.
  - (B) The examiner will reject the application because there is no inherent distinctiveness and no showing of secondary meaning.
  - (C) The examiner will reject the application on the basis that the claimed mark is not trademarkable subject matter.
  - (D) The examiner will reject the application on the basis that the claimed mark is functional.
  - (E) The examiner will allow the registration.
28. Suppose that on December 5, Hexetron applied to the USPTO not for trademark registration, but for a design patent for the Gigagadget 3000. Which of the following is the most plausible?
- (A) The examiner will reject the application because there has not been the requisite use in commerce.
  - (B) The examiner will reject the application because there is no inherent distinctiveness and no showing of secondary meaning.
  - (C) The examiner will reject the application on the basis that the claimed invention is not design-patentable subject matter.
  - (D) The examiner will reject the application on the basis that the claimed invention is functional.
  - (E) The examiner will allow issuance of the design patent.
29. Suppose that on December 5, Hexetron applies not for trademark registration, nor for design patent, but instead files a Form VA with the U.S. Copyright Office for copyright registration of the supercomputer as a sculptural work. Which of the following is the most plausible?
- (A) The examiner will reject the registration because there has not been the requisite use in commerce.
  - (B) The examiner will reject the registration because there is no inherent distinctiveness and no showing of secondary meaning.
  - (C) The examiner will reject the registration on the basis that sculptural works are not copyrightable subject matter.
  - (D) The examiner will reject the registration on the basis that the claimed work is functional.
  - (E) The examiner will allow registration of the copyright.

30. Suppose that IBM sues Hexetron over the shape of the Gigagadget 3000. IBM has, in the past, sold supercomputers with distinctive slanting sides (see the illustration, above). An IBM Blue Gene costs about \$1 million per rack, with the installation you see in the photo costing several million. Both Blue Gene and the Gigagadget 3000 are useful for many of the same supercomputing applications, and notably both of them have been used in artificial intelligence research for simulating a portion of the human cerebral cortex with billions of neurons and trillions of connections.

Which of the following might be found in a thoughtful, non-erroneous opinion by a court deciding this case on summary judgment?

- (A) "IBM cannot be entitled to a protectable trademark, since the shape of a product cannot, under recent Supreme Court precedent, serve as a trademark.
- (B) "Hexetron is entitled to the defense of nominative fair use."
- (C) "Unless IBM can demonstrate some level of actual confusion among relevant consumers, no claim for trademark infringement can succeed."
- (D) "The similarity of goods and markets is high, and this decidedly favors Hexetron."
- (E) "The care and sophistication of buyers in this case is very high, and this decidedly favors Hexetron."



31. Which of the following is least likely to be actionable under the right of publicity?

- (A) Arielle Aginsbarg, an attorney, uses the name of KJHK Electronics and an image of its corporate headquarters in a display ad for her legal practice. Text in the ad says, "KJHK Electronics, one of the world's most prestigious electronics firms, called on Arielle Aginsbarg when it needed some of the world's most sophisticated legal representation. So should you."
- (B) Bitty Boah prints up t-shirts with a silhouette of rock star Mickey Fants on them. Fants's name is not used. To most people familiar with Fants, however, the silhouette is recognizable. Boah sells the t-shirts online.
- (C) Camden Chevrolet airs a radio commercial with a celebrity impersonator doing a voice like that of Randra Stenten, a famous comedic actress. The commercial even uses several of Stenten's famous catch phrases. The Stenten impersonator invites listeners to come down for a test drive. At the end of the commercial is a clear disclaimer: "Celebrity voices impersonated."
- (D) Dibby Diapers puts a picture of Molly Ladden on its boxes. Ladden is a stay-at-home mom who lives in Nevizona. Dibby downloaded the picture from Ladden's Facebook page. While Dibby did not get Ladden's permission, it did confirm from her Facebook postings that she does, in fact, use Dibby Diapers.
- (E) Eapping Enterprises uses a charcoal-pencil drawing of Congresswoman Tina Kaydensen on boxes of Eapping's Old Fashioned Muffin Mix.

32. Sally and Terri are two college drama majors. Hanging out at the bar after their evening improv class, the two of them started riffing, and they ended up creating a hilarious bit. The next week when they tried to remember it all, they rued the fact that they hadn't written it down. They were surprised a couple years later when Victoria, a classmate of theirs, ended up in the cast of *Saturday Night Live*. Watching Victoria's television debut Sally and Terri were aghast to see Victoria do a sketch that mimicked, apparently word-for-word, the bit that Sally and Terri had come up with that night in the bar. And searching their memory, they realized that Victoria had been there that night. Hmmm. They had never really been friends with Victoria, but now they disliked her intensely.

Do Sally and Terri have a good claim against Victoria for copyright infringement?

- (A) Yes.
  - (B) No, because Sally and Terri cannot prove infringement, and that is because no inference of indirect copying can be made.
  - (C) No, because Sally and Terri cannot prove infringement, and that is because the copyright was not registered prior to the alleged act of infringement.
  - (D) No, because Sally and Terri have no copyright over their bit, and that is because they did not meet the fixation requirement to have a valid copyright.
  - (E) No, because Sally and Terri have no copyright over their bit, and that is because without a signed, written agreement, two persons cannot be joint owners of a copyright, and neither one alone has the requisite claim to authorship to be a sole owner.
33. Hexetron Systems Inc. holds as a trade secret a method of zanzfrinating polyclastic alloy material. Which would not constitute misappropriation of the trade secret?
- (A) Arnie bribes a security guard at Hexetron to let him into Building 22, where Arnie was able to learn the method.
  - (B) Billie, a disgruntled engineer at Hexetron, goes to over the Nakatomi Corporation and anonymously leaves documents describing the method at the front desk.
  - (C) Carlyle, an engineer with Fabrikam, Inc., has assistants anonymously purchase varying quantities of zanzfrinated polyclastic alloy from Hexetron. Then Carlyle uses gas-chromatographic mass spectrometry to chemically analyze the material and a scanning tunneling electron microscope to probe its structure. He then feeds the resulting data through a computer program that uses a mathematical technique called Monte Carlo analysis. In this way, Carlyle figures out the method.
  - (D) Darden, an executive at Zorin Industries, is approached by Luann, a shady person who offers to sell Hexetron's method to Darden. When Darden asks Luann how she got a hold of the method, she says that she figured it out by herself. Darden is dubious. When he asks Luann what "zanzfrination" means, she doesn't even know. But Darden goes through with the purchase anyway.
  - (E) Emily, an employee of Energon Enterprises, successfully logs into the e-mail account of a Hexetron employee by guessing at his password. She does this by trying various combinations of the names of his children and their birthdays. Once in, she finds an e-mail that describes the method.

34. Copyright could most clearly be claimed over which of the following?
- (A) a novel computer program
  - (B) a two-word slogan for a chain of fitness centers
  - (C) the shape of a doorknob
  - (D) an improvement on the design of a chair
  - (E) an idea for how to better defuse conflict in pre-school daycare
35. Mahmoud is a tinkerer. Purely as a hobby, he likes making electrical circuits and building robots. One day, November 7, Mahmoud attached some parts together in a clever way that created a very simple robot that could work its way through a maze by trial and error. Completely unknown to Mahmoud, on December 3, the USPTO issued U.S. Pat. No. 8,463,421 to Siobahn with claims covering Mahmoud's robot. The next day, on December 4, Mahmoud made a second little robot just like the first, and he gave it as a birthday gift to his nephew to use as a toy. Mahmoud has never met Siobahn. And he never knew anything about her patent or patent application. In fact, the patent application was unpublished until its December 3 issuance, and Siobahn kept the invention secret until that day.
- Which statement is most accurate?
- (A) Mahmoud is not liable for patent infringement because he can avail himself of the prior-use defense.
  - (B) Mahmoud is not liable for patent infringement because he did not copy Siobahn's invention, nor did his knowledge of how to build it derive in any way from hers.
  - (C) Mahmoud is not liable for patent infringement because there is no prima facie case for infringement since he did not sell or otherwise exploit his robot commercially.
  - (D) Mahmoud is not liable for patent infringement because Siobahn's patent, on these facts, is invalid.
  - (E) Mahmoud is liable for patent infringement.
36. Which of the following is not specifically and expressly embraced as patentable subject matter according to the language of 35 U.S.C. § 101?
- (A) a process
  - (B) a phenomenon of nature
  - (C) a machine
  - (D) a composition of matter
  - (E) regarding one of the other categories of patentable subject matter, an improvement thereof

NOTE THE FOLLOWING FOR QUESTIONS 37 AND 38:

Having worked on the problems of achieving zanfrination through non-mechanical means for more than eight years, on February 2, 2005, Carol conceived of a magnetic zanfrinator that could achieve zanfrination of a substrate through oscillation of the magnetic field. Carol did nothing on the project until May 5, 2005, when she began trying to build a working model of the magnetic zanfrinator. Carol then worked on the invention at least a couple of hours each day, six days a week. Beginning on July 10, 2005, Carol began working at least 14 hours a day every single day on the magnetic zanfrinator. Carol did not have success in building a working magnetic zanfrinator until September 19, 2005, when Carol tried tying the frequency of the oscillations to the temperature of the substrate. On the same day, Carol achieved perfect zanfrination through magnetic means. Carol finished a complete draft of her nonprovisional application on the magnetic zanfrinator on October 1, 2005, and she filed the nonprovisional application on November 11, 2005. The patent issued on April 5, 2006.

37. Assuming Carol pays her maintenance fees, the patent term will expire 20 years from which of the following dates?
- (A) May 5, 2005
  - (B) July 10, 2005
  - (C) October 1, 2005
  - (D) November 11, 2005
  - (E) April 5, 2006
38. Assuming Carol could make the required factual showing, which of the following would not be helpful for Carol in establishing that her magnetic zanfrinator is nonobvious under 35 U.S.C. § 103?
- (A) After its introduction into the marketplace, Carol's magnetic zanfrinator quickly grabbed a substantial market share at the expense of competitors.
  - (B) The magnetic zanfrinator had unexpected advantages in solving longstanding problems of breakage and incomplete zanfrination, problems associated with mechanical zanfrinators.
  - (C) Before Carol's invention of a working magnetic zanfrinator, virtually all firms in the zanfrination industry had tried but failed to build a zanfrinator that worked on magnetic principles.
  - (D) Carol's conception of the magnetic zanfrinator came to her through hard work and laborious experimentation, rather than "in a flash of genius."
  - (E) Before Carol's magnetic zanfrinator, experts said that zanfrination could not be achieved magnetically.

**THIS IS THE END OF THE AMALGAMATED QUESTIONS**