FACULTY OF LAW

UNIVERSITY OF NEW BRUNSWICK

INTELLECTUAL PROPERTY

LAW 3453

Final Examination
Professor Siebrasse

DATE: Monday 17 December 2007
TIME: 9:00 a.m. – 12:00 noon

INSTRUCTIONS

1. This examination is 5 pages long (including this page). Please check that you have all 5 pages.

2. This examination is 3 hours long.

3. This is an "open book" examination. You may bring the course text, your class notes and any review materials. You may *not* use library materials or any other materials or devices prohibited by university or law faculty rules or regulations.

4. The examination is marked out of 170. Questions are *not* all of equal value. The time you spend on each question should be approximately equal to the value of the question. There are no optional questions. Attempt all questions.

5. Unless the question specifically states otherwise, you must explain your answer. "Yes/no" answers are not sufficient. When a question requires you to assess a particular rule from a policy perspective be sure to address both advantages and disadvantages of the rule and the relevant options.

6. This examination is to be identified *only* using the anonymous number system. A penalty of one grade ranking (i.e. a B grade will become a B- grade) will be assessed against any student who writes his or her name on his or her examination booklets or who otherwise indicates his or her identity on or in his or her examination.

7. Handwriting must be legible. Passages written in illegible handwriting will be disregarded in assessing the grade.

Question 1 – 25 minutes/marks

In *CCH Canadian Ltd. v. Law Society of Upper Canada* McLachlin C.J. (for the Court) stated the following:

> When courts adopt a standard of originality requiring only that something be more than a mere copy or that someone simply show industriousness to ground copyright in a work, they tip the scale in favour of the author's or creator's rights, at the loss of society's interest in maintaining a robust public domain that could help foster future creative innovation. . . . By way of contrast, when an author must exercise skill and judgment to ground originality in a work, there is a safeguard against the author being overcompensated for his or her work. This helps ensure that there is room for the public domain to flourish as others are able to produce new works by building on the ideas and information contained in the works of others.

Does this statement provide a sound policy justification for the originality standard set out by the Court? Explain. You do *not* need to consider any alternative arguments which may provide a better justification for an originality requirement.

Question 2 – 25 minutes/marks

In *Bell v. Catalda* Frank J. made the following statement of law:

> A copyist's bad eyesight or defective musculature, or a shock caused by a clap of thunder, may yield sufficiently distinguishable variations. Having hit upon such a variation unintentionally, the 'author' may adopt it as his and copyright it.

John Wiley has referred to this as “the perversity of defining originality as variation.”

As a matter of policy, is the rule stated by Frank J. sound or “perverse”?

Question 3 – 40 minutes/marks

In order to increase holdings of monographs and treatises without increasing overall spending, law libraries across Canada, including the UNB Law Library, have been cancelling most paid subscriptions to law journals. A number of law libraries have entered into an arrangement among themselves whereby each library will maintain paid subscriptions to a small number of journals, with each library maintaining different journals so that every journal is held by at least one library in the system. When a library (for example the UNB Law Library) receives a request from an individual (a UNB law student) for an article from a journal that it does not hold, it sends a request to the library that does hold that journal (for example Dalhousie). The library that receives the request (Dalhousie) makes a copy of the requested article and send it to the original library (UNB), which then delivers the copy to the individual (the UNB law student) who requested it. There is no licence agreement with any holders of the copyright in the articles, and no fees are paid to any of the copyright owners. (It is clear that copyright subsists in the great majority of articles that are copied.) As a consequence of this system each library has cancelled approximately 90% of the journal subscriptions previously maintained. It can be shown that there has been a corresponding reduction in revenue to the copyright owners as a group.

A number of major publishers of law journals, whose revenues have been directly affected by this arrangement, have approached the various universities involved in this system and offered to enter into a licencing agreement whereby the system could be maintained but fees would be paid for each copy made. The agreement proposed would still be less costly for the law libraries than the old system under which each library had its own individual subscription, but it would be substantially more expensive than the current system in which the libraries pay no fees at all. Your firm has engaged by the law libraries to provide advice and you have been asked to write a memo on the issue of whether the current system of copying constitutes fair dealing in Canadian law. Be sure to consider both the strengths and weaknesses of the law libraries' position, as your clients do not wish to spend money on litigation if they expect to lose. However, substantial sums are involved and your clients are willing to litigate to the Supreme Court of Canada if necessary. Because the Supreme Court typically considers policy arguments, in addition to 'black letter' law and precedent, you should consider *all* policy arguments that are relevant to this issue. Discuss the strengths and weakness of these policy considerations, and also indicate whether the Supreme Court has historically been receptive to a particular policy argument. That is, consider those policy arguments that the Supreme Court has historically relied upon, and also consider possible counter-arguments and alternative arguments.

Question 4 – 22 minutes/marks

Consider the following statement:

> The patent system does not impede innovation, because an invention will be considered obvious and therefore unpatentable unless it would not have been invented but for the lure of the patent. It follows that while the grant of a patent creates a monopoly, the alternative would be not to have the invention at all.

Is this a persuasive defence of the patent system? Explain.

Question 5 – 18 minutes/marks

Should a patient searcher be entitled to a patent? Explain.

Question 6 – 40 minutes/marks

Wim Vansevenant is a farmer who operates a wild boar farm near Harvey, New Brunswick. The boar is raised entirely organically and free-range. Wim markets his boar meat under the label "Boar-licious." He has been in operation since 1991. His business has been growing steadily, if not spectacularly, since then. He started selling the meat locally at the market in Fredericton and Saint John, and he continues to do so, but he now also sells throughout the Martime Provinces and New England. He sells directly to a number of the restaurants in the region, many of which specify that they use "Boar-licious" boar in their boar dishes. He also sells through many small butcher or specialty meat stores, with the label "Boar-licious" clearly marked on every package.

Maple Branch Foods is a large Canadian food products company. In March of 2003 Maple Branch launched a line of meat products known internally as the "licious" line. The line included beef, chicken and pork products marketed under the names "Beef-licious," "Chick-licious," and "Pig-licious" respectively. The products include various prepared meat products such as sausages and breaded deep-fried chicken/pork fingers. On 10 March 2004, immediately after putting the products on the market, Maple Branch registered those names under the Trade-marks Act in respect of "meat products." While Maple Branch is a national company, the Maple Branch products were initially, and still are sold only in Ontario and Quebec. They are sold only in the packaged food section of large supermarkets.

Wim has only recently become aware of the Maple Branch products. While they do not currently sell their "licious" line in any of the same markets that he sells his "Boar-licious," he is concerned that they may try to stop him from using his "Boar-licious" mark. He is also concerned that if they do move into the Maritime market people will think that the Maple Branch products and his products come from the same source. This is of great concern to Wim because he believes that his products have a very healthful gourmet image, while he considers the Maple Branch products to be little better than junk food. Wim tells you that his product may not be not known to the average consumer, but it is well known to restaurant purchasers as well as to a minority of retail consumers who regularly ask for it by name.

Today, Wim has come to you for advice. Ideally he would like to stop Maple Branch from using their "-licious" marks. If that is not possible, he would also like to know whether Maple Branch can stop him from using his "Boar-licous" mark, and what steps, if any, he might take to protect his ability to use his own mark. Advise Wim on both these points, assuming Wim's information is about his product's reputation is correct and can be established on the evidence. Be sure to consider both the strengths and weakness of Wim's position. While his business is doing reasonably well he is not rich and he does not want to spend money on litigation unless necessary, though he is willing to take legal action if she has a strong case. Also, Wim is hoping that the Maple Branch "-licous" line might just die out on its own, and he would also like to know whether he can just wait and see what happens before he takes any action.

***** THE END *****