EXAM _____

FINAL EXAMINATION
COPYRIGHT LICENSING CLASS
SPRING, 2005
PROFESSOR HAGE

INSTRUCTIONS:

This is a take home, open book exam. You may consult the course materials as well as any other materials. However, your answers must be your own work. Do not discuss it with other students. Grading will be anonymous. Do not put your name on anything you turn in. Be sure your exam number is noted. If you find it necessary to make any assumptions as to fact or law for purposes of your answer, please state what they are.

This take home exam will be distributed on May 4, 2005 and must be returned to the registrar's office on May 13th ,2005 by 3:00 PM. There are three major problems, each of equal weight. Choose two out of three to answer. If you answer all three, you will receive credit for the two best answers. In addition, there are 5 multiple choice bonus questions for a total of 10 bonus points in the aggregate (2 points per question). Good luck, have fun and enjoy your summer.

Problem 1

You are acting as licensing counsel to Massachusetts Institute of Technology ("MIT"). MIT is the owner of all right, title and interest in the multimedia content and computer software of an interactive CD ROM about China entitled "Rising Force". MIT wants to have the multimedia content developed and commercialized and is willing to grant a license for that purpose. Interactive Media, Inc. ("IMI") has experience in the development, production, manufacture, marketing and sale of products similar to the MIT CD ROM product and has represented to MIT that it is committed to a thorough, vigorous, and diligent program of exploiting the multimedia content and CD ROM product and seeks to license the product including the right to sub-license to end-users.

MIT and IMI have negotiated a tentative agreement calling for MIT to grant IMI a license to exploit the CD ROM commercially, including the right to sub-license and to create derivative works. IMI perceives a broad market for the product and is willing to pay royalties consistent with the volume of sales it realizes. IMI also envisions widespread distribution in all fields of use and in a variety of media. MIT is willing to grant exclusivity subject to certain performance standards and requirements and subject to MIT's reserved rights. MIT reserves the right to use the multimedia content and to distribute it to third parties for non-commercial research purposes. IMI will agree to pay royalties to MIT on net sales of the licensed product including web based income. Each side seeks certain warranties and indemnities from the other.

Draft a grant clause, royalty clause, warranty clauses, indemnity clauses, and definition clauses needed to express the proposed agreement between MIT and IMI. You may include additional clauses. Your answer must not exceed 3 typewritten pages (single spaced), 8 ½ x 11 format.

Problem 2

Mr. Armand Goulet is the original author of a famous play entitled "The Gypsy Moth" which was produced in Paris, France in 1997. The play involves the relationship among husband and wife, Claude and Marie and their son, Pepe and the events pertaining to Pepe's proposed marriage to Francine. In 1999 Armand Goulet transferred the "exclusive motion picture rights" to the play to Michael Benedetto. In 2000, Benedetto made and distributed an Italian language motion picture version of the play. It was very successful and was displayed extensively in the United States. In 2001, Mr. Marvin Harris of Harris Production, Inc. ("Harris Production") was granted the "exclusive dramatic rights to prepare, produce, perform and display a musical adaptation" of Armand Goulet's play. In the spring of 2003 the musical adaptation of the Gypsy Moth debuted on Broadway as a musical comedy and Harris has also filmed the live performance and redistributed it to television outlets throughout the U.S.

In December of 2004, Harris Production received a letter from an attorney for Benedetto, complaining about its musical comedy. The letter asserted that the "Gypsy Moth" had content that constituted unauthorized expression and material from the movie. It went on to note that there were numerous and substantial similarities between the motion picture and the musical adaptation which could not fairly be said to derive from their common source, and which are more than incidental or coincidental. He also asserted that the genius of the movie was its transformation of purely comical and laughable characters as depicted in the play into very human and sympathetic ones. He said that the comical antics and superficial relationship in the characters in the play were replaced in the motion picture by a romantic relationship between the two enormously likeable characters and that this very essence of the movie had been adopted in the musical comedy. He also asserted that there were other similarities such as the setting of certain scenes in different locales and the development of the relationships among other characters that are common to the movie and musical comedy but not the stage play. The letter went on to complain that Harris Production's motive was obvious from a quote attributed to Mr. Harris in a recent edition of Time Magazine, where he described the circumstances before beginning the project as, "we were deluged with calls from composers who wanted to set the movie to music". Finally, Benedetto also asserted that the distribution on T.V. infringed on his exclusive motion picture rights.

You have been retained by Harris Production. Harris has said that although they had seen the movie and were properly quoted in Time Magazine, they did not consciously take anything from the movie when they created their musical comedy. Rather they used their own background and experiences when they set the stage play to music. Harris also believes that its exclusive rights include the right to perform and redistribute the musical adaptation on T.V. They request your advice with respect to the following two issues:

1. What are the strengths and weaknesses of any alleged claim for copyright infringement that Mr. Benedetto has against Harris' musical comedy.

2. Harris would like to make an English language motion picture based upon the musical comedy. Is Harris free to do so or will it need to get additional rights from either or both of Mr. Goulet or Mr. Benedetto? If additional rights are needed, draft appropriate grant clauses. Your answer must not exceed 3 typewritten pages (single spaced), 8 ½ x 11 format.

Problem 3

Plaintiff ABC Software Company ("Software Company") sued defendant Aetna Insurance Corporation alleging copyright infringement. Aetna Insurance Corporation filed a Motion for Summary Judgment on Software Company's claim.

This case arises out of the Software Company proposal to Aetna Insurance Corporation offering to create custom software for Aetna. Although Aetna did not sign the proposal it received from the Software Company, it paid the Software Company $300,000 and the Software Company delivered the software product pursuant to the proposal. After the Software Company delivered the software, it filed a copyright registration with the U.S. Copyright office identifying itself as the author and copyright owner. When the parties failed to reach agreement on the amount of royalties that Aetna would pay the Software Company for using the software product, the Software Company sued the Corporation alleging copyright infringement relating to Aetna's marketing and sale of a device that incorporates the custom software code or a derivative of it.

You are law clerk for the District Court Judge who is presiding over this case. The District Court must decide the issue of whether or not to grant the Aetna Corporation's Motion for Summary Judgment on the Software Company's claim alleging copyright infringement.

At the motion hearing the following facts were established:

> In April 2003, the Software Company gave Aetna a written proposal for the custom software development project. In the proposal, the Software Company proposed to create a software system for Aetna for controlling its medical claims. The proposal was signed by the Software Company President but never signed by Aetna. The proposal stated that "by authorizing this work, Aetna accepts the terms and conditions outlined in this proposal and requests that the Software Company execute and perform said project...". The proposal stated that the Software Company's work created by Aetna "will be the sole property of Aetna and will be delivered to Aetna." The proposal also stated that Aetna would share in the software development cost by paying royalties. Pending agreement on royalties, Software Company was paid on a time and material basis. The Software Company delivered the software code to Aetna pursuant to the proposal and Aetna has paid over $300,000 to the Software Company for the software product. Approximately 10 months after the date of the proposal, the V.P. of Operations for Aetna sent a letter of intent to the Software Company. In the letter Aetna stated "this letter will confirm the basic understanding between Aetna and the Software Company, until both companies agree and accept the terms of a royalty based agreement". The letter also said that the "contents of this letter" are "non-binding" and stated further that the letter "served only to communicate a base level of understanding between Aetna and the Software Company". Aetna's intent was to

provide the Software Company "a reasonable return on its investment".

After the hearing the Judge met with you to discuss the case. The Judge has identified the following issues:

1. Aetna's ownership claim to the software.
2. Aetna's claim that it has an express license, or at a minimum a non-exclusive implied license to use the software.
3. Software Company's claim of revocation of any implied non-exclusive license for non-payment of royalties.

The Software Company has argued that even if Aetna has a license, the license terminated when Aetna failed to enter into a royalty agreement.

The Judge has asked you to prepare a draft summary memorandum for the Judge's review on the issue of whether or not Aetna is entitled to summary judgment on the Software Company's claim for copyright infringement. Include in your answer a discussion of the (3) three issues identified by the Judge above. Your answer should not exceed 3 typewritten single space pages, 8 ½ x 11 format.

EXAM _____

BONUS QUESTIONS

For each question in this part choose the most accurate answer (whether or not you think it fits perfectly). Each multiple choice question is worth the same number of points (2 points). Unless otherwise specified all references to the Act are to the Copyright Act of 1976 in effect today unless otherwise noted. Any reference to a section is to that section of the Act. Words defined in the Act have the meanings assigned to them under the Act.

I have tried to make the questions as clear and objective as possible, however you may find the need to qualify your answer. You may do so if you feel necessary in three lines or less per question. This should not serve as an encouragement to qualify your answer. No points will be deducted for incorrect statements made in a qualification.

1. Under the Act, computer software is copyrightable subject matter defined as:

   a. Object code.
   b. Source code.
   c. Graphic work.
   d. Literary work.
   e. Method of operation.

2. A screen play, written in collaboration by Smith and Wesson, and based upon a best selling novel by Grisham is:

   a. A derivative work.
   b. A collective work.
   c. A joint work.
   d. A compilation.
   e. Both a&c .

3. For copyright purposes under the Act, a map is:

   a. A useful article.
   b. A pictorial work.
   c. A compilation.
   d. A diagram.
   e. Both b&c .

4. Which of the following statements is most true?

a. An exclusive license may be oral or written.
b. A work made for hire is any work specifically ordered or commissioned for use as long as the parties expressly agree in a written instrument signed by them that the work shall be considered a "work made for hire".
c. Ideas are always copyrightable.
d. A written non-exclusive license, even though not recorded at the U.S. Copyright office, takes precedence over a written assignment of copyright in the same work if the non-exclusive license was granted before execution of the assignment.
e. The right to terminate a transfer of copyright ownership is waivable in advance by agreement of the parties.

5. In 2003, Rita, a songwriter, orally agreed with her publisher, Apple Records, that the publisher could have "all her copyright interest" in two of her songs. Under the Act:

a. Rita no longer owns the copyright in the songs subject to the agreement, but she can reclaim the copyright in about 35 years if she complies with the requirements of the Act.
b. If Apple Records purports to license the songs to a production company for use in a movie, Rita will have a cause of action for copyright infringement against both Apple and the production company.
c. The agreement is ineffective to transfer any copyright interest to Apple Records.
d. Both b&c.
e. None of the above.