Exam No. _____

INFOLIBERTIES
Privacy, Free Speech, and Access to Information in the Information Age

Professor Susan M. Richey
Spring 2000—Final Exam

***General Instructions*:**

This exam has four short essay questions and one short answer question, worth a total of 90 points. The questions are not evenly-weighted so allocate your time accordingly.

The exam is open-book and you may take any written material that you wish into the exam with you. **Do not work with any of your classmates during the exam.**

Do not use a blue book. Please confine your responses to the lined area of this exam but do not feel compelled to fill the entire lined area.

You have 2 hours to complete the exam unless otherwise stated by the proctor.

1. (24 pts.) Joe Moran is a warehouse employee for Hi-tech Heaven, a chain of U. S. retail stores specializing in computers and other electronic equipment for the home and office. Management of Hi-tech Heaven has identified unusually high levels of inventory loss from its Boston warehouse during the night shift when Moran works and wants to implement video and audio surveillance of Moran to determine whether he is stealing inventory. Approximately 20 other employees work with Moran in the warehouse on the night shift, but Moran is the newest hire and theft did not become a problem until his arrival. The company not only wants to place video and audio taping devices throughout the storage area of the warehouse but also in the employee break room to determine whether Moran has recruited any of his fellow employees to help him steal. Additionally, management would like to place a tap on the phone in the break room in order to monitor the content of Moran's calls because management believes that Moran may be using that phone to contact a "fence," i.e., an individual who purchases stolen items. (Hi-tech Heaven is a private entity and is not a government contractor; its workforce is not unionized.)

The CEO of Hi-tech Heaven has consulted you as the company's lawyer for advice with respect to whether or not the aforementioned plans should be implemented and, if so, how to implement those plans in a way that will curtail liability on the part of the company. Advise the CEO with respect to video surveillance, audio surveillance, and tapping the phone in the break room, citing the reasons for your advice. Additionally, suggest a pre-employment screening method (beyond a background investigation of each potential employee) that might be implemented to address the problem of theft.

Unless otherwise indicated in a particular section, [illegible]

Response to Question 1:

Unless otherwise indicated in a particular question, [illegible]

2. (20 pts.) Jupiter, Inc., a U. S. manufacturer and distributor of various foodstuffs, maintains a web site devoted to its best-selling product, S & S candies. S & S candies are composed of small drops of chocolate covered with a candy shell and are particularly popular with children. In addition to providing nutritional information and sample recipes, the web site contains a digital coloring book and a variety of online games for children. The web site invites children to register to win prizes by filling out an online form including their name, postal address, telephone number, and e-mail address and answering an online survey directed to their favorite toys. Information thus collected is sold to direct marketers of childrens' toys. You are an attorney working for the Federal Trade Commission (FTC) and, as of last Friday, you are visiting web sites such as the S & S candy site to determine compliance with recent federal legislation. Name the legislation in issue and indicate what specific things will you look for as you visit the S & S site.

Response to Question 2:

3. (24 pts.) Naomi Pettit is a chemist employed by Biopsis, a private laboratory based in Washington, D. C., that conducts complicated chemical testing procedures, requiring lengthy and expensive training on the part of its laboratory personnel. Concerned about the expense generated by employee turnover, Biopsis contracts with a professional testing group that specializes in administering and evaluating psychological tests to ascertain a variety of different personality traits in potential employees, including those indicative of job stability. Prior to her hire for a laboratory technician position, Pettit took the battery of psychological tests and the report from the testing group indicated that she was committed to long-term employment. The type of test administered to Pettit, however, is also routinely used to predict addictive behavior and her test report suggested that she might be prone to such behavior. When Biopsis' Personnel Director initially reviewed her test report, he failed to notice the indicator of addictive behavior, and he hired Pettit for a position working with potentially habit-forming substances in the lab. Three months later, the Personnel Director reviewed Pettit's personnel records for purposes of her first quarterly performance evaluation and reread the test report, noticing the indicator of addictive behavior.

To date, Pettit has been a satisfactory employee, and the company has no desire to terminate her employment. The Personnel Director has sought your advice as outside counsel for Biopsis with respect to the company's obligations under the Americans with Disabilities Act (ADA), the Health Insurance Portability and Accountability Act (HIPAA), and the Fair Credit Reporting Act (FCRA). The psychological testing group has also sought your advice with regard to its obligations under the FCRA. In rendering that advice, please indicate what actions Biopsis and the testing group must take individually with respect to Pettit and her psychological test report.

Response to Question 3:

4. (16 pts.) Elegant Furs, Ltd., is a New York retailer specializing in the sale of natural fur coats for women. An internal document of the company has been received in the U. S. mail from an anonymous source by members of FurAlive, a Wisconsin animal rights organization that lobbies for a Congressional ban on the sale of fur coats. The document is a chilling discourse on the recommended method for killing fur-producing animals to preserve the integrity and sheen of their fur, and the document is only identified as originating with Elegant Furs by the copyright notice at its end. The company has been alerted that FurAlive intends to copy the document into digital form and mount it on the organization's web site in order to raise support for its lobbying efforts. Fur Alive does not plan to paraphrase the document because its members believe that their cause will be significantly aided by publicizing the company's exact inhumane verbiage.

On behalf of Elegant Furs, argue that a preliminary injunction should issue against the digital publication of the document despite the traditional rule against prior restraint. In your argument, address the effect that the characteristics of digital information—plasticity, transmissibility, and processibility—have on your position.

Unless otherwise indicated in a given [illegible]

Response to Question 4:

5. (6 pts.) List the three general activities for which the ECPA creates civil penalties.

Response to Question 5: