EXAM # _____

FRANKLIN PIERCE LAW CENTER
INTELLECTUAL PROPERTY SUMMER INSTITUTE

INTELLECTUAL PROPERTY UNDER THE UCC AND THE BANKRUPTCY CODE

FINAL EXAMINATION

Professor Ward
Two Hours

July 11, 2002
11:30 am - 1:30 pm

INSTRUCTIONS:

1. This examination contains two equally weighted questions.

2. You are permitted to use your copy of SELECTED COMMERCIAL STATUTES and your copy of UNFAIR COMPETITION, TRADEMARK, COPYRIGHT AND PATENT - SELECTED STATUTES. No other materials may be taken into the examination room. The fact situations in the questions arise in Mainshire, a mythical jurisdiction that has adopted the 2002 version of the Uniform Commercial Code. Do not assume the existence of other special state legislation unless the question directs or invites you to do so.

3. Use a pen and write on only one side of the page.

4. Although no page limitation has been imposed, a concise, tightly reasoned answer will receive more credit than one which rambles. Read the questions carefully. Answer only the question or questions asked.

5. Do not write your name on any part of the examination, but be sure to put your examination number on each blue book you turn in. Please write legibly. GOOD LUCK!

Question # 1
[Recommended time: 1 hour]

Patentee is the owner of PATENT NO. 43550. On April 1, X loaned money to Patentee and required that Patentee execute both a security agreement and a patent mortgage on PATENT NO. 43550. Under the terms of the patent mortgage, Patentee assigned title to NO. 43550 to X with the condition that title would revert back to Patentee when the loan debt was paid. As part of the same transaction, X granted an exclusive license in NO. 43550 back to Patentee. On April 15, X duly filed a U.C.C. financing statement covering NO. 43550 with the Mainshire Secretary of State. On August 1, X duly recorded the patent mortgage with the United States Patent and Trademark Office [PTO].

On June 1, Y loaned money to Patentee. Y also caused Patentee to execute both a security agreement and patent mortgage covering NO. 43550. The language of Y's agreements with Patentee are identical to the language in the documents used by X. Y duly filed a proper financing statement on June 2, and duly recorded with the PTO on August 2.

1. As between X and Y, who has Priority in PATENT NO. 43550 if [contrary to the holding in *In re Cyberbernetic Services Inc.*], section 261 of the Patent Act is controlling? Explain briefly.

2. Would your answer to 1. above be different if Y had searched the Mainshire state U.C.C. files on May 30 and found X's April 15 financing statement? Explain briefly.

3. As between X and Y, who has priority in PATENT NO. 43550 if Mainshire's U.C.C. Article Nine is controlling? See Revised § 9-322(a)(1). Explain briefly.

4. If the patentee above wanted to acquire the patent of another inventor (I) could she borrow the needed money from either X or Y and give back a purchase-money security interest in the newly acquired patent? Explain. Would the enabling lender (X or Y) have special purchase-money priority status in the newly acquired patent under Revised U.C.C. § 9-324(a)? Explain briefly.

Question # 2
[Recommended time: 1 hour]

StatSet Inc. filed a bankruptcy petition in Chapter 7 on June 1, 2002. Listed among the assets of the Corporation were the following intellectual property rights:

1. "StatSequence I" - a software program developed and owned by StatSet. "StatSequence I" is a data management program designed to quickly download large amounts of data into a spreadsheet. "StatSequence I" was written and marketed by StatSet in November 2000. The copyright covering "StatSequence I" was registered on December 1, 2000.

2. "StatSequence II" - a software program developed by StatSet in January 2002. "StatSequence II" is a redesigned improvement on StatSet's prior "StatSequence I" program. While "StatSequence II" is also a data management program, it was built on an entirely different platform than StatSequence I and is not a derivative work. StatSet decided not to register the copyright on "StatSequence II" and, at the time of the bankruptcy petition, was protecting it as a trade secret.

3. An exclusive 5-year copyright license from Mircosheen, Inc. to reproduce and distribute Microsheen's spreadsheet software "Quickcalk." in connection with StatSet's own data management software package. Microsheen distributes Quickcalk as an individual software application, but under the terms of the exclusive license only StatSet is authorized to incorporate Quickcalk as a platform for data management applications. The license agreement was executed on September 1, 2000. Under the terms of the agreement, StatSet paid Microsheen $50,000 at the execution of the license and agreed to pay an additional $100,000 on September 1, 2002.

On August 1, 2001, StatSet borrowed $500,000 from FirstBank. To secure the loan, FirstBank took a security interest in "the copyright covering debtor's StatSequence I software and all of StatSet's general intangibles - now owned and hereinafter acquired." The security agreement also contained the copyright registration number for the StatSequence I software. On August 2, FirstBank filed a duly executed financing statement with the Mainshire Secretary of State covering StatSet's "general intangibles - now owned and hereinafter acquired." On that same date, FirstBank recorded the duly executed security agreement with the Copyright Office.

The bankruptcy trustee has the following questions for you:

1. Can I retain the exclusive license on "Quickcalk" without paying Microsheen the $100,000 fee due on September 1, 2002? Explain.

2. Can I sell the exclusive license on "Quickcalk" to another similarly situated data management enterprise without Microsheen's consent? Explain.

3. Can I use § 544(a) of the Bankruptcy Code to avoid the security interest of FirstBank in the StatSequence I copyright? Explain.

4. Can I use § 544(a) of the Bankruptcy Code to avoid the security interest of FirstBank in the StatSequence II copyright? Explain.

5. Can I use § 544(a) of the Bankruptcy Code to avoid the security interest of FirstBank in the StatSequence II trade secret? Explain.