Fundamentals of Intellectual Property

Final Examination

Professor Field Fall 2004

Instructions

This is a three-hour, open-book exam. You may consult any written materials. Do not discuss the exam with others.

- **Put your exam number and answers on the sheet provided.**
- **Note that questions in Part I are worth four times as much as those in Part II.**

Do not waste time answering more questions than you need to!

Part I: Multiple choice
[80 points — 20 questions total]

Enter the *letter* for the most correct concluding phrase or statement in the numbered space **on the answer sheet**. In Part I, *only the first 5 answers* will count in each section.

A. Patents

*Answer **only** 5 of 7.*

1. The best reason for seeking a patent on a product is that:
   A. it can very easily be reverse engineered.
   B. infringers will be very easily detected.
   C. market success has long been shown.
   D. it is cheap to make.

2. Medex's patented method for early pregnancy detection requires an inexpensive, multi-purpose device (D) and renewed supplies of pre-packaged chemicals (PCs) selected for optimal results. By use of appropriate labeling, Medex could (and would be most likely to) prevent:
   A. many firms from selling Ds.
   B. consumers from using its PCs with other firms' Ds.
   C. consumers from using other firm's PCs with its own Ds.
   D. most firms from selling chemicals needed to practice the invention.

3. Medex's 2002 patent (Q.2) discloses ranges but not the optimal composition of the PC kit now sold. Under those circumstances, the patent is:
   A. invalid because Medex did not know the optimal compositions when it filed.
   B. invalid if Medex knew the optimal compositions when it filed.
   C. valid if optimal compositions are within the disclosed ranges.
   D. valid because most disclosed compositions are useful.

4. See Q.2. Genarix also sells pregnancy test kits as generally described in a 1999 Jones patent. Under those circumstances, Genarix:
   A. may infringe Medex's patent even if Medex would infringe the Jones patent.
   B. cannot infringe the Medex patent if it sought a license and Medex refused.
   C. is not liable to Medex if it owns the Jones patent.
   D. is likely to infringe the Jones patent.

5. Brown's 1983 patent also generally describes the subject matter of Medex's invention (Q.2). If Medex's application was filed in 2001, its invention could:

A. infringe the Brown patent.
B. be patentable despite being covered by Brown's claims.
C. be patentable unless Brown has been selling his invention.
D. not be novel because of the description in Brown's specification.

6. Should a firm be found to infringe Medex's patent (Q.2), it could evade liability:

A. if some women clearly use the invention to terminate pregnancies unlawfully.
B. if any woman might use the invention to terminate a pregnancy unlawfully.
C. if Medex's product sometimes gives false negatives.
D. but not for any of those reasons.

7. Martha, who works for a toothbrush manufacturer, invented a new method for making bristles. The PTO rejected her claims based on a brush used to groom pets. This rejection is:

A. unsound because the brushes are different.
B. unsound because her invention has nothing to do with hair.
C. sound if the grooming reference describes bristle construction.
D. sound unless toothbrush designers never take note of other kinds of brushes.

B. Copyright

*Answer **only** 5 of 7.*

1. In 1974, N.H. native, Mary Bell, wrote a poem. Later 10,000 copies were published without notice; copyright has still not been registered.

A. Under § 405(a), her copyright is valid regardless of when publication occurred.
B. She forfeited her copyright by failing to register within five years.
C. If publication occurred in 1987, her copyright is valid.
D. If publication occurred in 1999, her copyright is valid.

2. Liking Mary's poem (Q.1), Fred set it to the tune of an old folk song. At that time, he had never taped (or otherwise recorded) his work, but he sometimes performed, e.g., at Joe's bar.

A. Fred's music is protected by federal copyright.
B. Any copyright in Fred's music is based on state law.
C. Fred would infringe Mary's rights, if any, only if he is paid to perform.
D. Mary's rights, if any, cannot be infringed unless Joe's bar has more than fifty patrons.

3. Fred later phoned Mary (Q.2) for permission. He calls it "Mary Bell's Song" (MBS), so being flattered she agreed. Two weeks later, he filed to register a CD containing MBS.

A. Copyrights in songs on the CD are valid if the Office registered it.
B. Given the lack of originality, Fred could have no MBS copyright.
C. Fred is unlikely to have copyright in the melody for MBS.
D. Fred holds copyright in the lyrics for MBS by transfer.

4. Kluless heard an MP3 of MBS (Q.3) at one of the "free" music websites. Because he liked it, he downloaded it and has distributed MBS copies worth over $2000 within the past year. He is:

A. liable for costs under § 505.
B. criminally liable under § 506(a)(2).
C. liable for maximum § 504(c) damages.
D. liable under all of the provisions listed above.

5. Seeing MBS (Q.3) as disgustingly sweet, Paul recorded a take-off called "Harry Hell's Bong" (HHB). Fred refused a license under § 115(a), but Paul nevertheless put it on his CD. MBS sales dropped dramatically after that, but Paul is unlikely to be liable:

A. because HHB sales probably didn't cause MBS sales to drop.
B. because refusal to grant the MBS license was unjustified.
C. because his use seems fair.
D. for all of those reasons.

6. Scooter, a professional model, posed for a series of calendar photos taken by Petunia. After publishing her calendar and registering, Petunia assigned her copyrights to Zippy Thongs for use in magazine ads. If Scooter sues Zippy and Petunia:

A. he will lose because Zippy holds all copyrights that might exist.
B. all contract claims are preempted by copyright law.
C. he must lose under the holding in *Olan Mills*.
D. he may be able to establish joint authorship.

7. Flipper and Skipper collaborated on a play. Unbeknownst to Flipper, Skipper made a great deal of money producing it in New York. If Flipper brings suit, Skipper:

A. may have to share her profits.
B. owes him nothing because her use was fair.
C. will have to disgorge all of her ill-gotten gains.
D. owes him nothing because his work was for hire.

C. Trademarks

[All statutory citations to the Lanham Act]

Answer only *5 of 7*.

1. For six years, Petunia's popular calendars have all been diamond shaped (similar to a square hung from a corner) with scalloped edges. If George copies both aspects of her design, and she sues under § 43(a) without showing source significance, she is likely to lose because:

A. of copyright preemption.
B. of design patent preemption.
C. her claim seems to turn on trade dress.
D. her claim turns on product configuration.

2. To strengthen her hand, Petunia (Q.1) has sought federal trademark registration. If George becomes aware of this:

A. in light of § 2(f), he would accomplish little by opposing under § 13.
B. he could successfully oppose by asserting that only words can be registered.
C. in light of § 2(e)(5), he need not worry that her application will be accepted.
D. in light of § 7(b), he need not worry about being any worse off if she succeeds.

3. Joe holds a 1992 Ohio registration based on use of Hefty at his well-known Cleveland restaurant. Myrtle federally registered Hefty for her Austin area Tex-Mex restaurant in 1998. Should they become aware of one-another:

A. Myrtle could halt Joe's use of her mark if she can show likely confusion.
B. Joe could easily cancel her registration under § 14(1).
C. Joe may continue using the mark throughout Ohio.
D. Joe may continue using the mark in Cleveland.

4. See Q.3. Austin is home to, e.g., Dell computers, so people sometimes travel to Redmond, WA (home of, e.g., Microsoft). Myrtle has thereby learned of another Hefty restaurant operated by Iota for the past year. Under those circumstances, she might:

A. be able to force Iota to commence using another mark.
B. not be able to stop Iota if she specializes in beef and he in seafood.
C. be able to stop Iota's use but only if she can show likely confusion.
D. not be able to stop Iota until she opens her own restaurant near his.

5. Not wanting to spend any money on lawyers, Myrtle and Iota (Q.4) agreed that he would sell only take-out food and she, only sit-down meals. If a new, and growing, Silicon Valley chain of Hefty pizza shops (sit down and take out) is later discovered, she will:

A. be able to cancel its registration for heftypizza.com under § 43(d).
B. have difficulty showing likelihood of confusion under § 32.
C. have difficulty requiring, e.g., disclaimers of affiliation.
D. be able to stop use of Hefty for pizza under § 43(c).

6. Ashland Oil (AO) announced that it was exiting the antifreeze market and abandoning its Zerex® registration as of Jan. 1, 2006. Hocus (H) and Pocus (P), respectively, filed an intent-to-use application and shipped several thousand units — both on Jan. 2d. When H learned of P's ITU application, it sued under § 43. P responded by citing, e.g., *Lucent*.

A. AO should be able to stop them both under § 43(c).
B. P should get exclusive rights to the mark under § 7(c).
C. AO's interests are still adequate to support a § 43(a) action.
D. H should get exclusive rights under 43(a)(1)(A) because it was the first to use.

7. See Q.6. Greedo bought AO's remaining supplies to repackage as a novelty item. Containers are smaller, but his products are otherwise identical. If AO now complains, a court is apt to:

A. require only that consumers have accurate information.
B. deny all relief because AO has abandoned its rights.
C. require Greedo only to use dissimilar containers.
D. enjoin Greedo from any use of Zerex®.

D. Miscellaneous

Answer only *5 of 7*.

1. Kiwi's product has several components molded from different materials. If Kiwi proves that Bob, an employee, sold Stan scale drawings of those components, a court should:

A. enjoin Stan from ever making the product.
B. refuse relief if the components can be reverse engineered.
C. require Stan to return or destroy all copies of Kiwi's drawings.
D. refuse relief if Kiwi had briefly left a copy of its drawings in an unsealed court file.

2. If it can be proven that Bob (Q.1) put copies of Kiwi's drawings on his public website before he sold them to Stan, a court should:

A. require Stan to return or destroy all copies of those drawings.
B. find Bob criminally liable under the Economic Espionage Act.
C. find neither Bob nor Sam liable if the components can be reverse engineered.
D. regard unauthorized publication as having no effect on the status of a trade secret.

3. SofCo's program is protected by patents and copyrights. SofCo also uses a click-wrap license forcing users to agree not to view the underlying code. If Ralph's competing program is based on unpatented ideas admittedly acquired from inspecting SofCo's code, a court should:

A. find that Ralph infringes SofCo's trade secrets.
B. find that Ralph breached an enforceable contract.
C. regard the click-wrap license as preempted by federal patent law.
D. regard the click-wrap license as preempted by federal copyright law.

4. After SofCo (Q 3) threatened suit, Ralph's publisher ceased production and refuses to resume until there is no risk of infringement. If Ralph counterclaims, a court should find SofCo's:

A. communication privileged under state tort law.
B. communication privileged under the patent law.
C. communication unprivileged under state tort law.
D. communication unprivileged because it is commercial speech.

5. Marylynn, a well-known model, posed for a series of sexy calendar photos taken by Petunia. After publishing and registering her calendar, Petunia assigned her copyrights to Zippy Thongs. Zippy uses the photos in ads. If Marylynn sues Zippy and Petunia, she is most likely to:

A. win against Petunia for infringement of her right of publicity.
B. win against Petunia under 15 U.S.C. § 1125(a)(1)(A).
C. win against Zippy under 15 U.S.C. § 1125(a)(1)(A).
D. lose to both under 15 U.S.C. § 1125(c)(4).

6. Flinty has published a calendar using Petunia's photos (Q.B.6 and Q.D.5), but he cleverly merged Marylynn head's with Scooter's body, and vice versa. If Petunia and her models sue, Flinty is most likely to:

A. lose if his calendars are seen as media.
B. lose if his calendars are seen as merchandise.
C. win because his speech is clearly commercial.
D. lose because his speech is clearly noncommercial.

7. Datoid, whose employees belong to a union, uses considerable resources to deal with negotiations, strikes and lockouts. Cypher, a competitor, always pays more than the union negotiates with Datoid and comes out ahead by avoiding expense and bother. If Datoid, tired of such free riding, files an action, it is likely to:

A. see its suit dismissed.
B. lose on the merits after trial.
C. obtain an injunction against this form of *INS* misappropriation.
D. recover damages under § 1(a)(3) of the Restatement (3d) of Unfair Competition.

Part II: Matching
[20 points]
*Answer **only** 20 of 24*

Lettered clauses match only one term. Please enter the **best** letter in the corresponding space **on the answer sheet**.

1. Tying patented and unpatented goods
2. Trademark fair use
3. Statute of Anne
4. Statute of Monopolies
5. *Abercrombie & Fitch*
6. Restatement of Contracts
7. Restatement of Agency
8. Restatement of Torts
9. *DuPont* factors
10. Doctrine of equivalents
11. Idea submissions
12. Exhaustion of patent right
13. Exhaustion of trademark right
14. Copying
15. Inadvertent infringement
16. Cyberpiracy
17. Method
18. State
19. Internet
20. Abandoned
21. Commercial
22. Prompt
23. Damages
24. Deliberate infringement

A. Defined in 17 U.S.C. § 101.
B. Defined in 35 U.S.C. § 273.
C. Basis for refusing to issue injunctions.
D. Defined directly in 15 U.S.C. § 1127.
E. Set forth in, e.g., 15 U.S.C. § 1115(4).
F. Defined indirectly in 15 U.S.C. § 1127.
G. Closely tied to patent prosecution history.
H. Least likely with regard to rights of publicity.
I. Describes the comparative strength of marks.
J. Of decreased importance in trade secret cases.
K. Unnecessary for patent and trademark liability.
L. Early British legislation of little U.S. importance.
M. Increases patent, trademark and copyright damages.
N. Relates to purchasers' right to repair patented goods.
O. May be used in applying the 35 U.S.C. § 102(b) bar.
P. Addressed in a recent amendment to the Lanham Act.
Q. Often rejected unless a patent application has been filed.
R. Unlikely to be available without patent or trademark notice.
S. Often used to decide whether a copyrighted work is "for hire".
T. In the context of speech cases, concerns whether sales are proposed.
U. Early British legislation of major importance within the United States.
V. Relates to purchasers' right to sell goods made from strangers' products.
W. Way to assess likelihood of confusion in applications to register trademarks.
X. In the context of copyright registration, means "within three months of publication".

Examination No. _____KEY_____

Answer Sheet

Part I — (80%)

*Answer **only** 5 of 7 in each set* (4% each)

A. Patents

1. __A__
2. __C__
3. __B__
4. __A__
5. __B__
6. __D__
7. __C__

B. Copyrights

1. __D__
2. __B__
3. __C__
4. __A__
5. __C__
6. __D__
7. __A__

C. Trademarks

1. __D__
2. __A__
3. __D__
4. __A__
5. __B__
6. __C__
7. __A__

D. Miscellaneous

1. __C__
2. __B__
3. __C__
4. __A__
5. __C__
6. __B__
7. __A__

Part II — (20%)

*Answer **only** 20 of 24* (1% each)

1. __C__
2. __E__
3. __L__
4. __U__
5. __I__
6. __O__
7. __S__
8. __J__
9. __W__
10. __G__
11. __Q__
12. __N__
13. __V__
14. __K__
15. __H__
16. __P__
17. __B__
18. __A__
19. __F__
20. __D__
21. __T__
22. __X__
23. __R__
24. __M__