Fundamentals of Intellectual Property

Final Examination

Professor Field Fall 2005

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. After Fred assigned his 2004 U.S. widget patent to Apex, he terminated his employment. If Apex finds Fred making widgets within the scope of that patent's claims, his best defense is that:
   A. his patent does not disclose the best mode.
   B. he has every right to practice his own invention.
   C. his widgets are fully disclosed in an expired patent.
   D. his invention was obvious to persons skilled in the technology.

2. Among these arguments, Fred's (Q 1) best defense would be that:
   A. there was inadequate consideration for his assignment to Apex.
   B. he is making and selling his widgets in Mexico.
   C. widgets covered by his patents weren't novel.
   D. he exports all of his widgets to Mexico.

3. Chris has devised a way to make a TV-like device. Using cosmic rays, it is said to permit viewing of events that have happened at any time and place within the past week. If this is true, he is least likely to get valid patent claims that would block non-licensees from:
   A. using his device to witness future as well as past events.
   B. making his device other than by the method he discloses.
   C. making any device that uses cosmic rays to revisit the past.
   D. using anything other than cosmic rays to operate his device.

4. If Chris's device (Q 3) works sometimes but cannot be made to work consistently, the clearest hindrance to his getting a valid patent is presented by 35 U.S.C.:
   A. § 101.
   B. § 102.
   C. § 103.
   D. § 112.

5. Any patent Chris (Q 3) might obtain would be invalid if it:
   A. could be used to invade people's privacy.
   B. applies a mathematical algorithm.
   C. Neither A nor B is true.
   D. Both A and B are true.

6. If, more than a year before he filed for a patent, Chris (Q 3) charged detectives a fee to view past events by using a similar device:
   A. prior use of such a device would make any patent invalid.
   B. if the device the detectives used was different, such use is irrelevant.
   C. failure to disclose prior use to the PTO would make any patent invalid.
   D. failure to disclose prior use to the PTO may make any patent unenforceable.

7. Beta's patented devices are battery powered. Labels state: "Licenses to use this device are conditioned on purchasing replacement batteries from Beta."
   A. Firms that make and sell replacement batteries may be contributory infringers.
   B. Requiring purchase of unpatented replacements would invalidate the patent.
   C. Even if Beta's batteries are patented, purchasers may buy them elsewhere.
   D. Validity of the restriction is a matter of state contract law.

B. Copyright

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

1. George composed the song, *Xtc,* in 1975. He sang *Xtc* publicly but never recorded it. Myrtle, while at one of his concerts last year in Ohio, surreptitiously did so.
   A. Whether Myrtle's tape infringes his rights is governed by Ohio law.
   B. If Myrtle plays her tape publicly, she will infringe rights given by § 106.
   C. Only if Myrtle charges people to hear her tape will she infringe under § 106.
   D. News programs that play Myrtle's tape would be protected under the First Amendment.

2. Mabel wrote a pamphlet describing a new, improved mousetrap. If Al is selling that trap:
   A. he will not violate her rights unless her pamphlet has copyright notice and is registered.
   B. he does not infringe unless her copyright was registered within three months.
   C. he has every right to do so under § 102.
   D. he infringes her rights under § 106.

3. Sal's flat ceramic tiles, often selling for $1000 or more, are normally displayed on walls. If she seeks to register some of them in the Copyright Office:
   A. the Office is likely to refuse if her tiles could be used as trivets.
   B. and the Office refuses, she can sue anyone who copies those works.
   C. the Office is likely to refuse because her tiles have decorative utility.
   D. and the Office refuses, she cannot sue anyone who copies those works.

4. If Bob, an architect, hired Sal (Q 3) to design special tiles to be permanently incorporated in a new building, full determination of copyright ownership would probably require considering:
   A. § 101 definitions of joint works and works for hire.
   B. The Restatement (Third) of Unfair Competition.
   C. current Restatements of Agency and Contracts.
   D. everything listed in A and C.

5. Angus published a catalog containing photos of oil paintings he holds for sale. Dada, one of the artists, is aggravated because his paintings are selling for much more than he got paid for them. If Dada now registers and sues for infringement, Judge Posner is apt to:

A. be less inclined than some to find Angus's use fair.
B. award statutory damages for willful infringement.
C. be more inclined than some to find Angus's use fair.
D. deny recovery because his unpublished works were not registered sooner.

6 Ev's sexually-explicit songs are sold under the very misleading *Lullabies* label. Flo also sells Ev's songs under the same label. In a suit for infringement, an unclean hands defense is:

A. apt to preclude neither copyright nor trademark relief.
B. apt to preclude both copyright and trademark relief.
C. least likely to preclude copyright relief.
D. most likely to preclude copyright relief.

7. Ed burns custom CDs of tracks copied from original CDs that customers bring to his shop.

A. If he believes that his activities are legal, he is not liable under § 506(a)(1)(A).
B. His transformative activities are most likely to be seen as fair in the 6th Circuit.
C. If he doesn't know that customers are borrowing others' CDs, he does not infringe.
D. If his customers could do the same thing themselves, no court will find infringement.

C. Trademarks [references to the Lanham Act]

Answer only *5 of 7*.

1. After KleenCo's (K) design patent on its detergent bottle expired, Mitu copied K's bottle. If K sues for trade dress infringement, Mitu should prevail:

A. because K seeks to protect only packaging, not product design.
B. if, and only if, K's design has not acquired source significance.
C. if it copies nothing more than what was covered by the patent.
D. unless K's bottle design is functional.

2. Despite its name, Lullabies Music sells songs unfit to be heard by children. The FTC wants to order it to stop using the mark, *Lullabies*. If so, it will probably need to demonstrate that:

A. the mark is misdescriptive.
B. children were deceived by the name.
C. parents of small children have been misled by the name.
D. a disclaimer cannot prevent potential consumer deception.

3. In a patent, BeeCo's toy is described as a "wobbler". Until the patent expired, BeeCo was the sole source. When BeeCo disclaimed rights in "bee" and "wobbler", the PTO registered *Bee Wobbler* as a trademark. When TotsCo began selling a *Tots Wobbler,* BeeCo sued. If a court finds that consumers can distinguish the names but many expect more than TotsCo delivers:

A. TotsCo should be able to get BeeCo's mark cancelled under § 37.
B. BeeCo should prevail under § 43(a)(1)(A).
C. BeeCo should prevail under § 43(a)(1)(B).
D. BeeCo should prevail under § 32.

4. Moja (hereafter "Ja") has long sold women's shoes and leather goods in a small part of the southwest, but its 1990 federal registration refers only to women's shoes. Five years ago, Moha ("Ha") began selling camping gear, including tents and hiking boots in the Northeast. Once Ha got federal registration for everything but the boots, it began to expand geographically. The two names sound the same, so Ja took notice when Ha entered the Southwest. Ja also expanded its product lines to more closely match Ha's. In a suit:

A. Ja has no rights except for the goods covered by its registration.
B. Ha is disadvantaged by failure to search before adopting its mark.
C. Ja lost whatever rights it had for failure to protest Ha's registration.
D. Ha's expansion compared to Ja's seems likely to work to its advantage.

5. Both Ja and Ha (Q 4) have filed affidavits as required by § 15(3). If so, the most likely outcome of a suit is that:

A. Ha's sale of most camping gear will be halted in the northeast.
B. Ja's sale of most camping gear will be halted in the southwest.
C. Ha's sale of hiking boots will be halted in the northeast.
D. Ja's sale of hiking boots will be halted in the southwest.

6. Ja and Ha (Q 4) settled. Each agreed to avoid radio ads, the other's product lines and all similarity in trade dress or logos. If another Moha (Ha2) begins offering camping guide services:

A. Ha has the best chance of prevailing solo — under § 32.
B. Ja has the best chance of prevailing solo — under § 43(a)(1)(A).
C. Ja and Ha would be better off pursuing Ha2 jointly than separately.
D Both Ja and Ha will lose for entering into a naked licensing agreement.

7. Beaniebooties.com, a firm selling footwear for infants online, received a cease and desist letter from Ty. A key part of Beaniebooties' best defense is that:

A. Ty has no rights to *beanie,* as such.
B. it has prominent disclaimers on its webpages.
C. the domain name was available, so it is not cybersquatting.
D. the terms *beaniebooties* and *beaniebabies* have no source-significant relationship.

D. Miscellaneous

Answer only *5 of 7.*

1. SlimCo is selling a new diet supplement. It wants to include news photos of famous (slim) persons in its ads. Before doing so, it:

A. need not search for composition patents that might cover its supplement.
B. should conduct trademark searches for any proposed mark(s).
C. should conduct a copyright search for images it plans to use.
D. Each statement above is true.

2. SlimCo's ads (Q 1) suggest, but do not say, that its product is more effective for weight reduction than it really is. Such representations:

A. are shielded from attack by § 43(c)(4).
B. can probably be restrained by competitors under § 43(a)(1)(B).
C. can probably be restrained by competitors under § 43(a)(1)(A).
D. are protected by the First Amendment; its statements aren't false.

3. SlimCo's has (Q 1) no patent, but free riders are most apt to be liable for using its formula:
   A. under the Restatement of Unfair Competition, if obtained by chemical analysis.
   B under the UTSA, if obtained by chemical analysis.
   C. if, and only if, it was discovered independently.
   D. if they get it by means forbidden by the EEA.

4. If a SlimCo (Q 1) ad says that (thin, famous) Paris Hilton would not need its product, Paris would have the best cause of action under:
   A. § 43(a)(1)(B).
   B. § 43(a)(1)(A).
   C. California's right of publicity statute.
   D. None of the above; this is a true statement of fact.

5. An unknown person published seemingly false and clearly disparaging statements about SlimCo (Q 1). If a Utah competitor forwarded them to its dealers, it would most likely:
   A. not be liable because it was not the original source of the statement.
   B. be liable under that state's unfair competition law.
   C. not be liable unless the statement is literally false.
   D. be liable under § 43(a)(1)(B).

6. After Mary suggested it, CoCo inserted hollow spheres in its soap bars to make them float. Mary is most likely to be entitled to compensation:
   A. if Mary copyrighted an image showing her idea.
   B. if CoCo profited from misappropriating her idea.
   C. unless CoCo lost money because the product flopped.
   D. No prior statement is relevant to the outcome of this dispute.

7. MartCo was refused a design patent for its strange-looking toasters. Since then, it has sold them with prominent labels stating that purchasers agree not to replicate them and that those unwilling to agree are entitled to full refunds. If it is clear that Mitu copied by plug molding, Mitu is most likely to:
   A. lose because contracts, unlike patents, do not run against the world.
   B. lose if the design has source significance.
   C. win because a design patent was refused.
   D. win unless the design is functional.

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. Italy
2. Great Britain
3. European Union
4. Hot news
5. False authorship claims
6. Interstate commerce
7. Corporate right of privacy
8. Criminal liability
9. Laws of nature
10. CCPA
11. Refurbish
12. Offers to sell
13. Rules for simple games
14. Unoriginal works
15. Similarity and access
16. Parodies
17. Moral rights
18. Colors
19. Appropriation
20. Right to use
21. For-profit
22. Not-for-profit
23. Coined
24. Cybersquatting

A. Fanciful.
B. Explicitly lists unpatentable subject matter.
C. Type of speech that need not be commercial.
D. Conferred by no type of intellectual property.
E. Has been recognized in some trade secret cases.
F. Does not describe necessarily actionable free riding.
G. Usually needed to establish copyright infringement.
H. Enacted the so-called Statue of Monopolies in 1624.
I. Where the first patents are said to have been granted.
J. Sometimes required for federal trademark registration.
K. A type of subject matter often said to be unpatentable.
L. Forbidden by a recent amendment to the Lanham Act.
M. Recently held not to be actionable under the Lanham Act.
N. May not infringe rights of publicity, trademarks or copyrights.
O. Type of organizations, counter-intuitively, often in commerce.
P. Protected by the so-called International News Service doctrine.
Q. Possibly unprotected because of the copyright merger doctrine.
R. Foreclosed from copyright protection by the U.S. Constitution.
S. Arguably receive more recognition in the United States since 1988.
T. Source of much U.S. law about patentability and trademark registration.
U. Exist, for 35 U.S.C. § 102(b) purposes, under federal, not state, contract law.
V. Exclusive rights may be available as a matter of trademark but not copyright law.
W. Possible consequence of violating copyright and trademark, but not patent, rights.
X. Neutral term that does not resolve purchasers' rights in the context of patent exhaustion.

Examination No. _____KEY____

Answer Sheet

Part I — (80%)

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

A. Patents

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

B. Copyrights

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

C. Trademarks

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

D. Miscellaneous

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

Part II — (20%)

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

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