Fundamentals of Intellectual Property

Final Examination

Professor Field Spring 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. Pott (P) invented a widget. Doobert (D) invented a new way to use P's widget. Both P and D got patents.
   A. If D's patent is valid, he has a right to make widgets as needed to practice it.
   B. D's patent is invalid if P had already sold his widget for several years.
   C. If D's patent is valid, P can be restricted in how he uses his widget.
   D. D's patent is invalid because P, not he, invented the widget.

2. Assume for only this question that, when D (Q1) made his invention, he was employed as a research worker for P. D got his patent after he left employment with P. In such circumstances:
   A. P probably owns D's patent.
   B. P and D are joint inventors.
   C. P is entitled to only an equal share of income from D's patent.
   D. P is entitled to nothing because D filed after terminating employment with P.

3. Newtonium, occurring 45% pure in nature, has a variety of uses and is generally more useful as its purity increases. Aaron's (A) apparatus makes up to 90% pure newtonium. A's patent on it is
   A. invalid if A's apparatus works better when configured differently.
   B. invalid if A knew that his described configuration was not optimal.
   C. invalid if A did not claim what later proved to be best mode.
   D. invalid for all three reasons listed above.

4. If Bert (B) later invents a way to synthesize pure newtonium (Q 3), B probably can:
   A. not claim any compositions because newtonium is a product of nature.
   B. claim compositions comprising 85% or more of newtonium.
   C. claim compositions comprising 95% or more of newtonium.
   D. claim only his specific process for making newtonium.

5. Cortright (C) found that 45% pure newtonium (Q 3) kills certain kinds of weeds. If C gets a patent on her invention, she will probably:

A. have rights against anyone who sells 45% pure newtonium.
B. have no rights against small farmers who practice her invention.
C. find that her patent is invalid because it does not kill every kind of weed.
D. have rights against newtonium sellers who encourage its use to control weeds.

6. If Fudd (F) invents a new game that encourages kids to eat spinach, he probably can

A. not get a good patent because games are not useful.
B. not get a good patent because his invention violates a basic law of nature.
C. not get a good patent if it's the same as an old way to get kids to eat broccoli.
D. get a valid patent unless some factor other than the three stated above interferes.

7. Gungho's (G) sole business is replacing worn-out parts in devices under patent in the U.S. and Canada. G purchases its devices in those and other countries. If G is found to:

A. "repair," it may not resell any devices in the U.S.
B. "reconstruct," its sales will infringe throughout the world.
C. "repair," it may resell given devices only where they were purchased.
D. "reconstruct," it may resell given devices only where they were purchased.

B. Copyright

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

1. Peters (P) published a book in France. When he learned that Wheaton (W) was infringing in Pennsylvania, he filed suit without registering with the Copyright Office. P should:

A. be entitled to actual damages.
B. lose because he did not register as required by § 411(a).
C. be entitled to statutory damages if W's infringement was willful.
D. be entitled to an injunction based on Pennsylvania common law.

2. Cortright's (C) book describes ways to kill specific bugs on specific crops. Selden's (S) later book contains several minor errors that duplicate ones in C's book. If C sues, she:

A. will win in the 7th Circuit but not in the 9th.
B. will lose if S copied only facts from her book.
C. will lose because her deliberate errors constitute unclean hands.
D. will lose because her book describes something that should have been patented.

3. Taborski (T) invented a pump and registered copyright in his blueprints. Hoffman (H) is selling an essentially identical pump, using identical blueprints. If T sues, he should:

A. lose unless he can show that H copied his blueprints.
B. lose because blueprints needed to make pumps are useful.
C. win if he can show that H reverse engineered one of his pumps.
D. win because the striking similarity of H's blueprints prove that he copied.

4. Jewels (J) attempted to register her rag doll, but was refused. If her doll is copied, J can:

A. not sue for copyright infringement because she lacks registration.
B. sue for copyright infringement notwithstanding her lack of registration.
C. sue for copyright infringement unless registration was refused for lack of originality.
D. not sue for copyright infringement unless registration was refused for lack of novelty.

5. Paul (P) created graphics and timely perfected his rights. Balz (B) copied P's graphics to his website and gave Webster (W) permission to copy his pages. If P sues both W and B:

A. B is apt to be liable for larger statutory damages than W.
B. W has a good fair use defense because he had B's permission.
C. W and B both seem to be direct and contributory infringers.
D. W has a good fair use defense if his site, unlike B's, has no advertising.

6. Freela (F) sent her article to Newspaper (N). N's editor (NE) sent her a check. NE thereafter polished and published it.

A. Under § 101, NE and F are joint authors.
B. Under § 101, F's article is a work for hire.
C. F will infringe if she later includes the original article in a book.
D. N will infringe if it later includes the polished article in a book.

7. Gina (G) took photos of Studly (S). Dumpy (D), G's roommate, put scanned copies on her website, *NH Views*. If S later sues for copyright infringement, he should lose because:

A. NH law regards only commercial uses as unfair.
B. he has no copyright in the photos.
C. D had a license implied in fact.
D. of all three above reasons.

C. Trademarks

[All statutory citations to the Lanham Act]

Answer only *5 of 7*.

1. Fifteen years ago, Phew (P) received a design patent for the shape of its perfume bottle. P has since consistently used a *blue* bottle of that shape for its perfumes. When Smit (S) began to sell perfumes in *green* bottles of that shape, P sued under § 43(a).

A. S's rights should depend entirely on whether P's bottles have source significance.
B. S's rights should be primarily affected by whether P's bottle shape is useful.
C. P's rights should be affected by the expiration of its design patent.
D. P's rights should be affected by its existing design patent.

2. Before trial (Q 1), P sought federal trademark registration for its blue bottle. Its application survived ex parte examination.

A. S should oppose because colors cannot be trademarks.
B. S should oppose because only words can be trademarks.
C. If it obtains registration, P will surely prevail under § 32.
D. Any registration P obtains may be modified or canceled at trial.

3. S (Q 1) has sold its locally-popular line of *Jasmina* perfumes in Manhattan since 1990; it holds no federal registrations. *Jasmina 7,* for example smells like roses, but neither S nor P label scents. After their dispute arose, P introduced a citrus-scent called *Jasmin 7*. S should:

A. oppose any attempt by P to register *Jasmin* as deceptively misdescriptive.
B. succeed in stopping use of *Jasmin* for P's perfumes under § 43(a).
C. succeed in stopping use of *Jasmin* for P's perfumes under § 32.
D. try to force P to label its *Jasmin 7* perfume as citrus-scented.

4. P (Q 1) also registered <Jasmina.com>. P now offers to transfer that so-far-unused domain name and drop use of *Jasmin* if S agrees to use a differently-shaped bottle. S can most likely:

A. get the domain name transferred to it because of P's trademark misuse.
B. get damages for the traffic P has diverted from S's website.
C. show that its name has been diluted under § 43(c).
D. satisfy the requirements of § 43(d).

5. Jasper (J) began selling *Jasmine*-branded, jasmine-scented products in Manhattan in 1940. P (Q 3) just bought J's company and claims that S infringes the marks of its new acquisition.

A. Despite J's long use of *Jasmine,* P's acquired trademark rights are worth little.
B. P will surely win if J sold perfumes as well as, e.g., potpourri and candles.
C. To the extent that J had any trademark rights, S would surely infringe.
D. P's rights in *Jasmine* are strong because of J's long use.

6. Mildred (M) began selling *Flipper* dolls in Iowa in 2001; her federal registration issued in 2003. Edna (E) opened a *Flipper* pancake restaurant in Ada, Ohio in 2000.

A. E may sell *Flipper* dolls in Ada.
B. M cannot sell *Flipper* dolls in Ada.
C. E may open *Flipper* restaurants in Iowa.
D. E may not open a second *Flipper* restaurant in Ohio.

7. Flipper Flour (F) has held a federal registration for pancake mix since 1960. It has also licensed use of *Flipper* by a few Florida restaurants since 1980. Edna (Q 6) never heard of F.

A. F's prior registration would clearly prevent E from registering federally.
B. Under § 43(a), E could stop F from licensing pancake restaurants near hers.
C. Under § 32, F's rights in *Flipper* for pancake restaurants are superior to E's.
D. E's one restaurant in Ohio gives her no rights enforceable under the Lanham Act.

D. Miscellaneous

Answer only *5 of 7.*

1. Paula has published a doll pattern CD. Each time buyers use the CD, they must agree to make no more than one doll from any pattern, and no more than three dolls (total) per year. Enforcement of her click-wrap license is:

A. preempted under the doctrine of *ProCD*.
B. preempted under the doctrine of *Bonito Boats*.
C. not preempted because rights to use CDs are matters of state law.
D. not preempted because there is no conflict with the copyright statute.

2. Fred (F), Mary and Lucy worked on Gyro's (G) secret invention in Florida. Once the invention was complete, F sold blueprints to an interested firm. G's patent application, containing those blueprints, was published two years later. If prosecuted for theft of trade secrets, F most probably:

A. can be convicted.
B. cannot be convicted because the blueprints were later published.
C. cannot be convicted because F's coworkers had access to the blueprints.
D. cannot be convicted because F signed no written confidentiality agreement.

3. Two others, doubting that F(Q 2) owned the blueprints, refused, but Diablo (D) bought a set and soon was practicing G's invention. Only after G's application was published, did he learn for sure that G was the true owner. If G sues D before any patent issues, he should:

A. lose because F showed the blueprints to several firms.
B. lose because his patent application has been published.
C. get an injunction against D's ever practicing the invention.
D. recover for use of the invention prior to publication of his application.

4. Meanwhile G (Q 3) identified most of D's important customers and wrote them about his pending application. If D sues for interference with business relationships, G's actions are apt to be:

A. privileged under both state and federal law.
B. unprivileged under both state and federal law.
C. privileged as a matter of federal law because it concerns a patent.
D. privileged under the law of most states because his speech is commercial.

5. Homer (H) hosts a baseball statistics website. Supported by paid advertising, it is updated weekly. H disclaims any association with teams or players. If players and their association sue, they would most probably:

A. win because H free rides on the efforts of many players and teams.
B. win because H infringes players' rights of publicity.
C. lose because H's speech is noncommercial.
D. win because H's speech is commercial.

6. Below a photo of Barry Bonds (BB), a Nastex (N) poster says: "Do something this star won't; wear an Nastex T-shirt." If BB sues, he is

A. likely to win under § 43(a)(1)(A).
B. likely to win under § 43(a)(1)(B).
C. unlikely to win on any basis if A's statement is true.
D. likely to recover for violation of his right of publicity.

7. Zola (Z) recently set a new home run record. N's owners (Q 6), believing that to be the case, sell T-shirts implying that Z uses performance-enhancing drugs. If Z sues for damages, she most probably will:

A. recover for reductions in royalties from sales of her licensed goods.
B. lose if N's shirts qualify as protected media.
C. win if N's shirts qualify as protected media.
D. lose only if N's statement is actually true.

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

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

1. Notice
2. Publication
3. Nonobviousness
4. Improper means of obtaining
5. Substantial similarity
6. Golden rule
7. Restatements
8. Willfulness
9. Right to use
10. Patent and copyright clause
11. Free riding
12. Claim scope
13. First sale doctrine
14. UTSA
15. 35 U.S.C. § 102(b)
16. Exhaustion of right
17. Restatement of Torts § 757
18. Originality
19. Likelihood of Confusion
20. Commerce clause
21. Secondary meaning
22. Fixation
23. Definitions
24. EEA

A. Treats offers to sell more than one year before filing a patent application.
B. Infringement standard in trademark cases.
C. Often used to fill gaps in federal IP statutes.
D. Constitutional requirement for a valid copyright.
E. Is shown by unexpected results.
F. Infringement standard in copyright suits.
G. The key to determining infringement in patent suits.
H. Determines whether state or federal law applies under the 1976 Copyright Act.
I. Determines whether state or federal law applies under the 1909 Copyright Act.
J. Precludes federal, but not state, IP protection unlimited in time.
K. Source of congressional power over trademarks.
L. Allows purchasers of patented goods to resell them.
M. Allows purchasers of copyrighted goods to resell them.
N. Often the most important component of a statute.
O. Not required, but omission may reduce recovery of damages for infringement.
P. A maxim of statutory construction.
Q. Its absence may reduce damages but does not excuse patent or trademark infringement.
R. Must be shown to recover for misappropriation of trade secrets.
S. Conferred by no type of IP
T. Often permissible as well as unavoidable
U. Synonymous with “source significance.”
V. Once the primary source of trade secret law.
W. Source of federal trade secret law.
X. Common codification of state trade secret law.

Examination No. _____KEY_____

Answer Sheet

Part I — (80%)

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

A. Patents

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

B. Copyrights

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

C. Trademarks

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

D. Miscellaneous

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

Part II — (20%)

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

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