Fundamentals of Intellectual Property

Final Examination

Professor Field Spring 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. Eleven months ago, Chris began to sell computer mice. Her main point of novelty is that they vaguely resemble real mice. She needs to decide promptly whether to seek a patent because:
   A. the market for faddish stuff like this quickly expires.
   B. it takes time to prepare an application.
   C. she is planning to market it in Europe.
   D. market success has now been shown.

2. Appearances aside, Chris's mice (Q 1) are essentially the same as conventional devices of that kind. If so, her devices are most likely to qualify for:
   A. a design patent.
   B. an animal patent.
   C. a utility patent on an article of manufacture.
   D. a utility patent on a machine or composition of matter.

3. If Chris (Q 1) manages to get a patent, her rights are most apt to be infringed if:
   A. retailers replace her tails with longer ones before selling them.
   B. her mice are purchased and sold here after being modified in Canada.
   C. her used mice are purchased and sold here after being repaired in Canada.
   D. her used mice are purchased and sold here after being reconstructed in Canada.

4. If Chris (Q 3) sells her mice on condition that they not be used with Microsoft products:
   A. her patent is enforceable; anyone who violates her condition will infringe.
   B. she will be denied relief against patent infringers; she has unclean hands.
   C. her patent is unenforceable; sales are tied to unrelated products.
   D. her condition fosters monopolies, but her patent is enforceable.

5. If Fred gets a design patent:
   A. it will last twenty years from his filing date.
   B. he need not worry about infringing anyone's utility patents.
   C. it will be valid only if his design satisfies §§ 101-03, and 112.
   D. it will be valid only if his design satisfies §§ 102-03, and 112.

6. If Mabel gets a plant patent:
   A. she need not worry about infringing anyone's utility patents.
   B. it will be valid if her invention is new and unobvious.
   C. it will last twenty years from her filing date.
   D. it will be valid if she satisfies § 112.

7. Ralph assigned all rights in his unpatented invention to Apex on condition that it pay him a 3% royalty on gross receipts. After Apex tries to get a patent and fails, its obligation to pay:
   A. will cease when it stops making Ralph's invention.
   B. will cease twenty years after Ralph assigned his rights.
   C. will cease fourteen years after its application was filed.
   D. will cease because the rate is unrelated to term or validity.

B. Copyright

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

1. Phil, a free-lance artist, designed an ornate computer mouse cover. If he applies to register:
   A. because his covers are novel, the Office is unlikely to refuse.
   B. and the Office refuses, he can sue infringers under § 411.
   C. and the Office registers, validity cannot be challenged.
   D. because he is an artist, the Office is unlikely to refuse.

2. If Phil designed the cover (Q1) for Cutesy Computer Accessories (CCC), any copyright:
   A. belongs to CCC as a work for hire.
   B. is shared with CCC; it is a joint work.
   C. belongs to Phil unless he tells them otherwise.
   D. belongs to Phil, but they have a right to use it.

3. If the head of Phil's covers (Q1) resembles Mickey Mouse, it:
   A. is copyrightable despite any similarity to Mickey or lack of a Disney license.
   B. cannot be copyrightable if the overall cover is a "useful article".
   C. alone constitutes copyrightable subject matter.
   D. is a copyrighted derivative of Mickey.

4. If George designs doll clothes:
   A. copies of his clothes for toddlers would infringe in all circuits.
   B. doll clothes substantially similar to his would infringe in all circuits.
   C. derivatives of his clothes for toddlers might infringe in the 9th Circuit.
   D. mounted, framed versions of his clothes would infringe in the 7th Circuit.

5. In a mayoral contest, Al posted photos of Ed, altered to make him look like a clown.
   A. That is fair use if, and only if, the unaltered photos were used in Ed's campaign.
   B. That is noninfringing if, and only if, both Ed and Al are opposing candidates.
   C. That is noninfringing if, and only if, Al took the photos.
   D. No previous statement is true.

6. Ed (Q 5) responded by posting parodies of Al's campaign ads:
   A. As between the two of them, Ed's use is fair.
   B. Ed's use is not protected by the First Amendment.
   C. As between Ed and the designer of Al's ads, Ed's use is fair.
   D. Ed's use is fair only if his parodies are not substantially similar to Al's ads.

7. Mark got access to intimate photos of Sue and, knowing that he had no right to do so, scanned them into his computer. Mark will be criminally liable if:
   A. Sue's copyrights are infringed.
   B. copyright in the photos has been registered
   C. the photos have a total retail value of more than $1,000.
   D. the photos have a total retail value of more than $2,000.

C. Trademarks [references to the Lanham Act]
Answer only *5 of 7.*

1. Morton Co. invented gizmos and held a patent that has expired. It consistently sold them as Widget® gizmos, but consumers insist on calling then Mortons. If Able Co. wants to compete and fully exploit the goodwill of the product, it may legally sell:
   A. an identical product labeled as an "Able-brand Morton".
   B. an identical product labeled as an "Able-brand widget".
   C. only Able gizmos that don't closely resemble Morton's.
   D. an identical product labeled only as a "Morton".

2. Ipana was once a famous brand of toothpaste. Its manufacturer (M) has not sold it for the past twenty years but enjoys some residual goodwill. If Cox (C) begins to sell Ipana® toothpaste:
   A. the FTC has no sound basis for objection.
   B. M has no sound basis for objection.
   C. C can do so as well as copy the original packaging.
   D. both M and the FTC have sound bases for objection.

3. Bozon (B) registered crudexx.com as a domain name; two weeks later, it sold 50 cases of Crudexx™ toothpaste. Between those events, Kruk (K) filed with the USPTO an intent to use application for Crudexx dental floss. If K has so far sold nothing:
   A. B's domain name registration established strong common law rights.
   B. K's rights will be superior after it files a statement of use.
   C. As the first to use, B can enjoin K from using the mark.
   D. As the first to use, B can oppose K's application.

4. Because B and K (Q 3) sell different products and neither is famous:
   A. no court would enjoin one at the behest of the other.
   B. the USPTO would surely find both marks registerable.
   C. they should save money by agreeing to avoid each other's market.
   D. the USPTO will probably register both if they agree to avoid each other's market.

5. Should K (Q 3) somehow acquire superior rights to Crudexx for all dental hygiene products and B insist on continuing to hold its registered domain name (RDN):

A. any attempt by K to get the RDN transferred would constitute trademark misuse.
B. regardless of its use of the RDN, B would be liable under § 35(d).
C. if it uses the RDN, B might be liable under § 43(a)(1)(A).
D. because it uses the RDN, B is liable under § 43(a)(1)(A).

6. Exxon has heard about the Crudexx dispute (Q 3).

A. Should it sue, § 43(c) would offer the best chance of winning.
B. Should it sue, it will lose if the mark has been federally registered.
C. Should it sue, § 43(a)(1)(A) would offer the best chance of winning.
D. Given differences in the marks and products, it is very unlikely to sue.

7. Flo founded the Kodiak Foobah Church (KFC) in Alaska. Mo was a member, but, after disputes over menus for fund-raising suppers and bingo games, he opened a church of the same name only a mile away. If Flo objects, she would be most likely to lose:

A. because non-profit churches have no common law trademark rights.
B. because the name is not a technically good trademark.
C. unless both churches are in "interstate" commerce.
D. because someone else already has rights to KFC.

D. Miscellaneous

Answer only *5 of 7.*

1. Coco's House of Fashion is a famous source of chic designer products. Its wildly-successful, chocolaty Zip perfume won several awards. Later, Ira Snoot created a nearly identical copy and named it "Zippy." Should Coco sue, it is most likely to win if Ira got the recipe:

A. after it was unfortunately left in an open court file.
B. after it was posted on the web by a disgruntled Coco employee.
C. by using his acute sense of smell to figure out all the ingredients.
D. after it was posted on the web by a renegade government inspector.

2. Ira (Q 1) also got most women in his small apartment house to test Zippy. Each found it to smell better and last longer than Zip. Under 15 U.S.C. §1125(a)(1)(B), Coco is most likely to win if Ira's labels or ads say:

A. "Zippy — an interesting attempt to copy a famous chocolaty parfum".
B. "Tests show that Zippy is a 100% exact copy of Coco's Zip."
C. "Try Zippy; some women think that it smells like Zip."
D. "Snoot's Zippy — a good copy of the real McCoco".

3. If Ira (Q2) also claims that every woman he consulted found Zippy to smell better and last longer than Zip, a court could:

A. enjoin; his statement carries a false implication.
B. enjoin; his statement is fundamentally and facially false.
C. not enjoin; all claims in his statement enjoy First Amendment protection.
D. not enjoin; all claims in his statement are protected under 15 U.S.C. §1125(c)(4)(B).

4. Noticing that the design patent on its waffle iron had only one year left to run, Toto wrote to wholesalers of Exo, saying "Because we believe that their waffle irons infringe our patents, we intend to bring actions against Exo and those who distribute them." Exo then lost many customers. If it brings an action, Exo will:

A. find any suit under 15 U.S.C. §1125(a)(1)(B) to be preempted.
B. prevail for intentional interference with its business relationships.
C. prevail for patent misuse if Toto's claims are objectively unfounded.
D. find most, if not all, possible common law causes of action to be preempted.

5. After its patent expired, Toto (Q 4) molded this language into the bottoms of its waffle irons: "Purchasers agree not to copy. Anyone who finds this unacceptable must return the product for a full refund." Despite that, Diehr copied exactly. If it sues, Toto should:

A. be able to enjoin Diehr's blatant misappropriation of its product goodwill.
B. find its claim for breach of contract to be preempted by patent law.
C. be able to enjoin Diehr's use of its impermissibly-obtained design.
D. find itself losing when Diehr counterclaims for patent misuse.

6. In a further attempt to maintain its competitive position, Toto (Q 4) began running ads that say: "Ms. White could spin the Wheel even better if she made her waffles with a Toto!" If Vanna White sues, she will:

A. likely win for violation of her publicity rights.
B. surely lose under any theory; Toto has made no reference to her.
C. surely win for false endorsement under 15 U.S.C. §1125(a)(1)(A).
D. likely lose; Toto's speech is privileged under 15 U.S.C. §1125(c)(4).

7. Coca-Cola Co.'s new headquarters in Atlanta is built in the shape of the classic Coke bottle, and its architectural copyrights have been registered. Gentile photographed the building, put it on a poster, and registered his copyrights. The poster is signed with his full name and is labeled as "Coca-Cola Headquarters, Atlanta." Should Coke bring suit:

A. it should win because its famous bottles enjoy trade dress protection.
B. the poster will be found to infringe copyright in its building.
C. the poster is privileged under copyright law.
D. No prior statement is true.

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. Independent creation
2. Compulsory license
3. Exhaustion of right
4. 35 U.S.C. § 112
5. Golden rule
6. Mathematical algorithm
7. Unclean hands
8. Statutory bar
9. Secondary considerations
10. Contributory infringement
11. Preemption
12. Secondary meaning
13. Originality
14. Substantial similarity
15. 17 U.S.C. § 204
16. Plain meaning rule
17. 17 U.S.C. § 107
18. Private financial gain
19. Espionage
20. Commerce clause
21. Dilution
22. Statutory damages
23. Punitive damages
24. Right of publicity

A. The basic test for copyright infringement.
B. Creates vicarious patent and copyright liability.
C. When applicable, legislative history is irrelevant.
D. Arguably does not qualify for patent protection.
E. One kind of forbidden trade secret appropriation.
F. May be ten or more times compensatory damages.
G. No longer necessary for criminal copyright liability.
H. Not a defense to patent and trademark infringement.
I. Judge Nelson likened it to Kant's categorical imperative.
J. Patent equivalent to the first sale doctrine of copyright law.
K. Much less demanding than the patent novelty requirement.
L. May help overcome allegations that an invention is obvious.
M. Arises under, e.g., 35 U.S.C. § 102(b) and 17 U.S.C. § 412.
N. May be available from cybersquatters and copyright infringers.
O. Sometimes needed to establish common law trademark rights.
P. Does not require that marks confuse as to source or sponsorship.
Q. Source of power for federal trademark and trade secret legislation.
R. Obligates copyright owners to permit compensated use of many works.
S. A potential defense to infringement of any type of intellectual property.
T. Statutory interpretations cannot be inconsistent with legislative objectives.
U. Judge Kozinski said that it differs "materially from state statutes of fraud."
V. One type of IP addressed in the Restatement (Third) of Unfair Competition.
W. Explicitly addressed in copyright and federal trademark, but not in patent, legislation.
X. Minimizes options for having patent and trade secret protection for the same invention.

Examination No. _____KEY____

Answer Sheet

Part I — (80%)

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

A. Patents

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

B. Copyrights

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

C. Trademarks

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

D. Miscellaneous

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

Part II — (20%)

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

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