Fundamentals of Intellectual Property

Final Examination

Professor Field Spring 2007

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]

Specific Instructions: Put the letter for the most correct concluding phrase or statement in numbered spaces on the answer sheet. Only the first 5 answers in sections A through D count.

A. Patents [Section references to 35 U.S.C.]

Answer only 5 of 7.

1. Juan (J) assigned his patent to Boss (B). If B finds J practicing the protected technology, J's best defense is that:
   A. everything he uses is claimed in an expired patent.
   B. everything he uses is described in two expired patents.
   C. his patent is invalid.
   D. he cannot infringe his own patent.

2. Patent covers a combination device. A component has a lifespan of 2 years. If Competitor (C) encourages device purchasers (Ps) to buy their replacement components from it, C:
   A. will infringe under § 271(b) if Ps repair their devices as C urges.
   B. will infringe under § 271(c) if Ps have no other use for components that C sells.
   C. cannot infringe unless Ps, themselves, are liable under § 271(a).
   D. is most likely to infringe if C makes repairs itself.

3. If, after Patent issues, Owner (O) realizes that its claims are too narrow:
   A. O's only option is to file for an improvement patent within a year.
   B. O can expand the claims in the same patent within three years of issue.
   C. O will be unable to recover from people already using only unclaimed territory.
   D. no problem; others cannot use technology newly disclosed by the patent.

4. Inventor (I) claims an auto exhaust component said to improve the life of tires and seat cushions. If Examiner (E) is skeptical that the invention works, she:
   A. can reject all of I's claims on the basis of § 101.
   B. can reject all of I's claims on the basis of § 112.
   C. Neither A nor B are correct; E must presume utility.
   D. Both A and B are correct.

5. About 14 months after he began selling a device, Ben applied for a patent on a substantially improved version. If he chooses not to disclose his earlier sales to the PTO:
   A. that's good; no point in cluttering the record.
   B. it makes no difference; he seeks protection for a novel device.
   C. any patent is apt to be unenforceable even if some claims are valid.
   D. all claims in his patent are sure to be invalid under § 102(b).

6. P sued D for patent infringement. If D seeks to establish invalidity under § 103, it will be most helpful to P that:
   A. D must prove invalidity by a preponderance of evidence.
   B. many small commercial parties have taken licenses.
   C. the invention is very popular among with-it consumers.
   D. those skilled in the art were surprised that the invention works.

7. Ed's patent covers an improved razor that uses standard double-edge blades. If Ed seeks to require purchasers to buy blades only from him, you would tell him that he:
   A. can insist because of risks posed by unsterile blades.
   B. is unlikely to succeed.
   C. should market his razors as single-use-only.
   D. would have the most luck in preventing the use of imported blades.

B. Copyright [Section references to 17 U.S.C.]

Answer only 5 of 7.

1. After Myrtle registered copyright in her recipe for a unique candy, she posted it on the web and offered licenses for its use. If anyone uses it without paying her, she cannot recover because:
   A. use of recipes is not protected by §§ 102 or 106.
   B. use of a recipe is fair under § 107.
   C. the recipe and its expression will be seen to merge.
   D. of all of the above.

2. Mary sued Joe for exactly duplicating her registered vase. Joe's best argument for evading liability is that:
   A. his use is fair.
   B. vases have uses independent of their appearance.
   C. minimal ornamentation on her vases isn't very original.
   D. vases have no use apart from their appearance.

3. *The Scoop* (S) published a letter sent by Fred (F). If he sues for infringement, S will:
   A. win because S had an implied license.
   B. lose because F did not give S explicit written permission.
   C. lose if F registers before publication.
   D. win because S had an implied assignment.

4. If F's letter (Q3) is identical to much of Mo's published by S two months earlier, F would:
   A. infringe unless he forgot that he had read it.
   B. infringe unless Mo failed to register and give notice.
   C. infringe because access and copying would be presumed.
   D. not infringe because of differences between the two letters.

5. Shortly after Adam (A) won a photography contest, he was surprised to find Ed (E) selling posters strikingly similar to his prize-winning shot. If A sues for infringement, E should:

A. win if he can prove that he took his own photo.
B. win if he saw A's photo but had no opportunity to reproduce it.
C. win if A's photo is being used in commercial advertising.
D. lose unless he can prove that he never saw A's photo.

6. To help get re-elected, Guv (G) wrote a poem celebrating his success in office. If Opponent (O) rewrote the poem to make G's successes look like failures, and G sued, O will:

A. win because political speech is not copyrightable.
B. win if he copies no more than needed for a satirical response.
C. win because he can copy as much political speech as he wants.
D. lose because he is trying to take G's job.

7. Sam (S) found photos of Mary (M) on the web and copied them to his site. If his copies are worth more than $1000 and S is prosecuted, he may be convicted for:

A. wire fraud.
B. holding stolen property.
C. criminal copyright infringement.
D. no crime unless the photos were registered.

C. Trademarks [statutory references to Lanham Act]

Answer only 5 of 7.

1. From a small shop in Concord, NH, Fruitco (F) sells juices in uniquely-shaped bottles. If Grafix (G) begins selling posters featuring F's bottle, F:

A. will need to prove secondary meaning before § 43(a) would be available.
B. should not prevail unless G misrepresents source or sponsorship.
C. might be best off suing for copyright infringement.
D. At least two of the foregoing are true.

2. F's (Q1) potential trademark protection for its bottle:

A. is hampered by lack of interstate commerce.
B. is zero because bottles are functional.
C. is zero because three dimensional objects cannot be registered.
D. would be diminished by having design patent protection.

3. Juisco (J) competes with F (Q1). If F believes that J's ads make false claims about J's juices:

A. the 1st Amendment will prevent F's doing much about it.
B. F can prevail only if J also makes literally false claims about F's juices.
C. what consumers hear is more important than what J says.
D. § 43(a) would be unavailable if both parties' activities were limited to one state.

4. J (Q3) holds federal registration of a word mark for *fruit* juices. If J learns that Bozo (B) *vegetable* juices were earlier sold under essentially the same mark, it would be best off to:

A. enter into a non-compete agreement.
B. sue under both § 43(a) and (c).
C. sue under § 32.
D. find another mark.

5. Fut (F) has sold shoes for 30 years in Kansas. Four years ago, after selling inexpensive shoes under the same mark in most of the southwest, Boot (B) got federal registration. Not until B registered that mark as a domain name did F learn of B's existence. In those circumstances, F:

A. can cancel B's registration.
B. cannot cancel B's registration because it is incontestable.
C. is entitled to have the register reflect its common law rights.
D. is entitled to registration covering all currently unoccupied territory.

6. Saaks (S) registered the same mark used by B and F (Q5) for $2000 handbags. B knew about S but did not object until it began to distribute via the same retailers. In those circumstances, B:

A. may be able to cancel S's registration based on bad-faith adoption.
B. may be able to enjoin S's selling via common retailers.
C. cannot prevail because of unclean hands.
D. should expand its line to include inexpensive purses.

7. Marge (M) set up an internet business permitting people, for a small fee, to resell and exchange S's high-price handbags (Q6). If S objects, it can:

A. force M to label used merchandise as such.
B. force M to remove S's name from used merchandise.
C. prevent M from diluting its famous name on her website.
D. At least two of the foregoing are true.

D. Miscellaneous

Answer only 5 of 7.

1. Pel (P) uses custom-made tools in his business. P entrusted one set of tools to Machinist (M) for repair or replacement. If M makes a set for Olie (O), P can probably get them destroyed:

A. if O understood that M had a confidential relationship with P.
B. if no one other than P and M has had access to the tools.
C. if P has told M that the tools give him a great competitive advantage.
D. if at least two of the foregoing are true.

2. P and M (Q1) first met in a restaurant where P laid his tools out to see whether M could meet his needs. Unbeknownst to them, a stranger, John (J), found the tools interesting and took a few photos. If J later puts his photos on the web:

A. J will thereby violate P's commercial right of privacy.
B. P's rights are likely to be seriously compromised.
C. M's duties to P will still continue.
D. J will have improperly used P's trade secrets.

3. Despite a nondisclosure agreement with Lu (L), Ed (E) sold L's secrets to a foreign firm (F). If, since then, L has inadvertently published its secrets:

A. that will help E only if he is aware of L's publication.
B. E may be jailed up to three years and fined up to $5000.
C. F may be fined up to $10 million.
D. E would face no liability.

4. Zeta (Z) states prominently on its unique, attractive toasters and retail packaging, "Purchaser agrees to either not copy this product for retail distribution or return it for full refund." If, based on one bought at Wal-Mart, Ocme's (O) copied toasters are sold at Retailer (R):

A. O cannot be enjoined from selling more.
B. R can be enjoined from selling more.
C. because of its willful breach, O will be obligated to disgorge its ill-gotten gains.
D. No foregoing answer is true.

5. Nonprofit Consumer Union (CU) compared O's and Z's toasters (Q4) and suggested in *Consumer Reports* that O's slightly more expensive toasters were better made. Later, after further study, CU retracted that suggestion. Were it to sue under § 43(a)(1)(B) for income lost in the interim, Z would be more likely to recover if:

A. CU were for profit.
B. CU intended consumers to believe the false suggestion.
C. surveys show that consumers believed the false suggestion.
D. None of the foregoing answers are true.

6. O was very happy to see the CR article (Q5). If it made copies of the article and distributed them via its sales personnel:

A. that would be fair use if the retraction were also distributed.
B. O could be liable for Z's reduced income in Utah.
C. O could violate Z's right of publicity in Oklahoma.
D. O would be liable to Z in Utah — but only under that state's unfair competition law.

7. The nonprofit Phrenology Institute's (PI) bronze statue of a human head sits at the entrance to its campus. The logo on all of its literature and stationery is a side-view profile of the statue. Tom (T), no fan of phrenologists, sells coffee mugs containing a front-view photo of PI's statue. Beneath the photo, T's mugs say nasty things about phrenology. If PI decides to sue:

A. § 43(a)(1)(A) is unavailable because PI is not commercial.
B. T may win because PI's statue is visible from public streets.
C. T may win if his mugs are media, not merchandise.
D. T will win if his mugs are merchandise, not media.

Part II: Matching

[20 points]

Specific instructions: Answer only 20 of 24. Only the first 20 answers count.

Each numbered item is intended to match only one lettered item. Put the best letter in up to 20 numbered spaces on the answer sheet.

1. Boat hull protection
2. Plant patent term
3. First sale doctrine
4. Trademark registration
5. Published work for hire
6. Unpublished work for hire
7. Cybersquatting statutory damages
8. Copyright statutory damages
9. Head start injunction
10. Profits and damages
11. Reasonable royalty
12. Validity
13. Joint owners of plant patents
14. Joint owners of copyrights
15. Statutory compulsory licenses
16. Willful infringement
17. Exhaustion doctrine
18. Design patent term
19. Design patent requirement
20. Utility patent requirement
21. Copyright requirement
22. Likelihood of confusion
23. Doctrine of equivalents
24. Substantial similarity

A. Originality.
B. Up to $150,000.
C. Up to $100,000.
D. Must share income.
E. Twenty years from filing.
F. Disclosure of best mode.
G. Fourteen years from grant.
H. Nonobvious ornamentation.
I. Basis for patent infringement.
J. Not required to share income.
K. Must be renewed after ten years.
L. Test for copyright infringement.
M. Test for trademark infringement.
N. Remedy for patent infringement.
O. Numerous for copyrighted works.
P. Remedy for trade secret infringement.
Q. Limits post-sale rights of patent owners.
R. Requirement for criminal copyright liability.
S. Limits post-sale rights of copyright owners.
T. Term ends after no more than ninety-five years.
U. Term ends after ten years from alternative dates.
V. Remedy for copyright and trademark infringement.
W. Presumed from trademark and copyright registration.
X. Term ends after no more than one hundred and twenty years.

Examination No. _____KEY_____

Answer Sheet

Part I — (80%)

Again, in each set, only the first 5 answers count (4% each)

A. Patents

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

B. Copyrights

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

C. Trademarks

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

D. Miscellaneous

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

Part II — (20%)

Again, only the first 20 answers count (1% each)

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