Fundamentals of Intellectual Property
Final Examination

Professor Field Fall 2012

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

- Put your exam number and answers on the sheet provided.
- Questions in Part I are worth four times as much as those in Part II.
- This is not a research exercises. You shouldn't need to page through your book and notes; don't waste time trying to do it.
- **Don't waste time by answering more questions than required; they won't be graded.**

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

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

A. Patents [all references to 35 U.S.C.]
Answer only 5 of 7.

1. If Al believes that Bob is infringing his device patent, Al:
   A. can warn Bob but not people who have purchased Bob's device.
   B. cannot warn Bob's customers without committing a state tort.
   C. has a federal right to notify anyone who may be infringing.
   D. must carefully consider the First Amendment.

2. Abe invented a device but wants to delay filing a patent application until he investigates market demand over the next eighteen months to two years. To accomplish his objectives, he may:
   A. rent the devices, but not offer them for sale.
   B. sell the devices in the open market but only at cost.
   C. ask potential customers sworn to secrecy to evaluate it.
   D. publish all of the details on the web and conduct customer interest surveys.

3. Apex holds a patent on a new process of using CDs. To get licenses, people must purchase both his player and his uniquely sized CDs. If Beta sells CDs that fit only the Apex player, Beta
   A. may prevail because Apex requires customers to buy unpatented goods.
   B. infringes only if Apex also patented his CD player.
   C. infringes only if Apex also patented his CDs.
   D. may infringe under § 271(c).

4. Zidco holds only a U.S. patent on disposable razors sold around the world. If Crukco, a U.S. firm, wants to collect Zidco's used razors, replace the unpatented blades and resell them, it:
   A. cannot resell razors originally sold in Mexico in Japan.
   B. can probably resell any of Zidco's razor originally sold here.
   C. will infringe Zidco's exclusive right to make and sell its razors.
   D. may resell those razors regardless of where they were originally sold.

5. Before he got a patent, Ed tried to sell all his rights in a new fribbit (also called a gizmo) to manufacturers. One of those was ZCo; it lost interest after its engineers found the gizmo inoperative. Should it want to sell the product during the term of its patent, ZCo:

A. may be able to invalidate it for failure to comply with § 112.
B. would find it very difficult to invalidate it under § 103.
C. would find it easy to invalidate it for obviousness.
D. should be able to invalidate it for lack of utility.

6. Initial claims in Abe's application recited nails, glue and Velcro as fastening means. When an examiner found a similar use for screws, the claim to nails was stricken, and the patent issued. Now, otherwise infringing activities that use rivets as fastening means:

A. will infringe literally.
B. will infringe under the doctrine of equivalents.
C. may infringe if rivets are more like nails than Velcro.
D. may infringe if rivets are much more like Velcro than nails.

7. An examiner rejected Jo's claims as inoperative despite an affidavit from an expert. If the Board also discredits the affidavit, Jo will probably have the best chance of success by seeking the aid of:

A. the Federal Circuit.
B. the Second Circuit.
C. the Ninth Circuit.
D. a district court.

B. Copyrights [all references to 17 U.S.C.]

Answer only 5 of 7.

1. TZ sells popular summer hats. If Dud's-R-Us sells close copies and TZ sues, it will win:

A. if D-R-U copies TZ's unique floral prints.
B. because hats are unnecessary in warm weather.
C. despite lack of secondary meaning in its unique design.
D. if boat-shaped decals appear on both original and copied hats.

2. Mary sells posters that feature images of John's vases. She will be most likely to infringe if:

A. the utility of vases is seen to reside mostly in their appearance.
B. John's vases have original ornamentation.
C. John's vases lack original ornamentation.
D. vases are seen as containers.

3 If Bud is sued for selling copies of Not-E's obscene videos, he:

A. should prevail on an unclean hands defense.
B. is likely to lose if the videos have been registered.
C. need not worry if the Office has refused to register.
D. should win because the Office refuses to register obscene works.

4. If Bo posts some of Al's videos on the web for free downloads, she may be criminally liable:

A. unless a lawyer told her that she may do so.
B. if the value of downloads exceeds $1500.
C. if the value of downloads exceeds $500.
D. regardless of the value of her copies.

5. After Jane and Sally shared a lab, Jane read a paper published by Sally. If it presents data that Jane collected by dint of substantial inspiration and perspiration, Jane might win in state court:

A. if she did not publish her data.
B. if Sally's publication represents a breach of confidence.
C. by showing that the data was copied from one of Jane's publications.
D. if the data was unpublished and Sally's publication breached a confidence.

6. Working from images on Bill's web pages, May copied his popular sandals. To sell her sandals, May, too, posts images. If her images are strikingly similar to his and Bill sues, he can most likely recover if:

A. she reproduces his images as well as images of her shoes.
B. all of her images are substantially similar to his.
C. she had access to his images.
D. All previous statements are true.

7. Assume that, in 1992, I.M. Pei registered copyright for a building later built in a central urban location. If he now sees several small 3-D replicas and photos displayed for sale by the building's owners (BO) and sues, a court is most apt to find that:

A. the photos infringe unless BO's use is fair under § 107.
B. BO can't infringe because it owns the copyright.
C. both the replica and the photos infringe.
D. only the replicas infringe.

C. Trademarks [statutory references to Lanham Act]

Answer only 5 of 7.

1. Photog also sells posters featuring the Pei building mentioned in Q.B.7. If BO sues under the Lanham Act, it is likely to win:

A. because Photog copied their trade dress.
B. if the photos identify their building by name.
C. if it has federally registered a similar image as a trademark.
D. All previous statements are false.

2. Assume that Crukco may legally resell some Zidco razors described in Q.A.4. If Zidco nevertheless insists that its name be removed from the used goods, a court should:

A. agree unless that will make them cost more than consumers can afford to pay.
B. disagree because consumers need to know the goods' original source.
C. disagree if a disclaimer will eliminate any risk of source confusion.
D. agree because trademark rights are not exhausted by initial sales.

3. See Q.C.2. Crukco also sells on the web at usedzidcorazors.com. That prompted Zidco to seek arbitration under ICANN's Uniform Dispute Resolution Procedure and file under the Lanham Act. Zidco also registered crukco.com, intending to force Crukco to drop the other domain name. Under those circumstances:

A. Zidco itself has probably violated § 43(d).
B. Zidco would probably prevail under both § 32 and § 43(a)(1)(A).
C. Zidco would probably prevail under both § 43(a)(1)(B) and § 43(c).
D. All previous statements are true.

4. A famous BunkCo (BC) logo fed a rumor that its president worships Satan. Eventually, BC tired of the controversy and publically announced that it was abandoning its federal registration. When that became effective, X & Y immediately adopted BC's logo for identical goods:

A. BC has no basis for action against others' use of its abandoned logo.
B. As between X and Y, the first to file an ITU application should prevail.
C. As between X and Y, the first user of the logo in commerce should get exclusive rights.
D. All previous statements are false.

5. Assume that Concord's Washington Street Café (WSC), in business for many years, holds no federal registration. If a quickly expanding California restaurant chain of the same name:

A. held a federal registration issued before the local firm's use, it would have superior rights.
B. applies to register federally, it could secure rights to most of the country.
C. service marks are more appropriate than trademarks for restaurants.
D. All previous statements are true.

6. See Q.A.5. Assume that Ed sells its product as a Gizmo®. If ZCo sells its similar product as a "gizmo" and Ed sues:

A. he need not be concerned about what consumers call such devices.
B. he would be helped if fribbit is the common name for such devices.
C. he would be helped if his patent consistently calls his device a Gizmo®.
D. All previous statements are true.

7. See Q.A.5. Not until 7 years had passed did ZCo conclude that Ed's patent was invalid and begin to compete. ZCo's devices are blue whereas Ed's are red. If the patent proves to be invalid, courts might nevertheless require ZCo to:

A. make substantial product changes to comply with state unfair competition law.
B. make further ornamental changes if needed to avoid source confusion.
C. alter functional elements as needed to avoid source confusion.
D. All previous statements are false.

D. Miscellaneous

Answer only 5 of 7.

1. See Q.A.5. Ed brought detailed information when he visited ZCo but accidentally left some important process information behind. He later sued ZCo for making his product. If the patent is invalid, under state law a court may, with respect to the information left behind:

A. enjoin ZCo from using it.
B. permit use because it was accidentally disclosed.
C. permit use unless ZCo signed a confidentiality agreement.
D. not enjoin use lest states discourage use of the patent system.

2. Assume that the International Olympic Committee has exclusively (and expensively) licensed Flyts to transport U.S. spectators to and from its events. Also assume that Airgo, making no reference to the games or to Flyts, advertizes cheaper, appropriately timed round-trip tickets from NYC to Sochi Russia and Rio (sites of upcoming games). If parties to the license sue, the Second Circuit would most likely:

A. enjoin only if Airgo's competition eliminates Flyts' ability to make any profit.
B. enjoin based on its recent *NBA* and *Barclays* decisions.
C. refuse to enjoin for lack of a cause of action.
D. enjoin for unfair competition.

3. BoobTV accepted Mary's idea for a reality TV program and agreed to pay royalties for five years. Two years later, after others successfully copied, Boob stopped paying. Under New York law:

A. Boob must pay.
B. Boob need not pay if that would mean operating at a loss.
C. Boob need not pay if Mary got the idea from reading a book.
D. Mary should be able to recover licensing fees from Boob's competitors.

4. See Q.D.3. If Boob publishes ads claiming that named competitors ripped it off, those competitors:

A. might have a good cause of action for unfair competition in Utah.
B. might have a cause of action under Lanham Act § 43(a)(1)(B).
C. should have a good cause of action for slander per se in Utah.
D. All previous statements are true.

5. Assume that an Oprah show noted the popularity of Harry-Potter-inspired jellybeans with flavors such as earwax, mud and booger. Believing it to be true, she also implied that the candy might be harmful to small children. If sales later drop, the licensor of such things:

A. might have a good cause of action under § 43(a)(1)(B).
B. would find Oprah's commercial speech to be protected.
C. would find Oprah's noncommercial speech to be protected.
D. would have a good Oregon cause of action for product disparagement.

6. Zink sued Zonk for trade secret theft and won. When Zink later brought a similar action against Fink, Fink's attorneys found the alleged secrets disclosed by unsealed document left behind in the Zonk court file. If they move for a directed verdict, the court should be most influenced by:

A. evidence that some of that information was reported in a local newspaper.
B. Zonk's failure to take reasonable steps to preserve secrecy.
C. the parties' mutual interest in preserving secrecy.
D. the attorneys' discovery by improper means.

7. See Q.D.6. Zink once held a patent on another technology in issue but it has expired. If Fink's attorneys also move to have additional trade secret counts dismissed on that basis, a court should:

A. refuse unless the patent discloses the alleged secrets.
B. agree because such information had to be disclosed in the patent.
C. refuse if Fink originally used improper means to obtain the alleged secrets.
D. agree if any undisclosed information could be obtained with minimal effort.

Part II: Matching
[20 points]
Specific instructions: Answer only 20 of 24.

Match numbered items with their letter-denominated descriptions. Put the best letter matches in the spaces on the answer sheet. **Only your first 20 answers count.**

1. Utility
2. Profits
3. Fair use
4. Invalidity
5. Five years
6. Unlimited
7. Derivatives
8. Trade dress
9. Registration
10. Cyberpiracy
11. Orphan works
12. Art. 1 § 8, cl. 3
13. Inventors' ideas
14. *Polaroid* factors
15. Right to practice
16. Source confusion
17. Statutory damages
18. Knowing imitation
19. Secondary meaning
20. Compulsory license
21. Trademark strength
22. Economic monopoly
23. Substantial similarity
24. Intent to use applicants

A. Cannot be functional.
B. Conferred by no form of IP.
C. May be freely used if unsolicited.
D. The potential duration of trade secrets.
E. The basis for federal trademark legislation.
F. Synonymous with acquired distinctiveness.
G. Determined in part by the number of users.
H. A remedy that is not available for patentees.
I. A type of recovery unrelated to plaintiff's loss.
J. A requirement for the principal type of patent.
K. May have rights superior to those of first users.
L. A consequence of refusals to enjoin IP infringers.
M. May be legally created only by copyright owners.
N. A period important to federal trademark registrants.
O. Needed to recover under Lanham Act § 43(a)(1)(A).
P. Test for determining whether copyrights are infringed.
Q. One of the most common defenses to IP infringement.
R. Necessary for trade secret and right of publicity recoveries.
S. A market position unlikely to be enjoyed by most IP owners.
T. The most common defense to suits for copyright infringement.
U. Increasingly likely absent obligations to register copyright claims.
V. Reflect considerations equally applicable under Lanham Act § 2(d).
W. May result in damage awards up to $100,000 without proof of harm.
X. Needed before suits may be filed for infringing copyright in U.S. works.

Examination No. _KEY_

Answer Sheet

Part I — (80%)

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

A. Patents

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

B. Copyrights

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

C. Trademarks

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

D. Miscellaneous

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

Part II — (20%)

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

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