Fundamentals of Intellectual Property

Final Examination

Professor Field Spring 2010

This is a three-hour, open-book exam. You may consult any written materials but 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.
- **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 numbered spaces on the answer sheet. **Only the first 5 answers in I.A through I.D count.**

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

Answer only 5 of 7.

1. After Scooter (S) left Marx (M), his former employer, he started a competing business. If M sues for infringement of a patent that bears S's name, S's best defense will be that:
   A. he has every right to practice his invention.
   B. the technology he uses is fully disclosed in an expired patent.
   C. he was forced to agree to assign his patent rights to get the job.
   D. the patent is unenforceable because key information was withheld from the PTO.

2. The patent (Q. 1) claims an improved process of baking cookies. The patent will be valid if, and only if, it discloses:
   A. everything both commercial and amateur bakers need to know.
   B. the type of oven used for each batch of test cookies.
   C. everything commercial bakers need to know.
   D. optimal processes for all types of cookies.

3. If the patent (Q. 1) claims the use of a computer to control commercial ovens, it will be:
   A. invalid because software isn't patentable.
   B. invalid because business methods aren't patentable.
   C. valid if a new, useful and unobvious process is disclosed and claimed.
   D. valid unless some users can perform necessary calculations in their heads.

4. Mabel has discovered that a certain brand of paste is useful for wart removal. The manufacturer, however, refuses to reveal its exact composition. If she can obtain a patent:
   A. it will be invalid because she cannot provide the exact composition of the paste.
   B. members of the public who use the paste to remove warts will not infringe.
   C. it will enable her to sell the paste for such a use without FDA approval.
   D. it will be unenforceable against members of the public who infringe.

5. Mo (M), the first and only purchaser of Bud's (B) invention found it inoperative. B returned his money and, 14 months later, having worked out the bugs, B sought a patent. If so:

A. his patent would be valid because the product sold earlier didn't work.
B. his patent would be valid because he returned M's money.
C. he would be stupid to tell the PTO about the earlier sale.
D. any patent would be invalid.

6. After Flo's patent issued, new art was discovered. It suggests her invention, but careful research subsequently revealed her invention to have unexpected advantages. If so, validity will be:

A. clear once experts explain the nature of the advantages.
B. questionable under § 102 unless the prior art is identical.
C. questionable because the advantages are unsupported by her specification.
D. clear if those skilled in the art can immediately see the value of the advantages.

7. DOA's device analyzes enzymes in a drop of saliva put on a disposable wafer. The process is patented, but the device and wafer are not. Another firm that sells very similar wafers:

A. cannot infringe; purchasers have a right to use devices purchased from DOA.
B. might infringe under § 271(b).
C. might infringe under § 271(d).
D. will infringe under § 271(a).

B. Copyrights [statutory references to 17 U.S.C.]
Answer only 5 of 7.

1. PDQ's popular children's frocks are decorated with a rosebud appliqué. If Kruk copies them, it:

A. cannot infringe because appliqués are part of the frocks.
B. cannot infringe because clothes (frocks) are useful articles.
C. cannot infringe absent substantial similarity of its appliqués.
D. is likely to infringe because decorated frocks are not useful articles.

2. Some frocks (Q. 1) also have a polka-dot pattern. If registration of PDQ's pattern is refused:

A. anyone who copied it would nevertheless risk statutory damages.
B. PDQ still might get a jury to find it copyrightable.
C. no one can be sued for copying the pattern.
D. copyright will still be presumed valid.

3. If PDQ (Q. 1) hires a professional artist to design fancy borders, any copyrights will:

A. automatically belong to PDQ.
B. belong to PDQ if the artist signs a statement to that effect.
C. cover works for hire if the artist signs a statement to that effect.
D. belong to PDQ because the borders were commissioned as part of larger works.

4. Amos, an amateur, admires Jo's professional photographs. After many tries, he very closely approximated one. If, after he proudly sends a copy to Jo, a license fee is demanded, Amos:

A. cannot refuse merely because Jo's work lacks copyright notice.
B. can refuse because his photo was the result independent work.
C. may refuse unless he intends to display his work in public.
D. must pay to avoid damages as a willful infringer.

5. If Jo's friend, a federal prosecutor, decides to press criminal charges, Amos (Q. 4):
A. is apt to be guilty of violating larceny statutes.
B. is apt to be guilty if his photo is worth at least $500.
C. cannot be guilty unless Jo's photo is worth over $1000.
D. cannot be guilty because his work was noncommercial.

6. Bo just uploaded his song, "Fools Go-in' Down," to the web. Except for all different words, it sounds like Larry Platt's "Pants on the Ground." If Platt sues, Bo's best defense is:
A. many songs of that type sound very similar.
B. he is making fun of Larry Platt's song.
C. he is making fun of fools.
D. no words are the same.

7. South Butt (SB) built an avant-garde facility using only empty Skyy bottles. If Beavis sells posters featuring that building and SB sues, liability will most likely turn on whether:
A. the building is a useful article.
B. the posters are designed to make fun of SB.
C. the facility is ordinarily visible to the public.
D. the work was registered before the poster was published.

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

1. Tots copied PDQ (Q. B.1), too — to the point of using pictures of PDQ frocks in its ads. Details differ considerably, but styles and overall appearance are strikingly similar. If PDQ sues:
A. state unfair competition law would offer much better prospects than § 43(a).
B. it should win under § 43(a), based on inherent distinctiveness.
C. it should prevail under § 43(a) for reverse palming off.
D. it need not show secondary meaning.

2. Sam invented the Pladder, more like a calzone than a sandwich. He then filed to register *Pladder* as a trademark for his business. If he sells drinks, salads, etc., as well as his Pladders:
A. he'd save money by filing for a service mark instead.
B. as a trademark, *Pladder* would be problematic.
C. neither A nor B is true.
D. both A and B are true.

3. Apex holds incontestable Citi-Safari®. If it sues "Jones' Total City Safaris," Jones should:
A. not be allowed to call his tours "safaris."
B. be allowed to use city and safari in his name.
C. be required to disclaim any connection with Apex.
D. be required to offer exactly the same services as Apex.

4. MT filed an ITU application for *Ultra-uber* shoes on Jan. 1. Zing sold *Alter-uber* hats on Feb. 1, filed (based on use) on Mar. 1, and opposed when the PTO published MT's mark on May 1:
A. If the TTAB finds confusion likely, Zing's opposition will fail.
B. Zing was well advised to oppose MT's application.
C. Zing has superior rights if MT has not yet used.
D. MT has priority, so confusion is irrelevant.

5. T-T®, a Maine firm, registered in 1985; it sells sail boats. T-T™, an Arizona firm, has sold camping gear since 1997. If the boat firm learns of the second firm and sues:

A. its case for likelihood of confusion is strong.
B. it will have lost no territory for failure to sell in Arizona.
C. product differences are irrelevant because the marks are the same.
D. likely confusion would be enough to immediately halt the other's use of the mark.

6. If a firm deals exclusively in goods clearly marked as used but originally made by T-T™ (Q. 5), its ownership of T-T.com would be:

A. legal under § 43(d) despite evidence of consumer confusion.
B. actionable under § 43(c) because the mark is strong.
C. actionable under § 43(a)(1)(A).
D. actionable under 43(d).

7. A Tots (Q. C.1) sales clerk, who knows that clothes are never shipped with bananas, told Diz that, because PDQ frocks are shipped with bananas, they might contain spiders. Diz, a nervous mother, was horrified and tweeted some twits. If PDQ sues:

A. the clerk would be liable under § 43(a).
B. the clerk would be liable only if prompted by malice.
C. Diz would be liable under § 43(a)(1)(B) for spreading a false rumor.
D. the clerk could be liable under § 43(a), but only if she created the rumor.

D. Miscellaneous

Answer only 5 of 7.

1. T-T® (Q. C.5) employees designed a top-selling XL boat that is made by two other firms. It is very fast — the result of design features not apparent from inspection. After one of those firms also made an XL for a competitor, T-T® sued for use of trade secrets. That firm's best defense is:

A. high-level employees of three firms know the so-called secrets.
B. an XL designer touted its features at a professional meeting.
C. no one has signed any confidentiality agreement.
D. the XL can easily be reverse engineered.

2. An Apricot (A) engineer left a secret ZZ prototype in a bar. X found it and sold it to Blab for $5000. If A launches the ZZ before Blab publishes what it learns from inspection, Blab:

A. may face civil liability in Minnesota.
B. is likely to face civil liability in Pennsylvania.
C. could be criminally liable for purchasing trade secrets.
D. is sure to have a good defense based on accidental discovery.

3. Scoops-R-Us.com (S) links to front pages of many news sites but reports no original news. S's derivative site surrounds exact images of those pages with advertising that supports its business. If S is *not* liable for *copyright* infringement:

A. liability is unlikely absent threats to the survival of one or more other news sites.
B. it may be liable under state tort law because its site is commercial.
C. it is likely to be liable under § 43(a) of the Lanham Act.
D. 17 U.S.C. § 301(a) clearly precludes state tort liability.

4. Qiu Wen sent a great (novel) product idea to P&M, saying: "If you decide to make and sell the product described in my detailed attachment, you will thereby agree to pay me 2.5% of gross sales revenue." If P&M later begins to sell that exact product, it:

A. will have to pay the 2.5% royalty and continue as long as it sells.
B. will likely have to pay a reasonable royalty and continue as long as it sells.
C. is likely to owe nothing despite her idea's being both novel and very valuable.
D. cannot be liable because the Supreme Court has found such claims preempted.

5. Its new whiz IP lawyer advised PDQ (Q. B.1) to add the following to the sewn-in neck tag of each frock: "Purchasers and users agree not to copy any aspect of this garment. If you do not agree, do not purchase or use it!" If Wonk (W) bought one of them and began to produce cheaper copies, according to Supreme Court precedents, W can:

A. be liable because copyrights run only against the world.
B. be liable because patents run only against the world.
C. be liable for unfair competition if nothing else.
D. not be liable for breach of contract.

6. When Dupes (D) also began to sell knock-offs, PDQ (Q. B.1) ran warnings in trade publications saying, in essence, that anyone found to sell D's garments would be sued. It also sent letters to known retailers. If D immediately loses much business, it would be:

A. able to recover damages for lost sales if later found not to infringe.
B. entitled to an injunction ordering PDQ to cease and to recant.
C. unable to enjoin PDQ's noncommercial speech.
D. unable to enjoin PDQ's commercial speech.

7. Afla, Inc. (A) ran a series of clever ads featuring unoccupied sets of defunct TV shows such as Mr. Rogers' Neighborhood, the Wheel of Fortune and Cheers. If Mr. Rogers' estate, which owned one of the sets, sued for misappropriation of rights of publicity, it would:

A. lose under the California statute.
B. probably win based on publicity rights in the set.
C. lose because commercial speech is protected by the First Amendment.
D. probably win if Fred Rogers' right survives his death under applicable state law.

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 the first 20 answers count.**

1. Juno
2. Funk
3. Evans
4. Feist
5. Tabor
6. Keeler
7. Belcher
8. Brenner
9. Machlup
10. Pennock
11. Aronson
12. Wheaton
13. Zacchini
14. Polaroid
15. L.L. Bean
16. Bonito Boats
17. Weiner King
18. Morton Salt
19. Hanover Star
20. Abercrombie
21. U.S. v. Adams
22. Baker v. Selden
23. Continental Paper Bag
24. Cheney Bros. v. Doris Silk

A. Patents were invented in the 1400s.
B. The Court finds aggregations to be unpatentable.
C. Plaintiff's trade secret overlapped his expired patent.
D. The Court finds Justice Story's view of utility unhelpful.
E. The court refused to award relief against a blatant free rider.
F. Plaintiff complained of what is now known as cybersquatting.
G. The Court finds originality to be a constitutional requirement.
H. The Court finds that an owner may refuse to license its patent.
I. The court finds a state suit to be barred by the First Amendment.
J. The Court finds a patent void for failure to distinguish the prior art.
K. The Court finds state suits not to be barred by the First Amendment.
L. Obligations to pay for use of an unpatented invention need not expire.
M. The Court finds prior exploitation of an invention to bar a valid patent.
N. The court finds unclean hands to bar trademark but not copyright relief.
O. Copyright in a book cannot prevent use of a technology described therein.
P. Authorized sales of patented goods exhaust rights throughout this country.
Q. The leading articulation of factors that determine trademark infringement.
R. The leading authority classifying trademark categories in terms of strength.
S. The Court forbids states from interfering with strangers' reverse engineering.
T. The Court finds patentee's licensing scheme to forfeit its enforcement rights.
U. The Court finds an invention that yields unexpected results to be patentable.
V. Resolves the collision between a first user and first registrant of the same mark.
W. A user's common law trademark rights are generally conterminous with its markets.
X. An owner forfeited copyright by publishing without meeting all statutory requirements.

Examination No. _____

Answer Sheet

Part I — (80%)

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

A. Patents

1. _____
2. _____
3. _____
4. _____
5. _____
6. _____
7. _____

B. Copyrights

1. _____
2. _____
3. _____
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7. _____

C. Trademarks

1. _____
2. _____
3. _____
4. _____
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6. _____
7. _____

D. Miscellaneous

1. _____
2. _____
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7. _____

Part II — (20%)

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

1. _____
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