Introduction to Intellectual Property

Final Examination

Professor Field Spring 2002

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.

Basic Facts for Part I

Professor Igor Qat teaches psychology at Virtual Ivy Academy (VIA). He, a few other faculty, the administration and the web servers are physically located on a large Florida island.

After years of VIA-supported research, motivated largely by doing poorly on traditional intelligence tests, Igor devised a test to measure people's "right-lobe" intelligence quotient (RLIQ). He scores highly — as do those who, e.g., play the accordion, write computer-assisted instruction and sculpt linguini. Also, his test (RLIQT) proves to be better than the LSAT for predicting law school success.

Concerned that others would steal his ideas, Igor published nothing. However, when he spied the lively website <ouisue.com> of Oui, SUE! (OS!), he emailed them for advice about minimizing the risk of free riders. OS! assured him that its attorneys were in full command of the smoking-hot intellectual property field.

Igor was soon the proud owner of a document indicating that "RLIQ" was a registered trademark in Florida. A few months later and a remarkably few thousand dollars poorer, another document indicated that the RLIQT had survived the intense scrutiny of the Copyright Office.

Later, he learned that Bullwinkle Rocky had invented a Parlor Smarts test (PST). People taking the PST and RLIQT get remarkably similar scores.

A. Patents

Answer only *5 of 7*.

1.. The biggest problems the PST poses for patenting the RLIQT arise under:
   A. § 101 if both prove to be as good as or better than the LSAT.
   B. § 102 if both tests may serve exactly the same function.
   C. § 103 if the tests are strikingly similar in form and function.
   D. § 112 if the PST can be more quickly and cheaply scored.

2.. If Igor seeks a patent for the RLIQT, he will have the most difficulty with:
   A. § 101 because VIA clearly owns the patent.
   B. § 102 because the PST is similar in function.
   C. § 103 because a portion of his test is the same as the PST.
   D. § 112 if he claims only the process of scoring the RLIQT.

3. The PST aside, if Igor seeks a patent, he will have the most difficulty meeting the requirements of:

A. § 101 if his invention is limited to a particular set of questions.
B. § 102 because he has kept everything secret.
C. § 103 because IQ tests are well known.
D. § 112 if he does not want to release the data needed to score the RLIQ.

4. The PST aside, if Igor seeks a patent, he will have the most difficulty meeting the requirements of:

A. § 101 if it is unclear that the RLIQ accomplishes anything worthwhile.
B. § 102 because there are other IQ tests.
C. § 103 if the RLIQ may not have much of a market.
D. § 112 because there are other IQ tests

5. While an application was pending, Igor began to administer his test more widely. However, a patent on the PST has issued and claims a scoring process that compares an individual's answers to ones given by many others. If the RLIQT is the same except for having more questions, Igor:

A. cannot possibly infringe because the tests are not the same.
B. may infringe unless his test is patentable.
C. may infringe unless his scoring process differs.
D. will infringe if he does everything recited in any PST claim.

6. Igor eventually received a patent on a much faster scoring algorithm. If Bullwinkle adopts a similar algorithm:

A. he cannot infringe because he already has a patent on scoring the PST.
B. he may infringe despite differences.
C. he cannot infringe unless he adds Igor's questions to his test.
D. he can probably obtain a compulsory license to use Igor's faster algorithm.

7. Hacker has posted software on the web. It executes Igor's patented algorithm (Q6) and has been frequently downloaded by others. Under those circumstances, Hacker:

A. may be a contributory, but not a direct, infringer.
B. may be a direct, but not a contributory, infringer.
C. may be both a direct and a contributory infringer.
D. cannot infringe unless he uses or sells the software.

B. Copyright

Answer only *5 of 7*.

1. The biggest hindrance to Igor's having copyright on his RLIQT is that:

A. scoring requires use of a process excluded by § 102(b).
B. its function exceeds its appearance or any information it conveys.
C. it is useless without data needed to score it.
D. Bullwinkle came up with many of the same questions before Igor did.

2. In a speech, the President of VIA told all of its employees that it waives all rights in copyrightable works of employees. As a result, all of VIA's rights in Igor's work probably:

A. belong to him.
B. will last for 125 years from publication.
C. will last for Igor's life plus 70 years.
D. are subject to Igor's non-transferable interest.

3. If Igor uses software to execute a patented algorithm, the biggest hindrance to enforcing copyright in his software will be that:

A. it is not yet registered.
B. the scoring data is unprotectable as facts.
C. it essentially covers a process excluded by § 102(b).
D. it has a function beyond its appearance or information it conveys.

4. If Igor administers his test via the web but neglects to add copyright notice to what he posts:

A. any copyrights may be forfeited.
B. any copyrights will be unenforceable.
C. potential statutory damages may be reduced.
D. he will be unable to recover costs and attorney fees.

5. Smirk published a parody of Igor's RLIQT and called it the IDIQT. He is most apt to be

A. a willful infringer if he makes any money on his IDIQT.
B. able to evade liability if he makes no money on his IDIQT.
C. a direct and contributory infringer if posts the IDIQT for others to copy.
D. able to evade liability if he uses no more than necessary to poke fun at the RLIQT.

6. Wu has a copy of the RLIQT on his Singapore website. He urges others to use it as they see fit. If Clueless, a stranger to all that has gone before, posts a copy, he is most apt:

A. to be liable for statutory damages of at least $200.
B to be liable for statutory damages between $750 and $30,000.
C. not to be liable if he believes that the RLIQT is in the public domain.
D. not to be liable if he has good cause to believe that Wu owns the RLIQT.

7. If Clueless (Q6) would otherwise be liable for copyright infringement, he could best evade liability by pointing out that:

A. the PST predates the RLIQT.
B. neither the PST nor the RLIQT seems very original.
C. the RLIQT collects rather than conveys information.
D. he uses his own data and software to score his version of the RLIQT.

C. Trademarks (all citations to 15 U.S.C.)

Answer only *5 of 7*.

1. OS! is distressed to find that another party recently registered <wesue.com> (pronounced the same as "oui sue"). Under those circumstances, OS! may:

A. bring only a state action because it registered only in Florida.
B. not bring a federal action until it registers with the U.S. PTO.
C. bring suit under at least two subsections of § 1125.
D. bring suit under § 1114.

2. Any recovery by OS! from <wesue.com> (Q1), depends on its ability to show:

A. actual confusion using, e.g., relevant *Polaroid* factors.
B. likely confusion using, e.g., relevant *duPont* factors.
C. likely confusion as applied in § 1052(a).
D. actual confusion.

[I credited D because I inadvertently wrote recovery (money), compared to relief (injunction).]

3. Recovery by OS! (Q1) is most likely to require showing:
   A. that its use predates that of <wesue.com>.
   B. that <wesue.com> intended to confuse consumers.
   C. that <wesue.com> serves the same geographic market.
   D. all of the above.

4. If <wesue.com> (Q1) later obtains a state service mark registration, OS!:
   A. may nevertheless prevail under § 1114.
   B. will be entitled to no more than a disclaimer.
   C. should not be allowed to do business in that state.
   D. should find its rights essentially unaffected.

5. In a suit by OS! (Q1), <wesue.com> can best defend by arguing that:
   A. plaintiff's mark is descriptive.
   B. its use of "we sue" is fair under § 1115(b)(4) (if it's a law firm).
   C. plaintiff's mark is misdescriptive.
   D. its use of "we sue" is fair under § 1115(b)(2) (if it's a law firm).

6. Contrary to suggestions in prior questions, <wesue.com> (Q1) is non-commercial and non-profit. If it only criticizes lawyers, OS! would have the best chance of prevailing under:
   A. § 1125(a)(1)(A).
   B. § 1125(a)(1)(B).
   C. § 1125(c).
   D. all of the above.

7. That RLIQ is registered in Florida would, by itself:
   A. mean that it satisfies the requirements of § 1052.
   B. mean that Igor has rights against prior federal registrants.
   C. allow Igor to halt use of <RLIQ.com> for "really low (bank) interest quotations".
   D. none of the above.

D. Miscellaneous

Answer only *5 of 7*.

1. Fred, a paid assistant, helped Igor tabulate the data needed to score the RLIQT. When he graduated, he took the most complete copy of that information with him. If so, Fred's action:
   A. would generate no liability unless he had signed a confidentiality agreement.
   B. would generate no liability because he did most of the work.
   C. might subject him to criminal sanctions.
   D. might breach Igor's rights of publicity.

2. Fred plans to publish the information (Q1) on a public website.
   A. If he does, any trade secrets will be lost.
   B. Igor's rights will be unaffected by unauthorized publication.
   C. Fred cannot be enjoined; that would be a prior restraint on speech.
   D. If he does, others may be enjoined from using the information commercially.

3. Sarah also worked with Igor but remotely. They shared a private web folder. She sent the URL (web address) to a friend. Realizing her mistake, he deleted the email and told her that he had done so. Igor's rights in the data probably:

A. ceased if Sarah's message still exists somewhere in her friend's email files.
B. ceased because Sarah's friend did not agree to keep the URL confidential.
C. continue because the disclosure was accidental.
D. continue absent disclosure of the URL to others.

4. Bullwinkle misappropriated Igor's data by breaking into his computer. There, he also found a copy of the message from Sarah's friend (Q3). An injunction against Bullwinkle will probably:

A. not issue if he needs the data to score his PST.
B. not issue; the email proves that the data is no longer secret.
C. issue because the data is not published and he obtained it improperly.
D. issue because Igor took extraordinary measures to preserve its secrecy.

5. Igor became wildly successful and left VIA to strike out on his own. If VIA keeps his photo on its website, and he sues to have it removed:

A. he will probably be able to stop this infringement of his right of publicity.
B. all his state claims will be preempted if VIA has copyright in the photo.
C. he can prevail if they do not have clean hands.
D. he may be denied relief if he lacks clean hands.

6. After Igor left (Q5), VIA told the internet service provider (ISP) that initially hosted his website that it held all rights in his work and that the ISP would be liable, too, as an infringer. The ISP dumped him, and he could not find another. Later, it turned out that Igor infringed none of VIA's rights. If Igor sues VIA to recover his substantial losses, its speech is apt to be found:

A. privileged at common law.
B. constitutionally protected as non-commercial.
C. actionable as an intentional interference with his business relationships.
D. actionable under 15 U.S.C. § 1125(a)(1)(B).

7. To get even (Q6), Igor took unflattering photographs of VIA's modest facility from a nearby street. He then posted them on a website to show how little VIA has going for itself. If VIA sues, it will probably:

A. recover for infringement of its trade dress.
B. recover for infringement of its architectural copyrights.
C. both A and B.
D. neither A nor B.

Part II: Matching
[20 points]

Definitions match only one numbered term. Please enter the **best** letter in the corresponding space **on the answer sheet**. Only the first 20 answers will count.

1. Good intent
2. Deliberately copying another's mark
3. Searches
4. Subjective novelty
5. Objective novelty
6. Property
7. Misuse
8. Patent pending
9. Attorney fees
10. Espionage
11. Inadvertent infringement
12. Extravagantly misdescriptive
13. Constructive notice
14. Constructive use
15. Indirect copying
16. Contributory infringement
17. Unfair competition
18. Functional (or generic)
19. Cancellation (or opposition)
20. Invalidity (or non-infringement)
21. Fair use
22. First sale
23. Limited times
24. Hot news

A. Generates liability for acts of others.
B. The Patent Act forbids misuse of the term.
C. Relevant in minimizing (not avoiding) damage awards.
D. May result in "unclean hands" and denial of relief.
E. Needed for valid patents, but not for trade secrets or copyrights, much less trademarks.
F. Perhaps the narrowest type of actionable appropriation.
G. A generic term signifying alienable, divisible and legally enforceable rights.
H. Explicitly criminal under a recent federal statute.
I. A legal fiction recently introduced into U.S. trademark law.
J. Less likely for copyrights and trade secrets than for rights of publicity and patents.
K. Signifies incapacity to indicate source.
L. May help prevent patent and trademark infringement.
M. Less likely to infringe U.S. than British copyrights.
N. A legal fiction substituting for actual knowledge.
O. May create presumptive infringement.
P. Needed for valid trade secrets and copyrights, but not for trademarks.
Q. Copyright equivalent to patent or trademark doctrines concerning exhaustion of rights.
R. Constrains potential federal copyrights, but not federal trademark rights.
S. A term traditionally synonymous with source misrepresentation.
T. A defense to copyright or trademark infringement; less apt in trade secret or patent cases.
U. A statutory remedy unavailable for common law infringements.
V. Characteristic of a better-than-average type of trademark.
W. A defense to virtually all types of IP litigation.
X. An administrative option unique to trademark registrations.

Examination No. _____

Answer Sheet

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Part I — (80%)

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

A. Patents

1. ___C___
2. ___C___
3. ___D___
4. ___A___
5. __D____
6. __B____
7. __C____

C. Trademarks

1. __C____
2. __B/D__
3. __A____
4. __D____
5. ___B___
6. ___A___
7. ___D___

B. Copyrights

1. ___B___
2. ___D___
3. ___C___
4. ___C___
5. __D____
6. __A____
7. __C____

D. Miscellaneous

1. __C____
2. __A____
3. __D____
4. __C____
5. ___D___
6. ___A___
7. ___D___

Part II — (20%)

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

1. ___C___
2. ___O___
3. ___L___
4. ___P___
5. ___E___
6. ___G___
7. ___D___
8. ___B___
9. ___U___
10. ___H___
11. ___J___
12. ___V___
13. ___N___
14. ___I___
15. ___M___
16. ___A___
17. ___S___
18. ___K___
19. ___X___
20. ___W___
21. ___T___
22. ___Q___
23. ___R___
24. ___F___