Fundamentals of Intellectual Property

Final Examination

Professor Field | Fall 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 the 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. Apex patented a pregnancy test. It uses an unpatented device and an unpatented, disposable skin patch that has no other function. If Mabel buys Apex's device but uses a competitor's patch to monitor possible pregnancy, she:
   A. infringes only if such patches have other uses.
   B. infringes because she is practicing Apex's patented process.
   C. has an implied license to use Apex's product for its intended purpose.
   D. can do so because Apex cannot require purchase of unpatented patches.

2. If Apex's patches (Q1) can be made at home using a combination of readily available, naturally occurring materials:
   A. the patent is unenforceable unless do-it-yourself instructions accompany the device.
   B. the patent is invalid if each of the natural materials remains unchanged.
   C. competitors could not be prevented from selling competing patches.
   D. its rights are effectively exhausted by sale of its devices.

3. According to Apex's labels (Q1), its patented pregnancy test works only with patches containing a secret component. If that is true:
   A. its patent is invalid under § 112.
   B. its patent may be invalid under § 101.
   C. it has no effect on the validity of its patent.
   D. its patent will be valid after competitors identify the secret component.

4. Apex (Q1) began selling a pregnancy test kit labeled "for single use only." If Beta pays pharmacists to buy used kits and reconditions them:
   A. Apex's rights are apt to be infringed by consumers and pharmacists.
   B. Beta could sell its kits in any country where Apex holds no patent.
   C. Beta's activities are apt to constitute permissible repair.
   D. Apex's patent is apt to be found unenforceable.

5. Bob got a patent on a radar detector that nearly eliminates the risk of getting fined for speeding. If, shortly thereafter, use of his device was made illegal in every state:

A. an infringer could successfully argue that the patent is invalid under § 101.
B. an infringer could successfully argue that the patent is invalid under § 102.
C. an infringer would be afforded no sound basis for arguing invalidity.
D. Bob's patent would nevertheless entitle him to use the detector.

6. For over two years, Bob (Q5) tried to sell rights to his invention. If he applied after he found no one interested, an ensuing patent would be invalid:

A. because his invention had been on sale.
B. if his offers had been posted on Facebook.
C. if details of his invention had been disclosed on YouTube.
D. if his invention had been fully disclosed to several manufacturers.

6. If Ed invents a new and nonnobvious bookkeeping technique:

A. it would be unpatentable if it requires the use of software.
B. it would be patentable as a business method.
C. Neither A nor B is true.
D. Both A and B are true.

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

Answer only 5 of 7.

1. Zip holds utility and design patents as well as a registered trademark for its uniquely shaped ball. Registering copyright, if possible:

A. would be prohibitively expensive.
B. would be critical to halt importation of knock-offs.
C. would be useful for halting importation of knock-offs.
D. would be useful if it wants to enjoin sales of knock-offs.

2. Zip's biggest hurdle to obtaining copyright registration (Q1) is:

A. that the ball may be seen as lacking the originality required by § 102(a).
B. that Zip has been selling them without copyright notice.
C. the definition of "prohibited article" in § 101.
D. the definition of "useful article" in § 101.

3. If Zip's application to register (Q1) is refused, and it wants to argue copyright infringement to a jury:

A. it will be unable to do so.
B. it may do so, but the § 410(c) presumption will not apply.
C. success would entitle it to recover statutory damages under § 504(c).
D. success might entitle it to recover costs and attorney fees under § 505.

4. Bud gave ArtCo nonexclusive rights to sell copies of his paintings. Under § 204, the least ArtCo needs to prevent Bud from giving exclusive rights to someone else is:

A. proof of terms under which reproduction and sale were authorized.
B. a statement of terms, signed by or on behalf of both parties.
C. proof that it had paid reasonable royalties.
D. a statement of terms, signed by Bud.

5. GeneriScan monitors publications for clients. If generic use of a mark is discovered, relevant parts of documents or URLs are sent to affected clients. If USnuz sued based on § 106(2):

A. all courts would regard such URLs as unauthorized derivatives.
B. no court would regard clipped stories as unauthorized derivatives.
C. the 7th Circuit might treat emailed URLs as unauthorized derivatives.
D. the 9th Circuit might regard clipped stories as unauthorized derivatives.

6. Without Bo's knowledge, Dude took his friend's picture and put it on Facebook. Suds later copied it to his blog. If suit were brought against Suds:

A. Bo and Dude could prevail as co-authors.
B. Suds would win; his was clearly fair use.
C. Dude would likely prevail as author.
D. Bo would likely prevail as author.

7. OPU Professor Zzz assigned pages from several casebooks and put five copies of each on reserve. She also said that Copyzall, known to pay no royalties, would be worth visiting before her open-book final. Under the 6th Circuit's view of § 107:

A. Zzz could be liable as an induced infringer.
B. Copyzall could make individual course packs for students.
C. Zzz should have authorized Copyzall to make course packs.
D. it would be best if OPU had asked Copyzall to make coursepacks.

C. Trademarks [statutory references to Lanham Act]

Answer only 5 of 7.

1. In a patent application, Mo's new product is called a glibber. Its ads say, "Everyone needs a hot pink Glibber™." When no patent issued, Bo began to sell copies.

A. Section 43(a)(1)(B) offers the best prospects for requiring Bo to change its design.
B. Trade dress relief is impossible under §43(a)(1)(A) because patents were sought.
C. State law offers the best prospects for requiring Bo to change its design.
D. No prior conclusion is true.

2. If Bo (Q1) markets its product as an "authentic glibber," courts would most likely find:

A. using "authentic" actionable under § 32.
B. use of "glibber" actionable under § 43(c).
C. use of "glibber" actionable under § 43(a)(1)(A).
D. using "authentic" actionable under § 43(a)(1)(B).

3. If Bo's product(Q2) is made of surprisingly flimsy materials, courts would probably:

A. require ads and labels to distinguish Mo's products from its own.
B. find its use of "glibber"actionable under § 43(c).
C. halt its use of "glibber" as its product name.
D. halt all its references to "glibber."

4. Based on precedent that we read, if the last facts stated above (Q3) were proven by the FTC:

A. it could require Bo to turn all of its profits over to Mo.
AB. it could order Bo to cease calling its product a "glibber."
C. it would be unable to order Bo to cease calling its product a "glibber."
D. No previous choice is true.

5. Buried in a recent issue of Zinger magazine was a sarcastic pull-out ad for nonexistent goods allegedly sold by JCPenury. Positing fame, were JCPenny to sue, the 1st Circuit is apt to find:

A. use of the similar name privileged under § 43(c)(3)(B).
B. use of the similar name privileged under § 43(c)(3)(C).
C. use of the similar name to constitute tarnishment under § 43(c).
D. use of the similar name to constitute tarnishment under a state dilution statute.

6. ShirtCo (S) discontinued its Gotham line but kept gotham.com. TieCo (T) soon began using the mark on ties. If litigation ensues, courts are apt to find that:

A. S cannot retain the domain name because it stopped using the Gotham mark.
B. T's use can be enjoined if consumers believe that its goods come from S.
C. T has exclusive rights to the mark on men's apparel.
D. S must transfer the domain name to T.

7. A men's boot manufacturer in Texas (J1) registered Jakes in the PTO in 1995. In 2005, a seller of expensive women's hosiery (J2) registered Jake in Hawaii. In 2010, after J2 refused to stop using Jake, J1 filed suit. If so, courts most probably will find that:

A. J1's rights were adversely affected by J2's registration.
B. J2's use is apt to cause confusion among mutual customers.
C. J1 lost any rights it had in Hawaii for fifteen years of nonuse.
D. J2's use is unlikely to cause confusion among mutual customers.

D. Miscellaneous

Answer only 5 of 7.

1. Before filing in 2005, Bob sold Apex exclusive rights in his widget for 7% of net income. If no patent issued by 2010, the royalty would drop to 2%. By 2007, it was clear that no patent would issue. After that, Apex paid only 2% but marketed its widgets as "patent pending." Bob did not abandon his application until 2010, when Apex dropped the product. If Bob seeks the full 7% royalty for 2007 through 2010, a federal court would find:

A. that federal contract law governs whether additional payment is due.
B. the contract unenforceable as one of potentially unlimited duration.
C.that state contract law governs whether additional payment is due.
D. federal patent law to govern whether additional payment is due.

2. If Mervin software has a click-wrap license that forbids reverse engineering, a court should:

A. enforce it as a copyright license.
B. enforce it because the parties negotiated the terms.
C. refuse to enforce it because the restriction is of unlimited duration.
D. refuse to enforce it because such contracts would supplant the need for patents.

3. If a lab technician quits, carries off notebooks containing data she has collected, and files a patent application:

A. state criminal penalties would depend on only the value of blank notebooks.
B. her employment contract would likely warrant compelling an assignment.
C. all trade secret liability ceases upon publication of her application.
D. federal criminal law would be inapplicable.

4. Piff sent six crude drawings to Joe, a patent draftsman, to have them formalized for patent applications. Only two were used for that purpose in one application. After that patent issued, Joe copied all of the drawings for a Piff competitor. Under those circumstances:

A. Joe probably misappropriated trade secrets in four drawings.
B. Piff should have filed applications based on all of his drawings.
C. Joe is not lable absent a written promise not to copy for strangers.
D. Piff's patent is invalid for failing to include all of the drawings in his application.

5. Diddly taped one of several carefully choreographed acts regularly performed by Zeke, an extreme sports star. If he put it on YouTube, Diddly would probably:

A. infringe Zeke's rights but only if he had registered his copyrights.
B. be liable under state law if no authorized tape of that act exists.
C. infringe no rights unless Zeke has consistently forbade taping.
D. be liable under state law if Zeke has taped that act only once.

6. Jim sells posters containing caricatures of celebrities. One that features Lady Doodo offends Lady Gaga as the clear target. If she sues, Jim is likely to:

A. lose if his posters are seen as media.
B. win if some depicted celebrities are deceased.
C. win under Oklahoma's right of publicity statute.
D. lose if Lady DooDo clearly pokes fun at Lady Gaga.

7. When the Lady DooDo caricature (Q6) became popular, Jim licensed Nuz.com to run an ad saying "Don't be like Lady DooDo, sign up for our premium service." If so, and Lady Gaga sues Jim and Nuz.com, she:

A. could recover from neither if the website publishes only news.
B. might recover from Nuz.com based on her right of publicity.
C. could recover from Nuz.com based on § 43(a).
D. might recover from both based on § 43(a).

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. KSR
2. Sears
3. eBay
4. Story
5. Dastar
6. Boesch
7. Lipton
8. Belcher
9. ProCD
10. Mikohn
11. Kellogg
12. Moseley
13. Polaroid
14. Sandoval
15. Sweetarts
16. Group One
17. Morton Salt
18. Baker v. Selden
19. Ty v. Perryman
20. Hoechst Diafoil
21. Abercrombie & Fitch
22. California Fruit Growers
23. International News Service
24. Nat'l Football League v. White

A. Summarizes early U.S. patent laws.
B. Use of plaintiff's work was de minimis.
C. Copyright law protects authors, not inventors.
D. Discusses the goals of § 43(c) of the Lanham Act.
E Plaintiff's foreign sales do not exhaust its U.S. rights.
F. Contrasts two theories underlying trade secret protection.
G. Relief under 17 U.S.C. § 505 is not automatically granted.
H. Unclean hands prevented enforcement of plaintiff's patent.
I. Four traditional equitable factors govern patent injunctions.
J. Lists factors often used to determine likely source confusion.
K. Lays out a commonly used taxonomy of trademark strength.
L. A rigid TSM test is inappropriate for determining obviousness.
M. Duplication of authorized copies infringes underlying copyrights.
N. State law cannot be used to prevent copying of unpatented goods.
O. Unclean hands may bar attempts to halt trademark infringement.
P. Amounts spent on advertising do not determine trademark rights.
Q. Use of time-sensitive information may sometimes be briefly halted.
R. Defendant's use of trademarks to sell authentic goods was not dilution.
S. IP owners have a privilege, if not an obligation, to warn potential infringers.
T. Resolves a conflict between a first user and a first registrant of a trademark.
U. Lanham Act § 43(a) cannot be used to address misattribution of authorship.
V. Contracts that do not run against the world may be enforced under state law.
W. That members of the public may have seen information did not forfeit exclusivity.

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. _____
4. _____
5. _____
6. _____
7. _____

C. Trademarks

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

D. Miscellaneous

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

Part II — (20%)

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

1. _____
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24. _____