FACULTY OF LAW

UNIVERSITY OF NEW BRUNSWICK

INTELLECTUAL PROPERTY

LAW 3453

Final Examination
Professor Siebrasse

DATE: Monday 11 December 2006
TIME: 1:00 p.m. – 4:00 pm

INSTRUCTIONS

1. This examination is 4 pages long (including this page). Please check that you have all 4 pages.

2. This examination is 3 hours long.

3. This is an "open book" examination. You may bring the course text, your class notes and any review materials. You may *not* use library materials or any other materials or devices prohibited by university or law faculty rules or regulations.

4. The examination is marked out of 170. Questions are *not* all of equal value. The time you spend on each question should be approximately equal to the value of the question. There are no optional questions. Attempt all questions.

5. Unless the question specifically states otherwise, you must explain your answer. "Yes/no" answers are not sufficient. When a question requires you to assess a particular rule from a policy perspective be sure to address both advantages and disadvantages of the rule and the relevant options.

6. This examination is to be identified *only* using the anonymous number system. A penalty of one grade ranking (i.e. a B grade will become a B- grade) will be assessed against any student who writes his or her name on his or her examination booklets or who otherwise indicates his or her identity on or in his or her examination.

7. Handwriting must be legible. Passages written in illegible handwriting will be disregarded in assessing the grade.

Question 1 – 45 minutes/marks

Consider the following statement:

> Copyright law only prohibits copying; a work that is independently created cannot infringe copyright. Ideas are not protected by copyright law in order to ensure that copyright cannot be used to stifle independent creation.

Does this statement provide a sound policy justification for the idea/expression dichotomy? Is it consistent with the approach the courts generally use in dealing with the idea/expression dichotomy? Explain.

Question 2

A number of factors are considered in determining whether the defence of fair dealing is made out in a copyright infringement action. Parts A and B of this question ask you to consider whether certain distinctions should be used as factors in the fair dealing analysis. For specificity suppose the case involves copying a portion of a legal treatise.

Note that this question does not ask whether copying should always be fair dealing in one case and never in the other. Rather, the question is whether the distinctions described should be *relevant* in the overall determination of fair dealing, so that a court would be more or less likely to find fair dealing in one case rather than the other, if all other factors were the same.

Part A – 14 marks/minutes

As a matter of policy, should the law draw a distinction between a case where the person doing the copying

i) is copying for their own use, and
ii) is an institution which copies for clients at the clients' request?

Part B – 14 marks/minutes

As a matter of policy, should the law draw a distinction between a case where the person doing the copying

i) is copying in order to use the copied material as authority in preparing a brief, and
ii) is copying in order to write an article showing that the treatise is wrong in law on a specific point?

Question 3

Copyright and patent purport to encourage the creation of works that are valuable to society, yet neither requires the creator of a work to establish that the work is in fact socially valuable in order to gain protection.

Part A – 10 marks/minutes

Is this statement correct as a matter of law? Explain.

Part B – 10 marks/minutes

Is the legal rule on this point sound as a matter of policy? (That is, if the statement above is correct, is it sound; if it is not correct, is the true legal rule sound?) Explain.

Question 4 – 35 marks/minutes

Do you agree with the following remarks? Explain.

> The non-obviousness requirement is the key to the patent system. If it is properly implemented, the patent system will provide clear social benefits. If the non-obviousness requirement is not properly enforced, the patent system may do more harm than good. Unfortunately, Canadian courts are failing in their approach to the application of this clear and simple test.

Question 5 – 18 minutes/marks

Is the following statement correct as a matter of law?

> The effect of section 27(8) of the Patent Act is to prevent a patentee from stifling innovation by monopolizing all possible applications of their idea.

Explain. Note that you are *not* required to explain whether the rule embodied in s.27(8) is sound as a matter of policy. Section 27(8) of the Patent Act provides that "No patent shall be granted for any mere scientific principle or abstract theorem."

Question 6 – 24 minutes/marks

In *Ciba-Geigy v Apotex* Gonthier J. quoted the following statement with approval:

> The true basis of the action is that the passing off injures the right of property in the plaintiff, that right of property being his right to the goodwill of his business.

Effective comparative advertising, which persuades consumers that a competitor's products are better than those of the owner of a trade-mark, injures the goodwill of the trade-mark owner's business by diverting business to the competitor. Does it follow that a trade-mark owner can prevent the use of its trade-mark by a competitor in comparative advertising? Explain with reference to the basic theory of trade-mark law.

***** THE END *****