

Exam #: \_\_\_\_\_

UM Law School - Intellectual Property Survey  
Fall 2012, Will Wilkins

1. This is a 3 hour exam. Check to make sure this booklet is 5 pages.
2. Write your exam number at the top of this question booklet. Please turn this booklet in at the end of the exam.
3. You may take the exam using a blue book or on the computer: do not write your name on any of the materials – use your exam number only.
4. If using a blue book,
  - a. write on only one side of the page. You can have as many books as you need.
  - b. make sure to write your exam number on each bluebook you use.
  - c. make sure to label your bluebooks “1 of 1”, “1 of 2”, “2 of 2” . . .
  - d. write neatly.
5. If using a computer,
  - a. the exam must be taken using Exam 4.
  - b. you are responsible for submitting the exam as instructed by Exam 4.
  - c. please check the list outside the Law IT Help Desk to make sure your exam was appropriately submitted – if your exam does not show up on that list, please find an IT technician before leaving the building for assistance.
6. Limited open book: you are allowed to use a “cheat sheet” as we discussed in class.
  - a. It must not exceed 2, 8.5x11 pages.
  - b. No other materials can be used during the exam including without limitation: cell phones, non-exam 4 computers, tablets, books, notes, etc.
7. Goal: the goal of the exam is for you to show your mastery of the materials we discussed and read in the class. On the essay portion of the exam, make sure to identify and discuss any and all IP issues you spot.
8. Organization is critical. Please make sure to organize your answer and discussion in a way that is logical and shows your mastery of the materials.
9. I have assigned times to the questions to give you an idea of the complexity of each question. They are meant as guidelines and not as absolutes with regard to time. Students will move through questions at different rates.
10. Good luck – I’ve really enjoyed this class this semester. Thank you. I look forward to seeing you all after the break.

## 1. Essay 1: (50 minutes)

Rock Photos (RP) is a website devoted to photographs of famous musicians. Last month the website had over 120,000 unique users and 6,000,000 hits (mostly to its Justin Beiber page). The website is owned by the Jones brothers who have worked in the music business for years. As a result of being in "the business," they have developed special and trusted relationships with many of the biggest names in the business who give them and the photographers they employ special access to photograph them for the RP web page.

The front page of RP contains a few teaser photos but to see the vast majority of the RP photos, users must pay a monthly fee of \$18 per month and enter their unique username and password.

The Jones brothers are aware that some other websites have, without their permission, copied some of the RP photos, and published them without authorization on their own sites. RP has been handling these websites on an ongoing basis and has had some success in getting the unauthorized photos removed from those websites. They plan on continuing to use their in-house counsel to enforce their rights against these websites.

Recently, however, there has been a new development that concerns them greatly and is the reason they are asking for your advice. A newly developed and widely used internet search engine named Phoogle has appeared on the scene and has garnered 60,000,000 searches a week in its short existence. Phoogle is a free service on which internet users can search for images on the internet. Phoogle is ad-supported: that is, it earns revenues by selling ad space on its web pages – the pages that users see when they search for images on the Phoogle service. Last month, Phoogle, generated \$128,000 in ad revenue.

In layman's terms Phoogle works as follows: Phoogle's computers scan the internet for photographs on other websites. When it finds a photo, Phoogle's computers create a thumbnail of the image (a small, low resolution copy) and store the image on Phoogle's servers along with identifying information (such as the subject of the photo). Then, when a user searches on Phoogle for an image, a Phoogle web page appears with thumbnails of all the images on the Phoogle server matching the search request. Selecting one of the thumbnails brings up another page with the individual thumbnail and information about the photo – including the web address of the original photo.

This service is of concern to the Jones brothers because many of their photos which have been taken from their website and posted on other websites without their permission are now on the Phoogle server as thumbnail images. For instance, when a user searches "The Clash" on Phoogle, the resulting series of thumbnail includes 8 images from the RP website.

The Jones brothers have come to you for advice. Please analyze all the copyright issues involved in their situation including (without limitation): copyright ownership, any infringement that may be occurring, and a thorough analysis of any defenses you expect Phoogle to assert.

## 2. Essay 2: (50 minutes)

Your new client is a business named Grouchy Handbags, Inc. They manufacture a very famous line of luggage, handbags and accessories known by their mark "Grouchy." The "Grouchy" name is well known and has been a registered trademark in the U.S. since 1978.

Grouchy also uses a mark consisting of a highly stylized "GR" which is shown often in intricate patterns on Grouchy's products as well as on labels, tags and zipper pulls. The "GR" symbol is well recognized and has also been registered as a trademark in the U.S. since 1978. Both registrations list Grouchy and GR as marks for luggage, ladies handbags, gifts and accessories.

Grouchy products sell for very high prices. Currently its handbags sell for between \$950 for small bags to \$12,450 for the Lurkin, its largest bag favored by movie stars.

A new company called Bowwow, Inc. manufactures pet toys of all types. These toys typically sell for \$4-8 in pet stores. Bowwow has just begun selling a line of pet chew toys that mimic famous brands of other products including "Chewy Vuitton," "Furcedes," "Jimmy Chews," "Sniffany and Company," and "Dogior." Most disturbing to your client, however, is a miniature rubber handbag chew toy called "Growl" featuring a stylized "GRrrr" emblem which mimics Grouchy's own marks.

Prior to consulting with you, Grouchy politely wrote Bowwow asking Bowwow to take its "Growl" line off the market. Bowwow's response was short and not so polite but they did make it quite clear that they did not believe that their product infringed any of Grouchy's marks and that its use of similar marks were protected as a parody.

Grouchy would like you to prepare an analysis of their potential trademark infringement claims and any defenses they are likely to encounter. Include in your analysis a discussion of direct trademark infringement (likelihood of confusion) claims, dilution claims and the anticipated parody defense.

### 3. Essay 3: (50 minutes)

Today is December 11, 2012. While considering whether to take off early and fish, John (a fishing buddy) stops by your office. This certainly seems to increase the chances of your leaving early until he tells you that he came by to talk with you about an invention he has made and wants to get your help in protecting. The invention, "without getting too technical" he says, condescendingly, involves an apparatus that attaches to the air vents in a live well for fish. A live well is essentially a tank for keeping live fish on a boat. Most live wells include an air pump that blows air bubbles into the tank to help keep the fish alive.

John's invention is a fan type apparatus that uses the air being pumped into the live well to create a significant amount of agitation inside the tank while using a negligible amount of electricity to operate since it operates off the air already being pumped into the tank. This additional agitation, John explains, will keep the fish alive for days longer than solely pumping in air.

John, certain nothing like this exists, came up with this idea and created a prototype on June 6, 2012. He was so excited that he wrote an article about the apparatus in *Bassin' Magazine* which was published (complete with photos, of course) on October 12, 2012. In the article, he dubs the apparatus the "Bass Blaster."

John wants to know about patenting the Bass Blaster. He explains that this is a "hot area" and that he is ready to move forward as soon as possible . . . as long as it doesn't interfere with the winter bass fishing season, which will end March 3, 2013.

Advise John on patenting his invention. John knows very little about the U.S. patent system and wants to know all about what is required for an invention to be patentable, particularly with regard to his invention. If you need more facts from him, please state what they would be and why they are important.

As he's getting ready to listen to your astute analysis, John mentions that another friend, Buddy, worked with him in "coming up" with the Bass Blaster but that Buddy doesn't care much about patenting and would just like to swap Bass Basters for beer at the bait shop. So, John concludes, "you won't need to worry about him."

#### 4. Short answers (30 minutes)

Briefly define or discuss the following terms, concepts and phrases in a few sentences or a paragraph.

1. First sale
2. Privacy torts
3. Trade secret
4. Descriptive mark
5. Derivative work
6. Trade dress

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