INTELLECTUAL PROPERTY & FAITH

Types of intellectual property (all different, should not be used interchangeably)

- Patent
    - Invention
- Copyright
    - Works such as books, articles, plays, songs, works of art, movies, software, and videos.
- Trademark
    - Identifier of the source of goods and services
    - Used in commerce
- Trade Secrets
    - Protects formulas, patterns, designs, compilations of data, customer lists, and other business secrets
    -

I. PATENT

- "[P]romote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. Art. I, § 8, Cl. 8.

- Exclusive federal jurisdiction: "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights. For purposes of this subsection, the term "State" includes any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands." 28 U.S.C. § 1338(a)

- Requirements:

    - Must be **new** and **useful**. 35 U.S.C. § 101

    - Must be **novel** (new, never invented before, written about, patented, etc. with some exceptions)

        - "Prior Art.—A person shall be entitled to a patent unless— the claimed invention was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention." 35 U.S.C. § 102(a)(1).

- Must be **nonobvious** (people with ordinary skill in the art of the specific field wouldn't have thought it was an obvious fix)

    - "A patent for a claimed invention may not be obtained, notwithstanding that the claimed invention is not identically disclosed as set forth in section 102, if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art to which the claimed invention pertains. Patentability shall not be negated by the manner in which the invention was made." 35 U.S.C. § 103(a).

- Must have **utility** (some practical use) (you'll see that this is questionable with some examples)

- Must be **fully disclosed** ("patent bargain" - in exchange for patent protection, you must teach us how to make and use the invention)

- Timeline (General)
    - Conceive Idea (not yet patentable)
    - Reduce to practice (working prototype)
    - File application – pay fee
    - Publication – 18 months (prior art possible in this timeframe!)
    - Issuance / Rejection – 3 years
    - Maintenance Fees at 3.5, 7.5, and 11.5 years from date of issue
    - Expiration – 20 years from filing date (14 years for a design patent) (generally, see 35 U.S.C. § 154(a)(2))

- **Types** of patents:
    - Utility - Useful creations
        - Example: "Liquid filled, wafer covered, edible communion cup." (U.S. Patent Pub. Number 20040253346A1) [See Handout]
    - Design – decorative
        - Example: "religious ornament." (United States Design Patent No. D654826) [See Handout]
        - Example: "Neck towel for absorbing perspiration." (United States Design Patent No. D495550) [See Handout]
    - Plant - living plants

II. COPYRIGHT

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- **17 U.S.C. § 102:**
  "(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
    (1) literary works;
    (2) musical works, including any accompanying words;
    (3) dramatic works, including any accompanying music;
    (4) pantomimes and choreographic works;
    (5) pictorial, graphic, and sculptural works;
    (6) motion pictures and other audiovisual works;
    (7) sound recordings; and
    (8) architectural works.
  (b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."

- What can be copyrighted?
  - **Original**
  - **Fixed**
    - "A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for purposes of this title if a fixation of the work is being made simultaneously with its transmission." 17 U.S.C. § 101.

- **Copy**
  - "'Copies' are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term 'copies' includes the material object, other than a phonorecord, in which the work is first fixed." 17 U.S.C. § 101.
- It must be **more than an idea**. 17 U.S.C. § 102(b).

- Term of Copyright
  - Generally: "Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author's death." 17 U.S.C. § 302(a).
  - "In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first." 17 U.S.C. § 302(c).
- Derivative Works
  - "A 'derivative work' is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work'. 17 U.S.C. § 101.
    - "Originality means that the work owes its creation to the author and this in turn means that the work must not consist of actual copying." So, a "trivial variation" is not enough, but a "substantial variation" and "minimal element of artistic craftsmanship" is required for works that are in the public domain. *Batlin & Son, Inc. v. Snyder*, 536 F.2d 486 (2d Cir. 1976).
- Music
  - There are two copyrights involved with music, which possibly means to different copyright holders. If you illegally download a copy of music, you may have two copyright owners sue you! (Sometimes, the copyright owners are the same person.)
    - Sound Recording (17 U.S.C. § 102(a)(7))
      a. "'Sound recordings' are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied." 17 U.S.C. § 101.
      b. A sound recording is not the same as a musical work. The musical work is the melody, harmony, and lyrics. The sound

recording is the actual recording, the particular way that it is sung or presented on the medium. So, the sound engineers, etc. have a claim to the sound recording.

- ♦ Musical Works (17 U.S.C. § 102(a)(2))
  a. Music works include the instrumental component and the accompanying words: composition, rhythm, lyrics, harmony, melody, etc.

- Covers
  - ♦ "A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner." 17 U.S.C. § 115(a)(2)
  - ♦ How to get a compulsory license:
    a. Harry Fox Agency
    b. CCLI (Christian Copyright Licensing Int'l)
  - ♦ You must *cover* the song, this does not give you the right to play the *original recording*, although you may make your own recording.
  - ♦ Performing rights societies police, license, and administer copyright interests of the copyright holder (the composer). Examples are: American Society of Compsers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC.

- Infringement
  - Copying a songbook without permission violates copyright law
  - Copying a CD without permission violates copyright law
  - Taking a photograph from the Internet and putting it on your website probably violates copyright law
  - Penalties
    - ♦ Actual damages. 17 U.S.C. § 504(b) or
    - ♦ Statutory damages. 17 U.S.C. § 504(c)
      a. $750 to $30,000 per work
      b. $150,000 for willful infringement

- Fair Use (17 U.S.C. § 107)
  - "Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
    (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
    (2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors."

- Cases, generally
  - Using videotape recording machines to record movies on Betamax video tapes to view later was protected fair use. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).
  - Creating an "intermediate copy" for reverse engineering of software is fair use. *Sega Enterprises, Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992).
  - Reverse engineering by creating a copy is fair "research" use. *Atari Games v. Nintendo*, 975 F.2d 832 (Fed. Cir. 1992).
  - Intellectual property owners could sue companies for *encouraging* copyright infringement. *MGM v. Grokster*, 545 U.S. 913 (2005).
  - Use of 0.4% of programming code to create a new platform useful to programmers was fair use (not a bright line rule). 593 U.S. _____ (2021).
  - The U.S. Supreme Court held 7-2 that the fair use weighs against a secondary artist when the use is the same as the original (in this case for a magazine) and is commercial. The Court rejected the Andy Warhol Foundation's argument that it was fair use because the silkscreen conveyed a different message than the original photograph. *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith,* 598 U.S. _____ (2023).
- Cases finding fair use to use another's photograph on a website:
  - *Brody v. Fox Broadcasting Co., LLC*, Case No. 22cv6249 (S.D.N.Y. April 3, 2023) (adding markings to a still from a video that was in the public record).
  - *Clark v. Transportation Alternatives, Inc.*, 18 Civ. 9985 (VM) (S.D.N.Y. Mar. 18, 2019) (use of a screenshot showing a photo and a blog article to show the "humorous incongruence" between the two was fair use)
  - *Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18 (1st Cir. 2000) (publishing nude photographs that were themselves newsworthy was fair use)
  - *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003) (reproduction of thumbnails of copyright protected images by a search engine was fair use)
  - *Bill Graham Archives v.* Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006) (reproducing posters in a book was transformative of the images originally used to promote events and was fair use)
- Cases finding <u>no</u> fair use to use another's photograph on a website:

- *Sadowski v. BackChina, LLC*, Case No. H-17-1562 (S.D. Tex. July 16, 2018) (even though the character of the photo was previously published and factual, the court weight factors against fair use).
- *Golden v. Michael Grecco Prods.*, 2021 U.S. Dist. LEXIS 43701 (E.D.N.Y. Mar. 9, 2021) (use of promotional photograph in a blog discussing the television show is not fair use)
- *Brammer v. Violent Hues Productions, LLC*, No. 18-1763 (4th Cir. 2019) (using a cropped photograph to advertise tourist attractions was not fair use)

III. TRADEMARK

- Types of Marks
    - Trademark – identifies *goods*
        - Example: Nike, apple
    - Service mark – identifies *services*
        - Example: FedEx
    - Certification mark – owned by a non-profit cooperative or association that certifies certain standards and quality
        - Example: UL, Good Housekeeping Seal of Approval
    - Collective membership mark – owned by an organization whose members identify themselves with it
        - CPA, Teamster, Realtor

- State Trademark law exists (e.g., Ohio Revised Code Chapter 1329), but the focus of the presentation is on federal protection.

- Federal Law
    - Commerce Clause – Congress has the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." United States Constitution (Article I, Section 8, Clause 3).
    - Lanham Act – 15 U.S.C. § 1051, *et seq*.
    - Must be **Distinctive**. *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4 (2d Cir. 1976).
        - **Generic** - ***Cannot receive a registration and may be cancelled.*** A petition to cancel the mark may be filed "At any time if the registered mark becomes the generic name for the goods or services, or a portion thereof, for which it is registered." 15 U.S.C. § 1064(3).
            a. Used to be registered trademarks: Escalator, Aspirin, Zipper

- ASPIRIN is in the public domain. *Bayer Co. v. United Drug Co.*, 272 F. 505 (S.D.N.Y 1921).
- ESCALATOR was cancelled in 1950. *Haughton Elevator Company v. Seeberger*, 85 U.S.P.Q. (BNA) 80.

b. In danger of becoming generic: Xerox, Band-Aid, Google

- Band-Aid still has a registration (Reg. No. 194123)
- Google won a lawsuit seeking cancellation of the mark. *Elliott v. Google, Inc.*, 860 F.3d 1151 (9th Cir. 2017).

- **Descriptive** – "Marks that are merely descriptive of the goods or services may not be registered on the Principal Register absent a showing of acquired distinctiveness under §2(f) of the Trademark Act." TMEP 1209.01. "A mark is considered merely descriptive if it describes an ingredient, quality, characteristic, function, feature, purpose, or use of the specified goods or services." TMEP 1209.01(b).

  a. Example: Vision Center

- **Suggestive** – "Suggestive marks are those that, when applied to the goods or services at issue, require imagination, thought, or perception to reach a conclusion as to the nature of those goods or services." TMEP 1209.01(a).

  a. Example: Coppertone

  b. Example: Kleenex ("clean")

- **Arbitrary** – "Arbitrary marks comprise words that are in common linguistic use but, when used to identify particular goods or services, do not suggest or describe a significant ingredient, quality, or characteristic of the goods or services." TMEP 1209.01(a).

  a. Example: Apple for computers

- **Fanciful** – "Fanciful marks comprise terms that have been invented for the sole purpose of functioning as a trademark or service mark." TMEP 1209.01(a).

a. Example: Exxon

b. Example: Adidas

- In some cases, you may show **Acquired distinctiveness (secondary meaning)**

  - "If a proposed trademark or service mark is not inherently distinctive, it may be registered on the Principal Register only upon proof of acquired distinctiveness, or "secondary meaning," that is, proof that it has become distinctive as applied to the applicant's goods or services in commerce. TMEP 1212. *See also* 15 U.S.C. § 1052(f).

  - **5 years exclusive use** in the marketplace will probably get you a secondary meaning. TMEP 1212.

  - Surname (McDonald's)

  - Color (UPS Brown, Pink for insulation, Purple for mattresses). *See Qualitex Co. v. Jacobson Products, Inc.*, 514 U.S. 159 (1995) (color green-gold for dry cleaning presses could be a registered trademark).

  - Shape (Coca-Cola bottle, Hershey kiss, Lego mini-fig)

  - Sound (NBC chimes, Dolby Sound, 20th Century Fox fanfare)

  - Scent (Play-Doh) (Reg. 87335817) [See Handout]

- **Actual Use** in Commerce

  - "The term 'use in commerce' means the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark." 15 U.S.C. § 1127.

  - "[A] mark shall be deemed to be in use in commerce on goods when it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto . . . and the goods are sold or transported in commerce." 15 U.S.C. § 1127.

  - "[A] mark shall be deemed to be in use in commerce on services when it is used or displayed in the sale or advertising of services and the services are rendered in commerce." 15 U.S.C. § 1127.

- Marks that May Be Refused Registration

  - "Consists of or comprises immoral . . . or scandalous matter" 15 U.S.C. § 1052(a)
    a. Unconstitutional: *Iancu v. Brunetti*, 588 U.S. _____ (2019) (USPTO denied registration for FUCT for clothing, and the Supreme Court held the immoral and scandalous clauses of the Lanham Act violate the First Amendment).
  - "Consists of or comprises . . . deceptive . . . matter" 15 U.S.C. § 1052(a)
    a. Example: If your goods are tofu, you probably can't get a registration for ABC QUALITY BEEF.
  - "[M]atter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute" 15 U.S.C. § 1052(a)
    a. Unconstitutional: *Matal v. Tam*, 582 U.S. _____ (2017) (USPTO denied band with Asian persons a registration for THE SLANTS, and the Supreme Court held the disparagement clause of Lanham Act violates the First Amendment, permitting the registration). [See Handout]
  - "[G]eographical indication which, when used on or in connection with wines or spirits, identifies a place other than the origin of the goods and is first used on or in connection with wines or spirits by the applicant" 15 U.S.C. § 1052(a)
  - "Consists of or comprises the flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation, or any simulation thereof" 15 U.S.C. § 1052(b)
  - "Consists of or comprises a name, portrait, or signature identifying a particular living individual except by his written consent, or the name, signature, or portrait of a deceased President of the United States during the life of his widow, if any, except by the written consent of the widow." 15 U.S.C. § 1052(c)
    a. Currently being challenged. *In re Elster*, 26 F.4th 1328 (Fed. Cir. 2022), *petition for cert. filed*, *Vidal v. Elster* (U.S. Jan. 27, 2023) (No. 22-704) (USPTO denied registration for TRUMP TOO SMALL, the Federal Circuit held when applied to a public figure, this violates the First Amendment, the USPTO filed a petition for a writ of certiorari)
    b. Example: JEREMY CAMP, Reg. No. 5918718, with the consent of the living individual. [See Handout]
  - "[W]hen used on or in connection with the goods of the applicant is merely descriptive or deceptively misdescriptive of them" 15 U.S.C. § 1052(e)(1)
    a. LOVEE LAMB for covers that are not made of lambskin are deceptively misdescriptive. *In re Budge Mfg. Co.,* 857 F.2d

773, 8 USPQ2d 1259 (Fed. Cir. 1988), *aff'g* 8 USPQ2d 1790 (TTAB 1987). *See Also* TMEP 1203.02(g).

b. You probably could not get a registration for OCEANFRONT RESTAURANT if your restaurant is actually next to a trash dump.

- "[W]hen used on or in connection with the goods of the applicant is primarily geographically descriptive of them" 15 U.S.C. § 1052(e)(2)
  a. Example: APPALACHIAN LOG HOMES
- "[W]hen used on or in connection with the goods of the applicant is primarily geographically deceptively misdescriptive of them" 15 U.S.C. § 1052(e)(3)
  a. Example: *In re Jack's Hi-Grade Foods, Inc.*, 226 USPQ 1028 (TTAB 1985) (NEAPOLITAN geographically deceptively misdescriptive of sausage coming from the U.S., not from Naples in Italy).
  b. Example: *In re Loew's Theatres, Inc.*, 769 F.2d 764, 226 USPQ 865 (Fed. Cir. 1985 (DURANGO for chewing tobacco not grown in Durango, Mexico)
  c. Example: *In re Bacardi & Co. Ltd.,* 48 USPQ2d 1031 (TTAB 1997 (HAVANA SELECT marks for rum not originating from Havana).
- "[I]s primarily merely a surname" 15 U.S.C. § 1052(e)(4)
  a. Example: McDonald's
  b. Example: HAAS
  c. Example: Abercrombie
- "[C]omprises any matter that, as a whole, is functional" 15 U.S.C. § 1052(e)(5)
  a. Example: *Traffix Devices v. Mktg. Displays*, 532 U.S. 23 (2001) (two springs on a construction sign were functional to the sign not blowing over and did not act as a trademark).
- "May cause likelihood of confusion" 15 U.S.C. § 1052(d)
  a. All of the circuits have their own tests, but in the 6th Circuit: Frisch's Restaurants, Inc. v. Elby's Big Boy, Inc., 670 F.2d 642, 648 (6th Cir.1982)
     - the strength of the plaintiff's mark;
     - relatedness of the products;
     - similarity of the marks;
     - evidence of actual confusion;
     - plaintiff's marketing channels;
     - likely degree of purchaser care;
     - defendant's intent in selecting the mark; and
     - the probability that the product lines will expand.
  b. *Kibler v. Hall*, 843 F.3d 1068, 1073 (6th Cir. 2016) *citing Frisch's Rest., Inc. v. Shoney's, Inc.,* 759 F.2d 1261, 1264 (6th Cir. 1985). **"**Each case is unique, so not all of the factors will be helpful." *Id.* (internal citation omitted). "Further, there is

no designated balancing formula for the factors." *Id.* (internal citation omitted). "The[ir] enumeration is meant 'merely to indicate the need for weighted evaluation of the pertinent facts in arriving at the legal conclusion of confusion.'" *Id. citing CFE Racing Prods., Inc. v. BMF Wheels, Inc.*, 793 F.3d 571, 592 (6th Cir. 2015) *quoting Frisch*, 759 F.2d at 1264.

c. *See Also In re E. I. du Pont de Nemours& Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973) (the "*du Pont* factors"); *In re i.am.symbolic, llc*, 866 F.3d 1315, 1322, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017).

d. Examples to discuss:
    - ♦ WAVE CHURCH
    - ♦ MARS HILL CHURCH
    - ♦ WORSHIP LEADER (Reg. 4921183) [See Handout]
    - ♦ UNDER ARMOUR v. ARMOR & GLORY, LLC Case No. 1:15-cv-02323-JFM (N.D. Md.) [See Handout]

- Dilution
    - ♦ Blurring - "[A]rising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark." 15 U.S.C. § 1125(c)(2)(B).
    - ♦ Tarnishment - "[A]rising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark." 15 U.S.C. § 1125(c)(2)(C).
    - ♦ Toys "R" Us owns "family mark" in the name, and Adults "R" Us would tarnish that mark. *Toys "R" Us, Inc. v. Akkaoui*, 1996 U.S. Dist. LEXIS 17090, 40 USPQ.2d (BNA) 1836 (N.D. Cal. 1996).
    - ♦ "We Are Guns" using names "Guns Are Us" and "Guns Are We" with a website gunsareus.com has no dilution, tarnishment, or likelihood of confusion, despite the fact that Toys "R" Us made their stores gun-free. *Toys "R" Us, Inc. v. Feinberg*, 1999 U.S. App. LEXIS 29833 (2d Cir. 1999).
    - ♦ Critic of Rev. Falwell created FALLWELL.COM with criticism of Rev. Falwell, and the court found no likelihood of confusion and stated that the dilution laws applied to commercial marks to protect First Amendment concerns. *Lamparello v. Falwell*, 420 F.3d 309 (4th Cir. 2005).
    - ♦ Parody advertisement in Hustler Magazine stating "Jerry Falwell talks about his first time" was an advertisement parody protected by the First Amendment. *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46 (1988).
- Parody
    - ♦ When a mark is used to ***poke fun at the product itself***, this is okay parody. *Mattel, Inc. v. MCA Records, Inc.*, 296 F. 3d 894 (9th Cir. 2002).

- For social commentary, using someone else's marks as a general message ***that does not target the trademark owner*** is not okay. *Mutual of Omaha Insurance Company v. Franklyn Novak*, 836 F.2d 397 (8th Cir. 1988).
- Haute Diggity Dog's "Chewy Vuiton" products do not infringe or dilute Louis Vuitton. *Louis Vuitton Malletier v. Haute Diggity Dog, LLC*, 507 F.3d 252 (4th Cir. 2007).
- Examples to discuss:
    a. Enjoy Jesus Christ – Thou shalt never thirst (Coca-Cola style)
    b. Jesus Sweet Savior King of Kings (Reese's style)
    c. A Breadcrumb and Fish (Abercrombie & Fitch style)
- First Amendment vs. Likelihood of Confusion
    a. If there is some minimal artistic relevance, and the work is not misleading as to the source, and the mark is non-commercial, the First Amendment applies and the Lanham Act need not be applied. *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989).
    b. Pending before the U.S. Supreme Court: Jack Daniels sued Bud Spaniels for a dog toy that made a joke about poop. *Jack Daniels Properties, Inc. v. VIP Products LLC,* No. 22-148 (argued March 22, 2023).

- Maintenance
    - Must have continuous use or Excusable non-use. *See* TMEP 1604.11
    - Must file a Declaration of Use/Excusable Non-Use between the 5th and 6th year.
    - Must file a Renewal Application and Declaration of Use/Excusable Non-Use between the 9th and 10th year.
    - Must file a Renewal Application and Declaration of Use/Excusable Non-Use every 10 years thereafter.
- Symbols
    - ™ - Assert common law rights (notice)
    - ® - Only allowed when you have a registration
    - SM - for service marks

IV. TRADE SECRETS

- Protects formulas, patterns, designs, compilations of data, customer lists, and other business secrets
  Example: Coca-Cola recipe, KFC recipe
- Reverse engineering is examining the product to figure out the recipe. This is allowed.
- Economic Espionage Act 18 USC 1831–1839
    - Makes it a federal crime to steal trade secrets
    - Punishment could be prison term of up to 15 years for an individual