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THIS EXAMINATION CONSISTS OF **FIVE** PAGES (INCLUDING THIS PAGE)
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THE UNIVERSITY OF BRITISH COLUMBIA
PETER A. ALLARD SCHOOL OF LAW

FINAL EXAMINATION – APRIL 2019
LAW 422 / Intellectual Property Law
Section 1 / Professor Graham J Reynolds

TOTAL MARKS: 100
TIME ALLOWED: 3 HOURS
and 10 minutes reading time

NOTE:

1. This examination consists of **FOUR (4)** questions. Please answer all questions.
2. This is an **open book** examination. You are allowed to bring any written material, including your notes and published material, into the exam. You may not use any electronic devices/material other than your laptop or notebook computer with ExamSoft's Exemplify software.
3. You have **10** minutes of reading time. The reading time is in addition to the **180** minutes of writing time. During the reading time, you should only make notes on the question sheet or on the scrap paper. During the reading time, do not write anything that you want marked. The reading time is in addition to the times suggested for each question.
4. Unless otherwise indicated, assume the applicable laws are the laws of British Columbia and Canada.
5. Students writing by hand:
 - a. Please write legibly on every second line of your exam booklet. Write on one side of the page only.
 - b. Do not put your name on the exam booklets. Use only your exam number.
 - c. At the end of the exam, please return all exam booklets, including blank ones. No credit will be given for anything written in a booklet that is removed from the exam room, even briefly.
6. Students writing using the ExamSoft computerized exam process, please ensure that you do not write or type your name at any place in the exam
7. Do not begin your exam until you are instructed to do so.
8. Please put your exam code on the question paper and return the question paper at the end of the exam.
9. **Have a great summer break!**

Question 1 [25 marks, 45 minutes]:

You work as an Associate Lawyer in a prominent Vancouver intellectual property firm. This past week, you met with Anna Chen (Anna). Anna is a researcher with VanBioLab, a Vancouver-based biotechnology company. Anna has discovered that a compound derived from a plant commonly found throughout British Columbia (BC) is effective in reducing the severity of symptoms related to influenza (the flu). VanBioLab is interested in patenting this invention in Canada. Anna approaches you on behalf of VanBioLab. She would like your opinion on a number of questions.

First, VanBioLab would like to know whether they must disclose, in their patent application, the exact compound the use of which has these therapeutic benefits, or whether they can stop short of doing this (for instance by describing the class of compounds within which the specific compound can be found). VanBioLab knows what the useful compound would be, but would prefer not to divulge this information because of a concern that competitors would be able to copy their patented invention the second that their application is filed. Discuss.

Second, VanBioLab would like to include, in its disclosure, a statement about how the compound “effectively reduces flu symptoms including fever, runny nose, sore throat, muscle pain, headache, fatigue, sneezing, and coughing.” Only part of this statement can be supported by current test data, although VanBioLab is confident that all of the claims within the statement will be able to be supported within the next few months. In the event that one of the parts of this statement turns out to be inaccurate (i.e. if the compound does not effectively reduce sore throats related to the flu), is VanBioLab’s patent application at risk of being rejected (or its patent invalidated) for lack of utility should this statement be included in the disclosure? Discuss.

Third, VanBioLab would like to claim the method of treating the flu through use of the compound. Will they be permitted to do so? Discuss.

Question 2 [25 marks, 45 minutes]:

On 26 March 2019, the Vancouver Ice Dogs of the Pacific Hockey League (PHL) won the Buchanan Cup (the PHL’s Championship Trophy). The winning goal was scored by captain Bree Jenkins. After scoring, Jenkins threw her arms up in the air in celebration. She was then mobbed by her cheering teammates. The image of Jenkins with her arms in the air was captured by Caleb Wilson (Caleb), a photographer with the Vancouver Free Press. Caleb’s editor chose to place this photo on the front page of both the print and online editions of the newspaper.

Local Vancouver artist Diya is a huge hockey fan. She was in attendance at the Ice Dogs’ championship-winning game. Later that evening, while searching for commentary about the game, Diya came across Caleb’s photo on the Vancouver Free Press website. She thought it was perfect, and wanted to use it as raw material for her own creative expression. Diya tried to download a copy of the photo but was blocked by a technological measure employed by the Vancouver Free Press on its website. Using an application named SideStep, Diya circumvented this measure and downloaded the photo. She then created a new version of it. Diya’s version was a faithful copy of Caleb’s photo, with a few important differences. Diya’s version was in charcoal and is a black and white sketch, while Caleb’s work is a colour photograph. As well, neither the Ice Dogs logo nor Jenkins’s facial features are identifiable in Diya’s sketch (they are

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(Question 2, continued)

visible in Caleb's photo). Diya made her work available for download on her website (for a \$10 fee). She also displayed a copy of this work on her Facebook page.

Emmet Jones – a local social media influencer (described as someone who has a large following on social media platforms and uses this platform to persuade others to engage in certain activities) – came across Diya's work on her Facebook page. He downloaded Diya's work from her website after paying the requisite fee, and modified it by putting a colour picture of his face on the black and white charcoal image. He then made the modified image available through a range of social media platforms as well as through his personal website. Almost immediately, it was shared amongst hundreds of Internet users, many of whom replaced Emmet's face with their own.

Diya came across these re-uses of her work and was horrified. She quickly determined that Emmet was the person who started the trend of individuals putting their faces on her work, and contacted him to ask him to take down the original re-working of her image from his website as well as from his social media platforms. Emmet rejected her request, indicating that "you put your work online – I can do whatever I want with it!" He also stated that "I'm making you money!" Sure enough, downloads of Diya's photo from her website had spiked since Emmet first circulated his reworked version of her work (from 200 in total prior to Emmet's circulation, to 1200 (and counting) after his reworked version of her work had been circulated).

You are an Associate Lawyer in a prominent Vancouver intellectual property firm. Diya comes to you for advice. She would like your opinion on a number of questions.

First, Diya would like to know whether her charcoal sketch is protected under the *Copyright Act*. Discuss.

Second, Diya wishes to know whether she or any other party committed any prima facie infringing acts, under the *Copyright Act*, in relation to her use of SideStep to download Caleb's photo from the Vancouver Free Press website. (Do not address any defences to infringement in your response to this part of the question.) Discuss.

Third, Diya wishes to know whether Emmet's reworking of her work will be considered to be fair dealing under the *Copyright Act*. In responding to this question, consider what the impact would be of Diya having indicated, in the terms and conditions attached to the downloading of her work from her website, that "in agreeing to these terms and conditions, you waive your user rights under the *Copyright Act*." Such a term wasn't included in these terms of conditions, but had been contemplated by Diya when she set up her website. Discuss.

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Question 3 [25 marks, 45 minutes]:

In 1990, Jack Andrews (Andrews) founded a BC-based non-governmental organization (NGO) entitled Clean Earth. In an attempt to increase its public profile, Clean Earth created, in the second half of 2018, an advertising campaign featuring a cartoon black bear named Jack. This campaign – on multiple platforms including television, radio, and social media – was very popular with BC audiences. As part of this advertising campaign, Clean Earth produced stuffed animal versions of Jack the bear for sale, packaging the bear in a bear-shaped box (not unlike heart-shaped boxes often used for chocolates or candy). Unexpectedly, the bear box has in itself become a wildly popular item. The Vancouver Free Press (with a daily print circulation of 30,000 and a significant online presence) named it one of its must-have items of 2018.

You are an Associate Lawyer in a prominent Vancouver intellectual property firm. Andrews approaches you on behalf of Clean Earth, seeking to leverage its new-found notoriety. Discuss each of the questions raised by Andrews below.

First, Andrews is wondering whether there is any mechanism within the *Trademark Act* that would allow him to prevent the unauthorized use, by others, of the bear-shaped box? Discuss.

Second, Andrews tells you that he would like to use the Canadian flag in the context of Clean Earth advertising (ie Jack the bear waving a Canadian flag). May he do so? Discuss.

Third, Andrews would like to register, as a trademark, the slogan “Helping Keep Canada Clean” in association with the following services: 1) lobbying for political purposes, including political pressure concerning environmental politics and environmental preservation; 2) education, namely teaching, courses, training relating to the right to a clean environment. (This slogan has not yet been used by Clean Earth). Andrews is aware of a small family firm in Nova Scotia with the name Clean Canada. In 2015, this firm registered a trademark in the name “Clean Canada” in association with the following goods: 1) paper and plastic bags and 2) waste disposal bins made of plastic or metal. These goods are only sold in Nova Scotia. Will Clean Canada’s registration pose an issue for Andrews in seeking to register the slogan “Helping Keep Canada Clean” as a trademark? Discuss.

Fourth, Andrews would like to register the slogan “Plastic-Free Oceans for You and Me” in association with the following services: 1) lobbying for political purposes, including political pressure concerning environmental politics and environmental preservation; 2) education, namely teaching, schooling, courses, training relating to the right to a clean environment. Andrews does not have any intention of using the slogan “Plastic-Free Oceans for You and Me” in the context of his NGO’s operations. Rather, for years now, Andrews has been in a feud with another NGO named “Safe Ocean.” He has heard that Safe Ocean is considering rolling out a large advertising campaign under the slogan “Plastic-Free Oceans for You and Me” (they have not yet done so), and would like to disrupt this effort by registering a trademark in this phrase. Discuss whether there are any mechanisms in the *Trademarks Act* that Safe Ocean could rely on to challenge Andrews’ registration of the slogan “Plastic-Free Oceans for You and Me”.

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Question 4 [25 marks, 45 minutes]:

Discuss what in your view are the areas of Canadian intellectual property law most in need of reform. On what basis are these reforms necessary? What specific reforms would you recommend? In your response, discuss at least two of the three core areas of intellectual property covered this term (patents, copyright, and trademarks).

END OF EXAMINATION