

THIS EXAMINATION CONSISTS OF **SIX** PAGES
PLEASE ENSURE THAT YOU HAVE A COMPLETE PAPER

THE UNIVERSITY OF BRITISH COLUMBIA
PETER A. ALLARD SCHOOL OF LAW

FINAL EXAMINATION – APRIL 2022

LAW 422.002/570C.002
Intellectual Property Law

Jon Festinger, Q.C.

TOTAL MARKS: 100

WRITING TIME ALLOWED: 3 HOURS
AND READING TIME ALLOWED: 15 MINUTES

This is an open book examination, meaning that you can refer to class notes, the course casebook (Canadian Intellectual Property Law: Cases and Materials (2nd Ed.)), the course PowerPoint slides, and other class readings. Unless otherwise indicated, assume the applicable laws are the laws of British Columbia and Canada.

You have 15 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.

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.

Do not begin your exam until you are instructed to do so.

Please put your exam code on the question paper and return the question paper at the end of the exam.

This examination consists of THREE (3) questions. ANSWER ALL QUESTIONS.

If you think you have discovered an error or potential error in a question on this exam, please make a realistic assumption, set out that assumption clearly in writing, and continue answering the question.

Have a great summer!

The facts below are relevant for both Questions 1 & 2:

Michael Angelo is a well-known Vancouver artist and furniture maker, as well as an Adjunct Professor in the Bachelor of Fine Arts program at UBC. Michael is the grandson of William Angelo who founded William Angelo & Associates, a legendary maker of high-end furniture founded in Vancouver but known world-wide for its craftsmanship and design. In 2002, a Canadian trademark was obtained for “William Angelo & Associates” as well as a stylized version **William Angelo & Associates**.

William Angelo & Associates was sold in 2014 to a completely unrelated third party and remains an active business in Vancouver.

By day, Michael worked two jobs. Since 2002 and until 2014, he worked as a designer in the family furniture business (William Angelo & Associates) alongside his father in the family furniture business. In 2009 he reduced his hours in the family business and began doing other work as a furniture designer and creator under his own name. His personal business cards read “Michael Angelo, Furniture Design & Construction”. He never applied for a trademark for “Michael Angelo, Furniture Design & Construction” after receiving advice that name was “purely descriptive” and would not be approved by the Trademark examiners at the Canadian Intellectual Property Office. After the sale of “William Angelo & Associates” in 2014, Michael’s full-time day job was building his personal business (Michael Angelo, Furniture Design & Construction).

By night Michael created art in his garage-studio. He describes his art as “*a contemporary satire of the tropes of modernism with an eye to corrupting those tropes*”.

Question 1 [50 marks, 90 minutes recommended]:

As an artist, Michael has become known for multi-layered paintings where he applies abstract designs and words over a base photograph. For example, his breakthrough work in 2001 was a photograph he took while a Fine Arts student in Toronto of Margaret Trudeau and the Rolling Stones at the El Mocambo club in 1977, over which he repeatedly painted peace symbols and the words “WONDERFUL TIME”, “BE CAUTIOUS”, and “CANADIAN EYEBROWS”. The words were painted in a unique font designed by Michael, but no steps were taken to protect the font. The words and symbols cover approximately 65% of the photograph. The words themselves were short phrases found in Ron Wood’s biography about his career as the Rolling Stones’ guitarist and referred to time spent with Margaret Trudeau. The painting itself is both satiric and nostalgic in dealing with one of the most iconic moments in Canadian pop culture. The work made Michael Angelo very well-known and served as a prototype for his unique style of mixed media art. Michael continued creating similar works that were easily recognizable from

their look and feel as being uniquely his. Sometimes the works were based on his own photographs, but increasingly over time were based on images found on the internet.

Though his previous works were untouched by controversy, the same cannot be said about Michael's latest. In March 2022, Michael finished his latest work, "NINCOMPOOP SPEAK". The work is based on a photograph taken by Jeff Kravitz for MTV of Kanye West onstage accepting the "Michael Jackson Video Vanguard Award" from Taylor Swift during the 2015 MTV Video Music Awards ("VMA Awards") on August 20, 2015, in Los Angeles. The moment captured by the photo was a moment of reconciliation between Taylor Swift and Kanye West after Kanye's rude interruption of Taylor Swift's 2009 VMA Awards acceptance for "Best Female Video". On top of the image Michael alternated three phrases in his unique font over approximately 65% of the photograph. The phrases are even spread throughout the work (i.e. they are not concentrated over any single part of the photograph and effectively break the photograph up). Those phrases are:

- "WASTED HER VALUABLE TIME TO LISTEN TO THAT NINCOMPOOP SPEAK" (from a 2020 tweet by Taylor Swift's friend and collaborator Todrick Hall, where quoted more fully, he said "*My heart breaks listening to that phone call, the fact that she even picked up the phone and wasted her valuable time to listen to that nincompoop speak is just a testament to how great a human she is...*")
- "THIS IS WHY WE CAN'T HAVE NICE THINGS, DARLING" (a line from the lyrics of the song "This Is Why We Can't Have Nice Things" by Taylor Swift and Jack Antonoff released in 2017 - reportedly a response to Kanye West concerning a controversy involving a call between Swift and West about West's to be released song "Famous" which contained an inappropriate and sexist lyric that Swift was not made aware of.)
- "I TRIED TO PICK MY BATTLES 'TIL THE BATTLE PICKED ME" (a line from the lyrics of the song "Long Story Short" by Taylor Swift and Aaron Dessner on the December 2020 album "Evermore" – reportedly also a response to the controversy described immediately above.)

Michael has recently been reading about various copyright lawsuits involving the music industry. It occurs to him that as "NINCOMPOOP SPEAK" is about to be put up for sale by the Vancouver gallery that represents his work, he perhaps should consult with someone regarding intellectual property issues before the work is displayed and sold. Since he teaches regularly at UBC, he approaches the Allard Business Law Clinic. You are an Allard Law student who participates in the Clinic, and as luck would have it, Michael Angelo's queries come to you to be answered.

Please advise Michael with respect to his questions below:

1. *“I have not licensed the Jeff Kravitz/MTV photograph that is the base layer of my work “NINCOMPOOP SPEAK”. I’m worried that if I ask for a license, I won’t get one, or it will be too expensive.” Do I have a good argument that my use of that work is “fair dealing” in Canadian copyright law? What would be the constituent elements of that argument?”*
2. *“I have no agreement with Taylor Swift or any of her co-writers to use small parts of the song lyrics I have overlayed onto the photograph and which I repeat several times. Nor do I have the agreement of Todrick Hall to use part of his tweet either in the work or as the name of my work. I believe I’m using too little of their words to get into legal trouble. Do you agree with that? Either way please explain your reasoning, so that I might have some guidance for my future works.”*
3. *“Wouldn’t my work be seen as “transformative” in Canada. I understand that concept is part of U.S. copyright law. Is it, or something like it, a part of Canadian copyright law as well? Can you explain how it might (or might not) fit in to the Canadian fair dealing/users’ rights scheme?”*
4. *“Am worried about the Moral Rights provisions of Canada’s Copyright Act? Could Jeff Kravitz, MTV, Taylor Swift, or her collaborators sue me? What defenses would I have? Would fair dealing be a defense?”*

You are not asked about and should not provide any opinion on any defamation aspects of this situation. Michael has already received the opinion that any negative commentary about Kanye West implicit in “NINCOMPOOP SPEAK” is “fair comment on true facts on a matter of public interest”.

Question 2 [32 marks, 57 minutes recommended]:

A week later, Michael Angelo comes to see you again, this time with a series of trademark and passing off questions as he is thinking about renaming his furniture design business.

First, he asks you to consider various possible names and whether he would be able to obtain a trademark over the objections of the current owners of the trademark and business “William Angelo & Associates”. The names and stylized names he asks you to consider:

- a. William Angelo’s Grandson & Associates; **William Angelo’s Grandson & Associates**
- b. Michael Angelo & Associates; **MICHAEL ANGELO & ASSOCIATES**
- c. Angelo Furniture Design & Construction; **Angelo Furniture Design & Construction**

Second, he asks you what arguments he might successfully put forward should the current owners of “William Angelo & Associates” sue him for Passing Off? He wonders whether:

- (i) his historical family and employee association with the business of “William Angelo & Associates” before it was sold, and/or
- (ii) his working since 2009 under “Michael Angelo, Furniture Design & Construction”

would allow him to successfully defend any passing off action that might commenced against him by the current owners (since 2014) of “William Angelo & Associates”?

Third, he asks you whether he would be successful in trademarking the phrase “Nincompoop Speak” as the name of his business?

Finally, Michael is sure to let you know that if you have any creative suggestions for a name that you believe would likely be legally on the safe side, he welcomes your suggestions for “bonus marks” (whatever that means).

Question 3 [18 marks, 33 minutes recommended]:

In *Harvard College v Canada (Commissioner of Patents)*, [2002] 4 SCR 45, the Supreme Court of Canada, in a 5-4 decision, ruled that a genetically modified mouse was not a patentable invention under the *Patent Act*, RSC 1985, c P-4.

Harvard College filed identical patent applications in other countries for such a genetically modified mouse. Harvard received patents in the countries where applications were filed. In the U.S., Harvard’s application was filed in 1984, with the patent granted in 1988. The European Patent Office also granted the patent to Harvard College in 1992 despite having exceptions under Article 53 of the European Patent Convention regarding inventions, the publication or exploitation of which would be contrary to *ordre public* or morality. It can be suggested that Canadians should be concerned that our nation’s attraction to innovators could have been compromised by the Supreme court of Canada’s final disposition in the case.

Please provide your view, with reasons, of whether the majority or minority decisions of the Supreme Court of Canada was more correct. In doing so, please directly address the issue of the patentability of higher life forms, as well which areas of patent law might need to be reformed to ensure the proper balancing of the interests of inventors on one hand and the interests of the public on the other.

END OF EXAMINATION