

KERN COUNTY COLLEGE OF LAW

Real Property

Midterm Examination

Fall 2024

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INSTRUCTIONS

This examination is 3 hours and consists of 3 essays. Each essay is worth 1/3 of your final examination score.

ESSAY 1

Mavis, 85, owned a small lot of property in California that had a single-family residence on it. Mavis had two adult children, Barry and Larry. Barry was gainfully employed and financially stable. Larry was a disabled veteran, both physically and with post-traumatic stress syndrome, who lived at home with Mavis so that Mavis could care for him.

Mavis knew that Larry could never afford a home on his own, but believed that he would lose the house if she left her home to him. Mavis told Barry, "I am going to leave the house to you in my will, but please allow Larry to live in it rent free for the rest of his life." Mavis died in 2015 and her duly executed will left her home to "my son, Barry."

Larry continued to reside in the home after Mavis's death. Barry asked Larry to pay all property taxes on the home because Larry was living there.

After Mavis's death, Barry only visited Larry on holidays to bring leftover turkey dinners, and sometimes dropped off groceries. Larry, however, would never allow Barry into the house, always stating that he was embarrassed about the state of the home because he was a hoarder. Barry honored Larry's wishes and on the few occasions he was delivering food to Larry, would only stand on the front porch.

Barry was diagnosed with cancer shortly after Mavis's death. Barry planned to seek probate of Mavis's will after he was healthy. After a 2-year battle, Barry passed away without ever probating Mavis's will. Barry left a daughter, Sherry, who was the sole beneficiary of Barry's will. Barry told Sherry before death that it was Mavis's wish that Larry continue to live in the home rent-free but that Larry must continue to pay property taxes. Sherry continued to honor Mavis's wishes and never sought to remove Larry. In January 2020, Sherry filed a probate action for Barry's estate and filed one for Mavis's estate, too. The probate court determined in December 2020 that Sherry was the legal owner of the property.

Larry filed a quiet title action for adverse possession against Sherry in February 2021. Larry had paid all property taxes after Mavis's death.

In California, the statutory period for adverse possession is 5 years and includes a requirement that the adverse possessor pay property taxes for that period. California is not a minority jurisdiction with respect to an adverse possessor's intent when entering the property.

Discuss whether Larry might prevail on his cause of action for adverse possession.

ESSAY 2

Lyle owns a commercial building and entered into a lease agreement with Tomas for purposes of operating a Mexican food restaurant at the building. The lease provides:

Rent: \$5,000 per month base rent, plus 20% of the restaurant's net profits.

Term: For a period of 30 years, Tomas shall have an option to purchase the Property, which may be exercised at the 10th, 20th, or 30th year of the lease so long as Tomas is not in default of the terms of the lease.

Maintenance: Lyle shall maintain the exterior of the Property and parking lot.

Fixtures: Anything affixed to the Property shall become Lyle's property.

Assignment and Sublease: Tomas shall not sublet or assign the Property without Lyle's written consent, which consent shall not unreasonably be withheld.

Tomas made a number of improvements to the interior of the Property, including adding a commercial hood over the stove and a grease trap. Tomas also added a bar area and attached numerous televisions to the walls. Tomas's business was very successful, in part due to the location of the Property.

In the 8th year of the lease, Tomas fell ill and asked Lyle for consent to assign the lease to Arthur, who would continue operating the restaurant. Arthur had good credit and substantial assets, but no experience in the restaurant industry. Lyle refused. Tomas nevertheless gave the keys to Arthur and told him, "you take over, I will buy the Property in 2 years when my option to purchase is up, and then sell it to you." Each month, Arthur gave his rent to Tomas, who in turn paid it to Lyle.

In the 9th year of the lease, the lights in the parking lot went out. Arthur reported it to Tomas, who reported it to Lyle. Lyle never fixed the lights and on four occasions, customers reported to Arthur that their cars had been broken into while they ate at Arthur's restaurant. Arthur's business receipts began to decline as a result. One month shy of the 10th year of the lease, a customer was assaulted and robbed in the parking lot after eating at Arthur's restaurant.

Upon the 10th year of the lease, Tomas gave notice to Lyle that he was exercising his option to purchase the Property. Lyle refused his consent, claiming that Tomas was in default and that the option to purchase was invalid.

The customer then sued Arthur for personal injuries. Arthur sued Lyle for breach of the lease agreement and loss of profits.

1. Could Lyle refuse his consent to the transfer of interests from Tomas to Arthur?
2. Who is liable, if anyone, to the customer for the assault and robbery?
3. Would Arthur prevail in a lawsuit against Lyle for loss of profits based on Lyle's failure to repair the parking lot lights?
4. May Lyle refuse his consent to Tomas' exercise of the option to purchase?
5. If Tomas and/or Arthur are evicted, what fixtures or improvements may they remove from the Property, if anything?

ESSAY NO. 3

Jewel Stone is a content creator on a number of social media platforms and has 1.5 million followers. She resides in Texas. She spends her days doing her makeup and hair, recording herself, and editing videos. This is a full-time job for her.

Jewel believes she has coined a new phrase, “muy screwy,” when referring to being intoxicated. In a video, Jewel refers to a drunken evening out with her friends and says she got “muy screwy” after drinking the newest celebrity tequila brand. Because of Jewel’s physical appearance, tone of voice, funny mannerisms, and facial expressions, the video of her went viral.

Two days after Jewel posted her video, Martin Richie filed an application for a trademark of the phrase, “muy screwy,” hoping to capitalize on the new phrase all of the young people are saying by selling merchandise. One day later, Jewel filed her application for a trademark. And the next day, a third application was filed by the maker of La Boracha Tequila, which included the words and a drawing of an intoxicated woman.

The tequila manufacturer is a small business in Albuquerque, New Mexico that only sells its tequila in the greater Albuquerque area. For the last four years, the tequila company has been airing advertisements on local television and radio stations with a jingle set to the tune of “La Cucaracha” with the following lyrics:

“When La Boracha
Drinks La Boracha
She’ll get muy screwy, man.”

The tequila company has accounts on the main three social media platforms, but has not yet ventured onto any other social media platform. Two years ago, the tequila maker was issued a copyright for the lyrics to its jingle.

1. If a trademark is issued, who has the best claim for it: Jewel, Martin Richie, or the maker of La Boracha Tequila?
2. Does the tequila company have a potential claim against Jewel for copyright infringement?

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ANSWER OUTLINES

Essay 1 – Adverse Possession

Rule: Adverse possession is the acquisition of property through possession for the statutory period of time without the owner's consent. To establish adverse possession, the adverse possessor must show an entry onto property that is open and notorious, hostile, exclusive, and continuous for the statutory period. In California, there is an additional requirement that the adverse possessor pay property taxes for the statutory period as well.

Analysis:

1. Adverse Possession Elements

- a. Entry onto property – Larry lived with Beatrice and remained thereafter.
- b. Open and notorious – means that possession is such that a reasonable person would be aware that the adverse possessor is in possession of the property. Larry openly and obviously lived there. Barry knew it and brought him meals there.
- c. Hostility – Larry entered with Beatrice's permission. But as soon as she died, any possession would be without her consent. Barry will argue that he consent to Larry being there because those were his mother's wishes. To support this, Barry brought Larry meals at the house. Larry will argue that the consent was never stated or sought from Barry.
- d. Exclusive – Larry will argue that his possession was exclusive because he never allowed Barry to enter the house. Barry will argue he was allowed onto the property, just not into the house.
- e. Continuous – Larry possessed the property continuously for the statutory period
- f. Taxes – Larry paid the taxes, although only upon the request of Barry and later Mary.

2. Disabilities

- a. Barry's disability – He has an illness, though it is not mental. He has not been declared incompetent.
- b. Terry's disability – doesn't matter because he's the adverse possessor

3. Conclusion

Essay 2 - Leases

1. Could Lyle refuse his consent to the transfer of interests from Tomas to Arthur?
 - a. Rule –
 - i. Generally, the terms of the lease govern the obligations and rights between the parties.
 - ii. Where the lease provides that consent shall not unreasonably be withheld, consent cannot be withheld for reasons that are arbitrary or solely for the financial gain of the landlord.
 - b. Analysis – Arthur had good credit and ample assets. Therefore, it could be argued that Lyle's refusal is arbitrary. But, current rent payments are based upon a base amount plus a percentage of profits. Lyle could reasonably be concerned that Arthur's rent will fall below that paid by Tomas because Arthur does not have the experience to operate a restaurant that Tomas had.
 - c. Conclusion
2. Who is liable, if anyone, to the customer for the assault and robbery?
 - a. Rule –
 - i. A landlord remains liable for injuries in the common areas under his control and is liable for any injury caused by a dangerous condition that could reasonably have been discovered and made safe.
 - ii. A tenant in possession is liable for injuries on the property caused by dangerous conditions or activities on the premises.
 - iii. The lease terms govern the respective responsibilities as between landlord and tenant, but not liabilities to third parties.
 - b. Analysis – The landlord is responsible under the lease for the parking lot. The injury occurred in the parking lot due to dim lighting. Landlord was notified of the light issue before the injury occurred and failed to repair it. Neither Tomas nor Arthur undertook to repair it themselves either and simply deduct the expense of repair from rent, which was not precluded by the lease.
 - c. Conclusion
3. Would Arthur prevail in a lawsuit against Lyle for loss of profits based on Lyle's failure to repair the parking lot lights?
 - a. Negligence
 - i. Rule: Landlord owes duty to use reasonable care for areas that remain under his control.
 - ii. Analysis
 - iii. Conclusion
 - b. Contract –
 - i. Rules:
 1. An assignment is a transfer of the full quantum and scope of the original lease, whereas a sublease is a transfer of a lesser quantum or scope of the original lease.

2. For subleases, there is no privity of contract or estate between a landlord and sublessee. The relationship is between lessee and sublessee, and landlord and lessee.
 3. For assignments, there is privity of estate between the landlord and the assignee. The assignee steps in the shoes of the original tenant and the landlord and assignee hold the rights and obligations set forth in the original lease.
 - c. Analysis – Arthur received the remainder of the full lease term, but Tomas kept the option to purchase. Arthur paid his rent to Tomas. Arthur reported the crimes in the parking lot to Tomas. Tomas, in turn delivered the rent and reports of crimes to Lyle. The deal was done this way to get around Lyle's refusal to the assignment.
 - d. Conclusion
4. May Lyle refuse his consent to Tomas' exercise of the option to purchase?
 - a. Rule: The lease governs the terms, and the lease states that an option may be exercised only if the tenant is not in default.
 - b. Analysis: Tomas was perhaps in default when he sublet/assigned to Arthur. But if Lyle's consent was unreasonably withheld, perhaps Tomas was not in default.
 - c. Conclusion
 - d. **Extra credit** to the student who raises the Rule Against Perpetuities on the Option to Purchase being available in year 30, thus potentially violating the RAP and resulting in the option to purchase clause being stricken in its entirety.
 5. If Tomas and/or Arthur are evicted, what fixtures or improvements may they remove from the Property, if anything?
 - a. Rule: Fixtures are improvements that are attached to the property by the tenant. Fixtures become part of the property and therefore belong to the landlord at the end of the lease. But trade fixtures generally may be removed. TVs attached to the walls are not fixtures.
 - b. Analysis – The hood and grease trap are attached. The bar area is likely attached. They are, however, arguably trade fixtures, which generally may be removed. The lease does not distinguish between trade and regular fixtures and may cause an ambiguity.
 - c. Conclusion

Essay 3 – Intellectual Property

1. If a trademark is issued, who has the best claim for it: Jewel, Martin Richie, or the maker of La Boracha Tequila?
 - a. Rule:
 - i. Trademarks must be unique and distinctive.
 - ii. Common words can be used so long as the words are not merely descriptive or generic.
 - iii. Entities can use the same words so long as they are not in a similar industry so as to cause confusion or dilute the trademark.
 - iv. Where multiple entities are using the trademark, the courts look to who was first in time and the region in which it was used.
 - v. Property laws reward sweat of the brow.
 - b. Analysis:
 - i. Common words: Muy screwy in Texas might be common where many residents speak both Spanish and English fluently. The fact that another company in a nearby state was using the same phrase supports that it is common. But it was Jewel's use of it that went viral, tending to indicate that maybe it wasn't that common or that the words, when associated with her, were not generic or descriptive. On the other hand, she was just saying she was drunk, but in a manner that people thought was funny. So it could be argued the words were merely descriptive. Jewel also, is a content creator who has put hours into hair, makeup, editing, and developing a following.
 - ii. The trademarks may cause confusion as between Jewel and the tequila maker because the words are the same, but the tequila maker's trademark includes art of a drunk woman. Moreover, the tequila maker is in a different industry than Jewel and Martin Richie.
 - iii. Timing: Martin Richie was first, then Jewel, then the tequila maker. Ordinarily, first in time to file and receive trademark protection. But persons who used it first in commerce can still prevail and get their trademark. Martin never used it in commerce. The tequila company was first to use it in commerce, but only in the Albuquerque area. Jewel was the first to use it nationwide.
 - c. Conclusion.
2. Does the tequila company have a potential claim against Jewel for copyright infringement?
 - a. Rule: A work that receives copyright protection is protected as an entire work. The words within it are not protected if the words are not unique or creative.
 - b. Analysis: "Muy screwy" as a sequence of words is not common in every day parlance. But they could be in Texas or New Mexico where more Spanish is spoken. The mix of Spanish and English might be uncommon enough to warrant copyright protection.

c. Conclusion

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1)

Adverse Possession

A trespasser may be able to acquire title to land through continuous, hostile, open and notorious, exclusive entry for a statutory period of time.

Continuous for the statutory period of time

The adverse possessor must have continuous use of the property for a statutory period of time. They must use the property in the same manner that the property has been used for before they entered onto the property.

The statutory period for adverse possession in California is 5 years and that the adverse possessor pay property taxes. Here, Larry may argue that because he resided on the property since 2015, right after Mavis died that he has met the requisite statutory period. He will also argue he has been continuously paying the property taxes since Mavis had died up until Sherry tried to remove him from the property. However, Sherry may argue that Larry's statutory period didn't begin until Barry passed away because in Mavis' will she left her home to "my son Barry." She will further argue that Larry was a disabled veteran and because the adverse possessor, Larry, entered onto the property while Larry was disabled this tolled the statute of limitations. Therefore, Barry did not meet the statutory period requirements because the clock didn't start until Larry died not while he was alive. However, Larry will argue that post-traumatic stress syndrome or cancer didn't cause Barry to have any major disabilities and he was still able to visit him on holidays from time to time. This argument will likely fail because absent other facts stating that to be true one is left to assume Larry was medically diagnosed with the disability and that is enough to constitute the tolling of the statute of limitations.

Further, Sherry may also claim that an adverse possessor cannot lay claim to a property that has a future interest until it actually vests. So, Larry could not adversely possess the property from her until 2020 when she filed a probate action for Barry and Mavis's estate. However, Larry will claim that he began to adversely possess the property according to the statutory requirements in 2015 against Barry not Sherry.

Thus, Larry did not meet the continuous requirement.

Hostile

An adverse possessor must use or occupy the land without the owners consent.

Here, Sherry will argue that because Larry was on the property with the consent of both Mavis and Barry that he does not meet the element of hostility. The family lives in a jurisdiction that does not consider the intent of the adverse possessor therefore this element is solely satisfied by a trespasser being on the property without the owners consent. Absent other facts Larry would be hard pressed to argue otherwise.

Thus, Larry did not meet the hostile requirement to lay a claim for adverse possession.

Open and Notorious

An adverse possessor must use the land in a way that the public would deem them the rightful owner and if the true owner rightfully inspected the property they would have noticed the trespasser/adverse possessor on the property.

Here, Larry will argue that he used the property as it was intended because he used the premises for residential living. Sherry will argue that Larry was a hoarder and that is not the manner in which Mavis or Barry used the property when they lived there. However, Larry will argue that he did meet the element because Barry allowed him to live on the premises and anyone who would come by the property would be able to see that Larry lived on the premises.

Thus, Larry may have used the property openly and notoriously.

Exclusive

An adverse possessor must execute the right to exclude anyone, including the rightful owner, from the property.

Here, Larry will argue that he excluded Barry from the property because he would not allow him to enter the residence on the holidays that Barry would come and visit. Barry honored Larry's wishes and did not enter or even try to enter the property. Larry will also argue that when Barry died and probated the will to Sherry, she also never tried to remove Larry from the premises. Thus, Larry also excluded her. Sherry may argue that she and Larry, and also Barry and Larry were technically co-tenants during the time that Larry is claiming to make his case for adverse possession. Therefore, adverse possession cannot begin until there's an ouster. However, Larry will claim that there was an ouster because Barry and Sherry did not live on the property after Mavis's death. Absent other facts Sherry may not be able to argue that Larry did not exclude the rightful owners from the property.

Therefore, Larry may have satisfied the exclusive element to lay a claim for adverse possession.

Entry

An adverse possessor must have *actually* entered onto the land.

Here, Larry was on the premises for the entire statutory period. There are no facts that indicate that he ever left the property. The facts state that Larry was embarrassed by the state of the house because he was a hoarder. This indicates that Larry had to be living thus, satisfying the actual entry onto the property. Larry may also argue that Sherry never attempted to set foot on the property during the entire time he was there.

Thus, Larry actually entered the property.

Conclusion

Larry might not prevail on his claim for adverse possession.

Rule statements are clear, concise, and demonstrate a thorough understanding of adverse possession.

Analysis is strong and great argument on the co-tenant/ouster issue.

Well done!

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2)

1. Whether Lyle (LL) could refuse consent to transfer of interests from Tomas (T1) to Arthur (T2)

Term of Years Lease

A lease agreement transfers present possessory interest from a Landlord (LL) to a Tenant, and the LL retains a future interest of reversion. A term of years lease is created when LL and T agree on a fixed term for leasehold interest, and no notice is required for termination of a term of years lease, unless either party wishes to terminate sooner than the agreed-upon end of the term.

Here, a term of years lease was created between Lyle (LL) and Tomas (T) when they entered into a lease agreement for a period of 30 years.

Covenant to Consent of Assignment/Sublease

A lease agreement may contain a provision which grant a LL discretion to consent to assignment or subleasing. In commercial properties, a LL cannot refuse consent for reasons that are not commercially reasonable.

Here, the lease agreement between LL and T included a provision that T "shall not sublet or assign the property without LL's written consent, which consent shall not unreasonably be withheld." When T asked LL for consent to assign the lease to Arthur (T2), LL refused based on the fact that T2 had no experience in the restaurant industry. Although T2 had good credit and substantial assets, LL's refusal could be construed as reasonable because part of the agreed-upon rent in the lease agreement was for T to pay LL 20% of the restaurant's net profits, in addition to the \$5,000 per month base rent. Since T2 had no experience in the restaurant industry, LL had a pecuniary interest in wanting the restaurant to continue to be operated by T, an not T2. One could argue that LL's pecuniary interest would not really suffer because part of T's success was due to the location of the Property.

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Absent any facts about T's restauranteur skills or the quality of the food, LL had a commercially reasonable objection to refuse consent to assignment of the lease to T2. *Fantastic analysis!*

2. Who is liable to the customer for the assault and robbery?

Landlor's Duty

Generally, a landlord has a duty of reasonable care to maintain all common areas of a leased property, including duty to repair.

Here, the lease agreement included an explicit providing that LL was to maintain the exterior of the Property and parking lot.

LL breached his duty when, in the 9th year of the 30-year lease, he did not fix the lights in the parking lot after being notified by T.

Tort Liability

Generally, a tenant is liable for any injury suffered by tenant's guests while on the property under control of the tenant.

Here, although the Property was under control of T2, LL's negligence to fix the lights in the parking lot created a dangerous environment in a common area that caused undue vulnerability to T2's guests. It could be argued that T or T2 could have fixed the lights in the parking lot and just deducted the cost from the rent payment to LL, but that duty was an explicit provision in the lease agreement that LL had to abide by. Additionally, T2 was put on further notice of the dangerous condition that was created in the parking lot after customers reported to him on 4 separate occasions that their cars had been broken into while they ate at T2's restaurant. Whether T2 relayed this to T or LL is not known, but there should have been heightened awareness of the dangerous condition created in the parking lot. T2 could have also mitigated the dangerous condition by hiring additional security if he was unable to fix the lights himself.

Assignment/ Sublease

When a tenant agrees to transfer the entirety of their interest in a lease to a third party, this becomes an assignment in the lease, where the original tenant becomes assignor and the new tenant becomes assignee. The assignor retains privity in contract with the landlord, but the privity of estate is then between assignee and landlord. When a tenant agrees to transfer a portion of their interest in a lease to a third party, this becomes a sublease, where the original tenant becomes sublessor and the new tenant becomes sublessee. The sublessor retains privity of contract and estate with the landlord, but a new privity of contract and estate is created between sublessor and sublessee for the agreed upon term of the sublease.

Here, T essentially subleased the restaurant to T2 when he gave the keys to T2 and told him that he could take over until T buys the property from LL. Since there was no written consent

given by LL to T to be able to either assign or sublease the Property, T2 had no legal standing as a valid tenant.

T would be ultimately be liable to the customer for the assault and robbery.

3. Whether Arthur would prevail in a lawsuit against Lyle for loss of profits based on Lyle's failure to repair the parking lot lights.

Tenant Remedies

A tenant can seek remedies when a landlord has breached their duty under the lease agreement. Remedy options for a tenant include: moving out of the property and surrendering the lease, making any repairs and deducting cost of repairs from future rent, remain on the property and sue landlord for damages, or reducing all future rent and holding the difference in amount in escrow until landlord fulfills their duties.

Here, LL breached their duty of maintenance provision in the lease agreement (see above). T2 could have moved out of the property and surrendered the lease, but he did not. T2 could have made the necessary repairs and deducted them from future rent once he saw that LL was failing to make the repairs and the lack of maintenance was adversely affecting his customers. T2 sat on 4 separate reports of break-ins and did not act within a reasonable amount of time to try to mitigate the dangerous condition created.

T2 would not prevail in a lawsuit against LL for loss of profits based on LL's failure to repair the parking lot lights.

4. Whether Lyle can refuse his consent to Tomas's exercise of the option to purchase.

Option to Purchase

A lease agreement may contain a provision for a tenant to have an enforceable option to purchase from landlord, as long as the option terms are reasonable and there is no disparity between the parties' understanding of the terms.

Here, the lease agreement contained an option to purchase the Property, with conditions that the option be exercised at the 10th, 20th, or 30th year of the lease, and so long as T is not in default of the terms of the lease. Although T dutifully paid rent to LL on timely basis each month, T's subletting to T2 could be construed as a default in the terms of the lease because T did not get LL's written

consent to do so. T effectively sublet to T2 for the 8th and 9th years of the lease, even though T was ultimately paying the rent money to LL.

Yes, LL may refuse his consent to T's exercise of the option to purchase.

5. Whether any fixtures/improvements may be removed from the Property.

Trade Fixtures

Any chattel annexed to a property become part of that property. When the fixtures are added to a property for commercial purposes (trade fixtures) by a tenant, they are generally the tenant's property to take upon expiration of a leased term, unless otherwise provided for in a contract.

Here, the lease agreement included a "Fixtures" provision that anything affixed to the Property shall become LL's property. Since T made a number of improvements to the interior, including adding a commercial hood over the stove, a grease trap, a bar area, and attaching numerous televisions to the walls after signing the lease agreement, T should have reasonably believed that LL would keep it all.

If T or T2 are evicted, they may not remove any fixtures/improvements from the Property.

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3)

1. The best claim for a trademark issue between Jewel, Martin Ritchie, or maker of La Boracha Tequila

Trademark

A trademark is any name, device, or phrase that is distinct enough so that consumers can tell apart one persons goods from another and indicates the source of the goods or services. Multiple trademarks may be issued for the similar marks if they are used in separate trades and are far enough apart in in geographic markets. *Beautiful!*

Distinctiveness

This pertains to any unique, fanciful or distinct mark that distinguishes ones goods from another. This is based on a spectrum of strong, arbitrary, descriptive, and generic. *Yes!*

Here, Jewel may argue that she has a unique mark because no one was using the phrase "muy screwy" before she started using it on the internet for her millions of followers to see. However, La Boracha Tequila company will argue that they have the term "muy screwy" in their jingle and had been using that jingle for the last four years and therefore they have the best claim for the mark. Martin Ritchie may try to argue that they came up with the phrase and that he should deserve credit for the uniqueness of the phrase. Many consumers may not have used that phrase while drinking before, thus making the phrase unique in nature. Jewel will further argue that she was the first to only use "muy screwy" and that La Boracha's last line in their jingle is, "She'll get muy screwy, man" making the phrases both distinct from each other.

Therefore, the mark is unique in nature.

First in Use

The mark must be used first in a particular market not just adopted. This pertains to commerce since it is a more narrow scope. Secondary use may be allowed if the mark is distinct enough and there's no overlap in the industries.

Here, La Boracha Tequila will claim that they were the first to use the term "muy screwy" because they have been using that phrase in their jingle for the last four years. However, Martin Ritchie will

argue that because he was the first to actually trademark the phrase that he satisfies the first use element by default. However, both Jewel and La Boracha Tequila will argue that mere registration does not constitute "first use." They will argue that Martin Ritchie had to have profited off of the phrase before it can be considered first in use. Jewel will further argue that she was the first to only use "muy screwy" and that La Boracha's last line in their jingle is, "She'll get muy screwy, man" making the phrases both distinct from each other and she was the first to use just "muy screwy." She also filed for a trademark just one day after Martin Ritchie. However, both Martin Ritchie and La Boracha will make the same argument that Jewel never actually profited off of the phrase and therefore she cannot claim first use. However, Jewel may claim that due to the short amount of time she did not have the resources to profit off of the phrase just yet.

Thus, Jewel may have the better claim for the "first use."

Mark Dilution

Whether a consumers association of ones mark with that of another would cause harm to ones reputation or brand.

Here, La Boracha Tequila will argue that Jewel using the phrase "muy screwy" will harm their reputation as a reputable tequila brand and do not want to be associated with the likes of Jewel or Martin Ritchie. However, Jewel will argue that both the tequila company and herself are online. They both promote drinking. Therefore, Jewel using that phrase in connection with her content while drinking will not hurt La Boracha's brand if people associate them together.

Thus, Jewel using the mark will not cause mark dilution.

Market Confusion

Whether a consumers association of ones mark with that of another would cause a consumer to be confused with the source or association of ones mark with another's.

Here, La Boracha Tequila will argue that Jewel using the phrase "muy screwy" will cause consumers to confuse their brand/products with those that may Jewel or Martin Ritchie may put out. However, Jewel will argue that La Boracha only advertises in Albuquerque, New Mexico, which is in a completely different state than Texas. They only advertise on the radio and local televisions in their area. Therefore the markets are completely different. However, La Boracha will argue that the internet is a vast place and that the local media will eventually cross into the internet where Jewel is creator in multiple platforms. Jewel will argue that the tequila company is only on a few socials and

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again the cross over would be unlikely. Finally, La Boracha will argue that New Mexico and Texas are not far apart and again there will be inevitable overlap.

Thus, there may be a likelihood of confusion.

Conclusion

La Boracha has the best claim for a trademark, if there is one to be issued.

2. Tequila company's potential claim against Jewel for Copyright Infringement

Copyright Infringement

This protects an original owners overall work. In order for a plaintiff to prevail in a claim for copyright infringement they must prove that they have a valid copyright and that the infringer used one of the original owners exclusive rights without authorization. The infringement need not be intentional.

Fantastic!

Valid Copyright

An original owner must have a valid copyright that is original and fixated.

Here, Jewel filed for a trademark one day before La Boracha. She will claim that she created coined the phrase "muy screwy" and created the work into a tangible medium when she spoke the phrase on the internet. However, La Boracha Tequila will state that the actual date of issuance of a mark is one factor among many to consider who created an original work. La Boracha will claim that they created the original work because they have placed the phrase in a jingle that's been playing on the local media stations for the last four years. Due to the same reasons they placed that phrase into a tangible medium by making it into a jingle. Jewel will claim that she is only using a part of the jingle not the entire jingle. Also, the phrase that she's using is a part of the very last line of the jingle, not the entire last line. She'll claim La Boracha only has a claim to the entire work as a whole not just two words from the jingle.

Thus, La Boracha has a valid copyright.

Infringers unauthorized use of one of the original owners exclusive rights

A possible infringer may have exercised an original owners rights by copying, creating a substantially similar mark, or by performing the mark without permission.

Here, La Boracha will claim that Jewel made a derivative work using a substantially similar mark. They will claim that their jingle has the words "muy screwy" and Jewel used the phrase in an unauthorized way. They will also point out that Jewel admitted to getting the phrase after drinking the newest celebrity tequila brand. However, Jewel will argue that she did not get the phrase from La Boracha's brand of tequila. The facts do not state that La Boracha is celebrity owned and the brand was out four years before Jewel started to use the phrase. Jewel will argue that there have been a number of celebrity brands that have been out since La Boracha started using their jingle. The courts may view Jewel's admission of using the phrase after a celebrity tequila brand as enough proof that she may have copied the brand. Infringement need not be intentional. La Boracha will claim that if Jewel did get the phrase from another brand that wasn't there's, that other brand may have copied La Boracha and by proxy, Jewel did too. Once again, Jewel will argue that she's only using a part of the work and not the entire jingle.

La Boracha will argue that given the proximity of the markets that both Jewel and La Boracha have in their potential consumers; their geographic proximity; the fact that they have an original work; its tangible; and Jewel admitted to copying the mark from a famous brand, Jewel has infringed on their exclusive right.

Conclusion

La Boracha may not have a potential claim against Jewel for copyright infringement.

END OF EXAM

No comments. I can't think of even one suggestion for improvement.
