# Sex, Drugs, and Rock n'Roll

## An Overview of Intellectual Property Law & Legal Changes As Pushed From Modern Lifestyle Industries

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# Changes in IP law Emanating from Lifestyle Industries

- Overview of 3 areas of IP law critical for all practitioners
  - Copyright
  - Trademarks
  - Patents
- Focus on new copyright, trademark, and patent issues as being tested by “lifestyle” industries, which will have ripples for all industries.

# Quick Detour: What we won't discuss – the easy PR rules!

- Sex: 3-120: cannot demand sexual relations; if partner becomes client, may continue relationship unless it impacts ability to perform competently.

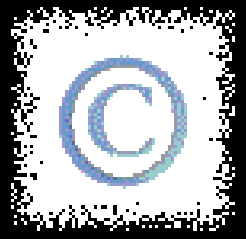
  Advice – abstinence vis-à-vis clients.

- Drugs: No per se state bar rule on drug use, but drug/substance use impacts ethical duty:
  - to act competently (3-110)
  - keep client updated (3-500)
  - Mandatory withdrawal if physical/mental condition makes it unreasonably difficult to continue representing client (3-700)
  - Can lad to criminal convictions that can trigger bar proceedings.

  Advice – abstinence or major vigilance in cautious use of substances in non-work setting within legal confines.

- Rock n' Roll: Do it!

# Copyright – Federal law



**(1) Original** works of **expression**

**(2) Fixed** in a tangible medium

→ No mandatory registration requirement

# Justice Holmes

"It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At one extreme, some works of genius would be sure to miss appreciation… At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge."

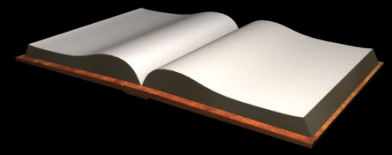
*Bleistein v. Donaldson Lithographing Co.,* 188 U.S. 239, 251 (1903)

# Fixation

- Fixed in a tangible medium.
- Permanent recordation or reduction to form.
  - Pen to paper, types, source code, drawing, sculpture.
- Not skywriting!

# What things fall within the copyright realm?

- Books and other writings
- Music
- Film
- Photographs
- Artwork
- Software source codes
- Architecture
- Clothing designs
- Pantomimes/choreographs



# What is a Trademark?

- Common synonym is “brand name.”
- **Coke, 7up, Chevy, Google.**
- Words-sounds-numbers-shapes-smells even.
  - Ferrari!!
- Must connote a given company’s goods or services→ source identifier.
- Extended even to product packaging and certain nonfunctional product configuration features
- No registration requirement

# Trademark law focus?

1. Identify origin of article.
2. Quality assurance-> Protect against consumer confusion
3. Symbol of good will → “commercial magnetism”

# Categories of Marks

1. Generic
2. Descriptive
3. Suggestive
4. Arbitrary/Fanciful

# Patents

1. For new inventions or ways of doing certain things.
2. Mandatory registration/application process
3. New, Useful, Nonobvious → the trifecta!
4. What kinds of things:
    a. inventions, products, devices;
    b. Methods, business methods or processes;
    c. Designs, a subset of patent law is the Design Patent

# Trademarks for Adult Industry: Can you trademark matter that is deemed immoral or scandalous?

- **To be considered "scandalous," a mark must be "shocking to the sense of truth, decency or propriety; disgraceful; offensive; disreputable; . . . giving offense to the conscience or moral feelings; . . . [or] calling out [for] condemnation," in the context of the marketplace as applied to goods and/or services described in the application. Scandalousness is determined from the standpoint of "not necessarily a majority, but a substantial composite of the general public, . . . and in the context of contemporary attitudes."**

  In re Mavety Media Group Ltd., 33 F.3d at 1371; see TMEP §1203.01.

- **Evidence that a mark is vulgar is sufficient to establish that it is scandalous or immoral. Dictionary evidence may be sufficient to show that a term is vulgar if multiple dictionaries, including at least one standard dictionary, uniformly indicate that the term's meaning is vulgar, and the applicant's use of the term is clearly limited to the vulgar meaning.**

  TMEP §1203.01; *see In re Boulevard Entm't, Inc.*, 334 F.3d at 1336,

# Trademarks on sex-related marks.

- “No fucks given” for t-shirts, hat, clothes.  Denied.
- “Fuck You” for alcoholic beverages.  Rejected, abandoned.
- “The fact that profane words may be uttered more freely in contemporary American society than in the past does not render such words any less profane.”  *In re Tinseltown, Inc*., 212 USPQ 863, 866 (TTAB 1981) (holding the mark BULLSHIT scandalous for handbags and other personal accessories); *In re Michalko*, 110 USPQ2d 1949, 1953 (TTAB 2014) (holding the mark ASSHOLE REPELLENT scandalous for a spray can gag gift).

# Representing Adult Industry Clients & the Internet- Copyright & Criminal Laws Part 1

- Criminal rules: 18 USC 2257, criminal labeling law and documentation regarding age of actors.
- Must be appended to content. But what if the content is being copied and placed on internet tube sites? (*Ventura* 9th Cir case)
- Example: Discovery materials.
- Practice Pointer: Any time you are dealing with subject matter that even potentially touches any kind of criminal laws, consult with a criminal defense lawyer or refer your clients to one.

# Representing Adult Industry Clients & the Internet- Copyright & Criminal Laws Part 2

- Copyright: Tube sites & Internet
- DMCA generally provides immunity to operator of tube site where users are uploading content if site is hands off in content management and editorialization/curation (think *YouTube*)
  - If so, DMCA provides immunity for the actual copyright infringement occurring
  - If client wants to editorialize and curate site, then immunity may disappear and copyright liability may apply.
  - Practice Pointer & Critical copyright line: is content being genuinely user uploaded or is it being prescreened, placed, and uploaded by service provider upon customer offering.

# Patents for Adult Industry

- Can you patent matter that is deemed immoral or scandalous?
- Moral Utility Doctrine
  - Old - *Lowell v. Lewis*: invention must ne non-injurious to well-being and sound morals of society.
  - Now - *Juicy Whip v. Orange Bang*: patent on device that was able to deceive public through imitation so as to increase sales. *Held* "no basis in section 101 to hold that inventions can be ruled unpatentable for lack of utility simply because they have the capacity to fool some members of the public."

  - MPEP 608: reject patent language/drawings that are offensive to race/religion/sex/nationality.

# Marijuana Trademarks?

- Federal vs State
  - PTO abandoned a proposed classification of “processed plant matters, medical marijuana.”
  - Controlled Substances Act makes sales in commerce illegal under federal law.
  - *But see:* state TM’s and federal registrations on brand for ancillary categories, clothing, etc.
  - Practice Pointer: if client has a med marijuana business in a state where it is legal, secure a state trademark registration in that state to preserve priority date evidence for when and if federal law opens up.

# “Cocaine” Trademark for Colas

- *In re Kirby*, Ser. No. 77006212

# Case studies: Marijuana Device Patents

- No prohibition on marijuana-based patents as there is on marijuana-specific trademarks.

**Some examples**

- Patent 9220294- Methods and Devices Using Cannabis Vapors.
- Patent 6328992B1- Cannabinoid patch and method for cannabis transdermal delivery
- Patent 6,132,762- Transcutaneous Application of Marijuana
- Pub. No. 2002/0031480 – Delta9 THC Solution Metered Dose Inhalers and Methods of Use

# Case studies: Marijuana Device Patents

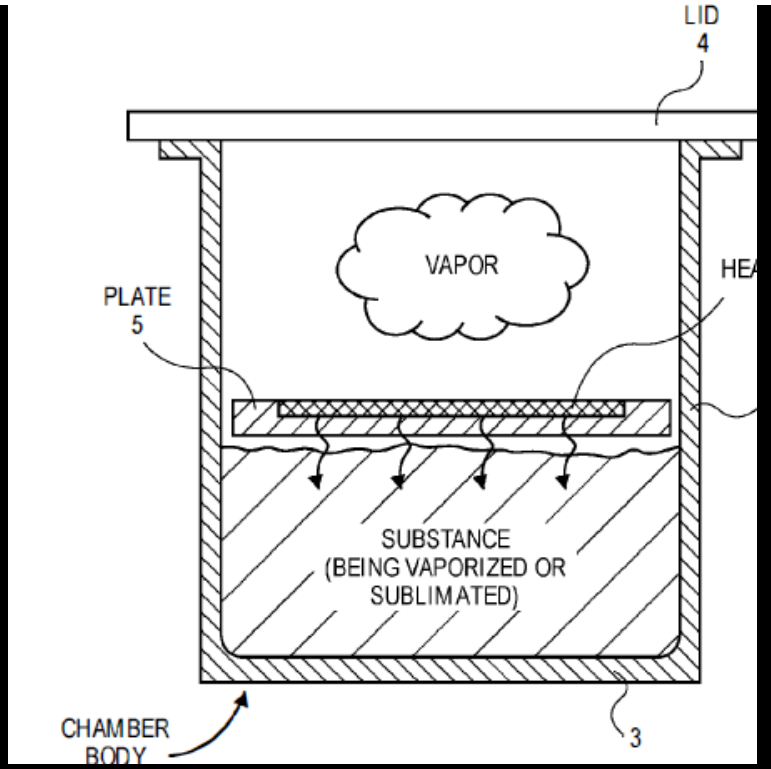
## Apple's latest pending patent?

A chamber body is to receive therein a substance that is to be vaporized or sublimated into a vapor. A plate whose bottom face rests on the substance inside the chamber body is temperature regulated, e.g., using a heater therein, which releases heat directly above the substance that lies below. The plate slides downward as the substance is consumed by vaporization or sublimation. Other embodiments are also described and claimed.

(19) **United States**
(12) **Patent Application Publicati**
**Ishikawa**

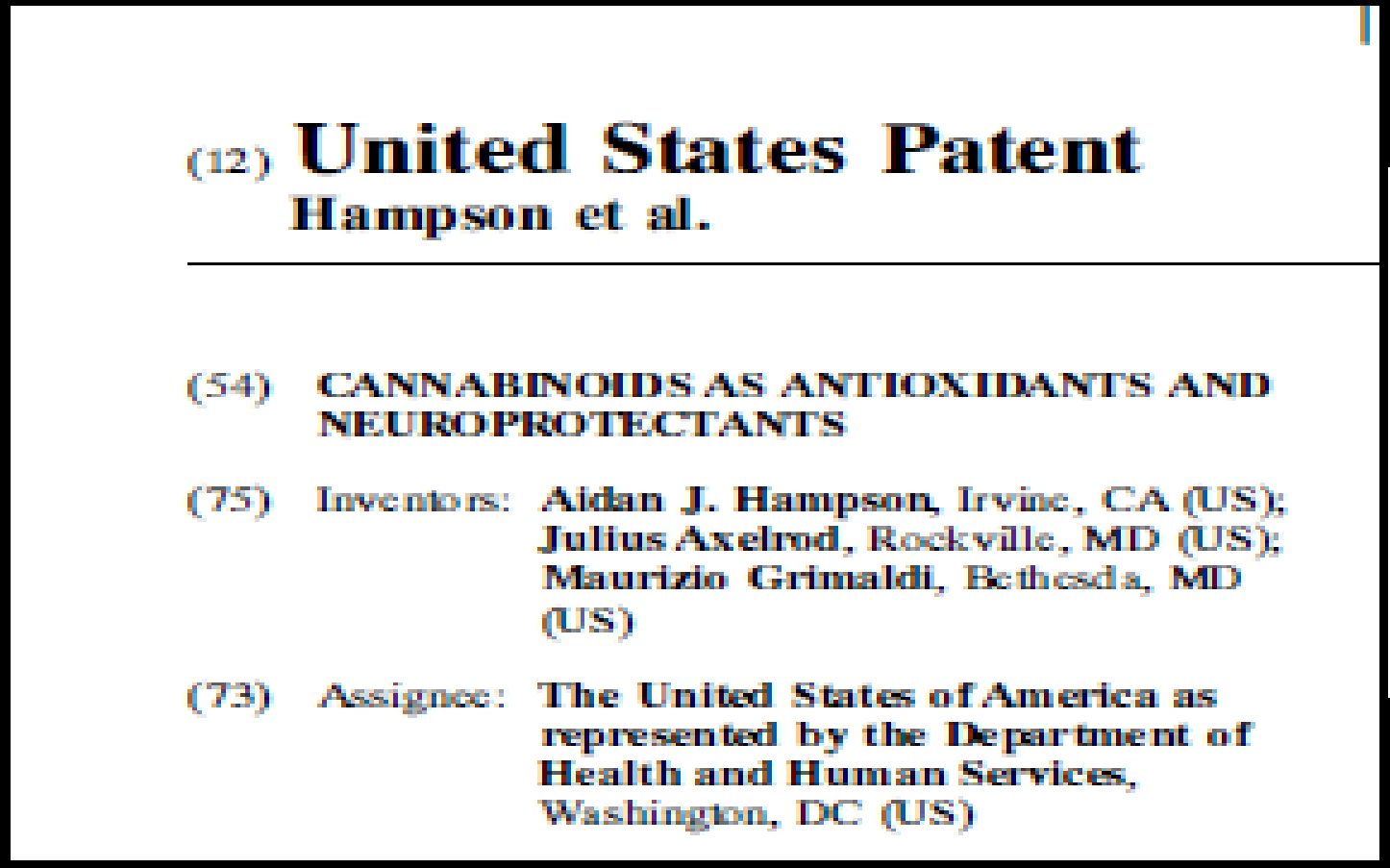
(54) **SUBLIMATOR/VAPORIZER**

(71) Applicant: **Apple Inc.**, Cupertino, CA (US)
(72) Inventor: **Tetsuya Ishikawa**, San Jose, CA (US)



# Marijuana Patents

Even the U.S. government holds patents in this space!

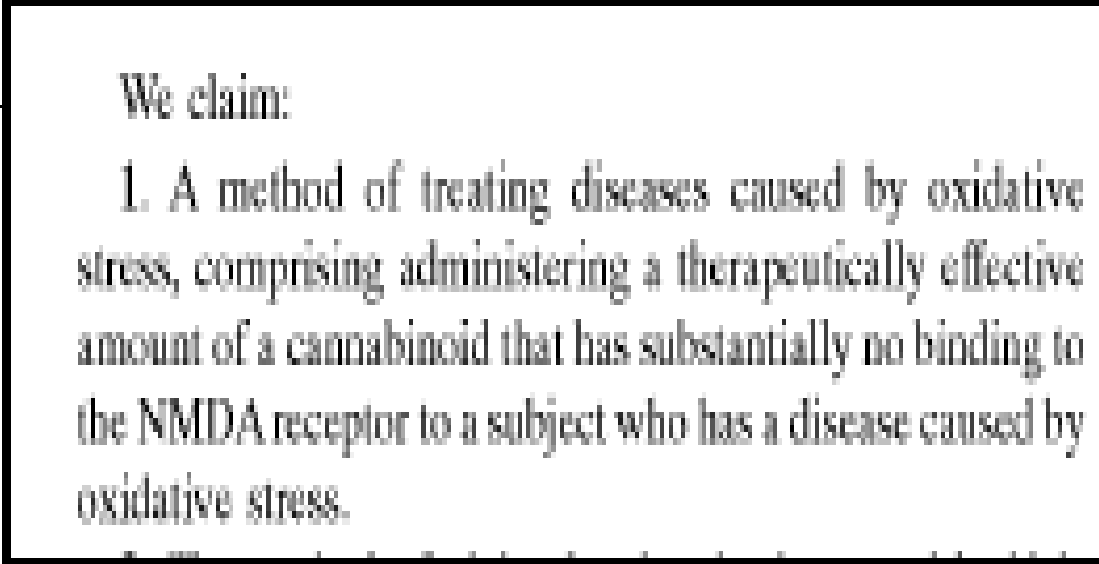


(12) **United States Patent**
**Hampson et al.**

(54) **CANNABINOIDS AS ANTIOXIDANTS AND NEUROPROTECTANTS**

(75) Inventors: **Aidan J. Hampson**, Irvine, CA (US); **Julius Axelrod**, Rockville, MD (US); **Maurizio Grimaldi**, Bethesda, MD (US)

(73) Assignee: **The United States of America as represented by the Department of Health and Human Services**, Washington, DC (US)



We claim:

1. A method of treating diseases caused by oxidative stress, comprising administering a therapeutically effective amount of a cannabinoid that has substantially no binding to the NMDA receptor to a subject who has a disease caused by oxidative stress.

# Rock n' Roll – Copyrights and Plagiarism

- *Led Zeppelin* "Stairway to Heaven" case from 2017
  - Appeared together as bands very early on so pltf argued they had to have heard and known of their song
  - Defense was that any similarities are because the chord structures and riffs were common to all music
  - Jury not permitted to hear each song as originally recorded; rather an expert musician play each song based on original sheet music
  - Now on appeal
  - Tests complex issues of what is common shared generic material and what is actually copied
- The George Harrison "My Sweet Lord" Case form 1976
  - Ronnie Mack's "He's So fine" for Chiffons in 1963; huge airplay when Beatles were in the US touring
  - GH denied copying but court concluded he had heard the song and the similarities were too much to be independently original, "subconscious plagiarism."

# Rock n’ Roll – Trademarks on Disparaging Marks

- “Slants” Band founder named his band as an act of "reappropriation" — adopting a demeaning term aimed at Asian-Americans and wearing it as a badge of pride by seizing bigots’ language.
- PTO: Denied as disparaging/scandalous. MPEP 2(a): no registration of marks that may “disparage persons, living or dead, institutions, beliefs, or national symbols.”
- Federal Circuit: Held 9-3 that “First Amendment protects even hurtful speech” and allowed trademark to issue.
- S Ct: Government argues that its imprimatur is akin to a government subsidy. “Nothing in the First Amendment requires Congress to encourage the use of racial slurs in interstate commerce,”
  - Korematsu Center and Redskins TM Opponents have joined government’s appeal
- Oral Argument was January 2017 – tenor of argument portends a definite split

# Sex, Drugs, and Rock n'Roll

## Conclusions

- IP law touches all facets of a small business
- IP law is being tested and pushed by modern lifestyle industries, and this will ripple over to regular businesses in terms of the scope of protection and the nature of what may be used as a brand or slogan.
  - Business opportunities for all clients to consider.
  - Knee jerk reaction on what is doable is being tested, literally in real time
- When dealing with potentially controversial issues—medical marijuana, adult industry, online dating sites, etc.—be extra cautious and cognizant of the other substantive laws that interface with the IP laws as they are potentially trip wires for you or the client.
  - Criminal law overlay