

**TRADEMARK**  
**Practice Exam - Fall 2020 - Question File**  
**Professor García**  
**Untimed**

**Honor Code Reminder:** Under the Honor Code, the submission of any academic work constitutes a representation on the student's part that such work has been done and submission is being made in compliance with all applicable provisions of the Code. You are responsible for knowing and complying with the Code, and with all exam instructions, including the time limit specified above.

**EXAM INSTRUCTIONS**

- **Exam Platform and Duration.** This examination will be completed via Google Forms. The Question File will be available on the course web site beginning at 9:00 a.m. on December 5, 2020.
  - a. By clicking the "Question File" link on the course web site, you will be certifying that you agree to adhere to the honor code.
  - b. You will draft your answers in a Word document, which you should name "Response File." Please do not put your name anywhere in the file name, or in the document itself.
  - c. You must upload your Response File to Google (by clicking the "Submit" button) no later than 5:00 pm on Thursday, December 17, 2020. You should receive an email confirmation that your response was submitted. If you do not, please reach out to Prof. Garcia.
- **Question File.** This Question File is 7 pages long, including these instructions. The entire exam is worth seventy-five (75) points, allocated as follows:
  1. Section I consists of two (2) short answer questions (worth 15 points each); and
  2. Section II consists of one (1) multi-part essay question worth 45 points total.
- **Anonymity.** The final exam is anonymous. Please do not add your name or any other information that identifies you to the Response File. You should include only your Exam Number on each and every page of your Response File.
- **Permitted Materials.** This is an "open" project, meaning that you may consult any materials and sources you like, including the Internet, except for your classmates or any other human beings. Work during the exam must be entirely your own. You may not collaborate with students or others. NB: Many of the fact patterns and materials provided herein are borrowed from actual, currently pending (or recently resolved) cases. As such, you should use the Internet at your own risk, and rely only on the information and facts presented in the Question File (and not as supplemented by reporting you may find online).

- Exam Format. Your writing project answer must:
  - be typed,
  - be single-spaced,
  - have a 1" margin on all sides,
  - be in 12-point Times New Roman font,
  - have page numbers at the bottom of all pages,
  - not include your name or other identifying information on any page, and instead
  - include your exam number on all pages.
  
- Page limits. For Short Answers, your answers should not exceed 500 words. Total word count for the Essay question should not exceed 1500 words (and indeed, may be satisfied in less). Headings/subheading/footnotes/citations may be excluded from the word count. Please include your word count following each answer.

**Good luck!**

## Section I: Short Answer (2 Questions; 15 points each)

### Instructions:

1. Read each of the two questions carefully and draft appropriate answers no longer than 500 words in length. Any words beyond that count will not be read or credited. In this section, you will be graded as much on the perceptiveness of your answer, as on the clarity and conciseness of your writing.
2. Where relevant, you must cite relevant statute sections, case law, etc. in order to receive full credit. These citations do not have to be in Bluebook format (or any particular format for that matter), nor do they need to be full and proper names. In other words, you may write “§43(a)” in lieu of “Lanham Act Section 43(a)” or “Abercrombie” in lieu of “Abercrombie & Fitch Co. v. Hunting World, Inc.”
3. Citations, footnotes, headings and subheadings will not count toward your word count.

**Short Answer Question #1 (15 points):**

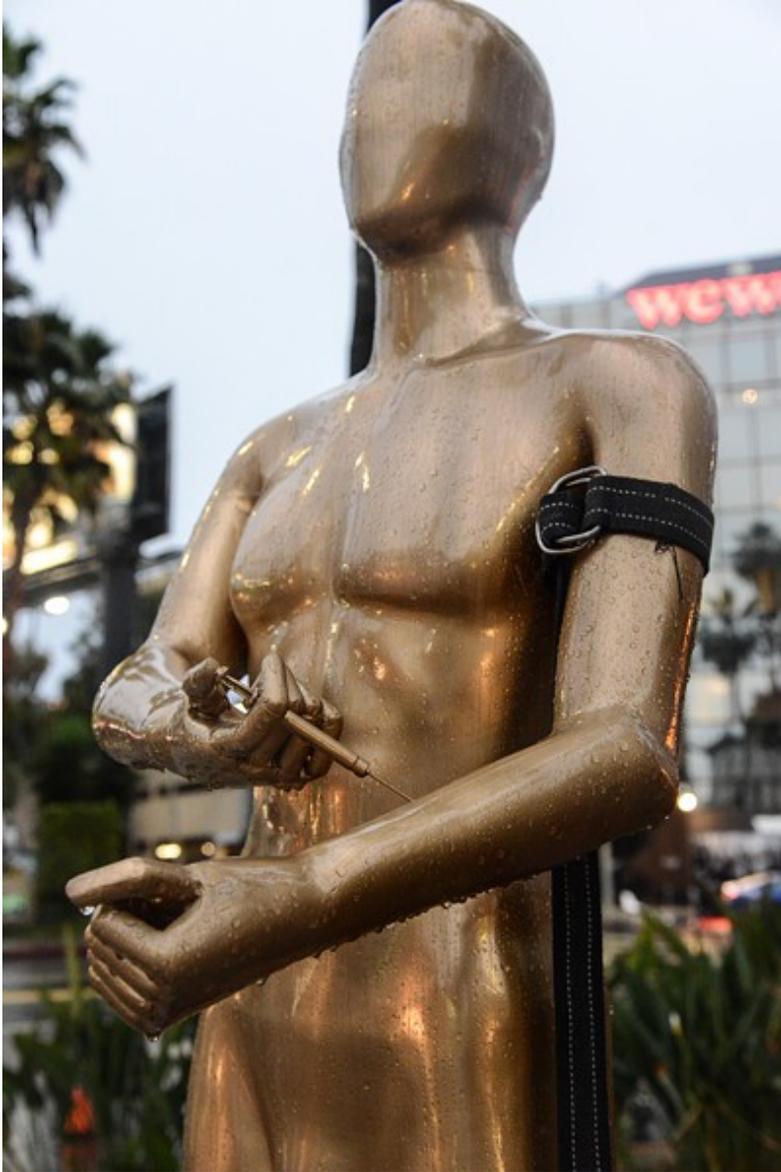
In a case pending before the district court for the Eastern District of Virginia, Plaintiff Beard Head, Inc. brings a claim for trade dress infringement under Lanham Act 43(a) against defendant Stat Ltd. for alleged copying of its knitted beard/hat hybrid product:



In its pleadings, Plaintiff claims to have a federal design patent (No.692,186), and common law trade dress protection in the state of Virginia. To demonstrate the product's design recognition, Plaintiff points to over 165,000 Facebook "likes," and presents several strongly worded letters from consumers regarding products believed to be Beard Heads, but which were in fact produced by Defendants. Defendants move to dismiss for lack of specificity as to the critical elements of distinctiveness and non-functionality. The defense also suggests that they - and not Plaintiffs - were first to use the beard/hat combo design. You are the district court judge, deciding a motion to dismiss on the pleadings. How do you rule, and why?

**Short Answer Question #2 (15 points):**

A Los Angeles-based artist who goes by the name Plastic Jesus installed a gold-colored sculpture that looks like an Academy Awards Oscar statuette - except that his version is shooting up heroin - on Hollywood Boulevard at La Brea Avenue, just outside of the Academy Awards venue in the days leading up to Oscar weekend:



In a public statement issued to local news outlets, Plastic Jesus described the piece as a “highly modified shop mannequin painted with gold acrylic and adorned with a belt. The syringe is real, but the needle was replaced with wire to make it safer.” According to the artist, the piece was inspired by the heroin-overdose death of Philip Seymour Hoffman, and also inspired by the heroin-overdose deaths of Plastic Jesus’ cousin and his cousin’s wife. A statement on the 8-foot statue reads, “Hollywood’s best kept secret.”

You are General Counsel for the Academy Awards, who hold a registered trade dress mark on the Oscar statuette. The Academy Awards ceremony is coming up in 2 days. Do you drop everything you’re doing and file for a preliminary injunction this afternoon, or not? Explain why or why not.

## Section II: Essay (1 Question in 2 parts for a total of 45 points)

### Instructions:

1. This is a test of your ability to read carefully, understand what you've read, identify legal issues in the area of trademark, apply the relevant law thoughtfully and correctly, and describe your analysis in a logical, clear manner.
2. When you are asked to assess or discuss a legal issue, please include all plausible arguments and responses on either side of that issue. If there are other facts that would be relevant to a legal issue, but are not stated in the question, please state what they are. If you believe there is an error, inconsistency or omission in a question, state your assumption(s) about the issue in your answer.
3. Read the call of the question(s) carefully and draft appropriate answer(s) totaling no longer than 1500 words in length. Any words beyond that count will not be read or credited. In this section, you will be graded as much on the perceptiveness of your answer, as on the clarity and conciseness of your writing.
4. Where relevant, you must cite relevant statute sections, case law, etc. in order to receive full credit. These citations do not have to be in Bluebook format (or any particular format for that matter), nor do they need to be full and proper names. In other words, you may write "§43(a)" in lieu of "Lanham Act Section 43(a)" or "Abercrombie" in lieu of "Abercrombie & Fitch Co. v. Hunting World, Inc."
5. Citations, footnotes, headings and subheadings will not count toward your word count.

**Essay Question #3 (1 Question in 2 parts - \*be sure to answer both parts):**

(a) Mo and Mark Constantine are the husband and wife team behind the Lush cosmetics brand. The couple founded the line of handmade soaps, lotions and other toiletries items in 1995 with a single store. In 1998, the Constantines were granted a federal registration for the trademark “Lush.” Over time, the brand expanded worldwide, and is now also available for sale online, exclusively on the Lush.com web site. According to the website, Lush “believes in making effective products from fresh, organic fruit and vegetables...in buying ingredients only from companies that do not conduct or commission tests on animals...and in using little or no preservatives or packaging.”

In 2010, the online retailer Amazon.com began to sell products that looked just like two of Lush’s products - the “Sex Bomb” bath salts and the “Prince Charming” shower gel:



Amazon shoppers searching for these Lush products (which are not available for sale on Amazon’s site) are instead directed to Amazon’s similar products, which use different names, but are described on the site as being “lush.” After a series of unsuccessful attempts at amicable resolution, including a months-long letter writing campaign, Lush filed a lawsuit against Amazon for trademark infringement. Discuss the claims that both sides can make, and what result?

(b) In retaliation for Amazon’s unapologetic attitude, Lush federally registers the trademark “Christopher North,” the name of Amazon’s head of online retail and the brains behind Amazon’s look-alike toiletries, and gives the name to a new line of rainforest-inspired shower gels made of organic murumura butter, brazil nut oil and acai berry. The new Christopher North shower gel line is packaged in bright pink bottles that boast “when it comes to rainforest organics, Christopher North is rich, thick, and full of it.” In-store and online marketing materials for the line urge consumers to “kindle a new love for your skin with this product packed with amazon prime ingredients.” The real-life Mr. North is not amused. Does he have a claim against Lush? Explain why or why not.

**End of Exam**