

Southeastern Emerging Companies Boot Camp Series

Emerging Companies Boot Camp

April 5, 2013



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Today's Boot Camp Topics

- Choice of Entity and Corporate Formation
- Intellectual Property - What Entrepreneurs Need to Know
- Top Five Ways to Reduce the Risk of Employment Litigation
- Investor/Entrepreneur Panel



Choice of Entity and Corporate Formation



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Why Establish an Entity?

- Divide the pie
- Allow for transfer of ownership
- Agree on governance rules
- Achieve immortality (sort of)
- Limit personal liability

Choice of Entity - Considerations

- Nature of business (active or passive; tax-sensitivity)
- Governance
- Number of owners
- Role of owners (active or passive)
- Allocation of profits, losses, and cash flow
- Ability to attract outside capital
- Incentive equity
- Taxation
 - Entity vs. flow-through
 - Payroll taxes

The Choices

- Sole Proprietorship (aka “d/b/a”)
- Corporation
 - An S-corporation is a tax election, not a different type of entity
- Limited Liability Company

Ignore:

- General Partnership
- Limited Partnership

Sole Proprietorship

- Simplest form of business – not an entity at all
 - Alter ego (“d/b/a”) of owner
- Single owner has complete control, but also full personal liability
- Generally requires nothing more than filing a certificate of assumed name and obtaining a business license
- All income and losses flow through
- When owner dies, business dies

- Limited liability entity is usually a better option

Corporation vs. LLC

- | | |
|--|--|
| <ul style="list-style-type: none">• Corporation<ul style="list-style-type: none">– State statute– Charter (or Certificate of Incorporation in DE)– Bylaws– Board of directors– Officers– Double tax (except S corp) | <ul style="list-style-type: none">• LLC<ul style="list-style-type: none">– State statute (lite)– Articles of Organization (or Certificate of Formation in DE)– Operating Agreement– Board or not– Officers or not– Pass through tax |
|--|--|



RIGID



FLEXIBLE

Recommendations

- For likely VC-backed, DE C-corp is “gold standard”
 - Pass-through entities create problems for institutional funds
 - Delaware is the most familiar and well-respected body of corporate law
- LLC better if unsure of VC path, or not necessarily growing to exit
 - Relatively easy to convert to a corporation later
- No real advantage (any more) to using S-corp over an LLC

Entity Formation

- File with secretary of state
 - For LLC: Articles of Organization (TN) or Certificate of Formation (DE)
 - For corporation: Charter (TN) or Certificate of Incorporation (DE)
- In TN, record with county of business
- Adopt organizational minutes and bylaws
- Subscription or contribution agreements for founder equity
- Business license and sales/use tax permit (county clerk's office)

Keeping Your House in Order

- A COMMON, AVOIDABLE PROBLEM – if you don't know who owns what, how do you expect an investor to know??
- Cap Table
 - Keep accurate, current info on equity ownership
 - Both issued and fully-diluted
 - Vesting and forfeiture restrictions
- Transfer Ledger
 - Track each individual stock certificate and equity transaction
 - Keep the paperwork documenting each one
- Minute Book
 - Minutes of all meetings (including actions on written consent)
 - Copies of relevant corporate documents (e.g. certificate of incorporation, bylaws, shareholders agreement, option plan, etc.)

Who Is Your Business Partner?

- Each owner typically relies heavily on the others
- Consider these scenarios:
 - An owner dies, leaving stock to the spouse, a complete jackass who is now your business partner
 - An owner pledges his LLC interest for a loan, then defaults; now the bank is your partner and wants to liquidate the business
 - An owner leaves the company to work for a competitor; he still is entitled to financial and other information about the company
 - An owner gets divorced and his stock is awarded to his ex-wife; now he works for her
 - An owner quits the business; he still owns a significant chunk of the company

Preventative Measures

- Founder Vesting - reciprocal vesting restrictions on co-founders
 - Ownership vests over time
 - Unvested shares are forfeited if owner quits
 - Acceleration on change of control
 - Acceleration if terminated without cause?
- Shareholders Agreement or Operating Agreement
 - aka Buy-Sell Agreement
 - Founder vesting could be addressed in this document

Shareholders or Operating Agreement

- Rules for decision-making
 - Supermajority voting for some matters
 - Rights to appoint board members or officers
- Dispute resolution
 - Toughest with 50-50 because of deadlock potential
 - “Hand Grenade” aka “Texas Shootout”
 - Voting trust (e.g. someone to break the tie)
 - Creative options
- Drag-along rights, tag-along rights
- Restrictions on voluntary transfers
 - No pledging or assignment
 - ROFR on other transfers
- Repurchase on involuntary transfers

Involuntary Transfers

- Transfers on death, divorce, bankruptcy, or other transfer by operation of law
- Company and/or other owners have right of repurchase
 - Suspend voting rights
- Valuation mechanism:
 - Board can set
 - Book value
 - Agreed value updated periodically
 - Financial formula (e.g. multiple of TTM revenue or profits)
 - Expert appraisal (many variations)
- Valuation standard = “fair market value”
 - Usually based on enterprise value as a going concern
 - Discounts allowed?

Other Issues

- Confidentiality & IP (if not addressed elsewhere)
- Tax distributions (if a pass-through entity)
- LLC owners usually treated as self-employed
 - “guaranteed payments” can roughly imitate salary but no withholdings
- Capital accounting provisions (if an LLC)
 - “substantial economic effect”

Equity Incentives

- Restricted Stock vs. Options
 - 409A
 - 83(b)
- ISOs vs. NQSOs (vs. Profits Interests in an LLC)
- Vesting Considerations
 - Standard = 4 years with first year cliff then quarterly/monthly

Securities Law Basics

- “Security” includes stock, options, LLC membership interests, promissory notes, bonds, investment contracts, etc.
- General Framework – registration is required unless an exemption applies
 - Must have both state and federal exemption
 - Fortunately, there are lots of exemptions
- Private Placements
 - Generally, an offer and sale not involving a public offering
 - Reg D – certain offerings to “accredited investors” are exempt from both state and federal registration
- Unlicensed Broker/Dealers

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PRESENTATION

Intellectual Property

What Entrepreneurs Need to Know



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What is Intellectual Property?

- Patents
- Trademarks
- Copyrights
- Trade Secrets
- Right of Publicity



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Alexandria, Virginia



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USPTO Headquarters



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Trademarks

A trademark is a symbol used by a person in commerce to indicate the source of the goods and to distinguish them from the goods sold or made by others. The symbol can be a word, phrase, design, image, sound, color, or even fragrance.

- Trademarks are indicative of the source or origin of a good or of a service
- A trademark is not the same thing as a company name

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Radio Systems Corporation



Scrrips Networks Interactive



Trademarks

A trademark can be a word, phrase, design, image, sound, color, or even fragrance.

Starbucks®



Holiday Inn Express



Examples of Trademarks

Nike®



Nature of Trademarks

- Trademarks are intended to address the question of “who,” not “what.”
- Dangerous slogans:
 - Have You Driven a Ford Lately?
 - Have a Coke and a Smile

Nature of Trademarks

- Trademarks are designed to protect consumers, not just businesses
- The issue is not “are you stealing my name,” but “are you confusing my customers.”

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Avoiding the “Likelihood of Confusion”



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IC 025. US 022 039. G & S: clothing and apparel items, namely, shirts, T-shirts, sweatshirts, jackets, and hats. FIRST USE: 19860426. FIRST USE IN COMMERCE: 19860426
IC 041. US 100 101 107. G & S: educational and entertainment services, namely, higher educational services in the nature of courses of instruction at the undergraduate and graduate level. FIRST USE: 19860426. FIRST USE IN COMMERCE: 19860426

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IC 041. US 100 101 107. G & S: educational services, namely, higher educational services in the nature of courses of instruction at the undergraduate and graduate level. FIRST USE: 20120201. FIRST USE IN COMMERCE: 20120201

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Creation upon Use In Commerce



Creation

- Trademark rights conferred by use in commerce
- Registration with U.S. Patent and Trademark Office is not required, but brings benefits:
 - Nationwide notice
 - Can achieve incontestable status
 - Additional remedies & statutory penalties for infringement
- State of Tennessee

Trademark – Choosing a Strong Mark

Levels of Distinctiveness

- Fanciful or Coined
- Arbitrary
- Suggestive

- Descriptive
- Generic

xerox 



SHARP



Trademark – Levels of Distinctiveness

Fanciful or Coined

- Letters that form a word without meaning, has no relation to the product
- Strongest type of mark
- E.g., KODAK, EXXON

Problem: Can become generic



Trademark – Levels of Distinctiveness

Arbitrary

- One or more words whose common meaning has nothing to do with the goods or services being labeled
- Strong mark
- E.g., PARLIAMENT, CAMEL, used for cigarettes



Trademark – Levels of Distinctiveness

Suggestive

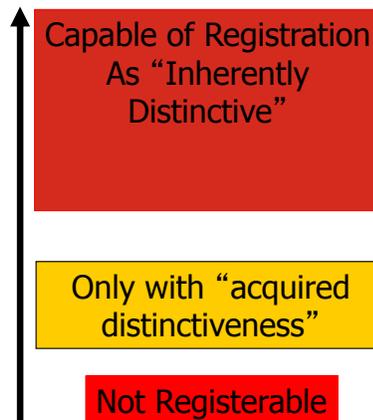
- One or more words that hint at or suggest the nature of a product without actually describing it
- Requires a mental step before association between mark and product is understood



Spectrum of Distinctiveness

Levels of Distinctiveness

- Fanciful or Coined
 - Arbitrary
 - Suggestive
-
- Descriptive
 - Generic



Copyrights

What is a copyright?

- A bundle of rights protecting an original work of authorship fixed in any tangible medium of expression

U.S. Constitution, Art. 1, Sec. 8, Cl. 8
17 U.S.C. § 101 *et seq.*



The Copyright Clause

The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

Article I, Section 8, Clause 8

Copyrights

What is copyrightable?

- Literary works
- Musical works (incl. words)
- Dramatic works (incl. music)
- Pantomimes and choreographic works
- Pictorial, graphics and sculptural works
- Motion pictures and audiovisual works
- Sound recordings
- Architectural works
- Computer software



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Copyrights

What is *NOT* copyrightable?

- Names
- Titles
- Slogans, short phrases
- Domain names
- Facts, ideas, systems, methods
- Recipes (mere listing of ingredients)
- Clothing designs



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Copyrights

Creation

- Copyright automatically exists as soon as work is created in “fixed form”
- Registration with U.S. Copyright Office is not required, but brings benefits:
 - Ability to bring infringement action
 - Timely registration allows recovery of statutory damages and attorneys fees
 - Prima facie evidence of validity of copyright



Certificate of Registration



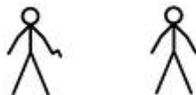
This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Marybeth Peters

Register of Copyrights, United States of America.

Copyrights

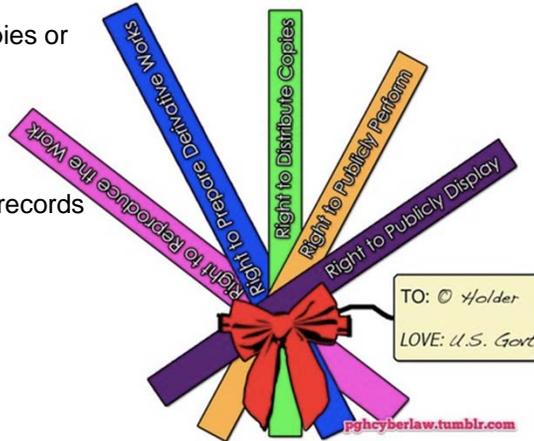
- To be protected by copyright, a work must contain at least a certain minimum amount of authorship in the form of original literary, musical, pictorial, or graphic expression.



Copyrights

What is in the bundle of rights?

- Reproduce the work in copies or phonorecords
- Prepare derivative works
- Distribute copies or phonorecords
- Perform the work publicly
- Display the work publicly



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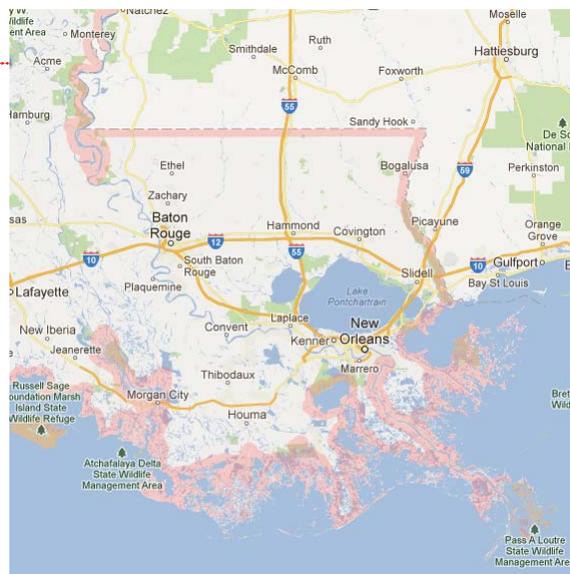
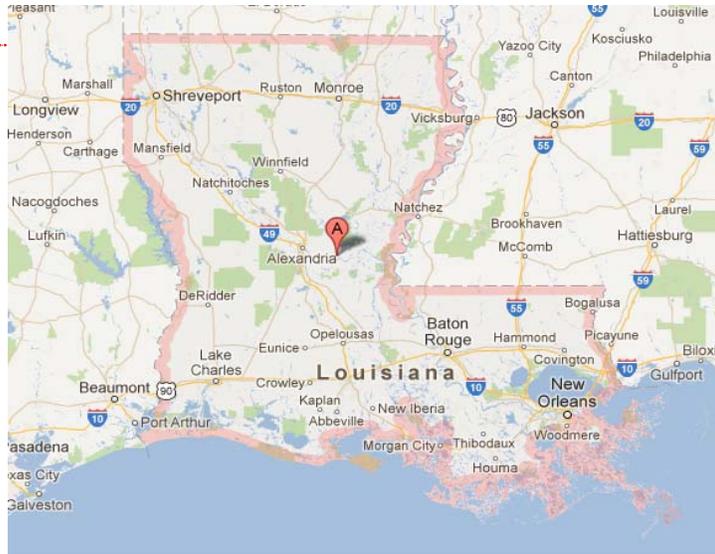
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The Crane Forest

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MISSION STATEMENT
PUBLIC INFORMATION
FLOOD DEPARTMENTS

Mission Statement

The Orleans Levee District is dedicated to protecting the lives and property of the citizens of Orleans Parish by constructing, operating and maintaining the Mississippi River and Hurricane Protection Flood Control Systems and to providing safe and secure facilities for aviation, marine and recreational activities.

August 29, 2005



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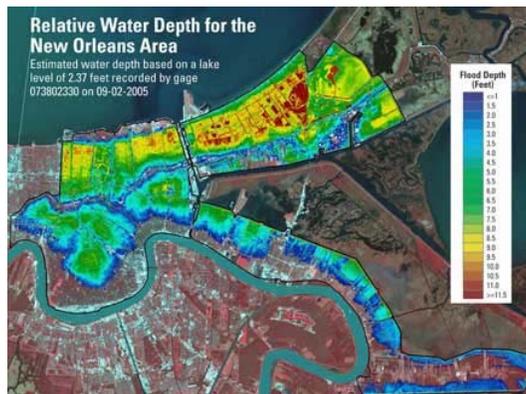
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Attribution

Chalmette Loop levee in St. Bernard Parish, La. at peak of construction
Photo courtesy of Cajun Industries, LLC. © 2011
Baton Rouge, Louisiana

Copyright Infringement

- To prove copyright infringement, an author must show that:
 - the defendant copied the protected work;
and
 - the copied work is substantially similar to the plaintiff's registered work.

Patents

- 35 U.S.C. 101

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

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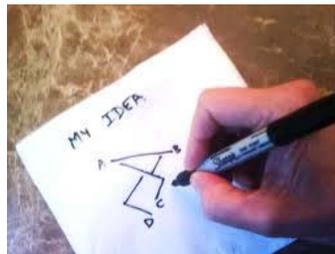
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Patents

What is a Patent?

- Set of exclusive rights granted to an inventor for a fixed period of time in exchange for the public disclosure of the invention
- Limited property right

U.S. Const. Article I, Section 8
35 U.S.C. § 101 *et seq.*



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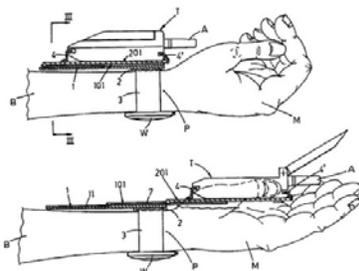
Exclusive Rights

- Right to exclude others from making, using, selling, offering to sell the invention within the U.S., or importing into the U.S.
- Does not give inventor the right to make, use, sell, offer to sell
 - still bound by regulatory restrictions
 - still subject to other prior patents
 - improvements (only the new stuff)



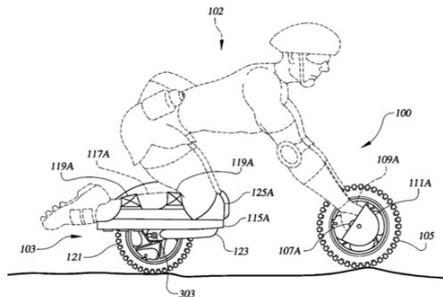
Types of Patents

- Utility – protects a useful device or method, e.g. the way it works or is used; functional and structural features
- Design – protects the ornamental (non-functional) appearance of an article, e.g. the way it looks
- Plant – protects certain types of asexually reproducible plant varieties



Utility Patent Requirements

- Patentable Subject Matter
- Utility (must be useful)
- Novelty (no single patent discloses all of the invention)
- Nonobvious to a person of ordinary skill in the art to which the invention pertains (may be shown by combinations)



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Utility Patents – Subject Matter

- Machine – concrete thing, consisting of parts or of certain devices and combinations of devices
- Manufacture (Article of Manufacture) – production of articles for use from raw or prepared materials by giving to these materials new forms, qualities, properties or combinations, whether by hand labor or by machinery
- Composition of Matter – composition of two or more substances; chemical compounds; gas, fluid, powder or solid
- Process – act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing; methods

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(12) **United States Patent**
Borman

(10) Patent No.: **US 7,090,268 B2**
(45) Date of Patent: **Aug. 15, 2006**

(54) **DOG WASTE CATCHER AND HOLDER**

(76) Inventor: **Setuko Borman**, 12012 132nd St.
East, Puyallup, WA (US) 98374

(* *) Notice: Subject to any disclaimer, the term of this patent is extended or adjusted under 35 U.S.C. 154(b) by 133 days.

(21) Appl. No.: **10/794,871**

(22) Filed: **Mar. 8, 2004**

(65) **Prior Publication Data**

US 2004/0201232 A1 Oct. 14, 2004

Related U.S. Application Data

(60) Provisional application No. 60/462,192, filed on Apr. 14, 2003.

(51) **Int. Cl.** (2006.01) **29A1.5**

(52) **U.S. Cl.** 2941.1, 2941.3-1.5, 55, 248/39, 15/257.1

(58) **Field of Classification Search** 2941.1, 2941.3-1.5, 55, 248/39, 15/257.1
See application file for complete search history.

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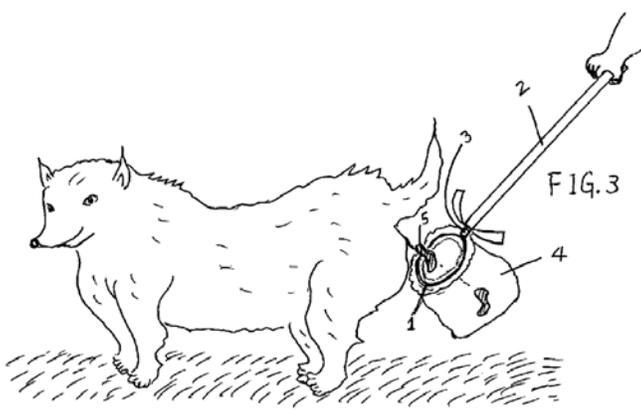
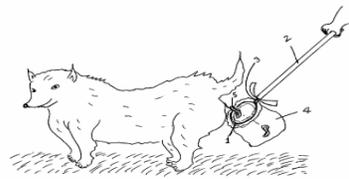
* cited by examiner

Primary Examiner—Dean J. Kramer
(74) Attorney, Agent, or Firm—Christensen O'Connor Johnson Kindness PLLC

(57) **ABSTRACT**

A dog waste catcher and holder is a very simple, light-weight and economical portable device designed to catch and hold a dog's droppings before they fall on the ground or grass. It is carried by a dog's owner or caretaker while he or she walks the dog. This is a device comprised of a loop shaped device to hold a plastic bag, a carrying rod of which one end is attached to the loop shaped device, a securing device such as a bracket to attach the loop shaped device to one end of the carrying rod, and a plastic bag, preferably a plastic bag such as a grocery bag, etc. placed inside the loop shaped device with its upper portion folded over the loop and its ends tied to the rod where the loop shaped device is attached. As soon as the dog shows the motion to excrete, this device can be placed under the dog's bottom and catches the waste in the plastic bag as it excretes. Once the dog has finished excreting, the plastic bag is removed and discarded. This is a very simple and sanitary way of catching and discarding the dog waste.

3 Claims, 1 Drawing Sheet





(12) **United States Patent**
Bontems

(10) **Patent No.:** **US 6,473,908 B1**
 (45) **Date of Patent:** **Nov. 5, 2002**

(54) **GARMENT HAVING A BUTTOCKS**
CLEANSAGE REVEALING FEATURE.

(57) **Inventor:** **Thomas A. Bontems, 1909 E.**
Palmcroft Dr., Tempe, AZ (US) 85282

(*) **Notice:** Subject to any disclaimer, the term of this patent is extended or adjusted under 35 U.S.C. 154(b) by 0 days.

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(21) **App. No.:** **10042,865**

(22) **Filed:** **Jan. 9, 2002**

(51) **Int. Cl.:** **A41B 9/00**

(52) **U.S. Cl.:** **2,027; 2,028; 2,609; 2,600**

(58) **Field of Search:** **2,400-408; 2,277; 2,228; 2,38; 67; 211; 105; 69; 75; 80; 78.1; 83; 78.2; DDC. I; 4,819,94; 95; 99; 102-105; 108; 102,700; 712; 718; 721; 732-736; 742**

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Primary Examiner—Gloria M. Hale
Attorney, Agent, or Firm—Patterson & Golery; Robert A. Parsons, Michael W. Golery

ABSTRACT
 (57) Disclosed is a garment having a buttocks covering portion and a buttocks cleansage-revealing portion disposed at the buttocks covering portion. The buttocks cleansage-revealing portion is an opening and see-through material is disposed at the opening. The garment is a pair having leg portions depending from a waist, and the opening is disposed below the waist.

17 Claims, 1 Drawing Sheet

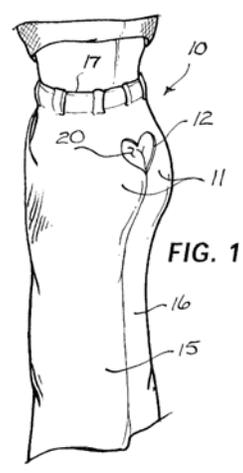
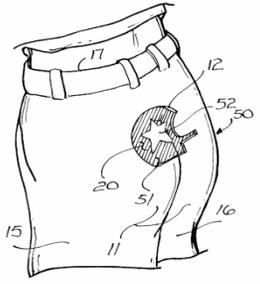
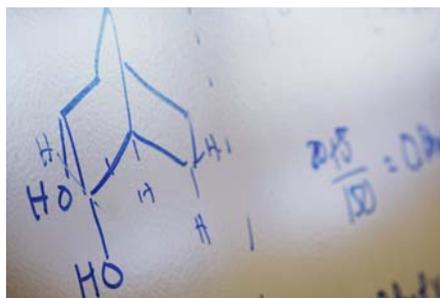


FIG. 1

Patentable Subject Matter

- CANNOT obtain a patent for:
 - Scientific truths, laws of nature
 - Mathematical expressions
 - Algorithms
 - Abstract ideas
 - Physical phenomena



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Novelty

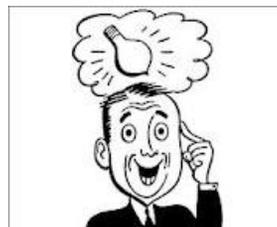
Novelty is destroyed by:

- public use of invention
- prior sales or offers for sale of invention
- printed publication of invention

...ANYWHERE IN THE WORLD

Unlike copyrights and trademarks, you must:

- (1) **timely file application with the USPTO; and**
- (2) **undergo examination and have patent issued**

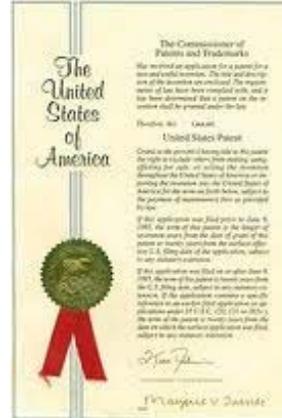


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Enforcement/Infringement

- To infringe a patent claim, all elements of a claim must be present in the accused device or method
- Patent owner is entitled to a claim scope commensurate with the details of the specification and their “reasonable equivalents”
- Patent validity will always be contested:
 - Failure to consider material prior art
 - Concessions made during prosecution (estoppel)
 - Inequitable conduct



A Few Patent Points

Patent Advice

1. Write all ideas down with dates of conception
2. Identify all collaborators with brief description of contribution
3. Secure strong nondisclosure agreements (NDAs) with other parties
4. File a provisional patent application very early
5. Patent rights can be lost by failing to file a patent application within one year of your first commercialization or other public use
6. Always remember that your competitors are getting patents – so should you.

America Invents Act (March 17, 2013)

- File early and often
- No more “first to invent” (now first inventor to FILE); effective March 2013
- Still have to be an “inventor”; can’t file for others’ inventions
- Self-disclosure buys a 1-year grace period and can avoid some prior art, but ruins international rights in “absolute novelty” countries
- Still a 12-month grace period from your own disclosures, but not disclosures of others
- Post-grant review within 9 months may reduce some litigation?

Questions?



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PRESENTATION

Top Five Ways to Reduce the Risk of Employment Litigation



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EXPAND YOUR EXPECTATIONS[®]

What laws apply to me?

5. Know the employment laws that apply to you:

- 1+ employees – Fair Labor Standards Act
 - basic wage and hour law that covers minimum wage and overtime pay and record keeping requirements
- 1+ employees – I-9 Compliance (immigration status documentation)
- 5+ employees – Worker's Compensation Insurance (in TN anyway)
- 8+ employees – Tennessee Human Rights Act
 - no race, sex, age, national origin, religion, or disability discrimination
- 15+ employees – Title VII, ADA; 20+ employees – ADEA
 - federal statutes prohibiting discrimination based on sex, race, color, religion, national origin, disability and age
- 20+ employees – COBRA
 - offer departing employees the option to continue their health insurance coverage at the employee's expense.
- 50+ employees w/in 75 mile radius – Family and Medical Leave Act

Policies and procedures . . .

4. Create an Employee Handbook with AT LEAST the following:
- At will statement
 - Anti-harassment / discrimination policy
 - Rules for workplace behavior
 - Explanation of benefits
 - Complaint procedure



**** DO NOT INCLUDE POLICIES YOU WON'T FOLLOW! ****

It's the Little Things That Cost Big Bucks

3. Make sure employees are classified correctly for wage and hour purposes and pay them accordingly.
 - Non-exempt employees: employer must keep records of all hours worked and must be paid minimum wage and overtime
 - Exempt employees: must meet certain legal tests to be exempt from minimum wage and overtime
 - Understand the difference between employees and independent contractors

Key Lessons to Learn

2. Respond quickly and appropriately to employee complaints about possible employment law violations and understand they have a legally protected right to complain.
 - Discrimination / Harassment
 - Wages
 - Safety Issues
 - Do not wait for the straw that broke the camel's back before taking action – Investigate!

Don't Be Penny Wise and Pound Foolish

1. Train your managers on employment laws and leadership skills
 - Recognize harassment, discrimination, request for accommodation
 - Know reporting / action is required
 - Document discipline
 - Be accurate in performance evaluations
 - Develop a relationship with an EMPLOYMENT lawyer.



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Questions



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Questions?

