

Intellectual Property
University of North Dakota School of Law
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SYLLABUS

GOALS: I intend for this class to provide meaningful training for the practice of law relating to intellectual property, including litigation, transactional practice, and advising and counseling clients. By the end of the course, you should: have a broad grasp of the principle doctrines, be keenly alert to the law's many pitfalls for the unwary, be conversant in the theoretical underpinnings and policy aims of IP law, and be aware of how a real-world panoply of expectations and value judgments filters IP law's effects on people and industry.

Compared to many other areas of law you have studied, IP is a relatively new body of law – much of it extremely new – and it is in a great state of flux. Its current relevance is compounded by the fact that it is at the center of the two great transformations of our age: globalization and cyberization. Therefore, it is particularly important that you be able to think about IP in its constantly evolving historical, societal, cultural, and political context. For IP, policy arguments and theoretical perspectives are much more than mere academic curiosity. In a world of first-impression cases, understanding policy and theory is essential.

CLASS WEBSITE: Various materials and links are on the class website at:
http://www.ericjohnson.com/courses/ip_11/

MATERIALS: The required materials for this course are:

Fundamentals of Intellectual Property: Cases & Materials,
by Thomas G. Field Jr.
Published by Field, 2009.

This book is available for free download from:

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1172142

The book is apparently also available via print-on-demand for about \$18 from Town & Country Reprographics in Concord, NH.

Intellectual Property: Examples & Explanations, Third Edition
by Stephen M. McJohn
Published by Aspen Publishers, 2009
ISBN: 9780735577336

Compendium and Referenced Works (internet): Additional materials that are part of the required reading will be available via links from the course website, in a section titled "Johnson's Intellectual Property Referenced Works for 2011," or for free download from the course website, in a section titled "Johnson's Intellectual Property Compendium for 2011." Materials may be added to these collections throughout the course.

Other: Certain other required materials may be handed out in class. In addition, materials may be placed on reserve in the library, including, possibly, audio, visual, and

audiovisual works. Also, you may be required to retrieve an occasional document from a proprietary online legal research service, such as Westlaw or LexisNexis.

Study Aids: Beyond the required materials, you are encouraged to use any other materials you find helpful or interesting, including, for instance, commercial outlines. The more you learn about intellectual property, the better. Commercial outlines are a great way of gaining a basic understanding of the blackletter law in a subject. That being said, the best time to read such a secondary source is right at the beginning of the semester. That way, you may give yourself a better foundation of knowledge for learning the material presented in the cases and in class. On the other hand, reading a commercial outline as exam preparation for this class could be a waste of your time and mental energy. But it's up to you, of course, to judge for yourself. If you do use study aids, I would appreciate your letting me know your experience with them – whether good or bad.

ASSIGNED READING: In each class I will announce the reading assignment for the next class meeting.

I take care to craft reading assignments so that they are not unduly burdensome. Because of this, I expect all students to actually do the reading and to be ready to discuss it, as doing so will ensure healthy classroom dialog.

How should you tackle the reading? You could, of course, brief the cases, use a highlighter, make margin notes, or do any of a number of other things. And, of course, you should do what works for you. But the most important thing is to read the material with interest. “With interest” means you should be having thoughts going through your head such as, “Mmmm, interesting!” “Ah ha! That makes sense!” or “What is wrong with this judge?!?!?”

One way to approach the reading, suggested by law professor Scott Brewer, is to be aware of “the literary drama of the law,” that is, “be alert to the narratives of the hopes, aims, fears, aspirations and frustrations of the litigants ...” Behind every case there is a real story. The more you allow yourself to be absorbed into that story, the more you will get out of the case.

Also, you should attempt to put yourself in the position of the judge. Force yourself to confront the challenge of trying to interpret the law in a way that is fair, unbiased, beneficial for society, while at the same time being true to statute and precedent. Using this kind of viewpoint, you are bound to get something extra out of every case you read.

ADDITIONAL EXPECTED READING: In addition to the assigned reading for class, I would like you to check in from time to time with Mike Masnick’s blogging on TechDirt. It’s interesting, and it offers the opportunity to engage with the material in a highly relevant, topical way. There are links from the course webpage.

GRADING: Your grade will primarily be based on your exam performance. The exam is discussed below. Each exam will be “blind graded,” so that I will not know the identity of the student as I am grading his or her exam. You may not waive anonymity. Self-identification on the exam or otherwise destroying anonymity will, at a minimum, result in a lower grade, and may result in disciplinary action.

Class participation will also count in calculating your grade. I may do this in one of a couple of ways. I may add or subtract from students’ exam grades on a non-blind, discretionary basis, with the result forming your grade for the course. Alternatively, I may create a class-participation grading component on a non-blind discretionary basis, and then have that component form a small portion, not exceeding approximately 10

percent, of the total grade for the course. Regardless of the method I use for factoring in class participation, I anticipate that some students' grades will be increased upward and others' may end up being adjusted downward, with most students' grades probably remaining unchanged.

The primary reason for class participation having a positive effect on the overall course grade would be superior performance in the classroom. In addition, it will be considered favorable in terms of class participation for a student to serve fellow students as a wypadki coordinator or extraordinary wypadki contributor, or otherwise providing particularly substantial service for the class, especially as judged by your peers.

Reasons for a negative effect of class participation on the overall course grade will include exhibiting poor performance in the classroom, excessive absence, tardiness, and being unprepared for class.

Please keep in mind that, despite the fact that class participation is graded, you should not worry unduly about the quality of your responses. As long as you do the reading and give it honest effort when speaking in class, you will not be marked down. Law school, like all other educational environments, is a place to learn, and that necessarily implies that it is a place to fumble and make mistakes. I do not ask questions and conduct discussion as a way of judging you, I do it as a way of challenging you and helping everyone to learn. So put aside your fears and engage in the conversation.

Depending on how the class evolves, I may give quizzes in class, and I may ask students do some minor oral presentations. None of these elements, if included, will be unduly burdensome, but I am reserving the right so that we can vary the classroom experience. To the extent I include such elements in the course, students' performance will figure into class-participation grading and, therefore, will be a very minor part of any student's overall grade. Note that I plan to do at least one quiz, using fill-in-the-blank bubble sheets, near the beginning of the semester after we have done the blackletter review.

COMMUNICATIONS: My e-mail address is ejohnson@law.und.edu. Please note that I do not answer or discuss substantive questions through e-mail. Moreover, perhaps unlike many students, I do not read e-mail on an hour-by-hour or even day-by-day basis. I may not respond at all to certain e-mailed questions, including those which ask for information that is clearly answered in this syllabus. If you miss class, please ask other students for information you may have missed, such as reading assignments. Any e-mail communications you do have with me should be prepared in a professional manner, including the use of a meaningful subject line.

If you have any questions about the exam, please ask them in open class. In the aims of fairness, I do not discuss the exam on an *ex parte* basis.

My office is No. 304. Open office hours are posted by my door and on ericejohnson.com. If you would like to speak with me and you cannot come by office hours, I am very happy to arrange for another time to talk with you. Please make an appointment by sending me an e-mail with some suggested times.

STUDENTS WITH SPECIAL NEEDS AND DISABILITIES: If you have emergency medical information to share with me or need special arrangements in case the building must be evacuated, please make an appointment with me. If you plan to request a disability accommodation, please contact the Dean of Students office, and be aware that you are expected to register with Disability Support Services, 190 McCannel Hall, 777-3425 v/tty.

IN THE CLASSROOM: Do not eat in class. Do not chew gum audibly or with your mouth open. Refrain from engaging in inappropriate uses of laptops. Do nothing that might disrupt class or distract your fellow students.

Your participation in classroom discussion should be meaningful and appropriate. Raise your hand to have a say in discussion when you have a comment that will contribute to the experience of the class as a whole, or when you have a question, the clarification of which will benefit the entire class. Your classroom participation should be appropriate – not too little, not too much. Everybody knows there are students who raise their hand too often and take up too much of the class's time. All of us also know that there are people who sit passively and rarely, if ever, contribute to classroom discussion. Take care that you do not fall into either extreme.

If you cannot participate fully for a particular class, for whatever reason (and there's no need to tell me why), please tell me before class, in person, so that I can avoid calling on you. Reasonable requests of this sort will not adversely affect your grade.

Be aware that I plan to make an audio recording of each class meeting. These recordings are for my use, and, unfortunately, I will not be making them available during the semester for absent students. No one is permitted to make an audio or video recording of class without my express, written permission.

ABSENCES AND TARDINESS: I view attendance in class as an essential component of the educational experience, and therefore, superior performance on an examination cannot make up for insufficient attendance. Deficient attendance may result in a lower class-participation grade. Further, I reserve the right to not award a passing grade for a student with a seriously deficient record of timely attendance.

That being said, an occasional absence or late arrival will not adversely affect your grade at all. But I do appreciate it if you e-mail me beforehand. If you will be late or absent, please let me know by e-mailing me before class, and please make sure you use this special e-mail address: attendance@eejlaw.com. Please make sure the subject line of your e-mail is "Intellectual Property." Note that I likely will not read any such attendance e-mails until after all classes conclude. My practice is to review attendance e-mails at the end of the semester when reviewing attendance records and calculating class-participation grades. Please note that there is no need to tell me why you will be absent or late.

Also, if you are late, make sure you come up to me after class so that I can note your attendance. Otherwise, you may be counted as absent.

If you are concerned about your attendance record, please talk to me. Of course, none of the foregoing supercedes the School of Law's or the University's policies.

WYPADKI: The traditional method of exam preparation for law students involves making an outline of the course. Because traditional legal pedagogy eschews using a textbook in lieu of a casebook, the outline fulfills the place of a textbook – providing a written explanation of the subject matter.

With the goal of saving time by reducing duplicative labor, I am providing the class with a chance to create an outline as a community – which we'll call a "wypadki." The wypadki will be enabled with a wiki, the same web application that is behind Wikipedia, the online encyclopedia that is authored and edited by its readership. Only members of the class will be able to contribute to the wypadki, and each addition, edit, and deletion will be tagged with the name of the contributing class member. I intend to allow students broad latitude in creating the wypadki, though I will step in and provide guidance and restrictions if necessary. On or after a certain announced date at the end of

the semester, before the exam, I will lock the wypadki. Designated student coordinator may then have a window of time to make additional changes. After that, I will then have a chance to review and alter it before leaving it in a final version. Please note that I reserve the right to make any changes, deletions, and additions I deem appropriate, in my sole discretion, before or after locking the wypadki. The final version will be made available for download sometime before the exam, and copies will be printed and distributed to all students during the exam, discussed below, for use as a reference in drafting an examination answer.

Contributions to the wypadki are voluntary. To the extent you do contribute, please note that contributions to the wypadki must respect intellectual-property law. Do not add copyrighted material (regardless of licensing); limit your contributions to your own originally authored material and material in the public domain, which includes court-issued opinions. In addition, you may add into the wypadki material from wypadkis constructed by prior classes of mine, as well as class materials that I author and post under the heading "Classroom Notes and Presentations," including the mindmap, unless otherwise noted. In making a contribution to the wypadki, you are certifying that the material you add is original and does not include the copyrighted content of others. Also, by contributing, you are agreeing that the wypadki and/or any of your contributions to it may be used, copied, and/or changed by your fellow students for this course and by others for any education- or learning-related endeavor approved by me or my designee.

Registration: Contributing to the wypadki is voluntary; it's not a class requirement. If you do choose to contribute to the wypadki, however, you must register. In the past, some users have had technical problems with getting registered and logging on. Make sure you work out any problems early in the semester. If you wait until too late in the semester to try logging on, you may find yourself in a situation where you cannot make any contributions. To get to the registration page, click on the link in the far upper-right corner of your browser window. When registering, please put your name in the following format:

`Lastname.Firstname`

Use your real name. Pseudonyms will not be accepted.

Registrations need to be approved before you can edit the wypadki. If you have had a registration pending for a few days without approval, please send me an e-mail to advise me so I can log on and approve it.

If the wiki software demands that you provide a biography or other personal information, please ignore this. You should be able to register your user ID without filling out such a field.

In the past, some users have had technical problems with getting registered and logging on. Because of this, you are well advised to attempt to register early in the semester so that you have time to work out any problems you encounter. If you wait until too late in the semester to try logging on, you may find yourself in a situation where you cannot make any contributions. For technical problems, please contact the law school's information technology staff.

EXAMINATION: I will give a final exam requiring written answers. You will have the choice of typing or handwriting your response.

You will be allowed to bring with you, into the exam, and to reference during the exam, a "reference sheet," consisting of a single 8.5-inch-by-11-inch sheet of paper, upon which you may write or print any information you wish. If you have concerns about

receiving a disability accommodation with regard to the reference sheet, please contact the Dean of Students office.

In addition to the reference sheet, you will be given a paper printout of the Intellectual Property Wypadki to reference during the exam.

Other than the wypadki and the reference sheet, no other informational or reference materials will be permitted, except as otherwise permitted by the Dean of Students office as an accommodation.

The exam will consist of one or more open-ended questions calling for written essay responses to one or more hypothetical fact patterns. In addition, the exam may include directed response or “short answer” questions. You may also be asked to answer a “theme” or “theoretical” style question, in which you will critique the law. In the case of a theoretical-style question, I may provide a fictional context for writing your answer and perhaps a stance for you to take, such as, “[A certain client] has asked you to write a letter to the editor of the *New York Times* arguing for [a certain change in the law].”

Be assured that I will not use any essay questions that have been used on any other prior exam. As noted above, I will not discuss the exam on an *ex parte* basis; any questions about the exam must be asked in open class.

I may provide a more specific description of the examination at a later time. My old exams, including those I wrote for separate courses in Patent Law and Trademarks, may be quite useful to you in studying for and thinking about the exam. My old exams can be found in the exam archive, accessible from ericejohnson.com.

SUBJECT MATTER TO BE COVERED: Topics I plan to cover are listed below. This list is subject to some adjustment.

I. BLACKLETTER OVERVIEW

II. THEORY AND POLICY

III. COPYRIGHT

1. Subject matter
2. Excluded subject matter
3. Onset of rights, ownership, formalities, and duration
4. Exclusive rights, infringement, and limitations

IV. MORAL RIGHTS

V. TRADE SECRET

1. Subject matter
2. Gaining and losing protection
3. Misappropriation and remedies

VI. PATENT

1. Subject matter
2. Excluded subject matter
3. Onset of rights, ownership, formalities, and duration
4. Exclusive rights, infringement, and limitations
5. Claims drafting

- VII. DESIGN PATENT
- VIII. PLANT PATENT
- IX. PLANT VARIETY PROTECTION
- X. MASK WORK PROTECTION
- XI. VESSEL HULL PROTECTION
- XII. TRADEMARK
 - 1. Subject matter
 - 2. Excluded subject matter
 - 3. Onset of rights, ownership, formalities, and duration
 - 4. Exclusive rights, infringement, and limitations
 - 5. Dilution
 - 6. Cybersquatting
- XIII. GEOGRAPHICAL DESIGNATIONS OF ORIGIN
- XIV. INTERNATIONAL ASPECTS
- XV. CONTRACT AND IDEA SUBMISSION
- XVI. MISAPPROPRIATION
- XVII. RIGHT OF PUBLICITY
- XVIII. FEDERAL PREEMPTION

FEEDBACK: If you have feedback for me – suggestions, ideas, commendations, or criticisms, please do not hesitate to tell me in person or by e-mail. If sending something to me anonymously would make you feel more comfortable, then I invite you to do just that.

Good luck. I hope you enjoy the course.

– EEJ