

**Intellectual Property**  
University of North Dakota School of Law  
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**SYLLABUS**

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**1. 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.

**2. COVERAGE:** The primary focus of this class is on United States law. Foreign and international law will be only cursorily surveyed. In terms of doctrine, our primary focus will be on copyright, patent, trademark, trade secret, and publicity rights.

**3. CLASS WEBSITE:** Various materials and links are on the class website. Go to [ericejohnson.com](http://ericejohnson.com) and find the link on the upper left. The direct URL is: [http://www.ericejohnson.com/courses/ip\\_12/](http://www.ericejohnson.com/courses/ip_12/)

**4. MATERIALS:**

**4-1. Books:**

There are two required books: the Field book and the McJohn book.

The Field book may be procured in the form of a pdf file (free) or printed paperback (\$29):

Fundamentals of Intellectual Property: Cases & Materials,  
by Thomas G. Field Jr.  
Published by Field, 2009 (revised May 15, 2011).

*Download file:*

<http://ssrn.com/abstract=1172142>



*Purchase book:*

Available through amazon.com and other online retailers.

Paperback: 472 pages

Publisher: CreateSpace

ISBN-10: 1456565001

ISBN-13: 9781456565008

The McJohn book may purchased from an online retailer or from the UND bookstore:

Intellectual Property: Examples & Explanations, Third Edition

by Stephen M. McJohn

Published by Aspen Publishers, 2009

ISBN: 9780735577336

**4-2. 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 2012," or for free download from the course website, in a section titled "Johnson's Intellectual Property Compendium for 2012." Materials may be added to these collections throughout the course.

**4-3. 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. It is possible that you may be required to retrieve an occasional document from a proprietary online legal research service, such as Westlaw or LexisNexis.

**4-4. Study Aids and Unassigned, Additional Reading:** 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.

**5. 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. In return, I ask that you do the reading conscientiously. 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 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, and true to statute and precedent. Using this kind of viewpoint, you are bound to get something extra out of every case you read.

**6. ADDITIONAL OPTIONAL READING:** In addition to the assigned reading for class, you might find it interesting to do some optional extra reading from blogs and online news sources. Doing so will allow you to engage with the material in a way that is highly relevant and topical, leveraging your imagination to solidify what you have learned and prime you for what comes next.

One source I can recommend is Mike Masnick's blogging on TechDirt. Masnick is a frequent and entertaining critic of intellectual property who comes from a geek perspective. There will be links from the course webpage.

In addition, I've established a Twitter account for the class: @UNDLawIP2012. You can find it at: <https://twitter.com/#!/UNDLawIP2012>. I'll post interesting things I come across. If you want to tweet about something related to class, use the hashtag #UNDIP12. I'll retweet it. But don't tweet during class! (Unless I specifically invite that as an experiment in which we monitor the tweets in class.) See Section 9-1(d), *infra*.

## **7. GRADING:**

**7-1.** 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.

**7-2.** 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.

**7-3.** Reasons for a positive effect of class participation on the overall course grade may include habitual preparedness and engagement, volunteering in discussions, advance volunteering for questions, and otherwise making a substantial contribution to the class and the learning enterprise.

**7-4.** 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.

**7-5.** 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.

**7-6.** 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.

## **8. COMMUNICATIONS AND OFFICE HOURS:**

**8-1.** My e-mail address is [ejohnson@law.und.edu](mailto: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.

**8-2.** 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.

**8-3.** My office is No. 304. Open office hours are posted on [ericejohnson.com](http://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.

**8-4.** At least once during the semester, I hope you will come by office hours and introduce yourself, even if you have no questions and nothing to discuss. That's not a requirement, just a request. But it would be nice to be able to chat informally with everyone at least once.

## **9. IN THE CLASSROOM:**

### **9-1. Classroom Conduct Rules:**

- (a) Do nothing that might disrupt class or distract your fellow students.
- (b) Do not eat in class. Do not chew gum audibly or with your mouth open.
- (c) Refrain from any use of a digital device that could reasonably disrupt class or distract fellow students. All digital devices must be operated without audio volume. Screens must not display any distracting content, including, but not limited to, distracting images, indecent content, moving images (video), and animation or flashing graphics.
- (d) You may use digital devices (including, without limitation, computers, phones, and tablets) in class; however, from the time of class's scheduled beginning until class ends: (1) You may not engage in any digitally enabled network communications with anyone else in class, including,



but not limited to e-mail and text messaging. (2) You may not engage in any web publication or any live-updating/realtime digitally enabled network communications with anyone at all, including, but not limited to, live chat, IM, Facebook (including, but not limited to, Facebook groups), Twitter, and Google Plus. The prohibitions of this subparagraph (d) are not limited by context and apply without regard to whether the activity in question can be characterized as disruptive or distracting. Any violation of the policy in this subparagraph (d) will presumptively result in a lowered course grade. The prohibitions of this subparagraph (d) do not apply if and when you are absent from class and not on campus, nor do they apply to communications with University information-technology staff for technical support purposes.

**9-2.** 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.

**9-3.** I am grateful for students to volunteer in advance for class discussion. If you volunteer in advance, I’ll assume that you are game for particularly challenging questions. If you would like to volunteer in advance for a particular class, e-mail me before class begins at this special e-mail address: [ipvolunteer@eejlaw.com](mailto:ipvolunteer@eejlaw.com), and use this subject line “IP Volunteer for [MM]-[DD]”. At the same time, cc me at [ejohnson@law.und.edu](mailto:ejohnson@law.und.edu). I can’t guarantee that I will call on you in such an event, but I will appreciate your offer nonetheless. If you would like to volunteer in advance for the entire semester, please send me an e-mail with the subject line “IP Volunteer for Semester”. If you do that, you can then opt-out on a day-by-day basis if needed, by e-mailing both [ipvolunteer@eejlaw.com](mailto:ipvolunteer@eejlaw.com) and [ejohnson@law.und.edu](mailto:ejohnson@law.und.edu) with the subject line “IP Opt-out”.

**9-4.** Even if you don’t volunteer in advance, I’ll expect you to be ready to participate meaningfully if called on. 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 are entirely understandable and will not adversely affect your grade.

**9-5.** 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.

**9-6. Students with Special Needs and Disabilities:** If you have medical information to share with me in advance of and in case of any prospective emergency, or if you need special arrangements in case the building must be evacuated, please call me or make an appointment with me to discuss. 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.



## **10. ABSENCES AND TARDINESS:**

**10-1.** 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.

**10-2.** 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](mailto:attendance@eejlaw.com). Please make sure the subject line of your e-mail is "IP". 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 evaluating class-participation for grading. Please note that there is no need to tell me why you will be absent or late.

**10-3.** 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.

**10-4.** If you are concerned about your attendance record, please talk to me. Of course, none of the foregoing supersedes the School of Law's or the University's policies.

**11. WYPADKI:** The traditional method of exam preparation for 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.

**11-1.** 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."

**11-2.** The wypadki will be accessible through the UND Blackboard system. Software-wise, the wypadki consists of a wiki, similar to Wikipedia. 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. 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 for use as a reference in drafting an examination answer.

**11-3.** 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, or otherwise is somehow legally permitted to be contributed. Also, by contributing, you are agreeing that the wypadki and any of your contributions to it may be used, copied, 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. Although the Blackboard site is not accessible to persons not enrolled in the class, the resulting wypadki document will be made publicly available online.



**11-4.** Your 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. Notwithstanding the foregoing, you may incorporate material from other wypadkis constructed by prior classes of mine as well as any handouts and slides from class, unless I specify otherwise.

**11-5.** In the past, some users have had technical problems with regard to the wypadki. Thus, you are well advised to attempt access early in the semester, so that you have time to work out any problems you may 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 or university's information technology staff.

## **12. EXAMINATION:**

**12-1.** I will not discuss the exam on an *ex parte* basis. (See Section 8-2.)

### **12-2. Exam format:**

(a) I will give a three-hour final exam requiring written answers. You will have the choice of typing or handwriting your response. The typing of exams will be in accordance with the School's policy for the use of computers to write exams. Be assured that I will not use any questions for that have been used on any other prior exam.

(b) 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.

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

(d) 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.

(e) 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]."

(f) Be assured that I will not use any essay questions that have been used on any other prior exam.

(g) I may provide a more specific description of the examination at a later time.

**12-3.** My old exams, including those I wrote for separate courses in Patent Law and Trademarks, should be quite useful to you in studying for and thinking about the exam. You will find them in my Exam Archive, which is publicly accessible online. You



will find a link on [ericjohnson.com](http://www.ericjohnson.com) (or use the direct URL: [http://www.ericjohnson.com/exam\\_archive.html](http://www.ericjohnson.com/exam_archive.html)). Later in the semester I will have more to say about how I recommend preparing.

**13. COURSE ORGANIZATION:** The planned organization of the Intellectual Property course is below. The structure is subject to minor adjustment.

**I. Preliminaries**

1. The Basic Framework and Initial Questions
2. Blackletter Overview
3. Theory and Policy

**II. Expression**

4. Copyright
5. Moral Rights

**III. Invention and Industry**

6. Patent
7. Design Patent
8. Plant Patent
9. Plant Variety Protection
10. Mask Work Protection
11. Vessel Hull Protection
12. Trade Secret

**IV. Commercial Origin**

13. Trademark
14. Geographical Designations of Origin
15. Right of Publicity

**V. Marginalia**

16. International Context
17. Contract and Idea Submission
18. Misappropriation
19. Federal Preemption

**14. 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