

Intellectual Property
Texas Tech University School of Law
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SYLLABUS

1. LEARNING OUTCOMES: 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 industries.

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. The work-a-day world of IP is a blizzard of first-impression and not-yet-brought cases – and that means that policy arguments and theoretical perspectives are not mere academic curiosities, they're standard tools of the trade.

The following is a non-exclusive list of specific learning outcomes for this course:

1. Broadly know and be able to apply the principal doctrines of United States copyright, patent, trade secret, and trademark law, as well as ancillary state law regimes and federal preemption.
2. Be able to avoid pitfalls of U.S. intellectual property law – especially where entitlements can be unwittingly surrendered or foregone.
3. Know and apply U.S. law such that you can counsel a client confidently as to the legal consequences of making use of a particular creative work, invention, or putative trademark – such as concluding that the use is safe, somewhat risky, very risky, or highly likely to incur liability.
4. Know and apply U.S. law such that you can advise a client how to use intellectual property law in the context of an incipient business strategy.

5. Be able to fashion persuasive appellate-level or scholarly arguments, grounded in theoretical and policy perspectives, for and against propositions involving intellectual-property doctrine.
6. Understand how the real-world effect of IP law can fail to correspond with blackletter doctrine because of strategic behavior, tactical maneuvering, ignorance of the law, and unpredictable outcomes in court.
7. Have a cursory knowledge of international and foreign intellectual property law such that you would know when to refer a client to alternative counsel, including foreign counsel, in order to take advantage of possible IP entitlements abroad or to receive advice on foreign liability.
8. Be able to speak intelligently and knowledgeably about current trends in the development of IP law.

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 the right of publicity. There is a course outline at the end of this syllabus.

3. CLASS WEBSITE: The central repository for class materials and information is the class website. It is not password protected. Go to ericejohnson.com and find the link on the upper left. The direct URL is:
http://www.ericejohnson.com/courses/ip_12_fall/

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 (about \$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 printed book:

The pre-printed paper version of the book has limited availability. It may be available through amazon.com or 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 bookstore:

Intellectual Property: Examples & Explanations, Fourth Edition
 by Stephen M. McJohn
 Published by Aspen Publishers, 2012
 ISBN: 978-1-4548-0332-4

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 “Intellectual Property Referenced Works for Fall 2012,” or for free download from the course website, in a section titled “Intellectual Property Compendium for Fall 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, treatises and commercial outlines. I mention this explicitly because some professors discourage outside sources. I do not. As far as I am concerned, the more you learn about intellectual property law, the better. I personally have found that commercial outlines can be 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.

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 her or his exam. You may not waive anonymity. Self-identification on the exam or otherwise culpably destroying anonymity will presumptively result in a deduction from your exam grade and a referral for disciplinary action under the Honor Code.

7-2. Class participation will also count in calculating your final grade. Within the parameters of the law school's policy, I will factor classroom performance and attendance will factor into final grades. Law school policy allows adding or subtracting one letter-grade increment to or from the otherwise-calculated final grades. By my use of this method, I anticipate that some students' exam grades will be increased upward, some will remain unchanged, and others' will end up being adjusted downward.

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. Reasons for a negative effect of class participation on the overall course grade will include exhibiting poor performance or visible disengagement 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. More is said about expectations for class participation and classroom conduct in Section 9, below.

8. COMMUNICATIONS AND OFFICE HOURS:

8-1. You may e-mail me at eric.e.johnson@ttu.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 asking 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 318 East. In general, I should be available and free to talk from approximately 2:00 to 3:00 p.m. on class days if you would like to drop by. I will

also post official office hours on my website. And feel free to grab me in the halls as well. I also am very happy to make appointments. To make an appointment please send me an e-mail with some suggested times. My office number is 806-742-3990 x226.

8-4. At least once during the semester, I hope you will come by my office to 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, moving images (video), animation or flashing graphics, or any kind of indecent content.
- (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 and may be referred for disciplinary action. 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. Occasionally, there are students who raise their hand too often and take up too much of the class's time. And in nearly every class, there are people who sit passively and rarely, if ever, contribute to classroom discussion. Try not to 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, and use this

subject line "IP Volunteer for [MM]-[DD]". 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 to eric.e.johnson@ttu.edu 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 ipvolunteer@eejlaw.com 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 in this way 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.

10. ABSENCES AND TARDINESS:

10-1. Attendance in class is an essential component of the educational experience, and the accreditation standards of the American Bar Association mandate that schools "require regular and punctual class attendance" and enforce attendance policies.

10-2. Attendance will be taken by means of a sign-in sheet. It will be your responsibility to make sure you have signed in. You may not sign the sheet on behalf of another person, even if that person is in attendance. You may not permit another person to sign the sheet on your behalf. Such forgery is in violation of the law school's Honor Code and will be dealt with accordingly.

10-3. In accordance with the policy reflected in the Student Handbook, Part II.I., I intend to exclude from the course and final exam any student accumulating nine absences or more, whether for illness, interviews, activities, etc. Coming to class late may be counted as an absence for this purpose, as may leaving early. This syllabus constitutes your warning that you are subject to exclusion on this basis. Keep track of your own absences. Do not expect to receive an independent warning from me if you draw close to your allowed absences.

10-4. If extended illness or a personal situation requires missing more than three classes, I encourage you to talk to me so that we can try to work through the situation.

10-5. If you are concerned about your attendance record, please talk to me. Of course, none of the foregoing supersedes the law school's or university's policies.

11. ACCOMODATIONS:

11-1. Disability: Any student who, because of a disability, may require special arrangements in order to meet course requirements should contact the Associate Dean for Academic Affairs Jarod Gonzales as soon as possible to make any necessary arrangements. Students should present appropriate verification from Student Disability Services during the Associate Dean's office hours. Please note that classroom accommodations cannot be provided until verification from Student Disability Services

has been submitted. For additional information, you may contact the Student Disability Services office in 335 West Hall or 806-742-2405.

11-2. Observance of a Religious Holy Day: Texas House Bill 256 requires institutions of higher education to excuse a student from attending classes or other required activities, including examinations, for the observance of a religious holy day. The student shall also be excused for necessary time to travel. An institution may not penalize the student for the absence and must allow for the student to take an exam or complete an assignment from which the student is excused. No prior notification of the instructor is required.

12. EXAMINATION:

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

12-2. Exam format:

(a) This class will have a three-hour final exam consisting of a multiple-choice portion, worth approximately one-third of the exam grade, and a portion requiring written answers, worth approximately two-thirds of the exam grade. Be assured that I will not use any questions on the written portion that have been used on any other prior exam.

(b) The exam will be administered closed book except that 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 see Section 11-1, above.

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

12-3. My old exams for Intellectual Property, plus 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). Later in the semester I will have more to say about how I recommend preparing.

13. COURSE OUTLINE: The planned organization of the Intellectual Property course is below. The structure is subject to minor adjustment. Note that this outline is not to scale – that is, some topics below will be covered with extreme brevity, while others will be covered in considerable depth. For greater detail, along with specific reading assignments, please reference the evolving Chart of Assignments, which will be available from the course webpage.

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

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