

Memorandum to Students

Exam Prospectus Intellectual Property

Spring 2016

University of North Dakota School of Law

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1. OVERALL POINTS

Purpose: I am writing this document to give you specific information that will help you prepare for, and know what to expect on, the Spring 2016 Intellectual Property final exam.

Fairness: My paramount value in designing and grading the exam is fairness. Over the years, I have thought long and hard about how to make exams and grading more fair, and you will see the product of that reflection in this memo. As a whole, this memo is intended to eliminate the potential for surprise on the exam by disclosing as much as I can about the exam in advance.

My goal and your goal: Your goal in writing your exam response is to show your mastery of the material presented in the course and your skills in analyzing legal problems involving the course's subject matter. My goal in designing the exam is to provide you with a full and fair opportunity to do so.

Now for some details.

2. PARAMETERS (SECTION 10-2 OF THE SYLLABUS)

Section 10-2 of the syllabus describes the exam in considerable detail, including how it will be structured and administered. You should review it carefully. For your convenience, I reprint § 10-2 in its entirety here:

- 10-2.** The examination will be administered in two parts.
- (a) **Part I: Multiple Choice Questions**
- (1) Part I of the exam, worth approximately one-third of the total exam grade, will consist of multiple-choice questions administered on a closed-book basis. The questions will include, but may not be limited to, bar-exam-style hypotheticals testing the application of law to facts, as well as questions that test literacy of pure law (e.g., legal doctrines and statutes) and understanding of relevant concepts of legal theory and scholarship.
- (2) Part I will be one hour in duration.
- (3) All multiple-choice questions are written by me. None of the questions used on the exam will be questions that have been previously released.

(4) At least some of the multiple-choice questions may be questions that have been used by me in a previous semester, but which have remained unreleased.

(6) A word about the re-use of multiple-choice questions: Re-use of multiple-choice questions is standard in higher education, and the practice permits better exam quality and better calibration of the results. There is a downside, of course, which is the possibility that questions will be leaked to some students. I take appropriate steps to prevent the dissemination of unreleased questions. But bear in mind that the security of multiple-choice questions is not just a matter of faculty and staff responsibility; it is a matter of student responsibility as well. If you are aware that detailed information about or copies of unreleased questions are circulating, please let me know. Informing me will allow me to (1) refrain from using the compromised questions on the exam, and (2) release those questions to the public exam archive so that everyone can study from them.

(7) Be aware that the use of unreleased exam materials – whether photocopied, roughly transcribed, or otherwise – as part of your preparation for the exam constitutes academic dishonesty. Moreover (not to put too fine a point on it) reproducing or trafficking in unreleased questions is civilly actionable. If you find, receive, or are offered unreleased questions, be responsible and act promptly to ameliorate academic unfairness by letting me know; I will pursue no action against you in this regard if you make timely notice to me, which may be made anonymously, specifically identifying the materials, preferably by submission of a copy. The notice is timely if (i) it is near the beginning of the semester, (ii) it is reasonably soon after you come into possession of the materials and there is enough time to prevent such questions from being used on the exam and to release them to the class for their meaningful use in studying, or (iii) it is immediately upon coming into possession of the materials.

(b) **Part II: Essay Response**

(1) Part II of the exam, worth approximately two-thirds of the total exam grade, will require written answers. This part of 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.

(2) I will write Part II such that it should be answerable in less than two hours. Nonetheless, you will have three hours in which to answer Part II.

(3) You will have the choice of typing or handwriting your response to Part II. The typing of exams will be in accordance with the School’s policy for the use of computers to write exams.

(4) Part II will be administered on an open-book basis. You may bring with you any notes and books you like. No electronic or interactive resources (such as a tablet computer, smart phone, etc.) may be used or referenced. You may, of course, use a laptop to write your exam, but you may not reference files stored thereon during the examination session.

(5) I do not re-use essay questions.

3. EXAM PARAMETERS: SOME QUESTIONS ANSWERED

About the open-book nature of the essay portion: I have often been asked about limitations on the materials that can be brought in for students to reference during the essay portion of the exam. Other than that it must be on paper, there is no limit. You can bring in any notes, books, and printed and/or handwritten materials you like. I know some instructors limit students to only bringing in materials that they prepared themselves. I have no such requirement.

The only limitation is that you cannot reference electronic/digital/interactive files or information. So whatever you want to be able to reference during the exam will need to be printed out on paper.

Word limit: There is no word limit.

4. TOPICS ON THE EXAM / HOW I WILL DESIGN THE EXAM

The best way for me to tell you what to expect is for me to tell you what I will draw from and what will constrain me when writing the exam.

The Correspondence Principle: The most important thing to me when I write an exam is what I call the Correspondence Principle. It is this: The emphasis on the exam will track the emphasis in class and in the readings. For example, if we spent barely any time on something in class and there was scant reading on it, it will be no more than a trifling part of the exam, if even that.¹

Comprehensiveness: In keeping with the Correspondence Principle, I will strive to be very comprehensive in terms of the coverage of topics on the exam. I will use the chart of assignments as a checklist. I expect to include every topic that was substantially explored in class.

Breadth and depth of coverage: Any material presented in class or in the readings is potentially fair game for the exam. But, in keeping with the Correspondence Principle, the emphasis given to topics will correspond to how much attention they received in class and in the readings. So, if some doctrinal point came up only in one smallish note appended to a case, then you can be sure that it will not loom large on the exam. In fact, it won't even loom medium.

Now, I cannot guarantee that no obscure point will find its way onto the exam. Why not? Well, there is always the possibility that on the essay portion some clever student will make a brilliant point regarding some tiny point of law, even if I never intentionally meant to include it. Actually, it's more than a possibility – it happens often! This is a natural consequence of having bright students working with an open-ended hypothetical fact pattern calling for an open-ended essay response. Obviously, I can't hold it against the student who sees something I didn't, and in such a situation I will happily award an extra point or two, although not a windfall.

So, the bottom line is, the more you know, the better, but do not obsess about trying to learn all the finer points. Prioritize your studying based on what I explain next.

¹ Keep the Correspondence Principle in mind when using old exams to study: Old exams correspond to old semesters. So if you see an old exam and think, gee, this old exam seems to be heavy on patent subject matter, and that seems out of whack with this semester, since we spent little time on it, you would be right. Old exams are to varying degrees out of whack with the current semester. But your exam will correspond to this semester.

The focus list – what I will draw from in writing the exam problem: When I sit down to write the exam, in order to obey the Correspondence Principle, I will look for areas that were emphasized during our semester. To accomplish that, I will make particular reference to the following, which we can call the “focus list.” This is where you should concentrate your studies.

- the mindmap
- slideshows posted to the class website
 - problems and hypotheticals in those slideshows
- doctrine that was the subject of a case we read
- doctrine that was the subject of sustained attention in class
- doctrine that is the subject of extensive coverage in the McJohn book
- doctrine needed to avoid pitfalls (listed in the appendix to this document)

The main message is to not worry about small details. Instead, work on having a thorough understanding of the major concepts and the ones highlighted as having particular importance.

Major versus minor form of intellectual property: You will note that the list of topics on the syllabus is a list of the forms of intellectual property that a person can use as a basis for suit. Some are major, some are minor. That is, the topics on the syllabus are far from equal in terms of how much attention we have spent on them and how much real-world importance they have. Correspondingly, some will be covered heavily on the exam, some will not.

Let me list them out:

The **major forms** are **copyrights, utility patents, and trademarks**. You can be sure that these forms will figure prominently on the essay portion and on the multiple-choice portion.

What we can call a **semi-major form** is **trade secrets**. This will be a small part of the essay portion and a small part of the multiple-choice portion.

The **minor forms** are **moral rights, design patents, plant patents, plant variety protection, mask work protection, vessel hull protection, and the right of publicity**. Most of these will not be on the essay portion at all. Perhaps one or two of these minor forms will be seeded into the essay portion in an extremely minor capacity. Now, assuming we covered it in class, then it will definitely appear *to a minimal extent* on the multiple-choice portion. But there will not be a whole multiple-choice question for every minor form. Note that any given topic may not involve more than a part of one multiple-choice questions. So, for instance, vessel hull protection might appear as a single answer choice in just one question. In studying these minor forms, you should concentrate on understanding them in broad strokes. Don't bother memorizing the finer points.

All of this can be derived from the Correspondence Principle: The emphasis in class will track the emphasis in class and in the readings. So you should prioritize your studying on copyright, utility patents, and trademark, as well as, to a lesser extent, trade secrets.

Jurisdictional coverage: All the hypothetical facts on the exam will take place in one or more hypothetical or unspecified states within the United States, with no circuit court of appeals specified. You will not be tested on the law of any particular state, municipality, or circuit.

Kinds of questions (legal analysis, theory/policy, etc.): The essay portion of the exam will call only for you to provide legal analysis (e.g., to analyze the parties' legal positions, including possibly explaining how you would advise a client). There will not be a "theory" or "policy" type question that, for example, calls for you to provide arguments for a change in the law. On the multiple-choice portion, you might see a question that concerns theory. (Note that we talked about theory briefly during part of the class on January 28).

5. FORMAT

The exam will be similar in form to essay exams I have given in the recent past. To get a feel for them, check out my exam archive.²

The kind of fact patterns I tend to write: I try to make my exams interesting and engaging. They often have pictures, images, sidebars, and the like. In comparison to other exams, you may find that my exams are heavy on narrative, plot, character, and backstory. As a practicing lawyer, I found that real-life cases are heavy on drama and narrative detail. So I have strived to include the same in my exams. In my view, this gets the exam closer to the real-life practice of law than the kind of stripped-down one-paragraph hypotheticals you tend to find on the multistate bar exam.

A consequence of my writing exams this way is that the exam ends up containing factual details that, while useful for holding the story together, are not fulcrums for the legal analysis. So, for instance, sometimes photos or graphics offer something useful to the legal analysis, but sometimes they are just decoration. A student once asked me, pointing to a sentence in one of my old exams, "I know that every single sentence in a law school exam is put in there for some reason, so why did you put this sentence in the exam? How does it change the analysis?" Well, my exams aren't like that. There will be various details that don't matter to the analysis. This is the way facts come to your desk in real life: Some are very significant, some are merely useful, others are irrelevant. I aim for my exams to be similar to real case-files in this sense.

Don't get unduly anxious about dropped issues: Making things interesting and more realistic is not the only reason I write exams the way I do. I also do it to reduce arbitrariness. In my view, with a reservoir of facts that is both wide and deep, there is less at stake with any given issue. To be more specific, the fact-filled, broadly comprehensive, and relatively long nature of my exam hypotheticals reduces arbitrariness by increasing opportunities for students to show off their knowledge. Anyone can, in the pressure of an exam session, blow by something important. On my exam, that won't destroy your grade. Dropping an important issue here or there will not be disastrous if you do well with the rest of the material. In fact, I have found that the top-grade recipients in my classes have never exhausted all the possibilities for legal analysis. Not only that, I can confidently say that the top grades usually miss at least one significant issue that can be found among the B exams. In my view, this method of exam

² There is a link from my home page. Or you can go directly to http://www.ericejohnson.com/exam_archive.html.

design helps to develop a good overall picture of students' mastery of the course, rather than seeing who can walk a tightrope without slipping.

6. ORGANIZATION

Organization is very important in an exam response. In fact, I've found it to be so important, it is now my practice to take it largely out of the exam taker's hands.

For your exam I will provide you with a pre-determined organizational structure, broken up into various subparts. You will find examples of this in the exams in the exam archive. By requiring all exam responses to adhere to the same format, I can grade all the exams in the same way, which helps me to be as fair as possible.

For example you might get a call-of-the-question and subpart structure like this:

Analyze the parties' legal positions. Organize your response as follows, clearly labeling the subparts:

Subpart A: Discuss any issues concerning copyright and, if applicable, moral rights.

Subpart B: Discuss any issues concerning patents and trade secrets, and, if applicable, any sui generis rights or other forms of IP protection for inventions, industrial designs, or the like.

Subpart C: Discuss any issues concerning trademark (including trade dress, unfair competition, and related doctrines).

Subpart D: If there is anything else you wish to discuss, which does not belong in any of subparts A through C, please put it under this Subpart D.

Your subpart structure will look like this, although the way in which the subparts are divided up could be slightly different. I will design the subpart structure so that it breaks down the analysis in a logical, sensible way.

It is important that you understand that the subparts will not all be given equal weight. The purpose of the subpart structure is to organize everyone's responses the same way, not to signal how much time you should spend on something. For instance, with the above structure, it would not make sense to try to write as many words for Subpart D as for A, B, or C. Subpart D would necessarily deserve to be short based on our topic coverage this semester. Also, given this structure, it would likely make sense to spend somewhat more time – for instance – on A than C, because this semester we spent more time on copyright than on trademark. And, in keeping with the Correspondence Principle (§4, above), I will seed more issues on copyright than on trademark. At any rate, all your points will be totaled at the end, so if you've got more to say about a given topic, go for it. But in general, aim for a complete, balanced treatment, and use your judgment to determine how much analysis is needed with regard to any particular topic.

7. ABBREVIATIONS

I will include in the exam a table of pre-defined abbreviations for you to use in your response, if you like. Examples can be found among my more recent exams in the

exam archive. Feel free to use other reasonable abbreviations as well; although if they are not completely obvious, you should define them the first time you use them.

8. ISSUES WITH TEXT: REPEATING, WRITING, TYPING, ETC.

Here are some specific pieces of advice for your writing.

Repetition: Be complete, but avoid redundancy. Specifically, do not repeat the exact same analysis with substituted parties. I will not give double the points for the same content that appears twice. (Along these lines, computer users should probably not use the cut-and-paste function.) Instead, to the extent called for, you may incorporate analysis by reference to another portion of your answer. For example, it would be appropriate to say something like, “The analysis with regard to Party B is the same as that for Party A, except that _____.”

Spelling, grammar, etc: There are no points to be won or lost for spelling, grammar, or stylistic aspects of writing, so long as I can understand what you are saying. If grammar or spelling issues render text ambiguous, then it’s a problem. But not otherwise. Substantive content is what matters.

Computer-typed exams: Don’t worry unduly about typos. As long as I can understand what you are saying, you’re fine. There’s no premium on prettiness.

Handwritten exams: If you are handwriting, please write only on one side of the page in your bluebooks and use a blue or black pen. Skip lines. I cannot grade what I cannot read, so be sure that your handwriting is readily legible.

9. WHAT MAKES FOR A GOOD ESSAY RESPONSE

I have written an entire memo on what makes for a good essay response. It’s called *Tip Sheet on Exam Writing*, and there’s a link to it on the class webpage. You should scrutinize it: It tells you exactly how to maximize your grade by providing solid legal analysis.

10. SOME TIPS ON STUDYING

The most important thing in studying is to prepare for what you need to do on exam day. That means first of all to know what you are doing in terms of exam-writing technique. Use the *Tip Sheet on Exam Writing* for that. Then, when studying the content, concentrate on the focus list (in § 4, above). Finally, you should bring exam-writing technique and substantive knowledge together by working through old exams from the exam archive.³ Trading your responses with classmate is an extremely effective way to find your weaknesses and strengths. It may also help you figure out what topics you’d like extra help on in office hours.

Wypadkis: In some prior semesters when I taught Intellectual Property, I administered the exam on a limited open-book basis where students were given to use during the exam a copy of a class-wide group outline that students constructed cooperatively using wiki software. This group outline was called the “wypadki.” For various reasons, I have stopped doing this, and I have moved to a no-limits open-book exam format. The legacy of the wypadkis, however, is that the old ones are available to you, if you find them useful, in studying and/or in constructing your own outline.

³ Again, that’s http://www.ericejohnson.com/exam_archive.html.

There are links to the prior-semester wydadkis on the class webpage, and you can download them in PDF format or editable DOCX format.

11. FINAL THOUGHTS

Remember, it's an open-book exam, so don't get too anxious. Study the big concepts, pay attention to the focus list (in § 4, above), and get a good night's rest. I wish you the best of luck!

APPENDIX: IP PITFALLS

The following are "pitfall" areas – that is, aspects of the law that, if misunderstood or neglected, can result in a surprising loss or substantial liability. Because of the potential treacherousness of these areas in practice, I am especially keen that you learn them well and know them for the exam:

- Copyright:
 - Understand that the author is the initial owner of a copyright – not necessarily the person who commissioned or paid for the work.
 - Be able to determine whether a hirer will be deemed the author of a work under work-made-for-hire doctrine.
 - Understand that co-owners of a copyright can independently grant a non-exclusive license and their default obligation to one another is only for an accounting (i.e., sharing of profits, if any).
 - Understand that transfer (assignment or exclusive license) requires a writing signed by the transferor.
 - Recognize that there are limited opportunities to terminate transfers, allowing the copyright to revert to the author or author's heirs.
 - Understand that existing derivative works can continue to be utilized after termination.
 - Be aware that many foreign works first published with authorization before 1923 had copyrights restored by Congress and that this was upheld as constitutional.
- Patent:
 - Understand that waiting too long to apply for a patent can result in the loss of prospective patent rights
 - Be able to apply 35 U.S.C. §102(a) & (b) under current law (i.e., the 2012 AIA version).
 - Recognize that enablement problems in a patent application cannot be cured without loss of the original filing date.
 - Understand that co-owners of a patent can independently grant a non-exclusive license and that patent law gives them no obligation to one another to share any profits.
- Trade secret:
 - Understand that trade secret protection is incompatible with patent protection, since trade secrets must remain secret, and patents must be published.
 - Understand that trade secret protection is lost when the trade secret stops being secret – whether or not as a result of the fault of the trade

- secret's owner.
- Understand that trade secret protection is lost when the owner does not take sufficient measures to maintain secrecy.
- Trademark:
 - Understand that a trademark's ownership is established by use in commerce, not by being the "author" of the mark.
 - Understand that two persons cannot be independent co-owners of a trademark (same mark in the same market), as that would mean the mark is not associated with a single commercial source.
 - Understand that a trademark need not be registered to be the basis of liability.
 - Understand the advantages of federal registration of a mark, including preventing future junior users from establishing rights.
 - Corollarily, understand the disadvantages of foregoing federal registration, including the possible loss of rights to a more junior user who registers.
 - Understand that trademark protection is destroyed by naked licensing, assignment-in-gross, and abandonment.
 - Understand that a mark can become generic, and if it does, this destroys trademark protection.