

Media & Entertainment Law

University of North Dakota School of Law
Fall 2011

Eric E. Johnson
Associate Professor of Law

SYLLABUS

CREDIT: This is a graded class worth three credits, and it partially fulfills the skills requirement for the juris doctor as a Level 2 Skills Course.

GOALS: I intend for this class to provide meaningful training for the practice of law in the context of the entertainment and media industries, including both transactional and litigation practice. By the end of the course, you should have a command of the principal legal doctrines that shape media and entertainment, a knowledge of basic industry vocabulary, an understanding of the litigation and dealmaking environments in media and entertainment, and a rudimentary understanding of contract drafting. Note that the relevance of what we will learn will go well beyond the media and entertainment realms. The knowledge and skills you acquire here will be applicable to legal practice in nearly any substantive area.

CLASS WEBSITE: Various materials and links can be found on the class website at: http://www.ericjohnson.com/courses/mel_11/index.html. To avoid all that typing, just go to my homepage at ericjohnson.com and find the link on the upper left.

SUBJECT MATTER AND COURSE DESIGN: Unlike torts, antitrust, family law, or many other law-school subjects, “media and entertainment law” is not a body of law, per se. For that matter, neither is “entertainment law” nor “media law.” Subjects such as these are professor- or lawyer-crafted grab bags that draw together law from across a range of disciplines. What gives these subjects coherence is not the law itself, but a particular range of parties and problems. So when people say “media law,” they are usually referring to the law relevant to newspapers, magazines, book publishing, and broadcast journalism. The term “entertainment law” generally refers to the substance and practice of law in the context of television, film, music, live theatre, and radio. You will find that the actual doctrinal foundation of media and entertainment law consists of constitutional law, torts, communications regulation, intellectual property, and civil procedure, as well as law from various other areas. Because of its artificiality and lack of inherent coherence, it can be a challenge to organize. We cannot, for instance, begin with prima facie elements, work through defenses, and then finish up with remedies, as we might with torts or contracts. That being said, the nature of the subject, with its scattered doctrinal foundations and clustered problems, presents a sensible way to tackle it in a law-school course: First, we will proceed law-by-law to learn the necessary doctrinal framework. Then, we will proceed problem-by-problem to see how that law is applied in well-worn industry contexts.

Thus, the course will be divided into two basic parts: In the first part, “General Background Law,” we will learn the substantive law that forms the foundation for deals and disputes in media and entertainment. During this portion of the course, our material will be arranged on a subject-by-subject basis. In the second part, “Specific Contexts,” we will apply the substantive law we’ve learned to the kinds of repeating situations that come up in media and entertainment, and we’ll also learn some unique legal doctrines that apply in certain circumstances.

This mode of course organization places a particular responsibility on you as a student. You cannot wait until the end of the semester, right before the exam, to learn the law. The second part of the course will be a waste if you don’t bring to it the law from the first part. So please keep up.

MATERIALS: There is one required texts for this course that is sold as a printed book:

Dealmaking in the Film & Television Industry (3rd Edition). Mark Litwak. Published by Silman-James Press, 2009.
ISBN: 1-879505-99-5

In addition, you will need to use materials I have edited and made available online. First is a book called *Media & Entertainment Law Compendium*, which will be downloadable in discrete sections published as pdf documents. In addition, there is a collection of source documents – such as contracts and letters – gathered together as *Media & Entertainment Law Compendium Appendix*. Both the main compendium and the appendix may be accessed from a link on the course webpage.

Other materials will be required reading, viewing, or listening. These will either be linked to on the class website or will be placed on reserve in the library.

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 media and entertainment law, the better. I personally have found that commercial outlines are a great way of gaining a basic understanding of the blackletter law in a subject. Unfortunately, I do not know of any commercial outlines for entertainment law or for media law, as such. There is a “nutshell” on Entertainment Law, published by West, which one student said was helpful. In addition, since the subject matter of the course comprises other areas of substantive law for which there are good outlines, and you may wish to consult the relevant portions of commercial outlines in constitutional law, intellectual property, torts, and any other subject areas we go through. If you do use study aids, I would appreciate your letting me know your experience with them – whether good or bad.

IN THE CLASSROOM: Do not eat in class. Do not chew gum audibly or with your mouth open. Do nothing that might disrupt class or distract your fellow students.

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.

COURSEWORK: This course is a skills-development course, and it is credited as a Level 2 Skills Course. Because of the emphasis on skills in this course, the work we do will be much more varied than you are probably used to in law school. In fact, this

course may more closely resemble a workshop or lab section from your undergraduate education than any traditional law-school classes. Thus, toward the end of developing skills, you can expect considerable variety in your assigned work. We will, of course, have assigned readings that we then discuss in class. But we will proceed in other ways as well. This course will involve homework assignments – especially for the purpose of learning practical skills and techniques, such as drafting. You will be required to present your results sometimes in writing, sometimes orally. You will be asked to work sometimes in groups, and sometimes by yourself. Note that exercises and homework may not be tied directly to the current readings under discussion, but may be in preparation for something we will encounter down the line. We will also have some low-stakes quizzes. In the past, I’ve found that quizzes are a good way to encourage students to master fundamentals before moving on to other work – and students have reacted positively to my using them in this manner.

The exercises and quizzes will factor into your grade only in the sense that they will count as class participation. So, if you occasionally miss the point of an assignment and perform very poorly, don’t worry about it. This is a place to learn and make mistakes.

I expect you to attend class faithfully. Because of the skills/workshop mode in which we will be proceeding, attendance is particularly important. That being said, occasional absences are understandable. Likewise, if there is a homework exercise you cannot do because of an outside contingency, that’s acceptable. Infrequent absence and an occasional missed assignment won’t ruin your grade. That being said, excessive absence, tardiness and/or inactivity will impact negatively on your grade. If you have personal circumstances that are substantially interfering with your ability to attend or do the work, or if you are otherwise concerned about your class participation, please talk to me.

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. Take note: You may not waive anonymity. Self-identification on the exam or otherwise acting to destroy anonymity during the exam or afterwards 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 two ways. I may add or subtract from some 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 many will remain unchanged. I will adjust grades downward if appropriate.

Reasons for a positive effect of class participation on the overall course grade include habitual preparedness and engagement, volunteering in discussions, and showing occasional excellence in class discussion or in exercises.

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 law school, like all other educational environments, is a place to learn, and that necessarily implies that this is a place to fumble and make mistakes. I do not ask questions or 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. Once you are a full-fledged lawyer, confidence will be indispensable. Now is the time to find your footing. Be bold.

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.

At least once during the semester, I hope you will come by office hours and say hello, even if you have no questions and nothing to discuss. That's not a requirement, just a request.

If you anticipate that you may be asking me to write you a letter of recommendation in the future or to serve as a reference for you, then please make sure you do the following at the end of the semester: (1) Send me an e-mail letting me know of your intention, (2) attach your résumé to the e-mail in .pdf or .doc format (not .docx), and (3) use the subject line "request for reference." Your doing so will enable me to make some notes about you while your classroom performance is fresh in my mind.

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.

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.

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 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.

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.

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.

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.

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, including on both sides of the piece of paper. 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 course wypadki to reference during the exam.

Other than the copy of the wypadki that you are given at the exam and the reference sheet you bring, no other informational or reference materials will be permitted, except as otherwise allowed 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.

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.

The material covered by the exam will potentially comprise all the material covered in the course. That is, if we talked about it in class or if it was in the assigned reading or exercises, it is within the scope of the exam. This should not, however, be a source of undue stress. Be assured that the emphases of the exam will mirror those of class. In other words, the exam's topic coverage will be not be substantially disproportionate to that of the course. Put still another way, I want you to study everything, but if you fail to master a minor point, relax: The results will not be catastrophic.

I may provide a more specific description of the examination at a later time. You can view copies of my past exams in Entertainment Law and Media & Entertainment Law in my exam archive at http://www.eejlaw.com/exam_archive.html (alternatively, you can simply access the link from the ericejohnson.com homepage).

COURSE ORGANIZATION: The planned organization of the course is below. The structure is subject to minor adjustment. Reading assignments for each module will be given out in class and will be archived later, updated from time to time, in a document on the class webpage. Note that the modules listed below are not intended to correspond to days. Thus, some days we may cover more than one module, and some modules will take more than one class day to cover.

PART I: GENERAL BACKGROUND LAW

- Module 1:** Sunshine, FOIA, and Access Rights
- Module 2:** First Amendment Freedom of Expression: Incitement
- Module 3:** First Amendment Freedom of Expression: Obscenity
- Module 4:** First Amendment Freedom of Expression: Injunctions and Prior Restraint
- Module 5:** First Amendment Freedom of Expression: Questions of Medium
- Module 6:** Press Freedom and Government Investigation
- Module 7:** Regulation of Advertising and Broadcasting
- Module 8:** Tort Liability for Audience Actions
- Module 9:** Copyright Basics
- Module 10:** Copyright and Music
- Module 11:** Trademark
- Module 12:** Right of Publicity
- Module 13:** Privacy Torts
- Module 14:** Defamation
- Module 15:** Online Safe Harbors
- Module 16:** Anti-SLAPP
- Module 17:** Regulation of Agents, Managers, and Attorneys

PART II: SPECIFIC CONTEXTS

- Module 18:** Paparazzi and Gossip Rags
- Module 19:** Record Contracts
- Module 20:** Pitches
- Module 21:** Film & Television Production
- Module 22:** Film & Television Writers
- Module 23:** Film & Television Directors and Actors
- Module 24:** Film & Television Distribution
- Module 25:** Reality Programming
- Module 26:** Media Mergers and Acquisitions
- Module 27:** Collaboration
- Module 28:** Profit Participations
- Module 29:** Blogging

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.

I hope you enjoy the course.

– EEJ