Cyberlaw Spring 2008 – Final Exam Memo

To: Cyberlaw Spring 2008 Students and Future Cyberlaw Students

From: Professor Risch

Date: June 2008

This memo follows the grading (and release of grades) in Cyberlaw. It is intended to aid current students in understanding their grades, and to aid future students in preparation for class and the final exam in future years. This memo should be read in conjunction with the highest scoring exams, which will be available if the students with those exams permit. I am happy to meet with any of you individually to review your exam.

I enjoyed class this semester and I enjoyed having all of you in class. I was pleased with the performance of all of the students on the exam. The exam asked you to address many issues ranging from basic to advanced, and every student showed basic proficiency in core areas and most students showed some advanced analysis. The primary differential in grading depended on the student; some wrote outstanding answers but missed several issues, some hit many issues but did not fully analyze them, and some struggled with both (and some did quite well with both!).

The following was my basic grading methodology. I graded both for finding an issue and for your handling of the issue. Unless you applied the wrong rule or applied the right rule incorrectly, your conclusions had no effect on your grade. The questions were clear about which types of claims and defenses should be discussed in which section. Some people put the right claims and defenses as answers to the wrong question. I did give you credit for those answers (to the extent they were correct), but I did award fewer organization points where this happened. I also gave points for organization, creativity, and "other" factors that made the exam answer better (or worse) than its peers.

I realize that there was a lot to say and only 4200 words. That said, I believe the word count was fair – there was not a single answer, including the highest scoring answer, that could not have benefited from cutting out irrelevant "fluff" and putting in more and/or better analysis. I discuss "fluff" more below. There were several people who received A's and high B's writing less than 4000 words.

Finally, I should address grading of non-law students. As you know, we had several non-law students. They were graded on a slightly different curve, based in part on the fact that they had no experience in writing law school exam answers and had no sample cyberlaw exams by me to look at as a model. However, I may not always grade non-law students on a different scale, now that a sample exam and this memo are available.

The following is a discussion of some key points from the exam – the "top and bottom" points. This section is directed primarily at future students to accentuate the point that despite the fact that the sample exams were quite good, there were still many issues in the exam to be found: the highest scoring exam scored 60 points out of a total of 93 available.

Top three: The following are three points that most of the class handled quite well.

1. For the most part, the class handled the trademark issues quite well. Analysis was complete, well reasoned and developed, and well written. This was definitely a strong point for the class.

2. Most people handled the copyrightability, direct infringement, and fair use questions having to do with the photograph well. People addressed the fair use factors, and considered the types of infringement that might have occurred, including addressing loading in RAM.

3. Almost everyone did quite well on the jurisdiction short answer. The answers were clear, concise, and to the (correct) point.

Improvable three: The following are three points that could have been most improved. The discussion is much longer than the positive points because the positive points are reflected in the top answers and most did well on them anyway!

1. I was most disappointed that almost no one addressed and no one fully addressed the secondary liability of YourPlace. While a few people spent time addressing secondary liability of MyPlace, this was a relatively simple question as Cy gave MyPlace the right to display the photo, Cy posted the photo himself, and MyPlace did not "aid" anything other than making the photo available at Cy's request. YourPlace, however, while not liable under the server test (see discussion below) might have been secondarily liable for assisting others to infringe. The Perfect10 v. Google case discussed three possible ways that YourPlace might have caused others to infringe: 1. The original poster infringed (not an issue here, as MyPlace was not infringing), 2. Users infringed by storing a copy in their local web browser (the court said that this was fair use), and 3. Users stored copies of the photos on their own computer (the court said that there was no evidence to support this). Add to this 4. The potential that the end uses of the photo are publicly available (at a kiosk, for example) and thus there is a public display concern (e.g. Frena). While there was no such liability in Perfect10, here there was a good chance that YourPlace customers were actually saving the photos and other copyrightable information in their databases to conduct marketing. Regardless of how you come out on this question, it is something to be addressed. Spotting this issue would have opened up a lot of areas of analysis, such as whether YourPlace gets a safe harbor under 512 for providing hyperlinks, as discussed in Google v. Perfect10.

2. While people did well on the photograph, almost no one addressed copyrightability and infringement of textual works. There were two issues here. First, the YourPlace profile states that there is a direct copy of the text from Cy's MyPlace page. This is not an inline link, and thus is direct infringement (reproduction and display rights) of Cy's rights, assuming the text is copyrightable, which could have been addressed. Second, the entire MyPlace page is loaded into RAM, and MyPlace arguably has a copyright interest in the entire page.

3. Almost no one got the short answer question about the anonymous commenter seeking protection under 230 right. Here is the issue – the commenter received the information from another service provider (YourPlace) over the internet. As such, the commenter could argue under at least three cases – Barrett (blog post), Batzel (email), Drudge (paid-for reports) – that information obtained over the net from another is immune. Most people said that 230 doesn't apply because the commenter is the "speaker" of the information, but 230 explicitly protects those who might otherwise be speakers – the key is if one is a "developer" of the information, and here the commenter did not develop the information. Indeed, only a couple people caught this same issue in the main essay on defamation – YourPlace might argue that the credit report came over the internet from a third party, and thus was protected under 230 under Drudge. On a side note, many people stated that 230 only applied if websites were vigilant about takedowns – this is directly opposite the law – 230 applies whether or not a site responds to complaints. A lot of people showed confusion between the 512 safe harbors and the 230 safe harbor.

The negatives above are intended to explain why your grade was not as good as you expected, and it is designed to aid future classes. Please do not take it as criticism; as I said above, I was very pleased with the quality of the exam answers and you all showed at least a basic understanding of cyberlaw.

I also want to provide a couple final notes on exam taking – these notes are intended to aid you in future law school exams, but more importantly to aid you on the bar. I suggest you also look at my Fall 2007 Patent Law memo, which has other advice. It appears that most of you followed the advice from that memo because many of the things mentioned there did not appear on your answers, so the suggestions below are additional:

1. Read the instructions and the exam. Many students left out discussion in areas I specifically said should be addressed, and others addressed the wrong questions. Still others left out key facts that were in the question. Read instructions and questions carefully – you might find that you save time and write a better answer.
2. Pay attention to new cases and special assignments. I was surprised by the number of people that said Kelly v. Arriba meant that YourPlace was liable for in-line linking of the photo, and even more surprised by answers that mentioned the server test of Perfect10 v. Google, and *then* said that the test would not apply and that Kelly v. Arriba would render liability. Here's the problem with that: a) Kelly v. Arriba never held that the in-line linking created liability. The lower court ruled this (in a note in the textbook, which I think I removed from the assignment list). The Ninth Circuit *reversed* the lower court and said that it was premature to answer that question on summary judgment; b) Perfect10 v. Google comes *after* Arriba in the *same circuit* and *specifically holds* that such activity is not infringement under the server test, c) I recall saying in class that Perfect10 answered this question that Arriba left unanswered, and d) we spent *two days* on Perfect10 – a special assignment – and we spent maybe 5 or 10 minutes on Kelly v. Arriba. The lesson is that when preparing for a final, consider the special cases you have been given. Indeed, Perfect10 applied specifically to the secondary liability question of YourPlace as well, as discussed above.

3. Tackle the tough issues. Essay exams often have issues deliberately designed to be difficult. If a question is difficult, then view it as your opportunity to show you understand the nuances of the law! Everyone will get the easy questions (though you have to do those too!).
4. Wisely choose where to expand. Whenever you have limited time, and especially where you have limited space, you have to choose how much to write on any given point. You should write more on the difficult questions and less on the easy questions. For example, several people discussed that the photo was copyrightable because it was fixed in a tangible medium, etc. This is an easy question, though, so you could write "the photo is copyrightable; it is original, fixed in a tangible medium (the hard disk), and reproducible, and it fits in one of the specific examples of copyrightable material." This is better than: "Section 101 defines a copyrighted work as ___, The photo is fixed because __. It is probably original because __." Another concrete example was the clickwrap license of MyPlace and also whether it was unconscionable. The law is pretty clear that clickwraps are binding, and here it was being asserted *against* MyPlace, so it would be difficult for the company to argue that it was not binding or that it was unconscionable. Many people spent paragraphs dealing with an issue that needed no more than a sentence or two. The more difficult issue was the browsewrap agreement with YourPlace, and few people addressed that issue in detail. The hard part, of course, is determining what are the easy and what are the difficult issues, but that's one of the differentiators on the exam.
5. Chase down all paths. Many people said: "this likely won't be __ because __." But what if you're wrong? What if the court reads the facts differently? You should list ALL of the reasons why something may or may not be a viable claim, and what the answers are, unless it is so outlandish that it is a waste of time, and even then it may not hurt to say why it is so outlandish.
6. Consider what we covered in class. While those that covered trademark issues did so quite well, several people did not discuss trademark issues at all! We spent literally weeks on trademark – if you have completed a long essay exam and not mentioned trademarks, you might want to double back and see if you missed something. Similarly, some students spent several pages discussing a small point we discussed in class for thirty seconds. While flagging the issue and discussing it is a good thing, such disproportionate treatment is probably not going to help you given limited time and space.
7. Bad intent is only relevant if it is relevant. Many people emphasized many times the "bad intent" of YourPlace with varying degrees of adjectives. However, copyright infringement is strict liability. Even fair use assumes intentional copying, but allows it anyway. There are places where motive matters (like in trademark), but spending valuable time and words on issues of intent can hurt you where intent is irrelevant. First, you lose time and words. Second, your answer does not show a clear understanding of the material.
8. I cannot overemphasize how important analysis is. This is the only way I know that you understand the issue!

I realize that all of the above tips are easier said than done. However, they are areas on which I suggest you focus as you prepare for exams and for the bar, as they will no doubt give you a leg up.