Cyberlaw Spring 2009–Final Exam Memo

To: Cyberlaw Spring 2009 Students and Future Cyberlaw Students

From: Professor Risch

Date: July 2009

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 very pleased with the performance of all of the students on the exam. In general, these exam answers were improved from last year. 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 used blind grading; I did not know whose exam I was grading. 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. Some types of conduct, however, should not be immunized even without reinterpreting the statute.

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. However, I may not always grade non-law students on a different scale.

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 65 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, like last year, 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 did a good job discussing secondary liability for copyright infringement for Cy's uploading of a copyrighted image. Discussion was much improved over last year.

3. Answers relating to Section 230 were much improved–almost everyone got the answers correct. NOTE: one of the top scoring exams got the 230 question answer wrong; beware when using sample exam answers as a guide!

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. Discussion of trademark defenses was underdeveloped in general. There was a lot to say about nominative use, fair use, first amendment, etc. Many people didn't mention any of them, and others just noted them but had no discussion.

2. Almost no one discussed infringement of GettaLife's copyright with respect to Cy's unauthorized login. By logging in as Christian, Cy ostensibly had no authority to make copies of the website in local RAM, etc. Without authority, Cy made infringing copies. This is a minor point, but a critically important one in understanding cyberlaw.

3. Many answers focused on the wrong things in the breach of contract section. In general, there was too much discussion about clickwrap v. browsewrap (this was a clickwrap license, so browsewrap is mostly irrelevant), and too little discussion about whether Cy actually breached the contract. There was a good argument that Cy did not breach the contract at all as written, but few spent the time exploring the facts to make that determination.

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 final notes on exam taking. I suggest you also look at my Fall 2007 Patent Law memo, Fall 2008 Patent Law memo, and Spring 2008 Cyberlaw Memo which have other advice. It appears that most of you followed the advice from those memos because many of the things mentioned there did not appear on your answers, so the suggestion below is additional:

1. Never assume that a registration, patent filing, etc. is conclusive of the validity of the IP. Courts can often invalidate a copyright, trademark or patent after the fact if one of the required elements is missing. Many assumed that the trademark was registered, though nothing in the question indicated this (tm means someone claims a trademark without a registration - ® implies registration). Based on this faulty assumption, many answers said,"therefore, the required distinctiveness, etc. is present." A better way to go would be to address each of the elements separately unless you are instructed not to.

I realize that all of the tips in these memos 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.