

Patent Law Fall 2009 – Final Exam Memo

To: Patent Law Fall 2009 Students and Future Patent Law Students

From: Professor Risch

Date: February 2009

This memo follows the grading (and release of grades) in Patent Law. 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 are available on the course web page. I am happy to meet with any of you individually to review your exam.

This was a small class, and I really enjoyed class discussion. I said at the beginning of the semester that it could be a great class if you were prepared, and you were. This preparation showed on the exam, as you all did well.

A note about 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 defenses should be discussed in which section. Some people put the right defenses as answers to the wrong question. I did give you credit for those answers (to the extent they were correct), but I also awarded fewer organization points where this happened.

There was an unfortunate typo in question 4. The question talks about Wire Company, and then asks about BTC's liability. You each tried to handle the question different ways, but I thought the mistake confusing enough (and the points at stake low enough) that I am not counting any answers in the total. All grades will be based on Questions 1-3, and I have deleted the answers to Question 4 from the sample answers.

The following is a discussion of some key points from the exam – the “top and bottom” three. 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.

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

1. The discussion of damages this year was quite good.
2. As in prior years, students handled priority and date of invention under 102(g) quite well - this was especially difficult with two dates of invention. I do note that if you separated the claims out this was an easier exercise.
3. Identification of the relevant prior art for obviousness and application of the Graham factors was something you all did well on this year.

Improvable three: The following are three points that could have been most improved.

1. Claim differentiation: Again, the most disappointing aspect of the exam was the failure to address each claim separately. This was a bit surprising, given that last year's memo said the same thing. Only two exams separated the claims in analysis, and it is no surprise that they received the A+ grades. Analyzing infringement, invention dates, anticipation, and obviousness gets a whole lot easier when you treat each claim as a separate invention – with separate invention dates, separate claim elements, etc.
2. Utility: The invention of claim 1 shocks people, and thus is arguably inoperable. Not many people discussed this and went right to claim 2. This may be an offshoot of the failure to distinguish the claims.
3. Claim construction: Just what is a wire/fabric combination? This determines whether Claim 2 is infringed or not, but few took on this issue directly. Several students wrote that the "claims need to be construed," but then failed to do so. This is an example of what I call "note dump" – it is not enough to know that claims must be construed ; actually doing it shows that you understand the issues.

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 a good basic understanding of patent law.

I don't have many general exam guidelines to add to the ones in my prior patent law and cyberlaw memos. You all wrote well from an organizational/style standpoint. I would reiterate the importance of separating the claims into separate inventions and treating them that way.