Cyberlaw Spring 2010 – Final Exam Memo

To: Cyberlaw Spring 2010 Students and Future Cyberlaw Students

From: Professor Risch

Date: July 2010

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.

I realize that there was a lot to say and only limited 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 72 points out of a total of 93 available. Note that even the highest scoring exam got

some things wrong, so make sure you look at *all* of the sample exams to get an idea of what the best answer might look like.

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

1. As in prior years, 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 also did a good job with browsewrap terms.

3. Many more people than I expected picked up the nuances of the trespass to chattels argument, especially with the spilled coffee.

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. Like last year, 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. These were the core defenses here, and most were too quick to assume that such defenses would fail.

2. While just about everybody spotted Cy's direct infringement by uploading the photo, bery few people picked up on the potential for secondary liability of Cy by uploading the photo. When Cy uploaded the photo, he made it possible for others to download, display, and distribute the photo in a variety of ways. Now, such liability is pretty unlikely after Perfect10 v. Google, but it was important to discuss nonetheless. Some of my evaluations noted that I focused on the technical in many of these cases – the reason I do that is that you cannot understand potential liability if you do not understand what is happening to the image, text, trademark, etc., in question. I can teach you the black letter rules, but you cannot apply them if you cannot see the factual pattern arise. Similarly, few people did well on Question 3, discussing secondary liability (and recognizing that Netcom immunizes direct infringement by the service provider). We spend a full 1.5 hour class period talking just about Netcom, and several class periods discussing secondary liability and the safe harbors, so this was a bit disappointing.

3. Few students (maybe two or three) caught that the iPad had never connected to the internet at the time of Cy's access to it. As a result, there was an argument that the iPad was not a "protected computer" under the CFAA, especially where the access to it was on the device itself rather than over a network. Those that did catch the issue did a good job of pointing out that the design was for interstate commerce, and that it later connected.

The negatives above are intended to explain why your grade might not have been 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 prior memos in both Patent Law and Cyberlaw (all available at http://www.casesofinterest.com), 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 any element of any doctrinal test is automatically met. It may very well be, but think about it first. What separates the best answers from good answers is the ability to find and question the nuances in every single element. The professor know where the lines are drawn in doctrine (and where they might be gray) and wants to see if you know the doctrine well enough to see those lines as well. This may seem a bit unfair, as there is no way the professor can cover all branches of analysis of every rule. However, the best students read the cases carefully and know the rules well enough (even if not fully explored in class) to recognize discrepancies. Part of your study habits should be to fully explore each prong of each rule with past exams and your own hypotheticals. If you take practice exams by quickly going through to make sure you know the elements of each test, but no more, then you are doing yourself a disservice, both in law school and – more importantly – in practice, where knowing an element's nuances can mean the difference between winning and losing a case.

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.