

## IP Survey Fall 2010 – Final Exam Memo

To: IP Survey Fall 2010 Students and Future IP Survey Students

From: Professor Risch

Date: February 2011

This memo follows the grading (and release of grades) in IP Survey. 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, are available for review. 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. 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. 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 3700 words.

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 70 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. The class handled the trademark liability issues quite well. Analysis was complete, well reasoned and developed, and well written. This was definitely a strong point for the class.
2. While a few people missed the issue, most people did a really good job on the trade secrets issues. That said, there was a downside –some of you well! I started getting nervous when your

trade secret answer, outstanding in all respects, took up half of the pages of your answer. This left too little room to discuss other issues, and was probably too much analysis of an issue that we only spent three days of class on. I did give extra points to really good answers, but a tip for limited word exams is to measure what you say until you know all the issues.

3. The class generally did well with obviousness analysis – pointing out the prior art and discussing how it differed from the claim.

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 fair use in particular. Many people didn't mention it at all, and others just noted the defense but had no discussion.
2. The copyright infringement analysis was generally weak. A strong point was the distinction between factual and legal copying. However, the analysis of legal copying was usually incomplete. We spent a lot of time discussing the abstraction-filtration-comparison test of Nichols and also did an exercise in class where we applied the "idea" of the New Yorker's "everything outside of New York is small" map. When it came to the exam, however, people spent almost no time going through this analysis. Few abstracted out the different levels of copyright – the idea of auto-tune comparison, the method for solving the problem, and the specific source code that was copied. Even those that cited *Computer Associates v. Altai* (an unassigned case) didn't do this. Instead, most jumped to the five lines of code copied (good) without considering whether the code was something that might be filtered out as a method or under merger (bad). The irony is that most people did well discussing those very concepts in the copyrightability section but didn't transfer it down to the infringement section.
3. Only two students in the class considered whether the device had any trade dress protection, and even those two students did so in a sentence. After all the time we spent looking at trade dress protection of spring-loaded signs and chocolate shells, I was hoping more of you would flag that issue as a potential (though probably losing) claim. A couple of other students considered whether the device had copyright protection and then considered the useful articles exception. The problem with that analysis (which got some credit) is that those students tended not to look at the software as copyrightable and missed points there.

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 intellectual property.