TEACHING AN INTELLECTUAL PROPERTY SEMINAR THROUGH THE LEGAL LITERATURE[1]

The content and application of Intellectual Property ("IP") law are becoming increasingly dominated by new and ever more complex technology. The rapid changes and developments occurring with respect to the subject matter of IP are reflected not only in the substance of what we teach but also in our teaching methodologies. Yet, as the famous saying goes, the more things change, the more they stay the same. Despite all the glitz and glamour surrounding IP over the past two decades, the fact remains that IP law, like any other area, is best taught and learned through a careful application of the lost art of reading. Law students of this generation are representative of their peers in other disciplines in that they are far more comfortable with visual learning as opposed to plain old reading. To be sure, law students spend a lot of time reading. In the majority of their courses, however, the reading is geared toward mastery of subject matter on a macro scale. The academic experience of reading a law review article, or even an academic press book, in order to absorb its essence on a micro level typically is not a part of the law school experience. But it should be. The seminar format provides the ideal educational vehicle for exposing students to meticulous readings of law review articles in their entirety.

I have taught seminars exclusively through the legal literature in various formats. My initial foray into this venue in 2003 was a seminar on Moral and Publicity Rights in which I assigned five articles on the right of publicity and five on moral rights.[2] Later, due to a generous donation by an alumna, I moved to a format in which I host about five professors each year who present works in progress on various copyright issues. The students analyze each article in class the week prior to the guest speaker's lecture. The format I am using this year at both DePaul and Tulane relies on the draft of an academic press book I am writing on moral rights as the basic text for the course,[3] supplemented by readings of published law review articles on complementary topics such as originality,

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[1] © Roberta Rosenthal Kwall, Raymond P. Niro Professor of Intellectual Property Law, Founding Director, DePaul College of Law Center for Intellectual Property Law and Information Technology. Many thanks to Irene Calboli and Michael Madison for helpful comments and suggestions.

[2] On the right of publicity: Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights,* 81 CAL. L. REV. 125 (1993); Roberta Kwall, *The Right of Publicity vs. The First Amendment: A Property and Liability Rule Analysis,* 70 IND. L.J. 47 (1994); Roberta Kwall, *FAME*, 73 IND. L.J. 1 (1997); Justin Hughes, '*Recoding' Intellectual Property and Overlooked Audience Interests,* 77 TEX. L. REV. 923 (1999); Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity,* 49 DUKE L.J. 383 (1999). On moral rights: Russ VerSteeg, *Federal Moral Rights for Visual Artists: Contract Theory and Analysis,* 67 WASH. L. REV. 827 (1992); Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation,* 24 RUTGERS L.J. 347 (1993); Roberta Kwall, *Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the Twenty-First Century,* 2001 UNIV. OF ILL. L. REV. 151 (2001); Ilhyng Lee, *Toward an American Moral Rights in Copyright,* 58 WASH. & LEE L. REV. 795 (2001); Roberta Kwall, *The Attribution Right in the United States: Caught in the Crossfire Between Copyright & §43(a)*, 77 WASH. L. REV. 985 (2002).

[3] ROBERTA ROSENTHAL KWALL, THE SOUL OF CREATIVITY: SHOULD INTELLECTUAL PROPERTY LAW PROTECT THE INTEGRITY OF A CREATOR'S WORK? (forthcoming, Stanford University Press).

Electronic copy available at: http://ssrn.com/abstract=1021891

creativity theory, and the history of the copyright clause,[4] as well as works in progress presented by a limited number of guest professors. In most years, I try to include a practitioner during the semester to discuss some interesting litigation in which he or she has participated. This lecture provides the students with a refreshing change of pace and a break from the usual targeted academic focus.

Although the exact contours of each seminar I have taught in this manner have differed, they all share the goal of requiring students to read thoughtfully works of secondary literature in their entirety rather than excerpted versions. To get a feel for how popular the legal literature seminar format is among our colleagues, I have spoken informally with IP professors and also posted an inquiry on the IP Profs Listserv asking colleagues who do similar types of seminars to contact me. Based on these informal inquiries, it appears as though at least nine other professors use somewhat similar models, although I strongly suspect there are many more.[5] I will discuss further the specific mechanics of my own courses in Part II, but initially I explore why the legal literature approach to IP seminars is valuable.

I. THE MERITS OF THE LEGAL LITERATURE APPROACH

There are numerous reasons why I like the idea of teaching an IP seminar though the legal literature. As suggested earlier, one important factor is that there really is no other place in the law school curriculum in which students have an opportunity to read a law review article in depth just for the sake of reading the article. Specifically, although students may read parts of law review articles for various legal writing assignments, or even as part of assignments for other courses, in these instances the reading is usually geared toward the objective of learning the material in order to accomplish the specific task of writing a memorandum or performing well on an exam. In the seminar format, however, students have a luxury they do not enjoy elsewhere in law school—the ability to read an article just for the sake of learning and enjoying the material without any other end in mind. In this way, the legal literature seminar affords students a novel and, according to many of my students, much appreciated opportunity.

A related benefit is that teaching a seminar through the legal literature allows students to examine a particular area through a multi-dimensional perspective. In selecting articles for inclusion in a given course, I always try to approach a designated topic from a variety of perspectives so that students can receive first-hand exposure to the

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[4] The law review articles I am assigning this year include: Julie Cohen, *Creativity and Culture in Copyright Theory,* 40 DAVIS L. REV. 1151 (2007); Cyrill Rigamonti, Cyrill Rigamonti, *Deconstructing Moral Rights,* 47 HARV. INT'L L.J. 353 (2006); Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power,* 94 GEO. L.J. 1771 (2006); Abraham Drassinower, *Sweat of the Brow, Creativity, and Authorship: On Originality in Canadian Copyright Law,* 1 U. OTTAWA L. & TECH. J. 105 (2004).

[5] I am aware of the following colleagues who have adopted the legal literature format to some degree: Irene Calboli (Trademarks; IP Theory); Rochelle Dreyfuss (rotating topics); Dave Fagundes (IP and the Constitution); Jessica Litman (rotating topics); Michael Madison ("Greatest Hits of IP"); Greg Mandel (Advanced Patent Law); Kristen Osenga (Advanced Patent Law); Kathy Strandburg (Advanced Patent Law); Polk Wagner (Advanced Patent Law).

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internal dynamics of academic discourse. Although it is true that most students will not be entering the legal academy, legal literature seminars also potentially stimulate in law students an appreciation for the importance of reading law review articles in practice. In addition, a course emphasizing the legal literature provides a nice counterpoint to upper level courses which are more skills-oriented. While in law school, students should experience a blend of the "academic" and the "practical" in their elective choices.

Many seminars, although perhaps not all, require students to produce their own works of scholarship.[6] With respect to student writing, the benefits of a course that focuses on legal literature are manifest. In order to maximize the success of their own writing agenda, students need to be careful readers of other articles. As Peter Jaszi and Martha Woodmansee have noted, "[w]e inevitably draw on the works of others in our creative activities."[7] Good writers tend to be good readers. In fact, many IP scholars have lamented the expansive nature of copyright protection on the ground that greater public access to works is necessary in order stimulate additional creative enterprise.[8] Students who read works of legal literature in a seminar format under the guidance of a professor have the opportunity to focus on a given article with respect to both its substance and its structure. In this venue, they can pay attention to organizational structure, word choices, the flow of particular arguments, and originality in presentation. By virtue of this class structure, students are able to develop the skills of evaluating and critiquing legal arguments in a context other than the more familiar case method. This diversity in analytical experience should enrich and deepen their lawyering skills.

Professors also gain unique benefits from teaching legal literature seminars. Notwithstanding tenure reviews and agreements to provide colleagues with commentary on their works, all too often we read articles only to facilitate our own focused scholarly agendas. As a result, we may not always invest the time necessary to contemplate, analyze, and digest others' works of scholarship, particularly those works that are not of direct relevance to our individual academic pursuits. When preparing for a class in which the entire assignment consists of a designated law review article, instructors may approach the reading with a completely different mindset than when reading for their personal research agendas. Like our students, we can benefit from a more critical contemplation about the nature of an assigned article in its entirety, from both a substantive and structural standpoint. Moreover, it is fun, and often instructive, for professors to see a given article through their students' perspectives. There have been many times in the past when my view of a particular article has been influenced by my students' reactions and commentary.

Another set of benefits are institutional. If you are able to either raise some money or persuade your dean to allocate a relatively small stipend, you can invite outside

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[6] *See infra* note 11 and accompanying text.

[7] Peter Jaszi & Martha Woodmansee, *The Ethical Reaches of Authorship,* 95:4 THE SOUTH ATLANTIC QUARTERLY 947, 951 (1996).

[8] *See generally* Pamela Samuelson, *Enriching Discourse on Public Domain,* 55 DUKE L.J. 783 (2006); Diane Leenheer Zimmerman, *Is There a Right to Have Something to Say? One View of the Public Domain*, 73 FORDHAM L. REV. 297, 308-09 (2004).

speakers to presents works in progress and thus turn your seminar into a facet of your school's IP program. The required sum of money does not have to be large, and if your school is located in a geographic area with many other law schools, you can also rely on local professors to keep the costs down.[9] Not only do students enjoy putting faces with the names of professor authors, but often the guest visitors will be impressed with your students as a result of the intellectual dialogue. In short, this type of format is a very easy way to raise your school's IP profile at a relatively modest cost.

II. THE MECHANICS OF THE LEGAL LITERATURE APPROACH

The relevant mechanics of any seminar will depend largely on the specific requirements of a given law school. Based on the informal survey I conducted on the IP Profs Listserv,[10] professors use a variety of grading mechanisms in their seminars, but the law review style research paper appears to be the most typical model based on my limited information.[11] With one exception discussed below, I have always required that students produce a law review article.[12] I find this format offers tremendous advantages for the students despite the fact that many of them will never be called upon to produce a similar work in the future. Requiring students to produce a law review article opens the door to publication opportunities for a wider range of students than those on law review. Over the years, many of my students and former students have published their student seminar papers as law review articles after they graduate, and I strongly encourage them to do so both during the course of the class and afterward. That aside, the experience of writing a law review article is invaluable and relatively unique in the law school curriculum.

One year, rather than requiring students to write a law review article on a topic of their choice, I asked them to write an "Article Review" of one of the articles assigned in class. The final product was intended to be somewhat similar to a law journal's book review rather than a more open-ended law review article. I expected students to go beyond a critique of the article they selected and present their own analysis of the topic. The benefit of this approach is that students can be a bit more focused in their writing and research. The downside is that they have a more limited ability to select a topic and pursue their own research agenda. Moreover, there are no publication opportunities for students after they complete their papers. If I were to offer this opportunity in the future, I think I would do so as an option available to students in addition to the conventional law review format.

One of the reasons I decided to try the "Article Review" format is that some students have a hard time selecting a topic. There are usually a few students every year who have an especially difficult time deciding upon a topic despite the fact that I always email them several weeks prior to the commencement of the seminar asking them to

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[9] In Chicago, we typically spend around or even under $1,000 per speaker. Of course, that figure might be higher for schools in a less centrally located part of the country.

[10] *See supra* note 5.

[11] One professor required three 15-page papers, and another seminar format did not mandate a final paper but instead required students to provide written comments on all works in progress presented (the latter being for a two-credit course).

[12] DePaul's seminar requirements mandate this choice.

begin thinking about topic selection and specifying the date by which the topics must be chosen. In addition, I always have my students read Eugene Volokh's terrific article, "Writing a Student Article,"[13] which provides extremely useful advice not only on topic selection but also on the entire writing process.

One specific mechanical issue that will arise if you adopt the legal literature format is deciding how much, if any, of your own work to assign. I imagine a professor's approach to this question will depend on whether the particular topic of the seminar is one in which she has done a considerable amount of writing. When I teach seminars based on moral or publicity rights, I do assign my own work. Nevertheless, I always include works by others representing viewpoints contrary to my own so that my students gain a global perspective on the subject matter. In contrast, when I teach a seminar examining a variety of topics within IP generally or copyright specifically, I do not typically assign any of my own work. If, however, the seminar is more focused on works in progress rather than published articles, sometimes I choose to present some of my current research. In these instances, I usually do not assign any reading in advance and try to schedule this session during the noon hour so that I can supply a pizza lunch and other munchies. In other words, I treat my presentation as a bit of a break for the students with respect to the work load for the course and, typically, I schedule the session at the very end of the semester when they are otherwise very focused on completing their papers.

In teaching any law school seminar, there are always certain pedagogical questions to consider. These include whether to require outlines and first drafts; whether to give students release weeks in order to work on their papers without class demands; how to deal with the extensions; determination of the grading criteria; when and how to schedule student conferences; whether to require assignments beyond the research paper; whether to mandate student presentations; and how to deal with a student whose writing ability is far below the norm. I do not claim to have any special expertise with respect to any of these issues, but I have taught seminars since I began my teaching career nearly 25 years ago,[14] so I will conclude this section with a few observations on these matters.

Historically, I have required an outline and bibliography three to four weeks into the semester, and a first draft (with a more complete bibliography) after eight to nine weeks. I meet with each student after I have had a chance to review these assignments. In general, I have found that the better the first draft the better the final product (a not too surprising result, I imagine). Some students have the tendency to slack off with respect to these assignments, so in recent years, I started basing a small percentage of their grade on these assignments (typically, 5% for the outline and 15-20% for the first draft). I must confess that over the years, I have lowered my expectations for the first draft to comport

[13] Eugene Volokh, *Writing a Student Article*, 48 J. OF LEGAL EDUC. 247 (1998).

[14] For many years, my IP seminar was the only IP course DePaul offered, other than a course on patent law. In those years, I used Paul Goldstein's casebook as the text for the seminar. Students were expected to write a research paper in lieu of taking an exam. When we began offering a separate, open-enrollment exam course covering Copyrights and Trademarks, I continued to offer an IP seminar using cases, article excerpts and student presentations as the basis for the class.

with the reality of what I often receive. If I had my way, student seminars would last a full year rather than a semester, because I think it is unrealistic to expect students to produce a law review article of publishable quality in just 14 weeks (despite the fact that some students do). I now use the first draft as a mechanism to assess students' abilities to write, research and organize (rather than as a mechanism for assessing the paper on a more global level). Thus, I emphasize that their focus with respect to the first draft should be on thoroughly writing and researching the first substantive section of the paper as well as their global organization. I do tell students that ideally, their first drafts should incorporate as much of their research and writing of the entire paper as possible, but at a minimum I require a detailed outline of everything beyond the first substantive section.[15]

In addition to the final paper, I have students write short (two- to three-page) reflection papers on the articles we have discussed in class. The point of this exercise is to encourage students to reflect and comment upon narrow aspects of the papers under discussion. The reflection papers also afford students an opportunity to factor additional assignments into their final grade calculus. The first time I taught a legal literature seminar I had the students do 10 reflection papers which together represented a total of 20% of their final grade. In retrospect, I think this was too much, so over the years, I have reduced the number of reflection papers and the relative percentage they count toward the final grade. Currently, I am requiring just one three-page (single spaced) reflection paper which accounts for 10% of the grade.

In some years, I assign a student (or groups of students) primary responsibility for running a particular class. Also, in the past I have occasionally mandated as part of the course requirements a critique of one of their classmate's papers. At the moment, I lean towards reducing the overall number of requirements aside from those in connection with the final paper, but I would not rule out resuming either of these practices in the future.

Similarly, in recent years, I have eliminated the student presentation requirement (although, as discussed above, I have substituted the reflection papers as a supplement to final paper). I abandoned the presentation requirement because there never seemed to be enough time for each student to have a meaningful amount of time to present their work to the class and the atmosphere always felt rushed. In addition, with a class of nearly 20 students, the student presentations would swallow up at least five classes which limited the other materials we could cover in a 14-week semester. This is particularly true if you allow your students one or more "release" weeks, which I almost always do (although I often schedule one release week during the week we have conferences on the first drafts). Candidly, I remain conflicted on the wisdom of eliminating student presentations because I do believe they are beneficial to both the presenter and the entire class and so I may well resume them again.

I typically have the final paper count for at least 60% of the grade, although currently I have raised the percentage to 65%. I break down the relevant grading categories as follows: 20% for research and familiarity of the legal literature and cases;

[15] For an example of a comprehensive articulation of expectations for students in a seminar, see Michael Madison's online materials at http:madisonian.net/homepage/writing_instructions.htm.

25% for writing (including organization, clarity, and expression); and 20% for originality and development of ideas. There is no magic to this particular formulation, and as one might expect, the lines between these categories often blur when it comes time to grade. I have found, however, that just as there is always an inherent range with respect to my exam grades, the same is true for seminar papers. At DePaul, we do not have a mandated curve for seminar courses, therefore the grades tend to be higher overall than for exam courses. Most of the students receive As and Bs, but there are always a few Cs, and even an occasional D.

In some years, I have had students who have greatly struggled with the writing process. Fortunately, this has not occurred often, but it has happened. I will usually confer with our Legal Writing Director if, after more than a couple of heavy line edits and explanatory conferences, I feel a student needs help beyond what I can provide. There are some writing resources sponsored by our university that sometimes have been helpful in these circumstances. Over the years, I also have had a few instances in which a student was making progress, but at a pace much slower than the rest of the class. If the student is trying hard throughout the semester, I will encourage him or her to take an incomplete and allow more time for the completion of the paper. Regarding the issue of extensions on a more general level, I tend to be strict with respect to the outlines and first drafts, but liberal in terms of the final papers. Barring extenuating circumstances, I do not allow extensions for the outlines and first drafts, as these are intended as checkpoints for the overall writing process. I will deduct points from the final grade if these assignments are turned in late. In contrast, for the final papers, I usually select a due date the week after classes end as a base line but allow students to vary their individual completion times according to their respective circumstances.

CONCLUSION

In some respects, teaching a seminar class is more challenging for a professor than a conventional class. Although seminars may afford more flexibility during the majority of the semester, they entail an extremely high work load during peak times. Moreover, in my experience, grading seminar papers, while more interesting than grading exams, is also more challenging. Ultimately, teaching seminars, especially through the vehicle of legal literature, affords both professors and their students the luxury of variety and deep intellectual engagement. Every day, I am grateful for the professional satisfaction and independence that goes along with being an academic. The seminar experience exemplifies these benefits and I always feel lucky to be able to participate in this type of educational endeavor.