

# Memorandum to Students

## Exam Prospectus for Copyright

Spring 2023

University of Oklahoma College of Law

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### 1. OVERALL POINTS

**Purpose:** I am writing this document to give you specific information that will help you prepare for and know what to expect on the Spring 2023 Copyright final exam. My paramount goal in designing and crafting the exam is fairness. Part of that, in my view, is disclosing as much as possible about the exam in advance to eliminate the potential for surprise. That's the purpose of this document, and it's the reason why I've already disclosed a huge amount of information about the exam in the Syllabus.

**Look at Syllabus §10:** The bulk of the information I have for you concerning your exam has already been provided to you in §10 of the Syllabus. Because the world has been so topsy-turvy lately, with recent semesters being bent to pandemic exigencies, I hedged a bit in the Syllabus and spoke of what *would* be the case if we have a "normal exam."

I confirm that, indeed: **We will have a "normal exam."** So before you read any further in this document, please put it down, pick up the Syllabus, and read §10. What you'll get out of that includes most of what I have to say about **fairness, transparency, comprehensiveness, coverage, format, anonymity, key advice in studying, and the enormous importance of strictly following exam requirements and instructions—including returning all materials correctly marked with your exam ID number.**

I'm determined not to mindlessly repeat all that Syllabus §10 content in this document, so please read Syllabus §10 with care.

**Please also look at Syllabus §1 and Syllabus §2.** These sections discuss goals of the course and particular learning objectives. I will look at these when designing the exam, and you can expect that I will try to test your learning with regard to specific learning outcomes 1, 2, 3, 4, and 5 listed in Syllabus §2.

Note that §10-1 contains the following important advice:

When I sit down to write the exam, in order to obey the Correspondence Principle, I will look for areas that were emphasized during our semester. To accomplish that, I will make particular reference to the following: (1) doctrine that was important to the resolution of a case we read or otherwise loomed large in a reading; (2) doctrine emphasized in the casebook's explanatory text (i.e, the part of the casebook that explains the law, as opposed to the cases and other "readings" within the casebook); (3) problems, hypotheticals, examples, etc. that we went over in class, including ones from slideshows posted to the class website.

Let me clarify a couple of things and add some things to that:

- First, that passage refers to things to study for both the Part I multiple-choice of the exam and the Part II essay portion of the exam.
- Second, under “(1),” in addition to the “*doctrine* that was important to the resolution of a case we read,” *non-dochtrinal aspects* that were important to the resolution of a case—including policy concerns, theoretical justifications, industry context, or what have you.
- Finally, add to the end of the list the following: “(4) material—including doctrine—covered in slideshows posted to the class website.” In other words: The slides are important as a signal of emphasis even beyond their being carriers of problems, hypos, and examples.

## 2. OVERVIEW OF FORMAT OF ENTIRE FINAL EXAMINATION

The overall duration of the exam is three (3.0) hours, but it will take a bit longer in real-time because of the reading of instructions, passing out and collecting of materials, stopping and re-starting between parts, and so forth.

The exam will consist of two parts. They will be separately administered, one after the other. Part I booklets and answer sheets will be collected before Part II materials are distributed.

Part I of the exam (worth 1/6 of the exam grade) will be multiple-choice questions, 30 minutes in duration, and closed-book.

Part II of the exam (worth 5/6 of the exam grade) will be essay, 2.5 hours in duration, divided up as follows: (1) a Reading Outlining (“RO”) Period of 30 minutes, and (2) an Exam Writing (“EW”) Period of two hours. This Part II is open-book/open-notes – limited to paper-based/non-digital materials. You will use a computer (tablet, laptop) locked down with exam software to type your response. Alternatively, you may handwrite your response in blue books that will be provided.

Highly specific details on what “closed-book” means, what “open-book/open-notes” means, items you’re allowed to have with you, and answers to various past and anticipated questions in this sphere are discussed in the Syllabus, in particular in Syllabus §10-5 and Syllabus §10-3. I have also provided some additional specifics below in Prospectus §13.

## 3. PART I MULTIPLE CHOICE: FORMAT DETAILS

As discussed above, Part I of the exam, worth one-sixth of the total exam grade, will be 30 minutes (0.5 hours) in duration. It will consist entirely of multiple-choice questions that have no more than five answer choices each.

You will get a question booklet with instructions, questions, and answer choices. You can make notes and scribble on it in pencil. But do not disassemble, tear, or otherwise mutilate it. **You must put your exam identification number on the question booklet where indicated and hand it back in at the end of the period to receive a passing grade for the course.**

You will be provided with a bubble sheet (“scantron”) to indicate your answers. You will use a “number 2” pencil to fill it in. **It is crucial that you use your current exam-identification number on the scantron sheet—and not your name.**

There will be approximately 12 or 13 questions or so.

This Part I portion of the exam will be totally closed-book. More on what “closed-book” means and detail about allowed items can be found in Syllabus §10-5, Syllabus §10-3, and in this document, Prospectus §13, below.

#### **4. PART I MULTIPLE CHOICE: HOW MANY QUESTIONS, PACING**

I am designing the multiple-choice portion of the exam with the intent of giving you adequate time to read and analyze each question. I don’t want time pressure to be a dominant factor. In this regard, I am informed by feedback I have gotten on past multiple-choice exams, and I endeavor to have things calibrated so that students will have the time they need to get through everything in a careful, thoughtful way.

For Spring 2023, you will have 30 minutes for approximately 12.5 questions, which means about 2.4 minutes per question. Note that this is considerably more time per question than the multiple-choice portion of the bar exam in recent years, which has provided an average of 1.8 minutes per question.

In further pursuit of keeping time pressure from figuring too greatly, I intend to keep the total word volume in check. Some questions may be long, taking up a full page, for instance. But I will work to balance such questions with shorter ones.

All that being said, the time you will have to answer multiple-choice questions is not unlimited. You should pace yourself.

It is my strong wish that no one does poorly on the exam because of time-management problems. So please stay aware of the time, and keep yourself on track.

#### **5. PART I MULTIPLE CHOICE: COVERAGE, SCORING, STYLE OF QUESTIONS, STRATEGY**

You can expect that Part I of the exam may embrace subject matter across the entire course.

Each multiple-choice question will be worth one point. The exception would be if I end up throwing out a question because of error or irregularity. In such a case, the affected question would be worth no points.

There will be no penalty for incorrect answers. So if you don’t know the answer to a question or are running out of time, you should guess.

I expect the bulk of questions will be hypothetical-style questions testing the application of law to facts. There likely will be other questions as well – such as, possibly, questions that concern relevant concepts of legal theory or recall-type questions. Recall-type questions might be focused on testing literacy of pure law (i.e.,

without being applied to particular facts) or familiarity with emphasized concepts. I don't love recall-type questions, because they tend to be less probative with regard to deep understanding and attainment of learning outcomes. In large number, such questions encourage mindless memorization rather than working to accumulate ready-to-apply knowledge. But recall-type questions can be kept short even while staying clear-cut. So putting in some of them can help keep the whole exam manageable in terms of pacing.

In terms of the structure of questions, how they are set up, and what they look like on the page, you can expect your exam to have great similarity with released multiple-choice batteries in my Exam Archive. So when you open it up, it should look familiar.

Look to my [Exam Archive](http://ericejohnson.com/exam_archive/) ([http://ericejohnson.com/exam\\_archive/](http://ericejohnson.com/exam_archive/)) for all of my publicly released multiple-choice questions. Look through the Intellectual Property questions – there are many copyright questions among those.

While probably obvious, it is important that you are aware that the released multiple-choice questions are not balanced in terms of subject matter so as to match the balance of subjects for this course. So don't take the frequency of questions on particular subjects in released questions to be a clue as to the frequency with which subjects are likely to come up on the multiple-choice portion of your exam. Your exam will obey the Correspondence Principle (see Syllabus §10).

If you haven't already, you should definitely read my tip sheet "How to Take a Multiple-Choice Exam in Law School." It's on the Exam Archive page.

## **6. PART I MULTIPLE CHOICE: SOURCE OF QUESTIONS, MATTERS OF SECURITY AND ACADEMIC INTEGRITY**

All multiple-choice questions are written by me. I do not use questions on the exam that have been previously publicly released. It's possible some of the multiple-choice questions may be questions that have been used by me in a previous semester, but which have remained unreleased, and which were not used for any IP Survey class in recent semesters (to avoid any overlap with currently enrolled students in this class who have taken IP Survey with me in the past).

A word about the re-use of multiple-choice questions: Re-use of multiple-choice questions is standard in higher education, and the practice permits better exam quality and better calibration of the results. This is not trivial: The statistical data that results from a multiple-choice test administration is quite rich, suggesting which questions are valid and probative, and which should be revised or thrown out. Using this data and reusing questions in a careful way helps me improve multiple-choice tests from year to year. That makes exams more fair – and fairness is my ultimate aim in designing examinations. There is, of course, a downside to reusing questions, which is the possibility that some questions may be leaked to some students. I take appropriate steps to prevent the dissemination of unreleased questions. But bear in mind that the security of multiple-choice questions is not just a matter of faculty and staff responsibility; it is a matter of student responsibility as well. If you are aware that detailed information about or copies of unreleased

questions are circulating, please let me know.

Be aware that the use of unreleased exam materials – whether photocopied, roughly transcribed, or otherwise – as part of your preparation for the exam constitutes academic misconduct/dishonesty. Moreover, reproducing or trafficking in unreleased questions is civilly actionable. Be aware that I may employ statistical analytical techniques to look for patterns that indicate cheating in this regard.

If you find, receive, or are offered unreleased questions, be responsible and act promptly to ameliorate academic unfairness by letting me know; I will pursue no action against you in this regard if you make timely notice to me, which may be made anonymously, specifically identifying the materials, preferably by submission of a copy if one is available to you.

Also be aware that a crucial part of exam quality and security involves the numbering of exam booklets and the marking of booklets with students' exam identification numbers. I anticipate that booklets will be clearly marked with a space for you to write your exam identification number. Do not omit to do what you are asked in this regard, and do not omit to turn the exam booklet back in. You can expect that an omission in this regard, even an innocent one, will be catastrophic for your grade, causing you to receive a failing grade for the course.

## 7. PART II ESSAY: FORMAT DETAILS

Part II of the exam, worth five-sixths of the total exam grade, will be 2.5 hours in duration. It will consist entirely of written-response or essay-type questions for an issue-spotter-style hypothetical.

You will get a question booklet with instructions, hypothetical facts, and questions. You can make notes and scribble on the booklet in pencil, pen, and highlighter. But do not disassemble, tear, or otherwise mutilate it. **You must put your exam identification number on the question booklet where indicated and hand it back in at the end of the period to receive a passing grade for the course.**

You can type using a computer or computing device (e.g., tablet, iPad, laptop) that is locked down with exam software as provided for under relevant College of Law policy. Or you can handwrite a response in provided “blue book” response booklets. Typing is recommended. **It is crucial that you use your current exam-identification number to identify your response and not your name.**

This Part II portion of the exam will be “open book” and “open notes” for paper materials. Electronic notes and books are not permitted. More details on what that means and detail about allowed items can be found in Syllabus §10-5, Syllabus §10-3, and in this document, Prospectus §13, below.

The 2.5 hour duration of Part II will be divided up as follows:

- **30-MINUTE RO PERIOD:** The first 30 minutes is a reading-outlining period (“RO Period”). This is your time to carefully read the exam booklet (that is, the facts and the questions), to take notes, to reference your outlines and books, and to outline your response on scratch paper. During the 30-minute RO Period you may not begin recording the

response upon which you will be graded and you may not use any computing device. Thus, during the RO Period, you may not type any characters at all into any computing device or make any mark in any blue book.

- TWO-HOUR EW PERIOD: Next, you will have a two-hour (120 minutes) exam-writing period (“EW Period”) during which you will write your response. (You can also continue to do the things allowed during RO Period.)

## 8. PART II ESSAY: KIND AND QUANTITY OF QUESTIONS.

I anticipate that Part II will have one fact pattern for which you must provide legal analysis, limited to and organized in the form of response to particular questions.

The essay portion of the exam will call only for you to provide lawyerly analysis (e.g., to analyze the parties’ legal positions, including possibly explaining how you would advise a client). There will not be a “theory” or “policy” or “history” type question as such. So I won’t, for example, ask you to write an essay analyzing the law’s desirability.

Now, that having been said, don’t ignore theory, policy, and history on the essay portion of the exam. As we’ve emphasized this semester, theory, policy, and history inform a lawyerly analysis because that stuff is baked into a lot of current copyright law and practice. We’ve seen again and again in the cases that policy concerns and theoretical justifications often exert a magnetic pull on the compass needle the court is using for guidance. So you may expect that strong analysis in the essay might include being able to explain how theory/policy concerns might play into a court’s determination of a matter. (Recall from Syllabus §2 learning outcome no. 5: “Be able to fashion persuasive appellate-level or scholarly arguments, grounded in case law and theoretical and policy perspectives, both for and against propositions involving copyright doctrine.”)

## 9. PART II ESSAY: EFFECTIVE WRITING; WHAT GETS POINTS.

**Concentrate on analysis (and conclusions supported by analysis). I don’t give points for statements of pure law, as such. Nor do I give points for regurgitating facts. I give points for analysis—the putting together of law and facts to produce conclusions—and the included conclusions.**

When grading open-book/open-note exam essays, I don’t give points for statements of law, even correct ones. Think about it this way: Anything you could copy out of your book, notes, or outline doesn’t prove anything to me about what you’ve learned. Instead, what I give points for is analysis. Legal analysis is the mixing of law and facts to create conclusions. So, in the language of the “IRAC” model, you are usually best advised to just do “AC.” Your identification of the issue and your understanding of the rule are implicit in good analysis that incorporates conclusions.

So, for instance, if there’s a fair use issue, consider an exam that says the

following:

“Next I will address the fair use issue. The fair use determination requires consideration of (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copy- righted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.”

There’s no need to say any of that. I already know it. And you could have copied it out of your notes, so it doesn’t prove anything about your learning, so I won’t give points for that. I’d advise that you just launch into the conclusions and analysis, for example:

“DD has a very strong case for fair use. The purpose and character of DD’s use is noncommercial and educational, which heavily favor the defendant, and [etcetera, etcetera ... ]”

If you haven’t already, you should definitely read my tip sheet “How to Write a Law School Essay Exam.” It’s on the Exam Archive page. That document goes into much more detail about issues of effective essay exam writing and how I approach evaluating essay responses. There’s also an additional tip-sheet document you may find helpful in the Exam Archive called “Three Examples of Exam Writing.”

**About cases—how to use them, etc.** There’s no need to cite cases as authority when speaking of a blackletter rule. So I’d suggest not worrying about namechecking cases like so: “Photographs can be copyrightable subject matter. *See Burrow-Giles.*” This is an exam, not a brief for a court. But if you know the cases, you may have many opportunities to make useful, insightful, nuanced points about the law by bringing up particular cases. As I’ve discussed in class, much of copyright law is in the cases. Cases suggest ways in which the blackletter doctrine can be stretched, ignored, or even turned upside-down. So in studying, I urge you to consider the cases and what they stand for, how they can be used by a litigant, etc. If and when you have a point to make on the exam regarding a particular case, it’s not important to me that you identify it by its formal name. For instance, there’s no point in saying “*Feist Publications, Inc. v. Rural Telephone Service, Co.*” You could just say “*Feist v. Rural*” or “*Feist*” or even “the white pages case” or “the phone book case.” As long as I can reasonably understand what you are talking about, that’s adequate.

Keep in mind that your goal in taking the exam, as discussed in Syllabus §10-1(b), is “to show your mastery of the material presented in the course and your skills in analyzing legal problems involving the course’s subject matter.” In so far as that goes, a tool I’ve provided to help you is the Copyright Analysis Synthesis. As of the posting of this Exam Prospectus, it may be that only the non-final/interim version is posted. But I will be posting the finalized Copyright Analysis Synthesis document soon.

## 10. PART II ESSAY: PACING, APPROACH, REPETITION, ETC.

Clearly label each question separately in your answer. Please don't start a new answer field in the exam-response software or separate "question" as far as the software is concerned (e.g., "ExamSoft," "Examplify," or whatever the current package is called). It's all one essay response. And I will grade it as one. But when I am reading it, it really helps me to see where you are. So, for example, for question 1, you could put "1" or "Q1" or "Question 1" on a line by itself. (Putting it on its own line is really helpful.)

I strongly advise you to avoid constraining formats like numbered or bulleted lists. Regular paragraphing tends to work best.

Use what you've learned in this course. Within the confines of the questions you are asked, address all genuine issues you spot, including obvious ones, but expect that more difficult issues will require more analysis. Spend your time accordingly. And I advise you not to work too hard to try to stretch the law to apply in far-fetched ways. A claim or theory that would almost work but not quite could be worth talking about, but a claim or theory that is in substance irrelevant is probably irrelevant for you to address. Deciding what to address and how brief or in-depth your discussion should be is a subjective judgment call. There's no getting away from that. But if you've been engaged with the course's content, you should be able to rely on what you've learned to make wise choices.

If it's relevant, and if you see it as appropriate or useful, you can note differences among approaches used by different courts and jurisdictions. But you will not be tested on the law of any particular state, municipality, or circuit. It's all just general United States law.

In terms of the particular sorts of questions you might be asked, how they might be phrased, etc., look at my Intellectual Property exams in my Exam Archive. Those will give you a good idea of the kinds of things you might expect in terms of call-of-the-question structure.

When I first started teaching, I would just have a general question along the lines of, "Discuss liability for the above facts." But I moved to asking particular questions to accomplish two objectives. First, asking a series of particular questions is a way of forcing each student's response to present analysis in the same order and the other responses, which makes essay responses more comparable. Second, by providing specific questions, I can channel students' discussion into what I'm really interested in and exclude discussion that would be largely redundant, focused on minutia, or otherwise providing material that I consider less probative of student understanding of course material. Therefore: **Limit your discussion to the questions posed.** I won't take away points for your discussing something I said not to discuss. But I cannot and will not give credit for analysis I ask you to exclude. And going off into excluded subject matter will necessarily squander your time, lessening your capacity for doing the analysis I've asked you to do. In the past, I have observed that a number of students would likely have done a bit better if they had just been more careful in heeding the call of the question.

Please do not repeat the exact same analysis when discussing a different party



or answering a different question. Instead, I strongly encourage you to incorporate previously stated analysis by reference. If analysis of an issue is substantively the same as what you have written previously, then I suggest you refer to your prior analysis and go on to discuss any differences.

For the exam software, if the copy-and-paste function is working, you can use that. But keep in mind that what I am really interested in is content that is probative of your understanding. And I'm a human being with a decent short-term memory. So mindlessly doubling your words through copying and pasting isn't going to double your points. If anything, it might risk your missing out on points, because, for instance, if you copy-and-paste a paragraph and only change one thing about it, I might miss the one difference. I'm not a computer.

All that being said, don't skip steps. If, for instance, the plaintiff has two claims for copyright infringement based on two distinct works, then probably all of the infringement analysis is going to be distinct.

Organization counts. Read all exam questions before answering any of them—that way you can be sure to put all of your material in the right places. **Generally I do not separate questions for weighting; instead, I typically lump everything together for assessment.** Again, as I said, it's all one essay response. The purpose of separate questions is really to get you to use the organizational structure I want you to use, and address what I want to see addressed. So plan ahead to put information where it belongs, and divide your time among the questions according to what requires the most discussion and analysis. And just to be crystal clear: **Do not expect that each question calls for an equal share of your time or words.**

## **11. PART II ESSAY: ABOUT THE LENGTH AND STYLE OF YOUR RESPONSE, SOME WRITING ADVICE**

Be aware that there are no points to be won or lost for spelling, grammar, or stylistic aspects of writing—so long as I can understand what you are saying. (If the spell-checker is working in the exam software, you can use that. It's up to you whether it will be helpful for you to use it.) It's rare that grammar or spelling is so bad I can't understand the substance of what someone is saying. It's happened, but it's really unusual.

Feel free to use abbreviations, but only if the meaning is entirely clear.

I advise against trying to use an interesting writing style for the exam. Spend what words you need for the sake of substance. But there's no need to lay them on for effect. Put differently, try to stay concise and focused, and value substance over word count. My observation is that the number of words in an essay does not correspond well to the grade it earns. I've never analyzed that numerically with a spreadsheet, but it's my sense based on years of experience as a grader. To be sure, people can have analysis that is too truncated in terms of substance and lose points that way. But I commonly see people being needlessly wordy in their responses, and that seems sometimes to correspond with people not getting through the whole essay or not thinking as carefully as they should about the substance. Thus, **I urge you to use your time to work carefully and thoroughly rather than trying to throw as many words onto**

paper as possible.

Write functionally. I welcome simple words. In particular, I strongly advise against your trying to come up with synonyms for “because” and “therefore” for the purpose of spicing up your writing. I’ve spoken with students who omitted legal/doctrinal words and phrases because they felt like their writing was getting repetitive and boring using the same words and phrases over and over again. This tends to happen more with 1Ls, for example, sometimes I have students trying to avoid repeating things like “foreseeability,” or “reasonable person.” But yikes! That is not a good strategy! Please use the legal/doctrinal words and phrases as many times as is appropriate for the substance of what you are talking about. Your goal as a test-taker is not to entertain me. It’s to show me that you know the law and that you know how to apply the law to a novel set of facts.

I welcome short paragraphs. Paragraph breaks are free. And I think students help themselves understand what they’ve covered and where they still need to go when they start a new paragraph before going on to a new issue, new claim, new defense, etc. Also, I love short sentences. But if a long sentence has flowed out of your fingers—then please don’t spend precious time breaking it up.

Bottom line: Don’t worry about polish or panache. Content is king.

**Blue books:** Make sure your handwriting is legible. I cannot grade what I cannot read. Please use a blue or black pen. Skip lines and write on only one side of the page. If you’re on the fence about typing or writing by hand, I strongly suggest you type.

Again, check out my tip sheet “How to Write a Law School Essay Exam” on the Exam Archive page.

## **12. PART II ESSAY: ABOUT THE 30-MINUTE READING/OUTLINING PERIOD**

As already mentioned, the administration of the Part II essay portion will start with a 30 minute period for reading and outlining (the “RO Period”). During this period you will not be able to start typing on your computer or writing in your bluebook.

It is my hope that the RO Period will push you to read the facts and think through the analysis carefully and deeply, and that it will encourage you to not race ahead to put down in your response everything you can think of as fast as you can think of it. So, during the RO Period, you should read the facts carefully, scratch out an outline, and be alert for difficult bits that will require deft handling in the analysis.

Note that you would be within the rules to start writing your response on scratch paper during the RO period and then spend part of the EW period copying what you’ve written on scratch paper into the computer response file or into your blue book — but this would be a terrible idea! Please take advantage of the RO Period to do careful and deep issue-spotting and analytical thinking. I am confident doing so will get you a much better result.

### **13. EXAM SESSION RULES, ALLOWED MATERIALS, ETC.**

What can you bring with you and use during the exam session? What are the limitations on communicating with others, accessing materials, etc.?

I've already provided most of this information in the Syllabus. Please read it. But here's a few extra tidbits I'll add, some of which are specific emphasis, and some of which are responsive to questions I've gotten.

- You may not communicate with anyone—necessary communications with administrators/proctors being the exception. You may not view or attempt to view materials other than your own. If necessary, a brief bathroom break is allowable under applicable policies; otherwise, you cannot leave the exam room.
- For the avoidance of doubt: Absolutely no talking or communicating with any other student is permitted before time is called—even if, for instance, you are finished working on the exam and you are out of the exam room visiting the restroom. It makes no difference what you are talking about or whether it has anything to do with the exam—the communication is not permitted.
- Do not wear a smart watch or anything that looks like a smart watch—even if you aren't interacting with it.
- Do not have a phone on your person—even if you aren't interacting with it.
- Also, you cannot use a calculator (you wouldn't need one anyway).
- For the avoidance of doubt: No ebooks, no accessing web, internet, etc. It makes no difference what you are reading or accessing or whether it has anything to do with the exam.

### **14. OVERALL THOUGHTS ON STUDYING**

I've already spoken to this in the Syllabus. Please read what the Syllabus already says about this, particularly §10-6.

### **15. FINAL THOUGHTS**

Don't get too anxious. Try to stay relaxed. Study the big concepts, remember the tips on exam-taking technique, and get a good night's rest. I wish you the best of luck!