

**Law in Cyberspace**  
**Fall 2003**  
**Professor Post**  
**Course Information and Syllabus**

**INTRODUCTION**

**Logistics :**

We meet on Mondays, 4:00 – 5:50 PM. I expect everyone to come to every class; if you are unable to make one of our weekly meetings, please, as a courtesy, let me know in advance. I will do the same.

You can reach me at 204-4539, or (preferably) by email at David.Post@temple.edu. If you send me email, please put "Cyberlaw" in the subject line of your message; that will make it much more likely that I will find it and that I will respond to it quickly.

My office is in Room 622. My office hours are Tuesday, 10 – 12 AM, and Wednesday, 4 – 5:30 PM; I will also almost always be in my office before and after our class on Monday, and I'm always happy to meet with you at other times if these are not convenient.

**Reading Assignments.**

We will be using the Casebook (Cyberlaw: Problems of Policy and Jurisprudence in the Information Age (West 2003)) I recently co-authored with two colleagues (Paul Berman and Patricia Bellia). This is, in fact, the first time that I will be using this book (or any book) in this course; I am very interested in hearing any comments that you might have (positive or negative) about the structure, or content, of the Casebook, how well (or poorly) it worked in the context of the course, etc.

**Writing Assignments**

You will be responsible for writing one substantial research paper, on one of the following general topics:

- The Pennsylvania Internet Child Pornography statute (18 PA. C.S. 7330).
- The "cyber-trespassing" case (Intel Corp. v. Hamidi, 30 Cal. 4th 1342, 71 P.3d 296, 1 Cal. Rptr. 3d 32 (2003))
- Napster and post-Napster: File-Sharing and Copyright Law on the Internet
- The Regulation of Internet Gambling
- Cyber-squatting: Trademark Law and Internet Domain Names

It is up to you to define the specific aspects of the topic you choose to focus upon. For instance, if you choose the PA statute as your topic, you might focus on whether the statute is (or is not) unconstitutional, either under the First Amendment or the “dormant commerce clause” (or both); or you might focus on whether the statute represents a new State regulatory strategy for dealing with unlawful conduct on the Internet (and whether the new strategy will, or will not, be effective); or you might focus on whether the statute’s jurisdictional provisions are “reasonable” and comport with due process; or whether the statute erodes users’ privacy protections online.

Defining the specific question you will focus upon within the particular topic you choose is an extremely important and difficult part of the project; just because the output of the process is a single sentence or two defining your question, do not assume that it will only take a couple of minutes of your time. You should begin thinking about your research question soon – you probably want to begin simply by spending a few hours with the literature out there on whichever topic you think is most interesting, in order to get a feel for the kinds of questions that might be most interesting and most appropriate for that topic.

You must hand in successive iterations of your work on the following schedule:

**Monday, September 29**

A one- or two-paragraph summary of the topic you’ve chosen, the specific question(s) you will be focusing on in your paper, and a (tentative) description of your thesis statement and the arguments that you hope to make in support of your thesis.

**Monday, November 3**

A detailed outline, or a rough draft, of your paper.

**Monday, December 9**

Final paper due.

These dates are set in stone. If you would like an extension, be prepared to justify your request with the sort of argument you’d make to a judge in the event that you had to request an extension of a filing deadline.

There is no minimum or maximum page limits on your papers. Once you have your specific question and research focus in place, your job is to answer the question as persuasively as you can; I do not expect that you will come up with something (and I’ll help make sure that you don’t come up with something) that you can adequately deal with in less than 20 pages or so, nor do I necessarily expect you to write a law-review-length tome.

Your course grade will be the grade you receive on this paper, weighted (gently) by class participation. There is no curve; if everyone turns in “A” quality work, everybody gets an “A,” (and, of course, *vice versa*).

You may collaborate with one another as much, or as little, as you would like in completing your paper; the only thing you may not do is work together on the actual text of the paper. Anything else – research, outlines, etc. – is fair game.

Be sure to read (and, I might suggest, re-read) my “Writing Guidelines” [attached, and available at <http://www.temple.edu/lawschool/dpost/guidelines.PDF>] for some rules you should follow, and some ideas you should consider, when working on your writing assignment.

Our last **two** classes will be devoted to your presentations on the results of your research; the actual scheduling, and format, will depend to some extent on how you end up distributing yourselves among the different topics.

## SYLLABUS

### CLASS 1: August 25

Introduction, pp. 1-2

Why Cyberlaw?

- Easterbrook, Cyberspace and the Law of the Horse, pp. 2-4
- Lessig, The Law of the Horse: What Cyberlaw Might Teach, pp. 4-10
- Notes and Questions, pp. 10-12

Our Approach, pp. 12-13

Internet Basics, pp. 13-14

- American Civil Liberties Union v. Reno, pp. 14-21

**Note:** You don't necessarily need any special technical background to understand cyberlaw; interest in, and curiosity about, the way the Internet space is constructed and how it operates is, however, a useful part of your toolkit. For those of you who know little or nothing about how the Internet works might want to take a look at any of the following:

Three good, readable accounts of the history and development of the Internet:

- Janet Abbate, *Inventing the Internet* (1999) [highly recommended – DGP]
- Katie Hafner & Matthew Lyon, *Where Wizards Stay Up Late* (1998)  
[which also has a nice website at  
<http://www.simonsays.com/titles/0684812010/>]
- Peter Salus, *Casting the Net* (2001)

Other good resources on the history of the Internet are:

- Jon Weinberg, *ICANN and the Problem of Legitimacy* 50 *Duke L.J.* 187 (2000) (has a good section on the 'early history of the Internet')
- The Internet Society website has a number of useful documents, including:
  - A [Brief History of the Internet](http://www.isoc.org/internet/history/brief.shtml) <<http://www.isoc.org/internet/history/brief.shtml>> (this is written by a number of the early Internet pioneers -- Barry M. Leiner, Vinton G. Cerf, David D. Clark, Robert E. Kahn, Leonard Kleinrock, Daniel C. Lynch, Jon Postel, Larry G. Roberts, Stephen Wolff – and is quite readable and useful)
  - [What is the Internet?](http://www.isoc.org/internet/) <<http://www.isoc.org/internet/>>
- Peter Salus, *The Net: A Brief History of Origins*, 38 *Jurimetrics* 671 (1998)
- Richard Griffiths, [History of the Internet, the Internet for Historians](http://www.let.leidenuniv.nl/history/ivh/frame_theorie.html) <[http://www.let.leidenuniv.nl/history/ivh/frame\\_theorie.html](http://www.let.leidenuniv.nl/history/ivh/frame_theorie.html)>

Useful material on how the Internet works can be found at any one or more of the following:

- The Complete “Findings of Fact,” [ACLU v. Reno I, 929 F.Supp. 824 \(E.D. Pa. 1996\)](#).  
<[http://www.eff.org/Censorship/Internet\\_censorship\\_bills/HTML/960612\\_aclu\\_v\\_reno\\_decision.html](http://www.eff.org/Censorship/Internet_censorship_bills/HTML/960612_aclu_v_reno_decision.html)>
- Jack Quarterman, [What is the Internet Anyway?](#)  
<<http://www.mids.org/what.html>>
- Jack Quarterman and Peter Salus, [How the Internet Works](#),  
<[http://www.matrixnetsystems.com/in\\_the\\_net/research/the\\_library/how\\_the\\_internet\\_works/index.jsp](http://www.matrixnetsystems.com/in_the_net/research/the_library/how_the_internet_works/index.jsp)>
- Jeff Tyson, [How Internet Infrastructure Works](#),  
<<http://www.howstuffworks.com/internet-infrastructure.htm/printable>>
- Russ Haynal, [Internet: The Big Picture](#),  
<[http://navigators.com/internet\\_architecture.html](http://navigators.com/internet_architecture.html)>
- LivingInternet.com, [How the Internet Works](#),  
<<http://www.howstuffworks.com/internet-infrastructure.htm/printable>>
- Internet.About.Com, [How Servers Make the Internet Work](#),  
<[http://internet.about.com/library/aa\\_servers3\\_072302.htm](http://internet.about.com/library/aa_servers3_072302.htm)>
- Russ Shuler, [How Does the Internet Work?](#)  
<[http://www.theshulers.com/whitepapers/internet\\_whitepaper.html](http://www.theshulers.com/whitepapers/internet_whitepaper.html)>
- Christopher Anderson, [The Accidental Superhighway](#)  
<<http://www.temple.edu/lawschool/dpost/accidentalsuperhighway.htm>>

## CLASS 2: September 8

### Problems of Metaphor and Analogy

Introduction, pp. 23-24

Trespass to Chattels in Cyberspace

- Intel v. Hamidi, Supplement pp. 1-18

Consumer Confusion and Online Trademarks, p. 40

- Brookfield Communications Inc. v. West Coast Entertainment Corp., pp. 40-47
- Notes and Questions, pp. 47-48
- Planned Parenthood Federation of American v. Bucci, pp. 48-54
- People for the Ethical Treatment of Animals v. Doughney, pp. 54-56
- Notes and Questions, p. 56
- Supplement, p. 18

## CLASS 3: September 15

### Problems of Geography and Sovereignty

Introduction, pp. 63-64

The Theoretical Debate

- Johnson and Post, Law and Borders, pp. 65-70
- Goldsmith, The Internet and the Abiding Significance of Territorial Sovereignty, pp. 70-75
- Goldsmith, Against Cyberanarchy, pp. 75-77
- Post, Against “Against Cyberanarchy,” pp. 77-82
- Notes and Questions, pp. 82-83

#### Jurisdiction to Prescribe

- Note on Jurisdiction, p. 83-84
- Extraterritorial Regulation of Speech, p. 84
  - ACLU v. Reno, pp. 84-88
  - Ashcroft v. ACLU, pp. 89-93
  - Notes and Questions, p. 93-94
  - LICRA v. Yahoo!, p. 94-95
  - Notes and Questions, p. 95-97

### CLASS 4: September 22

#### The “Dormant” Commerce Clause

- ALA v. Pataki, pp. 97-103
- Washington v. Heckel, pp. 103-8
- Notes and Questions, pp. 108-9

#### Jurisdiction to Adjudicate

- The United States Personal Jurisdiction Inquiry
- Note, pp. 124-27
- Asahi Metal Industry v. Superior Court of Calif., pp. 127-34
- Notes and Questions, p. 134

#### Jurisdiction Based on Online Interaction

- Inset Systems v. Instruction Set Inc., pp. 135-6
- Notes and Questions, pp. 137-8
- Zippo Manufacturing v. Zippo Dot Com, pp. 138-42
- Notes and Questions, pp. 142-44
- Winfield Collection v. McCauley, pp. 144-46
- Notes and Questions, pp. 146-47
- Young v. New Haven Advocate, pp. 148-51
- Notes and Questions, pp. 151-52
- Berman, The Globalization of Jurisdiction, pp. 152-54
- Notes and Questions, pp. 154-55

### CLASS 5: September 29

- Introduction, p. 186-87
- Personal Jurisdiction over Domain Name Disputes
  - AOL v. Chih-Hsien Huang, pp. 188-93
  - Notes and Questions, pp. 193-94

- In Rem Jurisdiction over Domain Name Disputes, pp. 194-95
- CNN v. Cnews.com, pp. 195-98
- Notes and Questions, pp. 198-200
- Non-Territorial Adjudication of Domain Name Disputes: ICANN and the Problem of Legitimacy, p. 200
  - Post, Governing Cyberspace, or Where is James Madison When We Need Him? pp. 200-6
  - Notes and Questions, p. 206

#### CLASS 6: October 6

##### Problems of Legal versus Technological Regulation

- Introduction, p. 207
- The Effect of Technology on State Power
  - Boyle, Foucault in Cyberspace, pp. 208-14
  - Notes and Questions, pp. 214-5
  - Experts' Report, LICRA v. Yahoo!, pp. 215-20
  - NFL v. TVRadioNow Corp., pp. 220-21
  - Notes and Questions, pp. 222-23
- Law, Technology, and Regulatory Outcomes, p. 223
  - Government Surveillance
  - Surveillance Techniques and Technological Change
    - Olmstead v. United States, pp. 225-8
    - Katz v. United States, pp. 228-31
    - Notes and Questions, pp. 231-32
    - Kyllo v. United States, pp. 232-37
    - Notes and Questions, pp. 237-38

#### CLASS 7: October 13

##### Copyright Protection

*Note: If you are unfamiliar with the basics of copyright law, you might want to take a look at the following:*

- Copyright Office, Library of Congress, "[Copyright Basics](http://lcweb.loc.gov/copyright/)," <http://lcweb.loc.gov/copyright/>
- Pamela Samuelson, [Copyright Tutorial](http://www.sims.berkeley.edu/~pam/coptutor/), <http://www.sims.berkeley.edu/~pam/coptutor/>
- Dawn Nunziato, [Copyright Law and the Internet](http://chnm.gmu.edu/sloan/copyright.html), <http://chnm.gmu.edu/sloan/copyright.html>
- Stacey Dogan, [Introduction to Copyright Law](http://www.cyberspacelaw.org/dogan/dogan1.html), <http://www.cyberspacelaw.org/dogan/dogan1.html>
- Terry Carroll, [Copyright FAQ](http://www.aimnet.com/~carroll/copyright/faq-home.html), <http://www.aimnet.com/~carroll/copyright/faq-home.html>

Readings:

- Introductory Note, pp. 269-71
- Infringement-Facilitating Devices, p. 271
- Sony v. UCS, pp. 271-77
- Notes and Questions, p. 277
- Note on § 1201 of the DMCA, pp. 277-80
- Real Networks v. Streambox, pp. 280-85
- Notes and Questions, pp. 285-86
- UCS v. Corley, pp. 286-301
- Notes and Questions, pp. 301-3
- Digital Rights Management Systems, pp. 303-5
  - Burk and Cohen, Fair Use Infrastructure for Rights Management Systems, pp. 305-7
  - Bell, Fair Use v. Fared Use, pp. 307-8
  - Cohen, Lochner in Cyberspace, pp. 309-10
  - Notes and Questions, pp. 310-11

CLASS 8: October 20

Problems of “Public” versus “Private” Regulation

- The “State Action” Doctrine and Its Critics
  - Introduction, pp. 333-34
  - Marsh v. Alabama, pp. 334-338
  - Amalgamated Food Employees Union v. Logan Valley Plaza, pp. 338-43
  - Lloyd v. Tanner, pp. 343-49
  - Hudgens v. NLRB, pp. 349-52
  - Berman, Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to “Private” Regulation, pp. 352-56
- The Role of Private Regulatory Entities in Cyberspace
  - Standard-Setting Bodies, pp. 356-57
  - Weiser, Internet Governance, Standard Setting, and Self-Regulation, pp. 357-60
  - ICANN
    - Fromkin, Wrong Turn in Cyberspace, pp. 361-67
    - Notes, 367-68

CLASS 9: October 27

Corporate Self-Help

- Cyber Promotions v. AOL, pp. 368-72
- Notes, pp. 372-73
- Harmon, Worries About Big Brother at AOL, pp. 373-77
- Notes, pp. 377-79

- Supplement, p. 23

Individual Self-Help, pp. 379-80

- Wingfield, MAPS Can Be A Roadblock to E-Mail Access, pp. 380-81
- Lessig, The Spam Wars, pp. 381-83
- Post, Of Black Holes and Decentralized Law-Making in Cyberspace, pp. 383-86
- Notes, pp. 386-88

CLASS 10: November 3

Government Regulation versus Private Filtering, pp. 388-426

- Ginsberg v. New York
- FCC v. Pacifica
- Sable v. FCC
- Renton v. Playtime Theaters
- Reno v. ACLU

CLASS 11: November 10

Filtering Sexually Explicit Speech, pp. 426-38

- Weinberg, Rating the Net
- Lessig, Code and Other Laws of Cyberspace

Use of Filtering Technology in Public Settings, pp. 438-59

- Loudoun II
- Note on CIPA
- Am. Library Ass'n v. United States – Supplement pp. 25-39

CLASS 12: November 17

The Role of ISPs and Other Intermediaries

Liability for Defamatory Content, pp. 495-513

- Cubby v. Compuserve
- Stratton Oakmont v. Prodigy
- 230(c) of the CDA
- Zeran v. AOL
- Blumenthal v. Drudge

Copyright Liability, pp. 513-44

- RTC v. Netcom
- Note on 512 of the DMCA
- A&M v. Napster
- MGM v. Grokster

CLASS 13 – CLASS 14: November 24/December 1

As noted above, these two classes will involve student presentations, in a format TBD.

# WRITING GUIDELINES

Professor David Post  
August, 2003

**There is nothing more important in the practice of law than your ability to put together quality written work.** I am committed to helping you produce the highest quality paper you are capable of producing. But be forewarned: Writing well is extremely difficult, for everyone (at least, everyone I have ever met). If you think you can produce a first-quality paper without a fair bit of pain and a great deal of hard work you are either (a) incredibly gifted, or (b) mistaken.

Read these guidelines through carefully, and re-read them periodically during the course of your writing project, especially before you turn in any written work to me. This will save us a great deal of time (and avoid possible misunderstandings) in regard to precisely what I expect of you (and what you can expect of me). I have very strong views about the process of writing, and I demand a serious commitment on your part; if you are writing a research paper merely because you need to fill out your schedule with some additional credits, or if you're asking me to supervise a journal paper of yours solely because I was 'assigned' to you as your supervisor, please do the following: read the following guidelines carefully, and when you are finished ask yourself whether you are prepared to follow the path I describe. If not, please feel free to reconsider working with me, which may save both of us a great deal of future aggravation and unpleasantness.

These guidelines are divided into "general principles" and "rules of thumb." You should think about the general principles, but you should obey the rules of thumb.

## PART ONE: GENERAL PRINCIPLES

### 1. "Good writing is like a windowpane." [George Orwell]

The point of legal writing is not to make the simple complicated – for example, by using lots of impenetrable phrases, long sentences, and big words. The point of legal writing is to make the complicated simple. Think about it. Do not be afraid to make things simple. Though you may have been taught that simplicity is a sign of stupidity, the opposite is more often true.

### 2. "Your language becomes clear and strong not when you can no longer add, but when you can no longer take away." [Isaac Babel]

Less is more. Write as though God will give you a nickel for each word you take out of your drafts over your lifetime. Say what you need to say. Eliminate unnecessary words. Get to the point.

Example 1 (from an actual student paper, with some of the excess verbiage in italics):

In Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998), *the district court ruled that the defendant was subject to the personal jurisdiction of the court. In so ruling, the court found that both prongs of the personal jurisdiction test had been met. First, the court found that the defendant fell under the District of Columbia's long arm statute, D.C. Code § 13-423, and was therefore subject to the jurisdiction of the court. Second, the court found that the defendant possessed the minimum contacts with the District of Columbia necessary for the exercise of personal jurisdiction to be Constitutional.*

*In order to establish personal jurisdiction under D.C. Code § 13-423(a)(4), which is the only applicable provision, the court must find that the injury was caused by the defendant's act or omission outside of the district of Columbia and the defendant "(1) regularly does or solicits business in the District of Columbia, or (2) derives substantial revenue from goods used or consumed or services rendered in the District, or (3) engages in any other persistent course of conduct here." Drudge, 992 F. Supp. at 53, 54. In addition to satisfying the personal jurisdiction provision of § 13-423(a)(4), the defendant must also have "sufficient minimum contacts with the jurisdiction in which the court sits such that maintenance of a suit does not offend 'traditional notions of fair play and substantial justice.'" Drudge, 992 F. Supp. at 57 quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). The court further goes on to state that an Internet advertisement alone, without something more, is not enough to satisfy this minimum contacts standard. Drudge, 992 F. Supp. at 57 citing Cybersell Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997).*

#### Example 2 (my revisions)

In Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998), the district court ruled that the defendant was subject to the personal jurisdiction of the court. The court found that the defendant satisfied both prongs of the District of Columbia's long arm statute, D.C. Code § 13-423, and that the defendant possessed the minimum contacts with the District of Columbia necessary for the exercise of personal jurisdiction to be constitutional.

To establish personal jurisdiction under D.C. Code § 13-423(a)(4), the court must find that the injury was caused by the defendant's act or omission outside of the District of Columbia and that the defendant "(1) regularly does or solicits business in the District of Columbia, (2) derives substantial revenue from goods used or consumed or services rendered in the District, or (3) engages in any other persistent course of conduct here." Drudge, 992 F. Supp. at 53, 54. In addition, the defendant must have "sufficient minimum contacts with the jurisdiction in which the court sits such that maintenance of a suit does not offend 'traditional notions of fair play and substantial justice.'" Drudge, 992 F. Supp. at 57 quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

An Internet advertisement alone is not enough to satisfy this minimum contacts standard. Drudge, 992 F. Supp. at 57 citing Cybersell Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997).

Example 1 has 288 words; example 2 has 230 words. Example 2 is also, not coincidentally, better – more direct, clearer, easier to follow.

**3. Legal documents are, always, persuasive documents; they are not “book reports.”** The goal, ultimately, is to state a specific question (or set of questions), to provide the reader with an answer to that question(s), accompanied by a logical argument designed to persuade the reader that the answer you have come up with is the correct one. *You will not write a paper “about copyright law”; you will pose, and then you will answer, a specific question about copyright law.*

All legal writing, I believe, is like this: briefs, judicial opinions, memoranda of law, etc. All are designed to persuade the reader of something by the force of argument(s).

I cannot stress this strongly enough; far and away, the most common reason that student papers are unsatisfactory is the absence of any sense that they are designed to marshal arguments in support of the author’s answer to a particular question.

Much legal writing is straightforward, in the sense that you know precisely where you are going when you start. When writing a brief, for example, you know where your argument has to lead: You are trying to persuade the reader that “the defendant [*i.e.*, your client] is not liable for doing X,” or “The defendant [the opposing party] is liable for doing Y,” or “Defendant’s motion for summary judgment should be granted/denied,” or “The court cannot constitutionally exercise jurisdiction over the claim in this case,” or . . . . Knowing exactly where you want to go, you can then work backwards from there to put together your argument.

With a research paper, on the other hand, you don’t really know where you are going when you begin. You don’t know when you begin, in other words, the answer to the question you’re posing – that’s why you have to do research. You don’t really know (when you start) “whether section 512(c) of the Copyright Act covers the dissemination of decryption software”; you don’t know (when you start) “whether the purposes underlying the Patent Act are furthered by Internet business method patents”; you don’t know (when you start) “whether courts can assert personal jurisdiction over foreign website operators”; you don’t know (when you start) “whether clickwrap licenses are or are not enforceable under the Uniform Electronic Transactions Act,” . . .

This makes research papers more difficult to write than briefs; it is hard to construct an argument when you don’t know where the argument is going to go.

On the other hand, this uncertainty about where you’re headed can be turned to your advantage. You can change your answer – indeed, you can even modify the question you’re asking – as you go along. This is a luxury you don’t have with briefs; you can’t say to your client: “Well, I’ve finished my research and, lo and behold, I have discovered that you are, after all, liable under section so-and-so of the Securities Act”!

But with a research paper, you may start out with some thesis – *e.g.*, that section 512(c) of the Copyright Act covers the dissemination of decryption software – but then conclude, after doing research on the question, that it does not.

**4. The purpose of writing.** You have two jobs. First, you have to figure out the answer to the question you have posed: Does section 512(c) of the Copyright Act cover dissemination of decryption software? In what way? Are the purposes underlying the Patent Act furthered by Internet business method patents? How so? Are clickwrap licenses enforceable under the Uniform Electronic Transactions Act? Etc.

The second job, which you can only accomplish after you have accomplished the first, is to persuade the reader that the your answer is the correct one.

In the best of all possible worlds, you would accomplish these tasks *seriatim*. You would, in other words, write two papers: The first would be the one you need to write in order to figure out the answer to your question. The second paper is the one that communicates what you have to say to your readers.

Most of you will not, actually, write two separate papers; but you need to think about your project as if you were going to do so. The first paper is the one that people often lose sight of – the one that helps you figure out what it is you’re trying to say. The only way for most of us mortals to construct a complicated, many-layered argument is to write it down to see whether it makes sense. Unless the question you’ve posed is a very simple one, you are not going to be able to figure out the answer without putting your argument down on paper and reading it through to see if it holds water; it’s going to be far too complicated for you to keep the whole thing in your head. Figuring out whether section 512(c) of the Copyright Act covers dissemination of decryption software is probably going to require you to figure out (a) what do you mean by “decryption software?,” and (b) “what does 512(c) actually say?,” and (c) “what did Congress mean by using the word “service provider” in Section 512?,” and (d) “is decryption software considered ‘speech’ so that First Amendment applies to our interpretation of section 512(c)?,” and perhaps many other questions like that. You can’t possibly keep all of that in your head and figure out where your argument is headed without writing it down and reading it through.

Use your drafts, in other words, to help make your argument better; if your argument doesn’t “work” when it is written down, it doesn’t work at all; if you can’t write it down, you don’t have an argument (yet).

The “second paper” – or your other task – is quite different. Once you have figured out where you are going – once you have written something that enables *you* to see the answer to the question that you have posed for yourself – you need to walk the reader through your argument as effortlessly and painlessly as possible. The reader does not necessarily need to see every step that you took to reach your conclusion; you may have taken some wrong turns, and gone down some dead ends, in trying to figure out how to answer the question, and the reader does not need to see all of those (and will be very confused if you show them to him/her).

Another way to say this: When you begin, you are writing for *you*, to help you understand what is going on. As you near the end, you write for your reader.

**5. You will not learn to write well by talking – to me, or to anyone else – about writing; you will learn to write well by writing.**

I’m always happy to talk to you about your project. But the bottom line is that talking to me is much less valuable than most students think it is. Talking about writing very rarely helps you write. Writing – practicing the very skill you are trying to master – usually helps a good deal more. If you would like to talk to me about something, write down what you want to talk about; a sentence, or a paragraph, or an outline, describing your thoughts, or the question(s) you have. That will not only give you valuable practice in the art of writing, but I guarantee you that it will make our subsequent conversation much more productive.

**6. Read good prose.** Imitation is the sincerest form of flattery. Find a model of some kind for your work, some piece of **persuasive** writing that you think is well-written, well-organized, and effective. This can be a judicial opinion, an op-ed piece from the newspaper, a law review article – anything that works through an argument and reaches some conclusion in a persuasive manner. Read it carefully, several times, and ask yourself: what makes it work well? How is it organized? Is there an introduction, and what functions does it serve? How does the author manage the transitions between sections? How does the author let the reader know the overall plan of the work? When does the author summarize what has come before?

Writing is a craft; find others who perform it well, observe their methods, and try to emulate them.

**7. Give yourself time.**

Writing well is often painful; it is always difficult and unbelievably time-consuming. It will always

When asked whether she enjoyed writing, Dorothy Parker replied “No – I enjoy having written.”

When asked whether he found writing difficult, Red Smith replied: “Not at all – you just sit down at the typewriter and

take longer — usually a lot longer — than you think (or than you'd like) to get an outline or a decent draft together, let alone your final product. You must commit to spend however much time it takes to produce a quality product.

**8. There is, unfortunately, no such thing as an “A for Effort” when it comes to written work.**

The reader doesn't know, and the reader doesn't care, how much time you spent producing whatever it is you have produced, how much sweat poured off your brow during long nights in the library, etc. All he or she has, and all he or she cares about, is what you put in his or her hands; that is all that matters to the reader because that is all that the reader can see. Your argument must stand on its own two feet. **You must always read your own work *from the reader's perspective*.** Sounds easy enough; it is not. Learning how to do this is critically important. Before you submit anything to me — an outline, a draft, whatever — you must read it over, from start to finish, in one sitting, as if you were the person to whom it is addressed -- the 'average reader' (if you are writing a law journal article), the partner in a law firm (if you are writing a memorandum to a partner), the judge (if you are writing a brief or legal memo).

One of the hardest things about writing well is remembering that your reader does not have in his/her head everything about the subject matter that you have in your head; indeed, the reader may have no information at all about the subject matter other than what is in your paper. Your reader will start at the beginning of your paper and read through to the end, picking up whatever information you are giving him or her and *only* that information, and *only* in the order in which you present it. You must do the same if you want to have any chance of getting the reader to understand what you are saying. *Developing the ability to edit your own work in this way is far more important than whatever you may come up with as far as substance is concerned in this project.*

**9. Revise, revise, revise.**

You need to revise your work as necessary so that it makes sense to that reader. If you are handing something in on THURSDAY AFTERNOON, do **not** print it out and read it over on THURSDAY MORNING; **leave yourself time for a final round of revisions** before you hand it in.

**10. Everything you put on the page matters .**

This is an attitude that you need to develop regarding your own writing: Every word matters.

Take the lowly comma. When Robert Frost's *Collected Poems* was originally published, it contained these lines (in “Stopping by the Woods on a Snowy Evening”):

“The woods are lovely, dark, and deep  
But I have promises to keep

And miles to go before I sleep  
And miles to go before I sleep.”

In fact, what Frost had written was:

“The woods are lovely, dark and deep  
But I have promises to keep  
And miles to go before I sleep  
And miles to go before I sleep.”

Insertion of the extra comma in the first version makes a big difference, does it not?

We are not poets, and the texts we read and write as lawyers are, heaven knows, not poetry. But read, for instance, Section 512(e) of the Copyright Act carefully:

“(e) When a public or other nonprofit institution of higher education is a service provider, and when a faculty member or graduate student who is an employee of such institution is performing a teaching or research function, for the purposes of subsections (a) and (b) of this section such faculty member or graduate student shall be considered to be a person other than the institution, and for the purposes of subsections (c) and (d) such faculty member's or graduate student's knowledge or awareness of his or her infringing activities shall not be attributed to the institution, if--

(A) such faculty member's or graduate student's infringing activities do not involve the provision of online access to instructional materials that are or were required or recommended, within the preceding 3-year period, for a course taught at the institution by such faculty member or graduate student;

(B) the institution has not, within the preceding 3-year period, received more than two notifications described in subsection (c)(3) of claimed infringement by such faculty member or graduate student, and such notifications of claimed infringement were not actionable under subsection (f); and

(C) the institution provides to all users of its system or network informational materials that accurately describe, and promote compliance with, the laws of the United States relating to copyright.”

Assume that:

- (a) Temple University is a “nonprofit institution of higher education” that is a “service provider” within the meaning of subsection (e);
- (b) A faculty member – call him “Professor Post” – is employed by Temple University, and that is performing a “teaching or research function” within the meaning of subsection (e);

- (c) Temple University does **not** provide “informational materials that accurately describe, and promote compliance with, the laws of the United States relating to copyright” to all users of its system, *i.e.*, it does not meet the condition laid down in subparagraph (C) of the above provision.

The question presented is: For “the purposes of subsections (a) and (b) of this section” – whatever they may be – is Professor Post “a person other than the institution”?

The answer is “No.” Why? Because “for the purposes of subsections (a) and (b) of this section” Prof. Post “shall be considered to be a person other than the institution” only if the conditions in sub-paragraphs (A), (B), and (C) are satisfied. The condition in sub-paragraph (C) is not satisfied. Therefore, Prof. Post shall not be considered to be a person other than the institution. [If you don’t see that, re-read the section over until you do].

Note what happens if we omit the comma before the word “if” at the end of the first paragraph. The section now reads as follows:

“(e) When a public or other nonprofit institution of higher education is a service provider, and when a faculty member or graduate student who is an employee of such institution is performing a teaching or research function, for the purposes of subsections (a) and (b) of this section such faculty member or graduate student shall be considered to be a person other than the institution, and for the purposes of subsections (c) and (d) such faculty member's or graduate student's knowledge or awareness of his or her infringing activities shall not be attributed to the institution if --

(A) such faculty member's or graduate student's infringing activities do not involve the provision of online access to instructional materials that are or were required or recommended, within the preceding 3-year period, for a course taught at the institution by such faculty member or graduate student;

(B) the institution has not, within the preceding 3-year period, received more than two notifications described in subsection (c)(3) of claimed infringement by such faculty member or graduate student, and such notifications of claimed infringement were not actionable under subsection (f); and

(C) the institution provides to all users of its system or network informational materials that accurately describe, and promote compliance with, the laws of the United States relating to copyright.”

The answer to the question presented is now “Yes.” Removing the comma changes the meaning of the subsection. Without the comma, for “the purposes of subsections (a) and (b) of this section” Prof. Post “shall be considered a person other than the institution” – full stop. The conditions in sub-paragraphs (A), (B), and (C) apply only to determining whether the faculty member will be considered to be a person other than the institution for purposes of subparagraphs (c) and (d). (If you don’t see that, read the section over again – possibly aloud – until you do).

Section 512(e) is much less beautiful than “Stopping by the Woods on a Snowy Evening.” The moral of the story, however, is that in legal prose, as in poetry, everything you put down on the page matters – every word, every punctuation mark, everything. If you don’t start cultivating that attitude towards your own writing, you will never learn to write well.

## **PART TWO: CRITICAL RULES OF THUMB – FOLLOW THESE OR DIE!!**

**1. Write your Introduction LAST.** Your paper will, basically, consist of three parts: an Introduction, an Argument, and a Conclusion – in that order. It would be silly, before you know exactly what you are going to say, to begin writing your Conclusion before anything else; that’s pretty obvious. But it is equally silly to write your Introduction first. You must know where your argument is going in order to write the Introduction (and the Conclusion). Once you know what your argument is going to be, it is very easy to write an Introduction (which just tells the reader what’s coming); before you know what your argument is going to be it is virtually impossible to write the Introduction.

**2. Use topic sentences.** Each paragraph in your paper should make one point, and each paragraph should begin with a declarative sentence stating that point. These “topic sentences” are enormously important. You should read your paper over *reading only the first sentence in each paragraph*. If the paper doesn’t make sense this way, you’re not finished revising.

**3. Eliminate the passive tense from your papers.** Do not say “As the Internet grew, new commercial uses were found,” say “As the Internet grew, users found new commercial uses.” Do not say “The 5-step test for determining likelihood of confusion under the Lanham Act was crafted by the court”; tell the reader *who* crafted it (“The Eighth Circuit crafted the 5-step test for determining likelihood of confusion under the Lanham Act”). Do not say “Where there is no general jurisdiction, the possibility of specific jurisdiction must be examined,” say “Where there is no general jurisdiction, the court must examine the possibility of specific jurisdiction.”

Always write so that the reader can tell who the actor is who is performing the action described in your sentences.

You may, if you wish, treat this as just another arbitrary grammatical rule to be followed by rote – like “don’t end a sentence a preposition with” or “don’t split infinitives.” Just do it.

It is, however, not an arbitrary rule at all; rewriting your sentences to eliminate uses of the passive tense will help you think. Here’s an example from a draft paper I received a while ago:

“Despite the radio broadcasters’ argument that they made little profit on broadcasts, ASCAP was authorized to demand payment for the broadcast of copyrighted works.”

Interesting – but who “authorized” ASCAP to do that? The author of this sentence probably didn’t know who authorized ASCAP to demand payment, and he was hiding behind the passive voice to obscure that lack of knowledge. We all do it, all the time, and we shouldn’t; eliminating the passive voice from our writing will help us avoid it.

**4. Do not thump on the table.** Do not say “It is clear that . . . .,” or “it is obvious that.” Do not use the words “clearly,” or “obviously,” or “undoubtedly,” as in “the statute clearly authorizes . . . .,” or “the *Feist* opinion obviously changes copyright law in important ways.” If it is clear, or obvious, or free from doubt, then there is no need to say that – the reader will already see it because you make it clear. Ninety-nine times out of 100, you use these words or phrases as crutches, to obscure the fact that you have *not* made something clear, or obvious, when you should have.

**5. Use parallel structure.** If you are talking about general and specific jurisdiction, and one paragraph begins, “In order for there to be general jurisdiction, the defendant must have . . . .,” then begin the next paragraph about the parallel topic (specific jurisdiction) the same way: “In order for there to be specific jurisdiction, the defendant must have . . . .” Make it simple.

**6. Avoid unnecessary introductory and transition words.** Words or phrases like “Moreover,” “In addition,” “Furthermore,” “As such,” “Notwithstanding,” are *sometimes* useful, but rarely; most of the time they get people into trouble. They tend to be inserted when you’re not quite sure whether the logical transition between your sentences is working; if you have two sentences that do not belong together, throwing in an “In addition” at the beginning of the second sentence will *not* help. Use these devices very sparingly.

**7. Watch out for “as explained below” and “as explained above.”** These are signals that your work is not yet properly organized. What is a reader supposed to do when he/she encounters “as explained below” in a paper? Stop reading and go “below” to wherever you explain what needs to be explained? If something needs to be explained now, explain it now.

**8. Read your work aloud.** Writing, Lawrence Sterne wrote (in his novel *Tristram Shandy*), is conversation. He was correct. If your paper, or outline, or memo, or letter, or brief, or . . . does not make any sense to a *listener*, chances are very good that it won’t make any sense to a *reader*.