

# WRITING GUIDELINES: GENERAL PRINCIPLES & RULES OF THUMB<sup>1</sup>

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There is nothing more important in the practice of law than your ability to put together quality written work. I'm happy to help you work on your writing, but please be forewarned: Writing is difficult, for everyone – at least, everyone I know or know of who does it well. If you think you can produce top-quality written work without pain and hard work you are either (a) incredibly gifted or (b) mistaken.

Please read these guidelines through carefully, and re-read them periodically during the course of your writing project. I've put most of what I know about writing into them. I will expect, when reading your drafts and other written work, that you have actually done – not “thought about doing,” or “appreciated the value of doing,” or “wondered what it would be like to be doing,” but actually *have done* – the things I ask you to do in what follows. I have strong views about the process of writing, and I demand a serious commitment on your part. Please ask yourself, after you have read through the following, whether you are prepared to do what I'm asking you to do. If not, please feel free to reconsider working with me; I will *not* be offended, and we will both will be spared considerable future unhappiness.

These guidelines are divided into ten “general principles” and nine “rules of thumb.” The general principles are for you to think about and aspire to; the rules of thumb are for you to obey blindly.

## GENERAL PRINCIPLES

### 1. “Good prose is like a windowpane.” [George Orwell, “Why I Write”]

Think about it. A windowpane is doing its job well when it allows the viewer to see, clearly, whatever is on the other side. Good prose is doing its job well when it allows the reader to see, clearly, whatever is on “the other side.”

What's on the other side? Your ideas, and your arguments.

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How do you learn to write good prose? If I knew the secret, I would happily reveal it to you, but I don't. I'm not sure there is a secret answer, just as I'm not sure there's a secret answer to the question "how do you learn to write good music?," or "how do you learn to paint good landscapes?," or the like. One thing is certain: practice helps. If you're trying to learn how to write well, write more – more outlines, more case summaries, more issue statements, more drafts of papers, more . . .

There is one skill that is critical and on which all others, in my opinion, depend: *the ability to read your own work and to find the places where what you are saying is not clear to the reader, and revising it to make it clear(er)*. It sounds easy enough; in fact, it is very difficult, and takes years, and practice, to master. The process of writing well consists of (a) writing, (b) reading what you have written from your reader's perspective, and (c) revising what you have written so that it is clear to your reader. Over and over again.

You have to learn how to put yourself in the mind of your reader (who may know nothing, or next-to-nothing, about the subject matter of your paper or article), and to ask of your own work what the reader will ask: Does what I am reading make sense? What exactly is the author trying to say here? Am I learning something about the subject matter of this paper? Does this particular argument that the author is presenting really work?

You must, first of all, know (or decide) *who your reader is*, because you must always be asking "Is what I have written clear?," and you can't answer that question unless you can answer the question: "Clear to whom?" Your explanation of why section 512(c) of the Copyright Act covers dissemination of decryption software, or why business method patents do not serve the purposes underlying the Patent Act, will be very different, depending upon whether you are explaining that to (a) a judge on the Federal Circuit, (b) the Chief Systems Engineer at Comcast, (c) a reader of the Philadelphia Inquirer, (d) a high school student, (e) a partner at your law firm who specializes in international tax law, (f) a partner at your law firm who specializes in patent prosecution, etc.

Here's a sentence that might appear in your paper.

"Like much of the DMCA, sec. 512(c) provides ISPs with a safe harbor against copyright infringement claims for monetary damages."

That sentence is either perfectly clear, or complete gibberish; I can't tell which unless I know who the reader is, because whether or not it is clear depends on what the reader has in his or her head at the moment he/she encounters the sentence. What's the DMCA? Who/what are "ISPs"? What's a "safe harbor"? What's copyright infringement? What are "claims for monetary damages"? Either (a) the reader had some idea what these things meant *before* starting your paper, or (b) you have explained earlier in your paper what they mean, or (c) the sentence is a failure and needs to be revised because the reader does not know what it means. Writing well means satisfying yourself that either (a) or (b) is true, *for every sentence in your paper*.

Reading your own work from your reader's perspective also means learning how to *clear your head of everything you have learned about the subject matter from having worked on the paper*. This is difficult, but absolutely indispensable. Your reader does not know what you know, has not read what you have read, has not been surrounded by articles about this subject matter for weeks or months the way you have, etc. If you keep all of that stuff in your head as you read over what you have written, you may conclude that your writing makes sense and is reasonably clear (to you) when it is meaningless to your reader (who does not have any of that in his/her head).

Before you submit anything to me – an outline, a draft, whatever – *read it over, from start to finish, in one sitting, as if you were the person for whom it is being written.* Satisfy yourself that your reader will not be confused by what you have written (or revise as necessary).

**Developing this ability to edit your own work in this way is the most important thing you will get out of your writing project.** You are the one editor who will always be at your disposal during your career, the one person who will always be available to read your work over and to comment upon it, to help you see which arguments are strong and which are weak, which sections make sense and which do not.

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. Say what you need to say. Eliminate unnecessary words. Get to the point.

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, or by continually reminding the reader that “it is not entirely clear, but, . . .” or that “courts have left this area very uncertain . . .” or the like. *The point of legal writing is to make the complicated simple.*

Do not be afraid of simplicity. Though we have all been taught that simplicity is a sign of stupidity, it is not. You *want* your reader to say, after having read your brief or your memo or your article, something like: “Well, *that* was simple.”

Simple prose does, it is true, reveal weaknesses in our thought; as Orwell put it, “if you simplify your English . . . when you make a stupid remark its stupidity will be obvious, even to yourself.” Many people are afraid to simplify their prose because of this, and because they hope that by complicating and over-complicating and over-over-complicating, they can avoid confronting the fact that they're not quite sure what it is they're trying to say. Trust me: It won't work. There's absolutely nothing wrong with being unsure about what you are trying to say – that's par for the course, for all of us, an inevitable part of the process of trying to master very complicated material. But you need to recognize that and confront it and work to *fix* it – not hide it, because hiding it will never work.

Here's an excerpt from a student paper:

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.

It's not bad, by an means, but here's my edited version:

In Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998), the district court ruled that the defendant was subject to the court's personal jurisdiction. The defendant satisfied both prongs of the personal jurisdiction test: he fell within the District of Columbia's long arm statute, D.C. Code § 13-423, and possessed the "minimum contacts" with the District of Columbia required for the constitutional exercise of personal jurisdiction. [ADD CITATION]

Here are the changes I made in going from the first to the second version:

In Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998), the district court ruled that the defendant was subject to the court's personal jurisdiction ~~of the court. In so ruling, the court found that. The defendant satisfied~~ both prongs of the personal jurisdiction test ~~had been met. First, the court found that the defendant: he~~ fell underwithin 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~~required for the constitutional exercise of personal jurisdiction ~~to be Constitutional~~. [ADD CITATION]

The original passage has 99 words; the revised version has 66 – exactly 33% fewer. Not coincidentally, the revised version is also better – more direct, clearer, easier to follow.

### 3. **Read the cases. Read more of them. Read the ones you have read over again.**

Students hardly ever do the amount of case law research that is required for a good paper. The cases, however, are where the law is – not in the law review articles, not in the treatises, not in the trade publication, not in the ALR annotations, but in the cases and other primary material (statutes, treaties, constitutions). Secondary sources can be enormously helpful – they can point you to the cases that you need to read, and sometimes they can help you to understand the cases you have read. But they should *never* be used as substitutes for the primary material on which they're based.

Learning how to read the cases *critically* – identifying *their* strengths and *their* weaknesses – will help you become a better writer, because it will help you learn how to read your own work critically. As you read the cases, always ask yourself: What question(s) is the court answering? How does it get to the answer? Are you persuaded that it got the right answer? Are you actually learning something about whatever it is the court is talking about? Why, or why not?

Reading judicial opinions is also valuable because it helps you soak up a way of talking and writing about legal questions – customary phrasings, ways of talking about and using

precedent, and legal doctrine, and the like. If you have read lots of opinions, you are much less likely to write sentences like the one I'm looking at right now, from another student paper:

“Personal jurisdiction can no longer be missing ‘because the defendant did not physically enter the forum state’. *Burger-King Corp. v. Rudzewicz*. . . .”

I have never encountered *any* judicial opinion (or any other document, for that matter) that referred to whether or not personal jurisdiction was “missing.” I think I understand what the author is trying to convey about the law of personal jurisdiction – but what he/she also conveys to me in this sentence is that he/she has either (a) not read very many opinions dealing with the question of personal jurisdiction, or (b) has not been paying much attention to those s/he has read.

**4. 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.**

Talking about writing is like talking about carpentry, or about playing the piano, or about riding a bicycle – interesting, perhaps, but of little help in actually learning how to *do* any of these things. To learn how to do them, you have to do them, over and over and over. It's called “practicing.” It's the same with writing; actually practicing the skill you are trying to master is almost always more useful than talking about it.

I'm not suggesting that I'm not happy to talk to you about your project. But talking to me is *much* less valuable than you (and most students) think it is. If you have questions about your writing project, I'm always happy to talk to you about them; but try, before you come in to talk, writing down what you want to talk about. A sentence, or a paragraph, or an outline, describing your thoughts, or the question(s) you have, will do. 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.

**5. Good legal writing is *persuasive* writing. A good paper or article provides an answer to a question (or related questions), and persuades the reader that the answer(s) are the best ones available. It is not a “book report.”**

A good paper necessarily contains (a) a specific question (or set of questions), (b) an answer to that question(s), and (c) an argument in support of that answer. 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.

(a) The question *You should not write a paper “discussing,” or “analyzing,” or “summarizing,” or “examining,” some aspect of copyright law; you should write a paper that will pose, and then answer, a specific question (or set of questions) about copyright law.*

The absence of a good question is the most common flaw in student writing – and it is generally fatal. A good question provides a paper with structure and purpose; it lets you make the decision “what do I leave in and what do I leave out?” [Answer: you leave in everything the reader needs to understand the question and your answer to it, and you leave out everything else.] How much “background” do I need to include? [Answer: As much as the reader requires to understand the question and your answer to it.] Etc.

Coming up with a good question is not a simple task, to be sure; but if you fail to do so, you will not have a good paper. Here are some randomly-chosen good ones:

Whether § 512(c) of the Copyright Act covers the dissemination of decryption software.

Whether software patents are invalid under the *Bilski* test for patentable subject matter.

Whether (and under what circumstances) foreign website owners are subject to personal jurisdiction in U.S. courts.

Whether (and under what circumstances) foreign website owners can raise the First Amendment as a defense to prosecution under the Online Gambling Enforcement Act.

Whether “browsewrap” licenses are enforceable under the Uniform Commercial Code and/or the Uniform Electronic Transactions Act.

Whether §230(c) of the Communications Decency Act shields social networking sites from liability for invasions of privacy.

Whether the use of a competitor’s trademarked name in a website “meta-tag” constitutes a sufficient “use in commerce” to subject the user to liability under the Lanham Act.

What makes them good questions? First, *you can answer them* using the tools of legal analysis and legal argumentation. Notice that they all focus on what the law is, not what the law should be – the “descriptive,” rather than the “normative.” I am not very interested in your views about whether § 512(c) of the Copyright Act *should* cover the dissemination of decryption software, or whether browsewrap licenses *should* be enforceable, or whether social networking sites *should* be immunized from liability for privacy invasions, etc. – at least, I’m not interested in that until you first tell me what the law is and show me that you understand what the law is.

Second, they’re good questions because they are all rich and complicated enough to support a good paper or article, with arguments that can be made on *both* sides and a deep ocean of relevant caselaw and commentary from which you can draw those arguments. You might not know that, reading over the questions, but *I* know it, because of my familiarity with the subject matter. That’s one of the most important roles I (or other faculty advisors) play in this process: we can help you decide whether you’ve got a good question or not. If, say, the Supreme Court has just decided, last Term, the question “whether the use of a competitor’s trademarked name in a website ‘meta-tag’ constitutes a sufficient ‘use in commerce’ to subject the user to liability under the Lanham Act,” that would *not* be a good question, because it would have too straightforward an answer (*i.e.*, whatever the Court declared the answer to be).

How do you find a good question? There's no simple answer to this. My advice: find a general area of law (copyright on the Internet, or service provider liability, or the definition of the "person of ordinary skill in the art" in patent law, or trademark dilution, or employee email privacy, or . . .) that you find generally interesting, and read a few recent articles on the subject, looking both for areas of disagreement and argument among the commentators *and* for citations to recent cases. Then, read the cases that seem to be the focus of the commentaries, asking yourself: What questions are the courts answering? What questions are they leaving for later, or ignoring, or missing? Are their arguments persuasive? Another idea: Skim through the last year's worth of US Law Week, or BNA's "Electronic Commerce Law Report," or any of the other specialized reporters that has good summaries of recent cases, looking for issues that have arisen in the cases recently (and on which there might be a difference of opinion among different courts) and/or issues that have been left open in the decided cases.

(b) The answer. Now that you have your question, you might think that your job is the find "the answer" to the question. Not so! Or, at least, not exactly. As noted above, having a "good" question means that there are differences of opinion as to what "the answer" is. "Does section 512(c) of the Copyright Act covers the dissemination of decryption software?" You can argue that it does, and you can argue that it doesn't – *remember, that's what makes it a good question*. It's not as though "the answer" is hiding somewhere out there somewhere, and you're just trying to find it; it's that there are multiple answers, and what you're trying to do is put together the arguments for and/or against one of them in a coherent and persuasive manner. So: *you take a position on the question you have posed, and your task is persuade me – your reader – that your position is the correct one*. Marshal the relevant legal arguments – from the statutes, the cases, the commentary (normally, in that order of significance) – that make your case.

Most legal writing is like this: briefs, judicial opinions, memoranda of law, etc. They are designed to *persuade* the reader of something by the force of argument(s). If you try to find "the answer" to the question, you'll inevitably end up producing something along the lines of: "It's very complicated, and messy, and I really don't know what 'the answer' is." That's not very useful for the reader. I don't need to read your paper to know that the law surrounding section 512 and decryption software is complicated and messy. I want you to make some sense of it for me, and *the best way you can do that is not to "summarize" the law but to argue for a position in regard to the law*.

Choose one side or the other – it doesn't really matter which. Make the argument that section 512(c) *does* cover the dissemination of decryption software. If, as you go forward, you find the opposing arguments too strong to overcome, change your answer. This is a luxury you have when writing research papers that you don't have when working for clients. You never want to say to your client (unless you have to): "Well, I've finished my research and, lo and behold, I have discovered that you the stronger argument is that you are, after all, liable under section 10(b) of the Securities Act"! But with a research paper, you may start out with some thesis – *e.g.*, that clickwrap licenses are enforceable under the UETA – but then conclude, after doing research on the question, that much stronger arguments exist for the opposite proposition. That's fine – you're free to turn around and write that paper instead.

*Let the process of writing help you think.* One of the errors that beginning writers make frequently is that they begin actually writing (as opposed to “doing research”) *much too late* in the process. (A related error is that when they do begin writing, they begin with the “Introduction”; more on that below). Remember: you’re not trying to figure out the answer, you’re trying to marshal the arguments. You don’t have to wait until you’ve got it “all figured out” – indeed, if you wait until you’ve got it all figured out, you’ll never even begin to write, because you’ll *never* have it all figured out. That’s the nature of legal problems. There’s an argument that section 512(c) of the Copyright Act covers the dissemination of decryption software, and there’s an argument that it does not. Either one will be complicated and many-layered; the only way to evaluate such an argument is to try to express it in writing, and then to read what you have written to see whether it makes sense and is persuasive.

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 *is* “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 ‘speech’?,” and
- (e) “if so, does the First Amendment apply to our interpretation of section 512(c)?,”

and *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. Don’t worry that the argument doesn’t “work” when you’re working on your drafts – it doesn’t have to work, yet. The point of writing it down is to see where, and how, it *doesn’t* work, so that you can fix the deficiencies in subsequent drafts.

Then, once you have figured out where you are going – once you have written something that enables *you* to see the best argument you can make answer to the question that you have posed for yourself – you need to figure out how best 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. Towards the end, you write for your reader.

## 6. Give yourself time.

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

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 open a vein.”

## 7. Revise, then revise, then revise again. Repeat.

You need to revise your work *as necessary* so that it makes sense to that reader. You don't get to stop when you have completed one, or two, or four, or any fixed number of revisions of your paper; you get to stop when what you have written is clear to your reader (see #8, below). If that takes five, or fifteen, revisions, that's what it takes. There is, unfortunately, no such thing as an “A for Effort” when it comes to written work; you don't get any prizes for the number of revisions you've done, you get prizes for expressing yourself clearly. 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, how you neglected your familial responsibilities in order to devote unconscionable amounts of time to the project, how you went through 22 separate drafts, etc. All she has, and all she cares about, is what you put before her in the form of the written document.

## 8. Read your work aloud.

“Writing,” Lawrence Sterne wrote (in *Tristram Shandy*), “is conversation.” He was correct. If your paper, or outline, or memo, or letter, or brief, or . . . does not make sense to a *listener*, chances are very good that it won't make any sense to a *reader*, and *vice versa*. Read your work aloud – to yourself if need be, or to someone else if possible. Many of your work's shortcomings will become evident when you do that – that's the good news. Learning how to write well is learning how to identify those shortcomings, and to fix them. If you can't even find them, you can't fix them.

## 9. Everything you put on the page matters.

Everything – every word, every bit of punctuation, every decision to begin a paragraph with one sentence rather than another, every decision whether to use “shall” or “should” or “may” or “might,” or whether to use “since” or “because” or “thus” or “moreover” – matters. That may or not be true in other fields, but it is true in ours. This is less an objective fact than an attitude,

an attitude that may or may not come naturally to you but which I urge you to start cultivating. Care about the words you put down on the page. Give a damn about them. They reflect who you are as a lawyer, and they are often the only reflection of who you are as a lawyer that your professional colleagues will get to see.

When Robert Frost's *Collected Poems* was originally published, it contained these familiar lines (in "Stopping by 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."

Omission of that comma after "dark" changes – subtly, but critically – the meaning of that stanza.

We are not poets, and the texts we read and write as lawyers are, heaven knows, not poetry. But consider the following: The Copyright Act of 1874 granted copyright protection to "any engraving, cut, [or] print," and it provided that

". . . in the construction of [this] Act, the words 'engraving,' 'cut,' and 'print' shall be applied only to pictorial illustrations or works connected to the fine arts."

Question: Were "pictorial illustrations" that were *not* "connected to the fine arts" covered by copyright? That depends on whether "connected to the fine arts" modifies both "pictorial illustrations" and "works," or "works" alone. See *Bleistein v. Donaldson Lithographic Co.*, 188 U.S. 239 (1903) (Holmes, J.).

Note how the meaning of this phrase would change if there were a comma after "pictorial illustrations":

". . . in the construction of [this] Act, the words 'engraving,' 'cut,' and 'print' shall be applied only to pictorial illustrations, or works connected to the fine arts."

And note how the meaning would change if there were commas after *both* the words "pictorial illustrations" and "works":

“. . . in the construction of [this] Act, the words ‘engraving,’ ‘cut,’ and ‘print’ shall be applied only to pictorial illustrations, or works, connected to the fine arts.”.

The 1874 Copyright Act is much less beautiful than “Stopping by Woods on a Snowy Evening.” (And section 512(e) of the 1976 Copyright Act is even less beautiful than that – see the Appendix). The moral of the story, however, is that in legal prose, as in poetry, everything you put on the page matters. If you don’t start cultivating that attitude towards your own writing, you will never learn to write well.

Needless to say, this means that if you are not a good proofreader, *find someone who is* and ask him/her for help. The details matter – not only because they can affect the meaning of what you have written, but also because your attitude towards the details gets communicated to your reader.

Typographical errors, for instance, matter. Not because they necessarily affect the meaning of what you have written, for, generally speaking, they do not; it is easy enough for the reader to realize you meant “ideas” when you wrote “ideax,” or “the Copyright Act” when you wrote “the Copyrihgt Act,” or that you meant to write “an employer’s liability for monitoring employee emails depends upon its status under section so-and-so . . .” when you wrote “an employer’s liability for monitoring employee emails depends upon their status under section so-and-so. . .” etc. They matter because they communicate your lack of attention to your own writing; if you had seen the word “ideax,” surely you would have corrected it, so the fact that it remained in your document suggests that you didn’t read it yourself. *And if you didn’t read it, why should I?*

## RULES

**1. Write your Introduction LAST.** Your paper will, usually, consist of three basic parts: an Introduction, an Argument, and a Conclusion – in that order. It would, obviously, be silly to begin writing your Conclusion first, before you know exactly what you are going to say. It is equally silly to write your Introduction first. You must know where your argument is going in order to write a decent Introduction, because the function of the Introduction is to tell the reader what’s coming. Once you know what your argument is going to be, it is easy to write an Introduction; *before* you know what your argument is going to be, it is very difficult –almost impossible – to do so.

**2. Quote first; explain later.** The actual words used in the statutes or the opinions under discussion *always* matter. Do not tell your reader what you *think* a statutory section means until you have given him/her the actual language in the statute; don’t venture to say what you think a court *meant* until you first tell me what it actually *said*. If the statutory language (or the court’s opinion) is clear, then it’s clear, and nothing more need be said. If it needs explanation and interpretation (as it almost always does), explain and interpret – *after* you tell me what the words are that you are explaining and interpreting. I don’t want to know your opinion about the statute or the case – I want to know (a) what it says, and (b) what it means.

**3. 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. *Read your paper over reading only the first sentences in each paragraph.* Ask yourself: If you knew nothing else about this subject matter, would this reading of the paper, topic sentence by topic sentence with nothing else, have made sense to you? If the answer is “no,” you’re not finished.

**4. Do not thump on the table.** Eliminate the phrases “it is clear that . . . .,” and “it is obvious that” and all similar phrases, along with the words, “clearly,” “obviously,” and “undoubtedly,” and all their close cousins, from your vocabulary. If something is obvious, then there is no need to say so – the reader will already see it, because you have made it so obvious. If it is not obvious, saying that it is will not make it so. *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. Eliminate the passive voice from your papers.**

Do not say “As the Internet grew, new uses for domain names were found . . .” Tell your reader who found them (*e.g.*, “As the Internet grew, users found new uses for domain names . . . .”).

Do not say “The 5-step test for determining likelihood of confusion under the Lanham Act was crafted . . .” Tell your 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.” Tell your reader who must examine it ( “Where there is no general jurisdiction, the court must examine the possibility of specific jurisdiction”).

Do not say “The arbitrators’ decisions are enforced by the imposition of monetary penalties on wrongdoers.” Tell your reader who enforces them (“The CFTC enforces the arbitrators’ decisions by the imposition of monetary penalties on wrongdoers”)

Do not say “The modern framework for analyzing a question of personal jurisdiction was developed in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).” Tell your reader who developed it ( “The Supreme Court developed the modern framework for analyzing questions of personal jurisdiction in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)”).

Do not say “ASCAP was authorized to demand payment for the broadcast of copyrighted works.” Tell your reader who authorized it ( “Congress [or “the FCC,” or “the Communications Act,” or whomever it was] authorized ASCAP to demand payment for the broadcast of copyrighted works.”).

Do not say “In this paper, theories of intellectual property protection are discussed”; indicate who discusses them ( “In this paper, I discuss theories of intellectual property protection.”)<sup>3</sup>.

Write so that the reader can tell who the actor is who is performing the action described in each of your sentences.

**6. Avoid unnecessary introductory and transition words.** Words or phrases like “Moreover,” “In addition,” “Furthermore,” “As such,” “Notwithstanding,” “It should be noted that . . .” are hardly ever useful. Most of the time they get you into trouble. They tend to be inserted when the logical transition between your sentences or paragraphs makes no sense, and reflects your desperate hope that by saying “moreover” or “furthermore” you will cover up that unfortunate failure of organization. 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, if at all.

**7. Watch out for “as explained below” and “as explained above.”** These are also signals that your work is not yet properly organized. What is a reader supposed to do when he/she encounters the phrase “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. If it doesn’t, don’t. Always remember: readers read from front to back, and from left to right; do not make the reader’s understanding of something depend on something that you say later.

**8. Do not use “since” when you mean “because.”** When I come across a sentence in a paper that begins like this:

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<sup>3</sup> All of these examples, as you might have guessed, come from actual student papers.  
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“Since enactment of the Copyright Act in 1976 . . .”

I expect what follows to look something like this:

“Since enactment of the Copyright Act in 1976, music-reproduction technology has greatly altered the landscape of the music business.” **Or**

“Since enactment of the Copyright Act in 1976, there have been many attempts to revise the statutory “work for hire” provisions.” **Or**

“Since enactment of the Copyright Act in 1976, copyright law has become a more important part of legal practice.”

What I do *not* expect is something that looks like this:

“Since enactment of the Copyright Act in 1976 was part of an effort to balance the incentives to create and to disseminate copyrighted works, it is important to keep the interests of authors and publishers in mind when considering statutory provisions.”

So I get a little jolt of dissonance when I reach the words “was part of an effort . . .” It’s the wrong part of speech, and I have to return to the beginning of the sentence to make sense of what’s written. That’s just a little bit of extra work I have to do as a reader, and it violates a cardinal rule: *never make your reader work hard – harder than absolutely necessary – to understand what you are saying.*

**9. 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) with parallel language: “In order for there to be specific jurisdiction, the defendant must have . . .” If you tell the reader that a statutory provision imposes three requirements on defendants, tell the reader what they are. Make it simple for your reader.

**10. If you’re saying the same thing, or referring to the same thing, use the same words.** You may have been taught otherwise, and encouraged to use diverse phrasing so as to give your writing variety and color. But for legal prose, that is a serious trap. Once you tell me that § 512 of the Copyright Act protects Internet Service Providers from copyright infringement claims, if you later refer to “online service providers,” and later to “Internet access providers,” and later to “telecommunications providers,” . . . your reader will assume that you’re talking about different categories; if you weren’t, why would you give them different labels?

“A man may take to drink because he feels himself to be a failure, and then fail all the more completely because he drinks. It is rather the same thing that is happening to the English language. It becomes ugly and inaccurate because our thoughts are foolish, but the slovenliness of our language makes it easier for us to have foolish thoughts. The point is that the process is reversible.”

George Orwell, “Politics and the English Language”

Orwell’s Six Rules (from “Politics and the English Language”):

1. Never use a metaphor, simile or other figure of speech which you are used to seeing in print.
2. Never use a long word where a short one will do.
3. If it is possible to cut a word out, always cut it out.
4. Never use the passive where you can use the active.
5. Never use a foreign phrase, a scientific word, or a jargon word if you can think of an everyday English equivalent.
6. Break any of these rules sooner than say anything outright barbarous.

## Appendix

Here's another, much more complicated, statutory illustration of the significance of a single comma. Section 512(e) of the Copyright Act provides:

“(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.*”

Read it again, carefully. Here's a little problem of statutory interpretation. 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 an employee of Temple University and 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: Is Professor Post “a person other than the institution” for “the purposes of subsections (a) and (b) of this section” (whatever subsections (a) and (b) might be)?

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. Because the condition in sub-paragraph (C) is not satisfied, 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 has completely changed the meaning of the subsection. Now, 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 – aloud if necessary – until you do).