Commenting on Writing Requirement Papers

Packet for Faculty

1. Examples of Student Thesis Statements (one weaker, one stronger – and “stronger” one could still use work on originality and specificity)

2. Example of Student Outline with Professor Comments

3. Excerpt of Student Draft Paper 1

4. Excerpt of Professor Comments (Margin + End) on Draft Paper 1

5. Excerpt of Student Draft Paper 2

6. Excerpt of Professor Comments (Margin + End) on Draft Paper 2

7. Sample Course Policies and Procedures for WR Seminar (includes expectations for each stage of the writing process)

8. Sample Separate Handout for Students on Writing the Seminar Paper

Example 1

The NCAA Regulations on Sports Agents: Do they really help the student athlete? I would talk about the different regulations on sports agents in the three major college sports (baseball, football, and basketball) and discuss how they are beneficial or detrimental to the student-athlete and how they can be improved or changed to make it a better system for the student-athlete.

Example 2

Topic: Taking discretion out of extraordinary ability decisions.

Thesis: Currently, sports athletes can immigrate to the United States by applying for the EB-1 employment visa. An EB-1 employment visa is available to athletes that showcase extraordinary ability. The INS makes a determination of extraordinary ability based on various subjective standards, which include things like salary, membership in a professional league, international recognition, full-time experience. My argument is that the determination of extraordinary ability should be made using more objective standards. In particular, I think that employment in a professional team in a major league should be enough on its own to evidence extraordinary ability. The major league sports have dreams of globalizing on a large scale. Clarifying the process by which a foreign athlete can come to the United States is key to carrying out these visions.
Introduction.

1. Overview of the Unauthorized Use of Music in Political Campaigns.
   A. Brief discussion of the long history of the use of music in political campaigns. ("The use of music by political campaigns is literally as old as the Republic itself." Every Little Thing I Do, at 138.)
   1. Source:
      • Every Little Thing I Do (Incurs Legal Liability): Unauthorized Use of Popular Music in Presidential Campaigns
   B. 1980s and 1990s.
      1. President Reagan’s use of Bruce Springsteen’s "Born in the U.S.A." in 1984, which "was an innovation because it was the first non-permissive use of a copyrighted song in a presidential campaign." Every Little Thing I Do, at 139.
      2. Brief discussion of the use of music in the 1988 and 1992 presidential campaigns. "While most of the songs used in the 1988 and 1992 campaigns were copyrighted, this did not deter campaigns from using them." Every Little Thing I Do, at 143.
   C. More recent examples.
      1. 2008 Presidential Campaign
         • Jackson Browne sued the RNC and John McCain for copyright infringement for use of his song "Running on Empty" in television advertisements criticizing Obama for suggesting that the country conserve gas through proper tire inflation.
         • Source: Browne v. McCain
         • According to Browne’s counsel, this case was "not politically motivated. It’s a copyright infringement lawsuit, pure and simple, but the fact that Sen. McCain has used this song in a hit-piece on Barack Obama is anathema to Jackson."
         • Source: Jackson Browne Sues John McCain Over Song Use.
         • The songs were not licensed in this instance and the parties ended up settling, with the RNC and McCain issuing apologies to Browne.
         • Sources: Jackson Browne Settles With GOP Over "Running on Empty" Song Use; Singer-Songwriter Jackson Browne Resolves Lawsuit Against the Ohio Republican Party, the Republican National Committee and Senator John McCain
• Ann and Nancy Wilson of Heart objected to the use of their song, "Barracuda," to introduce Vice Presidential candidate Sarah Palin at rallies.

  • Sources: Heart to Sarah Palin: Don’t Play 'Barracuda'; Use of 'Barracuda' for Sarah Palin Nets GOP a Heart Attack

• Barack Obama became "the latest presidential contender to feel the wrath of a crooner [when] Sam Moore of the legendary R&B duo Sam & Dave... demanded the campaign stop playing their 'Hold On, I'm Comin'" at rallies, where some fans sang it as 'Hold On, Obama's Coming.' When Sam Moore "let Bob Dole tweak his classic 'Soul Man' in '96 ('Dole Man'), the song-writers cried foul" (providing an example of the difficulties that can arise when the songwriter and performer disagree as to whether the authorize use of the song).

  • Source: 'Hold On,' Obama: This Isn't Your Song

2. Henley v. Devore. Don Henley, a founding member of "The Eagles," sued Charles DeVore, Barbara Boxer's Republican challenger for her Senate seat in California. Henley claims that DeVore is using his songs, "The Boys of Summer" and "All She Wants to Do Is Dance," without his authorization by posting videos in which DeVore uses Henley's songs but substitutes new lyrics criticizing Boxer. DeVore counterclaimed, "asserting [his] First Amendment right to political free speech." (Don Henley Sues Senate Candidate Over Song Use)

  • Sources:
    • Don Henley Sues Senate Candidate Over Song Use
    • Henley court documents (see Source List)

D. Brief overview of music licensing and explanation of the separation of the copyright in the sound recording from that in the underlying composition, and the lack of (an analog) public performance right for sound recordings.

1. Source: On the Record: How Music Connects with Law

II. Discussion of the Competing First Amendment Interests.

A. Political Speech. The most obvious First Amendment interest in such situations is the protection of political speech. "There is little disagreement that political speech is at the core of that protected by the First Amendment. The Supreme Court has spoken of the ability to criticize government and government officers as 'the central meaning of the First Amendment.'" (Chemerinsky (quoting New York Times v. Sullivan)).

1. However, what is and what is not political speech has been historically difficult to define. Id.

2. Sources:
B. The First Amendment Right of Non-Association and Right Against Compelled Speech. There is also a competing interest at play when a political candidate uses a song in connection with his or her campaign without express authorization. The Supreme Court has also recognized that laws compelling speech also violate the First Amendment: “Just as there is a right to speak, so, it is clear, there is a right to be silent and refrain from speaking.” (Chemerinsky at § 11.2.4.3).

1. Very brief discussion of the positive First Amendment right of association, generally.
   - **Sources**: Roberts v. United States Jaycees

2. Discussion of the corollary negative right not to associate and the right to exclude.

3. Argument that this right not to associate should be grounded in the right against compelled speech, thereby broadening the right above and beyond what the Court has explicitly held in traditional negative association cases.
   - **Sources**: West Virginia State Board of Education v. Barnette; Wooly v. Maynard
   - Redish & McFadden, *HUAC, the Hollywood Ten, and the First Amendment Right of Non-Association*, at 1673 (arguing for the recognition of a “passive version of the right of non-association”)
     - “By grounding [the right of non-association] in the First Amendment right not to be forced to speak, rather than as a means of facilitating the right to associate, we provide a foundation far more expansive than the narrowly based right of non-association recognized by the Supreme Court in Dale,” (at 1677).
     - “Exploration of the theoretical rationales for the recognition of [the right to be completely silent] provides an equally sound rationale for the recognition of a corresponding First Amendment right not to associate, even where the right is not exercised as a means of protecting affirmative acts of political association.” (at 1694).

4. Further, expanding *Dale* in the context of the individual’s right not to associate with a group will not create the conflicts that some
have argued that Dale, broadly construed, would—namely, jeopardizing the progress of equality in public accommodations—

- Sources:
  - Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*
  - Neal Troum, *Expressive Association and the Right to Exclude*

III. Discussion of The Inadequacy of Existing Remedies.

A. Existing remedies in the absence of a copyright remedy (namely, right of publicity and Lanham Act claims) were not created to provide—and do not provide—a fair remedy in cases involving the unauthorized use of music in a political context.

B. Brief discussion of the differences between the Lanham Act and the right of publicity (the Lanham Act focuses on the harm to the public—consumer confusion—whereas right of publicity doctrine is an equitable remedy used to prevent unjust enrichment).

  1. Need sources here.

C. The Right of Publicity. The right of publicity does not tend to provide a remedy in the case of the unauthorized use of a song in a political campaign, as a commercial use is generally required.

  1. Overview of the common law right of publicity and its historical development (the shift from a privacy right to a property right).
  2. Discussion of the general problem of any common law remedy where the remedy varies from state to state.

   - (Specifically, discuss the differences between California, where the right is more broadly construed, and New York, which has placed greater limits on the remedy—and where there is no common law remedy, only a statutory remedy.)

3. Courts have struggled with how to allow for right of publicity claims without infringing on First Amendment interests.


4. Courts tend to draw the line between a use that violates an artist’s right of publicity and a use that would be protected under the First Amendment based on whether or not there was a commercial purpose. This general rule tends to eliminate a right of publicity claim as an avenue for relief when an artist is suing a political candidate.

5. In California, the legislature has enacted an additional statutory right of publicity remedy. However, this remedy is also inadequate for an artist suing a political candidate, because it expressly exempts political advertisements in Section 3344(d), providing that “[f]or purposes of this section, a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs . . . or any political campaign, shall not constitute a use for which consent is required under subdivision (a).”

- **Sources:** California Civil Code § 3344. *Need legislative history.

D. The Lanham Act. Though the Lanham Act does provide a remedy in cases involving unauthorized use of music in a political campaign, it was not created to apply in such situations. The doctrine has been stretched beyond what it was originally intended to protect against (consumer confusion) to accommodate claims like Don Henley’s claim in *Henley v. DeVore*, while not adequately confronting the competing First Amendment interest of the political candidate.


2. Discussion of the expansion by the courts of this section of the Lanham Act to encompass political uses in addition to more standard commercial uses.

- **In Henley v. DeVore,** the court denied the defendants’ motion to dismiss, rejecting DeVore’s argument that their “parodies” do not “constitute the use of goods or services in commerce.”

- **Source:** Order Denying Defendants’ Motion to Dismiss, *Henley v. DeVore*, at 3.

- The Henley court relied on several other authorities in concluding that the Lanham Act applies to both noncommercial (including political) as well as commercial speech, because “political activities may constitute services within the meaning of 15 U.S.C. § 1125(a).” (Order Denying Defendants’ Motion to Dismiss at 5).

- **Browne v. McCain:** *United We Stand America, Inc. v. United We Stand, America New York, Inc.; MGM-Pathé Commc’ns Co. v. Pink Panther Patrol*

- In concluding this, the court reasoned that “reference to use ‘in commerce’ is ‘simply a jurisdictional predicate to any law passed by Congress under the Commerce Clause.’”

- **(Order Denying Defendants’ Motion to Dismiss, *Henley v. DeVore* at 4 (quoting *Bosley Med. Inst., Inc.*))

3. Though the Lanham Act clearly provides a remedy for artists, in applying it, courts have failed to provide and conduct a specific test that balances the artist's First Amendment interest against the competing First Amendment interest of the political candidate. Though courts have recognized and applied an “artistic relevance test" (derived from the Second Circuit case Rogers v. Grimaldi) to protect the First Amendment interests of artists seeking to use a copyrighted work for artistic purposes from Lanham Act claims, courts have not crafted a specific test under which to analyze political uses.

- Sources: Browne v. McCain, Rogers v. Grimaldi; Mattel, Inc. v. MCA Records, Inc.; A Fistful of Lawsuits: The Press, the First Amendment, and Section 43(a) of the Lanham Act; Rethinking the Parameters of Trademark Use in Entertaiment; A Celebrity Balancing Act: An Analysis of Trademark Protection Under the Lanham Act and the First Amendment Artistic Expression Defense

IV. Congress Should Amend the Copyright Act to Provide a Remedy that Will Protect Artists and that Balances the Competing First Amendment Interests at Issue in a Consistent Manner.

A. The text of the proposed amendment.

B. Discussion of how the proposed amendment properly balances the dueling First Amendment interests at issue. (*Drop footnote here to address the state action issue.)

1. Creation of an approval right. Express approval from the artist is generally required, even when the music has been licensed from ASCAP/BMI/SESAC through a blanket license.

2. First Amendment Balancing Test. But courts will be required to conduct a specific balancing test of the competing First Amendment interests at stake when the use is, arguably, a fair use.

- (For example, in Henley v. DeVore, where the video was arguably transformative because new lyrics were substituted for Henley’s lyrics)

C. Discussion of the benefits of the proposed amendment.

1. This amendment would bring this debate back into the realm of copyright law, rather than forcing plaintiffs to raise Lanham Act claims, which have been stretched by courts to provide such a remedy, and which can be expensive to prove.

2. At the same time, an explicit requirement that courts balance the competing First Amendment interests inherent in such a claim would ensure that the right of a candidate to issue (and the right of the public to hear) political speech is not unduly burdened.

3. An amendment generally requiring specific permission be sought would incentivize negotiation, and thereby reduce the number of
these situations that end up in court, which would benefit both politicians and artists.

D. Recognition of the potential problems with the amendment.
1. Defining the scope of political uses. Where is the right place to draw the line between uses that should require express approval and those that should not?
2. Addressing free market concerns.
   * Discussion of other parts of the Copyright Act that preclude an artist from contracting away a particular right.
     * E.g., Termination of transfer: "To safeguard the author’s interests, the Copyright Act provides that an author can neither waive his right to terminate in advance nor contract it away."
     * (Source: Termination of Copyrights in Sound Recordings; need legislative history on termination of transfer)
   * [Other defenses to this argument?]
3. Resolving disagreements between different copyright owners.
   * Back to the Bob Dole (‘Dole Man’) example, where the copyright owners disagreed about whether the song should be used.
   * To maintain consistency with copyright law, and to avoid conflicts like these, my proposed amendment would only grant the copyright owner of the underlying composition (the songwriter) express approval rights for political uses when the song is publicly performed, as there is currently no public performance right for sound recordings.
   * But if Congress does end up granting performance rights in sound recordings, a potential problem would emerge when the owner of the copyright in the composition and the owner of the copyright in the sound recording differ as to whether the song should be used.

Conclusion

Commented [A20]: This is a good question. Do you have a recommendation for how courts should draw this line?

Commented [A21]: Because your proposal is akin to a “moral right,” you might want to briefly address that point somewhere—one of the common arguments against adopting moral rights in the U.S. is that it would unduly limit the free market in copyrights because a purchaser’s potential uses for a work would be limited, so this might be a good place to acknowledge the moral rights debate and perhaps to state that you are not advocating for a broad moral right (and that a discussion of the bases/limitations of a full adoption of moral rights in the U.S. is outside the scope of your paper) but simply for a more limited right that applies only to political uses because of the unique First Amendment concerns on both sides.

Commented [A22]: Couldn’t this be resolved in a similar way to the termination right? – i.e., perhaps it would require unanimous approval of the featured artists and composers for a recording to be used. If the composer agrees to the use, the politician could always get someone else to record it, so that’s not as big an issue as where the artist agrees but the composer objects, or if some artists in a band approve and others object.
Music Law Paper Rough Draft

USING THIRD-PARTY MUSICAL CONTENT IN PODCASTS: ISSUES, PROBLEMS AND SOLUTIONS (TEMPORARY TITLE)

Student Name

1. Introduction

The history of copyright law can largely be described in terms of Congressional reactions to changes in technology. Nowhere has this been more apparent than in the field of musical copyrights. From the invention of piano rolls and sound recordings to the introduction of internet downloading and streaming technology, Congress has struggled to keep up with the pace of technological development. Often when action is taken, it is only enough to take care of a problem already in existence. Such legislation typically fails to address prospective issues that will inevitably arise. Of course, because legislation is always a result of bargaining and compromise between opposing sides, this can hardly be avoided, but that does not relieve individuals struggling under a copyright scheme that was not meant for them.

These issues are especially salient in the context of the podcast. Generally, a podcast is a syndicated, downloadable audio program consisting primarily of original spoken word content. After emerging in 2004, podcasting’s low cost and undemanding learning curve led to tremendous growth and popularity.¹ Today it would be difficult to find anyone who did not know what a podcast was. Podcasts have quickly become a valuable tool for spreading information, as well as engaging in criticism, debate, and discussion. The content available through podcasts is staggering. However, there is one area which podcasters have tended to

avoid or approach only tentatively. This is the area of music. Despite a significant demand for musical content,² there is a noticeable lack of music related podcasts available on the internet.³ This absence of content can be directly linked to the fact that the current music licensing system has been adopted to suit the needs of traditional radio, digital retailers, and web streaming services, and is thus inapplicable to podcasts.⁴ As a result podcasters are left in the dark about what rights apply and what types of permissions they must receive before they can legally use third-party music in their podcasts. This confusion threatens to stifle podcast growth and progress into an important area. Specifically, due to the unique technological attributes of podcasts they probably do not meet the statutory definitions of a digital phonorecord delivery and public performance. This dramatically increases the difficulty of obtaining the necessary licenses to include music in a podcast. Therefore, Congress should amend the Copyright Act to state that a podcast meets the definition of a digital phonorecord delivery, while also stating that it is not a public performance. Congress should also establish a separate statutory licensing scheme that is specifically adapted for podcasts, which takes into account the unique attributes and cultural importance of the technology.

² One study in the United Kingdom found that comedy and music are the two most popular categories among podcast subscribers. See Radio Joint Audience Research Limited, Podcasting and Radio Listening via the Internet, http://www.rajar.co.uk/docs/news/2008_07_podcasting_listening_survey.pdf (last visited March 31, 2011).
³ For example, of the top 50 podcasts listed on the website Podcast Alley for March 2011, there was only one podcast explicitly dealing with music, and that podcast featured only X-rated comedy music. Podcast Alley, Top 50 Rated Podcasts, http://www.podcastalley.com/top_podcasts.php?num=50 (last visited March 31, 2011). See also Matthew J. Astle, Stop the Music: Podcastings’s Licensing Conundrum 10 No. 2 J. Internet L. 1, 13(2006).
⁴ Billington, supra note 1, at 2.
Part II of this paper will discuss the historical origins of podcasting, including the reasons for its growth and popularity, as well as the technology behind the medium. Part III will give a brief summary of copyright law as it applies to musical recordings. Part IV will attempt to determine which rights apply to podcasts that contain music, and how this affects the licenses required to play music legally. Finally, Part V will include recommendations for congressional action, and describe what podcasters can do to include music in the mean time.
1. Introduction

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These issues are especially salient in the context of the podcast. Generally, a podcast is a syndicated, downloadable audio program consisting primarily of original spoken word content. After emerging in 2004, podcasting’s low cost and undemanding learning curve led to tremendous growth and popularity. Today it would be difficult to find anyone who did not know what a podcast was. Podcasts have quickly become a valuable tool for spreading information, as well as engaging in criticism, debate, and discussion. The content available through podcasts is staggering. However, there is one

area which podcasters have tended to avoid or approach only tentatively. This is the area of music. Despite a significant demand for musical content, there is a noticeable lack of music related podcasts available on the internet. This absence of content can be directly linked to the fact that the current music licensing system has been adopted to suit the needs of traditional radio, digital retailers, and web streaming services, and is thus inapplicable to podcasts. As a result podcasters are left in the dark about what rights apply and what types of permissions they must receive before they can legally use third-party music in their podcasts. This confusion threatens to stifle podcast growth and progress into an important area. Specifically, due to the unique technological attributes of podcasts they probably do not meet the statutory definitions of a digital phonorecord delivery and public performance. This dramatically increases the difficulty of obtaining the necessary licenses to include music in a podcast. Therefore, Congress should amend the Copyright Act to state that a podcast meets the definition of a digital phonorecord delivery while also stating that it is not a public performance. Congress should also establish a separate statutory licensing scheme that is specifically adapted for podcasts, which takes into account the unique attributes and cultural importance of the technology.

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II. Podcasting Background

A. Popularity and Growth

Despite the fact that the term "podcast" has come to mean many things to many different people, it is essentially just a specific technological device for creating and distributing audio content through the Internet. Generally, a podcast is a digital audio file, released periodically, that is uploaded by its creator to an internet server, and then downloaded automatically by listeners using specialized software.\(^5\) Today the term has become ubiquitous, but this was not always the case. In 2003, shortly before its introduction, using the term podcast would have been met with puzzled looks or polite nods.

The word was first used in print in a February 2004 article in the Guardian.\(^6\) Since that introduction the term has only become more popular. A Google search in September 2004 would have shown 24 potential hits, less than a year later, the number of

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Comments from Profs. Ross and Huppe:

You have a really nice start on the paper and have clearly put some thought into the subject and engaged in some strong initial research. We have provided some detailed comments/questions in the margins and below are some more general comments to keep in mind as you finalize the paper.

Organization:

Overall, your draft has a nice structure and proceeds logically from background information to the specifics that are relevant to your thesis (and ultimately will proceed to your actual proposal when you get that section done). As you revise, consider our margin comments about perhaps combining sections III.C and D, so that you address both the nature of the exclusive right in compositions and sound recordings and the organizations that administer those rights (typically) in a single subsection, rather than going back and forth and repeating information about the individual rights. We would suggest that you work on really trimming down this introductory material, condensing as much as possible, so that you have more space to devote to your original analysis. Also work on your transitions between sections and introductions and conclusions, so that the reader has clear guideposts about how the pieces fit together and how they support your overarching thesis.

Analysis:

You’ve provided some good background introductory information about the various rights, the manner in which they are licensed, and the dispute/ambiguity about whether podcasts “count” as performances. One suggestion that might help to unite the various pieces of your draft is to, very early in the paper, introduce some concrete possibilities about how music might be used in podcasts, so that you can analyze those concrete examples when you walk through what rights are implicated and what licenses are required. Right now, you only refer generally to the possible use of music in podcasts, and thus it’s not always clear what the use is that you are analyzing.

On a related note, you refer at several points to the importance of encouraging podcasts, but it would be helpful to elaborate on this point and devote some argument to establishing why, in fact, it is important. Why do we care whether podcasts include music? What is the public missing out on, or what policy underlying copyright is violated, or what aspect of Internet development is implicated if music is not included in podcasts because of the ambiguities that you point out? Why should podcasts get this special legislative treatment? Without establishing the importance of the issue, it will be harder for you to convince the reader that the current ambiguity in the law is a problem that needs to be addressed with your proposed legislation. Similarly, the paper speaks of podcasts as a great populist communications vehicle that allows for a “kind of freedom and access to information unheard of before.” If the underlying value in podcasts that
supports encouraging their use of music has something to do with fostering First Amendment speech and commentary, then consider laying that out more expressly – and perhaps explaining why the fair use doctrine is not sufficient to address these concerns. In other words, if podcasts are another form of reporting, why isn’t current law sufficient to permit them to flourish? (This gets back to the first question of what you have in mind in terms of how music might be used in podcasts – if all they would do is string together a variety of commercially released songs, with some commentary inserted, does this merit an overhaul of existing law?)

As you revise, consider adding a more in-depth discussion of the argument that podcasts are not public performances. This is an interesting question and is a place where you can inject some of your own views on the subject. While podcasts are clearly different from webcasting or terrestrial radio broadcasts, they are also different from single downloads from iTunes (like those addressed in the ASCAP case). We believe (but are not positive) that the nature of RSS feeds is such that they create a somewhat “automated” download that occurs without manual prompting from the recipient. If that’s the case, then it is much less “singular and deliberate” from a download, and closer to an automated “push” to a mass audience as soon as individuals sign on. It might be interesting to think about and explore in more depth how this distinction might impact the public performance debate.

We’re glad that you are planning to include a section at the end with some proposals, because this version still needs more of a thesis – that is, more of your own argument about what should happen, what the law should be, which of the arguments about whether podcasts are performances or not are the better ones and why, etc. As currently drafted, the paper spends too much space describing – describing the background information about podcasts and the underlying copyright issues that are implicated, describing the kinds of licenses that are needed and from whom. These descriptions are a necessary part of the paper, but not enough of it is currently dedicated to your own analysis. Do you think the ASCAP case was rightly decided? Are other courts likely to apply the same reasoning? Should this reasoning apply to podcasts in the same way that it does to downloads? What is different about how music is used in podcasts that could be argued to lead to a different result than for downloads of music? We can discuss more of these sorts of questions that your paper might tackle when we meet in conference, as it seems that you are already working on incorporating more of your own perspective in the section that is still in progress.

We look forward to talking with you about the paper and seeing your final draft.
They’re Playing Our Song: Music, Political Campaigns, and the First Amendment

INTRODUCTION

On a Wednesday in September 2008, presumptive Vice-Presidential candidate Sarah Palin was introduced at the Republican National Convention in St. Paul, Minnesota for her much anticipated speech accepting the Republican nomination.¹ Before she spoke, the rock band Heart’s classic song “Barracuda”² was played for the energized crowd.³ The song played again after Presidential candidate John McCain’s speech accepting the GOP nomination on Thursday.⁴ “Barracuda” was being used by the campaign as “a nod to Palin’s feisty reputation and to her high-school basketball-team nickname.”⁵ The performance of the song reached a large audience—according to the Nielsen Company, the Republican National Convention “had a reach of nearly 50% of U.S. households.”⁶

The front-women of Heart, Ann and Nancy Wilson, were not pleased that “Barracuda” was being used as a theme song for Palin, a controversial figure. They reacted swiftly, sending a cease-and-desist order demanding that the campaign stop using their song.⁷ In an interview with Entertainment Weekly, Nancy Wilson protested, “I think it’s completely unfair to be so misrepresented.”⁸ Unfortunately for the Wilson sisters, however, the Copyright Act does not

² Heart, Barracuda, on LITTLE QUEEN (Portrait Records 1977).
⁴ Id.
⁶ THE NIELSEN COMPANY, NIELSEN EXAMINES TV VIEWERS TO THE POLITICAL CONVENTIONS 2 (September 2008), http://blog.nielsen.com/nielsenwire/media_entertainment/two-thirds-of-us-households-tuned-in-to-dems-and-gops-conventions/ (follow “full report” hyperlink) ("[T]he audience sizes were nearly identical for the DNC and RNC.").
⁷ See Michaels, supra note 5.
provide a remedy for the McCain–Palin campaign’s use of their song.\textsuperscript{9} The RNC purchased a venue-based “blanket license” from the American Society of Composers, Authors, and Publishers (ASCAP), which granted it the right to perform “Barracuda” publicly in compliance with copyright law.\textsuperscript{10}

The “Barracuda” controversy represents only one of the many instances of performers or songwriters protesting the use of their intellectual property in conjunction with a political campaign.\textsuperscript{11} Several such situations emerged during the 2008 Presidential election cycle.\textsuperscript{12} Sometimes, based on the circumstances, copyright law provides a clear remedy for a contested use. Other times, however, an artist will have to look to other legal doctrines for a remedy. This paper will not address the copyright issues at stake in such a case, nor will it discuss the copyright remedies that are available. Instead, this paper will use the “Barracuda” controversy—where there was no copyright remedy available—as a model. The “Barracuda” scenario creates a significant problem, because the lack of a remedy in such a scenario has serious implications for a musical artist’s\textsuperscript{13} First Amendment interests. Though there are other legal doctrines the artist may invoke, this paper will demonstrate that these alternative avenues of relief are either inadequate to protect the artist or irreparably flawed in the sense of not necessarily requiring a balancing of First Amendment interests.

\textsuperscript{9} See Chris Wilson, \textit{Will McCain’s Heart Stop?}, SLATE, Sept. 5, 2008, http://www.slate.com/id/2199492/; see also Erik Gunderson, Comment, \textit{Every Little Thing I Do (Incurrs Legal Liability): Unauthorized Use of Popular Music in Presidential Campaigns}, 14 LOY. L.A. ENT. L.J. 137, 146–47 (noting that when a song has been licensed by a performing rights organization, the artist “will not be able to make out a \textit{prima facie} case of copyright infringement”).

\textsuperscript{10} See Wilson, \textit{supra} note 9. ASCAP is the organization that has been designated to collect royalties on “Barracuda” on behalf of the copyright owners when it is played publicly. See Reuters, \textit{Rock Group Heart Says “Barracuda” Use is Fishy}, Sept. 5, 2008, http://www.reuters.com/article/idUSN0451966120080905.

\textsuperscript{11} See infra Part I.

\textsuperscript{12} See infra section 1.B.

\textsuperscript{13} I use this term to refer to both composers of musical compositions and musical performers.
This paper argues that Congress should act to provide a clear remedy that will protect the rights of musical artists not to associate, through their music, with the campaign of a candidate whose views they do not share.\textsuperscript{14} I will discuss this First Amendment-based non-association interest, which is entangled with the related interest against compelled speech. These two related interests, taken together, create a strong incentive for Congress to act to protect artists who find themselves in a “Barracuda” situation. This remedy, however, must also take into account the competing First Amendment interests of the political candidates who seek to express their political views through music.

Part I of this paper will set the stage with a discussion of the relevant portions of the Copyright Act, followed by a survey of the history of the use of music in political campaigns. Section I.A will explain how the statutory structure of relevant copyright law, in tandem with structures inherent to the music industry, leads to the “Barracuda” problem, thus leaving the artist without legal recourse under the Copyright Act. Section I.B will then look at the history of the use of music in political campaigns, and survey the legal battles arising out of several contested uses, noting the specific claims the plaintiffs stated in each. Part II of this paper will discuss the competing First Amendment issues at stake when a politician seeks to use music for political speech while the writer or performer of that music wishes not to be associated with that speech. Part III will address the existing remedies, outside of copyright, available to a hypothetical “Barracuda” plaintiff, namely, a right of publicity action and a claim under the Federal Lanham Act. Section III.A will address the right of publicity, concluding that it is not likely to provide a remedy for our plaintiff. Section III.B will address the Lanham Act, concluding that though the Lanham Act may provide our plaintiff a remedy, that remedy is

\textsuperscript{14} Or, alternatively, an artist who does not want her music be used to support any political campaign, at all.
flawed because though it does take the First Amendment into account, it does so inconsistently.
Further, trademark doctrine is not equipped to address such a scenario because it lacks a specific
mechanism to balance the two competing First Amendment interests at issue in this unique
context involving political speech. Section IV.A will propose that Congress enact legislation to
provide a remedy that protects “Barracuda” plaintiffs while also ensuring that the First
Amendment rights of political candidates are not unduly burdened. Finally, section IV.B will
address two potential concerns about the effects of the legislation.
They're Playing Our Song: Music, Political Campaigns, and the First Amendment

INTRODUCTION

On a Wednesday in September 2008, presumptive Vice-Presidential candidate Sarah Palin was introduced at the Republican National Convention in St. Paul, Minnesota for her much anticipated speech accepting the Republican nomination.\(^1\) Before she spoke, the rock band Heart's classic song "Barracuda"\(^2\) was played for the energized crowd.\(^3\) The song played again after Presidential candidate John McCain's speech accepting the GOP nomination on Thursday.\(^4\) "Barracuda" was being used by the campaign as "a nod to Palin's feisty reputation and to her high-school basketball-team nickname."\(^5\) The performance of the song reached a large audience—according to the Nielsen Company, the Republican National Convention "had a reach of nearly 50% of U.S. households."\(^6\)

The front-women of Heart, Ann and Nancy Wilson, were not pleased that "Barracuda" was being used as a theme song for Palin, a controversial figure. They reacted swiftly, sending a cease-and-desist order demanding that the campaign stop using their song.\(^7\) In an interview with Entertainment Weekly, Nancy Wilson protested, "I

\(^2\) HEART, Barracuda, on LITTLE QUEEN (Portrait Records 1977)
\(^4\) Id.
\(^6\) THE NIELSEN COMPANY, NIELSEN EXAMINES TV VIEWERS TO THE POLITICAL CONVENTIONS (September 2008), http://blog.nielsen.com/ffi/news/entertainment/two-thirds-of-us-households-tuned-in-to-demos-and-gop-conventions/ (follow "full report" hyperlink) ("The audience sizes were nearly identical for the DNC and RNC.")
\(^7\) See Michaels, supra note 5.
think it's completely unfair to be so misrepresented." Unfortunately for the Wilson sisters, however, the Copyright Act does not provide a remedy for the McCain-Palin campaign's use of their song. The RNC purchased a venue-based "blanket license" from the American Society of Composers, Authors, and Publishers (ASCAP), which granted it the right to perform "Barracuda" publicly in compliance with copyright law.

The "Barracuda" controversy represents only one of the many instances of performers or songwriters protesting the use of their intellectual property in conjunction with a political campaign. Several such situations emerged during the 2008 Presidential election cycle. Sometimes, based on the circumstances, copyright law provides a clear remedy for a contested use. Other times, however, an artist will have to look to other legal doctrines for a remedy. This paper will not address the copyright issues at stake in such a case, nor will it discuss the copyright remedies that are available. Instead, this paper will use the "Barracuda" controversy—where there was no copyright remedy available—as a model. The "Barracuda" scenario creates a significant problem, because the lack of a remedy in such a scenario has serious implications for a musical artist's First Amendment interests. Though there are other legal doctrines the artist may invoke,...

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8 Whitney Pastorek, Exclusive: Heart's Nancy Wilson Responds to McCain Campaign's Use of 'Barracuda' at Republican Convention, EW.COM, Sept. 3, 2008, http://hollywoodinsider.ev.com/2008/09/05/heart-responds/ (In a written statement, Nancy and Ann Wilson said, "Sarah Palin's views and values in NO WAY represent us as American women. We ask that our song 'Barracuda' no longer be used to promote her image.")

9 See Chris Wilson, Will McCain's Heart Stop?, SLATE, Sept. 5, 2008, http://www.slate.com/id/2199492/; see also Erik Gunderson, Comment, Every Little Thing I Do (Incas Legal Liability): Unauthorized Use of Popular Music in Presidential Campaigns, 14 LOY. L.A. ENT. L.J. 137, 146-47 (noting that when a song has been licensed by a performing rights organization, the artist "will not be able to make out a prima facie case of copyright infringement").

10 See Wilson, supra note 9. ASCAP is the organization that has been designated to collect royalties on "Barracuda" on behalf of the copyright owners when it is played publicly. See Reuters, Rock Group Heart Says 'Barracuda' Use is Fidelity, Sept. 5, 2008, http://www.reuters.com/article/idUSN0451966120080905.

11 See infra Part I.

12 See infra section I.B.

13 I use this term to refer to both composers of musical compositions and musical performers.
this paper will demonstrate that these alternative avenues of relief are either inadequate to protect the artist or irreparably flawed in the sense of not necessarily requiring a balancing of First Amendment interests.

This paper argues that Congress should act to provide a clear remedy that will protect the rights of musical artists not to associate, through their music, with the campaign of a candidate whose views they do not share.\textsuperscript{11} I will discuss this First Amendment-based non-association interest, which is entangled with the related interest against compelled speech. These two related interests, taken together, create a strong incentive for Congress to act to protect artists who find themselves in a “Barracuda” situation. This remedy, however, must also take into account the competing First Amendment interests of the political candidates who seek to express their political views through music.

Part I of this paper will set the stage with a discussion of the relevant portions of the Copyright Act, followed by a survey of the history of the use of music in political campaigns. Section I.A will explain how the statutory structure of relevant copyright law, in tandem with structures inherent to the music industry, leads to the “Barracuda” problem, thus leaving the artist without legal recourse under the Copyright Act. Section I.B will then look at the history of the use of music in political campaigns, and survey the legal battles arising out of several contested uses, noting the specific claims the plaintiffs stated in each. Part II of this paper will discuss the competing First Amendment issues at stake when a politician seeks to use music for political speech while the writer or performer of that music wishes not to be associated with that speech. Part III will address the existing remedies, outside of copyright, available to a hypothetical “Barracuda”

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plaintiff, namely, a right of publicity action and a claim under the Federal Lanham Act. Section III.A will address the right of publicity, concluding that it is not likely to provide a remedy for our plaintiff. Section III.B will address the Lanham Act, concluding that though the Lanham Act may provide our plaintiff a remedy, that remedy is flawed because though it does take the First Amendment into account, it does so inconsistently. Further, trademark doctrine is not equipped to address such a scenario because it lacks a specific mechanism to balance the two competing First Amendment interests at issue in this unique context involving political speech. Section IV.A will propose that Congress enact legislation to provide a remedy that protects “Barracuda” plaintiffs while also ensuring that the First Amendment rights of political candidates are not unduly burdened. Finally, section IV.B will address two potential concerns about the effects of the legislation.

1. Setting The Stage

The issue of the unauthorized use of musical works in political campaigns is complicated by the unique, dual nature of the copyright in musical works. First, I will explain how the statutory scheme is structured under the Copyright Act, and how this scheme, in conjunction with music industry practice, can lead to the “Barracuda” scenario. Second, I will provide an overview of the long history of the use of music in political campaigns followed by a discussion of the shorter history of the objections that have been made to that use.

A. NO REMEDY FOR THE “BARRACUDA” PLAINTIFF IN THE COPYRIGHT ACT
General Comments on Draft Paper from Profs. Ross and Huppe

You have written an excellent draft paper. It is well-organized and well-researched, and you do a great job explaining and supporting your thesis. We have included margin notes above that respond to specific portions of the paper, and below we provide some general suggestions and questions that we hope will be helpful to you at the more global level as you work on the final version of the paper.

Organization:

Really nice job organizing this at the large- and small-scale level. You included strong introductions as you introduced each part of the paper, and your thesis was presented from the beginning in a clear manner that allowed the reader to see how each part of the paper led to and supported your ultimate conclusion. We've made some relatively minor suggestions in the margins for improving your organization in places, particularly with respect to breaking up some long paragraphs that deal with distinct issues and with respect to adding more detail to your introductory paragraph on p. 20 that lays out the arguments that will be made in your section on why the right of publicity provides inadequate protection for artists.

Of course, as you revise the substance in light of the comments in the margins and below, be sure to revise your introductory roadmaps and your conclusions accordingly so that they mirror any new or refined points in your analysis.

Analysis:

The two biggest things that we suggest you focus on as you revise are incorporating more specificity into your proposed statutory provisions and expanding your discussion of the right of publicity and the Lanham Act and why neither cause of action adequately balances the First Amendment concerns of both the politician and the artist.

First, with respect to making your proposal more specific, we've inserted several questions in the margin at the beginning of your section that outlines the proposal, most of which go to the process by which you anticipate your statutory provisions would work. You've dealt with the substance of the proposed legislation and some potential substantive or policy-based objections to them, but the procedural aspects of your statutory provision should not be ignored. How, exactly, would it work? Would any disputes have to be resolved before the politicians could use the music? If so, what effect would that have on the First Amendment rights of the politicians? If not, what effect would that have on the First Amendment rights of the artists?

Second, your discussion of the right of publicity and why it provides an inadequate remedy for the harm that you see arising out of political uses of musical artists' works is off to a good start, but parts of it could use additional discussion and analysis. In
particular, your discussion of the relationship between the First Amendment and the right of publicity could be expanded (and perhaps moved—it seems to be more substantive than a "practical problem" with the claims and more closely tied to the main thrust of your thesis). Your discussion of the First Amendment and the right of publicity is fairly limited at present, both in terms of the space you devote to it and in terms of the sources that you cite. Quite a few law review articles have addressed the conflict that often arises between the two areas of law, as well as quite a few cases, yet the cases you discuss are limited to a couple, fairly early cases to address the conflict (and Kozinski only addressed it in dissent in the White case). Because you focus on how the current balancing between the First Amendment and trademark owners’ rights in the Lanham Act context in some depth, expressly arguing why that balancing does not adequately address the non-association rights of artists, consider focusing on the same issues in the right of publicity context. We’ve included some more detailed suggestions in the margin with respect to enhancing your discussion of the right of publicity and First Amendment, as well as some suggestions for bringing more focus and in-depth discussion to your analysis of the pre-emption issue that arises in the right of publicity context.

Similarly, in your discussion of the Lanham Act, you conclude that the balancing between the First Amendment and the Lanham Act is currently inadequate but you stop short of providing a detailed discussion of how you arrive at that conclusion. In addition to some of the general discussion that you now include about the ambiguity inherent in the courts’ balancing of First Amendment interests against trademark owners’ interests, it would be helpful to see you engage more directly with some of the relevant case law to illustrate why/how the current balancing, in practice, does not work as effectively as your proposed test would work. We think it would also strengthen your analysis and your ultimate conclusion that Congressional action is needed if you more precisely explained how your express balancing between the politician’s and the artist’s respective First Amendment rights would be different, as a practical matter, from the current balancing of likelihood of confusion against the politician’s expressive rights. Would the result be different in the examples that you give? Why/how would there be a difference, both in terms of the nature of the proceedings necessary to succeed on a claim and in terms of the likely outcome?

Miscellaneous:

We’ve noted a few places in the margins where you’ll need to be careful with your choice of terms so that you do not inadvertently overstate a point or suggest that a rule relevant only to composers might apply generally to recording artists or vice versa. For example, there were some places where you referred generally to recording artists and records when the relevant law only relates to composers and compositions (e.g., when you discuss PROs) and other places where you used your generic “musical artists” term but the discussion was only expressly relevant to performing artists and sound recordings (e.g., your discussion of preemption of the right of publicity and the Laws case). As you look over your final draft, just be sure to look for how you use various terms, particularly ones that are loaded with legal meaning, and use them with precision.
We'd like to schedule a conference with you whenever it will be most convenient for you over the next couple of weeks before the final paper is due. If you'd like to meet this week, Friday afternoon is best. If you cannot meet until later, just let us know when you have a good break between exams and we can schedule it for a time that works well with your schedule.

It's been a pleasure having you in class this semester, and we look forward to seeing the final paper!

Best,
Profs. Ross and Huppe
MUSIC LAW SEMINAR: CHANGING LANDSCAPES IN THE MUSIC INDUSTRY AND THE LAW THAT GOVERNS IT

Course Policies and Procedures

I. General Information

A. Course Description

This course will engage in an in-depth exploration of legal issues that arise in the music industry and the complex ways in which the law has shaped the evolution of the industry and the industry has shaped the development of the law. We will begin with a historical unit that traces the manner in which copyright and other laws affected the development of the music industry (and vice versa) in the 20th century. Our second main unit will cover a cross-section of the current legal issues faced by the music industry and the business practices that have been and are being developed to address those legal issues. We will end the semester with a discussion of the future of the music industry and the role that law and public policy will likely play in that future, as well as with student presentations of their own research into relevant music law issues.

While the specific issues covered will vary in light of ongoing developments in the law and music industry business practices, some of the likely topics of discussion and analysis include the distinct “bundles” of rights in music and how the industry developed to exploit them; music licensing and statutory royalty regimes; illegal Internet downloading, its effect on the industry, and the industry’s response; the changing power relationships among the players in the industry and the contractual and legal issues that emerge from those changing relationships; deregulation and the effects of horizontal and vertical integration in the industry; new distribution models and new models of consumption for music and how the law is developing to accommodate them; the changing conceptions of what it means to “own” music in light of technological innovations in the industry; the future of performance royalties for sound recordings; and the role of social networking sites, YouTube, and other newly-developing avenues for marketing new music.

Some of the issues may be discussed using hypothetical case studies, with students assigned to represent/argue the interests of the various affected parties, such as recording label executives, musicians, songwriters, radio broadcasters, Internet radio operators, and concert promoters. The assigned materials will include a selection of cases, statutes, scholarly articles, and trade publication articles relevant to each of the issues discussed, as well as sample licenses and contracts. Students will be graded based upon their class participation and submission of the required papers for the course.

Copyright Law is a prerequisite for this seminar (the Intellectual Property survey course will not satisfy the prerequisite). Any requests for waiver of the prerequisite will be considered by the professors on a case-by-case basis.
B. **Meeting Times and Office Hours**

The seminar will meet on Mondays from 3:30-5:30 in McDonough 588. Please see the Course Syllabus, as amended from time to time, for more information about class meetings and assignments.

Prof. Ross will have office hours in McDonough Room 554 on Tuesdays from 1:15-2:45 pm and is also available by appointment ([rossj@law.georgetown.edu](mailto:rossj@law.georgetown.edu)). Prof. Huppe will have office hours by appointment throughout the semester ([mhuppe@soundexchange.com](mailto:mhuppe@soundexchange.com)).

II. **Course Requirements**

A. **General Information**

This course carries either two (2) or three (3) credit hours, depending upon whether an individual student elects to take the course as a Writing Requirement course or regular seminar. It will meet once a week for two hours. Class discussions showing thoughtful review and critical analysis of the assigned materials will be an integral part of the learning process. Your participation in class discussions will be considered in assigning your final grade. You will receive a syllabus that details the readings to be assigned for each class, and copies of the assigned readings will be either available in the online Course Materials site or provided on the TWEN site for this course (password = pianoman) (or both). You are not required to purchase any textbook for this course.

Most classes will be discussion-based. Some will begin with lectures by the two professors and occasionally by visiting practitioners in the music industry, or a student presentation in the last few weeks of class, followed by class discussion of the issues raised by the lecture, presentation, and assigned readings. Some classes will also involve case studies and/or contract drafting and negotiating exercises.

By 9 a.m. on the day that seminar meets each week, we expect each student to post at least one substantive question or comment about the subject matter of that week’s seminar in the appropriate folder under the “Forums” tab on the TWEN site, either based upon the assigned readings or upon the student’s general knowledge about the subject. During seminar, we will discuss at least some of the issues raised by your posted questions and comments, and your postings will be considered in evaluating your class participation for the seminar.
B. **Option to Take the Course as a Writing Requirement Seminar**

Students enrolling in the course will have the option of either (1) writing a paper that meets the Law Center’s upperclass Writing Requirement, in which case the student will earn 3 credits for the course or (2) writing two papers of at least 3000 words in length each (about 12-13 pages), one due in the middle of the semester and one due at the end, on a music law topic touched on during the course, in which case the student will earn 2 credits for the course. You must register for either the 2-credit or 3-credit option, so be sure that you check your schedule to confirm whether you will need to meet the requirements for the 2-credit or 3-credit course.

(1) For those students electing to write a paper fulfilling the Writing Requirement, the following guidelines will apply. As described in the *Georgetown University Law Center Student Handbook of Academic Policies*:

Students must complete the upperclass legal writing requirement as follows: (1) by successfully completing a seminar or clinic designated in the Curriculum Guide as meeting the upperclass legal writing requirement (i.e., see the “WR” notation in the course schedule); or (2) by successfully completing a Supervised Research project that has been approved by the Associate Dean for the J.D. Program, described below.

The upperclass legal writing requirement is intended to provide students with the opportunity to refine research and writing skills learned in the first year, and to develop the skills necessary to undertake writing projects on their own following graduation from law school. Students choose topics, submit outlines, prepare and submit a first draft, and complete the final paper in consultation with faculty members in approved seminars, clinics, and Supervised Research projects.

In the course of completing the upperclass legal writing requirement, students show their mastery of the in-depth research undertaken and demonstrate how they have organized, clarified, or advanced this body of knowledge in resolving the issues raised by the paper.

The following are the technical requirements for the upperclass legal writing requirement, which must be completed in accordance with the professor’s instructions and schedule:
(1) use of legal forms of citation (when appropriate)
(2) submission of an outline
(3) submission of a first draft of at least 6,000 words (excluding footnotes)
(4) submission of a revised final paper of at least 6,000 words (excluding footnotes) based on the professor’s comments.
Papers of 6,000 words (excluding footnotes) in length are approximately 25 typewritten pages using customary margins and spacing. All work must be that of the student in consultation with the supervising professor or must be cited for attribution to others. Students will receive a grade for both the course and the paper portions of the course. Both grades will be reflected on the student’s transcript; however, only the course grade is calculated in the student’s overall grade point average.

Final papers must be submitted to the Office of the Registrar, and a copy of the paper must also be submitted to the professor if requested, by the deadline announced by the professor. Final papers should be submitted through the Georgetown Law Online Paper/Exam Management System, at http://apps.law.georgetown.edu/exams/.

Because a paper that meets the upperclass legal writing requirement should be a product of the student’s own work in consultation with the supervising professor, students who are interested in using their final paper for other purposes (such as a law journal note) may do so only: (1) after the paper has been submitted for grading; and (2) to the extent the student has not received comments, edits, or other feedback on the paper from individuals other than their grading professor (or in connection with classroom discussion as overseen by such professor) prior to the time it is submitted for grading.

The course syllabus will provide the dates for submission of a paper topic and thesis statement, research plan, paper outline, draft paper, and final paper for students taking the course for a Writing Requirement. We take these deadlines very seriously. They are intended to allow us to provide meaningful advice and feedback to you in what may be your first major scholarly writing experience. Through this process, you will develop skills in selecting an original topic, presenting and defending a clear thesis, researching in law and other disciplines related to the music industry, and writing a well organized and thoughtful article.

However, we also recognize that different individuals may perform their best work by employing a writing process that differs from the one set forth in the syllabus. If that is the case, we will be happy to meet with you at or before the deadline for submission of your paper topic and thesis statement to discuss and agree upon an alternate process. If you do not schedule a meeting with us prior to that time and obtain our agreement on an alternate schedule, you will be expected to meet the deadlines set forth in the syllabus. All writing requirement papers should be substantial research papers that demonstrate thorough research, a deep understanding of the topic, and thoughtful analysis of the issue addressed by the paper. Please see Section III, below, for more detail about our expectations for each part of the writing process for your writing requirement paper.

(2) Students taking the course for 2 credits will need to comply with the submission dates for two 3000-word papers, but need not submit a research plan, outline, or draft of their
papers. All papers submitted under the 2-credit option must demonstrate original thinking and thoughtful analysis of the issue addressed by the paper, but need not be based upon extensive research. Instead, the 2-credit-option papers should ideally address a topic covered by the syllabus and may build from the materials discussed in class or included in the materials and be supplemented with additional research if the student desires.

C. Grading

Your grade in this seminar will be based upon the following:

- Class attendance, class participation, and timely completion of assignments, including group and individual assignments set out in the syllabus or given in class, assigned presentations, and the weekly postings on Courseware referred to in Section II.A, above, will make up forty percent (40%) of your grade. Because this course is designed as a seminar, the attendance and participation of all members of the seminar is essential to the thinking and learning process. We expect all students to attend and be prepared for every class, subject only to illness, family emergency and similar unanticipated problems of which you should try to advise us promptly. Class participation will be assessed on a qualitative rather than quantitative basis.

- Your written papers will make up the remaining sixty percent (60%) of your grade. For students taking the seminar for 2 credits, each of the two papers will make up thirty percent of your grade.

III. Guidelines for the Writing Requirement Paper

A. The Purpose of the Seminar Paper

While the Seminar itself is intended to serve as a broad overview of current legal issues in the various branches of the music industry, the purpose of the seminar paper is to give you an opportunity to master a particular, well-focused issue or subject matter within the broad range of topics that fall under the rubric of "music law," by doing original research and careful thinking. Writing the paper may also allow you to become familiar with a form of legal writing - "academic" or "scholarly" writing - that is somewhat different from other forms of legal writing with which you may have had more experience.

The purpose of the seminar paper is for you to discover, develop and refine a scholarly topic in such a way that allows you to explore your own thinking on the subject and add something to the field. It should be a challenging and rewarding intellectual experience that allows you to follow a disciplined path to discovering an original message and presenting it in an original way. It should be an opportunity for you to apply and improve upon your legal research techniques as well as your writing style; for you to organize and present complex materials in a clear, efficient and effective manner; and, if you have elected to take this course as a Writing
Requirement course, for you to receive detailed comments from and meet with one or both of the professors individually about your writing.

The descriptions of the stages of the writing process below are primarily intended for those students who intend to write a paper that fulfills the upperclass Writing Requirement. However, those students who do not make that election may still find the following to be helpful as they choose a topic, develop a thesis, and research and write the two shorter, required papers for the 2-credit course.

B. **What Distinguishes Scholarly Writing from Other Forms of Legal Writing?**

A scholarly paper is analytical rather than merely descriptive. It should take a legal issue or problem and, through legal analysis, propose a solution or offer insights that point towards some resolution of the issue. While it is appropriate for a paper to include introductory pages that are merely descriptive, these pages should include only what is necessary to set the stage for your legal/analytical discussion.

In addition to its focus on legal/analytical discussion, the paper should also be original. This does not mean that everything that you say in the paper should be something that has never been said before. In fact, scholarly papers often build off of work that has preceded them, adding something to what has already been said about the subject in scholarly papers and in judicial opinions. For example, a paper might note that there is an ongoing debate about a particular issue, and then go on to (1) offer new criticisms of certain of the arguments that have been made in the debate, or (2) offer new arguments for adopting one or another solution to the problem, or (3) propose an entirely new resolution of the problem. Indeed, a paper might be original by pointing out that something is a problem that has not previously been perceived as a problem, or, conversely, that something that has been thought to be a problem is not in fact a problem.

We have attached several appendices to these materials that address scholarly research and writing in more detail; we hope that you will find these materials helpful as you begin the process of researching and writing your seminar paper for this course. We also encourage you to seek advice from us, from GULC’s librarians, and from the Writing Center at all stages in your writing process.

C. **The Writing Process for the Seminar Paper**

The following is a summary of what the stages of your writing process might be, in the order in which you might proceed. Not everyone will follow the same process, and not everyone will work in the same order. Some of you will spend much more time at one part of the process than others. For example, for some of you, writing is a quick process once you have completed your research and an outline, but you may spend months researching your topic. Others may complete your research relatively quickly but may spend weeks and weeks on the writing and
rewriting stages of your writing process.

Regardless of your individual writing preferences, we will expect those of you have elected to write a paper meeting the upperclass Writing Requirement for this course to report to us on each of the following stages of your process by the deadlines listed in the syllabus. Please Note: If you prefer to follow a different process than the one outlined below, then you should schedule a meeting with us to map out what your process will be and to agree upon deadlines for you to report to us on your progress at each stage.

1. Selecting Your Topic

For many students, the biggest hurdle to beginning their seminar papers is the selection of a topic. The earlier you do this, the easier the writing process will be for you! This is true for a number of reasons, the most important of which is highlighted by the scholarly writing requirement of originality. You may initially select a topic which fascinates you and which you believe is appropriate for a piece of scholarly writing. However, you may discover during your research that it is not a novel issue; there may be hundreds of articles that already address this issue, leaving little room for original commentary or analysis. It is thus imperative that you select your topic as soon as possible and commence your initial research as early as possible, allowing you adequate time to select and research an alternative topic in the event that your first idea leads you nowhere.

How should you go about selecting your topic? There is no one "magic" path to a good topic, but here are some suggestions:

First, pick an aspect of music law that interests you. Although there are many fascinating copyright and trademark issues within the music field, you may not be one of those people who finds such issues fascinating. You may need to do some general reading on the various categories of law that are relevant to the music industry in order for you to determine what most intrigues you, and we will be happy to help you to narrow down your field of inquiry.

Second, once you have narrowed down your topic to a sub-category of music-related legal issues, do some initial research. Skim through recent publications in that field, whether they be legal publications or business publications or news publications. Is there a recently-decided case that was reported that may be of interest? Is there a statute that has been recently enacted or that is making its way through the legislative process that might have an impact on the field in which you are interested? Talk to practitioners in the field if you have access to them. Find out what issues they have struggled with recently, what concerns them about the future of the field, what direction the business might be taking that could raise new legal problems. Third, take a quick look at some very recent law review articles in the field in which you are interested. Do they raise issues for future research or analysis that you might want to take on? Are there matters that are stated to be beyond the scope of the article that pique your interest?

If you have done all of the above and are still at a loss for a topic, talk to us about
possible ideas. This suggestion comes last only because the most interesting paper for you to write will be one that discusses a topic you have conceived of yourself rather than one that you have been handed by a professor. If you invest your imagination in the selection of the topic, your final product will be that much better.

All students taking the course for the Writing Requirement must submit proposed paper topics by the date set forth in the syllabus.

2. Writing Your Thesis Statement

The next step in your writing process for this course will be to write a “thesis statement.” Such a statement should include a brief statement, even if tentative, that identifies the theory or hypothesis of the paper. It might also include a brief background of the area to be written about and a description of how the paper will contribute to the understanding of that area. It should be a carefully defined statement of the issue to be addressed. Writing the thesis statement should force you to begin the process of actively engaging with the issues, and reviewing your thesis statement should give the reader a clear idea of where you are headed with your research and analysis.

As you develop your thesis statement, you should consider the following:

- What is the primary purpose of your paper? Is it to synthesize a murky area of law, evaluate a decision or statute or line of cases, develop empirical data and interpret it, criticize a position, compare similar ideas in different contexts, or something else?

- Who is your target audience? Are you writing for scholars who are experts in this area of the law, practitioners who advise clients in this area of the law, legislators who are drafting or revising statutes governing this area of the law, executives who deal with this area of the law in the music industry, or some other potential audience?

- What is the intended scope of your paper? Keep in mind that you must be able to develop your thesis in a coherent, self-sustained manner within the minimum of twenty-five pages plus footnotes (if your paper is intended to fulfill the Writing Requirement) and that you must also be able to complete your paper before the end of the semester. Are your thesis and topic narrow enough to avoid the necessity of pages and pages of background introduction yet broad enough to warrant twenty-five pages of discussion and analysis?

- What stance will you take in your paper? You may choose to be curious, impatient, aggressive, conciliatory, quiet, or some other adjective. Consciously select your stance, however, so that you can connect your stance on your topic with your feeling about the topic and thus maintain a unified point of view throughout your paper.

- What is original about your theme? Indicate what you are adding to the field and what your paper will bring to the development of the particular theories that you discuss.
You may choose to present your thesis statement in a well-developed paragraph, a mini-outline, a chart, or some other format. Whatever format you choose, please make the thesis statement a prose statement. Clear articulation of your thesis at the beginning of your process will help to focus your research, your organization of the paper, and your drafting of the paper.

3. **Researching Your Paper Topic**

For most of you, researching your paper topic will be a recursive process that does not end once your writing begins. Rather, you will likely start outlining and writing your paper before your research is complete and will continue to research as you write, filling in gaps as you discover them in your paper and pursuing new avenues that only occur to you as you write.

Because where and how you conduct your research will depend upon the nature of your topic, we would be happy to meet with each of you to discuss your research strategy and to brainstorm potential research avenues if you so request. A research librarian will meet with us in class to discuss helpful research techniques, and you will submit a research plan for your project to us that will outline the starting point for your research. Research librarians will also be available to meet with you individually to assist you in developing and implementing your research strategy, and we encourage you to take advantage of this service.

4. **Outlining Your Paper**

You must produce an outline of your paper for this course if you are seeking to fulfill the Writing Requirement. Writing a detailed outline before you begin writing your paper (or after you begin drafting the paper) will enable you to set out your vision of the entire analysis of the paper without the need to worry about good prose. Preparing this outline will help to focus your thought, reveal gaps in the analysis that must be filled and criticisms that must be dealt with, inspire new ideas that were not previously clear to you, and will force you to consider the most effective organization for your analysis.

A good outline will provide a clear idea of the thesis, discussion and probable conclusion of the paper. It should be as detailed as possible, specifying particular works and arguments that serve as the basic foundation of the thesis and starting points for additional research. And, most importantly, it should provide a coherent, logical framework of the arguments and discussion that you intend to include in your paper.

You should not feel wedded to this initial outline; it will change as your research progresses and more ideas develop. However, it is essential to have a good, starting roadmap to guide your writing process. You may find it helpful to create a second (and third, and fourth!) outline as a way of maintaining control over the organization of your work as it progresses, and you should feel free to submit any additional outlines that you prepare to us for us to review and comment upon.
There is no required format for your outline, but it must include more than simply a list of topics that you intend to discuss and we expect that it would be at least three pages in length. It should sketch out the analysis that will be applied to the issue and the key authorities that will be examined. It might include a discussion of the legal doctrine that is being criticized, examined or discussed. It might also list the key criticisms of the approach taken in the analysis and suggested responses. To the extent possible at this stage in your writing and analysis, it should also sketch out your conclusions and/or recommendations. It should also include a list of key references as well as a description of any additional research that remains to be done.

We will review and comment on your outline and will be available to meet with you to discuss any questions or concerns with you at this stage in your writing process. At this meeting, you should be prepared to discuss how you will go about writing the paper itself and what additional research you intend to do as you write and rewrite the paper.

5.  Writing the Paper

You will be submitting a draft of your paper to us for our review and comment well before your final paper is due. We will provide you with written comments and will meet with you individually to discuss the comments and any questions that you may have. During our seminar meetings, you will also present your paper to the seminar participants and will receive feedback and suggestions from the group.

The draft that you submit to us should not be a “first” draft or a “rough” draft from your point of view; it is simply the first draft of the paper that we will see. This draft should be a carefully considered and well-written version of the paper, encompassing all of your major research materials and presenting a coherent thesis. It should not be a rough approximation of what you intend your final paper to be. It should be a product that you have already rewritten and revised without comments from us. It may inevitably contain loose ends, organizational problems, and logical gaps that were not anticipated at the outline stage, but there should be no major structural, theoretical, or grammatical problems with this draft of the paper. Time should be taken to polish it, and it should be a product that you are comfortable (and perhaps proud) to share with others.

The value of a good draft cannot be overstated. Our comments and the suggestions of other participants in the seminar are useful only if the draft upon which we base our comments is at a sufficient stage of completion that its strengths and weaknesses are evident. In fact, we encourage you to meet with a Senior Writing Fellow at the Writing Center before you turn in your first draft of the paper to us if you have any concerns as you struggle with writing and rewriting this first draft.

6.  Finalizing the Paper

While most of you will not be required to submit a second draft of your paper to us before preparing it in final form, if you decide to do so and arrange it with us in advance, we
would be pleased to provide you with further feedback on that draft. The best papers are ones that allow sufficient time for the rewriting and revising stages of the writing process. Revising should be a careful, deliberative process, with the choice and placement of every word having a specific purpose.

As you finalize your paper, keep in mind that you are the ultimate decision-maker with respect to the content of your paper. The feedback that you receive from us, from your classmates, and from the Senior Writing Fellows is intended to provide you with information about how different readers react to your work and to make suggestions for how the paper can be improved for the sake of the intended reader. Do not make suggested changes without considering and perhaps even questioning them. Our conferences about your paper and your subsequent revisions are an opportunity for you to defend your writing choices if you believe they deserve defending; to evaluate proposed solutions to problems with the paper and perhaps even reject them in favor of better ideas; to consider whether your purpose and audience are adequately served by the paper in its current form. Your final paper should reflect a thoughtful consideration of the comments you have received, but it should not incorporate suggested revisions automatically or verbatim. You are the author of this paper, and your final product should be something that you have embraced wholeheartedly.
Prof. Julie Ross

Writing the Seminar Paper

Discussion Points:

- Understanding the Paper's Purpose and Audience
- Selecting a Topic
- Developing and Articulating a Thesis
- Researching Unfamiliar Sources
- Identifying and Organizing the Most Relevant Sources and Ideas
- Maintaining a Consistent Stance

What Distinguishes Scholarly Writing from Other Forms of Legal Writing?

A scholarly paper is analytical rather than merely descriptive. It should take a legal issue or problem and, through legal analysis, propose a solution or offer insights that point towards some resolution of the issue. While it is appropriate for a paper to include introductory pages that are merely descriptive, these pages should include only what is necessary to set the stage for your legal/analytical discussion.

In addition to its focus on legal/analytical discussion, the paper should also be original. This does not mean that everything that you say in the paper should be something that has never been said before. In fact, scholarly papers often build off of work that has preceded them, adding something to what has already been said about the subject in scholarly papers and in judicial opinions. For example, a paper might note that there is an ongoing debate about a particular issue, and then go on to (1) offer new criticisms of certain of the arguments that have been made in the debate, or (2) offer new arguments for adopting one or another solution to the problem, or (3) propose an entirely new resolution of the problem. Indeed, a paper might be original by pointing out that something is a problem that has not previously been perceived as a problem, or, conversely, that something that has been thought to be a problem is not in fact a problem.

I have attached several appendices to these materials that address scholarly research and writing in more detail; I hope that you will find these materials helpful as you begin the process of researching and writing your seminar paper for this course. I also encourage you to seek advice from your professor, from GULC’s librarians, and from the Writing Center at all stages in your writing process.

The Writing Process for the Seminar Paper

The following is a summary of what the stages of your writing process might be, in the order in which you might proceed. Not everyone will follow the same process, and
not everyone will work in the same order. Some of you will spend much more time at one part of the process than others. For example, for some of you, writing is a quick process once you have completed your research and an outline, but you may spend months researching your topic. Others may complete your research relatively quickly but may spend weeks and weeks on the writing and rewriting stages of your writing process.

1. Selecting Your Topic

For many students, the biggest hurdle to beginning their seminar papers is the selection of a topic. The earlier you do this, the easier the writing process will be for you! This is true for a number of reasons, the most important of which is highlighted by the scholarly writing requirement of originality. You may initially select a topic that fascinates you and that you believe is appropriate for a piece of scholarly writing. However, you may discover during your research that it is not a novel issue; there may be hundreds of articles that already address this issue, leaving little room for original commentary or analysis. It is thus imperative that you select your topic as soon as possible and commence your initial research as early as possible, allowing you adequate time to select and research an alternative topic in the event that your first idea leads you nowhere.

How should you go about selecting your topic? There is no one “magic” path to a good topic, but here are some suggestions:

First, pick an aspect of the relevant area of law that interests you. Look over the syllabus and any textbook or course materials you might have for the seminar to get an overview of the topics that you will be discussing in the seminar. You may need to do some general reading on the various categories of law that fall within the realm of your seminar’s general scope in order for you to determine what most intrigues you, and your professor should be able to help you to narrow down your field of inquiry.

Second, once you have narrowed down your topic to a sub-category of the relevant area of law, do some initial research. Skim through recent publications in that field, whether they be legal publications or business publications or news publications. Is there a recently-decided case that was reported that may be of interest? Is there a statute that has been recently enacted or that is making its way through the legislative process that might have an impact on the field in which you are interested? Talk to practitioners in the field if you have access to them. Find out what issues they have struggled with recently, what concerns them about the future of the field, what direction the law or practice might be taking that could raise new legal problems.

Third, take a quick look at some very recent law review articles in the field in which you are interested. Do they raise issues for future research or analysis that you might want to take on? Are there matters that are stated to be beyond the scope of the article that pique your interest?

If you have done all of the above and are still at a loss for a topic, talk to your
professor about possible ideas. This suggestion comes last only because the most interesting paper for you to write will be one that discusses a topic you have conceived of yourself rather than one that you have been handed by a professor. If you invest your imagination in the selection of the topic, your final product will be that much better.

2. Writing Your Topic Statement

The next step in your writing process will be to write a “topic statement.” Such a statement should include a thesis statement, even if tentative, that identifies the theory or hypothesis of the paper. It might also include a brief background of the area to be written about and a description of how the paper will contribute to the understanding of that area. It should be a carefully defined statement of the issue to be addressed. Writing the topic statement should force you to begin the process of actively engaging with the issues, and reviewing your topic statement should give the reader a clear idea of where you are headed with your research and analysis. Forcing yourself to write it out is helpful both in terms of maintaining your focus as you engage in the research process and in terms of helping your professor to guide you if you run into stumbling blocks as you begin to shape your thinking on the subject and the contours of the paper.

As you develop your topic statement, you should consider the following:

- What is the primary purpose of your paper? Is it to synthesize a murky area of law, evaluate a decision or statute or line of cases, develop empirical data and interpret it, criticize a position, compare similar ideas in different contexts, or something else?

- Who is your target audience? Are you writing for scholars who are experts in this area of the law, practitioners who advise clients in this area of the law, legislators who are drafting or revising statutes governing this area of the law, business executives who deal with this area of the law, or some other potential audience?

- What is the intended scope of your paper? Keep in mind that you must be able to develop your thesis in a coherent, self-sustained manner within the minimum of twenty-five pages plus footnotes and that you must also be able to complete your paper before the end of the semester. Is your topic narrow enough to avoid the necessity of pages and pages of background introduction yet broad enough to warrant twenty-five pages of discussion and analysis?

- What stance will you take in your paper? You may choose to be curious, impatient, aggressive, conciliatory, quiet, or some other adjective. Consciously select your stance, however, so that you can connect your stance on your topic with your feeling about the topic and thus maintain a unified point of view throughout your paper. If your stance changes as your research progresses, integrate that changed stance into your topic statement and thesis summary to help ensure a consistent stance throughout the drafting process.

- What is original about your theme? Indicate what you are adding to the field
and what your paper will bring to the development of the particular theories that you discuss.

Be sure to begin developing your thesis, as well as the general topic, for the paper as early as possible. Clear articulation of your thesis at the beginning of your process will help to focus your research, your organization of the paper, and your drafting of the paper.

3. Researching Your Paper Topic

For most of you, researching your paper topic will be a recursive process that does not end once your writing begins. Rather, you will likely start outlining and writing your paper before your research is complete and will continue to research as you write, filling in gaps as you discover them in your paper and pursuing new avenues that only occur to you as you write. I will leave suggestions for researching topics in your particular field to the research librarians with whom you will meet, but keep in mind that the best research begins with a plan of action and requires you to maintain a detailed log of what research you have done and what remains to be done. See Appendix B, below, for some quick suggestions for effective notetaking during your research process.

4. Outlining Your Paper

Writing a detailed outline before you begin writing your paper (or after you begin drafting the paper) will enable you to set out your vision of the entire analysis of the paper without the need to worry about good prose. Preparing this outline will help to focus your thought, reveal gaps in the analysis that must be filled and criticisms that must be dealt with, inspire new ideas that were not previously clear to you, and will force you to consider the most effective organization for your analysis.

A good outline will provide a clear idea of the thesis, discussion and probable conclusion of the paper. It should be as detailed as possible, specifying particular works and arguments that serve as the basic foundation of the thesis and starting points for additional research. And, most importantly, it should provide a coherent, logical framework of the arguments and discussion that you intend to include in your paper.

A strong outline also typically identifies main sections of the paper with labels such as Roman numerals and identifies sub-sections and sub-sub-sections within each main section so that the relationship of each part to the whole is reflected in the enumeration. Consider, also, which components of the paper are foundational to points that you want to make and incorporate the foundational material early in the paper, so that the paper proceeds from general to specific: background material first, then identification of the specific problem addressed by the paper, then a discussion of the specific proposals that form your thesis and any critiques of those proposals.

You should not feel wedded to this initial outline; it will change as your research progresses and more ideas develop. However, it is essential to have a good, starting
roadmap to guide your writing process. You may find it helpful to create a second (and third, and fourth!) outline as a way of maintaining control over the organization of your work as it progresses.

There is no standard format for a seminar paper outline, but it should include more than simply a list of topics that you intend to discuss. It should sketch out the analysis that will be applied to the issue and the key authorities that will be examined. It might include an abbreviated discussion of the legal doctrine that is being criticized, examined or discussed. It might also list the key criticisms of the approach taken in the analysis and suggested responses. To the extent possible at this stage in your writing and analysis, it should also sketch out your conclusions and/or recommendations. It should also include a list of key references as well as a description of any additional research that remains to be done. Keep in mind that the more detail you provide in the outline, the more helpful it will be to you and the more it allows your professor to give you helpful feedback as you begin the writing process.

5. Writing the Paper

The draft that you submit to your professor should not be a “first” draft or a “rough” draft from your point of view; it is simply the first draft of the paper that your professor will see. This draft should be a carefully considered and well-written version of the paper, encompassing all of your major research materials and presenting a coherent thesis. It should not be a rough approximation of what you intend your final paper to be. It should be a product that you have already rewritten and revised without comments from the professor. It may inevitably contain loose ends, organizational problems, and logical gaps that were not anticipated at the outline stage, but there should be no major structural, theoretical, or grammatical problems with this draft of the paper. Time should be taken to polish it, and it should be a product that you are comfortable (and perhaps proud) to share with others.

The value of a good draft cannot be overstated. Your professor’s comments are useful only if the draft upon which those comments are based is at a sufficient stage of completion that its strengths and weaknesses are evident. In fact, I encourage each of you to meet with a Senior Writing Fellow at the Writing Center before you turn in your first draft of the paper if you have any concerns as you struggle with writing and rewriting this first draft.

6. Finalizing the Paper

The best papers are ones that allow sufficient time for the rewriting and revising stages of the writing process. Revising should be a careful, deliberative process, with the choice and placement of every word having a specific purpose. The revision process should be guided by your thesis: each part (each section, paragraph, and sentence) of the paper should provide a pillar of support for the ultimate thesis. If it does not, then it should be revised or removed (or the thesis should be adjusted).
As you finalize your paper, keep in mind that you are the ultimate decision-maker with respect to the content of your paper. Do not make suggested changes based on the comments you receive without considering and perhaps even questioning them. Your conference about your paper and your subsequent revisions are an opportunity for you to defend your writing choices if you believe they deserve defending; to evaluate proposed solutions to problems with the paper and perhaps even reject them in favor of better ideas; to consider whether your purpose and audience are adequately served by the paper in its current form. Your final paper should reflect a thoughtful consideration of the comments you have received, but it should not incorporate suggested revisions automatically or verbatim. You are the author of this paper, and your final product should be something that you have embraced wholeheartedly.
APPENDIX A

DIFFERENCES BETWEEN RESEARCHING FOR MEMOS
AND FOR SCHOLARLY WRITING

1. SCOPE. For most practical documents, the scope is a mile wide and an inch deep, so to speak. For scholarly writing, it is an inch wide and a mile deep. This means choosing a narrow topic and researching it exhaustively.

2. PREEMPTION CHECK. To qualify as original, your scholarship must not be preempted by anything written previously. This means you add a research step to see what has been written on your topic. The good news is that this step does help you gather materials for your paper. You may need to first skim sources, take notes, and then narrow your topic. You may also need to frame very specific questions for any computer searches.

3. CHOOSING SOURCES. In scholarly writing, you are not limited by such practical matters as budget, jurisdiction, client’s facts, and so on. You may choose whatever sources fit your document’s theme, whatever materials advance your thesis. A new factor is the credibility of your research. Whereas a case must be used in a memo because it is mandatory law, in scholarship you are bound only by your thesis statement in selecting sources. You are looking for sources that are credible, and you must research the research, so to speak. You may find an article that says exactly what you like, but it is never cited again and most scholars do not follow it. That has to be accounted for in your research.

4. PERSONAL INTERACTION. Use your colleagues, professor, and librarians to get constant feedback. While some practical settings offer this, often you are on your own until the end. In the scholarly setting, which often involves more complex puzzles and more analytical possibilities, it is important to factor in time to discuss your method of sorting through these and how they advance your thesis.

5. NOTE-TAKING. This may be the greatest difference. Take meticulous notes. Use your thesis to filter your sources: how does each source prove or redefine the thesis? Invent a system and stick to it. Take notes actively, not passively, giving each source a home in your organizational scheme and commenting on it in your own words. When in doubt, include much more detail than in researching practical memos. Here, your footnotes are an integral part of your paper, so your notes will feed into those footnotes. You do not want to backtrack once you have found a source. In scholarly writing, your notes are your closest ally. They not only record what your sources say, but what you say about the sources. They

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1 Appendix courtesy of Prof. Jill Ramsfield, former Director of Writing Program, Georgetown University Law Center.
should reveal possible relationships among the sources, possible ways of aligning them in your paper. They should be constructed in such a way as to teach yourself so that you know them so thoroughly that you can arrange them in any way you would like. The good news again: any system you develop in writing your scholarly paper will serve you throughout your career. You may not always have to be so detailed in practice, but your ability to do so will come in handy when you do. See Appendix B.

6. **TIME.** Scholarly writing takes much, much longer than practical writing. Because you are weaving together so many sources, because you are creating an original analysis, not synthesizing that of others, and because you are writing both a main text and textual footnotes, plan for much more time! Use your interim deadline schedule to help you, but assume that it will take about six times longer to do a task than it takes you in practice. Of course, some things will take less time, but usually not. Here, pessimism may be your ally; you will not get everything done as quickly as you think!
APPENDIX B²

TAking EFFECTIVE NOTES

Effective note-taking and organization of your research materials will allow you to be more efficient in your writing process and will enhance the quality of your final product. Although the tools available on Westlaw and Lexis for tracking your research trail on a particular topic are helpful, they should not be relied upon as substitutes for your own system for documenting and organizing your research — in part because your research for a seminar paper will typically take you well beyond either of these two commercial legal databases, and in part because your note-taking and organization of materials is best if done deliberately and thoughtfully after reviewing the materials you have found rather than merely being a reflection of the path that your research has taken. Below are some suggestions for creating an effective note-taking system and for organizing your research findings that best suits your individual writing process.

1. WRITE DOWN DATE. Make a note of when you are recording the information.

2. WRITE DOWN FULL CITATION - BLUEBOOK FORM. You’ll need it for your footnotes. If you aren’t sure, write it down anyway, providing all of the information about the source that is available to you, including dates, authors, titles, URLs, and page numbers (always record URLs and page numbers!). You don’t want to have to look it up later.

If you are cutting and pasting materials from an online source rather than downloading entire documents, be sure to include the citation with the pasted material; take advantage of options on Westlaw and Lexis that allow you to “paste with citation” or type the citation and pinpoint reference immediately before or after the pasted material. In addition to including the citation, always place quotation marks around material that you take verbatim from a source so that you do not run into plagiarism problems in the final product. Be consistent in how you treat notes that are your thoughts about information about a source and notes that are taken verbatim from a source; consider using a marker such as a “*” or “#” next to notes that are your own thoughts/reactions to material so that you can be comfortable incorporating those ideas into your paper during the writing process and so that you have a citing reference for the inspiration for those ideas.

3. CREATE A SYSTEM:

Although the computer revolution has left fewer and fewer students relying on traditional note-taking systems like note cards and legal pads, some still find it

² Thanks to Prof. Jill Ramsfield, former Director of the Writing Program, Georgetown University Law Center, for an early version of this Appendix, which has since been updated to incorporate technological tools for organizing one’s research.
helpful to print out materials and organize them in loose-leaf binders or folders, separating material by topic or sub-topic in a way that makes it easier to have all of the relevant research materials on a given part of the paper in front of the writer during the drafting process. Those materials can then be marked up with margin notes, post-its, and/or highlights to remind you of what you found most helpful or relevant in the material or what you wanted to say about it and to help you find specific materials more quickly. Some students find color-coding systems to be helpful as well.

If you are comfortable working with documents in purely electronic form, individual computer sub-files can be opened for your notes and research materials and organized by topic. Students who are working with a large number of research sources and materials may find it helpful to use one of the many research organizing tools available online, including Zotero, EndNote, Mendeley, and RefWorks, which can be used to store and organize your research materials. These tools typically allow you to import citations from research sources like databases and web sites, insert your own annotations, and create footnotes. The Georgetown Law Library has published a helpful chart that sums up the features of some of these tools that you might consider reviewing to decide whether one of these tools might be helpful to you as you begin gathering research materials; it is available at http://www.law.georgetown.edu/library/research/citation-tools/features.cfm
(note, however, that none of these organizing tools is a reliable source for proper Bluebook citation).

4. **BE METICULOUS.** As you read, filter each source through the cheesecloth of your thesis. Where necessary, paraphrase the source so that you are sure you understand it. Mark down quotes very carefully, noting page numbers, as noted above. Be active – grasp the meaning now; don’t put it off for later reading. Type or write questions that you have about the source in the margins or annotations to the source, and keep a separate list of research tasks that come up as you read each source. Mine the footnotes of the material you find most helpful; find and read the most relevant-seeming material that is cited by your source.

5. **RECORD YOUR OWN THOUGHTS.** Note your reactions. Do you like the source? Is it helpful, unhelpful? Why? How does it fit with your thinking? Take you off course? Reinforce the direction you’ve taken? Are there points that you will need to argue against in order to support your ultimate thesis? Does it require you to limit, expand, or otherwise rethink your thesis? Does it rely upon valid sources and reasoning? Be frank and original in noting your reactions; you’ll remember the source better later.

6. **ALLOW FOR DEVELOPMENT - AND RECORD IT.** Your thesis may change. Let it. The same is true of your organizational plan, your tone, your voice, and your overall impression of the subject. Record these changes and let them
They may be the most exciting part of the process for you: you may indeed change how you think about a sensitive subject.

7. **SKETCH AN OVERALL PLAN - AND KEEP SKETCHING.** Your document’s overall plan should match your thesis. Think about how you want to present the issue and your thesis to the reader, and feel free to do so in an original way that highlights what initially engaged you in the topic so that you can similarly engage your reader. You may start with an anecdote to dramatize a problem, a quote to force the issue, a snappy lead sentence to draw your reader in. Then build sections that carry your meaning. These are as many and as varied as there are thesis statements. Look for at least six ways to organize your paper, sketching very generally. As you develop your thesis, see which one matches it best, then go with that one.

8. **KEEP TRACK OF SOURCES.** You may forget what something said. Invent some sort of system for marking what value you think something will have. Because this process is recursive, you may change your mind, but it may be easier to remember and assess if you have made some judgment in the first place. You may want to number your sources from 1-10, 1 being essential and 10 being irrelevant. Or, you may want to create symbols such as the following:

\[
\begin{align*}
\checkmark &= \text{good} & \star &= \text{great, have to use} \\
\sim &= \text{not sure} & \times &= \text{no good, don’t reread}
\end{align*}
\]
Recommended Articles on Student Research Papers


For information on the book that's based on this article, *Academic Legal Writing: Law Review Articles, Student Notes, and Seminar Papers* (5th ed., Foundation Press 2016), see http://www2.law.ucla.edu/volokh/writing/. (Naturally, the book contains a great deal more than what was in the original article.)


The above focus on student scholarly writing, but many of the principles apply to scholarly writing generally. Some other helpful resources include:
