

RANKING LAW SCHOOLS' SPECIAL PROGRAMS*

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I. INTRODUCTION

Choosing a law school is far more challenging and consequential than choosing a brand or flavor of soup, or even a brand or model of vehicle. The small possibility of transfer aside, the purchase is permanent, with no opportunity to sample brands or flavors. The cost, particularly if opportunity cost is included, is vastly larger than most people spend on an automobile.¹ It is not surprising, then, that prospective applicants seek as much information as possible, and that they and persons who may ultimately employ them are influenced by U.S. News & World Report (U.S. News) rankings.

Yet a study commissioned by the Association of American Law Schools (AALS) concludes, “about 90% of the overall differences in ranks among schools can be explained solely by the median LSAT score of their entering classes and essentially all of the differences can be explained by the combination of LSAT and [a]cademic reputation ratings.”² With regard to the last point,

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¹ See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE (GAO), HIGHER EDUCATION: ISSUES RELATED TO LAW SCHOOL COST AND ACCESS 2 (2009), <http://www.gao.gov/new.items/d1020.pdf> (discussing “competition among schools for higher rankings” as a factor driving increases in law school cost). See also *id.* at 33, 34 (effect on minority admissions caused by US News stressing LSAT scores).

² STEPHEN P. KLEIN & LAURA HAMILTON, THE VALIDITY OF THE U.S. NEWS AND WORLD REPORT RANKING OF ABA LAW SCHOOLS (1998), <http://www.aals.org/reports/validity.html>.

it is also important to be mindful, “[n]one of us has adequate knowledge about more than a tiny handful of law schools so as to permit us, with confidence, to compare them with each other.”³

A large measure of reliance on the U.S. News rankings is likely to continue despite such criticism—not to mention evidence that schools are motivated, when possible, to game the system.⁴ The most critics apparently can hope for is applicants who have taken the time to be informed and will not permit rankings to overwhelm considerations such as cost, effects on partners, and quality of life. As for potential employers, more effort might be devoted to stressing that many well-qualified applicants have sound reasons for law school selections based on factors other than general ranking.⁵

Applicants interested, for example, in tax, health, environmental or intellectual property (IP) careers may also consider law school specialty rankings.⁶

³ Law School Admission Council (“LSAC”), Ranking Law Schools, <http://www.lsac.org/Choosing/deans-speak-out-rankings.asp> (last visited Feb. 6, 2010). That statement also lists twenty-two factors such as cost, faculty accessibility, and externship opportunities that US News does not consider. *Id.* Despite such observations about the objective worth of general rankings, consequences can be serious indeed when rankings fall. Perhaps the most serious instance was Nancy Rapaport’s loss of her decanal position at the University of Houston Law Center following the school’s drop of twenty places during her tenure. Mark Donald, *Rankings Rift Hastens UH Law Dean’s Resignation*, TEX. LAW., April 24, 2006, at 1.

⁴ See, e.g., Posting of Robert Morse, *Changing the Law School Ranking Formula*, to Morse Code: Inside the College Rankings, <http://www.usnews.com/blogs/college-rankings-blog/2008/06/26/changing-the-law-school-ranking-formula.html> (June 26, 2008, 04:46 PM EST) (“Many people have told us that some law schools operate part-time J.D. programs for the purpose of enrolling students who have far lower LSAT and undergrad GPAs than the students admitted to the full-time program in order to boost their admission data reported to U.S. News and the ABA.”).

⁵ But see, e.g., Adam Liptak, *On the Bench and Off, the Eminently Quotable Justice Scalia*, N.Y. TIMES, May 12, 2009, at A13 (“‘By and large,’ [Scalia] said, ‘I’m going to be picking from the law schools that . . . admit the best and the brightest, and they may not teach very well, but you can’t make a sow’s ear out of a silk purse. If they come in the best and the brightest, they’re probably going to leave the best and the brightest, O.K.?’”).

⁶ USNews.com, Best Law Schools, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools> (last visited Feb 7, 2010) (ranking specialization programs by law school).

John Doyle, Law Journals: Submissions and Ranking, <http://lawlib.wlu.edu/LJ/index.aspx?> (last visited Feb. 14, 2010) offers a way to rank law schools according to the frequency with which their general and specialty journals are cited by other journals and the courts.

To the extent that a specialty journal emphasizes patent law, however, it may suffer. See Craig Allen Nard, *Toward a Cautious Approach to Obeisance: The Role of Scholarship in Federal Circuit Patent Law Jurisprudence*, 39 HOUS. L. REV. 667, 678 (2002) (from 1983–

As discussed below, these rankings are based solely on peer recognition. Although much information contributes to informed judgments about the comparative worth of general rankings, specialty rankings have received less attention.⁷

This brief paper explores largely ignored implications inherent in U.S. News's evolving methodology for determining specialty rankings. After examining criteria intended to determine such rankings, as well as those expected also to affect the results, this paper points out factors that may contribute to unwarranted influence on, for example, professors otherwise well informed.

II. THE EVOLVING METHODOLOGY FOR SPECIALTY RANKINGS

From 1992, when U.S. News began to rank special law programs, at least until 1996, all senior faculty of those specific programs were apparently polled, and each ballot recipient could select up to ten schools.⁸ U.S. News has since instituted two notable changes.⁹ As recently stated:

These specialty rankings are based solely on votes by legal educators who nominated up to 15 schools in each field. Legal educators chosen were a selection of those listed in the Association of American Law Schools Directo-

2000, fewer than half—and in 1996 none—of the Federal Circuit's opinions cited a single secondary source). See also Posting of Dennis Crouch to Patently-O, *Citation of law review articles*, <http://www.patentlyo.com/patent/2008/11/citation-of-law.html> (Nov. 20, 2008, 23:56 CST) (noting that briefs to the Federal Circuit rarely cite law review articles).

⁷ But see Kenneth L. Port, *Intellectual Property Curricula in the United States*, 46 IDEA 165, 166–67 (2005) (tabulating IP courses listed by schools' web pages); Thomas G. Field, Jr., *Specialty Rankings* (Nov. 1, 2009), <http://www.piercelaw.edu/thomasfield/bio/statement.php> (discussing data provided by U.S. News in 1996—the last year such data was made available).

See also, a study by David W. Hill & Matthew T. Latimer, *The Role of Intellectual Property Education in the United States*, March 2003 (prepared for the Institute of Intellectual Property (Japan)), originally found at <http://www.iip.or.jp/e/index.html> (visited Nov. 25, 2009), but the report is no longer available at that site. The body of the study may be downloaded from <http://www.latimerip.com/downloads/USIPedu.pdf> (last visited Feb. 16, 2010), and the original study is referenced in Shaheen E. Lakhan & Meenakshi K. Khurana, *The State of Intellectual Property Education Worldwide*, AcademicLeadership.org, June 31, 2007, http://www.academicleadership.org/emprical_research/The_State_of_Intellectual_Property_Education_Worldwide.shtml (last visited Feb. 16, 2009).

⁸ See Field, *supra* note 7.

⁹ Information as to when such changes occurred is probably available but does not bear on the present analysis.

ry of Law Teachers 2005–2006 as currently teaching. . . . Those programs that received the most nominations appear.¹⁰

One change is reflected in that description: recipients chosen to be polled may now select fifteen schools worthy of recognition.¹¹ The 50% increase may console those whose programs are not in the top ten, but that U.S. News does not feature specialty programs ranked below the tenth place¹² may indicate that responsible people employed by U.S. News¹³ appreciate that the number of votes received by lower ranked programs is too small to have much value.¹⁴

U.S. News publishes general bases for determining voters' eligibility to be polled for specialty rankings but not the methodology for selecting voters. Morse and his colleagues, however, have long provided that information upon request.¹⁵

The second change since 1996 is that all, not just senior, IP faculty listed in the Directory are potential recipients of a ballot.¹⁶ Yet how an expansion of the voter pool might improve the validity of rankings is far from clear. It seems that longer tenure in an area of the law would increase the amount one knows about others' programs. Thus, it is notable that the most recent Directory

¹⁰ See *Law Methodology*, U.S. NEWS, Mar. 26, 2008, <http://www.usnews.com/articles/education/best-graduate-schools/2008/03/26/law-methodology.html>. The choice of verb is unlikely to have any effect, but the 2006 ballot, for example, asked recipients to “[i]dentify . . . schools that have the highest-quality intellectual property law courses or programs.” Ballot, U.S. News & World Report, *America’s Best Graduate Schools Annual Peer Assessment of Law Schools Intellectual Property Law (2006)* (on file with the author). It warrants mention that only full time teachers are listed in the Association of American Law Schools Directory. AALS Directory of Law Teachers, http://aals.org/services_directory.php (last visited Feb. 7, 2010).

¹¹ *Law Methodology*, *supra* note 10 (referring to the cited quotation).

¹² A list of twenty-four schools is nevertheless available as a “premium” service. US-News.com, *Best Law Schools Specialty Rankings: Intellectual Property Law*, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/intellectual-property-law> (last visited Feb. 8, 2010) (offering access to “Premium Online Edition”).

¹³ Notably Robert Morse, a U.S. News employee since 1976, who develops methodologies and surveys for annual academic rankings. See *About This Blog*, Morse Code: Inside the College Rankings, <http://www.usnews.com/blogs/college-rankings-blog> (last visited Feb. 12, 2010).

¹⁴ See *infra* notes 38–43 and accompanying text (briefly reviewing data provided in Field, *supra* note 7).

¹⁵ Morse, *supra* note 13, shared that information in 1996 and 2009; see, respectively, Field, *supra* note 7 and *infra* note 17. Morse’s colleague, Samuel Flanigan, was equally cooperative in 2006 and 2008. See respectively *infra* notes 22 and 21.

¹⁶ See *Law Methodology*, *supra* note 10 (referring to the cited quotation).

lists twice as many faculty who have taught at least one IP course fewer than five years as have done so for more than ten.¹⁷

Given the remarkable increase in number of courses offered, even at schools with three or more decades of commitment to IP,¹⁸ the ratio of junior to senior faculty is not surprising.¹⁹ Yet that ratio makes any given ballot twice as likely to have been cast by faculty new to academia²⁰ compared to those who have at least a decade of full time experience. Indeed, the increase in the number of IP professors between 2006 and 2008 led U.S. News to poll every third²¹ rather than every second person listed.²²

¹⁷ In the 2009–10 Directory, the latest available at the writing of this paper, IP faculty who had taught for fewer than five years occupy more than twice the space, Association of American Law Schools, *The Association of American Law Schools 2009–2010 Directory of Law Teachers* 1649–52 (2009–2010) (about 50 column inches), occupied by those who have taught for more than ten years, *id.* at 1654–55 (about 23 column inches).

Moreover, as related by Morse, *supra* note 13, to Jon Cavicchi in a phone conversation on Oct. 26, 2009, the 2009–2010 Directory was unavailable when the ballots were being prepared for the current year, so the 2007–2008 Directory was again be used for 2009 polls.

Similarly, in the 2007–2008 Directory, IP faculty who have taught for fewer than five years occupy more than twice the space (about 38 column inches), than that occupied by those who have taught for more than ten years (about 17 column inches). ASSOCIATION OF AMERICAN LAW SCHOOLS, *THE ASSOCIATION OF AMERICAN LAW SCHOOLS 2007–2008 DIRECTORY OF LAW TEACHERS*, 1325–27, 1328–29 (2007–2008).

¹⁸ An examination of old Pierce Law listings shows that as late as 1985, only five courses were consistently offered—two covering the nuts and bolts of patent prosecution, a copyright seminar, a survey of IP, and a year-long seminar in which students discussed recent opinions from the *United States Patents Quarterly* (U.S.P.Q.) (BNA). Started in 1986, an IP graduate program made it economically feasible to add more courses. By 2004, the course list had grown to twenty-five, with several courses being offered two or more times annually. See PierceLaw.edu, Academic Year 04–05 Course Listing, <http://www.piercelaw.edu/assets/pdf/registrar-coursedescription-04-05.pdf> (last visited Feb. 9, 2010).

¹⁹ See, e.g., Port, *supra* note 7, at 165. With a baseline derived from Roberta Rosenthal Kwall, *The Intellectual Property Curriculum: Findings of Professor and Practitioner Surveys*, 49 J. LEGAL EDUC. 203 (1999), he reports a surge in IP courses between 1999 and 2005.

²⁰ Years of teaching seem more relevant than years of experience otherwise obtained.

²¹ As related by Flanigan, *supra* note 15, in response to an Oct. 28, 2008, telephone query from Cavicchi.

²² As related by Flanigan, *supra* note 15, to Cavicchi by email. E-Mail from Samuel Flanigan, Deputy Director of Data Research, U.S. News & World Report, to Jon Cavicchi, IP Librarian, Pierce Law (Oct. 19, 2006, 12:05:28 EST) (on file with author). Flanigan also provided three years of raw votes for Pierce, but he would not disclose data for any other school.

III. POTENTIAL CRITERIA

Recipients of the 2006 ballot were instructed to “[i]dentify up to fifteen (15) schools that have the highest-quality intellectual property law courses or programs. In making your choices consider all elements that contribute to a program’s academic excellence, for example, the depth and breadth of the program, faculty research and publication record, etc.”²³

It is probable, however, that most people offered an opportunity to select schools with noteworthy prowess in IP would weigh the breadth of programs and publications of associated faculty without being prompted. Unmentioned factors are also likely to play a role. Although the perceived overall quality of schools as reflected by general rankings is not mentioned, it is unlikely to be ignored. Moreover, the odds that one’s own school or alma mater might be ranked, if nothing else, probably increases recipients’ inclination to complete and return ballots.

A great deal of promotional literature is distributed as each polling season rolls around, but, potential competitors aside, the amount of attention generated is apt to be small at best.²⁴ Barring other sources of information, most potential respondents are apt, instead, to regard faculty publications as providing the best evidence. Yet faculty teaching only copyright law,²⁵ for example, have

²³ Pierce Law faculty received six ballots that year but none since.

²⁴ The author’s personal experience in that regard is reinforced by discussions with colleagues.

²⁵ Given the effects on law professors’ rights and on their and librarians’ ability to reproduce and use print and other media, one might expect copyright law to be offered more often than patent or trademark law. In fact the first copyright course at Pierce was a seminar taught by the librarian, Thomas M. Steele.

It seemed surprising, however, that Kwall, *supra* note 19, at 206, 210 (1999), found, respectively 54 copyright and 56 patent courses being offered. Roughly six years later, Port, *supra* note 7, at 165, found 139 patent and 123 copyright courses. This led to an attempt to verify the hypothesis that patent law courses are apt to be taught by adjuncts unlisted in the Directory. See AALS Directory, *supra* note 10.

Verification of this hypothesis was attempted by examining the names of courses provided in biographical notes of currently listed IP faculty. If the name included patents, copyrights and trademarks, it was considered a survey course; if the name referenced only patents and trademarks, for example, it was counted as both a trademark and a patent course. In all, 153 copyright courses were found but only 74 patent and 74 trademark courses. It is therefore probable that course counts in excess of what we found do, indeed, represent the use of adjuncts. Compelling confirmation is provided by Hill & Latimer, *supra* note 7, at 10 (“a minority of law school IP professors are full time”). By way of example, they note that George Mason University listed thirty-two IP professors, only three being full time.” *Id.*

It doesn’t bear on that issue, but some may also be interested in trends reflected by a seniority breakdown. Full time IP faculty listed as teaching for fewer than six years taught

little reason to be aware of patent, trademark, trade secret or other coverage that ought to be reflected in an evaluation of the breadth²⁶ of an “IP” program. Particular faculty members’ areas of concentration would therefore be expected to strongly influence their inclination to select noteworthy programs.

Anyone, particularly those unhappy with rankings based on impressions unavoidably biased by limited knowledge,²⁷ could seek better information. Yet, receiving better information is difficult. Consider faculty publications, for example. Surely, no one would credit publishing volume alone. Lacking the capacity to judge the merits of each separate item, reputations of publishers would necessarily count heavily in the minds of faculty and prospective students alike. Likewise, one’s view of the worth of articles in comparison with casebooks and textbook would be influential—as would one’s view of amicus briefs, op-ed pieces, blogs and other less traditional contributions to legal scholarship.

Attempts to rank by faculty sizes, too, would raise a host of issues. How would those who teach, for example, an IP-related First Amendment or cyber law seminar be counted? How would fractions of load allocated to IP courses be accommodated; would core courses count more heavily? Would accessibility be weighed; in that vein, what of adjuncts?²⁸

Programs might also be ranked according to the number of courses offered; one paper, Kenneth Port’s *Intellectual Property Curricula in the United*

52 patent, 37 trademark, 59 copyright and 209 survey courses. Those listed for six to ten years taught 13 patent, 11 trademark, 30 copyright and 97 survey courses. Those listed for more than ten years taught 9 patent, 26 trademark, 64 copyright and 125 survey courses. The total number of survey courses was 431. Overall, 110 other “IP” courses were found; we did not break those down, but we did omit from the study entertainment, cyber law and other courses likely to be IP-related that did not feature core IP topics in the title.

²⁶ See ballot instructions quoted in text associated with *supra* note 23.

²⁷ See Port, *supra* note 7, at 165–66, stating: “[I]f one merely relies on promotional literature, there is a great risk that the numbers . . . would not be entirely accurate. Second, if you ask professors . . . , you run the risk that professors either do not know or unintentionally misrepresent . . . the number of classes offered at their school.” (note omitted).

²⁸ See *supra* note 25. Hill & Latimer, *supra* note 7 at 19, state, e.g., “Adjunct professors are as highly, if not more highly, desired by the law school than full-time IP professors.” They also observe

[D]ue to the fact that most of the professors are adjunct professors having primary (*i.e.*, daytime) employment in the IP field, most of the IP courses at schools offering a high-quality IP curriculum are conducted during the evening. As a result, a high percentage of students focusing on IP law are enrolled in the evening or “night” program at their law schools.

Id. at 21. This, of course, raises a host of other issues about quality.

States, attempts precisely that.²⁹ Excluding “quasi-ip” courses,³⁰ it attempts to eliminate puffery³¹ by considering only courses listed on law school web pages.³² The paper, however, makes no reference to whether courses are taught by full time or adjunct faculty, and explicitly disclaims any attempt to determine course frequency.³³

Data sources for the paper were also more problematic than they might seem. For example, students who edited and ultimately published that paper failed to consult course descriptions online at their own school at the time.³⁴ They therefore seem to bear most of the responsibility for substantially undercounting the courses.³⁵ This merely underscores, as law school deans and others point out, that seemingly straightforward attempts to rank schools objectively are fraught with difficulties.³⁶

IV. UNWARRANTED ASSUMPTIONS AND WASTED RESOURCES

Although one has cause to be skeptical, full awareness of shortcomings that invariably taint efforts to rank law schools and specialty programs requires more information than is available. To evaluate the importance of anything offered as a reflection of peer recognition, one should know the percentage of ballots returned and the extent to which respondents selected as many programs as possible.

The former would indicate whether potential respondents saw the exercise as worthwhile. The rate of return, as well as the percentage of programs nominated, would also indicate the respondents’ level of comfort in choosing

²⁹ *Id. passim*.

³⁰ *See id.* at 167 (“This in no way is intended to pass judgment on these quasi IP classes. They simply did not fit into what I referred to as Core IP courses.”).

³¹ *See supra* note 27.

³² Port, *supra* note 7, at 165–66.

³³ *Id.* at 168. Ignoring frequency, of course, leaves the possibility that listed courses are rarely if ever offered—a problem at least as significant as the one flagged *supra* note 27. It is unclear why Port did look not look for online catalogs or, if necessary, request copies from law school registrars’ offices.

³⁴ Compare Port, *supra* note 7, at 168–69 (stating that Pierce Law offered 14 core IP courses), with PierceLaw.edu, *supra* note 18 (listing 25 actual core IP courses in 2004–2005).

³⁵ Port, *supra* note 7, at 169, credits Pierce for fourteen courses identified on a web page serving only a related purpose. Twenty-five, however, are described in that year’s official course list. *See* PierceLaw.edu, *supra* note 18. The 2004–2005 Pierce Law course list also indicates frequency, with six courses being offered more than once and one (U.S. copyright law) being offered in the summer, as well as in fall and spring terms.

³⁶ *See* LSAC, *supra* note 3.

some programs over others. Moreover, if few available choices were exercised, would that signal disapproval of unranked programs or only lack of knowledge?

To evaluate specialty rankings, one should also know the number and percentage of votes received by differently ranked programs. Let's say that half of those polled respond, most respondents select fewer than five programs, and the top-ranked program receives only ten votes more than the tenth-ranked program.³⁷ How much weight should average one-vote differences between ranks receive?

Data needed for such appraisals has only once been provided.³⁸ Although more than a decade has since passed, it is still useful. As mentioned, only senior faculty were then polled, and each was permitted to select up to ten law schools. Eighty-seven professors apparently received ballots, but only forty-six (53%) returned them.³⁹

A total of 460 nominations could have been made, but the ten top-ranked schools received only 178 votes⁴⁰—slightly fewer than four votes per respondent. The remaining 282 votes could have been distributed among unranked schools, but it seems unlikely that the typical respondent selected more than five, instead of ten, programs.⁴¹

The first-place program was recognized by only fifteen more respondents than the tenth-place program.⁴² That averages to slightly more than one vote per rank. Indeed, the third through fifth-ranked programs were differentiated by exactly one vote.⁴³

Now that larger numbers of faculty are polled,⁴⁴ differences in votes received by variously ranked schools should be larger. But the significance of these differentials would be equally open to question. That U.S. News has since withheld data needed for assessment warrants no confidence.⁴⁵ One would be

³⁷ There is no reason to expect marked differences in the survey between IP and other specialties.

³⁸ See Field, *supra* note 7 (identifying 1996 as the year such data was provided).

³⁹ That level of response was obtained only after telephone follow-up. See *id.* at n.6. But, as mentioned, twenty of those polled were not currently teaching an IP course or seminar. *Id.* at n.1. Such faculty would seem particularly unlikely to respond.

⁴⁰ *Id.* at n.6.

⁴¹ Respondents could have lacked a basis for nominating ten schools. See KLEIN & HAMILTON, *supra* note 2.

⁴² See Field, *supra* note 7.

⁴³ Those schools received twenty-two, twenty-one and twenty votes respectively. *Id.* For those and other tallies, see tabulated data. *Id.*

⁴⁴ See Flanigan, *supra* note 22.

⁴⁵ Field, *supra* note 7 (noting that US News has since withheld data needed for assessment).

hard-pressed to conclude based on extant information that two, three, five, or even ten steps in current rankings warrant attention.⁴⁶ Those whose programs receive lower ranks or none, however, are likely to suffer nonetheless.

People more impressed by where people went to school than by what they might have learned⁴⁷ are unlikely to credit specialty rankings, whatever their source. But those interested in more than general institutional prestige may regard them highly, particularly if rankings are seen to reflect well-informed merit evaluations by peers. Even so, they might consider whether, evidence of native ability aside, anyone other than a fool would favor one job candidate over another based on reputations of professors neither candidate may have seen or lists of courses neither may have taken. Potential applicants and current students seeking employment, not to mention graduates well established in practice, need to be reminded of that proposition.

Until the limited subjective as well as objective importance of specialty rankings is more widely appreciated, however, schools will continue to devote apparently substantial resources in often-fruitless measures unrelated to education.⁴⁸

⁴⁶ Likewise, replacement of several schools by Chicago-Kent, Santa Clara, Cardozo, and Duke is unlikely to warrant concluding that programs offered by formerly ranked schools became materially weaker, even in comparative terms, between 1996 and 2008.

⁴⁷ See Liptak, *supra* note 5 (Scalia's comments); see also Hill & Latimer, *supra* note 7, at 22: "Interestingly, many private law firms publicly state that they are primarily interested in applicants having a strong general legal education. . . . In practice, however, private law firms (and, for that matter, private-side companies) highly value, and compete with each other for, law school graduates with formal IP law education."

⁴⁸ See GAO, *supra* note 1, at 2 (noting how schools' efforts to increase their ranking has also increased their cost).