

IP and Antitrust Seminar – Law 432

Wednesdays, 6:05 pm – 8:05 pm

Antonin Scalia Law School, George Mason University, Spring 2022

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Office Hours. Wed. 12 - 2 pm & by appointment.

Welcome. The goal of the course is to intersect the world of intellectual property and antitrust. While there might initially appear to be some tension between the two areas, there is a great deal of harmony when properly formulated. *Students are expected to come to class prepared and ready to discuss the assigned readings.*

Learning Outcome: By the end of the course, students will be able to comprehend, apply, and analyze the economic and legal concepts developed over the semester, which involve both IP and antitrust doctrines. Students will be able to perform detailed legal analyses harmonizing IP and antitrust law.

Text. Landes and Posner, *The Economic Structure of Intellectual Property Law*. All other readings will be made available on TWEN.

Course Requirements and Grading.

Written Assignments. There will be two written assignments. Each assignment is worth **15 percent** of your overall grade—for a total of **30 percent**. *All assignments must be submitted in PDF via TWEN before the due date & time.* Late submissions will receive zero credit.

- Assignment One: Mon., Feb. 21 → Due: Fri., Mar. 4 @ 11:59 pm
- Assignment Two: Mon., Apr. 4 → Due: Fri., Apr. 15 @ 11:59 pm

Term Paper. The term paper must use legal and economic analyses to analyze an antitrust issue that intersects with intellectual property concepts. It is worth **70 percent** of your overall grade. The paper should be 20-30 pages in length. The due date for the preliminary topic and outline is **Friday, March 25, 2022**. The final paper due date is **Monday, May 2, 2022**. *All assignments must be submitted in PDF via TWEN before midnight on the due date.* Late submissions will receive zero credit.

Class Participation. Your grade is subject to a discretionary class participation adjustment of 1/3rd of a grade in either direction. The course adheres to the attendance policy as outlined in AR 4-1.

Grading. This course follows the grading policies outlined in Academic Regulations (AR) 4-5.7, which may be found at ACADEMIC REGULATIONS, <https://www.law.gmu.edu/academics/regulations>.

Honor Code. Students are expected to adhere to the Scalia Law HONOR CODE, which may be found at https://www.law.gmu.edu/academics/honor_code.

Tentative Syllabus. We may deviate from the tentative syllabus for reasons including current events, scheduling, new cases, *et cetera*. Please make sure you are signed up to receive updates via TWEN.

Intellectual Property. I own all course content that is created (*e.g.*, slides), regardless of format (electronic, print, audio, video). You are forbidden to distribute them to anyone other than your classmates in this course. Pursuant to Academic Regulation 4-2.2, no portion of a class session or an examination may be preserved by means of a recording device such as an audio recording device or camera.

Class Schedule

1 **Economics of Information and Intellectual Property (Jan. 19)**

Required:

- Richard A. Posner, *Intellectual Property: The Law and Economics Approach*, 19 J. ECON. PERSP. 57 (2005).
- Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J. L. & ECON. 1 (1969).
- Douglas W. Allen, *What are Transaction Costs?*, 14 RES. L. & ECON. 1 (1991).
- Broadcast Music v. Columbia Broadcast System*, 99 S.Ct. 1551 (1979)

More Resources:

- F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

2 **Economic Theory of Property (Jan. 26)**

Required:

- Landes and Posner, Ch. 1, *The Economic Theory of Property*.
- Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).
- eBay v. MercExchange*, 547 U.S. 388 (2006)
- ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir 1996)

More Resources:

- Martin J. Bailey, *Approximate Optimality of Aboriginal Property Rights*, 35 J. L. & ECON. 183 (1992).

3 **Antitrust and Licensing Intellectual Property (Feb. 2)**

Required:

- Landes and Posner, Ch. 14, *Antitrust and Intellectual Property*.
- Gregory J. Werden, Luke M. Froeb, Bernhard Ganglmair, & Steven Tschantz, *Technology Economics: Innovation, Licensing, and Antitrust*, Global Antitrust Institute Report on the Digital Economy, 2020.
- Brulotte v. Thys*, 379 U.S. 29 (1964)
- Scheiber v. Dolby Labs*, 293 F.3d 1014 (7th Cir. 2002)

- Kimble v. Marvel, 135 S.Ct. 2401 (2015)

More Resources:

- 2017 DOJ/FTC Antitrust Guidelines for the Licensing of Intellectual Property.
- Joshua D. Wright & Douglas H. Ginsburg, *Whither Symmetry? Antitrust Analysis of Intellectual Property Rights at the FTC and DOJ*, 9 COMP. POL'Y INT'L 41 (2013).

4 Standard Essential Patents (SEPs) & FTC v. Qualcomm (Feb. 9)

Required:

- Joanna Tsai, *Standards Development Organizations, Intellectual Property, and Standardization: Fundamentals and Recent Proposals*, Global Antitrust Institute Report on the Digital Economy, 2020.
- Richard A. Epstein, *Toward the Peaceful Coexistence of Patent and Antitrust Law*, Global Antitrust Institute Report on the Digital Economy, 2020.
- FTC v. Qualcomm
 - FTC v. Qualcomm: (i) FTC complaint and (ii) Qualcomm's motion to dismiss
 - FTC v. Qualcomm, 969 F.3d 974 (9th Cir. 2020)
- Research in Motion v. Motorola, 644 F.Supp. 2d 788 (N.D. Tex. 2008)

More Resources:

- FTC v. Qualcomm, 411 F.Supp.3d 658 (N.D.Cal. 2019)
- Joanna Tsai & Joshua D. Wright, *Standard Setting, Intellectual Property Rights, and the Role of Antitrust in Regulating Incomplete Contracts*, 80 ANTITRUST L.J. 157 (2015).
- Bruce H. Kobayashi & Joshua D. Wright, *Federalism Substantive Preemption, and Limits on Antitrust: An Application to Patent Holdup*, 13 J. COMP. L. & ECON. 469 (2009).

5 Tying/Bundling & Price Discrimination (Feb. 16)

Required:

- Benjamin Klein & John Shepard Wiley, Jr., *Competitive Price Discrimination as an Antitrust Justification for Intellectual Property Refusals to Deal*, 70 ANTITRUST L.J. 599 (2003).
- U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION, *Ch. 5 Antitrust Issues in the Tying and Bundling of Intellectual Property Rights* (2007).
- Dawson Chemical Co. v. Rohm & Haas Co., 448 U.S. 176 (1980)
- Queen City Pizza v. Domino's Pizza, 124 F.3d 430 (1997)
- Illinois Tool Works v. Independent Ink, 126 S.Ct. 1281 (2006)

More Resources:

- Bruce H. Kobayashi, *Spilled Ink or Economic Progress? The Supreme Court's Decision in Illinois Tool Works v. Independent Ink*, 53 ANTITRUST BULL. 5 (2008).

6 Multi-Sided Platforms, Open v. Closed Sys., & Video Games (Feb. 23)

Required:

- Hanno F. Kaiser, *Are "Closed Systems" an Antitrust Problem?*, 7 COMP. POL'Y INT'L. 91 (2011).
- Daniel A. Crane, *Ecosystem Competition and the Antitrust Laws*, 98 NEB. L. REV. 412 (2019).
- Apple v. Psystar Corp.
 - Apple v. Psystar Corp., 586 F. Supp. 2d 1190 (N.D. Cal. 2008)
 - Apple v. Psystar Corp., 658 F.3d. 1150 (9th Cir. 2011)
- Datel Holdings v. Microsoft, 712 F. Supp. 2d 974 (N.D. Cal. 2010)

More Resources:

- David S. Evans, *Attention Rivalry Among Online Platforms*, 9 J. COMP. L. & ECON. 313 (2013).
- John M. Yun, *Overview of Network Effects & Platforms in Digital Markets*, Global Antitrust Institute Report on the Digital Economy, 2020.

7 **Coordinating Ecosystems (Mar. 2)**

Required:

- John A. Fortunato & Shannon E. Martin, *American Needle v. NFL: Legal and Sponsorship Implications*, 9 U. DENV. SPORTS & ENT. L.J. 73 (2010).
- American Needle v. National Football League*, 130 S.Ct. 2201 (2010)
- NFL v. Ninth Inning*
 - In Re NFL Sunday Ticket*, 933 F.3d 1136 (9th Cir. 2019)
 - NFL v. Ninth Inning*, 592 U.S. (2020)

More Resources:

- Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726 (2010).

8 **“Predatory” Innovation: Is it a Thing? (Mar. 9)**

Required:

- Joseph Gregory Sidak, *Debunking Predatory Innovation*, 83 COLUM. L. REV. 1121 (1983).
- Thibault Schrepel, *Predatory Innovation: The Definite Need for Legal Recognition*, 21 SMU SCI. & TECH. L. REV. 19 (2018).
- U.S. v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001)
- California Computer Products v. IBM*, 613 F.2d 727 (1979)
- Allied Orthopedic v. Tyco Healthcare*, 592 F.3d 991 (9th Cir. 2010)

9 **Privacy and Antitrust Policy (Mar. 23)**

Required:

- James C. Cooper, *Privacy and Antitrust: Underpants Gnomes, The First Amendment, and Subjectivity*, 20 GEO. MASON L. REV. 1129 (2013).
- Alex Marthews & Catherine Tucker, *Privacy Policy and Competition*, ECON. STUD. AT BROOKINGS, Dec. 2019.
- Fralely v. Facebook*, 830 F.Supp.2d 785 (N.D.Cal 2011)
- White v. Samsung Electronics*, 971 F.2d 1395 (9th Circ. 1992), 989 F.2d 1512 (9th Cir. 1993)

More Resources:

- Alessandro Acquisti, Curtis Taylor, & Liad Wagman, *The Economics of Privacy*, 54 J. ECON. LIT. 442, 442-49 (2016).

10 Counterfactuals: Nascent & Potential Competition (Mar. 30)

Required:

- John M. Yun, *Are We Dropping the Crystal Ball? Understanding Nascent & Potential Competition in Antitrust*, 104 MARQ. L. REV. 613 (2021).
- FTC v. Steris Corp., 133 F.Supp.3d 962 (N.D. Ohio 2015)
- U.S. v. Visa & Plaid Inc. (2020)
- Princo Corp. v. Int'l Trade Comm'n, 616 F.3d 1318 (Fed. Cir. 2010)

More Resources:

- Senate Testimony of Patricia Nakache on Nascent-Potential Competition (Sep. 24, 2019)

11 Sharing Economy & Algorithmic Collusion (Apr. 6)

Required:

- Ai Deng, *Algorithmic Collusion and Algorithmic Compliance: Risks and Opportunities*, Global Antitrust Institute Report on the Digital Economy, 2020.
- Nicholas Andrew Passaro, *How Meyer v. Uber Could Demonstrate that Uber and the Sharing Economy Fit into Antitrust Law*, 7 MICH. BUS. & ENTREPRENEURIAL L. REV. 259 (2018).
- Meyer v. Uber Technologies, 868 F.3d 66 (2nd Cir. 2017)
- United States v. David Topkins (2015), Complaint

More Resources:

- Jonathan Hall et al., *The Effects of Uber's Surge Pricing: A Case Study*, mimeo, 2015.
- Ulrich Schwalbe, *Algorithms, Machine Learning, and Collusion*, 14 J. COMP. L. & ECON. 568 (2018).
- Axel Gautier et al., *AI Algorithms, Price Discrimination and Collusion: A Technological, Economic and Legal Perspective*, EUR. J. L. & ECON. (2020).

12 The Economics of Trade Secret Law (Apr. 13)

Required:

- Landes and Posner, Ch. 13, *The Economics of Trade Secrecy Law*.
- Edmund W. Kitch, *The Law and Economics of Rights in Valuable Information*, 9 J. LEG. STUD. 683 (1980).
- E.I. duPont deNemours v. Christopher, 431 F.2d 1012 (5th Cir. 1970)
- Kewanee Oil v. Bicron, 416 U.S. 470 (1974)

More Resources:

- Bruce H. Kobayashi, *Antitrust, Non-Competition, and No-Poach Agreements in Digital Industries*, in GLOBAL ANTITRUST INSTITUTE REPORT ON THE DIGITAL ECONOMY, 2020

13 Misuse, Inequitable Conduct, and Piracy (Apr. 20)

Required:

- Rochelle Cooper Dreyfuss, *Does IP Need IP? Accommodating Intellectual Production Outside the Intellectual Property Paradigm*, 31 CARDOZO L. REV. 1437 (2010)
- Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion*, 92 VA. L. REV. 1687 (2006)
- Lexmark v. Static Control Components, 572 U.S. 118 (2014)