

Syllabus (Last Updated 1/3/2024)
Law 264 (Spring 2024)
The Legal and Economic Theory of Intellectual Property
Wednesdays 6:05 – 8:05pm

Professor Kobayashi

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Required Books:

Landes & Posner, *The Economic Structure of Intellectual Property Law*. Harvard University Press (2003).

LEARNING OUTCOMES

This course will expose students to the theory, methodology, and use of economics to analyze intellectual property law and policy. The aim of the course is to familiarize the student with the methodology and inferential tools of economics as applied to intellectual property. Upon completing this course, students will be able read and apply economic analysis to intellectual property law.

GRADING

Final Exam, May 3, 2024 (100%)

COURSE REQUIREMENTS:

Class Participation:

Class Participation is required. Students are expected to have completed the required readings and be prepared to discuss them in class.

Class Attendance:

Students must sign the attendance sheet and attend the entire class. Anyone missing three or more classes will not receive academic credit. Those missing more than two classes will not receive academic credit without supplement work that substitutes for the classes missed.

Reading Assignments:

Up to date reading assignments can be found by clicking on the Reading Assignments link on the course TWEN page. A preliminary reading list for the entire semester has been attached below. However, this preliminary list is subject to change, and students are responsible to check each week for any updates.

All requirements are subject to change.

READING ASSIGNMENTS:

I. Economics of Information (January 17)

Required:

- Veeck v. Southern Bldg. Code Congress Intern., Inc., 293 F.3d 791 (C.A. 5 2002).
- Easterbrook, F. H. "Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information, 1981 Sup. Ct. Rev. 309 (1982).

Optional:

- Kobayashi, B. H. & Ribstein, L. E., "Class Action Lawyers as Lawmakers", 46 Ariz. L. Rev. 733 (2004).
- Cunningham, L. A., "Private Standards in Public Law: Copyright, Lawmaking and the Case of Accounting," 104 Michigan L. Rev. 2 (2005).
- Hirshleifer, J. "The Private and Social Value of Information and the Reward to Inventive Activity", 61 Amer. Econ. Rev. 561 (1971). Article available at <http://www.jstor.org>

II. The Economic Theory of Property and Intellectual Property (January 24)

Required

- Landes and Posner, Chapter 1.
- Demsetz, H., "Toward a Theory of Property Rights", 57 Am. Econ. Rev. Papers & Proceedings 347 (May 1967). Article Available on JSTOR (www.jstor.org) though gmu.edu accounts or ISP accounts set up with [gmu](http://gmu.edu) proxy server.
- Smith, Henry E. "Intellectual Property as Property: Delineating Entitlements in Information", 117 Yale L.J. Pocket Part 87 (2007), <http://thepocketpart.org/2007/10/10/smith.html>. (full article is at 116 Yale L. J. 1742 (2007)).
- Bilsky v. Kappos, 561 U.S. 593 (2010).
- eBay Inc v. MercExchange, L.L.C., 547 U.S. 388 (2006).

Optional:

- Alchian, A.A., "Some Economics of Property Rights", reprinted in Selected Works by Armen A. Alchian, Liberty Press 1977.

III. Misappropriation and the Origin of Property Rights (January 31)

Required:

- *International News Service v. Associated Press*, 248 U.S. 215 (1918).
- Epstein, R. A. "International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News," 78 Va. L. Rev. 85 (1992). [PDF version available at <http://www.heinonline.org>].
- *National Basketball Association v. Motorola*, 105 F.3d 841 (2d Cir. 1997).
- Posner, R. A. "Misappropriation: A Dirge", 40 Hou. L. Rev. 621 (2003).

Optional:

- Baird, D. G., "The Story of *INS v. AP*: Property, Natural Monopoly, and the Uneasy Legacy of a Concocted Controversy," in Ginsburg & Dreyfuss, *Intellectual Property Stories* (Foundation Press 2006), pp. 9-35
- Hayek, F. A., "The Use of Knowledge in Society", 35 Am. Econ. Rev. 521 (1945) [PDF version available at <http://www.jstor.org>].
- Alchian, A. A., "Uncertainty, Evolution, and Economic Theory", 58 Journal of Political Economy 211 (1950). [PDF version available at <http://www.jstor.org>].

IV. The Private Production of Public Goods (February 7)

Required:

- Ronald Coase, *The Lighthouse in Economics*, 17 J. L. & Econ. 357 (1974) (available on JSTOR).
- *Fiest Publications v. Rural Telephone Service*, 499 U.S. 340 (1991)).
- *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir 1996)
- *Specht v. Netscape Comm. Corp.* 306 F.3d 17 (2d Cir 2002).
- *Quanta Computer, Inc. v. LG Electronics, Inc.* 553 U.S. 617 (2008).
- *Kirtsaeng v. Wiley*, 568 U.S. 519 (2013).

Optional:

- *Mallinkrodt v. Medipart*, 976 F.2d 700 (Fed. Cir. 1992).
- Kobayashi and Ribstein, "Uniformity, Choice of Law, and Software Sales," 8 Geo. Mason. L. Rev. 261 (1999).
- Ginsburg, *Copyright, Common Law, And Sui Generis Protection Of Databases in the United States And Abroad*, 66 U. Cin. L. Rev. 151 (1997).
- Harold Demsetz, *The Private Production of Public Goods*, 8 J. L. & Econ. 293 (1970). (available on JSTOR).

V. Non-Linear Pricing (February 14)

Required:

- Hal Varian, *Differential Pricing and Efficiency*, 1 First Monday (1996).
- Kobayashi & Wright, "A Transactions Cost Analysis of the Welfare and Output Effects of Rebates and Non-Linear Pricing (May 30, 2023). George Mason Law & Economics Research Paper No. 23-11, available at: <https://ssrn.com/abstract=4463974> or <http://dx.doi.org/10.2139/ssrn.4463974>.
- Mericoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661 (1944).
- Stigler, A Note on Block Booking, reprinted in *The Organization of Industry*, University of Chicago Press (1968). (check course materials section).
- C.R. Bard, Inc. v. Advanced Cardiovascular Systems, Inc., 911 F.2d 670 (Fed Cir. 1990).
- Dawson Chemical Co. v. Rohm & Hass Co., 448 U.S. 176 (1980).

Optional:

- Hausman and Mackie Mason, Price Discrimination and Patent Policy, 19 RAND J. Econ. 253 (1988).

VI. Economics of Copyright: (February 21)

- Basic Copyright Doctrines
 - Landes and Posner, Chapter 2 - 6. (required)
 - Baker v. Selden, 101 U.S. 99 (1879) (optional)
 - Lotus v. Borland, 49 F.3d 807 (1995) (optional)
 - Morrissey v. Proctor & Gamble, 379 F.2d 675 (1st Cir. 1967) (optional)
- Fair Use and Parody
 - Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 417 (1984) (required).
 - Harper and Row v. The Nation, 471 US 539 (1985) (required).
 - Campbell v. Acuff Rose Music, Inc. 510 U.S. 569 (1994) (required).
- Photocopying and Indirect Appropriability:
 - American Geophysical Union v. Texaco, 60 F.3d 913 (2d Cir. 1994) (required).
 - Princeton University Press v. Michigan Document Services, 99 F. 3d 1381 (6th Cir 1996) (optional).
 - Liebowitz, Copying and Indirect Appropriability: Photocopying of Journals, 93 JPE 945 (1985), available online at www.jstor.org.
- Unpublished Works
 - Salinger v. Random House, 811 F.2d 90 (1987) (required).
 - New Era Publications v. Henry Holt & Co. 873 F. 2d 576 (2d Cir. 1989) (optional).
- Performance Rights (optional):
 - Twentieth Century Music Corp v. Aiken, 422 U.S. 151 (1975).

- Broadcast Music, Inc. v. Claire's Boutiques, Inc., 949 F.2d 1482 (7th Cir. 1991).
- Edison Bros. Stores, Inc. v. Broadcast Music, Inc., 954 F.2d 1419 (8th Cir.1992).
- Springsteen v. Plaza Roller Dome, Inc., 602 F.Supp. 1113 (M.D.N.C. Jan 30, 1985).

VII. The Economics of Trademark Law (February 28)

- Trademark
 - Landes and Posner, Chapter 7
 - Two Pesos, Inc. v. Taco Cabana, 505 U.S. 763 (1992).
 - Qualitex Co. v. Jacobsen, 514 U.S. 159 (1995).
 - The Murphy Door Bed Co v. Interior Sleep Systems, Inc., 874 F.2d 95 (2d Cir. 1989).
 - TrafFix Devices Inc., v Marketing Displays, 532 U.S. 23 (2001).
- Right of Publicity
 - Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).
 - White v. Samsung Electronics America, Inc., 989 F.2d 1512 (9th Cir. 1993)).
 - M. Grady, "A Positive Economic Theory of the Right to Publicity, 1 UCLA Ent. L. Rev. 97 (1994)

Spring Break (March 6)

VIII. Term (March 13)

- Landes and Posner, Chapter 8.
- Eldred v. Ashcroft, 537 U.S. 186 (2003)
- Liebowitz, Stan J. and Margolis, Stephen E., "Seventeen Famous Economists Weigh in on Copyright: The Role of Theory, Empirics, and Network Effects" (December 2003). Available at <http://ssrn.com/abstract=488085>
- Brief of George Akerlof et al., in support of the petitioners in Eldred v. Ashcroft, available at: <https://cyber.harvard.edu/openlaw/eldredvashcroft/supct/amici/economists.pdf>
- Heald, How Copyright Keeps Works Disappeared, 11 J. Empirical Leg. Stud. 829 (2014).
- Williams, Heidi L. "Intellectual Property Rights and Innovation: Evidence from Health Care Markets." Innovation Policy and the Economy 16, no. 1 (January 2016): 53–87, available at: <https://dspace.mit.edu/bitstream/handle/1721.1/114270/684986.pdf?sequence=1&isAllowed=y>

IX. The Economics of Trade Secret Law (March 20)

- DuPont v. Christopher, 431 F.2d 1012 (5th Cir. 1970).
- Kewanee Oil v. Bicron, 416 U.S. 470 (1974).
- W. L. Gore & Associates v. Garlock, Inc., 721 F.2d 1540 (Fed Cir 1983).
- Warner-Lambert v. Reynolds, 280 F.2d. 197 (2d. Cir. 1960).
- Landes and Posner, Chapter 13.

X. The Economics of Patent Law (March 23)

- Landes and Posner, Chapter 11
- *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007).
- Christopher A. Cotropia “Predictability and Nonobviousness in Patent Law After KSR,” 20 Michigan Telecommunications & Tech. L. Rev. 391 (2014).
- Hilton Davis v. Warner-Jenkinson, 62 F.3d 1512 (1997) (concurring opinion by Judge Newman at 1529-36).
- *Festo v. Shoketsu Kinzoku Kogyo Kabushiki Co.* 535 U.S. 722 (2002).

XI. Measuring Patent Damages (April 3)

- Schlicher, Measuring Patent Damages by the Market Value of Inventions - The Grain Processing, Rite Hite, and Aro Rules, 82 J. Patent & Trademark Off. Soc'y 503 (2000).
- Grain Processing Corp. v. American Maize-Products Co., 185 F.3d. 1341 (Fed Cir. 1990).
- Rite Hite v. Kelley Co., 56 F.3d 1538 (Fed Cir 1995).
- State Industries v. Mor-Flo, Inc., 883 F. 2d. 1573 (Fed. Cir. 1988).
- Uniloc USA, Inc. v. Microsoft Corp., 632 F. 3d 1292 (Fed. Cir. 2011)
- ResQNet.com Inc. v. Lansa, Inc., 594 F.3d 860 (Fed. Cir. 2010)

XII. IP, Misuse, Inequitable Conduct, and Antitrust (April 10)

- Landes and Posner, Chapter 14
- *Brulotte v. Thys Co.*, 379 U.S. 29, 85 S.Ct. 176, 13 L.Ed.2d 99 (1964).
- *Scheiber v. Dolby Labs*, 293 F.3d 1014 (7th Cir. 2002).
- *Kimble v. Marvel*, 576 U.S. 446 (2015).
- *FTC v. Actavis*, 570 U.S. 136 (2013).
- Kobayashi, et. al., Actavis and Multiple ANDA Entrants: Beyond the Temporary Duopoly, 29 Antitrust 89 (2015).
- *Therasense, Inc., v. Becton-Dickinson, Inc.*, 649 F.3d 1276 (Fed. Cir. 2011, en banc).

XIII. Preemption of State Law, Conflict of Federal Laws (April 17)

- John S. Wiley, "Bonito Boats: Uninformed by Mandatory Federal Innovation," 1989 Sup. Ct. Rev. 283 (1989).
- *Bonito Boats, Inc., v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989).

- *Sears, Roebuck & Co. v. Stiffel Company*, 376 U.S. 225 (1964).
- *Goldstein v. California*, 412 U.S. 546 (1973).
- *Aronson v. Quick Point Pencil*, 440 U.S. 257 (1979).
- *Dastar v. 20th Century Fox*, 539 U.S. 23 (2003).
- *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir 1996).