

IP and Antitrust Seminar – Law 432

Wednesdays, 6:05 pm – 8:05 pm

Antonin Scalia Law School, George Mason University, Spring 2024

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Office Hours. Wednesdays 1-3 pm & by appointment.

Welcome. The goal of the course is to examine the intersection of intellectual property (IP) rights and antitrust law. While there might initially appear to be some tension between the two areas of law, there is significant harmony when properly formulated and considered. *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 also 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 should be submitted as a Word document via email.* Late submissions will receive no credit.

- Assignment One: Mon., Feb. 19 → Due: Fri., Mar. 1
- Assignment Two: Mon., Apr. 1 → Due: Fri., Apr. 12

Term Paper. The term paper must use legal and economic analyses to analyze a topic related to intellectual property and/or antitrust. It is worth **70 percent** of your overall grade. The paper should be 25-35 pages in length.

- The due date for the preliminary topic and outline is **Friday, March 29**. Please **submit** a **Word document** via email as this will allow for me to provide in-document comments and feedback.
- The final paper due date is **Friday, May 3**. Please **submit** a **PDF document** via email for the final paper.

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 Academic Regulations (AR) 4-1, which may be found at [ACADEMIC REGULATIONS, https://www.law.gmu.edu/academics/regulations](https://www.law.gmu.edu/academics/regulations).

Grading. This course follows the grading policies outlined in AR 4-6.

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*.

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 AR 4-2.2, no portion of a class session or an examination may be preserved by means of a recording device such as with an audio recording device or camera.

Class Schedule

1 Economics of Information and Intellectual Property (Jan. 17)

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).
- 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. 24)

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).
- Daniel A. Crane, “*The Magna Carta of Free Enterprise*” Really?, 99 IOWA L. REV. BULL. 17 (2014).
- Verizon v. Trinko, 540 U.S. 398 (2004)
- eBay v. MercExchange, 547 U.S. 388 (2006)

More Resources:

- Martin J. Bailey, *Approximate Optimality of Aboriginal Property Rights*, 35 J. L. & ECON. 183 (1992).
- Terry L. Anderson & P.J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J.L. & ECON. 163 (1975).

3 Antitrust and Licensing Intellectual Property (Jan. 31)

Required:

- Landes and Posner, Ch. 14 (pp. 372-90), *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 (pp. 192-210).
- 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.
- Alyssa A. Lutz & Lauren J. Stiroh, *The Relevant Market in IP and Antitrust Litigation*, 9 IP LITIGATOR 26 (May-June 2003).
- Douglas H. Ginsburg, Damien Geradin, & Keith Klovers, *Antitrust and Intellectual Property in the United States and the European Union*, SSRN (2018) (pp. 1-15).
- George A. Hay, *Market Power in Antitrust*, 60 ANTITRUST L.J. 807 (1997).

4 Standard Essential Patents (SEPs) & FTC v. Qualcomm (Feb. 7)

Required:

- Alexander Raskovich, *Self-Regulation in Standard-Setting Organizations: FRAND Royalties in the Process of Discovering Standards*, SSRN (2022).
- Research in Motion v. Motorola*, 644 F.Supp. 2d 788 (N.D. Tex. 2008)
- FTC v. Qualcomm*, 969 F.3d 974 (9th Cir. 2020)

More Resources:

- FTC v. Qualcomm*: (a) Complaint and (b) Motion to Dismiss
- Richard A. Epstein, *Toward the Peaceful Coexistence of Patent and Antitrust Law*, Global Antitrust Institute Report on the Digital Economy, 2020.
- Jorge Padilla, Douglas H. Ginsburg, & Koren W. Wong-Ervin, *Antitrust Analysis Involving Intellectual Property and Standards: Implications from Economics*, 33 HARV. J. L. & TECH. 1 (2019).

5 Tying, Aftermarkets, & Metering (Price Discrimination) (Feb. 14)

Required:

- Jean Tirole, *The Analysis of Tying Cases: A Primer*, COMP. POL'Y INT'L, Spring 2005.
- 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)

More Resources:

- John M. Yun, *App Stores, Aftermarkets, & Antitrust*, 53 ARIZ. ST. L.J. 1283 (2021).
- Hal Varian, *Differential Pricing and Efficiency*, 1 FIRST MONDAY 1 (1996).
- Illinois Tool Works v. Independent Ink*, 126 S.Ct. 1281 (2006)
- Burda v. Wendy's Intern, Inc.*, 659 F. Supp.2d 928 (S.D. Ohio 2009)

6 Multi-Sided Platforms, Open v. Closed Sys., & Video Games (Feb. 21)

Required:

- Landes and Posner, Ch. 14 (pp. 390-402), *Antitrust and Intellectual Property*.
- Hanno F. Kaiser, *Are “Closed Systems” an Antitrust Problem?*, 7 COMP. POL’Y INT’L 91 (2011).
- 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:

- Daniel A. Crane, *Ecosystem Competition and the Antitrust Laws*, 98 NEB. L. REV. 412 (2019).
- Jonathan M. Barnett, *The Host’s Dilemma: Strategic Forfeiture in Platform Markets for Informational Goods*, 124 HARV. L. REV. 1861 (2011).
- 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 (Feb. 28)

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).

SPRING BREAK (Mar. 6)

8 Privacy and Antitrust Policy (Mar. 13)

Required:

- James C. Cooper, *Privacy and Antitrust: Underpants Gnomes, The First Amendment, and Subjectivity*, 20 GEO. MASON L. REV. 1129 (2013).
- James C. Cooper & John M. Yun, *Antitrust & Privacy: It's Complicated*, 2022 U. ILL. J.L. TECH. & POL'Y 343, 343-69, 392-97 (2022).
- hiQ Labs v. LinkedIn, 31 F.4th 1180 (9th Cir. 2022)
- Fraley v. Facebook, 830 F.Supp.2d 785 (N.D.Cal 2011)

More Resources:

- Alessandro Acquisti, Curtis Taylor, & Liad Wagman, *The Economics of Privacy*, 54 J. ECON. LIT. 442, 442-49 (2016).
- Alex Marthews & Catherine Tucker, *Privacy Policy and Competition*, ECON. STUD. AT BROOKINGS, Dec. 2019.

9 “Predatory” Innovation: Is it a Thing? (Mar. 20)

Required:

- Joseph Gregory Sidak, *Debunking Predatory Innovation*, 83 COLUM. L. REV. 1121 (1983).
- 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)

More Resources:

- Richard Gilbert, *Holding Innovation to an Antitrust Standard*, 3 COMP. POL'Y INT'L (2007).
- Suzanne Van Arsdale & Cody Venzke, *Predatory Innovation in Software Markets*, 29 HARV. L.J. & TECH. 243 (2015).

10 Counterfactuals: Nascent & Potential Competition (Mar. 27)

Required:

- John M. Yun, *Potential Competition, Nascent Competitors, and Killer Acquisitions*, Global Antitrust Institute Report on the Digital Economy, 2020.
- FTC v. Meta-Within (2023)
- FTC v. Steris Corp., 133 F.Supp.3d 962 (N.D. Ohio 2015)

- 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)
- John M. Taladay & Jeffrey S. Oliver, *Analyzing Nascent Competitor Acquisitions Rationally*, CPI NORTH AM. COLUMN (Feb. 2021).
- U.S. v. Visa & Plaid Inc.* (2020) (moved to suggested rather the required)

11 Sharing Economy & Algorithmic Collusion (Apr. 3)

Required:

- Ai Deng, *Algorithmic Collusion and Algorithmic Compliance: Risks and Opportunities*, Global Antitrust Institute Report on the Digital Economy, 2020.
- Meyer v. Uber Technologies*, 868 F.3d 66 (2nd Cir. 2017)
- United States v. David Topkins* (2015), Complaint
- Gibson v. MGM Resorts* (2023)

More Resources:

- Jonathan Hall et al., *The Effects of Uber's Surge Pricing: A Case Study*, mimeo, 2015.
- 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).
- 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. 10)

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. 17)

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)

More Resources:

- Christopher B. Seaman & Thuan Tran, *Intellectual Property and Tabletop Games*, 107 IOWA L. REV. 1615 (2022).