Advanced Intellectual Property Law Seminar:  
Technology and Entertainment  
2 Credits

George Mason University School of Law  
Professor Scott Bain

GENERAL INFORMATION

Class Meetings: Hazel Hall, Tuesdays 8:00 p.m. - 9:50 p.m.  
Instructor email: sbain@gmu.edu  
Instructor phone: 703-967-9655 (cell)

I will set office hours TBD.

MATERIALS AND TOPICS

The course materials include cases, statutes, websites, articles, and other documents that you may access online through Westlaw, Lexis or the Internet, and/or that I will provide. We will not be using a traditional casebook or textbook. Reading assignments for the course are listed in the schedule below, along with all of the course topics. The order/schedule of topics presented below is an approximation. We will be having guest speakers during the seminar, and I may adjust the order of topics based upon availability of the speakers. Also, because this course is intended to cover the most current, relevant intellectual property issues in the technology and entertainment industries, some changes may be necessary to address new issues or cases that arise as the semester progresses.

GOALS FOR THE COURSE

This course is designed to (1) refine your creative problem solving ability and analytical skills, by examining novel or evolving legal issues at the intersection of technology and entertainment; (2) sample the most current and important IP issues in the technology and entertainment industries today, providing you with the tools and background to work in these areas; (3) introduce you to the typical parties in these industries and examine real-life case studies of their legal issues and strategies; (4) engage you in practice oriented exercises such as mock arguments and problem-solving, and (5) facilitate your writing of a term paper on a topic of your choice, with the goal of helping you create a publishable work.

Special guests from the entertainment and technology fields will supplement our discussions of some of the issues in the course, and provide you with insights on their cases, and possible paper topics.

PREREQUISITES

It is recommended that you have taken at least one introductory level intellectual property-related course, or have roughly equivalent experience. If you do not, please discuss with me.

GRADES - PAPER

There is no written exam in this course. Your grade will be based upon a paper submitted following the end of the course, on a date TBD, as well as classroom participation. We will
discuss paper formatting, approximate length, etc. in class. I am less concerned with the paper’s
length than with the depth of thought, clarity of writing, persuasiveness of analysis, and
sufficiency of legal support/citations. The paper will be 80% of your grade.

The topic of your paper may be a further exploration of one of the subjects of this course, or some
other intellectual property matter related to technology and/or entertainment. I will provide
further guidance on the paper and possible topics during the course.

This is an interactive seminar, and you will be expected to prepare for, attend and participate in
class. 20% of your grade will be based upon class participation, which includes in-class
exercises.

SCHEDULE AND ASSIGNMENTS

An approximate overview of the schedule and course topics is below, along with assigned reading
for each. For some of the lengthier cases listed, I will identify selected portions of the case to
read from week to week. I have also provided “optional” ideas for further reading on a topic if
you wish, such as for exploring the topic for your paper, or other further study or professional
preparation.

Week 1 (Aug 25)
• Brief Overview of Copyright, Trademark and Patent Principles.
• Policies Underlying Intellectual Property, and Tools of Analysis
• Exhaustion and the First Sale Doctrine: Licensing vs Ownership of software, media,
electronic games and other digital “goods”

Assigned Reading:
- Vernor v. Autodesk, Inc., 621 F.3d 1102 (9th Cir. 2010).
- UMG Recordings, Inc. v. Augusto, 628 F.3d 1175 (9th Cir. 2011).
- Seeing Red Over Copyright, http://concurrentmedia.com/2010/02/18/seeing-red-over-
copyright/ (Brief summary of the Redbox DVD rental litigation)
- Examine the contract (whether termed a “license” or “user agreement” or “terms of use”
etc.) of one of the software or media applications you use at home, such as iTunes,
Microsoft Word, Adobe Acrobat, iPhoto, etc. Are you permitted to transfer or sell your
copies of media (songs in iTunes, or the application itself for software like Word)? Are
you limited in the purposes for which you are allowed to use it? (e.g., non-commercial)
Is there any argument that this contract is non-binding and/or that you actually own your
particular copy (whether you acquired a CD, downloaded to your hard drive, etc.)?

Optional:
- MDY Industries v. Blizzard Entertainment, Inc., 629 F.3d 928 (9th Cir. 2011) ("World of Warcraft" case).

- Vernor v. Autodesk, Inc., 555 F.3d 1164 (W.D. Wash. 2008) (district court’s analysis that was subsequently overruled by the Ninth Circuit).

- ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996) (J. Easterbrook’s discussion of whether shrinkwrap licenses are valid contracts).


**Week 2 (Sept. 1)**

- The Flow of Media Across International Borders: the First Sale Doctrine versus the Importation Right.
- Google Books, Kindle, and iPad: Copyright Fair Use and “e-borrowing” in Publishing.

**Assigned Reading:**

- 17 U.S.C. § 602(a), (b)


**Optional:**

- Omega S.A. v. Costco Wholesale Corp., 541 F.3d 983 (9th Cir. 2008).


- Amazon Kindle License Agreement and Terms of Use, Section 1: Digital Content, http://www.amazon.com/gp/help/customer/display.html/ref=hp_left_cn?ie=UTF8&nodeId=200506200


Week 3 (Sept 8)
• Google Books, Kindle, and iPad: Copyright Fair Use and “e-borrowing” in Publishing (Continued).

Assigned Reading:


Week 4 (Sept 15) - Special Guest: Fabricio Vayra, Perkins Coie
• ICANN (Internet Corporation for Assigned Names and Numbers) and the Expansion of Internet Top Level Domains: Cybersquatting and Limitations of Trademark Online

Assigned Reading: (TBD)


- Compare the proposed “Rights Protection” rules in two of the competing applications for a new “.music” domain. (See Question 28 of each application, at the links below). How do these compare to the existing rules we have studied in the Transamerica case and other “.com” cybersquatting cases? What difficulties do you foresee in each applicant’s enforcement of their proposed policies, should they be awarded the .music top level domain?
  
  o .music application from .music LLC (group backed by major music industry trade associations): http://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1659
  
  o .music application from Google: http://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/528

Optional:

- ICANN Uniform Dispute Resolution Policy (UDRP), http://www.icann.org/en/help/dndr/udrp/policy (see particularly Section 2, Your Representations).

Week 5 (Sept 22) – Special Guest: Bruce McDonald, Buchanon Ingersoll
  • Cybersquatting and Limitations of Trademark Online.

Assigned Reading/Viewing:


- Transamerica Corp. v. Moniker Online Services, LLC, 672 F.Supp.2d 1353 (S.D. Fla. 2009); 15 U.S.C. § 1125(d)

Optional:

- Cybersquatting, Wikipedia,


Week 6 (Sept 29) – Special Guest: Elaine Gin, USPTO
  • International Practice and Special 301 Process

Assigned Reading: TBD

Week 7 (Oct. 6)
  • Secondary Liability in Copyright and Trademark Law: Where the Technology and Entertainment Battles are Fought (Part 1).
  • DMCA

    Case Studies: the Recording Industry and file-sharing; the Motion Picture Industry and YouTube.

Assigned Reading:

- Viacom et al. v. YouTube et al., 676 F.3d 19 (2d Cir. April 5, 2012).


Optional:


Oct. 13 – No Class.

**Week 8 (Oct 20)**
- Secondary Liability in Copyright and Trademark Law: Where the Technology and Entertainment Battles are Fought (Part 2).
- Space shifting and time shifting.
  Case Studies: VCR to the DVR; Walkman to iPod

Assigned Reading:


Optional:

- *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008)


**Week 9 (Oct 27)**
- The End of Copyright? Digital Locks, “Paracopyright,” and Anti-circumvention Laws

Assigned Reading:


- (Skim--Background) Protection and Control of Copyrighted Works through the Use of Technological Protections Measures and Title I of the DMCA (in Joseph & Bain,
Optional:

- Copyright Office DMCA Rulemaking:


- 17 U.S.C. §1003-1004 (Obligation to Make Royalty Payments: Digital Audio Recording Device and Digital Audio Recording Medium)

**Week 10 (Nov. 3) – Special Guest TBD**

- **Music Licensing, New Services, and New Media**
- **Abstract presentations**

Assigned Reading [files provided by Prof. Bain]:

- Excerpt of Written Testimony of Cary Sherman (RIAA) Before the Copyright Royalty Board in the “Mechanical” Rate Proceeding, Docket 2006-3

- *United States v. American Society of Composers, Authors and Publishers (ASCAP), in the Matter of RealNetworks and Yahoo*, 627 F.3d 64 (2d Cir. 2010).


Optional:

- iTunes terms extended to independent labels (indies), http://www.crainsnewyork.com/assets/pdf/CN89345626.PDF
Week 11 (Nov. 10)

- The Cottage Industry of Administrative Law in Music and Television Broadcasting: Rate settings, Consent Decrees, Compulsory Licenses, and PROs
  Rate Setting Cases in the Copyright Royalty Board: Satellite Radio, Internet Radio, Cable television, and more.

Assigned Reading:

- Skim 17 U.S.C. Sections 114(j) and 112(e).

- Skim “You Don’t Know Me, But I Owe You Money,” by Michael Huppe (SoundExchange)
  http://www.americanbar.org/content/dam/aba/migrated/Forums/entsports/PublicDocuments/ESLawyer_fall2010.authcheckdam.pdf. (page 3 of the periodical)

- Arista Records, LLC v. LAUNCH Media, Inc., 578 F.3d 148 (2d Cir. 2009). What is the distinction between “interactive” and “non-interactive” streaming services with respect to the statutory license? What does this case mean for Pandora, iTunes Radio, and similar services?

- Bonneville Int’l Corp. v. Peters, 347 F.3d 485 (3d Cir. 2003). In light of the evolving market for online music, as well as the historical importance of over-the-air broadcasting to the record industry, do you think this case was decided correctly?

- Skim Free Market Royalty Act. This is legislation introduced by Rep, Mel Watt (D-NC) last week that would extend the public performance right in sound recordings to include AM/FM transmissions (good for SoundExchange) but would do away with the statutory license (bad for SoundExchange) but designate SoundExchange to handle the direct licensing (hmm …). Attached are materials about the bill, which SoundExchange received from Rep. Watt’s office.

Optional:

- Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board, 684 F.3d 1332 (D.C. Cir. 2012), cert denied, May 28, 2013. The case challenged the constitutionality of the Copyright Royalty Board, which sets the rates under the statutory license. The D.C. Circuit’s remedy was critical here, as a different remedy might have injected too much chaos in the statutory license regime.
Overview of “Performance Rights Organization,”
http://en.wikipedia.org/wiki/Performance_rights_organisation

Royalty & Rate Setting Litigation, http://jenner.com/practices/262

Andrew Stockment, Internet Radio: The Case for a Technology Neutral Royalty
Standard, 95 Va. L. Rev. 2129 (2009),
http://www.virginialawreview.org/articles.php?article=280

SoundExchange, Inc. v. Librarian of Congress, 571 F.3d 1220 (D.C. Cir. 2009)

Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding — Ringtone
Decision (October 16, 2006), http://www.copyright.gov/docs/ringtone-decision.pdf

(Skim) 17 U.S.C. §§ 112 (Ephemeral Recordings), 114 (Public Performance of Sound
Recording By Means of Digital Audio Transmission), 115 (Digital Phonorecord
Delivery)

Week 12 (Nov 17)
• How Heavy the Hammer … The Pervasive Effect of IP Damages Statutes on Enforcement,
Deterrence, Licensing, and Consumer Respect for IP Laws.
  Case study: Jammie Thomas, the million dollar file-sharer.
• The evolving common law/Constitutional punitive damage limits in tort law … to what
extent do they impact the intellectual property statutes?

Assigned Reading:

- 17 U.S.C. §504

- Jammie Thomas case background/description:
  o Blog summarizing Jammie Thomas trial, second round:
  o Case history -- http://en.wikipedia.org/wiki/Capitol_v._Thomas

  11, 2012).


Optional:


- Pamela Samuelson & Tara Wheatland, Statutory Damages: A Remedy in Need of
Week 13 (Nov 24)
• Blogs, Mashups, Facebook, and YouTube: User Generated Content, Fair Use, and Ownership of IP Online.

Assigned Reading:


- Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003).


- Review the terms of your favorite social networking or content sharing site/forum. Who is purportedly recognized as the owner(s) of content that is posted? What licenses are purportedly granted? To what extent are the parties (you, the site host, the ISP, etc.) granting rights they arguably are not authorized to grant?

Optional:


- Compare Facebook Terms of Use (http://www.facebook.com/legal/terms) with MySpace Terms of Use (http://www.myspace.com/Help/Terms). What are the similarities and differences with respect to how they treat ownership of user generated content, and the “licenses” they purport to grant (to themselves, their users, and others) with respect to use of such content?


- “A Fair(y) Use Tale,” http://www.youtube.com/watch?v=CJn_jC4FNDo

Week 14 (Dec. 1)
• Hot news and unfair competition in sports and media.
• Athletes’ rights of publicity and related rights

Assigned Reading: TBD
Background References for Paper:


C. Steven Bradford, *As I Lay Writing: How to Write Law Review Articles for Fun and Profit…*, 44 J. Legal Education 13 (March 1994).  http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCsQFjAB&url=http%3A%2F%2Fdigitalcommons.unl.edu%2Fcgi%2Fviewcontent.cgi%3Farticle%3D1086%26context%3Dlawfacpub&ei=8iFlUNn5I8W70AG0sIBQ&usg=AFQjCNEnRrTxEALs_DL3Tmn0UydmY_DXw