Advanced Intellectual Property Law Seminar: 
Entertainment & Technology 
2 Credits 
Fall 2016 

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) 

**NOTE: WE WILL NOT BE MEETING THE FIRST WEEK OF SCHEDULED CLASSES. SEE BELOW.** 

I will set office hours TBD. 

MATERIALS AND TOPICS 

We will not be using a traditional casebook or textbook. The course materials include cases, statutes, websites, articles, videos, and other documents that you may access online through Westlaw, Lexis or the Internet, and/or that I will provide. Reading assignments for the course are listed in the schedule below, along with all of the course topics. 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. 

We will use TWEN for the posting/revision of reading assignments from week to week, and other announcements. 

GOALS FOR THE COURSE 

This course is designed to (1) build your analytical and creative thinking skills, by examining novel, evolving, and/or unsettled 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 in the future; (3) introduce you to the typical parties in these industries and examine real-life case studies reflecting their legal issues and strategies; (4) engage you in practice-oriented exercises such as mock arguments and client counseling, 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. Also, in lieu of the first week of class (see below) we will take a “field trip” to a court later in the semester. An alternative will be provided to those who cannot attend. 

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

**GRADES**

There is no written exam in this course. Your grade will be based upon a short mid-term assignment involving a “client’s” documentary film project (20%); a term paper submitted following the end of the course (60%); and classroom participation (20%). 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. You may choose to submit your paper for writing competitions at the end of the semester, including the ELI/Grammy competition (which we will discuss in class).

The topic of your paper may be a further exploration of one of the subjects of this course, or some other intellectual property matter of your choosing that relates 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, including in-class mock exercises.

**SCHEDULE AND ASSIGNMENTS**

An approximate overview of the schedule and course topics is below, along with a tentative list of readings for each. For some of the lengthier cases listed, I will identify (on TWEN) selected excerpts to read, in advance of class. 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 23) – NO CLASS. Please come prepared in Week 2 (see below).**

**Week 2 (Aug 30)**

- Brief Overview of Intellectual Property Law
- 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).
- 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 3 (Sept. 6)**

- First sale doctrine (cont’d): The Flow of Media Across International Borders – the First Sale Doctrine versus the Importation Right.

- Copyright registration

**Assigned Reading:**

- 17 U.S.C. § 602(a), (b)


**Ungraded homework Assignment:**

- Register your own copyright. See [www.copyright.gov/eco](http://www.copyright.gov/eco) (to be discussed in class)

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 4 (Sept 13)
• Google Books, Kindle, and iPad: Copyright Fair Use and “e-borrowing” in Publishing

Assigned Reading:


Optional:


Week 5 (Sept 20) - Special Guest (tentative)
• ICANN (Internet Corporation for Assigned Names and Numbers) and the Expansion of Internet Top Level Domains
• Cybersquatting and Online Protection of Trademarks and Domain Names

Assigned Reading:


Optional:

- Review the “about” page for the registry subject to the House Judiciary hearing noted above.  https://www.registry.sucks/


- 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

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


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**Week 6 (Sept 27) – Special Guest**

*Cybersquatting and Protection of Trademarks/domain names Online.*

Assigned Reading/Viewing:

- *Transamerica Corp. v. Moniker Online Services, LLC,* 672 F.Supp.2d 1353 (S.D. Fla. 2009)

- ACPA, 15 U.S.C. § 1125(d)
- Skim the *Transamerica v. Moniker* case file I posted in the course materials section of TWEN.

Optional:


**Week 7 (Oct 4) – Special Guest**

• The Legislative Process for IP Laws, and IP Lobbying in the Modern Congress

Assigned Reading (Tentative):

- Defend Trade Secrets Act (DTSA)  (link on TWEN)

- Crouch, “Implementing and Interpreting the Defend Trade Secrets Act”  (link on TWEN)

**Week of October 3:  Field trip to court (arguments)**

**No class October 11 (Administrative Monday)**

**Week 8 (Oct. 18)**

• Rights Clearance and Fair Use in the Motion Picture Industry

• Receive “Client Assignment”:  Documentary film fair use analysis

Assigned Reading/watching:

- *SOFA Entertainment v. Dodger Productions*, 709 F.3d 1273 (9th Cir. 2013) (fair use analysis with respect to Ed Sullivan Show clip utilized in Broadway show Jersey Boys).


- Documentary Filmmakers' Statement of Best Practices in Fair Use (public interest project coordinated by professors and filmmaker organizations)  (TWEN)
Optional:

- CMS practice exercises: documentary clips (video links posted on TWEN)
- Stanford Fair Use blog (link posted on TWEN)
- Attorney fair use opinion letters (examples) (TWEN)

**Week 9 (Oct 25)**

• Blogs, Mashups, Facebook, and YouTube: User Generated Content, Ownership, and Fair Use

Assigned Reading:


- Code of Best Practices in Fair Use for Online Video (American Univ. Center for Social Media) (TWEN link)

- Review the terms of your favorite social networking or content sharing platform. 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:

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


- “Mashup: ‘The Kings of Pop’ - Michael Jackson vs Justin Timberlake,”
  http://www.youtube.com/watch?v=rpSXTjzy0VQ

- Complaint in *Eros LLC v. Linden Research, Inc.*, (N.D. Cal. Case No. 09-CV-4269),
  http://www.3dinternetlaw.com/Trademark/Trademark/Eros_v_Linden_files/Eros%20v.%20Linden%20Complaint.pdf


- “A Fair(y) Use Tale,” http://www.youtube.com/watch?v=CJn_jC4FND0
*Client Assignment Due Nov. 1 in class

**Week 10 (Nov. 1)**
- Secondary Liability in Copyright and Trademark Law: Where the Technology and Entertainment Battles are Fought (Part 1).
- Digital Millenium Copyright Act (DMCA)

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

Assigned Reading:

- *Viacom et al. v. YouTube et al.*, 940 F.Supp.2d 110 (S.D.N.Y. 2013) (District Court decision on remand from the 2nd Circuit; after this District Court decision, the case subsequently settled)

Optional:

- [https://en.wikipedia.org/wiki/Online_Copyright_Infringement_Liability_Limitation_Act](https://en.wikipedia.org/wiki/Online_Copyright_Infringement_Liability_Limitation_Act)

**Week 11 (Nov 8)**
- 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 12 (Nov. 15)

• Music Licensing (part 1): New Services and New Media; Statutory Licensing

Assigned Reading (tentative)

- 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.craainsnewyork.com/assets/pdf/CN89345626.PDF](http://www.craainsnewyork.com/assets/pdf/CN89345626.PDF)


Week 13 (Nov 22) – Special Guest

• Music Licensing (part 2): 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?


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


- 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 14 (Nov 29)**
TBD: Right of Publicity (likenesses in video games); Statutory Damages and File Sharing; Digital Rights Management and Anticircumvention Laws (Section 1201)

**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=8iFlUNn5l8W70AG0sIBQ&usg=AFQjCNEiitRiTxAALs_Dl3Tmn0UydmY_DXw](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=8iFlUNn5l8W70AG0sIBQ&usg=AFQjCNEiitRiTxAALs_Dl3Tmn0UydmY_DXw)
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<td>1</td>
<td>Aug 23</td>
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<td>2</td>
<td>Aug 30</td>
<td>Course Overview</td>
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<td>Brief review/comparison of IP</td>
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<td>Exhaustion and first sale doctrine: software, music, video games, books</td>
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<td>3</td>
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<td>First sale doctrine: international issues</td>
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<td>Sept 13</td>
<td>Fair use: publishing and education</td>
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<td>5</td>
<td>Sept 20</td>
<td>ICANN, domain name expansion, TM protection (guest)</td>
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<td>6</td>
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<td>Cybersquatting and TM enforcement online (guest)</td>
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<td>Oct 4</td>
<td>IP lobbying and the legislative process (guest)</td>
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*Week of Oct 3: Field trip to court

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<td>Oct 18</td>
<td>Rights clearance and fair use: motion picture (film) industry</td>
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<td>9</td>
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*Client assignment due Nov. 1

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<td>Music licensing (I)</td>
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<td>TBD: Right of publicity (persona in video games)</td>
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*Paper due Dec. 20 (tentative)