

IP and Antitrust Seminar – Law 432

Mondays, 6:05 pm – 8:05 pm

Antonin Scalia Law School, George Mason University, Spring 2025

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Office Hours. Mondays 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, 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

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 **75 percent** of your overall grade. The paper should be 25-35 pages in length (double-spaced with one-inch margins).

- The due date for the preliminary topic and outline is **Friday, March 28**. Please **submit a Word document** via email as this will allow for me to provide in-document comments and feedback. *The outline must offer a clear thesis, reference two academic papers, and include some commentary on how those papers relate to the topic.*
- The final paper due date is **Monday, May 5**. Please **submit a PDF document** via email for the final paper.

Class Participation. Class participation represents **25 percent** of your overall grade and includes a short presentation at the end of the course on your research topic.

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>.

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.

Use of AI: The use of generative artificial intelligence is strictly prohibited in drafting or writing coursework related assignments. More information on Scalia Law's policy can be found at AR 4-3.

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 may be preserved by means of a recording device such as with an audio recording device or camera.

Class Schedule

1 Economics of Information & Intellectual Property (Jan. 27)

Required:

- ☐ Richard A. Posner, *Intellectual Property: The Law and Economics Approach*, 19 J. ECON. PERSP. 57 (2005).
- ☐ Jonathan M. Barnett, *Three Quasi-Fallacies in the Conventional Understanding of Intellectual Property*, 12 J.L. ECON. & POL'Y 1 (2016).
- ☐ Broadcast Music v. Columbia Broadcast System, 99 S.Ct. 1551 (1979)

More Resources:

- ☐ Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J. L. & ECON. 1 (1969).
- ☐ F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

2 Economic Theory of Property (Feb. 3)

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)
- ☐ Verizon v. Trinko, 540 U.S. 398 (2004)

More Resources:

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

3 Antitrust & Licensing Intellectual Property (Feb. 10)

Required:

- ☐ Landes and Posner, Ch. 14 (pp. 372-90), *Antitrust and Intellectual Property*.
- ☐ Alyssa A. Lutz & Lauren J. Stiroh, *The Relevant Market in IP and Antitrust Litigation*, 9 IP LITIGATOR 26 (May-June 2003).
- ☐ *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:

- ☐ 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).
- ☐ 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. 17)

Required:

- ☐ Alexander Raskovich, *Self-Regulation in Standard-Setting Organizations: FRAND Royalties in the Process of Discovering Standards*, SSRN (2022).
- ☐ John M. Yun, *The Legality of Legacy Business Practices in Antitrust*, 24 U. PA. J. BUS. L. 244 (2021) (pp. 280-89).
- ☐ *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:

- ☐ 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 (Feb. 24)

Required:

- ☐ 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).
- ☐ John M. Yun, *App Stores, Aftermarkets, & Antitrust*, 53 ARIZ. ST. L.J. 1283 (2021) (pp. 1291-99).
- ☐ 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).
- ☐ 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:

- ☐ Jean Tirole, *The Analysis of Tying Cases: A Primer*, COMP. POL'Y INT'L (2005).
- ☐ 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 Int'l, 659 F. Supp.2d 928 (S.D. Ohio 2009)

6 The Fashion Industry (Mar. 3)

Required:

- ☐ Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion*, 92 VA. L. REV. 1687 (2006)
- ☐ Jack Daniel's v. VIP Products, 143 S.Ct. 1578 (2023)
- ☐ Cavalleri et al. v. Hermès Int'l. (2024)
 - ☐ Complaint
 - ☐ Memo in Support of Motion to Dismiss

More Resources:

- ☐ Rochelle Cooper Dreyfuss, *Does IP Need IP? Accommodating Intellectual Production Outside the Intellectual Property Paradigm*, 31 CARDOZO L. REV. 1437 (2010).

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

Spring Break (Mar. 10)

7 Multi-Sided Platforms, Open v. Closed Sys., & Video Games (Mar. 17)

Required:

- ☐ Landes and Posner, Ch. 14 (pp. 390-402), *Antitrust and Intellectual Property in the New Economy*.
- ☐ Herbert Hovenkamp, *How IP Rights Create Competition in E-commerce*, NETWORK L. REV. (2024), <https://www.networklawreview.org/ip-rights-competition>.
- ☐ 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:

- ☐ 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.

8 Coordinating Ecosystems (Mar. 24)

Required:

- ☐ Roger D. Blair & Olivia Liu, *The NFL Sunday Ticket Nightmare*, ANTITRUST BULL. 1 (2024).
- ☐ 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)
 - ☐ In Re NFL Sunday Ticket, Case 2:15-ml-02668-PSG-SK (C.D. Cal. 2024)

More Resources:

- ☐ John A. Fortunato & Shannon E. Martin, *American Needle v. NFL: Legal and Sponsorship Implications*, 9 U. DENV. SPORTS & ENT. L.J. 73 (2010).

9 Privacy & Antitrust Policy (Mar. 31)

Required:

- ☐ Alessandro Acquisti, Curtis Taylor, & Liad Wagman, *The Economics of Privacy*, 54 J. ECON. LIT. 442 (2016) (pp. 442-49).
- ☐ James C. Cooper & John M. Yun, *Antitrust & Privacy: It's Complicated*, 2022 U. ILL. J.L. TECH. & POL'Y 343 (2022) (pp. 343-69, 392-97).
- ☐ 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:

- ☐ Jane R. Bambauer, *How to Get the Property Out of Privacy Law*, YALE L.J. FORUM (2024).
- ☐ American Enterprise Institute, *"Propertizing" Privacy: Evaluating the Merits of a Property-Based Approach to Personal Data Protection*, Panel Transcript (2024).

10 "Predatory" Innovation? (Apr. 7)

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).

11 Counterfactuals: Nascent & Potential Competition (Apr. 14)

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).

12 Sharing Economy & Algorithmic Collusion (Apr. 21)

Required:

- ☐ Ai Deng, *Algorithmic Collusion and Algorithmic Compliance: Risks and Opportunities*, Global Antitrust Institute Report on the Digital Economy, 2020.
- ☐ United States v. David Topkins (2015), Complaint
- ☐ Gibson v. MGM Resorts (2023)

More Resources:

- ☐ Ai Deng, *What Do We Know About Algorithmic Collusion Now? New Insights from the Latest Academic Research*, SSRN (2024).
- ☐ Axel Gautier et al., *AI Algorithms, Price Discrimination and Collusion: A Technological, Economic and Legal Perspective*, EUR. J.L. & ECON. (2020).
- ☐ Jonathan Hall et al., *The Effects of Uber's Surge Pricing: A Case Study*, mimeo, 2015.

13 Research Paper Presentations (Apr. 24)