

Introduction to Intellectual Property Law

Summary. This course will provide an overview of the major doctrines of intellectual property (or “IP”) law. Broadly speaking, IP law protects the products of human ingenuity—from useful inventions (patent law) to creative expression (copyright law) to corporate logos and brand names (trademark law) and beyond.

This course is a recommended, but not required, prerequisite to the substantive courses in Copyright, Patent, and Trademark Law and the accompanying courses in procedure. This course also is perhaps unique in attempting to raise the question whether what we call “intellectual property” really is a cohesive body of law unto itself, or simply an agglomeration of disparate fields that overlap, if at all, only at the margins.

The readings have been selected not only to familiarize you with the governing legal doctrines, but to introduce the broader policy debates that make IP law one of the most dynamic and contested domains in contemporary practice. Among the questions you should keep in mind as you read, which will recur frequently in class discussion, are these: *How is intellectual property like other forms of property, and how does it differ? Does the “property” metaphor explain existing legal doctrine? If not, should we change the doctrine, or the metaphor? What are the policy justifications for extending the law’s various protections to works of intellectual property? Does IP law advance those policies effectively? What balance should the law strike as between creators and those who view, use, or consume the works or products created? Does the law actually strike the proper balance? What challenges have advanced communications technologies posed to IP law? How should the law respond? How has it?*

Textbook and Course Materials.

- **Required Text:** Lange, LaFrance & Myers, *Intellectual Property: Cases and Materials* (3rd ed. 2007) (“**Casebook**”). The casebook is available in the Tangeman University Center or DuBois bookstores or online at <http://www.westacademic.com/>. You should review the notes following each assigned case in addition to the text of the cases themselves.
- **Optional, But Recommended:** Schechter’s *Selected Intellectual Property and Unfair Competition Statutes, Regulations, and Treaties* (2007 edition). All the statutes we will be studying in class are freely available on the Internet, although you will need to print your own copies for use during the final exam if you elect not to purchase the statute book.
- Additional course materials will be handed out in class or made available for pickup (“**Handout**”).

Grading. Your course grade will be based on two components.

- Final Examination: 75%.
- Course Participation: 25%. Your course participation grade includes in-class participation, participation in periodic short project assignments that will be made in class, and written participation in an online discussion forum for the course that is hosted on the web site of the H2O Project, <http://h2o.law.harvard.edu/>. Registration instructions for the discussion forum will be provided during the first class meeting.

Office Hours. Office hours will be held Thursdays 9 a.m. to noon, or by appointment. Please contact my assistant, Huda Kebede, at 556-9133, to schedule an appointment.

Course Syllabus

Part 1: Introduction to Copyright Law

I. Introduction

A. The Constitutional Foundation

- U.S. Constitution, Article I, Section 8, Clause 8:

The Congress shall have power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]

B. Copyright's Outer Boundaries

1. Idea and Expression

- *Baker v. Selden* (Casebook, pp. 2–7).

2. Authorial Originality

- *Feist Publications v. Rural Telephone Service* (Casebook, pp. 761–73).

3. Duration of Copyright

- *Eldred v. Ashcroft* (Casebook, pp. 903–27).
- *KISS Catalog, Ltd. v. Passport International Productions, Inc.* (Handout, pp. 1–4).

4. The Public Domain

- “Tom the Dancing Bug.” (Handout, p. 5).
- Excerpt from Boyle, *The Second Enclosure Movement and the Construction of the Public Domain* (Handout, pp. 6–9).

C. Statutory Protection for Copyright.

- **Skim:** Introduction and a Short History (Casebook, pp. 724–34).

II. Copyrightable Subject Matter

A. Copyright Act of 1976

- Notes on 17 U.S.C. § 102 (Casebook, pp. 738–39).

B. Selected Forms of “Authorship”

1. Photography

- *Burrow-Giles Lithographic Co. v. Sarony* (Casebook, pp. 735–38).

2. Selection and Arrangement

- *West Publishing Co. v. Mead Data Central, Inc.* (Casebook, pp. 778–84).
- *CCC Information Services, Inc. v. Maclean Hunter Market Reports, Inc.* (Casebook, pp. 810–19).

3. Plot and Characters

- *Hoehling v. Universal City Studios, Inc.* (Casebook, pp. 793–800).
- *Walt Disney Productions v. Air Pirates* (Casebook, pp. 800–01).

4. Maps

- *Mason v. Montgomery Data, Inc.* (Casebook, pp. 803–08).

5. Useful Articles

- *Mazer v. Stein* (Casebook, pp. 853–56 & Handout, p. 10).
- *Brandir International, Inc. v. Cascade Pacific Lumber Co.* (Casebook, pp. 856–62).

6. Architectural Works

- Note on the Architectural Works Copyright Protection Act of 1990 (Casebook, pp. 864–68).

7. Software

- Note on Literal Code and Screen Displays (Casebook, pp. 836–37).
- *Computer Associates International, Inc. v. Altai, Inc.* (Casebook, pp. 837–50).
- *Assessment Technologies of WI, LLC v. WIREdata, Inc.* (Casebook, pp. 786–92).

8. Government Works

- Note on 17 U.S.C. § 105 (Casebook, pp. 869–70).

III. Ownership and Duration of Copyright

A. Who Owns the Copyright? Particular Problems of Authorship

- *Childress v. Taylor* (Casebook, pp. 872–78).
- *Community for Creative Non-Violence v. Reid* (Casebook, pp. 881–88).

B. Duration of Copyright

- Notes on the 1909 and 1976 Copyright Acts (Casebook, pp. 901–03).
- *Stewart v. Abend* (Casebook, pp. 928–33).
- Notes on the Copyright Renewal Act of 1992 (Casebook, pp. 933–35).
- Copyright Duration and Renewal Guide (Handout, p. 11).
- Discussion Questions on Duration and Renewal (Handout, p. 12).

IV. Copyright Infringement

A. Introduction

- Notes on Infringement (Casebook, pp. 1140–41).

B. Copying & Improper Appropriation: Issues

- *Arnstein v. Porter* (Casebook, pp. 1157–59).
- *Shaw v. Lindheim* (Casebook, pp. 1159–64).
- *Leigh v. Warner Brothers, Inc.* (Casebook, pp. 1165–70).
- *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.* (Handout, pp. 13–14).

V. The Fair Use Defense

A. Evolution of the Fair Use Doctrine

- Notes on 17 U.S.C. § 107 (Casebook, pp. 1053–54).
- *Sony Corp. of America v. Universal City Studios, Inc.* (Casebook, pp. 1054–58).
- *Harper & Row v. Nation Enterprises* (Casebook, pp. 1059–71).
- *Campbell v. Acuff-Rose Music, Inc.* (Casebook, pp. 1072–86).
- *Bill Graham Archives v. Dorling Kindersley Ltd.* (Casebook, pp. 1106–14).

B. Fair Use in a Digital Age

1. Search Engines

- *Kelly v. Arriba Soft Corp.* (Casebook, pp. 1130–38).

2. Software

- *Sony Computer Entertainment v. Connectix Corp.* (Handout, pp. 15–20).

3. File-Sharing

- *A&M Records, Inc. v. Napster, Inc.* (Casebook, pp. 1119–29).
- Excerpt from Fisher, *Promises to Keep* (Handout, pp. 21–22).
- *BMG Music v. Gonzalez* (Handout, pp. 23–24).
- “Tom the Dancing Bug.” (Handout, p. 25).

VI. Third Party Liability

- *Fonovisa, Inc. v. Cherry Auction, Inc.* (Casebook, pp. 1184–89).
- *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.* (Casebook, pp. 1200–12).

VII. The “New Copyright”: The Digital Millennium Copyright Act

A. Safe Harbors for Internet Service Providers (17 U.S.C. § 512)

- Notes on 17 U.S.C. § 512 (Casebook, pp. 1213–16).
- *ALS Scan, Inc. v. RemarQ Communities, Inc.* (Casebook, pp. 1216–24).

B. Anti-Circumvention Rules (17 U.S.C. § 1201)

- *Universal City Studios, Inc. v. Corley* (Casebook, pp. 1227–46).
- *Lexmark Int’l, Inc. v. Static Control Components, Inc.* (Handout, pp. 26–37).

Part 2: Introduction to Patent Law

I. Introduction

- Introduction: Historical Protection for Innovations (Casebook, pp. 400–01).
- *Application of Bergy* (Handout, pp. 38–44).

II. 35 U.S.C. § 101: Patentable Subject Matter and the Requirement of Utility

A. Patentable Subject Matter

- *Diamond v. Chakrabarty* (Casebook, pp. 402–07).
- Excerpt from Boyle, *Shamans, Software, and Spleens* (Handout, pp. 44–46).
- *State Street Bank & Trust Co. v. Signature Financial Group, Inc.* (Casebook, pp. 408–18).
- Joyce, *Federal Case Highlights Debate Over Patenting of Tax Strategies* (Handout, p. 47).

B. The Requirement of Utility

- *Brenner v. Manson* (Casebook, pp. 424–27).
- *Juicy Whip, Inc. v. Orange Bang, Inc.* (Casebook, pp. 427–31).
- *In re Fisher* (Casebook, pp. 432–41).

- USPTO Guidelines for Examination of Applications for Compliance With the Utility Requirement (Handout, pp. 48–50).

III. 35 U.S.C. § 102: The Requirement of Novelty

- Notes on 35 U.S.C. § 102 (Casebook, p. 447).
- *In re Borst* (Casebook, pp. 448–50).
- *Bennett Regulator Guards, Inc. v. Canadian Meter Co., Inc.* (Casebook, pp. 450–54).
- *In re Wyer* (Casebook, pp. 456–58).
- *Alexander Milburn Co. v. Davis-Bournonville Co.* (Casebook, pp. 461–63).

IV. 35 U.S.C. § 103: The Requirement of Nonobviousness

- *Graham v. John Deere Co.* (Casebook, pp. 473–80).
- *Application of Antle* (Handout, pp. 51–53).
- *In re Paulsen* (Handout, pp. 54–56).
- *OddzOn Products, Inc. v. Just Toys, Inc.* (Handout, pp. 57–60).
- *KSR International Co. v. Teleflex, Inc.* (Casebook, pp. 483–96).

V. Design Patents

- *Gorham Mfg. Co. v. White* (Casebook, pp. 420–21).
- *Application of Yardley* (Casebook, pp. 421–22).
- *Avia Group International, Inc. v. L.A. Gear California, Inc.* (Casebook, pp. 441–43).
- *In re Carletti* (Casebook, pp. 444–46).

VI. Plant Patents

- *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc.* (Handout, pp. 61–66).

VII. Statutory Bars

A. Public Use

- *Metallizing Engineering Co., Inc. v. Kenyon Bearing & Auto Parts Co., Inc.* (Casebook, pp. 517–20).
- *Allied Colloids Inc. v. American Cyanamid Co.* (Handout, pp. 67–70).

B. On Sale

- *Pfaff v. Wells Electronics, Inc.* (Casebook, pp. 522–28).

C. Abandonment/Foreiture

- *Moore v. United States* (Casebook, pp. 531–34).

D. Foreign Patents

- *In re Kathawala* (Casebook, pp. 534–38).

E. Other Issues

- Note on Obviousness and Statutory Bars (Casebook, pp. 538–39).

VIII. Priority and the First-to-Invent Rule

- *Griffith v. Kanamaru* (Handout, pp. 71–74).
- *Paulik v. Rizkalla* (Casebook, pp. 465–69).
- Problems: Patent Priority (Handout, pp. 75–76).
- Excerpt from Jaffe & Lerner, *Innovation and Its Discontents* (Handout, pp. 77–79).

IX. The Patent Application

- *Christianson v. Colt Industries Operating Corp.* (Casebook, pp. 539–43).
- Notes on The Patent Application Process (Casebook, pp. 588–92).
- United States Patent No. 5,830,035 (Handout, pp. 69–73).

X. Patent Infringement

A. Claim Construction

- *Markman v. Westview Instruments, Inc.* (Handout, pp. 85–88).
- *Cybor Corp. v. FAS Technologies, Inc.* (Handout, pp. 89–104).

B. Infringement and the Doctrine of Equivalents

- Note on Patent Infringement (Casebook, p. 597).
- *Autogiro Company of America v. United States* (Casebook, pp. 598–602).
- *Warner-Jenkinson Co., Inc. v. Hilton Davis Chemical Co.* (Casebook, pp. 605–15).
- *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.* (Casebook, pp. 618–28).

Part 3: Introduction to the Law of Trade Secrets

I. Information Protectable as Trade Secret

- *Minuteman, Inc. v. Alexander* (Casebook, pp. 349–55).
- *Rockwell Graphic Systems, Inc. v. DEV Industries, Inc.* (Handout, pp. 105–10).

II. Misappropriation and Improper Acquisition of Trade Secrets

- *Lamb-Weston, Inc. v. McCain Foods, Ltd.* (Casebook, pp. 356–60).
- *E.I. du Pont de Nemours & Co. v. Christopher* (Casebook, pp. 368–72)

III. Trade Secrets in the Framework of Intellectual Property

- *Kewanee Oil Co. v. Bicron Corp.* (Handout, pp. 111–18).

Part 4: Introduction to Trademark Law

I. Trademarks in the Framework of Intellectual Property

- *The Trade-Mark Cases* (Casebook, pp. 7–12).

II. Trademarks as Source Identifiers

A. Distinctiveness and Secondary Meaning: Issues

- *Abercrombie & Fitch Co. v. Hunting World, Inc.* (Casebook, pp. 55–62).
- *International Kennel Club of Chicago, Inc. v. Mighty Star, Inc.* (Casebook, pp. 64–76).
- *David B. Findlay, Inc. v. Findlay* (Casebook, pp. 77–82).
- *Qualitex Co. v. Jacobson Products Co., Inc.* (Casebook, pp. 83–90).
- *Two Pesos, Inc. v. Taco Cabana, Inc.* (Casebook, pp. 253–57).
- *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.* (Casebook, pp. 258–63).

B. Generic Terms

- *King-Seeley Thermos Co. v. Aladdin Industries, Inc.* (Casebook, pp. 50–54).
- *Anheuser-Busch, Inc. v. John Labatt Ltd.* (Handout, pp. 119–21).

C. Functionality

- *TrafFix Devices, Inc. v. Marketing Displays, Inc.* (Casebook, pp. 264–69).
- *International Order of Job's Daughters v. Lindeburg & Co.* (Handout, pp. 122–25).
- *Warner Bros., Inc. v. Gay Toys, Inc.* (Handout, pp. 126–29).

D. Other Grounds for Refusing Registration

- *In re Old Glory Condom Corp.* (Casebook, pp. 91–97).
- *In re Budge Manufacturing Co., Inc.* (Casebook, pp. 100–04).
- *In re California Innovations, Inc.* (Casebook, pp. 104–13).

III. Acquisition, Priority, and Abandonment of Trademarks

- *Thrifty Rent-A-Car System, Inc. v. Thrift Cars, Inc.* (Casebook, pp. 137–43).
- *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.* (Casebook, pp. 149–54).
- *Sands, Taylor & Wood Co. v. Quaker Oats Co.* (Casebook, pp. 203–11).

IV. Trademark Infringement

A. Likelihood of Confusion

- *CBS, Inc. v. Liederman* (Casebook, pp. 155–60).
- *Foxworthy v. Custom Tees, Inc.* (Casebook, pp. 161–69).

B. Dilution

- *Mead Data Central, Inc. v. Toyota Motor Sales, U.S.A., Inc.* (Casebook, pp. 179–87).
- *Moseley v. V Secret Catalogue, Inc.* (Casebook, pp. 187–92).
- *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC* (Handout, pp. 130–32).

C. Other Theories

- *Dastar Corp. v. Twentieth Century Fox Film Corp.* (Casebook, pp. 245–52).

D. Defenses

- *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.* (Casebook, pp. 214–20).
- *R.G. Smith v. Chanel, Inc.* (Casebook, pp. 220–25).
- *Champion Spark Plug Co. v. Sanders* (Casebook, pp. 225–27).

V. “Cybersquatting” and Trademarks on the Internet

- *Brookfield Communications, Inc. v. West Coast Entertainment Corp.* (Handout, pp. 133–39).
- *Playboy Enterprises, Inc. v. Netscape Communications Corp.* (Handout, pp. 140–43).
- *Lamparello v. Falwell* (Handout, pp. 144–52).

Part 5: Misappropriation and the Right of Publicity

I. Misappropriation

- *International News Service v. Associated Press* (Casebook, pp. 17–30).

II. Rights of Publicity

- Excerpt from Nimmer, *The Right of Publicity* (Casebook, pp. 32–40).
- *Midler v. Ford Motor Co.* (Casebook, pp. 278–81).
- *White v. Samsung Electronics America, Inc.* (Casebook, pp. 282–96).
- *White v. Samsung Electronics America, Inc.* (Casebook, pp. 296–308).
- *Comedy III Productions, Inc. v. Saderup* (Handout, pp. 153–60).