

The Law and Economics of the Information Age

Ray Gifford & Phil Weiser

Spring 2005

This seminar will explore in depth the cutting edge legal issues in our emerging information economy. Our primary focus will be on (1) the regulation of telecommunications, and (2) legal and regulatory issues presented by the rise of the Internet.

Because the seminar will be driven almost entirely by student papers and class discussion, you must be very interested in the topic and committed to attending every seminar-except for an extraordinary reason. If you are very interested in these issues, either academically or professionally, the course should prove highly rewarding, with more than a few challenges along the way.

Students taking this seminar should have completed one of the following pre-requisites: Telecommunications Law & Policy; Introduction to Intellectual Property; Antitrust; Law and Economics; or Privacy, Security, and Digital Rights Management. Although the seminar will have heavy economics and technology components, you need not come with any undergraduate background in economics or technology. You must, however, be interested in those areas.

The required readings may be checked out at the law library reserve desk or are available through TWEN. (Three books are recommended for purchase, Lawrence Lessig, *Code and Other Laws of Cyberspace*, Carl Shapiro & Hal Varian, *Information Rules*, and William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law*.) For each suggested paper topic, there is a list of recommended readings, which can normally be obtained from the instructor.

Office Hours and Contact Information

Thursday 10-12, Room 313 or by appointment

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Class Requirements and Grading

The seminar will meet every Thursday afternoon from 12-1 and 2:20-4:30 p.m. in Room 241. Unless a student has an extraordinary reason, s/he must attend every class. Each absence without a qualifying reason will result in the student's grade being adjusted 1/3 of a grade downward. Each student must also be prepared to write a 20-25 page research paper and prepare a shorter in-class presentation (as well as comment on another student's research paper). These papers and presentations will drive the class discussion in most weeks of the course. Thus, grades for the seminar will be calculated as follows: 15% for class participation; 15% for a short presentation; 55% for a seminar paper; and 15% for comments on another student's paper.

Students will be responsible for posting their papers on TWEN at least three days before the class in which your paper will be discussed (i.e., by Monday evening at 7 p.m. at the latest). A first draft of

the paper, however, is due two weeks before then, to afford your “buddy” an opportunity to give you suggestions. Late submissions will be penalized.

KEY TO READINGS:

(P) = Purchase

(W) = Website or "hot linked" through TWEN

(R) = Library Reserve

UNIT I: Economics

Weeks 1 & 2: The Law and Economics of the Information Age

Readings/Week One (January 13) (special guest Betsy Hoffman)

(W) Richard Posner, Taxation By Regulation, 2 Bell J. Econ & Mgmt Science 22 (1971) (posted with course materials).

(R) Joseph Schumpeter, Capitalism, Socialism, Democracy, pp. 72-106.

(W) Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089 (1972).

(W) Timothy J. Muris, Improving the Economic Foundations of Competition Policy (January 15, 2003), available at www.ftc.gov/speeches/muris/improveconfoundatio.htm.

(W) Pierre Lemieux, The Public Choice Revolution, Regulation, available at <http://www.cato.org/pubs/regulation/regv27n3/v27n3-2.pdf>.

(W) Elizabeth Hoffman & Matthew L. Spitzer, Willingness to Pay vs. Willingness to Accept: Legal and Economic Implications, 71 Wash. U. L.Q. 59 (1993)

(W) Elizabeth Hoffman & Matthew L. Spitzer, Experimental Law and Economics: An Introduction, 85 Colum. L. Rev. 991 (1985)

(W) Mark G. Kelman, Comment on Hoffman and Spitzer's Experimental Law and Economics, 85 Colum. L. Rev. 1037 (1985)

Readings/Week Two (January 20)

(P) Lawrence Lessig, *Code and Other Laws of Cyberspace* pp. 3-63 (1999).

(W) David G. Post - What Larry Doesn't Get: Code, Law, and Liberty in Cyberspace, [52 Stan. L. Rev. 1439](#) (2000).

(W) Lawrence Lessig, Coase's First Question,
<http://www.cato.org/pubs/regulation/regv27n3/v27n3-4.pdf>.

(W) Joseph Farrell & Philip J. Weiser, Modularity, Vertical Integration, and Open Access Policies: Towards A Convergence of Antitrust and Regulation In The Internet Age (2003) (<http://jolt.law.harvard.edu/articles/pdf/v17/17HarvJLTech085.pdf>).

>>*HIGHLY RECOMMENDED*---Attend CIO Summit, Jan 24th

Week 3: Network Externalities and Standard Setting (Jan 27)

Reading: (P) Carl Shapiro & Hal Varian, *Information Rules* (1999).

PRESENTATIONS:

- (1) IP Policy and Std Setting Bodies (Jennie)
- (2) Std Setting Bodies and their connection to regulation (spam, IM, etc.)
- (3) Econ Review

UNIT II: Regulating Transport Platforms and the Logical Layer

Week 4: Wireline Broadband Platforms (Feb 3)

(W) Philip J. Weiser, Toward A Next Generation Regulatory Regime,
http://www.luc.edu/law/activities/opportunities/docs/weiser_revised_II.pdf

(W) *Brand X Internet Services v. F.C.C.*, 345 F.3d 1120 (9th Cir. 2003)

(W) Scott J. Marcus, *The Emerging EU Regulatory Framework: An Innovative Response to Convergence*, 2 J. TELECOMMS. & HIGH TECH. L. __ (2003), available at http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp36.pdf.

(W) Andrew Odlyzko, The Many Paradoxes of Broadband,
<http://www.dtc.umn.edu/~odlyzko/doc/broadband.paradox.pdf>.

(W) Jim Crowe, Telecom Regulation: A New Approach
(http://www.level3.com/userimages/dotcom/pdf/Progress_Freedom_Address.pdf).

(W) Andy Reinhardt, Net Phone Calls, Free--and Clear, Business Week (November 1, 2004) (http://www.businessweek.com/magazine/content/04_44/b3906087_mz063.htm)

PRESENTATIONS:

- (1) Alternative Models of Regulation—the Staggers Act and the FTC Act Models
- (2) Alternative Models of Regulation: The EU and Layered Model (Adam)
- (3) The Race to the Last Mile – Alternatives For AThird Broadband Platform?

Week 5: Physical Transport Policy Towards Wireless (Feb 10)

Readings

- (W) Weiser and Hatfield,
<http://web.si.umich.edu/tprc/papers/2004/300/policing%20spectrum%20commons.pdf>
- (W) Faulhaber and Farber, Spectrum Management, available at
http://rider.wharton.upenn.edu/~faulhabe/SPECTRUM_MANAGEMENTv51.pdf
- (W) FCC Spectrum Policy Task Force Report
(http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-228542A1.pdf)

PRESENTATIONS:

- (1) Getting Spectrum From Incumbents To Entrants (Windfall Concerns and Political Obstacles)
- (2) Regulating Equipment and The Interference Temperature Concept
- (3) The XG Concept and the Future of Software Defined Radio
(http://www.darpa.mil/ato/programs/XG/rfc_vision.pdf)

>>ATTEND Rewriting the Telecom Act conference, Feb 13 & 14

Week 6: Physical Transport Transition Policy: The Unwinding of The Public Switched Telephone Network Regulatory Regime (Feb 17)

Readings:

- (W) U.S. Telecom Ass'n v. F.C.C., 290 F.3d 415 (D.C. Cir. 2002)
- (W) Letter from David Isenberg et al (<http://www.netparadox.com/fccletter.txt>)
- (W) Atkinson and Barnekov, A Coasian Alternative to Pigovian Regulation,
<http://web.si.umich.edu/tprc/papers/2004/348/CoasianAlternative040901b.pdf>
- (W) Ray Gifford, Regulatory Impressionism: What Regulators Can And Cannot Do,
available at http://www.rnejournal.com/articles/gifford-RNE_10_final.pdf.

PRESENTATIONS:

- (1) The Unbundling Mess: What Went Wrong
- (2) The Telecom Meltdown: Prescriptions for Recovery
- (3) The Old Subsidy Regime and Its Aftermath: The Future of Universal Service and Intercarrier Compensation

Week 7: Models of Regulation, Institutions, and Introduction to the Internet (Feb 24)

- (W) Cerf and Kahn, What Is The Internet and What Makes It Work,
http://global.mci.com/us/enterprise/insight/cerfs_up/internet_history/whatIs.xml
- (W) A. Michael Froomkin, Habermas@discourse.net: Toward a Critical Theory of Cyberspace,
116 Harv. L. Rev. 749, 777-855 (2003).
- (W) Julie Cohen, Normal Discipline in Age of Crisis (posted with course materials)

PRESENTATIONS:

- (1) Self-Regulating Institutions: Internet Panacea or Fantasy
- (2) Design A Bandwidth Policy for CU
- (3) The Internet As A Coasian Problem

Week 8: The Logical Layer (March 3) (special guest Mike Gallagher)

(W) Clark et al, End-to-End Arguments in System Design

(<http://www.reed.com/Papers/EndtoEnd.html>)

(W) Blumenthal and Clark, Rethinking End-To-End, available at <http://rider.wharton.upenn.edu/~faulhabe/732/Rethinking%20the%20Design%20of%20the%20Internet.pdf>

(W) Stephen Baker, The Taming Of The Internet, BusinessWeek
(http://www.businessweek.com/print/magazine/content/03_50/b3862091_mz063.htm?db)
Readings TBA

PRESENTATIONS:

- (1) A Comparison of VoIP and File Sharing Regulation
- (2) End-to-End and its Limits
- (3) The Upgrade to IPv6

>>ATTEND, from 3:40-7:00—Open Source, Open Standards, and The Future of the Internet

Part III: The Applications and Content Layers

Week 9: Applications Layer: Antitrust and the Microsoft Case

The Case of Antitrust (March 10)

Readings:

(P) Landes & Posner, 390-402

(W) U.S. v. Microsoft (D.C. Cir. 2001)(<http://ecfp.cadc.uscourts.gov/MS-Docs/1720/0.pdf>).

(W) Einer Elhauge, Defining Better Monopolization Standards, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=437863

(W) Verizon v. Trinko (<http://www.supremecourtus.gov/opinions/03pdf/02-682.pdf>)

Paper Topics

1. The Economics of Innovation and the Cases Against Microsoft (including the EU Case)
2. 3M v. LePage, Bundling and the Search for An Appropriate Section 2 Standard (http://www.mayerbrown.com/antitrust/pdf/lepage_v_3M.pdf) (Jennie)
3. Sun's Antitrust Suit Against MSFT and/or Real Network's Suits Against MSFT (<http://www.mdd.uscourts.gov/Opinions152/Opinions/SunPI1202.pdf>) (<http://news.com.com/pdf/ne/2003/complaint.pdf?tag=real.pdf>)
4. Trinko and Its Aftermath

Week 10: Introduction to the Patent System: IP Limits On Access and the Open Source Alternative (March 17)

(W) Carl Shapiro, Navigating The Patent Thicket (March 2001)
(<http://faculty.haas.berkeley.edu/shapiro/thicket.pdf>)

(W)FTC Report on IP Policy, Executive Summary, available at <http://www.ftc.gov/os/2003/10/innovationrptsummary.pdf>

(W)Landes and Posner, 11-36; 294-353

- (W) Richard Epstein, Why Open Source is Unsustainable
(<http://news.ft.com/cms/s/78d9812a-2386-11d9-ae5-0000e2511c8.html>)
(W) Jon Zittrain, Normative Principles for Evaluating Free and Proprietary Software,
71 U. Chi. L. Rev. 265 (2004)

SKIM BOTH:

- (W) David McGowan, Legal Implications of Open Source Software,
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=243237
(W) Mark Lemley, The Economics of Improvement in Intellectual Property Law, 75 Tex. L.
Rev. 989 (1997).

Paper Topics

1. Evaluating the FTC's Recommendations and the Prospects of Patent Reform (Emily)
2. Open Source and Its Future
3. Patent Thickets and Anticommons Problems

Week 11: The Role of Copyright in an Age of Digital Content (March 31)

Readings:

- (W) Landes & Posner, 37-123
(W) MGM Studios, Inc. v. Grokster, 380 F.3d 1154 (9th Cir. 2004)
(W) In Re: Aimer Copyright Litigation, 334 F.3d 643 (7th Cir. 2003)
(W) Terry Fisher, Promises to Keep, ch. 6
(<http://cyber.law.harvard.edu/people/ffisher/PTKChapter6.pdf>).
(W) Chamberlain Group v. Skylink Technologies, 381 F.3d 1178 (Fed.Cir. 2004)
(W) Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2^d Cir.2001).
(W) Jonathan Zittrain, The Copyright Cage,
<http://www.darwinmag.com/read/090103/copyright.html>
(W) Unintended Consequences: Five Years Under the DMCA,
http://www.eff.org/IP/DMCA/unintended_consequences.pdf
(W) Richard Posner, Eldred and Fair Use,
<http://www.bepress.com/cgi/viewcontent.cgi?article=1003&context=ev>

Paper Topics:

1. The Levy Model?
2. The Grokster Case and the Induce Act
3. Linking, Framing and ownership rights on the Web
4. Digital Goods and Encoding Rules: Whither Fair Use?

Week 12: The First Amendment and the Future of Media Policy (April 7)

- (P) Landes & Posner, 210-253, 403-419
(P) Lessig, Code, 164-86
(W) Prometheus Radio Project v. F.C.C., 373 F.3d 372 (3rd Cir. 2004)
(W) Goodman, Media Policy Out of the Box
(http://papers.ssrn.com/sol3/papers.cfm?abstract_id=590425)

PAPERS:

- (1) The FCC, IP Policy, and Copyright As Communications Policy (Plug and Play, Broadcast Flag & Tim Wu, Copyright's Communications Policy, <http://faculty.virginia.edu/timwu/occp.pdf>)
- (2) The First Amendment and Commercial Speech—Do Not Call, Privacy Regulation, and Dangerous Speech
- (3) The Future of Media Policy and the Public's Interest in the Public Interest (see <http://dcc.syr.edu/ford/rma/reinventing.pdf>).
- (4) Lessons From the Past on Media Policy (Paul Starr, The Creation of the Media)
- (5) The Economics of A La Carte for Cable Television

Week 13: Electronic Commerce and User-Related Concerns (Spam, Privacy, and Security)
(April 14)

READINGS:

(W) Tim Muris, The Federal Trade Commission and the Future Development of U.S. Consumer Protection Policy (Aug. 19, 2003), available at <http://www.ftc.gov/speeches/muris/030819aspen.htm>

(P) Lessig, Code, 63-111, 142-164.

(W) Doug Lichtman & Eric Posner, Holding Internet Service Providers Accountable, Working Paper 217 (available at <http://www.law.uchicago.edu/Lawecon> or http://papers.ssrn.com/sol3/papers.cfm?abstract_id=573502)

(W) Randy Picker, Cyber Security: Of Heterogeneity and Autarky, Working Paper 223 (<http://www.law.uchicago.edu/Lawecon>)

Papers:

- (1) Informational Privacy
- (2) Security
- (3) Spam

Week 14: Cyberethics and Wrapup (Apr 21)

BUDDIES: