

# The Law and Economics of the Information Age

Ray Gifford & Phil Weiser

Spring 2004

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 Policy Aspects of Telecommunications (TLEN 5835). 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

Wednesday 10-12, Room 313 or by appointment

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## Class Requirements and Grading

The seminar will meet every Wednesday afternoon from 2:20-5:20 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 Sunday 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 14)*

(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.

(R) Ronald Coase, The Federal Communications Commission, 2 J.L. & Econ. 1 (1959)

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

(W) FM Scherer, Schumpeter and Plausible Capitalism, 30 J. Econ. Lit 1416 (1992)

##### *Readings/Week Two (January 21)*

(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, The Internet Under Siege, [http://www.foreignpolicy.com/issue\\_novdec\\_2001/lessig.html](http://www.foreignpolicy.com/issue_novdec_2001/lessig.html)

(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://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=452220](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=452220))

Week 3: Network Externalities and Standard Setting (Jan 28)

*Reading:*

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

>>>CELEBRATE FINISHING ECONOMIC SECTION AT WALNUT BREWERY

PRESENTATIONS:

- (1) IP Policy and Std Setting Bodies (Lemley article)
- (2) Std Setting Bodies and FCC Action (DTV – see Weiser & Nuechterlein, Chp 17)

## **UNIT II: Regulating Transport Platforms and the Logical Layer**

Week 4: Wireline Broadband Platforms (Feb 4)

Philip J. Weiser, Toward A Next Generation Regulatory Regime, \_\_ Loyola L. Rev. \_\_ (2003) ([http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=454380](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=454380))

Brand X Internet Services v. F.C.C., 345 F.3d 1120 (9<sup>th</sup> Cir. 2003)

(W) Remarks of Michael Powell at the National Summit on Broadband Development (Oct. 25, 2001), link to article available at ([http://www.fcc.gov/commissioners/powell/mkp\\_speeches\\_2001.html](http://www.fcc.gov/commissioners/powell/mkp_speeches_2001.html))

(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](http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp36.pdf).

PRESENTATIONS:

(1) Brand X and its Aftermath (petition for rehearing en banc -- <http://www.fcc.gov/ogc/briefs/02-70518-120303.pdf>)

(2) Alternative Models of Regulation: The EU and Layered Model (Werbach)

(3) The Third Broadband Platform? (Viability of Broadband Wireless)

>>ATTEND A Regulatory Regime For The Internet Age conference, Feb 8 & 9

Week 5: Physical Transport Policy Towards Wireless (Feb 11)

*Readings*

(W) Kevin Werbach, Supercommons, <http://werbach.com/research/supercommons.html>

(W) Faulhaber and Farber, Spectrum Management, available at

[http://rider.wharton.upenn.edu/~faulhabe/SPECTRUM\\_MANAGEMENTv51.pdf](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](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-228542A1.pdf))

PRESENTATIONS:

- (1) Enforcement of Protocols Based on A Commons Model
- (2) Getting Spectrum From Incumbents To Entrants (Political Obstacles)
- (3) Regulating Equipment and The Interference Temperature Concept

Week 6: Physical Transport Transition Policy: The Unwinding of The Public Switched Telephone Network Regulatory Regime (Feb 18)

(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) Paul Starr, The Great Telecom Implosion, The American Prospect (Sept 9, 2002) (<http://www.prospect.org/print/V13/16/starr-p.html>)

(W) William P. Rogerson, *The Regulation of Broadband Telecommunications, The Principle of Regulation Narrowly Defined Input Bottlenecks, and Incentives for Investment and Innovation*, 2000 U. CHI. LEGAL F. 119, 119 (2000)

(W) Ray Gifford, Regulatory Impressionism: What Regulators Can And Cannot Do, available at [http://www.rnejournal.com/articles/gifford-RNE\\_10\\_final.pdf](http://www.rnejournal.com/articles/gifford-RNE_10_final.pdf).

PRESENTATIONS:

- (1) The Unbundling Mess
- (2) The Telecom Meltdown
- (3) The Old Subsidy Regime and Its Aftermath

Week 7: Models of Regulation, Institutions, and Introduction to the Internet (Feb 25)

(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](http://global.mci.com/us/enterprise/insight/cerfs_up/internet_history/whatIs.xml)

(W) Michael Geist, Cyberlaw 2.0, 44 B.C. L. Rev. 323 (2003)

(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) Architecture as Policy
- (3) What Is The Internet: Different Models of Conceptualizing It

Week 8: The Logical Layer (March 3)

(W) Clark et al, End-to-End Arguments In System Design  
(<http://www.reed.com/Papers/EndtoEnd.html>)

(W) Timothy Wu and Lawrence Lessig Ex Parte Letter,  
[http://faculty.virginia.edu/timwu/wu\\_lessig\\_fcc.pdf](http://faculty.virginia.edu/timwu/wu_lessig_fcc.pdf)

(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](http://www.businessweek.com/print/magazine/content/03_50/b3862091_mz063.htm?db))  
Readings TBA

#### PRESENTATIONS:

- (1) VOIP
- (2) File Sharing
- (3) End-to-End and its Limits

>>ATTEND, from 3:00-7:00, "Taming The Internet," March 4th

### **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](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=437863)

#### *Paper Topics*

1. 3M v. LePage, Bundling and the Search for An Appropriate Section 2 Standard  
([http://www.mayerbrown.com/antitrust/pdf/lepage\\_v\\_3M.pdf](http://www.mayerbrown.com/antitrust/pdf/lepage_v_3M.pdf))
2. 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>)
3. Trinko and Its Aftermath (Mike)

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) Eric Raymond, The Magic Cauldron  
(<http://www.oreilly.de/catalog/cb/chapter/#magic-cauldron-6>)
- (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

SKIM BOTH:

- (W) David McGowan, Legal Implications of Open Source Software,  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=243237](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
2. Open Source and SCO v. IBM (Chad)
3. What rules should govern the reverse engineering of software?

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

*Readings:*

- (W) Landes & Posner, 37-123
- (W) Randal Picker, Copyright As Entry Policy, Antitrust Bulletin (Fall 2002)  
(available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=307005](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=307005))
- (W) Randal Picker, The Digital Video Recorder: Unbundling Advertising and Content, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=450180](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=450180)
- (W) A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).
- (W) MGM Studios, Inc. v. Grokster, 259 F. Supp. 2d 1029 (C.D. Cal. 2003).
- (W) Assessment Technologies of WI, LLC v. WIREDData, Inc., 2003 WL 22783823  
(7th Cir. Nov 25, 2003)

SKIM:

- (W) Five Scenarios in a Post-Napster World,  
<http://cyber.law.harvard.edu/home/uploads/254/2003-07.pdf>
- (W) Tim Wu, When Code Isn't Law, 89 Va. L. Rev. 679 (2003).

*Paper Topics:*

1. ISP Liability (Lucas)
2. The Levy Model? (Canadian system; AHRA; Netanel's article)
3. The Grokster Case
4. Linking, Framing and ownership rights on the Web (Uhaul v. WhenU.com)

5. Trespass to Chattels (eBay v. Bidder's Edge Inc., 100 F. Supp. 2d 1058 (N.D. Cal. 2000); Intel v. Hamidi, 71 P.3d 296 (Cal. 2003))

Week 12: The First Amendment, the DMCA, and IP Reform (April 7)

(P) Landes & Posner, 210-253, 403-419

(P) Lessig, Code, 164-86

(W) Eldred v. Ashcroft, 537 U.S. 186 (2003)

(W) Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir.2001).

(W) Jonathan Zittrain, The Copyright Cage,

<http://www.darwinmag.com/read/090103/copyright.html>

(W) Lawrence Lessig, Hollywood v. Silicon Valley: Make New Code, Not War,

<http://www.cioinsight.com/article2/0,3959,111142,00.asp>

(W) Mike Godwin, Hollywood v. The Internet,

<http://reason.com/0205/fe.mg.hollywood.shtml>

(W) Unintended Consequences: Five Years Under the DMCA,

[http://www.eff.org/IP/DMCA/unintended\\_consequences.pdf](http://www.eff.org/IP/DMCA/unintended_consequences.pdf)

PAPERS:

(1) Digital Goods and Encoding Rules: Whither Fair Use? (Ben)

(2) 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>)

(3) The First Amendment and Porn Regulation

(4) The First Amendment and Copyright

David McGowan, First Amendment & Copyright Policy,

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=460280](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=460280)

Neil Weinstock Netanel, Locating Copyright Within the First  
Amendment Skein, 54 Stan. L. Rev. 1 (2001).

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

(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) Do Not Call List Decision, TBD

(W) Reidenberg, Privacy Wrongs In Search of Remedies, 54 Hastings L.J. 877 (2003)

Papers:

(1) Informational Privacy

(2) Security

(3) Spam

Week 14: Cyberethics and Wrap-up (Apr 21)