

Course title: Laws of creativity. The impact of legal systems on artistic practices and other creative endeavors

Language of instruction: English

Professor: Antoni Rubí Puig.

Professor's contact and office hours: antoni.rubi-puig@upf.edu, Office 40.106. Office hours: Wednesday 11.30am- 1.30pm (or by appointment).

Course contact hours: 45

Recommended credit: 6 ECTS credits

Course prerequisites: there are no prerequisites for this course.

Language requirements: English B2 or Cambridge Certificate.

Course focus and approach: This course aims at providing an in-depth discussion on the ways law regulates creativity and affects the content of works. Different regulations and case studies will be used to test how law affects creativity and to what extent.

Course description: How does the law affect creativity? Is the law actually hindering creativity or is instead encouraging it? Are such impacts just quantitative or also qualitative? Are legal systems neutral to different forms of creativity or do they discriminate among forms? Answering these questions requires examining various branches of the law. The course focuses mostly in intellectual property law as the main legal tool for fostering creativity and innovation. Other areas of law such as freedom of expression, contract law, zoning law, and tax law will be also presented. Students will be provided with a theoretical overview of those areas to understand their rules and doctrines and how they affect creativity. The course will also offer the discussion of several case studies, including, among others, tattoos, memes, graffiti art, music sampling or content creativity in social media and other online platforms.

Learning objectives: At the end of this course the students:

- Will be able to understand how law affects creativity in different ways (by limiting or by encouraging it) and along different dimensions (quantity and quality).
- Will be able to identify the main legal problems and disputes that affect creativity and the arts.
- Will be acquainted with basic legal categories used in the field of copyright law; contract law; and constitutional law.
- Will be able to understand how the law interacts with other factors (technology, social norms, psychology) and together have an impact on creativity and the arts.

Course workload: Students are required to read a selection of texts and participate actively in the class. Students will have to write a final essay on one of the topics covered by the course, and take a midterm and a final exam.

Teaching methodology: The course is mostly structured in lecture classes. Lectures will start with the theoretical introduction to the session subject, followed by discussions on different case-studies. Readings, provided by the professors will be used as a support for class discussion.

Assessment criteria:

- Midterm exam: 30%
- Final exam: 30%
- Essay paper: 30 %
- Class participation: 10%

BaPIS absence policy

Attending class is mandatory and will be monitored daily by professors. Missing classes will impact on the student’s final grade as follows:

Absences	Penalization
Up to two (2) absences	No penalization
Three (3) absences	1 point subtracted from final grade (on a 10-point scale)
Four (4) absences	2 points subtracted from final grade (on a 10-point scale)
Five (5) absences or more	The student receives an INCOMPLETE (“NO PRESENTADO”) for the course

The BaPIS attendance policy **does not distinguish between justified or unjustified absences**. The student is deemed responsible to manage his/her absences.

Only absences for medical reasons will be considered justified absences. The student is deemed responsible to provide the necessary documentation. Other emergency situations will be analyzed on a case by case basis by the Academic Director of the BaPIS.

The Instructor, the Academic Director and the Study Abroad Office should be informed by email without any delay.

Classroom norms:

- No food or drink is permitted in class.



— Students will have a ten-minute break after one one- hour session.

Weekly schedule:

INTRODUCTION

WEEK 1	<p>Session 1. Interactions between law and creativity</p> <p>1.1. Defining creativity 1.2. Creativity in context: Law, Technology, Social Norms, and Psychology 1.3. <i>Creatio ex nihilo</i> v. sequential creativity</p> <p>Reading:</p> <p>-Christopher BUCCAFUSCO, Stefan BECHTOLD, and Christopher Jon SPRIGMAN, "The Nature of Sequential Innovation", 59 <i>Wm. & Mary L. Rev.</i> 1 (2017). (partial: pages 4-10, 16-33).</p>
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SECTION I. CREATIVITY AND INTELLECTUAL PROPERTY

WEEK 2	<p>Session 2. Intellectual Property Theories</p> <p>2.1. Intellectual Property and Human Values 2.2. Intellectual Property as Reward 2.3. Intellectual Property as Incentive: Does Intellectual Property foster or hinder creativity? 2.3.1. The Incentive-Access Paradigm 2.3.2. Intellectual Property and benefits 2.3.3. Intellectual Property and costs</p> <p>Reading:</p> <p>-Dan L. BURK, "Law and Economics of Intellectual Property: In Search of First Principles", <i>Annual Review of Law and Social Science</i>, 2012, 8:1, 397-414 (partial: pages 399-404).</p>
	<p>Session 3. Copyrights and Incentives</p> <p>3.1. The impact of legal entitlements 3.2. Extrinsic motivations of creators 3.3. Intrinsic motivations of creators 3.4. The psychology of incentives 3.5. Endowment effect</p>

	<p>Reading:</p> <p>-Christopher Jon SPRIGMAN, “Copyright and Creative Incentives: What We Know (and Don’t)”, 55 <i>Houston Law Review</i> 451 (2017). (partial: pages 451-465).</p>
WEEK 3	<p>Session 4. Basics of Copyright law</p> <p>4.1. Concept of work 4.2. Non-conventional subject matter 4.3. Originality 4.4. Term of protection 4.5. Formalities</p> <p>Reading: -CJEU, Judgment (Grand Chamber) of 13 November 2018, in case C-310/17, <i>Levola Hengelo BV v Smilde Foods BV</i></p>
	<p>Session 5. Who is an author?</p> <p>5.1. Non-human authors 5.2. Artificial Intelligence and other machines 5.3. Performers and creativity 5.4. Improvisations and fixations: jazz, flamenco and folk music 5.5. Authors and the death: rules on post-mortem protections</p> <p>Reading: -Oleksandr Bulayenko, João Pedro Quintais, Joost Poort, and Daniel Gervais, “AI Music Outputs: Challenges to the Copyright Legal Framework – Part I”, <i>Kluwer Copyright Blog</i>, April 22, 2022.</p>
WEEK 4	<p>Session 6. Individual creativity v. group creativity</p> <p>6.1. Romantic notions of individual authorship 6.2. Different forms of collaboration 6.3. Joint authorship 6.4. Collective works 6.5. Works for hire and other doctrines 6.6. Peer production</p> <p>Reading: -Lionel BENTLY and Laura BIRON, “Discontinuities between legal conceptions of authorship and social practices. What, if anything,</p>

	<p>is to be done?”, in VAN EECHOUD, M. (Ed.), <i>The Work of Authorship</i>, Amsterdam, Amsterdam University Press B.V., 2014, pp. 237-276. (partial: pages 238-243, 248-255)</p> <p>Session 7. Creativity and moral rights</p> <p>7.1. Right of attribution 7.2. Right of integrity 7.3. Destroying works 7.4. Abandoning rights</p> <p>Reading: -Amy ADLER, “Against Moral Rights”, <i>97 California Law Review</i> 263 (2009) (partial: pages 269-275).</p>
	<p>Session 8. Creativity and exclusive rights</p> <p>8.1. Right of reproduction and the dimensions of the notion of copy 8.2. Right of communication to the public: understanding creativity in dissemination 8.3. Right of distribution: innovating markets and discrimination of prices 8.4. Right to prepare derivative works: understanding transformative uses</p> <p>Reading: -CJEU, Judgment of 7 August 2018 in case C-161/17, <i>Land Nordrhein-Westfalen v Dirk Renckhoff</i>.</p>
<p>WEEK 5</p>	<p>Session 9. Exceptions and limitations to exclusive rights</p> <p>9.1. Purposes of exceptions and limitations 9.2. Protection of user rights 9.3. Case studies in borrowing: - Parodies - Sampling and remixing - Memes - Fanfictions - Freedom of panorama</p> <p>Reading: -CJEU, Judgment (Grand Chamber) of 29 July 2019 in Case C-476/17, <i>Pelham GmbH and others v. Ralf Hütter and Florian Schneider-Esleben (“Metall auf Metall”)</i>.</p>

<p>WEEK 6</p>	<p>Session 10. Plagiarism and copyright infringement</p> <p>10.1. The notion of substantial similarity 10.2. Plagiarism as a non-legal term 10.3 Different tests developed by courts 10.4. Tests in music cases 10.5. Tests in visual arts cases 10.6. Tests in literary works cases 10.7. Appropriationism</p> <p>Reading: -Patrick Cariou v. Richard Prince, United States Court of Appeals, Second Circuit. 714 F.3d 694 (2013)</p>
	<p>Session 11. Midterm Exam</p>
<p>WEEK 7</p>	<p>Session 12. Creativity without copyright law</p> <p>12.1. IP's Negative Space Theory 12.2. Case studies: - Tattoos - Cuisine and cocktails - Fashion - Graffiti art</p> <p>Reading: -Christopher Jon SPRIGMAN, "Copyright and Creative Incentives: What We Know (and Don't)", 55 Houston Law Review 451 (2017). (partial: pages 465-472).</p>
	<p>Session 13. Creativity and digital copyright</p> <p>13.1. Digital Renaissance: how digital technologies have encouraged creativity 13.2. Amateurism and the problem of quality of works 13.3. Creativity and Big Data 13.4. Creativity and online platforms</p> <p>Reading: Luis AGUIAR and Joel WALDFOGEL, "Digitization and the Content Industries", in Juan-José GANUZA and Gerard LLOBET (Eds.), Economic analysis of the digital revolution, FUNCAS, 2018, pp. 274-304. (partial: pages 283-293)</p>

WEEK 8	<p>Session 14. Creativity, copyright law and gender perspectives</p> <p>14.1. Different levels of protection for female associated creativity? 14.2. Do valuable rights end up in the hands of men? 14.3. Differences in enjoying exceptions and limitations?</p> <p>Reading: -Dan BURK, "Feminism and Dualism in Intellectual Property", <i>American University Journal of Gender, Social Policy and the Law</i>, vol. 15, 2007. (partial: pages 184-194).</p>
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SECTION II. CREATIVITY AND FREEDOM OF EXPRESSION

WEEK 8	<p>Session 15. Freedom of information and expression</p> <p>15.1. Why should free speech be a fundamental right? 15.2. Democratic theories of freedom of speech 15.3. Autonomy-base theories 15.4. The marketplace of ideas 15.6. Tolerance</p> <p>Reading: -Lawrence B. SOLUM, "Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech", 83 <i>Nw. U. L. Rev.</i> 54 (1988-1989) (partial: pages 68-82).</p>
WEEK 9	<p>Session 16. Censorship of cultural creations</p> <p>16.1. Prior restraints 16.2. Incitement to illegal activity and the arts 16.3. Obscenity laws and the arts 16.4. Racist and hate speech and the arts 16.5. Profanity, indecency and the arts</p> <p>Reading: -ECtHR, <i>Sinkova v. Ukraine</i>, App. no. 39496/11, Judgment (Merits) of 27 February 2018.</p>
	<p>Session 17. Defamation and image rights</p> <p>18.1. Right to honour and Twitter 18.2. Image rights and Instagrammers</p>

	<p>18.3. Publicity rights and Youtubers 18.4. Privacy and the arts</p> <p>Reading: -CJEU, Judgment of 3 October 2019, Case C-18/18, <i>Eva Glawischnig-Piesczek v Facebook Ireland Limited</i>.</p>
	<p>Session 18. Trip visit to a museum to discuss creativity in practice</p>

SECTION III. CREATIVITY AND OTHER AREAS OF THE LAW

	<p>Session 19. Commercial speech and creativity in the advertising industry</p> <p>19.1. The constitutional protection of advertising and other commercial messages 19.2. Activity-based regulation of advertising 19.3. Content-based regulation of advertising 19.4. Shocking ads 19.5. Sexism and advertising 19.6. Religion and advertising</p> <p>Reading: -ECtHR, <i>Sekmadienis Ltd. v. Lithuania</i>, App. no.69317/14, Judgment (Merits) of 30 January 2018.</p>
WEEK 10	<p>Session 20. Creativity and contracts</p> <p>20.1. Artists and performers in breach 20.2. Publishing agreements and incentives to creativity 20.3. Resale royalties for visual artists 20.4. Exclusivity and non-competes</p> <p>Reading: -Antoni Rubí Puig, "Fairness vs. welfare in the discussion of copyright laws and policies: royalties for the resale of artworks as a case study", in Daniel Gervais (Dir.), <i>Fairness, Morality and Ordre Public in Intellectual Property</i>, Edward Elgar, 2020, pp. 76-95.</p>
WEEK 11	<p>Session 21. Creativity and the State: Legal Subsidies, Public art,</p>

	<p>zoning and construction laws</p> <p>21.1. Public funding and the arts</p> <p>21.2. Tax law and cultural sponsorship</p> <p>22.1. Public sculptures</p> <p>22.2. Murals and the law</p> <p>22.3. Legal limits to architecture</p> <p>Reading:</p> <p>-Brian SOUCEK, "Aesthetic Judgment in Law", 69 <i>Alabama Law Review</i> 381 (2017) (partial: pages 389-396).</p>
	Session 22. Final Exam

Last revision: April 2023.

Required readings:

Required readings are described in the weekly schedule above. Access to the course reading pack will be made available by the instructor (when it is not openly available online).

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Recommended bibliography:

- APLIN, Tanya, and DAVIS, Jennifer. 2013. Intellectual Property Law. Text, Cases, and Materials, 2nd Ed. Oxford: Oxford University Press.
- BENTLY, Lionel, and SHERMAN, Brad. 2018. Intellectual Property Law. Fifth Edition. Oxford: Oxford University Press.
- BEZANSON, Randall P. 2009. Art and Freedom of Speech. University of Illinois Press.
- BUCCAFUSCO, Christopher, BECHTOLD, Stefan, and SPRIGMAN, Christopher Jon. 2017. "The Nature of Sequential Innovation," 59 William and Mary Law Review 1 (2017).
- DARLING, Kate, and PERZANOWSKI, Aaron. 2017. Creativity without Law. Challenging the Assumptions of Intellectual Property. New York: New York University Press.
- FARLEY, Christine H. 2015. "Judging Art", 79 Tulane Law Review 805 (2005).
- FISHMAN, Joseph. 2015. "Creating Around Copyright," 128 Harvard Law Review 1333 (2015).
- FISHMAN, Joseph. 2016. "The Copy Process," 91 New York University Law Review 855 (2016).
- FISHMAN, Joseph. 2018. "Music as a Matter of Law," 131 Harvard Law Review 1861 (2018).
- FROMER, Jeanne. 2012. "Expressive Incentives in Intellectual Property," 98 Virginia Law Review 1745 (2012)
- GEIGER, Christophe. 2018. "Freedom of Artistic Creativity and Copyright Law: A Compatible Combination?," 8 UC Irvine Law Review, 413-458 (2018).
- LANDES, William M. and POSNER, Richard A. 2003. The Economic Structure of Intellectual Property Law, Cambridge: Belknap Press of Harvard University Press.

- LEMLEY, Mark A. 2004. "Ex Ante versus Ex Post Justifications for Intellectual Property," 71 University of Chicago Law Review 129 (2004).
- MENELL, Peter S. and SCOTCHMER, Suzanne. 2007. "Intellectual Property" in POLINSKY, A. Mitchell and SHAVELL, Steven (Eds.), Handbook of Law and Economics, Vol. 2°, Elsevier, North Holland.
- MERGES, Robert P., MENELL, Peter S., LEMLEY, Mark A., and BALGANESH, Shyamkrishna. 2021. Intellectual Property in the New Technological Age, Clause 8.
- MERGES, Robert P. 2011. Justifying Intellectual Property, Cambridge: Harvard University Press.
- TUSHNET, Mark. 2012. "Art and the First Amendment", 35 Columbia Journal of Law and the Arts 169 (2012).