

**Advanced Master in Legal Sciences /
Master in European and Global Law
2016-2017**

Intellectual Property

Term: 2

Number of Credits: 4

Language: English

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Course Description

This course aims to provide conceptual tools to understand intellectual property (“IP”) law and practice. This course is addressed to students interested in learning how to deal with matters related to IP law (patents, trademarks, copyright) from a practical and theoretical perspective. In particular, the course furthers two main goals: 1. Providing a toolkit for understanding European IP Law and global trends in IP public policy. 2. Promoting an analytical approach to IP Law from different perspectives, including law and economics, psychology and the law, and comparative law.

Prerequisites

None.

Methodology

- 1) **Learning methods:** course materials mostly include EU case law on IP, legal scholarship, and some hypothetical cases to illustrate different analytical issues. Social sciences tools will be used to analyze the effects of legal rules and doctrines on parties’ behavior. Students are required to read the week course materials in advance with the goal of discussing them in class. Also students will have to prepare some assignments including two brief case notes and one case-based problem. Finally, students will have to conduct research on a topic related to IP law and write down an essay using the analytical tool supplied during the course.

- 2) **Capacities and skills:** after successfully completing the course, students shall be:
(a) equipped with an advanced knowledge and understanding of core aspects of IP law and litigation; (b) able to discuss public policy interests at stake in IP regulation and disputes and to develop their capacity to devise and sustain legal arguments and solve legal problems in the field of IP law; (c) able to understand the role of IP rights in different commercial and professional environments and how they may relate to innovation; and (d) encouraged to think pragmatically

about the law.

- 3) **Attendance policy:** at least 80% of class attendance is required to pass the course.
- 4) **Workload:** students are expected to spend 6-8 hours per week in the preparation of the classes, and the completion of the assignments. They are also expected to spend around 25 hours in writing their final essay.

Assignments and Evaluation

The final grade for the course will be based on several factors:

- a) **Final Essay (45 %):** Students shall select any of the subjects discussed during the course and conduct some additional research in order to write down a final essay on the issue. Approaches used in writing the final essay may include, among others, a comparative law perspective, a law and economics discussion, a descriptive or normative view of a particular issue, a case study, a historical or sociological approach. Other innovative approaches in law research are also welcome.

Length of essays: 5,000-7,000 words (approx. 10-12 pages). This is just a suggestion: students may write more pages if needed, but in any case they shall be concise and avoid non relevant information.

Each student shall write an individual final essay. However, some exceptions may be made in consideration of the selected topic or methodological approach. References and materials should be adequately cited through footnotes. A list of bibliography at the end of your essay may also prove useful.

- b) **Three partial assignments (15 % + 15% +15%):** During the course, students will be required to complete three different assignments. Two of them will include brief notes on particular IP cases. Students will have to summarize a judgment and assess some policy questions underlying the court decision. Another partial assignment will include a hypothetical case. Length of assignments: 800 -1,000 words (approx. 2-3 pages). Instructions will be provided in advance.
- c) **Participation in class (10%):** students are encouraged to actively participate in class and bring quality questions and comments during the discussions.

If the regular course is failed, students will have the possibility of preparing a writing assignment on a specific topic in order to pass the course, if the work carried by the student through the course shows sufficient commitment to that end.

Schedule and Work Plan

SESSION 1: Introduction to IP [date]

- 1.1. Justifications for Intellectual Property
- 1.2. Intellectual Property and Innovation
- 1.3. Intellectual Property and Economic Growth
- 1.4. International Intellectual Property Law
- 1.5. European Intellectual Property Law

Readings:

- Mark A. LEMLEY, "Ex Ante versus Ex Post Justifications for Intellectual Property," *71 University of Chicago Law Review* 129 (2004).

Further optional readings:

- Mark A. LEMLEY, "IP in a World Without Scarcity," *90 NYU Law Review* 460 (2015).

SESSION 2: Overview of Patent Law [date]

- 2.1. Patentable Subject Matter
- 2.2. Novelty
- 2.3. Inventive Step
- 2.4. Industrial application
- 2.5. Procedure for Grant
- 2.6. Rights

Readings:

- *Alice Corp. v. CLS Bank International*, 573 U.S. ___, 134 S. Ct. 2347 (2014)

SESSION 3: Overview of Trademark Law [date]

- 3.1. Subject Matter
- 3.2. Absolute and relative grounds of refusal
- 3.3. Trademark registration
- 3.4. European Union trade mark
- 3.5. Rights

Readings:

- ECJ, Judgment in Case C-421/13, *Apple Inc. v Deutsches Patent- und Markenamt*.

SESSION 4: Overview of Copyright Law [date]

- 4.1. Copyright and *droit d'auteur*

- 4.2. History
- 4.3. Subject Matter
- 4.4. Criteria for protection
- 4.5. Rights
- 4.6. Term
- 4.7. EU harmonization

Readings:

- ECJ, Judgment in Case 406/2010, *SAS Institute Inc v World Programming Ltd.*

Activity assignment: Brief note on ECJ, Judgment in Case 05/08, *Infopaq International A/S v Danske Dagblades Forening*. Instructions to follow.

SESSION 5: Substantial similarity and tests for copyright infringement [date]

- 5.1. Plagiarism, copies, imitation, appropriationism and other cultural practices
- 5.2. Idea-Expression
- 5.2. Substantial similarity tests
- 5.3. Psychology and IP Law

Readings:

- Shyamkrishna BALGANESH, Irina D. MANTA and Tess WILKINSON-RYAN, "Judging Similarity", 100 *Iowa Law Review* 267 (2014).

SESSION 6: Limitations and exceptions in copyright law [date]

- 6.1. Rules and Standards
- 6.2. Fair use v. Limitations
- 6.3. Temporary acts of reproductions
- 6.4. Private copy
- 6.5. Limitations to the right of public communication: educational uses.
- 6.7. Parodies

Readings:

- ECJ, Judgment in Case C-201/13, *Johan Deckmyn and Vrijheidsfonds VZW v. Helena Vandersteen and others.*

SESSION 7: Remedies for IP infringement (I): Damages [date]

- 7.1. Three ways of assessing damages: the traditional rule of *Dreifache Schadensberechnung*.
- 7.2. Compensatory damages

- 7.3. Actual damages. Lost profits. Causation problems. Secondary losses.
- 7.4. Reasonable royalties. The hypothetical negotiation construct. Alternative approaches.
- 7.5. Account of profits. Unjust enrichment
- 7.6. Moral prejudice. Pain and suffering. General problems.
- 7.7. Supracompensatory damages.
- 7.8. Minimum damages. Damages per se. In re ipsa doctrine.

Readings:

- Roger D. BLAIR and Thomas F. COTTER, "An Economic Analysis of Damages Rules in Intellectual Property Law", 39 *William and Mary Law Review* 1585 (1998). Pages 1586-1592 and 1617-1647.

SESSION 8: Remedies for IP infringement (II): Injunctions [date]

- 8.1. Requirements for granting injunctions
- 8.2. Interface between injunctions and damages. Bargaining in the shadow of copyright law.
- 8.3. Limitations. Damages in lieu of an injunction (lump sum vs. ongoing royalties).
- 8.4. Use of IPR enforcement measures for frivolous and/or anti-competitive purposes
- 8.5. Preliminary injunctions.
- 8.6. Injunctions imposed on intermediaries: Website blocking and Internet service blocking

Readings:

- ECJ, Judgment in Case 314/12, *UPC Telekabel Wien GmbH contra Constantin Film Verleih GmbH y Wega Filmproduktionsgesellschaft mbH*.

Activity assignment: case on internet disconnection injunctions and human rights.
Instructions to follow.

SESSION 9: Secondary Liability [date]

- 9.1. Trade-off between protection and innovation.
- 9.2. Vicarious liability.
- 9.3. Contributory liability.
- 9.4. ISPs liability and safe harbour provisions.

Readings:

- Dotan OLIAR, "The Copyright-Innovation Tradeoff. Property Rules, Liability Rules, and Intentional Infliction of Harm," 64 *Stanford Law Review* 951 (2012).

SESSION 10: IP and contracts [date]

10.1. Contract remedies.

10.2. Problems of combining remedies.

10.3. Copyright preemption

10.4. Breach of licenses and other copyright contracts.

10.5. Breach of Creative Commons and Open Source Software licenses.

Readings:

- Antoni RUBÍ PUIG, "Licensees in Breach: The Interface between Remedies for Copyright Infringement and Remedies for Breach of Contract", *Mimeo*, Universitat Pompeu Fabra, 2016.

SESSION 11: IP Markets [date]

11.1. Exhaustion Rationales

11.2. IP and Price Discrimination

11.3. Vertical Restraints and control of downstream markets

Readings:

- ECJ, Judgment in Case C-516/13, *Dimensione Direct Sales Srl and Michele Labianca v. Knoll International Spa*.

Assignment: Brief note on ECJ, Judgment in Case C128/11, *UsedSoft GmbH v. Oracle International Corp*. Instructions to follow

SESSION 12: IP and Social Norms [date]

12.1. Social Norms

12.2. Appropriability without IP

12.3. Attribution without moral rights

12.4. Case studies: cuisine, tattoos, stand-up comedy.

Readings:

- Elizabeth ROSENBLATT, "A Theory of IP's Negative Space," 34 *Columbia Journal of Law & the Arts* 317 (2011).

Bibliography/List of readings and materials

Basic/Required Readings and Materials:

Law journal articles:

- Shyamkrishna BALGANESH, Irina D. MANTA and Tess WILKINSON-RYAN, "Judging Similarity", 100 *Iowa Law Review* 267 (2014).
- Roger D. BLAIR and Thomas F. COTTER, "An Economic Analysis of Damages Rules in Intellectual Property Law", 39 *William and Mary Law Review* 1585 (1998). Pages 1586-1592 and 1617-1647.
- Mark A. LEMLEY, "Ex Ante versus Ex Post Justifications for Intellectual Property," 71 *University of Chicago Law Review* 129 (2004).
- Dotan OLIAR, "The Copyright-Innovation Tradeoff. Property Rules, Liability Rules, and Intentional Infliction of Harm," 64 *Stanford Law Review* 951 (2012).
- Elizabeth ROSENBLATT, "A Theory of IP's Negative Space," 34 *Columbia Journal of Law & the Arts* 317 (2011).
- Antoni RUBÍ PUIG, "Licensees in Breach: The Interface between Remedies for Copyright Infringement and Remedies for Breach of Contract", *Mimeo*, Universitat Pompeu Fabra, 2016.

Case law:

- *Alice Corp. v. CLS Bank International*, 573 U.S. ___, 134 S. Ct. 2347 (2014)
- ECJ, Judgment in Case C-421/13, *Apple Inc. v Deutsches Patent- und Markenamt*.
- ECJ, Judgment in Case 406/2010, *SAS Institute Inc v World Programming Ltd*.
- ECJ, Judgment in Case 05/08, *Infopaq International A/S v Danske Dagblades Forening*.
- ECJ, Judgment in Case C-201/13, *Johan Deckmyn and Vrijheidsfonds VZW v. Helena Vandersteen and others*.
- ECJ, Judgment in Case 314/12, *UPC Telekabel Wien GmbH contra Constantin Film Verleih GmbH y Wega Filmproduktionsgesellschaft mbH*.
- ECJ, Judgment in Case C-516/13, *Dimensione Direct Sales Srl and Michele Labianca v. Knoll International Spa*
- ECJ, Judgment in Case C128/11, *UsedSoft GmbH v. Oracle International Corp*.

Further readings:

- Tanya APLIN and Jennifer DAVIS, *Intellectual Property Law. Text, Cases, and Materials*, Second Edition, Oxford University Press, 2013.
- Lionel BENTLY and Brad SHERMAN, *Intellectual Property Law*, Fourth Edition, Oxford University Press, 2014.

- Rodrigo BERCOVITZ RODRÍGUEZ-CANO (Coordinador), *Comentarios a la Ley de Propiedad Intelectual*, 3ª ed., Tecnos, Madrid, 2007.
- Xabier BASOZÁBAL ARRÚE, “Método triple de cómputo del daño: la indemnización del lucro cesante en las leyes de protección industrial e intelectual”, *Anuario de Derecho Civil*, núm. L-3, julio 1997, págs. 1263-1299.
--- *Enriquecimiento injustificado por intromisión en derecho ajeno*, Civitas, Madrid, 1998.
- Roger D. BLAIR y Thomas F. COTTER, “An Economic Analysis of Damages Rules in Intellectual Property Law”, 39 *William and Mary Law Review* 1585 (1998).
--- *Intellectual Property. Economic and Legal Dimensions of Rights and Remedies*, Cambridge University Press, Cambridge, 2005.
- Guido CALABRESI and A. Douglas MELAMED, “Property Rules, Liability Rules, and Inalienability: One View of the Cathedral”, 85 *Harvard Law Review* 1089 (1972).
- Ángel CARRASCO PERERA, “Restitución de provechos (I)”, *Anuario de derecho civil*, Vol. 40, núm. 4, 1987, págs. 1055-1148.
--- “Restitución de provechos (II)”, *Anuario de derecho civil*, Vol. 41, núm. 1, 1988, págs. 5-152.
- EUROPEAN COMMISSION, *Synthesis of the responses. Civil Enforcement of Intellectual Property Rights: Public Consultation on the Efficiency of Proceedings and Accessibility of Measures*, Julio 2003, págs. 20-21 (http://ec.europa.eu/internal_market/consultations/docs/2012/intellectual-property-rights/summary-of-responses_en.pdf (accessed on 1.6.2015)).
- EUROPEAN OBSERVATORY ON COUNTERFEITING AND PIRACY, *Damages in Intellectual Property Rights*, 2011 (http://ec.europa.eu/internal_market/iprenforcement/docs/damages_en.pdf (accessed on 1.6.2015)).
- William M. LANDES y Richard A. POSNER, “An Economic Analysis of Copyright Law”, 18 *Journal of Legal Studies* 325 (1989)
---, *The Economic Structure of Intellectual Property Law*, Belknap Press of Harvard University Press, 2003 (Spanish translation by Víctor Manuel Sánchez Álvarez, *La estructura económica del Derecho de propiedad intelectual e industrial*, Fundación Cultural del Notariado, Madrid, 2006).
- Mark A. LEMLEY, “Beyond Preemption: The Law and Policy of Intellectual Property Licensing”, 87 *California Law Review* 111 (1999).
- Mark A. LEMLEY, “IP in a World Without Scarcity,” 90 *NYU Law Review* 460 (2015).
- Mark A. LEMLEY & Carl SHAPIRO, “Patent Holdup and Royalty Stacking”, 85 *Texas Law Review* 1991 (2007).
- Peter S. MENELL and Suzanne SCOTCHMER, “Intellectual Property” in A. Mitchell Polinsky and Steven SHAVELL (Eds.), *Handbook of Law and Economics*, Vol. 2º, Elsevier, North Holland, 2007.
- Robert P. MERGES, Peter S. MENELL and Mark A. LEMLEY, *Intellectual Property in the New Technological Age*, Sixth Edition, Aspen Publishers, 2012.
- Robert P. MERGES, “Contracting into Liability Rules: Intellectual Property Rights and Collective

Rights Organisations” 84 *California Law Review* 1293 (1996).

- Robert P. MERGES, *Justifying Intellectual Property*, Harvard University Press, 2011.
- José Miguel RODRÍGUEZ TAPIA (Dir.), *Comentarios a la Ley de la Propiedad Intelectual*, 2ª ed., Civitas, Cizur Menor, 2009.
- Pamela SAMUELSON y Tara WHEATLAND, “Statutory Damages in Copyright Law: A Remedy in Need of Reform”, 51 *William & Mary Law Review* 439 (2009).
- Haimo SCHACK, *Urheber- und Urhebervertragsrecht*, 5ª ed., Mohr Siebeck, Tübingen, 2010.
- Gerhard SCHRICKER y Ulrich LOEWENHEIM, *Urheberrecht. Kommentar*, 4ª ed., C.H. Beck, Munich, 2010, págs. 1825-1913.
- Stewart STERK, “Property Rules, Liability Rules, and Uncertainty about Property Rights”, 106 *Chicago Law Review* 1285 (2008).
- Mariano YZQUIERDO TOLSADA y Vicente ARIAS MÁIZ, “Responsabilidad civil por daños a la propiedad intelectual”, en L. Fernando REGLERO CAMPOS y José Manuel BUSTO LAGO (Coords.), *Tratado de Responsabilidad Civil*, Tomo II, 5ª ed., Thomson-Aranzadi, 2014, págs. 1581-1697.