Contemporary Topics in Intellectual Property Law (LAW-795AP-001)

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Abstract

In this course, we will review recent Supreme Court cases on intellectual property law, through the lens of amicus curiae briefs filed in these cases. Topics will include administrative law, patentability, the First Amendment, and so on. By reading briefs and preparing short bench-memo reflection papers akin to how judicial clerks might review amicus briefs, we will also learn about what makes for effective amicus advocacy in patent law and other areas. The final project for the course will be to write your own hypothetical amicus brief in a pending case.

Course Information

Meetings:	Monday, 1:00-2:50 PM
Location:	NT03
Credits:	2
Office hours:	Thursday at 1:00-3:00 PM
Prerequisites:	None.
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Contents

About This Course

To borrow a line from my friend and mentor, Professor Paul Ohm at Georgetown Law ↗: This seminar is an argument in the form of a course.

On the surface, this is a course about recent Supreme Court intellectual property cases. We will explore the theories, tensions, arguments, and policies that have shaped modern IP and technology law over the last decade or so. The topics to be covered will include the administrative law of IP, patentability, the First Amendment, modern technologies, and more. These cases are important and useful for anyone planning on practicing IP law in any capacity.

The argument of the course, however, is that we can learn not just from the traditional law school fare of judicial opinions and law review commentary, but from a unique type of document: amicus curiae briefs. These third-party "friend

of the court" briefs are expected to present the court with novel and useful information beyond the parties' legal arguments. When done well, amicus briefs can shed light on unintended consequences or unexpected policy connections, enriching one's understanding of a case beyond the four corners of the doctrines.

These amicus briefs will let us go "behind the scenes" to learn about the stakeholders, interests, and concerns that underlie patent cases. Along the way, we will also learn about what good amicus advocacy looks like—and how it differs from direct litigant advocacy. We will learn what makes an amicus brief effective, and how litigants can craft effective amicus briefing strategies.

Who Am I?

I am a former patent attorney who spent about ten years working at public interest organizations on patent policy. During that time, I filed around seventy amicus briefs on behalf of nonprofit organizations, law professors, library groups, former government officials, software companies, and once a group of cosplayers. These briefs have been cited in the Supreme Court, several federal appellate and district courts, and a variety of other media. In the 2016 Term, I was the sixth winningest amicus counsel in the Supreme Court ↗.

Who Are You?

This course has no prerequisites. No patent law background is required. In fact, I'd welcome non-patent students in this course. A key question we will tackle in the seminar is how one goes about explaining a body of law as technical as patents, to a Supreme Court with no specific patent law knowledge.

I would envision at least the following categories of students being interested in this seminar:

- Students intending to practice IP law, who want to know about cutting-edge issues.
- Students interested in administrative law, antitrust law, or other fields adjacent to IP law. Most of the cases we will study in this course are not "IP" cases per se, but cases about other doctrines where IP just happens to be involved.
- Students interested in Supreme Court or appellate advocacy. Amicus practice is a major part of these practices—plenty of the briefs we will read in

this seminar were written by top Supreme Court practitioners.

- Students interested in public interest advocacy. Learning how to write an amicus brief that attracts attention and persuades judges is an invaluable skill for advancing policy.

Learning Outcomes

The following are the learning outcomes anticipated for this course, the manner of assessment, and the provided learning experiences.

Outcome 1 Students will understand and be able to apply theory and policy positions underlying contemporary U.S. intellectual property law.

- **Assessment**: The instructor will evaluate students' progress and and achievement through in-class participation in discussions, and through the weekly and final writing assignments.
- **Learning experience**: Students will identify theoretical arguments and stakeholder policy positions through the reading of amicus curiae briefs filed in key intellectual property Supreme Court cases, and engage with those arguments and positions during class discussions.

Outcome 2 Students will practice identifying the interests and positions of non-litigant stakeholders, and make arguments from the unique perspective of an *amicus curiae* in a case.

- **Assessment**: The instructor will evaluate students' progress and achievement through weekly written assignments and final project, which is to write such a brief.
- **Learning experience**: Students will evaluate and discuss the argumentative and rhetorical strategies used by a wide variety of practitioners in amicus curiae briefs filed, and critique their effectiveness during class. Students will then put these skills to practice by writing a hypothetical brief.

Outcome 3 Students will present a case and an argument position, and engage in questions and answers during such presentations.

- **Assessment**: The instructor will evaluate students' progress and achievement during said presentations, to be delivered during the last few class meetings.
- **Learning experience**: Students will have the opportunity to present their in-progress final project to the class, structured along the lines of an academic conference presentation. An overview of and guidance on how to conduct such a presentation will be given during class.

Course Logistics

Reporting Attendance

Please record your attendance and absences on the following website:

https://www.cduan.com/attend/?course=LAW-795AP-001 ↗

This website will also contain the Zoom link for attending virtually, and will provide access to recordings of class if you are absent.

There is no need to email me in advance for absences; just report them, ideally in advance, on this website. You are also permitted to update your attendance record after the fact. For example, if you forgot to sign in during class, you can do so at home using this same website later.

The policy for absences is later in this document.

Weekly Assignments

This course is not structured like a normal seminar, where I provide cases and articles for you to read. In many of these cases, dozens of *amicus* briefs are filed. These briefs are optional reading for the courts, and a judge (or more likely, a judicial clerk) is not going to give every filed brief a complete and detailed review. Part of the goal of this course is to learn how to find briefs that stand out from the pack—and how to make your own briefs stand out.

For each day with a case listed in the schedule, your assignment is summarized in Figure 1. The complete instructions are as follows:

1. **Read the assigned background material** so you have a sense for what the case is about.
2. **Choose six briefs that you find the most interesting.** On almost every day, more than six briefs have been identified; on days marked "Free Choice,"

all of the briefs in the case are available to you. You only need to review six of them. You should choose the six that you believe would be the most "interesting" to a judge deciding the case. In deciding what is "interesting," keep in mind that the judge will have already read the party briefs in detail. An "interesting" brief is thus one that goes beyond the doctrinal arguments the parties have already presented.

Spend no more than 5–10 minutes choosing which briefs to read. You will pick up on signals for which briefs are likely to be more interesting. Pay attention to these signals—they will inform how you write your own brief.

These are the main restrictions on your choices:

- Read only *amicus* briefs, not party briefs. These are marked in light and dark green on SCOTUSBlog.
- Read briefs on both sides, ideally three supporting the petitioner and three supporting the respondent. You may also find a brief supporting "neither party"; you can count it for either side for purposes of counting to three.
- Do not read briefs filed before certiorari was granted in the case.
- Do not read briefs for the United States. (The Solicitor General serves a historically different role from other *amici*.)
- Do not read briefs that I authored. (I don't want to bias your choices.)

3. **Read two of the briefs in detail.** You should be prepared to discuss these briefs in class. The two briefs should not both support the same side or position.

4. **Skim the other four briefs.** so you have a general sense of their arguments and the nature of the amicus party proffering them, so that you can draw connections during discussion in class.

5. **Prepare a "bench memo"** summarizing the briefs you reviewed. For the briefs you read in detail, write a summary of about one paragraph (3–4 sentences) for each one. For the briefs you skimmed, write a one-sentence summary of each.

Do not put a great deal of effort into the memo. Do not write more than specified above—the exercise is distilling the key points. If a brief makes multiple points, you don't have to summarize them all; just pick the ones most interesting to you. You are allowed to copy-paste directly from the briefs; in fact you *should* plagiarize for these memos where you can. The memos do not need to be formatted in any particular way.

Cert petition	
Petition-stage amicus	Do not read these
Opposition to petition	
Petition GRANTED.	Do not read anything above this
Petitioner's merits brief	
Amicus briefs for petitioner	**Read one, skim two**
Amicus briefs for neither party	You can read/skim these too
Respondent's merits brief	
Amicus briefs for respondent	**Read one, skim two**
Amicus briefs for government	Do not read these

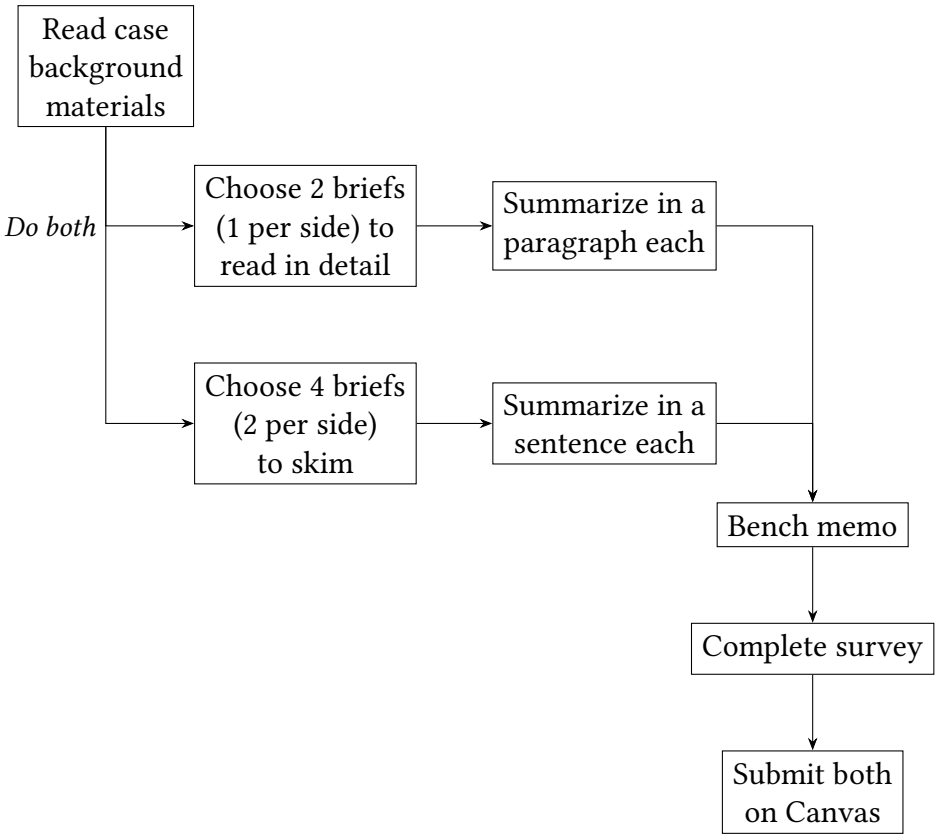

Figure 1: Summary of your weekly pre-class tasks. Use this as your checklist, but be sure you've read the full description in the syllabus first.

6. **Submit your bench memos via Canvas** at least 24 hours before the start of any class.

7. **Complete a survey on Canvas** of which briefs you read. (This just allows me to tabulate who read what.)

Writing Assignment

The main project for this course will be a short research paper on an intellectual property topic of your choosing. Alternately, the project is to write a hypothetical amicus brief on an issue in a pending IP case. As you will learn in this course, these are the same thing: a good amicus brief is also a good research paper.

The length requirement for the paper is 4,500 words, excluding footnotes. If you would like to use this course to satisfy the Upper Level Writing Requirement for an additional credit, please let me know.

The steps for completing this project are as follows:

1. Identify a pending case of interest to you. This need not be a Supreme Court case; cases in district and appellate courts are fine too. The easiest place to find these cases is to read articles on Law360 ↗.

2. Come up with a constituency that you would want to represent in an amicus brief in this case. This might be, for example, a technology industry, a nonprofit organization, a group of hobbyists, patients with a certain medical condition—the more creative, the better. The important thing is that **this constituency must have a distinct perspective that informs how a court should decide the case**.

3. Write a sentence of the form "What [your constituency] wants to say about this case, which the courts and parties have not considered so far, is this: [sentence]." That [sentence] is your thesis.

4. Find sources that prove your thesis to be (1) correct, and (2) important enough to be worthy of a court's attention.

5. Prepare a topical outline, in the form of brief-style argument headings. Organize your sources into this outline.

6. Write the brief.

Due dates for these steps are given below in the schedule.

What makes for a quality output is (1) an original perspective on the topic that others have not already analyzed, (2) creative and thoughtful use of sources, law review articles, and other materials to support an argument, and (3) clearly drawn connections between the doctrinal issue at stake and the novel perspective.

Presentation

In the last few classes, you will have the opportunity to present your in-progress brief. The style of this presentation is similar to what you might do at a law firm educational session or academic conference. The purpose of this presentation is (1) to give you some practice with presenting a case, (2) to obtain additional ideas and feedback for your final draft, and (3) to learn about your fellow students' projects.

Depending on the number of students in the class, you will have around 12 to 15 minutes of total presentation time, which you should divide into 8–10 minutes of presentation and the balance for questions. Aim for about 2 minutes per slide,[1] and about 4–5 slides. My recommendation is that you use the following outline:

1. Background of the parties, and the facts leading to the case
2. The key legal rules at issue, and the parties' arguments
3. Description of the amicus party you are representing and what its interests are
4. The argument you are making in your brief

In addition to presenting, you should be prepared to comment on other presentations as you listen to them. (Depending on the number of people in the course, I may assign students as commentators for specific presentations.) A good comment should (1) identify something new that you learned from the presentation, and (2) add a new insight, connection, or piece of information that you think would enhance the presenter's project.[2]

[1] A moderate speech pace is 100 words per minute. If you have about 5 points per slide and say 2 sentences per point, then at 20 words per sentence you have 200 words to say per slide.

[2] Suggestions for improvements and constructive criticisms are of course also helpful, but I would recommend giving those to the presenter privately. In a group discussion, my personal opinion is that you should focus on ideas that expand the audience's knowledge.

Schedule

Please carefully read the instructions on how to complete these reading assignments. **You do not need to read all the assigned materials as explained above.**

"ISO" stands for "in support of."

January 12—Introduction

Read: *Fundamentals of Preparing a United States Supreme Court Amicus Brief*, 5 J. Appellate Prac. & Process 523 ↗. Since there are no cases to read, you of course do not need to write a bench memo.

January 19—**NO CLASS**: Martin Luther King Jr. Day

January 26—*Impression Products v. Lexmark*

Background: 44 ABA Preview U.S. Sup. Ct. Cas. issue 6 ↗, pages 183–185, "What Is the Scope of" through "manufacturing practices in the modern".

Optional: *The Amicus Machine*, 102 Va. L. Rev. 1901 (2016) ↗.

Choose: Public Citizen ISO Petitioner ↗.

- IP Professors ISO Petitioner ↗.
- Costco Wholesale ISO Petitioner ↗.
- Pharmaceutical Research and Manufacturers of America ISO Respondent ↗.
- Nokia ISO Respondent ↗.
- American Intellectual Property Law Association ISO Neither Party ↗.

February 2—*Alice v. CLS Bank*

Background: *Previewing CLS Bank v. Alice*, Patent Progress (Feb. 7, 2013) ↗.

Optional: *Narratives of Gene Patenting*, 43 Fla. St. U. L. Rev. 1133 ↗. At least read the table on page 1193.

Choose: Paul R. Michel ISO Neither Party ↗.

- IEEE-USA ISO Neither Party ↗.
- Advanced Biological Laboratories ISO Petitioner ↗.
- American Civil Liberties Union ISO Respondents ↗.
- Microsoft ISO Affirmance ↗.
- Electronic Frontier Foundation ISO Respondents ↗.

February 9—*Amgen v. Sanofi*

Background: *Court to decide how specific a patent disclosure must be*, SCOTUSblog (Mar. 23, 2023) ↗.

Optional: *The Trouble with Amicus Facts*, 100 Va. L. Rev. 1757 ↗.

Choose: American Chemical Society ISO Petitioners ↗.

- National Association of Patent Practitioners ISO Petitioners ↗.
- Nature's Fynd ISO Petitioners ↗.
- High Tech Inventors Alliance ISO Neither Party ↗.
- Alliance of U.S. Startups and Inventors for Jobs ISO Petitioner ↗.
- Fresenius Kabi ISO Respondents ↗.
- Small and Medium Biotechnology Companies ISO Respondents ↗.
- Unified Patents ISO Respondents ↗.
- Sir Gregory Paul Winter ISO Respondents ↗.

February 12—**DUE**: Email or discuss with me one or more proposed cases that you would like to consider writing your brief for.

Conflicting Interests

February 16—*Georgia v. Public.Resource.Org*

Background: Amy Orlov, *Georgia v. Public.Resource.Org Inc.*, Geo. Wash. L. Rev. ↗.

Free Choice: SCOTUSBlog Docket ↗. See instructions in Weekly Assignments.

February 23—*Jack Daniel's v. VIP Products*

Background: Ronald Mann, *Dog toy poking fun at Jack Daniel's leads to dispute over parody exception to trademark protections*, SCOTUSBlog (Mar. 20, 2023) ↗.

Free Choice: SCOTUSBlog Docket ↗. See instructions in Weekly Assignments.

Characterizing the Facts

March 2—*Google v. Oracle*

Background: Sarah Jeong, *The Supreme Court is taking on Google and Oracle one last time*, The Verge (Oct. 6, 2020) ↗.

Free Choice: SCOTUSBlog Docket ↗. See instructions in Weekly Assignments.

March 5—**DUE**: Email me your proposed party to represent, a thesis statement, a section heading outline, and an initial list or sources and authorities.

March 8–15—NO CLASS: Spring Break

March 16—*Oil States v. Greene's Energy*
Background: *Patent Law: A Primer and Overview of Emerging Issues* (Congressional Research Service 2017) ↗, pages 38–40, Viability of Inter Partes Review Proceedings.
Free Choice: SCOTUSblog Docket ↗. See instructions in Weekly Assignments.

Building a System

March 23—*United States v. Arthrex*
Background: *Supreme Court to Consider Whether Patent Judges' Appointments Are Constitutional* (Congressional Research Service, 2021) ↗.
Free Choice: SCOTUSblog Docket ↗. See instructions in Weekly Assignments.

March 30—*Moody v. NetChoice*
Background: Lauren Feiner, *The Supreme Court is about to decide the future of online speech*, The Verge (Feb. 23, 2024) ↗.
Free Choice: SCOTUSBlog Docket ↗. See instructions in Weekly Assignments.

April 2—DUE: First draft of brief (submit on Canvas).

Student Presentations

April 6—Day 1

April 13—Day 2

April 20—Day 3

May 9—DUE: Final brief (submit on Canvas).

Course Policies

In addition to the policies below, please note the Honor Code for the Washington College of Law, the Grading and Examination policies of the Registrar, and other policies stated in the WCL Catalog ↗ and the American University Student Conduct Code ↗.

Assessment

Your grade in this course will be determined as follows:

70% Your hypothetical amicus brief/research paper, as described above.

10% Your other written work, namely the bench memo assignments. You will receive these points as a matter of course if you put in a good faith effort to preparing them.

20% Your class participation, including your presentation at the end of the class. High quality participation involves respectfully listening to your classmates and thoughtfully reflecting on their comments, the readings, and the topics of discussion.

Attendance and Participation

I expect that all students will attend class regularly, complete the assigned readings and any assigned practice questions, arrive to class promptly and be prepared to participate in the class discussion when called upon. To be prepared for class means that you have read the assignment and have made an effort to think through the materials and any problems or questions in the notes (though no outside research is necessary or encouraged).

The manner of recording your attendance is given above in this document.

You may miss up to four class sessions for any reason and without penalty (no need to email me in advance). Any additional absences must be excused for good cause in advance of the class meeting. Further unexcused absences will have a negative impact on your grade, at my discretion. If you face particular challenges that make attendance difficult, contact the Office of Student Affairs.

Classes will be recorded to the extent possible, but the recordings will only be made available to individual students with excused absences. Please let me know in advance if you will be absent, so that I am aware and can send you the recording. If I do, keep in mind that the recordings are for personal use and should not be retained or shared with others.

Artificial Intelligence and Other Assistance

The following quotation is the official policy of this course with respect to generative AI; the rest is just for you to think about.

> The use of generative AI programs is permitted for completing any written take-home assignments in this course. While AI is a powerful tool, it should not be used as a substitute for independent studying and work; further, there are inherent risks and potential ethical violations when using AI. As such, students must affirm that they have verified the authenticity and attest to the accuracy of the AI output upon submission of their work. Failure to do so could result in a lower grade on the respective assignment and potentially constitute an Honor Code violation.
>
> Please attach the following certification to any work to which more than one non-quoted sentence was initially generated by AI or any other source: "I certify that any language drafted by generative artificial intelligence, including quotations, citations, paraphrased assertions, and legal analysis, has been checked by me for accuracy, using, for example, print reporters or traditional legal databases. I understand I will be held responsible for the contents thereof according to applicable rules of the course syllabus and WCL Honor Code, regardless of whether generative artificial intelligence drafted any portion of this submission."

I'm generally permissive about what tools you use to produce writing. I study technology, after all, and have used computer programs to assist my writing for years. You'll have these tools available in your work, and lawyers have been using automation to speed up their workflow ever since the invention of the printing press.

That said, I would be cautious about over-relying on AI at this early stage in your legal career, for three reasons.

Writing is practice. You can't get good at the piano by listening to recordings; you have to move your fingers to learn. In the same way, if you want to be a great communicator of legal arguments—that is, a lawyer—you can't just sit back and listen to what ChatGPT says; you need to do the skill of communicating, over and over again, faster and faster. Law school writing is the slow practice of argument: Today you spend an hour every day writing IRAC paragraphs in the comfort of your home, so that tomorrow you can spin out IRAC paragraphs with your voice in seconds before an adversarial court. AI can help you write something right now, but it can't build your memory bank of turns of phrase and sentence structures that will serve you for the rest of your career.

Skepticism is your job. It is the very role of lawyers to challenge purported claims of the law, and to do so by digging deep into sources of authority. If opposing counsel puts forward a legal rule under which your client loses, you wouldn't just blindly trust it—you'd scrutinize all of the cases and laws cited, and research the counterarguments. So should you blindly trust AI in the same way? Instead, use generated statements the same way you would use any other slick-sounding but probably biased source of opinion (which, by the way, includes *lots* of third-party legal sources): a helpful starting point, but something to be verified.

Where we're going, we don't need AI. Practice these skills of constructing arguments and skeptical research enough, and faster than you expect you'll discover what top lawyers know already—legal writing and reasoning are not that hard once you've done them enough, and AI isn't much of a speed help. That might be hard for you to believe today. But remember when you were learning to add and complained that you could just use a calculator? How fast can you solve 5 + 7 now?

Right now, writing feels like a slog, and it's hard to see why you need to do it when this shiny new tool can. But put in the work, and soon enough you'll produce arguments as easily as ChatGPT—and yours will be better.