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*Sixth
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ANTITRUST ANALYSIS

Problems, Text, and Cases

Sixth Edition

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Preface to the Sixth Edition

This edition maintains tradition while embracing change. An additional author, also holding a law degree and a doctorate in economics, continues the book's emphasis on the synergy between the fields and brings new energy and expertise. Among the most notable differences from the previous edition are a substantial streamlining of portions of the introductory chapter; significant updating of the monopolization materials to reflect the *Microsoft* case and further developments relating to predation; simplification and modernization of the economic analysis of leverage, the single monopoly theorem, and vertical price and territorial restraints, including *Khan* and distinguishing the law of minimum and maximum vertical price fixing; and a major reorganization and modernization of the treatment of mergers in recognition of the importance of lawyering outside of formal litigation, associated with agency merger review, and of the evolution in arguments and economic analysis considered by government enforcers and the courts. Throughout the book, further attention is devoted to the intersection of antitrust and intellectual property law and to other matters involving emergent technologies. Furthermore, all treatments have been updated to reflect new court decisions and other developments.

Our approach continues to be the one Phillip Areeda inaugurated with the first edition, as described in the previous prefaces. We thank the large number of research assistants as well as secretaries and editors who contributed so much to this sixth edition.

L.K. & A.E.

June 2004

Preface to the Fifth Edition

This edition is the first to appear since Phillip Areeda passed away in 1995. His presence will be missed by all in the field of Antitrust, but his life's work will continue to cast light upon the subject well into the future.

Although he was not actively involved in its preparation, this revision carries the imprint of its originator in many ways. A substantial amount of the material remains from prior editions, and much of what is new consists of court decisions and government policy statements that were issued previously, so that I was able to benefit from his input. Moreover, throughout the editing process, this author could not help but contemplate what Phil would have said about all matters, large and small.

New material in this edition consists primarily of recent Supreme Court cases and government policy statements. In addition, some problems have been added to focus attention on areas that have become increasingly important, such as health care and intellectual property. Finally, there has been substantial condensation of older material so that, in total, the current edition is about the same length as the prior one.

The prefaces to the first and fourth editions, which state what continue to be the pedagogical premises underlying this book, follow. I wish to thank both a large and energetic group of research assistants and my students for making this edition possible and to acknowledge Phil's and my debts to the many who have helped us in the past.

L.K.

April 1997

Preface to the Fourth Edition*

This fourth edition provides not only the occasion for updating the book but also for streamlining it. New cases and text have been added without increasing the size of the book. This has been done by changing some cases to abstracts, by eliminating some of the overlapping hypotheticals, by reducing the detail of less frequently taught portions of the patent and price-discrimination materials, and by reordering some of the materials.

This edition also brings a second author to the book. The addition of a different, although complementary, viewpoint coupled with a doctorate in economics contributes to what has always been the book's object: to expose students to the difficulties of the subject and to the full range of possible resolutions.

Much in debate today is the proper role and utility of economic analysis in applying the antitrust laws. This book neither denigrates nor elevates it. Although the authors have their own, and somewhat different, conclusions about the content of wise antitrust rules, the book's approach is agnostic and presents contrasting approaches to the problems at hand. But whatever the values one chooses to promote, one must understand both the precedents and the assumed, proved, or possible effects of the practices or situations addressed by antitrust law. To assess such effects, we need to know *both* what economic theory can tell and how actual markets work; the two are not always the same, because the economic models—like all social science models—are simplifications that may ignore important complexities in order to isolate important truths. Thus, the dispute among commentators turns out to involve not one conflict but several—not just whether the antitrust laws reflect some values different from or not reflected in what economic analysis can illuminate, but also whether particular forms of economic analysis illuminate the effects brightly enough to dictate that antitrust law should encourage, tolerate, or condemn a practice, either generally or in a particular case.

That economic perceptions are useful in antitrust analysis is not the least bit novel. Even many of the earliest cases reflect knowledge, assumptions, or intuitions about how markets work and how a challenged practice might lead to lower production, higher prices, and consumer exploitation—or the opposite. Modern cases and commentary tend to be more explicit about it and, sometimes, to show how an intuition may be erroneous. Not surprisingly, therefore, a good bit of economics must be put before the student—more with every edition, it has turned out. As in previous editions, great care has been taken to inform students of

* This preface has been modified where appropriate.

economic learning, including some of its subtleties, in plain language with a minimum of technical apparatus. Experience with prior editions suggests that readers without training in economics will find the economics materials intelligible, although concise, and neither intimidating nor obscure.

P.A. & L.K.

March 1988

Preface to the First Edition*

Although this book may have some usefulness elsewhere, it was prepared to meet the threefold needs of antitrust classes for problems, text, and cases. The cases have been edited and organized for maximum ease of comprehension. But an improved casebook was never the primary object. The distinguishing features of this book lie in its text and in its extensive questions and problems.

Text. I am convinced that a contemporary antitrust course requires a judicious use of text to meet several clear needs. The relevance of economics to antitrust law is unquestioned. Although students need study economic theory and behavior only as useful to the law, they must know about market power, justifications for cartelization, price behavior in markets with few firms, basing point pricing, the economic rationale of the patent system, manufacturer interests in resale prices, the objects of tying and exclusive dealing arrangements, the competitive significance of large firms and of mergers, and various aspects of price discrimination. These are all subjects of textual discussion in this book, and in addition there is a summary exposition of the competitive system in Chapter 1A. The utility of such material is quite clear. As one example, consider the economics of vertical restraints. The cases are hardly illuminating, and, in prior years, neither lecture nor class discussion produced anything beyond confusion for most students. By contrast, my class has understood the essentials presented in text. The greater efficiency and effectiveness of economics text is manifest in two respects. First, limited class time is not used for conveying information that is more easily grasped when read and studied. Second, discussion may give the appearance that some members of the class comprehend the economics at hand, but the instructor may be quite uncertain as to how many of the class have mastered the economic argument. To reap these advantages fully, the text is sometimes made more elaborate than would on first consideration seem necessary for law students in order to meet complications or confusions that in fact have developed in the classroom when a simpler treatment has been used.

A second variety of text is more “legal.” Chapter 1 is entirely textual. In addition to the economics material already mentioned, and the historical background of the antitrust statutes, there is exposition of three matters that cannot receive full treatment in an antitrust course of usual length. Chapter 1C discusses procedures for enforcing the antitrust laws, Chapter 1D notes the statutes’ “jurisdiction” over interstate and foreign commerce and the major exemptions from the antitrust laws, with special attention to developing doctrines on state action and preemption, and Chapter 1E describes the premises and operation of the patent system. These sections attempt to steer a delicate course between undue generality and excessive

* There have been slight modifications where appropriate.

detail. Text in other chapters has varying objectives. There is the brief exposition of noteworthy issues that can be efficiently developed in text and that do not warrant class time, the compact presentation of an issue analogous to one analyzed in detail through questions and problems, especially where the related issue lends itself to great compression, and a presentation of necessary technical details.

Third, there are occasional brief paragraphs of introduction, connection, or comment scattered through the book. Finally, there is material that is midway between text and question: Questions are sometimes put in a way that tends to suggest at least one possible line of answers. This device is used where authority is scant, issues are important but difficult, and conventional text might seem prematurely definitive.

Let me add that I fully appreciate the difficulties in preparing text that is clear, concise, accurate, and yet free of unnecessary detail. This book is, I hope, a useful step in that direction.

Questions and problems. The several hundred questions and problems—categories that I do not distinguish sharply—are the heart of this effort for my own classroom. They try to achieve the advantages and avoid the disadvantages of both case and problem approaches. Problems force students to manipulate and apply antitrust ideas to difficult issues extracted from complex facts with uncertain economic and legal implications. That process tests the usefulness of doctrine, often demonstrates its inadequacies, and helps students focus both on private planning and on “legislative” considerations.

Adequate problems, however, are sometimes overly complex for effective classroom use. The difficulties are several. Problem analysis and solution often demand prior mastery of numerous cases and concepts, but few students can or will attain that command of a topic at the outset of its consideration. When analysis and solution require so much preparation, many students will do little more than read the cases. More manageable questions will be more adequately prepared.

To discuss a complex problem, moreover, is necessarily to discuss the meaning and reasoning of the relevant cases. The appropriate questions can, of course, be posed orally in class, but I find several overwhelming advantages in providing questions in the coursebook. First, students can and do think about them before class. Second, printed questions eliminate some of the delay, confusion, or misunderstanding inevitable with oral questions. Third, the greater precision of a written question invites more precise responses. Fourth, the structure of questions approximates an outline of the class discussion and thus enhances student understanding and sometimes lessens the compulsion to take notes. The result is greater confidence and a more relaxed classroom attitude.

There is, of course, no single best way to treat an antitrust topic. The teacher must often choose among several historical and analytical avenues. And student confusion may result from opaque opinions, complex facts, elusive business context, and obscure economic implications. In striving for orderly development and maximum clarity, I have endeavored to present questions and problems that are highly structured. The questions and problems are designed to expose easier or basic ideas before complex ones.

Where experience has shown that a complicating issue unduly obstructs progress toward “answering” a problem, the complicating factor has either been excluded from the problem or made the subject of a prior question that clears the way for a later inquiry. Although it is neither possible nor desirable to narrow questions and problems too finely, a conscious effort has been made to build from basic ideas to more elusive ones. Indeed, for this purpose, occasional elementary questions with clear-cut answers are scattered through the materials to emphasize fundamental points and remind students that some “answers” do exist. Other questions and problems vary in specificity, breadth, object, and student role. The statement of facts or of issues or both may be complete or require the student to supplement them. There may be subordinate questions to aid the analysis, or a complete fact statement may pose a variety of issues without further written guidance. The problem may call on the student to take the viewpoint of business manager, counselor, advocate, judge, or legislator, as well as to identify the legal issues, to use and distinguish cases after careful exegesis, to consider what data are available and how they can be used by either party or the judge, to understand the strengths and limits of the institutions that must decide, to explore the private and social interests at issue, and to resolve the issue within the limits imposed by the relevant institutions, doctrines, and interests.

Antitrust cases offer a particular challenge to orderly development. Some difficulties have already been noted. In addition, litigants have not arranged their affairs nor have judges written with the needs of the classroom in mind. Yet, in an institutional system in which judges and commissioners have such vital roles in developing and applying antitrust policy, cases provide an object of analysis and discussion, show the tribunals struggling with our problems and creating antitrust law, and, it is hoped, illuminate the subject and the process. Before preparing these materials, I sometimes asked students to read all the reproduced cases on, say, boycotts or tying arrangements and then attempted to discuss the subject as a unit. The results were far less successful than when students read one case, pondered a few questions about it, read another case, then considered questions about both cases, and so on. That is often the pattern of these materials. The questions immediately after a case will not necessarily exhaust its implications. It sometimes happens that the case that opens a section may not be fully explored until the end of that section, or even later. The effort is to open a theme and then, in orderly stages, to elaborate on it with richness and variations of reality.

Spontaneity and flexibility. The virtues — if such they be — of this structured approach raise two questions. First, will the orderly development and detailed questions reduce classroom spontaneity? Experience has provided satisfactory answers. Detailed questions have not reduced classroom spontaneity. The channeling of energies has increased the relevance of student observations or challenges without diminishing their originality, variety, or intensity. For all their detail, moreover, many questions remain quite difficult. The questions seemed to aid all students to grasp the subject and yet tax many to dig deeper. In my own classes there has been a more rapid and more subtle response from more students when using these materials.

The other question about structured materials is this: Will other teachers find the structure congenial? The tested sequence of cases, questions, and problems will be useful to those teachers who have not had occasion to develop a different approach to antitrust pedagogy. Other teachers will, I hope, find at least some of the structure suitable for their tastes. But few teachers will use all these materials in the printed sequence. At least on occasion, other teachers will use cases and text without using the questions or will use the questions or problems in a different order. A teacher who wishes to vary the order of topics or their development will find that the book's system of numbered paragraphs will greatly facilitate the task of making up a syllabus or assignment list.

The questions and problems need not, of course, be used in their entirety. Teachers who prefer to concentrate on problems in class may wish to urge students to answer the nonproblem questions for themselves. Teachers who emphasize case-analysis questions may wish to encourage their students to solve the problems for themselves as an aid to study and review. Indeed, no course of conventional length will have time to consider all the questions, problems, or topics in class. Some selection is therefore inevitable in the use of these materials, which are somewhat more extensive than I can cover in a semester-long course of four hours per week.

The organization of topics is by no means inevitable. To emphasize the unity of subject matter, I have used only a few chapter divisions. They need not be treated in the order printed. The content and development of each chapter is not, in the main, dependent on the order of topics. There are standard progressions. Price fixing must precede most of the other horizontal issues. Vertical restraints should precede vertical mergers. But most topics need not be pursued in any particular order. The answers to be expected and the development of the discussion will, of course, vary according to what has gone before, but most questions can be usefully discussed regardless of the order of topics.

The questions within each topic need not always be treated in the order in which they are printed, and some omissions can usually be made. A topic may include several distinct subtopics. But even where the questions are cumulative, a different progression is usually possible. At only a few points is the solution of a question totally dependent on what has directly preceded it. Most questions can be discussed out of the printed order when the instructor considers some other sequence preferable.

Editorial matters. All paragraphs other than statutes or principal cases are numbered to facilitate assignment, cross-reference, and general use of the book. Paragraphs of text or case abstracts are identified by boldfaced headings. Paragraphs without headings are questions or problems. Problems should be regarded as entirely hypothetical, although they are sometimes based on the case, if any, cited to the problem. A citation to a problem may simply identify a fact situation, or it may identify a discussion of some aspect of the problem. More elaborate footnotes to many questions and problems will provide considerable information about the relevant cases.

Some of the principal cases have been edited severely, but omissions are indicated in the conventional way with these exceptions: omitted without further notation are repetitive statutory or code citations to the antitrust

laws, repetitive reporter references within an opinion, cross-references within an opinion, citations for a court's references to a lower court decision in the same case, and excessive citations by a court to a case already cited. Where a court refers to important cases presented elsewhere in the book or already considered in the opinion, a short name for that case may be substituted for the full name and citation. Footnotes are frequently omitted from quoted material; reproduced footnotes retain their original numbers. Footnotes within a case are always those of the court unless a notation indicates otherwise. "Inc." has been omitted from case names. Finally, it should be noted that very occasional liberties have been taken with punctuation, capitalization, and paragraphing in the course of editing.

P.A.

January 1967

ANTITRUST ANALYSIS

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