

TRADE REGULATION

CASES AND MATERIALS

SIXTH EDITION

ROBERT PITOFSKY

HARVEY J. GOLDSCHMID

DIANE P. WOOD

FOUNDATION PRESS

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by

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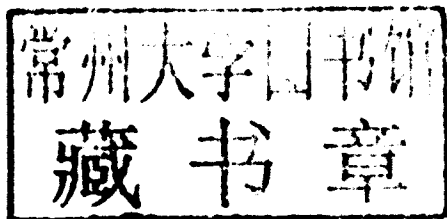
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FOUNDATION PRESS
2010



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195 Broadway, 9th Floor

New York, NY 10007

Phone Toll Free 1-877-888-1330

Fax (212) 367-6799

foundation-press.com

Printed in the United States of America

ISBN 978-1-59941-249-8

Mat #40555303

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PREFACE

In our Preface to the fifth edition of this casebook, published in 2003, we noted the increased willingness of courts, academics, enforcement officials, and the bar to reconsider almost all aspects of competition policy in the United States. The sixth edition is being published early in a new administration, and at a time when much rethinking and more aggressive antitrust enforcement is expected. The search continues for a middle way in antitrust that respects its role in protecting free markets as well as traditional non-economic values but also is sensitive to preserving and encouraging efficiencies and to protecting incentives to innovate. Reconciliation of competing values, in our view, makes debate about antitrust all the more fascinating to teach and to study.

There are several noteworthy changes in the approach of this edition to the study of antitrust.

First, the tradition of this casebook, going back to Milton Handler's earliest treatment of the subject, was to concentrate on Supreme Court caselaw. Although the Supreme Court remains active in the antitrust area, much law is being made in the Courts of Appeals, in federal (and state) guidelines, and in consent orders. Non-Supreme Court materials have always been included in prior editions, but their proportion has continued to increase. More in-depth essays and notes have been provided to elaborate on current issues and trends.

Second, as we recognized in the fifth edition, as the American economy grows increasingly high-tech, difficult issues at the intersection of antitrust and protection of intellectual property frequently arise. These issues are particularly important because products that are the embodiment of ideas, and therefore candidates for intellectual property protection, are found in the most dynamic and fastest growing sectors of the U.S. economy. There has been an increase in the number of antitrust cases that require reconciliation of antitrust policy on the one hand and patent, copyright and trade secret protection on the other. Differences between intellectual property and other forms of property—and potential antitrust consequences—are examined in an expanded part of Chapter 8.

Third, we commented previously that it is no longer enough to address competition questions in the United States without some knowledge of the antitrust systems of other countries. Comparative insights may lead to policy adjustments and are increasingly important in lawyering major transactions. The volume of comparative materials (mostly from the European Union) has been expanded in this edition in the form of extensive notes—due in large part to the special knowledge and experience of our colleague Diane Wood. We realize these materials are no substitute for a full analysis of foreign law, but expect that many teachers will find them

useful in the way they expose first principles and offer alternatives to accepted ways of regulating competition in the United States.

This edition of the casebook retains the fundamental approach of its predecessors. It has been written and edited to be used as a teaching tool. The cases are supplemented with materials from the related fields of economics, history, political science and even law. A continuing feature of this edition is a series of notes prepared in collaboration with Professor Steven C. Salop of Georgetown University Law Center. A new feature is an economic appendix, “Basic Economics for Antitrust,” authored by Nirit Sandman Eriksson. This appendix will allow teachers to provide basic economic learning for those students with limited backgrounds and greater depth for those who bring substantial economic backgrounds to the anti-trust course.

The casebook again includes hypothetical problems, spaced frequently throughout the chapters. A principal virtue of the problem method—optional, of course, for teachers—is the opportunity afforded students to “synthesize” particular assignments in the context of focused, structured discussion. An additional virtue is the opportunity provided to students to sharpen their lawyering skills with respect to concrete issues of fact and law. Many teachers assign two, four or more students in advance to address each problem, asking them to prepare to argue in class as counsel for defendant, plaintiff or, for example, a government intervenor. In an advanced class, which describes antitrust in virtually every law school, the problems demand all the reconciliation of doctrine, and all the policy scrutiny, of more traditional teaching methods.

Finally, we gratefully acknowledge the valuable assistance of the following individuals who participated in the preparation of this edition: Scott Buell, Jesse Creed, David Hutchinson, Joanna Persio, Michael D. Yanovsky, and Robert A. Yu. In addition we would like to express our very special thanks to Hilda Daniels who worked tirelessly and with enormous skill in the preparation of this manuscript.

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February 2010

EDITORIAL NOTE

Throughout the casebook omissions are generally indicated by ellipses. However, (i) some footnotes from judicial opinions and secondary sources, (ii) repetitive or unnecessary citations in the text of opinions and secondary sources, and (iii) most parallel citations and many full case names have been omitted without ellipses or other warnings to the reader. Parallel citations appear only for main cases, and in a few other instances, where it appeared likely that students would go to the original opinion. Footnotes that have been retained, whether in judicial opinions or secondary sources, are in their original citation form but have been renumbered. Unless the context clearly indicates otherwise or an “Ed.” has been inserted, a footnote found in an opinion or secondary source is the work of the indicated court or commentator.

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