

**Legal Studies 205-401/805-401 & Marketing 236-401/760-401:
The Law of Marketing and Antitrust**

MW 12-1:30
Fall Term 2005

Professor: Nicholas D. Constan, Jr
Office: 653 Jon M. Huntsman Hall
Office Hours: By Appointment Only
Telephone: 215-898-HELP
E-mail: constann@wharton.upenn.edu
Class web site: Class materials will be made available through a WebCafé site (tentatively: <http://webcafe.wharton.upenn.edu/eRoom/lgst/805-fa04-1>). If you do not have a Wharton account, you may obtain access by proceeding through <http://accounts.wharton.upenn.edu>, or by visiting *Huntsman Hall F35*.)

Description: The course explores the legal aspects of marketing strategy. The first half considers relevant antitrust doctrine and policy: the fundamentals of antitrust institutions and the antitrust approach to market definition; pricing strategy (e.g., price fixing, exchanging price information, predatory pricing, and discriminatory pricing); marketing channel strategy (e.g., resale price maintenance, territorial and customer restrictions, exclusive dealing, refusals to deal, etc.); and limits on market dominance.

The second half considers the intellectual property dimension (including federal patent, copyright, and trademark law), as well as federal and state laws pertaining to trade secrets, unfair competition, and consumer protection. The focus is primarily on U.S. law, but the challenges posed by diverse domestic, foreign, and international regimes will also be emphasized.

Readings:

- Most of the reading for the first half of the semester is from Handler, Pitofsky, Goldschmid, & Wood, Cases and Materials on Trade Regulation (5th ed., 2003) (TR), which is available at the Penn Bookstore.
- At the beginning of the semester a short coursepack will be made available for purchase at Wharton Reprographics in the Steinberg Hall-Dietrich Hall basement. A longer coursepack on intellectual property (IP) will be made available at approximately mid-semester.

- Additional readings may be made available through original links or WebCafé. If in-class handouts are required, Wharton Reprographics may assess an aggregate fee.

PART ONE – ANTITRUST AND TRADE REGULATION

DATE ASSIGNMENT

September 7 **Introduction: Goals and History of Antitrust Policy**
What are the goals of antitrust law? Where did it begin?

“I don’t disguise my belief that the Sherman Act is a humbug based on economic ignorance and incompetence.” Oliver Wendell Holmes, Letter, April 23, 1910

“The entire structure of antitrust statutes in this country is a jumble of economic irrationality and ignorance. It is a product: (a) of a gross misinterpretation of history, and (b) of rather naive, and certainly unrealistic, economic theories.” Alan Greenspan, Antitrust, Presentation to the Antitrust Seminar of the National Association of Business Economists, September 25, 1961

“The whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare.” Robert Bork, The Antitrust Paradox, 1978

- TR: pp. 1-15, 15-22 (skim), 31-33, 51-59, 61-62

12 **The Institutional Setting for Antitrust**
How is antitrust law enforced? How far does it reach?

- TR: pp. 70-75, 78-84, 90-94, 109-12, 443-49, 472-83
- For discussion: Problem A (coursepack)

14 **Defining Markets in Antitrust**
What is being monopolized, exactly?

- TR: pp. 130-43, 147-65, 172-83
- For discussion: Problem 1 (p. 191)

19 **Marketing with the Competition: Price Fixing and Division of Markets**

Is price fixing possible? Since most business arrangements affect prices, is they all illegal?

- TR: pp. 228-30, 233-45, 276-95, 316-21
- Wilke, Price-Fixing Investigations Sweep Chemical Industry, Wall Street Journal, June 22, 2004 (coursepack)
- For discussion: Problem 5 (p. 327)

26 **Refusals to Deal and Joint Ventures**

When is cooperation tantamount to a boycott? If it is, what about joint ventures?

- TR: pp. 354-77, 378-81, 402-07
- United States v. Visa USA (coursepack) [note: compare, if interested, to TR pp. 386-99]
- For discussion: Problem 6 (p. 378)

28 **Behaving Like the Competition: Oligopolies**

Assume a concentrated industry, but without a monopolist, and without express agreement among leading firms. When is parallel, potentially collusive, behavior unlawful?

- TR: pp. 490-94, 505-18, 542-50, 563-84 [note: for further background on facilitating practices, see pp. 526-32]
- For discussion: Problems 10 (p. 525), 11 (p. 586)

October

3 **Vertical Restraints: Setting Prices and Assigning Distributors**

If price fixing and market division are illegal per se, surely it's also illegal to tell downstream companies to fix prices, or to divide their markets – isn't it?

- TR: pp. 620-43, 651-69 , 679-719
- For discussion: Problems 14 (p. 645), 15 (p. 675) , 16(p. 719)

Vertical Restraints (cont'd): Refusals to Deal

- TR: pp. 679-83, 686-94, 696-711, 712-19
- For discussion: Problem 16 (p. 719)

5 **More on Monopolization and Attempted Monopolization**

Are monopolists free to compete? When does aggressive competition amount to an attempt to achieve monopoly?

- TR: pp. 736-50, 765-74 (skim), 774-84, 791-96, 798-99, 807-10, 824-30 [note: intervening portions of the Microsoft decision are assigned for subsequent classes]
- For discussion: Problems 17 (p. 831), 19 (p. 846)

10 **Pricing: Predation and Discrimination**

Is a company free to price, and package, its product, as it chooses?

“Under the Antitrust laws, a man becomes a criminal from the moment he goes into business, no matter what he does. For instance, if he charges prices which some bureaucrats judge as too high, he can be prosecuted for monopoly or for a successful 'intent to monopolize'; if he charges prices lower than those of his competitors, he can be prosecuted for 'unfair competition' or 'restraint of trade'; and if he charges the same prices as his competitors, he can be prosecuted for 'collusion' or 'conspiracy.’

” Ayn Rand, “Choose Your Issues,” The Objective Newsletter, Jan. 1962

- TR: pp. 784-85, 847-69
- Price Discrimination: The Robinson Patman Act (coursepack) [note: for the text of the RPA, pp. 1281-84]
- For discussion: Problem 20 (p. 875)

12 **Tying Products and Services**

"You go to a car dealership and buy a car with a radio. Because you can buy a radio separately, is it one product or two? Today the view is that it's an integrated product." Steve Sunshine, former Deputy Assistant Attorney General, Antitrust Division

"The car and stereo system are considered distinct products. A car and its engine are not." Steven Salop, Professor of Law and Economics, Georgetown University, and advisor to the Antitrust Division

- TR: pp. 886-920, 799-807
- For discussion: Problem 21 (p. 926)

19 **Exclusive Selling and Exclusive Dealing**

Can suppliers restrict themselves to one seller? Can sellers restrict themselves to one supplier?

- TR: pp. 931-37, 939-44, 948-51, 953-60, 784-91
- For discussion: Problem 22 (p. 961)

26 **Mergers**

If competitors can't collaborate, can they simply combine?

- TR: pp. 970-71, 975-77, 1015-24, 1034-58 (skim), 1060-61, 1067-80
- For discussion: Problem 23 (p. 1080)

31 **Mid-term Examination**

PART TWO – INTELLECTUAL PROPERTY AND RELATED DOCTRINES

The syllabus for the second half of the course is subject to revision; details regarding the reading assignments will be added later in the term, and the bulkpack made available prior to the midterm.

DATE		ASSIGNMENT
November	2	Patents: Subject Matter and Patentability Bulkpack part #1
	7	Patents: Rights and Remedies Bulkpack part #2
	9	Patents: Global Reform? Bulkpack part #3
	14	Trade Secrets Bulkpack part #4
	16	Copyright: Scope of Protection Bulkpack part #5
	21	Copyright: Rights and Remedies Bulkpack part #6
	28	Copyright: Limits Bulkpack part #7

	30	Trademark: Scope of Protection Bulkpack part #9
December	5	Trademark: Rights and Remedies Bulkpack part #10
	7	Regulating Advertising Bulkpack part #11
	14	Final Examination Wednesday, 12noon – 2pm Location to be announced