

LGST 205/805: THE LAW OF MARKETING AND ANTITRUST

THE WHARTON SCHOOL, UNIVERSITY OF PENNSYLVANIA
FALL SEMESTER 2016

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Office Hours: Tuesdays 2-3 and by appointment

COURSE DESCRIPTION

This course explores the legal aspects of competition. The aim is to understand what legal obligations a business organization owes to its competitors and consumers. In particular, the course focuses on permissible and impermissible marketing tactics, pricing strategies, use of intellectual property (including patents, copyrights, and trademarks), and exertion of market dominance. The focus is primarily on U.S. law, but the challenges posed by diverse domestic, foreign, and international regimes will also be discussed. The course is useful to students interested in marketing strategy or competitive business strategy, and, more broadly, to anyone desiring to understand the legal and public policy issues relating to competitive business interaction.

The course is primarily a course in legal reasoning and legal concepts, but it will also indirectly involve questions of both business decision-making and political theory. The aim is to understand the current black letter law, and also to make sense of the law's underlying principles and rationales so that students can anticipate how new cases and situations are likely to be resolved. To this end, we will mainly be reading legal cases and other legal materials, supplemented occasionally with theoretical scholarship.

COURSE REQUIREMENTS

Class Participation (30%) – The success of this course depends on active classroom discussion. Attendance and engagement are expected. I will cold call regularly in order to ensure a diversity of voices and active engagement. Students' grades will be dictated by quality, not quantity of participation.

Written Questions/Reaction Papers (10%) – Throughout the semester, you must submit four (4) short, ungraded written questions or reactions to the reading—two during Unit 1 and two during Unit 2—12 hours prior to the class covering the topic discussed. (E.g. A question about the puffery materials for Class 6 on Sept. 15 must be submitted by the night of Sept. 14.) Aside from the requirement that they be split between the units, these written assignments may be submitted at any point throughout the semester. These assignments are ungraded, though I will check them for adequacy and exceptional efforts may go to enhance class participation. They should not exceed 500 words, and they may be considerably shorter than that. The aim is to demonstrate some valuable thinking or reflection upon the materials in advance of a given class.

Unit 1 Exam (30%) – Open-book, 48-hr take home. No collaboration. Distributed Oct. 20 at 5pm; due Oct. 22 at 5pm. The exam will be intended to take you 4-6 hours.

Unit 2 Exam (30%) – Open-book, 48-hr take home. Dates TBD (during final period).

READINGS

There are two required books:

- REBECCA TUSHNET & ERIC GOLDMAN, ADVERTISING & MARKETING LAW: CASES AND MATERIALS, VOLUME I (2014). [Please Note: You only need Volume I, not Volume II.]
- RICHARD A. POSNER, ANTITRUST LAW (2nd Ed., 2001)

All other readings will be posted on the course website.

Class	Date	Topic	Readings
Introduction: Unfair Competition			
1	Aug. 30	Unfair Competition I	<i>Keeble v. Hickeringill</i> ; <i>Speakers of Sport v. ProServe</i>
2	Sept. 1	Unfair Competition II	<i>INS v. AP</i> Select and read <u>one</u> of these three: • Carr, “Fairness and Performance Enhancement in Sport”; • Werhane, “The Ethics of Insider Trading”; • Nagel, <i>The Possibility of Altruism</i> , excerpt
Unit 1: Marketing & Advertising Law			
3	Sept. 6	State Law	T&G 134 – 173
4	Sept. 8	FTCA & Lanham Act	T&G 97 – 133; 192 – 198
<i>Part A: False Statements</i>			
5	Sept. 13	Facts & Opinions	T&G 201 – 216
6	Sept. 15	Puffery	T&G 216 – 256
7	Sept. 20	Falsity	T&G 256 – 267; 278 – 300
8	Sept. 22	Falsity by Implication	T&G 468 – 494
9	Sept. 27	Omission & Disclosure	T&G 352 – 387
10	Sept. 29	Advertising and the First Amendment	T&G 49 – 61
11	Oct. 4	Mandatory Disclosures	T&G 404 – 428
-	Oct. 6	FALL BREAK	No class
<i>Part B: Injury & Damages</i>			
12	Oct. 11	Materiality	T&G 322 – 351
13	Oct. 13	Standing	T&G 558 – 579
14	Oct. 18	Injunctions	T&G 639 – 672
15	Oct. 20	Damages	T&G 672 – 694
Unit 2: Antitrust Law			
16	Oct. 25	Antitrust Foundations	Sherman Act §1; Posner Ch. 1 & 2
17	Oct. 27	Harm & Private Suits	<i>Brunswick</i>
<i>Part A: Concerted Action</i>			
18	Nov. 1	Price Fixing I	<i>Trenton Potteries</i> ; Posner Ch. 3
19	Nov. 3	Price Fixing II	<i>Twombly</i> ; <i>In re Text Messaging</i> ; <i>Apple</i>
20	Nov. 8	Exclusive Dealing	<i>Standard Oil</i> ; <i>Tampa Electric</i>
21	Nov. 10	Group Refusals to Deal	<i>Fashion Originators</i> ; <i>Northwest Wholesale Stationers</i>

<i>Part B: Exclusionary Practices</i>			
22	Nov. 15	Refusals to Deal	<i>Lorrain; Aspen Skiing; Trinko</i>
23	Nov. 17	Predatory Pricing	<i>Brooke Group; Posner Ch. 7</i>
24	Nov. 22	Tying & Forcing	<i>Jefferson Parish; Kodak</i>
-	Nov. 24	THANKSGIVING	No class
<i>Part C: Monopolies & Mergers</i>			
25	Nov. 29	Monopolization	<i>Alcoa; Spectrum Sports</i>
26	Dec. 1	Horizontal Mergers	<i>Whole Foods; Posner Ch. 5</i>
27	Dec. 6	Vertical Mergers	<i>Comcast</i>
28	Dec. 8	Remedies	<i>Microsoft III</i>

CLASS POLICIES & INFORMATION

1. *Be Respectful.* Rather than setting out a laundry list of classroom rules, I prefer to say simply that you should treat your classmates and me with respect. This class is about developing your judgment about how to treat others, and you should exercise that judgment in the classroom. The following are a few things that I think can often be disrespectful: talking separately while another person is addressing the group; getting up to leave in the middle of class; snickering at or mocking another person's comments; eating loudly or in a manner that will distract others. But this is not an exhaustive list. This is open to your discretion, which I hope will prompt deliberation on your part.

2. *No Bullshit.* You should do the readings. Legal materials can be challenging to read, and you may need to read things more than once before you understand them. But don't bullshit if you haven't done the readings for some class. It will only hurt the class discussion (and I will probably know).

3. *No Laptops.* Laptops and are not allowed in class. Recording devices are also not allowed. I will permit tablets (without an external keyboard) for the purpose of accessing assigned readings and notes that annotations that you may have made on the assigned readings. Electronic devices will also be permitted to respond to in class polls. However, electronic devices are permitted for these two purposes *only*. You are not to use electronic devices for taking notes or for recording, and certainly not for uses unrelated to class. If you abuse this limited use of electronic devices, I may ask that you no longer bring them at all.

4. *No plagiarism or cheating.* Both plagiarism and cheating are serious forms of academic misconduct, and punishment will be severe. Any time you use ideas from someone else, you should be open about that fact. Failure to do so is dishonest and unfair to others. Laziness or accident is not an excuse. Collaboration on the take-home exams is strictly prohibited.

5. *Meals.* Over the course of the semester, you will be invited and encouraged to sign up on Canvas for student-faculty meals sponsored by the Wharton Meals Program. The meals are entirely voluntary, and there is no charge to students. Lunches will take place somewhere near campus (e.g. Pod, White Dog, etc.).