Antitrust Law in the Online Economy: Selected Cases and Materials

Second Edition

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Preface to the Second Edition

There are three main categories of changes in this edition.

First, of course, there have been many developments in this area in the last year. Only a limited number of those developments have been court decisions, but as with the first edition, I have included a number of other sources, such as complaints and business review letters. It is as yet unclear, however, how these developments, such as the Google and Facebook complaints in the U.S. and the Digital Markets Act and Digital Services Act in the EU, will affect the law.

Second, I have sought to provide somewhat more introductory material prior to the cases and other materials in the book, and I have edited many of those cases and materials more vigorously. Despite the additional introductory material, the book is unlikely to be satisfactory as a standalone text for students with no competition background. However, during a semester teaching remotely as a result of Covid-19, I recorded several dozen lectures on the fundamental issues and U.S. cases, and the combination of those prerecorded lectures and this book seemed to work well.

Third, I have aimed to correct a number of typos and formatting infelicities in the first edition.

Finally, I am happy to acknowledge very useful comments and suggestions by Nicolo Zingales. His input has surely helped improve the book, but of course any remaining errors or omissions are my responsibility.
Preface

Most antitrust casebooks include the same traditional cases, and for good reason. Those cases, or many of them, set out the law as it currently stands. However, markets have changed dramatically since many of those cases were decided, and it is not always clear how the law will or should be applied in modern markets. It is important, therefore, that students consider the application of antitrust law to new markets, particularly in the information and high-technology industries.

This book seeks to provide a sampling of new cases and materials in each of the major areas of antitrust. In that respect, a course using this book could cover one of those areas in each week’s class, but I have also sought to keep the materials independent of each other so that antitrust professors can supplement traditional casebooks with these materials as they choose. I have also aimed to connect these materials to the traditional cases so that students and practitioners can use this book on their own, again selecting the topics in which they are particularly interested.

Broadly speaking, the book contains cases addressing two types of issues: intellectual property (Qualcomm, Huawei v. ZTE, etc.) and the online economy (Google, 1-800 Contacts, etc.). It also includes more secondary materials (on algorithmic collusion, personalized pricing, etc.) than is typical of a casebook, because some of these issues have not yet given rise to cases suitable for inclusion. In time, I expect to add problems for these issues to provide opportunities for factual analysis.

The book includes a greater portion of European materials than is usual for a U.S. antitrust book. The reason is obvious: the EU and its member states have been at the forefront of antitrust enforcement in these areas. For those readers who have studied primarily U.S. law, I have sought to provide enough context to appreciate the European materials. In today’s world, and particularly given differences in enforcement priorities, even U.S. antitrust lawyers will benefit from attention to Europe and other jurisdictions.

My plan is to update this book frequently—more often than is practical for a standard casebook—to keep up with developments in these fast-moving areas. Self-publication allows me to do that without the delays that would accompany traditional casebook publication. To this end, I welcome suggestions for materials or citations to add (or delete), and of course I also welcome suggestions about how the material is presented.

I hope you find the book useful.
Teaching with this Book

This book is intended to be used either after a traditional antitrust course or as a supplement to one. I use it in a four-credit, two-day-a-week course with the first day covering the traditional material and the second day covering the related material in this book. Taking this approach requires cutting some material from the traditional three- or four-credit course, but it still allows adequate coverage, I believe. To facilitate using the book that way, it includes prior to some of the cases here short descriptions of cases that traditional books include but that might be omitted. That allows those cases to be presented briefly, followed by discussions of their application in the context of technology and information issues.

The book also seeks to indicate what traditional cases it assumes are covered prior to the cases here by making reference to those cases in short notes preceding the materials here. The notes after the materials then suggest some avenues for considering how those cases apply in the contexts on which this book focuses.

A side-effect of these efforts is a lessening of the more-or-less linear presentation of cases in a traditional antitrust casebook. Here there are more frequent references to cases and issues not yet addressed (e.g., references to *Leegin* before coverage of vertical agreements) or not otherwise covered here (e.g., *Copperweld* and the intra-enterprise conspiracy doctrine, or *Brunswick* and antitrust injury). Some might object to this approach, but antitrust doctrine is sufficiently unitary and interrelated that presenting it in distinct categories is not always desirable. That is especially so for a supplement like this that is intended to follow or accompany presentation of traditional law.

In several instances, the materials provided for a particular area of law might not be sufficient for a typical two-hour class. In each such case, the notes before and after those provided point to related materials, and those materials can be used to supplement the materials here and set up the discussion of them.

A Note on Formatting

I have freely removed citations that are not of great value, even if the citation identifies the source of a quoted passage, on the view that the quotation marks themselves indicate that the passage does not come originally from the case or other source. I have also occasionally left short-form citations even after omitting the first, long-form citation. Again, I do not think this will be misleading.

I have generally left spelling, headings, and indentation internal to the materials as in the originals, which accounts for the inconsistencies in those formatting issues. Footnote numbers are also as in the original sources.
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I also gratefully acknowledge helpful comments by John Newman and Geoff Manne, but of course any errors and all editorial bias are mine. I also thank my students for their engagement with these issues in class, and for their typo-hunting efforts outside class.