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Oppenheim: Unfair Trade Practices, Cases and Comments

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UNFAIR TRADE PRACTICES, CASES AND COMMENTS. (2d ed.) By S. Chesterfield Oppenheim. St. Paul: West Publishing Company. 1965. Pp. xxix, 783. \$15.00.

The dynamic changes in the American economy in the past two decades have materially increased the significance of the laws regulating competitive activity. In particular, the accelerated shift from a predominantly rural to an urban society, the industrialization of new geographical areas, the huge expansion in the gross national product, the tremendous increase in advertising expenditures, and the vast growth in the service industries have greatly magnified the impact of earlier trade regulation laws. Moreover, in the past twenty years both Congress and the state legislatures have enacted many new trade regulation laws, the courts have substantially broadened the reach of prior laws, federal and state enforcement agencies have been greatly enlarged, and the volume of private litigation in trade regulation cases has multiplied enormously.

As a result of these profound changes, all "national" law schools and all law schools preparing students for practice in major metropolitan areas should offer courses that will enable students to obtain an adequate understanding of the fundamental policies and basic laws designed to preserve and strengthen our competitive economic system. This economic system, which has enabled the great majority of American citizens to achieve both the highest standard of living and the greatest degree of economic and political freedom in history, is regulated by two basic bodies of law. The antitrust laws, which are designed to preserve competition by prohibiting monopolistic combinations and unreasonably restrictive practices, are the first and more important group. The second set of laws represents an

endeavor to protect consumers and business concerns through the establishment of a plane of competition and the prohibition of undesirable forms of competition. Although these unfair competition and unfair trade practice laws have their roots in the common law, they have been greatly modified and expanded by both state and federal legislation.

In this dynamic field of antitrust and trade regulation law there is no legal scholar more respected and renowned than Professor S. Chesterfield Oppenheim. His 1936 publication of *Cases on Trade Regulation* was one of the pioneer endeavors that helped to establish trade regulation courses in law school curricula. A qualified and experienced economics teacher as well as a lawyer, he was among the first to perceive the growing importance of this field of law and the need for teaching law school trade regulation courses in the light of modern economic theory, with an understanding of industry and market structures. This was a great advance over the traditional teaching of such laws, which merely focused upon general tort theory or equitable principles. In 1948 and 1950 Professor Oppenheim again pioneered by publishing separate casebooks in federal antitrust laws¹ and unfair trade practices,² making possible an up-to-date and more comprehensive coverage of these bodies of law, which had developed rapidly in the late thirties and early forties. In 1959 he updated and greatly improved his casebook on federal antitrust laws,³ drawing upon his experience as co-chairman of the Attorney General's National Committee To Study the Antitrust Laws.

Professor Oppenheim's 1965 edition of *Unfair Trade Practices, Cases & Comments* is a publication that maintains the tradition of excellence he has established as a casebook editor. Although his principal goal was to update the 1950 casebook, he has also made some basic changes. His 1950 casebook was virtually encyclopedic; by contrast the new volume necessarily reflects the tremendous increase in the volume of litigation and the huge body of accumulated precedent by the employment of greater conciseness and limitation to landmark and example cases, together with increased summarization of cases and developments in comments and notes. In short, the most basic change is a substantial reduction in size. The casebook is designed to accommodate a three semester-hour (forty-five classroom-hour) course with provisions for adapting it to a two semester-hour (thirty classroom-hour) course. This necessitated some sacrifices which were made with excellent judgment, although they may not make all potential users happy. One area that was deleted entirely is the Food, Drug and Cosmetic Act. Others that were considerably

1. OPPENHEIM, *CASES ON FEDERAL ANTITRUST LAWS* (1st ed. 1948).

2. OPPENHEIM, *UNFAIR TRADE PRACTICES, CASES, COMMENTS & MATERIALS* (1st ed. 1950).

3. OPPENHEIM, *FEDERAL ANTITRUST LAWS, CASES & COMMENTS* (2d ed. 1959).

shortened include trademarks, Federal Trade Commission regulation of false advertising, and resale price maintenance under state "fair trade" laws. On the other hand, a salutary addition was the inclusion of some material on copyright law, enabling a comparison to be made between trademark and common-law unfair competition and copyright protection of commercial prints and labels, as well as design protection under copyright law and under the design patent statute. This also affords an opportunity for familiarizing students with the fundamental copyright concepts of "originality" and "general publication," as well as the unique judicial doctrine of "fair use," which seeks to balance the rights of the author with the public interest in disseminating knowledge.

The most controversial feature of this casebook was carried over from the 1950 edition. This is the inclusion of the Robinson-Patman Amendment to the Clayton Act in the unfair trade practices casebook while the remainder of the Clayton Act is included in Professor Oppenheim's federal antitrust laws casebook. Some of the most ardent admirers of this much-criticized legislation may be offended by this segregation of the Robinson-Patman Act from the antitrust course. There are, however, two principal justifications for this treatment. First, there is good reason to classify the Robinson-Patman Act as predominantly a "fair competition" law rather than an anti-trust law. The most prominent feature of this 1937 amendment to section 2 of the Clayton Act is the requirement that manufacturers and other sellers of goods have pricing and promotional systems that are fair to distributors. Even when competition between manufacturers may be intensified by use of price, service, or promotional discrimination, this law prohibits such discrimination if it is deemed to be potentially injurious to competition between distributors. The second justification for including the Robinson-Patman Act in the unfair trade practices casebook should appeal to this statute's staunchest supporters: it enables more adequate attention to be given to this important and complex law, which is so pervasive in its impact on pricing and promotional systems. This reviewer has had the experience of teaching the Robinson-Patman Act in an anti-trust law course and also as part of a separate unfair trade practices course. This experience confirms Professor Oppenheim's judgment that the Robinson-Patman Act may be effectively taught apart from the remainder of the antitrust laws and that it tends to be given inadequate coverage when taught in the antitrust course.

An important feature of this new edition is its improved, although shorter, sections on deceptive advertising, which cover common-law state and federal private remedies, as well as a note on state public remedies and an excellent chapter on the Federal Trade Commission. Since advertising has grown tremendously in recent

years to a multibillion dollar industry which is expected to double in the next decade, adequate protection of the general public and of businessmen against false advertising presents a gigantic challenge. The inclusion in the Appendix of the well-drafted Uniform Deceptive Trade Practices Act was therefore a desirable addition. This act would create a significant *private* remedy for deceptive practices. However, it is regrettably true that state and local *public* remedies are still woefully inadequate in most states and are used only sporadically in those states where strong laws exist. Moreover, the Federal Trade Commission, the primary overseer of advertising claims, does not have the manpower or the funds to begin to supervise local advertising. It even faces a tremendous challenge in monitoring the national advertising media. One minor shortcoming of this casebook is, therefore, the failure to include enough material to emphasize the magnitude of the economic and social problem of deceptive advertising, the inadequacy of state and local public remedies, and the doubts as to the capacity of the FTC to meet the anticipated expansion in advertising and the probable increase in deceptive advertising. Since this is probably the most acute social and economic problem covered in this course, it is unfortunate that these sections are not more lengthy. Some coverage of the postal fraud statute and fraud orders would also have been desirable. However, the book contains liberal bibliographical references that will help the teacher or student desiring to explore the advertising regulation problem more fully.

Most casebooks have relatively limited utility for practitioners and corporate counsel. Professor Oppenheim's casebooks have been notable exceptions because of their excellence and because of the paucity of good, comprehensive treatises in the field. This new edition of the unfair trade practices casebook, while less comprehensive than the earlier edition, will be a most worthwhile addition to law libraries. The chapters on trademarks, the Robinson-Patman Act, appropriation of values (including protection of trade secrets, know-how, and business ideas) and disparagement should prove particularly useful. The meticulously prepared comments and footnotes contain extensive references to the best texts and legal periodical literature. This should enhance the utility of the book for the trade regulation specialist as well as the general practitioner.

In summary, this casebook reflects the carefully distilled experience of one of the nation's most distinguished law teachers, who has devoted a lifetime to furnishing guidance and wisdom to the legal profession, lawmakers, and enforcement officials in the ever-changing, complex laws governing our dynamic competitive economy. It constitutes another major contribution from one to whom the legal profession already owes an incalculable debt. Every national or

metropolitan law school which has not done so previously should now give serious consideration to the addition of a course in this vital area of the modern curriculum. This thorough but concise casebook makes such a course much more feasible, and the growth of the law in this area now makes it almost imperative that law students be taught its fundamentals in order to be prepared adequately for counseling and litigating with regard to the problems of the modern corporation.

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