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*Legal Regulation of the Competitive Process—Cases, Materials, and Notes on Unfair Business Practices, Trademarks, Copyrights, and Patents—By Edmund W. Kitch and Harvey S. Perlman*

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## Book Review

LEGAL REGULATION OF THE COMPETITIVE PROCESS—CASES, MATERIALS AND NOTES ON UNFAIR BUSINESS PRACTICES, TRADEMARKS, COPYRIGHTS AND PATENTS. BY EDMUND W. KITCH AND HARVEY S. PERLMAN.†

*Reviewed by Peter B. Maggs\**

Professors Kitch and Perlman have brought together in a single casebook materials and notes on subject matter usually taught in a variety of courses. The result is not, however, four small casebooks in one big package; rather it is a unified whole reflecting a definite philosophy of law and legal education. The book is up to date, yet seasoned by years of preliminary use of tentative mimeographed editions. This reviewer, who has taught from both the 1971 mimeographed edition and the 1972 hardbound edition, has found the casebook highly effective for classroom instruction.

There are a number of current casebooks dealing with one or more areas of the law covered by the book under review. There are casebooks which include coverage of unfair business practices,<sup>1</sup> trademarks,<sup>2</sup> copyrights,<sup>3</sup> and patents.<sup>4</sup> Some of these casebooks

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† Pp. xxxiv, 1208. Supplement Containing Statutes, Regulations and Forms. Pp. iii, 430. Mineola, N.Y.: The Foundation Press, Inc., 1972, \$19.

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1. M. HANDLER, CASES AND MATERIALS ON BUSINESS TORTS (1972); S. OPPENHEIM, UNFAIR TRADE PRACTICES, CASES AND COMMENTS (2d ed. 1965); S. OPPENHEIM & G. WESTON, 1969 SUPPLEMENT TO OPPENHEIM'S UNFAIR TRADE PRACTICES (1969); S. OPPENHEIM & G. WESTON, UNFAIR TRADE PRACTICES (3d ed., scheduled for publication in 1973).
2. R. CHOATE, CASES AND MATERIALS ON PATENT LAW (1973); E. GOLDSTEIN, PATENT, TRADEMARK AND COPYRIGHT LAW (1959); M. HANDLER, *supra* note 1; S. OPPENHEIM, *supra* note 1; S. OPPENHEIM & G. WESTON, *supra* note 1.
3. R. CHOATE, *supra* note 2; E. GOLDSTEIN, *supra* note 2; B. KAPLAN & R. BROWN, COPYRIGHT, UNFAIR COMPETITION, AND OTHER TOPICS BEARING ON THE PROTECTION OF LITERARY, MUSICAL AND ARTISTIC WORKS (1960); M. NIMMER, CASES AND MATERIALS ON COPYRIGHT AND OTHER ASPECTS OF LAW PERTAINING TO LITERARY, MUSICAL AND ARTISTIC WORKS (1971); L. SCHWARTZ, FREE ENTERPRISE AND ECONOMIC ORGANIZATION, ANTITRUST AND REGULATORY CONTROLS (4th ed. 1972).
4. R. CHOATE, *supra* note 2; E. GOLDSTEIN, *supra* note 2; I. KAYTON, PATENT

incorporate materials from other areas of trade regulation law, for instance antitrust law<sup>5</sup> and the Robinson-Patman Act.<sup>6</sup> However, there is no casebook with the precise mix of the present one.

Law school courses likewise come in a variety of shapes and forms in the trade regulation area. Courses dealing with business torts and trademarks are common. Sometimes copyright is added; sometimes it is a separate course or not taught at all. Patent law is much less often part of the law school curriculum. Because of the unusual length of the book under review, it is possible, as its authors suggest,<sup>7</sup> to select chapters so as to make up a course with concentration on any of the four areas it includes. Indeed, given the combined length of the book and supplement, a total of 1,659 pages, the book offers considerably more material than can be covered in a typical three hour law school course. This reviewer has been forced to omit certain materials both times he has taught from the book. This has been done, however, with considerable regret, for the book reflects the interaction of fields of law, which, though they are often studied separately in law school, frequently appear together in practice.

Stronger even than the casebook's practical connections between the different subject areas is the unifying thread of the opinions of Judge Learned Hand to whom the authors dedicate the book with the observation that his "vitality, wisdom and creativity yet live in these fields of the law."<sup>8</sup> These opinions stand in sharp contrast to the weak reasoning, poor grammar and bad law which unfortunately mar the work of many judges who find themselves out of their depth when dealing with patent and copyright matters.

The authors have introduced a number of innovations in their selection of subject matter and arrangement of materials. These include a greater emphasis on consumer rights, an emphasis on problems of procedure and federal-state allocation of power, an attempt to draw out parallels between copyright and patent, and an effort to choose cases relevant to the students' own experience. They succeed in all four respects, but especially in the last.

Traditional unfair trade or business tort courses have placed heavy emphasis upon the protection of businessmen from injury by

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PROPERTY: CASES AND READINGS (1970); L. SCHWARTZ, *supra* note 3; A. SMITH, PATENT LAW: CASES, COMMENTS AND MATERIALS (Rev. ed. 1964).

5. L. SCHWARTZ, *supra* note 3.

6. S. OPPENHEIM, *supra* note 1; S. OPPENHEIM & G. WESTON, *supra* note 1; L. SCHWARTZ, *supra* note 3.

7. P. xviii.

8. P. xv.

other businessmen, but almost no emphasis upon the protection of the consumer from unethical business activity. The present work partially redresses the balance, including a number of cases presenting such key problems of consumer protection as class actions<sup>9</sup> and Federal Trade Commission intervention.<sup>10</sup> Classic problems such as "passing off" are represented, but so are more modern developments such as CATV. Important subjects generally absent from other casebooks are dealt with, such as lotteries, trading stamps and control of price advertising.<sup>11</sup>

Considerable attention is given throughout the book to procedural matters and questions of federal-state relations. The business tort and trademark section of the book constantly raises questions of access to federal courts and the scope of federal law under the Lanham Act. A section on preemption including the *Sears*,<sup>12</sup> *Compc*,<sup>13</sup> and *Lear*<sup>14</sup> cases serves as a bridge between the primarily state law questions of the first half of the book and the federal law questions of the second half of the book. The idea is a good one, though *Lear v. Adkins* is quite a case to give the student as his first patent case.

The integration of copyright and patent is attempted in a long chapter on "The Scope of the Copyright and Patent Systems,"<sup>15</sup> which compares the patent and copyright approach to such questions as validity, subject matter, utility, originality, creativity, and inventiveness. Considerable aids in the way of notes are given to the students, and the copyright comparison is helpful; nevertheless, the section is a challenge to the teacher and student alike because a tremendous number of new concepts and rules must be learned from relatively few cases.

The inclusion of a number of dull and technical cases is inevitable, particularly in the patent area. However, the authors have made an extraordinary effort to add relevance, interest and humor wherever they could. Familiar consumer products appear: Rapid Shave,<sup>16</sup> Campbell's soup,<sup>17</sup> Kodak film,<sup>18</sup> Gillette razor

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9. P. 123; *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968). An interesting further development in this case occurred in the spring of 1972, apparently too late for inclusion in the casebook. 40 U.S.L.W. 2716 (1972).

10. Pp. 138-92.

11. Pp. 267-311.

12. *Sears Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964).

13. *Compc Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964).

14. *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969).

15. Pp. 640-785.

16. P. 160.

17. P. 167.

18. P. 216.

blades,<sup>19</sup> Ipana toothpaste,<sup>20</sup> Zerex anti-freeze,<sup>21</sup> Nabisco shredded wheat,<sup>22</sup> V-8 vegetable juice,<sup>23</sup> Miss Clairol hair dye,<sup>24</sup> Roquefort cheese,<sup>25</sup> Aunt Jemima pancake flour,<sup>26</sup> Johnson's floor wax,<sup>27</sup> Seventeen magazine,<sup>28</sup> Budweiser beer,<sup>29</sup> Champion spark plugs,<sup>30</sup> and Chanel No. 5.<sup>31</sup> Favorite television shows are included: Captain Kangaroo,<sup>32</sup> "Have Gun Will Travel,"<sup>33</sup> Jack Benny,<sup>34</sup> and Ed Sullivan.<sup>35</sup> Students of different cultural tastes are offered their choice of grand opera,<sup>36</sup> the World Series,<sup>37</sup> stock car races,<sup>38</sup> songs,<sup>39</sup> the stage,<sup>40</sup> movies,<sup>41</sup> comic books,<sup>42</sup> and the Racing Form.<sup>43</sup> Women's liberation groups may note the inclusion of cases on ladies' fashions,<sup>44</sup> cases on ladies' underwear,<sup>45</sup> and a case on a lady wearing nothing at all.<sup>46</sup>

There is a good deal of explanatory material presented by the authors. However, perhaps because this material is scattered throughout the book, students do not regard it as a substitute for a hornbook or outline. The students' reaction is inevitably one of shocked disappointment when told that there is no good, concise source explaining the materials covered in this book, and that they will have to read and analyze the cases and attend class. The text is supplied with thorough annotations to treatises, articles and

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19. *Id.*
  20. P. 217.
  21. P. 219.
  22. P. 397.
  23. P. 403.
  24. P. 425.
  25. P. 438.
  26. P. 485.
  27. P. 488.
  28. P. 493.
  29. P. 502.
  30. P. 512.
  31. P. 518.
  32. P. 836.
  33. P. 578.
  34. P. 910.
  35. P. 455.
  36. P. 825 (*Madame Butterfly*).
  37. P. 577 (*Yankees & Dodgers*).
  38. P. 577.
  39. Pp. 880 (Cole Porter), 888 (Jerome Kern), 917 (Irving Berlin).
  40. Pp. 804, 825, 846, 852.
  41. Pp. 825, 852, 865 (*THE MALTESE FALCON*).
  42. Pp. 707 (Barney Google), 889 (Mutt and Jeff), 862 (Superman), 862 (Wonderman), 864 (Captain Marvel), 917 (*MAD MAGAZINE*).
  43. P. 890.
  44. Pp. 46, 388 (Christian Dior), 387 (Oleg Cassini).
  45. P. 493; p. 498; p. 943.
  46. P. 830.

court decisions, and with numerous provocative and interesting questions. The materials cited are so many that few faculty members and fewer students could hope to read them all.

The authors point out the difference between the heavily protectionist position taken in the writings on trademarks, copyright and patent by practitioners, and the anti-monopoly position taken by most of the academic authors. However, in their case selection and notes, they take a relatively neutral position, raising, but not answering, questions of what the law should be.

The authors include cases suggesting the importance of including a few intentional errors as a trap for plagiarists.<sup>47</sup> Perhaps it is just such an error that has garbled their description of the rule of law applying to such errors.<sup>48</sup>

It is becoming fashionable to include in law school casebooks materials from economists, sociologists or other social scientists who have something to say on the area of the law under consideration. The authors have not done so because of the paucity of solid research on the areas the casebook covers, rather than any idea that such research is unimportant. Indeed, the authors state:

[T]he delineation of appropriate legal rules for the regulation of the process of competition poses questions of great difficulty that have received insufficient attention from both lawyers and economists. This collection of the primary legal materials is designed in part to stimulate examination of the influence of American law on the operation of the marketplace.<sup>49</sup>

This reviewer joins in hoping that this book will encourage the study of this important, but too often neglected, area of the law.

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47. Pp. 897, 900.

48. P. 846.

49. P. xviii.