

Reviews of Recent Antitrust Books (2009-2010)

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The following is a compilation of book reviews and notices of notable books I have prepared over the past two years as U.S. Book Review editor for the World Competition Law & Economics Review (<http://www.kluwerlawonline.com/productinfo.php?pubcode=WOCO>) and/or for the web site for the Institute for Consumer Antitrust Studies at Loyola University Chicago (<http://www.luc.edu/antitrust>). All are short, none are deeply analytical. A couple of the books discussed were published in 2008, but I did not get around to reviewing them until at least 2009. Review of notable antitrust books from 2008-2008 can be found at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1235662.

Each of the current reviews highlight work that addresses different needs of the academic and practicing bar, and even includes a book or two of general interest to antitrust professionals. This is not intended as a comprehensive list of publications in the field, but rather those works that crossed my desk and appealed to me enough to review. The reviews are arranged by the date of publication of the review and include:

- 1) ABA SECTION OF ANTITRUST LAW, PROOF OF CONSPIRACY UNDER FEDERAL LAWS (2010).
- 2) ABA SECTION OF ANTITRUST LAW, ANTITRUST CLASS ACTION HANDBOOK (2010).
- 3) ABA SECTION OF ANTITRUST LAW, COMPETITION AS PUBLIC POLICY (2010).
- 4) DAVID GERBER, GLOBAL COMPETITION: LAW, MARKETS AND GLOBALIZATION (2010).
- 5) LLOYD CONSTANTINE, PRICELESS: THE CASE THAT BROUGHT DOWN THE VISA/MASTERCARD BANK CARTEL (Kaplan 2009).
- 6) MICHAEL A. CARRIER, INNOVATION FOR THE 21ST CENTURY: HARNESSING THE POWER OF INTELLECTUAL PROPERTY AND ANTITRUST LAW (Oxford University Press 2009).
- 7) ABA SECTION OF ANTITRUST LAW, ISSUES IN COMPETITION LAW AND POLICY (2008).
- 8) GARY L. REBACK, FREE THE MARKET! WHY ONLY THE GOVERNMENT CAN KEEP THE MARKETPLACE COMPETITIVE (Portfolio Books 2009).
- 9) ABA SECTION OF ANTITRUST LAW, ANTITRUST AND ASSOCIATIONS HANDBOOK (2009).
- 10) HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky ed. Oxford University Press 2008).
- 11) E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST LAW AND ITS ECONOMIC IMPLICATIONS, (LexisNexis 2009).

1) ABA SECTION OF ANTITRUST LAW, PROOF OF CONSPIRACY UNDER FEDERAL LAWS (2010).

There are two requirements for every action under Section 1 of the Sherman Act. The first is the existence of a contract, combination, or conspiracy. The second is that the contract, contract or conspiracy amount to an unreasonable restraint of trade. This helpful handbook focuses on the first of these requirements –the proof of a conspiracy (some agreement).

After a brief historical introduction to Section One as a whole, the book presents chapters on what constitutes an unlawful conspiracy, direct and circumstantial proof of a conspiracy, evidentiary issues relating to proof and participation in such agreements, and the type of intra-enterprise agreements that fall outside the scope of Section 1. Readers need to be aware that this last chapter went to press before the United States Supreme Court’s decision in *American Needle*, which is the most recent word on the subject of when collaborative enterprises constitute one, or more than one, economic actor for antitrust purposes.

What follows is the true heart of the book. There are excellent chapters on the requirements for pleading conspiracies, summary judgment, the use of expert economic testimony, and the trial of conspiracy cases. Each chapter is remarkably detailed for its relative brevity. The section on trial benefits from the use of a hypothetical fact pattern and helpful tips for practitioners sprinkled through the chapter.

There are a handful of places where the volume loses its focus and wanders over the border between proving agreement and proving the substance of the violation in question. This is understandable given the occasional fuzzy line between these issues, but this is one area where the focus of the book can be sharpened for future versions. Similarly, there are places where the book loses a bit of its objectivity and seems to land on the defense side of several of the issues it covers. Nevertheless, this is an immensely valuable and practical book on a key and complex issue in any case under Section One of the Sherman Act.

2) ABA SECTION OF ANTITRUST LAW, ANTITRUST CLASS ACTION HANDBOOK (2010).

The opening lines of this valuable handbook say it all: “At least 90% of United States antitrust enforcement is generated through private actions. The antitrust class action is a primary mechanism through which private actors seeks to enforce the antitrust laws.” This compact yet sophisticated handbook should thus be of interest to class action attorneys seeking to better understand practice in the antitrust area; antitrust lawyers seeking to better understand class action practice; and observers outside the United States seeking to understand this aspect of our litigation system and create sound systems of collective action for their own jurisdictions.

The handbook begins with an introduction which examines the history and future trends of class actions in the United States and briefly looks at the efforts in the EU and Canada to implement appropriate collective action litigation for their jurisdictions. The rest of the handbook proceeds with a comprehensive and even-handed look at the legal and strategic questions of filing a class action; antitrust claims suitable for class treatment; deciding whether to opt out of a class action; class action certification procedure; antitrust class certification standards; the role of experts in antitrust class certification, and antitrust class action settlements.

3) ABA SECTION OF ANTITRUST LAW, COMPETITION AS PUBLIC POLICY (2010).

This valuable and insightful book arises out of a May 2009 symposium examining competition as a fundamental policy. By coincidence, the planning of the conference preceded the global financial crisis but the symposium itself took place in the middle of the ongoing crisis when the value of competition has been under attack more so than any time since the Great Depression of the 1930s.

The conference featured three key note addresses from William Lewis, former head of the McKinsey Global Institute; Carl Shapiro, the current U.S. Deputy Assistant Attorney General for Economics; and the legendary economist Alfred Kahn. The program included a series of panels addressing the value of competition as a public policy from a variety of perspectives including:

- A historical overview of the role of competition as public policy in the United States;
- Deregulation and the legacy costs of market regulation;
- The financial crisis: market failure or regulatory failure?;
- Healthcare: Capable of a market-based solution or an arena in which competition cannot work?;
- State aid: Can markets recover from intervention by the visible hand?

The book itself contains all three keynote addresses, selected papers from each of the panels, and the edited transcript of the presentation from all the panels. A particular treat was Alfred Kahn's paper on a modest proposal to reverse the ranking of Type 1 and Type 2 errors in predation errors. Professor Kahn, now in his 90s, has been a key figure in both competition and regulatory policy since the 1950s, but has rarely written on pure antitrust matters. This short paper is a wonderful example why Kahn remains a first rate economist and a key figure in the history of competition policy in the 20th century and beyond. The symposium and the resulting book are a welcome opportunity to pull back from day-to-day practice concerns and think through from first principles why competition matters and where the limits to competition policy may lie in times of crisis.

4) DAVID GERBER, GLOBAL COMPETITION: LAW, MARKETS AND GLOBALIZATION (2010).

I am indebted to David Gerber on two very different levels. Besides being been a friend and

mentor, his scholarship has been an inspiration and an often under-appreciated contribution to international competition policy. His earlier book “Law and Competition in Twentieth Century Europe: protecting Prometheus” made a compelling case that there is a European competition law that stands apart from US antitrust law and policy.

http://www.amazon.com/Law-Competition-Twentieth-Century-Europe/dp/0199244014/ref=sr_1_1?s=books&ie=UTF8&qid=1280863210&sr=1-1 . He documented how EU competition law and its national analogues share common roots going back to prior to World War II as a true pan-European body of law with indigenous roots and a common frame of reference. He was the probably one of the very few US writers to be able to pull off this feat given his ability to do primary research in English, German, French, and Swedish and the ability to tie together the various strands of discourse in multiple legal systems.

Gerber now expands his field of inquiry to global competition policy in “Global Competition: Law, Markets and Globalization.” He both describes and analyzes the history and current state of national and international solutions to international competition law and set forth a path forward where past efforts have failed.

The key to understanding Gerber’s arguments is to appreciate his view that the past efforts did not fail, or at least did not fail as to the substance of the idea that global markets require global solutions to prevent private anticompetitive conduct on a global scale. He provides one of the best and most nuanced accounts of attempts in the 20th century to develop international competition law and the forces outside of the competition arena that prevented their adoption.

He begins with the League of Nations conference in the 1920s on global cartels and the glimmering of a consensus that some conduct based rules against cartel abuses were appropriate.

These efforts were overwhelmed by forces outside the competition debate itself such as the failure of the US to ratify the League Charter, the advent of the Great Depression, the eventual rise of the Axis powers, and the collapse of the League itself.

Gerber tells a similar story of consensus on emerging competition norms following World War II in the draft Havana Charter of the International Trade Organization. Here the heavily negotiated compromise provisions were undermined by the failure of the US to ratify the Charter for other reasons and the almost immediate division of the world in the ensuing Cold War between market and planned economies. He continues with a similarly sophisticated telling of the more familiar story of post-war US jurisdictional unilateralism as a partial solution for the next fifty years and the promise (and limitations) of convergence as a strategy in more recent times following the collapse of the Soviet Union. It is fascinating to reflect on what might have emerged decades ago, but for these external factors and the second best solutions that arose in their place.

Throughout *Global Competition* Gerber uses a much wider and more cosmopolitan lens than the often US-centric approach to these issues. He is as interested in the EU and the rest of the world, in addition to the US, in figuring out the possibilities of the current and past approaches and his proposals for what he dubs a “commitment pathway” in lieu of continued sole reliance on soft harmonization and convergence.

He has a unique ability to pull back and make big sweeping connections between competition, trade, and development law and policy and then focus in closely on the impact of a single event or scholar on the progress toward or away from international consensus on competition norms. In places, this ability to pull back and then swoop in reminds me of one of my favorite science documentaries “Powers of Ten.” There, the filmmakers show two picnickers in a park “with the area of each frame one-tenth the size of the one before. Starting from a view of the entire known universe, the camera gradually zooms in until we are viewing the subatomic particles on a man's hand.” <http://www.imdb.com/title/tt0078106/plotsummary>. Like the film, Gerber demonstrates the ability to show both the vast and the miniature in international competition law and have it make sense and reveal new perspectives. This is uniquely Gerber and wonderfully done.

5) LLOYD CONSTANTINE, PRICELESS: THE CASE THAT BROUGHT DOWN THE VISA/MASTERCARD BANK CARTEL (Kaplan 2009).

There is a growing literature in the United States consisting of books about major antitrust cases and issues intended for a more mass market audience. This min-trend probably began with Kurt Eichenwald's *The Informant*, a true crime thriller about the Archer Daniels Midland price fixing case involving lysine. It continued with a slew of books about the Microsoft litigation, the Christie's/Southeby's price fixing case, and other memoirs about particular cases or careers.

The most recent contribution along these lines is Lloyd Constantine's *Priceless* about the Visa-Mastercard antitrust litigation concerning credit and debit cards in the US. This has been an extremely important and long running series of cases in both the US and the EU that have involved both governmental and private litigation. Constantine was the lead lawyer for the plaintiffs in the private treble damage class action that resulted in a settlement on the eve of trial calling for \$3.4 billion in damages and significant changes to the way both Mastercard and Visa dealt with merchants throughout the United States.

Constantine traces in a lively fashion the events leading up to the case that consumed years from conception to settlement. He discusses the legal theories and the structure of the class action that was eventually filed without getting overly technical. He then focuses on six key procedural battles involving the scope of discovery, the intervention of the United States government into the case, the certification of the class action, the admissibility of key evidence, the denial of the defendants' motions for summary judgment along with the simultaneous granting of key portions of the plaintiffs' motion for partial summary judgment, and the denial of the defendants' final pre-trial motions. These uniquely US-style litigation battles set the stage for Constantine's exhausting preparation for trial and the eventual settlement following mediation and intense pressure from the presiding judge.

A US reader may well focus on the nature of a large (virtually unprecedented) class action, the antitrust theories being litigated, the back and forth nature of private antitrust litigation, and the importance of the relief granted in the settlement. An EU reader may find this an even more useful lens to view and reflect upon the key issues of contingent fees, class actions, pre-trial discovery, the use of experts, the specter of a jury trial, attorneys fees, and the other features of the US litigation system as the EU struggles to better define and implement private rights of actions for competition cases.

6) MICHAEL A CARRIER, *INNOVATION FOR THE 21ST CENTURY: HARNESSING THE POWER OF INTELLECTUAL PROPERTY AND ANTITRUST LAW* (Oxford University Press 2009).

Professor Carrier of Rutgers-Camden Law School has written a major new book on how intellectual property and antitrust have both helped and hurt the process of innovation. More importantly he offers sensible solutions how to improve both bodies of law and the way in which they interact.

He begins with an introduction and primer on innovation, intellectual property law, and antitrust law, and how they have interacted in the twentieth century and beyond. He follows these primers with ten chapters that focus on specific issues in copyright, patent, and antitrust law, where in his view the law has hindered innovation. He then proposes solutions to better harness the law in the service of innovation. For copyright, this means loosening legal constraints on dual use technology; limiting the enormous statutory damages that copyright law currently allows; and revising the controversial Digital Millennium Copyright Act. For patent law, he proposes a post-grant opposition procedure; narrowing equitable relief in certain patent cases; expanding the experimental use defense; and limiting the harmful effects of material transfer agreements in scientific research.

Competition lawyers will be most interested in the final three chapters which discuss key issues at the interface of modern antitrust and intellectual property law. They are innovation markets which Carrier supports as a concept to promote competition, particular in the pharmaceutical industry; standard settings organizations which he argues should receive continued lenient treatment under the rule of reason for most legitimate activities; and reverse payments in the pharmaceutical industry which he contends should be subject to a rebuttal presumption of illegality.

Carrier offers both a fascinating analysis of the problems and a thoughtful set of proposals. His proposals would have the cumulative effect of shrinking the sphere of intellectual property law, which has expanded significantly in recent decades, and in a more subtle way adjusting the role of antitrust so that it need not be a second best solution for overly broad intellectual rights. Antitrust law would then continue play its traditional role of promoting competition, but also more directly focus on promoting the broader notion of innovation. This is an important and well-written book about some of the key issues of the day in our field.

7) ABA SECTION OF ANTITRUST LAW, ISSUES IN COMPETITION LAW AND POLICY (2008).

Most of the books published by the Antitrust Section of the American Bar Association are compact analyzes of discrete topics in antitrust law and enforcement aimed at an audience of busy practitioners. *Issues in Competition Law and Policy* is very different in both scope and aim. This is a sprawling work of ninety seven essays filling three volumes and totaling over 2400 pages. Edited by Wayne Dale Collins and a large team of volunteers, this collection is a treasure trove of wonderful chapters on almost any topic in antitrust law and economics that one can imagine.

The collection is divided into sections on jurisprudence, economic foundations, single firm conduct, cooperation among competitors, mergers and acquisitions, distribution, the intellectual property-antitrust interface, and enforcement. Most of the chapters are relatively short and the author's list reads like a who's who of the U.S. antitrust world. There are a handful of chapters with an international or EU focus, but the emphasis is on the cutting edge issues in U.S. antitrust law and economics. The economics chapters are a mixture of non-technical literature reviews and more mathematical explanations and models.

Like Proust's *In Search of Lost Time* and other lengthy masterpieces, one probably cannot sit down and read this collection in one sitting. But dipping into selected chapters, pausing, and returning to different parts of the collection is to be savored, both as an intellectual delight and a starting point for research into many of the leading antitrust issues of the day. The Antitrust Section is to be commended for initiating and completing such an exceptional endeavor.

8) GARY L. REBACK, FREE THE MARKET! WHY ONLY THE GOVERNMENT CAN KEEP THE MARKETPLACE COMPETITIVE (Portfolio Books 2009).

There are only a handful of really good books about antitrust law aimed at a more general audience. This is one of them. Prominent antitrust lawyer Gary Reback has written a one of a kind book. It is equal parts history, memoir, polemic, and policy prescriptions for antitrust law and enforcement, particularly as it applies to the technology sector.

Reback makes his argument through the lens of the many high profile cases that he has been involved in over the years. While much of the book is brutally harsh on the Chicago School and the real world effects of its laissez faire approach, he nonetheless argues for a rule of reason approach for resale price maintenance. He uses the example of the early days of Apple computers and its need to limit discount mail order sales in order to build its own dealer network to convince a skeptical public of the benefits of the early personal computers and to better compete with IBM.

Free the Market is as much about the over-expansion of intellectual property law as it is the undue contraction of antitrust law. There are compelling stories of how patent and copyright law is used and abused to deter, rather than promote, innovation in the computer software and hardware industries. Reback's experiences in Silicon Valley form the core of the book, as does the saga of Microsoft, in which he represented Netscape and other high tech companies urging the FTC, then the Justice Department, and finally the courts to take quicker and more decisive action.

Reback concludes with two compelling stories about mergers. He uses his personal role in both the Thomson/West merger and the Oracle/Peoplesoft merger to argue that past administrations were too lenient in the first transaction and the courts too insensitive in the latter.

In an anecdotal and entertaining way, Reback manages to cover almost the full history of competition law in the United States and the full range of antitrust and intellectual property issues that define modern antitrust. He pulls no punches throughout and concludes:

The nation faces unprecedented economic challenges. To maintain the country's high standard of living in the coming decades, antitrust policy must renew its commitment to competition, the font of economic growth.

Competition engenders innovation, and innovation will keep our country ahead in world markets. On that point there are grounds for optimism. It is increasingly obvious to important people that the Chicago School approach is not working well. The consequences of *laissez faire* are no longer blithely accepted. The time has come to move past Chicago.

This is an excellent and entertaining book most appropriate for our times as the new Administration begins the long process of renewed faith in antitrust and other tools, and not just in the magic of the unfettered market.

9) ABA SECTION OF ANTITRUST LAW, ANTITRUST AND ASSOCIATIONS HANDBOOK (2009)

This handbook is an updated and expanded version of an earlier 1996 practice guide on the same subject. It covers the key areas of counseling, litigation, and compliance for the United States antitrust issues faced by associations of enterprises, their officials, and members. This includes the traditional trade and professional association, but also includes standard setting organizations which have been at the forefront of recent public and private enforcement actions.

The handbook begins with three introductory chapters summarizing the antitrust laws, enforcement regimes, and penalties faced by associations. Not surprisingly, the focus is on Section One of the Sherman Act, the basic modes of *per se*, quick look, and rule of reason

analysis applied to agreements that affect competition, and the criminal, civil, and private remedies available under federal and state antitrust laws.

The core of the book consists of the chapters which focus on the specific types of risks faced by most trade and professional associations. These include chapters on membership criteria and benefits, information collection and dissemination, immunity for lobbying and government-related activities, ethical codes and advertising restrictions, standard setting activities, and other types of competitor collaborations, including joint purchasing, marketing, and research.

The handbook concludes with particularly insightful chapters on handling investigations and litigation and antitrust compliance programs for associations. Also welcome are three practical appendices setting forth sample document retention, compliance, and association meeting guidelines and policies.

The approach is concise and practical. Almost every chapter includes checklists of key issues for counsel to consider. This is a perfect starting place for research and counseling in this critically important area of U.S. competition law.

10) HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky ed. Oxford University Press 2008).

Sometimes the title of a book tells it all. This volume was edited by Robert Pitofsky, the former chair of the Federal Trade Commission and former dean of Georgetown University Law Center. Pitofsky has assembled an all-star array of authors of every possible political, legal, and economic perspective to examine the value, and discuss the excesses, of reorienting United States towards a more exclusive focus on consumer welfare defined in increasingly narrow ways. The contributors to this volume are Richard Schmalense, Irwin Stelzer, F.M. Scherer, Thomas E. Kauper, Daniel L. Rubinfeld, Eleanor M. Fox, John Kirkwood, Robert Lande, Herbert Hovenkamp, Harvey Goldschmid, Steven Salop, Stephen Calkins, Warren S. Grimes, Marina Lao, Jonathan Baker, and Carl Shapiro.

The volume is organized into six sections on conservative economic analysis and its effects; whether efficiency is all that matters; the Chicago school and dominant firm behavior; economic analysis of exclusionary vertical conduct; whether the free rider explanation has been unrealistically expanded; and reinvigorating merger enforcement. The essays are short, pithy, and always of great interest whether the reader agrees with all the points being made. Pitofsky adds his own introduction and observations at the beginning of each section.

Taken as a whole, the book makes a forceful argument that the many positive contributions of the Chicago school have been overshadowed by an increasingly conservative laissez faire view of

antitrust in the federal agencies and the courts. The results of this change have been an emphasis of theory over empirical evidence and a deliberate choice among conflicting economic theories and evidence, rather than a consensus about that theory and evidence. For me this was the best and most provocative antitrust book of 2008.

11) E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST LAW AND ITS ECONOMIC IMPLICATIONS (LexisNexis 2009).

The fifth edition of this well-regarded one volume treatise has just appeared. The authors have updated their work to include developments from the past six years since the last edition. The new material focuses on developments in United States antitrust law dealing with resale price maintenance, price discrimination, monopolization, monopsony, and exemptions due to the presence of pervasive regulation, closely tracking the recently reinvigorated antitrust docket of the United States Supreme Court. As before, this handbook contains chapters on antitrust policy, antitrust economics, antitrust coverage, horizontal restraints, vertical restraints, monopolization, mergers, and price discrimination. The book continues to satisfy and fulfill its goals over the past twenty one years of highlighting where antitrust is relatively clear, where it is in flux, and the trends and competing points of view.