

MARKETING LAWS: CASE STUDIES AS TEACHING ENHANCEMENTS

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I. INTRODUCTION

Laws affect every aspect of daily life, marketing included. Marketing directly affects consumers daily, with or without their knowledge. In some ways marketing can greatly aid in consumer lifestyles, but in many others, marketing can harm society. Many marketing laws have enacted to protect consumers from unfair practices, to guard society from unbridled business behavior, and to regulate industry from anti-competition. In the United States, these laws regulate issues including “competition, product safety and liability, fair trade and credit practices, and packaging and labeling.”¹

This paper will provide an overview of the major laws affecting marketing practices and will provide highlights of both important and recent cases that can be used to illustrate the application of these principles to students. Students of business and their teachers will find this a concise overview of a technical and difficult topic. Cases are provided to illustrate both historical and current applications of each of the major acts.

II. SHERMAN ANTI-TRUST ACT (1890)

Marketing legislation in the United States began with the passage of the Sherman Anti-Trust Act in 1890. A variety of events in the nineteenth century led to the passage of antitrust legislation. In fact, politicians in the 1888 political elections used antitrust as a platform. Two events had a positive effect on the passage of this legislation, including: the advances in technology which required more capital in manufacturing industries and the reduced transportation costs as “railroads increased from 9,000 miles of road in 1850 to 167,000 miles in 1890.”²

The Federal Trade Commission and the U.S. Justice Department enforce the antitrust laws. These organizations try to ensure that a company does not try achieving a monopoly by unlawful means or tries holding on to a monopoly by unlawful means.³

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¹ PHILIP KOTLER, *MARKETING MANAGEMENT* 151 (millennium ed. 2000).

² WILLIAM A. McEACHERN, *MICROECONOMICS: A COMMENTARY EDITION* 363 (4th ed. 1997).

³ Mary Mosquera, *Sherman Act Has Roots in Industrial Age*, TECH WEB 1 (visited June 20, 2000) *available*

Before the nineteenth century, there was no “big business” in America. Railroads brought the first “big business” with mass transportation, and telegraphs soon followed bringing mass communication. Because there were not already corporations and such, people did not understand economics and how to operate business. Many companies participated in pools, trusts, and holding companies that would contest competition by controlling price. Standard Oil Trust was one of the companies that participated in these methods of controlling competition. It signed a trust on January 2, 1882, and elected a board of Trustees. These nine Trustees eventually became the board for all constituent companies, thus creating a monopoly.⁴ The Sherman Act was then passed in 1890 to prohibit Standard Oil and other companies from stifling competition.

The Sherman Act relates to marketing because it exists to protect the consumer and businesses. The consumer should benefit from lower prices and more competition. This allows better products to be created in order to compete for the consumers’ business.⁵ The business benefits from antitrust law because all businesses have a chance to compete; one business cannot prevail as a monopolist.

Recent cases involving anti-trust litigation are the Microsoft antitrust case and the BRG case of 1990. Soon after the decision concerning Microsoft, the “Feds [went] from computers to credit.”⁶ In Manhattan, New York, a trial began in October 1998 and alleged antitrust violations by Visa USA and MasterCard. These two companies control 75% of the credit card industry in the United States and were accused of limiting competition.⁷

A. UNITED STATES V. MICROSOFT (2000)

After two years of legal proceedings, Microsoft finally met its fate on Wednesday, June 7, 2000. U.S. District Judge Thomas Penfield ruled to split Microsoft, the largest software producer, into two entities. One would market the Windows operating systems while the other would handle programs and software.⁸ Microsoft appealed this ruling and recently entered into a settlement with the government that does not require Microsoft to split into two entities.

In the case, the government contended that , Microsoft violated the Sherman Anti-Trust Act by using its monopoly of the operating system market to extend its power to the browser market and stifle competition for Netscape Navigator. Microsoft was charged with violating Sections 1 and 2 of the Act, by “exclusionary agreements with computer manufacturers, ISPs, and Internet content providers” [and] the software giant’s supposed strong-arm behavior,” respectively.⁹

After an investigation began in July 1990, the Federal Trade Commission sought an injunction

at wysiwyg://30/http://www.techweb.com/wire/features/1998/microsoftTrial/antitrust.html.

⁴Keith T. Poole, *The Sherman Anti-Trust Act of 1890*, 1-2 available at <http://k7moa.gsia.cmu.edu/antitrust.htm> (visited June 11, 2000).

⁵Mosquera, *supra* note 3, at 1.

⁶*Feds go from computers to credit*, BEAUMONT ENTERPRISE, June 12, 2000, at 1A.

⁷*Id.*

⁸Dwight Silverman & Greg Hassell, *Judge orders Microsoft divided*, HOUS. CHRONICLE, June 8, 2000, at 1A.

⁹Mosquera, *supra* note 3, at 1.

against Microsoft concerning its business practices. Five years later, Microsoft signed a consent decree prohibiting the company from using its operating system to enter other markets. In October 1997, the Department of Justice (DOJ) alleged that Microsoft had violated the decree by using the Windows operating system to market the Internet Explorer web browser. Supposedly Microsoft would only allow computer manufacturers to install the operating system as a set with Internet Explorer. The DOJ filed a petition to hold Microsoft in contempt, while Microsoft contended that Internet Explorer and Windows were, in fact, one product, not separate entities subject to the decree.¹⁰

The government also claimed that Microsoft had a monopoly over the desktop operating system market. In order for the government to “win” the case, it had to prove that (1) There [was] a distinct relevant market for the desktop operating system, (2) Microsoft had monopoly power there, (3) Microsoft’s exclusionary conduct had a dangerous probability of keeping rivals out of the operating system market, (4) The conduct [was] not justified by efficiency considerations, and (5) The conduct had caused substantial harm to the consumer.¹¹

The government claimed that Microsoft had entirely too much power for one entity and was thus limiting competition. The DOJ claimed that no other operating system could compete in the market because of the market share that Microsoft held. On June 7, 2000, the courts agreed with the Department of Justice by finding that Microsoft did, in fact, have a monopoly over competition and the company was split into two separate entities. Microsoft appealed the ruling. While the ruling was upheld, the remedy (requiring that Microsoft be split into two entities) was overturned.¹²

B. PALMER V. BRG OF GEORGIA, INC. (1990)

Harcourt Brace Jovanovich Legal and Professional Publications (HBJ) provide lectures and seminars to ready law students to take the bar examination. In 1976, HBJ was the largest law review provider, and the company began to compete directly with BRG of Georgia, Inc. Because HBJ was so large, BRG was suffering from the competition. In 1980, the two companies agreed not to compete directly with one another, so HBJ would not provide bar review services in Georgia as long as BRG did not provide services outside of Georgia. One other condition existed, however. For every student that BRG enrolled in the law course, the company had to pay HBJ \$100. The two companies agreed to this, and neither competed directly with the other. Shortly after the agreement; however, BRG raised the price of its course from \$150 to \$400. Law school graduates enrolled in the course became angry with the price increase, and Jay Palmer sued BRG and HBJ alleging that the two companies were violating Section 1 of the Sherman Act. This arrangement is a form of horizontal restraint of trade.¹³

¹⁰ *Microsoft and the Department of Justice* 1-2, available at <http://www-cs-education.stanford.edu/class/cs201/Projects/microsoft-vs-doj/microdoj> (visited June 25, 2000).

¹¹ Robert E. Hall & Chris E. Hall, *Neutral Analysis of the Microsoft Anti-Trust Trial*, THE DISMAL SCIENTIST 1-2 (Dec. 18, 1998) at wysiwyg://96/http://www.dismal.com/thoughts/usvms_suma.stm.

¹² See United States Dept. of Justice, Antitrust Div., Information on the United States v. Microsoft Settlement, Antitrust Cases, at <http://www.usdoj.gov/atr/cases/ms-settle.htm> (last visited Feb. 14, 2002).

¹³ HENRY R. CHEESEMAN, BUSINESS LAW: THE LEGAL, ETHICAL, AND INTERNATIONAL ENVIRONMENT 1071-72 (1992).

The District Court found the defendants not guilty of dividing the market, and after appeal by the prosecutors, the appellate court also ruled in favor of the defendants. Jay Palmer appealed the case to the Supreme Court. The Supreme Court reversed the decision of the earlier courts, and found that BRG and HBJ had, in fact, divided the market by their agreement. The case was remanded for further proceedings.¹⁴

III. CLAYTON ACT (1914)

When the Sherman Act was passed, its language was very vague and terms such as “restraint of trade, combination, and monopoly” were not defined. This brought problems with the court’s interpretation of the Act.¹⁵ In 1914, the Clayton Act was passed to address certain issues not prohibited by the Sherman Anti-Trust Act.

The Clayton Act prohibited price discrimination, tying contracts, exclusive dealing and interlocking directorates. It also declared that mergers achieved through the acquisition of competitor’s stock are not considered “above board.” Price discrimination occurs when different customers are charged different prices for the same item. Tying contracts require a purchaser to buy another good as part of the sale, while exclusive dealing occurs when a buyer must agree not to buy from another manufacturer. Finally, interlocking directorates occur when the same individual serves on the board of directors for more than one company.¹⁶

The Clayton Act also allows for civil remedies under Section 4 for those individuals and companies that have been harmed by antitrust violations. The victim may recover up to three times the amount of the injury (treble damages). The injured may also recover the cost of the suit and attorney fees. These remedies are present to dissuade antitrust violations and encourage ethical behavior.¹⁷

The Clayton Act relates to marketing for the same reasons as the Sherman Act. It is designed to protect the consumer and business, but it also hopes to discourage unethical business behavior by rewarding victims of the situation with triple damages. Antitrust legislation is designed to benefit everyone.

A. KANSAS V. UTILICORP UNITED, INC. (1990)

In 1990, Utilicorp bought natural gas from a pipeline company to use and sell to its customers. This natural gas was inflated over the cost that it should have been, however. After purchasing the gas, Utilicorp banded together with several other gas and utility purchasers. The conglomerate sued the pipeline company and five other gas production companies in Kansas for

¹⁴*Id.*

¹⁵Poole, *supra* note 4, at 2.

¹⁶MCEACHERN, *supra* note 2, at 364.

¹⁷BRUCE D. FISHER & MICHAEL J. PHILLIPS, *THE LEGAL, ETHICAL, AND REGULATORY ENVIRONMENT OF BUSINESS* 658 (5th ed. 1995).

conspiring to inflate the price of gas in violation of the antitrust laws. The companies sued for treble damages (three times the amount of the injury) under Section 4 of the Clayton Act. The remedies were sought for the overcharged amount and decrease in sales from customers because of the overcharge.¹⁸

The District Court ruled that the utilities, as direct customers, had been victims of antitrust violations, but the consumers had not. The consumer were indirect customers who paid 100% of the alleged overcharge. This ruling was appealed, however, and the Court of Appeals agreed with the District Court. The case was once again appealed, this time to the Supreme Court. The Highest Tribunal affirmed the decision of the lower courts, stating that consumers were not allowed to sue the pipeline and other natural gas companies for antitrust violations because they were indirect purchasers.¹⁹

B. CARGILL, INC. V. MONFORT OF COLORADO, INC. (1986)

In 1983, Excel Corporation was the second largest beef packer in the country. Cargill, Inc. owned this company that operated five plants that both slaughtered and fabricated beef. On June 17, 1983, Excel Corporation signed an agreement with Spencer Beef, the third largest beef producer in the country. The two companies would merge and increase market share to a figure almost equal to the number one beef producer.

Because the beef industry was so competitive, Monfort of Colorado, Inc., the fifth largest beef producer in the country, alleged that Cargill was violating Section 16 of the Clayton Act by seeking to merge with Spencer. This merger would inhibit competition, especially for those smaller beef producers who did not have as much market share or resources. The District Court agreed with Monfort and declared that Cargill, Inc. was violating the antitrust laws.

After Cargill, Inc. appealed the verdict, the Appellate Court also agreed with Monfort. Cargill appealed once again, this time to the Supreme Court. The Supreme Court ruled that a plaintiff in an antitrust case must show a threat of antitrust injury. Loss or damages as a result of competition do not constitute antitrust injury, but simply a loss because of competition. The Supreme Court reversed the decision of the Appellate Court, stating that Monfort had no injury from antitrust violations. The case was remanded for future proceedings.²⁰

C. FEDERAL TRADE COMMISSION V. PROCTOR & GAMBLE CO. (1967)

A good example of application of the Clayton Act is the 1967 case of the *Federal Trade Commission v. Proctor & Gamble*. Even in the late sixties, Proctor & Gamble (P&G) was a leader in the household cleaning industry, producing detergents, soaps, and cleansers. At this time, Clorox Bleach was the leader of liquid bleach producers, and P&G bought Clorox and its share of

¹⁸*Id.* at 660.

¹⁹*Id.* at 660-63.

²⁰CHEESEMAN, *supra* note 13, at 1088-89.

the bleach market. After this merger, however, the Federal Trade Commission alleged that P&G violated Section 7 of the Clayton Act. This section states that it is unlawful for a company to acquire stock in another company where this acquisition may lead to a monopoly or lessen competition, otherwise known as the unfair advantage theory.

The Federal Trade Commission ordered P&G to sell its shares of Clorox Chemical Co. stock because of the violation of the Clayton Act. Proctor & Gamble appealed this decision and the Court of Appeals reversed the decision. The FTC appealed the reversal to the Supreme Court, which found in favor of the FTC. The Supreme Court thought that much evidence supported the FTC's claim, and that P&G would have an unfair advantage if allowed to merge with Clorox. Clorox at that time had 48.8% of the bleach market share, with its closest competitor at only 15.7%. It had also gained market share steadily for the previous five years. If allowed to merge with P&G, who accounted for 80% of its market share at the time, the company would certainly have an unfair advantage. The Supreme Court thus reversed the Court of Appeals decision and remanded the FTC's decision for P&G to divest of Clorox.²¹

IV. FEDERAL TRADE COMMISSION ACT (1914)

As a supplement to the Sherman Act, the Federal Commission Act was passed in 1914 to strengthen antitrust enforcement. The act "created the authority most active in controlling deceptive marketing practices" by establishing the Federal Trade Commission.²²

The Federal Trade Commission (FTC) was formed in 1914 to help enforce the antitrust laws and police unfair business practices. Five full-time commissioners appointed by the president serve on the FTC for a seven-year term. When antitrust legislation appears to have been violated, the FTC may charge the firm or group with breaking the law. The charged has the opportunity to sign a consent agreement to cease the wrongdoing or protest the charge. If protesting occurs, both sides in the court present evidence, and a judge decides the verdict.²³

V. ROBINSON-PATMAN ACT (1936)

While the Clayton Act served to protect against anti-competition in big business, protection was still needed for small, "mom and pop" type businesses.²⁴ The Robinson-Patman Act was added to the Clayton Act when grocers and other small wholesalers, along with their retail customers, were threatened by the rapidly growing chain store industry.²⁵ These small stores

²¹*Id.* at 1093-94.

²²DOROTHY COHEN, LEGAL ISSUES IN MARKETING DECISION MAKING 11 (1995).

²³MCEACHERN, *supra* note 2, at 363.

²⁴*The Robinson-Patman Act*, EXECUTIVE LEGAL SUMMARY 5 available at <http://www.businesslaws.com/el18.html> (last modified Sept. 97) [hereinafter *Robinson-Patman*].

²⁵Terry Calvini, *Price Discrimination: The Robinson-Patman Act* 1-4 http://web72330.ntx.net/articles/price_discrimination.html (visited June 23, 2000).

realized that they could not purchase large quantities, as did their larger counterparts, who could in turn sell their product at a lower price. The Robinson-Patman Act, like the Clayton Act, focuses on price discrimination, but also goes a step further prohibiting discrimination in the granting of promotional allowances and services. A seller may grant allowances and services only if they are made available to all competing purchasers on “proportionately equal terms.”²⁶

To establish a price discrimination claim under the Act, there are several basic jurisdictional provisions that are required. First of all, there must be one seller who offers a discriminatory price to at least two competing purchasers who make two consummate sales. To apply the Act, at least one of the purchases must involve interstate commerce. The sales must be of goods of tangible nature and of like grade and quantity. These sales transactions must also be within a relevant time frame of each other, considering that product obsolescence and inflation occur. Finally, there must be injury to competition in some way.²⁷

There are two specific levels of competition that may be injured. The first, referred to as Primary-line injury, harms a competing seller. Injury at this level is established when a plaintiff can provide evidence of the defendant pricing below appropriate cost and then demonstrating that the defendant had a reasonable prospect of recouping its losses.²⁸ Primary-line discrimination is basically the same as predatory pricing under Section 2 (a) of the Sherman Act.²⁹ The second level of injury to competition refers to competition of the purchaser who received the discriminatory price and companies that compete directly with that firm. Secondary-line injury does not include the seller of the differing price at all. A plaintiff in a Robinson-Patman case must have actual evidence of primary-line or secondary-line injuries to receive any compensation in the form of damages.

In response to a plaintiff’s claim, a defendant can establish one of five major defenses under the Robinson-Patman Act. The Cost-Justification Defense, found in Section 2 (a) of the Act, allows the seller to offer a favorable price when the seller can prove that it is saving costs by selling or delivering to the favored purchaser. This defense requires tedious documentation and does not hold up well in a court of law. The second defense, the Changing-Conditions Defense, relies on changing market conditions. Such conditions include: “actual or imminent deterioration of perishable goods, obsolescence, distress sales, or sales in good faith”.³⁰ Meeting-Competition Defense is a third defense strategy. If a defendant can show that a lower price was offered in good faith to meet a competitor’s low price, the defendant can crush the price discrimination claim. A fourth and fifth defense are not found directly in the Act, but have been inferred by the courts. The Availability Defense permits a seller to offer a normal price and a reduced price just as long as the reduced price is available to all purchasers equally. Similarly to the cost-justification strategy, is the Functional Discounts Defense. In this defense a seller grants purchasers discounts when they perform additional supportive functions of marketing, such as storage and transportation. The amount of the discount must reflect the cost of functions performed for the courts to accept this defense.

²⁶*Id.*

²⁷*Robinson Patman, supra* note 24, at 3-4.

²⁸*Id.*

²⁹*Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

³⁰*Robinson-Patman, supra* note 24, at 5.

Several companies have become subject to claims under the Robinson-Patman Act for price discrimination that threatens competition. Two such cases are *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* and *Falls City Industries, Inc. v. Vanco Beverage, Inc.*

A. BROOKE GROUP LTD. V. BROWN & WILLIAMSON TOBACCO CORP. (1993)

Brooke Group and Brown & Williamson are two of the six major cigarette-manufacturing companies in the U.S. In 1984, Brown and Williamson entered the market with a generic brand cigarette that undercut Liggett's (part of Brooke Group) prices. Liggett filed a primary-line injury claim under Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, stating that Brown & Williamson was selling their generic brand at a loss, which had the possibility of injuring competition. Liggett accused Brown of using rebates to set below cost prices in order to coerce Liggett to raise its generic brand's prices. This, Liggett claimed, "restrained the economy segment growth and preserved Brown and Williamson's supracompetitive profits of branded cigarettes."³¹

A district court held that Brown & Williamson deserved judgment as a matter of law. However, the jury found an absence of injury to competition because although the jury could see that Brown & Williamson's generic brand prices were below costs for 18 months, and it may have had anti-competitive intentions, it did not prove that Brown had reasonable prospect of recouping its losses.³²

B. FALLS CITY INDUSTRIES, INC. V. VANCO BEVERAGE, INC (1983)

Falls City Industries, a brewer in Nebraska, sells beer to thirteen states, including Indiana and Kentucky. One customer, Vanco Beverage, Inc., is a beer wholesaler located in Vanderbough County, Indiana. Another customer is located in Henderson County in Kentucky. The two counties are separated by a state-line, but are directly across from one another. In 1983, beer suppliers in Indiana raised the price of beer, so Falls City Industries followed suit, both in Indiana and Kentucky. Although prices were raised in Kentucky, the degree was not as great as in Indiana. Therefore, Vanco Beverage, Inc. alleged that Falls City had violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. This clause prohibits price discrimination, or charging different prices to different customers.³³

The District Court and Court of Appeals favored Vanco in the case, finding Falls City guilty of price discrimination. Falls City Industries appealed to the Supreme Court, stating that the company was merely meeting the competition when determining the prices for the beer wholesalers. The Supreme Court held that this "meeting the competition defense may be asserted by a seller of goods to justify raising prices to some customers less than it raises the prices

³¹Brooke Group Ltd. v. Brown & Williamson Tobacco Corp. 509 U.S. 209 (1993).

³²*Id.*

³³CHEESEMAN, *supra* note 13, at 1100.

to other customers.”³⁴ The decision by the Appellate Court was vacated and the decision was remanded for further proceedings.

VI. THE LANHAM ACT (1946)

The Lanham Act descended from earlier trademark laws. This “dynamic U.S. trademark law [which celebrated] its 50th anniversary [in 1999], has human traits: the ability to adapt and the power to influence. It has adjusted to sweeping changes in global commerce and has profoundly affected trademark owners, practitioners, and the general public.”³⁵ The first federal trademark law was enacted following reconstruction in 1870. Amended in 1878, the law was declared unconstitutional by the Supreme Court in the trademark cases on the grounds that it was improperly based on the copyright and patent clause of the U.S. Constitution. Later that same year the International Trademark Association (INTA) was founded, and the first order of business was to expedite the Trademark Act of 1881. This act has undergone many changes since its origination to stay abreast with the demands of an ever changing economy.

Today’s economy is indicative of new growth in technology and communications, just as technology and communications growth was experienced during the origination of these laws in the late 1800s. Internet protection of ideas and information has sparked a new field of interest in Congress lately. Congressman Fritz Lanham of Texas shared INTA’s vision, and on January 22, 1945, he introduced the latest in a series of bills encouraging registration and protection of marks from unfair competition. President Truman “defined a trademark as ‘any word, name, symbol, device or any combination thereof adopted by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others.’”³⁶ This would begin to shape the registered trademark process into a federally protected and enforced right for the protection of business, consumers, and society in general. It took 18 months of deliberation to pass the bill through Congress. The act was signed by President Harry S. Truman on July 5, 1946.

In the 1950s, the trademark office was inundated with trademark applications brought on by the blossoming suburbs in America. Television as a staple of American life greatly began to influence public awareness of countless new products available on the market. In 1975, Congress amended the Lanham Act to allow for the attorney’s fees in “exceptional cases because of their belief that the modern business world made trademark infringement and unfair competition especially attractive to unprincipled adversaries.”³⁷

By 1984, trademark counterfeiting increased the consumer desire for brand name products. Authenticity was a statement of one’s character and social status because knock-off brands or counterfeit goods were available through sophisticated and sometimes multi-national networks. Congress thus passed the Trademark Counterfeiting Act of 1984 to protect not only businesses

³⁴*Id.* at 1101.

³⁵INTA Electronic Communications Committee, *The Lanham Act: Alive and Well After 50 Years*, INT’L TRADEMARK ASS’N 1-6 at <http://www.inta.org/lanham.htm> (last modified May 14, 1999).

³⁶*Id.*

³⁷*Id.*

from unfair competition, but also to protect unsuspecting consumers from purchasing these goods unknowingly. This included civil treble damage awards and attorneys' fees.³⁸

In 1988, the Trademark Law Revision Act (TLRA) established a Trademark Review Commission. Unlike most countries at this time, the United States required a trademark to be used in interstate commerce prior to applying for registration. This resulted in mock exchanges occurring to satisfy this requirement. The TLRA now offered two options for applying or registering trade names and trademarks: the first, the prior interstate use; the second, the basis of bona fide intention to use the mark in commerce in the future. For example, the dot.com names are currently being bought and virtually auctioned for profit. Remedies are now being taken to fine individuals for false intentions of reselling domain names strictly for a profit rather than for use or trade purposes. The duration for renewal periods was reduced from twenty years down to ten years. Some of the first companies to register their trademarks under the Lanham Act include Goodyear, Pfizer and Tide.³⁹

A. BRAD PITT V. KHALID ALZOROONI AND NIDAL ABU-ROBB (1999)

The Brad Pitt case is the first suit filed under new legislation amending the Lanham Act. Lawsuits are beginning under this new law prohibiting the registration of others' marks and names for profit. There is a limit to the unique and distinct domain names available in the dot-com (.com) industry. As technology and communications continue to expand into the new millennium, the domain name availability is diminishing. This leaves an overlap or conflict as far as identification of desired domain sites is concerned.⁴⁰

Bill Clinton signed the Anticybersquatting Consumer Protection Act on November 29, 1999, as part of an Appropriations Bill. Three days later, actor Brad Pitt filed a suit against two domain holders for trying to sell the domain names to his agent for \$50,000. A new section was added to the Trademark Act of 1946 because of this lawsuit. In the past, trademark law protected marks connected with the distribution of goods and services, but domain names were purchased and allowed to sit idle for purposes of profiteering at some time in the future. This law should make it easier for trademark owners to get ownership of the trade names that correspond with their trademark. There has been speculation that the Anticybersquatting Bill gives unfair advantage to trademark holders in the market of advertising media.⁴¹

B. WARNER LAMBERT, INC. V. BREATHASURE, INC. (2000)

Warner Lambert, the maker of Certs, Dentyne gum, and Listerine mouthwash, "sued the makers of the product BreathASURE under section 43(a) of the Lanham Act based upon... belief that

³⁸*Id.*

³⁹*Id.*

⁴⁰Ritchenya A. Shepherd, *Cyberpirates Now May Have to Walk the Plank*, NAT'L L.J. 1-2. (Dec. 16, 1999) available at <http://www.law.com>.

⁴¹*Id.*

the trade names ‘BreathAsure’ and ‘BreathAsure-D’ constituted a false and misleading claim that gave BreathAsure an unfair sales advantage” in the market.⁴² BreathAsure’s product claim has no scientific evidence proving that the stomach is the source of bad breath, which was the basis of all its advertising campaigns.

Prior to this case, the Better Business Bureau conducted an investigation and concluded that BreathAsure’s advertising claims were false. The U.S. Court of Appeals held that a plaintiff seeking damages must establish customer reliance, but need not quantify loss of sales under the Lanham Act. BreathAsure’s advertising theme suggested that the capsules worked where the source of bad breath began. This made it seem as though its products were superior to products that only covered up problem breath such as gum, mints, and mouthwash. BreathAsure was advised against using the advertising that presented that the other products were ineffective.⁴³

VII. CELLER-KEFAUVER ACT (1950)

Section 7 of the Clayton Act is amended by the Celler-Kefauver Act of 1950. The Act considered all types of mergers to be subject to scrutiny focusing on anticompetitive mergers and acquisitions. Mergers exist at different levels: horizontal (sellers in the same market), vertical (supplier or distribution center merger) and conglomerate (unrelated market areas). The Clayton Act addressed the purchase of stock, but not the purchase of assets; the intent of the Celler-Kefauver Act is to close this loophole.

National regulation of monopolies began in the late 1800s subsequent to the effortless actions by individual states to monitor and control monopolistic conditions manifesting within the railroad industry. States were unable to enforce or hold companies accountable without a national support system. Federal regulation of businesses officially began in 1887. “Some of the most important acts were adopted during the presidency of Woodrow Wilson, who called for ‘regulated competition,’ not ‘regulated monopoly.’”⁴⁴ In 1914 along with the enactment of the Clayton Anti-Trust Act, “the Federal Trade Commission (FTC) was created to prevent the unlawful suppression of competition.”⁴⁵ Strengthening the power of the FTC, the Celler-Kefauver Act of 1950 was created “to prevent corporate merges that stifle competition and promote monopolies.”⁴⁶

⁴²Shannon P. Duffy, *Smelly Claim Forces Name Change*, LEGAL INTELLIGENCER 1-3 (Feb. 9, 2000).

⁴³Judges McKee, Rendell, & Garth, *Warner Lambert, Inc. v. BreathAsure, Inc.* 1-7 (Feb. 8, 2000) available at <http://www.law.com>

⁴⁴*History of Antitrust Regulation*, GOV? T REG. OF MONOPOLIES 1-2 at http://www.cs-education.stanford.edu/classes/cs201/projects/corporate-monopolies/government_history.html .(visited June 24, 2000)

⁴⁵*Id.*

⁴⁶*Id.*

A. BOOZIER V. McDONALD (1942)

The specific focus of the Boozier concerns trademarks, trade names and unfair competition. “A corporation or association cannot lawfully adopt or use either name of an existing corporation or association or partnership, or a name so similar that its use is calculated to deceive the public and result in confusion or unfair and fraudulent competition.”⁴⁷ The action taken by the plaintiffs in the case, James A McDonald and others, against Nelson N. Boozier was to enjoin the defendant from operating a “colored Masonic Lodge” under a similar name. An injunction was obtained to restrain the operations of the second masonic lodge from operating under the similar complete name known as “The Most Worshipful King Solomon Grand Lodge, A.F. & A.M., Queen Esther Grand Chapter Order of the Eastern Star and Daughters of the Sphinx.”⁴⁸

Boozier and his constituents were unlawfully operating under the similar lodge name, and were using its constitution, by-laws, ritualistic work, and decrees. The trial court entered a judgment restraining further use of such name and for damages in the amount of \$10.00. The use of a name so similar to an existing corporation or association which is calculated to deceive the public and result in confusion or unfair and fraudulent competition is unlawful. This case began as an agreement by the two lodges for the consolidation of both, but the lodge never authorized the agreement.⁴⁹

The case was appealed on terms that the party continued using the name even after the original ruling. The lodge added the added prefix “United” to the original “Most Worshipful King Solomon Grand Lodge, A.F. & A.M., Queen Esther Grand Chapter Order of the Eastern Star and Daughters of the Sphinx.”⁵⁰ This was used to camouflage the name, and business was uninterrupted for Mr. Boozier’s lodge.⁵¹ The second injunction upheld the use of the name as a cloak fraudulently operating upon and directly injuring the lodge and its reputation, business, lodge work and finances.⁵² The intent to market the lodge as an extension of the first masonic lodge was to gain recognition at the expense of others, thus defrauding the public and abusing the efforts of Mr. McDonald and others.

B. PFIZER, INC. V. WARNER-LAMBERT CO. AND AMERICAN HOME PRODUCTS CORP. (1999)

The Pfizer, Inc. case was a multi-billion dollar tug-o-war between the drugmaker Pfizer (maker of Viagra) and rival American Home Products concerning what began as a \$71 billion friendly merger with pharmaceutical maker Warner-Lambert Co. Pfizer’s motivation behind its \$75 billion hostile takeover offerings was to control the number one selling cholesterol-lowering drug, Lipitor, made by Warner-Lambert.⁵³

⁴⁷Boozier v. McDonald, 177 S.W.2d 807, 808 (Tex. Civ. App. - Galveston 1942).

⁴⁸*Id.* at 808.

⁴⁹*Id.* at 808-09.

⁵⁰Boozier v. McDonald, 177 S.W.2d 809, 810 (Tex. Civ. App. - Galveston 1943).

⁵¹*Id.*

⁵²*Id.*

⁵³Shareholder Suits, *Pfizer details arguments that Warner-Lambert merger with AHP cheats shareholders*, DEL.

American Home Products, maker of Fen-Phen diet drugs, and Warner-Lambert announced the intention to merge, which would form the largest drugmaker in the world. Pfizer came in with a higher counteroffer and filed suit attacking the secret merger with American Home Products. Warner-Lambert filed a counter claim against Pfizer in an effort to keep the rights to the drug Lipitor, which had sales of \$4 billion in 1999. Warner-Lambert argued that their deal with American Home Products simply reflected a merger of the two companies rather than an acquisition of either one which would result in a merger of equals.⁵⁴

Pfizer finally bought out Warner-Lambert at \$90 billion in stock to create the world's second largest drug firm. American Home Products accepted a \$1.8 billion breakup fee, the largest breakup fee in history, in order to cease its contract with Warner-Lambert. American Home Products decided against filing suit in order to combat the buyout.⁵⁵

VIII. MAGNUSON-MOSS WARRANTY ACT (1975)

The Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (MMWA) of 1975 sets forth rules under which consumer product warranties should be governed. This Act also attempts to make product warranties clearly worded and easily understood.

The MMWA addresses three areas of warranty concerns. Most importantly, it establishes minimum standards provided to protect consumers. This Act also ensures that detailed information is provided concerning consumers' warranty rights and procedures. Finally, the Act creates "judicial, administrative, and informal remedies for warranty enforcement."⁵⁶ The provisions of the MMWA are designed solely for use with consumer products. A "consumer product" is defined as any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached or installed in any real property without regard to whether it is so attached or installed).⁵⁷ Under these provisions, every consumer product is not required to have a warranty, but any written warranty that is provided for a product costing \$10 or more must be expressed as either full or limited. A full warranty requires an item to be repaired in a reasonable amount of time, and at no charge when a defect occurs or where an item does not operate in accordance with the warranty.⁵⁸ A manufacturer that issues a limited warranty instead is less restricted to what must be covered and ultimately less responsible for post-production problems.⁵⁹ According to the Magnuson-Moss Warranty Act any manufacturer who fails to meet the terms of either warranty is subject to

L. WKLY. 1-2 (Nov. 24, 1999) available at <http://www.law.com>.

⁵⁴Warner-Lambert's Counterpunch: Pfizer Broke Lipitor Pact by Making Merger Offer,

DEL. L. WKLY 1-2 (Dec. 7, 1999) available at <http://www.law.com>

⁵⁵Noelle Knox, *Pfizer Buys Warner-Lambert*, ABC NEWS, available at <http://www.abcnews.go.com/sections/business/DailyNews/pfizer000207.html> (visited July 8, 2000).

⁵⁶Lewis Popper, *The New Federal Warranty Law: A Guide to Compliance*, 32 BUS. LAW. 399-400 (1997).

⁵⁷*Id.* at 401.

⁵⁸WEST'S ENCYCLOPEDIA OF AMERICAN LAW 105-106 (1998).

⁵⁹*Id.*

prosecution, being liable for the cost of the product as well as all litigation expenses, including attorneys' fees.⁶⁰

A. WILBUR V. TOYOTA MOTOR SALES (1996)

In the case *Wilbur v. Toyota Motor Sales*, Plaintiff Nicolyn S. Wilbur brought suit against Toyota Motor Sales, U.S.A., Inc. for allegedly violating the Magnuson-Moss Warranty Act and the Vermont Consumer Fraud Act. Ms. Wilbur purchased a Toyota Camry from the defendant with the understanding that the vehicle had been used as a dealer demo, had approximately 5,800 miles on the odometer, and had been involved in a rear-end collision prior to her purchase.⁶¹ According to the Camry's New Vehicle Limited Warranty the warranty "went into effect 'on the date the vehicle is first delivered or put into use (in-service date),' " which in Ms Wilbur's case was the day she bought the car.⁶² At this time, the dealer included a provision in the warranty that excluded "repairs and adjustments required as a result of...accident."⁶³

While Ms. Wilbur was vacationing in California, she became aware that "the ABS system did not work, the trunk had a major leak, and that the rear of the car made a creaking noise."⁶⁴ She attempted to have the repairs done at a dealer in California, who refused to do the work on the basis that the damage was a result of an accident. After obtaining an estimate of \$9,500 for repairs and submitting it to her dealer in Vermont, the dealer agreed to do the work if Ms. Wilbur would split the cost of transporting the car back to Vermont. Ms. Wilbur refused and filed suit against Toyota and the dealer. The United States District Court for the District of Vermont ruled in favor of Toyota, holding that the damage was incurred in an accident, which is excluded from warranty coverage.⁶⁵

The United States Court of Appeals for the Second Circuit reversed the judgment in favor of Toyota. The Court conceded that the damage did occur before purchase by Ms. Wilbur and that since her warranty began on the day she purchased the car, the dealer was responsible for the repairs on the basis of their own definition of "in-service" in the New Vehicle Limited Warranty statement.⁶⁶

B. RICHARD G. AIRD V. FORD MOTOR CO. (1996)

The case *Richard G. Aird v. Ford Motor Co.* of 1996 tests the legal boundaries of the Magnuson-Moss Warranty Act. The original suit was filed in 1986 on behalf of Ford owners who

⁶⁰*Id.*

⁶¹*Wilbur v. Toyota Motor Sales., Inc.* 1-4 (2d Cir. 1996), available at <http://www4.law.cornell.edu/cgi-bin/ht...law.edu/2ndcircuit/june96/95-7829.html> (visited July 5, 2000).

⁶²*Id.*

⁶³*Id.*

⁶⁴*Id.*

⁶⁵*Id.*

⁶⁶*Id.*

alleged that their automatic transmissions could slip from park into reverse.⁶⁷ The case alleged this was a breach of warranty based on the MMWA.⁶⁸ A federal district court dismissed the plaintiffs' allegations and then dismissed their appeal.⁶⁹ Although the individual plaintiffs' cases were dismissed fourteen years after the original case was filed, a battle is still being waged over who is to pay all the incurred legal expenses.⁷⁰

IX. NUTRITION AND LABELING EDUCATION ACT (1990)

In recent years, consumers have grown much more health conscious. More and more attention has been merited to the nutritional value of foods, drinks, drugs, and dietary supplements. The Food and Drug Administration (FDA), a U.S. governmental regulatory agency, has been working hard for almost a century enforcing laws that prevent distribution of defective or misbranded foods, drugs, cosmetics, and other potentially hazardous consumer products. In 1990, the FDA proposed that food labels undergo extensive changes, including mandatory nutrition information. Therefore, the Nutrition Labeling and Education Act (NLEA) was implemented to fulfill the FDA's desire to inform and protect the consumer. The standards proposed by the NLEA included 20 proposals that filled 800 pages in the Federal Register. Although there have been high costs for the food industry in implementing the NLEA, the FDA hopes that once the NLEA is fully implemented, health care cost savings will be between \$4 billion and \$100 billion by 2010.⁷¹ This is definitely beneficial to consumers in that it not only will help them make more healthful choices in foods, but also later down the road may save them dollars on health care.

The NLEA carries three principle goals. First, the Act hopes to provide consumers with correct nutritional information that aids them in making healthful choices. One of the first things implemented by the NLEA was the "Nutrition Facts" on the labels or backs of food containers. These nutrition facts can be found on almost every food in the grocery store. "Nutrition Facts" includes information about the serving size, servings per container, calories, and percent daily values (based on a 2000-calorie diet) on fat, cholesterol, sodium, carbohydrates, and protein. Moreover, there are currently "10 relationships between a nutrient or food and the risk of a disease or health related condition [which] are now allowed" to be printed on a "Nutrition Facts" label.⁷²

Second, the FDA, through the NLEA plans to "clear up confusion" in the marketplace by setting descriptive standards on such terms as "fat free," "low sodium," "high fiber," etc.⁷³ This

⁶⁷Aird v. Ford Motor Co. 1-9 (D.C. Cir 1996), available at <http://www4.law.cornell.edu/cgi-bin/ht...d-Ct/Circuit/dc/opinions/95-7111a.html>.

⁶⁸*Id.*

⁶⁹*Id.*

⁷⁰*Id.*

⁷¹Bruce Silverglade, *The Nutrition Labeling and Education Act-Progress to Date and Challenges for the Future*, 15 J. PUB. POL'Y & MARKETING 148 (Spring 1996).

⁷²United States Food & Drug Administration, *The Food Label, FDA BACKGROUNDER*, at <http://vm.cfsan.fda.gov/~dms/fdnewlab.html> (visited July 4, 2000).

⁷³Paul J. Petruccelli, *Consumer & Marketing Implications of Information Provision: The Case of the Nutrition Labeling and Education Act of 1990*, 15 J. PUB. POL'Y & MARKETING 150 (Spring 1996).

perhaps has been the most arduous task of the NLEA and the most frustrating for food producers. For years, producers had been using these terms, yet each had their own standard for what they considered “low fat,” for example. The NLEA has established operational definitions for vague terms such as “reduced calories,” or “low fat,” which makes the task of labeling easier for producers. For example, “reduced calories,” by NLEA definition means that “the nutritionally altered product contains at least 25% less calories than the regular, or reference product.”⁷⁴ “Low fat” translates to “3 grams or less per serving.”⁷⁵ The third goal of the NLEA is to provide incentives for food industry producers to be innovative with their product as to meet consumers more health conscious needs. Fortunately for food producers, there are now guidelines for making health claims, which gives them more credibility to consumers that their claim is valid. Further, with more health conscious consumers, it is pertinent for food producers to achieve health claims in order to stay competitive with firms who are also striving to meet healthful people’s needs.

Since the Nutrition Labeling and Education Act’s passage in 1990, most food companies have complied, without much grumbling, to the FDA’s rules for nutrition labeling, although the undertaking has been costly and tedious. One industry that has been at arms with the FDA and NLEA regulations is the dietary supplement industry. The battle of dietary supplement regulation can be illustrated through the following case and proposed Acts.

A. NATIONAL COUNCIL FOR IMPROVED HEALTH V.
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (1995)

Members of the dietary supplement industry claimed that “the NLEA’s pre-market authorization process for health food claims violated the First Amendment of the United States Constitution.”⁷⁶ The industry insisted that NLEA rules infringed on the free speech of marketers to promote products through label claims. This was the first of five separate lawsuits filed by the dietary supplement industry questioning the constitutionality of the NLEA. The Supreme Court, however, held that the NLEA did not violate the First Amendment to the Constitution.⁷⁷

B. FOOD AND DIETARY SUPPLEMENT
AND CONSUMER INFORMATION ACT (1995)

Still not going down without a fight, the dietary supplement producers tried to weaken the NLEA through legislative action. The Food and Dietary Supplement and Consumer Information Act, introduced to Congress in June, 1995, proposed two ideas that would exempt: “both dietary supplements and foods from the NLEA’s pre-market approval requirements for health claims and would shift the legal standard for permissible claims from ‘significant scientific agreement’ to ‘truthful

⁷⁴United States Food and Drug Administration, *supra* note 72, at 7-8.

⁷⁵*Id.*

⁷⁶Silverglade, *supra* note 71, at 148-51.

⁷⁷*Id.*

and non-misleading’.”⁷⁸ According to NLEA supporters, however “the truthful and nonmisleading standard” fails to “ensure that health claims are reliable.”⁷⁹

C. DIETARY SUPPLEMENT HEALTH AND EDUCATION ACT (1994)

To try and lessen the tension between dietary supplement constituents and NLEA and FDA supporters, Congress passed the Dietary Supplement Health and Education Act, which allowed a Presidential Commission to study how the dietary supplement industry should be regulated. Based on the findings of the Commission, the dietary supplement producers might have to follow the guidelines on health claims originally set up by the FDA through the NLEA.⁸⁰

X. TELECOMMUNICATIONS ACT (1996)

The Telecommunications Act of 1996 is a vast reaching piece of legislation that touches virtually every branch of the telecommunications industry, especially the telephone and television industries. The purpose of this Act is to set regulations and boundaries in this rapidly growing market. For example, the Telecommunications Act contains provisions that allow “local phone companies, long-distance companies, and cable companies to compete over the same services.”⁸¹ This would encourage competition, thereby, lowering prices and increasing the quality of services provided. Another provision requires “television manufacturers to include circuitry that would allow parents to screen out programming they did not wish their children to view.”⁸² Title V of the Telecommunications Act, the Communications Decency Act of 1996, prohibits children under 18 years of age from having access to “indecent” materials over the Internet.⁸³

The Communications Decency Act of 1996 has met with considerable scrutiny in the courts. Many lawsuits have been filed arguing that the CDA is a violation of First Amendment rights including *Reno v. American Civil Liberties Union* and *United States v. Playboy Entertainment Group, Inc.*⁸⁴

A. RENO V. AMERICAN CIVIL LIBERTIES UNION (2000)

Section V of the Telecommunications Act of 1996 (entitled the Communications Decency Act of 1996) attempts to protect minors from “indecent transmission” and “patently offensive” display originating on the Internet.⁸⁵ One provision of the CDA prohibits “sending or displaying to a

⁷⁸*Id.*

⁷⁹*Id.*

⁸⁰*Id.*

⁸¹WEST’S ENCYCLOPEDIA, *supra* note 58, at 144.

⁸²*Id.*

⁸³*Id.* at 394.

⁸⁴*Id.* at 394-95.

⁸⁵*Reno v. American Civil Liberties Union*, 25 MEDIA L. REP. 1833 (1998)

person under 18 of any message ‘that in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.’”⁸⁶ The United States government filed suit in order to restrict access to such articles on the Internet.

A three-judge District Court (two federal district court judges and the chief judge of the U.S. Court of Appeals for the Third Circuit) convened and filed a temporary injunction against enforcement of the CDA.⁸⁷ The ACLU argued that the CDA was a violation of both the First and Fifth Amendments. The U.S. Supreme Court upheld the injunction against the CDA based on the grounds that it is overbroad and vague.⁸⁸ According to the court, “The Internet is a far more speech-enhancing medium than print....Because it would necessarily affect the Internet itself, the CDA would necessarily reduce the speech available for adults on the medium. This is a constitutionally intolerable result....As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion.”⁸⁹ The Court found the government’s argument unpersuasive and allowed the search for freedom of expression to reign supremely over the constraints of censorship.⁹⁰

B. UNITED STATES ET AL. V. PLAYBOY ENTERTAINMENT GROUP, INC. (2000)

As in the case *Reno v. ACLU*, the U.S. government filed suit to limit the transmission of “indecent” materials. This case involves transmission of these images over the medium of television.

The Telecommunications Act of 1996 contains provisions that restrict the hours of the day that channels “primarily dedicated to sexually-oriented programming” can broadcast without a signal that is either fully scrambled or otherwise blocked from view. These channels are limited to broadcasting between 10 p.m. and 6 a.m.—the hours when children are not likely to be watching.⁹¹

Playboy Entertainment Group, Inc. filed suit citing these restrictions as violating the First Amendment. Playboy argued that the government could limit this access without inhibiting everyone’s ability to receive their programming. One suggested alternative involved “upon request by a cable service subscriber. . .without charge, to fully scramble or otherwise fully block” any channel the subscriber does not wish to receive. The court reasoned that as long as the subscriber was aware of this alternative, this would provide as much protection as actually limiting the hours of broadcast.⁹²

The Supreme Court held on appeal that in this instance the CDA does indeed restrict First Amendment speech and is therefore unconstitutional. The Court stated, “Targeted blocking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible

⁸⁶*Id.*

⁸⁷WEST’S ENCYCLOPEDIA, *supra* note 58, at 394-95.

⁸⁸*Reno v. ACLU*, *supra* note 85, at 1833.

⁸⁹WEST’S ENCYCLOPEDIA, *supra* note 58, at 395.

⁹⁰*Id.*

⁹¹*United States v. Playboy Entertainment Group, Inc.* 1-3 (U.S. Sup. Ct 2000), *available at* <http://www4.law.cornell.edu/cgi-bin/ht...cornell.edu/supct/html/98/1682.ZS.html> (visited July 5, 2000).

⁹²*Id.*

and effective means of furthering its compelling interests.”⁹³ The Court came to this conclusion due in part to the fact that cable companies have the ability to block channel on a “household-by-household” basis.⁹⁴

XI. CONCLUSION

Although many of the laws have very specific purposes, the absolute purpose of each is to protect the consumer, business, and society. During competition, unethical practices are likely to occur, so these marketing laws were designed to lessen the practicality of this occurrence. Litigation will almost always be present, but the judicial system was designed for the good of the American people; ultimately, this marketing legislation is also designed for the good of the American people.

Students of business need to be aware of the current laws affecting marketing and the recent and historic cases interpreting them. This article provides students (and their teachers) with a current overview of the state of marketing law and regulation.

⁹³*Id.*

⁹⁴*Id.*