Minimum Advertised Price and Internet Distribution: A Transatlantic Perspective

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Minimum Advertised Price and Internet Distribution: A Transatlantic Perspective

AGENDA

• Introductions
• Why MAP Useful to A Manufacturer
  – From the Perspective of a Manufacturer
  – Control Quality and Level of Services
    • Era of Internet Discounts and “Showrooming”
• Effective, Enforceable MAP Program
• Limit Antitrust or Competition Law Exposure
The Value of MAP Policies to Manufacturers

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The Different Roles of MAP

• Indicate a product’s worth
  – Provide a consistent impression of the product’s value across sales channels
  – Enhance the perceived value of the retailer as well

• Provide incentive for retailers to educate consumers before sale and take on risky new product
MAP as a Value Signal

MAP is a sign of a product’s relative value both within a manufacturer’s own line and against competing brands.

- Camera Man Make-Ur-Movie $199
- Camera Man Film School Thesis $499
- Cinewonder I’m Serious! $1499
Providing Incentive for Retailer Investment

- MAP helps win the favor of retailers whose promotional support is needed
- MAP makes it worthwhile to buy demonstration units and train sales personnel on features and functionalities of new products
Music….on a Phone?

• Consumer electronics company develops a brand new product: an MP3 player that is also a phone (and a camera)

• Retailers are skeptical because this company’s past experiment with phones did not go well
The Limits of MAP

- MAP covers only “advertised” price – sales price requires a “minimum resale price” policy (that is acceptable under Colgate)
- MAP is only an incentive—it does not ensure the actual delivery of good pre-sale services
- MAP enforcement requires discipline and a long view; in the short term sales, and retailers, will be sacrificed
You Are a Retail Buyer

• Investigative lawyer with a smartphone walks into an electronics retailer asking for earbuds

• Helpful, well-informed saleswoman recommends a Bose pair at 99.99, and a Sounds Great pair at 79.99

• Smartphone Sez: the same Bose pair is advertised by a famous online retailer at 99.95, and the same Sounds Great pair at 43.40
A World Without MAP

• Would brick and mortar retailers survive?
• If not, or at far smaller numbers, how would manufacturers:
  – Provide the experiences they wanted for their customers
  – Support customer education efforts
• Would consumers be better or worse off if price became the sole basis for competition?
MAP PROGRAMS IN THE UNITED STATES

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Brief History of RPM and MAP Under US Antitrust Law

Federal Law

• Resale PRICE Agreements
  – Per se Violation - *Dr. Miles Medical Co* (1911)
  – Require specific resale price, cannot agree – *Colgate* (1919)
  – Since 2007: Minimum RPM Not Per Se Unlawful - *Leegin*

• Distinguish RESALE Price from ADVERTISED Price
  – All Vertical Restrictions Other than Price, Rule of Reason Analysis
    • *GTE Sylvania* (1977)

➢ MAP: Reseller Retains Right to Determine Resale Price
Brief History of RPM and MAP Under US Antitrust Law

State Law

• Seventeen States Continue Per Se Unlawful Treatment of RESALE Price Agreements
  » 2011 New York AG challenge
  » NY Court: **MAP** policy not a violation

• “ABA Resource – [OVERVIEW OF STATE RPM](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr13_lindsay_chart.authcheckdam.pdf)
  – Includes discussion relevant to MAP
Creating Effective MAP Programs in the United States

• Standard MAP Program
  – Terminate Supply if Advertised Prices Below MAP
  – Retain Discounts if Advertised Prices Below MAP
    ▪ Unilateral, Manufacturer-Imposed Policy
    ▪ Not Agreement with Reseller

• Manufacturer Assisted Advertising -- “Coop” Advertising
  – Retain Advertising Assistance Payments for MAP Violations
  – Substantial Support in Litigated Decisions
    • In re Nissan Antitrust Litigation (1978)
      ▪ Can be Agreement, Not Manufacturer-Imposed Policy

• Tie MAP to Additional Service Manufacturer Provides Reseller
  – Displays, Service Manuals, Training, Trademarks, etc.
  – Substantially easier judicial recognition of validity
Creating Effective MAP Programs in the United States


www.plantronics.com/us/terms/terms-umap-policy.jsp

“advertised . . . or sold Plantronics headsets at less than [MAP]”


• Same Principles of “Price” cf. “Advertising,”
  “Agreement” cf. “Policy” Apply to Internet Distribution
  • Prevalence, Low Cost, Penetration, Search Engines
  • Practical Difficulty of Tracking and Enforcing MAP Compliance

Why is the BPA #1 in MAP Monitoring & Enforcement? Results.
Creating Effective MAP Programs in the United States

• How far into the online sales process can the MAP requirement go?
  – When does advertising end and the resale begin?

• Restriction Can Extend Until Point of Individual Communication Between Reseller and Customer
  To point of resale
  – “To see selling price, add to cart”
    • Individual communication started
    • Compare: Consumer walking into store
      – Individualized Email or Phone Call to Customer

  – Go Beyond The Cart?
  – Prohibit automated email response?

AGGRESSIVE EXAMPLE: Sony Security MAP Policy

At no time may Reseller indicate
‘Check Cart for Lower Price’
‘Call for Lower Price’
Creating Effective IMAP Programs in the United States

• Low Enforcement Priority At Antitrust Agencies
  – *In re National Ass’n Music Merchants* – FTC 2009
    • “Cartel” of Competitors to Apply MAP Policies
    • Underlying, Separate MAP Polices Not Challenged

• Small Business Administration Advice
  – “perfectly legal under U.S. antitrust statutes”
    • “you are limited to advertising MAP-protected products at a certain price”
  – “Look for Alternative Ways to Discount”

• Private Litigation
  – *In re Musical Instruments Antitrust Litigation* – 2012
    • Plaintiffs did not establish plausible “conspiracy” to apply MAP programs across industry
Creating Effective IMAP Programs in the United States

home center.com

Versus

• Before May 2007, Two Motions to Dismiss Denied
• All Complaints After Twombly and Leegin – 2007 – Dismissed

worldhomecenter.com v. Thermasol; v. Kichler; v. Quoizel; on and on

Effective IMAP Programs Possible in US

Question: Stop at the Cart?
MAP PROGRAMS IN CANADA

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In 2009 there were major amendments to the *Competition Act*

- Resale price maintenance (RPM) **was** “per se” illegal
  > Prohibited regardless of the effect on competition

- RPM is **now** a civil “reviewable matter”
  > It is not an offence, and RPM is not prohibited except in specific cases by order of the Competition Tribunal
  > Proceedings may be commenced by either:
    - The Commissioner of Competition (head of the Competition Bureau); or
    - Private parties, with leave of the Tribunal (no class actions)
  > The Tribunal can only make remedial orders
    - No fines or other sanctions
The current civil provision has two essential elements

• First, the supplier must have either:
  > By agreement or specified unilateral actions (threats or promises) influenced upward, or discouraged the reduction of, the price at which products are sold or advertised for resale;
  > Refused to supply a product or discriminated against a person because of that person’s low pricing policy; or
  > Pressured a supplier by making it a condition of doing business with the supplier that the supplier refuse to supply a third party because of the third party’s low pricing policy.
The current civil provision has two essential elements (con’t)

- Second, the conduct must have an “adverse effect on competition” in a market
  - More than a trivial or *de minimis* lessening of competition
  - Less than a substantial lessening of competition

- Tribunal must define markets and assess whether the supplier has market power
  - RPM will rarely have an adverse effect on competition
    - product markets will usually be larger than a single brand
  - To date, only one case commenced by the Commissioner
    - no private cases have been started
MAP programmes will not usually be problematic in Canada

- A typical Minimum Advertised Price programme has three elements, to accommodate US RPM rules:
  - The manufacturer refuses to sell products to resellers that advertise the product for sale at less than the MAP;
  - The reseller remains free to establish its own selling prices, which may be above or below the manufacturer’s MAP; and
  - The manufacturer refuses to negotiate or discuss the MAP but may terminate a reseller which prices below the minimum level.
MAP programmes will not usually be problematic in Canada (con’t)

• Prior to 2009, the adoption of a US MAP programme may have breached the Canadian RPM rules:
  > Not *having* an agreement was not sufficient to avoid liability
  > The old (and new) RPM provisions captured unilateral conduct
    • The implicit threat is that the reseller will be cut off if it reduces advertised prices
    • The implicit promise is that the reseller will continue to be supplied if prices remain at or above advertised levels

• However, the “adverse effect” requirement now means MAP programmes will rarely be problematic
  > Only where there is market power
Internet-focussed MAP programmes will also not usually be problematic

- There is no statutory difference in the application of the RPM provisions to internet sales or advertising
  > MAP programmes, or agreements on resale prices, need not be adapted for internet advertising/sales

- However, caution should be exercised where internet retailers based in Canada are selling into the US
  > It may be desirable to consider a Colgate-MAP strategy to for internet sales
MAP PROGRAMS IN THE EUROPEAN UNION

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Overview:

• European approach to Resale Price Maintenance ("RPM")
• Enforcement
• Implications for MAPS in EU
• Online sales: EU
EU Approach to Resale Price Maintenance

• Historically cut and dried – “hard core”: prohibited under Article 101(1) Treaty on the Functioning of the European Union, no exemption under Article 101(3)

• A supplier must not seek to control the retailer’s sales prices.

• Prohibits fixed or minimum resale prices, as well as fixed/maximum discounts and economic incentives to abide by fixed minimum resale price.

• Related also to EU policy goal of a single EU market: pricing policy should not be a means of dividing markets between Member States
RPM – Legal Analysis

• Must create a binding obligation – unilateral insufficient:
  
  ➢ *JCB Service* (2006), the General Court held that efforts to influence dealers was not binding as it involved “*too low a level of coercion*”.
  
  ➢ *Volkswagen* (2003), the European Commission failed to establish sufficient “*concurrence of wills*”.

• Examples:
  
  ➢ *Outdoor clothing and equipment* – the supplier’s pricing policy *obliged* distributors to observe the recommended price level (Czech Republic 2011).
  
  ➢ *Petrol* – binding incentive on dealers not to set prices below a certain threshold at the dealer’s own expense (Denmark 2009).
Enforcement

- Agreements containing ‘hard core restrictions’ are void and unenforceable.

- Potential investigation by European Commission and/or National Competition Authority.
  - Adverse finding may result in administrative fines.
  - Supplier and retailer risk.
  - Low appetite for risk.
The most recent Vertical Restraints Block Exemption Guidelines contemplate an efficiency defense to RPM in limited circumstances under Article 101(3), eg introduction of new product.

- But EU efficiency defense untested in European Courts

- The Guidelines also make clear that genuine RRP permissible

- MAPS without sanction permissible

- Commission/Court will interrogate closely whether a MAPS policy amounts indirectly to RPM

- Is there “tacit acquiescence” (Bayer/Adalat) / a concurrence of wills (Volkswagen)?

- Who wants to be the test case?
Online Sales: EU

• No fundamental difference in treatment between “bricks and mortar” and online sales

• Distributor must be free to use the internet to advertise or sell products:

• Enforcement aimed at protecting pricing freedom:
  • *E-book* (2012)— publishers agreed to terminate all existing agency agreements that include retail price restrictions and a retail price MFN
  • *On-line Hotel Bookings* (2012) – UK OFT investigation into restrictions of online travel agent's ability to discount the price of room only hotel accommodation.
Conclusion

• Questions?

• Panelists Available to Continue Discussion
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