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

Rebecca Engola
Pioneer Electronics (USA) Inc.
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 is a sign of a product’s relative value both within a manufacturer’s own line and against competing brands.
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

David Laing

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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 IMAP 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.
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 MAP 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

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

有效的IMAP计划在美国可能

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
• 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 “concurrency 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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