Retail Price Maintenance: A Competitive Assessment

Warren S. Grimes
Professor
Southwestern Law School
February, 2009
My goal is to present an overall picture of RPM.

To support key propositions, I scavenge freely and indiscriminately from 100 years of economic literature, case law, business perspectives, and (even) common sense.

The advantages of this approach – it allows me to question the premises underlying various economic studies and to go where no economic study has yet gone.

Much (but not all) of this presentation is based on consensus views.
Why sellers impose RPM

- Brand sellers impose RPM to give retailers an incentive to carry and promote a branded product (it expands sales of the brand).
- There is no other credible and comprehensive explanation for RPM.
- RPM is not needed and not desired by many brand sellers (e.g. a low cost producer or a producer with a brand with strong consumer loyalty).
Less anticompetitive alternatives for increasing brand promotion

- Lower product’s Price
- Increase advertising (or make ads more effective)
- Offer contractual promotion incentives
- Send Manufacturer’s Reps to Stores
- Agree to buy-back unsold inventory
- Non Price Vertical Restraints (exclusive territories and location clauses) that lead to procompetitive vertical integration
RPM’s Primary Anticompetitive Effects

- The loss of Intrabrand retail price competition
- Higher consumer prices – the inevitable result if an efficient retailer is told it cannot pass along efficiencies in form of lower prices.
- RPM stifles efficient and innovative retailing (discount retailing is a potent marketing tool).
- There is a long history of innovative retailing that benefits consumers (dept store, supermarket, specialty store, warehouse store, on-line store).
The famous *Sylvania* footnote gave intrabrand competition second class status.

In fact, retail intrabrand competition is of *great* importance when producer interbrand competition is lessened by brand selling.

In many cases, producer interbrand competition and retailer intrabrand competition are inversely proportional.

Steiner research confirms that retailer intrabrand competition has its greatest disciplining effect on prices when strong brands are being sold.
RPM as Suppressor of Interbrand Competition

- RPM can lessen pressure on manufacturer to lower its prices to wholesalers and retailers. When RPM is pervasive in category, interbrand competition among producers tends to lessen.
- RPM creates an incentive for retailers to raise the price of non-RPM products (Shaffer).
- RPM, when imposed on multibrand retailers by more than one brand seller, can limit both interbrand and intrabrand competition (Rey & Verge, 2008).
Cartels?

- RPM can facilitate cartels at either manufacturer or downstream levels.
- The anticompetitive effects of a cartel can be duplicated when there is parallel widespread category use of RPM.
- Cartel theory does not reach most of the harmful effects of RPM.
RPM Increases Incentives and Opportunities for Exploitation of Consumer Information Gaps

- All brand promotion methods can lead to exploitation of consumer information gaps.
- RPM’s heightened exploitation comes from moving promotion incentives to the retailer, where misconduct is far more difficult to monitor and control.
- Other methods of moving promotion incentives to retailers (e.g., promotion allowances) are less likely to create disproportionately high margins for a particular brand (and thus create fewer incentives for exploitation).
- The tendency for RPM to create disproportionate incentives for exploitation is one reason to reject the Bork thesis that increased output = increased consumer welfare.
Policy Recommendations

- There should be a strong presumption that RPM is unlawful when it is employed in an open-ended distribution system.
- Vertical restraints that encourage efficient vertical integration should be widely tolerated.
- RPM used in connection with distribution-narrowing restraints that encourage efficient vertical integration should not be presumptively unlawful.
More Policy Recommendations

- Vertical Restraints Policy should recognize the importance of retail intrabrand competition in disciplining prices of branded goods.
- The free riding defense for RPM should be eliminated.
- The presumption that RPM is anticompetitive should not depend on widespread use of RPM in a category.
- The unilateral conduct (Colgate) defense for vertical restraints should be eliminated.