"IT'S AUTHORIZATION, STUPID": AN AUTHORIZED RESELLER PROGRAM, NOT A MAP, IS YOUR BEST WEAPON TO FIGHT UNAUTHORIZED INTERNET RESELLERS

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"It's the economy, stupid" was coined in 1992 by Bill Clinton's presidential campaign strategist, James Carville, to capture the issue that mattered the most to people. When product manufacturers set out to develop a strategy to combat Internet reseller and pricing issues, they, too, need to focus on what matters the most: an authorized reseller program.

Generally, when product manufacturers think of Internet pricing issues in the United States, the first thought is to implement a pricing policy. A pricing policy is certainly a piece of the puzzle, but the real key to a successful online pricing strategy is a transparent authorized reseller program. While price maintenance policies can help product manufacturers close the gap on their online price erosion issues, even the best pricing policy cannot be enforced against unknown third-party resellers. As they say in baseball: "You can't hit what you can't see." A pricing policy alone is ineffective to solve product manufacturers' online pricing problems. Further, pricing policies of any kind carry an inherent risk and should only be used as necessary. Manufacturers greatly increase their legal risk when the sole strategy employed to combat online price erosion is a pricing policy. Ultimately, the key to successfully combating online price erosion is a well thought-out distribution strategy along with the creation of a transparent authorized dealer network. Without gaining control of one's brand on the Internet, achieving sustainable and predictable margins will be nearly impossible.

BRIEF BACKGROUND ON RESALE PRICE MAINTENANCE POLICIES

Courts have long held that price fixing is illegal.[1] At the same time, courts have consistently found that manufacturers are permitted to maintain pricing programs with or affecting resellers in two circumstances: Minimum Advertised Price ("MAP") Policies and Unilateral Advertising and/or Resale Pricing ("UP") Policies.

A traditional MAP operates as an agreement between a manufacturer and a reseller where the reseller agrees not to advertise the manufacturer's product below a minimum advertised price in exchange for cooperative advertising funds.[2] A UP, or Colgate Policy, involves the manufacturer's unilateral announcement of 1) the minimum advertised or resale price of select goods and 2) the refusal to deal with resellers advertising or selling below those prices.[3] There are pros and cons to each depending on a product manufacturer's distribution demands as well as its goals and objectives, but generally speaking, a UP is most effective to combat pricing issues on the Internet.

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While these two policies are legal price maintenance options that enable manufacturers to maintain some control over resellers' prices of their products, the key to maintaining the legality of a pricing policy is the implementation and execution of the policy. Further, there is much confusion over pricing policies, and many companies end up implementing illegal pricing policies and enforcement protocols without even knowing it.

THE IMPORTANCE OF AUTHORIZATION

Price maintenance policies alone have a limited ability to curtail price erosion in the marketplace. Without knowing the identity of its resellers, a manufacturer may be able to publish the "carrots" of its pricing policy, but will not know on whom or how to enforce the "sticks." The simple announcement of a pricing policy, without more, will achieve minimal market control.

To truly address unauthorized resellers and online pricing issues, a manufacturer must start analyzing its distribution strategy and establishing an authorized dealer network. While some manufacturers choose to create a "complete" network of authorized dealers, some opt for a "limited" approach, establishing only a network of Internet authorized dealers. In the former, all resellers must become authorized; whereas in the latter, only Internet dealers, as opposed to brick and mortar resellers, become authorized. Either approach equips the manufacturer with authorized dealers responsible for selling product to end users on the Internet. What is more, the authorized dealer network provides the manufacturer the ability to control which websites and Internet marketplaces the dealer is authorized to sell on. Further, and potentially most importantly, it creates a low-risk legal framework for the manufacturer to aggressively pursue and remove unauthorized resellers selling product on the Internet.

When a manufacturer has a network of authorized dealers in place, it can safely and aggressively remove unauthorized resellers from the Internet. Manufacturers can remove the vast majority of disruptive unauthorized resellers without even implementing or enforcing a pricing policy. Ultimately, the creation of an authorized dealer network, along with consistent monitoring and enforcement against grey market and unauthorized sales, is an efficient, and effective way to control product distribution and combat online price erosion. Once disruptive unauthorized resellers are removed, a pricing policy allows the manufacturer to further help close the delta between the actual pricing on the Internet and the manufacturer's desired pricing. But again, before a pricing policy can be effective, step one for a manufacturer is to create an authorized reseller program to have control over and transparency in its distribution. A manufacturer may have the greatest pricing policy in the world, but without an authorized reseller program that allows it to identify its authorized versus unauthorized dealers (and against whom to enforce its pricing policy), the policy's effectiveness will be minimal.

Notes:

[1] *See, e.g., United States v. Masonite Corp.,* 316 U.S. 265, 282 (1942). See also 15 U.S.C. § 1 ("Every contract, combination . . . , or conspiracy, in restraint of trade or commerce . . . is declared illegal.").

[2] *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007); In re Nissan Antitrust Litig., 577 F.2d 910 (5th Cir. 1978) (applying the rule of reason to cooperative advertising program).

[3] *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

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