



# U.S. Law Regarding Control of Resale Prices

- *Leegin* (2007) changed everything . . . or did it?
- Formerly, all agreements on minimum resale prices were illegal *per se*, although maximum resale price agreements were allowed after 1997
- Unilateral setting of minimum pricing was permitted, but not often attempted



## Complications of U.S. Law

- Existing contracts frequently had said “distributor is free to set prices”
- Potential federal liability still is present
- Not all U.S. states and their enforcers agree with the change in federal law
- Many suppliers remain hesitant to control pricing, notwithstanding *Leegin*



# Minimum Advertised Price (MAP) Policies

- U.S. law has long considered MAP policies to be legal if reasonable
- The “A” for *advertised* is the critical distinction from control of actual pricing
- Rationale supporting MAP legality is brand owner’s need to control its image, which enhances competition

## Post-*Leegin* MAP Policies

- These policies were even safer after *Leegin*
- They also were less necessary if control over pricing itself was permitted
- MAP policies often became iMAP policies in the internet age



# Practicalities of Attempting to Control Internet Pricing in U.S.

- Enforcement is difficult
  - Monitoring costs
  - Internal conflict about cutting off sales
  - Constriction at source of supply is best mechanism, but it may not be possible
  - Intellectual property rights offer limited help
- Changed models have reduced number of brick-and-mortar-only distributors

# The EU perspective (I)

- RPM
  - Fixed or minimum resale prices
  - Direct RPM: clear cut contractual provision
  - Indirect RPM: threats, margin setting etc.
- Black listed right?
  - Yes still hardcore restriction, but efficiency defense possible, e.g. product launches
  - Who cares? Setting priorities...

## The EU perspective (II)

- Grey area (50 shades...)
  - Differentiated rsp policy
  - Heavy price monitoring policy
- New frontiers: vertical becomes horizontal
  - Hybrid cartel: intra-brand retail cartel with supplier(s) as intermediary
  - Hub-and-spoke: passing on secret info



International Distribution Institute

# Possibilities to tackle aggressive online pricing?

- Changing distribution model
  - Selective or exclusive distribution
  - Even better: agency
- Betting on efficiency defense and lack of enforcement interest
- Temporary suspension of online sales
- Online marketplace ban: Coty case
- MAP Policy? Probably not....





# Rationale for Price Controls

- Competition among brands is the best way to benefit consumers
- Protecting full-service distributors from free-riding incentivizes them to promote the supplier's brand, which is pro-competitive
- The risk of horizontal collusion among suppliers is low, and enforcers can deal with this separately under Sherman Act Section 1

# Discussion Questions

- What contract provisions would facilitate price control if it were desired and legal?
- Would EU companies control internet resale pricing if allowed?
- Is control of internet pricing desirable and practical for distributors that also sell through non-internet channels?

## Discussion Questions (cont.)

- Are suppliers encountering significant pressure from distributors to control internet pricing of others?
- How would more lenient EU laws work given that internet sales may cross borders within and outside the EU?