

Antitrust and the First-Sale Doctrine

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IP Roots of the First-Sale Doctrine

- The first-sale doctrine prohibited a patentee from using the patent laws to enforce restrictions on a patented good once the good had been sold.
- First-sale doctrine restriction codified for copyright law
- Roots in doctrine prohibiting restraints against alienation

Resale Price Maintenance

- Resale Price Maintenance (RPM) had been *per se* illegal for nearly 100 years under *Dr. Miles*
- In *Leegin* in 2007 the Supreme Court changed the standard for reviewing RPM arrangements to rule of reason
- RPM is not *per se* reasonable, must meet applicable standard

Conflicts between IP Rights and Antitrust Laws

- Do the restrictions imposed by the IP holder fall within the scope of IP rights?
- If the IP holder is trying to impose restrictions outside of the scope of its rights, this may raise antitrust law issues re:
 - Resale Price Maintenance
 - Monopolization of Aftermarkets

License vs. Sale

- Many transactions are being characterized as licenses to use IP rights not sales
- This raises many antitrust law questions re:
 - Applicability of the Robinson-Patman Act which prohibits price discrimination among competing dealers, but applies only to transactions in Goods
 - The boundaries between IP rights and antitrust law
 - Resale Price Maintenance
 - Monopolization of aftermarkets in product resale

E-books, License or Sale

- Amazon, for example, characterizes the sale of E-books as licenses to use copyright material and not sales
- User clicks “Buy Now”
- Questions about the characterization of transaction, incidents of sale

E-book Market and Resale Restrictions

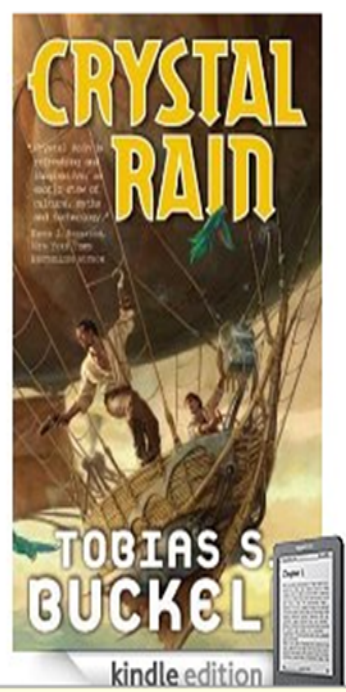
- Amazon and Macmillan had a dispute about the price at which Amazon was selling Macmillan's ebooks
- Relationship recharacterized as Agency arrangement
- Amazon notes price set by publisher
- One factor in reasonableness of RPM is widespread nature of the practice, if practice is too widespread, less likely to be reasonable

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Widespread Nature of Practice May be a Factor in Antitrust Liability

- Cf. Antitrust concern re: widespread practice indicator of unreasonableness (Leegin, Standard Fashions)
- IP industry arguments that licensing is the widespread practice and therefore the license characterization (as distinct from a sale) should be upheld

Antitrust Liability

- Restrictions on resale may be factors in Attempt to Monopolize or Monopoly Maintenance cases
- License label will not excuse tying arrangements

Beyond Labels

- The Court has long looked past the parties' labels to determine the real character of the transaction
- The Court emphasized the need for searching examination of the transaction in *Dr. Miles*
- *American Needle* decided in 2010 emphasized the need to look beyond form

Conclusion: Antitrust Analysis of First-Sale Doctrine Issues

- Expect more antitrust scrutiny of attempts to restrain resale
- Resale price maintenance
- Tying and other arrangements that limit competition