

[Home](#)[About ESLJ](#)[ESLJ Team](#)[ESLJ Issues](#)Volume 3  
Number 2[Fuhr et al](#)[Submission Standards](#)[Call For Papers](#)[News](#)[Conferences](#)[Copyright](#)[Exclusivity](#)[Links](#)Not signed in  
[Sign in](#)Powered by [Sitebuilder](#)  
© MMIX | [Privacy](#)  
[Accessibility](#)

## ESLJ Volume 3 Number 2 Articles

## Contents

[Abstract](#)  
[Introduction](#)  
[Background](#)  
[Description and Implications of MAP](#)  
[Per Se Illegal and Rule of Reason](#)  
[The FTC Complaint](#)  
[Distributor's Minimum Advertised Price Policies All Contain Provisions Which Suppress Retail Price Competition](#)  
[Limitations on Retailers Exceed Those Found in Traditional MAP Policies](#)  
[Transaction Prices Are Related to MAP prices](#)  
[MAP's Effect on Profitability](#)  
[The Competitive Effects of Eliminating MAP](#)  
[The Economics of MAP](#)  
[Conclusion](#)  
[References](#)

[Download](#)

ISSN 1748-944X

## The Antitrust Implications of Minimum Advertised Pricing: The Case of the U.S. Music Industry

Martin A. Asher, Ph.D.  
Adjunct Professor of Finance and Director of Research and Scholars Program, Wharton School, University of Pennsylvania.

John A. DelRoccili, Ph.D.  
Principal, Econsult.

Joseph P. Fuhr, Jr., Ph.D.  
Professor of Economics, Widener University.

## ABSTRACT

*In May 2003, without admitting wrongdoing, music distributors and retailers settled with private plaintiffs and the Attorneys General of 43 States a civil suit regarding a conspiracy to inflate or*

*support prices of prerecorded music products through an industry-wide strengthening of the music distributors Minimum Advertised Price (MAP) policies. The settlement leaves as an open question the proper economic and legal standard (rule of reason versus per se) to be adopted in such cases.*

*MAP had both horizontal and vertical implications and may have facilitated a horizontal conspiracy between the music distributors. The MAP policies were alleged to be equivalent in effect to Retail Price Maintenance (RPM).*

Volume 3 Number 2  
Content

## Articles

- ➔ [Pablo Ibáñez Colomo](#)
- ➔ [Ken Foster](#)
- ➔ [Martin A. Asher, John A. DelRoccili and Joseph P. Fuhr, Jr.](#)
- ➔ [Gavin Little](#)

## Interventions

- ➔ [Sarah Ellson and Matthew Lohn](#)

## Reviews

- ➔ [Call for Reviewers](#)
- ➔ [Steve Redhead](#)
- ➔ [Andreas Rahmatian](#)

*The Federal Trade Commission (FTC) claimed that prices increased by approximately \$2 per CD and that consumers paid an extra \$480 million. The effectiveness of the MAP program in raising prices was due to the all-encompassing nature of the advertising restrictions, the industry-wide implementation of MAP programs, the payment and significance of the advertising subsidy, and the severe penalties imposed for a MAP violation. This paper illuminates the antitrust implications of MAP policies through consideration of related practices in the United States market for music CDs. When viewed from this vantage point, MAP appears to be as pernicious as RPM.*

---

## KEYWORDS

Antitrust – Retail Price Maintenance – Minimum Advertised Price – Collusion – Cooperative Advertising - Music Industry

---

## INTRODUCTION

In May 2003, without admitting any wrongdoing, music retailers reached a settlement agreement with private plaintiffs and the Attorney General of 43 States regarding a conspiracy to inflate or suppress the prices of prerecorded music products through the strengthening of Minimum Advertised Price (MAP) policies. The settlement was valued at over \$480 million and would benefit numerous retail CD purchasers. Historically, retail prices were set by the distributors on CDs whose advertising was subsidized by the distributor – a practice known as cooperative advertising. Since the Federal Trade Commission (FTC) matter was resolved by a consent decree without admission of fault and the parties have settled it leaves as an open question the proper economic rule (rule of reason versus per se) to be adopted in such cases. This paper illuminates the antitrust implications of minimum advertised price policies through consideration of related practices in the United States market for music CDs.

## BACKGROUND

The recording industry primarily served the markets for live performances in the mid to late 1990s through the sale of compact discs (CDs) and cassette tapes (tapes). Five major distributors distributed over 85 percent of all prerecorded music in the United States. This concentration is a result of a wave of mergers in the last century when independents were bought by major distributors. The major distributors are Warner-Elektra-Atlantic Corporation; Universal Music Group; Video Distribution Inc.; EMI Music Distribution, Inc.; Sony Music Inc.; and Bertelsmann Music Group. The major distributors serve numerous retailers including independent retailers, large mass merchandisers such as Target, Wal-Mart and K-Mart, and consumer electronics stores such as Circuit City and Best Buy. These stores sold music to sub-distributors or rack-jobbers, which were not serviced directly by the distributors. Over this period, the music store business became increasingly concentrated due to store bankruptcies and the expansion of mass merchandiser firms controlling 46.8 percent of record store sales in 1999 (Federal Trade Commission Bureau, 2000).

The competitive environment in music retailing had changed in the early 1990s. The major consumer electronics stores and

merchandisers expanded their music offerings and used CDs to increase store traffic and awareness. The price cuts by electronics stores and mass merchandisers threatened the viability of music outlets causing about a dozen chains to file for bankruptcy. The closure of 1,000 independent stores to close (Christman, 2001, p. 1). The shift in music retailing is evidenced by industry data on the percentage of sales over the last decade. These data show that in the late 1990s a large portion of sales took place in record stores. The record stores' share of sales fell from 47.5 percent in 1992 and to 42.5 percent by 2000 (The Recording Industry Association of America, 2001, p. 1). The data also show that the record stores shifted a large part of their sales to the mass merchandisers and consumer electronics stores. The share of sales for these distribution channels in the Recording Industry Association of America (RIAA) category, the "other store" category, grew from 15.6 percent in 1992 to 20.1 percent in 2001.

In response to the increasingly competitive retail environment, music retailers asked distributors to strengthen MAP policies to restrain price competition. The scheme is alleged to have been implemented in 1995, when the CEO of Musicland, Mr. Jack W. Euster, gave a presidential Keynote Address to the National Association of Music Merchandisers (NARM) distributors and retailers:

This discussion brings us then to retailers, music company partnerships. More than these partnerships need to be tightened. Our industry is going to depend on proactive programs that will be implemented to prevent the devaluation of CDs. As recently reported by marketers who use your products as loss leaders for other merchandise. (CV00-10781R, *O'Brien v. Time Warner*, [2001] 2001 WL 10000, <http://www.angelfire.com/biz2/savicom/TW010101.htm>, pp. 9 – 10).

Originally the distributors did not respond to the special MAP policy. However, when the distributors saw many speciality stores they responded by strengthening the existing MAP policy. The distributors realized that increased market power in the hands of a few retailers would lead to less market power for the distributors and thus they implemented the special MAP policy.

#### DESCRIPTION AND IMPLICATIONS OF MAP

Retail stores carry out considerable amounts of advertising. They have to choose which of the many products that they sell to advertise. Distributors of CDs want their products advertised. In order to get their product advertised, they will pay a fee to the retailers. This is termed co-operative advertising. The retailers and distributors are jointly paying for the cost of the advertisements. A condition of these co-operative advertising contracts is that the retailer agrees not to advertise at a price below MAP in any area that is jointly funded.

However, historically the retailers were allowed to price their products at whatever price they wanted, that is, those advertisements were entirely by the retailer. The MAP policy that was questioned was not allow for co-op funds to retailers if prices in any advertisement were below MAP.

Although the MAP policies of distributors technically allow them to sell their product at whatever price they wanted, the retailers are not allowed to communicate to consumers via media or in-store advertisements that they are willing to sell CDs for less than the respective distributor's MAP.

paid entirely for the advertisement or in-store display, to the benefit of the revenue from cooperative advertising. The loss of this revenue was considered significant from a practical perspective. Even retailers that were sceptical of the distributors' MAP policies because the financial consequences of violating MAP were significant, retailers could lose millions of dollars in co-op advertising if they did not adhere to the distributors' MAP policies (Christman, 1999). Co-op advertising provided a cost advantage to stores receiving it. The MAP policy had considerable influence on price but some retailers initially found innovative ways to circumvent MAP. For example, in parts of June and July of 1996, a retailer devised a new market strategy to circumvent MAP. It ran a campaign that advertised "every CD \$11 or less." In fine print it stated that WEA, Sony and UNI products were priced at \$11. The retailer actually charged \$11 for these CDs too - as was shown on a receipt that was faxed to Ed Christman of Billboard (Christman, 1999). As the MAP policies were strengthened it became more difficult to circumvent MAP as other retail stores kept a watchful eye on alleged cheating. Retailers would look for print advertisements that were violating MAP and promptly send such ads to the distributor. If a MAP policy was being violated. Even though retailers were not required to do whatever level they wanted, the potential loss of millions of dollars in revenue induced them to follow the more stringent MAP policies of distributors and their impact on retailers were discussed in a newspaper article, which explained that most retailers that had lost funds which effectively ended price competition for the benefit of the distributors had defended this policy, arguing that it protected the retail music business and kept smaller chains and independent retailers in business (Segal, 2000, p. 2). Mr. Euster in his Keynote Address

For years, wholesalers in many industries have used minimum advertised price programs to qualify for advertising. These programs have been especially effective in supporting the desired price perceptions of their merchandise. Most music and movie studios have MAP programs. These programs accomplish their goals best when the MAP price is set above wholesale cost as to not de-value the product in the consumer's mind. Also, effective MAP programs require consistent store pricing as well as advertised prices and strong support for the entire ad on MAP compliance. How do we do together? (*O'Brien v. Time Warner* [2000])

During the period of the alleged conspiracy, price increases were demonstrated by a number of sources. Industry publications reported on the price increases. For example, an article in Billboard magazine titled "Bring Price War Cease Fire" stated, "Discounters' use of aggressive pricing strategies is falling by the wayside as major distributors take a hard stance on minimum-advertised pricing. Thanks to the major distributors' resolve on MAP, prices of hit CDs at discount chains rose 10% over the last month, industry observers say" (Christman, 1999). Christman estimated that during the period of 1996-1999 when MAP policies were in effect, consumers paid \$480 million extra for CDs. In addition to the price increases, retailers, new and small firms were unable to compete effectively. Krughoff explained: "MAP policies deny small firms the opportunity to get visibility and a foothold against established competitors" (Spencer, 1993, p. 2).

Gary Arnold, VP of Marketing for Best Buy complains "the main problem with the MAP is that more or less sets a price point for all merchandise based on what a retailer's cost of business is." For example, Arno

retailers' SG&A (selling, general and administrative) expenses are 40% of sales, whereas Best Buy's are only 13%" (Jeffrey questions the wisdom of having firms with such divergent same price. The MAP policy as enforced in the CD market is an attempt to appease the speciality stores. The speciality primary source of revenue is the sale of CDs, did not want to be the mass merchandisers and thus requested that the defendant enforce MAP and tighten the policy so that price competition is maintained in the market.

### PER SE ILLEGAL AND RULE OF REASON

The two principal laws governing antitrust in the US are the Sherman Act and the 1914 Clayton Act. These acts are further extended by the Federal Trade Commission Act. When applying these Acts, there are two standards: the action of the defendants is conclusively per se illegal or determined under a rule of reason. Per se violations are illegal and of themselves and the only defense allowed is that the defendant did not commit the act. Under the rule of reason the issue is whether the act is unreasonable based on its economic impact and thus in violation of the antitrust statutes. Black's Law Dictionary (1990, p. 1332) defines it as follows:

Under the rule of reason test ... the fact finder must consider all circumstances of the case to decide whether the defendant unreasonably restrains competition, and the plaintiff must show anticompetitive effects, not just harm to competition, and not whether the practice is necessary or tortious (*Richard Hoffman Corp. v. Integ Systems*, 610 F. Supp. 19 [1985] p. 22).

Thus, under the rule of reason, the reasonableness of the act is determined on a case-by-case approach and the burden of proof is on the plaintiffs.

With regard to per se violations, the Supreme Court in *Leegin v. U.S.* (356 U.S. 1 [1958]) stated that "there are certain practices which because of their pernicious effect on competition and any redeeming virtue are conclusively presumed to be unlawful and therefore illegal without elaborate inquiring as to the practical effect caused or the business excuse for their use." Currently, price restraints, minimum resale price maintenance, and allocation of territories among competitors are considered illegal per se. Black's Law Dictionary (1990, p. 1142) defines the per se doctrine as follows:

Under the "per se doctrine," if an activity is conclusively per se illegal, intent and pernicious in its effect, a court need not inquire into the reasonableness of the same before finding that it is a violation of the antitrust laws. (*Association of Clinical Laboratories v. Conne Inc.* 324A.2d288 [1973] p. 291).

A per se rule assumes that a particular practice (i.e., price fixing or RPM) is so detrimental to competition and generally lacks any terms of promoting competition that courts are not required to inquire into the details of the case. The conduct is illegal per se. In other words, the prohibition implies that the conduct is always unreasonable. A rule of reason prohibition requires a thorough review of the potential benefits and detrimental effects of the conduct. Here, the courts must consider the arguments put forth in order to decide whether the practice is reasonable and therefore compatible with the Sherman Act. However,

suggested that the most difficult aspect of the jurisprudence is "determining when it should be followed." This is because once a characterization is made, the legality of the practice is determined by inquiring into the market structure. Such a determination of whether a conduct can be recognized as harmful to competition and held illegal from the outset.

In *United States v. Socony Vacuum Oil Co.* (310 U.S. 150), the Supreme Court declared that any combination tampering with prices was illegal. The Court engaged in an unlawful activity. Even though the members of the group were in no position to control the market, to the extent that they raised, lowered or stabilized prices they would be direct restraints on the free play of market forces.

MAP in this case is alleged to have stabilized prices. However, price restraint is not illegal per se unless it includes some agreement to fix price levels. In *Continental T.V., Inc v. GTE Sylvania Inc* (457 U.S. 352), the Court refused to extend per se illegality to vertical nonprice restraints, stating that "departure from a rule of reason standard requires a showing of a demonstrable economic effect rather than...upon formalistic considerations." The Court concluded that "vertical restraints had not been shown to have a 'pernicious effect on competition' and to be so lack[ing] in economic sense as to justify per se illegality... Rather, we (the Court) focus on the fact that to stimulate inter-brand competition, 'the primary concern of the antitrust law'" (Handler, 1997, p. 656). Thus, the rule applied in *Sylvania* regarding agreements "affecting price" is much broader than the rule regarding vertical agreements. The Music Distributors' MAP policies restrict pricing (they were allowed, albeit possibly with some reimbursement, to charge any price they wished). Yet MAP also involves the advertising of prices, which directly impacted retail price competition. Nevertheless, the case would have been decided on a rule of reason basis (United States District Court of Maryland, Case No. 1361, Decision and Order on Notice, Settlement Proposal, and Attorneys fees, p. 30).

However, the relevant economic question is not whether a specific price level but whether the arrangement causes less competition than they otherwise would have been. That is, does the arrangement greatly attenuate price competition?

The Supreme Court of the United States has the final say on what is considered illegal per se and what is decided under rule of reason (*Company v. Khan* [1977] 522 U.S. 3). For example, in 1997 the Court ruled that maximum resale price maintenance (RPM) is illegal per se and thus comes under the rule of reason. If resale price maintenance is still considered illegal per se and MAP was considered equivalent to RPM then it might be considered illegal per se. In such a case, there would not be any need to determine whether it actually injured competition. However, given the trend toward the treatment of vertical restrictions that conclusion is by no means certain. Again there is the unfortunate aspect of not having a judge.

#### THE FTC COMPLAINT

In the music CDs antitrust litigation, the FTC charged that the distributors modified their MAP policies to induce retailers to charge higher prices. This behavior is, at least at first blush, perplexing since one would expect that the music distributors would want retailers to charge lower prices. If distributors charged their "best" price because the quantity of CDs that retailers sell is greater at lower prices (Posner, 2001). This is in the interest of the distributors to have low retail prices and to increase the distributors' profits.

The FTC's actions were based on two different legal theories. The Commission found that the more stringent MAP program constituted a vertical restraint in violation of Section 5 of the rule of reason analysis. Second the Commission also found that arrangements were practices that facilitate horizontal collusion among distributors (Leary, 2000, p. 2).

The FTC contended that the MAP policy did not represent a price maintenance agreement and thus was not illegal per se. Robert Pitofsky stated there was no explicit agreement between manufacturers and distributors. In our view *Sharp Business Electronics Corp. v. Sharp Electronics Corp.* 717 F.2d 1171 [1998]) requires something more than a showing that the practices had "some influence on price" (Pitofsky et al, 2000, p. 1). The Commission's presumption in favor of a rule of reason standard and that that standard must be justified by demonstrable economic benefits or facilitation of cartelizeing. As to the facilitating practice that that:

The market structure in which the distributors' MAP policies operated, the fact they were implemented with a purpose to stabilize prices, the significant price effects, and the lack of compelling business justifications gave the Commission the belief that the practices materially facilitated inter-distributor collusion (Leary, 2000, p. 5).

The Commission found that this MAP program exceeded the boundaries of "including advertising paid for entirely by the retailer to in-store advertising, excepting only the smallest price product." The result of MAP was to stabilize retail prices and reduce competition. The FTC determined that there was "no plausible economic justification for MAP and that the mass merchandisers and consumers were not "free riding" on services provided by traditional retailers (Leary, 2000, p. 3). Free riding is the principal argument made in retailer restriction cases and exists when pre-sale services are provided by full service retailers that provide good pre-sale services and are undercut by discount retailers that do not provide the pre-sale services. In turn, reducing the full service retailer's ability to offer pre-sale services. In this case, MAP could be justified if free-riding on the part of mass merchandisers and consumer electronics stores was taking place because of higher margins which would support the desired pre-sale services. However, it was never established that pre-sale services were important. It might be argued that distributors wanted to limit the amount of non-price competition among the dealers to stimulate pre-sale services. For example, distributors might try to defend their actions on the basis that CDs cannot be marketed effectively unless they have a large CD inventory with listening stations, a deep catalog, and knowledgeable sales people. In other words, distributors might justify their actions on the basis that if a distributor increases its price that exceeds the cost of reselling the product, the distributor will be able to provide the provision of such services.

The European Commission also investigated the vertical restraints of the five major recording companies and their retailers. The Commission focused on allegations of resale price maintenance through contracts with retailers where co-operative advertising was linked to MAP. However, on August 20, 2001 the European Commission suspended the investigation when the companies agreed to end the practice (*EU Closes Inquiry*, 2001, p. 184).

[DISTRIBUTOR'S MINIMUM ADVERTISED PRICE POLICY PROVISIONS WHICH SUPPRESS RETAIL PRICE COMPETITION](#)

In the civil action in federal district court, plaintiffs focus implications of MAP. Plaintiffs alleged that similar MAP policies at each of the major distributors, for the purpose of suppressing competition and consequently increasing the price of CDs appear to have achieved this goal in the 1996-1997 period. Existing MAP policies to such a degree that retailers were prevented from pricing CDs independently. Industry observers claim that under MAP, prices of CDs at discount chains increased from \$9.99 per month (Christman, 1996a, p.3). This was accomplished through co-op funds unless retailers displayed prices above MAP specified in media advertisements and in-store displays including those approved by the retailer.

#### LIMITATIONS ON RETAILERS EXCEED THOSE FOUND IN TRADITIONAL MAP POLICIES

It has been argued that the limitations placed upon retailers in the music industry exceed those found in traditional MAP policies. Elahi (2001, p.20) states, "these restrictions went beyond those found in programs that restricted solely the prices in the advertisements approved by the manufacturers." Music retailers were also required to adhere to distributors' MAP policies on all in-store signs and displays, regardless of whether the distributor contributed to their costs. In traditional advertising programs, manufacturers help dealers pay for advertising promotions, with the condition that advertisements supported by the manufacturer cannot include any price advertising unless it is at or above suggested levels. Unlike the MAP policies which support distributors, dealers are free to advertise price at whatever level they wish when they buy their own advertising. Further, a MAP violation by a national or regional chain implied a loss of co-op funds for other retailers. Elahi (2001, p. 21) describes the effect of the policies: "the implementation of MAP policies – which was secured through significant financial incentives – effectively eliminated the retailers' ability to communicate with consumers. This inability to effectively communicate with consumers meant that retailers had little incentive to actually sell products at the advertised price. Before the more restrictive new MAP policies some retailers would discount price CDs to attract customers into their stores. This was because these consumers would purchase other items once they were in the store. However, if the retailers were forced to advertise at MAP prices, this inducement would not exist and there would be little incentive for a retailer to discount the price once the customer was already in the store."

#### TRANSACTION PRICES ARE RELATED TO MAP PRICES

MAP directly affected CD prices by impeding retail price competition, consequently causing an increase in retail prices. This is supported logically from the following three facts. First, the distributors effectively imposed minimum prices through advertising restrictions with the loss of significant advertising subsidies for retailers. Second, all of the major distributors imposed similar MAP price restrictions on the key price points as noted above. Third, distributors with assistance from some retailers rigorously enforced their policies. When artificial restrictions prevent competitors from advertising price information, price competition will also be restrained because it will eliminate the competitive advantage obtained from lower prices. The increased sales that would come from advertising below MAP prices suggests that if one cannot advertise price below MAP then the reduction in revenue from anyone who would have bought from that retailer at higher prices. When advertising below MAP prices, cutting retailers would get a compensating increase in sales if more customers came in to purchase CDs at advertised prices.



Confirmation of the alleged relationship between MAP and its effect on the music industry is found in the following excerpt from Variety:

Better known in music circles by the acronym MAP, the system was essentially a pact between some major retailers and the major label groups that set a minimum agreed-upon floor for retail CD prices. ... The MAP program from the big five was to tie the financial success of the labels to the success of the major retailers. The labels gave retailers for advertising to an agreed-upon level. The strategy kept the discounters at bay by maintaining pricing at more or less consistent levels. (Oppelaar, 2000, pp. 1-2).

The MAP policies of distributors essentially led to all retailers being able to which thus efficiently forestalled price competition.

### MAP'S EFFECT ON PROFITABILITY

The significance of MAP and its effect on pricing and profitability is demonstrated by the "Industry and Competitive Environment" section contained in Trans World Entertainment Corporation's 1998 annual report. This is the annual financial report that a corporation must submit to the United States Securities and Exchange Commission. This states:

During 1996, many of the major music vendors began to implement MAP programs such as the Minimum Advertised Pricing program to eliminate loss-leader pricing strategies. These programs penalize sellers that fail to comply with MAP programs by limiting advertising support. The enforcement of the MAP program has been successful in stabilizing prices in the music industry. Non-traditional music retailers have since entered the market with music and video selections and maintained less aggressive pricing policies (Trans World, 1998, p. 5).

The profitability of retailers, as reflected in the companies' stock prices, significantly increased during the period that the industry expanded:

The US music chains and their wholesale suppliers, several of which have been in bankruptcy, are now turning around as they move through the market. Wall Street is watching the recovery of the music chains' stock price highlights the critical quarter. Trans World's stock price was \$3.13 in October, up from 52-week low of just over \$2.00; Music Group was up to \$6 recently from a low of \$4.50 in December; and National Record Mart was up from \$1.13 (Paige, 1997, p. 1).

The increase in the stock prices is not dispositive but it is indicative of the impact that MAP is alleged to have had on prices and profitability.

### THE COMPETITIVE EFFECTS OF ELIMINATING MAP

There was a fear in the industry that the elimination of MAP would restart the price wars that existed in the recording industry in the early 1990s. A publication stated, "Merchants privately say that the elimination of MAP rekindles fears that the price wars will break out and rekindle the unprofitability it suffered from 1994-1996, before the strategy was adopted and enforced" (Christman, 2000a, p.1).

Robert Higgins, CEO of Trans World Entertainment Corp was a very aggressive pricing environment, the most aggressive seen in almost 10 years, due to the electronic superstore merchants deciding to take advantage of the FTC-mandated majors' minimum-advertised-price policies" (Christman, 2000a, article stated, "Like other industry players, Universal fees could break out again. In the last price war, which occurred about a dozen chains filed for bankruptcy protection and independent stores closed, according to industry sources (p.2). This pattern of consolidation is similar to that found in other segments where more efficient competitors eliminated less efficient retail establishments. It should be realized that this "creative destruction" is consistent with a properly functioning market mechanism. Further, elimination of MAP is consistent with current antitrust law which strives to protect competition, not competitors.

### THE ECONOMICS OF MAP

The economics of MAP is complicated because higher retail prices appear to be in the distributors' self-interest. The difference between the distributors' price and the retail price is the distributors' cost, and sellers want to minimize that cost. Alternatively, a lower price reduces the demand for CDs and hence the distributors' revenue. From this perspective, it appears that it is not in the distributors' interest to promote higher prices in the retail sector (Posner, 2001, pp. 229-30).

Economic theory suggests several explanations for why distributors nonetheless often restrict competition in the distribution of CDs (Posner, 2001, pp. 172-73). First, the distributors may be acting in the interest of the dealers. That is, some retailers want to fix prices, as discussed in the keynote address of Jack Euster, and somehow enlisted the distributors to act as their agent in administering the cartel. This was accomplished by the distributors' enforcement of MAP. If the success of this alleged conspiracy resulted from the distributors, they were able to enlist the support of all the distributors. Perhaps the distributors supported this arrangement because it allowed them to charge higher prices at somewhat higher levels than they otherwise would.

A second explanation (and perhaps the most plausible) is that the distributors wanted to restrict the emergence of a competitive market for CDs. In the early nineties none of the speciality stores had a significant share of sales and it is likely given the level of competition that the distributors had considerable control over the price of CDs. As some of the speciality stores began to fail, the distributors have realized that over time Wal-Mart, Target, Best Buy and others have increased market power. During the time when MAP was in effect about a dozen chains filed for bankruptcy and more than 100 independent stores closed (Christman, 2000b, p. 5). This could eventuate in distributors facing an oligopsony (which exists when there are few buyers in the market). Under this market structure the distributor control over the price that they could charge retailers, would result in lower profits for the distributors in the long-run.

A third reason for MAP relates to the possibility that the distributors want to prevent cheating by the distributors since cheating would offer little benefit to distributors. Retailers would advertise the lower prices and expand their sales of the distributors' product. Fourth, the distributors may have increased their margins through MAP to encourage non-price competition.

services. Perhaps CDs can be marketed more effectively catalogues, listening stations and knowledgeable sales manufacturer restrains price competition and increases marginal cost of providing distribution services without the services, then retailers should increase the level of non-

## CONCLUSION

The facts presented above suggest that MAP had a horizontal retail level and may have facilitated a horizontal conspiracy among distributors. Further, the MAP policies as implemented by the industry could be considered equivalent in effect to RPM. The MAP program in raising prices in the music CD market, the encompassing nature of the MAP advertising restrictions on all the distributors, the payment of an advertising subsidy, and the penalties imposed for a MAP violation. Further, one can argue that a conspiracy extended beyond some high-cost retailers through their mark-ups and the distributors.

This case clearly shows that MAP programs can be as pro-competitive as those that MAP policies should be reviewed by antitrust authorities to determine their legality. Additional research is required to guide the design of MAP programs. It is possible that MAP programs with less restrictive policies have little antitrust impact. A key question then is can certain characteristics that cause MAP to be efficiency-enhancing or pro-competitive make MAP comparable to RPM and therefore exempt from antitrust laws (*United States v. Container Corporation of America*, 406 U.S. 333). MAP as practiced in the music CD industry may have benefits to consumers. The MAP programs also had both horizontal and vertical aspects. For example, it could be argued (and was in the civil suit) that the distributors participated in the conspiracy and can thus be considered a per se violation. As a result of the conspiracy, prices increased considerably. The FTC claimed that prices increased by approximately \$2 per CD and that consumers paid an extra \$1.50. Nevertheless, The Federal District Court of Maine specifically found that MAP was a vertical restraint because of the non-price aspect of the MAP policies. Since MAP policies are agreements on what to advertise, not what could be charged, it is likely that the court would have had plaintiffs satisfy the rule of reason standard. Yet MAP programs, which have the vantage point of music CDs, appears to have the same effect as Price Maintenance (RPM).

## REFERENCES

Black's Law Dictionary (1990) St. Paul, Minn, West Publishing Company.

Christman E (1996a) 'MAP Policies Bring Price War to a Cease-Fire, Billboard,' 1 June.

Christman E (1996b) 'Three is The Magic Number as EMD Toughens its MAP,' Billboard, 8 June.

Christman E (1996c) 'Circuit City short-circuits MAP with \$11 or less campaign,' Billboard, New York, 27 July.

Christman E (2000a) 'FTC Alleges MAP Restrains Competition,' Billboard, New York, 20 May.

Christman E (2000b) 'Indie Retailers Rallying against MAP Ruling,' Billboard New York, 27 May.

Christman E (2001) 'Retail track,' Billboard, New York, 13 Oct.

Distribution Law Developments At The Federal Trade Commission, (2000) Prepared Remarks of Thomas B. Leary, Commissioner, Federal Trade Commission, Distribution and Dealer Termination, 21<sup>st</sup> Anniversary Seminar, Law Journal Seminars, New York, New York, 26 June.  
<<http://www.ftc.gov/speeches/leary/ddtny000626.htm>>

Elahi H (2001) 'Notes and Comments: Record Distributors' Minimum Advertised Price Provisions: Tripping Antitrust During Pursuit of Revenue, Control, and Survival in the Openly Competitive Digital Age,' 21 Loyola of Los Angeles Entertainment Law Review.

'EU Closes Inquiry of Compact Disc Prices after Industry changes Business Practices,' (2001) Antitrust and Trade Regulation Report, Vol.84 No.2022, 24 Aug.

Handler M, Pitofsky R Goldschmid H J Wood D P (1997) Trade Regulation Cases and Materials, 4th Edition, Westbury New York, The Foundation Press, Inc.

Hovenkamp H (1999) Federal Antitrust Policy: The Law of Competition and Its Practice, 2<sup>nd</sup> Ed, West Group, St. Paul, Minnesota.

In the News: (2000) 'Attorney General Mark Pryor, along with twenty-nine other AG's charge music retailers with price fixing,' 8 August.  
<[www.AG.State.AR.US/percent.htm](http://www.AG.State.AR.US/percent.htm)> P.1

Jeffrey D (1997) 'MAPping out a Price-War Truce, Billboard,' 15 March.

Oppelaar J (2000) 'Fresh Lines Drawn over MAP,' Variety, New York, 4 -10 Dec.

Paige E (1997) 'Music Chains on the Rebound, Discount Store News,' New York, 3 Nov.

Posner R (2001) Antitrust Law. Chicago, The University of Chicago Press.

The Recording Industry Association of America (2001) 'Consumer Profile'  
<<http://www.riaa.com/news/marketingdata/pdf/2001co>>

Schumpeter J (1950) Capitalism, Socialism and Democracy, 3rd ed; New York: Harper.

Segal D (2000) 'Overcharged Music Buyers Stuck with the Bill,' The Washington Post, 13 May.

Spencer P (1993) 'Too Low too Print, Consumer Research Magazine,' Washington, D.C.

Statement of Chairman Robert Pitofsky and Commissioners Sheila F. Anthony, Mozelle W. Thompson, Orson Swindle, and Thomas B. Leary (2000) In the Matter of Sony Music Entertainment, Inc.; In the Matter of Time Warner, Inc.; In the Matter of BMG Music, d.b.a. "BMG Entertainment"; In the Matter of Universal Music & Video Distribution Corp.

and UMG Recordings, Inc.; and In the Matter of Capitol Records, Inc., d.b.a. "EMI Music Distribution" et al., Dockets Nos. C-3971, C-3972, C-3973, C-3974, and C-3975, File No. 971-0070, May.  
<<http://www.ftc.gov/os/2000/09/musicstatement.htm>>

Trans World Entertainment Corp. 1998 Form 10-K.

U.S. Census Bureau Concentration of Firms: (2000) 1997, Retail Trade Subject Series, 13 Oct.

United States District Court of Maine, MDL Docket No. 1361, Decision and Order on Notice, Settlement Proposals, Class Certifications and Attorneys fees.

Viscusi W, Vernon J and Harrington J (2000) Economics of Regulation and Antitrust, Cambridge, Massachusetts, The MIT Press.

---

Asher, Martin A., DeRoccoli, John A. and Fuhr, Joseph P., Jr., "The Antitrust Implications of Minimum Advertised Pricing: The Case of the U.S. Music Industry", [Entertainment and Sports Law Journal](#), ISSN 1748-944X, January 2006,  
<<http://go.warwick.ac.uk/eslj/issues/volume3/number2/>>