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Record Distributor's Minimum Advertised Price Provisions: Tripping Antitrust during Pursuit of Revenue, Control, and Survival in the Openly Competitive Digital Era

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RECORD DISTRIBUTORS' MINIMUM ADVERTISED PRICE PROVISIONS: TRIPPING ANTITRUST DURING PURSUIT OF REVENUE, CONTROL, AND SURVIVAL IN THE OPENLY COMPETITIVE DIGITAL ERA

I. INTRODUCTION

Compact disc ("CD")[1] retail prices have climbed to upwards of eighteen dollars per disc since the early 1990s.[2] Yet, retail competition has steadily increased during the same period,.[3] Simultaneously, technology has effectively reduced CD manufacturing costs.[4] In light of these economic realities, why do CDs remain so expensive?

CD prices have made the five major distributors of prerecorded music ("Distributors"),[5] and numerous prominent U.S. music retail chains

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1. A compact disc ("CD") is a 5.5 inch circular plastic disc that stores sound recordings in the form of digital codes and is designed for playback by a CD player or, more modernly, for recording by a CD burner. M. WILLIAM KRASILOVSKY & SIDNEY SHEMEL, THIS BUSINESS OF MUSIC, THE DEFINITIVE GUIDE TO THE MUSIC INDUSTRY 391 (Billboard Books 8th ed., 2000).

2. Alwyn Scott & Tricia Duryee, *Recording Industry, Discounters, Consumers Fight over CD Prices*, SEATTLE TIMES, Aug. 14, 2000, at A1.

3. *See* Lionel S. Sobel & Carol P. Sobel, *Major Record Companies Settle FTC Proceedings by Agreeing To Consent Orders that Require Them To Drop Minimum Advertised Price Provisions of their Cooperative Advertising Programs*, ENT. LAW. REP., June 2000, at 8.

4. *Id.* Records, cassettes, and CDs are generally inexpensive to manufacture. DONALD E. BIEDERMAN ET AL., LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES 558 (Praeger Publishers 3d ed., 1996). Although a typical CD can be manufactured for less than one dollar, distributors must also invest in the production, promotion, and advertising of CDs. *Id.* For point of reference, the approximate breakeven point for a typical CD released by a major distributor is 250,000 retail units sold. *Id.* Naturally, increases in production, promotion, and/or advertising costs may explain the rise in CD prices, despite decreased manufacturing costs and increased competition. As explained in Part II.B, however, a Federal Trade Commission ("FTC") investigation linked a distinct increase in CD prices to the distributors' minimum advertised price provisions ("MAPs") independent of increases in production, promotion, and advertising costs. *See* Notices, 65 Fed. Reg. 31319 (May 17, 2000) [hereinafter FTC Notices].

5. Currently, the five major record distributors are Sony Music Distribution, Universal Music & Video Distribution, BMG Distribution, Warner-Elektra-Atlantic Corporation, and EMI

("Retailers"),[6] the targets of consumer contempt and legal scrutiny.[7] Costly CDs have motivated consumers to discover alternatives to retail purchase, some of which are unlawful.[8] Costly CDs have also provoked a multi-State antitrust class action suit disputing the CD pricing practices of Distributors and Retailers.[9] In addition, European economic regulators recently opened investigations into the practices.[10]

The legal scrutiny of the Distributors' and Retailers' pricing practices began in 1997 with a Federal Trade Commission ("FTC")[11] investigation triggered in part by costly CDs.[12] The investigation implicated Distributor-Retailer marketing provisions termed "minimum advertised price" ("MAPs").[13] According to the FTC, Distributors enacted MAPs to counteract declining CD prices triggered by newfound retail competition in the prerecorded music market, and Retailers executed MAPs for that purpose.[14] MAPs accomplished that purpose.[15] In the process, MAPs caused consumers to pay an added $480 million for prerecorded music

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Music Distribution ("Distributors"). FTC Notices, *supra* note 4, at 31319; Sobel & Sobel, *supra* note 3, at 8.

6. The traditional retailers, for the purposes of this Comment, are Tower Records, Musicland, and Trans World ("Retailers"). Second Amended Complaint at 6, *In re* Compact Disc Minimum Advertised Price Antitrust Litigation (D. Me. filed Nov. 29, 2000) (No. 1361) [hereinafter Complaint].

7. *See id.*

8. Scott & Duryee, *supra* note 2.

9. *See generally* Complaint, *supra* note 6.

10. *Audio Notes*, AUDIO WEEK, Feb. 5, 2001.

11. The Federal Trade Commission ("FTC") is an independent federal regulatory agency created for public enforcement of antitrust law. E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS § 3.01, at 37 (3d ed. 1998). The FTC has civil jurisdiction over the Sherman Act, the Clayton Act, and the Federal Trade Commission Act ("FTCA"). *Id.* Specifically, § 5 of the FTCA outlaws "unfair methods of competition" that clearly violate § 1 of the Sherman Act or that constitute incipient violations of same. 15 U.S.C. § 45 (1994); 15 U.S.C. § 1 (1994); *see also* Donald S. Clark, *Price-Fixing Without Collusion: An Antitrust Analysis of Facilitating Practices After Ethyl Corp.*, 1983 WIS. L. REV. 887, 908–09 (1983). In contrast to the Sherman Act, the FTCA does not require concerted action as a requisite to violation. Donald S. Clark, *Price-Fixing Without Collusion: An Antitrust Analysis of Facilitating Practices After Ethyl Corp.*, 1983 WIS. L. REV. 887, 908–09 (1983).

12. Tim Carvell, *The Crazy Record Business: These Prices Are Really Insane*, FORTUNE, Aug. 1997, at 116.

13. FTC Notices, *supra* note 4, at 31319.

14. *Id.* at 31320.

15. *Id.*

products.[16] The FTC consequently concluded that MAPs amounted to unfair methods of competition prohibited by antitrust law.[17]

Without admitting wrongdoing or paying any damages, Distributors settled with the FTC by agreeing to postpone MAPs for seven years.[18] News of the FTC's findings confirmed long-held consumer suspicions regarding CD prices: record industry conglomerates price-gouge music consumers to pad corporate margins.[19]

Months after the FTC's announcement of the settlement, the attorneys general of forty-two states and three U.S. territories (collectively "States") filed antitrust class actions against the Distributors and Retailers.[20] Those actions were subsequently consolidated for adjudication in the District of Maine.[21] The consolidated suit alleges MAPs legally harmed consumers by artificially fixing CD prices in violation of the Sherman Antitrust Act.[22] The States may recover up to $1.5 billion in treble damages if they succeed.[23] Further, injunctive relief sought by the States may restrict the ability of Distributors and Retailers to direct the prices of their products.[24] In retrospect, what Distributors and Retailers launched as a simple solution boomeranged as a complex problem.[25]

This Comment evaluates the legality of MAPs under the Sherman Antitrust Act and further assesses their broader impact on the prerecorded music market. Part II highlights section 1 of the Sherman Act and its regulation of business practices that restrain trade. Discussed against that

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16. *Record Companies Settle FTC Charges of Restraining Competition in CD Music Market, available at* http://www.ftc.gov/opa/2000/05/cdpres.htm (last visited Jan. 24, 2001).

17. FTC Notices, *supra* note 4, at 31321. Specifically, the FTC concluded that MAPs violated section 5 of the FTCA (15 U.S.C. § 45) and potentially constituted unlawful restraints of trade under section 1 of the Sherman Act (15 U.S.C § 1). *Id.*

18. *Id.* at 31320.

19. Sobel & Sobel, *supra* note 3, at 8.

20. *See In re* Compact Disc Minimum Advertised Price Litigation, No. 1361, 2000 U.S. Dist. LEXIS 15928, at *1 (J.P.M.L. Oct. 20, 2000) [hereinafter Consolidation Order]; Complaint, *supra* note 6, at 3. The States are Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. Complaint, *supra* note 6, at 3. The United States Territories are the Northern Mariana Islands, Puerto Rico, and the Virgin Islands. *Id.*

21. Consolidation Order, *supra* note 20.

22. Complaint, *supra* note 6, at 4.

23. Scott & Duryee, *supra* note 2.

24. Complaint, *supra* note 6, at 4.

25. *See e.g.*, Ed Christman, *Retail Track: Labels Must Take Long-Term View To Avoid Price War Fallout,* BILLBOARD, Dec. 9, 2000, at 82.

background are the history and purpose of MAPs and the pending antitrust suit challenging the pricing practices of Distributors and Retailers. Part III proposes that MAPs resemble horizontal and vertical restraints of trade outlawed by section 1 of the Sherman Act. From a related perspective, Part IV posits that MAPs have cost the music industry by fostering music piracy[26] and by artificially supporting physical distribution to the impediment of more efficient means. Part V concludes that Distributors and Retailers are better served by evolving to contend with newfound competition rather than enacting provisions to impede competition.

II. BACKGROUND

A. Sherman Antitrust Act: The Charter of Economic Competition

The American free enterprise economy hinges on free and unfettered competition between businesses.[27] As articulated by the Supreme Court, the premise of free and unfettered competition is that "unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress."[28]

The Sherman Antitrust Act[29] is the charter of free and unfettered competition.[30] The Sherman Act was enacted over one hundred years ago to preserve the free enterprise environment from domination by powerful conglomerates,[31] yet it is applicable more than ever to the competitive

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26. Piracy refers to the unauthorized duplication of copyrighted music for sale or exchange. John Gibeaut, *Facing the Music*, A.B.A. J., Oct. 2000, at 37. For the purposes of this Comment, piracy delineates CD burning and Internet file swapping. CD burning is the process by which digital signals representing sound recordings (songs) are digitally encoded onto a blank CD via either a properly equipped computer or a stand-alone duplication device called a CD burner. *See* KRASILOVSKY & SHEMEL, *supra* note 1, at 446. The actual digital signals used can come from a variety of sources including prerecorded CDs (*i.e.*, a store-bought original or a previously duplicated CD) and compressed sound file formats created by computer software (*e.g.*, mp3). *Id.* Internet file swapping refers to the practice by which music from prerecorded CDs is converted to compressed sound files by encoding computer software in a process called "ripping." *Id.* The sound files can then be emailed to others or posted on a website for downloading by other Internet users. *Id.* Regardless of how they are obtained, the sound files can ultimately be played back either directly from the computer hard disc or by "burning" the files onto a CD for playback. *Id.* The software necessary to encode, decode, and burn the sound files is available free of charge on the Internet, and the entire swapping process can take mere minutes. *Id.*

27. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978).

28. N. Pac. Ry. Co. v. United States, 365 U.S. 1, 4 (1958).

29. 15 U.S.C. § 1 (1994).

30. *N. Pac. Ry. Co.*, 365 U.S. at 4.

31. *Id.* at 4–5.

American economy of the new millennium.[32] As in years past, established businesses may aggregate to maintain their market power to the detriment of nascent competitors.[33] Consequently, preservation of the free market environment as facilitated by the Sherman Act is vital in ensuring that competitors have the opportunity to introduce novel goods and services to the marketplace at the most competitive prices for the ultimate benefit of consumers.[34]

1. Market Restraints Implicate Section 1 of the Sherman Act

In a freely competitive market,[35] market forces forge the prices of goods and services.[36] Market restraints, or restraints of trade, are business practices that obstruct market forces.[37] According to the Supreme Court, a market restraint "refers not to a particular list of agreements, but to a particular economic consequence, which may be produced by quite different sorts of agreements in varying times and circumstances."[38]

Conceptually, market restraints assume two general orientations.[39] Restraints resulting from agreements among competing firms or businesses are classified as horizontal.[40] Restraints resulting from agreements between firms or businesses at different levels of distribution are classified as vertical.[41] Price fixing is a type of market restraint that can arise in either the horizontal or vertical orientation.[42]

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32. David A. Balto, *Antitrust Enforcement in the Clinton Administration*, 9 CORNELL J.L. & PUB. POL'Y 61, 132 (1999).

33. *Id.* at 105. Maintenance of the free market is especially important in light of distribution on the Internet. *Id.* Commerce on the Internet ("ecommerce") has grown exponentially and antitrust laws help foster that growth by preventing established distributors and retailers from engaging in practices (*e.g.* boycotting) that suppress emerging ecommerce businesses in their legitimate struggles to get market share. *Id.*

34. *See Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695.

35. In the antitrust context, the term "market" refers to the interaction between buyers and sellers. SULLIVAN & HARRISON, *supra* note 11, § 1.01, at 2.

36. *Id.* § 2.02[C], at 14; see *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692; *N. Pac. Ry. Co.*, 365 U.S. at 4–5.

37. Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 724 (1988).

38. *Id.* at 731.

39. *Id.* at 730.

40. *Id.*

41. *Id.*

42. SULLIVAN & HARRISON, *supra* note 11, § 4.01, at 109, § 5.01, at 217. Other types of market restraints include market divisions and concerted refusals to deal. *Id.* § 4.01, at 109.

Regardless of orientation, market restraints are suspect under section 1 of the Sherman Act.[43] Section 1 forbids "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."[44] Courts interchangeably use the terms "contract," "combination" and "conspiracy" to signify some sort of concerted action or arrangement between the alleged violators.[45]

Not all market restraints, however, automatically violate section 1.[46] As recognized by the Supreme Court, certain arrangements implicating trade may actually promote competition in the pertinent market thereby realizing the Sherman Act principle.[47] Consequently, the Supreme Court has interpreted section 1 as outlawing only those arrangements that unreasonably restrain trade.[48]

2. Business Practices Affecting Price May Unreasonably Restrain Trade

Business practices that fix price, either directly or indirectly, shortchange free market forces from forging prices.[49] Consequently, the Supreme Court declared decades ago that any "combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce" constitutes an unreasonable price fixing restraint under section 1.[50] Under comparable standards, business practices that restrict the ability of

43. *Bus. Elecs. Corp.* 485 U.S. at 723–24.

44. 15 U.S.C. § 1.

45. The Supreme Court has not differentiated the terms, instead stating that in section 1 cases, "[T]here is the basic distinction between concerted and independent action . . . ." Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984). Lower courts have consequently labeled trade-restraining arrangements, agreements, or combinations as concerted action. *See* Bogosian v. Gulf Oil Corp., 561 F.2d 434, 445 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978) (expressing that there is "no distinction between the terms combination and conspiracy" and noting that their reading of section 1 cases indicates that these two terms are interchangeably used); Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1455 (11th Cir. 1991) (stating "[t]he terms 'contract, combination . . .or conspiracy are used interchangeably to describe the requisite agreement between two or more persons to restrain trade").

46. *See Bus. Elecs. Corp.*, 485 U.S. at 723; NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 98 (1983).

47. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1917).

48. *Bus. Elecs. Corp.*, 485 U.S. at 723.

49. *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692 (citing United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226 n.59 (1940)).

50. *Socony-Vacuum Oil Co.*, 310 U.S. at 213.

businesses to freely *advertise* prices may amount to unreasonable restraints because they may have price fixing effects.[51]

a. Establishing Concerted Action

The threshold requirement under section 1 is that a given business practice must be the product of concerted action among the alleged violators.[52] Direct evidence, such as an express agreement or documented records of a meeting between businesses, signifies concerted action.[53] Alternatively, the conduct of businesses in light of surrounding circumstances may support the existence of tacit concerted action.[54]

In practice, businesses rarely agree to overtly price fix, therefore, the majority of cases turn on whether circumstantial evidence supports tacit concerted action.[55] The central question becomes whether the businesses' conduct flows from independent decision-making or whether it reflects a meeting of the minds.[56] Thus, proof that business practices are entirely unilateral negates the inference of concerted action.[57]

In the horizontal orientation, concerted action may be implied from a pattern of uniform business action among competitors, known as conscious parallel conduct, supported by one or more "plus factors."[58] Plus factors are additional facts supporting the inference of concerted action.[59] Specifically, plus factors may include: conduct by an actor that radically departs from prior practice; an actor's awareness that its co-competitors were solicited to cooperate; a substantial profit motive for the actor to engage in concerted action; actual participation in substantially uniform conduct with co-competitors; and circumstances in which the actor's compliance is more economically sensible than independent action.[60]

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51. *See* Morales v. Transworld Airlines, Inc., 504 U.S. 374, 388 (1992); Bates v. State Bar of Ariz., 433 U.S. 350, 377 (1977).

52. *Monsanto Co.*, 465 U.S. at 761; *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692.

53. SULLIVAN & HARRISON, *supra* note 11, § 4.15[A][2], at 182.

54. *Id.*

55. *Id.*

56. Theatre Enters. Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540 (1954).

57. *Monsanto Co.*, 465 U.S. at 761.

58. *See* Interstate Circuit, Inc. v. United States, 306 U.S. 208, 222–23 (1939).

59. Clark, *supra* note 11, at 911–12. Currently, "plus factors" represent the standard from which horizontal agreements can be inferred. SULLIVAN & HARRISON, *supra* note 11, § 4.15[A], at 187.

60. *Interstate Circuit, Inc.*, 306 U.S. at 222–23.

Evidence comporting with this standard signifies a horizontal restraint under section 1.[61]

In the vertical orientation, concerted action may be implied from "direct or circumstantial evidence that reasonably tends to prove that the [alleged violators] 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'"[62] According to the Supreme Court, there must be direct or circumstantial "evidence that tends to exclude the possibility that the [businesses] were acting independently."[63] In particular, a meeting of the minds may be implied from the informed acquiescence of one party to the practice or scheme of another.[64] Alternatively, a meeting of the minds may be implied where a party uses coercive tactics or threats of refusal to deal in order to secure adherence to its price terms.[65] Evidence comporting with these standards signifies a vertical restraint under section 1.[66] A vertical restraint implicating price or price levels is termed a resale price maintenance agreement ("RPM agreement").[67]

b. Assessing the Impact on Competition

Assuming the existence of concerted action, the next inquiry is whether the restraint resulting from that action unreasonably impedes competition within the pertinent market.[68] This inquiry considers the facts particular to the pertinent market together with the history, purpose, and effect of the restraint in question.[69] Notably, a "good intention" does not validate a restraint that is anti-competitive on balance.[70] The intent underlying a restraint is considered, however, in predicting its impact on competitors as well as on competition.[71]

Over time, two standards have evolved for assessing the reasonableness of restraints under section 1.[72] Under the more restrictive

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61. SULLIVAN & HARRISON, *supra* note 11, § 4.01, at 109.

62. *Monsanto Co.*, 465 U.S. at 764 (citing Edward J. Sweeny & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980)).

63. *Id.*

64. *Interstate Circuit, Inc.*, 306 U.S. at 226.

65. United States v. Parke, Davis & Co., 362 U.S. 29, 43 (1960).

66. SULLIVAN & HARRISON, *supra* note 11, § 5.02, at 218.

67. *Id.*

68. *Chicago Bd. of Trade*, 246 U.S. at 238; *Bus. Elecs. Corp.*, 485 U.S. at 723.

69. *Chicago Bd. of Trade*, 246 U.S. at 238.

70. *Id.*

71. *Id.*

72. *Bus. Elecs. Corp.*, 485 U.S. at 723.

per se rule, restraints having a "pernicious effect on competition and lack of any redeeming virtue" are judged *per se* unlawful.[73] Courts generally apply the *per se* rule where the circumstances espouse such a likelihood of anti-competitive impact that a deeper evaluation of the restraint is in vain.[74] *Per se* analysis is consequently not suitable for novel business practices whose competitive impact is not immediately obvious.[75]

The more lenient rule of reason enables courts to evaluate the rationale of novel business practices to assess competitive impact.[76] Under this standard, a restraint is judged on a case-by-case basis, thereby allowing the factfinder to balance competing factors in the context of the pertinent market.[77] Factors balanced include the characteristics of the pertinent market, the condition of the market before and after the practice, and the actual or probable effect of the restraint on competition.[78] On balance, a restraint violates the rule of reason when the anti-competitive impact outweighs any pro-competitive pledges or effects.[79]

B. Record Distributors' MAP Provisions: Unlawful Restraints Under Section 1 of the Sherman Act?

1. History of the MAP Provisions

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73. *N. Pac. Ry. Co.*, 356 U.S. at 5; *see also* Broadcast Music, Inc. v. Columbia Broad. Sys. Inc., 441 U.S. 1, 19–20 (1978) (specifying the *per se* rule applies to restraints "that would always or almost always tend to restrict competition and decrease output").

74. *NCAA*, 486 U.S. at 103–04; *see also Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692 (expressing the *per se* rule applies to arrangements "whose nature and necessary effect are so plainly anti-competitive that no elaborate study of the industry is needed to establish their illegality").

75. *NCAA*, 486 U.S. at 103–04; *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692. Naturally, the less experience the courts have with a challenged practice, the more necessary it becomes to conduct a detailed factual inquiry to ascertain the purpose, effect, and ultimately, the anti-competitive impact, if any, of that practice in the pertinent market. SULLIVAN & HARRISON, *supra* note 11, § 4.05, at 122.

76. *Bus. Elecs. Corp.*, 485 U.S. at 723. Articulating the reasoning behind a court's decision to apply the *per se* rule or the rule of reason, the Eleventh Circuit expressed that the *per se* rule is applied "'only when history and analysis have shown that in sufficient similar circumstances the rule of reason unequivocally results in a finding of liability,' *i.e.*, when the conduct involved always or almost always tend[s] to restrict competition and decrease output." Levine v. Cent. Fla. Med. Affiliates, Inc., 72 F.3d 1538, 1549 (11th Cir. 1996) (citing Consultants & Designees, Inc. v. Butter Serv. Group, Inc., 720 F.2d 1553, 1562 (11th Cir. 1983)).

77. *Bus. Elecs. Corp.*, 485 U.S. at 723; *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692; *Chicago Bd. of Trade*, 246 U.S. at 238.

78. *Id.*

79. *Id.*

The evolution of MAPs correlates with CD prices at both the retail and wholesale levels. By the early 1990s, Distributors sold CDs to Retailers for approximately ten dollars per disc.[80] Distributors were content with the arrangement because they charged appealing markups on each CD.[81] Retailers were satisfied because they sold each CD for approximately four dollars over the wholesale purchase price.[82] To promote retail sales, Distributors customarily granted each Retailer marketing and advertising funds under a cooperative advertising program ("COOP").[83]

By 1993, the emergence of a new breed of CD retailer, the national consumer electronics chains ("Discounters"),[84] disrupted the Distributor-Retailer dynamic.[85] Unlike Retailers whose profits flowed almost entirely from the sale of CDs and other music-related products, Discounters reaped earnings primarily from mass-selling consumer electronics such as televisions, computers, and home appliances.[86] Additionally, unlike Retailers that were typically located in high rent areas such as malls and promenades, Discounters took space in low rent warehouses to minimize overhead.[87] Discounters needed the perfect bait to attract consumers to their more isolated locations, and CDs fulfilled this need.[88]

Discounters began purchasing CDs from Distributors in bulk, pricing them two to three dollars below Retailers' customary prices, then promoting them heavily in self-funded advertisements.[89] Discounters earned only slight profits on the discounted CDs, and periodically even sold them at a loss, but the Discounters' strategy was to entice consumers with CDs, and then sell them consumer electronics.[90] Discounters were

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80. Carvell, *supra* note 12, at 110. CDs gradually replaced cassette tapes as the primary format for the distribution of prerecorded music during the 1980s. *See id.*

81. *Id.*

82. *Id.*

83. *See* FTC Notices, *supra* note 4, at 31319–20. In the traditional COOP, a distributor provides desiring retailers with funds to assist those retailers in promoting and advertising a given product. Balto, *supra* note 32, at 99 n.214. The distributor customarily conditions the disbursement of COOP funds on the retailer's advertising the given product at or above a price level suggested by the manufacturer in those advertisements funded *entirely* by the COOP dollars. *Id.*

84. Consumer electronics discounters include Best Buy and Circuit City. Complaint, *supra* note 6, at 5.

85. *See id.*

86. Carvell, *supra* note 12, at 110.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

also able to offset discounting and losses from CD sales with COOP funds they received from Distributors.[91] The Discounters' strategy proved effective.[92]

Over time, consumer electronics Discounters multiplied throughout the United States.[93] Distributors were delighted as the proliferation of Discounters translated into large wholesale orders.[94] Retailers, on the other hand, quickly realized that the Discounters' advertisements exposed them as overpriced in comparison.[95] Retailers needed to lower prices to compete amidst this new market dynamic, which they did, and intense retail competition ensued.[96]

Before long, the newfound retail competition became financially unbearable for Retailers.[97] In contrast to Discounters, Retailers were dependent on COOP funds to advertise, and they relied on CDs as their primary means of subsistence.[98] Simultaneously, however, market forces pressured Retailers to discount that very product to remain competitive.[99]

Faced with this dilemma, Retailers pressured Distributors for intervention to counteract discounting.[100] Distributors were initially apathetic.[101] After a number of celebrated Retailers filed for bankruptcy, however, Distributors realized their primary product outlet had destabilized.[102]

Between 1992 and 1993, Distributors mounted a rescue effort in the form of minimum advertised pricing provisions.[103] The provisions were enacted as part of the customary Distributor-Retailer COOP.[104] Yet, the provisions modified the COOP by setting more restrictive conditions on Retailers' and Discounters' (collectively "Resellers") receipt of COOP funds.[105] Specifically, the provisions declared that "any store that undercut

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91. *Id.*
92. *See* Complaint, *supra note* 6, at 12.
93. Carvell, *supra* note 12, at 110.
94. *Id.*
95. *Id.*
96. *See* FTC Notices, *supra* note 4, at 31320.
97. *See* Complaint, *supra* note 6, at 3.
98. Carvell, *supra* note 12, at 114.
99. *Id.* at 113.
100. FTC Notices, *supra* note 4, at 31320; Complaint, *supra* note 6, at 3.
101. Carvell, *supra* note 12, at 112–13.
102. *Id.*
103. *See* FTC Notices, *supra* note 4, at 31320.
104. *Id.* at 31319.
105. Carvell, *supra* note 12, at 112.

[a minimum advertised price] would be cut off from . . . advertising support."[106]

This initial series of provisions, however, contained loopholes.[107] The pricing restrictions did not apply to all advertisements and in-store displays,[108] and they were not strictly enforced.[109] Discounters retained wiggle room to lower prices, so discounting continued and retail prices continued to decline.[110]

Facing aggressive competition, Retailers insisted that Distributors enact stricter minimum advertised price provisions.[111] This pressure accumulated at the National Association of Recording Merchandisers ("NARM")[112] annual convention in 1995, at which Jack Eugster, the CEO of Retailer Musicland, openly expressed the need for Distributors to modify the existing provisions and to police them.[113] Delivering the keynote address at the convention, Eugster explicitly urged Distributors to extend advertisement restrictions to "in-store pricing as well as advertised prices" and to condition "co-op support for the entire ad" on compliance with those restrictions."[114] After the convention, representatives of numerous other Retailers pressured Distributors to respond with stricter restrictions.[115]

Foreseeing the impact decreasing retail prices could have on wholesale margins, Distributors responded.[116] In January 1996, one Distributor modified its provision to essentially include those terms urged by Retailers.[117] Shortly thereafter, other Distributors made near-identical modifications.[118] Within months, all five Distributors catalogued

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106. *Id.*

107. Ed Christman, *Retail Track: Three Is the Magic Number as EMD Toughens Its MAP*, BILLBOARD, June 8, 1996, at 86.

108. *Id.*

109. Chris Morris, *Declaration of Independence: Critical Factors in Retail Nosedive Outlined at NAIRD Convention*, BILLBOARD, June 8, 1996, at 16.

110. *Id.*; Christman, *supra* note 107, at 86.

111. Christman, *supra* note 107, at 86; Complaint, *supra* note 6, at 14; Ed Christman, *Sony Distribution to Raise MAP by $1: Minimum Advertised Price Goes To $11.88–$13.88*, BILLBOARD, Mar. 22, 1997, at 3; Carvell, *supra* note 12, at 112–13.

112. NARM is an industry trade association of which Distributors and Retailers are members. Complaint, *supra* note 6, at 12. The association holds regular meetings or conventions in which the Distributors, Retailers, and other music industry constituents discuss issues affecting their industry. *Id.* at 13.

113. *Id.*

114. *Id.*

115. *Id.* at 13–14.

116. Christman, *supra* note 111, at 3.

117. Complaint, *supra* note 6, at 15; *see also* FTC Notices, *supra* note 4, at 131320 (supporting the statement expressed in the Complaint).

118. FTC Notices, *supra* note 4, at 31320.

analogous provisions, known as MAPs.[119] Distributors then publicized their efforts, acknowledging that MAPs were in response to Retailers' requests.[120] Thereafter, Retailers expressly thanked Distributors and proceeded to execute MAPs at the retail level.[121] Discounters, on the other hand, loathed MAPs for interfering with their ability to discount, but each risked losing all COOP funds for failing to comply.[122]

2. Terms of the Modified MAPs

MAPs prohibited all Resellers receiving COOP funds from advertising CDs below the Distributors' MAP-specified minimum in any advertisements.[123] The advertisement terms encompassed all in-store signs and displays.[124] Only the small price tags affixed by Resellers to the actual CDs remained unrestricted.[125] Further, "advertisement" broadly embraced all print and media advertising.[126] Even those advertisements paid for entirely by Resellers were restricted to the MAP-specified minimum.[127]

Distributors aggressively enforced MAPs to ensure compliance.[128] Any Reseller discovered advertising a Distributor's CDs below the MAP-specified minimums was denied all COOP funds from that Distributor.[129]

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119. *Id.*

120. Christman, *supra* note 111, at 3.

121. Complaint, *supra* note 6, at 16.

122. Christman, *supra* note 107, at 86.

123. FTC Notices, *supra* note 4, at 31321.

124. *Id.* at 31319. "In store advertising or promotion" refers to "any promotional effort conducted in or on the physical premises of the [reseller] or a [reseller-controlled] internet site, including but not limited to, signs, bin cards, end caps, hit walls, listening posts, internet banner advertisements, and promotional stickers." *See, e.g.*, Agreement Containing Consent Order, *In re* BMG Music (FTC No. 971-0070), *available at* http://www.ftc.gov/os/2000/05/bmgmusicagre.htm (last visited Feb. 21, 2001) [hereinafter BMG Agreement Containing Consent Order].

125. FTC Notices, *supra* note 4, at 31321.

126. *Id.* at 31319. "Media advertisement" referred to "any promotional effort by a [Retailer] outside of the [Retailer's] physical location or [Retailer-controlled] internet site, including but not limited to, print, radio, billboards, or television." *See, e.g.*, BMG Agreement Containing Consent Order, *supra* note 124.

127. FTC Notices, *supra* note 4, at 31319.

128. *Id.* at 31319–20.

129. *Id.* Discounters occasionally discounted certain CD titles, advertising that the CD was available at a "guaranteed low price" to avoid MAP violations. *Id.* at 31321. Yet these discounters were publicly sanctioned. *See, e.g.*, Christman, *supra* note 107, at 86 (reporting Polygram Group Distribution's ("PGD") sanctioning of a Nebraska and an Illinois discounter).

Such sanctions lasted sixty to ninety days for a single violation and could be extended up to one year for multiple violations.[130]

3. FTC Investigation Faults MAPs

By 1997, retail CD prices gradually leveled off and, in fact, slowly increased.[131] During the same period, however, the intense retail competition of Discounters, coupled with other economic factors, dictated decreasing CD prices.[132] On April 1997, this paradoxical trend prompted the FTC to investigate CD pricing practices in the prerecorded music market.[133]

After a formal investigation, the FTC linked MAPs to a distinct increase in retail prices that, in turn, enabled Distributors to raise wholesale prices.[134] Based on its investigation, the FTC estimated that American consumers spent an added $480 million for prerecorded music during the period MAPs were implemented.[135] Consequently, the FTC concluded that distributors' MAPs amounted to unfair methods of competition in or affecting commerce under section 5 of the Federal Trade Commission Act, and that MAPs likely violated section 1 of the Sherman Act.[136]

To restore price competition, the FTC proposed a settlement obligating Distributors to discontinue MAPs for seven years.[137] Distributors agreed to the settlement without admitting the FTC's findings

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130. FTC Notices, *supra* note 4, at 31319–20. *See, e.g.*, BMG Agreement Containing Consent Order, *supra* note 124 (providing that a three-time violation by any reseller in a twelve month period resulted in "a suspension of all cooperative advertising and promotional funds for up to twelve months").

131. Sobel & Sobel, *supra* note 3, at 8.

132. *Id.*

133. Carvell, *supra* note 12, at 116.

134. *Id.*

135. Sobel & Sobel, *supra* note 3, at 8.

136. FTC Notices, *supra* note 4, at 31321.

137. *Id.* at 31320. More specifically, "[t]here are five separate complaints and proposed consent orders in this matter, one for each of the distributors, which are virtually identical with the exception of minor variations related to the corporate structure of each respondent." *Id.* at 31319. Part One of the orders provides definitions and clarifies that the provisions "apply to cooperative funding efforts regardless of whether the retailer sells prerecorded music in traditional retail stores or over the Internet." *Id.* at 31320. Part Two of the orders requires that the MAP provisions be discontinued in their entirety for seven years. *Id.* Part Three details specific provisions ensuring that none of the distributors can otherwise maintain their anti-competitive conduct. *Id.* The remaining parts of the consent orders note provisions addressing specific variations among the distributors. FTC Notices, *supra* note 4, at 31320.

or any legal violations, and without paying any damages.[138] To date, Distributors assert they settled to avoid costly, protracted litigation.[139] Absent a settlement, the pending antitrust action[140] now renders litigation inevitable.

4. Antitrust Class Action Asserts MAPs Fixed CD Prices

Within weeks of the FTC settlement, attorneys general of over thirty States filed *parens patriae* actions[141] seeking damages under the Sherman Act for injuries caused by MAPs to their respective citizen-consumers.[142] The number of suits continued to grow and on October 20, 2000, the Judicial Panel on Multidistrict Litigation consolidated actions from forty-two States and three U.S. territories, and transferred the suit to the District of Maine for adjudication.[143] The consolidated suit names the Distributors and a number of Retailers as defendants.[144]

The States allege Distributors and Retailers "transformed their MAP programs into blunt and effective instruments for putting an end to price

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138. *Record Companies Settle FTC Charges of Restraining Competition in CD Music Market, available at* http://www.ftc.gov/opa/2000/05/cdpres.htm (last visited Jan. 24, 2001). The settlement between the FTC and each Distributor "is for settlement purposes only and does not constitute an admission of a law violation." *Id.* The consent order does, however, carry with it "the force of the law with respect to future actions." *Id.* Further, "[e]ach violation of such an order may result in a civil penalty of $11,000." *Id.*

139. Christopher Stern, *Big Labels Accused of Fixing CD Prices: States Also Name Record Chains*, WASH. POST, Aug. 9, 2000, at E3.

140. *See generally* Consolidation Order, *supra* note 20.

141. *Parens patriae* denotes the authority of state attorneys general, pursuant to the Clayton Act (15 U.S.C. § 15c(a) (1994)), to assert a cause of action under the Sherman Act on behalf of allegedly injured consumers residing within their respective states. SULLIVAN & HARRISON, *supra* note 11, § 3.01, at 37. The action may be for treble damages or equitable relief and may in addition seek reasonable attorney's fees and costs. *Id.* As provided in the Clayton Act, the purpose of the *parens patriae* cause of action is to enable a means of: 1) redressing consumers whose individual losses may be too small to justify private litigation and 2) supplementing the enforcement of antitrust laws by federal agencies. *Id.*

142. Complaint, *supra* note 6, at 3.

143. Consolidation Order, *supra* note 20. The Judicial Panel on Multidistrict Litigation was created by the Multidistrict Litigation Act of 1968. 28 U.S.C. § 1407(d) (1994). The Judicial Panel was created to promote judicial economy with respect to multi jurisdiction lawsuits and to minimize inconsistent ruling across jurisdictions. *Id.* Specifically, the Panel is authorized to consolidate and transfer to a single district for adjudication those civil actions: 1) involving one or more common questions of law and/or fact; 2) that are pending in different jurisdictions and 3) whose transfer will serve the convenience of the parties and witnesses. *Id.* With the exception of *parens patriae* actions, transfer is for pretrial proceedings only (meaning that while all other actions must be remanded to their original forums for trial, *parens patriae* actions may be fully litigated in the transferee jurisdiction). *Id.*

144. Complaint, *supra* note 6, at 6–9.

competition."[145] The States seek treble damages that may reach $1.5 billion,[146] and they seek injunctive relief forbidding comparable Distributor-Retailer practices in the future.[147] The States believe a victory will allow CD prices to return to levels dictated by market forces and will punish Distributors and Retailers for their anti-competitive tactics.[148]

Distributors and Retailers deny any wrongdoing and pledge to vigorously contest all allegations.[149] Distributors contend MAPs in fact benefited consumers by enhancing retail competition.[150] Similarly, Retailers declare that the States' action lacks merit.[151] Both maintain that it is the discounting championed by the States that actually harms the music industry.[152] In the meantime, the prerecorded music market remains MAP-free.[153]

III. MAP PROVISIONS RESEMBLE HORIZONTAL AND VERTICAL RESTRAINTS OF TRADE OUTLAWED BY SECTION 1 OF THE SHERMAN ACT

MAPs can be analyzed as both horizontal and vertical restraints of trade under section 1 of the Sherman Act.[154] Indirect evidence suggests MAPs are the product of a horizontal arrangement ("combination") among the Distributors.[155] More direct evidence likens MAPs to vertical RPM

145. *Id.* at 14. New York State Attorney General, Eliot Spitzer, commented, "[B]ecause of these conspiracies, tens of million of consumers paid inflated prices to buy CDs." Ed Christman, *Industry Defends MAP in Wake of Antitrust Suit*, BILLBOARD, Aug. 19, 2000, at 6. To Spitzer, America's "business economy has been built on the notion of fair and free competition." *Id.* "When there is illegal activity to fix prices—as was the case here," reasons Spitzer, "the consumer is always the loser." *Id.*

146. Scott & Duryee, *supra* note 2.

147. Complaint, *supra* note 6, at 6–9.

148. Scott & Duryee, *supra* note 2.

149. Christman, *supra* note 145, at 6.

150. *Id.*

151. *Id.*

152. Scott & Duryee, *supra* note 2. Specifically, Distributors and Retailers believe discounted prices particularly threaten artists and smaller record shops. *Id.* Admittedly, the discounting perpetuated by discounting and price wars caused thousands of smaller independent retail chains to go out of business in the 1990s. *Id.* Such discounting even destabilized a number of established national retail chains. *See* Carvell, *supra* note 12, at 113. However, antitrust principles command that free market forces and legitimate competition, rather than schemes devised by market participants, should determine which businesses survive in a given market. *See* discussion *infra* Part III.

153. Robert Hilburn & Randy Lewis, *Limp Bizkit's Starfish Proves To Be a Best Buy But Controversy Builds over Retailer Dropping the Price of Group's Hot-Selling Album*, L.A. TIMES, Oct. 19, 2000, at Calendar, at 28.

154. *See* FTC Notices, *supra* note 4, at 31321.

155. *Id.*

agreements between Distributors and Retailers.[156] In both orientations, the distinct anti-competitive effects of MAPs arguably renders them unlawful restraints of trade under section 1 of the Sherman Act.

A. Distributors Possess Significant Market Power

Market power in the antitrust context connotes the ability of a business or a group of businesses to raise prices above competitive levels without causing demand to drop[157] or "without incurring a loss in sales that more than outweighs the benefits of the higher price."[158] This power is evident when the price and supply of the goods in question are not consistent with, or responsive to, consumer demand.[159]

In a market dominated by a few competitors, the market power of those competitors is especially important in evaluating an allegedly anti-competitive practice[160] and may indeed serve as a "surrogate for [the] detrimental effects"[161] of that practice. In *Sugar Institute v. United States*,[162] the Supreme Court held unlawful an arrangement among fifteen competing sugar refiners to announce price changes in advance.[163] The Court emphasized that the refiners processed almost all of the imported raw sugar refined domestically, and supplied seventy to eighty percent of the sugar consumed in the United States.[164] The Court reasoned that although the refiners had not explicitly agreed to price fix, their arrangement was

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156. *Id.*

157. *See* Levine v. Cent. Fla. Med. Affiliates, Inc., 72 F.3d 1553, 1549 (11th Cir. 1996).

158. SULLIVAN & HARRISON, *supra* note 11, § 2.06[A], at 27–30.

159. *Id.* § 4.08, at 137–38. Particularly in recent years, "the determination of the degree of market power has become a central focus of many antitrust cases ranging from agreements among competitors to behavior by single firms to mergers." *Id.* § 2.01, at 10.

160. Sugar Inst. v. United States, 297 U.S. 553 (1936); FTC v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986); United States v. Columbia Steel Co., 334 U.S. 495, 527 (1948). The gravity of market power as a factor in Supreme Court cases generally depends on the pertinent market and the nature of the restraint imposed. Mark R. Patterson, *The Role of Power in the Rule of Reason*, 68 ANTITRUST L.J. 429, 430 (2000). In particular, the Court has not required a showing of market power in rule of reason cases where anti-competitive effects are evident and has restricted that showing in *per se* cases to the characteristics of the power at issue. *Id.* In contrast, many lower courts require a general showing of market power as a threshold requirement in rule of reason cases. *Id.* Factors considered important in assessing market power include "the percentage of business controlled" by the dominant competitor(s) and "the strength of the remaining competition." *Columbia Steel Co.*, 334 U.S. at 527.

161. *Ind. Fed'n of Dentists*, 476 U.S. at 447 (quoting 7 P. AREEDA ANTITRUST LAW ¶ 1511, at 429 (1986)).

162. 297 U.S. 553 (1936).

163. *Id.* at 602.

164. *Id.* at 571–72.

reprehensible because it capitalized on their market power to influence sugar prices in an anti-competitive manner.[165]

Comparably in *United States v. Container Corp.*,[166] the Supreme Court found significant the fact that defendants controlled ninety percent of the market for containers they manufactured.[167] The Court underscored defendants' market power in holding that an informal price exchange arrangement between them "chill[ed] the vigor of price competition."[168]

Distributors in this case possess significant market power in comparison to the defendants in *Sugar Institute* and *Container Corp.* The Distributors account for approximately eighty-five percent of the domestic prerecorded music market.[169] Further, no Reseller can elect not to distribute any Distributor's products and remain viable, because each Distributor distributes prerecorded music from a unique and exclusive roster of record producing companies and artists.[170] Moreover, the prerecorded music market is characterized by high entry barriers that limit the entry of new competitors.[171] Together, these factors empower the Distributors to "chill the vigor of price competition"[172] through their policies. Their market power is evidenced in part by the fact that demand for prerecorded CDs has not decreased despite increased prices, and by the fact that they were able to raise prices without incurring a loss in sales.[173]

Since MAPs recognizably impeded competition in the pertinent market, the States may not need to establish market power to support their

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165. *Id.* at 601.

166. 393 U.S. 333 (1969).

167. *Id.* at 336.

168. *Id.* at 337.

169. FTC Notices, *supra* note 4, at 31319. Specifically, the Distributors' product market is the wholesale and retail sale of prerecorded music products, including CDs and cassette tapes. Complaint, *supra* note 6, at 10. The geographic market is the United States. *Id.* According to the FTC, the Distributors' total domestic sales from prerecorded music comprise approximately 85 percent of a $13.7 billion total. FTC Notices, *supra* note 4, at 31319. An industry trade association estimates the total domestic sales for prerecorded music at $14.6 billion. *See* Complaint, *supra* note 6, at 10. Naturally, it is safe to assume that these figures will fluctuate based on a variety of changing factors in the market including customer purchasing, volume of products distributed in a given period, etc. *See, e.g.*, KRASILOVSKY & SHEMEL, *supra* note 1, at 4–8.

170. *See* FTC Notices, *supra* note 4, at 31321; Complaint, *supra* note 6, at 10–11.

171. FTC Notices, *supra* note 4, at 31320.

172. *Container Corp.*, 393 U.S. at 337.

173. *See* Scott & Duryee, *supra* note 2 (reporting that despite industry concerns over piracy availed by digital downloading over the Internet, "sales are hardly slipping" and that according to NARM, "consumers spent a record $9.1 billion on CDs" in 1999); Don Jeffrey, *Music Biz Looks to Challenges Ahead*, BILLBOARD, Mar. 13, 1999, at 5 (noting United States album sales grew 5.3 percent in 1999).

suit.[174] Yet, given the lower courts' reliance on market power in assessing anti-competitive effect,[175] the Distributors' substantial market power could be considered a "surrogate for [the] detrimental effects"[176] of MAPs.

B. MAPs Suggest an Unlawful Horizontal Restraint Among Distributors

Distributors compete with one another in that each manufactures and distributes prerecorded music products to Resellers for retail sale.[177] In this orientation, the Distributors' collective enactment of MAPs potentially represents a horizontal combination in restraint of trade under section 1.[178]

1. MAPs May Be the Product of a Tacit Combination Among the Distributors

Evidence of a overt agreement between the Distributors concerning MAPs or CD prices has not been discovered to date.[179] Defendants in antitrust actions, however, are rarely found to have agreed to price fix overtly.[180] Therefore, as in most section 1 cases, the court must imply the existence of a combination among the Distributors from the circumstances surrounding the implementation of MAPs.[181] In this case, the conscious parallel conduct of Distributors, bolstered by numerous plus factors, may support a tacit combination under section 1.

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174. *Ind. Fed'n of Dentists*, 476 U.S. at 460 ("[T]he purpose of the inquiries into . . . market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, [and] proof of actual detrimental effects, such as reduction of output can obviate the need for an inquiry into market power") (quoting 7 P. AREEDA ANTITRUST LAW ¶ 1511, at 429 (1986)).

175. *See, e.g.*, Lie v. St. Joseph Hosp., 964 F.2d 567, 569 (1992); *see also* Patterson, *supra* note 160, at 430.

176. *Ind. Fed'n of Dentists*, 476 U.S. at 460 (quoting 7 P. AREEDA ANTITRUST LAW ¶ 1511, at 429 (1986)).

177. *See* FTC Notices, *supra* note 4, at 31320. *See generally* Complaint, *supra* note 6.

178. *See Bus. Elecs. Corp.*, 485 U.S. at 730 (stating combinations among competitors are horizontal in orientation for the purposes of § 1 analysis).

179. *See generally* Complaint, *supra* note 6.

180. SULLIVAN & HARRISON, *supra* note 11, § 4.15[A], at 181.

181. *Id.*

a. Distributors' Conscious Parallel Conduct Reflects a Tacit Combination

In *Interstate Circuit v. United States*,[182] the Supreme Court held a combination is tacit where "knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it."[183] Under this standard, a "meeting of the minds" is implied where the alleged violators participated or acquiesced in a pattern of uniform business conduct.[184]

In this case, the Distributors' collective enactment of MAPs is parallel both in time and in substance. Between 1992 and 1993, Distributors adopted an initial series of MAPs in response to pressure from Retailers.[185] Between 1995 and 1996, Distributors modified those MAPs such that they contained almost identical terms.[186] Thereafter, Distributors announced MAPs to Retailers in a series of publicized announcements.[187] Principally, unity of purpose, a common design, or a shared understanding between competitors may be sufficient to establish a tacit combination.[188] Accordingly, the Distributors' conscious parallel enactment of MAPs may evidence a tacit combination.[189] This is so whether Distributors enacted MAPs through a manifest meeting of the minds or by acquiescing to the scheme of one another.[190]

If the States cannot establish unity of purpose, a common design, or a shared understanding, they may introduce the Distributors' motives as evidence of a tacit combination.[191] In this case, the instability of the retail market combined with pressure from Retailers was motive for Distributors

182. 306 U.S. 208 (1939).

183. *Id.* at 226.

184. MCM Partners, Inc. v. Andrews-Bartlett & Assocs., Inc., 62 F.3d 967, 973 (7th Cir. 1995) (citing United States v. Paramount Pictures, Inc., 334 U.S. 131, 161 (1948)); Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 142 (1968); City of Vernon v. S. Cal. Edison Co., 955 F.2d 1361, 1371 (9th Cir. 1992)).

185. Carvell, *supra* note 12, at 112.

186. FTC Notices, *supra* note 4, at 31320.

187. *See* Christman, *supra* note 107, at 86; Christman, *supra* note 111, at 3.

188. *See* Esco Corp. v. United States, 340 F.2d 1000, 1007 (9th Cir. 1965) (finding a "knowing wink" between competitors may be sufficient to confirm a combination).

189. *See* Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226 (1939); *Esco Corp.*, 340 F.2d at 1007; Pittsburgh Plate Glass Co. v. United States, 260 F.2d 397 (4th Cir. 1958).

190. *Pittsburgh Plate Glass Co.*, 260 F.2d at 397. In *Pittsburgh Plate Glass Co.*, a group of competing manufacturers made arrangements, while attending a trade association meeting, to raise price on a specified date. *Id.* at 400. One competitor who was not in attendance at the meeting was later informed of the other manufacturers' arrangement before that arrangement was publicized. *Id.* The Fourth Circuit affirmed that the competitor's raising of its prices before publication evidenced its interdependence with other manufacturers. *Id.*

191. *See* Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 214 (3d Cir. 1992).

to take collective action.[192] The concurrent pressure on the Distributors' wholesale margins (caused by declining retail prices) was further motive.[193] By themselves, neither the opportunity to act collectively nor the capacity to do so establish the existence of a combination.[194] In this case, however, Distributors had the capacity to act collectively as a result of their market power,[195] and they capitalized on the opportunity to do so by enacting MAPs market-wide and enforcing them with sanctions.[196]

The Distributors' likely defense, that their parallel conduct is simply a characteristic of an oligopoly, is possible but not persuasive.[197] Under the oligopoly pricing theory, conscious parallel conduct among a small number of competitors may be a natural phenomenon of a concentrated market, because each competitor must swiftly respond to the conduct of its co-competitors to remain competitive.[198] Thus, what appears conscious parallel conduct among oligopoly members may be the product of their independent responses motivated by pro-competitive objectives.[199] In evaluating the Distributors' defense, the question is whether their parallel adoption of MAPs is a result of collective action or whether it is an independent reaction by each distributor stemming from a competitive response to market conditions.[200]

In this case, the Distributors' contemporaneous adoption, modification, implementation, and enforcement of MAPs appears collective. To begin with, the MAP of each Distributor contains almost identical terms.[201] Further, the uniform increase in each Distributor's wholesale prices within a relatively short time period, coupled with the absence of any discounting, reflects coordination rather than competition.[202]

Moreover, the Distributors' matching practices of fielding complaints from Retailers and then sanctioning Discounters reflects collective

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192. FTC Notices, *supra* note 4, at 31320.

193. *Id.*

194. Capital Imaging Assoc. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 545 (2d Cir. 1993).

195. *See* FTC Notices, *supra* note 4, at 31320.

196. *See* FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 460–61 (1986) (market power may be evaluated to determine "whether an arrangement has the potential for genuine adverse effects on competition.").

197. An oligopoly is a concentrated market characterized by a small number of competitors. SULLIVAN & HARRISON, *supra* note 11, § 4.15[B], at 193.

198. *Id.* § 4.15[B], at 193–94.

199. *Id.*

200. *Id.*

201. FTC Notices, *supra* note 4, at 31320.

202. Clark, *supra* note 11, at 905–06.

action.[203] This practice may signify a tactic by which Distributors used Retailers to police and maintain a tacit combination.[204] Alternatively, the Retailers' insistence that Distributors enact and enforce MAPs (to counteract the ability of Discounters to discount), and the Distributors' conformity therewith, may have forged a combination among the Distributors by motivating them to take collective action.[205]

Finally, the fact that MAPs were adopted to impede retail competition and to increase CD prices contradicts the premise that parallel conduct in an oligopoly stems from a competitive response.[206] As recognized by the industry itself, the increase in CD prices despite retail competition is attributable to MAPs.[207] In perspective, Distributors are in a less defensible position than the defendants in *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*,[208] where the plaintiffs failed to show that co-defendants knew of each other's conduct.[209] Distributors in this case were admittedly

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203. SULLIVAN & HARRISON, *supra* note 11, § 5.02[B], at 229; *see also* Wall Prods. Co. v. Nat'l Gypsum Co., 326 F. Supp. 295, 316 (N.D. Ca. 1971) (holding defendants' withdrawal of price exceptions pursuant to announced and unannounced policies compelled conclusion that the defendants were engaged in a tacit understanding by "acquiescence coupled with assistance" to stabilize the prices of gypsum wallboard).

204. *See* SULLIVAN & HARRISON, *supra* note 11, § 5.02[B], at 229. *But see* Ctr. Video Indus. Co. v. United Media, 995 F.2d 735, 738 (7th Cir. 1993) (holding the complaint-termination process does not substantiate an accord unless there exists an actual agreement setting resale prices with a "certain amount of specificity").

205. *See In re* Toys 'R' Us, Inc., 221 F.3d 928 (7th Cir. 2000) (holding retailer with significant market power orchestrated an agreement among manufacturers by insisting that manufacturers boycott discounters and by securing manufacturers' commitment in that endeavor).

206. *See* SULLIVAN & HARRISON, *supra* note 11, § 5.02[B], at 229; Lykes Pasco, Inc. v. Ahava Dairy Prods. Corp., 1997-2 Trade Cas. (CCH) ¶ 72,011, at 81,012 (E.D.N.Y. Nov. 25, 1997) (finding no combination among orange growers that correspondingly raised their prices, because the price increase was legitimately related to an acute shortage of oranges).

207. Christman, *supra* note 107, at 86. As early as 1996, *Billboard*, a respected trade publication, proclaimed that "since these policies have come into play, sanity appears to be returning to . . . pricing." *Id.* The trend was expressly acknowledged by Retailer Trans World in its 1998 securities filing, which stated that "enforcement of the MAP Program has been successful in stabilizing prices in the industry." Complaint, *supra* note 6, at 18.

208. 346 U.S. 537 (1954).

209. *Id.* at 541–42. At a minimum, the unanimity of the Distributors' conduct raises a genuine issue of material fact thus making it likely that a summary judgment in their favor will be denied. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 597 n.21 (1986) (holding the distributors would have to establish that their conduct is equally as "consistent with permissible competition as with illegal conspiracy" to succeed at summary judgment). Conversely, the States will likely not be able to succeed at summary judgment either, as they would have to produce evidence that tends to exclude the possibility that Distributors acted independently of each other. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984).

aware of the impact discounting had on each other's margins and aware of each other's efforts concerning MAPs.[210]

b. Plus Factors Support a Tacit Combination

Because evidence of conscious parallel conduct is by itself insufficient to imply a combination,[211] the States must establish plus factors that support a combination. Numerous plus factors are evident in this case.

The first plus factor is that the Distributors' enactment and enforcement of MAPs is a significant departure from their prior conduct.[212] To illustrate, the Distributors' previous COOPs did not define the advertisement term to include all in-store signs and displays.[213] Nor did the previous definition extend to all media advertisement.[214] Further, the Distributors' vigorous sanctioning of non-complying Discounters departed from their treatment of Resellers before MAPs.[215]

A second plus factor is that Distributors had a substantial profit motive to enact MAPs.[216] The entry of Discounters into the prerecorded music market triggered intense competition that decreased retail CD prices.[217] Distributors were aware that decreasing retail prices would consequently depress their wholesale prices.[218] This threat to the Distributors' margins provided economic incentive to keep CD prices from decreasing and also to cause those prices to increase.[219]

Furthermore, as reasoned in Part IV.B, maintenance of the traditional brick-and-mortar distribution system provided another incentive for Distributors to enact MAPs. In short, intensified retail competition

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210. *E.g.*, Christman, *supra* note 111, at 3 (reporting that the president of BMG Distribution and the president of PGD acknowledged MAPs as a topic of discussion at the 1997 NARM convention).

211. *Theatre Enters. Inc.*, 346 U.S. at 541.

212. *Interstate Circuit*, 306 U.S. at 222–23 (stating that a radical departure from the previous business practice may support a combination).

213. *See* FTC Notices, *supra* note 4, at 31319–20.

214. *Id.*

215. *Compare* Carvell, *supra* note 12, at 112 (reporting the initial delight of Distributors with the proliferation of discounters because the discounters "were rather enjoying the big orders placed by their new best friends in the electronics sector") *with* Christman, *supra* note 107, at 86 (reporting the publicized threats of PGD to "cut off" any reseller discovered advertising below MAP-specified minimum prices).

216. *Interstate Circuit*, 306 U.S. at 222 (stating the prospect of increased profits provides a strong motive for concerted action).

217. FTC Notices, *supra* note 4, at 31320.

218. *Id.*

219. *Id.*; *see also* Christman, *supra* note 111, at 3.

destabilized a number of established brick-and-mortar Retailers that comprise the Distributors' key product outlet.[220] By enacting MAPs, Distributors were arguably able to revive destabilized Retailers and also safeguard them from the effects of discounting.[221]

A third plus factor is that each Distributor openly and uniformly participated in a comparable plot.[222] In fact, Distributors enacted almost identical MAPs within a twelve-month period.[223] On one occasion, certain Distributors announced their modified MAPs four months before their effective dates.[224] Within that four-month period, two other Distributors adopted analogous provisions.[225] Contemporaneously, Distributors then publicized their efforts and implemented MAPs market-wide.[226]

A fourth plus factor is that the Distributors' collective action was economically the more attractive alternative.[227] The market instability occasioned by intensified retail competition and the consequent destabilization of Retailers impacted Distributors simultaneously and equally.[228] Under the prevailing market conditions, the Distributors' independent pursuits would have contravened their collective interest.[229] For example, had only some Distributors implemented MAPs, their CDs would have appeared overpriced in comparison to the CDs of non-MAP Distributors.[230] Such partial implementation of MAPs, or the enactment of MAPs with dissimilar terms, would not have enabled Distributors to impact prices market-wide; an inconsistent approach would foreseeably have resulted in Resellers advertising each Distributor's CDs at disparate

220. Carvell, *supra* note 12, at 113; Scott & Duryee, *supra* note 2.

221. FTC Notices, *supra* note 4, at 31320. This course of action may more directly support "evidence of high profit margins," which is, by itself, a plus factor. Clark, *supra* note 11, at 914.

222. *Interstate Circuit*, 306 U.S. at 226 (implying participation in a common "scheme" may evidence a combination).

223. Complaint, *supra* note 6, at 15.

224. FTC Notices, *supra* note 4, at 31320.

225. *Id.*

226. *Id.*

227. *Interstate Circuit*, 306 U.S. at 222–23 (stating a strong motivation for concerted action exists when the potential for a substantial business loss arises); First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 286–87 (1968) (noting that the inference of collective action is strengthened where independent action contravenes the economic interests of the defendants, and therefore, "the circumstances . . . make the inference of rational, independent choice less attractive than that of concerted action").

228. FTC Notices, *supra* note 4, at 31320; Christman, *supra* note 107, at 86.

229. *See Interstate Circuit*, 306 U.S. at 222–23; *First Nat'l Bank*, 391 U.S. at 286–87.

230. Clark, *supra* note 11, at 913 (acknowledging that "in an oligopoly characterized by product homogeneity, it ordinarily makes no sense for one firm to price at a given level unless its rivals price at the same level").

prices.[231] In this light, collective enactment of MAPs was economically attractive, because it enabled Distributors to concurrently raise retail prices market-wide—by way of uniform price advertising—without those increases appearing discordant to consumers.[232]

The final plus factor is that CD prices did not respond expectedly to changing market conditions after MAPs were implemented.[233] As approximated by one Retailer, average CD prices decreased from fifteen to ten dollars per CD shortly after Discounters entered the retail market.[234] Yet, by 1996, decreasing CD prices gradually leveled off and then increased.[235] Thereafter, Distributors uniformly raised their wholesale prices to Resellers market-wide.[236] *Billboard*, a respected trade publication, acknowledged that MAPs caused these trends.[237]

In sum, the circumstances surrounding MAPs evidence conscious parallel conduct as well as plus factors that suggest a tacit combination among the Distributors. Even if Distributors did not intend to price fix or to participate in an agreement when enacting MAPs, they may be "held to have intended the necessary . . . consequences of their acts."[238]

2. MAPs Potentially Capitalized on the Distributors' Market Power in an Anti-competitive Manner

As discussed in Part III.A, Distributors possess significant market power in the prerecorded music market. This power, coupled with the anti-competitive impact of MAPs, may render the Distributors' conduct an unlawful restraint of trade either *per se* or under the rule of reason.

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231. *See* Christman, *supra* note 107, at 86.

232. A *Billboard* report supports the proposition that the MAP of PGD proved ineffective because "the other [Distributors] didn't follow suit and didn't have strong MAP policies" and that the effects of MAPs became apparent once other Distributors followed PGD. Christman, *supra* note 107, at 86. *See Interstate Circuit*, 306 U.S. at 223 (noting the Distributors' parallel conduct would have been senseless unless each distributor could expect its co-competitors to impose the same restrictions).

233. *Wall Prods. Co.*, 326 F. Supp. at 327; *Lykes Pasco, Inc.*, 1997-2 Trade Cas. (CCH) ¶ 72,011 (noting distributors' logical price increase in response to acute shortage in the market).

234. Complaint, *supra* note 6, at 12.

235. *Id.* at 4, 6. The FTC affirmed this trend independent of other costs underlying CD distribution. *See supra* note 4 and accompanying text.

236. *Id.* at 17.

237. Christman, *supra* note 107, at 86 (reporting "a new floor price [on CDs] has been established" since MAPs were implemented).

238. United States v. Masonite Corp., 316 U.S. 265, 275 (1942).

a. Distributors' Conduct May Be Judged *Per Se* Unlawful Under Traditional Standards

In *United States v. Socony-Vacuum Oil Co.*,[239] the Supreme Court declared that any arrangement tampering with the natural price structure of a given market violates section 1, even when "it is not established that the [market participants] had the means available for the accomplishment of their objective."[240] Such cases suggest that even those arrangements not directly affecting price may be judged *per se* unlawful.[241]

In this case, MAPs do not prescribe CD prices but rather restrict price advertising.[242] Further, no evidence has been discovered to indicate that MAPs were the result of an agreement among the Distributors to fix price.[243] Yet, MAPs directly affected CD prices by impeding retail price competition and consequently causing an increase in CD prices, both retail and wholesale.[244] Accordingly, the Distributors' enactment of MAPs may be judged a *per se* unlawful horizontal combination for tampering with the pricing structure in the prerecorded music industry. Considering the trend away from *per se* analysis,[245] however, the Distributors' enactment of MAPs will likely be judged under the rule of reason.

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239. 310 U.S. 150 (1940). The Court considered the legality of an arrangement between competitors to decrease the supply of petroleum products into the pertinent market. *Id.* at 150.

240. *Id.* at 224–25 n.59. According to the Court, conduct that impacts price has no inherent social utility. *Id.* Decades later in *Northern Pacific Railway Co. v. United States*, the Supreme Court added that the *per se* prohibition of recognized price fixing restraints promotes certainty for businesses and furthers judicial economy. 356 U.S. 1, 5 (1958).

241. *See* SULLIVAN & HARRISON, *supra* note 11, § 4.06, at 125–26; *see, e.g.*, United States v. Alston, 974 F.2d 1206, 1208 (9th Cir. 1992) (holding that in a market consisting of individual service providers and consumers, concerted action by suppliers may be *per se* unlawful, even where that combination does not directly involve price); *cf.* SULLIVAN & HARRISON, *supra* note 11, § 4.06, at 125–26 (noting numerous economists consider the *Socony-Vacuum Oil Co.* standard as well as its reasoning expansive).

242. FTC Notices, *supra* note 4, at 31319.

243. *See generally* Complaint, *supra* note 6.

244. *See* FTC Notices, *supra* note 4, at 31320.

245. SULLIVAN & HARRISON, *supra* note 11, § 4.05, at 122; *see e.g.*, Levine v. Cent. Fla. Med. Affiliates, 72 F.3d 1538, 1549 (11th Cir. 1996) (stating the 11th Circuit applies "the *per se* rule 'only when history and analysis have shown that in sufficiently similar circumstances the rule of reason unequivocally results in a finding of liability . . . i.e., when the conduct involved always or almost always tend[s] to restrict competition and decrease output.'") (quoting Consultants & Designers, Inc. v. Butler Serv. Group, Inc., 720 F.2d 1553, 1562 (11th Cir. 1983); Broad. Music, Inc. v. Columbia Broad. Sys. Inc., 441 U.S. 1, 19–20 (1979) (alteration in original)).

b. Distributors' Conduct May Violate the Rule of Reason

Under the rule of reason, the purpose and effect of the Distributors' conduct is assessed.[246] In *Chicago Board of Trade v. United States*,[247] the Supreme Court evaluated an agreement between members of a trading committee that required all members electing to purchase grain after close of trading to pay the price established at the close of that trading day.[248] Despite its potential anti-competitive impact on price, the Court upheld the agreement because it improved market conditions on balance.[249]

Similarly, in *National Society of Professional Engineers v. United States*,[250] the Court reiterated rule of reason analysis for arrangements impacting price and advised that the focus should be on whether a given arrangement promotes or suppresses competition.[251] The Court invalidated an agreement prohibiting competitive bidding among a group of engineers because its purported benefits for public safety did not outweigh its restriction of price competition.[252]

Recent Supreme Court decisions continue to appraise the potential pro-competitive effects of a given arrangement.[253] In *Broadcast Music, Inc. v. Columbia Broadcasting System*,[254] the Court upheld a blanket license agreement because it minimized transaction costs and facilitated negotiations in a manner that would otherwise not be possible in that market.[255] The Court valued that the challenged arrangement was devised to promote economic efficiency and to foster competition.[256]

Comparably in *NCAA v. Board of Regents of the University of Oklahoma*,[257] the Court evaluated a joint venture arrangement between collegiate athletic teams and their conference leagues, on the one hand, and

246. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

247. 246 U.S. 231 (1918).

248. *Id.* at 239. Interestingly, the Court could have characterized the agreement as *per se* unlawful for restricting price competition after closing hours. SULLIVAN & HARRISON, *supra* note 11, § 4.05, at 122.

249. *Chicago Bd. of Trade*, 246 U.S. at 241.

250. 435 U.S. 679 (1978).

251. *Id.* at 688.

252. *Id.* at 679–80.

253. *Broad. Music, Inc.*, 441 U.S. at 1; NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984).

254. 441 U.S. 1 (1979).

255. *Id.* at 21–22, 24.

256. *Id.* at 20.

257. 468 U.S. 85 (1984).

television networks on the other.[258] The Court considered three plausible pro-competitive justifications offered by defendants,[259] but ultimately rejected them as insufficient to outweigh the anti-competitive effect of the arrangement.[260]

Finally in *FTC v. California Dental Ass'n*,[261] the Court assessed the competitive impact of advertising restrictions in the code of ethics of a state dental association.[262] The restrictions prohibited members from advertising, among other things, discounted fees, even in advertisements that were truthful and non-deceptive.[263] The Court upheld the restrictions, reasoning that they perceivably protected consumers from the dangers of misleading advertising as well as enabled consumers and state regulators to receive more readily verifiable information regarding dental services.[264] The Court noted that because the restrictions were intended to avoid false and deceptive advertising, they could have a net pro-competitive effect or no effect on competition at all.[265]

Against this background, the Distributors' claim that MAPs were pro-competitive[266] seems untenable. First, MAPs did not improve market conditions,[267] as did the agreement in *Chicago Board of Trade*.[268] Second, there is no evidence that MAPs minimized transaction costs or promoted efficiency in the prerecorded music market,[269] as did the license agreement in *Broadcast Music, Inc.*[270] Third, Distributors cannot plausibly justify MAPs as promoting the protection and welfare of consumers, as did the

258. *Id.* In particular, the agreement restricted the number of games that could be broadcast, established the number of times a given team could be broadcast, and set a price for the telecasts. *Id.* at 91–94.

259. Specifically, the justifications were that the arrangement: 1) minimized the loss of game attendance; 2) minimized loss of athletic program revenues and 3) increased revenues by spreading income among a greater number of schools. *Id.* at 97.

260. *Id.* at 120.

261. 526 U.S. 756 (1999).

262. *Id.* at 756.

263. *Id.*

264. *Id.* at 773, 775.

265. *Id.* at 771. The Court noted that pro-competitive justifications should be considered unless an "observer with . . . a rudimentary understanding of economics could conclude that the arrangements in question would have an anti-competitive effect on customers and markets." *Id.* at 770.

266. *See, e.g.*, Christman, *supra* note 145, at 6; Scott & Duryee, *supra* note 2.

267. *See* FTC Notices, *supra* note 4, at 31320.

268. *See Chicago Bd. of Trade*, 246 U.S. at 231, 239–241.

269. *See* FTC Notices, *supra* note 4, at 31320.

270. *See Broad. Music, Inc.*, 441 U.S. at 20–21.

advertising restrictions in *California Dental Ass'n*.[271] To the contrary, MAPs were enacted to suppress price competition, and they achieved that goal with increased prices and consumer harm as a consequence.[272] Even if the States are unable to establish the anti-competitive effects of MAPs directly, case law permits them to offer the Distributors' market power as alternative evidence of such.[273]

Finally, assuming MAPs have some pro-competitive justifications, the court will give those justifications latitude under the rule of reason.[274] However, the court is obligated to exercise discipline by declining those justifications that are essentially a collateral attempt to salvage what is truly anti-competitive.[275] Considering again the harm MAPs caused to consumer and to competition,[276] the pro-competitive justifications presented by Distributors will likely be judged a collateral salvage attempt.[277]

In sum, the parallel conduct of Distributors in implementing MAPs bolstered by plus factors may support a tacit combination among the Distributors to tamper with CD prices. Since no evidence of an overt agreement to price fix exists,[278] the *per se* rule will likely not apply.[279] Yet, the Distributors' conduct may be judged an unlawful horizontal restraint of trade under the rule of reason due to the anti-competitive effect of MAPs

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271. *See Cal. Dental Ass'n*, 526 U.S. at 772. Especially important to the Supreme Court in *California Dental Ass'n* was that the restricted advertisements were in "a market for professional services, in which advertising is relatively rare and the comparability of service packages not easily established. *Id.* According to the Court, "the difficulty for customers or potential competitors to get and verify information about the price and availability of services magnifies the dangers to competition associated with misleading advertising." *Id.*

272. *See* FTC Notices, *supra* note 4, at 31320.

273. Lie v. St. Joseph Hosp., 964 F.2d 567, 570 (6th Cir. 1992) (holding plaintiff is obliged to prove market power where "actual detrimental effects" cannot be established). A mere showing of market power by itself, however, may not be sufficient to prove detrimental market effect. *See* KMB Warehouse Distribs. v. Walker Mfg., Co., 61 F.3d 123, 129 (2d Cir. 1995) (expressing that "[t]here must be other grounds to believe that the defendant's behavior will harm competition market-wide, such as the inherent anti-competitive nature of the defendant's behavior or the structure of the . . . market").

274. Sullivan v. NFL, 34 F.3d 1091, 1112 (1st Cir. 1994), *cert. denied*, 513 U.S. 1190 (1995).

275. *Id.*

276. FTC Notices, *supra* note 4, at 31319.

277. *NCAA*, 468 U.S. at 107 ("[A] restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with . . .antitrust law."). Because MAPs increased prices, they cannot be likened to a practice that increases economic efficiency and is, therefore, pro-competitive. *See Broad. Music, Inc.*, 441 U.S. at 18–23.

278. *See generally* Complaint, *supra* note 6.

279. *See Lie*, 964 F.2d at 569 (asserting only combinations that are "'so plainly anti-competitive that no elaborate study of the industry is needed to establish their illegality'" are *per se* unlawful) (quoting Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978)).

on balance.[280] Whether Distributors intended that effect will not validate their otherwise anti-competitive conduct.[281]

C. *MAPs Exemplify Unlawful RPM Agreements Between Distributors and Retailers*

Distributors operate at a different level in the distribution chain than Resellers, because Distributors manufacture and distribute prerecorded music products to the latter for resale.[282] In this orientation, each Retailer's execution of MAPs as directed by each Distributor potentially represents an RPM agreement in restraint of trade under section 1.[283]

1. MAPs Embody a Conscious Commitment to a Common Scheme

As with horizontal combinations, parties in the vertical orientation rarely agree to fix prices overtly.[284] Thus, the court must imply an RPM agreement between Distributors and Retailers from the circumstances surrounding the parties' implementation of MAPs.[285] In this case, MAPs likely embody a conscious commitment to the common scheme of impeding price competition and raising CD prices.

a. MAPs Are the Products Of Consensual RPM Agreements

In *United States v. Colgate & Co.*,[286] the Supreme Court evaluated a distributor's practice of influencing the resale price of products it distributed to retailers.[287] The distributor's practice included prior announcement of desired resale prices, urging of dealer compliance with those prices, and termination of sales to dealers failing to adhere to those prices.[288] The Court declined to imply an RPM agreement, reasoning that

280. *See Lie*, 964 F.2d at 569 (reiterating rule of reason analysis balances whether the combination at issue promotes competition or harms it).

281. *Chicago Bd. of Trade*, 246 U.S. at 238 (stressing "a good intention" will not "save an otherwise objectionable regulation").

282. *See* FTC Notices, *supra* note 4, at 31321.

283. *See* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 730 (1988) (stating combinations between businesses at different levels in the distribution chain are vertical in orientation for the purposes of section 1 analysis).

284. SULLIVAN & HARRISON, *supra* note 11, § 4.15[A], at 181, § 5.02, at 218, 222–23.

285. *Id.* § 5.02, at 218.

286. 250 U.S. 300 (1919).

287. *Id.* at 304.

288. *Id.* at 303.

the distributor's conduct was entirely unilateral.[289] Under this standard, communication between distributors and retailers by itself does not consummate an RPM agreement, even if the communication directly pertains to price.[290] Yet, an RPM agreement is consummated when the evidence contravenes unilateral action,[291] or when a meeting of the minds is evident.[292] Such an agreement may be implied absent proof of an oral or a written contract.[293]

In this case, the parties' interaction regarding MAPs reflects a meeting of the minds rather than unilateral communication by Distributors. To begin with, Retailers repeatedly urged Distributors to respond to decreasing retail CD prices with strict MAPs.[294] Contemporaneously, Distributors acknowledged Retailers' pleas publicly and communicated their intent to respond accordingly.[295] After Distributors responded with MAPs, Retailers openly praised their response and proceeded to execute MAPs.[296]

Retailers' practice of informing Distributors about MAP-defying Discounters, and the Distributors' sanctioning of those Discounters in retort,[297] also reflects a meeting of the minds. The collaboration typifies a situation where "independent activity by a single entity [can] be

289. *Id.* at 307.

290. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761–62 (1984). The parties may in fact communicate regarding pricing and promotion strategies. *Id.* at 762.

291. *Id.* at 761.

292. *See* MCM Partners, Inc. v. Andrews-Bartlett & Assocs., Inc., 62 F.3d 967, 973, 975 (7th Cir. 1995).

293. Frey & Son, Inc. v. Cudahy Packing Co., 256 U.S. 208, 217 (1921) (Pitney, J., dissenting).

294. Complaint, *supra* note 6, at 16. For example, Stan Gorman, senior vice president of Tower Records and Video asserted: "The industry should police mass-merchant [discounters] who advertise and sell music at a loss." Christman, *supra* note 111, at 3.

295. *Id.* Responding to Retailers' pleas for MAPs, Jim Caparro, president of PGD commented: "I understand their concern [and] we need to evaluate whether that is the next step in the evolution of our policy." *Id.*

296. Complaint, *supra* note 6, at 16; Christman, *supra* note 107, at 86 (reporting Retailers pleaded with Distributors to fortify their MAPs at the 1995 NARM convention, PGD was "the first major [Distributor] to react to the [Retailers'] plight" and soon thereafter, "BMG Distribution and Sony Music Distribution bolstered their MAP policies"); Christman, *supra* note 111, at 3 (reporting Sony Music Distribution raised its MAP price in "respon[se] to numerous pleas from music specialty merchants").

297. *See* Christman, supra note 111, at 3 (publicizing the comments of two Retailers' executives expressly calling for Distributors to enact MAPs and to punish any discounters that defied them).

distinguished from a concerted effort by more than one entity. . . ."[298] Accordingly, the Distributor-Retailer interaction in this case is one where an RPM agreement "might be implied from [the] course of dealing or other circumstances."[299]

b. Coerced MAPs May Have Consummated RPM Agreements

In *United States v. Parke, Davis & Co.*,[300] the Supreme Court considered whether a manufacturer's declaration to retailers, that they would be cut off from supplies if they sold for less than suggested prices, coupled with the retailers' compliance therewith, consummated an RPM agreement.[301] The Court held an RPM agreement may be consummated where a manufacturer coerces adherence to its prices in a way that exceeds a unilateral effort to communicate a desired price.[302] The Court reasoned that the manufacturer's threats of refusal to deal amounted to a "vehicle to gain . . . participation in [a] program to [secure] the retailers' adherence to the suggested retail prices."[303] Lower courts have recently followed the reasoning that a meeting of the minds can occur absent voluntary consent to a given scheme.[304]

In this case, Distributors openly coerced certain Discounters to execute MAPs.[305] After being sanctioned for defying MAP terms, for example, one Discounter communicated to the punishing Distributor its resolve to comply.[306] Another Discounter obtained prior approval from a Distributor regarding its promotional efforts to avoid violating that Distributor's MAP.[307] Under the standard announced in *Parke, Davis* and

298. Fisher v. City of Berkeley, 475 U.S. 260, 266 (1986); *cf.* Capital Imaging Assocs. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 545 (2d Cir. 1993) ("[T]he mere opportunity to conspire does not by itself support the inference that such an illegal combination occurred.").

299. *See Frey & Son, Inc.*, 256 U.S. at 210; *In re* Toys 'R' Us, Inc., 221 F.3d 928, 930 (7th Cir. 2000) (holding insistence by a retailer with significant market power, that toy manufacturers either boycott discounters or deal with them on less favorable terms, and manufacturers' compliance therewith, forged a vertical arrangement between the parties).

300. 362 U.S. 29 (1960).

301. *Id.* at 45.

302. *See id.* at 43.

303. *Id.* at 46.

304. *See, e.g., MCM Partners, Inc.*, 62 F.3d at 973, 975 (expressing that "[s]o long as defendants knew that they were acquiescing in conduct that was in all likelihood unlawful . . . they thereby joined a combination").

305. Complaint, *supra* note 6, at 16; FTC Notices, *supra* note 4, at 31320.

306. Complaint, *supra* note 6, at 16.

307. *Id.*

comparable cases, even those Discounters that were coerced into executing MAPs could be considered parties to an RPM agreement.[308]

2. MAPs Channeled the Distributors' Market Power Through Retailers To Suppress Price Competition

a. MAPs May Be Judged *Per Se* Unlawful

In *Business Electronics Corp. v. Sharp Electronics Corp.*,[309] the Supreme Court held that "a vertical restraint is not illegal *per* se unless it includes some agreement on price or price levels."[310] MAPs do not prescribe CDs prices but rather restrict price advertising.[311] Thus, the legality of MAPs is subject to rule of reason analysis under *Business Electronics Corp.*[312]

Lower courts, however, may evaluate MAPs more strictly.[313] In *DeLong Equipment Co. v. Washington Mills Abrasive Co.*,[314] a manufacturer increased its prices to a wholesaler after growing displeased with the wholesaler's discounting below prices the manufacturer suggested.[315] The Eleventh Circuit acknowledged the manufacturer's discretion to set wholesale prices, but it focused on the manufacturer's practice of rebating portions of its wholesale revenues to wholesalers that charged higher resale prices.[316] Even though the manufacturer had not explicitly fixed resale prices, the court judged the practice a *per se* unlawful RPM agreement because the manufacturer employed the price

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308. Whether one party's ability to independently make pricing decisions is restricted by another party is a considerable factor in evaluating formation of an RPM agreement. *See Parke, Davis & Co.*, 362 U.S. at 33–36; Pearl Brewing Co. v. Anheuser-Busch, Inc., 399 F. Supp. 945, 955 (S.D. Tex. 1972) (expressing "the reseller or wholesalers must be free to make [its] own independent pricing determination"); *cf.* Acquaire v. Canada Dry Bottling Co. of N.Y. Inc., 24 F.3d 401, 410 (2d Cir. 1994) (permitting a manufacturer's unilateral requirement that distributors sell promotional products at a predetermined price).

309. 485 U.S. 717 (1988).

310. *Bus. Elecs. Corp.*, 485 U.S. at 735–36.

311. *See* FTC Notices, *supra* note 4, at 31319–20.

312. The lower courts have arguably followed the rule annunciated in *Business Electronics Corp.* too strictly. SULLIVAN & HARRISON, *supra* note 11, § 5.02[B], at 228. *See, e.g.*, Ctr. Video Indus. Co. v. United Media, Inc., 995 F.2d 735, 736 (7th Cir. 1993) (refusing to infer a manufacturer-dealer agreement to maintain resale price where the manufacturer terminated a price cutting dealer after receiving complaints about the price cutter from a dealer that was charging higher prices).

313. *See infra* notes 314–17 and accompanying text.

314. 990 F.2d 1186 (11th Cir. 1993), *cert. denied*, 510 U.S. 1012 (1993).

315. *Id.* at 1200.

316. *Id.*

announcement and rebate scheme as an anti-competitive tool to pad prices.[317]

MAPs are analogous to the practice in *DeLong*. To begin with, Distributors were troubled with the prices charged by Discounters,[318] as was the manufacturer with wholesalers in *DeLong*.[319] Further, the Distributors' withholding COOP funds from Discounters (that refused to advertise the MAP-specified minimum)[320] parallels the manufacturer's withholding rebates from discounting wholesalers in *DeLong*.[321] Finally, MAPs were implemented with the purpose of padding wholesale and retail CD prices,[322] comparable to the scheme in *DeLong*.[323] As such, MAPs could be judged *per se* unlawful tools to pad prices under strict lower court interpretations.[324]

b. MAPs Likely Violate the Rule of Reason

Considering the Supreme Court holding in *Business Electronics Corp.* and the trend away from *per se* analysis,[325] MAPs will likely be evaluated under the rule of reason. The rationale is that under certain circumstances, vertical agreements benefit competitors and consumers in accord with antitrust principles.[326] Further supporting rule of reason analysis in this case is that MAPs did not explicitly fix price.[327] Despite these considerations, MAPs likely amount to unlawful RPM agreements.

First, MAPs have no apparent pro-competitive effect.[328] MAPs were not implemented to induce Retailers to invest capital and labor in a market where goods are unknown to consumers.[329] Prerecorded music products are, in fact, highly popular with consumers.[330] Further, MAPs were not implemented to help Retailers hire and train sales personnel or to help fund

317. *Id.* at 1201.

318. Christman, *supra* note 107, at 86; Christman, *supra* note 111, at 3.

319. *See DeLong Equip. Co.*, 990 F.2d at 1200.

320. *See* FTC Notices, *supra* note 4, at 31320–21.

321. *See DeLong Equip. Co.*, 990 F.2d at 1200.

322. *See* FTC Notices, *supra* note 4, at 31320–21.

323. *See DeLong Equip. Co.*, 990 F.2d at 1200.

324. *Id.* at 1201.

325. SULLIVAN & HARRISON, *supra* note 11, § 4.05, at 122.

326. *Id.* § 5.02[B], at 229–30; *see e.g.*, *Cal. Dental Ass'n*, 526 U.S. at 772–73.

327. *See* FTC Notices, *supra* note 4, at 31319–20.

328. *Id.* at 31320.

329. *Bus. Elecs. Corp.*, 485 U.S. at 724–25.

330. *See* Scott & Duryee, *supra* note 2; Gibeaut, *supra* note 26, at 38; Jeffrey, *supra* note 173, at 5.

service and repair facilities.[331] Moreover, MAPs cannot be justified as protecting consumers from misleading or hazardous advertising in a market in which advertising is generally rare or price dissemination and verification difficult.[332]

Second, MAPs were not devised to counter "free riding."[333] Free riding occurs when a discounter, providing the same goods or services as a retailer, capitalizes on the promotional or marketing efforts of a retailer, thereby denying the retailer the complete fruits of its investments with respect to those goods or services.[334] Discounters in this case provided services that were as good as, or superior to, those provided by Retailers, despite the fact that Discounters charged lower prices.[335]

Third, MAPs strayed beyond the permissible COOP by effectively disabling Resellers from pricing CDs independently.[336] The traditional COOP does not raise antitrust concerns because only those advertisements paid for, in whole or in part, by the distributor are restricted.[337] Price fixing is of little concern, because the reseller remains free to advertise at whatever price it desires in those advertisements paid for entirely by the reseller.[338]

In this case, MAPs technically allowed Resellers to sell at any price, yet Distributors withheld all COOP funds unless Resellers displayed the MAP price in *all* media advertisements and in-store displays including

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331. *Bus. Elecs. Corp.*, 485 U.S. at 724, 728. Such an arrangement with retailers could be considered pro-competitive. *See Monsanto Co.*, 465 U.S. at 762–63.

332. *Cal. Dental Ass'n*, 526 U.S. at 772–73.

333. *See infra* notes 337–38 and accompanying text; FTC Notices, *supra* note 4, at 31320.

334. *See* SULLIVAN & HARRISON, *supra* note 11, § 5.02, at 218–19. To illustrate, suppose a retailer sets up shop in a high-traffic shopping area, offers product X, teaches its sales personnel about that product, and begins to heavily advertise that product. *Id.* Further, suppose that a discounter sets up shop in a low-rent area and proceeds to offer product X for retail. *Id.* Yet, the discounter advertises just enough to make its presence known and does not teach its sales personnel more than what is required to make the sale. *Id.* Considering its lower operating costs, the discounter would be able to sell product X at a lower cost. *Id.* In this case, the discounter would be free riding by benefiting from retailers' investment in promotion of product X yet earning a greater profit as a result of selling cheaper. *See id.*

335. FTC Notices, *supra* note 4, at 31320.

336. *See In re* American Cyanamid Co., 123 F.T.C 1257, 1265 (1997) ("[B]oth the courts and the [FTC] have judged cooperative advertising cases under the rule of reason, as long as the arrangements do not limit the dealer's right: (1) to discount below the advertised price, and (2) to advertise at any price when the dealer pays for the advertisement.").

337. Balto, *supra* note 32, at 99, n.214; *see also In re American Cyanamid Co.*, 123 F.T.C., at 1267–68 (holding a distributor's "conditioning [rebate] payments on dealers' charging a specified minimum price amounted to the *quid pro quo* of an agreement on resale prices").

338. Balto, *supra* note 32, at 99, n.214; *see In re* Nissan Antitrust Litigation, 577 F.2d 910 (5th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979) (holding COOP arrangements are not illegal *per se* where the dealer remains free to set resale price).

those advertisements not funded by the Distributors.[339] Given that almost all Resellers rely heavily on COOP funds, MAPs pressured acceptance of their terms.[340] One prominent national Discounter, for example, actually declined MAPs in order to advertise freely but eventually accepted them after losing millions in COOP funds.[341] By disabling Resellers' ability to effectively communicate discounts to consumers, MAPs caused antitrust injury.[342]

To ensure MAP compliance, Distributors and Retailers combined their efforts to police MAPs market-wide.[343] Any Reseller that failed to adhere to the MAP-specified minimum could be suspended from all COOP funds.[344] A Reseller's single violation at one store jeopardized COOP funds for the entire chain.[345] A number of Resellers were, in fact, publicly sanctioned for failing to comply with MAPs.[346] In effect, although MAPs were implemented as part of a COOP, economic reality essentially obliged market-wide communication of price according to their terms rather than free market forces.[347]

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339. FTC Notices, *supra* note 4, at 31319, 31321.

340. *See id.* at 31321; Carvell, *supra* note 12, at 112–13. On many occasions, the promotions funds are greater than what Resellers pay to actually advertise. Complaint, *supra* note 6, at 11.

341. Christman, *supra* note 107, at 86 (reporting the decision of Circuit City to begin implementing MAPs because it was "in danger of losing millions of dollars in advertising funds . . . that underwrite its loss-leader pricing strategies").

342. FTC Notices, *supra* note 4, at 31321 (stating antitrust injury results from an "inability to effectively communicate discounts to consumers").

343. Complaint, *supra* note 6, at 15–16. Retailers policed compliance with MAPs by alerting Distributors of any violators at the retail level, and Distributors enforced compliance by aggressively sanctioning defiant discounters. *Id.* at 16. An argument can be made that Retailers' informing Distributors of MAP-defying discounters, and Distributors' subsequent sanctioning of discounters forged a horizontal combination among the Distributors. SULLIVAN & HARRISON, *supra* note 11, § 5.02[B], at 229; *see In re Toys "R" Us, Inc.*, 221 F.3d at 930. The same argument can be made to support the inference of a horizontal agreement among the Retailers. *See Bus. Elecs. Corp.*, 485 U.S. at 736 (Stevens, J. & White, J., dissenting) (opining such complaint-response tactics could be considered RPM agreements); *see also* SULLIVAN & HARRISON, *supra* note 11, § 5.02, at 229 (expressing an RPM agreement could be a way for a group of competitors to police a horizontal arrangement by keeping retailers in line). *But see Ctr. Video*, 995 F.2d at 738 (declaring complaint-response tactics are not actionable absent an actual agreement specifying price with a "certain amount of specificity").

344. FTC Notices, *supra* note 4, at 31319.

345. Dale K. Dupont, *States: CD Prices Fixed*, THE MIAMI HERALD, Aug. 9, 2000, at C1.

346. Christman, *supra* note 107, at 86.

347. Santa Clara Valley Distrib. Co. v. Pabst Brewing Co., 556 F.2d 942, 945 (9th Cir. 1977) (declaring unlawful COOP arrangement by which adherence to a suggested retail price is exacted as a quid pro quo for receipt of COOP funds); FTC Notices, *supra* note 4, at 31321 ("[E]ven absent an actual agreements, [the] inability to effectively communicate discounts to consumers meant that retailers had little incentive to actually sell product at a discount.").

Fourth, MAPs were enacted with an anti-competitive purpose premised on the Distributors' market power.[348] Each Distributor distributes music from its own unique and exclusive roster of record producing companies and artists.[349] Consequently, Resellers could not simply choose to forgo a given Distributor's MAP and obtain the product from an alternate Distributor.[350] Dependence on the Distributors' unique products pressured acceptance of MAPs from a different angle.[351]

Finally, MAPs achieved their anti-competitive purpose by suppressing discount advertising and, ultimately, discounting itself.[352] While MAPs were implemented, Resellers broadly advertised CDs to consumers at or above the MAP-specified minimum.[353] Consumers, having seen those advertisements, entered retail stores market-wide expecting to pay the price as advertised.[354] In this light, MAPs effectively functioned as restrictions on price itself.[355]

In sum, MAPs appear to be the product of a conscious commitment between Distributors and Retailers to employ price advertising to impede competition and fix prices.[356] As expressed by the Supreme Court, price advertising "serves to inform the public of the . . . prices of products and

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348. *See* FTC Notices, *supra* note 4, at 31320; Part III.A, *supra*; *Ind. Fed'n of Dentists*, 476 U.S. at 460–61 (stating market power may be evaluated to determine "whether an arrangement has the potential for genuine adverse effects on competition").

349. Complaint, *supra* note 6, at 10–11.

350. *Id.* Doing so would result in that reseller having an incomplete collection of musical artists. *See id.*

351. Where market power is lacking, arrangements raising price will prompt consumers to seek the same product elsewhere. SULLIVAN & HARRISON, *supra* note 11, § 4.07, at 127. Higher prices will also motivate potential competitors to bring cheaper goods into the market. *Id.* In this case, however, the prerecorded music products of each Distributor are highly unique therefore consumers were unable to simply seek a substitute product. *See* FTC Notices, *supra* note 4. Because market power in this case actualized the potential for anti-competitive effect, it can be used as an alternative basis for proving an antitrust violation. *See* SULLIVAN & HARRISON, *supra* note 11, § 4.08, at 139.

352. FTC Notices, *supra* note 4, at 31321; *see* Bates v. State Bar of Ariz., 433 U.S. 350, 377 (1977) (stating "[w]here consumers have the benefit of price advertising, retail prices often are dramatically lower than they would be without advertising."); *In re Toys 'R' Us, Inc.*, 221 F.3d at 930 (holding unlawful a non-price vertical restraint that deprived consumers of lower prices offered by discounters and insulated established retailers from the competitive pressure of those discounters).

353. *See* FTC Notices, *supra* note 4, at 31320.

354. *See* Complaint, *supra* note 6, at 17; Morales v. Trans World Airlines, Inc., 504 U.S. 374, 388 (1992) (stating state restrictions on the fares advertised by an airline had a significant and forbidden impact on the fares themselves).

355. *Morales*, 504 U.S. at 388 (citing *Bates*, 433 U.S. at 377) ("[R]estrictions on the ability to advertise prices normally make it more difficult for consumers to find a lower price and for competitors to compete on the basis of price.").

356. *See generally* FTC Notices, *supra* note 4; Complaint, *supra* note 6.

services, and thus performs an indispensable role in the allocation of resources in a free enterprise system."[357] By shortchanging free market forces from forging and communicating prices without any discernable pro-competitive justification, MAPs likely amount to unlawful RPM agreements in restraint of trade under the rule of reason.

IV. MAP PROVISIONS COST THE MUSIC INDUSTRY AND DELAYED ITS EVOLUTION IN THE DIGITAL ERA

A. MAPs Indirectly Fostered Music Piracy

Current technology enables consumers to obtain prerecorded music by means other than conventional retail purchase.[358] The Distributors' and Retailers' implementation of MAPs arguably facilitated this occasion by increasing CD prices. The intersection of these events may have fostered music piracy.[359]

After dropping in the early 1990s, retail CD prices have increased by more than two dollars each.[360] Aware of decreasing manufacturing costs and more efficient production technology,[361] consumers are irritated with paying upwards of eighteen dollars for a CD.[362] Considering that CDs replaced cassette tapes as the primary delivery medium of prerecorded music a decade ago,[363] Distributors and Retailers cannot persuasively base CD prices on the novelty of the technology. The growing perception among consumers is that record industry conglomerates raise prices to pad margins and to impede Discounters from offering lower prices.[364] In purpose and in effect, MAPs confirm this perception.[365]

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357. *Bates*, 433 U.S. at 364.

358. Greg Kot, *Who Stole Metallica's Money? Record Companies Are the Culprits, Not Napster Users*, CHICAGO TRIBUNE, May 17, 2000, at Tempo, at 1.

359. Piracy refers to the unauthorized duplication of music for sale or exchange via either counterfeiting hard copies of CDs or swapping music sound files online. *See* Gibeaut, *supra* note 26, at 38.

360. Scott & Duryee, *supra* note 2.

361. Sobel & Sobel, *supra* note 3, at 8.

362. Scott & Duryee, *supra* note 2.

363. *See id.* Other delivery mediums for prerecorded music include the cassette tape and the LP. KRASILOVSKY & SHEMEL, *supra* note 1, at 4.

364. Scott & Duryee, *supra* note 2.

365. *Id.* (reporting that CD prices have increased in the past few years due to "record-company policies that punished [discounters] such as Target and Circuit City for offering [CDs] at discount prices.").

Dissatisfaction with inflated prices has motivated consumers to realize less expensive, albeit illegal, alternatives of obtaining music.[366] One such alternative is CD "burning," a process by which a blank CD is either encoded with sound files downloaded over the Internet or duplicated from another prerecorded CD.[367] In contrast to cassette duplication, burning produces a duplicate CD faster and with a level of quality matching the original.[368] Today, CD burners are commonly sold at most retail stores offering other electronic devices.[369] Blank CDs can be purchased for less than one dollar as the same stores.[370]

A second alternative to retail purchase, mp3 swapping,[371] is possible via the Internet.[372] This popular practice enables Internet users to trade music online in the form of compressed sound files.[373] Those sound files can then be played directly from a computer hard drive, burned onto blank CDs, or transferred to personal mp3 players sold by many electronics Retailers.[374]

The growing popularity of CD burning and mp3 swapping reflects consumer dissatisfaction with rising CD prices.[375] This popularity suggests that price is a priority to consumers.[376] In addition, the proliferation of

366. *Id.*

367. *Id.*

368. The music signal duplicated in the CD burning process is a digital format therefore can be duplicated indefinitely without loss of quality. *See* KRASILOVSKY & SHEMEL, *supra* note 1, at 446.

369. *See* Best Buy Advertisement (Jan. 28, 2000) (on file with the *Loyola of Los Angeles Entertainment Law Review*).

370. *Id.*

371. Mp3 is one of a number of compressed digital audio formats. KRASILOVSKY & SHEMEL, *supra* note 1, at 446. Music prerecorded on any CD may be converted to the mp3 format by use of encoding software that may be downloaded free of charge over the Internet. *Id.* An mp3 file can then be burned onto a blank CD, played directly from a computer hard drive, or transferred onto personal mp3 players. *Id.* An mp3 file can also be rather easily distributed over the Internet by, for example, attachment to email or posting on a Web site for download by Internet users. *Id.*

372. Kot, *supra* note 358.

373. KRASILOVSKY & SHEMEL, *supra* note 1, at 446.

374. *Id.*

375. *See id;* Kot, *supra* note 358.

376. *See* Gibeaut, *supra* note 26, at 39; Scott & Duryee, *supra* note 2.

online music trading, via communities such as Napster,[377] reflects consumers' willingness to bypass retail purchase altogether.[378]

Distributors naturally need to charge a premium on the manufacturing costs of CDs to cover legitimate expenses such as artist royalties, promotion, advertising, and investments made in failed artists.[379] Profits are comprised of revenues remaining after such expenses are recouped.[380] Coupled with the need to support destabilized Retailers, this earnings model pressured Distributors to heed Retailers' pleas and restrict minimum price advertising with MAPs.[381] As advised by the Supreme Court, however, restrictions on price advertising curtail the ability of consumers to find desirable prices.[382]

In this case, the lack of desirable prices arguably eased consumers' transition to CD burning and mp3 swapping. Faced with the choice of paying upwards of eighteen dollars for a CD or obtaining the same music for pennies, the consumer's desire to pirate becomes understandable. And, given the Distributors' and Retailers' implementation of MAPs to keep prices inflated, piracy becomes justifiable to even the morally astute consumer.[383]

B. MAPs Artificially Supported a Destabilized Brick-and-Mortar Distribution System to the Impediment of More Efficient Means

Distributors' and Retailers' response to legitimate competition with MAPs may elucidate a fundamental problem with their ability to contend with emerging competition in the prerecorded music market.[384] In this

377. Napster is an online trading community that, by means of free software provided on its site, allows registered users to download mp3 files from each other's hard drives over the Internet connection. Gibeaut, *supra* note 26, at 39. A user can search for a particular song by simply typing the name of the artist or the title of the song on the Napster search page. *Id.*

378. *See* Scott & Duryee, *supra* note 2. As voiced by one consumer, Napster is popular because "people aren't willing to pay, and yet prices aren't going down." *Id.*

379. *Id.*

380. *Id.*

381. *See id.*

382. Bates v. State Bar of Ariz., 433 U.S. 350, 377 (1977).

383. *Id.* Some music fans are simply irate with the inflated pricing of music products. As printed by one fan on her website, "For many, many years, we, the fans, have paid full price for concert tickets, CDs, tapes, posters, T-shirts, etc. [so] if anyone needs to be penalized for their actions, it's the record labels. . . ." Kot, *supra* note 358.

384. *Cf.* BIEDERMAN ET AL., *supra* note 4, at 558 (the breakeven point on music albums, including CDs, is high because, after production, manufacturing, promotion, and advertising costs are totaled, a Distributor may have invested upwards of 500,000 dollars in a given CD before selling a single copy).

context, Distributors' and Retailers' delayed evolution is partly the problem. Although implemented as a solution, MAPs arguably complicated the problem.

The current physical distribution network subsists on the traditional brick-and-mortar retail chains.[385] The emergence of Discounters and digital distribution threatens that network.[386] Yet, despite these threats, Distributors and Retailers have been "feeling around in the dark trying to figure out what to do."[387]

In the meantime, technological progression and competition have spawned more efficient and less expensive means for prerecorded music to reach consumers.[388] Those conglomerates that rely on physical distribution may lose their place in the future of music distribution as a result of this progression.[389] As acknowledged in *Billboard*, "for the five major record [Distributors], their distribution network remains their larger source of revenues, and a complete shift to [other distribution means] could make them largely irrelevant."[390] MAPs stemmed from the Distributors' and Retailers' delay in developing more efficient means as well as their panic to keep the physical distribution network from crumbling.[391]

By reacting with MAPs, however, Distributors and Retailers interjected their judgment for that of the free market.[392] In doing so, Distributors and Retailers further delayed their acceptance of and transition to more efficient distribution means, both to their own detriment and to the detriment of consumers. As a result, they tripped antitrust by impeding market forces from forging "the best allocation of our economic resources,

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385. Jeffrey, *supra* note 173, at 5.

386. *See* Carvell, *supra* note 12, at 112; Jeffrey, *supra* note 173, at 5; Chuck Philips, *Media Mega-Merger: Impact on Music: Deal Would Give Record Business a New Spin*, L.A. TIMES, Jan. 11, 2000, at C11.

387. Philips, *supra* note 386.

388. *Id.*

389. *See* Ed Christman, *The Danger of Digital Download*, BILLBOARD, Mar. 13, 1999, at 63 (stating that "Wall Street appears to be betting that e-commerce eventually will significantly cannibalize music sales from conventional record stores, if not eradicate them as a distribution channel altogether"). *But see id.* (reporting opinion of digital music company president that digital distribution will simply provide consumers another option for attaining music).

390. Jeffrey, *supra* note 173, at 5.

391. *See id. Billboard* expressed that "[p]art of the [Distributors'] panic stems from the fact that the lock they have enjoyed for many years is now threatened." *Id.*

392. *See* Christman, *supra* note 389, at 63; Jeffrey, *supra* note 173, at 5; Kot, *supra* note 358; *see also* Christman, *supra* note 111, at 3 (documenting the declarations of the president of Sony Music Distribution that "[w]e don't think the consumer has the right idea about the value of music. . ." and that "[w]e will work . . . to correct that.").

the lowest prices, the highest quality and the greatest material progress"[393] in the prerecorded music market.

V. CONCLUSION

Although CDs entered the prerecorded music market in the 1980s and became the primary medium for the delivery of prerecorded music by the early 1990s,[394] CD prices have steadily increased.[395] This paradoxical trend occurred despite increasing retail competition and despite other factors that suggest decreasing prices.[396]

Supported by an FTC investigation and a pending antitrust action, this Comment has proposed that a distinct increase in CD prices is related to MAPs, an anti-competitive provision involving Distributors and Retailers of prerecorded music, and, as implemented, MAPs resemble unreasonable restraints of trade outlawed by section 1 of the Sherman Antitrust Act. This Comment has further posited that the Distributors' and Retailers' implementation of MAPs has cost the music industry and delayed its evolution. Historically, established businesses have reacted to nascent competitors by capitalizing on market power to impede their development.[397] In this case, Discounters as well as the probable new means of distribution represent the emerging competitors, and MAPs embody the inhibiting reaction.

With the FTC settlement postponing MAPs for a seven-year period,[398] intense retail competition has resumed, and CD prices have consequently began to decrease.[399] As in the early 1990s, it is only a matter of time before competitive pressure on Retailers and Distributors builds. This time, however, Distributors and Retailers cannot resort to MAPs to offset the pressure. As a result, the ability of Distributors and Retailers to adapt to changing market conditions and to compete with intense competition may prove vital in determining their survival.

As recognized by the Supreme Court, the American free enterprise economy is premised on competition, and antitrust laws such as the

393. N. Pac. Ry. Co. v. United States, 365 U.S. 1, 4 (1958).

394. KRASILOVSKY & SHEMEL, *supra* note 1, at 4.

395. Sobel & Sobel, *supra* note 3, at 8.

396. *Id.*

397. Balto, *supra* note 32, at 105.

398. FTC Notices, *supra* note 4, at 31320.

399. Hilburn & Lewis, *supra* note 153, at 28. On Sunday, October 15, 2000, Best Buy advertised the highly anticipated third release of rap-rockers Limp Bizkit for $9.99, close to $2 below the CD's wholesale cost. *Id.*

Sherman Act preserve and facilitate that competition.[400] Rather than impede inevitable market forces via anti-competitive provisions, Distributors and Retailers are better served by adapting.[401] Their strategy should focus on ways to reduce prices and to entice customers to purchase their products, rather than making it more justifiable for them to pirate.[402] By doing so, Distributors and Retailers will not trip antitrust during their pursuit of revenue, control, and survival in the openly competitive digital era.

H. Damian Elahi[*]

400. *See* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978).

401. *See* Christman, *supra* note 389, at 63 (reporting "[t]here is an awful lot riding on how the [Distributors] get into the digital-distribution business").

402. *See* Philips, *supra* note 386.

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