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Intellectual property and price discrimination: a challenge for Australian competition law

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Abstract

Price discrimination usually requires a mechanism to prevent arbitrage. In respect of intellectual property, the mechanisms include bans on parallel importation in intellectual property legislation and licensing and distribution contracts that separate one group of users from another. A reasonable thesis would be to expose all market segmentation of intellectual property to the full force of competition law. Australian experience of the repeal of parallel import bans on CDs and the review of an intellectual-property specific provision in the competition legislation suggests otherwise.

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1. Introduction

A firm proposing to charge different prices to different customers has to have a way of preventing arbitrage. Unless customers who acquire at the cheaper price can be prevented from dealing direct with the customers who are charged a higher price, any system of differential pricing will be undermined.

The ways in which the original supplier can prevent its customers from inter-trading take different legal forms. One is contract. If the supplier deals directly with

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its ultimate users, it can contract on terms that there is to be no re-supply to anyone.¹ In other more common circumstances, the supplier supplies its product on terms that limit the re-supply of that product to a particular geographic territory or a particular class of users. A self-help method to the same effect as contract is to elect to supply only those customers who do not engage in arbitrage. In legal form this is an exercise of property rights. For some sorts of intellectual property, the intellectual property statutes bolster property rights by making it an infringement to import into the country products that could not legally have been made in the country unless the importation is done with the licence of the owner of the intellectual property.

This paper takes a lawyer's view of those rights and their exercise. One issue is how competition law addresses market division for the purpose of discriminatory pricing. In terms of the Australian *Trade Practices Act* [TPA] the issues are:

- (a) Whether a firm that segments the market for its product can thereby “lessen competition”, and so be caught by sections 45 and 47 of the TPA.
- (b) Whether market segmentation for the purpose of maximising income from the exploitation of the property might be a misuse of market power caught by s46.
- (c) How s51(3), the TPA's recognition that intellectual property is somehow different, operates on market-segmenting conduct. As s51(3) is under review it is worth looking at how the provision operates now, how it would operate in the form proposed by the Intellectual Property and Competition Review Committee (IP-CRC, 2000), and also at the government's response.
- (d) In respect of intellectual property statutes that make importation an infringement of the property right, whether a local intellectual property owner might nevertheless contravene the TPA by exercising its right to exclude imports. In Australia there has been long and passionate debate about whether the parallel importation provisions in the copyright legislation should be repealed. If a right-owner's refusal to licence importation is open to challenge under competition law, it may be that repeal of those provisions is of little significance.

2. Reasons for market division

Owners of intellectual property frequently licence their property on terms that limit the licensee's exploitation of the intellectual property to a particular sector of the downstream market. This phenomenon is not peculiar to intellectual property. Manufacturers of tangible goods do the same. From cars to ski boots to newspapers and street directories,² there are countless instances of manufacturers granting a distributor the exclusive right to distribute in a particular geographic territory or to a particular set of customers. The corollary of exclusive rights inside the granted sector

¹ An example of direct dealing is the Australasian Performing Right Association which issues public performance licences separately to each nightclub, each funeral parlour, etc.

² Cars, ski boots, newspapers and street directories are a few of the many product lines in which the record of proceedings under the TPA discloses vertical market division.

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