

# RDA: BOON AND BANE

One of the central facts of life for a magazine publisher is retail display allowances, RDA. What type of support will the publisher provide to retailers to display the publisher's magazines? Most commonly, publishers will provide as RDA a percentage of cover price for each copy sold. Sometimes, the RDA is in the form of display racks and other marketing tools. Other RDA formulas take into account the percentage of the retailer's shelf space devoted to the publisher's magazines, or how the magazines are displayed.

In each case, RDAs raise business and legal issues. From the business perspective, RDAs can enable retailers to provide more or more sophisticated marketing than they otherwise could, and it can ensure the publisher better retailing of its magazines. The business challenge may be one of designing a program that is effective and economic. From the legal perspective, there is the Robinson-Patman Act, which requires publishers to be very careful how their RDA programs are designed and implemented. We focus here on the legal issues.

The Robinson-Patman Act was enacted during the Great Depression to protect smaller retailers from big ones who often received better terms and conditions from suppliers. Essentially, the R-P Act bars a seller from discriminating among buyers. Therefore, for example, a seller generally cannot offer different prices to buyers who are competitors with each other, if that difference injures competition between those buyers, between those buyers' customers, or even between the seller and its competitors,

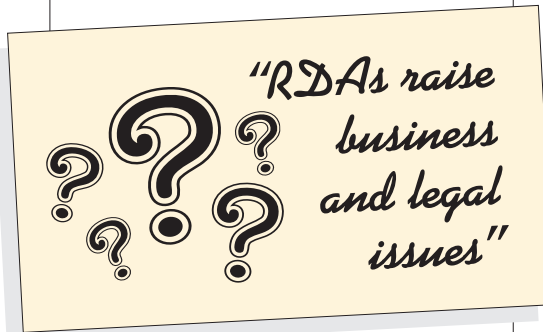
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if the difference cannot be cost-justified or was not offered in order to meet competition.

Even more strictly, the R-P Act requires that promotional allowances and services provided by sellers to facilitate resale by customers, be proportionally equal among a seller's competing customers and be practically available to those customers. It requires that a particular RDA that is offered to one customer also be practically available on proportionally



equal terms to all customers who are competitors of that customer. Proportional equality is generally found where the RDA is based on volume, for example, on a percentage of the retailer's sales of the publisher's magazines.

By practically available, it means that the RDA cannot be one that only some customers can use. For example, a RDA is not practically available if it provides only for television advertising support, if only the largest customers ever use TV advertising. Practical availability also

means that retailers must know about the RDA. It is not enough that the RDA would be provided if a retailer is knowledgeable enough to ask for it. If a RDA is offered to one customer directly or indirectly, then competitors of that customer who buy the publisher's magazines, directly or indirectly, must also have access to that RDA. To ensure that a RDA is available to all competing direct and indirect customers, a publisher should take steps to ensure that the availability of the RDA is made known to customers through all channels of trade. If a publisher is relying on wholesalers and distributors to get the word out, it should check that they are in fact doing so. If a RDA is practically available, then a retailer who did not take advantage of that RDA cannot complain of discrimination.

In the case of RDA in the form of monies rather than products or services, it is important that the publisher make reasonable efforts to ensure that the funds are indeed used for promotional purposes. If the funds are simply accepted by the customer and not used to market the magazines, then they can be considered to be merely rebates or discounts given to the customer, in which case the price discrimination prohibitions of the R-P Act must be considered, which is the subject of another article.

Like discrimination in pricing, discrimination in RDAs may be justified on the basis of needing to meet a competitive offer, but unlike price discrimination, RDA discrimination may not be justified on the basis of cost. To justify discrimination on a meeting competition basis, a publisher must have a good faith reason to

believe that a customer has a better offer elsewhere that s/he needs to meet (not beat). Ideally, the publisher will get a written statement from the customer or other evidence of such a competing offer, but internal records of such customer claims, if detailed, will generally be sufficient. In no circumstance should the publisher contact a competitor to verify a competing offer; that way lays antitrust exposure for a conspiracy by competitors in restraint of trade. If there has been an unjustified discrimination in RDA, then the R-P Act has been violated, even if there was no competitive injury to any customer or competitor as a result.

While the federal antitrust enforcement agencies have not been very active in enforcing the R-P Act, private

complaints are not uncommon. If a private party can demonstrate that there has been a violation of the R-P Act, and that it has been injured by that violation, it can recover treble damages, or three times its actual damages, plus attorney's fees. The Federal Trade Commission has issued guidelines, sometimes called the Fred Meyer Guidelines after the U.S. Supreme Court case that was their inspiration, on how to comply with the R-P Act regarding promotional allowances and services. These Guidelines provide insight into how the federal enforcement agencies interpret the law, although they do not bind the courts and private plaintiffs. The Guidelines discuss different types of situations involving promotional allowances and services, and how the R-P Act applies

to them. They can be found at <http://www.ftc.gov/bc/docs/16cfr240.htm>

In summary, RDA is a key part of any publisher's marketing plan, and the complex requirements of the R-P Act must be kept in mind in designing a RDA program. Consider carefully all the terms of the program, such as the eligibility requirements and the allowance structure, the way the program is publicized and implemented, and the procedures for checking performance to ensure the announcement by wholesalers and distributors of the terms of the program and the eligibility of retailers to receive RDA. The R-P Act is one of the most common areas of questions for antitrust counsel, and publishers should not hesitate to seek counsel in this complex area of law.