FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

THE CHAIRMAN

February 2, 2007

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Conyers:

Thank you for your letter regarding the *Leegin* resale price maintenance (RPM) case before the Supreme Court. As you know, the Federal Trade Commission joined the amicus curiae brief in support of the Petitioners that was filed for the United States by the Solicitor General on January 22, 2007. The brief sets forth the position of the Department of Justice and the Commission regarding the appropriate standard for considering RPM practices, and answers some of the questions that were posed in your letter. I have enclosed a copy of it for your reference.

As a general matter, the position taken in the brief harmonizes the law's treatment of RPM with modern antitrust doctrine. There is widespread consensus among economists and academics that the current per se rule is inappropriate because the effects of RPM can be either anticompetitive or procompetitive depending on the facts in a given case. Applying the rule of reason advocated in the brief offers protection against anticompetitive uses of RPM, while allowing defendants to defend their arrangements as legitimate and pro-competitive.

Below I have provided responses to your specific questions reflecting the Commission's views as presented in the *Leegin* brief.

Given Congress' active involvement in the RPM issue – on the last two occasions (in 1975 and in 1983) in unequivocal support of the Dr. Miles line of cases – would you agree that the Supreme Court should defer to Congress on this issue?

As you know, the Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, repealed provisions of earlier statutes that allowed "fair trade" pricing, i.e., RPM, at the option of individual states. As the amicus brief of the United States in the *Leegin* case states: "there is no incongruity between Congress's action in 1975 and a more flexible treatment of RPM under the Sherman Act. In repealing the broad *per se legality* afforded by the fair trade laws and once again subjecting RPM to antitrust scrutiny, Congress did not mandate a particular standard to

govern such scrutiny. Although both the House and Senate reports on the 1975 legislation indicate Congress's awareness of the reality that by repealing the exemption for fair trade laws they were remitting RPM to the Dr. Miles regime, the legislative history suggests that Congress merely intended to end a special exemption from the federal antitrust laws."

The Department of Justice and the Federal Trade Commission testified in favor of the 1975 Consumer Goods Pricing Act. Both agencies testified that the per se rule prohibiting RPM protects competition and consumers. Please provide your comments on that testimony, indicating areas of agreement or disagreement.

The Commission testified in 1975 in favor of repealing exemptions to the antitrust laws that allowed RPM to be *per se* legal regardless of its competitive effects. It was then and continues to be the Commission's view that exemptions and immunities from the antitrust laws should be disfavored. The position of the United States' brief in *Leegin* is consistent with the Commission's position in the 1975 testimony that RPM should not be exempt from the antitrust laws and that the *per se* legal posture provided by the laws repealed in 1975 can harm consumers. To the extent that the 1975 testimony failed to recognize potential procompetitive and pro-consumer justifications for RPM, it of course did not reflect the subsequent experience and economic analysis that has developed during the last thirty-plus years, as discussed in the *Leegin* brief.

In a relatively recent enforcement initiative, the Federal Trade Commission acted against the sound recording industry's use of minimum advertised prices for the sale of CDs. In that case, the FTC estimated that the restricted resale prices cost consumers $480 million over a three year period. See Record Companies Settle FTC Charges of Restraining Competition in CD Music Market, FTC Press Release, available at <www.ftc.gov/opa/2000/05/cdpres.htm>. Would you agree that RPM or minimum advertised pricing can be particularly harmful to consumers in cases such as this where there is little interbrand competition?

These Commission enforcement actions[1] concerned minimum advertised pricing policies by the five largest distributors of prerecorded music in the United States, alleged to have collectively accounted for approximately 85% of the industry's domestic sales. Under those programs, retailers seeking any cooperative advertising funds were required to observe the distributors' minimum advertised prices in all media advertisements.[2] The Commission examined the circumstances under the rule of reason and concluded that it had reason to believe that the practices were anticompetitive.

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[1] *In the Matter of Time Warner Inc. et al.*, FTC File No. 971-0070 (2000).

[2] *See* Analysis to Aid Public Comment on the Proposed Consent Order, *Time Warner, Inc. et al.*, FTC File No. 971-0070 (May 10, 2000).

As expressed in the United States' brief in *Leegin*, the Commission recognizes that whether an RPM agreement is anticompetitive or procompetitive depends on the particular facts of the case. The Commission therefore advocates applying the rule of reason to such agreements, as it is applied to other vertical restraints.

One of the issues before the Supreme Court is whether there are meaningful distinctions between RPM (currently subject to the per se rule) and non-price vertical restraints (subject to the rule of reason). Commenting on this topic, Professor Warren Grimes, in a briefing paper supplied to the Committee, has written:

> ***Most non-price vertical restraints are used to restrict distribution. RPM, in contrast, can be and often is used with unrestricted distribution. Because of this distinction, RPM is potentially far more threatening to efficient retailing and consumer prices. A manufacturer limiting distribution through location clauses or exclusive distribution practices does not seek a restraint on all retailers. Although the impact of a non-price vertical restraint on intrabrand retail competition can be severe, the restraint itself is self-limiting because the manufacturer, once achieving brand prominence, will want to open its distribution system to maximize sales. RPM is the only widely practiced vertical restraint that threatens the broad cross-section of multi-brand retailers that sell a variety of brands. Thus, among widely employed vertical restraints, RPM is the most threatening to innovative and efficient retailing and to the consumer interest in shopping for the lowest price.***

Would you agree or disagree with this explanation? Please explain.

While the Commission has not taken a position on this specific statement of Professor Grimes, it has concluded that there is no basis for subjecting RPM to *per se* analysis while analyzing nonprice vertical restraints and maximum resale price maintenance under the rule of reason. As the United States' brief in *Leegin* notes, *Dr. Miles's* per se rule has few defenders in the scholarly community. The brief also points out that, in a brief filed at the petition stage, a group of leading economists observed that nonprice vertical restraints, such as exclusive territories, can more completely restrict intrabrand competition than does RPM. While exclusive territorial restrictions can eliminate virtually all intrabrand competition, RPM permits retailers to engage in intrabrand competition on factors other than price, "leav[ing] multiple sellers of the brand in the same geographic market to engage in interbrand competition."[3]

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[3] Cert. Brief of Amici Curiae Economists 17. *See also* Richard A. Posner, *The Next Step in Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 9 (1981) ("Resale price maintenance is more flexible than exclusive territories as a method of limiting price competition among dealers."); Robert L. Steiner, *How Manufacturers Deal with the Price-Cutting Retailer: When Are Vertical Restraints Efficient?*, 65 Antitrust L. J. 407, 445, 446-447 (1997) (explaining that in some circumstances "the consumer interest is often better served by RPM [as opposed to other vertical restraints] . . .."

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We share your strong interest in protecting consumers and competition in the marketplace. If you or your staff have any questions or comments, please feel free to call me or have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195.

Sincerely,

Deborah Platt Majoras
Chairman

Enclosure