Slotting Allowances and Payola: Do They Deserve Different Regulatory Treatment?

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Similar Practices

- Definition
- Promotional effect
- Need to allocate scarce resource
- Claims of exclusion

Different Regulatory Treatment

- Slotting allowances are not regulated by the FTC
  - They "need to be judged on a case-by-case basis, with attention both to likely competitive harms and to likely procompetitive benefits." (FTC 2001)

- FCC regulates payola
  - Prohibits payments unless an announcement of the endorsement is made every time a song is played.
  - Major recording companies recently settled investigations brought by New York AG Spitzer; terms more restrictive than FCC regulations.

Can theories of exclusion explain slotting allowances and payola?

- Popular "theory" of exclusion:
  - Payment of fees increases the cost of introducing a new product. This may exclude manufacturers, particularly small ones.
  - Cannot explain exclusion: auctioning scarce resource to highest bidder results in efficient allocation.
- Economic theories of exclusion:
  - Contractual provision for retailer to exclude competitor in return for fees (Farrell 2001, Shaffer 2005).
  - Fees alone will not result in exclusion.

Is evidence consistent with theories of exclusion?

- Slotting allowances: Sometimes
  - Occasionally slotting allowances are accompanied by contract to reduce shelf space available to competing manufacturers.
  - Such contracts are rare (FTC 2003)
- Payola: No
  - No evidence of exclusionary contracts with payola. More likely that recording studios are simply trying to buy more of scarce resource—having song played on radio.

Are slotting allowances exclusionary? Evidence from the courts

- In two legal challenges to slotting allowances, the courts found that the fees are valid means of competing.

- El Aguila Food Prods. v. Gruma Corp:
  - “[S]ome of the plaintiffs’ losses are due to a ‘self-inflicted’ wound—they chose not to compete for shelf space.”

- R.J. Reynolds Tobacco Co. v. Philip Morris Inc:
  - “Defendant’s Retail Leaders program has induced rivals to compete more vigorously.”

Why does payola receive different regulatory treatment than slotting allowances?

- Belief that since airwaves are owned by public, radio stations should select music on basis of "public interest" rather than commercial interest.

Will regulating payola cause radio stations to select music that is in public interest?

- Under regulation, radio stations earn profits solely from advertisers. Will select music that appeals to people who buy advertisers' products.

- Without regulation, radio stations earn revenue from advertising and payola. Will modify playlists to appeal more to people who buy records.

Conclusion

- Highly unlikely that payola will exclude promising music.
- Regulation will not accomplish the goal of serving “public interest.” With or without regulation, radio stations will design playlists to serve commercial interest.
- Prohibiting explicit payment for radio airspace will not make competition for airspace disappear.

References

- El Aguila Food Prods. v. Gruma Corp., 301 F. Supp. 2d 612, 621 (S.D. Tex. 2003)
- Coase, Ronald (1979). Payola in Radio and Television Broadcasting. *Journal of Law and Economics*. v.22(2).
- Farrell, Joseph (2001). Some Thoughts on Slotting Allowances and Exclusive Dealing. U.S. Department of Justice, presentation before the American Bar Association (March 28).
- Federal Communications Commission. 2006. *The FCC's Payola Rules*, 19 (June).
- Federal Trade Commission. 2001. *Report on the Federal Trade Commission Workshop on and other Grocery Practices in the Retail Grocery Industry* (February).
- Federal Trade Commission. 2003. *Slotting Allowances in the Retail Grocery Industry* (November).
- Office of New York Attorney General Eliot Spitzer. 2005. Sony Settles Payola Investigation, 25 (July).
- R.J. Reynolds Tobacco Co. v. Philip Morris Inc., 199 F. Supp 2d 362 (M.D.N.C. 2002)
- Shaffer, Greg (2005). Slotting Allowances and Optimal Product Variety. *Advances in Economic Analysis & Policy* v.5 #1, article 3.