Misplaced Marketing Colas Big and Little: Anti-Trust Laws, Non-Regulation and the Disabled Marketing of Small Brands

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Misplaced Marketing Colas Big and Little: Anti-Trust Laws, Non-Regulation and The Disabled Marketing of Small Brands

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Abstract
Shelf access fees and cooperative merchandising agreements are tactics that clearly give power to big business, and nowhere is this more evident than in the soft drink wars. The lack of legal protection against these tactics by US regulators can squeeze small brands out of the retail environment and effectively disable the marketing strategy of small soft drink companies and other small businesses. Thus, marketing becomes not only misplaced, but irrelevant.
Putting the product on display

A decade and a half ago, Michael Weinstein, former executive vice president for A&W Beverages, said, “you can have the greatest ad in the world, and if the product is not on display ... it won’t sell” (Lawrence, 1987, p. 54). This is hardly a startling revelation, and most people assume there is a simple solution — just put the product on display. However, getting shelf space for small brands was not a simple matter then, nor is it now. Buried within the marketing wars of the major soft-drink brands lie examples of where market power replaces marketing. But to understand why marketing got misplaced requires some insights into the soft drink brands’ competitive environment.

The introduction of the Internet and other new media has not suddenly given advertising any magical powers to overcome a distribution problem. In theory, it is possible for advertising to create such great demand for a product that consumers pressure retailers to carry it; such is the standard “pull” strategy described in every basic textbook. However, this is only possible if the retailer can put the product on the shelf. In reality, manufacturers obtain agreements with retailers that prevent shelf space from going to a rival brand, regardless of consumer demand. With slotting fees and cooperative merchandising agreements or calendar marketing agreements (CMAs) giving a clear power preference to the largest companies, smaller soft drink manufacturers can be almost prevented from getting space in stores. And the lack of legal protection that the USA regulators provide for small businesses has made it even tougher for the smaller companies in the current retail environment.

Shelf access fees

The US Federal Trade Commission (FTC) has classified three types of payments to retailers as “shelf access fees.” First are slotting fees, which manufacturers pay to get new products on the shelves of food stores. These are defended as compensation to the retailer for the costs and risks of stocking new, unproven products. Critics find them an “unfair abuse of power by large retailers” that “damage channel relationship, and hurt competition among both retailers and manufacturers” (Bloom et al., 2000, p. 93). According to one report, the slotting fees amount to about $9 billion per year and are spreading to other industries including computer software, compact discs, books, apparel and tobacco. The only exception is alcoholic beverages, for which slotting fees are illegal (Sherwood, 1999).

“Pay-to-stay” fee

A second shelf access fee is the “pay-to-stay” fee, often in the tens or hundreds of thousands of dollars, which manufacturers of established brands pay to remain on the shelves (FTC, 2001). Third, and perhaps most problematic, are fees that limit or disadvantage a rival’s shelf space. Some agreements secure exclusive rights to the space, while others negotiate partial exclusivity or preferential shelf space. Among the various complaints made to the FTC, manufacturers of canned goods claimed that rivals paid slotting fees to keep them off the shelf, and a manufacturer of tortillas claimed that a dominant supplier paid to have the smaller firm’s product limited to just “three feet in a corner” (FTC, 2001, p. 31).

At the request of the chair of the US Senate Committee on Small Business, Christopher “Kit” Bond, the FTC examined these different types of payments as possible antitrust violations during a two-day workshop in 2000. Despite requests by the Independent Bakers Association, the Tortilla Industry Association, and the National
Association of Chewing Gum Manufacturers, the FTC declined to issue guidelines on shelf access fees on the basis that preparing such guidelines would be “resource-intensive” and that “other steps better serve the public interest” (FTC, 2002, p. 2).

CMAs are a particularly predatory form of business practice in food stores. Many variations exist, but typically a retailer accepts a promotional allowance from a manufacturer (or bottler) in return for advertising the brand exclusively for a specific number of weeks per year. When retailers commit to CMAs for multiple brands during the year, probably no threat to competition exists; however, when one or two brands acquire all available promotional activity for the year, they effectively squeeze small brands out of any retail advertising for the chain. As noted by an attorney specializing in corporate law, when this happens the CMAs could stand for “catastrophic methods of aggression” (Levin, 1991, p. 49). In recent years, CMAs in the soft drink industry have leveraged not only exclusive rights to advertising, but to display space, cold-drink equipment, and signage (Hays, 2000). One bottler of Double-Cola products noted that as a result of a one year, $1 million CMA with a retail chain, Double-Cola was relegated to one bottom shelf of a single cooler door in one store (DeSpain, 2001). When CMAs are negotiated for multiple chains, small brands can find themselves entirely locked out of a geographical area.

Lawful and valid
Though CMAs and shelf access fees seem to limit competition by eliminating competitors, they have usually been upheld as lawful and valid in the USA. The current interpretation of antitrust laws emphasizes the protection of competition without protecting competitors. Competition in the abstract is protected, but the effect of competition on rivals is not (Levin, 1991).

As a result, marketing is not just misplaced, but becomes almost irrelevant. Instead of protecting the needs of consumers and competitors who might serve them, regulators are protecting an interpretation of the concept of competition. They fail to protect consumers’ buying power as the determinant by which brands live or die on the shelf, and they also fail to help small bottlers effectively hold onto the only distribution channel available to them, since fountain drink and vending machines offer even less opportunity for competition. Regulators hold the view that as long as two companies are rivals in the soft drink wars, competition thrives, although the combined market share for their products is more than 75 percent. Regulators further believe that as long as prices remain relatively low, consumers’ needs are met. It is of little concern to them that “ordinary business practices” are so costly that only the industry giants with deep enough pockets can afford them. Nor is it of concern that these practices allow giants to block the only available distribution channel open to a small competitor. Further, it is of no concern that consumers are left out of the mix since it is not their choices that influence the right to shelf space.

Irrelevant marketing tools
The second way marketing is misplaced in these soft drink wars is that many marketing tools become almost irrelevant for the small business’ success. Normally, small business, can benefit from the use of marketing to sell their products, just as medium and large businesses do; strategically, the decision to use marketing is sound. However, the unregulated use of shelf access fees and CMAs creates a situation in which the marketing efforts of small businesses become disabled – at least those aimed at consumers.

When brands are given exceedingly limited shelf space or squeezed out of the retail environment altogether, marketing tools such as advertising, public relations, and sales promotions become powerless. A “buy one get one free” deal has no consumer value when it’s not possible to buy even one. Corporate responsibility and goodwill are irrelevant for a company that manufactures a product that cannot be purchased by consumers. The most creative advertising in the world is without value if the product is not on the shelf.
The misplaced marketing efforts of regulators have created an environment where any marketing efforts of small businesses can easily become disabled and ultimately lost.

References
DeSpain, J. (2001), personal interview May 30, and e-mail correspondence March to August.