

Keyword Restrictions - Part V: Restrictions on Using Trademarks as Keyword Search Terms: Why All The Gripping?

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Last time we discussed how restrictions on the use of a hotel's trademarked search terms by intermediaries can foster competition, improve quality, and lower costs. We ended by asking: Given these procompetitive benefits, what exactly is all the griping about?

So far as we can tell, two gripes have emerged.

Gripe #1: Hotels are using Google as a counterweight to OTAs. From an antitrust standpoint, the answer is: So what? If customers choose to search for accommodations on Google rather than OTA websites, that's just a fact of competitive life. The same goes if hotels choose to accommodate this customer preference.

Gripe #2: Restricting trademarked keyword use prevents some consumers from seeing the lowest price deals. It's not obvious to me that this factual claim is true. But even if it were true, surely an OTA with a strong brand and quality service can compete with search engines and hotel websites for potential hotel customers? If not, one may well ask why not.

In any event, a closer review of the complaint suggests other problems other than it might be flat out untrue. If the complaint is that a customer seeking, say, a Hilton room, will end up paying more by booking directly with Hilton rather than through an OTA, this seems unlikely to be an antitrust problem. As discussed in earlier posts, Hilton is generally free to organize its distribution chain as it sees fit, and is under no obligation to refer a customer who wants to book directly with it to an intermediary, even if that referral would result in a lower room rate.

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But perhaps the complaint is that this same customer will end up paying more for a Hilton room than it would have paid for, say, a Westin room. Maybe. But Hilton's restrictions on the use of its trademarks as search terms don't prevent a customer from searching for "Westin" on a search engine. And remember, there's nothing stopping the hotels from competing against each other, from vigorously promoting their own brands and products, and even from running comparative advertisements against each other. Also, there's nothing stopping any OTA from permitting such comparative shopping on its own website. All of this inter-brand competition acts as a check on any hotel's pricing power.

So what exactly is the problem? The only "problem" seems to be that OTAs, as middlemen, stand to lose at least some of their business to direct sales. But such wealth transfers, which do not impair competition, are not an antitrust problem.

Moreover, the root of this "problem" is not anticompetitive conduct, but technological innovation, exactly the kind of innovation that made OTAs possible in the first place. More on that next time, when I wrap up this series.