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Antitrust Law—Enforcement of Dealer-Location Clauses Declared Per Se Illegal

The 1967 decision of the United States Supreme Court in *United States v. Arnold, Schwinn & Co.*[1] has had a dramatic impact on the business world's attempts to comply with federal antitrust guidelines. In *Schwinn* the Court held that vertically imposed territorial and customer restraints[2] were to be examined under the rule of reason[3] if the manufacturer retained "title, dominion, and risk" over his product, but were per se violations of section 1 of the Sherman Act[4] if similar restraints were imposed by the manufacturer when the transaction constituted a sale of the product.[5] The Ninth Circuit was recently faced with the problem of defining the scope of *Schwinn* in *GTE Sylvania Inc. v. Continental T.V., Inc.*,[6] a case involving neither territorial nor customer resale restrictions. The court, nevertheless, held that dealer-location restrictions[7] are per se unlawful under section 1 of the Sherman Act when they are *enforced* by the manufacturer.[8]

The dispute in *Sylvania* resulted from a new distribution scheme initiated by the manufacturer, Sylvania, with which it attempted to limit the number of franchises in a given area. The plan was devised to reduce intrabrand competition among retailers with the ultimate goal of fostering interbrand competition for Sylvania products. In the fall of 1965, Continental, one of Sylvania's largest dealers, opened an unau-

1. 388 U.S. 365 (1967).

2. A vertically imposed territorial restraint exists when a manufacturer transfers his products to a distributor with the restriction that the distributor resell the products only to retailers in a particular territory. The manufacturer could also deal directly with the retailer and impose similar restraints. On the other hand, a customer resale restraint prohibits the distributor or retailer from reselling to a particular class of customers. *See* P. AREEDA, ANTITRUST ANALYSIS 530-31 (2d ed. 1974); Note, *Restricted Channels of Distribution Under the Sherman Act*, 75 HARV. L. REV. 795 (1962).

3. Mr. Chief Justice White launched the rule of reason in Standard Oil Co. v. United States, 221 U.S. 1 (1911). The test is designed to analyze the reason for the restraint and its effect as a restraint on competition.

4. 15 U.S.C. § 1 (1970). Section 1 of the Sherman Act was passed in 1890 and states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."

5. 388 U.S. at 379-80. All of the following analysis in this note pertains equally to a manufacturer dealing directly with a retailer as well as imposing similar restraints regarding the retailer's dealing with other retailers or the general public.

6. 1974 Trade Cas. 96,792 (9th Cir.), *petition for rehearing en banc granted*, Civil No. 71-1705 (Dec. 12, 1974).

7. The typical dealer-location clause designates the location of the place of business for which a franchise is issued and requires the franchisor's consent for the franchisee to open a second outlet. *See* Pollock, *Alternative Distribution Methods After Schwinn*, 63 NW. U.L. REV. 595, 603 (1968).

8. 1974 Trade Cas. at 96,795.

thorized store in an area in which Sylvania considered the market to be sufficiently developed. Despite Sylvania's objections, Continental shipped products from its authorized store to the unauthorized store. In an effort to enforce its dealer-location restrictions, Sylvania refused to extend further credit to Continental and accelerated prior balances. Such action had the effect of ending Continental's original franchise and driving it out of business.[9]

Continental filed a treble damage antitrust action[10] in federal district court.[11] In response to the judge's instructions, which interpreted the scope of *Schwinn* quite broadly, the jury returned a verdict against Sylvania.[12] Sylvania appealed, alleging that the trial judge's instructions were erroneous.

The Ninth Circuit stated that Sylvania had the legal right geographically to space exclusive dealerships[13] and probably could have used legal means to prevent Continental from professing to have a second authorized, franchised dealership.[14] Nevertheless, when Sylvania attempted to prevent Continental from opening a second outlet by lowering Continental's credit limit and by demanding payment of some accounts receivable, the situation came within the censure of the *Schwinn* rule.[15]

The court rejected Sylvania's contention that, since franchise-location clauses are legal, enforcement of them must likewise be legal,

9. *Id.* at 96,793.

10. Section 4 of the Clayton Act, 15 U.S.C. § 15 (1970), provides for treble damage relief in private antitrust actions. Section 4 reads in part: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

11. The action was filed in the District Court for the Northern District of California. Retired United States Supreme Court Justice Tom C. Clark, sitting by designation, presided over the trial. John P. McGuire & Co. v. Continental T.V., Inc., Civil No. 44251 TCC (N.D. Cal., Feb. 16, 1971), *affirmed sub nom.* GTE Sylvania Inc. v. Continental T.V., Inc., 1974 Trade Cas. 96,792 (9th Cir.), *petition for rehearing en banc granted*, Civil No. 71-1705 (Dec. 12, 1974).

12. The judge assumed that *Schwinn* applied and as a result asked the jury simply: "Did Sylvania Electric Products, Inc., engage in a contract, combination or conspiracy in restraint of trade in violation of the antitrust laws with respect to location restrictions alone?" This charge is quoted in the court of appeals opinion. 1974 Trade Cas. at 96,793.

13. *See* Bushie v. Stenocord Corp., 460 F.2d 116 (9th Cir. 1972). An exclusive distributorship is established when a manufacturer agrees not to place another distributor in the initial distributor's territory.

14. The court gave no examples of the legal means at Sylvania's disposal. Presumably these would be based on breach of contract or false advertising theories.

15. 1974 Trade Cas. at 96,794-95.

or at least not per se illegal. In the majority's view the illegality arose from the manufacturer's attempts to enforce the agreement by interfering with Continental's establishment of a second outlet. The court, however, failed to discuss the issue of conspiracy, a required element of all section 1 violations. It stated that "absent any anticompetitive motive and effect" Sylvania could have cancelled Continental's franchise.[16] Such anticompetitive motive and effect were exhibited by Sylvania's intent to limit intrabrand competition by preventing the opening of Continental's second outlet.[17] The court reasoned that, because Sylvania parted with dominion, risk, and control over the products, under *Schwinn*, Continental could resell to unfranchised retailers without Sylvania's approval. The court concluded that "there is no apparent reason why [the antitrust laws] should not also protect the transfer if Continental itself is the retailer."[18]

BACKGROUND AND ANALYSIS

The Supreme Court radically changed its attitude toward vertically imposed territorial and customer resale restraints in *United States v. Arnold, Schwinn & Co.*,[19] by holding that when a manufacturer sells his product to a distributor or retailer subject to such restraints, a per se violation of the Sherman Act results.[20] According to the Court, after a manufacturer has transferred title and relinquished dominion over the product, "it is unreasonable without more" to restrict the areas in which or the persons with whom a product may be traded.[21] *Schwinn* determined that such restraints had sufficient detrimental effect on intrabrand competition to warrant a strong proscriptive rule. In the Court's view such a per se rule would foster intrabrand competition.

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16. *Id.* at 96,794.

17. It is necessary to refer to the dissent to discern the meaning of the majority's conclusion. Judge Ely, dissenting, stated:

> The issue is whether a manufacturer-seller can enforce a location clause against its franchisee by terminating the latter's franchise if he opens an outlet at an unauthorized location. The majority has not only decided that the manufacturer could not lawfully refuse to sell to the breaching franchisee in this instance, but has also held that a unilateral termination of the franchise in order to enforce a location clause is a per se violation in restraint of trade.

Id. at 96,796.

18. *Id.* at 96,795.

19. 388 U.S. 365 (1967).

20. *Id.* at 379. The Court reasoned: "[T]o allow this freedom where the manufacturer has parted with dominion over the goods—the usual marketing situation—would violate the ancient rule against restraints on alienation and open the door to exclusivity of outlets and limitation of territory further than prudence permits." *Id.* at 380.

21. *Id.* at 379.

The *Schwinn* rule encourages alternative distribution methods, some of which are available only to large companies. Chief among these are consignment programs and vertical integration, both of which require substantial capital investment.[22] The latter method has proved appealing to many large companies.[23] But practical and legal risks accompanying such business practices often deter their implementation.[24] Moreover, numerous optional distribution plans are at a small company's disposal, thus tending to limit the impact of *Schwinn*.[25]

Schwinn has been criticized more for the analysis and principle used to decide the case than for the result reached. Use of "the ancient rule against restraints on alienation" is better viewed as a conscientious attempt by the Court to create a bright line test in an otherwise complex area rather than as a correct legal doctrine.[26] Regardless, easy circumvention of the *Schwinn* rule has led many commentators to question whether *Schwinn* has accomplished its intended goal—an in-

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22. The government in *Schwinn* outlined the virtue of vertical integration by noting the cost savings and economies. Brief for the United States at 50. Vertical integration through merger (*e.g.*, Schwinn purchasing an independent distributor's assets) is treated more leniently than restraints vertically imposed upon distributors because vertical integration is subjected to the rule of reason test. Brown Shoe Co. v. United States, 370 U.S. 294 (1962). *See* Pollock, *supra* note 7, at 608-09.

23. In fact, vertical integration is what has occurred with Schwinn, in spite of the fact that the government assured the Supreme Court that forward integration was "unlikely," "an entirely remote possibility," and "wholly lacking in credibility." Brief for the United States at 29, 50. *See* Keck, *The Schwinn Case*, 23 BUS. LAW. 669, 686-87 (1968); Pollock, *supra* note 7, at 610.

24. *Brown Shoe* subjects vertical integration through merger to rule of reason analysis. *See* note 22 *supra*. In addition, it is conceivable that a consignment plan would be held to transfer to the consignee insufficient "dominion" or "risk" over the product. Should sufficient transfer be recognized by the court in a particular case, the overall nature of the plan is still to be given rule of reason consideration. *See* note 27 *infra*.

25. Other restrictive practices limiting intrabrand competition but which have been held not to violate *Schwinn* are: primary responsibility clauses requiring dealers to concentrate their efforts in particular territories, Colorado Pump & Supply Co. v. Febco, Inc., 472 F.2d 637 (10th Cir.), *cert. denied*, 411 U.S. 987 (1973); primary responsibility clauses with a profit pass-over for sales made outside the designated territory, Superior Bedding Co. v. Serta Associates, Inc., 353 F. Supp. 1143 (N.D. Ill. 1972); and exclusive distributorships, Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

26. A noted commentator in the field observes that this can only be classified as a kind of "instant tradition," where an irrelevant property concept is applied to an antitrust issue. *See* Pollock, *supra* note 7, at 601. The words of Emerson are applicable for the rigid inflexibility of the *Schwinn* rule. Emerson said, " 'Generalization is always a new influx of the divinity into the mind. Hence the thrill that attends it.' " He refers to generalizations as the so-called "law" of the "least effort," a common way of breeding new problems in order to avoid old problems. Quoted in Granz v. Harris, 198 F.2d 585, 590 (2d Cir. 1952).

crease in intrabrand competition.[27] Various federal courts, realizing the great impact of the *Schwinn* per se rule, have sought to limit the rule by construing it narrowly. The most serious and legally questionable inroad into *Schwinn* was made by *Janel Sales Corp. v. Lanvin Parfums, Inc.*,[28] in which the Second Circuit declined to apply *Schwinn's* per se rule because the manufacturer had not firmly insisted on compliance with the contractual terms that required retailers to restrict their direct dealings to certain customers.[29] A logical inference from *Janel* and similar cases limiting *Schwinn* is that the lower courts find

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27. *Schwinn* has been criticized because the form of the transaction appears to be more important than the substance of the transaction. To avoid *Schwinn*, a manufacturer needs only retain dominion and control over the product by establishing a consignment or agency plan. Such a plan would subject the manufacturer to the rule of reason test rather than the per se prohibition. *See* Pollock, *supra* note 7, at 610-12; Note, *Restrictive Distribution Arrangements After the Schwinn Case*, 53 CORNELL L. REV. 514 (1968).

28. 396 F.2d 398 (2d Cir.), *cert. denied*, 393 U.S. 938 (1968).

29. *Janel* is similar to *Sylvania* in that enforcement is considered the wrongful act. *Janel* reached this result by observing that in *Schwinn* the Supreme Court had noted that Schwinn had been "firm and resolute" in insisting on compliance with its restrictive agreements. 388 U.S. at 372. It seems clear that *Schwinn's* discussion of such enforcement was designed merely to prove an agreement imposing territorial and customer restrictions. For that reason, *Janel* is an analytically incorrect limitation of *Schwinn*. *Janel's* limitation was mentioned but not definitely accepted by the Third Circuit in Tripoli Co. v. Wella Corp., 425 F.2d 932, 941 (3d Cir.), *cert. denied*, 400 U.S. 831 (1970). The Tenth Circuit simply followed *Janel* without adding anything instructive. Colorado Pump & Supply Co. v. Febco, Inc., 472 F.2d 637 (10th Cir.), *cert. denied*, 411 U.S. 987 (1973). A district court in the Second Circuit, *Janel's* circuit, upheld the validity of the "firm and resolute exception" but found that *Schwinn* had nevertheless been violated. United States v. Eaton Yale & Towne, Inc., 1972 Trade Cas. 91,697 (D. Conn.). The Second and Tenth Circuits are the only ones that have carved this exception out of the strict *Schwinn* prohibition.

The Supreme Court appeared to leave open the possibility that exceptions to the per se rule would be permissible when it stated that "it is unreasonable *without more*" for the manufacturer to impose territorial or customer restraints after transferring dominion over the product to the distributor or retailer. 388 U.S. at 379 (emphasis added). The Third Circuit seized this language to create a "reasonableness exception" to the *Schwinn* rule. Tripoli Co. v. Wella Corp., *supra*. It is questionable whether *Schwinn* permits such an exception. *E.g.*, United States v. Glaxo Group Ltd., 302 F. Supp. 1 (D.D.C. 1969); *see* Adolph Coors Co. v. FTC, 497 F.2d 1178 (10th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3388 (U.S. Jan. 14, 1975). In *Coors* the Tenth Circuit took note of the *Schwinn* rule in striking down territorial restrictions in the distribution of Coors Beer despite arguments by appellant that the plan was conceived in order to preserve the quality of the product. *Id.* at 1186. Such a refusal to use the "reasonableness exception" points out the rigid aspect of the *Schwinn* rule and is a counterargument that the rule is not being extensively limited by the lower federal courts. The validity of the "reasonableness exception" can be inferred from the fact that the *Schwinn* Court specifically pointed out that Schwinn was not a newcomer or a failing company and therefore should be subjected to a per se ruling. 388 U.S. at 374. This implies that the Court intended to limit the scope of the *Schwinn* rule in certain instances. The Ninth Circuit in *Sylvania* did not accept Sylvania's argument that the "failing-company" rule applied in the instant case. 1974 Trade Cas. at 96,795-96.

the strict proscriptive rule of *Schwinn* unnecessarily harsh and far-reaching. In addition, it has been argued that *Schwinn* unduly emphasized the form over the substance of the transaction by limiting its ruling to transfers between manufacturers and dealers that pass "dominion" over the product.[30]

The Ninth Circuit in *Sylvania* failed to recognize and respond to these criticisms. Instead it continued to emphasize the form of the transaction by holding that enforcement of dealer-location clauses by the manufacturer is per se unlawful because such enforcement prevents the distributor from transferring products and dealing to his second outlet.[31] *Sylvania* offered only one reason for including the enforcement of dealer-location clauses within the proscriptive rule of *Schwinn*: since *Schwinn* guaranteed Continental the right to sell to discounters or other unauthorized customers, the court saw no apparent reason why the Sherman Act should not protect the transfer if Continental itself is the retailer.[32]

Such analysis is incomplete, however. First, *Schwinn* debatably was not intended to affect dealer-location clauses. In his final decree in the *Schwinn* case on remand from the Supreme Court, Judge Perry specifically authorized Schwinn's use of location clauses in its franchise agreements.[33] Since such clauses are not illegal according to the Supreme Court in *Schwinn* and the Ninth Circuit in *Sylvania*, it appears anomalous that enforcement of a location clause would be impermissible. However, the Ninth Circuit concluded that such enforcement if done with anticompetitive motive and effect is per se illegal. If a manufacturer establishes an exclusive distributorship in one area and then proceeds to grant distributorships elsewhere he would appear to be under a contractual duty to prevent his distributors from invading the territory of a particular area's exclusive distributor. If this area is invaded, the dealer could conceivably have an action for breach of contract against the manufacturer.

Secondly, *Sylvania*'s failure to analyze carefully the substance of the vertically imposed restraint frustrates the underlying intent of *Schwinn* to proscribe only those restraints that unduly interfere with intrabrand competition. By carrying *Schwinn* to its logical extreme, *Syl-*

30. *See* note 27 *supra.*
31. *See* text accompanying note 16 *supra.*
32. 1974 Trade Cas. at 96,795.
33. United States v. Arnold, Schwinn & Co., 291 F. Supp. 564, 566 (N.D. Ill. 1968).

vania avoided the necessary analysis of the anticompetitive effect of dealer-location clauses as compared with territorial restraints.[34] If dealer-location clauses do not restrain intrabrand competition to the extent that territorial restrictions do, the Ninth Circuit has improperly extended *Schwinn.* In addition, since per se rules are created only after careful analysis of the economic impact of the restraints involved, the decision in *Sylvania* is definitely unwarranted.[35]

In light of these criticisms, a better approach to determine the legality of dealer-location clauses would be to examine the cases dealing with such clauses prior to *Schwinn* and then to compare the substantive impact of dealer-location clauses with the substantive effect of vertically imposed territorial restrictions that were found to be unlawful per se in *Schwinn.*[36] From the inception of the Sherman Act in 1890 until *Schwinn* was decided in 1967, neither territorial resale restrictions nor dealer-location clauses had been held to be a per se violation of the antitrust laws. The illegality of vertically imposed territorial resale restraints was clearly established by *Schwinn,* but the rule of reason remained the appropriate test whenever the manufacturer maintained dominion over the product. Although dealer-location clauses have never been specifically dealt with by the Supreme Court, such a clause was upheld by the Second Circuit in *Boro Hall Corp. v. General Motors*

34. *Sylvania* relied on the customer resale restraint aspect of location clauses to hold their enforcement per se unlawful; however, calling such restraints customer limitations is at best arguable when what is prevented is solely transfer of products between two outlets.

35. Ironically, the Supreme Court itself ignored its own earlier admonition when it established the *Schwinn* per se rule. The Court had warned in White Motor Co. v. United States, 372 U.S. 253 (1963), that it did "not know enough of the economic and business stuff out of which these arrangements emerge" to install a per se rule against vertically imposed restraints. *Id.* at 263. The *Schwinn* Court established a per se rule following no analysis of interbrand competition. Since per se rules normally are pronounced after careful economic analysis of the involved restraint, such analysis should by necessity include the possibility of overall benefits to competition. *See* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division,* 74 YALE L.J. 775 (1965).

36. A third type of restraint, an exclusive distributorship, is invariably sought by the distributor to give him a chance to infiltrate an area with advertising and to establish a clientele. The distributor often needs such protection to make the initial fixed costs worthwhile. An adverse effect on intrabrand competition results when the distributor is given an exclusive distributorship; however, retailers in that area are not restricted, since they do not have to deal with the exclusive distributor. Exclusive distributorships have never been considered unlawful, even following *Schwinn. See* note 25 *supra.* In United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944), the Supreme Court specifically refused to outlaw exclusive distributorships as violative of the antitrust laws. *See also* Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418 (D.C. Cir.), *cert. denied,* 355 U.S. 822 (1957).

Corp.[37] as not being an "unreasonable interference with competition."[38] Prior to *Schwinn* there had been little litigation over dealer-location clauses because they had been held to be subject to rule of reason analysis. Because of similarities with territorial resale restrictions, the situation regarding dealer-location restrictions, however, has become unsettled as a result of *Schwinn.*

Dealer-location restrictions resemble territorial restrictions in some respects. A territorial restriction prevents a distributor from selling the manufacturer's product to a retailer outside a prescribed area. If a manufacturer is careful not to have the territories of the dealers overlap, he can effectively prevent intrabrand competition. The situation is similar to that involving dealer-location restrictions except that, instead of being careful not to have the territories of his dealers overlap, the manufacturer must take pains to space his distributors. If the manufacturer spaces his distributors, intrabrand competition will be checked only to the extent that transportation costs and retailer knowledge of existing distributors make it inconvenient or economically unwise for a retailer to purchase from the distributor who is not the nearest one to the retailer's shop.

Dealer-location restrictions, however, have two crucial characteristics that make them less anticompetitive than territorial restrictions. First, a dealer-location restriction does not prevent a distributor from selling to a retailer located outside the distributor's zone.[39] If a distributor wants to compete with other distributors by cutting his price, he can make it feasible for a distant retailer to deal with him rather than with the closer distributor. Territorial restrictions on the other hand preclude intrabrand competition since they place all retailers in specific distribution areas and prevent the distributor from selling to those not within his territory. Secondly, even when the manufacturer carefully spaces his distributors, there will normally be retailers who are as far from one distributor as from another. This will usually be the

37. 124 F.2d 822 (2d Cir.), *rehearing denied*, 130 F.2d 196 (2d Cir. 1942), *cert. denied*, 317 U.S. 695 (1943). The Supreme Court was faced with the issue of dealer-location clauses in United States v. General Motors Corp., 384 U.S. 127 (1966), but avoided the question by deciding the case on "classic conspiracy" grounds. The government had requested a ruling on the legality of location clauses; however, the Court refused. The dissent in *Sylvania* incorrectly concluded that this is evidence of the Court's intention to permit such clauses. 1974 Trade Cas. at 96,799. It appears, rather, that the Court merely avoided an issue that it did not have to decide.

38. 124 F.2d at 823.

39. Specific territories are not set out by the manufacturer when he carefully spaces distributorships; however, a zone of convenient operations is established in effect.

case whenever the manufacturer does not draw the zones by imposing territorial restrictions but instead relies on carefully spaced distributorships to bring about a similar effect. In short, dealer-location clauses do not totally prevent two distributors from competing for the same retailers. Since such restrictions are not so anticompetitive as territorial resale restraints, the *Schwinn* rule, designed to foster intrabrand competition, should not be applicable. Enforcement of dealer-location clauses would be more properly examined under the rule of reason.

Even assuming that the restraint involved in *Sylvania* is as anticompetitive as territorial restrictions and that the enforcement of dealer-location clauses should be unlawful per se, there are still serious problems with the court's decision. First, the finding of a conspiracy is an essential element in all cases based on section 1 of the Sherman Act.[40] The court failed to examine the issue of conspiracy.[41] Had it done so, it would have found that the *Sylvania* fact situation is distinguishable from *Schwinn* as far as the conspiracy factor is concerned. The agreement between the manufacturer and the distributor formed the nucleus of the conspiracy in *Schwinn*.[42] The Ninth Circuit in *Sylvania* agreed with the intrinsic legality of dealer-location clauses and thus was arguably foreclosed from concluding that the various contracts between Sylvania and its distributors formed the foundation of the conspiracy.[43] The manufacturer was the only party interested in the enforcement of the location clause, and such enforcement by the manufacturer seems nothing more than unilateral action.[44] The court's decision to allow

40. *See* note 4 *supra*.

41. The dissent asserted that a conspiracy did not exist in the case. 1974 Trade Cas. at 96,798. The dissent accurately observed that it was impossible to find Sylvania's agent as the necessary partner in the conspiracy since the jury responded to a special interrogatory that the agent did not engage with Sylvania in a contract, combination, or conspiracy. *Id.* at 96,798 n.7.

42. 388 U.S. at 378.

43. Conforming dealers often favor the location clause and, as such, reap its benefits by not having other dealers invade their territories. It is arguable that their acquiescence and adherence to the plan form the basis of a tacit conspiracy. *See* Albrecht v. Herald Co., 390 U.S. 145 (1968).

44. It is possible that such unilateral action could be reached under section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1970), now that the Supreme Court has sanctioned the use of section 5 for the purpose of prohibiting conduct which is inherently "unfair," even though not specifically violative of any other section of the antitrust laws. FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 n.5 (1972). This would be true even if the Supreme Court should hold in the future that such conduct as that which existed in *Janel* and *Sylvania* is unilateral. Section 5 of the Federal Trade Commission Act gives the FTC jurisdiction to declare unlawful "[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce . . . ."

dealer-location clauses but not to permit their enforcement appears inconsistent with the rule set out in *Schwinn*. *Schwinn* itself draws no such distinction. Often the mere agreement is sufficient to gain the anticompetitive effect—for example, when all dealers willingly comply with such a clause to benefit from the limiting of intrabrand competition.

Secondly, *Sylvania* specifically stated that Sylvania could have cancelled Continental's franchise "absent any anticompetitive motive and effect,"[45] a statement that places the courts in the precarious position of having to determine motive. A manufacturer could easily disguise his motive and terminate the distributor's franchise. The anticompetitive effect resulting from a distributor's failure even to attempt to open a second outlet is similar to that which results from a manufacturer's preventing the attempted opening of a second outlet. This similarity is especially true when a distributor does not attempt to open a second outlet because he fears the opening of second outlets in his area by other distributors. Determination of motive is especially difficult since the court noted that, "if Sylvania later decided it didn't like Continental's *locations* and ceased selling to it, presumably there would be nothing illegal about it."[46] The court's requirement of enforcement of the contractual restraint appears unsound both legally and practically. When coupled with the frequent necessity for analysis of motive, the rule as set out in *Sylvania* appears to be highly unworkable.

CONCLUSION

The Ninth Circuit in *Sylvania* erroneously extended *Schwinn* under the mistaken belief that it was following the Supreme Court's directive in *Schwinn*. Lower federal courts have attempted to limit *Schwinn*.[47] The Ninth Circuit should have considered cases such as *Janel* and limited *Schwinn* to territorial restrictions. Such consideration could easily have been done since an examination of the effect of dealer-location clauses would have shown that the detrimental effect on intrabrand competition is not so great as with vertically imposed territorial restraints.

Mr. Justice Stewart, dissenting in *Schwinn*, warned against the ef-

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45. 1974 Trade Cas. at 96,794.

46. *Id.* at 96,795 (emphasis added). Use of the plural "locations" implies that the manufacturer can cancel the distributor's whole franchise because of the second outlet's existence. This appears quite contradictory indeed.

47. *See* note 29 and accompanying text *supra*.

fect of such a per se rule as possibly leading to the elimination of many small independent competitors.[48] The situation in *Sylvania* corresponds with that concern. By 1962 Sylvania's share of the television market had declined to one or two percent. The new distribution policy had helped it increase its share to five percent in 1965.[49] Even though it is controlled by General Telephone and Electronics Corporation, Sylvania has never been a giant in the television industry.

The antitrust laws were initially enacted to prevent monopolies by a few large companies. It is certain that the underlying purpose of the antitrust laws is not being served when interbrand competition is sacrificed to encourage intrabrand competition.[50] The *Schwinn* rule should only be applied to territorial resale restraints and other restraints that have a similar effect of dividing markets and limiting intrabrand competition. Dealer-location clauses are not such restraints.

JOHN GALE

Constitutional Law—Presidential Pardons and the Common Law

The Constitution states that "[t]he President shall . . . have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."[1] In *Schick v. Reed*[2] the United States Supreme Court was called upon to determine whether the commutation of a death sentence to a sentence of life imprisonment without the possibility of parole was a valid exercise of the President's pardoning power.[3] A divided Court[4] upheld the validity of this commutation, concluding that the power granted the President under article II, section 2, includes the power to substitute for the sentence imposed by the trial court another type of sentence not specifically provided for by statute.[5] In so holding, the Court extended the scope of the Presi-

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48. 388 U.S. at 394.
49. 1974 Trade Cas. at 96,793.
50. *See* note 35 *supra*.

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1. U.S. CONST. art. II, § 2.
2. 95 S. Ct. 379 (1974).
3. *Id.* at 382.
4. Chief Justice Burger wrote the majority opinion. Justices Marshall, Douglas, and Brennan dissented in an opinion written by Justice Marshall. *Id.* at 386.
5. *Id.* at 384.