Michigan Law Review

Volume 56 | Issue 2

1957

Regulation of Business - Sherman Act - Effect of Trade-Mark on Scope of Relevant Market

Robert H. Kapp S. Ed.
University of Michigan Law School

REGULATION OF BUSINESS—SHERMAN ACT—EFFECT OF TRADE-MARK ON SCOPE OF RELEVANT MARKET—Defendants are American corporations marketing trade-marked toilet goods obtained from their French affiliates. In each case the French company transferred to the American company trademark rights covering imported products. Pursuant to section 526 of the Tariff Act of 1930[1] defendants filed with the Bureau of Customs certificates of registration of these trade-marks for the purpose of preventing the competitive importation of products bearing the same trade-marks. In an action by the government charging that utilization of section 526 by each defendant constitutes an attempt to monopolize and a monopolization of the importation and sale of these trade-marked commodities in violation of section 2 of the Sherman Act,[2] *held,* injunction granted. The relevant market is confined to the trade-marked toilet goods of each defendant. *United States v. Guerlain,* (S.D. N.Y. 1957) 155 F. Supp. 77.

Delimitation of the relevant market is essential to the measurement of monopoly power in connection with section 2 of the Sherman Act.[3] The concept of market has product, territory, time, and consumer aspects.[4] Originally, only products essentially identical in price,[5] quality,[6] and use were regarded as being in the same market. Recent cases indicate that product differentiation may exist in the relevant market.[7] Implicit in these decisions is a rejection of pure competition as a policy goal in monopoliza-

1 46 Stat. 741 (1930), 19 U.S.C. (1952) §1526. The critical question of whether §526 applies to trade-marked goods of an affiliated company imported into the United States, a question of first impression decided in the negative in the principal case, is discussed exhaustively in 64 YALE L. J. 557 (1955).

2 26 Stat. 209 (1890), 15 U.S.C. (1952) §2.

3 E.g., United States v. Aluminum Co. of America, (S.D. N.Y. 1950) 91 F. Supp. 333.

4 MacDonald, "Product Competition in the Relevant Market Under the Sherman Act," 53 MICH. L. REV. 69 at 71 (1954).

5 United States v. Corn Products Refining Co., (S.D. N.Y. 1916) 234 F. 964.

6 Fashion Originators Guild v. FTC, (2d Cir. 1950) 114 F. (2d) 80. See generally 25 GEO. WASH. L. REV. 568 (1957).

7 E.g., United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956); Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953). While du Pont was a 4-3 decision in the Supreme Court, it has been applied in a number of recent district court cases. See 25 GEO. WASH. L. REV. 568 (1957).

tion cases. In accord with theories of monopolistic competition, it is recognized that a single market may contain competitive as well as monopolistic elements. While product differentiation is an aspect of monopoly, this force is counteracted by the competition of substitute products.[8] While it is frequently asserted that a trade-mark operates solely to distinguish the goods of competing sellers and is therefore the essence of competition,[9] others argue that by differentiating fungible products a trade-mark operates to create for its product a separate market where demand becomes inelastic and competition is greatly suppressed.[10] The principal case adopts the latter position in its entirety. Assuming, however, that a highly exploited trade-mark gives rise to product differentiation, it does not necessarily follow that monopoly exists. To conclude so is to disregard the substitute products doctrine and to equate monopoly with monopolistic competition. There are judicial statements to the effect that the power which the owner of a trade-mark has over his trade-marked products is not the power which constitutes an illegal monopoly.[11] Courts have recognized that trade-marked commodities may be in a competitive market embracing other rival commodities.[12] This is implicit in the requirement of the resale price maintenance cases, under the Miller-Tydings Amendment[13] to the Sherman Act, that the trade-marked commodity be "in free and open competition with products of the same general class produced by others."[14] Whether a trade-marked commodity is subject to competition is a question to be determined not by assumption but by market analysis[15] with the burden of establishing the relevant market resting upon the government.[16] The test of the scope of relevant market propounded by the Supreme Court is the extent of reasonable interchangeability measured in terms of cross-elasticity of demand.[17] While economists generally, like the present court, define cross-elasticity

[8] See CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION, 7th ed., 56-70 (1956).

[9] See, e.g., United States v. Timken Roller Bearing Co., (N.D. Ohio 1949) 83 F. Supp. 284 at 315, modified in regard to another point 341 U.S. 593 (1951). See generally Rogers, "The Lanham Act and the Social Function of Trade-Marks," 14 LAW AND CONTEM. PROB. 173 (1949); Pattishall, "Trade-Marks and the Monopoly Phobia," 50 MICH. L. REV. 967 (1952).

[10] See, e.g., Timberg, "Trade-Marks, Monopoly, and Restraint of Competition," 14 LAW AND CONTEM. PROB. 323 (1949).

[11] United States v. E. I. du Pont de Nemours & Co., note 7 supra, at 393, cited with approval on this point in Packard Motor Car Co. v. Webster Motor Car Co., (D.C. Cir. 1957) 243 F. (2d) 418.

[12] Packard Motor Car Co. v. Webster Motor Car Co., note 11 supra.

[13] 50 Stat. 693 (1937), as amended, 15 U.S.C. (Supp. IV, 1957) §1.

[14] Eastman Kodak Co. v. FTC, (2d Cir. 1946) 158 F. (2d) 592, cert. den. 330 U.S. 828 (1946).

[15] E.g., United States v. Aluminum Co. of America, (2d Cir. 1945) 148 F. (2d) 416; United States v. E. I. du Pont de Nemours & Co., (D.C. Del. 1953) 118 F. Supp. 41 at 197, affd., note 7 supra. See also Beacon Fruit and Produce Co. v. H. Harris, (D.C. Mass. 1957) 152 F. Supp. 702.

[16] United States v. Intl. Boxing Club of N.Y., (S.D. N.Y. 1957) 150 F. Supp. 397.

[17] United States v. E. I. du Pont de Nemours & Co., note 7 supra.

solely in terms of the responsiveness of consumers to price changes, the federal courts have rejected any such narrow definition.[18] They recognize that quality,[19] appearance, effectiveness, service and many other non-price factors enter into the competitive picture,[20] even though advertising techniques impose superficial differences.[21] Consideration has also been given to observable market behavior.[22] In the principal case there is no evidence on the responsiveness of the sales of one product to price changes of another. Consequently, the decision may be criticized not only for its failure to consider non-price and inter-brand competition,[23] but also for its resort to legal assumptions in place of extended inquiry into existing market conditions.

Robert H. Kapp, S. Ed.

18 In United States v. E. I. du Pont de Nemours & Co., note 7 supra, at 400, it was stated, "*An element* for consideration as to cross-elasticity of demand between products is the responsiveness of sales of one product to price changes of the other. . . . The court below held that the 'great sensitivity of customers in the flexible packaging markets to price or *quality* changes' prevented du Pont from possessing monopoly. . . ." Emphasis supplied.

19 Ibid. Quality competition is competition in the development of new and better products to maximize consumer satisfaction.

20 Eastman-Kodak Co. v. Home Utilities Co., (4th Cir. 1956) 234 F. (2d) 766.

21 See 54 COL. L. REV. 580 (1954), to the effect that the preference based upon trade-marks and advertising is rarely strong enough to destroy interchangeability.

22 In United States v. E. I. du Pont de Nemours & Co., note 7 supra, the Supreme Court took into consideration the observations of competition made by the trial judge while attending the 1952 Annual Packaging Show in Atlantic City. Similarly, the Court considered competitive advertising appearing in trade journals.

23 In the principal case the court reached the conclusion that there was low cross-elasticity of demand after comparing defendant's trade-marked goods with non-trade-marked goods. A more realistic result may have been reached were the trade-marked goods compared with trade-marked goods of others.