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Intraband Territorial Allocations and the Per Se Rule

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I. Introduction

Since the United States Supreme Court's decision in Continental T.V., Inc. v. GTE Sylvania, Inc., advocates are strongly urging the extension of rule of reason analysis to non-vertical intrabrand territorial allocation schemes. The principal argument made by opponents of the per se rule is
that the solitary goal of the antitrust laws is economic efficiency and that a strict application of the per se rule to intrabrand allocations, vertical or horizontal, should give way where the net effect of such allocations will not hamper interbrand competition. Therefore, because Sylvania has eliminated the per se rule with respect to vertical intrabrand allocations, the argument is that for the same reasons the per se rule should be removed for horizontal allocations.

The purpose of this Article is to consider the continued importance of the per se rule of liability under section one of the Sherman Act in the context of intrabrand allocations. The first section of this Article will analyze the ruling in Sylvania. The second section will consider four levels of intrabrand allocation: (1) the horizontal allocation at the manufacturer level; (2) the horizontal allocation at the distributor level; (3) the dual distribution allocation and (4) the vertical allocation. Significant recent decisions will be reviewed to identify judicial efforts at characterizing these restraints. The final section will critically examine the prospect of abrogation of the per se rule in these intrabrand allocation schemes within the context of antitrust goals and policy.

II. SYLVANIA AND THE RULE OF REASON

Prompted by declines in its national market share, GTE Sylvania, Inc. (Sylvania), a manufacturer of television sets, revamped its distribution system. Previously, it had sold its televisions to independent or company-owned distributors for resale to retailers. The new distribution system, adopted in 1962, did not rely on wholesale distributors, but rather involved direct sales to a small group of franchised dealers. Sylvania hoped that this selective distribution policy would increase the franchise retailers' incentive to move Sylvania products. To provide further incentive, Sylvania limited the number of franchise retailers in particular sales areas, although it did not grant its retailers exclusive sales territories, and imposed a restriction that required franchisees to sell Sylvania products only from the location or


3. See Reflections on the Sylvania Decision, supra note 2, at 6-12.

4. Id.

5. The opinion by the Ninth Circuit Court of Appeals, GTE Sylvania, Inc. v. Continental T.V., Inc., 537 F.2d 980, 982-83 (9th Cir. 1976), sets forth the change in company policy. Sylvania had used a "saturation" method of distribution whereby television sets were sold to many distributors and dealers without any limit upon the number of retail sellers in any given area. The revamped policy called an "elbow room" policy, involved selection of only a few retail sellers in any given market. The purpose of such a selective policy was to attract more aggressive and effective dealers who would be identified as authorized Sylvania dealers. This identification of dealers was intended to establish a prestige image for the dealers and the products.
locations specified in the franchise agreement. Sylvania, however, did not impose any restrictions on its franchisees concerning their right to sell products of competing manufacturers.

Continental T.V., Inc. (Continental), a prosperous franchisee, attempted to establish a new retail location in a different territory. Sylvania refused to approve Continental's new retail location, and, ultimately, Sylvania terminated Continental's franchise. Subsequently, a finance company, which handled Sylvania's credit arrangements with franchisees, sued Continental, which then cross-claimed against Sylvania and the finance company claiming that the restrictive location agreement violated section one of the Sherman Act. The district court rejected Sylvania's assertion that the location clause was illegal only if it was shown to be unreasonable, and instructed the jury that the clause was illegal per se if the jury concluded that Sylvania "exercised dominion or control over the products ... after having parted with title and risk to the products." The jury answered in the affirmative and assessed Continental's damages at $591,505, which was trebled.

The Ninth Circuit Court of Appeals, en banc, reversed the district court in a sharply divided decision. The Ninth Circuit reasoned that the location clause had pro-competitive effects and therefore the rule of reason, rather than the per se rule, was the appropriate standard.

The Supreme Court affirmed the Ninth Circuit. First, the Court noted that the case presented essentially the same issue as United States v. Arnold, Schwinn & Co., in which the Court declared a vertically-imposed location clause restriction illegal per se. The Sylvania Court considered the

6. 433 U.S. at 38. Sylvania, in its franchise agreements, retained sole discretion to increase the number of authorized dealers in any given territory. Id.
7. Continental's attempt to establish a new retail location in Sacramento, California, which was outside its franchise location in San Francisco, was actuated in part by Sylvania's prior grant of another franchise to Young Brothers in San Francisco. Despite Continental's complaint to Sylvania that the Young Brothers' franchise violated Continental's franchise agreement with Sylvania, Sylvania approved the Young Brothers' franchise. Id. at 39.
8. Both opinions by the Supreme Court and the court of appeals contained a wealth of information concerning the deterioration in the relationship between Sylvania and Continental. Id. at 39-40; 537 F.2d at 982-85. However, the Court concluded that these factors were irrelevant to the antitrust issue. 433 U.S. at 39-40 & n.7.
9. Id. at 40-41.
10. GTE Sylvania, Inc. v. Continental T.V., Inc., 537 F.2d 980 (9th Cir. 1976). The majority and dissenting opinions of the three-judge panel which originally heard the appeal were withdrawn by order of the full court. These opinions are unofficially reported in [1974-1 Trade Cases] TRADE REG. REP. (CCH) ¶ 75,072 (9th Cir. May 9, 1974).
11. 537 F.2d at 997.
12. 433 U.S. at 59.
14. Id. at 379. In Schwinn, the defendant imposed various territorial restrictions on distributors, franchise retailers and Schwinn agents. The Court concluded that the restrictive clauses on customers were illegal per se where the customers were not bona fide agents or consignees and the manufacturer did not retain title, dominion and risk of loss with respect to the
customer restriction in that case to be analytically similar to the location clause in Schwinn, and proceeded to reconsider its decision in Schwinn. The per se rule of illegality, the Sylvania Court stated, is the exception from the more generally applicable rule of reason, and indeed, per se rules "are appropriate only when they relate to conduct that is manifestly anticompetitive."

The Sylvania Court, expressing great doubt as to the analytic foundation of the per se rule announced in Schwinn, engaged in a comparative analysis of interbrand competition and intrabrand competition in the context of vertical non-price restraints. Vertical restrictions, the Court noted, reduce intrabrand competition, but they also "promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." More specifically, the Court identified several economic considerations concerning a manufacturer's desire to control certain distribution policies affecting its product. Interestingly, the Court's goods. "It is," the Court held "unreasonable without more for a manufacturer to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it." Id.

15. 433 U.S. at 46 & n.12.
16. Id. at 50.

The Court quoted from the case of Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958), that "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." 433 U.S. at 50.

The Court then explained in a footnote its conception of the per se rule:

Per se rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its procompetitive consequences. Cases that do not fit the generalization may arise, but a per se rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them. Once established, per se rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule-of-reason trials, see Northern Pac. R. Co. v. United States, 356 U.S. 1, at 5 (1958); United States v. Topco Associates, Inc., 405 U.S. 596, 609-610 (1972), but those advantages are not sufficient in themselves to justify the creation of per se rules. If it were otherwise, all of antitrust law would be reduced to per se rules, thus introducing an unintended and undesirable rigidity in the law. 433 U.S. at 50 n.16 (citations omitted).

17. Id. at 54.
18. The Court explained that vertical restrictions reduce "intrabrand competition by limiting the number of sellers of a particular product competing for the business of a given group of buyers." Id. However, the Court continued, vertical restrictions permit the manufacturers to achieve "certain efficiencies in the distribution of his products," and thereby stimulate interbrand competition. Id.

In support of its conclusion regarding the efficacy of vertical non-price restrictions, the Court noted two methods by which manufacturers could improve their competitive posture. First, manufacturers can use territorial restrictions to induce more aggressive retailing by their
sources of authority for its rather unprecedented economic efficiency analysis were several law review articles by academic lawyers and economists advocating the use of efficiency criteria in formulating per se rules.\textsuperscript{19}

Finally, the Court expressly overruled Schwin\textsuperscript{n}, characterizing it as an aberration from the per se standard articulated in Northern Pacific.\textsuperscript{20} In requiring use of the rule of reason in cases involving vertical non-price restrictions, the Court noted that these "restrictions, in varying forms, are widely used in our free market economy. [T]here is substantial scholarly and judicial authority supporting their economic utility. There is relatively little authority to the contrary."\textsuperscript{21} To this statement, the Court appended a provocative footnote:

There may be occasional problems in differentiating vertical restrictions from horizontal restrictions originating in agreements among the retailers. There is no doubt that restrictions in the latter category would be illegal per se, see, e.g., United States v. General Motors Corp., 384 U.S. 127 (1966); United States v. Topco Associates, Inc., supra, but we do not regard the problems of proof as sufficiently great to justify a per se rule.\textsuperscript{22}

The Court's footnote concerning horizontal arrangements and the accompanying text, are provocative both for what the Court stated and for what the Court left unanswered. First, the Court suggested that the factual issue of characterization of alleged offenses as "vertical" or "horizontal" may be determinative. Secondly, the Court implied that economic efficiency criteria are the benchmark by which all "vertical" restraints will be analyzed. In concluding, the Court stated that "we do make clear that departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than—as in Schwin\textsuperscript{n}—upon formalistic line drawing."\textsuperscript{23} Finally, the Sylvania opinion did not provide an analytic framework with which to

customers and to instill greater brand loyalty where customers marketed several brands. These goals, the Court noted, required manufacturers to limit, through restrictive territorial schemes, the tendency of some retailers to take a "free ride" on the promotional or service activities of their intrabr\textsuperscript{a}nd dealers. \textit{Id.} at 55. Secondly, the Court pointed to literature that argued that manufacturers have "an economic interest in maintaining as much intrabrand competition as is consistent with the effective distribution of their products," and that this manufacturer self-interest will advance the social and economic welfare of consumers, advance opportunities for small businessmen by reducing tendencies toward vertical integration and provide better market information. \textit{Id.} at 56-57 & nn.24-26.


20. 433 U.S. at 57-58.

21. \textit{Id.}

22. \textit{Id.} at 58 n.28 (citations omitted).

approach the problem of characterizing vertical and horizontal restraints and the problem of selecting the proper economic theory for analysis.\textsuperscript{24}

Perhaps the most significant aspect of the \textit{Sylvania} decision is the absence of any meaningful recognition of any goals of antitrust policy other than economic efficiency. However, given the diversity of antitrust goals and the lack of any cohesive theory of distributional efficiency it is questionable whether \textit{Sylvania} will have any permanent impact on the use of per se analysis in non-vertical intrabrand restriction cases.

### III. INTRABRAND ALLOCATION SCHEMES

In the aftermath of \textit{Sylvania}, and its rejection of the per se rule in vertical territorial allocation situations, speculation has mounted as to the future erosion of the per se rule in other intrabrand allocation situations. More particularly, the inquiry is whether the Court will look solely to economic theories to support or condemn other non-price territorial restraints or whether non-economic policies of the antitrust laws will be factored into the decision.

This section of the Article examines several cases involving certain intrabrand distribution schemes. The cases, which were decided both before and after the \textit{Sylvania} case, are used to develop the economic and non-economic policy perspectives which form the basis of a cogent theory of intrabrand restraints.

#### A. Allocation Schemes Defined

Before discussing each of the four areas, it is essential that they be properly identified. A vertical allocation is perhaps easiest to identify for it exists when a single manufacturer sells a product (e.g., \textit{Sylvania} television sets) to its distributors and in doing so grants to each an exclusive territory in which to sell that product. The allocation occurs at the distributor level and eliminates intrabrand competition between distributors. The impetus for the vertical allocation comes from the manufacturer and not from the distributors, although the latter may individually request from the manufacturer territorial protection as a condition to handling the product.

A horizontal allocation at the manufacturers' level occurs when one manufacturer licenses another manufacturer, which is a competitor or po-


For the most part these writings proffer economic models and analysis to be applied in cases of vertical non-price restraints. These models are helpful insofar as they provide a framework for evaluation of economic factors in a rule of reason analysis but they are deficient in that they limit the range of policy factors to economic efficiency criteria. See Part IV infra.
tential competitor, to manufacture and sell a particular trademarked product and in so doing grants an exclusive territory in which the latter can manufacture and sell. The licensing manufacturer also retains for itself an exclusive territory.\textsuperscript{25}

Similarly, a horizontal allocation at the distributor level occurs when distributors agree among themselves to divide up the distributor market in a particular product thereby giving to each an exclusive area. The manufacturer selling the product vertically to the distributors may or may not affirmatively acquiesce in the allocation.

A dual distributor allocation occurs when a single manufacturer sells a product to several distributors and assigns each an exclusive territory, and, in addition, retains for itself an exclusive territory in which it acts as its own distributor competing against the independent distributors. The system is dual because the manufacturer is both selling to distributors as well as to retailers in competition with its distributors.

**B. Horizontal Allocation at the Manufacturer Level**

The primary source of intrabrand territorial allocations is the trademark license. When one manufacturer licenses another to manufacture a trademarked product, grants an exclusive territory in which to manufacture and sell, and reserves to itself another area for exclusive manufacturing and sale, a horizontal allocation of the market occurs. The principal question is whether this trademark allocation should continue to be tested against the per se rule rather than the rule of reason.

The United States Supreme Court has consistently held that purely horizontally imposed territorial restraints are illegal per se because of the variety of pernicious effects. The leading decision is *Timken Roller Bearing Co. v. United States*,\textsuperscript{26} in which the Court considered a purely horizontal restraint. In that case the defendant, an Ohio corporation manufacturing tapered roller bearings, granted to British Timken an exclusive license to manufacture Timken roller bearings in certain areas of the world including Great Britain and Continental Europe with the remainder of the world being reserved to the defendant. The defendant and British Timken then licensed French Timken to operate in an exclusive territory covering France and its territories. Defendant argued that the restraints agreed upon, which included the territorial allocations, price fixing, cooperating to protect each other's markets and to eliminate outside competition, and participating in cartels to restrict imports to and exports from the United States, were rea-


\textsuperscript{26} 341 U.S. 593 (1951).
reasonable steps taken to implement a valid trademark licensing system.  

The Court forcefully rejected the defendant's contention and held that a trademark cannot be "used as a device for a Sherman Act violation." The Court's opinion indicated a substantial concern that the primary purpose and effect of the price and territorial restraints was continuance of a horizontal cartel. However, the Timken Court did not distinguish between an intrabrand allocation of the market and an interbrand allocation of the market, although interbrand market allocation schemes had been declared illegal under section one of the Sherman Act. A question therefore arose after the Timken decision as to whether an intrabrand allocation alone was sufficient to invoke the per se rule of section one of the Sherman Act. The answer to the question became apparent ten years after Timken when an abortive attempt was made to amend the Lanham Act so that a trademark owner could grant exclusive territories to its licensees thereby creating a legal intrabrand allocation.

To fully understand this attempt to amend the Lanham Act and to eliminate the per se rule as to horizontal intrabrand allocations, consideration must be given to the legislative history of the Act itself. As originally proposed, the Lanham Act was strongly opposed by the Department of Justice on the ground that it would become a vehicle for antitrust violations.

27. Id. at 596, 598. One of the primary holdings of Timken was that a conspiracy can exist between corporations with a common ownership. The Supreme Court stated that the "fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws." Id. at 598. This proposition has been uniformly followed in cases involving parent and subsidiary corporations. See, e.g., Perma Life Mufflers v. International Parts Corp., 392 U.S. 134, 141-42 (1968); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215 (1951); Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 116 (1948); United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947); Columbia Meat Culvert Co. v. Kaiser Aluminum & Chem. Corp., 579 F.2d 20, 33 & n.49 (3rd Cir.), cert. denied, 439 U.S. 876 (1978); Martin B. Glauerse Dodge v. Chrysler Corp., 570 F.2d 79, 81 n.16 (3d Cir. 1977), cert. denied, 436 U.S. 876 (1978); Mutual Fund Investors, Inc. v. Putman Management Co., 553 F.2d 620, 625 (9th Cir. 1977). See also Note, Intra-Enterprise Conspiracy Under Section One of the Sherman Act: A Suggested Standard, 75 Mich. L. Rev. 717 (1977).

28. 341 U.S. at 599. The Supreme Court's analysis underscored the rationale of the lower court's opinion. That court stated:

If a trade-mark may be the legal basis for allocating world markets, fixing of prices, restricting competition, the unfailing device has been found to destroy every vestige of inhibition set up by the Sherman Act. The rights pertaining to trade-marks and trade names were well known long before that legislative enactment was passed by Congress. It is certain that it was never intended that the consequences of violations of the antitrust laws may be escaped by the licensing of trade-marks.


31. Id.

32. See Hearings on H.R. 82 Before the Subcomm. on Patents, Trademarks and Copy-
In its report to the Subcommittee on Patents, the Department of Justice noted that trademarks had been used "in recent years as a convenient vehicle for" (1) geographical allocations, (2) customer allocations, (3) discrimination between different channels of distribution, (4) maintenance of goodwill of competitor companies and (5) monopolistic control through use of trademarks.\(^3\) As a positive response to the Department of Justice's objections, Congress enacted an amendment, the intent of which was to preserve the applicability of the antitrust laws to trademark licensing. Section 33(b)(7) of the Lanham Act provides, as a defense to the trademark infringement, "[t]hat the mark has been or is being used to violate the antitrust laws of the United States."\(^4\)

Statements in the debates on the Lanham Act appear to indicate that section 33(b)(7) was intended to preserve all the force and effect of the antitrust laws to trademark or intrabrand licensing. The intent of making an antitrust violation a defense to a trademark infringement was to foreclose the use of trademark licensing as a vehicle to foster restraints of trade, particularly collusive or cartel activity among competitors.\(^5\)


The privileges conferred upon copyright and patent are rewards for contributions to knowledge and technology which ultimately become a part of the public domain available to all. The privileges conferred on the inventor and author are limited in time, in scope, and in restrictive practices which may be adopted in commercial exploitation. Sanctions for these privileges are found in the Constitution. Trade-marks have no such sanction. In our economic system, dependent on free competition for its growth and expansion, it would be anomalous to accord to the trade-mark privileges not enjoyed by higher forms of creative effort. (4 Toulmin's Anti-Trust Laws, footnote 53, pp. 794-795).

251 F. Supp. at 978.


35. Senator O'Mahoney, in explaining the effect of the antitrust defense, stated that "[T]he point I wish to make perfectly clear is that the use of such mark to violate the antitrust laws, constitutes a defense in an infringement suit." 92 CONG. REC. 7873 (1946). He stated that:

It is of such great importance to the public of the United States that restraints of trade shall not be permitted, that the Senate inserted this amendment to make it a ground of contestability if it should be shown that the registrant was using the mark itself to violate the antitrust law.

Id. (emphasis added).

Senator O'Mahoney further stated:

It appeared, however, from the history of litigation in the United States, that trademarks from time to time—not at all as a general practice, I want it understood, but only from time to time—have been used in the violation of the antitrust laws. It was also felt that under the language of the bill trade names could be used to prolong a patent monopoly after expiration of a patent. One of the Senate amendments, agreed to with slight modifications by the House, was intended to eliminate this possibility. I
Although the legislative history makes clear that the Lanham Act does not immunize trademark licensors from the antitrust laws, it did not address the critical issue of whether violations of the antitrust laws were to be measured only against the rule of reason, or whether the traditional per se violations, though arising in the trademark context, should continue to receive per se treatment.

Ten years after the Timken decision special interest groups attempted to have the Lanham Act amended so that all antitrust violations arising in connection with trademark licensing would be tested against the rule of reason. In 1961, a bill was introduced in the Senate to remove the per se restrictions in the intrabrand trademark license category of cases. The bill provided in section 5(k): "The registrant of a mark by registered users, may, irrespective of any affiliation or relationship between the registrant and such registered users, prescribe conditions and restrictions as to mode and place of permitted use by each registered user of the mark."[8]

Proponents of the legislation testified that "it is imperative for the policy of the law to be established that when it is ancillary to a trademark license, there be no restrictions on the right to grant exclusive territories."[8] The principal contention was that the amendment would eliminate the per se rule in allocation cases and leave each case to be tested under the rule of reason.[8] The Department of Justice actively opposed the amendment on the ground that it would exempt "numerous per se violations from the applicability of the antitrust laws," encourage collusive behavior and thwart the intentions of the drafters of both the Sherman and Lanham Acts.[8]

think it is effective for that purpose.

Id. at 7872.

Senator Hawkes stated: "If a trademark should be used as the legal, causal and efficient instrumentality to effect a contract, agreement or arrangement which violates the antitrust laws then the actual use of the mark to carry out such a scheme would constitute a use in violation of the antitrust laws. . . ." Id. at 7836.


37. Id. at 74.

38. For example, counsel of Sealy, Inc., which was currently in litigation over price and territorial restrictions accompanying a trademark license, testified that the proposed amendment was necessary to indicate to the Justice Department that "in all circumstances did Congress believe that territorially exclusive licenses would constitute a per se violation of the Sherman Act." Id. at 32. Senator Hart inquired as to whether the proposed amendment would legalize all territorial allocations, to which Counsel responded:

Well, Mr. Chairman, it doesn't say such allocations are permitted. It says that such allocations are not per se violations of the Sherman Act. In other words, you might very well have a situation that you had in the Addyston and National Lead cases, where the parties to the arrangement dominated their industry and where there would be a real restraint of trade.

Id. at 33.

39. In a letter signed by Byron R. White, Deputy Attorney General, to Senator Eastland, dated June 22, 1961, the Department of Justice stated, inter alia:
The amendment was not passed, thus giving some weight to the belief that Congress intended that the courts strictly construe attempts by competitors or potential competitors to restrict or control trade among themselves. This congressional intent was manifested by the Supreme Court in two subsequent cases.

First, in *United States v. Sealy, Inc.*, the government brought a civil action alleging that the defendant Sealy, Inc. had conspired with its trademark licensees, manufacturers of mattresses in the United States, to fix retail prices and to allocate mutually exclusive territories among the manufacturer-licensees. The trial court found that there was price fixing, but, as to the territorial allocation, the lower court found that the conduct proven was not an unreasonable restraint of trade, and the United States appealed.

The Supreme Court noted that exclusive territories were allocated to the manufacturer-licensees, and that “Sealy agreed with each licensee not to license any other person to manufacture or sell in the designated area; and the licensee agreed not to manufacture or sell ‘Sealy products’ outside the designated area.” The issue, however, was whether the allocation was horizontal or vertical. Unlike Timken, Sealy, Inc. was not a manufacturer but solely a licensing agent. Thus, the horizontal aspect of the allocation had to be shown by the manufacturer-licensees’ control of Sealy, Inc. The Court found licensees’ control based on the facts that (1) the licensees owned all the stock of Sealy, Inc., (2) the board of directors and executive committee were comprised solely of licensee-stockholders and (3) the affairs of Sealy, Inc. were never intended [sic] that the effects of antitrust violations may be escaped by the licensing of trademarks. *United States v. Timken Roller Bearing Company*, 83 F. Supp. 254, 314-316 (N.D. Ohio, 1949) expressly affirmed in this respect, 341 U.S. 593, 598-599 (1951).

The Lanham Act itself shows that violations of the antitrust laws are not immunized by the magic touch of a trademark. Section 33(b)(7) (15 U.S.C. § 11(b)(7)) provides that the use of a trademark in violation of the antitrust laws shall be a defense even against an incontestable trademark whose 5-year registration otherwise constitutes conclusive evidence of the exclusive right to its user.

The provisions of the proposed new subsection (k) of Section 5 would give the registrant well nigh absolute power to impose, with impunity, otherwise antitrust-tainted restrictions. The word “place” would protect every division of territories. The word “mode” would save—from antitrust illegality—tying clauses, compulsory joint agencies, and many other conceivable restraints. Also, the establishing of suggested prices (which have a natural tendency to become rigidly fixed) might be contended as a mode of use.

... This would be inconsistent with the declared purpose of the author of the act “to protect honest business and also to protect the purchasers of commodities so that they know the origin of the goods they are buying.” Congressman Lanham, 91 Congressional Record 1724.
Inc., including the grant, assignment, reassignment and termination of exclusive territorial licenses, were operated in fact by the manufacturer-licensees.43

The Court, relying on Timken, engaged in a pragmatic and functional analysis of the territorial arrangement, and concluded that:

The territorial arrangements must be regarded as the creature of horizontal action by the licensees. It would violate reality to treat them as equivalent to territorial limitations imposed by a manufacturer upon independent dealers as incident to the sale of trademarked products. Sealy, Inc., is an instrumentality of the licensees for purposes of the horizontal territorial allocation. It is not the principal.43

Defendant urged that the rule of reason be applied even though the allocation was horizontal in nature. The Court rejected this suggestion on the ground that the arrangements for territorial limitations were part of "an aggregation of trade restraints" including unlawful price-fixing and policing."44

The second Supreme Court decision considering intrabrand territorial allocations was United States v. Topco Associates.46 Defendant Topco was a cooperative association made up of approximately twenty-five small and medium sized regional supermarket chains operating stores in some thirty-three states. The association served as a purchasing agent for its members and distributed to them, under the Topco name, approximately 1,000 food products which were delivered directly from the packer or manufacturer to the individual stores. Topco granted licenses to member stores to sell Topco brand products. With each license granted, Topco designated the territory in which each store could sell. No member store could sell outside the territory in which it was licensed.

The government brought a civil action contending that the division of markets among member stores "operated to prohibit competition in Topco-brand products."46 Topco argued, and the district court agreed, that it needed to grant exclusive territories to members in order to compete with the large chain stores. Moreover, the association contended that it could not exist if the territorial divisions were anything but exclusive and "that by restricting competition in the sale of Topco-brand products, the association actually increased competition by enabling its members to compete successfully with larger regional and national chains."47

42. Id. at 352-53.
43. Id. at 354.
44. Id. at 357. The Court noted that the fact that Timken restricted both trademarked as well as non-trademarked products, whereas the territorial restrictions of Sealy were limited to trademarked products, were differences in fact which were "not consequential." Id. at 356 n.3.
45. 405 U.S. 596 (1972).
46. Id. at 603.
47. Id. at 605. Topco argued that the small retail store members were unable to compete
The Supreme Court reversed, holding that the allocations in question were horizontal and thus per se illegal. Relying on *Sealy*, the Court noted that Topco was controlled by its licensees who owned the Topco stock and sat on its board of directors. The Court further noted that both Topco and Sealy "agreed with the licensees not to license other manufacturers or sellers to sell [trademarked products] in a designated territory in exchange for the promise of the licensee who sold in that territory not to expand its sales beyond the area demarcated by" the licensor. The Court concluded that such was a horizontal territorial restraint similar to the one found in *Sealy*.

The *Topco* Court addressed the difficult argument that the rule of reason should apply because the territorial allocation eliminated only intrabrand competition, and that limiting intrabrand competition would foster interbrand competition with the supermarket chains. The Court first stated that courts had institutional infirmities which impaired their ability to balance anticompetitive impacts to one market sector with pro-competitive effects in another sector, and that these infirmities were a principal justification for per se rules. Moreover, the Court asserted that important decisions as to trade-offs between intrabrand and interbrand competition could not be entrusted to a group of competitors, and more importantly, that the Sherman Act guaranteed fundamental freedom by competitors to make independent decisions concerning the nature and extent of competition. Effectively with the national and large regional chains without exclusive private label products, and that the only way Topco could procure private label products and assure the exclusivity thereof was through trademark licenses specifying the territory in which each member could sell such products. *Id.*

48. *Id.* at 609.

49. The Court stated: Whether or not we would decide this case the same way under the rule of reason used by the District Court is irrelevant to the issue before us. The fact is that courts are of limited utility in examining difficult economic problems. Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated per se rules. *Id.* at 609-10. Finally the Court in a footnote made it clear that horizontal territorial allocations without the presence of price fixing as in *Timken* and *Sealy*, are in themselves per se illegal. *Id.* at 609 n.9.

50. The Court stated that: Topco has no authority under the Sherman Act to determine the respective values of competition in various sectors of the economy. On the contrary, the Sherman Act gives to each Topco member and to each prospective member the right to ascertain for itself whether or not competition with other supermarket chains is more desirable than competition in the sale of Topco-brand products. Without territorial restrictions, Topco members may indeed '[cut] each others throats.' *Cf.* White Motor Co., supra, at 278 (Clark, J., dissenting). But, we have never found this possibility sufficient to warrant condoning horizontal restraints of trade. *405 U.S.* at 610-11.
Subsequent lower court cases have consistently applied the per se rule
to horizontal trademark license arrangements. In *American Motors Inns,
Inc. v. Holiday Inns, Inc.*, franchisees of Holiday Inns were granted the
right to construct and operate Holiday Inns at “specified sites.” The de-
defendant Holiday Inns, in addition to franchising independent owners, also
owned and operated through a subsidiary approximately 281 Holiday Inns.
The impermissible allocation of territories arose, not in the franchise agree-
ment, but because the three nearest existing franchisees could object to the
proposed location of new inns. Holiday Inns carefully considered the fran-
chisees’ objections in determining the location. Also, franchisees agreed not
to operate motels other than Holiday Inns. Since Holiday Inns could refuse
to grant franchises in areas in which it already operated a motel, (“company
towns”) Holiday Inns was able to allocate to itself exclusive territories.

The Third Circuit had no difficulty finding that this system resulted in
a horizontal allocation because Holiday Inns was operating motels itself in
potential competition with its franchisees. The court stated:

> In the present case, since HI [Holiday Inns], in one of its capacities, was
dealing on the same market level as its franchisees, its contracts that, in
effect, foreclosed such franchises from operating either Holiday Inns or
non-Holiday Inns in cities where HI operated an Inn, except with HI’s
permission, constitute market allocation agreements among compet-
titors.\(^53\)

The court found that acts by a franchisor, such as Holiday Inns, which cre-
ated an otherwise unreasonable restraint of trade “[were] not insulated from
the antitrust laws by the fact that such company functions as a franchisor as
well as a motel operator.”\(^54\)

Finally, in *Krehl v. Baskin-Robbins Ice Cream Co.*,\(^55\) which involved a
class certification order, the court addressed the question of whether a li-
censing arrangement, in which manufacturer-licensees were granted exclusive
territories, constituted a horizontal allocation because the licensor was
also a manufacturer reserving to itself certain exclusive territories in ques-
tion. In that case, Baskin-Robbins Ice Cream Company licensed manufac-
turers to manufacture Baskin-Robbins ice cream in assigned, exclusive terri-
tories. It also licensed its wholly-owned subsidiary Baskin-Robbins, Inc., a
manufacturer of Baskin-Robbins ice cream, to market in a number of the
exclusive territories. The court stated that if Baskin-Robbins Ice Cream
Company did nothing more than license others to manufacture Baskin-Robb-
ins ice cream, the allocation would be vertical.\(^56\) But, the court stated, Bas-

51. 521 F.2d 1230 (3d Cir. 1975).
52. Id. at 1235.
53. Id. at 1254.
54. Id. at 1253-54.
56. Id. at 123 (citing Tomac, Inc. v. The Coca Cola Co., 418 F. Supp. 359 (C.D. Cal.}
kin-Robbins Ice Cream Company was not strictly a franchisor; it was connected to the manufacture and supply of Baskin-Robbins ice cream products through its subsidiary which operated in certain of the exclusive territories. 57 "An entity occupying such a dual role is forbidden per se from imposing territorial market restrictions." 58

The courts in each of the above-mentioned horizontal trademark license cases have applied the per se rule of liability. Although the facts demonstrating the horizontal nature of the allocation scheme varied in Timken, 59 Holiday Inns 60 and Krehl, 61 the courts applied a functional analysis which considered the line of business in which the parties engaged as well as the fact that the licensor in each case reserved to itself certain of the exclusive territories in question. 62 Moreover, in Sealy 63 and Topco, 64 the licensor was in fact controlled by the licensees, and the Supreme Court firmly rejected the rule of reason analysis notwithstanding the presence of an intrabrand restrictive arrangement. 65 The cases strongly suggest that a licensor's attempts to control competitive conditions, whether intrabrand or interbrand, on a level in which the licensor functions, will result in an application of per se principles of liability.

The strongest attack on this per se approach in recent years was made by the defendant in Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc. 66 The Seventh Circuit rejected the argument that an intrabrand allocation should be tested by the rule of reason and not the per se rule. 67

In United States v. Topco Associates, Inc., supra, however, the Court rejected exactly this argument in the context of horizontal restraints, 405 U.S. at 610-11, and the Sylvania decision expressly reaffirmed that rejection. 433 U.S. at 57, n.27. A horizontal agreement among potential com-

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57. Id.
58. Id. (citing American Motors Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1254 (5th Cir. 1975)). Following trial, the court found that the plaintiff-franchise owners failed to "demonstrate concerted action to create or maintain the system among entities acting as competitors or potential competitors." Krehl v. Baskin-Robbins Ice Cream Co., [1979-2 Trade Cases] TRADE REG. REP. (CCH) ¶ 62,806, at 78,703 (C.D. Cal. 1979). The plaintiffs, according to the court, failed to show indicia of any abuse of a competitive relationship, such as "adherence to the system," exertion of power in the selection process and veto power. Id.
60. 521 F.2d 1230 (5th Cir. 1975). See text accompanying notes 51-54 supra.
62. See, e.g., id. at 123. See also American Motors Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1254 (5th Cir. 1975).
64. 405 U.S. 596 (1972). See text accompanying notes 45-50 supra.
67. Id. at 830.
petitors to develop a national brand and not to compete with each other in selling it is, we think, considerably more suspect than limitations imposed by a single independent manufacturer on its distributors as a condition of their distributorships, but even if we were inclined to agree with Sealy's argument to the contrary, we believe the Supreme Court has foreclosed that approach. 68

It is apparent that the courts as well as Congress, 69 as evidenced by the amendment to the Lanham Act 70 introduced in 1961, have rejected the intrabrand-interbrand distinction that has long been espoused by defendants in territorial allocation cases. Sylvania 71 apparently does not change this result. In fact, the Court in Sylvania gave substantial weight to congressional intent in repealing the Miller-Tydings and McGuire Acts in concluding that vertical price restrictions would continue to be treated as per se violations. 72 There is every reason to believe that a similar conclusion of congressional intent should dictate continued application of the per se rule to horizontal nonprice restrictions.

C. Horizontal Allocation at the Distributor Level

A horizontal allocation may also occur at the distributor or secondary level thus converting what might otherwise appear to be a vertical allocation into a horizontal allocation requiring per se treatment. In this category of cases the impetus for the allocation often comes from the distributors competing at the secondary level. The principal issue is whether the per se rule should apply and in what circumstances.

A leading case in this area is United States v. General Motors Corp., 73 in which Chevrolet dealers, operating pursuant to "location clauses," 74 complained to Chevrolet about discount houses selling new cars at bargain prices. The cars sold by discount houses were purchased through licensed Chevrolet dealers. A number of dealers complained to Chevrolet about the

68. Id. at 831 (citations omitted).
72. Id. at 52 n.18. The Court stated that:
433 U.S. at 52 n.18.
74. The location clauses prohibited "a dealer from moving to or establishing 'a new or different location, branch sales office, branch service station, or place of business including any used car lot or location without prior written approval of Chevrolet.'" Id. at 130.
practice and requested assistance to stop it. A letter was then sent out by the defendant informing errant dealers that sales to discount houses represented the establishment of a second "unauthorized" sales outlet or location contrary to the provisions of the dealership agreement. An agreement was obtained from each that such unauthorized sales would cease. The dealers joined together to police all dealers to be certain each was adhering to the agreement. The defendant General Motors participated in this policing at the request of the non-participating dealers.

General Motors argued that it was unilaterally enforcing the location clauses of its dealership agreements and thus was not violating the Sherman Act. The Court declined to pass on the territorial allocation aspects of the case, but rather treated the case as a per se boycott case directed against the discount houses. The Court stated:

We have here a classic conspiracy in restraint of trade: joint, collaborative action by dealers, the appellee associations, and General Motors to eliminate a class of competitors by terminating business dealings between them and a minority of Chevrolet dealers and to deprive franchised dealers of their freedom to deal through discounters if they so choose. 78

The Court emphasized the presence of collaborative action between the dealers which was spearheaded by General Motors. 77 Thus, the Court characterized the restraint as horizontal rather than vertical, and applied a conventional per se rule. 78

In White Motor Co. v. United States, 79 the defendant granted its distributors exclusive territories to sell defendant's trucks. In addition to the exclusive territories each dealer agreed not to sell trucks to any federal or state government or any department or political subdivision thereof, unless the right to do so was specifically granted by the defendant in writing. The government attacked the customer restriction clauses as per se illegal. The Court declined on summary judgment to rule whether the practices attacked, the territorial and customer restrictions, arising as they did in a "vertical arrangement," 80 were per se illegal. The Court stated "we know too little of the actual impact of both that [vertical territorial] restriction and the one respecting customers to reach a conclusion on the bare bones of the documentary evidence before us." 81

However, Justice Brennan, in his concurring opinion, 82 noted that if the

75. Id. at 140.
76. Id.
77. Id. at 143.
78. Id. at 145.
80. Id. at 261.
81. Id.
82. Id. at 264 (Brennan, J., concurring).
impetus for the territorial restrictions came from the distributors then a horizontal allocation would have been demonstrated calling for per se treatment.

Territorial limitations bear at least a superficial resemblance to horizontal divisions of markets among competitors, which we have held to be tantamount to agreements not to compete, and hence inevitably violative of the Sherman Act, Timken Roller Bearing Co. v. United States, 341 U.S. 593. If it were clear that the territorial restrictions involved in this case had been induced solely or even primarily by appellant's dealers and distributors, it would make no difference to their legality that the restrictions were formally imposed by the manufacturer rather than through inter-dealer agreement. 83

In Eiberger v. Sony Corp. of America, 84 Sony distributors pressured Sony into enforcing otherwise non-exclusive territorial boundaries between distributors by establishing a "warranty fee" which was exacted for each extraterritorial sale, irrespective of an actual provision of warranty service. At the time, Sony was the fifth largest manufacturer of office dictation equipment in the United States, with a national market share of twelve percent; Sony and the top four manufacturers accounted for ninety-six percent of national sales. In 1975, Sony altered the warranty fee provisions in its dealership contracts to require fee payments for extraterritorial sales; and Sony, in effect, acted as a clearinghouse in identifying dealers making such sales, and as an enforcer, exacting fee payments on behalf of "invaded" dealers. The court found that a horizontal allocation existed at the distributors level rather than with Sony. The court stated, "it is of no consequence that the conspiracy, although horizontal in its impetus was imposed in a vertical fashion by enlisting the manufacturer." 85 Quoting from Justice Brennan's concurring opinion in White Motor, 86 the court concluded: "Therefore, where dealers enter into an implicit agreement effecting or implementing an anticompetitive scheme, it makes no difference with respect to its illegality that Sony, itself not a dealer, was the one whose acts were needed to put the program into effect." 87

No doubt the critical issue in these types of cases, involving as they do ostensibly allocative activity by the manufacturer, is the characterization of the manufacturer's participation in the restraint. If, as in General Motors 88

83. Id. at 267 (citations omitted).
85. Id. at 1284.
86. 372 U.S. at 267.
87. 459 F. Supp. at 1284. The court, on appeal, affirmed the district court on the basis of the warranty fee plan's unreasonable restraint on intrabrand competition without any demonstrably significant increase in interbrand competition, and did not reach the horizontal restraint issues. 622 F.2d at 1075 & n.9.
and Eieberger, the distributors clearly implement the restraint, then it should be characterized as horizontal and per se analysis should be applied. However, the difficult problem arises in situations where the manufacturer's involvement in the restraint is at least ambiguous; a question unresolved by Sylvania. Clearly, of course, if the manufacturer unilaterally imposes the restraint, and the restraint improves the manufacturer's competitive posture, Sylvania dictates that the rule of reason should be applied. However, the Court in Sylvania did not discuss the difficult problem of ascertaining whether a particular restraint was imposed by a dealer's cartel or by a manufacturer. As discussed later, where it appears that the manufacturer or supplier is largely indifferent to a restraint and the distributors are the principal beneficiaries of the restraint, or if there is other evidence of an actual or potential dealer's cartel, the per se rule should be applied.

D. Dual Distribution Allocations

Between the horizontal allocation at the manufacturer level and the horizontal allocation at the distributor level lies the dual distribution allocation. A dual distribution allocation involves a single manufacturer licensing its distributors to sell its products and granting to each an exclusive territory in which to sell. To this extent, the allocation is vertical. At the same time, however, the manufacturer reserves to itself certain distributorships or exclusive territories and thereby competes on the same level with its independent distributors. To this extent, the allocation of territories becomes horizontal. The question then arises as to whether this type of allocation is subject to per se liability or to the rule of reason. The Supreme Court in White Motor was presented with a similar question, but did not pass on the issue. There, distributors were given exclusive territories and categories of customers to which they might sell. Although White Motor did not retain any of the territories for itself, it did reserve for itself the exclusive right to sell to state and federal agencies and certain national accounts. To that extent it was horizontally competing with its distributors and there was an allocation of the customer market. The Court treated the allocation as a wholly vertical arrangement and did not pass on the horizontal aspects of the customer allocation. Because the case was before the Court on summary judgment, the Court declined to pass on the important questions.

91. See id. at 57-58 & n.28.
94. Id. at 255-56.
95. Id. at 260.
before it without the benefit of a full evidentiary record.96

However, when directly confronted with the issue of whether the dual distribution system involves horizontal conduct violative of section one of the Sherman Act, the Supreme Court has answered in the affirmative. In *United States v. McKesson & Robbins, Inc.*,97 the defendant was a large drug manufacturer which distributed through numerous independent wholesale outlets as well as through direct sales to retailers. Defendant entered fair trade agreements with the independent wholesalers binding the latter to sell at wholesale prices fixed by it. “Each of these independent wholesalers is in direct competition with the McKesson wholesale division from which it buys.”98 The Miller-Tydings Act99 and the McGuire Act100 were noted by the Court to permit the setting of resale prices as an exemption to the antitrust laws provided such was not done “between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.”101

The Court first determined that the defendant lost its exemption under the “fair-trade” laws103 because it was also a wholesaler competing against its licensed independent wholesalers. However, the defendant argued, and the district court agreed, “that what would be illegal if done between competing independent wholesalers becomes legal if done between an independent wholesaler and a competing wholesaler who is also the manufacturer of the brand product.”108 Defendant argued, “[t]his is so . . . because in contracting with independent wholesalers it acted solely as a manufacturer selling to buyers rather than as a competitor of these buyers.”104 The Court construed the Miller-Tydings and McGuire Acts and stated that those Acts expressly continue “the prohibitions of the Sherman Act against ‘horizontal’ price fixing by those in competition with each other at the same functional level.”105 “Since appellee [defendant] competes ‘at the same functional level’ with each of the 94 wholesalers with whom it has price-fixing agreements, the proviso prevents these agreements from falling within the statutory exemption.”106

96. *Id.* at 261.
98. *Id.* at 308.
101. 351 U.S. at 311 (emphasis by the Court).
102. See notes 99-100 supra.
103. 351 U.S. at 312.
104. *Id.*
105. *Id.* at 313 (quoting Schwegan Bros. v. Calvert Distillers Corp., 341 U.S. 384, 389 (1951)).
106. *Id.* at 313. *See United States v. Ciba Geigy Corp.*, [1976-1 Trade Cases] TRADE REG.
The McKesson107 case thus recognized the horizontal nature of competition between a manufacturer competing against its own distributors on the same functional level. This case became the basis for a number of dual distribution allocations cases which relied on the same rationale in ruling that a per se horizontal allocation existed.

The first lower court decision to consider the dual distribution system in this context was Interphoto Corp. v. Minolta Corp.108 In that case, plaintiff, a distributor of photographic equipment, entered into a contract with the defendant Minolta Corporation which provided that there were thirteen states in which plaintiff was prohibited from selling Minolta products. "This area included states where Minolta acted as its own distributor and sold its products directly to dealers."109 Minolta entered into similar agreements with other distributors, "prohibiting them from selling Minolta products in certain geographic areas."110 The court found that Minolta had combined and conspired to divide and allocate geographic markets at the distributor level with the independent Minolta distributors. "This appears on the face of the sales agreement with Interphoto [plaintiff]," as well as in the agreements entered into with the other distributors.111 The court concluded that the "effect of such contracts is to eliminate competition among the distributors and with Minolta."112

In Fontana Aviation, Inc. v. Beech Aircraft Corp.,113 a Seventh Circuit decision, the plaintiff, a terminated dealer, alleged inter alia, that the defendant Beech Aircraft entered a conspiracy with its distributors to territorially divide the United States into exclusive territories. Beech Aircraft also operated some of the distributor companies itself. Plaintiff claimed, and the evidence showed, that it sought to operate as a dealer in a territory assigned to an independent distributor. When the independent distributor refused to grant the dealership, plaintiff turned to Beech Aircraft, which also refused, declining "to deviate from its established marketing setup through distribu

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109. Id. at 715.
110. Id. at 715-16.
111. Id. at 719-20.
112. Id. at 720. The court entered a preliminary injunction against Minolta foreclosing it from refusing to sell photographic equipment to the plaintiff and from terminating plaintiff as a distributor. Id. at 724.
113. 432 F.2d 1080 (7th Cir. 1970).
The court held that the agreement between Beech Aircraft, acting as a distributor itself, and its independent distributors constituted a horizontal arrangement which was per se illegal.\textsuperscript{118}

In reaching this result, the court interestingly relied on Justice Brennan's concurring opinion in \textit{White Motor}\textsuperscript{116} wherein he stated that if "the territorial restrictions in the case were induced solely or even primarily by [White Motor's] dealers and distributors, it would make no difference to their legality that the restrictions were formally imposed by the manufacturer rather than through inter-dealer agreement."\textsuperscript{117} The Seventh Circuit noted, however, that although the case before it scarcely seemed "to be that of the tail wagging the dog, such as apparently was involved in \textit{United States v. Sealy, Inc.},"\textsuperscript{118} still "there was sufficient evidence for the jury's consideration of concerted horizontal action, participated in by Beech."\textsuperscript{119}

The Fifth Circuit, in \textit{Hobart Brothers Co. v. Malcolm T. Gilliland, Inc.},\textsuperscript{120} decided the same issue three years later. In that case Gilliland was a distributor of Hobart and in the original distributor agreement was granted the exclusive territory of northern Georgia. The agreement also provided that Gilliland could not solicit orders outside its assigned territory. The agreement was subsequently amended and plaintiff was granted areas of primary responsibility rather than exclusive territories. The court noted that a dual relationship existed in that Hobart both sold to Gilliland, its distributor, as well as sold directly from its home office "in competition with its own distributors."\textsuperscript{111} Gilliland began selling Hobart products outside its assigned area in competition with the defendant Hobart, which subsequently led to the termination of Gilliland as a distributor.

In analyzing the distributor agreement which Hobart entered with all its distributors, the court concluded that its effect was to eliminate competition between Hobart and its distributors. "The Hobart distribution agreement, while appearing to allocate territory vertically, in fact, resulted in a horizontal allocation between Hobart and its own distributors. Such an arrangement must be treated as it operated in practice rather than 'as arranged by skillful drafting.'"\textsuperscript{112}

\begin{itemize}
    \item[114] \textit{Id.} at 1083.
    \item[115] \textit{Id.} at 1085.
    \item[117] 432 F.2d at 1085.
    \item[118] 388 U.S. 350 (1967). \textit{See} text accompanying notes 40-44 \textit{supra}.
    \item[119] 432 F.2d at 1085.
    \item[120] 471 F.2d 894 (5th Cir. 1973).
    \item[121] \textit{Id.} at 897.
    \item[122] \textit{Id.} at 899. Defendant argued that because there was no actual contract establishing the territorial restrictions, it does not constitute a "contractual restraint in violation of § 1 of the Sherman Act." \textit{Id.} The court rejected this argument, stating that a silent understanding, as existed in that case, could have the same effect. "Hobart's intra-office correspondence, which was introduced into evidence, shows clearly that Hobart considered the distribution agreement
The next case of importance is *Pitchford v. Pepi, Inc.*, decided by the Third Circuit in 1976. Defendants in that case were North American Philips Corporation, Philips Electronics Instruments and Philips Electronics & Pharmaceutical Industries, all related to each other as a parent, subsidiary or division. Plaintiff was made a distributor and given an exclusive territory in the United States to distribute the defendant’s sophisticated electronic instruments for industrial and scientific use. The agreement specifically precluded plaintiff from selling outside its assigned territory, and some defendants sold instruments at the distributor level in certain areas which had been taken over from other distributors. Moreover, the evidence adduced at trial revealed an elaborate enforcement procedure implemented by PEI to discourage extraterritorial sales, and very active efforts by PEI to control the quantity and quality of intrabrand competition in those products. The court concluded that the jury could reasonably have found a horizontal restraint from the dual distribution system employed by defendants because a “manufacturer cannot . . . police a division of markets for the benefit of horizontal competitors.”

containing the primary responsibility clause to have the same effect as the prior distribution agreement which contained outright territorial restrictions.” *Id.* at 900.

123. 531 F.2d 92 (3d Cir. 1976).

124. *Id.* at 101-02. If a dealer sold outside its assigned territory, a portion of the sales commission was given to the dealership, including the defendants when operating a dealership, that had jurisdiction over the area where the buyer was located. *Id.* On occasion defendants intervened at the behest of various dealerships to settle disputes over commissions and territories. *Id.*

125. *Id.* at 102-03. The court summarized the scope of defendants' restrictions in the following terms.

In the present case, there is evidence that PEI [defendants] responded to branch and dealer complaints about sales made without regard to the territorial allocation and actively sought to prevent entry by one dealer into another dealer's territory. If an extra-territorial sale was consummated, the selling branch [defendants] or [independent] dealer had to surrender all or a portion of its commission to the branch or dealer having jurisdiction over the customer's place of business. In addition, the record reveals explicit agreement between PEI [defendants] and each dealer to divide territories. *Id.* at 104.

126. *Id.* at 103 (citing United States v. Topco, 405 U.S. 596 (1972); American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230 (5th Cir. 1975)).

Moreover, it was clear that the dual distribution plan had the effect of stifling imaginative and aggressive marketing efforts by some dealers. For example, the plaintiff introduced into evidence a letter from the PEI sales manager to a distributor angered over the latter’s competition for a sale:

Phelan states he increasingly is running into [VWR] sales activity [in his territory] . . . .

I am also attaching recent correspondence from Pye Unicam alleging [VWR] trying for Unicam business in Taiwan. Ted, *this extra-curricular activity on the part of your sale representatives speaks well for their aggressiveness. However, I would appreciate it if you would investigate these two situations and let me know what plans
In *Dougherty v. Continental Oil Co.*, the Fifth Circuit addressed the issue of characterizing territorial restraints in a dual distribution situation. That case arose out of efforts of Conoco to reshape its methods of marketing gasoline in Texas. Prior to 1975, Conoco marketed in three ways: (1) it sold gasoline directly to the public from its own gasoline stations; (2) it sold gasoline to independent jobbers who stored the gasoline in their own storage facilities and resold to consumers and other distributors; and (3) it consigned gasoline, which was stored in Conoco's bulk facilities, to commission agents who sold to service stations, municipalities and quantity consumers such as farmers. In reorganizing its distribution system Conoco withdrew its Conoco brand gasoline from the Texas market and commenced selling E-Qual gasoline. The commission agents were informed that they could purchase the bulk facilities, but before any sale was consumated Conoco was approached by a number of jobbers who sought to purchase all of Conoco's marketing facilities including the bulk plants. In working out the sale the jobbers divided up the Conoco assets by geographic location, each jobber selecting an area encompassing his existing area of operation. The commission agents subsequently sued under section one of the Sherman Act when they learned they had been foreclosed from purchasing the bulk facilities.

In discussing the theories of liability, the court noted that the transaction in question fit under the rubric of horizontal restraint. The court stated:

> Entities in a seemingly vertical relationship may be deemed capable of horizontal restraints if they are actual or potential competitors. . . . Since Conoco operated bulk facilities and retail stations at the same marketing level as the jobbers, the arrangement theoretically could be given per se treatment as a horizontal market allocation among them.

Although the Court in *Sylvania* stated that "there may be occasional problems in differentiating vertical restrictions from horizontal restrictions" implemented by distributors, and that the latter would be per se illegal, the Court did not indicate how to differentiate the supplier-imposed restriction from the restrictions imposed by the supplier acting principally as a dealer. More importantly, the opinion did not suggest any preferred treatment for the usual situation in which a dual distributor seeks to maximize

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531 F.2d at 102 (emphasis added).

127. 579 F.2d 954 (5th Cir. 1978).

128. Id. at 959. The court of appeals reversed a judgment entered in favor of the plaintiffs on the ground that a *Schwein* instruction was given to the jury which was improper in view of the subsequently decided *Sylvania* case. Id. at 960. The court, however, made it clear that the various theories of liability might be conclusive including the per se horizontal allocation of the market. Id. at 962.


130. Id. at 59 n.28. See text accompanying notes 1-24 supra.
both its position as a manufacturer (i.e., by stimulating interbrand competition) and as a dealer (by limiting intrabrand competition within any territory), but overreaches in its dealings with intrabrand competitors.

E. Vertical Allocation of Markets

Although the Sylvania decision held that vertical territorial allocations must be tested against the rule of reason and stripped away the per se rule of Schwinn, the Court also stated that some "applications of vertical restrictions might justify per se prohibition under Northern Pac. Ry. Co." Subsequent commentary has speculated on the types of vertical restrictions which might warrant continued per se treatment, and recent judicial decisions have begun the process of sharpening the lines drawn in Sylvania. For example, the Supreme Court recently reaffirmed its message in Sylvania that vertical price restrictions will be considered as per se violations of the Sherman Act, notwithstanding the clearly applicable "free rider" analysis relied upon in Sylvania.

Another situation suggesting the application of the per se rule is where the vertical territorial allocation was ancillary or created to support a second per se violation. The Court in Schwinn stated that if the vertical restrictions "were part of a scheme involving unlawful price fixing, the result would be a per se violation of the Sherman Act." There is no suggestion in the Sylvania decision that this statement of law in Schwinn has been overruled. Moreover, the Court in General Motors was confronted with a vertical allocation of exclusive territories which were used to support a group boy-

131. Id. at 36.
133. 433 U.S. at 58 (citation omitted).
137. Reflections on the Sylvania Decision, supra note 2, at 7-9. Professor Posner persuasively argues that the economic rationale of Sylvania cannot logically be limited to non-price restrictions, and, indeed, can easily be extended to some horizontal restraints. Id. at 6-7, 9-12. However, notwithstanding the seemingly logical extension of the Sylvania rationale to vertical price restraints, the Court in California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 100 S. Ct. 937 (1980), gave great weight to the contrary congressional intent behind the Consumer Goods Pricing Act of 1975. Id. at 942 n.6.
138. 388 U.S. at 373. See text accompanying notes 13-24 supra.
cott of car discount houses. The Court in that case had little difficulty in finding that a per se violation had been committed, although the Court did not analyze the extent to which the territorial allocation entered into its decision. Thus, if a vertical allocation is ancillary to a price fixing or tie-in scheme, it is submitted that a per se violation will be demonstrated entitling the plaintiff to relief against both the territorial restriction as well as the price fixing or tie-in restriction.

The Court’s decision in Sylvania should be narrowly construed; not as a blanket approval of vertical restraints, but rather as a specific approval of vertical territorial restriction imposed solely by a struggling manufacturer that is desirous of stimulating its competitive position with other brands. More importantly, the Court’s opinion should not be read as a wholesale disapproval of the non-economic goals of the antitrust laws which the courts and enforcement agencies have been advancing for almost ninety years. Sylvania can be most plausibly read to articulate a judicial concern that antitrust rules and policies must be premised on the achievement of significant goals—economic or otherwise—and that absent a concrete finding that a horizontal or vertical restriction has or is likely to have a “pernicious effect on competition”; or that it lacks “any redeeming virtue,” the rule of reason should apply.

IV. Antitrust Policy and Goals: A Re-examination of the Per Se Rule

The Sylvania decision and its subsequent commentary have cast doubt on the future of the per se rules’ application to horizontal and vertical intrabrand restrictions. It is therefore necessary to consider the goals of the antitrust laws and how those goals are instrumentalized in the policies of the per se rule of liability and the rule of reason. Once the goals and policy instruments are established, it is possible to critically re-examine the continued applicability of the per se rule to intrabrand nonprice restrictions and to set forth a cogent form of analysis.

A. Goals of the Antitrust Laws

Recent literature is rich with theories of the goals of the antitrust laws. Some commentators propose that the goal of the Sherman Act is the

140. Id. at 145.
142. See notes 147-53 infra. Contra, Bork, Vertical Restraints: Schwinn Overruled, 1977 SUP. CT. REV. 171, 172 (“A great deal of doctrinal baggage about the social purposes of these laws . . . was silently jettisoned.”).
achievement of economic efficiency in particular markets. Other commentators have concluded that maximization of consumer welfare is the singular objective of the antitrust laws. These conclusions stem from liberal readings of the legislative history of the Sherman Act, and from arguments concerning the descriptive and predictive powers of allocative efficiency criteria.

Other writers contend that social and political goals form the basis of the antitrust laws and must be incorporated into any meaningful analysis. These include political values such as antipathy to concentrated economic power and protection from excessive interference with individual decision-making, plus social values such as more pluralistic composition of markets


144. See, e.g., R. Bork, The Antitrust Paradox A Policy at War With Itself 50-71 (1978) [hereinafter cited as The Antitrust Paradox].


146. See The Antitrust Paradox, supra note 144; Antitrust Law, supra note 143.


Pitofsky makes a principled, but guarded, argument, largely in the context of horizontal merger policy, that incorporation of certain political values into antitrust policy is both feasible and desirable. Pitofsky, 127 U. Pa. L. Rev. at 1065-67. However, that author expressly excludes from consideration some important “non-economic concerns”:

These include (1) protection for small businessmen against the rigors of competition, (2) special rights for franchisees and other distributors to continuing access to a supplier’s products or services regardless of the efficiency of their distribution operation and the will of the supplier (a kind of civil rights statute for distributors), and (3) income redistribution to achieve social goals.

Id. at 1058.

Insofar as Pitofsky argues that these concerns are unprincipled and should not be antitrust goals, he may be correct. And, he shares this belief with others. See, e.g., The Antitrust Paradox, supra note 144. Congress, on the other hand, has repeatedly exhibited its willingness to succor the small businessman, franchisee or distributor by enacting protectionist legislation such as the Robinson-Patman Act, 15 U.S.C. §§ 13a-13b, 21a (1976) (protecting small business against effects of price discrimination caused by chain stores); and the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, §§ 7, 19, 20 (to be codified in 15 U.S.C. 57a(a)(1)(B), 59, 60), which exempts certain industries from the rulemaking authority of the Federal Trade Commission.

Moreover, Pitofsky would treat the preferred political concerns “as limited factors that influence the way in which prospective rules are designed to accomplish antitrust objectives,” or “as a tie-breaker in individual cases.” Pitofsky, 127 U. Pa. L. Rev. 1067 & n.44.
and notions of distributive justice. Perhaps more importantly, the United States Supreme Court has frequently recognized the existence of these norms in setting antitrust policy. For example, the courts have repeatedly expressed the important role of the antitrust laws in keeping markets atomistic,” protecting “small dealers and worthy men” from large aggregations of political and economic power, prohibiting “interference with individual liberty of action in trading,” and accommodating or advancing distributive justice by establishing and protecting individual and commercial “rights.”

A survey of the literature and the cases makes one point clear: There is no unitary theory of antitrust goals; rather there is a myriad group of norms which the courts and enforcement agencies must apply in each case and in each formulation of policy. The recent scholarship suggesting that economic efficiency is an antitrust goal has added greater clarity and precision to the task of setting antitrust policy. However, it is narrow thinking to believe that any one discipline can fulfill the task of defining the complete range of policy in an area as complex as antitrust law.

It is also clear that economic and non-economic goals may conflict in application. However, the fact that goals conflict in application does not warrant discarding all norms but one, or in presuming the primary importance of one norm. Rather, the courts should weigh each objective and balance all the goals in establishing policy. In many situations there is a conflict


154. Sullivan, Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust, 125 U. PA. L. REV. 1214, 1232-43 (1977). The limits of the predictive ability of economic analysis was recently addressed by G. Warren Nutter when he admonished that “there is a danger that some economists may become dizzy with success and claim too much for their discipline and too little for other social sciences.” Nutter, On Economism, 22 J.L. & ECON. 263, 263 (1979). Nutter's concern was that the euphoria created by recent successes of the “economic approach” was creating the false illusion that the approach was capable of “universal application ... to analysis of human behavior and social activity.” Id. at 264.

Further, the Justices' opinions in Sylvania reflect the obvious fact that there is little unity of thought among the proponents of the economic approach to antitrust law. Compare 433 U.S. at 57 & nn.26 & 27 (Powell, J.) with 433 U.S. at 69-71 (White, J., concurring).
between economic efficiency objectives and non-economic goals, but those situations are not inevitable. When these goals conflict the courts must perform their historical function of selecting those values which reflect legislative intent, institutional competency and public policy.

Before considering an integrated approach to distributional problems, it is helpful to briefly consider current antitrust policies.

B. Antitrust Policy

Judicial decision-making in the antitrust field relies upon two forms or expressions of policy; the rule of reason and the per se rule. These policies have important procedural and substantive distinctions which have been refined by the courts since the late 1800's.

Per se rules of liability reflect a judicial decision that a particular restraint has, in most applications, no redeeming virtues or value, and that the restraint should be condemned on its face, irrespective of the defendant's purpose in implementing the restraint or of any arguable procompetitive effects. A court applying the per se rule will balance all social and economic

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Although the Court in *Sylvania* frequently cited the standard articulation of the per se rule in *Northern Pacific* (i.e., "pernicious effect on competition and lack of redeeming virtue"), the Court went on to add that "[c]ases that do not fit the generalization may arise, but a per se rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them." 433 U.S. at 50 n.16.

This refinement on the *Northern Pacific* standard seems principally to be a matter of degree. However, it suggests that the Court is more sensitive to countervailing procompetitive effects, and concomitantly more reticent to invoke the per se rule of liability. Other recent decisions reflect greater judicial care in fashioning appropriate antitrust policy. For example, in *Broadcast Music, Inc. v. CBS*, Inc., 441 U.S. 1 (1979), the Court considered whether defendants' blanket license rule should be characterized as per se illegal, and stated:

"[O]ur inquiry must focus on whether the effect and, here because it tends to show effect, the purpose of the practice is to threaten the proper operation of our predominantly free market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to "increase economic efficiency and render markets more rather than less competitive.""


It is also possible to infer that the *Sylvania* Court's reformulated per se standard includes a greater concern for non-price restraints which have arguably procompetitive effects in some now insubstantial number of situations, but in which the effects can be achieved by less restrictive alternatives. Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Re-
factors concerning the activity and determine if, on balance, it is most likely to offend antitrust goals and if, in practice, any beneficial aspects will be difficult to ascertain.\textsuperscript{188}

A rule of reason analysis involves a more flexible rule; recognizing that in application many restraints have socially and economically valuable attributes, and that courts should in each instance carefully evaluate the attributes and any detrimental aspects.\textsuperscript{189} When a restraint has greater capacity for achievement of important goals, or where other compelling goals are advanced by the restraint, then the courts will not presume illegality, but rather will evaluate each restraint on an individual basis.\textsuperscript{180}

The preceding summary of the rule of reason and per se rule methodologies should indicate that the appropriate policy in each case depends upon a careful balancing of the likelihood that a particular distributional restraint will achieve a desired objective with the least possible adverse effect on competition or competitors. In other words, when a restraint has a substantial likelihood of achieving a desirable economic objective, and the prospect that the restraint will adversely affect important economic and non-economic goals articulated by the antitrust laws is very small and there are no adequate lesser restrictive alternatives, then the practice should be analyzed under the rule of reason.\textsuperscript{181} It is important, however, to recognize that the decision of whether to apply per se or reasonableness policy depends, in

\textit{strictions}, \textit{78} \textit{COLuM. L. Rev.} \textit{1}, 14 (1978). The Court's reasoning in \textit{Broadcast Music}, suggests that the lack of less restrictive alternatives available to the defendants justified the use of a blanket license rule, and that per se treatment was unwarranted under the circumstances. 441 U.S. at 19-20.


The Court has, particularly in recent years, treated a few restraints which may affect prices under the rule of reason. For example, decisions by professional associations which establish "ethical norms" may fall within the rule of reason. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 695 (1978). Similarly, the Court has declared that private, non-governmental groups that perform licensing activities may have these activities considered under the rule of reason, especially where the restrictions are narrowly drawn, have substantially procompetitive effects, are applied in a non-discriminatory fashion, and there are no lesser restrictive alternatives. Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979); Chicago Board of Trade v. United States, 246 U.S. 231 (1918).

C. An Analysis of Intrabrand Restrictions and the Per Se Rule

In the context of the antitrust laws' policies and goals and the issues left unanswered in *Sylvania*, it is helpful to reformulate our thinking about the per se rule's application to non-price intrabrand restrictions. This re-examination is particularly useful now because of the Court's recent statements that the per se rule has great vitality in the area of intrabrand price restrictions, and, more particularly, that the per se rule should be applied only where the courts have great confidence that the restraint serves no useful purpose.

In analyzing an intrabrand non-price restraint, a court should consider several factors in determining whether the rule of reason or the per se rule should apply. Each restraint should be examined for its probable or actual effect on interbrand competition, its purpose, and its ability to advance or retard the objectives of the antitrust laws. A careful balancing of these factors should indicate, within an acceptable degree of probability, that a particular intrabrand restriction is likely to have a "pernicious effect on competition" and lack "any redeeming virtue," and concentration on these factors avoids resort to "formalistic line drawing" such as the origin of the restriction.

The initial inquiry concerns the presence of any pro-competitive effects of the restraint and, in particular, whether the restraint fosters greater in-

162. The Court in *Sylvania* strongly suggested that non-economic criteria, such as social or political goals, should no longer be considerations in antitrust decision-making because they offer no "objective benchmarks." 433 U.S. at 53 n.21. Aside from the dubious validity of the statement, it is important to note the Court's failure to distinguish the absolute inability of one discipline or science to perform in a predictive manner from a lack of developmental maturity. It is likely that the recent interdisciplinary scholarship between economists and academic lawyers that strongly influenced the *Sylvania* Court presages similar interdisciplinary efforts with sociologists, political scientists and organization behaviorists. See, e.g., Williamson, *Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transaction Cost Approach*, 127 U. PA. L. Rev. 953 (1979). It is therefore distinctly probable that social and political objectives will provide "objective benchmarks" for establishing antitrust policy.

Finally, it should be remembered that the economic efficiency criterion has only recently reached its pinnacle. A mere eight years ago the Court expressed grave doubts about the ability of courts "to ramble through the wilds of economic theory" in fashioning antitrust policies. United States v. Topco Assocs., 405 U.S. 596, 609-10 n.10 (1972). See also Illinois Brick Co. v. Illinois, 431 U.S. 720, 742 (1977).

163. See notes 23 & 24 supra & accompanying text.

164. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 100 S. Ct. 937 (1980).


166. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 59 (1977). The somewhat artificial distinction between vertical restraints and horizontal restraints often clouds the important issue of a restraint's effect on competition and competitors, and perhaps more frequently fails to examine the reason for such restraint. The suggested analysis does not rely on such a distinction.
terbrand competition. Where the benefits to interbrand competition clearly outweigh any offsetting decreases to intrabrand competition, the restraint should be viewed favorably and subject to proof that the restriction was not unilaterally imposed by the manufacturer or supplier to protect its trademark. This would require an evaluation of the relative intensity of the restriction, the presence of a demonstrable purpose or motive to advance or protect a legitimate interest in a trademark, the availability of less restrictive methods for protecting the manufacturer's interest, and the net competitive effect of the restriction. Thus, in most situations a manufacturer does not need exclusive territorial arrangements to stimulate interbrand competition, and less restrictive alternatives such as pass-over profit clauses or area of primary responsibility clauses are sufficient to advance the manufacturer's interest. Similarly, where a manufacturer is a new market entrant and imposes moderate restrictions on its distributors in an effort to improve its competitive position and that of its dealers, the court should analyze the restraint under a reasonableness standard.

For example, in Eiberger v. Sony Corp., the Second Circuit concluded that the vertical restriction, a warranty fee plan that operated like a strict ban on extraterritorial sales, was much more restrictive than a prior warranty fee arrangement which encouraged some interterritorial competition. Moreover, the court emphasized that the intrabrand restriction may be unreasonable even where there is no ostensible improvement in interbrand competition, and that the defendant’s twelve percent market share

167. A difficult problem in these cases is, of course, satisfactory proof of net interbrand competition gain. However, some suggested approaches to these situations, which are almost invariable vertically-imposed territorial or customer restraints, should provide great assistance to the courts in evaluating the evidence, particularly with respect to allocating evidentiary burdens. See, e.g., Reflections on the Sylvania Decision, supra note 2; Zelek, Stern & Dunfee, A Rule of Reason Decision Model After Sylvania, 68 CALIF. L. REV. 13 (1980).


Furthermore, as Piotofsky points out, there are many types of distributional restrictions which vary in the intensity. Piotofsky, The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions, 78 COLUM. L. REV. 1, 3-5 (1978). A change in type of restriction from moderate to intensive or “airtight” should indicate greater judicial scrutiny, especially when the manufacturer has less restrictive alternatives available which would accomplish the same thing. Id. at 28-31. Similarly, certain goods, such as “convenience goods,” and some dealer services such as many post-sale services, do not require exclusive or intense restrictions to be effective. The Supreme Court, 1976 Term, 91 HARV. L. REV. 70, 236 (1977).

169. New market entrants, or existing firms with flagging market shares, should be permitted greater flexibility in structuring their distributional efforts because, as the Sylvania Court stressed, a reasonableness standard protects many small businessmen and militates against market concentration by making vertical integration more unlikely. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. at 56-57 n.26.


171. Id. at 1079-80.

172. Id. at 1081.
Antitrust did not entitle it to special antitrust treatment as a "new entrant." Conversely, in *Hobart Bros. Co. v. Gilliland, Inc.*, the manufacturer, a competitor of the distributor with respect to a complimentary good, imposed a primary responsibility clause in its agreement, subsequently began to experience problems with the distributor's service to a major account and took over the account itself. A couple of years later the manufacturer terminated the distributorship. Although the court stated that the manufacturer's internal documents showed that the manufacturer treated the clause as having the same effect as a strict territorial restriction, the evidence clearly suggested that the restraint was reasonable under the circumstances, that the manufacturer's action did not hamper competitive conditions in the relevant market, that the manufacturer lacked any significant power to affect the market, and that mere competition in a related product market is not tantamount to a finding of horizontal conspiracy in the relevant market.

Second, the court should determine if there is any indication that a manufacturer's or dealer's cartel is responsible for the restriction. The Court in *Sylvania* expressed confidence that cartel agreements would continue to receive per se treatment, apparently notwithstanding the use of least restrictive distributional restraints. However, difficulties may arise, first, where a particular restraint may improve interbrand competition but is the result of cartel agreement, and, second, where the evidence of cartel agreement is equivocal at best.

A court should not be deterred by difficulties of proof, but rather should evaluate all evidence of the existence or possibility of cartel agreement, and declare any demonstrated or probable agreement unlawful on its face. The Sherman Act was intended to prohibit cartel activity because an agreement would permit firms with little or no individual ability to affect market conditions to collectively accomplish that goal, and because cartel agreements have utility in curbing competitive behavior, by limiting the range of conduct by cartel members, and by serving as a potent weapon to deter non-group members from entering the market or competing effectively.

Therefore, the courts should declare illegal per se intrabrand territorial

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173. *Id.* at 1080-81.
174. 471 F.2d 894 (5th Cir. 1973).
175. The Court stated:
There may be occasional problems in differentiating vertical restrictions from horizontal restrictions originating in agreements among the retailers. There is no doubt that restrictions in the latter category would be illegal *per se* . . . , but we do not regard the problems of proof as sufficiently great to justify a *per se* rule.
433 U.S. at 58 n.28.
restrictions which stem from agreements among manufacturers or suppliers which have an effect on, or a purpose to affect, prices or which unreasonably limit the range of decision-making by parties to the agreement. The agreements in United States v. Sealy, Inc.,178 United States v. Topco Associates,179 American Motors Inns, Inc. v. Holiday Inns, Inc.,180 and Krehl v. Baskin-Robbins Ice Cream Co.,181 had the plausible purpose of improving the defendants' competitive position with other brands. However, the agreements were clearly more restrictive than necessary to protect the collaborator's interest in the trademark, often involving exclusive territorial restrictions.182 Moreover, the restrictive agreements were undertaken to unduly limit the range of commercial behavior of the parties to the agreement and often served as an extrajudicial device to discipline members.183 For example, in Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc.,184 Sealy used a variety of otherwise proper trade restraints to effectively harness Ohio-Sealy, an extremely aggressive and competent manufacturer and distributor, in order to protect the other manufacturers. While there may be significant improvements to some manufacturer's ability to compete against other brands by the territorial restrictions, the likelihood of achievement of such improvements is relatively insignificant and the danger is great that the collaborators will begin to discuss price.

Similar problems of proof may arise when a manufacturer is imposing particular restraints for the benefit of, and at direction of, a group of distributors. A cartel of distributors may use a manufacturer to keep aggressive dealers in check or to discipline them, or to apply pressure to discontinue dealings with discounters. These cartel activities may exert an obvious effect on the price charged for the product, the relative fairness with which a manufacturer may treat a particular dealer, and, indeed, the ability of a manufacturer to remain in business.185 Thus, for example, powerful dealers in United States v. General Motors Corp.186 and Eiberger v. Sony Corp.,187 were able to exert significant collective pressure on the manufacturer to destroy intrabrand competition by members dealing with discounters or unauthorized distributors. Similarly, the effect of a dealer's cartel was evident in

179. 405 U.S. 596 (1972).
180. 521 F.2d 1230 (3d Cir. 1975).
Fontana Aviation Inc. v. Beech Aircraft Corp., where a powerful dealer was able to use the manufacturer to discipline the plaintiff for seeking to bypass dealings with the dealer by seeking direct dealings with the manufacturer to obtain a wider offering of aircraft. Finally, the restrictions in American Motor Inns, Inc. v. Holiday Inns, Inc. were a collaborative effort by dealers, including Holiday Inns, to limit the number of available motels. Clearly, there may be advantages to interbrand competition from such horizontally-imposed territorial restrictions. But, there is a greater likelihood that the restrictions will tend to limit other procompetitive activities, affect pricing and service decisions, and limit consumer access to certain goods either on the basis of price or location. Furthermore, horizontal and vertical cartel agreements, like resale price maintenance agreements, are likely to result in a diminuition of both intrabrand and interbrand competition, and should be declared illegal per se, irrespective of the manufacturers or suppliers desire to protect the trademark and protect against “free-riders.”

Thirdly, a restraint ostensibly imposed by a manufacturer or supplier should be condemned per se illegal where there is a substantial likelihood it will contravene the goals or objectives of the antitrust laws. Where a particular restraint stifles, or is intended to stifle, individual dealer initiative or innovation in local marketing, as, for example in Pitchford v. Pepi, Inc. and Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc. (where imaginative and aggressive marketing activities by distributors were persistently dampered by reluctant suppliers), the restraint should be condemned. In both instances, it is plain that the plaintiff distributors were more competitive than other distributors, that the form of competition was fair and price-reducing, and that the restraints, which were not exclusive, were intended to dampen intrabrand competition by the plaintiffs.

A court should similarly strike down dual distribution arrangements in which the supplier-distributor may arbitrarily limit the territory of a distributor or terminate a distributor either on behalf of a preferred distributor or in order to take the territory itself. While a supplier should be permitted some latitude to engage in fair contracts for the distribution of its products

188. 432 F.2d 1080 (7th Cir. 1970).
189. 521 F.2d 1230 (3d Cir. 1975).
190. See Reflections on the Sylvania Decision, supra note 2, at 9-10. However, in United States v. Topco Assocs., 405 U.S. 596 (1972), the Court rejected the argument, although it was economically plausible, that the exclusive territorial restriction was necessary to permit the members to effectively compete with the large chain supermarkets.
192. 531 F.2d 92 (3d Cir. 1976).
and to terminate distributors for bona fide grievances or for good faith alterations in marketing plans, suppliers should not be permitted to preclude the development of certain territory by an effective and aggressive distributor, such as in *Interphoto Corp. v. Minolta Corp.*,194 or to use restrictive provisions in agreements to coerce distributors that are attempting to break into a market, such as in *Dougherty v. Continental Oil Co.*195 Finally, manufacturers or suppliers should not be permitted to impose onerous agreements which permit the supplier to substantially reduce the sales area of a distributor and thereafter increase its own sales area, such as in *Pitchford v. Pepi, Inc.*196 There are, as some courts have recognized, certain basic rights of distributors or franchisees to obtain an interest in continued access to goods and trademark use of the franchisor or supplier while the distributor is faithfully performing its obligations under the agreement. A failure to recognize these basic rights of distributors or franchisees to take individual responsibility for their commercial decision-making and marketing activities and to continued access to goods will seriously impair the ability of small businesses to continue performing distributional activities. Therefore, restrictive provisions in distribution or franchise agreements which permit significant changes in the dealer or franchisee's rights for arbitrary or pernicious reasons should be declared per se illegal.

V. Conclusion

The rule of reason and the per se rule remain the judicial tools to implement the objectives of the antitrust laws. While the *Sylvania* Court balanced the goals of the Sherman Act to favor application of the rule of reason to a clearly pro-competitive arrangement, this Article has demonstrated that many antitrust goals dictate that the per se rule should apply to many other intrabrand restrictions, such as manufacturer and dealer agreements to allocate products or services, many restrictive provisions in agreements by firms that supply goods to distributors and simultaneously act as distributors of the same type of goods, and other unnecessarily intensive restrictions which will have negligible procompetitive effects.

The cases and legislative activities discussed in the Article have served to develop recurrent motives and devices which restrict intrabrand competition, and which "because of their pernicious effect on competition and lack of any redeeming virtue," should be declared per se unlawful. However, these cases also illustrate that because of their arguable benefits to interbrand competition and their ability to achieve certain non-economic goals to the antitrust laws, some restrictive provisions should be examined in each instance for their reasonableness. Only by a careful consideration of the pur-

195. 579 F.2d 954 (5th Cir. 1978).
196. 531 F.2d 92 (3d Cir. 1976).
pose and effects—economic and non-economic—of various non-price intrabrand restrictions can a court make principled decisions regarding the desirability of any restraint and, thereby, provide meaningful guidance for business decision-making.