ORIGINAL

In the

Supreme Court of the United States

CONTINENTAL T.V., INC., et al.,
Petitioners,
v.
GTE SYLVANIA INCORPORATED,
Respondent.

No. 76-15

Washington, D. C.
February 28, 1977

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HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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v.	:	No. 76-15
GTE SYLVANIA INCORPORATED, Respondent.	:	

Washington, D. C.,

Monday, February 28, 1977.

The above-entitled matter came on for argument at 1:35 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

GLENN E. MILLER, ESQ., 711 First National Bank Building, San Jose, California 95113; on behalf of the Petitioners.

M. LAURENCE POPOFSKY, ESQ., 44 Montgomery Street, San Francisco, California 94104; on behalf of the Respondent.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-15, Continental T.V. v. GTE Sylvania.

Mr. Miller, you may proceed whenever you are ready.

ORAL ARGUMENT OF GLENN E. MILLER, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. MILLER: Thank you. Mr. Chief Justice, and may it please the Court:

This is a private treble damage antitrust action, brought under section 1 of the Sherman Act and sections 4 and 16 of the Clayton Act. The case involves the television industry and a conspiracy between a manufacturer and its dealers to utilize a resale location restriction as a device to achieve restricted territories and forced against the petitioner at the insistence of a protected dealer.

The manufacturer is GTE Sylvania, which in 1962 installed its so-called "elbow room" plan under which goods were sold on the oral understanding that dealers could resell only at locations approved by Sylvania. The franchise in this case was a mere selling agreement that expressly limited the dealer relationship to that of vendor-vendee, and it expressly denied the right of the dealer to hold himself out as a Sylvania representative.

The anti-competitive purpose of Sylvania's resale location restrictions were apparent. As quoted from their own

sales manuals, it gave every dealer a geographic area within which to sell. It franchised dealers by territory. It eliminated same-brand competition. And it eliminated vicious price cutting. In short, Sylvania's purpose was to close territories.

QUESTION: Are you telling us that there were lines drawn or that this is the practical consequence of the location control?

MR. MILLER: We are saying that to say that in Schwinn, for instance, Schwinn drew lines around territories, where in Sylvania's case it drew, with the help of economic limitations, it drew lines around store locations which is a distinction without a difference. They both had the same announced purpose, to eliminate same-brand competition, and both had the same effect, where dealers like Continental were foreclosed from territories.

So we are saying that was the purpose and effect and the use of their device, which was illegal under Schwinn and Topco. The effect of Sylvania's market restriction was as clear as its purpose really, in that Sylvania utilized the economic limitations of retail distribution in combination with its resale location restraint to effectively control inter-brand competition. And this is because dealer outreach, that is the effective radius of marketing from any given location, is limited. In fact, it was conceded in this case throughout that a dealer can market effectively only within 25 to 50 miles

of his store location.

So by allowing a dealer to resell only from a specific location spaced more than fifty miles from a given territory, Sylvania achieved closed territories.

Now, if you look at the effect of this practice in Sacramento, you will see that it was dramatic in impact. Before "elbow room" there was some 19 dealers handling Sylvania products in a metropolitan area of about 500,000 people. After "elbow room" and during a rapid build-up of color TV demand, there was only Handy Andy. Handy Andy had become by use of Sylvania's resale restrictions a virtual monopolist in his brand in the territory.

Continental T.V. is a retail dealer which began dealing with Sylvania in 1964. By 1965, it had become one of Sylvania's largest dealers. At Sylvania's insistence, Continental accepted credit through Sylvania's financing agent, Maguire & Company, and as Continental's sales increased, so too did its credit line, ultimately reaching $350,000.

Continental also expanded geographically with Sylvania sponsored credit. Continental was able to grow from two stores in 1964 to eight approved store locations in 1965. It was then doing business in five northern California cities, and it had sales in excess of a million dollars a year.

Now, by August of 1965, Continental saw that entry into the Sacramento market would be profitable, and it notified

Sylvania that it was opening a store in that territory. Sylvania's response was immediate and unequivocal. Continental was told that it could not sell Sylvania products in Sacramento due to previous commitments that had been made to Handy Andy, and further told that if it attempted to do so it was jeopardizing its entire future.

Upon advice of its attorneys, however, Continental T.V. informed Sylvania that it was moving some of its own merchandise to Sacramento for resale. Now, Handy Andy's response to this was also immediate. He demanded of Sylvania that Continental's merchandise be removed from Sacramento, and Sylvania delivered that message to Continental and threatened to hold back pending orders if Continental persisted.

Nevertheless, Continental held firm and did open for business in Sacramento on September 7, 1965. At Handy Andy's insistence, Sylvania then retaliated, first by withholding two large orders that Continental had pending on the fictitious grounds that there was a credit review; next, by refusing to take any further orders and by instructing its sales and credit departments to have no further communication whatsoever with Continental.

Continental did hold firm, however, and stayed in Sacramento, even after being told by Sylvania that if it did so "there won't be any more Continental T.V." Therefore, Sylvania took immediate steps aimed at putting Continental out

of business. It immediately cut off Continental's credit, it directed Maguire to bring suit for sums not yet due, it caused inventory to be repossessed, locking and chaining Continental's main stores and warehouse, it attached Continental's bank accounts, causing the loss of its bank credit, refused to honor credits due Continental, and it disparaged Continental's credit with its other major supplier.

Finally, of course, on October 13, some 36 days later after the opening in Sacramento, Continental was terminated as a Sylvania dealer.

Now, Justice Clark, sitting as trial judge, specifically declared in Finding No. 15 that these acts were not as Sylvania claimed, taken because of concern about Continental's finances, its credit status or any alleged failure to make timely payments. In Finding No. 16, Justice Clark declared that Sylvania's action was part and parcel of a conspiracy between Sylvania and its dealers and forced at the insistence of Handy Andy against Continental to prevent Continental from selling Sylvania products in Sacramento.

Now, Sylvania's attack on Continental was successful. It came at a time when due to an unprecedented demand for color TV, manufacturers could not provide adequate inventory to their existing dealers, let alone add new dealers, and Continental was unable therefore to replace its supply that had been cut off by Sylvania and was forced to close its chain

of stores.

Now, the jury in this case was asked to decide only two issues: First, whether or Sylvania's resale location restraint was used as a device to close the Sacramento territory to Continental; and, secondly, whether Sylvania's action against Continental was for legitimate credit reasons as claimed or was at the insistence of Handy Andy in reprisal for selling Sylvania products in Sacramento.

Now, Justice Clark properly gave a Schwinn instruction. He repeatedly instructed the jury that it was unlawful for a manufacturer, having parted with title and risk respecting a product, to thereafter restrict the territories within which a dealer can resell, and concluded by stating that therefore in this case it would be unlawful for Sylvania to restrict Continental's outlets or store locations.

Now, since the only market here involved was Sacramento, and since Sylvania admittedly refused to allow a Continental store any closer than San Francisco, to so restrict Continental's outlets and store locations in this case was necessarily to restrict it or foreclose it from the territory of Sacramento.

But the territorial restrictions and not the lawfulness of a resale location restraint standing alone was the issue given a jury is certainly clear from both the argument of Continental and the argument of Sylvania to the jury, and

is also clearly the basis for the jury verdict in Continental's favor in the trial court.

The majority below has accepted Sylvania's disregard for these findings and for the evidence supporting the verdict and has reversed the Continental judgment. Both in effect argue first that the form and effect of Sylvania's restraint makes Schwinn inapplicable; and, secondly, that Schwinn is simply bad law and should be overruled.

We believe that neither of these arguments are meritorious. The narrow issue presented here in our view is whether, as the jury and the court found, Sylvania's use of its resale location restraint as a device to restrict territories is banned by Schwinn's per se rule. The decision of this issue in our view requires only a pedestrian application in Schwinn doctrine to clearly established facts.

Now, Schwinn of course holds that once a manufacturer has parted with title and risk, he has parted with dominion over the product, and that any effort thereafter to restrict territory or persons to whom the product may be transferred is a per se violation of section 1 of the Sherman Act.

Now, it is elementary that purpose and effect and not the form is the crucial inquiry. The fact that, as I have expressed before, that Schwinn used lines around territories, and Sylvania with the help of economic limitations kept Continental far enough away from Sacramento by drawing a line

in essence around his store location is indeed in our view a distinction without a difference, because the announced purpose was the same, elimination of inter-brand competition, and the effect was the same. Continental was foreclosed from the territory.

Sylvania claims that dealers could sell to anyone and here but necessarily ignores what happened in Sacramento. Sylvania and the majority also ignore these crucial findings and the evidence supporting the verdict. For example, they assume throughout that Sylvania acted only unilaterally, when the jury necessarily and the court expressly found that Sylvania acted in concert with Handy Andy, and at Handy Andy's insistence foreclosed the territory to Continental.

Now, significantly, Sylvania admits that the mere existence of their vertical restraint itself reflects the fact that the dealer spacing they are talking about was given as a bargained for benefit to the dealers in return for the dealers' promise to handle their line. Yet they ignore the strong horizontal impact of their system of restraint long held to be per se and legal.

Now, whether vertically imposed or horizontally effected, restraints on territories and customers do in fact have the same effect and hence the same rule should apply.

Now, this identity of effect was first enunciated by this Court in the resale maintenance context in 1911, the

Dr. Miles case. The Court in Dr. Miles said in effect, the manufacturer cannot impose a vertical restraint which its dealers could not lawfully effect horizontally.

QUESTION: Mr. Miller, could I interrupt you?

MR. MILLER: Surely.

QUESTION: What about a restraint on the character of the place of business that the retailer operates, it has to have so much square-footage or keep the windows clean or something like that?

MR. MILLER: They have to do a certain amount of advertising, they have to have so many sets on your floor, that kind of --

QUESTION: Well, they have to have a place of business of a certain size, to be specific.

MR. MILLER: Yes, Your Honor, I think there is no question that certain hebavioral controls that are only inhibitive instead of being prohibitive should be allowed, and certainly should be tested under the rule of reason. I think some of the things mentioned are in that category. Certainly a manufacturer should be allowed to --

QUESTION: Well, how do you reconcile that with the language of Schwinn, if the covenant is you may not resell this -- after you have bought it, you may not resell it from a place of business of less than a thousand square-feet?

MR. MILLER: All right. I don't think that couched

in those prohibitory terms that it would pass muster, but I do believe that a manufacturer should have some room to require some standard of advertisement, perhaps on a co-op basis, where each dealer is on a pro rata basis is required to pay into a local regional fund of some kind, or that certain kinds of facilities could be required, certain kinds of full-line displays be required.

QUESTION: Well, what was your answer about my thousand square-foot restriction?

MR. MILLER: If the restriction is that once you buy my set you cannot resell it unless you do so from a store that has a thousand square-feet at least, I think that that should be per se illegal under the Schwinn doctrine.

QUESTION: What if you can't resell it from a place of business that is not kept neat and orderly and clean and the windows washed and so forth?

MR. MILLER: I think now you are getting closer to the more inhibitive and not so much the prohibitive test. I don't think it is a question of whether we are talking about a rule of reason approach or a per se approach. I think that the principal distinction is between clauses like location practice without a resale restraint, which the automobile industry has used for years, and such things as primary responsibility clauses which have been used for years, which are inhibitive. They do inhibit either behavior, but they have long

been tested under the rule of reason. They are much less -- have much less negative impact on the economy than does the Sylvania-type restraint or does a straight territorial, drawing a line around a territory, Schwinn-type restraint. Those are prohibitive. A dealer --

QUESTION: Well, what is the distinction between inhibitive and prohibitive? I understand the word and I want to be sure where you are drawing the Schwinn line.

MR. MILLER: Right. An inhibitive restraint in the way I am using the term means that a dealer is inhibited to some extent in his behavior vis-a-vis handling a product of a manufacturer but is not prohibited from where he will sell, to whom he will sell, and basically not prohibited in terms of his freedom to do what, where and how he pleases with that product he has purchased.

In other words, the distinction I have in mind is the difference between saying you cannot go into the Sacramento territory and sell this product and saying you must use your best efforts in your own territory before you can justify going into Sacramento. If you do X, you can do Y, is inhibitive. If you cannot do Y under any circumstances, that is prohibitive.

QUESTION: No such distinction as that was made in Schwinn, was there?

MR. MILLER: In Schwinn, of course, we have a case where the District Court found a horizontal division of

division of territories between the dealers and the issues before the Supreme Court as I understood the case, number one was the type of rule to apply to the consignment sale and whether or not the customer restrictions should be treated on a per se basis.

I think that whether or not it is enunciated explicitly, there is no question but that the cases have treated these types of restraints on a prohibitive/inhibitive basis. In other words, areas or primary responsibility, passover clauses, exclusive dealerships, true location franchising, all these things if reasonably used are lawful because --

QUESTION: Under the ancient rule against restraints on alienation, upon which Schwinn's per se rule relied, there is no room really, is there, for the distinction you make between inhibition or prohibition?

MR. MILLER: I think there is, Your Honor, because there is no restraint on the dealer in these inhibitive-type devices. In other words, with a true location clause, where the dealer is told you may locate your store here, you must locate your store here with this franchise, he has not taken the next step and told he cannot sell from any other location or he can't sell to some group of customers. If that next step is not taken, you don't have a restraint on the dealer and you don't have a restraint on alienation. But if you do take the next step, Schwinn and Topco and Dr. Miles say that

you can't do that because it is a restraint on alienation and indeed the independent should remain independent.

QUESTION: But Topco was a horizontal agreement, wasn't it?

MR. MILLER: Your Honor, Topco involved both vertical and horizontal territorial restraints. Topco members engaged in retailing, were restricted to territories allocated to them horizontally, but Topco members involved in wholesaling were required to restrict their dealers vertically to the same territories to which they have been allocated. And in recognizing the identity of the effect, the Topco court says at page 612, and I quote, "Just as the territorial restrictions on retailing Topco brand products must fall, so must territorial restraints on wholesaling. The considerations are the same. And the Sherman Act requires identical results."

QUESTION: But at page 608, the opinion said, "We think that it is clear that the restraint in this case is a horizontal one and therefore a per se violation."

MR. MILLER: That's right, Your Honor. Yes, indeed.

QUESTION: So I guess you could take either one you want to?

MR. MILLER: You take either one you want, I suppose. But indeed the facts indicate that there was a vertical, there was a horizontal restraint, and that the language of the court at least in some sections, and the holding certainly can be

read clearly to be that, like Schwinn, you cannot restrain dealer behavior. Like Schwinn, once the product is sold to that dealer, it is a per se violation to restrict territories or customer groups or persons to whom the product can be transferred.

The argument Sylvania makes, that once franchised everywhere franchised, is really beside the point because the point is that once franchised you can sell anywhere. We are not saying, nor have we ever claimed that we were authorized, let's say in San Francisco, so therefore we should be able to be a franchised dealer every place else that we chose. We have never made that contention.

What our contention has been from the start, however, is this, that once franchised as a dealer we should be able to take those products and sell them in any territory or to any group of persons we wish.

Obviously, Sylvania cannot restrict a stranger from obtaining Sylvania products from us or anyone else. That is per se violative of the Schwinn doctrine and the Topco doctrine. Obviously also, Sylvania likewise can't restrict Continental T.V. from selling to any particular customer, whether it be a stranger dealer or to itself, and thus this franchised everywhere franchised anywhere argument boils down to a recognition of the market fact that authorized somewhere you can sell anywhere under the Schwinn and Topco doctrines.

So it is only by forgetting their conspiracy and by forgetting its post-sale nature of the restraint and by forgetting the strong horizontal impact associated with its practice of restraint that Sylvania can find refuge in the case law.

They cite and argue and rely on the auto dealer cases, but the auto dealer cases are location clause cases. They do not have a post-sale restraint and the judges in those cases go out of their way to explain that the dealer could sell anywhere and to anyone. They don't involve any concerted action. They are all unilateral cases. And, moreover, it seems that General Motors --

QUESTION: Well, they are a concerted action in the Albrecht sense, aren't they?

MR. MILLER: In the Albrecht sense they would have concerted action by just --

QUESTION: So you always have concerted action when you have a buyer and a seller?

MR. MILLER: That's right. But the significant point with these auto dealer cases is that General Motors used an area of primary responsibility clause in them, has never found in the last twenty-five years that the use of a true location practice without a post-sale restraint has impeded the effectiveness of their marketing programs, even though they abuse the location practice without more in an area of

responsibility. It has been certainly effective for them and it would certainly be effective for other concentrated industries like the television industry.

The other line of cases which are mentioned are the exclusive franchising cases. And I think that all need be said there is that Sylvania's practice is at the other extreme. The exclusive franchise case is simply a case where the manufacturer appoints one dealer in a territory and promises that dealer he will not appoint another. But he doesn't put any restraint on the dealer that he appoints or on any other dealer in any other area.

Now, they argue, Sylvania argues and the majority argues that there must be some inherent right to restrict outside dealers from coming in in order for the manufacturer to keep his promise. Well, obviously there is no inherent right or the exclusive dealers would not have to use areas of primary responsibility, yet all these cases involve the use of that less restrictive restraint, inhibitive restraint.

Now, just at this point, if I may, Your Honor, I would like to reserve my remaining time.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Miller.

Mr. Popofsky.

ORAL ARGUMENT OF M. LAURENCE POPOFSKY, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. POPOFSKY: Mr. Chief Justice, and may it please

the Court:

In the trial court, the plaintiffs, Continental T.V. pressed a claim against Sylvania for willful and malicious injury to Continental's business. I am happy that Sylvania won something before the jury that. Therefore, the only issue really before this Court is the one that was isolated in the jury instructions on the claims which Sylvania lost, and that was isolated in a jury instruction which was a per se instruction derived from Schwinn which expressly stated unequivocally that restraints of the locations clause character were legal per se. That issue went to the jury and Sylvania lost that issue. That jury instruction was the focus of the appeal to the Ninth Circuit and we think the Ninth Circuit, operating within the framework of stare decisus, correctly analyzed the distinctions between the Sylvania practice on the one hand and Schwinn on the other and determined that there were significant and sufficient distinctions to take the Sylvania locations practice outside the technical ambit of Schwinn.

By way of brief recapitulation, the Ninth Circuit majority held that, as they read Schwinn, leaving aside for a moment the restraint on alienation language and its full breadth, that what it was really striking at was a very rigid compartmentalization in a vertical sense of a distribution system which did have the effect of completely banning all

potential intra-brand competition. As the Ninth Circuit viewed it, that was so adverse that it was appropriately held per se illegal or at least they wouldn't address that question and that the Sylvania practice was in all events different.

As they looked at the Sylvania practice and as they looked at the record before the court, what it showed was that a struggling manufacturer, with one to two percent of the market in television, decided that they had to do something to survive, something to stay in the market, something to stay an effective intra-brand competitor, and that it did the one thing that a rational manufacturer would do. It tried to induce its dealers to carry the line, it tried to accord to its distribution units, the dealers, some incentive to try and carry Sylvania so that they could competitive effectively with RCA and Zenith.

QUESTION: What was the incentive extended?

MR. POPOFSKY: The incentive extended was the notion that Sylvania would adopt a vertical distribution system which would cut down the number of authorized dealers, thereby producing an inhibition, if you want to call it that, or at least a lessening of intra-brand competition, which I presume in an economic sense would provide the dealer with the potential for higher volume and presumably more profit.

QUESTION: So you don't contend that the purpose

and effect ws not to inhibit intra-brand?

MR. POPOFSKY: Oh, no. I think we have to take these words "purpose and effect" --

QUESTION: And --

MR. POPOFSKY: -- to look at them either broadly or narrowly.

QUESTION: And so it is just a question of to what extent it may inhibited before it is illegal?

MR. POPOFSKY: Well, I think I would look at this way, the broad purpose and the broad effect was to further inter-brand competition. The technique chosen had the purpose and the effect of trying to limit intra-brand competition. From the Ninth Circuit's perspective, operating from the four corners of the Schwinn decision, they perceived a significant and sufficient difference, one, if you will, of degree, that Sylvania made no attempt at all whatsoever to absolutely stop intra-brand competition. Its locations practice produced a lessening in the number of dealers. It went down in San Francisco, it went down in New York, it went down in St. Louis, all the major metropolitan areas, and in Sacramento, while it went down from 19 to I think the record shows 3, rather than one, but we will not quibble about that, it went down, the market share went down. Sylvania's dealers in Sacramento -- and let's call it Handy Andy all by itself, if you will -- yielded 13 percent of the inter-brand market to Sylvania in

Sacramento, compared to a nationwide average of 4 or 5 percent. For a struggling manufacturer, that is remarkable and --

QUESTION: What was the previous share?

MR. POPOFSKY: In Sacramento, it was --

QUESTION: Two percent?

MR. POPOFSKY: Two percent, one or two percent. So by cutting down the number of dealers and by in effect saying Handy Andy, you promote us, we will improve our competitive potential inter-brand, that is what happened precisely in Sacramento. It also happened elsewhere, but it didn't happen so well in San Francisco. There they only got --

QUESTION: It may have been just a good product.

MR. POPOFSKY: Pardon?

QUESTION: It may have been just a good product.

MR. POPOFSKY: It may have been just a good product, and cause and effect is, I suppose, always difficult in circumstances like this, Justice White. I think it is a good product, but it takes more I think than a good product to sell TV sets.

QUESTION: You don't know what it would have been if it had been 19 dealers?

MR. POPOFSKY: Pardon?

QUESTION: You don't know what it would have been if there had been 19 dealers?

MR. POPOFSKY: I don't know if -- obviously we cannot speculate, but I think we have to assume that manufacturers in competing try to stay, are not proceeding irrationally. I think we have to assume that from an economic point of view Sylvania rationally concluded that if it was to offer competition with RCA and Zenith in the major demand lines, it had to do something different. That was the nature of the business problem. And whether or not we can say in retrospect if they had kept 19 they would have achieved 13 percent, we can say one thing, but cutting down the number of dealers they did achieve a remarkable penetration in the Sacramento area.

QUESTION: After they --

MR. POPOFSKY: After they had cut down the number of dealers. Now, to my mind -- I won't get involved in a Humean-type of discussion with Your Honor, but to my mind cause and effect can be somewhat inferred from those facts. And I think it was intelligent for Sylvania to make the judgment it did and to try and stay in the market by limiting, if you will, the competitive outreach of its dealers but cutting down the number and adopting, let's assume because we've lost the Colgate question to the jury, by adopting a vigorous vertical agreement designating the location.

QUESTION: You started to tell us what happened in San Francisco and I --

MR. POPOFSKY: In San Francisco --

QUESTION: -- I missed that in the briefs. I didn't know what happened in San Francisco.

MR. POPOFSKY: In San Francisco, I think it is in one of the footnotes, Your Honor, they managed to achieve only 2.5 percent, even with this cut-down. For that reason, they decided they would take on Young Brothers. Well, Young Brothers was the kind of competitor which Continental T.V. didn't want in San Francisco. So, exercising its right of dealer independence, if you will, Continental T.V. said, well, if you take on Young Brothers, we are going to get out of the San Francisco market. And I think there is more than a suggestion in this record that everything that happened in Sacramento was in retaliation, that Continental T.V., believing there were options available to it, believing it could force a weak manufacturer such as Sylvania to follow its will, simply said we will open in Sacramento and let's see if you have the wisdom to do something about it.

QUESTION: Mr. Popofsky, if I remember the franchise agreement correctly, Sylvania did not in writing commit itself not to open additional dealerships, did it?

MR. POPOFSKY: It did not. It made no commitment in writing, but the record was unequivocal that it announced an "elbow room" practice in nice sales jargon to reflect what was a locations practice: There was no question that all dealers were authorized to sell only from designated or approved

locations. The jury I think under those instructions must be assumed to have found that there was in fact a further agreement.

QUESTION: I understand that the evidence showing the restriction on the dealer, but what is the character of the evidence showing the commitment, if any, by Saylvania --

MR. POPOFSKY: There is none.

QUESTION: -- not to appoint too many dealers?

MR. POPOFSKY: There is none whatsoever. There is only the announcement of policy.

QUESTION: Well, there is the language about providing franchised dealers maximum sales potential, I suppose that is what is involved.

MR. POPOFSKY: Maximum sales potential, yes. I think that is about the --

QUESTION: But that is the closest thing there is to it?

MR. POPOFSKY: That's correct. And conversely I would say that any dealer, including Continental T.V., had the opportunity on ten days notice to tear up the franchise agreement and buy Philco, which was then still in business, and to buy RCA and to buy Zenith. It was a two-way street, it worked both ways, and Continental walked both sides of the street, as this record demonstrates, and that is part of the reason why we think that when we go beyond the Ninth Circuit in the stare

decisus perspective and we take the literal language of Schwinn and we apply it to a locations practice and we say its full breadth would indeed strike it because a locations practice is on any word inhibitory, prohibitory, whatever, it is a post-sale restraint, then we do in fact invite this Court to re-examine Schwinn. And it is to that now that I would like to address myself and going beyond now the Ninth Circuit perspective.

QUESTION: Just before you do, I take it there is no -- it may have been impractical for a dealer to solicit outside close to another dealer's location, but legally he was free to do so?

MR. POPOFSKY: Legally he was free to do so. In any metropolitan area, in a locations practice such as Sylvania or any other of which we are aware, there are always multiple dealers. It is only in the rare circumstance where you have got smaller communities where you end up with just one dealer being authorized. In Salinas, California, for example, there was only one dealer that was authorized, and it was Continental T.V. They had a "monopoly" inter-brand in Salinas. In Sacramento, they say that is what happened, Handy Andy yielded -- it was a bigger market, but Handy Andy was yielded a monopoly they say, in Sacramento.

But in the major metropolitan areas, the natural result is that you have fewer but still several dealers who do in

fact compete with one another, and that is in this record.

QUESTION: And who advertise city-wide?

MR. POPOFSKY: Advertise city-wide, have the right to advertise city-wide, and indeed Continental if it could economically have done so --

QUESTION: And deliver city-wide?

MR. POPOFSKY: And deliver city-wide. The record shows, for example, that Continental T.V. did advertise pretty extensively in northern California and that it did make sales and deliveries in more than fifty miles from its particular stores. Its practice was to send salesmen out and show the sets in the homes, and it had quite an outreach beyond the normal just walk-in trade. But there was in fact no contractual inhibition of any kind and character to sales 50 or 100 or 200 miles away. But no one I think has ever deceived themselves into thinking that a dealer in Chicago could sell in New York. That is just not practical. And that, of course, was the whole point of a locations practice, was to cut down the number of dealers.

Welll, now I would like to move, if I could, directly to the Schwinn per se rule and its language because we think, as suggested throughout these proceedings, mostly in footnotes in the lower courts, of course, that Schwinn ought to be re-considered. And as I indicated previously, in our judgment the Schwinn language is capable, if read broadly, of reading on

a locations practice. So if we read it that way and read it beyond the Ninth Circuit interpretation, which we would urge upon this Court as correct, then we come to this:

In Schwinn, this Court flatly recognized, as we read the opinion and as Justice Stewart noted in the dissent, that the overall effect of Schwinn's distribution system was in fact pro-competitive viewed in the inter-brand sense; that although it was restrictive, although it was very tightly restrictive in its compartmentalization at the distributorship level, it nonetheless furthered inter-brand competition. There the inter-brand competition came from the so-called mass merchandisers, Sears's, Penny's, Wards, and from what were then the rather cheaper Japanese imported bicycles.

Nonetheless, this Court felt that it was appropriate to strike on a per se basis those restraints which went beyond what they viewed as the reasonable way to compete, and it did so on the basis of the per se language which is, of course, all familiar to you.

Now, the only way we think it appropriate to read that result, in light of the conceded benefits to inter-brand competition which resulted from the Schwinn system, is to look for a non-economic justification, and we have advanced one in our brief, and that non-economic justification seems to our mind to be that this Court, in its per se language and its articulation based on the restraint of alienation, was saying

that dealer sovereignty or dealer freedom of choice, if you will, is the paramount antitrust value which a legal system under the antitrust laws ought to further in vertical distribution relationships.

That way, it seems to us, the dissent can be reconciled with the majority, and it seems to us, too, that the particular language of the per se rule begins to make sense insofar as it distinguishes on the one hand between sales and on the other hand between consignments and agency relationships.

What is the result of that? The result of that is, it seems to us, that it has distorted antitrust values, that what it has done is it has said that although there are legitimate inter-brand competitive concerns. Indeed, competition is a central concern; nonetheless, we will take one from the many and isolate that as the primary concern, namely the dealer, and the consequence of that is in our judgment clearly, unequivocally harm to inter-brand competition, harm to the ability of manufacturers to compete on a near-brand basis, and harm to the consumer.

What it really yields is the notion: once a dealer is authorized somewhere, the per se language of Schwinn means that he is authorized everywhere. Now, let me test that, if I can, with Your Honors, because I think it is tantamount to saying that trade must follow the flag, that if Continental T.V.

chooses to plant its flag in Sacramento or anywhere else, Sylvania is obligated to deal with it there or anywhere else.

Now, I heard Mr. Miller say, well, perhaps Sylvania would not have to deal with the dealer in Sacramento, it would have to ships perhaps to it in San Francisco and then Continental T.V. could take care of the transshipment to Sacramento.

It is perfectly obvious under that system that Sylvania sets are going to be sold from an unauthorized location by Continental, holding itself out as a seller of Sylvania sets in Sacramento. But more, what about volume? Must Sylvania continue to supply volume in San Francisco sufficient to transship it to Sacramento?

Why, surely if Sylvania did not, if we said we will cap on a lid on volume, we will be said to have been restraining the freedom of the dealer to do as he wants to with goods, it will be somehow impairing the relationship, the dealer freedom will be in fact impaired.

And what about credit, once he moves into Sacramento? Is Sylvania, who had been authorizing the credit, going to be required to finance the credit so that the merchandise wanted in Sacramento can be had?

It seems to us that in fact what really is being urged by the application here to a locations practice of the per se rule of Schwinn, is that once you are a dealer, you are

a dealer everywhere, that the manufacturer is obligated to deal with you, and he cannot effectively cut you off.

Under Albrecht, it is inconceivable that this Court or any other would not find some form of concerted action. Indeed, that was tried to the jury here and it was perfectly clear from the evidence that a jury could possibly find that in the realtionships between any manufacturer and dealer, once they started buying and selling, that there is concerted action.

It is true that Colgate would protect Sylvania against a stranger. And then, of course, is the irony of the entire thing: If a stranger came to Sylvania in Sacramento and said, I want your goods, I want to buy Sylvania and I want to hold myself up as a Sylvania dealer in Sacramento, Colgate would provide a valuable and meaningful tool for saying no, I have the right as a manufacturer of dealer selection, I can under the antitrust laws determine who is going to buy where and who is going to sell where, and that is a legitimate tool of inter-brand competition. Colgate would say we could say that to a stranger but does it really make sense for Schwinn to say, no, you cannot say that to an existing dealer, an existing dealer who once franchised somewhere because of the language, the particular language of the Schwinn opinion, with its questionable historic antecedence, I would respectfully submit, that that particular language compels Sylvania to

continue doing dealer business, no matter what the dealer does, no matter what the character of the business of the dealer.

There are, after all, a number of ways the dealer can change his business operations. He cannot expand his locations from one to four to eight.

QUESTION: Mr. Popofsky, doesn't your argument prove a little too much? You say "no matter what the dealer does." Suppose he doesn't sell any merchandise, for example? Or suppose he sells it in a dirty store or a small store? Or suppose he misrepresents the kind of merchandise he is selling? Aren't there thousands of reasons why you can terminate a dealer?

MR. POPOFSKY: I think there should be thousands of reasons why.

QUESTION: But do you think Schwinn gives a guarantee that no matter what he does?

MR. POPOFSKY: I would hope not, Your Honor, but I think we are right back to the question --

QUESTION: I think really you are saying that the -- wouldn't it be more accurate to say your argument is that, read the way your opponent reads Schwinn, it would prohibit the manufacturer from terminating a dealer for selling too much merchandise?

MR. POPOFSKY: I would think, Your Honor, that the

way that the opposition reads Schwinn raises the spectre that any number of heretofore acceptable reasons for dealer termination are now suspect, because all, despite this inhibitory language, all are capable of being read as in some way restricting the dealer's economic freedom to sell to whom and where and in the manner he might choose. It really depends on whether you want to read Schwinn as broadly as some trial courts have, and have suggested that if you have $25 you must sell. If you are going to read it as broadly as that, then I dare say you really have deprived the manufacturer of every tool available to further inter-brand competition.

On the other hand, if you do read it more narrowly and try to approach it the way the Ninth Circuit did, I think what you would conclude is that there are a number of vertical practices that ought not and were not struck down by Schwinn. One would be a locations practice, I would submit. Another would be an exclusive dealing practice. Historically, there has been no precedent, no precedent which has suggested that the normal traditional tool of established and exclusive distributorships in the name of furthering your inter-brand competitive potential, absent monopoly, so long as competing brands are available, that that would be in any way illegal.

The purpose, the effect of that kind of distribution system is substantially the equivalent of Sylvania.

QUESTION: We can agree with you and affirm without

overruling Schwinn.

MR. POPOFSKY: We can, Your Honor. We would urge it. We would also urge the alternative, if for any reason the literal language of Schwinn were to be read as applicable to a locations practice. We do not stand before this Court and invite the Court to overrule Schwinn easily.

QUESTION: I thought that is what you were doing.

MR. POPOFSKY: I am addressing the potential --

QUESTION: Unless I misunderstood you.

MR. POPOFSKY: I am addressing the potential, Mr. Justice Marshall, that a reading of Schwinn could be sufficiently broad to literally strike a Sylvania practice. If that were the reading, contrary to the Ninth Circuit, and contrary to the argument that we have made at all stages in this litigation, if that were the reading then we would urge a re-examination of Schwinn for all the reasons we've suggested.

QUESTION: To warrant these location restrictions, do they have to be imposed wholly by the manufacturer or may they be -- can the scheme appear as a piece of paper and a map signed by all the dealers and the manufacturer?

MR. POPOFSKY: Well, if this particular type of vertical restraint, a locations practice, or perhaps any other, even a Schwinn type, are essentially the product of a dealer originated scheme, let's call it a -- in the economic literature, Professor Posner particularly calls it a dealer

originated cartel -- then I think a wholly different analysis obtains. Then you --

QUESTION: Well, it may be a wholly different analysis, but how do you come out on it?

MR. POPOFSKY: Well, how you come out I think is that the Topco rule would strike it as a horizontal agreement, and the United States v. General Motors would strike it as a horizontal agreement to which the manufacturer had become the agent.

QUESTION: Well, what about -- what if the proof was that, although the plan originated in the manufacturer, every dealer surely knew about it, and when you put on a dealer he asks the manufacturer, well, where are my boundaries, where are my neighbors, who are my nearest neighbors?

MR. POPOFSKY: Well, I --

QUESTION: So that in the long run you have a -- everybody is a party to the agreement, all the dealers and the manufacturer.

MR. POPOFSKY: But there is I think a fundamental difference in terms of where the plan originates, and the difference is addressed by Professor Posner in his article we cited, among other noted economists. The difference is this: If the manufacturer is creating these vertical restraints, these vertical distribution practices, which have as their practice some kind of limitation upon intra-brand competition

at the dealer level, the manufacturer is doing it, he is doing it with the full realization that he is increasing his costs of getting the goods to the consumer, because the distribution cost to the manufacturer can only have the effect of increasing the cost to the consumer and cutting down the manufacturer sales.

So the rational, necessary point of view of the manufacturer is, I will concede to the dealers the minimum necessary to effectively get my goods to the consumer, I will do that which prudence tells me I must do to market inter-brand, and I will do no more. And if I have to have a locations clause; sobeit. If I have to have, in Schwinn a much more rigid case, maybe or maybe non-legal, sobeit. But in Sylvania's case, it was the locations clause, a locations practice which was thought to be the minimum necessary.

Now, if it is coming the other way around, if it is coming from the dealers, they are going to do the maximum. They are going to say we want, our interest is to increase our profits, pure and simple. It is anti-consumer. That is the dealer's perspective. And from the dealers' point of view, they are going to do the maximum they can get away with, the maximum their bargaining power will compel a manufacturer to concede.

So the origination, the purpose for the adoption of a vertical restraint, viewed in economic terms, is crucial to

a determination of why it is in fact beneficent, why a vertical restriction can --

QUESTION: Do you apply the same analysis to the resale price maintenance? I think you would have to.

MR. POPOFSKY: There is no question that the legal scholars have said that many of the arguments advanced in defense of any vertical, territorial or customer restraint can equally be advanced in favor of a resell price restraint.

I will, if I may, rely upon Mr. Justice Brennan's concurring opinion in White Motor, in which he addressed that very fact, that very contention, and expressly noted that there was a fundamental difference in his view, and we endorse it, between vertical resell price maintenance on the one hand and territorial restraints on the other, and that is that with a price scheme you deprive the dealer of his ability to respond to inter-brand competitive pressures. Whereas, with a territorial practice, such as a locations practice, the dealer is free to respond inter-brand as to price to any move by RCA, Zenith or whatever.

QUESTION: Unless the move comes from outside the territory?

MR. POPOFSKY: Unless the move comes from outside the territory. Now, I think it is a decisive difference between price and between territorial and customer restraints. We would stand on that difference. We certainly do not urge

reconsideration of Dr. Miles or any of the seventy-year tradition governing vertical price fixing. We don't think it is necessary. We don't think it is economically compelled, despite what some of the commentators have said.

QUESTION: Let me ask you: I haven't read Professor Posner's article, but does he urge the reconsideration of Schwinn itself? He argued the case, I think, didn't he?

MR. POPOFSKY: Yes, he did. He argued the case on behalf of the United States. He has since recanted, if I can use that term. He has said he believes he was wrong, he believes Schwinn was vastly too rigorous a view. He has --

QUESTION: He was just representing the United States?

MR. POPOFSKY: He was just representing the United States.

QUESTION: He was not pretending for a per se rule, either. The government didn't want one in the Schwinn case.

MR. POPOFSKY: He has on behalf of one of the soda pop manufacturers, submitted to Congress a formal statement in which he states he believes Schwinn was in fact wrong and that he was wrong when he urged that Schwinn was illegal.

QUESTION: He did not urge a per se rule

MR. POPOFSKY: He did not urge a per se rule, but he urged that Schwinn was illegal.

QUESTION: Yes.

MR. POPOFSKY: And he has even backed away from that.

QUESTION: And he very likely didn't determine the policy the United States urged in that case anyway.

MR. POPOFSKY: Undoubtedly. I think someone else was the Solicitor General.

QUESTION: He wasn't in the antitrust division?

MR. POPOFSKY: No. And I think there was someone else there at the time and perhaps it was the Solicitor General of the United States who made those determinations ultimately.

QUESTION: What would you say, counsel, about a practice of which the manufacturer owned all the outlets and buildings and then required as part of the contract the arrangement that they use these as the outlets?

MR. POPOFSKY: You run into potential tie problems, you run into potential exclusive dealing issues, but I don't think that in and of itself would change vertical restriction law particularly. I would say that there is a natural consequence of the Schwinn rule which is a heightening or at least a potential heightening of vertical integration by manufacturers, despite the assurances of the United States in Schwinn that Schwinn would not vertically integrate. It did proceed to do precisely that in the face of the Schwinn ruling by this Court.

So I think, if I may speak to Your Honor's point, that there is a danger if one is as restrictive as Schwinn

appears literally to be in the vertical restraint area, that one will compel manufacturers to vertically integrate, either vertically integrate on the one hand or go out of business on the other, which was Sylvania's problem. As to the latter, I would simply state that we have addressed two additional issues, both of which are contingent, in our briefs, the failing company and the retroactive activity defense.

QUESTION: Before you move on to that, Mr. Popofsky, do you accept in this case as fact, given the findings of the jury and the findings of fact of Justice Clark, acting as district judge, that it was not Sylvania alone that decided to terminate its doing business with Continental but that it was Handy Andy that -- it was at Handy Andy's instrigation that Sylvania terminate it?

MR. POPOFSKY: Well, I think there is certainly evidence in this record that Handy Andy complained. There is no evidence beyond that. But let's assume that we take it as established --

QUESTION: I took it -- I have read Finding 16 as pretty much saying that, doesn't it?

MR. POPOFSKY: Yes, Finding 16 certainly goes beyond that. We cited --

QUESTION: Well, not beyond what I have said, does it?

MR. POPOFSKY: Not beyond what you've said. But I

would say that, let us assume or postulate that the actual termination was at the instigation of Handy Andy.

QUESTION: Handy Andy.

MR. POPOFSKY: Handy Andy in fact complains to Sylvania, hey, they are in there without authorization, get them out.

QUESTION: And it is your duty to get them out?

MR. POPOFSKY: And it is your duty under your practice. Mr. Justice Clark, in his conclusion three, attached no significance to that, in his conclusions of law. He saw the illegality in the vertical restraints alone. That is all he addresses in his conclusions of law.

But I would say that it has been historically true in all cases that have addressed the matter in terminations invovling exclusive dealerships, and I think particulary of Schwing v Hudson and -- these are all lower court decisions -- that almost as a matter of course, when someone has been terminated, somebody else has complained or somebody has requested an exclusive at the expense of somebody else. So in and of itself the fact that there is a request does not change the legal character of the question.

QUESTION: The Court of Appeals earlier in its opinion talked about that dichotomy and then concluded that it mattered not.

MR. POPOFSKY: That it mattered now. After all, if

Sylvania's agreement with Continental T.V. was in fact lawful, a locations practice was lawful, then it doesn't become unlawful because a dealer has said enforce that which is lawful.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Miller?

MR. MILLER: Yes, Your Honor.

MR. CHIEF JUSTICE BURGER: You have about four minutes.

ORAL ARGUMENT OF GLENN E. MILLER, ESQ.,
ON BEHALF OF THE PETITIONERS -- REBUTTAL

MR. MILLER: Thank you.

It is, of course, the purpose and effect that we view as important and not counsel's argument that some triviality may cause a cutoff on a dealer and rightfully so under Schwinn. We view Schwinn as saying that it is only when the purpose and effect of whatever the control the manufacturer has over the dealer amounts to a restriction on the territory or the customers that Schwinn and Topco forbid it.

And it is our case exactly that the purpose and effect was to keep us out of Sacramento. The Court need not go beyond that narrow issue and go to the next step and ask whether a restraint on the location without that purpose and effect would also be illegal under Schwinn. We are not necessarily arguing that, but I think that it would follow because

I don't imagine a case where such restraint on location resale would be used without having the inevitable effect of restricting territory or customer.

Next, counsel says that this business of benefits to inter-brand competition are important and that Schwinn is wrong, Topco is wrong in holding to the contrary. Well, all I can say on that, Your Honors, is that Topco says that inter-brand benefits will not be considered where certain diminishment or destruction to intra-brand competition takes place.

But further than that, I think that testimony of their own expert witness in this case I think illustrates the wisdom of Topco. Preston, their economic witness, testified that economic theory in its present state could not help decide the question of whether there was any net pro-competitive gain to inter-brand competition from the use of this restraint. He furthermore said he couldn't even tell whether there was a necessary connection between the use of Sylvania's restraint and their ability to gain or hold their market share. So that the majority below really is saying this is a jury issue, when Sylvania's own expert witness could not answer that question.

QUESTION: Well, he said that it was not settled and that there is economic theory on both sides, expert opinion on both sides. And if that be so, why should there be a per se antitrust rule if it is illegal? I am echoing Judge Duniway's little concurring opinion.

MR. MILLER: Yes, and I would cite to you the majority in Topco that gives the answer of the public policy issue, left properly for Congress' determination, and that certainly --

QUESTION: Congress has determined in section 1 of the Sherman Act that combinations of restraint of trade are illegal, but if there is a difference of expert economic theory as to whether or not this kind of arrangement is or is not pro-competitive or anti-competitive, why should there be a per se rule on either side of it?

MR. MILLER: I think Topco says more than that. Topco says destruction to one type of competition --

QUESTION: You are talking about the evidence in this case --

MR. MILLER: Yes.

QUESTION: -- as to whether it is pro- or anti-competitive?

MR. MILLER: Yes. In spite of any supposed benefits to inter-brand, I think Topco says in spite of. We are not going to look at that aspect of it, but once we find certain destruction or diminishment to one type of competition, that is enough, it is a per se violation.

QUESTION: Well that was, we agreed, a horizontal agreement?

MR. MILLER: Right. Now --

QUESTION: Mr. Miller, could I ask one other question.

MR. MILLER: Surely.

QUESTION: The specific questions put to the jury, the one they answered yes, the second one was did Sylvania engage in a contract conspiracy and so forth in restraint of trade and violation of the antitrust laws with respect to locations restrictions alone. Who do you understand the parties to the conspiracy to have been?

MR. MILLER: The parties to the conspiracy were all of the dealers that were part of the system of restraints. Handy Andy was one of those dealers.

QUESTION: I see.

MR. MILLER: At Handy Andy's insistence they moved to enforce their restraints against us in Sacramento.

QUESTION: Was it part of your theory that your client was a party to the conspiracy?

MR. MILLER: Initially, yes, until it broke away.

QUESTION: Right.

MR. MILLER: Let me conclude, Your Honors, by saying this: In 1911, this Court, in Dr. Miles, gave a strong argument for the public policy reason for the eventual Schwinn per se rule when it said a manufacturer having sold its product at prices satisfactry to itself, the public is entitled to whatever advantage may be derived from competition and

subsequent traffic. We believe that rule has as much significance today for the same reason as it did in 1911.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Miller. Thank you, gentlemen, the case is submitted.

[Whereupon, at 2:35 o'clock p.m., the case in the above-entitled matter was submitted.]

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