The facts do not lead to a predictable outcome because the implied terms of the contract do not state how to perform in a specific situation. One party can take advantage of the contractual silence to thwart the right of the counterparty to receive what is provided for expressly in the contract. Fact finders can review the same evidence and come to different legal conclusions. As a result, bringing a net profits case into a courtroom means the parties are entering into a high stakes affair where millions of dollars are on the line and an interpretation of the relevant legal doctrine does not lead to predictable outcomes. The question for both creative talent and studios is whether they are willing to roll the dice.

Recognizing the Importance of Intrabrand Competition in High Technology Markets: The Problem with Large Retailors & Vertical Territorial Restraints

By Kyle Colonna*

I. Introduction

The current antitrust regime places a premium on interbrand competition. Interbrand competition is competition between brands, such as Apple competing with Google in the smartphone market. Intrabrand competition is, on the other hand, competition within a brand. For example, intrabrand competition occurs when Apple stores compete with each other or when Apple stores compete with Wal-Mart stores that sell Apple products. In many instances, the

---

* Contributing Editor, Case Western Reserve Journal of Law, Technology & the Internet; B.A., University of Illinois at Chicago (2010); J.D. Candidate 2013, Case Western Reserve University School of Law. The author would like to thank Thomas A. Piraino, Jr. for his guidance.


3. See Harry McCracken, iPhone v. Android: The Smart Phone Wars Rage On, TIME (Oct. 5, 2010), http://www.time.com/time/business/article/0,8599,2023452,00.html (noting “the battle between the iPhone and Android is in its early stages”).

4. Cont'l T. V., 433 U.S. at 52 n.19 (“Intrabrand competition is the competition between the distributors - wholesale or retail - of the product of a particular manufacturer.”).

5. The key to determining intrabrand competition is correctly defining the product or service the party provides. For instance, an Apple Store that sells iPhones and a nearby cellular service provider that sells iPhones is intrabrand competition. The same label, i.e., Apple, is being sold at different distributors. At the interbrand level, however, Apple and Google compete in the smart phone market. The cellular service provider is a retailer of a service. So it competes interbrand against other cellular service providers.
introduction of vertical restraints enhances interbrand competition at
the expense of diminishing intrabrand competition.

Generally, a manufacturer imposing vertical price restraints upon
its distributors will create efficiencies. Instead of competing on price,
the distributors compete by investing in and providing superior
customer service and other non-price factors. One form of vertical
restriction is using exclusive territorial restraints, whereby an
upstream manufacturer will “assign distributors to a particular
geographical area or sales territory with the objective of restricting
intrabrand competition.” These agreements prohibit distributors of
the same brand from operating in one another’s territory. For
example, Apple may forbid its product retailers from operating within
a certain proximity of another retailer selling Apple products or one of
Apple’s stores.

intraprand competition by limiting the number of sellers of a particular
product competing for the business of a given group of buyers,” and
“vertical restrictions promote interbrand competition by allowing the
manufacturer to achieve certain efficiencies in the distribution of his
products”).

7. Id. (“Vertical restrictions promote interbrand competition by allowing
the manufacturer to achieve certain efficiencies in the distribution of his
products . . . for example, new manufacturers and manufacturers
entering new markets can use the restrictions in order to induce
competent and aggressive retailers to make the kind of investment of
capital and labor that is often required in the distribution of products
unknown to the consumer. Established manufacturers can use them to
induce retailers to engage in promotional activities or to provide service
and repair facilities necessary to the efficient marketing of their
products. Service and repair are vital for many products, such as
automobiles and major household appliances. The availability and
quality of such services affect a manufacturer’s goodwill and the
competitiveness of his product.”).

(2000) (“A single manufacturer’s use of vertical price restraints tends to
eliminate intrabrand price competition; this in turn encourages retailers
to invest in tangible or intangible services or promotional efforts that
aid the manufacturer’s position as against rival manufacturers.”).

9. Shanteu Dutta et al., Vertical Territorial Restrictions And Public
Policy: Theories And Industry Evidence, 63 J. MarC.G., 121, 121 (1999),
available at http://research3.bus.wisc.edu/file.php/155/
Vertical_Territorial_Restrictions.pdf.

10. See, e.g., Graphic Prods. Distrib., Inc. v. ITEK Corp., 717 F.2d 1560,
1569 (11th Cir. 1983) (describing a distribution system with vertical
non-price exclusive territorial restraints).

Product turnover is significantly greater in high technology
markets than other markets. As technology increases in complexity,
consumers will likely require more guidance from vendors of high
technology products than from vendors of other types of products.
Superior customer service is integral to providing sufficient
information to customers purchasing or dealing with technology.
However, by geographically diminishing competition, vertical
territorial restraints weaken the incentive to compete in providing
superior customer service. While interbrand competition appears
more important than intrabrand competition when considering
vertical restraints, that determination depends on the circumstances
and the market characteristics.

The exceptional nature of high technology markets assures –
particularly in the cases of larger retailers or big-box stores – that
decreasing or eliminating intrabrand competition will adversely affect
consumers in certain geographic markets. The current school of
introduction of vertical restraints enhances interbrand competition at the expense of diminishing intrabrand competition. 10

Generally, a manufacturer imposing vertical price restraints upon its distributors will create efficiencies. 7 Instead of competing on price, the distributors compete by investing in and providing superior customer service and other non-price factors. 8 One form of vertical restriction is using exclusive territorial restraints, whereby an upstream manufacturer will “assign distributors to a particular geographical area or sales territory with the objective of restricting intrabrand competition.” 9 These agreements prohibit distributors of the same brand from operating in one another’s territory. 10 For example, Apple may forbid its product retailers from operating within a certain proximity of another retailer selling Apple products or one of Apple’s stores.

6. Cont’l T. V., 433 U.S. at 54-55 (finding “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,” and “vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products”).

7. Id. (“Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products . . . for example, new manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products. Service and repair are vital for many products, such as automobiles and major household appliances. The availability and quality of such services affect a manufacturer’s goodwill and the competitiveness of his product.”).

8. Legin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 890 (2006) (“A single manufacturer’s use of vertical price restraints tends to eliminate intrabrand price competition; this in turn encourages retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer’s position as against rival manufacturers.”).


10. See, e.g., Graphic Prods. Distrib., Inc. v. ITEK Corp., 717 F.2d at 1560, 1569 (11th Cir. 1983) (describing a distribution system with vertical non-price exclusive territorial restraints).
Recognizing the Importance of Intrabrand Competition in High Technology Markets

The current antitrust framework, including an overview of Section 1 of the Sherman Antitrust Act, the rule of reason, vertical and horizontal restraints, and court's current method of evaluating vertical restraints. Section III discusses the distinct nature of high technology markets, the importance of customer service to consumers of high technology products, and the hazard large, independent retailers without sufficient intrabrand competition pose to consumers. Lastly, Section IV proposes a three-pronged test courts should apply when analyzing vertical territorial restraints in high technology markets.


This section provides some necessary background on the structure of current antitrust law and how courts apply that law to analyze the validity of vertical restraints. Section A will introduce Section 1 of the Sherman Antitrust Act. Section B identifies the "rule of reason" as the predominant analytical framework for assessing vertical restraints under Section 1 of the Sherman Act. Finally, Section C presents the rule of reason toward vertical restraints established by the seminal Supreme Court case, Continental T. V. v. GTE Sylvania.

A. Section 1 of the Sherman Antitrust Act

Courts apply the rule of reason when analyzing vertical restraints of trade under Section 1 of the Sherman Antitrust Act. This section states:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony....

Legal scholars do not entirely agree on Congress's intent behind the Sherman Act. The Sherman Act was promulgated during a time when the public feared large institutions. The "Harvard School" approach incorporates a fear of large institutions and the acquisition of substantial market share and concentration. By contrast, the "Chicago School" posits that Congress viewed consumer welfare as the exclusive goal of antitrust laws. As Justice Brandeis suggested in Board of Trade of City of Chicago v. United States, courts should analyze the effects of vertical territorial restraints in high technology markets by considering the characteristics peculiar to the situation. This Comment recommends courts adopt a three-pronged test that clarifies the overall effects of a vertical territorial restraint in a high technology market and whether consumers are being harmed by the particular arrangement.

Section II explores the current antitrust framework, including an overview of Section 1 of the Sherman Antitrust Act, the rule of reason, vertical and horizontal restraints, and court's current method of evaluating vertical restraints. Section III discusses the distinct nature of high technology markets, the importance of customer service to consumers of high technology products, and the hazard large, independent retailers without sufficient intrabrand competition pose to consumers. Lastly, Section IV proposes a three-pronged test courts should apply when analyzing vertical territorial restraints in high technology markets.

18. See Rodes, supra note 1, at 962 (noting that courts apply the rule of reason by examining "the particularities of the relevant business under consideration and the restraint's history, nature, and effect.").
20. William L. Letwin, Congress and the Sherman Antitrust Law: 1887-1890, 23 U. Chi. L. Rev. 221, 221 (1955-1956) ("The deceptive simplicity of the Sherman Act has led many historians to believe that the intention of Congress was equally simple. Although they have not agreed on what the intention was, these historians have shared the view that the motives of Congress was elementary and unmixed and have differed chiefly over whether Congress was sincere.").
21. Id. at 222 ("No one denies that Congress passed the Sherman Act in response to real public feeling against the trusts.").
22. Thomas A. Piraino, Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century, 82 IND. L.J. 345, 346 (2007) ("In the 1960s and 1970s, the courts and agencies adopted the economic theories of a group of Harvard scholars who assumed that firms with market power would act in an anticompetitive manner. Under the 'Harvard School' approach, the courts and agencies presumed the illegality of any mergers, joint ventures, or agreements that allowed firms to obtain, enhance, or exercise market power, regardless of whether the conduct had the potential to benefit consumers by lowering prices or increasing output.").
thought identifies consumer welfare as the exclusive goal of antitrust laws. As Justice Brandeis suggested in *Board of Trade of City of Chicago v. United States*, courts should analyze the effects of vertical territorial restraints in high technology markets by considering the characteristics peculiar to the situation. This Comment recommends courts adopt a three-prong test that clarifies the overall effects of a vertical territorial restraint in a high technology market and whether consumers are being harmed by the particular arrangement.

Section II explores the current antitrust framework, including an overview of section 1 of the Sherman Antitrust Act, the rule of reason, vertical and horizontal restraints, and court's current method of evaluating vertical restraints. Section III discusses the distinct nature of high technology markets, the importance of customer service to consumers of high technology products, and the hazard large, independent retailers without sufficient intrabrand competition pose to consumers. Lastly, Section IV proposes a three-pronged test courts should apply when analyzing vertical territorial restraints in high technology markets.


This section provides some necessary background on the structure of current antitrust law and how courts apply that law to analyze the validity of vertical restraints. Section A will introduce section 1 of the Sherman Antitrust Act. Section B identifies the “rule of reason” as the predominant analytical framework for assessing vertical restraints under section 1 of the Sherman Act. Finally, Section C presents the rule of reason toward vertical restraints established by the seminal Supreme Court case, *Continental T. V. v. GTE Sylvania*.

A. Section 1 of the Sherman Antitrust Act

Courts apply the rule of reason when analyzing vertical restraints of trade under section 1 of the Sherman Antitrust Act. This section states:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . . .

Legal scholars do not entirely agree on Congress's intent behind the Sherman Act. The Sherman Act was promulgated during a time when the public feared large institutions. The “Harvard School” approach incorporates a fear of large institutions and the acquisition of substantial market share and concentration. By contrast, the “Chicago School” posits that Congress viewed consumer welfare as the exclusive goal of antitrust law and how courts apply that law to analyze the effects of vertical restraints.

---

17. Robert H. Bork, *Legislative Intent and The Policy of The Sherman Act*, 9 J.L. & ECON. 7 (1966) (discussing courts' need to "distinguish between agreements or activities that increase wealth through efficiency and those that decrease it through restriction of output.").

18. See Rodes, supra note 1, at 962 (noting that courts apply the rule of reason by examining “the particularities of the relevant business under consideration and the restraint's history, nature, and effect.”).


20. William L. Lotwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221, 221 (1955-1956) (“The desipt ve simplicity of the Sherman Act has led many historians to believe that the intention of Congress was equaly simple. Although they have not agreed on what the intention was, these historians have shared the view that the motives of Congress was elementary and unmixed and have differed chiefly over whether Congress was sincere.”).

21. Id. at 222 (“No one denies that Congress passed the Sherman Act in response to real public feeling against the trusts.”).

22. Thomas A. Piraino, *Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century*, 82 IND. L.J. 345, 346 (2007) (“In the 1960s and 1970s, the courts and agencies adopted the economic theories of a group of Harvard scholars who assumed that firms with market power would act in an anticompetitive manner. Under the 'Harvard School' approach, the courts and agencies presumed the illegality of any mergers, joint ventures, or agreements that allowed firms to obtain, enhance, or exercise market power, regardless of whether the conduct had the potential to benefit consumers by lowering prices or increasing output.”).
fundamental policy concern behind the Sherman Act. Since the 1970s, courts began adopting the “Chicago School” approach, with an eye toward promoting and protecting consumer welfare while allowing greater leeway in permitting firms to expand.24

B. The Rule of Reason: The Framework for Analyzing Vertical Restraints under Section 1 of The Sherman Antitrust Act

Standard Oil Co. of New Jersey v. United States established the rule of reason. Although the Standard Oil Court did not provide substantive guidance on the rule of reason, later courts have developed an interpretive framework. An analysis under the rule of reason begins with the question of whether an agreement exists between two or more natural or legal persons under section 1 of the

23. See Bork, supra note 16 (“Congress intended courts to implement only the value we would today call consumer welfare. To put it another way, the policy the courts were intended to apply is the maximization of wealth or consumer want satisfaction.”); see also Piraino, supra note 22 (“[B]eginning in the late 1970s, the courts and agencies began to adopt the theories of a group of University of Chicago academics, who taught that the only legitimate goal of the antitrust laws was to promote consumer welfare. Under the ‘Chicago School’ approach, the courts and agencies became much less willing to prohibit competitive conduct on its face. Instead, they felt compelled to engage in an extensive factual inquiry to confirm the effects of particular conduct on consumers before finding it illegal.”).

24. Piraino, supra note 22, at 351 (noting the “Chicago” approach “led courts and agencies to become more lenient in allowing firms to acquire and exercise market power.”). In addition, a post-“Chicago School” approach is developing. See Daniel A. Crane, Chicago, Post-Chicago, and Neo-Chicago, 76 U. Chi. L. Rev. 191, 1924 (2001) (“So Chicago is unempirical. What does post-Chicago offer to take its place? The answer is: not much so far.”).

25. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 66 (1911) (“If the criterion by which it is to be determined in all cases whether every contract, combination, etc., is a restraint of trade within the intendment of the law, is the direct or indirect effect of the acts involved, then of course the rule of reason becomes the guide, and the construction which we have given the statute, instead of being refuted by the cases relied upon, is by those cases demonstrated to be correct. This is true, because the construction which we have deduced from the history of the act and the analysis of its text is simply that in every case where it is claimed that an act or acts are in violation of the statute, the rule of reason, in the light of the principles of law and the public policy which the act embodies, must be applied.”); see also Edward D. Cavanagh, The Rule of Reason Re-Examined, 67 Bus. Law. 435, 449 (2012) (“[S]tandard Oil established the Rule of Reason as the governing standard for adjudicating liability under section 1 of the Sherman Act . . . .”)

26. Id. at 440-44 (illustrating the evolution of the rule of reason).

27. 15 U.S.C.A. § 1 (2004) (requiring an agreement of some sort to establish liability under section 1 of the Sherman Act). There is no set test for the rule of reason; courts generally disagree on rule of reason analysis. The “general framework” is supposed to illustrate the most commonly utilized factors that courts apply in Section 1 cases. Three Movies of Taraneas v. Pac. Theatres, 828 F.2d 1395, 1399 (9th Cir. 1987) (“To establish a cause of action for an unreasonable restraint of trade under the rule of reason, the plaintiff must show: (1) An agreement among two or more persons or distinct business entities; (2) which is intended to harm or unreasonably restrain competition; and (3) which actually causes injury to competition.”).

28. See Jared Kagan, Note, Bricks, Mortar, and Google: Defining the Relevant Antitrust Market for Internet-Based Companies, 55 N.Y.L. Sch. L. Rev. 271, 279 (2010-2011) (“When examining a market in an antitrust case, courts must define the relevant geographic market . . . In addition to defining the geographic market in an antitrust case, it is necessary to define the relevant product market to determine ‘which products compete with the defendant’s product and thus limit or prevent the exercise of market power.’”); see also Matt Koehler, Note, The Importance of Correctly Identifying the Consumer for An Antitrust Relevant Market Analysis, 67 UMKC L. Rev. 521, 521 (1998-1999) (“Claims under the Sherman Antitrust Act and the Clayton Antitrust Act often require proof of the defendant’s market power by the plaintiff. In order to prove that a defendant possesses market power, a plaintiff must establish the relevant market which enables the court to decide if market power exists.”).

29. See Kagan, supra note 28 (noting the relevant geographic and product market analyses are distinct); see also Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962) (noting the relevant product is “determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.”); Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961) (defining the relevant geographic market as “the market area in which the seller operates, and to which the purchaser can practicably turn for supplies.”).


31. See, e.g., id. at 320 (finding the exclusive dealing contracts did not tie up a sufficient percentage of the market and applying the exclusive dealing variation of the rule of reason); Bd. of Trade of City of Chicago v. United States, 246 U.S. 231, 241 (finding nearly all trade organizations utilize restraints that restrict its members’ conduct and generally applied the quick look analysis); Toys “R” Us, Inc. v. FTC,
fundamental policy concerns behind the Sherman Act. Since the 1970s, courts began adopting the "Chicago School" approach, with an eye toward promoting and protecting consumer welfare while allowing greater leeway in permitting firms to expand.

B. The Rule of Reason: The Framework for Analyzing Vertical Restraints under Section 1 of The Sherman Antitrust Act

Standard Oil Co. of New Jersey v. United States established the rule of reason. Although the Standard Oil Court did not provide substantive guidance on the rule of reason, later courts have developed an interpretive framework. An analysis under the rule of reason begins with the question of whether an agreement exists between two or more natural or legal persons under section 1 of the

23. See Bork, supra note 16 ("Congress intended courts to implement only the value we would today call consumer welfare. To put it in another way, the policy the courts were intended to apply is the maximization of wealth or consumer want satisfaction."); see also Piraino, supra note 22 ("Beginning in the late 1970s, the courts and agencies began to adopt the theories of a group of University of Chicago academics, who taught that the only legitimate goal of the antitrust laws was to promote consumer welfare. Under the 'Chicago School' approach, the courts and agencies became much less willing to prohibit competitive conduct on its face. Instead, they felt compelled to engage in an extensive factual inquiry to confirm the effects of particular conduct on consumers before finding it illegal.").

24. Piraino, supra note 22, at 351 (noting the "Chicago" approach "led courts and agencies to become more lenient in allowing firms to acquire and exercise market power."). In addition, a post-"Chicago School" approach is developing. See Daniel A. Crane, Chicago, Post-Chicago, and Neo-Chicago, 76 U. CHI. L. REV. 1911, 1924 (2009) ("So Chicago is unempirical. What does post-Chicago offer to take its place? The answer is not much so far.").

25. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 66 (1911) ("If the criterion by which it is to be determined in all cases whether every contract, combination, etc., is a restraint of trade within the contemplation of the law, is the direct or indirect effect of the acts involved, then of course the rule of reason becomes the guide, and the construction which we have given the statute, instead of being refuted by the cases relied upon, is by those cases demonstrated to be correct. This is true, because the construction which we have deduced from the history of the act and the analysis of its text is simply that in every case where it is claimed that an act or acts are in violation of the statute, the rule of reason, in the light of the principles of law and the public policy which the act embodies, must be applied."); see also Edward D. Cavagnah, The Rule of Reason Re-Examined, 67 B. L. REV. 435, 440 (2012) ("Standard Oil established the Rule of Reason as the governing standard for adjudging liability under section 1 of the Sherman Act . . . .").

26. Id. at 440-44 (illustrating the evolution of the rule of reason).

27. 15 U.S.C.A. § 1 (2004) (requiring an agreement of some sort to establish liability under Section 1 of the Sherman Act). There is no set test for the rule of reason; courts generally disagree on rule of reason analysis. The "general framework" is supposed to illustrate the most commonly utilized factors that courts apply in Section 1 cases. Three Movies of Tarranta v. Fac. Theatres, 828 F.2d 1395, 1399 (9th Cir. 1987) ("To establish a cause of action for an unreasonable restraint of trade under the rule of reason, the plaintiff must show: (1) An agreement among two or more persons or distinct business entities; (2) which is intended to harm or unreasonably restrain competition; and (3) which actually causes injury to competition.").

28. See Jared Kagan, Note, Bricks, Mortar, and Google: Defining the Relevant Antitrust Market for Internet-Based Companies, 55 N.Y.L. SCH. L. REV. 271, 279 (2010-2011) ("When examining a market in an antitrust case, courts must define the relevant geographic market."). In addition to defining the geographic market in an antitrust case, it is necessary to define the relevant product market to determine "which products compete with the defendant's product and thus limit or prevent the exercise of market power."); see also Matt Koehler, Note, The Importance of Correctly Identifying the Consumer for An Antitrust Relevant Market Analysis, 67 UMKC L. REV. 521, 521 (1998-1999) ("Claims under the Sherman Antitrust Act and the Clayton Antitrust Act often require proof of the defendant's market power by the plaintiff."). In order to prove that a defendant possesses market power, a plaintiff must establish the relevant market which enables the court to decide if market power exists.").

29. See Kagan, supra note 28 (noting the relevant geographic and product market analyses are distinct); see also Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962) (noting the relevant product is "determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."); Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961) (defining the relevant geographic market as "the market area in which the seller operates, and to which the purchaser can practicably turn for supplies.").


31. See, e.g., id. at 320 (finding the exclusive dealing contracts did not tie up a sufficient percentage of the market and applying the exclusive dealing variation of the rule of reason); Bd. of Trade of City of Chicago v. United States, 246 U.S. 231, 241 (finding nearly all trade organizations utilize restraints that restrict its members' conduct and generally applied the quick look analysis); Toys "R" Us, Inc. v. FTC,
on an abbreviated version of the rule of reason, termed the "quick look,"\textsuperscript{32} when a firm has induced distributors to discriminate or when a considerable market inquiry is unnecessary because the suspect restraint is not so anticompetitive as to warrant per se treatment.\textsuperscript{33}

C. Vertical Restraints and Substantial Market Share: The Rule of Reason Analysis Set Forth by GTE Sylvania and Subsequent Cases

Antitrust law distinguishes between horizontal and vertical restraints.\textsuperscript{34} Horizontal restraints occur between competitors at the same level of the distribution chain.\textsuperscript{35} The vast majority of cases find horizontal agreements between competitors per se invalid due to their anticompetitive nature.\textsuperscript{36} By contrast, vertical restraints are formed between different levels of the distribution chain.\textsuperscript{37} For example, a vertical restraint imposed by Apple might require all Apple retailers to sell iPads at the same price.

221 F.3d 928, 936 (7th Cir. 2000) (finding Toys "R" Us facilitated a naked horizontal agreement at the retailer level and applying the quick look analysis); Cal. Dental Ass'n, v. FTC, 526 U.S. 756, 781 (9th Cir. 1999) (finding that a more intensive inquiry than the quick look was necessary since courts did not have substantial experience with analyzing dentists, and thereby remanded the case to apply the full rule of reason).

32. Cavanaugh, supra note 25, at 458; see also Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 89 (1984) (illustrating the quick look variation of the rule of reason being applied in a case).

33. Cavanaugh, supra note 25, at 458; see also Nat'l Collegiate Athletic Ass'n, 468 U.S. at 109 (applying "quick look" or "truncated" rule of reason analysis, holding elaborate inquiry was unnecessary to ascertain competitive merit of restraints).

34. Mark A. Lemley, Categorical Analysis in Antitrust Jurisprudence, 93 Iowa L. Rev. 1207, 1219 (2008) ("Antitrust law draws a fundamental distinction between so-called horizontal and vertical agreements.").

35. Id. ("Horizontal agreements are contracts or conspiracies among competitors--firms at the same level in the distribution chain that we would expect to compete against each other in a free market.").

36. Cont'l T.V. v. GTE Sylvania, 433 U.S. 36, 59 n.28 (1977) ("There may be occasional problems in differentiating vertical restraints 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 also Lemley, supra note 34, at 1219 ("Horizontal agreements are much more likely to be condemned as per se illegal, while analogous vertical restraints are evaluated under the rule of reason."); Jeffrey M. Knetsch, A Uniform Rule of Reason for Vertical and Horizontal Nonprice Restraints, 55 S. Cal. L. Rev. 441, 448 (1982) ("Horizontal arrangements are inherently more suspect [than vertical agreements].").

37. Knetsch, supra note 36, at 444 ("Vertical restraints are restrictions imposed upon the transfer of goods from one level of the production chain to another.").
on an abbreviated version of the rule of reason, termed the "quick look," when a firm has induced distributors to discriminate or when a considerable market inquiry is unnecessary because the suspect restraint is not so anticompetitive as to warrant per se treatment.

C. Vertical Restraints and Substantial Market Share: The Rule of Reason Analysis Set Forth by GTE Sylvania and Subsequent Cases

Antitrust law distinguishes between horizontal and vertical restraints. Horizontal restraints occur between competitors at the same level of the distribution chain.35 The vast majority of cases find horizontal agreements between competitors per se invalid due to their anticompetitive nature.36 By contrast, vertical restraints are formed between different levels of the distribution chain.37 For example, a vertical restraint imposed by Apple might require all Apple retailers to sell iPads at the same price.

221 F.3d 928, 936 (7th Cir. 2000) (finding Toys "R" Us facilitated a naked horizontal agreement at the retailer level and applying the quick look analysis); Cal. Dental Ass'n, v. FTC, 526 U.S. 756, 781 (9th Cir. 1999) (finding that a more intensive inquiry than the quick look was necessary since courts did not have substantial experience with analyzing dentists, and thereby remedied the case to apply the full rule of reason).

32. Cavangh, supra note 25, at 458; see also Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984) (illustrating the quick look variation of the rule of reason being applied in a case).

33. Cavangh, supra note 25, at 458; see also Nat'l Collegiate Athletic Ass'n, 468 U.S. at 109 (applying "quick look" or "truncated" rule of reason analysis, holding elaborate inquiry was unnecessary to ascertain competitive merit of restraints).

34. Mark A. Lemley, Categorical Analysis in Antitrust Jurisprudence, 93 IOWA L. REV. 1207, 1219 (2008) ("Antitrust law draws a fundamental distinction between so-called horizontal and vertical agreements.").

35. Id. ("Horizontal agreements are contracts or conspiracies among competitors--firms at the same level in the distribution chain that we would expect to compete against each other in a free market.").

36. Cont'l T.V. v. GTE Sylvania, 433 U.S. 36, 59 n.28 (1977) ("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 also Lemley, supra note 34, at 1219 ("Horizontal agreements are much more likely to be condemned as per se illegal, while analogous vertical restraints are evaluated under the rule of reason."); Jeffrey M. Knetesch, A Uniform Rule of Reason for Vertical and Horizontal Nonprice Restraints, 55 S. CAL. L. REV. 441, 448 (1982) ("[H]orizontal arrangements are inherently more suspect [than vertical agreements].").

37. Knetesch, supra note 36, at 444 ("Vertical restraints are restrictions imposed upon the transfer of goods from one level of the production chain to another.").

38. See Joseph Anthony Capezzuto, The Nonprice is Right: The Price Cutter’s Bone Business Electronics v. Sharp Electronics, 24 NEW ENG. L. REV. 565, 566 (1989) ("In determining which rule applies, the Court has distinguished between vertical price restraints and vertical nonprice restraints.").


40. Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 890 (2007) ("A single manufacturer’s use of vertical price restraints tends to eliminate intrabrand price competition; this in turn encourages retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer’s position as against rival manufacturers. Resale price maintenance also has the potential to give consumers more options so that they can choose among low-price, low-service brands, high-price, high-service brands; and brands that fall in between.").

41. See generally Knetesch, supra note 36, at 444-46 (explaining the differences between vertical price and nonprice restraints and the resulting competitive effects of vertical and horizontal restraints).

42. Id. at 444-45 ("The most common nonprice restraints are geographic market divisions"); see also Carole A. Casey, The Rule of Reason Analysis of Dual Distribution Systems: Does It Further the Purposes of the Sherman Act?, 29 B.C. L. REV. 431, 433 (1988) ("[A]greements among competitors to allocate exclusive territories are a common business practice frequently challenged under the Sherman Act.").

43. See Shantau Dutta et. al., Vertical Territorial Restrictions and Public Policy: Theories and Industry Evidence, 63 J. OF MCR. 121 (1999), downloadable at http://research3.bus.wisc.edu/file.php/153/Vertical_Territorial_Restrictions.pdf ("Such restrictions, which are initiated by a manufacturer, assign distributors to a particular geographical area or sales territory with the objective of restricting intrabrand competition.").

44. See Leegin, 551 U.S. at 890 (holding that the full rule of reason analysis applies to all vertical price restraints); see also Graphic Prods. Distrib. v. ITEK Corp., 717 F.2d 1560, 1567 (11th Cir. 1983) ("Where the manufacturer retains ownership and the risk of loss, the more flexible rule of reason would apply."); see also Cont'l T.V. v. GTE Sylvania, 433 U.S. 36, 59 (1977) ("[W]e conclude that the appropriate decision is to return to the rule of reason that governed vertical restrictions.").
substantial market share in the interbrand market. Courts also look to whether a restriction eliminates intrabrand competition, facilitates collusion, excludes competitors or reinforces oligopolistic behavior. The analysis also takes into account other business justifications. Last, when the balancing test weighs in favor of decreasing intrabrand at the expense of increasing interbrand competition, courts should consider whether a more pro-competitive means could achieve the same objective.

Imposing vertical restraints on downstream distributors seeks to prevent intrabrand competition. By limiting competition against itself, the manufacturer will theoretically increase revenue and efficiency, thereby making the product more competitive in the interbrand market. Increasing competition in the interbrand market generally decreases market concentration and evenly distributes market power between firms. However, the more substantial a firm’s share in the interbrand market, the more likely it is to have monopoly power in the relevant market. This correlation raises substantial antitrust concerns due to the harmful effects of monopolies on consumers as opposed to growth resulting from superior product, business acumen, or historical accident. In addition, if a firm already has control of a market, no legitimate business reason may justify the firm’s imposition of vertical restraints to strengthen its grip on the relevant market. Although GTE Sylvania sets forth the legal framework for analyzing vertical restraints, lower courts are inconsistent in their approaches to this issue. For example, in Eiberger v. Sony Corporation of America, the Second Circuit applied a more stringent approach than called for in GTE Sylvania. That same year, the

51. Knetsch, supra note 36, at 448 (“A manufacturer’s degree of market power may play an important role in the balancing of intrabrand and interbrand competitive effects. The imposition of nonprice restraints by a manufacturer with greater market power is more likely to have an overall anticompetitive effect, because the harms to intrabrand competition will outweigh any benefit to the manufacturer’s interbrand competitive position. A manufacturer with little market power is not able to extract monopoly profits by imposing vertical restraints, and therefore has no motive for imposing restraints other than to strengthen his competitive position.”); see also Krauss, supra note 46, at 539 (“Absent monopoly power, exclusive distribution agreements are permissible.”).

52. See generally Thomas A. Piraino, Jr., Identifying Monopolists’ Illegal Conduct under the Sherman Act, 75 N.Y.U. L. REV. 809, 814 (2000) (“Modern economists emphasize that monopolies misallocate and waste economic resources. Since monopolists can price products in excess of the level that would prevail in a competitive market, they are able to bring about a transfer of wealth from consumers to themselves. Furthermore, a ‘deadweight loss’ occurs in monopoly markets because a monopolist has the ability unilaterally to reduce output in order to increase prices. Since the monopolist makes no profit on the output it does not produce, a portion of the wealth taken away from consumers is not transferred to the monopolist, but is simply lost.”).


54. See Graphic Prods. Distrib. v. ITEK Corp., 717 F.2d 1560 (11th Cir. 1983) (finding Itek could not establish a legitimate, pro-competitive purpose for the vertical restraints).

55. Seth E. Lipner, Restricted Distribution at the FTC: Rule of Reason or Reign of Chaos?, 17 J. MARSHALL L. REV. 309, 308 (1984) (“Since 1977, the courts have struggled in applying the new standard. The various circuits have developed different approaches and guidelines making the law far from uniform.”).

56. Eiberger v. Sony Corp. of Am., 622 F.2d 1068, 1061 (2d Cir. 1980) (“Unless we are to conclude that an anticompetitive impact on intrabrand competition cannot alone support a finding that §1 has been violated - and we see no basis for such a conclusion - we must conclude that [the plaintiff] has proven such a violation here. The district court correctly determined that [the defendant’s] 1975 warranty

492

54. See, e.g., Continental T. V., 433 U.S. at 39 (discussing market share of two corporations); see also Knetsch, supra note 36, at 456 (“Thus, he advocated balancing the harms to intrabrand competition against the benefits to interbrand competition that result from vertical nonprice restrictions.”).


47. See id. (“Courts deciding under the rule of reason analysis, recognize as legitimate several business justifications for non-price restraints: Encouraging distributors to promote the brand by advertising and other promotional efforts; Eliminating the ‘free rider’ frequently accompanying intense intrabrand competition; Encouraging product demonstration by full-service dealers; Encouraging dealers to maintain service and maintenance departments; and Stimulating interbrand competition, even at the cost of reducing intrabrand competition.”).

48. Id. (“However, even when the benefits of increased interbrand competition outweigh the detriments of decreased intrabrand competition, the courts will consider whether less restrictive means to achieve the legitimate objective were available.”).

49. See Cont’l T. V., 433 U.S. at 54 (“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. Location restrictions have this effect because of practical constraints on the effective marketing area of retail outlets.”).

50. Id. at 54-56 (“Economists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers . . . . Indeed, to the extent that the form of the transaction is related to interbrand benefits, the Court’s distinction is inconsistent with its articulated concern for the ability of smaller firms to compete effectively with larger ones.”).
substantial market share in the interbrand market. Courts also look to whether "a restriction eliminates intrabrand competition, facilitates collusion, excludes competitors or reinforces oligopolistic behavior." The analysis also takes into account other business justifications. Last, when the balancing test weighs in favor of decreasing intrabrand at the expense of increasing interbrand competition, courts should consider whether a more pro-competitive means could achieve the same objective.

Imposing vertical restraints on downstream distributors seeks to prevent intrabrand competition. By limiting competition against itself, the manufacturer will theoretically increase revenue and efficiency, thereby making the product more competitive in the interbrand market. Increasing competition in the interbrand market generally decreases market concentration and evenly distributes market power between firms.

However, the more substantial a firm's share in the interbrand market, the more likely it is to have monopoly power in the relevant market. This correlation raises substantial antitrust concerns due to the harmful effects of monopolies on consumers, opposed to growth resulting from superior product, business acumen, or historical accident. In addition, if a firm already has control of a market, no legitimate business reason may justify the firm's imposition of vertical restraints to strengthen its grip on the relevant market.

Although GTE Sylvania sets forth the legal framework for analyzing vertical restraints, lower courts are inconsistent in their approaches to this issue. For example, in Eiberger v. Sony Corporation of America, the Second Circuit applied a more stringent approach than called for in GTE Sylvania. That same year, the

See, e.g., Continental T. V., 433 U.S. at 39 (discussing market share of two corporations); see also Knetsch, supra note 36, at 448 ("Thus, he advocated balancing the harms to intrabrand competition against the benefits to interbrand competition that result from vertical nonprice restrictions.").

See id. ("Courts deciding under the rule of reason analysis, recognize as legitimate several business justifications for non-price restraints: Encouraging distributors to promote the brand by advertising and other promotional efforts; Eliminating the "free rider" frequently accompanying intense intrabrand competition; Encouraging product demonstration by full-service dealers; Encouraging dealers to maintain service and maintenance departments; and Stimulating interbrand competition, even at the cost of reducing intrabrand competition.").

Id. ("However, even when the benefits of increased interbrand competition outweigh the detriments of decreased intrabrand competition, the courts will consider whether less restrictive means to achieve the legitimate objective were available.").

See Cont'l T. V., 433 U.S. at 54 ("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. Location restrictions have this effect because of practical constraints on the effective marketing area of retail outlets.").

Id. at 54-56 ("Economists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers. . . . Indeed, to the extent that the form of the transaction is related to interbrand benefits, the Court's distinction is inconsistent with its articulated concern for the ability of smaller firms to compete effectively with larger ones.").

51. Knetsch, supra note 36, at 448 ("A manufacturer's degree of market power may play an important role in the balancing of intrabrand and interbrand competitive effects. The imposition of nonprice restraints by a manufacturer with greater market power is more likely to have an overall anticompetitive effect, because the harms to intrabrand competition will outweight any benefit to the manufacturer's interbrand competitive position. A manufacturer with little market power is not able to extract monopoly profits by imposing vertical restraints, and therefore has no motive for imposing restraints other than to strengthen his competitive position."); see also Krauss, supra note 46, at 539 ("Absent monopoly power, exclusive distribution agreements are permissible.").

52. See generally Thomas A. Piraino, Jr., Identifying Monopolists' 'Illegal Conduct under the Sherman Act, 75 N.Y.U. L. REV. 809, 814 (2000) ("Modern economists emphasize that monopolies misallocate and waste economic resources. Since monopolists can price products in excess of the level that would prevail in a competitive market, they are able to bring about a transfer of wealth from consumers to themselves. Furthermore, a 'deadweight loss' occurs in monopoly markets because a monopolist has the ability unilaterally to reduce output in order to increase prices. Since the monopolist makes no profit on the output it does not produce, a portion of the wealth taken away from consumers is not transferred to the monopolist, but is simply lost.").


54. See Graphic Prods. Distribs. v. ITEK Corp., 717 F.2d 1560 (11th Cir. 1983) (finding that the exclusionary purpose for the vertical restraints).

55. Seth E. Lipner, Restricted Distribution at the FTC: Rule of Reason or Reiem of Chaos?, 17 J. MARSHALL L. REV. 309, 309 (1984) ("Since 1977, the courts have struggled in applying the new standard. The various circuits have developed different approaches and guidelines making the law far from uniform.").

56. Eiberger v. Sony Corp. of Am., 622 F.2d 1068, 1081 (2d Cir. 1980) ("Unless we are to conclude that an anticompetitive impact on intrabrand competition cannot alone support a finding that §1 has been violated — and we see no basis for such a conclusion . . ., we must conclude that [the plaintiff] has proven such a violation here. The district court correctly determined that [the defendant]'s 1975 warranty
Recognizing the Importance of Intrabrand Competition in High Technology Markets

Second Circuit Court of Appeals shifted to a much more liberal analysis of vertical restraints in *Borger v. Yamaha International Corp.*57 a decision that ultimately diminished intrabrand competition.58 This variation in standards for assessing vertical restraints needlessly interferes with business and hinders lawyers’ ability to counsel their clients effectively.59 The nature of high technology markets demands a more consistent, logical approach toward analyzing vertical territorial restraints.

The next section examines the unique nature of high technology markets. In particular, Section III provides insight into why high technology markets are different from other, more mature markets, and illustrates how a large independent retailer subject to a vertical territorial restraint can harm consumers of high technology products.

III. THE UNIQUENESS OF HIGH TECHNOLOGY MARKETS AND THE NEED FOR SUPERIOR CUSTOMER SERVICE

The rapid pace of development of high technology products has created a special market environment. Section A illustrates this uniqueness and the resulting importance that retailers provide superior customer service with respect to these products. In the context of high technology markets, Section B explains the imposition of vertical restraints on big-box retailers, such as Wal-Mart, and how these restraints create problems in customers’ ability to receive adequate customer service.

See generally Lawrence M. Rausch, *Industry, Technology, and the Global Marketplace*, in *NAT’L SCIENCE BD., SCIENCE AND ENGINEERING INDICATORS*, Vol. 1 (2002). ("The global market for high-technology goods is growing at a much faster pace compared to other manufactured goods, and high-technology industries are driving economic growth around the world. During the 18-year period examined (1990–98), high-technology production grew at an inflation-adjusted average annual rate of nearly 6.0 percent compared with 2.7 percent for other manufactured goods. Global economic activity was especially strong at the end of the period (1995–98), when high-technology industry output grew at 13.9 percent per year, more than three times the rate of growth for all other manufacturing industries. Output by the four high-technology industries, those identified as being the most research intensive, represented 7.6 percent of global production of all manufactured goods in 1980; by 1998, this figure rose to 12.7 percent.")

This evolution of high technology is startling when compared to more mature technologies such as automobiles. Automobiles have existed for over 150 years, yet fundamental features have persisted, such as steering wheels, transmissions, and pedals. Even autonomous cars will still have steering wheels and pedals because technology has

See generally Lawrence M. Rausch, *Industry, Technology, and the Global Marketplace*, in *NAT’L SCIENCE BD., SCIENCE AND ENGINEERING INDICATORS*, Vol. 1 (2002). ("The global market for high-technology goods is growing at a much faster pace compared to other manufactured goods, and high-technology industries are driving economic growth around the world. During the 18-year period examined (1990–98), high-technology production grew at an inflation-adjusted average annual rate of nearly 6.0 percent compared with 2.7 percent for other manufactured goods. Global economic activity was especially strong at the end of the period (1995–98), when high-technology industry output grew at 13.9 percent per year, more than three times the rate of growth for all other manufacturing industries. Output by the four high-technology industries, those identified as being the most research intensive, represented 7.6 percent of global production of all manufactured goods in 1980; by 1998, this figure rose to 12.7 percent.")

See *Borger v. Yamaha Int’l Corp.*, 625 F.2d 390, 397 (2d Cir. 1980).

Id. at 397 (“In the instant case, the jury was instructed to find Yamaha liable solely on the basis of a purpose to restrict intrabrand competition, without any finding of either a purpose or effect related to interbrand competition. This was reversible error.”).

59. *See Piraino, supra note 22, at 363 (“When the rule of reason supplanted the per se rule as the dominant approach in restraint of trade litigation, antitrust cases became more complicated and their outcome became more difficult to predict. As a result, antitrust enforcement under section 1 of the Sherman Act lost much of its deterrent effect. Antitrust practitioners were no longer able to advise their clients with certainty of the type of conduct that would be permitted or prohcted.”).
Second Circuit of Appeals shifted to a much more liberal analysis of vertical restraints in *Borger v. Yamaha International Corporation*, a decision that ultimately diminished intrabrand competition. This variation in standards for assessing vertical restraints needlessly interferes with business and hinders lawyers’ ability to counsel their clients effectively. The nature of high technology markets demands a more consistent, logical approach toward analyzing vertical territorial restraints.

The next section examines the unique nature of high technology markets. In particular, Section III provides insight into why high technology markets are different from other, more mature markets, and illustrates how a large independent retailer subject to a vertical territorial restraint can harm consumers of high technology products.

III. THE UNIQUENESS OF HIGH TECHNOLOGY MARKETS AND THE NEED FOR SUPERIOR CUSTOMER SERVICE

The rapid pace of development of high technology products has created a special market environment. Section A illustrates this uniqueness and the resulting importance that retailers provide superior customer service with respect to these products. In the context of high technology markets, Section B explores the imposition of vertical restraints on big-box retailers, such as Wal-Mart, and how these restraints create problems in customers’ ability to receive adequate customer service.

---

60. See generally Lawrence M. Rausch, *Industry, Technology, and the Global Marketplaces*, in NAT'L SCI. BD., SCI. AND ENGINEERING INDICATORS, Vol. 1 (2002). (“The global market for high-technology goods is growing at a faster rate than that for other manufactured goods, and high-technology industries are driving economic growth around the world. During the 18-year period examined (1980-98) high-technology production grew at an inflation-adjusted average annual rate of nearly 6.0 percent compared with 2.7 percent for other manufactured goods. Global economic activity was especially strong at the end of the period (1995-98), when high-technology industry output grew at 13.9 percent per year, more than three times the rate of growth for all other manufacturing industries. Output by the four high-technology industries, those identified as being the most research intensive, represented 7.6 percent of global production of all manufactured goods in 1980; by 1998, this figure rose to 12.7 percent.”) (citations omitted); see also, Piraino Statement, supra note 11, (stating “Speed of Market Transition” is more frequent in high-technology industries than in other more mature industries).


62. Id.

63. Apple Introduces iPhone 5, AP (Sept. 12, 2012), http://www.apple.com/pr/library/2012/09/12Apple-Introduces-iPhone-5.html (boasting “the world’s most advanced mobile operating system.”).

not evolved far enough to render them useless.65 Cars have undoubtedly evolved since their inception, but their rate of development pales compared to the progress seen in the short period that high technology consumer products like computers, cell phones, and software have existed.

The rapid turnover rate of high technology products presents another major difference between high technology markets and other markets.66 High technology products become obsolete much faster than other markets' products.67 For example, smartphone manufacturers regularly release new smartphones with new features and updated operating systems.68 On average, Americans keep their cell phone for approximately twenty months, while changing cars every eleven years.69

Because of the accelerating technological advancement in high technology products, consumers will continue to need guidance when making purchases. Whether it is a television, computer, or cell phone, high technology products are changing rapidly, and in many instances, their features and interface are becoming more complex for the user. Many retailers provide superior customer service, even in the absence of intrabrand competition. Nevertheless, large independent retailers like Wal-Mart and Target typically lack the level of customer service consumers of high technology products need to make educated purchases.70

B. The Big-Box Problem

Big-box retailers like Wal-Mart, Target, and K-Mart sell electronic high technology products and generally offer relatively low prices, which benefit consumers.71 At the same time, large retailers' lackluster customer service creates problems for high technology markets that might not exist in other markets.72 The dynamic nature of high technology markets and their products73 invites a deeper investigation of the relationship between quality of customer service, vertical restraints, and competition.

Manufacturers imposing vertical territorial restraints upon large distributors selling the manufacturer's products can detrimentally affect intrabrand competition. In this situation, consumers have no choice but to purchase a high technology product at a big-box retail store. If not for the vertical restraints, consumers might favor smaller retailers with superior customer service over big-box stores. Consequently, big-box stores might lose profits to smaller dealers carrying the same products or be compelled to implement a more effective customer service policy. For example, assume Apple has distribution agreements that incorporate vertical territorial restrictions with Wal-Mart and Target to sell some of its products.74 Pursuant to these agreements, no distributor may sell Apple products within a certain radius of a Wal-Mart or Target store.
not evolved far enough to render them useless.\(^6\) Cars have undoubtedly evolved since their inception, but their rate of development pales compared to the progress seen in the short period that high technology consumer products like computers, cell phones, and software have existed.

The rapid turnover rate of high technology products presents another major difference between high technology markets and other markets.\(^6\) High technology products become obsolete much faster than other markets’ products.\(^6\) For example, smartphone manufacturers regularly release new smartphones with new features and updated operating systems.\(^6\) On average, Americans keep their cell phone for approximately twenty months, while changing cars every eleven years.\(^6\)

Because of the accelerating technological advancement in high technology products, consumers will continue to need guidance when making purchases. Whether it is a television, computer, or cell phone, high technology products are changing rapidly, and in many instances, their features and interface are becoming more complex for the user. Many retailers provide superior customer service, even in the absence of intrabrand competition. Nevertheless, large independent retailers like Wal-Mart and Target typically lack the level of customer service consumers of high technology products need to make educated purchases.\(^7\)

B. The Big-Box Problem

Big-box retailers like Wal-Mart, Target, and K-Mart sell electronic high technology products and generally offer relatively low prices, which benefit consumers.\(^7\) At the same time, large retailers’ lackluster customer service creates problems for high technology markets that might not exist in other markets.\(^7\) The dynamic nature of high technology markets and their products\(^7\) invites a deeper investigation of the relationship between quality of customer service, vertical restraints, and competition.

Manufacturers imposing vertical territorial restraints upon large distributors selling the manufacturer’s products can detrimentally affect intrabrand competition. In this situation, consumers have no choice but to purchase a high technology product at a big-box retail store. If not for the vertical restraints, consumers might favor of smaller retailers with superior customer service over big-box stores. Consequently, big-box stores might lose profits to smaller dealers carrying the same products or be compelled to implement a more effective customer service policy. For example, assume Apple has distribution agreements that incorporate vertical territorial restrictions with Wal-Mart and Target to sell some of its products.\(^7\) Pursuant to these agreements, no distributor may sell Apple products

65. See Suzanne Ashe, Volkswagen’s ‘Temporary Auto Pilot’ will drive your car up to 80 mph, CNET (June 25, 2011, 3:02 pm), http://reviews.cnet.com/8301-13746_7-20074113-48/volkswagen-temporary-auto-pilot-will-drive-your-car-up-to-80-mph/ (“No heading to the back of the RV to make a sandwich, or crawling into the back seat to watch a movie with the kids—just yet.”).

66. See Pitofsky Statement, supra note 11, (“New generations of products, undermining existing market power, appear more frequently in high-tech than in mature industries.”).

67. See id.


69. Average Length of Time Wireless Customers Keep Their Mobile Phones Increases Notably, J.D. POWER AND ASSOC. (Sept. 23, 2010), http://businesscenter.jdpower.com/news/pressrelease.aspx?id=2010185 (“The study finds that customers are keeping their traditional mobile devices for an average of 20.5 months . . . . “); Our cars are getting older, too: Average age now 10.8 years, USA TODAY (Jan. 17, 2012, 4:02 pm), http://usatoday30.usatoday.com/money/auton/story/2012-01-17/cars-trucks-age-polls/52631302/1 (“The average age of the cars and trucks on U.S. roads hit a record 10.8 years as of July 1, 2011.”).

70. See Nick Simeonidis, Buydowns: A Practical Way to Discount Under Robinson-Patman, 21 ANTITRUST 36, 36 (2006-2007) (“Big Box competes on price. Consumers brave the crowds and tolerate the lack of personal service at Big Box in order to get the lowest price.”).

71. See id.

72. Even low prices can cause intrabrand competition to decrease, resulting in lackluster customer service. See Christopher J. Heck, Conceived Action and the Premption of State Fair Trade Provisions after Leegin, 2009 COLEM. BUS. L. REV. 853, 892-93 (“The American Bar Association, in urging Congress not to pass a statute to overturn Leegin, has expressed precisely this concern for preserving competition at the retail level, stating that ‘[t]he per se prohibition on minimum resale price maintenance in force for several decades has had the effect of enhancing the market power of very large retailers that carry a wide variety of products,’ enabling them to sell certain products at ‘loss leader prices’ that smaller retailers cannot match, which will result in the disappearance of the smaller retailers. Whether all economists will agree with such an analysis is an open question, but, ultimately, it may be the wrong question.”).

73. See RAUSCH, supra note 60.

within fifty miles of another distributor that sells Apple products. In locations where Apple stores exist, adequate customer service is probably not an issue. However, in geographic locations where only big-box retailers exist, consumers will face inferior customer service when purchasing Apple products. 75

Currently, courts do not consider customer service when evaluating distributors and fail to apply a uniform analysis to vertical restraints. The analysis generally reflects empirical economic data and the market share of the manufacturer in the interbrand market. 76 But in light of the importance of intrabrand competition within a given geographic area, courts should also consider the nature of the distributors and other market characteristics unique to the geographic market. Section IV proposes a standard for courts to consider when analyzing vertical territorial restraints under the rule of reason in high technology markets.

IV. PROPOSAL: A MORE COMPREHENSIVE APPROACH TO ANALYZING VERTICAL RESTRAINTS WITH RESPECT TO INTRABRAND COMPETITION IN HIGH TECHNOLOGY MARKETS

Courts applying the rule of reason to a vertical restraint typically quote Justice Brandeis from the following passage in Board of Trade of City of Chicago v. United States:

"The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

Even though the consumer could purchase the product on the Internet, there is typically no customer service for internet purchases. 75


77. Bd. of Trade of City of Chicago v. United States, 246 U.S. 231, 238 (1918); see also Piraino, supra note 76, at 1761 ("The courts simply quote a long list of factors without any indication of priority or weight to be accorded each factor.").

78. Piraino, supra note 76, at 1760. 79. Id. at 1761 ("The Court simply quote a long list of factors without any indication of priority or weight to be accorded each factor."); see, e.g., Bus. Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 726 (1988) (applying rule of reason to termination of price-cutting distributor at behest of competing distributor); Fed. Trade Comm’n v. Ind. Fed’n of Dentists, 476 U.S. 447, 458-59 (1986) (applying rule of reason to dentists’ concerted refusal to deal with insurers); Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 298 (1985) (applying rule of reason to group boycott where the defendant lacked market power or exclusive access to an element essential to competition); Arizona v. Maricopa Cnty. Med. Soc’y, 457 U.S. 332, 348 (1982) (applying per se rule to maximum price-fixing arrangement); Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 648 (1980) (applying per se rule to horizontal agreement to fix credit terms); Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 24-25 (1979) (applying rule of reason to horizontal price-fixing arrangement); Bailey’s, Inc. v. Windsor Am., Inc., 245 F.2d 1018, 1031 (6th Cir. 1961) (applying rule of reason to distributor termination); ES Dev. v. RWM Enter., 939 F.2d 547, 557 (8th Cir. 1991) (applying per se rule to agreement between dealers).

80. Piraino, supra note 76, at 1760 ("Once the courts have decided that the rule of reason is appropriate, they have usually neglected to explain how it should be applied on remand.").

81. Bd. of Trade of City of Chicago, 246 U.S. at 238. The factor set forth by Justice Brandeis "consider[ ] the facts peculiar to the business to which the restraint is applied." Hereafter will be referred to as the "peculiarity factor."
Even though the rule of reason appears frequently in federal court, "the analysis has largely been confined to the issue of whether a rule of reason or per se standard should apply," and not the analysis of the factors contemplated by the Court in Board of Trade of City of Chicago. For example, a court that decides the rule of reason is applicable typically remands the case without providing guidance for the lower court. Without an in-depth and case-specific consideration of the factors set forth by Justice Brandeis, determining if a restraint is pro-competitive or harmful becomes difficult.

With respect to high technology markets, the need for superior customer service is apparent. Nevertheless, the use of vertical territorial restraints upon distributors threatens to give big-box stores monopolistic power over a geographic market. Justice Brandeis stated in Board of Trade of City of Chicago that a court tasked with analyzing a restraint of trade under the rule of reason should "consider the facts peculiar to the business to which the restraint is applied." If courts truly hew to Justice Brandeis's approach, they must examine the nature of a distributor subject to intrabrand territorial restraints.

IV. PROPOSAL: A MORE COMPREHENSIVE APPROACH TO ANALYZING VERTICAL RESTRAINTS WITH RESPECT TO INTRABRAND COMPETITION IN HIGH TECHNOLOGY MARKETS

Courts applying the rule of reason to a vertical restraint typically quote Justice Brandeis from the following passage in Board of Trade of City of Chicago v. United States:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

---

75. Even though the consumer could purchase the product on the Internet, there is typically no customer service for internet purchases.


77. Bd. of Trade of City of Chicago v. United States, 246 U.S. 231, 238 (1918); see also Piraino, supra note 76, at 1761 ("The courts simply quote a long list of factors without any indication of priority or weight to be accorded each factor.").

78. Piraino, supra note 76, at 1760 ("The Courts simply quote 'a long list of factors without any indication of priority or weight to be accorded each factor."") (quoting M. Laurens Popofsky & David B. Goodwin, The "Hard-Boiled" Rule of Reason Revisited, 56 ANTitrust L.J. 195, 198 (1987)).


80. Piraino, supra note 76, at 1760 ("Once the courts have decided that the rule of reason is appropriate, they have usually neglected to explain how it should be applied on remand.").

81. Bd. of Trade of City of Chicago, 246 U.S. at 238. The factor set forth by Justice Brandeis "consider[ ] the facts peculiar to the business to which the restraint is applied." Hereinafter will be referred to as the "peculiarity factor."
restraint. Further defining the peculiarity factor with respect to vertical territorial restraints in high technology markets will allow courts to assess the likelihood of consumer harm resulting from a particular vertical restraint.

When presented with a vertical territorial restraint involving a big-box store and the sale of high technology products, the court should apply a three-prong test. The court should weigh the result of each prong against the other prongs and consider the factors Justice Brandeis promulgated in Board of Trade of City of Chicago. 82 In addition, courts should apply the current practice of analyzing and weighing the manufacturer's interbrand market share against the diminution in intrabrand competition to determine whether a vertical territorial restraint results in efficiencies or is anticompetitive.

Under the first prong, courts should consider which other distributors carry the product(s) within the geographic market. If a big-box retailer is the only distributor in a territory, the burden should shift to the defendant manufacturer to provide a business justification or rebuttal that substantially outweighs the anti-competitive effects. The more distributors within the geographic vicinity of the big-box store, the less likely the vertical territorial restraint will be deemed wholly anti-competitive, because the consumers will have greater choice as to where to purchase products. 83 The more choices a consumer has, the more likely a defendant manufacturer can satisfy this prong.

Second, courts should examine the distributor's nature. This inquiry can be accomplished by objectively analyzing the number of staff working in the electronics section of the store, the staff's level of training, and the store's customer service policies. For instance, if the distributor is a big-box store, then a more detailed inquiry is necessary to determine the customer service component. In contrast, an Apple Store providing customers with superior service would require relatively little analysis. 84 While a store may objectively appear to provide good customer service, an objective test by itself may be inadequate. Therefore, a subjective test that considers consumer sentiment is also necessary. If a store can satisfy both the objective and subjective tests, then it will satisfy this prong.

The third and final prong examines the complexity of the product or products. Experts can provide insight regarding the general complexity of devices. If an expert decides that an inherently complex product requires superior customer service, the burden will shift to the defendant manufacturer to prove otherwise. However, an expert's finding that the product requires nothing more than consumer self-education might justifiably ending the inquiry.

V. CONCLUSION

The high technology market is unique in its breakneck pace of innovation. 86 In the environment of high technology products, consumers need adequate customer service in order to make educated purchases. In practice, antitrust law treats interbrand competition as a more important consideration than intrabrand competition. 87 Yet, increasing interbrand market share at the expense of intrabrand competition via vertical territorial restraints threatens to harm consumers.

This danger is particularly visible when a vertical territorial restraint is imposed on a large independent retailer or a big-box store with deficient customer service. Preventing harm is the current policy concern behind the antitrust laws, 88 however, courts lack uniformity in and guidance on applying the rule of reason to vertical restraint situations. There must be a standard when analyzing big-box stores that sell high technology products subject to vertical territorial restraints.

The Supreme Court's requirement that courts consider "the facts peculiar to the business to which the restraint is applied" has gone all but unheeded. 89 This Comment proposes a three-prong analysis giving credence to this "peculiarity factor." The first prong considers the characteristics of the geographical locale and the distributors that

82. Id (stating that courts should consider the nature of the rule, the scope of the rule, the effects of the rule and the severity of the restraint).

83. To an extent, however, it also depends on what types of distributors are located nearby.

84. See generally Carmine Gallo, The Apple Experience: Secrets to Building Insanely Great Customer Loyalty 3 (2012) ("If your employees are not trained, personable, and passionate about your brand, you'll have no chance of building a company that delivers an Apple quality experience.").
restraint. Further defining the peculiarity factor with respect to vertical territorial restraints in high technology markets will allow courts to assess the likelihood of consumer harm resulting from a particular vertical restraint.

When presented with a vertical territorial restraint involving a big-box store and the sale of high technology products, the court should apply a three-prong test. The court should weigh the result of each prong against the other prongs and consider the factors Justice Brandeis promulgated in Board of Trade of City of Chicago. In addition, courts should apply the current practice of analyzing and weighing the manufacturer’s interbrand market share against the diminution in intrabrand competition to determine whether a vertical territorial restraint results in efficiencies or is anticompetitive.

Under the first prong, courts should consider which other distributors carry the product(s) within the geographic market. If a big-box retailer is the only distributor in a territory, the burden should shift to the defendant manufacturer to provide a business justification or rebuttal that substantially outweighs the anticompetitive effects. The more distributors within the geographic vicinity of the big-box store, the less likely the vertical territorial restraint will be deemed wholly anti-competitive, because the consumers will have greater choice as to where to purchase products.

The more choices a consumer has, the more likely a defendant manufacturer can satisfy this prong.

Second, courts should examine the distributor’s nature. This inquiry can be accomplished by objectively analyzing the number of staff working in the electronics section of the store, the staff’s level of training, and the store’s customer service policies. For instance, if the distributor is a big-box store, then a more detailed inquiry is necessary to determine the customer service component. In contrast, an Apple Store providing customers with superior service would require relatively little analysis.

While a store may objectively appear to provide good customer service, an objective test by itself may be inadequate. Therefore, a subjective test that considers consumer sentiment is also necessary. If a store can satisfy both the objective and subjective tests, then it will satisfy this prong.

82. Id. (stating that courts should consider the nature of the rule, the scope of the rule, the effects of the rule and the severity of the restraint).

83. To an extent, however, it also depends on what types of distributors are located nearby.

84. See generally Carmine Gallo, The Apple Experience: Secrets to Building Insanely Great Customer Loyalty 3 (2012) (“If your employees are not trained, personable, and passionate about your brand, you’ll have no chance of building a company that delivers an Apple quality experience.”).
Recognizing the Importance of Intrabrand Competition in High Technology Markets

are located in and around that locale. The second prong inquires into the nature of the distributor at issue and utilizes both an objective and subjective test to determine the quality of customer service the distributor provides to its customers. The third and last prong examines the complexity of the high technology products. Products that do not require customer service likewise do not require this analysis. When this test is used, the court should weigh all three prongs together, and then rely on the result to examine other reasonably applicable factors set forth in Chicago Board of Trade. This approach will provide courts with a better understanding of the effects of vertical restraints on customers. In addition, it will provide uniformity, which in turn will make it easier for lawyers to counsel their clients.

90. *Bd. of Trade of City of Chicago*, 246 U.S. at 238.

CENSORSHIP AND SURVEILLANCE IN THE GLOBAL INFORMATION AGE:—

ARE TELECOMMUNICATIONS COMPANIES AGENTS OF SUPPRESSION OR REVOLUTION?

Sana Ahmed*

The Internet is a wild land with its own games, languages and gestures through which we are starting to share common feelings

—Ai Weiwei¹

If you want to liberate a society, just give them the Internet

—Wael Ghonim²

INTRODUCTION

As global access to Internet and communications technology (ICT) grows, individuals gather on the Internet to discuss everything from the best breakfast cafés to opinions about the latest governmental decrees. In early 2011, increased access to ICTs allowed individuals in Tunisia and Egypt to lift the authoritarian veil of the oppressive governments that stifled freedom of expression for

* J.D. Candidate, 2013, Case Western Reserve University School of Law; M.Sc. Middle East Politics, 2010, SOAS, University of London; B.A., 2009, George Washington University. I would like to thank Professor Raymond Ku for his instruction and editorial guidance. I would also like to thank my family for their endless love and support.

