

GIVING TEETH TO SHERMAN ACT ENFORCEMENT  
IN THE INTRABRAND CONTEXT: WEANING  
COURTS OFF THEIR INTERBRAND  
ADDICTION POST-SYLVANIA

*Carlo Luis Rodes\**

INTRODUCTION

The evasion of antitrust liability for anticompetitive conduct in the intrabrand market is a frequent occurrence, which receives little to no attention from courts.<sup>1</sup> Within many intrabrand markets, anticompetitive and monopolistic conduct is a real threat, if not already a reality, and deserves more attention from the courts than it currently receives.

To illustrate the problem, imagine two companies (*X* and *Y*) that wish to provide distribution/dealership services for a group of manufacturers of distinct, but similar, products. Imagine, for example, that *X* and *Y* both want to open car dealerships in the same geographic area and BMW, Mercedes, and Lexus would all like to have their cars sold by either *X* or *Y*.<sup>2</sup> Because the car companies just want their inventory sold, they do not care which one sells their cars. Now let us assume that *X* has more bargaining power than *Y* from having leased potential car lots in locations that are more attractive and accessible and can thereby promise the car companies a superior presence in

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\* Candidate for Juris Doctor, Notre Dame Law School, 2009; B.A. Philosophy and Economics, University of California, Berkeley, 2004. Many thanks to Professor Christine Venter who is not only a fantastic legal writing teacher, but who also has been a mentor throughout my law school career. I also want to thank Amy for always keeping me calm and being there for me every day. Finally, I want to thank my parents for always encouraging me to reach higher.

1 Intrabrand competition takes place between distributors of manufacturing firms and, as this Note will discuss, it is considered to be less of an enforcement priority than interbrand competition—competition between manufacturers. *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 52 n.19 (1977).

2 This Note also assumes that demand for these cars is high in this area and the nearest luxury car dealership besides *X* and *Y* is farther than the residents of this town are willing to drive.

the local luxury automobile market. This sway is enough for *X* to convince the manufacturers to enter into exclusive distributorship agreements whereby the manufacturer agrees with *X* that it will not allow competing dealers to sell its products where other dealers might compete with *X*,<sup>3</sup> which of course includes *Y*.

Due to *X*'s business acumen and excellent locations, *X* is able to convince all three of the manufacturers to agree to exclusive distributorships.<sup>4</sup> For the duration of each agreement, *Y*, or any other competitor who wishes to enter this market, will be unable to procure cars to sell from that particular manufacturer. The more exclusive agreements a firm like *X* is able to secure, the less variety of luxury cars other would-be dealers will have, thus drawing customers away from them and toward *X*. Eventually, new dealers seeking to enter the luxury car market will find it nearly impossible to contract with one of these manufacturers to sell their cars due to *X*'s exclusive distributorships. Additionally, if the majority of the luxury automobile manufacturers deal exclusively with *X*, entrants into the luxury dealership business will find themselves with only a few, less popular brands, hardly worth selling. Downstream customers will also lose out—decreased competition among the dealerships due to the exclusive arrangements will manifest itself in higher sticker prices and monopolistic premiums.

So, can *Y* bring a claim under section 1<sup>5</sup> or 2<sup>6</sup> of the Sherman Act for anticompetitive dealing or monopolization against *X*? Although it technically could under the current antitrust regime, *Y*'s chances of surviving a motion to dismiss or summary judgment would be small.<sup>7</sup>

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3 GTE Sylvania Inc. v. Cont'l T.V., Inc., 537 F.2d 980, 997 (9th Cir. 1976) ("In an exclusive dealership arrangement a manufacturer agrees with a dealer not to authorize any competing dealers to sell the manufacturer's products anywhere within the exclusive territory of the first dealer."), *aff'd*, 433 U.S. 36 (1977).

4 It is not unreasonable to believe that a similarly situated firm would also be motivated to capture the entire distribution market, not only by a desire to capitalize on its superior physical presence as a selling point for exclusivity agreements with manufacturers, but also to be able to preserve the viability of its business by bringing in enough revenue to afford its brick and mortar storefront. Furthermore, it makes no difference to the manufacturer so long as its product can sell in the market.

5 15 U.S.C. § 1 (2006) (criminalizing contracts, conspiracy, and combinations in the form of a trust that are in restraint of trade or commerce among the several states or with foreign nations).

6 15 U.S.C. § 2 (2006) (criminalizing the creation of a monopoly, an attempt to monopolize, or conspiracy to monopolize any part of the trade or commerce among the several states or with foreign nations).

7 This is because, according to the current case law, *X* and *Y* would be classified as intrabrand competitors, while the car manufacturers compete at the interbrand level. Such a distinction is significant because Supreme Court precedent has focused

As a result, firms in the intrabrand market that are the victims of collusion among competing distributors and their suppliers have little hope of vindicating their right to participate in a competitive market. Thus, ironically, the very laws created to foster competition and punish unreasonable restraints of trade offer the very loopholes through which intrabrand distributors are legally pushed out of the market because, according to the courts, it serves a greater, “procompetitive” good of increased interbrand competition and efficiency.

This Note’s analysis is particularly germane in two oft-occurring circumstances. It applies in markets with few distributors and many manufacturers. It also applies, with much overlap, to any market where a distributor is offering an indispensable service to its supplier, and based on its recognition of its own necessity, the distributor insists on exclusive vertical nonprice agreements. These agreements prevent the supplier from allowing other distributors to carry its goods or provide its services—effectively driving the distributor’s competitors out of the market. For example, this same issue has arisen in the ticket vending market (involving companies such as Ticketmaster) as well as in the movie theater business, both of which will be discussed below.<sup>8</sup> The problem, if not yet apparent, is that under the Supreme Court’s current jurisprudence, there is little to no enforcement of such anticompetitive agreements under the Sherman Act given the Court’s infatuation with effects on interbrand competition and its apathy toward *intra*brand competition.

This Note addresses the practical impact of this trend, particularly as it applies to what should be considered anticompetitive behavior, and explains why such behavior is in dire need of increased scrutiny by the courts. Anticompetitive behavior that just happens to

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more heavily on the anticompetitive impact on the *inter*brand competition (competition between manufacturers of the same generic product) rather than on *intra*brand competition (competition between the distributors of the manufacturer’s product or service). See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2715 (2007) (acknowledging that the primary purpose of the antitrust laws is to protect interbrand competition, even at the expense of *intra*brand competition); *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 748–49 (1988) (Stevens, J., dissenting) (“What is most troubling about the majority’s opinion is its failure to attach any weight to the value of intrabrand competition. . . . Not a word in the *Sylvania* opinion implied that the elimination of intrabrand competition could be justified as reasonable without any evidence of a purpose to improve interbrand competition.”).

8 My discussion of unregulated anticompetitive behavior in the intrabrand context will be driven by these three examples (car dealerships, Ticketmaster, and movie theaters) and will explore each of these scenarios as a way of speaking to the intrabrand context more generally.

fall short of the letter of the law, yet violates its spirit, should not be sanctioned by that same law.

Part I begins this analysis by setting forth the governing legal standards for anticompetitive conduct under sections 1 and 2 of the Sherman Act, focusing in particular on the rule of reason analysis employed by the Supreme Court as to nonprice vertical restraints in *Continental T.V., Inc. v. GTE Sylvania Inc.*<sup>9</sup> and on the requirements of a monopolization claim.

Part II expands upon the legal analysis in Part I and applies it to the hypothetical set forth above, as well as to Ticketmaster and movie theaters. This Part will show the various ways in which dominant distributors in intrabrand markets are able to evade liability under the Sherman Act despite anticompetitive intent and conduct. It also reveals how the Chicago School of Economics has influenced the Court's treatment of intrabrand competition and has led to a jurisprudence that readily overlooks anticompetitive actions, so long as they take place within the intrabrand market.<sup>10</sup>

Finally, Part III recommends a possible solution that can have a positive impact on enforcement of anticompetitive conduct falling outside the strict language of the rules, while violating their spirit and allowing for unreasonable restraints of trade in the intrabrand distribution market. Using *Lorain Journal Co. v. United States*<sup>11</sup> as a classic example of an anticompetitive vertical restraint case, this Part concludes that courts should move beyond their current preoccupation with economic and procompetitive impacts on the interbrand market and focus on alternative ways of considering the intrabrand problem, especially when it is the distributor who wishes to impose the vertical

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9 433 U.S. 36 (1977).

10 See Jean Wegman Burns, Comment, *Challenging the Chicago School on Vertical Restraints*, 2006 UTAH L. REV. 913, 913–14 (arguing that the Chicago School dismisses detrimental effects on the intrabrand market as irrelevant since the main thrust of antitrust law, according to the Chicago School, should be to bolster competition at the interbrand level); see also Mark E. Roszkowski, *The True Reagan Antitrust Legacy: The End of Intrabrand Competition*, ANTITRUST SOURCE, Mar. 2005, at 8, <http://www.abanet.org/antitrust/at-source/05/03/05-mar05-roszkowski323.pdf> (“The Chicago School approach to vertical integration is of course consistent with its modern vertical restraints law, which elevates supplier over small dealer interest and permits suppliers to direct downstream competition by controlling the retail dealer’s prices, territories, locations, and customers.”).

11 342 U.S. 143 (1951). For a more detailed explanation of the case and its relevance to my analysis of intrabrand competition, see *infra* note 114 in Part III of this Note.

restraint on its supplier, and not the other way around.<sup>12</sup> Analyzing these vertical nonprice restraints in the framework of group boycotts and unilateral refusals to deal, instead of only focusing on intrabrand competition, is a first step toward preventing this kind of Sherman Act evasion.

## I. THE LEGAL FRAMEWORK GOVERNING INTERBRAND AND INTRABRAND COMPETITION AND MONOPOLIES

This Part will set forth the governing legal standard for anticompetitive conduct under sections 1 (contracts in restraint of trade) and 2 (monopolies in restraint of trade) of the Sherman Act. It will discuss the use of a nonprice vertical restraint—the exclusive distributorship—as a means of creating monopoly-like conditions without a technical violation of the Sherman Act. It will focus in particular on the rule of reason analysis, developed by the Supreme Court in *Sylvania*, as it pertains to nonprice vertical restraints and on the requirements of a monopolization claim. This foundational discussion will set the stage for Part II, where I will develop the argument that the Supreme Court’s current antitrust jurisprudence, including use of the rule of reason and its preoccupation with stimulating interbrand competition at any cost, is permitting anticompetitive behavior that should be punished under the Sherman Act.

An exclusive distributorship exists when a supplier or manufacturer agrees with a dealer that it will not allow competing dealers to sell its products where other dealers might compete with it.<sup>13</sup> There has been an overwhelming amount of case law demonstrating that a manufacturer may grant exclusive distributorships, even if it results in the diminution or elimination of intrabrand competitors, provided that there is not enough evidence to make out a monopolization claim under the Sherman Act.<sup>14</sup> Furthermore, “[p] *er se* rules of ille-

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12 This will often be the case when there are few distributors for many suppliers in a limited geographic area, especially when one of the distributors has a competitive advantage such as widespread customer contact or superior market placement and availability, much like in *Lorain*. 342 U.S. 143.

13 *GTE Sylvania Inc. v. Cont’l T.V., Inc.*, 537 F.2d 980, 997 (9th Cir. 1976), *aff’d*, 433 U.S. 36 (1977).

14 *Id.*; *see also, e.g.*, *White Motor Co. v. United States*, 372 U.S. 253, 261 (1963) (“Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. 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.” (quoting *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918))); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 76 (9th Cir. 1969) (“[I]t is well settled

gality are appropriate only when they relate to conduct that is manifestly anticompetitive.”<sup>15</sup> Thus, exclusive dealerships are evaluated under the rule of reason since such arrangements are vertical non-price restraints of trade.<sup>16</sup>

### A. *The Rule of Reason Analysis*

The rule of reason is the standard for determining whether a practice restrains trade in violation of section 1 of the Sherman Act.<sup>17</sup> Section 1 of the Sherman Act states in relevant part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . 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 . . . .<sup>18</sup>

Aspects such as the particularities of the relevant business under consideration and “the restraint’s history, nature, and effect” should be taken into account under the rule of reason analysis.<sup>19</sup> Another important consideration is whether the businesses involved have market power.<sup>20</sup> The purpose of this rule is to “distinguish[ ] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer’s best interest.”<sup>21</sup> Therefore, in order “[t]o establish a cause of action for an

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that it is not a per se violation of the antitrust laws for a manufacturer or supplier to agree with a distributor to give him an exclusive franchise, even if this means cutting off another distributor.”).

15 *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49–50 (1977).

16 *Thee Movies of Tarzana v. Pac. Theatres, Inc.*, 828 F.2d 1395, 1398 (9th Cir. 1987) (citing *Sylvania*, 433 U.S. at 58–59). The Supreme Court “noted that especially in the vertical restraint context ‘departure from the rule-of-reason standard must be based on demonstrable economic effect rather than . . . upon formalistic line drawing.’” *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724 (1988) (omission in original) (quoting *Sylvania*, 433 U.S. at 58–59).

17 *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2712 (2007) (citing *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006)).

18 15 U.S.C. § 1 (2006).

19 *Leegin*, 127 S. Ct. at 2712 (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997)).

20 *Id.* (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984)).

21 *Id.* at 2713; accord 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 57 (6th ed. 2007) [hereinafter ABA SECTION OF ANTITRUST LAW] (“[T]he inquiry under the rule of reason is limited to whether the restraint ‘is one that promotes competition or one that suppresses competition.’” (quoting *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 691 (1978))).

unreasonable restraint of trade under the rule of reason, the plaintiff must show” that there is an agreement between two or more persons or business entities, that the intent behind that agreement is to unreasonably restrain competition, and that the restraint actually injures competition.<sup>22</sup>

There are further aspects of the intrabrand market that need to be touched on before proceeding. First, there is the issue of defining the product. In most cases, the dealer itself does not manufacture the product. Rather, it simply possesses the right to sell another’s product. Going back to our dealership example, from the perspective of the manufacturer, X’s “product” is its ability to sell luxury automobiles better than its competitors can. What is being offered in exchange for the ability to sell these cars at a mark-up above their cost is a service to the manufacturers that involves the promotion and sale of cars they may not have otherwise sold in this region. Therefore, the interbrand market could be defined as the market for luxury cars in City A, while the intrabrand market would be the market for car dealership and sales services.

So, who are the customers? This critical factor in determining the potential anticompetitive effect of exclusive vertical agreements is discussed in Part II. It is a harder question than it seems because depending on the customer’s identity, there will be divergent repercussions in the case of a reduction in competition.

For example, if Joe Car-Buyer is the customer and X dealership is the only dealer in town selling luxury cars (because of its exclusive

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22 *Three Movies of Tarzana v. Pac. Theatres, Inc.*, 828 F.2d 1395, 1399 (9th Cir. 1987). There is of course some debate as to the proper standard for a rule of reason analysis. In his article, Professor Gevurtz views the market analysis performed by the courts in cases of vertical restraints as “more slapdash” than in other antitrust arenas. Franklin A. Gevurtz, *Vertical Restraints on Competition*, 54 AM. J. COMP. L. 357, 363 (Supp. 2006). He points out that “it is rare in the vertical restraint context to see any formal analysis of potential competition or the like.” *Id.* Yet the ABA Section of Antitrust Law seems to disagree, saying that “[s]ince the early 1980s, lower courts have imposed greater structure on the rule of reason analysis by casting it in terms of shifting burdens of proof.” ABA SECTION OF ANTITRUST LAW, *supra* note 21, at 57. Under this analysis,

[T]he plaintiff bears the initial burden of proving that an agreement has had or is likely to have a substantially adverse effect on competition. If the plaintiff meets its initial burden, the burden shifts to the defendant to produce evidence of the procompetitive virtues of the conduct. If the defendant does produce evidence of procompetitive virtues, then the plaintiff must show that the challenged conduct is not reasonably necessary to achieve the stated objective or that the anticompetitive effects nonetheless outweigh the procompetitive virtues.

*Id.* at 58 (footnotes omitted).

distributorships), then Car-Buyer may end up paying more than he otherwise would have had *Y* also been allowed to sell the manufacturer's cars.<sup>23</sup> Car-Buyer, however, may not have legal recourse against *X* for anticompetitive pricing if Car-Buyer is not considered to be *X*'s consumer base. This is because courts are not concerned with the fact that Car-Buyer would bear the brunt of *X*'s anticompetitive vertical agreements. Rather, because *X* offers dealership services, it is conceivable that courts would consider the manufacturers to be *X*'s intended customers instead of Car-Buyer. Courts are presently fixated on finding anticompetitive behavior only when interbrand competition is negatively impacted.<sup>24</sup> Because only intrabrand competition is suffering in our hypothetical, Car-Buyer is without recourse so long as competition is thriving at the level that concerns courts: the interbrand level.

Finally, there is the issue of exactly what kind of relationship the dealer has to the manufacturer. Let's assume *X* and *Y* are not technically reselling the cars, because they never purchased them from the manufacturer. Rather, they have contracted to sell the available cars and thus could be viewed as a brokerage service for the manufacturers.

Another possibility is consignment where the "supplier retained title, dominion and risk of loss with respect to its products."<sup>25</sup> However, according to the Court in *Sylvania*, such "formalistic line drawing," when it comes to restricting sales and consignment transactions, is no longer appropriate because nonprice vertical restraints must be evaluated according to the rule of reason, and thus "upon demonstrable economic effect."<sup>26</sup>

The rule of reason analysis only focuses on the vitality of interbrand competition.<sup>27</sup> Moreover, given the lack of Supreme Court

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23 If *X* and *Y* were selling in the same area, then they would compete for customers by offering incentives such as rebates and generally lower prices. *X*, however, left to its own devices as the sole dealer in City *A*, would raise its prices, to the extent that the consumer would swallow the increase.

24 See, e.g., *infra* notes 33–35.

25 Michael J. Denger et al., *Vertical Price, Customer and Territorial Restrictions*, in 48TH ANNUAL ANTITRUST LAW INSTITUTE 295, 374 (PLI Corporate Law & Practice Course Handbook Series No. B-1602, 2007).

26 *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977).

27 *Three Movies of Tarzana*, 828 F.2d at 1399 (explaining that under a rule of reason, certain vertical nonprice restraints will be held harmless "if they are likely to promote interbrand competition without overly restricting intrabrand competition"). The frequent findings of reasonableness in the context of vertical restraints is a result of the Supreme Court's repeatedly confirming that the primary purpose of the antitrust laws is to protect interbrand competition, often at the expense of intrabrand



review on this issue, lower courts have been left with little guidance regarding the application of the rule of reason to vertical intrabrand contexts.<sup>28</sup> An application of the rule of reason is discussed in Part I.C.

### B. *The Movie Clearance As a Useful Analogy*

One way to more fully flesh out the anticompetitive issues that can arise in the intrabrand context is to take a closer look at an intrabrand market that has been subject to some scrutiny by the courts. It is therefore worthwhile to focus on the relationships between movie production companies and the theaters that show the movies to the public. The relevant nonprice vertical restraint used between production companies and theaters is the “clearance.”

The clearance is a vertical restriction used in agreements between movie studios and exhibitors that grants a movie theater obtaining the clearance an exclusive right to exhibit a movie at any given time.<sup>29</sup> This restrictive covenant is analogous to our hypothetical car dealers, X and Y. Through exclusive distributorship agreements, while one of the dealers is selling cars to the public for a particular manufacturer, the agreement would preclude that manufacturer from using other dealerships in the area.<sup>30</sup> Countless courts have recognized that exclusive licensing agreements—known as clearances—intentionally and justifiably discriminate between competitors at the intrabrand distribution level.<sup>31</sup> Likewise, it is the nature of all business agreements and contracts to exclude other firms and restrain competition to some extent, and therefore courts have construed section 1 of the Sherman Act as prohibiting only those agreements that constitute an *unreasonable* restraint of trade.<sup>32</sup> Such vertical restraints are reasonable if they

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competition. See *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1368 (3d Cir. 1996) (citing *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 722–23 (3d Cir. 1991); *Sylvania*, 433 U.S. at 36).

28 See *Gevurtz*, *supra* note 22, at 377. Some suggestions on how to better enforce anticompetitive behavior are provided below in Part II.

29 *Three Movies of Tarzana*, 828 F.2d at 1397.

30 For example, X could have a clause in one of its exclusive distribution agreements where, for a specified amount of time (the duration of the contract), it would be the sole provider of retail sales of that particular car in a given geographic region. The duration of these exclusivity agreements factors into a court’s analysis of the anticompetitive nature of such exclusivity. See *infra* Part I.D.

31 See *Three Movies of Tarzana*, 828 F.2d at 1399.

32 See *Orson*, 79 F.3d at 1366 (citing *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)).

are “likely to promote interbrand competition without overly restricting intrabrand competition.”<sup>33</sup>

According to the Supreme Court in *Sylvania*, intrabrand competition (the competition that takes place between distributors of manufacturing firms’ products) is considered to be less of an enforcement priority than interbrand competition (competition between manufacturers).<sup>34</sup>

For example, one way for an intrabrand competitor’s exclusivity agreement to survive scrutiny under section 1 of the Sherman Act is if the agreement results in increased interbrand competition despite the corresponding decrease or elimination of *intrabrand* competition.<sup>35</sup>

In *These Movies of Tarzana v. Pacific Theatres, Inc.*,<sup>36</sup> the owner of a movie theater brought suit against a competing exhibitor and several movie distributors, alleging that the clearances granted by the distributors violated section 1 of the Sherman Act.<sup>37</sup> The court held that the clearances were not unreasonable restraints of trade, however, because though they reduced intrabrand competition to a minor degree, they also encouraged interbrand competition by forcing These Movies of Tarzana to find alternative movies to exhibit and promote.<sup>38</sup> The court also noted that the distributors had a legitimate business interest in the revenue generated by the theaters they licensed because the distributors were paid, in part, out of each movie’s gross profits.<sup>39</sup> Therefore, the clearances reflected reasonable business decisions on both sides of the transaction.<sup>40</sup>

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33 *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 694 F.2d 1132, 1137 (9th Cir. 1982). Reasonableness in such circumstances is a result of the Supreme Court’s repeatedly confirming in vertical restraint cases that the primary purpose of the antitrust laws is to protect interbrand competition, often at the expense of intrabrand competition. *Orson*, 79 F.3d at 1368 (citing *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 722–23 (3d Cir. 1991); *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 36 (1977)).

34 *See Sylvania Inc.*, 433 U.S. at 52 n.19.

35 *See id.* at 54 (noting that interbrand competition can be enhanced “by allowing the manufacturer to achieve certain efficiencies in the distribution of his products” that result from such nonvertical price restraints). *But see* *Gevurtz*, *supra* note 22, at 377–78 (“[C]ontrary to the traditional notion that the rule of reason is supposed to balance anti- and pro-competitive impacts from the restraint in question, lower Federal courts . . . have not demanded a showing of pro-competitive justifications . . .”).

36 828 F.2d 1395 (9th Cir. 1987).

37 *Id.* at 1397–98.

38 *Id.* at 1399.

39 *Id.* at 1399–1400.

40 *Id.* at 1400. Again, this is one of the factors that a court may analyze in order to determine whether or not there is any merit to the exclusive dealing relationship. *See, e.g.*, *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1569 n.37 (11th Cir. 1991) (“In applying the rule of reason, the factfinder takes into account ‘the facts

*Orson, Inc. v. Miramax Film Corp.*<sup>41</sup> involved a similar relationship between a movie distributor and various theaters that exhibited the films. In *Orson*, the court again looked to the interbrand competitive effects of the clearances involved as the touchstone of the rule of reason.<sup>42</sup> The *Orson* Court found significant that competition in that market thrived at both the distributor and exhibitor levels<sup>43</sup>: “[I]t is the indisputable existence of alternative sources of supply for the [plaintiff theater] which negates the existence of anticompetitive effects in this case.”<sup>44</sup> Though the clearances certainly reduced intrabrand competition to some degree by disallowing the plaintiff from showing on a first-run basis any Miramax film that the defendant theater had selected, they “undeniably promoted interbrand competition by requiring the [plaintiff] to seek out and exhibit the films of other distributors, which it consistently accomplished,” thereby affording art film consumers more movies from which to chose.<sup>45</sup>

### C. Application of the Rule of Reason

The analysis of *X*'s desired market behavior is similar to the above clearance cases insofar as it involves a supplier who is willing to give exclusive rights to a distributor for a set duration.<sup>46</sup> Courts take a strong stance toward fostering interbrand competition when evaluating the reasonableness of a vertical restraint on trade.<sup>47</sup> *Orson* and *These Movies of Tarzana*, however, are potentially distinguishable because both clearance agreements resulted in an increase in inter-

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*peculiar to the business* to which the restraint is applied; its condition before and after the restraint was imposed; [and] the nature of the restraint and its effect, actual or probable.” (emphasis added) (alteration in original) (quoting *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918)).

41 79 F.3d 1358 (3d Cir. 1996). Here, *Orson, Inc.*, the owner of various theaters, brought a suit under section 1 of the Sherman Act against *Miramax*, alleging that *Miramax* had conspired with another theater by entering into exclusive first-run screening agreements with them in order to drive *Orson, Inc.* out of business. *Id.* at 1361.

42 *Id.* at 1372 (“[W]e conclude that the reasonableness of a clearance under section 1 of the Sherman Act depends on the competitive stance of the theaters involved and the clearance’s effect on competition, *especially the interbrand competition* which, as the Supreme Court has instructed, is our primary concern in an antitrust action.” (emphasis added)).

43 *Id.*

44 *Id.*

45 *Id.*

46 Whether or not the car manufacturers are in fact *willing* participants in such exclusive dealings and how the potential for “coercive conduct” should play into a court’s analysis will be discussed in Part II.

47 *Orson*, 79 F.3d at 1372.

brand competition and, consequently, more choice for the downstream consumer.<sup>48</sup>

By comparison, *X*'s hypothetical exclusivity agreements with the car manufacturers would inevitably reduce intrabrand competition by reducing "competition between the distributors . . . of the product of a particular manufacturer,"<sup>49</sup> as a result of *Y*'s inability to also sell cars made by the same manufacturers with which *X* deals exclusively.<sup>50</sup> Furthermore, there exists the incentive to eliminate free riding by

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48 *Id.* ("Although the Miramax-Ritz clearances most certainly reduced intrabrand competition[,] . . . they undeniably promoted interbrand competition by requiring the [theater] to seek out and exhibit the films of other distributors . . . . Thus . . . , the record conclusively establishes that the clearances did not produce the anticompetitive effects the Sherman Act was designed to prevent."); *Three Movies of Tarzana v. Pac. Theatres, Inc.*, 828 F.2d 1395, 1399 (9th Cir. 1987) ("The Galleria's clearances reduced intrabrand competition . . . . However, they also encouraged interbrand competition by forcing TMT to find alternative subrun movies to exhibit and to promote. . . . The clearances were a sound business practice for Pacific and the distributors."); see also NAT'L ASS'N OF ATTORNEYS GEN., REVISIONS TO THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, VERTICAL RESTRAINTS GUIDELINES § 3, at 6 (1995) [hereinafter NAAG GUIDELINES], available at [http://www.naag.org/assets/files/pdf/at-vrest\\_guidelines.pdf](http://www.naag.org/assets/files/pdf/at-vrest_guidelines.pdf) (explaining the potential effects of vertical restraints on trade). The NAAG GUIDELINES stated that the basis of the Court's ruling in *Sylvania* "was its recognition of a growing body of economic literature" which found that certain vertical restraints could actually result in increased competition among manufacturers or suppliers of competing brands. *Id.* The Court set in place a "rule of reason analysis" which was to "balance any pro-competitive interbrand effects against the diminution or elimination of intrabrand competition, which vertical restraints always intentionally cause." *Id.*

49 *Orson*, 79 F.3d at 1368 n.10 (quoting *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 52 n.19 (1977)).

50 Courts do not often make clear how such agreements would actually result in a concomitant increase in interbrand competition, sparing the restrictive agreement Sherman Act scrutiny. See NAAG GUIDELINES, *supra* note 48, § 3.2A, at 8 ("By diminishing or extinguishing intrabrand competition, a supplier may provide existing or new dealers with the incentive to devote additional effort to advertising, services and other forms of product enhancement and differentiation."); ABA SECTION OF ANTI-TRUST LAW, *supra* note 21, 150 n.842 ("Restrictions on intrabrand competition can actually enhance market-wide competition by fostering vertical efficiency and maintaining the desired quality of a product." (quoting *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 127-28 (2d Cir. 1995))). But see NAAG GUIDELINES, *supra* note 48, § 3.2A, at 8 n.30 ("Recent empirical studies have cast some doubt on the oft-stated generalization that the net welfare effect of lessening intrabrand competition will be favorable." (citing Willard F. Mueller, *The Sealy Restraints: Restrictions on Free Riding or Output?*, 1989 WIS. L. REV. 1255 (1989))); cf. Gevurtz, *supra* note 22, at 362 ("Despite urging from academic commentators . . . vertical restraint cases in the United States, by and large, do not reflect a structured analysis of pro- and anti-competitive impacts from the restraint.").

other dealers.<sup>51</sup> Then again, it is also possible that such agreements would not have the effect of increased interbrand competition because *X* is the dominant player in the market and could foreseeably undercut all of the other distributors, thus virtually destroying intrabrand competition without a complementary increase in interbrand competition.<sup>52</sup>

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51 This incentive usually exists in tandem with the other potential promotions of interbrand competition that can occur as a result of an exclusive distributorship agreement. Compare ABA SECTION OF ANTITRUST LAW, *supra* note 21, at 154 n.872 (“[M]anufacturers can use restraints to induce distributors to invest capital and effort, to supply service and repair facilities needed to market the manufacturer’s products effectively, and to engage in promotional activities, all of which seek to increase sales of the manufacturer’s products.” (citing *Sylvania*, 433 U.S. at 55), and *Gevurtz*, *supra* note 22, at 361 (arguing that manufacturers restrict competition among dealers in their products in order “to encourage provision of various services or other promotional efforts by [the] dealers—the incentive for which would be undermined if some dealers offered cut-rate prices while free-riding on the services or other promotional efforts of the higher priced dealers”), with NAAG GUIDELINES, *supra* note 48, § 3.2B, at 9 (“The free-ride phenomenon is much disputed among theorists, especially with regard to certain products for which servicing or product enhancement is highly unlikely. Others have argued that free-riding could be eliminated through less restrictive means such as contract provisions or promotional fees.”). This comparison brings to light a potential Catch-22 with procompetitive results of vertical nonprice restraints insofar as such agreements may stimulate interbrand promotion while at the same time creating the free-riding problem that the restraint may have been designed to eliminate. As applied to the car dealership hypothetical, the elimination of free-riding would most likely not be a valid procompetitive benefit since, as noted in the NAAG GUIDELINES, the “product” at issue (the service of selling the manufacturers’ cars) does not lend itself to servicing or product enhancement (nor does Ticketmaster’s ticketing service or a movie theater’s screening of a particular film). Moreover, a dealer like *X* is not necessarily in competition with other dealers who sell cars at a different price point and therefore would not “reap the benefits of such [promotional] services performed by other dealers.” NAAG GUIDELINES, *supra* note 48, § 3.2B, at 8.

52 See NAAG GUIDELINES, *supra* note 48, § 3.3C, at 10 (“Vertical restraints can raise entry barriers, erect new barriers and force competitors to operate inefficiently.”). In this section, the *Guidelines* are referring to when the dominant firms in an affected market bind available dealers to exclusive dealing arrangements, such that other rival firms could not enter the market. In the world of *X* and *Y* car dealers (as with Ticketmaster), it is the dealerships (not the manufacturers) that are interested in locking down the exclusive distributorships in order to protect their market share. Given these vertical restraints, any existing or incoming car dealers are going to find far more difficult entry into the intrabrand market of factory-direct car dealing. The same occurs in the case of Ticketmaster because it has all of the desired venues locked up in exclusive ticketing arrangements.

#### D. *The Duration of Exclusive Agreements*

In *Ticketmaster Corp. v. Tickets.com Inc.*,<sup>53</sup> the court, using the rule of reason analysis, did not find Ticketmaster in violation of section 1 of the Sherman Act, despite its six-year-long exclusive venue contracts.<sup>54</sup> This case embodies a useful rubric for structuring exclusive dealership arrangements in order to avoid an unreasonable restraint of trade under the law. In finding the exclusive agreements at issue not violative of section 1, the court considered the following to be mitigating factors: there was “substantial competitive bidding” for exclusive vendor contracts; entry into the market was not “unduly difficult”; and any deviations from fully competitive bidding were not “likely to be of significant magnitude.”<sup>55</sup> Furthermore, foreclosure of competition was not found to be excessive in light of the fact that “on average, 16% of Ticketmaster’s venues, or 26% of the top 150 venues, come up for renewal in any given year.”<sup>56</sup> This is not so low as to preclude entry: “[A]ll customers might contract to buy exclusively from incumbents and yet allow effective entry if 20 percent of the contracts expire monthly (or even annually).”<sup>57</sup> Thus, by staggering the termination dates of their various exclusive agreements, while still having at least twenty percent of them coming due monthly, X could place a monopolistic hold on the market while still evading liability under the Sherman Act.<sup>58</sup>

#### E. *Monopolization Framework*

Beyond the unreasonable restraint of interbrand competition, X may also face being considered a monopoly under section 2 of the Sherman Act. Section 2 states in relevant part: “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . . .”<sup>59</sup>

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53 127 F. App’x 346 (9th Cir. 2005).

54 *Id.* at 347–48.

55 *Id.*

56 *Id.* at 348.

57 *Id.* (quoting *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1164 (9th Cir. 1997)).

58 *See infra* Part II.B.

59 15 U.S.C. § 2 (2006).

A showing of market power requires the ability “to control prices or exclude competition.”<sup>60</sup> To prevail on a section 2 monopoly claim, the plaintiff is required to prove that the defendant possesses the requisite monopoly power and has achieved, increased, or sustained that power through exclusionary conduct.<sup>61</sup> Furthermore, to prevail on a section 2 attempt claim, the plaintiff is required to establish that the defendant “(1) engaged in exclusionary conduct, (2) with a specific intent to monopolize, and (3) with a ‘dangerous probability’ of achieving monopoly power.”<sup>62</sup> A showing of market power through circumstantial evidence requires the plaintiff to define the relevant market, demonstrate that the defendant possesses a dominant share of it, and determine that there are substantial barriers to entry.<sup>63</sup>

In *Ticketmaster*, the court did not find that Ticketmaster had acquired or maintained market power through exclusionary conduct as a basis for monopolization or attempted to monopolize claims under the Sherman Act.<sup>64</sup> The rate at which the exclusive contracts with venues came up for renewal each year—sixteen percent for all of their venues or twenty-six percent for their top 150 venues—was not so low as to preclude entry by competitors.<sup>65</sup>

A barrier to entry is “either a cost that would have to be borne by an entrant that was not and is not borne by the incumbent or any condition that is likely to inhibit other firms from entering the market on a substantial scale in response to an increase in the incumbent’s

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60 *Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1202 (9th Cir. 1997) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966)). Courts will often use the phrases “market power” and “monopoly power” synonymously and without distinction. ABA SECTION OF ANTITRUST LAW, *supra* note 21, at 226 & n.10 (internal quotation marks and citations omitted). *But see* *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 481 (1992) (“Monopoly power under § 2 requires, of course, something greater than market power under § 1.”); ABA SECTION OF ANTITRUST LAW, *supra* note 21, at 226 n.10 (“Neither *Kodak* nor the lower court decisions, however, explain where market power ends and monopoly power begins.”). Given the ambivalent precedent, I will be using the two interchangeably for our purposes here.

61 *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

62 ABA SECTION OF ANTITRUST LAW, *supra* note 21, at 225 (quoting *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993)). Market power can be proven by either direct or circumstantial evidence of control over prices or exclusion of competition. *Id.* at 229. However, given the limited availability of direct evidence, courts generally look to circumstantial evidence. *Id.*

63 *Kodak*, 125 F.3d at 1202 (quoting *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995)).

64 *Ticketmaster Corp. v. Tickets.com Inc.*, 127 F. App’x 346, 348 (9th Cir. 2005).

65 *Id.*

prices.”<sup>66</sup> Some examples of barriers to entry include small markets incapable of supporting more firms, nonprice vertical restraints (such as exclusive dealerships), and high startup costs.<sup>67</sup> Without substantial barriers to entry, monopolistic prices will not be sustained because even with the eradication of one’s competition, the increase in prices will entice new competitors into the market who are willing to accept a lower price for their goods and services.<sup>68</sup> “Even a 100% monopolist may not exploit its monopoly power in a market without entry barriers.”<sup>69</sup> Part II examines how *X* can once again evade liability under section 2 of the Sherman Act due to the peculiarities of this market.

## II. AVOIDING SHERMAN ACT LIABILITY GIVEN THE COURT’S PREOCCUPATION WITH INTERBRAND COMPETITION

This Part expands upon the legal analysis in Part I and applies it to the hypothetical set forth above in order to show the various ways in which firms in the position of *X* are able to evade liability under the Sherman Act despite anticompetitive intent and conduct. It also reveals how the Chicago School of Economics has influenced the Court’s treatment of intrabrand competition and has led to a jurisprudence that readily overlooks anticompetitive actions, so long as they take place within the *intra*brand market.

Under the foregoing analysis, which compared the hypothetical relationship of two car dealers and their exclusive agreements with manufacturers to the clearance relationship between movie theaters and studios as well as to Ticketmaster’s market, it seems unlikely that a court would find the exclusivity agreements sought by either car deal-

66 ABA SECTION OF ANTITRUST LAW, *supra* note 21, at 233 & n.42.

67 *Id.* at 234–35 (“The presence of any of these barriers to entry may not, by itself, be sufficient to establish monopoly power.”); *see also* Ticketmaster Corp. v. Tickets.Com, Inc., 2003-1 Trade Cas. (CCH) ¶ 74,013, at 96,241 (C.D. Cal. 2003) (“[B]rand name recognition or reputation alone is not considered a barrier to entry . . .”), *aff’d*, 127 F. App’x 346 (9th Cir. 2005).

68 *United States v. Syufy Enters.*, 903 F.2d 659, 664 (9th Cir. 1990) (citing *Metro Mobile CTS, Inc. v. NewVector Commc’ns, Inc.*, 892 F.2d 62, 63 (9th Cir. 1989)); *accord* *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (“The opportunity to charge monopoly prices—at least for a short period—is what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth.”).

69 *Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1208 (9th Cir. 1997) (citing *L.A. Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1427 (9th Cir. 1993)); *see also* *Ticketmaster*, 2003-1 Trade Cas. (CCH) at 96,241 (“Size alone or heavy market share alone does not make one a monopolist (or in danger of becoming one). . . . There must be evidence of the ability to control process or exclude competitors.”).



ership company to unreasonably restrain trade. This would be true, however, only if the court were to focus on the reduction of interbrand competition as a result of the vertical restraints. A great number of courts focus on whether a particular restraint lessens interbrand competition in the relevant market overall, and the same courts simultaneously hold that negative impacts on intrabrand competition are inadequate on their own to be considered violations of section 1.<sup>70</sup> Through the exclusive distribution agreements sought by companies such as X, the only market that is ostensibly being restrained is that of the intrabrand distribution market for luxury automobiles in City A. However, “[r]obust interbrand competition will provide a significant check on any increase in intrabrand market power resulting from the implementation of vertical nonprice restraints.”<sup>71</sup> The reasoning behind this conclusion is that if any of the distributors, through these vertical restraints, gains market power,<sup>72</sup> driving up prices at the retail or wholesale level, then customers in a highly competitive interbrand market would quickly shift to a competitor’s product and thus to a different distributor, effectively undercutting whatever market power was gained through the initial restraint.

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70 ABA SECTION OF ANTITRUST LAW, *supra* note 21, at 154–55 & n.876 (citing various cases which have held or observed that antitrust law’s main priority is interbrand competition and that, if there is strong interbrand competition, then a negative effect on intrabrand competition is not relevant to the court’s reasonable restraint of trade inquiry). This same footnote, however, does observe several cases where courts have held that though a detrimental effect on intrabrand competition may not be enough on its own to render a vertical nonprice restraint unreasonable, if coupled with considerable or strong market power by the seller or supplier, that same lessening of intrabrand competition can be dispositive for the determination of an unreasonable restraint of trade. *See, e.g.*, *Graphic Prods. Distribs., Inc. v. ITEK Corp.*, 717 F.2d 1560, 1571–72 & n.20 (11th Cir. 1983); *Eiberger v. Sony Corp. of Am.*, 622 F.2d 1068, 1080–81 (2d Cir. 1980); Lawrence T. Festa, III, Comment, *Eastman Kodak Co. v. Image Technical Services, Inc.: The Decline and Fall of the Chicago Empire?*, 68 NOTRE DAME L. REV. 619, 649 & nn.174–75 (1993) (observing that after *Sylvania*, so long as competition thrived in the interbrand market, vertical restraints that limited intrabrand competition were presumed lawful). *But see* *Gevurtz*, *supra* note 22, at 378 (noting that courts construe antitrust laws as being “only concerned with interbrand competition . . . rendering the reduction in intrabrand competition irrelevant”).

71 ABA SECTION OF ANTITRUST LAW, *supra* note 21, at 150 (citing *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 725 (1988); *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 52 n.19 (1977); *Ezzo’s Invs., Inc. v. Royal Beauty Supply, Inc.*, 243 F.3d 980, 987 (6th Cir. 2001)).

72 Monopoly power is “the power to control prices or exclude competition.” ABA SECTION OF ANTITRUST LAW, *supra* note 21, at 225 (quoting *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956)). Market power and monopoly power are being used synonymously here. *See supra* note 60 and accompanying text.

A. *Finding a Safe Harbor in the Judicial Preoccupation with Interbrand—  
and Not Intrabrand—Competition*

Many intrabrand contexts deviate from the traditional roles of interbrand/intrabrand competition set forth in *Sylvania*.<sup>73</sup> For example, consider the relationship Ticketmaster has with its customer venues. The events for which Ticketmaster makes tickets available are not like the generic products of different manufacturers insofar as they are not fungible items, like televisions. Rather, they are each distinct, providing a different experience. Therefore, consumers are not necessarily free to substitute a different brand of the same product, as they would have been able to do in *Sylvania*.<sup>74</sup> In any intrabrand market—like that of Ticketmaster—with few dealers and many manufacturers, regardless of how robust the interbrand competition is, if one dealer is able to work out exclusive distribution agreements because of some competitive advantage, then the customer will have only one choice of where to go for any given need.

On the other hand, the customers would still be getting what they needed from whichever dealer struck the distributorship agreement with the supplier. Thus, there may not be a concomitant procompetitive benefit in the interbrand market that could offset this decrease in intrabrand competition; but, in light of the understanding that non-price vertical restraints always intentionally reduce intrabrand competition,<sup>75</sup> it seems that so long as such effects are relegated to the intrabrand market,<sup>76</sup> and the customer is able to procure what it wants at a reasonable price (if not slightly inflated),<sup>77</sup> the exclusivity practices of such an intrabrand distributor would evade a court's finding of an unreasonable vertical restraint.

The intrabrand market, however, does not always lend itself to the conventional *Sylvania* analysis.<sup>78</sup> It is not that the manufacturers

73 *Sylvania*, 433 U.S. at 52 n.19. As has already been discussed in this Note, the movie theater business, the event ticketing market, and, at least hypothetically, the car dealership market, as well as any similarly situated markets, are susceptible to the analysis provided in this Note with respect to intrabrand competition.

74 *Id.*

75 NAAG GUIDELINES, *supra* note 48, § 3, at 3.

76 *See supra* note 70 and accompanying text.

77 *See* Louis M. Solomon & Robert D. Joffe, *Exclusive Distribution and Antitrust*, 53 *FORDHAM L. REV.* 491, 504 (1984) (“[A]ntitrust laws were enacted for the ‘protection of competition, not competitors.’” (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962))). “[I]n looking at the impact on competition, consumer welfare is the primary reference point.” Solomon & Joffe, *supra*, at 504; *cf. supra* note 48 and accompanying text (demonstrating the importance of downstream consumer choice).

78 *Sylvania*, 433 U.S. at 52 n.19.

want to deal exclusively with *X* or *Y*, thus limiting the dealerships' distribution potential. Rather, it is rational to assume that distributors would want their cars available to the public at varying prices and locations in order to cover the scope of the market. Instead, it is the company in *X*'s position that would want to lock the different manufacturers into exclusive distribution agreements such that the customers have to get their luxury automobiles through *X* alone, thus maximizing profit from the increased amount it can add to the sticker price as a result of being the only show in town for such cars.<sup>79</sup>

The question remains as to whether this kind of analysis by the courts would leave *X* free to restrain the intrabrand market as it pleases without any judicial repercussions. *X*, or any firm similarly situated (like Ticketmaster), should not be able to evade its duty to comport with antitrust law simply by virtue of its unique position in the market. Yet under the current rule of reason regime, it is possible, without some refiguring of the analysis by the courts, that *X* could get away with practically any kind of exclusivity agreement so long as interbrand competition were left intact.<sup>80</sup> A possible solution to this dearth of antitrust enforcement of restraints of intrabrand competition will be discussed in Part III.

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79 Cf. Kenneth L. Glazer & Brian R. Henry, *Coercive vs. Incentivizing Conduct: A Way Out of the Section 2 Impasse?*, 18 ANTITRUST 45, 49 (2003) ("It should by now be a given in antitrust cases that every firm in every industry is at all times doing everything it can to drive competitors out of the market."); *id.* ("Every competitor seeks to capture as much business as possible.") (quoting *Ortho Diagnostic Sys., Inc. v. Abbott Labs., Inc.*, 920 F. Supp. 455, 465 (S.D.N.Y. 1996)).

80 See *supra* note 70 and accompanying text. This shift in the Court's reasoning from *Schwinn*'s more formalistic analysis to the more functional approach of *Sylvania* reflects the prevalence at the time of the "Chicago school critique of vertical restraints on intrabrand competition," Gevurtz, *supra* note 22, at 361, and its acceptance by the Court. Moreover, as astutely observed by Burns:

Under the Chicago approach, a court need not try to balance or assess issues of dealer coercion, unequal bargaining power, the multi- or single-brand nature of the dealer, or competition in the intrabrand market. The Chicago school dismisses all such concerns as irrelevant. Instead, provided that there is a modicum of interbrand competition, a court can justify upholding any vertical restraint.

Burns, *supra* note 10, at 913–14. In this comment, the author also notes that "a series of Supreme Court decisions made it almost impossible for dealers to successfully bring such actions" challenging vertical restraints. *Id.* at 914 n.4. Burns' fears can find only confirmation in another recent shift by the Supreme Court in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007). There, the Court overruled the longstanding precedent of *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), which had held that vertical minimum price fixing agreements were per se illegal. Now, such vertical price restraints have been added to the menagerie of plaintiff friendly rule of reason analysis.

*B. Duration of Exclusive Agreements and Terminability As a Safe Harbor*

The circumstances of *Ticketmaster* were similar to the situation that either of our hypothetical car dealers would face insofar as they are dealing with a manufacturer that gave them an exclusive contract to sell a particular product. Therefore, either of them may be able to enter successfully into these exclusive agreements so long as they stay within the boundaries of what the *Ticketmaster* court found acceptable. This includes the existence of competitive bidding on at least a yearly, if not monthly, cycle where close to a quarter of their exclusive contracts come up for renewal.<sup>81</sup> It also includes low barriers of entry into the market by competitors.<sup>82</sup> This, however, does not take into account the potential market foreclosure created by staggered expiration dates for such exclusive arrangements.

If *X*'s exclusive agreements were to expire at varied dates, a new dealership entering the market would experience significant difficulty in establishing sufficient distributorship agreements to sustain its business.<sup>83</sup> Regardless, the view adopted by a majority of courts is that short-term exclusive dealerships are unlikely to bar rival distributor firms from the market.<sup>84</sup> Thus, by properly structuring such exclusiv-

81 *Ticketmaster Corp. v. Tickets.com Inc.*, 127 F. App'x 346, 347–48 (9th Cir. 2005).

82 “Many courts . . . focus on the agreement’s duration. Agreements with short terms and providing short notice for termination have often been upheld on the premise that the competitive effects of short term or easily terminable foreclosure are likely to be minimal . . . .” ABA SECTION OF ANTITRUST LAW, *supra* note 21, at 219–20 (footnotes omitted); *accord* *Gevurtz*, *supra* note 22, at 382 (“The duration of the contracts is of prominent importance here—the notion being that if the buyers can terminate the contracts on short notice, then competitors can still enter the market by persuading buyers to terminate their exclusive dealing contracts . . .”).

83 Joshua D. Wright, *Antitrust Law and Competition for Distribution*, 23 YALE J. ON REG. 169, 198 (2006). Judge Easterbrook rejected this argument in *Menasha Corp. v. News America Marketing In-Store Services, Inc.*, 354 F.3d 661 (7th Cir. 2004):

One might think that staggered expiration dates make entry easier; *Menasha* (or any other rival) can sign up chains as their exclusives expire, without having to enroll the entire retail industry at one go. But, as *Menasha* sees things, the different expiration dates make it harder for a rival to sign up the *whole* retail industry at one time. (*Menasha* does not notice the irony that under its reasoning this sign-up-everyone strategy would create an unlawful monopoly. Perhaps *Menasha* should thank NAMIS for keeping it on the straight and narrow.)

*Id.* at 663. Therefore, “[a]s long as contracts are of short duration, the competitive process for distribution is fair to both incumbents and rivals and should be left alone.” Wright, *supra*, at 200.

84 Wright, *supra* note 83, at 202 n.139 (citing various cases from the First, Second, Fourth, Seventh, and Ninth Circuits, which “have embraced the notion that contracts

ity agreements—where twenty percent of all contracts come up for renewal each year and are terminable upon short notice by the supplier/manufacturer—dealers like Ticketmaster will continue to be able to enter into such arrangements without being branded as anticompetitive.<sup>85</sup> This outcome, however, still begs the question as to the manner in which *X* is able to negotiate such contracts and whether exploitation of the peculiarities of the market and its dominant physical presence should be allowed under the rule of reason. The Court's current bent toward ignoring detrimental effects on *intra*brand competition would allow—and has allowed—such exploitation.<sup>86</sup> A suggestion as to how to address this avoidance of liability for anticompetitive/monopolistic conduct is discussed in Part III.

### C. *Escaping Monopoly Liability Based on Market and Firm Size*

Supreme Court precedent supports the notion that a business is free to choose those with whom it will deal so long as its motivation is free from monopolistic purpose.<sup>87</sup> Applying the market power rubric<sup>88</sup> to our dealership example, it can be argued that if there are no significant barriers to entry, *X* will not be considered a monopoly under section 2. The key factor in defining the relevant market is determining whether significant competition exists.<sup>89</sup> In *Ticketmaster*, the relevant market was the ticket brokerage business. Determination of the market in other *intra*brand contexts, however, will not always be so simple. For example, in the movie theater business discussed in Part II.B, the market could be narrowly defined as supply and demand for one particular movie being shown at any given point in time. This means that each clearance agreement between the theater and production studio would form its own microcosmic market for that one

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terminable in less than one year are either presumptively legal or most likely are unable to foreclose rivals”).

85 ABA SECTION OF ANTITRUST LAW, *supra* note 21, 219 nn.1273–74.

86 *See supra* note 70 and accompanying text.

87 *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919); *see also* *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 137 (1998) (“The freedom to switch suppliers lies close to the heart of the competitive process that the antitrust laws seek to encourage.”); *GTE Sylvania Inc., v. Cont'l T.V., Inc.*, 537 F.2d 980, 997 (9th Cir. 1976) (“[A]bsent sufficient evidence of monopolization, a manufacturer may legally grant such an exclusive franchise, even if this effects the elimination of another distributor.”), *aff'd*, 433 U.S. 36 (1977).

88 *See supra* note 60 and accompanying text.

89 *Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1202 (9th Cir. 1997); ABA SECTION OF ANTITRUST LAW, *supra* note 21, at 228 (“A relevant market has both product and geographic dimensions.” (footnote omitted)).

movie showing at that time. On the other hand, a court could also expand its view of the market to include all theaters in the area showing any given movie at any time. As will be discussed below in Part III, if courts were to narrow their conception of the relevant market in the nonprice vertical restraint context and just focus on an exclusive distributorship agreement as its own market for that particular good at any given time, it would finally give teeth to the Court's current rule of reason analysis as it applies to the intrabrand market.<sup>90</sup>

An evaluation of a firm's market share provides a relevant understanding of its influence and power in the market relative to the influence and power of other firms.<sup>91</sup> This is because having a dominant market share is usually coextensive with the ability to restrict output, thereby controlling prices.<sup>92</sup> Generally, courts have required at least a sixty-five percent market share in order to establish a prima facie case of market power.<sup>93</sup>

Let us assume that while *X* controls over sixty-five percent of the luxury car market in City *A*, it does not have the corresponding power to control prices and output because these variables are determined largely by the manufacturer.<sup>94</sup> As the Court in *United States v. Syufy Enterprises*<sup>95</sup> pointed out, "[a] high market share, though it may ordinarily raise an inference of monopoly power, will not do so in a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors."<sup>96</sup>

This appears to be the likely case with *X*. If it were indeed able to establish a monopoly in the luxury automobile market in City *A* and subsequently tried to raise prices, there would not be any barrier to

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90 See *infra* notes 139–43 and accompanying text.

91 *Kodak*, 125 F.3d at 1206.

92 *Id.*

93 *Id.* (citing *Am. Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946)). There seems to be some margin of error here. The ABA Section of Antitrust Law's survey of court cases found that courts can very well go either way when market shares are between fifty percent and seventy percent. ABA SECTION OF ANTITRUST LAW, *supra* note 21, at 232 & n.39. Thus, it seems that anything above seventy percent would generally establish at least a presumption of market power.

94 See ABA SECTION OF ANTITRUST LAW, *supra* note 21, at 226 (“[T]he material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded, but that power exists to raise prices or to exclude competition when it is desired to do so.” (quoting *Am. Tobacco*, 328 U.S. at 811)).

95 104 F.2d 659 (9th Cir. 1990).

96 *United States v. Syufy Enters.*, 903 F.2d 659, 664 (9th Cir. 1990). This is likely the case with Ticketmaster because it controls neither how many seats are available nor the face value of the tickets. Rather, it only controls its end of the transaction—the ticket service charge.

another competitor entering the market by setting up its own dealership. The only potential barrier to entry would be if *X* were somehow able to enter into exclusivity agreements with every luxury car manufacturer in the area. Even then, when the agreements expired (regardless of staggered termination dates), the market would become fluid, providing opportunities for competitors to lure some of *X*'s manufacturers away, as occurred with the venue contracts in *Ticketmaster*.<sup>97</sup>

Furthermore, depending on a particular dealer's business model, market entry will not always be prohibitively expensive. For example, a competitor of Ticketmaster does not need a brick and mortar storefront to operate this kind of business. It is therefore conceivable that a company with nothing more than a website, an advertising scheme, and a firm handshake could lure some of Ticketmaster's venues away from their exclusive agreements upon termination. This conclusion is bolstered by the district court's holding in *Ticketmaster Corp. v. Tickets.Com, Inc.*<sup>98</sup> In *Ticketmaster*, the district court held that while exclusive long-term contracts combined with brandname recognition can be formidable barriers to entry, alone they are insufficient to constitute an exercise of monopoly power.<sup>99</sup> Therefore, new entrants, despite the name recognition of *X* and *Y* in the car dealing business or Ticketmaster's name in the ticketing business, could potentially enter the market.

Ultimately, it is not a firm's market share that is relevant to the monopoly analysis, but rather its ability to keep hold of that market share.<sup>100</sup> It is counterintuitive that any given intrabrand dealer would be able to control prices in a market where the manufacturers could just as easily either use a different distributor or publicize their products themselves, thereby cutting the distributor out of the picture. In addition, in many vertical restraint contexts, as with Ticketmaster for example, the venues it deals with already fix the prices at which the tickets are sold and ticketing companies can only sell them for face value, plus any additional service fee. Therefore, in many instances, the inquiry about controlling price is limited to the service fee charged or commission made above the price set by the manufac-

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97 See *supra* notes 83–86 and accompanying text.

98 2003-1 Trade Cas. (CCH) ¶ 74,013 (C.D. Cal. 2003), *aff'd*, 127 F. App'x 346 (9th Cir. 2005).

99 *Id.* at 96,241.

100 *Syufy*, 903 F.2d at 666 (citing *Oahu Gas Serv., Inc., v. Pac. Res. Inc.*, 838 F.2d 360, 366 (9th Cir. 1988)).

turer/supplier.<sup>101</sup> If Ticketmaster, for example, were to raise its service charges above a certain level, there would be a point at which it would simply price itself out of the market.<sup>102</sup> Both customers and the venues putting on the shows would turn to alternative sources of ticket distribution if Ticketmaster began charging exorbitant service fees.<sup>103</sup>

In *United States v. Syufy Enterprises*, the court held that even though the defendant possessed a monopoly share of movie theaters in the relevant market, this alone was not sufficient to constitute a violation of the Sherman Act since there was no resultant decrease in competition.<sup>104</sup> Because of the low barriers to entry in this market, the essential elements of power to set prices and power to exclude competition were not present, and the government was not able to make out a Sherman Act monopoly case against Syufy.<sup>105</sup> The court also found significant that although Syufy possessed a territorial monopoly, the company always treated the consumers fairly regarding prices and services.<sup>106</sup>

If an intrabrand competitor like *X* neither has the requisite monopoly power to control prices and exclude competition, nor abuses its market share in order to treat consumers unfairly (especially since this would be counter to their best interests), it is unlikely that such a company will be found to be a monopoly in violation of section 2 of the Sherman Act.

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101 This could just as easily apply to our example of *X* and *Y* car dealers. It could be the case that *X* must sell a given car for at least a specified amount set by the manufacturer, and any amount captured by the dealership over the manufacturer's cost would be a profit to the dealership.

102 Likewise, if *X* began placing high premiums on its luxury car inventory, there would be a point at which even those with a strong desire to get behind the wheel of a new car would look elsewhere for a better deal.

103 How courts view the relevant market in any given vertical restraint case will affect a dealer's incentive to charge monopoly-like prices above what the manufacturer/supplier wants. Taking a broad view of the relevant market, any given dealer lacks a real incentive to charge monopoly-level prices or service charges. This is because manufacturers have the prerogative to deny renewal of exclusive agreements and instead contract with dealers willing to offer lower prices and service charges that will better attract potential customers. However, as discussed in Part III.B, the analysis would change if the conception of the market were narrowed to an aggregation of each of the smaller monopolies that the exclusive distribution agreements would create with each individual product or service. Ticketmaster, for example, would have great leeway and incentive to raise service charge prices since all competition would be barred for that particular show based on the exclusivity agreement. See *infra* notes 139–43 and accompanying text.

104 *United States v. Syufy Enters.*, 903 F.2d 659, 671 (9th Cir. 1990).

105 *Id.*

106 *Id.* at 663.



Much of the foregoing analysis has already addressed the requirements of an attempt to monopolize claim under section 2 of the Sherman Act; however, some further analysis regarding attempts to monopolize claims would still be illuminating. Several courts, as well as the Federal Trade Commission, take the stance that out of all the required showings for an attempt claim, “the dangerous probability of success should be considered as a threshold matter.”<sup>107</sup> In making this determination, courts generally look to “the same factors that they consider in determining whether a defendant has sufficient market power to be guilty of monopolization.”<sup>108</sup> However, a lesser showing is required in an attempt case.<sup>109</sup> The principal factor in this analysis is the defendant’s share of the relevant market.<sup>110</sup> Also, a showing of significant entry barriers is also required in order to establish this prong of the analysis.<sup>111</sup>

Assuming that a given intrabrand competitor like *X* did not have the power to control prices in the market (because customers would go elsewhere at a certain point) and assuming that there existed surmountable (and thus insignificant) barriers to entry, a plaintiff dealership like *Y* would most likely be unable to make out a successful “attempt to monopolize” claim against *X* given the threshold nature of these requirements. Even assuming a specific intent to monopolize and actions in furtherance of that goal, it does not appear that its behavior would be sanctionable. Once again, a business like *X* could evade judicial scrutiny based on the peculiarities of the market in which it operates.

The ABA Section of Antitrust Law points out an interesting aspect of the section 2 attempt claim that appears to apply directly to the case at hand. It observed that “[o]ne implication of the dangerous probability of success requirement is that it prevents Section 2 from reaching unilateral conduct by a small firm that is unlikely to achieve actual monopoly.”<sup>112</sup> Thus, regardless of specific intent or anticompetitive conduct, if, given the realities of the market, a small firm has little to no likelihood of achieving the desired monopoly, then there could be no successful cause of action against it under either actual or attempted section 2 monopolization claims. This is because the small

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107 ABA SECTION OF ANTITRUST LAW, *supra* note 21, at 311 & nn.594–95.

108 *Id.* at 312.

109 *Id.* (citing *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1438 (9th Cir. 1995); *Tasty Baking Co. v. Ralston Purina, Inc.*, 653 F. Supp. 1250, 1268 (E.D. Pa. 1987)).

110 *See id.* at 312 & n.598.

111 *Id.* at 315.

112 *Id.* at 317.

firm would never achieve the requisite monopoly power under either inquiry. Thus, “[i]f the objectionable conduct is unilateral, and thus beyond the reach of Section 1, it may not be prohibited by the Sherman Act regardless of how egregious it is.”<sup>113</sup>

### III. A POSSIBLE SOLUTION TO ANTITRUST ENFORCEMENT IN THE INTRABRAND CONTEXT

This Part recommends a possible solution that can have a positive impact on enforcement of anticompetitive conduct falling outside the strict language of the rules, while violating their spirit. I explore the Supreme Court’s decision in *Lorain Journal Co. v. United States* as a classic example of an anticompetitive vertical restraint case and conclude that courts should move beyond their current preoccupation with economic and procompetitive impacts on the interbrand market.<sup>114</sup> Courts handling such cases should focus on alternative ways of considering the intrabrand problem, especially when it is the distributor who wishes to impose the vertical restraint on its supplier, and not the other way around.

The Court’s preoccupation with anticompetitive effects on interbrand competition in the case of nonprice vertical restraints has insulated what should be branded and enforced under the Sherman Act as anticompetitive conduct by distributors.<sup>115</sup> The problem for the most part is that courts overlook the initial stage of exclusive dealing arrangements—the formation of the agreement itself—in considering the reasonableness of a restraint. Why should it be the case that so

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113 *Id.* Section 1 of the Sherman Act does not apply to unilateral conduct.

114 In *Lorain*, a local newspaper was the sole method of advertisement to the Lorain community until a nearby radio station was created and began accepting advertisements from businesses that also advertised with the newspaper. *Lorain Journal Co. v. United States*, 342 U.S. 143, 146–48 (1951). Likewise, X, or any firm similarly situated, would want to become the sole distributor of luxury automobiles in this geographic area in order to capitalize on monopoly-level prices, just as Lorain wished to preserve its current advertising prices instead of having to compete with the radio station. Through this comparison, several salient parallels are drawn out which provide a useful rubric by which to hold a firm like X liable when it would otherwise evade antitrust law enforcement.

115 Building off of his model for addressing Sherman Act section 2 underenforcement with regard to vertical restraints, I find it more convenient to make use of Kenneth Glazer’s “coercive” and “incentivizing” conduct terminology when considering the formation and maintenance of distributor-centric exclusivity agreements. See Glazer & Henry, *supra* note 79, at 46; Kenneth L. Glazer, Three Key Distinctions Under Section 2: Written Testimony of Kenneth L. Glazer Before the Antitrust Modernization Commission 6 (Sept. 29, 2005) [hereinafter Glazer Statement], available at [http://govinfo.library.unt.edu/amc/commission\\_hearings/pdf/Glazer.pdf](http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Glazer.pdf).

long as there is “a modicum of interbrand competition,”<sup>116</sup> the rule of reason analysis employed by the courts would allow a distributor<sup>117</sup> to enforce anticompetitive restraints by means of refusals to deal and exclusive dealership termination whenever a firm in the vertical distribution chain tries to carry a competing firm’s product?<sup>118</sup> In the years after *Sylvania*, and in the wake of the proliferation of the rule of reason, “a surplus of anticompetitive vertical restraints is tolerated . . . because courts almost always find a priori or abstract legitimate business justifications for them.”<sup>119</sup> Moreover, as argued above,<sup>120</sup> too often a firm will evade enforcement of the Sherman Act by virtue of its not meeting the letter of the law regarding some element of anticompetitive behavior, such as the requisite market power for a monopoly claim.<sup>121</sup>

#### A. *Eliminating Enforcement Loopholes by Focusing on Coercive Conduct*

One way to give teeth to the rule of reason standard as applied to section 2 monopoly claims is by focusing on coercive conduct.<sup>122</sup> *Lorain* provides a close analogy to our car dealership example. There, the defendant, Lorain Journal, owned the town’s only competitive daily newspaper.<sup>123</sup> At the time, running advertisements in this paper was essential for local businesses to spread the word about their products and services.<sup>124</sup> This remained true until 1948, when WEOL radio station was approved by the FCC to operate in a town a short distance from Lorain, and it began to accept advertisement business from Lorain businesses that wanted both print and radio coverage.<sup>125</sup> In order to protect its monopoly on the Lorain advertising market,

116 Burns, *supra* note 10, at 914.

117 The rule of reason is usually applied in the case of a “manufacturer” who wants to impose a restraint on trade. However, given the fact that it is often the distributor (be it X, Ticketmaster, or any other similarly situated company) that would be exercising its market influence over the supplier/manufacturer of a particular product, I believe that the analysis works in both directions and thus it is just as accurate to replace manufacturer with “distributor.”

118 Richard Hardack, *What They Don’t Want You to Hear: Beltone, Ticketmaster, and Exclusive Dealing*, 9 B.U. J. SCI. & TECH. L. 284, 287 (2003).

119 *Id.* at 285.

120 *See supra* Part II.C.

121 Hardack, *supra* note 118, at 285.

122 *See generally* Glazer & Henry, *supra* note 79 (arguing that coercive conduct giving rise to forced exclusive dealing agreements ought to be forbidden under section 2 of the Sherman Act).

123 *Lorain Journal Co. v. United States*, 342 U.S. 143, 146 (1951).

124 *Id.* at 152 (calling the newspaper “an indispensable medium of advertising”).

125 *Id.* at 147–48.

the newspaper began refusing to accept advertisements from businesses that also advertised on WEOL, knowing that these businesses depended on the local print advertising.<sup>126</sup>

In much the same way, *X* could potentially force *Y* from the market by requiring that the manufacturers deal with it exclusively. Imagine that the majority of luxury car makers use *X* as their dealer because of its dominant physical presence in the market. Then, *Y* comes along and begins offering a new method of selling cars—over the Internet. Of course, these manufacturers want as much distribution as possible and want to take advantage of the online car-sales market; yet *X* wants to protect its monopoly on distribution and so requires all of its suppliers to sell their cars exclusively through it or refuses to do businesses with them.

If analyzed under the boycott schema of *Lorain*, it is likely that such conduct would be found violative of section 2, regardless of whether or not it is a group boycott per se.<sup>127</sup> Furthermore, what is underlying this unreasonable restraint of trade is the fact that it was born of coercive conduct. *X*, much like the *Lorain Journal*, would essentially be saying “take it or leave it,” thus leaving the customer (the manufacturer in this case) with no alternative as *X* already owns the prime car-selling locations around town.<sup>128</sup>

It would also be useful for the courts to view this coercive conduct in light of a refusal to deal. For example, in *United States v. Dentsply International, Inc.*,<sup>129</sup> the court applied the following test in concluding that Dentsply—the dominant manufacturer in the American artificial teeth market—violated Section 2 of the Sherman Act by not permit-

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126 *Id.* at 148. This policy conceivably gave rise to exclusive dealing arrangements by which the businesses agreed not to advertise with any competitor of the newspaper. “The program was effective.” *Id.* at 149. The court held that “[t]he publisher’s attempt to regain its monopoly of interstate commerce by forcing advertisers to boycott a competing radio station violated § 2.” *Id.* at 152.

127 See Glazer Statement, *supra* note 115, at 6–7 (“What [Lorain] did . . . was the equivalent of the classic group boycott . . . . Because of its monopoly power, the newspaper was able to achieve the same result . . . . [W]hatever the label[,] . . . [it is] a refusal to deal with a customer or supplier that does business with a competitor.”). *But see* Hardack, *supra* note 118, at 287 (“A vertical restraint, wherein, *e.g.*, ‘a supplier or dealer makes an agreement exclusively to supply or serve a manufacturer, is not a group boycott . . . .’” (quoting *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 594 (1st Cir. 1993))).

128 The above example in its entirety would be no different had the case involved Ticketmaster. Using its superior presence in the market and ability to reach customers, Ticketmaster could be attaining its exclusive ticketing agreements by means of coercive conduct and take-it-or-leave-it demands on venues.

129 399 F.3d 181 (3d Cir. 2005).

ting its distributors to carry other denture brands: “whether the challenged practices bar a substantial number of rivals or severely restrict the market’s ambit.”<sup>130</sup> Turning this analysis around, yet preserving its force, it could be that *X* was imposing on the manufacturers prohibitions on dealing with any of *X*’s rival distributors in order to continue doing business with them.

The designations are not quite as important as the fact that the manufacturers are *X*’s customers insofar as they use its car distribution services. In *Dentsply*, the fact remained that even “in spite of the legal ease with which the relationship can be terminated, the dealers have a strong economic incentive to continue carrying Dentsply’s teeth,” and therefore “the rivals simply could not provide dealers with a comparable economic incentive to switch.”<sup>131</sup> Likewise, even if *X* did not have a monopoly under section 2, but *Y* could not overcome the economic incentive or provide a better deal to the car makers that would entice them away from dealing exclusively with *X*, it is likely that a court, using coercive conduct as a factor, would find *X* liable for its anticompetitive behavior. This is because under such an analysis the court would no longer be overlooking the underlying impact of the agreement at the intrabrand level by simply focusing on the procompetitive impacts on the interbrand market. It is possible that the agreement Dentsply had with its distributors had a procompetitive impact. Courts, however, should no longer ignore the fact that such an agreement came to be as a result of a firm’s use of its indispensability in order to present the customers with “an offer they couldn’t refuse.” According to the Third Circuit, the “test is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market’s ambit.”<sup>132</sup>

### *B. Expanding the Coercive Conduct Analysis Beyond Monopolies*

Though Mr. Glazer,<sup>133</sup> in his statement before the Antitrust Modernization Commission, argues that the coercive conduct rubric can only apply in cases of monopolies and, thus, section 2 of the Sherman Act,<sup>134</sup> this Note argues its scope is broad enough to cover section 1—

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130 *Dentsply*, 399 F.3d at 185, 191.

131 *Id.* at 194–95.

132 *Id.* at 191.

133 Kenneth L. Glazer was a competition lawyer for Coca-Cola before being appointed Deputy Director of the Bureau of Competition. See Press Release, Fed. Trade Comm’n, Glazer and Wales Appointed Deputy Directors of Bureau of Competition (Mar. 28, 2006), available at <http://www.ftc.gov/opa/2006/03/deputydirectors.shtm>.

134 See Glazer Statement, *supra* note 115, at 8.

unreasonable restraints of trade. As seen thus far, the anticompetitive behavior of intrabrand distributors seeking exclusive distributorships will not always be strictly unilateral.<sup>135</sup> Granted, any refusals to deal on the distributor's part would be unilateral, but if the suppliers/manufacturers go ahead with the exclusive agreement, the firms have entered into Sherman Act section 1 territory.

Applying the coercive conduct inquiry in the context of section 1 will protect the intrabrand market from the anticompetitive effects of exclusive dealing arrangements between *X* and its manufacturers that would otherwise destroy the ability of other distributors to compete. If the court were to focus on any coercive conduct that gave rise to the exclusive dealing arrangements, it would potentially enable injured plaintiffs to prevail in situations where they were excluded from the market, notwithstanding any positive impact on the interbrand market.

The whole point of the coercive conduct model as applied here is to shift the court's focus away from its traditional concerns under *Sylvania* and its progeny, and to realize that reduction in competition at the intrabrand level could itself have deleterious effects on the downstream consumer and, thus, the market as a whole.<sup>136</sup> If *X*, or any firm in its position, were left to its own devices to completely cut out competition at the distributor level, it would be free to charge monopoly-level premiums on each car sale. The intrabrand market can no longer be ignored and be subject to the rather lenient rule of reason standard. Rather, this Note suggests some level of increased scrutiny in between per se illegality and the rule of reason.<sup>137</sup> However, it may be wise to avoid a strict liability rule because there are situations wherein a procompetitive justification of great magnitude will exist such that the coercive conduct at the intrabrand level would be worth overlooking.

Finally, the coercive conduct analysis should extend beyond situations involving monopolies because it would help to address those situations where a firm that comports with the letter of the law, but

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135 Their exclusivity agreements require the acceptance of the particular manufacturer with which they are attempting to deal.

136 According to Mr. Glazer, this method of scrutiny is beneficial because it "focuses on the conduct itself rather than effects or intent or foreclosure . . . . By focusing on the conduct itself, we put firms on notice, in advance, as to exactly what they can and cannot do." Glazer Statement, *supra* note 115, at 9 (internal quotation marks omitted).

137 Mr. Glazer goes further than I would by suggesting a per se rule based on his view that the coercive conduct "hurts the customer and leaves the competitor with no real options for responding." *Id.*

violates its spirit, is able to avoid liability under the Sherman Act. This pertains mostly to the issue of the relevant market and market power. Above, this Note described various situations where a firm could evade antitrust enforcement because of the peculiarities of the market, thus falling somewhere between section 1 and section 2 enforcement.<sup>138</sup>

A solution lies in a suggestion made by Mr. Hardack in his article with regard to defining the relevant market for imposing antitrust liability on Ticketmaster. If one were to look at a given intrabrand market as a whole, such as Ticketmaster's concert ticketing market, it is possible to rationalize that given the number of shows that need ticket distribution services and the relative ease with which one can set up a telephone or internet ticketing system, the barriers to entry are not prohibitively high. Likewise, a business like *X* could not preclude entry overall, especially when its exclusivity agreements come due every so often. Even if it did, it is not as though it is putting large, Fortune 500 companies out of business in doing so.<sup>139</sup>

However, in the case of Ticketmaster, if the market were narrowed to only "each self-contained show at each venue,"<sup>140</sup> then courts would have ample grounds to enforce anticompetitive behavior where the firm might have otherwise evaded liability. The rationale behind treating each ticketing agreement for a particular show as an individual market is that "a ticket buyer can not substitute a ticket to one show for another."<sup>141</sup> Each show, and thus each corresponding agreement, is a separate entity and, therefore, if the arrangement is one of exclusive dealing, then the ticket distributor's competitors would be completely barred from this market, albeit a narrow one.

Consequently, an intrabrand ticketing business like Ticketmaster could fix prices in the form of ticketing service charges particular to this one show—thereby establishing the much-needed market power in order to find the firm in violation of the Sherman Act.<sup>142</sup> As Hardack compellingly argues, "[A]nticompetitive vertical restraints should not be tolerated merely because the victim is a single merchant whose business is so small that his destruction makes little difference

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138 See *supra* notes 112–13 and accompanying text.

139 However, "[m]onopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups." Hardack, *supra* note 118, at 289.

140 *Id.* at 318.

141 *Id.*

142 See *id.* at 289 ("While the markets may remain separate or incommensurate, the harms should be aggregated if their effect is as great or greater than the harm a single monopolist with market power can cause.").

to the economy.”<sup>143</sup> Despite the fact that the elimination from the market of a business like *Y*'s would not have a profound ripple effect in the economy, courts should take care to enforce the Sherman Act in those cases. Such vigilance reflects the importance of monitoring coercive conduct among firms and urges courts to look beyond economic effects and more toward the underlying fairness of vertical transactions in order to prevent violations of the spirit of the antitrust laws, if not their letter.

#### CONCLUSION

Courts that wish to properly enforce the procompetitive spirit of the Sherman Act should no longer ignore the anticompetitive impact of vertical nonprice restraints of trade on intrabrand competition. Through the examples of *X* and *Y* car dealerships, movie clearances, and Ticketmaster, this Note has shown how such agreements can eliminate firms from the distribution market while avoiding liability because of market-specific peculiarities and the courts' adherence to Chicago School preoccupations with interbrand competition alone.

By choosing not to factor into their Sherman Act analysis relevant, pre-contract formation behaviors such as coercive conduct, courts are allowing firms like *X* to dominate the distribution market without repercussions. Additionally, courts must reassess their notions of what constitutes the relevant market in exclusive dealership cases, because even though a dealer may not dominate an entire market from a bird's eye view, it may have effectively created a series of small monopolies, one for each venue and show it tickets, as is the case with Ticketmaster.<sup>144</sup> Courts' categorization of exclusive vertical intrabrand agreements as irrelevant to antitrust analysis will (and probably already has) result in less intrabrand competition and thus higher service charges and prices for downstream customers. Movie

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143 *Id.*

144 The same can be expanded to the car dealership hypothetical. Even if *X* is unable to procure exclusive dealership agreements with all of the luxury car dealers in a particular region, each individual agreement can be looked at as a monopoly in and of itself. This is the case if the relevant market is narrowed to just one kind of luxury car in a given region. Therefore, instead of thinking of the market as the luxury automobile market in City *A*, we would consider the market for Mercedes or BMW as individual markets relevant to the antitrust analysis outlined in this Note. Therefore, *X* can have a monopoly, not in the luxury car market, but in the Mercedes Benz market or the BMW market as a result of exclusive dealership agreements that only allow *X* to sell this particular brand in this region. The Sherman Act would have a much stronger bite in the intrabrand market if this were how courts viewed the relevant market.



theater patrons, concertgoers, and luxury car buyers beware—the courts' eschewing of the importance of intrabrand competition is raising prices at a dealer near you.

