Exclusive Territorial Arrangements and the Antitrust Laws

Follow this and additional works at: http://www.repository.law.indiana.edu/ilj

Part of the Antitrust and Trade Regulation Commons

Recommended Citation
Available at: http://www.repository.law.indiana.edu/ilj/vol39/iss4/5
The inevitable result of a deduction disallowance is that large concerns with excess working capital have the greatest ability to purchase and business ownership therefore becomes more and more concentrated. These consequences appear inconsistent with recent legislation.

Ultimately, the goals of both the antitrust and tax laws should be examined and steps taken to correlate respective policies. This may require that the entire tax structure be revamped. However, as an immediate step, the tax treatment of en masse contracts, customer structure and goodwill could be revised to aid small business and foster that free and open competition which is the cornerstone of our economy.

EXCLUSIVE TERRITORIAL ARRANGEMENTS AND THE ANTITRUST LAWS

On October 31, 1963, the Department of Justice filed a civil antitrust suit against the Studebaker Corporation of South Bend, Indiana, seeking to end Studebaker's allegedly illegal methods of distributing the motor-oil additive "STP." The complaint asserted that Studebaker fixed the prices at which its distributors could sell the additive to jobbers, jobbers could sell to retailers, and retailers could sell to the public, thereby violating section 1 of the Sherman Act. Studebaker, it was charged, also allocated territories within which its distributors could sell, and prevented them from selling outside of those territories. The Studebaker case is one of several recent instances in which "territorial security" has come under fire from the Government.

The term "territorial security" refers to arrangements under which a wholesaler or retailer agrees not to sell outside of a specified geographical area, or not to sell to customers who reside or have their places of business outside of that area. Closely related to territorial security is the

installments covering a six year period. The decision of the court to disallow depreciation undoubtedly worked a hardship on the taxpayer in meeting the necessary installments. That decision tends to reduce the incentive of acquiring a small business where the taxpayer has limited funds and resources.

150. Large firms acquired surpluses of working capital because of substantial depreciation charges and accumulation of profits during periods when tax rates were lower. MASSEL, COMPETITION AND MONOPOLY 74 (1962).

151. See generally Schmidt, supra note 148.


2. 26 Stat. 109 (1890), as amended, 15 U.S.C. § 1 (1958): "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade of commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

3. The terminology relating to such arrangements is by no means uniform. Such
"exclusive franchise," an arrangement under which a supplier assigns his wholesaler or retailer a territory within which the supplier agrees not to sell to anyone else.\(^4\) Territorial security is often employed in conjunction with the exclusive franchise, with each wholesaler or retailer being confined to his assigned territory, and each safeguarded against "raids" on his territory by others.\(^6\) Territorial security, exclusive franchises, and combinations of these arrangements are referred to in this Note as "exclusive territorial arrangements."

This Note explores the economic and legal issues which arise from the use of exclusive territorial arrangements. Since the legality of these arrangements cannot intelligently be evaluated without considering the purposes they are designed to serve, and their effects on competition, the economic issues are considered at the outset.

I. THE "ECONOMIC AND BUSINESS STUFF"\(^6\) FROM WHICH EXCLUSIVE TERRITORIAL ARRANGEMENTS Emerge

A. Exclusive Franchises

When a supplier adopts an exclusive franchise system at the retail level of distribution, he limits the number of retailers to whom he can sell.\(^7\) The question that suggests itself is why would he not sell to all


4. This type of arrangement is usually referred to in marketing literature as an "exclusive agency." See Note, Restricted Channels of Distribution Under the Sherman Act, supra note 3, at 802. The exclusive franchise should not be confused with an arrangement under which the distributor or dealer agrees to handle the supplier's product to the exclusion of competitive products. The latter type of arrangement is referred to as "exclusive dealing." Exclusive dealing may present problems under section 3 of the Clayton Act, 38 Stat. 731 (1914), as amended, 15 U.S.C. § 14 (1958). An exclusive dealing contract violates section 3 where the effect of such contract may be to substantially lessen competition or tend to create a monopoly in the line of commerce affected. Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961). For a discussion of exclusive dealing arrangements see Smith, Vertical Arrangements in Antitrust Law: Exclusive Dealing Arrangements, 22 A.B.A. Antitrust Section 18 (1963).

The term "supplier," as used in this Note, denotes one who supplies tangible products or intangible property rights to wholesalers or retailers. The term includes manufacturers, prime distributors and owners of patents or trademarks. See Stewart, Franchise or Protected Territory Distribution, 8 Antitrust Bull. 447 (1963).


7. Exclusive territorial arrangements may be employed at any level of distribution.

To avoid unnecessary complexity, however, these marketing systems are discussed in this section only as they are used on the retail level.
NOTES • 787

retailers who wanted to buy his product, and benefit from the resulting increase in retail price competition through greater sales. It may be, if he lacks sufficient economic leverage, that he is compelled to restrict the number of his retail outlets by those retailers who would not otherwise sell his product. However, if the supplier is under no such compulsion, why would he voluntarily limit the number of retail outlets from which he could sell his product to consumers?

It is instructive to see whether an exclusive franchise system would be economically feasible under certain hypothetical market conditions. Suppose that the supplier is a monopolist who sells his product directly to retailers. As a monopolist, he has the power to fix the wholesale price of his product, and will do so at a level that will maximize his profits. The monopolist supplier normally benefits from maximum competition among his retailers because such competition decreases the retail price of a product and increases supplier sales volume. When maximum competition exists at the retail level, retailer profits are set by market forces at a minimum level. With retailer profits at a minimum, the supplier can exercise effective control over the retail price of his product, seeking by this means to obtain optimum sales volume. If the supplier adopts an exclusive franchise system and thereby restricts the number of retailers to whom he sells, competition among his retailers decreases, retailer profits normally increase, and the supplier's control over the retail price of his product will decrease. The less control that a supplier has over the retail price of his product, the less certain he is that that price will be maintained at a level which will result in optimum supplier sales volume and maximum profit. It is obvious, then, that the

9. The term "monopolist" in this context refers to a person with full monopoly power. In Att'y. Gen. Nat'l Comm. Antitrust Rep. 318 (1955), the term "monopoly power" is defined as follows:
   The essence of full monopoly power resides in being the sole source of a product, so that the buyer must meet the seller's terms or go without. . . . The basic economic aspect of monopoly is the seller's power over the terms on which he trades. All the factors and elements which constitute this idea are summed up by the convenient short-hand reference to monopoly power as power over price or power to exclude competitors. Monopoly power in this sense implies the monopoly seller's relative freedom from pressure to reduce costs, to develop new products, or otherwise to innovate, and to diffuse the benefits among its customers.
10. It is assumed that the wholesale price of the product will be uniform to all retailers.
11. If retailer profits are at a minimum level, the retail price of the product will be determined primarily by the wholesale price fixed by the supplier. Jordan, supra note 8, at 114.
12. Id. at 113-14.
monopolist supplier would be disinclined to adopt an exclusive franchise system.

When the supplier is not a monopolist, but is instead a competitor in a perfectly competitive market, he is unable to affect the price of his product by increasing or decreasing the number of retailers who sell his product because he has no control over the competitive market forces which determine product price. Under such conditions, it is not advantageous for the supplier to restrict the number of retailers to whom he sells.

Thus, the adoption of an exclusive franchise system would be unwise in situations where the price of a product is controlled by a monopolist or is determined by the forces of perfect competition. However, the perfectly monopolistic and perfectly competitive markets discussed above are not intended to, and do not, describe reality. Actual markets are neither perfectly competitive nor perfectly monopolistic; they contain both monopolistic and competitive elements. Any realistic appraisal of exclusive franchise systems must, therefore, be conducted against a background of imperfectly competitive markets.

In an imperfectly competitive market, all retailers are not perfect substitutes for each other; consequently, consumers may prefer some retailers to others. Consumer preferences for retailers, or "consumer-retailer attachments," are especially important where the purchase of a product requires a large capital expenditure by the consumer. If a consumer purchases an automobile, for example, and that automobile turns out to be a "lemon," the consumer may suffer substantial financial loss. To avoid risk, he may prefer to patronize a well established retailer with whom he has had previous experience, relying upon that retailer to "stand behind" the product and to correct any defects in it. The consumer's selection of a brand may be affected by the existence of such

13. The term "perfectly competitive market" denotes a hypothetical market in which the following conditions are fulfilled: the products of all rival sellers in the market are perfect substitutes for each other; all buyers and sellers have perfect knowledge of the market and complete indifference as to their customers or sources of supply; the number of sellers is so large that no one seller produces more than a negligible share of the market supply; new firms can enter the market with the same costs as existing firms; and all buyers and sellers in the market have mobility. The term does not purport to indicate ideal conditions. ATty. GEN. NAT'L COMM. ANTITRUST REP. 316, 337 (1955).
16. "Imperfectly competitive" markets are markets which contain both monopolistic and competitive elements. The standard work on such markets is CHAMBERLIN, THEORY OF MONOPOLISTIC COMPETITION (8th ed. 1957).
17. On the other hand, when a consumer purchases a low-priced, relatively standardized product, such as toothpaste, he tends to purchase at the most convenient outlet. Note, Restricted Channels of Distribution Under the Sherman Act, supra note 3, at 795.
If consumer-retailer attachments account for a sufficiently large percentage of the total sales of a supplier's product, the supplier may find it profitable to preserve such attachments by maintaining a relatively stable group of retailers. One way for the supplier to stabilize his dealer organization is to adopt an exclusive franchise system.

A supplier may derive many benefits from limiting the number of retailers to whom he sells his product. He may be able to attract better dealers by offering them exclusive franchises, and he may achieve higher sales volume by selling to these selected dealers. Moreover, by selling to a minimum number of dealers, the supplier can reduce his selling costs and more accurately estimate future demand for his product. Selling to a limited number of dealers may be desirable if the supplier's product is a "prestige" product, or one which requires specialized selling or servicing techniques which the supplier must control in order to protect his good will. Finally, by offering an exclusive franchise, the supplier may be able to induce the dealer to handle the supplier's product to the exclusion of competitive products.


19. Id. at 38. A policy of maintaining a relatively stable group of retailers may develop consumer-retailer attachments and, hence, consumer-brand attachments at a lower cost to the supplier than any other sales promotion policy. Id. at 37-38.

20. Id. at 38-39. By limiting the number of his retailers, the supplier may help protect his retailers from incurring losses which would cause them to go out of business. Ibid.

An exclusive franchise system is not likely to be adopted unless at least two market conditions exist: first, consumer-retailer attachments must account for a sufficiently high percentage of the supplier's total sales; and, second, economies of scale in distribution must preclude the existence of many efficient retailers in each market. Id. at 32, 44.


22. Note, Restricted Channels of Distribution Under the Sherman Act, supra note 3, at 805; Pashigian, op. cit. supra note 18, at 26-41.


25. Id. at 117. Under certain circumstances, such an exclusive dealing arrangement may run afoul of the antitrust laws. See note 4 supra.
An exclusive franchise may also be beneficial to the franchised dealer. Indeed, potential dealers often demand exclusive franchises as their price for making substantial investment in a dealership because that investment will be better protected if the number of the supplier's outlets is restricted. An exclusively franchised dealer may derive some benefit from the supplier's good will. Additionally, the profit rates of dealers operating under an exclusive franchise system tend to be higher than those of retailers who do not operate under such a system. From the dealer's point of view, however, the main advantage of an exclusive franchise system is that it affords him protection against intrabrand competition.

The exclusive franchise system can also benefit the consumer. Since the system tends to produce a relatively stable group of retailers, the consumer may be able to purchase from a dealer who has been in business for a number of years and with whom the consumer has had prior dealings. Also, the consumer may receive better service from an exclusively franchised dealer than he otherwise would, and he may be able to purchase from a more complete stock of the supplier's products.

Like all marketing systems, however, the exclusive franchise arrangement has its disadvantages. The supplier, of course, will likely suffer if the dealer does not perform satisfactorily. The dealer's business may be very adversely affected if the supplier terminates his franchise, especially if the business is based upon exclusive representation. And the exclusive franchise arrangement can adversely affect the public. Retail prices tend to be higher under an exclusive franchise system than under a system in which intrabrand competition is unrestricted, and the entry into the market of more efficient retailers tends to be forestalled.

B. Territorial Security

It is evident from the above that under certain circumstances a supplier may find it profitable to restrict intrabrand competition. One way for the supplier to do this is to adopt an exclusive franchise system.

28. Note, Restricted Channels of Distribution Under the Sherman Act, supra note 3, at 809. The term "intrabrand competition" denotes competition between persons who sell the same brand. It should not be confused with competition between persons who sell different brands. The latter type is referred to as "interbrand competition."
29. Pashigian, op. cit. supra note 18, at 38. Dealership turnover rates tend to be relatively low and dealership life expectancies tend to be relatively high under an exclusive franchise system. Id. at 21-24.
30. Kessler, supra note 21, at 1136.
31. Ibid.
32. Pashigian, op. cit. supra note 18, at 14, 42.
However, to the extent that retailers or consumers are mobile, *i.e.*, able and willing to travel for the purpose of selling or buying a product, an exclusive franchise system may not effectively protect retailers from intrabrand competition. In such a situation the supplier may find it advantageous to resort to territorial security in order to protect his retailers from intrabrand competition. Territorial security not only helps protect the retailer from "raids" on his territory by other retailers selling the same brand, but also encourages him to develop the full sales potential of his territory.

Territorial security and exclusive franchises emerge from the same "economic and business stuff," and have substantially the same advantages and disadvantages.

C. The Net Economic Effects of Exclusive Territorial Arrangements

Exclusive territorial arrangements restrict intrabrand competition to varying degrees; the effect of an arrangement on such competition depends upon the percentage of the relevant market foreclosed, as well as upon the vigor of the remaining competition, at each level of distribution. An exclusive territorial arrangement may have an inhibitory effect on interbrand competition where either the supplier or his dealers occupy dominant positions. However, where neither the supplier nor

34. Jordan, *supra* note 8, at 120. A raid by one retailer on another's territory will often constitute an attempt to take away the raided dealer's best accounts, since it may cost the raiding retailer less to obtain such accounts than to cultivate the less lucrative accounts in his own area. If the raided retailer loses his best accounts, he may go out of business, or may engage in retaliatory raids. In either event, the less lucrative accounts are likely to go by default to other brands, thereby decreasing the supplier's share of the market. Note, Restricted Channels of Distribution Under the Sherman Act, *supra* note 3, at 811-13.

To the extent that a raiding dealer makes sales that would have been made by the raided dealer anyway, duplicated dealer efforts dissipate available promotional funds with no return to the supplier. By preventing an overlap of dealer efforts, territorial security enables the supplier to make a more efficient allocation of his dealers' resources. Stone, *Closed Territorial Distribution: An Opening Question in the Sherman Act*, 30 U. Chi. L. Rev. 286, 310-11 (1963).

35. Territorial security may be enforced by terminating the franchise of any retailer who engages in raids, or by requiring the raiding dealer to "pass over" all or some of the profit he makes on each raid to the raided dealer. Note, Restricted Channels of Distribution Under the Sherman Act, *supra* note 3, at 814-17. If territorial security is enforced by the latter method, interbrand competition is not necessarily completely eliminated, since the extent to which such competition is restricted depends upon the extent of the pass-over.

36. See Hershey Chocolate Corp. v. FTC, 121 F.2d 968 (3d Cir. 1941), for an example of how exclusive territorial arrangements, if used by dominant suppliers, may inhibit interbrand competition at the dealer level by driving competing dealers out of business. United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948), illustrates how exclusive territorial arrangements, if used in conjunction with other trade practices by dominant distributors, may inhibit interbrand competition at the supplier level by denying competing suppliers a market for their products.
dealers are in a dominant position, an exclusive territorial arrange-
ment may stimulate interbrand competition in the long run. This would
be particularly true where the supplier is a small factor in the industry,
or where it is in a competitively vulnerable position because it is a new
entrant or a failing company. The fact that exclusive territorial
arrangements may restrain as well as stimulate interbrand competition
raises the issue of whether such arrangements are legally justifiable.

II. THE LEGAL BACKGROUND

A. Exclusive Franchises

It seems to be established that an exclusive franchise is not illegal
under the antitrust laws unless it is effected by a party or parties with
monopoly power, or is without a legitimate business purpose. The
reasonableness of an exclusive franchise is evaluated by determining
whether the arrangement affords only fair protection to the interests of
the party in whose favor it is given, and does not impose a restraint so
large as to interfere with the interests of the public.

In United States v. Bausch & Lomb Optical Co., the district court
condemned an elaborate distribution scheme designed to fix the resale
price of pink-tinted eyeglass lenses, but upheld a separable exclusive
franchise agreement conceived to provide a source of supply for the
distributor. The court said that the exclusive franchise agreement was
needed to protect the distributor's investment in developing good will
and enlarging the public patronage of a relatively new article of com-

37. Stewart, Exclusive Franchises and Territorial Confinement of Distributors, 22
A.B.A. ANTITRUST SECTION 3, 37 (1962); Day, supra note 3, at 249.
38. Stewart, supra note 37, at 37. The less powerful the supplier, the more difficult
it may be for it to establish and maintain a dealer organization without employing
exclusive territorial arrangements. Robinson, Restraints of Trade and the Orderly
39. Where an exclusive franchise "forms part of an attempt to monopolize pro-
§ 2 (1958)], or the lesser degree of unreasonable restraint prohibited by Section 1, it
should be held a violation." On the other hand, where an exclusive franchise "is merely
an ancillary restraint, reasonably necessary to protect the parties' main lawful business
purposes," such a franchise "should be upheld where its effect is not unreasonably to
foreclose competition from the dealer's market." ATT'Y. GEN. NAT'L COMM. ANTITRUST
Since Bausch & Lomb, the Government has rarely challenged the legality of exclusive franchises. Most recent suits attacking them have been instituted by private parties, and these attempts have been notably unsuccessful. In two such suits, Schwing Motor Co. v. Hudson Sales Corp. and Packard Motor Car Co. v. Webster Motor Car Co., former automobile dealers in Baltimore brought actions against automobile manufacturers for treble damages on account of the termination of their franchises. The manufacturers involved were much smaller than the "big three" in the automotive industry, and both had experienced declines in their respective market shares.

The plaintiffs in Schwing alleged that the manufacturer terminated its dealerships in Baltimore in favor of another dealer who had been granted an exclusive franchise in the Baltimore area. The court dismissed the case, stating that exclusive franchise agreements are not unlawful unless they are used to violate the antitrust laws. The court said:

[T]he mere fact that such an agreement necessarily gives the dealer a monopoly in handling the product of the particular manufacturer in a given area, and thereby enables the dealer to dictate the price at which the products of that manufacturer shall be sold in that area, subject to competition with the products of other manufacturers, does not condemn such agreements; otherwise all exclusive agency agreements would be illegal per se.

In the Packard case, the plaintiff alleged that the largest of three Packard dealers in Baltimore told Packard that it would stop selling their automobiles unless it was granted an exclusive franchise. Packard thereupon informed the plaintiff that its franchise would be discontinued in one year. The district court entered judgment for the plaintiff after a trial, but the court of appeals reversed the judgment of the district court, stating that an exclusive franchise is lawful if it is not part of a scheme to monopolize, and if effective competition exists at both supplier and dealer levels. The court of appeals, recognizing the legitimate business

42. The district court's decision on the exclusive franchise agreement was upheld by an equally divided Supreme Court. 321 U.S. 707 (1944).
46. 138 F. Supp. at 903.
reasons which often lead to the adoption of an exclusive franchise system, said:

"The short of it is that a relatively small manufacturer, competing with large manufacturers, thought it advantageous to retain its largest dealer in Baltimore, and could not do so without agreeing to drop its other Baltimore dealers. To penalize a small manufacturer for competing in this way not only fails to promote the policy of the antitrust laws but defeats it." 47

More recently, in *United States v. White Motor Co.*, 48 the district court said, and the Government seemed to concede, that exclusive franchises are lawful when ancillary to a lawful main purpose. 49

**B. Territorial Security**

The law relating to territorial security provisions in general is unsettled, although it seems well established that a patent or trademark may form the basis of a lawful license agreement containing territorial security provisions. 50 The early cases uniformly held that territorial

---

47. 243 F.2d at 421.
49. 194 F. Supp. at 578, 372 U.S. at 271 n.11.
50. Stewart, *Franchise or Protected Territory Distribution,* 8 ANTITRUST BULL. 447, 461-66 (1963); Stewart, *Exclusive Franchises and Territorial Confinement of Distributors,* 22 A.B.A. ANTITRUST SECTION 33, 43-44 (1963). It should be noted, however, that under decisions of the Supreme Court, the purchaser of a patented article in one part of the United States may resell it anywhere in the United States, despite any territorial restrictions placed upon him by the patentee. This rule is an outgrowth of the notion that the first authorized sale of a patented article "exhausts" the patent monopoly. ATT'Y. GEN. NAT'L COMM. ANTITRUST REP. 236-37, 240-41 (1955). It is doubtful whether the owner of a trademark may impose valid territorial restrictions on the purchaser of a trademarked article. See *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 721 (1944); CALLMAN, *UNFAIR COMPETITION AND TRADEMARKS* § 15.5 (Supp. 1963).

If the owner of a patent or trademark wishes to territorially confine the distributors of a patented or trademarked product manufactured by him, he may be required to retain title to the product and license the distributors to sell the product for him. If he retains title to the product until it is sold to the ultimate consumer, he is thereby subjected to substantial economic and legal burdens which he would not otherwise be required to bear. Stewart, *Exclusive Franchises and Territorial Confinement of Distributors,* 22 A.B.A. ANTITRUST SECTION 33, 39-40, 43-44 (1963). The validity of an agreement under which a supplier retains title to goods until they are sold to the ultimate consumer may depend upon such factors as payment by the supplier of casualty insurance premiums, property taxes and the cost of inventory maintenance, accounting and policing; payment by the dealer to the supplier only after sale to the ultimate consumer; and the right of the dealer to return unsold goods to the supplier. A supplier who retains title to goods until they are sold to consumers may be subjected to legal burdens such as increased liability in tort and contract to consumers. *Id.* at 39-40, 43.

Since a patent license restriction is invalid unless at least a substantial portion (or perhaps all) of the product is patented, most manufactured products could not be
security was lawful when reasonably necessary to protect the parties' valid business purposes. Recently, however, the Government has been challenging the legality of such provisions, primarily on the assertion that territorial security so closely resembles two traditionally outlawed arrangements—horizontal market division and resale price maintenance—that it, too, ought to be declared illegal per se. The development of the law relating to territorial security is traced in the material that follows.

Phillips v. Iola Portland Cement Co., a case which illustrates the early attitude of courts toward territorial security, upheld the right of a cement manufacturer to recover damages from a cement jobber, where

the subject of a territorially restricted patent license agreement. Id. at 43.

Until recently, there was some authority to indicate that territorial security, even if generally condemned as illegal per se, would be lawful under a bona fide consignment agreement. In United States v. General Elec. Co., 272 U.S. 476 (1926), the Court upheld consignment agreements which contained resale price restrictions, although such restrictions are generally condemned as illegal per se. The Court said: "The owner of an article patented or otherwise is not violating the common law or the Anti-Trust Act by seeking to dispose of his articles directly to the consumer and fixing the price by which his agents transfer the title from him directly to such consumer." Id. at 488.

However, in Simpson v. Union Oil Co. of California, 377 U.S. 13 (1964), the Court, without expressly overruling General Electric, invalidated consignment agreements which were virtually indistinguishable from the agreements involved in General Electric except for the fact that the articles sold in General Electric were patented, whereas the commodity sold in Simpson was unpatented. In Atlantic Refining Co., No. 7471, FTC, TRADE REG. REP., 1961-63 Transfer Binder ¶ 16422 (May 16, 1963), the Commission condemned the use of consignment agreements to control retail prices during gasoline "price wars." The latter case is now pending on appeal in the Court of Appeals for the Sixth Circuit. 3 TRADE REG. REP. 25901 (October 26, 1964).

51. The legality of territorial security has been upheld in a number of cases, both state and federal. See, e.g., Snap-On Tools Corp. v. FTC, 321 F.2d 825 (7th Cir. 1963); Johnston v. Franklin Kirk Co., 83 Ind. App. 519, 148 N.E. 177 (1925). For a list of cases upholding such provisions, see Robinson, supra note 43, at 261.

Several bills have been introduced in Congress to permit the use of territorial security, but none have been enacted. See, e.g., H.R. 567, 88th Cong., 1st Sess. (1963). For a discussion of prior bills, see Heuerman, Dealer Territorial Security and "Bootlegging" in the Auto Industry, 1962 Wis. L. Rev. 486. The passage of such legislation appears unlikely unless a rule of per se illegality is eventually applied to territorial security situations.

52. Horizontal market division is illegal per se. See, e.g., Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951). But cf. United States v. National Football League, 116 F. Supp. 319 (E.D. Pa. 1953), in which the court held illegal certain by-laws of the National Football League, but upheld a by-law under which telecasts of outside professional football games were "blacked out" in the home territories of other teams on days when the other teams were playing at home. The court declared that "this . . . is a clear case of allocating territories between competitors, which is a practice generally held illegal under the antitrust laws." Id. at 322. However, the court concluded that the restraint was reasonable, stating: "This particular restriction promotes competition more than it restrains it in that its immediate effect is to protect the weak teams and its ultimate effect is to preserve the League itself." Id. at 325.

53. Unless legalized under "Fair Trade" statutes, resale price maintenance agreements are illegal per se. See, e.g., Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

54. 125 Fed. 593 (8th Cir. 1903), cert. denied, 192 U.S. 606 (1904).
the jobber breached his contract with the manufacturer by refusing to accept part of a quantity of cement which the jobber had ordered. The jobber's defense was based upon the contention that the contract was illegal under the Sherman Act because it prevented him from reselling or shipping the cement outside of the State of Texas. The court rejected this contention, finding that the manufacturer had no monopoly of the manufacture or sale of cement in the country, and that if territorial confinement of the jobber prevented him from competing with other jobbers or manufacturers outside of the State of Texas, the restriction was a mere "indirect and immaterial incident" of the contract rather than its major purpose or effect. Phillips has little present significance, because the court did not consider the arguments now being made against territorial security by the Government.

Not until 1932 was there a reported case in which territorial security was compared to horizontal market division and resale price maintenance. In that year the Federal Trade Commission dismissed a complaint which charged the General Cigar Co. with violating section 5 of the Federal Trade Commission Act by territorially confining its distributors. The Commission gave no reasons for dismissing the complaint. Commissioner McCulloch, in dissent, argued that territorial security should be held illegal per se because it has the same effect as an illegal horizontal agreement between distributors to divide territories. The Commissioner also compared territorial security to resale price maintenance. He argued that territorial security, like resale price maintenance, should be relegated to per se illegality because it prevents intra-brand competition between distributors. The arguments advanced by Commissioner McCulloch more than 30 years ago remain the principal legal arguments against territorial security provisions.

The district court in Boro Hall Corp. v. General Motors Corp.,

55. 125 Fed. at 595.
57. General Cigar Co., 16 F.T.C. 537 (1932). See Sealy, Inc., 45 F.T.C. 730 (1948), in which the Commission dismissed a complaint alleging territorial confinement of mattress manufacturers operating under trademark licenses. See also Columbus Coated Fabrics Corp., 55 F.T.C. 1500 (1959), in which charges relating to territorial security were dismissed because there was no substantial evidence to indicate that the supplier policed the arrangement. In Snap-On Tools Corp., No. 7116, FTC, Trade Reg. Rep., 1961-63 Transfer Binder § 15546, at 20413 n.8 (Nov. 1, 1961), the Commission said that the General Cigar case has little present significance.
58. 16 F.T.C. at 537-38.
59. Another argument against territorial security is based upon language in United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 721 (1944), that a seller "may not lawfully limit by agreement, express or implied, the . . . persons to whom its purchaser may resell . . . ."
60. 37 F. Supp. 599 (S.D.N.Y. 1941), aff'd, 124 F.2d 822 (2d Cir.) rehearing denied, 130 F.2d 196 (2d Cir. 1942), cert. denied, 317 U.S. 695 (1943).
upon its view of the facts, went very far toward upholding the legality of all territorial security arrangements when it upheld the territorial confinement of Chevrolet dealers by General Motors. The Boro Hall case was an action by a Chevrolet dealer to recover treble damages under the Sherman Act on the ground that General Motors had refused to permit it to establish a used-car outlet, lot or salesroom outside of its so-called "zone of influence." Without considering the affidavits of the parties, the district court dismissed the complaint for failure to allege such a restraint as would violate the antitrust laws. The court found reasonable the defendants' attempts to prevent the plaintiff from trading upon the defendants' name in an area where that name had been delegated to others.

The court of appeals did not go as far as the district court had in upholding the legality of territorial security. Relying upon an uncontradicted affidavit of the defendants, the court said that the dealer was not prohibited from selling used cars outside of its zone, but was prevented only from establishing a used-car outlet "at such place as would . . . unduly prejudice other dealers who did business with the seller." The court did not view this as an unreasonable interference with competition. The court found, in denying a petition for rehearing, that there was sufficient competition in the low-price car field in the dealer's market, and that the restrictive agreement had no tendency to monopolize trade.

Shortly after the Second World War, the Government began its attacks on territorial security; the automobile manufacturers, who were among the most important suppliers with territorially confined dealers, were its first target. Between 1949 and 1952, the automobile manufacturers succumbed to pressure from the Department of Justice, and eliminated territorial security clauses from their dealer franchise contracts. The Government then brought actions against numerous other suppliers whose dealers were confined to specified geographical areas, and all but two of these actions ended in consent decrees under which the suppliers were enjoined from restricting the territories in which their distributors could sell. The Government did not encounter much

61. 37 F. Supp. at 1000.
62. Id. at 1001.
63. 124 F.2d at 823.
64. Ibid.
65. 130 F.2d at 197.
67. See 1 TRADE REG. REP. 3040.842-856. The two actions which did not end in such decrees were United States v. Volkswagen of America, Inc., 182 F. Supp. 405
resistance because it was often willing to settle for consent decrees containing provisions which expressly permitted suppliers to designate areas of primary responsibility for their distributors. Under such provisions, distributors are not barred from selling outside of their areas of primary responsibility, but their franchises may be terminated if they fail to adequately represent their suppliers within the specified areas.

Not until United States v. Volkswagen of America, Inc. did a supplier contest an attack by the Department of Justice on territorial security. In Volkswagen, it was charged that the sole importer of Volkswagen automobiles and 14 Volkswagen distributors were engaged in an unlawful conspiracy in violation of section 1 of the Sherman Act, because the Volkswagen distribution system involved resale price maintenance and territorial security. The court, in denying the defendants' motion to dismiss the part of the complaint concerning the territorial security provisions, said that even if such provisions were legal by themselves, they might be illegal if part of an illegal price-fixing scheme. The Volkswagen case ended in a consent decree under which the defendants were prohibited from entering into agreements to fix the resale prices of Volkswagens. The charges relating to territorial security were dismissed on the agreement of the importer to notify its distributors that

(D.N.J. 1960) (defendants' motion for partial dismissal denied), TRADE REG. REP. (1962 Trade Cas.) ¶70256 (D.N.J. 1962) (consent decree which did not ban territorial security; the Government dropped the charges relating to territorial security in return for a concession by one of the defendants); and White Motor Co. v. United States, 372 U.S. 253 (1963).

68. See 1 TRADE REG. REP. 3040-495.
69. The consent decree in United States v. Rudolph Wurlitzer Co., TRADE REG. REP. (1958 Trade Cas.) ¶69011, at 74003 (W.D.N.Y. 1958) contains a typical provision permitting a supplier to designate areas of primary responsibility for its distributors:

"... Wurlitzer may exercise its right from time to time to choose and select its distributors and customers and to designate geographical areas within which a distributor may agree to devote his best efforts to the sale of coin-operated phonographs and may terminate the contract of any distributor who may fail to devote his best efforts to the sale in the area so designated of coin-operated phonographs manufactured by Wurlitzer or to represent Wurlitzer adequately in said area."

The legality of primary responsibility provisions is not beyond question. See Stewart, Exclusive Franchises and Territorial Confinement of Distributors, 22 A.B.A. ANTITRUST SECTION 49 (1963). Since primary responsibility provisions allow a supplier to discontinue dealing with distributors who fail to observe previously announced conditions, such provisions may be protected by the doctrine announced in United States v. Colgate & Co., 250 U.S. 300 (1919). In the Colgate case, the Court held that a supplier may refuse to deal with distributors who fail to sell at prices recommended by the supplier. Although the Colgate doctrine has not yet been overruled, there is not much life left in it. Halper, Individual Refusals to Deal: Customer Selection or Dealer Protection?, 22 A.B.A. ANTITRUST SECTION 49 (1963).

they could sell and service other makes of automobiles.

A similar attack on territorial security was resisted by a supplier in United States v. White Motor Co.\textsuperscript{71} The defendant truck manufacturer was charged with conspiring with its distributors and dealers to confine their sales to customers located in designated territories, to refrain from selling to certain customers reserved to White and, in specified cases, to sell at prices fixed by White. White contended that the restrictive provisions of its contracts were designed to enable it, as a small manufacturer, to hold its own against giant competitors. The district court entered a summary judgment for the Government, holding that the price-fixing aspects of White's distribution system, which affected only a small share of White's total business, constituted per se violations of the Sherman Act.\textsuperscript{72} The district court also condemned as illegal per se the provisions of White's contracts which restricted its distributors and dealers territorially and restrained them from selling to certain reserved customers.\textsuperscript{73} On appeal, White did not challenge the district court's ruling that the price-fixing provisions of its contracts were unlawful, and the Government did not contend that, as in Bausch & Lomb, price fixing was such "an integral part of the whole distribution system"\textsuperscript{74} as to render the entire scheme illegal. However, White did challenge the court's ruling that its customer and territorial restrictions constituted per se violations of the Sherman Act.

The Supreme Court, in a 5-to-3 decision, reversed and remanded the case to the district court for trial. The Court held that a trial was necessary to determine whether the customer and territorial restrictions should be branded illegal per se. Mr. Justice Douglas, speaking for the Court, said that the tribunal did not know enough of the economic and business stuff which precipitate such arrangements to allow it to decide whether they should be declared illegal per se merely on the basis of the documentary evidence before it.\textsuperscript{75} Reviewing cases which involved practices condemned as illegal per se, Douglas concluded that per se illegality has been reserved for "naked restraints of trade with no purpose except stifling of competition."\textsuperscript{76} He said that White's customer and territorial restrictions "may be too dangerous to sanction or they may be allowable protection against aggressive competitors or the only practicable means a small competitor has for breaking into or staying in busi-

\textsuperscript{72} 194 F. Supp. at 576-77.
\textsuperscript{73} Id. at 585-87.
\textsuperscript{74} 321 U.S. at 720.
\textsuperscript{75} 372 U.S. at 261-63.
\textsuperscript{76} Id. at 263.
ness . . . and within the "rule of reason.""77

Mr. Justice Brennan, in a concurring opinion, thought that it would be difficult to justify White's customer restrictions, since they vitiated all competition between manufacturer and distributors for the best accounts.78 He indicated that the customer restrictions could not be justified if the distributors were capable of competing "in any meaningful sense"79 with White for the reserved accounts. However, he said that the territorial restrictions—at least if imposed by White without coercion from its distributors and dealers—could give rise to vigorous interbrand competition that otherwise might not occur.80 In response to the Government's contention that territorial restrictions should be declared illegal per se because they closely resemble horizontal market division and resale price maintenance, Mr. Justice Brennan found the analogies "instructive" but perhaps "misleading."81 It seemed to him that the similarities had obscured the important differences which distinguish territorial restrictions from other practices to which a per se test is appropriate.82 "The crucial question," he said, "whether, despite differences in form, these restraints serve the same pernicious purpose and have the same inhibitory effects on competition as horizontal divisions of markets, is one which cannot be answered without a trial."83

With respect to the analogy to resale price maintenance, he stated that resale price maintenance is designed to, and almost always does, reduce both intrabrand and interbrand competition, whereas territorial security does not necessarily have that effect.84

Mr. Justice Clark, joined by Mr. Chief Justice Warren and Mr. Justice Black, dissented on the ground that White's territorial security provisions had a tendency to restrain competition among its distributors just as surely as would a horizontal agreement among distributors and dealers.85 The dissenters were convinced that the remand was futile since White "cannot plead nor [sic] prove an issue upon which a successful defense of its contracts can be predicated."86

In several cases decided by the Federal Trade Commission before the Supreme Court decision in White Motor, the Federal Trade Commis-

77. Ibid.
78. Id. at 272.
79. Id. at 272-73.
80. Id. at 268.
81. Id at 266.
82. Id. at 266-67.
83. Id. at 267-68.
84. Id. at 268.
85. Id. at 279.
86. Id. at 282.
sion declared distribution systems under which distributors were territorially confined to be unlawful. One of these cases, Snap-On Tools Corp., involved a tool manufacturer's nationwide distribution system under which franchised dealers purchased tools from the manufacturer and resold the tools out of mobile, walk-in trucks, covering routes in assigned territories. The FTC held that the distribution system violated section 5 of the Federal Trade Commission Act by fixing resale prices, geographically restricting markets, limiting customers and restricting dealers' rights to compete after the termination of their franchises. The Commission held that the restrictive provisions of the manufacturer's contracts with its dealers were part of an integrated distribution scheme, the purpose and effect of which was to prevent competition at the dealer level. Snap-On's territorial restrictions, in the Commission's opinion, "contributed to the illegality of its over-all distribution system." The Commission concluded that "some of these practices might not be illegal standing alone [but] we believe it necessary in the public interest, and in the exercise of our responsibility to provide effective relief, that the order ban them individually at least until such time as their collective effect on competition has been completely erased."

The Court of Appeals for the Seventh Circuit set aside the Commission's order requiring the manufacturer to cease and desist from engaging in the challenged practices. The court held that there was no basis in the record as a whole for considering the restrictive provisions of the dealer contract collectively, and that none of those provisions, considered individually, were illegal.

Under the dealer contract, each Snap-On dealer was given an exclusive franchise to sell products within the territory described in the contract, subject to the manufacturer's right to sell to certain accounts. The contract provided that the dealer could sell Snap-On products only within the described territory, though he was left free to sell to customers who came to him from outside of his territory. The court thought that

88. No. 7116, FTC, TRADE REG. REP. 1961-63 Transfer Binder ¶ 15546, at 20413.
89. Ibid.
90. Ibid. at 20416.
91. 321 F.2d at 830-32. In its opinion the court did not say whether it was realistic to expect customers to travel outside of one sales territory to purchase hand tools from a dealer in another territory. Because of the nature of the product and the method of distribution, it is possible that Snap-On's territorial restrictions were just as effective as restrictions which prohibit sales to customers who reside or have their places of business outside of the dealer's assigned territory.
Snap-On's territorial restrictions were prompted by legitimate business considerations and were not unlawful, noting that Snap-On was not a monopolist and that competition in the hand tools industry was "bitter and bloody." The court rejected the Commission's contention that the public is entitled to the benefit of intrabrand competition, stating that the antitrust laws should not restrict or prevent the orderly marketing of products, but rather should encourage manufacturers to promote interbrand competition.

The court brushed aside the Commission's suggestion that Snap-On revise its dealer contract, assigning the dealers areas of primary, rather than exclusive, responsibility:

We think that petitioner's argument against this proposal is sound. It says that if the dealer contracts are rewritten so as to describe each dealer's territory as a "primary zone of influence," and if Snap-On policed adequate sales and service coverage, it would in practice duplicate the effect of the existing provision and "would be a sterile exercise in language," because the dealers are free even under the existing provision to sell to any customers (regardless of the customer's permanent location) who wish to come to a dealer's assigned territory. If the Commission's proposal means less than this, we believe that it would only tend to promote friction and misunderstanding among the dealers. What is actually meant by a "primary zone of influence," and who is going to be the roving interpreter of the term's meaning? We think these are pertinent questions which militate against the Commission's suggestion.

_Sandura Co._ involved a relatively small, short-line manufacturer of hard-surface floor coverings in an industry dominated by large firms. The Federal Trade Commission accused Sandura of establishing an illegal distribution scheme under which its distributors and dealers could sell only within assigned exclusive territories, distributors could sell only to approved dealers, dealers could sell to other dealers only if the latter were approved by the manufacturer, and distributors and dealers could sell only at or above prices recommended by the manufacturer. The hearing examiner held that Sandura's territorial restrictions were illegal per se, but the Commission did not go that far, holding that Sandura's methods of distribution, considered as a whole, violated section 5 of the Federal Trade Commission Act. Some evidence in the record tended

---

92. _Id._ at 833.
93. _Ibid._
94. _Id._ at 832.
to show that Sandura established its territorial restrictions as an emergency measure to aid reestablishment after nearly becoming insolvent. However, the Commission said that the record did not support Sandura's contention that it needed the territorial restrictions in order to effectively compete with its larger rivals.96

*White Motor* and *Snap-On Tools* are the most significant of the cases dealing with territorial security. The significance of *White Motor* lies in the refusal of the Court to blindly accept the Government's comparisons of territorial security to horizontal market division and resale price maintenance, and in the indications in the majority and concurring opinions that territorial security provisions would not be relegated to per se illegality if it can be demonstrated that they are economically justifiable and do not have the same purposes or effects as the arrangements which have traditionally constituted the "hard core" antitrust violations. *Snap-On Tools* is significant because the court repudiated the Government's analogies to horizontal market division and resale price maintenance, and said that territorial security should not be declared illegal per se merely because it restricts intrabrand competition. Although these two cases do not contain intelligible standards by which the legality of territorial security arrangements can be evaluated, they do indicate a trend, for the present at least, away from the adoption of a rule of per se illegality for such arrangements.

### III. A Legal Evaluation of Territorial Security

Territorial security restricts intrabrand competition, and in that respect is admittedly analogous to resale price maintenance and horizontal market division. However, it does not follow from this fact that territorial security should be declared illegal per se, since a single identifiable effect of different kinds of transactions is not necessarily dispositive in the same way of their legality under the antitrust laws.97 For

---

96. Commissioner MacIntyre, dissenting, said that the Commission had "delivered a one-two punch" to Sandura. *Id.* at 20774. He thought that the Commission should "take a broad perspective and weigh the public interest in the survival of the respondent against the theoretical possibility of a pygmy inflicting monopoly conditions in the sale and distribution of hard surface floor coverings." *Id.* at 20773.

97. Robinson, *Restraints of Trade and the Orderly Marketing of Goods*, 45 CORNELL L.Q. 254, 267 (1960). There are many situations in which transactions with the same effects have different legal consequences. For example, an agreement between a supplier and his dealers to fix resale prices is illegal in the absence of a "Fair Trade" statute which legalizes such an agreement. However, the supplier may be able to achieve the same result by refusing to deal with dealers who do not resell at prices recommended by the supplier. Similarly, concerted action may violate the antitrust laws in situations in which individual action having the same effect may be lawful. Expansion of corporations by merger may be unlawful in cases in which expansion by internal growth would be lawful. *Ibid.*
example, forward integration eliminates intrabrand competition, but it is clear that this, without more, is lawful. As a matter of fact, there are several important ways in which territorial security is distinguishable from resale price maintenance and horizontal market division, which taken together suggest that the three need not be and should not be accorded analogous legal treatment.

Resale price maintenance not only restrains intrabrand competition, but it may also restrain interbrand competition by depriving distributors of sufficient pricing flexibility to compete effectively with the distributors of rival brands. On the other hand, territorial security enables distributors to retain all of the competitive tools with which to compete with rival brand distributors. Moreover, in resale price maintenance and horizontal market division, the anticompetitive intent is clear and unmistakable. In a territorial security arrangement, however, the intent is more ambiguous, since the restriction of intrabrand competition in the latter instance is usually ancillary to some larger business purpose.

Under the antitrust laws, weight must be given to the intent and purpose of particular conduct. Since the primary purpose of territorial security

99. Ibid.
100. Ibid.

It is sometimes thought that *per se* rules give effect to empirical generalizations based on observation of economic effects: that, for example, price-fixing is illegal *per se* because many instances of the practice have shown over the years that it always (or nearly always) does economic harm. But this is a mistaken view. (No doubt antitrust reflects *inter alia* a general consensus in the United States that price-fixing and other restrictive practices are, on balance, economically harmful: but the legal rule that price-fixing is illegal *per se* would be in no way upset by the occurrence of cases in which fixed prices could be shown to be beneficial.) What is clear and unmistakable is a *per se* offence is not its economic effect but its restrictive intent.

103. ATT’Y. GEN. NAT’L COMM. ANTITRUST REP. 340 (1955). In Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918), the Court said:

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

Another argument against territorial security is based upon a
statement in United States v. Bausch & Lomb\textsuperscript{104} to the effect that once
a seller of trademarked goods has parted with title to goods, he may not
lawfully restrict the purchaser's freedom to sell the purchased items
wherever and to whomever he pleases, regardless of the reasons for the
restriction or its economic effect.\textsuperscript{105} This argument ignores the fact that a
trademark creates a special nexus between a trademark owner and his
dealers, arising from the interests of both in creating, maintaining and
increasing consumer demand for the trademarked goods.\textsuperscript{106} Passage
of title to a trademarked commodity does not end all relationship of
the trademark owner to the commodity, at least while it remains in
commercial channels.\textsuperscript{107} It may be vital to his interests that the functions
of distribution be in the hands of persons who are subject to certain
controls by him.\textsuperscript{108} If those controls are designed to promote some
legitimate business interest, they should be prohibited only if some
restraint of competition in the market as a whole is clearly discernible.\textsuperscript{109}

It would not be desirable to invalidate territorial security merely
because it restricts the freedom of the dealer to sell wherever and to
whomever he pleases. The restriction arises from a contract by the dealer,
and any contract limits to some extent the freedom of the contracting

\textsuperscript{104} 321 U.S. 707, 721 (1944):

A distributor of a trade-marked article may not lawfully limit by agreement,
express or implied, the price at which or the persons to whom his purchaser
may resell except as the seller moves along the route which is marked by the
Miller-Tydings Act .... Even the additional protection of a copyright, ... or
of a patent, ... add nothing to a distributor's power to control prices of resale
by a purchaser. The same thing is true as to restriction of customers. ... 

This broad statement should be evaluated in the light of the context in which it
was made. This case involved restrictions on resale as a part of an elaborate resale
price maintenance scheme. Price fixing was such "an integral part of the whole
distribution system" as to render the entire scheme illegal. 321 U.S. at 720. Even in the
statement relied upon by the Government, the Court seems to have treated the scheme
as a whole. Note, Restricted Channels of Distribution Under the Sherman Act, 75
Harv. L. Rev. 795, 799-800.

The cases cited by the Court in support of its statement regarding the invalidity
of customer restrictions all involved horizontal agreements between suppliers to dis-
criminate against certain classes of customers. Jordan, supra note 102, at 148.

\textsuperscript{105} Id. at 153.

\textsuperscript{106} Callman, Unfair Competition and Trade-Marks, § 15.5 (Supp. 1963).

\textsuperscript{107} Ibid.

\textsuperscript{108} Jordan, supra note 102, at 154.

\textsuperscript{109} Ibid.
parties. Moreover, the restriction may have been adopted in order to protect the dealer, and it may have been the dealer himself who requested the restriction as his price for making substantial investment in a dealership. The legality of territorial security, rather, ought to be evaluated under the rule of reason. The reasonableness of such arrangements should be appraised according to the factors suggested in United States v. Columbia Steel Co. and reiterated in Times-Picayune Publishing Co. v. United States: "[1] the percentage of business controlled, [2] the strength of the remaining competition, [and, 3] whether the action springs from business requirements or purpose to monopolize." Admittedly, a rule-of-reason approach to territorial security might have certain disadvantages. It would not provide the certainty of a per se rule of illegality, it could lead to long and expensive trials, and it might hinder enforcement of the antitrust laws. A rule-of-reason approach might also make inroads on existing per se rules of illegality. For example, if a small supplier were allowed to territorially confine his dealers, it might be argued that he should likewise be allowed to practice resale price maintenance. On the other hand, a rule of per se illegality applied to territorial security would ban one effective method of competing without making lawful alternatives equally available to all suppliers. If a per se rule is applied, relatively strong suppliers might still be able to territorially confine their dealers under a patent or trademark license agreement, or take over the functions of distribution by

110. Id. at 153-54.
113. 334 U.S. 495, 522 (1948).
114. 345 U.S. 594, 615 (1953).
115. This test, which was originally applied to vertical mergers, was advocated in ATTY. GEN. NAT'L COMM. ANTITRUST REP. 28 (1955) for evaluating the legality of exclusive franchises. In Day, supra note 98, at 249-50, this test was recommended for appraising the legality of territorial security. Territorial security is analogous to forward integration and exclusive franchises, because all of these arrangements restrict intrabrand competition, but may have independent business purposes. Therefore, this test would appear to be an appropriate one under which to determine the reasonableness of territorial security provisions.
116. ATTY. GEN. NAT'L COMM. ANTITRUST REP. 391-92 (1955) (General Dissent of Louis B. Schwartz). The difference between enforcing a per se rule and a rule of reason can easily be exaggerated. A per se rule was used in United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), but the record in that case contained more than 12,000 pages and more than 1000 exhibits. Phillips, Policy Implications of the Theory of Interfirm Organisation, Am. Econ. Rev., May 1961, p. 245, 254.
117. Such an argument would not be successful if territorial security is clearly distinguished from the practices which have been condemned as illegal per se. See note 101 supra.
118. Jordan, supra note 102, at 155.