The Burger Court Opinion Writing Database

Continental T.V., Inc. v. GTE Sylvania, Inc.

433 U.S. 36 (1977)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 13, 1977

Re: 76-15 - Continental T.V. v. GTE Sylvania

Dear Lewis:

I join.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 6/10/77

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 76-15

Continental T.V., Inc., et al.
Petitioners,

v.

GTE Sylvania Incorporated

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

June ____ 1977

MR. JUSTICE BRENNAN, dissenting.

I would not overrule the per se rule stated in United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), and would therefore reverse the decision of the Court of Appeals for the Ninth Circuit.

I have rewritten that in the Part

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 6/13/77

Recirculated:

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-15

Continental T. V., Inc., et al., Petitioners, *v.* GTE Sylvania Incorporated. } On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June —, 1977]

MR. JUSTICE BRENNAN, dissenting.

I would not overrule the *per se* rule stated in *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365 (1967), and would therefore reverse the decision of the Court of Appeals for the Ninth Circuit.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 1, 1977

76-15, Continental TV v. GTE Sylvania

Dear Lewis,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

✓

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 1, 1977

Re: No. 76-15 - Continental T. V., Inc. v.
GTE Sylvania, Inc.

Dear Lewis:

It is likely that I shall concur in the result in this case.

Sincerely,

Byron

Mr. Justice Powell

Copies to Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 6-15-77

Recirculated: _____

DRAFT

77

No. 76-15 — Continental T.V., Inc. v. GTE Sylvania

MR. JUSTICE WHITE, concurring in the judgment.

Although I agree with the majority that the location clause at issue in this case is not a per se violation of the Sherman Act and should be judged under the rule of reason, I cannot agree that this result requires the overruling of United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967). In my view this case is distinguishable from Schwinn because there is less potential for restraint of intrabrand competition and more potential for stimulating interbrand competition. As to intrabrand competition, Sylvania, unlike Schwinn, did not restrict the customers to whom or the territories where its purchasers could sell. As to interbrand competition, Sylvania, unlike Schwinn, had an insignificant market share at the time it adopted its challenged distribution practice and enjoyed no consumer preference that would allow its retailers to charge a premium over other brands. In two short paragraphs, the majority disposes of the view, adopted after careful analysis by

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 21, 1977

MEMORANDUM TO THE CONFERENCE

Re: Continental T.V., Inc. v. GTE Sylvania Inc.

The attached is subject to cite checking and stylistic changes.

B.R.W.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 6-21-77

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-15

Continental T. V., Inc., et al., Petitioners, *v.* GTE Sylvania Incorporated. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June —, 1977]

MR. JUSTICE WHITE, concurring in the judgment.

Although I agree with the majority that the location clause at issue in this case is not a *per se* violation of the Sherman Act and should be judged under the rule of reason, I cannot agree that this result requires the overruling of *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365 (1967). In my view this case is distinguishable from *Schwinn* because there is less potential for restraint of intrabrand competition and more potential for stimulating interbrand competition. As to intrabrand competition, Sylvania, unlike Schwinn, did not restrict the customers to whom or the territories where its purchasers could sell. As to interbrand competition, Sylvania, unlike Schwinn, had an insignificant market share at the time it adopted its challenged distribution practice and enjoyed no consumer preference that would allow its retailers to charge a premium over other brands. In two short paragraphs, the majority disposes of the view, adopted after careful analysis by the Ninth Circuit en banc below, that these differences provide a "principled basis for distinguishing Schwinn," despite holdings by three courts of appeals and the District Court on remand in *Schwinn* that the *per se* rule established in that case does not apply to location clauses such as Sylvania's. To reach out to overrule one of this Court's recent interpretations of the Sherman Act, after such a cursory examination of the necessity for doing so, is surely

Techical changes

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

2nd DRAFT

From: Mr. Justice White

Circulated: _____

Recirculated: 6-22-77

SUPREME COURT OF THE UNITED STATES

No. 76-15

Continental T. V., Inc., et al., Petitioners, *v.* GTE Sylvania Incorporated. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 23, 1977]

MR. JUSTICE WHITE, concurring in the judgment.

Although I agree with the majority that the location clause at issue in this case is not a *per se* violation of the Sherman Act and should be judged under the rule of reason, I cannot agree that this result requires the overruling of *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365 (1967). In my view this case is distinguishable from *Schwinn* because there is less potential for restraint of intrabrand competition and more potential for stimulating interbrand competition. As to intrabrand competition, Sylvania, unlike Schwinn, did not restrict the customers to whom or the territories where its purchasers could sell. As to interbrand competition, Sylvania, unlike Schwinn, had an insignificant market share at the time it adopted its challenged distribution practice and enjoyed no consumer preference that would allow its retailers to charge a premium over other brands. In two short paragraphs, the majority disposes of the view, adopted after careful analysis by the Ninth Circuit en banc below, that these differences provide a "principled basis for distinguishing *Schwinn*," *ante*, at 9, despite holdings by three Courts of Appeals and the District Court on remand in *Schwinn* that the *per se* rule established in that case does not apply to location clauses such as Sylvania's. To reach out to overrule one of this Court's recent interpretations of the Sherman Act, after such a cursory examination of the necessity for doing

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 16, 1977

Re: No. 76-15, Continental T.V., Inc., et al. v. GTE Sylvania Incorporated

Dear Bill:

Please join me.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 13, 1977

Re: No. 76-15 - Continental T. V. v. G. T. E. Sylvania

Dear Lewis:

Please join me.

Sincerely,

H. A. B.

Mr. Justice Powell

cc: The Conference

September 29, 1976

No. 76-15
Continental TV, Inc. v. GTE Sylvania, Inc.

Dear Potter:

This is the case that John Stevens and I think give us an appropriate opportunity to reexamine Schwinn.

The Court's decision in that case has been the subject of considerable criticism and confusion. I think you and John Harlan were right in thinking that the Court adopted a "wooden and irrelevant formula" rather than a "reasoned response" to the problem.

There are now three votes to grant (Bill Brennan, John and me), and the case was relisted for Byron to "take another look".

Although you voted to deny, I write to express the hope that you also will take another look.

Sincerely,

Mr. Justice Stewart

lfp/ss

I have talked to Potter & he will reconsider. Thus we have chance to deal with Schwinn problem - either to clarify or overrule it.

5/31/77

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: MAY 31 1977

No. 76-15 Recirculated: _____

CONTINENTAL T.V., INC.

v.

GTE SYLVANIA INC.

MR. JUSTICE POWELL delivered the opinion of the Court:

Franchise agreements between manufacturers and retailers frequently include provisions barring the retailers from selling franchised products from locations other than those specified in the agreements. This case presents important questions concerning the appropriate antitrust analysis of these restrictions under § 1 of the Sherman Act, 15 U.S.C. § 1, and the Court's decision in United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

I

Respondent GTE Sylvania, Inc. ("Sylvania") manufactures and sells television sets through its Home Entertainment Products Division. Prior to 1962, like most other television manufacturers, Sylvania sold its televisions to independent or company-owned distributors

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 9, 1977

No. 76-15 Continental T.V., Inc. v.
GTE Sylvania Inc.

MEMORANDUM TO THE CONFERENCE

I am circulating today the first printed draft of the opinion that circulated on May 31, in typewritten form.

John has made several suggestions, indicating his willingness to join the opinion if these changes are made. All are quite acceptable to me, and neither John nor I think they change in any way the basic analysis of the opinion. Rather than delay circulating the printed draft until these suggestioned changes can be incorporated, I enclose a copy of John's letter of June 9. The page references therein are to my typewritten circulation of May 31.

Sincerely,

L. Lewis

Enclosure

LFP/lab

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

1st PRINTED DRAFT Recirculated: JUN 9 1977

SUPREME COURT OF THE UNITED STATES

No. 76–15

Continental T. V., Inc., et al., Petitioners, *v.* GTE Sylvania Incorporated. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June —, 1977]

MR. JUSTICE POWELL delivered the opinion of the Court.

Franchise agreements between manufacturers and retailers frequently include provisions barring the retailers from selling franchised products from locations other than those specified in the agreements. This case presents important questions concerning the appropriate antitrust analysis of these restrictions under § 1 of the Sherman Act, 15 U. S. C. § 1, and the Court's decision in *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365 (1967).

I

Respondent GTE Sylvania, Inc. (Sylvania) manufactures and sells television sets through its Home Entertainment Products Division. Prior to 1962, like most other television manufacturers, Sylvania sold its televisions to independent or company-owned distributors who in turn resold to a large and diverse group of retailers. Prompted by a decline in its market share to a relatively insignificant 1 to 2% of national television sales,[1] Sylvania conducted an intensive reassessment of its marketing strategy, and in 1962 adopted the franchise plan challenged here. Sylvania phased out its wholesale dis-

[1] RCA at that time was the dominant firm with as much as 60 to 70% of national television sales in an industry with more than 100 manufacturers.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 16, 1977

No. 76-15 Continental TV v. GTE Sylvania

MEMORANDUM TO THE CONFERENCE:

In order to facilitate our moving ahead, I enclose pages 10, 14 and 16, of my opinion reflecting changes in footnotes.

I do not expect to have any further changes.

L.F.P.

L.F.P., Jr.

ss

✓

technical changes

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: JUN 21 1977

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-15

Continental T. V., Inc., et al., Petitioners, *v.* GTE Sylvania Incorporated. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June —, 1977]

MR. JUSTICE POWELL delivered the opinion of the Court.

Franchise agreements between manufacturers and retailers frequently include provisions barring the retailers from selling franchised products from locations other than those specified in the agreements. This case presents important questions concerning the appropriate antitrust analysis of these restrictions under § 1 of the Sherman Act, 15 U. S. C. § 1, and the Court's decision in *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365 (1967).

I

Respondent GTE Sylvania, Inc. (Sylvania) manufactures and sells television sets through its Home Entertainment Products Division. Prior to 1962, like most other television manufacturers, Sylvania sold its televisions to independent or company-owned distributors who in turn resold to a large and diverse group of retailers. Prompted by a decline in its market share to a relatively insignificant 1 to 2% of national television sales,[1] Sylvania conducted an intensive reassessment of its marketing strategy, and in 1962 adopted the franchise plan challenged here. Sylvania phased out its wholesale dis-

[1] RCA at that time was the dominant firm with as much as 60 to 70% of national television sales in an industry with more than 100 manufacturers.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 22, 1977

Cases heretofore held for Continental TV v. GTE Sylvania, Inc., No. 76-15.

MEMORANDUM TO THE CONFERENCE:

No. 76-86 McClatchy Newspapers v. Noble
No. 76-242 Noble v. McClatchy Newspapers

Noble was a distributor for the Sacramento Bee, a newspaper published by McClatchy Newspapers (the newspaper). Before his contract was cancelled, Noble had the right to distribute the paper in a particular area of Sacramento. The contract included a right to transfer the distributorship, but after the contract was cancelled, Noble was told that he "had nothing to sell." Noble asserted three antitrust claims against the newspaper: (1) an alleged § 1 violation in terminating the contract, (2) an alleged § 1 violation in preventing the sale of the distributorship, and (3) an alleged § 2 violation in monopolizing the publication of daily newspapers of general circulation in the relevant market. The jury reurned a verdict for the newspaper on claims (1) and (3) and for Noble on claim (2). Both sides appealed to CA9.

With respect to the termination claim, CA9 held that it was necessary to remand for a new trial since the DC failed to instruct the jury that an agreement to restrict the territory in which newspapers purchased by Noble from the newspaper could be sold would have been a per se violation of § 1. With respect to the sale-of-business claim, CA9 held that it was error for the DC to deny the newspaper's motion for judgment n.o.v. According to CA9, after the cancellation of the contract, Noble owned nothing but a contractual right to distribute the paper for 30 days (the notice period), and testimony at trial indicated that that right was worthless.

Finally, petr relied on the old case of Baker v. Selden, 101 U.S. 99, for the argument that resp's forms and books are not property subject to copyright. CA9 distinguished Baker on the ground that the books in the instant case contain instructional information. I do not consider this issue certworthy.

L.F.P.

L.F.P., Jr.

ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 1, 1977

Re: No. 76-15 - Continental TV, Inc. v. GTE Sylvania, Inc.

Dear Lewis:

Please show me as not participating in the consideration or decision of this case.

Sincerely,

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 9, 1977

Re: 76-15 - Continental T.V., Inc. v. GTE Sylvania

Dear Lewis:

With a few changes, which I do not expect to cause you any difficulty, I am prepared to join your opinion. Would you be willing to do the following?

On page 14 of your typewritten draft, substitute the following for the two sentences in the middle of the page beginning with "Under this rule . . . ."

> "Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.15/ Per se rules of illegality are appropriate only when they relate to conduct which is manifestly anti-competitive. As the Court explained . . . ."

On page 17, line 11, I believe the word "power" should be omitted.

On page 18, rewrite the second sentence to read:

> "For example, new manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers . . . ."

On page 19, rewrite the last full sentence on the page to read:

> "We conclude that the distinction drawn in Schwinn between sale and nonsale transactions is sufficient to justify the application of a per se rule in one situation and a rule of reason in the other. The question remains . . . ."

(NOT)

On page 20, rewrite the third sentence from the bottom to read:

> "As indicated above, there is substantial scholarly and judicial authority supporting their economic utility. There is relatively little . . . ."

If my reason for any of these suggestions is unclear, I will be glad to chat with you about them.

Respectfully,

JL

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 9, 1977

Re: 76-15 - Continental T.V., Inc. v. GTE Sylvania Inc.

Dear Lewis:

Please join me.

Respectfully,

JPS

Mr. Justice Powell

Copies to the Conference