INTEGRATING RECENT SUPREME COURT DECISIONS INTO THE MARKETING CURRICULUM

Robert B. Breitenbach, Metropolitan State College, Denver

ABSTRACT

Classroom analysis of an evolutionary line of marketing-oriented U. S. Supreme Court cases is recommended for consideration by marketing instructors. Earlier cases are presented for the purpose of allowing students: 1) to put more recent cases into context and 2) to understand the choices that the Court has made.

FOUR IMPORTANT CASES

Marketing-oriented Supreme Court cases can generate lively, realistic, and timely classroom discussions. The line of relatively recent cases presented in this paper can provide this type of experience by introducing the following topics: the meaning of competition in a marketing-management context, the types of control manufacturers can exert over the marketing activities of distributors and retailers, and the conditions under which distributors and retailers can be terminated. These discussion topics can be inserted into both beginning and advanced marketing courses. This paper illustrates an approach to using these cases.

An important reference point for class discussion is the admittedly, somewhat dated case of United States v. Arnold, Schwinn & Co. (1967). Schwinn's marketing strategy has been summarized as follows:

> (1)...Schwinn sells [less than half of its bicycles] to 22 wholesale cycle distributors. Each is instructed to sell (a) only within the territory specifically described and assigned to him on an exclusive basis and (b) only to franchised Schwinn retailers. (2) Schwinn also sells to retailers through consignment or agency arrangements with these same distributors with the same territorial and customer limitations. (3) Most...sales are made to retailers...[whereby] Schwinn ships directly to the retailer, invoices and extends credit to him, and pays a commission to the distributor taking the order. (4) ...retailers...are free to handle other brands but...[must give] Schwinn bicycles...at least equal prominence with competing brands. The number of franchised dealers in any area was limited, and a retailer was franchised only as to a designated location. Each franchised dealer was to purchase only from or through the distributor authorized to serve his area and to sell only to consumers and not to unfranchised retailers.... (Areeda 1974, p. 543).

After presenting the above description to the class, students can be asked for their evaluations of Schwinn's marketing strategy. Discussion can be guided with questions concerning: (1) the degree of control Schwinn appeared to exercise over the trade and (2) what the students think are the advantages and disadvantages of such control. The students can then be informed that the Supreme Court declared the following types of behavior, apparently representing part but not all of Schwinn's strategy, to be illegal:

> ...any limitation upon the freedom of distributors to dispose of the Schwinn products, which they have bought from Schwinn, where and to whomever they choose. The principle is, of course, equally applicable to sales to retailers.... (Schwinn, p. 1259).

In other words, the Supreme Court ruled that when the manufacturer loses ownership of a product it also loses its ability to control certain marketing activities of the purchasing distributors and retailers. However, when the manufacturer uses consignment or agents, the manufacturer might be able to maintain control of marketing activities. Students can be asked whether they agree that a manufacturer's control should end with the passing of title. They can also be asked to generate the advantages and disadvantages of the Court's ruling. Advantages that can be discussed might include more opportunity for marketing creativity by distributors and retailers. Disadvantages might include a lack of consistency and/or quality across marketing outlets.

The class can next be introduced to Continental T.V., Inc. v. GTE Sylvania, Inc. (1977). The students can be asked to consider how the Supreme Court's following description of Sylvania's marketing strategy compares with Schwinn's strategy:

> Sylvania phased out its wholesale distributors and began to sell its televisions directly to a smaller and more select group of franchised retailers. An acknowledged purpose of the change was to decrease the number of competing Sylvania retailers in the hope of attracting the more aggressive and competent retailers thought necessary to the improvement of the company's market position. To this end, Sylvania limited the number of franchises granted for any given area and required each franchisee to sell his Sylvania products only from the location or locations at which he was franchised. [There were no restrictions in relation to selling competing products.] A franchise did not constitute an exclusive territory, and Sylvania retained sole discretion to increase the number of retailers in an area in light of the success or failure of existing retailers in developing their market. (Sylvania, p. 573).

Discussion can be focused upon Sylvania's apparent attempt to control the retailers' marketing activities after title passed. The question then becomes whether this attempt by Sylvania would seem to be illegal under the guidelines issued in the Schwinn case.

The class can then be informed that the Court in Sylvania, in a decision that has great significance to marketing management, overturned its decision in Schwinn. In Sylvania, the Court emphasized the distinction between interbrand and intrabrand competition. For discussion purposes, students can be asked to give examples of each type of competition and asked which type, if either, should be favored by the law.

> Interbrand competition is the competition among the manufacturers of the same generic

product--television sets in this case--and is the primary concern of antitrust law.... In contrast, intrabrand competition is the competition between the distributors--wholesale or retail--of the product of a particular manufacturer.

[W]hen interbrand competition exists...it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product. (Sylvania, p. 581).

Having declared that interbrand competition is "the primary goal of antitrust law," the Court next analyzed the effect on interbrand competition of nonprice, vertical restrictions of the type utilized by Sylvania. For discussion purposes, the class can be asked to generate a list of examples of nonprice, vertical restrictions that manufacturers might consider imposing upon other channel members. Examples might include storage requirements, types and amounts of goods required to be carried, and educational requirements for the purchaser's sales force. Some of the Court's analysis follows:

Vertical restrictions [e.g., Sylvania's location restrictions] promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products.... For example,...manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products.... Because of market imperfections such as the so-called 'free rider' effect, these services might not be provided by retailers in a purely competitive situation.... (Sylvania, p. 583).

Discussion might next focus upon free riders. Students can be informed that free riders might be retailers which let higher-priced competitors develop demand in a particular area, perhaps through expensive promotion, with the free rider then making the sale at a lower price (Pellegrini and Reddy 1986, pp. 32-33). The students can also be informed that not all commentators agree that free riders are always a problem. Established consumers, for example, who know about the product, would not necessarily benefit from prices which are high, in part, because of the provision of information by a full-service retailer (Comanor 1985).

A discussion of the distinction between a merchant wholesaler and an agent can be used to reinforce the Court's message that a manufacturer can probably (assuming a favorable influence on interbrand competition) control some of the nonprice activities of other channel members after title has passed. Probably typical definitions (Berkowitz, et al. 1986, pp. 357-58) of these institutions are: "Merchant wholesalers are independently owned firms that take title to the merchandise they handle." "[A]gents...do not take title to merchandise...." Students can be asked to discuss, from a manufacturer's viewpoint, the pre-Sylvania advantages and disadvantages of using a merchant wholesaler. Advantages might include less capital tied up in inventory. Disadvantages might include the inability to control the merchant wholesaler's marketing activities. The class might next reach the conclusion that an effect of the Court's diminishing the importance of title has been to make merchant wholesalers more attractive to manufacturers.

In order to keep the evolving classroom discussion in perspective, students should be reminded that the two cases discussed thus far have been primarily concerned with manufacturers' attempts to control the nonprice, marketing activities of a trade buyer. The Supreme Court has apparently tried to maintain a distinction between the vertical control of nonprice, marketing activities and the vertical control of pricing activities. An attempt to control the latter after title passed would probably be considered per se illegal (Sylvania, p. 581). As will be illustrated below, this distinction is sometimes difficult to perceive in real, marketing situations.

The next case that can be presented for discussion is Monsanto Company v. Spray-Rite Service Corporation (1984). In this case:

...Monsanto announced that it would appoint distributors for 1-year terms, and that it would renew distributorships according to several...criteria. Among the criteria were: (i) whether the distributor's primary activity was soliciting sales to retail dealers; (ii) whether the distributor employed trained salesmen capable of educating its customers on the technical aspects of Monsanto's [products]; and (iii) whether the distributor could be expected 'to exploit fully' the market in its geographical area of primary responsibility. [Several distributors were assigned to each area and the distributors were allowed to sell outside of their assigned area.] (Monsanto, pp. 780-81).

The students can be asked to evaluate the above passage and to decide whether it seems that Monsanto's marketing strategy promoted interbrand competition and possibly eliminated free riders. It would seem that the answer to both questions could be "yes" because Monsanto appeared to be trying to establish full service distributors.

There was, however, more evidence in the Monsanto case. Evidence, the Supreme Court said, that allowed the jury to conclude that Monsanto had stepped over the line between the possibly legal control of nonprice activities and the illegal control of pricing activities (after title had passed). "There was testimony from a Monsanto district manager, for example, that Monsanto on at least two occasions [after the plaintiff was terminated] approached price-cutting distributors and advised that if they did not maintain the suggested resale price, they would not receive adequate supplies...." (Monsanto, p. 786). Monsanto lost the lawsuit.

The Court admits that the distinction between controlling nonprice and pricing activities is "difficult to apply in practice." (Monsanto, p. 784). This difficulty can arise because a manufacturer

can be legitimately interested in receiving information on the pricing activities of its distributors. High prices might be an indication that full-service activities are being implemented by the distributors; low prices might indicate the existence of a free rider. A contribution of the Court in the Monsanto case was its ruling on how to handle this difficult distinction. Basically, the Court said that it is probably permissible to terminate a distributor after receiving complaints about the terminated distributor's prices from competing distributors as long as the manufacturer's decision was independently made (i.e., not made pursuant to an agreement with the remaining distributors). (Monsanto, pp. 784-85). The students can be asked to describe, in their own words, what the Supreme Court seems to be trying to do in the Monsanto case. An acceptable answer might be that the Court is trying to allow a manufacturer as much freedom as possible to implement marketing strategies that will increase interbrand competition.

The difficult distinction between prohibited price fixing and the control of nonprice activities arose again in Business Electronics Corporation v. Sharp Electronics Corporation (1988). The Supreme Court described this case as follows:

> While much of the evidence in this case was conflicting--in particular, concerning whether [Business Electronics] was 'free riding' on Hartwell's provision of presale educational and promotional services by providing inadequate services itself--a few facts are undisputed. [Sharp, the manufacturer,] published a list of suggested minimum retail prices, but its written dealership agreements with [Business Electronics] and Hartwell did not obligate either to observe them, or to charge any other specific price. [Both dealers sometimes charged below the suggested prices and Business Electronics apparently generally charged below Hartwell's prices.] In June 1973, Hartwell gave [Sharp] the ultimatum that Hartwell would terminate his dealership unless [Sharp] ended its relationship with [Business Electronics] within 30 days. [Sharp] terminated [the Business Electronics] dealership in July 1973. (Sharp, pp. 814-15).

The class can be asked whether the above sequence of apparent price cutting, complaints from a dealer, and the subsequent termination of the alleged price cutter resulted in the Court concluding that the termination was per se illegal. In other words, is this an example of automatically illegal price fixing? The Court's answer was "no." There must be additional evidence that there had been an agreement to fix prices, between the manufacturer and the remaining dealer, covering the time period after the termination. The Sharp case was sent back to the trial court to determine if the additional evidence existed. The Supreme Court noted that to require less evidence would unduly restrict the goal of fostering interbrand competition. Thus complaints about price cutters and their subsequent termination, without evidence of post-termination agreements to fix prices, can be consistent with the economic theory espoused in Sylvania (Sharp, pp. 818-19).

At this point the students might be asked to summarize their thoughts on the Court's rulings in the four cases presented in this paper. Another possible question is: Have the guidelines with which marketing management must work been improved as a result of the rulings made in Sylvania, Monsanto, and Sharp?

CONCLUSION

This paper has attempted to illustrate the marketing flavor and the marketing-management ramifications of four cases of the United States Supreme Court. The Court's descriptions of companies' marketing strategies were usually quoted verbatim in order to preserve the underlying, marketing reality. The discussion-oriented approach presented in this paper has been, and is, employed by the author. The results have been encouraging as indicated by the students' interest in the topics and their ability to discuss them. It should be stressed to the students, however, that the objective is to give them an insight into evolving guidelines for marketing management, not to make them legal experts.

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