

To *Sylvania* and Beyond!

— Theoretical Construction and Proliferating Viewpoints of a Watershed Decision

Andy C. M. Chen *

Abstract

The celebrated decision of *Continental TV v. Sylvania* by U.S. Supreme Court in 1977 has been praised as a watershed decision in antitrust jurisprudence. I introduce this case and elaborate upon its theoretical underpinnings and implications in this paper. In addition to summarizing the influence of the thought from the Chicago School in formulating the Court's reasoning against applying the *per se* rule to cases concerning vertical non-price restraints, I will also show how *Sylvania* enlightened our understanding of other market arrangements. By placing the importance of economic effects ahead of legal formality, *Sylvania* has in effect challenged the need to maintain the characterization of conducts as being unilateral or mutual, price or non-price, and vertical or horizontal. Its implications would be to reconsider whether and how traditional rules based upon those characterizations should be revised. Although the vast literature on modeling game and its associated theories on "strategic" market foreclosure has call into questions the validity of *Sylvania*, yet its value in terms of establishing a clear, succinct, and operable analytical framework is irreplaceable. In reviving *Sylvania*, I caution in this paper that the costs from the application of the strategic foreclosure theories might exceed the "false negative" cost from *Sylvania*. It could be more of the case when the potential for the market to self-correct the several market imperfections that concern the strategic theorists is re-evaluated. I apply the main points from this study to examine the current status of the Fair Trade Law of Taiwan at the end of this paper. I attempt to expose the problems from relying too eagerly by the Fair Trade Commission on the theory of "relatively dominant position" to

Date submitted: September 1, 2010

Date accepted: December 27, 2010

* Andy C. M. Chen, Associate Professor, Department of Financial and Economic Law, Chung Yuan Christian University; SJD, Northwestern University.

decide cases and to settle policy issues. I will also demonstrate that the Commission's penchant to "categorize" illegal behavior and to apply the law accordingly has left room to be desired. In the spirit of *Sylvania*, I conclude this paper by proposing my own thoughts on how those problems could be ameliorated.

Keywords: Vertical Restraints, Chicago School, Inter-Brand Competition, Free Ride, Strategic Foreclosure Theories, Successive Monopoly, Lock-In, Switching Cost, Relatively Dominant Position, Patently Unfair Behavior, per se illegal, Antitrust Law.