



The Distinction Between Monopoly and Monopolization in Antitrust Law

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Summary

Antitrust law does not mandate either that markets be competitive, or that they contain some predetermined number of participants/competitors; it is concerned, rather, with the *operation* of markets, on the assumption that a properly functioning market (i.e., one in which there is an *opportunity* for viable competition, and is not skewed by the predatory actions of participants), will best protect consumers. “Monopoly” and “monopolist” are, therefore, merely descriptive terms, used to illustrate situations in which a single entity (or group of entities) possesses effective control of the market in which it operates; neither term implies anything about the lawfulness of the monopoly possessed. “Monopolization,” on the other hand, is the term used in antitrust law to characterize as *unlawful* a situation in which a monopolist—irrespective of whether his monopoly has been lawfully achieved—couples his monopoly status with behavior designed to unfairly exploit, maintain, or enhance his market position. Similarly, “attempted monopolization” connotes a situation in which an entity *unlawfully or unfairly* attempts to secure a market monopoly. The long-standing, judicially created Rule of Reason, which involves balancing an anticompetitive action with any procompetitive results, underscores those facts.

Whether a market participant who is a monopolist must deal with anyone who desires to deal with it continues to be largely governed by the so-called *Colgate* doctrine. In 1919, in *United States v. Colgate & Co.* (250 U.S. 300), the Supreme Court recognized the unfettered “right” of a private vendor “to exercise his own independent discretion as to parties with whom he will deal” *Colgate* notwithstanding, the existence of an “essential facility” (i.e., a necessary component of a potential competitor’s business *and* which is both unavailable from any source other than the alleged monopolist *and* cannot be reasonably duplicated), once established, has generally been thought to impose a duty to deal with the actual or potential competitors of even a lawful monopolist. The continuing viability of the so-called “essential facilities” doctrine, however, was called into question by the Supreme Court’s 2004 ruling in *Verizon v. Trinko* (540 U.S. 398).

The Antitrust Division of the Department of Justice (DoJ) and the Federal Trade Commission (FTC) each operate on the assumption that the monopoly status of competitors is antitrust-relevant only insofar as their actions may impact the operation or competitiveness of markets.

This report—which explores the difference between monopoly and monopolization as those terms are used in antitrust law, and the differing enforcement consequences of each—will be updated if case law or legislation alters the concepts it discusses. It is based on several existing documents by the same author, including CRS Report RS20241, *Monopoly and Monopolization - Fundamental But Separate Concepts in U.S. Antitrust Law*; CRS Report RS21723, *Verizon Communications, Inc. v. Trinko: Telecommunications Consumers Cannot Use Antitrust Laws to Remedy Access Violations of Telecommunications Act*; and *Duty of a Monopolist to Deal*, a general distribution memorandum.

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Introduction

Antitrust doctrine holds that robust competition will best protect consumers; it is concerned with the viability of individual competitors only insofar as their fates affect marketplace competitiveness.¹ There is neither an arbitrary antitrust directive concerning the requisite amount of competition deemed acceptable in any given market, nor any predetermination of the point beyond which a market participant may grow; nor is there any absolute number of competitors a market participant must face. Although there are general prohibitions against monopolization and attempted monopolization in the Sherman² and Clayton Acts,³ and a prohibition against “unfair acts” in commerce in section 5 of the Federal Trade Commission Act,⁴ “monopoly” and “monopolist” are merely descriptive terms, used to illustrate a situation in which a single entity possesses effective control of the market in which it operates. Neither term implies anything about the lawfulness of the monopoly possessed: there is no concept of “no fault” monopolization in United States antitrust law.⁵ Absent a finding by a court of “guilty behavior” by a monopolist,⁶ therefore, there can be no finding of “monopolization.” Further, the antitrust Rule of Reason has modified the concept of competition by recognizing that in certain situations the anticompetitiveness of some actions must be balanced against any procompetitive effects that might be produced by those actions.⁷

Accordingly, any assessment of whether any of the prohibitions against monopolization have been violated requires two inquiries. First, it must be determined whether an entity is in fact a monopolist;⁸ and second, whether that monopolist has *unlawfully* monopolized the market(s) within which it operates (the applicable, “relevant market,” which may be either product- or geographically based, or both).

Assuming that a market participant has been legally determined to be a monopolist (as opposed to being so determined by reference to the popular definition—i.e., one who possesses at least a 51% market share), the question arises, “Does that monopoly entity have a legal obligation to

¹ “The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest.” *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993).

² 15 U.S.C. § § 1-7 (specifically, 15 U.S.C. § 2).

³ 15 U.S.C. § § 12-27 (specifically, § 18).

⁴ 15 U.S.C. § 45.

⁵ I.e., there is no “bright line” for the size beyond which an entity may grow before it is deemed a “monopoly.” Attempts during the 1970s to create “no fault monopolization” were not successful (*see, e.g.*, S. 1167, 93d Congress, sponsored by Senator Philip Hart, introduced March 12, 1973 (119 Cong. Rec. 7320); S. 1167 would have made unlawful the mere possession of monopoly power; *see* footnote 15, *infra*, for a brief description of S. 1167). *See* below for a discussion of some DoJ and FTC enforcement activities that underscore the “monopoly-by-itself-is-not-unlawful” notion.

⁶ Examples of “guilty behavior” include, e.g., predatory pricing or tying the purchase of an unwanted product to the purchase of one over which the seller has a monopoly.

⁷ The concept of a Rule of Reason was first utilized in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), although it was most clearly enunciated in 1918, in *Board of Trade of the City of Chicago v. United States*, 246 U.S. 321, 238 (1918). *See* notes 21 and 22, *infra*, and associated text.

⁸ “Monopoly power” has, since at least 1956, been defined as “the power to control market prices or exclude competition” (*United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956)).

deal with any or all of its actual or potential competitors?” The courts have generally answered, “No,”⁹ but the situation long thought to create such an obligation—monopolist ownership or control of an “essential facility”¹⁰—is, currently, not as settled as was once thought. In 2004, the Supreme Court opined that “We have never recognized such a doctrine ... and we find no need either to recognize it or to repudiate it here.”¹¹

The recent prosecutions by the Antitrust Division of the Department of Justice (*Microsoft*) and the Federal Trade Commission (*Intel*) (both discussed below) are particularly illustrative of the monopoly/monopolization dichotomy.

Monopoly and Monopolization

Although monopoly and monopolization are fundamental, and related, concepts in antitrust law, they are not synonymous. A shorthand definition of “monopoly” is “the power to control prices or exclude competition.”¹² The significance of the ability to exclude competition or control prices, however, lies in the supposed deleterious effect of the lack of competition on, *consumers*, who are presumed to benefit from the existence of largely competitive markets. The impact on excluded *competitors* is relevant only insofar as it affects the fate of *competition*:

‘[t]he antitrust injury requirement obligates [complainants] to demonstrate, as a threshold matter, “that the challenged conduct has had an actual adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice.”’¹³

“... it is axiomatic that the antitrust laws were passed for ‘the protection of **competition, not competitors**.’”¹⁴

⁹ “Despite the generally recognized evils of monopoly power, it is ‘well settled,’ See J. von Kalinowski, *Antitrust Laws & Trade Regulation* ¶ 802(3), at 8-41 (1979), that § 2 does not prohibit monopoly *Simpliciter* or, as the Supreme Court phrased it in the early landmark case of *Standard Oil Co. of New Jersey*, ... 221 U.S. at 62, ... ‘monopoly in the concrete.’” (*Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273 (2d Cir. 1979, *cert. denied*, 444 U.S. 1093 (1980); emphasis added). See, also, *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946); *United States v. Griffith*, 334 U.S. 100, 107 (1948); *United States v. Columbia Steel Co.*, 334 U.S. 495, 525 (1948); *United States v. Aluminum Co. of America* (hereinafter referred to as *Alcoa*), 148 F.2d 416, 424 (2d Cir. 1945).

¹⁰ An “essential facility” is said to exist when a *necessary* (not merely desirable) component of a potential competitor’s business is both unavailable from any source other than the monopolist, *and* cannot be duplicated by a potential competitor—either at all or only at great expense and/or time.

¹¹ *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 411 (2004) (Citations omitted). The fact that that language was dicta has not curtailed discussion of its implications. See, e.g., “Complaint for Breach of Duty by Incumbent Phone Company under Telecommunications Act Did Not State Antitrust Claim,” 21 *Computer and Internet Law* 34, (April 2004); Nicholas Economides, “Vertical Leverage and the Sacrifice Principle: Why the Supreme Court Got Trinko Wrong,” 61 *N.Y.U. Ann. Surv. Am. Law* 379 (2005); John Thorne, “A Categorical Rule Limiting Section 2 of the Sherman Act: *Verizon v. Trinko*,” 72 *U. Chi. L. Rev.* 289 (Winter 2005); Jonathan L. Rubin, “The Truth About Trinko,” 50 *Antitrust Bulletin* 725 (Winter 2005).

¹² *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391-92 (1956).

¹³ *Anheuser-Busch, Inc. v. G.T. Britts Distributing, Inc.*, 44 F.Supp. 2d 172, 174 (N.D.N.Y. 1999), *quoting*, *George Haug Co. v. Rolls Royce Motor Cars, Inc.*, 148 F.3d 136, 139 (2d Cir. 1998), which *quoted*, *Capitol Imaging v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 543 (2d Cir. 1993), *cert. denied*, 510 U.S. 947(1993).

¹⁴ *Wichita Clinic, P.A. v. Columbia/HCA Healthcare Corp.*, 45 F.Supp. 2d 1164, 1193 (D. Kansas 1999), *quoting* *Brooke Group v. Brown & Williamson Tobacco*, 509 U.S. 209, 224 (1993), *quoting* *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (emphasis in *Brown Shoe*).

There is no concept of “no fault” monopolization in United States antitrust law,¹⁵ and courts have differed over the years since the passage of the Sherman Act in 1890, as to the size of the market share that must be attributable to a given market participant in order to accurately label the participant a “monopolist.”¹⁶ Absent a finding by a court of “guilty behavior,” therefore, there can be no automatic finding of “monopolization” based merely on a finding of monopoly power: a finding of “*monopoly power*” does *not*, by itself, *necessarily equate to a finding of the monopolization* prohibited by either section 7 of the Clayton Act or section 2 of the Sherman Act, or the “unfair practices” prohibited by section 5 of the FTC Act.¹⁷

The point that “monopoly” (or size) does not equate to unlawful “monopolization” was made in 1998 by the Assistant Attorney General, Antitrust Division:

Sometimes people complain about a merger solely based on its size. ... I want to make clear[, however,] that antitrust analysis focuses on the *specific competitive harms* that may be associated with a particular merger, *not on its size in the abstract*. Thus, for example, a big merger may not be challenged because the merging parties are not competitors or potential competitors of one another and the merger does not raise any vertical antitrust issues. At the same time, we may challenge a smaller merger that involves the only two firms that make a particular product. *The key for our review is whether the merger will harm consumers, not the sheer size of the corporate entities involved.*¹⁸

What the Antitrust Laws Prohibit

As noted above, both the Sherman and Clayton Acts contain absolute prohibitions only against monopolization and attempted monopolization: Section 2 of the Sherman Act makes it a felony for any person to “monopolize, or attempt to monopolize, or combine or conspire with any other person to monopolize [interstate] ... commerce”; section 7 of the Clayton Act, the so-called antimerger provision, prohibits mergers or acquisitions by persons engaged in interstate commerce “the effect ... may be substantially to lessen competition, or to tend to create a monopoly.”¹⁹

¹⁵ The “Industrial Reorganization Act” (S. 1167, 93d Cong., introduced by Senator Philip Hart) would have created a rebuttable presumption that monopoly power existed whenever, e.g., there was either (1) a lack of “substantial price competition among two or more corporations” for a specified 3-year period, or (2) “four or fewer corporations account[ing] for 50% (or more) of sales” “in any line of commerce in any section of the country.” (Secs. 101(b)(2)(3)). The bill would also have placed on the corporation(s) found to possess monopoly power, except in cases in which such power was the result of lawfully obtained patents, the burden of proving to an Industrial Reorganization Court that such power should not be divested (Sec. 101(c)).

¹⁶ “[90% of market supply] is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not” (*Alcoa*, 148 F.2d 416, 424 (2d Cir. 1945); the court was commenting on the various ways in which the market control exercised by *Alcoa* could be, and had been, calculated by the district court. The case was certified for decision to the Second Circuit by the Supreme Court, which lacked the requisite six-Justice quorum to hear it). *See, also*, *United States v. Columbia Steel Co.*, *supra*, footnote 9, at 527-28: “We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation’s enlargement of its activities The relative effect of percentage command of a market varies with the setting in which that factor is placed.”

¹⁷ *See* notes 8 and 9, *supra*.

¹⁸ Joel I. Klein, Assistant Attorney General, Antitrust Division, testimony before the Senate Judiciary Committee, June 16, 1998 (emphasis added).

¹⁹ 15 U.S.C. § 2; 15 U.S.C. § 18.

On the other hand, the judicially created Rule of Reason doctrine, first used in 1911 by the Supreme Court in *Standard Oil Co. of New Jersey v. United States*²⁰ modifies the apparent inflexibility of the prohibitions in those provisions. The doctrine recognizes that in certain circumstances, adhering to the letter of the law concerning monopolization would be unreasonable;²¹ and that the anticompetitiveness of some actions must be balanced against any procompetitive effects that might be produced by those actions.²²

The Concept and Importance of “Relevant Market”

Whether a market entity is considered a monopolist, or whether it can be successfully charged with either having attempted to monopolize a market or actively monopolizing a market depends on the definition of the market in which it operates. A defendant facing a charge of (attempted) monopolization would prefer to have the relevant product market and/or the relevant geographic market defined broadly. If he can include several interchangeable substitutes for his product, its (and therefore, his) proportion of that product market will be calculated differently than if the product market is confined to only his product, or his product and merely a few alternatives. Similarly, the more expansive the definition of the geographic market within which the alleged monopolist is operating, the less likely it is that he will be seen to control a sufficiently large portion of it to justify a determination of “monopolist” or a finding of “(attempted) monopolization.” And, as was noted earlier, “there can be no automatic finding of ‘monopolization’ based merely on a finding of monopoly power.” Moreover, the fact that a trademarked or patented product gives the owner a lawful monopoly over *that* product may not suffice to justify a determination that he is a monopolist in a given market.²³

²⁰ 221 U.S. 1 (1911).

²¹ “... the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. 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.” *Board of Trade v. United States*, 246 U.S. 321, 238 (1918).

²² The doctrine, which is used as an alternative means of evaluating the antitrust lawfulness of challenged activities, is employed *only* where the action in question is not automatically prohibited as a *per se* violation of the antitrust laws. (Price fixing, e.g., is a *per se* violation that can never be saved from illegality by any attempt to describe the price fixing as “reasonable.” *See, e.g., United States v. Trenton Potteries*, 273 U.S. 392, 397 (1927): “The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable price.”; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 217 (1940): “for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense”; *Arizona v. Maricopa Medical Society*, 557 U.S. 332, 348-55 (1982)(attempt by medical society to keep a “floor” under medical charges in order to keep them at some reasonable rate deemed price fixing despite fact that it was *maximum* price fixing).

²³ *See, e.g., U.S. v. duPont*, *supra*, footnote 8, 351 U.S. at 393: “... [the] power that, [for example], automobile or soft-drink manufacturers [who, admittedly, produce non-standardized, differentiated products that may or may not have acceptable substitutes] have over their trademarked products is not the power that makes an illegal monopoly.” In early 2006, the Court reversed a presumption concerning market power that it had utilized for nearly 40 years. In 2006, the Court was asked, in an action under § 1 of the Sherman Act alleging a defendant’s unlawful tying (“if you want my patented product, you also have to take an unpatented product that may be available from one of my competitors”), to apply the presumption that a defendant’s possession of monopoly power in a relevant market that includes the patented, tying product may be presumed solely from the existence of his patent. The Court said that it no longer made economic (continued...)

Judicial and Administrative Definition/Treatment of Monopoly Status

The courts have generally used a subjective “test” rather than an inflexible number for the amount of market share that would be a prerequisite to a determination that a market participant has a monopoly. The Supreme Court noted in 1956, for example, that “[t]he relative effect of percentage command of a market varies with the setting in which that factor is placed.”²⁴

Eleven years earlier, the United States Court of Appeals for the Second Circuit, in a case decided upon transfer from a Supreme Court,²⁵ on the way to noting that the way in which a market share was calculated mattered, observed that although a 90 per cent share of a relevant market would be “enough to constitute a monopoly[,] it is doubtful whether sixty or sixty-four per cent would be enough; and certainly thirty-three percent is not.”²⁶

Monopolization

In order to be found guilty of either “monopolization” or “attempted monopolization” one has first to be determined to be a “monopolist.” As was observed earlier at footnote 8, the existence of “monopoly power” is generally conceded if a market participant possesses the power “to control prices or exclude competition.” A finding of monopoly power, by itself, however, will not support a “monopolization” charge. In addition, a monopolist must generally also be guilty of “the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”²⁷ That having been said, however, courts have had to evaluate actual business conduct in order to distinguish between lawful (e.g., that having a “legitimate business purpose,” or that which is merely indicative of aggressive competition) and unlawful (that which is predatory—i.e., seemingly economically irrational except for its adverse effect on competition, or exclusionary) conduct by a monopolist. Throughout its analysis a court must be mindful of the consumer protection purpose of the antitrust laws, which protect *competition*, not *competitors*; as we noted at the beginning of this report, the viability of individual competitors is relevant only to the extent their fates affect marketplace competitiveness.²⁸

(...continued)

sense to do so, and sent the case back to the U.S. Court of Appeals for the Federal Circuit (*Illinois Tool Works Inc. v. Independent Ink, Inc.*, (547 U.S. (2006), *vacating and remanding* 396 F.3d 1342 (Fed. Cir. 2005)). The Federal Circuit sent the case back to the trial court for discovery on whether the patent monopoly did, in fact, translate into a relevant market monopoly (*Independent Ink, Inc. v. Illinois Tool Works, Inc.*, 183 Fed. Appx. 953 (Fed. Cir. 2006)). For a more detailed discussion of the *Illinois Tool Works* case and the effect of a patent on a presumption of market power, see CRS Report RS22421, *Antitrust Effect of Patent on Tying Product: Illinois Tool Works Inc. v. Independent Ink, Inc.*, by (name redacted).

²⁴ *United States v. Columbia Steel*, 334 U.S. 495, 527-28 (1956).

²⁵ 322 U.S. 716 (1944), *certifying and transferring* the case to the Second Circuit.

²⁶ *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

²⁷ *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

²⁸ “[A] practice is not ‘anticompetitive’ simply because it harms competitors. After all, almost business activity, desirable and undesirable alike, seeks to advance a firm’s fortunes at the expense of its competitors. Rather, a practice is ‘anticompetitive’ only if it harms the competitive process. (Town of Concord v. Boston Edison Co., 915 F.2d 17, 21 (1st Cir. 1990), *cert. denied*, 499 U.S. 931 (1991)) (emphasis added). See, also, *Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d , 1182 (1st Cir. 1994).

Attempted Monopolization

An allegation of “attempted monopolization,” as does a charge of “monopolization,” requires proof of predatory or anticompetitive conduct (i.e., “guilty behavior”) on the part of the would-be monopolist; but because “a full blown monopoly [will not yet] ha[ve] been accomplished,”²⁹ there must also be proof that the defendant entity (a) specifically intended to achieve monopoly status *and* (b) that there is/was a “dangerous probability” that monopoly status could be achieved.³⁰ Moreover, emphasizing the importance of determining the relevant market, the *Spectrum Sports* Court continued, “[i]n order to determine whether there is a dangerous probability of monopolization, courts have found it necessary to consider the relevant market and the defendant’s ability to lessen or destroy competition in that market.”³¹

Duty of Monopolist to Deal

In general

The basic antitrust truth, expressed in 1919 by the Supreme Court in *United States v. Colgate & Co.*,³² notwithstanding certain exceptions and attempts to circumscribe it, remains that an entity—even a monopolist—is free to deal or not deal with any other entity unless its actions constitute either “guilty behavior”³³ or an attempt to expand its monopoly into a market adjacent to the one in which it may hold a lawful monopoly:

In the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private

²⁹ *Paladin Assoc. v. Montana Power Co.*, 97 F. Supp. 2d 1013 1038 (D. Mont. 2000), *aff’d*, 328 F.3d 1145 (9th Cir. 2003).

³⁰ *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993) (no liability “for attempted monopolization under § 2 of the Sherman Act absent proof of a dangerous probability that they would monopolize a particular market and specific intent to monopolize.”).

³¹ *Id.* (note giving case citations omitted).

³² 250 U.S. 300 (1919).

³³ A monopoly achieved by means of, e.g., predatory pricing, or some other type of anticompetitive (or “guilty”) behavior, is viewed as distinctly different from a lawful monopoly—one which has developed “as a consequence of a superior product, business acumen, or historical accident.” *See, e.g., Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 281 (2d Cir. 1979), *cert. denied* 444 U.S. 1093, 1094 (1980), Mr. Justice Blackmun dissenting from the *denial of cert.*, especially concerning whether Kodak had unlawfully monopolized the photo-finishing portion of the market, and *quoting*, *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) re: the lawfulness of a monopoly “achieved as a consequence of a superior product, business acumen, or historic accident”; and *Crossroads Cogeneration Corp. v. Orange & Rockland Utils., Inc.*, 159 F.3d 129, 141 (3d Cir. 1998). Although, in *Berkey*, the Second Circuit was specifically addressing the duty of a monopolist to share information about its planned introduction of new products that would impact those already existing in the market, its reasoning is reflective of case law that underscores the concept that even a monopolist does not have a duty to aid its competitors by dealing with them:

“... a firm may normally keep its innovations secret from its rivals as long as it wishes, forcing them to catch up on the strength of their own efforts after the new product is introduced. *See, e.g., Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 481 ... (1974). It is the possibility of success in the marketplace, attributable to superior performance, that provides the incentives on which the proper functioning of our competitive economy rests. If a firm that has engaged in the risks and expenses of research and development were required in all circumstances to share with its rivals the benefits of those endeavors, this incentive would very likely be vitiated.

“Withholding from others advance knowledge of one’s new products, therefore, ordinarily constitutes valid competitive conduct.”

business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell.³⁴

Moreover, according to the United States Court of Appeals for the Federal Circuit, the fundamental, *Colgate* precept of seller choice is not altered by the applicability of either the patent or copyright law to the item(s) in question, unless it is judicially determined that the patent or copyright in question was fraudulently procured.³⁵

Vis-a-vis markets adjacent to the one in which the monopolist usually operates

The antitrust legality of a situation in which even a genuine monopolist, albeit a lawful one, takes (or refuses to take) action which adversely affects competition in an adjacent market depends, for one thing, upon the monopolist's position vis-a-vis those who compete in that market. Whether the monopolist may be required to deal advantageously with entities in an adjacent market also depends on whether the monopolist's actions are taken in pursuance of an attempt to extend his lawful monopoly (which, of course, may be the result of patent or copyright grants) in one market into another by means other than those which resulted in his original, sanctioned market position.

Two courts reached opposite conclusions after analyzing somewhat similar circumstances involving monopolists' decisions concerning dealings with entities in adjacent markets that were their competitors in those markets. In both *Eastman Kodak Co. v. Image Technical Services, Inc.* (referred to alternatively as *Kodak*)³⁶ and *In re Independent Service Organizations Antitrust Litigation*³⁷ the requisite competition was presumed. In the first case, however, the ISOs (independent service organizations) did not directly allege a refusal to deal, but, rather, that Kodak had unlawfully tied³⁸ the sale of both the repair parts it manufactured, as well of certain others manufactured under license, to the purchase of its service, violating the antitrust laws by extending its lawful monopoly in the parts market³⁹ into the service/repair market and, thus, eliminating much of the competition to itself from ISOs; in the second, plaintiff ISOs alleged specifically that the Xerox Corporation's refusal to sell them either patented repair parts or copyrighted service manuals violated the antitrust laws.

³⁴ 250 U.S. at 307.

³⁵ *In re Independent Service Organizations Antitrust Litigation*, 203 F.3d 1322, 1326 (Fed. Cir. 2000). *See, also*, footnote 23, *supra*, and associated text concerning the importance of monopoly power in a relevant market.

³⁶ 504 U.S. 451 (1992), *aff'g* 903 F.2d 612 (9th Cir. 1990).

³⁷ 203 F.3d 1322 (Fed. Cir. 2000), *cert. denied sub nom.*, CSU, L.L.C. v. Xerox Corp., 531 U.S. 1143 (2001).

³⁸ Tying exists when a vendor says, in effect, "If you want B, you must take A."

³⁹ The definition of the relevant market was itself an issue, with Kodak asserting, and the Supreme Court rejecting the contention, that since it did not have a monopoly in the manufacturing (or "original equipment") market, it could not, therefore, have a monopoly in the parts it manufactured for that equipment: "Respondents ... contend that Kodak's control over the parts market has excluded service competition...."

Kodak counters that even if it concedes monopoly *share* of the relevant parts market, it cannot actually exercise the necessary market *power* for a Sherman Act violation.

* * *

Kodak also contends that, as a matter of law, a single brand or a product or service can never be a relevant market under the Sherman Act. We disagree.

504 U.S. at 465-466, 481 (emphasis in original)

The Supreme Court held, in *Image Technical Services*, that the lower courts must determine whether Kodak, in fact, possessed sufficient market power in the market for parts used to service photocopier equipment to be able to unlawfully tie the purchase of service for its copiers to the purchase from it of repair parts for those copiers (in other words, to require purchasers of its copier equipment to agree either to use only *its* repair parts/service or not to use the repair parts/services of an ISO);⁴⁰ on remand, a jury found the existence of the Supreme Court's required monopoly power and the misuse of that power in the service market, and the appeals court affirmed that finding and the injunction it precipitated.⁴¹ In the *Independent Service Organizations Antitrust Litigation*, the United States Court of Appeals for the Federal Circuit upheld the United States District Court for Kansas' grant of summary judgment to Xerox, noting, first, that although a patent holder (or other intellectual property owner) does not, by virtue of his patent, have a right to violate the antitrust laws, "it is also correct that the antitrust laws do not negate the patentee's right to exclude others from patent property."⁴² The court, emphasizing that the differing allegations in this case and *Image Technical Services*⁴³ necessitated a different approach to analyzing the antitrust legality of the challenged actions, stated:

... Kodak does nothing to limit the right of the patentee to refuse to sell or license within the scope of the statutory patent grant. In fact, we have expressly held that, absent exceptional circumstances, a patent may confer the right to exclude competition altogether in more than one antitrust market....

... In the absence of any indication of illegal tying, fraud in the Patent and Trademark Office, or sham litigation, the patent holder may enforce the statutory right to exclude others from making, using, or selling the claimed invention free from liability under the antitrust laws.⁴⁴

An earlier, related "adjacent market" case presented the Federal Trade Commission (FTC) with a situation in which the publisher of The Official Airline Guides chose to list the schedules and connecting flights of smaller, commuter airlines less advantageously than those of the major airlines, undeniably putting the "commuters" in an unfavorable position; the Commission was rebuked by the United States Court of Appeals for the Second Circuit for having ruled that the publisher acted in violation of Section 5 of the FTC Act,⁴⁵ which prohibits "unfair acts of practices in commerce":

The Commission did not find in the present case 'any purpose to create or maintain a monopoly,' but went on to say that 'the philosophy of Colgate must give way to a limited extent where the business judgment is exercised by a monopolist in an arbitrary way.' The Commission conceded that its result 'may be inconsistent to some extent with the theory of the Colgate doctrine.'

* * *

⁴⁰ 504 U.S. at 462-465.

⁴¹ *Image Technical Services, Inc. v. Eastman Kodak Co.*, 1996 WL 101173 (N.D. Cal. 1996), *aff'd in part, rev'd in part*, 125 F.3d 1195 (9th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998).

⁴² 203 F.3d at 1325, *quoting*, *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1362 (Fed. Cir. 1999).

⁴³ "Kodak was a tying case when it came before the Supreme Court, and [unlike the case before us] no patents had been asserted in defense of the antitrust claims against Kodak." 203 F. 3d at 1327.

⁴⁴ *Id.*

⁴⁵ 15 U.S.C. § 45.

... we think enforcement of the FTC's order here would give the FTC too much power to substitute its own business judgment for that of the monopolist in any decision that arguably affects competition in another industry. Such a decision would permit the FTC to delve into, as the Commission itself put the extreme case, 'social, political, or personal reasons' for a monopolist's refusal to deal. ... Thus, if the only supermarket in town decides to stock Birdseye vegetables but not Green Giant vegetables, the FTC would be able to require it to stock Green Giant vegetables if it were to find Green Giant competitively disadvantaged.⁴⁶

The court concluded: "We do not think that the Colgate doctrine is as dead as the Commission would have it."⁴⁷ The *Official Airline Guides* case remains the touchstone for assessing a monopolist's duty to deal advantageously with non-competitor entities in an adjacent market.

"Essential facilities" doctrine

From almost the beginning of statutory antitrust law (the enactment of the Sherman Act in 1890), the concept of the so-called "essential facilities" doctrine has been developing; courts have rather consistently held that a monopolist who controls an instrumentality that is crucial to the ability of a potential competitor to compete *and* which cannot be reasonably duplicated by the potential competitor must make that facility available to him. Perhaps the most well known "essential facilities" case is *United States v. Terminal Railroad Association*, in which access to the only terminal in St. Louis that could reasonably accommodate rail traffic to the west was required to be made available to potential competitors of the railroads who jointly owned the terminal.⁴⁸ The concept of an "essential facility" was determinative when, in 1985, the Court required the owner of three of four skiing mountains to continue allowing the owner of the fourth mountain to jointly market access to all four mountains.⁴⁹

As the United States Court of Appeals for the Seventh Circuit explained, in *MCI Communications Corp. v. AT&T*, a case that required AT&T to grant connection to its telephone lines in order to allow MCI to compete in the long-distance telephone business,

A monopolist's refusal to deal under these circumstances [the requested access was both technically and economically feasible] is governed by the so-called essential facilities doctrine. Such a refusal may be unlawful because a monopolist's control of an essential facility (sometimes [especially in telecommunications law] called a 'bottleneck' [a point through which everything destined for a specific point must pass]) can extend monopoly power from one stage of production to another, and from one market into another. Thus, the antitrust laws have imposed on firms controlling an essential facility the obligation to make the facility available on nondiscriminatory terms.⁵⁰

Verizon v. Trinko

Curtis Trinko challenged, as a violation of the antitrust laws, Verizon's failure to adequately share its network facilities with his provider of telecommunications service, as required by the

⁴⁶ *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 925, 927 (2d Cir. 1980), *cert. den.*, 450 U.S. 917 (1981).

⁴⁷ 630 F.2d at 927.

⁴⁸ 224 U.S. 383 (1912).

⁴⁹ *Aspen Skiing Co. v. Aspen Highlands Skiing*, 472 U.S. 585 (1985).

⁵⁰ 708 F.2d 1081, 1132 (7th Cir. (1983)), *cert. denied*, 464 U.S. 891 (1983).

Telecommunications Act of 1996.⁵¹ His suit was filed as a class action immediately following a series of state and federal regulatory actions that penalized Verizon for failing to comply with the act's mandate to provide any requesting telecommunications carrier with interconnection service "at least equal to that provided by the local exchange carrier to itself"⁵² The complaint alleged that Verizon "continues to resist competitive entry by carriers seeking to compete entirely with their own facilities," and consequently, that customers of Verizon's competitors have been injured in their business or property by reason of "Verizon's "exclusionary and anticompetitive behavior." The Court rejected both Trinko's reasoning and his arguments.

The opinion first discussed and described the regulatory scheme set out in the Telecommunications Act, the regulatory actions carried out pursuant thereto, and the effect of the act's antitrust "savings clause." After observing that the savings clause foreclosed the possibility of either unquestioningly substituting the regulatory scheme for traditional antitrust analysis or granting the regulated entity the benefit of implied antitrust immunity, the Court noted nevertheless that the savings clause "preserves [*only*] those 'claims that satisfy *established* antitrust standards.'"⁵³ It then analyzed those "established standards"—monopoly status, and the offenses of "monopolization" and "attempted monopolization"—and quoted from the "*Colgate* doctrine" concerning the "long recognized right" of a private businessman "to exercise his own independent discretion as to parties with whom he will deal."⁵⁴ Prior cases that had utilized the "essential facilities" doctrine were distinguished by the Court, which found the differences between them and its present case significant: *Aspen* was not available to Trinko because access to the "essential facility" in that case (the defendant's three mountains), previously granted, had been withdrawn.⁵⁵ *Terminal Railroad* and another case relied on by Trinko, *Associated Press v. United States*,⁵⁶ were also distinguished, the Court noting that both "cases involved *concerted* action, which presents greater anticompetitive concerns"⁵⁷ The majority stressed its belief that although Verizon had violated a duty imposed by the act, it had not violated any obligation—positive or negative—imposed by the antitrust laws.⁵⁸

⁵¹ P.L. 104-104; the 1996 Act constituted an amendment to the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*

⁵² 47 U.S.C. § 251(c)(2)(C).

⁵³ 540 at 406 (emphasis added).

⁵⁴ *Id.* at 408.

⁵⁵ *Id.* at 408-409: "*Aspen Skiing* is at or near the outer boundaries of § 2 liability. The Court there found significance in the defendant's decision to cease participation in a cooperative venture."

⁵⁶ 326 U.S. 1 (1945).

⁵⁷ 540 U.S. at 410, note 3 (emphasis in original).

⁵⁸ For additional detail, see CRS Report RS21723, *Verizon Communications, Inc. v. Trinko: Telecommunications Consumers Cannot Use Antitrust Laws to Remedy Access Violations of Telecommunications Act*, by (name redacted).

Some Examples of Antitrust Enforcement Agency Posture

The 1992 jointly issued Horizontal Merger Guidelines⁵⁹ make clear that the “monopoly”/“monopolization” dichotomy is a key enforcement concept. The Guidelines were promulgated in order to inform the business community of the agencies’ (DOJ, FTC) governing philosophy and “analytical framework” when they are reviewing the permissibility of proposed mergers, but they afford a good view of the agencies’ overall thinking about antitrust culpability. The “Purpose and Underlying Policy Assumptions” section of the Introduction states unequivocally that “mergers should not be permitted to create or enhance market power or to facilitate its exercise; it goes on to note, however, that while “competitively harmful” mergers will be challenged, there is a “larger universe of mergers that [is] either competitively beneficial or neutral.”⁶⁰ We earlier quoted an Assistant Attorney General to the effect that competitive harm rather than size is the determinative element in a decision on a reviewed merger.⁶¹

Two relatively recent cases clearly illustrate the antitrust enforcement agencies’ differentiation between the existence of monopoly power and active monopolization: the Department of Justice suit against Microsoft⁶² and the FTC’s complaint against Intel.⁶³ In *Microsoft*, the Antitrust Division stated that “Microsoft possesses (and for several years has possessed) monopoly power in the market for personal computer operating systems.”⁶⁴ The DOJ action, however, was filed not to challenge Microsoft’s monopoly status, but rather, the company’s actions:

To protect its valuable [and presumably, lawful] Windows monopoly against ... potential competitive threats, and to extend its operating system monopoly into other software markets, *Microsoft has engaged in a series of anticompetitive activities*. Microsoft’s conduct includes agreements tying other Microsoft software products to Microsoft’s Windows operating system;⁶⁵ exclusionary agreements precluding companies or potential competitors

⁵⁹ The *Guidelines* were issued in 1962 by the Antitrust Division, and revised in 1982 and 1984. They were substantially modified and issued jointly by DoJ and the FTC 1992, and revised by the agencies in 1997. The 1984 version indicated that the Department would consider foreign as well as domestic competition in determining the geographic market for the products or services of a potential merger (§ 2.34). The 1992 version states that the “unifying theme of the *Guidelines* is that mergers should not be permitted to create or enhance market power or to facilitate its exercise” § 0.1). The 1997 revision dealt only with the agencies’ treatment of the so-called “efficiency defense”: a merger that is, on balance, anticompetitive, will not generally be “saved” by claimed or actual efficiencies, nor likely be approved by the reviewing agencies (§ 4). Although the *Guidelines* are not binding on either the Antitrust Division or the FTC (or, for that matter, the courts), they are indicative of the agencies’ thinking with respect to the competitive concerns inherent in all market transactions.

⁶⁰ *Merger Guidelines*, § 0.1.

⁶¹ See footnote 18 and associated text.

⁶² *United States v. Microsoft*, Civil Action No. 98-1232, filed in the United States District Court for the District of Columbia on May 18, 1998 (hereinafter referred to as “Complaint”) “to restrain *anticompetitive conduct* by defendant Microsoft Corporation ..., the world’s largest supplier of computer software for personal computers ...” (Complaint ¶ 1, emphasis added); 87 F.Supp. 2d 30 (D.D.C. 2000) (“Conclusions of Law”), 97 F.Supp. 2d 59 (D.D.C. 2000) (“Final Judgment”); *aff’d in part, rev. in part*, “Final Judgment” *vacated, remanded to be assigned to new judge*, 253 F.3d 34 (D.C. Cir. 2001); *cert. den.*, 534 U.S. 952 (2001); *on remand*, 231 F.Supp.2d 144 (D.D.C. 2002); *aff’d sub nom.*, *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004).

⁶³ *In re Intel Corporation*, Doc. No. 9288, filed June 8, 1998 (hereinafter referred to as Docket No. 9288), settled May 17, 1999 by means of a Consent Decree; See <http://www.gov.ftc/opa/1999/9903/intelcom.htm> for details of the Consent Decree and <http://www.gov.ftc/opa/1999/9904/intelst.htm> for FTC comments on the decree.

⁶⁴ Complaint, 2.

⁶⁵ By refusing to sell one product to a buyer unless the buyer agrees also to take a designated second product (“you can’t buy X without Y”), tying precludes the buyer’s choice concerning where to purchase each component, and forecloses to other sellers a portion of the market in the tied product. The established “test” for a tying violation first (continued...)

from distributing, promoting, buying, or using products of Microsoft's software competitors or potential competitors; and exclusionary agreements restricting the right of companies to provide services or resources to Microsoft's software competitors or potential competitors.⁶⁶

In the charges against Intel Corporation by the FTC, the Commission acted to restrain the "pattern of conduct ... that violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45,"⁶⁷ and not because of Intel's acknowledged monopoly status.⁶⁸

As a *monopolist*, Intel can compete by producing better, cheaper and more attractive products. It *cannot act to cement its monopoly power by preventing other firms from challenging its dominance*. Intel has acted illegally. It has used its monopoly power to impede innovation and stifle competition [by denying necessary technical information to certain customers in retaliation for their suits against Intel to enforce their (the customers') patents, allegedly infringed by Intel].⁶⁹

Conclusion

Judicial determination of "monopoly" status for a market participant says nothing concerning the lawfulness of the monopoly enjoyed. At most, monopoly status indicates that the monopolist possesses sufficient market power to "control prices or exclude competition." But such a determination does not automatically create an obligation on the part of the monopolist to deal—at all, or "fairly"—with other entities in the market, or with consumers. That obligation may be created only by a further finding either that the monopolist has achieved his monopoly position in violation of the prohibitions against monopolization or attempted monopolization in the Sherman or Clayton Antitrust Acts or the prohibition against unfair practices in the Federal Trade Commission Act (i.e., possesses an unlawful monopoly); or that he has unlawfully exploited even a lawfully obtained monopoly position; or both. In other words, a monopolist's "guilty behavior" is what creates a monopolization violation of the antitrust laws, not his status as a monopolist.

The duty to deal with actual or potential competitors of a lawful monopolist who has not been found to have engaged in some "guilty behavior" is generally governed by the *Colgate* doctrine, which gives market participants the right to choose their commercial relationships. That "right," however, has been thought to have been circumscribed by what has become known as the "essential facilities" doctrine; it stands for the proposition that a monopolist who possesses or controls a necessary component of an actual or potential competitor's business must make it

(...continued)

requires that there be two separate products—each, or either, capable of being purchased separately by a consumer, but also a defendant with monopoly power in the market for the tying product, lack of choice for the consumer, and foreclosure of a substantial volume of commerce. Tying is most generally analyzed as a *per se* violation of the antitrust laws, although when a court has failed to find the requisite "separate products," a Rule of Reason analysis has been employed. *See e.g.*, *United States v. Jerrold Electronics Corp.*, 187 F.Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961); *Broadcast Music, Inc. v. CRS*, 441 U.S. 1 (1979); *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984). *See* footnote 23, *supra*, for the effect of a patented tying product on the consideration of a defendant's monopoly power in the market for the tying product.

⁶⁶ Complaint, ¶ 5 (emphasis added).

⁶⁷ Introduction to FTC Docket No. 9288 (emphasis added).

⁶⁸ Docket No. 9288, ¶¶ 4-10.

⁶⁹ FTC Press Release Issued to Announce Agency's Filing Against Intel, June 8, 1998 (emphasis added).

available to his competitor(s) if it cannot reasonable be obtained—at all, or only at prohibitive expense.

In *Verizon Communications, Inc. v. Trinko*, however, the Supreme Court questioned the validity of the “essential facilities” doctrine in antitrust law—at least in the context of regulated entities. When a regulated entity violates a regulatory statute that compels the sharing of specifically named facilities, the Court said, there is not also an automatic antitrust violation without a finding that that behavior would have violated something in the antitrust laws—with or without the existence of the statutory requirement.⁷⁰

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⁷⁰ The refusal to deal alleged in the present case does not fit within the limited exception recognized in *Aspen Skiing* [*Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985)]. The complaint does not allege that Verizon voluntarily engaged in a course of dealing with its rivals, or would ever have done so absent statutory compulsion. Here, therefore, the defendant’s prior conduct sheds no light upon the motivation of its refusal to deal—upon whether its regulatory lapses were prompted not by competitive zeal but by anticompetitive malice. The contrast between the cases is heightened by the difference in pricing behavior. In *Aspen Skiing*, the defendant turned down a proposal to sell at its own retail price, suggesting a calculation that its future monopoly retail price would be higher. Verizon’s reluctance to interconnect at the cost-based rate of compensation available under § 251(c)(3) [of the 1996 Telecommunications Act] tells us nothing about dreams of monopoly. The specific nature of what the 1996 Act compels makes this case different from *Aspen Skiing* in a more fundamental way. In *Aspen Skiing*, what the defendant refused to provide to its competitor was a product that it already sold at retail—to oversimplify slightly, lift tickets representing a bundle of services to skiers. ... In the present case, by contrast, the services allegedly withheld are not otherwise marketed or available to the public. The sharing obligation imposed by the 1996 Act created ‘something brand new’—the wholesale market for leasing network elements.’

* * *

... we do not believe that traditional antitrust principles justify adding the present case to the few exceptions from the proposition that there is no duty to aid competitors. 540 U.S. at 409-410, 411.

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