Antitrust implications of aftermarkets

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I. INTRODUCTION

The methods used by firms to extend their sales into the aftermarket for their primary products are varied and pervasive—involving a multitude of industries and hundreds of billions of dollars of sales. Therefore, it is hardly surprising that this behavior deserves, and continues to receive, extensive antitrust scrutiny, by lawyers and businessmen, by scholars and by courts.

A useful way to undertake an analysis of the antitrust implications of activities in aftermarkets is to start with an overview of the nature of the behavior involved. Therefore, this article will begin with a brief survey of a handful of the multitude of factual situations and industry settings in which aftermarket issues have arisen. Next, I will identify the variety of means by which firms attempt to restrict the choices open to consumers as to the products or services available in the aftermarket. This article will then address the competitive implications of these various forms of restrictive behavior—the potential efficiency-

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enhancing justifications for these restraints, and then their potential anticompetitive consequences. I will conclude with a discussion of some of the legal theories and case law in this area and with some comments about further treatment of aftermarket restrictions.

II. BREADTH AND HISTORY OF AFTERMARKET RESTRAINTS

To put this analysis in context, it is helpful to set forth a definition of the behavior under discussion. By “aftermarket restraints,” I mean to include the array of techniques by which a firm selling (or licensing or leasing) a product (or service or franchise)—which is frequently referred to as the “primary product”—is able to require its customers (or its licensees or franchisees) to purchase some other product or service—oftentimes referred to as the “secondary product”—from that firm.

The adage that “those who cannot remember history are condemned to repeat it” applies with full force to a discussion of aftermarket restraints. The multiple strategies that sellers of certain products or services have used in attempts to extend their market power into adjacent or secondary markets doubtless have a lineage extending back for centuries. In any event, challenges under the antitrust laws to this behavior, and judicial consideration thereof, can be traced at least to the early part of the previous century. A brief review of a handful of cases will illustrate the enormous diversity of industries in which aftermarket restraints have been attempted.

Many of these decisions will be familiar to students of antitrust law. The first such Supreme Court case dates back almost a hundred

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1 For purposes of simplicity, this article will henceforth refer only to the sales of products. The transactions which give rise to aftermarket issues may in fact include all of the various methods by which products, services or franchises are distributed.

2 1 GEORGE SANTAYANA, THE LIFE OF REASON (1905-06).

3 Lower court analysis of aftermarket restraints dates back at least to the end of the nineteenth century. In Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co., 77 Fed. 288 (6th Cir. 1896), the court of appeals held that the plaintiff, the patentee of a machine for fastening buttons to shoes,
years. There, in the *A.B. Dick* case, the Court rejected a judicial challenge under the Sherman Act to the insistence by the manufacturer of a patented stencil duplicating machine that it be used only with the manufacturer’s unpatented paper, ink and other supplies. Shortly thereafter, Congress passed the Clayton Act, and in its aftermath, in the *Motion Picture Patents* case, the Supreme Court overruled *A.B. Dick*, holding that the sale of a patented projector of motion pictures could not be conditioned on its use only with the patentee’s films. Other landmark Supreme Court cases involving attempted aftermarket restraints include the 1936 *IBM* decision, in which the Court found unlawful the insistence by the leading manufacturer of a machine for the sorting of punch cards on which data was placed that its customers purchase those cards only from it; the 1947 *International Salt* case, in which the Court found unlawful the insistence by a manufacturer of machines for injecting salt into canned foods that its customers purchase all of the salt used in those machines from it; the lawfully could condition the sale of its machines on the requirement that purchasers use only plaintiff’s unpatented staples therewith, and that the defendant’s unauthorized sale of its staples to the plaintiff’s customers constituted contributory patent infringement.

4 Henry v. A.B. Dick Co., 224 U.S. 1 (1912). See also Cortelyou v. Charles Eneu Johnson Co., 207 U.S. 196 (1907) (aff’g dismissal of injunction sought by manufacturer of patented duplicating machines, which had affixed notice on machines that they could be used only with ink sold by patentee, against seller of ink for contributory patent infringement, because none of defendant’s officers had knowledge of restriction and they had never been notified by plaintiff of its rights).


6 *Motion Picture Patents Co. v. Universal Film Co.*, 243 U.S. 502 (1917).

7 *IBM Corp. v. United States*, 298 U.S. 131 (1936). See also *United Shoe Mach. Corp. v. United States*, 258 U.S. 451 (1922) (successfully challenging restraints imposed by the monopolist-seller of machinery used for the manufacture of shoes, which required lessees to purchase certain supplies only from the defendant); *Pick Mfg. Co. v. Gen. Motors Corp.*, 80 F.2d 641 (7th Cir. 1935) (upholding contract requiring automobile dealers to purchase G.M. parts), aff’d *per curiam*, 299 U.S. 3 (1936).

1992 *Kodak* case, in which the Court held that a manufacturer of micrographic reproduction machines may have acted illegally by attempting to exclude independent service organizations (ISOs), which were its competitors in the market for the servicing of those machines, by its refusal to sell parts to them, or to the owners of the machines, that were necessary for their repair; and the *Independent Ink* case, decided only last year, in which the Court considered a challenge to restrictions imposed by the manufacturer of certain inkjet printers that its customers purchase ink cartridges only from it, and clarified the standards for proving an unlawful tying arrangement. The factual settings and the issues raised by these cases show substantial variation, and the legal standards to be applied have evolved in light of scholarly examination of the legal and economic implications of these practices. However, at bottom the continuing task of the Supreme Court has been to evaluate the impact on competition of, and the potential harm to consumers which may result from, these practices.

### III. VARIETY OF INDUSTRY SETTINGS AND RELATIONSHIPS

A large number and variety of industries and relationships have spawned significant amounts of litigation about the legality of attempts to control aftermarkets. Of these, three situations are particularly deserving of attention. The automobile industry is often characterized by limitations or requirements imposed on dealers, for example, that they may only use authorized parts in connection with or lease of land adjacent to railroad’s right-of-way, requiring that all commodities grown, manufactured or mined on that land be shipped on defendant’s rail lines, were unlawful).


11 See, e.g., Grappone, Inc. v. Subaru of N. Eng., Inc., 858 F.2d 792 (1st Cir. 1988); Mozart Co. v. Mercedes-Benz of N. Am., 833 F.2d 1342 (9th Cir. 1987);
the servicing or repair of the manufacturer's automobiles.11 Second, not surprisingly, sellers of primary products in the various sectors of the computer industry frequently strive to extend their control into the markets for servicing, component parts, replacement parts, or supplies.12 Indeed, the newer technology areas of the economy are often characterized by attempts to extend sales into aftermarkets, as evidenced, just for example, by the thriving market for cartridges for video game consoles.13 The third situation is somewhat different, since most discussion of aftermarkets involves a durable good as the primary product, and something like a component or replacement part as the secondary product. But, aftermarket issues also arise in franchise relationships. Here, the primary product is the franchise, or the trademark associated with it. These agreements almost always involve contractual undertakings that the franchisees use only certain

Metrix Warehouse, Inc. v. Daimler-Benz AG, 828 F.2d 1033 (4th Cir. 1987); Sherman v. British Leyland Motors, Ltd., 601 F.2d 429 (9th Cir. 1979); Heattransfer Corp. v. Volkswagenwerk, A.G., 553 F.2d 964 (5th Cir. 1977); Pick Mfg. Co. v. Gen. Motors Corp., 80 F.2d 641 (7th Cir. 1935), aff'd per curiam, 299 U.S. 3 (1936). See also Bob Maxfield, Inc. v. Am. Motors Corp., 637 F.2d 1033 (5th Cir. 1981) (alleged tying of big cars to small cars); Dealer Computer Servs., Inc. v. Ford Motor Co., 2006-1 Trade Cas. (CCH) ¶ 75,212 (S.D. Tex. 2006) (refusing to grant injunction, based on allegations that Ford sought to extend its market position in proprietary replacement parts into the electronic parts catalog market, by imposing restrictive and unreasonable conditions on license for provision of parts data).

12 A core allegation in the Microsoft litigation, United States v. Microsoft Corp., 253 F.3d 34 (D.D.C. 2001), was the defendant's use of its market power in the Intel-compatible PC operating systems market to enhance its market position in the Internet browser market. See also SMS Sys. Maint. Servs., Inc. v. Digital Equip. Corp., 188 F.3d 11 (1st Cir. 1999); Virtual Maintenance, Inc. v. Prime Computer, Inc., 11 F.3d 660 (6th Cir. 1993); HyPoint Tech., Inc. v. Hewlett-Packard Co., 949 F.2d 874 (6th Cir. 1991); A.I. Root Co. v. Computer/Dynamics, Inc., 806 F.2d 673 (6th Cir. 1986); Digidyne Corp. v. Data Gen'l Corp., 734 F.2d 1336 (9th Cir. 1984); Transamerica Computer Co. v. IBM Corp., 698 F.2d 1377 (9th Cir. 1983); Systemcare, Inc. v. Wang Labs., 787 F. Supp. 179 (D. Col. 1992).

13 Cf. Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992) (rejecting claim for trademark and copyright infringement by manufacturer of computer video game console and programs against its competitor for programs).
products, ingredients, supplies, or services sold or provided by the franchisor or its authorized supplier.\textsuperscript{14}

In addition to these, and some other, more frequently discussed situations, there are a host of less well-known—perhaps one might even say obscure—restrictions on aftermarket sales. For example, in one case, the seller of hot air balloons restricted the sources of replacement fabric for those balloons.\textsuperscript{15} In another case, the manufacturer of devices used in reprocessing dialyzers—which are used by people with renal failure—allegedly restricted the sale of cleaning agents for those devices.\textsuperscript{16} And the case law is replete with many other instances of aftermarket restraints.\textsuperscript{17}


\textsuperscript{17} See, e.g., Roy B. Taylor Sales, Inc. v. Hollymatic Corp., 28 F.3d 1379 (5th Cir. 1994) (requirement by supplier of hamburger patty machines that dealers also purchase patty paper from supplier); Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228 (7th Cir. 1988) (tying sale of electric motors to purchase of replacement parts); Metzler v. Bear Automotive Serv. Equip. Co., 19 F. Supp. 2d 1345 (S.D. Fla. 1998) (refusal to sell certain replacement parts for defendant’s automotive diagnostic equipment without purchase of accompanying repair service).
IV. VARIETY OF METHODS FOR EXTENDING AFTERMARKET SALES

Sellers have also employed a wide variety of methods to achieve these restraints. Perhaps the most familiar device occurs in cases like *International Salt*,\footnote{Int'l Salt Co. v. United States, 332 U.S. 392 (1947). See supra note 8 and accompanying text.} which is a variation of the classic tying arrangement. Here, the seller of a product conditions the sale of that "tying product" on the purchase by the customer of a second product or service (the "tied product"); or, similarly, there will be a prohibition on the buyer's using any product in connection with the tying product other than one sold by or authorized by the seller. The requirement that the buyer purchase the secondary product in order to obtain the primary product is usually the result of an express condition in the parties' contract. However, occasionally, that condition may also be inferred from the parties' relationship and their history and method of doing business.\footnote{See generally 2 JOSEPH P. BAUER & WILLIAM H. PAGE, FEDERAL ANTITRUST LAW §§ 13.18 (2002).}

A variety of other tactics have also been used by sellers to expand the market for their secondary products or services. Particularly where the primary product is the subject of intellectual property, the seller may simply refuse to sell or license the secondary product to others; as a result, the seller becomes the de facto sole source of both products.\footnote{See, e.g., *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322 (Fed. Cir. 2000); Image Technical Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195 (9th Cir. 1997); PSI Repair Servs., Inc. v. Honeywell, Inc., 104 F.3d 811 (6th Cir. 1997); ID Security Sys. Canada, Inc. v. Checkpoint Sys., Inc., 249 F. Supp.2d 622 (E.D. Pa. 2003). See also infra notes 58–63 and accompanying text.} Or, the seller may design or configure its primary product so that only its proprietary version of the secondary product will work with it, foreclosing other firms from providing alternatives to purchasers of the primary product.\footnote{See, e.g., Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 539–43 (9th Cir. 1983); *In re IBM Peripheral EDP Devices Antitrust Litig.*, 481 F. Supp. 965, 1002–03 (N.D. Cal. 1979), aff'd sub nom. Transamerica Computer Co. v. IBM Corp., 698 F.2d 1377 (9th Cir.).} Or, the manufacturer of two new,
related products may withhold product specifications or details before the products are first sold, thereby giving it a long headstart, with the goodwill associated with being the first to market the product. Or, the seller may offer a particularly advantageous price for the purchase of two components of a package. Or, the seller may engage in a strategy of selling the primary product at abnormally low prices, with the forgone profit on that product made up by elevated prices charged for the secondary product.

V. COMPETITIVE SIGNIFICANCE OF AFTERMARKET RERAINTS

The significance of various aftermarket industries as a segment of the economy cannot be overstated. For example, it has been estimated that in 2003 the aftermarket for automobile parts alone accounted for annual revenues of $185 billion. And the use of any of the techniques

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22 See, e.g., Berkey Photo Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979).

23 The Supreme Court has held, however, that a seller’s practice of offering two products as part of a package, at a lower combined price than the two products sold separately—especially when the two products are available separately from other sources—is not unlawful, and indeed may represent a form of vigorous competition. See Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 11–12 (1984); N. Pac. Ry v. United States, 356 U.S. 1, 6 n.4 (1958).

24 See, e.g., Kentmaster Mfg. Co. v. Jarvis Prods. Corp., 146 F.3d 691 (9th Cir. 1998) (dismissing monopolization claim against manufacturer of slaughterhouse equipment, which allegedly offered original equipment at predatory low prices, but made up losses by charging high prices for replacement spare parts). A variation of this pricing arrangement is found in the cellular phone industry, where the handset is sold at a very low price, contingent on the subscriber’s agreement to a contract of a particular duration, with stiff fees for premature cancellation.

just identified would appear to carry the potential for diminishing consumer choice and/or increasing the price paid by consumers for the secondary product. Therefore, the competitive implications of these practices virtually demand antitrust analysis.26

A. Competitive benefits

Many instances in which firms attempt to retain or expand their market shares in the aftermarket sector of a systems industry will not harm consumers. Indeed, those firms may offer a wide variety of explanations for this behavior, arguing that the use of these techniques either is efficiency-enhancing and thus has procompetitive results or, at worst, is competitively neutral.

26 Because many of the primary products involved in aftermarket restraints are the subject of intellectual property protection, the patent and copyright laws are often used by the sellers of the primary products to justify and shield their attempted market extensions. See generally Daniel Gifford, The Antitrust/Intellectual Property Interface: An Emerging Solution to an Intractable Problem, 31 Hofstra L. Rev. 363, 403–06 (2002).

Although any discussion of the intellectual property law aspects of these restrictions is far beyond the scope of this article, it must be noted that firms that have a copyright protecting the primary product have increasingly attempted to use the Digital Millennium Copyright Act, L. 105–304, 112 Stat. 2860 (codified in scattered sections of 17 U.S.C.), as a means of excluding competitors in the secondary product market. See, e.g., Lexmark Int’l, Inc. v. Static Control Components, Inc., 387 F.3d 522 (6th Cir. 2004) (affirming dismissal of action by printer manufacturer against seller of computer chip used in remanufactured toner cartridges seeking to replicate microchip in plaintiff’s toner cartridges); Chamberlain Group, Inc. v. Skylink Techs., Inc., 381 F.3d 1178 (Fed. Cir. 2004) (affirming summary judgment against manufacturer of garage door opener, which had sued competitor that manufactured universal remote control), cert. denied, 544 U.S. 923 (2005). Cf. Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992) (rejecting claim for trademark and copyright infringement by manufacturer of computer video game console and programs against its competitor for programs). See generally Caryn Borg-Breen, Comment, Garage Door Openers, Printer Toner Cartridges, and the New Age of the Digital Millennium Copyright Act, 100 Nw. U. L. Rev. 885 (2006); Marcus Howell, Note, The Misapplication of the DMCA to the Aftermarket, 11 B.U. J. Sci. & Tech. L. 128 (2005).
One particularly important function that may be served by these techniques is quality control and protection of the goodwill of the seller of the primary product. For example, in the franchise setting, the franchisor and all of its franchisees have a shared interest in maintaining uniform quality of all goods sold or services provided. Thus, if one hamburger franchisee uses low-quality buns, or if an oil change franchisee uses inferior-quality oil, the reputation of all participants in the franchise may suffer. Similarly, if one automobile dealer uses inferior replacement parts or crash parts, and if consumers mistakenly believe that these parts are made by or are authorized by the manufacturer, its reputation may be adversely affected. And, in these examples, consumers may also be injured. Therefore, while there may be other, potentially less anticompetitive, ways of insuring quality control in these and similar settings, a requirement that all franchisees or all dealers use only materials,


28 See supra note 11 and accompanying text.

29 But see Edward Iacobucci, Tying As Quality Control: A Legal and Economic Analysis, 32 J. LEGAL STUD. 435 (2003):

[II]t is the buyer, not independent sellers of the tied goods, who imposes costs on the seller of the tying good by buying independent tied goods that the buyer anticipates to be of inferior quality. ... [U]sing inferior tied goods may not harm the tying good’s reputation even when customers are unable to attribute particular blame or credit to the tying good or tied good following the performance of the tying/tied good package. In some circumstances, purchasing inferior tied goods from independent suppliers may enhance the tied good’s reputation and expected profits.

Id. at 437–38 (emphasis added).
supplies or parts specified by the franchisor or manufacturer may be an effective and efficient way of protecting the interests of all parties to the relationship.30

Another function of these requirements is that they may serve as a form of metering, allowing the seller to engage in price discrimination among different purchasers or users of the primary product.31 Thus, in the International Salt case, different food canners presumably ascribed different utility to the salt injecting machines because of variations in the intensity of each canner’s use of the machines, its labor costs and so forth. By charging a relatively low price for its machines, International might have been able to capture their added utility for each canner through an elevated price for the salt.32 Similarly, video game consoles have typically been sold for a comparatively low price, with their manufacturers reaping their full value to consumers by sales, at comparatively elevated prices, of game cartridges that are available only from the manufacturer or its authorized licensees; as a result, users who want more games end up

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30 It has been argued that these restraints also may benefit consumers by incentivizing increases in quality of the primary product. See Marius Schwartz & Gregory Werden, *A Quality-Signaling Rationale for Aftermarket Tying*, 64 Antitrust L. J. 387, 388 (1996) (“tying can make it profitable to offer high-quality durables if the demand for the complement is sufficiently higher when the durable proves to be of high quality”).

31 See Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 15 n.23 (1984) (“Sales of the tied item can be used to measure demand for the tying item; purchasers with greater needs for the tied item make larger purchases and in effect must pay a higher price to obtain the tying item”). This explanation for manufacturers’ attempts to control both the primary and secondary markets has been recognized for a half-century. See, e.g., Ward Bowman, *Tying Arrangements and the Leverage Problem*, 67 Yale L.J. 19 (1957); M. L. Burstein, *A Theory of Full-Line Forcing*, 55 Nw. U. L. Rev. 62 (1960).

32 There, however, this explanation for imposing ties may at least in part be undermined by the fact that International’s contracts provided that buyers could make purchases from any competitor that offered salt at lower prices, subject to International’s right to match that lower price. Int’l Salt Co. v. United States, 332 U.S. 392, 396–97 (1947). Of course, even having just this “right of first refusal,” so that International didn’t have to beat its competitors’ prices to make a sale, gave it a competitive edge.
paying, at the end of the day, what is effectively a higher price for the console.\footnote{Most consumers probably will know about the price of additional game cartridges, and will factor those prices into an assessment of the true cost of the console.}

Defenders of aftermarket restraints argue that the use of these techniques to capture, retain, or expand market share in the secondary product market usually does not result in higher overall prices to consumers for the combination of those products.\footnote{See, e.g., Jill Herndon, Intellectual Property, Antitrust, and the Economics of Aftermarkets, 47 ANTITRUST BULL. 309, 311 (2002) ("[M]anufacturers will have an incentive to restrict competition in the aftermarkets whenever their replacement parts are ‘unique,’ i.e., when replacement parts are not substitutable across brands, regardless of the structure of the primary equipment market. But this incentive does not jeopardize consumer welfare"); Carl Shapiro, Aftermarkets and Consumer Welfare: Making Sense of Kodak, 63 ANTITRUST L. J. 483, 485 (1995) ("significant or long-lived consumer injury based on monopolized aftermarkets is likely to be rare, especially if equipment markets are competitive").} But, to the extent that higher prices, or even merely loss of choice, in fact are by-products of these forms of marketing the primary product, they also argue that these rewards are useful ways of inducing higher levels of investment and research, which would benefit the consumer by the development of new and better products and services.\footnote{See, e.g., Thomas Arthur, “Formalistic Line Drawing”: Exclusion of Unauthorized Servicers from Single Brand Aftermarkets Under Kodak and Sylvania, 24 J. CORP. L. 603 (1999) ("Kodak’s holding that a self-distributing manufacturer lacking traditional interbrand market power may nevertheless be guilty of unlawful tying and monopolization in ‘markets’ for its brand’s parts and service will impede those firms’ efforts to market their products effectively"); Mark Glick & Duncan Cameron, When Do Proprietary Aftermarkets Benefit Consumers?, 67 ANTITRUST L.J. 357, 365 (1999) ("economic price discrimination [which allows sellers to maximize sales of the primary product to both higher intensity and lower intensity users] may be necessary to produce profits sufficient to support the development and manufacture of new systems").} This argument has particular resonance where the primary product is protected by a form of intellectual property. Indeed, the constitutional authority to enact the patent and copyright laws is based in part on the premise that the
grant of a type of "monopoly" will serve as an incentive to the creation of more and better inventions and works of authorship.\textsuperscript{36}

B. Potential for injury to competition and harm to consumers

But, there are many reasons not to be sanguine about the competitive implications of these techniques for capturing a larger share of systems aftermarkets. To the extent that these practices contribute to a reduction in the number and diversity of sources for consumers to acquire the secondary product or service, there will be opportunities for sellers to attempt to raise prices, and sometimes these attempts will be successful. One such instance is the factual situation in \textit{Kodak}. This article is not the appropriate setting to undertake a full discussion of the "lock-in" theory advanced there by the Supreme Court.\textsuperscript{37} But, the primary importance here of that theory is its recognition that when circumstances—which may include imperfect information on the part of buyers, significant buyer investment in the primary product, or high switching costs—permit a seller of a primary product to "lock in" certain buyers,\textsuperscript{38} the seller will be able to exploit its market power by charging higher prices for the secondary product.\textsuperscript{39} And

\textsuperscript{36} See U.S. Const., art. I, § 8, cl. 8 ("The Congress shall have power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").


\textsuperscript{38} These buyers are sometimes described as the seller's "installed base."

\textsuperscript{39} Kodak had argued that the presence of significant competition in the primary product market (for micrographic equipment) precluded, as a matter of law, the conclusion that it could exploit its market power in the downstream, or secondary, market, for the servicing of its equipment. \textit{Kodak}, 504 U.S. at 465–78. Although the Court was willing to assume the presence of substantial competition in that upstream market, \textit{id.} at 466 & n.10, it nonetheless rejected this argument, relying in part on the "lock-in" phenomenon. \textit{Id.} at
there are numerous other situations in which these techniques can result in an elevated net price for the combination of primary and secondary products.

Several of the very justifications identified above for these restraints suggest their anticompetitive potential. The compelled purchase of the secondary product from the supplier of the primary product, as a form of metering or price discrimination, by definition means that the seller will be able to obtain greater aggregate revenue from all its customers than it would have, had each of those buyers had the freedom to take the secondary product from any source.

473–77. It would appear to follow that when there is an absence of vigorous competition in the primary market, the seller will be even more likely to be able to engage in supracompetitive pricing with respect to the secondary products.

See generally Severin Borenstein, Jeffrey K. MacKie-Mason & Janet Netz, Antitrust Policy in Aftermarkets, 63 ANTITRUST L. J. 455, 459 (1995) (“Economic theory does not support the argument that strong primary market competition will discipline aftermarket behavior, even without market imperfections. In fact, firms will rationally engage in above-cost aftermarket pricing even if the equipment market is very competitive, all parties are well informed, and demand in the market is stable”); Herbert Hovenkamp, Market Power in Aftermarkets: Antitrust Policy and the Kodak Case, 40 UCLA L. REV. 1447, 1454, 1459 (1993) (noting that “one cannot infer lack of market power in aftermarket from lack of market power in primary markets. Rather, one must look at the various components in the aftermarkets individually,” asserting that existence of market power must be “measured against the package price of the whole, for that is what the customer is purchasing,” and concluding that in most cases, assertions of market power in aftermarket cannot be sustained).

40 See generally Benjamin Klein, Market Power in Aftermarkets, 17 MANAGERIAL & DECISION ECON. 143, 153 (1996) (acknowledging that “high aftermarket prices primarily exist because they serve as a way to meter consumer intensity. In particular, high aftermarket prices is [sic] a way to charge more intensive users higher package prices and low intensive users lower package prices . . .,” but asserting that “[w]hile such discriminatory pricing could not exist in a perfectly competitive world, it is not indicative of antitrust market power”).

Tying as a form of indirect metering is subject to another criticism as well. Metering can often be done directly, for example, by putting a counter on the tying product, without the foreclosure of opportunities for the seller’s competitors or the loss of consumer choice.
And, while quality control and preservation of the seller’s goodwill are certainly important goals, frequently those goals could be achieved by less restrictive alternatives. For example, the specification of the qualities of the secondary product, or the termination of franchises if inferior quality products are used, or the voiding of warranties, would in many cases serve as quality control mechanisms, while still permitting the continuation of competition in the market for the secondary product.41

At bottom, a seller’s extension of its market power into the market for secondary products will often have anticompetitive consequences. Consumer choice will inevitably be limited as a result of these aftermarket restraints—whether for variations of the secondary product, or just for a different source for that product.42 And, because the number of firms competing to provide the secondary product to a specific customer will be diminished, there is also likely to be less variety in the kinds of secondary products available and less innovation in the means of their production and distribution. Therefore, many of these restraints clearly require antitrust scrutiny.

VI. ANTITRUST ANALYSIS

So, how should the antitrust laws deal with the competitive implications of restraints in aftermarkets? To begin, it should be indicated that it would be counterproductive to propose and adopt a new methodology

41 See Int’l Salt Co. v. United States, 332 U.S. 392, 397 (1947) (“Of course, a lessor may impose on a lessee reasonable restrictions designed in good faith to minimize maintenance burdens and to assure satisfactory operation. . . . But it is not pleaded, nor is it argued, that the machine is allergic to salt of equal quality produced by anyone except International. . . . Rules for use of leased machinery must not be disguised restraints of free competition, though they may set reasonable standards which all suppliers must meet”); Metrix Warehouse, Inc. v. Daimler-Benz AG, 828 F.2d 1033, 1040-41 (4th Cir. 1987); Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39, 46-47 (5th Cir. 1976); Siegel v. Chicken Delight, Inc., 448 F.2d 43, 51 (9th Cir. 1971).

42 See Borenstein et al., supra note 39, at 469-73 (arguing that in addition to leading to higher net prices for primary and secondary products, aftermarket restraints cause harm by leading to inefficiently reduced use of both products and “fewer choices over variety and quality than is optimal”).
for evaluating behavior. Rather, the analytic tools and the standards of legality need not be significantly different from the treatment that the Sherman and Clayton Acts have given over the years to the host of different forms of unilateral and concerted activities that have the potential to diminish competition and reduce consumer welfare. Instead, courts will occasionally need to tailor their analysis to the specific proffered justifications for, and harmful effects of, these restraints.

The analysis of the legality of aftermarket restraints should fruitfully begin with some basic doctrines. While there is considerable disagreement on what forms of behavior to characterize as "exclusionary," it is familiar law that the antitrust laws condemn various kinds of attempts to exclude rivals. Among the recognized forms of exclusionary behavior are certain refusals to deal and certain conduct that is deemed "predatory." Included in these categories are attempts by a firm to use its market power in one market as a form of "leverage" to extend that power into another market.43

The theories for challenging improper attempts to maintain or extend sales into the aftermarket are also familiar. The Kodak case— in which the plaintiffs asserted that the defendant's refusal to sell replacement parts was undertaken pursuant to an unlawful attempt to exclude competition in the secondary market to service its equipment—provides a useful template. The plaintiffs relied on the two principal theories that will likely be used by others for attacking anticompetitive conduct involving aftermarkets—challenging Kodak's behavior both as an unlawful tying arrangement and as unlawful monopolization or attempt to monopolize.44 And, as we know, the Court there concluded that the plaintiffs had stated viable claims under both these theories and thus remanded the case for trial.


45 Id. at 459.
But, how should courts apply these principles and theories in the specific context of aftermarket restraints? How should courts look at future challenges to attempts by firms to seek to use their power in a primary product market to maintain or expand sales in the aftermarket?

A. Tying arrangements

Again, space constraints preclude a detailed elaboration of the application of these theories. With respect to tying arrangements, it is noteworthy that a significant majority of all tying decisions involve some form of attempt to control sales in aftermarkets. As has already been pointed out, Supreme Court decisions, from the very earliest under the Clayton Act—Motion Picture Patents—up through the very latest—Independent Ink, which was decided just a year ago—fall into this category. The learning about the elements of an unlawful tying arrangement is by now familiar to all of us. With specific reference to control of aftermarkets, they include

• Proof that there were two separate products. This element will normally not be a significant issue with respect to aftermarkets. However, not only was it raised in the Kodak case, but disagreement in the Supreme Court on this issue was one of the reasons that Justice Scalia would have held Kodak's behavior to be lawful.

• Proof that the seller required, or coerced, the buyer to take both products, rather than merely offering a package in which it was cheaper, more convenient, or more attractive to take both elements. Success for plaintiffs on this prong will often prove to be more difficult—especially if sellers in aftermarkets are able to design or redesign their sales programs, by pricing, packaging, marketing or other techniques that are intended to obviate this requirement.

46 Motion Picture Patents Co. v. Universal Film Co., 243 U.S. 502 (1917). See supra note 6 and accompanying text.


49 Kodak, 504 U.S. at 494–95 n.2 (Scalia, J., dissenting).
• Proof that the seller had market power in the tying product market, or here, in the market for the primary product. As we know, in Independent Ink, the Supreme Court made the plaintiff's task more difficult on this element, by erasing the presumption which it had reasserted as recently as Jefferson Parish,50 that a patent on the tying product was probative of the necessary market power. Going forward, plaintiffs will now have to prove the requisite market power either by showing that the seller has a significant market share in the primary product market,51 or by showing that the product is sufficiently unique that other would-be suppliers are unable to offer it. While having a patent can no longer suffice as proof of this element, when the patent confers a competitive value on the patentee flowing from the right that the patent gives its owner to exclude others from the use of that particular technology, that fact should at least still be evidence of some degree of market power.52

• Finally, the plaintiff will have to prove that the restraint has had some not insubstantial effect on competition in the tied product market. Earlier cases suggested that this element could be satisfied by proof of some nontrivial dollar amount of commerce.53 While more recent decisions have imposed a requirement of proof of actual adverse effect,54 this presumably will be satisfied by evidence that the plaintiff would have been able to compete for sales in the secondary market but was foreclosed from such competition by the defendant's restrictive behavior.


51 While the necessary threshold is unclear, it probably must exceed 30%. See Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 517 (3d Cir. 1998). More important, this will require evidence that the tying product indeed is the "relevant market" for the purpose of tying analysis.

52 The Court's conclusion—"that a patent does not necessarily confer market power upon the patentee," Independent Ink, 126 S. Ct. at 1293—is obviously not inconsistent with the assertion that some patents in fact do confer such power or at least contribute to its exercise.

53 See, e.g., Datagate, Inc. v. Hewlett-Packard Co., 60 F.3d 1421, 1425-26 (9th Cir. 1995); Thompson v. Metropolitan Multi-List, Inc., 934 F.2d 1566, 1578 (11th Cir. 1991); Digidyne Corp. v. Data Gen. Corp., 734 F.2d 1336, 1346-47 (9th Cir. 1984).

54 See, e.g., Hack v. President & Fellows of Yale Coll., 237 F.3d 81, 85-86 (2d Cir. 2000); United Farmers Agents Ass'n v. Farmers Ins. Exch., 89 F.3d 233, 235 n.2 (5th Cir. 1996). See also Reifert v. S. Central Wis. MLS Corp., 450 F.3d 312, 317-18 (7th Cir. 2006) (this prong of test was not satisfied when plaintiff failed to show that there was at least one competitor in the tied product market other than the favored seller).
B. Sherman Act section 2

Reliance on section 2 of the Sherman Act to prove that a seller’s efforts to control the aftermarket for its products is demonstrative of monopolization, or of an unlawful attempt to monopolize that market, also involves elements with which we are all familiar. To prove monopolization, the plaintiff must show that the defendant has monopoly power in the relevant product and geographic markets and the willful (and improper) acquisition or maintenance of that power, rather than growth as a consequence of a superior product, business acumen, or historic accident. In the context of aftermarket restraints, this approach could involve proof that the seller has monopoly power in the primary product market and that the defendant’s practices, involving the exclusion of competition in the secondary product market, also enable the seller to maintain its market position in the primary product market.

To make out a case of an unlawful attempt to monopolize, the plaintiff must prove that the defendant has engaged in certain exclusionary or predatory practices, with both an intent to achieve monopoly power in that secondary market, and a dangerous probability of success of achieving that monopoly position—which of course requires, among other things, proof that the secondary market in question is a “relevant market” for antitrust purposes. In the aftermarket setting, proof of the necessary “exclusionary practices” could include either the leveraging incidental to the contractual requirement that buyers purchase the secondary product only from a source approved by the seller of the primary product or a refusal to sell the secondary product to others.

C. Aftermarket restraints and intellectual property

Although the “exclusionary practices” element of section 2 of the Sherman Act could by itself be the basis of another, lengthy article, I

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56 Cf. United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (concluding that Microsoft’s predatory and exclusionary practices were principally intended to allow it to maintain its monopoly position in market for Intel-compatible PC operating systems).

conclude by focusing on one important aspect thereof—the significance of intellectual property protection for the primary product. As has just been noted, one way in which a seller of the primary product can exploit its market power is through the refusal to sell other products to its customers or competitors. An obvious example of this behavior occurred in the Kodak case, where the defendant refused to sell replacement parts to ISOs, thereby curtailing their ability to compete with Kodak in the market to service its equipment. Some (although a minority) of those replacement parts were protected by patents. In the Xerox case, which was another case challenging a similar refusal of a manufacturer of copying equipment to sell replacement parts or to license certain copyrighted software to ISOs, the Court of Appeals for the Federal Circuit held that the patent and copyright laws gave the owner of that intellectual property the absolute right to refuse to deal in that property, regardless of any alleged competitive harm. In a recent law review article, I have explained why I believe that the view of the Ninth Circuit, on remand from the Supreme Court decision in Kodak—in which the court of appeals held that the presumptively legitimate business justification for the defendant’s refusal to deal can be overcome by evidence that it “does not legitimately promote competition or that the justification is pretextual,” and thus held that such refusals may be unlawful under section 2 of the Sherman Act—is the sounder approach.

It is standard wisdom that the ownership of intellectual property rights does not afford the owner thereof the right to extend the federally protected patent or copyright monopoly into other, adjacent markets. Therefore, while a refusal to deal by the patent or copyright

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60 Image Technical Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195 (9th Cir. 1997).

61 Id. at 1212.

owner is obviously not always unlawful by itself, the Supreme Court has held for decades that certain refusals—when coupled with the requisite market power and exclusionary intent or effects—may be unlawful. When those circumstances are present, I, like the Ninth Circuit in Image Technical, and in contrast to the Federal Circuit in Xerox, would not afford greater rights to firms refusing to deal in parts or components merely because they are under patent or copyright protection. The presence of intellectual property rights should not alter the analysis of whether refusals to deal, when used as part of an attempt to extend market power into the aftermarket, produce the requisite injury to competition and thus violate the antitrust laws.

VII. CONCLUSION

Attempts by sellers of a primary product to extend their market power into the market for the sale of another product or service are pervasive, take a variety of different forms, and contain the potential for serious injury to consumers in the form of higher prices, diminished innovation, and the loss of choice. Because of the strong possibility of serious anticompetitive effects resulting from these efforts to capture sales in the aftermarket, this behavior requires close scrutiny under the antitrust laws. While the dynamics of the actual pro- and anticompetitive effects may vary in the aftermarket setting, and therefore while the nature of the rule of reason analysis may differ, the antitrust theories that have been used to scrutinize other potentially anticompetitive behavior—in particular, analysis as an unlawful tying arrangement or an attempt to monopolize—are also appropriate for consideration of aftermarket restraints.

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