THE PER SE RULE IN TYING CONTEXTS: A CRITICAL VIEW[1]

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I. Historical and Contemporary Applications of the Per Se Rule

The per se standard of antitrust illegality has been the subject of an increasing number of attacks in recent years. The movement to eliminate, or at least to reduce substantially, application of the per se rule has often focused on tying arrangements, where the seller of one product conditions the sale of that product (the tying product) on the purchase of a second product (the tied product). Ex-Assistant Attorney General William F. Baxter said of the per se rule, "When you want to stop thinking about something you invoke Latin."[2] Another way of making the same point is: If you don't want to determine whether an arrangement really violates the antitrust laws, then invoke the per se rule. The purpose of this article is to analyze contemporary applications and criticisms of the per se rule in tying contexts in light of its historical development and to demonstrate its shortcomings in light of contemporary economic theory.

A. *Origins and Development of Tie-In Illegality*

The first important patent tying case was *Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co.,* known commonly as the *Button Fastener* case.[3] In *Button Fastener,* the tying patent covered a very successful machine for fastening buttons onto shoes using unpatented staples. The patent owner sold the patented machine with a label affixed to the machines which conditioned the sale on the buyer purchasing its requirement of staples from the patent owner. After conducting an economic analysis, the Sixth Circuit concluded that any control that the patent owner achieved over the sale of staples was "incident from" and "a legitimate result of" the patent owner's control over the patented machine. The quality of staples sold by the patent owner would depend upon the merits of the patented

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1. An earlier version of this article appeared in 7 Licensing L. & Bus. Rep. 147 (1984).

2. Baxter, *Luncheon Speech,* A.P.L.A. Bull. 298, 299 (May-June 1982).

3. 77 F. 288 (6th Cir. 1896).

machine. Moreover, such control would last only until the patented machine was superseded by an even more efficient button-fastening machine. Thus, the court held the conditional license to be "neither obnoxious to public policy, nor an illegal restraint of trade."[4]

In 1912, the United States Supreme Court reached the same conclusion in *Henry v. A.B. Dick Co.*[5] In that case, patented mimeograph machines were sold on the condition that the buyers' requirements of unpatented paper and ink must be purchased from the owner of the patent in the mimeograph machine. The Court concluded that the licensee had not been harmed by the terms of the license. The Court found that the patent owner merely had chosen to take his profit through the sale of accessories rather than by charging a high purchase price for the mimeograph machines.[6] If the patent owner's price for paper and ink was too high and incommensurate with the benefits of the patented machine, the Court reasoned, potential users would not buy the machine and owners would cease using it.[7] Moreover, the Court observed that

> [t]he market for the sale of [the unpatented] articles to the users of his [the patent owner's] machine, which, by [the license] condition, he takes to himself, was a market *which he alone created* by the making and selling of a new invention. Had he kept his invention to himself, *no ink could have been sold by others for use upon machines embodying* [the patented] *invention.* By selling it subject to the restriction, *he took nothing from others and in no wise restricted their legitimate market.*[8]

In 1917, in *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*,[9] the Supreme Court overruled its prior decision in *A.B. Dick* and thereby gave birth to the patent misuse doctrine. In *Motion Picture Patents,* the patent owner licensed the use of the patented motion picture projector film feeder upon the condition that the licensee agree to show only motion pictures leased from persons authorized by the patent owner. The patented film feeding device was so revolutionary that projectors which used it quickly displaced prior pro-

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4. *Id.* at 296.
5. 224 U.S. 1 (1912).
6. *Id.* at 32.
7. *Id.* at 34.
8. *Id.* at 32 (emphasis added).
9. 243 U.S. 502 (1917).

jectors. Consequently, the patent owner developed a degree of market power in the motion picture projector market.

Contrary to the views of the courts in *Button Fastener* and *A.B. Dick,* the Court held the conditional license to be outside of the scope of the patent laws because by imposing the condition, the patent owner sought to control unpatented products outside of the scope of the patent claims. The Court criticized the *Button Fastener* Court's reasoning that because a patent owner can withhold its patent altogether from public use, he must logically and necessarily be permitted to impose any condition that he chooses upon the use of the product. Thus, the Court rejected the argument that the arrangement benefited the public by making the patented machine available at cost and thereby available to more purchasers. The Court indicated that, in fact, this argument tended to buttress the Court's decision because it showed that the patent owner intended to derive his profit from unpatented supplies which are wholly outside of the scope of the patent monopoly.[10]

B. Antitrust Division View of the Early Cases

The Antitrust Division of the United States Department of Justice rejects both the per se standard for tie-ins and the doctrine of patent misuse. In general terms, the Antitrust Division advocates a rejection of the decision in *Motion Picture Patents* and its progeny and readoption of the decisions in *Button Fastener* and *A.B. Dick.* The Antitrust Division says that absent economic certainty that anticompetitive effects will follow from a particular type of practice, the rule of reason should be applied, rather than the per se standard.

The Antitrust Division believes that tie-ins may have dual utility. First, a tie-in may allow a patent owner to charge its licensee an amount that more closely approximates the value of the license than would be obtainable by forcing the patent owner to measure the value of its license by other less direct or more costly means. Second, a tie-in may provide incentives to practice a patent by using unpatented "inputs" in correct proportion with the patented item. Both of these characteristics are illustrated by the tie-ins in *Button Fastener* and *A.B. Dick.*[11]

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10. *Id.* at 517.

11. For a more detailed analysis of the views of the Antitrust Division and an expansion of the subject matter of this article, see B. BRUNSVOLD & J. HORNICK,

C. *The Courts and Tie-Ins*

Although most courts still consider tie-ins to be per se antitrust violations as well as per se patent misuse where patents are the tying products, recently Judge Posner, writing for the court in *USM Corp. v. SPS Technologies,*[12] expressed an opinion regarding tie-in arrangements which is sympathetic to the views of the Antitrust Division. The court stated:

> As an original matter one might question whether any of these [patent misuse] practices really "extends" the patent. The patentee who insists on limiting the freedom of his purchaser or licensee—whether to price, to use complementary inputs of the purchaser's choice, or to make competing items—will have to compensate the purchaser for the restriction by charging a lower price for the use of the patent. If, for example, the patent owner requires the licensee to agree to continue paying royalties after the patent expires, he will not be able to get him to agree to pay as big a royalty before the patent expires.[13]

The court also characterized tie-ins as a form of price discrimination and questioned why only one form of price discrimination, i.e., the tie-in, is proscribed despite the fact that price discrimination by patent owners generally is not forbidden.[14]

The majority position, however, is most notably expressed in *Shafer v. Bulk Petroleum Corp.*,[15] where the court specifically rejected the views of the Antitrust Division. Defendants Bulk Petroleum and Gulf Oil Corporation sought a ruling that the rule of reason, rather than the per se standard, should be applied to the resale price maintenance claims and the tying claims brought by thirty-two independent retail gasoline dealers.[16] The defendants argued:

> Current judicial analysis of tying claims and resale price

RECENT DEVELOPMENTS AT THE PATENT LICENSING/ANTITRUST INTERFACE; 1983 LICENSING LAW HANDBOOK 1-45 (B. Brunsvold ed. 1983). *See also* McGrath, *Patent Licensing: A Fresh Look at Antitrust Principles in a Changing Economic Environment,* Remarks Before the Seminar Services International Conference on U.S. Patent Practice, Apr. 5, 1984 [hereinafter cited as McGrath].

12. 694 F.2d 505 (7th Cir. 1982), *cert. denied,* 103 S. Ct. 2455 (1983).
13. *Id.* at 510-11.
14. *Id.* at 511.
15. 569 F. Supp. 621 (E.D. Wis. 1983).
16. *Id.* at 623-24.

> maintenance is generally conducted under the *per se* standard. However, Defendants believe that the law has evolved to the point that this court should recognize that the rule of reason is appropriate for judging plaintiffs' antitrust claims in this case.[17]

In response to this argument, the court stated that the "evolution of the law" which led defendants to this conclusion is founded upon: (1) their reading of *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[18] in which the United States Supreme Court concluded that economic considerations should control in cases of vertical territorial and customer restraints; (2) the position announced by William F. Baxter, then assistant attorney general and chief of the Antitrust Division, in which he concluded that resale price maintenance and tying should be subject to the rule of reason; and (3) various academic articles, particularly those authored by Judge (then Professor) Posner. Having thus described the bases for defendants' argument, the *Shafer* court concluded:

> It goes without saying that while there may be some merit to the opinions of Assistant Attorneys General, their opinions are not law. The same is true of analyses performed by academics. As to the effect of *Sylvania*, . . . sitting as a district judge, I would be reluctant to extend that case to vertical price restraints or to tying claims . . . .
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> Defendants' request to apply the rule of reason to these claims is denied. My role is to apply the law as it seems to be, not as commentators think it should be.[19]

II. SUPREME COURT REAFFIRMS PER SE STANDARD IN TYING CONTEXTS

The United States Supreme Court's decision in *Jefferson Parish Hospital District No. 2 v. Hyde*[20] reaffirms the applicability of the per se standard of antitrust liability to tying arrangements. In this case, the Court upheld an exclusive arrangement between a hospital and

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17. *Id.* at 624.
18. 433 U.S. 36 (1977).
19. *Shafer*, 569 F. Supp. at 624-25.
20. 104 S. Ct. 1551 (1984).

a firm supplying anesthesiological services thereto. Respondent Hyde, an independent anesthesiologist, commenced this action seeking a declaratory judgment that the arrangement, which tied anesthesiological services to other services offered by the hospital, constituted a per se violation of section 1 of the Sherman Act.[21]

After trial, the United States District Court for the Eastern District of Louisiana denied relief, finding that the anticompetitive consequences of the exclusive arrangement were minimal and outweighed by benefits in the form of improved patient care.[22] The district court also concluded that the petitioner, East Jefferson Hospital, did not possess sufficient market power to use the exclusive arrangement to achieve anticompetitive ends.[23]

The United States Court of Appeals for the Fifth Circuit reversed because it was persuaded that the exclusive contract was illegal per se.[24] The court of appeals reasoned that the case involved an illegal tying arrangement because the "users of the hospital's operating rooms (the tying product) are also compelled to purchase the hospital's chosen anesthesia service (the tied product)."[25]

A majority of the Supreme Court held that although two distinct services were involved in the tying arrangement,[26] the hospital possessed insufficient market power to force patients to accept anesthesiological services provided under the exclusive arrangement.[27] Thus, the Court found the per se standard to be inapplicable here and held that, under the rule of reason, respondent made no showing of actual adverse effects upon competition.[28]

A. Traditional Per Se Tying Analysis

The real significance of this case is the Court's treatment of the per se rule as applied to tying arrangements. Before discussing this treatment, however, it is helpful to understand the manner in which the per se analysis has been traditionally applied in tying contexts. A tie-in is an arrangement under which a seller or licensor conditions

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21. 15 U.S.C. § 1 (1976).

22. Hyde v. Jefferson Parish Hosp. Dist. No. 2, 513 F. Supp. 532 (E.D. La. 1981).

23. *Jefferson Parish,* 104 S. Ct. at 1555.

24. Hyde v. Jefferson Parish Hosp. Dist. No. 2, 686 F.2d 286 (5th Cir. 1982).

25. *Id.* at 289.

26. *Jefferson Parish,* 104 S. Ct. at 1555.

27. *Id.* at 1566.

28. *Id.* at 1568.

the sale or license of a product or service upon the purchase or use of unwanted goods or services. The requirements of tie-in arrangements in general are:

1. Two separate products, the tying product and the tied product;
2. A showing of sufficient economic power in the tying product market appreciably to restrain free competition in the tied product market;
3. Foreclosure of a not insubstantial amount of commerce; and
4. Coercion or conditioning in requiring the purchase of the tied product to obtain access to the tying product.[29]

The defendant who is accused of a tie-in may offer business justifications as defenses to the charge of per se illegality, but such justifications are rarely allowed.[30] Although it may seem obvious, it is important to note that the business justifications defense asserts a business justification for probable anticompetitive effects of a tying arrangement. It is not a defense asserting that the tying arrangement does not have anticompetitive effects.

The most important attribute of the per se standard, as it applies to tying arrangements, is that a showing of anticompetitive effect is not required and need not even be addressed.[31] Indeed, it is primarily this factor which separates the per se standard from the rule of reason standard. It should be noted, however, that although a showing of anticompetitive effect is technically irrelevant to a per se analysis of a tying arrangement, some courts nevertheless discuss the anticompetitive effects of the accused practice.[32]

B. *Per Se Tying Analysis in* Jefferson Parish

In *Jefferson Parish* the Court first lays out the rule against tying in strict per se fashion. The requirements, which differ somewhat

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29. Northern Pac. Ry. v. United States, 356 U.S. 1, 6-7 (1958); Betaseed, Inc. v. U & I, Inc., 681 F.2d 1203, 1215 (9th Cir. 1982).

30. United States v. Jerrold Elec. Corp., 187 F. Supp. 545, 556-58 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

31. *Northern Pac. Ry.*, 356 U.S. at 9; Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 598 (1969) (*Fortner I*; Digidyne Corp. v. Data Gen. Corp., 734 F.2d 1336, 1338, 1346-47 (9th Cir. 1984); *Betaseed*, 681 F.2d at 1215.

32. *See, e.g., Northern Pac. Ry.*, 356 U.S. at 12.

from the traditional per se tying analysis, are:

1. Two distinct products (a tying product and a tied product);[33]
2. The probability that the tying seller can "force" buyers to buy the tied product because of the tie;[34]
3. The probability of foreclosure of a substantial volume of commerce as a result of the tie;[35] and
4. The buyer would have bought the tied product from the tying seller or from a competitor of the tying seller but for the tie.[36] (This requirement apparently is a sub-requirement of the foreclosure of commerce requirement.)

Note that the traditionally required showing of a sufficient amount of economic power (market power) in the tying product market to restrain competition in the tied product market has been absorbed into the new required showing of a probability that the tying seller can force purchases of the tied product because of the tie. If a seller has the ability to force, then market power can be presumed, and vice versa. In the area of tie-ins, market power is now, by definition, the ability to force tied purchases. Moreover, the Court presumes, apparently irrebuttably, that forcing invariably restrains competition.[37]

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33. *Jefferson Parish,* 104 S. Ct. at 1561-63.

34. *Id.* at 1560, 1566.

35. *Id.* at 1560. Although the Court uses the word "substantial," the four Supreme Court cases which it cites as support use the term "not insubstantial." Thus, "not insubstantial" is probably still the standard. In Digidyne Corp. v. Data Gen. Corp., 734 F.2d 1336 (9th Cir. 1984), the court stated that the *Jefferson Parish* Court's requirement of foreclosure of a "substantial" volume of commerce in the tied product market means "substantial enough in terms of dollar-amount so as not to be merely *de minimis.*" *Id.* at 1341 (citing *Fortner I,* 394 U.S. at 501). *See also* Johnson v. Soundview Apts. Hous. Dev. Fund Co., 588 F. Supp. 1381, 1382-83 (S.D.N.Y. 1984) ("substantial" means more than merely *de minimis).*

36. *Jefferson Parish,* 104 S. Ct. at 1560.

37. *Id.* at 1558-60. Since the *Jefferson Parish* decision, at least one court has adopted the Supreme Court's presumption that forcing invariably restrains competition. *Digidyne,* 734 F.2d at 1340-41. *Cf.* R & G Affiliates, Inc. v. Knoll Int'l, Inc., 587 F. Supp. 1395, 1398, 1400 (S.D.N.Y. 1984) (quoting *Jefferson Parish* on the irrebuttable presumption that forcing restrains competition, but stating that forcing "may be unlawful"). Post-*Jefferson Parish* decisions have also adopted the Supreme Court's reasoning which equates forcing and marketing power. *Digidyne,* 734 F.2d at 1341; Robert Waikiki U-Drive, Inc. v. Budget Rent-A-Car Syss., Inc., 732 F.2d 1403, 1407 (9th Cir. 1984).

Initially, the Court's presumption that forcing invariably restrains competition seems like a shift toward a strict, or at least stricter, per se rule for tying arrangements. Upon closer analysis, however, the presumption is found to have a firm historical basis in prior decisions of the Court. For instance, in *Northern Pacific Railway v. United States,*[38] the Court stated:

> For our purposes a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Where such [tying arrangements] are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. . . .
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> . . . Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most.[39]

Similarly, the Court in *Fortner Enterprises, Inc. v. United States Steel Corp.*[40] stated as follows:

> Market power is . . . a source of serious concern . . . regardless of whether the seller has the greatest economic power possible or merely some lesser degree of appreciable economic power. In both instances, despite the freedom of some or many buyers from the seller's power, other buyers . . . can be forced to accept the higher price because of their stronger preferences for the product, and the seller could therefore choose instead to force them to accept a tying arrangement that would prevent free competition for their patronage in the market for the tied product.[41]

In view of the historical basis for the Court's rationale in *Jefferson Parish,* the Court apparently has not substantively changed the elements of an illegal tying arrangement.

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38. 356 U.S. 1 (1958).
39. *Id.* at 5-6.
40. *Fortner I,* 394 U.S. at 503-04.
41. *Id.*

C. *Tying in Patent Contexts*

A patent tie-in is an arrangement under which a patent owner conditions a license to manufacture, use, or sell a patented machine, process, or combination upon the purchase of unpatented supplies, components, or services. The requirements for a patent tying arrangement traditionally have been the same as for any other type of tying arrangement. However, where the tying product is patented, some authorities say that economic power in the tying product market is presumed. Some commentators have criticized this presumption on the ground that the possession of a patent does not entail the possession of any degree of market power.[42]

In *Jefferson Parish* the Court provided, in dicta, a confusing treatment of tying arrangements involving patents. Initially, the Court stated that certain types of contractual arrangements, such as a patent license conditioned on the use of unpatented materials in conjunction with the patented device, are deemed unreasonable as a matter of law.[43] In support of this rule, the Court quoted *United States v. Columbia Steel Co.*,[44] a nonpatent case.[45] In the passage quoted from *Columbia Steel,* the Court adopted a presumption that patent tying arrangements *invariably* foreclose a not insubstantial amount of commerce (the traditionally required quantum) in the tied product market. The *Columbia Steel* Court relied for this apparently irrebuttable presumption upon an arguably erroneous reading of *International Salt Co. v. United States.*[46] Rather than holding that the existence of a patent tying arrangement invariably justifies a presumption that a

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42. *See, e.g.,* McGrath, *supra* note 11, at 12-14, 17-18; Voight, *The Nine No-No's,* 6 LICENSING L. & BUS. REP. 99, 102 (1983). *See also* Justice O'Connor's dissenting opinion in *Jefferson Parish,* 104 S. Ct. at 1572 n.7.

> A common misconception has been that a patent or copyright, a high market share, or a unique product that competitors are not able to offer suffice to demonstrate market power. While each of these three factors might help to give market power to a seller, it is also possible that a seller in these situations will have no market power: for example, a patent holder has no market power in any relevant sense if there are close substitutes for the patented product.

USM Corp., 694 F.2d at 511 ("not every patent confers market power"); and *Northern Pac. Ry.,* 356 U.S. at 10 n.8 ("Of course it is common knowledge that a patent does not always confer a monopoly over a particular commodity. Often the patent is limited to a unique form or improvement of the product and the economic power resulting from the patent privileges is slight.").

43. *Jefferson Parish,* 104 S. Ct. at 1556 & n.10.

44. 334 U.S. 495, 522-23 (1948).

45. *Jefferson Parish,* 104 S. Ct. at 1556 & n.10.

46. 332 U.S. 392 (1947).

not insubstantial amount of commerce will probably be foreclosed by the tie, the *International Salt* Court ruled that the volume of business affected *by the particular contracts in question* was not insignificant or insubstantial.[47]

However, the *Jefferson Parish* Court goes on to say that once the "foreclosure of commerce" requirement is surmounted, per se prohibition is appropriate if anticompetitive forcing is likely. "For example," the Court says, "if the government has granted the seller a patent or similar monopoly over a product, *it is fair to presume* that the *inability to buy the product elsewhere* gives the seller market power."[48] The latter statement suggests that market power in a patent owner is a rebuttable presumption and that application of the per se standard to patent tie-ins can be avoided by rebutting this presumption.

The points of confusion raised by the latter of the two preceding statements are fourfold. First, the use of a patent tying arrangement as an example here is apparently inconsistent with the *Columbia Steel* passage quoted in footnote 10 of the decision because the Court strongly implied that the "foreclosure of commerce" requirement is a threshold requirement even for patent tying arrangements.

Second, the statement contemplates a showing of *anticompetitive* forcing. Other statements by the Court in this case indicate that forcing is presumptively anticompetitive. Thus, if the Court, by its statement here, contemplates a showing that forcing is anticompetitive, then the requirement that such a showing must be made supplants the per se analysis with a rule of reason analysis in tying contexts.

Third, the Court suggests that a patent owner can be presumed to have market power if potential buyers of a patented product are unable to buy the product elsewhere. Thus, the patent owner's market power apparently cannot be presumed unless there are no viable substitutes for the tied product.

Fourth, assuming that there are no viable substitutes for the patented product, and market power in the patent owner therefore can be presumed, the Court states that such a presumption is a fair one. This suggests that the presumption of market power in a patent owner is always rebuttable. However, the Court's apparent creation in this statement of a rebuttable presumption of market power in a

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47. *Id.* at 396.

48. *Jefferson Parish*, 104 S. Ct. at 1560 (emphasis added) (citing United States v. Loew's, Inc., 371 U.S. 38, 45-47 (1962)).

patent owner seems to be inconsistent with its earlier statement in this opinion that certain types of contractual arrangements, such as patent tie-ins, are deemed unreasonable as a matter of law.

A rebuttable presumption can be read into the *United States v. Loew's, Inc.*[49] decision, which the Court cites here in support of its "fair presumption" statement. For instance, in *Loew's,* the Court stated that "[t]he requisite economic power is presumed when the tying product is patented or copyright[ed]."[50] Other statements in *Loew's* suggest that the Court may have intended this presumption to be irrebuttable.[51] However, *Loew's* is a copyright case, not a patent case, and all of the Supreme Court cases which the Court cited in its discussion of patent tie-ins in *Loew's* were decided prior to its decision in *Northern Pacific,* where it stated:

> The defendant attempts to evade the force of *International Salt* on the ground that the tying product there was patented while here it is not. But we do not believe this distinction has, or should have, any significance. In arriving at its decision in *International Salt* the Court placed no reliance on the fact that a patent was involved nor did it give the slightest intimation that the outcome would have been any different if that had not been the case. If anything, the Court held the challenged tying arrangements unlawful *despite* the fact that the tying item was patented, not because of it.[52]

More importantly, the Court stated in a footnote: "Of course it is common knowledge that a patent does not always confer a monopoly over a particular commodity. Often the patent is limited to a unique form or improvement of the product and the economic power resulting from the patent privileges is slight."[53]

In view of the Court's prior decisions and the general tenor of the decision in *Jefferson Parish,* the preceding points of confusion probably can be resolved as follows. Concerning the first point of confusion, although the likelihood of foreclosure of a not insubstantial amount of commerce is a threshold requirement even in patent tying contexts, such foreclosure can be rebuttably presumed if market power

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49. 371 U.S. 38 (1962).
50. *Id.* at 45.
51. *Id.* at 46-48.
52. *Northern Pac. Ry.,* 356 U.S. at 9.
53. *Id.* at 10 n.8.

also can be presumed. Market power may be presumed if there are no viable substitutes for a patented product.

In reference to the second point of confusion, the Court seems to presume that forcing is always anticompetitive. "When such 'forcing' is present," the Court says, "competition on the merits in the market for the tied item is restrained and the Sherman Act is violated."[54] The Court also states that "[t]ying arrangements need only be condemned if they restrain competition on the merits by forcing purchases that would not otherwise be made."[55] Thus, not only has the Court failed to dilute the per se standard by introducing economic analysis, but it has apparently reaffirmed strict application of the per se rule to tying arrangements.[56]

With respect to the third point of confusion, although the Court may not have intended to create a new threshold requirement for establishing market power, i.e., that viable substitutes for the patented product must not be available, this requirement is clearly implied by the Court's statement.

Finally, as to the fourth point of confusion, it is likely that the Court contemplates that the presumption of market power in a patent owner is a rebuttable one. Its statement that "[c]ertain types of contractual arrangements are deemed unreasonable as a matter of law," such as patent tying arrangements,[57] is merely an affirmation of the viability of the per se standard. It was not concerned in the latter statement with the *elements* of the per se analysis. Thus, it is perfectly consistent to state at one point that patent tying arrangements are per se illegal, and to state at another point that one of the elements of the per se analysis, market power, can be presumed in a patent owner, but that such a presumption is a rebuttable one.[58]

This conclusion is buttressed by the Court's statement in the paragraph following the subject statement.[59] The Court noted:

> The same strict rule [i.e., the strict per se rule for patent tie-ins] is appropriate in *other* situations in which the existence of market power is *probable.* When the seller's share

54. *Jefferson Parish,* 104 S. Ct. at 1558.

55. *Id.* at 1566.

56. Note, however, that the *Jefferson Parish* tying arrangement was found not to violate § 1 of the Sherman Act because the hospital lacked sufficient market power in the tying product market. *Id.* at 1566-67.

57. *Id.* at 1556 n.10.

58. *Id.* at 1560.

59. *Id.*

> of the market is high, or when the seller offers a unique product that competitors are not able to offer, the Court has held that the likelihood that market power exists and is being used to restrain competition in a separate market is sufficient to make *per se* condemnation appropriate. Thus, in *Northern Pac. R. Co. v. United States,* we held that the railroad's control over vast tracks of Western real estate, although not itself unlawful, gave the railroad a unique kind of bargaining power that enabled it to tie the sales of that land to exclusive, long term commitments that fenced out competition in the transportation market over a protracted period. *When, however, the seller does not have either the degree or the kind of market power that enables him to force customers to purchase a second, unwanted product in order to obtain the tying product, an antitrust violation can be established only by evidence of an unreasonable restraint on competition in the relevant market.*[60]

Thus, as indicated by the emphasis supplied in the preceding passage, the Court apparently assumes that market power is only *probable* in patent owners.[61] Moreover, where it can be shown that the seller (who from the context presumably may be a patent owner) does not have market power and therefore cannot force purchases of tied products, then the per se standard is not applicable.

D. Justice O'Connor's Concurring Opinion

The *Jefferson Parish* majority, which applied the per se standard and found that the exclusive arrangement did not violate section 1 of the Sherman Act, consisted of Justices Stevens, Brennan, White, Marshall, and Blackmun. The four remaining justices (Justices O'Connor, Burger, Powell, and Rehnquist) concurred in the majority's decision that the exclusive arrangement did not violate section one of the Sherman Act but did not agree that the per se standard should be applied to tying arrangements.

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60. *Id.* at 1561 (emphasis added, footnote and citations omitted).

61. In the *Digidyne* decision, the Ninth Circuit cited and quoted *Jefferson Parish,* 104 S. Ct. at 1560, and *Loew's,* 371 U.S. at 45, in support of a presumption of market power where the tying product is patented or copyrighted. *Digidyne,* 734 F.2d at 1341-42, 1344. However, the court proceeded to confirm the rebuttable nature of such a presumption as follows: "The [district] court erroneously imposed the burden of proof on plaintiffs. The RDOS copyright created a presumption of economic power sufficient to render the tying arrangement illegal *per se.* The burden to rebut the presumption shifted to defendant." *Id.* at 1344 (footnote omitted).

Justice O'Connor, writing for the minority, recognized that traditional application of the per se rule has only been strict where the type of restraint in question "rarely serves any purposes other than to restrain competition," such as price-fixing or division of markets.[62] In the case of tying arrangements, however, "[t]he Court has never been willing to say . . . that they are always illegal, without proof of market power or anticompetitive effect."[63] According to Justice O'Connor:

> The "*per se*" doctrine in tying cases has thus always required an elaborate inquiry into the economic effects of the tying arrangement. As a result, tying doctrine incurs the costs of a rule of reason approach without achieving its benefits: the doctrine calls for the extensive and time-consuming economic analysis characteristic of the rule of reason, but then may be interpreted to prohibit arrangements that economic analysis would show to be beneficial. Moreover, the *per se* label in the tying context has generated more confusion than coherent law because it appears to invite lower courts to omit the analysis of economic circumstances of the tie that has always been a necessary element of tying analysis.
>
> The time has therefore come to abandon the "*per se*" label and refocus the inquiry on the adverse economic effects, and the potential economic benefits, that the tie may have. The law of tie-ins will thus be brought into accord with the law applicable to all other allegedly anticompetitive economic arrangements, except those few horizontal or quasi-horizontal restraints that can be said to have no economic justification whatsoever. This change will rationalize rather than abandon tie-in doctrine as it is already applied.[64]

In footnote 2 to the passage quoted above, Justice O'Connor made an interesting observation. Application of the per se rule to tying arrangements is particularly anomalous, she said, because arrange-

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62. *Jefferson Parish*, 104 S. Ct. at 1570 (O'Connor, J., concurring).
63. *Id.* at 1570.
64. *Id.*

ments largely indistinguishable from tie-ins are generally analyzed under the rule of reason. Justice O'Connor stated:

> For example, the "*per se*" analysis of tie-ins subjects restrictions on a franchisee's freedom to purchase supplies to a more searching scrutiny than restrictions on his freedom to sell his products. And exclusive contracts, that, like tie-ins, require the buyer to purchase a product from one seller, are subject only to the rule of reason.[65]

In support of the latter proposition, Justice O'Connor cites *Tampa Electric Co. v. Nashville Coal Co.*,[66] where the Court subjected an exclusive requirements contract for the purchase of coal to a rule of reason analysis.

Justice O'Connor's approach to tying reflects recent criticism of the per se rule and in fact adopts a significant portion of the Antitrust Division's reasoning contained in its *amicus* brief submitted in this case.[67] She asserts strongly that application of the per se rule in tying contexts has always required proof of market power or anticompetitive effect. It is true that proof of market power has always been required; this aspect of Justice O'Connor's assertion is supported by her citation of *Northern Pacific*.[68] However, a showing of anticompetitive effect has not been required by the Court, except insofar as the Court has required a showing that a not insubstantial amount of commerce is foreclosed as a result of the tie. It is true, though, that many courts have gratuitously considered the anticompetitive effects of accused tying arrangements. Justice O'Connor cites no specific authority for this aspect of her assertion, and statements in some Supreme Court opinions directly contradict it.[69] Moreover, if the per se analysis results in a finding of no market power, then there is no reason to address the question of anticompetitive effect.

The only case which Justice O'Connor seems to have had in mind to support this aspect of her assertion is *Times-Picayune Publishing Co. v. United States*.[70] She states:

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65. *Id.* at 1570 n.2 (citations omitted).

66. 365 U.S. 320, 333-35 (1961).

67. *See* Brief for the United States as *Amicus Curiae* in Support of Reversal, Jefferson Parish, No. 82-1031, at 10-28 (U.S. Sup. Ct.) [hereinafter cited as Antitrust Division *Amicus* Brief].

68. *Northern Pac. Ry.*, 356 U.S. at 6.

69. *Id.* at 5-6; *Fortner I*, 394 U.S. at 498.

70. 345 U.S. 594 (1953).

> Our prior opinions indicate that the purpose of tying law has been to identify and control those tie-ins that have a demonstrable exclusionary impact in the tied product market, or that abet the harmful exercise of market power that the seller possesses in the tying product market. Under the rule of reason tying arrangements should be disapproved only in such instances.[71]

The section of the *Times-Picayune* opinion cited by Justice O'Connor contains a discussion of the supposed anticompetitive effects of tying arrangements. Contrary to Justice O'Connor's construction of that discussion, however, the *Times-Picayune* Court did not establish a rule that only demonstrable anticompetitive tying arrangements are per se illegal. Rather, it broadly condemned tying arrangements.[72] This reading of *Times-Picayune* is supported by the Court's subsequent decision in *Northern Pacific,* where it stated:

> While there is some language in the *Times-Picayune* opinion which speaks of "monopoly power" or "dominance" over the tying product as a necessary precondition for application of the rule of *per se* unreasonableness to tying arrangements, we do not construe this general language as requiring anything more than sufficient economic power to impose an appreciable restraint on free competition in the tied product (assuming all the time, of course, that a "not insubstantial" amount of interstate commerce is affected). To give it any other construction would be wholly out of accord with the opinion's cogent analysis of the nature and baneful effects of tying arrangements and their incompatibility with the policies underlying the Sherman Act. *Times-Picayune,* of course, must be viewed in context with *International Salt* and other decisions concerning tying arrangements. There is no warrant for treating it as a departure from those cases. Nor did it purport to be any such thing; rather it simply made an effort to restate the governing considerations in this area as set forth in the prior cases. And in doing so it makes clear, as do those cases, that the vice of tying arrangements lies in the use of economic power in one market to restrict competition on the merits in

71. *Jefferson Parish,* 104 S. Ct. at 1570 (citation and footnote omitted).
72. *Times-Picayune,* 345 U.S. at 605.

> another, regardless of the source from which the power is derived and whether the power takes the form of a monopoly or not.[73]

To the extent that statements in the preceding passage seem to contemplate anticompetitive effects of the tie, it should be remembered that the focus of the per se analysis is on the *likelihood* that the arrangement will cause anticompetitive effects, not on an actual showing of such effects. As observed previously, the chief difference between the per se analysis and the rule of reason analysis is that the question of anticompetitive effect need not be addressed in the former and is crucial to the latter. It should be noted, however, that the Ninth Circuit in *Hirsh v. Martindale-Hubbell, Inc.*[74] made a statement similar to Justice O'Connor's assertion. There the court said, "We have long recognized that the rules governing tying arrangements are designed to strike solely at practices employed to impede competition on the merits." However, this view has not been adopted by the Court and does not comport with its per se treatment of tying arrangements.

Although Justice O'Connor's understanding of the history of tying law appears to be somewhat clouded (or at least is not made crystal clear in her opinion), her proposal to reject the per se rule is both progressive and compelling. Market power, she asserts, can be acquired legitimately, perhaps through the grant of a patent, or illegitimately, possibly as a result of unlawful monopolization. In either event, exploitation of consumers in the market for the tying product may be regulated adequately under section 2 of the Sherman Act.[75] According to this approach, analysis of the tying arrangement under section 1 of the Sherman Act is unnecessary and the focus of antitrust scrutiny is properly shifted to the anticompetitive effects of the tying seller's *conduct* and away from the *type of arrangement* whereby the seller markets his goods or services.

Justice O'Connor recognizes that tying may be competitively harmful (1) where power in the tying product market is used to create *additional* market power in the tied product market, (2) where a firm operating in a regulated industry exacts supercompetitive profits from the sale of unregulated tied products or services, or (3) where the tying seller engages in price discrimination facilitated by

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73. *Northern Pac. Ry.*, 356 U.S. at 11.
74. 674 F.2d 1343, 1348 (9th Cir. 1982), *cert. denied,* 103 S. Ct. 305 (1982).
75. *Jefferson Parish,* 104 S. Ct. at 1570-71.

"metering" the buyer's use of the tying product.[76] In such cases, she says, the arrangement should be subjected to the following threshold analysis to determine if a tying arrangement exists:

1. Does the seller have power in the tying product market;
2. Is there a substantial threat that the tying seller will acquire market power in the tied product market; and
3. Is there a coherent economic basis for treating the tying and tied products as distinct?[77]

Justice O'Connor's treatment of the third point of analysis listed above is significant. For products to be treated as distinct, she says, the tied product must, at a minimum, be one that some consumers might wish to purchase separately *without also purchasing the tying product.* When the tied product has no use other than in conjunction with the tying product, a seller of the tying product can acquire no *additional* market power by selling the two products together. Whether the tying product is one that consumers might wish to purchase without the tied product should be irrelevant, she says. Once it is conceded that the seller has market power over the tying product it follows that the seller can sell the tying product on noncompetitive terms. Thus, injury to consumers results regardless of whether the seller chooses to charge a supercompetitive price or charges a competitive price but insists that consumers also buy a product that they do not want.[78]

If Justice O'Connor's three threshold requirements are met, then the tying arrangement should be subjected to the rule of reason analysis. She states:

> Under the Rule of Reason a tie-in may prove acceptable even when all three [threshold requirements] are met. Tie-ins may entail economic benefits as well as economic harms, and if the threshold requirements are met these benefits should enter the Rule of Reason balance. 'Tie-ins . . . may facilitate new entry into fields where established sellers have wedded their customers to them by ties of habit and custom. . . . . They may permit clandestine price cutting in products which otherwise would have no price competition at all

76. *Id.* at 1571.
77. *Id.* at 1571-72.
78. *Id.* at 1572 & n.8.

> because of fear of retaliation from the few other producers dealing in the market. They may protect the reputation of the tying product if failure to use the tied product in conjunction with it may cause it to misfunction . . . . And, if the tied and tying products are functionally related, they may reduce costs through economies of joint production and distribution.' The ultimate decision whether a tie-in is illegal under the antitrust laws should depend upon the demonstrated economic effects of the challenged agreement. It may, for example, be entirely innocuous that the seller exploits its control over the tying product to "force" the buyer to purchase the tied product. For when the seller exerts market power only in the tying product market, it makes no difference to him or his customers whether he exploits that power by raising the price of the tying product or by "forcing" customers to buy a tied product. . . . On the other hand, tying may make the provision of packages of goods and services more efficient. A tie-in should be condemned only when its anticompetitive impact outweighs its contribution to efficiency.[79]

III. ECONOMIC AND CONSTITUTIONAL SHORTCOMINGS OF THE PER SE RULE FOR TYING

The *Jefferson Parish* majority opinion regarding the validity of the per se rule for tying arrangements is based primarily on the presumption that forcing is invariably anticompetitive. This presumption is derived from several prior decisions of the Court, but the Court's justification for the presumption was summed up in the *Jefferson Parish* Court's quotation from *Times-Picayune:* "By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stresses of the open market."[80]

A. *Time/Proximity Analysis*

As Justice O'Connor correctly observed, however, "[i]t may . . . be entirely innocuous that the seller exploits its control over the

79. *Id.* at 1573-74 (citations omitted).
80. *Id.* at 1558 (citing *Times-Picayune,* 345 U.S. at 605).

tying product to 'force' the buyer to purchase the tied product."[81] Whether forcing by the tying seller and insulation of the tied product from the competitive stresses of the open market are competitively innocuous or competitively harmful can best be determined by considering the tying arrangement within the following analytical framework. I have termed this analysis the time/proximity analysis of competitive effects.

First, local effects upon competition, whether positive or negative, must be distinguished from remote effects upon competition. For instance, in a tying arrangement, the local negative effect of the scheme is that direct competitors are foreclosed from competing with the owner of the tying product. This local reduction of competition, however, may have the remote effect of stimulating the development of products which surpass the tying product. Thus, although competition was restricted locally, innovation was stimulated remotely and the resulting improved product may eliminate or lessen the original local reduction of competition by creating a new competitor for the tying product. Where patents are involved, another remote effect might be that the foreclosed competitor will challenge the validity of the tying patent. If the patent is found to be invalid, normal competition will resume and production of the product embodied in the invalid patent probably will be stimulated.

Second, short-term effects upon competition, whether positive or negative, must be distinguished from long-term effects. To use the same example as above, one usual short-term effect of a tying arrangement is that local competition is restricted. A long-term effect, however, usually is that competition is increased, either by a new entry product which can compete effectively with the tying product, or by the invalidation of tying patents.

In patent contexts, depending upon the degree of advance represented by the tying invention, varying degrees of local, short-term reductions in competition involving the tied product will be felt. More remotely, however, sellers of devices which compete with the tying machine will be stimulated to compete with the patent owner on a short-term basis because such competitors' prices will determine the attractiveness of the patent owner's conditional license. The less significant the advance embodied in the tying product, the more competitive will be existing substitutes on a short-term basis. If the advance embodied in the tying product is great, short-term com-

81. *Id.* at 1574.

petition may be reduced, but only with the long-term effect of stimulating the invention of a new product which may supersede the tying product. Moreover, although short-term competition in the tied product market may be reduced in such situations, competitors of the tied products will have every incentive to find new markets for their products. This remote, long-term effect may have the additional remote, long-term effect of multiplying markets and increasing production once the tying product is superseded by an invention of one of its competitors.

Thus, the overall long-term effect of tie-in arrangements generally seems to be to accelerate both innovation and competition. Without the particular incentives for long-term competition and innovation which may be brought about by tie-ins, an insulated competitive system or market is less likely to accelerate the pace of competition and innovation independently, and is more likely to maintain either the status quo or a lesser rate of competitive and innovative advance.[82]

Roger B. Andewelt, current chief of the Intellectual Property Section of the Antitrust Division, has observed that the *Button Fastener* and *A. B. Dick* tie-in arrangements could have had the local, short-term effect of increasing output of the tying machine. That is, because the patent owner sought to sell the machines at cost and to obtain profit through the sale of unpatented accessories, low-volume users could buy the machine at a lower total price. Thus, since any potential increase in output could be beneficial to consumers, Andewelt argued, the application of the per se standard in such a situation is inappropriate.[83]

B. Legal Efficiency and Public Interest

In terms of legal efficiency and public interest, application of the per se standard to tying arrangements (and to other arrangements as well) has at least two negative effects. First, it denies the antitrust defendant an opportunity to engage in activities which might turn out to be procompetitive if considered in their entirety. Second, it enables the plaintiff to make its case with less effort, which could cost the defendant and ultimately the consumer millions of dollars in antitrust damages. The positive effects of the per se standard

82. *See* Antitrust Division *Amicus* Brief at 25, 27 n.30.

83. Andewelt, *Competition Policy and the Patent Misuse Doctrine,* 25 PAT., TRADEMARK & COPYRIGHT J. 41, 45 (1982).

appear to be a shortening of complex trials and the attendant lessening of attorneys' fees and costs, which often are ultimately passed on to the consumer.

When the negative effects of the per se standard are weighed against its possible benefits, it becomes clear that the per se standard does not favor the public interest in substantial justice. Moreover, the possible benefits of the standard, which are listed above, may be outweighed by the larger number of lawsuits, and attendant rise in attorneys' fees and litigation costs, that accompany the more easily proven per se standard.

A look at the rule of reason standard itself makes the per se standard appear too narrowly focused and, to borrow a term from another discipline, "unscientific." Some of the factors relevant to a determination of reasonableness are:

1. Stimulation of interbrand competition;
2. Inhibition of intrabrand competition;
3. Newcomer status of a product;
4. Market position of the supplier;
5. Existence of product differentiation in the market;
6. Reasons or necessities for the challenged restriction;
7. Effects of aggregation of restraints;
8. Profit levels in the market;
9. Extent of price competition in the market;
10. Existence of less restrictive alternatives.[84]

With the exceptions of considering the reasons or necessities for the challenged restriction and whether less restrictive alternatives exist, none of the factors listed above, especially the ones which relate specifically to procompetitive effects, is considered in a strict per se analysis. The inequity of such a standard seems to be clear. More importantly, however, even if the inequity of such a standard is not clear, the real danger of the per se standard is that it will be applied in circumstances where a thorough economic analysis under

84. Selinger, *Patent Licensing in the Afterglow of Sylvania: Practicalities of Life Under the Rule of Reason,* 63 J. PAT. OFF. SOC'Y 353, 374-75 (1981); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

the rule of reason would have revealed that the accused practice was actually either procompetitive or competitively neutral. This is true even if application of the standard is theoretically justifiable in some instances. Unfortunately, the per se standard, when strictly applied, inures to the detriment of the defendant and ultimately to the consumer, regardless of any economic benefits offered by the practice.

It should be noted here that some commentators have asserted that the courts effectively apply a rule of reason analysis of sorts to tying arrangements when they determine whether a tying seller has market power.[85] Such assertions are somewhat misleading. Although the courts are forced to consider economic and competitive factors when determining whether a tying seller has market power, this assessment is fundamentally different from analyzing the economic and competitive effects of the tying arrangement itself. Theoretically, even a tying arrangement involving a monopolist might have procompetitive effects or may be competitively neutral. The economic analysis conducted in determining market power is certainly welcome and represents a step in the right direction, but it is no substitute for a full-scale analysis of the competitive effects of an accused tying arrangement under the rule of reason standard.

C. Constitutional Shortcomings

Finally, on a somewhat more academic level, an argument can be made that the per se rule of antitrust illegality, at least as it is applied to tying arrangements, violates the due process rights of tying sellers. To apply a logical tool from the discipline of philosophy called the "open question argument," after a court concludes that a seller is engaged in a tying arrangement and is in violation of section 1 of the Sherman Act per se, it remains a legitimate open question to ask: But does the tying arrangement actually restrain trade or commerce under this section of the Sherman Act?

This remaining open question raises the constitutional question of whether a tying defendant is really given his day in court if he is not permitted to rebut the substantive charge against him, i.e., that he has restrained trade or commerce. In other words, even though an allegation that a tying seller has violated section 1 of the Sherman Act entitles the defendant to *process,* how much process is *due,* especially in view of the fact that such violations are felonies? Although process is accorded in the form of a federal court trial,

85. *See* Antitrust Division *Amicus* Brief at 10-11.

might *due* process require the defendant to be permitted to rebut the Sherman Act, section 1, felony charge by showing that he did not restrain trade or commerce?

This due process consideration is made more intriguing by footnote 34 of the majority opinion in *Jefferson Parish,* where the Court stated:

> Of course, the Sherman Act does not prohibit "tying," it prohibits "contracts . . . in restraint of trade." Thus, in a sense the question whether this case involves "tying" is beside the point. The legality of petitioners' conduct depends on its competitive consequences, not whether it can be labeled "tying." If the competitive consequences of this arrangement are not those to which the per se rule is addressed, then it should not be condemned irrespective of its label.[86]

Before proceeding, it should be noted that the preceding footnote seems to be contrary to the majority opinion's per se analysis as a whole. Although the footnote appears to have definite rule of reason overtones, it will be assumed for the sake of argument that the Court intended this footnote to support rather than to contradict the tenor of its opinion. This assumption is reasonable in view of the fact that the last sentence of the footnote links the anticompetitive effects of the accused practice to the subject matter of the per se rule, and not to the type of conduct prohibited by section 1 of the Sherman Act.

Nevertheless, the point made by footnote 34 also has due process implications. As the Court says, tying is *not* prohibited by section 1 and the legality of the accused conduct *does* depend on its competitive consequences. Despite these principles, the per se rule effectively raises tying to the level of an antitrust violation. If the tying requirements established by the Court are met, then section 1 of the Sherman Act is declared to have been violated. Thus, under the due process argument suggested here, it is precisely because section 1 of the Sherman Act prohibits restraint of trade or commerce, and not tying, that tying defendants should be permitted to show that they have not restrained trade or commerce. Such a showing would properly be made under the rule of reason analysis.[87]

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86. *Jefferson Parish,* 104 S. Ct. at 1563 n.34.

87. *But compare* United States v. Manufacturers' Ass'n of Relocatable Bldg.

In view of the foregoing considerations, it is clear that the per se rule, as applied to tying arrangements, should be replaced by the rule of reason standard.

IV. DEVELOPMENTS SINCE *JEFFERSON PARISH*

In *Digidyne v. Data General Corp.*[88] the Ninth Circuit followed the Supreme Court's reasoning in *Jefferson Parish* and affirmed the United States District Court for the Northern District of California's holding that an arrangement whereby Data General tied sales of its NOVA central processing unit (CPU) to licenses of its copyrighted RDOS operating system software constituted a per se illegal tying arrangement in violation of section 1 of the Sherman Act[89] and section 3 of the Clayton Act.[90] In so holding, the court specifically affirmed the trial court's rejection of the justification which Data General presented for the tying arrangement. Data General had argued that tying sales of the comparatively expensive CPUs to inexpensive licenses of the RDOS software allowed it to recover its substantial research and development investment in the software without having to set the price of the software at a supracompetitive level.[91]

The United States District Court for the Southern District of New York's decision in *R & G Affiliates, Inc. v. Knoll International, Inc.*,[92] where the court denied the parties' cross motions for summary judgment, is an anomalous treatment of the per se rule for tying arrangements. Citing *Yentsch v. Texaco, Inc.*,[93] *Jefferson Parish,* and *Northern Pacific,* Judge Weinfeld purported to require a showing of anticompetitive effects in the tied product market in addition to the traditionally required elements of per se tying claims.[94] *Yentsch v.*

Indus., 462 F.2d 49 (9th Cir. 1972) (per se rule as applied to price-fixing arrangements does not violate due process); *with* United States v. Grinnell Corp., 236 F. Supp. 244, 247 (D.R.I. 1964), *aff'd in part, rev'd in part,* 384 U.S. 563 (1966) (per se rules "form the basis of virtually irrebuttable charges of violation of the Sherman Act"); *and* United States v. Brighton Bldg. & Maintenance Co., 435 F. Supp. 222, 227-28 (N.D. Ill. 1977), *aff'd,* 598 F.2d 1101 (7th Cir. 1979), *cert. denied,* 444 U.S. 840 (1979) (per se rule for price fixing is not unconstitutional as a conclusive presumption).

88. 734 F.2d 1336 (9th Cir. 1984).

89. 15 U.S.C. § 1 (1976).

90. *Id.* § 14; *Digidyne,* 734 F.2d at 1338, 1340-41.

91. *Digidyne,* 734 F.2d at 1343-44.

92. 587 F. Supp. 1395 (S.D.N.Y. 1984).

93. 630 F.2d 46, 56-57 (2d Cir. 1980).

94. *R & G Affiliates,* 587 F. Supp. at 1399, 1402-03.

Texaco requires a showing of anticompetitive effects in the tied product market, but relies on *Northern Pacific*[95] and *Coniglio v. Highwood Services, Inc.*,[96] as support for such a requirement.[97] *Northern Pacific* clearly does not require such a showing,[98] and *Coniglio* relies on *Northern Pacific*. Although the *R & G Affiliates* court quoted with approval the *Northern Pacific* Court's rationale for applying the per se rule to tying arrangements[99] and the *Jefferson Parish* anticoercion rationale for application of the per se rule in tying contexts,[100] it purported to require a showing of anticompetitive effects in the tied product market. However, the court presented this issue of anticompetitive effects as a question of whether plaintiff was forced to buy the tied product or whether it willingly did so.[101] Thus, it is difficult to determine whether the analysis which the court will apply in the trial on the merits in this case will be a strict per se analysis presented as a rule of reason analysis, or vice versa.

A hint of the court's ultimate treatment of the tying arrangement in this case might be found in its approval of a portion of Justice O'Connor's concurring opinion in *Jefferson Parish*. Judge Weinfeld stated in pertinent part:

> It is true that 'the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes' and that the 'requisite economic power is presumed when the tying product is patented or copyrighted.' Here, however, the alleged tying product is not one unique patented product, but a dealership in an entire line of furniture, not all of which is patented. It is not evident what role the patented furniture, as distinguished from the entire line, plays in the alleged tie-in. Further, it is not clear that the furniture that is patented actually is sufficiently distinctive to confer the required market power. 'A patent holder has no market power in any relevant sense if there are close substitutes for the patented product.'[102]

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95. *Northern Pac. Ry.*, 356 U.S. at 6.
96. 495 F.2d 1286, 1289 (2d Cir. 1974).
97. *Yentsch*, 630 F.2d at 57.
98. *Northern Pac. Ry.*, 356 U.S. at 9.
99. *Id.* at 6.
100. *Jefferson Parish*, 104 S. Ct. at 1558.
101. *R & G Affiliates*, 587 F. Supp. at 1402-03.
102. *Id.* at 1403-04 (quoting *Jefferson Parish*, 104 S. Ct. at 1572 n.7 (O'Connor, J., concurring)).

Note also that the court's analysis resembled a rule of reason analysis more than a per se analysis and in fact the term "per se" does not appear in this opinion. Judge Weinfeld also stated that forcing "may be unlawful" despite his quotation of the *Jefferson Parish* irrebuttable presumption that forcing invariably restrains competition.[103] Thus, Judge Weinfeld may be making a progressive attempt to apply a rule of reason analysis to the accused tying arrangement while couching the analysis in per se terms to minimize the risk of being reversed by the Second Circuit.

At least one other court has already expressed approval of Justice O'Connor's approach to the viability of the per se rule as applied to tying arrangements. In overturning the United States District Court for the District of Massachusetts' issuance of a preliminary injunction directed to a truck manufacturer's repurchase arrangements, the First Circuit stated in *Kenworth of Boston, Inc. v. Paccar Financial Corp.*:[104]

> We need not treat the concept of a 'tie' like a [P]rocrustean bed onto which this practice must be squeezed or stretched—particularly when doing so could lead to finding 'per se' unlawful a practice that may well be justified as reasonable. These questions and problems make KOB's success on the merits of a tying claim most unlikely.[105]

Most recently, the U.S. Department of Justice issued "Guidelines for Vertical Restraints," dated January 23, 1985, wherein the Justice Department states that "[t]ying arrangements often serve procompetitive or competitively neutral purposes."[106] After discussing such procompetitive and competitively neutral purposes of tying arrangements, the Department set forth the following "screen" under which it will evaluate tying cases when determining whether or not to exercise its prosecutorial discretion:

> The use of tying will not be challenged if the party imposing the tie has a market share of thirty percent or less in the market for the tying product. This presumption can be overcome only by a showing that the tying agreement un-

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103. *Id.* at 1400, 1398 (respectively).
104. 735 F.2d 622 (1st Cir. 1984).
105. *Id.* at 624 (citation omitted).
106. Guidelines for Vertical Restraints 38 (Jan. 23, 1985).

reasonably restrained competition in the market for the tied product.[107]

According to the Department, this screen recognizes that where the party imposing a tie has a share of thirty percent or less in the market for the tying product, "dominant" market power does not exist and the tie is not per se illegal. The screen also recognizes that where a tying agreement does not unreasonably or significantly restrain competition in the tied product market, it is legal. On the other hand, if the market share in the tying product market is over thirty percent, the Department will attempt to determine whether the seller has "dominant" market power. Where the seller has dominant power, and where the other traditionally required elements of a tying arrangement are present, the arrangement will be considered per se illegal. When dominant market power is not present, the Department will apply a rule of reason analysis. Employing this analysis, it will only challenge those tying arrangements which unreasonably restrain competition in the tied product market.[108]

At least one commentator has observed that although the Justice Department would prefer to eliminate the per se rule in tying contexts, in preparing the Vertical Guidelines it was constrained to work around the *Jefferson Parish* decision. After presenting several examples of procompetitive and competitively neutral uses of tying arrangements, the Guidelines then state, apparently reluctantly, that when a dominant firm is involved, *Jefferson Parish* requires that the tying arrangements be considered per se illegal.[109]

V. CONCLUSION

The *Jefferson Parish* opinions (majority and concurring) represent an interesting mixture of legal scholarship. The majority's opinion, although historically accurate and firmly based on prior decisions of the court, is unenlightened and represents the easy way out of subjecting tying arrangements to vigorous economic scrutiny. On the other hand, Justice O'Connor's concurring opinion, although apparently historically flawed, is both progressive and based in sound economic principle.

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107. *Id.* at 41.

108. *Id.* at 42.

109. *Distribution Seminar Speakers Differ on Current Vertical Law, Counseling*, 48 ANTITRUST & TRADE REG. REP. (BNA) 717 (Apr. 25, 1985) (discussing comments of Joe Sims, of Jones, Day, Reavis & Pogue, Washington, D.C.).

It is likely that vigorous economic analysis of tying arrangements will eventually replace "unscientific" application of the per se rule. The appointment of one new justice who agrees with the approach taken by the minority in *Jefferson Parish* could lead to application of the rule of reason to the next tying case to come before the Court. However, until the composition of the Court changes, application of the per se rule to tying arrangements appears to be an unfortunate certainty.