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WHAT THEY DON'T WANT YOU TO HEAR: *BELTONE*, *TICKETMASTER*, AND EXCLUSIVE DEALING

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I. INTRODUCTION

Vertical restraints in exclusive dealing arrangements can serve pro-competitive ends in allowing manufacturers to manage their distribution networks efficiently. As assessed under the rule of reason, however, vertical restraints can also provide an undeserved shield from antitrust liability. Vertical restraints in exclusive dealings may allow manufacturers to secure best efforts obligations and patent-like protections from distributors without entering the bargaining processes that are typically associated with exclusive licenses. As such, these restraints allow manufacturers to achieve monopoly-like anticompetitive restrictions. When the rule of reason is coupled with an excessively mechanical application of standing and injury requirements, along

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with an inflexible definition of market power, manufacturers may achieve non-scrutinized horizontal effects through vertical restraints.[1]

Exclusive dealing restrictions are presumed valid where the distributor is not independent but is instead an agent of the supplier. The restrictions then violate antitrust policy only if they unreasonably restrict competition.[2] Such a rule makes general sense; the distributor in such cases acts more like an employee of the manufacturer than an independent entity. Manufacturers often have just cause to terminate their exclusive dealers as agents. Because a manufacturer often has legitimate interests in promoting its products exclusively, it will also almost always retain a valid excuse to impose restraints or to terminate.

Anticompetitive vertical restraints often escape liability because manufacturers impose them without colluding horizontally. Under a rule of reason, a surplus of anticompetitive vertical restraints is tolerated, in part because courts almost always find a priori or abstract legitimate business justifications for them. Furthermore, most manufacturers do not posses monopoly power as it is more appropriately defined for horizontal restraints. This article examines several emblematic intellectual property cases, including *In re Beltone Electronics Corp.*,[3] in which a hearing aid manufacturer imposed a series of vertical restraints on its distributors for a period of more than thirty years; several *Ticketmaster* cases;[4] and the dismissed complaints the music group Pearl Jam filed against Ticketmaster.[5] Through this examination, I demonstrate that the anticompetitive effects of certain restraints currently tolerated rise to the level of antitrust violations.

I argue that vertical restraints are often imposed by companies that do not have monopoly power in the entire market, but achieve the monopoly protections usually associated with intellectual property rights by using exclusive dealing arrangements. While the hearing aid manufacturer in *Beltone* may not have "dominated" the market in terms of traditional percentage or foreclosure analysis, its conduct produced effects similar to those

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[1] As shorthand, I refer to those at the top of the vertical chain as manufacturers or suppliers, and those at the bottom as distributors.

[2] *See, e.g.,* Continental T.V. v. GTE Sylvania, 433 U.S. 36, 49 (1977) (holding that the reasonableness analysis from the rule of reason determines whether anticompetitive effects of vertical restraints violate the Sherman Act).

[3] *See In re* Beltone Electronics Corp., 100 F.T.C. 66 (1982). *See, e.g.,* Williams v. Kemp, 542 F.2d 1053 (9th Cir. 1976) (holding that "where the distributor is effectively an agent or salesman and . . . the manufacturer retains title, dominion, and risk with respect to the product . . . it is only if the impact of the confinement is 'unreasonably' restrictive of competition that a violation of § 1 [of the Sherman Act] results . . . .").

[4] *See, e.g.,* Campos v. Ticketmaster Corp., 140 F.3d 1166, 1168-70 (8th Cir. 1998); *In re* Ticketmaster Corp. Antitrust Litig., 929 F. Supp. 1272, 1277 (E.D. Mo. 1996).

[5] Memorandum of Pearl Jam to the Antitrust Division of the United States Department of Justice Governing Anticompetitive Actions Engaged in by Ticketmaster Holdings Group Ltd. (May 6, 1994).

antitrust law intends to prevent. Further, in the industries and contexts this article examines, having multiple manufacturers, and ostensibly more competitors, enter the market is likely only to proliferate the anticompetitive model; *i.e.,* each new hearing aid manufacturer would be able to effectuate parallel anticompetitive vertical restraints, and each new ticket service would be able to charge anticompetitive prices for each venue with which it had an exclusive arrangement. In fact, the new restraints would be justified *because* they were more widely applied in vertical fashion, and thus technically being used in smaller market shares. However, the restraints would have equal or greater anticompetitive market effect. The practices are thus validated in part because all competitors can, at least in theory, implement them equally. In this narrow sense, under some exclusive dealing arrangements, there is no relevant market or relevant market question to ask. Regardless of how many competitors existed, each company could create a vertical restraint that produced the same monopoly effects as if no competitors existed.

Under this analysis, the market share dominance of the company using vertical restraints is less relevant because each company creates a virtual monopoly in its micro-market that does not require horizontal collusion. The restraint often carries a built-in appearance of business justification, and creates anticompetitive effects in a cumulative fashion whose aggregate percentage reflects market 'dominance,' but which escapes scrutiny by being generated in individual vertical swaths. Manufacturers like Beltone and suppliers like Ticketmaster have monopoly market power *within* their distribution chain, and each distribution chain is isolated (or foreclosed) from the next. As a result, exclusive dealings can produce interbrand vertical foreclosure *by* restraining intrabrand competition. With Beltone, lack of market share meant that an industry-wide practice of imposing vertical restraints resulted in anticompetitive effects within each distribution chain. Aggregated across manufacturers, each 'bandwidth' of vertical restraint is insulated from scrutiny. With Ticketmaster, market power, even where acknowledged, was deemed irrelevant because of the indirect purchaser doctrine and inappropriate definitions of injury and collusion. Especially with cases such as *Ticketmaster*, where the "distributor" actually controls the market, courts should consider which party bears power vertically over others and what interbrand effects the exercise of such power institutes.

In the following section, the article contrasts the obligations typically generated through bargaining under exclusive licenses with those sometimes imposed under exclusive dealings. The uncertainty of the obligations under exclusive licenses helps contextualize the uncertainty in exclusive dealings, most notably the right of a manufacturer to impose obligations (*i.e.*, vertical restraints) on distributors. The article then examines exclusive licenses in comparison with exclusive dealing, the *Beltone* case, and the Ticketmaster cases to show the connections between the otherwise disparate areas (*i.e.*, copyright, patent, and trademark) of intellectual property protection and, in turn, their connection to antitrust analysis. Because manufacturers can achieve monopoly-like protections in exclusive dealings, vertical restraints have been too systematically presumed valid.

II. Implied Obligations in Exclusive Licenses: Contrasts and Correlations with Exclusive Dealing

Courts have decisively determined that the appropriate standard for evaluating the legality of vertical restraints in exclusive dealings is the rule of reason.[6] A vertical restraint, wherein, *e.g.*, "a supplier or dealer makes an agreement exclusively to supply or serve a manufacturer, is not a group boycott," and is usually deemed significantly more beneficial than a horizontal arrangement among competitors because "none of them will supply a company that deals with one of their competitors."[7] However, as I explore in this article, the rule of reason standard allows a manufacturer, as evidenced by the *Beltone* and *Ticketmaster* cases, to enforce anticompetitive restraints primarily by threatening to terminate exclusive distributorships when a party in the vertical chain attempts to carry a competitor's product. Typically, "a supplier might enforce its policy of requiring distributor exclusivity by refusing to continue selling to distributors who do not observe the exclusivity limitation," and thereby imposes a vertical restraint subject to the rule of reason that, in practice, proscribes few anticompetitive behaviors.[8]

As Wanda Rogers suggests, "the true issue that arises in exclusive dealing cases is legal, not economic: does the defendant exercise market power in a manner that antitrust law seeks to avoid?"[9] In *U.S. Healthcare*, the Court of Appeals for the First Circuit noted the divergent approaches to antitrust policy: the dominant view that antitrust protects "competition, not competitors," and the "no sparrow shall fall" concept of antitrust.[10] Under a rule of reason standard, a purely economic approach to vertical restraints fails to consider the undue power manufacturers and suppliers can wield even in markets where they do not possess the traditional definition of market power. Unlike

[6] *See*, *e.g.*, State Oil Co. v. Khan, 522 U.S. 3, 10, 22 (1997) (describing the rule of reason as the most common means for analyzing restraints on competition); MCA Television Ltd. v. Pub. Interest Corp., 171 F.3d 1265, 1276 (11th Cir. 1999) (citing *State Oil*).

[7] *See* U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 594 (1st Cir. 1993); *Yamaha Motor Co. v. F.T.C.*, 657 F.2d 971, 983-84 (8th Cir. 1981) (indicating that while vertical restraints often restrict intrabrand competition, they promote interbrand competition).

[8] Kurt Strasser, *Antitrust Policy in Agreements for Distributor Exclusivity*, 16 CONN. L. REV. 969, 971 (1984).

[9] Wanda Rogers, *Beyond Economic Theory: A Model for Analyzing the Antitrust Implications of Exclusive Dealing Arrangements*, 45 DUKE L.J. 1009, 1011 (1996),

[10] *U.S. Healthcare*, 986 F.2d at 597. *Compare* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (affirming that antitrust laws protect "competition, not competitors"), *with* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959) (anticompetitive arrangement not to be tolerated merely because the victim's destruction makes little difference to the economy).

exclusive franchises, where distributors bargain and contract for the benefits of a particular brand, and which have legitimate business justifications, the exclusive dealings that impose vertical restraints can usually be justified on grounds of theoretical economic efficiency, while also promoting behaviors the antitrust laws were meant to restrain.

The economic approach to antitrust policy is partly represented in *Ryko Manufacturing v. Eden Services.*[11] Ryko, a manufacturer of automatic car-wash equipment, allegedly restricted the practices of its distributors impermissibly, including fixing its resale prices. The district court found that

> exclusive dealing provisions of its distributorship contract, which prohibit the distributor from promoting or selling products that compete with Ryko's, violate Section 1 of the Sherman Act and Section 3 of the Clayton Act. Contracts imposing an obligation on a distributor to deal only in the goods of a single supplier will violate Section 3 when "performance of the contract will foreclose a substantial share of the line of commerce affected."[12]

As part of a pattern of cases in which the lower courts' factual records of market conditions are overlooked in order to implement an overarching economic model, the appellate court reversed. The court listed a number of factors to consider in determining illegality: "The willingness of consumers to comparison shop and their loyalty to existing distributors; the existence of entry barriers to new distributors; the availability of alternative methods of distribution; and any trend toward growth (or decline) in the level of competition at the supplier level."[13] But the court did not adequately consider the aggregate market effect such restraints have (when most or all similar manufacturers impose similar restraints) or the cumulative effects within the specific industry and the economic climate as a whole.

Unlike the Court in *Federal Trade Commission v. Brown Shoe Co.*[14] — a case in which the Supreme Court held that the contractual practices of Brown, the nation's second largest shoe manufacturer, requiring retailers to limit trade with competitors, violated Section 5 of the Federal Trade Commission Act — the *Ryko* court found an insubstantial foreclosure rate.[15] The line the Ryko Court wanted to draw between harm to competition and to individual

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[11] *See* Ryko Mfg. v. Eden Servs., 823 F.2d 1215, 1219-20 (8th Cir. 1987) (agreeing with the result in *Beltone*, which held that exclusive dealing should be analyzed in terms of market share dominance, the dynamic nature of the market, and whether the plaintiff has demonstrated the probability of an adverse effect on interbrand competition; this inquiry is akin to, but not precisely the same as, the rule of reason).

[12] *Id.* at 1233.

[13] *Id.* at 1234. Even under this economic analysis, if one considers Ticketmaster a supplier, its exclusive contracts preclude any means of alternative distribution, comparison shopping, or competition in the market.

[14] Fed. Trade Comm'n v. Brown Shoe Co., 384 U.S. 316, 321 (1966).

[15] *See Ryko*, 823 F.2d at 1233.

competitors is not so easily maintained in small markets, and despite duplication of anticompetitive practices on a national scale, most manufacturers and suppliers (including Ticketmaster) operate in an aggregate of thousands of small, self-contained, and often incommensurate markets.[16] In fact, under the potential tautology of this approach, harm to competition only occurs when a manufacturer possesses market power; if it is deemed to posses anything less, it only harms a competitor. While the markets may remain separate or incommensurate, the harms should be aggregated if their effect is as great as or greater than the harm a single monopolist with market power can cause.

An anticompetitive vertical restraint imposed under an exclusive dealing arrangement, especially one that prevents competition on putatively small scales, often interferes with the natural flow of interstate commerce; it clearly has by its nature a "monopolistic tendency." As such, anticompetitive vertical restraints should not be tolerated merely because the victim is a single merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups.[17] The *Klor's* holding, which retains the legal and social analysis necessary to antitrust policy, may resolve the issues in *Ticketmaster* and *Beltone*, but *Klor's* diminished influence reflects courts' increasing reluctance to find antitrust injury in all but the most egregious vertical restraints.[18] *Beltone* and *Ticketmaster*, even more than the department stores in *Klor's*, involve "not a case of a single trader refusing to deal with another, nor even of a manufacturer and a dealer agreeing to an exclusive distributorship" but a more problematic combination of the two scenarios: a manufacturer refusing to deal with a distributor, or locking up the distribution market, can produce anticompetitive effects as harmful as the list the *Ryko* Court enumerates.[19]

My analysis builds toward these two cases as representative of several specific loopholes in antitrust law. In both instances, antitrust injuries remain undeterred because the companies deceptively claim business justification and

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[16] *Id.* Courts, however, have tended to treat these venues not as independent markets, but as components of a single market. For some industries, a more realistic aggregate market could be defined by drawing on the analysis used. *E.g.*, *Image Technical Services v. Eastman Kodak*, 125 F.3d 1195, 1204 (9th Cir. 1997) (noting that under *United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966), groups of non-interchangeable services and products can be aggregated to form a single market).

[17] Klor's, Inc. v. Broadway-Hale Stores, Inc*.*, 359 U.S. 207, 213 (1959).

[18] For instance, one court states that "*Klor's* in any event belongs to an era in the Supreme Court's antitrust jurisprudence when the Court was concerned with the welfare of individual competitors as well as with the health of the competitive process viewed as a means of protecting consumers." Prods. Liab. Ins. Agency, Inc. v. Crum & Forster Ins. Co., 682 F.2d 660, 665 (7th Cir. 1982).

[19] *See Klor's*, 359 U.S. at 211-12 (suggesting that antitrust scrutiny must consider the ends more carefully than the means of the anticompetitive behavior).

lack of market share, and manipulate the measurement of that market share. By looking at how and why the near equivalent of anticompetitive vertical restraints is desirable in exclusive licenses, I hope to show why they are often undesirable, and a locus of potential abuse, in exclusive dealings. In my use of the term exclusive dealing, I refer narrowly to those instances where vertical restraints are effectively imposed on a distributor after the fact and, often, without contract (*e.g.*, once a distributor is already obliged to a manufacturer, or where a manufacturer effectively terminates the distributor for use of a competing product); where unequal bargaining power allows the manufacturer to impose contractual vertical restraints that violate the spirit, if not the letter, of the antitrust laws; and where a manufacturer or supplier evades antitrust scrutiny for vertical restraints in exclusive dealing via procedural and other non-substantive grounds.

III. NON-COMPETE CLAUSES AND RESTRAINTS UNDER EXCLUSIVE LICENSES

The right to use or sell a competitor's products under exclusive licenses and exclusive dealing arrangements has proven to be a vexed issue. Under the Clayton Act, "Congress made it unlawful to condition the sale or lease of one article on an agreement not to use or buy a competitor's article (whether either or both are patented), where the effect is 'to substantially lessen competition or tend to create a monopoly."[20] Under most exclusive licenses, however, manufacturers receive patent-like protections because they are either licensing a patented or trade-secret protected article, or because they have bargained — at least in some general, if not always precise, terms — for their distributor to devote exclusive or significant attention to that article.

Manufacturers/suppliers are sometimes able to achieve such patent or exclusive license protections — obligations to promote a product using the equivalent of best efforts or to refrain from using competing products — by entering into or enforcing exclusive dealing, whose final obligations the distributor may or may not have assumed through voluntary bargaining. In this section on exclusive licenses, best effort obligations and non-compete agreements, I introduce the terminology and concepts later to apply to exclusive dealings. In particular I address best efforts obligations in relation to distribution policies, the right to terminate and compete, and antitrust scrutiny. In the next section, I focus on *In re Beltone Electric Corp.*, and several *Ticketmaster* cases, to address loopholes in antitrust law as applied to exclusive dealing. This section examines how best efforts and non-compete obligations of distributors in exclusive licenses correlate to antitrust considerations in exclusive dealings. In both scenarios, the distributor may face obligations that are implied rather than express, and are defined only after the manufacturer/supplier presses for performance.

[20] *See* Transparent Wrap Mach. Corp. v. Stokes and Smith Co., 329 U.S. 637, 647 (1947) (quoting Int'l Bus. Mach. Corp. v. United States, 298 U.S. 131 (1936)).

Earlier in the past century, courts were relatively lenient in allowing exclusive licensees to use competing products. In *Eclipse Bicycle Co. v. Farrow*, the Supreme Court held that an exclusive licensee's obligation to "use due business diligence" in marketing patented products "did not preclude it from using any later invention, if one were made which superseded [the plaintiff's], and did not embody it."[21] In other words, at this stage, a form of best efforts obligation did not necessarily preclude the use of competing goods.

The Court had previously held in *Thorn Wire Co. v. Washburn & Moen Co.* that a covenant not to sell barbed wire produced under competitive patents could not be implied from a covenant "to use reasonable and diligent efforts" to promote an exclusively licensed product.[22] Courts still generally indicate that

> the obligation to exploit diligently does not necessarily exclude all competition by the licensee with the licensed patent . . . mere ownership and use of a competing patent do not necessarily in themselves constitute a violation of the implied obligation to use due diligence in working the patent. Whether due diligence has been exercised is a question of fact to be determined in each case.[23]

While these cases have not been expressly overruled, most circuit courts now qualify that exclusive licensees may use competing products only when necessary unless they have paid an up front royalty or some other form of consideration.[24] Furthermore, these courts provide in effect that exclusive licensees may use a competing product only when doing so does not violate the implied obligation of good faith. Courts now hold that an exclusive licensee should not be obligated to make or promote inferior or unmarketable products; a licensee should not be trapped into exploiting a hopeless invention. To analogize, one might say the exclusive licensee or dealer cannot use the arrangement to achieve anticompetitive ends.

The licensee also may not purposely manufacture inferior products, hiding behind the exclusive license, in order to avoid paying royalties. The Second Circuit holds that "[i]f competition comes from a better article than the one licensed, [the licensee] is under no obligation to try with no hope of success to meet it with the licensed device."[25] The dissent, however, expressed concern that this approach would allow a licensee to market an inferior product to avoid paying royalties.[26] The circuits seem to agree that implied contractual obligations may allow some

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[21] 199 U.S. 581, 589 (1905).

[22] 159 U.S. 423, 449 (1985).

[23] Dwight & Lloyd Sintering Co. v. American Ore Reclamation Co., 44 F. Supp. 391, 393-94 (S.D.N.Y. 1937).

[24] *See, e.g.*, Mechanical Ice Tray Corp. v. Gen. Motors Corp., 144 F.2d 720 (2d Cir. 1944).

[25] *Id*. at 726.

[26] *Id.* at 727 (Frank, J., dissenting).

> competitive activity on the licensee's part . . . [and] allow the licensee to handle unlicensed products and technology where necessary to stay competitive, but [not] to undermine the licensor's reasonable expectations of revenue under the agreement. Nor [can] a licensee use the licensor's own intellectual property without authorization to support a competing business.[27]

Under a rule of reason, such restraints on competition are almost always considered to have a legitimate business justification under exclusive dealings, where the distributor may not have bargained at all — *i.e.*, has received no consideration — for such obligations. Under the economic approach, antitrust law has inverted the rule of exclusive licenses: rather than allowing distributors to justify using competing products where necessary, it allows manufacturers to justify disallowing them.

Uncertainty about the obligations of distributors under exclusive licenses, which often involve patents, can help illuminate why certain obligations are imposed on exclusive dealing distributors. Some exclusive license cases suggest that courts have a tendency to require more of distributors than manufacturers bargained to expect (a tendency that becomes damaging in exclusive dealing cases where patents are typically not involved).

In *Bailey v. Chattem, Inc.*, an emblematic and problematic Sixth Circuit case, the court conflates the terminology of "best efforts" and "good faith" obligations.[28] This conflation reflects the general uncertainty about the relationship between obligations not to compete, as generated by best efforts obligations, and protections afforded by patents and exclusive dealings.[29] While not clear on whether it was technically imposing obligations of good faith or "best efforts," *Bailey* imposed something akin to a "best efforts" obligation on an exclusive licensee, holding his apparently considerable efforts and expenditures as insufficient under the agreement.[30]

In *Bailey*, Plaintiff Bailey began work on a new paint thinner, then entered into an agreement with Chattem to serve as a consultant: any discovery or invention Bailey made would be Chattem's exclusive property.[31] After a patent was issued, Bailey inquired about a promised long-term consulting agreement, but was told that he had received all he was entitled to in the one percent royalty and renewable two-year consulting agreement. When Chattem refused to enter into the consulting agreement, Bailey filed suit.[32] In addition to filing other claims of fraud, Bailey sought to recover for Chattem's failure to

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[27] JAY DRATLER, JR., LICENSING OF INTELLECTUAL PROPERTY, § 8.07 (2002).

[28] 684 F.2d 386, 396 (6th Cir. 1982) (criticized on other grounds) (discussing "best efforts" by using contract law language of "good faith").

[29] *Id.* at 396-97 (the court first indicates that the jury implied a best efforts obligation, but then asserts that the jury applied a good faith obligation).

[30] *Id.* at 397.

[31] *Id.* at 388.

[32] *Id.* at 388-89.

commercialize the potential product and bring the premix to market earlier than he did.[33]

The court affirmed the one percent royalty agreement: "This agreement formed the basis for the failure to commercialize claim. The jury was told to award damages that would place Bailey in the position he would have been had the contract been performed, including the implied terms of using 'best efforts' to commercialize the patent."[34] The court, however, remained opaque about whether the level of implied obligation owed by the licensee under the contract was a "best efforts" or "good faith" obligation.[35]

This confusion about obligation is closely related to confusion about the legality of restraining an exclusive licensee (and, as addressed later, exclusive dealers) from using competing products, and both stem from uncertainty regarding the scope of intellectual property protection when patents are not involved but the structures of patent licensing remain. Courts in exclusive dealings cases sometimes allow manufacturers rather than juries to imply duties on distributors' parts that have anticompetitive effects.

The court in *Mechanical Ice* indicated that parties can contractually allow an exclusive licensee to make competing products.[36] The court also upheld the general rule that, absent such an express provision, exclusive licensees are obligated to refrain from competition interfering with the exploitation of the patent in good faith, unless the patented device did not afford the licensee with a reasonable chance of market success. As a side note, such an analysis bears some similarity to the assessment of pro- and anti-competitive effects of exclusive dealings under the rule of reason, but the analysis is more

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[33] *Id*. at 389.

[34] *Id.* at 396.

[35] *Id.* (In pertinent part, the patent license agreement stated that Chattem "contemplates marketing organo-aluminum compounds . . . covered by the aforesaid patent application, and in the event Chattem establishes a market for such [compounds] . . . it agrees to pay Bailey one percent of the net sales price on . . . Chattem's sales . . . [of said compounds]. . . . It is Chattem's view that this contract language clearly and unambiguously states that Chattem has no *duty* to market Bailey's invention, but if it *chooses* to do so Bailey will receive a one percent royalty on all sales. Chattem contends that because the contract language is clear, the trial court erred in permitting the jury to imply a duty on Chattem's part to *use its best efforts* to develop the patent. . . . 'In any commercial agreement in which the compensation promised by one to the other is a percentage of profits or receipts, or is a royalty on goods sold, manufactured, or mined, there will nearly always be found an implied promise of diligent and careful performance in good faith and of forbearance to make performance impossible by going out of business or otherwise.' . . . This rule of law has been applied with full force to patent license agreements. *Bellows v. E.R. Squibb & Sons, Inc*., 359 F. Supp. 204 (N.D. Ill. 1973). . . . This was such a case, and it was not error to permit the *jury to imply a duty of good faith* performance on the part of Chattem." (emphases added)).

[36] *See* Mechanical Ice Tray Corp. v. Gen. Motors Corp., 144 F.2d 720, 726 (2d Cir. 1944).

appropriate in a context where licensee and licensor have bargained for a patent or an exclusive franchise.[37]

In *Parev Products Co., Inc., v. I. Rokeach & Sons, Inc.*,[38] the court tried to balance a licensor's right to restrain a licensee's competitive activities with a licensee's need to compete in the market (an analysis that again has correlatives for exclusive dealings).[39] Rokeach contractually obtained from Parev the exclusive use of all the necessary secret formulae to make kosher coconut oil, Parev Schmaltz, in exchange for royalties on the oil sales.[40] Under the agreement, Rokeach could use Parev Schmaltz as it should "'think fit for its use and benefit absolutely.'"[41] This same privilege was restated with a specification of what was included, such as labels, trademarks, and good will. Parev agreed not to "'engage or aid . . . in the manufacture, sale or distribution of any article that might be in competition with [defendant] in the sale, manufacture or distribution of Parev Schmaltz or of any similar product.'"[42] Rokeach could discard the name Parev Schmaltz, and any name that was substituted would remain defendant's property.[43] When it could no longer market Parev Schmaltz as effectively, however, Rokeach began selling Kea, a competing brand of oil.[44]

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[37] It is important to note a key argument in this case. The court in *Mechanical Ice* indicated that because the "license shows that the parties contemplated that . . . devices which the defendant had made and on which it had paid running royalties could thereafter be manufactured and sold royalty-free. . . . The continued manufacture, use and sale of them without payment of running royalties was, therefore, permissible in accordance with the express provisions of the license and no obligation to the contrary can be implied. . . . The exercise of good faith in exploiting the licensed patents [for ice trays] did not require the defendant to refrain from doing whatever the plaintiffs had expressly agreed that it might do." The dissent, however, noted that he did not believe that the parties "meant that defendant could thus, in part, place plaintiff's patent on ice [sic] . . . [that] should a court decision narrow the patent claims in any respect, the defendant, still retaining its right to keep plaintiff from using the patent, could itself reduce the sales of the patented device while making and selling a competing article . . . . [Nor] on any principle of fairness or public policy, should [we], without regard to the parties' actual intention, read into the contract a 'constructive' intention to permit such anti-social conduct, which, I think, closely approaches . . . illegality." *Id.* at 726 - 27.

[38] 124 F.2d 147 (2d Cir. 1941).

[39] *Id*. at 149-50.

[40] *Id.* at 147-48.

[41] *Id*. (quoting the agreement language).

[42] *Id.*

[43] *Id.*

[44] *Id.* ("Although defendant does not manufacture Kea, it distributes it under its own label as a Kosher product to the same orthodox Jewish trade. Defendant, of course, has not paid any royalties to plaintiff on its sales of Kea. Plaintiff claims that, since the royalties on Nyafat are based on an absolute sum per ounce and since the price obtained by defendant has been falling, defendant has undertaken the sale of Kea to avoid its royalty obligation.

The court held that although the licensee could be liable for the licensor's proven lost sales, an express covenant not to handle similar products did not preclude the licensee from doing so where necessary to respond to competition:

> If any covenant is to be implied, it must be one which reaches the core of this dispute, which is the claim that a directly competitive product is produced by defendant. Whatever reasons there are for imposing on defendant such a strict obligation are hardly vitiated by the difference in composition of the two products.[45]

Stricter obligations are allowed in exclusive dealings, however, when manufacturers can terminate dealers who fail to comply with the manufacturer's company policy as opposed to the terms of a license. Such restraints raise antitrust concerns rather than unfair business or contract issues because manufacturers — in isolation, and cumulatively in parallel practice — can apply such policies to great numbers of distributors. In exclusive dealings, manufacturers/suppliers may often imply a similar covenant that distributors cannot market other products, or can be terminated for failing to meet quotas/best efforts norms. In such cases, however, the manufacturer may not have bargained for these obligations but have achieved them from the manufacturer's ability to pressure its distributor to remain exclusive. Balancing interests, the *Parev* court indicated that "[p]laintiff must clearly rely on defendant for any future benefit to be derived from its original formula; and defendant, if it is to continue to remain in the vegetable oil market, must be able to prevent the inroads of outside products."[46]

Denying an injunction to stop sales of Kea, the court indicated it was not enough to say that no cause of action lies where there has been good faith by the defendant.[47] By extrapolation, the *Parev* court would suggest that an

Defendant, on the other hand, asserts that Crisco and Spry, widely selling cooking oils, were cutting into the Nyafat market.").

[45] *Id.* at 149.

[46] *Id.* at 149-50 (Though the court noted that "extensive freedom of action was intended [in the contract, it] could not have been wholly unlimited, as . . . defendant properly concedes when it admits that at least tortious competition or destruction of the Nyafat market was not open to it. . . . [I]f the defendant does not terminate the contract, it can keep Nyafat under its control until Kea is successfully built up, and then it can safely forget Nyafat. The advantage is all to defendant. But a court of equity should grant some protection to a person who parts with his formula for exploitation. Thus, a court would hardly have permitted the defendant from the inception of this contract to lock up the plaintiff's formula in a vault and freely market Kea. There is no reason to do so now.").

[47] *Id.* at 150 ("that so long as defendant acts in good faith in judging the extent to which Kea must be sold to meet the competition of Crisco and Spry, no cause of action lies . . . ; a limited rule of good faith, valid so far as it goes, does not exhaust the possibilities. (citation omitted). The really equitable solution is to permit defendant to sell Kea so long as it does not invade Nyafat's market if that point is susceptible of proof, as we think it is. Thus, assuming that defendant is correct in its assertions, Kea sells only to people who no longer

exclusive dealing arrangement would not allow for unlimited vertical restraints to be imposed on a distributor. Furthermore, the court's analysis seems not to allow a manufacturer unlimited rights to coerce the distributor/licensee's competitive activities so long as there was some pro-competitive reason for the activities.

In *Guardino Tank Processing Corp. v. Olsson*,[48] in addition to imposing duties of reasonable effort approximating best efforts obligations, the court emphasized an implied good faith duty of an exclusive licensee not to use inventions competing with its licensed property.[49] Guardino licensed to make, and to employ for the cleaning of tanks of maritime vessels, Olson's patented invention within an exclusive radius.[50] A further agreement was made between Olsson and the third-party defendant, the Guardino brothers' corporation, whereby the latter was exclusively licensed to make and employ the Olsson invention in that same area, and the Guardino brothers agreed to pay Olsson a five percent royalty for any cleaning jobs performed.[51] Guardino subsequently requested Olsson to reduce the royalties, but he refused, after which Guardino began using the then royalty-free Wheeler cleaning system.[52] Olsson sued for rescission and an accounting of the third-party defendants, alleging "the willful breach of the implied covenant to exploit in good faith and not to compete unnecessarily with the Olsson invention which he claims is an incident of the exclusive license herein."[53]

The court defined a license as exclusive "if it carries with it the obligation of the licensor not to grant or enlarge other licenses. In other words, a license is exclusive if it shuts off the competition which otherwise might thereafter emanate from the licensor."[54] In the court's estimation, "formalism will not be allowed to obscure that which was patently [sic] understood but imperfectly expressed."[55]

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buy Nyafat. Hence, the plaintiff is only entitled to the market Nyafat has created and will retain, regardless of outside competition.").

[48] 89 N.Y.S.2d 691 (1949).

[49] *Id*. at 696-97.

[50] *Id.* at 693.

[51] *Id.* at 694.

[52] *Id.* at 695.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 696-97 ("the third-party defendants did not use any mechanical system other than Olsson's in the [tank] cleaning [after the license agreement was made] . . . thereby tacitly recognizing their obligation to refrain from competing with the Olsson system. And finally, before engaging in competition with [it], the third-party defendants . . . sought a reduction of the royalty obligation. It is inconceivable that the third-party defendants would have exercised such restraint except in response to . . . a clear obligation to refrain from competition with the Olsson system. Formalism will not be allowed to obscure that which was patently [sic] understood but imperfectly expressed. The doctrine of implied

Thus, the court imposed two duties: to exploit the licensed property, and to refrain from unnecessary competition. Because the subject matter was placed exclusively with the licensee for the purpose of exploitation,

> there was implicit in the arrangement the obligation of the licensee reasonably to exploit and to refrain from competition. The obligation to refrain from competition was not absolute, as might have been the case if there was present an express provision against all competition. The implied obligation to refrain from competition was subject to the condition that it be economically feasible and did not require submission to competition without a reasonable chance of success.[56]

By implication, where exclusive dealings are not predicated on such intellectual property protections or explicit, bargained for contractual provisions, and the manufacturer does not depend on a single distributor to develop or exploit a product not yet marketed, the right to restrict competition should be moderated. Modulating the above analyses from exclusive licenses to exclusive dealings, one concludes that where a manufacturer does not bargain to obtain a distributor's best efforts or a developer's best efforts, and does not become dependent on the distributor through such negotiations, the manufacturer should have neither the right nor the need to restrict the distributor's use of competing goods. While courts may at times produce inconsistent holdings and rationales on the nature of a licensee's obligations, they seem to agree that best efforts obligations must be bargained or compensated for; distributors, however, can often be terminated for putatively not meeting such obligations, and more realistically for anticompetitive reasons.

In *Park-In Theatres v. Paramount-Richards Theatres*,[57] the court allowed rescission of an exclusive license where an exclusive licensee failed to use best efforts, but did not reach the issue of competition or define the implied obligation (a curious decision insofar as the court found a breach without first determining whether the licensee was actually under any obligation).[58] Park, the plaintiff, argued that an exclusive patent licensee for an outdoor drive-in theater is

> under an implied obligation to exploit the patented device in good faith and to refrain from the use of competing devices; that the exclusive license being given in consideration of royalties, the failure to exploit or use the device and the inability of the patentee to license others would

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undertaking to perform fairly and in good faith appears to have been applied whenever the subject to be exploited, tangible or intangible, has been placed in exclusive possession.").

[56] *Id.* at 697-98.

[57] 90 F. Supp. 730, 733 (D. Del. 1950).

[58] *Id*.

> result in no royalties and consequent loss to the patentee unless . . . he moves to rescind. . . .[59]

The holding regarding rescission may have limited precedent insofar as the court did not consider it necessary

> to decide whether an exclusive patent licensee is or ever was under an implied obligation to exploit the patent or, if there is such an implied obligation, what its extent may be. It is not necessary to decide whether any implied obligation of an exclusive patent licensee to exploit does more than create a correlative right in the licensor to rescind the contract in case of violation of such duty to exploit.[60]

Like the Ninth Circuit in *Maxim Integrated Products, Inc. v. Analog Devices, Inc.,*[61] the court does not define best efforts obligations in relation to a patent.[62] This omission reflects the greater uncertainty regarding obligations not to compete, as well as rights to enforce non-competition, under exclusive dealings where no intellectual property protections or obligations to develop automatically arise. The crucial issue here pertains to the vertical obligation imposed on a distributor who has not bargained or received any added benefit as consideration for the manufacturer's restraints.

In *Krantz v. Van Dette,* the principal issue concerned whether an exclusive licensee was obligated solely to supply, or also create demand, for storm windows that proved to be of inferior quality.[63] The court distinguished between explicit best efforts contractual obligations to supply an existing product (analogous to most exclusive dealings) and implied best efforts obligations to develop and exploit an invention.[64] The court determined that the licensee used his best efforts to promote the sale of the Krantz window, and "nearly went broke in doing so."[65] Because Krantz also paid a minimum royalty, he owed no damages.[66]

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[59] *Id.*

[60] *Id.* at 733-34.

[61] Maxim Integrated Prods., Inc. v. Analog Devices, Inc., No. 94-16744, 1996 U.S. App. LEXIS 5785 (9th Cir. Mar. 15, 1996) (unpublished opinion).

[62] *Park-In Theatres,* 90 F. Supp. at 733.

[63] 165 F. Supp. 776, 779 (N.D. Ohio 1958).

[64] *See id.* ("Article 5. Licensee agrees that it will use its best efforts to supply the demand for storm windows within the territory in which this license is granted.' . . . Article 5 assumes that a demand existed for the Krantz window. All the licensee agreed to do was to use his best efforts to supply it. Nowhere did the licensee agree to use his best efforts to create any demand. The agreements did not require the licensee to sell any windows. This is materially different from a covenant to mutually develop and exploit an invention. If there was any ambiguity in the article, it should be resolved in favor of the licensee. The licensor prepared the agreements and they should be construed against him.").

[65] *Id.* at 780 ("It met with keen competition from other suppliers who sold [windows] for a lower price. The licensee reported its predicament to Krantz and urged him to redesign his window to make it lighter and cheaper in order to meet the competition. Krantz refused to

Industry custom often plays a decisive role in determining whether best efforts obligations preclude a licensee from using any devices in competition with the licensed property. Custom can be used to construe what distribution and marketing efforts can be implied in a contract where the terms have not been specified. Such considerations indicate that some exclusive dealings and vertical restraints should be allowed to restrict competition if an industry widely adopts such a commercial "standard."

The court in *Joyce Beverages of New York, Inc. v. Royal Crown Cola Co.* held that a best efforts clause precluded a distributor from handling two competitive soft drink lines, in part because "[t]he entire pattern of industry practice since the beginning of the soft drink industry has been for distributors to distribute only one cola."[67] The court also treated a contract for exclusive distribution as akin to a franchise.[68]

In *Joyce*, the court held that exclusive dealing increased competition because it compelled each bottler to promote a single brand with its best efforts.[69] The court, anticipating Judge Posner's approach in *Roland*

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do so. The licensee was thus faced with a serious problem of continuing its unsuccessful and unprofitable operations with the Krantz window and going broke or securing a different, and commercially superior, [unpatented] window which would be competitive and could be sold at a profit. It [permissibly] chose the latter course.").

[66] *Id.* at 784.

[67] 555 F. Supp. 271, 277 (S.D.N.Y. 1983).

[68] Licenses or contracts for exclusive distribution should be treated as akin to franchises where the distributor has expressly undertaken the obligation to act as agent for the manufacturer. Courts have held that where royalties are based on sales volume and the licensee promises to "use its best efforts to promote and maintain a high volume of sales," it may not systematically sacrifice volume for the sake of profit, even to extricate itself from a losing position. Bloor v. Falstaff Brewing Corp*.*, 601 F.2d 609 (2d Cir. 1979). Here, Bloor had sold its brewery to Falstaff, providing that Bloor would get a percentage of sale proceeds and that Falstaff would use its best efforts to promote Falstaff's former product and maintain a high volume of sales*.* *Id.* at 610. Though "[the best efforts clause] did not require Falstaff to spend itself into bankruptcy to promote the sales of [plaintiff's] products, it did prevent the application to them of [Falstaff's] philosophy of emphasizing profit *uber alles* without fair consideration of the effect on [plaintiff's] volume," especially where it was selling its own brands in competition with the licensed brand. *Id.* at 614.

But compare AMF, Inc. v. Bandag, Inc., 1980-1 Trade Cas. (CCH) ¶ 63,080, at ¶¶ 77,378, 77,380 (D. Md. 1979) (enjoining a franchised tire re-treader from threatening its franchisees with termination to prevent them from installing competitive tire retreading systems, and holding that best efforts clauses did not justify franchisor's conduct). Franchises are exceptions to the preceding discussions because the distributor has typically contracted for the benefits and obligations of promoting a single line; he has become a kind of agent for the manufacturer. The aforementioned threat of termination in exclusive dealing arrangements, however, where manufacturers overtly or covertly restrict the practices of distributors, is central to antitrust policy, but tends to be ignored under the rule of reason.

[69] *Joyce*, 555 F. Supp. at 275.

Machinery Co. v. Dresser Industries,[70] somehow concluded that if Joyce distributed two colas, the two products would not actually compete.[71] The court seems here to confuse the best efforts obligations analysis under exclusive licenses with the anti-competitive effects analysis of exclusive dealing. Joyce should not necessarily be required to promote one brand; why should the manufacturer rather than the distributor/seller always control promotions, prices and competition? Joyce may have a contractual obligation under its exclusive license to use its best efforts to promote one soft drink, but this obligation does not then demand that such arrangements will always have pro-competitive effects under exclusive dealing antitrust considerations.

In summary, imprecision regarding obligations under exclusive licenses parallel, and therefore tell us much about many shortcomings in exclusive dealing antitrust law. In most cases, exclusive dealing manufacturers should not be entitled to obligate their distributors to develop the manufacturer's products or refrain from competition absolutely. Furthermore, a distributor should not endure other vertical restraints unless both parties have agreed upon consideration in return (*i.e.*, as they would need to do for an exclusive license).[72] The rule of reason standard therein allows an excess of vertical restraints to escape scrutiny. In an unpublished opinion, the Ninth Circuit in *Maxim* decided a case involving an interference with best efforts obligations to distribute integrated circuits under an exclusive dealing agreement, along with antitrust and unfair business practice allegations.[73] Maxim argued that ADI's successful attempts to convince distributors to terminate their distribution contracts with Maxim and sign exclusive dealing arrangements with ADI specifically violated the first two sections of the Sherman Act.[74] The court dismissed the antitrust violations, finding no evidence of anticompetitive effects from the exclusive arrangement because the contracts could be terminated at any time. The court did remand an issue regarding potential tortious interference claims.[75]

In the tortuous interference claims, Maxim alleged that ADI had induced another distributor to breach its contractual obligation to use its "best efforts to promote the use and sale" of Maxim's circuits.[76] Relevant to this discussion, the court admitted,

[70] Roland Machinery Co. v. Dresser Indus. Inc., 749 F.2d 380, 395 (7th Cir. 1984).

[71] *See Joyce*, 555 F. Supp. at 279.

[72] Of course, conversely, in many licensing cases, distributors have paid some form of royalty as well, which obligates both sides of the transaction. In exclusive dealings, most manufacturers seem to have few obligations to their distributors beyond those imposed from self-interest.

[73] Maxim Integrated Prods., Inc. v. Analog Devices, Inc., No. 94-16744, 1996 U.S. App. LEXIS 5785 at *2 (9th Cir. Mar. 15, 1996).

[74] *Id.*

[75] *Id.* at *10-12.

[76] *Id.* at *10.

> There is no firm rule as to what constitutes best efforts. Some cases have suggested that a best efforts clause required the promisor to employ the same efforts he 'has employed in other contracts where the adequacy of his efforts have not been questioned.' (citation omitted) Other cases merely require the promisor not undertake activity that is 'so manifestly harmful . . . as to justify the court in saying there was a breach of the covenant.'(citation omitted) . . . Essentially what we have here is a dispute over the interpretation of 'best efforts.' The question is properly one for the jury.[77]

Establishing the right to compete or to restrict competition under vertical restraints is not a matter that may be left to a jury, but must be established as a matter of antitrust law.

The *Maxim* court dismissed the unfair business practice claims because Maxim had based its claims on allegations that ADI violated Section 5 of the FTC Act. Because the equivalent Sherman Act allegations did not survive summary judgment, "after *Beltone*, an examination of exclusive dealing arrangements under § 5 of the FTC Act is essentially the same as the Sherman Act's 'unreasonable restraint' analysis.'"[78] The unreasonable restraint here involves the typical exclusive dealing antitrust issue: the distributor's obligation to use best efforts to promote a single line, or be terminated. The court acknowledges that the best efforts issue is not defined by a firm rule.[79] Instead, the issue is given to the jury as question of fact, while also subjected to a rule of reason analysis as a question of law.[80] The lack of clarity regarding the definition of best efforts obligations, and their relation to the antitrust violation, reflects a systemic uncertainty regarding permissible vertical restraints in exclusive dealings where no straightforward intellectual property protections would otherwise exist.

Palmer v. BRG of Georgia, Inc. illustrates a court's ability to prevent exclusive dealing arrangements from securing de facto intellectual property protections where they are not warranted.[81] In *Palmer*, Harcourt Brace Jovanovich ("HBJ") granted BRG an exclusive license to use its Bar/Bri name and materials in Georgia, stipulating that HBJ would not compete with BRG in Georgia and that BRG would not compete with HBJ outside Georgia.[82] Immediately after the agreement, the price of BRG's courses increased 150 percent.[83] Here, horizontal competitors colluded to allocate territories and minimize competition, which entails a per se violation of § 1 of the Sherman

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[77] *Id.*

[78] *Id*. at *12.

[79] *Id*. at *10.

[80] *Id*.

[81] 498 U.S. 46, 47 (1990).

[82] *Id*.

[83] *Id.*

Act.[84] If this distribution or promotion deal had been structured vertically as an exclusive license, it should have been legal. As a vertical exclusive license, the deal would involve a contract in which both sides bargain for rights and obligations, and in which one party intentionally acts as a kind of agent for the other. However, if the deal were imposed as part of a vertical exclusive dealing arrangement, it could generate similar harms as those occurring in arrangements between competitors. Courts would likely assess no injury in that event: under a rule of reason, the court would probably find insufficient market share, insufficient foreclosure, and legitimate business justification.[85]

Taken together, the above licensing cases suggest that patent and other intellectual property protections may offer a key to determining antitrust liability in exclusive dealings: where such protections do not naturally arise, and have not been bargained for by the parties involved, antitrust scrutiny should be applied with greater force. Otherwise, manufacturers can use exclusive dealings to obtain patent-like protection — *i.e.*, the right to compel best efforts to market a product, and the right to restrict competition — without the use of a patent or the consideration usually required to generate an exclusive license. Though some exclusive dealing arrangements might initially seem to give rise only to anticompetitive effects outside a monopoly context, the exclusivity of some such arrangements, and their cumulative effect on markets, bring them into the antitrust arena.

IV. SINGLED OUT: DEALING WITH EXCLUSIVITY IN *BELTONE*

In exclusive dealings, the manufacturer often has not made any of the bargains found under exclusive patent licenses. The manufacturer has no automatic or implied patent-like expectation that a seller or distributor will use

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[84] *Id.* at 49.

[85] Ticketmaster, as discussed later, entered into an agreement with BASS similar to BRG's, whereby BASS was allowed to use Ticketmaster's computer systems and trade name in Northern California, but agreed not to compete with Ticketmaster in Southern California. Kevin Stern, *The High Cost of Convenience: Antitrust Law Violations in the Computerized Ticketing Services Industry*, 16 HASTINGS COMM. & ENT. L.J. 349, 355-56 (1994). Such exclusive dealing arrangements should fall under antitrust analysis rather than just unfair business practice scrutiny because these arrangements often enable parties to achieve intellectual property-like protections for their dealings where they have no actual patents, copyrights, or possibly even "best efforts" contractual requirements, and vertically achieve the same effects by dealing with putative non-competitors.

BRG's form of non-compete agreement is presumptively valid in the context of exclusive patent licenses where such a restraint "does not appear to be an agreement between competitors not to compete, for absent the licensed know-how, (the licensee) is in no position to compete." A & E Plastik Pak Co., Inc., v. Monsanto Co., 396 F.2d 710, 714-15 (9th Cir. 1968). Yet such protections are often achieved through the use of exclusive dealing arrangements, where distributors are compelled to use best efforts to market a product, not to sell competing products, or to become de facto agents of the manufacturer. Otherwise, the distributors face termination.

best efforts to develop, or in some cases even market, the product. Moreover, the manufacturer is usually not dependent on the seller to the same degree. A problem arises because many exclusive dealing cases, particularly those involving the distribution of a single-line of products, duplicate the uncertainty of best efforts analyses, with the potential for more injurious results. Some exclusive dealing arrangements do have pro-competitive effects (*e.g.*, allowing manufacturers to market and promote goods cost-effectively, prevent free-riding, and develop brand loyalties). Other exclusive dealing arrangements, as reflected by cases discussed below, enervate competition when many manufacturers impose vertical restraints on existing distributors in parallel fashion or individually foreclose market shares. These anticompetitive results cannot be mitigated under the rule of reason.

In re Beltone Electronics Corp. represents a problematic exclusive dealing decision because many of the issues raised by exclusive licenses recur in separate contexts. This case shows many anticompetitive behaviors that have been allowed under exclusive licenses because intellectual property protections were involved or because the licenses had been accepted as desirable by both parties. These licenses were allowed because the FTC failed to consider them except through the limited lens of the economic rule of reason.[86]

Beltone, a national hearing-aid manufacturer, entered into a protracted series of contracts that required its dealers exclusively to sell Beltone hearing aids, and prohibited dealers from selling to certain customers.[87] To varying degrees over more than thirty years, Beltone promoted a general policy of pressuring dealers to exclude competitive brands and maintain territorial exclusivity, and refused to sell parts or schematics to companies repairing the hearing aids.[88] Dealers signed agreements to use their "best efforts" to promote and increase the sales of Beltone. In this regard, Beltone structured its dealerships as if they were exclusive licenses. As intimated by the discussion, such an arrangement gives patent-like monopoly protections to the anticompetitive effects of exclusive dealings.[89] Through these combined vertical restraints, Beltone could not only monitor the conduct of its dealers, but, in combination with other manufacturers in parallel situations, foreclose each segment of its market from competition.

By industry custom, "most [hearing-aid] dealers carry one major line of hearing aids, and, to different degrees, supplement the line with one or two other brands."[90] Before 1957, Beltone's authorized dealers were required to sell Beltone hearing aids exclusively in exclusive territories.[91] As a result, Beltone allegedly hindered interbrand competition with other manufacturers;

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[86] *In re Beltone Electronics Corp.*, 100 F.T.C. 68, 197-204 (1982).

[87] *Id*. at 176-77, 182-86.

[88] *Id.* at 185-86.

[89] *Id.* at 182-85.

[90] *Id.* at 90.

[91] *Id.* at 119, 209-18.

intrabrand competition among Beltone dealers; and interbrand competition between Beltone and other dealers.[92] This foreclosure deprived consumers of fair and impartial recommendations.[93] The FTC determined that Beltone's pattern of restrictions "has the tendency and capacity to restrict a dealer's freedom to act in the best interest of the hearing impaired public."[94] For more than twenty years, Beltone instructed its Home Office Field Executives ("HOFEs") to promote aggressively the idea of single-line merchandising, but, pursuant to a consent decree, putatively agreed not to require exclusivity subsequently.[95] The court stated,

> Whenever termination of a dealer is contemplated the HOFE's are instructed that grounds for such termination can never be the fact that the dealer is selling competing brands of hearing aids, or selling hearing aids outside his area of primary marketing responsibility. Permissible grounds for termination are 'inadequate market penetration' after all attempts have been made to try to help the dealer through suggested programs such as hiring additional manpower and obtaining additional leads.[96]

Aside from their necessarily fact-specific contexts, such consent decrees produce inconsistent and sometimes inequitable results. Many cases ultimately suggest that manufacturers can legally terminate dealerships unilaterally for a failure to deal exclusively. Since monopoly power is rarely found in manufacturers who enter exclusive dealing arrangements, it is extremely easy to set artificially high market expectation levels as an excuse to terminate dealerships for anticompetitive reasons.

Not surprisingly, many dealers felt that Beltone, despite the consent decree, continued to use the threat of termination "as a club to force dealers to adhere to its single-line policy,"[97] stating "potentials were set above the level of what average Beltone dealers were achieving."[98] These high levels made it possible for Beltone to claim that a dealer was terminated for not reaching the potential level rather than for refusing its exclusivity requirements (though such subterfuge might not even technically have been necessary).[99] Typically, Beltone terminated 15 to 20 out of 370 dealers per year, but the deterrent and cumulative effect could have been notably more significant than the roughly 5 percent annual termination rate.[100] In addition to terminating dealers who sold other brands, Beltone also terminated dealers who sold new Beltone hearing aids to ex-Beltone dealers, which effectively created a Beltone embargo or

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[92] *Id.* at 76-79.

[93] *Id*. at 137.

[94] *Id.*

[95] *Id*. at 91-97.

[96] *Id.* at 94.

[97] *Id*. at 106.

[98] *Id*. at 105.

[99] *Id.* at 105-06.

[100] *Id.* at 92.

series of boycotts.[101] Yet courts tend to treat such terminations as part of a manufacturer's unilateral right to refuse dealing rather than as part of a consistent pattern of anticompetitive conduct.

The FTC failed to consider the anticompetitive ripple effect of such terminations. For every dealer actually terminated, one can assume that many more dealers complied in response to the threat. In this sense, such "negative evidence" may be more telling than the statistics regarding actual dealer terminations. On termination, the dealer loses its "business investment," and must "cease all use of the Beltone name," including the use of its listed telephone number, without transfer.[102] Dealers thus have a great incentive to avoid the risk of termination, especially when courts will not intervene under a rule of reason. Even where contracts lasted only a few years at a time, they still impose prohibitive costs on dealers, who increasingly would need to surrender the entire investment in their existing business in order to switch to another manufacturer. Manufacturers in Beltone's position are thus able to achieve monopoly like anti-competitive effects with minimal expense by letting the mere threat of termination — one that needs to be carried through only minimally — compel distributors to comply with their restraints: this is an example of a different kind of "manufactured consent." Yet the anticompetitive effects of such practices are not held to outweigh their benefits under the rule of reason analysis. (And in practice, even the rule of reason analysis is itself rarely applied when the FTC/courts have already concluded that most vertical restraints are per se legal where no traditionally defined monopoly power is evident). Further, the FTC does not consider the lingering effect such long-term policies might have had on Beltone's market share as of the late 1970s, which is the period involved in one of the more recent cases.

Companies quickly learn to couch their anticompetitive practices in ways more amenable to legal standards. As in most similar suits, Beltone's HOFEs openly acknowledged that their policy remained to terminate for failure to deal exclusively, but tempered this with the admission, "if you have a dealer who in the company's mind is disloyal, if there are other grounds for termination such as poor sales performance, that dealer would be more apt to be terminated if he were handling a competitive hearing aid than had he not been. . . ."[103] Dealers testified that the termination policy led them to sell fewer competitive brands because of the need to focus exclusively on Beltone, reach the required potential levels (*i.e.*, quotas), and avoid termination.[104]

While many of the dealers Beltone called as witnesses claimed they had independently chosen to carry Beltone exclusively, this choice does not represent a legitimate contractual agreement or voluntary meeting of minds. Instead, this choice shows the inevitable consequence of Beltone's carrot and

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[101] *Id.* at 131-32.

[102] *Id.* at 133, 135.

[103] *Id.* at 131 (statement of an ex-HOFE).

[104] *Id.* at 105, 116-17.

stick incentives (Beltone, *e.g.*, would extend special rewards to single-line dealers).[105] Beltone was so successful at enforcing its single-line policy that "other manufacturer's representatives did not usually bother to call on Beltone dealers."[106] Beltone dealers generally refused to sell Beltone products to non-Beltone dealers, typically for fear of being terminated, and refused to supply unauthorized dealers with promotional materials or price lists.[107] Beltone's practices gave it a variety of means to coerce its distributors into anticompetitive conduct. The FTC noted, "the possibility that Beltone could deliver a dealer's customers' names to another dealer gives Beltone power over the dealer's practices with respect to brand sold, the geographic area sold in, and the customers sold to . . . ."[108]

While mentioning that the case arose under Section 5 of the Federal Trade Commission Act — under which conduct not heretofore illegal could still be proscribed, and whose purpose is to protect competition without strict consideration of the rigid mold of cases brought under the more specific antitrust statutes — the FTC held that the violations did not sufficiently harm competition to impose liability.[109] The coercive threats of termination were held unreasonable, but Beltone's overall conduct was held legal. The Commission does not clarify how these two holdings may be reconciled, as Beltone's conduct is predicated on these unreasonable threats.[110]

The ALJ determined that Beltone, the largest hearing aid manufacturer, accounted for approximately 7 to 8 percent of the nation's dealers and about 16 to 21 percent of the nation's sales from 1972 to 1977, and that, despite its foreclosures, entry barriers remained low.[111] Under the rule of reason, the Commissioner stressed the potential free rider threat to Beltone's practice of providing dealers with leads to customers.[112] The Commissioner ultimately found that while Beltone had an understanding with its distributors that amounted to exclusive dealing, thereby enforcing territorial and customer restraints, Beltone did not violate the antitrust laws.[113]

While finding "numerous accounts of dealers who were pressured by HOFE's and threatened with termination for non-Beltone sales," the Commissioner stated that few actual terminations were recorded.[114] Under this notion, the very success of Beltone's threats, which caused dealers to conform after they understood the consequences of resisting, serves to insulate Beltone

[105] *Id.* at 118.
[106] *Id.* at 116.
[107] *Id.* at 122-23, 126-27.
[108] *Id.* at 129.
[109] *Id.* at 139-40.
[110] *Id.* at 140-42, 178-79, 218.
[111] *Id.* at 182-84.
[112] *Id.* at 189.
[113] *Id.* at 176-77.
[114] *Id.* at 191.

from liability. While finding at nearly every turn that Beltone's restrictions amounted to territorial exclusivity and coercive exclusive dealing, the Commissioner downplays the effects of that conduct. In balancing benefits and harms, the Commissioner accepted the theoretical advantages of vertical restraints — citing, *e.g.*, distributional efficiencies under *Continental T.V. v. GTE-Sylvania, Inc.*,[115] — and discounted the actual negative effects. For example, the court does not seem to consider fully that elderly consumers, who tend not to comparison shop for hearing aids, were offered no comparative evaluations and were unable to comparison shop.[116] The elderly consumers encountered 300 percent mark-ups (a supracompetitive percentage that one might associate with a product protected by patent monopoly), and had reduced access to repairs and service.[117] Under *GTE Sylvania*, the FTC concluded that vertical restraints can serve pro-competitive ends, and that interbrand considerations are paramount.[118] While refusing to apply a "least restrictive alternative" test to Beltone's restraints, and admitting that it would not find Beltone's foreclosure clearly lawful under *Standard Oil* or *Tampa Electric*, the Commissioner declined to find that Beltone's restraints "facilitated interdependent behavior or enhanced respondent's market power."[119] Because the Commission found that no monopoly power existed, Beltone could use these practices in legally "anticompetitive" ways. While comporting with antitrust law and doctrine, such an initial bar makes limited sense when applied to exclusive dealings and some vertical restraints. Manufacturers like Beltone have monopoly power *within* their distribution chain, and each manufacturer's distribution chain in the industry is isolated (or foreclosed) from the next. To assume a lack of monopoly power in such instances is not only immaterial but inevitable, and this assumption prevents the court from assessing the actual effects of the restraints.

Furthermore, the possible justifications for Beltone's policy came with little actual proof. Beltone claimed that its method of distributing customer leads required it to guard against free riding; Beltone also hoped to curtail the

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[115] Continental T.V. v. GTE Sylvania, 433 U.S. 36 (1977). Abstract benefits typically attributed to exclusive dealings are that exclusive dealings may assure supply, reduce expenses and negotiating costs, and stabilize the market. Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 334 (1960). Consideration of the abstract potential harms of exclusive dealing arrangements would be equally appropriate, which may

> create or extend market power of a supplier or the purchaser party to the exclusive-dealing arrangement, and may thus restrain horizontal competition. Exclusive dealing can have adverse economic consequences by allowing one supplier of goods or services unreasonably to deprive other suppliers of a market for their goods, or by allowing one buyer of goods unreasonably to deprive other buyers of a needed source of supply.

Jefferson Parish Hosp. v. Hyde, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring).

[116] *In re Beltone,* 100 F.T.C. at 193-94.

[117] *Id.* at 71-73.

[118] *See GTE Sylvania,* 433 U.S. at 49-52.

[119] *In re Beltone*, 100 F.T.C. at 217-18.

possibility that its joint advertising subsidies could be used to promote other brands.[120] The ALJ concluded that the restraints on balance had no such actual pro-competitive justifications, eliminated intrabrand competition, and foreclosed a substantial portion of the market to competitors.[121] While the ALJ concluded that Beltone's coercive policies created de facto illegal exclusive dealing, the FTC effectively decided not to weigh the case on the merits of the antitrust complaints but deal with the policies on "procedural" grounds. While in theory, "a plaintiff may rebut an asserted business justification by demonstrating either that the justification does not legitimately promote competition or that the justification is pretextual," this rebuttal appears inapplicable to exclusive dealings.[122]

The concurrence downplays the effects of Beltone's conduct. While indicating that the record contains an imperfect demonstration of interbrand price effects, the concurring Commissioner complained that less than optimal interbrand competition in the market occurs because consumers do not comparison shop, and also claims that hearing aid prices are not set in consideration of competitor's prices.[123] This perspective reifies the very anticompetitive effects the antitrust injury creates. The record does not contain information on comparison-shopping precisely because Beltone's exclusive dealing prevents comparison-shopping. Though acknowledging that the apparently competitive conditions of the hearing aid market may be explained by factors working in spite of Beltone's conduct,[124] the Commissioner never considers that such an approach exonerates Beltone. That "exoneration" occurs in examining the overall state of the market despite Beltone's conduct, rather than the direct effect of Beltone's practices. The Commissioner's opinion does not make clear how a market with limited ability to comparison-shop can ever provide an adequately competitive environment. This form of analysis allows many exclusive dealing arrangements with pernicious effects to escape antitrust liability. Instead of distinguishing between direct and indirect purchasers, courts would do better to consider direct market effects, even when local, and indirectly maintained market conditions together.

The concurring Commissioner realized the lack of sense in the Commission's conclusion that Beltone's restraints reasonably served its market objectives:

> Applying a rule of reason test in this fashion to weigh Beltone's justifications . . . puts too much faith in Beltone's assertions and leads, I fear, inevitably to a real possibility that complaint counsel will always lose. . . .

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[120] *Id.* at 188-90.

[121] *Id.* at 185-87.

[122] Image Tech. Servs., Inc., v. Eastman Kodak, 125 F.3d 1195, 1212 (9th Cir. 1997).

[123] *In re Beltone*, 100 F.T.C. at 223 (Bailey, Comm'r., concurring).

[124] *Id*. at 225.

> . . . .
>
> . . . [It] might sanitize a system of airtight intrabrand restraints in all interbrand competitive situations as long as some sort of highly predictable free rider danger or other excuse is thrown up . . . .[125]

Commissioner Bailey concurred with the result primarily on theoretical grounds, claiming the restraints were necessary to Beltone's goals,[126] despite agreeing with the determination of the Administrative Law Judge that the record showed "no practical free rider threat, whether real or theoretical."[127] While manufacturers may need to restrict price cutters who free ride on a distributor paying for promotion, no such problem seemed to exist in *Beltone*.[128] In fact, such sanitization is the result of applying a rule of reason to exclusive dealings: vertical restraints are generally exonerated.

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[125] *Id.* Such a claim seems the understated obverse of Judge Posner's acknowledgment, *infra*, that his analysis may "exaggerate the smoothness" with which the market operates. *Roland Machinery Co. v. Dresser Indus*., 749 F.2d 380, 394 (7th Cir. 1984).

[126] *In re Beltone*, 100 F.T.C. at 225.

[127] *Id.*

[128] *See Roland*, 749 F.2d at 380. In *Roland*, Dresser terminated its construction equipment dealership with Roland after Dresser discovered that Roland had entered into a similar distribution agreement with a Japanese competitor. While the typical industry practice was not to carry competing lines, Roland argued that the practical effect of the termination was to implement a secret or implied term of the contract requiring exclusive dealing (regardless, the consequence of such termination or threat of termination would be to enforce a policy that dealers never carry competing lines). *Id.* at 382.

Judge Posner's opinion encapsulates several of the tautologies sometimes present in economic antitrust analysis. For Judge Posner, the "mere announcement of [Dresser's termination policy], and the carrying it out of it by canceling Roland and any other non-complying dealer, would not establish an agreement," and hence would not violate Section 3 of the Sherman Act. *Id.* at 393. First, such a unilateral act may remain anticompetitive. Second, almost by definition, a party injured by an antitrust violation will not have entered into an agreement to be harmed. An unwilling party, or a party to a contract unconscionable for its antitrust effects, may not, as Judge Posner acknowledges, have entered into any meeting of minds. *Id.* at 392.

As the dissent elaborates, in a comment that applies to virtually all such cases, "Dresser offered no persuasive evidence of its reason for terminating Roland's distributorship other than an implied exclusive dealing condition." Id. at 403 (Swygert, J., dissenting). For courts to uphold such a reason as valid is almost to create a per se rule that any dealer who refuses to carry an exclusive line can be terminated at will. Such terminations would seem to violate the premises of United States v. Colgate & Co., 250 U.S. 300 (1919): that combinations exist wherever a manufacturer contracts with a second distributor to compete with a first who refused to follow suggested prices, and that threats of termination are illegal when used to obtain the acquiescence of retailers to price fixing. See Albrecht v. Herald Co., 390 U.S. 145, 149-50 (1968); United States v. Parke, Davis & Co., 362 U.S. 29, 45-47 (1960). While *State Oil Co. v. Khan*, 522 U.S. 3, 22 (1997), overruled *Albrecht*'s application of a per se rule to vertical price fixing — and vertical non-price restrictions had already been subjected to a rule of reason under *Continental T.V., v. GTE-Sylvania, Inc.*, The predictable litany of identical justifications for terminations surfacing in exclusive dealing cases bears out Commissioner Bailey's fear. While a company may not legally fix suggested prices by coercion, a distributor likewise should not be permitted to achieve the same results through the threat of termination or exclusive dealing. For example, in *United States v. Parke, Davis & Co.*, the Court admonished,

> Parke Davis did not content itself with announcing its policy regarding retail prices and following this with a simple refusal to have business relations with any retailers who disregarded this policy. Instead Parke Davis used the refusal to deal with the wholesalers in order to elicit their willingness to deny Parke Davis products to retailers and thereby help gain the retailers' adherence to its suggested minimum retail prices.[129]

Many exclusive dealing arrangements that are enforced by threat of termination implicitly help set vertical prices. These arrangements escape scrutiny as being created surreptitiously or as a secondary effect.

The notion that threats of termination do not amount to unfair methods of competition reflects an ongoing failure of economic theory to address antitrust injury; this notion resurfaced in the *Ticketmaster* cases. Because "one of the objectives of the Sherman Act was to preserve, for social rather than economic reasons, a high degree of independence, multiplicity, and variety in the economic system,"[130] such decisions create significant loopholes in limiting anticompetitive practices. The ultimate social, as well as economic, factors to consider in exclusive dealing cases are the effects of the dealing arrangements on individual competitors and individual consumers. While larger monopolies tend to create visible effects, exclusive dealings, in particular those on a smaller scale, tend to escape scrutiny. Few commentators rigorously consider such social factors or cumulative economic effects. According to Kurt Strasser, for example, "[T]he goal of giving buyers uncoerced choices is a legitimate objective, [but] it is not a useful analytical concept for deciding distributor exclusivity cases."[131] Strasser's assertion presumably rests on the fact that exclusive dealing is not illegal per se. But a consideration of this lack of consumer options should foreground any analysis of exclusive dealings.

Traditional combinations were not present in either *Ticketmaster* or *Beltone*, yet both companies managed to fix prices through anticompetitive forms of exclusive dealing with impunity. Despite *State Oil*'s rejection of the per se rule against price fixing,[132] price fixing should remain illegal "if a seller

433 U.S. 36 (1977) — the restraints imposed by *Dresser*, and by *Beltone* and *Ticketmaster*, should not survive that rule of reason analysis.

[129] 362 U.S. at 45.

[130] *Albrecht,* 390 U.S. at 158 (Harlan, J., dissenting).

[131] Kurt A. Strasser, *Antitrust Policy in Agreements for Distributor Exclusivity*, 16 CONN. L. REV. 969, 992 (1984).

[132] *State Oil*, 522 U.S. at 18 (expressly overruling the *Albrecht* holding regarding price fixing).

suggests prices and secures compliance by means in addition to the 'mere announcement of his policy and the simple refusal to deal.'"[133] The "exclusive" loophole allows an individual distributor to fix prices vertically over an exclusive dealer rather than horizontally (*i.e.*, in combination with other competitors). The effect may become more insidious because the effect is hidden and apparently sanctioned.

V. AN IMPROPER VENUE: CONTESTING YOUR TICKET UNDER THE TICKETMASTER CASES

The next form of exclusive dealing this Article addresses involves a near inversion of the pattern in *Beltone*. That is, a ticket distributor with the equivalent of monopoly power may restrain each of its suppliers and foreclose the market through a series of exclusive deals that combine to generate antitrust violations. Ticketmaster was accused in a series of cases, outlined below, of violating Section 1 of the Sherman Act.[134] The allegations contested Ticketmaster's actions under the Sherman Act by asserting that Ticketmaster colluded with concert venues and promoters to fix the price of tickets and used monopoly power to exclude competition. Ticketmaster structures its exclusive deals with venues by insisting that it remain the sole vendor of tickets and that it retain full control of service charges. In exchange, Ticketmaster typically guarantees venues a percentage of revenue or an up-front lump sum. In part, Ticketmaster's distribution practices escape antitrust infringement because

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[133] *Parke, Davis*, 362 U.S. at 44. Under the rule of reason, vertical restraints are often permissible even where one dealer terminates all other competing intrabrand dealers. In *White Motor Co. v. United States*, Justice Brennan, concurring, posited that

'The short of it is that a relatively small manufacturer, competing with large manufacturers, thought it advantageous to retain its largest dealer in Baltimore, and could not do so without agreeing to drop its other Baltimore dealers. To penalize the small manufacturer for competing in this way not only fails to promote the policy of the antitrust laws but defeats it.' (citation omitted). The doctrine of the *Packard* and *Schwing* cases is, however, of necessarily limited scope; not only were the manufacturers involved much smaller than the 'big three' of the automobile industry against whom they competed, but both had experienced declines in their respective market shares. And the exclusive franchises involved in those cases apparently were not accompanied by territorial limitations.

372 U.S. 253, 270 (1963) (Brennan, J., concurring). However, by the time of Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 726-27 (1988), the Court maintained that any manufacturer's termination is to be evaluated under the rule of reason, and concluded in that case that "There has been no showing . . . that an agreement between a manufacturer and a dealer to terminate a 'price cutter,' without a further agreement on the price or price levels to be charged by the remaining dealer, almost always tends to restrict competition and reduce output." But as Justice Stevens elaborates at length in his dissent, "the restraint that results when one or more dealers threaten to boycott a manufacturer unless it terminates its relationship with a price-cutting retailer is more properly viewed as a 'horizontal restraint.'" *Id.* at 736.

[134] 15 U.S.C. § 1 (2000).

alternate (usually box office) access to tickets, however minimal and inconvenient, remains possible. This outcome stems from a variety of loopholes. It also foreshadows the inconsistencies in *United States v. Microsoft Corp.*, in which the Court affirmed that "because Microsoft has not 'completely excluded Netscape' from reaching any potential user by some means of distribution, however ineffective . . . [its] agreements do not violate § 1."[135] Such a theoretical justification ignores the practical reality that if buyers wish to purchase tickets to Ticketmaster venues electronically or by phone, they have no choice but to purchase them from Ticketmaster for whatever service fees it demands.

Some commentators, including Matthew Finkelstein and Colleen Lagan, argue that Ticketmaster's exclusive dealing arrangements violate the spirit of the antitrust laws:

> Ticketmaster's exclusive agreements with venues generally extend for three to five years. . . . [and] violate Section 1 of the Sherman Act if Ticketmaster colluded with venues to exclude rivals, and qualify as conduct evidencing a violation of Section 2 of the Sherman Act if, on balance, their anticompetitive effect outweighs Ticketmaster's legitimate business reasons for exclusive dealing.[136]

According to these commentators, however, Ticketmaster's conduct appears to be unilateral; even if venues prefer to receive guaranteed up-front payments, they are not necessarily acting collusively, and may opt for Ticketmaster because it is the only ticket service providing these guaranteed payments.[137] Their suppositions, however, ignore the same flaw that many courts ignore: some agreements — or scenarios without explicit agreements — may violate Section 2 if they act as de facto restraints, even though they do not absolutely restrict competition on their face.[138] By capturing all vertical markets under exclusive deals, Ticketmaster forecloses not just interbrand competition, but a particular kind of intrabrand competition as well. At the interbrand level,

[135] United States v. Microsoft Corp., 253 F.3d 34, 70 (D.C. Cir. 2001).

[136] Matthew K. Finkelstein & Colleen Lagan, Note, *Not For You; Only for Ticketmaster: Do Ticketmaster's Exclusive Agreements with Convert Venues Violate Federal Antitrust Law?*, 10 ST. JOHN'S J. LEGAL COMMENT. 403, 417-18 (1995).

[137] *Id.* at 414.

[138] *See e.g.*, Matthew Ryan, *Jamming Ticketmaster: Defining The Relevant Market in the Pearl Jam-Ticketmaster Controversy*, 4 COMMLAW CONSPECTUS 119, 124 (1996). Ryan concludes that Ticketmaster decided to forego revenue to protect its market share; threatened and effectively boycotted the band Pearl Jam (which had sued Ticketmaster for alleged antitrust violations); held exclusive contracts for 68% of the total number of seats in venues holding over 50,000 people; and may hold exclusive contracts with approximately two thirds of the country's major venues. *Id.* at 121-26. Though examination of this occurrence is beyond the scope of this essay, it also seems probable that Ticketmaster was able to acquire Ticketron — a "failing firm" and thus putatively exempt from close scrutiny by the Department of Justice under the Hart-Scott-Rodino Antitrust Improvements Act — through predatory practices. *See* Finkelstein & Lagan, *supra* note 136, at 430 n.39.

competitors entering the market would, as Beltone's competitors did, replicate the same vertical monopoly structures. On one plane of the intrabrand level, venues do not compete with each other because Ticketmaster controls the service charges for tickets. In this configuration, Ticketmaster and any other ticket companies could compete for venues but not for ticket buyers. Ticketmaster's form of exclusive dealing arrangements can thus again achieve the patent-like protections and obligations more typically associated with exclusive licenses. In this case, however, Ticketmaster's "licensors" (*i.e.*, the venues) agree that only Ticketmaster can "develop" their product, which produces the paradoxical effect that the licensor venues must promote Ticketmaster exclusively.

Ticketmaster has escaped liability because courts have offered two reasons for refusing to find that Ticketmaster's exclusive dealings violated antitrust law: first, the arrangement occurs between vertical non-competitors, and 2) direct purchasers are not injured. In *Sands v. Ticketmaster-New York, Inc.*, the court held that a violation of New York's Donnelly Act[139] could only occur "when the conspirators are in competition with one another or with the plaintiff."[140] Ticketmaster and the venues are agent and principal, not competitors. Thus, the court would not find collusion that restrains trade in Ticketmaster's exclusive dealing contracts. But a conspiracy, or at least the effect of one, can still exist even if the venues are silent partners, unwitting participants, or simply along for the ride.[141] As in *Beltone*, the court pre-defines the impossibility of an antitrust violation without directly addressing the anticompetitive effect of Ticketmaster's practices.

In *In re Ticketmaster Corp. Antitrust Litigation*,[142] the fact that plaintiffs paid more for tickets because of Ticketmaster's monopoly power was insufficient for the court to sustain an antitrust injury. As the plaintiffs were not "the target of the anticompetitive activity," they had no standing to sue.[143] In bizarre fashion, the court concluded that "if there is an injured party who is

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[139] N.Y. GEN. BUS. § 340 (governing restraint of trade).

[140] Sands v. Ticketmaster-New York, Inc., 207 A.D.2d 687, 688 (N.Y.A.D. 1 Dept. 1994).

[141] *See* Penelope Preovolos, *Antitrust Pitfalls in Licensing Part 2*, PRACTICING LAW INSTITUTE: PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES (2001). Such an acknowledgment comports with the general credo that "exclusive licenses of intellectual property . . . raise antitrust issues only where the licensor and licensee(s) are actual or potential competitors." *Id.* at 732. However, this approach allows for anticompetitive practices to flourish in monopolistic exclusive dealing arrangements that involve only "vertical" or apparently non-competing parties.

In *Reynolds v. Ticketmaster Corp.*, the court remanded to state court because no purely federal claims resided in the complaints, but also noted that plaintiffs had not pleaded a monopoly cause of action, only used "monopoly-like facts to bolster their California causes of action." 1993-1 Trade Cases (CCH) ¶ 70,098 n.9 (N.D. Cal. 1992).

[142] *In re* Ticketmaster Corp. Antitrust Litig., 929 F. Supp. 1272 (E.D. Mo. 1996).

[143] *Id*. at 1277.

the target of Ticketmaster's alleged antitrust activity, it is the venue—the 'consumer' of Ticketmaster's ticket handling services. . . . who would suffer any direct loss if there is supracompetitive pricing in the fee contracts due to Ticketmaster's alleged monopoly power."[144] Under this tautology, if the "consumers" allow a monopolist to charge a particular price, the price must be competitive; otherwise, the monopolist could not get away with the pricing actions. In reality, Ticketmaster's monopoly prices will cause few concert or club attendees — the actual consumers at issue — entirely to forego purchasing these tickets, because they do not have a pragmatic alternative means to attend shows at Ticketmaster-controlled venues. At the same time, they will likely attend significantly fewer events than if tickets were available through competitive outlets. Ticketmaster's practices thereby injure consumers far more than they injure venues. Ticketmaster, though technically a distributor, takes on the role of a manufacturer, and imposes vertical restraints on its multiple vendors as if the vendors were in Ticketmaster's vertical chain.

The Missouri court internalized Ticketmaster's own hype, but externalized the costs to the public. Ticketmaster's president, Fred Rosen, asserted that because demand is high, fans will be willing to pay a premium service charge for concert tickets; supply and demand is thus used to rationalize anticompetitive behavior.[145] Proponents of Rosen's view presume that if a market bears a price, it is not supracompetitive, and imagine that Ticketmaster's practices could only injure venues and not consumers. Yet venues receive significant kickbacks for using Ticketmaster exclusively and pay no part of the ticket surcharge (and in fact usually receive part of it); and Ticketmaster, at least at the time at issue, notoriously did not specify what portion of the total price represented the added service charge.[146] While courts

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[144] *Id.* Such reasoning anticipates the fallacy in *Campos*, discussed *infra*, which held that "Since the price of the ticket (that is, the actual purchase price plus the service fees) is obviously a price that the market will bear, a venue free from Ticketmaster's domination of ticket distribution would be able to charge that price itself. . . ." Campos v. Ticketmaster Corp., 140 F.3d 1166, 1171 (8th Cir. 1998).

[145] *See* Eric Boehlert, *Ticketmaster Is Under Fire: How David Became the Industry's Goliath*, BILLBOARD, July 9, 1994, at 1, 97.

[146] *See, e.g.*, Chuck Phillips, *Breaking Down Those $4 to $7.75 Service Charges*, L.A. TIMES, June 9, 1992, at F1. For Wanda Rogers, Ticketmaster's pay back schemes do not represent forms of superior efficiency. Instead, the schemes create artificial barriers to entry since other distributors cannot afford to match Ticketmaster's guarantees, or find ways to get around their three-to-five-year exclusive contracts. Wanda Jane Rogers, *Beyond Economic Theory: A Model for Analyzing the Antitrust Implications of Exclusive Dealing Arrangements*, 45 DUKE L.J. 1009, 1043-45 (1996). Continuing the analogy to exclusive licenses shows that Ticketmaster creates a series of exclusive dealings that effectuate the anticompetitive effects of exclusive licenses, which it has not necessarily bargained for and which escape traditional antitrust scrutiny. As the court notes in *Ralph C. Wilson Indus. v. Chronicle Broad. Co.*, a "pattern of acquisitions of arbitrary and overly broad exclusive

do need to limit the chain of liability and are justifiably cautious in awarding treble damages, the Missouri court's approach may prevent all plaintiffs in exclusive dealing cases from proving injury or sustaining antitrust suits on standing grounds.[147]

In *Campos v. Ticketmaster Corp.*,[148] the complaint alleged that Ticketmaster had "exclusive contracts ensur[ing] that Ticketmaster will have the right to handle the vast majority of ticket sales at almost every large scale popular music concert in the United States, regardless of whether or not Ticketmaster has exclusive contracts with the particular venues . . . ."[149] As in several other Ticketmaster cases, the *Campos* plaintiffs alleged that Ticketmaster and the venues conspired to boycott performers who refused to allow the venue to use Ticketmaster (thus further mimicking the kind of coercive practices found in *Beltone* and *Roland*).[150]

The *Campos* court, however, affirmed the District Court's decision that plaintiffs lacked standing to sue under section 4 of the Clayton Act because they were "indirect purchasers within the meaning of *Illinois Brick Co. v. Illinois*."[151] Under the Eight Circuit's analysis, indirect purchasers buy the product from a party in the vertical chain other than the party suspected of the antitrust violation.[152] In that light, Ticketmaster immunizes itself through its own collusive efforts along vertical lines. Aside from being flawed in theory, the court's reasoning is improperly applied:

> An indirect purchaser is one who bears some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and another, independent purchaser. . . . The indirect

licenses may constitute predatory conduct sufficient to establish a violation of Section 2 [of the Sherman Act]." 1982-83 Trade Cases (CCH) ¶ 65,012 (N.D. Cal. 1982). Though not involving exclusive licenses, Ticketmaster's exclusive deals, where acquired to maintain a monopolistic market share, may establish a similar pattern and a violation of Section 2.

[147] Under *Illinois Brick Co. v. Illinois*, the rationale for limiting recovery to direct purchasers includes the difficulty of assessing the effects of overcharges and a desire to limit double recoveries by multiple purchasers. 431 U.S. 720, 737-38 (1977). In *Ticketmaster*, consumers should be the only group able to recover damages. The costs of surcharges may be determined by comparing and adjusting for non-Ticketmaster service charges and box office service charges.

[148] *Campos*, 140 F.3d at 1168-70.

[149] *Id*.

[150] Jill Kingsbury, *The Indirect Purchaser Doctrine: Antecedent Transaction? Campos v. Ticketmaster Corp.,* 65 MO. L. REV. 473, 474 (2000).

[151] *Campos*, 140 F.3d at 1168. According to some courts, Ticketmaster could not be held liable under the Clayton Act because it provides a service rather than a commodity. *See* Rogers, *supra* note 9, at 1048 n.80. *See, e.g.*, Kennedy Theater Ticket Serv. v. Ticketron, 342 F. Supp. 922, 927 (E.D. Pa. 1972).

[152] *Campos*, 140 F.3d at 1169.

purchaser, in turn, pays some portion of the monopoly overcharge only because the previous purchaser was unable to avoid the overcharge.[153]

This mode of analysis is unsuitable to the Ticketmaster scenario, which does not involve a "previous purchaser" — prior to the consumer — who paid any overcharge. Instead, the opposite occurs: another supplier profits from the overcharge. Here, if the pleadings are accepted as true, the plaintiffs bear the entire cost of the overcharge, and the defendants split the collusive take.

Under the policy rationale for the indirect purchaser doctrine, plaintiffs are, as they alleged, the direct purchasers of the tickets.[154] The *Campos* court's misplaced reliance on the notion that "ticketing service companies do not compete directly for consumers' business" recapitulates the exact antitrust violation it purportedly examines. The structures that the plaintiffs protest are the precise impediment preventing ticket service companies from competing for consumers directly.[155] This inversion recapitulates the *Beltone* court's (improper) validation of the vertical restraint that itself insured that consumers could not comparison shop. The court conflates a current anticompetitive market practice with a desirable one; ticketing services do not compete for consumers because they are able to maintain exclusive contracts with venues that result in monopolistic conditions, not because such is a desirable state of competition for their market.

The *Campos* court emphasized that a plaintiff's inability to obtain competitively priced tickets was at base the result "of the antecedent ability of the venues to do so." [156] This notion misconceives the market: venues are not foreclosed from buying tickets to their own events from other sources (as a result of their own contracts); ticket buyers are. As the dissent notes, however, "both the direct and the indirect purchaser will usually suffer . . . . the plaintiffs in this appeal (and other similarly situated 'indirect purchasers') are the only parties actually injured by Ticketmaster's alleged illegal price-fixing, if any."[157]

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[153] *Id.* at 1169-70. Under the limitations imposed by the indirect purchaser doctrine, plaintiffs are barred from seeking damages, but have standing to pursue injunctive relief under § 16 of the Clayton Act. *Id.* at 1171. *See also* Heather McShain, Note, *Still Alive: Antitrust Injury Remains a Part of the Standing Inquiry Under Sections 4 and 16 of the Clayton Act Despite Three Recent Appellate Court Decisions*, 75 NOTRE DAME L. REV. 761, 777 (1999) ("[T]he most confusing aspect of [*Campos*] stems from the intermingling of two different maintenance requirements: the indirect purchaser doctrine and antitrust injury.").

[154] *Campos*, 140 F.3d at 1171.

[155] *Id.*

[156] *Id*. The Court noted plaintiff's failure to join the venues as defendants in the case, but it would have been nearly impossible to join hundreds of venues. *Id.* at 1171 n.4.

[157] *Id.* at 1174-75 (Arnold, J., dissenting). Even here, however, the dissent defines the market imprecisely, by holding too unequivocally that "the monopoly product at issue in this case is ticket distribution services, not tickets." *Id.* at 1174.

Before *Illinois Brick Co. v. Illinois*,[158] the Supreme Court had "rejected the argument that monopolists could avoid liability to direct purchasers [because] those direct purchasers had 'passed on' any and all of their markups to indirect purchasers."[159] The applicability of a pre-*Illinois Brick* holding in this area is questionable: "the Supreme Court refused to carve out an exception to the direct purchaser rule for situations [such as in *Ticketmaster*] where the full cost of the product (and hence one hundred percent of any surcharge) had been passed on to the indirect purchaser."[160] As Kingsbury points out, however, "when the product at issue is a 'service,' the concept of an indirect purchaser is meaningless . . . . it is difficult to envision a scenario where an indirect purchaser of a 'service' is even possible."[161] Kingsbury further elucidates, "from the perspective of the consumer, it is irrelevant which firm in the exclusive arrangement is a buyer and which is a seller. . . . [the indirect purchaser] rule works to contravene the underlying purposes of the federal antitrust laws, [and] provides an incentive to industries to enter into exclusive dealing arrangements [to shield] themselves from" treble damages antitrust liability.[162]

Further, as far as antitrust policy is concerned, whether the alleged monopolist has conspired with a competitor or someone other than the plaintiff would not matter to the purchaser and should not determine resolution of the antitrust issue.[163] Ticketmaster can collude with non-competitors to maintain its position because it has rarely encountered significant rivals for extended periods (*i.e.*, Ticketmaster's tactics worked so well it did not need to, and in fact could not, collude with actual competitors because it could not find them, and had to make do with vertical restraints instead).[164] Given the way Ticketmaster structures its vertical monopolies, anticompetitive collusion only makes sense with vertical non-competitors.[165]

Some commentators claim that antitrust results, which can be confined to horizontal restraints, may "follow from agreements solely between purchasers and suppliers and, second. . . are best analyzed by asking whether they

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[158] 431 U.S. 720 (1977).

[159] *Campos*, 140 F.3d at 1174-75.

[160] Kingsbury, *supra* note 150, at 483 (referring to *Kansas v. UtiliCorp United Inc.*, 497 U.S. 199 (1990)).

[161] *Id.* at 489.

[162] *Id.* at 492.

[163] *Id*. *See also, e.g.,* Ticket Fee Disclosure Act of 1994, H.R. 4995, 103rd Cong. § 2(4) (1994) (suggesting that members of Congress also did not believe a distinction should be made between direct and indirect purchasers of tickets, or the seller venue and reseller ticket service, i.e. that it does not matter whether vendors are conspiring to monopolize ticket sales directly or indirectly).

[164] *See, e.g.,* Campos v. Ticketmaster Corp., 140 F.3d 1166, 1168-69 (8th Cir. 1998) (accusing Ticketmaster of anticompetitive practices); *In re Ticketmaster*, 929 F. Supp. at 1276 (accusing Ticketmaster of anticompetitive practices).

[165] *Id.*

unjustifiably confer on one party the power to raise price by raising its rivals' costs."[166] As Ticketmaster does not have effective rivals,[167] it may therefore raise costs solely through its agreements with its suppliers.

Finally, at least one analysis of *Tampa* poses problems for the bifurcation of sellers and buyers in the Ticketmaster cases.[168] This seller-buyer dichotomy mirrors the direct and indirect purchaser distinction. Under *Tampa*, it is extremely difficult to prove the antitrust violation of a buyer, which is partly the role Ticketmaster occupies. Thus,

> The coal company in *Tampa Electric* was a seller, not a buyer, so its claim does not fit the model for analyzing foreclosure restraints, which focuses on the *seller's* abuse of market power. Even if the buyer (Tampa Electric) had been victimized by altered market conditions, it could not establish an unlawful exclusive dealing arrangement because the supply contract was not the product of exploitative exercise of market power by the seller . . . . [for a] contract which appears to have been fairly negotiated by knowledgeable parties on each side.[169]

The distinctive characteristics of Ticketmaster's exclusive dealings, in which it is both the seller and the buyer of goods and services, should not allow it to escape antitrust liability by switching 'hats' to avoid liability under one category.

More courts need to address *actual*, and not *theoretical*, market conditions, and also define the particular markets that emerge as a direct result of the vertical restraints that foreclose markets. For Ticketmaster customers, the relevant market should not be defined in national, regional or even local contexts, but for each self-contained show at each venue. This market definition is necessary because a ticket buyer can not substitute a ticket to one show for another. The market cross-elasticity in demand and foreclosure should be defined from the *buyer's* perspective, not the seller's. The holding in *Twin City Sports Services v. Finley*[170] can be appropriately applied to the Ticketmaster court's situation. In *Twin City*, the court noted that the market should be narrowly defined as "the relevant market to those concession franchises for which reasonable substitutability in demand among national concessionaires can be found."[171] The court then concluded that "[t]he artificially large relevant market proffered . . . by Sportservice lacks the above

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[166] Thomas G. Krattenmaker & Steven Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209, 231 (1986).

[167] *See, e.g., Campos*, 140 F.3d at 1168-69; *In re Ticketmaster*, 929 F. Supp. at 1276.

[168] LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 436 (2000) (commenting on *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961)).

[169] *Id*. (emphasis in original).

[170] 676 F.2d 1291 (9th Cir. 1981).

[171] *Twin City*, 676 F.2d at 1300.

characteristics."[172] Notably, Ticketmaster proffers an overly broad definition of the market, including "tickets for museums, amusement parts, state parks, and county fairs" to demonstrate it does not have monopoly market share.[173] However, a ticket to see a monster truck demolition show is not interchangeable with a ticket to see Metallica (though some would disagree) — in fact, a ticket to any other band, or even the same band at a different venue on a different night, is not equivalent. What is potentially fungible is the ticket service used to distribute the unique ticket, a consideration courts rarely factor into their analyses — a consideration that would entail serious consequences for the results of the antitrust analysis.[174]

Commentators Finkelstein and Lagan argue, "Ticketmaster's relevant market is the right to sell tickets for venues throughout the nation."[175] This argument misses the mark and the market: those national venues are not equivalent for the consumer, and do not offer substitutability. Other commentators have defined the relevant market more appropriately:

> Analysis of market foreclosure in the computerized ticket distribution industry is complicated by the infrastructure of the industry. 'When an exclusive dealing arrangement involves an end-user, the foreclosure effect is straightforward; sales to the end-user are foreclosed. . . . When distributors are involved, however, this kind of one-to-one analysis is not reliable.' Therefore, the most accurate determination of foreclosure will result from an examination of the extent to which competing ticketing service companies are foreclosed from reaching the ultimate market—the consumers of the product. Any meaningful analysis thus must contemplate the obstacles that Ticketmaster has created in keeping actual and potential competitors from reaching the ultimate consumer.[176]

The actual negative effects of Ticketmaster's foreclosure include the virtual monopoly of ticket distribution at a majority of entertainment venues and exorbitant service charges, as much as 25 - 40 percent of the ticket price.[177]

Pro-competitive effects may exist for vertical restraints — *e.g.*, where "an exclusive dealing arrangement makes the distributor not just a conduit, but a devoted advocate . . . because its own success will be tied to the brand's success"[178] — such justifications do not resonate for Ticketmaster's distribution practices. Ticketmaster, as well as its venues, will not be induced

[172] *Id*.

[173] Finkelstein & Lagan, *supra* note 136, at 417-18.

[174] *See, e.g.*, Campos v. Ticketmaster Corp., 140 F.3d 1166, 1168-69 (8th Cir. 1998); *In re* Ticketmaster Corp. Antitrust Litig., 929 F. Supp. 1272, 1276 (E.D. Mo. 1996).

[175] Finkelstein & Lagan, *supra* note 136, at 419.

[176] Rogers, *supra* note 9, at 1040 (footnotes omitted).

[177] *See* Scott Mervis, *TicketMaster Swallows Local Choice Seat*, PITTSBURGH POST-GAZETTE, Nov. 1, 1994, at C1, *available at* http://www.lexis.com.

[178] Richard M. Steur, *Exclusive Dealings After Jefferson Parish*, 54 ANTITRUST L.J. 1229, 1235 (1985).

to invest in additional personnel or facilities as a result of the exclusive dealing arrangements. Ticketmaster is not promoting a particular venue or style of venue, but individual events that typically have little to do with one another. Ticketmaster supplies tickets to venues that generate their own demand.[179] Ticketmaster does not foster or maximize sales for a particular venue, as demonstrated by the fact that Ticketmaster sells tickets for the same band at multiple venues, even venues within the same area.[180] Unless it occasionally favors certain venues that accept a lower kick back percentage of its service charges, Ticketmaster only promotes the maximum sale of all tickets in its system;[181] its exclusive arrangements do not make it a more devoted advocate or a more efficient supplier. Indeed, Ticketmaster may have a greater incentive to sell tickets to maximize its supra-competitive profit, but this isolated consideration could be used to justify all monopoly practices.[182]

The specific anticompetitive effects of Ticketmaster's exclusive dealings are seen in comparable cases.[183] In *Twin City Sports Services v. Finley*, a case involving the franchise and concession services markets at major sports facilities, the court stated, "Sportservice's consistent pattern of obtaining contracts of unreasonable duration . . . [and] the predatory use of its financial strength . . . artificially created barriers to effective entry into and competition within the market."[184] The court's insight in *Twin City*, distinguishing legal exclusive franchises from anticompetitive monopoly contracts, applies to the exclusive dealing cases discussed above:

> While the fast food franchisee competes in an open market among many operators (including intra-brand competitors) who sell items for which there exists recognized cross-elasticity of demand . . . Sportservice's operations, by comparison, constitute monopolies for the sale of a limited menu of items of its choosing to a closed, contained market with no sales competition from others (either inter- or intra-brand).[185]

The limited number of tickets available for a venue, and the other parallels between Sportservice's and Ticketmaster's distribution practices, make the

[179] *See Campos*, 140 F.3d at 1168-69 (plaintiff's complaint states that Ticketmaster controls various venues throughout the United States). *See also* Finkelstein & Lagan, *supra* note 136, 417-18 (listing a range of venues for which Ticketmaster will sell tickets).

[180] *Campos*, 140 F.3d at 1168-69 (plaintiff's complaint accuses Ticketmaster of boycotting the band Pearl Jam and of having tight control of musical performances at major venues throughout the United States).

[181] *See id*. *See also* Finkelstein & Lagan, *supra* note 136, 417-18.

[182] *See Campos*, 140 F.3d at 1169 (alleging that Ticketmaster's practices caused ticket buyers to pay supracompetitive prices); *In re Ticketmaster*, 929 F. Supp. at 1274, 1276.

[183] *Compare Twin City Sports Services v. Finley*, 676 F.2d 1291, 1301 (9th Cir. 1981) *with Campos*, 140 F.3d at 1166 (alleging that Ticketmaster engaged in anticompetitive practices) *and In re Ticketmaster*, 929 F. Supp. 1272.

[184] *Twin City*, 676 F.2d at 1301.

[185] *Id.* at 1306.

Ticketmaster decisions inconsistent with the antitrust analysis in *Twin City*. Further, as in *Twin City*, Ticketmaster would be hard pressed to provide justifications that its restraints foster competition, create pro-competitive effects, incorporate the least restrictive means available, or are fairly necessary under the circumstances.[186]

The *Twin City* court observed, regarding a fact pattern analogous to *Ticketmaster,* that "in many instances the long-term contracts were procured by Sportservice's cash payment loans or other financial inducements, and that without these financial inducements, the contract terms are comparatively short."[187] The court, quoting the district court, stated that "'the most blatant indication of Sportservice's intention is its repeated use of lavish loans, advances, and cash payments specifically to secure long-term contracts and contract extensions.'"[188] The sports teams, like the Ticketmaster venues, receive "enormous sums of money by way of advances" in exchange for dealing exclusively over long terms with the monopolist.[189]

The *Twin City* assessment aptly captures the spirit of Justice Brennan's dissent in *Illinois Brick*, where Brennan noted that most suppliers will pass the overcharge or the costs of large advances to injured consumers.[190] Likewise, Ticketmaster externalizes the cost of their payback scheme so that consumers subsidize Ticketmaster's monopoly, and plaintiffs are left without standing to recover for the antitrust injury.[191]

Other courts successfully avoided a mechanical application of the rule of reason and static definitions of market share, and refused to let a strict, literal reading of standing and injury prerequisites contravene the policy rationales of antitrust jurisprudence. In *International Wood Processors v. European Banking Co.*, the defendants terminated International's sublicense in order to exclude International as a competitor in the market for wood-drying machines.[192] Though defendants began their conspiracy before receiving their patent rights, they were not held immune from antitrust scrutiny simply "because [they] conspired only with non-competitors."[193] Instead, the court affirmed that it "must consider who the parties were who conspired to eliminate plaintiff as a competitor even before [defendant] received its patent rights."[194] The court held that

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[186] *Id*. at 1304-05. *See also Campos*, 140 F.3d at 1168-69; *In re Ticketmaster*, 929 F. Supp. at 1276.

[187] *Twin City*, 676 F.2d at 1308.

[188] *Id*. at 1309 (quoting Excerpt of Record at 81).

[189] *Id*. at 1308. *See also Campos*, 140 F.3d at 1168-69 (alleging Ticketmaster participated in anticompetitive practices); *In re Ticketmaster*, 929 F. Supp. at 1276.

[190] *Illinois Brick Co*. *v. Illinois*, 431 U.S. 720, 749 (1977).

[191] *Id*.

[192] Int'l Wood Processors v. European Banking Co., 792 F.2d 416, 419 (4th Cir. 1986).

[193] *Id*. at 426.

[194] *Id*.

> [t]he right to exclude does not permit the patent holder, who has acquired his rights under the patent as part of a conspiracy to eliminate outstanding licenses, to terminate such licenses in agreement with a former exclusive licensor, a former licensee, financial advisors, and other individuals with interests in the patent. Such an agreement . . . constitutes an anticompetitive extension of the patent monopoly by an agreement to eliminate competition unlawful under the antitrust laws.[195]

While the facts of the above case are distinguishable from those of the *Ticketmaster* cases, the court's reasoning is still relevant to them, especially since similar artificial restraints can create pseudo-patent protections in other cases even where no patent is at issue. Ticketmaster's agreements represent anticompetitive extensions of its exclusive dealing monopoly. This policy forces the termination or preclusion of all rivals, a practice that achieves unwarranted patent-like protection as well as eliminates competition.[196] For example, Ticketmaster uses its exclusive dealings to situate itself as if it were European Banking, refusing to deal with any venue that will not give it this patent-like protection; venues are effectively left without an alternative ticket distributor.[197] Thus, by refusing to deal, a manufacturer in these scenarios can coerce a distributor who resists supracompetitive terms or is not exclusively promoting its product, and obtain a variety of artificial monopolies.

According to most courts' definition, Ticketmaster, at the apex of its food chain, has no substantive competitors: certainly most consumers have no alternate vendor from which to buy tickets for any particular event they wish to attend (only, in some cases, for tickets to other events). Thus, because Ticketmaster may never have had any competitors, it has putatively not conspired horizontally or vertically.[198] As one commentator states, "[e]ven during the heyday of their rivalry, Ticketmaster and Ticketron never competed on the basis of lower service charges because they both bid for and received exclusive contracts. Therefore, if true competition is to exist . . . venues and promoters would probably have to be enjoined from entering into any sort of long-term exclusive dealing arrangements with Ticketmaster or BASS."[199] Ticket distributors in this system never compete for the business of ticket buyers — their real consumers — only for venue contracts, implementing anti-

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[195] *Id*. at 429.

[196] *See* Campos v. Ticketmaster Corp., 140 F.3d 1166, 1168-69 (8th Cir. 1998); *In re Ticketmaster*, 929 F. Supp. at 1276.

[197] *Compare Campos*, 140 F.3d at 1168-69 *with Int'l Wood Processors*, 792 F.2d at 416.

[198] *See Campos*, 140 F.3d at 1168-69, 1171 (alleging Ticketmaster participated in anticompetitive practices, and finding that plaintiffs were barred from suing for damages that arose under antitrust violations).

[199] Kevin E. Stern, Note, *The High Cost of Convenience: Antitrust Law Violations in the Computerized Ticketing Services Industry*, 16 HASTINGS COMM & ENT. L.J. 349, 383 (arguing that § 3 of the Clayton Act and § 16727 of the Cartwright Act should apply to the sale of ticketing services).

competitive system that permanently bypasses all antitrust scrutiny. Imagine the analogous problems that would be encountered if a consumer could purchase airline tickets for specific flights from only one exclusive distribution agency, at a 25 percent or greater mark up, or with a minimal markup from the airline's own single "box office" open only a few hours a week. This structure is the near universal scenario for event tickets. While most venues sell a small, comparatively insignificant, number of tickets from their own box offices, "the relevant market is defined more plausibly as *off-site* ticket sales in major metropolitan areas. Ticket distribution companies such as Ticketmaster are in direct competition not with the venue's box office ticket sales, but with other distribution companies of its kind."[200] That is to say, Ticketmaster is in competition with no one, because no other distributors are able to sell any tickets that Ticketmaster sells.

In this respect, Ticketmaster may have deliberately developed the equivalent of an essential facility or bottleneck, as it possesses an exclusive computer ticketing service that precludes competition.[201] Though astute analysts, Finkelstein and Lagan err when addressing the inapplicability of the essential facilities doctrine to the case at hand, suggesting that "[w]hile Ticketmaster could remove the denial of access by removing the exclusivity clause, Ticketmaster cannot unilaterally provide access to facilities which it does not own."[202] While Ticketmaster may not control a traditional essential facility, its dealings with venues prevent others from gaining access to distribution.[203] The fact that Ticketmaster cannot collude unilaterally does not exonerate or transform its conduct. Ticketmaster may not force venues to use other distributors, but the record demonstrates that Ticketmaster can force venues *not* to use them.[204]

Ticketmaster's computer ticketing system bears some of the characteristics of an essential facility. Under Ticketmaster's exclusive contracts, (1) competitors cannot sell tickets without access to the Ticketmaster database, which enables Ticketmaster to eliminate competition; (2) competitors cannot duplicate the Ticketmaster system; and (3) in theory, competitors would be capable of using the ticketing system without interfering with Ticketmaster's business. Even if the service Ticketmaster provides is generic, each ticket, especially for the majority of shows with assigned seating, is unique and incapable of substitution. Without acceptable business justification,

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[200] Rogers, *supra* note 9, at 1034-35 (emphasis in original).

[201] Finkelstein & Lagan, *supra* note 136, at 421-22 (describing "essential facilities," or bottlenecks under the "bottleneck doctrine," as violating § 2 of the Sherman Act because the plaintiff is refused access to a vital facility controlled by the monopolist). *See also* M.C.I. Communications Corp. v. AT&T, 708 F.2d 1081, 1133 (6th Cir. 1983) (defining the four-part test to establish an "essential facility" claim).

[202] Finkelstein & Lagan, *supra* note 136, at 424.

[203] *See Campos*, 140 F.3d at 1168-69; *In re Ticketmaster*, 929 F. Supp. at 1276.

[204] *See Campos*, 140 F.3d at 1168-69; *In re Ticketmaster*, 929 F. Supp. at 1276.

Ticketmaster's reservation/ ticketing system is expressly designed to be unique and incapable of duplication without unreasonable expense.[205] Thus, Ticketmaster represents a form of essential facility insofar as it creates insurmountable artificial entry barriers to the market.

While Finkselstein and Lagan conclude that no essential facility is involved,[206] analogous cases suggest otherwise.[207] The Ticketmaster courts seem to misconstrue the market so thoroughly that one wonders whether theoretical models have overtaken practical assessments of actual vertical restraints. In this sense, the rule of reason allows Ticketmaster to transform a fungible product (*i.e.*, the service of selling tickets) into a patent-like, "untranslatable" monopoly product. While the unique tickets Ticketmaster sells may not be duplicated by competitors, Ticketmaster's purchasing system could be made available to others or integrated with other systems. Alternatively, a court could order Ticketmaster to reduce the number of venues for which it distributes exclusively. This condition alone, however, might not lower ticket prices. Ticketmaster would not need to lower its service fees just because other services have lowered theirs for entirely incommensurate events: for any particular show, consumers would still not have a choice between competitors, but a choice between paying an artificially supracompetitive fee and hearing nothing.

VI. CONCLUSION

These cases suggest that courts should use some form of "intermediate scrutiny" to balance a per se rule and the current rule of reason standard. Such analysis may attend to the ways vertical restraints impose vertical monopolies with cumulative horizontal effects. Some commentators suggest that the rule of reason itself is insupportable with regard to entire classes of exclusive dealing: "by concentrating on the apparent vertical form and overlooking the possible horizontal competitive substance of the exclusive distributor cases, many courts have failed to consider the application of the per se rule in situations in which its use may indeed have been appropriate."[208] On the other

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[205] *See, e.g.*, *M.C.I. Communications Corp.*, 708 F. 2d at 1081 (suggesting a communications network can be an essential facility).

[206] Finkelstein & Lagan, *supra* note 136, at 422-24.

[207] *See* Fishman v. Estate of Wirtz, 807 F.2d 520, 539-40 (7th Cir. 1986) (finding that Chicago Stadium is an essential facility because it is unique and cannot be duplicated without unreasonable expense). *But see In re* Air Passenger Computer Reservations Sys. Antitrust Litig., 694 F. Supp. 1443, 1453-55 (C.D. Cal. 1988) (holding that leases for an airline's computerized reservation systems may restrain trade and raise the cost of entering the market, but do not foreclose competition or threaten monopolization). That holding, which also draws on Judge Posner's primarily economic analysis, is not apposite where the "leases" entirely prevent other reservation or ticketing systems from entering the market.

[208] Thomas A. Piraino, Jr., *Distributor Terminations Pursuant to Conspiracies Among a Supplier and Complaining Distributors: A Suggested Antitrust Analysis*, 67 CORNELL L. REV. 297, 309 (1982).

hand, a blanket per se rule would prohibit conduct that has a legitimate business justification. Courts would do better to weigh the actual effects of restraints from the record, balance costs and benefits, and employ a least restrictive means test on vertical restraints. This test would allow manufacturers to guard against free riding, but would offer safeguards for the competitive options of distributors and the choices of consumers. Granted, some predictability might be lost by moving away from formal categories under the rule of reason and requiring courts to assess the aggregate horizontal effects of vertical restraints. However, courts currently make such judgments by abnegation. That is, courts assume (incorrectly) that a company lacking market power will not produce structural antitrust violations even when its practices are aggregated across its market.

Courts need a distinct standard to judge monopoly power for many vertical restraints. For example, if a manufacturer imposed an anticompetitive vertical restraint in combination with a widespread practice, courts might consider the cumulative effect of the industry practice — *e.g.*, the series vertical restraints/exclusive dealings whose very independence from one another helps preclude competition — as a potential *negative*, rather than as a *justification* for the practice. Admittedly, manufacturers may face a kind of "prisoner's dilemma" in imposing restraints, trying to second guess what restraints competitors will impose.[209] If a sufficient percentage of these parallel anticompetitive restraints accrued either within a distribution chain or industry-wide, all restraints would become impermissible. Such a rule, however, may encourage self-restraint in the imposition of anticompetitive restrictions, and allow for a "mixed economy" of restraints that effectively balances the pro- and anti-competitive effects generated by vertical restraints.

[209] For a definition of a prisoner's dilemma, where one is faced with two equally irrational choices based on an inability to anticipate the move of another player in the same game, *see, e.g.*, *In re* Oracle Securities Litig., 136 F.R.D. 639, 646 (N.D.Cal. 1991); RICHARD POWERS, PRISONER'S DILEMMA (1989).