
**THE MONOPOLY GAME:
HAS THE SEVENTH CIRCUIT GIVEN PATENT
HOLDERS A GET OUT OF JAIL FREE CARD?**

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INTRODUCTION

It is not uncommon for a court to find itself at the crossroads of two conflicting, yet equally controlling laws.¹ In instances such as this, how does a court determine which set of laws should dictate the outcome of the case? The intersection of the patent and antitrust laws, while not a new conflict, has recently attracted a significant amount of

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¹ Even just within the realm of intellectual property, there are a plethora of conflicts. For example, in *Oliveira v. Frito-Lay, Inc.*, the Second Circuit grappled with whether Astrud Gilberto could enjoin Frito-Lay under the trademark laws from using her signature song, “The Girl From Ipanema,” in one of its commercials. 251 F.3d 56 (2d Cir. 2001). The court held that because songs are traditionally protected under the copyright laws, this created a conflict with her present action. While neither set of laws discussed what to do in such a situation, the court looked to the underlying purpose of each Act. The court noted that copyrights can only be granted for a limited amount of time, and once that time expires, the work goes into the public domain. Because trademarks offer perpetual rights, it would go directly against this principle of the Copyright Act to give Gilberto trademark protection.

attention.² This conflict arose from the traditional view that intellectual property rights regimes, which seek to stimulate innovation by granting limited monopolies, and the antitrust laws, which seek to protect competition by eliminating monopolies, were inherently contradictory.³ Today, however, most commentators view the antitrust and intellectual property laws as complementary, both seeking to protect consumers, yet, admittedly by taking different paths.⁴ Unfortunately unifying patent policy with antitrust principles in order to effectuate this mantra has been difficult, in major part, because neither the Patent Act, nor the Sherman Act sets distinct boundaries or defines in any meaningful way how these two bodies of law are to be reconciled.⁵ What's more, when faced with alleged antitrust violations by holders of intellectual property rights, the approaches taken by the various Federal Circuit courts run the gamut.⁶

In a case of first impression in the United States Court of Appeals for the Seventh Circuit, *Schor v. Abbot Laboratories*⁷ revealed this inherent tension between the antitrust and patent laws. There, the court was charged with determining what, if any, liability a patent holder is subject to under the antitrust laws. Specifically, the court asked whether a patent holder may be liable for using its patent to exclude others from, or to affect competition in, more than one relevant market. In the end, the approach taken by the Seventh Circuit harms the ultimate beneficiary of both sets of laws—the consumer—by severely curtailing the antitrust laws at the hands of the patent laws.

Part I of this Comment outlines the basic principles underlying both the patent and the antitrust laws and describes the inherent tension between them. Part II discusses relevant cases in the antitrust-

² See, e.g., David A. Balto & Andrew M. Wolman, *Intellectual Property and Antitrust: General Principles*, 43 IDEA 395, 396 (2003).

³ *Id.*

⁴ *Id.*

⁵ The notable exceptions are §§ 271(c) and (d) of the Patent Act. 35 U.S.C. § 271(c), (d) (2002).

⁶ See discussion in Part II, *infra*.

⁷ *Schor v. Abbott Labs* (“*Abbott II*”), 457 F. 3d 608 (7th Cir. 2006).

intellectual property conflict, including a recent Supreme Court case, *Eastman Kodak, Co. v. Image Technical Services, Inc.*⁸ and interpretations of the Court's holding by the First, Ninth and Federal Circuits. These cases will shed light on the path that the Seventh Circuit should have taken. Part III delves into the facts of *Schor v. Abbott Labs*, a case that specifically dealt with the scope of intellectual property rights in light of an alleged antitrust violation. Lastly, Part IV contends that by following the lead of the Federal Circuit in rejecting the Ninth Circuit's approach, the Seventh Circuit severely undercut competition by elevating the patent laws over the antitrust laws. Part IV further contends that the Seventh Circuit should have followed the approach of the Ninth Circuit, which properly addresses the policy concerns underlying each set of laws by raising a rebuttable presumption that a patent holder has a valid business justification in exercising its statutory-granted proprietary rights.

I. INTRODUCTION TO THE PATENT AND ANTITRUST LAWS AND THE TENSION THAT EXISTS BETWEEN THEM

A. *Underlying Principles of the Antitrust Laws*

In their simplest form, antitrust laws are intended to ensure that markets remain competitive. This is desirable in that freely operating competitive markets result in the most efficient allocation of a nation's resources and bring consumers the widest variety of choices, the highest quality goods and services, and the lowest possible prices.⁹ While the traditional rationale underlying antitrust laws had both social and economic justifications, more recently, the promotion of consumer welfare has become the sole guiding principle.¹⁰

To effectuate this goal of protecting consumer welfare, the antitrust laws proscribe certain types of anticompetitive conduct. Not

⁸ 504 U.S. 451 (1992).

⁹ HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 3 (1994).

¹⁰ Balto & Wolman, *supra* note 2, at 398.

all conduct that hurts competitors is anticompetitive or a violation of the antitrust laws.¹¹ Thus, the main focus of the antitrust inquiry is to determine whether the conduct under scrutiny is likely to harm consumers, for example by raising prices or restricting production of goods or services.¹² Two of the main statutory provisions defining conduct that is unlawful under the antitrust laws are §§ 1 and 2 of the Sherman Antitrust Act.¹³ Generally, § 1 of the Sherman Act proscribes agreements among competitors that interfere with the ability of firms to enter markets, introduce new products or price their products.¹⁴ On the other hand, § 2, which will be the main focus of this Comment, has the prohibition of monopolization as its prime concern.¹⁵

In *United States v. Grinnell Corp.*,¹⁶ the Supreme Court of the United States defined monopolization under § 2 of the Sherman Act as having two main elements: (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic

¹¹ Schor v. Abbott Labs (“*Abbott I*”), 378 F. Supp. 2d 850, 856 (N.D. Ill. 2005) (citing *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993)).

¹² Balto & Wolman, *supra* note 2, at 403.

¹³ 15 U.S.C. §§ 1, 2 (2000). This Comment will mainly focus on the Sherman Act, in particular § 2, but § 7 of the Clayton Act (proscribing stock and asset acquisitions), § 3 of the Clayton Act (prohibiting certain forms of tying and exclusive dealing) and § 5 of the Federal Trade Commission Act (prohibiting unfair methods of competition) also come into play in the intellectual property context.

¹⁴ Section 1 of the Sherman Act provides: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”

¹⁵ Section 2 of the Sherman Act provides: “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishment, in the discretion of the court.”

¹⁶ *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).

accident.¹⁷ The language of §2 makes it clear that a monopoly itself is not illegal. Rather, the offense of monopolization contemplates some sort of anticompetitive or exclusionary conduct. Thus, the limitations of §2 take into account that it cannot merely forbid all monopolies, such as those that result from natural economic conditions, vigorous competition on the merits, or technological innovation, but only those that were acquired or maintained by means other than normal competition.¹⁸

The first element of a § 2 monopolization claim requires a court to define the relevant antitrust market.¹⁹ Without a definition of the relevant market, “there is no way to measure a defendant's ability to lessen or destroy competition.”²⁰ Yet, because defining the relevant market requires “a factual inquiry into the ‘commercial realities’ faced by consumers” it is not an easy undertaking.²¹ In defining the relevant market, the courts have examined whether consumers using one product will easily shift to another product, should, for example, the price of the product they are using increase or the price of other comparable products decrease.

Once the court has established the parameters within which the alleged monopolist’s power can be evaluated, it must determine what

¹⁷ 15 U.S.C. § 2; *Grinnell*, 384 U.S. at 570-71. A claim of attempted monopoly under § 2 requires: (a) the intent to monopolize a relevant market, (b) predatory conduct in pursuit of that end, (c) a dangerous probability of success, and (d) causal “antitrust” injury. *Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377, 1382 (9th Cir. 1983).

¹⁸ HOVENKAMP, *supra* note 9, at 10-2, 10-3.

¹⁹ Essentially, this means that the court must determine what subset of all of the goods or services the defendant is in competition with and in what geographic area. A relevant market can be as small as a single brand of a product or service. *Eastman Kodak Co. v. Image Technical Servs., Inc. (“Kodak I”)*, 504 U.S. 451, 481-82 (1992).

²⁰ *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. denied* 445 U.S. 917 (1980) (stating a definition of relevant market is essential to assessing the alleged offender’s power over competition).

²¹ *Kodak I*, 504 U.S. at 482 (quoting *Grinnell*, 384 U.S. at 572).

share of that market is controlled by the alleged offender.²² In calculating a firm's market share, in order to determine whether it has monopoly power, the court must determine what percentage of the total output in the market is sold by the defendant.²³ One indicia of monopoly power includes a firm's "power to control prices or exclude competition."²⁴ Notably, the Supreme Court held in *Illinois Tool Works, Inc. v. Independent Ink, Inc.* that a patent does not necessarily confer monopoly power in the relevant market.²⁵

The acquisition or maintenance of monopoly power in itself is not necessarily an actionable offense under the Sherman Act.²⁶ Therefore,

²² Because of the importance of the definition of relevant markets to the outcome of a monopolization or attempt to monopolize case, the plaintiff in such cases will inevitably attempt to establish the narrowest market definitions possible, while the defendant will attempt to establish the broadest possible market definitions. *See, e.g., Int'l Boxing Club of N.Y., Inc. v. United States*, 358 U.S. 242 (1959) (defendants argued that the relevant market was all professional boxing events, while the plaintiff successfully argued that the relevant market should be limited to championship boxing matches).

²³ HOVENKAMP, *supra* note 9, at 10-16.

²⁴ *Grinnell*, 384 U.S. at 571. As further explanation:

A pure monopoly exists when the defendant is the only seller in the market, and it is impossible for anyone to enter the market in competition with it. But a defendant may be guilty of monopolization even if it does not have a 100 percent market share, so long as it has sufficient control over the market that it can increase price and reduce output without being constrained by competition.

HOVENKAMP, *supra* note 9, at 10-6. "Courts generally require a 65% market share to establish a prima facie case of market power under § 1 of the Act." *Image Technical Servs., Inc. v. Eastman Kodak Co.* ("*Kodak II*"), 125 F.3d 1195, 1206 (9th Cir. 1997) (citing *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946)). Thus, something more is required to establish monopoly power.

²⁵ 126 S.Ct. 1281, 1293 (2006).

²⁶ For example, the Supreme Court in *Grinnell* noted that power gained "from growth or development as a consequence of a superior product, business acumen, or historic accident" is not the type of conduct the Sherman Act aims to prohibit. 384 U.S. at 570-71. Thus, as one can see, this is why exercising one's rights under the government sanctioned, legal monopoly of the patent grant alone does not violate the Act.

the requirements of a § 2 monopolization claim are designed to “strike a balance by prohibiting only monopolies acquired or maintained by anticompetitive means.”²⁷ The second element of a §2 claim relates requires some showing of anticompetitive conduct, which can include the use of monopoly power “to foreclose competition, to gain a competitive advantage, or to destroy a competitor.”²⁸ Generally, if a firm’s conduct is part of a willful scheme to acquire or maintain monopoly power by means other than competition on the merits, it has violated § 2.²⁹ To assess whether the conduct of an intellectual property holder is anticompetitive, it is typically necessary to perform a rigorous economic analysis of the likely competitive effects of that conduct.

One of the most controversial theories of anticompetitive conduct involves claims that a monopolist in one market is attempting to “leverage” its monopoly into another market. To establish a § 2 Sherman Act violation based on monopoly leveraging, a plaintiff must prove that the monopolist: “(1) possesses monopoly power in the primary market; (2) gained or attempted to gain a monopoly power in a second relevant market; and (3) willfully acquired the monopoly power by some exclusionary conduct and not through efficiency and innovation.”³⁰ Most often, monopoly leveraging cases involve tying³¹ claims, or some other exclusionary conduct.³² At issue in *Abbott* was

²⁷ 1 HERBERT HOVENKAMP, MARK D. JANIS & MARK A. LEMLEY, IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW 10-3 (2002).

²⁸ *Eastman Kodak Co. v. Image Technical Servs., Inc.* (“*Kodak I*”), 504 U.S. 451, 482-83 (1992) (quoting *United States v. Griffith*, 334 U.S. 100, 107 (1948)).

²⁹ *Kodak I*, 504 U.S. at 483.

³⁰ *Schor v. Abbott Labs.* (“*Abbott I*”), 378 F. Supp. 2d 850, 856 (N.D. Ill. 2005) (citing *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 547 (9th Cir. 1991)).

³¹ “A tying arrangement is ‘an arrangement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.’” *Kodak I*, 504 U.S. at 461 (quoting *N. Pac. R. Co. v. United States*, 356 U.S. 1, 5-6 (1958)).

³² Tying can also be an exclusionary practice in itself and can lead to § 2 liability.

whether a theory of monopoly leveraging that did not involve one of the typical exclusionary practices—such as tying—could violate the antitrust laws.³³

Unfortunately, the application of most theories of antitrust liability is particularly difficult when the alleged monopolist also has a legal monopoly in one or more of the relevant markets through some statutory-granted intellectual property right. For example, the thought of punishing a patent holder—who has a statutory right to exclude others from using its patented product—for refusing to license a patent or refusing to deal with its competitors seems counterintuitive. If one purpose of the antitrust laws is to encourage competition and innovation, then it seems as though a firm that has achieved monopoly status because of the demand for its patented good and has merely attempted to reap the benefits of such success, should not be punished for doing so. As Judge Learned Hand once declared, “[t]he successful competitor, having been urged to compete, must not be turned upon when he wins.”³⁴ Yet the Supreme Court has made it clear that a patentee’s right to exclude is not absolute.³⁵ In light of this principle, the courts have been hard pressed to specify under what set of circumstances and for what reasons a patent holder will violate the antitrust laws.

B. Underlying Principles of the Patent Laws

Patents, along with copyrights, trademarks and trade secrets are a form of legal protection for intellectual property. In very simplistic terms, a patent is a time-limited property right granted by the United States federal government.³⁶ The subject matter of a patent may

³³ Schor v. Abbott Labs (“*Abbott II*”), 457 F.3d 608, 610 (7th Cir. 2006).

³⁴ United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945).

³⁵ See *Kodak I*, 504 U.S. at 483 n.32 (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602-05 (1985)).

³⁶ The United States Constitution gives Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and

include any “process, machine, manufacture, or composition of matter.”³⁷ However, only such inventions that are novel,³⁸ useful,³⁹ and nonobvious⁴⁰ are worthy of a patent. The patent grant allows its holder to prevent others from making, using, selling, or offering to sell his or her patented invention, or importing it into the United States⁴¹ during the term of the patent—twenty years from the date the patent application was filed.⁴² Thus, in the sense that a patent allows its holder to prevent others from competing in the market for the patented good, a patent is essentially a government sanctioned monopoly.⁴³

Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8.

³⁷ 35 U.S.C. § 101.

³⁸ *Id.* §§ 101-102.

³⁹ *Id.* § 101.

⁴⁰ *Id.* § 103. An invention is obvious if it constitutes merely a trivial advancement over the state of the art.

⁴¹ *Id.* § 154(a)(1) & (2) (2000); *see also id.* § 271(a) (“Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefore, infringes the patent.”). The term of the patent begins on the date that the patent issues and ends 20 years from the date that the patent application was filed in the United States. *Id.* § 154(a)(2). Notably, a patent does not convey any positive or affirmative right to make, use, sell, offer to sell, or import an invention; a patent is a negative property right.

⁴² *Id.* § 154(a)(2). While the patent term technically lasts for twenty years, the enforceable life of a patent does not begin until the date the patent is *issued*. JANICE M. MULLER, AN INTRODUCTION TO PATENT LAW 17 (2003). Thus, the time elapsed between filing and issuance of the patent—the pendency period—is subtracted from the enforceable life of the patent. *Id.* In the U.S., the pendency period usually lasts about 2 years, so in reality, the enforceable patent term is more like eighteen years. *Id.*

⁴³ MULLER, *supra* note 42, at 18 (citing *Jamesbury Corp. v. Litton Indus. Prod., Inc.*, 756 F.2d 1556, 1559 (Fed. Cir. 1985)). Others argue that patents are more akin to “time-limited government conveyances of *potential* monopoly power, which can be put to ‘good’ or ‘bad’ uses from a societal standpoint.” MULLER, *supra* note 42, at 18 (citing Giles S. Rich, *Are Letters Patent Grants of Monopoly?*, 15 W. NEW ENGLAND L. REV. 239, 251 (1993)).

In exchange for this right to exclude, the inventor must fully disclose the invention to the public in sufficient detail and clarity.⁴⁴ As compared to the utility, novelty and nonobviousness requirements which draw out the “technical merits of the claimed invention,” the disclosure requirements of the Patent Act pertain to the “informative quality of the patent *application*.”⁴⁵ Thus, the Act requires that this disclosure be “enabling,” such that when read, others will be able to make and use the invention (once the patent expires), without undue experimentation.⁴⁶ This puts the public in a position to almost immediately begin competing with the patent holder once the term of protection expires. In addition, the inventor must disclose the “best mode,” known to him or her, of practicing the invention.⁴⁷ This requirement seeks to prevent the inventor from disclosing an inferior means of carrying out the invention, while concealing preferred embodiments from the public.⁴⁸

Yet, without the protections afforded by the patent laws, inventors would have little incentive to invest in research and development, let alone to publicize their resulting inventions for fear that someone may pirate their work.⁴⁹ The key problem with investing in the research and

⁴⁴ 35 U.S.C. § 112, ¶ 1. The Patent Act mandates that:

The specification shall contain a written description of the invention and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or which it is most nearly connected to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.

⁴⁵ MULLER, *supra* note 42, at 65.

⁴⁶ 35 U.S.C. § 112, ¶ 1.

⁴⁷ *Id.*

⁴⁸ See MULLER, *supra* note 42, at 76.

⁴⁹ Another option, aside from the patent laws, is for the inventor to keep his invention as a trade secret. Unlike patents, trade secrets have no time limits. However, with trade secrets, the inventor can only protect from free-riding what he can keep secret. For example, the Coca-Cola Company holds the recipe for Coke as a trade secret by maintaining strict confidentiality and non-compete policies within the company. Yet, for technologies that can be easily reverse engineered (the process of discovering the technological principles of a device or system usually with the

development of new technologies is that “the cost of creation [] can be very high, but the cost of copying it is often trivial.”⁵⁰ In theory, because copying is so easy and inexpensive, without the protections offered by the patent grant, free-riders and copyists would make it difficult if not impossible for inventors to recoup their initial investments.⁵¹ As some scholars argue, without patent protection, invention and technical innovation would be uneconomical and would come to a halt.⁵² The patent grant allows inventors to recoup their sunk research and development costs by charging monopoly prices.⁵³ To would-be inventors, the lure of obtaining a government-sanctioned monopoly on a commercially profitable invention induces research, development, and, ultimately, progress in the form of new technology.⁵⁴ By providing time-limited right to exclude others, the patent laws make inventing an attractive endeavor.

intention to construct a new device or program that does the same thing), trade secret is not a desirable form of protection. In the United States and many other countries, even if an artifact or process is protected by trade secrets, reverse-engineering the artifact or process is often lawful as long as it is obtained legitimately. The patent laws, on the other hand, allow the patent holder to bring his invention to the public without the fear that a copyist may simply reproduce the patented technology through reverse engineering. *See* MULLER, *supra* note 42, at 67.

⁵⁰ *Id.* at 6.

⁵¹ Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 994 (April 1997) (“In a private market economy, individuals will not invest in invention or creation unless the expected return from doing so exceeds the cost of doing so—that is, unless they can reasonably expect to make a profit from the endeavor”). “The ability of free-riders to appropriate the benefits of a new technology serves as a deterrent to those considering an investment in developing or investing in such technologies.” *Id.*

⁵² *Id.*; *see also* MULLER, *supra* note 42, at 7 (“When adequate incentives for innovation do not exist, the result is underproduction of new inventions. . . . Absent a mechanism to exclude ‘free riders,’ i.e., people who enjoy the benefit of the good without paying for it, [new inventions] will be underproduced.”).

⁵³ Christopher R. Leslie, *The Anticompetitive Effects of Unenforced Invalid Patents*, 91 MINN. L. REV. 101, 151-52 (The benefits [of a patent] include potential monopoly profits for the life of the patent.”).

⁵⁴ *See* *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 480 (1974).

While it is clear that the immediate effect of the patent laws is to secure a fair return for the inventor's labor, the ultimate aim is, by this incentive, to benefit the public.⁵⁵ The patent laws promote consumer welfare in the long term by encouraging investment in the creation and development of new technology. By fostering faster introduction of inventions through its incentives, the patent laws also increase competition.⁵⁶ Additionally, as noted above, the patent laws essentially strike a bargain with the inventor—protection, in the form of a government-sanctioned right to exclude in the market of the invention, in exchange for public disclosure of the invention. So, not only does the public reap the benefits of technological progress, but also they benefit from the knowledge that the patentee gained in developing such technology. Thus, like the antitrust laws, the laws relating to intellectual property are aimed, in significant part, at fostering economic development.⁵⁷

⁵⁵ Thus, the patent laws are not aimed at benefiting the inventor. The patent laws merely use the lure of obtaining monopoly profits on a patented invention to entice inventors to invest in developing new technologies, and thus, benefit the public. This is also true for the Copyright Laws. *See* *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (“The primary objective of a copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’”) (brackets in original) (quoting U.S. CONST. art. I, § 8, cl. 8).

⁵⁶ *Image Technical Servs., Inc. v. Eastman Kodak Co.* (“*Kodak II*”), 125 F.3d 1195, 1215 (9th Cir. 1997).

⁵⁷ Economists have offered three other principle rationales for the existence of intellectual property rights: (1) Broader dissemination of innovations: The patent grant is essentially a bargain with the Patent Office. The patent holder receives the right to exclude others in the market of the invention in exchange for public disclosure; (2) Greater commercialization of inventions: intellectual property rights encourage licensing; and (3) Minimizing duplicative research. Balto & Wolman, *supra* note 2, at 405-07.

C. *The Tension*

Intellectual property rights enjoy greater importance today than ever before and play a large role in fostering technological growth.⁵⁸ Yet, on the other hand, the antitrust laws are hailed as “represent[ing] a fundamental national economic policy.”⁵⁹ Thus, it is of no surprise that courts are increasingly faced with questions of the proper breadth and enforceability of the patent grant in light of the antitrust laws. Confounding these questions is the fact that the patent and antitrust laws were traditionally viewed as directly contradictory—one granting monopolies and the other prohibiting them.⁶⁰ Yet today, most feel that the supposed tension is merely illusory. In theory, the underlying purposes of the two bodies of law are largely the same: to promote the public good and to benefit consumer welfare.⁶¹ However, in practice, there is still considerable tension between the two bodies of law and many of the relevant cases addressing the intersection of intellectual

⁵⁸ See Robert P. Taylor, *The Continuing Presence of Antitrust Considerations in Patent Enforcement*, 877 PLI PAT 119, 125-26 (2006). In 2005, the United States Patent and Trademark Office (“the PTO”) granted 143,806 utility patents. Since 1963, the PTO has granted a grand total of 3,891,901 utility patents. Thus, over 37 percent of the total number of patents granted occurred in 2005 alone! USPTO ELECTRONIC INFORMATION PRODUCTS DIVISION, ALL TECHNOLOGIES REPORT JANUARY 1, 1963 – DECEMBER 31, 2005, http://www.uspto.gov/web/offices/ac/ido/oeip/taf/all_tech.pdf; see also *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

⁵⁹ *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 421 (1986).

⁶⁰ While most of the cases impacting the antitrust laws have arisen in the context of the patent laws, the other areas of intellectual property rights—copyright, trademark and trade secrets—are equally in tension with the antitrust laws. This comment will focus exclusively on the intersection between the patent and the antitrust laws.

⁶¹ *Atari Games Corp. v. Nintendo of America, Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990) (both laws herald themselves as “encouraging innovation, industry, and competition”) (citing *Locite Corp. v. Unltraseal Ltd.*, 781 F.2d 861, 876-77 (Fed. Cir. 1985)).

property and antitrust have not effectuated this supposed goal.⁶² *Schor v. Abbott Labs* is such a case.

Despite their common goal, defining a boundary between the objectives of antitrust and those of intellectual property protection has been notoriously difficult, if not impossible.⁶³ In major part, this is because both statutory provisions are silent on the issue and there is little to no Supreme Court jurisprudence resolving the conflict. Furthermore, while these bodies of law both strive to promote competition, they take very different paths to effectuate this goal.

In order for both the patent and antitrust laws to achieve their mutual goal of encouraging innovation while keeping anticompetitive behavior in product markets to a minimum, the two laws must be held in equilibrium. When one set of laws is elevated over the other, competition is stifled and the public is harmed. Yet, applying antitrust and patent principles in a non-discriminatory manner is particularly difficult because of the issues discussed above. This is especially true in a day when inventors make significant investments to protect their intellectual property and want to be able to take full advantage of that investment.

While many of the principles underlying the patent laws have seemingly dictated the struggle to reconcile thus far, some concessions have been made for antitrust considerations. For example, as a general rule, a patent holder is not required to license the protected technology and has no duty to cooperate with competitors.⁶⁴ However, this right is not unqualified; “it exists only if there are legitimate competitive

⁶² *Image Technical Servs., Inc. v. Eastman Kodak Co.* (“*Kodak IP*”), 125 F.3d 1195, 1217 (9th Cir. 1997) (“At the border of intellectual property monopolies and antitrust markets lies a field of dissonance yet to be harmonized by statute or the Supreme Court.”).

⁶³ “[T]here is no easy delineation between a patent holder’s permissible exercise of its rights under patent law, which grants a government sanctioned monopoly and expressly allows the patentee to engage in exclusionary conduct, and anticompetitive behavior that violates antitrust law, which proscribes exclusionary conduct when coupled with monopoly power.” *Schor v. Abbott Labs* (“*Abbott I*”), 378 F. Supp. 2d 850, 855-56 (N.D. Ill. 2005).

⁶⁴ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602-05 (1985).

reasons for the refusal.”⁶⁵ Section 2 of the Sherman Act may prohibit a firm from unilaterally refusing to license their intellectual property rights or deal with competitors where such a refusal would allow the firm to obtain or maintain monopoly power by excluding competition in a way that does not benefit consumers. Furthermore, a patent holder may violate the Sherman Act by exercising its right to exclude beyond the scope of the patent grant in an attempt to curtail competition in a secondary market.⁶⁶

The antitrust theory of monopoly leveraging, while not new, has not been adequately clarified by the courts with respect to the actions of a patent, or other intellectual property right holder. Some circuit courts have, on varying levels, attempted to further develop monopoly leveraging as an antitrust cause of action against intellectual property holders. While monopoly leveraging in the context of intellectual property has not been directly addressed by the Supreme Court, at least four circuit courts⁶⁷ have interpreted the Court’s holding in *Eastman Kodak Co. v. Image Technical, Inc.* (“*Kodak I*”) as having varying ramifications on the outcome of this issue. All of these decisions offer insight into the path that the Seventh Circuit should have taken in deciding *Abbott II* and are discussed below.

⁶⁵ *Image Technical Servs., Inc. v. Eastman Kodak Co.* (“*Kodak I*”), 504 U.S. 451, 483 n.32 (1992); *see also Aspen Skiing*, 472 U.S. at 600-01 (“The absence of a duty to transact business with another firm is, in some respects, merely the counterpart of the independent businessman’s cherished right to select his customers and his associates. The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.”).

⁶⁶ As the Supreme Court in *Ethyl Gasoline Corp. v. United States* noted:
[The patentee] may grant licenses to make, use or vend, restricted in point of space or time, or with any other restriction upon the exercise of the granted privilege, save only that by attaching a condition to his license he may not enlarge his monopoly and thus acquire some other which the statute and the patent together did not give.
309 U.S. 436, 456 (1940).

⁶⁷ The First, Ninth, Federal and Seventh Circuits have all cited to *Kodak I* in deciding similar issues. The courts come down on different sides as to whether the Supreme Court’s holding actually dictates whether a patent holder may be liable under a theory of monopoly leveraging.

II. SEMINAL CASES IN THE INTELLECTUAL PROPERTY AND ANTITRUST CONFLICT

A. *Berkey Photo, Inc. v. Eastman Kodak Co.*

In 1979, the United States Court of Appeals for the Second Circuit touched on the theory of monopoly leveraging in *Berkey Photo, Inc. v. Eastman Kodak Co.*⁶⁸ At issue in *Berkey Photo* was Kodak's conduct in the photography and photofinishing industry, in which it competes along with several other firms, including Berkey Photo.⁶⁹ The relationship between the two firms was complex in that Kodak was Berkey Photo's competitor in some markets and its supplier in others, such as those for film and photofinishing equipment and supplies.⁷⁰ Berkey Photo claimed that Kodak had violated § 2 of the Sherman Act by willfully acquiring and maintaining monopolies in the film, color print paper, and camera markets and that this conduct "caused it to lose sales in the camera and photofinishing markets and to pay excessive prices to Kodak for film, color print paper, and photofinishing equipment."⁷¹

The Second Circuit took care to define what conduct, exercised in conjunction with monopoly power, would bring about a § 2 violation. The court reiterated that the Sherman Act does not condemn one "who merely by superior skill and intelligence . . . [acquired monopoly power] because nobody could do it as well," but rather one who wields that monopoly to prevent or impede competition.⁷² Thus, Kodak could not be held liable for merely acquiring monopoly power because it had a superior product, but only if it exercised that power in an anticompetitive manner. Conversely, the court held that in light of an improper acquisition or maintenance of monopoly power, a firm could

⁶⁸ 603 F.2d 263 (2d Cir. 1979).

⁶⁹ *Id.* at 267.

⁷⁰ *Id.*

⁷¹ *Id.* at 267-68.

⁷² *Id.* at 274 ("[A] firm with a legitimately achieved monopoly may not wield the resulting power to tighten its hold on the market.").

not escape liability by arguing that it had not used that power to extract improper benefits.⁷³ As the court explained, both innocent and intentional acquisition and maintenance of a monopoly “coupled with the purpose or intent to exercise that power” in a manner that excludes or prevents competition violates § 2.⁷⁴

Attempting to show that Kodak’s conduct was exclusionary in nature as required by § 2, Berkey Photo moved forward, essentially, under a theory of monopoly leveraging. Berkey Photo contended that Kodak had “illicitly gained an advantage in [the markets for photofinishing equipment and services] by leveraging its power over film and cameras.”⁷⁵ Agreeing with Berkey Photo, the court explicitly recognized that “a firm may not employ its market position as a lever to create or attempt to create a monopoly in another market.”⁷⁶

The Second Circuit found its conclusion to be “an inexorable interpretation of the antitrust laws.”⁷⁷ Even when legitimately obtained, monopolies are contrary to our notions of fair competition and must be strictly constrained. Such monopoly power is only tolerated out of considerations of fairness towards the innocent monopolist and insofar as necessary to preserve proper economic incentives.⁷⁸ Accordingly, the court found no reason to allow for the exercise of monopoly power to the detriment of competition, even if such power was wielded over a secondary market.⁷⁹ Such behavior

⁷³ *Id.* (“Unlawfully acquired power remains anathema even when kept dormant.”).

⁷⁴ *Id.* Thus, it is no defense for a firm who wields their monopoly power in an anticompetitive manner to argue that they innocently acquired such power—such as through a patent, or as the result of a superior product. Likewise, it is no defense for an intentional monopolist to argue that it did not exercise that power in a destructive manner. *Id.* at 274-75.

⁷⁵ *Id.* at 275.

⁷⁶ *Berkey Photo*, 603 F.2d at 275 (emphasis added) (citing *Griffith*, 334 U.S. at 107).

⁷⁷ *Berkey Photo*, 603 F.2d at 275.

⁷⁸ *Id.*

⁷⁹ *Id.* (“There is no reason to allow the exercise of such power to the detriment of competition, in either the controlled market or any other.”).

does not become “more palatable” simply by arguing that “competition in the leveraged market may not be destroyed but merely distorted.”⁸⁰ The court found support for this theory of monopoly leveraging in *United States v. Griffith* in which the Supreme Court held that the defendant had illegally used its monopoly power “to beget monopoly.”⁸¹

Yet, according to the court, *Griffith* stood for more than just the recognition of monopoly leveraging as an antitrust cause of action. Griffith’s “rationale swept more broadly . . . for it admonished that ‘the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, [was] unlawful.’”⁸² The court recognized the theory of monopoly leveraging as linked to the prohibition against tying arrangements.⁸³ To find liability for the tying arrangement, the Supreme Court did not require that “the market for the tied product [actually] be monopolized,” but, rather, that the monopolist’s conduct had merely foreclosed a “‘substantial’ amount of competition.”⁸⁴ Thus, the court concluded that “the use of monopoly power attained in one market to gain a competitive advantage in another [was] a violation of [Section] 2, even if [the alleged monopolist did not] attempt to monopolize the second market.”⁸⁵

Berkey Photo, one of the “largest and most significant antitrust suits” of its time,⁸⁶ stands for the proposition that a monopolist is liable under § 2 of the Sherman Act on a theory of monopoly leveraging if it used “its monopoly power in one market to gain a competitive advantage in another, albeit without an attempt to

⁸⁰ *Id.*

⁸¹ *Id.* (quoting *United States v. Griffith*, 334 U.S.100 , at 108 (1948)).

⁸² *Berkey Photo*, 603 F.2d at 275 (quoting *Griffith*, 334 U.S. at 107).

⁸³ *Berkey Photo*, 603 F.2d at 275.

⁸⁴ *Id.* at 276 (quoting *Times Picayune Publ’g Co. v. United States*, 354 U.S. 594, 608-09 (1953)).

⁸⁵ *Berkey Photo*, 603 F.2d at 276.

⁸⁶ *Id.* at 267.

monopolize the second market.”⁸⁷ The court’s holding is most notable in that it does not require that the monopolist utilize its monopoly in one market in an attempt to monopolize a secondary market; it only requires an attempt to gain a “competitive advantage” in the secondary market. While not specifically addressing intellectual property, it stresses that even those who acquire monopoly power through legitimate means—such as a patent—may be liable for leveraging that power into a secondary market. Thus, the court’s holding bears on the antitrust-patent tension.

B. Eastman Kodak Co. v. Image Technical Services, Inc.

More than two decades after the *Berkey Photo* decision, the Supreme Court of the United States squared off against the conflicting antitrust and patent laws in *Eastman Kodak Co. v. Image Technical Services, Inc.* (“*Kodak I*”).⁸⁸ Bringing claims under both § 1 and § 2 of the Sherman Act, the plaintiffs, independent service organizations (ISOs), sought recovery from Eastman Kodak (“Kodak”) for its policies limiting the availability to ISOs of replacement parts for its equipment.⁸⁹ Kodak manufactures and sells high volume photocopiers and micrographic equipment.⁹⁰ Additionally, Kodak sells annual or multi-year service contracts to its customers for the sale and installment of replacement parts for its equipment.⁹¹ However, as Kodak’s parts are not interchangeable with other manufacturers’ products, Kodak does not compete with the other manufacturers in the service market; Kodak competes only with ISOs.⁹² In the early 1980s, the ISOs would purchase some parts on a limited basis from Kodak,

⁸⁷ *Id.* at 275.

⁸⁸ 504 U.S. 451 (1992).

⁸⁹ *Id.* at 455.

⁹⁰ *Id.* at 456.

⁹¹ *Id.* at 457.

⁹² *Id.*

but most parts came directly from the original equipment manufacturers that produced parts that Kodak did not produce itself.⁹³

After some time, consumers actually came to prefer the services of the ISOs and Kodak suffered a loss in service business.⁹⁴ In response, Kodak stopped selling its photocopier parts to ISOs and shortly thereafter adopted the same policy for its micrographic parts.⁹⁵ Kodak also allegedly entered into contractual agreements with its original equipment manufacturers to prevent them from selling parts to ISOs.⁹⁶ These policies made it more difficult for ISOs to sell service for Kodak machines, and many were forced out of business, while others lost substantial revenue.⁹⁷ Under a theory of monopoly leveraging, the ISOs claimed that Kodak violated § 2 of the Act by using its monopoly over Kodak photocopier and micrographic parts to attempt to create and actually create a second monopoly over the service markets.⁹⁸

With respect to the first element of the § 2 claim, the Court easily concluded that Kodak held monopoly power in the service and parts markets.⁹⁹ Because there were no readily available substitutes for Kodak's parts and service, it had the power to control prices or exclude competition and, thus, had monopoly power.¹⁰⁰ In evaluating whether the ISOs had satisfied the second element of the § 2 claim, the Court analyzed whether Kodak's policies were impermissibly based on a scheme of willful acquisition or maintenance of monopoly power.¹⁰¹ The Court concluded that Kodak took exclusionary action to maintain

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 458.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 459.

⁹⁹ *Id.* at 481.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 482-83; *see also* Michael H. Kauffman, *Image Technical Servs., Inc. v. Eastman Kodak Co.: Taking One Step Forward and Two Steps Back in Reconciling Intellectual Property Rights and Antitrust Liability*, 34 WAKE FOREST L. REV. 471, 484 (1999).

its parts monopoly in an attempt to strengthen its monopoly share of the service market.¹⁰² Finding this conduct to be anticompetitive, the Court held that “[l]iability turn[ed] on whether ‘valid business reasons’ [could] explain Kodak’s actions.”¹⁰³ According to the Court, while “a firm can refuse to deal with its competitors, . . . such a right is not absolute.”¹⁰⁴ If a firm’s actions are exclusionary under the Sherman Act, to avoid liability, it must have “legitimate competitive reasons” for conducting itself in such a manner.¹⁰⁵

In one of the most notable passages in the opinion,¹⁰⁶ at least as it refers to the antitrust-IP conflict, the Court stated that “power gained though some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if ‘a seller exploits his dominant position in one market to expand his empire into the next.’”¹⁰⁷ Because it is found in the Court’s analysis of the ISO’s § 1 tying claim, the applicability of this language to the actions of a patent holder in the context of a § 2 violation is heavily disputed and has had various implications in lower court decisions.¹⁰⁸ At the very least, this

¹⁰² *Kodak I*, 504 U.S. at 483.

¹⁰³ *Id.* (quoting *Aspen Skiing*, 472 U.S. at 605).

¹⁰⁴ *Kodak I*, 504 U.S. at 483 n.32 (citing *Aspen Skiing*, 472 U.S. at 602-05).

¹⁰⁵ *Kodak I*, 504 U.S. at 483 n.32. Kodak contended that its actions were justified because it was: (1) maintaining its commitment to provide quality service; (2) controlling inventory costs; and (3) preventing ISOs from free-riding on its capital investment in equipment, parts and service. *Id.* at 483. As this case was on appeal from the Ninth Circuit’s denial of summary judgment, the Court did not decide on the merits whether these were valid business justifications. The Court merely held that Kodak’s asserted business justifications were insufficient to prove that Kodak is “entitled to a judgment as a matter of law” on the § 2 claim. *Id.* at 485-86 (quoting FED. R. CIV. P. 56(c)).

¹⁰⁶ Curiously, the most frequently discussed passage in the *Kodak I* opinion is actually found in a footnote.

¹⁰⁷ *Kodak I*, 504 U.S. at 479 n.29 (quoting *Times-Picayune Publ’g Co. v. United States*, 345 U.S. 594, 611 (1953)).

¹⁰⁸ Many attack applying this language to a § 2 violation because of the fact that it was placed in the Court’s discussion of Kodak’s alleged § 1 violation. Additionally, others take note that Kodak did not actually seem to present its patents in defense of the antitrust claims.

passage can be interpreted to support the antitrust theory of monopoly leveraging.¹⁰⁹ While, on the whole, there is little discussion of Kodak's intellectual property rights, some read the Court's holding as further standing for the proposition that patent rights do not immunize a patent holder from antitrust violations based on monopoly leveraging, and that a patent holder may be liable under the monopoly leveraging theory for using its monopoly over a patented product to affect a secondary market.¹¹⁰

C. Data General Corp. v. Grumman Systems

The First Circuit was the first circuit court to interpret the Supreme Court's opinion in *Kodak I* as it related to a § 2 monopolization claim. In *Data General Corp. v. Grumman*¹¹¹ the plaintiff, designed and manufactured computers and also offered a line of products and services for the maintenance and repair of its computers.¹¹² From 1976 until sometime in the mid-1980's, Data General affirmatively encouraged competition in the service market for its computers,¹¹³ by providing access to several necessary service tools to "third party maintainers" ("TPMs"), including Grumman.¹¹⁴

¹⁰⁹ "Even assuming . . . that all manufacturers possess some inherent market power in the parts market, it is not clear why that should immunize them from the antitrust laws in another market." *Kodak I*, 504 U.S. at 479 n.29.

¹¹⁰ *See id.*

¹¹¹ 36 F.3d 1147 (1st Cir. 1994).

¹¹² *Data General*, 36 F.3d at 1152.

¹¹³ *Id.* at 1154.

¹¹⁴ *Id.* For example:

[Data General (DG)] sold or licensed diagnostics directly to TPMs, and allowed TPMs to use diagnostics sold or licensed to DG equipment owners. DG did not restrict access by TPMs to spare parts manufactured by DG or other manufacturers. DG allowed (or at least tolerated) requests by TPMs for DG's repair depot to fix malfunctioning circuit boards, the heart of a computer's central processing unit ("CPU"). DG sold at least some schematics and other documentation to TPMs. DG also sold TPMs engineering change order kits. And finally, DG training classes were open to

One of these service tools included the MV/Advanced Diagnostic Executive System ("ADEX"), a sophisticated computer program developed by Data General to diagnose problems in its MV computers.¹¹⁵ In the mid-1980's, Data General, in an attempt to maximize revenues from its service business, began to refuse to provide many service tools, including the ADEX software, directly to TPMs.¹¹⁶ However, Grumman found various ways to "skirt" Data General's ADEX restrictions.¹¹⁷

In 1988, Data General filed suit against Grumman in the United States District Court for the District of Massachusetts claiming that Grumman had infringed its ADEX copyrights.¹¹⁸ Grumman asserted that Data General's actions constituted an illegal tying under § 1 and monopolization under § 2 of the Sherman Act.¹¹⁹ In response to Data General's motions for partial summary judgment, the district court rejected Grumman's affirmative defenses and counterclaims.¹²⁰ Grumman appealed.

Most relevant to this Comment is Grumman's claim under § 2 of the Sherman Act that Data General willfully maintained its monopoly in the aftermarket for service of Data General's computers.¹²¹ Grumman asserted that Data General's unilateral refusal to license

TPM field engineers. Grumman suggests that DG's liberal policies were beneficial to DG because increased capacity (and perhaps competition) in the service aftermarket would be a selling point for DG equipment.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1155. Data General also claimed that Grumman had misappropriated trade secrets embodied in the APEX software. *Id.* A jury agreed, awarding DG \$27,417,000 in damages (excluding prejudgment interest and attorney's fees). *Id.*

¹¹⁹ Grumman counterclaimed and asserted affirmative defenses that Data General "could not maintain its infringement action because [Data General] had used its ADEX copyrights to violate §§ 1 and 2 of the Sherman Antitrust Act." *Id.* at 1156. This Comment will only discuss the First Circuit's response to the § 2 counterclaim.

¹²⁰ *Id.* at 1155.

¹²¹ *Id.* at 1181.

ADEX and other service tools to TPMs constituted exclusionary conduct within the meaning of § 2.¹²² The First Circuit set out to determine “whether a unilateral refusal to license a copyrighted work might ever deserve to be condemned as exclusionary.”¹²³

From the start, the court rested its analysis on whether or not the actions of Data General actually harmed the competitive process, as opposed to simply harming competitors.¹²⁴ The court noted that conduct which “obstructs the achievement of competition’s basic goals—lower prices, better products, and more efficient production methods” harms the competitive process.¹²⁵ “In contrast, exclusionary conduct does not include behavior which poses no unreasonable threat to consumer welfare but is merely a manifestation of healthy competition, an absence of competition, or a natural monopoly.”¹²⁶ Thus, said the court, if a monopolist’s refusal to deal harms the competitive process, it “may constitute prima facie evidence of exclusionary conduct in the context of a § 2 claim.”¹²⁷

Drawing on the Supreme Court’s decision in *Kodak II*, the court stated that a monopolist may rebut the presumption of exclusionary conduct by establishing a valid business justification for its conduct.¹²⁸ Keeping in line with the underlying principles of the antitrust laws, the court noted that valid business justifications include those that relate

¹²² *Id.* at 1182.

¹²³ *Id.* While *Data General* discusses the reach of antitrust liability in light of the copyright laws, the First Circuit’s holding is also applicable to the antitrust-patent intersection.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* (citing *Grinnell*, 384 U.S. at 570-71).

¹²⁷ *Data General*, 36 F.3d at 1183.

¹²⁸ *Id.* (citing *Kodak Co. v. Image Technical Servs., Inc.* (“*Kodak I*”), 504 U.S. 451, 483 n.32 (1992) (suggesting that a monopolist may rebut an inference of exclusionary conduct by establishing “legitimate competitive reasons for the refusal”); citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608 (1985) (suggesting that sufficient evidence of harm to consumers and competitors triggers further inquiry as to whether the monopolist has “persuade[d] the jury that its [harmful] conduct was justified by [a] normal business purpose”).

directly or indirectly to the enhancement of consumer welfare, such as pursuing efficiency and quality control.¹²⁹ Again, the court's overall analysis turned on the overall effect on the competitive process: evidence of harm to the competitive process raised a presumption that a monopolist's unilateral refusal to deal was exclusionary, and evidence of countervailing benefits to the competitive process, in the form of a valid business justification, was necessary to rebut that presumption.¹³⁰

Notably, the court refused to adopt Data General's proposal that a unilateral refusal to license a copyright can never constitute exclusionary conduct.¹³¹ According to the court, such an irrebuttable presumption would be tantamount to conceding that unilateral refusals to license a copyright always have a net positive effect on the competitive process, or that as a policy preference, intellectual property rights should categorically take precedence over the antitrust laws.¹³² Furthermore, while noting that the Sherman Act does not explicitly exempt asserting one's intellectual property rights from antitrust scrutiny, the court warned that the Supreme Court disfavors creating implied exceptions to the antitrust laws.¹³³ However, the court noted that, remarkably, in the patent context, many courts have either treated the patent laws as creating an implied limited exception to the antitrust laws, or have specifically held that the unilateral refusal to license a patent is exempt from antitrust liability.¹³⁴

According to the court, this "patent exception" came into existence for two reasons. First, as a policy presumption, it was

¹²⁹ *Data General*, 36 F.3d at 1183. The court contrasted that the desire of a monopolist to maintain a monopoly market share or thwart the entry of competitors would not be a valid business justification. *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 1184.

¹³² *Id.*

¹³³ *Id.* at 1185 (citing *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 421 (1986) ("[E]xceptions from the antitrust laws are strictly construed and strongly disfavored.")).

¹³⁴ *Data General*, 36 F.3d at 1186.

“largely a means of resolving conflicting rights and responsibilities.”¹³⁵ While somewhat circular, this presumption rested on the argument that because patents are essentially a government sanctioned monopoly, giving the patent holder the exclusive right to prevent others from practicing the invention, there could be no adverse effect on competition.¹³⁶ Additionally, the court noted that the “exception” was “grounded in an empirical assumption that exposing patent activity to wider antitrust scrutiny would weaken the incentives underlying the patent system, thereby depriving consumers of beneficial products.”¹³⁷

Rather than fall in line with the patent exception, the court found it more appropriate to choose an approach which both complemented the underlying purposes of the Copyright Act¹³⁸ and addressed the “realities of the market.”¹³⁹ In turning to the Copyright Act, the court found it safe to assume that “Congress itself made an empirical assumption that allowing copyright holders to collect license fees and exclude others from using their works creates a system of incentives that promotes consumer welfare in the long term by encouraging investment in the creation of desirable artistic and functional works of expression.”¹⁴⁰ Finding it inappropriate to require an antitrust defendant to prove the validity of this assumption in every refusal to deal case, the court noted, however, that the Copyright Act does not purport to immunize copyright holders from liability under the Sherman Act.¹⁴¹ The Copyright Act’s silence on this issue “is particularly acute in cases where a monopolist harms consumers in the monopolized market by refusing to license a copyrighted work to competitors.”¹⁴²

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 1187.

¹³⁹ *Id.* at 1184.

¹⁴⁰ *Id.* at 1186-87.

¹⁴¹ *Id.* at 1187.

¹⁴² *Id.* The court does note that Congress has not been silent on the relationship between antitrust and the patent laws. In 1988, Congress amended the patent laws to

In resolving the conflict, the court recognized the importance of “preserving the economic incentives fueled by the Copyright Act,”¹⁴³ but also sought a resolution which would uphold the policies embodied in both the Copyright and Sherman Acts—“to improve the welfare of consumers in our free market system.”¹⁴⁴ Ultimately, the court held that “the desire of an author to be the exclusive user of its original work is a presumptively legitimate business justification for the author’s refusal to license to competitors.”¹⁴⁵ Additionally, the court made it clear that this is a rebuttable presumption, “for there may be rare cases in which imposing antitrust liability is unlikely to frustrate the objectives of the Copyright Act.”¹⁴⁶ The court suggests three arguments that may be successful in rebutting the presumption of a valid business justification: (1) the monopolist “refuses to cooperate with a competitor in circumstances where some cooperation is indispensable to effective competition;”¹⁴⁷ (2) the copyright was acquired in an unlawful manner;¹⁴⁸ or (3) the monopolist knowingly developed its “proprietary position” to maintain a monopoly in a secondary market.¹⁴⁹

The First Circuit’s holding is important in that it refuses to fall in line with the theory that intellectual property rights holders are exempt from antitrust liability. Instead, the court continually refers back to the

provide that “[n]o patent owner otherwise entitled to relief for infringement . . . of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of [the patent owner’s] refus[al] to license or use any rights to the patent.” 35 U.S.C. § 271(d) (1988). The court correctly notes that § 271(d) prevents an accused infringer from bringing a patent misuse defense when the patent owner has unilaterally refused a license, but its contention that § 271(d) “may even herald the prohibition of all antitrust claims and counterclaims premised on a refusal to license a patent” is not so well grounded. I will discuss this in further detail below.

¹⁴³ *Data General*, 36 F.3d at 1187.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 1182.

¹⁴⁶ *Id.* at 1187 n.64.

¹⁴⁷ *Id.* at 1188 (quoting *Olympia Equip. Leasing Co. v. W. Union Telegraph Co.*, 797 F.2d 370, 379 (7th Cir. 1986)).

¹⁴⁸ *Data General*, 36 F.3d at 1188.

¹⁴⁹ *Id.*

heart of the antitrust laws—consumer protection—and recognizes that some actions of an IPR holder may harm competition beyond what we are willing to justify as a necessary incentive to innovate. Additionally, the court follows the lead of the Supreme Court by allowing alleged monopolists to justify their exclusionary conduct by presenting valid business reasons for such conduct. Furthermore, the First Circuit took painstaking care to address and reconcile the interests of both the patent and antitrust laws. Recognizing their common goal, the court presented approach that gave deference to the choice of the intellectual property right holder to exercise its statutory right to exclude, but also protected the considerations of the antitrust laws by allowing the antitrust plaintiff to rebut that such a choice has a valid business justification.

D. Image Technical Services, Inc. v. Eastman Kodak Co.

In *Image Technical Services, Inc. v. Eastman Kodak Co.*, (“*Kodak I*”)¹⁵⁰ plaintiffs, a group of independent service organizations (ISOs) brought claims under §§ 1 and 2 of the Sherman Act after Kodak refused to sell replacement parts, many of which were patented, to the ISOs, who serviced and repaired Kodak photocopier equipment along with Kodak itself.¹⁵¹ With respect to the § 2 claim, the ISOs proceeded on a theory of monopoly leveraging that Kodak used its monopoly in the parts market, to monopolize or attempt to monopolize the sale of service for its machines.¹⁵² On remand from the Supreme Court, the case proceeded to trial in the district court and a unanimous jury awarded \$71.8 million in damages to the ISOs on their § 2 monopolization claim.¹⁵³

On appeal, the United States Court of Appeals for the Ninth Circuit discussed the subject of a § 2 monopoly leveraging claim.¹⁵⁴

¹⁵⁰ 125 F.3d 1195 (9th Cir. 1997).

¹⁵¹ *Kodak II*, 125 F.3d at 1200-01.

¹⁵² *Id.* at 1201.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 1214.

Interpreting the Supreme Court's holding in *Kodak I* as generally endorsing the antitrust theory of monopoly leveraging,¹⁵⁵ the court in *Kodak II* required that, in order to succeed on a theory of monopoly leveraging, the antitrust defendant must have used its monopoly in one market to monopolize or attempt to monopolize the downstream market.¹⁵⁶ Notably, the court reiterated its rejection of the Second Circuit's *Berkey Photo* standard which only attached liability to the use of monopoly power "to gain a competitive advantage" in a downstream market as too "loose."¹⁵⁷

While recognizing that monopoly leveraging could be an available theory of liability, the court grappled with the issue of what conduct displayed by a patent holder, could be considered anticompetitive. The court reiterated that the second element of a § 2 monopoly claim—the conduct element—requires that the alleged monopolist exhibit some exclusionary conduct, and not merely competition on the merits.¹⁵⁸ As a general rule, the court considered exclusionary conduct to include any conduct that "unnecessarily excludes or handicaps competitors in order to maintain a monopoly" or conduct that "extends natural

¹⁵⁵ *Id.* at 1208.

¹⁵⁶ *Id.* at 1209. In *Kodak II*, Kodak was attacking the district court's monopoly conduct jury instructions, specifically Instruction No. 29, which stated in relevant part:

[A] company with monopoly power in a relevant market has no general duty to cooperate with its business rivals and may refuse to deal with them or with their customers if valid business reasons exist for such refusal. It is unlawful, however, for a monopolist to engage in conduct, including refusals to deal, *that unnecessarily excludes or handicaps competitors in order to maintain a monopoly.*

Id. at 1208-09. The court declared that "§ 2 of the Sherman Act prohibits a monopolist from refusing to deal in order to create or maintain a monopoly absent a legitimate business justification." *Id.* at 1209.

¹⁵⁷ *Id.* at 1209 (citing *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 546. (9th Cir. 1991)).

¹⁵⁸ "'Willful acquisition' or 'maintenance of monopoly power' involves 'exclusionary conduct,' not power gained 'from growth or development as a consequence of a superior product, business acumen, or historic accident.'" *Kodak II*, 125 F.3d at 1208 (quoting *Grinnell*, 384 U.S. at 570-71).

monopolies into separate markets.”¹⁵⁹ Drawing on the Supreme Court’s notorious footnote 29 in *Kodak I*, the court held that a patent holder may be liable under the monopoly leveraging theory by “exploit[ing] [its] dominant position to enhance a monopoly in another market.”¹⁶⁰ However, as the court notes, *Kodak I* did not specifically address whether a unilateral refusal to deal in a patented product was exclusionary conduct.¹⁶¹ In fact, no other court had imposed antitrust liability for a unilateral refusal to sell or license a patent and most courts did not view such conduct as exclusionary.¹⁶² But the court reiterated that patent rights do not immunize a patent holder from antitrust liability.¹⁶³ Patent holders do not have the right to exclude others from the market if the patent was unlawfully acquired, nor can they “attempt to extend a lawful monopoly beyond the grant of a patent.”¹⁶⁴

Contrary to Kodak’s assertions, the court did not turn a blind eye to the serious impact its decision could potentially have on the value of intellectual property rights. The court recognized that making the actions of a patent holder susceptible to antitrust violations could deter would-be inventors from taking part in the development of new technologies.¹⁶⁵ This risk strikes to the core of “the fundamental and complimentary purposes of both the intellectual property and antitrust

¹⁵⁹ *Kodak II*, 125, F.3d at 1208, 1216.

¹⁶⁰ *Id.* at 1216.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 1215-16.

¹⁶⁴ *Id.* at 1216.

¹⁶⁵ *Id.* at 1218. The court reasoned that:

Particularly where treble damages are possible, such claims [based on unilateral refusals to deal] will detract from the advantages lawfully granted to the holders of patents or copyrights by subjecting them to the cost and risk of lawsuits based upon the effect, on an arguably separate market, of their refusal to sell or license. The cost of such suits will reduce a patent holder’s “incentive . . . to risk the often enormous costs in terms of time, research, and development.”

Id. (quoting *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 480 (1974)).

laws, which aim to ‘encourag[e] innovation, industry and competition.’”¹⁶⁶ While ultimately deciding to extend liability for unilateral refusals to deal in patented products, the court felt that its approach must “account for the procompetitive effects and statutory rights extended by the intellectual property rights.”¹⁶⁷

Relying on *Kodak I* and *Aspen Skiing*, the court held that §2 of the Sherman Act “prohibits a monopolist from refusing to deal in order to create or maintain a monopoly absent a *legitimate business justification*.”¹⁶⁸ Thus, “[w]hen a legitimate business justification supports a monopolist’s exclusionary conduct, that conduct does not violate §2 of the Sherman Act.”¹⁶⁹ Citing to *Data General*, the court noted that this presumption could be rebutted by presenting evidence that the alleged monopolist had unlawfully acquired the intellectual property rights in question.¹⁷⁰ Additionally, “[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.”¹⁷¹ Following the lead of the First Circuit in *Data General*, the court held that a patentee’s desire to exclude others from its patented technology is a presumptively valid business justification.¹⁷² According to the court, such a presumption would help

¹⁶⁶ *Kodak II*, 125 F.3d at 1218 (quoting *Atari Games Corp. v. Nintendo of America, Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990)).

¹⁶⁷ *Kodak II*, 125, F.3d at 1218.

¹⁶⁸ *Id.* at 1209 (emphasis added); *see also* *Image Technical Servs., Inc. v. Eastman Kodak Co. (“Kodak I”)*, 594 U.S. 451, 483 n.32 (1992) (“It is true that as a general matter a firm can refuse to deal with its competitors. But such a right is not absolute; it exists only if there are legitimate competitive reasons for the refusal.”).

¹⁶⁹ *Kodak II*, 125 F.3d at 1212.

¹⁷⁰ *Id.* at 1219 (citing *Data General v. Grumman*, 36 F.3d 1147, 1188 (1st Cir. 1994)).

¹⁷¹ *Id.* at 1212 (citing *Kodak I*, 504 U.S. at 483). Pretext is defined as “[a] false or weak reason or motive advanced to hide the actual or strong reason or motive.” BLACK’S LAW DICTIONARY (8th ed. 2004).

¹⁷² *Kodak II*, 125 F.3d at 1218.

the fact finder in equally applying the principles of both the antitrust and patent laws.¹⁷³

E. In re Independent Service Organizations Antitrust Litigation

In *In re Independent Service Organizations Antitrust Litigation* (“*Xerox*”),¹⁷⁴ the Federal Circuit was presented with facts strikingly similar to those presented to the Ninth Circuit in *Kodak II*. Xerox manufactured, sold, and serviced high-volume copiers.¹⁷⁵ After Xerox implemented a policy of not selling replacement parts and other copyrighted materials to ISOs unless they were also end-users of the copiers, ISO competitors in the photocopier service market sued Xerox for antitrust violations under the Sherman Act.¹⁷⁶ The plaintiffs claimed that Xerox used its monopoly over patented parts unique to its photocopiers to effectively eliminate ISOs from the service aftermarket.¹⁷⁷

Turning to the antitrust-IP conflict, it was clear from the start that the Federal Circuit was biased towards intellectual property rights. While tipping its hat to the mantra that the proprietary right of a patent does not insulate its holder from antitrust liability¹⁷⁸ and recognizing that a patentee’s right to exclude is not boundless,¹⁷⁹ the court made it clear that “the antitrust laws do not negate the patentee’s right to exclude others from patent property.”¹⁸⁰ Ultimately, the court held that a patent holder is only subject to liability under the Sherman Act in

¹⁷³ *Id.* at 1218 (“The presumption should act to focus the factfinder on the primary interest of both intellectual property and antitrust laws: public interest.”).

¹⁷⁴ *In re Indep. Serv. Orgs. Antitrust Litig.* (“*Xerox*”), 203 F.3d 1322 (Fed. Cir. 2000).

¹⁷⁵ *Xerox*, 203 F.3d at 1324.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 1325 (“Intellectual property rights do not confer a privilege to violate the antitrust laws.”).

¹⁷⁹ *Id.* at 1326.

¹⁸⁰ *Id.* (quoting *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1362 (Fed. Cir. 1999)).

cases of “illegal tying, fraud in the Patent and Trademark Office, or sham litigation [to enforce the patent].”¹⁸¹ Where these circumstances are not present, a patent holder can enforce its right to exclude “*exempt* from the antitrust laws.”¹⁸² The court’s strong language overwhelmingly communicated its preference for the patent laws.

Furthermore, the court severely limited the application of the Supreme Court’s holding in *Kodak I* by asserting that the language in footnote 29 stood for nothing more than the “undisputed premise that the patent holder cannot use his statutory right to refuse to sell patented parts to gain a monopoly in a market *beyond the scope of the patent*.”¹⁸³ The court hung its hat on this principle and declared that so long as the patentee operates within the scope of the statutory patent grant, it has the unqualified right to refuse to sell or license its patented product. *Kodak I* did nothing to limit this freedom whatsoever.¹⁸⁴ In essence, according to the Federal Circuit, a patent holder’s right to exclude extends to any relevant market that involves the use, manufacture, or sale of the invention.¹⁸⁵ Going even further, the court held that a patent holder does not violate the Sherman Act by unilaterally refusing to license or sell a patented item, even if the refusal to deal impacts competition in more than one market.¹⁸⁶

The court also expressly rejected the rebuttable presumption approach taken by the Ninth Circuit in *Kodak II*. Akin to its disregard for the subjective motivation of a patentee in bringing suit to enforce its proprietary rights, the court held that a patent holder’s subjective

¹⁸¹ *Xerox*, 203 F.3d at 1327-28. Aside from illegal tying, the court also attaches liability in patent infringement suits where: (1) “the asserted patent was obtained through knowing and willful fraud;” or (2) “the infringement suit was a mere sham to cover what is actually no more than an attempt to interfere directly with the business relationships of a competitor.” *Id.* at 1326.

¹⁸² *Id.* (emphasis added).

¹⁸³ *Id.* at 1327.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 1326-27.

¹⁸⁶ *Id.* at 1327 (“[W]e have expressly held that, absent exceptional circumstances, a patent may confer the right to exclude competition altogether in more than one antitrust market”).

intent in refusing to deal in the patented product are irrelevant to antitrust law.¹⁸⁷ The court refused to “inquire into [a patentee’s] subjective motivation for exerting his statutory rights, even though his refusal to sell or license his patented invention may have an anticompetitive effect.”¹⁸⁸ Essentially, the court’s approach entails first asking the threshold question of whether the patentee’s refusal to sell its patented product exceeds the scope of the patent grant.¹⁸⁹ If the answer is no, then the court’s analysis ends and it will not inquire into the patent holder’s subjective intent for participating in such conduct.¹⁹⁰

While all of the above cases do not necessarily discuss the antitrust-IP conflict, their holdings all have significant impact on the subject. The Seventh Circuit addressed many of these cases in *Schor v. Abbott Labs*, but except for a nod in the Federal Circuit’s direction, disagreed with or decided to disregard the holdings and reasoning of these cases. The presentation of *Schor v. Abbott Labs* and following discussion will shed light on why the court’s choice to do so was incorrect.

III. *SCHOR V. ABBOTT LABORATORIES*

A. *Facts and the District Court’s Opinion*

Abbot Laboratories (“Abbott”) is an Illinois-based pharmaceutical company engaged in the business of developing, manufacturing and distributing a wide variety of drugs within the United States and worldwide.¹⁹¹ Among its portfolio of marketed drugs are several for

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 1327-28.

¹⁸⁹ *Id.* at 1328.

¹⁹⁰ *Id.*

¹⁹¹ *Schor v. Abbott Labs*. (“*Abbott I*”), 378 F. Supp. 2d 850, 852 (N.D. Ill. 2005).

the treatment of HIV and AIDS.¹⁹² One such drug, ritonavir, is a protease inhibitor (PI)¹⁹³ that slows the progression of the disease by preventing cells that have been infected with HIV from producing new copies of the virus.¹⁹⁴ Ritonavir, sold under the brand name Norvir, was originally marketed as a stand-alone drug, but caused severe side effects when used alone in high doses.¹⁹⁵ Abbott found, however, that Norvir had powerful effects when used in conjunction with other protease inhibitors.¹⁹⁶ By blocking an enzyme in the liver that normally metabolizes away PIs, Norvir causes combined PIs to last longer in the bloodstream, thus boosting their overall effectiveness.¹⁹⁷ This “boosting” effect allows HIV and AIDS patients to take lower doses of these other PIs, and less frequently.¹⁹⁸ Abbott offers its own ritonavir boosted combination drug under the brand name Kaletra.¹⁹⁹

¹⁹² HIV (human immunodeficiency virus) is a retrovirus that causes AIDS (acquired immune deficiency syndrome). *Schor v. Abbott Labs.* (“*Abbott I*”), 457 F.3d 608, 609 (7th Cir. 2006). For more information on HIV/AIDS, its transmission and treatments, see CENTERS FOR DISEASE CONTROL AND PREVENTION, HIV/AIDS, <http://www.cdc.gov/hiv/> (last visited Dec. 4, 2006).

¹⁹³ Protease inhibitors (“PIs”) are just one class of anti-HIV drugs. Others include nucleoside/nucleotide reverse transcriptase inhibitors (NRTIs); non-nucleoside reverse transcriptase inhibitors (NNRTIs); entry inhibitors, which include fusion inhibitors; integrase inhibitors; maturation inhibitors; and cellular inhibitors. See Aidsmeds.com, <http://www.aidsmeds.com> (last visited Dec. 4, 2006)

¹⁹⁴ *Abbott I*, 378 F. Supp. at 852; see also Aidsmed.com, What are Protease Inhibitors (PIs)?, <http://www.aidsmeds.com/PIs.htm#Question> (last visited Dec. 4, 2006). For more information on how HIV infects a T-cell and begins to create more viruses, and where each class of anti-HIV drugs blocks this process, see Aidsmeds.com, The HIV Life Cycle, <http://www.aidsmeds.com/lessons/LifeCycleIntro.htm> (last visited Dec. 4, 1006)

¹⁹⁵ *Abbott I*, 378 F. Supp. 2d at 852.

¹⁹⁶ At least seven other protease inhibitors not manufactured by Abbott Labs are now commonly boosted by Norvir: Agenerase, Crizivan, Fortovase, Invirase, Lexiva, Reyataz, and Viracept. *Id.*; see also Aidsmeds.com, Protease Inhibitors (PIs), <http://www.aidsmeds.com/PIs.htm> (last visited Dec. 4, 2006)

¹⁹⁷ *Abbott II*, 457 F.3d at 610.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

Along with potentially lowering the cost of effective treatment and reducing the number of doses a patient must take daily, Norvir is also effective in combating drug resistance. Drug resistance—reduction in the ability of a drug, or combination of drugs, to block HIV reproduction in the body²⁰⁰—is a huge problem affecting HIV/AIDS patients.²⁰¹ In general, it is important for those suffering from HIV/AIDS to have a variety of effective PIs, or other drugs, available to them if they become resistant to a particular drug or drug cocktail and need to alter their treatment regimen.²⁰² Resistance to a drug often occurs when the drug is not effective at preventing the virus from reproducing inside the body. If the virus continues to reproduce during treatment, it can alter itself—or "mutate"—to avoid the drugs.²⁰³ Norvir helps to keep viral replication and, thus, mutation to a minimum by keeping the concentration of the boosted protease inhibitor in the bloodstream high. Norvir-boosted PIs are therefore able to remain effective treatments for longer periods of time.²⁰⁴

Abbott holds a patent on ritonavir²⁰⁵ and, thus, controls 100% of the Norvir market.²⁰⁶ Abbott also holds a patent covering ritonavir taken in combination with other protease inhibitors.²⁰⁷ In 2003, Kaletra, Abbott's own boosted PI, began to lose its market share and defendant responded by raising the price of Norvir by more than four-

²⁰⁰ See Aidsmeds.com, Understanding Drug Resistance and the Tests to Measure It, <http://www.aidsmeds.com/lessons/Resistance1.htm> (last visited Dec. 4, 2006)

²⁰¹ *Abbott I*, 378 F. Supp. 2d at 852.

²⁰² *Id.*

²⁰³ See Aidsmeds.com, Understanding Drug Resistance and the Tests to Measure It, <http://www.aidsmeds.com/lessons/Resistance1.htm> (last visited Dec. 4, 2006)

²⁰⁴ *Abbott I*, 378 F. Supp. 2d at 852.

²⁰⁵ U.S. Patent No. 6,037,157 (filed Jun. 26, 1996) (hereinafter the '157 patent).

²⁰⁶ *Abbott I*, 378 F. Supp. 2d at 852.

²⁰⁷ U.S. Patent No. 5,886,036 (filed Mar. 20, 1997) (hereinafter the '036 patent).

hundred percent.²⁰⁸ However, Abbott did not raise the price of ritonavir as incorporated in Kaletra.²⁰⁹ As a result, Kaletra costs substantially less than boosting another PI with Norvir.²¹⁰

Plaintiff Gary Schor, who purchased Norvir for his personal use,²¹¹ brought a class action in the District Court for the Northern District of Illinois against defendant Abbott, alleging violation of § 2 of the Sherman Act.²¹² Specifically, Schor alleged under a theory of monopoly leveraging that Abbott violated §2 of the Sherman Act by abusing its legal monopoly over Norvir to unfairly injure competition in the market for Norvir-boosted PIs.²¹³ According to Schor, Abbott's "anticompetitive pricing scheme [was] designed to exclude competition for Kaletra,"²¹⁴ which competes in the boosted PI market.²¹⁵ However, Schor did not allege that Abbott participated in any of the typical exclusionary practices such as tie-in sales, a price-squeeze, exclusive dealing and selective refusal to deal, or predatory pricing.²¹⁶

²⁰⁸ *Abbott I*, 378 F. Supp. 2d at 852.

²⁰⁹ *Id.*

²¹⁰ *Id.* This statement does not mean to suggest that other drug companies in the business of developing and manufacturing HIV/AIDS drugs actually sell a drug cocktail combining their protease inhibitor with Norvir in a pre-packaged, or chemically combined form similar to Kaletra. These practices would constitute infringement under Abbott's '036 patent. This only means that an HIV/AIDS patient wishing to take a Norvir-boosted drug cocktail, he can either purchase Kaletra, or pay substantially more to purchase Norvir alone along with another protease inhibitor.

²¹¹ *Id.*

²¹² *Id.* at 851-52 (N.D. Ill. 2005). Plaintiff also brought a claim alleging violations of the Illinois Consumer Fraud Act, 815 ILCS 505/1, *et seq.* and a state law claim for unjust enrichment. *Abbott I*, 378 F. Supp. 2d. at 852.

²¹³ *Id.*

²¹⁴ *Id.* at 853.

²¹⁵ *Id.* at 855.

²¹⁶ *Abbott II*, 457 F.2d at 610.

Such a claim of “free-standing” monopoly leveraging had never been brought before the Seventh Circuit.²¹⁷ More importantly, the Seventh Circuit had never addressed “whether the Sherman Act limits a patentee’s right to exclude others from more than one relevant market” under a theory of monopoly leveraging.²¹⁸ Seeming to understand the weight of the case before it, the district court not only took note of the “sparse case law regarding if or how the monopoly leveraging theory applies to conduct by a [patent holder],” but also that the little existing case law did not relate to a price increase by the patent holder.²¹⁹ Thus, looking for guidance, the court analogized the price increase at issue to refusal to deal cases with because, “if a patentee has the right to refuse to sell its product altogether, it has the right to raise the price.”²²⁰ Above all, the court reiterated that in order to violate the Sherman Act, the alleged monopolist’s conduct must harm competition in the relevant market.²²¹

Turning specifically to the issue of whether a patent holder may be liable under a theory of monopoly leveraging for unilaterally increasing the price of its patented product, the court addressed the split between the Ninth Circuit and Federal Circuits. The district court ultimately sided with the Federal Circuit’s “sounder” approach and

²¹⁷ *Id.* at 611. Curiously, the Seventh Circuit felt it appropriate to analogize Abbott’s price increase conduct to the refusal to deal conduct present in *Xerox* and *Kodak II* when discussing relevant approaches to dealing with a monopoly leveraging claim, yet refrained from doing so when it characterized Schor’s monopoly leveraging claim as “free standing.” Wouldn’t it have been similarly appropriate for the court to analogize a price increase to a refusal to deal in determining whether Abbott participated in any of the “normal exclusionary practices”?

²¹⁸ *Abbott I*, 378 F. Supp. 2d at 857.

²¹⁹ *Id.* at 856. In fact, as you can see from the cases discussed above, most either dealt with a refusal to deal/license in the patented product or a tie-in sales.

²²⁰ *Id.* (citing *Zenith Labs., Inc. v. Carter-Wallace, Inc.*, 530 F.2d 508, 513 n.9 (3d Cir. 1976) (“[A] patentee is privileged to withhold [its invention] from sale at any price, or to offer it for sale at any price he wishes, low or high.”)).

²²¹ *Abbott I*, 378 F. Supp. 2d at 856 (“[A] monopoly leveraging claim ‘presupposes anticompetitive conduct.’”) (quoting *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993)).

held that, “subject to narrow limitations . . . , a patentee’s exercise of its statutorily-granted market power does not constitute a Sherman Act violation, even if such conduct affects a second market.”²²²

Conversely, the court interpreted the *Kodak II* as limiting a patent holder’s right to exclude others to a single market.²²³ As with the Federal Circuit, the court felt that so long as the secondary market was encompassed by the patent claims, the patent holder’s right to exclude was not curtailed by the antitrust laws in that market.²²⁴

The court also noted that, as distinguished from *Xerox* and *Kodak II*, Abbott’s patents cover Norvir’s use in the stand-alone market, as well as in the Norvir-boosted PI market.²²⁵ While not unsympathetic to the plaintiff’s concerns, the court feared it would run afoul of the aims of the antitrust and patent laws to encourage innovation and competition by imposing liability on a manufacturer that raised the price on patented products wholly within its patent grant.²²⁶ According to the court, the Federal Circuit’s approach “[kept] with the case law and the statutory language suggesting that a court must consider the scope of the patent grant when determining whether an antitrust violation has occurred.”²²⁷ Holding that the defendant had not exceeded the scope of its patents, the court granted Abbott’s motion to dismiss.²²⁸ Schor appealed.

B. The Seventh Circuit’s Opinion

On appeal, the Seventh Circuit affirmed the District Court and held that Abbott did not violate the Sherman Act by discriminately raising the price of ritonavir in Norvir. The court read the district court’s opinion as holding that a monopoly leveraging claim cannot

²²² *Abbott I*, 378 F. Supp. 2d at 858.

²²³ *Id.* at 857.

²²⁴ *Id.*

²²⁵ *Id.* at 859.

²²⁶ *Id.* at 858.

²²⁷ *Id.*

²²⁸ *Id.* at 860.

stand absent some additional exclusionary conduct on the part of the alleged monopolist.²²⁹ Noting that Schor had not alleged any of the typical exclusionary practices, Judge Easterbrook, writing for the majority, set out to determine whether such a “free standing” theory of monopoly leveraging, could give rise to liability under the antitrust laws.²³⁰

According to the court, there could be no liability under a theory of monopoly leveraging unless the antitrust defendant, having a monopoly in the primary market, could, through some “clever combination of prices,” make a monopoly profit for itself by inducing one or more of its competitors to withdraw from the secondary market.²³¹ The court seemed to embrace the idea that unless the alleged monopolist’s conduct produced such consequences—the ability to reap monopoly profits by excluding others from the secondary market—it was not exclusionary as required by the antitrust laws. Judge Easterbrook opined that Abbott’s pricing scheme could bring about no such harm.²³² He explained that “a monopolist can take its monopoly profit just once” either by charging monopoly prices in the primary market and allowing competition in the downstream markets, or by reducing the price in the primary market and inducing customers to buy more of the good.²³³ But an effort to do both “makes [the monopolist] worse off and is self-detering”—attempting to quash

²²⁹ *Abbott II*, 457 F.3d at 610. Curiously, the district court does not seem to say anything to this effect.

²³⁰ *Id.* at 610-11. The court concluded that Abbott’s conduct could not be considered a tie-in, a refusal to deal, price discrimination, a price-squeeze, nor an example of predatory pricing. This conclusion is questionable, to say the least.

²³¹ *Id.* at 611. This Comment will only focus on the court’s ultimate decision on how to determine whether a patent holder can be subject to liability on a theory of monopoly leveraging. Discussion of the court’s strange reservations on the theory of monopoly leveraging, which has deep roots in antitrust jurisprudence, is saved for a later time.

²³² *Id.* The court believes that this practice does not harm consumers because the alleged monopolist could not increase its profits. Yet, why would Abbot adopt these practices in the first place?

²³³ *Id.* at 611-12.

the competition in such a way is simply not economical.²³⁴ Thus, because a monopolist could not technically increase profits through such a discriminatory pricing scheme by making it unprofitable for others to compete in the market, it simply should not be prohibited by the antitrust laws.²³⁵

As further support that Abbott's conduct was not exclusionary, the court noted that Abbott's competitors had not taken their drugs off the market and, thus, consumers were not harmed.²³⁶ Abbott's rivals were continuing to profitably sell their competing products, so there was no prospect that Abbott was going to monopolize the market of Norvir-boosted PI's.²³⁷ Unless Abbott's unilateral conduct "create[d] a dangerous probability of success in monopolizing [the secondary market]" its conduct was not unlawful under the Sherman Act.²³⁸ On this point, the court condemned the approach taken by the Ninth Circuit in *Kodak II* and parts of the Second Circuit's approach in *Berkey Photo*.²³⁹ The court reasoned that "[t]he ninth circuit did not give any reason for thinking that a monopolist's acquisition of market power in a complementary product injures consumers."²⁴⁰ In the court's opinion, the *Kodak II* standard, which conditioned success on a monopoly leveraging claim on a mere showing that the antitrust defendant had "[used] its monopoly in one market to monopolize or

²³⁴ *Id.* at 612.

²³⁵ *Id.*

²³⁶ *Id.* at 613. "None of Abbott's rivals contends that, at Kaletra's going price, it is unable to sell its own protease inhibitor profitably." *Id.* at 610.

²³⁷ *Id.* at 613. This also relates back to the court's discussion of why monopoly leveraging should not be a theory of antitrust liability. According to Judge Easterbrook, Abbott could have either a monopoly in the Norvir market or in the Kaletra market, not both. But, curiously, earlier in the opinion, the court cast serious doubt on whether Abbott actually held a monopoly in the Norvir market. And other courts have suggested that it is not necessary to succeed on a theory of monopoly leveraging that the antitrust defendant have a monopoly in the primary market.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

attempt to monopolize [a] downstream market,”²⁴¹ was “undisciplined.” Instead, the court opted to side with the Federal Circuit in saying that the Ninth Circuit “just got it wrong.”²⁴²

Furthermore, the court rejected the Ninth Circuit’s interpretation of *Kodak I* as a “misunderstanding” of the Supreme Court’s holding.²⁴³ According to Judge Easterbrook, the Ninth Circuit erroneously read *Kodak I* as forbidding firms with market power from dealing in complementary products.²⁴⁴ Interpreted correctly, Judge Easterbrook claimed, *Kodak I* stood for the proposal that firms with market power are forbidden to deal in complementary products only “in ways that take advantage of customers’ sunk costs.”²⁴⁵ In *Kodak I*, because Kodak initially allowed the ISOs to service its photocopiers, but then switched to a closed-service model, it “had the potential to raise the total cost of copier-plus-service above the competitive level” and above the price it charged if it had done its own repair work from the outset.²⁴⁶ Because such a switch that would exploit customers’ sunk costs was not possible, the court concluded that Schor could only be successful if it were to generalize *Kodak I* as promulgating “a rule against selling products that complement those in which the defendant has market power.”²⁴⁷

²⁴¹ *Image Technical Servs., Inc. v. Eastman Kodak Co.* (“*Kodak I*”), 125 F.3d 1195, 1209 (9th Cir. 1997).

²⁴² *Abbott II*, 457 F.3d at 613 (citing *In re Indep. Serv. Orgs. Antitrust Litig.* (“*Xerox*”), 203 F.3d 1322, 1327 (Fed. Cir. 2000)). The court stated that:

It would be possible to cabin [*Kodak II*] by observing that, despite the opinion’s language, the case arose from a refusal to deal, so it occupies one of the traditional antitrust categories rather than a claim of “naked” monopoly leveraging of the sort that Schor attempts to pursue. But we think it better to join the Federal Circuit in saying that [*Kodak II*] just got it wrong.

Abbott II, 457 F.3d at 613.

²⁴³ *Id.* at 614.

²⁴⁴ *Id.* at 613-14.

²⁴⁵ *Id.* at 614.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

On the whole, the court cabined its decision on the theory that Abbott's disparate pricing of ritonavir did not harm consumers. Abbot's conduct did not force other competitors in the Norvir-boasted PIs out of the market and it was not exploiting consumers' sunk costs. In fact, the court noted that consumers technically benefited from the relatively low price for ritonavir in Kaletra²⁴⁸ and, because the antitrust laws "condemn high prices, not low ones, . . . it would be wholly inappropriate to oblige Abbott to raise its price for Kaletra."²⁴⁹ A patent holder "is entitled to charge whatever the traffic will bear" and is not required "to cooperate with rivals by selling them products [at prices] that would help the rivals to compete."²⁵⁰ Even though this case seemingly presented perfect conditions for the court to analyze a patent holder's potential liability under the antitrust laws, this was one of the only references that the court made to the antitrust-IP conflict.

IV. WHY THE SEVENTH CIRCUIT "JUST GOT IT WRONG" AND HOW IT COULD HAVE DONE RIGHT

A. *Where the Seventh Circuit Went Wrong*

The Seventh Circuit's holding in *Abbott II* essentially dodges the patent-antitrust conflict by failing to discuss, let alone attempting to reconcile their respective considerations. Almost no formal discussion is made of the elements of a § 2 monopolization claim, let alone as

²⁴⁸ The court seems to frame its arguments on the idea that Schor was complaining about the "relatively low" price of ritonavir in Kaletra, when in reality, Schor was complaining about Abbott's 500% increase in the price of ritonavir in Norvir. According to Schor's complaint, the price of Kaletra never fluctuated. Thus, it is the fact that Abbott drastically increased the price of Norvir—a component in many other combination drug treatments—that was harming consumers.

²⁴⁹ *Id.* at 613. Again, it is not the low price of ritonavir in Kaletra that Schor complains of, but rather the high price of ritonavir in Norvir. Schor is arguing that the Abbott should be obliged to lower the price of Norvir.

²⁵⁰ *Id.* at 610.

they apply to patent holders.²⁵¹ *Abbott II*, a case that should have laid the groundwork for similar cases to come, leaves much to want as far as guiding how antitrust plaintiffs should proceed under a theory of monopoly leveraging against patent holder-monopolists. While outright rejecting the Ninth Circuit's approach on at least one ground, the court does not clearly advocate for that of the Federal Circuit. Nor does the court present why the reasoning of the Federal Circuit is superior to that of the Ninth. After *Abbott II*, it is not entirely clear what conduct on the part of a patent holder is actionable, especially under the monopoly leveraging theory.

Furthermore, contrary to what he stated upfront, Judge Easterbrook presented his opinion in terms of whether Abbott's unilateral price increase was an exclusionary practice, and not in terms of whether a "naked" theory of monopoly leveraging could be successful under the Sherman Act. The court ultimately found that because Abbott's conduct was not forcing other competitors from the market, it was not harming consumers and thus was not exclusionary and did not violate the antitrust laws. While determining whether an alleged monopolist's conduct is exclusionary is one of the main steps to finding liability under the Sherman Act, the court nevertheless missed its chance to set out a clear standard for the potential liability of a patent holder under a theory of monopoly leveraging.²⁵² The court seemed to just ignore one of the major issues presented to it.

²⁵¹ While the court assumed, as the complaint was dismissed for failure to state a claim, that Abbott had market power, thus addressing the first element of a § 2 monopolization claim, the court fails to clearly assess the second element—whether Abbott's conduct was exclusionary or anticompetitive. *Id.* at 610-11.

²⁵² Also curious is the fact that the court spent the majority of the opinion attempting to show that Abbott's conduct was not exclusionary rather than realize, as the district court did, that a unilateral price increase is akin to a unilateral refusal to deal. Refusing to sell a product is the same as selling it at an infinite price; because no one can afford to pay an infinite amount, it is essentially the same as refusing to sell the product altogether. Thus, a refusal to deal is merely a subset of a unilateral price increase. Additionally, the court's conclusion that Abbott's conduct does not fall into any of the mentioned traditional exclusionary practices is questionable. It is not such a stretch to see how Abbott's price increase is akin to the price-squeeze claim in *United States v. Aluminum Co. of America*, 148 F.2d 416, 436-38 (2d Cir.

What's more, the court misinterpreted not only the Ninth Circuit's holding in *Kodak II*, but also the Supreme Court's holding in *Kodak I*. The court interpreted the Ninth Circuit's *Kodak II* decision as completely limiting a patent holder's right to exclude others to a single market.²⁵³ This interpretation is too broad. The Ninth Circuit held that a patent holder *may* violate the Sherman Act by using its patents to monopolize or attempt to monopolize a secondary market.²⁵⁴ Aside from such anticompetitive conduct, the patent holder is free to use the patented product as it wishes, in any market. The court interpreted the *Kodak I* holding as standing for the proposition that a monopolist can't deal in complementary products in a way that takes advantage of customers' sunk costs.²⁵⁵ This interpretation is too narrow. The Supreme Court clearly states that under § 2 of the Sherman Act, a firm cannot wield its monopoly power "as part of a scheme of willful acquisition or maintenance of monopoly power" in a secondary market.²⁵⁶

Overall, the few statements that the court did make concerning the relationship between the antitrust and patent laws tend to resolve the conflict in favor of the latter.²⁵⁷ Much like the Federal Circuit, the Seventh Circuit sends a message that patentees essentially have free reign in any of the markets encircled within its patent grants.²⁵⁸

1945), where the defendant violated the Sherman Act by selling processed aluminum sheets (i.e. Kaletra) for less than the price it charged for the raw aluminum required to make them (i.e. Norvir).

²⁵³ *Abbott II*, 457 F.3d at 613-14.

²⁵⁴ *Image Technical Servs., Inc. v. Eastman Kodak Co. (Kodak II)*, 125 F.3d 1195, 1209 (9th Cir. 1997).

²⁵⁵ *Abbott II*, 457 F.3d at 614.

²⁵⁶ *Eastman Kodak Co. v. Image Technical Servs., Inc. (Kodak I)*, 504 U.S. 451, 483 (1992).

²⁵⁷ *Abbott II*, 457 F.3d at 614 ("It would make little sense to use the antitrust laws to condemn Abbott for a strategy . . . that the patents *entitle* Abbott to pursue if it chooses.") (emphasis added); *id.* at 610 ("[A] patent holder is *entitled* to charge whatever the traffic will bear.") (emphasis added).

²⁵⁸ *Id.* at 614 ("Recall that [Abbott's] patents cover not only ritonavir administered by itself but also ritonavir administered in combination with another

Additionally, the Seventh Circuit chose to take the side of the Federal Circuit in rejecting the Ninth Circuit's approach. Whether or not this can necessarily be interpreted as a direct adoption of the Federal Circuit's approach, it can be inferred that if the Seventh Circuit had clearly advocated for a particular approach, it would have been one that gave great deference to the patent laws. Yet, as it will become clear in the following discussion, elevating one set of laws above the other is improper and can have detrimental effects on competition. Because it best harmonizes the patent and antitrust laws, the Seventh Circuit should have adopted the approach taken by the First and Ninth Circuits.

B. Harmonizing the Patent and Antitrust Laws

Historically, the public has held a particular distain for monopolies. Like many other Americans at the time, Thomas Jefferson, the author of the 1793 Patent Act and an inventor himself, had an "instinctive aversion to monopolies," initially including those given under the patent grant.²⁵⁹ While clearly recognizing the social and economic rationale of the patent system, Jefferson did not feel that the exclusive rights of the patent grant should be freely given. He insisted that in order to deserve the "embarrassment of an exclusive patent," technologies must meet very high standards.²⁶⁰ Only

protease inhibitor. Abbott therefore could *take control* of the market in combination treatments until the patents expire." (emphasis added).

²⁵⁹ *Graham v. John Deere*, 383 U.S. 1, 7-8 (1966) ("From France, he wrote to Madison (July 1788) urging a Bill of Rights provision restricting monopoly, and as against the argument that limited monopoly might serve to incite 'ingenuity,' he argued forcefully that 'the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression,' V Writings of Thomas Jefferson, at 47 (Ford ed., 1895)").

²⁶⁰ *John Deere*, 383 U.S. at 11. In *John Deere*, the Court stated:

The grant of an exclusive right to an invention was the creation of society—at odds with the inherent free nature of disclosed ideas—and was not to be freely given. Only inventions and discoveries which furthered human knowledge, and were new and useful, justified the special inducement of a limited private monopoly.

inventions and discoveries which furthered human knowledge, and were new and useful, outweighed the restrictive effect of the limited patent monopoly.²⁶¹ Thus, Jefferson was very much aware of and concerned with the anticompetitive nature of the patent grant.

In a day when the United States Patent and Trademark Office (the “PTO”) receives over 390,000 patent applications²⁶² and grants upwards of 140,000 patents²⁶³ per year, it is hard to believe that every patent undergoes such a high level of scrutiny as Jefferson would have liked.²⁶⁴ In fact, many believe that it has almost become too easy to get

Jefferson did not believe in granting patents for small details, obvious improvements, or frivolous devices. His writings evidence his insistence upon a high level of patentability.

Id. at 9.

²⁶¹ *Id.* at 11.

²⁶² USPTO ELECTRONIC INFORMATION PRODUCTS DIVISION, NUMBER OF UTILITY PATENT APPLICATIONS FILED IN THE UNITED STATES, BY COUNTRY OF ORIGIN CALENDAR YEAR 1965 TO PRESENT, http://www.uspto.gov/go/taf/appl_yr.pdf. The United States grants three types of patents: utility, design and plant. JANICE M. MUELLER, AN INTRODUCTION TO PATENT LAW 196 (2003). Utility patents, the most common type of issued U.S. patents, are what most people commonly think of when they think of a patent—a patent for an invention. *Id.* A design patent, in contrast, protects the “new, original and ornamental design for an article of manufacture,” 35 U.S.C. § 171, i.e. the aesthetic “look” of a particular item. A plant patent is available for those who:

[Invent] or discover[] and asexually reproduce[] any distinct and new variety of plant, including cultivated sports, mutants, hybrids, and newly found seedlings, other than a tuber propagated plant or a plant found in an uncultivated state.

35 U.S.C. § 161 (2002). The number quoted in the text is for utility patent applications alone filed in the U.S. in 2005.

²⁶³ USPTO ELEC. INFO. PROD. DIV., ALL TECHNOLOGIES REPORT: JANUARY 1, 1963 – DECEMBER 31, 2005, http://www.uspto.gov/go/oeip/taf/all_tech.pdf.

²⁶⁴ “Over the last 10 years, the number of patent applications filed annually with USPTO has increased 91 percent from about 185,000 in 1994 to over 350,000 in 2004.” US GOV’T ACCOUNTABILITY OFFICE REPORT TO CONG. COMM. ON INTELL. PROP., USPTO HAS MADE PROGRESS IN HIRING EXAMINERS, BUT CHALLENGES TO RETENTION REMAIN 1, <http://www.gao.gov/new.items/d05720.pdf>.

a patent.²⁶⁵ If this is so, then why should we place intellectual property rights on such a pedestal? While it is clear that we have become an intellectual property-based society,²⁶⁶ why should we give patent

²⁶⁵ “[R]ecent increases in both the complexity and volume of patent applications have . . . raised concerns among intellectual property organizations, patent holders, and others about the quality of the patents that are issued.” US GOV’T ACCOUNTABILITY OFFICE REPORT TO CONG. COMM. ON INTELL. PROP., USPTO HAS MADE PROGRESS IN HIRING EXAMINERS, BUT CHALLENGES TO RETENTION REMAIN 1, <http://www.gao.gov/new.items/d05720.pdf> (last visited, Dec. 5, 2006). In response to waning standards for obviousness, which Thomas Jefferson viewed as the important threshold for patentability, one patent scholar noted:

The PTO is now run like a business, and popular view is that PTO’s incentive structure and need for funds are such that it more or less sells patents for the price of filing and maintenance fees. Even if this view were off the mark, the sheer increase in filings—tripling in the last 20 years—must have lead to an even greater “move them through” mentality. In a vicious circle, lowering the bar increases filings, and increasing filings further lowers the bar. The populace has gotten wind of the situation, and the widespread perception now is that obtaining a patent has become too easy.

Samson Vermont, *A New Way to Determine Obviousness: Applying the Pioneer Doctrine to 35 U.S.C. 103(A)*, 29 AIPLA Q.J. 375, 392-93; see also Greg Aharonian, *Problems with the Examination of Patent Applications*, <http://www.bustpatents.com> (last visited Dec. 4, 2006).

²⁶⁶ At the turn of the twentieth century, the Dow Jones Industrial Average, which many consider the symbol of American wealth and prosperity, was comprised of Amalgamated Copper, American Sugar, Tennessee Coal & Iron, U.S. Rubber, and U.S. Steel, among others. DOW JONES INDUSTRIAL AVERAGE HISTORY 3, http://djindexes.com/mdsidx/downloads/DJIA_Hist_Comp.pdf (last visited Dec. 2, 2006) (*hereinafter* “Dow Jones”). As one columnist noted: “The Dow Jones industrial average has always been the great financial symbol of U.S. business and manufacturing. The Dow was American business; if the business of America was business, then the companies that made up the Dow Jones industrial average were what American business was all about.” Bob Greene, *A Mouse Replaces Men of Steel*, CHI. TRIB., May 20, 1991, at 1C; see also J. Thomas McCarthy, *Intellectual Property—America’s Overlooked Export*, 20 U. DAYTON L. REV. 809, 809-10 (1995) (discussing Greene’s observation). In 1991, the Walt Disney Corporation replaced U.S. Steel on the Dow Jones Index. DOW JONES, at 13. The face of American business had changed:

[T]he heart of U.S. Steel was property—those huge mills spewing sparks, belching smoke and turning out rolled steel twenty-four

holders the right to violate the antitrust laws when patents are becoming less and less meaningful, in a substantive sense? The clear answer is that we should not.

Neither the Patent Act, nor the Sherman Act speaks on how to resolve any conflicts between the two sets of laws. Strangely, this silence has led to many courts implicitly giving more weight to the patent laws, often exculpating patent holders from antitrust liability.²⁶⁷ Yet nothing in the Patent Act says that patent holders are immune to antitrust liability, and the Supreme Court supports this principle. Even more troubling, the Supreme Court has stated that “exemptions from the [Sherman Act] are strictly construed and strongly disfavored.”²⁶⁸ Then how is this tension to be resolved? The Supreme Court in *Watt v. Alaska*²⁶⁹ stated that when faced with such a conflict of laws, a court *must* attempt to resolve the conflict. Thus, the main concern of any court presented with the antitrust-IP conflict should be to find an approach that upholds the primary concern of both laws—consumer welfare. This is what the Seventh Circuit should have held as its ultimate goal. As the following discussion will show, the Federal Circuit completely disregarded this principle, while the First and Ninth Circuits succeeded in finding a common ground.

hours a day. But what is the property that is at the heart of a company like Disney? It is a new kind of property. We call it intellectual property.

J. Thomas McCarthy, *Intellectual Property—America’s Overlooked Export*, 20 U. DAYTON L. REV. 809, 810 (1995).

²⁶⁷ See, e.g., *In re Indep. Serv. Orgs. Antitrust Litig. (“Xerox”)*, 203 F.3d 1322, 1327 (Fed. Cir. 2000).

²⁶⁸ *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 421 (1986); see also *Silver v. NYSE*, 373 U.S. 341, 357 (1963 (“It is a cardinal principle of construction that repeals [of the antitrust laws] by implication are not favored.”) (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)).

²⁶⁹ 451 U.S. 259, 267 (1981).

C. The Federal Circuit's Approach Does Not Give Equal Weight to the Antitrust and Patent Laws

In attempting to maintain the sanctity of the patent grant, the Federal Circuit completely disregarded the considerations of the antitrust laws. Read broadly, the Federal Circuit's holding in *Xerox* stands for the proposition that (absent evidence of fraud, sham litigation, or illegal tying) no antitrust claim may be asserted on a firm's unilateral refusal to sell or license intellectual property.²⁷⁰ The court misinterpreted Supreme Court precedent and the text of the Patent Act and attempted to set intellectual property holders apart from holders of all other forms of property. Furthermore, the court is implicitly founded on questionable assumptions regarding the incentives behind the patent grant.

The court incorrectly interprets Supreme Court precedent as only holding patent holders liable under the antitrust laws for unlawfully extending monopoly power outside of the patent grant.²⁷¹ The Federal Circuit hung its hat on the theory that if the patentee's actions can be construed as falling within the patent grant, the antitrust inquiry ends.²⁷² Essentially, the court holds that if a patent holder uses monopoly power in one market to have an anticompetitive effect in a secondary market, such conduct will not violate the antitrust laws so long as the patent grant can be construed to also cover the secondary market.²⁷³ Furthermore, the court refuses to address whether the patent holder, and alleged monopolist had a valid business justification for refusing to sell or license its patented product.²⁷⁴

This theory of antitrust liability is completely at odds with recent Supreme Court antitrust jurisprudence. The Supreme Court in *Kodak I* expressly indicated that a patent holder could be liable for leveraging

²⁷⁰ *Xerox*, 203 F.3d at 1327.

²⁷¹ *Id.*

²⁷² *Id.* at 1328.

²⁷³ *Id.* at 1327.

²⁷⁴ *Id.*

its power in one market to gain a competitive advantage in another.²⁷⁵ In making this declaration, the Court did not condition its application to the context of a §1 tying violation as suggested by the Federal Circuit. Furthermore, while the court is correct in noting that a patent holder cannot extend its monopoly beyond the bounds of the patent grant,²⁷⁶ the language used by the Supreme Court extends beyond this limited view.

Furthermore, implicit in the Federal Circuit's rejection of *Kodak II* and its refusal to assess a patent holder's "subjective motivation for refusing to sell or license its patented products" lay a rejection of Supreme Court precedent allowing an antitrust plaintiff to rebut evidence of the alleged monopolist's valid business reasons.²⁷⁷ Because the Patent Act does not condition a patentee's right to exclude on having a particular motive for doing so, the Federal Circuit refuses to apply Supreme Court precedent, even if the patentee's actions have an anticompetitive effect.²⁷⁸ However, there is no reason to believe that this rule should not similarly apply to patent monopolists and the Supreme Court did not so restrict the rule.

In addition, the court reads § 271(d) of the Patent Act as support for a finding of antitrust liability.²⁷⁹ However, on its face, the language of this section does not purport to address antitrust liability, but rather patent misuse.²⁸⁰ Patent misuse is an affirmative defense against

²⁷⁵ *Eastman Kodak Co. v. Image Technical Servs., Inc.* ("Kodak I"), 504 U.S. 451, 479 n.29 (1992).

²⁷⁶ *Xerox*, 203 F.3d at 1327.

²⁷⁷ *Kodak I*, 504 U.S. 483 ("[The right to refuse to deal with competitors] exists only if there are legitimate competitive reasons for the refusal.") (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602-605 (1985)).

²⁷⁸ *Xerox*, 203 F.3d at 1327.

²⁷⁹ *Id.* at 1326.

²⁸⁰ Section 271(d) states in relevant part:

No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent *shall be denied relief or deemed guilty of misuse or illegal extension of the patent right* by reason of his having done one or more of the following: . . . (3) sought to enforce his patent rights against infringement or contributory infringement; (4) refused to license or use any rights

alleged patent infringement or contributory infringement that renders the patent unenforceable.²⁸¹ A patent holder is deemed to have misused the patent if she attempted to extend the power of the patent grant beyond the boundaries defined by the patent claims.²⁸² Moreover, as some scholars have pointed out, the legislative history of the 1988 amendment of the Patent Act, which added § 271(d), “makes plain that it was originally conceived not as an antitrust exception for patent holders, but rather as an effort to address certain judicial precedents that Congress thought subjected intellectual property owners to harsher treatment than that afforded to owners of other forms of property.”²⁸³

Thus, this legislative history of the Patent Act reflects a clear Congressional intent to treat intellectual property the same as other forms of property for antitrust purposes.²⁸⁴ Yet, the Federal Circuit attempts to justify this exact opposite conclusion by also pointing to § 154 of the Patent Act, which grants to patentees the statutory right to

to the patent; or (5) conditioned the license of any rights to the patent or the sale of the patented product on the acquisition of a license to rights in another patent or purchase of a separate product, unless, in view of the circumstances, the patent owner has market power in the relevant market for the patent or patented product on which the license or sale is conditioned.

35 U.S.C. 271(d) (emphasis added).

²⁸¹ See *B. Braun Med., Inc. v. Abbott Labs.*, 124 F.3d 1419, 1427 (Fed. Cir. 1997) (describing patent misuse doctrine as an equitable doctrine that allows patent infringers to show patentee’s inequitable conduct has rendered the patent unenforceable).

²⁸² See *Mallinckrodt, Inc. v. Medipart, Inc.* 976 F.2d 700, 708 (Fed. Cir. 1992) (determining patent misuse by whether conduct falls within scope of patent grant).

²⁸³ A. Douglass Melamed & Ali M. Stoeppelwerth, *The CSU Case: Facts, Formalism and the Intersection of Antitrust and Intellectual Property Law*, 10 GEO. MASON L. REV. 407, 412 (2002).

²⁸⁴ *Id.* (“A review of the Congressional record discussing the 1988 amendment and subsequent related bills reveals a consistent Congressional intent to create a ‘level playing field’ under the antitrust laws for all forms of property—not to provide special treatment, or an antitrust immunity, for patent and copyright holders.”).

exclude.²⁸⁵ The court essentially concludes that the patentee's right to exclude under this section is unfettered.²⁸⁶ This conclusion is not supported by recent Supreme Court case law.²⁸⁷ To the contrary, some patent scholars argue that § 154 "does no more than afford patent holders the same rights as those enjoyed by owners of tangible property under common law."²⁸⁸

Moreover, the Federal Circuit's approach is seemingly based off of the categorical assumption that invention and innovation will cease if the protections of the patent laws are subjected to the antitrust laws.²⁸⁹ It is clear that the founders of the Patent Act intended the right to exclude afforded by the patent grant to promote consumer welfare in the long term by encouraging investment in the research and development of new technologies.²⁹⁰ Many scholars, but few courts, challenge this assumption.²⁹¹ These scholars say that there is little to no empirical evidence that adding some limitations to a patentee's power would actually lead to a decrease in technological advancement. In fact, many argue that overly broad protection of intellectual

²⁸⁵ *Xerox*, 203 F.3d at 1324 ("But it is also correct that the antitrust laws do not negate the patentee's right to exclude others from patent property.") (quoting *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1362 (Fed.Cir.1999)). 35 U.S.C. 154(a)(1) states, in relevant part, that "[e]very patent shall contain a . . . grant to the patentee, his heirs or assigns, of the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States."

²⁸⁶ *Xerox*, 203 F.3d at 1327 ("In the absence of any indication of illegal tying, fraud in the Patent and Trademark Office, or sham litigation, *the patent holder may enforce the statutory right to exclude others from making, using, or selling the claimed invention free from liability under the antitrust laws.*") (emphasis added).

²⁸⁷ *Melamed & Stoepfelwerth*, *supra* note 276, at 411 ("[T]he Supreme Court has repeatedly rejected assertions of intellectual property rights as defenses to conduct that would otherwise be condemned under the Sherman Act.").

²⁸⁸ *Melamed & Stoepfelwerth*, *supra* note 276, at 410-11.

²⁸⁹ *Id.* at 414.

²⁹⁰ *See* Part IB, *supra*.

²⁹¹ *See* *Melamed & Stoepfelwerth*, *supra* note 276, at 414-16.

property stifles innovation.²⁹² The approach taken by the Federal Circuit fails to assess these economic realities by outright upholding the patent laws, even if the patent holder's conduct has an anticompetitive effect.²⁹³

By and large, the Federal Circuit's Xerox decision exempts patent holders from antitrust liability. However, even if we think that this approach gives patentees too much freedom, at least other players in the market know the clear boundaries of what the patent holder has proprietary rights to and they can attempt to innovate around those boundaries. Notwithstanding this one benefit, the Federal Circuit's holding was incorrect and should not be followed by the Seventh Circuit.

D. The Ninth Circuit's Approach Best Harmonize the Patent and Antitrust Laws

Despite the Seventh Circuit's inclination that the Ninth Circuit "just got it wrong," the *Kodak II* holding best recognizes, and attempts to reconcile the opposing tugs of the antitrust and intellectual property laws. Overall, the *Kodak II* decision makes up for everything that the Federal Circuit's approach lacks. By correctly applying Supreme Court precedent and refusing to categorically allow patent law considerations overtake the antitrust laws, the Ninth Circuit promulgated a sounder approach. This is the approach that the Seventh Circuit should have adopted in *Abbott II*.

On the whole, the Ninth Circuit set out to address the competing concerns of the patent and antitrust laws, rather than sweep them under the rug as the Federal Circuit did in *Xerox*. While generally recognizing that a patent holder has the right to refuse to sell or license a patent good, the court refused to believe that this right necessarily

²⁹² *Id.* ("[Limitations on intellectual property rights reflect that . . . too much protection for intellectual property rights can retard innovation by, for example, inhibiting the development of improvement patents."].)

²⁹³ *In re Indep. Serv. Orgs. Antitrust Litig.* ("*Xerox*"), 203 F.3d 1322, 1327 (2000).

gave patentees free reign to violate the antitrust laws.²⁹⁴ The court correctly read the recent *Kodak I* decision in this light.

At the very least, the court reads *Kodak I* as standing for the proposition that “intellectual property rights do not confer an absolute immunity from antitrust claims.” This principle cannot be disputed. But, the court was also correct in interpreting *Kodak I* as standing for the proposition that a firm, holding a legitimate monopoly in one market, can be held liable for using that power to enhance a monopoly in a second market.²⁹⁵ While noting that *Kodak I* did not address unilateral refusals to deal in a patented product, the court recognized that § 2 of the Sherman Act clearly “condemns exclusionary conduct that extends natural monopolies into separate markets.”²⁹⁶ This principle was also recognized by the Second Circuit in *Berkey Photo*.²⁹⁷ Because patented property should be treated no differently than real property, the Ninth Circuit was correct in extending this prohibition to patent holders.

Furthermore, the Ninth Circuit, in following the lead of the First Circuit in *Data General*, correctly required patent holders to present valid business reasons for exercising their statutory right to exclude in an allegedly anticompetitive manner.²⁹⁸ The court recognized that not all conduct on the part of a patent holder, which presumptively falls under the statutory right to exclude, “benefit[s] consumers by making a better product or service available—or in other ways—and instead has the effect of impairing competition.”²⁹⁹ While further recognizing

²⁹⁴ *Image Technical Servs., Inc. v. Eastman Kodak Co.* (“*Kodak II*”), 125 F.3d 1195, 1215 (9th Cir. 1997)

²⁹⁵ *Id.* at 1216. (“[T]he Supreme Court in [*Kodak I*] refutes the argument that the possession by a manufacturer of ‘inherent power’ in the market for its parts ‘should immunize [that manufacturer] from the antitrust laws in another market.’”) (citing *Kodak I*, 504 U.S. at 470 n29).

²⁹⁶ *Kodak II*, 125 F.3d at 1216.

²⁹⁷ *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275 (2d Cir. 1979).

²⁹⁸ *Kodak II*, 125 F.3d at 1212.

²⁹⁹ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 597 (1985).

that the Patent Act does not purport to limit a patentee's exercise of its statutory right to exclude to any particular reasons, the Ninth Circuit did not believe that a patent holder should be allowed to do so for anticompetitive purposes; If the producer of any other form of real property should not be allowed to do so, then a patent holder should not be treated any differently.³⁰⁰ Thus, the court refused to promulgate a per se rule that a patentee cannot violate the antitrust laws by exercising its right to exclude.

However, the court did recognize that the underlying purposes of the patent laws deserve some deference.³⁰¹ Thus, as a means for allowing a jury to "account for the procompetitive effects and statutory rights extended by the intellectual property laws," the court, like the First Circuit, held that a patentee's exercise of its statutory right to exclude is presumptively a valid business justification.³⁰² The court reiterated that this is a rebuttable presumption. Yet, unlike the First Circuit, the court held that an antitrust plaintiff may rebut this presumption of legitimacy by showing that the patent holder's justification was pretextual.³⁰³ The court justified this by holding that "[n]either the aims of intellectual property law, nor the antitrust laws justify allowing a monopolist to rely upon a pretextual business justification to mask anticompetitive conduct."³⁰⁴

This presumption approach, gives respect to the goals of the patent laws, but also recognizes that a patentee should not be allowed to outright harm competition simply because he has a patent. The Federal Circuit criticized this approach and felt that it severely undermined the incentives lying at the heart of the patent laws. However, *Kodak II* does not stand for the proposition that a patentee cannot exercise its right to exclude under a patent grant to protect his investment.³⁰⁵ The Ninth Circuit simply holds that a patentee should

³⁰⁰ *Kodak II*, 125 F.3d at 1216-17.

³⁰¹ *Id.* at 1218.

³⁰² *Id.*

³⁰³ *Id.* at 1212.

³⁰⁴ *Id.* at 1219.

³⁰⁵ Melamed & Stoepplwerth, *supra* note 276, at 427.

not be able to use its legal monopoly power in an anticompetitive manner.³⁰⁶ This approach attempts to address economic realities by recognizing that the harm associated with a refusal to deal (shutting competitors out of the secondary market) was not offset by any efficiencies or potential benefits to consumers.³⁰⁷ The Ninth Circuit's approach does not seek to proscribe a patentee's exercise of its statutory right to exclude, but rather proscribe patentees from doing so for the purpose of monopolizing or attempting to monopolize a secondary market.

The Ninth and First Circuits' presumption approach allows the court to assess any potential anti-competitive effects of a monopolist's conduct by requiring the alleged monopolist to put forth evidence of a business justification that advances consumer welfare, and allowing the antitrust plaintiff to rebut that evidence with a showing of net damage to the competitive process. Because this approach holds the concerns of both the patent and antitrust laws to be of equal importance, it is far superior to that of the Federal Circuit. Thus, the Seventh Circuit should have adopted the approach of the Ninth Circuit.

One may enjoy the fruits of her lawfully obtained property, including whatever monopoly profits that property enables her to earn, but she may not sacrifice such profits strategically, by using that property in ways that serve no legitimate purpose (i.e., one that neither benefits consumers nor promotes efficiency) in order to create additional market power. In other words, a firm, even a monopolist, can profit from its property (including its intellectual property) but has not legal entitlement to extend its power beyond the intellectual property grant or to create additional market power.

Id.

³⁰⁶ *Id.* at 1217.

³⁰⁷ Joseph P. Bauer, *Refusals to Deal with Competitors by Owners of Patents and Copyrights: Reflections on the Image Technical and Xerox Decisions*, 55 DePaul L. Rev. 1211, 1215 (2006).

D. The Added Wrinkle of Schor v. Abbott Labs

Unfortunately, *Schor v. Abbott Labs* was not your typical battle of the intellectual property and antitrust laws. From the perspective of the patent holder, patents covering pharmaceutical products entail many special considerations that your average utilitarian patent does not.³⁰⁸ The threat that placing antitrust limitations on a patent holder's right to exclude poses to the incentives at the heart of the patent laws is particularly pronounced in the pharmaceutical context.³⁰⁹

A compelling argument can be made that limiting the scope of drug patents may severely diminish the incentives to invest in research and development in these markets. In the pharmaceutical field, research and development costs can be much greater than in other technical fields.³¹⁰ The time and money necessary to bring a drug to fruition can be on the order of hundreds of millions of dollars.³¹¹ Additionally, the number of developed drugs that acquire FDA approval and actually become successful on the market is low.³¹² Thus,

³⁰⁸ Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. R. 1575, 1576 (2003).

A wealth of empirical evidence demonstrates deep structural differences in how industries innovate. Industries vary in the speed and cost of research and development ("R&D"), in the ease with which inventions can be imitated by others, in the need for cumulative or interoperative innovation rather than stand-alone development, and in the extent to which patents cover entire products or merely components of products.

Id.

³⁰⁹ *See id.* at 1581-82.

³¹⁰ *Id.* at 1581.

³¹¹ *Id.*

³¹² *Id.* at 1581-82. Burk and Lemley discussed why drugs are so expensive to develop:

Some of this cost is a result of the labyrinthine regulatory process and the detailed study that is required to sell a drug for consumption by humans. A major additional part of the cost stems from the uncertainty of the R&D efforts. Pharmaceutical companies may try hundreds of compounds before identifying a

once a pharmaceutical firm has a commercially viable drug in its possession, the potential harm that can be caused by an unscrupulous copyist is particularly great. This is not only due to the high level of investment that the drug company has made, but also because drugs are extremely easy to copy—once the chemical compound is known, it can be reproduced relatively inexpensively.³¹³ Drug companies, therefore, are ultra-dependent on patent protection to protect their investments.³¹⁴

Yet, on the other hand there is this concern that the substance of these patents—the drugs themselves—can have vast life saving potential and that we should do all we can to protect the competitive market in these goods. According to the Centers for Disease Control (“CDC”), at the end of 2003, an estimated 1,039,000 to 1,185,000 persons in the United States were living with HIV/AIDS.³¹⁵ Approximately 40,000 persons become infected with HIV each year.³¹⁶ The CDC estimates that the average cost of lifetime treatment

possible drug, and they may not know for years whether they have chosen the right one for testing.

Id.

³¹³ *Id.* at 1616-17. Burk and Lemley explain:

While imitation of a drug is reasonably costly in absolute terms, a generic manufacturer who can prove bioequivalency can avoid the R&D cost entirely and can get FDA approval much more quickly than the original manufacturer. The ratio of inventor cost to imitator cost, therefore, is quite large in the absence of effective patent protection. As a result, it is likely that innovation would drop substantially in the pharmaceutical industry in the absence of effective patent protection.

Id.

³¹⁴ *Id.* at 1616 (“Strong patent rights are necessary to encourage drug companies to expend large sums of money on research years before the product can be released to the market.”).

³¹⁵ CENTERS FOR DISEASE CONTROL AND PREVENTION, A GLANCE AT THE HIV/AIDS EPIDEMIC 1 (2006), <http://www.cdc.gov/hiv/resources/factsheets/PDF/At-A-Glance.pdf>.

³¹⁶ *Id.*

for HIV infection is \$210,000.³¹⁷ Furthermore, the U.S. Department of Health and Human Services recommends a standard treatment regimen including a protease inhibitor either alone or boosted with ritonavir.³¹⁸ There are no generic versions of Norvir and (according to Schor) no other drug on the market performs Norvir's "boosting" function.³¹⁹ When it is so clear that Abbot's Norvir has had immense effects on the treatment of HIV/AIDS, why should the court take such a lenient approach?

In evaluating Schor's § 2 monopolization claim, the Seventh Circuit should not only have taken into account, the economic realities of the market, as discussed above,³²⁰ but potentially should have taken note of the special considerations surrounding the particular goods in question. On the one hand, in light of the overwhelming devastation caused by the HIV/AIDS virus and the utility of Abbott's Norvir in fighting this disease, the Seventh Circuit seems particularly out of line in elevating Abbott's patent rights over antitrust concerns. In this light, its not at all clear that we should let the producer of a necessary HIV/AIDS drug monopolize it in such an anticompetitive manner simply because they have intellectual property rights in that compound. Yet, on the other hand, when the producers of pharmaceutical compounds are so dependent on the patent system to reap the benefits of their investment, subjecting them to antitrust liability could have dire effects on the development of new drugs. While these considerations may have made *Abbott II* even more difficult to decide, the Seventh Circuit seemingly should have taken them into account when making its decision.

³¹⁷ Centers For Disease Control And Prevention, Prevention Pays, http://www.cdc.gov/hiv/resources/reports/comp_hiv_prev/prev_pays.htm (last visited Dec. 6, 2006).

³¹⁸ U.S. DEP'T OF HEALTH AND HUMAN SERVICES, GUIDELINES FOR THE USE OF ANTIRETROVIRAL AGENTS IN HIV-1 INFECTED ADULTS AND ADOLESCENTS 19, 52 tbl.6a (2006), <http://aidsinfo.nih.gov/ContentFiles/AdultandAdolescentGL.pdf>.

³¹⁹ Schor v. Abbott Labs. ("*Abbott I*"), 378 F. Supp. 2d 850, 852 (N.D. Ill. 2005).

³²⁰ See Part III A-D, *supra*.

CONCLUSION

The Seventh Circuit missed an important opportunity in *Abbott II* to settle the law of monopoly leveraging as applied to patent holders. By essentially punting on this issue, the court gave no guidance for antitrust plaintiffs wishing to allege such a theory of antitrust liability. As supported by the abovementioned discussion, the Seventh Circuit should have adopted the approach taken by the Ninth Circuit in *Kodak II*. The Ninth Circuit's approach balances the considerations of the patent and antitrust laws by allowing the court to address the potential anticompetitive effects of a patent holder's conduct. Furthermore, as *Abbott II* dealt with a patented drug, vital to the treatment of HIV/AIDS, the Seventh Circuit should have taken those special considerations into account when addressing the antitrust claim.