New Challenges Of Proving “Market Power” In Patent Tying Cases

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The presumption of market power based on the patent is not enough. The plaintiff has the burden of proving it.

TO MAXIMIZE THE PROFITS from a successful business, some manufacturers of successful patented goods attempt to require customers to purchase related but unpatented goods, services, or replacement parts from that manufacturer. In other situations, a manufacturer of patented equipment might require purchasers or lessees to also purchase the manufacturer’s maintenance and repair services and parts, and will not provide replacement parts to independent service providers. Under some circumstances, such requirements by the seller may violate the federal antitrust laws that prohibit illegal tying arrangements. The recent Supreme Court decision in Illinois Tool Works v. Independent Ink, 126 S.Ct. 1281 (2006), has clarified the burdens of proof in the trial of such cases.

WHAT IS A “TYING” ARRANGEMENT? • A tying arrangement is “an agreement by a party to sell one product (the tying 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.” Northern Pac. Ry. v. United States, 356 U.S. 1 (1958). As the Supreme Court has explained, “the
essential characteristic of an invalid tying arrangement lies in the seller’s exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.” Illinois Tool Works, supra, 126 S.Ct. at 1286. To establish that a tying arrangement is unlawful, a plaintiff must show that:

- Two separate products—a tying and a tied product—are involved;
- The sale of one product is conditioned (actually or effectively) on the purchase of another;
- The seller has sufficient economic power in the tying product market to coerce purchaser acceptance of the tied product; and
- A not insubstantial amount of interstate commerce in the tied product is affected.

When Tying Involves Patented Articles

Tying, involving a patented article, poses special considerations. A patent gives an inventor the right to exclude others from making, using, or selling his invention—in short, it can effectively give the patent holder a lawful monopoly (a patent gives its owner a right to exclude others) with respect to that invention. Patent law and antitrust law share the common goal of promoting the availability of high-quality, innovative goods and services, but through very different means. A major policy concern is how to balance the incentive of granting a monopoly to the inventor with the more general interest in promoting competition. Broadly stated, it is the policy of the antitrust laws not to permit a patent holder to extend his monopoly in time or reach beyond the scope of his patent. Therefore, when a patent holder ties an unpatented article to the sale of his patented article, it raises the concern of whether the patent holder is extending the patent monopoly to other products in an anticompetitive manner.

The Presumption Of Economic Power

Before Illinois Tool Works, in cases considering tying claims involving a patented product, courts had split over what constituted a sufficient showing of market power to coerce the purchase of the tied product. Some courts had followed International Salt Co. v. United States, 332 U.S. 392 (1947), in which the Supreme Court held that a patent created a presumption of market power. Other courts had concluded that there was no economic validity to the presumption that a patent inherently confers power in the marketplace, and required that market power be proven as in other antitrust cases.

In Illinois Tool Works, supra, the Supreme Court resolved this conflict. The facts in that case reflect a common pattern of dealing. A subsidiary of Illinois Tool Works sold a patented printhead that applied bar codes to articles as they passed through an assembly line. To license the printhead (the tying product), a firm had to agree to purchase non-patented ink (the tied product) from the manufacturer-licensor. A competing seller of ink sued, claiming, among other things, that this arrangement was unlawful tying in violation of Section 1 of the Sherman Act. The District Court dismissed the complaint for failure to plead and prove market power in the tying product. The Federal Circuit reversed, holding that plaintiff was entitled to a presumption that the patent on the tying product conferred market power on the seller. The Supreme Court, in turn, vacated
and remanded the case, and held that the plaintiff must prove that the defendant, in fact, has market power in the tying product.

In reaching that conclusion, the Court noted that Congress, in amending the definition of patent “misuse,” the Department of Justice and the Federal Trade Commission in promulgating the Antitrust Guidelines for the Licensing of Intellectual Property, and most economists “have all reached the conclusion that a patent does not necessarily confer market power upon the patentee.” *Id.* at 1293.

One of the arguments advanced in *Illinois Tool Works* for denying certiorari and for upholding the Federal Circuit’s presumption that a patent conferred market power was that proving market power is “notoriously difficult and expensive,” and that the presumption of market power promotes the efficient administration of the antitrust laws by streamlining the proof and better allocating the burdens of proof to the parties best situated to bear them. Without the benefit of a presumption, a plaintiff in a patent tying case has the task of proving “market power” in the tying product. As is discussed below, the task of proving market power will greatly expand the need for pre-trial discovery and the length of the trial.

**MARKET POWER** • Before turning to how “market power” might be proven, it is best to clarify what is meant by market power. Market power traditionally is defined as “the power to control market prices or exclude competition.” In *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984), the Supreme Court stated the definition in the following terms: “As an economic matter, market power exists whenever prices can be raised above the levels that would be charged in a competitive market.” Economists argue that in a perfectly competitive market, prices would approximate the marginal cost of production of the goods. That definition might suggest that a firm that sells its patented product at a price above marginal cost has some degree of market power.

However, patented articles tend to have advantages over more common ones, and presumably that is reflected in greater market value. Furthermore, obtaining intellectual property (whether by research and development or acquisition)—and then taking the necessary steps to protect it—can be costly. Although arguably these are not variable costs, the expense does have to be recouped. Therefore, products with a valuable intellectual property component—like a patented article—are unlikely to be sold at a “competitive” price approximating the marginal cost of production. A different, or more nuanced, definition of market power would seem to be required in the case of patented products.

In further elaborating on the definition, the majority in *Jefferson Parish* noted that “market power” was the power “to force a purchaser to do something that he would not do in a competitive market.” In the context of a tying claim, this may, at first, sound circular: if a seller has succeeded in coercing a purchaser to purchase the tied product on his terms, then he has the market power to commit the violation of unlawful tying. However, the Court drew a distinction between the exercises of market power in the market of the tying product alone and those that use that power to affect the market of the tied product:

“When the seller’s power is just used to maximize its return in the tying product market, where presumably its product enjoys some justifiable advantage over its competitors, the competitive ideal of the Sherman Act is not necessarily compromised. But if that power is used to impair competition on the merits in another market, a potentially inferior product may be insulated from competitive pressures.”

*Id.* at 14. An issue, therefore, is whether the seller-patent holder has the degree of “market power”
to compel the purchase of a product in some market other than the market of the patented product, where he holds a legally authorized competitive advantage.

Evidence Of Market Power

Courts have found market power over a separate market, in a tying product, by applying several different theories, each based on different factual showings. These theories can be divided into four categories:

- Market share/market structure;
- Uniqueness of the product;
- “Lock-ins”; and
- Actual market evidence.

MARKET SHARE/MARKET STRUCTURE

- A plaintiff can prove market power by circumstantial evidence pertaining to the structure of the market and defendant’s share within it. The first step in such an analysis is to define the relevant market. A relevant market has two dimensions:
  - The relevant product market, which identifies all of the products or services that compete with one another; and
  - The relevant geographic market, which identifies the geographic area within which that competition takes place.

Defining The Relevant Product Market

For antitrust purposes, defining the relevant product market can be complex. The relevant product market can be defined as consisting of all products that are, or could readily become, substitutes for each other. A patented item might not be coextensive with the relevant product market since, as the Supreme Court had noted in *Walker Process Equipment, Inc. v. Food Machinery and Chemicals Corp.*, 382 U.S. 172 (1965) “[t]here may be effective substitutes for the device which do not infringe the patent.” Hence, the scope of protection afforded by a patent does not necessarily define the boundaries of the relevant product market. Nor does the mere issuance of a patent establish that the patent holder (or exclusive licensee) has power over the relevant product market, because the patented item might be competing with non-infringing goods and services in that relevant product market. For example, the marketplace might prefer an unpatented toothpaste over a patented toothpaste for a variety of reasons.

Are There Other Interchangeable Products?

A major factor in defining the relevant product market is the reasonable interchangeability of use with other products—that is, what market alternatives are there for a customer to use. In the well-known case of *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377 (1956) the Supreme Court held that, although cellophane and other flexible packaging materials were not identical, they were reasonably interchangeable and should be included in the same product market. Accordingly, products can have considerable differences in their physical characteristics, grade, and quality and nonetheless be reasonably interchangeable in their use. For example, a variety of drain cleaners might compete in the same product market even though they have wildly different compositions, functionalities, and patent protection; those cleaners may also compete with a common household plunger.

Cross-Elasticity Of Demand And Effect On Pricing

The cross-elasticity of demand between two products measures the extent to which demand for the first product will change in response to a price change in the second product. Some products may not be viewed as substitutes under static price conditions. However, if there is a small but significant increase in price, consumer preferences might change. A high cross-elasticity value indicates that the products are, in fact, good substitutes. This can be persuasive evidence that they are in the same
product market. Another method of analysis is to measure the price correlations between two products; a high correlation in their price movement is indicative that the products respond to the same demand factors and are in the same market.

**When The Patent Defines The Market**

There are, however, circumstances in which the scope of patent protection is co-extensive with the relevant product market. For example, as will be discussed in connection with “lock-ins,” some patented articles are designed so that they will accept only certain specially designed replacement parts or peripheral products. In such situations, an argument might be made that the patent holder’s brand of replacement parts and peripheral products is a market unto itself, since parts or products of other manufacturers are not, in fact, substitutable. If a market is confined to a single brand, then it logically follows that the manufacturer of that brand has monopoly power in its own brand of parts, peripherals, and related services.

**The Geographic Market**

Defining the geographic market can also be complex. An article or process may have patent protection in a limited number of jurisdictions and may encounter different competition in those jurisdictions where it does not have patent protection. For example, electronic equipment might be patented in the United States, but not in Japan, China, and Taiwan, where it and competing products are made, or in Europe, where the largest demand might exist. Also, a competitor’s article might conform to U.S. industry or safety standards, but not to similar standards in Europe. Likewise, a patented article or process involving a pharmaceutical or a medical device, or a product having an environmentally sensitive component, may have regulatory approval in some jurisdictions but not in others. All of these—as well as factors common to all manufacturers such as transportation, distribution networks, advertising costs, and others—influence the proper definition of the geographic market.

**No Presumption? Get Ready For Discovery**

Often, detailed discovery and industry and economic expert testimony is required to support the parties’ conflicting positions on the proper definition of the relevant product and geographic markets. Thus, without a presumption of market power, discovery into these issues and related trial testimony are likely to be required.

**Measuring Market Share**

Once the product and geographic markets have been defined, courts often use market shares as a proxy for measuring market power, at least in the first instance. Different indicators are sometimes used to measure market share, e.g., sales measured in dollars vs. units; sales vs. production capacity; and so forth. Many courts have held that, as a general rule of thumb, market shares below 30 percent do not give rise to an inference of market power.

**Additional Factors To Consider**

While market share is a useful tool, additional factors should be considered in assessing market power. One such factor is market structure. There is a vast difference between a market in which a firm with a 40 percent market share competes with another of equal size, and one in which a firm with 40 percent of the market may dominate its fragmented competition (for example, where no competitor has more than five percent of the market). Moreover, a firm’s market power may be enhanced...
by other market characteristics, such as when the firm is able to secure exclusive contracts with large customers, thus foreclosing significant portions of the market from competition. For example, the existence of exclusive contracts with Home Depot and Lowes, for a home repair product, would be relevant to an assessment of market power.

Another important consideration is whether there are significant barriers to new entry or expansion by existing competitors, because such new entrants could take away business and dilute the market power of even a dominant firm. A wide variety of factors affecting the production, distribution, and marketing of a product can be barriers that a new market entrant would have to overcome in order to compete successfully. The actual experiences of firms attempting entry or geographic or product expansion into the market is evidence of how formidable those barriers to entry truly are.

Is The Patent A Barrier To Market Entry?

Patents themselves can be a barrier to entry. The essential legal attribute of a patent is the right to exclude others from practicing the protected art and may lead to a monopoly of the market, albeit a lawful one. Even when they do not entirely block entry, patents may be imposing barriers that significantly increase a potential entrant’s costs, such as when the patent protects a less expensive way of producing the product, imposing on competitors capital requirements for research and development or “design-around” expenses, or litigation expenses in dealing with the threat of costly infringement claims. In some industries, even if a new, non-infringing product is developed, formidable expenses and lead times for product testing to satisfy regulatory requirements may also deter or significantly delay new entry.

How Useful Is Historic Data?

Market shares are, by their very nature, historic data. In markets that are undergoing significant change, historic market shares may not be accurate predictors of future competition. Product innovation is one factor that can induce market change. Market power generally—and particularly with respect to tying arrangements—can be ephemeral in the face of rapid and significant innovation. Innovation in either the tying or the tied product can eliminate or reduce any likely anticompetitive effects of such an arrangement.

Hence, when a large market share might suggest that the patent holder has market power, a counter-argument may be that the market is in flux, so that the current market shares do not accurately reflect the competitive landscape.

Based on these and other considerations of the market structure and the extent and nature of competition, a court can infer whether the seller has market power in the tying product.

UNIQUENESS OF THE PRODUCT • Even without a dominant market share, the tying product may have market power because of its unique characteristics—whether of a physical, legal, or economic nature. While a product may encounter significant competition in the market generally, the product may have traits that make it particularly well-suited, if not essential, for a category of end-users or for a specific application. With respect to that category of users, the product may have particular value that gives the manufacturer disproportionate power over purchasers for that application. Still, the fact that a product is “unique” is different
from the fact that a category of customers “prefer” the product.

**Has Anyone Tried To Design A Non-infringing Alternative?**

Evidence of efforts by others to replicate or design non-infringing alternatives to the patented tying product—successful or unsuccessful—will be relevant to a determination of the product’s uniqueness. A patent protecting the tying product may be shown to occupy the field and block the development of substitutes. However, unlike under *International Salt*, the uniqueness of the patented product, such that it would occupy the field, must be demonstrated by the available evidence, without benefit of any presumption.

**What Can You Do To Prove Uniqueness?**

Issues will arise regarding whether the product is “unique” to the point of having market power. In some instances, it may be necessary to have expert testimony establishing that because of certain physical, chemical, or other properties, there are no reasonable non-infringing substitutes. As a theoretical matter, there may be substitutes for the tying product in a particular application, but if those substitutes are inordinately expensive, low in supply, or unmarketable, they may not be deemed practical alternatives for the purchaser.

**Economic Testimony**

In some instances, economic testimony may be required to establish that the tying product is differentiated by the price at which it sells; in others, a marketing expert may be needed to establish that customers expect that the tying product, or a product having the unique attributes of the tying product, will be used. The range and role of expert testimony in establishing market power based on uniqueness can be seen in a recent “block booking” case in which a television network sued a local station for breach of its license agreement that required booking three shows. The station counterclaimed, alleging that the network had unlawfully tied licenses for two shows—*Judge Judy* and *Judge Joe Brown*—to a less desirable third show. The counterclaimant avoided summary judgment by presenting expert testimony about the uniqueness of these programs—including evidence as to different types of syndicated programming and substitutability within different demographic groups. This evidence demonstrated a need for a trial to resolve the genuine disagreement between the experts.

**LOCK-INS** • Sometimes a manufacturer will require that a purchaser use only particular replacement parts or supplies. Its device may be designed in such a way that it will accept only certain parts or products and is technologically incompatible with products of other manufacturers. For example, an air filter might only accept specially constructed replacement cartridges. Alternatively, the device may have a “key,” such as a coded microchip, that locks out non-conforming products. Technological tie-ins, even when products are redesigned to make competitors’ products incompatible, generally have been upheld as lawful. Technological tie-ins were addressed in *Eastman Kodak Company v. Image Technical Services, Inc.*, 504 U.S. 451 (1992). There, a manufacturer of photocopying equipment adopted a policy of selling replacement parts only to original equipment manufacturer (“OEM”) purchasers. When challenged that this was an unlawful tying arrangement, it argued that because there was ample competition among OEMs of photocopiers, it lacked market power with respect to aftermarket photocopier replace-
ment parts, notwithstanding that the parts were specific to the particular brand of photocopier.

In considering the issue, the Supreme Court found that purchasers made a substantial investment in their photocopying equipment. Hence, the “switching cost” would be high if at a later time, the purchaser learned it was paying excessive prices for replacement parts because they were only available from a single source. To accurately make a comparison of the total cost of their photocopying equipment, a purchaser would require information on the anticipated cost of parts for the lifetime of the equipment at the time of purchase. Even then, only a sophisticated purchaser might appreciate the significance of these costs in light of the lock-in. The Supreme Court held that the manufacturer was not entitled to summary judgment and that a trial would be required on the issue of whether the manufacturer had market power.

The Lock-In Can Mean Market Power

Courts have held that when the purchaser is locked-in for aftermarket purchases (whether technologically or because significant investment costs deter switching once the equipment is purchased), the manufacturer may have market power, even though the manufacturer may not have a dominant share of the OEM market. For example, the purchaser might not have sufficient information about the costs of the aftermarket purchases to make effective comparisons at the time of purchase. The rationale for this is that if the purchaser has adequate information at the time of purchase, it can view its purchase as the purchase of a “system,” comprised of the equipment and any mandated peripherals, products, or parts. If there is sufficient information, robust competition will take place on the “system” level, even if not separately on the equipment or parts level.

Is The Lock-In Recognizable To The Consumer?

The offense of tying requires the sale of two products. If the lock-in is recognized by consumers at the outset, and they have sufficient information to assess its total cost, it is as if there is a sale of a single product. However, without that information, the purchaser is at a disadvantage and the manufacturer might have market power with respect to the compelled purchase of aftermarket products. Consequently, when a customer is locked in and subject to exploitation in the purchase of the tied product, courts have found that the tying product has “market power.” In some Circuits, a plaintiff would have to show that price increases or other adverse terms were imposed after the initial purchase so that the purchaser was not amply informed and was vulnerable to the abusive exercise of market power.

ACTUAL MARKET EVIDENCE • Market power can also be established through actual market evidence of the power of the tying product. What evidence will be necessary to prove market power will depend on particular facts about—among other things—the market, sales patterns, and customer and competitor reactions.

Can The Seller Charge A Higher-Than-Competitive Price?

The ability of the seller to charge higher-than-competitive prices for the tied product is an indication that the seller has market power in the tying product. The historic pattern of prices and sales in the industry also might be illuminating. If the tying manufacturer was the historic price leader or
if it imposed the tying obligation in lieu of a price increase, those facts might suggest market power. Similarly, evidence that, after imposing the alleged tying arrangement, the seller increased sales or profits in the tied product in an otherwise declining market, could also support a finding of market power.

**Are There Frequent Price Increases?**

In a similar vein, frequent or unexpected price increases for the tied product may demonstrate that there is a lock-in and that insufficient information about lifecycle costs was provided at the time of initial purchase. Under these circumstances, the seller could be considered to have market power over its “locked-in” customers. Conversely, pricing patterns may show that prices for the tying product have fallen and that the “bundling” of the tying and the tied products has been price-neutral or even pro-competitive in responding to consumer demand.

**What Are The Market Experiences For Competitors?**

The experience of competitors in the markets for both the tying and the tied products may also be probative on the issue of market power. For example, the inability of competitors to enter the market for the tied product, despite vigorous competitive efforts to do so, would suggest that competition was being distorted by the power of the seller in the market for the tying product.

**How Do The Customers Behave?**

Evidence of acceptance of the tying arrangement by a substantial portion of the seller’s customers may be indicative of market power—but only in the absence of some other explanation for the customer approval. Evidence that customers believed that the purchase of the tied product was beneficial, or that the market willingly accepted the linkage of the tying and tied products as a single “system,” would refute the inference that customer acceptance was the product of the seller’s market power and coercion. Customer survey and anecdotal evidence may demonstrate whether there has been coercion.

**BUSINESS JUSTIFICATIONS** • Claims of an unlawful restraint of trade are evaluated under either a per se or a rule of reason standard. Per se illegality is reserved for a narrow category of offenses that, on their face, have been found to have no competitive justification. For example, price-fixing and competitors’ allocation of customers or markets are deemed to be so clearly without any pro-competitive justification that courts will not require proof of their anticompetitive effects and will preclude a defendant from attempting to prove a competitive justification.

**Per Se Standards Notavored**

Courts generally have been reluctant to apply per se standards. They have been particularly reluctant to do so in industries that are characterized by innovation, because it often is less clear whether complained-of conduct is inherently anticompetitive and without compensating efficiencies. One of the reasons that *Illinois Tool Works* rejected the *International Salt* approach was that it had led to “a presumption of per se illegality of a tying arrangement involving a patented product,” and such per se treatment was contrary to the general trend of antitrust jurisprudence.

**The Rule Of Reason Analysis**

In a rule of reason analysis, a plaintiff typically has the initial burden of demonstrating that an agreement has, or is likely to have, an anticompetitive effect. If the plaintiff satisfies that burden, the burden then shifts to the defendant to demonstrate any pro-competitive aspects to the agreement. Finally, if the defendant makes such a showing, the plaintiff must discredit these pro-competitive as-
pects (such as by showing that they are pretextual) or show that they are not reasonably necessary to achieve the claimed objective. As is evident, the discovery and trial time for a rule of reason case greatly exceeds that needed for a per se liability case. By removing the presumption of market power for a patented article, the Supreme Court imposed on plaintiffs the same initial burden as in other rule of reason cases.

**Establishing Reasonableness Of The Purchase Of The “Tied” Product**

To rebut a tying claim involving patented articles, the manufacturer-patent holder can try to establish the reasonableness of the required purchase of the tied product. The patent holder might assert that requiring the use of particular products, parts, or peripherals is necessary for effective maintenance, which they might argue is necessary for maintaining customer goodwill and the product’s overall reputation. The patent owner might also claim that requiring the use of authorized products and parts prevents free-riding or counterfeiting, or that consumers demand or prefer the combined purchase of two products. Justifications are sometimes related to, or the flip-side of, claims that the tie-in has been coerced by brute market power.

**CONCLUSION** • It is certainly correct that eliminating a presumption of market power of patented articles adds to the complexity of prosecuting a tying claim. Still, the burden that falls on plaintiffs to prove (rather than have presumed) market power in the tying product is reasonable since the existence of a patent does not always preclude meaningful competition from non-infringing alternatives. Rather, requiring evidence, while more burdensome to a plaintiff, is entirely consistent with the trend in antitrust cases to require proof of anticompetitive effects.

**PRACTICE CHECKLIST FOR New Challenges Of Proving “Market Power” In Patent Tying Cases**

- Market power traditionally is defined as “the power to control market prices or exclude competition.” However, patented articles tend to have advantages over more common ones, and presumably that is reflected in greater market value. “Market power” is now considered the power “to force a purchaser to do something that he would not do in a competitive market.” Hence, the issue is whether the seller-patent holder has the degree of “market power” to compel the purchase of a product in some market other than the market of the patented product.

- A plaintiff can prove market power by circumstantial evidence pertaining to the structure of the market and defendant’s share within it. A relevant market has two dimensions: The relevant product market, which identifies all of the products or services that compete with one another, and the relevant geographic market, which identifies the geographic area within which that competition takes place. Other factors include:

  - The reasonable interchangeability of use with other products—that is, what market alternatives are available for a customer to use;
The cross-elasticity of demand between two products. Some products may not be viewed as substitutes under static price conditions. However, if there is a small but significant increase in price, consumer preferences might change. A high cross-elasticity value indicates that the products are, in fact, good substitutes; whether the scope of patent protection is co-extensive with the relevant product market. If a market is confined to a single brand, then it logically follows that the manufacturer of that brand has monopoly power in its own brand of parts, peripherals, and related services; market structure. For example, the existence of exclusive contracts with Home Depot and Lowes, for a home repair product, would be relevant to an assessment of market power; and whether there are significant barriers to new entry or expansion by existing competitors. Actual experiences of firms attempting entry or geographic or product expansion into the market is evidence of how formidable those barriers to entry may be.

Even without a dominant market share, the tying product may have market power because of its unique characteristics—whether physical, legal, or economic. Issues will arise regarding whether the product is “unique” to the point of having market power; in some instances, it may be necessary to have expert testimony establishing that because of certain properties, there are no reasonable non-infringing substitutes; in some instances, economic testimony may be required to establish that the tying product is differentiated by the price at which it sells; in others, a marketing expert may be needed to establish that customers expect that the tying product, or a product having the unique attributes of the tying product, will be used.

Sometimes a manufacturer will require that a purchaser use only particular replacement parts or supplies (“lock-in”): technological tie-ins, even when products are redesigned to make competitors’ products incompatible, generally have been upheld as lawful. If the lock-in is recognized by consumers at the outset, and they have sufficient information to assess its total cost, it is as if there is a sale of a single product, and hence there can be no “tying.”

Market power can also be established through actual market evidence of the power of the tying product. Factors to consider:
- Can the seller charge a higher-than-competitive price?
- Are there frequent price increases?
- What are the market experiences for competitors?
- How do the customers behave?

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