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REFUSALS TO LICENSE INTELLECTUAL PROPERTY AFTER TRINKO

Michael A. Carrier*

INTRODUCTION

Refusals to license intellectual property (IP) present one of the thorniest issues in antitrust law. Such activity is privileged under the IP regime, the foundation of which is the right to exclude. But it may be punished under antitrust law, which focuses on competition.

The courts have promulgated a number of inconsistent tests in determining whether IP refusals to license constitute monopolization. They have granted absolute immunity to the patentee, applied various rebuttable presumptions, and examined whether an "essential facility" was denied. Throughout this disarray, the Supreme Court has stayed on the sidelines. But the recent decision of Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, L.L.P. (Trinko),1 which addressed a telephone company's refusal to share its network with rivals, provides a range of clues as to how the Court would treat IP refusals to license.

In Part II of this Article, I articulate five approaches for IP refusals to license that courts have elucidated in recent years. In Part III, I analyze six elements of the Trinko opinion that shed light on the Court's likely treatment of such conduct. In particular, I examine the Court's general themes of the benefits of monopoly power, the dangers of sharing, and the costs of antitrust, and specific treatment of claims addressing refusals to deal, essential facilities, and monopoly leveraging.

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II. The Tests

Courts have articulated a number of tests in analyzing refusals to license IP.2 This section examines five cases that reveal the diversity of approaches that courts have applied to monopolists' refusals to license IP. The tests offer analyses based on (1) absolute immunity, (2) near-absolute immunity, (3) presumptive legality, (4) presumptive legality with an intent-based rebuttal, and (5) essential facilities.

A. Absolute Immunity: SCM

The first approach is presented by SCM Corp. v. Xerox Corp. (SCM).3 In this case, Xerox acquired a patent on a process for copying documents that allowed images to be reproduced on plain paper.4 It refused to grant a license to a competitor, SCM, that wished to manufacture its own plain-paper copier.5 SCM sued, claiming that Xerox's acquisition of patents and subsequent refusal to license the patents constituted monopolization.6

The Second Circuit began by explaining that the patent and antitrust laws "necessarily clash" when "the patented product is so successful that it evolves into its own economic market ... or succeeds in engulfing a large section of a preexisting product market."7 A patentee, however, that merely exercises its right to exclude by unilaterally refusing to license the patent undertakes activity that is "expressly permitted by the patent laws."8 Moreover, it "would seriously threaten the integrity of the patent system" if a patentee were to be punished with "treble damages based on what a reviewing court might later consider, with the benefit of hindsight, to be too much success ..."9 The court concluded: "[W]here a patent has been lawfully acquired, subsequent conduct permissible under the patent laws cannot trigger any liability under the antitrust laws."10 Because the court found that Xerox had lawfully acquired the patents, its refusal to license was permissible.11 Other courts have similarly provided absolute immunity to the patentee under § 2 of the Sherman Act.

3. 645 F.2d 1195 (2d Cir. 1981).
4. Id. at 1197.
5. Id. at 1200.
6. Id. at 1197.
7. Id. at 1203.
8. Id. at 1204.
9. SCM Corp., 645 F.2d at 1206.
10. Id.
11. Id. at 1209.
reasoning that the patentee is merely exercising its rights under the patent laws.\textsuperscript{12}

B. Near-Absolute Immunity: Xerox

The Federal Circuit's decision in \textit{In re Independent Service Organizations Antitrust Litigation (Xerox)}\textsuperscript{13} provides another example of an approach offering substantial deference to patentees. Xerox manufactured, sold, and serviced high-volume photocopiers.\textsuperscript{14} It instituted a policy of not selling parts for one (and later, all) of its lines of copiers to independent service organizations (ISOs) unless they also were end-users of the copiers.\textsuperscript{15} At one point, Xerox cut off certain ISOs' abilities to directly purchase such restricted parts.\textsuperscript{16} A class of ISOs filed an antitrust lawsuit, and Xerox settled the suit by agreeing to suspend its parts policy and licensing its diagnostic software for a period of time.\textsuperscript{17} One ISO opted out of the settlement and sued, claiming that Xerox violated the antitrust laws by selling patented parts at higher prices to ISOs than to end users in order to force ISOs to increase their prices.\textsuperscript{18} Such conduct ostensibly was designed to eliminate ISOs as competitors in service markets for Xerox copiers.

The Federal Circuit held that Xerox did not violate § 2.\textsuperscript{19} The court emphasized the centrality of the right to exclude in the patent system


\textsuperscript{13} 203 F.3d 1322 (Fed. Cir. 2000).

\textsuperscript{14} Id. at 1324.

\textsuperscript{15} Id.

\textsuperscript{16} Id.

\textsuperscript{17} Id.

\textsuperscript{18} Id.; see also In re Indep. Serv. Orgs. Antitrust Litig., 989 F. Supp. 1131, 1133 (D. Kan. 1997) (setting forth the factual history concerning Xerox's efforts to "use price as a weapon to defeat ISO competition in the service market").

\textsuperscript{19} As a result of the Supreme Court's holding in \textit{Eastman Kodak Co. v. Image Technical Services, Inc. (Kodak I)}, 504 U.S. 451 (1992), that one brand of a product could constitute an antitrust market and a manufacturer in a competitive "primary" market could thus have monopoly power in the "secondary" market of the servicing of parts of its own equipment, many manu-
before carving out three limited categories in which a patentholder would not be immune from antitrust liability: (1) tying patented and unpatented products, (2) obtaining a patent through knowing and willful fraud, and (3) engaging in sham litigation. 20 The Federal Circuit also refused to examine the patentee’s subjective intent in refusing to deal with a competitor. 21 And it confirmed that action “within the scope” of the patent grant could not violate the antitrust laws. 22 Because the court concluded that “Xerox’s refusal to sell its patented parts [did not] exceed[ ] the scope of the patent grant” and did not fall within any of the three exceptions, it concluded that Xerox “did not violate the antitrust laws . . . .” 23

C. Presumptive Legality: Data General

Several cases have applied a rebuttable presumption that a refusal to license IP does not violate § 2 of the Sherman Act. The first case to offer such a presumption was Data General Corp. v. Grumman Systems Support Corp. (Data General). 24 In that case, Data General created a sophisticated computer program that diagnosed problems in its computers. 25 Data General occupied approximately ninety percent of the “aftermarket” for the service of its computers; Grumman had approximately three percent. 26 Data General had initially pursued liberal policies that allowed third parties to use the diagnostic software. 27 But it subsequently altered these policies, restricting the licensing of the software to its own technicians and equipment owners who performed their own service. 28 As a result, Grumman was not able to use the software. Data General sued Grumman for copyright infringe-
ment and trade secret misappropriation, and Grumman filed an antitrust counterclaim challenging Data General's refusal to license the diagnostic software.29

The First Circuit began by exploring the purposes of the antitrust and IP laws and the history of courts' treatment of the intersection.30 It then articulated the legislative assumption underlying the copyright laws that the right to exclude "creates a system of incentives that promotes consumer welfare . . . by encouraging investment in the creation of desirable artistic [ ] works of expression."31 Antitrust defendants, according to the court, cannot be required "to prove and reprove the merits of [the] legislative assumption in every case where a refusal to license a copyrighted work comes under attack."32

The court therefore concluded that a party's "desire to exclude others from the use of its [protected] work is a presumptively valid business justification . . . ."33 But it never explained precisely how the presumption could be rebutted, stating only that "there may be rare cases in which imposing antitrust liability is unlikely to frustrate the objectives of the Copyright Act."34 In this case, Data General's exercise of its right to exclude was "a presumptively valid business justification" that Grumman could not rebut.35

D. Presumptive Legality With Intent-Based Rebuttal: Kodak II

One way to rebut the presumption would be to rely on the defendant's intent. Such an approach was famously applied by the Ninth Circuit in Image Technical Services, Inc. v. Eastman Kodak Co. (Kodak II),36 another case in which ISOs sued the manufacturer of a durable product.

Kodak manufactured high volume photocopiers. The market for such copiers was competitive, and it included Xerox, IBM, and Canon.37 Kodak also sold and installed replacement parts for its copiers;

29. Data General, 36 F.3d at 1155 & n.8. Grumman also challenged as a "tying arrangement" Data General's requirement that consumers wishing to utilize the software also purchase support services from the company. Id. at 1156.
30. Id. at 1185–87.
31. Id. at 1186–87.
32. Id. at 1187.
33. Id.
34. 36 F.3d at 1187 n.64. For a recent example of a court following Data General, see Telecom Technical Services Inc. v. Rolm Co., 388 F.3d 820, 827 (11th Cir. 2004) (finding no harm to consumers from a refusal to sell repair parts).
35. 36 F.3d at 1187–88.
36. 125 F.3d 1195 (9th Cir. 1997).
37. Id. at 1200.
in this activity, Kodak and ISOs competed. Of the machines it manufactured, Kodak repaired at least eighty percent. Although the company had, at one time, sold parts for repair service to ISOs, it began to restrict this practice as competition from the ISOs increased. As a result of the limited access, "ISOs lack[ed] a reliable supply of parts," and thus were not able to compete with Kodak in providing multi-year service contracts. Several ISOs claimed that they were forced out of business as a result of the parts shortage.

The ISOs sued Kodak, claiming that its restrictive parts policy violated § 1 and § 2 of the Sherman Act. The district court granted summary judgment for Kodak, but the Ninth Circuit reversed. The Supreme Court affirmed the reversal and on remand from the Supreme Court, a jury entered a verdict against Kodak.

The Ninth Circuit affirmed the verdict. To ensure that the jury would account for the "procompetitive effects and statutory rights extended by the intellectual property laws," the court adopted the Data General presumption that a party's "desire to exclude others from [use of] its [protected] work is a presumptively valid business justification." But the Ninth Circuit held that the presumption could be rebutted by evidence of pretext. The court explained: "Neither 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."

In applying its rebuttable presumption, the court found that "the proffered business justification played no part in the [defendant's] decision to act." The court explained that "Kodak photocopy and micrographics equipment requires thousands of parts, of which only 65 were patented" and that "Kodak's parts manager testified that patents 'did not cross [his] mind' at the time [the company] began the

38. Id.
39. Id. at 1201.
40. Id.
41. Id.
42. Kodak II, 125 F.3d at 1201.
43. Id.
45. 903 F.2d 612, 621 (9th Cir. 1990).
48. 125 F.3d 1195, 1228 (9th Cir. 1997).
49. Id. at 1218.
50. Id. (second alteration in original) (internal quotation marks omitted).
51. Id. at 1219.
52. Id.
53. Id.
parts policy.”54 As a result, the court concluded that “it is more probable than not that the jury would have found Kodak’s presumptively valid business justification rebutted on the grounds of pretext.”55 Even though the district court’s instructions to the jury “fail[ed] to give any weight to Kodak’s [IP] rights,” the court concluded that such error was harmless.56

E. Essential Facility: Intel

The district court in Intergraph Corp. v. Intel Corp. (Intel)57 demonstrated the final approach, one relying on the “essential facilities” doctrine.

Intel is the world’s largest designer, manufacturer, and supplier of high-performance computer microprocessors, which are often described as the “brains” of a computer.58 Intergraph used Intel microprocessors in the computer workstations that it developed and sold.59 At one time, Intergraph manufactured microprocessors, but it then ceased production, converting its products to incorporate Intel’s microprocessors.60 It made this transition based on Intel’s assurances that its central processing units (CPUs) could support Intergraph’s workstations and that it would supply its CPUs to Intergraph on fair terms.61 But when Intel developed its Pentium II microprocessors, it shifted away from the “open architecture” that it had made available to all participants in the industry and embraced a proprietary architecture.62 As a result of this change, computers manufactured by original equipment manufacturers (OEMs) had to meet the technical requirements of the Intel architecture in order to use Intel microprocessors.63 After this development, an unrelated patent dispute between the parties arose; as a result, Intergraph filed patent infringement claims against OEM customers of Intel. Intel responded by refusing to provide to Intergraph confidential information necessary for product development that it had previously provided.64 Intergraph thus was not

54. 125 F.3d at 1219 (first alteration in original).
55. Id. at 1219–20.
56. Id. at 1218.
58. Id. at 1259.
59. Id. at 1263.
60. Id. at 1264.
61. Id.
62. Id. at 1261.
63. 3 F. Supp. 2d at 1261.
64. Id. at 1267.
able to receive advance samples of Intel microprocessors and could not deploy its products at the same time that competitors could.\textsuperscript{65}

The court first found that Intel had a monopoly in markets for CPUs and in markets for Intel CPUs.\textsuperscript{66} It then treated Intel's refusal to deal as the denial of an essential facility.\textsuperscript{67} The essential facilities doctrine provides that a monopolist cannot deny to its competitors facilities that are necessary to compete in a particular market.\textsuperscript{68} A plaintiff relying on the theory must show "(1) control of the essential facility by a monopolist; (2) a competitor's inability . . . to duplicate the essential facility; (3) the denial of the use of the facility . . . and (4) the feasibility of providing the facility."\textsuperscript{69}

The court found that "[r]easonable and timely access to critical business information that is necessary to compete is an essential facility."\textsuperscript{70} It then elevated the protection of competitors to a critical objective of the antitrust laws: "[A] monopolist's unilateral refusal to deal violates § 2 of the Sherman Act where such conduct unreasonably handicaps competitors or harms competition."\textsuperscript{71} The court concluded that Intel withheld an essential facility: "Intel's refusal to supply advanced CPUs and essential technical information to Intergraph likely\textsuperscript{72} violates § 2 of the Sherman Act, because they are not available from alternative sources and cannot be feasibly duplicated, and because competitors cannot effectively compete in the relevant markets without access to them."\textsuperscript{73} Even though the \textit{Intel} district court decision was vacated by the Federal Circuit on the ground that Intel and Intergraph were not competitors in any relevant market,\textsuperscript{74}

\textsuperscript{65.} Id. at 1269.
\textsuperscript{66.} Id. at 1275.
\textsuperscript{67.} Id. at 1278.
\textsuperscript{68.} See, e.g., Otter Tail Power Co. v. United States, 410 U.S. 366, 377 (1973) (holding that an electric utility company could not prevent towns from using its transmission system after its retail electric power distribution franchise expired).
\textsuperscript{69.} MCI Commc'ns Corp. v. AT&T, 708 F.2d 1081, 1132–33 (7th Cir. 1983).
\textsuperscript{70.} 3 F. Supp. 2d at 1278.
\textsuperscript{71.} Id.
\textsuperscript{72.} The court did not definitively find a substantive violation because it considered the issue in the context of a motion for a preliminary injunction. \textit{Id.} at 1258.
\textsuperscript{73.} \textit{Id.} at 1278. The court also concluded that Intel "ha[d] no legitimate business reason to refuse to deal with Intergraph" since it had been a "loyal and beneficial customer" and the dispute over Intergraph's patent claims "could [have been] resolved separately without Intel denying Intergraph information it need[ed]." \textit{Id.} In addition, the court dismissed any defense based on intellectual property, finding that Intel "has no legitimate intellectual property basis with which it can refuse to supply Intel microprocessors and technical information to Intergraph . . . ." \textit{Id.} at 1279.
\textsuperscript{74.} 195 F.3d 1346, 1357–58 (Fed. Cir. 1999); see also \textit{id.} at 1358 ("The district court erred in holding that Intel's superior microprocessor product and Intergraph's dependency thereon converted Intel's special customer benefits into an 'essential facility' under the Sherman Act.").
the approach (which has garnered attention in recent years) counsels considerable caution, as it could apply in any market in which a monopolist relies on intellectual property, with an excluded party claiming that the property is "essential" to compete in the market.\textsuperscript{75}

In short, the \textit{CSU}, Xerox, Data General, Kodak II, and Intel courts reveal an array of disparate approaches to IP refusals to license. This muddled area of law therefore can benefit from a close reading of the Court's \textit{Trinko} decision.

III. \textbf{Trinko Opinion}

In \textit{Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, L.L.P.},\textsuperscript{76} the Supreme Court held that an incumbent telephone company's refusal to share its network with rivals did not violate §2 of the Sherman Act. Though not directly addressing IP refusals to license, the Court's likely treatment of such issues can be pieced together from several aspects of this opinion.

A. Factual Setting

The \textit{Trinko} case arose in the shadow of the Telecommunications Act of 1996.\textsuperscript{77} Before the passage of the Act, telephone companies known as incumbent local exchange carriers (ILECs) possessed state-provided monopolies in the provision of local service.\textsuperscript{78} The difficulty of replicating the ILECs' networks—which encompassed the "local loop," or "last mile" of wire to millions of residential and commercial locations—gave the ILECs "an almost insurmountable competitive advantage not only in routing calls within the exchange, but . . . in the markets for terminal equipment and long-distance calling as well."\textsuperscript{79}

In seeking to break up the local monopolies and increase competition, Congress imposed duties on ILECs that facilitated competitors' entry into local markets.\textsuperscript{80} In particular, ILECs were required to

\textsuperscript{75} For additional criticism of this doctrine, see, e.g., Phillip Areeda, \textit{Essential Facilities: An Epithet in Need of Limiting Principles}, 58 \textit{Antitrust L.J.} 841 (1990). For another application of the doctrine to IP, see \textit{David L. Aldridge Co. v. Microsoft Corp.}, 995 F. Supp. 728 (S.D. Tex. 1998) (rejecting claim by seller of disk caching program that Microsoft denied essential facility by including disk caching function in operating system).

\textsuperscript{76} 540 U.S. 398 (2004).


\textsuperscript{78} The local exchange network consists of "the local loops (wires connecting telephones to switches), the switches (equipment directing calls to their destinations), and the transport trunks (wires carrying calls between switches)." \textit{AT&T Corp. v. Iowa Utils. Bd.}, 525 U.S. 366, 371 (1999).

\textsuperscript{79} \textit{Verizon Commc'ns, Inc. v. FCC}, 535 U.S. 467, 490 (2002).

\textsuperscript{80} 540 U.S. at 401.
share their network with competitors by offering local services for resale and by providing "access to elements of the network on an 'unbundled' basis." Through such utilization or resale, new entrants, known as competitive local exchange carriers (CLECs), were able to offer local service.

Verizon, an ILEC, was charged with these duties. Accordingly, it "signed interconnection agreements with rivals such as AT&T" that specified "the terms on which it [was to] make its network elements available." It also took advantage of the opportunity—not available to ILECs before the passage of the Act—to enter the long-distance market. In order to enter the market, Verizon needed to satisfy a checklist of statutory requirements that included nondiscriminatory access to elements of the network.

A local telephone service customer of AT&T, the law firm of Curtis V. Trinko, L.L.P., filed a complaint alleging that Verizon (then Bell Atlantic) discriminated against CLECs. It contended that Verizon "has not afforded CLECs access to the local loop on a par with its own access." In particular, Verizon "has filled orders of CLEC customers after filling those for its own local phone service [and] has failed to fill in a timely manner, or not at all, a substantial number of orders for CLEC customers substantially identical in circumstances to its own local phone service customers for whom it has filled orders on a timely basis . . . ." Such activity naturally would make it more difficult for CLECs to compete in the market for local telephone service and could maintain the ILECs' local service monopolies.

The district court dismissed the complaint. The Second Circuit reversed in part, finding that the complaint stated a claim under the essential facilities and monopoly leveraging doctrines and that the passage of the 1996 Act did not preempt the application of antitrust.

In an opinion written by Justice Scalia on behalf of six Justices, the Supreme Court reversed the Second Circuit. One focal point of its opinion was the existence of the Telecommunications Act of 1996,

81. Id. at 402; see also 47 U.S.C. § 251(c) (2000).
82. 540 U.S. at 402.
83. Id.
84. Id. at 402–03; see also 47 U.S.C. §§ 251, 271.
85. 540 U.S. at 404.
87. Id.
89. Chief Justice Rehnquist and Justices O'Connor, Kennedy, Ginsburg, and Breyer joined the opinion. Justice Stevens, joined by Justices Souter and Thomas, authored a concurring opin-
which, in opening up local markets and facilitating competition, demonstrated a regulatory regime serving many of the same purposes as antitrust (and therefore reducing, if not eliminating, the need for antitrust). This aspect of the opinion likely will not affect IP refusals to license because, in contrast to the telecommunications regime, the right to exclude at the foundation of IP often contravenes the goal of competition.

Several other parts of the opinion nonetheless are instructive. In particular, six aspects shed light on how the Court might analyze IP refusals to license: (1) the benefits of monopoly power, (2) the dangers of sharing, (3) the costs of antitrust, (4) refusals to deal, (5) essential facilities, and (6) monopoly leveraging. The first three present general themes and the latter three focus on particular antitrust doctrines.

B. Monopoly Power and Incentives

The first general theme comes from the Court’s discussion of monopoly power. The activity at issue in *Trinko*, a company’s denial of interconnection services to a rival, is a form of unilateral conduct that courts consider under § 2 of the Sherman Act. Oft-cited case law requires a plaintiff alleging a § 2 violation to demonstrate both monopoly power and monopoly conduct.

In discussing the first requirement, the Court lauded monopoly power, explaining that a firm’s ability to charge monopoly prices “is an important element of the free-market system.” The “opportunity to charge monopoly prices—at least for a short period—is what attracts ‘business acumen’ in the first place [by] induc[ing] risk taking that produces innovation and economic growth.” In order, then, “[t]o safeguard the incentive to innovate,” courts cannot condemn the possession of monopoly power alone. While numerous pre-*Trinko* courts had explained that a firm’s mere possession of monopoly power does not violate § 2, no court had so fervently defended monopoly power.

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ion that concluded that the plaintiff lacked standing to maintain the action. 540 U.S. at 416 (Stevens, J., concurring).
90. Id. at 407 (majority opinion).
91. Id.
92. Id.
93. For a critique of the Court’s argument, see Michael A. Carrier, *Of Trinko, Tea Leaves, and Intellectual Property*, 31 J. Corp. L. 101 (2005) (explaining that the Court “short-circuits the debate that has raged . . . in the economic literature about the market structure that best promotes innovation” and that it “does not support its assertion that the quest for monopoly power provides the motivation driving firms today”).
The Court’s statements on monopoly power would apply forcefully to IP. To be sure, the existence of a patent or copyright does not necessarily (or even in most cases) signify monopoly power. But if incentives are critical anywhere, it is in the context of IP.

The traditional story explaining IP is that the nonexclusive and nonrivalrous nature of information prevents owners from appropriating the rewards of their creations. The patent and copyright laws are designed to address this problem by granting a right to exclude. This right allows creators to charge prices in excess of the marginal cost of producing their inventions so that they can not only recover their initial expenditures but also receive profits. But the right to exclude, and the incentives for innovation it promotes, could be compromised by the application of antitrust. In short, the Court’s emphasis on the role of monopoly power in driving innovation and economic growth is magnified when the incentives apply not only at the general level of a firm’s risk-taking activity but also at the more specific level of the unique risks facing IP holders.

C. Sharing

The second insight comes from the Court’s recitation of four dangers that would result if a firm were forced to share its facilities with competitors. First, sharing contravenes the “purpose of antitrust law,” which promotes incentives to invest. Second, it requires courts to “act as central planners . . . a role for which they are ill-suited.” Third, sharing facilitates collusion, which is “the supreme evil of antitrust.” And fourth, it intrudes upon the rights of manufacturers to select the parties with whom they wish to deal.

94. See, e.g., Org. Econ. Cooperation & Dev., Competition Policy and Intellectual Property Rights 16 (1989) (reporting that in a survey of patent licensors, no close substitutes existed for the patented product in only twenty-seven percent of cases, and that there were more than ten competitors in more than twenty-nine percent of cases); Kenneth W. Dam, The Economic Underpinnings of Patent Law, 23 J. Legal Stud. 247, 249–51 (1994); see also id. at 250 (“[L]eaders companies may obtain 1,000 or more patents in a single year, and yet many such firms are unlikely ever to obtain even a single monopoly in any market.”).

95. Michael A. Carrier, Cabining Intellectual Property Through a Property Paradigm, 54 Duke L.J. 1, 32 (2004) (“Nonexclusivity prevents owners from excluding others from the possession of information . . . . Nonrivalrousness magnifies this danger because one person’s consumption does not diminish the amount of the good for others to consume . . . .”). For a critique of the traditional story of IP, see id. at 34–44.


97. 540 U.S. at 407–08.

98. Id. at 408.

99. Id.

100. Id. at 407–08.
These arguments would apply most powerfully to IP holders. The right to exclude is, once again, the foundation of the IP system.\textsuperscript{101} If sharing is contrary to antitrust, then it is anathema to IP. Moreover, to the extent that the Court focuses on "incentives to invest" as the purpose of antitrust law,\textsuperscript{102} such incentives are even more directly implicated by the IP system.

Even the provisions in the IP laws—such as compulsory licenses in copyright law and government appropriation in patent law—that provide for compensated sharing would not provide material support for a court’s compelling the sharing of IP under § 2.\textsuperscript{103} For the calculation of royalty rates for compulsory licensing would require courts to act as the forbidden "central planners."

\textbf{D. Antitrust’s Costs}

The disadvantages of antitrust garner much attention from the Court. One cost is the difficulty of applying § 2 because "the means of illicit exclusion . . . are myriad."\textsuperscript{104} A second involves the consequences of false condemnations, which "are especially costly, because they chill the very conduct the antitrust laws are designed to protect."\textsuperscript{105} Third, oversight by antitrust tribunals "would seem destined to distort investment and lead to a new layer of interminable litigation."\textsuperscript{106} And fourth, remediation would "require continuing supervision of a highly detailed decree," which courts could not effectively do.\textsuperscript{107}

These costs would be particularly significant in the context of IP. By wrongfully punishing IP holders’ refusals to deal, false positives would adversely affect not only competition but also the separate incentive system underlying IP. Concerns of distorted investment similarly would apply directly to IP. And the courts could be forced to oversee detailed decrees in ordering royalty-based compulsory licensing. Applying the costs of antitrust to IP thus would counsel against punishing IP refusals to license.

\textsuperscript{101} See supra note 96 and accompanying text.
\textsuperscript{102} For a critique of this development, see Carrier, supra note 93, at 110.
\textsuperscript{103} For compulsory licenses in copyright, see, e.g., 17 U.S.C. § 111 (2000) (retransmission of broadcasts by cable and satellite television companies), id. § 115 ("cover" licenses for musical works), id. § 118 (public broadcasting). For government appropriation in patent law, see 28 U.S.C. § 1498 (2000).
\textsuperscript{104} 540 U.S. at 414 (internal quotation marks omitted).
\textsuperscript{105} Id. (internal quotation marks omitted).
\textsuperscript{106} Id.
\textsuperscript{107} Id. at 415.
In short, the general themes of the benefits of monopoly power, the dangers of sharing, and the costs of antitrust all counsel deference to refusals to deal. The especially direct application of these concepts to IP refusals to license makes it even less likely that the Court would penalize such conduct.

E. Aspen Skiing and Refusals to Deal

The Court’s application of specific monopolization doctrines confirms its general themes. The most important monopolization doctrine discussed in Trinko is the refusal to deal. In particular, the case of Aspen Skiing takes center stage in the Court’s discussion. 108 In Aspen Skiing, the Court found a § 2 violation when the owner of several downhill skiing facilities withdrew from a joint ticketing arrangement with its competitor. 109 The Trinko Court asserted that Aspen Skiing was “at or near the outer boundary of § 2 liability.” 110 It stated that the withdrawal “suggested a willingness to forsake short-term profits to achieve an anticompetitive end” and that the defendant’s unwillingness to accept the retail price “revealed a distinctly anticompetitive bent.” 111

Verizon, in contrast, did not evidence such behavior. It did not engage in a voluntary course of dealing with its rivals or (obviously) withdraw from such a relationship. 112 Nor did it “turn[ ] down a proposal to sell at its own retail price.” 113 The Court also distinguished the type of service offered from that in previous cases. In Aspen Skiing and Otter Tail, 114 the defendants offered ski lift tickets and power transmission, respectively, services that were already available to the public. 115 In contrast, Verizon was required to share unbundled network elements, a “brand new” type of service that “exist[ed] only deep within the bowels of Verizon . . . .” 116 These network elements were “offered not to consumers but to rivals, and at considerable expense and effort.” 117 Largely because Verizon’s conduct did not re-

109. Id. at 609–11.
110. 540 U.S. at 409.
111. Id.
112. Id.
113. Id.
115. 540 U.S. at 410.
116. Id.
117. Id.
semble the defendant's activity in *Aspen Skiing*, the Court concluded that Trinko failed to offer a cognizable refusal-to-deal claim.\textsuperscript{118}

In its discussion of *Aspen Skiing*, the Court does not clearly articulate which of several potential tests for exclusionary conduct it is applying. Three related possibilities come to mind.

The first requires a cognizable refusal-to-deal claim to mirror the facts of *Aspen Skiing* itself: a party's termination of a voluntary course of dealing and resultant sacrifice of short-term profits. The second is slightly broader, adopting a "short-term sacrifice" test similar to that applied in predatory pricing claims, in which the Court punishes only a monopolist's pricing below cost, which sacrifices profits.\textsuperscript{119} The third is slightly broader still, analyzing whether the defendant—even if it does not sacrifice profits—fails to offer a legitimate business justification for its conduct. All three of the approaches are consistent with the Court's refusal-to-deal analysis in *Trinko*.

The Court explained, for example, that Verizon did not "voluntarily engage[ ] in a course of dealing with its rivals,"\textsuperscript{120} which distinguishes the case from *Aspen Skiing* and removes an indicator that could have revealed a sacrifice of profits or the lack of a business justification. It also noted that Verizon's "reluctance to interconnect at [a] cost-based rate of compensation" is distinct from the *Aspen Skiing* defendant's rejection of a proposal to sell at its retail price and does not provide clues as to sacrifice or business justification.\textsuperscript{121} Finally, Verizon's reluctance to offer a new service differs from the *Aspen Skiing* defendant's refusal to provide a product it already sold to consumers and does not as readily demonstrate sacrifice or lack of business justification.\textsuperscript{122}

\begin{footnotes}
\textsuperscript{118} Id. The Court also distinguished the cases of *United States v. Terminal Railroad Association*, 224 U.S. 383 (1912), and *Associated Press v. United States*, 326 U.S. 1 (1945), on the grounds that those cases involved concerted action. 540 U.S. at 410 n.3.
\textsuperscript{119} Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222 & n.1 (1993) (stating that plaintiff must show that defendant priced "below an appropriate measure of its . . . costs").
\textsuperscript{120} 540 U.S. at 409.
\textsuperscript{121} Id.
\textsuperscript{122} In addition to not clarifying what standard it was applying, the Court discerned much from a barren record, having arrived at the Court in the context of a motion to dismiss under Rule 12(b)(6). For example, the Court seemed overly eager to distinguish Verizon's behavior from that of the defendant in *Aspen Skiing* even though the compensation Verizon gave up under § 251(c)(3) was not just "cost-based" but also included a reasonable profit. See Local Competition Order ¶ 738 (explaining that Total Element Long Run Incremental Cost (TELRIC) allows incumbents "to recover a fair return on their investment" because it "produce[s] rates for monopoly elements and services that approximate what the incumbent LECs would be able to charge if there were a competitive market for such offerings").
\end{footnotes}
In the context of a patentee monopolist's refusal to deal, it would appear that a post-Trinko plaintiff would need to demonstrate an Aspen-like scenario to succeed under § 2.123 The first of the three interpretations of the Court's analysis, the Aspen case itself, most obviously requires a withdrawal from an existing licensing arrangement. And the other two interpretations—the sacrifice and business justification tests—will typically mirror the Aspen scenario as well. To be clear, many patentee monopolists' withdrawals from ongoing arrangements will not be subject to § 2 liability. Circumstances may have changed, rendering continued participation in the venture unprofitable. But in most cases,124 a withdrawal from an ongoing arrangement will be a necessary (though not sufficient) condition to show sacrifice or a lack of a business justification.125

When a patentee decides to license its patent and then withdraws from the arrangement, questions of sacrifice and business justification arise. After all, the initial decision to license demonstrates a firm's business decision that a particular patent could be commercially successful. It also shows that the patentee—who in many cases is not the ideal candidate to distribute the product in all markets—would benefit from another entity's distribution.126 The decision, then, to withdraw from a licensing arrangement introduces (though, again, does not resolve) questions of sacrifice and justification similar to those in Aspen Skiing.

In contrast, a patentee that has never licensed its patent may have justifiable reasons for its reluctance. It could determine that its product will not be commercially successful. Such a determination would be consistent with most patentees' decisions not to exploit their pat-

123. The analysis in the text refers to simple refusals to license. In contrast, conditional refusals to license generally receive less deference because the condition itself may violate another antitrust provision, such as § 1 of the Sherman Act or § 3 of the Clayton Act. 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 709a, at 219–20 (2d ed. 2002).

124. One exception could apply when a monopolist acquires but then suppresses patents. In an extreme case, a court could conclude that such activity violates § 2. See id. ¶ 708e, at 218 (positing example of monopolist buying exclusive licenses to all patents in a particular field and refusing to license such patents to competitors). Liability (under the sacrifice or business justification tests) might be appropriate in such a case because the traditional story explaining IP is less directly implicated and the acquisition provides some indication of commercial value.

125. To be clear, in nearly all cases, antitrust courts should not punish a firm's unilateral refusal to license IP. But even though such exclusion is expressly authorized by the patent laws, see 35 U.S.C. § 261 (2000), in certain cases—such as where a refusal to license lacks any business justification—it may not be entitled to absolute immunity from the antitrust laws.

It also would be consistent with the right to exclude (not use) underlying the IP laws. In the absence of a preexisting relationship, then, courts following *Trinko* generally will not second-guess patentee monopolists' refusals to license.

**F. Essential Facilities**

Another doctrine that may be implicated by refusals to deal is the essential facility doctrine. In *Trinko*, the Court stated that it "ha[s] never recognized such a doctrine" and "find[s] no need either to recognize it or to repudiate it here." Nonetheless, it weakened the doctrine in two material respects.

First, the Court found, on a 12(b)(6) motion and in opposition to the allegations of the complaint, that there was access to the interconnection facilities at issue, thus precluding the prerequisite unavailability of access. Second, it seemingly limited the application of the doctrine to facilities that had not previously been made available to the public. In particular, it contrasted the situation in *Aspen Skiing* (in which the defendant had provided lift tickets to consumers) and *Otter Tail* (in which the defendant had provided power transmission over its network to customers) with the situation in *Trinko* (in which Verizon would be forced to share "'something brand new'—'the wholesale market for leasing network elements'—with competitors').

The refusal to license IP could constitute the denial of an essential facility under the Court's first conclusion as long as access was in fact not available. The second finding likely would center the analysis once again on the existence of a previous course of dealing. If the patentee had previously licensed the IP, then an essential facility claim—assuming the satisfaction of the other requirements—still could be made.

But if the patentee had not previously licensed the IP, then two interpretations of the Court's opinion are possible. Under one, which focuses on the *liberty* of the monopolist to choose not to share facilities that "exist only deep within the bowels" of the company, the previously unshared nature of IP would appear to preempt an essential

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127. See Mark A. Lemley, *Rational Ignorance at the Patent Office*, 95 NW. U. L. REV. 1495, 1507 (2001) (estimating that the "total number of patents litigated or licensed for a royalty ... [is approximately] five percent of issued patents").

128. 540 U.S. 398, 411 (2004). Even if the Court had not explicitly articulated an essential facilities doctrine, previous decisions were consistent with such a doctrine. See *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

129. 540 U.S. at 411; see Amended Complaint, *supra* note 86, ¶ 21.

130. 540 U.S. at 410.
facility claim. But under the other, which centers on the burden placed upon the monopolist, the claim would likely not be preempted because the intangible nature of IP would make it easier and cheaper to share than physical infrastructure.

IP essential facility claims tempt courts to force the sharing of helpful (albeit not essential) facilities. For that reason, and because of the stark contrast between the doctrine and IP's right to exclude, the Court's restriction of these claims, at least as applied to IP refusals to license, would appear to be justifiable.

G. Monopoly Leveraging

Finally, the Court addressed the issue of monopoly leveraging, which targets a monopolist's use of its power in the monopoly market to gain an advantage in a secondary market. The Court made clear, however, that a party can articulate a successful monopoly leveraging claim only by showing a "dangerous probability of success in monopolizing [the] second market." The Court's requirement that the plaintiff show a "dangerous probability of success" in the secondary market sounds the death knell for monopoly leveraging. The Second Circuit had recognized a leveraging cause of action for a party's use of monopoly power in one market "to gain competitive advantage" in another. But requiring a dangerous probability of success in monopolizing the second market mirrors the prerequisites of an attempt to monopolize claim, thus removing any independent viability of monopoly leveraging. The Court's holding on this point is consistent with the text of the Sherman Act, which prohibits monopolization and attempts to monopolize but not abuse of a dominant position, and with the majority of lower court leveraging decisions.

The monopoly leveraging conclusion also removes a temptation for courts to punish IP activity that spills into more than one market.

131. See supra notes 57-75 and accompanying text.
132. Areeda & Hovenkamp, supra note 123, ¶ 652a, at 89.
133. 540 U.S. at 415 n.4 (quoting Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459 (1993)).
136. Id. ¶ 652a, at 89-90.
137. Id. ¶ 652b2, at 93-95.
138. See, e.g., Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 479 n.29 (1992) ("The Court has held many times that power gained through 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.'").
Because patents issue for inventions, and not final products, they can often be mapped onto more than one antitrust market.\textsuperscript{139} For example, the patent could implicate manufacturing, retail, and service markets.\textsuperscript{140} While some such activity may appropriately be analyzed under the rubric of attempted monopolization or patent misuse, courts applying the leveraging doctrine could have punished activity that was a natural consequence of commercializing patented products and that did not present a harm to antitrust competition.

IV. Conclusion

The law on IP refusals to license is, to put it charitably, unclear. The conflict between antitrust and IP cannot easily be resolved, and the five approaches that courts have applied to the issue are far from consistent. Because the Supreme Court has not directly addressed IP refusals to license, the \textit{Trinko} case provides a window through which we can discern otherwise-concealed views on IP refusals to license.

Piecing together \textit{Trinko}'s general themes of the benefits of monopoly power, the dangers of sharing, and the costs of antitrust results in a skeptical view as to whether the Court would punish IP refusals to license. This conclusion is only strengthened after examining the Court's holdings on the specific claims relating to refusals to deal, essential facilities, and monopoly leveraging.

The Court's likely deference to IP refusals to license would tend to support lower court cases proffering absolute (as in \textit{SCM}) or near-absolute (\textit{Xerox}) immunity for refusals to license. It would tend not to support presumptions that could be rebutted based on intent (\textit{Kodak II}) or essential facility approaches (\textit{Intel} district court).

In short, \textit{Trinko} will certainly not make it any easier for plaintiffs challenging IP refusals to license. In fact, in its guidance to lower courts on general themes and specific doctrines, \textit{Trinko} likely will make it more difficult to challenge such activity.

\textsuperscript{139} Carrier, \textit{supra} note 2, at 792.

\textsuperscript{140} See \textit{In re Indep. Serv. Org. Antitrust Litig.}, 989 F. Supp. 1131, 1136 (D. Kan. 1997); see also id. at 1138 ("The reward for a patented invention is the right to exploit the entire field of the 'invention,' not the right to exploit the single most analogous antitrust market.").