



Joint FTC-DoJ Hearings on Section 2 of the Sherman Act

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Kodak and Section 2 of the Sherman Act

U.S. v. Kodak

- Consent decree prohibiting sale of private label film

1921

1954

U.S. v. Kodak

- 2nd consent decree prohibiting tying film to photofinishing sales

1979

Berkey Photo v. Kodak (2d Cir.)

- No obligation to pre-disclose new products to competitor
- Truthful advertising does not offend §2

1991

ITS v. Kodak (U.S. Sup. Court)

- Single brand derivative after markets

1994

Kodak v. U.S.

- Termination of 1921 and 1954 consent decree restrictions due to changed market conditions

1996

ITS v. Kodak (9th Circuit)

- IP owner's right to refuse to deal limited by motives

Kodak

Kodak Business Model Evolution



Focus on Consumables
Cameras + Film, Paper & Chemicals



Hardware + Service
Copiers/Micrographics units + Aftermarket Service



Solution Sales
Printers + Media/Ink + Sensors + Software + Professional Services + Aftermarket Service



1880s – 1970s

1970s – 1990s

2000s – ?

Critical Success Factors to Digital Model

Speed of innovation and technology development

Cross licensing of intellectual property

Ability to sell solutions



Potential Section 2 Impediments

Delayed recognition of market changes

Line between tying and bundling has blurred

- *LePages v. 3M*

Obstacles to IP protection and licensing

- *ITS v. Kodak* (9th Circuit)
- European Commission precedent
 - Compulsory licensing

Uncertainty in the Wake of *LePages*

Above cost bundled discounts can be exclusionary under Section 2

- *Brooke Group* does not apply
- Exclusionary effect = harm to “one significant competitor”

Clearly permissible discounting practices?

- Single product volume discounts

At risk:

- Discounts linking products across multiple markets
- Discounts linking products within a single line
 - E.g. branded and private label tape

No Coherent Standard to Evaluate Bundled Pricing

Alternative Approaches to Bundling

Concord Boat (8th Circuit)

- Above cost single-product discounts are not exclusionary (apply *Brooke Group*)

Ortho Diagnostic Systems (S.D.N.Y.)

- Could an equally efficient competitor to the monopolist profitably match its bundled discounts?

To prohibit above-cost discounting creates “intolerable risks of chilling legitimate price-cutting.” *Brooke Group*

Split Among the Circuits on IP Rights

9th Circuit in *ITS v. Kodak* (1997)

- Presumptively valid business justification for refusing to license/sell IP rights can be rebutted by evidence that justification was a pretext for anticompetitive motives

Federal Circuit in *Xerox v. CSU* (2001)

- Absent tying, fraud or sham litigation, “we will not inquire into the patentee’s motivations for asserting his statutory right to exclude.”
- Same rationale extended to refusals to license copyright protected works

Impact of Section 2 Uncertainty on Digital Model

Uncertainty and risk:

Hypothetical Transactions

 <p>Photo Kiosks</p>	<ul style="list-style-type: none"> Can Kodak offer retailers bundled discounts on kiosks, media and service? Can we include digital camera discounts in bundle? Can Kodak refuse to license patented parts, diagnostic software, service manuals to ISOs?
 <p>Digital Camera IP</p>	<ul style="list-style-type: none"> Can Kodak refuse to license digital camera patents to competitors? Can licenses be bundled with discounted Kodak software?
 <p>On-line Photo Service</p>	<ul style="list-style-type: none"> Can Kodak Gallery offer discounts on photo fulfillment services to customers who store a fixed number images on our servers?
 <p>Graphics Solution</p>	<ul style="list-style-type: none"> Can Kodak Graphic Communications offer a workflow solution that combines digital equipment, software, consumables and consulting services at a bundled price?

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