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TYING ARRANGEMENTS UNDER THE ANTITRUST LAWS:
THE "INTEGRITY OF THE PRODUCT" DEFENSE

I

One of the most frequently asserted defenses to an action under either the Sherman Act¹ or the Clayton Act² against a tying arrangement—a contractual limitation imposed by a manufacturer whereby the purchaser of the "tying product" agrees to purchase a related "tied product" only from the manufacturer of the tying product—has been that the tying was necessary to protect the good will or the integrity of the tying product. Whether the tied product is service for the tying product,³ another component in a system in which the tying product is used,⁴ repair parts for the tying product,⁵ or any other product related in some way to the functioning of the tying product,⁶ the basic defense is the same. It is that the tying product operates properly only when used in conjunction with the tied product, and that if the user of the tying product is not compelled to use the tied product it is possible that he will use an inferior substitute which will cause malfunctioning of the tying instrumentality and thus impugn the integrity of the product. It has generally been possible to reinforce this argument by showing that the malfunctioning of the tying product or the system in which it is used would not be readily traceable to the inferior quality of the substitute for the tied product, and therefore the user would be likely to blame the tying product for the failure to perform properly.⁷

This defense has met with widely varying reactions by the courts, and it is helpful to survey some of the more important judicial determinations in order to evaluate the most recent developments. In *United States v. United Shoe Mach. Co.*,⁸ the defendant had specified in agreements for leasing its shoe machinery that, among other things, all repair parts had to be obtained exclusively from the defendant. In a suit by the Government under section 3 of the Clayton Act, the district court upheld this provision, saying:

the Senate—which would exempt collective bank investments from the Securities Act and the Investment Company Act and place their regulation in the hands of the Comptroller of the Currency. S. 2223, H.R. 8499, H.R. 9410, 88th Cong., 1st Sess. (1963). These bills do in truth provide for a minimum of disclosure, but they do not preserve the basic investor safeguards of the Securities Act and the Investment Company Act. The SEC's criticism of and opposition to this proposed legislation is contained in a letter from Chairman Cary to Senator Robertson, printed in 109 CONG. REC. 23997 (daily ed. Dec. 19, 1963). This letter also implies that the SEC is of the opinion that no legislation of any kind is needed in this area.

1 26 Stat. 209 (1890), 15 U.S.C. § 1 (1958).

2 38 Stat. 731 (1914), 15 U.S.C. § 14 (1958).

3 *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

4 *Ibid.*

5 *United States v. United Shoe Mach. Co.*, 264 Fed. 138 (E.D. Mo. 1920).

6 *Pick Mfg. Co. v. General Motors Corp.*, 80 F.2d 641 (7th Cir. 1935), *aff'd*, 299 U.S. 3 (1936).

7 See, e.g., *International Business Machs. Corp. v. United States*, 298 U.S. 131 (1936).

8 264 Fed. 138 (E.D. Mo. 1920), *aff'd*, 258 U.S. 451 (1922).

"In the opinion of the court there is nothing unreasonable in this provision. The evidence shows that most, if not all, parts of these machines, are very delicate, and unless perfectly adjusted will, if not entirely, at least very seriously, prevent the proper operations of the machine, and in some instances prove ruinous, necessitating costly repairs, thus depriving the lessee of a full output, and the lessor of royalties. They may also cause dissatisfaction with the machines, owing to the decreased and unsatisfactory output. The parts furnished by the defendants are all standardized and fit perfectly, so that by replacing broken or worn-out parts with the parts made by defendants, the machines will perform the work in as satisfactory manner as a new machine."⁹

Thus the court recognized that the "integrity of the product" defense could be valid in proper circumstances. It is significant that the Government did not contest this portion of the opinion on appeal.¹⁰ This view expressed in *United Shoe* was reiterated in *Pick Mfg. Co. v. General Motors Corp.*,¹¹ where the defendant included in its distributorship contract a provision requiring that the distributor sell and use in repair of defendant's cars only parts manufactured by the defendant. One of the defendant's distributors brought suit alleging that this provision was in violation of section 3 of the Clayton Act. The court, relying on the language in *United Shoe* quoted above, said that the provision in question was necessary to protect the defendant in its warranties as well as to preserve the confidence of the public.¹² This holding was weakened, however, by the finding that, in any event, the provision did not lessen competition substantially.

The first substantial restriction upon the protection of good will defense originated in *International Business Machs. Corp. v. United States*.¹³ The defendant had leased its tabulating and other machines on the condition that the lease would terminate if punch cards not manufactured by the defendant were used in the machines. The Government contended that this condition violated section 3 of the Clayton Act and sought to enjoin its use. The defendant attempted to justify the covenant on the basis that if the cards were not of uniformly high quality and free from certain defects they would interfere with the successful operation of the machines. The Court responded to this argument by saying that it was not necessary to use a tying provision to insure the proper functioning of the machines. Instead, the defendant could set reasonable specifications of quality for the cards so that they would be suitable for use in the machines and thus allow anyone who could meet the specifications to manufacture and sell the cards. In effect, then, the Court was saying that the defense of protecting the integrity of the tying product could not be used if it was possible to achieve the same

⁹ *Id.* at 167.

¹⁰ See 4 GEO. WASH. L. REV. 427, 429 (1936).

¹¹ 80 F.2d 641 (7th Cir. 1935), *aff'd*, 299 U.S. 3 (1936).

¹² *Id.* at 644.

¹³ 298 U.S. 131 (1936).

protection by specifying minimum standards to which the tied product was required to conform and by conditioning the sale or lease of the tying product upon use of a product which met these standards. This solution was further developed in *International Salt Co. v. United States*.¹⁴ There the Court struck down as an illegal tying arrangement a lease of machinery, challenged under section 1 of the Sherman Act and section 3 of the Clayton Act, which required the use of defendant's salt in its machines, stating that "it is not pleaded, nor is it argued, that the machine is allergic to salt of equal quality produced by anyone except [defendant]."¹⁵ Again it was observed that the defendant was completely free to impose upon its lessees any "reasonable restrictions designed in good faith to minimize maintenance burdens and assure satisfactory operation."¹⁶ Even with this limitation imposed upon the use of the defense, it seemed that the Court recognized the validity of the defense under proper circumstances, *i.e.*, where specifications of quality for the tied product would not be sufficient to protect the integrity of the tying product. This principle of restriction by specifications, however, was severely shaken by the subsequent decision in *Northern Pacific Ry. v. United States*.¹⁷ It was held in that case that a tying arrangement is illegal per se under section 1 of the Sherman Act whenever a party has "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected."¹⁸ Although not concerned with the "integrity of the product" defense, the Court's per se approach to tying clauses in general appeared to exclude all such defenses. It seems doubtful, however, that the Court's per se language referring to "pernicious effect on competition and lack of any redeeming virtue"¹⁹ was intended to encompass the type of situation in which integrity of the product is a legitimate concern.

II

Within two years of the decision in *Northern Pacific*, a lower court was faced with the problem of deciding whether the Supreme Court intended such a rigid proscription of tying arrangements. The court in *United States v. Jerrold Electronics Corp.*²⁰ thought not and recognized a defense based upon the "protection of good will" argument. Because of limitations imposed upon this defense by the court, however, the defendant was found to have violated sections 1 and 2 of the Sherman Act and section 3 of the Clayton Act for part of the time during which the tying arrangements were used. The defendant was a manufacturer of community tele-

¹⁴ 332 U.S. 392 (1947).

¹⁵ *Id.* at 398.

¹⁶ *Id.* at 397.

¹⁷ 356 U.S. 1 (1958).

¹⁸ *Id.* at 6.

¹⁹ *Id.* at 5.

²⁰ 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

vision antenna systems and had instituted a policy of selling its equipment only as a complete system and only in conjunction with a service contract. The Government contended that such a tying arrangement was illegal *per se* under the *Northern Pacific* decision. The court assumed that Jerrold had the requisite economic power affecting a "not insubstantial" amount of commerce to meet the *Northern Pacific* test of *per se* violation;²¹ however, it went on to reject the application of the *per se* rule in this case:

"Any judicially, as opposed to legislatively, declared *per se* rule is not conclusively binding on this court as to any set of facts not basically the same as those in cases in which the rule was applied. In laying down such a rule, a court would be, in effect, stating that in all the possible situations it can think of, it is unable to see any redeeming virtue in tying arrangements which would make them reasonable. The Supreme Court of the United States did not purport in the *Northern Pacific* case to anticipate all of the possible circumstances under which a tying arrangement might be used. Therefore, while the *per se* rule should be followed in almost all cases, the court must always be conscious of the fact that a case might arise in which the facts indicate that an injustice would be done by blindly accepting the *per se* rule."²²

The court pointed out that in this case, the system being sold consisted of delicate and highly unstable electronic equipment which could easily malfunction if the components of the system were not properly matched and serviced, and such a failure would not only reflect adversely on the special "head end" equipment of Jerrold's which was in great demand, but upon the whole community television antenna industry, which was just getting started when Jerrold initiated these tying arrangements. Concluding that some protection of the integrity of the system was needed, particularly in view of the new and somewhat unstable character of the industry, the court framed the crucial test as "whether Jerrold could have accomplished the ends it sought without requiring the [tying] contracts."²³ This was exactly the same inquiry to which the Supreme Court had addressed itself in the *IBM* and *International Salt* cases many years earlier. This time, however, the issue was determined in favor of the defendant because "the limited knowledge and instability of equipment made specifications an *impractical*, if not impossible, alternative."²⁴ It seems that the court in *Jerrold* was applying a less stringent form of the "specifications test" than was outlined in *IBM* and *International Shoe* in that it was only requiring impracticability of alternatives to tying instead of the impossibility of substitution standard which was implicit in the *IBM* decision.²⁵ Although the court

²¹ See *id.* at 554.

²² *Id.* at 556.

²³ *Id.* at 557.

²⁴ *Id.* at 560. (Emphasis added.)

²⁵ See 298 U.S. at 140, where the Court said that it would not sustain the good will defense "where it does not appear that the [protection of good will] *can not* be achieved by methods which do not tend to monopoly and are not otherwise unlawful." (Emphasis added.)

gave the defense new breadth in this respect, it also implied a new limitation when it stated that its conclusion was "based primarily on the fact that the tie-in was instituted in the launching of a new business with a highly uncertain future."²⁶ This limitation was emphasized in the court's holding that Jerrold had violated the Sherman and Clayton Acts by continuing these tying arrangements beyond the infancy of the industry into a period when the industry had become established and the protection of good will in this manner was not justifiably necessary. The constituent elements of the defense as recognized by *Jerrold Electronics*, then, can be summarized as follows: (1) the tied product must be related to the tying product in such a way that the tied product, when used with the tying product, will cause malfunctioning of the latter if the tied product is not of minimum quality; (2) it must be "impractical, if not impossible" to insure that the tied product will meet these minimum standards by methods other than actual tying; and (3) the industry involved must be in a stage of development where protection against malfunctioning is crucial to the survival of the industry itself.

An examination of *Dehydrating Process Co. v. A. O. Smith Corp.*,²⁷ the only case since *Jerrold Electronics* in which the defense has been relied upon, provides a basis for examining the application of these requirements. The case involved the tying of a certain type of silo manufactured by the defendant to its silo unloading machinery. The first requirement of the defense was easily met by a showing that over fifty percent of buyers of the unloader had complained about its operation when it was used with a silo other than those sold by defendants. These malfunctionings were traceable to the use of silos which, unlike defendant's, did not have sufficiently smooth walls to allow the unloader to operate properly. The second requirement—that the tying clause be the only effective means to insure proper functioning—was clearly not satisfied since the defendant offered no evidence that the sale of the unloader only on the condition that the buyer have a silo meeting the seller's specifications would not have sufficed to protect the integrity of the unloader. Although the court seemed to recognize the applicability of the first two requirements proposed in *Jerrold*,²⁸ it disposed of the case on the ground that since the action was by a private party the plaintiff could not recover in view of his inability to prove that he had been damaged by the tying arrangement. Thus the court never had to consider the third requirement and, indeed, gave no indication that it even recognized its existence. Therefore, this case does little to clarify the proper application of the defense, although it does support the proposition of *Jerrold Electronics* that *Northern Pacific* has not abolished the defense completely.

²⁶ 187 F. Supp. at 557.

²⁷ 292 F.2d 653 (1st Cir. 1961).

²⁸ "If the containers were made by others to defendant's essential specifications, that portion of defendant's policy which required the use or purchase of its own silos as distinguished from such others may well have been improper." *Id.* at 657.

III

Even granting judicial recognition of the good will defense since the pronouncement of the per se rule in *Northern Pacific*, the question remains whether such a defense can be justified in light of the policy of the anti-trust laws.²⁹ It has been reiterated in case after case that tying agreements "serve hardly any purpose beyond the suppression of competition,"³⁰ and several writers have espoused the view that no defense, or at least not this one, can justify the use of a tying clause where sufficient tying power exists.³¹ With this considerable amount of authority favoring rejection of the defense, suspicion is cast on its validity even if a "rule of reason" approach, such as that in *Jerrold*, is taken. The basic premise of the attack is that the same objectives which allegedly justify the defense can be obtained by means which are less likely to restrain competition. Whether this premise, and the per se rule which evolves from it, can be sustained depends upon whether the anti-competitive elements of tying arrangements protected by the defense outweigh the social interests which may not be protected by any other means, as was the case in *Jerrold*.

The competing social interest which this defense furthers is the encouragement of innovation. Entering the market with a new product subjects the entrepreneur to the usual risk of competition, *i.e.*, the risk that the product is not sufficiently desired by the public that it will be purchased at a price which will cover the costs of production and return a profit adequate to attract the capital necessary to continue and expand production.³² This risk is ever present in a free enterprise economy and is necessary for the proper allocation of resources.³³ The "integrity of the product" defense raises the question whether the entrepreneur should be exposed to the further risk that his product will not be judged solely on its merits, but may be misjudged because it is used with another product which impairs its proper functioning. The question, when stated in terms of the balancing notion, is whether the degree of restraint upon competition which occurs

29. "The general objective of the antitrust laws is promotion of competition in open markets." ATT'Y GEN. NAT'L COMM. ANTITRUST REP. I (1955).

30 See, *e.g.*, *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953); *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1949).

31 "[T]he desirable results achieved by these tying arrangements were not in fact dependent on them, but could be achieved in other ways. This is true in general. Therefore a flat rule against tying arrangements, regardless of whether or not they serve a useful purpose, appears justified." KAYSER & TURNER, ANTITRUST POLICY 159 (1959). "[The protection of good will] . . . can scarcely be sufficient justification for the serious harm the tying arrangement causes to competitors in the supplies and replacement parts industry." Lockhart & Sacks, *The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act*, 65 HARV. L. REV. 913, 947 n.100 (1952); Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50, 64 (1958).

32 See generally GRIFFIN, ENTERPRISE IN A FREE SOCIETY 113-41 (1949).

33 See generally SAMUELSON, ECONOMICS: AN INTRODUCTORY ANALYSIS 16-57 (5th ed. 1961).

in order to protect the new entry outweighs the social value of removing this extra risk of introducing a new product into the market.

First, it seems appropriate to examine the extent to which competition is lessened by a tying clause having the "redeeming virtue" of the type involved in *Jerrold Electronics*. The most important element of the defense in this connection is the principle of necessity—that no means other than tying can effect adequate protection. If it is genuinely impossible for a competitor to produce the tied product so that it meets the standards necessary for proper operation, then there is no lessening of competition because there is none to begin with. This is only true in the short run, however, because a competitor may be able to develop and perfect an interchangeable product over a longer period of time. There is no solution in saying that the manufacturer will remove the tying arrangement when his competitors develop substitutable products, because competitors have no incentive, knowing that the practical condition for market entry is not successful development of a substitute, but the removal of the tying clause.³⁴ It would appear, therefore, that if this were the only requirement of the defense, there would never be any justification for a tying clause because the manufacturer could always condition the lease or sale of the tying product upon the use of a substitute meeting the necessary standards. Then, if no one could meet the standards,³⁵ the effect would be the same as a tying clause without its objectionable influence upon competitive development. One difficulty in such an approach is the problem of enforcing the condition, in the case of a sale, after the sale is complete,³⁶ or even, as a practical matter, in a lease where the manufacturer is newly organized and does not have the financial resources to pursue any legal remedies he may have under his "specifications" agreements. It is apparent from the experience of the defendant in the *Dehydrating Process* case that the manufacturer cannot always rely on admonitions to the buyer to prevent the use of his product in conjunction with inferior products;³⁷ some means of enforcing the conditions is necessary.

³⁴ Of course, this is not so if the tied product itself may be used in capacities other than in conjunction with the tying product. In this case, the competitor will have some independent incentive to spur his development of the required technology. Nevertheless, the foreclosure from the market related to the tying product cannot but lessen the incentive he has; thus it is still socially harmful.

³⁵ This is always assuming the standards are reasonable and not set above the quality level necessary to maintain the proper operation of the tying product. See *International Salt Co. v. United States*, 332 U.S. 392, 397 (1947).

³⁶ Cf. *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917).

³⁷ The manufacturer in the *Dehydrating Process* case tried to persuade his customers to use his silos by explaining to them that the unloaders which they had purchased from him would not operate properly unless they were used in connection with his silos. The court made it clear that his customers were unconvinced by this argument and preferred to chance malfunctioning of the unloaders in order to save money on the silos by purchasing a cheaper competitive model: "[I]n spite of defendant's educational efforts, its customers did not install the unloaders in containers [of the proper specifications] to permit the unloader to function [D]efendant did not readily escape . . . injury

The third element of the defense, as expounded in *Jerrold*, provides a way to limit the tying clause so as to avoid the undesirable effects upon the incentive of competitors to develop adequate substitutes. It also eliminates the enforceability problems involved in a "specifications" condition. This element requires that the protection of good will be necessary to the survival of the new industry. This provides a limitation on the duration of the tying clause in that it will become illegal at such time as the industry becomes well enough established to withstand an occasional jolt to its reputation due to the product's use with an inferior product. This was the circumstance the court found in *Jerrold Electronics*. Although this third requirement solves the problem of limiting the term of validity of the tying clause, it creates new problems in its own right. How the manufacturer of the tying product will determine when his tying clause has become illegal poses the most serious problem. How the courts will be able to decide the same question is a corollary question. Related to this problem are the difficulties confronting the manufacturer in making an initial determination that his industry is so weak at its inception that it cannot bear the extra risk that the defense is designed to remove. Although every manufacturer who engages in an activity having antitrust implications is free to decide how near to approach the borders of illegality, the judicially created situation of the good will defense is peculiarly troublesome in that the manufacturer must decide from day to day, with hardly any guidelines for decision, whether his heretofore legal tying clause has become illegal. The situation is further complicated by the fact that the defense may be justified in some geographical areas and not in others as varying rates of expansion and change in competitive circumstances occur.³⁸ Even assuming a symmetrical market, the other factors which must be considered in resolving this dilemma are innumerable. For example, aside from the type of product and its price, some variables which are relevant to the issue are the amount and type of advertising being done, the amount of capital required to be committed, and the extent to which it is totally committed to the product in question or may be utilized in the production of another product if the first should fail, and the maturity and amount of resources of the business entering the new industry. It should be noted that although all these factors can be measured quantitatively, it is their qualitative significance which is determinative, and there is no fixed relationship either between these factors *inter se* or to the question of when a tying clause is

to its reputation by telling its customers that the fault was theirs." *Dehydrating Process Co. v. A.O. Smith Corp.*, 292 F.2d 653, 656 (1st Cir. 1961).

³⁸ See *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545, 557 (E.D. Pa. 1960). In many cases, this would appear to be inconsistent with the "survival of the industry" requirement of the defense in that once the product is established in some areas, the industry should be able to survive without the use of the tying clause. However, in some cases the industry may have to continue to expand in order to recoup its development costs and reach the break-even point, and in this case the separate treatment of different market areas to see whether the defense is appropriate may be justified.

no longer necessary to insure the survival of the industry. The maturity and financial strength of the business is probably the most important factor in view of the emphasis placed on it in *Jerrold Electronics*.³⁹

There can be no doubt that the defense has the most economically sound justification in the situation where the manufacturer is a small, non-diversified enterprise with limited financial resources; this type of business is most vulnerable to the risk which the defense is designed to alleviate. If the goal is only to preserve the maximum number of new businesses, the defense may be justifiably limited to this situation. However, in view of the broader policy of encouraging new products to enter the market on their own merits without being subjected to the risk of loss of good will by use with inferior products, it can be argued that the determinative factor should be the character of the product rather than the character of the manufacturer. Even large established manufacturers may not be willing to undertake production of a new product whose integrity they cannot protect during the crucial period of introduction into the market. This consideration is, of course, closely related to the problem of obtaining capital.⁴⁰ If production requires commitment of a large amount of capital specifically to the new product, an investor will be more hesitant than if the capital can be committed in a manner so as to allow its use in the production of other types of goods.⁴¹ The risk the investor faces in investing his capital, then, is a function of the type of commitment. More importantly, it is also a function of the probability that the product will succeed in the market. If the risk of failure of the product is substantially affected by the chance it will lose its good will through improper mating with coordinate parts, this will be an important consideration in determining whether to invest in the new product. These risks must be weighed against the expected profit on the product, which in turn depends on the price at which the product can be sold⁴² and the total costs of production and distribution of the product.

Thus it can be seen that the determination of the point at which an industry has established itself requires an extended and extremely complex economic analysis. Obviously, neither businessmen nor the courts are going to be able to predetermine this point, yet the whole basis for the third

³⁹ "A wave of system failures at the start . . . would have been disastrous for Jerrold, who, unlike others experimenting in this field such as R.C.A. and Philco, *did not have a diversified business to fall back on* but had put most of its eggs in one precarious basket in an all out effort to open up this new field." *Ibid.* (Emphasis added.)

⁴⁰ Or, in the case of the richly endowed manufacturer, convincing the top management that available capital should be allocated to the new product. From the point of view of economic analysis the situation is the same.

⁴¹ This is because the risk of loss is greater where the investment is totally dependent on the new product than where it can still be utilized in alternative fashions if the new product fails.

⁴² This price will be determined by the demand for the product at a given level of production. See NEWBURY, *THE AMERICAN ECONOMIC SYSTEM* 62 (1950); SAMUELSON, *op. cit. supra* note 33, at 66.

element of the defense turns upon this determination. Thus, the choice seems narrowed to eliminating the "survival" test from the defense as impracticable, or retaining it as the best means of limiting the duration of a tying clause despite the difficult economic analysis involved.

Assuming for the moment that even with the problems created by the requirements discussed above, the defense is still viable, the next matter to be considered is the implementation of the defense. The *IBM* and *International Salt* cases suggested that the defendant had the burden of proving compliance with the second requirement of the defense, *i.e.*, that the tying product could not be adequately protected by specifying standards for the tied product.⁴³ What proof is needed to carry this burden? Must the manufacturer show that none of his competitors can meet the required specifications and that his customers will use the inferior products of his competitors if they are not forced to use his own? Certainly a showing that his competitors do not presently make the tied product up to the required standards does not prove that they could not if they were forced to do so in order to gain entry into the market. To prove further that they could not meet the necessary standards if required to would seem extremely difficult, if not impossible. The proposition that his customers would use inferior products if not forced to use his would be equally hard to prove unless the manufacturer went ahead and placed his product on the market and was thus able to show the actual behavior of his customers.⁴⁴ This course of action would subject the manufacturer to the risk that his product's good will would be ruined before he was able to gather sufficient evidence to justify a tying clause. However, to do less than prove these two propositions would appear to fall short of showing that the establishment of specifications for the tied product would not suffice to protect the tying product.⁴⁵

The court in *Jerrold Electronics* did not press the requirement this far; it inferred that specifications were impractical from the showing that the electronic equipment involved was highly sensitive and unstable, and from the fact that even Jerrold had experienced difficulty in matching the components and adjusting the system properly.⁴⁶ Probably such an inference is necessary in light of the onerous alternatives, but this creates a further difficulty in deciding which products are complex enough to justify the inference. Moreover, it is not the tying product alone which must be examined, but the combination sought to be tied.⁴⁷ This type of analysis leads

⁴³ See *International Salt Co. v. United States*, 332 U.S. 392, 398 (1947); *International Business Mach. Corp. v. United States*, 298 U.S. 131, 139 (1936).

⁴⁴ This is what the defendant in the *Dehydrating Process* case was able to do. See note 34 *supra*.

⁴⁵ At this point, the previously discussed difficulties of enforcing such specifications are being ignored; however, such difficulties should be relevant in proving this issue.

⁴⁶ See *United State v. Jerrold Electronics Corp.*, 187 F. Supp. 545, 556 (E.D. Pa. 1960), *aff'd. per curiam*, 365 U.S. 567 (1961).

⁴⁷ A good example of this is the *IBM* case, where, although the tabulating machines

to the same type of dilemma for the businessman that arose earlier in connection with the "survival of the industry" requirement, *i.e.*, the businessman must decide whether his product combination is sufficiently complex that specifications are impractical.

There is another very important consideration for the manufacturer who is contemplating the use of a tying clause to protect the good will of his product. Even though he may feel that he can satisfy the burden of proving the requirements of the defense, he must consider the possibility of loss of his patent on the product through the application of the patent misuse doctrine. Although this will not apply in every case, it is very likely that the type of product that meets the defense will be patented because it is by hypothesis an innovation. It is quite clear that the standard for patent misuse is not the same as that of the antitrust laws, and that a court may find a patent misuse without finding a violation of the antitrust laws.⁴⁸ The test is instead whether the patentee has gone beyond the scope of his patent grant, which is delineated by the invention itself.⁴⁹ A tying arrangement is one of the more common ways in which a patent may be so misused.⁵⁰ Therefore, counsel for a manufacturer might well advise against the use of a tying clause even though it appears to satisfy the requirements of the good will defense. It is possible, of course, that a court might hold this defense equally applicable in a patent misuse case, because the rationale of the defense is just as valid here as in the antitrust violation; but it is dangerous to predict such a result in light of the available precedent.

IV

From the foregoing it can be seen that, whatever value a tying clause might have to a manufacturer, its use in hopes of protecting the integrity of a product, and justification of its use on this basis, is hazardous indeed. The requirements of the defense are so strict that few can hope to satisfy them, and consequently the risks of an antitrust violation and possible loss of the patent on a product are great. One possible way to avoid the use of a tying clause and still achieve the objective of protecting the good will of the tying product would be to condition the warranty on the tying product on the use of the tied product produced by the manufacturer. The effectiveness of this approach would depend on the value of the warranty to the customer, since the desired effect of persuading the customer to buy the manufacturer's coordinate product would not be obtained if the customer valued the saving in cost of the inferior product produced by his competitors more than the warranty on the tying product. Moreover, the manufacturer's

were quite complex, the cards sought to be tied were not and the tying clause was held illegal. The same was true in the *International Salt* case.

⁴⁸ *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488 (1942).

⁴⁹ *Carbice Corp. of America v. American Patents Dev. Corp.*, 283 U.S. 27, 32 (1931).

⁵⁰ See, *e.g.*, *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488 (1942); *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917).

good will may nevertheless be damaged by public knowledge that he does not always stand behind his warranty, even though those times when he does not, appear to him to be justified. This would depend in large degree on the sophistication of the customers and the extent to which they initially understand the conditions of the warranty. Another danger involved in the use of the conditional warranty is that a court may find it a mere subterfuge designed to conceal a tying clause in substance, if not in form.

The future of the good will defense as developed in *Jerrold Electronics* is unclear at the moment since none of the other decisions subsequent to *Northern Pacific* have been rendered by the Supreme Court, and there can be no certainty as to whether the Court will adhere to the position taken in *Jerrold*. The Supreme Court's per curiam affirmation of *Jerrold* appears limited to the finding of violation, and cannot be construed as either accepting or rejecting the district court's reasoning upon the issue of when a tying clause could be justified. It may well be that the present tendency of the Supreme Court toward the expansion of per se illegality in this area, in addition to the burdensome administrative problems previously discussed, will lead the Court to reject the defense altogether. It is interesting to note in this connection that the Common Market has apparently taken a position similar to that in *Jerrold*, at least with respect to tying arrangements in patent licensing agreements.⁵¹ The manner in which this idea is developed there may have some impact on its development in this country, or vice versa, depending on where resolution of the issues involved first becomes necessary. Certainly, the Common Market Commissioners will have to consider and solve many of the same problems discussed in this paper. For the present, however, the uncertain status of the defense and the possible extreme consequences of a violation of the antitrust laws if the defense is found to be inapplicable make the use of a tying clause inadvisable except where overriding business considerations make it necessary to chance the substantial legal risks. It is hoped that this deleterious unpredictability will be resolved in the near future.

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⁵¹ In an official notice issued Dec. 24, 1962, the Commission of the European Economic Community stated that Article 85(1) (the section covering tying arrangements) of the Treaty was not violated where "Standards of quality or obligations imposed upon the licensee with respect to the obtaining of supplies of certain products, insofar as they are indispensable for a technically proper utilization of the patent." CCH COMMON MARKET REP. ¶ 2694, at 1767 (1962).