

ARTICLE

Antitrust and Digital Refusals to Deal

Herbert Hovenkamp

Early in 2024 the United States Department of Justice accused Apple of monopolizing a market for “performance smartphones” by refusing to share features that have placed the iPhone in the performance category. One problem this complaint faces is that the Supreme Court’s twenty-year-old *Trinko* decision made U.S. antitrust challenges to refusals to deal close to impossible.¹ A narrow exception survives under the Court’s earlier *Aspen* decision,² but only when a dominant firm abandons previous cooperation with a rival without a good justification.

Nevertheless, the no-duty-to-deal rule remains controversial.³ Current law assumes that a firm’s right not to deal preserves investment incentives and limits free riding. Critics argue that it perpetuates monopoly by making it impossible for new firms to break into any dominated market that requires cooperation in order to function. That includes much of digital commerce, including collaborative networks.

One result of highly restrictive dealing rules is that antitrust defendants try to characterize legal challenges as refusals to deal, increasing their chances of a dismissal. Of course, verbal gymnastics can turn nearly anything into a refusal to deal. A tying arrangement becomes a refusal to deal, because the seller refuses to sell the tying product without the tied product. Even a cartel member “refuses to deal” with someone unwilling to pay the cartel price. Distinguishing between unilateral and collaborative acts is crucial. Cartels and ties are not simple refusals to sell, but rather refusals to sell except on agreed-upon conditions.

In the law of vertical restraints, the century-old *Colgate* rule distinguishes vertical agreements, such as resale price maintenance (RPM), from unilateral refusals

¹ Verizon Comm., Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

² Aspen Skiing Co. v. Aspen Highlands Skiing corp., 472 U.S. 585 (1985).

³ Erik Hovenkamp, *The Antitrust Duty to Deal in the Age of Big Tech*, 131 Yale L.J. 1385 (2022).

to deal.⁴ RPM agreements, under which a supplier specified the price at which a product must be resold, were per se unlawful until 2007.⁵ Under the *Colgate* decision, however, a firm could lawfully announce its intention to sell only to those who charge a specified price and then refuse to sell to anyone who disobeyed. Both the announcement and the subsequent refusal were unilateral acts.⁶ That decision retains vitality.⁷

In digital tech the relevant claims are more likely to be akin to tying or exclusive dealing rather than RPM. Indeed, bundling things together is one of the hallmarks of digital innovation.

One thing that would improve outcomes is for the courts to recognize a more robust distinction between “primary” and “secondary” refusals to deal.⁸ A primary refusal to deal occurs when a rival wants shared access to a firm’s core product in which it has monopoly power. For example, someone who wanted to sell iPhones in competition with Apple might insist that Apple license out the necessary technology. Primary duties to deal are direct attacks on the defendant’s dominant asset and the heart of its investment, challenging the long-standing rule that firms have no duty to share their property with others. No antitrust statute obliges firms acting unilaterally to share their property, and liability conflicts with statutory patent policy.⁹ While antitrust law occasionally compels sharing, it is only as a remedy for some conduct *other* than the refusal to share itself.¹⁰

By contrast, secondary refusals to deal are instances of vertical integration or integration into complementary markets. These are better treated as tying or sometimes exclusive dealing arrangements, which are governed by U.S. antitrust statutes. In these cases the plaintiff does not want to share the defendant’s primary asset itself, but rather wishes to do business in some secondary product for which the primary product is a bottleneck. This comes much closer to the rationale for condemning tying arrangements, which have been covered by United States antitrust law since the 1910s,¹¹ with greatly expanded coverage and even per se illegality in the 1930s and 1940s.¹² For example, the monopoly owner of a patented movie projector has no duty to share the technology so that others can make the

⁴ *United States v. Colgate & Co.*, 250 US 300 (1919).

⁵ *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), overruled by *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

⁶ *E.g.*, *Business Electronics Corp. v. Sharp Elect. Corp.*, 485 U.S. 717 (1988).

⁷ *E.g.*, *In re Qualcomm Litig.*, 2017 WL 5985598 (S.D.Cal. Nov. 8, 2017).

⁸ Erik Hovenkamp, *Antitrust Duty*, *supra*.

⁹ *E.g.*, 35 U.S.C. §271(d)(4) (patentee has no duty to license).

¹⁰ *E.g.*, *Charles Pfizer & Co. v. FTC*, 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969) (FTC Act §5 violation; remedy required defendant to license its patents).

¹¹ *Motion Picture Patents Co. (MPPC) v. Universal Film Co.*, 243 U.S. 502 (1917).

¹² *E.g.*, *Inter. Bus. Mach. Corp v. United States*, 298 U.S. 131 (1936); *Int’l Salt Co., Inc. v. United States*, 332 U.S. 392 (1947).

projector (a primary refusal), but it may have a duty not to restrict customers to the use of its own films (a secondary refusal and a tie).¹³

A good recent example of a secondary refusal is the *John Deere* right-to-repair case. Deere had a dominant position in agricultural tractors, which contained circuitry that could connect to copyrighted diagnostics software.¹⁴ Deere refused to license the software to anyone other than its own repair technicians. While Deere's policy presented as a refusal to deal, the court permitted the claim to proceed as one of tying of the tractor to aftermarket repair services.¹⁵ The plaintiff was not trying to duplicate the tractor or even to replicate and sell the software. Rather, it wanted the right of independent repair in the aftermarket, which required access and use of the software. The tying analogy worked better. It also made liability possible by avoiding the *Trinko* rule. The court sustained the plaintiff's complaint.

Compare the *Deere* complaint with the government's antitrust suit against Apple.¹⁶ The government alleges that Apple has (1) blocked "super apps," or apps that can act as secondary sellers of further apps; (2) locked the iPhone to Apple's own mobile cloud services; (3) excluded rivals from participating in iMessage, Apple's cross-platform messaging technology; (4) provided inadequate linkage support for third-party digital watches to the same extent as it did for the Apple Watch; and (5) excluded third-party "wallets," or transaction managers, that might compete with the Apple Wallet.¹⁷ In its motion to dismiss Apple characterizes these practices as refusals to deal, heavily citing the Supreme Court's *Trinko* decision.¹⁸

But are these practices refusals to deal or are they tying? The government's complaint does not allege tying. Rather, the claim is that Apple is trying to wall up its dominant position in the smartphone itself by creating desirable features exclusive to the iPhone, and which users will lose if they switch to a different phone. Apple "increases the cost and friction of switching from the iPhone to another smartphone and generates extraordinary profits...."¹⁹ If you switch from the iPhone you lose iMessage, the Apple Wallet, the Apple Watch linkage, or the other services that Apple provides only to iPhone users. Of course, any unique feature that makes a product more attractive to consumers also makes switching away less attractive. For example,

¹³ *MPPC, supra*.

¹⁴ *In re Deere & Co. Repair Service Antitrust Litig.*, 703 F.Supp.3d 862 (N.D. Ill. 2023).

¹⁵ *Id.* at 908-910.

¹⁶ See *United States v. Apple, Inc.*, No. 2:24-cv-04055 (D.N.J. June 11, 2024), available at <https://www.justice.gov/atr/case/us-and-plaintiff-states-v-apple-inc>.

¹⁷ *Id.*, ¶¶10-11, pp. 8-11.

¹⁸ See "Apple Files Motion to Dismiss DOJ Antitrust Lawsuit," 9to5Mac (Aug. 1, 2024), <https://9to5mac.com/2024/08/01/apple-motion-to-dismiss-doj-lawsuit> (Aug. 1, 2024).

¹⁹ Apple Cplt, ¶155.

by installing a camera on a smartphone the seller makes user switching to phones without cameras less desirable.

By contrast, in a tying claim the offense would be that Apple is using the iPhone as a fulcrum to leverage additional power or profits in a secondary market. That would meet the less stringent requirements for unlawful tying. Under §1 of the Sherman Act, a market share of 40% should probably be enough, although Apple would still be able to offer defenses.

The Apple complaint appears vulnerable to a *Trinko* defense. That does lead to a secondary question, however, which is whether the *Trinko* rule should be changed, creating greater liability for at least some refusals to deal involving digital commerce. Aside from the fact that the Supreme Court would have to overrule *Trinko*, it is difficult to see how this can be done without diminishing the incentive to innovate. After all, competing smartphones such as Androids can and do have their own messaging, wallet, or cloud technology.

One doctrinal change that would make challenges to secondary refusals more rational would be to address tying under the rule of reason. The *Deere* decision concluded that current case law compelled approval of a per se tying claim.²⁰ The per se tying rule, however unfortunate, has never been rejected by the Supreme Court. By contrast, under the rule of reason a plaintiff would still have to show the defendant’s market power in the tying product, that the two products were in fact “tied” together, and that there were no reasonable justifications for the practice.²¹ Such defenses are particularly important for practices such as Apple’s or even Deere’s, because things can go wrong when a firm is forced to interconnect its own technology with someone else’s. For example, Apple has repeatedly convinced courts that its relatively closed system produces fewer security risks or performance shortfalls.²²

Digital internet commerce creates a complicating wrinkle, which is that computer code can act as an alternative to tying law’s agreement requirement. Historically, ties were executed by either a contract or a patent license, and both were agreements. By contrast, a refusal to deal is unilateral. Antitrust coverage is limited to §2 of the Sherman Act with its more stringent market power requirements.

One important feature of digital commerce, however, is that code often acts as a functional substitute for an agreement. Apple does not need its millions of customers to “agree” that they will not purchase apps through rival stores, or that users will not put Apple Wallet on an Android phone. Rather, it simply configures its own code so as to lock out such attempts. This is usually an entirely unilateral act. In its motion to

²⁰ *Deere*, 803 F.Supp.3d 905-909.

²¹ See Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, Ch. 17D, E (5th ed. 2024).

²² E.g., *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946 (9th Cir. 2023).

dismiss Apple made this point, distinguishing various “contractual restrictions” that Microsoft had imposed on its various service partners.²³

The case law does recognize some liability for unilaterally-imposed tying arrangements facilitated by technology design. The plaintiff’s window is small, although not as small as the one that *Trinko* provides. For example, in the *Bard* case, the defendant produced a market-dominating biopsy gun, which employed single-use needles to take tissue samples.²⁴ Bard then redesigned the gun, making it compatible only with its own needles and excluding the plaintiff’s generic needles. Lacking a contractual tying agreement, the plaintiff argued that “Bard unlawfully leveraged its monopoly power in the guns to obtain a competitive advantage” in the needles.²⁵ The Federal Circuit affirmed liability on a jury verdict. The dominant judicial approach, reflected in the Ninth Circuit’s *Allied Orthopedic* decision, is that if the technical innovation that binds two products together is any product improvement at all, it is lawful.²⁶ The court expressly refused to “balance” an actual improvement against the amount of harm done to competitors.²⁷

This is also likely to be an issue in the *Apple* litigation. That the challenged features Apple has attached to the iPhone are actual improvements seems undisputed. If that is the case, should a court try to “balance” the product and user experience improvements against any harm done to rivals because they cannot access these same features (although they can always build their own)?

Herbert Hovenkamp

Professor, University of Pennsylvania Carey Law School

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²³ Apple, Motion to Dismiss, pp. 22-23.

²⁴ C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340 (Fed. Cir. 1998).

²⁵ Id. at 1367. On the leveraging point, see Erik Hovenkamp, *Antitrust Duty*, *supra*, 1518-1522.

²⁶ Allied Orthopedic Appliances, Inc. v Tyco Health Care Grp., LP, 592 F.3d 991 (9th Cir. 2010).

²⁷ Id. at 1000 (“There is no room in this analysis for balancing the benefits or worth of a product improvement against its anticompetitive effects.”)