THE UNQUALIFIED RIGHT TO UNILATERALLY REFUSE TO LICENSE

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The Supreme Court's decisions in Trinko *and* linkLine *dealt with unilateral refusals to deal and potential liability under Section 2 of the Sherman Act, both reaffirming the right to refuse to deal. Given that neither* Trinko *nor* linkLine *dealt with intellectual property and the special considerations that come into play at the intersection of antitrust and intellectual property law, where these two decisions leave unilateral refusals to license intellectual property remains an open question. This Article attempts to provide answers. It looks at refusals to deal generally and circuit court decisions dealing with refusals to license specifically before and after* Trinko/linkLine. *It then examines the intersection of antitrust and intellectual property law and constitutional issues with imposing liability for unilateral refusals to license and related considerations. It concludes by endorsing an unqualified right to unilaterally refuse to license.*

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INTRODUCTION

In *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*,[1] the Supreme Court held that the exception to the right to refuse to deal recognized in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*[2] is limited and that *Aspen* "is at or near the outer boundary"[3] of liability under Section 2 of the Sherman Act.[4] In *Pacific Bell Telephone Co. v. linkLine Communications, Inc*, the Supreme Court reaffirmed *United States v. Colgate & Co.*[5] and the "general rule" that "businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing."[6]

Where *Trinko* and *linkLine* leave unilateral refusals to license is an open question. Prior to these decisions, in *Image Tech. Servs., Inc. v. Eastman Kodak Co.* and *In re Independent Service Organizations Antitrust Litigation* (*CSU*), the Ninth Circuit and Federal Circuit respectively came down differently on refusals to license under similar facts, and in both cases the Supreme Court denied *certiorari*.[7] Subsequent to *Trinko* and *linkLine*, the Ninth Circuit in *FTC v. Qualcomm Inc.* listed three requirements that ought to be present for the limited *Aspen* exception to apply and found that Qualcomm's refusal to license to rivals did not fall under the limited *Aspen* exception, none of the three requirements being present and the Federal Trade Commission (FTC) itself conceding error in the district court's finding of liability for the refusal.[8] Further, the Tenth Circuit in *Novell, Inc. v. Microsoft Corp.* found no liability under Section 2 based on the three-part test for unilateral refusals to license it used, and the Supreme Court denied *certiorari*.[9]

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1. 540 U.S. 398 (2004).
2. 472 U.S. 585 (1985).
3. *Trinko*, 540 U.S. at 409.
4. 15 U.S.C. § 2.
5. 250 U.S. 300, 307 (1919) ("In the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal, and, of course, he may announce in advance the circumstances under which he will refuse to sell.").
6. 555 U.S. 438, 448 (2009) (citing *Colgate*, 250 U.S. at 307).
7. *Compare* Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195 (9th Cir. 1997), *cert. denied*, Eastman Kodak Co. v. Image Tech. Services, Inc., 523 U.S. 1094 (1998) *with In re* Independent Service Organizations Antitrust Litigation (*CSU*), 203 F.3d 1322 (Fed. Cir. 2000), *cert. denied*, CSU, L.L.C. v. Xerox Corp., 531 U.S. 1143 (2001).
8. 969 F.3d 974, 993–95 (9th Cir. 2020).
9. 731 F.3d 1064, 1074-76 (2013), *cert. denied*, 572 U.S. 1096 (2014).

Part I provides an overview of refusals to deal. Part II discusses circuit court approaches to refusals to license pre-*Trinko*/*linkLine* and post-*Trinko*/*linkLine*. Part III makes the case for the unqualified right to refuse to license. It examines the intersection and the respective goals of antitrust and intellectual property law and constitutional issues with imposing liability for unilateral refusals to license and related considerations.

I. A PRIMER ON REFUSALS TO DEAL

Whether unilateral refusals to deal ought to be a source of antitrust liability has long been a contested issue. In the first decade of the Sherman Act's existence, the Supreme Court, in *United States v. Trans-Mo. Freight Ass'n*, recognized that a "trader or manufacturer . . . can sell to whom he pleases."[10] Twenty years after *Trans-Mo. Freight Ass'n*, the Supreme Court in *United States v. Colgate & Co.*[11] established what became known as the "*Colgate* doctrine"[12] in holding that:

> In the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal, and, of course, he may announce in advance the circumstances under which he will refuse to sell.[13]

Colgate involved unilateral refusals to deal: Colgate refused to sell to wholesale and retail dealers that would not sell at the prices Colgate outlined.[14] The Supreme Court had previously held in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[15] that, given the common law on restraints on alienation, it was *per se* unlawful under Section 1 of the Sherman Act[16] for a manufacturer to agree with the distributor the price at which the latter would sell the manufacturer's products. This *per se* prohibition was expanded to maximum resale price fixing in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.* in 1951,[17] to vertical non-price restrictions in *United States v. Arnold, Schwinn & Co.* in 1967,[18] and to vertical

10. 166 U.S. 290, 320 (1897).
11. 250 U.S. 300 (1919).
12. *See, e.g.*, United States v. Parke, Davis Co. 362 U.S. 29, 37 (1960).
13. *Colgate*, 250 U.S. at 307.
14. *Id.* at 301–02.
15. 220 U.S. 373 (1911).
16. 15 U.S.C. § 1.
17. 340 U.S. 211 (1951).
18. 388 U.S. 365 (1967).

maximum price fixing in *Albecht v. Herald Co.* in 1968.[19] In the interim, though, the *Colgate* Court distinguished *Dr. Miles* on the following basis: a dealer could sell Colgate's products at any price and only had to fear that Colgate, acting unilaterally, might refuse to sell its products to that dealer moving forward, something Colgate had "the undoubted right to do."[20] In the decades that followed, this became known as the "*Colgate* exception" to the *per se* rules.[21] *Dr. Miles* was overruled in 2007 in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*[22] The good doctor was preceded in precedential demise by *Schwinn* in *Continental T.V., Inc. v. GTE Sylvania Inc.* in 1977,[23] *Kiefer-Stewart* in *Copperweld Corp. v. Independence Tube Corp.* in 1984,[24] and *Albrecht* in *State Oil Co. v. Khan* in 1997.[25] While the *per se* rules to which *Colgate* was an exception are no more, that *Colgate* for a century existed in a sea of *per se* illegality is illustrative of the respect courts have rightly afforded the right to unilaterally choose with whom one does business.

Between *Trans-Mo. Freight Ass'n* and *Colgate*, the Supreme Court decided *United States v. Terminal Railroad Ass'n*, which involved the Terminal Railroad Association of St. Louis (TRRA) and its "unification of substantially every terminal facility by which the traffic of St. Louis is served."[26] The Court remanded the case to the lower court, which would then direct the parties to submit a remedial plan covering seven considerations.[27] Amongst them was ending restrictions to the "use of the facilities of [TRRA]" and not affecting the power of the Interstate Commerce Commission, which regulated the railroads, "over the rates to be charged by [TRRA], or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such Commission."[28] The Court's emphasis on the "geographical and topographical situation" in the relevant area[29] and the broader context of the case show that the decision ought to be interpreted narrowly.[30]

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19. 390 U.S. 145 (1968).
20. United States v. Colgate & Co, 250 U.S. 300, 305–07 (1919).
21. *See, e.g.,* Clairol v. Boston Discount Ctr. of Berkley, 608 F.2d 1114, 1123 (6th Cir. 1979).
22. 551 U.S. 877 (2007).
23. 433 U.S. 36 (1977).
24. 467 U.S. 752 (1984).
25. 522 U.S. 3 (1997).
26. 224 U.S. 383, 394 (1912).
27. *Id.* at 411–13.
28. *Id.* at 411–12.
29. *Id.* at 397.
30. *See* George Sakkopoulos, *The Right to Refuse to Deal, the Essential Facilities Doctrine, and the Digital Economy*, 55 ST. MARY'S L.J. 1035, 1046, 1055 (2024).

Several Supreme Court decisions between the 1940s and the early 1970s, however, expanded Section 2 liability for refusals to deal. In *Associated Press v. United States*, the Supreme Court held that the eponymous news organization's bylaws, which prevented "members from selling news to nonmembers, and which granted each member powers to block its nonmember competitors from membership," violated Sections 1 and 2 of the Sherman Act.[31] This decision is problematic for two reasons. First, the Court's remedy was inadministrable because "[t]he decree enjoined the Associated Press from observing the bylaws even though it would be impossible for it to know whether its 'members took into consideration the competitive situation in passing upon applications for membership.'"[32] Second, the Court's "underlying concern about potentially harmful unilateral conduct to market competitors, which is not harmful to overall market competition in that market, has since been rejected."[33]

In *Lorain Journal Co. v. United States*, the Supreme Court found that the eponymous newspaper attempted to monopolize the relevant market in violation of Section 2.[34] Between 1933 and 1948, the Journal was the only news and advertising business in Lorain, Ohio.[35] In 1948, a small radio station was established in nearby Elyria, Ohio, and it eventually opened a branch in Lorain.[36] The Journal "attempt[ed] . . . to destroy" the radio station and "regain [its] pre-1948 substantial monopoly over the mass dissemination of all news and advertising" by "refus[ing] to accept local advertisements in the Journal from any Lorain County advertiser who advertised or who [the Journal] believed to be about to advertise" over the radio station.[37] As the Court explained, the Journal engaged in conduct that was "bold, relentless, and predatory" with an intent to monopolize[38] and, with the benefit of an extensive trial record,[39] rightly found liability.[40]

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31. 326 U.S. 1, 4, 21–22 (1945).
32. Sakkopoulos, *supra* note 30, at 1062 (quoting *Associated Press*, 326 U.S. at 21).
33. *Id.* at 1062–63 (citing Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993)).
34. 342 U.S. 143, 154 (1951).
35. *Id.* at 147.
36. *Id.*
37. *Id.* at 148–49, 153.
38. *Id.* at 149.
39. *Id.* at 152.
40. *Lorain Journal* has been described as "one of the most widely supported Supreme Court Section 2 decisions." Timothy J. Muris, *The FTC and the Law of Monopolization*, 67 ANTITRUST L.J. 693, 715 (2003). *See also, e.g.*, ROBERT BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 345 (1978) (calling the decision "entirely correct" as the Journal had an "overwhelming market share," "clearly displayed predatory intent," and had "no apparent efficiency justification" for its conduct).

In *Otter Tail Power Co. v. United States*, the defendant, an electric utility company, refused to sell energy at wholesale to proposed municipal distribution systems and to agree to wheel power from other suppliers of wholesale energy. [41] The Court concluded that these refusals "were solely to prevent municipal power systems from eroding its monopolistic position" and thus were a Section 2 violation.[42] The decision has the following flaw:

> The Court found no use for Otter Tail's business justification for its actions, namely that "more and more municipalities will turn to public power and Otter Tail will go downhill" if it were not allowed to exercise its right to refuse to deal. As the dissent points out, the lower court "gave little credence" to the argument that forcing Otter Tail to deal would be "contributing to its own corporate death because more and more municipalities would then change to municipal ownership to obtain the cheaper Bureau power," thus leading to "most of its customers" going elsewhere and to Otter Tail being "eroded to the detriment of its customers, stockholders and employees." Otter Tail offered a study demonstrating the "financial disaster" it would suffer if forced to deal, but the lower court brushed it aside as being "pessimistic." The Supreme Court saw no issue with this characterization and affirmed.[43]

These decisions have been used as support for even more expansive antitrust liability under the so-called "essential facilities" doctrine. The doctrine was first identified by name in 1977 in *Hecht v. Pro-Football, Inc.*,[44] where the D.C. Circuit found the R.F.K. Stadium in Washington, D.C., to be an essential facility because "duplication of the facility would be economically infeasible" and mandated that its owner share it because "denial of its use inflicts a severe handicap on potential market entrants."[45] Several lower courts followed the D.C. Circuit's lead and embraced the essential facilities doctrine.[46] Amongst those courts was the Seventh Circuit, which, in *MCI Communications Corp. v. American Telephone and Telegraph Co.*, another major essential facilities case often cited by

41. Otter Tail Power Co. v. United States, 410 U.S. 366, 368, 371 (1973).
42. *Id.* at 377–79.
43. Sakkopoulos, *supra* note 30, at 1066 (citations omitted).
44. 570 F.2d 982 (D.C. Cir. 1977).
45. *Hecht*, 570 F.2d at 992.
46. *See, e.g.*, Twin Lab'ys, Inc. v. Weider Health & Fitness, 900 F.2d 566, 571 (2d Cir. 1990); Ferguson v. Greater Pocatello Chamber of Com., Inc., 848 F.2d 976, 983 (9th Cir. 1988).

proponents of the doctrine,[47] found that there are four elements necessary to establish liability: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility."[48]

Despite the reliance of the lower courts on prior Supreme Court decisions that placed limitations on the right to refuse to deal for support for their recognition of the essential facilities doctrine, the Supreme Court has never explicitly endorsed the essential facilities doctrine. Even *Aspen*, the "culmination" of the expansion of liability seen in *Associated Press*, *Lorain Journal*, and *Otter Tail*,[49] explicitly refused to recognize the doctrine.[50] And that the Supreme Court has never endorsed the doctrine *Trinko* went to pains to make clear.[51]

Alas, in *Aspen*, the Supreme Court held that, while the right to refuse to deal generally applies, provided it is exercised independently (in other words, absent collusion),[52] the right is "not unqualified."[53] The case concerned rival Aspen, Colorado, ski resorts involved for several years in a joint venture, which offered a six-day, all-Aspen ticket.[54] Management of one of the resorts decided to abandon the venture and, after it made to the other resort an offer it knew the other resort "could not accept," the venture died.[55] The resort then refused to deal with its rival altogether, refusing to sell any lift tickets, even at retail value.[56] The rival eventually figured out a workaround, but the resulting system did not come with the convenience of the old all-Aspen ticket, and the rival's share of the market

47. *See, e.g.*, Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 801–02 (2017).

48. MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.,708 F.2d 1081, 1132–33 (7th Cir. 1983) (citing *Hecht*, 570 F.2d at 992–93; Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); United States v. Terminal Railroad Ass'n, 224 U.S. 383, 405, 409 (1912); City of Mishawaka v. American Electric Power Co., 465 F. Supp. 1320, 1336 (N.D. Ind. 1979), *aff'd in relevant part*, 616 F.2d 976 (7th Cir.1980), *cert. denied*, 449 U.S. 1096 (1981)).

49. Sakkopoulos, *supra* note 30, at 1061.

50. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 611 n. 44 (1985) ("Given our conclusion that the evidence amply supports the verdict under the instructions as given by the trial court, we find it unnecessary to consider the possible relevance of the "essential facilities" doctrine. . . .").

51. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 410–11 (2004).

52. *Aspen*, 472 U.S. at 601 n. 27 (citing Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761 (1984); United States v. Colgate & Co., 250 U.S. 300, 307 (1919)).

53. *Id.* at 601 (citing Lorain Journal Co. v. United States, 342 U.S. 143 (1951)).

54. *See id.* at 587–89.

55. *See id.* at 592–93.

56. *Id.* at 593.

dropped considerably.[57] The Supreme Court found problematic the "decision by a monopolist to make an important change in the character of the market" and "relevant . . . [the] impact on consumers."[58] The Court held that the resort's refusal to deal adversely affected consumers by eliminating the All-Aspen ticket, impeded the ability of the rival to compete, and, "[p]erhaps most significant[ly]," lacked any "any normal business purpose."[59] In the end, the *Aspen* Court affirmed the jury verdict of illegal monopolization under Section 2 against the resort[60] and found it unnecessary to consider the essential facilities doctrine,[61] which the lower court had employed.[62]

Aspen heavily relied on *Lorain Journal*.[63] It admitted that the "conduct [of the *Aspen* defendant] may not have been as 'bold, relentless, and predatory'" as that of the Journal, but insisted that the trial record "comfortably support[ed] an inference that the monopolist made a deliberate effort to discourage its customers from doing business with its smaller rival."[64]

In the years between *Aspen* and *Trinko*, many a plaintiff asserted claims under the essential facilities doctrine, successfully or unsuccessfully, while many a commentator expressed concerns about the *Aspen* exception to the general right of refusal to deal and pondered about its scope.[65]

And then came *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, where the Supreme Court defined *Aspen*'s scope: "*Aspen* is at or near the outer boundary of § 2 liability" and the exception it recognized "limited."[66] *Trinko* involved the Telecommunications Act of 1996, which mandated that phone companies provide new rivals access to their infrastructure.[67] A law firm and customer of a rival alleged, on behalf of itself and a class of similarly situated customers, that Verizon had "filled rivals' orders on a discriminatory basis," providing lesser service.[68] Verizon, though, did not voluntarily deal, but rather was required to do so

57. *See id.* at 594–95.
58. *Aspen*, 472 U.S. at 604–05.
59. *Id.* at 606–08.
60. *Id.* at 605–11.
61. *Id.* at 611, n. 44.
62. Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1520–21 (10th Cir. 1984).
63. *See Aspen*, 472 U.S. at 601–05, 611.
64. *See id.* at 610.
65. Sakkopoulos, *supra* note 30, at 1038–39 (collecting cases and sources).
66. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 399 (2004).
67. 47 U.S.C. § 251(c).
68. *Trinko*, 540 U.S. at 404–05.

by statute, its dealing with rivals was at "considerable expense and effort," and the relevant services were not available to the public.[69] In other words, the conduct did not fall under the narrow claims for liability for refusing to deal under *Otter Tail* and *Aspen*, a conclusion that "would be unchanged" under the essential facilities doctrine, which the Court refused to "recognize" or "repudiate."[70]

A few years later, the Court, in *Pacific Bell Telephone Co. v. linkLine Communications, Inc*, reaffirmed *Colgate* and the "general rule [that] businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing."[71] The plaintiffs were four Internet service providers who alleged, as relevant here, that AT&T refused to deal with them and denied them access to essential facilities.[72] The Court held that AT&T did not have a duty to deal under the antitrust laws, whatever duty came from Federal Communications Commission regulations, and AT&T could refuse to deal.[73]

Since *Trinko* and *linkLine*, there has been a chill in successful claims arguing for duties to deal.[74] That is much to the chagrin of some.[75]

Owing to the fact that neither *Trinko* nor *linkLine* dealt with intellectual property, their effect on refusals to license is not immediately clear. While antitrust and intellectual property are not seen as at conflict with each other as they once were perceived to be, it has been held that "[a]t the border of intellectual property monopolies and antitrust markets lies a field of dissonance yet to be harmonized."[76] In the absence of a Supreme Court decision clearly setting out the law, where we are on unilateral refusals to license intellectual property is an open question. This Article attempts to provide answers.

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69. *Id.* at 409–10.

70. *Id.* at 410–11.

71. Pacific Bell Telephone Co. v. linkLine Commc'ns Inc., 555 U.S. 438, 448 (2009) (citing United States v. Colgate & Co., 250 U.S. 300, 307 (1919)).

72. *Id.* at 442–43.

73. *See id.* at 450.

74. Sakkopoulos, *supra* note 30, at 1084 n. 350 (collecting cases). *But see* Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 435 (7th Cir. 2020) ("Viamedia has also adequately stated a claim that Comcast has unlawfully refused to deal with Viamedia and any cable competitor that bought advertising representation services from Viamedia. On the pleadings and the summary judgment record, Viamedia's *prima facie* claims of monopolization are similar to but stronger than the successful plaintiff's Section 2 claim in [*Aspen*]. We remand this case for any further necessary discovery and for trial.").

75. Sakkopoulos, *supra* note 30, at 1040 n. 22 (collecting sources). *See also, e.g.*, MAJORITY STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGIT. MKTS. 399 (2020).

76. Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1217 (9th Cir. 1997).

II. Refusals to License Pre- and Post-*Trinko*/*linkLine*

*A. Different Approaches under Similar Facts Pre-*Trinko/linkLine*:* Kodak *and* CSU

Prior to *Trinko* and *linkLine*, the Ninth and the Federal Circuits came down differently on refusals to license under similar facts. In 1997, in *Image Technical Services., Inc. v. Eastman Kodak Co.*, the Ninth Circuit found the defendant company in violation of Section 2 of the Sherman Act for a unilateral refusal to license intellectual property.[77] Three years later, in *In re Independent Service Organizations Antitrust Litigation (CSU)*, the Federal Circuit affirmed summary judgment for defendant company under similar circumstances.[78] The Supreme Court denied *certiorari* in both cases.[79]

The plaintiffs in both cases were independent service organizations (ISOs).[80] They sued original equipment manufacturers (OEMs), alleging that they violated Section 2 by refusing both to sell patented parts and to license patented and copyrighted software.[81] In both cases, the liability theory was that the defendants had a monopoly in the relevant parts market and were improperly extending their monopolies into servicing of the equipment by refusing to deal with the ISOs as far as parts were concerned.[82] In both cases, the defendants implemented policies restricting the selling and licensing of parts in the mid-1980s.[83]

In *Kodak*, the defendant, Kodak, did not distinguish between patented and unpatented parts in refusing to deal, and the Ninth Circuit held that Kodak had monopoly power in a so-called "all parts" market—this included unpatented rights.[84] *CSU* was more complicated. The district court granted summary judgment for the defendant for the refusal to sell or license patented parts and reserved judgment on the refusal to sell unpatented parts.[85] Plaintiffs conceded that they could not prove antitrust injury only from the refusal regarding the unpatented parts, and the district court granted summary judgment on all antitrust claims.[86] Consequently,

77. *Id.*
78. 203 F.3d 1322 (Fed. Cir. 2000).
79. Eastman Kodak Co. v. Image Tech. Services, Inc., 523 U.S. 1094 (1998); CSU, L.L.C. v. Xerox Corp., 531 U.S. 1143 (2001).
80. *Kodak*, 125 F.3d at 1200; *CSU*, 203 F.3d at 1324.
81. *Kodak*, 125 F.3d at 1200; *CSU*, 203 F.3d at 1324.
82. *Kodak*, 125 F.3d at 1209; *CSU*, 203 F.3d at 1327.
83. *Kodak*, 125 F.3d at 1201; *CSU*, 203 F.3d at 1324.
84. *Kodak*, 125 F.3d at 1219–20.
85. *In re* Indep. Serv. Orgs. Antitrust Litig., 964 F. Supp. 1479, 1490 (D.Kan. 1997).
86. *In re* Indep. Serv. Orgs. Antitrust Litig., No. MDL-1021, 1999 U.S. Dist. LEXIS 23262 (D.Kan. Jan. 8, 1999).

the only issue before the Federal Circuit was whether defendant Xerox's "refusal to sell patented parts and copyrighted manuals and to license copyrighted software violate[d] the antitrust laws."[87]

In *Kodak*, the Ninth Circuit held that a "reluctance to sell . . . patented or copyrighted parts was a presumptively legitimate business justification."[88] The Ninth Circuit relied on *Data Gen. Corp. v. Grumman Sys. Support Corp.*, a 1994 First Circuit decision.[89] The Ninth Circuit held that the presumption was rebuttable in two ways: first, "by evidence that the monopolist acquired the protection of the intellectual property laws in an unlawful manner"[90] and, second, "by evidence of pretext."[91] The court reasoned that the goals of neither intellectual property law nor antitrust law "justify allowing a monopolist to rely upon a pretextual business justification to mask anticompetitive conduct."[92] The Ninth Circuit placed emphasis on the fact that, while Kodak's photocopy and micrographics equipment required thousands of parts, only 65 were patented.[93] It held that under the facts there was sufficient evidence of pretext for the jury to conclude that there was liability regardless of the fact that the instructions did not differentiate between patented and unpatented parts since Kodak did not do so either in refusing to deal.[94]

The Federal Circuit had a different approach in *CSU*. The court refused to consider the "patentee's subjective motivation for refusing to sell or license its patented products."[95] The court reasoned that there was "no more reason to inquire into the subjective motivation of the defendant, Xerox, in refusing to sell or license its patented works" than there was to evaluate the "subjective motivation of a patentee in bringing suit to enforce that same right," which the court had held was not to be considered in antitrust cases, as long as the patent infringement suit was not objectively meritless.[96] Where, the Federal Circuit concluded, there is no fraud on the Patent and Trademark Office, sham litigation, or, as in the 1992 *Kodak*

87. *CSU*, 203 F.3d at 1324.
88. *Kodak*, 125 F.3d at 1219.
89. *Id.* (citing Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1188 (1st Cir. 1994)).
90. *Id.* (citing *Data Gen.*, 36 F.3d at 1188).
91. *Id.*
92. *Id.* (citing Eastman Kodak Co. v. Image Tech. Services, Inc., 504 U.S. 451, 484 (1992)).
93. *Id.*
94. *Kodak*, 125 F.3d at 1220.
95. *In re* Independent Service Organizations Antitrust Litigation (*CSU*), 203 F.3d 1322, 1327 (Fed. Cir. 2000).
96. *Id.* (citing Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1072 (Fed. Cir. 1998)).

Supreme Court decision,[97] illegal tying, "the patent holder may enforce the statutory right to exclude others from making, using, or selling the claimed invention" without being liable under the antitrust laws.[98] This remains the case even where the "refusal to sell or license [the] patented invention may have an anticompetitive effect," provided the "anticompetitive effect is not illegally extended beyond the statutory patent grant."[99]

The Federal Circuit also relied on the First Circuit's decision in *Data Gen*. The Federal Circuit found that whatever monopoly in a given market granted by a patent rested on the Congress' assumption that the right to exclude "creates a system of incentives that promotes consumer welfare in the long term by encouraging investment" in innovation.[100] The Federal Circuit used the First Circuit's *Data Gen.* standard, under which the patent holder's "desire to exclude others from use of its copyrighted work is a presumptively valid business justification."[101] The burden of overcoming the presumption, the Federal Circuit held, is "firmly placed on the antitrust plaintiff."[102] The First Circuit in *Data Gen.*, the Federal Circuit found, faced with "evidence of the defendant's desire to develop state-of-the-art diagnostic software to enhance its service and consumer benefit," did not give weight to "evidence showing knowledge that developing a proprietary position would help to maintain a monopoly in the service market."[103] The Federal Circuit then held that the Ninth Circuit in *Kodak* "adopted a modified version" of the *Data Gen.* standard and disagreed with that modification.[104]

Both the First and the Ninth Circuits agreed that the presumption of valid business justification could be rebutted by "evidence that 'the monopolist acquired the protection of the intellectual property laws in an unlawful manner.'"[105] The Federal Circuit, though, disagreed with the Ninth Circuit's holding that the presumption could be rebutted with "evidence that the defense and exploitation of the copyright grant was merely [] pretextual."[106] To the Federal Circuit, "both the path taken and the outcome reached" by the Ninth Circuit demonstrate the folly of its

97. Eastman Kodak Co. v. Image Tech. Services, Inc., 504 U.S. 451, 484 (1992).
98. *CSU*, 203 F.3d at 1327.
99. *Id.* at 1327–28 (citing Glass Equip. Dev., Inc. v. Besten, Inc., 174 F.3d 1337, 1343 (Fed. Cir. 1999)).
100. *Id.* at 1328 (quoting *Data Gen.*, 36 F.3d at 1186–87).
101. *Id.* at 1329 (quoting *Data Gen.*, 36 F.3d at 1187).
102. *Id.*
103. *Id.* (citing *Data Gen.*, 36 F.3d at 1188–89).
104. *CSU*, 203 F.3d at 1329.
105. *Id.* (quoting *Kodak*, 125 F.3d at 1219 (itself citing *Data Gen*., 36 F.3d at 1188)).
106. *Id.* (citing Image Technical Services., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1219 (9th Cir. 1997)).

approach.[107] The jury instructions in *Kodak* mandated that every business justification offered by Kodak be examined for pretext and gave no weight to intellectual property rights, thus allowing the jury to "second guess the subjective motivation of the copyright holder" in exercising their duly given right to exclude under the copyright laws "without properly weighing the presumption of legitimacy" in doing so.[108] The Federal Circuit took issue with the Ninth Circuit's finding that the jury instructions being as such was an abuse of discretion and yet concluding that the error was harmless, holding that "the jury must have rejected the presumptive validity of asserting the copyrights as pretextual."[109] This, the Federal Circuit held, was "in reality a significant departure" from the "central premise" of the First Circuit's *Data Gen.* standard that "rebutting the presumption would be an uphill battle" and that it "would only be appropriate in those rare cases in which imposing antitrust liability is unlikely to frustrate the objectives" of the copyright laws.[110]

The Federal Circuit thus held that, given the absence of evidence that could rebut the presumption, such as "that the copyrights were obtained by unlawful means or were used to gain monopoly power beyond the statutory copyright granted by Congress," Xerox's refusal to license intellectual property "was squarely within the rights granted by Congress . . . and did not constitute a violation of the antitrust laws."[111]

*B. Post-*Trinko/linkLine *Circuit Approaches to Refusals to License:* Qualcomm *and* Novell

The Ninth Circuit had an opportunity to deal with refusals to license in the post-*Trinko*/*linkLine* world in *FTC v. Qualcomm Inc.*[112] The FTC sued Qualcomm in 2017,[113] alleging that various aspects of its cellular licensing program were unlawful under Section 5 of the FTC Act.[114] These included Qualcomm's "'no license, no-chips' policy," under which customers' access to licenses for standard-essential patents were conditioned on acceptance of Qualcomm's terms, which included royalties on greater than fair, reasonable, and non-discriminatory (FRAND)

107. *Id.*
108. *Id.* (citing *Kodak*, 125 F.3d at 1218, 1220 n. 12).
109. *Id.* (citing *Kodak*, 125 F.3d at 1219–20).
110. *CSU*, 203 F.3d at 1329 (citing *Data Gen.*, 36 F.3d at 1187 n. 64).
111. *Id.*
112. FTC v. Qualcomm Inc., 969 F.3d 974 (9th Cir. 2020).
113. *Id.* at 986.
114. 15 U.S.C. § 45.

terms.[115] It also included, crucially for present purposes, Qualcomm's refusal to license its standard-essential patents to competing chipset manufacturers, instead licensing only to downstream OEMs.[116]

The district court ruled on partial summary judgment that the intellectual property policies of two standard setting organizations (SSOs) required Qualcomm to offer licenses to competing chipset manufacturers.[117] After a ten-day bench trial, the district court ruled for the FTC.[118] The Ninth Circuit reversed, finding that the FTC failed to establish anticompetitive effects in the relevant product markets and that the district court had improperly "looked beyond these markets to the much larger market of cellular services generally."[119] It also found that Qualcomm's practices were "chip supplier neutral" because OEMs were "required to pay a per-unit licensing royalty to Qualcomm for its patent portfolios" no matter from which company they sourced their chips.[120]

The Ninth Circuit also held that Qualcomm had no antitrust duty to license its standard essential patents (SEPs) to other chip manufacturers.[121] It listed three requirements for *Aspen* —which it described as "[t]he one, limited exception to th[e] general rule that there is no antitrust duty to deal"—to apply and found that Qualcomm's refusal to license to rivals did not fall under *Aspen*, none of the requirements being present and the FTC itself conceding error as far as the district court's finding of liability for the refusal was concerned.[122]

The three requirements are as follows:

> [A] company engages in prohibited, anticompetitive conduct [under *Aspen*] when (1) it unilaterally terminates a voluntary and profitable course of dealing; (2) the only conceivable rationale or purpose is to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition; and (3) the refusal to deal involves products that the defendant already sells in the existing market to other similarly situated customers.[123]

115. Compl. at ¶ 3–7, Fed. Trade Comm'n v. Qualcomm Inc., 5:17-cv-00220 (N.D. Cal. Jan. 17, 2017).
116. *Id.*
117. Fed. Trade Comm'n v. Qualcomm Inc., No. 17-CV-00220-LHK, 2018 WL 5848999 (N.D. Cal. Nov. 6, 2018).
118. Fed. Trade Comm'n v. Qualcomm Inc., 411 F. Supp. 3d 658 (N.D. Cal. 2019).
119. FTC v. Qualcomm Inc., 969 F.3d 974, 992 (9th Cir. 2020).
120. *Id.* at 985.
121. *Id.* at 995.
122. *Id.* at 993–95.
123. *Id.* at 993–94 (internal brackets, quotation marks, and citations omitted).

Regarding the first requirement, the Ninth Circuit held that the district court was wrong to hold that Qualcomm ended a "voluntary and profitable course of dealing" regarding chip-manufacturer-level licensing.[124] The district court cited only one piece of evidence: an email from a Qualcomm lawyer sent in 1999, "seven years before Qualcomm gained monopoly power in the CDMA modem chip market."[125] Qualcomm explained that it ceased the licensing following developments in patent law's exhaustion doctrine, something that was not rebutted by anything in the record or the district court's factual findings.[126]

Regarding the second requirement, Qualcomm switched to OEM-level licensing not "to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition," but rather to respond to "the change in patent-exhaustion law by choosing the path that was 'far more lucrative,' both in the short term *and* the long term, regardless of any impacts on competition," something the district court itself concluded.[127]

Regarding the third requirement, there was "no evidence that Qualcomm singles out any specific chip supplier for anticompetitive treatment in its SEP-licensing."[128] In *Aspen*, the defendant tried to "put the smaller, nearby rival out of business," while Qualcomm's OEM-level licensing policy applies "equally with respect to all competitors in the modem chip markets."[129] Further, Qualcomm "declines to enforce its patents against these rivals even though they practice Qualcomm's patents" without paying any royalties, Qualcomm instead providing them "indemnifications through the use of 'CDMA ASIC Agreements,''' which the Ninth Circuit described as the *Aspen* "equivalent of refusing to sell a skier a lift ticket but letting them ride the chairlift anyway."[130] Qualcomm does have a "no license, no chips" policy towards OEMs, but towards rival chipmakers Qualcomm's policy, the Ninth Circuit found, could be "characterized as 'no license, no problem.'"[131]

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124. *Id.* at 994 (citations omitted).
125. *Qualcomm*, 969 F.3d at 994.
126. *Id. See also* Christine Wilson, *A Court's Dangerous Antitrust Overreach*, WALL ST. J. (May 28, 2019), https://www.wsj.com/articles/a-courts-dangerous-antitrust-overreach-11559085055 ("Qualcomm licensed some of its chips 20 years ago. A judge says that obliges it to license all of them now.").
127. *Qualcomm*, 969 F.3d at 994 (citing *Qualcomm*, 411 F. Supp. 3d at 753).
128. *Id.* at 995.
129. *Id.* (citing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 593–94 (1985)).
130. *Id.*
131. *Id.*

None of the three requirements for *Aspen* liability to apply being present, the Ninth Circuit concluded that "Qualcomm's OEM-level licensing policy, however novel, is not an anticompetitive violation of the Sherman Act."[132]

The Tenth Circuit, in an opinion written by then-Judge Gorsuch, had a similar approach in *Novell, Inc. v. Microsoft Corp.*[133] The Tenth Circuit explained that "[i]n earlier days, some courts suggested that a monopolist must lend smaller rivals a helping hand" and that, in those days, "[i]f a monopolist so much as expanded its facilities to meet anticipated demand, or failed to keep its prices high enough to permit less efficient rivals to stay afloat, it could find itself held liable under section 2."[134] Nowadays, though, "'as a general rule . . . purely unilateral conduct' does not run afoul of section 2—'businesses are free to choose' whether or not to do business with others and free to assign what prices they hope to secure for their own products."[135] To be in violation of Section 2, "the monopolist's conduct must be irrational but for its anticompetitive effect."[136]

The Tenth Circuit then held that for liability for a unilateral refusal to license to apply under Section 2, a plaintiff must prove, first, that there was a preexisting voluntary course of dealing between the parties; second, a "willingness to forsake short-term profits to achieve an anti-competitive end"; and, third, that the refusal was "irrational but for its anticompetitive effect."[137] The Tenth Circuit then applied this test to the facts, which were developed over a "long trial [of] 8 weeks" and were outlined in a "voluminous record [of] 16,696 pages."[138]

The first requirement was met because a "voluntary and profitable relationship clearly existed between Microsoft and Novell," Microsoft itself not disputing that "at first it freely offered its applications rivals, including Novell, access to its" namespace extensions (NSEs)—a subset of application programming interfaces that "permit a user to see (and then

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132. *Id.*

133. 731 F.3d 1064 (10th Cir. 2013).

134. *Id.* at 1072 (citing United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945); Telex Corp. v. Int'l Bus. Machs. Corp., 510 F.2d 894, 925 (10th Cir. 1975)).

135. *Id.* (quoting Pacific Bell Telephone Co. v. linkLine Commc'ns Inc., 555 U.S. 438, 448 (2009)).

136. *Id.* at 1075 (citing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 597 (1985); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004); 3B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 772, at 223 (3d ed. 2008); Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 ANTITRUST L.J. 413, 422–25 (2006)).

137. *Id.* at 1074–76.

138. *Novell*, 731 F.3d at 1066.

open) documents affiliated not just with the current application but located in wildly different places on the computer or elsewhere."[139]

Regarding the second and third elements, Microsoft did not dispute that giving Novell and other rivals access "was profitable enough, encouraging software companies to write for its new operating system and in that way making Windows more attractive to consumers."[140] However, Novell, the Tenth Circuit found, "presented no evidence from which a reasonable jury could infer that Microsoft's discontinuation of this arrangement suggested a willingness to sacrifice short-term profits, let alone in a manner that was irrational but for its tendency to harm competition."[141] Rather, Microsoft's decision, all the evidence suggested, "came about as a result of a desire to maximize the company's immediate and overall profits."[142]

The Tenth Circuit concluded that, though the case involved a time "when Microsoft was busy amassing a virtual empire . . . sometimes in violation of the antitrust laws," "[w]ith respect to Novell at least, Microsoft did nothing unlawful."[143] The Supreme Court denied *certiorari*.[144]

III. THE RIGHT APPROACH: THE UNQUALIFIED RIGHT TO UNILATERALLY REFUSE TO LICENSE

A. Reexamining Kodak *and* CSU *in light of* Trinko *and* linkLine

The Federal Circuit's approach in *CSU* is in line with *Trinko* and *linkLine*. In *Trinko*, the Supreme Court held that the exception to the right to refuse to deal recognized in *Aspen* is limited and that *Aspen* "is at or near the outer boundary" of liability under Section 2.[145] In *linkLine*, the Supreme Court reaffirmed *Colgate* and the "general rule" that "businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing."[146] The Federal Circuit respected that right in *CSU*.

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139. *Id.* at 1068, 1076.

140. *Id.* at 1076.

141. *Id.*

142. *Id.*

143. *Id.* at 1066.

144. Novell, Inc. v. Microsoft Corp., 572 U.S. 1096 (2014).

145. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 409 (2004).

146. Pacific Bell Telephone Co. v. linkLine Commc'ns Inc., 555 U.S. 438, 448 (2009) ("As a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing." (citing United States v. Colgate & Co., 250 U.S. 300, 307 (1919)).

Further, *CSU* avoided issues identified in *Trinko* and *linkLine* with imposing duties to deal. *Trinko* explained that forced dealing requires courts to play a role for which they are "ill-suited," that of "central planners," because, in forcing a business to deal with a competitor, courts have to "identify[] the proper price, quantity, and other terms of dealing."[147] *linkLine* repeated *Trinko*'s concerns about these issues:

> Institutional concerns also counsel against recognition of such claims. We have repeatedly emphasized the importance of clear rules in antitrust law. Courts are ill suited to act as central planners, identifying the proper price, quantity, and other terms of dealing. No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremediable by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency.[148]

Trinko identified another issue: forced dealing may facilitate collusion, the "supreme evil of antitrust."[149] This concern is particularly strong under facts such as that of *Aspen*—horizontal competitors who once cooperated in a joint venture. In the context of *Kodak* and *CSU*, this concern is present but not as strong. The ISOs were competitors that asked for licenses but were turned away by Kodak and Xerox, and they at best could only get second-hand parts. But in the licensing context as well, there can be collusion through a system of trademark licensing, as seen in *Timken Roller Bearing Co. v. United States*, where the defendant company conspired with two foreign companies to set up a trademark licensing system which was otherwise valid but meant to help allocate markets and control the manufacture and sale of certain products, whether trademarked or not.[150]

Unlike that of the Federal Circuit in *CSU*, the approach of the Ninth Circuit in *Kodak* is highly problematic post-*Trinko*/*linkLine*. The inquiry into subjective motivations is in want of limiting principles.[151] That makes it hard for *Kodak* to not be out of step with *linkLine*, where the Supreme Court—quoting the 1990 First Circuit decision in *Town of Concord, Massachusetts v. Boston Edison Co.*, written by then-Chief Judge

147. *Trinko*, 540 U.S. at 408.
148. *linkLine*, 555 U.S. at 452–53 (internal quotation marks and citation omitted).
149. *Trinko*, 540 U.S. at 408.
150. 341 U.S. 593 (1951).
151. *Cf.* Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1990).

Breyer—held that "antitrust rules 'must be clear enough for lawyers to explain them to clients.'"[152] Indeed, the Court has "repeatedly emphasized the importance of clear rules in antitrust law."[153] The *Kodak* approach can only be described as unclear: figuring out the subjective motivation of a business in refusing to license to its competitors comes with considerable difficulty.

A refusal in order to see a return on research and development investment does not appear to be pretextual under the *Kodak* standard. As Kodak, citing a Seventh Circuit decision written by Judge Posner, argued, a "desire to best the competition does not prove pretext, nor does hostility to competitors."[154] *Trinko* recognized that this desire to compete is exactly what the antitrust laws are meant to protect:

> The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it 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; it induces risk taking that produces innovation and economic growth.[155]

The Supreme Court then tied that to refusals to deal:

> Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.[156]

The Ninth Circuit's focus in *Kodak* on subjective motivation is in contrast with modern antitrust analysis for another reason. Modern antitrust focuses on conduct. The Ninth Circuit's inquiry into non-conduct factors such as motivations was deemed out of step with modern antitrust

152. *linkLine*, 555 U.S. at 453 (quoting Town of Concord, Mass. v. Bos. Edison Co., 915 F.2d 17, 25 (1st Cir. 1990)).
153. *Id.* at 452.
154. Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1219 (9th Cir. 1997) (citing Olympia Equip. Leasing Co. v. W. Union Telegraph Co., 797 F.2d 370, 379 (7th Cir. 1986)).
155. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).
156. *Id.* at 407–08.

law even prior to *Trinko*.[157] The Supreme Court in *Trinko* made it clear that "the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*."[158]

Finally, as for the Ninth Circuit's emphasis on the inclusion of both patented and unpatented rights in Kodak's refusal to license, it is also misguided. If courts are ill-suited for the role of "central planners, identifying the proper price, quantity, and other terms of dealing," and for "assum[ing] the day-to-day controls characteristic of a regulatory agency,"[159] courts are also ill-suited for the role of inquiring into the interplay between the patented and the unpatented parts and its owners' understanding thereof. And that interplay happens all the time. As Judge Easterbrook noted, "[f]requently, indeed almost always, different patented goods and processes compete with each other and with unpatented goods and processes."[160] If courts attempted to engage in that inquiry, it would be a fruitless attempt at central planning at worst, acting as a regulatory agency at best. Courts can do neither.

B. The Intersection and the Respective Goals of Antitrust and Intellectual Property Law

Finding antitrust liability for a unilateral refusal to license duly granted intellectual property is out of step with modern perspectives on antitrust and intellectual property law separately and at the intersection of the two.

Starting with the latter, the relationship between antitrust and intellectual property, modern practice does not see the two fields as at odds with each other. To the Ninth Circuit in *Kodak*, "[a]t the border of intellectual property monopolies and antitrust markets lies a field of dissonance yet to be harmonized."[161] The modern perspective on antitrust and intellectual property is different. Under the *Antitrust Guidelines for the Licensing of Intellectual Property*, issued jointly by the Department of Justice and the FTC in 2016, antitrust and intellectual property law "share

157. A. Douglas Melamed & Ali M. Stoeppelwerth, *The* CSU *Case: Facts, Formalism and the Intersection of Antitrust and Intellectual Property Law*, 10 GEO. MASON L. REV. 407, 426–27 (2002).

158. *Trinko*, 540 U.S. at 407.

159. Pacific Bell Telephone Co. v. linkLine Commc'ns Inc., 555 U.S. 438, 452–53 (2009) (citing *Trinko*, 540 U.S. at 408, 415 (itself citing Areeda, *supra* note 152, at 853)).

160. Frank H. Easterbrook, *Intellectual Property is Still Property*, 13 HARV. J.L. & PUB. POL'Y 108, 109 (1990).

161. Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1217 (9th Cir. 1997).

the common purpose of promoting innovation and enhancing consumer welfare."[162]

Starting with the intellectual property laws, the Guidelines explain their utility as follows:

> The intellectual property laws provide incentives for innovation and its dissemination and commercialization by establishing enforceable property rights for the creators of new and useful products, more efficient processes, and original works of expression. In the absence of intellectual property rights, imitators could more rapidly exploit the efforts of innovators and investors without providing compensation. Rapid imitation would reduce the commercial value of innovation and erode incentives to invest, ultimately to the detriment of consumers.[163]

The Congress has recognized these benefits and that duties to license go squarely against the incentive to innovate. It has explicitly protected, in the context of the patent laws, the patent owner who has "refused to license or use any rights to the patent."[164]

The antitrust laws as well have as one of their core goals incentivizing innovation. As the Guidelines explain, antitrust promotes "innovation and consumer welfare by prohibiting certain actions that may harm competition with respect to either existing or new ways of serving consumers."[165] Indeed, protecting the incentive to innovate is such an important part of antitrust's reason for being that even to the charging of monopoly prices, for a short period of time at least, antitrust turns a blind eye because it "attracts 'business acumen'" and "induces risk taking that produces innovation and economic growth."[166] And "experience teaches that the process of firms investing in their own infrastructure and intellectual property and competing rather than colluding normally promotes competition and consumer gains."[167]

The Supreme Court in *Illinois Tool Works Inc. v. Independent Ink, Inc.* found that "Congress, the antitrust enforcement agencies, and most

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162. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 1.0 (2017) (citing Atari Games Corp. v. Nintendo of Am., Inc., 897 F.2d 1572, 1576 (Fed. Cir. 1990); Intergraph Corp. v. Intel Corp., 195 F.3d 1346, 1362 (Fed. Cir. 1999)) [hereinafter GUIDELINES].

163. *Id.*

164. 35 U.S.C. § 271(d).

165. GUIDELINES, *supra* note 163, at § 1.0.

166. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

167. Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1078 (2013).

economists have all reached the conclusion that a patent does not necessarily confer market power upon the patentee."[168] But even where there is market power, the antitrust laws do not condemn it "unless it is accompanied by an element of anticompetitive *conduct*" so as to "safeguard the incentive to innovate."[169]

As Phillip Areeda explains in his widely cited article, mandated sharing disincentivizes investments that would benefit consumers.[170] There is empirical support for that proposition: in countries that mandated access to certain facilities there was a reduction in investment.[171] Areeda argues that a "defendant never would have built a laboratory of [a certain] size and character in the first place if he had known that he would be required to share it."[172] The point Areeda makes about a laboratory, which is physical property, applies all the same to property of the intellectual variety.

Imposing antitrust liability for a unilateral refusal to license intellectual property is at odds with the lodestar of antitrust, consumer welfare, for another reason. What may seem as a refusal to license intellectual property can in actuality be attempts to license it at high prices and engage in price discrimination that allows markets and consumers to be served that otherwise would not have been served, conduct that is beneficial to consumers.[173]

Given that we want to encourage licensing—even short-term licensing and especially where competition only exists because of a license, or in the context of, say, ISOs, who compete because of second-hand parts and customer-provided parts—the "preexisting dealings" factor of *Aspen* is especially suspect in the intellectual property context. It is useful here to take into account the facts of *Kodak* and *Aspen*, as well as how the Supreme Court dealt with *Aspen* in *Trinko*.

Trinko emphasized the following facts as significant in the *Aspen* Court's decision to find liability under Section 2. First, the *Aspen* defendant decided "to cease participation in a cooperative venture," and

168. 547 U.S. 28, 45 (2006).

169. *Trinko*, 540 U.S. at 407. *See also* Kartell v. Blue Shield of Mass., Inc., 749 F.2d 922, 927 (1st Cir. 1984) (Breyer, J.) ("[E]ven a monopolist is free to exploit whatever market power it may possess when that exploitation takes the form of charging uncompetitive prices.").

170. Areeda, *supra* note 152, at 851.

171. Michal Grajek & Lars-Hendrik Roller, *Regulation and Investment in Network Industries: Evidence from European Telecoms*, 44 J. L. & ECON. 189 (2012).

172. Areeda, *supra* note 152, at 851.

173. Benjamin Klein & John Shepard Wiley Jr., *Competitive Price Discrimination as an Antitrust Justification for Intellectual Property Refusals to Deal*, 70 ANTITRUST L.J. 599 (2003).

this "unilateral termination of a voluntary (and thus presumably profitable) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end."[174] Second, the *Aspen* "defendant's unwillingness to renew the ticket *even if compensated at retail price* revealed a distinctly anticompetitive bent."[175]

The facts of *Kodak* were different. The Ninth Circuit noted that "ISOs began servicing Kodak equipment in the early 1980's" and that Kodak stopped selling copier parts and micrographic parts to ISOs in 1985 and 1986 respectively.[176] In other words, Kodak dealt with ISOs for only a handful of years. This is in sharp contrast with the facts of *Aspen*: the ski companies in that case cooperated on a joint ski ticket between 1962 and 1978.[177] The Ninth Circuit decided to disregard this difference, finding it significant that—despite the fact that "the service market prior to Kodak's [refusal to deal] had not," unlike the refusal in *Aspen*, "originated in a competitive market and persisted for several years"[178]—the "ISO service market had existed for three years and was growing rapidly before Kodak" refused to license.[179] That is a questionable choice in the pre-*Trinko* world: there was no competitive market that persisted for several years. In the post-*Trinko* world, the Ninth Circuit's approach is unsound. There was certainly no "cooperative venture."

And even if one sees the few years that Kodak dealt with ISOs as such, there is no indication that the ISOs attempted to negotiate with Kodak or offered to pay retail price. They filed suit against Kodak in 1987, shortly after Kodak decided to cease dealing with them.[180]

The Ninth Circuit in *Kodak* itself noted differences with *Aspen* yet unwisely decided to disregard them:

> Our case is factually distinguishable from *Aspen Skiing* in several respects: here there are no readily comparable competitive markets; ISO profits were not halved after the imposition of the anticompetitive policies; and there are two markets at issue, rather than only one. Further, unlike most essential facilities cases and this case, *Aspen Skiing* did not involve the effects of a supplier's

174. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 409 (2004) (citing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 608, 610–11 (1985)).
175. *Id.*
176. Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1201 (9th Cir. 1997).
177. *Aspen*, 472 U.S. at 591–92.
178. *Kodak*, 125 F.3d at 1211 (quoting *Aspen*, 472 U.S. at 603).
179. *Id.*
180. *Id.* at 1201.

> refusal to deal with its customers in order to control a downstream market.[181]

As noted in *Trinko*, the Supreme Court is "very cautious in recognizing . . . exceptions" beyond *Aspen* "because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm."[182] In the post-*Trinko* world, *Aspen* is "at or near the outer boundary of § 2 liability" and a "limited" exception to the right to refuse to deal.[183] Finding liability under the *Kodak* facts would turn *Aspen* into less of an exception and more of a rule and the right to refuse to deal into less of a rule and more of an exception. It would treat *Aspen* as not at or near the boundary of liability under Section 2 but at the core.

The following must be noted as to "uncertain virtue of forced sharing" with regard to dealing in general and then to licensing intellectual property in particular. Regarding dealing in general, businesses reevaluate their business relationships all the time. Market conditions change, and businesses decide that courses of dealing ought to be reexamined. And even if these decisions can be evaluated and terms of dealing figured out by entities other than the parties, it's not the courts that can "identify[] the proper price, quantity, and other terms of dealing."[184] The Cybersyn operations room[185] is not to be found at the local federal courthouse.

Regarding licensing intellectual property in particular, part of the reason licensing is encouraged is that we want to encourage reevaluation and experimentation. Loose applications of *Aspen* to impose liability threaten to deter licensing and the benefits of complementarity.

And as far as the essential facilities doctrine is concerned, its application to intellectual property would effectively create compulsory licensing regimes. This sort of framework is something the Congress knows quite well how to create,[186] and it is the Congress that should create

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181. *Id.* at 1211.

182. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004).

183. *Id.* at 409.

184. *Id.* at 408; Pacific Bell Telephone Co. v. linkLine Commc'ns Inc., 555 U.S. 438, 452 (2009).

185. In the early 1970s, Salvador Allende's socialist government in Chile, to aid its attempts at central planning, created Project Cybersyn, a technological experiment centered around a futuristic operations room that was located in the presidential palace and that looked like something out of the back drawer of Ken Adam. *See, e.g.*, Eden Medina, *Project Cybersyn: Chile's Radical Experiment in Cybernetic Socialism*, MIT PRESS READER (Sept. 11, 2023), https://thereader.mitpress.mit.edu/project-cybersyn-chiles-radical-experiment-in-cybernetic-socialism/ [https://perma.cc/2T7E-E36R].

186. *Cf.* 17 U.S.C. §§ 101–1511 (copyright); 35 U.S.C. §§ 1–390 (patents).

it if it determines that the benefits outweigh the costs. Doing it through the back door of antitrust would undermine incentives to appropriate given the high transaction costs and the uncertainty of litigation.

To the extent there are concerns about the unqualified right to unilaterally refuse to license, the following is noted. There are well recognized areas of antitrust liability in cases of intellectual property misuse. They include attempting to enforce a patent obtained through fraud on the Patent and Trademark Office, something the Supreme Court in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.* recognized as a basis for liability.[187] Another area of liability, as the Supreme Court recognized in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, is an objectively baseless assertion of infringement,[188] which can overcome a First-Amendment right-of-petition defense under the *Noerr-Pennington* doctrine.[189] Other well-recognized kinds of conduct that lead to liability are licensing terms that constitute violations of Section 1 of the Sherman Act[190] and conditioning licensing in a way that unreasonably constrains competition under Section 2 of the Sherman Act, as the D.C. Circuit found in the seminal *Microsoft* case:

> Microsoft's primary copyright argument borders upon the frivolous. The company claims an absolute and unfettered right to use its intellectual property as it wishes: "[I]f intellectual property rights have been lawfully acquired," it says, then "their subsequent exercise cannot give rise to antitrust liability." That is no more correct than the proposition that use of one's personal property, such as a baseball bat, cannot give rise to tort liability. As the Federal Circuit succinctly stated [in *CSU*]: "Intellectual property rights do not confer a privilege to violate the antitrust laws."[191]

Intellectual property rights are by no means a license to commit any of the above violations. Given the goals of both antitrust and intellectual

187. 382 U.S. 172 (1965).

188. 508 U.S. 49 (1993).

189. Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965).

190. United States v. Line Material Co., 333 U.S. 287 (1948) (price fixing); United States v. Masonite Corp., 316 U.S. 265 (1942) (same); United States v. Univis Lens Co., 316 U.S. 241 (1942) (same); Ethyl Gasoline Corp. v. United States, 309 U.S. 436 (1940) (same).

191. United States v. Microsoft Corp., 253 F.3d 34, 63 (D.C. Cir. 2001) (quoting in turn Microsoft's Opening Br. at 105 and *In re* Independent Service Organizations Antitrust Litigation (*CSU*), 203 F.3d 1322, 1325 (Fed. Cir. 2000)).

property law, however, duly granted intellectual property rights ought to be a license to unilaterally refuse to license.

C. Constitutional Issues and Related Considerations

1. The Fifth Amendment

The Takings Clause of the Fifth Amendment provides that no "private property [shall] be taken for public use, without just compensation."[192] The Supreme Court, in *Horne v. Dep't of Agriculture*, the Court held that "[n]othing in th[e] history [of the drafting of the Fifth Amendment] suggests that personal property was any less protected against physical appropriation than real property" and then proceeded to provide patents as an example.[193] Further, in *Oil States Energy Services, LLC v. Greene's Energy Group*, the Court stated that its decision in that case "should not be misconstrued as suggesting that patents are not property for purposes of . . . the Takings Clause."[194] In *James v. Campbell*, cited by both of these two decisions, the Court held that:

> [T]he government of the United States when it grants letters-patent for a new invention or discovery in the arts, confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser, we have no doubt.[195]

In other words, whether the property is real property—for example, the R.F.K. Stadium in Washington, D.C.,[196] or a fresh produce market in Rhode Island[197]—or protected intellectual property does not make a difference for Takings Clause purposes.[198]

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192. U.S. CONST. amend. V. *See also* Chicago, Burlington & Quincy Railroad Co. v. City of Chicago, 166 U.S. 226 (1897) (incorporating against the States under the Fourteenth Amendment, U.S. CONST. amend. XIV).

193. 576 U.S. 351, 359 (2015) (citing James v. Campbell, 104 U.S. 356, 358 (1881)).

194. 584 U.S. 325, 344 (2018) (citing *James v. Campbell*, 104 U.S. at 358).

195. James v. Campbell, 104 U.S. at 357–58.

196. Hecht v. Pro-Football, Inc., 570 F.2d 982, 993 (D.C. Cir. 1977) (naming the doctrine and finding R.F.K. Stadium to be an essential facility).

197. Gamco, Inc. v. Prov. Fruit & Produce Bldg, 194 F.2d 484, 487 (1st Cir. 1952) (applying what has come to be known as the essential facilities doctrine to a fresh produce market in Rhode Island).

198. *See also* Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause*, 87 B.U. L. REV. 689, 722 (2007)

Cases where the government appropriates private property for itself or a third party are "as old as the Republic."[199] A different kind of takings, regulatory takings, where government regulation restricts the ability of an owner of private property to use the property, was first recognized in 1922 in *Pennsylvania. Coal Co. v. Mahon*, where the Supreme Court held that regulation alone may be a taking if it "goes too far."[200] In the ensuing several decades, the Court shifted its focus back to eminent domain cases, offering little refinement of the concept.[201] It remains to an extent ill-defined to this day, and it has not yet been determined whether it can be grounded in the original meaning of the Constitution.[202]

In 1999, in the context of *Microsoft*, Tad Lipsky and Gregory Sidak examined whether "an injunctive remedy providing mandatory access to the Windows platform"—which was pursued by the government and which "would seem to be the necessary result of any successful antitrust claim expressly predicated on the essential facilities doctrine"—would violate the Takings Clause as a *per se* taking by being a "permanent physical invasion of Microsoft's property" and found that in any case the remedy would force courts to deal with a "complex pricing problem" to avoid a violation of the just compensation requirement.[203] I have found Takings Clause issues in the context of forced dealing and facilities sharing in the digital economy[204] under modern precedents, such as *Cedar Point Nursery v. Hassid*,[205] as well as older precedents, such as *Penn Central Transportation Co. v. City of New York*.[206] Few other commentators have dealt with Takings Clause issues in the forced dealing context.[207]

(concluding that patents are "private property" for Takings Clause purposes). *But see* Robin Feldman, *Patents as Property for the Takings*, 12 N.Y.U. J. INTELL. PROP. & ENT. L. 198, 226 (2023) (concluding that patents do not fall within the Takings Clause).

199. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 322 (2002).

200. 260 U.S. 393, 415 (1922).

201. *See generally* Robert Meltz, *Takings Decisions of the Supreme Court: A Chronology*, CONGR. RES. SERV. (July 20, 2015), https://sgp.fas.org/crs/misc/97-122.pdf [https://perma.cc/FZD2-WCQQ].

202. *See, e.g.*, Bridge Aina Le'a, LLC v. Hawaii Land Use Comm'n, 141 S. Ct. 731 (2021) (Thomas, J., dissenting from the denial of *cert.*).

203. Abbott B. Lipsky & Gregory J. Sidak, *Essential Facilities*, 51 STAN. L. REV. 1187, 1225 (1999).

204. Sakkopoulos, *supra* note 30, at 1087–92.

205. 594 U.S. 139 (2021).

206. 438 U.S. 104 (1978).

207. Robert Pitofsky, Donna Patterson & Jonathan Hooks, *The Essential Facilities Doctrine Under United States Antitrust Law*, 70 ANTITRUST L.J. 443, 443 (2002) (summarily dismissing Takings Clause concerns with the essential facilities doctrine as "rather ideological"); Christine S. Wilson, The Sword of Damocles: The Slender Thread

As long as intellectual property is "private property," the analysis remains the same. A brief overview follows. The Court in *Penn Central* in 1978 outlined three factors of "particular significance" in determining whether there was a regulatory taking: first, the "economic impact of the regulation" on the property owner; second, the "extent to which the regulation . . . interfere[s] with distinct investment-backed expectations"; and, third, the "character of the governmental action," as regulation of use is not as problematic as physical invasion.[208] Decided in 2021, *Cedar Point Nursery* involved an "access regulation," a California law granting labor organizations a "right to take access" to property belonging to agricultural employers to solicit support for unionization.[209] The Supreme Court distinguished between cases where "the government has physically taken property for itself or someone else"—which are *per se* takings and to which *Penn Central* does not apply—and cases where the government has instead "restricted a property owner's ability to use his own property."[210] Because the access regulation, the Court found, "appropriate[d] a right to invade" property, it was a *per se* taking.[211] The Court noted that the access was not a mere restraint on the right of the owners to use their property but rather an appropriation of the owners' right to exclude "for the enjoyment of third parties."[212] The Court also rejected the Ninth Circuit and the dissent's argument that the access regulation was not a *per se* taking because it allowed access fewer than 365 days a year.[213] The Court concluded that the regulation was a taking because it gave third parties a right to physically invade, "to literally take access."[214]

In short, where the finding of an obligation, be it in the form of a regulation or because of a finding of liability, results in the property owner keeping their property and also third parties "literally take[ing] access," it is a taking. One example in the licensing context is as follows:

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of Expanded Antitrust Conduct Claims, Remarks for the U.S. Chamber of Commerce: Antitrust Webinar Series: Focus on Conduct at 4–5 (May 6, 2021), https://www.ftc.gov/system/files/documents/public_statements/1589671/chamber_of_commerce_wilson_keynote_final_1.pdf [https://perma.cc/HJA9-4RZ5] (dedicating a paragraph to the issue and concluding that the backlash that followed Kelo v. City of New London, 545 U.S. 469 (2005), suggests that "the Takings Clause provides one final reason to tread lightly" as far as claims under the essential facilities doctrine are concerned).

208. *Penn Central*, 438 U.S. at 124.

209. *Cedar Point Nursery*, 594 U.S. at 143.

210. *Id.* at 149.

211. *Id.*

212. *Id.*

213. *Id.* at 152 (citing *Cedar Point Nursery*, 923 F.3d at 532; *Cedar Point Nursery*, 594 U.S. at 172–74 (Breyer, J., dissenting)).

214. *Cedar Point Nursery*, 594 U.S. at 152.

> [I]n 2018, following a $5 billion antitrust fine by the European Commission for tying Chrome and search apps to Android, Google changed its licensing terms in Europe and started charging manufacturers fees of up to $40 per phone and $20 per tablet for, "the 'Google Mobile Services' suite of apps, which includes the Google Play Store." Assuming Google charged similar fees in the United States, if it was forced to provide access to its Play Store, as has been suggested, the economic impact on it would be immense. Granted, before the new licensing fees, Google provided Android to manufacturers for free—one of its "strongest selling points" compared to Microsoft, "which offered its alternative OS for a cost." However, apart from the fact that the economic impact would still be colossal, forced access would both greatly interfere with Google's investment-backed expectations, and be much closer to physical invasion than regulation of use.[215]

As explained above, takings can occur as long as "just compensation" is provided. Just compensation generally is determined by fair market value, meaning the "market value of the property at the time of the taking contemporaneously paid in money."[216] Deviation may be necessary where "market value has been too difficult to find, or when its application would result in manifest injustice to owner or public."[217] Such cases may involve "properties that are seldom, if ever, sold in the open market."[218] In industries such as healthcare, which is characterized by novel products and a dynamic market and where licensing happens often, courts would face considerable difficulty. And the Supreme Court has already determined that, as a general rule, courts have considerable difficulty "identifying the proper price, quantity, and other terms of dealing."[219]

2. The Takings Clause and the Copyright and Patent Clause

The Copyright and Patent Clause in Article I gives the Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their

215. Sakkopoulos, *supra* note 30, at 1091 (citations omitted).
216. Olson v. United States, 292 U.S. 246, 255 (1934).
217. United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950).
218. United States v. 50 Acres of Land, 469 U.S. 24, 30 (1984) (citing *Lutheran Synod*, 441 U.S. at 513).
219. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004).

respective Writings and Discoveries."[220] The Copyright and Patent Clause and the Takings Clause have a mirror-image relationship. The latter limits the government's power to take an individual's property and give it to the public: the government can only "take[] [an individual's property] for public use" and after providing "just compensation."[221] The former limits the government's power to take public property and give it to an individual: the government can only do so if it "promote[s] the Progress of Science and useful Arts."[222]

That approach was a break from that of England.[223] Writing to Madison from Paris in December 1787, shortly after the Constitution was signed and submitted to the Congress of the Confederation, which in turn unanimously voted to send it to the States for ratification, both in

220. U.S. CONST., art. I, § 8, cl. 8. Copyright law lies in "Writings," which has been held to include, for example, photography, Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60 (1884), and to not be "limited to script or printed material," Goldstein v. California, 412 U.S. 546, 561 (1973). Patent law lies in "Discoveries." *See generally* Graham v. John Deere Co. of Kan. City, 383 U.S. 1, 5–6 (1966). The Clause is sometimes referred to as the "Intellectual Property Clause," but intellectual property is an umbrella term inclusive of the subjects of the Copyright and Patent Clause and things that do not fall under it, trademarks being the most prominent example. In the *Trade-Mark Cases*, the Supreme Court held that that the Congress had no power to regulate trademarks under the Clause given that, since it reflects "growth of a considerable period of use, rather than a sudden invention," "[t]he ordinary trademark has no necessary relation to invention or discovery" and that, unlike writings, which "are the fruits of intellectual labor, embodied in the form of books, prints, engravings, and the like," "[t]he trademark may be, and generally is, the adoption of something already in existence as the distinctive symbol of the party using it." 100 U.S. 82, 94 (1879). The Court "propose[d] to leave undecided," *id.* at 95, whether the Congress can regulate trademarks based on the Commerce Clause, under which the Congress has power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," U.S. CONST. art. I, § 8, cl. 3. Two years later, the Congress, under the Commerce Clause, passed what became known as the Trade-Mark Act of 1881, ch. 138, 21 Stat. 502, and allowed for registration of trademarks used in trade with foreign nations and Indian tribes. The Congress then expanded registration to trademarks used in interstate commerce in 1905 with what became known as the Trade-Mark Act of 1905, ch. 592, 33 Stat. 724. The Trademark Act of 1946, known as the Lanham Act, ch. 540, 60 Stat. 427, 15 U.S.C. § 1051 *et seq.*, is the "current federal trademark scheme," B&B Hardware, Inc. v. Hargis Indus., Inc., 575 U.S. 138, 142 (2015).

221. U.S. CONST. amend. V. *See also, e.g.,* Kelo v. City of New London, 545 U.S. 469, 477 (2005) ("[I]t has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation.").

222. U.S. CONST., art. I, § 8, cl. 8. *See also, e.g.,* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 480 (1974) ("The stated objective of the Constitution in granting the power to Congress to legislate in the area of intellectual property is to 'promote the Progress of Science and useful Arts.'").

223. *See generally* Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 84 J. PAT. & TRADEMARK OFF. SOC'Y 909 (2002).

September 1787,[224] Jefferson stated he "d[id] not like . . . the omission of a bill of rights providing clearly & without the aid of sophisms for," amongst other things, "restriction against monopolies."[225] Madison replied as follows:

> [Monopolies] are justly classed among the greatest nusances [sic] in Government. But is it clear that as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced? Would it not suffice to reserve in all cases a right to the Public to abolish the privilege at a price to be specified in the grant of it? Is there not also infinitely less danger of this abuse in our Governments, than in most others? Monopolies are sacrifices of the many to the few. Where the power is in the few it is natural for them to sacrifice the many to their own partialities and corruptions. Where the power, as with us, is in the many not in the few, the danger can not be very great that the few will be thus favored. It is much more to be dreaded that the few will be unnecessarily sacrificed to the many.[226]

The Congress was granted the power to "secur[e] for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" because such exclusive rights can "promote the Progress of Science and useful Arts"—and only if they do, the Congress can grant them. In other words, underlying the Clause is an important goal of national economic policy that the Framers recognized. That goal is in tandem with antitrust's goal and the resultant effect on liability for refusing

224. *See, e.g.*, RICHARD B. BERNSTEIN, ARE WE TO BE A NATION? THE MAKING OF THE CONSTITUTION 201–03 (1987).

225. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *in* 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON, 1776–1826, 512 (James Morton Smith ed. 1995). Jefferson at the time was Minister to France. The Constitution was singed and submitted to the Congress of the Confederation and by it to the States in September 1787, and by the time Jefferson sent his letter on December 20, Delaware, New Jersey, and Pennsylvania had voted in favor of ratification, all earlier that month. 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 105–13 (Merrill Jensen ed. 1978) (regarding Delaware, which ratified Dec. 7, 1787, thus becoming the first state to do so); *id.* at 177–91 (regarding New Jersey, which ratified Dec. 18, 1787, thus becoming the third state to do so); 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 590–91 (Merrill Jensen ed. 1978) (regarding Pennsylvania, which ratified on Dec. 12, 1787, thus becoming the second state to do so).

226. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON, 1776–1826, 566 (James Morton Smith ed. 1995).

to deal as outlined in *Trinko*.[227] The Congress has, in an exercise of its power under the Clause, explicitly protected the patent owner who has "refused to license or use any rights to the patent."[228] And more fundamentally, "to protect property of every sort" is "the end of government."[229]

3. The Copyright and Patent Clause and the First Amendment

Under the First Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[230] Some have argued that intellectual property is in conflict with free expression.[231] Phrased in constitutional terms, the Copyright and Patent Clause is, the argument goes, in contrast with the First Amendment. The Supreme Court has responded. In *Eldred v. Ashcroft*, the Court held that "copyright's limited monopolies are compatible with free speech principles" in the eyes of the Framers as evidenced by the fact that the two constitutional provisions "were adopted close in time."[232] The Court

227. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407–08 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it 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; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct. Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.").

228. 35 U.S.C. § 271(d).

229. James Madison, *Property*, NAT'L GAZETTE (Mar. 29, 1792), *reprinted in* 14 THE PAPERS OF JAMES MADISON 266 (Robert Rutland et al. eds., 1983).

230. U.S. CONST., amend. I. As with other constitutional provisions, under the doctrine of selective incorporation, the different clauses of the First Amendment were incorporated against the States under the Fourteenth Amendment, U.S. CONST., amend. XIV, in different cases. Everson v Board of Education, 330 U.S. 1 (1947) (Establishment Clause); Cantwell v. Connecticut, 310 U.S. 296 (1940) (Free Exercise Clause); Gitlow v. New York 268 U.S. 652 (1925) (Free Speech Clause); Near v. Minnesota 283 U.S. 697 (1931) (Free Press Clause); DeJonge v. Oregon 299 U.S. 353 (1937) (Assembly Clause); Edwards v. South Carolina, 372 U.S. 229 (1963) (Petition Clause). *See also* NAACP v. Alabama, 357 U.S. 449 (1958) (freedom of association).

231. *See, e.g.*, Tun-Jen Chiang, *Patents and Free Speech*, 107 GEO. L.J. 309 (2019). *See also id.* at 311 n. 4 (collecting sources).

232. 537 U.S. 186, 219 (2003).

continued: the purpose of intellectual property protection "is to promote the creation and publication of free expression."[233]

The First Amendment has been cited to argue for limiting intellectual property protections specifically in the forced licensing context. It has been argued that forced licensing of software "supports wide dissemination of information, an implicit goal of the copyright clause and the First Amendment."[234] On the contrary, forced licensing is not in support of the First Amendment's goals, and it can be in conflict with the First Amendment's terms.

First, the Supreme Court "has 'long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others.'"[235] That can be violated when one is forced to deal,[236] and licensing is but one form of dealing. There can also be a violation when the forced dealing is effectively forced speech.[237] Second, the Supreme Court has held that by "establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."[238] Third, "copyright law contains built-in First Amendment accommodations": the idea/expression dichotomy and the fair-use defense.[239] Under the former, "'every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication,'" while "the author's expression alone gains copyright protection."[240] The latter is codified in statute: "fair use of a copyrighted work, including such use by reproduction in copies . . ., for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."[241] To the extent there is concern that intellectual property harms free expression, these accommodations, described by the Supreme Court as the "traditional contours of copyright protection,"[242] provide sufficient relief.

233. *Id.*

234. Catherine Parrish, *Unilateral Refusals to License Software: Limitations on the Right to Exclude and the Need for Compulsory Licensing*, 68 BROOK. L. REV. 557, 584 (2002) (citing Robert Cassler, *Copyright Compulsory Licenses—Are They Coming or Going?*, 37 J. COPYRIGHT SOC'Y 231, 242–44 (1990)).

235. Americans for Prosperity Found. v. Bonta, 594 U.S. 595, 606 (2021) (quoting Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984)).

236. Sakkopoulos, *supra* note 30, at 1092–94.

237. Lipsky & Sidak, *supra* note 203, at 1240–48.

238. Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) (quoting Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 558 (1985)).

239. *Id.*

240. Golan v. Holder, 565 U.S. 302, 328 (2012) (quoting *Eldred*, 537 U.S. at 219).

241. *Id.* at 329 (quoting 17 U.S.C. § 107).

242. *Eldred*, 537 U.S. at 221.

CONCLUSION

In *Aspen*, the Supreme Court held that the right to refuse to deal is "not unqualified."[243] In *Trinko*, the Supreme Court held that the exception to the right to refuse to deal recognized in *Aspen* is "limited" and that *Aspen* "is at or near the outer boundary" of liability under Section 2 of the Sherman Act.[244] To use terminology based on *Aspen*'s factual context, the limitation on the unilateral right to refuse to deal under *Aspen* is, under *Trinko*, at or near the cliff. Liability for unilateral refusals to license ought to be off the cliff.[245]

243. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601 (1985) (citing Lorain J. Co. v. United States, 342 U.S. 143 (1951)).

244. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 409 (2004).

245. Though belaboring the analogy, it is noted that there ought to be no flag-embroidered parachute to save it either. *THE SPY WHO LOVED ME | Opening Scene*, YOUTUBE (Mar. 27, 2020), https://www.youtube.com/watch?v=YAIkFX-qZaU&abm [https://perma.cc/RV8W-94N6] (showing main character James Bond skiing off a cliff and eventually deploying a parachute with the Union Jack, the flag of the United Kingdom).