THE ESSENTIAL FACILITIES DOCTRINE UNDER UNITED STATES ANTITRUST LAW

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1. **The "essential facilities" doctrine has a long and respected history as part of United States antitrust law.**

    a. **Generally seen as originating in the Supreme Court's 1912 *Terminal Railroad* decision, the Supreme Court and lower courts have consistently applied the "essential facilities" doctrine throughout this century in appropriate circumstances.**

United States courts have long recognized that the general rule that a firm has no obligation to deal with its competitors is subject to certain exceptions. While generally "[a]ntitrust law … does not require one competitor to give another a break just because failing to do so offends notions of fair play," *Twin Labs., Inc. v. Weider Health & Fitness*, 900 F.2d 566, 568 (2d Cir. 1990), the Supreme Court has recognized that "[t]he high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985). *See also Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 483 n.32 (1992) ("It is true that as a general matter a firm can refuse to deal with its competitors. But such a right is not absolute; it exists only if there are legitimate competitive reasons for the refusal."); *Lorain Journal Co. v. United States*, 342 U.S. 143, 155 (1951) (right to refuse to deal is "neither absolute nor exempt from regulation").[1]

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[1] As suggested by these broad statements, some courts have concluded that antitrust liability for a unilateral refusal to deal may both include and extend beyond "essential facilities" claims. *See CTC Communications Corp. v. Bell Atlantic Corp.*, 77 F. Supp. 2d

The "essential facility" doctrine has been articulated as a subset of the so-called "refusal to deal" cases which place limitations on a monopolist's ability to exclude actual or potential rivals from competing with it. The doctrine is one long-standing limitation on the general rule that a firm has no obligation to deal with its competitors.[2] As stated by one appellate court:

> [T]he essential facilities doctrine imposes liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first.

Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 542 (9th Cir. 1991); *see also Byars v. Bluff City News Co.*, 609 F.2d 843, 846, 856 & n. 34 (6th Cir. 1980) ("a business or group of businesses which controls a scarce facility has an obligation to give competitors reasonable access to it."), citing *Associated Press v. United States*, 326 U.S. 1 (1945); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977) ("where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms. It is illegal restraint of trade to foreclose the scarce facility.") (citation omitted).

124, 147 (D. Me. 1999) ("[I]t is not necessary that [plaintiff] either allege or prove that each of the services involved in its specific claims is an essential facility before it may proceed against [defendant] on its claims of refusal to deal.") (citing *Data General Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1183-84 (1st Cir. 1994)). Some cases describe a second line of "intent" cases where a unilateral refusal to deal can be held to constitute monopolization even where there is no claim an "essential facility" is being denied. *See, e.g., Byars v. Bluff City News Co.*, 609 F.2d 843, 855-56 (6th Cir. 1980); *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 925-26 (2d Cir. 1980). However, such additional theories of liability for unilateral refusals to deal are beyond the scope of this memorandum.

[2] *See Carribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1088 (D.C. Cir. 1998) ("A monopolist has no general duty to share his essential facility, although there are certain circumstances in which he must do so.").

The Supreme Court first articulated this doctrine in *United States v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912). In *Terminal Railroad*, a group of railroads controlling all railway bridges and switching yards into and out of St. Louis prevented competing railroad services from offering transportation to and through that destination. This, the court held, constituted both an illegal restraint of trade and an attempt to monopolize. *See id*. at 409-10.

Since *Terminal Railroad*, the Supreme Court has reached similar decisions in a series of cases:

- In *Associated Press v. United States*, 326 U.S. 1 (1945), the Supreme Court found that the Associated Press bylaws violated the Sherman Act by limiting membership in the organization and thereby access to its copyrighted news services.
- In *Lorain Journal Co. v. United States*, 342 U.S. 143, 146-49 (1951), the Supreme Court considered whether the defendant newspaper, the only local business circulating news and advertisements in the town, violated the Sherman Act by refusing to accept advertising from businesses that placed advertisements with a small radio station. The Court approved an order requiring the newspaper to accept advertisements. *See id.* at 156.
- In *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377-79 (1973), the Supreme Court found that the defendant, an electrical utility which sold electricity at both the retail level (directly to consumers) and the wholesale level (to municipalities who sought to resell electricity at retail), had monopolized in violation of the Sherman Act by refusing to supply electricity at wholesale and instead to service customers directly itself.

These Supreme Court cases – and other cases – make clear that the "essential facilities" doctrine renders a unilateral refusal to deal subject to potential liability as a monopolization violation of Section 2 of the Sherman Act. "The 'essential facilities' doctrine is not an independent cause of action, but rather a type of monopolization claim." *Kramer v. Pollock-Krasner Found.*, 890 F. Supp. 250, 257 (S.D.N.Y. 1995); *see also Int'l Audiotext Network, Inc. v. American Tel. & Tel. Co.*, 893 F. Supp. 1207, 1213

(S.D.N.Y. 1994); *Viacom Int'l Inc. v. Time Inc.*, 785 F. Supp. 371, 376 n.12 (S.D.N.Y. 1992).

Following this significant line of Supreme Court precedent, numerous lower courts have found the essential facilities doctrine potentially applicable in those extraordinary circumstances where one firm uses its control of a bottleneck to eliminate actual or potential competitors. For example, in a widely-cited decision, the Seventh Circuit Court of Appeals applied the essential facilities doctrine to require the monopolist telecommunications provider to provide access to its local service network to competitors in long-distance services. *See MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132-33 (7th Cir. 1983). Prominent cases applying the essential facilities doctrine include those finding that entities controlling stadiums must provide access on reasonable terms to potential competitor/owners of sporting teams that need to use such bottleneck assets. *See Fishman v. Estate of Wirtz*, 807 F.2d 520, 539-40 (7th Cir. 1986); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992-93 (D.C. Cir. 1977). In addition, in a variety of other contexts, lower courts have also found the doctrine potentially applicable where one firm with monopoly control over an asset that serves as a vital input for its competitors refuses access to that input to a competitor.[3]

[3] *See, e.g., CTC Communications Corp. v. Bell Atlantic Corp.*, 77 F. Supp. 2d 124, 147-48 (D. Me. 1999) (voice mail services provided by local telecommunications company may constitute essential facility for competing reseller of local telecommunications services); *Apartment Source of Philadelphia v. Philadelphia Newspapers*, Civ. A. No. 98-5472, 1999 WL 191649, at *7-*10 (E.D. Pa. Apr. 1, 1999) (dominant city newspapers could be essential facility for plaintiff apartment locator service where newspapers ran competing service); *Direct Media Corp. v. Camden Tel. & Tel. Co., Inc.*, 989 F. Supp. 1211, 1218-19 (S.D. Ga. 1997) (access to telephone company's subscriber phone list could be essential facility for competing telephone book producer, notwithstanding availability of telephone company's printed listings); *BellSouth Adver. & Publ'g Corp. v. Donnelley Info. Publ'g, Inc.*, 719 F. Supp. 1551, 1566 (S.D. Fla. 1988) (applying essential facilities doctrine to directory listings in which defendant phone company claimed copyright), *rev'd on other grounds*, 999 F.2d 1436 (11th Cir. 1993), *cert. denied*,

A widely-cited decision by the Tenth Circuit Court of Appeals in *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1520-21 (10th Cir. 1984), applied the essential facilities doctrine to a ski resort's decision to terminate its long-standing participation, with a competitor ski resort, in selling a "multiarea" ski ticket that gave customers flexibility to patronize any of the area's ski resorts at a discounted price. The court described the "multiarea" ticket as an "essential facility" as to which defendant was denying access, with the intent to monopolize by putting the competitor ski resort out of business, and therefore found sufficient evidence to find antitrust liability for refusal to deal. *See id*. Notably, the Supreme Court upheld the finding of antitrust liability, but characterized its determination under the more general rubric of Sherman Act monopolization. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 611 (1985).[4]

b. **The doctrine is applied cautiously and usually in exceptional circumstances that meet strict requirements.**

Because it represents a divergence from the general rule that even a monopolist may choose with whom to deal, courts have established widely-adopted tests that parties must meet before a court will require a monopolist to grant access to an essential asset to its competitors. Specifically, to establish antitrust liability under the essential facilities doctrine, a party must prove four factors:[5]

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510 U.S. 1101 (1994); *see also Colonial Penn Group v. American Ass'n of Retired Persons*, 698 F. Supp. 69, 72-73 (E.D. Pa. 1988); *cf. Home Placement Serv., Inc. v. Providence Journal*, 682 F.2d 274 (1st Cir. 1982).

[4] The Court did not find it necessary to consider the "essential facility" doctrine because it concluded that "the evidence amply supports the verdict" that the defendant monopolist had violated the Sherman Act by refusing to deal with its competitor. *Id.* at 611 n.44.

[5] Of course, if a court were to mandate access to an essential facility it also would need to address the process by which the mechanics of that access (price, etc.) are to be determined.

> (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 to competitors.

MCI Communications, 708 F.2d at 1132-33. This test for antitrust liability has been adopted by virtually every court to consider an "essential facilities" claim.[6]

The doctrine only rarely results in antitrust liability because courts require a showing that the facility controlled by the defendant firm is truly *essential* to competition – *i.e.*, constitutes an input without which a firm cannot compete with the monopolist. "[A] facility 'controlled by a single firm will be considered "essential" only if control of the facility carries with it the power to *eliminate* competition . . . .'" *City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1380 n.5 (9th Cir. 1992) (quoting *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 544 (9th Cir. 1991)).[7] However, this element does

[6] *See Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1356, 1357 (Fed. Cir. 1999); *Carribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1088 (D.C. Cir. 1998); *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996); *City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1380 (9th Cir. 1992); *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 544 (4th Cir. 1991); *Delaware & Hudson Ry. Co. v. Consol. Rail Corp.*, 902 F.2d 174, 179 (2d Cir. 1990); *Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 150-51 (4th Cir. 1990); *City of Malden v. Union Elec. Co.*, 887 F.2d 157, 160 (8th Cir. 1989); *Ferguson v. Greater Pocatello Chamber of Commerce, Inc.*, 848 F.2d 976, 983 (9th Cir. 1988); *McKenzie v. Mercy Hosp.*, 854 F.2d 365, 370 (10th Cir. 1988), *overruled on other grounds*, 117 F.3d 1137 (10th Cir. 1997); *Int'l Audiotext Network, Inc. v. American Tel. & Tel. Co.*, 893 F. Supp. 1207, 1213 (S.D.N.Y. 1994); *Servicetrends, Inc. v. Siemens Med. Sys., Inc.*, 870 F. Supp. 1042, 1055 (N.D. Ga. 1994); *Sunshine Cellular v. Vanguard Cellular Systems, Inc.*, 810 F. Supp. 486, 497 (S.D.N.Y. 1992); *Data General Corp. v. Grumman Sys. Support Corp.*, 761 F. Supp. 185, 192 (D. Mass. 1991).

[7] *See also America Online, Inc. v. GreatDeals.net*, 49 F. Supp. 2d 851, 862 (E.D. Va. 1999) ("An 'essential facility' is one which is not merely helpful but vital to the claimant's competitive viability.") (quoting *Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 456, 463 (E.D. Pa. 1996)). *See also Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992-93 (D.C. Cir. 1977) ("To be 'essential' a facility need not be indispensable; it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants."); *see also Twin Labs., Inc. v. Weider Health & Fitness*, 900 F.2d 566, 568, 569

not go so far as to require that the party denied access have gone out of business as a result of the restriction.[8]

Related to this, the asset in question also must not be available from other sources or capable of duplication by the firm seeking access. "[A] facility will not be deemed essential if equivalent facilities exist or where the benefits to be derived from access to the alleged essential facility can be obtained from other sources." *Apartment Source of Philadelphia v. Philadelphia Newspapers*, Civ. A. No. 98-5472, 1999 WL 191649, at *7 (E.D. Pa. Apr. 1, 1999).[9]

Furthermore, the final factor – feasibility of providing access to competitors – makes evident that the essential facilities doctrine is "carefully delimited: the antitrust laws do not require that an essential facility be shared if such sharing would be impractical or would inhibit the defendant's ability to serve its customers adequately." *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992-93 (D.C. Cir. 1977). Thus, the essential facilities doctrine does not impose liability where a defendant monopolist has a legitimate

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(2d Cir. 1990); *TCA Bldg. Co. v. Northwestern Res. Co.*, 873 F. Supp. 29, 39 (S.D. Tex. 1995); *Driscoll v. City of New York*, 650 F. Supp. 1522, 1529 (S.D.N.Y. 1987).

[8] *See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 594-95 (1985) (noting decline in – but not elimination of – plaintiff's share of the market for downhill skiing in Aspen); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1518 n.11 (10th Cir. 1984) (rejecting argument that antitrust violation requires showing that without access to facility plaintiff "absolutely cannot bring its product … to the market"); *United States v. Associated Press*, 52 F. Supp. 362, 371 (S.D.N.Y. 1943) (noting that it "would be possible … to conduct some kind of newspaper without any news service whatever"), *aff'd*, 326 U.S. 1 (1945).

[9] *See also Twin Labs.*, 900 F.2d at 569 (in many cases applying the essential facilities doctrine, "the facility in question was more than dominant; it was effectively the only one in town."); *id.* at 570 ("As the word 'essential' indicates, a plaintiff must show more than inconvenience, or even some economic loss; he must show that an alternative to the facility is not feasible."); *City of Malden v. Union Elec. Co.*, 887 F.2d 157, 163 n.6 (8th Cir. 1989) (approving presentation of essential facilities claim to a jury with the instruction that "[i]f you find that [plaintiff] had no realistic, economically practical alternative means of obtaining wholesale electricity, then you must find that [defendant] had a bottleneck monopoly.").

business (or technological) justification for declining access to the disputed assets to its competitor. *See City of Anaheim*, 955 F.2d at 1381.

Given the stringency of the widely-adopted requirements, United States courts rarely find liability under the essential facilities doctrine. But even courts rejecting application of the doctrine note that their analysis is highly fact-specific. *See*, *e.g.*, *Intergraph*, 195 F.3d at 1356. Similarly, though commentators may disagree with the application of the doctrine on a particular set of facts, even the doctrine's most prominent critics recognize that it is appropriate to require a monopolist to deal in certain exceptional circumstances. *See* Philip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L. J. 841, 853 n.21 (1989) (noting that "*MCI* … is probably correct [in holding that] a monopolist must, when feasible, make its essential facility available to a competitor who is unable to duplicate it.").

c. **While not required to establish liability, application of the essential facilities doctrine is particularly appropriate when the denial of access is combined with a "specific intent" to injure rivals.**

Opinions of the United States courts also suggest that antitrust liability under the essential facilities doctrine is particularly appropriate when denial of access is motivated by an anticompetitive animus – usually demonstrated by a change in existing business practices with the apparent intent of harming rivals. *See Otter Tail*, 410 U.S. at 378 (citing finding that utility's "refusals to sell at wholesale [or otherwise provide access to the essential facility] were solely to prevent municipal power systems from eroding its monopolistic position"); *City of Anaheim*, 955 F.2d at 1381 (citing *Otter Tail* as appropriate instance for application of essential facilities doctrine because "the sole reason for the denial of access is to maintain a monopoly"); *Sunshine Cellular v.*

Vanguard Cellular Sys., Inc., 810 F. Supp. 486, 497 (S.D.N.Y. 1992) ("[A monopolist] may not refuse to deal with [its competitor] if its refusal is motivated by anticompetitive animus.").

Most recently, in *Aspen Skiing*, which it decided as a straight-forward "refusal to deal" case without reaching the question whether the defendant's facility was "essential," the Supreme Court found compelling the anticompetitive intent demonstrated by the "decision by a monopolist to make an important change in the character of the market." *Aspen Skiing*, 472 U.S. at 604. Because the defendant's decision departed from a long-standing profitable arrangement with its competitor, the jury's determination that there was no valid business justification for the termination of the arrangement was amply supported.[10]

It is unsurprising that anticompetitive animus is relevant to application of the essential facilities doctrine. Numerous United States courts have held that a refusal to deal coupled with an anticompetitive intent may support a finding of antitrust liability even absent proof that the withheld input constitutes an "essential facility." *See Intergraph*, 195 F.3d at 1356, 1358 ("A 'refusal to deal' may raise antitrust concerns when the refusal is directed against competition and the purpose is to create, maintain, or enlarge a monopoly."). The Supreme Court has reached the same conclusion. *See Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 483 n.32 (1992) (right to refuse to deal "exists only if there are legitimate competitive reasons for the refusal") (citing *Aspen Skiing Co.*, 472 U.S. at 602-05); *see also Image Technical Servs., Inc. v.*

[10] *See Aspen Skiing*, 472 U.S. at 603 ("[T]he monopolist did not merely reject a novel offer to participate in a cooperative venture that had been proposed by a competitor. Rather, the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years.").

Eastman Kodak Co., 125 F.3d 1195, 1210-11 (9th Cir. 1997) (citing Supreme Court precedents which limited right to refuse to deal to situations where there was no "purpose to create or maintain a monopoly") (quotation omitted).

2. **The doctrine is consistent with antitrust policy which limits the discretion of dominant firms in order to preserve and enhance competition.**

Notwithstanding its status as an exceptional incursion into the general rule that firms may normally choose their business partners without antitrust restraint, the essential facility doctrine is supported by the welfare-enhancing goals of United States antitrust policy. The doctrine seeks to prevent the firm with monopoly control over an essential asset from unlawfully excluding actual or potential rivals, or from extending its monopoly over that asset to the final stage of production (a finished product market, for example). As one appeals court stated:

> A company which has monopoly power over an essential facility may not refuse to make the facility available to others where there is no legitimate business reason for the refusal.

City of Anaheim, 955 F.2d at 1379; *see also Interface Group, Inc. v. Mass. Port Auth.*, 816 F.2d 9, 12 (1st Cir. 1987).

The limitation is justified because the bedrock principle of antitrust policy is that consumer welfare is enhanced by vigorous competition. Preserving competition ensures that firms will have efficiency incentives to lower costs and prices, and to develop consumer welfare-enhancing innovations.

Moreover, this policy justification applies not merely in the case of natural monopolies, but to intellectual property as well. One commentator has noted that preserving competition does not undercut incentives to innovate, but enhances them:

> Allowing a patent holder with monopoly power in the patented market to refuse to deal with competitors in complementary markets would eliminate competition and reduce innovation and consumer choice in complementary markets; and those markets would become dominated by a single firm – the monopolist in the patent market. In the long run, such expansive interpretation of the rights of a patent grant would only diminish, not enhance, innovation in the complementary markets.

Marina Lao, *Unilateral Refusals to Sell or License Intellectual Property and the Antitrust Duty to Deal*, 9 CORNELL J. L. & PUB. POL'Y 193, 218 (1999).

3. **Though the "classic" applications of the doctrine have related to natural monopolies, recent cases and U.S. enforcement policy demonstrate that the essential facilities doctrine applies to intellectual property no less than to tangible assets.**

    a. **Numerous United States courts have squarely held and otherwise indicated that the essential facilities doctrine applies to intellectual property and other intangibles.**

When essential facilities claims have been raised in the context of assets protected by intellectual property laws – such as copyrighted databases or software – United States courts have applied the essential facilities doctrine just as they have when the undisputed natural monopolies involved utilities, transportation facilities or other physical assets. For example, one district court considered a claim applying the essential facilities doctrine to telephone directory listings in which defendant (the local telephone company and a publisher of telephone directories) claimed copyright protection. *See BellSouth Adver. & Publ'g Corp. v. Donnelley Info. Publ'g, Inc.*, 719 F. Supp. 1551, 1566 (S.D. Fla. 1988), *rev'd on other grounds*, 999 F.2d 1436 (11th Cir. 1993), *cert. denied*, 520 U.S. 401 (1994). The court saw no barrier to considering the claim in this context:

> Although the doctrine of essential facilities has been applied predominantly to tangible assets, there is no reason why it could not apply, as in this case, to information wrongfully withheld. The effect in both situations is the

> same: a party is prevented from sharing in something essential to compete.

Id.; see also Rural Tel. Serv. Co., Inc. v. Feist Publ'ns, Inc., 737 F. Supp. 610, 617-20 (D. Kan. 1990) (analyzing essential facilities doctrine in context involving allegedly copyrighted telephone listings), *rev'd on other grounds*, 506 F.2d 765 (10th Cir. 1992); 499 U.S. 340 (1990). Similarly, other courts found no *per se* barrier to applying the essential facilities doctrine to intellectual property. In *Data General Corp. v. Grumman Sys. Support Corp.*, 761 F. Supp. 185, 191-92 (D. Mass. 1991), *aff'd in part and remanded*, 36 F.3d 1147 (1st Cir. 1994), the court applied the doctrine to a claim that a competitor service provider needed access to the copyrighted diagnostic software produced by the system manufacturer (who competed in the service aftermarket). The claim ultimately was rejected because the court concluded that the facts did not support the allegation that the facility was "essential" – not because the court concluded that the doctrine was inapplicable to copyrighted software.[11] *See also Serv. & Training, Inc. v. Data General Corp.*, 737 F. Supp. 334, 343-44 (D. Md. 1990) (allowing monopolization

[11] United States courts are sensitive to concerns that limiting intellectual property protections may dampen incentive for innovation. However, the courts have recognized that permitting antitrust liability in proper circumstances appropriately promotes competition, and, ultimately, innovation as well. *See, e.g., Data General*, 36 F.3d at 1184-86. In *Data General* the court considered defendant's argument that "allowing copyright owners to exclude others from the use of their work creates incentive which ultimately work to the benefit of consumers in the [alleged] service aftermarket" but concluded that "it may be inappropriate to adopt an empirical assumption that simply ignores harm to the competitive process caused by a monopolist's unilateral refusal to license a copyright." *Id*. at 1185. The court in *Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997) expressed similar concerns. Notwithstanding its recognition that liability for unilateral refusal to deal might reduce the incentives to innovate that normally flow from intellectual property protection, the *Kodak* court recognized that appropriate situations merit antitrust intervention. *See id*. at 1218-20.

claim to proceed based on computer manufacturer's unwillingness to license diagnostic software to competitor computer repair service provider).[12]

Moreover, the doctrine has been widely applied to other intangible assets; for example, such intangibles as "services have been held to be essential facilities." *Sunshine Cellular v. Vanguard Cellular Sys., Inc.*, 810 F. Supp. 486, 497 (S.D.N.Y. 1992); (cause of action stated where essential facility alleged to be roaming agreement to provide billing services for competitor cellular telephone service carrier); *American Tel. & Tel. Co. v. North American Industries, Inc.*, 772 F. Supp. 777, 785 (S.D.N.Y. 1991) (plaintiff "adequately alleged that the central office services refused it by [defendant] are essential within the meaning of the federal antitrust laws"). Courts have also applied the doctrine to health care referral services. *See Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 150-51 (4th Cir. 1990) (supplier of home health care products adequately alleged that access to hospital patients for patient referrals constituted essential facility); *American Health Sys., Inv. v. Visiting Nurse Ass'n of Greater Philadelphia*, No. CIV. A. 93-542, 1994 WL 314313, at *13 (E.D. Pa. June 29, 1994) (same; home health care provider).[13]

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[12] *See also Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 431 F.2d 334, 338-40 (5th Cir. 1970) (exclusive licensee of movie promotional materials, such as posters, could constitute essential facility required to supply additional materials to competitor distributor); *Montgomery County Ass'n of Realtors, Inc. v. Realty Photo Master Corp.*, 878 F. Supp. 804, 817 (D. Md. 1995) (considering essential facilities claim as to copyrighted real estate listing service; dismissing claim because no evidence presented that service constituted an essential facility), *aff'd*, 91 F.3d 132 (4th Cir. 1996).

[13] Given the varied contexts in which the essential facilities doctrine has been applied, courts have declined to impose any artificial limit on the kinds of products, services, or other assets to which the doctrine may appropriately be applied. As one court stated,

> The essential facilities doctrine does not unequivocally require that a facility be of a grand nature as suggested by the defendant, nor is the doctrine specifically inapplicable to tangibles such as a manufacturer's spare parts. "The

b. **In considering related refusal to deal claims, appellate courts have stated that antitrust liability will attach notwithstanding claims of intellectual property protection.**

Several recent cases from United States appellate courts provide significant support for the proposition that intellectual property protections do not shield a monopolist from antitrust liability for refusal to deal in an essential facility. In *Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1201-02 (9th Cir. 1997), the Ninth Circuit reviewed a jury decision that Kodak, a manufacturer and servicer of copiers, had illegally monopolized the latter market for service of its copiers by refusing to deal in its patented replacement parts (needed for repair of the copiers); the award required Kodak to sell such parts on reasonable terms to plaintiff independent services organizations (who competed with Kodak to service Kodak copiers). After describing the essential facilities doctrine as one theory of a more general unilateral refusal to deal claim, *see id.* at 1209-11, the court confronted the tension between attaching antitrust liability to exclusionary acts (because "neither patent nor copyright holders are immune from antitrust liability") and the principle that "patent and copyright holders may refuse to sell or license protected work." *Id.* at 1215.

Citing to an earlier Supreme Court decision in the *Kodak* dispute, the court concluded that abuse of intellectual property rights (such as patent protection) could give rise to antitrust liability. *See id.* at 1216 ("the [Supreme] Court in *Kodak* supposed that

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> term 'facility' can apply to tangibles such as sports or entertainment venues, means of transportation, the transmission of energy or the transmission of information and to intangibles such as information itself."

Tri-Tech Machine Sales, Ltd. v. Artos Eng'g Co., 928 F. Supp. 836, 839 (E.D. Wis. 1996) (quoting Irving Scher, Antitrust Advisor § 1.29 at 1-60 (4th ed. 1995)).

intellectual property rights do not confer an absolute immunity from antitrust claims"). Specifically, in its *Kodak* decision, the Supreme Court rejected the contention that "because Kodak has only an 'inherent' monopoly in parts for its equipment …, the antitrust laws do not apply to its efforts to expand that power into other markets," *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 479 n.29 (1992), stating instead that "[t]he Court has held many times that power gained through some natural or legal advantage such as a patent, copyright or business acumen can give rise to liability if 'a seller exploits his dominant position in one market to expand his empire into the next.'" *Id*. at 479.[14]

The appellate court in *Kodak* then reconciled the principles by concluding that the intellectual property protection provided only a "presumptively valid business justification" for a unilateral refusal to deal. *See Kodak*, 125 F.3d at 1218 (quoting *Data General Corp. v. Grumman Sys. Support Corp*., 36 F.3d 1147, 1187 (1st Cir. 1994)). In other words, a firm could be subject to antitrust liability for refusal to deal in protected intellectual property where the presumption of valid reason not to license was rebutted by evidence of antitcompetitive intent. *See Kodak*, 125 F.3d at 1219 (citing *Aspen Skiing* as an example where the presumption was rebutted "where a monopolist made an important change in its practices"). Such liability for refusal to deal would, of course, include situations where the intellectual property could be proven to be an "essential facility."

The court in *Data General*, whose approach was adopted by the *Kodak* court, addressed a similar scenario. Data General, a manufacturer of computers and servicer of

[14] Though it addressed tying claims, the Court's language is broad enough to encompass monopolization claims based on a refusal to deal. *See* Marina Lao, *Unilateral Refusals to Sell or License Intellectual Property and the Antitrust Duty to Deal*, 9 CORNELL J. L. & PUB. POL'Y 193, 201 (1999).

its own products, refused to provide access to its copyrighted diagnostic software to firms competing to service those products. *See Data General*, 36 F.3d at 1152-55. The competitor-servicer alleged both that such software constituted an essential facility and that Data General's unilateral refusal to deal could be construed more broadly as monopolization. While the district court denied the essential facility claim (and it was not pursued on appeal), *see id.* at 1156 n.13, in considering the more general refusal to deal claim, the Court of Appeals held "that while exclusionary conduct can include a monopolist's refusal to license a copyright, an author's desire to exclude others from use of its copyrighted work is a presumptively valid business justification for any immediate harm to consumers." *Data General*, 36 F.3d at 37. Thus, while the court showed some deference to intellectual property protections (as suggested by its adoption of a presumption), it declined to immunize refusal to deal in such protected material where that presumption could be overcome by a showing of anticompetitive intent. *See id.* at 1187 n.64 ("[W]e do not hold that an antitrust plaintiff can never rebut this presumption, for there may be rare cases in which imposing antitrust liability is unlikely to frustrate the objectives of the Copyright Act."); *id.* at 1183-84 (citing *Aspen Skiing* as an example of a unilateral refusal to deal where the proffered business justification was rejected).

The United States Court of Appeals for the Federal Circuit, which is responsible for most cases involving patent issues, concluded, in *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346 (Fed. Cir. 1999), that certain cases might justify mandated access to intellectual property. In that case, in the context of plaintiff's demand that it be allowed access to defendant's intellectual property (protected technological data related to defendant's microprocessor chips), the court noted that such mandatory access may be

imposed – where the defendant's refusal to license access to such intellectual property demonstrates anticompetitive intent. *See id*. at 1356, 1363.[15]

Given this precedent, it is simply inaccurate to claim that "U.S. courts have uniformly held that a refusal to license lawfully obtained intellectual property to potential competitors is not an act of monopolization." Mark Leddy and George Cary, "The Essential Facilities Doctrine Under U.S. Antitrust Law," at 1-2; *see also id*. at 4 (same). There is no antitrust exemption for intellectual property holders. Instead, it is clear that the essential facilities doctrine may be – and has been – applied in appropriate instances to "facilities" allegedly protected by intellectual property laws.[16]

c. **United States antitrust enforcement agencies have suggested that, in appropriate cases, intellectual property will be considered an essential facility.**

The United States antitrust enforcement agencies – the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") – have taken positions suggesting that the essential facilities doctrine could be applied to intellectual property "bottlenecks."

On the most general level, the DOJ and FTC's 1995 Antitrust Guidelines for the Licensing of Intellectual Property provide that "[t]he Agencies apply the same general

[15] The D.C. Circuit has also suggested that it would follow this analysis, rejecting a copyright defense to a claim of monopolization of operating systems software through restrictive license terms as "border[ing] upon the frivolous" because "[i]ntellectual property rights do not confer a privilege to violate the antitrust laws." *United States v. Microsoft*, 253 F.3d 34, 63 (D.C. Cir. 2001).

[16] Moreover, the results in *Data General* and *Kodak* directly refute assertions that "it is not unlawful for an owner of intellectual property to refuse to license competitors wishing to use it in the very market for which the intellectual property was developed" Leddy and Cary, *supra*, at 8. In those instances, companies who had developed claimed intellectual property for use in their provision of services were in fact, found liable for their refusal to license such intellectual property to their competitors in the market for which such software was developed.

antitrust principles to conduct involving intellectual property that they apply to conduct involving any other form of tangible or intangible property." Guidelines at § 2.1.[17] More directly related to allegations of monopolization, the Guidelines state that the use of market power by an intellectual property holder will be treated no differently than that of other monopolists:

> If a patent or other form of intellectual property does confer market power, that market power does not by itself offend the antitrust laws…. As in other antitrust contexts, however, market power could be illegally acquired or maintained, or, even if lawfully acquired and maintained, would be relevant to the ability of an intellectual property owner to harm competition through unreasonable conduct in connection with such property.

Guidelines at § 2.2.[18]

In addition to these policy statements, the enforcement activities of the United States agencies also confirm that they will pursue these kinds of antitrust claims in contexts involving intellectual property. For instance, one recent complaint filed by the FTC suggests that the United States antitrust enforcement agencies will pursue unilateral refusal to deal claims against intellectual property holders when such refusals evidence anticompetitive intent. The FTC filed a complaint against Intel contending that its refusal to provide access to patented and other information regarding its microprocessor chips to certain computer manufacturers, because the manufacturers engaged in litigation against

[17] *See also* Guidelines at § 2.0 (a) ("[F]or the purpose of antitrust analysis, the Agencies regard intellectual property as being essentially comparable to any other form of property.").

[18] This qualification on the rights of an intellectual property holder is conveniently ignored by Leddy and Cary in their discussion of the U.S. antitrust agencies' Guidelines. *See* Leddy and Cary, *supra*, at 3.

Intel, constituted an antitrust violation.[19] By extension, such claims are just as appropriate when the more stringent standards of the essential facilities doctrine are met. In addition, in appropriate cases, the enforcement agencies have imposed mandatory licensing requirements for competitor use of copyrighted systems as a condition of resolving antitrust disputes.[20]

4. **While many cases applying the essential facilities doctrine do so in the context of vertically-related markets, there is no requirement that a plaintiff raising an essential facilities daim demonstrate the existence of two distinct antitrust markets.**

In many cases applying the essential facilities doctrine, plaintiffs are both customers (requiring the essential facility or input) and competitors of the parties refusing access to the essential facility. The prototypical formulation describes a two-tiered market frequently associated with the doctrine: *"Otter Tail* … stands for the principle that 'a monopolist may not abuse its monopoly power in one market to gain an improper advantage or to destroy threatened competition in an adjacent market in which it also operates.'" *American Tel. & Tel. Co. v. North American Industries, Inc.*, 772 F. Supp. 777, 784 (S.D.N.Y. 1991) (quoting *Official Airline Guides, Inc. v. FTC*, 630 F.2d, 925 (2d Cir. 1980)).[21]

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[19] *See* Charles L. Freed, *Antitrust and the Duty to License Intellectual Property*, 14 ANTITRUST 33, 36 (1999) (noting that FTC brief cited *Data General* and *Kodak* as leading cases).

[20] *See, e.g., United States v. The Thomson Corp.*, 949 F. Supp. 907, 925-31 (D.D.C. 1996) (approving consent decree requiring merging legal publishers to provide mandatory licensing of copyrighted pagination system to competitors); *see also United States v. Realty Multi-List, Inc.*, Civil Action No. 76-87-Col, 1982 WL 1878 (M.D. Ga. June 25, 1982) (approving settlement containing mandatory licensing provision for access to real estate listing service by competing realtors).

[21] *See, e.g., Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 150 (4th Cir. 1990) ("[T]he central concern in an essential facilities claim is whether market power in one market is being used to create or further a monopoly in another market."); *Twin Labs., Inc. v. Weider Health & Fitness*, 900 F.2d 566, 568 (2d Cir. 1990) ("The policy behind prohibiting denial of an essential facility to a competitor … is to

However, there is no *requirement* that a plaintiff alleging anticompetitive denial of access to an essential facility demonstrate the existence of two separate antitrust markets. Instead, as demonstrated in recent cases shaping the doctrine, parties making essential facilities claims may simultaneously be customers and competitors of the alleged monopolists – in a single market. For example, in *Aspen Skiing*, both plaintiff and defendant operated competing ski resorts. The trial and appellate courts did not require plaintiff to prove that the alleged essential facility – access to defendant's ski resort through a multiarea ticket offering – itself constituted a separate antitrust market distinct from plaintiff's resort. Instead, the jury found that the relevant product market at issue was "downhill skiing services in the Aspen area, including multi-area and multi-day lift tickets" – *i.e.*, the monopolized market (which encompassed the essential facility). *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1513 (10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985).

Thus, the lower court opinions in the *Aspen Skiing* case directly contradict the assertion that "the essential facilities doctrine can apply only where a company with market power supplies a product or service to which competitors on an upstream or downstream market must have access in order to compete." Leddy and Cary, *supra*, at 7; *see also id.* at 1 and 6 (stating same).[22] The *Aspen Skiing* court confronted a similar claim by the defendant, which "argu[ed] that … a duty [to deal] can arise only in

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prevent a monopolist in a given market … from using its power to inhibit competition in another market.").

[22] A variation of this claim – that "[t]he essential facilities doctrine … applies only when a property owner seeks to extend its right to exclude or control beyond the legitimate scope of the property rights in issue" – is similarly mistaken. Leddy and Cary, *supra*, at 5. As noted above, given the results in *Data General* and *Kodak*, it cannot be maintained that upstream or downstream markets are required to find antitrust liability simply because intellectual property rights are asserted.

different circumstances where, through vertical integration, one firm has come to monopolize or control the supply of a component necessary for production, distribution or sale of a rival's product or service." *Aspen Highlands*, 738 F.2d at 1518. The court explicitly rejected such contentions:

> We decline to adopt a narrow rule that would immunize an unintegrated monopolist from antitrust liability for refusing a competitor access to an essential facility in these circumstances. Vertical integration is not essential to finding a violation of the antitrust laws for a refusal to deal under the intent test.

Aspen Highlands, 738 F.2d at 1519 n.11; *see also id*. at 1521 (rejecting such "restrictive analysis"). Further, the court was "not convinced that the essential touchstone of bottleneck cases is vertical integration." *Id.* at 1519 n.11.[23]

Lower courts have similarly applied the essential facilities doctrine irrespective of whether the essential facility constitutes a separate vertically-related market. For example, one lower court considered a dispute between cellular providers in adjacent service areas. *See Sunshine Cellular v. Vanguard Cellular Sys., Inc.*, 810 F. Supp. 486, 496-98 (E.D. Pa. 1992). The plaintiff claimed that a "two-way roaming agreement" (a billing arrangement for calls made from the competitor's service area) between the two parties constituted an "essential facility." *Id.* at 497. Notwithstanding that plaintiff sought access to the competitor's cellular service in the same market in which it competed, the court held that the essential facilities claims survived a motion to dismiss.

[23] *See also* James C. Burling, William F. Lee & Anita K. Krug, *The Antitrust Duty to Deal and Intellectual Property Rights*, 24 J. CORP. L. 527, 531 (1999) ("Although the essential facility test has been applied predominantly to cases in which a monopolist controls a facility deemed essential to a competitor in a vertically-related market, at least one court has applied it in a case, involving only a single market, in which a monopolist refused to pursue a joint-venture relationship with a competitor.") (citing *Aspen Highlands*, 738 F.2d at 1518).

Similarly, an appellate court reinstated a plaintiff's essential facility claim after it was dismissed by the trial court in *Delaware & Hudson Ry. Co. v. Consol. Rail Corp.*, 902 F.2d 174 (2d Cir. 1990). The case involved a dispute between two rail companies. Because plaintiff had a more limited track system than defendant, it required access to defendant's tracks for portions of certain shipping trips – the end portion (or "short haul") to deliver to specific destinations. Defendant, which had previously acquiesced in such arrangements before the rival carriers began competing on price, refused to allow access on reasonable terms. The court defined the "relevant market" as the "transportation of newsprint from eastern Canada to the mid-Atlantic states" – a market which would encompass the "essential facility," "[defendant's] tracks used for short haul routes." *Id*. at 179. Notwithstanding the absence of two separate, vertically-related markets, the appellate court found that the plaintiff's essential facilities claim could proceed. *See id*. at 180.[24]

As these cases suggest, the essential facilities doctrine does not require a plaintiff to neatly distinguish the relevant levels of production into two separate antitrust markets. It is sufficient to prove that the parties compete – or would compete if the plaintiff were permitted access to the defendant's asset – in the same ultimate market.[25] This is not to say that the essential facilities doctrine does *not* apply where two vertically-related

[24] The Federal Court of Appeals, a court with special authority to speak to intellectual property issues, though not itself confronting a single-market case, agreed that the doctrine applies irrespective of whether the situation involves one market or two. *See Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1357 (Fed. Cir. 1999) ("Although the viability and scope of the essential facility doctrine has occassioned much scholarly commentary, no court has taken it beyond the situation of competition with the controller of the facility, whether the competition is in the field of the facility itself or in a vertically related market that is controlled by the facility.").

markets are involved; obviously, as the cases cited *supra* at note 18 indicate, it captures such situations as well. The principle, however, is that United States courts are simply not concerned with a demonstration that the "essential facility" relates to a distinct product market. The courts require only that plaintiff prove that the facility is indispensable for competition in a relevant product market, is controlled by a monopolist who could practically make access available, and is not capable of duplication. *See supra* at 5 (listing factors required to prove essential facilities claim).

Given the policy reasons for the essential facilities doctrine – preserving competition at each phase of production, whether defined as a separate market or not – it is understandably *irrelevant* to United States courts whether the essential facility at issue is characterized as a vertically-related separate market, or as part of the market in which the two parties compete. The policy concern is simply to ensure competition in the market where the two parties could compete *but for* the refusal to provide access to the essential asset; any characterization of the essential facility (beyond meeting the elements that prove it is, indeed, essential) would be superfluous and artificial.

5. **Reinforcing this conclusion, numerous courts have emphasized that it is the plaintiff's status as a *competitor* of the alleged monopolist – not as its customer – that allows a firm to seek relief under the essential facilities doctrine.**

Thus, courts addressing the threshold issue of standing to assert an essential facilities claim suggest that the vital issue is whether plaintiff has a *competitive* relationship with the alleged monopolist in the relevant product – not what the relationship is between plaintiff and defendant with respect to the asset alleged to be

[25] To the extent courts have rejected essential facilities claims, we are aware of no United States cases – and IMS Health identifies none – where the proffered basis was the plaintiff's failure to identify two vertically-related markets.

"essential." Numerous lower court cases – particularly those noting the recurring use of "competitor" among the four requirements for an essential facilities claim – require simply that plaintiffs demonstrate that they are competitors (including potential competitors) being denied access to an essential facility controlled by the defendant-monopolist. *See, e.g., Mid-South Grizzlies v. Nat'l Football League*, 550 F. Supp. 558, 570 (E.D. Pa. 1982) ("The doctrine is applicable only where a party is being denied access to something necessary for that party to engage in business which is controlled by his *competitors*."), *aff'd*, 720 F.2d 772 (3d Cir. 1983).[26]

The competitive relationship between the parties – not the relationship between the essential facility and the relevant market – is the touchstone of liability under the essential facilities doctrine. This is confirmed by the dismissal of essential facilities claims in contexts where the plaintiff has not shown an adequately competitive relationship with the defendant monopolist. *See Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1356 (Fed. Cir. 1999) (application of the essential facility theory requires a "competitive relationship" between the parties); *Carribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1088-89 (D.C. Cir. 1998) (dismissing essential facilities claim where complaint did not adequately allege competitive relationship).

[26] *See also Ferguson v. Greater Pocatello Chamber of Commerce, Inc.*, 848 F.2d 976, 983 (9th Cir. 1988) (essential facilities doctrine applies to refusals to deal with competitors); *Interface Group, Inc. v. Mass. Port Auth.*, 816 F.2d 9, 12 (1st Cir. 1987) (doctrine applies when access denied to actual or potential competitors); *America Online, Inc. v. GreatDeals.net*, 49 F. Supp. 2d 851, 862 (E.D. Va. 1999) (doctrine requires that plaintiff and defendant are competitors); *Kramer v. Pollock-Kranser Found.*, 890 F. Supp. 250, 257 (S.D.N.Y. 1995) ("the plaintiff must be a competitor of the defendant monopolist whose facility it seeks to employ"); *Driscoll v. City of New York*, 650 F. Supp. 1522, 1529 (S.D.N.Y. 1987); *cf. Ad-Vantage Tel. Directory Consultants, Inc. v. GTE Directories Corp.*, 849 F.2d 1336, 1348 (11th Cir. 1987).

CONCLUSION

In those rare and exceptional circumstances where a facility is truly essential to competition, the anticompetitive effects of denial of access are severe, and there is no business justification (and evidence of a specific intent to injure a rival), United States courts will find antitrust liability for a monopolist's refusal to license access to an essential facility. In such rare circumstances, where intellectual property (as with any other kind of property, tangible or intangible) is shown to constitute an essential facility – *i.e.*, where it meets the four factors set forth in *MCI Communications*, 708 F.2d at 1132-33 – the same result obtains: United States antitrust law permits a court to order compulsory licensing of such intellectual property. Indeed, notwithstanding the defendant/monopolist's arguments against applying the doctrine where the subject asset was intellectual property or in situations that did not involve vertically related markets, courts in the United States have applied this rule in appropriate cases like *Kodak*, *Data General*, and *Aspen Skiing*.