



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

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Kodak and Section 2 of the Sherman Act

U.S. v. Kodak

- Consent decree prohibiting sale of private label film

1921

1954

U.S. v. Kodak

- 2nd consent decree prohibiting tying film to photofinishing sales

1979

Berkey Photo v. Kodak (2d Cir.)

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

1991

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

- Single brand derivative after markets

1994

Kodak v. U.S.

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

1996

ITS v. Kodak (9th Circuit)

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

Kodak

Kodak Business Model Evolution



Focus on Consumables
Cameras + Film, Paper
& Chemicals

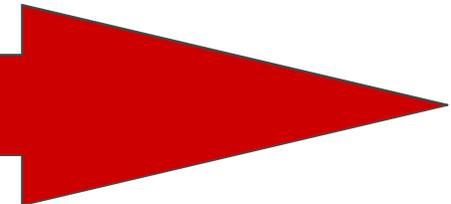
Hardware + Service
Copiers/Micrographics
units + Aftermarket
Service

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

1880s – 1970s

1970s – 1990s

2000s – ?



Critical Success Factors to Digital Model

Speed of innovation and technology development

Cross licensing of intellectual property

Ability to sell solutions



Potential Section 2 Impediments

Delayed recognition of market changes

Line between tying and bundling has blurred

- *LePages v. 3M*

Obstacles to IP protection and licensing

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

Uncertainty in the Wake of *LePages*

Above cost bundled discounts can be exclusionary under Section 2

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

Clearly permissible discounting practices?

- Single product volume discounts

At risk:

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

No Coherent Standard to Evaluate Bundled Pricing

Alternative Approaches to Bundling

Concord Boat (8th Circuit)

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

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

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

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

Split Among the Circuits on IP Rights

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

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

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

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

Impact of Section 2 Uncertainty on Digital Model

Uncertainty and risk:

Hypothetical Transactions

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

Kodak

