THE ESSENTIAL FACILITIES DOCTRINE UNDER U.S. ANTITRUST LAW

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I. INTRODUCTION

Right of access to an essential facility controlled by a monopolist has long been a controversial subject under U.S. antitrust law. If the facility is truly essential, a denial of access means the monopolist will be immune, at least for some time, to most instances of competition. On the other hand, a policy that defines access generously encounters the rather ideological complaint that it represents a government "taking" of private property, and the more practical concern that it will be likely to reduce incentives to innovate. Added to these conflicting policy concerns is the further complication that a simple declaration of access is seldom enough, and that government authorities, legislative, judicial or regulatory, must also define the terms of access—price, priority, and other terms and conditions of sale—usually on a basis that requires continuing supervision.

If U.S. scholarship were the last word on the subject, one would be led to conclude that the essential facilities doctrine should be described narrowly or fully abandoned.[1] U.S. courts, however, when faced with

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[1] *See, e.g.*, 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 771c (2d ed. 2002) (arguing that "the essential facility doctrine is both harmful and unnecessary and should be abandoned," but urging in the alternative that the doctrine be narrowed to situations of natural monopoly, price-regulated monopoly utilities, and publicly owned facilities provided to firms at subsidized rates); Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 852 (1989) (offering principles to limit the application of the essential facilities doctrine, such as strengthening the definition

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real instances of monopoly dominance, have not been so grudging in application of the doctrine. All agree that access should be accorded cautiously, with several qualifying conditions; none concludes that the right course is to abandon the doctrine altogether.

Another factor that makes the essential facilities doctrine particularly important is the increase in the number of situations in which the monopolist's dominance depends on intellectual property. As products and services that are the embodiment of ideas represent an increasing portion of the economy, dominant market positions based on intellectual property become more significant.

The issue of essential facilities has attracted renewed attention in Europe in recent years because of the controversy between IMS Health Inc. and NDC Health Corporation, two competitors in pharmaceutical data services in Germany.

The market at issue involves purchasing data regarding sales of pharmaceuticals in Germany, which must be reported in amounts sufficiently aggregated to be anonymous in accordance with German privacy law, but in units small enough to devise marketing strategies and track sales by area (because such area sales are used in compensating pharmaceutical sales personnel). To meet this situation, pharmaceutical data are reported using a "brick structure" based upon the German postal code. The vast majority of pharmaceutical companies use the current structure—the "1860 brick structure"—and are committed to it, given that, as noted above, the compensation of their sales personnel is tied to the structure. Moreover, it is unclear that any other structure would be legal, given that a second structure could, through cross-referencing, constitute a violation of German privacy law. Though IMS Health previously had allowed others to use the 1860 brick structure—and its predecessor, the 1845 structure—IMS asserted a copyright interest in the 1860 structure for the first time when a competitor, NDC, entered the market. IMS successfully sought injunctions against the use of the 1860 structure by both NDC and another competitor.

After an extensive investigation, the European Commission (EC) ordered that IMS grant access to the 1860 brick structure on commercially reasonable terms, and the EC decision is now on appeal in the Court of First Instance in Luxembourg. One issue that emerged in that litigation

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of "essential," permitting exceptions where the denial of access is based on legitimate business reasons, and only imposing access where the duty to deal can be reasonably supervised); Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 GEO. L.J. 395, 397–401 (1986) (criticizing Supreme Court decisions thought to establish the essential facilities doctrine as "not offer[ing] much support" and urging limits on the doctrine).

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is whether a decision by European authorities to grant access to the alleged essential facility, especially one whose market power derived in part from a copyright, would open a gap between European and U.S. antitrust law. In response to that contention, the authors of this piece filed a statement in the Court of First Instance describing U.S. law on the subject. We argued that the EC's ruling is consistent with U.S. jurisprudence on the subject of essential facilities. The remainder of this article consists of a revised version of the Court of First Instance filing.

II. HISTORY AND CORE ELEMENTS OF THE ESSENTIAL FACILITIES DOCTRINE

A. GENERAL PRINCIPLES

The essential facilities doctrine has a long and respected history as part of U.S. antitrust law. Generally seen as originating in the Supreme Court's 1912 decision in *United States v. Terminal Railroad Ass'n*,[2] the Supreme Court and lower courts consistently have applied the essential facilities doctrine throughout this century in appropriate, though limited, circumstances. U.S. 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 in most circumstances "[a]ntitrust law . . . does not require one competitor to give another a break just because failing to do so offends notions of fair play,"[3] 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."[4]

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[2] 224 U.S. 383 (1912).

[3] Twin Labs., Inc. v. Weider Health & Fitness, 900 F.2d 566, 568 (2d Cir. 1990).

[4] 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").

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 Atl. Corp., 77 F. Supp. 2d 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 Gen. 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 article.

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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.[5] As stated by the Ninth Circuit in *Alaska Airlines, Inc. v. United Airlines, Inc.* "[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."[6] Other courts of appeal have made similar statements: "[A] business or group of businesses which controls a scarce facility has an obligation to give competitors reasonable access to it."[7] "[W]here 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."[8]

The Supreme Court first articulated this doctrine in *United States v. Terminal Railroad Ass'n.*[9] 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.[10]

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

- In *Associated Press v. United States,*[11] 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,*[12] the Supreme Court considered whether the defendant newspaper, the only local business circulating news and advertisements in the town, violated the Sherman Act by

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[5] *See* Caribbean 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.").

[6] 948 F.2d 536, 542 (9th Cir. 1991).

[7] *Byars,* 609 F.2d at 856; *see also id.* at 856 n.34 (citing Associated Press v. United States, 326 U.S. 1 (1945)).

[8] Hecht v. Pro-Football, Inc., 570 F.2d 982, 992 (D.C. Cir. 1977) (citation omitted).

[9] 224 U.S. 383 (1912).

[10] *See id.* at 409–10.

[11] 326 U.S. 1 (1945).

[12] 342 U.S. 143, 146–49, 156 (1951).

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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.

- In *Otter Tail Power Co. v. United States*,[13] 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 so that it could instead 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."[14]

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, *MCI Communications v. AT&T Co.*,[15] 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. Other prominent cases applying the essential facilities doctrine include decisions that entities controlling stadiums must provide access on reasonable terms to potential competitors/owners of sporting teams that need to use such bottleneck assets.[16] In addition, in a variety of other contexts, lower courts have found the doctrine potentially applicable where one firm with monopoly control over an asset that serves as a vital input for its competitors refuses to grant a competitor access to that input.[17]

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[13] 410 U.S. 366, 377–79 (1973).

[14] Kramer v. Pollock-Krasner Found., 890 F. Supp. 250, 257 (S.D.N.Y. 1995); *see also* Int'l Audiotext Network, Inc. v. AT&T 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).

[15] 708 F.2d 1081, 1132–33 (7th Cir. 1983).

[16] *See* Fishman v. Estate of Wirtz, 807 F.2d 520, 539–40 (7th Cir. 1986); *Hecht*, 570 F.2d at 992–93.

[17] *See, e.g.*, *CTC Communications Corp.*, 77 F. Supp. at 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. Action 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.

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An often-cited decision by the Tenth Circuit Court of Appeals in *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*[18] 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 "multi-area" ski ticket that gave customers flexibility to patronize any of the area's ski resorts at a discounted price. The court described the "multi-area" ticket as an "essential facility" to which the defendant was denying access, with the intent to monopolize by putting the competitor ski resort out of business. The court therefore found sufficient evidence to impose antitrust liability for refusal to deal.[19] The Supreme Court upheld the finding of antitrust liability, but characterized its determination under the more general rubric of Sherman Act monopolization.[20]

B. LIMITATIONS ON APPLICABILITY

The essential facilities doctrine is applied cautiously, usually in exceptional circumstances that meet strict requirements. Because the doctrine 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 its competitors access to an essential asset. Specifically, to establish antitrust liability under the essential facilities doctrine, a party must prove four factors:[21] "(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."[22] This test for

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v. Camden Tel. & Tel. Co., 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); *see also* Colonial Penn Group v. Am. Ass'n of Retired Persons, 698 F. Supp. 69, 72–73 (E.D. Pa. 1988).

[18] 738 F.2d 1509, 1520–21 (10th Cir. 1984).

[19] *See id.*

[20] *See Aspen Skiing*, 472 U.S. at 611. 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.

[21] 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.) would be determined.

[22] *MCI Communications*, 708 F.2d at 1132–33.

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antitrust liability has been adopted by virtually every court to consider an essential facilities claim.[23]

Courts rarely impose liability under the essential facilities doctrine, in large part because the doctrine requires 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. As the Ninth Circuit Court of Appeals has stated, "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 . . . .'"[24] However, this element does not go so far as to require that the restriction cause the party denied access to go out of business.[25]

On a related note, the asset in question 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

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[23] *See* Intergraph Corp. v. Intel Corp., 195 F.3d 1346, 1356, 1357 (Fed. Cir. 1999); Caribbean 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. AT&.T 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 Sys., Inc., 810 F. Supp. 486, 497 (S.D.N.Y. 1992); Data Gen. Corp. v. Grumman Sys. Support Corp., 761 F. Supp. 185, 192 (D. Mass. 1991).

[24] *City of Anaheim*, 955 F.2d at 1380 n.5 (quoting Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 544 (9th Cir. 1991)); *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)); *Hecht*, 570 F.2d at 992–93 ("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."); Twin Labs., Inc. v. Weider Health & Fitness, 900 F.2d 566, 568–69 (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).

[25] *See, e.g.*, *Aspen Skiing*, 472 U.S. at 594–95 (noting decline in—but not elimination of—plaintiff's share of the market for downhill skiing in Aspen); *Aspen Skiing*, 738 F.2d at 1518 n.11 (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) (finding liability while noting that it "would be possible . . . to conduct some kind of newspaper without any news service whatever"), *aff'd*, 326 U.S. 1 (1945).

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the benefits to be derived from access to the alleged essential facility can be obtained from other sources."[26]

Furthermore, the final factor enumerated in the *MCI Communications* rule—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."[27] Thus, the essential facilities doctrine does not impose liability where a defendant monopolist has a legitimate business (or technological) justification for declining access to the disputed assets to its competitor.[28]

Given the stringency of the widely-adopted requirements set forth in *MCI Communications*, U.S. 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, rather than condemning the doctrine itself.[29] Similarly, though commentators may disagree with the application of the doctrine to 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.[30]

C. THE ROLE OF INTENT

U.S. court opinions also suggest that, while not required to establish antitrust liability under the essential facilities doctrine, liability is particularly appropriate when the denial of access is motivated by an anticompetitive animus—usually demonstrated by a change in existing business practices with a specific intent to harm rivals. For example, in applying the doctrine in *Otter Tail*,[31] the Supreme Court cited a finding that the utility's "refusals to sell at wholesale [or otherwise provide access to the

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[26] *Apartment Source of Philadelphia*, 1999 WL 191649, at *7; *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*, 887 F.2d at 163 n.6 (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.").

[27] Hecht v. Pro-Football, Inc., 570 F.2d 982, 992–93 (D.C. Cir. 1977).

[28] *See City of Anaheim*, 955 F.2d at 1381.

[29] *See* Intergraph Corp. v. Intel Corp., 195 F.3d 1346, 1356, 1356 (Fed. Cir. 1999).

[30] *See* Areeda, *supra* note 1, at 853 n.21 (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.").

[31] 410 U.S. 366, 378 (1973).

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essential facility] were solely to prevent municipal power systems from eroding its monopolistic position." The Ninth Circuit in *City of Anaheim*[32] cited *Otter Tail* as an appropriate instance for application of essential facilities doctrine because "the sole reason for the denial of access is to maintain a monopoly." Other courts have similarly concluded that "[a monopolist] may not refuse to deal with [its competitor] if its refusal is motivated by anticompetitive animus."[33]

Most recently, in *Aspen Skiing*, which the Supreme Court decided as a straightforward "refusal to deal" case without reaching the question whether the defendant's facility was "essential," the Court found compelling the anticompetitive intent demonstrated by the "decision by a monopolist to make an important change in the character of the market."[34] 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.[35]

It is unsurprising that anticompetitive animus is relevant to application of the essential facilities doctrine. Numerous U.S. 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." In *Intergraph Corp. v. Intel Corp.*, the Federal Circuit stated that "[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."[36] The Supreme Court has reached the same conclusion, noting in *Eastman Kodak Co. v. Image Technical Servs., Inc.*, that the right to refuse to deal "exists only if there are legitimate competitive reasons for the refusal."[37]

D. RELATIONSHIP BETWEEN THE ESSENTIAL FACILITIES DOCTRINE AND BROADER ANTITRUST POLICY

Notwithstanding its status as an exceptional incursion into the general rule that firms normally may choose their business partners without

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[32] 955 F.2d at 1381.

[33] Sunshine Cellular v. Vanguard Cellular Sys., Inc., 810 F. Supp. 486, 497 (S.D.N.Y. 1992).

[34] *Aspen Skiing*, 472 U.S. at 604.

[35] *See id.* 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.").

[36] 195 F.3d 1346, 1358 (Fed. Cir. 1999).

[37] 504 U.S. 451, 483 n.32 (1992) (citing *Aspen Skiing Co.*, 472 U.S. at 602–05); *see also* Image Technical Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1210–11 (9th Cir. 1997) (citing Supreme Court precedents which limited the right to refuse to deal to

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antitrust restraint, the essential facility doctrine is consistent with, and supported, by the welfare-enhancing goals of U.S. antitrust policy, which aim to preserve and enhance competition. The doctrine seeks to prevent a firm with monopoly control over an essential asset from unlawfully excluding actual or potential rivals, or from extending its monopoly over that asset to another stage of production (from an input market to 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."[38]

This limitation on the discretion of dominant firms is justified by the bedrock principle of antitrust policy, which 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 enhances, rather than undercuts, incentives to innovate:

> 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.[39]

III. APPLICABILITY OF THE ESSENTIAL FACILITIES DOCTRINE TO INTELLECTUAL PROPERTY

A. RECENT CASES

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. Numerous U.S. courts have squarely held and otherwise indicated that the essential facilities doctrine applies to

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situations where there was no "purpose to create or maintain a monopoly") (internal quotation omitted).

[38] *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).

[39] 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).

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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—these 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 the defendant (the local telephone company and a publisher of telephone directories) claimed copyright protection.[40] 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."[41]

Similarly, other courts found no barrier to applying the essential facilities doctrine to intellectual property.[42] For example, in one prominent case, *Data General Corp. v. Grumman Systems Support Corp.*,[43] 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 (which 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.[44]

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[40] *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).

[41] *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).

[42] *See, e.g.*, Serv. & Training, Inc. v. Data Gen. Corp., 737 F. Supp. 334, 343–44 (D. Md. 1990) (allowing monopolization claim to proceed based on computer manufacturer's unwillingness to license diagnostic software to competitor computer repair service provider); *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).

[43] 761 F. Supp. 185, 191–92 (D. Mass. 1991), *aff'd in part and remanded*, 36 F.3d 1147 (1st Cir. 1994).

[44] U.S. courts are sensitive to concerns that limiting intellectual property protections may dampen incentives 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

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Moreover, the doctrine has been widely applied to other intangible assets; for example, such intangibles as services have been held to be essential facilities.[45] In *AT&T Co. v. North American Industries, Inc.*, for example, the plaintiff "adequately alleged that the central office services refused it by [defendant] are essential within the meaning of the federal antitrust laws."[46] Courts have also applied the doctrine to health care referral services.[47] 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.[48]

B. LESSONS FROM REFUSAL TO DEAL CASES

In considering related refusal to deal claims in several recent cases, appellate courts have stated that antitrust liability will attach notwithstanding claims of intellectual property protection. In *Image Technical Services, Inc. v. Eastman Kodak Co.*,[49] 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

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court considered defendant's argument that "allowing copyright owners to exclude others from the use of their work creates incentives 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 Services, 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.

[45] 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).

[46] 772 F. Supp. 777, 785 (S.D.N.Y. 1991).

[47] *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).

[48] 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 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 Mach. 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)).

[49] 125 F.3d 1195, 1201–02 (9th Cir. 1997).

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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,[50] 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."[51]

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.[52] Specifically, the Supreme Court earlier had 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,"[53] 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.'"[54]

The appellate court in the second *Kodak* case then reconciled these principles by concluding that the intellectual property protection provided only a "presumptively valid business justification" for a unilateral refusal to deal.[55] In other words, a firm could be subject to antitrust liability for refusal to deal in protected intellectual property where the presumption of a valid reason not to license was rebutted by evidence of anticompetitive intent.[56] 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

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[50] *See id.* at 1209–11.

[51] *Id.* at 1215.

[52] *See id.* at 1216 ("the [Supreme] Court in *Kodak* supposed that intellectual property rights do not confer an absolute immunity from antitrust claims").

[53] Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 479 n.29 (1992).

[54] *Id.* at 479. Though it addressed tying claims, the Court's language is broad enough to encompass monopolization claims based on a refusal to deal. *See* Lao, *supra* note 39, at 201.

[55] *See Kodak*, 125 F.3d at 1218 (quoting Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1187 (1st Cir. 1994)).

[56] *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").

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computers and servicer of its own products, refused to provide access to its copyrighted diagnostic software to firms competing to service those products.[57] A 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),[58] in considering the more general refusal to deal claim, the court of appeals held "that while exclusionary conduct can include a monopolist's unilateral 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."[59] However, the court noted that "we 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."[60] 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.

The U.S. Court of Appeals for the Federal Circuit, which is responsible for most cases involving patent issues, concluded, in *Intergraph Corp. v. Intel Corp.*,[61] 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.[62]

C. MESSAGES FROM THE U.S. ENFORCEMENT AGENCIES

The U.S. antitrust enforcement agencies—the Department of Justice Antitrust Division and the Federal Trade Commission—have taken posi-

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[57] *See Data General*, 36 F.3d at 1152–55.

[58] *See id.* at 1156 n.13.

[59] *Id.* at 1187.

[60] *Id.* at 1187 n.64; *see also id.* at 1183–84 (citing *Aspen Skiing* as an example of a unilateral refusal to deal where the proffered business justification was rejected).

[61] 195 F.3d 1346 (Fed. Cir. 1999).

[62] *See id.* at 1356, 1363. 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

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tions suggesting that, in appropriate cases, the essential facilities doctrine may be applied to intellectual property "bottlenecks."

On the most general level, the DOJ/FTC 1995 Antitrust Guidelines for the Licensing of Intellectual Property[63] (IP Guidelines) provide that "[t]he Agencies apply the same general antitrust principles to conduct involving intellectual property that they apply to conduct involving any other form of tangible or intangible property."[64] More directly related to allegations of monopolization, the IP 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.[65]

In addition to these policy statements, the enforcement activities of the U.S. agencies confirm that they will in fact pursue these kinds of antitrust claims in contexts involving intellectual property. For instance, one recent complaint filed by the FTC suggests that the U.S. 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 Intel, constituted an antitrust violation.[66] 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

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"[i]ntellectual property rights do not confer a privilege to violate the antitrust laws." United States v. Microsoft Corp., 253 F.3d 34, 63 (D.C. Cir. 2001).

[63] U.S. Department of Justice & Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property (1995), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,132.

[64] *Id.* § 2.1; *see also id.* § 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.").

[65] *Id.* § 2.2.

[66] *See Intel Corp.*, FTC Dkt. No. 9288 (June 8, 1998) (Complaint); *see also* Charles L. Freed, *Antitrust and the Duty to License Intellectual Property*, ANTITRUST, Fall 1999, at 33, 36 (noting that FTC brief cited *Data General* and *Kodak* as leading cases). Robert Pitofsky was Chairman of the Federal Trade Commission at the time the *Intel* case was initiated and settled.

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imposed mandatory licensing requirements for competitor use of copyrighted systems as a condition of resolving antitrust disputes.[67]

IV. HOW MANY RELEVANT MARKETS MUST BE PROVEN?

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 of the doctrine describes two vertically-related markets. For example, "*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.'"[68]

However, there is no *requirement* that a plaintiff alleging anticompetitive denial of access to an essential facility demonstrate the existence of two separate relevant product 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 the plaintiff and the 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 multi-area ticket offering—itself constituted a separate antitrust market distinct from the 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).[69]

The lower court opinions in the *Aspen Skiing* case directly contradict any assertion that the essential facilities doctrine only applies when a company with market power supplies a product or service that suppliers

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[67] *See, e.g.*, U.S. v. 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* U.S. 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).

[68] AT&T Co. v. North Am. Indus., 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)); *see also, 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 prevent a monopolist in a given market . . . from using its power to inhibit competition in another market.").

[69] *Aspen Skiing*, 738 F.2d at 1513.

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or customers must have in order to compete. The *Aspen Skiing* court confronted a similar claim by the defendant, which "argu[ed] that . . . a duty [to deal] can arise only in 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."[70] 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."[71] Further, the court was "not convinced that the essential touchstone of bottleneck cases is vertical integration."[72]

Lower courts have similarly applied the essential facilities doctrine irrespective of whether the essential facility constitutes a separate vertically-related product market. For example, one lower court considered a dispute between cellular providers in adjacent service areas.[73] 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."[74] Notwithstanding that the 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.

Similarly, an appellate court reinstated a plaintiff's essential facility claim after it was dismissed by the trial court in *Delaware & Hudson Railway Co. v. Consolidated Rail Corp.*[75] The case involved a dispute between two rail companies. Because the plaintiff had a more limited track system than the defendant, it required access to the defendant's tracks for portions of certain shipping trips—the end portion (or "short haul")—to deliver to specific destinations. The defendant, which previously had acquiesced in such arrangements before the rival carriers began compet-

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[70] *Id.* at 1518.

[71] *Id.* at 1519 n.11; *see also id.* at 1521 (rejecting such "restrictive analysis").

[72] *Id.* at 1519 n.11; *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 Skiing*, 738 F.2d at 1518).

[73] *See* Sunshine Cellular v. Vanguard Cellular Sys., Inc., 810 F. Supp. 486, 496–98 (E.D. Pa. 1992).

[74] *Id.* at 497.

[75] 902 F.2d 174 (2d Cir. 1990).

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ing 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."[76] Notwithstanding the absence of two separate, vertically-related markets, the appellate court found that the plaintiff's essential facilities claim could proceed.[77]

As these cases suggest, the essential facilities doctrine does not require a plaintiff to distinguish neatly the relevant levels of production into two separate relevant product 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. This is not to say that the essential facilities doctrine does *not* apply where two vertically-related markets are involved; obviously, as the cases cited above indicate, it captures such situations as well.[78] The guiding principle, however, is that U.S. courts simply are not concerned with a demonstration that the essential facility relates to a distinct product market. The courts require only that the 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.[79]

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 U.S. 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.

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[76] *Id.* at 179.

[77] *See id.* at 180. The Court of Appeals for the Federal Circuit, 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.").

[78] *See supra* note 68 and cases cited therein.

[79] *See supra* text accompanying note 22 (listing factors required to prove essential facilities claim).

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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 the plaintiff and the defendant with respect to the asset alleged to be "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.[80]

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.[81]

V. 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 particularly when there is evidence of a specific intent to injure a rival), U.S. courts will impose antitrust liability for a monopolist's refusal to license access to an essential facility. The same result obtains in those circumstances where

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[80] *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); *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) (describing *Aspen Skiing* as "appl[ying] in a situation where there is *competition* and *competitors*").

[81] *See Intergraph*, 195 F.3d at 1356 (application of the essential facility theory requires a "competitive relationship" between the parties); Caribbean 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).

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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*:[82] U.S. 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*. While it is important that the essential facilities doctrine not be allowed to expand into a vague and amorphous set of "rights," the approach of most lower courts in the United States—applying the doctrine cautiously and pursuant to limiting principles—seems to work well.

[82] 708 F.2d at 1132–33.

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