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Dominating digital music

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Apple Computer Inc. has embraced vigorous antitrust enforcement in order to enjoin the exclusionary behavior of its rival, Microsoft Corp. Now, however, Apple may have engaged in similar exclusionary conduct.

Apple has designed its iTunes downloadable digital music service and iPod portable digital music players to operate exclusively with one another for their most technologically significant uses: The iPod is the only music player that can play songs downloaded from iTunes, and iTunes offers the only legally downloadable music that can be instantaneously transferred to the iPod. This exclusive interoperability is accomplished by embedding digital rights management (DRM) software into the iPod/iTunes code.

Apple's practices raise significant concerns under the Sherman Act's prohibitions against tying and monopolization. Tying is evaluated under either antitrust's per se rule or its rule of reason. To succeed on a per se claim, a plaintiff need only show that the defendant possesses market power and that it has forced consumers to purchase the tied product as a condition of selling the tying product over which the defendant has market power. If the plaintiff fails to prove this, then the claim may proceed under the rule of reason, which requires proof of anti-competitive effects and permits an inquiry into the business justifications for the tie. Apple's tying arrangement is problematic even under the more searching rule of reason because the tie seemingly reinforces its market power, just as the bundling of Internet Explorer with Windows reinforced Microsoft's Windows monopoly.

Economic theory dictates that Apple's market dominance will continue due to the "lock in" effect associated with the iPod/iTunes tie-in. When an iPod user who has downloaded music from iTunes faces the decision to buy a new digital music player, he will be confronted with the following dilemma: either buy another iPod to ensure that he can continue to enjoy the digital music that he has downloaded over the years—an investment of hundreds, possibly thousands, of dollars—or face the prospect of rendering this investment almost worthless. Most users will thus be required to purchase another iPod. This "lock in" effect could reinforce both iTunes' and iPod's market power, and may be doing so already.

In *Slattery v. Apple Computer Inc.*, a consumer class action recently filed in the Northern District of California that challenges the iPod/iTunes tie, Apple argues that there is no tie-in because consumers may buy or use an iPod or a song from iTunes without also purchasing or using the other. For example, consumers can buy songs from iTunes without storing them on iPods, and consumers do not have to download music from the Internet in order to enjoy their iPods (e.g., they can "rip" their own CDs).

These arguments cut tying jurisprudence too finely. Tying law exists to protect consumers from artificial restraints that force them to make choices they would not make absent the tie. The relevant inquiry is not how that forcing is accomplished, only whether it occurs. Tying law also exists to prevent firms with market power from extending that power into other markets, and from reinforcing that power.

Monopolization

Apple's market shares—90% of hard-drive digital music players, and 70% of all legal music downloads—and iPod pricing suggest that Apple possesses monopoly power (assuming relevant markets comprised of portable digital music players and lawful downloadable music services). And Apple's imposition of the DRM interoperability barrier

appears to be "exclusionary" conduct.

In *Slattery*, Apple characterizes its behavior as a mere unilateral refusal to license its DRM software to competitors. Apple argues that its behavior is lawful in view of *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398 (2004), which held that refusals to deal with competitors generally do not constitute exclusionary conduct. But this is not a case-like *Trinko*-in which Apple has refused to grant its competitors access to its distribution facility. Rather, Apple has foreclosed a significant number of *consumers* from iTunes unless they also buy an iPod, even if they are willing to pay iTunes' retail price. Also, here there is no mere absence of dealing, but Apple's affirmative integration of its DRM software into its iPod/iTunes code in order to prevent consumers from using competitive products.

Although Apple may attempt to justify the DRM-imposed tie as protection against music piracy, such a justification may be met with skepticism. Electronics manufacturers Sony, Panasonic, Samsung and Philips-all of which share Apple's concerns about music piracy-have entered into a joint DRM venture that allows interoperability.

In sum, Apple's tie-in harms consumers and will continue to do so to the extent that consumers are "locked in" to the iPod/iTunes platform.

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