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## Increasing Competition in the Petroleum Industry by Proscribing Trademark Tying Arrangements

For over fifty years, the Federal Trade Commission (FTC) has scrutinized the petroleum industry in the interest of preserving and promoting competition. FTC efforts have met with limited success, however, since the major integrated oil companies have successfully evaded many attacks on specific anticompetitive practices.<sup>1</sup> Consequently, over 300 formal investigations into alleged deceptive practices have left the structural foundation of the petroleum industry basically unchanged.<sup>2</sup>

Contemporary concern with the level of competition in the oil industry prompted a penetrating new inquiry that revealed the compelling market dominance of the largest integrated firms.<sup>3</sup> As a result, the FTC filed a complaint requesting court-ordered divestiture of previously integrated operations.<sup>4</sup> This approach, which is designed to restructure the foundation of the industry, is an effort to create price competition and correct several anticompetitive practices by establishing new, independent firms.<sup>5</sup> Divestiture is not without its problems,<sup>6</sup> however, and both the FTC and private litigants continue to seek additional ways of battling anticompetitive practices of the largest oil companies.

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1. FTC, PRELIMINARY STAFF REPORT ON THE PETROLEUM INDUSTRY I-1 (1973) [hereinafter cited as FTC REPORT]. For a discussion of the FTC Report, see Comment, *FTC v. The Petroleum Industry: The Need for Consistent Regulatory Policy*, 24 BUFFALO L. REV. 761 (1975) [hereinafter cited as *FTC v. Petroleum Industry*].

2. FTC REPORT, *supra* note 1, at I-2.

3. The inquiry resulted in a published report documenting the dominance of the eight largest oil companies at each level of the industry. The eight largest firms are Texaco, Shell, Standard of New Jersey, Standard of Indiana, Gulf, Mobil, Atlantic Richfield, and Standard of California. In 1969, these companies controlled 51% of net domestic crude production; in 1970, 58% of refining capacity and 55% of gasoline marketing. FTC REPORT, *supra* note 1, at II-3, -22, -23. The FTC alleges that these companies have restrained competition at all levels of the industry and have earned profits in excess of those that would have been earned in a competitive market. *FTC v. Petroleum Industry*, *supra* note 1, at 766-67. *But see* Tell, *Attacks on the Petroleum Industry: A Rebuttal*, 20 ROCKY MTN. MIN. L. INST. 91 (1975).

4. *See* *FTC v. Petroleum Industry*, *supra* note 1, at 761 n.1.

5. *Id.* at 778-79.

6. Divestiture would probably generate considerable litigation and reorganization expenses, eliminate some economies of scale, and require delicate renegotiation of foreign marketing arrangements. Additionally, procedural delays and appeals could leave the ultimate outcome languishing in the courts for years. Moreover, unless divestiture were accompanied by specific regulatory changes and continued emphasis on particular abuses, new anticompetitive practices would undoubtedly occur. *See* *FTC v. Petroleum Industry*, *supra* note 1, at 779-82. *See generally* Comment, *Attacking Barriers to Entry: An Alternative to Divestiture in Antitrust Enforcement*, 20 U.C.L.A. L. REV. 311 (1972).

One such practice is the arrangement whereby a major oil company (major) permits wholesale jobbers or retail dealers to sell refined petroleum under the major's commercially attractive trademark only if the jobber or dealer agrees to purchase from the major refiner all refined products sold under the trademark.<sup>7</sup> This practice has been challenged on the theory that it constitutes an illegal tying arrangement that restrains commerce.<sup>8</sup>

A tying arrangement, or tie-in, is a stratagem whereby one item (the tying device) is sold only on the condition that a separate product (the tied product) also be purchased.<sup>9</sup> A tie-in can-

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7. See, e.g., *Hearings on Marketing Practices in the Gasoline Industry Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. 2, at 911-13 (1971) [hereinafter cited as *Hearings on Gasoline Interchangeability*]. The dealer supply contract of Standard Oil of California provides:

4. (a) The petroleum products covered by this agreement shall be sold by Buyer as the products of Seller and only under the trademarks or brands regularly used by Seller for such products and Buyer shall not, at any time, offer for sale under Seller's trademarks or brands, any product not authorized to be sold thereunder.

*Id.* at 911.

8. See *Redd v. Shell Oil Co.*, 1974-2 Trade Cas. ¶ 75,390, at 98,264 (D. Utah 1974), *rev'd*, 524 F.2d 1054 (10th Cir. 1975), *cert. denied*, 96 S. Ct. 1508 (1976); *Phillips Petroleum Co.*, [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,716 (FTC 1974). Tying arrangements have been proscribed under three federal antitrust statutes: (1) section 1 of the Sherman Act, 15 U.S.C. § 1 (1970) (see *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969)); (2) section 3 of the Clayton Act, 15 U.S.C. § 14 (1970) (see *United States v. Jerrold Elecs. Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961)); and (3) section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a) (1970) (see *FTC v. Texaco*, 393 U.S. 223 (1968)). When the right to use a trademark is involved as the alleged tying device, only section 1 of the Sherman Act and section 5 of the Federal Trade Commission Act may be employed, since the alleged tying item is an intangible, to which section 3 of the Clayton Act does not apply.

*Phillips* summarizes the provisional acceptance of a consent decree issued by the FTC against Phillips Petroleum. The decree is aimed at the exclusive dealing arrangement that is enforced by tying the dealer's supply of gasoline to the right to use the Phillips trademark. Although the decree provides that lessee dealers may be required to protect the Phillips trademark and maintain a representative amount of Phillips' trademarked gasoline on their premises, Phillips may not prohibit dealers from selling gasoline purchased from non-Phillips sources. In fact, non-Phillips gasoline can even be financed with Phillips' credit provisions.

Although the order is not explicit on this point, one commentator has suggested that the provision for trademark protection requires the non-Phillips gasoline to conform to specifications that assure that the gasoline is the equivalent of trademarked Phillips gasoline. Solomon, *An Analysis of Tying Arrangements: The Offer You Can't Refuse*, 26 MERCER L. REV. 547, 557 (1975).

9. In *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5-6 (1958), the Supreme Court defined a tying arrangement as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier."

not be found unless the tying device and the tied product are separate and distinct. Here, the tying device is the right to sell refined petroleum products under the trademark of a major oil company; the tied product is the dealer's or jobber's supply of the major's refined petroleum. When a tying arrangement is enforced, competition on the merits is curtailed, since the tied product rides to market on the coattails of the tying device. Such arrangements, according to the Supreme Court, "serve hardly any purpose beyond the suppression of competition."<sup>10</sup>

An extensive market analysis into the impact on competition normally is not required in order to support an allegation of an antitrust violation caused by tying. Rather, the procedure has been condensed into a "per se" rule. Under this approach, tie-ins are presumed to be illegal when the requisite separateness is established and the arrangement is shown to involve significant anticompetitive potential.<sup>11</sup> A valid justification for the tie-in, however, can provide an affirmative defense.

Although the Supreme Court has applied the per se test where patented and copyrighted items have been used as tying devices,<sup>12</sup> the Court has not yet examined an alleged tie-in involving a trademark. The federal circuit and district courts and the FTC, however, have applied the per se test to trademark tie-ins with conflicting results. There is no doubt that a license to use a trademark can be a tying device,<sup>13</sup> but given proper circumstances, the requisite separateness or distinctness between the right to use the trademark and the tied product may not be present.<sup>14</sup>

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10. *Standard Oil Co. v. United States*, 337 U.S. 293, 305-06 (1949).

11. See, e.g., *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969); *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958); *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), cert. denied, 405 U.S. 955 (1972); *Warriner Hermetics, Inc. v. Copeland Refrig. Corp.*, 463 F.2d 1002 (5th Cir.), cert. denied, 409 U.S. 1086 (1972).

Traditionally most courts treat the second aspect, significant anticompetitive potential, as composite in nature. This characteristic is discussed more thoroughly at notes 39 to 62 and accompanying text *infra*.

12. *United States v. Loew's, Inc.*, 371 U.S. 38 (1962); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *International Salt Co. v. United States*, 332 U.S. 392 (1947).

13. In *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), cert. denied, 405 U.S. 955 (1972), the court found that requiring licensed Chicken Delight franchisees to purchase packaging supplies and spice mixes exclusively from the franchisor constituted a tying arrangement. See *Warriner Hermetics, Inc. v. Copeland Refrig. Corp.*, 463 F.2d 1002 (5th Cir.), cert. denied, 409 U.S. 1086 (1972); *Chock Full O'Nuts Corp.*, [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,441 (FTC 1973).

14. In *Capital Temporaries, Inc. v. Olsten Corp.*, 506 F.2d 658 (2d Cir. 1974), the court held that the right to do business under the marketing emblem is not a separate tying item unless the arrangement involves more than a mere trademark. See *Susser v.*

Thus, the general applicability of the per se tying rule to trademark tie-ins remains unclear.<sup>15</sup>

This comment will analyze the applicability of the per se rule and the rule's potential affirmative defenses in the context of refined petroleum trademark tie-ins and explore some implications of proscribing this marketing method.

## I. APPLICATION OF THE PER SE RULE TO PETROLEUM TRADEMARK TYING ARRANGEMENTS

### A. *Separateness of the Tying Device and the Tied Product*<sup>16</sup>

The courts have not clearly defined what constitutes separateness for purposes of tying analysis under the per se test. *Fortner Enterprises, Inc. v. United States Steel Corp.*,<sup>17</sup> the Supreme Court's most recent decision involving a tie-in, is not dispositive of the question of separateness. It illustrates, however, that even items not traditionally recognized as distinct can be treated as separate, particularly when tying the items has an anticompetitive impact. In *Fortner*, the Court held that an arrangement whereby *credit* was provided only on the condition that another product also be purchased could constitute an illegal tying arrangement.<sup>18</sup> Similarly, under proper circumstances, a

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Carvel Corp., 332 F.2d 505 (2d Cir. 1964), *cert. dismissed as improvidently granted*, 381 U.S. 125 (1965); *Mid-American ICEE, Inc. v. John E. Mitchell, Co.*, 1973-2 Trade Cas. ¶ 74,681, at 94,982 (D. Ore. 1973) (ICEE trademark and ICEE machine not separate; however, tying established on other grounds).

15. *See, e.g.,* McCarthy, *Trademark Franchising and Antitrust: The Trouble with Tie-Ins*, 58 CALIF. L. REV. 1085, 1109-16 (1970).

16. If a marketing arrangement undeniably involves two separate items, the first question is whether the items are tied—that is, whether one of the items could not be purchased without the other. For instance, in *Ungar v. Dunkin' Donuts of America, Inc.*, 68 F.R.D. 65 (E.D. Pa. 1975), *rev'd and remanded on other grounds*, 531 F.2d 1211 (3d Cir. 1976), the court recognized that several separate items were involved. Therefore, the court required the plaintiffs to show that the items were tied—either by coercion or by formal agreement. 531 F.2d at 1224. The items are tied in the case of a refined petroleum trademark tie-in because the dealer supply contract formally links the right to use the trademark to the supply of refined petroleum. *See* note 7 *supra*.

Finding that the right to use the trademark is formally linked to the product assumes, however, that the items are separate. This assumption is not always valid in the field of trademarks. Whether the items are separate must be specifically considered.

17. 394 U.S. 495 (1969).

18. *Id.* at 498. The *Fortner* decision demonstrates how simple it is to find the required separateness. Fortner agreed to purchase overpriced home building materials from a subsidiary of U.S. Steel in order to obtain the tying device, uniquely attractive financing provisions offered by the parent corporation. The dissent reasoned that incidental and ancillary selling provisions such as financing arrangements could not be construed to be separate tying items. *Id.* at 510-25 (White & Fortas, JJ., dissenting in separate opinions). The majority held, however, that although almost all modern selling involves providing

*trademark* would be considered a separate tying device.

In modern marketing and manufacturing, trademarks generally serve either an identifying or a licensing function. Historically, identification has been more widely acknowledged as the primary function of a trademark.<sup>19</sup> Thus, in traditional marketing and distributing agreements, the trademark is seen as something intimately associated with the product before the product reaches the marketing outlet, since the emblem identifies the product, its source, and its quality. In such situations, the trademark is regarded as inseparable for purposes of tying analysis.

In contrast, modern chain-style marketing techniques have encouraged the development of a new trademark function—the licensing function.<sup>20</sup> Licensing is the purpose served by trademarks employed in “rent-a-name” franchise operations, where the emblem serves principally as a business opportunity for potential franchisees attracted by the right to sell under a commercially valuable emblem. In this situation, it is easier to conceptualize the trademark as a separate device, and courts have generally treated it as distinct for tying purposes.

Even courts that have treated the right to use a trademark as a separate item recognize, however, that trademarks historically have been considered inherently related to the product they identify rather than separate and distinct. Hence, establishing the requisite separateness requires that the trademark be found to serve more than its traditional purpose.<sup>21</sup> For example, in *Siegel v. Chicken Delight, Inc.*,<sup>22</sup> the United States Court of Appeals for the Ninth Circuit found that the Chicken Delight trademark served primarily as a licensing device for a chain-style busi-

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some incidental services or sales materials, even these incidentals can be separate items, particularly where they have an anticompetitive effect. Therefore, U.S. Steel's credit provisions were held to be a separate item. *Id.* at 507-08.

*Fortner* may make it easier to consider even those trademarks that serve incidental or ancillary purposes as separate and distinct items. See McCarthy, *supra* note 15, at 1107-09.

19. See Diamond, *The Historical Development of Trademarks*, 65 TRADEMARK REP. 265 (1975); Hanak, *The Quality Assurance Function of Trademarks*, 43 FORDHAM L. REV. 363 (1974); Lunsford, *Consumers and Trademarks: The Function of Trademarks in the Market Place*, 64 TRADEMARK REP. 75, 87 (1974).

20. See McCarthy, *supra* note 15, at 1112.

21. See, e.g., *Redd. v. Shell Oil Co.*, 524 F.2d 1054, 1057 (10th Cir. 1975), *cert. denied*, 96 S. Ct. 1508 (1976); *Capital Temporaries, Inc. v. Olsten Corp.*, 506 F.2d 658, 663 (2d Cir. 1974); *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 48-49 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972); *Chock Full O'Nuts Corp.*, [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,441 (FTC 1973).

22. 448 F.2d 43, 48-49 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

ness and was not intimately related to the particular products sold. In rejecting the defendant's argument that trademarks and franchise licenses cannot be separate and distinct items, the court looked closely at the reason for tying the trademark to the product. The court determined that, since the Chicken Delight trademark was designed to represent goodwill and quality, it could be a distinct product.<sup>23</sup> Therefore, the court held that the right to do business under the Chicken Delight name was a separate tying device. In reaching its conclusion, the court deemed it important that the "sale of a franchise license, with the attendant rights to operate a business in the prescribed manner and to benefit from the goodwill of the trade name, in no way requires the forced sale by the franchisor of some or all of the component articles."<sup>24</sup> This analysis lends considerable support to the proposition that a major oil company trademark is a separate tying device where the licensee benefits from the goodwill of the trade name.

In *Redd v. Shell Oil Co.*<sup>25</sup> the United States Court of Appeals for the Tenth Circuit reached the opposite result. Pursuant to the sales contract between the parties, Redd, the jobber, was permitted, but not required, to sell Shell petroleum products under the SHELL trademark. Although Shell required Redd to purchase a minimum quantity of Shell products, he was not precluded from purchasing petroleum from other sources and selling it under a different trademark or under no trademark at all.<sup>26</sup> The court concluded that "the permissive trademark use did not in any way transform the mark into a separate product to be sold to the plaintiff."<sup>27</sup> In reaching this conclusion, the court was influenced by its observation that Redd was in business for himself, had his own bulk stations and trucks, did business as "Abajo Petroleum" rather than under Shell's name, and sold products represented to be from sources other than Shell. Thus, he did not have a typical "franchise," and his use of the SHELL trademark had nothing to do with the manner in which he did business.<sup>28</sup> The rationale for the court's conclusion seems to be that there was no separate sale of the SHELL trademark.<sup>29</sup>

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23. *Id.*

24. *Id.* at 49.

25. 1974-2 Trade Cas. ¶ 75,390, at 98,264 (D. Utah 1974), *rev'd*, 524 F.2d 1054 (10th Cir. 1975), *cert. denied*, 96 S. Ct. 1508 (1976).

26. See 524 F.2d at 1056; 1974-2 Trade Cas. ¶ 75,390, at 98,265-66.

27. 524 F.2d at 1057.

28. *Id.* at 1056.

29. There are reasons for treating the refined petroleum trademark as a separate item which the Tenth Circuit may have ignored. See notes 30-38 and accompanying text *infra*.

To provide guidance in resolving the conceptual issue of separateness, it has been suggested that the inquiry focus on "whether the items can be and have been sold separately—that is, whether the industry in question treats the items as separate."<sup>30</sup> The gasoline marketing arrangement is difficult to classify simply by trademark function alone, since it is a hybrid in which the major brand emblem serves both an identifying and a licensing function. Therefore, an analysis of petroleum industry practices is helpful in determining whether the trademark should be treated as a separate tying device.

In traditional marketing arrangements, the product and the trademark are treated as inseparable. Soup purchased in a brand name can at the supermarket is one example of a traditional arrangement—the emblem is part of the packaging itself. Bulk transfers of trademarked products can involve similar inseparability, but this may be more difficult to conceptualize, since each product unit is not necessarily packaged in a container bearing the marketing emblem. Nevertheless, where a manufacturer consistently and permanently links the trademark with the product before releasing the product into the marketing arena, the right to use the trademark and the product itself should be treated as one indivisible item. This marketing method has been referred to as a typical sale of a trademarked product, or a typical bulk transfer. Treating the product and the trademark as inseparable assures that the trademark will not be used to sell inferior products and that purchasers can rely on the quality and uniformity of the product. Additionally, it safeguards the trademark owner's right to market under the emblem.<sup>31</sup> In such a case, the requisite separateness cannot be found for purposes of applying the per se rule, since the emblem and the product it represents are not sold separately.

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30. McCarthy, *supra* note 15, at 1108. In *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 48 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972), the court stated that the following factors must be considered: (1) the function of the aggregation; (2) whether cost savings result from joint sale; (3) whether the items are normally sold as a unit and in fixed proportions; and (4) the function of the trademark. In *United States v. Jerrold Elecs. Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961), the lower court considered the following: (1) whether the items were sold exclusively as a single package; (2) whether the composition of each sale had varying proportions of the tying and tied items; (3) whether customers were charged for the items separately; and (4) whether there was a sound business reason for the combination.

31. Permitting inferior products or products of inconsistent quality to be marketed under the trademark might well constitute a misuse of the legal monopoly conferred upon a trademark owner. See Trade-Mark Act of 1946, 15 U.S.C. §§ 1051-1127 (1970); Comment, *Quality Control and the Antitrust Laws in Trademark Licensing*, 72 YALE L.J. 1171 (1963) [hereinafter cited as *Quality Control*].



The marketing of refined petroleum products, however, does not involve the same situation, because the supply of products and the right to sell under the major brand emblem are frequently sold separately by the majors through the use of petroleum exchange agreements. An exchange agreement is a method whereby one refiner purchases gasoline from another refiner. Exchanging gasoline reduces transportation costs and permits firms lacking refining capacity in a certain market area to offer gasoline to their branded franchisees in that area.<sup>32</sup> *Redd v. Shell Oil Co.*,<sup>33</sup> for example, illustrates the common situation where a jobber or dealer receives his supply of gasoline from one company's refinery but sells it under another company's trademark.<sup>34</sup> The use of exchange agreements demonstrates that it is appropriate to consider the marketing opportunity (trademark) and the refined petroleum as separate. Selling these two items separately is possible because the refined petroleum of one company is essentially interchangeable with the refined petroleum from another company. In fact, the majors take advantage of interchangeability until the petroleum is ready for sale to the public. As Dr. Albert J. Fritsch of the Center for Science in the Public Interest stated, "gasoline is treated commercially as a fungible commodity within the petroleum refining and transport network and then, by a grand hocus pocus, becomes a nonfungible product when it reaches the consumer."<sup>35</sup> The fungibility of gasoline is further demonstrated by the fact that the American Society for Testing Materials issues gasoline specifications that are uniformly accepted throughout

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32. See *Hearings on Gasoline Interchangeability*, *supra* note 7, at 649-50 (statement of Frank H. Staub, Vice President of Marketing, Shell Oil Co.), 891 (statement of D.L. Mulit, Vice President of Sales, Standard Oil Co. of California).

33. 1974-2 Trade Cas. ¶ 75,390, at 98,265 (D. Utah 1974), *rev'd*, 524 F.2d 1054 (1975), *cert. denied*, 96 S. Ct. 1508 (1976).

34. Keith Redd, the plaintiff, alleged that commerce was restrained because he was required to purchase his entire supply of gasoline from a Shell refinery, whereas other jobbers were able to obtain gasoline from several brands' refineries and sell it under a different trademark. Shell refined all the gasoline that was delivered to Redd. Under an exchange agreement, however, Shell refined gasoline for Continental Oil Co. and sold it to a CONOCO jobber, without the right to use the SHELL trademark, at a reduced price. Furthermore, Eugene Hunt, a branded SHELL jobber, received gasoline refined by American Oil; yet he sold it under the SHELL name. When Redd purchased gasoline from Hunt and sold it under the SHELL trademark, Shell Oil terminated Redd's contract. 1974-2 Trade Cas. ¶ 75,390, at 98,265-68.

35. *Hearings on Gasoline Interchangeability*, *supra* note 7, at 691-92; *see id.* at 697 (statement of Dr. Fritsch), 523 (statement of Maj. Gen. Charles C. Case, Commander, Defense Fuel Supply Center). Industry spokesmen, on the other hand, maintain that gasoline is not fungible. *Id.* at 672-75 (written response of Shell Oil Co.), 779-82 (statement of Randall Meyer, Vice President, Humble Oil & Refining Co.).

the petroleum industry and are closely paralleled by federal government gasoline purchasing specifications.<sup>36</sup> Gasoline purchased by the federal government, for example, must conform with specifications measured primarily in terms of octane ratings and volatility classes. The brand, the refinery, and the size of the oil company make no difference whatsoever;<sup>32</sup> even the presence or absence of gasoline additives is disregarded unless it can be established that engine performance might be affected.<sup>38</sup>

The use of exchange agreements and the industry's treatment of refined petroleum as a fungible commodity clearly distinguish bulk petroleum transactions from bulk transfers where the manufacturer consistently links the trademark to the product. Since refiners do not consistently and permanently link the right to use the trademark with the gasoline supply before releasing the product into the marketplace, the trademark and the product should be treated as separate items for purposes of the *per se* rule.

### B. *Significant Anticompetitive Potential of Tying Arrangements*

The proscription of tie-ins is not aimed at the mere coupling of two items but at the significant anticompetitive potential resulting from the economic leverage of the tying device. In early decisions, the Supreme Court's test of significant anticompetitive potential was based on the market dominance of the firm imposing the tie.<sup>39</sup> Market dominance, however, is difficult for the

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36. *Id.* at 521, 529 (statement of Maj. Gen. Charles C. Case, Commander, Defense Fuel Supply Center).

37. *Id.* at 538-45 (Fed. Spec. W-G-76B, March 20, 1970).

38. *Id.* at 520-30. There is considerable controversy about the usefulness of additives and their effect on the interchangeability of gasolines. Under present marketing arrangements, essentially similar additives are available as shelf items to all refiners. *Id.* at 768-69 (testimony of A.J. Williams, Vice President, Dow Chemical Co.). Furthermore, additives are frequently dispensed by sophisticated equipment into several different brands at a common location such as a bulk plant or the terminus of a pipeline. *Id.* at 637-38 (testimony of D.W. Calvert, Executive Vice President, Williams Co.). This suggests that the additive package desired in a particular brand of gasoline could be added to the gasoline without tying the supply of gasoline to the right to use the trademark. Therefore, even if a dealer or jobber obtained his gasoline from a source other than the company whose trademark he displays, he could still obtain the additive package advertised in connection with the trademark under which he markets gasoline. Although it may be impractical for individual dealers to mix additives at their stations, *id.* at 651 (statement of Frank H. Staub, Vice President of Marketing, Shell Oil Co.), satisfactory alternative methods are available.

39. See *FTC v. Sinclair Ref. Co.*, 261 U.S. 463, 474 (1923); *United Shoe Mach. Corp. v. United States*, 258 U.S. 451, 457-58 (1922).

plaintiff to establish.<sup>40</sup> Accordingly, more recent Supreme Court decisions have rejected the need to show market dominance and have adopted the following criteria in determining whether the anticompetitive potential is significant enough to establish an antitrust violation: (1) the tying arrangement must involve "sufficient economic power to appreciably restrain free competition" in the market for the tied product; and (2) a "not insubstantial amount of interstate commerce" must be affected by the arrangement.<sup>41</sup>

### 1. *Sufficient economic power*

a. *Market influence.* One factor that may be determinative of whether "sufficient economic power" exists is the market influence of the firm imposing the tie. The seller's market influence can be demonstrated by the seller's ability to impose price increases, other burdensome terms, or merely the tie-in itself on an appreciable number of buyers.<sup>42</sup> The market influence of the major integrated oil companies over dealers and jobbers is manifested by the thousands of dealers and jobbers throughout the nation who are locked into these tying contracts.<sup>43</sup> As the Supreme Court noted in *Northern Pacific Railway v. United States*,<sup>44</sup> "the very existence of this host of tying arrangements is

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40. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958).

41. See *Northern Pac. Ry. v. United States*, 356 U.S. 1, 6 (1958); *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 501-04 (1969).

Although in recent decisions the Sherman Act test of anticompetitive potential has been described as two-pronged, arguably one prong would suffice. When a tying arrangement involves sufficient economic power to "appreciably" restrain free competition, the volume of commerce required by the second prong is almost certainly satisfied. The Supreme Court appears to have recognized this by minimizing the importance of the second prong. For example, in *Fortner*, the Court held that the second prong is satisfied so long as the amount of commerce is not de minimus. Moreover, under section 3 of the Clayton Act, a per se violation exists even if only one prong of the test is met. See *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 607-09 (1953).

For convenience, this comment employs the traditional bifurcated Sherman Act analysis. But the intent of the courts could be preserved and analysis simplified if the Sherman Act test and the Clayton Act test were harmonized and the per se rule were rephrased. A tying arrangement should be per se illegal if there is a separate tying device and a tied product and the arrangement has the potential to significantly restrain interstate commerce.

42. See *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 504 (1969).

43. In *Redd v. Shell Oil Co.*, for example, the alleged tie-in was part of a standard-form contract imposed on over 800 Shell jobbers and retailers located throughout the nation. Brief for Appellee at 42, *Redd v. Shell Oil Co.*, 524 F.2d 1054 (10th Cir. 1975), cert. denied, 96 S. Ct. 1508 (1976).

44. 356 U.S. 1, 7-8 (1958).

itself compelling evidence of the defendant's great power."

The inequality between the bargaining positions of the major oil company and the jobber or retailer further demonstrates the market influence of the seller. As one circuit judge has commented:

The inherent leverage a major oil company has over its dealers results from the market structure of the industry and the special dependence on the company of the service station dealer (who is usually also a lessee). . . . *A man operating a gas station is bound to be overawed by the great corporation that is his supplier, his banker, and his landlord.*<sup>45</sup>

Jobbers and retailers are simply unable to bargain for anything but a tie-in if the major chooses to impose it.

Although refiners often expressly disclaim in their contracts any control over jobbers and station operators, such contract language is frequently not observed in practice.<sup>46</sup> Refiners often dictate hours, location, station appearance, product source, and credit card policy. They also manipulate price and sales territory through bulk hauling rates and temporary market allowances.<sup>47</sup>

*b. Inherent power.* Alternatively, the sufficient economic power requirement can be satisfied by showing that the tying device itself has "inherent power" to appreciably restrain commerce.<sup>48</sup> The inherent power of the tying device can be demonstrated by its desirability to buyers.<sup>49</sup> This desirability is clearly evidenced when the tied product commands a higher wholesale or retail price than if it were sold separately.

Major brand petroleum trademarks possess this quality. By sponsoring nationwide advertising and encouraging motorists to purchase gasoline on credit, the majors induce consumers to pay a higher price for branded gasoline. This, in turn, permits the majors to charge dealers and jobbers more for gasoline tied to the trademark.<sup>50</sup> The increased price is thought by some to signifi-

45. *Shell Oil Co. v. FTC*, 360 F.2d 470, 487 (5th Cir. 1966) (emphasis added).

46. Solomon, *supra* note 8, at 549.

47. See Brief for Appellee at 13-17, *Redd v. Shell Oil Co.*, 524 F.2d 1054 (10th Cir. 1975), *cert. denied*, 96 S. Ct. 1508 (1976) (discussing Shell's delivery and territorial restrictions).

48. See *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 503 (1969); *United States v. Loew's, Inc.*, 371 U.S. 38, 45 (1962).

49. See *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 503 (1969).

50. See, e.g., *Redd v. Shell Oil Co.*, 1974-2 Trade Cas. ¶ 75,390, at 98,266-67 (D. Utah 1974), *rev'd*, 524 F.2d 1054 (10th Cir. 1975), *cert. denied*, 96 S. Ct. 1508 (1976); *Hearings on Problems of Small Business in Gasoline Marketing Before the Subcomm. on Activities*

cantly exceed the price that is justified by the cost of advertising, credit, and other services provided by majors to dealer-jobber networks.<sup>51</sup>

The inherent power of the tying device is also demonstrated where the uniqueness of the tying item prevents competitors from also offering the item. Uniqueness may be legal, physical, or economic.<sup>52</sup> For instance, in the field of patents and copyrights, the Supreme Court has held that the very existence of a tying device that is protected by a patent or copyright gives rise to the economic power needed to make a tying arrangement illegal.<sup>53</sup> Although there are differences between copyrights, patents, and trademarks,<sup>54</sup> the major brand petroleum trademark enjoys a legal distinctiveness analogous to the uniqueness of patents and copyrights. The emblem is saturated with commercial magnetism and legal uniqueness, particularly in light of the market influence the major refiners exercise over buyers. Moreover, the impact of using a trademark to exclude competition is precisely the same as the impact of using a patent or copyright.<sup>55</sup> Thus, in the context of major brand refined petroleum marketing, there is "no reason why the presumption that exists in the case of the patent and copyright does not equally apply to the trade-mark."<sup>56</sup>

## 2. *Not insubstantial amount of interstate commerce*

Traditionally, the second determinant of significant anti-competitive potential is whether the tying arrangement involves a "not insubstantial amount of interstate commerce."<sup>57</sup> The re-

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*of Regulatory Agencies Relating to Small Business of the House Select Comm. on Small Business*, 92d Cong., 2d Sess. 12-13 (testimony of Lloyd M. Sutherland, President, Sutherland Oil Co.), 30 (testimony of T.A. Harrell, Jr., Mobil jobber), 38-39 (submission of Harrison F. Houghton, economic consultant) (1972) [hereinafter cited as *Small Business Hearings*].

51. *E.g.*, *Small Business Hearings*, *supra* note 50, at 31 (testimony of T.A. Harrell, Jr., Mobil jobber), 38-39 (submission of Harrison F. Houghton, economic consultant).

52. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 503, 505 n.2 (1969).

53. *United States v. Loew's, Inc.*, 371 U.S. 38, 45, 46 (1962); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 157-59 (1948); *International Salt Co. v. United States*, 332 U.S. 392, 395-96 (1947).

54. Lunsford, *supra* note 19, at 79.

55. *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 49-50 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972). *See also* *United States v. Loew's, Inc.*, 371 U.S. 38 (1962); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *International Salt Co. v. United States*, 332 U.S. 392 (1947).

56. *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 50 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

57. *Fortner Enterprises, Inc., v. United States Steel Corp.*, 394 U.S. 495, 501 (1969).

quirements for this determinant were summarized in *Fortner*, where the Supreme Court stated that "the controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely *de minimus*, is foreclosed to competitors by the tie . . . ."58 The relevant figure is the volume of sales tied by the sales policy under challenge.<sup>59</sup> Even relatively small sums have been held significant enough to qualify.<sup>60</sup>

The required "not insubstantial" amount of interstate commerce can readily be demonstrated in gasoline marketing arrangements.<sup>61</sup> Although the market share controlled by any major firm may never amount to traditional "market dominance,"<sup>62</sup> as applied by the courts, the per se rule is not dependent on market dominance but only on the absolute dollar amount of commerce subject to restraint. The dollar amount can be determined by considering sales to the plaintiff or the aggregate volume of commerce tied by the defendant's policy. Consequently, it is difficult to imagine a refined petroleum tie-in that would not involve sufficient interstate commerce. Even sales to an individual station operator would probably not be insubstantial or *de minimus*, particularly if the tie-in had existed for several years.

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58. *Id.*

59. *Id.* at 502.

60. The Court stated in *Fortner*, "[W]e cannot agree . . . that a sum of almost \$200,000 is paltry or 'insubstantial.'" *Id.*

61. During the few years that Keith Redd served as a branded Shell jobber, he purchased over \$3,000,000 worth of refined petroleum products, including over \$500,000 worth of gasoline. *Redd v. Shell Oil Co.*, 1974-2 Trade Cas. ¶ 75,390, at 98,269 (D. Utah 1974), *rev'd*, 524 F.2d 1054 (10th Cir. 1975), *cert. denied*, 96 S. Ct. 1508 (1976).

With respect to the requirement that the commerce be interstate, there usually can be little doubt that the major oil companies are engaged in interstate commerce. Even when there is doubt, the Court has demonstrated a willingness to find interstate commerce on a very tenuous connection. *See Standard Oil Co. v. United States*, 337 U.S. 293, 314-15 (1949).

62. The FTC Report identified the largest individual market share of any one of the major firms as 8.13%. FTC REPORT, *supra* note 1, at II-23. Senator Hart, however, pointed out that these national figures are somewhat misleading.

Texaco is the only company which even tries to market in all 50 States. Most of the rest tend to concentrate, in greater or lesser degree, in particular marketing areas.

This makes their importance in individual markets far greater than national figures would indicate.

*Hearings on Competition in the Petroleum Industry Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 2 (1973) (introductory remarks by Senator Phillip Hart, Chairman).

### C. *Potential Justifications for Tying Arrangements*

Even if it is shown that a tying arrangement exists, an affirmative defense can be established by demonstrating the presence of a legitimate business purpose<sup>63</sup> and the absence of a less restrictive and commercially feasible alternative.<sup>64</sup>

#### 1. *Legitimate business purpose*

A legitimate business purpose for a tie-in can be demonstrated by evidence that business goodwill or product quality would be threatened absent the restriction.<sup>65</sup> Legitimate business purposes, however, generally depend upon current and transitory market considerations. Thus, a defendant's justification may be eliminated by technological breakthroughs or economic changes.<sup>66</sup> One legitimate business purpose served by the petroleum trademark tying arrangement is the interest in maintaining business goodwill by assuring reliable sources of supply. Tying arrangements can assure retailers and jobbers a continuity of source, which helps establish and preserve the goodwill of the clientele.<sup>67</sup> A second major interest that can be protected by the petroleum trademark tie-in is product quality. Binding the job-

63. See *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 51 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972) (Chicken Delight asserted that its arrangement was necessary to assure quality control); *United States v. Jerrold Elecs. Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961) (Jerrold Electronics maintained that new firms struggling to capture a share of a market deserved freedom from the tie-in proscription).

64. In discussing defenses to a tying claim, a federal district court, in *Ungar v. Dunkin' Donuts of America, Inc.*, said: "The general principle which has emerged, . . . is that a restraint of trade can be justified only in the absence of less restrictive alternatives. . . ." 68 F.R.D. 65, 117 (E.D. Pa. 1975), *rev'd and remanded on other grounds*, 531 F.2d 1211 (3d Cir. 1976) (suitability of class action challenge to illegal tie-in). In *Standard Oil Co. v. United States*, 337 U.S. 293, 306 (1949), the Supreme Court concluded that "[t]he only situation, indeed, in which the protection of good will may necessitate the use of tying clauses is where specifications for a substitute would be so detailed that they could not practically be supplied." For a discussion of the defenses to a tying claim, see *McCarthy*, *supra* note 15, at 1110-16.

65. See *McCarthy*, *supra* note 15, at 1110-11.

66. *Standard Oil Co. v. United States*, 337 U.S. 293, 306-08 (1949).

For instance, the "newcomer" justification, *see* note 63 *supra*, would probably not apply to established major brand refiners even though it may be asserted to protect new independent refiners and small integrated firms. In *United States v. Jerrold Elecs. Corp.*, 187 F. Supp. 545, 557-58 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961), the trial court concluded that, while the tie-in was reasonable at the time of its inception, it later violated section 1 of the Sherman Act.

67. In *Siegel v. Chicken Delight, Inc.*, 311 F. Supp. 847, 850-51 (N.D. Cal. 1970), *rev'd and remanded on other grounds*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972), the trial court rejected the argument that tying was necessary to assure a continuing source of essential items.

bers and dealers to brand name refiners vests in the trademark owner the ability to control quality, regardless of whether the gasoline is acquired under an exchange agreement or directly from the trademark owner.<sup>68</sup> When the trademark owner makes all the decisions about the quality of the product, he is naturally more willing to assume ultimate responsibility for any damage that results from dispensing an inferior product.<sup>69</sup> Without the petroleum trademark tie-in, the refiner would necessarily release some of his power to control quality. It has also been suggested that a secure, profitable market encourages research and development—without the expectation of selling gasoline under a tied trademark, petroleum technology, especially important in light of modern demands for energy, would lose its priority among industry objectives.<sup>70</sup>

## 2. *Commercially feasible and less anticompetitive alternatives*

Although there are at least two legitimate business purposes for the refined petroleum trademark tie-in, an antitrust violation might be shown to exist since each business purpose can be satisfied by a less restrictive alternative arrangement. For example, one alternative that assures reliable market outlets and sources of supply is to allow dealers and jobbers to negotiate requirements contracts with their gasoline suppliers.<sup>71</sup> Requirements contracts negotiated for a reasonable term would allow competitive forces

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68. See *Hearings on Gasoline Interchangeability*, *supra* note 7, at 654-55 (statement of Frank H. Staub, Vice President of Marketing, Shell Oil Co.), 893 (statement of D.L. Mulit, Vice President of Sales, Standard Oil Co. of California). "Regarding the aspect of quality control of gasoline received on exchange or purchased, . . . we are careful to exercise continuing quality control to assure that such gasoline meets our product standards, including such important factors as octane, volatility, vapor pressure, stability, lead content, and uniformity of quality." *Id.* at 893.

69. Interview with William Simon, counsel for Shell in *Redd v. Shell Oil Co.*, 524 F.2d 1054 (10th Cir. 1975), *cert. denied*, 96 S. Ct. 1508 (1976), in Washington, D.C., September 18, 1975.

70. *Hearings on Gasoline Interchangeability*, *supra* note 7, at 654-55 (statement of Frank H. Staub, Vice President of Marketing, Shell Oil Co.).

71. The Supreme Court recognized the advantages of reasonable requirements contracts in *Standard Oil Co. v. United States*, 337 U.S. 293, 306 (1949):

Requirements contracts . . . may well be of economic advantage to buyers as well as to sellers, and thus indirectly of advantage to the consuming public. In the case of the buyer, they may assure supply, afford protection against rises in price, enable long-term planning on the basis of known costs, and obviate the expense and risk of storage in the quantity necessary for a commodity having a fluctuating demand.

*Id.*



to operate as the contracts expire, while permitting dealers, jobbers, and refiners to project with reasonable certainty the quantity of gasoline necessary to satisfy the market.

The legitimate interest in protecting product quality can be adequately safeguarded by providing specifications to competitors so that conforming products can be purchased from alternative sources.<sup>72</sup> This alternative has been required by courts proscribing other tying arrangements unless the defendant can prove that specifications could not be practicably supplied or effectively policed.<sup>73</sup> Since gasoline specifications are already furnished by refiners involved in exchange agreements,<sup>74</sup> this alternative appears to be a satisfactory method of protecting quality.

Each of these alternative arrangements would have less anti-competitive effect than trademark tie-ins. Competition would be increased by allowing retailers and jobbers to enter into requirements contracts with competing refiners who market conforming gasoline and by requiring the major brand refiners to exchange their specifications in order to make available conforming alternative sources of supply.<sup>75</sup> Dealers and jobbers would then continue to bind themselves to single suppliers only if it were

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72. See, e.g., *Standard Oil Co. v. United States*, 337 U.S. 293, 306 (1949); *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 51-52 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972). For instance, although the McDonald's Corporation trademark attaches at the point of consumer sale to all products sold by individual franchisees, McDonald's itself sells none of the ingredients to franchisees. Rather, ingredients conforming to McDonald's specifications are obtained locally by the franchisees. See *Hearings on the Role of Small Business in Franchising Before the Subcomm. on Minority Small Business Enterprise and Franchising of the House Permanent Select Comm. on Small Business*, 93d Cong., 1st Sess. 52 (1973) (testimony of Norman Axelrad, Vice President, Public Affairs, McDonald's Corp.) [hereinafter cited as *Hearings on Franchising*].

73. *Standard Oil Co. v. United States*, 337 U.S. 293, 306 (1949). There are, of course, cases where some extraordinary condition forecloses the exchanging of specifications. For example, it would be impractical where product quality is measured subjectively. See *Chock Full O'Nuts Corp.*, [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,441, at 20,346 (FTC 1973). Furthermore, specifications would not be required where they would reveal a trade secret. See *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 51 n.9 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

74. See, e.g., *Redd v. Shell Oil Co.*, 1974-2 Trade Cas. ¶ 75,390, at 98,268 (D. Utah 1974), *rev'd*, 524 F.2d 1054 (10th Cir. 1975), *cert. denied*, 96 S. Ct. 1508 (1976); *Hearings on Gasoline Interchangeability*, *supra* note 7, at 893 (statement of D.L. Mulit, Vice President of Sales, Standard Oil Co. of California).

75. One potential problem remains. It has been observed that direct quality control over products supplied by other petroleum companies may tend to restrict competition. If constant, extensive interrelationships between actual and potential competitors are required, the resulting interdependence may induce and camouflage other forms of anti-competitive combination. *Quality Control*, *supra* note 31, at 1191. This hazard must be controlled as courts select alternatives to tying arrangements.

economically advantageous;<sup>76</sup> thus, the refiners would be required to compete for the continued patronage of the buyers rather than being able to dictate price terms unilaterally.

Although some costs may be incurred in policing the quality of gasoline purchased from other refiners, both of the above alternatives appear to be commercially feasible. First, since the requirements contracts alternative merely involves substituting one contract for another, there should be no significant increase in cost. Second, whatever additional expense might be incurred in supplying specifications and establishing a follow-up system of quality control,<sup>77</sup> present gasoline marketing techniques suggest that quality can be effectively policed without substantial cost.<sup>78</sup> For instance, specifications currently are traded under exchange agreements, and methods already exist for inspecting gasoline at refineries, bulk plants, and retail stations. Moreover, experience in other industries confirms that quality control frequently can be accomplished simply by setting standards and periodically inspecting samples.<sup>79</sup>

## II. IMPLICATIONS OF PROSCRIBING REFINED PETROLEUM TRADEMARK TYING ARRANGEMENTS

Forecasting the implications of proscribing tying arrangements necessarily involves some speculation. Thus, potential effects must be stated as possibilities or, at best, probabilities. It appears, however, that eliminating petroleum trademark tie-ins

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76. See *Standard Oil Co. v. United States*, 337 U.S. 293, 313-14 (1949).

77. Interview with William Simon, *supra* note 69; see, e.g., *Hearings on Gasoline Interchangeability*, *supra* note 7, at 898-900 (statement of D.L. Mulit, Vice President of Sales, Standard Oil Co. of California).

78. The commercial feasibility and cost of quality control should not be analyzed in terms of the relative cost of the "specification" alternative compared with the economic injury from the present method of doing business. Rather, the cost of supplying specifications, that is, whether the alternative would require a prohibitive expenditure, should be the deciding factor. This method obviates the need for a complicated analysis of the tying arrangement's effect on competition and recognizes that tie-ins are proscribed for their anticompetitive potential, not their proven impact. Similarly, by concentrating on cost, the burden of proving infeasibility remains on the defendant, and the inquiry centers on the defendant's own cost structure. Relatively simple calculations provide the court with the relevant data, including the price increase necessary to absorb the expense of quality control. See 84 HARV. L. REV. 1717, 1723-24 (1971).

79. See, e.g., *Hearings on Franchising*, *supra* note 72, at 52 (testimony of Norman Axelrad, Vice President, Public Affairs, McDonald's Corporation). Other possible methods of quality control include "plant supervision, inspection, training of the licensee's employees, approval of the licensee's advertising, requiring the licensee to refund the dissatisfied purchasers, and cancellation of license provisions." *Quality Control*, *supra* note 31, at 1177.

would increase competition in the marketing of gasoline without jeopardizing the legitimate interests of consumers, dealers, jobbers, and integrated majors. Consumers would probably notice few changes other than reduced prices; credit card acceptance and product quality probably would not change. Dealers and jobbers would acquire a greater responsibility to negotiate for lower priced gasoline.<sup>80</sup> Since the focal point of competition would be price, branded dealers would no longer be limited to competition through secondary marketing techniques such as location, service, giveaways, and the image created by national advertising. A greater premium would be placed on ability to negotiate the most advantageous price with the majors; therefore, marginal dealers and jobbers might be eliminated.<sup>81</sup>

From the perspective of the integrated majors, eliminating trademark tie-ins would increase direct competition with respect to the sale of petroleum products and place more emphasis on franchise marketing techniques. Since sales of the tied product would no longer provide compensation for the use of the trademark,<sup>82</sup> the majors would have to develop other methods of attaining a return for the use of their trademark name. Feasible alternative methods of compensation include charging franchise fees or royalties calculated as a percentage of total sales under the trademark, regardless of the actual source of the petroleum products.<sup>83</sup>

The integrated majors also may attempt to expand their marketing of brand name refined petroleum through company-

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80. Certainly many jobbers and dealers would find it convenient to continue purchasing both trademark rights and refined petroleum products from the same source. These jobbers and dealers could be enticed by legitimate price reductions resulting from selling a package of services along with the supply of refined petroleum. For instance, price reductions could result from consolidating quality control procedures and streamlining accounting operations. Neither the trademark license nor the refined petroleum, however, could be offered at artificially low prices to induce purchases of both items as a package. See *United States v. Loew's, Inc.*, 371 U.S. 38, 54-55 (1962).

81. Faced with the new emphasis on ability to negotiate such sales contracts, dealers and jobbers might react by organizing associations designed to provide expertise and advice in dealing with the major petroleum companies.

82. This is not to say, however, that the majors would be unable to make a profit on the sale of petroleum products. This would eliminate only the portion of profits on sales of petroleum products that were designed to compensate for the use of the trademark.

83. Royalties based on sales could be measured either from required accounting statements or meter readings on gasoline pumps. Linking franchise fees to sales would encourage majors to continue to provide a package of marketing services complementing the right to sell under the trademark, thereby promoting the interests of the refiners, dealers, and jobbers.

owned stations.<sup>84</sup> Fortunately, the anticompetitive impact of this alternative has been observed by Congress. The Senate of the 94th Congress unanimously approved a bill checking further expansion into marketing by the integrated majors, and the House of Representatives considered several similar measures.<sup>85</sup> Without such protection, increased direct retail marketing would probable weed out jobbers and retailers who attempt to shop for their supply of refined petroleum.

Faced with price competition and less opportunity to reap excess profits, the major oil companies may choose to divest themselves of stations not selling their brand name products. Small businessmen would probably be unable to purchase these stations, thereby creating a void that might be filled by gasoline marketing chains.<sup>86</sup> Although the majors have threatened such action, large-scale abandonment of retail marketing outlets seems unnecessary. The commercial desirability of the nationally advertised brand, coupled with effective quality control, should permit the majors to earn a reasonable return by charging their branded dealers for credit card programs and other marketing services and by collecting royalties or franchise fees.<sup>87</sup>

Proscribing petroleum trademark tying might have an im-

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84. See *Hearings on Gasoline Interchangeability*, *supra* note 7, at 651-53 (statement of Frank H. Staub, Vice President of Marketing, Shell Oil Co.), 896-900 (statement of D.L. Mulit, Vice President of Sales, Standard Oil Co. of California).

85. The United States Senate unanimously approved S. 323, 94th Cong., 1st Sess. (1975) (Fair Marketing of Petroleum Products Act) on June 20, 1975. The bill would have enforced a moratorium on major market shareholder expansion in gasoline marketing. It provided in pertinent part that a major market shareholder could not

commence the operation of any distributorship or retail establishment the personnel of which are under the control of such person or under the control of an entity controlled by such a person if . . . the total number of such person's distributorships and retail establishments would be larger than the largest fraction computed for any major market shareholder . . . during the five years preceding April 1, 1975.

121 CONG. REC. S 11111 (1975). The bill, however, was never enacted.

During the 1st Session of the 94th Congress, the following bills, entitled "Fair Marketing of Petroleum Products Act," were introduced and referred to the House Committee on Interstate and Foreign Commerce: H.R. 6266, H.R. 6385, H.R. 7529, H.R. 7530, H.R. 9392, and H.R. 10070. Each included provisions substantially similar to S. 323, 94th Cong., 1st Sess. (1975), quoted *supra*, and like S. 323 each died in committee.

86. Loss of the small, independent businessmen would reduce competition at the retail level. Moreover, the major oil companies allege that if these stations were put up for sale, promising business opportunities for minorities would evaporate. See *Hearings on Gasoline Interchangeability*, *supra* note 7, at 651-53 (statement of Frank H. Staub, Vice President of Marketing, Shell Oil Co.), 896-900 (statement of D.L. Mulit, Vice President of Sales, Standard Oil Co. of California).

87. See note 83 and accompanying text *supra*.

pact on parties other than those directly affected by the arrangements. For example, with jobbers and dealers free to purchase any conforming gasoline, independent refiners might be induced to expand refining capacity and offer additional gasoline conforming to industry specifications. Because this would augment the range of potential suppliers, competition might be further increased.<sup>88</sup>

Court-ordered divestiture of refining and marketing facilities may eventually be required, but for the present, eliminating trademark tying would be a significant victory.

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88. Arguably, genuine price competition at both the marketing and refining levels might unleash backward competitive pressure on the crude oil market, particularly if such competition is supplemented with increased energy efficiency and the development of alternate energy sources.