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Franchising and Consumers' Beliefs about "Tied" Products": The Death Knell for Krehl?

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FRANCHISING AND CONSUMERS' BELIEFS ABOUT "TIED" PRODUCTS: THE DEATH KNELL FOR *KREHL*?

Robert W. Emerson[*] [**]

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I. INTRODUCTION

If a franchisor requires its franchisees to purchase certain products, either directly from the franchisor or from a source financially related to the franchisor, can the franchisee successfully challenge such a requirement? Or can the franchisor defeat such a challenge by proving that the franchise and the "tied" products are so closely linked that they actually constitute a single product?

Franchisors have defeated many franchisees' challenges using a num-

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ber of arguments based in economics, marketing, and even consumer psychology. This article examines these arguments in light of the contention that a franchise and certain products sold at a franchise are, for antitrust tying purposes, a single item.[1] This article focuses on judicial notions of public perceptions about franchises and their trademarked products. Judges' ideas about what the consuming public believes when it purchases products have influenced an entire line of antitrust tying cases. This article contends that the underlying premise of these cases is flawed both empirically and as a matter of policy. After analyzing the law and economics in Part II, this article compares judicial guesswork about public beliefs with actual public beliefs as reflected in a random public survey. It concludes by outlining a simpler, more sensible approach to resolving the basic tying question: When is a franchised trademark separate from the products sold under that trademark?

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1. It will not do for the franchisor to say that the franchisee waived its antitrust "rights" when it joined the franchise system. The *in pari delicto* defense is far too limited in scope to reach the typical franchisee. The *in pari delicto* defense originated from the Latin maxim, "*in pari delicto potior est conditio defendentis*" ("In a case of equal or mutual fault . . . the condition of the party . . . defending is the better one."). BLACK'S LAW DICTIONARY 791 (6th ed. 1990). It is "an expression of a moral judgment that a party should not be permitted to profit from his own misconduct." Milton Handler, *Reforming the Antitrust Laws*, 82 COLUM. L. REV. 1287, 1359 (1982).

In the leading case, Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968), the Supreme Court determined that Congress did not intend to incorporate the *in pari delicto* defense in antitrust suits, *id.* at 138-40, and held that the law must encourage antitrust suits by permitting treble damages awards to even "morally reprehensible" plaintiffs in order "to further the overriding public policy in favor of competition." *Id.* at 139. The Court noted that the lure of treble damages would not draw potential plaintiffs into contracts violative of the antitrust laws, because the plaintiffs would still be subject to substantial civil and criminal penalties. *Id.* Moreover, the defendant's superior bargaining position often allows it to force the unlawful arrangement upon the plaintiff. *Id.* at 143 (White, J., concurring); *id.* at 139 (stating that in *Perma Life* the plaintiff's involvement with antitrust violations was "not voluntary in any meaningful sense"); *accord* CVD, Inc. v. Raytheon Co., 769 F.2d 842, 856 (1st Cir. 1985) (holding the *in pari delicto* defense inappropriate against a party "overwhelmed by a party in a superior bargaining position"), *cert. denied*, 475 U.S. 1016 (1986); American Motor Inns v. Holiday Inns, 521 F.2d 1230, 1255 (3d Cir. 1975) (denying defendant *in pari delicto* defense because plaintiff franchisee was subject to the defendant franchisor's dictatorial control); Handler, *supra*, at 1360 n.453 (describing *Perma Life* and concluding that there could be no antitrust *in pari delicto* because the plaintiffs were not "free and equal participants in the challenged illegality"); *see also* LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 789 (1977) (noting that plaintiffs generally sue because their attempted withdrawal from the allegedly illegal scheme results in the defendant-manufacturer's termination of the plaintiff's contract). *See generally* Milton Handler & Ira S. Sacks, *The Continued Vitality of In Pari Delicto as an Antitrust Defense*, 70 GEO. L.J. 1123 (1982) (noting that although *Perma Life* did not completely eliminate the *in pari delicto* defense from antitrust litigation, the boundaries of the defense are murky). As stated by Justice White, the *in pari delicto* defense should not be permitted to eliminate the antitrust deterrent against those parties actually "most likely to be responsible for organizing forbidden schemes." *Perma Life*, 392 U.S. at 145 (White, J., concurring).

II. Franchising and the Single-Product Defense to Antitrust Tying Allegations

A. *Tying Law and Economics*

In antitrust law, a tying arrangement requires buyers to purchase a second, "tied" product in order to obtain a desired item, the "tying" product.[2] The Supreme Court has stated,

> [T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.[3]

Franchise agreements that require franchisees to buy specified products from the franchisor, or from a source in which the franchisor has a financial interest,[4] may constitute an illegal tying under Section 1 of the Sherman Antitrust Act.[5] Until fairly recently, a large number of franchisors tied economically and technologically independent products to the franchise license.[6]

2. Eastman Kodak Co. v. Image Technical Servs., 112 S. Ct. 2072, 2079 (1992) ("A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product . . . .' ") (quoting Northern Pac. Ry. v. United States, 356 U.S. 1, 5-6 (1958)); Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 475 (3d Cir.), *cert. denied*, 113 S. Ct. 196 (1992); Smith v. Mobil Oil Corp., 667 F. Supp. 1314, 1316 (W.D. Mo. 1987); KFC Corp. v. Marion-Kay Co., 620 F. Supp. 1160, 1169 (S.D. Ind. 1985); Valerie Flocco, Recent Decision, 63 TEMPLE L. REV. 595, 595 (1990).

3. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984).

4. *See* Roberts v. Elaine Powers Figure Salons, Inc., 708 F.2d 1476, 1479-80 (9th Cir. 1983) (discussing whether the seller of the tying product has an economic interest in the tied product); Moore v. James H. Matthews & Co., 550 F.2d 1207, 1216 (9th Cir. 1977) (same); Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368, 377-79 (5th Cir. 1977) (same).

5. 15 U.S.C. § 1 (1988) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."). Tying agreements are also per se illegal under Section 3 of the Clayton Act, 15 U.S.C. § 14 (1988), if they involve "goods, wares, merchandise, machinery, supplies, or other commodities." 15 U.S.C. § 14 (1988). See *infra* note 33 on the per se doctrine in antitrust law. However, because most franchise tying disputes involve an intangible right, the franchise trademark, the Clayton Act usually does not apply. *See* United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 97 (1918); Fox v. Comprehensive Accounting Corp., 1984-1 Trade Cas. (CCH) ¶ 65,993 (N.D. Ill. Apr. 16, 1984) (citing several cases to support its holding that for a tying to violate the Clayton Act both the tied and the tying items must be goods); Comment, *A New Approach to the Legality of Franchising Tie-Ins*, 129 U. PA. L. REV. 1267, 1269 n.8 (1981).

6. *See, e.g.*, Jerome L. Fels, *The Franchising Phenomenon: An Overview, in* THE FRANCHISING PHENOMENON 1, 23 (James E. Rice ed., 1969) (stating that "many franchise arrangements" include tying clauses); Lewis G. Rudnick & Ross W. Blair, *Federal Antitrust and Trade Regulation Law: Problems and Concerns in Franchising*, P.L.I. COMMERCIAL LAW & PRACTICE NO. 525, FRANCHISING 1990: BUSINESS STRATEGIES & COMPLIANCE ISSUES 921, 944-45 (1990) (noting that the business format "franchisor frequently required franchisees to purchase equipment, merchandise and supplies

In 1971, an extremely influential Ninth Circuit Court of Appeals decision, *Siegel v. Chicken Delight, Inc.*,[7] served to reduce dramatically these blatant tying practices.[8] *Chicken Delight* spawned a wave of franchisee class action suits,[9] mostly against fast-food franchisors.[10] Since the *Chicken Delight* decision, many franchisors have dropped their express tying requirements. In 1971, nearly half of all fast-food franchise agreements included tying requirements, but perhaps only about ten percent now have such provisions.[11] Subtle tie-ins, however, may remain common.[12]

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from the franchisor or designated the suppliers from whom its franchisees were required to purchase, receiving commissions from such designated suppliers . . . . "). These tie-ins were often the sole or main source of franchisor income, and not until lawsuits in the late 1960s and the 1970s did franchising tie-ins definitely decrease. *Id.* A few commentators contend that tying remains a frequent practice. *See, e.g.*, HAROLD BROWN, FRANCHISING: REALITIES AND REMEDIES §§ 10.05[1][a] & 10.05[6] (rev. ed. 1992) (stating that "[t]ying is prevalent in franchising" and is "one of the principal areas of franchise abuse").

7. 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972). For further discussion of the *Chicken Delight* case, see California Glazed Prods., Inc. v. Burns & Russell Co., 708 F.2d 1423, 1429 n.13 (9th Cir.) (including citations to much law review commentary about *Chicken Delight*), *cert. denied*, 464 U.S. 938 (1983). As noted a decade ago by Frank A. Camp, "*Chicken Delight* has long been recognized as the leading case on the separate products issue," and "[s]ome form of a *Chicken Delight* test has been cited in seven of the circuit courts." Frank A. Camp, Recent Development, 7 J. CORP. L. 137, 143 & n.55 (1981) (citations omitted).

8. DENNIS L. FOSTER, THE ENCYCLOPEDIA OF FRANCHISES AND FRANCHISING 277 (1989) (stating that "[e]arly franchise agreements sometimes required franchisees to purchase equipment or fixtures from stipulated sources, often at prices higher than those available for the same or comparable products from others" and with the suppliers secretly paying the franchisor finder's fees or other illegal compensation; after the *Siegel* decision, franchisors started to replace these tie-ins with product specifications and standards); Jill M. Aubin, *Franchise Tie-Ins: The State of the Law*, 26 NEW ENG. L. REV. 1, 21 (1991) (stating that the *Siegel* holding "inspired most franchisors to avoid including express tie-in provisions in their contracts").

9. Ernest A. Braun, *Policy Issues of Franchising*, 14 SW. U. L. REV. 155, 183 (1984).

10. *Id.* at 183 n.116. These suits were usually settled before trial. *Id.*

11. A study over 20 years ago showed that close to half of all fast-food franchise agreements contained a tying of purchases arrangement. SENATE SELECT COMM. ON SMALL BUSINESS, 92D CONG., 1ST SESS., REPORT PREPARED FOR THE SMALL BUSINESS ADMINISTRATION: THE ECONOMIC EFFECTS OF FRANCHISING 229-30 (1971) (Comm. Print 1971) (written by University of Wisconsin College of Business Professors Urban B. Ozanne & Shelby D. Hunt). One-third mandated the franchisees' purchase of paper products from the franchisor, 43% required franchisees to buy operating supplies directly from the franchisor, 43% also required franchisees to purchase or lease equipment from the franchisor and 34% of the franchisees had to buy or lease the franchisor's signs. *Id.* As an update on that study, from October 1992 to February 1993 the author obtained copies of 100 current fast-food franchise agreements (the standard forms used by the franchisor) to verify the frequency and general content of various provisions. Only 11% of the agreements contained purchase requirements that might be considered outright tying provisions. *See* Robert W. Emerson, *Franchise Contract Clauses and the Franchisor's Duty of Care Toward Its Franchisees*, 72 N.C. L. REV. (forthcoming Apr. 1994).

12. Moreover, other abuses are present. *See* Harold Brown, *Franchising: The Resurgence of the Kickback*, 207 N.Y. L.J., Apr. 23, 1992, at 3. Franchisee attorney Harold Brown discusses suppliers' bribery of franchisors so that the franchisors will induce franchisees to purchase goods from these suppliers. *Id.* The bribing supplier obtains an unfair competitive advantage over honest vendors that the franchisor does not list as approved suppliers, and the malfeasant suppliers may recoup their kickback costs by charging inflated prices to franchisees who cannot easily buy elsewhere. *Id.*

The Supreme Court has identified four elements necessary to prove a tying claim: (1) There are two, distinct products—a tying product and a tied product; (2) a sale or lease of the tying product is conditioned on the sale or lease of the tied product; (3) the seller/lessor possesses sufficient market power over the tying product to enable it to restrain appreciably the competition in the tied product's market; and (4) a "not insubstantial" amount of interstate commerce in the tied product is foreclosed by the tying arrangement.[13] The first element—requiring two separate products—appears simple and is intended to shield sellers from liability when the products could not effectively be sold separately.[14] Nonetheless, court interpretations of product separability have been confusing.[15] That confusion is more pro-

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For an earlier example of franchisor kickbacks, see Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368, 376 n.10 & 377 (5th Cir. 1977). Note that a secret rebate from supplier to franchisor constitutes an illegal tying even if the franchisor has no other financial interest in either the supplier or the supplies themselves. Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979).

13. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12-18 (1984); *id.* at 37-39 (O'Connor, J., concurring); *see* Thompson v. Metropolitan Multi-List, Inc., 934 F.2d 1566, 1574 (11th Cir. 1991); Tic-X-Press, Inc. v. Omni Promotions Co., 815 F.2d 1407, 1413-14 (11th Cir. 1987); Fox Motors, Inc. v. Mazda Distribs. (Gulf), Inc., 806 F.2d 953, 957 (10th Cir. 1986); Digidyne Corp. v. Data Gen. Corp., 734 F.2d 1336, 1338 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985); Bogosian v. Gulf Oil Corp., 561 F.2d 434, 449 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978).

The second element is relatively simple to resolve. If a buyer can purchase the items separately, there is no conditioned sale. *See, e.g.*, Northern Pac. Ry. v. United States, 356 U.S. 1, 6 n.4 (1958); Bouldis v. United States Suzuki Motor Corp., 711 F.2d 1319, 1331 (6th Cir. 1983); Sargent-Welch Scientific Co. v. Ventron Corp., 567 F.2d 701, 708 (7th Cir. 1977), *cert. denied*, 439 U.S. 822 (1978); Fox. v. Comprehensive Accounting Corp., 1984-1 Trade Cas. (CCH) ¶ 65,993 (N.D. Ill. Apr. 16, 1984). A reasonable, cost-justified discount does not create a tie-in when the products may be purchased separately. Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Sys., Inc., 732 F.2d 1403, 1407 (9th Cir. 1984); American Mfrs. Mut. Life Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 446 F.2d 1131, 1137 (2d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972).

As for tying's fourth and final element, the requirement that the tie-in foreclose more than an insubstantial amount of interstate commerce in the tied product, the courts generally have held that anything more than a de minimis foreclosure meets the definition. Thus this element is easily satisfied. *See, e.g.*, Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495, 502 (1969) (finding that the market foreclosure is measured by the dollar amount of all sales subject to the tie-in, not just the plaintiffs' purchases); Tic-X-Press, Inc. v. Omni Promotions Co., 815 F.2d 1407, 1419 (11th Cir. 1987) (holding that $10,091.07 is more than a de minimis amount).

14. *Fortner*, 394 U.S. at 507 ("There is, at the outset of every tie-in case, including the familiar cases involving physical goods, the problem of determining whether two separate products are in fact involved."). Of course, if the express language in a franchise agreement embodies the tie by treating two items as separate and then tying them, a prima facie case of tying is established. Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 725 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980).

15. Carolyn L. Harris, Comment, *The Single Product Issue in Recent Tying Litigation*, 1980 ARIZ. ST. L.J. 871, 879-84 (describing five distinct tests used by the federal courts to determine product separability). *See generally* Michael Dore, *The "Total Product" Approach to Analysis of Alleged Tying Arrangements*, 34 WASH. & LEE L. REV. 409 (1977); Lynn H. Pasashow, *Tying and the Single-Product Issue*, 54 ANTITRUST L.J. 1219 (1986); Michael E. Ross, *The Single Product Issue in Antitrust Tying: A Functional Approach*, 23 EMORY L.J. 963 (1974); Donald F. Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50 (1958); Roger D. Young, *Separate*

nounced in the area of franchising than in other business arrangements. Franchising has led to frequent litigation on the question of whether separate items actually exist, for antitrust tying purposes.[16] The parties' characterization of the arrangement is not binding,[17] although it may furnish some guidance.[18] Because the courts have failed to create a uniform standard defining the two-product element of tying, franchisors and franchisees have little notice as to how courts will rule in the future.[19] Indeed, one commentator concluded that courts "have frequently confused and mixed together the quality control business justification defense [for tying] with the initial requirement that there be separate products."[20]

Many commentators contend that tying's economics are far clearer than its law.[21] Despite the long-standing prohibition of tying, such arrangements have been defended, in economic terms, as: (1) a counting device meant to economize the costs of revenue collection from franchisees;[22] (2) an improvement in production economies, other economies of scale, or overall efficiency;[23] (3) a better means of attaining quality control,[24] including

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Products in the Tying Case, in MONOPOLIZATION AND TYING CASES IN THE 90'S, at 265 (ALI-ABA Course of Study No. C695, 1991); Note, *A Clarification and Reformulation of Prevailing Approaches to Product Separability in Franchise Tie-In Sales*, 67 MINN. L. REV. 1165, 1176 (1983); Karen L. Hunt, Note, *Product Separability: A Workable Standard to Identify Tie-In Arrangements Under the Antitrust Laws*, 46 S. CAL. L. REV. 160 (1972); John Lahey, Note, *Tying Arrangements and the Single Product Issue*, 31 OHIO ST. L.J. 861 (1970); Richard Levy, Jr., Note, *Trademark Franchising and Antitrust Law: The Two-Product Rule for Tying Arrangements*, 27 SYRACUSE L. REV. 953 (1976).

16. *See* AMERICAN BAR ASS'N ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 140-42 & nn.763-71 (3d ed. 1992).

17. Philip F. Zeidman, *The Two Product Test in Franchising: If You Want to Get X, You Gotta Buy Y*, 1980 ARIZ. ST. L.J. 433, 435-36 (stating that one cannot simply call something a single product to avoid antitrust laws). Along these lines, one cannot simply sell two or more products "as a unit," in order to avoid tying prohibitions. *Id.* at 446 n.58.

18. *See* Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 725 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980) (described *supra* note 14).

19. *See, e.g.*, United States v. Mercedes-Benz of N. Am., 517 F. Supp. 1369, 1377-78 n.9 (N.D. Cal. 1981) (noting that courts often reconcile antitrust tying principles with business reality—thus permitting a tying practice by finding, for instance, no separate products; also noting that "as a result courts as well as industries are left without consistent guidance"); Ross, *supra* note 15, at 989-93.

20. Note, *supra* note 15, at 1176.

21. *See, e.g.*, 9 PHILIP E. AREEDA, ANTITRUST LAW ¶ 1703, at 50-55 (1991) (condemning tying prohibitions as overbroad); *id.* ¶ 1730, at 406-14 (same); Comment, *supra* note 5, at 1297 (concluding that tying law is unpredictable and complicated, and that the law may very well be clearer "if efficiency concerns were acknowledged outright rather than being camouflaged behind such vague requirements as the two product rule").

22. WILLIAM R. ANDERSEN & C. PAUL ROGERS, III, ANTITRUST LAW: POLICY AND PRACTICE § 6.05, at 757 (1985); Kurt A. Strasser, *Big Macs and Radio Shacks: Antitrust Policy for Business Format Franchises*, 27 ARIZ. L. REV. 341, 369 (1985) (justifying tie-ins as the only effective method to monitor franchisee sales); Comment, *supra* note 5, at 1279-80.

23. Principe v. McDonald's Corp., 631 F.2d 303, 309-11 (4th Cir. 1980), *cert. denied*, 451 U.S. 970 (1981); A.O. Smith Corp. v. Lewis, Overbeck & Furman, 777 F. Supp. 1405, 1410 (N.D. Ill. 1991), *rev'd on other grounds*, 979 F.2d 546 (7th Cir. 1992); ANDERSEN & ROGERS, *supra* note 22, at

greater protection from warranty or other product liability for defective products;[25] (4) a method to protect new, experimental products and industries;[26] and (5) a way to retain goodwill and prevent widespread consumer dissatisfaction.[27] There are also well-formulated economic objections to franchisors'

757; ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 379 (1978); HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW § 8.9, at 233-36 (1985); E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 185-89 (1988); SULLIVAN, *supra* note 1, at 449; Ward S. Bowman, Jr., *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19, 29 (1957); David Pester, *Antitrust Laws: Removing the Confusion in Tying Arrangement Jurisprudence*, 1990 ANN. SURV. AM. L. 699, 714 n.115 (1990); Turner, *supra* note 15, at 70-72; *accord*, HOVENKAMP, *supra*, at § 8.3, at 217-19 (in a competitive market, a tie-in, to become operational, must be "efficiency-creating"). *But see* Kurt A. Strasser, *An Antitrust Policy for Tying Arrangements*, 34 EMORY L.J. 253, 262-65 (1985) (reviewing tie-in economics and concluding that "[b]ecause of the substantial anticompetitive potential of tying arrangements . . . , justification for permitting tying arrangements based on economies of scale is not persuasive").

24. ANDERSEN & ROGERS, *supra* note 22, at 757; RICHARD POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 175-76 (1976); Note, *supra* note 15, at 1174; James K. Eckmann, Note, *Antitrust Problems in Trademark Franchising*, 17 STAN. L. REV. 926, 933 (1965); Kurt J. Fischer, Note, *Product Separability in Franchise Tying Arrangements: The Fourth Circuit's New Rule*, 38 WASH. & LEE L. REV. 1195, 1201 (1981); Harris, *supra* note 15, at 907; Levy, *supra* note 15, at 957; *accord* Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368, 376 (5th Cir. 1977). *But see* Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39, 46-47 (5th Cir. 1976) (finding an unlawful franchise tying arrangement and denying the franchisor's argument that it was necessary to maintain quality control); United States v. Mercedes-Benz of N. Am., Inc., 517 F. Supp. 1369, 1388 (N.D. Cal. 1981) (noting that the quality assurance excuse for tying "is rarely sufficient"); J. Thomas McCarthy, *Trademark Franchising and Antitrust: The Trouble with Tie-Ins*, 58 CAL. L. REV. 1085, 1117 (1970) (stating that quality control "hardly ever" justifies tying supply sources to the licensed trademark, that it is a rare case when meaningful quality specifications cannot be drafted instead); Strasser, *supra* note 22, at 353 n.74.

25. United States v. Mercedes-Benz of N. Am., Inc., 517 F. Supp. 1369, 1389-90 (N.D. Cal. 1981).

26. United States v. Jerrold Elec. Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961); *Carpa, Inc.*, 536 F.2d at 47; Fischer, *supra* note 24, at 1201; Strasser, *supra* note 22, at 369 (stating "technologically interdependent products may be tied by the franchisor to insure franchisee use of them"); Oliver E. Williamson, *Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transaction Cost Approach*, 127 U. PA. L. REV. 953, 965 (1979); Zeidman, *supra* note 17, at 439 & n.30; Michael R. Flicker, Note, *Newcomer Defenses: Reasonable Use of Tie-ins, Franchises, Territorials, and Exclusives*, 18 STAN. L. REV. 457, 458-65 (1966). Professor Kurt Strasser warns, however, that in some cases the new technology defense "is more likely offered as a smokescreen" than because the tied products are genuinely technologically interdependent. Strasser, *supra* note 23, at 262.

27. Mozart Co. v. Mercedes-Benz of N. Am., Inc., 833 F.2d 1342, 1348-51 (9th Cir. 1987), *cert. denied*, 488 U.S. 870 (1988); Roberts v. Elaine Powers Figure Salons, Inc., 708 F.2d 1476, 1481 (9th Cir. 1983); Phonetele, Inc. v. American Tel. & Tel. Co., 664 F.2d 716, 738-39 (9th Cir. 1981), *cert. denied*, 459 U.S. 1145 (1983); Moore v. James H. Matthews & Co., 550 F.2d 1207, 1217 (9th Cir. 1977); Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368, 381 (5th Cir. 1977); KFC Corp. v. Marion-Kay Co., 620 F. Supp. 1160 (S.D. Ind. 1985); BORK, *supra* note 23, at 379-80; POSNER, *supra* note 24, at 175; Tyler A. Baker, *The Supreme Court and the Per Se Tying Rule: Cutting the Gordian Knot*, 66 VA. L. REV. 1235, 1249-51 (1980); Bowman, *supra* note 23, at 27; Zeidman, *supra* note 17, at 443-44 & n.51 (tying in order to preserve goodwill); Fischer, *supra* note 24, at 1201; Harris, *supra* note 15, at 902 (noting that the protection of goodwill defense to tying is a necessary outgrowth of Lanham Act compliance) & 907 (stating that the protection of goodwill is

tie-ins, such as tie-ins create unwarranted price discrimination, distort prices, foster market-entry barriers, foreclose sellers in the tied-product market, and interfere with the franchisee's own preferences.[28] But, economic analysis, thus far, has offered little help in developing cogent rules for franchise tying cases. Scholars have opined that most concerns of tying law are better suited for laws other than antitrust.[29] For instance, mandating additional disclosures of information may better serve the public and the franchising community than a tying law much more remote from the consumer protection issues really at stake in some franchise disputes.[30] If a franchisor is profiting from commissions paid by the suppliers that it approves, is it the tying law or the disclosure of the franchisor-supplier ties that is crucial? Regulatory schemes, such as the Federal Trade Commission's franchising and business opportunities disclosure rule,[31] assume the latter. So apparently do the courts.[32]

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a forceful argument for a tie-in); Richard S. Markovits, Comment, *The Functions, Allocative Efficiency, and Legality of Tie-ins: A Comment*, 28 J.L. & ECON. 387, 393-95 (1985) (discussing tie-ins as the most feasible method to protect goodwill); *accord* Aubin, *supra* note 8, at 25 (citing WILLIAM H. HOLMES, ANTITRUST LAW SOURCEBOOK (1991) for the proposition that tie-ins "are accepted more and more as economically appropriate tools by which franchisors may protect the reputation and/or integrity of their products"). *But see* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 25-26 n.42 (1984) ("We have . . . uniformly rejected . . . 'goodwill' defenses for tying arrangements, finding that the use of contractual quality specifications are generally sufficient to protect quality without the use of a tying arrangement."); United States v. Mercedes-Benz of N. Am., Inc., 517 F. Supp. 1369, 1388 (N.D. Cal. 1981) (noting that the protection of goodwill is an acceptable reason for tying only when product specifications are impractical).

28. ANDERSEN & ROGERS, *supra* note 22, at 757; *see also* Strasser, *supra* note 23, at 283 (noting many of the same competitive harms as do Andersen and Rogers and stating that tying makes more difficult the attainment of self-policing markets and "interfere[s] with the populist goal of preserving individual entrepreneurial opportunity"). Strasser labels foreclosure, entry barriers, and the exercise of leverage as tying's most deleterious consequences—economically, socially and politically. *Id.* at 290. For that reason, a tying with any of those harms "should be presumptively illegal, and only the most compelling procompetitive justifications should save the tie from a finding of illegality." *Id.*

29. *See, e.g.*, Richard Craswell, *Tying Requirements in Competitive Markets: The Consumer Protection Issues*, 62 B.U. L. REV. 661, 663 (1982) (stating that "most tie-in controversies could be addressed far more effectively if they were removed from the penumbra of the antitrust laws entirely").

30. *Id.*

31. Promulgated on October 21, 1979, the Federal Trade Commission's rule, entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," requires the franchisor to disclose numerous items to prospective franchisees, but it does not require registration with governmental authorities, nor does it prohibit any particular practices. 16 C.F.R. §§ 436.1-.3 (1992). *See generally* Robert W. Emerson, *Franchising and the Collective Rights of Franchisees*, 43 VAND. L. REV. 1503, 1509-16 (1990) (discussing state franchising legislation, as well as the FTC rule).

32. In Photovest Corp. v. Fotomat Corp., 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980), plaintiff Photovest did not buy processing from defendant Fotomat because of Fotomat's power over a trademark. Photovest bought from Fotomat because of Fotomat's misrepresentation that it was selling to franchisees at cost. Thus, the court found that there could not be "tying by lying." *Id.* at 723. While Fotomat may have committed fraud, breached the franchising contract, or violated state law, its misconduct did not constitute the forcing necessary to make a tie-in. *Id.*

Recently, it became commonplace for writers to assume that tying law would officially pass from the per se to a "rule of reason" doctrine.[33] Indeed, some courts have in effect already avoided the per se stricture against tying[34] by accepting business justifications for product aggregation and thus finding that a challenged arrangement actually constituted only a single prod-

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For a recent Supreme Court decision concerning, *inter alia*, consumers' information costs, see Eastman Kodak Co. v. Image Technical Servs., Inc., 112 S. Ct. 2072, 2085-87 (1992).

33. Janet L. McDavid, Kodak *Decision Revitalizes Tying Claims*, 12 FRANCHISE L.J., Summer 1992, at 3, (noting that the *Kodak* decision's failure to overturn the per se rule was "[c]ontrary to the expectations of most antitrust lawyers"); *see also* California Glazed Prods., Inc. v. Burns & Russell Co., 708 F.2d 1423, 1427 n.10 (9th Cir.) (stating that "[m]any commentators . . . have criticized the application of the *per se* illegal label to tie-ins, especially in the franchising context"), *cert. denied*, 464 U.S. 938 (1983); HOVENKAMP, *supra* note 23, at § 8.3; Baker, *supra* note 27, at 1236-37 (suggesting that the per se rule be abandoned in favor of rule of reason analysis); Carson W. Bays, *Tying Arrangements Should Be Per Se Legal*, 26 AM. BUS. L.J. 625, 662 (1989) (finding an "evolving rule of reason" approach, but arguing that a better standard would be per se legality); Donald L. Beschle, *"What, Never? Well, Hardly Ever": Strict Antitrust Scrutiny as an Alternative to Per Se Antitrust Illegality*, 38 HASTINGS L.J. 471, 497 (1987) (stating that the prevailing sentiment—the momentum among antitrust commentators—has been to "limit or eliminate *per se* categories, if not the entire concept of *per se* antitrust illegality"); Henry N. Butler et al., *The Futility of Antitrust Attacks on Tie-in Sales: An Economic and Legal Analysis*, 36 HASTINGS L.J. 173, 212-13 (1984) (opining that the Supreme Court's maintenance of a per se prohibition against tying ignores economists' "well-reasoned attacks on the view that tying arrangements create monopoly power" and concluding that, even if the Court's analysis were correct, the potential gains from proscribing tie-ins are so small that it is sensible to quit wasting enforcement resources and instead adopt "a rule of reason analysis that includes a presumption of legality"); John F. Hornick, *The Per Se Rule in Tying Contexts: A Critical View*, 10 DEL. J. CORP. L. 703 (1985); Pester, *supra* note 23, at 709 (arguing that the courts should abandon the per se rule); Russell Pittman, *Tying Without Exclusive Dealing*, 30 ANTITRUST BULL. 279, 295 (1985) (contending that the only unlawful tie-ins should be those requiring distributors to engage in exclusive dealing); Katherine C. Grady, Comment, Jefferson Parish Hospital District No. 2 v. Hyde: *Time to Apply the Rule of Reason to Tying Arrangements*, 70 IOWA L. REV. 565 (1985).

34. Under the rule of reason, conduct only violates the antitrust laws when, on balance, it negatively affects competition. This reasonableness standard has continued to evolve since the seminal case, Standard Oil Co. v. United States, 221 U.S. 1 (1911). As for the per se standard, it requires no analysis of competitive impact. Some activities so frequently foster anticompetitive results that they are deemed to be per se antitrust violations. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940) (discussing a price-fixing case); *see also* International Salt Co. v. United States, 332 U.S. 392, 394-96 (1947) (tying defendant's patented machines to the use of its other products held to be per se illegal because of the foreclosure of competition in the tied product market); United Shoe Mach. Corp. v. United States, 258 U.S. 451, 458 (1922) (finding that the practical effect of defendant's tying its patented machine to other United Shoe machines and supplies was an agreement not to purchase competitors' products); KFC Corp. v. Marion-Kay Co., 620 F. Supp. 1160, 1169 (S.D. Ind. 1985) (noting that the per se doctrine requires no proof of anticompetitive consequences because the defendant's alleged acts "are considered so typically and traditionally anti-competitive that the courts have found it appropriate to 'short-circuit' the usual analysis of competitive effects . . . . "). In court cases, the division between activities governed by the per se standard and those under the rule of reason has changed over time. *See, e.g.*, Thomas A. Piraino, Jr., *Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis*, 64 S. CAL. L. REV. 685, 739 (1991) (stating "[a]s the courts have attempted to incorporate modern economic theory into their analysis of antitrust issues, they have inevitably chosen a rule of reason over a per se approach," and concluding that this is fairer to defendants but unduly penalizes plaintiffs and confuses the antitrust law standards).

uct.[35] Presumably all that was needed was an opportunity for the Supreme Court to rule. It came close in 1984, in *Jefferson Parish Hospital District No. 2 v. Hyde*,[36] when four Justices voted for a "rule of reason" approach.[37] However, despite a "large body of legal and economic literature" favoring the replacement of the per se rule on tying,[38] the Court majority reaffirmed the per se rule.

Nonetheless, the trend against per se proscriptions appeared unbroken, and an implicit signal from *Jefferson Parish* seemed to be, "let the prospective franchisee beware."[39] The hopes for a "rule of reason" were dashed, and pro-franchisee opponents' fears were allayed, when the Supreme Court, in June 1992, ruled 6-3 in favor of maintaining the per se standard in tying law.[40] This decision, in *Eastman Kodak Co. v. Image Technical Services,*

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35. *See, e.g.*, Anderson Foreign Motors, Inc. v. New England Toyota Distrib., Inc., 475 F. Supp. 973, 980-81 (D. Mass. 1979); *see also* Aubin, *supra* note 8, at 13 ("Several courts appear to have incorporated a rule of reason approach to the single-product issue even before *Hyde*."); Baker, *supra* note 27, at 1315 (concluding "the 'two product' characterization may be the only way for the lower courts to avoid per se condemnation of practices that they regard as innocuous . . . "); Peter J. Klarfeld, *Tying, Exclusive Dealing, and Franchising Issues, in* 32d ANNUAL ANTITRUST LAW INSTITUTE at 9, 21 (PLI Corp. Law & Practice Course Handbook Series No. 740, Volume 2, 1991) ("In many cases, courts appear to have concluded that a single product exists in order to circumvent application of the per se rule."); Strasser, *supra* note 23, at 259 ("In the checkered history of tying law, courts have sometimes used a single product finding as a smokescreen for the conclusion that a particular tie should be permissible."); Malcolm E. Wheeler, *Some Observations on Tie-ins, the Single-Product Defense, Exclusive Dealing and Regulated Industries*, 60 CAL. L. REV. 1557, 1585 (1972) (criticizing both plaintiffs' attorneys for too quickly relying upon a "talismanic 'tie-in' because of its per se qualities" as an antitrust violation, and courts for too hastily adopting "the talismanic 'single-product' defense without examining its function or the purpose of proscribing tie-ins"); Harris, *supra* note 15, at 875, 907 (finding that "some courts have used the initial characterization issue, *i.e.*, whether separate products are involved, to find that no tie exists"; and holding that "lack of a designated, workable test for product separability . . . has allowed courts to use the single product determination as a means of circumventing the per se illegality of tying arrangements"); Levy, *supra* note 15, at 964 ("A court could obviate any need to apply the per se rule simply by characterizing the items as a single product package"). *See generally* W. David Slawson, *A New Concept of Competition: Reanalyzing Tie-in Doctrine After Hyde*, 30 ANTITRUST BULL. 257, 259 (1985) (noting that the Supreme Court still considers tying's per se illegality to be absolute, even though the doctrine has actually operated as a rebuttable presumption).

36. 466 U.S. 2 (1984).

37. *Id.* at 41 (O'Connor, J., concurring). Joining Justice O'Connor were Chief Justice Burger and Justices Powell and Rehnquist.

38. Slawson, *supra* note 35, at 258; *see supra* note 33.

39. Aubin, *supra* note 8, at 25. Judge Posner predicted shortly after *Jefferson Parish* that the decision's emphasis on market power might doom all franchise cases because franchises almost always involve a highly competitive retail industry. Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698, 705 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984); *accord* Martino v. McDonald's Sys., Inc., 625 F. Supp. 356 (N.D. Ill. 1985). In reality, the proper approach in franchising cases remained muddled. Klarfeld, *supra* note 35, at 24-25.

40. Eastman Kodak Co. v. Image Technical Servs., Inc., 112 S. Ct. 2072 (1992). Kodak had insufficient evidence of a lack of market power to win summary judgment. *Id.* at 2087-88. This was the first tying case in front of the Supreme Court that was won by the plaintiff since 1969. McDavid, *supra* note 33, at 3.

Inc.,[41] came despite contrary urging by the U.S. Justice Department's Antitrust Division, by numerous commentators, and by Justice Scalia in a forceful dissent.[42] In effect, the Court made law simply by what it chose *not* to do—by rejecting a relaxed "rule of reason" approach to tying.[43] Thus, *Kodak* appears to ensure the courts' return to some of the reasoning found in franchise tying cases from the 1970s and the early-to-mid 1980s. No longer will judges simply assume that market analysis or the application of other economic principles should resolve all tying cases.[44] That the Supreme Court has yet to rule in a *franchise* tying case indicates even more clearly the viability of these older cases, as well as the continuing need to deal with the separability of items issue.

B. *Trademark Law and Economics*

While there has long existed a spirited debate about the connection between the economics and public policy of tying arrangements and the legal doctrine on tying,[45] courts have been reluctant to jump into the franchise law maelstrom and take a "ramble through the wilds of economic theory."[46] A significant reason for the reluctance must be that in the franchising con-

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41. 112 S. Ct. 2072 (1992).

42. *Id.* at 2092 (Scalia, J., dissenting). Joining Justice Scalia were Justices O'Connor and Thomas.

43. Allen Kezsbom & Alan V. Goldman, *The Ties That Bind: Kodak Decision Will Develop Into a Landmark on "Tying" and Antitrust*, BUS. L. TODAY, Jan.-Feb. 1993, at 44, 46. While conceding that *Kodak* could be seen narrowly as "merely a summary-judgment decision," Kezsbom and Goldman maintain that *Kodak* actually signals the Court's unwillingness to be led by a preconceived economic theory. *Id.* at 44. Presumably the Court simply will not adopt without reservation the Chicago School view of law and economics. *Id.* at 49.

44. *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 41 (1984) (O'Connor, J., concurring). After *Jefferson Parish*, commentators found "[a] clear trend . . . toward a stricter market power standard." Aubin, *supra* note 8, at 25. With *Kodak* came a "significant veering in antitrust theory." Harold Brown, *Tying: Return to Reality*, N.Y. L.J., Aug. 27, 1992, at 3, 26. This change already has begun to have an effect on lower court decisions. *See, e.g.*, Virtual Maintenance, Inc. v. Prime Computer, Inc., 113 S. Ct. 314 (1992) (vacating a judgment by the 6th Circuit Court of Appeals that an 11% share of the software market was insufficient to establish market power, and remanding the case for further consideration in light of the *Kodak* decision). *But see* Robert Pitofsky, Patent-Antitrust Litigation—Key Issues II, Establishing Market Power Post-Kodak, Outline for ABA Section of Antitrust Law Conference on Antitrust and Intellectual Property: Practice and Policy Issues for the 1990s (Oct. 19-20, 1992) (arguing that *Kodak*'s effect on measuring market power will be minimal and that the principal point of the holding is simply that "facts trump theory").

45. *See, e.g.*, Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 485 n.23 (3d Cir.), *cert. denied*, 113 S. Ct. 196 (1992); Comment, *supra* note 5, at 1267 & n.1.

46. Comment, *supra* note 5, at 1267-68 & n.6 (quoting from the antitrust opinion, United States v. Topco Assocs., 405 U.S. 596, 610 n.10 (1972)). For brief introductory information about franchising, see Emerson, *supra* note 31, at 1506-09. More extensive accounts are provided in *Franchising in the U.S. Economy: Hearings Before the House Committee on Small Business, Serial No. 101-79*, 101st Cong., 2d Sess. (Sept. 27, 1990); STAFF OF HOUSE COMM. ON SMALL BUSINESS, 101st CONG., 2D SESS., FRANCHISING IN THE U.S. ECONOMY: PROSPECTS AND PROBLEMS (Comm. Print 1990).

text, one of the allegedly tied products is quite often the franchised system's trademark itself.[47] Trademarks are central to most franchising relationships. Analysis of the franchise trademark simply adds to the complexity of the applicable antitrust tie-in doctrine.[48]

If a franchise is simply a name and method of doing business, as some courts have stated,[49] then perhaps the franchise cannot be tied to a product since the franchise is not a separable product capable of being independently sold.[50] This theory of inseparability assumes that the trademark and the franchise are essentially equivalent. Numerous courts, adopting the reasoning of *Krehl v. Baskin-Robbins Ice Cream Co.*,[51] have found that a franchise system's trademark was inseparable from the product sold by the franchisees, and thus two independent products were not present.[52] In addition, under the

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47. Zeidman, *supra* note 17, at 437 & n.17.

48. Note, *supra* note 15, at 1167 & n.9 (citing James M. Treece, *Trademark Licensing and Vertical Restraints in Franchising Arrangements*, 116 U. PA. L. REV. 435, 435-36 (1968)) ("The suggestion is sometimes made that the legal limits of franchisee control should be determined, not merely by antitrust policy, but by trademark policy as well. This suggestion implies the existence of a general principle which would restrain action otherwise dictated by antitrust considerations in deference to trademark policy.").

49. *See, e.g.*, Will v. Comprehensive Accounting Corp., 776 F.2d 665, 671 n.1 (7th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986).

50. *Id.* Another rationale for avoidance of a tying claim is that the tied product is manufactured pursuant to a secret formula. *See, e.g.*, Susser v. Carvel Corp., 332 F.2d 505 (2d Cir. 1964), *cert. dismissed*, 381 U.S. 125 (1965); State of New York v. Carvel Corp., 1984-1 Trade Cas. ¶ 65,926 (N.Y. Sup. Ct. Mar. 26, 1984). The franchised trademark and the quality of the end product are identified as a single item. "It is to the system and the end product that the public looks with the confidence that the established goodwill has created." KFC Corp. v. Marion-Kay Co., 620 F. Supp. 1160, 1166 (S.D. Ind. 1985) (citing Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348, 1354 (9th Cir. 1982)). *See generally* UNIF. TRADE SECRETS ACT, 14 U.L.A. 433 (1990) & 71 (Supp. 1992) (listing 36 states and the District of Columbia as adopting jurisdictions).

51. 664 F.2d 1348, 1354 (9th Cir. 1982).

52. *See, e.g.*, Power Test Petroleum Distribs., Inc. v. Calcu Gas, Inc., 754 F.2d 91, 96-98 (2d Cir. 1985) (analyzing the "metes and bounds" of a trademark, reviewing *Krehl* and like cases, and concluding that the trademark and Power Test gasoline were inseparable in the consumer's eyes, and thus no tying was possible); California Glazed Prods., Inc. v. Burns & Russell Co., 708 F.2d 1423, 1430 (9th Cir.) (citing *Krehl* and Hamro v. Shell Oil Co., 674 F.2d 784 (9th Cir. 1982), looking at the consumer's perceptions about trademarks and products, and concluding that the nexus between the franchisor's trademark and the allegedly tied products "is so close that they must be considered one product"), *cert. denied*, 464 U.S. 938 (1983); William Cohen & Son, Inc. v. All American Hero, Inc., 693 F. Supp. 201, 206 (D.N.J. 1988) (finding that portion control meat products used in the All American Hero sandwiches and the All American Hero trademark are separate items, and thus could constitute the tying and tied products needed to evince an antitrust tying violation, and further finding the All American Hero franchise to be part of the business format system described in *Krehl*); Smith v. Mobil Oil Corp., 667 F. Supp. 1314, 1329 (W.D. Mo. 1987) (holding that "the court accepts the validity of the *Hamro-Krehl* approach in deciding whether, for tying purposes, a trademark is separate from the item to which it is attached"); KFC Corp. v. Marion-Kay Co., 620 F. Supp. 1160 (S.D. Ind. 1985) (finding that the franchisor's secret seasoning was an essential and inseparable part of the end product sold by franchisees, and was associated with the franchisor's service mark in the minds of consumers, and thus, the franchise and the seasoning constituted a single product); State of New York v. Carvel Corp., 1984-1 Trade Cas. (CCH) ¶ 65,926 (N.Y. Sup. Ct. Mar. 26, 1984) (holding that the Carvel

tying standards that the Supreme Court announced in *Jefferson Parish*, perhaps no market for the franchised trademark can exist independent from the product itself.[53]

Because various conflicting approaches are still put forth, and the resulting confusion lingers, courts' analyses of tying arrangements venture far beyond the application of a "simple" per se rule.[54] As stated by Justice O'Connor, "The [Supreme] Court has never been willing to say of tying arrangements, as it has of price fixing, division of markets, and other agreements subject to per se analysis, that they are always illegal, without proof of market power or anticompetitive effect."[55] Judges may clash over what is

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mark identified the ice cream and was not a business format mark, so that it was not an illegal tie-in for an ice cream mix producer to sell the mix only to the franchisor itself); *accord* Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698, 704-05 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984); T.A.M., Inc. v. Gulf Oil Corp., 553 F. Supp. 499, 506-07 (E.D. Pa. 1982); Eprad, Inc. v. Dolby Labs., Inc., 209 U.S.P.Q. 238, 242-43 (N.D. Ohio 1980); *see also* Redd v. Shell Oil Co., 524 F.2d 1054, 1056-57 (10th Cir. 1975) (finding that a petroleum products wholesaler who was permitted to display the Shell trademark in conjunction with selling various Shell products was simply a product distributor, and the trademark was not a separate tying item as it would be in, for example, a typical fast-food franchise), *cert. denied*, 425 U.S. 912 (1976); Kugler v. AAMCO Automatic Transmissions, Inc., 460 F.2d 1214, 1215-16 (8th Cir. 1972) (holding that advertising materials customarily provided by the franchisor as part of the franchise were not a separate product); Joe Westbrook v. Chrysler Corp., 419 F. Supp. 824, 835 (N.D. Ga. 1976) (finding that an automobile trademark was not separate from the car itself); Refrigeration Eng'g Corp. v. Frick Co., 370 F. Supp. 702, 711 (W.D. Tex. 1974) (finding that trademarks are separable if sold by "rent-a-name" type franchisors, and distinguishing these separable, quality-of-product trademarks from simple "representation of product origin" type trademarks, and therefore refusing to find that a distribution relationship is a tying product); Mid-America ICEE, Inc. v. John E. Mitchell Co., 1973-2 Trade Cas. (CCH) ¶ 74,681, at 94,987 (D. Or. Aug. 7, 1973) (concluding that the ICEE trademark was not a tying product because defendant's business was not the sale of trademarks or franchises and because—despite the views of customers—defendant viewed its trademarks as indicating product origin rather than product quality); Chock Full O'Nuts Corp., 83 F.T.C. 575, 638-42 (1972) (finding a strict purchase requirement provision to be an illegal tie-in); Levy, *supra* note 15, at 979 (contending that the critical factor in deciding whether a trademark is a separable item for tying purposes is whether the franchisor's business is based upon selling trademark licenses (separable) or upon selling trademarked products (inseparable)).

53. *See Jefferson Parish*, 466 U.S. at 2; *see also* Power Test Petroleum Distribs., Inc. v. Calcu Gas, Inc., 754 F.2d 91 (2d Cir. 1985) (discussing gasoline and trademark); Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698, 703-04 (7th Cir.) (discussing prefabricated buildings and trademark), *cert. denied*, 469 U.S. 1018 (1984); Smith v. Mobil Oil Corp., 667 F. Supp. 1314 (W.D. Mo. 1987) (discussing gasoline and trademark). In Eastman Kodak Co. v. Image Technical Servs., Inc., 112 S. Ct. 2072 (1992) (described *supra* note 40 and *infra* note 56), however, the court stated that *intrabrand* market power might be sufficient market share to constitute a tie-in. More generally, *Kodak* eased up on the requirements for plaintiffs to prove an illegal tying. *Id.* Thus, the inseparability of product notion may become more useful to defeat tying claims. At the same time, courts may look more favorably upon contentions that there are separate demands for two alleged products, the trademark and the good sold under that trademark.

54. Comment, *supra* note 5, at 1269 (stating "a plaintiff must do more than merely show the existence of a tying arrangement in order to prevail"); *accord* A.O. Smith Corp. v. Lewis, Overbeck & Furman, 979 F.2d 546, 550 n.3 (7th Cir. 1992) (noting that the approach to tying is not really per se in practice).

55. *Jefferson Parish*, 466 U.S. at 34 (O'Connor, J., concurring).

sufficient evidence of market power or anticompetitive effect,[56] but there is a consensus that these economic issues must be considered.[57] This limited consensus, in combination with confusion elsewhere in the law, has led back to the very basic "separability of product" analysis. Two economists have opined, "[t]he improper economic analysis of trademarks, and hence the inability to use an absence-of-market-power defense for franchising tie-in arrangements, has led courts to turn to the single-product defense as the primary manner of rationalizing a franchising tie-in arrangement."[58]

Even if properly analyzed, trademark law tends to present further complications for potential franchise tie-ins. Tying may not be justified simply by invoking trademark law's Lanham Act.[59] In some instances, however, the Act may require some product specifications, possibly including the required purchase of franchisor-supplied items, so that a trademark licensor can exercise adequate control over the use of its mark.[60] The trademark licensor must ensure the accuracy of the consuming public's belief that it is buying

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56. *See, e.g.*, *Kodak*, 112 S. Ct. at 2072 (finding that manufacturer had not put forth sufficient evidence of a lack of market power to defeat a tying claim via summary judgment, Justice Scalia, joined by Justices O'Connor and Thomas, strenuously disagreed. *Id.* at 2092-2101.

57. *See, e.g.*, Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 482 (3d Cir.), *cert. denied*, 113 S. Ct. 196 (1992). "Rule of reason" tying claims are still an option for plaintiffs if per se claims fail. Historically, however, few plaintiffs have bothered to include a "rule of reason" approach. *Id.*

58. Benjamin Klein & Lester F. Saft, *The Law and Economics of Franchise Tying Contracts*, 28 J.L. & ECON. 345, 359 (1985). See *supra* note 13 and accompanying text on the four elements of a tie-in. The market power problem was addressed, if not resolved, in both *Jefferson Parish*, 466 U.S. at 2, and *Kodak*, 112 S. Ct. at 2072. Professors Klein and Saft opine that trademark uniqueness is an inadequate standard for measuring a franchisor's market control. Klein & Saft, *supra*, at 355; *accord* Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 798 (1st Cir. 1988); Mozart Co. v. Mercedes-Benz of N. Am., Inc., 833 F.2d 1342, 1346 (9th Cir. 1987) (stating that a "trademark is not itself persuasive evidence of economic power"), *cert. denied*, 488 U.S. 870 (1988); Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39, 48 (5th Cir. 1976) (stating that the existence of a trademark does not insure economic power sufficient to constitute an antitrust violation); Tominaga v. Shepherd, 682 F. Supp. 1489, 1493-94 (C.D. Cal. 1988) (stating that a distinctive trademark should not be confused with the existence of market power); Metrix Warehouse, Inc. v. Mercedes-Benz of N. Am., Inc., 1989-1 Trade Cas. (CCH) ¶ 68,457 (D. Md. Feb. 8, 1989) (noting that market power "must be derived from the product itself, not from a name or symbol"); J. Dianne Brinson, *Proof of Economic Power in a Sherman Act Tying Arrangement Case: Should Economic Power Be Presumed When the Tying Product Is Patented or Copyrighted?*, 48 LA. L. REV. 29 (1987) (contending that patents, copyrights, and trademarks do not grant market power); John F. Dienelt & Gail M.G. Foote, *Tying and Franchising: A Question of Perspective*, 6 FRANCHISE L.J., Winter 1987, at 1, 21 (citing cases for the proposition that economic power cannot be inferred from a trademark or the uniqueness of a franchise).

This article is not intended to cover the market power issue, but deals with the first element of a tying claim: separability of products.

59. 15 U.S.C. §§ 1051-1127 (1988). While fear of infringement does not excuse tying, the reverse is true: a tie-in serves as a defense to trademark infringement. Power Test Petroleum Distribs., Inc. v. Calcu Gas, Inc., 754 F.2d 91, 95-96 (2d Cir. 1985).

60. Lanham Act §§ 5 & 45, 60 Stat. 429, 440, 443 (1946) (codified as amended at 15 U.S.C. §§ 1055 & 1127 (1988)); 1 J. THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 18:14 (2d ed. 1984).

goods of uniform quality[61] or risk losing the trademark.[62] Conversely, the risk of too much franchisor control includes not just antitrust claims, but also potential liability for franchisees' torts under agency law.[63] Of course, with lessening state enforcement,[64] one may see an increase in outright fraudulent

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61. For the proposition, in franchising cases, that the trademark represents to consumers a certain level of quality, see, e.g., Siegel v. Chicken Delight, Inc., 448 F.2d 43, 51-52 (9th Cir. 1971) (noting that the franchisor's preservation of the quality of its product is a legitimate purpose, but concluding that the purpose did not "immunize" from the antitrust laws the numerous tie-ins in that case), *cert. denied*, 405 U.S. 955 (1972); Greil v. Travelodge Int'l, Inc., 541 N.E.2d 1288, 1292 (Ill. App. Ct. 1989) (quoting S. REP. NO. 1333, 79th Cong., 2d Sess. (1946), and stating, "The criterion regarding the control necessary to satisfy the Lanham Act is whether such control guarantees that third parties dealing with the franchisee will receive goods or services of the quality which they have learned to associate with the trademark."). *See also* Power Test Petroleum Distribs., Inc. v. Calcu Gas, Inc., 754 F.2d 91, 96-97 (2d Cir. 1985) (stating that "customer perceptions . . . decide what property rights the trademark owner has").

62. *See* 15 U.S.C. § 1127 (1988); Dawn Donut Co. v. Hart's Food Stores, Inc., 267 F.2d 358, 367 (2d Cir. 1959) ("The only effective way to protect the public where a trademark is used by licensees is to place on the licensor the affirmative duty of policing in a reasonable manner the activities of his licensees."); Morse-Starrett Prods. Co. v. Steccone, 86 F. Supp. 796, 805 (N.D. Cal. 1949) (stating that the trademark owner must maintain sufficient control over the nature and quality of the licensed goods and the activities of the licensee to retain his rights as the trademark owner, and that the licensed goods must be of the same nature and quality as were the goods bearing the trademark before the licensing); Stock Pot Restaurant, Inc. v. Stockpot, Inc., 737 F.2d 1576, 1579-80 (Fed. Cir. 1984) (stating that the restaurant owner had exercised sufficient control over the trademark so as not to have abandoned it); Haymaker Sports, Inc. v. Turian, 581 F.2d 257, 261 (C.C.P.A. 1978) ("Uncontrolled licensing of a mark results in abandonment of the mark by the licensor."); Sheila's Shine Prods., Inc. v. Sheila Shine, Inc., 486 F.2d 114 (5th Cir. 1973) (finding that the trademark owners lost their trademark rights by failing to exercise any control over the activities of licensees); Midwest Fur Producers Ass'n v. Mutation Mink Breeders Ass'n, 127 F. Supp. 217 (W.D. Wis. 1955) (holding that the practice of licensing a trademarked name to anyone who will pay a stipulated fee constitutes an abandonment of trademark rights); *see also* MCCARTHY, *supra* note 60, at § 18:15; UNIF. TRADE SECRETS ACT, 14 U.L.A. 433 (1990) & 71 (Supp. 1992).

63. *See, e.g.*, Billops v. Magness Constr. Co., 391 A.2d 196, 197-98 (Del. 1978) (noting that franchisors generally try to maintain some control to protect the product or services covered by their trademark, but that franchisors who exercise control over their franchisees' daily operations may create an agency relationship); Michael R. Biggs & Matthew C. Hesse, *The Franchisor's Liability When Its Franchisee Goes Public*, 5 FRANCHISE L.J., Winter 1986, at 1, 21. Biggs and Hesse conclude,

> [T]rademark law, bona fide business considerations, and potential claims based on agency or respondeat superior theories combine to create a tightrope which the franchisor must traverse. If an attempt is made to reduce the indications of an agency relationship in order to rebut potential claims, certain features or benefits of the franchise system may suffer.

Id. The harmed franchising features which Biggs and Hesse list include product consistency, trademark protection, and advertising program coordination. *Id.*; *accord* Arthur I. Cantor, *Federal/State Franchise and Dealership Laws*, in P.L.I. CORPORATE LAW & PRACTICE NO. 589, DISTRIBUTION AND MARKETING 105, 240 (1990) (concluding "a franchisor is often caught in the quandary of at once imposing controls to protect its trademarks while avoiding excessive controls that might lead to an unwelcome finding of vicarious liability"); Kenneth B. Germain, *Tort Liability of Trademark Licensors in an Era of "Accountability": A Tale of Three Cases*, 69 TRADEMARK REP. 128, 131-32 (1979) (noting "the very practices that lead to effective licensing—careful quality control, widespread advertising of the licensed trademark and close supervision of the licensee's modus operandi—are likely to lead courts to conclude . . . that licensors must share the financial responsibility for the torts of their licensees").

64. Jeffrey A. Tannenbaum, *States Are Cutting Back on Enforcing Franchise Rules: As Com-*

behavior, such as kickbacks to franchisors from approved suppliers.[65]

C. *The* Krehl *Case*

The revitalization of antitrust tying law in *Kodak* may mean that the most significant decision involving a franchisor's "two-product" defense to tying allegations remains the seminal case of *Krehl v. Baskin-Robbins Ice Cream Co.*[66] There, the Ninth Circuit Court of Appeals expanded upon the distinction between two kinds of franchising systems: the business format system, and the distribution system.[67]

In effect, the court held that the trademark in a distribution franchising system is indistinct, *in the minds of consumers*, from the end product marketed by that system.[68] Therefore, the court found no antitrust "tying" violation because the trademark and the end product were inseparable, creating one good.[69] Obviously, without two separate products, there cannot be a "tying" arrangement.[70] In a related case in which a court held that a franchise system was a distribution system, the court also found *inseparable* products and stated, "[t]he tie-in doctrine has no application where the trademark [franchise in this case] serves only to identify the allegedly tied product."[71]

Krehl has had supporters, both judicial and scholarly.[72] Others have

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plaints About Abuses Mount, Buying Such Businesses May Be Riskier, WALL ST. J., Feb. 4, 1993, at B2.

65. *See supra* note 12.

66. 664 F.2d 1348 (9th Cir. 1982).

67. *Id.* at 1353-54. Previously, commentators had found the difference between distribution and business format franchises to be significant. *See, e.g.*, Levy, *supra* note 15, at 955-56, 974-79; Harris, *supra* note 15, at 883. In the business format arrangement, "the franchisee operates his business under the franchisor's trade name, is identified as a member of a select group of dealers, and generally is required to follow standardized methods of operation prescribed by the franchisor." 15 GRADYS GLICKMAN, FRANCHISING § 2.01, at 2-2 (1993). The franchisor for a distribution franchise merely licenses a franchisee to sell the franchisor's product. *Id.*; *accord Krehl*, 664 F.2d at 1353-54. While a business format franchisee typically must produce or prepare the system's end products and services, the distribution franchisee acts merely as a conduit. *See Krehl*, 664 F.2d at 1353-54. Distribution systems accounted for roughly 70% of total sales made by franchised businesses in 1990, but the business format approach is growing faster, both in the number of franchises and in total sales. INTERNATIONAL FRANCHISE ASS'N EDUC. FOUNDATION & HORWATH INT'L, FRANCHISING IN THE ECONOMY 1988-1990, at 12, 90, 94 (1990) (indicating that business format franchises accounted for 30% of total franchise sales in 1990 with their sales growing at 11% per annum, a rate nearly three times greater than that of distribution franchises). By 1990, franchises accounted for over one-third of total retail sales in the United States, and the number of business format franchises had risen to nearly 400,000. *Id.* at 11-12.

68. *Krehl*, 664 F.2d at 1353-54. Conversely, in a business format situation, "the trademark and the product are separate in the consumer's eyes . . . . " Power Test Petroleum Distribs., Inc. v. Calcu Gas, Inc., 754 F.2d 91, 98 (2d Cir. 1985).

69. *Krehl*, 664 F.2d at 1354.

70. *See supra* note 14 and accompanying text.

71. KFC Corp. v. Marion-Kay Co., 620 F. Supp. 1160, 1170-71 (S.D. Ind. 1985).

72. *See, e.g.*, Note, *supra* note 15, at 1196 (calling the Ninth Circuit's approach, including *Krehl*,

challenged one or more aspects of the decision in *Krehl*.[73] Despite these criticisms, *Krehl* remains good law. As stated by the court in *Smith v. Mobil Oil Corp.*,[74] "it [is] difficult to accept the conclusion that *Hyde*[75] overruled the whole flock of *Hamro-Krehl* cases without mentioning even one of them. The allegations in *Hyde* did not involve franchising or an alleged trademark tie."[76] The conclusion in *Smith* is even more cogent given the decision in *Kodak*.[77] There, the Supreme Court relied on what it believed to be the commercial realities faced by consumers, especially high information costs.[78]

Still, there remains nothing but judicial supposition about the *Krehl* notion that consumers know or do not know certain things about franchised systems. Indeed, it places too much credence in courts' capacity to take judicial notice of certain facts to suppose that judges have a feel for what is or is not public knowledge. Surveys and other empiric evidence are far more reliable than judicial notions of public knowledge.[79] As stated by one commentator reviewing *Krehl*'s and similar cases' troubling reliance on public perceptions, "[*Krehl*] raises the problem of how a court is to ascertain whether the trademark and the product are 'inextricably interrelated' in the public's mind. Should the court make a subjective evaluation, or should it examine objective evidence, such as consumer polls?"[80] This article pro-

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"vastly superior" to the Fourth Circuit's approach in Principe v. McDonald's Corp., 631 F.2d 303 (4th Cir. 1980), *cert. denied*, 451 U.S. 970 (1981)); *supra* note 52.

73. *See, e.g.*, Principe v. McDonald's Corp., 631 F.2d 303, 309 (4th Cir. 1980), *cert. denied*, 451 U.S. 970 (1981); Casey v. Diet Center, Inc., 590 F. Supp. 1561 (N.D. Cal. 1984). In *Principe*, decided two years before *Krehl*, the Fourth Circuit Court of Appeals wrote, "we think the proper inquiry is not whether the allegedly tied products are associated in the public mind with the franchisor's trademark, but whether they are integral components of the business method being franchised." *Principe*, 631 F.2d at 309.

74. 667 F. Supp. 1314 (W.D. Mo. 1987).

75. *Jefferson Parish*, 466 U.S. at 2.

76. *Smith*, 667 F. Supp. at 1327.

77. 112 S. Ct. at 2072.

78. *Id.* at 2085-87. The Court noted that the record "suggests Kodak is able to exploit some customers who in the absence of the tie would be protected from increases in parts prices by knowledgeable customers." *Id.* at 2089 n.29. Moreover, consumers' beliefs about retail products and operational items at franchised outlets do not correspond to the "informed" judgments presumed by the court in *Krehl*. *See infra* part III.B.

79. *See* Robert W. Emerson, *Franchisors' Liability When Franchisees Are Apparent Agents: An Empirical and Policy Analysis of "Common Knowledge" About Franchising*, 20 HOFSTRA L. REV. 609 (1992) (examining judicial notice of the public's knowledge about franchising in the context of a franchisee's apparent authority to bind the franchisor, and survey evidence undermining the supposed, factual premises of this court doctrine).

80. Note, *supra* note 15, at 1189-90. The note argues that while the public perception in *Krehl* was "intuitively clear," such clarity breaks apart in "multiple product situations like *Hamro*." *Id.* at 1190. In both cases, the court "failed to elaborate the standards it used to evaluate the public's perceptions" and thus left no guidance to future courts. *Id.*; *see also* Kosters v. Seven-Up Co., 595 F.2d 347, 353 (6th Cir. 1979) (indicating that consumer reliance upon a trademark could be used to place im-

vides survey evidence and refutes the *Krehl* court's assumption that consumers would find more separability of the products for the business format franchise than for the distribution type of franchise.[81] The article then proceeds to outline the significance of the empiric evidence for franchise tying cases.[82]

III. THE SURVEY

A. *Methodology*

Seven survey specialists from the University of Florida conducted a survey between September 7, 1992 and September 21, 1992. Among the objectives were to determine: (1) consumer perceptions about trademarks and products; and (2) consumer distinctions between business format and product distribution franchises.

These objectives were studied through the course of several meetings to determine the population of respondents, the sample size, specific items to include in the questionnaire, and procedures for getting more detailed and accurate information. Because of the complexity of the research topic, exact, simple phrasing to ease respondent comprehension was an important goal. After several revisions to find the best wording, length, order, topic completeness, and method for recording responses, a final questionnaire was pretested[83] and then edited a final time. Nonthreatening questions were presented first, followed by those measuring opinion. Closing questions concerned demographics, with the final question asking for an open-ended response.[84]

Sampling determines whether a poll is representative. A representative poll selects a sample large and random enough that the sample can be ap-

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plied product warranty liability upon a soft drink franchisor for harm to a grocery store customer).

81. In *Krehl*, the court wrote that goods tied by business format franchises are perceived as separate from the trademark because the quality standards associated with the trademark can be ensured by means other than franchisor production. *Krehl*, 664 F.2d at 1353. The franchise customers "have no reason to associate with the trademark, those component goods used either in the operation of the franchised store or in the manufacture of the end product." *Id.*

82. Another tying issue of consumer perception involves the question of whether consumers are able, or even inclined, to determine the combined price of tied products from the subprices for each of the two items. While *Kodak* noted the problem of high information costs, *see supra* note 78 and accompanying text, the Supreme Court has stated that a seller's expectation of consumer inability or disinclination to compare goods or services does not, by itself, create an antitrust claim. *Jefferson Parish*, 466 U.S. at 27-28; Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 489-90 (3d Cir.), *cert. denied*, 113 S. Ct. 196 (1992). The antitrust tying laws should not be expanded to cover problems better served by enacting consumer protection laws expressly focussed upon mandated disclosure of information. *Id.* at 492-93 (citing Craswell, *supra* note 29, at 687-96).

83. Pre-testing involved administering the survey to 50 persons who would not be among the actual survey sample finally polled. The pre-test participants' answers and comments were used to make any necessary fine-tuning of the survey instrument.

84. Complete demographics are on file with the *Florida Law Review*.

plied to the larger public.[85] The population sampled for this survey was defined as telephone subscribers in Alachua County, Florida. While the sample may have been poorer in income than the national average,[86] it was better educated than the typical American.[87]

To assure reliable results, the surveyors used the random digit dialing method which allows all individuals included in the population to have an equal chance of being selected.[88] The completed sample's size was 590 adults. The degree to which a sample fails to represent the population accurately is called the tolerated error and is determined by the size of the sample.[89] In this case, there was less than a one percent chance that the sample did not accurately reflect the total population.[90]

85. ROBERT KENDALL, PUBLIC RELATIONS CAMPAIGN STRATEGIES: PLANNING FOR IMPLEMENTATION 84 (1992) ("Survey research is one of the most common descriptive research methods. It measures public opinion, attitudes, or behavior by interviewing representative samples of appropriate publics. Random selection of appropriate numbers for the sample ensures that the results will represent the characteristics of the entire population from which the sample is drawn.").

86. No questions were asked about income, but Alachua County's per capita income level is lower than the national average; it was about 86.4% of the national average in 1990. UNIVERSITY OF FLORIDA BUREAU OF ECONOMIC AND BUSINESS RESEARCH, FLORIDA STATISTICAL ABSTRACT 140 (Anne H. Shermyen ed., 26th ed. 1992). Of course, a sample of telephone subscribers would exclude, as nonsubscribers, a proportionately poorer segment of the populace, so the sample may have been closer to the national income average.

87. Most of the respondents had undertaken some college course work, and almost one-third were college graduates, with a small percentage (about 4%) holding advanced degrees. *See* Survey Results on file with the *Florida Law Review*. According to the Census Bureau, the median level of education for Americans 25 years old and older is high school graduation, with little or no college course work. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 144-45 (112th ed. 1992) (indicating 1991 median years of schooling for persons age 25 or older—12.7; 1991 percentage of persons age 25 or over with four years of college or more—21.4%, with a slightly higher percentage having not graduated from high school).

88. KENDALL, *supra* note 85, at 98 ("[Random digit dialing] has the advantage of combining the final sample selection with the interviewing, which greatly simplifies the design of the survey. It also gets high marks for accuracy in representativeness of the intended population."); William R. Klecka & Alfred J. Tuchfarber, *Random Digit Dialing: A Comparison to Personal Surveys*, 42 PUB. OPINION Q. 105, 113 (1978) (finding the random digit dialing technique to be superior, in most ways, to personal interviews, and "at least as accurate as the best alternative survey methods"). Complete information on the random digit dialing method employed is on file with the *Florida Law Review*.

89. *See* ALBERT H. CANTRIL, THE OPINION CONNECTION: POLLING, POLITICS AND THE PRESS 114-18 (1991) (discussing sampling error).

90. Complete information on the survey's tolerated error, or chance sampling error, is on file with the *Florida Law Review*.

B. *Results*[91]

Based on the survey results, *Krehl*'s notions of consumer beliefs about distribution franchising systems have merit, at least insofar as Baskin-Robbins ice cream itself is concerned. Respondents were asked if they thought "products such as Baskin-Robbins ice cream are made and distributed by Baskin-Robbins: '. . . for all stores,' . . . 'for most stores,' . . . 'for some stores,' . . . or 'for none, where each individual store makes or purchases its own ice cream from various suppliers.' " Approximately forty-three percent of those with a response felt that Baskin-Robbins made and distributed the ice cream to all of the stores; almost a third thought that Baskin-Robbins made and distributed its ice cream for most stores, and the fewest respondents—less than twelve percent—believed that each individual store made or purchased its own ice cream.[92] For another distribution type of franchise, gasoline service stations, most respondents distinguished between the franchised trademark and the principal product sold by the franchises—gasoline.[93] This contradicts the *Krehl* presumption that trademark and product are inseparable in the minds of the public.[94] However, the nearly fifty-nine percent of those survey respondents who believed that when they buy gas at, for example, a Shell service station, they are not actually getting gasoline made by Shell,[95] are often correct on the facts.[96]

91. Information on the survey, telephone interviewing techniques, computer tabulation of the results, and verification both of the tabulations and that the reported interviews actually took place, is on file with the *Florida Law Review*.

92. *Infra* app., ques. 5. Obviously, if the respondent believes that the franchisor itself conducts the production and distribution, then it becomes more difficult to construct a scenario in which the respondent somehow continues to distinguish the product trademark from the goods. More direct questioning as to product/trademark differentiation was impractical because of problems with wordiness and respondent comprehension. Moreover, the questions may have been more likely to lead the respondents to particular answers. Respondent ignorance as to the rather complex subject of trademark connotations seems probable given the respondents' ignorance about more basic, less ephemeral subjects such as production and distribution or ownership and control. *See* Emerson, *supra* note 79, at 680-82; *infra* text accompanying notes 122-24.

93. *See infra* app., ques. 3.

94. *See, e.g.*, Hamro v. Shell Oil Co., 674 F.2d 784, 787-88 (9th Cir. 1982). In *Hamro*, the court followed *Krehl* and analogized that the Shell gasoline and the Shell trademark, like Baskin-Robbins ice cream and its trademark, were "inextricably interrelated" in the mind of the public and thus constituted one product. *Id.* at 788. Unlike the franchisees in *Krehl* who sold one main tied product (ice cream), the Shell franchisees sold products in addition to the tied item (gasoline). That made no difference to the court. *See id.*

95. *Infra* app., ques. 3.

96. *See, e.g.*, Smith v. Mobil Oil Corp., 667 F. Supp. 1314, 1319 (W.D. Mo. 1987) (stating that Mobil admitted it commonly exchanged gasoline with other oil companies, and so "[a] good deal of the gasoline Mobil supplied its dealers was not produced, refined, or delivered by Mobil . . . "); Bogosian v. Gulf Oil Corp., No. 71-1137, 1983 WL 1824, at *1 (E.D. Pa. Apr. 12, 1983) (referring to arrangements whereby trademarked gasoline sometimes came from various sources besides the oil company that held the trademark); Edward J. Sweeney & Sons v. Texaco, Inc., 478 F. Supp. 243, 279-

Krehl and its progeny go far beyond ice cream and gasoline, however. The *Krehl* approach places a broad judicial imprimatur on the implications arising from "a common sense perception of what people expect" when buying goods from a franchisee.[97] The fundamental intuitive notion of the *Krehl* line of cases is that consumers tie, in their minds, the franchisor trademark and the endproducts at distribution franchises, but do not do so for business format franchises.[98] The survey evidence, though, clearly refutes this court-based distinction between types of franchised systems. Nearly half of the survey's respondents believed that fast food products, such as McDonald's hamburgers, are made and distributed by the franchisor for all of the outlets; over twenty-two percent of people with an answer felt that the franchisor made and distributed the hamburgers for most outlets, and less than eighteen percent believed that each individual store made or purchased its own products.[99] In fact, the trend may be toward greater ignorance inasmuch as the youngest age group polled, ages eighteen through twenty-four, was most likely to doubt that the individual franchisees had anything to do with the making or distributing of the hamburgers.[100] This same age group was also least likely to believe that franchisees must meet certain product quality specifications.[101] Conversely, an older group, persons age forty-five to fifty-four, was most likely to believe that the franchisees themselves made or purchased their own products[102] and that such franchisees typically were required to meet specifications.[103] Overall, for fast-food enterprises, which are business format franchises, the respondents were at least as likely to link the trademark and the actual products sold to consumers as they were to link the trademark and product for a distribution franchise such as Baskin-

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80 (E.D. Pa. 1979), *aff'd*, 637 F.2d 105 (3d Cir. 1980) (rejecting a distributor's claim that since Texaco purchased gasoline from other refiners and sold it to him as Texaco gas, Texaco had no right to complain about the distributor's labelling of this gasoline), *cert. denied*, 451 U.S. 911 (1981). Various brands of gasoline, though, are not truly fungible because gasoline products are made up of a varying blend of hydrocarbons and additives, meaning gasoline is not a single substance, like water. *See* David Owen, *Octane and Knock*, THE ATLANTIC, Aug. 1987, at 53, 57. The importance of brand names must be receding, not just because of perceived fungibility, but also because changes in industry composition leave less of a market share for the well-known brands. *See generally* J. Richard Shaner, *Is "Big Oil" Getting Bigger? Well, Yes and No, But Not Really*, NAT'L PETROLEUM NEWS, Nov. 1991, at 42 (noting that while the assets of the 15 largest American oil companies have increased considerably during the last 20 years, the level of concentration has declined by 16%).

97. Note, *supra* note 15, at 1186.

98. *See Krehl*, 664 F.2d at 1353-54.

99. *Infra* app., ques. 1. Of those who felt that each individual store made or purchased its own products, most felt that the stores still were required to meet certain specifications. *Id.* ques. 2.

100. *See* cross tabulations on file with the *Florida Law Review*. Less than 10% of this age group thought so, far below the 18% figure for the entire sample. *Id.*

101. *See id.*

102. *See id.* Approximately 35% thought that to be the case. *Id.*

103. *See id.*

Robbins.[104] Interestingly enough, the public was more likely to adopt the *Krehl* inseparableness of trademark and product approach involving a business format fast-food franchise than for the most common type of distribution franchise, the gasoline station.[105] This result, although counter to *Krehl*, would probably also hold true for business format franchises other than fast-food restaurants.[106]

Even when the products are not goods intended for retail purchase by consumers, as was the case in *Krehl*, many respondents viewed the franchisor and these operational goods as being inextricably linked.[107] Perhaps this is not surprising, given the number of service marks or trademarks a franchised operation may acquire for matters relating to the packaging, advertising, sale, or distribution of an item, as opposed to the item itself.[108] About three-fifths of the survey respondents thought that the franchisor makes or obtains "all cooking equipment, napkins, trays, and the like for each McDonald's restaurant."[109] Of course, requiring franchisees to purchase "commonplace articles" from the franchisor would constitute an antitrust tying violation.[110] Moreover, adherence to quality standards can be maintained via less restrictive measures,[111] such as providing contractual specifications about quality

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104. *Compare infra* app., ques. 1 (finding that approximately 46% of respondents believed McDonald's made and distributed hamburgers for all stores) *with infra* app., ques. 5 (finding that approximately 43% of respondents believed Baskin-Robbins made and distributed ice cream for all stores).

105. *Compare infra* app., ques. 1 (finding that approximately 46% of respondents believed McDonald's made and distributed hamburgers for all stores) *with infra* app., ques. 3 (finding that approximately 56% of respondents believed gas purchased at a Shell service station was made by another company and purchased by Shell).

106. *See* Emerson, *supra* note 79, at 672-73 (ques. 1, 7) (finding, in other recent surveys, that respondents were more likely to believe a health/diet center was nationally owned and operated (inseparable from the local business) than to believe a gas station was nationally owned and operated).

107. *See infra* app., ques. 6 (giving results of the survey with respect to Supercuts Hair Salon Shampoo); *see also* Note, *supra* note 15, at 1193, 1196 (discussing the difference between final products sold through the franchised system and operational products or other goods apart from the end-products).

108. *See, e.g.*, KFC Corp. v. Marion-Kay Co., 620 F. Supp. 1160, 1163 (S.D. Ind. 1985) (listing 21 trademarks and service marks registered to the KFC Corporation, many of which do not relate directly to particular Kentucky Fried Chicken food, but to the overall KFC system).

109. *Infra* app., ques. 8. For two other types of franchises, the hair cutting salon and the hotel, the responses varied considerably. Approximately 44% believed that each individual franchised hair salon makes or buys its own products such as the shampoo it uses on customers. *Infra* app., ques. 6. Barely a majority thought that the franchisor (Supercuts Hair Salon) made and distributed the products used at the salons to some, most, or all of the salons in that franchised system. *Infra* app., ques. 6; *see generally* Johnson & Johnson v. Quality Pure Mfg., 484 F. Supp. 975, 981 (D.N.J. 1979) (noting that one shampoo is not fungible with another, and that the term "shampoo" covers a broad array of substances). As for hotels, almost 70% of the respondents felt the franchisor, Holiday Inn, Inc., does *not* make or obtain "all bedsheets, furniture, cleaning products, and the like used at each hotel." *Infra* app., ques. 12.

110. *KFC Corp.*, 620 F. Supp. at 1166.

111. *See id.*

as well as a list of acceptable independent suppliers.[112] In a 1992-93 survey of 100 fast-food franchise agreements,[113] almost all of the contracts with purchasing provisions provided specifications for product standards and approved suppliers.[114]

While a business format franchise does much more than act as a conduit for products supplied via a franchisor,[115] the customers may not distinguish between the overall multi-layered package and *mere* distribution. For example, most respondents associated the Diet Center franchises with the selling of diet food and pills, rather than counseling, other services, or anything other than retail sales.[116] In fact, Diet Center franchises are business format in nature, and do far more in the way of individual counseling, motivational group support, behavior modification, nutrition education, and development of weight-loss programs, than selling products.[117] However, another survey shows that would-be consumers expect trademarked health/diet centers to be centrally owned and operated rather than franchised.[118]

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112. Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39, 47 (5th Cir. 1976) (citing Kentucky Fried Chicken Corp. v. Diversified Pkg. Corp., 376 F. Supp. 1136, 1148 (S.D. Fla. 1974)); Siegel v. Chicken Delight, Inc., 448 F.2d 43, 49 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972); Esposito v. Mister Softee, Inc., 1980-1 Trade Cas. (CCH) ¶ 63,089, ¶ 77,422-23 (E.D.N.Y. 1979), *modified*, 1983-1 Trade Cases ¶ 65,336 (E.D.N.Y. 1983) (finding that ice cream quality could be controlled by specification and distinguishing the case from other systems in which there exists a secret formula); Kentucky Fried Chicken Corp. v. Diversified Pkg. Corp., 376 F. Supp. 1136, 1148 (S.D. Fla. 1974); *see also* McCarthy, *supra* note 24, at 1117 (stating that it is rare that contract specifications could not meet the franchisor's quality control needs); *supra* notes 59-62 and accompanying text (regarding product specifications and the Lanham Act); *but see In re* Howard Johnson Co., 94 F.T.C. 324 (1979) (issuing a consent decree which permitted the franchisor to continue requiring its franchisees to purchase 30 items produced by Howard Johnson Co. that were difficult to make through specifications).

113. *See* Emerson, *supra* note 11.

114. *See* Emerson, *supra* note 11. A 1971 study likewise showed that most franchise agreements without an express tying provision required franchisees to meet the purchasing specifications set forth by the franchisor. SENATE SELECT COMM. ON SMALL BUSINESS, *supra* note 11, at 231-33 (identifying franchisor-approved supplier provisions in these percentage of contracts: paper goods supplier (53%), operating supplies vendor (48%), equipment supplier (48%), and sign vendor (43%)).

115. *See supra* note 67.

116. *Infra* app., ques. 7.

117. Telephone interview with Consumer Relations Department, Diet Center, Inc. (Dec. 18, 1992); *see also* FOSTER, *supra* note 8, at 64-66.

118. *See* Emerson, *supra* note 79, at 673. Therefore, the trademark and the goods would likely be inextricably linked in the respondent's mind. *See infra* text accompanying notes 122-25. In Fiske v. Sullivan, No. 778-904, 1984 WL 15696 (Cal. Super. Ct. May 29, 1984), the judge ruled that Diet Center was not a business format franchise system. In so doing, the court relied upon *Krehl* as "persuasive authority," and held that the Diet Center weight loss program and the Diet Center supplement were insufficiently independent to find a tying of those two items. *Id.* at *1. The court opined as follows:

> The connection between the Diet Center program and the Diet Supplement is not remote. While it may be argued that the supplement is low on the scale of importance in relation to other aspects of the program, for example the counseling or the diets, the supplement is nevertheless a component of the program and inextricably interrelated to the program in the

If *Krehl* and its progeny make any sense for distribution franchises, the survey results make it hard to apply the reasoning to Baskin-Robbins and not to McDonald's and many other business format franchises. The *Krehl* court itself noted that a franchise system may be a distribution kind for its end product but a business format type for operational items.[119] While some have contended that such hybrid cases really should not prove difficult, and that an accurate line can be drawn in order to classify a system as either distribution or business format,[120] the key fact that the survey reveals may be that consumers simply do not distinguish between the types of franchises involved.[121] Another public survey also indicates that respondents typically had little knowledge about the probable ownership and control either of well-known distribution franchises or of well-known business format franchises.[122] Because average customers do not know who owns or controls a franchise, it appears likely that they also do not understand the trademark significance of certain franchised operations.[123] When asked about specific, prominently advertised, local business format franchises, respondents frequently, and incorrectly, opined that these businesses were not locally owned and operated.[124] These responses were made in spite of advertising that always noted the franchise's independent ownership and operations, as well as the fact that the franchise's trade name and logo were not just the national franchisor's name and logo, but also incorporated the name of the local owner.[125]

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mind of the consumer who has opted to engage in the Diet Center program.

Id. The same reasoning would extend to end products sold at franchised businesses that are definitely business format in nature. For instance, are not the McDonald's hamburger and the McDonald's system also inextricably interrelated in consumers' minds? The survey for this article so indicates, *infra* app., ques. 1, and the author does, in fact, recommend that the arbitrary distinction between business format and distribution be dropped for tying purposes. *See infra* part IV.

119. *Krehl*, 664 F.2d at 1353 n.11.

120. Smith v. Mobil Oil Corp., 667 F. Supp. 1314, 1322 n.8 (W.D. Mo. 1987). Looking at "most of the cases likely to arise," the *Mobil* court wrote, "No one would argue, for example, that McDonald's is in the hamburger manufacturing or distributing business, or that Dolby Laboratories is actually engaging in 'business format' franchising when it sells sound equipment to theatres." *Id.*

121. *See infra* app.

122. *See* Emerson, *supra* note 79, app. at 680 (indicating that the public could not properly classify either distribution franchised systems like Kentucky Fried Chicken and Chevron Gas or business format franchised systems such as McDonald's, Holiday Inn, and Budget Rent-a-Car).

123. *See* Neptune T.V. & Appliance Serv., Inc. v. Litton Microwave Cooking Prods. Div., 462 A.2d 595, 599 (N.J. Super. Ct. App. Div. 1983). Most consumers may simply believe, in a very general manner, that "there is a connection between the trade name licensor and licensee by which the licensor vouches, as it were, for the activity of the licensee." *Id.* Such purposely created, reasonable beliefs, *see id.*, have been shown empirically via a random public survey. *See* Emerson, *supra* note 79, app. at 682 (indicating that a majority of respondents felt that the national company "stands behind" the local stores' goods and services).

124. Emerson, *supra* note 79, at 656, 681.

125. *Id.* at 656 & n.222.

An implicit assumption in *Krehl* is that consumers are concerned about who makes the end product.[126] The survey results seem to refute this notion. Approximately fifty-nine percent of all respondents agreed with the premise that a Baskin-Robbins licensee "is free to use other products," such as a brand of milk other than Baskin-Robbins milk.[127] A similar percentage of respondents also felt that a gasoline station licensee could buy needed products, such as wiper fluid, from suppliers other than the licensor.[128] Both questions involve a distribution franchise, but for the latter question the item was something other than the principle retail item sold by the franchisee.[129] While a dairy source seems more closely related to the main product of an ice cream outlet than does the brand of wiper fluid with respect to a brand of gasoline, survey respondents did not make this distinction.[130] Only when respondents dealt with what are obviously the two main products, ice cream and gasoline, did a distinction in the minds of many respondents seem to exist. Far more respondents seemed to tie in their minds the ice cream store trademark and the ice cream product than did so for the service station trademark and the gasoline product.[131]

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126. *See, e.g.*, Krehl v. Baskin-Robbins Ice Cream Co., 1979-2 Trade Cas. (CCH) ¶ 62,806, at 78,706 n.5 (C.D. Cal. 1979), *aff'd*, 664 F.2d 1348 (9th Cir. 1982) (noting that the court might have found a tie-in between the trademark/trade name and products other than ice cream). While conceding that the franchisor's trademark need not encompass only franchisor-manufactured goods, the court in *Krehl* spoke of detailed specifications. *Krehl*, 664 F.2d at 1353. Clearly, a manufacturing licensee must make the goods exactly as if the franchisor itself were the manufacturer. *See* Power Test Petroleum Distribs. v. Calcu Gas, Inc., 754 F.2d 91, 97 (2d Cir. 1985) (citing cases for the proposition that purchasers need not know the manufacturer's name for the trademark to be linked inextricably with a particular product); Redd v. Shell Oil Co., 524 F.2d 1054, 1057 (10th Cir. 1975) (discussing a trademark representing that Shell gasoline was made by or for Shell), *cert. denied*, 425 U.S. 912 (1976).

127. *Infra* app., ques. 10.

128. *Infra* app., ques. 11. Approximately five out of every six respondents with an opinion felt that the retail products sold at a Shell service station, other than gasoline, were made by many other companies beside Shell. *Infra* app., ques. 4. When asked only about the primary retail product, gasoline, the number of respondents who felt that Shell did not actually make the product was far lower—about 56%. *Infra* app., ques. 3.

129. See *infra* app., ques. 3, 4 for more on the distinction between the principal retail item and other goods at a franchised outlet.

130. *Compare infra* app., ques. 10 (finding that approximately 53% of respondents believed a Baskin Robbins store may use other brands of milk) *with infra* app., ques. 11 (finding that approximately 57% of respondents believed a Shell service station may buy other brands of windshield wiper fluid).

131. *Infra* app., ques. 3, 5. Perhaps respondents simply saw gasolines as fungible, as some courts have done. *See, e.g.*, United States v. Johnson, 612 F.2d 843, 846 (4th Cir. 1979) (recognizing the fungibility of gasoline in a case concerning gasoline stolen from a pipeline); Bogosian v. Gulf Oil Corp., 561 F.2d 434, 453 (3d Cir. 1977) (noting the apparent fungibility of gasoline with similar octane ratings), *cert. denied*, 434 U.S. 1086 (1978). However, in trademark cases, fungibility may not matter. *See* Edward J. Sweeney & Sons v. Texaco, Inc., 637 F.2d 105, 117-123 (3d Cir. 1980) (indicating that despite the party's admission that gasoline is a fungible commodity, the court held that Texaco had the right to put its trademark on whatever gasoline it deemed suitable, regardless of the gasoline's source), *cert. denied*, 451 U.S. 911 (1981). Moreover, when the evidence is present, courts have had no diffi-

Almost three-quarters of the respondents thought that a franchised trademark, such as the golden arches of McDonald's, should leave the trademark licensee restricted in its sales to only those products associated with that trademark.[132] Note that the restrictions endorsed by the greatest percentage of respondents involve a business format system—a fast-food restaurant chain, not distribution franchises involving ice cream or gasoline.[133] Apparently, there is a greater tendency to link product and trademark in the business format case, which is the opposite of what *Krehl* assumes when distinguishing distribution franchises from business format franchises.[134]

IV. Conclusion

A. *Recommendations*

The author recommends a simpler approach to the tying separability issue. The difference in *Krehl* between distribution and business format franchises should be abandoned. In the franchising context, the courts should find inseparable the franchised trademark and the end product sold to consumers, if this "tying" was agreed to at the outset of the franchise relation-

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culty finding a distinct gasoline product which purchasers do not deem fungible with other gasolines. *See* Power Test Petroleum Distribs. v. Calcu Gas, Inc., 754 F.2d 91, 98 (2d Cir. 1985); *see also supra* note 96. This analysis seems even more appropriate in light of the further development of gasoline products, coupled with the varying performance of automobile engines depending upon the gasoline used. *See* Owen, *supra* note 96, at 60. Consequently, gasolines have gone from being virtually interchangeable to having significant differences, even among well-known brands. *Id.*

132. *See infra* app., ques. 9. In another survey, respondents looked at a rent-a-name hotel logo and overwhelmingly concluded that it was likely the hotels using that logo must be owned and operated by the national, trademark owner. Emerson, *supra* note 79, at 674-75 (ques. 12). Again, for this type of business format arrangement, as opposed to a distribution franchise like gasoline chains, respondents linked the trademark and the products or services sold under that trademark. *Id.* at 672.

133. *Compare infra* app., ques. 9 (showing that 65% placed restrictions on McDonalds) *with infra* app., ques. 10 (showing that 53% placed no restriction on Baskin-Robbins) *and infra* app., ques. 11 (showing that 57% of respondents placed no restriction on Shell).

134. *See Krehl*, 664 F.2d at 1354 n.15 (noting that for distribution systems "it is simply impossible for the trademark to be desirable if the product it represents is perceived as undesirable," while no such link is suggested for business format franchises). Other courts, however, have looked at business format franchise systems and adopted the same reasoning as the *Krehl* court. *See, e.g.*, Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 722 (7th Cir. 1979) (finding that a retail film development franchise was a separate product from the film processing and from the kiosk in which the franchise operated), *cert. denied*, 445 U.S. 917 (1980); William Cohen & Son v. All American Hero, Inc., 693 F. Supp. 201, 206-07 (D.N.J. 1988) (using *Krehl* to find that portion control meat products used in the All American Hero sandwiches and the All American Hero trademark are separate items, and thus could constitute the tying and tied products needed to evince an antitrust tying violation); Refrigeration Eng'g Corp. v. Frick Co., 370 F. Supp. 702, 711 (W.D. Tex. 1974) (finding that trademarks are separable if sold by rent-a-name type franchisors because these distinct, quality-of-product trademarks were distinguished from simple "representation of product origin" type trademarks); AAMCO Automatic Transmissions, Inc. v. Tayloe, 368 F. Supp. 1283 (E.D. Pa. 1973) (finding that the franchise was a separate product from the franchised business' initial equipment and repair parts).

ship. While the tying of an end-product and the franchise would thus be permitted, there would still be a prima facie unlawful tie-in for operational items where the franchised trademark and operational items are distinct.

B. *Discussion*

There is no logical basis for a product separability test based upon the *Krehl* distinction between distribution franchises and business format franchises. The survey evidence in this article, as well as basic economic realities, confirm that the *Krehl* distinction is untenable. While the recent *Kodak*[135] case indicates that antitrust law should not be seen as synonymous with Chicago-School economics, clearly economics still matters.[136] Economists have warned that it is actually with business format franchises that the threat of free-riding is greatest.[137] Therefore, a tie-in would be easier to justify economically, not for a "mere conduit" distribution franchise, but for a business format franchise.[138] In the latter case, franchisees "have the greatest effect on final quality and are renting a common brand name."[139]

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135. 112 S. Ct. 2072 (1992).

136. *See id.* at 2082-92.

137. Klein & Saft, *supra* note 58, at 349-50. Free-riding has been explained as follows:

> Because the quality information [about products distributed via a franchised system] applies to a group of franchisees using a common name, there is a free-riding problem. If each franchisee supplies inputs that significantly influence the quality of the product marketed, and consumers cannot detect the quality of the product before they purchase it, then each franchisee will have the incentive to cut costs and supply less than the desired level of product quality. Because the product is standardized, consumers who receive products of less than anticipated quality will blame the entire group of retailers using the common name. The individual franchisee directly benefits from the sales of the lower-quality product, and the other franchisees share in the losses caused by decreased future demand.

Id.; *see also* Richard E. Caves & William F. Murphy, *Franchising: Firms, Markets, and Intangible Assets*, 42 S. ECON. J. 572, 577 (1976) (arguing that tying is an effective and profitable method for deterring franchisee opportunistic behavior); McCarthy, *supra* note 24, at 1118; Strasser, *supra* note 22, at 344, 351; Note, *supra* note 15, at 1175 n.49; Comment, *supra* note 5, at 1296 n.180. This free-riding problem is potentially most severe at locations (e.g., along an interstate highway) where the probability of repeat sales to the same customer is quite low. Klein & Saft, *supra* note 58, at 350 n.20. Courts have recognized the problem. *See, e.g.*, Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368, 380 (1977). However, courts have also refused to adopt an expansive view of free-riding that might undermine the purposes of the antitrust laws. *See, e.g.*, *Kodak*, 112 S. Ct. at 2092 (refusing to accept Kodak's arguments that plaintiffs—who repaired office equipment—were free-riders because they had not entered the equipment and parts market; the court held that Kodak's suggested approach would require competitors to enter two markets simultaneously, thus supporting entry barriers which are the very evil proscribed by the antitrust laws).

138. *See* Klein & Saft, *supra* note 58, at 360 (concluding that the *Krehl* "distinction regarding whether the trademark can be considered a separate tying item is contrary to what is implied by economic analysis").

139. *Id.* Professors Klein and Saft go on to write:

> Rather than analyzing the economic costs and benefits of the particular contractual arrangement that are being challenged, the courts appear to believe they have been forced by

Because franchising presents unique opportunities and problems related to tie-ins, the author proposes that franchises be considered distinct from other arrangements.[140] Franchising naturally calls for contracts involving interrelated products.[141] As stated in *Principe v. McDonald's Corp.*,[142] a franchise is an all-encompassing arrangement in which the franchisee may be offered "a complete method of doing business"[143] and in which the franchising relationship becomes "a sort of partnership that might be impossible under other circumstances."[144] Therefore, the franchise is unlike other tie-in arrangements inasmuch as the parties have both a long-term contractual relationship and laws that require numerous disclosures to the prospective franchisee in addition to some states' substantive protections.[145] By law, franchisees have access to the information needed for evaluating a proposed tie-in before they agree to it.[146] Most other non-securities commercial transactions, particularly one-time purchases, are not as extensively regulated, at least insofar as information disclosure is concerned.

Under the Federal Trade Commission's franchising disclosure rule (the FTC Rule),[147] promulgated several years after *Chicken Delight*,[148] franchisors must furnish prospective franchisees[149] with a "statement describing

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> previous rulings to use an artificial and, in an important economic sense, perverse distinction between rent-a-name [business format franchises] and source-of-origin [distribution franchises] trademarks . . . .

Id. at 360-61.

140. There are numerous examples of tie-in cases concerning item separability, but not involving franchises or trademarks as the alleged tying item. In these cases, courts have found various products to be separate. *See* Faulkner Advertising Ass'n v. Nissan Motor Corp., 905 F.2d 769, 774 (4th Cir. 1990), *on rehearing*, 945 F.2d 694 (4th Cir. 1991) (discussing automobiles and an advertising program); Mozart Co. v. Mercedes-Benz of N. Am., Inc., 833 F.2d 1342 (9th Cir. 1987), *cert. denied*, 488 U.S. 870 (1988) (discussing cars and replacement parts); Digidyne Corp. v. Data Gen. Corp., 734 F.2d 1336 (9th Cir. 1984) (discussing computer software and central processing units), *cert. denied*, 473 U.S. 908 (1985). *But see* Southern Pines Chrysler-Plymouth v. Chrysler Corp., 826 F.2d 1360 (4th Cir. 1987) (finding older and newer models of cars are not separate products); Hirsh v. Martindale-Hubbell, Inc., 674 F.2d 1343 (9th Cir.) (finding an attorney directory and advertising in that directory are not separate products), *cert. denied*, 459 U.S. 973 (1982).

141. *See, e.g.*, Phillips v. Crown Cent. Petroleum Corp., 602 F.2d 616, 628 (4th Cir. 1979) ("The very essence of a franchise is the purchase of several related products in a single competitively attractive package."), *cert. denied*, 444 U.S. 1074 (1980).

142. 631 F.2d 303 (4th Cir. 1980), *cert. denied*, 451 U.S. 970 (1981).

143. *Id.* at 309.

144. *Id.* at 310-11.

145. *See* Emerson, *supra* note 31, at 1509-13.

146. *See* 16 C.F.R. §§ 436.1-.3 (1993) (making it an unfair or deceptive trade practice for a franchisor to fail to disclose specified information to a prospective franchisee).

147. *Id.* For a brief history of the rule, see *supra* note 31.

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

149. 16 C.F.R. § 436.2(e) (1993). The term "prospective franchisee" is defined broadly as: "any person, including any representative, agent, or employee of that person, who approaches or is ap-

any recurring funds required to be paid" concerning the franchised business, including payments for "equipment or inventory purchases."[150] Franchisors must also furnish information about any people affiliated with the franchisor with whom the franchisee may be required or recommended to do business,[151] as well as any "supplies, products, inventories, signs, fixtures, or equipment relating to the establishment or the operation of the franchise business which the franchisee is directly or indirectly required by the franchisor to purchase, lease or rent . . . ."[152] Not only must the franchisor inform the franchisee whether these purchases, leases or rentals have to be made from specific persons, including the franchisor itself,[153] but the franchisor also must disclose information to assist the prospective franchisee in determining how much money the franchisor is to receive, directly or indirectly, from required franchisee purchases of goods or services.[154]

Before becoming a franchisee, any responsible businessperson should have been alerted to the particulars of each tie-in or other similar arrangement.[155] Moreover, a required table of contents for the disclosure statement refers, in plain language, to:

> 1. Recurring funds required to be paid by a franchisee.
> 2. Affiliated persons the franchisee is required or advised to do business with by the franchisor.
> 3. Obligations to purchase.
> 4. Revenues received by the franchisor in consideration of purchases by a franchisee.[156]

With all of this information at the disposal of prospective franchisees, they should know of any tie-ins which may be a part of the initial contract with the franchisor.

Because prospective franchisees are privy to extensive disclosures, determining whether a business relationship is a franchise should matter immense-

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proached by a franchisor or franchise broker, or any representative, agent, or employee thereof, for the purpose of discussing the establishment, or possible establishment, of a franchise relationship involving such a person." *Id.*

150. 16 C.F.R. § 436.1(a)(8) (1993).

151. *Id.* § 436.1(a)(9).

152. *Id.* § 436.1(a)(10).

153. *Id.* The franchisor must provide the prospective franchisee with a list of the names and addresses of each such person. *Id.*

154. *Id.* § 436.1(a)(11).

155. 16 C.F.R. § 436.2(g) (1993). This information must be provided to the prospective franchisee at least ten business days prior to the execution of any franchise agreement or any payment of money by the prospective franchisee. *Id.*

156. 16 C.F.R. § 436.1(a)(23) (1993) (requiring a table of contents); *id.* § 436.1(a)(1)-(20) (listing the 20 categories of information, which must be put forth in the table of contents, including categories 8 through 11 listed herein).

ly. Rather than falling into extensive case-by-case analysis, including varying descriptions of the franchising phenomenon, courts analyzing antitrust tying cases should simply examine whether the alleged franchisor sought to comply with the FTC Rule.[157] If it complied, the arrangement would constitute a franchise for tying purposes. Because, under this proposal, legal presumptions may favor a franchisor's alleged tying practices more than it does for a non-franchisor's practices, there would be no incentive for a business to avoid the FTC Rule in order to help it in a tying case. Attempting to gain an advantage with respect to the tying issue would subject a so-called franchisor to the additional mandated disclosures required by the FTC Rule. This runs counter to the ordinary inclination to avoid regulation. Therefore, under this test for applying tying standards, an easy method of classifying businesses could be used without unduly disturbing business behavior. Overall regulatory avoidance concerns would ordinarily prevent businesses from trying to take advantage of easier tying standards by forcing them to submit to federal, and often state, franchise laws should they try to take advantage of the system.[158]

The proposal entails having product separability generally serve as a conclusive issue *when franchises are involved.* If there is a franchise, as previously defined, then, at law, there would be no separability of the franchised trademark and any of the end products sold by the franchisee. Unlike

157. 16 C.F.R. §§ 436.1-.3 (1993).

158. The incentives against disclosure and compliance "hassles" under the FTC Rule evidently have sometimes encouraged entities to argue that they are not covered by the Rule. *See, e.g., Prepared Statement of the Federal Trade Commission,* [1990-1992 Transfer Binder], Bus. Franchise Guide ¶ 9785 (Mar. 20, 1991). The FTC noted several instances in which businesses failed to comply with the FTC Rule, and it referred to the "many victims with meritorious complaints," while stating, "there are many more potential cases than state and federal officials can handle." *Id.* ¶ 22,057. The FTC listed 34 cases that it had brought against franchisors. *Id.* ¶ 22,058-22,059. One and a half years later, another 10 cases had been filed. Remarks of Barry J. Cutler, Bus. Franchise Guide (CCH) ¶ 10,125, at 23,879 (Oct. 30, 1992). For recent FTC actions in the United States District Courts against franchisors for failure to provide prospective franchisees with basic disclosure documents, see FTC v. The Bachman Co., 2 Bus. Franchise Guide (CCH) ¶ 10,169 (E.D. Pa. Feb. 10, 1993) (stipulated final judgment entered against a franchisor of a wholesale snack food franchises); FTC v. Safe-Stride Int'l, 2 Bus. Franchise Guide (CCH) ¶ 10,120 (M.D. Fla. Nov. 24, 1992) (discussing action filed against Safe-Stride Int'l and two individuals that sell franchises marketing a non-slip floor and bathtub treatment); FTC v. Whitehead Ltd., 2 Bus. Franchise Guide (CCH) ¶ 10,062 (D. Conn. Aug. 10, 1992) (discussing action filed against a furniture gallery franchisor); FTC v. Perkits, Inc., 2 Bus. Franchise Guide (CCH) ¶ 10,055 (E.D. Tenn. Aug. 6, 1992) (discussing action against three corporations and four individuals selling yogurt shop franchises); FTC v. Intellipay, Inc., et al., 2 Bus. Franchise Guide (CCH) ¶ 10,061 (S.D. Tex. Aug. 5-6, 1992) (discussing action and temporary restraining order against five individuals and four corporations involved in selling pay-telephone franchises); FTC v. Telecom, Inc., 2 Bus. Franchise Guide (CCH) ¶ 10,083 (D.N.J. June 29, 1992) (discussing action and proposed consent decree filed against a public access fax machine franchisor and two of its principal officers); FTC v. Blanc, 2 Bus. Franchise Guide (CCH) ¶ 10,032 (N.D. Ga. June 18, 1992) (announcing action and temporary restraining order against six individuals and two corporations involved in selling vending machine business opportunities).

Krehl and other cases, this approach would not depend upon whether a franchise is a business format or a distribution type because, regardless of the type, the franchised trademark and the end goods often are inseparable in the consumers' minds.[159] Also, unlike *Krehl* and cases since, there would be no need or desire to poll, or guess, about the knowledge and attitudes of consumers. As stated by the court in *Smith v. Mobil Oil Corp.*,[160] it is "a somewhat strange concept that the legality of an arrangement between two parties ought to be controlled by the mere untutored perceptions of third party bystanders."[161] In effect, the *Mobil* court refused to "hinge the entire result of a tying claim, whenever an alleged tying item was (in whole or in part) a trademark, upon whatever the outcome of a public opinion poll might be."[162]

There would be no relaxation of the tying law for operational items, such as equipment used to make goods or other items not seen or otherwise familiar to the consumers. This particular continued reliance upon the two-product test not only comports with case law,[163] but also seems to be supported by the survey results.[164] Because trademark law goes toward protection of

159. *See, e.g., infra* app., ques. 1, 5 (considering both McDonald's business format hamburgers and Baskin-Robbins distribution ice cream).

160. 667 F. Supp. 1314, 1325 (W.D. Mo. 1987).

161. *Id.*

162. *Id.* The court further noted that *Krehl* turned to consumer perceptions not for assistance in distinguishing one type of franchise from another, but in "explaining why a trademark may be a separate item for tying purposes in a 'business format' franchise, but not in a 'distribution' type franchise." *Id.* at 1325 n.10. The *Smith* court, however, failed to recognize that *Krehl* and its progeny do not call for the taking of polls about individual franchise systems. Instead, the *Krehl-Hamro* line of cases posit that consumers' trademark perceptions serve to divide franchises into two different types, each with different consequences with respect to tying law as applied to product separability. *See Krehl*, 664 F.2d at 1353-54. This overall presumption is, in many ways, contradicted by this article's empiric evidence, but the *Krehl* approach does not require courts to act as polltakers. Additionally, there is an issue as to whether consumer behavior and market demand evince a differentiation between the allegedly tied products (i.e., do the consumers, in effect, prefer one item but not the other?). *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 23-24 (1984); Klamath-Lake Pharm. Ass'n v. Klamath Medical Serv. Bureau, 701 F.2d 1276, 1289 (9th Cir.), *cert. denied*, 464 U.S. 822 (1983); *see also* Will v. Comprehensive Accounting Corp., 776 F.2d 665, 671-74 (7th Cir. 1985) (examining price structures and the choices available to retail consumers in deciding whether accounting services franchisor had market power over franchisees who alleged an illegal tying), *cert. denied*, 475 U.S. 1129 (1986).

163. *See, e.g.*, Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705, 711-13 (11th Cir. 1984) (finding that a Waffle House franchise was a product separate from equipment and vending services that franchisees were required to purchase); Roberts v. Elaine Powers Figure Salons, 708 F.2d 1476, 1481 (9th Cir. 1983) (finding that franchise and related bookkeeping service were separate products); Northern v. McGraw-Edison Co., 542 F.2d 1336, 1345 (8th Cir. 1976) (determining that the trademark and the equipment of a franchised dry cleaning establishment were separate products), *cert. denied*, 429 U.S. 1097, *reh'g denied*, 430 U.S. 960 (1977); Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39, 45-47 (5th Cir. 1976) (holding that a franchised restaurant's trademark, food, and supplies were all separate products).

164. *See infra* app., ques. 6, 8, 12. While the public may connect the trademark to operational

goodwill, assurance of product source or quality,[165] and meeting consumer expectations, any concerns about public perceptions rest with what consumers see—the end products or services, not the intermediate operations or production equipment. For the latter subjects, separate products ought to remain possible for antitrust law tying purposes.[166]

The consuming public is just as inclined to connect the trademarks and tied goods sold or used in operating a business format franchise as for a distribution franchise.[167] The courts in *Krehl* and subsequent cases assume that consumers do not associate the trademark with end products (e.g., food) or operational goods (e.g., napkins) at business format franchises.[168] They are, however, wrong, at least for some franchised systems.[169] It is better to establish a clear standard that does not fly in the face of marketplace realities or businesses' and customers' expectations, than to have standards that are vague, unclearly defined, and based on erroneous judicial assumptions about public beliefs. Along these lines, *Kodak* signals an increasing interest in informational costs as they affect a party's ability to determine what is in its best long-term economic interest.[170] Cost-efficiency may require that the parties operate by guesswork rather than pay high costs, in time and money, seeking adequate information.[171] Commentators have noted, for instance, that other nontying restraints on competition, such as vertical price restraints, may lead consumers to make less informed, less competitive purchasing decisions.[172] Thus, these restraints should be very carefully scrutinized be-

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goods for some systems, such as McDonald's, for many franchised systems, such as Supercuts Hair Salons and Holiday Inn, the public apparently finds no direct link between the franchisor and the operational goods used at the franchised outlets. *Id.*

165. *See supra* note 61.

166. As stated in a somewhat different context by one commentator, "[A]ntitrust policy should not encourage the pursuit of horizontal market power, even if it does not attack the existence of the power directly in a given situation." Strasser, *supra* note 23, at 292 (citing M.L. Burstein, *A Theory of Full Line Forcing*, 55 NW. U. L. REV. 62, 93-95 (1960)).

167. *See supra* text accompanying note 104.

168. *See, e.g.*, William Cohen & Son v. All American Hero, Inc., 693 F. Supp. 201, 206 (D. N.J. 1988).

169. The survey results refute this assumption. *See infra* app., ques. 1, 2, 8, 9. With respect to McDonald's, 68% of respondents believed that McDonald's hamburgers were made and distributed by McDonald's for all or most of its stores. *Id.* ques. 1. This seems to indicate that most people do associate McDonald's with the particular hamburgers they purchase at McDonald's. Moreover, over 50% of respondents believed McDonald's makes or obtains operational items for its franchisees. *See id.* ques. 8.

170. *Kodak*, 112 S. Ct. at 2085-87.

171. *Id.* at 2086-87.

172. *See, e.g.*, Warren S. Grimes, *Spiff, Polish, and Consumer Demand Quality: Vertical Price Restraints Revisited*, 80 CAL. L. REV. 815, 829-32 (1992) (arguing that vertical price restraints shift promotion burdens upon retailers, who unfairly push certain products, who have a financial incentive to reduce the quality of consumer demand, and whose promotional abuses are far less susceptible to monitoring and control than are abuses by the manufacturer itself). Still, such restraints are not tie-ins, and they most definitely are not tie-ins in the franchising context. *See* Casey v. Diet Center, Inc., 590

fore courts presume the existence of an interbrand market with enough capable competitors and informed buyers to sustain a level of competition equivalent to that found prior to the restraint. When the restraint involves horizontal relationships, as when a franchisor also owns and operates its own retail units, the state of market conditions becomes even more perilous.[173] Of course, this is not the situation usually present in the case of franchisor-imposed tying requirements, which tend to operate as vertical restraints.

C. *Final Thoughts*

The proposed standard would not resolve all tying cases involving franchises.[174] For franchising arrangements in which tying has been alleged, the separability of products question is but one, albeit fundamental, issue; it may not be decisive.[175] Furthermore, regardless of the resolution of that issue, other nontying violations, such as exclusive dealing arrangements, may still be proven.[176] Also, the new standard would only involve the franchising relationship, not the rights or duties of independent third parties.[177]

The inherently anticompetitive nature of a franchising tie-in arises not through franchisor market power over potential franchisees, but through the franchisor's power in a contractual setting—a legal environment in which the franchisor holds economic leverage over existing franchisees.[178] *Kodak* bol-

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F. Supp. 1561, 1568 (N.D. Cal. 1984) (arguing that even if tying affected prices at the retail level, that is only one factor in potential franchisees' choosing among "reasonably interchangeable" weight loss program franchises).

173. *See Kodak*, 112 S. Ct. at 2084-85 n.18.

174. Other elements needed to prove a tying claim may remain. *See supra* text accompanying note 13; *supra* note 58. Thus, the fact that there are two distinct items does not mean that all other tying requirements are present. Moreover, even if there is no per se violation, the rule of reason approach is still available. *See* Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 482-85 (3d Cir.) (finding that a rule of reason approach to tying claims is distinct from a per se inquiry, and that a showing of tying market power is not needed to succeed on the rule of reason tying claim), *cert. denied*, 113 S. Ct. 196 (1992).

175. *See supra* notes 13-20 and accompanying text.

176. *See, e.g.*, Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 44-46 (1984) (O'Connor, J., concurring).

177. The per se doctrine could continue when it is a third-party alleging a tying. Refusal to apply the doctrine would only occur when a party that chose to be part of the franchised system (and who received full disclosure under the FTC Rule, see *supra* notes 142-53 and accompanying text) and now claims that this system has illegal tie-ins. Admittedly, an *in pari delicto* defense should fail. *See supra* note 1.

178. *See* Neptune T.V. & Appliance Serv., Inc. v. Litton Microwave Cooking Prods. Div., 462 A.2d 595, 601 (N.J. Super. Ct. App. Div. 1983) (indicating that franchisors have the potential to abuse their relationship with franchisees); Rutter v. BX of Tri-Cities, Inc., 806 P.2d 1266, 1268 (Wash. Ct. App. 1991) (indicating that franchisors have an overwhelmingly stronger bargaining position over franchisees). *But see* Paul H. Rubin, *The Theory of the Firm and the Structure of the Franchise Contract*, 21 J.L. & ECON. 223, 232 (1978) (arguing against any antitrust focus on the bargaining leverage within a franchisor-franchisee contract, but doing so while conceding that, from an economics viewpoint, the franchisee is more of an employee than an independent entrepreneur). *See generally* Gillian

sters this point of view, for it holds that a single brand of a product or service can be the relevant market for antitrust purposes.[179] In the franchise setting, this could mean that the X franchised trademark has its own market, that franchisees are bound within that market, and that courts should recognize the commercial and contractual reality that long-term franchisees may have severe switching costs.[180] On balance, the interbrand market of other franchised systems may be ineffective in undermining the franchisor's ability to coerce existing franchisees.[181] The franchisor can threaten franchise termination or otherwise opportunistically "hold up" a franchisee that has sunk costs in the form of illiquid investments in the franchised business.[182]

K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 STAN. L. REV. 927 (1990) (analyzing franchise contract clauses and finding that franchisees are encumbered with far more obligations than franchisors are); Dienelt & Foote, *supra* note 58. For the argument that exclusive dealing arrangements may be permitted because the interbrand competition promoted by such contracts may serve as "a significant check on the exploitation of intrabrand market power," see Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 52 n.19 (1977). *See generally* Robert L. Steiner, *Intrabrand Competition—Stepchild of Antitrust*, 36 ANTITRUST BULL. 155 (1991) (analyzing the relationship between interbrand and intrabrand competition and how it affects antitrust analysis).

179. *Kodak*, 112 S. Ct. at 2090. *But see* Arthur I. Cantor, *Tying, Exclusive Dealing and Franchising Issues*, *in* 30th ANNUAL ANTITRUST LAW INSTITUTE, at 579, 608 (PLI Corp. Law & Practice Course Handbook Series No. 644, Volume 1, 1989) (concluding that only "a few cases" have addressed the interbrand/intrabrand market control issue, and that most have "soundly rejected" the notion that every franchisor satisfies the market power requirement because it controls all of its own franchise system "market").

180. The Court in *Kodak* develops the argument that the defendant can engage in anticompetitive price increases because the purchasers are locked-in and their cost of switching to a different product may severely inhibit their economic freedom. *Kodak*, 112 S. Ct. at 2087; *see also* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) (indicating that antitrust liability existed because there was no legitimate, business justification for a monopolist's imposition of switching costs); Victoria E. Brieant & Paul S. Schmidtberger, *Information Costs, Lifecycle Costs, Switching Costs, and Lock-in*, *in* NEW DIRECTIONS IN ANTITRUST LAW AFTER *KODAK* AND *TICOR*: MARKET DEFINITION, SUMMARY JUDGMENT, ECONOMIC THEORY, AND STATE ACTION (A.L.I. No. C847, 1993) (noting how *Kodak* opens the door toward "greater deference to the realities of information costs and related market imperfections," and opining that switching costs "are perhaps the single most important factor in determining whether a customer is 'locked-in' ").

181. Justice Scalia's dissent notes that such a position flies in the face of several recent, lower court opinions and takes away from the Court's prior emphasis on interbrand competition as a check on *intra*brand power. *Kodak*, 112 S. Ct. at 2099-2101 (Scalia, J., dissenting).

182. *See, e.g.*, Digidyne Corp. v. Data General Corp., 734 F.2d 1336, 1343 (9th Cir. 1984) (concluding that "locked-in customers were not free to choose among competing operating systems"), *cert. denied*, 473 U.S. 908 (1985); Meineke Discount Muffler Shops, Inc. v. Bleier, 1983-1 Trade Cas. (CCH) ¶ 65,461 (5th Cir. 1983) (holding that the jury could find franchisor coercion of newly signed franchisees into purchasing their initial inventory from the franchisor, if the jury believed that, at a training session several months after the franchisees made their investment, the franchisor orally insisted that this purchase from the franchisor was necessary for a franchisee that wanted to retain its franchise; decision subsequently withdrawn upon the franchisor's unopposed motion); Klein & Saft, *supra* note 58, at 353 (discussing franchisors' abilities to deter franchisee free riding by requiring large sunk costs from franchisees who are subject to potential termination); McDavid, *supra* note 33, at 6 (noting that franchisees likely will claim that they "are 'locked-in' to a franchise system once they have made the investment necessary to join the system"); Strasser, *supra* note 22, at 353 (discussing

Matters stand differently, though, at the outset of the franchised relationship. With many franchises available in many different fields, and within many different industries,[183] there simply cannot be any "forcing," or leverage, until after a franchise has been granted, at which point the franchisee may be "locked in."[184] Thus, *Krehl*'s inseparability of items approach can, and should, be expanded to cover all franchises, not just those labelled "distribution" types. To continue the harsher review of business format franchise tie-ins arbitrarily retains unnecessary obstacles to franchise development. Even if under the old case law two distinct items could have been proven, thus indicating a possible tying violation, courts should no longer follow the per se standard[185] when the challenged arrangements (1) involve end products and (2) were agreed to at the inception of a franchise relationship.[186] This new approach encompasses the *Krehl* court's reading of franchise customers, while updating that reading with actual survey results. Rather than mere supposition, this approach comports with marketplace realities, as reflected not only in court decisions, but in franchising's economic and trademark practices and in the empiric evidence of customer expectations.

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opportunism and sunk costs in the franchising context).

183. As stated by the court in *Casey v. Diet Center, Inc.*, "[t]here is no reason to suppose *a priori* that different weight-loss program franchises are not 'reasonably interchangeable' " by franchisees. 590 F. Supp. 1561, 1568 (N.D. Cal. 1984); *see also* Webb v. Primo's, Inc., 706 F. Supp. 863, 869 (N.D. Ga. 1988) (finding an absence of franchisor market power because the plaintiff-franchisee could have purchased a franchise from a competing pizza franchisor, rather than accept the franchisor's requirements that franchisees buy all products from the franchisor); Tominaga v. Sheperd, 682 F. Supp. 1489 (C.D. Cal. 1988) (suggesting that the market power of a franchisor's trademark should be determined by the *pre-contract* market for franchisees and that courts should examine the number and kind of similar franchises also available to a prospective franchisee); WILLIAM J. BAUMOL & ALAN S. BLINDER, ECONOMICS: PRINCIPLES AND POLICY 481 (2d ed. 1982); Emerson, *supra* note 31, at 1509 n.21 (noting "the tendency of many potential franchisees to 'shop' for the best franchise available"); Klein & Saft, *supra* note 58, at 356 (noting that competition among franchisors for potential franchesees prevents franchisors from abusing any economic power when setting contract terms with potential franchisees); Strasser, *supra* note 22, at 363 n.118.

184. *See* Dienelt & Foote, *supra* note 58, at 16; Klarfeld, *supra* note 35, at 33-35, 54; Klein & Saft, *supra* note 58, at 356.

185. *See supra* note 34.

186. *See* Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705, 718 (11th Cir. 1984) (holding that unless the fair market value of both the tied and tying products are determined and an overcharge found, no injury can be claimed); Kypta v. McDonald's Corp., 671 F.2d 1282, 1285 (11th Cir.) (indicating that total payments for both tying and tied products must exceed their combined fair market value to show a tying injury), *cert. denied*, 459 U.S. 857 (1982); Casey v. Diet Center, Inc., 590 F. Supp. 1561, 1571-73 (N.D. Cal. 1984) (embracing the *Kypta* analysis and taking it to its logical conclusion that "franchisees will . . . rarely be able to establish injury from a tying arrangement because the price paid is usually conclusive proof of the franchise package's fair market value"). *But see* Bell v. Cherokee Aviation Corp., 660 F.2d 1123, 1133 (6th Cir. 1981) (measuring damages strictly within the tied product market based on differences between the price paid for a tied item and its fair market value).

APPENDIX

Public Survey

590 Respondents—randomly selected.

Responses are given in percentages, to the nearest 0.1%.

1. Do you think that fast food products such as McDonald's hamburgers are made and distributed by McDonald's:

For all stores	46.4
For most stores	21.5
For some stores	11.0
For none, where each individual store makes or purchases its own products from various suppliers	17.3
No Answer	3.8

2. For respondents that said "None" in Question 1.

Do you think that each individual franchisee that makes its own products is required to meet certain specifications:

For all products	58.8
For just the food items	33.3
For none, meaning it is not required to meet any specifications	7.8

3. When you buy gas, for example, at a Shell service station, do you think you are buying:

Shell gasoline made by Shell	39.8
Gasoline made by another company bought by a Shell store	56.4
No Answer	3.8

4. When you buy products other than gas at a Shell station do you think you are buying:

Products, in general, made and distributed by Shell	15.9

Products made by many other companies bought by a Shell store	81.5
No Answer	2.6

5. Do you think products such as Baskin-Robbins ice cream are made and distributed by Baskin-Robbins:

For all stores	43.1
For most stores	30.2
For some stores	11.7
For none, where each individual store makes or purchases its own ice cream from various suppliers	11.4
No Answer	3.5

6. Do you think a product such as Supercuts Hair Salon shampoo, which is actually used on customers, is made and distributed by Supercuts:

For all salons	18.0
For most salons	15.3
For some salons	16.1
For none where each individual salon makes or purchases its own shampoo for customer use from various suppliers	44.4
No Answer	6.2

7. What do you most associate with Diet Center?

Diet Center's diet food	37.6
Diet Center's diet pills	9.7
Diet Center's counseling	30.3
Other Answer	15.6
No Answer	6.7

8—12. For each statement about franchises and their trademarks, please tell me whether you agree, disagree, or have no opinion. Or tell me whether you feel strongly either way.

1 to 5 scale, from Strongly Disagree (1), to Disagree (2), to No Opinion (3), to Agree (4), to Strongly Agree (5).

8. McDonald's Corporation makes or obtains all cooking equipment, napkins, trays, and the like for each McDonald's restaurant.

Strongly Agree or Agree	54.5
Strongly Disagree or Disagree	37.8

Mean—3.228 (between No Opinion and Agree)
Standard Deviation—1.149

9. A franchise, for example McDonald's, licensed to use a specific trademark, for example the golden arches, should sell only those products that are associated with that trademark.

Strongly Agree or Agree	64.9
Strongly Disagree or Disagree	24.2

Mean—3.503 (between No Opinion and Agree)
Standard Deviation—1.029

10. A business that buys a license, for example Baskin-Robbins, is free to use other products, such as Publix [a grocery store] milk instead of Baskin-Robbins' milk

Strongly Agree or Agree	53.2
Strongly Disagree or Disagree	37.1

Mean—3.153 (between No Opinion and Agree)
Standard Deviation—1.100

11. A business should be able to buy a license, for example Shell gas, and buy from other suppliers—such as Windex—windshield wiper fluid instead of Shell wiper fluid.

Strongly Agree or Agree	56.6
Strongly Disagree or Disagree	33.6

Mean—3.254 (between No Opinion and Agree)
Standard Deviation—1.047

12. Holiday Inn, Inc. makes or obtains all bedsheets, furniture, cleaning products, and the like used at each hotel.

Strongly Agree or Agree	28.1
Strongly Disagree or Disagree	64.2

Mean—2.578 (between Disagree and No Opinion)
Standard Deviation—1.047

[Then, questions to establish demographics]