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Antitrust Law--Sherman Act Section 2--A Monopolist Has No Duty to Predisclose Information on Innovations

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COMMENTS

Antitrust Law—Sherman Act, Section 2—A Monopolist Has No Duty to Predisclose Information on Innovations

Berkey Photo, Inc. v. Eastman Kodak Co. *

I. Introduction

Section 2 of the Sherman Act makes it unlawful for an enterprise "to monopolize . . . any part of the trade or commerce. . . ."[1] The Act fails, however, to define the term "monopolize." Similarly, legislative history provides little assistance in determining the scope of the offense.[2] Although the courts have made significant strides in determining standards and defining the elements of the antitrust offenses, many important issues remain unresolved. One of these issues is the question of what type of behavior undertaken by a lawfully obtained monopolist will constitute a violation of section 2. The lack of a definitive answer is illustrated by the differences between the opinions of the District Court for the Southern District of New York[3] and the Court of Appeals for the Second Circuit[4] in *Berkey Photo, Inc. v. Eastman Kodak Co.*

In *Berkey,* the courts addressed two major issues. First, the courts looked at whether a film and camera monopolist's introduction of a camera system without predisclosure to its competitors could constitute a violation of section 2. In dealing with this issue, the courts had to consider whether a duty of predisclosure could be imposed upon the monopolist and whether the introduction of an innovation (the 110 camera) and new type of complementary product (Kodacolor II film), available only for use with the innovation, could be found unlawful. Second, the courts faced the issue of whether a division with monopoly power in one market (the camera market) may be forbidden under section 2 to disclose technical information to another division in a related market (the photofinishing market) without making the information available to the latter's competitors. The courts arrived at different answers to these issues.

The district court had responded affirmatively to each of these questions

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* 603 F.2d 263 (2d Cir. 1979), *cert. denied,* 48 U.S.L.W. 3532 (U.S. Feb. 19, 1980) (No. 79-427).

1 The full text of section 2 of the Sherman Act is as follows:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. 15 U.S.C. § 2 (1976).

Private parties are permitted to bring a civil suit against violators of the Sherman Act under section 4 of the Clayton Act, 15 U.S.C. § 15 (1976).

2 The major item drawn from legislative history is a statement by sponsors of the Sherman Act to the effect that the Act would not pertain to those "who merely by superior skill and intelligence . . . got the whole business because nobody could do it as well." 21 CONG. REC. 3146-52 (1890) *quoted in* United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 341 (D. Mass. 1953), *aff'd per curiam,* 347 U.S. 521 (1954). *See generally* 1 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 106 (1978).

3 457 F. Supp. 404 (S.D.N.Y. 1978).

4 603 F.2d 263 (2d Cir. 1979), *cert. denied,* 48 U.S.L.W. 3532 (U.S. Feb. 19, 1980) (No. 79-427).

holding that introduction of the products as a system and failure to predisclose could be found exclusionary and thus violations of the Act. Finding the failure to disclose information to competing photofinishers exclusionary as well, the district court entered an equitable decree requiring Kodak to disclose relevant information to all photofinishers if it discloses the information to its own photofinishing division.

The appellate court found the behavior to be a normal and lawful part of competition and integration. The appellate court, therefore, held that the monopolist had no duty to predisclose information on its innovation to camera competitors and that the introduction of the film and camera as a system was not a basis for liability under section 2. The court also vacated the equitable decree requiring disclosure to photofinishing competitors since it found that the decree was unfair to the monopolist who was then denied "the legitimate benefits of integration."[5]

The courts' opinions in *Berkey* merit analysis as they illustrate the uncertainties and inconsistencies underlying the application of section 2 of the Sherman Act. The present law lacks workable, definitive criteria to determine when a monopolist's acts are unlawful. This gap is due partially to the failure of the courts to agree on the economic and social policies underlying these criteria. The heart of the problem lies in the paradoxical relationship between competition and monopoly—competition may give birth to its own antithesis, monopoly, since competitive actions may result in the preclusion or destruction of competitors.

It is necessary for the courts to examine the criteria in relation to the underlying economic and social policies and to develop uniform standards for determining when a lawfully obtained monopolist's acts are unlawful. The Court of Appeals for the Second Circuit moved in this direction by adopting a balancing approach. Under this approach, the court balanced both the need to protect competitors from unfair uses of monopoly power by the monopolist and also the lawfully obtained monopolist's rights to compete, to benefit from the lead time resulting from innovation, and to cultivate the legitimate benefits of integration.

II. Statement of the Facts

With annual revenues in the billions of dollars, Kodak is the dominant firm in the amateur photography industry. From 1954 through 1973 Kodak never had less than an 88 percent share of the film market nor less than a 64 percent share of the amateur still camera market, in terms of total dollar revenues. Kodak also offered photofinishing services and produced photofinishing equipment, chemicals and color print paper, although its market shares in these areas were much smaller.

As a function of its dominance, Kodak's introduction of new products has a substantial impact on the photography markets. In 1972, when Kodak introduced its 110 pocket instamatic camera, the effect on the market was signifi-

5 *Id.* at 292.

cant. The camera was the first of its size in the amateur photography market and an immediate success. Although Kodak could have manufactured one of its earlier films in a size compatible with the 110 camera, a decision was made to introduce a new film, Kodacolor II. The film was produced initially only in the 110 size and required a new photofinishing process. Together, the camera and film were introduced and advertised as a single "photographic system."[6]

In the past, Kodak had elected to advance information to its competitors on certain forthcoming innovations. Thus, the competitors had an opportunity to develop complementary products or their own similar products for introduction simultaneous to Kodak's introduction of the innovation. With respect to the 110 system, however, Kodak made a managerial decision to limit predisclosure of information.[7] The primary reason for this decision was apparently to give Kodak a short-term monopoly on all the goods and services relating to the system. The anticipated temporary monopoly resulted. Due to the time necessary to develop similar products and to get them to the market, none of Kodak's competitors were able to begin selling their own 110 pocket cameras until nine months after Kodak's introduction of its model. Similarly, for several weeks after the product's introduction, only Kodak's Color Print and Processing Laboratory (hereinafter referred to as CP&P) had the technical information and equipment necessary to photofinish the new Kodacolor II film.

One of the competitors whose market share suffered during the short-term monopoly was Berkey Photo, Inc., a major photofinisher that had also competed in the camera market in 1972.[8] Berkey believed that Kodak's introduction of the 110 system without adequate predisclosure to its camera and photofinishing competitors violated section 2 of the Sherman Act. If Kodak had predisclosed information on the 110 system earlier Berkey contended that it would have been able to enter the 110 market at the same time as Kodak and lure away some of the sales. Berkey reasoned that this alleged violation by Kodak had caused it to lose sales in the 110 camera and photofinishing markets. Based on this reasoning, Berkey filed an antitrust complaint in federal district court requesting money damages.

The major allegation in Berkey's complaint was that Kodak had violated section 2 of the Sherman Act by monopolizing the camera market. Berkey based this allegation on three separate acts engaged in by Kodak. First, it was contended that Kodak had monopolized the market by failing to predisclose information on its innovations. Though an innovator ordinarily has no duty to predisclose, Berkey argued that such a duty should be imposed on Kodak. Berkey asserted that in light of Kodak's position as an industry leader, smaller companies could not compete effectively unless they were able to introduce

6 *Id.* at 276-78.

7 Fearing legal action from competitors, Kodak did predisclose some information to camera manufacturers for a fee. This predisclosure, however, was not made until a short time before Kodak's introduction. Due to the inadequate time period between the predisclosure and Kodak's introduction of the camera, competitors were unable to produce their own models for simultaneous introduction.

8 Through its Keystone Division operations, Berkey participated in the amateur still camera market from 1969 through 1978. During 1978, Berkey sold the Keystone Division and withdrew from the still camera market.

simultaneously models similar to Kodak's. Because a major goal underlying antitrust law is to preserve competition, Berkey contended that predisclosure should be required in this case as it was necessary to accomplish the goal. Also, Berkey alleged that Kodak had forfeited its right to surprise innovation because Kodak had previously used its film monopoly to deprive other camera manufacturers of the right to innovate. This contention was founded on Berkey's accusation that Kodak continually refused to make film in any size or cartridge format other than that necessary for one of its own cameras. Berkey reasoned that this effectively prevented Kodak's camera competitors from innovating major changes as they would be unable to obtain film in a new format. Berkey concluded that the competitors were forced to rely on imitating Kodak's products, thus necessitating a duty of predisclosure.

The second action allegedly constituting monopolization was Kodak's introduction of the camera and film as a system. Berkey asserted that the joint introduction was an unfair use of Kodak's film monopoly. Other camera competitors, lacking film-making capacity, could not introduce complete systems and therefore were placed at a disadvantage. To support its contention that the introduction of the system was merely an unfair ploy to gain a larger portion of the camera market, Berkey introduced evidence that the system was, in some ways, inferior to products already marketed.

The third and final act which Berkey characterized as supporting its charges that Kodak had monopolized the camera market, was Kodak's initial restriction of the new Kodacolor II film to the 110 size. Since the other companies did not have a chance to introduce 110 cameras during the initial period, Berkey argued that this restriction constituted monopolization as anyone who wished to use the new film also had to buy a Kodak camera.

The second major allegation in Berkey's complaint was that Kodak had unlawfully used its monopoly power in the film market to gain a competitive edge in the photofinishing market. Essentially, Berkey objected to Kodak's film division communicating the technical information for processing the new Kodacolor II film to Kodak's own CP&P division without simultaneously making the same information available to independent photofinishers. Due to the advance receipt of information, CP&P was the beneficiary of a short-term monopoly over 110 photofinishing services. Although CP&P was prepared to process the Kodacolor II film immediately after its introduction, other photofinishers such as Berkey were not able to make the necessary processing adjustments for several weeks because of the late receipt of the information.

After a nine-month trial, a jury returned general verdicts against Kodak on the section 2 violations discussed above and on several other antitrust claims.[9] The jury awarded Berkey total damages in excess of $87 million after trebling. In a memorandum opinion on various posttrial motions, the district

9 In addition to the claims discussed in this comment, Berkey had requested damages for the following alleged section 2 violations: 1) unlawful use of its film monopoly power to gain an advantage in the photofinishing services and equipment market; 2) monopolization of the film market; and 3) monopolization of the color print market.

Berkey also alleged that Kodak had violated section 1 of the Sherman Act by conspiring with General Electric Company and Sylvania Electric Products, Inc. to restrain trade with respect to the Magicube and Flipflash devices. For a summary of the district and appellate court dispositions of these claims, see 603 F.2d at 309-10.

judge upheld the jury's findings against Kodak, stating his belief that in view of the evidence and the law, the jury had made the correct decision. He also entered an equitable decree requiring Kodak's film division to disclose simultaneously to the independent photofinishers all relevant information which it communicates to its CP&P department.

On appeal, the Court of Appeals for the Second Circuit strongly disagreed with district court, affirming only $990,000 of the damages. Although the appellate court remanded large portions of the award for a new trial, it reversed the verdict on monopolizing the camera market without remand; the damages awarded for this violation were over 45 million dollars. The appellate court also vacated the equitable decree requiring simultaneous disclosure of information. With respect to those claims remanded for a new trial, the appellate court laid down much stricter criteria than had been applied by the district court. Berkey Photo subsequently filed a petition for writ of certiorari to the Supreme Court. The Court denied review.[10]

III. Statement of the Law: The Section 2 Offense

Berkey's complaint alleged that Kodak was liable for damages resulting from acts of monopolization and unlawful use of monopoly power in one market to gain an advantage in another market. To establish monopolization, monopoly power and the act of achieving or maintaining power in the same market must be proven.[11] The elements of the offense of unlawful use of monopoly power are the same as those for monopolization except that the behavior involves the use of monopoly power to achieve an advantage in a market other than the one in which it holds monopoly power.[12] In private antitrust suits, it is also necessary for the plaintiff to prove he was injured by the violation.[13]

Given the statistics on Kodak's market share and apparent dominance in the film and camera industry, both the district and appellate court agreed that the finding of monopoly power in the camera and film markets was supported by sufficient evidence. The major issue then was whether Kodak's acts constituted a section 2 violation. Underlying this issue was the fundamental question of the criteria to be applied in determining whether the activity undertaken by a lawfully obtained monopolist[14] is unlawful.

10 48 U.S.L.W. 3532 (U.S. Feb. 19, 1980) (No. 79-427).

11 United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); *see,* California Computer Prod., Inc. v. Int'l Business Mach. Corp., No. 77-1563, slip op. at 2181 (9th Cir. June 21, 1979); Greyhound Computer Corp. v. Int'l Business Mach. Corp., 559 F.2d 488, 492 (9th Cir. 1977), *cert. denied,* 434 U.S. 1040 (1978).

12 Kodak did question whether unlawful use of monopoly power in another market was a section 2 offense as the statute only states that monopolizing and attempting to monopolize are illegal. *See* note 1 *supra.* Both the district and appellate courts, however, agreed that section 2 incorporated unlawful use of monopoly power in markets other than that in which the enterprise has monopoly power. The appellate court described the offense as requiring the elements of monopoly power and anticompetitive behavior. 603 F.2d at 271-76. A discussion on the merits of Kodak's argument that this is not a section 2 offense is outside the scope of this comment. For a discussion on the precedents on this issue, see 603 F.2d at 275-76.

13 California Computer Prod., Inc. v. Int'l Business Mach. Corp., No. 77-1563, slip op. at 2181 (9th Cir. June 21, 1979).

14 A monopolist may violate section 2 either by obtaining its monopoly power through illegitimate conduct or by using its lawfully obtained monopoly power unlawfully. 603 F.2d at 275. A lawfully obtained monopolist is one which obtained its monopoly power through lawful means. In *Berkey,* it was not alleged that Kodak had achieved its monopoly power unlawfully and that question is not considered in this comment.

It is firmly established in case law that the existence of monopoly power alone is not sufficient for a violation of section 2 of the Sherman Act; an additional "conduct" element is necessary.[15] Acts in violation of the other antitrust laws such as section 1 of the Sherman Act[16] clearly can constitute the behavior necessary for a section 2 offense.[17] The problem arises, however, when the conduct is normally lawful, but due to the nature of the market structure, it is found particularly injurious to competition or competitors. The courts universally agree that some acts by a monopolist violate section 2 even though they would be lawful if done by a nonmonopolistic enterprise.[18] They have failed, however, to agree on the criteria for determining when otherwise lawful activity should be unlawful if undertaken by a monopolist.

The Supreme Court has not directly addressed the issue presented in *Berkey.* Its most definitive statement on the behavioral element of the section 2 offense is found in *Grinnell v. United States.*[19] In *Grinnell,* the Court defined the conduct requirement as "the willful acquisition or maintenance of that [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[20] It was unnecessary, however, for the Court to discuss further the conduct element because the behavior by the defendant and its subsidiaries was found to be in violation of section 1. Thus, the actions adequately met the behavioral element required for a violation of section 2.[21]

The courts have developed essentially three different approaches for determining whether a monopolist's conduct violates section 2 of the Sherman Act.[22] The approaches do not directly conflict and even adopt the same basic premises. Subtle differences of emphasis and perspective, however, change the manner in which the issue is stated, and can lead to differing evaluations of a monopolist's behavior.

A. *The "Exceptions" Test*

The first approach was developed by Judge Learned Hand of the Second Circuit Court of Appeals in *United States v. Aluminum Co. of America.*[23] Under this approach, although it is conceded that the existence of monopoly power does not necessarily imply that monopolization has occurred, the stress is placed on the evils of monopolistic structures. Rather than asking when the monopolist's behavior is unlawful, the inquiry is made as to under what special

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15 "[T]he law does not make mere size an offence or the existence of unexerted power an offence. It . . . requires overt acts and trusts to its prohibition of them and its power to repress or punish them." United States v. U.S. Steel Corp., 251 U.S. 417, 451 (1920).

16 Section 1 of the Sherman Act provides that: "[e]very 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 declared to be illegal." 15 U.S.C. § 1 (1976).

17 Standard Oil Co. v. United States, 221 U.S. 1, 61-62 (1911).

18 *See, e.g.,* Sargent-Welch Scientific Co. v. Ventron Corp., 567 F.2d 701, 711-12 (7th Cir. 1977), *cert. denied,* 439 U.S. 822 (1978); 559 F.2d at 498.

19 384 U.S. 563 (1966).

20 *Id.* at 570-71.

21 Grinnell's acts included the use of restrictive agreements, anticompetitive pricing practices and acquisitions of competitors. *Id.* at 576.

22 For a different classification of the approaches adopted by the courts, see L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST §§ 33-38 (1977).

23 148 F.2d 416 (2d Cir. 1945).

circumstances a monopolist may avoid violating section 2. Under this approach, a monopolist violates the Sherman Act unless "it falls within the *exception* established in favor of those who do not seek, but cannot avoid, the control of a market."[24] If the monopolist was a mere "passive beneficiary"[25] of monopoly power that had been "thrust upon"[26] it through the "involuntary elimination of competitors by automatically operative economic forces,"[27] it would not be in violation of section 2. If it were not "inevitable"[28] that the enterprise would become and remain a monopolist but, instead, the enterprise had actively sought to achieve or maintain its monopoly power, it would be found in violation of the Act.

In *Alcoa,* Hand held that the Aluminum Company had violated section 2 by anticipating and expanding to meet increased demand for aluminum ingots.[29] He found that Alcoa did not fall within the exception. It was not a "passive beneficiary"[30] because it had actively sought to maintain its market through expansion.

B. *The "Exclusionary Conduct" Approach*

In *Alcoa,* Hand had further supported his decision by finding that the Aluminum Company's conduct was exclusionary. Alluding to Alcoa's growth to meet demand, Hand had stated that there is "no more effective exclusion [of competitors] than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity. . . ."[31] Focusing upon this secondary inquiry in *Alcoa,* an approach different from the exceptions test was developed in Judge Wyzanski's opinion in *United States v. United Shoe Machinery Corp.*[32]

In *United Shoe,* Judge Wyzanski gave recognition to the exceptions approach and utilized many of the same phrases as Hand. However, a subtle difference in the tone of the opinion was manifested. Less antagonism was exhibited towards monopolists. The question of what type of behavior undertaken by a monopolist should be considered unlawful was directly addressed with the answer being that exclusionary conduct violated section 2.

In *United Shoe,* the issue presented was whether it was unlawful for the monopolist, United Shoe Machinery, to adopt a particular type of lease-only policy. Ordinarily this type of leasing policy would not be unlawful. In view of United Shoe's dominance in the industry and certain exclusionary features of

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24 *Id.* at 431 (emphasis added).
25 *Id.* at 430.
26 *Id.* at 429.
27 *Id.* at 430.
28 *Id.* at 431.
29 In addition to the expansion, Alcoa had been involved in many other activities which were alleged to be violations of section 2. These other activities, however, did not form the basis for the decision. Some of the activities were not considered as they had been the basis of litigation in 1912 which had resulted in a consent decree. With respect to the other, post-1912, alleged unlawful activities, Hand expressly stated that consideration of them was not necessary to the finding that Alcoa had monopolized the ingot market. *Id.* at 432.
30 148 F.2d at 430.
31 *Id.* at 431.
32 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam,* 347 U.S. 521 (1954).

its lease-only policy,[33] Wyzanski found that the leasing system was in violation of section 2. His analysis went beyond the questions of whether United Shoe was more than a "passive beneficiary" or whether its acts were economically "inevitable."[34] Instead, he looked at the nature of the leasing practices and stated:

> They represent something more than the use of accessible resources, the process of invention and innovation, and the employment of those techniques of employment, financing, production, and distribution, which a competitive system must foster. They are contracts, arrangements, and policies which, instead of encouraging competition based on pure merit, further the dominance of a particular firm.[35]

He stressed the fact that the practices were "unnatural barriers"[36] which "unnecessarily exclude[d] actual and potential competition."[37] Contrary to Hand's analysis, the emphasis was not placed upon the evils of a monopolistic structure and a search for a reason to avoid condemnation, but rather focused on the nature of the behavior undertaken and the effect of that behavior in relation to the competitive process. The question raised was whether the behavior "excluded," and thus injured, competition and competitors.[38]

C. *The Modern Approach*

A third approach has developed in a recent series of cases involving IBM. In these modern cases, the courts appear to adopt the position that although lawfully obtained monopolists are not favored by the law, they are lawful and cannot be found in violation of section 2 unless they undertake some kind of anticompetitive conduct. Rather than focusing on the evils of the monopolistic structure or the question of whether the act of the monopolist injures competition and competitors, the first question under this approach is whether the monopolist's act is actually a legitimate part of competition. If the act is found to be a legitimate part of the competitive process, then it cannot be construed as behavior violating section 2.

The third approach was introduced by the Tenth Circuit in *Telex Corp. v. International Business Machines Corp.*[39] In *Telex,* the appellate court reversed a trial court's findings that design changes in equipment and price reductions were violations of section 2. The appellate court rejected the trial court's interpretation of the law that, to avoid violation of section 2, IBM's acts had to be within the "exception" of "development as a consequence of a superior product, business acumen or historic accident" as described in *Grinnell.*[40] Instead,

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33 Those features which the court considered exclusionary included the long duration of the leases (10 years), the provision for a penalty fee if, prior to the lease expiration, the leased machine was replaced by a machine made by a competitor, and the inclusion of repair services under the lease fees.

34 *See* notes 25 & 28 *supra* and accompanying text.

35 110 F. Supp. at 344-45.

36 *Id.* at 345.

37 *Id.*

38 *Id.* at 343.

39 510 F.2d 894 (10th Cir.), *cert. dismissed,* 423 U.S. 802 (1975).

40 *Id.* at 925. The court also based the reversal on the grounds that an erroneous market definition had been used. *Id.* at 933.

the appellate court asked whether IBM's acts were "ordinary business practices typical of those used in a competitive market"[41] as opposed to an unfair "*use* of monopoly power."[42] This language suggests that the behavior which violates the Act must be of a type which would not be undertaken unless the enterprise had monopoly power or which creates damages of a special kind as opposed to injuries indigenous to a pure competitive process.

In two other cases involving IBM, this same approach was adopted by courts in the Ninth Circuit. In *Greyhound Computer Corp., Inc. v. International Business Machines Corp.*,[43] Greyhound alleged that IBM had violated section 2 by implementing certain changes in its leasing and pricing policies and manipulating discounts, rental prices, and purchase prices. All of these activities were allegedly undertaken to injure competitors who were lessors of computers. The appellate court reversed a directed verdict entered in IBM's favor, holding that sufficient evidence was presented from which a jury could have found that IBM had violated section 2. The court adopted the following standards: (1) acts which "unnecessarily excluded competition"[44] or which could be classified as "anticompetitive activities that impaired competition without a legitimate business purpose"[45] are violative behavior, whereas, (2) a "reasonable response to . . . competition"[46] is perfectly lawful. Similarly, in *ILC Peripherals Leasing Corp. v. International Business Machines Corp.*,[47] the District Court for the Northern District of California asked whether IBM's activities in introducing a leasing policy and several new products, in initiating price cuts, and in failing to predisclose information necessary for designing complementary products (peripheral units), were "reasonable response[s] to competition."[48] The court found not only that these acts were reasonable responses but also that the introduction of the new products, although having a "detrimental impact"[49] on smaller competitors, was precisely the type of behavior that "the antitrust laws were meant to encourage."[50] Based on this determination the court entered a directed verdict in favor of IBM.[51] The emphasis in the IBM cases was thus placed upon whether the acts engaged in by the monopolist were a part of the competitive process or whether they were without a legitimate economic purpose and injurious to competitors.

IV. District Court Application of the Law

In *Berkey,* the district court essentially adopted the exclusionary conduct approach. In accord with this approach, the emphasis was placed upon the impact of the monopolist's acts on competition and competitors. Although the court did caution the jury that activity which directly benefited consumers

41 *Id.* at 925-26.
42 *Id.* at 926.
43 559 F.2d 488 (9th Cir. 1977).
44 *Id.* at 498.
45 *Id.* at 505.
46 *Id.* at 499.
47 458 F. Supp. 423 (N.D. Cal. 1978).
48 *Id.* at 441-42.
49 *Id.* at 443.
50 *Id.* at 444.
51 *Id.*

though incidentally injuring competitors was lawful, it broadly defined the unlawful conduct as acts "which instead of encouraging competition, were designed primarily to further . . . domination of the market."[52] The basic question presented to the jury was whether Kodak had "engaged in exclusionary conduct" by introducing the film and camera as a system[53] and by failing to predisclose information on the innovations to camera and photofinishing competitors.[54]

In a decision on posttrial motions, the district court held that its instructions had properly interpreted the law and that the evidence supported the jury's determination. The district court judge, Judge Marvin Frankel, found that the evidence clearly supported the jury's determination that the introduction of the products as a system was unlawful. He reasoned that this introduction as a system, wherein the Kodacolor II film was available only for use with the 110 camera, left "competitors paralyzed and consumers deprived of choice"[55] because, at the time of introduction, "no other camera manufacturer [was] in a position to offer the consumer a camera other than Kodak's for use with that film."[56] Thus, he found that the system's introduction could constitute exclusionary conduct.

Similarly, he reviewed the overall circumstances of the case and reasoned that introduction of the innovations without predisclosure denied the competitors the opportunity to "enter the market at about the same time as, and compete on the merits with, Kodak's initial line of 110 cameras."[57] He concluded, therefore, that the jury could have found the behavior to be exclusionary and in violation of section 2. Though the judge conceded that ordinarily there is no duty of predisclosure, he reasoned that, "Kodak's monopoly power in film, if it was found to disable competitors who could not offer cameras comparable to Kodak's, might lead judges of facts to decide that the failure to give camera makers the necessary predisclosure concerning film should in all the circumstances be deemed anticompetitive."[58] In reviewing "all the circumstances,"[59] the judge referred to evidence supporting Berkey's various contentions that the 110 system had been introduced with the intent to displace competitors' markets, that the new film was introduced as a competitive ploy and not because it was an improvement, that the new products were actually inferior to the products already on the market, and that Kodak had restricted the new film to the 110 size to gain further advantage in selling the new camera.[60]

Frankel's adoption of the exclusionary conduct standard also led to the granting of equitable relief. Reasoning that communications from Kodak's film division to its own CP&P but not to CP&P's competitors "handicap[ped] competitors and discourage[d] competition,"[61] the court decided that judicial

52 457 F. Supp. at 412-13 n.6.
53 *Id.*
54 *Id.* at 414 n.9.
55 *Id.* at 413.
56 *Id.*
57 *Id.* at 410.
58 *Id.* at 414.
59 *Id.*
60 *Id.* at 415.
61 *Id.* at 429.

relief was necessary to prevent this exclusionary practice. The court concluded that an equitable decree forcing "Kodak to treat all photofinishers, including CP&P, alike in relevant respects"[62] was the appropriate remedy as the decree would "leave to Kodak power to disclose or not, but deprive it of the power to confer unfair and anticompetitive advantages upon CP&P."[63]

In response to Kodak's arguments that its behavior was, in fact, a normal part of business, the district court stated that "Kodak . . . overlook[ed] that monopolies are not darlings of the antitrust laws"[64] and that "the principles of the Sherman Act and the pertinent precedents [demand] a frequently subtle, inevitably comprehensive appraisal of actions by a company like Kodak. . . ."[65] Simply because the behavior resulted from a business decision it could not be "shielded from scrutiny."[66] Kodak's arguments that its acts were competitive and economically reasonable were to no avail as the court answered that "the antitrust laws do not permit willful maintenance of monopoly power by conduct that might for a company without such power be deemed 'honestly industrial.' "[67]

Judge Frankel also noted that had Kodak's behavior been judged under *Alcoa*'s "exceptions" approach, it would have equally been found to have violated section 2. Kodak had actively obtained the temporary monopoly by introducing the new system and not predisclosing information about it; the temporary monopoly had not been "thrust upon"[68] it and certainly was not "inevitable."[69] The district court characterized Kodak's acts as "plainly avoidable"[70] and, therefore, likewise in violation of section 2 under the stricter *Alcoa* criteria.

V. Appellate Court Analysis

On appeal, the Second Circuit did not adopt the "exclusionary" conduct standard as the district court had; instead, it used an approach similar to the one developed in the IBM cases. In analyzing the conduct element of the section 2 offense, the court stressed the principles that monopoly power alone is not unlawful and that an enterprise which lawfully obtains monopoly power should not be penalized for successfully competing. Based upon these premises, the court determined that a lawfully obtained monopolist does not violate the Act merely by capitalizing upon advantages inherent to its success, such as size and integration. The conduct it found to be proscribed by the statute was the attainment of monopoly power through unlawful means or the use of the monopolist's *market power* to "prevent or impede competition."[71] Based on this reasoning the Second Circuit did not inquire whether the monopolist's activity was "exclusionary," as the district court had, but instead

62 *Id.* at 430.
63 *Id.*
64 *Id.* at 414.
65 *Id.* at 415.
66 *Id.*
67 *Id.* at 414.
68 *Id.*
69 *Id.*
70 *Id.*
71 603 F.2d at 274.

made a two-part inquiry. The appellate court interpreted the law as requiring it to ask whether the monopolist's acts were anticompetitive exercises of its monopoly power or whether, instead, the acts were legitimate, competitive business activity.

Under that interpretation of the law, the court of appeals found it necessary to reverse the verdict against Kodak. The court held that, "as a matter of law, Kodak did not have a duty to predisclose information about the 110 system to competing camera manufacturers."[72] The court reasoned that innovation is a very desirable and legitimate part of competition. It found that as part of the competitive process, an innovator, be it a monopolist or the smallest firm in the industry, "has a right to the lead time that follows from its success."[73]

The court stated that there would be no duty to predisclose even if Berkey was correct in its contentions that (1) the smaller competitors could not compete effectively unless they imitated Kodak's products, and (2) that Kodak should be penalized for failing to meet competitors' requests for new film formats to be used with their innovations. With respect to the first contention, the court believed that imposition of a predisclosure duty would harm the competitive system more than it would help. Though predisclosure would help smaller competitors maintain their market shares, the court reasoned that it would greatly diminish the incentive to innovate, a very important part of competition. The monopolist would not expend large sums on research and development since it would not be able to reap the benefits of innovation. If it were forced to adhere to predisclosure, its competitors would be able to produce cheaper imitations of the innovation for introduction at the same time, undercutting any advantage to be gained through new developments. Applying section 2 in this manner would discourage monopolists from competing, rather than implementing the goal of encouraging competition.

In addressing the second contention, that Kodak should be penalized for failing to provide formats necessary for competitors' innovations, the appellate court agreed that if Kodak had "used its film monopoly to stifle format innovations by any other camera manufacturer,"[74] it had probably acted unlawfully. The court accepted "the proposition that it is improper, in the absence of a valid business policy, for a firm with monopoly power in one market to gain a competitive advantage in another by refusing to sell a rival the monopolized goods or services he needs to compete effectively in the second market."[75] Berkey, however, did not base its section 2 allegation on the failure to supply a requested film format and establish injury therefrom. Berkey's argument posited that the previous refusal to supply formats for other cameras justified the imposition on Kodak of the duty to predisclose information on its innovations. It alleged that failure to meet that duty to predisclose was the violation from which injury arose. Although the court stated that Berkey could attempt to establish a case based upon the refusal to supply formats and resulting in-

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72 *Id.* at 281.
73 *Id.* at 283.
74 *Id.* at 283-84.
75 *Id.* at 284.

jury, the court found no legal basis for the idea that the refusal to supply formats created a duty to predisclose. Because the damages Berkey established were based on the failure to predisclose and not the refusal to supply a film format, Berkey did not have a right to recovery.

In addition to finding that failure to predisclose did not constitute a violation of section 2, the appellate court also held that the simple introduction of the film and camera as a system did not constitute monopolization. The court reasoned that the ability to introduce the new film and camera was simply a benefit of integration and research and development, and did not involve any anticompetitive use of monopoly power. Kodak had not used its monopoly power in the film industry to coerce consumers into purchasing the 110 camera, as it had continued to produce its other lines of film to accommodate those consumers who elected to use one of the other cameras produced by Kodak or its competitors.[76]

The appellate court similarly found it necessary to vacate the lower court's equitable decree requiring Kodak to treat its own CP&P division the same as independent photofinishers with respect to disclosure of information. The court stated that "[s]o long as we allow a firm to compete in several fields, we must expect it to seek the competitive advantages of its broad-based activity."[77] Free communications concerning product developments between divisions of a corporation is a benefit of integration; it does not involve a use of monopoly power. The decree was vacated since it denied Kodak one of the "legitimate benefits of integration."[78]

VI. Critique

A. *The Disagreement*

As the district court stated in *Berkey,* "the basic historical facts . . . [were] not in significant dispute."[79] The dispute between the courts arose as to the interpretation of the law. Through its adoption of the exclusionary conduct approach, the district court adopted the premise that monopoly power is bad and that the behavior of monopolists is suspect. The court applied the standard that a monopolist's activity violates section 2 if his act or failure to act injures competitors unless such activity is justified as necessary to encourage competition or improve consumer welfare.

In contrast, the appellate court's major premise was that monopolists which lawfully obtained their monopoly power do not violate section 2 unless they undertake anticompetitive behavior. Under this approach, a violation would be found only if the plaintiff established that he suffered injury resulting from specific behavior undertaken by the monopolist and that this behavior

76 The court did not directly deal with the question of whether the restriction of the Kodacolor II film to the 110 format, as part of the system introduction, could constitute the behavior necessary for a section 2 violation. The court found it unnecessary to answer this question as Berkey had failed to establish damages caused by the restriction; Berkey failed to offer any evidence showing that a consumer bought a Kodak camera, rather than a competitor's, simply because he desired to use the new film. *Id.* at 288-89.

77 *Id.* at 276.

78 *Id.* at 292.

79 457 F. Supp. at 410.

was a use of monopoly power designed to injure competitors as opposed to being a normal part of the competitive process. The standard for determining a section 2 violation under this interpretation was not whether the monopolist's acts injured competitors, but was whether the behavior, on balance, was procompetitive or anticompetitive.

The law is not well-settled as to the section 2 offenses. Confusion arises because of the lack of a definitive standard within the statute itself, and the lack of a uniform approach or standard in the precedents. As *Berkey* evidences, different approaches adopted by the courts can lead to differing results. The case manifests the need for a uniform approach and uniform, definitive criteria to determine when a monopolist's behavior is unlawful.

B. *The Policies*

The source of confusion which has led to the development of differing approaches and tests in applying section 2 is the paradoxical nature of the goals of the Sherman Act. Traditionally, preservation of competition and prevention of concentration of economic power have been perceived as the major goals underlying the antitrust laws. Preservation of competition is desirable because it acts to maximize the benefits received by the consuming public and creates economic efficiencies.[80] Prevention of concentration of economic power is desired as part of the Jeffersonian democratic ideal which is symbolized by "small, local, responsible, and individually owned enterprises [as] contrasted with large, politically irresponsible, absentee-owned, and possibly corrupt giants capable of crushing smaller businessmen and individuals and of subverting democratic government."[81]

Superficially, these goals appear to dovetail. The Jeffersonian ideal envisages competition among small enterprises and competition presupposes many enterprises striving to maximize their profits through better service to consumers. The problem is that the goals of preserving competition and preventing concentration of economic power may often conflict in practice. Under the competitive system, each firm attempts to maximize its profits and to enlarge its market share through the introduction of new and better products at lower prices. Although these efforts benefit the consumer, they may lead to the destruction of competitors who simply cannot meet the competition because of inefficiency, lack of innovation, or simple bad luck. Due to the efficiencies derived from economies of scale or "superior entrepreneurial and innovative talent," one or two businesses may win the competitive battle.[82] In this manner, the other competitors may be forced out of the market leaving economic power concentrated in the winners. Thus competition itself may lead to monopolies. Continued competitive actions by the monopolist, such as innovations or the adoption of more efficient processes leading to lower prices and higher quality, will serve to perpetuate the monopolist's power.

80 *See generally* 1 P. AREEDA & D. TURNER, *supra* note 2, at ¶¶ 103-13; *Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy,* 125 U. PA. L. REV. 1182 (1977).

81 *See* 1 P. AREEDA & D. TURNER, *supra* note 2, at ¶ 109b.

82 *Id.* at ¶ 103.

The problem faced by the courts is caused by this paradoxical relationship between competition and monopoly. Since competition is highly valued and encouraged in American society, it is considered inequitable to punish a lawfully obtained monopolist for succeeding in the competitive process. Based on this policy consideration, the courts have held that the existence of monopoly power alone does not violate the law.

Monopolists are disfavored by the law, however, as they are harmful to the competitive process and opposed to the populist goals discussed above. The courts have limited what a monopolist can do, in hopes of maintaining competitive practices and protecting smaller competitors. The various approaches developed by the courts differ in the emphasis placed on these underlying goals and tenets.

C. *Shortcomings of the District Court Approach*

The district court approach places great emphasis on the attainment of antitrust goals by preventing injury to competitors and hence, competition, and by placing limitations on the acts of monopolistic enterprises. In *Berkey,* introduction of the camera and film as a system injured competitors as they lacked the film-making capacity to introduce such systems. A duty to predisclose information was implied as refusal to predisclose injured competitors who were unable to offer similar cameras and photofinishing services at the time of introduction.

By keying on the question of whether competitors have been injured and adopting a strong willingness to condemn the monopolist's acts, the approach fails. Inadequate consideration is given to the rights and needs of the lawfully obtained monopolist and to the desirability of competitive acts by all competitors, including the monopolist. Additionally, the long-term detrimental impact of the remedies is often overlooked due to the excessive preoccupation with injury to competitors. Application of the exclusionary conduct approach tends to place lawfully obtained monopolists in an inequitable position and does not effectuate the goals for which it was designed. Instead, the results may actually be counterproductive to the goals of the antitrust laws.

The monopolist is placed in an unfair position as it has a legal right to exist but, under the district court approach, it is not permitted to exist in an economically meaningful manner without risking violation of section 2. As a private business entity, the monopolist's purpose is to make profits for its shareholders. However, if the "exceptions" or "exclusionary" conduct test is strictly applied, the mere production of a single widget by a monopolist could be construed to be unlawful. By making and selling the widget, the monopolist would have actively sought a part of the market and would not be a "passive beneficiary."[83] Similarly, the act technically "excludes" smaller competitors who could have otherwise made the sale. Thus, under these standards, the

83 *See* note 25 *supra.*

undertaking of the most fundamental business activity by a monopolist could be found violative of the Act.[84]

Admittedly, the district court judge in *Berkey* probably would not have permitted a jury to decide that the production and sale of a camera by Kodak was exclusionary. In his instructions, the judge had made some attempt to distinguish between behavior violating section 2 as it excluded competition and behavior which was beneficial to consumers although incidentally excluding competitors. Even this distinction, however, failed to consider the mechanism of the competitive process and the monopolist's need to exist in an economically rational manner within that process.

This failure is illustrated by considering the behavior which the court permitted the jury to find violative of the Act—introduction of the film and camera as a system and failure to predisclose information on the innovations and on photofinishing processes for the new film. The court had reasoned that the introduction of the system was not beneficial to the consumer because, as the court stated, he was "deprived of choice";[85] if he wished to use the new film during its initial period of availability, he had to buy the other part of the system, the new Kodak camera. Likewise, it reasoned that failure to predisclose was not lawful exclusion as, if Kodak would have given adequate predisclosure, the consumers would have been given the choice of 110 cameras and photofinishing services from many competitors at the time of introduction.

Condemnation of this behavior, although it met the district court criteria, violated the principle that a lawfully obtained monopolist may lawfully exist. It also violated the concept that a corporation may be horizontally integrated.[86] Presumably, if a monopolist, as a business entity, has a right to exist, it has a right to attempt to earn profits through competition. Similarly, if a company has the right to be integrated, it should have the right to use its integrative capabilities and act as an integrated business. Under the district court decision, though, Kodak would not be permitted to utilize its integration. It could not have one division make a new type of complementary product designed solely for an innovation developed by another division without fear that a jury or judge will later decide that the introduction of the new complementary product was unnecessary. Nor could this corporation act as a single unit. In accord with the equitable decree, Kodak would have been required to act as if its own Color Print and Processing organization was not part of the company. Likewise, Kodak could not attempt to earn maximum profits by actively competing

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84 As Robert Bork stated:

> The problem is to know what exclusion is improper. All business activity excludes. A sale excludes rivals from that piece of business. Any firm that operates excludes rivals from some share of the market. Superior efficiency forecloses. Indeed, exclusion or foreclosure is the mechanism by which competition confers its benefits upon society. The more efficient exclude the less efficient from the control of resources, and they do so only to the degree that their efficiency is superior.
>
> Such exclusion is proper and beneficial. It is the task of antitrust to see that it continues to operate. Antitrust, therefore, must be able to distinguish efficiency exclusion from improper exclusion. The conceptual apparatus now in use is incapable of making that crucial distinction.

R. Bork, The Antitrust Paradox 137 (1978).

85 457 F. Supp. at 413.

86 This concept was implicitly accepted by the district court. If the district court did not think that it was lawful for Kodak to be horizontally integrated, then, logically, it should have ordered divestiture. The court, however, denied Berkey's request that divestiture be ordered. *Id.* at 428-29.

through innovation. Instead, it would be required to help its competitors by predisclosing information on innovations. Due to the predisclosure requirement, Kodak would not even have the right to recoup some of its research and development costs by being first on the market with its own innovation and the associated complementary services. The limitation on these activities was virtually indistinguishable from limiting the monopolist's right to produce that single widget. Under this approach, although the monopolist would be permitted to exist, it would be questionable whether it could exist in a rational manner.

Perhaps it would be acceptable to place the monopolist in this inequitable position if the approach was effective in implementing the goals of the Sherman Act. As is illustrated by the potential results of the lower court decision, however, the approach is unsatisfactory in implementing the underlying policies.

The district court approach and test placed emphasis on protecting competition and competitors from injury. At first, this appears to be an appropriate way to implement the goals of preserving competition, striving to meet the populist ideal, and preventing concentration of economic power. Protecting competitors is important to preserving competition because without more than one business there is no competition. Similarly, the image of the Jeffersonian ideal requires many competitors and the existence of competitors implies some distribution of economic power.

Due to the paradoxical nature of competition, however, attempts to protect competitors may actually lead to the destruction, rather than the preservation, of competition. As discussed earlier, some successful competitive acts harm competitors. If the competitors are protected from this harm by preventing the acts, then the cure is the prevention or limitation of those competitive acts and hence, competition itself. This paradox is illustrated by the imposition upon a monopolist of the duty to predisclose information on innovations. Failure to predisclose hurts competitors as they cannot offer similar products at the date of introduction. However, by requiring predisclosure and thus allowing competitors to introduce imitations and complementary services at the same time, the monopolist-innovator is deprived of one of the incentives to innovate—the increased profits associated with being the first on the market with the new goods. With this incentive gone, the monopolist is less likely to expend funds on research and development and attempt to innovate. Because innovation is a very important and desirable part of competition, the net effect may be characterized as discouraging competition by the monopolist.

In addition to discouraging competition by the monopolist, broad restrictions on acts of monopolists and increased liability are likely to dampen competition by firms approaching the status of monopoly. Large firms that have not yet attained sufficient power to be classified as monopolies, but that are near to that status, will be unwilling to increase their market share. They will not want to be exposed to the greater liability and be subjected to the associated broad restrictions on behavior. Therefore, they may restrict their growth efforts and attempt to maintain the status quo. This could lead to the evils of economic stagnation and sluggishness which Hand associated with monopolies in *Alcoa.*[87]

Also, the requirement that monopolistic enterprises help their competitors through predisclosure and similar rules could lead to complacency among the medium-sized firms rather than stimulating competition. As a result of the district court holding in *Berkey,* Kodak's competitors would have less desire to expend funds on research and development of new cameras since Kodak would be required to share its innovations with them through predisclosure. To deny the innovator, Kodak, a portion of the initial higher profits from being the first on the market with its innovation would be counterproductive to the preservation of competition. Even more counterproductive is the awarding of these profits to Berkey, a substantial enterprise which complained because Kodak did not earlier tell it how to imitate the innovation.[88]

This protection of competitors, if it is extended broadly and does discourage competition, will not effectively implement the Jeffersonian goals. The idealistic image is one of hardworking, enterprising businesses merely asking for a chance to compete fairly. The ideal is not a picture of large corporations parasitically increasing their profits through the judicially enforced assistance of monopolistic enterprises. By implying a duty of predisclosure, which is essentially a duty to help competitors, the latter image is more likely to be created than the former.

Although the motivation underlying the district court decision was basically sound, the decision was unsatisfactory. The court, by adopting the exclusionary conduct approach, failed to consider adequately the position and needs of the monopolist, the paradoxical nature of the competitive process and the long-range effects of its judgment.

D. *Advantages of the Appellate Court Approach*

The appellate court approach, which could be labelled the competitive-anticompetitive balancing test, succeeds for the very reason the district court approach fails. In addition to considering the need to protect competitors from injury unfairly inflicted, the appellate court approach recognized the right of the monopolist to exist, compete, and receive the benefits of its integration, innovative talents, and size. Given this latter consideration, the court did not begin with an expectation that the monopolist would be found in violation unless it could justify its acts. Instead, the court began with an awareness that the monopolist has a right to compete and to take advantage of its integration. The court recognized, however, that a monopolist does not have a right to use its monopoly power to undertake behavior which lacks any legitimate business purpose except to increase profits in the long run by destroying or foreclosing competitors in the short run.

87 In his discourse on the evils of monopolistic structures, Hand stated: "Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is narcotic, . . . that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone." 148 F.2d at 427.

88 *See* Sims, *'Kodak' Provides Comfort for Trust Defendants,* Legal Times of Wash., July 16, 1979, at 13, col. 1.

Through its recognition that the monopolist should be allowed to act in a competitive manner, the competitive-anticompetitive balancing test avoids three failings from which the district court's approach suffers. First, the balancing test gives economic reality to the legal principle that monopoly power alone is not unlawful. The lawfully obtained monopolist is permitted to act in an economically rational manner as, under this test, it is permitted to compete actively. The inequity of the successful competitor being penalized solely for its success does not arise under this test. Second, the consumer is able to reap the benefits resulting from the monopolist's continued competition. This may be through lower prices due to efficiency and integration, innovation, or other advantages inuring to the consumer from competition. Third, inefficient competitors are not protected at the expense of consumers. Under this approach, competitors are forced to meet the competition from the monopolists and come close to their prices and quality of product. Those producers which are inefficient or unable to offer the consumer modern, quality products are forced from the market.

Through its recognition that monopoly power may be used in an anticompetitive manner to unfairly destroy competitors and that this should be prevented, the balancing test provides a measure of protection to smaller competitors. Competitors are not protected from competitive practices which may injure them due to their inefficiency or inability to keep up with technological developments. Activities by the monopolist which involve manipulation of its monopoly power to destroy competitors or limit their advances in the market without a legitimately competitive purpose would be unlawful, however, under this test.

This distinction is illustrated by the appellate court's decision in *Berkey.* Failure to predisclose information about the innovation and complementary services could not be found to violate section 2. The resultant lead time advantage was the competitive incentive to innovate. As an integral part of competition, innovation without predisclosure was encouraged rather than forbidden. Similarly, introduction of the camera and film as a system was merely a benefit of integration and not a use of monopoly power. Therefore, it could not be the basis for a violation of section 2, although firms lacking integration are placed at a disadvantage.

Refusal by Kodak to supply film to its competitors in the camera market, however, could be violative of section 2. If a competitor had sued because Kodak had refused to supply it with a film in a new format necessary for the competitor's innovation, the court indicated that it would be willing to find a violation of section 2.

Other examples of conduct which courts would probably find unlawful under the balancing test are predatory pricing and leasing practices such as those in *United Shoe.* The selling of goods below cost would appear to be a violation of section 2 since that act would not have a legitimately competitive purpose. The act would not be undertaken for direct profit-maximization but instead for the expectation of future profits after the destruction of competitors which did not have sufficient capital to absorb losses during a "price war."

Similarly, the leasing practices in *United Shoe*[89] would also likely be considered anticompetitive since the primary aim of the leases was to make it economically impractical for manufacturers to utilize a competitor's machine. No procompetitive purpose was served by the leasing arrangements.

The distinction between anticompetitive and competitive behavior is very subtle and difficult to discern. A shortcoming of the appellate court approach is that a great deal of subjectivity remains. Objective, definitive criteria would be preferable but it is questionable whether the formulation of totally objective standards is feasible given the nature of antitrust regulation. The balancing test is workable, however, since it recognizes that subjectivity is involved and presents to the trier of fact the conflicting interests. As long as the two different types of exclusion, competitive and anticompetitive, are recognized and the trier of fact considers the interests of the monopolist, competitors, and the competitive process, the policies underlying the antitrust laws are likely to be effectuated.

VII. Conclusion

The Second Circuit's decision in *Berkey* is important because of its express recognition of a lawfully obtained monopolist's right to compete, to benefit from the lead time resulting from its innovation, and to cultivate the legitimate benefits of integration. Through the application of a competitive-anticompetitive balancing test, the court found that monopolists, such as Kodak, must be allowed to compete and reap the benefits of their competitive successes. In this manner, the lawfully obtained monopolist is permitted a rational existence. The court warned monopolists, however, that although they may incidentally injure their competitors by winning the competitive battle fairly, they cannot undertake activity without a legitimate business purpose simply to destroy or impair the effectiveness of their competitors. Monopoly power cannot be used purposefully to disable competitors. By analyzing the facts from both the competitive and anticompetitive perspectives, the appellate court gained a better insight into molding a solution which is in accord with the policies underlying the Sherman Act.

Mary E. Anthony

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89 *See* note 33 *supra* and accompanying text.