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Product Separability in Franchise Tying Arrangements: The Fourth Circuit's New R ule

PRODUCT SEPARABILITY IN FRANCHISE TYING ARRANGEMENTS: THE FOURTH CIRCUIT'S NEW RULE

A tying arrangement or tie-in exists when a seller conditions a buyer's purchase of a desired product (tying item) on the buyer's agreement to purchase another product (tied item).[1] Courts condemn tie-ins under the antitrust laws[2] to prevent sellers from foreclosing competition in the tied product market by depriving competing sellers of the opportunity to vie for the business of the buyer.[3] The tying doctrine has had

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[1] *See, e.g.*, United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 611 (1977) (defendant alleged to tie purchase of prefabricated houses to extension of credit); United States v. Loew's Inc., 371 U.S. 38, 44-45 (1962) (defendant tied sale of unwanted, inferior films to sale of copyrighted feature films); Northern Pac. Ry. v. United States, 356 U.S. 1, 5-6 (1958) (defendant sold and leased land on condition that grantee or lessee use defendant's facilities for shipping all commodities produced on land). *See generally* 16 H J. VON KALINOWSKI, BUSINESS ORGANIZATIONS: ANTITRUST LAWS AND TRADE REGULATION § 64.01[1] (1969) [hereinafter cited as VON KALINOWSKI].

Courts have stated that sellers can impose tie-ins by the course of conduct between the parties as well as by express language. *E.g.*, Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 724 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980); Advance Business Systems and Supply Co. v. SCM Corp., 415 F.2d 55, 66 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

[2] Courts have found tying arrangements illegal under § 1 of the Sherman Act, § 3 of the Clayton Act, and § 5 of the Federal Trade Commission Act.

Section 1 of the Sherman Act provides in pertinent part, "Every contract, combination in the form of trust of 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). For decisions holding tying arrangements illegal under § 1 of the Sherman Act, see United States v. Loew's, Inc., 371 U.S. 38, 52 (1962); Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 627 (1953).

Section 3 of the Clayton Act makes the sale or lease of goods, wares, and merchandise illegal when the effect of the sale or lease is to "substantially lessen competition." 15 U.S.C. § 14 (1976). For cases holding tying arrangements illegal under § 3 of the Clayton Act, see International Salt Co. v. United States, 332 U.S. 392, 393-95, 402, *appeal dismissed*, 332 U.S. 747 (1947); United Shoe Mach. Corp. v. United States, 258 U.S. 451, 465 (1922).

Section 5 of the Federal Trade Commission Act provides in pertinent part, "Unfair methods of competition and unfair or deceptive acts in commerce are declared unlawful." 15 U.S.C. § 456 (1976). *See* FTC v. Texaco Inc., 393 U.S. 223, 224, 231 (1968) (holding tie-in illegal under § 5 of the Federal Trade Commission Act).

[3] *E.g.*, Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958); International Salt Co. v. United States, 332 U.S. 392, 396, *appeal dismissed*, 332 U.S. 747 (1947).

In addition to preventing tied product market foreclosure, a second reason courts have stated for striking down tie-ins is the need to prevent interference with buyers' free choice. *E.g.*, Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 503 (1969); United States v. Loew's Inc., 371 U.S. 38, 45 (1962). The Supreme Court substantially repudiated the "buyers' free choice" rationale in Continental T.V., Inc. v. G.T.E. Sylvania Inc., 433 U.S. 36 (1977). In *Sylvania* the Court held that the autonomy of independent businessmen was an inadequate justification because it was unrelated to price, quality and quantity of goods and services. *Id.* at 53, n.21.

an important impact on trademark franchising.[4] Many trademark franchisors require franchisees to purchase goods and services along with the trademark license as part of a franchise "package."[5] As a result, dissatisfied franchisees often allege that the franchisor is tying the goods and services included in the package (tied products) to the purchase of the trademark license (tying product).[6] In a recent case, *Principe v. McDonald's Corp.*,[7] the Fourth Circuit created a new rule which will permit franchisors to market seemingly separate products as part of a mandatory franchise package in a greater number of situations.[8]

Courts often examine business practices challenged under the antitrust laws under the rule of reason.[9] In rule of reason cases, courts balance the anticompetitive effects of a business practice against socially beneficial effects of the practice to determine whether an unreasonable

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[4] *See* Note, *Trademark Franchising and Antitrust Law: The Two-Product Rule for Tying Arrangements*, 27 SYRACUSE L. REV. 953, 953-54 (1976) [hereinafter cited as *Trademark Franchising*]. Trademark franchising is a method of doing business in which the franchisor of a trademarked product, method, or service permits affiliated franchisees to sell the product, method, or service in accordance with procedures established by the franchisor. *See* 16 H VON KALINOWSKI, *supra* note 1, § 65.01[1]; *Trademark Franchising, supra* note 4, at 955.

Commentators identify three types of trademark franchises. The first type is the enterprise franchise in which the franchisee operates an independently owned business under the franchisor's trademark. The franchisor provides the trade name and usually provides a complete method of doing business. The franchisee agrees to use the business method and follow the controls the franchisor puts on the operation of the business. *See* 16 H VON KALINOWSKI, *supra* note 1, § 65.01[1]. For cases involving the enterprise franchise, see Warriner Hermetics, Inc. v. Copeland Refrig. Corp., 463 F.2d 1002, 1012-16 (5th Cir.), *cert. denied*, 409 U.S. 1086 (1972) (air conditioning and refrigeration compressor franchise); Siegel v. Chicken Delight, Inc., 448 F.2d 43, 47-53 (9th Cir. 1971) *cert. denied*, 405 U.S. 955 (1972) (fast food franchise). The second type of franchise is the distributorship franchise, in which the manufacturer distributes his finished goods to consumers by means of a franchise system. The franchisee is licensed to sell the product under the franchisor's trademark which identifies the product, but the franchisee maintains his own business identity and trademark. *See* Redd v. Shell Oil Co., 524 F.2d 1054, 1056 (10th Cir. 1975), *cert. denied*, 425 U.S. 912 (1976) (distributorship franchise); 16 H. VON KALINOWSKI, *supra* note 1, § 65.01; *Trademark Franchising, supra* note 4, at 955-56. The third type of franchise exists when the manufacturer or processor supplies a secret formula or process to a licensee who produces the finished product and sells the product to consumers under the trademark. *See* 16 H VON KALINOWSKI, *supra* note 1, § 65.01.

[5] The Fourth Circuit has held that the essence of a modern franchise is the purchase of several products in a single package. Phillips v. Crown Cent. Petroleum Corp., 602 F.2d 616, 628 (4th Cir.), *cert. denied*, 444 U.S. 1074 (1979).

[6] *See, e.g.*, Northern v. McGraw-Edison Co., 542 F.2d 1336, 1340-42 (8th Cir. 1976) (tying lease and equipment to franchise license); Capra, Inc. v. Ward Foods, Inc., 536 F.2d 39, 45-47 (5th Cir. 1976) (tying of food, supplies, and equipment to franchise license); Siegel v. Chicken Delight, 448 F.2d 43, 46-47 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972) (tying of equipment, dry mix food items, and packaging items to franchise license).

[7] 631 F.2d 303 (4th Cir. 1980).

[8] *Id.* at 310-11; *see* text accompanying notes 49-78 *infra*.

[9] *See* Ross, *The Single Product Issue in Antitrust Tying: A Functional Approach*, 23 EMORY L.J. 963, 966 (1974) [hereinafter cited as Ross].

restraint of trade exists.[10] Courts have held, however, that tying arrangements are inherently anticompetitive and, therefore, are illegal per se under the Sherman Act[11] if three prerequisites exist.[12] First, the

[10] *E.g.*, Continental T.V., Inc. v. G.T.E. Sylvania Inc., 433 U.S. 36, 49 n.15 (1977); Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918); Standard Oil Co. v. United States, 221 U.S. 1, 51 (1911). In balancing the benefits of a challenged business practice against the practice's anticompetitive effects courts consider the business' condition before and after the manufacturer imposed the restraint, the nature of the restraint, the reasons for adopting the restraint, the effect of the restraint on the market place. Chicago Board of Trade v. United States, 246 U.S. at 238.

[11] 15 U.S.C. § 1 (1976); *see* note 2 *supra* (text of Sherman Act § 1).

[12] Northern Pacific Ry. v. United States, 356 U.S. 1, 6 (1958). Courts find tie-ins per se illegal under § 3 of the Clayton Act, 15 U.S.C. § 14 (1976), if two prerequisites exist. First, the arrangement must involve two distinct products and provide that one cannot be obtained without purchasing the other. *See* International Salt Co. v. United States, 332 U.S. 392, 398, *appeal dismissed*, 332 U.S. 757 (1957); text accompanying note 15 *infra*. Second, the arrangements must either involve a "not insubstantial amount of commerce" or the tying product "must yield sufficient economic power to restrain competition in the market for the tied product." International Salt Co. v. United States, 332 U.S. at 396; *see* text accompanying notes 13 & 14 *infra*.

Courts have mentioned two other requirements for per se illegality under § 1 of the Sherman Act in addition to the traditional three. *See* text accompanying notes 13-15 *infra* (traditional three requirements). Some courts state that the defendant must have coerced the buyer into purchasing unwanted tied products. *E.g.*, Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211, 1225 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976); American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 446 F.2d 1131, 1137 (2d Cir. 1971). Courts generally find, however, that an expressed contractual provision which establishes a tying arrangement is presumptive proof of coercion. Milonas v. Amerada Hess Corp., 1976-2 Trade Cas. ¶ 61,069, 69,818-20 (S.D.N.Y. 1976); In re 7-Eleven Franchise Antitrust Litigation, 1972 Trade Case. ¶ 74,156, 92,830-31 (N.D. Cal. 1972). *But see* Capital Temporaries, Inc. v. Olsten Corp., 506 F.2d 658, 662-63 (2d Cir. 1974) (individual coercion must be found even if an expressed contractual provision exists). Courts generally have held that in the absence of an express contractual provision, the plaintiff must demonstrate coercion. *E.g.*, American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 446 F.2d at 1137; Abercrombie v. Lum's Inc., 345 F. Supp. 387, 391 (S.D. Fla. 1972). *But see* Hill v. A. T. O. Inc., 535 F.2d 1349, 1355 (2d Cir. 1976) (individual coercion never a separate element of tie-in claim). A separate individual coercion requirement is illusory, however, because the third requirement for § 1 per se illegality already demands that two separate products exist and that the purchase of the tying product be conditioned upon the purchase of the tied product. *See* text accompanying note 15 *infra*. Thus, a buyer who wants the tying product always is coerced into buying the tied product. *See* text accompanying note 1 *supra* (defining illegal tie-in).

Some courts state "lack of justification" as a requirement for § 1 per se illegality. These courts inquire into whether legitimate business reasons exist for declaring the tie-in to be reasonable and, therefore, legal under the Sherman Act. *See* Siegel v. Chicken Delight, Inc., 448 F.2d 43, 50 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972); Susser v. Carvel Corp., 332 F.2d 505, 519 (2d Cir.), *cert. granted*, 379 U.S. 885 (1964), *cert. dismissed*, 381 U.S. 125 (1965). Courts have considered legitimate business reasons both to determine if an arrangement is reasonable, and to determine if an arrangement involves more than one product. *See* text accompanying notes 31-41 *infra* (legitimate business reason analysis used to determine product separability). One commentator has suggested that the best place in which to undertake legitimate business reason analysis is the product separability area. *See* Dore, *The "Total Product" Approach to Analysis of Alleged Tying Arrangements*, 34 tying product must yield sufficient economic power "to appreciably restrain competition in the market for the tied product."[13] Second, the seller's tying arrangement policy must affect a "not insubstantial amount of commerce."[14] Third, the arrangement must involve two distinct products and must provide that the buyer cannot obtain one without purchasing the other.[15]

Proof of the first two requirements for per se liability has become increasingly easy for the party alleging the tie-in.[16] Thus, a court's deter-

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WASH. & LEE L. REV. 409, 417 (1977) [hereinafter cited as Dore]. *Contra*, Ross, *supra* note 9, at 992-93.

[13] Northern Pac. Ry. v. United States, 356 U.S. 1, 6 (1958); *see* text accompanying note 16 *infra* (proof of economic power requirement has become increasingly easy for the party alleging tie-in).

[14] International Salt Co. v. United States, 332 U.S. 392, 396, *appeal dismissed*, 332 U.S. 757 (1947); *see* text accompanying note 16 *infra* (proof of "not insubstantial" requirement has become increasingly easy for party alleging tie-in).

[15] Time-Picayune Pub. Co. v. United States, 345 U.S. 594, 613-14 (1953); *see* text accompanying notes 19-48 (discussion of product separability requirement for per se illegality under Sherman Act).

[16] The earliest Supreme Court decisions on tying arrangements held that sufficient economic power to establish a per se § 1 violation existed only if the seller enjoyed a dominant or monopolistic position in the market for the tied product. *E.g.* Times-Picayune Pub. Co. v. United States, 345 U.S. 549, 608-09 (1953); United Shoe Mach. Corp. v. United States, 258 U.S. 451, 457-58 (1922). The Court has relaxed the high standard described in earlier cases significantly. In Northern Pac. Ry. v. United States, 356 U.S. 1 (1958), the Court held that sufficient economic power exists if the seller imposes tie-ins on a "host" of buyers and no other explanation exists for the existence of the arrangements. *Id.* at 6. In United States v. Loew's, Inc., 371 U.S. 38 (1962), the Supreme Court further relaxed the economic power requirement by holding that economic power could be inferred from the uniqueness of the tying product. *Id.* at 45. In United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610 (1977), the Supreme Court defined the term "uniqueness." *Id.* at 620-22. The Court held that a product is sufficiently unique to provide the requisite economic power for a tying violation when the seller enjoys a cost advantage over competing sellers in the production of the product or when other sellers cannot offer the same product as a result of some legal or physical barrier. *Id.* Courts have held that three legal barriers, the copyright, the patent, and the trademark, are capable of providing the economic power necessary to establish the economic power requirement for per se illegality under the Sherman Act. *E.g.* United States v. Loew's Inc., 371 U.S. 38, 44-45 (1968) (copyright and patent); International Salt Co. v. United States, 332 U.S. 392, 396 (patent), *appeal dismissed*, 332 U.S. 747 (1947); Siegel v. Chicken Delight, Inc., 448 F.2d 43, 50 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972) (trademark). *But see* Capital Temporaries, Inc. v. Olsten Corp., 506 F.2d 658, 662-63 (2d Cir. 1974) (trademark does not provide the economic power for per se violation). The Supreme Court has held that the location and value of the seller's land is a sufficient physical barrier to provide the economic power necessary for a per se violation of the Sherman Act. *See* Northern Pac. Ry. v. United States, 356 U.S. at 3.

The Supreme Court also has relaxed significantly the requirement that a "not insubstantial amount of commerce" be involved in the transaction. The current test is whether the total monetary amount of commerce involved in the use of the challenged practice is "not insubstantial." Courts have held that relatively small amounts of money satisfy the requirement. *E.g.*, Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 502 (1969) ($200,000); Aamco Automatic Transmissions, Inc. v. Tayloe, 407 F. Supp. 430, 436 (E.D. Pa. 1976) ($50,000).

mination of whether the first two requirements for per se liability exist rarely is crucial to the outcome of the litigation.[17] Consequently, the determination of whether the arrangement involves two separate products has increased in importance.[18]

The leading case on the issue of product separability is *United States v. Jerrold Electronics Corp.*[19] In *Jerrold*, the district court established a two step analysis for determining whether an amalgamation of items is separable into two or more products for tie-in purposes.[20] Under the *Jerrold* test, courts first inquire whether the alleged tying and tied products are normally separable.[21] If the two items are normally separable, courts determine whether legitimate business reasons exist for considering the items to be one product.[22]

The determination of whether alleged tying and tied items are normally separable often depends on how a court views the particular facts involved.[23] Commentators, however, have identified four general approaches.[24] In one approach courts inquire whether the two items are fungible.[25] If the items are reasonably interchangeable, a court will not find separate products.[26] Under a second approach, courts find that the alleged tying and tied items are one product if a patent defines the amalgamation as one product.[27] Under a third technique courts inquire whether the combination of allegedly separate products involves a cost savings to the manufacturer apart from the cost savings normally present in any tie-in.[28] A fourth technique courts use to determine whether

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[17] *See* Dore, *supra* note 12, at 411-12.

[18] *See* text accompanying note 17 *supra* (courts have reduced importance of economic requirements for per se illegality under Sherman Act); Ross, *supra* note 9, at 972-73 (reduction of importance of economic requirements has made product separability determination crucial).

[19] 187 F. Supp. 545, 560 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961); *see* Dore, *supra* note 12, at 413-14.

[20] *See* Dore, *supra* note 12, at 413-14; for cases following the two step *Jerrold* test, see Northern v. McGraw-Edison Co., 542 F.2d 1336, 1347 (8th Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); Siegel v. Chicken Delight, Inc., 448 F.2d 43, 50 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

[21] *See* Dore, *supra* note 12, at 413.

[22] *See* Ross, *supra* note 9, at 989-90; text accompanying notes 31-41 *infra* (describing legitimate business justification analysis).

[23] *See Trademark Franchising*, *supra* note 4, at 964.

[24] *See* Ross, *supra* note 9, at 973-1000.

[25] *See id.* at 973-84 (describing fungibility analysis).

[26] *See, e.g.*, Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 613 (1953) (newspaper space in morning paper and afternoon paper constitutes one product, newspaper space); Washington Gas Light Co. v. Virginia Elec. and Power Co., 438 F.2d 248, 253 (4th Cir. 1971) (electricity). *But cf*, Ross, *supra* note 9, at 981 (criticizing *Washington Gas Light* decision on grounds that court failed to recognize the tied product).

[27] *See* Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50, 57-58 (1958).

[28] An example of a single product under cost savings analysis is an automobile with a dashboard. *See* Ross, *supra* note 9, at 1014. Cost savings for the purpose of product

an amalgamation is separable is to examine whether a separate market exists for the alleged tied and tying items.[29] If the tied product can be marketed separately from the tying product, the items are normally separable.[30]

The second step of *Jerrold* product separability analysis is a determination of whether legitimate business reasons justify treating normally separable products as one product for antitrust purposes.[31] Although courts frequently state that tie-ins are per se illegal, the business justification step in product separability analysis is actually a rule of reason inquiry into whether the combination of items is a reasonable restraint of trade.[32] If the combination is a reasonable restraint of trade because of legitimate business reasons, courts find only one product and uphold the arrangement.[33] This business justification exception to the tie-in per se rule has been a narrow one. Courts have not balanced the beneficial effects of alleged tying arrangements against the arrangements' anticompetitive effects. Courts have found legitimate business reasons for combining normally separable products only when the seller would suffer substantial injury if the combination were disallowed and the harm could not be avoided in a less restrictive manner.[34]

The courts have found legitimate business justification for upholding combinations of normally separable items in three situations.[35] First, a

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separability does not include mere savings in sales expense normally present in any tie-in because if so, all tie-ins would be permissible. Siegel v. Chicken Delight, Inc., 448 F.2d 43, 48 (9th Cir. 1971), *cert. denied,* 405 U.S. 955 (1972).

[29] *See* Ross, *supra* note 9, at 1008; Note, *Product Separability: A Workable Standard to Identify Tie-in Arrangements Under the Antitrust Laws,* 46 S. CAL. L. REV. 160, 163-69 (1972). In United States v. Jerrold Elecs. Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam,* 365 U.S. 567 (1961), the district court considered four criteria in examining whether separate markets exist. *Id.* at 559. The court considered whether the seller's competitors also sold only the aggregation, whether the number of components in the alleged product varied among buyers, whether the buyer charged by individual components or by the whole product, and whether the seller required that all necessary components be purchased from him. *Id.*

[30] *See* Ross, *supra* note 9, at 1008-09.

[31] *See* Dore, *supra* note 12, at 413.

[32] *See* Ross, *supra* note 9, at 966.

[33] For cases holding a combination of items to be reasonable and, therefore, one product, see Foster v. Maryland State Sav. & Loan Assoc., 590 F.2d 928, 933-35 (D.C. Cir. 1978), *cert. denied,* 442 U.S. 917 (1979); Kugler v. Aamco Automatic Transmissions, Inc., 560 F.2d 1214, 1215-16 (8th Cir. 1972); *In re* 7-Eleven Franchise Antitrust Litigation, 1974-2 Trade Cas. ¶ 75,429, 98,427-28 (N.D. Cal. 1974).

[34] *See* Dore, *supra* note 12, at 416-417. For cases holding that legitimate business justification exists only when the seller would suffer substantial injury if the combination were disallowed, and when the combination is the only way to avert the injury, see Susser v. Carvel Corp., 332 F.2d 505, 519 (2d Cir.), *cert. granted,* 379 U.S. 885 (1964), *cert. dismissed,* 381 U.S. 125 (1965); Dehydrated Process Co. v. A. O. Smith Corp., 292 F.2d 653, 655-57 (1st Cir.), *cert. denied,* 368 U.S. 931 (1961); United States v. Jerrold Elecs. Corp., 187 F. Supp. 545, 556-58 (E.D. Pa. 1960), *aff'd per curiam,* 365 U.S. 567 (1961).

[35] *See* 16 H VON KALINOWSKI, *supra* note 1, § 64.05[1].

legitimate business justification exists when the aggregation is necessary to prevent erosion of the goodwill the seller has obtained with respect to the tying product.[36] This business justification does not exist when the seller can protect the tying product's goodwill by specifying the type and quality of the tied product to be used in connection with the tying product.[37] The goodwill justification for a combination of normally separable items exists, therefore, only when specifications for a substitute product would be impracticable.[38] Another business justification for combining normally separable items exists during the experimental period of a new industry when the seller has an interest in assuring the proper functioning of equipment to prevent customer dissatisfaction at the industry's inception.[39] This business purpose disappears after the industry becomes established and the combination is not critical to the industry's survival.[40] A third valid business reason exists when the seller can protect the alleged tying product from wholesale customer dissatisfaction only by combining another product or service to the alleged tying product.[41]

Courts have applied the two step product separability analysis of the *Jerrold* court to tying arrangement litigation in the trademark franchising area.[42] In trademark franchising tie-in cases a court first must determine if the trademark license is normally separable from other goods and services included in the franchise package.[43] Courts frequently use the separate market technique[44] to determine if a trademark license is a normally separate product.[45] If a court determines that the trademark license can be marketed separately from other goods and services included in the franchise package, the court will find two normally separable products.[46]

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[36] *See* Standard Oil Co. v. United States, 337 U.S. 293, 306 (1949); International Bus. Mach. Corp. v. United States, 398 U.S. 131, 138-40 (1936).

[37] Standard Oil Co. v. United States, 337 U.S. 293, 306 (1949).

[38] *Id.*

[39] *See* United States v. Jerrold Elecs. Corp., 187 F. Supp. 545, 556-58 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961) (tying service contract and supplementary equipment to desired antenna equipment upheld to prevent destruction of infant cable television industry).

[40] *Id.* at 538.

[41] *See* Dehydrating Process Co. v. A. O. Smith Corp., 292 F.2d 653, 654-55 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961) (purchase of silos by buyers necessary to insure proper functioning of unloading equipment).

[42] *E.g.*, Northern v. McGraw-Edison Co., 542 F.2d 1336, 1346-47 (8th Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); Capra, Inc. v. Ward Foods, Inc., 536 F.2d 39, 45-47 (5th Cir. 1976); Siegel v. Chicken Delight, Inc., 448 F.2d 43, 50 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

[43] *See Trademark Franchising*, *supra* note 4, at 970.

[44] *See* text accompanying notes 29 & 30 *supra* (describing separate market technique for determining if amalgamation is normally separable).

[45] *See Trademark Franchising*, *supra* note 4, at 972-73.

[46] One commentator has suggested that courts should examine the function of the

If a court finds that the trademark license is normally separable from the other components of the franchise package, the court must then inquire whether legitimate business reasons exist for upholding the combination.[47] Courts have found legitimate business reasons for the combination only when inclusion of the goods and services in the franchise package is necessary to prevent substantial harm to the franchise, and if the harm cannot be avoided in any other manner.[48]

In *Principe v. McDonald's Corp.*[49] the Fourth Circuit addressed the problem of what constitutes legitimate business justification for combining normally separable products in a franchise package.[50] McDonald's Corporation (McDonald's)[51] had entered into a standard McDonald's franchise agreement with the plaintiffs.[52] In the McDonald's franchise agreement the franchisor agrees to grant the franchisee rights to use the McDonald's food preparation system and sell food products under the

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trademark to determine if a separate market exists for the trademark license. *See id.* at 975-84. If the function of the trademark is to represent the franchise's goodwill, quality standards, and method of doing business, the seller can market the trademark license separately from other goods and services which the franchisor may include in the franchise package. *Id.* at 974-75. A fast food chain trademark is an example of a "method of doing business" trademark. A trademark which represents a fast food chain can be marketed separately from food, packaging goods, and other goods and services which a franchisor might require that the franchisee purchase as part of a franchise "package." *Id.* If, however, the function of the trademark is to represent product origin, the trademark cannot be marketed separately from the product it represents. *Id.* A trademark which appears on a shaving cream bottle is an example of a "product origin" trademark. A "product origin" trademark is indistinguishable from the product it represents. Thus, no separate market exists for the "product origin" trademark license. *Id.*

[47] *E.g.*, Northern v. McGraw-Edison Co., 542 F.2d 1336, 1347 (8th Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); Siegel v. Chicken Delight, Inc., 448 F.2d 43, 47-52 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

[48] *E.g.*, Northern v. McGraw-Edison Co., 542 F.2d 1336, 1347 (8th Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); Siegel v. Chicken Delight, Inc., 448 F.2d 43, 47-52 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

[49] 631 F.2d 303 (4th Cir. 1980).

[50] *Id.* at 308-11.

[51] At the time suit was filed in *McDonald's*, the McDonald's system consisted of four separate corporations. The parent was McDonald's Corp. A second corporation, Franchise Realty Interstate Corp., acquired land for the construction of McDonald's restaurants, built the restaurants, and leased the stores to franchisees. *See* note 54 *infra* (describing Franchise Realty's role in the McDonald's system). A third corporation McOpco, operated some franchises as company stores. A fourth corporation at the time the McDonald's suit was filed was McDonald's Systems Inc., which licensed franchise rights. McDonald's Corp. subsequently effected a merger with McDonald's Systems. 631 F.2d at 305 n.3.

[52] 631 F.2d 306. The plaintiffs in *McDonald's* were Frank A. Principe, Ann Principe, and Frankie Inc., a closely held corporation owned by Frank Principe and Raymond Principe. *Id.* At the time plaintiffs entered into the 20 year agreement with McDonald's, the standard McDonald's franchise agreement actually was two agreements, a franchise contract, and a separate lease for the store premises rented by the franchisor. McDonald's Corp. stopped using the two agreement practice in 1976. The company now consolidates the two agreements into one document. *Id.* at 306 n.5.

company's trademark.[53] The franchisee agrees to rent a store from McDonald's and conduct franchise operations in this store.[54] The franchisee also must pay a $12,500 franchise fee, remit three percent of gross sales as a royalty, remit eight and one half percent of gross sales as rent, and post a $15,000 refundable security deposit.[55] McDonald's Corporation does not require the franchisee to purchase food or equipment from the franchisor.[56]

The plaintiffs sued McDonald's Corporation, alleging that the company had violated the antitrust laws by tying the store lease and security deposit to the franchise license.[57] The trial court granted summary judgment in favor of the defendants on the security deposit allegation. The court held that the security deposit was nothing more than a deposit against loss, and, as such, was inseparable from the lease to which the deposit pertained.[58] The trial court directed a verdict in favor of defendants on the lease tie-in allegation, holding as a matter of law that the McDonald's franchise agreement constituted one product.[59]

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[53] *Id.* at 306.

[54] *Id.* at 306 n.7. McDonald's usually begins building a store long before entering into an agreement with a franchisee. McDonald's selects the sites for the new stores carefully. The company does extensive statistical research to determine which sites would be suited best for expansion. After McDonald's Corp., *see* note 51 *supra*, acquires the land and builds the store. Franchise Realty builds only the store shell. The franchisee assumes responsibility under the lease for building maintenance, taxes, improvements, and other costs incurred in maintaining the store. 631 F.2d at 305-07.

[55] 631 F.2d at 306-07.

[56] *Id.* The franchisee must purchase the equipment from sources other than McDonald's. The company does, however, provide specifications for the equipment. *Id.*

[57] The plaintiff's complaint filed in the United States District Court for the Eastern District of Virginia alleged numerous violations of federal and state antitrust laws as well as state franchising laws. *Id.* at 304. Before trial the district court dismissed all other allegations except the tying arrangement allegations and the plaintiffs' allegation that McDonald's denied the plaintiffs an additional franchise in retaliation for plaintiff's refusal to follow McDonald's Corporation's pricing guidelines. *Id.* at 304-05. The district court submitted to the jury the issue of whether McDonald's denied plaintiffs an additional franchise in retaliation for plaintiffs' refusal to follow McDonald's pricing guidelines. *Id.* at 305. The jury returned an unsolicited note. In the note the jury stated that McDonald's had treated the plaintiffs unfairly, but retaliation for failure to follow pricing guidelines had not occurred. *Id.* The district court disregarded the note and entered judgement for McDonald's. *Id.* The plaintiffs appealed the retaliation issue and the Fourth Circuit agreed with the district court that the unsolicited jury note did not affect the validity of the jury verdict. *Id.* at 311. The plaintiffs did not appeal the counts dismissed before trial. *Id.* at 305.

[58] *Id.* The Fourth Circuit dismissed the security deposit issue with little comment. *Id.* at 311. The Fourth Circuit agreed that the security deposit was not separable from the lease. *Id.*

[59] In addition to the court's finding that one product existed, the trial court also stated that it was directing a verdict on the lease allegation because the court found that the plaintiff had failed to introduce evidence concerning McDonald's economic power in the tying product market. *Id.* at 304-05; *see* text accompanying note 13 *supra* (describing economic power requirement).

The plaintiffs appealed to the Fourth Circuit, relying on *Siegel v. Chicken Delight, Inc.*,[60] the leading case on the issue of franchising product separability.[61] In *Chicken Delight* the plaintiff alleged that the defendant's standard franchise agreement violated the tying doctrine of the antitrust laws.[62] Under the franchise agreement the defendant franchisor required franchisees to purchase cooking equipment, food items, and packaging products in order to obtain the franchise license.[63] The Ninth Circuit initially held that the franchise could market the trademark license separately from the other goods included in the package and, therefore, the trademark license was a normally separable product.[64] The court also held that no legitimate business reasons existed for upholding the combination of separable products because the franchisor could accomplish the company's business purpose in ways other than a tying arrangement.[65] The plaintiffs in *McDonald's* urged the Fourth Circuit to adopt the Ninth Circuit's product separability analysis, and to find that the McDonald's standard franchise agreement established an illegal tie-in.[66]

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[60] 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

[61] Principe v. McDonald's, 631 F.2d 303, 308 (4th Cir. 1980); *see Trademark Franchising*, *supra* note 4, at 970.

[62] 448 F.2d at 46-52.

[63] *Id.* at 46-47.

[64] *Id.* at 47-48. The Ninth Circuit looked to the function of the trademark to determine if Chicken Delight's trademark license could be marketed separately from food, mixes and packaging products also included in Chicken Delight's franchise "package." *Id.* at 49. The court found that Chicken Delight's trademark represented the goodwill and quality standards of the Chicken Delight franchise and, as such, could be marketed separately from the other goods included in the package. *Id.* at 48-49; *see* text accompanying notes 45 & 46 *supra* ("function of the trademark" analysis described).

[65] 448 F.2d at 47-52. Chicken Delight argued three business justification defenses. First, Chicken Delight contended that the company's practice of combining the trademark license with other goods and services was reasonable because the combination was necessary for measuring and collecting revenue. *Id.* at 50. The Ninth Circuit rejected this argument. The court held that Chicken Delight could accomplish the company's purpose of collecting revenue by charging a royalty for the trademark license. Since Chicken Delight could accomplish the company's purpose in another way, legitimate business justification did not exist for the tie-in. *Id.* Second, Chicken Delight argued that the company's package was reasonable under the "new business" defense. *Id.* at 50-51; *see* text accompanying notes 39 & 40 *supra* (describing new business defense). The Ninth Circuit rejected Chicken Delight's "new business" argument because Chicken Delight was not a new business during the time period in which the plaintiffs purchased their franchise packages. The court stated that the new business defense is not applicable after the industry becomes established and the combination is not critical to the industry's survival. 448 F.2d at 51. Third, Chicken Delight argued that the company's franchise package was reasonable because the package was necessary to protect the goodwill Chicken Delight had established with respect to the company's franchises. *Id.* The Ninth Circuit rejected this business reason because Chicken Delight could protect the company's goodwill by requiring franchisees to meet established specifications. Since Chicken Delight could accomplish the company's business purpose in another less restrictive way, the franchise package was not a reasonable restraint. *Id.* at 51-52; *see* text accompanying notes 36-38 *supra* (goodwill justification described).

[66] 631 F.2d at 305.

McDonald's Corporation responded to the plaintiff's argument by contending that the company offered franchisees one product, a unique, highly profitable manner of doing business, and that the components of the overall McDonald's package are necessary to insure the success of both the franchisor and franchisee.[67] The Fourth Circuit agreed, holding that legitimate business reasons existed for upholding the McDonald's franchise package.[68] By inquiring into business justification the Fourth Circuit implicitly recognized that a trademark license and accompanying lease are normally separable.[69]

In deciding whether legitimate business reasons existed for a finding that the lease and trademark license should be considered one product, the *McDonald's* court focused on whether the alleged tied products were integral components of the franchised business method.[70] The Fourth Circuit stated four business reasons to support the conclusion that the lease is an important part of the McDonald's franchise package. First, the practice of leasing completed stores to franchisees enables McDonald's Corporation to select systematically the best franchise sites and to use the company's enormous economic power to obtain these sites.[71] The McDonald's Corporation site selection system not only allows

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[67] *Id.* at 307-08. McDonald's engages in the business of developing fast-service, limited-menu restaurant franchises. The company grants franchisees the right to operate for 20 years a specific franchise site owned by McDonald's Corp. McDonald's does not engage in the business of selling foodstuffs, equipment, or other products to franchisees. The franchisors sole source of profit, apart from an initial $12,500 franchise fee, is the monthly payments McDonald's receives from franchisees. *Id.* The monthly payments consist of a fixed percentage of the franchisee's sales. *Id.* McDonald's seeks to maximize the sale of franchisees by selecting the best available sites for McDonald's restaurants and by keeping these advantageous sites within the franchise system. The franchisor uses an intricate marketing analysis to select the best sites and keeps these sites within the system by retaining ownership of the sites. *Id.* McDonald's also seeks to maximize the profits of the company's franchises by selecting franchisees who have great management potential and a willingness to become involved in the day to day operation of the franchise. McDonald's teaches franchisees the skills necessary to operate a franchise at the company's management school. *Id.* Moreover, McDonald's continues to consult and advise the franchisee after the franchisee begins operating a McDonald's franchise. *Id.*

[68] *Id.* at 310.

[69] Courts inquire into whether legitimate business reasons exist for considering an amalgamation to be one product only after finding that two normally separate products are tied together. *See* text accompanying note 22 *supra*. Therefore, an inquiry into whether legitimate business reasons exist for upholding a "package" is an implicit statement that two normally separate products exist. A conclusion that the McDonald's franchise license and lease are normally separate products is sound. The McDonald's franchise reflects the goodwill, quality standards and method of doing business of McDonald's Corp., and, as such, the franchise can be marketed separately from the other parts of the package. *See* note 46 *supra* (describing function of the trademark technique for determining if franchise license is normally separable from other products in a franchise "package"). The franchise license is, therefore, a normally separate product. *Id.*; *see* Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 724-25 (7th Cir. 1979) (franchise license is normally separable from lease).

[70] 631 F.2d at 309-10.

[71] *Id.* at 310; *see* note 67 *supra* (describing importance of site selection process to McDonald's system). McDonald's economic power to obtain the best franchise sites is enor-

the company to select the best franchise sites for its stores, but also enables the company to position these stores to avoid intra-franchise competition.[72] Second, the Fourth Circuit reasoned that the lease is important to the franchise because the McDonald's policy of owning all franchise restaurants assures that the store will remain in the McDonald's system.[73] By keeping all the stores in the McDonald's system, the company can prevent buildings whose architecture identifies them as McDonald's stores from sitting idle or being used for other purposes which might damage the franchise system's goodwill.[74] The practice of keeping all stores in the McDonald's system also insures that the best sites which McDonald's initially chooses will remain in use as McDonald's stores.[75] Third, the Fourth Circuit stated that the McDonald's system enables the franchisor to select franchisees based on their management potential rather than on the prospective franchisee's real estate expertise or wealth.[76] Finally, the Fourth Circuit found that the lease is an integral part of the McDonald's Corporation franchise system because both the franchisor and franchisee have a substantial stake in the success of the restaurant.[77] This financial stake creates a partnership in which both partners have a strong incentive to cooperate for their mutual benefit.[78]

The Fourth Circuit's analysis in the *McDonald's* case contradicted the reasoning of most earlier decisions on the issue of business justification for combining two normally separate products in a franchise package. Prior to the *McDonald's* case, courts found only in a few limited situations that a combination of normally separable products was a reasonable restraint of trade, and therefore one product for antitrust purposes. Courts found that a combination of separable products was permissible only when the combination was necessary to prevent substantial harm to the franchise, and the harm could not be avoided in a less restrictive manner.[79] The Fourth Circuit did not inquire whether the McDonald's package was the least restrictive alternative. The Fourth

mous. The company owns over 4000 stores and is the world's largest and most successful fast food franchisor. *See* Martino v. McDonald's Systems, Inc., 81 F.R.D. 81, 84 (N.D. Ill. 1979).

[72] 631 F.2d at 310; *see* note 67 *supra* (describing importance of keeping best franchise sites in the system to success of McDonald's).

[73] 631 F.2d at 310.

[74] *Id.*

[75] *Id.*

[76] Principe v. McDonald's, 631 F.2d 303, 310 (4th Cir. 1980); *see* note 67 *supra* (describing importance of policy of choosing franchisees based on management potential).

[77] Principe v. McDonald's, 631 F.2d 303, 310-311 (4th Cir. 1980). The financial stake of both the franchisor and franchisee is substantial in the McDonald's system. McDonald's spends approximately $500,000 purchasing the land and building the restaurant. The franchisee usually invests over $100,000. *Id.* at 311.

[78] *Id.*

[79] *See* text accompanying note 34 *supra.*

Circuit focused instead on whether the alleged items were essential or integral to the franchise in determining whether legitimate business reasons existed for considering the McDonald's package to be one product for antitrust purposes.[80]

The Fourth Circuit's new rule broadens the scope of previously narrow business justification analysis. Under the Fourth Circuit's new rule the franchisor need not establish that the combination of alleged tied and tying items is the only way the franchisor can prevent substantial harm to the franchise. The franchisor need only establish that the normally separate products are integral parts of the franchise system.[81] Thus, courts applying the *McDonald's* analysis will uphold combinations of normally separable items even though the franchisor could accomplish his business purpose in another way other than the tie-in. The focus of a court's inquiry under the new rule will be on the importance of the alleged tied products to the success of the franchisor's system. Franchisors, therefore, will be able to justify combinations of separable products in a greater number of situations. Despite the *McDonald's* court's abandonment of the least restrictive alternative principle, the Fourth Circuit's new rule will not permit franchisors to sell franchise packages which are an unreasonable restraint of trade. The practical effect of the *McDonald's* court's expansion of the business justification rule is to subject franchise tying arrangements to analysis under the rule of reason.[82] Courts applying the *McDonald's* rule will balance the importance of the alleged tie-in to the success of the franchise against the anticompetitive effects of the arrangement on the tied product market. If the anticompetitive effects of the package outweigh the package's beneficial effects, courts will strike down the arrangement.

The Fourth Circuit's decision to broaden the business justification rule, and, thus, subject trademark franchise tie-ins to rule of reason analysis, was well reasoned. Commentators have pointed out that the socially beneficial effects of many tie-ins outweigh the harmful effects of the arrangements.[83] The trademark franchise package is an example of a

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[80] 631 F.2d at 309-11. The Fourth Circuit's decision in McDonald's was not entirely unprecedented. In *In re* 7-Eleven Franchise Antitrust Litigation, 1974-2 Trade Cas. ¶ 75,429 (N.D. Cal.), the district court held that a convenience store franchise package was not separable into tied and tying products because the tied items were an integral part of the franchise. *Id.*, at 98,427-28. *Cf.* Foster v. Maryland State Sav. & Loan Assoc., 590 F.2d 928, 931-32 (D.C. Cir. 1978), *cert. denied*, 99 S. Ct. 842 (1979). (Court held that borrower's payment of attorney's fee integral part of loan transaction and, therefore, not separable).

[81] *See* text accompanying note 70 *supra*.

[82] *See* text accompanying notes 9 & 10 *supra* (describing rule of reason analysis).

[83] *See* Austin, *The Tying Arrangement: A Critique and Some New Thoughts*, 1967 WIS. L. REV. 88, 96-103; Baker, *The Supreme Court and the Per Se Tying Rule: Cutting the Gordian Knot*, 66 VA. L. REV. 1235, 1267-1274 (1980) [hereinafter cited as Baker]; Bowman, *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19, 29-36 (1957); Lockhart & Sacks, *The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section Three of the Clayton Act*, 65 HARV. L. REV. 913, 947, 951 (1952).

tie-in in which the beneficial effects of the arrangement frequently outweigh the anticompetitive effects.[84] Trademark franchise packages are not "inherently anticompetitive,"[85] and, therefore, should be examined under the rule of reason rather than a per se rule.[86]

The *McDonald's* case is an excellent example of a franchise "tie-in" in which the beneficial effects of the package outweigh the package's harmful effects on a tied product market. Under the facts of *McDonald's*, identification of harm to competition in a tied product market is impossible. The McDonald's policy of owning franchise restaurants does not foreclose a realtor or commercial lessor from competing for a sale or lease. The only effect of the McDonald's system is that the realtor must sell or lease the restaurant site to the franchisor rather than the franchisee. Competition in a real estate and lessors market is not affected if McDonald's rather than the franchisee leases or purchases the restaurant site. While the McDonald's package involves no actual harm to competition in a tied product market, the package is crucial to the success of McDonald's Corporation. Through use of the company's franchise system McDonald's Corporation has become the world's most successful fast food franchisor.[87]

Although the Fourth Circuit's new rule contradicts the reasoning of earlier tie-in cases regarding what constitutes business justification, the court's rule is consistent with the Supreme Court's current attitude toward per se violations of the antitrust laws. In *Continental T.V. v. G.T.E. Sylvania, Inc.*,[88] the Supreme Court expressed an antagonistic

[84] *See* Baker, *supra* note 83, at 1236-37; Comment, *Trademark Franchising and Antitrust Violations: The Need for a Limited Rule of Reason*, 52 B.U.L. REV. 463, 478-79 (1972). One commentator has suggested that the procompetitive effects of most trademark franchise tie-ins outweigh the anticompetitive effects. *See* Baker, *supra* note 83, at 1236. This commentator states two important procompetitive purposes which trademark franchises may further. First, tie-ins are an important quality control device. *Id.* Second, tie-ins can be an effective way to monitor and enforce the franchisor's rights under the franchise agreement. If, for example, the franchisor sells food along with the franchise license, the franchisor will be able to monitor accurately the amount of business conducted by the franchisee, and will be assured an adequate return on the sale of the franchise license. *Id.* at 1277-81. This commentator also states that franchise tie-ins are not "anticompetitive" because the arrangements have an insignificant effect on the price, quantity, and quality of goods and services. *Id.* 1268-69.

[85] *See* text accompanying note 12 *supra* (tie-ins subjected to per se analysis because the arrangements are considered inherently anticompetitive).

[86] *See* Baker, *supra* note 83, at 1268-69 (franchise tie-ins have little anticompetitive effect on price, quantity and quality of goods and services and, therefore, should be considered under the rule of reason).

[87] *See* note 71 *supra*; text accompanying notes 71-77 *supra* (importance of McDonald's package to success of franchise system).

[88] 433 U.S. 36 (1977). In *Sylvania* the defendant, a manufacturer of television sets, restricted the locations from which franchisees could sell the defendant's television sets. *Id.* at 38. Continental T.V., one of Sylvania's franchisees, sued the manufacturer, alleging that Sylvania had violated § 1 of the Sherman Act by imposing restrictions on the area from which the franchisee could sell the television sets. *Id.* at 40. The district court ruled that

view toward inflexible per se rules and a preference for economically oriented antitrust analysis.[89] The Court stated in *Sylvania* that a business practice should be analyzed under a per se rule only if the practice is "manifestly anticompetitive."[90] In all other cases the practice should be considered under the rule of reason.[91] The Court held that a business arrangement is manifestly anticompetitive if the arrangement is such that the anticompetitive effects of the arrangement consistently outweigh the pro-competitive effects.[92]

Earlier Supreme Court decisions also stated the general rule that courts should not invoke per se analysis unless the practice is inherently or manifestly anticompetitive.[93] The *Sylvania* Court's definition of "anticompetitive" is significant, however. Unlike earlier decisions, the Supreme Court in *Sylvania* stated that a business practice was not anticompetitive merely because the practice limited the autonomy of independent businessmen.[94] The Court stated that in order for a business practice to be anticompetitive the practice must have a demonstrable effect on the market for the product involved.[95] Under the Court's new definition of "anticompetitive", a court will subject a business practice to a per se rule only if the anticompetitive effects on the price, quantity, and quality of the product consistently outweigh the beneficial effects of

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United States v. Arnold Schwinn & Co., 388 U.S. 365 (1967) controlled the issue, and found for the plaintiff, 433 U.S. at 40-41.

In *Schwinn* the Supreme Court had held that manufacturer imposed restrictions on where a product may be sold after the product leaves the control of the manufacturer are per se illegal. *Id.* at 379. The court of appeals reversed, stating that *Schwinn* was not applicable, and Sylvania's restriction should be considered under the rule of reason. Continental T.V. Inc. v. G.T.E. Sylvania Inc., 537 F.2d 982, 988 (9th Cir. 1976) (en banc), *aff'd*, 433 U.S. 36 (1977). The Supreme Court agreed with the trial court and held that *Schwinn* was applicable to the Sylvania practice. 433 U.S. at 46. The Court, however, overruled *Schwinn* and held that location restrictions are not manifestly anticompetitive and, therefore, should be considered under the rule of reason. *Id.* at 58-59.

[89] *See* Baker, *supra* note 83, at 1262.

[90] Continental T.V. v. G.T.E. Sylvania, Inc., 433 U.S. 36, 49-50 (1977).

[91] *Id.*

[92] *Id.* at 50 n.16.

[93] *E.g.*, Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958); Standard Oil Co. v. United States, 337 U.S. 293, 305-06 (1949).

[94] In *Sylvania* the defendant's policy of limiting the locations from which Sylvania products could be sold affected the autonomy of individual franchisees because franchisees were not free to sell Sylvania products anywhere they desired. *See* note 89 *supra*. Tying arrangements such as the McDonald's package similarly affect the autonomy of franchisees. Under mandatory franchise packages such as the McDonald's package the franchisor does not allow the franchisee a free choice of products. The franchisee must purchase the tied products from the franchisor. *See* text accompanying note 54 *supra*. Since under *Sylvania* a business practice is not anticompetitive merely because the practice limits the autonomy of independent businessmen, franchise packages such as the McDonald's package are not anticompetitive because the practices limit buyers' free choice of products. Under the analysis of *Sylvania*, a franchise package is anticompetitive only if the package has a demonstrable effect on the tied product market. *See* text accompanying note 96 *infra*.

[95] 433 U.S. at 58-59.

the practice. Since "tying arrangements" such as the McDonald's package involve substantial benefits to the tying product and have little or no anticompetitive impact on a tied product market, the Supreme Court may well determine that tie-ins such as the McDonald's package should be analyzed under the rule of reason rather than a per se rule.[96]

The Fourth Circuit's new business justification rule creates a conflict in the circuit courts concerning the issue of what constitutes legitimate business justification for combining two normally separable products in a franchise package.[97] The Supreme Court should grant certiorari in the *McDonald's* case and resolve the conflict by subjecting franchise tying arrangements to analysis under the rule of reason. As the *McDonald's* case well demonstrates, a franchise package may involve substantial benefits to the franchisor and cause no harm to a tied product market. Continued application of a per se rule to strike down "tie-ins" such as the McDonald's package would be inconsistent with the *Sylvania* doctrine, and economically unjustifiable.[98]

KURT J. FISCHER

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[96] *See* text accompanying notes 86-87 *supra.*

[97] For decisions holding that legitimate business justification exists only when the franchisor would suffer substantial harm if the combination were disallowed, and the harm cannot be avoided in any other manner, see Northern v. McGraw-Edison Co., 542 F.2d 1336, 1347 (8th Cir. 1976), *cert. denied,* 429 U.S. 1097, *rehearing denied,* 430 U.S. 960 (1977); Capra, Inc. v. Ward Foods, Inc., 536 F.2d 39, 46-47 (5th Cir. 1976); Susser v. Carvel Corp., 332 F.2d 515, 519 (2d Cir.), *cert. granted,* 379 U.S. 885 (1964), *cert. dismissed,* 381 U.S. 125 (1965); Dehydrating Process Co. v. A. O. Smith Corp., 292 F.2d 653, 656-57 (1st Cir.), *cert. denied,* 368 U.S. 931 (1961).

For decisions holding that legitimate business reasons exist for combining two normally separable products when the tied product is an integral part of the franchise, see Principe v. McDonald's Corp., 631 F.2d 363, 309-311 (4th Cir. 1980); Kugler v. Aamco Automatic Transmissions, Inc., 460 F.2d 1214, 1215-1216 (8th Cir. 1972).

[98] *See* Baker, *supra,* note 83, at 1274.