

# Some comments on tying

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February 2013



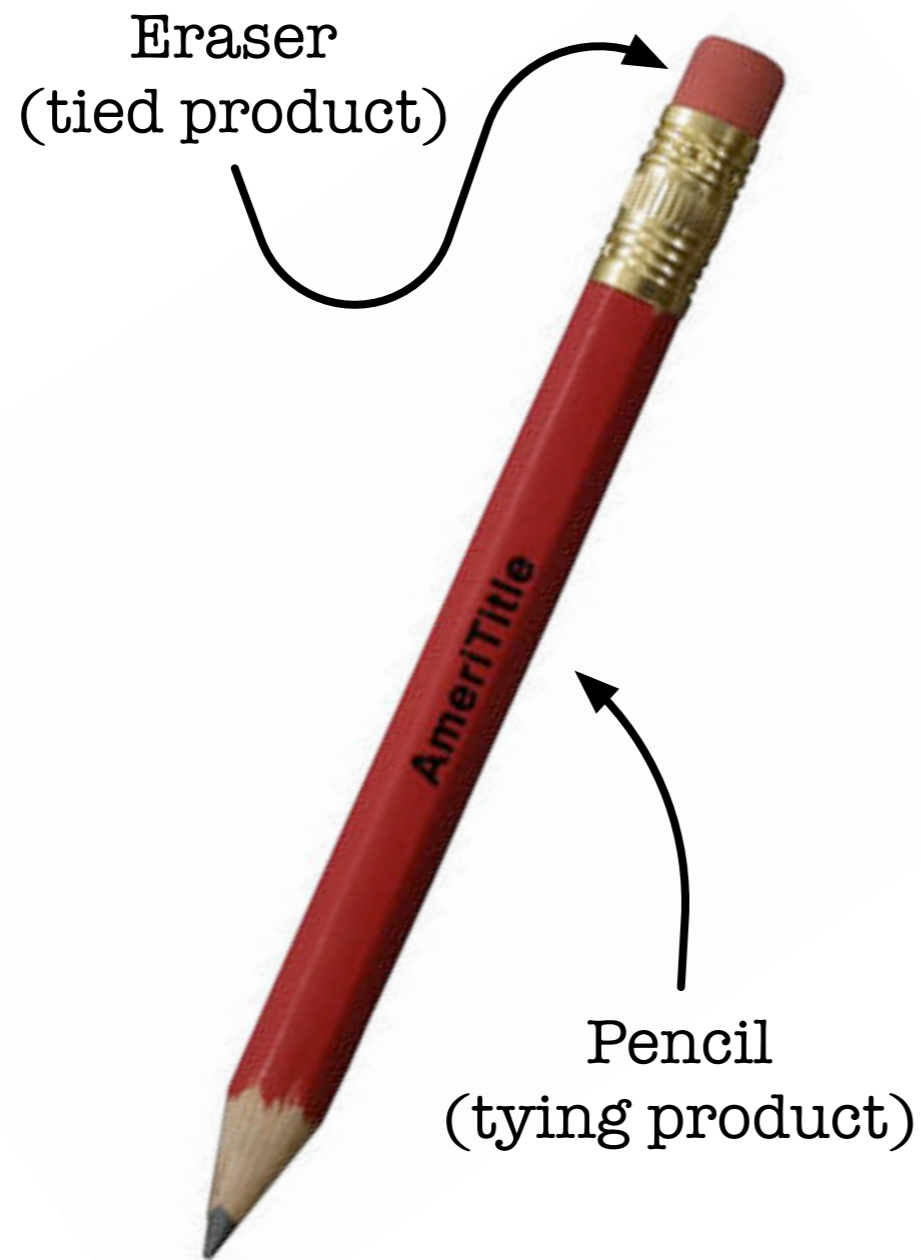
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# Elements of a tying claim

- Tying is a “two market” leveraging offense.
  - “[T]he vice of tying arrangements lies in the use of economic power in one market to restrict competition on the merits in another.” *Northern Pacific Railway Comp., v. U.S.*, 356 U.S. 1, 11 (1958).
- Elements
  - Two products
  - Tie
  - Market power in the tying product market
  - Impact on the tied product market

# Two products



- Separate products requires “separate demand” for products A and B

If there is no separate demand, then there can be no tie (right/left shoes).

- But “separate demand” is a backward-looking proxy

“The separate-products test is a poor proxy for net efficiency from newly integrated products. Under the per se analysis the first firm to merge previously distinct functionalities (e.g., the inclusion of starter motors in automobiles) or to eliminate entirely the need for a second function (e.g., the invention of the stain-resistant carpet) risks being condemned ... because at the moment of integration there will appear to be a robust ‘distinct’ market for the tied product.”

*United States v. Microsoft Corp.*, 253 F.3d 34, 92 (D.C.Cir.2001).

# Tie

- Contractual tie (“If you want A, you must also buy B.”)
  - Reinforced (e.g., patent license) and held in check (e.g., first sale limits on click-wrap agreements, misuse) by IP law. Policed by antitrust law (tying).
- Economic tie (“A is \$100. A + B is also \$100.”)
  - Some checks provided by antitrust law (tying, bundling).
- Technological tie (“A’s printer only works with A’s ‘genuine’ toners.”)
  - Engineered incompatibility or proprietary, undisclosed APIs are very common to delineate the boundaries of a platform
  - Antitrust is generally permissive of pure technological ties
  - But attempts to reinforce the tie via DMCA have been curtailed by the courts

# Market power in the tying and the tied product markets

- Tying requires more than 30% and less than monopoly power in the tying product market.

*Jefferson Parish Hospital Dist. No.2 v. Hyde*, 466 U.S. 2 (1984)

- No more patent = market power presumption

*Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006)

- The level of impact required in the tied product market is subject to debate – it depends on one’s theory of the harm from tying

- **Customer exploitation in the tying product market?** Tying forces the buyer of a “wanted product” to also buy – *and pay for* – an “unwanted product.”

- **Competitor exclusion in the tied product market?** Tying dries up the demand for stand-alone sales of the tied product.

# How likely are anticompetitive effects from tying?

- The ubiquity of tying in competitive markets suggests that tying is generally net beneficial.
  - “[T]ying arrangements serve hardly any purpose beyond the suppression of competition.” *Standard Oil Co. of California v. U.S.*, 337 U.S. 293, 306 (1949). **Wrong.**
  - “It is clear, however, that every refusal to sell two products separately cannot be said to restrain competition.” *Jefferson Parish v. Hyde*, 466 U.S. 2, 11 (1984). **Better.**
  - “[F]irms without market power will bundle two goods only when the cost savings from joint sale outweigh the value consumers place on separate choice.” *U.S. v. Microsoft*, 253 F.3d 24, 87 (2001). **Correct.**
- Without market power in the tying and the tied product market, can there be anticompetitive effects in either market?