Notes re *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451 (1992)

First, the court lays seemingly straightforward tying and monopolization claims:

Tying

1. **Two products**: parts, services
2. **Tie**. Contract: no parts unless you buy my services
3. **MP in tying market** (= Parts) (100%, Kodak is the sole source)
4. **Effect in tied market** (= Services). Yes, ISOs go under; Kodak's share rises.

Monopolization (parts and service markets)

1. **Monopoly power**
   - Parts 100% share
   - Services 80-90% share
2. **Exclusionary conduct**
   - Yes. ISOs were forced out.
3. **No plausible business justifications**
   - Quality? No, customers preferred ISOs
   - Inventory management? No, same demand for spares with and without ISOs.
   - Free-riding? No, ISOs invested in their business.

But there are problems with the seemingly straightforward analysis

Does Kodak really have "monopoly power" in the parts and service

markets, given that Kodak faced significant competition in the equipment market? This is a multi-faceted question for which there is no easy answer.

Economic argument

Kodak may have 100% of the parts market, but it has no “power over price,” because if it raised prices, customers would punish Kodak in the equipment market.

- This is a plausible starting point (= rule)
- But not always true (= exception), because under certain conditions, Kodak may be able to raise prices in the aftermarket *without fear of punishment in the equipment market.*
    - Existing customers are locked into the aftermarket because they bought expensive copiers. Those customers would tolerate a price increase rather than abandoning their equipment. That’s plausible as to existing customers, but wouldn’t Kodak get punished by new customers?
    - Only if the new customers know about the changed circumstances in the aftermarket at the time they make their equipment purchases.
        - Some customers may never get that information
            - It may have been concealed
            - It may not have existed at the time of the equipment purchase (= policy change)
            - One department deals with service prices, another with buying equipment, and the two never speak to each other
        - Some customers may get the information but can’t make sense of it
        - Some customers may get the information but choose to ignore it because it is too expensive to make sense of it (TOC)

- In sum: If Kodak gets $10 from exploiting the locked in customers and only loses $5 in the equipment market by diverted customers, Kodak has market power in the aftermarket.
    - Note: What if the game was repeated? How would Kodak deal with the reputational hit?

The economic reasoning above underwrites the legal analysis:

a. As a rule, competition in the equipment market protects the aftermarket customers and despite monopoly shares there is no market power and no §2 aftermarket claim

b. However, if the equipment market fails to discipline conduct in the aftermarket, then there may be monopoly power and a §2 aftermarket claim. That requires:

- Lock in of existing customers
- Insufficient knowledge about restrictions in the aftermarkets at the time of the equipment purchase.
    - The most common reason for insufficient knowledge at the time of the equipment purchase is a policy change (e.g., closing a formerly open system)
    - The “insufficient knowlege” exception will fail (i.e., no aftermarket market power) if:
        - There is an express agreement spelling out the aftermarket restrictions (Queen City Pizza)
        - The aftermarket services/products were purchased at the time of the equipment purchase (because that means that the buyer likely considered the “lifecycle costs”)

Plausibility argument #1: “Is this really

monopoly power?”

The economic argument is only part of the story, however. There is a more fundamental objection to the aftermarket concept: Are aftermarkets “relevant antitrust markets” to begin with?

Suppose that E makes very unique jewelry in his living room that he sells on Etsy for $1,000 apiece. If a piece breaks, E only sells repair parts if the customer lets E handle the repair (= service). E has a grand total of 50 customers. Does E have “100% of the parts market?” And is he using his parts monopoly to force customers to also buy E’s services? Yes. From a customer’s point of view, E is the only seller of parts and E conditions the sale of the parts to the purchase of services. If that aftermarket restraint had not been sufficiently disclosed, it appears that a customer could bring a tying and a monopolization claim under Kodak.

But this seems wrong, or at least very odd. E’s living room enterprise simply does not wield the kind of structural power over output and price that the antitrust laws are concerned with. The aftermarket doctrine can thus easily turn into “monopoly paranoia,” where plaintiffs are ready to find a monopolist under every rock.

Plausibility argument #2: “What about buyer beware?”

Two-step purchasing patterns are common and they often involve two choice sets, where the second choice set is dependent upon the first choice. For example:

- A is in the market for copiers. There are many choices: Kodak, IKON, Ricoh, Xerox, etc. After choosing Kodak, A’s set of parts and service choices is limited to those that are available “on the Kodak platform.” This two-step pattern was visible to A.

- B is in the market for franchise opportunities. There are many choices: Domino's, McDonalds, KFC, Taco Bell, etc. After choosing Dominos, A's set of ingredient choices is limited to those that are permitted "on the Domino's platform." This two-step pattern was was visible to B.
- C is in the market for smartphones. There are a number of choices: Apple, Google, Microsoft, FirefoxOS. After choosing a Windows phone, A's set of app choices is limited to those that Microsoft allows into its App Store. This two-step pattern was visible to C.

Given the ubiquity of two-step purchasing patterns, isn't the better legal rule one of contract law rather than of antitrust law? In other words, if the buyer is concerned about aftermarket "lock in" she should seek contractual protection. If there is demand for such protection *and* the equipment market is competitive, then manufacturers will compete on the basis of offering better aftermarket protections.

Big picture property rights argument

There is yet another dimension to the aftermarket doctrine, as it reflects a compromise to competing claims over the profits from a shared (or jointly developed) business opportunity. This leads to a hypothetical discussion over "who owns the profits from the Kodak copier system."

- **Kodak**: "I created this business opportunity. Without me, the ISOs would have no Kodak-related business. I own this platform and I get to decide with whom to share the gains, how to share the gains, and for how long."
- **ISOs:** "We contributed to the growth of the Kodak platform. Kodak was able to sell more copiers at lower costs because it did not have to build a matching

> service infrastructure. We provided that. We have a legitimate claim to some of the Kodak-business that we helped create."

The dissent agrees with Kodak. The ISOs are free to protect themselves contractually against Kodak's opportunism. If they fail to do that, the gains default to the platform owner. The majority invokes antitrust as a residual layer of regulation, assigning some claim to the jointly created value to the ISOs.