

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

CAPTION: EASTMAN KODAK COMPANY, Petitioner, v.

IMAGE TECHNICAL SERVICES, INC., ET AL.

CASE NO: 90-1029

PLACE: Washington, D.C.

DATE: Tuesday, December 10, 1991

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   EASTMAN KODAK COMPANY,                   :

4                   Petitioner                   :

5           v.                                   :   No. 90-1029

6   IMAGE TECHNICAL SERVICES, INC.,       :

7   ET AL.                                   :

8   - - - - - X

9                                   Washington, D.C.

10                                   Tuesday, December 10, 1991

11                   The above-entitled matter came on for oral  
12   argument before the Supreme Court of the United States at  
13   10:05 a.m.

14   APPEARANCES:

15   DONN P. PICKETT, ESQ., San Francisco, California; on  
16   behalf of the Petitioner.

17   JAMES F. RILL, ESQ., Assistant Attorney General,  
18   Department of Justice, Washington, D.C.; as amicus  
19   curiae, supporting the Petitioner.

20   JAMES A. HENNEFER, ESQ., San Francisco, California; on  
21   behalf of the Respondents.

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1 PROCEEDINGS

2 (10:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in No. 90-1029, the Eastman Kodak Company v. Image  
5 Technical Services, Inc.

6 Mr. Pickett.

7 ORAL ARGUMENT OF DONN P. PICKETT

8 ON BEHALF OF THE PETITIONER

9 MR. PICKETT: Mr. Chief Justice, and may it  
10 please the Court:

11 Kodak's lack of market power is central to the  
12 resolution of this case. Kodak lacks market power because  
13 interbrand equipment competition disciplines Kodak's  
14 conduct in the derivative after-markets for parts and  
15 service. Without evidence of market power, respondent's  
16 claims fail, and Kodak has no duty to sell them parts.

17 Kodak's copiers and micrographics equipment,  
18 like most durable goods, require regular service and  
19 maintenance. Kodak chose to provide this service itself,  
20 through an in-house service organization, subject to  
21 uniform training, practices, and procedures.

22 Kodak did not have to choose this course. It  
23 could have used independent service outlets, as many  
24 manufacturers do. But in deciding what would work best in  
25 highly competitive interbrand markets, Kodak chose an

1 equipment marketing strategy that would stress the  
2 highest-quality service available in the industry. And to  
3 make good on that promise, Kodak invested in the best in-  
4 house service organization it could develop.

5 Kodak saw the rise of independent service  
6 organizations as a threat to its interbrand equipment  
7 marketing strategy and to the investments which had been  
8 made to support it. So when ISO's demanded that Kodak  
9 provide them with parts, tools, service manuals,  
10 diagnostic equipment, which would be used solely to  
11 provide service in competition with Kodak, Kodak said no.  
12 It said what any competitor, in a competitive market,  
13 ought to be able to say to another competitor.

14 QUESTION: Mr. Pickett, may I ask a question?

15 I'm unclear about these things that the  
16 respondents wanted to buy from Kodak. Are they things  
17 manufactured by Kodak, or does Kodak, in turn, buy these  
18 things from other suppliers?

19 MR. PICKETT: In the great majority of  
20 instances, they are things that are manufactured by Kodak.  
21 In some small percentage of times, there are other  
22 equipment manufacturers who will manufacture a part for  
23 Kodak to be used in a copier, or in a component of a  
24 micrographics system.

25 QUESTION: So the only source of supply would

1 have to be from Kodak, if the respondents were to buy  
2 these parts?

3 MR. PICKETT: Well, unless they made them  
4 themselves, or unless they disassembled used equipment, or  
5 unless they sought other sources.

6 But the lack of market power that Kodak has,  
7 does not come from the source -- availability of sources  
8 to ISO's; it comes from the interbrand competition and the  
9 effects.

10 Also, Kodak --

11 QUESTION: Mr. Pickett, I had thought when we  
12 took this case, that the absence of market power in the  
13 equipment market was a given. But apparently it's not.

14 MR. PICKETT: It is a given, Your Honor,  
15 absolutely. This was never challenged, even in the  
16 petitions for certiorari, from the very first --

17 QUESTION: Am I mistaken that it's challenged in  
18 the briefs here?

19 MR. PICKETT: It is for the very first time in  
20 the briefs on the merit. But the fact is the evidence in  
21 the district court, which, of course, controls the  
22 resolution in this case, was only evidence put in by  
23 Kodak. It was un-rebutted with a single iota of evidence  
24 by respondents. And even on a de novo review, there is  
25 absolutely no reading of that evidence. These are the

1        declarations of Mr. Lacy and Mr. Murray, that one could  
2        conclude interbrand equipment competition does not exist.

3                QUESTION:    What about the response to the  
4        petition for cert.?    Was there a challenge to the --

5                MR. PICKETT:    No, none whatsoever in the  
6        response to the petition for cert.

7                QUESTION:    Because your question does -- your  
8        question presented in the petition is does a vertically  
9        integrated equipment manufacturer that lacks market power  
10       in fiercely competitive interbrand competition violate  
11       Sherman Act, et cetera, et cetera.

12               MR. PICKETT:    And that --

13               QUESTION:    So I had assumed that that's what we  
14       were going to talk about today.

15               MR. PICKETT:    Absolutely, and that is what I  
16       will talk about today.    That was not challenged at all in  
17       the response to the petition for cert.

18               QUESTION:    Mr. Pickett, may I just go back to an  
19       issue of fact in your earlier answer?

20               Is the actual manufacturing of the parts done  
21       primarily by Kodak or primarily by independents?

22               MR. PICKETT:    Primarily by Kodak.

23               QUESTION:    What's the relative share?    Do you  
24       know?

25               MR. PICKETT:    The relative share is something on



1 the order of 75 percent by Kodak.

2 Kodak said to these ISO's --

3 QUESTION: Was that in the record?

4 MR. PICKETT: That is in the record in the  
5 declarations provided by Kodak in the summary judgment.

6 Kodak said to the ISO's what any competitor  
7 ought to be able to say: we will not help you, help  
8 yourself. Compete with us if you will, but by making the  
9 same investments and taking the same risks as we have.

10 This Court has previously recognized, in GTE  
11 Sylvania, and again in Sharp Electronics, that interbrand  
12 competition is at the core of vertical restraints  
13 analysis. Interbrand competition is the primary concern  
14 of the antitrust laws and provides a significant check on  
15 intrabrand competition.

16 Interbrand competition also governs the analysis  
17 of this case. The core of Kodak's motion for summary  
18 judgment was its evidence that Kodak faced robust  
19 interbrand competition in the markets for copiers and  
20 micrographics equipment, from the likes of Xerox, 3M, Bell  
21 & Howell, Canon, Minolta, Fuji, and a host of other  
22 Japanese manufacturers.

23 Kodak must conform its conduct to the demands of  
24 that robust, interbrand competition.

25 QUESTION: Mr. Pickett, you're giving us kind of

1 a narrative account of things. And yet this did come up  
2 on a motion for summary judgment, where all disputed facts  
3 are to be resolved against you.

4 MR. PICKETT: Yes, Your Honor.

5 QUESTION: I hope you'll be careful when you  
6 give the narrative account to make sure that you limit  
7 yourself to the sort of things you're justified in arguing  
8 on this posture.

9 MR. PICKETT: That's right, Mr. Chief Justice.  
10 Respondents did not even challenge Kodak's evidence on  
11 interbrand competition.

12 QUESTION: Well, so on whom is the burden of  
13 proof in that situation in the trial court?

14 MR. PICKETT: Well, the burden of proof, of  
15 course, is on plaintiffs. And under the Celotex case, the  
16 fact that Kodak has presented evidence in its initial  
17 motion for summary judgment does place the burden on them  
18 to come forward with significant, probative evidence --

19 QUESTION: Since they -- you say they had the  
20 burden of proof. There were affidavits in opposition to  
21 them?

22 MR. PICKETT: Well, they would have the  
23 obligation to put forward those affidavits.

24 QUESTION: Yes.

25 MR. PICKETT: They did not do so. And

1       therefore, they failed to meet their burden.

2               QUESTION: Do you take the position that it  
3 necessarily follows that if there was competition in the  
4 equipment market, that there could -- the same degree of  
5 competition in the parts market?

6               MR. PICKETT: I'm sorry?

7               QUESTION: Does your argument about the original  
8 equipment market necessarily mean that there's the same  
9 amount of competition in the parts market?

10              MR. PICKETT: It necessarily means that the  
11 manufacturer's dominant -- the answer is no.

12              It necessarily means --

13              QUESTION: So shouldn't we focus our attention  
14 on the parts market?

15              MR. PICKETT: No, because the interbrand  
16 equipment market plays a dominant role on the derivative  
17 after-markets for parts and service.

18              Kodak's -- the manufacturer's --

19              QUESTION: Is that undisputed too?

20              MR. PICKETT: That is undisputed, absolutely.

21              Kodak's dominant incentive in this case, to use  
22 the words of Justice Scalia in the Sharp Electronics case,  
23 is to sell equipment. And its dominant incentive --

24              QUESTION: Well, it also wants to sell parts,  
25 doesn't it?

1 MR. PICKETT: It wants to sell as much of its  
2 total package of goods, and therefore it must price its  
3 total package of goods at a competitive price.

4 QUESTION: Well, I understand that argument.  
5 But are you saying as a matter of law, the fact that  
6 there's competition in the -- well, you are, I guess -- in  
7 the original equipment market, means there's an equal  
8 amount of competition in the parts market?

9 MR. PICKETT: No, no. I'm not saying that. I'm  
10 saying that --

11 QUESTION: Well, is it conceivable that there  
12 could be, say, patented parts, for example, which there  
13 could be no competition?

14 MR. PICKETT: Certainly there could be patented  
15 parts. But even in the case of a patented part, the  
16 competition at the interbrand equipment level would offer  
17 those consumers the choices that they want in that market.  
18 And they would choose among the various packages that are  
19 offered by the various manufacturers.

20 Manufacturers have options. They can choose  
21 service by themselves; they can choose service offered by  
22 ISO's. It's those options that can -- in the competitive  
23 process -- will win or fail, as consumers decide. And as  
24 manufacturers like Kodak come up with product offerings of  
25 equipment, parts, and service, that are designed in



1 various innovative ways, it's the -- it's the  
2 manufacturer's freedom to design those particular packages  
3 that offers the competitive process to work.

4 QUESTION: Well, how do we know? This is a law  
5 of nature or a law of economics?

6 MR. PICKETT: It is certainly a law of  
7 economics. It is also --

8 QUESTION: Because this case comes up to us  
9 after very little discovery. And it just seems hard for  
10 me to, I would imagine, writing an opinion setting forth  
11 all the propositions you make, without some factual  
12 background to support what I'm -- what you're saying.

13 QUESTION: Your Honor, we put in a fully  
14 detailed, factual background, in our motion for summary  
15 judgment. The fact is, that that was not rebutted at all  
16 by respondents.

17 Moreover, as to discovery, Judge Schwarzer told  
18 respondents that they should go out and take discovery on  
19 the issue of market power, which is what we're arguing  
20 about today.

21 They took extended depositions. They took  
22 complete document discovery. They went back to Judge  
23 Schwarzer and he allowed them more depositions --

24 QUESTION: Market power in the equipment sales  
25 area or in the parts and service area -- or all three?

1 MR. PICKETT: All three, they were entitled to.  
2 The fact is, they never sought discovery in the equipment  
3 market area. But it's no -- they are not --

4 QUESTION: I take it, their theory of the case  
5 is they don't have to, because there's a separate market  
6 for parts and services.

7 MR. PICKETT: Well, if one defines a separate  
8 market, or attempts to, one has to overlook the connection  
9 between interbrand equipment market and the derivative  
10 after-market for parts and service.

11 There's no evidence that could isolate that  
12 parts and service market from the activity going on in the  
13 equipment market in this case.

14 QUESTION: Well, there certainly is. There's  
15 evidence -- as I understand the record -- that there were  
16 independent organizations that sold parts and services  
17 separately from your company, for a period of time, until  
18 you changed your policy. Isn't that right?

19 MR. PICKETT: There is evidence that there were  
20 some sales of that. But the important --

21 QUESTION: And a substantial sales, at a  
22 competitive -- they were under-cutting your price, weren't  
23 they?

24 MR. PICKETT: They were under-cutting the price  
25 at times. But the total package price offered by

1 Kodak --

2 QUESTION: Well, they weren't selling the total  
3 package. They were selling parts and service.

4 MR. PICKETT: They were selling -- they were  
5 selling parts and service, correct.

6 QUESTION: So they can be -- at least  
7 conceivably, that's evidence that indicates they can be  
8 sold separately from the original equipment, isn't it?

9 MR. PICKETT: Well, they can be sold separately,  
10 Your Honor, But that doesn't mean that they can be sold  
11 in isolation from the impact of the interbrand equipment  
12 market. The interbrand equipment market is the one in  
13 which the various product offerings of manufacturers are  
14 tested.

15 Kodak chose a vertically integrated distribution  
16 system, for example. It didn't go to retail --

17 QUESTION: Yes, but before it made that choice,  
18 there were these separate competitors out there.

19 MR. PICKETT: No, Your Honor, there's no  
20 evidence of that. The record shows that ISO's developed  
21 in 1982, at the very earliest. They chose a vertical --

22 QUESTION: And when did -- when did you adopt  
23 the policy at issue in this case?

24 MR. PICKETT: For the copier market in 1975,  
25 when Kodak introduced copiers, and for micrographics, in

1 1985 -- but prospectively.

2 QUESTION: Well, there's a 3-year period where  
3 there was a history of competition.

4 MR. PICKETT: Yes, but prospectively, for  
5 micrographics, so that it didn't apply to the older  
6 micrographics equipment.

7 QUESTION: Well, but I'm just -- it was 3 years  
8 in one of your products.

9 MR. PICKETT: Yes, and parts are continued to be  
10 sold to ISO's for the micrographics equipment that was in  
11 existence at that time.

12 Kodak chose a vertically integrated distribution  
13 system. It didn't have to. Other manufacturers use re-  
14 sellers, for example. Kodak chose a vertically integrated  
15 service offering. It didn't have to. Other manufacturers  
16 chose other ways to do it.

17 But Kodak's view was that it could provide the  
18 best distribution for its products, itself. And that it  
19 could service those products best, itself. And it  
20 stressed the quality of its service in marketing the  
21 equipment. Other manufacturers chose other strategies.  
22 It so happened that Kodak's strategies have worked well.

23 And Kodak's successful entry, for example, in  
24 the copier market, a market dominated by Xerox, was highly  
25 procompetitive. Buyers were given greater choices;



1 competition was enhanced, since Kodak was free to offer  
2 its product offering in an innovative way.

3 Manufacturers should be free to offer their  
4 equipment with service options that cover the  
5 gamut -- from long-term warranties, on the one-hand,  
6 included in the initial price, to very low equipment  
7 prices, with higher service charges down the road; from  
8 service offered by manufacturers, alone, on the one hand,  
9 to manufacturers who rely entirely on independent service  
10 organizations.

11 QUESTION: Mr. Pickett, maybe you're right as a  
12 matter of policy. What is -- what case do you think  
13 supports your position from this Court, most strongly?

14 MR. PICKETT: The case that most strongly  
15 supports our position is Sharp Electronics, Your Honor.  
16 In Sharp Electronics, a price cutter, retailer price  
17 cutter, was terminated in part due to the manufacturer's  
18 dominant incentive to ensure the provision of service, and  
19 customer support at the retail level. If that can be done  
20 in combination with another retailer, surely it can be  
21 done by Kodak, itself.

22 In this case, competition --

23 QUESTION: As I understand it, Mr. Pickett, your  
24 argument is not that -- not that people can't enter a  
25 separate market and make a go of a business in the parts

1 and service market alone.

2 MR. PICKETT: That's correct.

3 QUESTION: But your point is that you could not  
4 monopolize that market without paying the price in your  
5 original equipment market, that the two are connected to  
6 that extent?

7 MR. PICKETT: Absolutely. On this record,  
8 raising the price of service and parts to supercompetitive  
9 levels, would have the same effect as raising equipment  
10 prices. And Kodak would lose equipment sales, which is  
11 its dominant incentive in this marketplace, and on this  
12 record.

13 QUESTION: But wasn't there evidence in the  
14 record that Kodak sometimes charged twice as much for its  
15 service as ISO's?

16 MR. PICKETT: There was evidence in the record  
17 that Kodak competed with ISO's, yes, for price at various  
18 times. But that's not to say that the fact that Kodak set  
19 a particular part of its package -- that is service in  
20 this instance, at one level, and someone could come in and  
21 undercut that, that doesn't mean that the total,  
22 competitive return that Kodak receive on equipment, parts,  
23 and service, is not at a competitive level. In fact, in  
24 this case, competition works on this record, because Kodak  
25 is restrained from charging supercompetitive prices at the

1 service and parts levels.

2 If it charged supercompetitive prices, it would  
3 quickly lose equipment sales; it would quickly be out of  
4 business. Kodak --

5 QUESTION: Give away the camera to sell the  
6 film. Isn't that the motto that the old Kodak used to  
7 use, years --

8 MR. PICKETT: Excuse --

9 (Laughter.)

10 QUESTION: You're saying that they were doing  
11 the same here. That you may have charged a lot for the  
12 service; you gave away the machines in order to service  
13 them. And that's where you were making your money.

14 MR. PICKETT: It's just like that. It's just  
15 like the cheap financing and the expensive homes that were  
16 involved in the Fortner case, in which this Court ruled.  
17 And it's just like the razors and blades that are brought  
18 up in the Solicitor General's brief.

19 QUESTION: Doesn't your argument make the  
20 assumption that the buyers are all just as well informed  
21 about the long-range costs as Eastman is?

22 MR. PICKETT: Excuse me?

23 QUESTION: Doesn't your basic argument make the  
24 assumption that the buyers are as well informed in the  
25 long range about costs -- price of costs and service of

1 its equipment as you are?

2 MR. PICKETT: Yes, and these are very  
3 sophisticated buyers --

4 QUESTION: And why, then, do you -- why then, do  
5 you allow the most sophisticated customers who are able to  
6 service their own equipment to buy the parts, whereas you  
7 don't allow the less-sophisticated ones --

8 MR. PICKETT: It's self-servicers who are  
9 allowed to buy the parts. They are not necessarily --

10 QUESTION: And aren't they presumably the most  
11 sophisticated customers?

12 MR. PICKETT: No, they are simply the ones who  
13 use the most equipment.

14 QUESTION: But can anybody fix this equipment,  
15 or don't you have to have a fairly sophisticated  
16 engineering department?

17 MR. PICKETT: You go through a Kodak training  
18 program.

19 If there are --

20 QUESTION: Do you give that training program to  
21 your customers?

22 MR. PICKETT: Yes, absolutely.

23 And if there are no further questions, I'd like  
24 to reserve my remaining time.

25 QUESTION: Very well, Mr. Pickett.



1 Mr. Rill, we'll hear now from you.

2 ORAL ARGUMENT OF JAMES F. RILL

3 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

4 SUPPORTING THE PETITIONER

5 MR. RILL: Mr. Chief Justice, and may it please  
6 the Court:

7 There are two, central points to the argument of  
8 the United States in this case.

9 First, the ISO claim that Kodak can possess and  
10 exploit market power in the parts and service market, when  
11 it lacks market power in the equipment market, is  
12 implausible, as a matter of antitrust law and economic  
13 theory.

14 Second, when a plaintiff, seeking to avoid  
15 summary judgment, attempts to put forward an implausible  
16 argument, or argument based on an implausible theory, it  
17 is required under rule 56 and under this Court's decision  
18 in the Matsushita case, to come forward with particularly  
19 persuasive, probative, and substantial evidence in support  
20 of a cogent theory of antitrust liability.

21 QUESTION: You say then that Matsushita, or  
22 Matsushita, as you pronounce it, laid down a different  
23 rule as to summary judgment for antitrust cases than  
24 prevails in the rest of the legal area?

25 MR. RILL: No, Mr. Chief Justice, I do not. The

1 rule for summary judgment is, of course, prescribed in  
2 rule 56 of the Federal Rules of Civil Procedure; and in  
3 particular, rule 56(e). Matsushita stands for the  
4 proposition that this Court recognized that in antitrust  
5 cases, where conduct can be often ambiguous and can permit  
6 an inference of procompetitive as well as anticompetitive  
7 conduct, it is particularly appropriate to use the vehicle  
8 of summary judgment to prevent the deterrence of  
9 procompetitive conduct that would result from the threat  
10 of costly, time-consuming, and antitrust trials,  
11 particularly where they proceed on a per se theory.

12 QUESTION: Well, the court of appeals, as I  
13 understand its opinion here, took the position that maybe  
14 things wouldn't work out in the real world, so to speak,  
15 the same way they do in economic theory. And while the  
16 district court might have been justified in granting  
17 summary judgment as a matter of pure economic models, that  
18 was not necessarily controlling, so far as summary  
19 judgment would be concerned.

20 MR. RILL: Yes, Your Honor, it's the position of  
21 the United States that the court of appeals erred in  
22 reversing summary judgment on the grounds of some  
23 generalized -- with all respect -- speculation with  
24 respect to market imperfections that might exist.

25 When Kodak came forward and set out the point

1 that it was not contested, that it lacked market power in  
2 the equipment market, it became incumbent upon the ISO's  
3 under rule 56 and under Matsushita, to come forward with  
4 specific, substantial, probative evidence that raised a  
5 genuine issue as to a cogent theory of antitrust  
6 liability.

7 QUESTION: Mr. Rill, the issue wasn't whether  
8 there was competition in the equipment market. The issue  
9 is whether market power in the parts market. Isn't that  
10 correct?

11 MR. RILL: Justice Stevens, the answer is yes.  
12 There is an issue as to whether there is market power in  
13 the parts market. The absence of market power in the  
14 equipment market, however, makes it implausible -- as that  
15 term is used in Matsushita -- for Kodak to be able to  
16 exercise market power in the parts market.

17 QUESTION: And why is that? Why is it  
18 that -- is it conceivable they have market power in the  
19 parts market? How do you define them? What is your  
20 definition of the relevant market in this case?

21 MR. RILL: As this case was presented to the  
22 court of appeals, and came up upon review before this  
23 Court, there's been a concession that the parts market can  
24 be a relevant market.

25 QUESTION: The parts market can?

1 MR. RILL: The parts market can be a relevant  
2 market, as this case is presented.

3 However, the absence of market power in the  
4 primary market, the equipment market, makes it  
5 impossible --

6 QUESTION: No, not impossible, you said  
7 implausible.

8 MR. RILL: Implausible. I stand corrected.

9 QUESTION: It's surely not impossible.

10 MR. RILL: I stand corrected, Justice Stevens,  
11 quite right -- implausible for Kodak to exercise market  
12 power in the parts market.

13 Now, it could have argued --

14 QUESTION: Even if it has market power in the  
15 parts market.

16 MR. RILL: It could have argued below -- well,  
17 no, we're saying it's implausible that it has market power  
18 in the parts market --

19 QUESTION: Oh.

20 MR. RILL: -- and it could well have argued  
21 below, that if it were --

22 QUESTION: The reason being -- why don't you  
23 spell out the reason why that is? That is, because, if it  
24 raises its prices too high for servicing and parts, people  
25 won't buy Kodak machines.



1 MR. RILL: Well, that's correct, Justice Scalia,  
2 because the -- the Ninth Circuit acknowledged --

3 QUESTION: Because they can buy other machines  
4 because of the primary market --

5 MR. RILL: The --

6 QUESTION: -- which is competitive.

7 MR. RILL: That's correct, Justice Scalia. The  
8 Ninth Circuit acknowledged at the -- that the customers  
9 make a parts, equipment, and service price assessment as a  
10 package at the time they purchase the equipment.

11 QUESTION: That all customers do this?

12 MR. RILL: The Ninth Circuit acknowledged that  
13 customers do it. The mere fact that the customers --

14 QUESTION: Well, what if only a few customers  
15 did it. Would that make a difference?

16 MR. RILL: The fact of the matter is there's no  
17 claim in this record that Kodak discriminated among  
18 customers who made that assessment and did not make that a  
19 system -- assessment.

20 Kodak would be required, in the competitive  
21 equipment market, to price the total package  
22 competitively, or suffer a very severe runoff of equipment  
23 sales to its competitors in the equipment market. Since  
24 Kodak needs to sell equipment to sell parts and service,  
25 it's going to have to package --

1 QUESTION: It would, if all the customers are  
2 fully informed.

3 MR. RILL: No, no, Justice Stevens, the fact of  
4 the matter is that the Ninth Circuit acknowledged that  
5 customers made that assessment. The fact that customers  
6 make that assessment requires Kodak to behave  
7 competitively in the equipment market.

8 QUESTION: Did they tell us how many customers  
9 make that assessment, how many --

10 MR. RILL: There's nothing in the record,  
11 Justice Stevens, that tells us that --

12 QUESTION: You don't think that's relevant,  
13 either, I don't suppose.

14 MR. RILL: -- as the case is presented to this  
15 Court. The Ninth Circuit acknowledged that customers make  
16 that comparison at the time they purchase equipment. And  
17 that --

18 QUESTION: It doesn't have to be all of them,  
19 Mr. Rill, does it?

20 MR. RILL: No, it does not.

21 QUESTION: It's one of the advantages of a free  
22 market, that the sophisticated customer helps the  
23 unsophisticated, right?

24 MR. RILL: That is --

25 QUESTION: Sharp cheese is very expensive. My

1 wife calls this the sharp cheese theory. You can always  
2 tell which cheese is sharp. It's the one that costs more.  
3 Because --

4 MR. RILL: My wife and I had a discussion of  
5 sharp cheese as well.

6 QUESTION: -- the sophisticated buyers are the  
7 one that lead the market. So you don't have to know  
8 whether cheese is sharp or not. You're --

9 MR. RILL: Because manufacturers will behave in  
10 a manner consistent with the sophisticated buyers'  
11 behaving competitively makes it implausible and self-  
12 defeating for manufacturers to attempt to exploit the  
13 parts and service market, because they're going to  
14 behaving -- behave competitively --

15 QUESTION: Mr. Rill --

16 QUESTION: Is that why they left the (inaudible)  
17 market?

18 QUESTION: -- there is a certain amount of very  
19 theoretical approach to your presentation, that this is  
20 the way the market is going to behave, without any real,  
21 empirical evidence, it seems to me.

22 MR. RILL: Mr. Chief Justice, the argument  
23 proceeds very logically, and very practically from the  
24 Hyde decision.

25 QUESTION: It is -- I agree it's very logical.

1 But I am still not totally persuaded that there wasn't  
2 something in what the Ninth Circuit said. How can we  
3 know, at this stage, that this is the way it would work  
4 out in practice?

5 MR. RILL: Well, if Kodak had attempted to tie  
6 service to equipment, clearly that would fall under the  
7 Court's decision in the Hyde case, because it lacks market  
8 power in the equipment market.

9 Why should a stricter standard be applied to  
10 Kodak when, in fact, it has exercised a less-restrictive  
11 policy of tying service to parts? It needs to sell  
12 equipment in order to sell parts and service. It needs to  
13 present a competitively priced package to customers who  
14 make comparison, and to behave competitively in the  
15 equipment market.

16 QUESTION: I'm not sure that's consistent with  
17 your earlier concession that there's a separate market for  
18 parts.

19 What is it, in your view, that's the bare  
20 minimum that these plaintiffs would have had to show to  
21 survive summary judgment in this -- in this case?

22 MR. RILL: Justice Kennedy, they would have had  
23 to show a triable issue. They would have had to show a  
24 genuine dispute as to the issue of market power in the  
25 equipment market in order to go to trial in this case.



1 QUESTION: If we disagree with that. If we say  
2 that the parts and the service market are separate  
3 markets, as to which a separate standard of competitive  
4 conduct is required; then must we reverse?

5 MR. RILL: You would then have to still make a  
6 determination that market power would have to exist in the  
7 equipment market, because in the absence of market power  
8 in the equipment market, it is implausible for Kodak to  
9 attempt to exercise market power in the parts market, so  
10 as to create a service parts tie.

11 With respect to your market definition question,  
12 I will certainly say that this case could have come up,  
13 could have come up on the issue of whether parts is a  
14 separate, relevant market.

15 QUESTION: Well, I thought we were proceeding on  
16 the assumption -- for argument purposes -- that there was  
17 a separate market in parts?

18 MR. RILL: For purposes of the way this case is  
19 before the Court now, it's the position of the United  
20 States, we're willing to accept a separate market and say  
21 that it cannot be exploited in the absence of market power  
22 in the equipment market.

23 Thank you, Mr. Chief Justice.

24 QUESTION: Thank you, Mr. Rill.

25 Mr. Hennefer, we will hear from you.

1 ORAL ARGUMENT OF JAMES A. HENNEFER

2 ON BEHALF OF THE RESPONDENTS

3 MR. HENNEFER: Mr. Chief Justice, and may it  
4 please the Court:

5 The questions of the Court and Mr. Pickett and  
6 Mr. Rill's response, highlight the fundamental problem  
7 with Kodak's case: that is, that there are hotly  
8 contested, factually disputed issues which plaintiffs  
9 should be allowed to proceed on. Let's take some of these  
10 issues.

11 The market power in the basic equipment market  
12 is hotly debated. You look just at the admissions, the  
13 declarations of Kodak's --

14 QUESTION: Excuse me, why didn't you debate that  
15 in the response to the petition for certiorari? Because  
16 frankly, I was not interested in considering whether there  
17 is market power in this primary market. That's not the  
18 question we took this for.

19 MR. HENNEFER: Well, because this was one of  
20 many factors, and we didn't consider it the most important  
21 factor on why the -- why power in the basic equipment  
22 market does not discipline prices and power in the parts  
23 and service markets.

24 QUESTION: It was the premise of the whole  
25 question presented, question number one presented: Does a

1 vertically integrated equipment manufacturer that lacks  
2 market power in fiercely competitive interbrand equipment  
3 markets violate the Sherman Act by declining to sell  
4 replacement parts?

5 Given that that's the question, it seems to me  
6 if you were choosing to contest the question of whether  
7 they lack market power or not, you should have done it in  
8 your response.

9 MR. HENNEFER: We didn't feel that this was  
10 fundamental to defending the judgment in the Ninth  
11 Circuit, as --

12 QUESTION: Well, maybe it isn't. I'm happy --

13 MR. HENNEFER: Yes.

14 QUESTION: -- to listen to whatever other  
15 arguments you have, but not to that one.

16 QUESTION: Oh, and -- I thought the Ninth  
17 Circuit proceeded on the assumption that there wasn't any  
18 issue about the equipment market?

19 MR. HENNEFER: Well, the Ninth Circuit --

20 QUESTION: Isn't that right?

21 MR. HENNEFER: Yes, it proceeded that there was  
22 some market share and some market power.

23 QUESTION: Well, you didn't make an issue out of  
24 it before them, apparently.

25 MR. HENNEFER: There was an issue, Your Honor,

1 presented in Kodak's own declarations as to whether --

2 QUESTION: Well, are you defending -- are you  
3 defending the -- the court of appeals' decision and its  
4 rationale?

5 MR. HENNEFER: Yes, we are arguing that --

6 QUESTION: Well, you don't need this other  
7 argument, then, do you?

8 MR. HENNEFER: We don't have to have that  
9 argument.

10 QUESTION: Well, are you with -- are you  
11 withdrawing any concessions that you've made previously in  
12 the case?

13 MR. HENNEFER: Well, no, we have not made a  
14 concession to Kodak. They have --

15 QUESTION: Or are you contesting issues now that  
16 you did not contest earlier?

17 MR. HENNEFER: Yes. This Court --

18 QUESTION: The answer is yes?

19 MR. HENNEFER: Mr. -- yes.

20 QUESTION: Well, what issues are those that  
21 you're contesting now that you didn't contest earlier?

22 MR. HENNEFER: Well, we did not contest the  
23 issue of market power because it was not essential to our  
24 case -- market power, that is, in the equipment market.

25 This Court, Chief Justice Rehnquist, however, is



1 entitled to make a de novo review of the record and all  
2 facts that are on the record.

3 QUESTION: But what we're entitled to do  
4 may -- is one thing. What we're willing to do may be  
5 another.

6 In our recent change of rules in our opinion of  
7 Oklahoma City against Tuttle says if you don't raise -- if  
8 you don't make an objection in your brief in opposition  
9 to -- as to why a question raised in a petition for  
10 certiorari can't be reached by us, your objections are  
11 waived. Are you familiar with that rule?

12 MR. HENNEFER: No, I'm not, Your Honor.

13 QUESTION: Well, next time you have a response  
14 here, you probably ought to read it.

15 MR. HENNEFER: Okay.

16 Um, other --

17 QUESTION: I suggest that you not go too heavily  
18 into that point, since I think it's waived.

19 MR. HENNEFER: Other issues of fact which are  
20 hotly contested, and were at the district court as well,  
21 are whether parts are manufactured by Kodak or by outside  
22 vendors.

23 Mr. Pickett stated that it was a 75 percent/25  
24 percent ratio. Our declarations show that it's a 10  
25 percent/90 percent ratio -- Kodak manufacturing only 10

1 percent of the parts. And as a matter of fact, an  
2 interrogatory was asked to Kodak on this, and they refused  
3 to answer it. And the district court refused to allow a  
4 motion to compel the answer on that particular issue.

5 Mr. Pickett stated another factual issue, and  
6 that was that Kodak took all service for its equipment in-  
7 house. That is not the case. That's a hotly contested  
8 factual issue.

9 QUESTION: Well, even if you were correct that  
10 somebody other than Kodak makes the parts, then couldn't  
11 your clients buy parts from those other people?

12 MR. HENNEFER: We put evidence on the record,  
13 yes, they could, but that we tried to buy those parts.  
14 And the evidence shows that the OEM's said Kodak will not  
15 allow us to sell them to you. Kodak's own documents say  
16 that they have instructed these people not to sell them to  
17 us. We have --

18 QUESTION: Well, I thought the district court  
19 found there was no conspiracy --

20 MR. HENNEFER: The district --

21 QUESTION: -- between Kodak and the suppliers of  
22 parts.

23 MR. HENNEFER: The district court ignored that  
24 evidence, said that that evidence was not admissible  
25 evidence, even though in --

1 QUESTION: But that was the finding, right?

2 MR. HENNEFER: Yes, that was the finding.

3 QUESTION: And you didn't petition for cert. on  
4 that. Yet, you want to argue that finding was erroneous.

5 MR. HENNEFER: No, we contested -- we do contest  
6 this issue, because we contest that Kodak did not control  
7 the parts market. And control of the parts market, and  
8 the ability to control price and people in that  
9 marketplace involves a question of whether you can get  
10 outside supply sources. And that issue was clearly raised  
11 by us.

12 Whether there is a parts market, and whether  
13 Kodak has power in that parts market, has, as an essential  
14 component, whether or not you can get source of supply, as  
15 well as whether higher prices will allow you to substitute  
16 under the duPont rule of substitutability, whether there's  
17 price substitutability or whether there's demand  
18 substitutability.

19 QUESTION: Of course, none of that would matter  
20 if Kodak's principal point is correct. That is --

21 MR. HENNEFER: Yes.

22 QUESTION: -- if you -- their principal point  
23 is, you know, we're cutting off our nose to spite our face  
24 if we try to monopolize the -- and exact a monopoly rent  
25 in the parts requirement.

1 MR. HENNEFER: That is --

2 QUESTION: All of these facts become quite  
3 irrelevant.

4 MR. HENNEFER: That is correct. If there's a  
5 one-to-one correlation or a close to one-to-one  
6 correlation between raising the prices in the equipment  
7 market, and -- or in the parts market and people not  
8 buying equipment, that's correct.

9 But of course it's our primary contention here,  
10 that that kind of a per se rule of immunity should not be  
11 accepted.

12 QUESTION: Well, they're not saying it's a per  
13 se rule. What the argument is about is whether that  
14 should be assumed to be the norm, and you have to come up  
15 with some evidence on the motion for summary judgment to  
16 say why the world is not as it seems; or rather, whether  
17 your theory should be the norm, and they would have to  
18 come in to show why the world is not as it seems.

19 MR. HENNEFER: Well, it's more than a norm.  
20 They want to say once a defendant comes up with proof that  
21 there is competition in the basic equipment market, then  
22 the case is over. Because you cannot, as a matter of law,  
23 then, in the parts or service market, have any market  
24 power or dominance of those markets.

25 QUESTION: I don't understand them to be saying



1     that. I understand them to be saying only that you have  
2     to come up with something to show why this particular  
3     market has an imperfection.

4             For instance, if you could have shown that the  
5     purchasers of the parts, and of the service, don't take  
6     into account the life -- the life cost of equipment plus  
7     service -- if you could have shown that, I don't think  
8     they're contesting that the case couldn't have gone  
9     forward.

10            What they're saying is, you didn't come up with  
11     anything that wouldn't -- that would give anybody any  
12     reason to believe that this market doesn't operate the way  
13     a market operates.

14            MR. HENNEFER: Your Honor, in fact, we did come  
15     up with substantial record evidence of this. It's Kodak  
16     who did not come up with any record evidence.

17            Let me give you a few examples.

18            We came up with evidence of a purchaser, a copy  
19     shop, Mr. Hernandez, who buys photocopy machines and who  
20     is aware of the price of service, because he also was  
21     giving some outside service -- who bought Kodak's machines  
22     knowing that they were charging two to three times the  
23     price that a private servicer would charge for it.

24            In that situation, certainly it's hard evidence  
25     that a knowing purchaser takes something else into account

1     besides the cost of the parts or service. Let me give  
2     a --

3             QUESTION: Why -- what does that prove?

4             MR. HENNEFER: Okay.

5             QUESTION: He knows that they're charging twice  
6     as much for the service, but they're charging half as much  
7     for the machine. Did he say I don't care what the total  
8     cost of the machine plus service is?

9             MR. HENNEFER: If there's no record evidence as  
10    to the cost of the machine. Kodak has not come forward.

11            QUESTION: Okay, so you didn't come up with  
12    something that would show that the market has a lack of  
13    information.

14            MR. HENNEFER: Justice Scalia, in other  
15    situations -- if I may give a few more examples. For  
16    example, the purchasers of the Federal Government, one  
17    group on a capital budget will purchase machines without  
18    any regard to how the service for those machines are going  
19    to be paid for.

20            That will then be given to a particular  
21    department. And then that department, on its operating  
22    budget, has to pay for those -- that service. Now there's  
23    a totally separate situation: one purchaser for the  
24    machines, who is not taking into account the cost of  
25    service. How can you say, in this case, there would be a

1 one-to-one correlation?

2 QUESTION: You show that Kodak had pieced out  
3 the market, that it could discriminate among buyers, that  
4 it could discriminate among those buyers who did take  
5 lifetime value into account and those who didn't --

6 MR. HENNEFER: Exactly.

7 QUESTION: Did you introduce evidence to that  
8 effect?

9 MR. HENNEFER: Yes -- yes, we did. This is  
10 Justice Stevens' point, and a very good one. And that is,  
11 that Kodak, where they have very sophisticated buyers like  
12 Top Copy in Boston, which have several photocopy machines,  
13 would allow them to self-service. There's a sophisticated  
14 buyer who's saying I'd like to buy the machine, but your  
15 service is high, so they're allowed to self-service.

16 And then Kodak did something even more with Top  
17 Copy --

18 QUESTION: Excuse me, only those buyers? I  
19 think your -- your brother has contested that. He said  
20 they'd allow all buyers to do that.

21 MR. HENNEFER: No -- well, any buyer --

22 QUESTION: Any buyer.

23 MR. HENNEFER: -- any buyer who came to them,  
24 sophisticated enough to say I will -- I will have my own  
25 self-service. And this self-service is going to be

1 cheaper than Kodak's. I'd like to buy the machine, but I  
2 don't want to pay the high price.

3 They even offered Top Copy -- and this is record  
4 evidence -- a block of service at a lower rate than they  
5 normally sell it to other people, because Top Copy was  
6 going to service their own machines, and they were going  
7 to lose \$300,000 worth of service business.

8 QUESTION: Mr. Hennefer, on whom do you think  
9 the burden of proof is as to this particular issue that  
10 you're talking about with Justice Scalia?

11 MR. HENNEFER: We -- Chief Justice Rehnquist, we  
12 have come forward with specific facts in this marketplace  
13 that show -- and it's -- the burden is on us, initially,  
14 to come forward with specific facts on the record. After  
15 that, Kodak has to come forward with specific facts on  
16 their affirmative defense -- if they want to prove an  
17 affirmative defense -- to show that that works, which they  
18 haven't done.

19 We have, in fact --

20 QUESTION: Are you talking about an affirmative  
21 defense denominated as such in the antitrust laws or just  
22 in the summary judgment process?

23 MR. HENNEFER: This comes by way of an  
24 affirmative defense, because we have shown, under 80 years  
25 of antitrust jurisprudence, that we have section 1 Sherman



1 and section 2 Sherman violations.

2 Ah --

3 QUESTION: Well, if it's an affirmative defense,  
4 I would think you'd say the burden of proof was on Kodak.

5 MR. HENNEFER: That's correct, on the -- on that  
6 issue.

7 QUESTION: On that issue.

8 MR. HENNEFER: Yes.

9 QUESTION: And so then it's not up to you to  
10 negate anything; it's up to them to prove something beyond  
11 any triable issue.

12 MR. HENNEFER: That's correct. It's up to --

13 QUESTION: Of course, once they introduce  
14 affidavits showing facts on those issues, you can't stand  
15 mute. You have to -- you have to come forward with  
16 affidavits showing facts to the contrary.

17 MR. HENNEFER: Yes, that is -- that is correct.

18 QUESTION: And they came forward with evidence  
19 showing that there was no market power in the equipment  
20 field, which is what we are assuming is established here.

21 MR. HENNEFER: No, they came forward with  
22 affidavits that showed that they had substantial  
23 percentages in two or three markets, which they defined as  
24 such.

25 Their own admissions show some power. But on

1 the next issue of whether that power -- or lack of power  
2 -- in the basic equipment markets transfers over to the  
3 parts and service markets, they came forward with only a  
4 single blanket statement that -- saying generally  
5 consumers consider the costs. It doesn't -- and they --  
6 they offered a trade journal article that said here are  
7 the factors you need to consider when buying a photocopy  
8 machine, which included not just cost -- which they didn't  
9 give a specific number for but which included features of  
10 the machine, and the name of the company, and all of the  
11 other factors as pointed out in the Public Citizens'  
12 brief, that -- that customers consider when they're buying  
13 a machine.

14 : You cannot know, on buying one of these  
15 machines, what the cost of the service is going to be for  
16 the life of the machine. Kodak only gives a 1-year  
17 warranty. These are at least 7-year life machines.

18 We came forward with evidence that showed there  
19 was no connection between power in the interbrand market  
20 and power in the parts and service market, that specific  
21 evidence, in fact, showed that while Kodak was charging  
22 supercompetitive prices -- two and three times competitive  
23 prices for parts and service -- Kodak was not losing the  
24 customers.

25 If Kodak's theory were true, they ought to be

1     losing the customers in the equipment market, when they're  
2     pricing supercompetitively in the parts and service  
3     market.

4             QUESTION:  It depends how much they're selling  
5     the equipment for.  If they're selling the equipment very  
6     cheaply, they wouldn't be losing customers.

7             MR. HENNEFER:  But if they were selling the  
8     equipment very cheaply, why would they allow self-  
9     servicers?  Because they would be losing money on the  
10    equipment, and they could no gain it back in the service  
11    market, from the people who were self-servicing.  They'd  
12    lose it both ways.

13            It doesn't make --

14            QUESTION:  Is volume an answer?

15            MR. HENNEFER:  I'm sorry?

16            QUESTION:  Is volume an answer -- the buyers who  
17    are sophisticated enough to do self-service buy lots of  
18    machines?

19            MR. HENNEFER:  But if they're buying lots of  
20    machines, they would be losing lots of money under Justice  
21    Scalia's particular scenario.

22            QUESTION:  You mean they'd be losing more, is  
23    what I'm saying.

24            MR. HENNEFER:  Well, certainly it doesn't make  
25    sense that Kodak would be losing money on the machines,

1 and then also letting somebody self-service, so they  
2 couldn't regain the money on the service.

3 And, in fact, Kodak has come forward with no  
4 evidence that they are pricing these machines below cost.  
5 In fact, their declarations say we price these machines in  
6 the marketplace the same way our competitors do.

7 Another issue that --

8 QUESTION: I don't think they'd sell them below  
9 cost, but they'd -- they'd sell them below the degree of  
10 profit that their competitors are getting. I think that's  
11 their argument.

12 MR. HENNEFER: In a situation where consumers  
13 are benefitting the most in a vertically integrated  
14 distribution network, each item in that network ought to  
15 be priced with relation to marginal cost. It is not in  
16 the best consumer welfare to allow somebody to have a --  
17 control over a derivative market.

18 For example, Kodak does make this argument, that  
19 we're entitled to the profits in these derivative markets.  
20 Does that mean that automobile manufacturers are entitled  
21 to the profits in the gasoline market, because gasoline  
22 was required to have an automobile go. I don't think so.

23 QUESTION: Let's see whether it's in the  
24 consumer welfare or not. Suppose you have a new entrant  
25 in this field. Let's assume it's a field that just has a



1 few, big companies. And you have a new entrant. And he  
2 says boy, it's going to be hard to break into this market.  
3 I'm going to do it by offering a really low price for my  
4 machine. I'm barely going to cover costs on it. And I'm  
5 going to -- exclusive service, though. You have to do  
6 service with me. And I'm going to charge a lot for that.  
7 And I'll tell all my customers.

8 In effect, I'm giving you a loan. I'm willing  
9 to take less now, but I'll get more later. There'll be a  
10 good number of customers who'll want to do that. And  
11 therefore, I'll be able to break into this market.

12 Why is that against the consumer welfare to have  
13 somebody be able to enter the market that way?

14 MR. HENNEFER: It isn't. I think in that case,  
15 Justice Scalia, you're correct. That -- for example, the  
16 Subaru automobile in the Grappone case. In order to break  
17 into the market with a very small market share, and a very  
18 small, installed base, it makes very good sense for a  
19 competitor to say I'm -- I'm not only going to price the  
20 car low, I'm also going to try to keep the service and  
21 parts in-house. That's not our case here.

22 We have a situation where Kodak has, in some  
23 markets, over 50 percent of the market share, and has  
24 significant enough power to be able to continue to sell  
25 the basic equipment, yet charge two to three times the

1 competitive price for parts and service.

2 What we're seeing here in this case, on the  
3 small record we have, is that Kodak is able to do this.  
4 In the 1985 through 1987 period, Kodak was gaining market  
5 share in the photocopy sales. Yet, they were charging, as  
6 we see on the face of the record, from our declarations,  
7 two to three times, for -- to the State of California,  
8 what the competitive rate of service was.

9 Now, they shouldn't be gaining market share  
10 under that circumstance. They should be losing customers  
11 by the droves. The same in the micrographics area.

12 QUESTION: Depends on the price of their  
13 equipment.

14 MR. HENNEFER: Certainly, if they were pricing  
15 the equipment very low, which there's no evidence of at  
16 all. And that's Kodak's burden on that, to come forward  
17 with the evidence that shows that that's how they were  
18 pricing, that that's how they're going to defend this  
19 action, that there is a connection, a good, solid  
20 connection, that allows a per se -- in effect, per se  
21 rule, when you show competition in the basic equipment  
22 market, but you can't have markets or market power in the  
23 service and parts market.

24 QUESTION: You're making a lot of arguments that  
25 are just based upon normal human behavior and how we

1 interpret normal, economic behavior to be. It seems to me  
2 they're just doing the same thing. They're saying that  
3 what you're just proposing is crazy, that they would be  
4 losing the market if they tried to compel people to buy  
5 their service, and then over-price the service. People  
6 say never mind, I'll buy somebody else's machine. It  
7 makes no sense.

8 MR. HENNEFER: Well, Kodak wasn't doing this in  
9 this case, and to apply a theory that is contradictory to  
10 the facts presented by plaintiffs in a case, is, in  
11 effect, Matsushita. The Matsushita situation is 100 miles  
12 from this situation. They are polar opposites.

13 In Matsushita, consumers were getting low  
14 prices. And the plaintiffs in the case were saying wait.  
15 Consumer welfare will be hurt. Prices will go up.

16 Here, the prices are high. And Kodak is saying,  
17 wait. Trust us. We can't be doing this, but if we are,  
18 it will be -- suicidal. Moreover, in the Matsushita case,  
19 this was decided on an extensive record, with the Third  
20 Circuit having reviewed all of the evidence on a pretrial,  
21 just basic -- at the edge of trial type of evidence. And  
22 it was fully explored, whether there was a connection  
23 between the economic theory and the realities of the  
24 marketplace.

25 That is not the case here. There have been

1 material issues of fact that have been raised -- very  
2 substantial material issues of fact -- and controverted.  
3 We have -- we have shown how consumers behave. We have  
4 shown how consumers buy new equipment without considering  
5 the costs of the life cycle of that equipment. We have  
6 shown that consumers -- that a company may, with a small  
7 market share, price that equipment, and tie it to parts  
8 without the problems that we have.

9 QUESTION: Before you finish, could you give --  
10 just tell me what your theory is about -- on the  
11 monopolization issue? I take it there still is an issue  
12 of monopolization in the case.

13 MR. HENNEFER: Yes, there is.

14 QUESTION: And the charge is that Kodak is  
15 monopolizing the market for its own parts?

16 MR. HENNEFER: Yes, Kodak -- Kodak, in order to  
17 keep those parts from getting to the service companies  
18 that were competing fiercely with them, did a number of  
19 things. The first thing they did was to go to their  
20 original equipment parts manufacturers and say don't sell  
21 them to these ISO's so they can't have parts.

22 The second thing they did was to say --

23 QUESTION: But it is a theory that they're -- a  
24 company can monopolize the market for its own parts that  
25 it makes?



1 MR. HENNEFER: Well, it is not making these  
2 parts; 90 percent of these -- at least we have presented  
3 record evidence that 90 percent of these parts are made by  
4 outside people.

5 QUESTION: Well, what if they are?  
6 Nevertheless, Kodak sells them as their parts.

7 MR. HENNEFER: Kodak then has to go to these  
8 people and make an agreement with them. And there's an  
9 agreement there, at least a rule of reason agreement -- a  
10 conspiracy, if you will -- evidence of that agreement.  
11 They didn't -- excuse me, Justice White. They did several  
12 other things in addition to that.

13 They went to people they sold parts to and said  
14 we will sell you these parts, so long as you don't let an  
15 ISO get a hold of them so they can compete.

16 QUESTION: Yeah, I know. I know that. What was  
17 the -- what -- did they have an agreement with their --  
18 with the suppliers of parts to Kodak?

19 MR. HENNEFER: Yes.

20 QUESTION: What was -- what was it?

21 MR. HENNEFER: The agreement, at least from what  
22 we were able to see in the record of it, and there's a  
23 Kodak document that says that they told Acme Electric not  
24 to sell those parts to the ISO who was trying to get those  
25 parts.

1 QUESTION: And Acme Electric was supplying parts  
2 to Kodak?

3 MR. HENNEFER: That's correct, Justice White.

4 QUESTION: Can you tell me a little bit more  
5 about percentages? My understanding from the petitioner  
6 was that 75 percent of the parts, I think, in question --  
7 I'll interpolate that -- were made by Kodak. Is -- so,  
8 are the 90 percent of the parts that you're referring to  
9 90 percent of that 25 percent balance?

10 MR. HENNEFER: No. It was our understanding on  
11 this meager record, that 10 percent of the parts are made  
12 by Kodak, not 75 percent.

13 QUESTION: Ten percent of all parts --

14 MR. HENNEFER: The actual parts.

15 QUESTION: -- that are sold to --

16 MR. HENNEFER: Yes, yes.

17 QUESTION: -- to owners of equipment?

18 MR. HENNEFER: That is correct. And that's in  
19 one of the declarations. And specific -- to specifically  
20 pin this down, we asked an interrogatory that asked for  
21 Kodak to give us a list of the parts for photocopy  
22 machines, and to specify which of those parts were  
23 manufactured by Kodak, and which of those parts were  
24 manufactured by OEM's, to pin it down.

25 Kodak refused to answer that. The district

1 judge refused to allow us to make a motion to compel that.  
2 And so we don't have the benefit of Kodak's own, inside  
3 information on that.

4 QUESTION: And are we talking about 95 percent  
5 in terms of dollar volume, or in terms of the actual  
6 number of components?

7 MR. HENNEFER: Number -- my understanding was in  
8 number of parts, actual parts.

9 QUESTION: Now, leaving aside the percentages,  
10 as I understand it, the district court found that you had  
11 presented, and had not explained that you might later be  
12 able to present any admissible evidence that indicated a  
13 conspiracy between Kodak and the -- either the 25 or the  
14 90 percent manufacturers. Am I right on that?

15 MR. HENNEFER: Yes, the district court looked at  
16 --

17 QUESTION: Yeah, now did you -- do you claim  
18 that you had admissible evidence or indicated that you  
19 could have? I didn't understand that from your brief, but  
20 I may be wrong.

21 MR. HENNEFER: Yes, we did. We presented a rule  
22 56(f) motion, which said we are presenting evidence from  
23 our plaintiffs, that they have approached these OEM  
24 companies and asked them. And, if given the opportunity  
25 to take the depositions that we would like of these

1 companies, then that hearsay evidence could be converted  
2 to admissible evidence. And that was refused. We were  
3 allowed, initially, four, and then an additional two -- so  
4 a total of six depositions and chose, because of the  
5 limited focus --

6 QUESTION: But you didn't cross-appeal on that,  
7 did you?

8 MR. HENNEFER: Did not cross-appeal?

9 QUESTION: Did you cross-appeal on that?

10 MR. HENNEFER: Yes, we did. We raised the issue  
11 that there was insufficient discovery, and that that  
12 insufficient discovery did not allow us sufficient  
13 opportunity to prove that issue.

14 QUESTION: Is there a -- I always hate cases  
15 where lawyers can't agree on what the record contains. Do  
16 you agree that your opponent has something in the record  
17 that says that 75 percent of the parts are made by  
18 original -- by Kodak rather than original equipment --

19 MR. HENNEFER: I don't recall a statement like  
20 that in the record, Justice Stevens.

21 QUESTION: May I ask one other question?

22 In the other 70 percent of this industry --  
23 assuming the figures are as your opponent describes  
24 them -- what do most of the competitors do? Do they  
25 follow a similar policy like Kodak, or do they allow



1 independents to get into the business?

2 MR. HENNEFER: As was lodged with the court, and  
3 the court was asked to take judicial notice of it, Xerox,  
4 who is Kodak's main -- actual only -- competitor now,  
5 virtually their only competitor -- there is a duopoly in  
6 high-speed copiers -- initially, in 1987 -- up until  
7 1987 -- had a policy where they would allow ISO's.

8 And we presented record evidence -- that on the  
9 basis of that, Xerox's prices for an equivalent machine to  
10 Kodak's, for service, for a yearly contract, were one-  
11 third of what Kodak's services were.

12 Xerox, after Kodak, adopted its policy in  
13 cutting off parts, and putting ISO servicers in the  
14 photocopy business, out of business -- adopted the same  
15 policy that Kodak adopted, in the United States and  
16 Canada. And the equivalent of the Federal Trade  
17 Commission in Canada took exception with this and ruled  
18 against Xerox and said that Xerox cannot monopolize and  
19 cut off these parts under these circumstances.

20 QUESTION: This was evidence before the trial  
21 court, Mr. Hennefer?

22 MR. HENNEFER: This was not before the trial  
23 court. It occurred after the summary judgment motion.  
24 And we have lodged that, and requested the Court to take  
25 judicial notice of it.

1 QUESTION: So it was not before the trial court?

2 MR. HENNEFER: It was not before the trial  
3 court.

4 QUESTION: Was it before the court of appeals?

5 MR. HENNEFER: Some of the facts, Chief Justice  
6 Rehnquist, were before the trial court. The fact that  
7 Xerox was competitive on service was before the trial  
8 court. It's in a declaration. The fact that Xerox was  
9 charging one-third, under a freely competitive market, of  
10 what Kodak was charging for service, was before the  
11 district court.

12 The fact that Xerox then changed its policy,  
13 which occurred after 1987, was not before the trial court.  
14 And the fact of the Canadian Federal Trade Commission was  
15 not before the trial court, either.

16 QUESTION: You've also said they're a duopoly.  
17 Does the record tell us, as of the date of the rulings --  
18 forgetting, for a moment, the subsequent lodgings -- how  
19 many companies made up the other 70 percent of the market?  
20 Of the --

21 MR. HENNEFER: Yes, it does. Kodak's own  
22 admissions, their own declarations, which we depend on for  
23 factual evidence on the market power issue, shows that  
24 there were primarily three, in the marketplace for high-  
25 speed copiers: Xerox, Kodak, and IBM.

1 QUESTION: So Xerox and IBM were 70 percent, and  
2 Kodak was 20 or 30 percent?

3 MR. HENNEFER: About 30 percent. And we have  
4 submitted to the Court, and asked for judicial notice,  
5 that since the district -- since the district court  
6 opinion, Kodak has acquired Xerox, and it's now over 50  
7 percent market share in the high-speed copier market.

8 They acquired IBM, so it's -- Kodak acquired IBM  
9 and it's now just Kodak --

10 QUESTION: Acquired part of IBM.

11 MR. HENNEFER: Yes, and Xerox -- part, yes, I'm  
12 terribly sorry.

13 (Laughter.)

14 MR. HENNEFER: They're big, but not that big,  
15 yet.

16 I would like to say that I don't think that this  
17 Court should adopt a per se rule of legality, or at least  
18 one that gives a presumption to Kodak and immunize Kodak  
19 and other basic equipment manufacturers from section 1 and  
20 section 2 Sherman violations. I don't think you should do  
21 so in light of this Court's experience with the trilogy of  
22 cases in White Motor and Schwinn, and in GTE Sylvania. I  
23 don't think this Court should do so in light of the  
24 profoundly regulatory intervention into the service market  
25 that this kind of an -- immunization from section 1 and

1 section 2 Sherman would put into effect.

2 QUESTION: Thank you, Mr. Hennefer.

3 MR. HENNEFER: I thank the Court.

4 QUESTION: Mr. Pickett, you have 4 minutes  
5 remaining.

6 REBUTTAL ARGUMENT OF DONN P. PICKETT

7 ON BEHALF OF THE PETITIONER

8 MR. PICKETT: Mr. Chief Justice, I'd like to  
9 clear up one point, with respect to your question  
10 concerning affirmative defenses and burden.

11 Market power is an essential element of both  
12 respondents' tying claim, and their monopolization claims.  
13 As an essential element, respondents had the burden of  
14 proof on that element. There is --

15 QUESTION: Well, do you have a -- case authority  
16 for that?

17 MR. PICKETT: Certainly, every monopolization  
18 and market power -- Jefferson Parish for tying, and Aspen  
19 or any other monopolization case, says that there must be  
20 the requisite economic power on the part of respondents.

21 Now, Kodak presented evidence on this case,  
22 first of significant, robust, interbrand equipment  
23 competition in its declarations. Second, that buyers --

24 QUESTION: May I ask, sir --

25 MR. PICKETT: Sure.



1 QUESTION: Do you agree with his  
2 characterization of the remainder of the market? Is it  
3 just two or three other companies?

4 MR. PICKETT: No, he's left out the Japanese  
5 manufacturers, who are significant. Canon --

6 QUESTION: What percentage do they represent?  
7 Do they show?

8 MR. PICKETT: Back in 1986, they represented in  
9 the high-volume segment of copiers, approximately 10  
10 percent; in the lower-volume areas, they were the dominant  
11 competitors, along with Xerox.

12 Kodak presented evidence of interbrand  
13 competition. It presented evidence that the sophisticated  
14 buyers take into account those future service and parts  
15 costs. And it took -- and it presented evidence that  
16 Kodak sets its prices for parts and service, based on what  
17 those sophisticated buyers will do in the interbrand  
18 market.

19 Now, in response to that, what did respondents  
20 do, and what more could Kodak have done to present its  
21 motion for summary judgment?

22 Respondents failed to take discovery on market  
23 power, for the most part, although they were given many  
24 opportunities by Judge Schwarzer, over the remaining 6  
25 months that this summary judgment motion was on file.

1 They didn't rebut that evidence at all. They presented a  
2 single theory.

3 QUESTION: May I just ask this question? They  
4 didn't offer theoretical evidence. But the Ninth Circuit  
5 relied on kind of folksy evidence, that, in fact, the  
6 service was less expensive, provided by the competitors,  
7 and that sort of things, at pages 10 and 11 in their  
8 opinion.

9 Does that evidence -- is that evidence at least  
10 raise an issue of fact?

11 MR. PICKETT: Well, they presented a couple of  
12 anecdotes in declarations --

13 QUESTION: Right.

14 MR. PICKETT: -- about incidences in which  
15 they've been able to offer service.

16 But that doesn't begin to rebut the  
17 implausibility of the case, in which --

18 QUESTION: Oh, but if those were typical  
19 examples, and if the competitors' prices were roughly half  
20 of yours, isn't that some -- at least a scintilla of  
21 evidence that maybe there was some market power in the  
22 service market?

23 MR. PICKETT: Although it may be a scintilla of  
24 evidence, it's not the significant, probative evidence  
25 that's required under --

1 QUESTION: So the question goes as to how much  
2 weight to give to that evidence, not whether there's any  
3 there at all.

4 MR. PICKETT: They didn't present any evidence,  
5 not even a scintilla, of a fundamental change in the  
6 workings of the marketplace that would separate the  
7 equipment market from the parts and service market -- none  
8 that showed how that would work. Their only theory was a  
9 lock-in theory. That was the only theory they presented  
10 to Judge Schwarzer. And as this Court held in Jefferson  
11 Parish, the proper time to assess market power in that  
12 instance is at the time of purchase, since that's  
13 when -- that's when the competing offers are being  
14 considered by the purchasers. And co --

15 QUESTION: You -- you and your colleague on the  
16 other side have quite a different notion about what  
17 percentage of the parts that Kodak makes and what  
18 percentage does it buy.

19 MR. PICKETT: Yes, Your Honor.

20 QUESTION: You say 75 percent; he says 10  
21 percent.

22 MR. PICKETT: I -- on page 293, of the joint  
23 appendix, Kodak presents evidence that it has over 10,000  
24 parts in copiers, and over 20,000 parts in micrographics.  
25 It does not say what percentage, at that point. And I'm

1       unable at this point to find that reference.

2               However, I submit it makes no difference, what  
3       percentage, whether it's 75 or 10.

4               QUESTION: Well, I know your time is up, but --

5               MR. PICKETT: Excuse me.

6               QUESTION: Was there a charge that Kodak had an  
7       arrangement or an agreement with the -- its parts  
8       suppliers not to sell to ISO's?

9               MR. PICKETT: There was -- there was some  
10      inadmissible hearsay evidence of a --

11              QUESTION: Is that part of the charge?

12              MR. PICKETT: Part of the charge of a vertical-  
13      only arrangement between Kodak and its suppliers. And in  
14      any event, they have no market power.

15              QUESTION: Well, I know, but I ask you  
16      whether -- is there a charge that you had an arrangement  
17      with your parts suppliers not to sell to ISO's?

18              MR. PICKETT: Yes, that for proprietary  
19      information for Kodak parts, it would not be provided.

20              QUESTION: Well, let's assume that -- let's  
21      assume that they could prove that you had this arrangement  
22      with your parts' suppliers not to sell to ISO's. You  
23      would be in sort of a lot of trouble, wouldn't you?

24              MR. PICKETT: No, Your Honor, for two reasons.

25              QUESTION: Well, why not?



1 MR. PICKETT: One is that it's a vertical  
2 arrangement only. Second --

3 QUESTION: Vertical?

4 MR. PICKETT: Yes, they are not horizontal  
5 competitors.

6 QUESTION: Well, I agree with that --

7 MR. PICKETT: Second --

8 QUESTION: -- I agree with that. But you  
9 are -- have an agreement with somebody else to exclude  
10 somebody from the service market.

11 MR. PICKETT: Yes, much like in the Sharp  
12 Electronics case with the retailers. And in any event,  
13 there'd be no market power.

14 QUESTION: Thank you, Mr. Pickett.

15 MR. PICKETT: Thank you.

16 CHIEF JUSTICE REHNQUIST: The case is submitted.

17 (Whereupon, at 11:06 a.m., the case in the  
18 above-entitled matter was submitted.)  
19  
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## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents and accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

NO. 90-1029 - EASTMAN KODAK COMPANY, Petitioner V. IMAGE

TECHNICAL SERVICES, INC., ET AL.

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BY

Michael Sander

(REPORTER)