

Antitrust for IP Lawyers: Agreements Under \S 1 of the Sherman Act

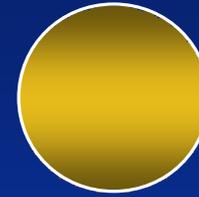
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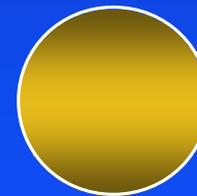
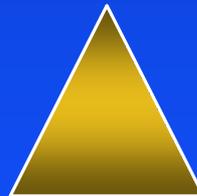
Topics to Be Covered

- Horizontal vs. vertical
- Per se vs. rule of reason
- General principles of the 1995 Guidelines
- Analysis of specific types of restraints

Horizontal vs. Vertical



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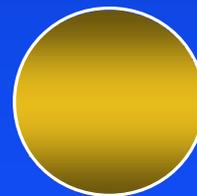
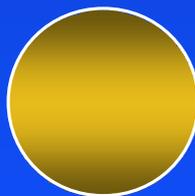


. . . the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly.

E. Bement & Sons v. National Harrow Co.
186 U.S. 70, 91 (1902).



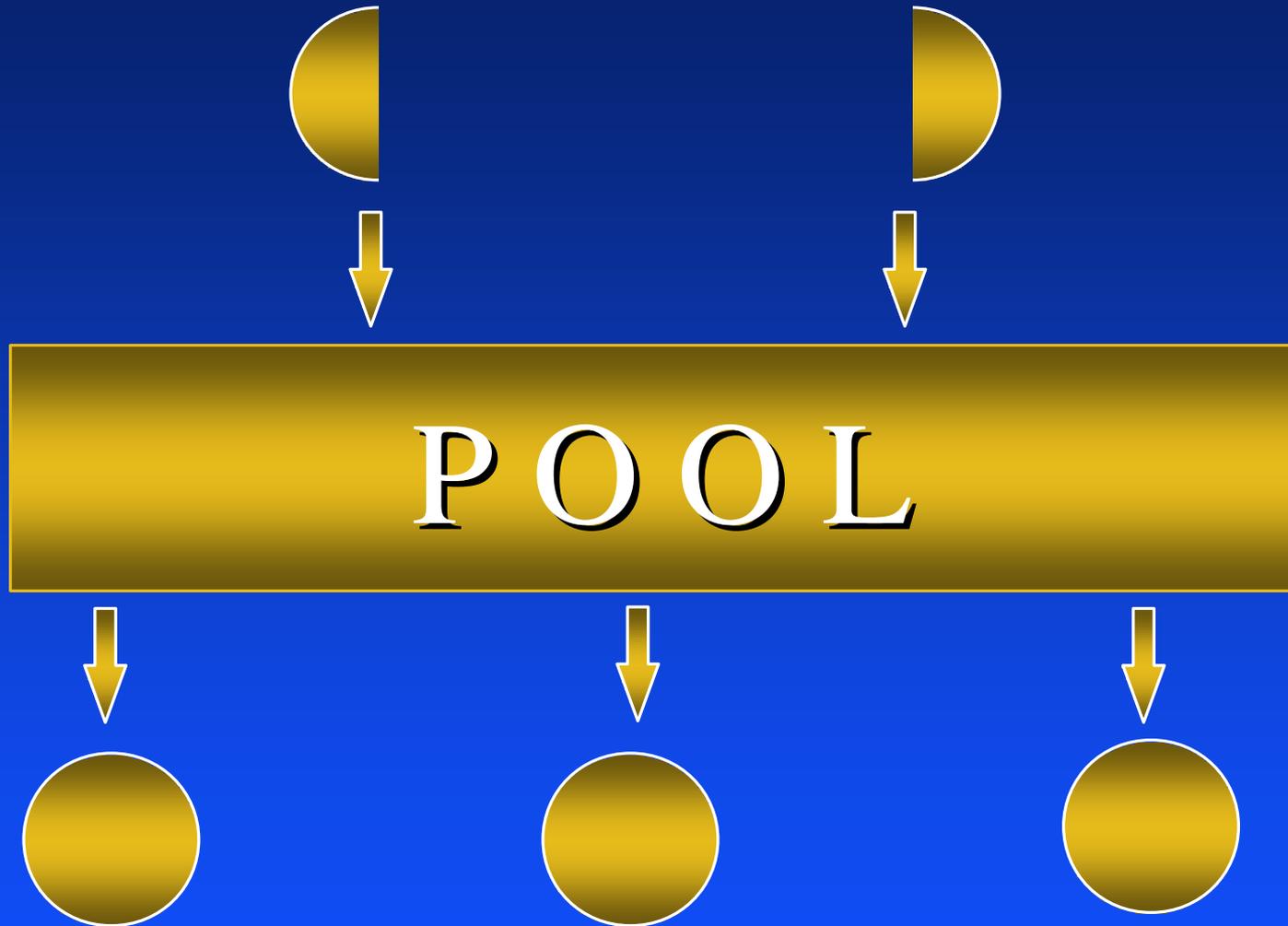
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■ "... the possession of a valid patent or patents does not give the patentee any exemption from the provisions of the Sherman Act beyond the limits of the patent monopoly."

◆ United States v. Line Material Co., 333 U.S. 287, 308 (1948).

MPEG-2 & DVD Pools



Horizontal vs. Vertical: the Test

- Would there have been competition absent the license?

Per Se vs. Rule of Reason

Per Se Unlawful

- Horizontal restraints that:
 - ◆ Fix prices
 - ◆ Divide customers or territories
 - ◆ Restrict output
- Vertical minimum price restraints
 - ◆ Except in certain IP licenses
- Certain tying arrangements and concerted refusals to deal

Rule of Reason

- Any other agreement that meets the following test:
- $\text{Harm}_{\text{competition}} > \text{Benefit}_{\text{competition}}$

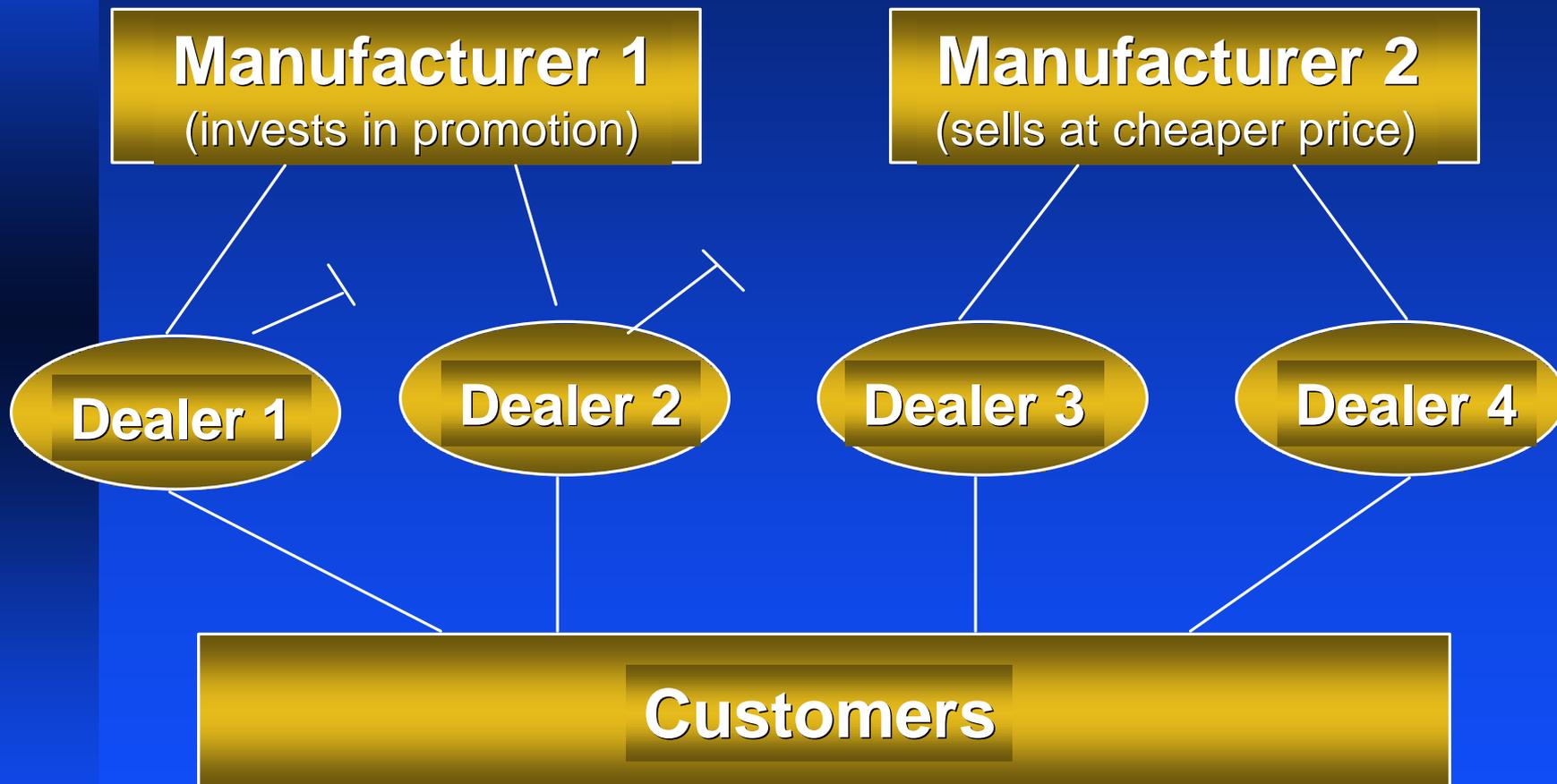
Harm Must Be to Competition

- All competition is horizontal.
- Parties are in a horizontal relationship if there would likely have been competition among them absent a license.
- E.g., territorial and field-of-use restrictions are usually lawful.

Benefits

- Preventing free-riding and safeguarding the rewards to investment count as a justification.

Beltone



General Principles of the 1995 Guidelines

1995 Guidelines

- For antitrust purposes, IP is comparable to other kinds of property
- No presumption of market power
- IP licensing is generally procompetitive because it allows firms to combine complements

1995 Guidelines, cont'd

- IP differs from other kinds of property.
 - ◆ Easier to misappropriate
 - ◆ High fixed costs, near-zero marginal costs
 - ◆ Often requires many complementary inputs to produce a product
- These differences can be taken into account by ordinary antitrust principles.

Townshend v. Rockwell

- Because a patent owner has the legal right to refuse to license his or her patent on any terms, the existence of a predicate condition to a license agreement cannot state an antitrust violation.”

(N.D. Cal. 2000)

“A promise by the licensee to murder the patentee’s mother-in-law is as much ‘within the patent monopoly’ as is the sum \$50.00; and it is not the patent laws which tell us that the former agreement is unenforceable and subjects the parties to criminal sanctions.”

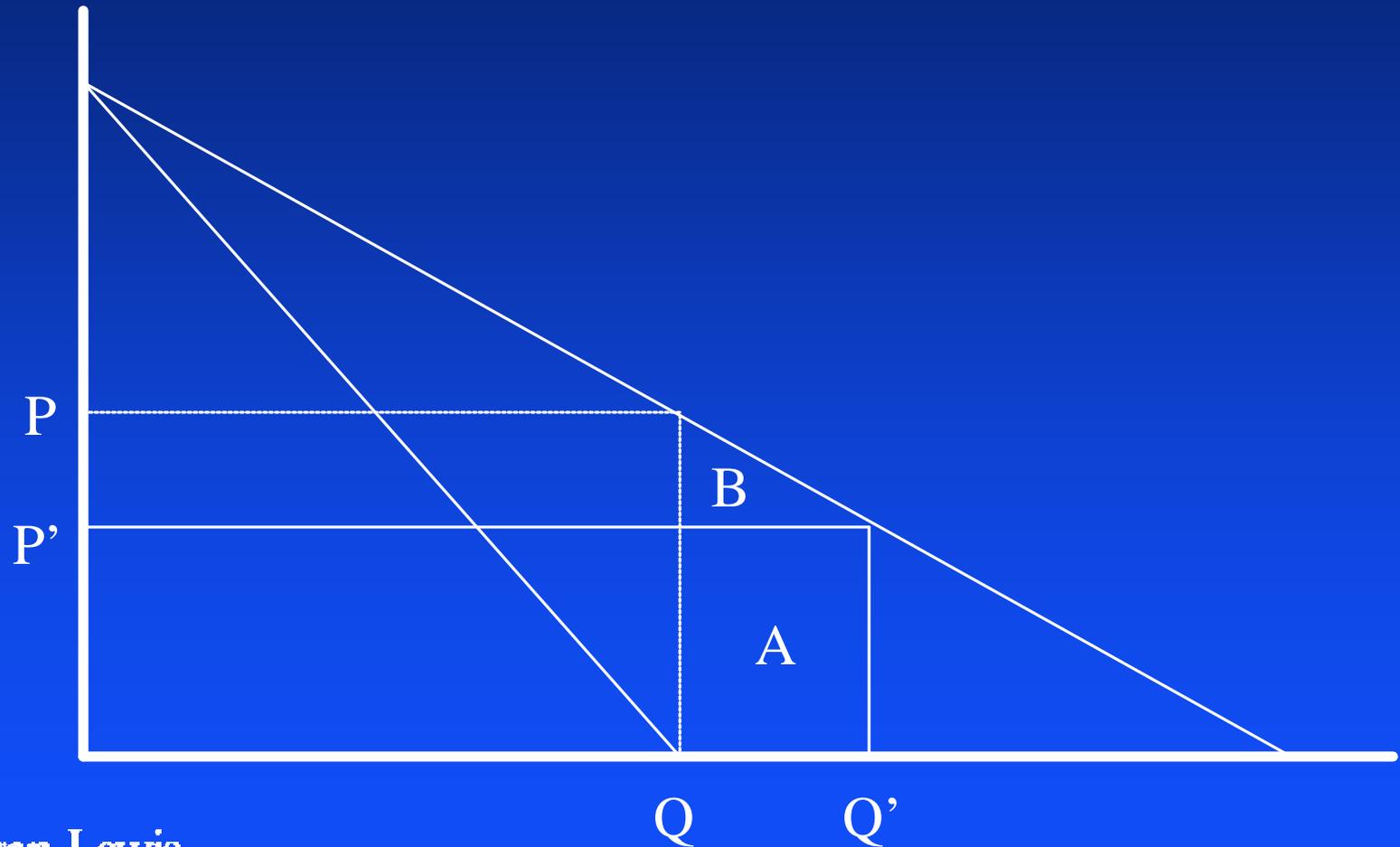
the late William F. Baxter,
President Reagan’s
first antitrust chief

Analysis of Specific Types of Restraints

The Obsolete and Thoroughly Repudiated Nine No-Nos

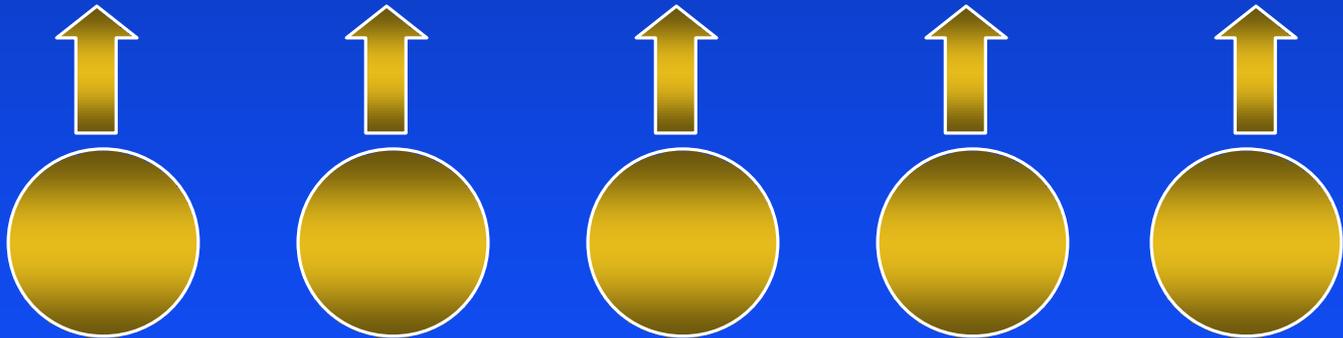
- Tying of Unpatented Supplies
- Mandatory Grantbacks
- Post-sale Restrictions on Resale by Purchasers of Patented Products
- Tie-Outs
- Licensee Veto Power Over the Licensor's Grant of Further Licenses
- Mandatory Package Licensing
- Royalties Not Reasonably Related to Sales
- Restrictions on Sales of Unpatented Products Made by a Patented Process
- Resale Price Maintenance

Tying of Unpatented Supplies

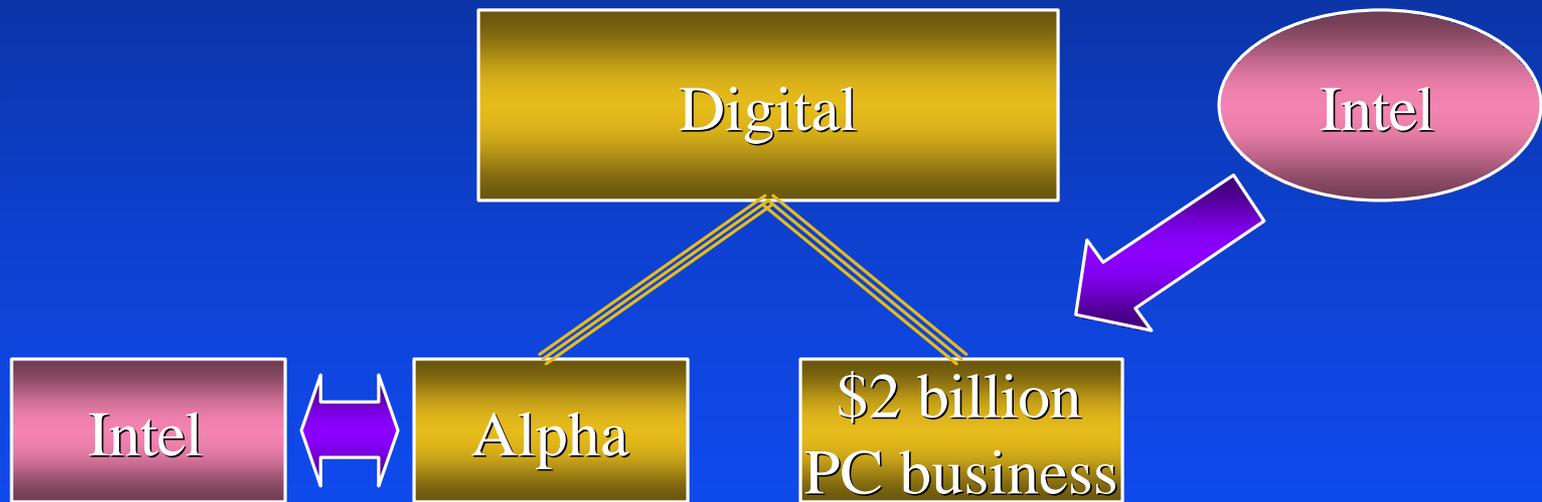


Grantbacks, cont'd

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FTC v. Intel



Intel's Principal Defense

- Patent thicket/ tragedy of the anti-commons

Grantbacks

- Pose problems where they significantly reduce the incentives to innovate of those who could innovate absent the pool.
- Should pose no problems where licensee/grantor could not innovate or sponsor innovation absent license from licensor/grantee.

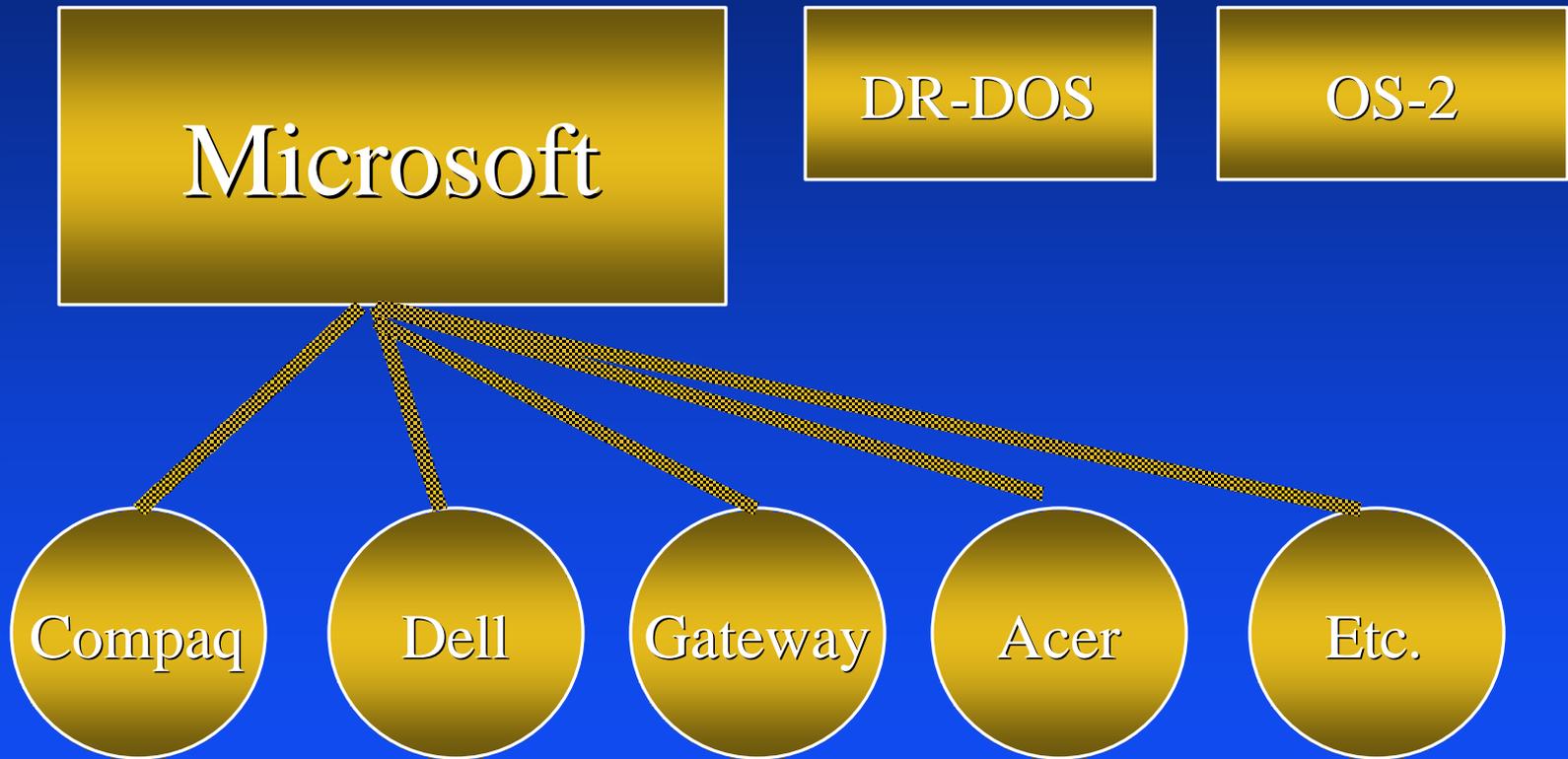
Post-sale Restrictions on Resale

- “First sale doctrine”
- Supremely uninteresting to modern antitrust authorities
- Regarded as a species of price discrimination
- Courts may be more backward, but do allow use to be licensed separately from manufacture and sale.

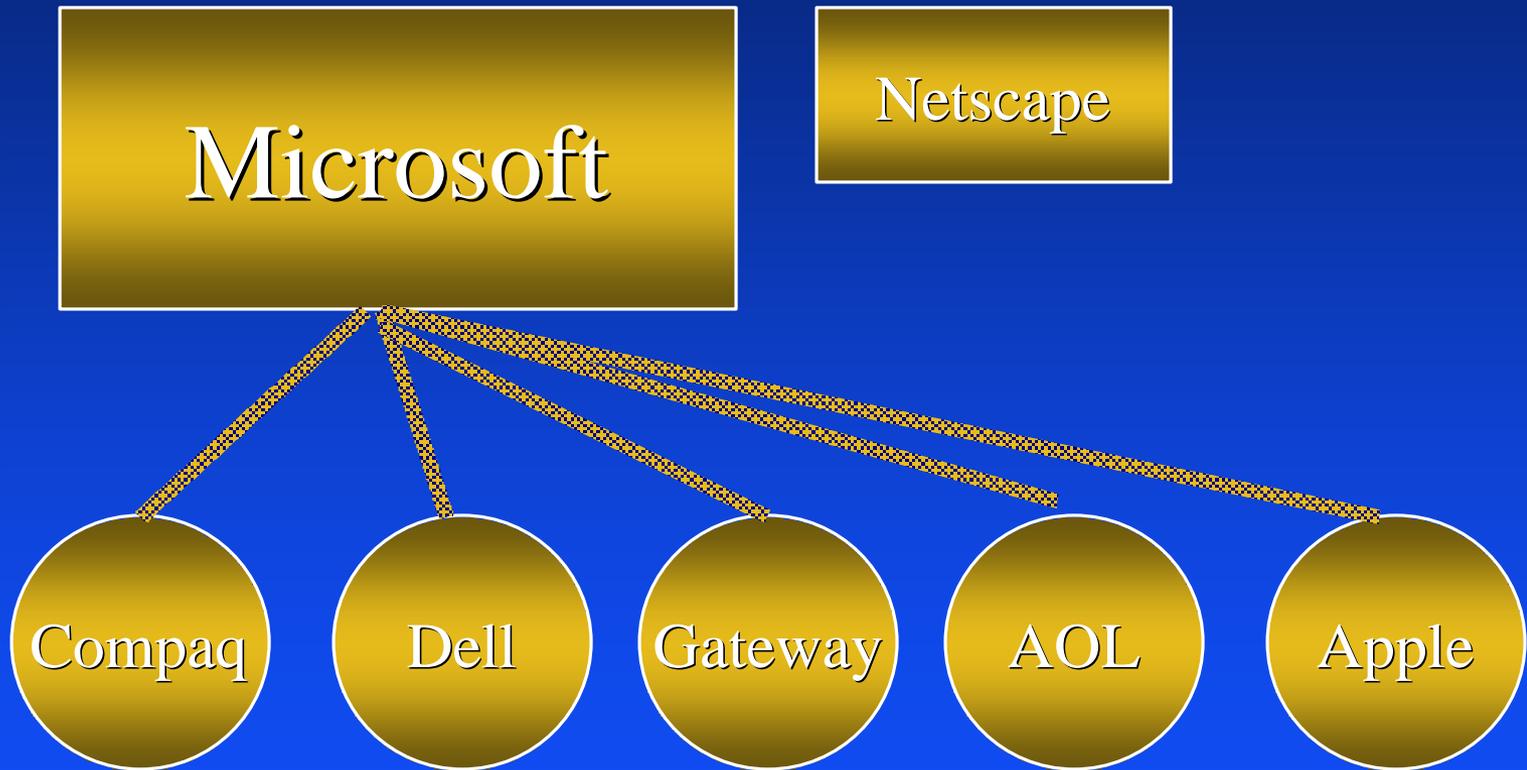
Tie-Outs

- Licensing or selling on the condition that the licensee or purchaser not deal in the products or services of another.
- Typically takes the form of exclusive dealing.

Microsoft I (1995)



Microsoft II



Licensee Veto Power

- Isn't this just another form of exclusive licensing?
- We'll show later on that exclusive licenses can be analyzed like mergers.

Mandatory Package Licensing

- This is a form of tying
- Elements of tying
 - ◆ Separate Products
 - ◆ “Conditioning” or Coercion
 - ◆ Market Power
 - ◆ More Than De Minimis Effect on Commerce

Royalties Not Reasonably Related to Sales

- Metering again
- Zenith: royalties on products that do not use the teaching of the patent
 - ◆ (except for the convenience of the parties)
- Brulotte v. Thys: post-expiration royalties
- Microsoft I

Sales of Unpatented Products Made by a Patented Process

- Depends on what, if any, competition is being restrained.
- Except in the case of resale price maintenance.

Resale Price Maintenance

- U.S. v. General Electric (1926)
- Agencies sympathetic
- Courts have narrowed GE considerably
 - ◆ Multiple licenses w/ parallel price restrictions
 - ◆ Unpatented products of patented processes
 - ◆ Resale prices
 - ◆ Agreements with other licensees or patentees

Patent Settlements

- Issues are similar to pooling and cross-licensing
- Indeed settlements often take the form of pooling, cross-licensing, or merger.

Patentee



Patients



