

2008

Areeda, Epithets, and Essential Facilities.

Spencer W. Waller

Loyola University Chicago, swalle1@luc.edu

Follow this and additional works at: <http://lawcommons.luc.edu/facpubs>



Part of the [Law Commons](#)

Recommended Citation

Waller, Spencer Weber, Areeda, Epithets, and Essential Facilities, 2008 Wisc. L. Rev. 359 (or 360?).

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Faculty Publications & Other Works by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

AREEDA, EPITHETS, AND ESSENTIAL FACILITIES

SPENCER WEBER WALLER*

The late Professor Phillip Areeda's 1990 article "Essential Facilities: An Epithet in Need of Limiting Principles" has had a profound impact on the development of the essential facilities doctrine in antitrust law. Although Areeda was not altogether negative about the essential facilities doctrine, his article has proved to be one of the influential pieces in the canon of antitrust literature and represented the beginning of a counterrevolution in antitrust thought that has left the essential facilities doctrine, charitably speaking, hanging by a thread. This Paper critically reexamines Areeda's analysis of the essential facilities doctrine and suggests that while many of his concerns were valid in the time of its publication, most of his concerns are no longer applicable in today's antitrust climate.

This Paper suggests that infrastructure theory responds to most, if not all, of Areeda's legitimate critiques and creates a sound theoretical basis for an economically based essential facilities doctrine. Infrastructure theory better ties the essential facilities doctrine to related doctrines in other areas of the law and suggests that essential facilities doctrine is one of better, not worse, ideas that antitrust has offered in its one hundred-plus years.

Introduction.....	359
I. The Essential Facilities Doctrine in U.S. Antitrust Law.....	361
II. Professor Areeda's Epithet.....	366
III. The Impact of Epithets.....	368
IV. A Primer on Infrastructure Theory	371
V. Responding to Areeda through an Infrastructure Lens.....	375
Conclusion.....	385

INTRODUCTION

The late Professor Phillip Areeda's 1990 article "Essential Facilities: An Epithet in Need of Limiting Principles"¹ has had a profound impact on the development of the essential facilities doctrine in antitrust law. It has become the intellectual basis for the critique and

* Professor and Associate Dean for Faculty Research, Loyola University Chicago School of Law; Director, Institute for Consumer Antitrust Studies. Thanks to Brett Frischmann for his numerous contributions to the ideas in this Paper, for his permission to draw on our previous work together, and for his own pioneering work on infrastructure theory. Thanks to Lindsay Frank Dansdil and Jillian Brady for their research assistance. The preparation of this Paper was supported by a summer research grant from Loyola University Chicago School of Law.

1. Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1990).

roll back of a doctrine that has been around for approximately the same amount of time as the rule of reason.²

Apart from Areeda's distinguished stature in the antitrust field, there was little reason to think this short essay would represent the start of a sea change in antitrust. The article was a short symposium piece based on a panel discussion held at a fall 1989 program of the American Bar Association (ABA) Antitrust Section. Moreover, Areeda's comments somewhat bucked the trend of the contemporary case law and commentary as well as the remarks of the other panelists.³

Although Areeda was not altogether negative about the essential facilities doctrine, his article has proved to be one of the influential pieces in the canon of antitrust literature and represented the beginning of a counterrevolution in antitrust thought that has left the essential facilities doctrine, charitably speaking, hanging by a thread. The Areeda article has been cited in numerous lower-court cases, discussed in most of the academic commentary and criticism of the essential facilities doctrine, and featured prominently by the United States Supreme Court in the 2004 *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*⁴ decision, which harshly criticized the doctrine in dicta.⁵

This Paper critically reexamines Areeda's analysis of the essential facilities doctrine. It suggests that while many of his concerns were valid in the time of its publication, most of his concerns are no longer applicable in today's antitrust climate. Certain concerns of Areeda's were simply exaggerated. More significantly, many of Areeda's comments have been taken out of context by later critics of the essential facilities doctrine who often had very different agendas than Areeda had at the time.

Part I briefly summarizes the essential facilities doctrine in U.S. antitrust law. Part II then summarizes Areeda's critique of the doctrine. Part III examines how the Areeda critique has been used in the

2. Most commentators trace the history of the essential facilities doctrine to *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912), which was decided one year after *United States v. Standard Oil Co.*, 221 U.S. 1 (1911), the case that established the rule of reason.

3. See Mary L. Azcuenaga, *Essential Facilities and Regulation: Court or Agency Jurisdiction?*, 58 ANTITRUST L.J. 879 (1990); William Blumenthal, *Three Vexing Issues under the Essential Facilities Doctrine: ATM Networks as Illustration*, 58 ANTITRUST L.J. 855 (1990); Stanley M. Gorinson, *Overview: Essential Facilities and Regulation*, 58 ANTITRUST L.J. 871 (1990); Bruce M. Owen, *Determining Optimal Access to Regulated Essential Facilities*, 58 ANTITRUST L.J. 887 (1990).

4. 540 U.S. 398 (2004).

5. *Id.* See generally Spencer Weber Waller, *Microsoft and Trinko: A Tale of Two Courts*, 2006 UTAH L. REV. 741.

subsequent case law and scholarly debate beyond the more limited critique he may have envisioned.

Parts IV and V suggest that an essential facilities doctrine based on infrastructure theory responds to most, if not all, of Areeda's legitimate critiques. Infrastructure theory better ties the essential facilities doctrine to related doctrines in other areas of the law and suggests that the essential facilities doctrine is one of the better, not worse, ideas that antitrust has offered in its one hundred-plus years.

I. THE ESSENTIAL FACILITIES DOCTRINE IN U.S. ANTITRUST LAW

Three Supreme Court cases represent the de facto application of the essential facilities doctrine, although the Court never used the doctrine by name and often applied section 1 of the Sherman Act, not section 2, as the basis of liability. In all three cases, however, the Court held that the refusal of equal and nondiscriminatory access to the facilities of a dominant enterprise constituted a violation of the antitrust laws. In *United States v. Terminal Railroad Association*,⁶ the Court directed the issuance of an injunction requiring the joint operators of the only railroad bridge across the Mississippi River to grant open and equal access to all competitors.⁷ Later, in *Associated Press v. United States*,⁸ the Court required a news-gathering organization to offer nondiscriminatory membership terms to rival news organizations that competed with its existing members.⁹ Finally, the Supreme Court in *Otter Tail Power Co. v. United States*¹⁰ affirmed the grant of an injunction against a regulated power company that refused to transmit power generated by competing companies through its transmission system to municipal distribution systems that wanted to buy cheaper power from the defendant's power-generating competitors.¹¹

The term *essential facilities doctrine* was first coined in 1970 by Professor A.D. Neale in his treatise *The Antitrust Laws of the United States*.¹² Neale used the term to both describe and analyze the line of Supreme Court and lower-court cases that had dealt with the refusal to deal with a competitor by a vertically integrated dominant enterprise.¹³

6. *Terminal R.R. Ass'n*, 224 U.S. at 383.

7. *Id.* at 411-13.

8. 326 U.S. 1 (1945).

9. *Id.* at 18-19.

10. *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

11. *Id.* at 382.

12. A.D. NEALE, *THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA: A STUDY OF COMPETITION ENFORCED BY LAW* (2d ed. 1970).

13. *Id.* at 67.

The term was first used in a court decision in *Hecht v. Pro-Football, Inc.*,¹⁴ a case brought by a group that had unsuccessfully sought an American Football League franchise in Washington, D.C. The plaintiffs lost the franchise, in part, because they were barred from leasing the only suitable stadium for professional football by a restrictive covenant in the lease between the NFL franchise using the stadium and the stadium authority.¹⁵ In *Hecht*, the Court held that the failure to give a jury instruction based on the essential facilities doctrine, along with other errors of law in the instructions and evidentiary rulings, was sufficient to reverse and remand for a new trial.¹⁶ The case was then tried to a jury, which found for the defendant. There was no subsequent appeal.

The standard analysis of the elements for the essential facilities doctrine was set forth in *MCI Communications Corp. v. AT&T Co.*, the 1983 decision of the United States Court of Appeals for the Seventh Circuit.¹⁷ Prior to the landmark 1984 disintegration of the old Bell System, AT&T was a regulated monopolist that controlled the local-phone systems in most markets but faced fledgling competition from MCI and other firms in long-distance markets. MCI alleged an unlawful violation of section 2 of the Sherman Act by AT&T's unjustified failure to interconnect MCI's long-distance traffic to the local-phone systems so the calls could be completed.¹⁸ AT&T argued that its refusal to interconnect was justified on the basis of cream-skimming arguments, technological incompatibility, and lack of regulatory approval.¹⁹ MCI prevailed in a jury trial and won a verdict, which—after trebling, fees, and costs—exceeded two billion dollars.²⁰

The Seventh Circuit affirmed liability for the essential facilities portion of the case and set forth a four-part test that has been widely cited by litigants and courts for imposing antitrust liability for failure to do business with a rival when (1) the monopolist controls access to an essential facility, (2) the facility cannot be reasonably duplicated by the competitor, (3) the monopolist denies access to the competitor, and (4)

14. 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).

15. *Id.* at 982.

16. *Id.* at 992.

17. 708 F.2d 1081, 1132-33 (7th Cir. 1983), *cert. denied*, 464 U.S. 891 (1983).

18. *Id.* at 1096.

19. *Id.* at 1094 n.12.

20. Spencer Weber Waller, *The "New" Law of Monopolization: An Examination of MCI Communications Corp. v. American Telephone & Telegraph Co.*, 32 DEPAUL L. REV. 595, 621 (1982).

it was feasible to grant access.²¹ Other courts have explicitly employed a fifth factor that was implicit in *MCI*, namely, that the defendant lacked a valid business justification for its refusal to deal.²²

While the *MCI* test was widely adopted in the lower courts,²³ actual winning cases remained rare. The courts rarely imposed liability for either damages or injunctive relief, and when they did so, they rarely used the essential facilities doctrine by name, more often imposing liability under other theories.

For example, in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,²⁴ the plaintiffs ultimately prevailed in the Supreme Court but not on the essential facilities doctrine, which had been an alternate theory of liability in the lower courts.²⁵ In *Aspen Skiing*, the defendant controlled three of four ski mountains in Aspen, Colorado.²⁶ The defendant had engaged in a long-standing, popular joint-venture arrangement for lift tickets with the remaining competitor that owned the fourth mountain in the valley.²⁷ The defendant then abruptly terminated the joint venture without a credible business justification.²⁸ The Supreme Court affirmed the verdict for the plaintiff but without addressing the essential facilities test used by the lower court.²⁹

In *Aspen Skiing*, the Supreme Court spoke in more general section 2 terms and relied on the defendant's termination of a successful program that was beneficial to consumers and on the defendant's failure to establish a plausible business justification at trial. The Court further emphasized the defendant's willingness to sacrifice short-term profits in order to injure competition down the road.³⁰

21. *MCI Commc'ns Corp.*, 708 F.2d at 1132. The Seventh Circuit reversed liability on certain other theories and remanded for a new trial on damages. The case subsequently settled for approximately \$115 million. *MCI Settles Antitrust Suits Against AT&T, Six Regionals*, COMPUTERWORLD, Nov. 25, 1985, at 7.

22. See, e.g., *Morris Commc'ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288 (11th Cir. 2004); *United Asset Coverage, Inc. v. Avaya Inc.*, 409 F. Supp. 2d 1008 (N.D. Ill. 2006).

23. See ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 278-84 (5th ed. 2002) (collecting cases).

24. 472 U.S. 585 (1985), *aff'g*, 738 F.2d 1509 (10th Cir. 1984).

25. *Id.* at 611.

26. The defendant never appealed the finding in the lower court that it had monopoly power in a relevant market for downhill skiing in Aspen, Colorado. See *id.* at 596 n.20, 600 n.26.

27. *Id.* at 589-95.

28. *Id.* at 604.

29. *Id.* at 611 n.44.

30. See generally Symposium, *Aspen Skiing 20 Years Later*, 73 ANTITRUST L.J. 59 (2005).

The essential facilities doctrine has never been a plaintiffs' panacea. Actual verdicts using the doctrine by name have been few and far between since *MCI*. Yet, almost alone of theories of antitrust liability, the essential facilities doctrine has come under withering academic criticism, particularly since Areeda's article.³¹

In 2004 the Supreme Court went out of its way to discuss the essential facilities doctrine in the harshest possible terms.³² In *Trinko*, a customer of the incumbent local-phone monopolist brought a private treble-damage class action challenging the dominant firm's discrimination against a competitor, which allegedly resulted in overpriced and inadequate phone service.³³ The Supreme Court ultimately ruled that the plaintiff's only remedies lay under the Telecommunications Act of 1996 and dismissed the antitrust counts.³⁴ Although the remainder of the Court's brief decision was thus dicta,

31. See, e.g., Areeda, *supra* note 1; Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 GEO. L.J. 395, 397-403 (1986); Richard J. Gilbert & Carl Shapiro, *An Economic Analysis of Unilateral Refusals to License Intellectual Property*, 93 PROC. NAT'L ACAD. SCI. 12,749 (1996) (forced licensing of IP equivalent to essential facilities doctrine and normally not welfare enhancing); Keith N. Hylton, *Economic Rents and Essential Facilities*, 1991 B.Y.U. L. REV. 1243; Allen Kezsbom & Alan V. Goldman, *No Shortcut to Antitrust Analysis: The Twisted Journey of the "Essential Facilities" Doctrine*, 1996 COL. BUS. REV. 1; Abbott B. Lipsky & Gregory Sidak, *Essential Facilities*, 51 STAN. L. REV. 1187 (1999) (no coherent rationale for the doctrine); Paul D. Marquandt & Mark Leddy, *The Essential Facilities Doctrine and Intellectual Property Rights: A Response to Pitofsky, Patterson & Hooks*, 70 ANTITRUST L.J. 847 (2003); David McGowan, *Regulating Competition in the Information Age: Computer Software as an Essential Facility under the Sherman Act*, 18 HASTINGS COMM. & ENT. L.J. 771 (1996); Gregory J. Werden, *The Law and Economics of the Essential Facility Doctrine*, 32 ST. LOUIS U. L.J. 433 (1987); David J. Gerber, Note, *Rethinking the Monopolist's Duty to Deal: A Legal and Economic Critique of the Doctrine of "Essential Facilities"*, 74 VA. L. REV. 1069 (1988); Note, *Unclogging the Bottleneck: A New Essential Facility Doctrine*, 83 COLUM. L. REV. 441 (1983) (claiming that the essential facilities doctrine is not applied with principled consistency and arguing for a narrower rule-of-reason version of the doctrine with additional defenses for incumbent firms). *But see* LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 124-30 (2d ed. 2006) (supporting the doctrine for jointly operated facilities and supporting a more limited version of the doctrine for unilaterally controlled essential facilities); Robert Pitofsky, Donna Patterson & Jonathan Hooks, *The Essential Facilities Doctrine under U.S. Antitrust Law*, 70 ANTITRUST L.J. 443, 462 (2002) (endorsing the doctrine as currently defined); James R. Ratner, *Should There Be an Essential Facility Doctrine?*, 21 U.C. DAVIS L. REV. 327 (1988) (supporting a narrowly defined version of the doctrine); Glen O. Robinson, *On Refusing to Deal with Rivals*, 87 CORNELL L. REV. 1177 (2002) (endorsing the essential facilities doctrine in lieu of a broader general duty to deal for monopolists).

32. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

33. *Id.* at 404-05.

34. *Id.* at 415-16.

Trinko went on to discuss, and nearly reject, the essential facilities doctrine. The court stated,

This conclusion would be unchanged even if we considered to be established law the “essential facilities” doctrine crafted by some lower courts, under which the Court of Appeals concluded respondent’s allegations might state a claim. We have never recognized such a doctrine, and we find no need either to recognize it or to repudiate it here. It suffices for present purposes to note that the indispensable requirement for invoking the doctrine is the unavailability of access to the “essential facilities”; where access exists, the doctrine serves no purpose. Thus, it is said that “essential facility claims should . . . be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms.” Respondent believes that the existence of sharing duties under the 1996 Act supports its case. We think the opposite: The 1996 Act’s extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access. To the extent respondent’s “essential facilities” argument is distinct from its general § 2 argument, we reject it.³⁵

Despite this part of *Trinko* constituting dicta, all subsequent essential facilities doctrine cases denominated as such have been unsuccessful either because of the regulated nature of the facility under question or the failure of the plaintiff to satisfy one of the traditional *MCI* standards for the doctrine.³⁶ The shift from doctrine to epithet envisioned by *Areeda* appears largely complete.

35. *Id.* at 410–11 (quoting 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 773e (2d ed. 2000)).

36. For cases at the appellate level, see *Gregory v. Fort Bridger Rendezvous Ass’n*, 448 F.3d 1195, 1204–05 (10th Cir. 2006); *Stein v. Pacific Bell*, 172 F. App’x. 192 (9th Cir. 2006); *ASAP Paging Inc. v. CenturyTel of San Marcos Inc.*, 137 F. App’x. 694 (5th Cir. 2005); *Covad Commc’ns Co. v. Bell Atl. Corp.*, 407 F.3d 1220, 1222 (D.C. Cir. 2005). *But see LinkLine Commc’ns, Inc. v. SBC Cal., Inc.*, 503 F.3d 876, 884–85 (9th Cir. 2007) (holding that the plaintiffs stated a claim under a different price-squeeze theory); *In re Elevator Antitrust Litig.*, 502 F.3d 47, 52, 54 (2d Cir. 2007) (dismissing a class action for failure to state a cause of action but holding open the possibility of a cause of action if the defendant had terminated a prior course of dealing).

II. PROFESSOR AREEDA'S EPITHET

Much of the functional demise of the essential facilities doctrine can be attributed to the arguments raised by Areeda. More than any other author, Areeda succeeded in making the essential facilities doctrine a dirty word in antitrust. But many courts and commentators have relied on an unnuanced reading of his words in a manner beyond what he may have intended.

As previously mentioned, Areeda's article arose out of his participation in a fall 1989 National Institute presented by the ABA Antitrust Section entitled "The Cutting Edge of Antitrust: Exclusionary Practices." The essential facilities panel was one of a number of different panels on different topics, and Areeda was one of five distinguished speakers.³⁷ The papers from the Institute were then published by the *Antitrust Law Journal*, the peer-review journal published by the Antitrust Section of the ABA.

Areeda critiqued first and foremost "judging by catch phrase."³⁸ He described three stages for such cases: (1) an extreme case to which the courts respond, (2) the application mechanically and creatively by subsequent courts to expand the doctrine, and (3) the expansion becoming ridiculous and beginning to cut back.³⁹

Areeda characterized the essential facilities doctrine as it existed in 1989 as in the expansionary second phase. He distinguished the early Supreme Court cases such as *Terminal Railroad* and *Associated Press* as involving multifirm combinations and therefore not based on monopolization principles. He then analyzed the limited Supreme Court cases arguably on point that relied on section 2 of the Sherman Act and either distinguished or limited them.⁴⁰ He argued for the need for caution in imposing liability on an essential facilities doctrine theory, particularly in the section 2 context, and for the need to allow a defense based on legitimate business justifications.

He concluded by offering six principles:

- (1) There is no general duty to share. Compulsory access, if it exists at all, is and should be very exceptional.
- (2) A single firm's facility, as distinct from that of a combination, is "essential" only when it is both critical to the plaintiff's

37. See *supra* note 3.

38. Areeda, *supra* note 1, at 841.

39. *Id.*

40. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600 (1985); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 382 (1973); *United States v. Griffith*, 334 U.S. 100 (1948).

competitive vitality and the plaintiff is essential for competition in the marketplace. “Critical to the plaintiff’s competitive vitality” means that the plaintiff cannot compete effectively without it and that duplication or practical alternatives are not available. (3) No one should be forced to deal unless doing so is likely substantially to improve competition in the marketplace by reducing price or by increasing output or innovation. Such an improvement is unlikely when (a) it would chill desirable activity; (b) the plaintiff is not an actual or potential competitor; (c) when the plaintiff merely substitutes itself for the monopolist or shares the monopolist’s gains; or (d) when the monopolist already has the usual privilege of charging the monopoly price for its resources. (4) Even when all these conditions are satisfied, denial of access is never per se unlawful; legitimate business purpose always saves the defendant. What constitutes legitimacy is a question of law for the courts. Although the defendant bears the burden of coming forward with a legitimate business purpose, the plaintiff bears the burden of persuading the tribunal that any such claim is unjustified. (5) The defendant’s intention is seldom illuminating, because every firm that denies its facilities to rivals does so to limit competition with itself and increase its profits. Any instruction on intention must ask whether the defendant had an intention to exclude by improper means. To get ahead in the marketplace is not itself the kind of intention that contaminates conduct. (6) No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irreparable by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency. Remedies may be practical when (a) admission to a consortium is at stake, especially at the outset, (b) divestiture is otherwise appropriate and effective, or (c) as in *Otter Tail*, a regulatory agency already exists to control the terms of dealing. However, the availability of a remedy is not reason to grant one. Compulsory sharing should remain exceptional.⁴¹

And he accomplished all this in a grand total of twelve printed pages!⁴²

41. *Areeda*, *supra* note 1, at 852–53.

42. Professor Areeda had a habit of using symposium pieces to develop short expositions of ideas and responses to current developments to get them into print

III. THE IMPACT OF EPITHETS

Areeda's written remarks, although brief, have had a powerful influence on the cut back and near extinction of the essential facilities doctrine. His article has been cited in subsequent lower-court cases⁴³ as well as the Supreme Court's key *Trinko* decision.⁴⁴ It has become a de rigeur cite for any subsequent article in the field, particularly for a critique of the doctrine.⁴⁵

His original conception was, however, more limited and less conceptual. In the 1978 first edition of his treatise, Areeda dealt with refusals to deal by monopolists principally in two places, without seeking to deal comprehensively with the essential facilities doctrine by name, which was just beginning to develop. First, he discussed the leading Supreme Court cases on refusals to deal under the heading of price-and-supply-squeeze cases by vertically integrated firms. He approved *Otter Tail* but found it unique its terms of its partially regulated status and the availability of a regulatory agency to implement the injunction. In light of these two facts, he simply concluded that *Otter Tail* should "properly be confined to its peculiar facts."⁴⁶ He analyzed *Terminal Railroads* and *Associated Press* as combinations of competitors, not a single monopolist, and thus not relevant to the duties of a unified integrated monopolist.⁴⁷ Later in the treatise he also dealt with *Associated Press* under the rubric of "arbitrary refusals to deal" and briefly concluded that *Associated Press* was sui generis and that

quickly in order to influence the current debates. William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 56 (describing other short publications by Areeda designed to influence timely issues of antitrust policy). Perhaps Areeda would have been a frequent blogger using today's technology to accomplish the same goal.

43. *Metronet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1133 (9th Cir. 2004); *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1088 (D.C. Cir. 1998); *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1412 (7th Cir. 1995); *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 971 n.19 (10th Cir. 1994); *Ala. Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 542 (9th Cir. 1991); *Universal Analytics, Inc. v. MacNeal-Schwendler Corp.*, 914 F.2d 1256, 1258 (9th Cir. 1990); *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 761 F. Supp. 185, 188 (D. Mass. 1991).

44. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415 (2004).

45. A November 2007 Westlaw search of the "journals/law reviews" database indicated over 150 citations in the academic literature.

46. 3 PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 729e (1978).

47. *Id.* ¶ 729g.

such refusals were better dealt with through the common law or the enactment of new legislation.⁴⁸

This analysis was adopted and extended by Professor Herbert Hovenkamp in the second edition of the treatise, which he took over from Areeda, into an even-more extensive critique. Areeda's six conditions from his 1990 article grew to ten even-more rigorous conditions before the treatise would impose an open-access obligation on a dominant firm controlling an essential facility.⁴⁹ The list in the second edition concluded,

In sum, the "essential facility" doctrine responds to the monopoly problem by forced sharing of a monopoly facility. By contrast, and at a more general level, the *antitrust* approach to the monopoly problem is to remove market clogs that prevent the plaintiff from developing its own facility independently.⁵⁰

Hovenkamp's own views appear to have evolved even further, and in his 2006 monograph, *The Antitrust Enterprise*, he argued,

While not stating it in so many words, *Trinko* may effectively have brought the era of antitrust essential facility claims to an end, certainly in regulated industries where an agency is actively supervising the conduct that forms the basis of an antitrust claim. If so, that would be an important step in our recognition that competition is not regulation, and federal courts are not regulatory agencies.⁵¹

Many other critics have also gone well beyond anything Areeda stated, and they have argued for the abolition of the essential facilities doctrine in ways and situations where it is not clear that Areeda necessarily would have agreed.⁵²

It should be noted that Areeda was commenting at perhaps the high point of the essential facilities doctrine. Then and now, there were some truly silly cases being alleged. But it is equally important to remember that even then the plaintiffs rarely convinced a court that the facility in question was "essential." Even where a court was convinced that facility was essential, liability was almost always affirmed or denied on different grounds. The essential facilities doctrine,

48. *Id.* ¶ 736d–e.

49. AREEDA & HOVENKAMP, *supra* note 35, ¶ 773a.

50. *Id.*

51. HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE* 248 (2005).

52. *See supra* note 31 and accompanying text.

particularly in the more egregious cases, appears to be make-weight arguments in most cases or quickly rejected on the merits in the vast majority of cases.

Areeda offered six examples of the absurdity of the expansion of the essential facilities doctrine. In fact, the defendant won all but one of those cases. In *Flip Side Productions, Inc. v. Jam Productions, Ltd.*,⁵³ the court affirmed the district-court grant of summary judgment to the defendants on the essential facilities claim.⁵⁴ In *Olympia Equipment Leasing Co. v. Western Union Tel. Co.*,⁵⁵ the Seventh Circuit reversed a judgment for the plaintiff on the theory that the defendant was under no obligation to affirmatively assist a competitor.⁵⁶ In *Twin Laboratories, Inc. v. Weider Health & Fitness Corp.*,⁵⁷ the United States Court of Appeals for the Second Circuit affirmed summary judgment for the defendant and rejected essential facility claims by a competitor in the body-building-nutritional-supplements business to advertise in a dominant firm's wholly owned magazine.⁵⁸ In that case, the competitor had access to forms of other media for advertising its products, including starting its own competing magazine.⁵⁹ In *Florida Fuels, Inc. v. Belcher Oil Co.*,⁶⁰ the district court rejected the plaintiff's essential facility claim because the plaintiff failed to establish that its competitor's storage tanks at the port in question were an essential facility incapable of duplication by the plaintiff.⁶¹ *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*⁶² ultimately went to the Supreme Court, only to have the Court hold that the plaintiff's exclusion from a buying cooperative be judged under the rule of reason, with the case having little to do with the essential facilities doctrine in the first place.⁶³ Similarly, *Jefferson Parish Hospital District v. Hyde*⁶⁴ became a landmark tying-and-exclusive-dealing case in the

53. 843 F.2d 1024 (7th Cir. 1988), *cert. denied*, 488 U.S. 909 (1988).

54. *Id.* at 1032.

55. 797 F.2d 370 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987).

56. *Id.* at 383.

57. 900 F.2d 566 (2d Cir. 1990).

58. *Id.* at 569.

59. *Id.* At the time of the Professor Areeda article only the district-court opinion, 720 F. Supp. 31 (S.D.N.Y. 1989), was available.

60. 717 F. Supp. 1528 (S.D. Fla. 1989).

61. *Id.* at 1533.

62. 472 U.S. 284 (1985).

63. *Id.* at 298. There are no further reported opinions in the case suggesting that the plaintiff abandoned its rule-of-reason claims or settled. Any settlement would likely be for a minor sum given the weakness of the plaintiff's claim after the Supreme Court opinion.

64. 466 U.S. 2 (1984).

Supreme Court. But again the defendant won, and the essential facilities doctrine played no part in the final resolution of the case.⁶⁵

Only in *Aspen Skiing* did the plaintiff actually win its case, and even there the verdict was affirmed on a different theory in the Supreme Court, which wisely chose to avoid dealing with the case under the essential facilities doctrine.⁶⁶ Thus, a compelling case could be made that Areeda was making a mountain out of a molehill, and that molehill has only shrunk in the intervening years.

However, Areeda was doing more than contending that a valid theory was being misalleged by a plaintiff or misapplied by the courts. He was contending that the cause of action itself was fundamentally flawed unless carefully limited by the principles he enunciated. His measured criticisms were used subsequently to justify getting rid of the essential facilities doctrine almost entirely, even in the area of regulated industries where Areeda conceded it had the most validity. To provide a counterweight to these important criticisms and to rehabilitate the essential facilities doctrine, a persuasive theory is needed that explains why the essential facilities doctrine in the proper case helps promote the competitive process. When Areeda was writing, no such theory existed. But now infrastructure theory helps fill that void.

IV. A PRIMER ON INFRASTRUCTURE THEORY

Infrastructure theory⁶⁷ adds a demand-side component to the traditional supply-side considerations that underlie the essential facilities doctrine. The term *infrastructure* generally conjures up the notion of physical resource systems made by humans for public consumption. A list of common examples includes (1) transportation systems, such as highway and road systems, bridges, railways, airline systems, and ports; (2) communication systems, such as telephone networks and postal services; (3) governance systems, such as court systems; and (4) basic public services and facilities, such as schools, sewers, and water

65. *Id.* at 31–32.

66. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 611 (1985), *aff'g*, 738 F.2d 1509 (10th Cir. 1984).

67. Thanks to Brett Frischmann, the developer of infrastructure theory, for his permission to draw on his insights and pioneering work. This Part is drawn with some revisions from Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917 (2005), and Spencer Weber Waller & Brett M. Frischmann, *Revitalizing Essential Facilities*, 75 ANTITRUST L.J. 1 (2008). For additional applications of the notion of infrastructure and spillovers outside the field of antitrust, see Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257 (2007), and Brett M. Frischmann & Barbara van Schewick, *Network Neutrality and the Economics of an Information Superhighway: A Reply to Professor Yoo*, 47 JURIMETRICS 383 (2007).

systems. However, for this purpose the key feature of all types of infrastructure resources is that they generate value as inputs into a wide range of productive processes, often supporting many uses, applications and downstream markets.⁶⁸

Two additional points about infrastructure are worth noting. First, the government has played and continues to play a significant and widely accepted role in ensuring the provision of many infrastructure resources.⁶⁹

Second, traditional infrastructures generally are managed in an openly accessible manner. They are managed such that the resources are accessible to members of a community who wish to use the resources on nondiscriminatory terms. This does not mean that access to the resource is unregulated. The use of the highways and the postal system are heavily regulated. Other aspects of infrastructure are more lightly regulated. In either situation, the infrastructure resource typically is openly accessible to all on nondiscriminatory terms regardless of the identity of the end user or the end use.⁷⁰

Nor does it mean access to infrastructure is free: We pay tolls to access highways. We buy stamps to send letters. We are billed for electrical service. We pay telephone companies to have our calls routed across their lines. And so on.

Managing infrastructure in this fashion makes economic sense. The general value of this management regime is that it maintains openness, does not discriminate among users or uses of the resource, and eliminates the need to obtain approval or a license to use the resource. As a general matter, managing infrastructure resources in this fashion eliminates the need to rely on either market actors or the government to “pick winners” downstream. This facilitates competition downstream, innovation and experimentation with new uses, and often the generation of positive externalities that result in large social gains (i.e., spillovers).⁷¹

68. Frischmann, *supra* note 67, at 923–24.

69. While private parties and markets play an increasingly important role in providing many types of traditional infrastructure due to a wave of privatization, as well as cooperative ventures between industry and government, the government’s position as provider, coordinator, subsidizer, and/or regulator of traditional infrastructure provision remains intact in the United States and most communities throughout the world. If anything, the wave of privatization should be associated with more, not less, need for the essential facilities doctrine, as infrastructure once held in government hands is now private. Oddly, the law is moving in the opposite direction. *See* Waller & Frischmann, *supra* note 67, at Part I.B. Moreover, the Supreme Court seems to be reviving previously disfavored doctrines of implied immunity. *See Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007).

70. Frischmann, *supra* note 67, at 925.

71. *See id.*; Frischmann & Lemley, *supra* note 67.

The infrastructure resources that historically have been available on nondiscriminatory terms tend to satisfy the following demand-side criteria: (1) the resource may be consumed nonrivalrously; (2) social demand for the resource is driven primarily by downstream productive activity that requires the resource as an input; and (3) the resource is used as an input into a wide range of goods and services, including private goods, public goods, and/or nonmarket goods.⁷²

Traditional infrastructure, such as roadways, telephone networks, and electricity grids, satisfy this definition, as do a wide range of resources not traditionally considered as infrastructure resources, such as lakes, ideas, certain software platforms, and the Internet.

The first criterion describes the “sharable” nature of infrastructure resources. Infrastructure is sharable in the sense that the resources can be accessed and used by multiple users at the same time. Infrastructure resources vary in their capacity to accommodate multiple users, and this variance in capacity differentiates nonrivalrous (infinite-capacity) resources from partially (non)rival (finite-but-renewable-capacity) resources. Simply put, nonrivalry opens the door to widespread access and productive use of the resource. For nonrivalrous resources of infinite capacity, the marginal costs of allowing an additional person to access the resource are zero.

For partially (non)rival resources of finite capacity, the cost-benefit analysis is more complicated because of the possibility of congestion through competing uses and users. These resources may be consumed nonrivalrously or rivalrously depending on the conditions, such as how the resource is managed, the number of users, and the available capacity. Congestion problems can be overcome through management choices, such as expansion of capacity or regulation by the market (i.e., price), the government (i.e., command and control), norms, or even technology.⁷³

The second and third criteria illustrate how infrastructure resources create social value. The second criterion emphasizes that infrastructure resources are intermediate goods that create social value when utilized productively downstream and that such use is the primary source of the social benefits. In other words, while some infrastructure resources may be consumed directly to produce immediate benefits, most of the

72. Frischmann, *supra* note 67, at 956.

73. If a particular asset was fully congested and could not accommodate additional users, this would be a defense under the fourth prong of *MCI*, the other traditional formulations of the essential facilities doctrine, or Professor Areeda’s fifth conclusion that a business-justification defense should be available to defendants. *MCI Comm’ns Corp. v. AT&T Co.*, 708 F.2d 1081 (7th Cir. 1983), *cert. denied*, 464 U.S. 891 (1983); Areeda, *supra* note 1, at 852–53. Nothing in infrastructure theory would change this result.

value derived from the resources results from productive use rather than consumption.⁷⁴

The third criterion emphasizes both the variance of downstream outputs (i.e., the genericness of the input) and the nature of those outputs (particularly, public goods and nonmarket goods). The reason for emphasizing variance and the production of public goods and nonmarket goods downstream is that when these criteria are satisfied, the social value created by allowing additional users to access and use the resource may be substantial but extremely difficult to measure. The information problems associated with assessing demand for the resource and valuing its social benefits plague both infrastructure suppliers and users where users are using the infrastructure as an input to produce public goods or nonmarket goods. This is an information problem that is pervasive and not easily solved.⁷⁵

From an economic perspective, it makes sense to manage certain infrastructure resources in an openly accessible manner because doing so permits a wide range of downstream producers of private, public, and nonmarket goods to flourish. As Professor Yochai Benkler has noted, “The high variability in value of using both transportation and communications facilities from person to person and time to time have made a commons-based approach to providing the core facilities immensely valuable.”⁷⁶

Purely commercial infrastructure resources are used to produce private goods. Basic manufacturing processes, such as die casting, milling, and the concept of the assembly line, are all nonrivalrous inputs into the production of a wide variety of private manufactured goods. Similarly, basic agricultural processes and food-processing techniques are nonrivalrous inputs into the production of a wide variety of private agricultural goods and foodstuffs. Many commercial-infrastructure resources are used productively by suppliers purely as a delivery mechanism for manufactured goods, agricultural goods, foodstuffs, and many other commercial products. Ports, for example, act as an infrastructural input into the delivery of a wide range of private goods. Similarly, the Internet and highway systems are mixed infrastructures used by a wide range of suppliers to delivery private goods and services. The Internet and highway systems, in contrast to

74. Frischmann & Lemley, *supra* note 67, at 273.

75. Frischmann, *supra* note 67, at 988–89.

76. Yochai Benkler, *Property, Commons, and the First Amendment: Towards a Core Common Infrastructure* 47–48 (White Paper for the Brennan Center for Justice) (2001), available at <http://www.benkler.org/WhitePaper.pdf>. See generally YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006).

ports, also are used as inputs to support a wide range of other socially valuable activities.

Public- and social-infrastructure resources are used to produce public goods and nonmarket goods. For both public and social infrastructure, the ability of competitive output markets to effectively generate and process information regarding demand for the required input is less clear than in the case of commercial infrastructure. Infrastructure users that produce public goods and nonmarket goods suffer valuation problems because they generally do not fully measure or appropriate the (potential) benefits of the outputs they produce and consequently do not accurately represent actual social demand for the infrastructure resource. Instead, for public and social infrastructure, demand generated by competitive output markets will tend to reflect the individual benefits realized by a particular user and not take into account positive externalities enjoyed by society as a whole. Difficulties in measuring and appropriating value generated in output markets translates into a valuation/measurement problem for infrastructure suppliers, who will not fully take into account, or provide the services for, the broader set of social benefits attributable to downstream producers of public or nonmarket goods.⁷⁷

Most infrastructure represents some combination of commercial, public, and social goods. For example, the Internet is a combination of all three types of infrastructure and is thus a mixed infrastructure. The analytical advantage of this general categorization schema is that it provides a means for understanding the social value generated by these infrastructure resources, identifying different types of market failures, and formulating the appropriate rules to correct such failures. But as Professor Brett Frischmann's typology shows, the issue of open access to infrastructure is ubiquitous and creates an important lens to address the essential facilities doctrine and other legal doctrines of open access.

V. RESPONDING TO AREEDA THROUGH AN INFRASTRUCTURE LENS

Few scholars have directly engaged Areeda's core critiques that the essential facilities doctrine lacked any theoretically sound limiting principle and in practice could not be applied by the courts.⁷⁸ An infrastructure lens best shows which of Areeda's criticisms are

77. Frischmann, *supra* note 67, at 988–89.

78. *But see* Merrill Hirsch & Gabriela A. Richeimer, *The Essential Facilities Doctrine: Keeping the Word "Epithet" from Becoming One* (Social Science Research Network, Working Paper, 2003), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=389200 (arguing that Professor Areeda misconstrued existing law and that his critique nonetheless supported liability for the denial of an essential facility by a regulated monopolist).

misplaced or overblown and which hit the mark. But they can be addressed through an infrastructure-based essential facilities doctrine.

Areeda's first conclusion was that compulsory access should be "very exceptional."⁷⁹ With one reformulation and one quibble, nothing in infrastructure theory would change this basic baseline. The reformulation is that the issue is not "compulsory access" but when competition and society would benefit from a regime of "open access." The quibble is that under infrastructure theory, open access would remain exceptional but not very exceptional. Regardless of semantics, there will be times when the presence of demonstrable, but hard to measure, downstream spillovers provide an economic basis for requiring access on a nondiscriminatory basis and for the imposition of antitrust liability when a monopolist denies access to the infrastructure under its control.

Areeda's second conclusion was that a single firm's facility, as distinct from that of a combination, should be deemed essential when it is both critical to the plaintiff's competitive vitality and the plaintiff is essential to competition in the marketplace. Areeda further added the qualification that "critical to the plaintiff's competitive vitality" means that the plaintiff cannot compete effectively without it and that duplication or practical alternatives are not available.⁸⁰

From an infrastructure perspective, this is half right. Whether a single firm or a combination of firms control the infrastructural assets should be irrelevant. The critical distinction is that if the facility truly constitutes infrastructure, then nondiscriminatory access should be the norm. At the same time, the very definition of infrastructure means that questions of open access would not arise in the first place if the plaintiff can compete without access to the defendant's facility or can duplicate that facility for itself.

Areeda's third conclusion is the most complex and the most difficult to unpack. Here he stated,

No one should be forced to deal unless doing so is likely substantially to improve competition in the marketplace by reducing price or by increasing output or innovation. Such an improvement is unlikely (a) when it would chill desirable activity; (b) the plaintiff is not an actual or potential competitor; (c) when the plaintiff merely substitutes itself for the monopolist or shares the monopolist's gains; or (d) when

79. Areeda, *supra* note 1, at 852.

80. *Id.*

the monopolist already has the usual privilege of charging the monopoly price for its resources.⁸¹

Areeda's reference to not chilling desirable activity appears to go to the question of incentives. Like many critics after him, Areeda appears to have been concerned that the essential facilities doctrine could distort the incentives of incumbents to build out their facilities and the incentives of challengers to do the same rather than free riding on the incumbent's prior investments.⁸²

Both incumbents and new entrants will have sufficient incentives to innovate and invest under an infrastructure-based essential facilities doctrine.⁸³ Most infrastructure does not arise fully formed, nor is it often the product of purely private investment decision. Often infrastructure is the product of a governmental grant, subsidy, or regulation, and the incumbent is rewarded for whatever part of the infrastructure is the product of private investment and risk taking. Moreover, under this proposal, the incumbent would continue to be compensated for access to its infrastructure at whatever price it receives from other users. In addition, the period of nondiscriminatory paid-for access would be limited to the period where the facility constitutes infrastructure within the meaning of the theory. Incentives would be unaffected prior to the facility evolving into true infrastructure and after it ceases to qualify as infrastructure.⁸⁴ Thus, an infrastructure-based essential facilities doctrine should continue to provide sufficient incentives to both incumbents and entrants to develop infrastructure and its alternatives.

Finally, infrastructure theory actually supports open and nondiscriminatory as a remedy, even if the incumbent firm charges a monopoly price. While price clearly matters, and a competitive price will clearly produce more social benefit than a monopoly price, even access at the existing monopoly price helps. Remember, the question is nondiscriminatory access and the denial of access by a monopolist who

81. *Id.* (citations omitted). Nothing in infrastructure theory would affect Professor Areeda's requirement that the plaintiff be an actual or potential competitor of the defendant. This is the current state of the law and would be unaffected by an infrastructure approach.

82. For a particularly cogent recent analysis of the question of incentive and investment, see Ashwin van Rooijen, *The Role of Investments in Refusals to Deal*, 31 *WORLD COMP. L. & ECON. REV.* (forthcoming 2008).

83. Waller & Frischmann, *supra* note 67, at Part V.B.1.

84. For example, there was a substantial period of time before local telephony evolved into infrastructure under the theory requiring a regime of open, but paid for, nondiscriminatory access. Similarly, a person can envision a future where local telephony ceases to function in this manner because of technological innovation and the migration to a more complete wireless-communications platform.

refuses to do business with a competitor/customer at any price. Requiring open access at whatever price the monopolist charges other current customers nonetheless will help expand output in the downstream market that it serves and occasionally at the infrastructure level as well.

Consider *MCI* as the archetypical infrastructure case.⁸⁵ AT&T refused to provide MCI with access to its local loop at any price.⁸⁶ If it granted access at the regulated price or even an unregulated monopoly price, the total long-distance-telephone market would be increased by the increase of new, cheaper MCI microwave long-distance traffic minus the loss of the more expensive hard-wire AT&T long-distance calls foregone.⁸⁷ Standard price theory predicts that there should be a net increase in output and consumer welfare in this situation. But at the same time, if the net amount of long-distance traffic increases, then, by definition, net local telephony will increase, since the local loop is a component of every long-distance call and there is no evidence that customers substitute long distance for local calling.

The fourth conclusion is the easiest to deal with because it is uncontroversial. Areeda argued that firms should always have the ability to argue that a legitimate business justification justified their refusal to deal.⁸⁸ This is largely already part of the existing essential facilities doctrine and would be unaffected by the adoption of infrastructure theory in place of the current textual and seat-of-the-pants approach to what is essential.

For example, if either AT&T's or Aspen Skiing's proffered business justifications had not been found to be pretextual, no liability would have ensued.⁸⁹ Similarly, other defendants have escaped liability under the essential facilities doctrine and more general monopolization law where denial of access was based on capacity constraints, contractual liability, technological incompatibility, and similar provable business justifications.⁹⁰ There appears to be no case where a defendant was held liable for failing to grant access to a competitor when it literally could not do so without rationing access to others. To the extent that infrastructure theory directly addresses this issue, it does so by limiting the concept of infrastructure to those assets which are shareable and thus unlikely to raise this issue.

85. *MCI Commc'ns Corp. v. AT&T Co.*, 708 F.2d 1081 (7th Cir. 1983), *cert. denied*, 464 U.S. 891 (1983).

86. *Id.* at 1095-96.

87. *Id.* at 1099.

88. Areeda, *supra* note 1, at 852.

89. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608 (1985); *MCI Commc'ns Corp.*, 708 F.2d at 1081.

90. *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980).

Similarly, Areeda's caution against relying on the intent of the defendant⁹¹ has little to do with an infrastructure-based essential facilities doctrine. The defendant's intent would have little to do with whether the defendant controlled infrastructure within the definition set forth or whether the facility is used as an input in downstream activities that generate the spillovers justifying a regime of open access in the first place. In short, intent would not play any more substantial role in revitalizing the essential facilities doctrine than it would for Areeda in constraining it.

Finally, Areeda strongly insisted on the availability of a remedy that did not require the court to act as a regulator.⁹² Areeda conceded that a viable remedy existed when a consortium exists that controls the essential facility and relief consists of admitting the plaintiff on the same terms as present participants or where a regulatory agency with jurisdiction exists to supervise terms of access. While most commentators would agree that these are the easiest cases, they are not the only cases when a court can adjudicate a claim without exceeding its institutional competencies.

First, no one has appeared to address why damages (treble or otherwise) cannot be imposed, calculated, and collected without the court acting as a regulator. The biggest transformation in the modern essential facilities doctrine has been a shift from injunctive relief to a predominant interest in a treble-damage remedy, at least in the handful of reported successful cases. *MCI* was an enormous jury verdict in favor of the plaintiff that later settled for less than 5 percent of the original award after the appellate court reversed certain bases of the original award and remanded for a new trial on damages.⁹³ *Aspen Skiing* was also a jury verdict for the plaintiff on a much more modest scale, which the Supreme Court affirmed as rational and supported by the evidence.⁹⁴ The plaintiffs in *Trinko*, although unsuccessful, appeared to be principally attempting to obtain treble damages on a class-action basis for alleged injury from receiving inferior service to the customers of the incumbent monopoly telecom provider.⁹⁵

Of course not all cases are entirely, or even mostly, about damages. From *Terminal Railroads* to the most recent unsuccessful

91. Areeda, *supra* note 1, at 852–53.

92. *Id.* at 853. Justice Scalia made the same error but upped the ante when he sneeringly referred to courts acting as central planners under this scenario. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

93. See Waller, *supra* note 20, at 595.

94. *Aspen Skiing Co.*, 472 U.S. at 611.

95. *Trinko*, 540 U.S. at 404.

essential facilities doctrine case at the appellate level,⁹⁶ competitors have also been seeking future access. Areeda himself conceded that certain injunctions are not problematic, namely where there is an existing course of dealing and the competitor can be admitted on terms equal to those of the current users of the facility.⁹⁷ It is not clear why Areeda limits these situations to the existing course of dealing among joint operators of the facility. The same logic should apply in most cases where a single monopolist has existing outside or affiliated customers and can deal with the new entrant on an equal, nondiscriminatory basis. In addition, he would be satisfied with those situations when the tough postinjunction decisions can be made by a regulatory authority, as was apparently the case in *Otter Tail*.⁹⁸

Areeda and most of the subsequent critics raising the issue of remedy have argued at a high level of abstraction and provide few examples of where the courts have gone wrong. It is simply not clear in which cases the critics believe the courts have embroiled themselves in an endless regulatory process beyond their institutional capabilities. Perhaps the AT&T consent decree administered by Judge Harold Greene of the United States District Court for the District of Columbia qualifies.⁹⁹ But the defendant hardly had cause to complain since it agreed to the decree in the first place, and there is substantial evidence that the court in fact managed to muddle through until the passage of the Telecommunications Act of 1996.

The injunctive process itself has built-in limitations that make it unlikely that the courts will find themselves in over their heads in the manner that Areeda feared. Injunctions cannot be issued unless the plaintiff has suffered irreparable injury, normally defined as an injury that cannot be compensated through money judgments at the conclusion of the proceeding.¹⁰⁰ Preliminary injunctions also normally require a showing of a likelihood of prevailing on the merits, a balancing of the harms to the plaintiff and other parties in the granting or denial of the injunction, and a consideration of the public interest.¹⁰¹ Permanent

96. See *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912); *Gregory v. Fort Bridger Rendezvous Ass'n*, 448 F.3d 1195, 1204 (10th Cir. 2006) (denying an essential facilities claim seeking access for a seller of reproductions of Old West artifacts to fairgrounds used for three-day recreation of early Western fur trading). A person does not need infrastructure theory to see why this would have been a poor use of the essential facilities doctrine.

97. Areeda, *supra* note 1, at 853.

98. *Id.*

99. *United States v. AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982).

100. *EBay Inc. v. Mercexchange, LLC*, No. 05-130, slip op. at 2 (U.S. May 15, 2006).

101. *Id.*

injunctions do not require further proof of prevailing on the merits, since they arise after the imposition of liability, but normally still require a showing of threat of future harm if the defendant's conduct is not altered to eliminate the illegal conduct. Failure to satisfy any of these requirements for equitable relief will leave even the successful plaintiff with only whatever damages it is able to separately prove to the satisfaction of the court.

It is important to remember the point of injunctive relief for those plaintiffs that can establish the full requirements for either a preliminary or permanent injunction. The point is not merely to enjoin future violations but to also undo the violation so competition can exist. There may be difficult cases where the court has to curtail the full relief that would otherwise be forthcoming in order to achieve an enforceable real-world decree. But those are few and far between and are not an excuse to avoid trying.

Infrastructure theory has nothing to say one way or another regarding whether the courts are institutionally competent to administer effective relief in the handful of essential facilities cases that are likely to arise at any given time. However, federal courts are more than competent to determine and administer relief in cases that raise the question of unlawful, less favorable treatment.¹⁰² They do so all the time across a wide variety of constitutional, statutory, and common-law causes of action that raise more complicated factual questions than essential facilities doctrine cases. In so doing, the courts can further direct parties to work out private solutions to their postdecree disputes and use alternate-dispute-resolution procedures to keep the courts out of the minor day-to-day disputes that are certain to arise in any disputed matter.¹⁰³

Areeda's own solution of involving the appropriate regulatory agencies as needed is a good one that has been embraced by other commentators as well.¹⁰⁴ If all else fails, the court has the power, but only occasionally the inclination, to invoke the civil-contempt process if it believes that an injunction is being deliberately and significantly flaunted.¹⁰⁵ When considering the combination of those few successful essential facilities doctrine cases, those that concern damage awards only, those injunctive cases where there is a preexisting course of

102. Waller & Frischmann, *supra* note 67, at Part IV.A.

103. *Id.*

104. Areeda, *supra* note 1, at 847–48, 853; Waller & Frischmann, *supra* note 67, at Part IV.A; Philip J. Weiser, *The Relationship of Antitrust and Regulation in a Deregulatory Era*, 50 ANTITRUST BULL. 549 (2005); Philip J. Weiser, Goldwasser, *the Telecom Act, and Reflections on Antitrust Remedies*, 55 ADMIN. L. REV. 1 (2003).

105. *United States v. Microsoft Corp.*, 147 F.3d 935, 941–42 (D.C. Cir. 1998).

dealing, those injunctive cases where the parties can bargain out their differences or resolve them through other dispute resolution procedures,¹⁰⁶ those injunctive cases where a regulatory body can assist the court, and the existence of some degree of judicial common sense, it is hard to see how often Areeda's legitimate concerns will counsel in favor of doing nothing to remedy an actual violation of the law.¹⁰⁷

What has happened since Areeda's article is actually the worst of both worlds. The *Trinko* decision has virtually eliminated the essential facilities doctrine where it is most needed in the fringes and twilight of the regulated-industry universe and theoretically preserved it in nonregulated-industry contexts, where it is least needed and least likely to be present in the first place.¹⁰⁸

What appears to be going on is a very different concern. Most critics arguing for the abandonment of the essential facilities doctrine appear more broadly concerned with the judicial process itself. According to most versions of this critique of antitrust, either Type I errors (i.e., false positives) will overwhelm Type II errors (i.e., false negatives) and procompetitive behavior will be unduly deterred.¹⁰⁹ Better, then, to do nothing and let the market correct what it can or defer to more expert regulators.¹¹⁰

One response is simply factual. How many Type I errors are there in the current system? More bluntly, how many cases did the courts get wrong? Almost no critics really think that either *MCI* or the government's case against AT&T were unjustified regarding the denial of access. Areeda himself conceded as much with respect to these

106. For example, the European Union includes arbitration clauses in its remedies in merger investigations that require open-access to essential facilities under the control of the merging firms. See GORDON BLANKE, *THE USE AND UTILITY OF INTERNATIONAL ARBITRATION IN EC COMMISSION MERGER REMEDIES* (2006). In addition, the private-monitoring structure in the *Microsoft* consent decree and numerous consent decrees in U.S. merger practice often impose relief far more regulatory in nature than the relief sought in the typical essential facilities case. See Andrew Gavil & Harry First, *Re-framing Windows: The Durable Meaning of the Microsoft Antitrust Litigation*, 2006 UTAH L. REV. 641, 696-97, for a description of technical-compliance process under the *Microsoft* consent decree.

107. Even here the court could enter a declaratory judgment or a finding of violation and the deferral of relief until later. Waller & Frischmann, *supra* note 67, at Part IV.A.

108. Microsoft's Windows operating system may constitute a rare example of unregulated infrastructure. See *id.*

109. Ratner, *supra* note 31, at 376-82.

110. HOVENKAMP, *supra* note 51, at 237. See generally Ronald A. Cass & Keith N. Hylton, *Preserving Competition: Economic Analysis, Legal Standards and Microsoft*, 8 GEO. MASON L. REV. 1, 30-33 (1999) (arguing that, in general, Type II errors promote market competition in the long run while Type I errors create incentives to avoid competition and seek court relief).

seminal cases. He agreed that *MCI* was “probably decided correctly,”¹¹¹ and he did not identify any specific essential facilities doctrine case imposing liability that he believed was incorrectly decided. Moreover, it is equally difficult to identify real-world solutions outside the litigation context where otherwise-lawful innovative conduct was deterred because of the theoretical possibility of erroneous liability.

The courts have, in fact, proved themselves quite adept at making these sorts of decisions in right-to-access antitrust cases, whether called essential facilities cases or not. Both *Areeda* and the Supreme Court in *Trinko* acknowledged that the courts have adequately handled such disputes under the rubric of section 1 of the Sherman Act.¹¹² When the essential facilities doctrine has been explicitly used by the lower courts, they have been quite adept at sorting out the meritorious cases from the frivolous cases where a competitor could reasonably duplicate the facility in question but simply preferred not to go to the trouble and expense.¹¹³ The quick rejection of most essential facilities claims at the pleading or summary-judgment stage suggests, if anything, that the courts are doing just fine at separating the wheat from the chaff in this area.¹¹⁴

The question for the courts is not whether the access standards are correct in some cosmic sense. It is, rather, whether the dominant firm (or firms) controls infrastructure in the sense defined earlier, whether the full *MCI* test is satisfied, and whether the competitor is being treated less favorably or unlawfully denied access at all. More often than not, this will involve proof of the magnitude of the disparity in treatment and may require proof that the incumbent acted deliberately—as opposed to acting with inadvertence, inability, or as a result of a valid business justification. These may or may not be complicated fact questions, but they are by no means beyond the skill set of the average jury or federal court.

111. *Areeda*, *supra* note 1, at 845 n.21.

112. *Id.* at 844, 852–53; *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

113. For example, *MCI* was denied access to AT&T’s intercity lines on the grounds that it could build, and indeed had built, its own intercity lines and could not free ride on AT&T’s efforts in those areas where it had not yet entered the market. *MCI Commc’ns Corp. v. AT&T Co.*, 708 F.2d 1081, 1148 (7th Cir. 1983), *cert. denied*, 464 U.S. 891 (1983).

114. Professor Robinson has argued that the lower courts have been far more circumspect about imposing liability under the essential facilities doctrine than the Supreme Court has done in more general refusal-to-deal cases. Robinson, *supra* note 31, at 1231–32.

These critics reveal a more general uncomfortableness with the litigation process applied to antitrust disputes in general and the essential facilities doctrine in particular. While some plaintiffs bring borderline claims, litigation remains too costly, and some defendants settle unmeritorious cases, there is no evidence that this occurs more frequently in the essential facilities doctrine area than elsewhere in antitrust or more generally in the federal civil-litigation system. Even if true, it does not really matter until U.S. litigation is reengineered away from discovery and summary judgment doing the heavy lifting to determine the merits of cases and the bargaining range for settlement in favor of stiffer pleading requirements and sanctions for frivolous litigation or the detachment of antitrust from the general litigation system.¹¹⁵

The critics also display a distaste for juries that Areeda shared on the most complex antitrust issues.¹¹⁶ Throughout his treatise and other writings, Areeda focused on the inability of juries to evaluate questions of defendants' intent and complex issues of economics and competing expert testimony and was concerned with other aspects of private treble-damage litigation as well.¹¹⁷

While the proper role of juries is often a question of normative preference, it is also a matter of constitutional law. Unless and until the Seventh Amendment is interpreted in a significantly different way, this question remains settled, even if not to the liking of many commentators.¹¹⁸

115. The combined effect of the Supreme Court's decisions in *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007), *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007), and *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), all suggest that the Supreme Court may be pursuing the latter course.

116. See, e.g., HOVENKAMP, *supra* note 51, at 61–63, 307–08.

117. See Areeda, *supra* note 1, at 851; AREEDA & TURNER, *supra* note 46; Phillip Areeda, *Monopolization, Mergers, and Markets: A Century Past and the Future*, 75 CAL. L. REV. 959, 963 (1987) (discussing problems with juries evaluating intent in monopolization cases).

118. While the desirability of juries deciding such questions is debatable, such criticism is really a separate argument and foreclosed for the time being by precedent. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 444 U.S. 1093 (1980) (Rehnquist, J., dissenting) (“Kodak is entitled as a matter of constitutional right under the Seventh Amendment to demand a jury trial in a case such as this”); *In re Fin. Sec. Litig.*, 609 F.2d 411, 432 (9th Cir. 1979) (rejecting complexity exception to Seventh Amendment). If the real objection is the jury, rather than judicial competence, then one intermediate solution would be to characterize the question of the existence of an essential facility as a question of law or a mixed question of law and fact and assign it to the judge. See generally Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769 (2003).

The pioneering work of Professor Neil Komesar of the University of Wisconsin Law School on comparative institutional analysis further suggests that the critics of the essential facilities doctrine litigation in the litigation context are not asking the right question at two different levels.¹¹⁹ First, most critics have trouble documenting any serious institutional failure by the judiciary (with or without juries) in essential facilities cases, although courts, like all institutions, eventually begin to function less well as more parties and more complex claims are introduced.¹²⁰ Second, and more importantly, most critics have not engaged in the comparative part of comparative institutional analysis in determining whether other institutions do any better job.¹²¹

Much of *Trinko* and its progeny are based on an assumption that the regulatory system is better equipped to handle such claims, but there is little, if any, analysis of whether this is actually so. The irony is that many critics who wish to limit the judicial consideration of essential facilities claims in favor of regulatory expertise rarely have anything complementary to say about the regulatory processes they advocate in this regard.

Even if the role of the jury is not off limits, and the issue is deemed off limits to judges as well, infrastructure theory can still help. If critics of the judicial application of the essential facilities doctrine are serious about limiting such issues to the regulatory context, regulators still need a framework to do so. Infrastructure theory helps move the finder of fact—whether jury, judge, agency, or legislature—away from a seat-of-the-pants determination of what is essential to a more structured analysis of infrastructure and where society benefits from a regime of open access.

CONCLUSION

All property regimes have their limits. Real property has implied easements, nuisance, adverse possession, and other limitations on the unfettered use of one's property. Since medieval times, common carriers and other businesses affected with the public interest must provide nondiscriminatory access to all. Intellectual property has temporal limits, public-disclosure requirements, exceptions for

119. NEIL K. KOMESAR, *LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* (2001) [hereinafter KOMESAR, *LAW'S LIMITS*]; NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

120. KOMESAR, *LAW'S LIMITS*, *supra* note 119, at 38–51.

121. *But see* Owen, *supra* note 3, at 890–94 (comparing the strengths and weaknesses of courts and agencies in addressing essential facilities issues).

trademarks that have become generic, copyright immunity for fair use, dichotomies between ideas and expression, and doctrines of misuse.

Antitrust has the essential facilities doctrine. With careful definitions and rigorous application, it should be celebrated and not attacked. Areeda properly challenged us to more rigorously define the limits of the essential facilities doctrine. Infrastructure theory creates a path to do so in a way that better ties open access to traditional and nontraditional infrastructure on a nondiscriminatory basis to the goals of antitrust, the competitive process, and increasing both consumer and societal welfare. Areeda might even agree.