Harmonizing Intellectual Property Law with Antitrust Law
in the Interface Between the Two

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ABSTRACT

The relationship between intellectual property law and antitrust law has not been clearly explained and is not easy to definitely explain as well. There have always been conflicts between antitrust law and intellectual property law. In spite of the effort to relieve the tension between them, it is more serious and unavoidable than generally perceived. For instance, regarding the refusal to deal, one of the most critical issues is whether intellectual property right can be protected prior to antitrust rules, or vice versa.

This article first discusses the relationship between antitrust law and intellectual property law, and presents an overview of ‘refusal to deal,’ a specific but a representative condition where a conflict or an overlap between antitrust and intellectual property legislation arises. This article also examines the Xerox and Kodak cases through the issues of refusal to deal (specifically refusal to license), and finally discusses and analyzes the issue of prevalence, i.e., which law has priority in complex cases where both antitrust law and intellectual property law are involved.

KEYWORDS: intellectual property law, antitrust law, refusal to deal, refusal to sell or license, exclusive right, subjective intent, valid business justification

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I. INTRODUCTION

The relationship between intellectual property law and antitrust law has not
been clearly explained because it defies simplicity owing to variations in national
legal development. Before the 1980s, the dominant view was that antitrust law
and intellectual property law are inherently in conflict, as antitrust law protects
competition while intellectual property law protects monopolies by allowing
exclusivity.\(^1\) Indeed, court cases and academic views opined that intellectual
property law should be considered as an exception to antitrust law.\(^2\) However, the
current prevailing view is that antitrust law and intellectual property law are
complementary as well as contradictory, as the two corpuses of legislation share
the common goal of improving innovation and consumer welfare.\(^3\)

There have always been collisions between antitrust law and intellectual
property law. In spite of the effort to relieve the tension between them, it is more
serious and unavoidable than generally perceived. For instance, regarding
refusing to sell or license a copyrighted or a patented work, one of the most
critical issues is whether intellectual property can be protected prior to antitrust
rules, or vice versa. Especially excluding competitors in an adjacent or a
complementary market, refusal to deal in intellectual property, which is a

\(^1\) "The patent laws which give a 17-year monopoly on ‘making, using, or selling the invention’ are in
pari materia with the antitrust laws and modify them pro tanto.” Simpson v. United Oil Co., 377


\(^3\) "...when the patented product is so successful that it creates its own economic market or consumes a
large section of an existing market, the aims and objectives of patent and antitrust laws may seem,
at first glance, wholly at odds. However, the two bodies of law are actually complementary, as both
are aimed at encouraging innovation, industry and competition.” Atari Games Corp. v. Nintendo of
Am., Inc., 897 F.2d 1572, 1576 (Fed. Cir. 1990); Marina Lao, Unilateral Refusals to Sell or
License Intellectual Property and the Antitrust Duty to Deal, 9 Cornell J.L. & Pub. Pol'y 193, 193
(1999).