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The *CSU* Case: Facts, Formalism and the Intersection of Antitrust and Intellectual Property Law

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THE *CSU* CASE: FACTS, FORMALISM AND THE INTERSECTION OF ANTITRUST AND INTELLECTUAL PROPERTY LAW

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INTRODUCTION

We live in an age of innovation. Industries are being restructured, technologies are being transformed, and huge sums of money are being made, and lost, by entrepreneurs and investors.

The law affects all of this. Not surprisingly, therefore, the age of innovation has been accompanied by an almost unprecedented prominence of the two bodies of law that most directly affect these phenomena—antitrust law and intellectual property law. They are widely perceived to be in tension.[1]

Intellectual property law is said to want to create monopolies over products in order to encourage research and innovation. It looks at the conditions of wealth creation ex ante.

Antitrust law, by contrast, is said to be hostile to monopoly and seeks to maintain prices at competitive levels. In effect, it is said, antitrust law is concerned with conditions likely to enhance economic welfare ex post.

This is a false conflict. It reflects an overstatement of some aspects of

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1 *See, e.g.*, Willard K. Tom and Joshua A. Newberg, *Antitrust and Intellectual Property: From Separate Spheres to Unified Field*, 66 ANTITRUST L.J. 167, 189-90 (1997); Donald F. Turner, *Basic Principles in Formulating Antitrust and Misuse Constraints on the Exploitation of Intellectual Property Rights*, 53 ANTITRUST L.J. 485, 487 (1984).

intellectual property law and a misstatement of antitrust law. And it leads to mistaken legal rulings, such as *In re Independent Service Organization Antitrust Litigation*,[2] which held that a patent or copyright holder's refusal to license or sell its rights is essentially immune from antitrust scrutiny. This article analyzes that decision, argues that it is wrong as a matter of both law and policy, and attempts to draw broader lessons about the intersection of antitrust and intellectual property law.

I. THE CSU DECISION

The facts of the case can be summarized briefly. Defendant Xerox manufactures, sells, and services high-volume photocopiers and laser printers.[3] Plaintiff CSU is an independent service organization (ISO) that competes with Xerox to service Xerox machines. In 1984, Xerox decided to discontinue selling parts used to service its copiers and printers directly to ISOs unless they were also end-users of the equipment.[4] End-users remained free to purchase parts directly from Xerox, to supply to ISOs any parts they bought and to use any service provider they wished. In 1994, as part of the settlement of a class action brought by end-users and ISOs, Xerox agreed to sell parts directly to ISOs and to license its diagnostic software to copier and printer end-users. The end-users were then permitted to employ ISOs as their agents to order and use the software. CSU opted out of the settlement and filed its own action against Xerox, challenging Xerox's previous refusal to sell parts and license software under section 2 of the Sherman Act.[5]

Xerox filed a motion for summary judgment, arguing that its unilateral refusals to sell patented parts and to license patented and copyrighted software were a lawful exercise of its intellectual property rights and were therefore immunized from scrutiny under the antitrust laws.[6] Although the district court initially denied Xerox's motion, it subsequently reconsidered and dismissed CSU's antitrust claim, holding that, if a patent or copyright is lawfully acquired, the acquirer's refusal to sell or license its patented invention or copyrighted expression cannot constitute exclusionary conduct under section 2, even if the refusal to deal impairs competition in more than one market and is motivated by a desire to exclude rivals.[7]

The Federal Circuit affirmed the district court's decision. While recognizing that "[i]ntellectual property rights don't confer a privilege to vio-

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2 203 F.3d 1322 (Fed. Cir. 2000) (hereinafter *CSU*), *cert. denied*, 121 S. Ct. 1077 (2001).
3 *Id*. at 1324.
4 *Id*.
5 *Id*.
6 *Id*.
7 CSU L.L.C. v. Xerox Corp., 989 F. Supp. 1131, 1139 (D. Kan. 1997).

late the antitrust laws,"[8] the court nevertheless held that, "[i]n the absence of any indication of illegal tying, fraud . . . , or sham litigation, the patent holder may enforce the statutory right to exclude others from making, using or selling the claimed invention free from liability under [section 2]."[9] Buttressing this holding, in the court's view, were (i) the fact that "[t]here is 'no reported case in which a court ha[s] imposed liability for a unilateral refusal to sell or license a patent'"[10] and (ii) section 271(d) of the Patent Act, which provides that "'[n]o patent owner otherwise entitled to relief [for patent infringement] . . . shall be denied relief or otherwise deemed guilty of misuse or *illegal extension of the patent right* by reason of his having . . . (4) refused to license or use any rights to the patent.'"[11]

The potential implications of this decision are troubling. Read broadly, its holding may be interpreted as standing for the proposition that (absent evidence of fraud, sham litigation or concerted conduct) no antitrust claim may ever be asserted on the basis of a firm's unilateral refusal to sell or license intellectual property.[12] Such a rule would conflict with longstanding precedent holding that, for purposes of antitrust analysis, intellectual property should be treated the same as any other form of property.[13] It would also effectively immunize from antitrust liability a dominant firm's decision to deny rivals access to inputs or facilities they need, merely because those inputs or facilities contain patented or copyrighted materials, regardless of the competitive effect of the denial.

II. LEGAL BASIS FOR IMMUNITY

Recognizing that "the antitrust laws represent a fundamental national economic policy," the Supreme Court has repeatedly emphasized that "exemptions from the [Sherman Act] are strictly construed and strongly disfa-

[8] 203 F.3d at 1325 (citing Intergraph Corp. v. Intel Corp., 195 F.3d 1346, 1362 (Fed. Cir. 1999)).

[9] *Id*. at 1327. The court extended a similar exemption to copyright holders. *See id.* at 1329.

[10] *Id*. at 1326 (quoting Image Technical Servs. v. Eastman Kodak Co., 125 F.3d 1195, 1216 (9th Cir. 1997)).

[11] *Id.* (quoting 35 U.S.C. § 271(d) (1999)) (emphasis in original). In justifying its conclusion on the copyright issue, the court acknowledged that "[t]he [Supreme] Court has not . . . directly addressed the antitrust implications of a unilateral refusal to sell or license copyrighted expression" but relied on the Fourth Circuit's decision in *Service Training, Inc. v. Data General*, 963 F.2d 680, 686 (4th Cir. 1992) (rejecting a claim of illegal tying supported only by evidence of a unilateral decision to license copyrighted software to some firms but not to others), and the First Circuit's decision in *Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147 (1st Cir. 1994), to the effect that, absent any evidence that the relevant copyrights were unlawfully obtained or "used to gain monopoly power beyond the statutory copyright granted by Congress," a copyright holder's refusal to sell or license its works does not violate the antitrust laws. *CSU*, 203 F.3d at 1328-29.

[12] In its brief in the Supreme Court, the United States suggested that the decision need not be read so broadly and that the Court should not grant certiorari but should, instead, await further discussion of the issue in the lower courts. Brief of Amicus Curiae United States at 7-8, *CSU*, 121 S. Ct. 1077 (2001) (denying cert.). The United States did state, however, that it was not prepared to support the decision if it were read broadly. *Id.* at 10.

[13] *See, e.g.*, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 2.0 (1995) ("[intellectual property is] essentially comparable to any other form of property.").

vored."[14] Absent clear evidence that Congress intended to immunize the challenged conduct or that denying immunity could subject the defendants in a particular case to conflicting legal requirements, courts have uniformly rejected such defenses to antitrust liability.[15] The holdings in *CSU* and other similar cases, however, have either ignored or misapplied these well-established principles.[16] As explained below, nothing in the text of the Patent or Copyright Acts or their legislative history reflects a clear Congressional intent to treat intellectual property differently for antitrust purposes from any other form of property, and there is no basis for concern that applying the antitrust laws to refusals to deal in intellectual property would subject intellectual property holders to inconsistent legal standards.

No statute explicitly provides that refusals to sell or license intellectual property are exempt from the antitrust laws or are to be assessed under antitrust standards that differ from those applicable to other forms of property. Proponents of an antitrust immunity must therefore argue for an implied immunity.

The *CSU* court and most of the other lower courts that have rejected antitrust claims based on refusals to license intellectual property point to language in section 154 of the Patent Act, which authorizes a patentee "to exclude others from making, using or selling the invention throughout the United States."[17] That section, however, does no more than afford patent

[14] Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409, 421 (1986). *See also* Silver v. NYSE, 373 U.S. 341, 357 (1963) ("[i]t is a cardinal principle of construction that repeals [of the antitrust laws] by implication are not favored") (quoting United States v. Borden Co., 308 U.S. 188, 198 (1939)).

[15] *See, e.g.*, Nat'l Gerimedical Hosp. and Gerontology Ctr. v. Blue Cross of Kansas City, 452 U.S. 378, 388-89 (1981); Gordon v. NYSE, 422 U.S. 659, 689-90 n.14 (1975) (explaining that in *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-52 (1963), "two factors pointed against antitrust immunity: (1) congressional intent in the [relevant] act not to immunize activities from [the] antitrust [laws], and (2) the lack of conflict between the Bank Merger Act and Clayton Act standards"); Strobl v. New York Mercantile Exch., 768 F.2d 22, 27-29 (2d Cir. 1985); S. Pac. Communications Co. v. A.T. & T., 740 F.2d 980, 999-1000 (D.C. Cir. 1984); Phonetele, Inc. v. A. T. & T., 664 F.2d 716, 729-30 (9th Cir. 1981). *See also* Finnegan v. Campeau Corp., 915 F.2d 824, 829 (2d Cir. 1990) ("repeal by implication may only be found where there is a conflict between the provisions of the antitrust and [other applicable] laws").

[17] 35 U.S.C. § 154. *See, e.g.*, Cygnus Therapeutic Sys. v. Alza Corp., 92 F.3d 1153, 1160 (Fed Cir. 1996); Genentech v. Eli Lilly & Co., 998 F.2d 931, 949 (Fed Cir. 1993); Miller Insituform, Inc. v. Insituform of N. Am., Inc., 830 F.2d 606, 609 (6th Cir. 1987); United States v. Westinghouse Elec. Corp., 648 F.2d 642, 647 (9th Cir. 1981); SCM v. Xerox Corp., 645 F.2d 1195, 1204 (2d Cir. 1981); Intergraph Corp. v. Intel Corp., 88 F. Supp. 2d 1288, 1292 (N.D. Ala. 2000), *aff'd*, 253 F.3d 695 (Fed. Cir. 2001); Townshend v. Rockwell Int'l Corp., No. C99-0400SBA, 2000 WL 433505, at *11 (N.D. Cal. March 28, 2000); Crucible v. Stora Kopparbergs Bergslags AB, 701 F. Supp. 1157, 1162 (W.D. Pa. 1988).

Although the rights granted to a copyright holder are narrower than those provided to a patentee, courts rejecting antitrust claims based on refusals to license or sell copyrighted material have similarly relied on language of the Copyright Act that gives copyright holders the exclusive right to distribute copyrighted works. *See, e.g.*, Fox Film Corp. v. Doyle, 286 U.S. 123, 127 (1932) (referring to a copyright owner's "right to exclude others from using his property"); Data Gen. Corp. v. Grumman Sys.

holders the same rights as those enjoyed by owners of tangible property under common law.[18] Neither the general language in that section nor any other provision in either in the Patent Act or the Copyright Act compels the conclusion that Congress intended the exercise of those property rights to be exempt from the antitrust laws.[19] To the contrary, the Supreme Court has repeatedly rejected assertions of intellectual property rights as defenses to conduct that would otherwise be condemned under the Sherman Act.[20]

The *CSU* court and some commentators have also pointed to section 271(d) of the Patent Act, which was added by amendment in 1988, as statutory support for a finding of antitrust immunity.[21] On its face, however, the language of that section does not purport to address antitrust liability.[22] Moreover, the legislative history of the 1988 amendment makes plain that it was originally conceived not as an antitrust exemption for patent holders, but rather as an effort to address certain judicial precedents that Congress thought subjected intellectual property owners to harsher treatment than

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Support Corp., 36 F.3d 1147, 1186 (1st Cir. 1994) (interpreting 17 U.S.C. § 106 as providing that, if a copyright owner "pleases, [it] may refrain from vending or licensing and content [itself] with simply exercising the right to exclude others from using [its] property") (citations omitted); Tricom v. Elec. Data Sys. Corp., 902 F. Supp. 741, 743 (E.D. Mich. 1995); Advanced Computer Serv. of Mich. v. MAI Sys. Corp., 845 F. Supp. 356, 370 (E.D. Va. 1994); Corsearch, Inc. v. Thomson & Thomson, 792 F. Supp. 305, 328 (S.D.N.Y. 1992).

[18] *See* Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property"); Cont'l Paper Bag Co. v. E. Paper Bag Co., 210 U.S. 405, 425 (1908) ("patents are property, and entitled to the same rights and sanctions as other property"); Consol. Fruit Jar Co. v. Wright, 94 U.S. 92, 96 (1896) ("A patent for an invention is as much property as a patent for land. The right rests on the same foundation and is surrounded and protected by the same sanctions."); 35 U.S.C. § 261 ("patents shall have the attributes of personal property").

[19] *See* Turner, *supra* note 1, at 485 ("A patent or copyright is a species of property whose use and disposition are no more immune from scrutiny under antitrust law and other public policies than other forms of property."); William F. Baxter, *Legal Restrictions on Exploitation of the Patent Monopoly: An Economic Analysis*, 76 YALE L.J. 267, 276 (1966) (describing language of the Patent Act as "highly general").

[20] *See, e.g.*, United States v. Line Material Co., 333 U.S. 287, 308 (1948); United States v. New Wrinkle, Inc., 342 U.S. 371, 378-79 (1952); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948). *See also* Broad. Music, Inc. v. CBS, 441 U.S. 1, 19 (1979) ("the copyright laws confer no rights on copyright owners to fix prices among themselves or otherwise to violate the antitrust laws"). *See also* United States v. Microsoft, 253 F.3d 34, 63 (D.C. Cir. 2001) (en banc) (describing Microsoft's argument for a broad intellectual property immunity as "border[ing] on the frivolous").

[21] *CSU*, 203 F.3d1322, 1326 (Fed. Cir. 2000); PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶704.2, at 123 (2001 Supp.).

[22] *See* Image Technical Servs. v. Eastman Kodak Co., 125 F.3d 1195, 1214 n.7 (concluding that, although section 271(d) "indicates Congressional intent to protect the core patent right of exclusion," its language does not preclude a finding of antitrust liability); Grid Sys. Corp. v. Texas Instruments Inc., 771 F. Supp. 1033, 1037 n.2 (N.D. Cal. 1991) (holding that, "[o]n its face, section 271(d) relates only to the defense of patent misuse" and that "Congress rejected an extension of this statute into the area of antitrust"). Far from supporting an argument for antitrust immunity, the language of section 271(d)—in particular, its omission of any reference to the antitrust laws—instead supports the conclusion that Congress must have intended not to create an antitrust exemption. In other instances, where Congress did intend to provide antitrust exemptions for intellectual property holders, it did so unambiguously. *See, e.g.*, 17 U.S.C. § 115(c)(3)(B) (authorizing and immunizing joint negotiations for royalties under compulsory license for "mechanical" right to make and distribute records containing copyrighted musical works).

that afforded to owners of other forms of property.[23] The bill was narrowed in conference by deletion of the market-power provision and restriction of the patent misuse provision to refusals to license and tying arrangements.[24] A review of the Congressional record discussing the 1988 amendment and subsequent related bills reveals a consistent Congressional intent to create a "level playing field"[25] under the antitrust laws for all forms of property—not to provide special treatment, or an antitrust immunity, for patent and copyright holders.[26]

As further support for their position, proponents of the *CSU* decision

[23] The original version of the bill to amend section 271(d) contained two sections. The first (section 101) would have eliminated the presumption in antitrust cases that ownership of a copyright or patent creates market power. *See* S. REP. NO. 100-492, at 9-12 (1988) (criticizing the majority opinions in *United States v. Loew's*, 371 U.S. 38, 44 (1962), and *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 16 (1984), and emphasizing that proposed section 101 would "require only that courts evaluate practices involving intellectual property rights under the *same antitrust principles* that are applied to practices involving other forms of property") (emphasis added). The second (section 201) provided that no patent owner could be "deemed guilty of misuse or illegal extension of the patent right by reason of his . . . licensing practices or actions or inactions related to [the] patent, unless such [conduct] . . . violate[s] the antitrust laws." *See* S. REP. NO. 100-492 at 13, 17-18 (1988) (explaining that section 201 was designed to address the problem that, under current judicial precedents, misuse based upon "alleged anticompetitive extensions of the owner's patent rights . . . may also be found where the patent owner's conduct has not violated the antitrust laws, has no demonstrated anticompetitive effect and has not even injured the infringing party who raises misuse as a defense").

[24] *See* 134 CONG. REC. 32,471 (1988) (statement of Sen. DeConcini) (observing that, although "[t]he purpose of the legislation . . . remained the same throughout [the conference process]," the amendment ultimately enacted differed from the original bill "in two important respects: First, the patent misuse doctrine is no longer reformed across the board, but only as it relates to refusals to license or use patents, and to tying arrangements[;] [s]econd, as the misuse doctrine is applied to tying, the generic antitrust violation standard adopted by the Senate has been replaced by a market power test"); 134 CONG. REC. 32,295 (statement of Rep. Kastenmeier) (explaining that the amendment as modified by the House "proceeds on the basis of consensus about two categories of misuse [refusals to use or license and tying arrangements] that the [Judiciary] Committee concluded should not be the subject of a rigid per se rule").

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[26] *See, e.g.*, S. REP. NO. 100-492 at 9 (1988) (stating that the purpose behind the Senate bill to amend section 271(d) was "to clarify the law of patent misuse and to put intellectual property rights on an equal footing with other property with respect to the license, sale and other agreements concerning the distribution of property rights"). *See also* S. REP. NO. 101-8, at 11 (1989) (in recommending passage of S. 270, another effort to eliminate the market power presumption in antitrust cases involving intellectual property, the committee report indicates that the intended effect of the legislation is to subject intellectual property owners to antitrust liability "to the same extent as owners of other forms of property"; the report emphasizes, however, that "[b]y eliminating the presumption . . ., the committee does not sanction anticompetitive arrangements for the distribution of, or *refusal to distribute*, intellectual property rights and innovative products") (emphasis added); 136 CONG. REC. 31,411 (1990) (statement of Sen. Leahy) (intended effect of eliminating market power presumption in section 270 was "to level the playing field between intellectual property rights and other property implicated in antitrust litigation").

Significantly, in subsequent remarks supporting passage of section 270, Senator Leahy rejected as "emphatically not the case" concerns that "this legislation might elevate intellectual property rights to too high a level of protection, rendering the owner or licensor of intellectual property rights effectively exempt or immune from antitrust challenge." *See* 136 CONG. REC. 31,411-2 (1990) ("[t]his legislation does not knock antitrust plaintiffs out of the box; it merely requires them to come forward with evidence to sustain their market power claim").

cite language in some of the Supreme Court's older opinions that might suggest that a patent owner's exclusive rights are absolute and that refusals to license those rights are therefore beyond the reach of the Sherman Act.[27] In *United States v. United Shoe Machinery Corp.*, for example, the Court stated that a patent confers on its owner "the right to exclude others from the use of the invention, absolutely or on the terms the patentee chooses to impose" and added that the "exertion of this right within the field covered by the patent is not an offense against the Anti-Trust Act."[28] But the language used in these cases reflected the Court's contemporaneous view of all forms of private property, not special rules for intellectual property.[29] Neither *United Shoe Machinery* nor any other of the handful of Supreme Court cases containing similarly broad language concerned the issue of an intellectual property law defense to what would otherwise be an antitrust violation arising out of a refusal to license or sell intellectual property.[30] Those cases do not provide a legal basis for the *CSU* holding.[31]

III. POLICY BASIS FOR IMMUNITY

Not surprisingly, *CSU* and similar cases pay scant attention to the legal basis for an antitrust immunity and focus, instead, on notions of policy. These cases appear to be based on a belief that antitrust immunity is necessary in order to further the objectives of the intellectual property laws—in particular, in order to prevent the antitrust laws from undermining the incentives for innovation that the intellectual property laws are intended to create.[32] This policy concern, however, rests on an insufficiently refined

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28 247 U.S. 32, 57 (1918).

29 *See, e.g.*, Cont'l Paper Bag v Eastern Paper Bag Co., 210 U.S. 405, 425 (1908) (patents are "entitled to the same rights and sanctions as other property").

30 *United Shoe* concerned lease restrictions. *See also Cont'l Paper Bag*, 210 U.S. at 423-24 (patent infringement case in which defendant challenged patentee's non-use of the relevant patent; Court observed that the exclusive right of patent holders to make use or sell their inventions employs "the language of complete monopoly" and that "[t]here has been no qualification … of [that] right"); Bement v. Nat'l Harrow Co., 186 U.S. 70, 90 (1902) (challenge to exclusive dealing and resale price maintenance provisions in a license agreement in which the Court said that a patent owner's "'title is exclusive, and so clearly within the constitutional provisions in respect of private property that he is neither bound to use his discovery himself nor permit others to use it.'") (citation omitted).

31 *See* Marina Lao, *Unilateral Refusals to Sell or License Intellectual Property and the Antitrust Duty to Deal*, 9 CORNELL J.L. & PUB. POL'Y 193, 199 (1999) ("[t]he Supreme Court . . . has never directly considered the legality of unilateral refusals to license a patent where the practice is used for monopoly leveraging purposes"); James C. Burling, William F. Lee & Anita K. Krug, *The Antitrust Duty to Deal and Intellectual Property Rights*, 24 J. CORP. L. 527, 534 (1999) ("the intersection of duty-to-deal antitrust analysis and intellectual property law remains virtually uncharted territory").

32 *See, e.g.*, Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1186 (1st Cir. 1994) (observing that "the [patent] exception is grounded in an empirical assumption that exposing patent activity to wider antitrust scrutiny would weaken the incentives underlying the patent system, thereby depriving consumers of beneficial products); SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1209 (2d Cir. 1981) (imposing antitrust liability for patentee's refusal to license on lawfully acquired patent "would severely trample upon the incentives provided by our patent laws and thus undermine the entire patent system"); Image Technical Servs. v. Eastman Kodak, Co., 125 F.3d 1195, 1217-18 (9th Cir. 1997) (recognizing that "[w]ithout bounds, claims based on unilateral [refusals to deal]" by patent and copy-

statement of the purposes of the intellectual property laws and a misunderstanding of the antitrust laws. There is, in fact, no serious conflict between them.

A. *The Purported Antitrust/Intellectual Property Conflict*

The goals of the intellectual property and antitrust laws are complementary, not inconsistent. As the Federal Circuit has recognized, although they serve the public in different ways, both bodies of law "are aimed at encouraging innovation, industry and competition."[33] A reflection of antitrust law's recognition of the importance of promoting innovation may be seen in the permissive stance it takes toward research and development joint ventures, as well as the more recent emphasis on "innovation markets" in the agencies' enforcement guidelines.[34]

The mistaken belief that there is a conflict seems to derive from two erroneous premises. The first is that Congress, convinced that such a reward was necessary in order to induce a sufficient amount of innovation, intended by means of the patent and copyright laws to permit intellectual property holders to *maximize* the returns from their works.[35] On its face, this notion is untenable; the limited duration of intellectual property (unlike tangible property, which can be owned in perpetuity), the patent misuse and copyright fair use doctrines and the well-accepted understanding that intellectual property holders have no special right to tie patented or copyright property to other property are just a few of the many ways in which intellectual property law makes clear that it is not intended to maximize returns to holders.

The legislative history also makes this clear. Congress has repeatedly

right holders "will proliferate" and "[t]he cost of such suits will reduce [their] 'incentive . . . to risk the often enormous costs in terms of time, research and development'") (quoting Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 480 (1974)).

33 Atari Games Corp. v. Nintendo of Am., Inc., 897 F.2d 1572, 1576 (Fed. Cir. 1990). *See also* Intergraph Corp. v. Intel Corp., 195 F.3d 1346, 1362 (Fed. Cir. 1999) ("The patent and antitrust laws are complementary, the patent system serving to encourage invention and the bringing of new products to market by adjusting investment-based risk and the antitrust laws serving to foster industrial competition.").

34 *See* Turner, *supra* note 1, at 485 ("Antitrust gives wide latitude to joint research and development among competitors, it being recognized that joint ventures will often facilitate innovations which no individual firm participant could attain"); Robert Pitofsky, *Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economy*, Speech at Antitrust, Technology and Intellectual Property Conference, University of California, Berkeley (March 2, 2001) (noting that "since the passage of the Sherman Act in 1890, there has been only one federal government challenge to a research joint venture"); ANTITRUST GUIDELINES FOR LICENSING OF INTELLECTUAL PROPERTY (1995), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,132.

35 *Cf.* King Instruments Corp. v. Perego, 65 F.3d 941, 950 (Fed. Cir. 1995) ("[T]he Patent Act creates an incentive for innovation. The economic rewards during the period of exclusivity are the carrot. The patent owner expends resources in expectation of receiving this reward. Upon grant of the patent, the only limitation on the size of the carrot should be the dictates of the marketplace.").

emphasized that the rights conferred under the intellectual property laws are not unlimited, as well as the fact that the monopoly grant itself represents a compromise among competing policy interests.[36] Limitations on intellectual property rights reflect that the purpose of those rights is to induce innovation and that too much protection for intellectual property can retard innovation.[37] As several commentators have noted, overly broad intellectual property rights can retard innovation by, for example, inhibiting the development of improvement patents[38] and derivative copyrighted works (such as the recent sequels to *Gone With The Wind*).[39] It is, in short, only the beginning and not the end of the analysis of an intellectual property law issue to note that one outcome will provide greater or lesser returns to the intellectual property rights holder than another outcome.

The second and more important mistake made by proponents of the *CSU* result is their apparent belief that the antitrust laws are hostile to lawfully acquired monopolies and, therefore, that application of those laws will prevent the intended exploitation of intellectual property rights.[40] There is,

[36] *See, e.g.*, S. REP. 100-492, at 2 (1988) (explaining that, "[b]y recognizing intellectual innovations as property, the [patent and copyright] laws provide inventors, as well as authors and other artists, with exclusive rights to the use of their inventions and original works *for a limited time*" and "[t]hese rights enable innovators to capture *some* of the economic rewards of their efforts") (emphases added); Stewart v. Abend, 495 U.S. 207, 228 (1990) (reviewing legislative history of Copyright Act and observing that "although dissemination of creative works is a goal of the Copyright Act, the Act creates a balance between the artist's right to control the work during the time of copyright protection and the public's need for access to creative works."); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) ("The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit [;] [r]ather, the limited grant is . . . intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.").

[37] The National Commission on New Technological Uses of Copyrighted Works (CONTU), established by Congress in 1974 to study the implications of computer and other new information technologies and recommend revisions to the federal intellectual property laws, emphasized in its report the fundamental principle that "[c]opyright should not grant more economic power than is necessary to achieve the incentive to create." *See* Peter S. Menell, *An Epitaph for Traditional Copyright Protection of Network Features of Computer Software*, ANTITRUST BULLETIN 651, 709 (*quoting* CONTU Report at 12) (1998).

[38] *See* Carl Shapiro, Navigating the Patent Thicket: Cross Licenses, Patent Pools and Standard Setting, Remarks Before National Bureau on Economic Research Seminar: Innovation Policy and the Economy (Apr. 2000) (transcript available at http://www.haas.berkeley.edu/Shapiro/thicket.pdf) ("With cumulative innovation and multiple blocking patents, stronger patent rights can have the perverse effect of stifling, not encouraging, innovation."); Joseph Stiglitz, Speech at Opening of FTC's Hearings on Competition Policy in the New High-Tech, Global Marketplace, FTC STAFF REPORT 6 (1995) ("some people jump . . . to the conclusion that the broader the patent rights are, the better it is for innovation, and that isn't always correct, because we have an innovation system in which one innovation builds on another. If you get monopoly rights down at the bottom, you may stifle competition that uses those patents later on . . . so the breadth and utilization of patent rights can be used not only to stifle competition, but also have adverse effects in the long run on innovation").

[39] *See generally* Menell, *supra* note 37, at 677 (arguing against interpreting the Copyright Act as providing protection for network features of computer software and cautioning that, "[i]n view of the cumulative nature of technological advancement, intellectual property law must be careful not to choke off secondary innovation by according excessive or unjustified protections for first generation inventions.").

[40] *See, e.g.*, Axis v. Micafil, 870 F.2d 1105, 1111 (6th Cir. 1989) (asserting that because "[p]atent laws grant a monopoly for a limited time in order 'to promote [innovation]'" while the "[a]ntitrust laws,

to be sure, language in older antitrust cases suggesting that even legally obtained monopolies are to be "tolerated, but not cherished."[41] However, at least since the Chicago school began to influence antitrust policy in the late 1970's and 1980's, antitrust doctrine has crystallized around sound notions of economic analysis. It is now beyond doubt that antitrust law—whether it cherishes or merely tolerates monopoly—explicitly permits firms to charge monopoly prices and otherwise to profit from their lawfully obtained monopoly.[42] It does so for the same reason that intellectual property laws create property rights—to create and protect ex ante incentives for entrepreneurship, innovation and commercial success. That is what the antitrust laws mean when they say that one who gains a monopoly by "skill, foresight and industry" is permitted to reap the fruits of the monopoly.[43] That is also why antitrust law explicitly permits ancillary restraints that reduce competition ex post if they are reasonably related to a procompetitive venture and, thus, are procompetitive ex ante.[44]

B. *The Similar Approaches of Antitrust and Intellectual Property Law.*

The similarities of antitrust and intellectual property law run deeper. Intellectual property law gives rights holders ownership of the intellectual property. When that property enables the owner to have monopoly power

on the other hand, are designed to promote and protect competition in the marketplace," the two legal regimes "seek to further different and opposing policies") (citation omitted); United States v. Westinghouse, 648 F.2d 642, 646 (9th Cir. 1981) (noting the "obvious tension" between the patent and antitrust laws: "[o]ne body of law creates and protects monopoly power while the other seeks to proscribe it") (citations omitted).

41 Berkey Photo v. Eastman Kodak Co., 603 F.2d 263, 273 (2d Cir. 1979) (quoting United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 345 (D. Mass. 1953); *aff'd per curiam*, 347 U.S. 521 (1954)); *see also* Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 375 (7th Cir. 1986) (discussing the evolution in opinion about the offense of monopolization); SCM v. Xerox Corp., 645 F.2d 1195, 1205 (2d Cir. 1981) (quoting language from *Berkey* and observing that "[t]he tension between the objectives of preserving economic incentives to enhance competition while at the same time trying to contain the power a successful competitor acquires is heightened tremendously when the patent laws come into play").

42 Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic, 65 F.3d 1406, (7th Cir. 1995) (monopolist that has acquired and maintained its monopoly by lawful means "can . . . charge any price that it wants, . . . for the antitrust laws are not a price-control statute"); *Olympia Equip. Leasing*, 797 F.2d at 376 ("[a] monopolist has no duty to reduce its prices in order to help consumers") (citing *Berkey Photo*, 603 F.2d at 294); USM Corp. v. SPS Technologies, Inc., 694 F.2d 505, 512-13 (7th Cir. 1982) ("there is no antitrust prohibition against a patent owner's using price discrimination to maximize his income from the patent").

43 United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945).

44 *See, e.g.*, ANTITRUST GUIDELINES FOR COLLABORATION AMONG COMPETITORS § 3.2 (2000). *See also, e.g.*, Turner, *supra* note 1, at 486 ("it is now established antitrust law that even dominant firms are not only free but are encouraged to innovate and retain the fruits of their innovations even though innovative success may tend to perpetuate their dominant position"); *Olympia Equip. Leasing,* 797 F.2d at 375 ("[a] monopolist, no less than any other competitor, is permitted and indeed encouraged to compete aggressively on the merits") (*quoting* Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 544 (1983)).

in an antitrust market, the effect of the intellectual property protection is to enable the owner to reap monopoly profits.[45] An intellectual property owner is not free, however, to engage in efforts to extend his monopoly beyond the terms of the statutory grant. Thus, for example, a patentee may not tie patented items to unpatented goods[46] or charge royalties past the term of the patent.[47] Such conduct is proscribed under the doctrines of patent and copyright misuse, and the proscription applies regardless whether the intellectual property holder acts unilaterally or in concert with others[48] and even though the rewards to the intellectual property holder might in some circumstances be greater if there were no such proscription.

Antitrust principles are similar. Under the antitrust laws, a firm is free to charge monopoly prices and earn monopoly profits, but it may not engage in anticompetitive conduct to increase its market power.[49] Anticompetitive conduct not only reduces economic welfare in a static sense by enabling price increases and output reductions but also diminishes and distorts innovation—precisely the harm the intellectual property laws are intended to guard against.

Although there are differing ways of articulating the notion of anticompetitive conduct, there appears to be an emerging consensus in both the economics literature and judicial decisions that anticompetitive conduct is

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45 It is sometimes said that intellectual property laws are intended to enable rights holders to earn monopoly profits. That is not entirely clear. The intellectual property laws are intended to confer rights of ownership, but there is no a priori reason to think that those laws were intended to favor innovations that enable the owner to obtain monopoly power. Moreover, while it is often the case that an intellectual property holder can be rewarded for the innovation only if it is able to charge a price in excess of marginal cost, it is by no means clear that conferring the reward of monopoly profits is optimal as a matter of intellectual property law. *See, e.g.*, Ian Ayres and Paul Klemperer, *Limiting Patentees' Market Power Without Reducing Innovation Incentives: The Perverse Benefits of Uncertainty and Non-Injunctive Remedies*, 97 MICH. L. REV. 985, 987 (1999) (arguing that "unconstrained monopoly pricing is not a cost-justified means of rewarding patentees" on the ground that "[t]he last bit of monopoly pricing produces large amounts of deadweight loss for a relatively small amount of patentee profit" and is not necessary to induce innovation). In any event, because there is no general prohibition in the antitrust laws or elsewhere on a monopolist's reaping monopoly profits, intellectual property laws predictably have the effect of enabling the realization of such profits, regardless whether that was their purpose.

46 *See, e.g.*, Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 136 (1969) ("[a]mong other restrictions upon him, [patentee] may not condition the right to use his patent on the licensee's agreement to purchase, use or sell, or not to purchase, use or sell another article of commerce not within the scope of his patent monopoly").

47 *See* Brulotte v. Thys. Co., 379 U.S. 29, 33 (1964) (while "a patent empowers [its] owner to exact royalties as high as he can negotiate with the leverage of that monopoly[,] . . . . use [of] that leverage to project those royalty payments beyond the life of the patent is analogous to an effort to enlarge the monopoly of the patent by tieing [sic] the sale or use of the patented article to the purchase or use of unpatented ones"); Meehan v. PPG Indus., 802 F.2d 881, 886 (7th Cir. 1986). These cases appear wrongly decided from the vantage point of contemporary antitrust analysis because deferring royalty payments probably does not constitute creation of additional market power. But even if these cases rest on an economic mistake, they embrace as a principle of intellectual property law that one cannot use intellectual property to extend the power conferred by it beyond the statutory grant.

48 *See* Leitch Mfg. Co. v. Barber Co., 302 U.S. 458, 463 (1938) (reiterating "the rule [that] every use of a patent as a means of obtaining a limited monopoly of unpatented material is prohibited" and emphasizing that it "applies whatever the nature of the device [i.e., unilateral action or contract] by which the owner of the patent seeks to effect such unauthorized extension of the monopoly").

49 *See* Berkey Photo v. Eastman Kodak Co., 603 F.2d 263, 274 (2d Cir. 1979).

conduct that serves no legitimate purpose, or is itself unprofitable, and is undertaken in order to exclude or weaken competitors in anticipation of increased market power and resulting supracompetitive recoupment.[50] This principle is, of course, entirely consistent with cases that find tie-ins and efforts to extend intellectual property beyond its statutory term to be a violation of the intellectual property laws.[51] In other words, both the antitrust laws and the intellectual property laws distinguish between earning monopoly profits, which property owners are entitled to do, and sacrificing profits in order to create additional power.

While unilateral refusals to deal are assessed under these same broad antitrust principles, successful challenges to unilateral refusals to deal have been very rare.[52] For one thing, except in cases involving evasion of regulation,[53] unilateral refusals to deal generally do not enable the defendant to obtain supracompetitive profits beyond those it would otherwise be able to

[50] *See, e.g.*, Aspen Skiing Co. v Aspen Highlands Skiing Corp., 472 U.S. 585, 610-11 (1985); (upholding jury verdict for plaintiff in section 2 case because the evidence "support[ed] an inference that [the defendant] was not motivated by efficiency concerns and. . . was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival."); Advanced Health Care Servs., Inc. v. Radford Comm. Hosp., 910 F.2d 139, 148 (4th Cir. 1990) ("if a plaintiff shows that a defendant has harmed consumers and competition by making a short-term sacrifice in order to further its exclusive, anticompetitive objectives, it has shown predation"); Neumann v. Reinforced Earth Co., 786 F.2d 424, 427 (D.C. Cir. 1986) ("predation involves aggression against. . . rivals through the use of business practices that would not be considered profit maximizing except for the expectation that (1) actual or potential rivals will be driven from the market, or the entry of potential rivals blocked or delayed, so that the predator will gain or retain a market share sufficient to command monopoly profits, or (2) rivals will be chastened sufficiently to abandon competitive behavior the predator finds threatening to its realization of monopoly profits."); United States v. Microsoft, 87 F. Supp. 2d 30, 38 (D.D.C. 2000) ("If the defendant with monopoly power consciously antagonized its customers by making its products less attractive to them—or if it incurred other costs, such as large outlays of development capital and forfeited opportunities to derive revenue from it—with no prospect of compensation other than the erection or preservation of barriers against competition by equally efficient firms, the Court may deem the defendant's conduct 'predatory'"), *aff'd in part and rev'd in part on other grounds*, 253 F.3d 34 (D.C. Cir. 2001).

Some cases involving alleged refusals to deal have analyzed the issues under the so-called "essential facilities doctrine," which is typically articulated in a way that does not explicitly focus on whether the defendant sacrificed profits in order to create additional market power. *See, e.g.*, MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1132-33 (7th Cir. 1983), *cert. denied*, 464 U.S. 891 (1983). Plaintiffs rarely prevail under this doctrine, however; and it is, in any event, not inconsistent in substance with the standard articulated in text, at least in cases involving unilateral refusals to deal.

[51] *See, e.g.*, Cite.

[52] *E.g.*, *Aspen Skiing*, 472 U.S. at 601; Otter Tail Power Co. v. United States, 410 U.S. 366, 372 (1973); Lorain Journal Co. v. United States, 342 U.S. 143, 155 (1951); *MCI*, 708 F.2d at 1102-03; *Cf.* Goldwasser v. Ameritech Corp., 222 F.3d 390, 397 (7th Cir. 2000) (although it may be "exceedingly difficult" to establish the possession-of-monopoly-power element of a section 2 case, this task "is a snap" compared to the challenge of proving predation or the unlawful maintenance of monopoly power); Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1183 (1st Cir. 1994) ("Despite the theoretical possibility, there have been relatively few cases in which a unilateral refusal to deal has formed the basis of a successful Section 2 claim.").

[53] *See, e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366, 368 (1973); United States v. AT&T, 524 F. Supp. 1336, 1347 (D.D.C. 1981).

obtain.[54] Further, there are often legitimate reasons for one firm's refusal to deal with another; the latter may, for example, be an opportunist, untrustworthy with trade secrets, or an unreliable shepherd of the former's goodwill. It is thus widely acknowledged that all firms, including monopolists, are ordinarily free under the antitrust laws to decide with whom and on what terms they will do business.[55]

In addition, courts and antitrust enforcers recognize that one can prudently condemn a refusal to deal only if dealing is demonstrably feasible and the terms on which dealing should be required can be readily ascertained.[56] Thus, they have, for reasons of prudence or principle, generally insisted on either a prior pattern of dealing by the defendant, which can serve as a benchmark by which to measure the defendants' duty to the plaintiff,[57] or that the defendant be already subject to regulation by a government agency with the expertise and resources to determine appropriate terms of dealing and to monitor their implementation.[58]

And, of course, there are the other elements that must be established by an antitrust claimant, such as the requirement that the defendant be shown to have monopoly power, or a dangerous probability of obtaining it, in a properly defined antitrust market.[59] This obstacle should prove insuperable for many potential plaintiffs—particularly ISOs like CSU that usually will have to show that the defendant will be able to exercise monopoly power in a market for servicing equipment that is sold in a competitive market.[60]

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[54] Although the facts bearing on the antitrust issues in the *CSU* case were not developed, it appears very unlikely that the plaintiff there would have been able to prove the requisite competitive harm. The problem with the decision thus appears to be not the result, but the rationale.

[55] *See* United States v. Colgate & Co., 250 U.S. 300, 307 (1919); Serv. & Training, Inc. v. Data Gen. Corp., 963 F.2d 680, 686 (4th Cir. 1992).

[56] In principle, the defendant should be required to deal only at a profit-maximizing price, which will of course be above marginal cost. The reason is that the defendant is permitted to maximize profits and the antitrust offense requires proof that it chose not to do so. *Cf.* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) (plaintiff is entitled to relief only from the illegal increment of defendant's conduct, not to a competitive price).

[57] *E.g.*, *Aspen Skiing*, 472 U.S. at 597. Some commentators have gone so far as to suggest that there can never be a duty to deal if the monopolist has not previously dealt with rivals. *See* Pitofsky, *supra* note 30, at 6 ("a patent holder has no obligation to license or sell in the first instance").

[58] *See, e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366, 372 (1973). A duty to deal was also imposed in *United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 410-11 (1912), *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484, 488 (1st Cir. 1952), and *Associated Press v. United States*, 326 U.S. 1, 12-13 (1945), but those cases involved concerted action, not a unilateral refusal to deal by a monopolist.

[59] *See* Goldwasser v. Ameritech Corp., 222 F.3d 390, 397 (7th Cir. 2000) ("Few would say that the first element [of a Section 2 case] is easily proved: it is exceedingly difficult to prove market power, or monopoly power directly, and the conventional way of proving power by showing a given share of a properly defined relevant market can present vexing problems as well."). Where the product or service to which access has been denied is alleged to be an essential facility, the plaintiff must also demonstrate an inability practically or reasonably to duplicate the facility. *See* MCI Communications Corp. v. AT&T, 708 F.2d 1091, 1132-33 (7th Cir. 1983); Corsearch, Inc. v. Thompson & Thompson, 792 F. Supp. 305, 332-33.

[60] Unless the defendant manufacturer has a very high share of the overall equipment market, ISOs challenging a manufacturer's refusal to license diagnostic software or to sell patented parts will have to rely on "lock-in" theory articulated in *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S.

There is, in short, no serious conceptual or policy conflict between intellectual property law and antitrust law—properly understood—that could justify an antitrust exemption for refusals to license intellectual property. Nor, especially in light of the infrequency of successful antitrust claims based on unilateral refusals to deal, is there any reason to believe that, absent an antitrust immunity, ex ante incentives for innovation would be reduced.[61]

There is one practical concern, though, that should be noted. By contrast to a gas station at the only exit off the highway or a restaurant with the best chef in town or any of the countless other tangible assets that can create market power, intellectual property can be replicated at virtually no marginal cost. Intellectual property that could be useful to a rival's business—the stuff of antitrust disputes—thus invites a request for a license. Refusals to license might therefore more frequently be provoked, and a regime that permitted antitrust remedies for such refusals might be expected to induce unfounded lawsuits and thus to impose a tax on the legitimate exercise of intellectual property rights.[62] If large enough, the prospect of that tax could diminish the kind of innovative activity the intellectual property laws are intended to induce.

Although there is some theoretical basis for this concern, at least absent compelling empirical support, it does not provide a sufficient basis to justify a special safe harbor for intellectual property. In the first place, especially given the increasing importance of network industries,[63] which are

451, 496-97 (1992), to define the relevant market and establish monopoly power. That theory requires a showing that the market is characterized by high information and switching costs and that, as a result, customers become "locked-in" to one brand of equipment and competition in the primary equipment market does not discipline aftermarket pricing. Since *Kodak*, few plaintiffs have been successful in establishing market or monopoly power by this means. *See, e.g.*, PSI Repair Servs., Inc. v. Honeywell, Inc., 104 F.3d 811, 821 (6th Cir. 1997); Digital Equip. Corp. v. Uniq Digital Techs., Inc., 73 F.3d 756, 763 (7th Cir. 1996); Allen-Myland, Inc. v. IBM Corp., 33 F.3d 194, 208 (3d Cir. 1994). *But see* Picker Int'l, Inc. v. Leavitt, 865 F. Supp. 951, 960 (D. Mass. 1994) (plaintiff presented sufficient evidence to create a genuine issue of fact with respect to whether the relevant market was service for Picker's CT scanners).

[61] *See generally*, Turner, *supra* note 1, at 489 (explaining the "flaw in the supposition that any antitrust rules limiting the patentee's reward would have a significant effect on decisions to embark on inventive activity"). *See also, e.g.*, F.M. SCHERER, INNOVATION AND GROWTH: SCHUMPETERIAN PERSPECTIVES 216 (1984) ("no evidence" that compulsory licensing in antitrust decrees led to reduced development in R&D).

[62] *See Image Technical Servs.*, 125 F.3d at 1217-18 (observing that "[t]he effect of [antitrust] claims based upon unilateral conduct on the value of intellectual property rights is a cause for serious concern" because "[w]ithout bounds, [such] claims . . . will proliferate" and "subject holders of patents and copyrights" to the "cost and risk of lawsuits based upon the effect . . . of their refusal to sell or license").

[63] *See generally, e.g.*, Allan Murray, *Intellectual Property: Old Rules Don't Apply*, WALL STREET JOURNAL, August 23, 2001, at A1 (citing software and pharmaceuticals as examples of products "whose primary value lies in intellectual property" and which "drive today's economy"); Peter S. Menell, *An Epitaph for Traditional Copyright Protection of Network Features of Computer Software*, ANTITRUST BULLETIN, 651, 656 (Fall-Winter 1998) (observing that modern markets in which network effects are

themselves obvious candidates for access demands, it is by no means clear that antitrust disputes about refusals to deal are especially likely to involve intellectual property. Moreover, while there have in the past been flurries of lawsuits in response to perceived changes in the law, antitrust challenges to refusals to deal have rarely succeeded; and the claims have rapidly subsided as claimants have come to understand the difficult burden they must meet. There is no reason to expect a different result in the intellectual property context.

IV. TOWARD A SYNTHESIS

If unilateral refusals to deal rarely violate the antitrust laws, it might be argued, subjecting unilateral refusals to license intellectual property to antitrust scrutiny is unlikely to have a big practical impact. So, one might ask, why the controversy? Why does the *CSU* decision matter?

The answer is that it matters on several levels. In the first place, some unilateral refusals to deal are very anticompetitive and damaging. The *AT&T* case was, after all, a refusal to deal case.[64] There is no reason to think that AT&T should have been permitted to engage in the conduct at issue there if only the interfaces used by MCI to connect with AT&T's network had been patented—especially since AT&T's market power was a result of its ubiquitous local network, not its interfaces.[65]

Second, the line between simple refusals to deal and other kinds of exclusionary conduct is hard to draw, and antitrust immunity will no doubt encourage firms to seek to expand the boundaries—and to do so by formalistic arguments that focus on how to categorize types of conduct rather than on their competitive affects. *Lorain Journal*, for example, involved a monopolist's refusal to deal in order to deter customers from dealing with the monopolist's rivals so that it could obtain a monopoly in another business.[66] And, while the *CSU* case purported to be narrowly decided and to acknowledge, for example, that tie-ins involving intellectual property are not immune from the antitrust laws, it is by no means clear how its rule would treat an arrangement in the form of a unilateral announcement of a refusal to deal policy that effects in substance a tie in (*e.g.*, a firm announces that it will license patented product A only to firms that also buy B from it).

significant "have taken on growing importance" and "include interface specifications for computer operating systems, protocols for Internet communication, networks of automatic teller machines for banking, and broadcast standards for high-definition television").

[64] MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1132-33 (7th Cir. 1983).

[65] *Id*. at 1133. It has been suggested that this problem could be avoided by "distinguishing between cases in which the intellectual property right itself is the facility to which the plaintiff wants access and cases in which intellectual property rights exist but are incidental to the control of the facility itself." H. Hovencamp, M. Janis and M. Lemley, IP and Antitrust ¶ 13.3 at 13-21 (New York 2002). This distinction seems on its face rather arbitrary and invites difficult line-drawing disputes in some cases. It is not at all clear, for example, whether a competing manufacturer of personal computer operating systems that seeks interoperability with Windows wants access to the copyrighted software or to the network externalities (i.e., the universe of users and applications) available to Windows.

[66] Lorain Journal Co. v. U.S., 342 U.S. 143, 149-50 (1951).

Third, and perhaps most important, safe harbors distort business behavior. Antitrust counsel would advise an AT&T of today, for example, that it could immunize its anticompetitive refusal to deal from the antitrust laws by contriving to design its system so that firms like MCI that need access to its network would have to use patented or copyrighted interfaces that, under *CSU*, it may refuse to license. In that event, competition would be injured, and network design and innovation would be distorted and presumably diminished. In other words, the *CSU* decision, although intended to prevent the antitrust laws from reducing incentives for and thus distorting innovation, could itself have the effect of both distorting innovation and undermining competition.

The larger problem with *CSU* is that it is retrograde. For more than twenty years, from at least the Supreme Court's decision in *BMI*[67] through the recent unanimous *en banc* Court of Appeals decision in the *Microsoft* case,[68] antitrust law has moved away from the rigidities of formalism and legal issues, in favor of a fact-based analysis that applies rigorous economic principles to distinguish anticompetitive from procompetitive conduct. The *CSU* decision seems oblivious to this development and to the resulting convergence of antitrust and intellectual property law principles. Ironically, therefore, *CSU* in this respect disserves its own purported objective of protecting a coherent regime for the exploitation of intellectual property rights.

Some have suggested that there might be a middle ground, a kind of partial immunity from the antitrust laws for intellectual property. Two such hybrid approaches have been suggested. Neither is sound.

The first approach, picking up on language in patent and copyright misuse cases proscribing attempts to extend monopoly power beyond the terms of the statutory grant, asks whether the alleged injury to competition resulting from the refusal to deal is within the patent grant (*e.g.*, the market in which patented parts are sold) or outside it (*e.g.*, the service market, for which the parts are an input). In the former case, the monopolist's conduct would be immune from antitrust scrutiny; in the second, ordinary antitrust principles would apply.[69] There are a number of problems with this pro-

[67] Broad. Music, Inc. v. CBS, 441 U.S. 1 (1979).

[68] United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001) (en banc), *cert. denied*, 122 S. Ct. 350 (2001). The court relied on a broad, fact-based analysis and rejected arguments for formalistic rules including, among others, safe harbors for product design and intellectual property, a per se approach to software tying, mechanical rules for exclusive dealing-type conduct, and special rules for proving monopoly power in dynamic industries.

[69] *See, e.g.*, Ronald S. Katz, Janet A. Hart & Adam J. Safer, *Intellectual Property v. Antitrust: A False Dilemma*, SD 72 ALI-ABA 1 (1999) (suggesting that "[t]here is a simple formula that will ensure that the purposes of [the antitrust and intellectual property laws] are fulfilled[;] [w]here there is one market involved a patent and/or copyright holder has the exclusive right to exploit his invention[;] [h]owever, where two markets exist and the patent or copyright holder seeks to extend his 'legal monopoly' into the second market, antitrust liability is likely"); Telecomm Technical Servs., Inc. v. Siemens Rolm Communications, Inc., 150 F. Supp. 2d 1365, 1369 (N.D. Ga. 2000) (indicating that, even after the Federal Circuit's decision in *CSU*, "[t]here is still room for a particular plaintiff to show lever-

posed compromise. First, it ignores the reality that patents are granted for inventions, not markets, and the difficulty of distinguishing, for market definition purposes, between a product and its components.[70] In addition, such a formalistic rule could create incentives for intellectual property holders to avoid otherwise efficient vertical integration in order to make sure that they stay in the safe harbor.[71] Moreover, as others have noted, this approach is inconsistent with the doctrine of contributory infringement.[72]

The second approach focuses on whether the refusal to deal was genuinely intended to protect intellectual property rights or was, instead, a pretext for some other, anticompetitive goal.[73] It is not clear what this means. If it means that a refusal to deal loses its antitrust immunity if it is "anticompetitive" in the antitrust sense, it effectively nullifies the exemption; if it means "anticompetitive" in a less technical sense, then it is based on a false dichotomy because the very purpose of intellectual property law is to permit the holder to reap the benefits of exclusive enjoyment, even if that means charging monopoly prices to customers and not sharing the property with rivals. Moreover, as the *CSU* court correctly noted,[74] any rule that turns on intent and motive—rather than the economic attributes of the defendant's conduct—is inconsistent with the trend of the modern cases, which focus on objective evidence, rather than inferences from inevitably ambiguous evidence of subjective intent.[75]

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aging by proving that the market in which the defendant refused to deal was outside the scope of the patent").

[70] *See* Intergraph Corp. v. Intel Corp., 88 F. Supp. 2d 1288, 1292 (N.D. Ala. 2000) ("the patent grant is a legal right to exclude, not a commercial product in a competitive market"); *In re* Indep. Serv. Org. Antitrust Litigation, 989 F. Supp. 1131, 1135-36 (D. Kan. 1997) (emphasizing that "[t]he scope of a 'patent monopoly' is defined by the claims of the patent, not by the limits of what a court determines is the most analogous antitrust market and criticizing the Ninth Circuit's assumption in *Image Technical Services* "that a single patent . . . can be equated with a single relevant antitrust market" because were such a view to prevail, "[i]nventors rarely could refuse to license their products without fear that they had not properly defined the relevant antitrust market or considered how the relevant markets may be defined in the future").

[71] *Cf.* Daniel L. Rubinfeld, *Antitrust Enforcement in Dynamic Network Industries*, ANTITRUST BULLETIN, 1998 WL 16568457 (observing that "a dominant firm will have a legitimate interest in innovating and entering into complementary product markets, since (among other things) this will enhance the value of [its] product" and that such integration may create real efficiencies).

[72] *See, e.g.*, Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶704.1 at 114 (2001 Supp.) (explaining that in *Dawson Chem. Co. v. Rolhm & Haas*, 448 U.S. 176 (1980), the Supreme Court "explicitly read the doctrine of contributory infringement broadly to permit a patentee to enforce its rights in a process patent even when the effect was to create a monopoly in an unpatented product to which the process patent applied, notwithstanding the infringement defendant's claim that the impact was to extend the patentee's monopoly from the patented process to the unpatented product").

[73] *See Image Technical Servs.*, 125 F.3d at 1219 (desire to protect intellectual property rights is a presumptively valid business justification for refusal to license, but the presumption may be rebutted by evidence that the justification is a "pretext . . . to mask anticompetitive conduct"). *Cf.* Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1188 (1st Cir. 1994) ("evidence that [the defendant] knew that developing a 'proprietary position' in the area of diagnostic software would help maintain its monopoly in the aftermarket for service of [its] computers" was not sufficient to rebut justification in the face of "evidence that [Data General] set out to create a state-of-the-art diagnostic that would help to improve the quality of [its] service").

[74] 203 F.3d 1322, 1327-28 (Fed. Cir. 2000).

[75] *See, e.g.*, *Olympia Equip. Leasing*, 797 F.2d 370, 379 (7th Cir. 1986) ("We add, what has be-

CONCLUSION

Although the hybrids discussed above are flawed, they suggest an important intuition—one that lies at the core of both intellectual property law and antitrust law. It is that one may enjoy the fruits of her lawfully obtained property, including whatever monopoly profits that property enables her to earn, but she may not sacrifice such profits strategically, by using that property in ways that serve no legitimate purpose (i.e., one that neither benefits consumers nor promotes efficiency) in order to create additional market power. In other words, a firm, even a monopolist, can profit from its property (including its intellectual property) but has no legal entitlement to extend its power beyond the intellectual property grant or to create additional market power.[76] The *CSU* case erred in not recognizing this common intersection of intellectual property law and antitrust law, in not understanding how the rigorous economics and careful attention to facts of contemporary antitrust law ensures that it protects the legitimate interests of property owners, and in relying on formalistic distinctions—between intellectual property and tangible property, and between refusals to deal and other forms of exclusionary conduct—that disserve the interests of both bodies of law.

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come an antitrust commonplace, that if conduct is not objectively anticompetitive the fact that it was motivated by hostility to competitors . . . is irrelevant."); Ball Mem. Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1338 (7th Cir. 1986) ("'intent to harm rivals' is not a useful standard in antitrust"); Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 232 (1st Cir. 1983) ("'intent to harm' without more offers too vague a standard in a world where executives may think no farther than 'Let's get more business,' and long-term effects on consumers depend in large measure on competitors' responses").

The intent test also appears to conflict with the Supreme Court's holding in *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 64 (1993), that a copyright holder's intent in pursuing an infringement action is irrelevant so long as the copyright is objectively valid and enforceable. *See* Areeda & Hovenkamp, *supra* note __, ¶ 704.1 at 112.

76 *See generally*, William F. Baxter, *The Definition and Measurement of Market Power in Industries Characterized by Rapidly Developing and Changing Technologies*, 53 ANTITRUST L.J. 717, 725-26 (1984) ("The basic principle is that the owner of a technology is entitled to the expropriation of all the consumer surplus under the demand curve for his invention" but not to use his invention to "erect entry barriers" or to "suppress[] rivalry between different technologies".)