

Antitrust and IP: What the Feds should do about refusals to deal

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*The Strategic Use of Licensing: Is There Cause for Concern about
Unilateral Refusals to Deal?*

IP/antitrust policy conflict?

- *Image Tech v. Kodak* (9th Cir. 1997)
 - Refusal to deal = plaintiff's judgment
 - IP defense rejected as “pretext”
- *CSU v. Xerox* (Fed. Cir. 2000)
 - Refusal to deal = defense judgment
 - IP defense works like a charm
- Facts not identical, but pretty darn close!

Conflict misperceives key issue

- Common view: cases about “antitrust treatment of intellectual property”
- *Wrong perspective*, we say:
 - Rather, cases about “antitrust treatment of price discrimination”
 - Mistaken antitrust hostility forced true case explanations into hiding.

The executive summary

- We should correct mistaken antitrust policy
- Metering often a reasonable procompetitive way to collect for use of valuable property
- Any property - not just IP.

Refusals enabled *price discrimination*

- Why do firms refuse to deal?
- Often refusals to deal enable **price discrimination**
 - Price discrimination: “reaping different margins from different consumers”
 - Higher service users probably have greater willingness to pay
 - Not effective simply to raise parts prices, due to parts-service tradeoff.

Price discrimination has bad rap

Cases make two suggestions:

1. Price discrimination is evidence of market power
 - *Fortner II*, 429 U.S. 610, 617 (1977)
2. Price discrimination has bad effects
 - *Jefferson Parish*, 466 U.S. 2, 14 (1984).

Bad rap 1 unwarranted

- Price discrimination not evidence of market power
- With differentiated products, most can discriminate
- Ability to affect own price
 - That is, *individual firm pricing discretion*
 - Does not imply ability to affect market price.

Bad rap 2 unwarranted

- Price discrimination does not necessarily have social costs
- Price discrimination often can be good for consumers
 - Increase in user base
 - Increase in innovation.

What should DOJ and FTC do?

- Clarify antitrust policy:
 - “Price discrimination a valid business justification for refusals to deal”
 - Part of normal competitive process
- Justification should be valid, whether or not IP involved
- Educate courts
 - Intervene appropriately
 - Combat *Fortner* and *Jefferson Parish* dicta in future cases.