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MAKING SENSE OF SHERMAN ACT SECTION 2
IN THE HIGH-TECH ECONOMY

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Section 2 of the Sherman Act makes it illegal to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations."[1] The text of this prohibition has not changed since it was enacted in 1890, during a time of rapid industrialization and the emergence of heavy industry. Today, our economy is increasingly dominated by less tangible forces: information, service, and technology. Yet Section 2 lives on. The most serious question presented in monopolization law today is whether Section 2 is flexible enough to confront the forces of the new economy with tools designed in a long-gone era.

This paper examines significant recent developments in U.S. monopolization law: the remedy order in the Microsoft case; the emergence of case law helping to define a manufacturer's legitimate aftermarket policies for supporting equipment and supplying services, in the wake of Eastman Kodak Co. v. Image Technical Services, Inc.;[2] and the intersection between antitrust law and an intellectual property holder's right to refuse to license its protected

[1] 15 U.S.C. § 2 (1997).

[2] 504 U.S. 451 (1992).

property. Together, the development of these issues indicates that Section 2, properly interpreted and properly applied, should remain vital to the health of the high-tech economy. At the same time, each issue also shows that ill-advised or unwise applications of monopolization law can jeopardize the vigorous competition Section 2 was intended to protect.

I. The Microsoft Remedy

Monopolization cases under Section 2 of the Sherman Act are often high-profile affairs. But few cases of any kind have generated as much public comment and scrutiny as United States v. Microsoft Corp. Hundreds of writers have drafted thousands of pages analyzing the case and Judge Thomas Penfield Jackson's findings of fact and conclusions of law. The latest developments in this matter will do nothing to stem this tide. On June 7, 2000, Judge Jackson issued an eagerly-anticipated order creating a remedy for the violations of antitrust law he found. The court dramatically—and without elaborate discussion—divided Microsoft into two separate companies. As explained below, the severe remedy unnecessarily divests Microsoft of significant parts of its legitimately-acquired competitive edge and may ultimately deflate honest competition in the high-tech world.

The history of this case is well-known. The Justice Department and numerous states attorneys general brought this action against Microsoft in 1998. The suit accused the giant software company of a wide array of anticompetitive conduct relating to the licensing of its Windows operating system. Most notably, the government alleged that Microsoft illegally tied its Explorer internet browser to the Windows operating system by requiring customers to accept the browser in order to obtain Windows. According to the government, Microsoft's conduct stifled competition in the operating systems market and harmed rival internet browsers such as Netscape.

A bench trial began in October 1998 and concluded in June 1999. In the findings of fact entered in November 1999, the court concluded that Microsoft enjoyed monopoly power in the market for Intel-compatible personal computer operating systems.[3] The court also made extensive findings pertaining to a wide array of anticompetitive conduct, which collectively preserved and protected Microsoft's operating systems monopoly. After weeks of unsuccessful settlement negotiations, conclusions of law were entered in April 2000. The court held that Microsoft violated Section 2 of the Sherman Act by monopolizing the operating systems market and attempting to monopolize the internet browser market.[4] The court further concluded that Microsoft illegally tied its web browser to Windows, in violation of Section 1 of the Sherman Act.[5]

The stage was set for Judge Jackson to find a remedy. Adopting the proposal set forth by the government, the heart of the court's ruling splits Microsoft into two separate and competing companies.[6] One, colloquially dubbed "Ops Co.," would own and market the Windows operating system. The other, colloquially dubbed "Apps Co.," would control all other Microsoft business, such as the Explorer browser and the Office suite of programs (including Word and Excel). The order regulates the conduct between the two new entities. Specifically, Ops Co. and

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[3] See United States v. Microsoft Corp., 84 F. Supp. 2d 9 (D.D.C. 1999) (findings of fact).

[4] See United States v. Microsoft Corp., 87 F. Supp. 2d 30 (D.D.C. 2000) (conclusions of law).

[5] The authors assume the correctness of the liability ruling in Microsoft only for the purpose of providing commentary on the remedy phase of the case.

[6] See United States v. Microsoft Corp., 97 F. Supp. 2d 59 (D.D.C. 2000) (imposing remedy).

Apps Co. are prohibited from merging, entering into joint ventures, or agreeing to develop and market each other's products, for a period of ten years. The new businesses are also expressly prohibited from "licensing, selling or otherwise providing to the other [b]usiness any product or service on terms more favorable than those available to any similarly situated third party."[7]

Not to be overlooked is an important series of restrictions on the conduct of the new companies with regard to computer equipment manufacturers and other software companies. The new companies are prohibited from taking any adverse action against any original equipment manufacturer who uses or sells non-Microsoft products or services.

The order also requires Ops Co. to license Windows products pursuant to uniform licensing agreements and to afford original equipment manufacturers equal access to licensing terms and discounts. Significantly, the new companies are not permitted to enter into or enforce agreements in which third parties agree to distribute, use, or promote Microsoft's operating system software on an exclusive basis.

Appreciating the magnitude of this decision requires a sense of the history of court-imposed sanctions for Section 2 violations. A break-up such as Judge Jackson ordered is the most extreme remedy in a monopolization case. It is extraordinarily rare for dissolution to be ordered following an adjudication of a monopolization claim on the merits, and one must dig into dusty volumes of antitrust law to find such cases. To the extent it has been imposed, the "break up" remedy addresses the unlawful acquisition of monopoly power. For example, two landmark antitrust cases, Standard Oil Co. v. United States[8] and United States v. American Tobacco Co.,[9]

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[7] Id. at 65.

[8] 221 U.S. 1 (1911).

arose from governmental challenges to "trusts" that were illegally created by assembling and combining numerous competing firms and related enterprises. The remedies in both cases imposed dissolution and division of the monopoly. Comparable break-ups may be warranted to rectify a merger that impermissibly creates monopoly power in a relevant market, or as a remedy for the effects of a government-sanctioned and poorly-regulated monopoly, such as happened in the consent decree in the AT&T case.

The allegations in Microsoft are fundamentally different in nature. Microsoft is a case pertaining to the maintenance, not acquisition, of monopoly power. The government claimed (and the court found) that Microsoft engaged in exclusionary practices to protect its monopoly. The creation of Microsoft's monopoly in the operating systems market was largely not at issue in the trial. So why should a remedy divest Microsoft of that power? It is well-established that Section 2 does not prohibit monopoly power, only the abuse or wrongful acquisition thereof. If it is the abuse of such power that is being attacked, there is little evidence to suggest that divestiture is required when more narrowly-crafted and tailored conduct-specific remedies could easily be imposed. Indeed, the elimination of "exclusive licensing" and "exclusive grant backs" in intellectual property deals could go a long way in this regard.

Unfortunately, the court offered a veiled and incomplete analysis of why a structural remedy was appropriate in this case. The court first denied Microsoft's request for additional discovery in the remedy phase, finding it necessary to reach a quick and appealable judgment. The court explained that Microsoft has not conceded that its business practices violated the antitrust laws and that an appeal should be heard sooner, not later. Furthermore, the court

[9] 221 U.S. 106 (1911).

characterized Microsoft as "untrustworthy" and its compliance with prior court orders "illusory." Judge Jackson then "reluctantly [came] to the conclusion, for the same reasons, that a structural remedy has become imperative."[10] But the court's rationale is clearly more tailored to explaining why it denied additional discovery, not why it imposed the structural remedy. The only reasons relevant to this later point were the court's finding that Microsoft continues to do business as it has in the past, and the court's facile conclusion that, since the government won its case, it was entitled to deference on the remedy of its choice.[11]

Yet those reasons have little weight in explaining why such a grave remedy was warranted. If the problem is that Microsoft has not abandoned its anticompetitive practices, why not simply tailor conduct-based relief prohibiting these actions? Moreover, the fact that the government has won the case does not necessarily mean that the relief they have requested is sound as a matter of policy or proper as a matter of law. Some commentators have referred to the ruling as "intellectually lazy."[12] In light of the rigorous and detailed findings of fact and conclusions of law, this might be overstatement. But the court's failure to engage the enormously important questions of law and policy leave the impression that the divestiture order was largely motivated by a desire to punish Microsoft for its lack of contrition, rather than by the values Section 2 was designed to protect.

[10] Id. at 62.

[11] Unfortunately, "populist" political tensions among the plaintiffs may have forced the U.S. Department of Justice to seek a remedy more severe than it had wanted. During the course of court-ordered mediation, it was widely reported that DOJ (along with some, but not all, of the 19 state plaintiffs) was willing to accept a settlement imposing conduct-based remedies that could be implemented quickly. See, e.g., Jared Sandberg, "Microsoft's Six Fatal Errors," Newsweek (June 19, 2000) at 23.

[12] Robert J. Samuelson, "Microsoft Muddle," Wash. Post (June 11, 2000) at B7.

Crafting remedies in high-tech antitrust cases is a particularly delicate task—one that cannot be carried out capriciously. Above all else, what is required is a balanced approach that respects legitimately-acquired market power. Relief should be reasonably related and proportional to the alleged harm created by the wrongful conduct, in order to restore the market to the conditions that would have existed but-for the violation. The consequences of imposing broader relief are severe. Failing to protect legitimate market power diminishes the rewards of honest competition, and discourages new innovation. This is a particularly important concern in rapidly-changing ("moving target") high-tech markets, which time and again have demonstrated how new technologies and innovation can quickly and profoundly alter the structure of an entire industry. An excessive remedy will throw cold water on the pace of technological innovation, a major engine of economic growth.

The Microsoft court's failure to address these concerns leaves one to wonder why a more balanced conduct-based approach could not be adopted. It is important to note that the ruling does not "break up" the operating systems monopoly itself, but merely isolates it from software applications and other Microsoft businesses. As a result, the order necessarily contains many conduct-based restrictions limiting Ops Co.'s ability to protect its market power or expand that power into related markets. For example, the order requires uniform licensing of Windows software and prevents discrimination in licensing terms based on computer hardware manufactures' dealings with other operating systems providers. Even more significant is the restriction on exclusive licensing. This will put an end to one of Microsoft's most effective anticompetitive strategies: requiring licensees to grant Microsoft an exclusive license in their software or technology, in exchange for a non-exclusive license to use Windows. Imposing conduct limitations that create open and equal access to Windows should obviate the need for broad structural relief in this case. Such a conduct-based remedy would be far more consistent with the narrowly-tailored approach courts need to take in the rapidly-moving high-tech world.

As of this writing (September 2000), the order breaking up Microsoft has been stayed. The Supreme Court is considering an important procedural question of whether it should review Judge Jackson's ruling directly, or whether the case would benefit from review by an intermediate appellate body. Whatever the procedural outcome, the reviewing body must carefully consider whether the drastic remedy is necessary to restore competition and whether it bears any direct relationship at all to the wrongful conduct alleged. In the final analysis, the appellate courts must adopt a more balanced conduct-based approach to the remedy in the Microsoft case.

II. Tying Claims in Aftermarkets: Kodak and Its Progeny

A tying agreement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier."[13] Tying has long drawn special interest from economists and antitrust practitioners, having been challenged both as an unreasonable restraint of trade under Section 1 and as exclusionary conduct triggering liability for monopolization or attempted monopolization under Section 2.

Much recent attention has justifiably been focused on the tying claim presented in the Microsoft case. The government challenged Microsoft's "bundling" of software with its operating system package. The court held that such packaging illegally tied the sale of the

[13] Northern Pac. Ry. v. United States, 356 U.S. 1, 5-6 (1958).

Explorer internet browser to the sale of Windows. The critical determination in that claim was the factual finding that the operating system and the internet browser are two different products, for if they were not, no tying could be found.

To reach a finding of liability on the tying claim, the Microsoft court needed to address a seemingly contrary ruling from the D.C. Circuit. In the earlier proceeding, the government had sought to hold Microsoft in contempt for violating a consent order that allowed Microsoft to sell "integrated products" but prohibited the company from bundling its internet browser with Windows 95. The D.C. Circuit reversed the district court's preliminary injunction against the practice and defined an integrated product as "a product that combines functionalities (which may also be marketed separately and operated together) in a way that offers advantages unavailable if the functionalities are bought separately and combined by the purchaser."[14] Judge Jackson neatly side-stepped this ruling. Relying on Supreme Court precedent, Judge Jackson held that whether two separate products exists depends on the character of demand for the products, not their functional relation. Because internet browsers were distinguishable from operating systems in the eyes of consumers, the court concluded that two separate products existed, and an illegal tie was found.[15]

Yet the tying claim against Microsoft is not the only significant development in tying law involving high-tech goods and services. Courts are still grappling with the legacy of the Supreme Court's 1992 ruling in Eastman Kodak Co. v. Image Technical Services, Inc.[16] Kodak

[14] United States v. Microsoft Corp., 147 F.3d 935, 948 (D.C. Cir. 1998).

[15] See United States v. Microsoft Corp., 87 F. Supp. 2d at 50-51.

[16] 504 U.S. 451 (1992).

challenged a decision by a photocopier equipment manufacturer to condition the sale of replacement parts on the sale of service for the equipment. The policy change terminated without warning long-standing relationships with service providers.

Largely because of its unique procedural posture and fact pattern, Kodak's contribution to the law of tying has proven to be highly controversial. Of particular importance here is the Court's holding that, as a matter of law, it was possible for Kodak to possess market power in derivative aftermarkets (such as service of an OEM's own equipment) even though it did not possess market power in the primary market—that for the sale of the equipment itself.[17] Kodak had argued that competition in equipment sales would check supracompetitive pricing in the aftermarkets, because "higher service prices will lead to a disastrous drop in equipment sales."[18] The Court held that significant information and switching costs could, in certain circumstances, dampen the effect of parts and service policies on primary product sales. Importantly, the Court also stressed that "[i]t may be that [Kodak's] parts, service, and equipment are components of one unified market, or that the equipment market does discipline the aftermarkets so that all three are priced competitively overall, or that any anticompetitive effects of Kodak's behavior are outweighed by its competitive effects."[19]

Much as Justice Scalia's dissenting opinion in Kodak feared, Kodak has spawned a wave of litigation in a wide range of industries. Subsequent cases have shown that the unique facts of Kodak render it an isolated exception to the general doctrine permitting a firm to choose its own

[17] See id. at 466.

[18] Id. at 472.

[19] Id. at 486.

business partners in providing the post-equipment sale of repair parts and services. The cases make clear that the strength of Kodak-type claims must be measured according to three central criteria:

- Whether customers were ***surprised*** by an unexpected detrimental change in policy or pricing of post-equipment sale parts or service;
- Whether ***excessive costs prevent switching*** to a different equipment manufacturer's product; and
- Whether ***lifecycle pricing*** is possible to permit an accurate assessment of the total cost of equipment, service, and parts over the life of the equipment.

Based on these concerns, nearly all courts have correctly recognized that a Kodak-type claim cannot be sustained when a company has not unexpectedly changed its policy in a detrimental manner to diminish the availability of parts or service for original equipment customers, when original equipment customers are likely to be able to calculate lifecycle costs, and when original equipment purchasers can switch to a different original equipment manufacturer.

A recent First Circuit case, SMS Systems Maintenance Services, Inc. v. Digital Equipment Corp.,[20] demonstrates the dim view lower courts have taken of Kodak-type claims. The facts of that case are straightforward. Digital Equipment Corp. (DEC) manufactures computer hardware, including personal computers and mainframes. In 1994, DEC introduced a new product line of mid-range computer servers and included a three-year service warranty at no extra charge. This was a break from past warranties that were of one year in length only.

[20] 188 F.3d 11 (1st Cir. 1999), cert. denied, 120 S. Ct. 1241 (Feb. 28, 2000).

SMS is a national independent service organization (ISO) that specializes in servicing DEC equipment. SMS argued that users of DEC equipment—DEC's "installed base"—are locked-in to buying DEC computers because of significant sunk costs in training employees and acquiring DEC-compatible software. SMS contended that DEC exploited its installed base by lengthening its warranties. According to SMS, DEC equipment owners would not consider using third-party ISOs for service because doing so effectively means paying for the same service twice. Relying on Kodak, SMS alleged that such conduct amounted to an attempt to monopolize the market for computer repair and maintenance.

The First Circuit affirmed the district court's grant of summary judgment to DEC. The court first rejected an argument by SMS that the relevant market is for servicing DEC mid-range servers. Recognizing that "[c]ases involving aftermarkets are sui generis,"[21] the court held that "a court may conclude that the aftermarket is the relevant market for antitrust analysis only if the evidence supports an inference of monopoly power in the aftermarket that competition in the primary market appears unable to check."[22]

The court then concluded that SMS had not raised a genuine issue of material fact regarding DEC's alleged monopoly power, based on SMS' failure to present evidence of the Kodak factors outlined above. First, all equipment purchasers were aware of the warranty's terms. The transparency of DEC's policy provided customers in the primary market with sufficient information to check abuses in the aftermarket. Indeed, the court pushed this analysis one step further. In a compelling footnote, the court noted that customers in the primary market

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[21] Id. at 16.

[22] Id. at 17.

need not have perfect information pertaining to lifecycle costs. Instead, "the focus should be on whether the primary market is in possession of information that sufficiently reveals the anticompetitive tendencies of a manufacturer in its aftermarket."[23] The ability to calculate formal and accurate lifecycle costs is therefore not necessary to defeat a Kodak-type claim, if enough information is available so that primary market consumers are aware of conditions in the aftermarket.

The second part of the court's analysis considered switching costs and whether the extended warranty was a Kodak-type policy change that exploited DEC's installed base of customers. The court rightly focused on the fact that, unlike Kodak, DEC did not withhold parts or otherwise prevent equipment purchasers from using ISOs or other service providers. Also unlike Kodak, customers could switch service providers without having to purchase new equipment. The only switching costs in SMS is the cost of writing off a potion of the equipment's purchase price that represents the warranty. Because this cost did not prevent customers from switching service providers, the court concluded that the three-year warranty was not inherently anticompetitive.

Other circuits have likewise rejected Kodak claims for failure to allege high switching costs, an anticompetitive policy change, or a lack of lifecycle pricing information. In PSI Repair Services, Inc. v. Honeywell, Inc.,[24] the Sixth Circuit distinguished Kodak by noting that "[i]nformation and switching costs were particularly high in Kodak because Kodak adopted its parts-restrictive policy after numerous customers had already purchased Kodak copiers, thus

[23] Id. at 19 n.3.

[24] 104 F.3d 811 (6th Cir. 1997).

creating a 'lock-in' effect."[25] Agreeing with the First and Seventh Circuits,[26] the Honeywell court concluded that "the change in policy in Kodak was the crucial factor in the Court's decision,"[27] and further held that "an antitrust plaintiff cannot succeed on a Kodak-type theory when the defendant has not changed its policy after locking-in some of its customers, and the defendant has been otherwise forthcoming about its pricing structure and service policies."[28]

Honeywell and SMS add to the weight of authority stressing the importance of a change in aftermarket policy to sustain Kodak-type claims.[29] From the perspective of maximizing consumer welfare in the new economy, these cases embody sound policy. Kodak was fundamentally concerned about "installed base opportunism"—the ability of an equipment manufacturer to adopt post-equipment sale pricing strategies for parts and service that would exploit the vulnerability of existing customers. The Kodak analysis thus focuses exclusively on information known at the time of past equipment purchases. Kodak does not dispute that exploitative aftermarket strategies will adversely affect a manufacturer's future equipment sales and reputation. How likely is it that a manufacturer of high-tech products will adopt a near-sighted strategy of exploiting aftermarkets, if such a strategy will result in significant long-term injury to the manufacturer in terms of lost equipment sales and reputational harm? Kodak's

[25] Id. at 818.

[26] See Digital Equip. Corp. v. Uniq Digital Techs., Inc., 73 F.3d 756, 763 (7th Cir. 1996); Lee v. Life Ins. Co. of North America, 23 F.3d 14, 20 (1st Cir. 1994).

[27] Honeywell, 104 F.3d at 820.

[28] Id.

[29] See also Alcatel USA, Inc. v. DGI Techs., Inc., 166 F.3d 772, 783 (5th Cir. 1999); Metzler v. Bear Automotive Serv. Equip. Co., 19 F. Supp. 2d 1345, 1353 (S.D. Fla. 1998).

concern with the post-sale exploitation of customers is therefore likely to occur only in the rare circumstances identified in that case.

III. Section 2 and Unilateral Refusals to License Intellectual Property: The Xerox Case

The high-tech economy's dependence on intellectual property is at once obvious and significant. Yet there is an uneasy relationship between intellectual property rights and Section 2 of the Sherman Act. Intellectual property law is premised on the notion that, in order to encourage the development of new products and technologies, inventors must have some ability for financial recoupment for their efforts. The right to exclude others from using intellectual property is therefore necessary to preserve the incentives to innovate. At the same time, Section 2 can be violated by a monopolist's unilateral refusal to deal, if that decision lacks legitimate business justification. Increasingly, these values find themselves in conflict, and courts are asked to reassess whether Section 2 is violated by a unilateral refusal to license a patent or copyright.

Virtually all cases examining this question have refused to attach Section 2 liability to a refusal to license intellectual property, provided that there is no attempt to extend the scope of the intellectual property protection beyond the limits of the statutory grant. Yet a great risk remains of courts over-enforcing Section 2 and finding violations of the law in the legitimate use of statutorily-conferred intellectual property rights.

A recent high-profile case in this vein is the Federal Circuit's opinion in In re Independent Service Organizations Antitrust Litigation ("Xerox").[30] Xerox arose on Kodak-type facts, as a challenge to Xerox's policies for selling parts and services for high-volume copiers it

[30] 203 F.3d 1322 (Fed. Cir. 2000).

manufactures. In 1984, Xerox implemented a policy of not selling parts for its copiers to ISOs unless they were also end-users of the copiers. The plaintiff, CSU L.L.C., also serviced Xerox copiers. Because of Xerox's parts policies, CSU was required to cannibalize parts from used equipment, obtain parts from other ISOs, or purchase parts through its customers. CSU claimed that Xerox violated the Sherman Act by setting higher parts prices for ISOs than for end-users. The district court granted summary judgment to Xerox, holding that a unilateral refusal to sell or license lawfully-acquired intellectual property is not exclusionary conduct prohibited by Section 2.

The Federal Circuit affirmed. The court reasoned that, "[i]n the absence of any indication of illegal tying, fraud in the Patent and Trademark Office, 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 the antitrust laws."[31] The burden is on the infringement defendant, not the patent holder, to show that one of these unusual circumstances exists. Significantly, the court found irrelevant Xerox's subjective motivation for refusing to license its patents and copyrights. Even if the refusal to sell or license the patented invention had an anticompetitive effect, the court refused to inquire into the patent holder's subjective motivation for exercising its statutory rights, "so long as the anticompetitive effect is not illegally extended beyond the statutory patent grant."[32] The court made a parallel ruling as to Xerox's copyrights, holding that Xerox's subjective motivation for asserting its copyrights would not be examined

[31] Id. at 1327.

[32] Id. at 1327-28.

for pretext "in the absence of any evidence that the copyrights were obtained by unlawful means or were used to gain monopoly power beyond the statutory copyright granted by Congress."[33]

The Xerox court persuasively distinguished the Ninth Circuit's holding on remand from the Supreme Court in Kodak. In Image Technical Services, Inc. v. Eastman Kodak Co.,[34] the Ninth Circuit held that the desire to exclude others from using one's intellectual property is only presumably a valid business justification for refusing to deal. That presumption could be rebutted by a showing that the exercise of patent rights was a pretextual justification masking anticompetitive conduct. The Xerox court –as has all other courts addressing this issue— rejected the Ninth Circuit's reasoning. The court found "no more reason to inquire into the subjective motivation of Xerox in refusing to sell or license its patented works than we found in evaluating the subjective motivation of a patentee in bringing suit to enforce the same right."[35]

Xerox rightly recognized that Image Technical Services is a rogue opinion that creates a misguided rule of law. It draws a fundamentally unworkable distinction between a permissible refusal to deal based on a bona fide desire to protect intellectual property rights, and an impermissible refusal to deal based on a desire solely to exclude competitors. But because intellectual property rights are exclusionary in nature, is there really any difference? Judges and juries should not be expected to draw principled distinctions between "good" and "bad" refusals to license intellectual property.[36] This rule provides no guidance for holders of intellectual

[33] Id. at 1329.

[34] 125 F.3d 1195 (9th Cir. 1997).

[35] Xerox, 203 F.3d at 1327.

[36] The same is true for refusals to grant permission to any third party—particularly a competitor—to use proprietary information or technology, regardless of whether it is patented or

(Continued …)

property rights as to what reasons are "valid" for refusing to license their property. The uncertainty diminishes the value of intellectual property and damages the incentives to innovate that the intellectual property laws were intended to protect. Xerox correctly refused to adopt this impossible standard.

Lest the significance of Xerox be underestimated, it is important to recognize that courts have found "no reported case in which a court has imposed antitrust liability for a unilateral refusal to sell or license a patent or copyright."[37]

IV. Conclusion

Increasingly, U.S. monopoly law is demonstrating a respect for the role of intellectual property and is rapidly reconciling itself to protecting the incentives to create new inventions and technologies. Progress on this front might seem uneven at times. But in light of the importance to the high-tech economy of innovation and the development of new technologies, one would fully expect these trends to continue.

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copyrighted. See, e.g., Intergraph Corp. v. Intel Corp., 195 F.3d 1346, 1358 (Fed. Cir. 1999) ("[N]o case has held that the divulgation of proprietary information and the provision of special or privileged treatment to a legal adversary can be compelled on a 'refusal to deal' antitrust premise.").

[37] Image Tech. Servs., Inc. v. Eastman Kodak Co., 123 F.3d at 1216.