Unilateral Refusals to Deal in Intellectual and Other Property

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Abstract: This article examines the potential divergence in antitrust law’s approach to unilateral refusals to deal in intellectual property from its approach to refusals to supply rivals with other kinds of property. It argues that there are neither economic grounds nor reasons related to intellectual property law or policy for antitrust law to treat a firm’s refusal to supply IP to rivals more leniently than a firm’s refusal to supply its rivals with other kinds of goods. This article then surveys alternative tests for refusal-to-deal liability under Section 2 of the Sherman Act and argues that courts should restrict but not preclude liability for such conduct. It thus argues against extending the trend toward effectively per se legality for unilateral refusals to deal found in several recent cases, notably those involving intellectual property.

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