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# Patent-Antitrust Law: A New Theory

Martin J. Adelman
*Wayne State University*

Robert P. Jaress
*Wayne State University*

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# PATENT-ANTITRUST LAW: A NEW THEORY

MARTIN J. ADELMAN†
ROBERT P. JARESS‡

## I. INTRODUCTION

Since the passage of the Sherman Antitrust Act in 1890,[1] the federal courts have periodically attempted to reconcile that Act as well as the more particularized provisions of the Clayton Act[2] with the older law of patents.[3] The need for a proper reconciliation between these laws is accentuated by the importance society attributes to their respective goals. On one hand, the Sherman Act, with its prohibition against contracts, combinations or conspiracies in restraint of trade[4] and monopolization or attempts or conspiracies to

† Associate Professor of Law, Wayne State University. A.B. 1958, M.S. 1959, J.D. 1962, University of Michigan.—ED.

‡ B.A. 1967, Michigan State University; J.D. 1970, Wayne State University.—ED.

1. Essentially this Article will be dealing with sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1964).

2. 15 U.S.C. §§ 12-27 (1964). A myriad of specific antitrust violations are set forth in the Clayton Act, including arrangements relating to price discrimination, brokerage and commission compensation, exclusive dealing agreements, direct and indirect acquisitions, and activities proscribed by other antitrust laws such as the Sherman Act. Of interest with respect to the Patent Act is the treatment of exclusive dealing arrangements wherein the Clayton Act proscribes contracts conditioning leases or sales on a lessee's or purchaser's curtailment of dealings with a competitor of the lessor or seller if the result may be to substantially lessen competition or tend to create a monopoly in any line of commerce. *Id.* § 14. Another feature of the Act significant to patentees is that it enables injured parties to bring actions for antitrust violations seeking damages or injunctive relief. *Id.* §§ 15, 26.

3. The first American patent law was passed in 1790. The current statute is found in Title 35 of the United States Code, enacted into positive law in 1952. For a compilation of the various patent laws which have been in effect since 1790, see 3 WALKER ON PATENTS, app. (A. Deller 2d ed. 1964).

4. "Every contact, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is hereby declared to be illegal . . . ." 15 U.S.C. § 1 (1964).

monopolize,[5] has been deemed fundamental to our national well-being.[6] Likewise, the Patent Act is also designed to fulfill a basic societal need by answering the constitutional mandate for laws to promote the "progress of science and useful arts."[7] The Patent Act encourages such progress by providing a "reward" for fruitful inventive activity.[8]

Reconciliation is required by the form of the patent grant. Instead of a monetary grant for worthy inventions, society grants property rights in an invention for a limited number of years.[9] These include the right to exclude others (generally potential or actual competitors) from the invention's use.[10] Therefore, while the antitrust laws achieve their stated purpose by discouraging restraints on competition, the Patent Act stimulates invention by providing the patentee with a limited monopoly—an interference with normal competitive behavior.

It has sometimes been argued that there is really no conflict between patent and antitrust law since patents do not deprive the public of anything which it enjoyed before the patent was granted.[11] Nevertheless, while the patent system certainly does not restrain

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5. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of . . . trade or commerce . . . shall be deemed guilty of a misdemeanor . . . ." *Id.* § 2.

6. Northern Pac. R.R. v. United States, 356 U.S. 1, 4 (1958). The decision discusses the validity of tie-in arrangements under section 1 of the Sherman Act.

7. U.S. CONST. art. 1, § 8, cl. 8, gives Congress legislative power to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

8. Encouraging inventive activity is to be understood as including the providing of incentives to individuals and corporations to finance inventive activities.

9. The current period is seventeen years. 35 U.S.C. § 154 (1964).

10. 35 U.S.C. § 154 (1964) reads in part: "Every patent shall . . . grant to the patentee, his heirs or assigns, the right to exclude others from making, using or selling the invention throughout the United States . . . ."

11. In a dissenting opinion in United States v. Line Material Co., 333 U.S. 287 (1948), Mr. Justice Burton outlines this view as follows:

> Though often so characterized a patent is not, accurately speaking, a monopoly, for it is not created by the executive authority at the expense and to the prejudice of all the community except the grantee of the patent. The term monopoly connotes the giving of an exclusive privilege for buying, selling, working or using a thing which the public freely enjoyed prior to the grant. Thus a monopoly takes something from the people. An inventor deprives the public of nothing which it enjoyed before his discovery, but gives something of value to the community by adding to the sum of human knowledge.

*Id.* 329 (citation omitted).

competition in inventive activity, but in fact encourages it,[12] it cannot be argued that patents do not affect competition in *existing* inventions. The marginal cost of using an idea is zero[13] and allowing

12. Professor Turner, former Assistant Attorney General in charge of the Antitrust Division and a strong critic of some asperts of the patent system, has discussed the financial burden of inventing and the disinclination to do so absent patent grants in Turner, *The Patent System and Competitive Policy*, 44 N.Y.U.L. REV. 450, 451 (1969), as follows:

> While there remains some dispute, I believe most economists would now agree that without special inducements our economy would tend to underinvest in invention and innovation, more generally described as the production of knowledge. Briefly, the main reasons are these. Devotion of resources to the production of knowledge is a comparatively risky enterprise. There are no known market methods for satisfactorily shifting the kind of risks that are involved. . . . Apart from risk, underinvestment in the production of knowledge seems probable because the economic value of knowledge can be captured only to a limited extent. Any given piece of information is an indivisible commodity, and once disclosed, by sale or otherwise, it can be reproduced and further disseminated at little or no cost. Thus, in the absence of legally protected rights, the value to the owner would be little more than the use he himself could make of it.

*See also* SUBCOMMITTEE ON PATENTS, TRADEMARKS AND COPYRIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 86TH CONG. 2D SESS., THE PATENT SYSTEM: ITS ECONOMIC AND SOCIAL BASIS (Comm. Print 1960) concluding that:

> A limited number of new inventions is assured to society even without any special stimulus. Accident or observation unrelated to deliberate inventive effort will provide some inventions. Others will be produced by those with an "instinctive bent" for invention, or who find sufficient reward in the joy of the effort or the satisfaction or accomplishment. Purely economic factors will also support some inventive effort without assured safeguards. . . .
>
> By any social test, however, the community's needs for new industrial technology are unlikely to be satisfied through such incidental efforts for incentives. If, in determining the adequacy of supply, we apply to inventions the same tests that we do to most other products under our free enterprise system, we will measure performance according to cost-price relationships. By this standard, it will be in society's interest to assure, as a minimum, the supply of any invention whose costs of creation can be recovered through savings made possible in manufacture, or through the profitable sale of a new product. So long as the hazard remains that the profit potentialities of inventive effort may be dissipated through competitive use of the invention, this social aim cannot be achieved. For some with inventive skill will be attracted to this work only if their prospective incomes appear as great as in other fields open to them; while others will be more likely to direct their inventive activities to the satisfaction of social needs if they could see in this manner a way of increasing their incomes.

*Id.* 6 (footnotes omitted).

13. Perhaps the most eloquent expression of this fact is contained in the famous letter of Thomas Jefferson to Isaac McPherson, the following portion of which was

a patentee to restrict its use can only be deemed a *serious* clog on competition. Therefore, at the outset, the authors concede that the patent system, by necessity, tends to restrain trade; the proposed theory does not purport to evaporate this impediment.

Though many decisions have dealt with the interrelationship of these two sets of laws,[14] beginning under the leadership of Professor Turner, the Department of Justice has generated a new wave of litigation in the area.[15] This litigation is directed at the many problems in the field of patent licensing where the patentee restricts the activities of his licensee, an area generally characterized by confusing rules and chaotic case law.

Restrictive patent licensing arrangements come in a variety of forms, *e.g.,* licenses limiting the price which can be charged by the licensee when selling licensed goods, or limiting the form in which the licensed goods can be sold, or limiting the class of customers to whom the licensee may sell, or limiting the type of activity which the licensee can carry out with a licensed process. Restrictive licenses have been considered legal if the restraints imposed by the patentee are within the scope of the patent grant and if the restriction is normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly.[16] Nevertheless, owing to the vague-

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quoted in the landmark case of Graham v. John Deere Co., 383 U.S. 1, 8 n.2 (1966), as follows:

> "If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me."

14. Perhaps the most elaborate discussion of the interrelationship between these two laws is found in the majority, concurring, and dissenting opinions in United States v. Line Material Co., 333 U.S. 287 (1948).

15. United States v. Ziegler, Civil No. 1255-70 (D.D.C., filed Apr. 24, 1970); United States v. Westinghouse Elec. Corp., Civil No. C-70-852-SAW (N.D. Cal., filed Apr. 22, 1970); United States v. Bristol-Myers Co., Civil No. 822-70 (D.D.C., filed Mar. 19, 1970); United States v. Fisons Ltd., Civil No. 69 C 1530 (N.D. Ill., filed July 23, 1969); United States v. Ciba Corp., Civil No. 792-69 (D.N.J., filed July 9, 1969); United States v. Sterling Drug, Inc., Civil No. 175-68 (D.N.J., filed Feb. 23, 1969); United States v. Farbenfabriken Bayer A. G., Civil No. 586-68 (D.D.C., filed Mar. 7, 1968); United States v. Glaxo Group Ltd., 302 F. Supp. 1 (D.D.C. 1969).

16. General Talking Pictures Corp. v. Western Elec. Co., 305 U.S. 124 (1938); United States v. General Elec. Co., 272 U.S. 476 (1926).

ness of this standard, much of the "law" in the patent-antitrust area is, as one commentator has observed, created by "framing question-begging generalities" on a case-by-case basis.[17]

The Justice Department's position is not much clearer. The Department has made it known that it will ask two fundamental questions when considering whether to attack an agreement involving patents. First, is the agreement necessary to the patentee's exploitation of his lawful monopoly? Second, are less restrictive alternatives available to the patentee which are more likely to foster competition? If the answer to the first question is no, and to the second yes, the Department may challenge the restriction.[18]

This Article will attempt to show that neither the case law nor the formulation of the Department of Justice represents the proper approach to patent-antitrust issues. Instead, the authors propose a two-step methodology, with one step focusing on the patent laws and the other on antitrust. This methodology will then be applied to some of the currently controversial patent-antitrust issues such as restrictive licenses and whether a patentee, having granted one license, may refuse other applicants for similar licenses.

## II. THE IMPLIED EXEMPTION

Though at times the following discussion regresses to quite

17. Baxter, *Legal Restrictions on Exploitation of the Patent Monopoly: An Economic Analysis*, 76 YALE L.J. 267, 276-77 (1966). A decade earlier a similar observation was made by one expert in the area:

> As in other fields of law, lawyers constantly seek general principles or "rules of thumb" as guides in dealing with patent-antitrust questions. Because of the great variety and complexity of these problems no single or all-inclusive "rule of thumb" covering all situations is available.

Hollabaugh, *Patents and Antitrust Laws*, 25 U. CIN. L. REV. 43, 59-60 (1956). Within the last year another author began his Article by stating that:

> The close of the decade would seem an appropriate time to attempt an assessment of the state of compatibility or conflict between the patent system and the antitrust laws in respect of patent licensing. It would be very pleasant if one could only announce that the courts have offered us a clear and concise statement of the areas of compatability and conflict. Unfortunately, such is not the case, and further, the scene is cloudier today than ever and filled with warnings of further conflict.

Heyman, *Patent Licensing and the Antitrust Laws—A Reappraisal at the Close of the Decade*, 14 ANTITRUST BULL. 537 (1969) (footnotes omitted).

18. Roland W. Donnem of the Justice Department set out this formulation as the position of the Department in Donnem, *The Antitrust Attack on Restrictive Patent License Provisions*, 14 ANTITRUST BULL. 749 (1969).

rudimentary concepts, such a fundamental analysis appears necessary to dispel the patent mystique permeating antitrust law. The initial focal point will be the statutes; the case law, with the ubiquitous patentee being alternatively punished or immunized from antitrust law for no apparent reason, will be dealt with later.

Since the antitrust laws do not provide any *specific* exemption for the exercise of patent rights, the patentee must rely on judicially created implied exemptions. Such exemptions appear appropriate since it would not seem logical for Congress to *grant* rights on one hand and then *prohibit the exercise* of them on the other.

Accepting that specific patent rights should be exempt, the first step in resolving conflicts is the identification of these rights. Patent rights reflect the statutory reward or incentive to invent.[19] Any

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19. It is most important here to note that the purpose of the patent system is not, as some have maintained, to stimulate investment in the *commercialization of inventions already made*, but rather to encourage the creation and disclosure of inventions. Graham v. John Deere Co., 383 U.S. 1, 10-11 (1966). Perhaps the most famous exposition of this erroneous theory is contained in Judge Frank's concurring opinion in Picard v. United Aircraft Corp., 128 F.2d 632, 642 (2d Cir. 1942), a case effectively criticized in Kitch, *Graham v. John Deere Co.: New Standards for Patents*, 49 J. PAT. OFF. SOC'Y 237, 242-45 (1967).

Professor Machlup, in SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 85TH CONG., 2D SESS., AN ECONOMIC REVIEW OF THE PATENT SYSTEM 56 (Comm. Print 1958), commented as follows (footnotes omitted):

> Other theories—not often clearly expounded—stress other incentives as the essential functions of the system: To stimulate innovation and to stimulate investment. Inventing, innovating, and investing are different activities, though usually not properly separated in analysis. They may, of course, be interrelated; a big investment may be required to finance inventive activity; innovation also usually involves investment of capital; innovation, moreover, may be based on a patented invention, constituting, in effect, its commercial exploitation. But there need not be such relationships: Innovation may be based on nonpatentable inventions or even on nontechnological ideas, and investment may be for new though not novel plant and equipment. Now, under the theory that the patent system is designed to stimulate innovation, existing patents (and pending patents) will play a direct role in the realization of this objective. The point is that *inventive* activity must precede the patent, whereas *innovating* activity may follow it. But the justification of the patent system as an incentive for innovating enterprise and for entrepreneurial investment would call for different supporting arguments than the justification as an incentive for invention. These arguments might have to include a demonstration that innovations based on patentable inventions are socially more desirable than other innovations, and that the free-enterprise system would not, without monopoly incentives, generate investment opportunities to an adequate ex-

other proposed incentive becomes indefensible since it is not moored to the statutory grant. Thus, whenever a conflict between

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> tent—propositions which the supporters of the theories in question might not be willing to entertain.

THE PATENT SYSTEM: ITS ECONOMIC AND SOCIAL BASIS, *supra* note 12, at 12, (footnotes omitted), also explains why Judge Frank is incorrect:

> There is, however, a more fundamental objection to the grant of monopoly powers specifically to aid in the exploitation of patented inventions. Where market prospects are uncertain, caution in the use of the Nation's resources serves a social purpose. And it cannot be demonstrated that society will benefit by according to patented inventions a generally preferred status in the use of these resources. In any event, where the only bar to entry in an industry is uncertainty of demand, rather than conditions of supply such as in the "public utilities," monopoly is not necessary to sustain production once undertaken.
>
> In supporting the argument for monopoly to insure the exploitation of patented inventions, a great deal of stress has been laid on the costs which the pioneering firm will have to bear which its rivals will be spared, thus producing a constraint against initial market development. The problem differs according to the stage of exploitation.
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> During the pilot plant stage, the knowledge acquired takes such forms as records of tests and experiments, the production of models and samples, blueprints, plans for plant organization and layout, and other results of a similar nature. Such information is closely akin to patentable inventions in the sense that acquisition by competitors may be costless and accordingly requires protection to assure its supply. However, it is not usually difficult to keep such information secret. In fact, even where licenses are granted under a patent, it is often difficult to transmit to the licensee sufficient know-how to assure effective operation under the invention.
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> The second stage, which consists of the erection of production facilities, entails expenditures which any rival will have to duplicate. An extended market for such facilities may produce so-called external economies which will lower costs, but these conditions prevail in many industries other than those which operate under patent protection, and are unlikely to be sufficiently significant or progressive to justify the grant of monopoly powers for initial market development.
>
> The third stage, commercialization, entails market development expenditures such as advertising, salesmen's salaries, transportation, and warehousing. It is said that the benefits of market development are shared by those who follow in the paths broken by the innovator. Per unit costs of sales are likely to be greater at an early stage than after market acceptance of a new product has been attained. Competitors, however, will not always benefit from the market development activities of their rivals, since such activities often attach trade to a single seller, and may in fact create an obstacle to entry by competitors. The advantages which do fall to latecomers as a result of the general demand for a product created by a pioneering firm are not, moreover, confined to patent-protected industries, nor are they likely to be important enough to warrant the grant of monopoly powers for the mere task of initial market development.

patent and antitrust law is alleged,[20] a fundamental two-step analysis should be utilized. First, if conduct must be permitted in order to preserve patent incentives, *i.e.*, is characterized by the exercise of statutory rights, then it should be exempt from the antitrust laws. If the conduct does not fall within the exempt category, then it should be judged under antitrust principles. Though determinations under this procedure may prove complex, at least a clear perspective is maintained, and confusion is lessened or eliminated because patent exemptions and antitrust determinations may be made separately, systematically and rigorously.

Basically, the Patent Act is designed to provide the patentee with "rights of personal property" in his invention for a limited period;[21] it is from these familiar rights that the grants to exclude is derived. Those who make use of or sell a patented invention without the patentee's authority are deemed infringers under section 271(a)[22] and are liable under the remedy sections.[23] It is in these remedy sections that the Act gives the means to exclude by

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20. Similar methodologies are being developed by the federal courts to resolve conflicts between regulatory statutes and the antitrust laws. A recent example involving a conflict between the Securities Act and the antitrust laws is found in Thill Sec. Corp. v. New York Stock Exch., 477 ANTITRUST & TRADE REG. R. D-1 (7th Cir., Aug. 27, 1970). In its opinion, the Seventh Circuit quoted and heavily relied upon the following passage from the Supreme Court's decision in Silver v. New York Stock Exch., 373 U.S. 341 (1963):

> The Securities Exchange Act contains no express exemption from the antitrust laws or, for that matter, from any other statute. This means that any repealer of the antitrust laws must be discerned as a matter of implication, and "[i]t is a cardinal principal of construction that repeals by implication are not favored." Repeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes.

*Id.* 357 (citations omitted). The approach of the federal courts to a reconciliation between the antitrust laws and the Securities Exchange Act is essentially the approach which the authors are suggesting here for reconciliation between the Patent Act and the antitrust laws since repeal of the latter is to be regarded as implied only if necessary to insure the viability of patent incentives.

21. Section 261 provides, "Subject to the provision of this title, patents shall have the attributes of personal property." 35 U.S.C. § 261 (1964).

22. *Id.* § 271 (a) provides, "[W]hoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent."

23. *Id.* § 281 provides, "A patentee shall have remedy by civil action for infringement of his patent." *Id.* §§ 283, 284 provide for damages and for injunctive relief.

providing the patentee with a civil action against infringers. Therefore, just as a possessor of land has an action against trespassers, so does a patentee have an action against infringers. This right to exclude infringers is the only reward specifically offered by a patent grant, section 154 providing that "[e]very patent shall contain . . . a grant to the patentee . . . of the right to exclude others from making, using or selling the invention . . . ."[24] Relating this concept to an antitrust exemption, one can conclude that conduct characterized by a patentee excluding infringements of his patent should not be construed illegal under our antitrust laws.[25]

Superficially, the patent reward may seem a bit hollow, and in many cases it is; in others, the exercise of patent rights proves quite lucrative. This uneven result occurs because a patent only protects the inherent worth of the invention, just as trespass law only protects the inherent worth of land.

The patentee may reap pecuniary reward in several ways. He may exploit his invention by licensing others to make, use or sell it, or he may exercise his rights to exclude all others from infringing. If a patentee excludes others from making and selling goods incorporating his invention, he may become a product market monopolist depending upon the presence and relative quality of competing inventions. If the patent covers a process, the patentee may gain a competitive edge by more efficient operations or a better product. This, in turn, may be parlayed into a product market monopoly. The patentee may, of course, achieve nothing since it is entirely possible to invent a worse mousetrap.

Now that the patentee's basic right has been identified, *i.e.*, his right to exclude infringers (those who make, use or sell his invention), this conduct must merely be exempted from any antitrust liability. That is, conduct characterized by excluding infringers should not be held illegal under the antitrust laws. A corollary to this fundamental exemption is that, absent fraud, if a patent once granted is subsequently adjudicated invalid, the exemption should be lost only with respect to conduct subsequent to the invalidation. This is required because it is often difficult to predict in advance the outcome of patent litigation. To strip away the patent exemption retroactively once a patent is found invalid would certainly reduce the incentive to use patents and

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24. *Id.* § 154. Donnem, *The Antitrust Attack on Restrictive Patent License Provisions*, 14 ANTITRUST BULL. 749, 758 (1969).

25. Arguably, 35 U.S.C. § 271(d)(3) (1964) compels this result.

lower their value as an inducement to invent. Few persons would be so bold as to enforce a patent if subsequent invalidation may make that enforcement illegal under the antitrust laws.[26] At the other extreme is the situation where a patent is obtained by fraud on the Patent Office. Here, the exemption should be eliminated retroactively since preservation of patent incentives certainly does not require an exemption for a patent fraudulently obtained.[27]

## III. APPLICATION OF THE IMPLIED PATENT EXEMPTION

The application of the proposed implied patent exemption to major patent-antitrust problems produces a curious result. In some areas the results dictated by this exemption and its corollary principles cluster closely about the rules produced by present case law. In other areas no such correlation is present. The areas of similarity generally involve those antitrust laws designed to thwart unilateral restraints of trade characterized by the attempt to gain or retain monopoly power.

### *A. Unilateral Restraints*

The basic proscription against unilateral restraints of trade is found in section 2 of the Sherman Act:

> Every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States, or with foreign nations shall be deemed guilty of a misdemeanor . . . .[28]

26. In Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965), Justice Harlan, in a concurring opinion which the authors believe implicitly supports the implied exemption methodology, after first pointing out that allowing a private action under section 4 against a patentee who has obtained and maintained a patent by deliberate fraud cannot impinge upon the policy of the patent laws to encourage inventions and their disclosure, stated the following:

> On the other hand, to hold, as we do not, that private antitrust suits might also reach monopolies practiced under patents that for one reason or another may turn out to be voidable under one or more of the numerous technicalities attending the issuance of a patent, might well chill the disclosure of inventions through the obtaining of a patent because of fear of the vexations or punitive consequences of treble-damage suits. Hence, this private antitrust remedy should not be deemed available to reach § 2 monopolies carried out under a non-fraudulently procured patent.

*Id.* 180.

27. *Id.* See particularly the concurring opinion of Justice Harlan.

28. 15 U.S.C. § 2 (1964).

Though there may be disagreement as to the exact coverage and meaning of this section, several things seem clear. First, two types of unilateral conduct are prohibited: attempting to monopolize and monopolizing. Both prohibitions purport to interfere with a patentee who diligently undertakes to exclude infringers.

An attempt to monopolize merely requires acts designed to gain a product market monopoly with some possibility of success.[29] Excluding others from the use of a basic invention certainly opens the possibility of gaining a product market monopoly; yet, as pointed out previously, if the patentee is denied this right, he is being denied his patent reward. Therefore, unless his right to exclude is exempt from this portion of the Sherman Act it will be dissipated along with the patent incentives. The same is true for monopolizing itself. Though being a monopolist may not, in itself, be illegal under section 2 of the Sherman Act, generally speaking any efforts to retain such status will be.[30] Therefore, absent an exemption, the patentee could run afoul of section 2 if he happened to gain a product market monopoly by excluding actual or potential infringers.

Though an exemption has never quite been articulated in the fashion suggested here, its existence in the above circumstances has never been questioned, much less denied.[31] The practical effect is to prevent some patentees from being punished merely because they are exercising their right to exclude infringers. Even without this exemption, those with patents on inventions of minor importance would be free of antitrust liability since their efforts to exclude would not lead to a product market monopoly. Ironically, the more basic or important the patentee's invention, the more likely, absent an exemption, a charge of monopolization or attempted monopolization could succeed.

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29. United States v. Columbia Steel Co., 334 U.S. 495, 532 (1948); United States v. Aluminum Co. of America, 148 F.2d 416, 431-32 (2d Cir. 1945).

30. *See* United States v. Grinnell Corp., 384 U.S. 563 (1966). This case seems to require a willful acquisition of monopoly power. For an excellent discussion of what may or may not be needed, see Comment, 30 U. PITT. L. REV. 715 (1969).

31. One group of authors, however, has stated that "antitrust laws are applied to patent-based monopolies in the same manner and with rigor equal to that demonstrated in non-patent situations." H. KRONSTEIN, J. MILLER, & P. DOMMER, MAJOR AMERICAN ANTITRUST LAWS 87 (1965) (footnote omitted). But the authors admitted that, "As of this time, there is not a single case in which the defendant in a monopoly case was able to refer to so strong a patent as to justify control over an entire field of business." *Id.* 47 (footnote omitted).

It should be recognized, however, that a patentee may attempt to or gain a monopoly other than by exercising patent rights against infringers, *i.e.*, the patentee may resort to methods available to non-patentees such as "exclusive dealing" contracts.[32] Therefore, the *method* of excluding and not the *status* of being a patentee is the critical factor. The practical result of a contrary approach would be the destruction of section 2 of the Sherman Act since nearly every business enterprise large enough to come under scrutiny in the first place holds a patent grant.

The courts have also reached this necessary result. For example, in the famous *United States v. Aluminum Co. of America*[33] case, the court found that while patents contributed to Alcoa's monopoly power, they were only one of several factors and did not provide a sufficient defense to a Sherman Act, section 2, action. The court reached a similar result in *United States v. United Shoe Machinery Corp.*[34] where the defendant vigorously asserted a patent defense.

In summary, the patentee, absent fraud, should be exempt from any charge of violation under section 2 for obtaining and enforcing a patent. All other unilateral acts of such a patentee must be judged under general antitrust principles. While perhaps expressed in different terms, this has been the thrust of the case law.[35]

### *B. Contracts, Combinations and Conspiracies*

The current wave of litigation and growing controversy involving patent-antitrust law does not generally pertain to the unilateral restraints described above but rather to bilateral actions in restraint of trade. The most important bilateral restraints are price fixing, territorial and market divisions, quantity limitations, field of use limits and even the patent royalty agreement itself.[36] Must any or

32. F.C. Russell Co. v. Consumers Insulation Co., 226 F.2d 373 (3d Cir. 1955); F.C. Russell Co. v. Comfort Equip. Corp., 194 F.2d 592 (7th Cir. 1952). "An exclusive dealing agreement restrains the buyer from purchasing goods from suppliers other than the seller; concomitantly, it forecloses the seller's competitors from the market represented by the buyer." SECTION OF ANTITRUST LAW OF AM. BAR ASS'N, ANTITRUST DEVELOPMENTS 1955-1968, at 109 (1968).

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

34. 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

35. *See* Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965).

36. In view of the decisions of the Supreme Court in Brulotte v. Thys Co., 379 U.S. 29 (1964), and Zenith Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969), it is clear that the Court considers royalty payments restraints of trade. Indeed, in

all such restraints be exempt to preserve patent incentives? For other than the royalty agreements,[37] the answer is no. While there may be a general right to enter agreements involving patent property (just as with other property), nothing in the Patent Act suggests that the patentee may conspire to restrain trade. It may be argued that immunity from all antitrust proscriptions may prove lucrative to a patentee and hence be deemed a "patent" incentive. However, this is not the form of reward Congress has chosen and it is doubtful whether such immunization could provide an effective incentive to invent. Decisions relating to the creation of inventions are far too speculative and subject to so many contingencies that incentives are unlikely to be affected by such dimly perceived future events as the ability or lack thereof to engage in certain forms of restrictive licensing.[38] Thus, as a general rule, bilateral conduct other than the payment and collection of royalties should not be the subject of an implied exemption and hence must be tested solely under antitrust principles.

The basic antitrust provision dealing with bilateral restraints of trade is found in section 1 of the Sherman Act. This section outlaws "Every contract, combination . . . or conspiracy, in restraint of trade"[39] and has generated extensive case law describing what type of group activity transgresses its provisions.[40] However, the case law pertaining to patent-related agreements contains inconsistencies resting on the presumption that, for one reason or another, an activity deserves special treatment when a patent is even tangentially related. The authors will not attempt to catalogue all the various lines of reasoning offered by the courts, but will comment on two of the more popular ones before discussing the various problem areas.

The first, for lack of a better name, may be termed the "inher-

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*Zenith* the Court clearly held that royalties can only be justified when collected for items covered by living patent claims or alternatively on articles in the public domain as well as articles covered by living claims if necessary for the convenience of the parties.

37. There can be no question that prohibiting the collection of royalties on living patent claims would materially affect patent incentives and is contrary to 35 U.S.C. § 271 (d) (3) (1964). There is nothing strange about such activity, since licensing an invention is analogous to leasing other property, an act not in itself illegal.

38. Turner, *Patents, Antitrust and Innovation,* 28 U. PITT. L. REV. 151 (1966).

39. 15 U.S.C. § 1 (1964).

40. *See generally* REPORT OF ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS (1955); A. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA (1960).

ency" theory[41] Whenever a patentee licenses another to make, use of sell his patented invention, the patentee is deemed to have relaxed his monopoly.[42] The theory holds that since the patentee has the right to a monopoly he has a corresponding right to enter agreements to restrain trade when he "relaxes" his monopoly. The argument has momentary emotional appeal because it shields the "benevolent" patentee (who relaxed his monopoly) from harsh treatment for restraining trade. Sometimes it even carries the warning that if the patentee is punished he may react by refusing to relax his monopoly. All this is quite similar to the manufacturer who claims that if he is not allowed to set the retail prices on the goods he sells to retailers, he will open his own retail outlets. Surely then, we have a pure antitrust question when a patentee exchanges his right to exclude infringers for other rights, just as when a manufacturer exchanges his right to sell his goods at retail for some other form of distribution arrangement.[43]

A second line of reasoning, which may be viewed as another version of the inherency theory, draws into focus the Patent Act by claiming that any trade restrictions practiced by the patentee that achieve *monopoly income* represent exempt conduct. It can be supposed that this assumption rests on the premise that a patentee is given a legal monopoly and hence the patent law explicitly authorizes the extraction of monopoly profits by restricting utilization of and raising the price for using the invention.[44] Rather than

41. For a good comparative law analysis of the inherency theory, see Buxbaum, *Restrictions Inherent in the Patent Monopoly: A Comparative Critique*, 113 U. PA. L. REV. 633 (1965).

42. For an example of the inherency theory as applied to price fixing licenses, see United States v. Line Materials Co., 333 U.S. 287, 344 (1947), Justice Burton, dissenting:

> Therefore, as long as the license agreement has only the effect of reducing the lawful restraint imposed by the patent, such agreement merely converts the original lawful restraint into a lesser restraint, equally lawful.

43. *See* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967); White Motor Co. v. United States, 372 U.S. 253 (1963).

44. The classic statement of this proposition is found in United States v. General Elec. Co., 272 U.S. 476 (1927):

> If the patentee goes further, and licenses the selling of the articles, may he limit the selling by limiting the method of sale and the price? We think he may do so, provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly. One of the valuable elements of the exclusive right of a patentee is to acquire profit by the price at which the article is sold. The higher the price, the greater the profit, unless it is prohibitory. When the patentee licenses another to make

recognizing that the right to exclude infringers is exempt and that this may lead to a product market monopoly, this theory assumes that the patentee has the right to product market monopoly profits achievable by any means.[45] Under this theory (the right to monopoly profits), one could have two inventors, each having patents covering product markets but only one owning the necessary means of production. The one without the means of production will argue that since he cannot produce and sell, he should be allowed to enter into restrictive agreements to gain his monopoly profits.[46] This patentee wants additional rights merely because he does not have as many resources as another patentee may have. Besides finding no basis in the patent laws and not being required to preserve patent incentives, the "monopoly profits" theory provides a conceptual oddity—a patent reward based on need.[47]

While the courts may have relied on one or both of the above concepts or on the "question begging generality" that some otherwise illegal agreement is "within the patent reward," the outcome has not proved disastrous. Though the courts have acceded to many special privileges in this area, they have never allowed the status of patentee to, in itself, grant immunity. Instead, inconsistent case law has developed, characterized by "no rule of thumb." Several major problem areas will be discussed to determine what changes would result from using the proposed two-step methodology. A patent exemption will be provided only for conduct necessary to preserve patent incentives, such as the right to preclude patent infringements and the right to grant royalty bearing licenses; all

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> and vend, and retains the right to continue to make and vend on his own account, the price at which his licensee will sell will necessarily affect the price at which he can sell his own patented goods. It would seem entirely reasonable that he should say to the licensee, "Yes, you may make and sell articles under my patent, but not so as to destroy the profits that I wish to obtain by making them and selling them myself."

*Id.* 490.

45. Baxter, *Legal Restrictions on Exploitation of the Patent Monopoly: An Economic Analysis*, 76 YALE L.J. 267, 312 (1966).

46. This argument finds parallel in the application of section 1 of the Sherman Act to distribution restraints. Manufacturers often argue that rather than setting up their own fully owned distribution system, they should be permitted to achieve the same end by means of contractual restrictions with independent distributors. The latest rejection of this theory is found in United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

47. It should also be noted that most restraints can achieve no more for the patentee than the licensing royalties he can legally gain. Baxter, *supra* note 45, at 329-39.

other patent related conduct will be examined under antitrust law. While the antitrust law itself may be none too clear, at least analysis will not be hindered by nagging doubts that somehow patent law should concurrently be considered.

## IV. CURRENT PROBLEMS

### *A. The Right To License*

The right of the patentee to pick and choose who, if anyone, he will license to use his invention involves many possible antitrust questions. For example, the patentee's refusal to "deal" can be designed to create a monopoly in another or himself, with respect to a product incorporating his invention or another product;[48] the refusal may also be the subject of a "conspiracy to monopolize" or enforce a price fixing arrangement or may be part of a boycott. In any event, all the problems that can occur when a seller refuses to sell products can also occur with the licensing of inventions. Professor Turner has recently argued that a somewhat different approach should be taken when considering a patentee's refusal to license. He contends that once "a patentee issues a license with a field-of-use restriction he should be obligated to issue a comparable license to any qualified candidate . . . ."[49] He qualifies this, however, by allowing exclusive field of use licenses if it can be established that such limitations are required to induce others to innovate. Professor Turner then suggests that perhaps this rule should be applicable even if the first license is unrestricted, *i.e.*, a simple non-exclusive license.[50]

Professor Turner defends his approach by pointing to general antitrust law treating monopolists a bit different than normal sellers because of their ability to damage buyers through refusing

48. Refusing to license except on the condition that an unpatented product be purchased from the patentee is an illegal tying arrangement, B.B. Chemical Co. v. Ellis, 314 U.S. 495 (1942), while refusing to license in order to suppress the patented technology and thus protect existing technology is an illegal attempt to monopolize. Lorain Journal Co. v. United States, 342 U.S. 143 (1951). The latter conclusion conflicts with Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U.S. 405 (1908). However, the opinion in *Continental Paper Bag* relied on the fallacies previously discussed, notes 34-43 and accompanying text, and therefore this case should be overruled.

49. Turner, *The Patent System and Competitive Policy*, 44 N.Y.U.L. REV. 450, 472 (1969).

50. *Id.* 474, 476.

to deal or dealing on a discriminatory basis.[51] This isn't quite so radical as it appears, since both sections 1 and 2 of the Sherman Act prohibit refusals to deal when it can be shown that such refusals tend to monopolize[52] or are otherwise connected with a restraint of trade.[53] It appears that Turner's approach rests on the assumption that, generally, the only reason a patentee who has granted one or more licenses would refuse to license others is that the licensees wish to cartelize industries and have combined with the patentee to achieve such a result. However, other reasons, less reprehensible, are also apparent, particularly where the patentee would be competing with his prospective licensee. In any event, the basic difference between Turner's approach and the usual antitrust analysis is that Turner proposes an almost conclusive presumption that once a license has been given, any further refusal to license is based on an illegal restraint, while generally in antitrust the actual illegal restraint must be proven. Instead of adopting the Turner approach, we suggest substantially disparate treatment for non-manufacturing and manufacturing patentees.

The only way that a non-manufacturing patentee (a patentee who will not be competing with the prospective licensee) can achieve income, other than by sale, is through licensing. Thus, any rule requiring additional licenses after the first would not serve to suppress licensing. Further, there is a serious question whether a patentee who grants one or more non-exclusive licenses would increase his royalty income by refusing to grant additional licenses. Indeed, such refusal generally benefits the licensees rather than a patentee since the patent would operate as a barrier to com-

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51. *See, e.g.*, United States v. Terminal R.R., 224 U.S. 383 (1912); LePeyre v. FTC, 366 F.2d 117 (5th Cir. 1966). The latter case involved the leasing of patented shrimp peeling machines on a discriminatory basis. This practice was found an unfair method of competition forbidden by section 5 of the Federal Trade Commission Act, 15 U.S.C. §§ 45(a)(1), 45(a)(6) (1964). The court merely found that a lawful monopolist must conduct his business so as not to injure competition in another line of commerce. 366 F.2d at 121. One could read this to mean that because the defendant-seller was a lawful monopolist (in this case because he was a patentee) he had this duty. This would have the adverse effect of adding extra baggage onto a patent grant. However, the court seemed to be concerned with the fact that if any monopoly discriminated against its purchasers, competition could not rectify the damage by giving an alternative source of supply. Therefore, whether monopoly power was achieved legally, as by patent grant, or illegally is of little importance.

52. Lorain Journal Co. v. United States, 342 U.S. 143 (1951); Eastman Kodak Co. v. Southern Photo Materials, 273 U.S. 359 (1927).

53. United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

petition for the licensees. Since licensees have a substantial interest in the patentee refusing to create more competition for them, and there is no good evidence that the patentee would increase his royalty income by such a refusal, it would not be unfair in many situations to infer an express agreement between the parties. Indeed, the grant of one or more non-exclusive licenses coupled with a refusal by the non-manufacturing patentee to grant additional licenses may be enough to prove the existence of such an agreement as a matter of law.[54] Thus, there is much to be said for the Turner approach when applied to non-manufacturing patentees.

However, the equities shift when the prospective licensee would be a competitor of the patentee. Here, the patentee frequently will have good commercial reasons of his own not to grant additional licenses. Most likely, his refusal would not be by reason of any agreement between the patentee and any existing licensee, but rather the feeling, frequently justified, that additional competition would materially harm the patentee's business. Hamstringing such a patentee by requiring additional licenses once one has been granted would probably lead, in many cases, to the patentee's refusal to license at all, with obvious adverse consequences for competition. Further, it could well adversely affect competition in the development of new technology. Business concerns might sleep more comfortably while doing little research if they knew that their competitors would either have to exploit their inventions themselves or, alternatively, give licenses to the less innovative competitors. Therefore, absent proof of an actual agreement with his licensees,[55] a manufacturing patentee who does not want to experience further competition should be permitted under section 1 of the Sherman Act to refuse to license additional competitors likely to materially harm the patentee's business.

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54. See the excellent discussion of Albrecht v. Herald Co., 390 U.S. 145 (1968), in Handler, *Through the Antitrust Looking Glass*, 23 THE RECORD 601 (1968). Professor Handler concludes that the facts did not support an inevitable or inexorable finding of joint action. Yet the Court required a directed verdict for plaintiff.

55. Where a patentee informs his licensees that only a certain class of potential licensees will be licensed, he risks being considered to have entered into an agreement with them to refuse licenses to those not in that class. For example, if the class is those companies already in the business to which the patent relates, the patentee who refuses a license to a newcomer may be considered to have done so in accordance with an agreement with his licensees. *See generally* Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962).

*B. Price Fixing*

As with any other type of bilateral restraint, price fixing can occur in connection with the sale of the patented product or with the licensing of the invention. Under section 1 of the Sherman Act, price fixing is illegal per se;[56] therefore, little discussion will be required in this area except to note the changes required by the proposed methodology in the present case law.[57]

It was long ago resolved that when a patentee incorporates his invention into a product and sells it himself he cannot fix its resale price.[58] There is, however, one possible inconsistency between this area of the law and the general antitrust approach. In vertical price fixing actions, the manufacturer sometimes asserts the defense of "agency," a practice whereby he controls resale prices by selling only through his so-called agents. Such a defense is viable with various exceptions, one of which is found in *Simpson v. Union Oil.*[59] This exception disallows the defense when a vast distribution network is involved. Pertinent to this discussion is the method the *Union Oil* court used to distinguish an earlier, apparently controlling decision. In the earlier *United States v. General Electric Co.*[60] case which upheld such a defense where a vast distribution network was involved, the product in question was patented.[61] The court in *Union Oil* seized upon this to distinguish the two cases, giving the definite impression that it was leaving a loophole in the rule it created.[62] But this distinction between patented and unpatented goods has nothing to do with patent incentives or with the resulting restraint on competition. Hence, the *Union Oil* rule should be applied regardless of whether the product is patented.

The *General Electric* case also plays a prominent role in the

56. *E.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 (1940).

57. *E.g.*, United States v. Univis Lens Co., 316 U.S. 241 (1942); Boston Store of Chicago v. American Gramophone Co., 246 U.S. 8 (1918).

58. Bauer & Cie v. O'Donnell, 229 U.S. 1 (1913).

59. Simpson v. Union Oil Co., 377 U.S. 13, 21 (1964).

60. 272 U.S. 476 (1926).

61. *Id.* 490.

62. The Court in the *General Electric* case did not restrict its ruling to patented articles; it, indeed, said that the use of the consignment device was available to the owners of articles "patented or otherwise." [*United States v. General Electric Co.*, 272 U.S. 476, 488 (1926).] But whatever may be said of the *General Electric* case on its special facts, involving patents, it is not apposite to the special facts here.

377 U.S. at 23.

more important area of licensing price fixing. *General Electric* held that price fixing by a patentee in a licensing arrangement is lawful when the patentee also produces and sells the patented product. While this rule has survived frontal attack,[63] several subsequent cases have narrowed its scope.[64] However, the *General Electric* decision should be overruled since it relied on the fallacy that patent rights include the right to "monopoly profits"[65] and since Professor Turner has effectively pointed out that prohibiting price fixing licenses will not lead to any appreciable reduction in patent licensing, and thus, from an antitrust viewpoint, there is no justification for allowing price fixing in patent licensing.[66]

### C. *Field of Use Licenses*

We conclude our analysis with a discussion of field of use licensing, *i.e.,* licensing where the manufacturing licensee is limited in the way he may use the patented invention. For example, the licensee may be limited to sales to certain customers, to sales of only certain types of patented products, or to using a process invention

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63. The *General Electric* rule barely escaped demise in United States v. Line Material Co., 333 U.S. 287 (1948).

64. For a discussion of the limitations on the *General Electric* rule, see Gibbons, *Price Fixing in Patent Licenses and the Antitrust Laws,* 51 VA. L. REV. 273 (1965); Hollabaugh, *Patents and the Antitrust Laws,* 25 U. CINC. L. REV. 43 (1956).

65. *See* note 40 *supra* and accompanying text.

66. Turner, *The Patent System and Competitive Policy,* 44 N.Y.U.L. REV. 450, 464-69 (1969).

Perhaps the most cogent judicial attack on price fixing patent licenses is found in the concurring opinion of Justice Douglas in United States v. Line Materials Co., 333 U.S. 287, 319 (1948):

> It is said in reply that he, the patentee, has that monopoly anyway—that his exclusive right to make, use, and vend would give him the right to exclude others and manufacture the invention and market it at any price he chose. That is true. But what he gets by the price-fixing agreement with his competitors is much more than that. He then gets not a benefit inherent in the right of exclusion but a benefit which flows from suppression of competition by combination with his competitors. Then he gets the benefits of the production and marketing facilities of competitors without the risks of price competition. . . . The patentee creates by that method a powerful inducement for the abandonment of competition, for the cessation of litigation concerning the validity of patents, for the acceptance of patents no matter how dubious, for the abandonment of research in the development of competing patents. Those who can get stabilized markets, assured margins, and freedom from price cutting will find a price-fixing license an attractive alternate to the more arduous methods of maintaining their competitive positions.

only in a specified field or fields. Such licenses may not expressly restrict the licensee to the field defined in the license, but rather provide that the licensee may act outside that defined field but only as an infringer of the patent which he has recognized by taking the limited license. Since manufacturing licensees do not take limited licenses intending at the same time to infringe the licensed patent or patents, there is little doubt that limited licenses not containing an express contractual prohibition against operating outside the licensed area come within the purview of section 1 of the Sherman Act.[67] Therefore, section 1 is indifferent to whether the holder of a limited license has or has not specifically contracted not to use the invention outside of the terms of the grant.

With respect to limited licenses, there appears to be no basis for refusing to permit a patentee to reserve a part of the field covered by the patent for his exclusive use. Certainly if such field of use licensing were prohibited, the patentee would often simply refuse to license since he fully intends to be a monopolist in any event. Hence, it is decidedly preferable to permit the patentee to license in one area, thereby possibly stimulating technological innovation, while reserving another field exclusively for himself. As far as the authors are aware, neither the Department of Justice nor Professor Turner has suggested otherwise. However, as previously discussed, Professor Turner has suggested that once one limited license has been granted, the patentee should be under a duty to grant all applicants similar licenses on similar terms. This approach is proper so long as the patentee himself is not competing in the restricted field.[68]

The question becomes more acute when the patentee himself agrees to stay out of the licensee's field and further agrees to grant no additional licenses, *i.e.,* the so-called exclusive field of use license[69] This is, in effect, an agreement to divide up markets with the patentee agreeing to stay in the retained field and the exclusive licensee in the limited field. The justification for such an arrangement is that frequently a licensee will not endeavor to enter the limited field

67. This is also true of price fixing licenses which license sales only at a specified price.

68. *See* pp. 16-18 *supra.*

69. Exclusive field of use licenses were upheld in General Talking Pictures Corp. v. Western Elec. Co., 305 U.S. 124 (1938). This case relied heavily on the reasoning and authority of *General Electric* and hence its continued vitality is in doubt. Indeed, at least insofar as this case blesses all forms of field of use licenses, it should be overruled.

unless he is protected by an exclusive. This justification is valid in many cases, and hence, to the extent that exclusives are shown to be necessary, they should be permitted—at least for a period long enough to reasonably insure that a licensee will be able to recover his investment. Thus, in many cases the facts will support, at least for a limited time, an exclusive field of use license.

The most controversial of all field of use arrangements is typified by the so-called bulk sales restriction, most often employed in the pharmaceutical industry. To understand this type of restriction it is necessary to recognize that, in addition to the large pharmaceutical houses marketing drugs under their own brand names, other drug companies, generally much smaller in size, buy drugs in bulk and then convert into dosage (generally pill) form. They then label and package the drug and sell under generic names at prices 30 to 40 percent below the prices of equivalent brand name drugs.[70]

A patentee can, without question, choose to market his patented drug in pill form only, under a brand name, without at the same time being under a duty to sell the patented drug in bulk to generic drug houses. And, of course, if the patentee granted limited licenses because it wished to have a monopoly on bulk sales, then no objection to such bulk sale restriction would be raised. However, the issue is whether the patentee should be given the privilege of granting to other companies the right to manufacture the patented drug in pill form only—excluding bulk sales—when the patentee himself has no intention of exploiting the bulk market.

Bearing in mind the fallacies previously discussed, it is clear that merely because the patentee has a right to refuse to sell in bulk he does not also have a right to license others while he and his licensees, by means of restrictive agreements, refrain from selling in bulk. In the same fashion, while one manufacturer has the right to refuse to deal with a customer or class of customers, several manufacturers may not agree among themselves to so refuse to deal.[71] Yet, if bulk sales limitations are prohibited, the response of the patentee might be to refuse to license, thereby insuring a monopoly position in the pill form rather than competition on that level. On the other hand, those not licensed would be encouraged to either break the patent or invent around it. On balance, it would seem that even at the risk of discouraging some licensing, brand name drug manufacturers

70. *See* affidavits filed in connection with the proceedings on remedy in United States v. Glaxo Group, Ltd., 302 F. Supp. 1 (D.D.C. 1969).

71. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

should not be permitted to effectively agree not to make the patented drug available in bulk form to generic drug houses.

## V. CONCLUSION

We have set out a methodology for analyzing patent-antitrust issues which, as a first step, seeks to identify patent rights, *i.e.*, those rights given to the patentee to ensure that the constitutional and statutory goal of spurring inventive effort is met. Once these rights are identified, and we have identified at least the right to sue for infringement and the right to grant royalty bearing licenses, they are exempt from antitrust. All conduct not thereby found exempt is treated solely under antitrust principles.

We have applied a pure antitrust analysis to several issues of current importance and, as a result, have concluded that price fixing licenses should be held illegal, that under certain circumstances patentees may not be permitted to refuse to license, and that field of use licensing is appropriate and lawful under certain conditions but not others.

While the specific conclusions we have reached are significant, we believe that the most important aspect of our suggested approach is its general applicability, separating as it does the patent questions from antitrust. The confusions all too frequently occurring when patent and antitrust issues are mixed together are thus avoided.