Attachment 16

# Patent-Antitrust Policies in U.S.

*Problem may not be so much in logic of laws, but in their enforcement*

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Debate over the accommodation between the policies underlying patent law and antitrust law has a long tradition. Having been on both sides of most of the questions in that debate, I change my mind about them with some frequency. The primary misgiving about the exchanges that have gone on is that they have not been so much dialogues as contemporaneous monologues.

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First, I would like to discuss that which I think is not fairly open to dispute. The patent system is absolutely essential to sensible patterns of investment in the U.S. economy. It has worked reasonably well to achieve that objective. From the central purpose of the patent law, it follows that a patentee is not only entitled to the exclusive use of his invention, but to all that he can extract for a waiver of that exclusive position, provided that what he is exploiting is the specific monopoly covered by the claims of his patent, and provided of course the patent is valid. It is never a legitimate objection that returns to patentees are sometimes very, very large — that can be true only if his contribution to the technology is very, very large.

## Competition

But it is also true, on the other hand, that the U.S. public is entitled to competition in all sectors of the economy other than the very specific monopoly covered by those patent claims. The reason that is true is very much the same reason underlying the patent system: Such competition is essential to efficient patterns of allocation not only of capital but of all other resources. And because these two systems are really designed to further the same social goal, efficient resource allocation, one might expect — and indeed I believe it is true — that, as a theoretical matter at least, there is absolutely no conflict between the U.S. patent system and the U.S. antitrust laws — or at least with what U.S. antitrust laws should be in the areas of patents.

Unfortunately, that is only a theoretical statement, because it rests — and I think this is really the critical point — it rests on tacit assumption that we have a faultless and essentially costless device for ascertaining the validity of patents and the scope of the monopolies which they confer. And of course, in the real world, that assumption is very false. And as soon as the falsity of that assumption is recognized as the problem from which conflicts between patent and antitrust law flow, can be seen with much greater clarity — with more perception of what the character of the conflict really is. Let me give you a few cases as examples — I put them as hypotheticals, but I'm sure they will be recognized as past cases.

A patentee finds a new and improved varnish. A large preponderance of U.S. manufacturers in what once was a competitive industry take licenses and capitulate to a minimum price demand by the patentee. They withdraw similar varnishes, ostensibly on the grounds that they are commercially inferior to this new invention. The industry now is functioning with a reduced range of product offerings and at a uniform price. If this patent is really valid, and if the product that is covered by those claims — if the varnish covered by those claims — is really commercially superior to the varnishes that have been withdrawn from the U.S. market, there can be no possible objection to that licensing pattern and commercial result. And yet a heavy odor of cartelism hangs about any such arrangement. One suspects that the favor which the new varnish has found among the licensees has more to do with the fact that price fixing is possible with regard to it than because of its true commercial superiority. One suspects; but is the suspicion correct? It is because questions of this kind are so difficult to answer, and because we know or ought to know that the institutions we have available for answering them will often make mistakes, and because the mistakes will, in fact, trench either upon the patentee's position or upon the competitiveness of our markets that we have conflict between patent law and antitrust.

## Combination Patent

Consider another case. An inventor comes up with a new combination patent on a system of thermostatic controls to be used in residences. It's a combination patent such that the combination will never actually be assembled and used except on the residential premises. Under those circumstances, enforcement of the combination patent is essentially impossible for the patentee, unless he can employ the manufacture and sale of some — by hypothesis — unpatented component as a royalty collection device. And so he manufactures a thermostatic



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switch that has features useful only in this combination. And he sells it at a price well in excess of his manufacturing cost, using it as a royalty collection device and granting a license with each switch. He is challenged by a rival manufacturer who also manufactures thermostats which have features useful only for purposes of infringement or contributory infringements. Again, if there's really no question about the validity or scope of the patent claim, there should be no objection to the arrangement.

When the first case was litigated, the varnish license arrangement was struck down, and I think quite rightly. Because there's a danger of error, we have to ask in each of these patent-antitrust cases which of the rival policies is likely to suffer to a significant extent as a consequence of errors of administration. In my view, the power of a patentee to exploit his patent position is only marginally diminished — it is diminished, there is no question about that — but it is only marginally diminished by eliminating, in the name of competition, his right to engage in minimum price licensing. On the other hand, the dangers of competition are very great if the patent is invalid or the invention, while new, is not commercially significant.

### Wrong Result

In the second case, the patentee's attempt to use the unpatented component as a royalty collection device was struck down, quite wrongly in my view. Wrongly because, as is true of combination patents in a wide variety of circumstances, the patentee was deprived of his only practical mechanism for exploiting his invention. Often combination patentees cannot exploit their invention if they are not permitted to sell specialized, unpatented components as a licensing device and prevent others from doing so. On the other hand, the real dangers to competitive processes that emerge from that type of arrangement — mindlessly called a tie-in arrangements — are trivial, even if error occurs in determining validity.

It is that kind of examination of the commercial settings, and those kinds of questions about how deeply error will trench upon one policy or another, it seems to me, that point the way to a sensible accommodation between the bodies of the law. As long as one stays on theoretical ground, ignoring the possibility of, and the costs of, error in application, one can start off with the proposition that patents are "property" and run with the proposition forever; and the set of conclusions one reaches by entirely logical reasoning is that competition must give way at every point. Indeed, competition is never threatened because, by tacit assumption, we make no mistakes. Alternatively, one can start with the proposition that competition is essential and run with that proposition forever, purely as a deductive, logical matter, with the result that the patent system is greatly impaired. Theoretically, it is correct to say there is no conflict between patent and antitrust law, although in fact there is and it arises not from the logic of the two systems themselves but from our highly imperfect enforcement of the systems.