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Patents and Antitrust Law

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PATENTS AND ANTITRUST LAW. By *Ward S. Bowman, Jr.* Chicago: University of Chicago Press. 1973. Pp. xii, 272. \$10.50.

For one who has spent half a professional lifetime trying to rationalize the relationship between the patent and the antitrust laws, Professor Bowman's book is real help. The book's basic conclusions appear to be sound, and the book should be required reading for those lawmakers, jurists, and practitioners who venture into the crosscurrents of patent and antitrust law.

The author begins by arguing that "[b]oth antitrust law and patent law have a common central economic goal: *to maximize wealth by producing what consumers want at the lowest cost*" (p. 1) (emphasis original). Various criticisms of the patent system itself are dismissed, and alternative proposals for rewarding invention are examined and rejected as less likely to achieve the desired objective (pp. 15-32).

Pronouncing the patent system economically sound and worthy of continued support, Professor Bowman turns to the system's method of rewarding invention—a limited temporary monopoly on

the often unrealistic option of keeping the invention to himself and manufacturing, selling and/or using the invention alone, the only way for the inventor to exploit the patent is to license others to use the invention. Following an economic analysis of the operation of use restrictions and price restrictions in patent licenses, the author concludes that these restrictions can serve only to maximize the patentee's income, thus achieving the objective of rewarding inventiveness. Professor Bowman convincingly maintains that, contrary to current case law and Department of Justice policy, no use restriction or price restriction in a patent license can in any way create a monopoly or tend to create a monopoly beyond the legitimate monopoly granted by the patent (pp. 53-139).

After a discussion of the pre-Clayton Act cases involving the legality of use restrictions in patent licenses (pp. 140-62), the author analyzes the decisions since 1917 that have imposed greater and greater restrictions on the patent owner's right to license his invention (pp. 163-238). Professor Bowman's conclusions are an indictment of the courts, and particularly of the Supreme Court:

But spurious and unarticulated motivations aside, the most frequently cited reason for prohibiting patentees from imposing various use-restrictive contracts upon licensees has been a finding that the proper scope of the patent monopoly has been exceeded.

In applying its scope test—a test which implicitly, at least, involves an economic appraisal of profit maximization under a valid patent as contrasted to monopoly extension into inappropriate areas—the Supreme Court has mostly been mistaken. And its mistakes come from getting the wrong answers to the right questions. No careful distinction between monopoly maximization and monopoly extension has been articulated and consistently applied. The Supreme Court's facility for finding a leveraging process by which one monopoly becomes two (or more) monopolies is particularly notable. Examples have been provided in case after case. In addition, under both patent-misuse law and antitrust law, there is an increasing propensity to apply a foreclosure test. Emphasis is thus focused on competitors rather than upon competition (or, more appropriately, the competitive process). Equating effect on competitors with effect on competition is a dubious hypothesis which the Court tends to adopt as an obvious conclusion. This persists even though there has been neither legislative nor judicial adoption of the proposition that inefficient competitors are to be favored over a consumer-benefitting competitive process.

. . . It should not be surprising, therefore, as monopolization mythology has gained the upper hand in the antitrust arena, that what some viewed as intensified conflict between patent law and antitrust law turns out to be compatibility, albeit a compatibility in error. Neither should it be a cause for surprise that this development has called for cures from antitrust diseases, phantom and real, which are

more harmful to the competitive process than the maladies themselves.

Antitrust law, including the Clayton Act, the Robinson-Patman Act, and the Miller-Tydings and McGuire Fair Trade acts, in addition to the Sherman Act, has become increasingly stringent with respect to vertical integrations and vertical contracts—contracts not between competitors but between suppliers and their customers or between buyers and their sources of supply. Many if not most patent licensing contracts are of this type. Included are the tie-in sales, exclusive licensing, territorial division, discriminating licensing and price-restrictive licenses analyzed in preceding chapters. These contractual arrangements are often means by which patentees are able to “efficiently” recover that value which is measured by customer evaluation of the competitive superiority afforded by the patent. . . . [T]hese vertical contracts not only are “efficient” as profit-maximizing devices for those who employ them, but they also can be, and mostly are, efficient in the social sense. They can be means of getting more of what the community wants at lower overall cost than if their use were prohibited. [Pp. 240-41.]

While Professor Bowman's indictment appears to be soundly based, it is too much to expect an overnight about-face by the courts or the federal regulatory agencies. Forty years of mythology and wrong thinking cannot be easily overcome. Attempts by counsel for patent owners in future litigation to obtain a realistic weighing of the competition-promoting against the competition-restricting aspects of a given patent license agreement may be thwarted by per se patent misuse pronouncements or dicta gleaned from earlier cases.

The only way Professor Bowman's conclusions could quickly become law would be by congressional action, and the legislative climate for such action seems lacking. However, each new litigated case in which the legality of the terms of a patent license is attacked logically requires a rational and independent analysis by the court of the economic merits of those terms accused of misuse. Thus, the opportunity still presents itself to diligent counsel for the patent owner to defend the accused license terms as economically justifiable and logically incapable of any tendency to create a monopoly beyond that granted by the patent. In these endeavors, Professor Bowman's book should provide considerable assistance.

Professor Bowman's criticism of the prevailing protectionist attitude that underlies recent court decisions denying effect to restrictive patent licenses finds support in the review of his book by University of Pennsylvania economist Oliver Williamson.¹ According to Professor Williamson, vertical market restrictions imposed by patent licenses can and often do lead to allocative efficiency gains.²

1. 83 YALE L.J. 647 (1974).

2. *Id.* at 659.

He urges the antitrust enforcement agencies and the courts to apply a case-by-case economic efficiency test when examining patent licensing arrangements.

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