# Note

## GIVING THE PATENT OWNER HIS DUE: RECENT DEVELOPMENTS IN THE ANTITRUST/PATENT MISUSE INTERFACE

### I. INTRODUCTION

The antitrust laws, described at one point as "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade,"[1] and the patent laws, enacted under the authority of article I of the United States Constitution,[2] have almost uniformly been seen by the courts as antithetical. In considering the relationship of the antitrust and patent laws, courts have spoken with virtual unanimity of the "monopoly" conferred by the grant of a patent to the patentee, yet the patent laws do not give the patentee a monopoly in anything in an antitrust sense.[3] Rather, a patent is properly understood as the grant of a right to exclude others from making, using, or selling the patented invention for a limited time.[4] The patentee is not guaranteed the right to practice his own invention,[5] which has a demonstrated novelty[6] and utility.[7] The patentee may be similarly constrained in the licensing

1. Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958).

2. U.S. CONST. art. I, § 8, cl. 8 provides: "The Congress shall have Power [t]o 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 . . . ."

3. *See infra* note 9 and accompanying text.

4. The current statutory term is 17 years. 35 U.S.C. § 154 (1981) provides, in relevant part: "Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, for the term of seventeen years . . . of the right to exclude others from making, using, or selling the invention throughout the United States . . . ."

5. An example of a situation in which a patentee might hold a valid patent, yet still might be unable to practice his own invention, would be where the patent is for an improvement on a previously patented insecticide utilizing compound X in a novel, unobvious manner. If the improvement patent were for an insecticide using a novel and unobvious combination of compounds X and Y, the patentee could be prevented from exploiting his improvement patent by the prior patentee.

6. *See* 35 U.S.C. §§ 101, 102.

7. *See id.* § 101. While the invention need not be "of such general utility, as to supersede all other inventions now in practice to accomplish the same purpose,"

or sale of his invention, assuming that there is a market for the licensing or sale of his invention in the first place.[8]

In contrast,

> 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 is enjoyed before his discovery, but gives something of value to the community by adding to the sum of human knowledge.[9]

For the most part, the courts have been unwilling to examine whether the conflict between the antitrust and patent laws is more apparent than actual; in any event, it would appear that in general

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it must be "one as may be applied to some beneficial use in society" to be patentable. *See also* Graham v. John Deere Co., 383 U.S. 1, 5 (1966).It should be noted that while the utility requirement for patentability is not substantial, antitrust concerns will only arise when the patent is useful enough to a third party (whether licensee or assignee) to permit anticompetitive behavior. A monopoly of a worthless commodity is equally as worthless.

8. The existence of such a market, after all, is not a prerequisite to patentability. All that is really required in this regard is that the subject matter be novel, useful, and nonobvious. 35 U.S.C. §§ 101-103.

9. Rupert, *The Relationship of Patent Law to Antitrust Law*, 49 ANTITRUST L.J. 755 (1981) [hereinafter Rupert, *Patent Law*]. Rupert sets forth three ways in which an inventor may give "something of value to the community":

> The first occurs by an absolute and irrevocable dedication of the invention to the public, such as by publishing a scientific paper which describes, in detail, the invention and thereafter not pursuing patent rights, or by obtaining a patent and then dedicating that patent to the public. The second method involves maintaining the invention as a trade secret but providing to the public the "fruits" of that trade secret. A prime example of this would be the Coca-Cola soft drink product. Although the formula has been maintained as a trade secret, the product made using that formula has been and is enjoyed by many. The third method of giving something to the public is through the use of the patent system. Thus, the invention is disclosed to all, may be used by anyone, subject, of course, to the patent owner's right to exclude others from manufacturing, using, or selling the patented invention, and may indeed be improved upon by anyone, subject again to the patent owner's rights in the underlying patent.
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> In this latter method of adding to the "sum of human knowledge" many patent owners choose to rely on well-established contrast principles in order to achieve broad dissemination of the invention while, at the same time, acquiring a reasonable return on the research and development efforts. It is in this context in which the patent and antitrust laws overlap.

*Id.* at 756.

the antitrust laws have always emerged victorious,[10] despite the Constitutional underpinnings of the patent laws.[11] In recent years, however, a perceived[12] decline in the ability of the United States to compete on an international scale with other industrialized nations has brought about an awareness of the importance of innovation and a less mechanical application of the antitrust laws in order to maintain a competitive position in the world market.[13]

The degree to which this awareness has affected, will affect, and should affect the courts' perceptions of the proper relationship between the antitrust laws and the patent laws is the subject of this discussion. After a background section on the misuse doctrine, the first portion of this note will be devoted to an examination of the National Cooperative Research Act of 1984 (NCRA). A second section will turn to a discussion of current administrative and judicial trends in the misuse/antitrust interface, particularly as they might relate to future interpretations of the NCRA. The ultimate aim of the paper is to assess the present and potential impact of the NCRA on the relationship of the patent and antitrust laws. It is the author's conviction that, given recent developments in the antitrust laws[14] and

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10. The expansion of the misuse doctrine to encompass practices that are not also antitrust violations supports this assertion at least implicitly. Cases such as Bement v. National Harrow Co., 186 U.S. 70 (1901), and Henry v. A.B. Dick Co., 224 U.S. 1 (1912), demonstrate that the situation described in the text has not always existed.

11. *See supra* note 2 and accompanying text.

12. The extent and causes of this decline are a matter of some dispute. *See, e.g.*, House Committee Report, H.R. 5041, 98th Cong., 2d Sess., *Joint Research and Development Act of 1984*, 130 CONG. REC. 53,3184, *as amended in committee. Id.* at 53,3189.

13. The need for a flexible use of the antitrust laws to deter anticompetitive conduct without needlessly deterring potentially procompetitive behavior has been accepted to a greater degree at this point than the need for a similarly flexible standard with regard to patent practices. *See infra* notes 39-41 and accompanying text.

14. These developments are indicative of a general trend toward a "rule of reason" approach in judging allegedly anticompetitive behavior, and toward a Congressional awareness of and sensitivity for the potential anticompetitive effects of the antitrust laws as they impact upon the patent system. *See infra* notes 33-82 and accompanying text.

The per se standard for judging allegedly anticompetitive practices was first described in Northern Pac. Ry. v. United States, 356 U.S. 1 (1957), where the Court stated that "certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise

the increasing convergence of patent misuse and antitrust principles,[15] courts will eventually abandon their traditional antagonism toward

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harm they have caused or the business excuse for their use." *Id.* at 5. *See also infra* notes 164-68 and accompanying text (per se rule has been abandoned in several contexts).

The rule of reason recognizes that all agreements restrain trade to a certain extent, but certain agreements may promote competition and the public interest. *See* Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1917). The restraints of trade under the rule of reason have been evaluated for potential procompetitive effects or legality according to the guidelines set forth in *Chicago Bd. of Trade* by Justice Brandeis:

> To determine [the legality of a restraint in trade] the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

*Id.*

But as the United States Supreme Court recently noted in NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 104 n.26 (1984): "[T]here is often no bright line separating per se from Rule of Reason analysis. Per se rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct." This blurring of the distinction between the two modes of analysis evinces a concern for the actual competitive effects of certain restraints. *See* Hornick, *The Per Se Rule in Tying Contexts: A Critical View*, 10 DEL. J. CORP. L. 703 (1985); Comment, *Tying Arrangement Analysis: A Continued Integration of the Rule of Reason and the Per Se Rule*, 63 WASH. U.L.Q. 337 (1985) [hereinafter Comment, *Tying Arrangement*].

15. *See generally* USM Corp. v. SPS Technologies, Inc., 694 F.2d 505 (7th Cir. 1982), *cert. denied*, 462 U.S. 1107 (1983). In *USM*, USM Corporation had brought suit against SPS Technologies to invalidate SPS's patent and to recover royalties paid to SPS as part of a settlement of an earlier infringement action. The royalty agreement under the settlement required USM to remit to SPS 25% of any royalties obtained by sublicensing the patent, except that if USM sublicensed any of four companies that SPS had previously licensed directly, USM was to remit 75% of the royalties obtained by sublicensing the four companies. In reviewing the doctrine of patent misuse generally, Circuit Judge Posner, one of the leading expositors of the "Chicago School," noted that "[s]ince the antitrust laws as currently interpreted reach every practice that could impair competition substantially, it is not easy to define a separate role for a doctrine also designed to prevent an anticompetitive practice—the abuse of a patent monopoly." *Id.* at 511. Judge Posner further observed that "[o]utside [of the conventional boundaries of the doctrine] there is increasing convergence of patent-misuse analysis with standard antitrust analysis," *id.*, and queried, "[i]f misuse claims are not tested by conventional antitrust principles, by what principles shall they be tested?" *Id.* at 512. Judge Posner answered this question with the observation that "[o]ur law is not rich in alternative concepts of monopolistic abuse," *id.*, and suggested that "it is rather

the patent system[16] in favor of a more reasoned approach that fairly balances the patentee's interest in obtaining a return on his investment and society's interests in promoting innovation, productivity, and competition.

## II. GENERAL BACKGROUND ON THE DOCTRINE OF PATENT MISUSE

The doctrine of patent misuse has been broadly described as "an equitable concept designed to prevent a patent owner from using the patent in a manner contrary to public policy."[17] As traditionally applied, the doctrine has been confined largely to instances in which the patentee has attempted to extend his "monopoly" beyond the prescribed scope of his patent.[18] Enforcement of the patent is arrested until the effects of the misuse are dissipated.[19]

Misuse has been found where the patentee has "tied" the grant or license of his patent to the purchase of a separate, unpatented product from himself or a designated third party,[20] to the licensing of patents not desired by the licensee,[21] and to the licensing[22] or assignment[23] in return for improvement patents held by the licensee. In addition, compelling the payment of royalties that were based on

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late in the day to try to develop one without in the process subjecting the rights of patent holders to debilitating uncertainty." *Id.* Judge Posner proceeded to uphold the licensing arrangement under antitrust principles. *Id.* at 512-14.

16. *See, e.g.*, Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488, 491 (1942) (the use of the patent monopoly to restrain competition in the marketing of unpatented articles, salt tablets, and to aid in the limited monopoly in the tablets is contrary to public policy).

17. 694 F.2d at 510 (citing Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488 (1942)).

18. *Id.*

19. *Id.*

20. International Salt Co. v. United States, 332 U.S. 392 (1947) (tie of license to two patented machines, one for dissolving rock salt into a brine for commercial use and the other for injecting salt tablets into canned products during canning, to purchase of salt from patentee, then the largest producer of salt for industrial uses).

21. American Securit Co. v. Shatter Proof Glass Corp., 268 F.2d 769 (3d Cir. 1959) (mandatory licensing of group of patents, some of which pertained to the same art of manufacturing tempered flat glass, held misuse of patents).

22. United States v. General Electric Co., 80 F. Supp. 989, 1006 (S.D.N.Y. 1948) ("employment of basic patents, or patents which may be basic, to compel the transfer of future patent rights, is condemned per se").

23. Deering Milliken Research Corp. v. Leesona Corp., 201 F. Supp. 776 (E.D.N.Y. 1962) (licensee of patent for yarn manufacturing apparatus and process required to "grant back" improvements on process and/or apparatus, and any applications or patents granted thereon).

sales of an unpatented product,[24] were discriminatory in nature,[25] or were to be paid after the expiration of the patent term[26] have similarly been held to be beyond the lawful scope of the patent. Misuse has also been found where the patentee attempted to fix the price at which the purchaser of the patented item could resell it.[27]

The precise rationale and scope of the doctrine have defied explanation.[28] The misuse doctrine has been seen as both an equitable

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24. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) (five-year package license agreement, covering 500 plus patents, and reserving royalties on the licensee's total radio and television sales regardless of whether licensed patents were actually used in the manufacture of such radios and televisions).

25. Laitram Corp. v. King Crab, Inc., 244 F. Supp. 9 (D. Alaska 1965) (license of shrimp peeling machines to West Coast canneries at double the rate charged Gulf Coast canneries, ostensibly because the same volume of the smaller West Coast shrimp would have taken twice as much hand labor as on the Gulf coast, thereby resulting in a double savings to West Coast canneries upon automation).

26. Brulotte v. Thys Co., 379 U.S. 29 (1964) (license of hop-picking machinery).

27. Bauer & Cie v. O'Donnell, 229 U.S. 1 (1913) (purchase by retail drug store operator of patented composition conditioned on resale at or above specified price; any sale in violation of condition to be charged as infringement).

28. Compare USM Corp. v. SPS Technologies, Inc., 694 F.2d 505 (1982), *cert. denied*, 462 U.S. 1107 (1983), where Circuit Judge Posner questioned whether:

> as an original matter . . . any of these practices [resale price maintenance, ties to unpatented staple items, requiring licensees to pay royalties beyond the expiration of the patent or to pay royalties measured by the sales of unpatented end products containing the patented item, and requiring licensees to refrain from making items competing with the patented item, condemned in Stewart v. Mo-Trim, Inc., 192 U.S.P.Q. 410 (S.D. Ohio 1975)] really "extends" the patent. The patentee who insists on limiting the freedom of his purchaser or licensee whether to price, to use complementary inputs of the purchaser's choice, or to make competing items—will have to compensate the purchaser for the restriction by charging a lower price for the use of the patent.

*Id.* at 510-11. He further noted: "One still finds plenty of statements in judicial opinions that less evidence of anticompetitive effect is required in a misuse case than in an antitrust case. But . . . we have found no cases where standards different from those of antitrust law were actually applied to yield different results . . . ." *Id.* at 512.

Justice Holmes in his dissent in Motion Pictures Patent Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917), stated:

> I suppose that a patentee has no less property in his patented machine than any other owner, and that in addition to keeping the machine to himself the patent gives him the further right to forbid the rest of the world from making others like it. In short, for whatever motive, he may keep his device wholly out of use . . . . So much being undisputed, I cannot understand why he may not keep it out of use unless the licensee or for the matter of that, the buyer, will use some unpatented thing in

deterrent to anticompetitive behavior[29] and as the product of a hostile, misguided judiciary.[30] In any event, the misuse doctrine, which has generally been perceived as broader in scope than the antitrust laws[31] in years past, seems destined to be affected by recent developments in the antitrust laws and by the greater deference being accorded the patent system in some courts.[32]

## III. THE NATIONAL COOPERATIVE RESEARCH ACT OF 1984

### A. *Background*

Perhaps the most significant recent development in the antitrust laws in terms of impact on the treatment of patent practices is the enactment of the National Cooperative Research Act of 1984,[33] which

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> connection with it. Generally speaking the measure of a condition is the consequence of a breach, and if that consequence is one that the owner may impose unconditionally, he may impose it conditionally upon a certain event . . . .

*Id.* at 519. *See also infra* note 83 and accompanying text (discussion of recent legislative proposals regarding the misuse doctrine).

29. *See generally* Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488 (1942) (the use of the patent to suppress competition in the sale of an unpatented article may deprive the patentee of the court of equity to restrain an alleged patent infringement).

30. *See* Rupert, *Patent Law, supra* note 9, at 755.

31. *See, e.g.*, Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) (compelling the payment of royalties that were based on the sales of an unpatented product beyond the lawful scope of the patent); Report of the Attorney General's National Committee to Study the Antitrust Laws 254 (1955).

32. *See. e.g.*, Dawson Chem. Co. v. Rohm & Haas Co., 448 U.S. 176 (1980) (patent holder's suit to prevent contributory infringement by one selling the chemical with instructions for applying it by the patentee and the patent holder's failure to grant a license to would-be competitors did not amount to patent misuse); USM Corp. v. SPS Technologies, Inc., 694 F.2d 505 (7th Cir. 1982), *cert. denied*, 462 U.S. 1107 (1983) (patent owner did not commit patent misuse by including a differential royalty schedule in the license agreement); SCM Corp. v. Xerox Corp., 645 F.2d 1195 (2d Cir. 1981), *cert. denied*, 455 U.S. 1016, *reh'g denied*, 456 U.S. 985 (1982) (where patent had been lawfully acquired, subsequent conduct permissible under patent laws could not trigger any liability under antitrust laws).

33. 15 U.S.C. §§ 4301-4305. The National Cooperative Research Act (NCRA) has an European Economic Community counterpart, regulation No. 418/85, to article 85 of the Treaty of Rome. Recently issued also was regulation No. 2349/84, which grants certain patent license agreements an exempted status. Under this regulation, "tie-in agreements deemed 'technically indispensable' are permitted, as are certain field of use and assignment restrictions, non-exclusive grantbacks, and most favored licensee clauses." 30 PAT., TRADEMARK & COPYRIGHT J. (BNA) No. 743, at 409 (1985).

is in essence title II of the National Productivity and Innovation Act of 1983 (NPIA).[34]

The NCRA generally provides that joint research and development (R & D) programs will be scrutinized under a rule of reason standard rather than a per se standard.[35] Venture participants will be exposed to liability for, at most, actual (rather than the customary treble)[36] damages, plus attorneys' fees and other reasonable costs if the venture is disclosed to the Department of Justice and the Federal Trade Commission.[37] Pursuant to the NCRA, substantially prevailing defendants will be able to recover attorneys' fees in antitrust actions involving R & D joint ventures.[38]

Titles III, IV, and V of the NPIA, which dealt with intellectual property licensing, patent and copyright misuse, and process patents respectively, were deleted from the original bill by the Senate committee on the judiciary[39] because these provisions were considered

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34. S. 1841, 98th Cong., 2d Sess. § 201 (1983).

35. The first venture to be cleared under the Act, without challenge from the Justice Department, involved a proposal by Microelectronics and Computer Technology Corp. (MCC) to form a venture to "develop a new generation of computer applications and software for the aerospace industry." 29 PAT., TRADEMARK & COPYRIGHT J. (BNA) No. 720, at 489 (1985).

36. Clayton Act § 4, 15 U.S.C. § 15.

37. Under § 6 of the NCRA, the disclosure need only contain the identities of the parties to the venture, and the nature and objectives of the venture. Once disclosed, the participants have thirty days to reconsider before publication in the Federal Register. Even when so limited in scope, publication may cause a potential venture participant to reconsider:

(1) Publication may "attract unwelcome attention that could lead to antitrust allegations by private parties, even though the government takes no action." Morron, *The Administration's Legislation: The National Cooperative Research Act of 1984, The National Productivity and Innovation Act of 1983*, 18 J. MAR. L. REV. 607, 633 (1985) [hereinafter Morron, *Legislation*].

(2) The information "could divulge the type of research project or program being undertaken, which the venturers might wish to remain a secret." *Id.*

(3) The information could also "result in a loss of exclusivity, as such information would inform competitors of the feasibility of a particular enterprise that the competitors may then also wish to attempt." *Id.*

One commentator has suggested that some questions remain as to the adequacy of disclosure necessary to trigger the liability limitation, when the filing period begins to run, and the ability of private parties to challenge the disclosure. Holmes, *Research Joint Ventures and the Antitrust Laws: Recent Statutory and Administrative Changes*, 83 PAT. & TRADEMARK REV., No. 2, at 59 (1985) [hereinafter Holmes, *Changes*]. The Justice Department has recently fleshed out the disclosure requirements. *See* 29 PAT., TRADEMARK & COPYRIGHT J. (BNA) No. 710, 210 (1984).

38. NCRA § 5(a). Attorney's fees were previously unavailable to successful defendants due to the absence of authorizing language in §§ 4 and 16 of the Clayton Act. 15 U.S.C. § 4304(a).

39. S. REP. No. 427, 98th Cong., 2d Sess. 8, *reprinted in* 1984 U.S. CODE

sufficiently controversial to jeopardize the passage of the bill as a whole;[40] hence, the portions of the bill dealing with intellectual property were excised.[41] Title II of the NPIA, now renamed the NCRA, was enacted with only minor changes.[42]

The ramifications of the NCRA insofar as it affects the development and licensing of patents, particularly with reference to emerging judicial and administrative trends, will be discussed.[43]

### B. *Titles III, IV, and V of the NPIA: A Summary of the Severed Titles*

A brief examination of the several titles is necessary to establish a foundation for understanding the possible future of the NCRA in patent cases. Titles III, IV, and V of the NPIA reflected in a broad sense the conviction of the Reagan Administration that exploitation of patent rights could, in many instances, stimulate competition rather than restrain it,[44] and in any event, that such exploitation of the patentee's opportunity to earn a fair return on his patent investment was intimately related to the formation of R & D joint ventures and to increased innovation. This conviction is also apparent in earlier, related legislation.[45]

#### 1. Title III—Intellectual Property Licensing Under the Antitrust Laws

Section 301 of the NPIA would have mandated rule of reason[46] treatment under the Clayton Act for "[a]greements to convey rights to use, practice, to sublicense patented inventions, copyrights, trade

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CONG. & AD. NEWS 3105, 3108.

40. Morron, *Legislation*, *supra* note 37, at 658.

41. *See supra* note 39.

42. States were limited under § 203(c) to single damages, § 204(b) was amended as to the filing procedure for liability limitation, § 204(c) was deleted as superfluous in view of the amendment to § 204(b), and § 205, awarding reasonable attorneys' fees to all successful parties, was added. H.R. CONF. REP. No. 1044, 98th Cong., 2d Sess. 7, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 3131.

43. *See infra* text accompanying notes 59-62, 122-130, 132- 209.

44. *See* Morron, *Legislation*, *supra* note 37, at 635-40 (discussion of the current Administration's position on the relationship between the patent and antitrust laws).

45. *See, e.g.*, 35 U.S.C. §§ 200-211, Government Patent Policy Act of 1980, Pub. L. No. 96-517, 94 Stat. 3015 (1980) (relating to patent rights of participants in federally supported R&D programs); Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172 (1981) (creating a tax credit for R&D investments); Patent Term Restoration Act of 1983, S. 1306, 98th Cong., 1st Sess. (1983).

46. *See supra* note 14.

secrets, trademarks, know-how, or other intellectual property."[47] The title was proposed to "ensure that courts would not strike down licenses without economic analysis" and "give businesses confidence that courts will not return to the hostile attitude toward licensing that some courts [have] displayed."[48] Further, the title was "to encourage 'procompetitive intellectual property licensing' which is intended to 'spread new knowledge' and promote economic development and commercialization of technology."[49] The licenses sought to be protected under the title were those that traditionally had been treated harshly by the courts, but which had assertedly procompetitive aspects, such as "field of use licenses, licenses containing nonprice-fixing restrictions, grant-back licenses, and certain tying arrangements."[50]

The effect of the title on current law, one commentator has asserted, would have been to "codify the recent trend of the [Antitrust] Division and courts to treat facially restrictive licensing clauses under the rule of reason standard"[51] and to add "some certainty, both with respect to judicial treatment and the imposition of monetary damages."[52]

### 2. Title IV —Patent and Copyright Misuse

Section 401 of the NPIA would have amended 35 U.S.C. section 271, dealing with the contributory infringement of patents, by com-

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47. Section 301 provides:

> The Clayton Act, as amended (15 U.S.C. 12 et. seq.), is amended by renumbering section 27 as section 28 and by adding the following new section 27:
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> SEC. 27. (a) Agreements to convey rights to use, practice, or sublicense patented inventions, copyrights, trade secrets, trademarks, know-how, or other intellectual property shall not be deemed illegal per se in actions under the antitrust laws . . . .

S. 1841, 98th Cong., 2d Sess. § 301 (1983).

48. *Hearings on S. 1535 and S. 1841 Before the Subcomm. on Patents, Copyrights and Trademarks of the Comm. on the Judiciary*, 98th Cong., 2d Sess. 51 (1984) (statement of Donald W. Banner, Pres. of Intellectual Property Owners, Inc.).

49. Morron, *Legislation*, *supra* note 37, at 640 (citing statements of Malcolm Baldridge, Sec. of Commerce in *The National Productivity and Innovation Act of 1983: Hearings on S. 1841 Before the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 3 (1983)).

50. Morron, *Legislation*, *supra* note 37, at 641.

51. *Id.*

52. *Id.* Treble damages were eliminated as a remedy. S. 1841, 98th Cong., 2d Sess. § 301.

bining the present subsections (c) and (d) into a single subsection[53] in compliance with the Supreme Court's construction of section 271 in *Dawson Chemical Co. v. Rohm & Haas Co.*[54] Section 401(c) would have added a new subsection (d) to the present section 271,[55] listing six patent licensing practices that could not be the basis for a holding of "misuse or illegal extension of the patent right,"[56] unless "such

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53. The present § 271 states:

(a) Except as otherwise provided in this title, whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent.

(b) Whoever actively induces infringement of a patent shall be liable as an infringer.

(c) Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.

(d) No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following:
(1) derived revenue from acts which if performed by another without his consent would constitute contributory infringement of the patent; (2) licensed or authorized another to perform acts which if performed without his consent would constitute contributory infringement of the patent; (3) sought to enforce his patent rights against infringement or contributory infringement.

35 U.S.C. § 271. Section 401 proposed to redesignate subsection (c) as paragraph (c)(I) and subsection (d) as paragraph (c)(2). S. 1841, 98th Cong., 2d Sess. § 401.

54. 448 U.S. 176 (1980).

55. The proposed addition to § 271:

(d) No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following, unless such conduct, in view of the circumstances in which it is employed, violates the antitrust laws: (1) licensed the patent under terms that affect commerce outside the scope of the patent's claims, (2) restricted a licensee of the patent in the sale of the patented product or in the sale of a product made by the patented process, (3) obligated a licensee of the patent to pay royalties in amounts not related to the licensee's sales of the patented product or a product made by the patented process, (4) obligated a licensee of the patent to pay royalties that differ from those paid by another licensee or that are allegedly excessive, (5) refused to license the patent to any person, or (6) otherwise used the patent allegedly to suppress competition.

S. 1841, 98th Cong., 2d Sess. § 401(d).

56. S. 1841, 98th Cong., 2d Sess. § 401(d). *See supra* note 55 and *infra* notes 58-77 and accompanying text.

conduct, in view of the circumstances in which it [was] employed, violate[d] the antitrust laws."[57]

The first licensing practice exempted under section 401(d) from a holding of misuse, absent an antitrust violation, would be "licens[ing] the patent under terms that affect commerce outside the scope of the patent's claims."[58] This exemption would further support the decision of the Supreme Court in *Dawson*, and would appear to extend that holding even further.[59]

In *Dawson*, the Court was asked to determine the legality of Rohm & Haas' refusal to license a nonstaple,[60] previously known chemical that was necessary for the function of the process covered by the Rohm & Haas process patent in question.[61] The tie of the nonstaple item to the patented method was sanctioned by the majority of the Court as "a lawful adjunct" of the patentee's rights.[62]Under the first exemption, the *Dawson* decision would apparently extend to the tie of *staple* items to the license of the patented invention, which was the same conduct the Court permitted in *Henry v. A.B. Dick Co.*[63] in 1912. It should be noted that the tying of unpatented staple items to a patent was still condemned as per se illegal[64] under the Supreme Court's latest tie-in decision, *Hyde v. Jefferson Parish*.[65]

The second exempted practice under section 401(d) would be where the patentee "restricted a licensee of the patent in the sale of the patented product or in the sale of a product made by the patented process." This exemption has been lauded as a "valuable addition" to the patent laws[66] by permitting potentially procompetitive resale restrictions[67] and in providing investors the "incentive

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57. S. 1841, 98th Cong., 2d Sess. § 401(d).

58. *Id.* at § 401(d)(1).

59. *See infra* note 63 and accompanying text.

60. A "nonstaple" is, within the meaning of § 271(c), an "article or commodity of commerce" that is not "suitable for substantial noninfringing use." Here the nonstaple was 3,4-dichloropropionanilide or propanil, an herbicide which was necessary to the practice of Rohm & Haas' method patent.

61. The patent in question actually claimed a method of "selectively inhibiting growth of undesirable plants" by use of the propanil, and a method of doing so at a specified range of application rates.

62. *Dawson Chem. Co.*, 448 U.S. at 201.

63. 224 U.S. 1 (1912).

64. *See supra* note 14 and *infra* text accompanying notes 170-209 (discussion of the per se rule in patent tie-ins and its basis in the law).

65. 466 U.S. 2 (1984). *See also infra* notes 132-209 and accompanying text.

66. Morron, *Legislation*, *supra* note 37, at 646.

67. *See generally* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

to develop new methods of production and use for known compounds, an incredibly costly investment" [68] through expansion of the protection granted process patent owners.[69]

The third activity that would be protected under section 401 from per se treatment is licensing the patent at "allegedly excessive" royalty rates or at different rates for different licensees. This provision would legislatively reverse the controversial *Shrimp Peelers* cases[70] and encourage the licensing of the patent.[71]

The fourth exemption from per se treatment would permit the patentee to charge royalties based on criteria other than sales of the patented product or products made from the patented product, thereby legislatively reversing *Zenith Radio Corp. v. Hazeltine Research, Inc.*[72] It has been suggested that the form of an invention frequently may make accurate measurement of that invention's use impossible;[73] under such circumstances, if use of a tie-in to an unpatented component as a reasonable counting mechanism for collecting royalties is disallowed as per se illegal, the patentee could be forced to charge a single royalty to both large and small users of the invention. Smaller users might find such a charge prohibitive, thus preventing "the most efficient and widespread use of new technology."[74]The third and fourth practices may both be viewed as being naturally incidental to the patentee's right to negotiate the largest royalty the property can command based on its worth to the public, as approved by the Supreme Court in *dictum* in *Brulotte v. Thys Co.*[75]

The fifth exempted practice would be refusing to license the patent to any person.[76] Finally, the sixth exemption is for other

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68. Morron, *Legislation*, *supra* note 37, at 646.

69. Patent owner protection would appear to be the primary objective of title V of the NPIA. *See infra* text accompanying notes 79-82.

70. LaPeyre v. F.T.C., 366 F.2d 117 (5th Cir. 1966); Peelers Co. v. Wendt, 260 F. Supp. 1983 (W.D. Wash. 1966); Crown Packers, Inc. v. LaPeyre, 260 F. Supp. 193 (W.D. Wash. 1966); Laitram Corp. v. King Crab, Inc., 244 F. Supp. 9 (D. Alaska 1965).

71. The licensing of a patent not only enables the transfer of technology to others who may be in a position to take advantage of the invention's utility for the benefit of society, but contributes to "the progress of science and useful arts" (U.S. CONST. art. I, § 8, cl. 8) by ensuring that the patentee is rewarded for his inventiveness.

72. 395 U.S. 100 (1969).

73. Lowin, *Whether Patented or Unpatented: A Question of the Economic Leverage of Patents to Coerce Tie-Ins*, 23 IDEA 77, 105 (1982) [hereinafter Lowin, *Patented*].

74. *Id.* at 106.

75. 379 U.S. 29 (1964).

76. *See* Dawson Chem. Co. v. Rohm & Haas Co., 448 U.S. 176 (1980). *See supra* text accompanying notes 53-65.

practices or conduct previously held to be misuse, absent a showing that such behavior is substantially likely to lessen competition under the circumstances.[77]

Title IV's primary contribution was its clarification of the relationship between antitrust and the misuse doctrine. Under title IV, the doctrine of patent misuse would have been limited to allegations of fraud in the procurement[78] and other circumstances where economic analysis would be inappropriate, whereas conduct which possessed procompetitive potential would have necessitated such an analysis.

### 3. Title V—Process Patents

Title V of the NPIA was intended to rectify what was seen by some as an inequity under the present patent laws—the disparity in protection given process patents and product patents.[79] Title V extended to holders of process patents the same rights granted to product patent owners with regard to products made with the process.[80] This title was designed to alleviate the difficulties of proving whether a product was actually made by the patented process; it affords the patentee a presumption on the showing of "a substantial likelihood . . . that the product was produced by the patented process"[81] and of an inability to discover the actual process used after "all reasonably available means were exhausted."[82] The provisions of title V are a

77. *See supra* notes 20-27 and accompanying text.

78. Fraud in the procurement of the patent maybe found on the basis of fraudulent misrepresentations to the patent examiner in the application process, or by the failure of the applicant to disclose references or prior use, etc. that would invalidate the patent if known to the examiner. Such behavior renders the patent unenforceable. The subjects of fraud in the procurement and the applicant's duties in the application process are discussed in a number of cases. *See, e.g.*, Kingsland v. Dorsey, 338 U.S. 318 (1949); Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806 (1945); Carter-Wallace, Inc. v. Davis-Edwards Pharmacal Corp., 443 F.2d 867 (2d Cir. 1971); Monsanto Co. v. Dawson Chem. Co., 312 F. Supp. 452 (S.D. Tex. 1970).

79. For instance, the owner of a product patent may prevent the manufacture, sale and use of the invention even if the product is manufactured abroad, while the holder of a process patent cannot prevent the manufacture of products abroad using his process and their subsequent importation even at possibly lower costs.

80. Section 502 of the NPIA would have added to § 271 a provision that made use or sale in the United States, during the term of the process patent, of the product made with the patent an infringement. S. 1841, 98th Cong., 2d Sess. § 502.

81. *Id.* § 503.

82. *Id.*

further indication of legislative recognition of the importance of intellectual property and innovation in promoting competition.

### C. *Title II—The NCRA: Does Its Wording Permit the Same Practices as Under the Deleted Titles?*

For purposes of this discussion, the question that must be asked about the NCRA is whether the changes in intellectual property law embodied in titles III through V of the NPIA, specifically those concerned with the treatment of licensing practices and the misuse doctrine, might find their way back into the NCRA because of certain ambiguities in the wording of the NCRA.[83]

The principal operative provision of the NCRA is section 3, which provides:

> In any action under the antitrust laws, or under any State law similar to the antitrust laws, the conduct of any person in making or performing a contract to carry out a joint research and development venture shall not be deemed illegal per se: such conduct shall be judged on the basis of its reasonableness, taking into account all relevant factors affecting competition, including, but not limited to, effects on competition in properly defined, relevant research and development markets.[84]

The term "joint research and development venture" is expansively

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83. These ambiguities are pervasive and make an assessment of the Act's impact difficult, not only as it pertains to intellectual property but as to any area of the law.

This question, with which the rest of this paper is chiefly concerned, may be mooted by the revival, in large part, of titles III, IV, and V of the NPIA in a recently introduced bill: H.R. 4585, *Trade Counterfeiting and Piracy Prevention Act of 1986*, introduced by Rep. Ben Erdreich (D.—Ala.) on April 15, 1986. The bills would: (1) apply a rule of reason, in assessing the legality of intellectual property licensing agreement; (2) amend section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, to eliminate the injury and industry requirements; (3) protect process patents against products for by the process; (4) extend patent term restoration to agrichemical products; (5) require a showing of an antitrust violation to establish patent misuse; and (6) clarify questions about the rights of parties to a patent license should the licensee challenge the validity of the patent which have persisted since the Supreme Court's decision in Lear, Inc. v. Adkins, 395 U.S. 653 (1969) (licensee estoppel). This bill is beyond the scope of this discussion. *See generally* 32 PAT., TRADEMARK & COPYRIGHT J. (CNA) No. 778, at 16 (1986).

84. 15 U.S.C. § 4302 (Supp. III 1985).

defined in section 2(a)(6),[85] with some limitations imposed by section 2(b).[86]

A number of questions come into mind after reviewing these provisions and are determinative of our inquiries here. First, with regard to section 3, what does the word "conduct" mean? Is it meant to cover not only the formation of the venture itself but also the imposition of collateral restraints[87] on the participants ("making") or third parties ("performing")?

If "conduct" is meant to cover collateral restraints on participants as well as third parties, the NCRA would seem to mandate rule of reason treatment for the practices previously covered by titles

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85. Section 2(a)(6) of the NCRA, 15 U.S.C. § 4301 provides:

The term "joint research and development venture" means any group of activities, including attempting to make, making, or performing a contract, by two or more persons for the purpose of —

(A) theoretical analysis, experimentation, or systematic study of phenomena or observable facts,

(B) the development or testing of basic engineering techniques,

(C) the extension of investigative findings or theory of a scientific or technical nature into practical application for experimental and demonstration purposes, including the experimental production and testing of models, prototypes, equipment, materials, and processes,

(D) the collection, exchange, and analysis of research information, or

(E) any combination of the purposes specified in subparagraphs (A), (B), (C), and (D), and may include the establishment and operation of facilities for the conducting of research, the conducting of such venture on a protected and proprietary basis, and the prosecuting of applications for patents and the granting of licenses for the results of such venture, but does not include any activity specified in subsection (b) of this section.

86. Under § 2(b) of the NCRA, the term "joint research and development venture" excludes the following activities involving two or more persons:

(2) entering into any agreement or engaging in any other conduct restricting, requiring, or otherwise involving the production or marketing by any person who is a party to such venture of any product, process, or service, other than the production or marketing of proprietary information developed through such venture, such as patents and trade secrets, and

(3) entering into any agreement or engaging in any other conduct—

(A) to restrict or require the sale, licensing, or sharing of inventions or developments not developed through such venture, or

(B) to restrict or require participation by such party in other research and development activities,

that is not reasonably required to prevent misappropriation of proprietary information contributed by any person who is a party to such venture or of the results of such venture.

15 U.S.C. § 4301(b) (Supp. III 1985).

87. Such "collateral restraints" might be the licensing restrictions mentioned under Title IV of the NPIA. *See supra* text accompanying notes 54-77.

III, IV, and V of the NPIA.[88] Those titles, however, were dropped from the bill in committee, ostensibly because they were so controversial as to endanger passage of what became the NCRA.[89] The deletion of titles III, IV,and V suggests that the term "conduct" was *not* intended to cover such collateral restraints, but is certainly not dispositive of the question.[90]

To ascertain the full reach of the NCRA, an examination must be made of sections 2(a) and (b),[91] the legislative history of the NCRA,[92] its interpretation and related policies of the Department of Justice,[93] as well as the trends of the courts in dealing with such restraints.[94]

### 1. Sections 2(a)(6) and 2(b)

"Joint research and development venture" is broadly defined in section 2(a)(6) as including "any group of activities," including "performing" a "contract," associated with the accomplishment of a range of purposes.[95] It also expressly includes "the granting of licenses for the results of such venture."[96] The term further includes, by virtue of section 2(b)(2), agreements or "other conduct restricting, requiring, or otherwise involving"[97] the production or marketing by a venture participant of "proprietary information developed through such venture, such as patents and trade secrets."[98] Section 2(b)(3)(A) expressly excludes agreements or other conduct that "restrict[s] or require[s]" the "sale, licensing, or sharing of inventions or developments not developed through such venture."[99]

It would appear that restrictions on the venture participants with regard to the "production or marketing of proprietary information developed through [the] venture"[100] are given the benefits of

88. *See supra* note 39 and accompanying text.
89. *See* Morron, *Legislation*, *supra* note 37, at 658.
90. *See* Holmes, *Changes*, *supra* note 37.
91. *See supra* notes 85, 86 (complete text of these sections).
92. S. 1841, 98th Cong., 2d Sess. 3105 (1983).
93. Holmes suggests that the DOJ positions may be key in resolving several of the issues raised by the ambiguities. Holmes, *Changes*, *supra* note 37, at 66.
94. *See infra* notes 132-76.
95. 15 U.S.C. § 4301(a)(6) (Supp. III 1985).
96. *Id.* § 4301(a)(6)(E).
97. *Id.* § 4301(b)(2).
98. *Id.*
99. *Id.* § 4301(b)(3)(A).
100. *Id.* § 4301(b)(2).

rule of reason treatment, while such restrictions are not permitted, insofar as third parties are concerned, under section 2(b)(3)(A) for "inventions or developments not developed through such venture."[101] The questions which then arise are:

> 1) When are "inventions or developments" "developed" through the venture?
>
> 2) Does the phrase "production or marketing of proprietary information *developed* through such venture" include the products or services resulting from such proprietary information, in the sense that one does not customarily "market" or "produce" "proprietary information"?
>
> 3) Is "conduct" in "carry[ing] out a joint research and development venture" meant to include only the activities made part of the "venture" under sections 2(a) and (b), or does it imply something more?[102]

These questions are not susceptible of certain resolution. However, some indication as to their probable answers may be garnered from the statute. As to the first question regarding "inventions", the term "developed" in its usual, ordinary sense would connote the advancement of some theory or proprietary information held by one of the joint venturers prior to the establishment of the venture—hence the separate mention of "developments." "Inventions" suggests a genesis during the term of the venture. The differentiation in the NCRA between "inventions" and "developments" suggests that the term "developed" demands an active advancement of the idea in accordance with the purposes outlined in section 2(a)(6).[103] Such a construction would not permit restrictions imposed with regard to an invention that is only remotely related to the actual research being conducted, or that is only marginally served or advanced by the joint program.

Considering the second question, the wording of the phrase "product, process, or service, *other than* the production or marketing of proprietary information"[104] seems rather clearly to indicate a Congressional intent to extend the protection of the NCRA to "proprietary information," and not to the products developed from that

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101. *Id.* § 4301(b)(3)(A).
102. *Id.* § 4301(b)(2) (emphasis added).
103. *Id.* § 4301(a)(6).
104. *Id.* § 4301(b)(2).

"proprietary information." Use of the words "production" and "marketing" in conjunction with "proprietary information" is regrettable indeed, but the Congressional intent on this question seems quite certain.

As for the third question, the very detailed nature of section 2(a)(6) and section 2(b) militates against the argument that "conduct" in section 3 of the NCRA extends to activities which are not included as part of the venture under sections 2(a) and (b). By virtue of section 2(b), the NCRA would appear to exclude from protection a broad range of collateral restraints that are not closely related to the actual conduct of the research. Such a conclusion would support the inference, drawn from the deletion of titles III, IV, and V, that much of the "conduct" protected by those titles is not within the scope of the NCRA and is therefore not protected from per se condemnation.

There is no basis, however, for separate antitrust analysis of the venture arrangement itself and those restraints which *are* within the meaning of the words "joint research and development venture."[105] On the contrary, the use of the expansive term "conduct," and the apparent exclusion of those restraints under section 2(b) that do not bear a close relationship to the conduct of the research venture, demonstrate that those collateral restraints *not* excluded under section 2(b) must be evaluated with the venture arrangement itself for the competitive effect of the "program" *as a whole.*

2. Legislative History and the Department of Justice Position

The foregoing should illustrate, if nothing else, the difficulties involved in reading the NCRA. In view of these difficulties, the author recognizes the potential for a number of differing constructions, and the need for further analysis to determine what construction will be given the NCRA in future litigation.

An examination of the legislative history reveals that the House and Senate had divergent views on the need for the NCRA and on the scope of protection granted a venture.[106] The House version was purportedly designed to provide clarification of the antitrust treatment

105. *See supra* text accompanying notes 95-105.

106. *See generally* S. 1841, 98th Cong., 2d Sess. (1983) (Background and Need for Legislation); H.R. 5041, 98th Cong., 2d Sess. (1983) (Purpose). *See also infra* notes 107-20 and accompanying text.

of joint R & D ventures without "unnecessary substantive changes,"[107] and "without committing 'radical surgery' to the antitrust laws."[108] As viewed in the House, "the economic evidence and enforcement record [did] not appear to present a compelling case for antitrust legislation at [that] time,"[109] but perceptions in the business community, "perhaps based on misapprehensions,"[110] were recognized as "nevertheless working to inhibit co-operative R & D behavior."[111] It is interesting to note that, in spite of the limited purpose attributed to the NCRA by these remarks, it was said that as to joint R & D programs "the degree of anticompetitive impact to be tolerated varies with the value and complexity of the R & D to be conducted."[112]

The Senate bill, which originally included the intellectual property titles and which was very similar to the NCRA as passed, was evidently not subject to the reservations expressed in the House.[113] After amending the bill to remove the intellectual property provisions and to add a provision excluding certain activities from the definition of "joint research and development program," "the joint granting of licenses or the refusal to grant licenses by participants [fell] within the scope of the [Act]."[114] No mention was made, however, of restrictions imposed on license participants or the developed/not developed distinction found in the final version.[115]

It is perhaps also significant that both the House and Senate versions of the NCRA originally spoke of joint R & D "programs," whereas the NCRA uses the narrower term "venture."[116] Both bills

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107. House Committee Report on H.R. 5041, *Joint Research and Development Act of 1984*, H.R. REP. No. 656, 98th Cong., 2d Sess. 4 (1984). *See* Trade Reg. Rep. (CCH) No. 645, part II, at p. 4, (Apr. 17, 1984).

108. *Id.* at 11.

109. *Id.*

110. *Id.* These misapprehensions were of the antitrust risk involved in a research joint venture, and were attributed at least in part to the paucity of cases on the subject. *Id. See also infra* notes 121, 122.

111. *Id.*

112. *Id.* at 24.

113. *See supra* text accompanying notes 107-12.

114. S. REP. No. 427, 98th Cong., 2d Sess. 15, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 3103, 3105 (text of report by Senate Committee on the Judiciary for S. 1841).

115. 15 U.S.C. § 4301(b)(2), (3)(A).

116. *Compare* texts of S. 1841, 98th Cong., 2d Sess. § 5 (1983) *and* H.R. 5041, 98th Cong., 2d Sess. (1984), *reprinted as amended in committee at* 130 CONG. REC. 53,3184 (1984), *and* with amendments to original bill noted at 130 CONG. REC. 53,3189 (1984), *with* text of NCRA, *supra* notes 85, 86.

also originally provided that "no joint research and development *program* shall be deemed illegal *per se*,"[117] whereas the NCRA speaks of the "conduct of any person in making or performing a contract to carry out a joint [R & D] venture shall not be deemed illegal *per se*."[118]

The import of this last change is unclear. Perhaps it is intended to indicate that individual participants are to be given a greater degree of latitude in their individual capacities, and to provide that individual actions, and not just joint actions, should be given the benefits of rule of reason treatment.[119] The range of permissible activities, however, would appear to be narrowed in the NCRA as compared to the Senate bill because the latter had originally protected "any conduct reasonably necessary and appropriate to [a joint R & D] program."[120] At best, though, the legislative history of the NCRA only seems to complicate the matter of divining its actual scope.

It is, of course, axiomatic that courts will eventually decide the meaning and scope of a statute, sometimes without due regard for the lawmakers' intent. In situations like this, where the statute is ambiguous in its terms and where the legislative history is inconclusive, the power of the courts in this respect is manifest. Unfortunately, there have been no reported decisions to date dealing with the interpretation of the NCRA, and only three cases previously have dealt with the legality of joint R & D ventures.[121]

The enforcement policies of the Antitrust Division of the Department of Justice are especially important at this juncture in de-

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117. *See* S. 1841, 98th Cong., 2d Sess. § 202 (1983); H.R. 5041, 98th Cong., 2d Sess. (1983).

118. *See* 15 U.S.C. § 4301.

119. H. Conf. Rep. No. 1044, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 3131, somewhat cryptically suggests that "[t]he word 'program' in the Senate version is rejected in order to avoid any suggestion of a federal program." *Id.* at 3132. The change may be entirely innocuous, then,having no bearing on the scope of the Act. Whether courts will attribute to this change some greater significance than is suggested in the conference report is, of course, a matter for speculation at this point. Changing judicial attitudes toward the patent and antitrust laws in general will undoubtedly have some bearing on the outcome.

120. S. 1841, 98th Cong., 2d Sess. § 201(b)(B) (1983).

121. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); United States v. Automobile Mfrs. Ass'n, 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd sub nom.*, City of N.Y. v. United States, 397 U.S. 248 (1970); United States v. Manufacturers Aircraft Ass'n, 1976-1 Trade Cas. (CCH) ¶ 60,810. (The last two were consent decrees, and all were challenges of collateral restraints.)

termining the impact and interpretation of the NCRA, particularly when it is considered that damages under this act are not trebled.[122] A recent presentation[123] by Mr. J. Paul McGrath, Assistant Attorney General, Antitrust Division, reveals that the Department's general attitude toward joint research ventures is quite favorable. The general legal standard for reviewing such ventures will be the rule of reason,[124] and the Department will not challenge restrictions involved in the venture if they are reasonably imposed to realize efficiencies of scale[125] or are reasonable restrictions on "*venture-generated* technology."[126] The Department will still apparently challenge those restrictions that are "not reasonably required to achieve the venture's legitimate objectives,"[127] or which are, on balance, significantly anticompetitive.[128] These restrictions will be reviewed by an ancillary restraints analysis.[129] Thus, the Department would apparently still consider some restrictions per se impermissible, while the joint venture which spawned them would be subject to a rule of reason approach. Mr. McGrath's presentation also indicates that purely vertical arrangements between firms that are neither actual nor potential competitors will not be challenged.[130] Could, then, a patentee and licensee (or franchisee of a trademark) enter into a tying arrangement involving a staple item, set up a *prima facie* research venture, and thereby insulate themselves from Departmental scrutiny[131] while at most exposing themselves to liability for actual damages under a rule of reason analysis? For the

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122. 15 U.S.C. § 4303.

123. *Joint Ventures—Department of Justice Analysis, reported in* 5 Trade Reg. Rep. (CCH) ¶ 50,470 (Nov. 2, 1984) (New England Antitrust Conference).

124. *Id.* at 56,139.

125. *Id.* at 56,138. Such efficiencies might be found where the venture results in the "creation of a new product that could not be offered by individual venture members acting alone," *id.*, or where distribution systems are streamlined. *Id.* In the context of R & D joint ventures, such efficiences may "allow innovators to share the fixed costs and spread the high risks associated with the development of new technology, and to capture 'synergies' by exchanging important research information." *Id.* at 56,139.

126. *Id.* at 56,140.

127. *Id.* at 56,138.

128. *Id.*

129. *Id.* at 56,140.

130. *Id.* at 56,137.

131. The DOJ is currently disposed toward a rule of reason analysis for intellectual property licensing restraints. *See, e.g., Department of Justice Guidelines—Vertical Distribution Restraints*, 5 TRADE REG. REP. (CCH) ¶ 50,473, at 56,191 (1985) (DOJ scrutiny is likely to be slight in any event).

time being there would appear to be no reliable answers to this or a host of related questions. Only time, and the courts, will tell.

## IV. *Jefferson Parish* and the Evolution of Tie-In Theory: Moving Ever Closer to a Rule of Reason?

The Supreme Court's latest pronouncement on tie-ins, *Jefferson Parish Hospital District No. 2 v. Hyde*,[132] is illustrative of a trend in antitrust matters toward a rule of reason analysis. The tie-in theory, as it has evolved over the years, is instructive also in the treatment of patent restrictions. This discussion turns to an examination of *Jefferson Parish*, its impact on subsequent decisions, and the basis (or lack thereof) for the continued per se treatment of tie-ins involving patents and staple articles, particularly in view of *Dawson Chemical Co. v. Rohm & Haas Co.*[133]

### 1. The *Jefferson Parish* Decision

In *Jefferson Parish*, the Supreme Court was faced with determining the legality of an exclusive services contract between a hospital and a firm of anesthesiologists.[134] The plaintiff, an anesthesiologist, was denied admission to the hospital's staff on the grounds that the hospital had an agreement with the firm to be the exclusive supplier of anesthesia services.[135] Dr. Hyde[136] filed suit in federal district court, alleging a per se illegal tying of the purchase of anesthesia services to the hospital's surgical facilities under section 1 of the Sherman Act. The district court, deciding that the per se standard was inappropriate in cases involving professional activities,[137] upheld the arrangement under the rule of reason as procompetitive in enhancing competition among anesthesiologists for the exclusive contract opportunities[138] and in improving the hospital's patient care.[139] The

132. 466 U.S. 2 (1984).

133. 448 U.S. 176 (1980).

134. Although the exclusive dealings clause had been deleted from the contract, the hospital continued to adhere to the terms of the clause. *Jefferson Parish*, 466 U.S. at 6.

135. The plaintiff's credentials had been examined and approved, so his merit as an anesthesiologist was not in question. *Id.* at 5.

136. The plaintiff/respondent. *Id.*

137. Hyde v. Jefferson Parish Hosp. Dist. No. 2, 513 F. Supp. 532, 543-44 (E.D. La. 1981), *rev'd*, 686 F.2d 286 (5th Cir. 1982), *rev'd*, 466 U.S. 2 (1984).

138. *Id.* at 541.

139. *Id.*

Court of Appeals for the Fifth Circuit reversed,[140] holding the contract a per se illegal tying arrangement on the theory that market imperfections in the health care industry provided the hospital with sufficient market power to force patients to buy the tied anesthesia services.[141] The Supreme Court reversed and held that the tying arrangement was not per se illegal.[142] Justices Brennan and Marshall concurred in a separate opinion, saying they thought the per se rule on tying arrangements was too well entrenched to reevaluate.[143] Chief Justice Burger and Justices Powell and Rehnquist joined in Justice O'Connor's plea for the abandonment of the per se rule for tie-ins in favor of a rule of reason approach.[144]

Justice Stevens' plurality opinion began by reaffirming the vitality of the per se rule in certain situations,[145] but noted "that not every refusal to sell two products separately [could] be said to restrain competition."[146] The court found "that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer" to purchase the tied product[147] and noted that such an arrangement was impossible unless two separate product markets were distinguishable to the buyer.[148] If the two products were in fact separate products in terms of the buyer's perceptions, per se condemnation of the arrangement would only be appropriate, as a threshold matter, where there was a "substantial potential for impact on competition" and a "substantial volume of commerce [was] foreclosed thereby. . . . Once this threshold is surmounted, *per se* prohibition is appropriate if anticompetitive forcing is likely."[150]

The opinion gave examples from prior decisions of circumstances in which "forcing" was "likely" and where the seller had been granted "a patent or similar monopoly over a product"; the Court

140. Hyde v. Jefferson Parish Hosp. Dist. No. 2, 686 F.2d 286, 292 (5th Cir. 1982), *rev'd*, 466 U.S. 2 (1984).

141. *Id.* at 290.

142. *Jefferson Parish*, 466 U.S. at 29.

143. *Id.* at 32.

144. *Id.* at 32-47.

145. It could be argued that Justice Stevens' opinion was affirmed more out of reluctance to challenge long-standing principles than an honest belief in their validity.

146. *Jefferson Parish*, 466 U.S. at 11.

147. *Id.* at 12.

148. *Id.* at 21, 22.

149. *Id.* at 16.

150. *Id.*

indicated that "it [was] fair to presume" market power sufficient to force the tie-in.[151] The Court also explained that such a presumption was appropriate where the seller's share of the market was high[152] or where the seller offered a unique product that competitors were unable to offer.[153] Finding no probability of "forcing" in the evidence given, the opinion proceeded to analyze the arrangement under the rule of reason and, finding insufficient evidence of actual competitive effect in the tied product market, reversed the court of appeals.[154]

Justice O'Connor's concurrence advocated the abandonment of the per se rule for rule of reason analysis.[155] Asserting that the per se rule required the same elaborate inquiry into the probable anti-competitive effects of a tying arrangement as would the rule of reason, Justice O'Connor argued that the rule of reason was a superior standard because it allowed a similar inquiry into the procompetitive effects of the tie.[156] Under the analysis proposed by Justice O'Connor, the economic harm occasioned by the leveraged creation of additional market power in the tied product's market would be possible only if three threshold criteria were met. First, the seller would have to possess market power in the tying product market.[157] Second, the threat must be "substantial" that the tying seller would acquire market power in the market for the tied product,[158] as where there are not "many stable sellers"[159] or where entry barriers are high.[160] Finally, "the tied product must, at a minimum, be one that some consumers might wish to purchase separately *without also purchasing the tying product.*"[161]

### 2. What Does *Jefferson Parish* Mean to Lower Courts?

The precise implications of *Jefferson Parish* are unclear at this time; the feeling of some appears to be that *Jefferson Parish* was essentially a rehashing of old ideas and did not contain anything

151. *Id.*
152. *Id.* at 17 (citing Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 611-13 (1953)).
153. *Id.* (citing *Fortner I*, 394 U.S. at 504-06 & 506 n.2).
154. *Id.* at 32.
155. *Id.* at 35.
156. *Id.* at 34.
157. *Id.* at 37.
158. *Id.* at 38.
159. *Id.*
160. *Id.*
161. *Id.* at 39.

particularly startling,[162] while others see significant changes from prior tie-in law in *Jefferson Parish*.[163] It should be remembered that the Supreme Court itself in *NCAA v. Board of Regents of University of Oklahoma*[164] noted the blurring of the line separating per se analysis and rule of reason analysis.[165]

Certain of the Court's terms and holdings have caused consternation in the lower courts. One of these holdings is the requirement of separate products and separate demands for those products.[166] Another point of departure relates tothe meaning of "forcing": more

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162. *See, e.g.* . Digidyne Corp. v. Data Gen. Corp., 734 F.2d 1336 (9th Cir. 1984) (*Jefferson Parish* decision reaffirms the legal rule that tying arrangement is illegal per se if seller of tying product has the capacity to force some buyers to purchase a tied product they do not want or would have purchased elsewhere); Glictronix Corp. v. American Tel. & Tel. Co., 603 F. Supp. 552 (D.N.J. 1984) (*Jefferson Parish* decision reaffirmed per se rule in tie-in cases); Kramer, *The Supreme Court and Tying Arrangements: Antitrust as History*, 69 MINN. L. REV. 1013 (1985) (*Jefferson Parish* decision, while shifting the direction of the law of tying arrangements, was a reversion back to established legal ideas on the subject); Slawson, *A New Concept of Competition: Reanalyzing Tie-in Doctrine After* Hyde, 1985 ANTITRUST BULL. 257 (tie-in doctrine hardly changed).

163. *See, e.g.*, Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698 (7th Cir. 1984) (*Jefferson Parish* decision holds that products are separate for tie-in purposes if they are separate for each product); Comment, *Tying Arrangement*, *supra* note 14 (*Jefferson Parish* decision fully integrates the rule of reason and per se standards under tying arrangement analysis).

164. 468 U.S. 85 (1984).

165. *Id.* at 100.

166. *See, e.g.*, Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698 (7th Cir. 1984).

> Only time will tell how far the "separate markets" approach of *Jefferson Parish* will be pushed. There are separate markets for sugar and for sugarless breakfast cereals, but it would be surprising to find that a sugary cereal was a tie-in (sugar tied to cereal), assuming the seller offered to sell a sugar-free version. The belt example also becomes problematic under the separate markets approach. Belts are rarely sold without buckles: but surgical operations are even more rarely sold without anesthesia . . . . There may be overwhelming economies of joint provision for most customers [the traditional test, it is asserted here] and yet enough customers with idiosyncratic demands to encourage small markets trailored [sic] to their needs to emerge [but] [w]e doubt that, even after *Jefferson Parish*, belts are tie-ins of buckles to straps: yet we cannot be sure where the separate markets test will lead.

*Id.* at 703-04. *See also* Metromedia Broadcasting Corp. v. MGM/UA Entertainment Co., 611 F. Supp. 415 (C.D. Calif. 1984) (separate markets test may not work where license of first-run T.V. shows tied to reruns of same show under same copyright), and Comment, *Tying Arrangement*, *supra* note 14 (no two separate products to tie in *Jefferson Parish*).

specifically, whether "forcing" in the context of market power requires proof of actual coercion.[167]

Regardless of these problems, however, *Jefferson Parish* must be seen as continuing the judicial trend toward rule of reason and economic analysis as a general matter.[168] Be that as it may, *Jefferson Parish* does *not* change the presumption of sufficient market power in patents to "force" a per se unlawful tying arrangement.[169]

### 3. The Presumed Power of a Patent to Coerce Tie-Ins

The question which becomes important at this point is whether such a presumption is tenable in terms of the economic realities of the situation or supported by precedent. If there is no sound basis for the presumption in fact or in precedent, then there is more than a fair possibility that the per se rule will eventually be abandoned in patent tying cases, in spite of the Court's continued adherence to the presumption in *Jefferson Parish*. The continued erosion of the per se rule in the analysis of vertical restraints should eventually overcome the Court's doctrinaire insistence on an irrational presumption, if that is what it truly is.[170] This gradual erosion may be expedited or entirely obviated by a broad reading of the NCRA,[171] at least where venture participants demonstrate a *prima facie* capacity to conduct a joint research venture. For present purposes, however, the NCRA will be assumed to have no effect on the legality of patent tie-ins. It is further assumed that the use of a patent to acquire competitive advantage in the market for the tied product (assuming

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167. *Cf.* McMorris v. Williamsport Hosp., 597 F. Supp. 899 (M.D. Pa. 1984) (coercion is required as essential element of tying claim); Bogosian v. Gulf Oil Corp., 596 F. Supp. 62 (E.D. Pa. 1984) (no need for proof of actual coercion in tying claim).

168. *See generally* Dawson Chem. Co. v. Rohm & Haas Co., 448 U.S. 176 (1980) (use of rule of reason and economic analysis); USM v. SPS Technologies, Inc., 694 F.2d 505 (7th Cir. 1982), *cert. denied*, 462 U.S. 1107 (1983) (same); SCM Corp. v. Xerox Corp., 645 F.2d 1195 (2d Cir. 1981) (same); Bloxom, *On the Convergence of the Patent and Antitrust Statutes*, 39 WASH. & LEE L. REV. 245 (1982) (discussing the courts' use of the rule of reason and economic analysis).

169. Justice O'Connor, however, would reject the presumption as "a common misconception," and further asserted that the presumption lacked "support in . . . prior cases." *Jefferson Parish*, 466 U.S. at 37 n.7.

170. *See* Note, *The Procrustean Approach Remains:* Monsanto Co. v. Spray-Rite Service Corp., 10 DEL. J. CORP. L. 733 (1985). *See also infra* text accompanying notes 178-209.

171. *See supra* text accompanying notes 83-130.

the product is a staple item of commerce) is beyond the legitimate scope of the powers granted through the patent. This is, however, by no means a universally accepted conclusion.[172]

From a competitive perspective, there is no difference between a tie to a nonpatented staple and a tie to a nonpatented nonstaple, the latter practice having been expressly sanctioned in *Dawson Chemical Co. v. Rohm & Haas Co.*[173] as a "lawful adjunct" of the patentee's rights.[174] Both practices restrain competition in the market for the tied product, assuming, of course, that the patentee possessed sufficient market power in the tying product market, which is not always the case. The staple is, by definition, capable of "substantial, noninfringing use,"[175] however, whereas the tie to a nonstaple may *entirely foreclose* competition in the market for the nonstaple component of the patented item. This market might exist, for instance, because the tied component has a shorter useful life than does the patented item. Under such circumstances replacement of the component might constitute repair of the patented device, rather than an impermissible reconstruction.[176]

It is not clear, beyond the obvious,[177] why a tie to a nonstaple, which could eliminate an entire market, is within the patentee's rights, while a tie to a staple that would restrain competition in the tied product's market to a potentially negligible extent is not.

Even if these assumptions are indulged, there is still no warrant for a presumption of sufficient market power in a patent to "force" the purchase of a tied product in an anticompetitive fashion. In the first place,

> [t]here are two circumstances in which a rational business decision to enter a tying arrangement will be made. In the first, the typing [sic] product has no fungible substitutes and is so essential to the business that the only choices are to accept the tying condition or find a new line of business.

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172. *See Motion Pictures Patent Co.*, 243 U.S. at 519-20 n.26 (Holmes, J., dissenting).

173. *See supra* text accompanying notes 60-62.

174. *Rohm & Haas*, 448 U.S. at 201.

175. *See supra* note 61.

176. The holding in *Rohm & Haas* may have at least one beneficial effect in eliminating the necessity for the difficult determination of when "repair" ends and "reconstruction" begins, at least in nonstaple ties, for the life of the patent.

177. *See* 35 U.S.C. § 271 (contributory infringement). *See also supra* note 53 (text of § 271).

> In the second circumstance, the tying product is not essential to the business or there are fungible substitutes available. Here, the tying agreement is entered because it is the best deal which can be found. In *either* of these two circumstances the tying product [may or may not be] patented *without affecting* the result.[178]

Where the tying product has no fungible substitutes, it is the desirability of the tying product to the buyer *and* the absence of substitutes for the product that provide "forcing."[179] All too often courts do not consider the presence or absence of suitable substitutes for the tying product,[180] assuming instead that a patent is an effective barrier to entry into the market for the tying product by any substitutes.[181] In the second circumstance, the tying product simply has no "market power" in the eyes of the buyer[182] and "forcing" is necessarily impossible.

The presumption similarly lacks any foundation in Supreme Court precedent.[183] Prior to enactment of the Clayton Act in 1914, case law placed almost no restrictions on the dealings between patentees and their licensees.[184] It was thought that the limited scope of the Sherman Act and the constitutional basis for the patent grant compelled the conclusion that the Sherman Act did not apply to such restrictions.[185] Two early cases, *Bement v. National Harrow Co.*,[186] where "the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States,"[187] and *Henry v. A.B. Dick Co.*,[188] illustrate this point well.

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178. *See* Lowin, *Patented, supra* note 73.

179. *Id.*

180. *See generally id.*

181. *But see* Lavey, *Patents, Copyrights, and Trademarks as Sources of Market Power in Antitrust Cases*, 1982 ANTITRUST BULL. 433, 438-39 n.17 ("[P]atents . . . are not insurmountable entry barriers . . . patents offer no protection against the entrant who develops an offsetting or comparable but non-infringing innovation.").

182. *See, e.g.*, Will v. Comprehensive Accounting Corp., 776 F.2d 665 (7th Cir. 1985) ("Market power" has been defined as "power over price"; the ability to charge more for the package than the sum of the fair market values of the tying and tied products).

183. Lowin, *Patented, supra* note 73, at 102-04. *See also Jefferson Parish*, 466 U.S. at 37, 38 n.7.

184. Lowin, *Patented, supra* note 73, at 84.

185. *Id.*

186. 186 U.S. 70 (1902).

187. *Id.* at 91.

188. 224 U.S. 1 (1912).

With the advent of the Clayton Act in 1914, the attitude of the Court changed. In *Motion Picture Co. v. Universal Film Co.*,[189] *Henry* and *Heaton-Peninsula Button Fastener Co. v. Eureka Specialty Co.*[190] were specifically overruled, and the practice of tying arrangements involving patents was found to be against "the pervasive expression of the public policy of our country."[191] The Court, however, did not consider the market power of the patent. This issue was addressed in *United Shoe I*[192] and *United Shoe II*.[193]

In *United Shoe I*, the Court reasoned:

> A patentee is given rights to his device, but he is given no power to force it on the world. If the world buy it or use it the world will do so upon a voluntary judgment of its utility, demonstrated, it may be, at great cost to the patentee. If its price be too high, whether in dollars or conditions, the world will refuse it; if it be worth the price, whether of dollars or conditions, the world will seek it.[194]

In contrast, the Court in *United Shoe II* spoke of the Clayton Act as "preventing rights granted by letters patent from securing immunity from the prohibitions of the Act."[195] *United Shoe II* then, only stands for the proposition that patents were not, as previously believed, exempt or immune from the antitrust laws.[196] Succeeding decisions generally were grounded on misuse/public policy and, thus, did not reach the question of the economic leverage of the patent.[197]

An examination of the cases cited in *United States Steel v. Fortner Enterprises*[198] as authority for the per se power of patents to coerce tie-ins shows that *International Salt Co. v. United States*[199] spoke of the same absence of immunity mentioned in *United Shoe II*,[200] which is "far from a *per se* condemnation."[201] In fact, while the Court in

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189. 243 U.S. 502 (1917).
190. 77 F. 288 (6th Cir. 1896).
191. *Motion Pictures Patent Co.*, 243 U.S. at 517-518.
192. United States v. United Shoe Mach. Co., 247 U.S. 32 (1918).
193. United Shoe Mach. Co. v. United States, 258 U.S. 451 (1922).
194. *United Shoe Mach. Co.*, 247 U.S. at 65.
195. *United Shoe Mach. Co.*, 258 U.S. at 460.
196. *Id.*
197. *See, e.g.*, Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488 (1942); IBM v. United States, 298 U.S. 131 (1936); Carbice Corp. v. American Patents Dev. Corp., 283 U.S. 27 (1930).
198. 429 U.S. 610 (1977).
199. 332 U.S. 392 (1947).
200. *See supra* text accompanying note 195.
201. Lowin, *Patented, supra* note 73, at 98.

*Northern Pacific Railway Co. v. United States*[202] cited *International Salt* as authority for the proposition that tying arrangements were per se unreasonable restraints of trade and spoke of the necessity for "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product," [203] the opinion noted that in *International Salt* "the Court held the challenged tying arrangements unlawful despite the fact that the tying product was patented, not because of it."[204] In a footnote in the majority opinion, the *Northern Pacific* Court specifically rejected the presumption of sufficient leverage in a patent: "Of course it is common knowledge that a patent does not always confer a monopoly over a particular commodity. Often the patent is limited to a unique form or improvement of the product and the economic power resulting from the patent privileges is slight."[205] *United States v. Paramount Pictures, Inc.*[206]and *United States v. Loew's Inc.*[207] both involved the block-booking or package licensing of copyrighted materials.[208] *Loew's* was the first decision to assert the presumption, explicitly saying that "the requisite economic power is presumed when the tying product is patented or copyrighted."[209] The logical question that comes to mind in response is, if the existence of a patent or copyright is sufficient to establish market power, why would a tie of one patented or copyrighted product to another be necessary in the first place? The patent or copyright on the tied product would, if the presumption were valid, necessarily confer market power in the market for the tied product as well.

## V. CONCLUSION

The trend in the courts toward a rule of reason analysis in antitrust cases, concurrent with the growing convergence of the

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202. 356 U.S. 1 (1958).
203. *Id.* at 6.
204. Id. at 9.
205. *Id.* at 10 n.8.
206. 334 U.S. 131 (1948).
207. 371 U.S. 38 (1962).
208. "Block-booking is the practice of licensing, or offering for license, one feature or group of features on condition that the exhibitor will also license another feature or group of features released by the distributors during a given period." *Paramount Pictures*, 334 U.S. at 156. Block-booking or package licensing of patents would involve conditioning the licensing of certain desired patents on the licensing of other, undesired patents. *See, e.g., supra* note 22.
209. *Loew's*, 371 U.S. at 45.

doctrine of patent misuse and antitrust theory, makes an analysis of recent developments in the antitrust law prudential in assessing the future validity of certain patent practices. The impact of one such development, the passage of the National Cooperative Research Act, is uncertain in the absence of interpreting authority. Potentially, though, the NCRA could effect drastic changes in the law respecting these patent practices. These changes could also result from the trend in the courts toward economic analysis in applying the antitrust laws, if the irrationality behind conventional attitudes toward the patent system is recognized. The author's ultimate faith in the judicial process prevents him from believing that such attitudes will persist for very much longer.

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