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Intersection of Patent Law and Antitrust Laws

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ABSTRACT

The author has chosen this topic for the purpose of drawing a line to the ongoing debate between the two important laws that are patent law and competition law. In its general sense, one can observe that both the laws are conflicting in nature as one promotes monopoly and the other restrains it. But the purpose of this project is to look into a deeper aspect of it, from where it can be derived that patent law does not always oppose competition but at times complements it by encouraging innovations which is also an important part for a free and competitive market. Thus, it might be for that reason that the regulation under competition law excludes patent law from its ambit. It is not actually the exclusive right of the patentee but the anti-competitive practices which are in real disagreement with competition policies. The author in this project will analyze all such anti-competitive practices carried out by the patent holders that extensively affect the market and competition policies and would also suggest measures to harmonize the two apparently conflicting laws.

Keywords: *Patent, Competition Law, Anti Trust Law, Monopolization*

I. INTRODUCTION

In almost all the major parts of the world, monopoly market is generally being discouraged as it limits competition from the market and it's quite evident that in order to have growing free market competition plays a huge role. Thus, the law making bodies of different countries have legislated certain laws and policies to regulate all such practices that are anti-competitive in nature. But what would be the scenario when the same legislation makes certain other law that provides monopoly rights to individuals. The situation can better be explained through the following statement: *Can a body of case law that grants monopoly opportunities be reconciled with a body of case law that curtails monopolization*.[2] It is particularly at this juncture where the interface between competition law and patent law takes place.

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[2] Cooper Robin Feldman, 'The Insufficiency of Antitrust Analysis for Patent Misuse, 55 Hastings L. J. 399 (2003)

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The relationship between patent and competition have thus always been a matter of concern among the scholars, jurists and legislators who tries find out a pathway through which harmonization of competition policy and patent rights can be successfully done. Competition policy gave emphasis on the concept of fair market where there would be minimum or no barriers for entry of competitors into the market. Patent right on the other hand grants the patentee with an exclusive right to exclude others from entering the market by restricting him to make, use, offer for sell or sell the innovation on which patent has been granted. In order to avoid the conflict the Supreme Court of United States in several cases where of the view that the rights of patentee would be outside the ambit of competition law.[3] Thus, even in the statues of competition law patent rights has been excluded from the scope of regulation and control. For example, the Sherman Act on anti-trust laws of United States also leave outs patent right from its arena of control. The basic reasoning behind this is patent encourages innovation and this in a way increases competition in the market. It is basically the patent misuse and not the patent right which lies at the intersection of patent and competition law.[4]

Patent misuse can be defined as an improper attempt to expand patent.[5] Whenever the patent holders strive for some unjust profit from their innovation, they involve themselves in certain kind of anti-competitive activities like patent pool, patent thicket, patent troll, patent linkage and pay for delay. The competition law basically restricts such practices in order to avoid the unnecessary expansion of monopoly rights of patent holder. In this paper each of these practices would be examined in detail and the author would try to find out the exact limits of patent holders rights in regard to their innovation. The author would also suggest certain remedies for coordination and synchronization of both laws.

II. PATENT AND ITS RELATIONSHIP WITH COMPETITION LAW

The term 'Patent' was coined from the term 'Letters Patent'. The meaning of 'Letters Patent' is an open letter. It was basically an instrument "under the Great Seal of the King of England addressed by the Crown to all subjects at large, in which the crown conferred certain rights and privileges on one or more individuals in the kingdom."[6] Later in the nineteenth century, there were several developments in the field of science and the inventors started coming up with new inventions be it product or process of manufacturing a product. During that time

[3] *See, e.g.,* Carbice Corp. v. Am. Patents Dev. Corp., 283 U.S. 27, 34 n.4 (1931). *See also* Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488 (1942); United Shoe Mach. Corp. v. United States, 258 U.S. 451, 462 (1922); Motion Picture Patents Co. v. Universal Film Mfg., 243 U.S. 502, 517 (1917).
[4] *Supra note* 1 at 11.
[5] *Id.*
[6] B.L WADEHRA., LAW RELATING TO INTELLECTUAL PROPERTY 3-5 (5th ed. Universal Publication 2011).

only they became very much cautious about their invention and were in no mood to get it infringed by others. Thus, the Government at that period in order to provide incentive to the inventors and to protect their work from infringement came up with a right which is known as 'patent right'.

Patent right can be defined as 'an exclusive right which is granted for a fixed time period, to an inventor by the Government for his invention'. The right that has been delivered is primarily a reward to the inventor for his intellect through which he has created the invention. This exclusive right can also be termed as a negative right as it excludes others from making, using, selling, offering for sale or importing patented invention. The patentee can deal with his patent exactly in similar manner as he would have dealt with any of his other tangible and moveable properties. He can at any time during the term of patent which varies under every jurisdiction, sell, license or assign this property to anyone in exchange of consideration that are agreed upon by both the parties.

(A) SIGNIFICANCE OF PATENTS OVER THE MARKET

Technological development in the market takes place only when a new innovation comes into being. In order to understand the development process of technology one has to look into 'the technology life cycle' model. In which different stages of the life cycle have been laid down, this includes R&D, invention, marketing, etc. For each stage a different method has been adopted so that it encourages innovation.

Patent is one such crucial instrument or method through which the invention of an inventor is protected. By providing the exclusive right to the inventor it in turn gains the society as the right which becomes a reward for the patentee's creation motivates him for coming up with more innovation that is more technical advancement for the society. It also helps him to achieve market power and in this manner the patentee also able to recover all the monetary losses he has incurred while creating the invention which would also help them to indulge in further R&D's. Due to all such advantages, there has been rapid increase in growth rate of granting global patents. The exact data can be traced from the reports of the '*World Intellectual Property Indicators'*.[7]

[7]Mirei Isaka, *Intellectual Property Rights Role Patents Renewable Energy Technology Innovation* (IRENA June 2013).

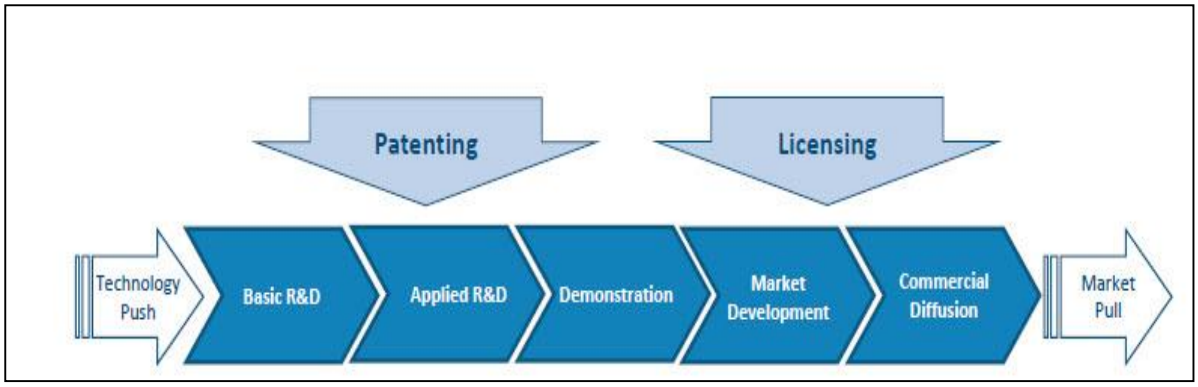

Figure 1: Patents facilitate advances throughout the technology life cycle.

(B) JURISPRUDENCE BEHIND THE PATENT RIGHT PROVIDED

The reward in the form of patent right which is provided to a patentee is definitely a right which would incentivize his work and he would also gain confidence that no one else will be able to infringe his work. But this right also has certain limits and it's not in perpetuity and would expire after a span of time which is generally 20 years. So, the legal theory governing the patent right that is the quantum and duration of reward of the patentee is discussed below:

Deriving the Optimal Patent Life

a) **The Costs and Benefits of Varying the Patent Life. –** The longer life of a patent acts as a biggest reward for the patentee but what should be the actual length of the patent is difficult to be determined. Thus, in order to understand what amount of patent life would act as an incentive for the patentee, it is necessary to understand the relationship between the life of the patent and the cost and benefits of the society. This approach of determination has been discussed below:

- **Social benefits derived from patent-** in order to determine the benefits of patent for a society. The interrelationship between the patent life and the social benefits from it must be understood. This relationship can be better understood with through maintenance of a logical sequence. Firstly, the longer the patent life provided to a patentee the more he or she is being rewarded as it would increase the level of exercising monopoly over the patent. Secondly, this increase in reward of patent would in turn motivate the patentee to innovate more but this is not applicable in every case and might vary basing on other factors. Thirdly, as there is high chance of increase in invention this would

automatically benefit the society which would otherwise come into existence after a quite long duration or may not come into existence at all.[8]

- **Social costs incurred by patent-** In order to provide incentive to the patentee the society needs to bear certain costs. This generally takes place in situations where certain innovations are bound to come into existence irrespective of increasing the length of patent life.[9]

b) **Determining the Optimum** – "The optimal patent life is that length of time at which the marginal social cost of lengthening or shortening the patent life equals the marginal social benefit."[10] Under this theory a proportion is sought between the marginal cost and marginal benefit in order to reach an optimum point The best point that is the optimum point to fix the reward or patent life is that point "when the total social benefits exceed the total social costs by the greatest possible amount."[11]

Derivation and Interpretation of the Ratio Test

a) Deriving the Ratio Test – through the ratio test one can determine the willingness to permit a particular practice which is other otherwise of forbidden nature and it is done by making a comparison to the costs that such practice would incur upon the society with the costs of lengthening or shortening the patent life for receiving the similar reward. This test is laid down under two steps: at first, one has to decide whether allowing the forbidden practice would impose more cost per unit of the increased reward than would result if the life of patent is lengthened to receive the same amount of reward.

Second step of this method is only being taken up when it has been determined that allowing the practice would lead to same amount of increase in reward for the patentee as it would have been if one year of the life of patent is increased but at lower cost. In this step, "one must determine whether permitting the practice would impose less cost per unit of incremental reward than would be saved by shortening the patent life to diminish the total reward by an offsetting amount."[12]

(C) RELATIONSHIP BETWEEN PATENT AND COMPETITION LAW

[8] WARD BOWMAN, PATENT AND ANTITRUST LAW: A LEGAL AND ECONOMIC APPARISAL (1973).
[9] *Id.*
[10] *See* Jesse W Markham., *Inventive Activity: Government Controls and the Legal Environment*, in THE RATE AND DIRECTION OF INVENTIVE ACTIVITY, supra note 25, at 587, 597.
[11] *Supra note* 1 at 11 .
[12] Kaplow Louis, *The Patent-Antitrust Intersection: A Reappraisal*, 97 HARV. L. REV. 1824, 1816-1889 (1984).

The basic understanding of the relationship between the Patent Law and the Competition law can be primarily derived from the suggestion laid down by the economist, Joseph Schumpeter in which he has stated that *"the* dynamic competition would result in creative destruction."[13] So, it is at this juncture where the interrelationship between the two laws lies. On one hand patent law promotes innovation thereby encourages monopoly while on the other hand the competition policies tend to curb it.[14] However, the common objective which is shared by both the laws is that both are formulated with the purpose to rectify failures in market.[15]

Innovation is truly essential for the growth of the economy as it is through innovation that a nation obtains its technological intensification. So, the initiatives that have been taken by the law making bodies to advance the growth of innovation seem justified. These initiatives are generally in the form of providing incentives to private innovators for their creative and intellectual efforts and other investments through strong IP laws.[16] But it would be incorrect to conclude that innovation alone contributes to economic growth of a nation, there are also other factors which have equal importance in the rise of economy of a country. Among which 'competition' also plays a crucial part which actually prevents the customers to get exploited in the hands of the inventors who enjoys strong monopoly in the market and also tends to misuse it by overpricing goods and limiting output. Due to which regulation of innovation in the form of competition policies has become a vital need.

This in turn would result in better and cheaper goods for customers in the market. "The current mainstream view is that IP and competition policies do not have conflicting goals and that they should work in unison to maximize wealth by promoting innovation and economic progress."[17] The only point of concern is the modes that the policies tend to adopt in order to reach their goals.[18] On one hand the competition policies promotes competition by putting restrictions upon monopoly on the other hand IP laws encourages exclusivity to create incentives for the innovators. So, now the primary motive of the policy makers is to let go off all the shortcomings of these laws and try to formulate a mid way so that benefit can be extracted from both the laws.

[13] COMPETITION POLICY AND PATENT LAW UNDER UNCERTAINTY: REGULATING INNOVATION, 1-24 (Geoffrey A. Manne & Joshua D. Wright ed., Cambridge University Press 2011).
[14] Robin Feldman, *Patent and Antitrust: Differing Shades of Meaning*, 13 Va. J. L. & Tech. 2, 2-20 (2008).
[15]CZAPRACKA KATARZYNA, INTELLECTUAL PROPERTY AND THE LIMITS OF ANTITRUST, (Edward Elgar Publishing Ltd. 2009).
[16] *Id.*
[17] *Supra note* 2 at 11 .
[18] SCM Corp. v. Xerox Corp., 645 F. 2d 1195, 1203 (2d Cir. 1981).

In both the arenas there is an ongoing challenge to achieve the desired goals of the policy makers. Like in the domain of competition law, the current discussion revolves around innovation, patent rights and misuse and market competition. These discussions have stimulated the scholars to come up with several approaches so that innovation succeeds to fit in the realm of competition law. Few among those concepts and approaches can be named as 'innovation market' concept and 'cost and benefit' analysis approach.[19] There are also certain agencies like the 'Federal agency', the officials of which have shown their trepidation in relation to the overstretched competition policies that in order to increase short living market competition ignores larger effectiveness produced by innovation.[20] So, the current ongoing point in the symposium that prevails is 'whether there is a need to rationalize the anti-competition law so that it can incorporate the concepts of innovation, patent right and technological advancement'.[21] The declaration given by the Antitrust Modernization Committee Report and Recommendations (2007) in this regard are as follows:

*"*Current antitrust analysis has a sufficient grounding in economics and is sufficiently flexible to reach appropriate conclusions in matters involving industries in which innovation, intellectual property, and technological change are central features." The inventors would start enjoying uninterrupted monopoly which may give rise to patent misuse. A patent misuse is not only undesirable but also dreadful in regard to consumer interests.[22] The concern for the same is well reflected in the decision of the Federal Circuit Court of U.S.A. in Bilski's case where the court has diluted the patent protection over an algorithm innovation and didn't give the right much importance.[23] Not only the courts but also some of the commentators were of the view that a reform must be brought in the patent laws of US in the upcoming years and such a change is very much required for the well being of the society. EU antitrust enforcement bodies considers the role of competition policies as a body of law that would bring corrections over faulty IP rights whereas, the US approach is such that it avoids direct interference with the core IP rights.[24]

III. HISTORICAL BACKGROUND BEHIND THE RELATIONSHIP

It was almost in the late 19th and early 20th century when the antitrust law globally came into existence and with its very arrival conflict started developing between the two bodies of law,

[19] *Supra note* 1 at 11.
[20] *Id.*
[21] RICHARD POSNER, ANTITRUST LAW (2nd ed. University of Chicago Press 2001).
[22] *Supra note* 1 at 11.
[23] *Supra note* 1 at 11.
[24] *Supra note* 2 at 11.

patent law and antitrust law. The major point of inconsistency between the two laws is as mentioned above that is one is in favour of monopoly while the later tends to curb monopolization. So, it was totally unavoidable to build a midway without knowing the limits of both the laws. This was patent would have no restrictions at all. As one German witness commented during Senate hearings, "there was no reason to view American antitrust law as an impediment because one could simply do the same things through patent licensing."[25]

This theory of patent isolation was also been struck down by the Supreme Court of US in the years 1930 to 1940 and the court supported its move with the reason that antitrust law must function in situations where the patentees tend to extend their limits granted to them under the patent law.[26]

Several attempts were made to harmonize the two differing laws since 1980's and in this process the general trend that was being followed is to include patent in the antitrust regime. This was evidenced in the year 1986 when the Federal Circuit Court in *Windsurfing's case*, held that it is not sufficient to establish patent misuse by merely uncovering that the patentee has reached beyond his patent limits but also an anticompetitive effect of the act needs to be established. However, nine months later the Court draws back stating that such a change can only be made with Supreme Court or Congressional action. The Senate, after two years gives its assent by passing a bill in this regard. But in the final Patent Act of 1988, the scope was narrowed down and it was declared that patentees upon whom the claim of tying has been made cannot be found guilty unless it is established that he has market power to do so.[27] The Act also stated that there will no presumption made in antitrust cases that the patent holder holds market power. The language was such that it brought the patentees on an equal footing as other commercial businessmen thus so this was not adopted. The Congress later failed to come up with any change in the Act at later times.

In the later years, due to Congress's failure, the Federal Circuit Court adopted what it once retreated after *Windsurfing's case* in *Mallinckrodt v. Medipart,* 1992[28] where it totally ignored the retreat and was of the view that finding an anticompetitive effect is mandatory for establishing patent misuse. The Supreme Court moved a step forward in the year 2006 in *Independent Ink* case[29] and stated that there will no presumption made of having market power in case of antitrust cases that are in relation to patents. Nonetheless, a proper

[25] *See* F. Machlup, Subcomm. on Patents, Trademarks, and Copyrights of Senate Comm. on Judiciary, 85th Cong., 2d Sess., An Economic Review of the Patent System 15 at n.56 (Comm. Print 1958).
[26] *See* Carbice Corp. v. Am. Patents Dev. Corp., 283 U.S. 27, 34 n.4 (1931).
[27] 35 U.S.C. § 271(d) (5) (2000).
[28] 976 F.2d 700, 708-9 (1992).
[29] *See* Illinois Toolworks Inc. v Independent Ink, Inc. 547 U.S. 28 (2006).

harmonization will only be possible when there will be a better understanding of the two areas of law which often seems to use very similar ideas and terms but in reality carries very different meaning.

(A) Conceptual Disparities between the Two Laws

- **Exclusivity concept-** the concept of 'exclusivity' is a common term which is often used in both the arenas of law. Most of the times, no difference is made in understanding the concept in two different sense under two different laws. In the anticompetitive context the meaning of exclusivity denotes taking over such a space where a firm has a complete power of its own which is also known as market power and where he does not allow any other competitor i.e. "the notion of exclusivity takes on its ordinary meaning of permitting one party to the exclusion of all others."[30] This kind of exclusivity is often barred under the completion law and any practise of such nature comes under investigation. It is a general tendency of Courts in most of the antitrust cases that the meaning is taken in similar sense in the patent law as under competition law. It is assumed under the antitrust law that granting patent right to a patentee means giving him the market power that is right to 'make, use and sell the invention'.[31]

- **The Monopoly Concept-** if the term monopoly is seen from the perspective of the antitrust regime then those firms which have power to increase the prices of products and to limit the output are considered to have monopoly power. The regime determines such power by calculating the share that the firm occupies in a definite market. In the earlier cases, Court was of the view that the term monopoly must be equalized with patent monopoly.[32]

In 1962, the Supreme Court in the *Loew's* case held that: "as one of the objectives of the patent laws is to reward uniqueness, the existence of a patent establishes enough distinctiveness for a finding of sufficient power to create anticompetitive consequences."[33] These were the earlier judgments but in recent time the court has changed its view and finally in 2006, the Supreme Court was of the view that "a patent, by itself, is insufficient to create a presumption of market power for the purposes of a tying claim."[34]

[30] Robin Feldman, *Patent and different shades and meaning*, 13 Va. J. L. & Tech. 5 (2008).
[31] *Supra note* 24 *at* 22.
[32] *See, e.g.*, U.S. Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610, 619 (1977); International Salt Co. v. United States, 332 U.S. 392; United States v. Loew's Inc., 371 U.S. 38, 46; Fortner Enters., Inc. v. U.S. Steel Corp., 394 U.S. 495, 505 n.2 (1969).
[33] *See* United States v. Lowe's Inc., 371 U.S. 38, 46 (1962). *See also* Fortner Enters., Inc. v. U.S. steel Corp., 394, U.S. 495, 505 n.2 (1969); International Salt Co. v. U.S., 332 U.S. 392.
[34] *Supra* note 24 at 22.

- **Meaning of Product**- there has been several arguments among the antitrust bodies concerning 'products'. There are several firms who tend to indulge themselves in tying activities meaning thereby in order to get a competitive edge they tie two or more products together and market them.[35] In most of the cases the efficiency of a patent can only be derived by combining two or more patents. Like for example in the process of 'defensive patenting' where the patentee tries to figure out and obtain patent rights over all the possible variants of the patented good. Some people are of the view that defensive patenting must be permissible as it "respond to flaws in the patent system that make it difficult to properly control the invention and its equivalents."[36]

The value of patents thus, can be judged by observing the portfolio in its totality. This would not be the case under the antitrust regime where any firm would be allowed to purchase all the possible substitutes of the product in which it is carrying out its business. Such a conduct would then be in violation of the US Patent Act that is Section 2 of the Sherman Act. In short, the idea of product as individual finished good cannot be fully incorporated in similar manner under patent law. Similarly, in case of 'Patent Pools' patents combine together to give out a cumulative effect in certain cases this are of pro-competitive nature while in some other cases they may be anti-competitive.

- **The Concept of 'Monopolization'**- in the modern era antitrust has developed to a great extent. At present day monopoly is acceptable if it is attained through skill and labour.[37] Monopoly is opposed by the antitrust law only in cases where it is attained through indulgence in certain forbidden activities that would lead to domination. This conduct is known as 'monopolization or attempted monopolization'. The courts and the commentators at times vary in opinion regarding the determination of such conducts that would be considered to be barred.

Without having any clear knowledge in this regard it is quite difficult to take the step of harmonizing the two laws. It is because "If we do not have a robust notion of what economic effects are anticipated with a patent, how we can know what effects reach beyond what is contemplated and into the realm of anti-competition?"[38]

[35] *See* Int'l Salt Co. v. United States, 332 U.S.392 (1947); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984); Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451 (1992); United States v. Microsoft Corp., 253 F.3d 34; Illinois Toolworks Inc. v Independent Ink, Inc. 547 U.S. 28 (2006); N. Pac. Ry, Co. v. United States, 356 U.S. 1 (1958). *See also* Robin Cooper Feldman, *Defensive Leveraging in Antitrust*, 87 Geo. L.J. 2079, 2079 (1999).
[36] *Supra* note 23 at 21.
[37] United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).
[38] *Supra note* 23 at 21.

Another point of difference can be recognized in an attempt of comparing between the apprehended harm which the patent may result to and that which is being tolerated under the monopoly pattern. They may suppress then patent in its totality. If the difference is failed to be traced then the Court can make the mistake of misjudging the total damage patent monopoly can incur.[39] Whatever might be the accepted suggestion one thing is quite clear that the behaviour under the patent can never be evaluated under the antitrust mechanism. In order to do that the impacts of suppressing the patent must be known.[40]

IV. RECOMMENDATION AND CONCLUSION

The intersection of patent law and antitrust law has frustrated courts and scholars since the inception of antitrust law more than a century ago. They have adopted several methods and tests from time immemorial to deal with the issue. One such doctrine that attempts to provide a remedy is the 'Patent Misuse Doctrine'. 'Patent Misuse Doctrine' is an equitable remedy analogous to the 'unclean hands' doctrine in tort law. It bars infringement suits by patentees who have "misused" their patent grant, either by using the patent to violate the antitrust laws or by extending their patent monopoly in some other way. But several scholars have argued that "the patent misuse doctrine is irrational from an economic standpoint for three reasons: the level of sanction is unrelated to the injury caused; the sanction duplicates antitrust remedies, leading to excessive recoveries; and the sanction is awarded as a windfall to the patent infringer even if that party was not injured by the misuse."[41] These effects combine to make the patent misuse doctrine indefensible from the standpoint either of proportionality or of deterrence.

It has been propagated by many that application of antitrust rules to test for patent misuse would adequately identify the types of harm that patent misuse is designed to address. But according to many this assumption is unfounded. Antitrust law is designed to address only particular types of harm, and it cannot reach everything that patent policy addresses. Thus, applying antitrust rules to test for patent misuse would ignore significant concerns under patent policy.

Within this structure, limiting the time and scope of a patent limits the potential economic harms that may flow from granting a patent. Such potential harms include the type of monopoly effects that raise concerns under antitrust law, but they are not confined to this effect. Potential harms also include (1) other types of economic waste, such as the waste that

[39] *Supra note* 23 at 21.
[40] *Id.*
[41] Lemley A. Mark,*The Economic Irrationality of the Patent Misuse Doctrine*, 78 Cal. L. Rev. 1599 (1990).

can occur with defensive research or inventing around a patent, (2) the burden on innovation that can result from an over proliferation of patent rights and (3) the disincentives to innovation that can result from allocating reward to early-stage inventors over late-stage inventors. Thus, limiting an individual patent enhances the overall efficiency of the patent system in its quest to promote the inventions that will eventually enter into the public domain. Altering the limits on time and scope threatens to upset the balances struck in the system.

Antitrust law, however, would not necessarily be sensitive to these policy dictates. In order to create the harm that antitrust law recognizes, a firm ordinarily must have market power. Without market power, a firm cannot raise prices, limit supplies, and create the type of anticompetitive effects that antitrust law recognizes. In this manner several commentators, scholars and judges have given different opinions and laid down various tests to harmonize both the laws and find a mid way between the two so that the issue can be dealt in better and comprehensive manner. The author has tried to analyze all the attempts previously made.

In the earliest judicial decisions on patent-antitrust issues courts generally tends to evade the conflict. The decisions that addressed license provisions requiring, for example, that "the licensee adhere to prices set by the patentee, or purchase various supplies only from the patentee (tying clauses) - uniformly favored the patentee, largely on the theory that the greater power includes the lesser."[42] Because patentees were legally entitled to refuse to license their patent at all, the less restrictive practice of licensing the patent subject to certain conditions was deemed unimpeachable. "This type of argument has been rejected in many contexts, typically because the lesser can indeed be more of an evil than the greater or because regulation of the lesser restriction can lead to substantial improvement in light of the unwillingness of the regulated entity to resort to the greater restriction."[43] This position has gradually fallen into disfavor in the patent-antitrust context as well. Even after the notion of an antitrust immunity for patentees fell into disrepute in the second decade of this century, the purpose of the patent statute - providing reward to encourage inventive activity continued to be blindly invoked in support of restrictive practices by patentees. The most eminent example is United States v. General Electric Co., where "the Supreme Court, upholding the patentee's right to issue price-restricted licenses, cited as a sufficient argument the contention that the patentee's reward was enhanced."[44]

It is not that all the analyses of the patent-antitrust issue have been marked by the sort of

[42] *See, e.g.*, Henry v. A.B. Dick Co., 224 U.S. I, 32, 35 (I9I2).
[43] Powell, *TheNature of a Patent Right*, I7 COLUM. L. REV. 663, 678-79, 684 (I9I7).
[44] 272 U.S. 476 (I926).

evasion just noted. The Supreme Court has taken up several endeavors to devise rules to indicate which practices are permissible. “The first such attempt was a reference in Bement v. National Harrow Co. to conditions which are not in their very nature illegal.”[45] Next, the Court expressed the view “in Motion Picture Patents Co. v. Universal Film Manufacturing Co. that the scope of every patent is limited to the invention described in the claims contained in it.”[46] In subsequent cases like “the General Electric case, on the reward which the patentee by the grant of the patent is entitled to secure”[47]and “the Court's statement in Zenith Radio Corp. v. Hazeltine Research, Inc. that the patentee may not extend the monopoly of his patent to derive a benefit not attributable to use of the patent's teachings.”[48] In framing each of these tests, the Court seems to assume that there exists some transcendent notion of what constitutes "normal" or "proper" patent exploitation. If there were such a well-established conception, courts might have little difficulty reaching consistent and relatively uncontroversial decisions on these issues.

Moreover, patent-antitrust doctrine is noted for its indeterminacy and its frequent shifts in direction. These circumstances suggest that, in reality, courts lack any such uniform conception of the appropriate scope of a patent. Commentators have often invoked formalistic tests no more informative than those employed by the courts. Perhaps the most sweeping recent use of such formalistic tests appears in Stedman's description of the various legal approaches that he claims are available for resolving the patent-antitrust conflict. It is relied upon such tests as “full monopoly power of the patentee and scope of his patent.”[49]

Then again there were another test ‘Bowman's Test’ - Bowman states that his test “assumes the propriety of allowing a patentee to use any method of charging what the traffic will bear if, but only if, the reward to the patentee arising from the conditional use measures the patented product's competitive superiority over substitutes.”[50] This competitive superiority approach has two components. Primarily, Bowman relies on “an objective test that takes as affirmative evidence of legitimacy a licensee's or buyer's willingness to accept a restriction as a condition to the deal.”[51] Bowman does not completely limit himself to this objective component, because it would potentially immunize any restrictive practice by a patentee, even a blatant cartel. Instead, Bowman sometimes proceeds beyond the objective test of what

[45] Addyston Pipe & Steel Co. v. United States, I75 U.S. 2II (I899), and United States v. Trans-Missouri Freight Ass'n, i66 U.S. 290 (I897).
[46] *See* Ethyl Gasoline Corp. v. United States, 309U.S. 436, 456 (I940) .
[47] United States v. General Elec. Co., 272 U.S. 476, 489 (I926) .
[48] 107 395 U.S. IOO, I36 (1969)
[49] Stedman, *An Economic Analysis of Royalty Terms in Patent Licenses*, 67 MINN. L. REV. 1198, 1221 (I983).
[50] *Supra note* 3 at 11.
[51] *Id.*

the market will bear. Hence, he must be considering some additional limitation when he refers to competitive superiority. Moreover, this second principle must be addressed in every case, even if the principle is rarely dispositive. In giving content to this second component, Bowman seems to rely upon formalistic conceptions for he often resorts to arguments for or formulations of his test that fall within the formalistic genre.

One might attempt to formulate a rough approach to patent-anti-trust doctrine by drawing together some recurring themes that emerge from the various applications. The first step would be to determine whether the observed patentee practices are in reality a subterfuge for collusion or other exclusionary conduct. Such practices probably will fail under the ratio test. If a practice did not fall into the subterfuge category, one would have to engage in a second and far more complicated stage of analysis in order to apply the ratio test.[52] In light of the deficiencies in our understanding of the patent system, decisions derived at this stage would arguably have to be limited to the sort of cost-effectiveness analysis, under which some prohibitions are traded for others in an attempt to achieve the current level of patentee reward at the minimum possible cost. But any other configuration of doctrine - including one that provided far more or far less aggregate reward, even to the extent of permitting all restrictive practices or permitting none - could not be decisively criticized because there is no way of knowing whether the current level of reward provided by the combination of the patent system and patent-antitrust doctrine is anywhere near the optimal level. If one emerges from all this without losing hope, an approach must be developed for those cases in which the practice in question may have any number of effects, some leading to far lower ratios than others. Unless one has confidence in our ability to determine at moderate cost which of the many possible effects are relevant in any particular instance, the best that we can probably do is to prohibit at least those practices that exhibit a serious potential for substantial loss.

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[52] *Supra note* 7 at 16.