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Norman Rishefsky

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Recommended Citation
Norman Rishefsky, FTC Section 5 Powers and the Pfizer-Cyanamid Inbroglio: Where Do We Go from Here, or 'You Ain't Seen Nothing Yet', 18 Cath. U. L. Rev. 335 (1969). Available at: https://scholarship.law.edu/lawreview/vol18/iss3/4

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FTC Section 5 Powers and the Pfizer-Cyanamid Inbroglio: Where Do We Go From Here, or 'You Ain't Seen Nothing Yet'*

NORMAN RUSHEFSKY**

The Federal Trade Commission Act was passed for a specific basic purpose—to establish the Federal Trade Commission.1 In setting forth the responsibilities of the Commission, the Act provides inter alia that "[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful,"2 and the Commission can "prevent persons, partnerships, or corporations" from engaging in the prohibited acts.3

Basically, the Commission is empowered to issue a cease and desist order requiring the offender to halt his prohibited act.4 Naturally, such "unfair methods of competition" can be found in many situations, including the use, or misuse, of patents. In the area of unfair competition based on patents, a mere cease and desist order may be insufficient. Affirmative relief is called for, but may not be available depending, of course, on how the statutory power of the Commission is interpreted. The question, therefore, arises whether the Commission is empowered to order affirmative relief and, if so, what is the scope thereof? This article will trace the evolution of the cease and desist order to include affirmative relief, even to the extent of ordering compulsory licensing.

The procedures which the FTC must follow, as well as those by which the affected parties may reply or appeal, are set forth in the Act itself. When the Commission has reason to believe that any person, partnership, or corporation is in violation of the Act "it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges . . . and containing a notice of a

*With apologies to FTC Chairman Paul Rand Dixon.
**Patent Examiner at United States Patent Office; B.E. (Mech.), The City College of The City University of New York, 1965; J.D., New York University, 1967; Member of the New York Bar. The author wishes to express his appreciation to Herbert I. Cantor, a third year student at the Catholic University of America Law School, for his assistance in the preparation of this article.

The affected party then “shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring [him] to cease and desist from the violation of the law so charged . . . .” After holding a hearing, if the Commission is of the opinion that there was, in fact, a violation of the Act, it is to make a written report of its findings of fact “and shall issue and cause to be served on such [party] an order requiring [him] to cease and desist from using such method of competition or such act or practice.” Review of the Commission’s order may be had in the proper court of appeals. Findings of fact, if supported by evidence, are to be conclusive. If either party (the Commission or the petitioner) believes that additional evidence should be taken, and can show to the satisfaction of the court that such evidence is material “and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission . . . .” Any modified or new findings of the Commission are then filed with the court which makes a final judgment, except for a possible “review by the Supreme Court upon certiorari, as provided in section 347 of Title 28.” FTC cases are not reviewed by the courts until the Commission has issued a final order, except in rare instances when there is a “compelling” need.

The Pfizer-Cyanamid Case

In Charles Pfizer & Co. v. FTC, the Sixth Circuit was presented with the novel question of whether the FTC has the power to order compulsory licensing of a patent upon a reasonable royalty basis as a remedy for Section 5 violations. In 1949 American Cyanamid Company obtained a patent on a drug it called Aureomycin, the molecular structure of which was not then known. This drug is known as a broad spectrum antibiotic because, unlike penicillin and streptomycin, it is normally effective against both gram-positive and gram-negative bacteria. For this reason Aureomycin is commonly referred to as a “wonder...
drug," and public demand for it creates a market running into $100 million per year. In 1950 Pfizer obtained a patent on a related antibiotic which it called Terramycin.

In 1952, Pfizer scientists ascertained the molecular structures of both Aureomycin and Terramycin, and speculated that an antibiotic could be developed with superior qualities by removing a chlorine atom from the Aureomycin molecule. They succeeded in doing this by subjecting Aureomycin to mild hydrogenation by means of a particular catalyst, and filed a patent application for the new product, which they later named tetracycline. At about the same time scientists at Cyanamid perfected a similar process, which led to the filing of a patent application by Cyanamid. The following year an application for a patent was filed in the name of a scientist at the Heyden Chemical Corporation on what also appeared to be tetracycline. Shortly thereafter, Cyanamid purchased Heyden's antibiotic facilities, which included the rights to the patent application.

In proceedings before the Patent Office, an interference was declared between the Pfizer and Cyanamid applications. A private cross-licensing agreement was executed between Pfizer and Cyanamid to the effect that the party winning the interference would license the other, but then Cyanamid conceded priority to Pfizer and withdrew its application, and the interference was terminated. Meanwhile the Bristol-Meyers Company (and a subsidiary) filed a patent application on a salt of tetracycline, and a second interference was declared involving the applications owned by Pfizer, Cyanamid (the Heyden application), and Bristol-Meyers. The patent examiner dissolved the second interference, ruling that "the product tetracycline was not patentable, and [rejecting] all product claims on the basis of coproduction, i.e., that the previously patented Aureomycin process . . . inherently produced certain amounts of tetracycline."

The reasoning of the examiner as to unpatentability was that the Aureomycin patent disclosed a process for producing an antibiotic composition inherently containing tetracycline, and that this disclosure constituted an anticipation of any later product claims for tetracycline. This rejection was based on Section

17. Id. at 774.
18. Pursuant to Section 135 of the Patent Act of 1952, 35 U.S.C. § 135 (1964), an interference can be declared between two or more applications claiming the same invention to determine the priority of the applicants.
20. Id. at 774.
102(e) of the Patent Act of 1952, which bars the obtaining of a patent when the applicant's claim is anticipated by a description in another party's patent which had been granted on an application made before the invention by the current applicant. The examiner relied upon the disclosure in the Heyden application (now owned by Cyanamid) that a certain amount of coproduction occurred as creating a "rebuttable assumption of inherent production." This reliance he said was justified by the fact that the application was available to all the parties in the interference. Pfizer's patent counsel denied that such an assumption was justified, and it was finally agreed that if Pfizer could prove that tetracycline was not, in fact, coproduced with Aureomycin, the claims might be allowed. Such proof was finally submitted in the form of an affidavit, and a notice of allowance was issued. Regarding this procedure the Court of Appeals for the Sixth Circuit later commented:

The Patent Office, not having testing facilities of its own, must rely upon information furnished by applicants and their attorneys. Pfizer and Cyanamid, like all other applicants, stood before the Patent Office in a confidential relationship and owed the obligation of frank and truthful disclosure.

In Kingsland v. Dorsey the Supreme Court quoted with approval the following: "By reason of the nature of an application for patent the relationship of attorneys to the Patent Office requires the highest degree of candor and good faith. In its relation to applicants, the Office . . . must rely upon their integrity and deal with them in a spirit of trust and confidence . . . ."

Earlier in the proceedings, Cyanamid's patent counsel had informed the examiner that Cyanamid "can unequivocally state that there has not been any tetracycline produced by them, inadvertently or otherwise."

Thereafter the Federal Trade Commission in 1958 filed a complaint charging that:

Pfizer made false, misleading and incorrect statements to, and withheld material information from, the Patent Office for the purpose and with the effect of inducing the issuance of a patent on tetracycline; and that Cyanamid . . . withheld . . . material information in the course of the prosecution of the patent [application], as a result of which Pfizer was aided in obtaining its tetracycline patent.

...[W]hile both of their patent applications were pending, Pfizer and Cyanamid agreed that they would settle privately between them-

23. American Cyanamid Co. v. FTC, 363 F.2d 757, 775 (6th Cir. 1966).
24. Id. at 777.
27. Id. at 582.
selves the question of which had priority on the invention of tetracycline, after which they would cooperate in securing the awarding of a patent to the winner; that the owner of the patent then would license the unsuccessful party; and that the two would exchange information concerning the production of this drug.\(^\text{28}\)

The Commission, finding the charges true and in violation of Section 5, entered a final order embodying cease and desist provisions and directing Pfizer "to license its tetracycline patent to any domestic applicant on a two and one-half percent royalty basis and to provide the licensees with certain technical information. Under identical terms Cyanamid is directed to license its two [A]ureomycin patents."\(^\text{29}\) On petition for review, the Court of Appeals for the Sixth Circuit vacated the order and remanded the case to the Commission for a de novo consideration of the record, and to take new evidence.\(^\text{30}\) The court's decision was based on two grounds: first, Chairman Dixon of the FTC should have disqualified himself,\(^\text{31}\) and second, the patent examiner should have been allowed to testify.\(^\text{32}\)

On rehearing, the Commission without Chairman Dixon heard testimony of the patent examiner and of two other witnesses called by Pfizer. The Commission again found that Pfizer and Cyanamid had violated Section 5 and ordered that the tetracycline and Aureomycin patents be licensed to any domestic applicant on a two and one-half percent royalty basis.\(^\text{33}\) Again, Pfizer and Cyanamid petitioned the court for review of the Commission's order on the ground that the findings of fact were not supported by substantial evidence. The order was affirmed and enforced.\(^\text{34}\) In affirming, the court quoted approvingly from \textit{Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co.:}

Those who have applications pending with the Patent Office or who are parties to Patent Office proceedings have an uncompromising duty to report to it all facts concerning possible fraud or inequitableness underlying the applications in issue. . . . Public interest demands that all facts relevant to such matters be submitted formally or informally to the Patent Office, which can then pass upon the sufficiency of the

\(^{28}\) American Cyanamid Co. v. FTC, 363 F.2d 757, 761 (6th Cir. 1966).
\(^{29}\) \textit{Id.} at 763.
\(^{30}\) \textit{Id.} at 779.
\(^{31}\) \textit{Id.} at 763. The court held that there was a denial of due process since Chairman Dixon had been chief counsel of a Senate subcommittee (the Kefauver Committee) which had investigated the same facts, issues and parties that were involved in the present case.
\(^{32}\) \textit{Id.} at 779.
\(^{33}\) Chas. Pfizer & Co. v. FTC, 401 F.2d 574, 577-78 (6th Cir. 1968).
\(^{34}\) \textit{Id.} at 578.
evidence. Only in this way can that agency act to safeguard the public in the first instance against fraudulent patent monopolies.35

The court agreed that Pfizer "failed to abide by the standards of absolute candor and utmost good faith" in its dealings with the patent office.36 Furthermore, "Cyanamid aided Pfizer in its efforts . . . by deliberately withholding information which it knew or should have known was relevant to the patentability of tetracycline."37

**Affirmative Relief**

While compulsory licensing of patents on a reasonable royalty basis has been used extensively by the courts,38 Pfizer was the first attempt by the FTC to use it as a remedy for Section 5 violations. Pfizer thus raises the issue of whether the FTC may extend its power of ordering a Section 5 violator to cease and desist beyond what is expressed in the statute and call for affirmative relief by ordering compulsory licensing of patents used in restraint of trade.

It had previously been thought that "[t]he power to issue a cease and desist order does not carry with it any power to issue an affirmative order."39 The difference between the two types of orders is that the former directs one to refrain from an act which the statute forbids, whereas the latter directs the individual concerned to perform the act which the statute requires.40 In approaching the cease and desist power as a purely negative one it would appear that within the context of Pfizer the Commission's sole remedy would have been to order the companies not to give misinformation to the Patent Office in any future patent applications.41 The Sixth Circuit rejected this narrow view of the Commission's remedial powers, however, and reasoned that it was Congress' intention "to make a broad delegation of power to regulate and control unfair methods of competition."42 The court quoted with approval Mr. Justice Harlan's concurring opinion in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*43 that in instances of improper patent monopolies "antitrust remedies

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35. 324 U.S. 806, 818 (1945).
36. Chas. Pfizer & Co. v. FTC, 401 F.2d 574, 579 (6th Cir. 1968).
37. Ibid.
40. Id. at 145.
42. American Cyanamid Co. v. FTC, 363 F.2d 757, 769 (6th Cir. 1968).
43. 382 U.S. 172 (1965).
should be allowed room for full play." Further, the court reasoned that "the Federal Trade Commission Act may be construed in pari materia with the Sherman and Clayton Acts," thereby allowing for the use of "cases decided under any of the antitrust laws in dealing with cases brought by the Commission." It cited *Atlantic Refining Co. v. FTC* for the proposition that the Commission has wide discretion in its choice of a remedy deemed adequate to cope with unlawful practices, and *FTC v. Ruberoid Co.*, in which the Supreme Court stated that Congress gave the FTC the power to shape remedies necessary to deal with unfair methods of competition, and that the court is to interfere only where there is no reasonable relation between the remedy and the violation. It is important to note that since the power of the Commission is purely regulatory and not punitive the remedy must be such as not to punish for past transgressions. It is to be designed as a means for preventing illegal practices in the future.

Because the FTC is an administrative body and not part of the judicial system, the remedy that it may fashion must necessarily be restricted in that it must comport with the powers granted it expressly or by fair implication. Despite the fact that the statute authorizes the Commission to issue an order to cease and desist, the Commission has broadly interpreted this grant and in a number of instances has required affirmative relief. Although neither the Commission nor the Sixth Circuit in *Pfizer-American Cyanamid* specifically discussed the power of the FTC to grant affirmative relief with regard to the compulsory licensing of the patents, the Commission did state, regarding another issue, that they be-

44. *Id.* at 180; see also *United States v. Singer Mfg. Co.*, 374 U.S. 174, 199-200 (1963) (concurring opinion).
45. *American Cyanamid Co. v. FTC*, 363 F.2d 757, 770 (6th Cir. 1968).
47. 381 U.S. 357 (1965).
51. *Chamber of Commerce v. FTC*, 13 F.2d 673 (8th Cir. 1926). The Commission is not a court; it exercises administrative and not judicial power. *Eastman Kodak Co. v. FTC*, 7 F.2d 994 (2d Cir. 1925), *aff'd*, 274 U.S. 619 (1927).
52. The affirmative order objected to was with regard to the price-fixing charge, ordering that the companies individually and independently cancel existing prices and determine new ones within 60 days. *American Cyanamid Co. v. FTC*, 363 F.2d 757, 763 (6th Cir. 1968). On remand, this charge was dismissed by an equally divided vote of two to two, with Chairman Dixon disqualified. *Chas. Pfizer & Co. v. FTC*, 401 F.2d 574, 577 (6th Cir. 1968).
lieved Congress intended the cease and desist power not to be so literally con-
strued as to prevent the Commission from ordering affirmative acts.

The courts assert that they are not extending the powers of the Commission,
but are merely interpreting the powers as granted by Congress in the enabling
 statute. It appears, however, that they are only looking to the face of the statute.
The legislative history reveals that injunctive-type powers for the FTC were re-
jected and the “cease and desist” power was added in its stead. The primary
function of the proposed Commission was to serve in an advisory capacity to
the courts and to Congress in passing future legislation.53

Had the Congress desired to provide the Commission with affirmative powers
under Section 5 it could easily have done so. Section 11 of the Clayton Act
promulgated the same year as Section 5 gives the FTC not only the cease and
desist power, but the express power to order divestiture as well. Furthermore,
Section 5 was extensively amended in both 193854 and 195255 at which times
provisions giving the FTC affirmative power could have been inserted, if Con-
gress so desired. There can be no doubt, then, that Congress’ intention was not
to confer upon the Commission the drastic power of divestiture. Nevertheless,
in view of the Supreme Court’s broad construction of the cease and desist order,
it appears certain that the Commission will not go too far when its order is
“ample to deal with the evil at hand.”56

Antitrust Enforcement

In analogizing the powers of the FTC to those of a court of equity the Court is
opening up remedies heretofore unavailable to the Commission. To determine
the extent of these powers in the patent-antitrust area it will be necessary to first
discuss the relation of the FTC to the enforcement of the antitrust laws in gen-
eral.

Although the Sherman Act specifies enforcement responsibility only for the
Attorney General,57 the Supreme Court has held that the Commission has juris-
diction to declare conduct tending to restrain trade to be an unfair method of

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The FTC is to administer a group of statutes whose meaning and content are
primarily entrusted to the judiciary for rational extrapolation. There was no
intention on the part of Congress that the FTC should become a plenary body,
reshaping American industry to a model which the Commission in its own wis-
dom decided best served the Nation. On the contrary, the FTC was to prevent
“unfair competition” in widely divergent industries, preserving the existing
price system so fundamental to the American way of life.

See also Elman, Antitrust Enforcement: Retrospect and Prospect, 53 A.B.A.J. 609
competition, even though the self-same conduct may also violate the Sherman Act.\textsuperscript{58} According to the Attorney General's National Committee to Study the Antitrust Laws:

Supporting this interlacing of enforcement responsibilities, the Supreme Court has noted, is "a strong Congressional purpose not only to continue enforcement of the Sherman Act by the Department of Justice . . . but also to supplement that enforcement through the administrative process of the new Trade Commission." The effort was "to provide the Government with cumulative remedies against activity detrimental to competition. . . ." Toward this end, there was created a "body specially competent . . . by reason of information, experience and careful study of . . . business and economic conditions . . . to [treat] . . . special questions concerning industry" and "to exercise a special competence in formulating remedies to deal with problems in general sphere of competitive practices."\textsuperscript{59}

Under the Clayton Act, the Attorney General and the Commission share responsibility for the enforcement of Sections 2, 3, 7, and 8.\textsuperscript{60}

In reviewing the legislative history in \textit{FTC v. Raladam Co.}\textsuperscript{61} the Supreme Court concluded that Section 5 was designed to supplement the Sherman Act by stopping in their incipiency those methods of competition which fall within the meaning of the word "unfair." Thus, the Commission need not wait for the alleged trust or combination to reach fruition, as must the Attorney General who bears the burden of establishing a combination which restrains trade.\textsuperscript{62} Application of holdings in cases brought by the Attorney General under the antitrust laws is thus condoned in considering the extent of the FTC's Section 5 powers. Indeed, the courts have long held that the antitrust laws and Section 5 are \textit{in pari materia}, and are to be construed together so as to reinforce their common legislative purpose.\textsuperscript{63}

Although this dual enforcement of the antitrust laws has been approved by the courts\textsuperscript{64} and others,\textsuperscript{65} it has had its critics.\textsuperscript{66} The critics contend that the

\begin{itemize}
\item\textsuperscript{58} FTC v. Cement Institute, 333 U.S. 683, 693 (1948).
\item\textsuperscript{59} \textit{Report of the Att'y Gen.}, \textit{supra} note 38, at 375.
\item\textsuperscript{60} 15 U.S.C. §§ 13, 14, 18, 19 (1964).
\item\textsuperscript{61} 283 U.S. 643 (1931).
\item\textsuperscript{62} \textit{Id.} at 647.
\item\textsuperscript{63} Beech-Nut Packing Co. v. FTC, 264 F. 885 (2d Cir. 1920), \textit{rev'd on other grounds}, 257 U.S. 441 (1922); see also Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965).
\item\textsuperscript{64} See, \textit{e.g.}, Menzies v. FTC, 242 F.2d 81 (4th Cir.), \textit{cert. denied}, 353 U.S. 957 (1957).
\item\textsuperscript{65} \textit{Report of the Att'y Gen.}, \textit{supra} note 38, at 375: "This Committee endorses this goal of 'efficient cooperation' through dual enforcement. Accordingly we reject two suggestions equally drastic—on the one hand, to abolish the Commission's antitrust function—or, on the other, to transfer from the [Justice] Department to the Commission all antitrust matters." See also Elman, \textit{supra} note 53.
\item\textsuperscript{66} Simon, \textit{The Case Against the Federal Trade Commission}, 19 U. CHI. L. REV. 297
\end{itemize}
FTC was established by President Wilson as an informative body to guide businessmen in understanding the law; "[n]ot only has it failed to do that, but it has created confusion as to the meaning of the antitrust laws by its inconsistent and contradictory statements concerning interpretations of these laws."\(^{67}\) Despite these criticisms the viability of the FTC in the antitrust field cannot be doubted. The only question remaining concerns the extent of its remedial powers.

**Divestiture**

In the area of divestiture, the cease and desist order has been narrowly construed. The courts feel that this is a remedy of a court of equity and that the Commission has not been delegated the authority of such a court.\(^ {68}\) In *FTC v. Eastman Kodak Co.*,\(^ {69}\) the Supreme Court was presented with the issue of whether the Commission had the authority under Section 5 to order the company to divest itself of laboratories which it had lawfully acquired but which gave the company a monopoly in the manufacture and sale of positive films. The Court unequivocally stated that the Commission did not possess this power and that the proper remedy was for the courts to administer.\(^ {70}\)

The Court in *Eastman* relied heavily on the decision in *FTC v. Western Meat Co.*\(^ {71}\) In that case the Supreme Court held that although Section 11 of the Clayton Act\(^ {72}\) empowered the Commission to order divestiture of stock held in a competitive corporation in violation of Section 7 of the Clayton Act,\(^ {73}\) the Commission could not also order the divestiture of assets even though they were obtained through the use of such unlawfully held stock.

The propriety of the Court's relying on the *Western Meat* case was criticized by the able dissenters.\(^ {74}\) They pointed out that that case was brought by the Commission on a Section 7 violation, and since Section 7 dealt only with stock,

\(^{(1952)}\): "The purpose of this article is to prove from the record that the only tenable solution is to take antitrust jurisdiction away from the Federal Trade Commission and to give exclusive antitrust jurisdiction to the Attorney General."

\(^{67}\) *Id.* at 301.


\(^{69}\) 274 U.S. 619, 625 (1927).

\(^{70}\) *Id.* at 623.

\(^{71}\) 272 U.S. 554 (1926).


\(^{74}\) *FTC v. Eastman Kodak Co.*, 274 U.S. 619, 625 (1927) (dissenting opinion of Mr. Justice Stone, in which Mr. Justice Brandeis concurred).
the Commission was powerless to order divestiture of anything else if only a Section 7 violation was established. The dissenters felt that since Section 5 of the Federal Trade Commission Act is general in its terms, the FTC powers should be broadly construed and not denied where it is framed in an affirmative manner.\textsuperscript{75}

Perhaps Justices Stone and Brandeis were vindicated when the Clayton Act was amended in 1950 to include assets as well as stock in the Section 7 prohibition.\textsuperscript{76} The next logical question to arise is whether Section 7 includes patents as assets. This question has not yet been answered by the courts, although the answer has been predicted by Donald Turner: "At the outset, I shall simply assert categorically that Section 7 of the Clayton Act—which prohibits the acquisition of... the assets of a corporation where the effect may be to substantially lessen competition or tend to create a monopoly—applies to the acquisition of either a patent or an exclusive license. Specifically, I am certain that both will be held to be 'assets' within the meaning of that statute."\textsuperscript{77}

The viability of the \textit{Eastman} doctrine today can also be seriously questioned in light of recent decisions of the Supreme Court construing the cease and desist powers of other administrative agencies. In \textit{Pfizer} the Commission stated that the \textit{Eastman} doctrine must be viewed with the insight provided in \textit{Pan American World Airways, Inc. v. United States}\textsuperscript{78} where the Court stated that the cease and desist power of the Civil Aeronautics Board under Section 411 of the Federal Aviation Act\textsuperscript{79} was not to be read so restrictively as to exclude the power to compel divestiture.

In \textit{Pan American} the Court analogized the powers of the CAB under Section 411 to those of the FTC under Section 5: "[w]e may profitably look to judicial interpretation of [Section] 5 as an aid in the resolution of... questions raised... under [Section] 411."\textsuperscript{80} This analogy of the powers of the FTC to those of the CAB has been criticized\textsuperscript{81} because while the FTC has regulatory power over business competition in general, the CAB was created to deal with nearly all the problems which might arise in the operation of a single industry. The powers of the CAB over air transportation are designed to affirmatively regulate that industry while the FTC's antitrust powers are aimed only at the

\textsuperscript{75} Id. at 627.
\textsuperscript{76} Act of Dec. 29, 1950, ch. 1184, 64 Stat. 1125.
\textsuperscript{78} 371 U.S. 296 (1963).
\textsuperscript{81} See Note, \textit{supra} note 41, at 1517.
prevention and correction of practices impeding free competition in a given industry.\textsuperscript{82}

Despite these criticisms, the language of the Supreme Court in \textit{Pan American} reflects a judicial trend toward allowing greater access to administrative agency remedial powers. Illustrative of this is the reasoning in \textit{Phelps Dodge Corp. v. NLRB}.\textsuperscript{83} Although not a divestiture case, it is nevertheless indicative of the judicial thinking in this area. There the Court explained that Congress could not have set out all the remedies to be employed in specific situations, and that the exercise of the power to adapt the statutory remedial language to concrete situations had been committed to the Board. The general approach by the Court appears to be that where the statute is general and vague, this broad language should admit itself of a broad interpretation.\textsuperscript{84}

Clearly the cease and desist power thus can no longer be read as precluding affirmative orders in general, and the divestiture remedy in particular.\textsuperscript{85} The \textit{Eastman} doctrine that the Commission has not been delegated the power of a court of equity is being replaced by language of the courts that the "[a]uthority to mold administrative decrees is indeed like the authority of courts to frame injunctive decrees,"\textsuperscript{86} and "the power to order divestiture need not be explicitly included in the powers of an administrative agency to be part of its arsenal of authority . . . ."\textsuperscript{87}

\textit{Compulsory Licensing on a Reasonable Royalty Basis}

In condoning compulsory licensing of the Pfizer and Cyanamid patents on a reasonable royalty basis as a remedy for Section 5 violations, the Sixth Circuit has construed the cease and desist power one step beyond the remedy of divestiture. In divestiture or dissolution the antitrust violators may sell the offending res and retain what the free market will bring them, but with compulsory licensing of patents, the royalties are fixed by the Commission itself.

Although compulsory licensing on a reasonable royalty basis has been termed a partial confiscation\textsuperscript{88} its constitutionality as an antitrust remedy is firmly established as a result of the Supreme Court decision in \textit{Hartford-Empire Co. v. United States}.\textsuperscript{89} In that case the Court noted the conflicting policies of the

\textsuperscript{83} 313 U.S. 177 (1941).
\textsuperscript{84} See 39 Notre Dame Law. 581, 584 (1964).
\textsuperscript{85} Note, \textit{supra} note 41, at 1517.
\textsuperscript{87} \textit{Ibid.}
\textsuperscript{88} \textit{REPORT OF THE ATT'Y GEN.}, \textit{supra} note 38, at 255-56.
\textsuperscript{89} 323 U.S. 386, \textit{clarified}, 324 U.S. 570 (1945).
patent and the antitrust laws: one grants rights of monopoly, while the other forbids monopolistic activities. Recognizing that rights conferred by patents are very definite and extensive, the Court said that as broad as these rights may be, "they do not give any more than other rights [a] universal license against positive prohibitions. The Sherman law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained."90

In response to the assertion that compulsory licensing is a confiscation, the Court countered that the use of this remedy was justified as the only means by which active competition in the industry could be enforced.91 Inasmuch as the duty of the FTC is to restore competition before the "seeds of monopoly germinate,"92 it does not seem logical that the courts will deny the use of this remedy where the agency has decided that this is the only effective remedy.93 In Pfizer the Commission determined that the order was necessary to assure dissipation of the effect of the companies' illegal actions,94 and in view of the Commission's wide discretion in its choice of a remedy, it appears that the Commission was well within the guidelines of the test formulated in Pan American that the order be "ample to deal with the evil at hand."95

In the area of compulsory licensing the technical competence of the FTC makes it the preferred body for computing a reasonable royalty which will restore competition. The difficulty of a court doing this has been recognized,96 and the handling of it by the Justice Department has been criticized.97 Although

90. Id. at 406; see also Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 49 (1912).
92. Address by Joseph E. Davies, Chamber of Commerce of the United States, Feb. 4, 1915, in 52 Cong. Rec. app. 491-92 (1915): "Here is an agency that has been designed . . . to destroy the very seeds of monopoly in their germination, rather than to permit them to develop into a vigorous and rank growth which will throttle the healthful upshoots in the industrial field."
93. It is well to heed the words of Justice Stone in his dissenting opinion in Arrow-Hart & Hegeman Elec. Co. v. FTC, 291 U.S. 587, 607 (1934): "When the courts are faced with interpretation of the particular, administration breaks down and the manifest purpose of the legislature is defeated unless it is recognized that, surrounding granted powers, there must be a penumbra which will give scope for practical operation. In carrying such schemes into operation the function of courts is constructive, not destructive, to make them, wherever reasonably possible, effective agencies for law enforcement and not to destroy them."
96. See United States v. National Lead Co., 332 U.S. 319, 349 (1947); past royalties, though not conclusive, may offer "guidance." Another court-approved standard of reasonableness has been a royalty figure allowing "continuous competition" between patentee and licensee. United States v. Hartford-Empire Co., 65 F. Supp. 271, 275 (N.D. Ohio 1946); see also Besser Mfg. Co. v. United States, 343 U.S. 444 (1952); Turner, supra note 77.
a court may refer an antitrust suit to the FTC for the framing of the appropriate form of relief. It would be better from the public’s point of view that the action be begun by the FTC rather than by the Attorney General. The Attorney General must meet the higher burden of proving a violation of the antitrust statutes, whereas the FTC need only find that there existed an unfair method of competition. Since Commission orders cannot be enforced without first subjecting them to the scrutiny of a court, substantial risk of abuse would be obviated.

**Know-How**

Along with the remedies of compulsory licensing, the typical antitrust decree may contain provisions for the disclosure of “know-how” to licensees so that they may make full and effective use of the patented device or process. The requirement that outsiders be given access to technical matter is not new in antitrust law. In *United States v. National Lead Co.* the Supreme Court upheld a decree requiring disclosure of technical information used by patentees in connection with the production of titanium pigments. The Court pointed out that the defendants had secured a monopoly on technical information relating to the manufacture of the pigments by the exchange of “know-how” among themselves. Relying on this precedent, the Commission in *Pfizer* included a provision requiring Pfizer and Cyanamid to disclose the “know-how” and technical information relating to the manufacture of Aureomycin and tetracycline.

The importance of disclosure as an antitrust remedy was illustrated in *United States v. Imperial Chemical Industries, Ltd.*, where it was recognized that “the supplying of such know-how and technology is necessary to the efficient use of the licensed patents and to the production by the licensee of products comparable in quality and cost of production to that of the licensor.” The Commission seems justified in employing this as one of their remedies so that it may adequately cope with the unlawful practice in question.

**Royalty-Free Licensing**

In *Hartford-Empire* the Supreme Court modified the district court’s decree of royalty-free licensing, stating that since the “provisions . . . in effect confiscate considerable portions of the appellants’ property, we think they go beyond what is required to dissolve the combination and prevent future combinations of like

100. The other corporate defendants were E.I. du Pont de Nemours & Co. and Titan Co.
character." Two years later, the government made its first attempt to have the Hartford-Empire prohibition against royalty-free licensing overruled. In National Lead the Court rejected the government's effort to modify a district court decree providing for compulsory licensing at reasonable royalties, finding it unnecessary to test the constitutionality of such an order since the government failed to show that it was necessary to the effective enforcement of the Sherman Act. It did recognize, however, that at times a reasonable royalty may be ordered and set at a nominal rate or at zero. In view of this dictum, the majority's refusal to pass on the constitutionality of a decree of a royalty-free license, and the strong minority in favor of such a decree, it has been asserted that the prohibition of this type of order as espoused by the Hartford-Empire decision "pronounce[s] no blanket statutory or constitutional ban on royalty-free licensing." However, the courts have been reluctant to allow royalty-free licensing, for it is considered "penal rather than remedial in character and hence, beyond the Sherman Act's authority to prevent and restrain violations." Although royalty-free licensing may be viewed as confiscatory, thus raising the question of whether private property is being taken for public use without compensation in violation of the Constitution, the situation may arise where competition can only be restored through the use of such relief.

In Pfizer the Commission stated that it could require royalty-free licensing when necessary to pry open a market closed by illegal restraints. As a prerequisite to forming such a decree the FTC would first have to find that the payment of reasonable royalties would be a burden of sufficient magnitude to prevent any of the patentee's competitors from becoming licensed. Inasmuch as the question of royalty-free licensing as an antitrust remedy remains unsettled,

104. See 32 MINN. L. REV. 309 (1948).
106. Id. at 349.
107. National Lead was a 4-3 decision.
108. This was the position of the minority of the members on the Attorney General's National Committee to Study the Antitrust Laws. They felt that the two main cases stand for the proposition that "a court will decree no more in any one case than is needed to achieve effective competition." REPORT OF THE ATT'Y GEN., supra note 38, at 258.
110. REPORT OF THE ATT'Y GEN., supra note 38, at 256.
111. U.S. CONST. amend. V.
112. This was the situation in United States v. General Elec. Co., 115 F. Supp. 835 (D.N.J. 1953), implementing 82 F. Supp. 753 (D.N.J. 1949). The relief granted was dedication of the patents, which is more drastic a remedy than royalty-free licensing.
114. Comment, supra note 82, at 554.
one would expect the FTC to hesitate in employing this remedy until it has been authoritatively established that it is one of the weapons available to the Justice Department in its enforcement of the antitrust laws.\textsuperscript{115}

In compulsory royalty-free licensing the patentee retains formal title to his patents, but he is barred from asserting the exclusive nature of his grant. In theory, he might again be allowed to collect royalties upon a showing that competitive conditions prevailed.\textsuperscript{116} Before doing so he will probably be required to show that "[he] has fully abandoned [his] present method of restraining competition . . . and that the consequences of that practice have been fully dissipated."\textsuperscript{117} In attempting to show this it is more than likely that the lapse of "a significant period of time may be necessary before courts will agree that competitive conditions have been established."\textsuperscript{118} Adding to this the heavy burden of proof imposed upon the patentee in showing that competition prevails, it is not surprising that courts have considered royalty-free licensing equivalent to dedication.\textsuperscript{119} This is especially apparent when one considers that the patentee's exclusive right to prevent others from making, using, and selling his invention expires after 17 years.\textsuperscript{120}

\textit{Dedication of Patents}

Despite the fact that dedication and compulsory royalty-free licensing have been used interchangeably by the courts there are obvious differences, the main one being that in dedication the patentee is permanently deprived of all rights in the patent and may not recover his patent monopoly by showing that competition has been restored. The use of dedication as an antitrust weapon was given impetus by the decision concerning lamps in \textit{United States v. General Electric}
Co. 121 In that case the court justified the order for dedication of certain GE patents to the public on the ground that GE's smaller competitors were “un-equipped to engage in litigation on . . . one patent after another,” so that requiring them “to shoulder royalties . . . could prove to be the very factor that would push them out of the competitive circle of the market.” 122 The court discussed inadequately the alternative remedy of royalty-free licensing, which would appear to be the preferred remedy in that it is less penal in nature. Such an alternative would at least have allowed GE the opportunity to show at some later time that competition in the industry prevailed and thus have the royalties restored. Since this would involve a suit with the government it would not be a financial burden to GE's competitors. Despite the fact that the profit margin in the industry was very narrow and there could be no competition if such a royalty was imposed, the situation might be different in several years. An order calling for dedication of patents goes beyond what is necessary and hence is not remedial but penal in nature and “in effect tantamount to cancellation or divestiture without compensation.” 123

Cancellation

The consequences of cancellation of a patent *ab initio* are more severe than outright dedication in that it enables a licensee to recover royalties already paid. 124 This may be one of the reasons why the courts are reluctant to order cancellation as an antitrust remedy. Its penal nature is apparent, and with the availability of other remedies its use ought to be restricted to extreme situations. Perhaps one such situation is that in which the patent has been procured by fraud. 125 For

122. Id. at 844.
123. Report of the Att'y Gen., supra note 38, at 256. But in a number of instances the Justice Department has been able to negotiate a consent decree requiring the outright dedication of patents. See, e.g., United States v. A.B. Dick Co. (N.D. Ohio, Mar. 25, 1948); United States v. Austenal Laboratories, Inc. (S.D.N.Y. June 29, 1951). In attempting to determine congressional intent in this area it should be observed that repeatedly legislation has been proposed in Congress to give the courts power to order forfeiture or compulsory licensing if the patent is not used within a specified time. Congress has not adopted such legislation. H.R. 20388, 60th Cong., 1st Sess. (1908); H.R. 13876, 62d Cong., 1st Sess. (1911).
125. This is not as rare as heretofore believed. See Cullen & Vickers, *Fraud in the Procurement of a Patent*, 29 Geo. Wash. L. Rev. 110 (1960): “A recent report [S. Rep. No. 97, 82d Cong., 1st Sess. (1961)] by the Senate Subcommittee on Patents, Trademarks, and Copyrights noted that in sixty applications examined by it in which a final rejection was overcome by affidavits, a 'substantial number' of the affidavits did not appear sufficient for that purpose. It thus appeared to the Subcommittee that the half-truths which had misled the examiners in those cases presented sufficient ground to seek methods which would, to some extent, remove the opportunity for fraud in the prosecution of patent applications.”
almost 90 years the right of the United States to obtain cancellation of a patent procured by fraud has been clearly established:126 "[t]hat the government, authorized both by the Constitution and the statutes to bring suits at law and in equity, should find it to be its duty to correct this evil, to recall these patents, to get a remedy for this fraud, is so clear that it needs no argument . . ."127

Inasmuch as there is no statutory provision for the Attorney General to institute such suits128 the courts have narrowly confined the government in this area.129 The authority of the government in these suits in equity for cancellation of patents is based on the common law of England, where the mode of proceeding was by writ of *sciē facias*.130 The scope of the Attorney General's power in this area was considerably limited by the decision in the second *United States v. American Bell Telephone Co.* case.131 There the Attorney General brought a suit in equity to cancel a patent for a telephone receiver, alleging fraud and lack of patentability. The Supreme Court held that no fraud was proven and that the mere possibility that the Patent Commissioner's judgment might have been erroneous did not confer authority on the Attorney General to bring a suit for cancellation on the same facts that were before the Commissioner. The holding


128. In the United States the first patent statutes contained a specific provision for cancellation of patents. Patent Act of 1790, ch. 7, § 5, 1 Stat. 109. According to this provision a private citizen might petition the district court having proper jurisdiction over the patentee to grant a rule to show cause why process should not issue to cancel a patent. In 1836 the statute was repealed and no substitute was provided. Patent Act of 1836, ch. 357, 5 Stat. 117. Thus, today no statutory authority for such suits exists and individuals are precluded from bringing them. Davis, *The Cancellation of Patents*, 16 J. Pat. Off. Soc'y 43, 45-6 (1934). See also Mowry v. Whitney, 81 U.S. (14 Wall.) 494, 441 (1871), which mentioned that a patentee, if private cancellation suits were allowed, could be subject to "innumerable vexatious suits to set aside his patent"); accord, *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965).


130. According to Davis, supra note 128, at 43, three classes of cases were established for which the writ might be granted:

1. When the King by his letters-patent has by different patents granted the same thing to several persons, the first patentee shall have a *sciē facias* to repeal the second.

2. When the King has granted a thing by false suggestion, he may by *sciē facias* repeal his own grant.

3. When he has granted that which by law he cannot grant, he *jure regis*, and for the advancement of justice and right, may have a *sciē facias* to repeal his own letters-patent.

*See also* Mowry v. Whitney, 81 U.S. (14 Wall.) 434 (1871), for a discussion of *sciē facias*.

131. 167 U.S. 224 (1897).
of this case has been much debated. The dictum of the Court, which seems to indicate a prohibition of all cancellation suits except those brought for fraud, has been adopted by some, while others have attacked this decision and would limit it to its facts, i.e., to instances where the Attorney General does not assert any new information not passed upon by the Patent Office. Thus, when the Attorney General brings in new evidence of prior art, the decision in the second Bell case is said to be not controlling.

The second Bell case has been somewhat limited by the Supreme Court’s dictum in United States v. United States Gypsum Co., where the Court went out of its way to state that “in a suit to vindicate the public interest by enjoining violations of the Sherman Act, the United States should have the opportunity to show that the asserted shield of patentability does not exist.” Although this dictum has yet to be acted upon by the Justice Department, it appears that it logically follows from the precedents.

The direction in which the Court seems to be heading in allowing the Attorney General to question the validity of a patent in an antitrust case appears to be analogous to the line of decisions reflecting a licensee’s right to challenge the validity of a patent when being sued for royalties. Thus, the second Bell case, which is said to estop the government from asserting the patent’s invalidity once granted, can be compared to the early cases holding that a licensee is estopped to deny the validity of the patent as against the patentee or the licensor. This estoppel gave way somewhat in later decisions to allow the introduction by the Justice Department in antitrust suits, and the licensee in private suits, of prior art to ascertain the scope of the claims of the various patents involved. The Gypsum dictum appears consonant with the holding in Sola Electric Co. v. Jefferson Electric Co. where, in a suit for royalties by the patentee, the licensee was held not estopped to show invalidity of the patent since the license

132. See 53 YALE L.J. 579, 582 (1944).
134. 333 U.S. 364 (1948). Justice Frankfurter excepted from this dictum as “deliberate” dictum which “should be deliberately avoided.” Id. at 402.
135. Id. at 388.
136. 53 YALE L.J. 579, 583 (1944).
137. E.g., Eskimo Pie Corp. v. National Ice Cream Co., 26 F.2d 901 (6th Cir. 1928), aff’g 20 F.2d 1003 (W.D. Ky. 1927).
140. 317 U.S. 173 (1942).
had a price-fixing provision which, if the patent was invalid, would conflict with the Sherman Act.

Although the FTC has statutory power to request cancellation of trademarks,\(^{141}\) it has no similar powers to cancel patents. Indeed, it is probably precluded from such acts by statute and by dictum in the first \textit{Bell} case stating: "The only authority competent to set a patent aside, or to annul it, or to correct it, for any reason whatever, is vested in the judicial department of the government, and this can only be effected by proper proceedings taken in the courts of the United States."\(^{142}\)

\textit{Validity Determinations}

In \textit{Pfizer} the companies asserted that Section 1338 of the Judiciary Act\(^{143}\) prevented the Commission from exercising its jurisdiction, and that the Commission was precluded from passing on the validity of the patent because this would be an unauthorized review of another agency’s determinations. Pfizer’s position was that since Congress has expressly given federal courts original jurisdiction over civil actions arising under any act of Congress relating to patents, Congress has by implication given federal courts exclusive jurisdiction vis-à-vis all other tribunals, including the FTC. Pfizer also relied on a statement by the court in \textit{Charles Pfizer & Co. v. Columbia Pharmaceutical Corp.}\(^{144}\) that "[t]he Federal Trade Commission has neither the right nor the power to pass on the patent’s validity."

The assertion that the Commission has no right to "second-guess" the patent examiner perhaps has some basis in law. In \textit{Decker v. FTC}\(^{145}\) the Court of Appeals for the District of Columbia Circuit held that statements used in advertising the invention, although also made in the patent application to show utility, were not necessarily passed upon by the patent examiner, and that the FTC was not reviewing the Patent Office’s judgment when ordering the respondent to cease and desist from making such statements. The dissent, however, felt that the FTC was substituting its judgment for that of the examiner and, since no fraud was involved, was overstepping its jurisdiction. The reasoning of this case seems to be consistent with the holding in the second \textit{Bell} case that where all the facts were before the Patent Commissioner his determination of its validity would estop the government from asserting its invalidity in a suit for cancella-

\(^{144}\) 142 U.S.P.Q. 493, 494 (E.D.N.Y. 1964). This was an infringement suit brought by Pfizer under its tetracycline patent. The court denied the defendant’s motion for a stay of the infringement suit pending a final determination of the review of the proceeding brought by the Commission.
tion. But where fraud has been committed, or new evidence of prior art is uncovered, there remains the question of whether the Commission may attack the validity of the patent when it is asserted as a defense to an antitrust violation.

In *Pfizer* the Commission argued that Section 1338 of Title 28 was passed before the creation of the FTC and thus was not intended to preclude it from asserting jurisdiction over questions involving conduct in the Patent Office. It also argued that this statute does not prevent a state court from determining the validity of a patent when it is collaterally attacked.\(^{146}\) As the court stated in *Cyanamid*, "[i]t is not accurate to accuse the Commission of 'second-guessing' the Patent Office. The Commission had before it evidence which it found to have been withheld from the Patent Office and passed upon a situation which the Patent Office never knew existed."\(^{147}\) The Commission also pointed out in its first order that it was not determining the validity\(^ {148}\) of the patent, but that Pfizer was estopped from enforcing it because of its inequitable conduct in securing the patent accompanied by its subsequent price fixing.

The problem of whether the Commission may question the validity of a patent is of understandable concern to the FTC because of the failure of the Justice Department to undertake cancellation proceedings\(^ {149}\) and the great temptation to accept licenses rather than to test the patent's validity in infringement suits.\(^ {150}\) Although the receipt of an invalid patent would probably not be a per se Section 5 violation, it might be when it thwarts competition. Whether the courts will allow the Commission to enter into such an area will probably involve a balancing of the conflicting interests involved. On the one hand there is a "public interest in granting patent monopolies only when the progress of the useful arts and of science will be furthered because as the consideration for its grant the public . . . has been imposed upon and the patent clause subverted."\(^ {151}\) On the other hand the public policy of having disclosure of inventions may be subverted by the potential harassment of costly litigation.\(^ {152}\)


\(^{147}\) *American Cyanamid Co. v. FTC*, 363 F.2d 757, 771 (6th Cir. 1966).

\(^{148}\) *Id.* at 762, 769. The Commission reversed the position of the hearing examiner who believed that the validity of the tetracycline patent was a question to be determined.

\(^{149}\) Since the decision in the first *Bell* case the Justice Department has brought actions to cancel a patent for fraud only three times. *Cullen & Vickers, supra* note 125, at 116.

\(^{150}\) This was the case in *Pfizer*, where Upjohn, Bristol-Meyers, and Squibb preferred to receive a license rather than challenge the patent's validity.


Grant-Backs

Another form of remedy which is sanctioned by the courts is the striking of "grant-back" covenants in license agreements. The legality of grant-backs has rarely been discussed in antitrust cases; instead, their utilization has been considered most frequently in connection with remedial provisions in the decree. In some cases they have been eliminated in order to correct violations of Section 2 of the Sherman Act, while in other cases their termination has not been deemed necessary.

Because a grant-back amounts to a covenant by the licensee to give a similar return license on any patents he may have or obtain, it is apparent that in certain situations this may dull the licensee's incentive to invent. Thus, where the grant-back is by assignment or exclusive license, there is little incentive for the licensee to perform research if the fruits will be transferred to the licensor. For this reason the Antitrust Division of the Justice Department has announced its intention to seek a ruling that they are illegal per se. But it has been asserted that the "grant-back of a non-exclusive license may diffuse the benefits to all licensees and thus tend to encourage competitive use of the innovations." In any event, its use as a remedy for antitrust enforcement is established, and the discretion of the district court in most instances will prevail.

When patents are used to stifle competition it seems likely that any grant-back covenants would be vulnerable to attack by the FTC. Although in some instances the striking of the grant-back provision may result in a royalty-free license this is not done to penalize the party but to restore the incentive to do research and to compete.

Suggestions

Although a patent when issued contains only a statutory presumption of validity it is conclusive as against the Patent Office. This foreclosure of the

156. REPORT OF THE ATT'Y GEN., supra note 38, at 229.
157. In United States v. Aluminum Co. of America, 91 F. Supp. 333 (S.D.N.Y. 1950), grant-back clauses were stricken from Alcoa's patent licenses, even though they represented the only consideration received for the licenses, with the result that compulsory royalty-free licensing was, in effect, decreed.
159. Although an examiner is authorized by the Patent Office Rules of Practice, 37 C.F.R. § 1.56 (1960), to strike an application when fraud has been attempted, once issued the rule in McCormick Harvesting Mach. Co. v. Aultman & Co., 169 U.S. 606, 608, 612 (1898) applies:
agency most capable to deal with the determination of invalidity no doubt compounds the problems in this area. What is needed is an expeditious testing of the validity of patents by a body which is skilled in the area of patent law. In Great Britain the revocation proceeding and in Germany the nullity proceeding accomplish this result within the patent office after the grant of the patent.\textsuperscript{160} The advantage of this procedure is that it allows persons to come forward who are knowledgeable in the specific field in which the patent lies, and who may be aware of the fact that the invention was previously disclosed in some trade publication or textbook. Since the Patent Office examination ordinarily extends only to prior patents, the proceeding would carry the investigation to a far greater extent. If the opponent of the patent is successful in the revocation proceeding the patent becomes public property, or the scope of the claims in the patent is limited over the scope of the claims as originally granted.\textsuperscript{161}

What is also needed is more vigorous prosecution by the Attorney General to cancel patents procured by fraud or collusion in the Patent Office. Although this would involve questions of materiality of misrepresentations and, thus, a discussion of patent law, there may be antitrust questions,\textsuperscript{162} and the fact that fraud is a factor would make an unbiased tribunal such as the courts the preferred body to adjudicate the issue.

Without legislation to establish a revocation proceeding and with continued inaction by the Attorney General, the vacuum of enforcement can only be filled by the Federal Trade Commission's movement into this area. Although the Commission will be sailing into new waters, the far-reaching social and economic consequences of a patent give the public a paramount interest in its validity.\textsuperscript{163} Recognition of "FTC jurisdiction here compromises no consistently followed

It has been settled by repeated decisions of this Court that when a patent has received . . . the seal of the Patent Office, it has passed beyond the control and jurisdiction of that office, and is not subject to be revoked or canceled by the President, or any other officer of the Government.

\* \* \*

. . . [T]o attempt to cancel a patent upon an application for reissue when the first patent is considered invalid by the examiner would be to deprive the applicant of his property without due process of law, and would be in fact an invasion of the judicial branch of the government by the executive.

\textsuperscript{160} This differs from the interference proceeding in that the primary purpose of an interference is to ascertain the first and true inventor of the invention, and not its validity.


\textsuperscript{162} "[C]learly collusion among applicants to prevent prior art from coming to or being drawn to the Office's attention is an inequitable imposition on the Office and on the public. . . . In my view, such collusion to secure a monopoly grant runs afoul of the Sherman Act's prohibitions against conspiracies in restraint of trade—if not bad \textit{per se}, then such agreements are at least presumptively bad." United States v. Singer Mfg. Co., 374 U.S. 174, 200 (1963) (concurring opinion of Mr. Justice White).

policies of uniformity or expert application. Furthermore, the integrity of Patent Office judgments is not impugned by FTC jurisdiction since the Commission, even when dealing with patent law questions, will be doing so in the light of facts not known to the Office." It can be seen, therefore, that the Pfizer court merely continued the trend of broadening the FTC's powers in a situation where no other remedy existed.

Conclusion

The former view that the Commission is not a court is giving way to the theory that the agency's remedial powers should extend beyond a literal interpretation of the cease and desist power to allow it to issue an order that is "ample to deal with the evil at hand." This construction would allow the Commission the remedial powers which are available to the Attorney General in antitrust cases. Inasmuch as compulsory licensing on a reasonable royalty basis was approved by the court in Pfizer the availability of royalty-free licensing, where warranted, seems to be likely. Dedication of patents, being of a penal rather than remedial nature, goes too far and will probably not be used. The issue of whether the Commission has the power to determine the validity of a patent remains to be determined by the courts, but it appears unlikely that such an extreme alternative will be allowed.

The emergence of the FTC into the patent-antitrust area will no doubt gain impetus by the decision in Pfizer. The extent of this inroad may perhaps be foretold by Chairman Dixon's premonition: "you ain't seen nothing yet."  


The Catholic University of America

Member, National Conference of Law Reviews

Law Review

Volume XVIII  Spring 1969  Number 3

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