Fall 1967

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THE MISUSE DOCTRINE AND POST EXPIRATION—
DISCRIMINATORY—AND EXORBITANT
PATENT ROYALTIES

THE PATENT MISUSE DOCTRINE

In a series of cases the Supreme Court developed the doctrine of patent misuse which denies relief to patentees who attempt to extend the patent beyond the scope of the lawful grant. This doctrine originated in patent infringement cases, which are litigated in a court of equity, and follows the principle that equity will deny use of its powers to a wrongdoer. Besides providing an affirmative defense to infringement suits, the misuse doctrine has been extended to strip the patentee of his exemption under the antitrust laws. The economic concept of free competition is implemented by the antitrust laws which prohibits monopolies and monopolistic practices. However, the patent laws, by granting a patentee the right to exclude others from making, using or selling the invention, provide a lawful monopoly which is exempt from the prohibition of the antitrust laws. This exemption is a limited one and the Supreme Court has closely restricted the monopoly to the scope of the patent grant.

The misuse doctrine is applied as an equitable defense in patent law infringement cases and also as an antitrust law counterclaim for damages. To avoid confusion, it is important to distinguish between the two applications of the doctrine. The consequences of a violation of the antitrust laws are more severe than the sanctions under the patent laws for abuse of a patent. An infringement proceeding in which misuse is alleged does not always involve a question of antitrust law and a patentee can be denied the right to enforce his patent for

2. 1955 ATT'Y. GEN. NAT'L. COMM. ANTITRUST REP. 249.
3. Motion Pictures Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917). In this case, the Court enumerated the restrictions. First, the scope of every patent is limited to the invention described in the patent grant. Second, the only effect of the patent is that the patenttee receives the right to restrain others from manufacturing, using or selling the invention. Third, the public interest take precedence over the creation of private fortunes.
4. In a normal infringement suit, where the patentee is found to have misused his patent, he will be denied the right to sue for infringement or for royalties due until he has purged himself of the illegal activity. However, if the misuse reaches antitrust proportions, then the patentee will also be subject to a counterclaim for treble damages.
activity which falls short of an antitrust violation. However, when an antitrust violation is asserted as a defense or counterclaim to an infringement proceeding or to a claim for royalties, the defendant must meet the standards of proof required by the antitrust laws. Although not every misuse of the patent violates the antitrust laws, every use of the patent that violates the antitrust laws constitutes a misuse of the patent.

Because the patent misuse doctrine has been applied to a variety of activities, this note will be limited to the current developments in relation to patent royalty practices. More specifically, this note will survey the decisions dealing with post-expiration royalties, discriminatory royalty rates, and exorbitant royalty rates.

**Post Expiration Royalties**

For economic or technological reasons, a patentee may decide his patent can be exploited most advantageously by licensing others to make, use or sell the invention. The right to grant licenses is one of the most valuable elements of the patent grant. However, since this right is not unlimited, a patentee, entering into a license agreement providing for royalty payments which extend beyond the expiration date of the patent, may be guilty of misuse of the patent. Basically, there are two situations in which the validity of post-expiration royalties may be questioned. First, a post-expiration agreement may

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6. Brulotte v. Thys Co., 379 U.S. 29 (1964); Rocform Corp. v. Acitelli-Standard Concrete Wall, Inc. 367 F.2d 678 (6th Cir. 1966); McCullough Tool Co. v. Well Surveys, Inc. 343 F.2d 381 (10th Cir. 1965).


The simple grant of a patent license—like the simple assignment of a patent poses no antitrust problems. Indeed, the right to grant such licenses is one of the major elements of value in the patent itself. It has long been judicially recognized that limitations may be included in such licenses as to the nature and scope of the rights which the patentee grants under his patent. These limitations have as their basic purpose the description and the definition of the rights which are conferred on the licensee.
license the use of a single patent with the provision that royalty payments are to extend beyond the period of the lawful patent grant. Second, a patentee may license a package of patents at a non-diminishing royalty rate which is to continue until the expiration of the last patent. For purposes of clarity the first situation will be designated as a post-expiration royalty agreement and the second situation as a non-diminishing royalty agreement.

History

Dicta in two Supreme Court cases seem to indicate that a single patent post-expiration royalty agreement is illegal and a package license non-diminishing royalty rate agreement is legal. In Scott Paper Co. v. Marcus Mfg. Co., the Court in dicta said "any attempt" to extend the patent monopoly beyond its expiration date would be contrary to the policy and purpose of the patent laws. However, when presented with a package licensing situation in Automatic Radio Mfg. Co. v. Hazeltine Research Inc., where some of the patents involved had expired prior to the termination date for the payment of royalties, the Supreme Court upheld the royalty agreement. In this case, Hazeltine entered into a licensing agreement with Automatic Radio whereby the latter was to pay royalties for the use of 570 patents and 200 applications. Under the agreement, which was executed in September of 1942 for a term of ten years, Automatic Radio was to pay the royalty, based on a percentage of its sales, whether or not it used Hazeltine's patents. Automatic Radio refused to pay the royalties and Hazeltine sued for the royalties due. Automatic Radio defended on the ground that it was a misuse of the patent to require a licensee to pay


11. 326 U.S. 249 (1945). In this case the Court was presented with the question of whether or not the assignor of a patent is estopped by virtue of his assignment from defending a suit for infringement on the ground that the infringing device is that of an expired patent. The Court held that such an estoppel would violate the policy of the patent laws. The Court concluded by saying,

Hence any attempted reservation or continuation in the patentee. . . of the patent monopoly, after the patent expires, whatever the legal device employed, runs counter to the policy and purpose of the patent laws. . . .

It is thus apparent that the patent laws preclude the patentee of an expired patent. . . from recapturing any part of the former patent monopoly; for those laws dedicate to all the public the ideas and inventions embodied in an expired patent. They do not contemplate that anyone by contract or any form of private arrangement may withhold from the public the use of an invention for which the public has paid by its grant of a monopoly and which has been appropriated to the use of all. Id. at 256.

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royalties based on its sales, even though none of the patents are used. The Court upheld the agreement because it represented "the most convenient method of fixing the business value of the privileges granted by the licensing agreement." Arguably the dicta of the two cases conflicts because in the *Scott Paper* case the Court is condemning "any attempt" to extend royalty payments past the expiration of the patent but in *Hazeltine* the Court upholds non-diminishing royalty agreements because of business convenience or necessity.

In two cases the Third Circuit, in dicta, declared that both non-diminishing and post-expiration royalty agreements constitute a misuse of the patent grant. In *American Securit Co. v. Shatterproof Glass Corp.*, the court held that the patentee's refusal to grant a license under one or more of its patents unless a license was taken under all constituted a misuse of the patent monopoly. The court reasoned that this practice was unlawful coercion and similar to illegal tying arrangements. However, the court went much further and in dicta declared non-diminishing royalty rate agreements to be a misuse of the patent.

The post-expiration royalty problem was presented to the same court in *Ar-Tik Sys., Inc. v. Dairy Queen, Inc.* In this case, the patentee sued a sub-licensee for royalties due after the expiration of the patent. The licensing agreement contained a provision for the continuation of royalties "regardless of the expiration of the patent." The court declared post-expiration royalties to be a misuse of the patent because they are contrary to the purpose and policy of the patent laws. Therefore, the Third Circuit considers both non-diminishing and post-expiration royalty agreements to be a misuse of the patent.

To resolve the confusion, the Supreme Court granted a petition for certiorari to a patent licensee who had been held liable for royalties after some of the patents had expired. The Thys Company, a

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15. *Id.* at 777. The court said:

> We conclude also, and quite apart from all of the foregoing, that Paragraph 8(a) of Securit's Standard Licensing Agreement which provides that that agreement shall continue "in full force and effect to the expiration of the last to expire of any" of Securit's patents set out in "Schedule A" constitutes a patent misuse for it extends the payment of royalties of patents under patents which may expire to the expiration date of that patent most recently granted to Securit.

16. 302 F.2d 496 (3d Cir. 1962).
patentee who was engaged in the manufacture and sale of patented hop-picking machinery, sold machines to farmers and charged a yearly royalty for the use of the machine. The royalty payments were to be made over a period of seventeen years and were based on amount of use and production by the farmer. The patentee had twelve patents, seven of which were incorporated into the machine, and the agreement licensed farmers to use all twelve of the patents plus any patents pending on hop-picking devices. After the seven patents incorporated into the machine had expired, two of the farmer licensees refused to pay royalties. Thys Company sued to recover the royalties due. The Supreme Court, reversing a judgment of the Supreme Court of Washington, held that the agreement for the payment of royalties after the last patent incorporated into the machine had expired constituted a misuse of the patent.

The Court, basing its decision on public policy, held the arrangement was analogous to patent tying agreements. An agreement of this nature, the Court decided, runs contrary to the policy and purpose of the patent laws because it would subject "the free market visualized for the post-expiration period... to monopoly influences that have no proper place there." The Court distinguished the Hazeltine case because not all of the patents had expired in that case, while in the present case all of the patents incorporated into the machine had expired prior to the termination date for the payment of royalties. Thus, the Court declined to extend Hazeltine to the point of extending the lawful patent monopoly beyond the term of any of the patents in a package.

19. All but one of the patents were scheduled to expire prior to the termination of the agreement. Although the record is not clear as to whether or not the five patents not incorporated into the machine were of any value to the farmers, it is clear that all pertained to hop-picking. See Brief for Petitioners at 6, Brulotte v. Thys Co. 379 U.S. 29 (1964).

20. Id. at 33.

A patent empowers the owner to exact royalties as high as he can negotiate with the leverage of that monopoly. But to use that leverage to project those royalty payments beyond the life of the patent is analogous to an effort to enlarge the monopoly of the patent by tying the sale or use of the patented article to the United States, 309 U.S. 436; Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661, 664-665 and cases cited.

21. Id. at 32.

22. Id. at 33. The Court said:
Automatic Radio Co. v. Hazeltine, 339 U.S. 827, is not in point. While some of the patents under the license apparently had expired, the royalties claimed were not for a period when all of them had expired.

23. The Court's reliance on Scott Paper while attempting to uphold the validity of Hazeltine seems to be inconsistent. In Scott Paper the Court proscribes "any" device to extend the patent monopoly. In Hazeltine the Court approves extension of the patent in a package licensing situation where not all of the patents have expired. This inconsistency seems to be the real root of the conflict in the circuit courts over the extent
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The Court's attempt to distinguish Hazeltine because not "all" of the patents had expired in that case seems tenuous since not all of the patents had expired in Brulotte. The possibility exists that the court did much more than merely distinguish Hazeltine; it may have placed a severe limitation upon it. Although it is subject to contrary interpretation, footnote five (5) of the Court's opinion indicates that the Court may be willing to prohibit extension of royalty payments beyond the expiration of any of the patents. However, if the Court really wanted to limit Hazeltine, it is difficult to understand why it did not seize the opportunity to decide the non-diminishing royalty question since it was at least technically before the Court.

Post-Brulotte

Predictions were made that the Brulotte decision would be of limited significance and would only be applied in a similar factual situation of this unusual nature. However, a conflict, as to the effect of Brulotte, has arisen between the Tenth and Sixth Circuits. The Tenth Circuit held that it is not illegal to charge a non-diminishing royalty rate for a package of patents even though some patents will expire prior to the termination of the license agreement. In McCullough Tool Co. v. Well Surveys, Inc. (WSI), questions of
validity, infringement, and misuse of patents relating to a method of logging oil wells were presented. WSI charged its licensees a flat percentage of the receipts of the operations whether or not the patents, some of which had expired and others of which would expire during the life of the agreement, were used. When WSI filed suit against McCullough for infringement of its patents, McCullough, in addition to other defenses, asserted that WSI had misused its patents by collecting royalties on expired patents.

Relying on its determination of a factual similarity with Hazel- tine, the Tenth Circuit denied the defense of misuse of patents in a non-diminishing royalty agreement.29 The court believed that Hazel- tine was the leading case upholding the validity of a voluntary package license agreement in which some of the patents expire during the life of the agreement and was controlling. The decision in this case had been held in abeyance pending the Supreme Court's decision in Brulotte. However, the Tenth Circuit distinguished Brulotte because in the case at bar not all of the patents had expired, while in Brulotte the license agreement had attempted to extend the period for paying royalties beyond the expiration of the last patent incorporated into the machine. Therefore this court interpreted Brulotte as upholding the validity of non-diminishing royalties in a package license situation.30

the holding of misuse. However the court went much further and made the following broad statement:

A package license agreement which provides that that agreement shall con- tinue in full force and effect until the expiration date of the last patent to expire under which the patent is granted, constitutes patent misuse because it extends the payment of royalties under patents which will expire to the expiration date of the patents which will expire later. Id. at ¶ 84,272. Based on the law as it exists at present, so broad a statement can hardly be valid. It would seem clearly to apply to mandatory non-diminishing royalty agreements. However, the statement would be invalid if applied to voluntary non-diminishing royalty agreements. See discussion notes 35-39 infra.

29. McCullough Tool Co. v. Well Surveys, Inc., 343 F.2d 381, 409 (10th Cir. 1965), cert. denied, 383 U.S. 933 (1966). The court in discussing the package license situation said:

The validity of such an agreement was upheld by the Supreme Court in Automatic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U.S. 827, ... . The facts in that case are almost identical with the facts in this case. There, as here, the license agreements offered by the patentee were of the so called package type and included all of its present and future patents. The package licenses were offered for a flat percentage of the licensee's operations whether or not any of the patents were used. Then, as here, some but not all of the patents had expired before the license agreement in question was executed and more of them would expire during the effective period of the agreement.

30. Id. at 410. The court distinguished Brulotte because "... the license agreement under consideration attempted to extend the period for paying royalties beyond the date of the expiration of the last of the patents covered by the agreement. That is not the case here or in Hazel- tine." The specific language of Brulotte would seem to justify the Tenth Circuit's interpretation. In Brulotte, the Court distinguished Hazel- tine because "[w]hile some of the patents under that license apparently had expired, the royalties
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The Sixth Circuit applied *Brulotte* to condemn a multi-patent license for lack of royalty reduction when the most important patent expired. This court, in *Rocform Corp. v. Acitelli Standard Concrete Wall, Inc.*, placed a different interpretation upon the extent of the holding in *Brulotte* and held that a license agreement which had the effect of extending royalty payments for a patent which was about to expire by grouping it with others was illegal. Rocform Corporation, which held a patent on a "Prefabricated Wall Form" and other patents relating to the process of pouring concrete basement walls, grouped all of its patents into one package and licensed them as the "Rocform System." Although the crucial patent was about to expire, the other patents were of longer duration.

The Rocform Corporation argued that this arrangement was legal because *Brulotte* upheld the validity of an arrangement where royalties were continued until the last necessary patent had expired. The Sixth Circuit regarded this contention as too broad and distinguished *Brulotte* because in the present case the patents were not incorporated into a machine and the most important patent had been grouped with others for "leverage." The court's attempt to distinguish the two cases because the patents were not incorporated into a machine seems tenuous. The patents in the *Rocform* case were incorporated into the "Rocform System." Practically there appears to be no difference between incorporating patents into a machine and incorporating them into a system. A package license is involved in both situations and it would seem to make little difference whether the combination is called a "system" or a "machine." Whether it is a machine or a system, the end result is one item composed of various patents which contribute to the overall success of the operation.

The Sixth Circuit's attempt to distinguish the *Rocform* situation from *Brulotte*, because the most important patent had been grouped with others for "leverage," ignores the Supreme Court's approval of using the leverage of a patent to exact royalties as high as the patentee claimed were not for a period when all of them had expired." *Brulotte v. Thys Co.*, 379 U.S. 29, 33 (1964).


32. *Id.*

33. *Id.* at 681.

We believe this is too broad a contention. We do not deal here (as did the Supreme Court in *Brulotte v. Thys Co.*, supra) with the sale of a piece of machinery which incorporated a number of patents. Rather we deal with a licensing arrangement where one important patent (about to expire) is grouped with others of longer duration for "leverage."
can negotiate. Also, this court misinterpreted the Supreme Court's analogy to tying arrangements. By interpreting this analogy as applying to a voluntary package license situation, the Sixth Circuit ignores the Supreme Court's approval of voluntary package licensing. The Sixth Circuit may have failed to recognize the Supreme Court's previous distinction between mandatory package licensing and voluntary package licensing. Patent tying arrangements are illegal because they are an attempt to restrain competition by extending the lawful patent monopoly to an unpatented article. A mandatory package situation is very analogous because the patentee is refusing to license one patent unless the licensee accepts patents of less value; thus he is attempting to use a strong patent to restrain competition in a weak patent area. The Court said that "[t]he patent monopoly of one invention may no more be enlarged for the exploitation of a monopoly


A patent empowers the owner to exact royalties as high as he can negotiate with the leverage of that monopoly. But to use that leverage to project those royalty payments beyond the life of the patent is analogous to an effort to enlarge the monopoly of the patent by tying the sale or use of the patented article to the purchase or use of unpatented ones.

35. In the Rocform case, the court did not make a decision as to whether this was a voluntary package license agreement or coercive mandatory package licensing. Since the court based its finding of misuse on an attempt to illegally extend the patent, it appears there was insufficient evidence as to the element of coercion. The appellant (Rocform Corporation) contended that the license agreement was a mandatory packaging agreement for interlocking patents related to producing one product and hence valid. If the agreement was a mandatory package agreement for interlocking patents, it would be treated the same as a voluntary package license agreement.


The Court proceeded on the assumption that this was a voluntary package licensing arrangement. Although Automatic Radio had asserted this was a mandatory package licensing arrangement, it did not press the point on appeal and there was nothing available in the record to support the assertion. However, it appears obvious that Hazeltine was actually engaged in the illegal practice of mandatory package licensing.

Justice Douglas who alluded to this fact in his dissent, appears to have appraised realistically the actual factual setting.

37. Package licensing is the practice of tying in a license under one patent with the grant of a license under one or more other patents. Mandatory package licensing, which is a misuse of the patent monopoly, is a refusal to license a single patent unless the licensee accepts the whole package at package rates. For an example of mandatory package licensing, see American Securit Co. v. Shatterproof Glass Corp., 268 F.2d 769 (3d Cir. 1959), cert. denied, 361 U.S. 902 (1959); Hazeltine Research, Inc., v. Zenith Radio Corp., 239 F. Supp. 51 (N.D. Ill. 1965). For a complete discussion of mandatory package licensing see Comment, Post Expiration Royalty Payments and Mandatory Package Licensing as Patent Misuses, 11 Vill. L. Rev. 382 (1966). Voluntary package licensing exists when a patentee will grant one, or all, or any number of his patents at different rates. See Automatic Radio Mfg. Co. v. Hazeltine Research, Inc 399 U.S. 827 (1950).

for another, . . . than for the exploitation of an unpatented article, . . . ." There was no evidence in the *Rocform* case to indicate that the patentee would have refused to grant a license for the patent in suit as a separate item and at a royalty rate which was different from the rate charged for the entire package. Therefore, the element of coercion is lacking because the licensee had the choice of accepting a license under one or all of the patents.

The dissenter in *Rocform* thought the majority had erroneously assumed that some part of the license fee, after expiration of the main patent, must necessarily be attributed to the expired patent. The dissent's argument seems to be consistent with the voluntary package licensing cases which do not assume that part of the license fee must be attributed to the expired patents. Relying on *McCullough* and the language of *Brulotte*, the dissent argued there was no misuse of the patent unless the license agreement extended beyond the last of the patents to expire.

There appears to be no justification for distinguishing between post-expiration and non-diminishing royalty agreements. Post-expiration royalties are an illegal attempt to control that which is not protected by the patent laws. These arrangements run contrary to the purpose and policy of the patent laws. One purpose of the patent laws is to encourage invention by guaranteeing the inventor that he will be justly rewarded for his contributions to society. Another purpose is to facilitate release of inventions into the public domain. Established public policy requires that public benefit take precedence over reward to the inventor. Since the effect of both mandatory and voluntary non-diminishing royalty agreements is also to control that which is not protected by the patent laws, these agreements should likewise be illegal.

Voluntary non-diminishing royalty agreements have been held valid because of business convenience or necessity. The patentees argue that when a large number of patents are involved it is impossible to make a continuing adjustment in license rates as various patents expire and new patents are added to the package. However, with the

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41. *Brulotte* v. Thys Co., 379 U.S. 29, 32 (1964). The Court said: . . . we conclude that a patentee's use of a royalty agreement that projects beyond the expiration date of the patent is unlawful per se. If that device were available to patentees, the free market visualized for the post-expiration period would be subject to monopoly influences that have no proper place there.
availability of modern methods of accounting, it is difficult to understand why courts continue to accept this argument. There is no reason to assume that patentees cannot assign a value to each patent and arrange a decreasing royalty on the basis of this value.

The possibility exists that a distinction should be made between licensing consumers and licensing manufacturers to incorporate the patents in their manufactured products. Justice Harlan attempted to make this distinction in his dissent to the Brulotte opinion.\textsuperscript{44} He expressed the opinion that free use would not be restricted when consumers entered into post-expiration agreements with the licensee because there would be no substantial restriction on the use of the idea by other manufacturers. However, post-expiration licensing agreements between patentees and manufacturers should be invalid because the agreement would "restrict the manufacturer's exploitation of the idea after it falls into the public domain." When the royalty agreement between the patentee and the consumer licensee is based solely on use, the distinction between consumers and manufacturers appears to be valid. Upon expiration of the patent, the consumer licensee would be free to discontinue use of the patent and buy from another manufacturer. However, exploitation of the patented idea after it entered the public domain was restricted in Brulotte since the agreement provided for the payment of a minimum royalty regardless of use.\textsuperscript{45} Since the licensees were obligated to continue paying the original patentee, they would be reluctant to increase costs by buying from another manufacturer. Thus, the use of the idea would be restricted after the patent had entered the public domain. Justice Harlan based his dissent on the proposition that the agreement between the Thys Company and the farmers was nothing more than a long term installment contract. Therefore, post-expiration royalty agreements between patentees and consumer licensees should be valid only if they are based solely on use since the effect then is the same as a long term installment contract.

\textbf{DISCRIMINATORY ROYALTY RATES}

Historically it has been a principle of patent law that a patentee may charge as high a royalty as he can negotiate for his patent. But today a patentee, who charges a higher royalty rate to one licensee than he charges other licensees, may find he has misused his patent and violated the antitrust laws. Discriminatory royalty rates have

\textsuperscript{44} Brulotte v. Thys Co., 379 U.S. 29, 34 (1964) (dissenting opinion).
\textsuperscript{45} Id. at 29. "Under that license there is payable a minimum royalty of $500 for each hop-picking season or $3.33\% per 200 pounds of dried hops harvested by the machine, whichever is greater."
recently been held to violate the Sherman Act when the practice is pursuant to an unlawful combination or conspiracy in restraint of trade or an unlawful attempt to monopolize trade and may also be condemned as an unfair method of competition under section 5 of the Federal Trade Commission Act.\(^46\) There has been a flurry of judicial activity resulting from royalty rate discrimination in the shrimp-peeling and canning industry.\(^47\) The discussion will be limited to the judicial activity arising from this factual situation.

**Factual Background**

The Peelers Company\(^48\) is engaged in the business of manufacturing, leasing, and selling patented shrimp-peeling and processing machinery. The ownership and control of the Peelers Company is essentially the same as that of Grand Caillou Packing Company which is engaged in the business of canning shrimp and other seafood products. The patent on the shrimp-peeling machinery was first issued in 1947 and the machines were constructed in sufficient volume for use in the Grand Caillou plant. The machinery was first offered on the market in 1949. Prior to the invention, the canning of raw shrimp had been limited entirely to the Louisiana and Gulf Coast areas and shrimp-peeling was done by hand labor. The shrimp on the Gulf Coast area were of a larger variety than on the Pacific Coast, the other source of supply, with resultant economy in the labor cost of peeling by hand.

In order to determine the basis for a royalty charge, Peelers Company engaged an expert in "shrimp analysis and production" to compare the relative costs of peeling shrimp by hand and by machine. On the basis of this analysis a rental charge of fifty five cents per unit increase, that is per 100 cycles of the machine, was determined as the proper royalty to afford a reasonable return to the patentee and

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46. LaPeyre v. FTC, 366 F.2d 117 5th Cir. 1966).
48. Although the same patentee is involved in the cases which follow, the name changes as the result of changes of business form. For purposes of clarity the patentee will be designated as the Peelers Company. See Laitram Corp. v. King Crab, Inc., 244 F. Supp. 9, 11 (D. Alas.), modified, 245 F. Supp. 1019 (D. Alas. 1965).

The plaintiff Laitram Corporation is a corporation organized under the laws of the State of Louisiana with its principal place of business in New Orleans. It is the successor to the Peelers Company, a partnership in commendam. . . . The Peelers Company was a successor in interest to Peelers, Inc., a Louisiana corporation. . . .

Ownership and control of these organizations has always been vested in some six individual members of the LaPeyre family. . . . These same individuals have also retained ownership and control of. . . Grand Caillou Packing Company. . . .
a substantial saving to lessees of the machines. The success of the machines was immediate and it became necessary for canners to use machines in order to compete in the industry.

In the early 1950's, it was discovered that shrimp canning on the Northwest Coast was commercially feasible and the Peelers' machinery could be adapted for use on the smaller species of shrimp. In 1956, Peelers entered into negotiations with canneries in Washington, Oregon, and Alaska to lease machines at a royalty rate of one dollar and ten cents per unit increase. The rate charged the Northwest canners was based on the same labor cost saving analysis as was applied to the Gulf Coast canners. Because the Northwest shrimp were a smaller species and since it took the same amount of hand labor to peel one small shrimp as it did to peel one large Gulf Coast Shrimp, the new machine saved the Northwest canners at least twice the labor cost per unit weight of shrimp.49

_Laitram Corp. v. King Crab, Inc._50

The Laitram Corporation51 brought an action for infringement of its patented shrimp-peeling machinery. King Crab defended on the grounds that the plaintiff had misused its patent and violated the antitrust laws by charging the Northwest canners royalty rates double the amount charged to the Gulf Coast canners. The plaintiff argued the double rate was proper because a patentee is not required to license and the rate was inconsistent with the benefits bestowed upon the licensee. In essence, the Laitram Corporation was arguing that its rates were proportionate to the labor saved and that nature, not the plaintiff, had created the competitive disadvantage.

In its first opinion,52 the court held the discriminatory rates constituted a misuse of the patent monopoly and violated the antitrust laws.53 However, in its subsequent modified opinion, the court decided

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49. _Id._ at 16.

The evidence also disclosed that consideration was not given in fixing such double rate to what is known as the "yield" of shrimp in the canneries, that is, the amount of canned shrimp which would be produced from 100% of raw head-on penaeid shrimp, which was found to be 33%, and the amount of canned shrimp produced from 100% of raw head-on penaeid shrimp, which was found to be from 11% to 17%.

50. _Id._

51. See note 48 for the relationship between Laitram Corporation and Peelers Company.


53. To support its holding of a violation of the antitrust laws, the court relied on _United States v. United Shoe Mach. Corp._, 110 F. Supp. 295 (D. Mass. 1953), _aff'd_, 347 U.S. 521 (1954). In this case the court held that price discrimination in the leasing of shoe manufacturing machines which aided in monopolization or an attempt to
there was no evidence of an antitrust violation but that an antitrust violation was not necessary for a determination of misuse of the patent. Therefore, the court decided that Laitram had misused the shrimp-peeling machine patent but the misuse was not so great as to warrant finding an antitrust violation.

In this case the court seemed to be applying antitrust principles to a patent case. The holding of misuse was based on the broad proposition that any use of the patent monopoly which restrains or injures competition is not justified by the patent grant. But so general a principle can hardly be valid because the very nature of the patent grant is anti-competitive. When the use of a patent restrains competition, this restraint does not constitute a misuse unless the restraint is outside the restraint of trade permitted by the patent laws. Since the Federal Trade Commission, in a proceeding before it on these same facts, had already found a violation of section 5 of the Federal Trade Commission Act the court would seem to be justified in holding the patent had been misused. Because the court held that evidence of an antitrust violation is not necessary to a finding of misuse, it did not pass on the question of whether or not an antitrust violation had occurred. Apparently the misuse was based on the finding of a restraint of competition which did not reach antitrust proportions. This reasoning would be clearly erroneous because carried to its logical conclusion it would greatly impair the benefits of a patent. Any time a patentee exercises his right to exclude, he is

monopolize trade or commerce was not justified by the patent laws, but in effect violated § 2 of the Sherman Act. However, in its subsequent modified opinion, the court in Laitram distinguished United Shoe because restraint of competition in the sale and leasing of machines was different from restraint of competition on the product from use of the machines. See Laitram v. King Crab, Inc., 245 F. Supp. 1019, 1021 (D. Alas.), modifying, 244 F. Supp. 9 (D. Alas. 1965). The court said:

Moreover, the patent misuse in the United Shoe Machinery Corp. case was found by the court to be with relation to leases of its machinery. In the case at bar there was no evidence with respect to restricting competition of plaintiff's peeling machines, but rather the effect of such price discrimination upon the product of such machines, being canned shrimp.

It is held by the United States Supreme Court in the case of Morton Salt that the use of a patent monopoly to restrain competition... is not within the monopoly granted by the patent and is contrary to the public policy of the United States...

Later the court quoted from Commissioner Elman's concurring opinion in Grand Caillou... refusal to treat the Northwest and Gulf coast shrimp canners on equal terms is an abuse of monopoly power in that plaintiff has "substantially and unjustifiably injured competition in the shrimp canning industry." Id. at 17.

See discussion notes 57-61 infra.

restraining competition to some degree because others in the industry are prevented from competing with him.

_LaPeyre v. FTC_57

In the _Grand Caillou_ case,58 the F.T.C. issued a cease and desist order against Peelers because discriminatory rates were an "unfair method of competition", violating section 5 of the Federal Trade Commission Act.59 Writing for the majority, Commissioner MacIntyre said that there were two species of unlawful activity—"[a]cts performed to gain, maintain, and extend a patent based monopoly and acts constituting an abuse of monopoly power."60 The majority felt the real reason for the discriminatory rate "was to protect and foster their own interests as shrimp canners by inhibiting the shrimp canners packing the... shrimp of the Northwest."61

For the Commission to hold that a patentee who uses his patent monopoly to protect his own interest has abused his monopoly power, is clearly inconsistent with the rights inherent in the patent grant. The patent grants the patentee the exclusive right to make, use or sell his invention. It would seem that the patentee's attempt to protect his own interest would be inherent in the right to exclude. One of the purposes of the patent laws is to encourage invention by protecting the patentee's interest in the patent for the period of the patent grant. Giving the patentee the right to exclude guarantees the successful implementation of this purpose.62

In _LaPeyre v. FTC_,63 the Fifth Circuit upheld the F.T.C. cease and desist order because there was sufficient evidence to show that the discriminatory rates had the tendency to hinder competition unduly and because a lawful monopolist has a duty to avoid inflicting competitive injury on a class of customers.64 The court's holding pertaining to the competitive injury on competition seems to be inconsistent with the natural effect of the patent grant. Whenever a patentee exercises his right to exclude, there is always the possibility that competition may

57. 366 F.2d 117 (5th Cir. 1966).
61. Id.
62. The _LaPeyre_ case involved more than simple exclusion. The patentee was also licensing the use of the patent. However see discussion notes 64-65 _infra_ which equates exclusion and royalty rates.
63. 366 F.2d 117 (5th Cir. 1966).
64. _Id._ at 120. The court said:

Conceptually, then, the problem of this case is not one of Robinson-Patman-type discrimination, but the duty of a lawful monopolist to conduct its business in such a way as to avoid inflicting competitive injury on a class of customers.
be hindered and thereby injured. Therefore, carried to its logical conclusion, the competitive injury argument, if it is construed as broadly as the words appear to justify, would seem to place a severe restriction upon the rights of a patentee.

For various economic or technological reasons, a patentee may decide to license others to manufacture or use his patent. Absent a conspiracy to restrain competition, the courts have been unwilling to prohibit a patentee from granting a license to one manufacturer or part of an industry because there is nothing in the patent grant which requires a patentee to grant a license to all who request it. Conceivably, there is no logical distinction between discriminatory rates and discriminatory licensing because the ultimate effect of both is to hinder competition to some degree. Whenever a patentee licenses only one or a few manufacturers in an industry, the unlicensed manufacturers will be placed at a competitive disadvantage as to the particular patent in question. The same competitive disadvantage exists when a patentee licenses some manufacturers at higher rates than others.

There appears to be no justification for the Fifth Circuit's holding that a lawful monopolist has the duty to avoid inflicting competitive injury on a class of customers. The court failed to explain why a patentee has this duty. The court may have been attempting to apply Robinson-Patman Act standards to discriminatory lease rates. However, section 2(a) of the Clayton Act applies only to "sales" of "commodities." A patent license is not a sale of a commodity; it is an agreement not to sue for practice of the patent.

The F.T.C. held conflicting views as to the motive for the difference in rates. The majority said the petitioners were trying to protect their own interests as shrimp canners (Grand Caillou) from the competition of the Northwest canners. Commissioner Elman was of the opinion the petitioners were simply attempting to maximize their profits and charging what the market would bear. The Fifth Circuit felt it was unnecessary to resolve these contrary findings as to motive. However, in this particular situation it would seem that motive would be of some practical importance and that Commissioner Elman's view of the motive was correct. If petitioner's desire was to protect Grand Caillou from competition, then surely it would have refused to license any other canner. Such a course of action could have resulted in


Sec. 2(a) That it shall be unlawful for any person engaged in commerce...

to discriminate in price between different purchasers of commodities of like grade and quality. . . .

66. LaPeyre v. FTC, 366 F.2d 117 (5th Cir. 1966).
Grand Caillou's being the only shrimp canner in the United States for the seventeen year period of the patent grant. Thus, the fact that Grand Caillou licensed others indicates it was interested in maximizing profits and not in restraining competition. The fact that the patentee initiated the agreements with the Northwest canners would seem to indicate a willingness to increase rather than decrease competition because prior to the invention of the machines shrimp canning in the Northwest was not commercially feasible.

*Peelers Co. v. Wendt*

The *Peelers Co.* case involved eleven claims for treble damages which were all based on alleged violations of the Sherman Act. The jury found the defendant (Peelers Company) had violated section 2 of the Sherman Act by single firm monopolization in excess of the patent monopoly. Because the factual setting and parties were identical, two actions were joined in a single trial—leading to the *Peelers* opinion. The first action was a suit tried by a jury for violation of the Sherman Act and involved the question of treble damages. The second action was an infringement suit by Peelers Company against the defendants for infringing the patented shrimp-peeling machinery. The defendants charged patent misuse, and the parties stipulated a non-jury determination of the misuse question.

In the first case the district court said that since the same facts had been found by the F.T.C. in *LaPeyre*, the jury could properly have found that the following facts were proved by a preponderance of the evidence:

(1) the defendants had no reasonable business necessity or

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67. *Id.* at 119.

68. *Id.*

69. *Id.* In this case the court said, "Prior to the availability of petitioners' shrimp peeling machinery in 1949, the domestic canners, who were then all located in the Southern part of the United States, utilized hand labor for peeling shrimp." See also Laitram Corp. v. King Crab, Inc., 244 F. Supp. 9, 11 (D. Alas.), modified, 245 F. Supp. 1019 (D. Alas. 1965). In this case the court said, "[p]reviously [sic] to this invention shrimp canning of raw shrimp had been confined entirely to the Louisiana and Gulf Coast areas, canning a variety of shrimp."


71. This part of the case will not be discussed because the court held Peelers to be estopped to deny misuse since misuse had been determined in the Laitram case. For a discussion of the validity of this holding of misuse, see the previous analysis notes 50-57 supra.
justification for imposing unequal lease rates for the use of their machinery; (2) in all particulars relevant to equal rates claimants and their competitors were similarly situated; (3) the lease rates were an important expense factor in the production costs of claimants and their competitors; and (4) the rates imposed by defendants were unequal and caused substantial impairment of competition by claimants in the sale of food processed on defendants' machinery.  

On the basis of these facts, the jury could reasonably reach the conclusion that the defendant had unlawfully exceeded its patent monopoly in violation of section 2 of the Sherman Act.

In its instructions to the jury, the court made it clear that royalty rate discrimination in itself would not be sufficient for a violation of the Sherman Act; there must also be an unreasonable impairment or suppression of competition. To negate this requirement, the defendant argued that the relevant market was the shrimp processing machinery market. However, since the leasing rates charged by the defendant caused the impairment or suppression of competition in the shrimp canning industry, the court held the relevant market to be the canned shrimp market. The court reached its decision on the relevant market by reasoning that the Sherman Act does not confine itself to a certain class of customers but is designed to protect all who are made victims of the unlawful conduct.

In any complicated case where a jury is involved it may not be possible to find the motivation behind the jury's decision. In this case the court made it quite clear to the jury they were to relate all of the instructions to each other. However, it does appear that some of the instructions to the jury could have been misleading. The jury was instructed that the Sherman Act prohibits monopolizing in excess of the lawful patent monopoly and monopolizing was defined as the "power to exclude competitors." If by this instruction the court meant to say the exercise of power to exclude is necessarily in excess of the patent monopoly, this instruction would be contrary to what the Constitution

72. Peelers Co. v. Wendt, 260 F. Supp. 193, 197 (W.D. Wash. 1966). The court used the LaPeyre case only to show that the jury's findings were not clearly erroneous and could reasonably be supported by the evidence.
73. Id. at 193.
74. Id. at 196. Monopolizing was defined in the jury instructions as follows:

"Monopolizing is the acquisition or retention of power to control prices, or to exclude competitors in interstate commerce in commodities sold or distributed in the same market. The power to monopolize does not necessarily require that entire control of pricing or competition be acquired of the market in a particular commodity. The Sherman Act prohibits the monopolizing, in excess of lawful patent monopoly, of any part of the market for any product in interstate trade or commerce."
and patent laws expressly give to a patentee.\textsuperscript{75} Congress provided that "[e]very patent shall contain... a grant to the patentee... for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery..."\textsuperscript{76} It seems illogical to say that, although a patentee has the power to exclude, his exercise of this power constitutes a violation of the Sherman Act.\textsuperscript{77}

The court correctly instructed the jury that recovery could not be based merely on a finding of discriminatory rates—that an essential element of recovery was proof of an unreasonable impairment or suppression of competition. But it is in this area that the real problem exists. The previous cases\textsuperscript{78} involving the shrimp-peeling machine patents said the discriminatory lease rates caused the impairment of competition. But this seems to be the result of a misinterpretation of the facts and of the rights and obligations of a patentee. The facts of this case disclose that prior to the invention shrimp canning in the Northwest was not commercially feasible and, in fact, it was only the invention that made shrimp canning in this area a possibility.\textsuperscript{79} The question then becomes one of whether or not a patentee has an obligation to use his patent to create a competitive situation. By saying a patent owner has the duty to conduct his business in such a manner as to avoid inflicting competitive injury on a class of customers does not mean a patent owner has the duty to create a competitive condition where a non-competitive situation already exists.

The jury had the opportunity to find Peelers in violation of section 1 of the Sherman Act for an unlawful combination or conspiracy in restraint of trade.\textsuperscript{80} It would seem that this would have

\begin{itemize}
\item \textsuperscript{75} U.S. Const. art. I, § 8. "The Congress shall have Power... to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries..."
\item \textsuperscript{76} 35 U.S.C. § 154 (1952).
\item \textsuperscript{77} Automatic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U.S. 827 (1950). See also 1955 ATT’Y. GEN. NAT'L. COMM. ANTITRUST REP. 226 where the Committee said: ... the sound rule that monopoly power individually acquired solely through a basic patent, or aggregation of patent grants should not by itself constitute monopolization in violation of Section 2 [of Sherman Act]. It would be paradox to encourage individual invention by grant of a patent and then penalize that temporary monopoly by deeming it “monopolization.”
\item \textsuperscript{78} LaPeyre v. FTC, 366 F.2d 117 (5th Cir. 1966); Laitram Corp. v. King Crab, Inc., 244 F. Supp. 9 (D. Alas.), modified, 245 F. Supp. 1019 (D. Alas. 1965).
\item \textsuperscript{79} See note 70 supra.
\item \textsuperscript{80} Peelers Co. v. Wendt, 260 F. Supp. 193, 195 (W.D. Wash. 1966).
\end{itemize}
THE MISUSE DOCTRINE

been the appropriate charge under which the patentee could have been found to have violated the Sherman Act. However, the jury did not find a violation of section 1; therefore, it seems proper to assume there was no evidence of a combination or conspiracy. As suggested above, it is rather difficult to justify a finding of monopolization in restraint of trade under section 2 of the Sherman Act. Conceivably this finding was based on misleading instructions and on a misunderstanding of the obligation imposed under the patent monopoly. The patent grant gives the patentee a lawful monopoly and, as pointed out previously, it would be illogical to grant the patentee the power to exclude and then hold the exercise of this power violates the antitrust laws.

The discriminatory royalty cases seem to misinterpret the rights of a patentee and prohibit the activity in which he should be entitled to engage. In fact, the series of cases resulting from the shrimp-peeling situation seems to demonstrate a misuse of the misuse doctrine. For example, in Laitram, the misuse was based on a competitive disadvantage but the court failed to consider that the necessary result of a patent grant is a competitive advantage to the patentee and his licensees. The court in the Peelers case, by finding a violation of section 2 of the Sherman Act, seemed to confuse the lawful patent monopoly with the traditional antitrust concept of monopoly. While the traditional monopoly takes something from society, the patent monopoly is based on a contribution to society and therefore is not a monopoly in the antitrust sense of the term.

In the LaPeyre case, the court at least attempted to distinguish between a competitive disadvantage to a class of customers and a competitive disadvantage to competitors. However, this court failed to distinguish between the situation where the competitive disadvantage already exsists and the situation where the patentee creates the competitive disadvantage among a class of its customers. Although a lawful monopolist may have the duty to conduct his business in such a manner as to avoid inflicting competitive injury on a class of customers, this does not mean

polize by a single defendant; (5) attempting to monopolize by a combination of defendants.

81. See discussion notes 74-76 supra.
82. 15 A.B.A. ANTITRUST SECTION 318 (1959-60).

Thus, although the patent comes within the literal definition of a monopoly—the right to sell alone—it is far different from the type of monopoly against which the antitrust policy and its common law predecessors were directed. For historically a "monopoly" connoted the giving of an exclusive right to that which the public had previously freely enjoyed. In a patent, however, the rights relate by definition only to that which the patentee has added to the sum of human knowledge.
he has the duty to create competition where a non-competitive situation already exists.

**EXORBITANT ROYALTIES**

Generally a patentee is entitled to charge as high a royalty as he is able to negotiate. However, Supreme Court dicta have indicated this right is not unlimited when exercised by patentees in combination. Also, dicta in a recent decision by the Seventh Circuit indicate there may be a new trend developing in the area of patent royalty rates. At least in this Circuit, an undisputed showing of exorbitant and oppressive royalty rates involving the bulk of the industry accompanied by an increase in selling price may constitute a misuse of the patent and price fixing in violation of the antitrust laws. The discussion will be limited to the reasoning underlying this new development.

*American Photocopy Equip. Co. v. Rovico, Inc. (APECO)*

In the APECO case the court discussed the criteria which should be taken into consideration in determining whether or not exorbitant royalties are a misuse of a patent and a violation of the antitrust laws. The case arose from a suit filed against Rovico, Inc. for infringing the plaintiff's Epstein patent. This patent was for a machine to develop photocopies by means of the diffusion-transfer-reversal process (DTR). In conjunction with other defenses, the defendant charged APECO with violating the antitrust laws by charging exorbitant and oppressive royalty rates which amounted to price fixing by in effect placing a minimum price on the machines. The royalty was fixed at six per cent of the retail price of the machine sold. The defendant contended this amounted to a twenty-four per cent royalty because it equaled twelve per cent of the manufacturing cost and the cost of the patented element was one-half of the cost of manufacturing.

The court held that the patents were valid and infringed, that the royalty was neither exorbitant nor oppressive, and that there was no

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85. 257 F. Supp. 192 (N.D. Ill.), rev'd, 359 F.2d 745 (7th Cir. 1966).
evidence of a restraint on competition. Since there is no restriction against "unreasonably high royalties" and a patentee is free not to license, the court reasoned a patentee is entitled to grant a license "for any royalty" which is reasonably within the reward of the patent grant. Licensing should be encouraged because it dilutes a monopoly which would otherwise be complete. The court was influenced by the lack of evidence that the bulk of the industry was involved and also by the fact that there had been a decline in the selling price of the machines.

The history and holding of this case should serve as a warning to patentees of the situations in which exorbitant royalties may constitute a misuse of the patent and violate the antitrust laws. Originally the district court granted APECO a preliminary injunction pendente lite. On appeal, the Seventh Circuit reversed the case with instructions to proceed to trial on the merits and stated in dicta that an undisputed showing of exorbitant and oppressive royalty rates involving the bulk of the industry accompanied by an increase in selling price would constitute a misuse of the patent and a price-fixing in violation of the antitrust laws. The court said exorbitant royalties would be contrary to the public interest and cited Brulotte to support its holding of unlawful enlargement of the patent monopoly. It is questionable whether or not the court's reliance on Brulotte is justified because in Brulotte the Supreme Court declined to invalidate the use of the patent leverage to exact high royalties.

In a case where there is evidence of domination and restraint, the Supreme Court would probably follow the reasoning of the Seventh Circuit. In dicta in Standard Oil Co. (Indiana) v. United States, the Supreme Court said exorbitant royalties, agreed upon by patentees in concert, may violate the antitrust laws when there is evidence that the industry is dominated or interstate commerce is directly restrained. The Court reasoned that since royalties could be a decisive factor in the cost of production, the power to fix royalties was tantamount to the power to fix prices. However, since this case involved an agreement between cross-licensing patentees, there is some doubt that the Court would be willing to apply this reasoning to a situation involving a

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88. 283 U.S. 163 (1931).
If it is accepted that exorbitant royalties are really a method of fixing prices, the courts should base their conclusions in exorbitant royalty situations on the same reasoning applied in the patent price-fixing cases. Generally, in the absence of a patent or other statutory authorization, vertical price fixing is a per se violation of the antitrust laws. Since industry wide licensing agreements which are part of a common plan to maintain prices in an entire industry through a network of patent licenses are illegal, the Seventh Circuit's view would seem to be valid. Thus a patentee who licenses the bulk of the industry at exorbitant rates which result in increased or maintained prices would violate the antitrust laws. Proof that the increased prices were a direct result of dominance and of the exorbitant rates should be sufficient evidence of a common plan between a patentee and his licensees to fix prices. The patentee is able to coerce the licensee to agree in effect to maintain prices when he agrees to pay the high royalties. This restriction on the patentee is justifiable because it prevents a patentee from using exorbitant royalties to circumvent the patent price-fixing cases. Analyzing the cases in the same manner as the price-fixing cases would not prevent a patentee from charging as high a royalty as is consistent with the true value of his patent grant because the price-fixing

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When patents are involved, a distinction must be made between simple and complex licensing agreements because a simple agreement does not violate the antitrust laws. A simple price fixing agreement is one, "[w]here all that is involved is that 'A', holding a patent covering a particular article of manufacture, licenses 'B' to make and sell that article, he may impose a condition that 'B' shall not charge less for it than a price he specifies." A. Neale, The Antitrust Laws of the United States 263 (1960). See also United States v. General Elec. Co., 272 U.S. 476 (1926).

However, the following complex agreements do violate the antitrust laws: (1) A patentee cannot control the resale price of a product after the first sale. United States v. Univis Lens Co., 316 U.S. 241 (1942). (2) When there is a mutual agreement among distributors of competing products, a patentee cannot control the licensee's selling price. United States v. Masonite Corp., 316 U.S. 265 (1942). (3) Patentees participating in cross-licensing arrangements cannot fix the licensees' selling prices. United States v. Line Material Co., 333 U.S. 287 (1948). (4) Industry-wide licensing agreements that are part of a common plan to stabilize prices in an entire industry through a network of patent licenses are illegal. United States v. United States Gypsum Co., 333 U.S. 364 (1948).

90. The true value of a patent will be determined by the forces of supply and demand. Also, when the patent royalty exceeds the cost of the pre-patent method or of a substitute product or method, the market for the patent will decline and the patentee will have to reduce his royalty back to its actual value. See American Photocopy Equip. Co. v. Rovico, Inc., 257 F. Supp. 192, 199 (N.D. Ill.), rev'd, 359 F.2d 745 (7th Cir. 1966). In this case the court said:

We cannot assume that there exist restrictions against "unreasonably high royalties," absent any proof of favoritism or conspiracy to fix prices, . . . The free competitive market place has built-in controls such as supply and demands
THE MISUSE DOCTRINE

The cases involving alleged misuse of patents by reason of royalty practices present the courts with a difficult choice between the rights of patentees and the general aims of the antitrust laws. The patentee should be entitled to obtain the maximum profits which are consistent with the value of his contribution to society. However, the constitutional grant of exclusive rights does not give the patentee the right to restrain competition illegally. In attempting to satisfy the purpose of both laws, courts should proceed with caution so they do not place burdens on a patentee which are not placed on non-patentees.

Larry R. Fisher

to limit the royalties charged by a prospective licensor. There is no indication that further controls are justified.