

The Mystery of Section 253(b)

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Repository Citation

Matthew Gagnier, *The Mystery of Section 253(b)*, 22 Marq. Intellectual Property L. Rev. 151 (2018).

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INNOVATION IN WISCONSIN: OPEN SOURCING INNOVATION COMMENTS

THE MYSTERY OF SECTION 253(b)

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INTRODUCTION

In 2014, Elon Musk, the renowned and socially-minded CEO of Tesla Motors, Inc., posted a blog on Tesla’s website that stated the company would be freeing up many of its patents involved in the creation of the company’s electric cars to any interested party.¹ Yet again, Musk astounded the public by choosing the betterment of society over corporate profits—stirring up a more positive image than any other corporate personality. But there are numerous questions that Musk’s positive PR have drowned out: Where can you access the patents?; How did freeing up the patents get past the other executive officers and the shareholders?; and Why even free up the patents in the first place? The last question has the easiest answer on its face: for the betterment of mankind. However, such an answer is doubtful to have swayed an entire board of directors as well as any shareholder, and Tesla is not well known for turning a profit.² Tesla giving up its patents does not appear to be a reasonable business decision, unless there was an ulterior motive for doing so; say, it would be reasonable if Tesla did so to protect itself from something else.

1. Elon Musk, *All Our Patent Are Belong to You*, TESLA (June 12, 2014), <https://www.tesla.com/blog/all-our-patent-are-belong-you> [https://perma.cc/37ZV-C348].

2. See Robert Ferris, *Tesla Shares Drop After Posting Wider-Than-Expected Loss*, CNBC (Nov. 1, 2017), <https://www.cnbc.com/2017/11/01/tesla-q3-2017-earnings.html> [https://perma.cc/LY4R-UCJP].

Indeed, by freeing up its patents, Tesla is able to avoid liability for possible antitrust accusations down the line. How it manages to do this is not entirely clear and may end up causing Tesla more headaches down the road,³ but one avenue to this current situation, known as a “dedicat[ion] to the public,” is found within the Patent Act.⁴ Located within the current section 253(b), dedications to the public allow a patent-holder to relinquish their rights in a patent in order to allow any third-party to utilize said patent and to avoid any potential liability from having rights in the same.⁵ Doing so grants protections to both patentees and patent-holders and may be considered to expand the prior art for the betterment of all, dependent on your point of view. Regardless, section 253(b) is one possible avenue that Tesla may have taken to give up its patents under the guise of benevolence.

Again, there are the problems with gaining the votes of the board of directors and keeping shareholders happy. In comes section 253(b), which, instead of being used simply out of the goodness of a patent-holder’s heart, may be used as a defense against antitrust prosecution. How a dedication to the public can be used to prevent antitrust adjudication is not immediately clear from the language of the statute, and unfortunately, there is no case law that outlines how section 253(b) can be used to protect a patent-holder.⁶ Instead, legislative intent is the lens through which we can determine the true purpose of section 253(b) and dedication to the public at its inception. Additionally, with the incredible expansion of many companies and embrace of vertical integration tactics, a discussion of the shift from section 253(b)’s shift from being an antitrust shield to an antitrust weapon for the benefit of a plaintiff is relevant to show how dedication to the public should become more relevant moving forward.

This comment will discuss these topics, beginning with an examination of the language of the subsection as well as its changes through an examination of legislative history. Part I will also include the historical relevance of the antitrust discussion going on during the section’s birth. Next, Part II will discuss how section 253(b) is used as an antitrust shield and whether it should shift to become an antitrust remedy for plaintiffs instead. In that vein, Part II will also discuss the current state of patent monopolies and the context of contemporary society in determining the necessities of a legal shift.

3. For example, Tesla now has no means of benefiting economically from those patents except by indirect methods, such as other necessary, related patents.

4. 35 U.S.C. § 253(b) (2012).

5. *See id.*

6. In my research, there were no cases found that clearly outline this point. Much of my research had to be extrapolated from relevant legislative comments and other discussions that were occurring historically at the time of the language’s first inception.

I. WHAT DOES IT MEAN TO DEDICATE TO THE PUBLIC?

A. The Language and History of Section 253(b)

The current language of section 253(b) reads as follows:

In the manner set forth in subsection (a), any patentee or applicant may disclaim or dedicate to the public the entire term, or any terminal part of the term, of the patent granted or to be granted.⁷

The key language here is the portion related to dedication to the public. Unfortunately, case law on this subject is very scarce and provides little assistance in defining what this language means.⁸ Because of this scarcity, defining section 253(b) requires an examination of the legislative history of the statute and the few discussions left behind by politicians.

The dedication to the public language first originated in the House Bills working up to the Patent Act of 1952.⁹ Specifically, in 1951 House Bill 3760, section 203, relegated the language to a second paragraph (instead of a subsection) that stated as follows: “In like manner any patentee or applicant may disclaim or dedicate to the public the entire term, or any terminal part of the term, of the patent granted or to be granted.”¹⁰ Again, “[i]n like manner” references the paragraph above, which is related to the irrelevant terminal disclaimer language.¹¹ From this point forward, the language would remain unchanged—the only alterations being the statute shifting from section 203 to section 253 over the course of the statute’s creation and into the statute’s life.¹² However, prior to the language’s initial inclusion in House Bill 3760, there was one prior House Bill that *did not* include the dedication to the public language—House Bill 9133.¹³ House Bill 9133 does include section 203, but the second paragraph that included the relevant language was absent.¹⁴ What caused the change is outlined in the Report from the Committee on the Judiciary House of Representatives that accompanied House Bill 7794, which stated the

7. 35 U.S.C. § 253(b). Note that subsection (a) is exclusively related to the doctrine of terminal disclaimers and is not relevant to this discussion.

8. Search for 35 U.S.C. § 253(b) on Westlaw, then check the citing references tab and refine the search for “dedication” or “dedicate.”

9. United States Patent Act, H.R. 3760, 82d Cong. § 203 (1951).

10. *Id.*

11. *Id.*; see also 35 U.S.C. § 253(b).

12. *Id.*; United States Patent Act of 1952, Pub. L. No. 82-593 § 253, 66 Stat. 792, 809 (codified as amended at 35 U.S.C. § 253 (1952)).

13. United States Patent Act, H.R. 9133, 81st Cong. § 203 (1950).

14. *Id.*

following:

There is now a provision in the statute under which an invalid claim must be disclaimed without unreasonable delay in order to save the rest of the patent. [I]f one claim of a patent is invalid, the patentee may take it out. He may sue on the remaining claims which have whatever validity they may have on their own merits.¹⁵

It appears the drafters desired to leave an option for patent-holders to drop a portion of their patent in haste should the holder expect a challenge to a portion of the patent's validity. Litigation can be costly, and to have an easy out to avoid a court challenge could feasibly promote greater interest in patenting. P.J. Frederico gave the following commentary on why this section was added:

No specific reason for this provision appears in the printed record, but its proponents contemplated that it might be effective in some instances, in combatting a defense of double patenting, to permit the patentee to cut back the term of a later issued patent so as to expire at the same time as the earlier issued patent and thus eliminate any charge of extension of monopoly.¹⁶

Extending the monopoly would mean that, if an earlier patent existed as a part of a newer patent—thus continuing the limited monopoly right—the patent-holder would hold monopoly rights over the older patent past the expiration date. This problem is known as double patenting and would be an issue in these scenarios, as it would mean the newer patent would essentially cover both the greater invention and any lesser parts that had been previously patented.¹⁷ Therefore, the intent of including the language for dedication to the public would assumedly be to prevent unrestricted patent continuations that would allow for an unlimited patent period.

The language of the second paragraph of section 253 survived into the current Leahy-Smith America Invents Act (“AIA”), passed in 2011.¹⁸ Since its passage to its current state in section 253(b), dedication to the public has not been challenged in the judicial system or further defined by many, if any, judges.¹⁹ With the case law being so scarce, the average scholar would assume

15. H.R. REP. NO. 82–1923, at 8 (1952).

16. P.J. Frederico, *Commentary on the New Patent Act*, 35 U.S.C.A. 1, 49 (1954).

17. See U.S. PATENT & TRADEMARK OFFICE, MANUAL OF PATENT EXAMINING PROCEDURE § 804 (2018), <https://www.uspto.gov/web/offices/pac/mpep/s804.html> [<https://perma.cc/2JLM-QGT4>].

18. Leahy-Smith America Invents Act, Pub. L. No. 112-29 § 253, 125 Stat. 284 (2011).

19. Search 253 on Westlaw citation references for “253(b)” and only one case will appear. This case is not about dedication to the public but instead concerns terminal disclaimers.

that section 253(b) is unused or nonthreatening to any party involved in a double-patenting scenario, but that simply seems unrealistic, given how confrontational the American legal system is designed. Much more likely, section 253(b) is used as a tool before issues arise to avoid challenges by possible licensees. Indeed, as will be discussed below, the history surrounding the passage of the Patent Act of 1952 will illustrate how this can be the case.

B. Antitrust

Founded in the 1930s, the Chicago School of Economics quickly rose to prominence in economic circles by producing numerous Nobel Prize winners.²⁰ Though initially proponents of more liberal economic ideas from the era of the Great Depression, Chicago School thinkers began moving toward more libertarian policies of laissez-faire market solutions.²¹ These new policies reject “non-economic social goals and posit[] economic analysis as the major or sole criterion for government intervention.”²² Essentially, Chicago Economists argue in favor of a free market in order to find solutions to society’s problems and stand against government intervention at all times, except in extreme circumstances.²³

One method of making free market determinations to solve societal problems is termed “price theory,” which “is the science explaining rational economic behavior and the operation of markets.”²⁴ According to Chicago School economists, price theory can be used to make the rational determination in a cost-benefit analysis of any given situation, including crime, divorce, having children, etc.²⁵ Chicago School economists can also make these analyses with antitrust considerations; they argue that monopolies can be a maximization of consumer welfare.²⁶ If a single firm dominates a market, the market can still be efficient as the firm will need to maintain competitive pricing in order to maintain their monopoly—thus, the monopoly remains the

20. David Hess, *Chicago School of Economics*, ENCYCLOPEDIA BRITANNICA (June 6, 2017), <https://www.britannica.com/topic/Chicago-school-of-economics> [<https://perma.cc/Z992-F9Z9>].

21. See Lanny Ebenstein, *Going Off the Rails*, THE ECONOMIST (Oct. 22, 2015), <https://www.economist.com/news/books-and-arts/21676745-how-libertarians-hijacked-liberal-economics-going-rails> [<https://perma.cc/6UXX-B5QR>].

22. J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 1:6 (4th ed. 1996).

23. See *id.*

24. WALTER ADAMS & JAMES W. BROCK, ANTITRUST ECONOMICS ON TRIAL: A DIALOGUE ON THE NEW LAISSEZ-FAIRE 4 (1991).

25. *Id.* at 5.

26. *Id.* at 25.

most efficient form for the consumer.²⁷ Any intervention from the government would merely harm the markets, as the intervention creates the threat of political-economic collusion that hampers free markets through a restriction of consumer choice and thereby ruining efficiency in the market for said consumers.²⁸ Only in the advent of collusion monopolies that restrict efficiency should governments get involved with antitrust.²⁹

Unfortunately for the free market idealist, the government is involved in the marketplace in various forms, one such form being patents. Patents are limited monopolies that grant the owner an exclusive right to the creation, sale, or licensure of their patent, given by the United States Patent Office (USPTO).³⁰ This right is essentially a limited monopoly over the invention, granting the holder the right to exclude others as they could under other forms of property rights.³¹ What originally began as a right to protect commercial products from thieving competitors has now evolved into an all-consuming right in the hands of certain parties to control who can create what and where by restricting licensing.³² The reason for such an expansion is obvious: a right holder would prefer his right to be construed as broadly as possible in order to maintain their monopolistic dominance,³³ but there are broader legal ramifications of the slow creep of rights expansion. Of course, there are protections against gross abuse of a right via laws against patent extension, but with the growth of companies like Amazon where vertical integration becomes the norm,³⁴ one parent company can hold hundreds of subsidiaries, which hold thousands more patents. At some point, courts must be wary of the sheer size of these companies when examining cases involving their patent rights.

Patent extension and double-patenting fall generally under the doctrine of patent misuse. The United States Supreme Court established the doctrine of patent misuse in the case *Morton Salt Co. v. G.S. Suppiger Co.*³⁵ The

27. *Id.*

28. *See id.* at 19–20.

29. *See id.* at 22–23.

30. *General Information Concerning Patents—What Are Patents, Trademarks, Servicemarks, and Copyrights?* U.S. PATENT AND TRADEMARK OFFICE (Oct. 2015), <https://www.uspto.gov/patents-getting-started/general-information-concerning-patents#heading-2> [<https://perma.cc/LA97-LTP5>].

31. *Id.*

32. *See* Andrew Beckerman-Rodau, *The Expansion of Overlapping Intellectual Property Rights*, IPWATCHDOG (Mar. 22, 2012), <http://www.ipwatchdog.com/2011/02/22/the-expansion-of-overlapping-intellectual-property-rights/id=15369/> [<https://perma.cc/8WL2-FAHW>].

33. Mark A. Lemley & Mark P. McKenna, *Scope*, 57 WM. & MARY L. REV. 2197, 2200 (2016).

34. Zack Kanter, *Why Amazon is Eating the World*, TECHCRUNCH (May 14, 2017), <https://techcrunch.com/2017/05/14/why-amazon-is-eating-the-world/> [<https://perma.cc/5WDD-J885>].

35. *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488, 491 (1942). *Morton Salt* was abrogated

respondent in this case owned a machine which required a specific type of salt tablet to use, and the company required any licensees of the machine to contract to only purchase those specific tablets.³⁶ The petitioner, a competitor, allegedly infringed on the respondent's patent,³⁷ but the Court determined the following:

Where the patent is used as a means of restraining competition with the patentee's sale of an unpatented product, the successful prosecution of an infringement suit even against one who is not a competitor in such sale is a powerful aid to the maintenance of the attempted monopoly of the unpatented article and is thus a contributing factor in thwarting the public policy underlying the grant of the patent. Maintenance and enlargement of the attempted monopoly of the unpatented article are dependent to some extent upon persuading the public of the validity of the patent, which the infringement suit is intended to establish.³⁸

To use the patent to cover something unpatented by a contract that binds the patented and unpatented materials together would prevent any opportunities of prosecuting infringement, as the respondent did here, by forcing licensees to contract for the salt tablets as well as the machine and inserting clauses limiting the licensor's liability.³⁹ If, instead, the respondent had not forced licensees to contract for the tablet, but attempted to remain competitive by keeping its tablet prices the lowest, then this suit likely could have moved forward against the infringer. Unfortunately for the respondent, that hypothetical situation did not occur, and thus the Court found that the respondent had unlawfully extended their patent.⁴⁰

Another case that established patent misuse principles was *United States v. General Electric Co.*⁴¹ In this case, the respondent attempted to extend its patents over lamp parts to control the lamp-making industry.⁴² Unlike *Morton Salt*, the respondent here was not attempting to unlawfully extend its patents but instead possessed "an arsenal of a huge body of patents that [could] easily overwhelm and defeat competition by small firms desiring to stay in or

by the Supreme Court in *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006), but this does not detract my point as *Morton Salt* is still the case wherein double patenting as doctrine was established.

36. *Id.* at 490.

37. *Id.*

38. *Id.* at 493.

39. *Id.* at 490.

40. *Id.* at 494.

41. See *United States v. General Electric Co.*, 115 F. Supp. 835 (D.N.J. 1953).

42. *Id.* at 844.

gain a foothold in the industry.”⁴³ The Court was thus forced to impose an extreme remedy to protect the market, and required the respondent to dedicate some of its patents.⁴⁴ Such a conclusion was unavoidable because of the respondent’s overwhelming market presence quashed competition by smaller firms.⁴⁵ Though not explicitly stated to come from section 253(b) in the opinion, the Court used dedication as a means to protect competition in a monopolized market where no other solution was viable.

Lastly, in *Hartford-Empire Co. v. United States*, the District Court found that some firms must be allowed to continue licensure control if it is the firm’s only means of generating income.⁴⁶ In *Hartford-Empire*, the defendant—a company that produced glass-making machinery—had restricted competition in the market over a specific piece of the greater glass-making tool known as the “gob feeder.”⁴⁷ By controlling the vast majority of the market of gob-feeders, the defendant created a substantial entry barrier for any party that could not pay its licensing fees and thus stifled competition.⁴⁸ However, the Supreme Court did not force dedication upon the petitioner because Congress never built patent cancellation into the law as a method of combating antitrust—despite numerous opportunities to do so.⁴⁹ The Court could not decide whether to destroy a patent right on its own, as it would hamper the entire patent system in place.⁵⁰ Therefore, the remedy had to be reasonable royalties limited exclusively to certain patents and not the destruction of the patent right altogether.⁵¹

II. ANTITRUST SHIELD OR ANTITRUST REMEDY

Though only one case above directly used dedication as a remedy, each is relevant in the discussion of how dedication has been used and how it can be used moving forward. Courts have been extremely hesitant to use dedication as an antitrust remedy, as evidenced by the cases above, due to the confiscatory nature of dedication as a remedy.⁵² An example of the judicial branch’s

43. *Id.*

44. *Id.* at 843.

45. *Id.* at 844.

46. *See* *United States v. Hartford-Empire Co.*, 46 F. Supp. 541, 593–94 (D. Ohio 1942).

47. *See* *Hartford-Empire Co. v. United States*, 323 U.S. 386, 393–94 (1945).

48. *Id.* at 394.

49. *Id.* at 416–17.

50. *See id.* at 415.

51. *Id.* at 420.

52. *See* Lawrence Schlam, *Compulsory Royalty-Free Licensing as an Antitrust Remedy for Patent Fraud: Law, Policy and the Patent-Antitrust Interface Revisited*, 7 CORNELL J.L. & PUB. POL’Y 467, 509 (1998).

hesitancy can be seen in *Hartford-Empire*, wherein the Court did not wish to apply dedication as it would harm the market.⁵³ Courts, in general, seek to apply Chicago School of Economics principles when determining issues surrounding patents, as removing the protection of a patent has the possibility of harming the free market by damaging a major player within that specific market.⁵⁴ In the converse, dedication could exist as an antitrust shield that protects large entities from possible patent misuse allegations by allowing them to free up a minor part of a patent in order to uphold the greater patent.

The basis for such an argument is within the history of section 253(b) itself, with the discussion of dedication as a protection from double-patenting.⁵⁵ Under such a paradigm, dedication would be used exclusively by the patent-holder to defend against the dangers of unlawfully extending a patent. Section 253(b) would allow a patent-holder to dedicate the remainder of a new patent, rather than attaching an older patent to the newer one. By so doing, not only is double-patenting avoided, but the patent-holder is able to avoid any liability. Therefore, Congress' intent was clearly to use dedication to the public as an antitrust shield on behalf of patent-holders.

Dedication as an antitrust shield became even more relevant as time went on, particularly beginning in the 1970s when patent law began to slowly expand past what antitrust laws were meant to protect against.⁵⁶ With the rampant growth of economic power in the hands of a few, large companies, fewer outsiders are able to challenge the holdings of these companies and prevent integration on both the vertical and horizontal levels.⁵⁷ Especially in the technology sector, larger companies hold incredible power over the smaller ones—with important software and hardware being locked behind expensive patents or the patent itself being used to direct traffic away from smaller competitors.⁵⁸ Any one of these large tech companies can be protected by large legal teams identifying possible antitrust threats within its extensive chains of patents and then choosing to dedicate any number of lesser patents in order to avoid expensive legal battles.

Indeed, the likelihood of Tesla doing this is high, especially as the company

53. *Hartford-Empire Co.*, 323 U.S. at 393–94.

54. Louis Kaplow, *Antitrust, Law & Economics, & the Courts*, 50 LAW & CONTEMP. PROBS. 181, 181 (1987).

55. Frederico, *supra* note 16.

56. Herbert Hovenkamp, *Antitrust and the Patent System: A Reexamination*, 76 OHIO ST. L.J. 467, 473–74 (2015).

57. See Senator Elizabeth Warren, Reigniting Competition in the American Economy, Keynote Remarks at America's Open Market Programs Event, 2 (June 29, 2016).

58. *Id.*

begins to expand its market reach into solar panels,⁵⁹ more advanced forms of electric car,⁶⁰ and other interrelated technology.⁶¹ The idea that corporate shareholders or board members would be okay with simply freeing up all of Tesla's patents without any monetary gain is laughable. Instead, the company is likely doing so in order to avoid potential liability when it begins to license out other patents that may possess parts from the freed patents—thereby avoiding any allegations of patent extension. In so doing, Tesla is able to simultaneously render the issue of patent extension moot as well as drum up a positive public image.

Allowing dedication to exist as a shield, as well as current jurisprudence over patent misuse, is indicative of greater policy with regard to antitrust that harms competition rather than fosters it.⁶² Such policies give firms the ability to create a network of patent rights that do not explicitly require an unpatented product but can require said unpatented product from another party—a party that may be engaging in price fixing with the original patent holder.⁶³ At the same time, the idea of incipiency comes into play, which is when a company begins to approach antitrust-level proportions but has not yet reached them, thus safeguarding them in courts due to the companies being considered “more efficient.”⁶⁴ Allowing for these practices gives incentive to “patent troll” firms, which can obtain wide swaths of patents exclusively for the use of harming competitors or other players in the market.⁶⁵ Indeed, once the patent exists in the market, there is little to no oversight for where these rights end up and who is controlling them.⁶⁶ Arguably, the market can be controlled by a handful of patent troll firms with selectively owned patents that charge prices that block smaller competitors or keep control in the hands of larger parent corporations. Once that control is established, any threat to a troll firm's control can be handled by picking some lesser patents to dedicate, thereby protecting control. Amongst those within innovative communities, there is a relative consensus

59. *Solar Panels FAQs*, TESLA (Oct. 12, 2017), <https://www.tesla.com/support/solar/solar-panels-faqs> [<https://perma.cc/H3ES-SHCD>].

60. *Model 3*, TESLA, <https://www.tesla.com/model3> [<https://perma.cc/LJ96-GW3R>] (last visited Feb. 1, 2018).

61. Danielle Muoio, *Here's Everything Tesla is Working on Right Now*, BUSINESS INSIDER (Sept. 9, 2017, 9:37 AM), <http://www.businessinsider.com/tesla-projects-long-term-plans-2017-9/#tesla-may-also-add-a-dashcam-to-its-future-vehicles-12> [<https://perma.cc/F74Z-VDXG>].

62. See generally Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, 65 COLUM. L. REV. 363 (1965).

63. See *id.* at 366–67.

64. *Id.* at 368.

65. *Patent Trolls*, Electronic Frontier Foundation (May 1, 2017, 1:09 PM), <https://www.eff.org/issues/resources-patent-troll-victims> [<https://perma.cc/TYB2-NHAP>].

66. Hovenkamp, *supra* note 57, at 480–81.

that patent trolls (entities that accumulate patents in order to make money off of them exclusively) are hampering innovation by filing approximately 60% of all infringement litigation.⁶⁷ Part of the problem is that these trolls are bringing infringement suits over possibly obvious patents, as many of the suits are brought against the actual inventor.⁶⁸ Unfortunately for these companies, patent infringement is strict liability, and thus, no matter the extent to which the company actually uses the allegedly infringed patent, the company generally must pay.⁶⁹ Such activities are a clear abuse of the patent system; they extend the patent right beyond a right to exclude by allowing troll firms to completely control even patents that may be considered obvious—thus eliminating any defense from companies.

Instead of allowing dedication to the public to exist as an antitrust shield, courts should look to dedication as an antitrust remedy. Though there are numerous barriers to overcome to apply antitrust law to these situations,⁷⁰ there already exists a possible solution in section 253(b). Dedication to the public can be an effective doctrine to circumvent the barriers to antitrust law, as section 253(b) exists directly in the Patent Act. In effect, when a patent troll brings a suit against a technology firm for a possibly obvious patent, the technology company could attempt to counterclaim that the lawsuit is frivolous and aim for a remedy of dedication. If the patent is provably obvious, then the patent troll should not retain those rights. Even in situations where obviousness is not totally provable, if the firm can be shown to exist as a patent troll, then a similar solution should be applied. Antitrust has difficulties of being applied to patent trolls due to their nature as non-producers, meaning they only aggregate rights and do not create anything themselves.⁷¹ However, that does not mean patent trolls cannot be used to control the market. Courts should be allowed to pierce the corporate veil if a larger parent owns the troll or if there is evidence that the troll is hampering the market then the court should be allowed to punish these unlawful allocations of control. Dedication is the most readily available method for this because if dedication is allowed as a remedy then these firms will break themselves up as they can no longer control markets. The existence of trolls alone shows a failure of the market and a failure of the patent system, therefore indicating a need for dedication to the public to mesh with antitrust law to promote competition.

67. *Id.* at 558.

68. *Id.*

69. *Id.* at 558–59.

70. *Id.* at 560.

71. *Id.*

The judicial system needs to be more mindful of what the patent monopoly should be in relation to rulings. The largest companies in America today are capable of expanding their market control simply through vertical and horizontal integration tactics.⁷² Such aggressive expansions equate to concentrations of wealth in a handful of shadowy parent corporations⁷³ and can effectively allow these corporations to control the market of patent licenses indirectly. Rising in importance again should be the judicial policies of trust-busting from the early 1900s with courts becoming more worried about concentrations of patent monopolies in the hands of the few, whether directly or indirectly.⁷⁴

Chicago School economists would likely argue against such policies as damaging competition—after all, monopolies are merely an outcome of high efficiency.⁷⁵ The proof against such an assertion is visible in today’s society, as companies like Amazon are able to lock out competitors due to their control of keystone markets.⁷⁶ For example, when Amazon released its Kindle e-reader, the company “decided to price bestseller e-books at \$9.99, significantly below the \$12 to \$30 that a new hardback typically costs [Amazon’s] plan was to dominate the e-book selling business in the way that Apple had become the go-to platform for digital music. The strategy worked[.]”⁷⁷ From actions like this, it is not difficult to extrapolate how Amazon can easily dominate competitors. Indeed, due to vertical integration, Amazon is fully capable of never needing to sell its licenses to competitors; instead, many competitors find it necessary to use Amazon’s systems to market their products.⁷⁸

The above examples are not exclusively indicative of patent abuse alone, but they do show how utilizing patents in an anticompetitive manner can damage the greater market. In fact, situations like those just described are not uncommon.⁷⁹ Unfortunately, courts have a tendency to rule in favor of strong patent protections over market ones.⁸⁰ Such cases are difficult to decide, as the court must weigh the patent-holder’s right to exclude against any alleged antitrust acts the holder may be committing. Because of the holder’s right to exclude, many scholars would argue that there is no antitrust violations so long

72. See Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710, 754 (2017); see also Warren, *supra* note 58, at 1–3.

73. See Warren, *supra* note 58, at 4.

74. *Id.* at 4–5.

75. *Id.* at 5; see also Adams & Brock, *supra* note 24.

76. Khan, *supra* note 73, at 755.

77. *Id.* at 757.

78. *Id.* at 781.

79. See *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1324 (Fed. Cir. 2000).

80. See *id.* at 1326.

as the holder is not using their right to illegally misuse their patent.⁸¹ However, holding so strictly to the patent holder's right to exclude others is a dangerous path to tread, as larger companies are fully capable of trouncing that line by refusing licensure selectively, or—specifically to internet-related businesses⁸²—by using their patents to exclude others from the market altogether. Chicago School economists would argue that these businesses' increased efficiency led them to dominate the markets. But companies like Google are currently capable of dominating the market simply by barring any and all entry⁸³—efficiency is no longer required. A shift in judicial policy away from protecting these corporate giants must be considered, as a market failure currently exists where these same giants can control not only the production and sale of goods but also the flow of information. Dedication to the public must be considered as a remedy to this problem, particularly where a few companies have so much accumulated power that both the consumer and competitors cannot challenge these companies' market dominance.

III. CONCLUSION

Elon Musk likely had pure intentions when he was freeing up his patents, but that does not mean ulterior motives did not also exist within the board of directors and prominent shareholders. Musk himself likely had knowledge of the boons of avoiding antitrust and saw the situation as a win-win. Either way, Tesla's actions show an act in line with the historically intended use of dedication to the public. However, considering the increased allocations of power in fewer corporations, should such a use be continued? Courts should be wary of allowing any sort of monopoly, and that includes the patent right. The patent right must be returned to its original, intended use of limiting the holder's right only to exclusion. The current expansion of patent rights has allowed these large corporations to essentially control the markets by not only refusing licenses but also by using their patents to dominate markets and exclude competitors. The Chicago School of thought must be removed from jurisprudence in order to rebalance competition in our current age of monopolistic dominance, and dedication to the public can be the avenue to achieve that in both doctrine and policy.

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81. Peter M. Boyle et al., *Antitrust Law at the Federal Circuit: Red Light or Green Light at the IP-Antitrust Intersection?*, 69 ANTITRUST L.J. 739, 747 (2002).

82. See Khan, *supra* note 73, at 785.

83. *Id.*

* J.D., Marquette University Law School, May 2018.

