

# Patent Law: Patent Acquisitions, Section 7 and Public Policy

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## NOTE

### PATENT ACQUISITIONS, SECTION 7, AND PUBLIC POLICY

In order to stem the increasing rate of industrial concentration in this country, Congress, in 1950, amended Section 7 of the Clayton Act, broadening the number of acquisitions deemed illegal thereunder.<sup>1</sup> To what extent patent acquisitions are covered by this amendment is a vexing and, of late, an often-asked question. Rather than attempt to directly answer this question, this effort will raise factors considered to be of importance in seeking a solution to the problem. Because patent acquisitions present a unique problem, an unfettered inquiry into a statute that has been construed by the highest court of the land appears justified.

#### I. GENERAL APPLICATION OF ANTITRUST LAWS TO PATENT ACQUISITIONS

Recently, some observers and critics of the patent system have called for an evaluation of patent acquisitions and their relationship to the antitrust laws.<sup>2</sup> Although it has seldom been suggested that patent acquisitions should be exempt from the antitrust laws, in practice few patent acquisitions have been challenged under such laws. This situation can, perhaps, be attributed to the required standards of proof in this area which, in the past, have presented serious evidentiary obstacles. For example, a violation of Section 2 of the Sherman Act<sup>3</sup> is established only when a dominant company, through acquisition, secures a significant number of the patents in a field. Although a showing of market power is ordinarily

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1. Relevant portions of this Act read:

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation . . . shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly.

15 U.S.C. § 18 (1970).

2. See Davis, *Patent Licensing and the Antitrust Laws: Some Recent Developments*, 46 J. PAT. OFF. SOC'Y 12 (1964); Heymah, *Patent Licensing and the Antitrust Laws—A Reappraisal at the Close of the Decade*, 14 ANTITRUST BULL. 537 (1969); Murchison, *Patent Acquisitions and the Antitrust Laws*, 45 TEXAS L. REV. 663 (1967); Turner, *Patents, Antitrust, and Innovation*, 12 ANTITRUST BULL. 277 (1967).

3. This section covers: "Every person who shall monopolize or attempt to monopolize."

essential for purposes of proving such a violation, no such power need be shown if it can be established that the company has made an "attempt to monopolize" the market. Proof of such an attempt, however, is a hardy task, since it is very difficult to show a subjective specific intent to monopolize. Further, while patent acquisitions may be held violative of Section 1 of the Sherman Act<sup>4</sup> where the contract of acquisition is held to be in restraint of trade, the applicable standard is far from clear, as each case must be measured by the "rule of reason." It is doubtful whether an acquisition, without a showing of some anti-competitive intent, would be sufficient to satisfy this rule. Thus, it is apparent why patent acquisitions have been, for the most part, free from litigational attack—the evidentiary hurdle presented is a difficult obstacle to overcome.

For this reason, it seems logical to assume that any future attack of patent acquisitions will be brought under Section 7 of the Clayton Act. This section, commonly known as the anti-merger section, is adaptable to such an attack because the standard of proof needed to show a violation is nominal. Congress having enacted this section in order to curb market power in its incipiency, a showing of mere probable lessening of competition is sufficient to render an acquisition illegal, notwithstanding the intent of the acquirer.

Although it is clear that acquisitions of patents can lead to the type of excessive market power of which Congress was speaking, it is not certain that the congressional intent was to have Section 7 encompass patent acquisitions. Indeed, the legislative history appears devoid of any mention of patent acquisitions. However, this does not mean that the spirit of the law cannot be construed so as to include them.<sup>5</sup> It merely means that the question appears to be one never contemplated by Congress.<sup>6</sup>

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4. This section provides: "Every contract . . . in restraint of trade . . . is hereby declared to be illegal."

5. Although the Supreme Court has never considered the legislative history in the context of patent acquisitions, most observers agree with the language used in *United States v. Columbia Pictures Corp.*, 189 F. Supp. 153 (S.D.N.Y. 1960). In discussing what transactions fit into § 7, the court stated, at 182:

As used here, the words "acquire" and "assets" are not terms of art or technical legal language . . . they are generic, imprecise terms encompassing a broad spectrum of transactions. . . . As used in the statute and depending upon the factual context, "assets" may mean anything of value.

6. See Weinstein, *The Application of Section 7 of the Clayton Act to Patents, Copyrights, and Trademarks*, 5 PAT. T.M. & C.J. 328 (1961).

Whether Congress did or did not intend patent acquisitions to be subject to Section 7 is, therefore, problematic. Perhaps the crucial question to be confronted within the next few years will be whether patent acquisitions should be analyzed with other merger problems or, because of their unique character, treated as a special sort of problem. If treated separately, at what point should patent acquisitions be halted in order to best satisfy the aims of the patent system?

## II. THE SPECIAL NATURE OF PATENT ACQUISITIONS

As mentioned previously, in an orthodox Section 7 action, the primary issue to be determined is whether the acquisition will probably result in a substantial lessening of competition. Prior to the resolution of this issue, inquiries must also be made into the relevant product and geographic markets. Additionally, percentage control by the acquiring company over these markets must be determined. The answers to these sub-issues have a direct bearing on the court's determination of whether a substantial lessening of competition does, in fact, exist.

Because there are many factors present in a patent-acquisition action which are nonexistent in an orthodox Section 7 case, it is doubtful whether the above analysis of the latter type of action can be made applicable to the former. As an analysis not giving due weight to these differing factors may yield a result contrary to the public good, before the Justice Department seeks to prosecute an alleged violator or before a court attempts to examine such a case, it should take note of the special nature of these patent acquisitions.

In particular, four distinctive features of patent acquisitions should be considered apart from the customary Section 7 approach. While the most obvious factor to be considered is the effect of the acquisition upon competition, equally cogent are the value of the patent, the need for a patent market, and the intent of the acquirer—each of which will be treated separately.

### *A. Value of the Patent*

Unlike tangible assets, which can be rather accurately priced, thereby making quantification of their increased market power a relatively simple matter, intangible assets, such as patents, cannot be easily assessed. Because a patent's value is the product of many variables, hasty estimates of the amount of market power the acquirer has gained may be illusory.

Were the patent first exploited and later assigned or licensed,

its value would be more readily determinable. Unfortunately, in practice the converse is more often the case; that is, before any large-scale manufacturing or marketing takes place, the patent is sold or licensed to another, usually because a smaller company lacks the necessary capital to exploit the patent.

At the outset, it must be recognized that the party who acquires such a non-exploited patent may not necessarily be adding substantially to his market power. Because the capital outlay that must be made and the risks inherent in the production and marketing of the patented product may be enormous, the acquirer may realize a profit on his investment only after many years of diligent toil. Because of this, it is important that an analysis of patent worth take note of not only the theoretical value of the patent, but also its importance in a practical context. A company may be able to close off an entire area of competition with one important patent acquisition<sup>7</sup> without substantial change in its marketing or production policy. On the other hand, as noted, the patent may be only potentially lucrative, with its ultimate success contingent upon sound business judgment. These two types of cases, along with the myriad of others between the two extremes, must be distinguished and given due weight in a Section 7 analysis. This is so because a company acquiring a patent which is only potentially powerful should not be penalized when, through that company's own expertise, the patent ultimately bestows market power upon the acquirer. This sort of patent acquisition and internal development more closely resembles internal discovery of patents, which has been excluded from Section 7 scrutiny.<sup>8</sup>

To ignore this distinction would be to deprive society of the advantages inherent in fair and aggressive competition for the best product. Unfortunately, this short-run benefit could very easily be sidestepped in favor of the long-run protection afforded by the orthodox Section 7 standard. While it can be argued that with regard to stock acquisition Congress intended that the probable lessening of competition in the long run be avoided, it is questiona-

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7. For an example of dominant patent position, see *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass 1953), *aff'd per curiam*, 347 U.S. 521 (1954), wherein United Shoe held 3,915 patents. An important patent acquisition by a company with such dominance would be of questionable legality under § 7.

8. In *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827 (1950), the Supreme Court held that the mere accumulation of patents, regardless of how many, is not in and of itself illegal. However, this proposition has been interpreted by many as referring only to patents acquired by internal processes.

ble whether the same reasoning can be applied to patent acquisitions. Further, a counter-argument can be made that the societal short-run benefit gained by internal patent development is, in itself, strong reason for making the Section 7 standard nearer to "actual," rather than "probable," lessening of competition—the net effect being to postpone prosecution of a dominant<sup>9</sup> patent acquirer until the harm caused to society is real, rather than imagined.

The argument for a different standard for patent acquisitions becomes even stronger when we consider the fact that many acquisitions are of a non-exclusive nature.<sup>10</sup> It may be assumed that the value of such a non-exclusive license, in terms of market power conferred, is in most cases substantially below that of an exclusive license or assignment. Some observers have maintained that the acquirer receives nothing more than the licensor's promise not to sue for infringement.<sup>11</sup> While this is true, it is apparent that the licensee, in addition, has at least potentially increased his market power. The non-exclusive nature of the right, however, seems to guarantee that there will be some competition, albeit not perfect, during the life of the patent; and after expiration of the patent, an even more vigorous competition may be envisioned, since the barriers to entry will probably be less severe. Thus, society may, proverbially, have its cake and eat it too. It can take advantage of all the benefits inherent in developing the patent on a widespread basis without becoming overly concerned about long-run dominance of the market.

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9. The question of when a company becomes dominant in a given field is a difficult one to answer. As pointed out in *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962), within broad markets there may exist sub-markets which are well defined and appropriate for antitrust analysis. Therefore, when one seeks to determine how valuable a given patent acquisition is to the assignee in question, the market in which the patent fits should be measured against the market in which the acquirer enjoys his alleged dominance. In other words, horizontal acquisitions should be distinguished from vertical acquisitions.

10. Recognizing the distinction between non-exclusive and exclusive rights, the court in *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954), stated, at 333:

United contends that the patents acquired by United have been generally to enable it to pursue development which might otherwise have been blocked, or to resolve patent controversies, or for hedging purposes. But most of these purposes could have been served by non-exclusive licenses. Taking the further step of acquiring the patents has . . . buttressed United's market power. In some instances . . . the acquisition made it less likely that United would have competition.

11. See note 2 *supra*. Under the broad test for "assets" proposed by the court in *United States v. Columbia Pictures Corp.*, 189 F. Supp. 153 (S.D.N.Y. 1960), wherein an "asset" refers to "anything of value," even a promise not to sue could be considered an asset, since such a promise bestows upon the promisee value he otherwise would not receive.

In summary, the value of patent acquisitions is most difficult to measure. Although they may confer unacceptable market power on the acquirer, critical analysis of the unique nature of patents may show that the overall benefit to society favors a substantial number of the acquisitions. It would, therefore, be error to group patent acquisitions with other acquisitions subject to the stringent Section 7 test.

### B. *The Need for a Patent Market*

Smaller companies often assign their patent rights to firms that can more efficiently product and market the end product. Because there is statutory authority for such a transaction,<sup>12</sup> the transfer is not, in itself, invalid. However, if the acquirer has a dominant position in the field and acquisition enhances that position, Section 7 may, theoretically, be violated. Court-imposed divestiture of such acquisitions raises serious questions concerning the effect of such action on the patent market. It seems logical to conclude that to the extent that patent transfers are not permitted under Section 7, a greater number of potential patentees will forego the tedious task of securing a patent.<sup>13</sup> Of course, many patentees are sole proprietors who, having been exempted from the necessity of compliance with Section 7, will not be discouraged.<sup>14</sup> However, the remaining patentees who may otherwise wish to transfer their right would seemingly reduce investment in research and development to the degree that their transfer would be blocked.<sup>15</sup> Consequently, the number of companies engaged in research would presumably dwindle until patent development would be handled solely by the larger companies.<sup>16</sup> Thus, accepting these assumptions as true, an over-

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12. 35 U.S.C. § 261 (1971).

13. See address sponsored by the American Society of Inventors in 27 PAT. T.M. & C.J. AA-9 (1971), wherein the speaker asked:

Why force inventions to be developed only by companies large enough to do the whole job themselves? To do so is actually to work in favor of monopolies and trusts.

14. This group accounts for approximately forty per cent of the total number of patents issued. While a company acquiring a patent from an individual may still be prosecuted, it will be under the more stringent proof requirements of § 1 of the Sherman Act.

15. Some critics have maintained that this reduction in the transferability of patents is, in the long run, beneficial to society because it alleviates the problem of concentration. See Murchison, note 2 *supra*, at 708. However, most of these critics would presumably find an exception in two cases: (1) where the patentee is a failing company in need of a significant royalty in order to remain a viable competitor; and (2) where the patented product or process is such that no one but the dominant acquirer can profitably exploit the patent. Were these exceptions not recognized, the patentee could conceivably be left with the bare right to exclude others from making, using, or selling.

16. Note 13 *supra*.

zealous anticoncentration campaign could lead to the anomalous result of increased concentration. Whether, and to what extent, patent concentration is good or bad will be considered in a subsequent section of this article.<sup>17</sup>

Without regard to the level of innovative activity among small companies, there are other reasons for the argument in favor of easy transferability of patent rights. The number of patent disputes that are settled rather than litigated is said, by some, to be due to the availability of licensing and assignment as alternatives to litigation. Rather than take part in an expensive and time-consuming lawsuit, a company may be willing to license or assign the patent to its adversary. Were Section 7 to prohibit a substantial number of companies from making such a disposition, the burden of deciding who actually deserved the patent right would fall on the courts.

Furthermore, there is a very basic reason for insuring that a patent be easily transferrable. In an economic system such as ours, where prices and supply of goods are theoretically determined by the give and take of competing demands, it seems inconsistent to prohibit the transfer of a property right. Only through transfer will the property be used in the most economically efficient method. Moreover, unless bidding for the property is permitted, the market price will not reflect the patent's true value. This is not to say, however, that we should at no time tamper with this ideal model. Nevertheless, we should recognize when we are markedly departing from free-market ideas and invoke such a remedy only when the harm to society is quite clear. Implicit in this assumption is the premise that because patents need to be handled with greater skill in order to be initially accepted by society, the blocking of patent markets will more severely limit total efficiency than the blocking of normal transactions. With improper marketing and development, a patent may ultimately be useless to society even though, when granted, it was of potential utility.

In summary, an analysis of the need for a patent market raises issues which must be determined apart from the primary issue to be determined in traditional Section 7 cases. Because a substantial reduction in the transferability of patents may, in effect, be con-

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17. This being a most difficult question to resolve in a non-patent setting, consideration of it in the context of patents increases the complexity. While, on the one hand, the social effectiveness of the patent system depends upon diffusion of patent ownership and the resultant increase of competition, on the other hand, the ultimate goal of that competition is to eliminate competitors and, thus, assure nonwaste of research dollars.

trary to the public interest, before a patent acquisition is condemned as lessening competition, the effect of such a prohibition on the marketability of the patent should be closely analyzed.

### C. *The Intent of the Acquirer*

As mentioned earlier, in orthodox Section 7 cases, good intentions cannot redeem an acquisition which will probably result in a substantial lessening of competition. Consequently, intent of the acquirer is not an issue in that type of case. With patent acquisitions, however, it appears that the intention of the acquirer is a very relevant consideration.

Generally, as seen in the above discussion, there are factors present in the case of patent acquisitions which gravitate against the position that concentration *per se* is contrary to the best interests of society. While more will be said henceforth on the advantages and evils of concentration, let it suffice here to say that the threat posed by patent acquisitions need not be halted in its incipency.

Moreover, the difficult task of proving an anti-competitive intent in a normal acquisition appears to be mitigated in the case of patent acquisitions by certain signposts which point to an anti-competitive motive. For example, if the acquisition were that of a patent which could not possibly be used to lower the acquirer's production costs or otherwise directly benefit him, it could clearly be implied that he intended to stultify competition. While this is particularly true with respect to assignments, it may also very well be the case if an exclusive license were granted. While there will be cases wherein it is unclear as to whether or not the patent will benefit the acquirer, in a short time the acquirer's subsequent actions should demonstrate whether the acquisition was merely an attempt to block future competition.

The nature of the acquisition provides an even clearer indication of the acquirer's motives. Only in rare cases will a non-exclusive license indicate an attempt to lessen competition,<sup>18</sup> for the very nature of such a license tends to provide more competitors in the market, both during and after the life of the patent. On the other hand, as we move closer to acquisitions that vest absolute control in the licensee or assignee, his anti-competitive motives should be easier to prove. Thus, the difficult evidentiary problems inherent in

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18. Note 10 *supra*.

most Section 7 cases are notably absent to the same extent in patent-acquisition cases. For these reasons, the intent of the acquirer should be a factor given due weight in a Section 7 patent-acquisition action.

### III. SUGGESTED ANALYSIS IN PATENT-ACQUISITION CASES

The considerations discussed above are, for the most part, listed in an Attorney General's Committee Report published several years ago.<sup>19</sup> If the government is to base its decision to prosecute on societal principles, the factors presented in this report are certainly the material elements to be focused upon. However, there is a danger with this seriate approach to the problem—namely, any given element may be given undue emphasis. Indeed, an emphasis inconsistent with sound social policy may yield an unfortunate result.

As discussed above, all arguments in a typical Section 7 case tend to evolve around the question of whether there will be a probable lessening of competition as a result of the acquisition. Courts have readily expanded and contracted the concept of a "relevant" market to suit their own judgment as to the actual lessening of competition.<sup>20</sup> Whether these Procrustean definitions of markets have been beneficial or deleterious to society presents a problem beyond the scope of this article. What is important, however, is a keen recognition of the ease with which a divestiture order can be fashioned.

Projecting this type of analysis into the area of patent acquisitions would, in the opinion of this writer, be an unfortunate and counterproductive method of resolving problems. As pointed out,

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19. ATT'Y GEN. NAT'L COMMITTEE, ANTITRUST REP. 227 (1955). In this report, factors mentioned as being worthy of consideration included the nature, number and value of patents acquired in relation to the market for competing patented or unpatented processes or products, the purpose and effect of the purchase, and the decrease or increase in competition in the relevant geographic and product market. Also to be considered are whether the inventor is using or has the ability to use the patent, as measured against the purchaser's intended use, and whether the purchase had the purpose and probable effect of resolving conflict.

20. See *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), at 591, wherein J. Fortas, by way of dissent, argued that the Court had manipulated the market concept to fit the case before it. In his words:

This Court now approves this strange red-haired, bearded, one-eyed man-with-a-limp classification. . . . Moreover, we are told that the "relevant market" must assume this strange and curious configuration despite evidence . . . that "fringe competition" . . . has, in at least twenty cities, forced the defendants to operate at a "loss". . . .

there are factors in patent-acquisition cases that ought to be considered separately from the issue of whether or not a lessening of competition will result. Such factors as increased short-run benefits, maintenance of a viable patent market, and easier identification of the acquirer's motive should be dealt with on an individual basis. Should these factors not be given due weight, we would be running the risk of reaching results contrary to the public interest.

Recognizing that the burden of proving a Section 7 violation is meager indeed, we find patent acquisitions to be potentially more vulnerable to attack than even the traditional acquisitions.<sup>21</sup> Particularly is this true in light of the fact that a patent, by its very nature, can be characterized as a grant of a monopoly. In addition, the acquirer is usually a company of substantial size, enjoying a certain degree of dominance in the market. Taking note of these realities, one can readily see how proving that a patent acquisition probably lessens competition can be reduced to an elementary task.

In light of this inherent vulnerability of patent acquisitions, it seems that overzealous prosecution of these transactions could be harmful to the public good. Contrariwise, a wait-and-see approach on the part of the government seems to pose a lesser risk of harm to society.

The question, then, really comes down to one of knowing when certain acquisitions are being used to manipulate our competitive system. In the opinion of this writer, the burden of proving such anti-competitive conduct should be established in an approach nearer to that connected with Sherman Act violations, rather than the incipency approach required by Section 7 of the Clayton Act.

Since the soundest interpretation of the legislative history behind Section 7 appears to be that patent acquisitions were neither included nor excluded, such acquisitions should be dealt with as a distinct phenomenon. While it would be desirable that Congress speak on the standard and the factors to be considered in patent acquisition cases, from a more practical viewpoint it appears that the more immediate action in this area will come from the judicial sphere.<sup>22</sup> When and if cases of this nature reach the courts in sub-

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21. Stedman, *Acquisition of Patents and Know-How by Grant, Fraud, Purchase and Grant-Back*, 12 ANTITRUST BULL. 199 (1967).

22. Although one case of this nature did get to the Supreme Court, the issue of a dominant firm's acquisition of a patent dominating the industry was not considered, that issue being expressly saved by the Court for future consideration. *United States v. Singer Mfg. Co.*, 374 U.S. 174, 189 (1963).

stantial numbers, it is hoped that not only the unique nature of patents will be given due weight, but also that the patent system, in general, will be recognized for its contributions to our technology. This broader question concerning the value of the patent system to our society is directly related to the need for proceeding cautiously when attacking patent-related transactions. For this reason, it appears appropriate to briefly comment upon the costs and benefits of the patent system.

#### IV. THE VALUE OF THE PATENT SYSTEM TO SOCIETY

The principal goal of the patent system is to provide society with an *adequate* supply of inventions and, through such innovation, to make society a better place in which to live.<sup>23</sup> Although a certain number of inventions would obviously be developed without such a system, inquiry must focus upon the word, "adequate." To achieve this level of adequacy, there must be some type of incentive provided which will encourage large investment in research and development of new ideas.<sup>24</sup> Such incentive is provided under our system by giving the developer of a new idea the right to exclude others from using or selling that idea for a limited time.

Assuming for the moment that this is the best method of assuring an adequate supply of inventions, it must nevertheless be recognized that use of this system is not without its costs to society. By way of illustration, but not limitation, some often-stated criticisms follow.

It has been claimed that the monopoly thus created allows a patentee to set his price at a level that is not commensurate with his cost of production.<sup>25</sup> This argument, however, fails to take into account recoupment of research expenses, which is a substantial part of the patentee's investment. To be sure, the patentee is given a great deal more freedom in the market than is the case where there is normal competition. Nevertheless, it would be erroneous

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23. U.S. CONST. art. 1, § 8, clause 8.

24. Recognizing the problems surrounding incentives, one writer noted: [I]nventions, however, consist only of ideas which rivals can often acquire without cost to themselves. . . . Where this occurs no one will be under any constraint to take invention costs into account in setting production rates or selling prices of products which embody or utilize the invention. . . . The problem of policy is to determine what supply of inventions is needed.

ABRAMSON, THE PATENT SYSTEM: ITS ECONOMIC AND SOCIAL BASIS, STUDY NO. 26, SENATE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS, 86th Cong., 2d Sess. 5 (1960).

25. *Id.*

to assume that the patentee is absolutely free from competition. The development of a new idea can cause the inventor's competitors to redouble their efforts so that they will not lose their previous share of the market. Although this is not price competition, it is a form of competition that cannot be ignored.<sup>26</sup> Moreover, it is hard to conceive of a product or process so unique that it creates an absolutely inelastic demand. That is to say, there are always products sufficiently interchangeable so that if the price of the new product were too high, the public could avoid the psychological need to purchase it.

Another often-stated criticism of the system is that a premium is placed on bigness. Although it is undoubtedly true that the larger research facilities stand a better chance of producing a patentable product and that, in this sense, the system encourages concentration of industry, it does not necessarily follow that all concentrated industries are disabling to society. While concentration should be attacked when it is harmful to society, it should also be credited when it is beneficial.<sup>27</sup> Undoubtedly, a certain degree of concentration is in the public interest. The difficult problem is determining when that concentration becomes deleterious.

In the past few years, there have been a number of suggested alternatives to the patent system. One study, undertaken at the behest of the Senate Subcommittee on Patents, Trademarks, and Copyrights,<sup>28</sup> called for the complete abolition of the patent system. In its place, the author opted for a governmentally-subsidized program of stipends to non-profit institutions which seek to produce knowledge as an end in itself.<sup>29</sup> Needless to say, such a system

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26. As one writer recognized, in analyzing price competition: "[I]t is not that kind of competition that counts but the competition from the new commodity, the new source of supply, the new type of organization." SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 84 (1950). See also 1971 AM. PATENT LAW ASS'N BULL. 356.

27. Recognizing that market power serves as the protector of the incentive to technological development, one widely-known economist has noted:

[T]here must be some element of monopoly in an industry if it is to be progressive. . . . [T]he slight continuing loss of efficiency, as compared with ideal performance, resulting from possession of market power is regularly offset and more by large gains from technological development.

J. GALBRAITH, *AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVALUING POWER* 92 (1956).

28. MACHLUP, *AN ECONOMIC REVIEW OF THE PATENT SYSTEM*, STUDY NO. 15, SENATE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS, 85th Cong., 2d Sess. (1958).

29. This study has come under a great deal of criticism. For example, one writer has accused Mr. Machlup of judging patents on the basis of false, biased assumptions which, carried to their logical conclusion, would appear to counsel against scientific advance. ABRAMSON, note 24 *supra*, at n.37.

would substitute private wants for those of the state, hypothetically, resulting in an inadequate supply of inventions in terms of satisfying the needs of society. Other critics have suggested that prizes be granted to the inventor when the government deemed his contribution "successful." Again, this seemingly places too much control in the state's choice. But moreover, uncertainty as to whether the prize would, in fact, find its way to the developer of the best invention could very understandably make investors reluctant to expend large sums of money for research.

In summary, the precise amount of incentive that must be provided in order to assure society of an adequate supply of inventions is, at best, problematic. Arguments concerning the question of whether the benefits of the system justify the costs to society are also difficult to resolve from an objective standpoint.<sup>30</sup> However, it would be difficult to refute the argument that our technology has advanced rapidly during the last century largely as a result of the incentive provided by the patent system.<sup>31</sup> For this reason, any challenge of a patent transaction should confront the broader questions raised by this demonstrated success.

## V. CONCLUSION

The interrelationship of patent and antitrust policy embraces matters usually of extreme complexity. It is, therefore, difficult to set forth rules that can be applied with clarity to the many and varied problems in this area. While important considerations may be listed in seriatum, this approach does not guarantee a desirable solution; it merely lessens the burden of analysis. The critical problem of determining which factors deserve the greatest emphasis cannot be solved without an in-depth study of the situation.

With regard to patent acquisitions and their relation to Section 7 of the Clayton Act, we must realize that the unique nature of patents calls for special treatment. While in certain cases it may be tempting to apply the orthodox incipency standard of Section 7, the inherent vulnerability of patents renders this approach overly harsh. Simplistic solutions such as this may, in effect, exacerbate the very problem sought to be resolved.

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30. See Marybee, *A Philosophic Approach to the Patent System*, 53 J. PAT. OFF. SOC'Y 307 (1971).

31. See REPORT OF PRESIDENT'S COMMISSION ON THE PATENT SYSTEM (1966).