

***IN RE* INDEPENDENT SERVICE ORGANIZATIONS ANTITRUST LITIGATION**

By Nicolas Oettinger

Patents and copyrights are government sanctioned monopolies. In order to encourage innovation and investment in research, the government provides the owners of these intellectual property rights the power to control production of and exclusively use their inventions. Antitrust laws, on the other hand, limit restraints of trade in order to prevent the abuse of market power and protect competition. Although these two sets of laws are seemingly at odds with each other, striking a balance between the two will promote both innovation and competition. Any imbalance between the two doctrines will ultimately pose the danger of causing harm to the concerns of both. Either innovation will suffer because of limited competition, or competition will decrease because of a lack of innovation in the marketplace.

An imbalance of power between patents and antitrust, suggested by previous decisions of the Court of Appeals for the Federal Circuit, is fully realized in the recent decision *In re Independent Service Organizations*¹ (“*ISO*”). The *ISO* decision demonstrates the Federal Circuit’s decided preference for intellectual property rights over antitrust concerns. After the *ISO* decision, it is unlikely that the exercise of intellectual property rights will give rise to antitrust liability. This means that a patent holder who possesses significant market power through his stable of patents is free to refuse to license his patents, thereby discouraging competition and hindering competitors from entering the markets controlled by his patents. This broad protection for intellectual property rights will likely harm competition by preventing potential innovators from developing and producing competing products. Ultimately, this bar to competition threatens innovation as well, and the broad protections of *ISO* might become a detriment to the intellectual property system.

I. BACKGROUND

The Sherman Antitrust Act encourages competition by prohibiting restraints of trade and the unfair exercise of monopoly power. The owners of

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1. 203 F.3d 1322 (Fed. Cir. 2000).

patents and copyrights receive government-sanctioned monopolies in order to encourage innovation. In seeming conflict with antitrust law, patentees and copyright owners are allowed to exclude others from the use of their intellectual property, even if this exclusion restrains trade. The Federal Circuit has exclusive jurisdiction over appeals raising patent issues, and therefore its decisions have tremendous impact on the intersection of patent law and antitrust law.

A. Antitrust

In 1890, Congress enacted the Sherman Act² to create a uniform federal law that would encourage competition in interstate commerce by outlawing monopolies and restraints of trade.³ The first section of the Act outlaws restraints of trade based on agreements between competitors.⁴ The second section of the Act outlaws actions by a single competitor to monopolize, or to attempt to monopolize, any part of trade or commerce.⁵

The prohibition of section 1 of the Sherman Act generally applies to the conduct of two or more separate parties.⁶ The Supreme Court, however, has held that section 1 also prohibits tying arrangements when the seller has enough market power to force the buyer to purchase products that he would not accept in a competitive market.⁷ Many such cases involve arrangements that require a party to pay for unpatented goods in order to receive patented products.⁸

Where an inquiry focuses on a single party, section 2 of the Sherman Act prohibits the exercise of market power to control prices or exclude competition.⁹ Although the inquiry under section 2 focuses on market power, courts have resisted defining this as simply some function of market size and share.¹⁰ The Supreme Court has held that section 2 does not prohibit a "monopoly in the concrete" or mere dominance of a market.¹¹

2. 15 U.S.C. §§ 1-7 (1994).

3. PHILLIP AREEDA & LOUIS KAPLOW, ANTITRUST ANALYSIS ¶ 131 (5th ed. 1997).

4. "Every contract . . . or conspiracy . . . in restraint of trade . . . is declared to be illegal." 15 U.S.C. § 1 (1994).

5. *Id.* § 2.

6. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-69 (1984).

7. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 13-15 (1984). Although this case did not involve intellectual property rights, the Court noted in dictum that market power could be presumed if "the government has granted the seller a patent or similar monopoly over a product." *Id.* at 16.

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

9. 15 U.S.C. § 2 (1994).

10. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 274 (2d Cir. 1979).

11. *Standard Oil Co. v. United States*, 221 U.S. 1, 62 (1911).

Rather, the prohibition of section 2 extends to parties with market dominance who exercise their power to anticompetitive ends.¹² A company may lawfully dominate and maintain its market share so long as it does not impede competition.¹³ Although there is no strict rule for defining the market power required for a monopoly, holding patents on the sole product in a market should raise antitrust concerns.¹⁴

Commentators often advance economic efficiency as the primary, if not exclusive, justification for antitrust laws.¹⁵ Free from the restraints of conspiracies and monopolies, competition lowers prices, increases production, and encourages innovation, consumer choice, and fair business dealing.¹⁶ While there are inconsistencies in the justifications for the prohibitions in the antitrust laws, courts have valued freedom of competition over price-fixing arrangements that lower consumers prices.¹⁷ That restraints of trade seem reasonable or necessary does not prevent antitrust liability.¹⁸

12. *Berkey Photo*, 603 F.2d at 273-75.

13. *See id.* at 274. *But see Standard Oil Co.*, 221 U.S. at 61-62 (suggesting that the omission in section 2 of a direct prohibition against monopolies indicates a confidence that “the centrifugal and centripetal forces resulting from the right to freely contract” will inevitably frustrate monopolies, so long as monopolies are prohibited from making unlawful contracts).

14. *See* Joseph P. Lavelle & Celine T. Callahan, *Patent, Antitrust Law Usually Don't Impose an Obligation to Deal*, LEGAL TIMES, March 8, 1999 (stating that the Court's decision that a market may consist solely of products by a single manufacturer could raise antitrust issues for manufacturers who wish to refuse to deal with certain retailers).

15. AREEDA & KAPLOW, *supra* note 3, at ¶ 130. *But see* S.J. Liebowitz & Stephen E. Margolis, *High Technology, Antitrust & the Regulation of Competition: Should Technology Choice be a Concern of Antitrust Policy?*, 9 HARV. J. LAW & TECH. 283, 284 (1996) (“There is disagreement over whether economic efficiency is now or ever was the goal of antitrust, and there are scores of disagreements about exactly what practices result in monopoly inefficiencies.”).

16. AREEDA & KAPLOW, *supra* note 3, at ¶ 130.

17. *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290 (1897) (rejecting the argument that the Sherman Act outlawed only “unreasonable” restraints on trade and ruling illegal a railroad association that set freight prices). Justice Peckham noted that combinations which artificially lower prices are also undesirable as they may drive out of business “the small dealers and worthy men” who would otherwise compete in the market.

18. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd* 175 U.S. 211 (1899) (holding that restraints adopted for the sole purpose of impeding competition were illegal no matter the reasons for adopting the restraints).

B. Patent and Copyright

1. Patent Law

The Federal Circuit has rejected arguments that patents constitute an exception to the general rule against monopolies.¹⁹ The court has noted that the right to exclude that is inherent in a patent is "the very definition of property."²⁰ That a patent can aid in the violation of antitrust laws does not necessarily create a conflict between patent and antitrust.²¹ When a patented product represents a small segment of a market, antitrust laws ensure the patent holder's ability to compete in the market.²² The potential conflict between patent and antitrust law arises, however, when the patented product consumes most of the relevant market or develops a new market in which it stands alone.²³ Despite this apparent conflict, one court described the aims of patent and antitrust laws as "complementary," because competition relates closely to innovation.²⁴ The patent system encourages investment and innovation that create new jobs, industries, and goods essential to our system of competition.²⁵

Despite the broad rights granted to patent holders, the patent system contains safeguards against patent owners abusing their monopolies.²⁶ Patent misuse is one of the ways by which a patent holder becomes vulnerable to antitrust claims.²⁷ Misuse generally involves attempts to extend the patent beyond its lawful scope, such as illegal tying or collecting royalties on an expired patent.²⁸ Although Justice Douglas' language in *Mercoïd Corp. v. Minneapolis-Honeywell Regulator Co.*²⁹ suggested that patent misuse automatically falls under the antitrust law,³⁰ it is now

19. *Carl Schenck, A.G. v. Nortron Corp.*, 713 F.2d 782, 786 n.3 (Fed. Cir. 1983).

20. *Id.*

21. *Id.*

22. *See Atari Games Corp. v. Nintendo of America, Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990).

23. *See id.*

24. *Id.* ("[T]he two bodies of law are actually complementary, as both are aimed at encouraging innovation, industry and competition.").

25. *Loctite Corp. v. Ultraseal Ltd.*, 781 F.2d 861, 876-77 (Fed. Cir. 1985).

26. *See* 35 U.S.C. §§ 271(d)(4) and (5) (1994).

27. *See id.*; *see also Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965) (holding that attempts to enforce a patent obtained by fraud on the Patent Office could give rise to section 2 liability).

28. JULIAN O. VON KALINOWSKI ET AL., *ANTITRUST LAWS AND TRADE REGULATIONS* § 75.01(1) (2000).

29. 320 U.S. 680 (1944).

30. *Id.* at 684 (stating that the legality of any attempt to increase the scope of the patent "is measured by the antitrust laws and not by the patent laws").

accepted that patent misuse rises to the level of an antitrust violation only when there is proof of both intent to monopolize and market power in the relevant market.³¹

2. Copyright

A copyright, like a patent, bestows upon its owner a limited monopoly.³² The control afforded a copyright owner creates a potential for conflict between copyright and antitrust laws.³³ As with patents, the interest of the copyright holder in profiting from his intellectual property must be balanced against society's interests in maintaining free commerce and competition.³⁴ While the Federal Circuit has exclusive jurisdiction over patent appeals,³⁵ each circuit develops its own copyright law subject only to review by the Supreme Court.³⁶ The copyright issues raised in *ISO* are thus much less far reaching than the patent issues. While the Federal Circuit has demonstrated support of copyright interests over antitrust concerns,³⁷ parties with copyright and antitrust concerns are not required to bring suit in the Federal Circuit.

C. The Federal Circuit

In 1982, Congress created the Federal Circuit as a new court of appeals having exclusive jurisdiction over patent appeals.³⁸ With this broad

31. See VON KALINOWSKI ET AL., *supra* note 28, at § 75.01 n.7.

32. Stephen J. Davidson, *Exploring Tensions between Copyright Law and Competition*, COMPUTER LAW., Dec. 1997, at 1, 2 n.2.

33. See *id.* As a practical matter, almost all conflicts between copyright and antitrust laws arise with respect to media such as computer software, which have significant functional elements.

34. *Id.*; see also *id.* at 4 (citing *Computer Associates International, Inc. v. Altai, Inc.*, 982 F.2d 693, 696 (2d Cir. 1992)).

35. See discussion *infra* Part I.C.

36. See *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1325 (Fed. Cir. 2000) (holding that the court must apply Tenth Circuit law to a copyright and antitrust issue arising on appeal from District of Kansas).

37. See *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1186-87 (Fed. Cir. 1994).

38. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (April 2, 1982). In order to create uniform federal patent law, Congress provided the Federal Circuit with exclusive jurisdiction over cases arising under the patent laws. See 28 U.S.C. §1295(a)(1) (1994) (granting the Federal Circuit exclusive jurisdiction "of an appeal from a federal district court . . . if the jurisdiction of that court was based, in whole or in part, on section 1338 of this title," except where the case involves only issues of copyright, mask work, or trademark rights); 28 U.S.C. §1338 (1994) (giving federal district courts original jurisdiction over civil actions "relating to patents, plant variety, protection, copyrights and trademarks," as well as actions relating to mask works and designs).

jurisdiction over patents, the Federal Circuit is in many ways the court of last resort for patent cases.³⁹ In reviewing a district court's ruling on federal antitrust law, the Federal Circuit applies the law of the circuit in which the district court sits.⁴⁰ The Federal Circuit, however, applies its own law to antitrust matters closely related to patent issues, including determinations of relevant markets and market power.⁴¹ The court justified this approach by emphasizing the need to avoid circuit splits on important patent issues.⁴² The court also stated that antitrust issues typically arise as counterclaims advanced by patent infringement defendants, so that antitrust issues are interwoven with the patent issues that already lie within the court's exclusive jurisdiction.⁴³

The Federal Circuit's jurisdiction over all patent cases gives it an opportunity to specialize in an area of the law that is increasingly important in our technology-driven economy.⁴⁴ Some commentators, however, express concern that highly specialized courts are susceptible to rapid policy swings and other dangers.⁴⁵ The Federal Circuit has not hesitated to disregard the patent holdings of other circuits—usually ruling in favor of patent holders and against competitors invoking antitrust law.⁴⁶ For example, in

39. A losing party in the Federal Circuit can seek certiorari review by the Supreme Court, but one commentator has suggested that it is unlikely the Court would become involved in a patent case. Martin J. Adelman, *The New World of Patents Created by the Court of Appeals for the Federal Circuit*, 20 U. MICH. J.L. REF. 979 (1987). Adelman suggests that with the extremely limited number of certiorari the Supreme Court grants and the large number of patent cases the Federal Circuit reviews, it is unlikely the Court will take on patent cases. *See id.* at 986 n.26. Adelman also notes that with the Federal Circuit having sole jurisdiction over patent cases, it is unlikely that a circuit split will motivate the Court to review a patent case. *Id.*

40. *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1068 (Fed. Cir. 1998) (“[W]e will . . . apply the law of the appropriate regional circuit to issues involving . . . elements of antitrust law such as relevant market, market power, damages, etc. . . .”).

41. *See id.* As evidence of the Federal Circuit's autonomy in the field of patents, the court, apparently without fear of Supreme Court intervention, announced: “[W]e hereby change our precedent and hold that whether conduct in procuring or enforcing a patent is sufficient to strip a patentee of its immunity from the antitrust laws is to be decided as a question of Federal Circuit law.” *Id.*

42. *Id.*

43. *Id.*

44. *See Adelman, supra* note 39, at 982.

45. *Id.* at 983 n.13 (citing Richard Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on the Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 777 (1983); Simon Rifkind, *A Special Court for Patent Litigation? The Danger of a Specialized Judiciary*, 37 A.B.A. J. 425 (1951)).

46. *See generally In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322 (Fed. Cir. 2000); *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346 (1999).

Intergraph Corp. v. Intel Corp.,⁴⁷ the Federal Circuit rejected the Second Circuit's rule of *Berkey Photo, Inc. v. Eastman Kodak Co.*⁴⁸ and noted that several other circuits had done the same.⁴⁹

Certainly, the Federal Circuit has not hesitated to develop patent law that relates closely to, and in many cases impinges upon, antitrust law. For example, the Federal Circuit noted in *Intergraph* that the Supreme Court has held that in the absence of any purpose "to create or maintain a monopoly," the Sherman Act does not prevent a party from deciding with whom he will not deal.⁵⁰ Nevertheless, the Federal Circuit has gone further by holding that a patent holder—even one with monopolistic intent—does not violate antitrust laws so long as he does not unlawfully exceed the scope of his patent.⁵¹ By the year 2000, the Federal Circuit had demonstrated its strong support of patents and copyrights, and its strong opposition to anything that might limit those rights.⁵²

II. CASE SUMMARY

A. District Court Decision

In 1984, Xerox instituted a policy of not selling patented parts unique to its copiers to independent service organizations ("ISOs").⁵³ Through strict enforcement, this expanded policy severely impaired the ability of ISOs to purchase restricted parts.⁵⁴ The price of parts increased considerably, limiting the ISOs' ability to compete in the service market.⁵⁵ In 1994, the ISOs brought suit in the District Court of Kansas, alleging that Xerox's refusal to sell patented parts was a violation of the Sherman Act because Xerox effectively eliminated the ISOs as competitors in the service market.⁵⁶ Xerox counterclaimed for patent and copyright infringement, argu-

47. 195 F.3d 1346 (1999).

48. 603 F.2d 263 (2d Cir. 1979) (holding that a patentee with market power in a first market could not use that power to gain competitive advantage in a second market, regardless of intent).

49. *Intergraph*, 195 F.3d at 1360 (citing *Aquatherm Indus. Inc. v. Fla. Power & Light Co.*, 145 F.3d 1258 (11th Cir. 1998); *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171 (3d Cir. 1992)).

50. *Id.* at 1358 (citing *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)).

51. *See Glass Equip. Dev. Inc. v. Besten, Inc.*, 174 F.3d 1337, 1343 (1999).

52. *See, e.g., Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346 (1999); *see also Adelman, supra* note 39, at 987-88.

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

54. *See id.*

55. *See id.*

56. *See id.*

ing that plaintiffs' antitrust claims relied solely on Xerox's legal right to refuse to license its intellectual property and that Xerox's refusal to deal did not constitute patent and copyright misuse.⁵⁷ The district court granted summary judgment for Xerox, holding that if Xerox lawfully acquired the patent or copyright, then intent was irrelevant and refusal to license did not violate antitrust law.⁵⁸

B. Federal Circuit Decision

Reviewing the summary judgment de novo, the Federal Circuit applied its own law to antitrust claims related to patent licensing and the law of the Tenth Circuit to claims related to copyright licensing.⁵⁹

1. Patent

The court began its discussion by noting the inherent conflict between antitrust law and intellectual property rights.⁶⁰ At issue in this case was how the antitrust laws limit patent and copyright holders' ability to exclude others and to refuse to license their intellectual property.⁶¹ The court noted that a patent holder's right to exclude was broad and well supported by case law and statutes.⁶²

Nevertheless, because of limits on those rights, the court noted two circumstances in which an infringement defendant could succeed in antitrust claims.⁶³ In *Glass Equipment Development Inc. v. Besten, Inc.*,⁶⁴ the court held that an infringement defendant could succeed in his antitrust claim if he could prove either (1) that the patentee obtained the patent by "knowing and willful fraud"⁶⁵ or (2) that the infringement suit was a sham.⁶⁶ *ISO* did not involve the first test because the ISOs did not allege any fraud at the Patent and Trademark Office ("PTO").⁶⁷ Hence, the ISOs had to show that Xerox's infringement suits were both objectively without

57. *See id.*

58. *See id.*

59. *See id.* at 1325.

60. *See id.* (citing *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1362 (Fed. Cir. 1999)).

61. *See id.*

62. *See id.* at 1326.

63. *See id.*

64. 174 F.3d 1337, 1343 (Fed. Cir. 1999).

65. The Supreme Court defined "knowing and willful fraud" in *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965).

66. The Supreme Court defined a "sham" suit as one that is both objectively baseless and subjectively intended to further the patentee's anticompetitive motives. *Eastern R.R. Presidents Conference v. Noerr Motor Freights, Inc.*, 365 U.S. 127 (1961).

67. *See Indep. Serv. Orgs.*, 203 F.3d at 1326.

merit *and* subjectively motivated by a desire to cause anticompetitive injuries to potential competitors.⁶⁸

The court rejected an argument by ISOs that Xerox illegally sought to leverage its dominance in the parts market into a dominance in the service market.⁶⁹ While the case law prohibits illegal tying and extension of a patent owner's monopoly beyond the scope of his patent, the court concluded that this case did not involve either of these impermissible activities.⁷⁰

The court then declined to follow a Ninth Circuit holding that placed great importance on a patent holder's subjective motives for exclusion.⁷¹ The court instead reiterated its rule that if a patent infringement suit was not objectively baseless, then the patentee's subjective motives would be immaterial.⁷² At the end of its patent analysis, the court turned to the question of whether the defendant had exceeded the scope of its patent, concluding that Xerox had not.⁷³ Therefore, on the matter of Xerox's refusal to sell its patented parts, the court held that Xerox did not violate antitrust law.⁷⁴

2. Copyright

The court then examined Xerox's refusal to distribute copyrighted manuals and software to plaintiffs. The court first noted that the Supreme Court had not directly addressed the issue of antitrust and the refusal to sell or license copyrighted works.⁷⁵ Without a Tenth Circuit decision on the matter, the court turned to the most extensive analysis of that issue which had been conducted by the First Circuit in *Data General Corp. v. Grumman Systems Support Corp.*⁷⁶ The First Circuit reasoned that a copyright holder's desire to exclude others from the use of his copyright was a "presumptively valid business justification" for any harm to competition that might result.⁷⁷ Therefore, the burden of overcoming this presumption

68. *See id.* (citing *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1071 (Fed. Cir. 1998)).

69. *See id.* at 1327.

70. *See id.*

71. *See id.* (citing *Image Technical Servs. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1996)).

72. *See id.* (citing *Nobelpharma*, 141 F.3d at 1072).

73. *See id.* at 1328.

74. *See id.*

75. *See id.*

76. *See id.* (citing *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147 (1st Cir. 1994)).

77. *Data General*, 36 F.3d at 1187.

rested with the antitrust plaintiff,⁷⁸ who must produce evidence that the copyright was illegally obtained.⁷⁹ The Federal Circuit noted that the Ninth Circuit extended this test in *Image Technical Services v. Eastman Kodak Co.* to allow plaintiffs to rebut the presumption by showing that the use of the copyright was a mere pretext to produce anticompetitive harm.⁸⁰ The Federal Circuit, however, rejected the Ninth Circuit's extension in favor of the First Circuit's rule, making it more difficult to overcome the presumption in favor of the copyright holder.⁸¹ Therefore, because the ISOs did not allege that Xerox committed any fraud in obtaining its copyright, the court refused to examine Xerox's motivations for refusing to sell or license its copyrighted works.⁸² The Federal Circuit concluded that Xerox's refusal lay within the scope of its copyright. Accordingly, the court upheld the summary judgment.⁸³

III. DISCUSSION

The *ISO* decision makes it unlikely that a patentee's exclusion of competitors will be found to violate antitrust laws, even when his conduct is motivated by anticompetitive concerns. Because of the Federal Circuit's exclusive jurisdiction over patents and the limited frequency with which the Supreme Court reviews Federal Circuit decisions, *ISO* likely will have a tremendous impact on antitrust matters arising in patent infringement cases. By giving extremely little weight to a patentee's anticompetitive motives, the *ISO* decision gives extreme favor to patent rights at the expense of antitrust concerns. This poses the danger of damaging the patent system if patentees engage in behavior that, prior to *ISO*, would have violated antitrust laws, and if this behavior deters potential competitors from investing in research and from entering new markets.

A. Consequences of the *ISO* Decision

After the *ISO* decision, a patent holder has very broad rights to refuse to license or sell his intellectual property even if the patent holder has anticompetitive motives. Under *Glass Equipment Development*⁸⁴ and *ISO*,

78. See *Indep. Serv. Orgs.*, 203 F.3d at 1329 (citing *Data General*, 36 F.3d at 1187).

79. See *id.*

80. See *id.* (citing *Image Technical Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1219 (9th Cir. 1996)).

81. See *id.* at 1329 (citing *Data General*, 36 F.3d at 1187 n.64).

82. See *id.* at 1330.

83. See *id.*

84. 174 F.3d 1337 (Fed. Cir. 1999), discussed *supra* notes 64-66 and accompanying text.

a court will not examine the motives of the patentee in an infringement suit unless a defendant can show either that the patentee committed fraud at the PTO,⁸⁵ or that the infringement suit is a sham.⁸⁶ A patent holder may also be subject to antitrust liability for attempting to misuse his right beyond the scope of his patent.⁸⁷ These are difficult conditions to prove, and represent virtually no limit on the right of a patentee to pursue anticompetitive ends.⁸⁸

In order to prove fraud at the PTO, an infringement defendant must show, by “independent and clear evidence of deceptive intent,”⁸⁹ that the patentee made knowing and willful misrepresentations to the PTO that resulted in a patent which would not have issued but for the misrepresentations.⁹⁰ Mere failure to provide information to the PTO will not result in liability,⁹¹ and the plaintiff’s showing of good faith mistake can rebut the defendant’s proof of deceptive intent.⁹² Once the defendant clearly establishes deceptive intent, he must then prove that the patent would not have issued but for the misrepresentations.⁹³ This difficult task requires detailed evidence about the patent examiner’s handling of the patent application, and the plaintiff can rebut the evidence by showing that the misrepresentation was not the principal reason for the patent’s approval.⁹⁴

In order to prove that an infringement suit is a sham, the defendant must show that the suit is both objectively baseless and subjectively moti-

85. *Id.* at 1326.

86. *Id.*

87. *Id.* at 1327.

88. See Robert Pitofsky, Remarks at American Antitrust Institute Conference: An Agenda for Antitrust in the 21st Century (June 15, 2000), available at <http://www.ftc.gov/speeches/pitofsky/000615speech.htm> (arguing that the conditions required by the court appear to be almost nonexistent limits on the “virtually unfettered right of a patent holder to refuse to deal in order to achieve an anticompetitive objective”).

89. *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1071 (Fed. Cir. 1998).

90. *Id.* at 1070.

91. *Id.*

92. *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965).

93. *Nobelpharma*, 141 F.3d at 1071.

94. See Pitofsky, *supra* note 88 (stating that fraud at the PTO is “more difficult to prove than almost any other antitrust allegation because the Federal Circuit requires clear evidence that a patent applicant made knowing and willful misrepresentations that resulted in a patent that would not have issued in the absence of a misrepresentation”).

vated by bad faith.⁹⁵ Each of these conditions places a significant burden of proof on the alleged infringer who is raising antitrust counterclaims. He must first show that no objective litigant could reasonably believe that the infringement suit would succeed, and then he must prove that the patentee's desire to interfere with a competitor's business motivated the suit.⁹⁶ The patentee has an absolute defense if he can show any objectively reasonable basis for his claim, making the defendant's burden of proof quite high.⁹⁷ Misuse, or exceeding the patent's scope, might also subject a patentee to antitrust liability.⁹⁸ The Federal Circuit's brief treatment of the patent scope in *ISO*,⁹⁹ however, suggests that this bar, too, will be hard for an infringement defendant to overcome.

If a balance between patent and antitrust existed prior to *ISO*, the Federal Circuit has upset that balance with its decision.¹⁰⁰ Given the near total autonomy of the Federal Circuit to rule on antitrust issues that arise in patent cases, this imbalance will have unfortunate consequences for competition and innovation in the intellectual property economy. In high-technology markets dominated by patents, where intellectual property is often a barrier to entry, this decision may have chilling effects on innovation and disclosure.¹⁰¹

B. The Federal Circuit Is Rarely Subject to Review

A number of factors contribute to the Federal Circuit's near total autonomy on patent issues.¹⁰² The ultimate effect of this autonomy is that the Federal Circuit is, for all practical purposes and at least for the imme-

95. *Nobelpharma*, 141 F.3d at 1071-72; see also *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60-61 (1993) (holding that sham litigation requires proof of objective baselessness and subjective intent).

96. *Nobelpharma*, 141 F.3d at 1071.

97. See Pitofsky, *supra* note 88 (arguing that this test is an extremely narrow limit on the ability of the patent holder to pursue anticompetitive ends).

98. See *Int'l Salt Co. v. United States*, 332 U.S. 392 (1947).

99. *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1328 (Fed. Cir. 2000).

100. See Pitofsky, *supra* note 88 (examining whether the antitrust-intellectual property balance has changed).

101. See *id.*

102. See Adelman, *supra* note 39, at 986 n.26 (noting that the extremely limited number of certiorari petitions granted by the Supreme Court, combined with the unlikelihood of a circuit split on patent issues, means the Federal Circuit will rarely be reviewed by the Supreme Court). Adelman also argues that the Federal Circuit was created in part because of congressional dissatisfaction with the Supreme Court's treatment of patent cases, and this also contributes to the Supreme Court rarely reviewing the Federal Circuit. *Id.* at 986-87.

diate future, the court of last resort for patent issues and related antitrust matters.

The Supreme Court receives a large number of petitions for review on writ of certiorari and grants only a small number of those petitions. While the number of petitions granted to each circuit varies from year to year, the Federal Circuit is often among the least reviewed circuits. During the twelve-month period from October 1, 1998 to September 30, 1999, the Supreme Court received 5518 petitions for review on writ of certiorari.¹⁰³ The Court granted 137 of those petitions to the eleven regional circuits and the Court of the Appeals of the D.C. Circuit¹⁰⁴ but only two petitions to the Federal Circuit.¹⁰⁵ By comparison, in the same twelve-month period, the Court granted 22 petitions to the Fourth Circuit.¹⁰⁶ Similarly, in the twelve-month period from October 1, 1997 to September 30, 1998, the Court received 4995 petitions and granted 109 to the eleven regional circuits and the D.C. Circuit.¹⁰⁷ While the Court granted 22 petitions to the Eighth Circuit,¹⁰⁸ it granted only three to the Federal Circuit.¹⁰⁹

One reason for the small number of petitions granted to appeals from the Federal Circuit is that a split among the circuits is one basis for Supreme Court review. With the Federal Circuit's sole jurisdiction over patents, this justification for Supreme Court review is essentially nonexistent.¹¹⁰ Without a circuit split, the Supreme Court will likely grant review only when it believes that the Federal Circuit decided a case erroneously. While a conflict between the Federal Circuit and the Supreme Court could arise, one commentator has suggested that such a conflict would likely bring congressional intervention in favor of the Federal Circuit.¹¹¹

103. Leonidas Randolph Mecham, Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts*, 1999 ANNUAL REPORT OF THE DIRECTOR, 93 (Table B-2), available at <http://www.uscourts.gov/judbus1999/b02sep99.pdf> (last visited Jan. 29, 2001).

104. *Id.*

105. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999); Lehman v. Zurko, 525 U.S. 961 (1998).

106. Mecham, *supra* note 103.

107. Leonidas Randolph Mecham, Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts*, 1998 ANNUAL REPORT OF THE DIRECTOR 99 (Table B-2), available at <http://www.uscourts.gov/dirprt98/b02sep98.pdf> (last visited Jan. 29, 2001).

108. *Id.*

109. LaChance v. Erickson, 522 U.S. 262 (1998); Pfaff v. Wells, 523 U.S. 1003 (1998); United States v. United States Shoe Corp., 523 U.S. 360 (1998).

110. Adelman, *supra* note 39, at 986 n.26.

111. *Id.* at 986-987 (stating that Congress's creation of the Federal Circuit indicated a "dissatisfaction with the effectiveness of Supreme Court review of patent issues"). Adelman

In practice, the Supreme Court has demonstrated a willingness to affirm Federal Circuit holdings, even those that radically alter patent law. For instance, for two hundred years, patent infringement cases had been tried before juries, and juries decided claim construction.¹¹² In *Markman v. Westview Instruments, Inc.*, the Federal Circuit changed that tradition, holding that the judge should interpret the meaning and scope of the claims as matters of law.¹¹³ The Federal Circuit based its decision, in part, on its belief that judges, trained in the law, are better suited to provide uniformity in claim construction.¹¹⁴ The decision represented a considerable change in the role of juries in patent infringement trials. Since infringement cases are often decided on issues of claim construction, *Markman* effectively removed juries from their role as triers of fact in most patent infringement cases.¹¹⁵ In the view of some judges, that decision overturned two hundred years of jury trial in patent cases in the United States, and raised concerns over the role of the Seventh Amendment right to trial by jury in patent cases.¹¹⁶ *Markman* was heard *en banc* by the Federal Circuit, with two judges filing concurring opinions¹¹⁷ and another filing a lengthy dissent.¹¹⁸ Yet the Supreme Court upheld *Markman* in a unanimous decision, agreeing with the majority of the Federal Circuit that the need for uniformity in patent law required that judges, not juries, determine claim construction.¹¹⁹ The Supreme Court's unanimous affirmation of a precedent-altering, and widely criticized,¹²⁰ Federal Circuit decision suggests

man goes on to suggest that this Congressional disapproval, along with other factors, has "essentially removed" the Supreme Court from playing any role in the patent system. *Id.*

112. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 989 (1995) (Mayer, J. concurring).

113. *Id.* at 978.

114. *Id.* at 979.

115. *Id.* at 989 (Mayer, J., concurring).

116. *Id.* at 1000 (Newman, J., dissenting).

117. *Id.* at 989 (Mayer, J., concurring); *Id.* at 998 (Rader, J., concurring).

118. *Id.* at 999 (Newman, J., dissenting).

119. 517 U.S. 370, 391 (1996).

120. See, e.g., Greg J. Michelson, *Did the Markman Court Ignore Fact, Substance, and the Spirit of the Constitution in its Rush toward Uniformity?*, 30 LOY. L.A. L. REV. 1749, 1787 (1997) (arguing that the *Markman* decision disregarded that factual matters exist in claim construction and that by removing the jury from claim construction the decision effectively prevents them from playing any role in an infringement trial); Elizabeth J. Norman, *Markman v. Westview Instruments, Inc.: The Supreme Court Narrows the Jury's Role in Patent Litigation*, 48 MERCER L. REV. 955, 963 (1997) (arguing that the *Markman* decision's removal of juries from playing an important role in infringement trials runs counter to established Seventh Amendment jurisprudence).

that, at least for the present, the Court has no interest in taking issue with the Federal Circuit's sweeping changes.¹²¹

C. Patent Rights are Favored at the Expense of Competition

1. *The Federal Circuit's Autonomy Has Resulted in Support of Patents to the Detriment of Antitrust Law*

While the Federal Circuit has occasionally ruled against patent holders and in favor of antitrust claims, there has been a general trend of strong support for patent holders facing antitrust charges.¹²² In *Loctite Corp. v. Ultraseal Ltd.*,¹²³ an early Federal Circuit case, the court upheld Loctite's infringement claim and denied Ultraseal's antitrust counterclaims. Declining to adopt a "preponderance of the evidence" standard, the court held that clear and convincing evidence was needed to rebut the presumption that the patentee had brought its infringement suit in good faith.¹²⁴ The court reasoned that the patent system serves a positive function in the system of competition by encouraging "investment based risk."¹²⁵ If the burden of proof on an infringement defendant were not high enough, then the threat of treble damages in an antitrust counterclaim might discourage good faith attempts at patent enforcement.¹²⁶

More recently, in *Intergraph*, the Federal Circuit asserted that antitrust laws do not negate a patent holder's right to exclude others from his patents.¹²⁷ On the issue of illegal leveraging, the Federal Circuit held that the district court's ruling relied on an erroneous per se theory of future Sherman Act violations.¹²⁸ The Federal Circuit stated that this was an unwarranted expansion of antitrust theory that would penalize companies for

121. See Gregory D. Leibold, *In Juries We Do Not Trust: Appellate Review of Patent-Infringement Litigation*, 67 U. COLO. L. REV. 623, 626-25 (1996) (expressing surprise that the Supreme Court unanimously affirmed the decision, despite the Court's long held position that the Seventh Amendment right to jury trial applied to patent infringement cases).

122. See generally Pitofsky, *supra* note 88 (expressing concern that in recent years the Federal Circuit has upset a balance between patent and antitrust interests); Richard Gray & David Banie, Note, *Intergraph Corporation v. Intel Corporation*, 16 COMPUTER AND HIGH TECH. L.J. 437, 447 (2000) (suggesting that the Federal Circuit's decision in *Intergraph* demonstrates its continued support for the proposition that the exercise of intellectual property rights will rarely lead to antitrust liability).

123. 781 F.2d 861 (1985).

124. *Id.* at 876.

125. *Id.* (citing *Patlex Corp. v. Mossinghoff*, 758 F.2d 594, 599 (Fed. Cir. 1985)).

126. *Id.* at 877.

127. 195 F.3d 1346, 1362 (Fed. Cir. 1999) (citing *Cygnus Therapeutic Sys. v. ALZA Corp.*, 92 F.3d 1153, 1160 (Fed. Cir. 1996)).

128. *Id.* at 1360.

conduct that, if it occurred, would not violate the Sherman Act.¹²⁹ The court based its decision in part on the district court's erroneous ruling that the mere presence of monopoly power is actionable under the antitrust laws.¹³⁰ This decision also followed the Federal Circuit trend of strongly criticizing any incursion onto patent rights by antitrust law.¹³¹

Subsequently, in *Glass Equipment Development*, the Federal Circuit ruled that a patent owner's infringement suit would not expose it to antitrust liability unless the defendant proved fraud or sham.¹³² The defendant in *Glass Equipment Development* did not allege either fraud or sham, and so the court dismissed its antitrust claim with little discussion.¹³³ Although *ISO* restated the rule in more sweeping language, the *Glass Equipment Development* holding stands for same basic proposition—it is unlikely that the exercise of patent rights will subject the patent owner to antitrust liability.¹³⁴

Despite the general trend described above, the Federal Circuit has, on occasion, held patent owners liable for antitrust violations. In *C.R. Bard, Inc. v. M3 Systems, Inc.*,¹³⁵ a patentee appealed from a jury verdict finding the patentee liable for infringement, misuse, fraud, and attempted monopolization due to improperly redesigning a patented product to exceed the scope of the original patent. In a complex opinion, the Federal Circuit upheld the jury verdict of attempted monopolization on the sole grounds that there was substantial evidence to support it.¹³⁶ However, the court overturned the jury verdicts of infringement, misuse, and fraud.¹³⁷ The Federal Circuit then denied the plaintiff's petition for rehearing *en banc*.¹³⁸ In a concurring opinion to that denial, Judge Gajarsa noted that on appeal of the antitrust violations, the plaintiff challenged only the sufficiency of the evidence.¹³⁹ Given the limited nature of *Bard*'s appeal, the Federal Circuit's opinion—and its decision to deny rehearing *en banc*—neither establishes nor suggests any new antitrust theory.¹⁴⁰ While the *Bard* decision does provide an example of the Federal Circuit ruling against a patent

129. *Id.*; see also Gray & Banie, *supra* note 122, at 443-44.

130. Gray & Banie, *supra* note 122, at 447.

131. *Id.*

132. *Glass Equip. Dev., Inc. v. Besten, Inc.*, 174 F.3d 1337, 1343 (1999).

133. *Id.* at 1344.

134. *Id.* at 1343.

135. 157 F.3d 1340, 1346 (1998).

136. *Id.* at 1383 (Bryson, J. concurring).

137. *Id.* at 1358, 1367-69.

138. 161 F.3d 1380 (Fed. Cir. 1998).

139. *Id.* (Gajarsa, J., concurring).

140. *Id.* at 1381.

holder in an antitrust counterclaim, this decision was primarily based on the deferential standard of review and so does not suggest a retreat from the court's trend of strong patent support.¹⁴¹

2. *ISO Represents the Federal Circuit's Continuing Support for this Trend*

In *ISO*, the Federal Circuit ruled that its own law applies to antitrust matters arising in patent cases.¹⁴² The court noted that, as a general proposition, regional circuit law controls when reviewing a district court judgment involving federal antitrust law.¹⁴³ When matters fall under the Federal Circuit's exclusive jurisdiction, however, then it must apply its own law.¹⁴⁴ Therefore, the court concluded that antitrust matters arising from a patent infringement suit were within the exclusive jurisdiction of the court and that Federal Circuit law should govern those matters.¹⁴⁵ In comparison, the court decided that Tenth Circuit law should govern the antitrust matters related to the copyright claim.¹⁴⁶ In sum, the Federal Circuit has created antitrust law favorable to its strong support of patent rights.

The *ISO* decision follows a trend apparent in the Federal Circuit's cases that favors patents over antitrust. The opinion itself is relatively short, especially in comparison to prior decisions like *Nobelpharma* or *Intergraph*, in part because the court was able to rely on the reasoning in those cases. The court held that its own law applies to antitrust claims by citing *Nobelpharma*.¹⁴⁷ The court cited *Intergraph* for the proposition that while intellectual property rights do not confer a privilege to violate antitrust laws, the right to exclude others does not conflict with the purpose of antitrust.¹⁴⁸ The court cited *Glass Equipment Development* for the proposition that a patent owner bringing an infringement suit is exempt from liability for the anticompetitive effects of his suit unless there was fraud at the PTO or the suit is baseless.¹⁴⁹ *ISO* thus unifies the Federal Circuit's prior decisions on patent rights and antitrust liability. The decision affirms, and then enhances, the court's position that the exercise of intellectual property rights will rarely give rise to antitrust violations.

141. *Id.* at 1380.

142. *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1325 (Fed. Cir. 2000).

143. *Id.*

144. *Id.* (citing *Pro-Mold & Tool Co. v. Great Lakes Plastics, Inc.*, 75 F.3d 1568, 1574-75 (Fed. Cir. 1996)).

145. *Id.*

146. *Id.*

147. *Id.* at 1325.

148. *Id.*

149. *Id.* at 1326.

D. The *ISO* Decision Presents the Danger of Deterring Innovation

1. *Patentees who Dominate their Markets Will Likely Be Able to Hinder Competitors*

The practical result of the *ISO* decision is that companies like Xerox, who hold all or most of the important patents in an industry, can exercise more or less total control over their own industry and other related, downstream industries. Xerox's control over patented parts and copyrighted manuals and software allows it to exert significant control over the markets for sale and service of its copiers.¹⁵⁰ Under earlier antitrust analysis, this might have constituted impermissible expansion into a downstream market;¹⁵¹ however, the Federal Circuit concluded, in a relatively brief section of the decision, that Xerox's actions to limit the ability of service organizations to compete were within the scope of its patent.¹⁵²

Especially in emerging markets and technologies, where pioneer patents receive broad protection, the *ISO* case means that a patent holder with monopoly power over his market has the potential substantially to bar new entrants.¹⁵³ The patent holder is under no obligation to sell or license patented products to potential competitors.¹⁵⁴ If the technology remains valuable in the market during the life of the patent, this barrier could prove such a disadvantage that potential competitors might be severely discouraged from entering the market. Of course, where the technology's viability exceeds the life of the patent, competitors can enter the market after the patent has expired. The original patentee will still, however, have a significant head start over competitors, which might discourage new entrants.

In some markets, the commercially valuable technology might change so rapidly that the years of patent protection are useless because no patented product has commercial value for that long. Some commentators have argued that the high technology marketplace changes so quickly that, without the intervention of antitrust laws, consumers will punish patent holders who abuse their market power by raising prices and reducing out-

150. *See id.* at 1329.

151. *See Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 479 n.29 (1992) (noting that the Court has often held that power gained through a patent or copyright can give rise to liability if "a seller exploits his dominant position in one market to expand his empire into the next").

152. *Indep. Serv. Orgs.*, 203 F.3d at 1328.

153. *See Pitofsky, supra* note 88 (arguing that especially in high tech markets, intellectual property is often the principal barrier to new entry).

154. *See* 35 U.S.C. § 271(d) (1994).

put.¹⁵⁵ Nevertheless, a patent monopolist still gains considerable advantage by excluding competitors, even for a short time, because of his head start in developing new technology based upon his original patents.¹⁵⁶ Competitors can of course use the published patents to develop their own products, but the original patent holder's control over his original products can limit competitors' ability to profit from their new products.

2. *Competition Encourages Innovation*

Commentators have argued that the Federal Circuit's strengthening of patent rights has been one cause for the increase in patent activity—both in prosecution and litigation—because inventors have confidence in the strong patent protection provided by the court.¹⁵⁷ The rights granted to patent holders encourage investment in research and development because investors know that if they obtain a valuable patent, they can receive a return on their investment.¹⁵⁸

In *Nobelpharma*, the Federal Circuit expressed concern that private antitrust suits might have a chilling effect on the disclosure of inventions because inventors might not file patents out of fear of treble damages.¹⁵⁹ Yet, overbroad patent protection that allows one party to exclude others for anticompetitive reasons poses the danger of hindering potential innovators. Just as investors will hesitate to fund research if they might not receive adequate protection for their inventions, they will also hesitate to fund research if they can not compete in the marketplace.

155. See Liebowitz & Margolis, *supra* note 15, at 318 ("The high technology marketplace appears to be quite capable of disciplining any firm that does not address the needs of its consumers, as demonstrated by the extraordinary rate of turnover of product leaders in these markets.").

156. See Pitofsky, *supra* note 88 (discrediting the argument that the antitrust laws are applicable only to traditional industries, and are not well suited to the modern high technology economy. Pitofsky cites the history of innovation in the telecommunications market since the break up of AT&T as evidence that competition, rather than monopoly power, best fosters innovation).

157. Jon F. Merz & Nicholas M. Pace, *Trends in Patent Litigation: The Apparent Influence of Patents Attributable to The Court of Appeals for the Federal Circuit*, 76 J. PAT. & TRADEMARK OFF. SOC'Y 579 (1994) (suggesting that an increase in patent filings after 1983 may be in part attributable to the advent of the Federal Circuit and its stabilization of patent law). The authors are careful to note that other factors, such as the patenting of new technologies like software and biotechnology, may also have contributed to the increase.

158. See *Loctite Corp. v. Ultraseal Ltd.*, 781 F.2d 861, 876 (Fed. Cir. 1985) (noting that the patent system motivates competition because it encourages investment based risk).

159. *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1069 (Fed. Cir. 1998).

It is true that market power is, at times, reasonably necessary to achieve efficiencies in the market.¹⁶⁰ For example, research and development joint ventures, where several competitors pool their resources to fund shared research, have a short term anticompetitive effect—a group with significant aggregate market power is conducting research. Nevertheless, the overall benefit to consumers from newly developed technologies, which a single firm could not develop, outweighs the need to enforce research competition.¹⁶¹ This example shows that a balance can exist between patent and antitrust, a balance which the Federal Circuit could restore by giving the impact on competition some place in its consideration of antitrust counterclaims.

3. *A Balance between Patents and Antitrust*

It is appropriate for the Federal Circuit strongly to support patent rights and the right of patentees to exclude competitors. This encourages innovation by giving investors confidence that they can profit from investments in research. There is no disagreement with the fundamental principle that a patentee has no obligation to sell or license his patent to anyone.

The *ISO* decision, however, focuses almost entirely on this statutory right to exclude and more or less ignores any anticompetitive motives or effects, except in very limited instances. Concern about the *ISO* decision arises from fear that a patentee will be able to limit availability of his product with terms that severely impair competition, for instance, terms which effectively destroy competition in a related market.¹⁶² After the *ISO* decision, it seems that the mere invocation of the right to exclude will eliminate any antitrust concerns.¹⁶³ It seems that antitrust concerns are eliminated without consideration given to the nature or severity of the harm to competition, or the importance of the limiting terms in order to protect incentives to innovate.¹⁶⁴

160. See Pitofsky, *supra* note 88. In response to the argument that market power always benefits innovation and therefore, the government should have a hands off policy in dealing with it, Pitofsky gives four examples of situations in which the modest anticompetitive effects of transactions are outweighed by resulting gains in innovation.

161. *See id.*

162. *See id.* (expressing concern that impact on competition will have little or no place in patent cases after the *ISO* decision).

163. There are the three instances in which a patentee can be liable for antitrust counterclaims, but these represent very narrow situations. *See id.* (arguing that these three situations place very few limits on the ability of a patentee to behave in an anticompetitive manner).

164. *See id.*

A better solution would be to balance the incentives to innovate against the anticompetitive effects of the patent.¹⁶⁵ The right to exclude should be valued much more highly than any single anticompetitive effects—exclusion is the fundamental property right associated with patents.¹⁶⁶ But some weight should be given to the anticompetitive effects of exclusion, and whether or not that exclusion is necessary to encourage innovation. If the exclusionary use of a patent is grossly anticompetitive, this should have some weight in considering whether or not the patent is valid in an infringement case.¹⁶⁷

IV. CONCLUSION

The Federal Circuit has rejected what it perceives as an unwarranted “enlargement of antitrust theory and policy” that works to prohibit the exercise of patent rights.¹⁶⁸ This ruling creates a situation where it seems that the exercise of patent rights will very rarely lead to antitrust violations. While this provides even stronger protection for intellectual property rights, it might prove to be a bar to competition, as patent holders are free to monopolize so long as their infringement suits pass a minimal test. This imbalance between patent law and antitrust law poses the danger of being detrimental to innovation and ultimately detrimental to the patent system.

165. *See id.* (arguing for a balancing of antitrust and patent concerns).

166. *See* Carl Schenck, A.G. v. Nortron Corp., 713 F.2d 782, 786 n.3 (Fed. Cir. 1983).

167. *See* Pitofsky, *supra* note 88 (concluding that a balancing of patent and antitrust concerns can be accomplished with great respect and concern for protecting a patentee’s rights and incentives to innovate).

168. *See* Intergraph Corp. v. Intel Corp., 195 F.3d 1346, 1360 (Fed. Cir. 1999) (stating that “the purpose of antitrust law is to foster competition in the public interest, not to protect others from competition . . . in their private interest”).

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