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COMPETING IN GLOBAL PRODUCT INNOVATION: IS ANTITRUST IMMUNITY NECESSARY?

George J. Alexander†

One hears many cries that antitrust should be curtailed in the interest of improving United States competitiveness. There can be no doubt that the country's economic position has been slipping for a considerable time. Calls for change are always viewed more seriously when there is agreement that the situation is deteriorating. This article is an essay of the author's reactions to the revisionists. It opines that antitrust generally functions well and that other adjustments ought to be considered before further changes are made to it.

Antitrust is truly an American contribution to world law. Although the concept of restraint of trade existed in England before the Sherman Act,¹ the shape of modern law comes from that act. As the United States prospered, it became an increasingly demanding proponent of its utility. Its message was influential. Antitrust now appears in the national laws of most free market countries.² It is prominent in the European Community where it provides a second layer over the national laws on the same subject.³ Even Japan, a country that has made only modest use of its law, has recently appeared more interested in its enforcement.⁴

Unfortunately, the United States has fallen on harder times in its international trade. In a number of industries in which Ameri-

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1. *United States v. Addyston Pipe & Steel, Co.*, 85 F. 271, 279 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

2. See generally J. VON KALINOWSKI, *WORLD LAW OF COMPETITION* (1987).

3. Treaty of Rome (1962), §§ 85-86, Regulation 17, at 2 Common Market Reporter § 2400.

4. *Apple Japan and Canon Face Antitrust Probe*, Wall St. J., Oct. 4, 1989, at A6, col. 3.

can firms controlled, products from other countries now predominate. With the changes that flow from subordination, the pressures to moderate antitrust impact have grown.

Pressures for change come from opposite ends of the economic and political spectrums. On the one hand there are some in business who feel that what they lack is the ability to cooperate with other U.S. firms to tackle foreign competitors. They seek relief from antitrust restrictions on size and on joint ventures.⁵

Others, especially in high tech fields, focus on the limited advantage they achieve from innovation. Even given patent and copyright protection, they find their ideas reproduced abroad, if not domestically, in short time. They tend to press for relief for cooperative development and production groups strong enough to fend off the imitators.⁶

Labor leaders press for protection from lower cost foreign goods. They tend to focus on import duties and restrictions as means for accomplishing their objectives.⁷

All of such proposals have in common a belief that free market forces are inadequate or inappropriate to solve the country's problems. Although America urged the rest of the world to rely on its economic philosophy when it was the leading economic force in the world, it is seen as now considering at least partial recantation.

This essay will attempt an evaluation of the desirability of modifying the antitrust laws in order to facilitate greater innovation. Some change has already taken place and further change is being proposed. The essay will also discuss whether other measures might be useful to promote innovation.

American products have lost their appeal in the world, and indeed, in the United States over the last several decades. The Japanese and others have captured much of the world market in automobiles.⁸ American manufactured cars have even lost a substantial share of the U.S. market.⁹ Electronics manufacturing has largely moved to Asia.¹⁰ While the United States pioneered in computer development, it is fighting to retain that market.¹¹ Chip man-

5. Shenenfield, *Export Joint Ventures*, 54 ANTITRUST L.J. 1039 (1985).

6. Hoffman, Marcou & Murray, *Commercial Piracy of Intellectual Property*, 71 J. PAT. & TRADEMARK OFF. SOC'Y 556 (1989).

7. Note, *An Analysis of the Conflicts Between Congressional Import Quotas and the General Agreement on Tariffs and Trade*, 9 FORDHAM INT'L L.J. 734, 744 (1986).

8. *Car Output Up in Japan*, N.Y. Times, Jan. 26, 1989, at D3, col. 3.

9. *Vehicle Sales Dropped 19% In Late June*, N.Y. Times, Jul. 6, 1989, at D1, col. 6.

10. *2 Studies Show Big Drops In U.S. Share of Electronics*, N.Y. Times, Jan. 5, 1989, at D1, col 1.

11. Markoff, *Supercomputers Worry U.S. . . .*, N.Y. Times, May 1, 1989, at D1, col. 4.

ufacture is slipping.¹² Software is being produced - sometimes simply copied - abroad.¹³ Hardware is also coming in from the orient.¹⁴

It is discomfoting for a country to be a second-rate economic power even if it has never experienced greater success. Far worse is to have been the preeminent power in the world at the middle of the century and to be falling, seemingly inexorably, into that status. Politically, it is expedient not to admit reality and to blame the problems which exist on external factors.

It would be easier to adopt new protectionist policies had the United States not been the prime advocate of free markets as a world economic solution.¹⁵ Especially troublesome, at the moment, is the fact that the planned economies which seemed our major trade opponents, have themselves so largely been persuaded of the utility of free markets and have begun shedding failed planning as a national policy.¹⁶

In the main, the Reagan administration pressed free market values. During its eight years, internal antitrust was stripped of most of its focus on values other than economic efficiency. The period provides a sharp contrast with the remainder of post World War II antitrust. In the prior twenty-plus years, concern about the social consequences of concentration of economic power was an important factor in antitrust.¹⁷ Although size was never admitted to be itself a violation of law, the principal method of acquiring size, merger, was greatly restricted and monopoly size was condemned unless it was inevitable.¹⁸ As recently as the Von's Grocery merger,¹⁹ Justice Stewart noted that, in anti-merger cases, "The sole consistency that I can find is that . . . the Government always wins."²⁰ Economic pluralism was pursued aggressively despite a

12. *The Chip Industry Is Sliding Again*, N.Y. Times, Jan. 27, 1989, at D1, col. 3.

13. Farnsworth, *China Called Top Copyright Pirate*, N.Y. Times, Apr. 20, 1989, at D7, col. 4.

14. See Miller, *Technology: Devices Shows Changes As They Are Made in Fax*, Wall St. J., Jun. 5, 1989, at B1, col. 1. See also Schlesinger, *Zen and the Art of Auto Sales*, Wall St. J., Mar. 13, 1989, at B1, col. 3.

15. Oddi, *The International Patent System and Third World Development: Reality or Myth?*, 1987 DUKE L.J. 831, 833 (1987). See also *Soviet Call to West: Money for Rebuilding*, N.Y. Times, Oct. 29, 1988, at 1, col. 1.

16. Gamble & Killheffer, *The Enemies of United States' Trade Competitiveness: A Lawyer's Perspective*, 6 DEL. LAW. 7 (Winter 1988).

17. See Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U.L. REV. 1020 (1987).

18. *United States v. Aluminum Co. of America*, 148 F.2d 416 [hereinafter *Alcoa*].

19. *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966).

20. *Id.* at 301.

recognition that it might lead to inefficiency and, consequently, increased costs for consumers.²¹ The benefits to be realized included lessening of political power by major corporations, presumably in some proportion to their reduced capital base, and increased business opportunity for relatively small entrepreneurs.²²

In the following years, antitrust policy shifted to an equally polar, but opposite position. Led by Chicago school economists, the government almost totally abandoned its focus on the political consequences of business size to pursue economic efficiency.²³ Concern about abuses of economic power were subordinated to allowing firms to seek to solidify their positions. So long as firms did not obtain enough market power to control prices, mergers were freely approved. Firms were assumed to be the best judge of efficiency in making merger decisions. The market place was seen as the best "regulator" punishing incorrect decisions and rewarding those prudently accomplished. Much governmental regulation of business was dropped in favor of business competition in the industry. Merger mania replaced an equally frantic period of merger prohibition.²⁴

Among other things, the shift in policy was supposed to enhance American competitiveness in the world market. American competitiveness had slipped to its lowest ebb since World War II. Causation is difficult to fix in these matters. It can be argued that the loss of market position was a product of the prior period of world wide growth strangulation or of the less competitive stance of the now larger companies. It is quite likely, however, that the loss of market position is more a product of the increased growth and sophistication of the other developed and developing countries.

In addition, many in Congress are urging that tariff barriers be raised and that further efforts be made to insure a better balance between exports and imports.²⁵ Whether these take the form of ex-

21. "Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization." *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

22. "Throughout the history of . . . [the antitrust acts] it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." *Alcoa*, 148 F.2d at 429 (2d Cir. 1945).

23. Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1221 (1988).

24. Austin, *Antitrust Reaction to the Merger Wave: The Revolution v. the Counterrevolution*, 66 N.C.L. REV. 931, 933 (1988).

25. Note, *supra* note 7, at 744.

port quotas for our trading partners or of import quotas for our products, such measures are, of course, the antithesis of free market forces. They result in distortions in supply which raise the price of products. They certainly raise the extent of governmental market planning.

The slipping world position of the United States presented an interesting dilemma to the administration. President Reagan's public positions were always cast in terms of free market principles. Yet, his administration proposed a number of laws which moderated antitrust even in instances in which classic restraints of trade might take place. Chief among them were the National Cooperative Research Act of 1984²⁶ and the Export Trading Company Act of 1982.²⁷ The former eased antitrust concerns for companies engaged in research and development. The latter did the same for associations engaged in export.

While it is not clear how or even whether President Bush will change the executive department's approach to antitrust,²⁸ several proposals are being considered which would further moderate antitrust in international transactions. So far, the administration has expressed interest and ambivalence.²⁹ As of this writing, it has not yet taken a position on the proposals in Congress which would continue the Reagan program.

There are two major approaches to the new proposals. One type, modelled on the ETCA,³⁰ provides for reporting to government, approval and resultant antitrust immunity. The other type, modelled on the NCRA,³¹ does not involve governmental review. It reduces antitrust exposure by dropping treble damages and instituting the rule of reason as the review standard.

In apparent recognition of the potential anticompetitive effect of blanket exemptions, both approaches use either the courts or ad-

26. 15 U.S.C. §§ 4301-4305 (1988) [hereinafter NCRA].

27. 15 U.S.C. §§ 4001-4003 (1988) [hereinafter ETCA].

28. Assistant Attorney General Rill recently indicated that antitrust enforcement would have an increasingly prominent role in the Department's work, J. Rill, *Antitrust and International Competitiveness in the 1990's*, Remarks before the Annual Meeting of the Section of Antitrust Law, American Bar Association 3 (Aug. 7, 1989), but later in the same speech opined that he thought that there primarily was a need for better communication with the public concerning the Department's work. Rill stated "there may be a need for further clarification of the antitrust laws applicable to joint ventures, particularly joint production ventures." *Id.* at 9.

29. See Concerning Joint Production Ventures, testimony of Michael Boudin before the Subcommittee on Economic and Commercial Law, Committee on the Judiciary, House of Representatives, May 17, 1989.

30. 15 U.S.C. §§ 4001-4003 (1988).

31. 15 U.S.C. §§ 4301-4305 (1988).

ministrative agencies to sort out anticompetitive collaboration. Since prior law only prohibited anticompetitive collaboration, these acts would be redundant if the law were perfectly applied. Both approaches are obvious attempts to lower the risk of antitrust error for U.S. sellers by making it easier to avoid unfavorable results. These approaches, consequently, are either useless or inhibit antitrust.

The Export Trading Company Act has had some impact on the creation of exporting associations. As of the middle of 1989, one hundred-two export trade certificates had been issued. Both of the administration agencies involved in granting the certificates, Commerce and Justice, believe the act is working well.³²

The Cooperative Research Act is also apparently having an impact. One hundred twenty-five notifications had been filed in the same period.³³ Further, the act may well have persuaded some companies to proceed with cooperative research and development without filing.

Following the urging of the prior administration and as a result of new appointments to the Supreme Court, the Court has shifted toward an efficiency based approach to antitrust. Actions which were considered *per se* violations of law, are now governed by the rule of reason.³⁴ The rule of reason generally allows justification of actions when they make transactions more efficient.³⁵ Private treble damage actions have, on a variety of grounds, been diminished.³⁶

The major premise of proposals which would allow greater cooperation among U.S. producers is that the resultant size would make American competition more effective in international markets. Larger aggregations of assets, it is argued, are needed to deal efficiently with international markets.³⁷

Why would more concentrated American companies (or joint ventures) compete more effectively in world markets? If less fragmented markets are more efficient, why not amend domestic law to accomplish the same results? The fact that the Clayton Act, with its anti-merger provision, has not been modified to lessen its impact

32. See Boudin, *supra* note 28, at 12.

33. *Id.* at 9.

34. *E.g.*, Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984); United States v. General Dynamics Corp., 415 U.S. 486 (1974).

35. "[T]hat there is a presumption in favor of a rule-of-reason standard; that departure from that standard must be justified by demonstrable economic effect. . . ." *Business Elects. Corp. v. Sharp Elects. Corp.*, 108 S. Ct. 1515, 1520 (1988).

36. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

37. Shenefield, *supra* note 5.

since its passage in 1914 indicates that there is no such consensus.³⁸ The conventional explanation for requiring different conditions in overseas trade is it that the American market is open and that the markets abroad are protected by national policies.³⁹

There are policies in other countries which block free trade. Chief among them are tariff barriers which keep U.S. trade from entering.⁴⁰ Inspection and standard setting have a similar effect.⁴¹ Government subsidy to industry which leads to exports also has a significant effect.⁴²

Also important is the concern that foreign goods not drive out both actual and potential competition.⁴³ Were they able to do so, sellers of those products could then exploit their position by charging higher prices or allowing their product to deteriorate.

To some extent, adjustments to permissible size under antitrust laws is being accomplished by considering the world to be the appropriate geographic market.⁴⁴ For all the reasons that apply to domestic law, market definition should reflect the actual range of alternatives available to sellers. Even a national monopoly need not offend the law if the product is brought under effective competition, in the foreign markets and at home, by equally well established competitors of sufficient size and number. U.S. antitrust has historically considered the national boundaries as the maximum geographic market for products.⁴⁵ The possible competition of imports has been disregarded. Judge Hand, in the *Alcoa* case,⁴⁶ pointed out that to do otherwise presented difficult problems.⁴⁷ Transportation costs may make foreign competition inadequate to force a competitive price in the domestic market. That problem, however, is not new to antitrust. It forms part of the analysis of the appropriate

38. *But see infra* note 54.

39. See Donlan, *Not So Free Trade: U.S. Preaches What It Doesn't Always Practice*, *Barron's*, Jun. 27, 1988, at 70.

40. See Alm & Tanakadate, *Is Japan Really Opening the Door to Trade?*, *U.S. News and World Rep.*, Aug. 12, 1985, at 24. See also Wallis, *Protectionism and Trade Barriers*, *Dep't St. Bull.*, Jan. 1988, at 29.

41. See Archbold, *Pre-Shipment Inspections Pose Rising Threat to Exports*, *Cashflow*, May 1987, at 57.

42. Fong & Walker, *International High-Technology Joint Ventures: An Antitrust and Antidumping Analysis*, 7 *INT'L TAX & BUS. LAW.* 57 (1989).

43. See *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 174 (1964).

44. L. SULLIVAN, *ANTITRUST* 70 (Hornbook Series 1977).

45. *Id.* at 68.

46. *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

47. He reasoned that "within the limits afforded by the tariff and the cost of transportation, 'Alcoa' was free to raise its prices as it chose. . . ." *Id.* at 426.

geographic market.⁴⁸

Tariffs are another matter. They should logically be a factor in market definition. If tariffs impose significant entry barriers (as they often do) the market should remain domestic.⁴⁹ Arrangements which are approved because of the existence of a world wide market should be reevaluated when new tariffs are imposed.⁵⁰ In other words, an American company should not be allowed an excessive position in the domestic market on the grounds of world competition if that competition cannot reach domestic markets without tariff distortion. If an industry believes it would be competitive in the world market if it were allowed to amalgamate its resources (either by merger or joint production venture) it should bear the burden of obtaining an end to tariff protection so that its thesis can be put to a market test.

In fact, domestic antitrust principles are generally an excellent guide in international application. As a start, companies that have benefitted from the more permissive attitude toward mergers and vertically imposed restraints at home should not be heard to complain against comparable arrangements by their foreign competitors. Consistency, however, still appears to be an often despised virtue. There have been vocal complaints⁵¹ against tying and exclusive dealing arrangements despite the fact that the former is clearly governed by rule of reason analysis⁵² and the latter is so circumscribed as a per se offense that it might as well be.⁵³ Similarly, companies have complained about mergers which include foreign competitors.⁵⁴ Having persuaded U.S. enforcers that merger law

48. "While the relevant competitive market is not ordinarily susceptible to 'metes and bounds' definition, cf. *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 611, it is of course the area in which respondents and the other 700 producers effectively compete." *Tampa Elect. Co. v. Nashville Coal Co.*, 365 U.S. 320, 331-32 (1961).

49. It seems that the Justice Department is at best equivocal on that point. In the *U.S. Department of Justice Antitrust Guidelines for International Operations*, 54 ANTITRUST & TRADE REG. REP. (BNA) S1 (June 9, 1988) [hereinafter *Antitrust Guidelines*], the Department indicated that "[f]oreign competitors would not be excluded from the relevant market solely because their sales in the United States are subject to quotas or VERs [voluntary export restraints]. That is because it is difficult to assess the effectiveness and longevity of such restraints. . . ." *Id.* at S18. Later it did note that it would consider the actual impact of the restraint and acknowledged that such quotas or VER might actually assist cartel pricing. *Id.*

50. *But see* Remarks of Charles F. Rule before the Antitrust Law Section Annual Meeting of the New York State Bar Assoc., Jan. 27, 1988, at 4-5.

51. Remarks of Charles F. Rule before the Antitrust Law Section of the New York State Bar Assoc., Jan. 12, 1988, at 6.

52. *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293 (1949).

53. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 26 (1984).

54. Davidow, *Special Antitrust Issues Raised by International Joint Ventures*, 54 ANTITRUST L.J. 1031 (1985).

should protect competition without necessarily trying to protect small business competitors also, some now urge that it protect U.S. companies from the competition of foreigners. The Reagan administration proposed giving the President authority to allow unlimited mergers and acquisitions in an import affected industry "unless there is a significant *probability* that such merger or acquisition would *substantially* increase the ability of the resulting firm to maintain prices above competitive levels in such market for a *significant* period of time" (emphasis added).⁵⁵ Commerce Secretary Baldrige went a step farther and proposed outright repeal of Section 7 of the Clayton Act, the provision of antitrust law which deals with mergers.⁵⁶

The prescription of use of domestic principles with respect to mergers requires a caveat because the Justice Department has not chosen to bring many to the Supreme Court. The older, and never expressly overruled, cases hold that efficiencies are not necessarily relevant in deciding whether a merger violates the law.⁵⁷ It seems likely that the present Court would disregard that principle. At least in industries competing in the world market, the Court certainly should.⁵⁸ Rather than obstruct mergers and joint ventures between U.S. and foreign manufacturers when they are based in creating efficiencies and when they don't threaten competitive pricing, the United States should encourage and support them.⁵⁹

A far more difficult problem attends U.S. antidumping legislation.⁶⁰ In the first place, the law is broad and there are proposals to make it broader. One suggestion is to have the law apply to any product that has a "dumped" component.⁶¹ Another is to provide a private treble damage remedy for dumping.⁶² With such a weapon, an inefficient domestic firm might well stave off foreign rivals which could win, but would be intimidated by the prospect of American litigation.

An aspect of domestic law can be called into play here as well.

55. See *Reagan Administration's Package to Congress for Revision of Federal Antitrust Laws*, DER Special Supplement, Feb. 19, 1986, at S9.

56. Baldrige, *Rx for Export Woes: Antitrust Relief*, Wall St. J., Oct. 15, 1985, at 28, col. 6.

57. See *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

58. See R. Davis, *Antitrust, The Trade Deficit and U.S. International Competitiveness: A Time for Rethinking*, 18 N.Y.U. J. INT'L L. & POL. 1235 (1986).

59. The FTC has set a good example in GM-Toyota, 103 FTC 386 (1984). See generally R. Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 74 GEO. L.J. 1605 (1986).

60. 19 U.S.C. §§ 1673-1677 (1982 & Supp. V 1987).

61. Rule, *supra* note 49, at 12-13.

62. *Id.*

Antitrust law prohibits sales below average variable cost as unlawful predation.⁶³ The antidumping law goes farther. It finds dumping to exist unless the foreign price exceeds *total cost plus 8%*.⁶⁴ Thus domestic buyers are deprived of lower prices from firms which could and would price with reference to marginal costs simply for competitive reasons without anticipating predatory results.

While calculating costs is difficult when the data is relatively easy to discover, it is far more difficult for goods produced abroad. One accepted surrogate for cost data is home country pricing. About three quarters of U.S. dumping cases are brought against firms which sell in the United States at prices lower than their prices at home.⁶⁵ Home country pricing may reflect non-predatory factors. Distribution costs at home may be higher. This may well be true of many Japanese consumer items, for example. Cartel or oligopoly pricing may account for the home prices; there is little reason to insist that U.S. consumers participate in the same mark-up. When foreign components are used in U.S. products, the antidumping law may, through its required higher pricing, make the American end product uncompetitive in the world market.⁶⁶

Another difficult problem concerns direct foreign subsidy of exports to the United States. While American consumers benefit from the lower price, there is strong public sentiment for protecting the domestic industry from such "unfair competition."⁶⁷ Surprisingly, there is less vocal support for accepting the lower prices! Ideally, state subsidies will, over time, be removed politically. In the meantime, a political response protecting American industry is to be expected despite the fact that it makes little sense either economically or politically. Protectionism breeds counter-protectionism. Fortunately there is a current wave of world reform directed at its limitation.⁶⁸

In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,⁶⁹ the Supreme Court rejected a claim of private damage resulting from Japanese price fixing. It theorized that if the Japanese were in fact engaged in cartel pricing in the United States, the higher prices would provide the plaintiffs either greater profits or larger market

63. *Transamerica Computer Co. v. IBM Corp.*, 481 F. Supp. 965 (N.D. Cal. 1979) (However, prices below average costs are legal if they are reasonable, such as "if a monopolist was merely liquidating excess, perishable, or obsolete merchandise." *Id.* at 996).

64. 19 U.S.C.A. § 1677(b)(e)(1)(B)(ii) (West Supp. 1989).

65. Rule, *supra* note 49, at 10-11.

66. *See id.* at 11-14.

67. Fong & Walker, *supra* note 41, at 77.

68. Oddi, *supra* note 15, at 833.

69. 475 U.S. 574 (1986).

share, perhaps both. The coupled predation claim was dismissed because the lack of success in driving the U.S. firms out of business made predation seem an improbable explanation of what had transpired. While the American firms kept their market shares, Japanese subsidy of products destined for the U.S. could only benefit consumers through their lower price. Unless the Japanese firms could recoup their losses by higher monopoly prices, they should have no motivation to set a lower-than-market price.

There are, of course, other national interests. The United States may wish to preserve a strong domestic position in such industries as aviation and electronics because of military considerations. It may wish to reduce business turn over in some fields because of labor displacement concerns. It may have concern about the political power of large corporations. Such considerations are perfectly appropriate, but not well fitted to antitrust.⁷⁰

One specific field in which protection of domestic manufacture may be lacking is in the protection of product innovation. Intellectual property law has been slow to adapt to changes in industrial needs. While intellectual property law protection is the inverse of allowing the free market to operate, there is general recognition of a need for protection. Perhaps some modification of that law might result in a more equitable adjustment to the need to encourage American innovation.

Of the forms of protection of intellectual property, three major ones require legislative establishment: patent,⁷¹ copyright⁷² and trademark.⁷³ Patents are issued expressly for innovation. If one were able to obtain the statutory seventeen years of exclusivity, for most inventions, that would probably provide a sufficiently substantial reward for their creation. That patent law has not functioned in that manner, especially in high technology development, is attested to by the prevalent use of trade secrecy as an alternative. It is estimated that an inventor gets on average six months of advantage before competitive products challenge its position.⁷⁴ Among the problems presented by patent law are: the lack of protection during the period of patent processing, the need to disclose know-how in

70. See generally R. BORK, *THE ANTITRUST PARADOX* (1978) (Former Judge Bork argues that judges should interpret the antitrust laws to promote economic efficiency).

71. Weisen, *The Elements of a Domestic License of Intellectual Property*, 9 ALI-ABA Course Materials J. 55 (August 1984).

72. *Id.*

73. *Id.*

74. Thornburgh, *U.S. Firms Get Tripped in Race to the Market-place: Grant Antitrust Exemptions. . .*, Wall St. J., Dec. 27, 1988, at A10, col. 3.

the patent application which provides information to competitors and the uncertainty concerning patentability of some forms of innovation. In an era of an explosion of biological discovery, patent law's uncertainty about protection is lamentable.⁷⁵ Design protection, expressly offered by design patent law, is difficult to obtain in practice.⁷⁶

Copyright law seems also to lag behind industrial needs. Since it only bars copying and does not inhibit independent development of identical products,⁷⁷ it seems well suited to protection for intellectual property. While its use to protect literature seems quite perfected, it has not been adequate in keeping up with technical changes. Computers are a good illustration. It took a specific new act, the Semiconductor Chip Protection Act of 1984,⁷⁸ to provide protection to that form of electronic expression. To what extent computer programs are copyrightable is still in controversy. The field is rapidly developing and uncertainty may well slow progress considerably.⁷⁹ Even when the law is clearer, copying may prove difficult to establish in practice.

Trademarks are designed to help identify products with their producers for consumers.⁸⁰ They have also become embroiled in international trade issues in many ways. One particularly significant manner in which trademarks have been used involves them in effective world market division. Since, as a general matter, trademark owners can license exclusive territories for their use, some have used that power to block the importation of goods sold abroad into the United States. The control of so called "gray market" goods, can significantly impede competition by preserving a high

75. See *Diamond v. Chakrabarty*, 447 U.S. 303 (1980). Respondent filed a patent application relating to his invention of a human-made, genetically engineered bacterium capable of breaking down crude oil, a property possessed by no naturally occurring bacteria.

76. Comment, *The Future of Design Protection in the United States: An Analysis of the Proposed Domestic System in View of Recent Developments in the United Kingdom, New Zealand, and Australia*, 20 J. MAR. L. REV. 261, 261-62 (1986).

77. G. ALEXANDER, *COMMERCIAL TORTS* § 3.6 (2d ed. 1988).

78. 17 U.S.C. §§ 901-904. This Act generally provides protection for a "mask work" fixed in a semiconductor chip. *Id.* § 902(a)(2). A "mask work" is:

a series of related images, however fixed or encoded -

(A) having or representing the predetermined, three-dimensional pattern of metallic, insulating, or semiconductor material present or removed from the layers of a semiconductor chip product; and

(B) in which series the relation of the images to one another is that each images has the pattern of the surface of one form of the semiconductor chip product.

Id. § 901(a)(2).

79. ALEXANDER, *supra* note 76, § 8.1.

80. *Id.* § 1.1.

market price in one market from the competition of identical (or at least quite similar) goods.⁸¹ Similar exclusion may be accomplished if a United States company alleges that a proposed import would violate its intellectual property rights.⁸² Since the filing of a claim requires the International Trade Commission to block imports until the matter is resolved, it is another potential barrier to competition for goods that truly do not violate U.S. rights. The Justice Department has indicated a reluctance to prosecute any but the most calculating instances of such conduct.⁸³

Other ideas have no protection at all.⁸⁴ There is no statute (and perhaps no common law either) protecting the discovery of body cells which fight cancer.⁸⁵ A commercially useful idea which does not fall into an established parameter of protection may well be unsalable because an idea becomes unprotectible when it is disclosed.⁸⁶

Antitrust also is not fine tuned to intellectual property concerns. Many forms of transactions, for example intellectual property licensing agreements, have previously been dealt with under per se rules apparently in the belief that holding a patent or copyright creates market power.⁸⁷ The Reagan administration attempted to reverse this result by converting all licensing agreements to rule of reason analysis and reducing potential damages from trebled to singular.⁸⁸ Even assuming the administration's basic argument that licensing agreements may result in efficiencies, there is no reason to resist recognizing that they may also involve horizontal market division or other conduct which is deservingly condemned by per se rules. It has been argued that innovation, in general, is so dispersed that no concern about cartel forming is warranted.⁸⁹ Should that thesis prove correct, it might lead to broad permissiveness in new protective legislation of the sort which protects cooper-

81. *Id.* § 2.4.

82. Tariff Act of 1930 § 337, 19 U.S.C. § 1337(a) (1982).

83. *Antitrust Guidelines*, *supra* note 48, at §31. (action permissible on "merely . . . some doubt"). *Id.* at §32.

84. ALEXANDER, *supra* note 76, § 3.6.

85. *Moore v. Regents of the Univ. of Cal.*, 202 Cal. App. 3d. 1230, 249 Cal. Rptr. 494 (1988).

86. ALEXANDER, *supra* note 76, § 3.6.

87. Joelson, *Licensing of Intellectual Property Rights*, 14 GA. J. INT'L & COMP. L. 479, 487 (1984).

88. See Intellectual Property Licensing Legislation; testimony of Charles F. Rule before the Subcommittee on Technology and the Law and Antitrust, Monopolies and Business Rights of the Committee on the Judiciary of the U.S. Senate, Oct. 20, 1987.

89. Jorde & Teece, *Innovation, Cooperation and Antitrust: Striking the Right Balance*, 4 HIGH TECH. L.J. 1 (1989).

ative research.⁹⁰ There is no apparent reason for extending such legislation to include general manufacturing.

Using antitrust immunity to promote innovation is, in any event, unfocused. There are many more direct methods of encouraging creativity. Tax policy might be shaped to treat intellectual property so as to encourage innovation. As an early goal, making shareholders less interested in immediate profits as opposed to long term growth might be considered. Governmental purchasing power might be slanted in the direction of innovative producers. Military spending already supports many forms of intellectual property. Creative solutions to other governmental problems might be similarly directly rewarded. The government might provide more seed financing for appropriate work. Federal recognition, quite aside from compensation, might provide stimulus. Some of these solutions might directly support intellectual property development without simultaneously lowering the competitive forces that force more slothful companies to change.

Perhaps the time has come to develop a more coherent body of law protecting intellectual property. It will not be an easy matter. Whatever develops will reduce "competition" to the extent of protection. Perhaps done well enough, such law could provide sufficient incentive to improve the level of innovation in the country.

Many of the industries that were most concentrated have produced the least innovation. The auto market is a good illustration. Steel is another. It seems that the recent explosion in communications awaited the dismemberment of the telephone company. On the other hand, the inventions from garage shops are legend in Silicon Valley.⁹¹

In any event, no universally applicable antitrust dilution seems adequately thoughtful. There is a difference between direct protection of intellectual property and the types of antitrust limitations presently under consideration. Protections would be directly responsive to innovation. Antitrust limitations run the risk of simply allowing greater aggregations of power. In the past, large size has not guaranteed product innovation. Perhaps the converse is true.

90. NCRA, 15 U.S.C. §§ 4301-4305 (1988).

91. *Case, Sources of Innovation: A Fresh Perspective on the Role of Big Companies and Small, INC.*, June 1989, at 29.