cedure[45] when it stated: "If an administrative agency is best qualified to weigh the facts and opinions that culminate in regulations, its conclusions should be final and it is no anomaly that they are; [but] the legality of *applying* a regulation to a particular party may still be questioned, and the relevant facts shown, in the usual types of judicial proceedings. . . . If a party has no standing whatever, in certain circumstances, to challenge the administrative action, the reason is that under the governing substantive law the action taken is not an infringement of any legal interest of that party."[46]

The opinion in the *Philadelphia* case did not make the court's position clear as to whether the decision rested upon the belief that rules and regulations can be reviewed under Section 24(a) or upon the belief that the amendment in question was an order. If the former is the court's belief, that belief seems clearly to conflict with the language of the statute providing that orders are reviewable, without making any mention of regulations. If the court's belief is that the amendment to Rule U-49(c) was an order, that determination cannot be said to be clearly wrong because the definitions and distinctions in this field are not sufficiently precise to enable one to be certain of any result. However, it is submitted that the court's opinion did not shed light upon the confused and complex considerations with which it was dealing. The court made no effort to clarify the status of an administrative regulation under Section 24(a) of the Public Utilities Holding Company Act. It did not indicate a test for determining when there is an order that is reviewable under that section.

It is submitted that a desirable policy would be to deny reviewability of administrative regulations under Section 24(a). Judicial review of the legality of applying the regulations to a party should be allowed to such party only if he can show that application of the regulation will injure him. There should be no exceptions to this policy. But if a party can show that mere promulgation of a regulation causes him injury, he should have standing in a court of equity to obtain immediate review. This latter situation is demonstrated in the *Columbia* case. Presumably there would be very few regulations which would give rise to review prior to application of the regulation to specific parties.

In the *Philadelphia* case there was no certainty that the complaining company was going to be injured. If such injury becomes apparent when the amendment is enforced, the company will then have its opportunity for a day in court. The decision under discussion was not necessary to protect its rights.

ILLEGALITY PER SE OF PARTIAL EXCLUSION FROM MARKET

The appellant, International Salt Company, owned patents on two machines for utilizing salt products in various industrial processes. It distributed these

[45] A committee appointed by the Attorney General, at the request of the President, to investigate the need for procedural reform in various administrative tribunals and to suggest improvements therein.

[46] Administrative Procedure in Government Agencies: Report of the Committee on Administrative Procedure, 77th Cong. 1st Sess., at 119 (1941).

machines under leases requiring the lessees to purchase from the International Salt Company all salt and salt tablets used in the machines. The United States brought a civil anti-trust action to enjoin the appellant from carrying out the provisions of these tying clauses, alleging that the restriction violated Section 1 of the Sherman Act[1] and Section 3 of the Clayton Act.[2] The district court granted summary judgment in favor of the Government, stating that no issue as to material facts was presented.[3] On appeal, the Supreme Court rejected the alternate decree proposed by the appellant[4] and affirmed the decree of the district court invalidating the tying clauses and directing the appellant to offer to sell, lease, or license the patented machines to any applicant on non-discriminatory terms.[5] *International Salt Co. v. United States.*[6]

The Salt Company argued that the summary judgment was unwarranted since there was no trial of the factual issue of the reasonableness of the restraint under the Sherman Act, or of the lessening of competition, or of the tendency to create a monopoly under the Clayton Act. The Court rejected this contention, stating that it was unreasonable per se to foreclose competitors from any substantial part of the market.[7] Moreover, the contracts in question were not saved from unreasonableness because the lessees were given the privilege of buying salt of an equal grade in the open market if the defendant would not furnish salt at the market price. "The appellant had at all times a priority on the business at equal prices. A competitor would have to undercut appellant's price to have

[1] 26 Stat. 209 (1890), 15 U.S.C.A. § 1 (1941).

[2] 38 Stat. 731 (1914), 15 U S.C.A. § 14 (1941).

[3] United States v. International Salt Co., 6 F.R.D. 302 (N.Y., 1946).

[4] The defendant would be enjoined "from refusing to sell, lease or license the use of any such machine to any person . . . or from discriminating in the terms of any contract of sale, lease, or license . . . with any person . . . on the ground that he has used or dealt in, or intends to use or deal in, salt not manufactured or sold by the defendant International Salt." International Salt Co. v. United States, 68 S. Ct. 12, at 16 n. 8 (1947).

[5] "Defendant . . . is directed to offer . . . the use of the . . . machines . . . to any applicant on non-discriminatory terms and conditions; provided that . . . the rental or sale price or royalty at any one time is uniform as to each size or type of machine." Ibid., at 16 n. 7.

[6] 68 S. Ct. 12 (1947), noted in 46 Mich. L. Rev. 576 (1948).

[7] The Supreme Court in the instant case cited Fashion Originators Guild of America v. FTC, 114 F. 2d 80, 85 (C.C.A. 2d, 1940), aff'd 312 U.S. 457 (1941), as authority for this proposition, but went on to add that the volume of business cannot be said to be insignificant and that under "the law, agreements are forbidden which 'tend to create a monopoly,' and it is immaterial that the tendency is a creeping one rather than one that proceeds at full gallop. . . ." International Salt Co. v. United States, 68 S. Ct. 12, 15 (1947). Thus it would seem that the general proposition that it is unreasonable per se to foreclose competitors must be limited in that the question of unreasonableness depends upon the degree of control over the industry which is exercised by the defendant. The district court explained that in the light of FTC v. Sinclair Refining Co., 261 U.S. 463 (1923), and Pick Mfg. Corp. v. General Motors Corp., 299 U.S. 3 (1936), it could not rest its decision on the illegality per se of merely the conduct complained of, but rather "that a restraint which affects 900 business units in a business aggregating $500,000 per annum, is without more, undue and unreasonable, and the lessening of competition, on its face substantial." United States v. International Salt Co., 6 F.R.D. 302, 307 (N.Y., 1946).

any hope of capturing the market, while appellant could hold that market by merely meeting competition."[8]

The evident purpose of the decree compelling the International Salt Company to sell, lease, or license on non-discriminatory terms (uniformity of price for each size and type of machine) is to prevent more favorable treatment of a customer who purchases International's salt rather than a competitor's. Under existing law, if the patentee is to be permitted to get revenue from both the patent and the sale of a related product, the only sure way to prevent a business arrangement which is the effectual counterpart of a tie-in arrangement may be to compel the offer of the patent or patented machine on the same terms to everyone.[9] In answer to the contention that a decree merely restraining the use of the illegal tying clauses would serve the same purpose and still enable International to compete with makers of other machines, the Court, speaking through Justice Jackson, observed that:

> The District Court is not obliged to assume, contrary to common experience, that a violator of the anti-trust laws will relinquish the fruits of his violation more completely than the court requires him to do. . . . When the purpose to restrain trade appears from a clear violation of the law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed. . . . In an equity suit, the end to be served is not punishment of past transgression, nor is it merely to end specific illegal practices. A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints. If this decree accomplishes less than that, the Government has won a lawsuit and lost a cause.[10]

If this is the end to be served by the decree, it is difficult to see why, as a logical extension of existing doctrine, the Government did not, in addition to seeking invalidation of the tying clauses, urge an injunction restraining the enforceability of the patents.

More than thirty years ago, the Supreme Court determined that the presence of tying provisions in patent licensing agreements would render the patentee's normal rights unenforceable in a private infringement suit.[11] This holding has been reiterated throughout the years, even in those cases where there has been no showing of a lessening of competition in the sale of the unpatented articles.[12] Recently, judicial scrutiny of patents has become increasingly strict. This may

[8] International Salt Co. v. United States, 68 S. Ct. 12, 15 (1947).

[9] See discussion of this problem in concurring opinion of Magruder, J., in B. B. Chemical Co. v. Ellis, 117 F. 2d 829, 838, 839 (C.C.A. 1st, 1941), aff'd 314 U.S. 594 (1942). For an example of such an illegal business arrangement, see Dehydrators, Ltd. v. Petrolite Corp., Ltd., 117 F. 2d 183 (C.C.A. 9th, 1941).

[10] International Salt Co. v. United States, 68 S. Ct. 12, 17 (1948). See also the statement by Justice Douglas in United States v. Crescent Amusement Co., 323 U.S. 173, 186 (1944).

[11] Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917).

[12] Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488, 490 (1942); B.B. Chemical Co. v. Ellis, 314 U.S. 495 (1942); Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661 (1944); Mercoid Corp. v. Minneapolis-Honeywell Regulator Co., 320 U.S. 680 (1944); Carbice Corp. v. American Patents Corp., 283 U.S. 27 (1931); Leitch Mfg. Co. v. Barber Co., 302 U.S. 458 (1938).

be explained by the desire of the courts to limit the monopolistic effects of the patent franchise to the four corners of the grant.[13] Any attempt to extend the monopoly granted will be struck down.[14]

Although it is now more popular to speak in these terms, it has always been true that the main issue in anti-trust cases is the scope of the decree.[15] Thus, in 1942 two cases were decided, which, although not based on violation of the anti-trust laws, were based on the broader policy of promoting a system of free competition.[16] One of these cases, *Morton Salt Co. v. G. S. Suppiger Co.*,[17] presented a fact situation remarkably similar to that in the instant case. There, a patentee licensed his patented salt-depositing machines under licenses requiring the lessee to purchase from the licensor the salt tablets used in the machines. There, too, the decision rested upon summary judgment, and no evidence was admitted as to the reasonableness of the restriction contained in the license. In the patentee's suit for an injunction and an accounting for infringement of his patent, his maintenance of the suit was held to be contrary to public policy and the complaint was dismissed for want of equity. In a companion case, *B. B. Chemical Co. v. Ellis*,[18] the owner of a method patent who allowed manufacturers to use it only with materials furnished by him was not permitted to enjoin infringement by another supplier even though he volunteered, prior to the final decree, to give unconditional licenses on a royalty basis to all manufacturers. The Court said: "It will be appropriate to consider the petitioner's right to relief when it is able to show that it has fully abandoned its present method of restraining competition in the sale of unpatented articles and that the conse-

[13] See United States v. Masonite Corp., 316 U.S. 265, 273 (1942); United States v. Univis Lens Co., 316 U.S. 241, 251 (1942). For an analogy of the treatment of patents with the treatment of railroads under the Sherman Act see Levi, The Antitrust Laws and Monopoly, 14 Univ. Chi. L. Rev. 153, 157 (1947) and cases cited therein. In the Brief for the United States as Amicus Curiae in Mercoid v. Mid-Continent Investment Co., 320 U.S. 661 (1944), the Government's interest in the working of the patent system is clearly expounded.

[14] Not only have the requirements for patentability become more stringent, Marconi Wireless Telegraph Co. v. United States, 320 U.S. 1 (1943); Cuno Engineering Corp. v. Automatic Devices Corp., 314 U.S. 84 (1941); Potts v. Coe, 145 F. 2d 27 (App. D.C., 1944), but "the public policy which includes inventions within the granted monopoly excludes from it all that is not embraced in the invention." Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488, 492 (1942).

[15] For example, Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1910), is usually analyzed in the light of the rule of reason which it enunciated. However, even at that time, emphasis was placed on the consideration of the terms of the decree necessary to restore competition to the oil industry. For the terms of the decree see United States v. Standard Oil Co. of New Jersey, 173 Fed. 177, 192 (C.C.A. Mo., 1909). See also Frank, The United States Supreme Court: 1946–47, 15 Univ. Chi. L. Rev. 1, 15 (1947).

[16] "It is the protection of the public in a system of free enterprise which alike nullifies a patent where any part of its is invalid . . . and denies to the patentee after issuance the power to use it in such a way as to acquire a monopoly which is not plainly with the terms of the grant." Mercoid v. Mid-Continent Investment Co., 320 U.S. 661, 665, 666 (1944).

[17] 314 U.S. 488 (1942).

[18] 314 U.S. 495 (1942). For an unfavorable view of the results of the decisions, see Barnett, Patent Property and the Anti-Monopoly Laws (1943).

quences of that practice have been fully dissipated."[19] Two years later in the *Mercoid* case,[20] the doctrine was not only extended to a contributory infringer, but the Court went still further, saying: "The legality of any attempt to bring unpatented goods within the protection of the patent is measured by the anti-trust laws, not by the patent law. . . . [The patentee] may not obtain from a court of equity any decree which directly or indirectly helps it subvert the public policy which underlies the grant of a patent."[21]

These decisions indicated that the result of misuse of the patent, whether by tying clauses or otherwise, will result, in a suit for infringement, in at least a temporary deprivation of the patentee's power to enforce his patent—in effect a temporary revocation of the rights granted under the patent franchise. It is not clear what the patentee must do to purge himself of the effects of his abuse or how long a period must elapse before his rights will be restored,[22] if at all.[23]

In a few recent prosecutions under the antitrust laws, the relief granted has been compulsory licensing on a reasonable royalty basis.[24] Aside from the obvious difficulties of determining a reasonable royalty, it is doubtful that such a decree deprives the offenders of the rewards of their patent abuse. In some cases continuance of the royalties gives the licensor, who obviously need pay no royalties to himself, a tremendous advantage over competitors from whom he would collect this tribute. In other cases, closer to the instant situation, the abuse is profitable to the licensor up to the time of the decree, and after the decree the patentee still retains the advantage previously gained plus the royalty.[25]

[19] B.B. Chemical Co. v. Ellis, 314 U.S. 495, 498 (1942).

[20] Mercoid Corp. v. Mid-Continent Investment Corp., 320 U.S. 661 (1944); Mercoid Corp. v. Minneapolis-Honeywell Regulator Co., 320 U.S. 680 (1944).

[21] Ibid., at 684. See also Rostow, The New Sherman Act: A Positive Instrument of Progress, 14 Univ. Chi. L. Rev. 567, 594 (1947).

[22] In Campbell v. Mueller, 159 F. 2d 803 (C.C.A. 6th, 1947), noted in 14 Univ. Chi. L. Rev. 709 (1947), the plaintiff revoked an executory price-fixing agreement before the end of the trial and was allowed to recover damages for infringements which occurred prior to the cancellation. It has also been suggested that immediately upon cessation of the patent misuse, the plaintiff may secure an injunction against infringement. But see United States v. Vehicular Parking, Ltd., 61 F. Supp. 656 (Del., 1945) where an interval of one year was held to be insufficient.

[23] Novadel-Agene Corp. v. Pennsylvania, 119 F. 2d 764 (C.C.A. 5th, 1941), cert. den. 314 U.S. 606 (1941), explicitly precludes this possibility. The Antitrust Division of the Department of Justice has achieved great success in effecting the cancellation of patents which had been used for monopolistic purposes by the means of negotiated consent decrees. For a listing of these cases, see the exhaustive note, Compulsory Patent Licensing By Antitrust Decree, 56 Yale L. J. 77, at 99 n. 58 (1946). For a discussion of the integration of patent and anti-trust law in patent misuse cases, see Wood, Patents and Antitrust Law 89–95 (1941); Hartford-Empire v. United States: Integration of the Anti-Trust and Patent Laws, 45 Col. L. Rev. 601 (1945).

[24] Hartford-Empire Co. v. United States, 323 U.S. 386 (1945); United States v. National Lead Co., 67 S. Ct. 1634 (1947).

[25] See Levi, op. cit. supra note 13, at 180.

Although some of the lower courts have seized upon the doctrine of the *Morton Salt* and *Mercoid* cases and have applied it vigorously,[26] there have been a number of Supreme Court cases, subsequently decided, which have tended to limit its application. In the *Hartford-Empire* case,[27] compulsory licensing at reasonable royalties under the abused patents was the form of the relief granted,[28] and in the *National Lead* case,[29] although both the Government and one of the defendants urged either a permanent injunction against enforcement of the abused patents or royalty-free licensing, neither was granted.[30]

It is disappointing to note that the Department of Justice, as a result of the *National Lead* case, has apparently decided to abandon any attempt to secure royalty-free licensing or patent unenforceability in anti-trust suits. Factually, the instant situation appears to be on all fours with the *Morton Salt* case and seems to dictate the propriety of the same type of relief therein granted. At the very least, the Court would be embarrassed at the prospect of denying to the Government in an anti-trust suit that which it would grant to a defendant in a private infringement action.[31] It would seem, a fortiori, that the Government, representing the public, should be in a much more favorable position.[32] At a

[26] Standard Register Co. v. American Sales Book Co., 148 F. 2d 612 (C.C.A. 2d, 1945), cert. den. 326 U.S. 732 (1945); Landis Machinery Co. v. Chaso Tool Co., 141 F. 2d 800 (C.C.A. 6th, 1944), cert. den. 323 U.S. 720 (1944). But see Sylvania Industrial Corp. v. Visking Corp., 132 F. 2d 947 (C.C.A. 4th, 1943), cert. dismissed on motion of petitioner 319 U.S. 777 (1943), where injunctive relief was granted upon elimination of the tying clause.

[27] Hartford-Empire Co. v. United States, 323 U.S. 386 (1945).

[28] Justice Roberts stated that the "Government urges that such forfeiture is justified by our recent decisions in Morton Salt . . . and B.B. Chemical. . . . But those cases merely apply the doctrine that, so long as the patent owner is using his patent in violation of the antitrust laws, he cannot restrain infringement of it by others. We were not there concerned with the problem whether, when a violation of the antitrust laws was to be restrained and discontinued, the court could, as part of the relief, forfeit the patents of those who had been guilty of the violation." Ibid., at 415. No mention is made of the Mercoid cases, decided the previous year, which extended the doctrine of the Morton Salt and B.B. Chemical cases to comprehend the very situation described above.

[29] United States v. National Lead Co., 67 S. Ct. 1634 (1947).

[30] The defendant National Lead desired royalty-free licensing, since that would have tended to equalize its competitive position with that of another defendant, Dupont. This decision has not passed without adverse comment. See Zlinkoff & Barnard, The Supreme Court and a Competitive Economy: 1946 Term, 47 Col. L. Rev. 914, 933 (1947). For a comparison with Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 250, 251 (1944), where simple fraud in procuring the patent resulted in forfeiture, see Frank, op. cit. supra note 15, at 14, 15.

[31] United States v. United States Gypsum Co., 53 F. Supp. 889 (D.C., 1943) would seem to support this anomalous view. The case has been sharply criticized in Steffen, Invalid Patents and Price Control, 56 Yale L. J. 1 (1946). In addition, the Supreme Court has recently thought it ". . . inadvisable to leave the decision as a precedent. . . . In a suit to vindicate the public interest by enjoining violations of the Sherman Act, the United States should have the same opportunity [as a private infringer] to show that the asserted shield of patentability does not exist." United States v. United States Gypsum Co., 68 S. Ct. 525, 538 (1948).

[32] "Whilst the remuneration of genius and useful ingenuity is a duty incumbent upon the public, the rights and welfare of the community must be fairly dealt with and effectively guarded." Kendall v. Winsor, 21 How. (U.S.) 322, 329 (1858); Pennock v. Dialogue, 2 Pet. (U.S.)

time when the effects of patent abuse have been dramatized,[33] it is not too much to hope for an automatic rule remedying illegal extension of the patent franchise by declaring the abused patents unenforceable.

REFUSAL TO SIGN IMMUNITY WAIVER AS "CONDUCT UNBECOMING AN OFFICER"

Two police officers, Lieutenant Drury and Captain Connelly, assigned by the Chicago police department to investigate a shooting, were instrumental in securing signed statements from three persons who testified that they could identify the gunmen. The police officers testified fully before the grand jury, which subsequently returned indictments against suspects identified by the supposed eyewitnesses obtained by the officers. Two weeks later, however, two of the three witnesses repudiated their testimony. Once again the officers were called before the grand jury. This time they were asked to sign waivers of immunity, and thus relinquish, before being questioned, the constitutional privilege that "no person shall be compelled in any criminal case to give evidence against himself. . . ."[1] Apparently fearing indictment, Drury and Connelly refused to sign the waivers and were dismissed without questioning. An indictment was returned charging the two officers with conspiracy to procure a false indictment. Later it was nolle prossed by the State's Attorney. The Chicago commissioner of police, however, filed charges against them with the Civil Service Commission, which ordered the officers dismissed from the force for "conduct unbecoming an officer."[2] This order was reversed by the Superior Court of Cook County.[3] An appeal is now pending before the Supreme Court of Illinois.

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1 (1829); see United States v. Masonite Corp., 316 U.S. 265 (1942). See also Brief for the United States in United States v. National Lead Co., 67 S. Ct. 1634 (1947). It may be argued that the Government has no need of such relief since the patent is already effectively unenforceable under the doctrine of the Morton Salt and Mercoid cases. Private infringers themselves may raise the defense of the tying clauses. But see the clarifying opinion of Justice Roberts in Hartford-Empire Co. v. United States, 324 U.S. 570, 572 (1945). At the present time it may well be that a private infringer is in a worse position as a result of a successful antitrust action by the Government, since the decree is considered to have wiped out the past abuses. See Standard Oil Co.v. Markham, 61 F. Supp. 813 (N.Y., 1945).

[33] During the war years, the popular press was filled with stories of patent abuse, cartelization, and the consequent sapping of our military potential. For a general account, see Berge, Cartels: Challenge to a Free World (1944); Reimann, Patents for Hitler (1942); No Peace with I. G. Farben, 26 Fortune 105 (Sept. 1942).

[1] Ill. Const. Art. 2, § 10. Compare U.S. Const. Amend. 5: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

[2] In Matter of Thomas E. Connelly, Civil Service Commission of the City of Chicago, Case No. H 4789 (1947); In Matter of William J. Drury, Civil Service Commission of the City of Chicago, Case No. H 4790 (1947).

[3] Connelly and Drury v. Hurley, Superior Court of Cook County, Illinois, Case Nos. 47-S-17720, 47-S-17721 (1948).