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THE INSIGNIFICANCE OF MACROECONOMICS IN PATENT ANTITRUST LAW: A COMMENT ON MILLSTEIN

*Richard A. Posner**

I shall depart from the standard format slightly, and comment briefly on Professor Scherer's comment, as well as on the main paper. I find myself in substantial agreement with both Mr. Millstein and Professor Scherer. This may seem to involve a logical contradiction, given the caustic tone of Scherer's comment. But I reconcile them as follows. Professor Scherer has delivered a searing criticism not of the paper that Mr. Millstein wrote, but of a paper he might have written. This hypothetical paper would argue for a dramatic expansion in patent protection (a longer term, a lesser required showing of novelty, utility, and nonobviousness, etc.) in order to increase America's lagging productivity. Such a paper would be vulnerable to Professor Scherer's criticisms, because, as he points out (and as I shall also note), strengthening patent protection is not the unequivocal Good Thing that Mr. Millstein seems to think it is.

The paper Millstein in fact wrote, however, is not a call for greatly strengthened patent laws but a competent review and evaluation of the major rules of antitrust law affecting the exploitation of patents; I use "antitrust" broadly to include those aspects of the common law doctrine of patent misuse that are designed to prevent competitive abuses by patent holders. I agree with Millstein that these rules are becoming more liberal in the sense of more permissive and that this trend is a good thing and should be encouraged. The rules he criticizes are futile, costly vestiges of a period of unreasoning hostility to, based on misunderstanding of, patent "monopolies."

I have only two comments of any significance. The first is that I would like to see Mr. Millstein give more credit for the trend toward more permissive antitrust policy to the Chicago School of Antitrust Analysis that began with Aaron Director in the 1950's, and that numbers among its members and alumni such important legal and economic analysts as George Stigler, Robert Bork, Ward Bowman, Lester Telser, Ronald Coase, John Peterman, John McGee, and Frank Easterbrook—to name only a handful. It is difficult to estab-

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lish any causal relationship between the ideas of scholars and the decisions of courts, but it seems more than an accident that both judicial and academic antitrust thinking today closely resemble the approach of the Chicago School as first adumbrated in the 1950's by Director. I know that Mr. Millstein's own thinking about antitrust has changed and I daresay that whether he knows it or not the change is due in part to the vigorous advocacy and scholarship of the Chicago School.

My second comment, and only serious disagreement with Mr. Millstein's paper, is that I think it is a mistake to try to connect issues in patent antitrust law to our trade deficit or related macroeconomic issues such as economic growth and international competition. The history of efforts to impart macroeconomic significance to antitrust issues is not a happy one. In the early days of the New Deal many people thought that excessive competition was a cause of the Depression (or of its severity); and the result was the NRA Codes,[1] which fostered cartelization. Later the pendulum of opinion swung the other way and it was decided that too little rather than too much competition had been a factor in the Depression. Both views are fallacious.

The relationship between patent antitrust law on the one hand and the trade deficit and other macroeconomic problems on the other is extraordinarily complex, yet probably too insignificant to warrant much effort at understanding. No doubt, if there were no patent protection at all the level of research and development expenditures would be lower; and the funds diverted to other uses might well have a lower social product, resulting in an efficiency loss, possibly a big one. But the issues canvassed in Mr. Millstein's paper do not include whether there should be patents. They are issues which, depending on how they are resolved, will slightly raise or slightly lower the income of patent holders. Consider, for example, tying. If patentees are allowed to tie unpatented products to their patented products, there are only two plausible consequences, now that the "leverage" theory of tie-ins has been discredited. The first is that price discrimination will be facilitated where (as in the tying of ink to mimeograph machines in the old *Henry v. A.B. Dick Co.*[2] case) purchases of the tied product vary with the intensity of the consumer's preference for the tying product. The second possibility is that the goodwill of the patentee will be enhanced in those cases where a malfunction in the tied product is difficult to ascertain, so that the consumer may blame the

[1] See National Industrial Recovery Act, ch. 90, § 3, 48 Stat. 195, 196-97 (1933) (held unconstitutional in A. L. A. Schecter Poultry Corp. v. U.S., 295 U.S. 495 (1935)).

[2] 224 U.S. 1 (1912).

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malfunction on the producer of the tying product.[3] In both types of case, allowing tying will increase the income of the patentee, but the increase will probably be too small to make a significant difference in the incentive to invent patentable products, especially since there is no prohibition against patent price discrimination as such. Even in the aggregate, it seems unlikely that recent and foreseeable changes in the direction of more relaxed rules of patent antitrust law will significantly increase the returns to invention.

And if they did, one could not pronounce that a good thing without careful examination of the social returns to invention.[4] Suppose the term of a patent were increased from seventeen years to fifty years. The result would be to increase the expected private returns from patents (though, because of discounting to present value, the increase would not be nearly so dramatic as a comparison between seventeen and fifty years might suggest). However, this might suck too many resources into invention compared to activities which allow smaller or no monopoly profits. Remember that the patent goes to the first inventor, even if he beats his competitor by only one day. The greater the private returns from invention, the greater the resources that will be devoted to making the invention just a bit sooner than rivals, and the costs may exceed the social benefits. To take an extreme example, suppose that the net private and social benefit of some invention is $1,000,000, discounted to present value. If Inventor *X* takes one year to bring the invention to the stage where it is patentable, it will cost him $500,000. To shorten this by a week will cost him another $100,000. Although a saving of one week in bringing the invention to this stage will have some social value, the increment in social value is unlikely (given that the present value of the whole stream of future benefits from the patent is only $1,000,000) to be as great as $100,000. Nevertheless the investment may be worthwhile from a private standpoint because it will enable *X* to enjoy the earnings from the patent (now $400,000), rather than rival *Y* who cannot shave off a week. Every policy change that goes to increase the expected gains from patent development also generates incentives to make expenditures on invention that may not be commensurate with the social gain from the expenditures.

So, strengthening patent protection may not, on balance, be a good thing; and if it is a good thing (as it may well be), changes in the details of antitrust law are not going to have a big enough impact to

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[3] IBM Corp. v. United States, 298 U.S. 131, 139 (1936).

[4] See R&D, Patents, and Productivity (Z. Griliches ed. 1984).

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be worth worrying about from the standpoint of increasing the amount of inventive activity.

I agree with Mr. Millstein's proposals, and don't want to pour cold water on them. I merely want to "decouple" them from his ruminations on the economic crisis that he and others believe this nation faces. It should be enough to justify his proposals that the rules he criticizes cost something to administer, yet do no good and probably do harm. Take the rule against patent tie-ins again. To the extent that such tie-ins are a method of price discrimination, since other methods of patent price discrimination are lawful what is the point of singling out this one for prohibition? To the extent that such tie-ins protect goodwill—and this is often the case with patent tie-ins, because a patented product is apt to be new or complex and in either event to present problems of "fit" with complementary products, warranting the manufacturer of the patented product in insisting on providing the complements as well—the rule raises the cost of invention. So the tie-in rule is inefficient and should be abolished, but not because this or the other changes that Mr. Millstein discusses, singly or together, will make an appreciable difference in the balance of trade or the rate of economic growth.

I think it is not only irrelevant from a practical standpoint to dwell on the macroeconomic dimension of patent antitrust law—so trivial do I think that dimension—but counterproductive, in deflecting attention from the nation's real economic ills. There was a period during the 1970's when it looked as if antitrust might do real harm to the American economy; consider, in particular, the groundless suits against Kodak,[5] IBM,[6] and other highly efficient companies. But with the decline in litigation in this decade,[7] the danger has receded and I do not think antitrust is any longer a major stumbling block to corporate efficiency. If it is, it is dwarfed by such other economic and political (including legal) phenomena as: (1) excessive regulation of employment, by laws against racial and sexual discrimination, by collective bargaining contracts (fostered by federal labor law), by the minimum wage, OSHA,[8] and by common law inroads into employ-

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[5] Berkey Photo, Inc. v. Eastman Kodak Co., 457 F. Supp. 404 (S.D.N.Y. 1978), aff'd in part, rev'd in part, 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980).

[6] Transamerica Computer Co. v. International Business Mach. Corp. (*In re* IBM Peripheral EDP Devices Antitrust Litigation), 481 F. Supp. 965 (N.D. Cal. 1979), aff'd, 698 F.2d 1377 (9th Cir.), cert. denied, 464 U.S. 955 (1983).

[7] See Kauper & Snyder, An Inquiry into the Efficiency of Private Antitrust Enforcement: Follow-On and Independently Initiated Cases Compared, 74 Geo. L.J. 1163, 1178, n.49, 1181 Table 3 (1986).

[8] Occupational Safety & Health Act of 1970, 29 U.S.C. §§ 651-678 (1982 & Supp. III 1985).

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ment at will; (2) by other forms of costly, inefficient regulation (e.g., the Clean Air Act[9]); (3) the domination of government regulation, government procurement, and other governmental activities by redistributive rather than efficiency considerations; (4) heavy taxes, which distort incentives and drain off resources into unproductive or inefficiently managed activities; (5) poor quality of government at all levels (including the judicial), which has as its only saving grace that bad policies are often poorly executed and their thrust thereby blunted; (6) low levels of investment; (7) poor work attitudes, lack of discipline, and other symptoms of social disorganization including broken families, high crime rates, and the prevalence of a self-indulgent style of living; and (8) a poor education system. In a list of impediments to the nation's economic growth, antitrust policy, partly as a result of reforms of recent years, ranks pretty low.

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[9] 42 U.S.C. §§ 7401-7642 (1982 & Supp. III 1985).

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