From the

FINAL REPORT AND RECOMMENDATIONS

OF THE TEMPORARY NATIONAL ECONOMIC COMMITTEE

on the

Investigation of Concentration of Economic Power

(Presented by Senator O'Mahoney and ordered to be printed March 31, 1941)

Extracts Relating to Enforcement of Anti-Trust Laws and Proposed Changes in the Patent Laws.

(from pages 32, 34-37 of the Report)

FOREIGN PATENT CONTROLS OVER AMERICAN INDUSTRY.

Ample testimony on cartels before the Temporary National Economic Committee and other information which has come to the committee from governmental sources indicate that the interchange of patents between American and foreign concerns have been used as a means of cartelizing an industry to effectively displace competition. The production of vitally important materials, such as beryllium, magnesium, optical glass, and chemicals, has been restrained through international patent controls and cross-licensing which have divided the world market into closed areas. As a result, the capacity of American industry to produce these materials is not adequate to meet the needs of the defense program. The present international emergency further attests the need for a strong policy with respect to the control exercised by foreign governments and their dependent industries over American concerns through the patent system. The committee decries this situation and recommends that appropriate legislation be enacted to remedy it.

The further recommendation is made that the patent laws be strengthened so that no application for patent may be filed in a foreign country until specific permission has been obtained from the proper agency in this Government. This will prevent results detrimental to American interests following upon the use of a patent by a foreign government or its agents.

[Approved without objection.]

ANTITRUST

In its examination of the extent and economic effects of the concentration of economic power in private industry, the committee concerned itself more with industrial monopoly than with any other single subject. In so doing, the committee held extensive hearings on specific industries such as steel, petroleum, copper, sulphur, glass containers, beryllium, and distilled spirits, as well as the construction and automotive industries. Some of the industries studied received more detailed examination than others, but in each case an effort was made to develop the pattern of the industry, the extent of the concentration of control and the devices used to achieve and maintain that control. The record also contains substantial evidence of the

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performance of the trade association, a development of increasing importance in recent years.

As a result of the studies made, the committee has arrived at certain conclusions as to desirable ways of better meeting the problem of monopoly. It is important that it be made clear at this point that the recommendations hereinafter made are all premised on the proposition that the public policy evidenced by the Sherman Act and by the Clayton and Federal Trade Commission Acts holds as good today as it did when this legislation was enacted. All of this committee's recommendations are in furtherance of that public policy, and in this connection it is significant that in all the hearings held before this committee no witness so much as suggested any substantive change in the basic philosophy of those laws.

It is also important to point out that the recommendations are made in the light of world conditions as they exist today and of the national defense effort which is considered by all to be of first importance. The steps we recommend are, in the judgment of the committee, not only consistent with the conditions this country faces today but also are things that must be done if we hope to cope successfully with the economic problems of our time. It will avail us nothing to carry a gigantic defense program to a successful conclusion if in so doing we lose sight of the basic philosophy of our American economy—a competitive system of private capitalism.

In this field, the committee makes the following recommendations:

ENFORCEMENT OF THE ANTITRUST LAWS

The extended study of the concentration of economic power made by this committee leads inevitably to recommendations to strengthen the enforcement of the antitrust laws. No hope of preventing the increase of evils directly attributable to monopoly is possible, no prospect of enforcing and maintaining a free economic system under democratic auspices is in view, unless our efforts are redoubled to cope with the gigantic aggregations of capital which have become so dominant in our economic life.

The Department of Justice and the Federal Trade Commission are the agencies clothed with the responsibility for enforcing the statutes which Congress has so wisely enacted to curb monopoly and to free enterprise from the restraints of price fixing, collusive agreements, and other restraints of trade. Confronted with the present-day American economy, they are admittedly undermanned and meagerly budgeted. No law, and particularly no law of the type here discussed, can be stronger than the zeal and resources of the agencies of enforcement into whose care it is entrusted. We strongly urge the absolute necessity of providing funds for these agencies adequate to the task which confronts them.

[Approved without objection.]

LEGISLATIVE CHANGES IN ANTITRUST LAWS

The Committee believes that legislation is clearly indicated as necessary in order that the struggle against monopoly and the uneconomic concentration of economic power in private hands be carried on with better effect than heretofore. Our suggestions follow:[7]

1. *Patent Laws.*

No one can read the testimony developed before this committee on patents without coming to a realization that in many important segments of our economy the privilege accorded by the patent monopoly has been shamefully abused. It is there revealed in striking fashion that the privilege given has not been used, as was intended by the framers of the Constitution and by the Congress, "to promote the progress of science and the useful arts," but rather for purposes completely at variance with that high ideal. It has been used as a device to control whole industries, to suppress competition, to restrict output, to enhance prices, to suppress inventions, and to discourage inventiveness.

We have certain specific recommendations to make which, in our judgment, are clearly called for by the record before us. It should be emphasized, however, that if the pattern of control which has been achieved through the patent monopoly continues in spite of the changes we suggest, and it is entirely possible that it will, a complete reexamination of our patent laws should be made with a view to determining whether, under present-day conditions, they are calculated to achieve their avowed purposes.

Indicated changes in the patent laws divide naturally into two general classes—procedural and substantive. In its preliminary report to the Congress, dated July 17, 1939, the Committee made certain recommendations with respect to the patent laws. Some of the procedural changes recommended have since become law. Subsequent examination of the problem has confirmed our belief that substantial changes are needed, including some in addition to those already recommended.

(*a*) *Licensing of patents.*—In order to eliminate the use of patents in ways inimical to the public policy inherent in the patent laws, as well as that of the antitrust laws, we recommend that the Congress enact legislation which will require that any future patent is to be available for use by anyone who may desire its use and who is willing to pay a fair price for the privilege. Machinery, either judicial or administrative, should be set up to determine whether the royalty demanded by the patentee may fairly be said to represent reasonable compensation or is intended to set a prohibitive price for such use.

This proposal is intended to prevent the suppression of patents as well as to provide for their availability for use in an equitable manner in any industry where they are a major factor.

[Approved. Dissenting: Sumners and Taylor.]

(*b*) *Unrestricted licenses.*—We recommend that the owner of any patent be required to grant only unrestricted licenses, and that he not be permitted to impose restrictions upon the buyer in sales of patented articles. In other words, the holder of a patent should not be permitted to restrict a licensee in respect of the amount of any article he may produce, the price at which he may sell, the purpose for which or the manner in which he may use the patent or any article produced

[7] Senator King, formerly a member of the Committee, has prepared a statement indicating his views with respect to the existing patent laws. The position he takes is somewhat at variance with the views herein expressed. His statement will be found in hearings before the Temporary National Economic Committee, Part 31-A, pp. 18025-57.

thereunder, or the geographical area within which he may produce or sell such article. There should be a further prohibition against any other restriction which would tend substantially to lessen competition or to create a monopoly, unless such restriction is necessary to promote the progress of science and the useful arts.

[Approved without objection.]

(*c*) *Recording of transfers and agreements.*—We recommend that any sale, license, assignment, or other disposition of any patent be evidenced by an instrument in writing and that the same be required of any condition, agreement, or understanding relating to any sale or disposition of any such patent, and that in any such case a copy of such written instrument be filed with the Federal Trade Commission within 30 days after execution. There should, of course, be a substantial monetary penalty for failure to file as required.

[Approved without objection.]

(*d*) *Limitation on suits for infringement.*—In order to prevent the use of litigation as a weapon of business aggression rather than as an instrument for adjudicating honest disputes, we recommend legislation which will provide that no action, based upon a charge of infringement of any patent, whether for damages, for an injunction, or for any other relief shall be permitted against any licensee under a patent or against any purchaser or licensee or any article unless the plaintiff has previously secured a judgment against the grantor of the license or the manufacturer of the article for infringement in connection with the granting of such license or the sale of such article.

[Approved without objection.]

(*e*) *Forfeiture of patent for violation.*—If any person who owns any interest in or right under a patent violates any of the prohibitions described in paragraphs (*a*) and (*b*) above, his interest therein should be forfeited, such forfeiture to be brought about in a civil action against such person by the United States. Any patent or interest therein so forfeited should become a part of the public domain.

[Approved. Dissenting: Taylor.]

(*f*) *Single Court of Patent Appeals.*—In order to improve the existing mechanism for the issuance of patents and the determination of disputes relating thereto, we recommend the creation of a single Court of Patent Appeals with jurisdiction co-extensive with the United States and its territories. Such a court would replace the present 11 different and independent jurisdictions and should do much to assure uniform treatment of patents and to reduce the time and cost of patent litigation.

[Approved without objection.]

(*g*) *Limitation on period of patent monopoly.*—The life of a patent should be so limited that it will expire not more than 20 years from the date of the filing of the application, thus obviating the possibility of prolonging the patent monopoly by keeping an application pending in the Patent Office a long time. This would mean that if an application were kept pending in the Patent Office for more than 3 years, the 17-year term of the patent granted would be to that extent decreased.

[Approved without objection.]

The Basis for the Supreme Court's Holding of Invalidity in Muncie v. Outboard

BY

PAUL N. CRITCHLOW

A paper read before the Patent Law Association of Pittsburgh, October 28, 1942, in the University Club.

With a discussion of Mr. Critchlow's paper by Col. Harry Frease.

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