THE EFFECT OF THE FEDERAL ANTI-TRUST LAWS ON COMMERCE IN PATENTED AND COPYRIGHTED ARTICLES

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THE Clayton Anti-Trust Act which went into effect Oct. 15, 1914,[1] restricts the making of "tying contracts," affecting: "goods, wares, merchandise, machinery, supplies, or other commodities, *whether patented or unpatented.*"

The insertion of the words "whether patented or unpatented" injects further interest into a subject which has claimed much recent attention before the United States Supreme Court.

The purpose of the patent and copyright laws is to create monopolies. The purpose of the "Anti-Trust Laws" is to restrict them. Obviously there is a line where the operations of the two groups of statutes must come into contact, if not into conflict. These two questions are therefore presented:

First: Exclusive of the Clayton Act, does the fact that a monopoly, combination, or agreement alleged to be in unlawful restraint of trade, involves the use of patented or copyrighted commodities, cause it to be judged by a standard different from that governing other situations, and if so, to what extent?

Second: If such a different standard exists, how far has it been affected by the Clayton Act?

I

The Status of the Law before the Clayton Act

The Sherman Act[2] provides that:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce . . . is hereby declared to be illegal. . . .

"Sec. 2. Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to

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[1] Public Acts No. 212, 63d Congress, § 3.

[2] 26 Stat. at L. 209.

monopolize any part of . . . trade or commerce . . . shall be deemed guilty of a misdemeanor. . . ."

The other federal "Anti-Trust Laws"[3] apply to imports and are in substantially similar form. Into this language must be read the principle of the *Standard Oil and Tobacco* and some later cases[4] that the laws are to be interpreted in the "light of reason" and that only "undue" restraint of commerce is prohibited.

Conferring the right to create patents and copyrights, the Constitution of the United States[5] gives to Congress the power "To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

Pursuant to this, Congress has granted[6] to every patentee for the term of seventeen years "the exclusive right to make, use, and vend the invention or discovery."

To holders of copyrights it has granted[7] for the term of twenty-eight years the sole liberty of "printing, reprinting, publishing, completing, copying, executing, finishing, and vending" their works.

There is no doubt that a combination or contract may be unlawful under the Sherman Act, though it relates to either patented or copyrighted commodities.[8] Nevertheless the element of patents and copyrights is important at times in determining whether that act has been violated. At least three decisions of the United States Supreme Court[9] and two decisions in the

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[3] Act of Aug. 27, 1894, 28 STAT. AT L. 570, §§ 73–77, and amendment of Feb. 12, 1913, 46 STAT. AT L. 667.

[4] Standard Oil Co. *v.* United States, 221 U. S. 1 (1911); United States *v.* American Tobacco Co., 221 U. S. 106 (1911); United States *v.* Union Pacific R. R. Co., 226 U. S. 61 (1912).

[5] ART. 1., § 8. [6] REV. STAT., § 4884. [7] REV. STAT., § 4052.

[8] Standard Sanitary Mfg. Co. *v.* United States, 226 U. S. 20, 48, 49 (1912); Straus *v.* American Publishers' Association, 231 U. S. 222 (1913); United States *v.* Patterson, 205 Fed. 292 (1913); Blount Mfg. Co. *v.* Yale, etc. Co., 166 Fed. 555 (1909); National Harrow Co. *v.* Hench, 83 Fed. 36 (1897), 84 Fed. 226 (1898); Bobbs-Merrill Co. *v.* Straus, 139 Fed. 155 (1905); Strait *v.* National Harrow Co., 18 N. Y. Supp. 224 (1891); National Harrow Co. *v.* Bement, 47 N. Y. Supp. 462 (1897); Attorney-General *v.* National Cash Register Co., 148 N. W. 420 (Mich., 1914); Mines *v.* Scribner, 147 Fed. 927 (1906).

[9] United States *v.* Winslow, 227 U. S. 202 (1913); Dr. Miles Medical Co. *v.* Park & Sons, 220 U. S. 373 (1911); Bement *v.* National Harrow Co., 186 U. S. 70 (1902).

Circuit Court of Appeals [10] lend themselves inevitably to this conclusion.

United States v. *Winslow* [11] was a direct criminal prosecution by the government of certain defendants who, before combining, had separately under letters patent made almost all of the machines used in manufacturing shoes. They organized a new corporation, turned over to it all their stocks and business and ceased to sell machinery, but continued to let machines on condition that the lessees use the lessor's machines exclusively. Partially on the ground that the defendants had previously not been competing, and without deciding whether the leasing of machines was valid, the court dismissed the indictments. As a part of its reason however for so doing, it emphasized strongly the fact that the machines were patented. Justice Holmes said: [12]

> "The machines are patented, making them is a monopoly in any case, the exclusion of competitors from the use of them is of the very essence of the right conferred by the patents, *Paper Bag Patent Case*, 210 U. S. 405. . . ."

Dr. Miles Medical Co. v. *Park & Sons Co.* [13] was a suit to enjoin a retailer of medicines manufactured by secret processes from violating one of a series of agreements with retailers restricting prices. The defense was the Sherman Act. It was urged that the restrictions of prices were valid because the agreements related to secret processes. The court held the agreements invalid, basing its decision almost wholly upon the distinction between the rights of owners of secret processes and the rights of owners of patents.

In *Bement* v. *National Harrow Co.* [14] suit was brought to enforce the payment of royalties under a license agreement, which was the only one of a series of several contemplated agreements that was actually executed. The defense here also was the Sherman Act, but the court upheld and enforced the agreement. It expressly refused to decide whether the proposed system of controlling the trade would have been valid if all the contracts had been executed, but the court, through Justice Peckham, said: [15]

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[10] Rubber Tire Wheel Co. v. Milwaukee Rubber W. Co., 154 Fed. 358, Seventh Circuit (1907); U. S. Consolidated Seeded Raisin Co. v. Griffin & Skelley Co., 126 Fed. 364, Ninth Circuit (1903).

[11] 227 U. S. 202.

[12] *Idem*, p. 217.

[13] 220 U. S. 373.

[14] 196 U. S. 70.

[15] *Idem*, p. 88.

"This brings us to a consideration of the terms of the license contracts for the purpose of determining whether they violate the act of Congress. The first important and most material fact in considering this question is that the agreements concern articles protected by letters patent of the government of the United States. The plaintiff, according to the finding of the referee, was at the time when these licenses were executed the absolute owner of the letters patent relating to the float spring tooth harrow business. It was, therefore, the owner of a monopoly recognized by the Constitution and by the statutes of Congress. An owner of a patent has the right to sell it or to keep it; to manufacture the article himself or to license others to manufacture it; to sell such article himself or to authorize others to sell it."

It is somewhat difficult to distinguish in principle the facts in *Rubber Tire Wheel Co.* v. *Milwaukee Rubber W. Co.* and *U. S. Consolidated Seeded Raisin Co.* v. *Griffin & Skelley Co.* (*supra in note*) from those in the *Bathtub Trust Case*,[16] where the Supreme Court later found an illegal combination to exist. A feature which may be material is that the *Bathtub Trust Case* involved licenses for the use of a patented tool used in manufacturing processes, while the other cases involved licenses under patents actually used in commodities of commerce. In both of the Circuit Court of Appeals cases the combinations were upheld as valid and great emphasis in each instance was laid on the fact that they were combinations dealing in patented articles. Each involved a system of license agreements and an extensive plan for controlling prices and discounts. The *Rubber Tire Wheel Company Case* involved licenses under a single patent and the *Raisin Case* involved licenses under a number of patents. The *Bathtub Trust Case* involved licenses under a single patent, though other infringing patents had been bought up and suppressed. It is worth while to consider the forceful argument of the Circuit Court of Appeals in the *Rubber Tire Wheel Company Case*, where it said:[17]

"Plaintiff, as his successor in interest, is the owner of a valid patent. That stands as an unquestionable fact on this writ of error. The only grant to the patentee was the right to exclude others, to have and to hold for himself and his assigns a monopoly, not a right limited or

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[16] Standard Sanitary Manufacturing Co. *v.* United States, 226 U. S. 20.

[17] 154 Fed. 358, 363.

conditioned according to the sentiment of judges, but an absolute monopoly constitutionally conferred by the sovereign lawmakers. *Over and above an absolute monopoly created by law, how can there be a further and an unlawful monopoly in the same thing?* If plaintiff were the sole maker of Grant tires, how could plaintiff's control of prices and output injure the people, depriving them of something to which they have a right? *Is a greater injury or deprivation inflicted, if plaintiff authorizes a combination or pool to do what plaintiff can do directly?* To say yes means that substance is disregarded, that mere words confer upon the people some sort of a right or interest counter to the monopoly, when by the terms of the bargain the people agreed to claim none until Grant's deed to them shall have matured." (The italics are ours.)

It is perhaps unfortunate that, although the Supreme Court of the United States granted a writ of *certiorari* to review this decision,[18] the cause was later dismissed by stipulation.[19]

In 1904 the Court of Appeals of the State of New York, when *Straus* v. *American Publishers' Association* was first presented to it,[20] held that a combination among publishers owning many different copyrights, attempting to limit prices and sales of books, was valid with respect to copyrighted works, and was invalid with respect to those not copyrighted. The distinction was based solely upon the existence of the copyrights, and two dissenting opinions of Judges Gray and Bartlett were rendered only because they considered the agreement valid also with respect to the uncopyrighted books. This case came before the New York Court of Appeals again in 1908[21] on a certified question in which the element of the uncopyrighted books was eliminated, and the court again held that the combination was lawful. The Supreme Court of the United States, however, reversed the New York Court of Appeals on the ground that the monopoly of the combination transcended the rights created by the copyright laws.[22]

The Supreme Court in this case and in the *Bathtub Trust Case* (*supra*) states clearly that there is a point beyond which the patent and copyright laws have no protective force. In the former it said regarding the license agreements under consideration:[23]

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[18] 207 U. S. 589 (1907).
[19] 210 U. S. 439 (1908).
[20] 177 N. Y. 473, 69 N. E. 1107.
[21] 199 N. Y. 548, 93 N. E. 1133.
[22] 231 U. S. 222 (1913).
[23] 226 U. S. 20, 48.

"The agreements clearly, therefore, transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman law. . . .

"Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions. The Sherman law is a limitation on rights which may be pushed to evil consequences and therefore restrained."

In the *Straus Case* the Court said:[24]

"No more than the patent statute was the copyright act intended to authorize agreements in unlawful restraint of trade and tending to monopoly, in violation of the specific terms of the Sherman law, which is broadly designed to reach all combinations in unlawful restraint of trade and tending because of the agreements or combinations entered into to build up and perpetuate monopolies."

Through all these cases can be traced two principles: first, that the "Anti-Trust Laws," except the Clayton Act at least, do not restrict the patent or copyright laws, do not trespass upon the domains of the monopolies legalized by them; and, secondly, that beyond those limits, situations are to be judged under the "Anti-Trust Laws" exactly as though the element of patents or copyrights were not involved. This is apparently the theory of the Circuit Court of Appeals in the *Rubber Tire Wheel Company Case*, where it said:[25]

"Congress, having created the patent law, had the right to repeal or modify it in whole or in part, directly or by necessary implication. The Sherman law contains no reference to the patent law. Each was passed under a separate and distinct constitutional grant of power; each was passed professedly to advantage the public; *the necessary implication is not that one iota was taken away from the patent law. . . .*" (The italics are ours.)

It is consistent with the statement (*supra*) in the *Bathtub Trust Case* that patents do not give "an *universal* license against positive prohibitions," and with the statement (*supra*) in the *Straus Case* that the Sherman Act is designed to reach "all combinations in unlawful restraint of trade and tending *because of the*

[24] 231 U. S. 222, 234.

[25] 154 Fed. 358, 362.

agreements or combinations entered into to build up and perpetuate monopolies."

The *Bathtub Trust Case*, therefore, was decided in favor of the government, not with the intent to clip away parts of the territory of patent monopolies, but because the combination in that instance "transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it." The United States Supreme Court reversed the New York Court of Appeals in the *Straus Case*, not with an intent to take away any rights created by the copyright laws, but because the New York Court of Appeals had exaggerated the inherent scope of monopoly which the copyright laws create. The parties charged with violating the Anti-Trust Acts in the *Winslow* and *Bement* cases were exonerated, not because the "Anti-Trust Laws" cannot affect patented commodities at all, but because the transactions in those cases were all within the authorized scope of the patent monopoly. In the *Dr. Miles Medical Company Case* the contrast was drawn between secret processes and patents, because if the transactions had concerned patents, they might have been within the scope of the patent monopoly, but the implication is not that there would have been absolute immunity. So, also, in the other cases, though it is not clearly stated in all the opinions, the important underlying question was whether the transactions were within the limits of the legalized monopolies created by the patent or copyright laws.

The adoption of this theory by no means solves all the difficulties of the situation. The extent of the inherent limitations of the legalized monopolies is still a matter of perplexing complexity. If, however, that problem can be approached from the point of view of endeavoring to determine the extent of rights created by the patent and copyright laws, and not with a lurking suspicion of some encroachment upon those rights by the "Anti-Trust Laws," much confusion of thought can be avoided.

Our conclusions as to the status of the law before the Clayton Act took effect can be summarized as follows:

First: Except the Clayton Act, the "Anti-Trust Laws" do not restrict the monopolies created by the patent and copyright laws.

As corrolaries to this it follows:

A. The extent of patent and copyright monopolies should be judged solely with reference to the laws creating them and wholly independent of any operation of the "Anti-Trust Laws."

B. Out of the possible field of operation of the "Anti-Trust Laws" is definitely carved the complete field of patent and copyright monopolies.

C. If a patent is sufficiently broad to cover a whole industry, it is not a violation of the "Anti-Trust Laws" for its owner completely to monopolize that industry.

D. Licenses under a single patent, so long as they are of the character authorized by the patent laws, are valid, no matter how numerously multiplied.

Second: Beyond the *inherent limitations* of their monopolies, patents and copyrights have no protective force in determining whether the "Anti-Trust Laws" have been violated.

It is certain that there is no absolute guarantee of protection where:

(1) The combination or agreements in question relate to several different patents or copyrights originally acquired by more than one person.[26]

(2) It is expressly provided that the combination or agreements shall extend beyond the life of the patents or copyrights.[27]

(3) Agreements seeking to control an entire industry are put in the form of "license agreements" under a patent which obviously does not naturally cover the whole industry.[28]

II

THE EFFECT OF THE CLAYTON ACT[29]

The Second Section of the Clayton Act is directed against unfair discriminations in prices between different purchasers of commodities. It provides:

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[26] National Harrow Co. *v.* Hench, 83 Fed. 36, 84 Fed. 226; Bobbs-Merrill Co. *v.* Straus, 139 Fed. 155; 1 Page on Contracts, p. 698; Vulcan Powder Co. *v.* Hercules Powder Co., 96 Cal. 510, 31 Pac. 581 (1892).

[27] National Harrow Co. *v.* Bement, 47 N. Y. Supp. 462.

[28] See Standard Sanitary Mfg. Co. *v.* United States, 226 U. S. 20.

[29] "An Act to Supplement Existing Laws against Unlawful Restraints and Monopolies and for other Purposes." PUBLIC ACTS No. 212, 63d Congress, H. R. 15657.

"Sec. 2: That it shall be unlawful for any person . . . to discriminate in prices between different purchasers of commodities . . . where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce. *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities, made in good faith to meet competition: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in *bona-fide* transactions and not in restraint of trade."

The Third Section applies to what are known among merchants as "tying contracts" and provides:

"Sec. 3: That it shall be unlawful for any person . . . to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities *whether patented or unpatented* . . . or fix a price charged therefor, or discount from or rebate upon such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce." (The italics are ours.)

These sections have probably not made any radical change in the law. By their terms they only operate where the effect of the transactions to which they apply "may be to *substantially lessen competition or tend to create a monopoly*." But the Sherman Act already had the effect of prohibiting *all* contracts and attempts to monopolize commerce, which amounted to an "undue" or "unreasonable" restraint of trade, and the new test does not seem to differ greatly from the old one. Almost the exact words of the Clayton Act were used in *Whitwell* v. *Continental Tobacco Co.*, where the Circuit Court of Appeals for the Eighth Circuit was considering squarely the propriety of a "tying contract" and said:[30]

[30] 125 Fed. 454, 457 (1903).

"[That the purpose of the Sherman Act] was to prevent the stifling or *substantial restriction of competition*, and the test of the legality of a combination under the Act which was inspired by this purpose is its direct and necessary effect upon competition in commerce among the states. If its necessary effect *is to stifle or to directly and substantially* restrict free competition, it is a contract, combination, or conspiracy in restraint of trade and it falls under the ban of the law." (The italics are ours.)

The sections have, however, at least put the test into statutory form, and the very fact that there are now specific provisions against "tying contracts" and price discrimination will undoubtedly cause them to be scrutinized with greater care.

The insertion of the words "whether patented or unpatented" in Section 3 presents two interesting questions:

First: Has this specific reference to patents made the law larger than it would have been had the words been omitted?

Second: Is any significance to be attached to the omission of specific reference to copyrighted commodities in this section, and to either patented or copyrighted commodities in Section 2?

The first question is academic except for its bearing upon the second. There is no doubt that "tying contracts" relating to patented commodities are prohibited if their "effect may be to substantially lessen competition or tend to create a monopoly." The Act says so. If, however, they would not have been but for the express mention of patented commodities, then immediately the maxim *expressio unius est exclusio alterius* is suggested to us, and the question arises whether copyrighted commodities are impliedly excluded from Section 3, and whether either patented or copyrighted commodities are covered by Section 2.

Certainly copyrighted productions are, at least in some instances, "commodities." [31]

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[31] See Barataria Canning Co. *v.* Joulian, 80 Miss. 555, 31 So. 961 (1902); Texas & Pacific Coal Co. *v.* Lawson, 89 Tex. 394, 32 S. W. 871 (1895); Beechley *v.* Mulville, 102 Ia. 602, 70 N. W. 107 (1897); S. S. White Dental Mfg. Co. *v.* Commonwealth, 212 Mass. 35, 98 N. E. 1056 (1912); Alpaca Co. *v.* Commonwealth, 212 Mass. 156, 98 N. E. 1078 (1912); Century Dictionary & Encyclopedia, vol. II, p. 1132; State *v.* Frank, 169 S. W. 333 (Ark., 1914); Amer. League Baseball Club of Chicago *v.* Chase, 149 N. Y. Supp. 6 (1914); State *v.* Chicago, R. I. & P. Ry. Co., 95 Ark. 114, 128 S. W. 555 (1910); Rohlf *v.* Kasemeier, 140 Ia. 182, 118 N. W. 276 (1908); Queen Ins. Co. *v.* Texas, 86 Tex. 250, 24 S. W. 397 (1893).

It is not a sufficient answer to say that both Sections 2 and 3 prohibit "any person" from doing the acts to which they refer. The language of the Sherman Act applies to "every person who shall monopolize or attempt to monopolize . . . any part of trade or commerce. . . ." Literally construed, the Act would have abolished patent and copyright monopolies completely.

Section 3 applies to both patented and copyrighted commodities for at least two reasons. In the first place it would be quite arbitrary to apply it to one and not to the other. The maxim *expressio unius est exclusio alterius* does not create an inflexible rule. It is always subjected to the intent to be gathered from the statute as a whole.[32] It does not operate where the specific mention is by way of illustration only.[33] Section 3 applies to a restricted and specific class of transactions. There is no evidence elsewhere in the statute of an intent to except from its operation any commodities. The reference to patented commodities indicates rather an intent not to overlook any.[34] Although the Supreme Court has said that the rules applicable to patents under the "Anti-Trust Laws" do not necessarily govern copyrights,[35] the distinction is not material in this connection.

In the second place there is no reason for reading copyrighted commodities out of Section 3, as there was for reading patented and copyrighted commodities to a certain extent out of the Sherman Act. Assuming that the section applies to all commodities, it takes away no rights created by the patent or copyright laws. Those laws do not confer the right to make "tying contracts." Whatever rights the owners of patents and copyrights had to make such contracts before the Clayton Act, were rights existing by virtue of the common law. A "tying contract" relating to patented commodities was upheld in *New York Bank Note Co.*

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[32] Johnson *v.* Southern Pac. Co., 196 U. S. 1 (1904); State *v.* Standard Oil Co., 61 Ore. 438, 123 Pac. 40 (1912); Lewis' Sutherland Stat. Cons., 2 ed., vol. II, p. 925.

[33] Scaggs *v.* Baltimore & Washington R. R. Co., 10 Md. 268 (1856); Brown *v.* Buzan, 24 Ind. 194 (1865); Park *v.* Soldiers & Sailors Home, 22 Colo. 86, 43 Pac. 542 (1896); Lewis' Sutherland Stat. Cons., 2 ed., vol. II, p. 925.

[34] The words were not in the draft of the Act originally reported to the House by Mr. Clayton from the Committee on the Judiciary. Report 627, 63d Congress, 2d Sess. to accompany H. R. 15657.

[35] Bobbs-Merrill Co. *v.* Straus, 139 Fed. 155.

v. *Hamilton Bank Note Co.*,[36] but for the reason that the contract was not "unreasonable in its restraint of trade," and not because the patents laws authorized such a contract.

Section 3, therefore, given its fullest possible force, operates only outside the "inherent limitations" of the patent and copyright monopolies. If it takes away any rights, they are common-law rights. If it produces any novel effects, it affects contracts relating to all commodities alike. The specific reference to patented commodities was not necessary to accomplish that result.

The situation regarding Section 2 is somewhat, but not entirely, the same. Would that section, if applied literally and fully to patented and copyrighted commodities, trespass upon rights created by the patent and copyright laws? Those laws do expressly confer the right "to vend" productions. The right "to vend" has been interpreted to include the right to fix prices. The Supreme Court in *Bement* v. *National Harrow Co.* said:[37]

"The owner of a patented article can, of course, charge such price as he may choose."

Both before and since the Clayton Act he undoubtedly has had the right to "choose," within certain limits at least, to charge one purchaser one price and another a different price. Is not this right, however, merely a common-law right which he has enjoyed in common with all other traders except common carriers and other persons charged with a public service? Is it not the same right described by the Circuit Court of Appeals in *Whitwell* v. *Continental Tobacco Co.*,[38] where it said, regarding a trader who was not dealing in patented or copyrighted commodities:

"The right of each competitor to fix the prices of the commodities which he offers for sale, and to dictate the terms upon which he will dispose of them, is indispensable to the very existence of competition. . . . They [the defendant and its employee] had the right to select their customers, to sell and to refuse to sell to whomsoever they choose, and to fix different prices for sales of the same commodities to different persons."

Unless the right to discriminate in prices is necessary to protect the patent or copyright monopoly, the owner of copyrights or

[36] 180 N. Y. 280, 73 N. E. 48 (1905).
[37] 186 U. S. 70, 93.
[38] 125 Fed. 454.

patents never has had any rights of this character greater than anyone else; the Sherman Act affected him exactly as it did all others in this respect, and Section 2 of the Clayton Act, if applied to him, does not infringe any of his statutory rights.

Whether the patent and copyright monopolies include in their scope peculiar rights to discriminate in prices is, however, a question not yet completely answered by the courts. If they do, then to the extent of those peculiar rights there is the same reason for exempting patented and copyrighted commodities from the operation of Section 2 that there was in exempting them from the Sherman Act. Furthermore, by its terms the section only operates when the "*effect of such discrimination* may be to substantially lessen competition or tend to create a monopoly." To the extent that the patent or copyright laws are the moving cause which produces this effect, the section, by its own language, is inoperative.

Section 2, therefore, applies to both patented and copyrighted commodities, but, like Section 3 and like the Sherman Act, it operates only outside of their "inherent limitations."

Our conclusions regarding the effect of the Clayton Act can be summarized as follows:

First: The Act in setting up the new test whether the effect of the transactions prohibited "may be to substantially lessen competition or tend to create a monopoly" does not change greatly, if at all, the old test of whether there was "unreasonable" or "undue" restraint of trade. The existence of a specific statute covering price discrimination and "tying contracts" will, however, cause such transactions to be scrutinized with care.

Second: Sections 2 and 3 apply to both patented and copyrighted commodities. Section 3, at least, takes away no rights created by the patent and copyright laws, and Section 2 should be construed as operating only outside the scope of the monopolies created by those laws. The insertion of the words "whether patented or unpatented" in Section 3 was unnecessary.

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