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Giles S. Rich

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INTRODUCTION

Justice Holmes once said, "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis."[1]

What is generally referred to as the "patent monopoly" presents one of those ideas that has become encysted in a phrase and has, consequently, ceased to provoke analysis. It is important to consider whether patents actually grant monopolies because "monopoly" is an emotional word. Ask the average person whether "monopoly" is bad and he or she will undoubtedly tell you it is. Ask why, and he or she will say that monopolies gouge the public. Thus, to talk of the "patent monopoly" weds patents to prejudice, which is not conducive to clear thinking.

Another reason for considering this question is succinctly stated in that great textbook, *The Law of Patents for Useful Inventions*:

> The question whether a patent privilege is a monopoly is not a mere question of words. It is the point of departure for two distinct theories, under whose influence courts and legislatures may be led to widely different conclusions as to the dividing line between the rights to be conceded to inventors and those to be reserved to the public.[2]

This point is especially pertinent when considering the relationship between the anti-monopoly laws, which are designed to protect the rights reserved to the public, and patent rights granted to inventors.

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* Giles S. Rich is a Circuit Judge on the United States Court of Appeals for the Federal Circuit, Washington, D.C.

1. Hyde v. United States, 225 U.S. 347, 391 (1912).

2. 1 WILLIAM C. ROBINSON, THE LAW OF PATENTS FOR USEFUL INVENTIONS § 12, at 18-19 (Boston, Little, Brown and Co. 1890).

I. THE CURRENT CONFUSION

If one looks in the books for an answer to the question of whether patents grant monopolies, one will find, as is usual in this field, confusion. Robinson ends a fifty page chapter devoted to this topic with the conclusion "[t]hat the patent privilege is a true monopoly, granted in derogation of the common right."[3] He deems this theory to be essential to a proper development of the law, and to be in the interests of both inventors and the public. To be sure, he also concludes that a patent is not an "odious" monopoly,[4] and that when properly bestowed it is conducive to the public good. Robinson was writing at a time (1890, the year the Sherman Antitrust Act was passed) when there was a tendency to expand the rights of patentees. He feared for "the future safety of the entire patent system" because courts were drifting "into lax and dangerous modes of dealing with the public interests when opposed to those of the inventor."[5] He therefore advocated a "return" to the theory that a patent is a true monopoly which "approaches very nearly to an odious monopoly."[6]

Robinson's advice was sound. Perhaps if the courts had not favored patent rights so heavily in those days, the pendulum would not have swung so far in the opposite direction. Let us now look at a more modern text, written during a period in which the courts seem to have been inclined to apply the monopoly theory with a vengeance, engendering the feeling that they were antagonistic toward patents. Anthony William Deller, in his first edition of *Walker on Patents*, and no doubt after careful consideration of everything Robinson said, concluded that the grant of an exclusive privilege for a useful invention, is not the granting of a monopoly:[7] "A patent is not a monopoly"[8] and "an inventor is not a monopolist, but a public benefactor."[9]

There we have represented two schools of thought. The courts follow now one, now the other. The tendency is to call a patent a "monopoly" when it is to be invalidated or restricted and to say it is not a monopoly when it is to be held valid and infringed. But that does not answer our question. How is it possible for the patent right,

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3. *Id.* § 44, at 67.
4. *Id.* § 32, at 51.
5. *Id.* at 51-52.
6. *Id.* § 23, at 37.
7. ALBERT H. WALKER, WALKER ON PATENTS § 6, at 27 (Anthony W. Deller ed. 1937).
8. *Id.*
9. *Id.* at 25.

which, being fixed by statutes, is one and the same thing in all places and at all times, to be both a monopoly and not a monopoly?

Is it not obvious that we are dealing with a simple question of definition? If the patent right is not a changeling, there must be two definitions of monopoly, one which includes patents and one which excludes them. The fact is there are two definitions. Before examining these definitions, let us recall to mind the prohibition of section two of the Sherman Act which says "every person who shall *monopolize*, or attempt to *monopolize* . . . any part of the trade or commerce among [the] several States . . . shall be deemed guilty of a misdemeanor . . . ."[10] If this law does not prohibit the exercise of the rights granted by patents—and it has always been held that it does not[11]—then patent rights are necessarily outside of the definition of "monopoly" as that term is interpreted in administering this anti-monopoly law. If we can solve this dilemma of definition, perhaps we shall shed considerable light on the relative spheres of the patent law and the anti-monopoly laws and the relation, if any, between them. To do so we have to go back to the point where the confusion began, merely a matter of three hundred and seventy years or so.

II. HISTORICAL BASIS OF THE CONFUSION

Queen Elizabeth the First, in the vernacular of modern times, was hard up for cash while at the same time desirous of rewarding numerous faithful servants and courtiers. The situation has its modern parallel whenever there is a change of administration in our government. She availed herself of an institution, then already well known to the sovereign, namely, the granting of monopolies to her favorite subjects ("patronage" to us). These were granted by the Crown in the form of letters patent (*literae patentes*, open letters), authenticated by the Great Seal and addressed to the people at large. By them, the patentee received the sole right, exclusive of all others, of selling certain specified commodities, or of engaging in certain trades. David Hume, in *The History of England*, gives a long list of the things on which monopolies had been granted by patents, including such common articles of commerce as salt, iron, cards, vinegar, paper, starch, tin, and sulphur. As examples of trades monopolized, he mentions the transportation of beer and the importation of Spanish Wool.[12]

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10. Sherman Antitrust Act, ch. 647, § 2, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 2 (1988)) (emphasis added).

11. *See, e.g.*, United States v. Line Material Co., 333 U.S. 287, 331 (1948).

12. DAVID HUME, THE HISTORY OF ENGLAND 335 (Liberty Classics 1983) (1788).

The monopoly appears at an earlier time to have had a perfectly legitimate function. Originally, monopolies were granted to induce the patentee to engage in a business that would be to the public benefit. By the time of Elizabeth, however, this theory had so far been lost sight of that patents were granted not only to persons who had no intention of engaging in trade, but to create monopolies in trades that were already flourishing.

Elizabeth's patentees promptly sold their patents at the highest price they could get and the purchasers, armed with a crown grant excluding competitors, raised prices and enhanced their profits at the expense of the public. Hume says, "[t]hese monopolists were so exorbitant in their demands that in some places they raised the price of salt from sixteen pence a bushel to fourteen or fifteen shillings."[13]

But it would also appear that, on occasion, another sort of patent had been granted for the sole working or making *of any new manufacture within the realm, to the first and true inventor or inventors that others, at the time of making of such letters-patent, did not use*. For when the monopolies in England reached the point where they were beyond enduring, the people in Parliament assembled, rose up and struck them down. In so doing, specific reference was made to the previous existence of such "letters-patent and grants of privilege" on inventions.[14]

In 1623, during the reign of Elizabeth's successor, James the First, the *Statute of Monopolies* was passed.[15] Blackstone in his *Commentaries on the Laws of England*, in speaking of "monopolies" and their abolition says the following:

> These had been carried to an enormous height during the reign of [Q]ueen Elizabeth; and were heavily complained of by [S]ir Edward Coke, in the beginning of the reign of [K]ing James the [F]irst: but were in great measure remedied by [the Statute of Monopolies] which declares such monopolies to be contrary to law and void.[16]

This was the case "except as to patents, not exceeding the grant of fourteen years; to the authors of new inventions; and except also patents concerning printing, saltpetre, gunpowder, great ordnance and shot."[17] The government took care to reserve control over the pro-

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13. *Id.*

14. 1623, Statute of Monopolies, 21 Jam. 1, ch. 3, § 5 (Eng.).

15. *Id.*

16. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, ch. 12, § 9 (Dawsons of Pall Mall 1966) (1769) (emphasis added).

17. Statute of Monopolies § 10.

duction of propaganda and munitions!

III. BASIS OF THE CONTENTION THAT PATENTS ARE NOT MONOPOLIES

After the passage of this statute, Coke, Lord Chief Justice of England, published his *Institutes of the Laws of England*, in which he discussed the Statute of Monopolies. He said, "[i]t appeareth by the Preamble of this Act . . . that all Grants of Monopolies are against the ancient and Fundamental laws of this kingdome."[18] The preamble to which he referred said: "Whereas your majesty, in the year 1610, published a book declaring that *all grants of monopolies are contrary to law*, and whereas your majesty then expressly commanded that no suitor should ever apply for such grants; and whereas, nevertheless, such grants have been applied for and allowed."[19]

Now it must be kept clearly in mind, as Blackstone pointed out,[20] that the Statute of Monopolies did *not* declare *all* monopolies to be contrary to law, notwithstanding the preamble, because certain exceptions were made, including letters patent for new manufactures within the realm. The preamble to the statute did not correctly state the law of England prior to the passage of the statute.

In *The Clothworkers of Ipswich Case*, decided in 1615, eight years before the passage of the Statute of Monopolies, it was held that the Crown might lawfully grant exclusive privileges in a new invention, a new discovery or a new trade within the realm, for a limited time.[21] These were one species of monopoly grants and the statute treated them as such in excepting them along with a few monopolies of the other sort such as printing and the transportation of calves' skins. Moreover, the statute did not purport to abolish only monopolies but commissions, licenses, charters, and letters patent of or for the sole buying, selling, making, working, or using of anything or of any other monopolies.[22] This all-inclusive statutory language certainly does not except letters patent for new inventions from the meaning of the word "monopoly," though such patents were excepted from the condemnation of the law.

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18. 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 181 (London, M. Flesher 1628).

19. Statute of Monopolies § 1.

20. BLACKSTONE, *supra* note 16, § 9.

21. The Clothworkers of Ipswich Case (K.B. 1615), *reprinted in* 1 BENJAMIN V. ABBOTT, DECISIONS ON THE LAW OF PATENTS FOR INVENTIONS 6, 6 (Washington, C.R. Brodix 1887).

22. Statute of Monopolies § 1.

It is interesting to note that in the *Clothworkers* case, the Court of King's Bench indulged in the same verbal gymnastics heard today by assiduously avoiding calling a patent on a new invention a grant of a "monopoly." It instead called it a grant by charter of an exclusive privilege.[23] The court had elsewhere in the opinion already tied its own hands by saying that the King could not authorize a "monopoly, for that is to take away free trade."[24]

Returning to Coke, he said that in view of the preamble of the Statute of Monopolies, declaring all monopolies to be contrary to law, it was necessary to define what a monopoly is.[25] In writing his definition, he no doubt had in mind not only the statute but also, like the good lawyer he was, the cases, including *Clothworkers*, and he so phrased his definition as to include illegal monopolies and exclude lawful monopolies. It reads as follows:

> A Monopoly is an Institution, or allowance by the King by his Grant, Commission, or otherwise, to any person or persons, bodies politique, or corporate, of or for the sole buying, selling, making, working, or using, of anything, whereby any person or persons, bodies politique, or corporate, are sought to be restrained of any freedome or liberty *that they had before*, or hindered in their *lawfull* trade.[26]

Now let the reader clear his or her mind of the fact that letters-patent, or just "patents," were originally the documents by which all kinds of monopolies were granted, both legal and illegal, and from this point think only of patents as we know them today, as grants for limited times of privileges relating to new inventions or discoveries. The meaning of words like "patents" often changes with time and place.

Let us see Coke's definition at work in the United States two or three centuries later. In *Allen v. Hunter*,[27] the judge, being favorably disposed toward patents, instructed the jury as follows:

> *Patentees are not monopolists*. This objection is often made, and it has its effect on society. The imputation is unjust and impolitic. A monopolist is one who, by the exercise of the sovereign power, takes from the public that which belongs to it, and gives to the grantee and his assigns an exclusive use. On this ground mo-

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23. *Clothworkers*, *supra* note 21, *reprinted in* 1 BENJAMIN V. ABBOTT, DECISIONS ON THE LAW OF PATENTS FOR INVENTIONS 6, 6 (Washington, C.R. Brodix 1887).

24. *Id.*

25. COKE, *supra* note 18, at 181.

26. *Id.* (emphasis added).

27. 1 F. Cas. 476 (C.C.D. Ohio 1855) (No. 225).

> nopolies are justly odious. It enables a favored individual to tax the community, for his exclusive benefit, for the use of that to which every other person in the community, abstractly, has an equal right with himself. Under the patent law this can never be done. No exclusive right can be granted for anything which the patentee has not invented or discovered. If he claim[s] anything which was before known, his patent is void. So that the law repudiates a monopoly. The right of the patentee entirely rests on his invention or discovery of that which is useful, and *which was not known before*. And the law gives him the exclusive use of the thing invented or discovered, for a few years, as a *compensation* for "his ingenuity, labor, and expense in producing it." *This, then, in no sense, partakes of the character of monopoly.*[28]

A few years later, in *Seymour v. Osborne*,[29] the Supreme Court said:

> *Letters patent are not to be regarded as monopolies*, treated by the executive authority at the expense and to the prejudice of all the community except the persons therein named as patentees, *but as public franchises* granted to the inventors of new and useful improvements for the purpose of securing to them, as inventors, for the limited term therein mentioned, the exclusive right and liberty to make and use and vend to others to be used their own inventions, as tending to promote the progress of science and the useful arts, and as matter of compensation to the inventors for their labor, toil, and expense in making the inventions, and reducing the same to practice for the public benefit, as contemplated by the Constitution and sanctioned by the laws of Congress.[30]

The reader is warned to beware of the phrase "exclusive right *and liberty* to make and use and vend,"[31] which appears in the above quotation. Patents grant no *liberty* to make, use, or vend, as the Supreme Court has many times decided.[32]

The case of *United States v. Dubilier Condenser Corp.*,[33] shows that the Court still, on occasion, follows Lord Coke. Justice Roberts said,

> Though often so characterized, *a patent is not, accurately speaking, a monopoly*, for it is not created by the executive authority at the

28. *Id.* at 477 (emphasis added).
29. 78 U.S. (11 Wall.) 516 (1870).
30. *Id.* at 533-34 (emphasis added).
31. *Id.* (emphasis added).
32. *See, e.g.*, Bloomer v. McQuewan, 55 U.S. (14 How.) 539, 549 (1852).
33. 289 U.S. 178 (1933).

> expense and to the prejudice of all the community except the grantee of the patent. The term monopoly connotes the giving of an exclusive privilege for buying, selling, working or using a thing which the public freely enjoyed prior to the grant. Thus *a monopoly takes something from the people*. An inventor deprives the public of nothing which it enjoyed before his discovery, but gives something of value to the community by adding to the sum of human knowledge.[34]

What is meant by "accurately speaking," other than that the Court was following Lord Coke? But all Coke defined was *illegal* monopolies. That was most essential to clarify the law. *So what the courts are really saying when they follow Coke and state that a patent (assuming it to be valid) is not a monopoly, is that a patent is not illegal.* This point is clear from the explanations usually appended to the dogmatic statements that a patent is not a monopoly. There is a class of illegal monopolies in which patents are not to be included. To follow this line of reasoning, however, one must assume, with Coke, that *all* monopolies are illegal. We are then justified by rules of logic in stating simply that patents are legal, *therefore*, they are not monopolies. So, it all comes down to how one defines "monopoly" in the first place.

IV. MONOPOLY — THE WORD

People generally do not think, they talk. In talking, they use words, and words, like non-rolling stones, gather moss. The word "monopoly" started on its path in Greece as the word *monopolion*, meaning right of exclusive sale, derived from *monos*, meaning alone, and *polein*, meaning sell. Probably it was a word of sinister connotation even before it reached the British Isles, for see what Aristotle (384-322 B.C.) says in his *The Politics*:

> Every person should collect together whatsoever he hears occasionally mentioned, by means of which many of those who aimed at making a fortune have succeeded in their intentions; for all these are useful to those who make a point of getting money, as in the contri-

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34. *Id.* at 186. See also, the definition of monopoly in *Webster's New International Dictionary*:

> Ownership or control that permits domination of the means of production or the market in a business or occupation . . . for controlling prices and that is achieved through an exclusive legal privilege (as a governmental grant, charter, patent, or copyright) or by control of the source of supply (as ownership of a mine) or by engrossing a particular article or commodity (as in cornering the market) or by combination or concert of action.

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1463 (1976).

> vance of Thales the Milesian (which was certainly a gainful one, but as it was his it was attributed to his wisdom, though the method he used was a general one, and would universally succeed) when they reviled him for his poverty, as if the study of philosophy was useless: for they say that he, perceiving by his skill in astrology that there would be great plenty of olives that year, while it was yet winter, having got a little money, he gave earnest for all the oil works that were in Miletus and Chios, which he hired at a low price, there being no one to bid against him; but when the season came for making oil, many persons wanting them, he all at once let them upon what terms he pleased; and raising a large sum of money by that means, convinced them that it was easy for philosophers to be rich if they chose it, but that that was not what they aimed at; in this manner is Thales said to have shown his wisdom. *It indeed is, as we have said, generally gainful for a person to contrive to make a monopoly of anything*; for which reason some cities also take this method when they want money, and *monopolise* their commodities.
>
> There was a certain person in Sicily who laid out a sum of money which was deposited in his hand in buying up all the iron from the iron merchants; so that when the dealers came from the markets to purchase, there was no one had any to sell but himself; and though he put no great advance upon it, yet by laying out fifty talent he made an hundred. When Dionysus heard this he permitted him to take his money with him, but forbid him to continue any longer in Sicily, as being one who contrived means for getting money inconsistent with his affairs. This man's view and Thales's was exactly the same; both of them contrived to procure a monopoly for themselves: it is useful also for politicians to understand these things, for many states want to raise money and by such means, as well as private families, nay more so; for which reason some persons who are employed in the management of public affairs confine themselves to this province only.[35]

In England, over three centuries ago, the word "monopoly" was associated in the public mind with privileges of sole selling, to be sure, but more often than not with the sole selling of things that had previously been in the public domain.[36] Such privileges deprived the public of some of the freedom and liberty that it had enjoyed before and hurt where it hurt most, in the pocketbook. This kind of injury became so identified with the word "monopoly" that it is folly to try to separate the two. That grants of the privilege of the sole selling of new inventions and discoveries are beneficial monopolies and deprive the public

35. ARISTOTLE, THE POLITICS 20-21 (William Ellis trans., Prometheus Books 1986).

36. *See supra* note 12 and accompanying text.

of nothing that it had previously enjoyed does not seem to have materially affected the emotional response of the public mind to the word "monopoly."

We are faced with the fact, nevertheless, that patents for inventions were historically, and always will be, grants of privileges the same in terms as those to be found in patents granting the so-called "odious monopolies"—the *sole* making, using or selling of something. The difference is not in the privilege but in the status of the thing over which it is granted. If the public had the same thing before, the monopoly is illegal; if it got the thing from the patentee, the monopoly is legal. Whether or not the monopoly will be granted of course depends, in the United States, not on the whim of a sovereign but upon compliance with the patent statutes.

A. *Basis of the Contention That Patents Are Monopolies*

One definition of monopoly has been considered at length. Let us now turn to another. In *Dubilier*,[37] the Supreme Court relied on *Webster's Dictionary*. We shall refer to *Funk & Wagnalls*, if only as an example of how one can "prove" a patent to be what he or she wants by selection of the proper "authority." This lexicon says

> *monopoly*—I. The exclusive right, power, or privilege of engaging in a particular traffic or business, or the resulting absolute possession or control; especially, in political economy, such control of a special thing, as a commodity, as enables the person or persons exercising it to raise the price of it above its real value, or above the price it would bring under competition.
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> * * * *
>
> 4. Law. An exclusive license from the government for buying, selling, making, or using anything, *and now granted only in case of patents and copyrights*.[38]

To the same effect is the definition in *Black's Law Dictionary*:

> Monopoly. A privilege or peculiar advantage vested in one or more persons or companies, consisting in the exclusive right (or power) to carry on a particular business or trade, manufacture a particular article, or control the sale of the whole supply of a particular commodity. A form of market structure in which one or more or only a few firms dominate the total sales of a product or

37. United States v. Dubilier Condenser Corp., 289 U.S. 178 (1933). *See supra* text accompanying notes 33-34.

38. 1 FUNK & WAGNALLS NEW PRACTICAL STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 861 (1956).

service.[39]

Prior to the Patent Act of 1952,[40] the patent grant used to be defined in the statute as "*the exclusive right to make, use and vend the invention or discovery.*"[41] This certainly fell within the terms of the foregoing definitions. That our highest court has been of the same opinion is clearly enough established by the following excerpts from some of its older opinions. For instance, in *Bement v. National Harrow Co.*,[42] the Court speaking of the patent laws said, "[t]he very object of these laws is monopoly."[43] In *Continental Paper Bag Co. v. Eastern Paper Bag Co.*,[44] the Supreme Court affirmed that

> The patent law is the execution of a policy having its first expression in the Constitution . . . . It is worthy of note that all that has been deemed necessary for that purpose, through the experience of years, has been to provide for an exclusive right to inventors to make, use and vend their inventions. In other words, the language of complete monopoly has been employed.[45]

Again in *Henry v. A.B. Dick Co.*,[46] the Supreme Court stated its opinion of the character of a patent, stating, "[i]t is a statute creating and protecting a monopoly. *It is a true monopoly*, one having its origin in the ultimate authority, the Constitution."[47] Justice Holmes stated in *United States v. Winslow*,[48] "[t]he machines are patented, making them 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."[49]

The statutory language of Revised Statute 4884,[50] interpreted in the aforementioned cases, contained an ambiguity that often led to the erroneous perception that the patent granted its holder a positive right "to make, use and vend" the thing patented. This led the Supreme Court in the case of *Bloomer v. McQuewan*,[51] to clarify the patent

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39. BLACK'S LAW DICTIONARY 1007 (6th ed. 1990).

40. Act of July 19, 1952, ch. 950, 66 Stat. 792 (codified as amended in scattered sections of 35 U.S.C.).

41. Act of July 8, 1870, ch. 230, § 22, 16 Stat. 201 (emphasis added).

42. 186 U.S. 70 (1902).

43. *Id.* at 91.

44. 210 U.S. 405 (1908).

45. *Id.* at 423.

46. 224 U.S. 1 (1912) (overruled on other grounds).

47. *Id.* at 27 (emphasis added).

48. 227 U.S. 202 (1913).

49. *Id.* at 217 (citation omitted).

50. 18 Stat. 945, vol. 1 (1878).

51. 55 U.S. (14 How.) 539 (1852).

right in the following words: "The franchise which the patent grants *consists altogether in the right to exclude* every one from making, using, or vending the thing patented, without the permission of the patentee. *This is all* that he obtains by the patent."[52] Even so, the prolific author on patent law, Emerson Stringham, was led to say, in 1937, in his *Outline of Patent Law*,

> The American statute, and following it the patent deed, purports to grant the exclusive right to make, use, [and] vend. The falsity of this language is patent law's most notorious scandal . . . the patent right has today nothing to do with any affirmative making, using, [or] vending, but merely with the right to stop others.[53]

With these comments in mind, the drafters of the Patent Act of 1952[54] set matters straight by revising the statute[55] to say that a patent grants "the right to exclude others from making, using, or selling the invention throughout the United States."[56] This is the right we are talking about today in discussing whether or not a patent is a monopoly.

The English courts have been no more faithful to the definition of their Lord Chief Justice than have the courts of the United States. In *Edgebury v. Stephens*,[57] decided in 1691 by the Court of King's Bench, we see an early breakdown of Coke's attempt to limit the meaning of "monopoly" to such monopolies as were illegal. The court said, "A grant of monopoly may be to the first inventor, by [the Statute of Monopolies]."[58] Robinson gives more than a dozen other English cases in which the courts, during the eighteenth and nineteenth centuries, referred to patents for inventions as monopolies.[59]

B. *"Monopoly" Is a Word of Wide Scope*

Selection of one definition or the other and insistence that a patent is or is not a monopoly is mere name-calling unless we go further. So far we have developed two meanings of the word "monopoly"

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52. *Id.* at 549 (emphasis added).

53. EMERSON STRINGHAM, OUTLINE OF PATENT LAW AND GUIDE TO DIGESTS § 4050 (1937) (citation omitted).

54. Act of July 8, 1870, ch. 230, § 22, 16 Stat. 201.

55. 35 U.S.C. § 154 (1988).

56. *Id.*

57. Edgebury v. Stephens (K.B. 1691), *reprinted in* THOMAS WEBSTER, REPORTS AND NOTES OF CASES ON LETTERS PATENT FOR INVENTIONS 35 (London, Thomas Blenkam 1844).

58. *Id.*

59. ROBINSON, *supra* note 2, § 11, at 17 n.3.

which differ with respect to one essential. That essential is *the status, prior to the creation of the monopoly, of what is monopolized*.

If the right, freedom, or liberty of the people in something they have been accustomed to enjoy is taken from them collectively and given to one (mono-) person or group of persons, an inequality of right results. The people have lost something and the monopolist has gained something *at the people's expense*. Such a monopoly is considered to be odious. It is against these monopolies that the Sherman Antitrust Act[60] and other "anti-monopoly" laws are directed. A little thought will show that such laws were no more intended to prevent *all* monopolies than the patent laws, which are much older, were intended to protect *all* monopolies. Yet one will find such pompous statements in the literature as this: "This constitutional guarantee to the patentee flatly contradicts the Sherman Act. There is no reconciling the two. They are mutually inconsistent. One must yield to the other."[61] The patent and antitrust laws *are* reconcilable—and easily so. If the thing monopolized was in the public domain before the creation of the monopoly in it, the monopoly is odious, illegal, bad. If the thing is a new and unobvious contribution to society, a temporary monopoly is a fair *quid pro quo* for society to pay as a reward or inducement to the inventor and those who took the financial risk of commercializing the thing in order to make it available to society. This principle is, at the same time, what undergirds the law as to what may be patented, the law on patentability. The thing patented must be new and unobvious.[62]

A monopoly, in the broad sense of the term, is neither good nor bad. It is simply *power* which can be put to good or bad uses. The patent laws are one way of putting this power to a good use to the overall advantage of society.

Unless the grant of a patent gives some kind of economic power to the patentee that he or she would not otherwise have, the patent system would not work. That power is the right to exclude others from making, using, or selling the thing patented. That right potentially makes the patentee the *sole seller*, and that, Aristotle taught us, makes him or her a *monopolist*. Calling it a "property right" does not change the fact. All property owners have a monopoly in their property.[63] Whether they gain anything from it depends on the circum-

60. Sherman Antitrust Act, ch. 647, § 2, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 2 (1988)).

61. Gilbert H. Montague, *The Sherman Anti-Trust Act and the Patent Law*, 21 YALE L.J. 433, 468 (1912).

62. 35 U.S.C. §§ 101-103 (1988).

63. See the thoughts of Dean Wigmore on this in Appendix A.

stances of the marketplace, not from their possession of the right. As Aristotle pointed out, Thales first cornered the market on olive presses and the man of Sicily bought up all the iron, putting themselves into the position of sole sellers or monopolists.[64] What they bought up was property rights. The patentee of a new invention stands to gain from his patent right only to the extent the public wants his invention, or can be persuaded to want it, instead of other things available. But monopolistic power is the engine of the patent system.

C. *"Monopoly" is an Emotional Word*

Notwithstanding all of the foregoing, which represents the personal thoughts of this writer, the Court of Appeals for the Federal Circuit (CAFC), in several opinions in its early period (1983-85), took the view that the patent right should not be referred to as a "patent monopoly" but as a "patent property," the reason being that "patent monopoly" is a pejorative term. This was a view put forth by the CAFC's then Chief Judge Markey in *Nickola v. Peterson*,[65] a Sixth Circuit opinion he authored as a visiting judge even before the creation of the CAFC, when he was Chief Judge of the Court of Customs and Patent Appeals. He there quoted, *inter alia*, the statement from the Supreme Court's *Dubilier* opinion: "Though often so characterized, a patent is not, accurately speaking, a monopoly."[66] Five years later, on panels of the CAFC he repeated this sentiment in *Schenck v. Norton Corp.*:[67] "It is but an obfuscation to refer to a patent as 'the patent monopoly' or to describe a patent as 'the patent monopoly' or to describe a patent as an 'exception to the general rule against monopolies.' "[68] This same sentiment was expressed in *Connell v. Sears, Roebuck & Co.*,[69] "[t]he phrase 'patent monopoly' appears at various points [in the trial court's opinion]. Under the statute, Title 35 U.S.C. Section 261, a patent is a form of property right, and the right to exclude recognized in a patent is but the essence of the concept of property."[70]

Judge Nies, Judge Markey's successor as Chief Judge, sitting with Judges Newman and Bissell, in *Jamesbury Corp. v. Litton Indus.*

64. ARISTOTLE, *supra* note 35, at 20-21.
65. 580 F.2d 898 (6th Cir. 1978).
66. *Id.* at 914 n.25 (quoting United States v. Dubilier, 289 U.S. 178, 186 (1933)).
67. 713 F.2d 782, 218 U.S.P.Q. 698 (Fed. Cir. 1983).
68. 713 F.2d at 786 n.3.
69. 722 F.2d 1542, 220 U.S.P.Q. 193 (Fed. Cir. 1983).
70. 722 F.2d at 1548.

Prod., Inc.,[71] authored a most significant ruling dealing with this question of whether patents grant monopolies. This was *a jury case* in which the verdict was for the defendant. The CAFC reversed and remanded. The jury had been charged

> [T]he public is a silent but nevertheless an important, an interested party in all patent litigation and is entitled to protection against the *monopolization* of what is not lawfully patentable. In other words, it is not simply between Jamesbury and Litton. Other people are affected by it.
>
> So I charge you that it is your duty to subject the invention defined in claims seven and eight of the Freeman patent to careful scrutiny before endorsing Jamesbury's right to *the patent monopoly* defined by such claims.[72]

After stating it was error to suggest that the jury must affirmatively find the patent valid (because it is presumed to be), the opinion continues,

> Further, this court has disapproved of a challenger's characterization of a patentee by the term *monopolist*, which is commonly regarded as pejorative. In both of the cited cases, a bench trial was involved. Here, not only was Litton's counsel not admonished for so characterizing Jamesbury before the jury, a more serious impropriety than in a bench trial, but also the characterization found its way into the instructions. . . . [T]he characterization of a patent as a "monopoly" is misdirected: "The phrase 'patent monopoly' appears at various points. Under the statute, 35 U.S.C. § 261, a patent is a form of property right, and the right to exclude recognized in a patent is but the essence of the concept of property." Instructions which supplement the statutory body of law governing patent validity by interjecting language to the effect that the public must be "protected" against a "monopoly," a term found nowhere in the statute, are likely to be prejudicial and should be avoided.[73]

V. CONCLUSION

I conclude for now, but the signs are that this debate will continue because some lawyers will go on trying to take advantage of uncertainty, ambiguity, and the propaganda value of emotion-stimulating words.

The purpose of this Article has been to educate, not to advise. It

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71. 756 F.2d 1556, 225 U.S.P.Q. 253 (Fed. Cir. 1985).
72. *Id.* at 1558 (emphasis altered).
73. *Id.* at 1559 (emphasis added) (citations omitted).

is hoped that readers can see for themselves that there is enough knowledge of this subject in the CAFC that it is not likely to be influenced in its own decisions by semantic shenanigans in briefs over "monopoly." The court has in fact specifically warned against them: "We . . . reject many of the views set forth in the appellee's brief and trust that counsel will cease holding up the specter of a patent as a '17-year monopoly' . . . ."[74]

It should be equally clear that playing *this* "Monopoly" game in trial courts, especially before juries, is dangerous.

APPENDIX A: FOREWORD BY JOHN H. WIGMORE[75]

The author's introductory chapter of course outlines the history and the theory of that beneficent institution, the patent for industrial invention. As to the theory of it, *I take the opportunity to intrude my personal opinion, that neither Courts nor treatise-writers have been radical enough in defending the legitimacy of the "monopoly" in a patent, as distinguished from the ordinary trade-monopoly. Is it not a fact that every property-right that we have is a "monopoly"*? The right to our house or our automobile is simply a right to keep anyone else from entering or using it without our consent; and is that not a monopoly? Take the case of the miner; he discovers a deposit of gold,—he stakes it out and registers it, and he gets a monopoly,—and not merely for fourteen years, but forever! Yet no one ever publicly attacked his "monopoly", [sic] or proposed to cut down its duration, or to take it away from him unless he worked it; and so on. When Sir Isaac by thinking and thinking discovered the law of gravity, and when Alexander Bell by thinking and tinkering discovered electric telephony, and when the California gold-miner by digging and sinking discovered gold, they all three were doing an identical thing, i.e. discovering a condition of nature which had been existing all along but nobody else had ever found it out. Yet the third man gets a perpetual property-right (= monopoly); the first one gets no legal recognition at all; and the second one is awarded grudgingly a temporary right, and every once in a while he is reproached for even that temporary "monopoly."

Of course, patent-rights can be so used as to merit the distrust attaching to a monopoly,—by contracts fixing prices, by tying agree-

74. Union Carbide Corp. v. American Can Co., 724 F.2d 1567, 1574 n.4 (Fed. Cir. 1984).

75. John H. Wigmore, *Foreword* to LAURENCE I. WOOD, PATENTS AND ANTITRUST LAW at vii-viii (1942) (emphasis added). Reproduced with permission from Laurence I. Wood, Patents and Antitrust Law, published and copyrighted by Commerce Clearing House, Inc., 4025 W. Peterson Ave., Chicago, Illinois, 60646.

ments, by pools, and the like. But so can gold-mines and all the necessities of life by bargains be used monopolistically; yet no one blames the mine-owning right itself or the food-ownership right itself; the blame is directed to the use of it.

And so *I for one regard it as unfortunate that courts and treatise-writers have not stood up more boldly for the fundamental right-ness of the patent-right itself. I say "for one," because I do not recall reading anywhere an adequate defence of the theory of the patent-right.*

Perhaps I should not have intruded this lonesome doctrine. But I have until now had no opportunity to present it to professional attention. And, after all, it is relevant, in that it may induce some reader to put himself in a more correct *prima facie* attitude toward the patent "monopoly", [sic] as he thinks over the issues presented in this book. [Emphasis added].