TRADE

U.S. export-import policy: the figures and the PR flak

Statistics released by the National Science Foundation (NSF) underline how much the export potential of the U.S. economy has been sabotaged by antitechnology, "environmentalist" policies.

According to the NSF, U.S. research-and-development-intensive industries ran a favorable trade balance with foreign countries of $29 billion in 1976, whereas the trade in non-R&D-intensive products ran a $16.5 billion deficit in the same year.

This being the case, one would suppose that an Administration committed to fostering U.S. exports—to a world in need of development—would emphasize R&D funding for the development of new technologies as the best way of capitalizing on its work force, the most skilled in the world. Instead, the NSF reports, R&D expenditures as a fraction of the federal budget have declined 34 percent during the 1968-1978 period. "Investment by industry, as a percentage of net sales, has dropped 32 percent during the same period. The percentage of scientists and engineers engaged in research and development has declined 13 percent in the U.S., while it has risen 57 percent in the USSR and in West Germany, and 62 percent in Japan," according to front-page *Journal of Commerce* coverage on May 29.

The next day, the *Journal of Commerce* ran, under the headline "Is U.S. in Innovation Recession?", an article featuring various scientists and industrialists blasting the antitechnological bias of current national policy, along with a verbose attempt at refutation by Manufacturers Hanover economist Tilford Gaines.

Two recent public-relations gambits exemplify the antitechnology camp's effort to skew potential mobilization for an actual export policy. One involves the Carter Administration's trade talks with China. The other is a May 28 *New York Times*

CORPORATE STRATEGY

Patent law ploy to restrict technology

Opponents of technology have targeted U.S. patent acquisition for antitrust action which they hope will rapidly develop a body of case law with which to hit corporations holding new patents for restraint of trade.

This is the alternative to pressing legislation weakening patent rights, which would be obviously unconstitutional and would invite a corporate counterattack. The approach was mounted by Michael Malina of Kaye, Scholer, Fierman, Hays and Handler, attorneys for Xerox Corporation in the recently appealed **SCM vs. Xerox** case. Malina urged patent lawyers at the May 7-8 *New York Law Journal*'s seminar on "Planning For Patent-Antitrust Litigation" to develop case law to effectively convert patent law into an antitrust weapon.

If recent decisions like *SCM vs. Xerox* and *Berkey Photo vs. Kodak* are allowed to stand, companies using any newly patented technology will have to be concerned whether at some future time—perhaps in 15 years—they can be sued for triple damages and equity claims for not having known and informed their competitors that their patent holdings might give them a large share of any given market!

Already, the increasing reluctance by the U.S. Patent Office to accept applications has meant an extraordinary 21 percent decline in patents issued between 1971 and 1976. The number of new venture capital companies launched has dropped from several hundred a year in 1971 to zero in 1977.

Malina explained to the seminar that "Serious legal issues of monopolization are raised by the existence of patents, especially in advancing technologies. Malina pointed out that these legal issues apply across the board, from the issuance of the initial patent on *through* the accumulation steps where the original technology is improved periodi-

article, titled "A Trade Link to Offset OPEC," which tries to sell the North American Common Market plan—a proposal for a 1930s-style regional autarky bloc—as the same policy sought in the decades before the Civil War by Whig party leader and founder Henry Clay. Speaking of the North American Common Market proposal, Clyde Farnsworth writes: "It is an idea almost as old as the Republic itself. In a more jingoist age, Henry Clay thought the United States should establish a North American union—by military force if necessary. He wanted a 'counterpoise' to what he considered to be the wickedness of the Old World."

Beneath the surface

U.S. Special Trade Negotiator Robert Strauss has been featured prominently by the press as playing tough with the Chinese over the question of the quantity of textiles the Chinese will be permitted to export to the U.S. It is no secret that this is purely a public relations maneuver on Strauss's part to disarm potential U.S. textile lobby opposition to the General Agreement on Tariffs and Trade pact, which will be coming before Congress for ratification soon. The antitechnology facton is eager to implement GATT's anti-Third-World-development provisions banning various categories of government and export industries.

Hence Strauss's alleged ultimatum to the Chinese to put up or shut up within three days or else uttered for the benefit of the U.S. press—with denials a day later appearing in smaller print. Most telling, however, is the fact that Strauss didn't allow reporters to accompany him, lest some embarrassing details slip out—not only on the textile question, but presumably also the unstated military-geopolitical aspects of his trip.

Meanwhile, a package to expand cheap-labor imports to the U.S.—in the name of patriotically protecting U.S. industry—is being promoted by Norman Hinerfeld, chairman of the executive committee of Kayser-Roth. Hinerfeld's patriotic proposal is to save 6 percent of the U.S. textile industry by cutting the goods in the U.S., shipping them to the low-wage Caribbean for assembly, then importing them to the U.S. This will only be profitable, says Hinerfeld, if sections 806/7 of the U.S. Tariff Act are repealed so that only the value added in the Caribbean will be dutiable rather than the entire value.

Gulf and Western, the parent company of Kayser-Roth, already has extensive sugar interests in the Caribbean. Kayser-Roth has allegedly helped to conduit U.S. nuclear secrets for Israeli intelligence through a front called the "Nuclear Club of Wall Street"—perhaps the firm's most characteristic contribution to expanding U.S. exports.

—Richard Schulman

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cally. Certain patents can result in a company acquiring market power, thus making them vulnerable for antitrust and divestiture cases.... If there's a violation of Amended Section VII of the Clayton Act, the government should be allowed to move on divestiture, but that, in terms of law, is still up in the air." Malina went on to complain that the case law from which he hopes to develop antitrust action—without any basis in actual legislation—is still lacking.

Remarkably, Malina was the attorney for Xerox, the *defendants* in the **SCM vs. Xerox** case. At one point in the seminar, a staff attorney for Xerox jumped up to protest that Malina was essentially presenting the case from SCM's point of view.

In fact **SCM vs. Xerox** was an "inside job"—a fact possibly known to neither company—designed to establish the type of case law Malina was referring to. The jury decided in July 1978 that Xerox knew or should have known that its patent would increase its market share at the expense of competitors like SCM, and that it was liable for damages going back to 1956. Judge Newman, known as "a smart liberal who creates his own doctrine," then passed the case up to the Appeals Court without indicating what points of law were being appealed, and leaving it entirely unclear whether he was throwing out the damages alone or was dumping the original liability verdict. When he finally passed it back to the Appeals Court, Newman indicated that the issue was one of equity, thus opening up a whole new tack for zero-growthers in subsequent cases.

Patent lawyers are furious about this development but even more frightened by the Justice Department, which they know to be the main official, albeit covert, power behind attempts to turn patent law into antitrust law.

Ironically, at the *Law Journal* seminar, it was Malina himself who expressed the juridical basis for defeating the zero-growthers. Malina commented that "patent law has been in the tradition of the Constitution and Abraham Lincoln, and the reason for a patent to the founders of the Constitution and Abe was to describe scientific development and to develop the useful arts. But things have changed...."

The legal ground for defeating the use of antitrust actions against holders of high technology patents is the test of whether the patent has been used for the good of the republic, regardless of how much of the market any corporation holding any patent absorbs. The doctrine of market share being confounded with restraint of trade can be knocked down in the patent area with obvious consequences in antitrust litigation. That may take a special breed of lawyer.

—Leif Johnson and Mary Gilbertson