CARTELS AND ENEMY PROPERTY†

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Prior to our entry into the war, property in this country owned by our present enemies was frequently subject to international cartel agreements.[1] Now that we are at war, such agreements affect the administration of enemy property, in the location and seizure of such property, its management while held by the Custodian, and even its ultimate sale or other disposition.

CARTELS AND THE SEIZURE OF PROPERTY

Concealing Ownership of American Companies

In the decade preceding the outbreak of the present war, German firms owning business enterprises in the United States contrived a number of ingenious devices to camouflage the ownership of such properties, but the most effective methods were those dependent on the services of some cartel partner domiciled in one of the other continental European countries. Because of the partnership atmosphere generated out of the cartel relationship, or more often because of the fear that the domestic companies might fall into the hands of some person not connected with the cartel and thus generate competition with the cartel, cartel members lent their services in peacetime to German efforts to frustrate the seizure of such companies in the eventuality of another war between Germany and the United States.

The case of the Schering Company illustrates this point. Schering A. G. of Berlin, a prominent German chemical concern, was a member of a European pharmaceutical cartel which included Dutch and Swiss corporations. In 1937 the German company decided to adopt measures to cloak its ownership of the Schering Corporation of Bloomfield, New Jersey, and transferred its controlling stock interest in the company to a prominent Swiss bank. The mystery of why a Swiss bank desired to purchase a business manufacturing medical specialties in the United States was dissipated when it is understood that the bank was closely affiliated with a

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[1] "Cartel" is merely a convenient term of reference for a certain type of agreement in restraint of trade. As used in this article, it will refer to an agreement designed to eliminate competition which affects our foreign and domestic commerce, one of the parties to which is a national of a foreign country. Such agreements commonly violate the Sherman Act, 26 STAT. 209 (1890), 15 U. S. C. (1940 ed.) §1 *et seq.*

Swiss member of the cartel, and that Schering of Berlin retained a beneficial interest in Schering of Bloomfield. The Alien Property Custodian has vested the stock of Schering of Bloomfield because of Schering A. G.'s interest in the Bloomfield concern.[2]

The Custodian has successfully pierced the network of camouflage erected over certain domestic companies by German nationals. There are, however, other domestic companies, ostensibly owned by nationals of neutral or allied countries, suspected of being in reality German-owned or controlled via the medium of cartel arrangements. Although the Custodian has the statutory power to vest any foreign property, and could conceivably have vested all foreign-owned companies suspected of being enemy-owned or controlled, he has vested only those domestic enterprises which could be proven to be enemy-owned or controlled. Concern for the legitimate interests of one of our allies or of a neutral country and an awareness of the diplomatic repercussions which would have ensued if all foreign-owned domestic companies were vested, together with a belief that a painstaking investigation of each such company would determine true ownership, may have prompted this policy. Because of the difficulties of securing proof, some enemy-owned enterprises may, however, escape seizure through the assistance of cartels.[3]

Transfer of Patents

In the examples above referred to, cartels have merely attempted to screen the real ownership of American assets, and where the real facts have been developed the enemy property in this country could be vested. However, in another category of cases, involving principally patents, participation by American concerns in cartels with German companies may have completely blocked the possibility of vesting the property in this country even though the true facts are known. In these cases, German companies have made bona fide transfers of United States patents to American-owned companies in anticipation of war and in order to avoid seizure after the outbreak of war.

The best publicized example of the transfer of patent rights to avoid seizure as enemy property is the case of the readjustment of patents held by the Jasco Company (a domestic corporation jointly owned by Standard Oil of New Jersey and the I. G. Farbenindustrie). Standard and I. G. Farben were parties to a cartel arrangement which surrendered to Standard Oil Company of New Jersey rights under certain of I. G. Farben's present and future patents for use in the oil indus-

[2] Criminal and civil proceedings charging violation of the Sherman Act were brought by the United States against the Schering Corporation of Bloomfield and other American cartel participants in the United States District Court for the District of New Jersey in 1941. The defendants pleaded nolo contendere to the criminal information and consented to the entry of a decree in the civil case terminating their connection with the cartel. See also hearings on the hormone cartel before the Kilgore Subcommittee on War Mobilization, *Hearings before Subcommittee of the Committeee on Military Affairs, Senate, pursuant to S. Res. 107 and on S. 702*, 78th Cong., 1st Sess. (Dec. 9, 1943), Part 10.

[3] Vesting by the Custodian is of course not conclusive upon the real owner. If the claimant can establish that he is not a foreign national and is the real owner of the vested property, he may sue for its recovery. See McNulty, *Constitutionality of Alien Property Controls, infra*, this symposium, at 135.

try outside of Germany and gave to the I. G. Farbenindustrie control of certain of Standard's chemical developments.[4] As part of this cartel I. G. Farben and Standard Oil (New Jersey) had placed with Jasco certain rights respecting patents to valuable processes, including synthetic rubber, issued by many countries throughout the world. After the outbreak of the European war in 1939, Standard and I. G. decided to take measures to prevent the seizure of their patent rights in certain fields by the various belligerent countries. Jasco, wherever possible, took over record title to the patent rights for the United States and the French and British Empires, while I. G. took over record title to the rights for the rest of the world. The parties believed that their arrangements would (in the words of a Standard official) "leave us in full control of the situation without interference of any government as regards the processes in question for the United States, the British Empire, and the French Empire."[5]

Situations of this sort present to the Custodian problems of great difficulty. Cartel relations make it likely that after the war American companies will return patent rights conveyed even without a formal commitment to do so, or will make some compensating arrangement. For example, as part of the Jasco adjustment referred to above, Standard and I. G. Farben entered into an arrangement (intended to be morally binding but legally unenforceable) to exchange regular reports of the financial returns and to correct any financial inequity, as judged by their original agreement, resulting from the rearrangement.[6]

Even though a transfer was made in contemplation of (though prior to) the outbreak of war, and to avoid seizure, if the transfer is in fact bona fide, absolute and without qualification, it is doubtful whether the Custodian has the power to vest the patents.[7] On the other hand, if the transfer was not bona fide and was made with the intent of reserving an interest in the patent rights to the German company, the Custodian can regard the transfer as a nullity and vest the patents. The line between the two situations is difficult to discern from the hazy indications of the parties' intentions shrouded in a cartel relationship the existence of which may not even be known.[8]

[4] Criminal and civil proceedings were brought by the United States in March 1942 against Standard Oil Co. (New Jersey) and certain of its subsidiaries charging violations of the Sherman Act based on the agreements between Standard and I. G. Farben. The defendants pleaded nolo contendere to the criminal information and consented to the entry of a decree in the civil case terminating the cartel arrangements.

[5] *Hearings before the Committee on Patents on S. 2303 and S. 2491*, 77th Cong., 2d Sess. (1942) part 6, 2921.

[6] *Id.* at 2920. The patents of I. G. Farben involved in the arrangement have been vested by the Custodian (*infra* p. 114). If the action of the Custodian in vesting such patents is sustained, such patents cannot of course now be returned to I. G. Farben unless Congress enacts legislation making such return mandatory.

[7] Stöhr v. Wallace, 269 Fed. 827 (S. D. N. Y. 1920), aff'd 255 U. S. 239 (1921); Magg v. Miller, 296 Fed. 973 (App. D. C. 1924).

[8] If a cartel relation exists and relates to patents and there is any foreign interest in the patents, General Order No. 2 issued by the Custodian requires the reporting of the facts to the Custodian. Criminal sanctions are provided for concealment.

CARTELS AND THE MANAGEMENT OF SEIZED PROPERTIES

Even if the barriers imposed by cartels do not prevent the vesting of the enemy-owned property, cartels continue to pose problems in its administration. These difficulties are increased by the terms of the law under which the Custodian derives his powers. The statute simply provides that enemy property "shall be held, used, administered, liquidated, sold or otherwise dealt with in the interest and for the benefit of the United States."[9] Under the statute the Custodian is an officer of the United States, and vests property for the exclusive benefit of the United States. Despite the title of his office, the notion that he is in effect a trustee for the enemy owners was long ago dispelled.[10] Nevertheless his duty in administering the property for the best interests of the United States may be primarily to conserve the value of the property.[11] As a public official, the Custodian has recognized an obligation to wage economic warfare upon the enemy and to carry out public policy by taking measures to destroy cartels. It is evident, however, that the requirements of public policy may not always be completely in harmony with the obligation upon the Custodian to conserve the value of the seized property. Although the Custodian shares the interest of the Antitrust Division of the Department of Justice in curbing cartels and is striving to cope with the problem, his primary function in the absence of further legislation is to administer vested property in a manner which he deems effective.[12]

Management of Business Enterprises

The policies actually adopted in the administration of vested property have varied with the type of property involved. In the management of seized business enterprises, the policies appear to be based upon the concept that the Custodian is obligated to protect the value of the asset vested. The management of such companies has been delegated to Directors nominated by the Custodian who have managed the companies in much the same way as other private corporations. The Directors have apparently followed the normal business urge of trying to make as much money for the companies as possible. They have not attempted to furnish the public with

[9] Sec. 616 of Title III, First War Powers Act, 1941, 55 STAT. 839 (1941), 50 U. S. C. App. (Supp 1941-1943) §616.

[10] The enemy owner loses all interest in the property after seizure. Vesting is equivalent to confiscation. Munich Reinsurance Co. v. First Reinsurance Co., 6 F. (2d) 742 (C. C. A. 2d, 1925); and see Becker Steel Co. v. Cummings, 296 U. S. 74 (1935). Cf. Dulles, *The Vesting Powers of the Alien Property Custodian* (1943) 28 CORN. L. Q. 245; McNulty, *Constitutionality of Alien Property Controls, infra,* this symposium, p. 135.

[11] After the close of the last war, legislation was enacted directing the return of the proceeds of seized property to the former owners, subject to a prior lien created for the benefit of American citizens having claims against the German government. No legislation of this character has yet been passed with regard to the property seized in this war. If such legislation is enacted the preservation of the property by the Custodian for the benefit of the United States will redound to the ultimate benefit of the former owner.

[12] An example of the Custodian's attempt to curb cartel practices is the provision inserted in the Custodian's Standard Patent License Form. "Section 5. Limitations on Use: No licensed patent shall be used in furtherance of any unlawful cartel or combination or in any other way which is contrary to the laws of the United States."

the particular commodities manufactured at the lowest possible cost (allowing for reasonable profit), which would presumably be the objective of a governmental manager acting for the general public benefit.

This type of policy has sometimes tended to perpetuate the results of cartel practices. For example, for many years a cartel dominated by German companies fixed the price at which potash, an essential fertilizer ingredient, was sold in the United States. The American Potash and Chemical Company, one of the principal domestic potash producers, was secretly owned by members of the potash syndicate and American Potash sold its product at the same price as that fixed by the cartel. After seizure by the Custodian, that company continued to sell its product at the level formerly fixed by the cartel.

It should be noted in this connection that if any other policy had been attempted the Custodian would have been severely criticized, charged with fostering government competition with private enterprise. Certainly he has no Congressional mandate to socialize the companies seized or to enter into competition with private industry on a non-profit making basis. In addition, it is evident that the rights of any outstanding non-enemy minority stock interest in the seized companies must be respected. It is not suggested that in view of the Trading with the Enemy Act and the Executive Orders creating the office of the Alien Property Custodian, he should have adopted any other policy.

Under the circumstances, however, the Department of Justice has felt that it had no other alternative but to consider the vested companies, despite their ownership by the United States, subject to the antitrust laws, just as any other private business.

For example, in Sepember of 1944 an indictment and a civil complaint were filed against the American Potash and Chemical Company, which had been vested by the Custodian, charging that company, together with other persons, with participating in a cartel restraining and monopolizing trade in borax and boric acid.[13] If any vested companies have violated the Sherman Act, they have evidently done so without the knowledge or consent of the Custodian. The Custodian directed American Potash and Chemical Company to withdraw from a Webb Export Association charged with engaging in illegal practices when such charges were brought to his attention. I am advised that all vested enterprises were directed by the Custodian to comply with all applicable laws.

Administration of Patents

Policies adopted in the administration of seized enemy patents, however, have apparently not been determined by a desire to preserve asset values. Pursuant to instruction from the President, no attempt is made to exploit seized patents for the sake of the revenue that might be derived from such exploitation. As a general practice, revocable royalty-free licenses are issued to any person under any patent seized by the Custodian; doubts as to the Custodian's authority to give away gov-

[13] United States v. Borax Consolidated Ltd., *et al.* (U. S. Dist. Ct., N. D. Calif. Southern Div., Sept., 1944).

ernment property have prevented the issuance of irrevocable royalty-free licenses. However, exclusive licenses outstanding in the hands of American companies are respected, and the Custodian will not license any patent subject to such an exclusive license, due to concern for the legitimate property interests of American companies.

Exclusive licenses by enemy concerns to American companies are, however, frequently part of an illegal cartel arrangement. If the Department of Justice secures an adjudication that the exclusive license is unlawful, the Custodian is then in a position to license the patents concerned without respecting the exclusive license to the American company.[14] Where illegality is too plain to require adjudication, the American company may agree with the Custodian to acknowledge the Custodian's licensing right.

The cartel arrangement between Standard Oil Co. (New Jersey) and I. G. Farbenindustrie illustrates the type of question that may arise in the administration of patents subject to an exclusive license which is part of an illegal cartel. As part of the cartel arrangements I. G. Farben had granted an exclusive license for use in the oil industry to Standard under certain of its present and future patents, while Standard had granted control to I. G. Farben of certain of its future chemical developments. In a consent decree entered in the U. S. District Court for the District of New Jersey, the Court required Standard to license all of the patents which were involved in the conspiracy to any person requesting a license, such licenses to be royalty-free for the duration of the war and six months thereafter, and at reasonable royalties for the remainder of the life of the patents. These patents covered such valuable processes as synthetic rubber and aviation gasoline. The Custodian, as successor to I. G. Farben's interest in the patents, became a party to the decree and consented to its entry, in order to insure that all of the patents and patent rights owned by I. G. Farben as well as those owned by Jersey would be immediately available to all American companies. The action of the Custodian further insured that there would be no continuance of the illegal division of use of the patents between the oil and chemical fields.

In addition to the requirement for licensing the patents under the decree, the Custodian at present owns the patents originating with I. G. Farben, having seized them under a vesting order prior to the antitrust decree. The Custodian has stated that he proposed to disregard the exclusive license which I. G. Farben had origin-

[14] Cf. Thoms v. Sutherland, 52 F. (2d) 592 (C. C. A. 3d, 1931). In this case, the Alien Property Custodian sued the Eastman Kodak Co. for back dividends on a certain block of Eastman stock which the Custodian had seized. The defendant had issued the stock in 1903 to a German corporation as consideration for the German company entering into a contract with the defendant to run for 100 years. As part of the contract, the German company agreed not to manufacture or sell collodion papers in North American and certain European countries, and the defendant agreed not to manufacture or sell the same products in certain European countries. The defendant as a defense asserted that the stock had been illegally issued as consideration for a contract in restraint of trade. The court held that the contract was valid because the convenants referred to were incidental to a sale of the property. Consequently, the Custodian recovered. The court's decision on the antitrust point appears questionable. It should be noted that the action of the Custodian in this case resulted in an affirmance of the cartel arrangement.

ally granted Standard and to grant licenses himself. Ownership of the patents is at present in litigation with Standard, but the Court has sustained the Custodian's right to grant licenses during the litigation on terms consistent with the antitrust decree.[15] The action of the Custodian, in disregarding the oustanding exclusive licenses was, in this case, warranted by the provisions of the consent decree. Even without a decree, the Custodian may be in a position to follow a similar course with respect to patents subject to an illegal exclusive license.

Renegotiation of License Agreements

At the present time the Custodian is endeavoring to negotiate modifications of the license agreements affecting seized patents in order to terminate illegal provisions or provisions which effectuate cartel arrangements and to make possible the free licensing of the patents involved. Any such modifications must of course comply with the requirements of the antitrust laws and are scrutinized by the Antitrust Division of the Department of Justice.

If the relationship between the American company and the enemy firm is such as to make the renewal of illegal cartel arrangements likely, administrative action by the Custodian abrogating licensing agreements may not afford sufficient protection to the public interest. In such cases the Antitrust Division of the Department of Justice envisages the institution of litigation designed not merely to abrogate the illegal arrangements but also to provide for safeguards against their renewal.

An example of this type of situation is the pending *Merck* case.[16] The Merck Company of Rahway, New Jersey, had in 1932 entered into the so-called treaty agreement with E. Merck of Darmstadt, Germany, which allocates to each of the two companies the exclusive right to use the name of Merck in certain markets of the world. The Antitrust Division of the Department of Justice believes that this treaty was a cloak to conceal the territorial allocation of the business of the two firms. The Custodian has seized all of E. Merck's interest in the treaty, including certain patent rights and is therefore in a position to terminate the so-called treaty. He has not done so to date. Because of the close association of the two firms over a long period of time, and the nature of the evidence, the Government instituted proceedings seeking cancellation of the treaty and injunctive provisions against its renewal.[17]

CARTELS AND THE DISPOSITION OF VESTED PROPERTY

Cartels continue to create problems for the Custodian in connection with the sale or disposition of seized property. In disposing of the vested property, it is to be expected that the Custodian would wish to take measures to prevent vested property sold from being reacquired after the war by the former enemy owners, and to make

[15] Standard Oil Co. v. Markham, 57 F. Supp. 332 (S. D. N. Y. 1944).

[16] United States v. Merck & Co., Inc. (U. S. Dist. Ct. N. J. 1943).

[17] The defendant in its answer insisted that the Custodian was a necessary party to the litigation because he had vested patent rights belonging to the German concern which would be affected by the litigation. The Department of Justice does not believe that the Custodian is a necessary party. However, to expedite the litigation it has, with the Custodian's consent, moved to join him as a party plaintiff to the proceedings. This motion now awaits adjudication.

certain that the cartel relationship affecting the seized company did not survive his administration of the property.[18]

After the last war, the then Alien Property Custodian required purchasers to stipulate they would not resell the properties to German nationals. These stipulations proved ineffective. In a short period of time after the cessation of hostilities, the former owners had entered into cartel agreements with the purchasers which eventually gave the former owners control of the companies sold. A number of the properties seized by the Custodian during the present war were also seized by the Custodian during the First World War and were sold with the understanding that such properties would not again revert into German ownership.[19]

The Custodian, at the present time, proposes to sell the stock of the business enterprises seized in this war in small lots to private individual investors. The hope is that if the stock ownership in such companies is widely diffused among the American public, this will prevent reacquisition of the property by its former owners. If the seized company is sold without cancellation of the cartel agreements, however, it is apparent that after the war the cartel relationship between the seized company and the enemy owner may continue in effect despite the ownership of the domestic corporation by the United States during the war period. While the former German owner will not be able to claim any legal rights in the cartel contract unless the Custodian restores such rights, parties to a cartel who are desirous of continuing the relationship can readily reconstitute their contractual relationship. On the other hand, even if the Custodian should terminate such agreements by administrative action and resell the stock of the company to the American public in small lots, it is extremely doubtful whether these measures will be adequate to

[18] The cartel problem is here inextricably involved with the problem of ending enemy control. A restrictive agreement may be just as effective as stock ownership in securing control of a company's operations and even a share in the profits, and in the past both methods have been used. Particularly in cases where stock ownership was concealed through intermediaries and stock control therefore somewhat precarious, cartel agreements were entered into giving the German concern effective control over the domestic corporation's activities.

[19] After the First World War the properties of the Bayer Company, one of the predecessors of I. G. Farben, consisting of dyestuff and pharmaceutical factories, were sold by the Custodian to Sterling Products, Inc. Sterling resold the dyestuff factories to the Grasselli Chemical Company. By 1923 Sterling had entered into agreements with a predecessor of the I. G. Farben which gave the German company an interest in the profits derived by Sterling from the sale of aspirin, the chief Bayer products, in certain markets. Within a short time thereafter Sterling and I. G. Farben had agreed to conduct their business in the United States in ethical drugs through the medium of Winthrop Chemical Company, owned fifty percent by each. Winthrop agreed to refrain from exporting pharmaceuticals from the United States.

The Grasselli Chemical Company similarly entered into an arrangement with predecessors of the I. G. Farbenindustrie which led to the transfer of the dyestuff business formerly belonging to the Bayer Company to a new corporation, a predecessor of the General Aniline & Film Company, now one of the largest dyestuff manufacturers in the United States. General Aniline entered into an agreement with I. G. Farben providing that all of I. G. Farben's patents and processes in the field of dyestuffs and other commodities would be transferred to General Aniline for its use in the United States. General Aniline agreed to refrain from exporting dyestuffs and other commodities from the United States. Through the medium of these agreements, and holdings of stock through intermediaries, I. G. Farben regained control over General Aniline. The Custodian has vested substantially all of the stock of General Aniline, and all of the I. G. Farben interests in the contracts referred to. The validity of the agreements between General Aniline and I. G. Farben is now in litigation. United States v. General Aniline & Film Corporation (U. S. Dist. Ct. S. D. N. Y., 1941).

prevent the reacquisition of the properties, or the reestablishment of the cartel relationship. Even with the stock ownership widely distributed, control of the company may be bought up by the former owners after the war. Moreover, in many cases the seized company was dependent on the German cartel partner for its technology, and the cartel agreements have sheltered it from competition. There will, therefore, be strong pressures gravitating the seized company back into the German company's orbit either through the medium of a cartel arrangement or through stock ownership.

In many instances, the original acquisition of the domestic corporation by the enemy owner was in violation of the antitrust laws, and an injunction could therefore be secured against reacquisition. In cases where circumstances make such reacquisition or a revival of the cartel relationship likely after the war, it is believed that a court decree is required to guard against such a possibility. Administrative measures taken by the Custodian at the time of the sale of the seized companies may not be adequate for this purpose. For that matter it is also possible that decrees resulting from antitrust litigation may also prove inadequate to guard against the possibility of former owners reacquiring vested companies. The desirability of legislation banning such reacquisition should be explored.

This discussion has attempted to outline some of the difficulties which cartels have created. The problems involved are complicated and not easy of solution, but the objective is clearly recognized by both the Custodian and the Antitrust Division of the Department of Justice. The public policy underlying the antitrust laws and the war aims of the United Nations require that the cartel influence on seized property must be permanently eradicated.