

[Pseudo-Ramseyer of Turner.001 (draft dated July 9,2001; 4:43 p.m.)

July 9, 2001

NATIONAL COOPERATIVE RESEARCH AND PRODUCTION ACT OF 1993

(Enacted as the National Cooperative Research Act of 1984, October 11, 1984; 98 Stat. 1815)

(Amended by the National Cooperative Production Amendments of 1993, Enacted June 10, 1993; 107 Stat. 117.)

An Act to promote research and development, encourage innovation, stimulate trade, and make necessary and appropriate modifications in the operation of the antitrust laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the “National Cooperative Research and Production Act of 1993”.

(15 U.S.C. 4301 note)

DEFINITIONS

SEC. 2. (a) For purposes of this Act:

(1) The term “antitrust laws” has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12), except that such term includes section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section 5 applies to unfair methods of competition.

(2) The term “Attorney General” means the Attorney General of the United States.

(3) The term “Commission” means the Federal Trade Commission.

(4) The term “person” has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)).

(5) The term "State" has the meaning given it in section 4G(2) of the Clayton Act (15 U.S.C. 15g(2)).

(6) The term "joint venture" means any group of activities, including attempting to make, making, or performing a contract, by two or more persons for the purpose of—

(A) theoretical analysis, experimentation, or systematic study of phenomena or observable facts,

(B) the development or testing of basic engineering techniques,

(C) the extension of investigative findings or theory of a scientific or technical nature into practical application for experimental and demonstration purposes, including the experimental production and testing of models, prototypes, equipment, materials, and processes,

(D) the production of a product, process, or service,

(E) the testing in connection with the production of a product, process, or service by such venture,

(F) the collection, exchange, and analysis of research or production information, or

(G) any combination of the purposes specified in subparagraphs (A), (B), (C), (D), (E), and (F),

and may include the establishment and operation of facilities for the conducting of such venture, the conducting of such venture on a protected and proprietary basis, and the prosecuting of applications for patents and the granting of licenses for the results of such venture, but does not include any activity specified in subsection (b).

(7) *The term "standards development activity" means any action taken by a standards development organization for the purpose of developing, promulgating, revising, amending, reissuing, interpreting, or otherwise maintaining a voluntary consensus standard, or using such standard in conformity assessment activities.*

(8) *The term "standards development organization" has the same meaning as the terms "voluntary consensus standards body" and "voluntary, private*



sector consensus standards body' as such term are used in section 12(d) of the National Technology Transfer and Advancement Act of 1995 and in Circular Number A-119, as revised February 10, 1998, of the Office of Management and Budget.

(9) The term "technical standard" has the meaning given such term in section 12(d)(4) of the National Technology Transfer and Advancement Act of 1995.

(10) The term "voluntary consensus standard" has the meaning given such term in Circular Number A-119, as revised February 10, 1998, of the Office of Management and Budget.

(b) The term "joint venture" excludes the following activities involving two or more persons:

(1) exchanging information among competitors relating to costs, sales, profitability, prices, marketing, or distribution of any product, process, or service if such information is not reasonably required to carry out the purpose of such venture,

(2) entering into any agreement or engaging in any other conduct restricting, requiring, or otherwise involving the marketing, distribution, or provision by any person who is a party to such venture of any product, process, or service, other than—

(A) the distribution among the parties to such venture, in accordance with such venture, of a product, process, or service produced by such venture,

(B) the marketing of proprietary information, such as patents and trade secrets, developed through such venture formed under a written agreement entered into before the date of the enactment of the National Cooperative Production Amendments of 1993, or

(C) the licensing, conveying, or transferring of intellectual property, such as patents and trade secrets, developed through such venture formed under a written agreement entered into on or after the date of the enactment of the National Cooperative Production Amendments of 1993,

(3) entering into any agreement or engaging in any other conduct—



(A) to restrict or require the sale, licensing, or sharing of inventions, developments, products, processes, or services not developed through, or produced by, such venture, or

(B) to restrict or require participation by any person who is a party to such venture in other research and development activities, that is not reasonably required to prevent misappropriation of proprietary information contributed by any person who is a party to such venture or of the results of such venture,

(4) entering into any agreement or engaging in any other conduct allocating a market with a competitor,

(5) exchanging information among competitors relating to production (other than production by such venture) of a product, process, or service if such information is not reasonably required to carry out the purpose of such venture,

(6) entering into any agreement or engaging in any other conduct restricting, requiring, or otherwise involving the production (other than the production by such venture) of a product, process, or service,

(7) using existing facilities for the production of a product, process, or service by such venture unless such use involves the production of a new product or technology, and

(8) except as provided in paragraphs (2), (3), and (6), entering into any agreement or engaging in any other conduct to restrict or require participation by any person who is a party to such venture, in any unilateral or joint activity that is not reasonably required to carry out the purpose of such venture.

(c) *The term "standards development activity" excludes the following activities:*

(1) *Exchanging information among competitors relating to costs, sales, profitability, prices, marketing, or distribution of any product, process, or service that is not reasonably required for the purpose of developing or promulgating a voluntary consensus standard, or using such standard in conformity assessment activities.*



(2) *Anticompetitive actions of a for-profit entity that stands to benefit from such actions, including actions of such entity's officers, employees, and agents.*

(15 U.S.C. 4301)

RULE OF REASON STANDARD

SEC. 3. In any action under the antitrust laws, or under any State law similar to the antitrust laws, the conduct [of any person in making or performing a contract to carry out a joint venture shall] of—

(1) *any person in making or performing a contract to carry out a joint venture, or*

(2) *a standards development organization while engaged in a standards development activity,*”.

shall not be deemed illegal per se; such conduct shall be judged on the basis of its reasonableness, taking into account all relevant factors affecting competition, including, but not limited to, effects on competition in properly defined, relevant research, development, product, process, and service markets. For the purpose of determining a properly defined, relevant market, worldwide capacity shall be considered to the extent that it may be appropriate in the circumstances.

(15 U.S.C. 4302)

LIMITATION ON RECOVERY

SEC. 4. (a) Notwithstanding section 4 of the Clayton Act (15 U.S.C. 15) and in lieu of the relief specified in such section, any person who is entitled to recovery on a claim under such section shall recover the actual damages sustained by such person, interest calculated at the rate specified in section 1961 of title 28, United States Code, on such actual damages as specified in subsection (d) of this section, and the cost of suit attributable to such claim, including a reasonable attorney's fee pursuant to section 5 of this Act if such claim—

(1) *results from conduct that is within the scope of a notification that has been filed under section 6(a) of this Act for a joint venture, or for a standards development activity engaged in by a standards development organization, and*

(2) *is filed after such notification becomes effective pursuant to section 6(c) of this Act.*



(b) Notwithstanding section 4C of the Clayton Act (15 U.S.C. 15c), and in lieu of the relief specified in such section, any State that is entitled to monetary relief on a claim under such section shall recover the total damage sustained as described in subsection (a)(1) of such section, interest calculated at the rate specified in section 1961 of title 28, United States Code, on such total damage as specified in subsection (d) of this section, and the cost of suit attributable to such claim, including a reasonable attorney's fee pursuant to section 4C of the Clayton Act if such claim—

(1) results from conduct that is within the scope of a notification that has been filed under section 6(a) of this Act for a joint venture, *or for a standards development activity engaged in by a standards development organization*, and

(2) is filed after such notification becomes effective pursuant to section 6(c) of this Act.

(c) Notwithstanding any provision of any State law providing damages for conduct similar to that forbidden by the antitrust laws, any person who is entitled to recovery on a claim under such provision shall not recover in excess of the actual damages sustained by such person, interest calculated at the rate specified in section 1961 of title 28, United States Code, on such actual damages as specified in subsection (d) of this section, and the cost of suit attributable to such claim, including a reasonable attorney's fee pursuant to section 5 of this Act if such claim—

(1) results from conduct that is within the scope of a notification that has been filed under section 6(a) of this Act for a joint venture, *or a standards development activity engaged in by a standards development organization*, and

(2) is filed after notification has become effective pursuant to section 6(c) of this Act.

(d) Interest shall be awarded on the damages involved for the period beginning on the earliest date for which injury can be established and ending on the date of judgment, unless the court finds that the award of all or part of such interest is unjust in the circumstances.

(e) This section shall be applicable only if the challenged conduct of a person defending against a claim is not in violation of any decree or order, entered or issued



after October 11, 1984,¹ in any case or proceeding under the antitrust laws or any State law similar to the antitrust laws challenging such conduct as part of a joint venture, *or of a standards development activity engaged in by a standards development organization.*

(15 U.S.C. 4303)

ATTORNEY'S FEES

SEC. 5. (a) Notwithstanding sections 4 and 16 of the Clayton Act, in any claim under the antitrust laws, or any State law similar to the antitrust laws, based on the conducting of a joint venture, *or of a standards development activity* engaged in by a standards development organization, the court shall, at the conclusion of the action—

(1) award to a substantially prevailing claimant the cost of suit attributable to such claim, including a reasonable attorney's fee, or

(2) award to a substantially prevailing party defending against any such claim the cost of suit attributable to such claim, including a reasonable attorney's fee, if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith.

(b) The award made under subsection (a) may be offset in whole or in part by an award in favor of any other party for any part of the cost of suit, including a reasonable attorney's fee, attributable to conduct during the litigation by any prevailing party that the court finds to be frivolous, unreasonable, without foundation, or in bad faith.

(15 U.S.C. 4304)

DISCLOSURE OF JOINT VENTURE

SEC. 6. (a)(1) Any party to a joint venture, acting on such venture's behalf, may, not later than 90 days after entering into a written agreement to form such venture or not later than 90 days after October 11, 1984, whichever is later, file simultaneously with the Attorney General and the Commission a written notification disclosing—

[(1)] (A) the identities of the parties to such venture,

¹ So in law. See section 3(e)(1)(C) of Public Law 103-42.



[(2)] (B) the nature and objectives of such venture, and

[(3)] (C) if a purpose of such venture is the production of a product, process, or service, as referred to in section 2(a)(6)(D), the identity and nationality of any person who is a party to such venture, or who controls any party to such venture whether separately or with one or more other persons acting as a group for the purpose of controlling such party.

Any party to such venture, acting on such venture's behalf, may file additional disclosure notifications pursuant to this section as are appropriate to extend the protections of section 4. In order to maintain the protections of section 4, such venture shall, not later than 90 days after a change in its membership, file simultaneously with the Attorney General and the Commission a written notification disclosing such change.

(2) A standards development organization may, not later than 90 days after commencing a standards development activity engaged in for the purpose of developing or promulgating a voluntary consensus standards or not later than 90 days after the date of the enactment of the Standards Development Organization Advancement Act of 2001, whichever be later, file simultaneously with the Attorney General and the Commission, a written notification disclosing—

(A) the name and principal place of business of the standards development organization, and

(B) documents showing the nature and scope of such activity.

Any standards development organization may file additional disclosure notifications pursuant to this section as are appropriate to extend the protections of section 4 to standards development activities that are not covered by the initial filing or that have changed significantly since the initial filing.

(b) Except as provided in subsection (e), not later than 30 days after receiving a notification filed under subsection (a), the Attorney General or the Commission shall publish in the Federal Register a notice with respect to such venture that identifies the parties to such venture and that describes in general terms the area of planned activity of such venture, *or a notice with respect to such standards development activity that identifies*



the standards development organization engaged in such activity and that describes such activity in general terms. Prior to its publication, the contents of such notice shall be made available to the parties to such venture or available to such organization, as the case may be.

(c) If with respect to a notification filed under subsection (a), notice is published in the Federal Register, then such notification shall operate to convey the protections of section 4 as of the earlier of—

(1) the date of publication of notice under subsection (b), or

(2) if such notice is not so published within the time required by subsection (b), after the expiration of the 30-day period beginning on the date the Attorney General or the Commission receives the applicable information described in subsection (a).

(d) Except with respect to the information published pursuant to subsection (b)—

(1) all information and documentary material submitted as part of a notification filed pursuant to this section, and

(2) all other information obtained by the Attorney General or the Commission in the course of any investigation, administrative proceeding, or case, with respect to a potential violation of the antitrust laws by the joint venture, or the standards development activity, with respect to which such notification was filed,

shall be exempt from disclosure under section 552 of title 5, United States Code, and shall not be made publicly available by any agency of the United States to which such section applies except in a judicial or administrative proceeding in which such information and material is subject to any protective order.

(e) Any [person who] *person or standards development organization that files a notification pursuant to this section may withdraw such notification before notice of the joint venture involved is published under subsection (b). Any notification so withdrawn shall not be subject to subsection (b) and shall not confer the protections of section 4 on any person or any standards development organization with respect to whom such notification was filed.*

(f) Any action taken or not taken by the Attorney General or the Commission with respect to notifications filed pursuant to this section shall not be subject to judicial review.

(g)(1) Except as provided in paragraph (2), for the sole purpose of establishing that a person *or standards development organization* is entitled to the protections of section 4, the fact of disclosure of conduct under section 6(a) and the fact of publication of a notice under section 6(b) shall be admissible into evidence in any judicial or administrative proceeding.

(2) No action by the Attorney General or the Commission taken pursuant to this section shall be admissible into evidence in any such proceeding for the purpose of supporting or answering any claim under the antitrust laws or under any State law similar to the antitrust laws.

(15 U.S.C. 4305)

APPLICATION OF SECTION 4 PROTECTIONS TO PRODUCTION
OF PRODUCTS, PROCESSES, AND SERVICES

SEC. 7. Notwithstanding sections 4 and 6, the protections of section 4 shall not apply with respect to a joint venture's production of a product, process, or service, as referred to in section 2(a)(6)(D), unless—

(1) the principal facilities for such production are located in the United States or its territories, and

(2) each person who controls any party to such venture (including such party itself) is a United States person, or a foreign person from a country whose law accords antitrust treatment no less favorable to United States persons than to such country's domestic persons with respect to participation in joint ventures for production.

(15 U.S.C. 4306)

