

PATENT REFORM AND 1943: ANTITRUST OR ANTI-PATENT LAW

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The passing of 1942 took into history twelve of the most significant of all months insofar as problems involving the economic implications of the patent system are concerned.

Commencing with a series of nation-arousing disclosures concerning international cartels, the past year has seen the subject of patent reform become headline news and the topic of more literature than in a score of previous years.¹ Most significant in the entire sweep of events were the Senate Patent Committee Hearings, extending from April into August, whose reports ran into ten parts.² Focal points of the mass of testimony and documentary evidence there produced were two bills introduced by a trio of energetic Senators—O'Mahoney of Wyoming,³

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¹ See especially, Woodward, *A Reconsideration of the Patent System as a Problem of Administrative Law* (1942) 55 HARV. L. REV. 950; Frank, *What's Wrong with Our Patent System* (Nov. 28, 1942) SAT. EVE. POST 20; Fleming, *Prospects Held Increasing for Revision of Patent Law* (Aug. 15, 1942) Christian Science Monitor 10; Oppenheim, *Patents, The Monopoly Issue and the War* (Aug. 1, 1942) GEO. WASHINGTON UNIV. VICTORY COUNCIL BULLETIN, No. 3, reprinted in (1942) 24 J. PAT. OFF. SOC. 667; White, *The American Patent System* (June 29, 1942) 88 CONG. REC. 5876; *ibid* (1942) 24 J. PAT. OFF. SOC. 509; Note, *Patents in Anti-Trust Suits* (1942) 42 COL. L. REV. 1182; Kronstein, *Dynamics of German Cartels and Patents* (June, 1942) 170 ATLANTIC MONTHLY; ARNOLD, *DEMOCRACY AND FREE ENTERPRISE* (1942); FOLK, *PATENTS AND INDUSTRIAL PROGRESS* (1942); *War and Peace and the Patent System* (Aug. 1942) FORTUNE; WOOD, *PATENTS AND ANTITRUST LAW* (1942).

1943 promises to be equally fertile: FOLK, MEMORANDUM ON PATENTS (submitted to the National Patent Planning Commission) (Jan. 1943); *Public Interest in a Sound Patent System* (March 11, 1943) N. Y. Journal of Commerce; N. A. M. NEWS LETTER, PATENTS (April 3, 1943); Wood, *Agreements Concerning Patent License Restrictions* (1943) 37 ILL. L. REV. 350; Dominick, *Recent Developments in the Law of Patent License Agreements* (1943) 11 GEO. WASH. L. REV. 302.

² Hearings on S. 2303 and S. 2491 before Senate Committee on Patents, 77th Cong., 2d Sess. (10 pts.) (1942).

³ Chairman of the TNEC which in its Final Report (1941) made proposals for patent law revision virtually identical with those contained in S. 2491. It is significant, in connection with Senator O'Mahoney's proposals for permanent changes in the patent system, that he was in 1940 sponsor of a bill proposing a "labor-differential" tax on all products, intended to discourage the use of labor-saving machinery.

Bone of Washington,⁴ and La Follete of Wisconsin.

Most portentous possibility involving patents in 1943 is the Scientific Mobilization Bill, recently introduced, and presently before a sub-committee of the Senate Military Affairs Committee.⁵

The subject of patent law reforms has been a vital, effervescent topic for over thirty years. During that time there have been many proposals—and present trends indicate there will be many more—all of them variants, if not direct lineal descendants, of some much mooted forbear. Many volumes have been written concerning the merits and demerits of the various proposals.⁶ There is little present need for further elaboration on the substantive phases of the problem, for already included in the extant literature are all the points to be marshalled for or against specific reforms.

There is, however, one aspect of the problem which has nowhere sufficiently been stressed—this is what Dean Wigmore would have called the “prima facie attitude” with which the entire subject of patent reform is approached. It is scarcely necessary to restate the fact that the success or failure of a given piece of legislation depends far more on the mood of the Congress and of the country behind it than on the merits or demerits of the bill itself.

To put the matter very frankly, the attitude of many people in the country today with regard to patents is a

Similarly, Representative Sumners of Texas, Vice Chairman of the TNEC went on record before the Committee on Patents of the House of Representatives in 1932 as questioning the feasibility of further encouraging inventions: “. . . I don't see the reason for offering inducements to people to do that which increases our big problem, the problem of unemployment.” Hearings on General Revision of Patent Laws, 72d Cong., 1st Sess. (1932) p. 43. This viewpoint of the proponents must be borne in mind in evaluating the purpose and effect of the changes advocated for the patent system.

⁴ Chairman of the Senate Patent Committee.

⁵ S. 702, 78th Cong., 1st Sess. (1943), a bill to mobilize the scientific and technical resources of the Nation and to establish an Office of Scientific and Technical Mobilization, introduced Feb. 11, 1943. This bill is a successor to S. 2721, 77th Cong., 2d Sess. (1942). See Hearings before Subcommittee of Senate Committee on Military Affairs on Technological Mobilization, 77th Cong., 2d Sess. (1942); *id.* 78th Cong., 1st Sess. (1943).

⁶ See bibliography in Wood, *op. cit. supra* note 1 at pp. 213-218.

petulant, irritated mood. The reasons are not hard to find; the reasons should be analyzed. It is the purpose of these paragraphs not to reiterate all that has been said concerning the merits or defects of this specific legislation, but rather to urge the proposition that the patent is a valuable, if imperfect, part of our American economic system.

The importance of this, if you please, "psychological" approach is particularly apparent when we realize that there has arisen in many parts of the country an antipathy for patents by reason of the fact that they have become associated in the public mind with an unpatriotic and unpopular institution. If the patent is disassociated in our thinking from that institution it will be evident that many of the wholesale reforms advocated are not essential for the maintenance of a healthful, beneficial patent system.

Walter Wheeler Cook, the eminent legal scholar, is fond of remarking that many discussions produce considerably more heat than light. Unfortunately, this has been the effect, if not the purpose, of many of the committee hearings. The Senate Patent hearings last year were originally called to consider Senate Bill 2303, advocating wartime freedom from patent restraints in production for governmental needs. If this were the real reason for the sessions, the Committee might well have gone back to its constituents after the first week, for it was at once evident that the feeling of the nation was unanimous in demanding some such measure as this, as a reasonable wartime expedient.⁷

The vast bulk of the evidence produced, however, both there and more recently at the Scientific Mobilization hearings has related to other matters than to the conduct of the war,—the testimony principally pertaining to the

⁷ It is interesting in this connection to note the action of Leo T. Crowley, Alien Property Custodian, in seizing 50,000 patents, to be available by non-exclusive royalty-free licenses during the war to any interested United States manufacturer. The policy of the Custodian is described in an official pamphlet entitled *PATENTS AT WORK* (1943). See *TIME*, Dec. 21, 1942, pp. 92-94.

Department of Justice charges linking patents to international cartels. When evidence of the existence of these international agreements was disclosed to the country the effect was immediately electric. In the words of Royal F. Munger, writing in the Chicago *Daily News*, the temper of the country was "exceedingly short" when it thought of the dead bodies lying on Bataan, and of an unpatriotic use of the patent system. Charges of "treasonable," "traitorous" and "unpatriotic" were hurled at the patent system itself. These blanket assertions were of course unjustified.

For it must be emphasized that these international cartels are, and long have been, illegal in and of themselves, as violative of both section 73 of the Wilson Act,⁸ and of the Sherman Antitrust Law.⁹ Too, the government itself unquestionably had full data on these matters without holding the Senate hearings. These international cartels have been under governmental attack as long ago as the year 1930,¹⁰ and their existence was apparent at the time of the TNEC hearings. Finally, these agreements form no inherent or essential part of the patent system. It is because of this array of facts that many have contended that the sole purpose in holding these hearings was to generate heat rather than light.

The greatest danger which could result from any such upsurge of popular disapproval of patents because of associating them with an illegal, antisocial institution is that it might lead to an unwise, wholesale purge of the entire patent system. Evidence that such fears were not wholly unjustified arose with the appearance last year of the second O'Mahoney, Bone, La Follete Bill,¹¹ for it was

⁸ 28 Stat. 570 (1894), 15 U. S. C. § 8 (1941).

⁹ 26 Stat. 209 (1890), 15 U. S. C. § 1 (1940).

¹⁰ See the government's complaint in its antitrust suit against the electrical industry filed in 1930, summarized in Wood, *op. cit. supra* note 1, pp. 135-136.

¹¹ S. 2491. This bill was offered "To amend the patent laws, to prevent suppression of inventions, to promote the progress of science, and the useful arts. . . ." In summary, the bill is but a reoffering of the proposals contained in the Final Report of the TNEC in 1941. Here again are the compulsory work-

here that the Patent Committee moved on to the subject of the permanent rewriting of the patent system. The evidence was strengthened with the recent introduction of the Scientific Mobilization Bill, offered for the purpose of putting the government into the field of research in competition with private patentees, as a means of weakening the value of patents by collateral attack.

Quite obviously a complete discussion of the merits of either of these bills is not possible here; they have been fully analyzed elsewhere, and many words are yet to be written about them. While some of the amendments suggested are of obvious merit, the submission of these two bills, proposing respectively a wholesale re-writing and a deliberate vitiation of the patent laws, in the midst of the excitement of a wartime emergency, gives evidence of a concern with far more than the promotion of "progress of science and the useful arts."

In view of the nature of the evidence which has been presented to the legislators, it is not unreasonable to fear that the Congress might move on to the subject of permanent reform in a petulant, angry mood. This is, of course, a good mood for the carrying on of the war; it is not conducive to the objective attitude required for dispassionate permanent reform of any economic institution. The constant association of "cartel," "patent," and "treason," has linked these terms in the public mind until the word "patent" becomes virtually synonymous with the others. In a time of intense international emergencies, the importance of words, and of a careful use of words, is vital. R. Ellis Roberts, in an article entitled "Words, words, words,"¹² says:

No one should think that the study of words, the study of meanings is remote from the present world-tragedy. Confused thought, malicious thought issue in confused language; and a

ing and licensing of patents; the abolition of patent license restrictions; the filing of all patent agreements with the Federal Trade Commission; and the abolition of suits against secondary infringers.

¹² 25 SATURDAY REVIEW OF LITERATURE (May, 1942) p. 19.

confused, careless use of words breeds confusion of thought. . . . There is no panacea; but if people would be more careful in the translation of their thought, more anxious that others get their *meaning* as well as the sound of their speech, it would be more difficult for the cheat and the liar, the madman and the man without scruples to succeed in his attacks on his fellows.

It is obviously urgent that in such a time as this all subjects of great importance should be approached carefully with a minimum of the misuse of words and the misassociation of ideas. That there is, on the part of some writers, a deliberate attempt to create an antipathy for patents *per se* by a careful misuse of words and ideas is all too evident. Unfortunately, the confusion is easy to create; it is hard to be guarded against. This is particularly true because of the intangible nature of the patent grant and the rights which it conveys.

Judge Thurman Arnold, in opening the hearings on the Scientific Mobilization Bill, recently testified that:

If the Antitrust Act were being passed today, it would not be called the antitrust law, but it would be called the 'antipatent law.'¹³

It may well be that this sentence characterizes only too well the current patent policy of the Antitrust Division. There are many present-day monopoly problems wherein the misuse of patents has played a large part. Judge Arnold is correct in saying that in many such instances the patents are the "spearhead" of a formidable industrial position. The antitrust law was designed, as Mr. Arnold has proven he well knows, to break down just such monopolies of, or monopolies via misuse of, patents. But to urge that the attack and the law itself should be directed against patents themselves is as reasonable as the position that corporations should be outlawed because they can, and frequently do, merge to form monopolizing trusts.

Yet this is the spirit and this is the effect of such pro-

¹³ Hearings on Scientific and Technical Mobilization, 78th Cong., 1st Sess. (March 30, 1943) Pt. 1, p. 15.

posals as are contained in these bills. Such legislation purports to be directed only at misuse of patents; its means is to eliminate misuse by castigating the patents.

The Federal Trade Commission has contributed to the elimination of abuses perpetrated in the name of the patent privilege.¹⁴ Thurman Arnold and his antitrust staff cleaned up many situations under the aegis of the Sherman Act.¹⁵ Perhaps more corrective legislation of this nature is needed; but the need is not for anti-patent legislation of the type here proposed.

The means are not well directed to the end. One prepared to tear down the house to kill the rats must give some consideration to the value of and need for the shelter.

It is, of course, incontrovertible that the pooling of patents and the interweaving of restrictive licenses may be used by dominating elements in an industry to facilitate the creation and protection of a monopoly.¹⁶ But the Supreme Court is awake to the dangers which have arisen through the illegal use of a screen of licenses to control the activities of an entire industry. In May of last year that body in two unanimous decisions¹⁷ pierced the guise of patent license protection under which two industry groups maintained rigid price agreements. As long as

¹⁴ Improper usage of patents or patented products has been enjoined as an unfair method of competition. See *In the Matter of Gartside Iron Rust Soap Co.*, Doc. No. 190, Feb. 6, 1919; *In the matter of American Flange & Mfg. Co.*, Doc. No. 3391, Dec. 12, 1938. See also complaint issued *In the matter of Eastman Kodak Co.*, Doc. No. 4322, Sept. 23, 1940. The Commission's activities have been of real significance in the enforcement of the antitrust laws. See Montague, *The Commission's Jurisdiction Over Practices in Restraint of Trade* (1940) 8 GEO. WASH. L. REV. 365.

¹⁵ See *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436, 60 Sup. Ct. 618, 84 L. ed. 852 (1940); *United States v. Univis Lens Co.*, 316 U. S. 241, 62 Sup. Ct. 1088, 86 L. ed. 998 (1942); *United States v. Masonite Corp.*, 316 U. S. 265, 62 Sup. Ct. 1070, 82 L. ed. 1088 (1942); *United States v. Hartford-Empire Co.*, 46 F. Supp. 541 (N. D. Ohio, 1942).

¹⁶ See *United States v. Hartford-Empire Co.*, *supra* note 15.

¹⁷ *United States v. Masonite Corporation*, *supra* note 15; *United States v. Univis Lens Co.*, *supra* note 15, analyzed in Dominick, *Recent Developments in the Law of Patent License Agreements* (1943) 11 GEO. WASH. L. REV. 302. And see *Sola Electric Corp. v. Jefferson Electric Co.*, 317 U. S. 173, 63 Sup. Ct. 172, 87 L. ed. 154 (1942) (where a patentee imposes price restrictions on a licensee, he is free to attack the validity of the patents, despite the traditional estoppel rule under which a licensee cannot raise questions as to the validity of the licensed patent).

license restrictions are confined to those necessary to the reasonable benefit of the patentee—and that is all that the law recognizes—the right to so qualify is a valuable and easily controlled asset.

Unfortunately, however, after many days of testimony relating to cartels and monopolistic abuses many legislators would reject most of the foregoing as verbiage and technicality. It is the sole purpose, therefore, of these paragraphs to attempt to guard against any such frame of mind. Patent laws are for the benefit of the public, not for any one individual. The value and importance of patents as they relate to our economic welfare must therefore be borne in mind. Patents today, as for many decades, furnish a substantial encouragement for the investment of speculative capital in new industries. While the abuses present in the patent system must be eliminated, it is essential that the abridgment of the rights of the individual be no greater than is necessary, so as not to impair the incentive of the patent system.

The proposals contained in these Bills are not on this basis; they obviously do not spring from that economic philosophy. It is evident that some changes are to be worked in the months just ahead for the betterment of this institution. Perhaps the President's National Patent Planning Commission,¹⁸ whose report is looked for in the immediate future, may be looked to hopefully for constructive as contrasted with destructive suggestions. But whenever and however these changes come, it must be urged that our legislators maintain an unbiased frame of mind toward the institution of patents, to the end that those reforms which are adopted have the two-fold merit of benefiting both the public at large and those who rely legitimately on the protection of the patent system.

¹⁸ See Holland, *An Opportunity for the National Patent Planning Commission* (1942) 28 A. B. A. J. 455.

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