

LAW AND CONTEMPORARY PROBLEMS

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FOREWORD

The student of law or politics, on first looking into the American patent system, is likely to find that his dominant impression is one of unresolved conflict. The existence of a patent system in the American economy presupposes a reconciliation of competing policies. The reconciliation, however, appears not to have been worked out. Monopoly, especially of the sort that crudely excludes all but the specially privileged from the pursuit of a trade or the practice of an art, was abhorrent to the founders of the American system;¹ at the same time the need to strengthen the nation by stimulating progress in science and useful arts was not to be denied merely because the means at hand was the traditional one of letters patent, of odious memory. The conflict might have been avoided if the framers of the Constitution and the members of the First Congress had sought other means; but the decision to reward inventors by the grant of exclusive rights injected a contradiction of purpose which called for thorough rationalization. There was, indeed, a partial resolution of the inconsistency between monopoly and common right, in that the more obvious evils of monopoly, as revealed by the lessons of the past, were repudiated by the determination that these limited monopolies were to be granted only for useful "inventions" or "discoveries."² Plainly, however, the meaning of invention was crucial; for to carry the granting of letters patent beyond the necessities which impelled this compromise with an oppressive tradition was to license and defend encroachment on the public domain.³

But there was no definition of invention, either in the Constitutional provision for patents or in the act of Congress implementing it. More than a hundred and fifty years have passed, and the concept of invention remains not only undefined by

¹ See WALTON H. HAMILTON, *PATENTS AND FREE ENTERPRISE* 18-27 (TNEC Monograph 31, 1941).

² Cf. the language of the first patent act, 1 STAT. 109-110 (1790).

³ Thomas Jefferson, the "friend of invention," was keenly aware of the danger. Speaking as a former member of the first patent board, he said: ". . . I know well the difficulty of drawing a line between the things which are worth to the public the embarrassment of an exclusive patent, and those which are not." 6 WRITINGS OF THOMAS JEFFERSON 181 (H. A. Washington, Ed., 1854). He spoke also from personal experience. On one occasion he found himself constrained to pay tribute to the holder of a patent for the privilege of using certain mill machinery, when he was convinced, on the basis of what must be a classic canvass of the prior art, that the essentials of the patented devices had been part of the common store of knowledge since antiquity. *Id.* at 182-183.

Congress but highly controversial. In such circumstances one is justified in asking whether the Founding Fathers really formulated a patent policy, as it is generally taken for granted they did, or whether they simply embraced, without fully reconciling, two not altogether compatible aspirations.

There are doubtless many other instances in which what appear to be comfortably settled policy determinations may turn out, on closer examination, to be attempts to hold on to conflicting desires in the hope that an adjustment will work itself out, or even the hope that cake can be both had and eaten.⁴ It is, of course, the boast of the common law that conflicting interests are composed by a case-by-case eclecticism rather than according to any single foreordained policy; and it is characteristic of the administrative state that policy is formulated only in broad terms, to be made explicit in the light of experience and changing circumstances. Yet it is doubtful that there is anything in our experience comparable to the patent system as an example of conspicuous failure of this technique of control to achieve a practicable accommodation of divergent objectives. It is not merely that no reconciling concept of invention has been discovered and consistently applied; more serious is the fact that the courts and the administrative agencies—the two institutions charged with the application of the patent law—are, for reasons which are both ideological and institutional, poles apart in their positions on this fundamental issue.⁵

The seriousness of this irresolution was accentuated when, just a hundred years after the first patent statute, at a time when technology was assuming new importance in American life in general and corporate enterprise in particular, Congress translated the traditional antipathy to restraints of trade into high national policy. Since then we have been deeply concerned not only with the question of what constitutes patentable invention, but also with the uses to which a patent, once granted, may be put. Never before has recognition of the social value of scientific advance been so universal; and, while the same cannot be said of competitive enterprise, the passage of the Sherman Act did infuse the competitive ideal with a new vitality. The chosen instrument for the promotion of technology must be made to serve its purpose, the patentee must be given the full benefit of his grant; but the public domain must be jealously guarded against appropriation, and the competitive system must be defended against any attempt by the patentee to enlarge the scope of his monopoly. Since we have never really decided what we want to do about the areas in which friction attends the effort to apply these principles concurrently, it is not surprising that the reasoning in arguments and judicial decisions in the critical areas tends to go in a circle.

These perennial problems, however, are not the only causes of the current awakening of interest in the patent institution and its effect on the welfare of the nation. Recent years have brought epoch-making changes in the meaning of

⁴It may not be too far-fetched to suggest that there are some social maladjustments which, like neuroses in an individual, may be traced to unresolved conflicts. Cf. the idea of a "frustrated community" in RANYARD WEST, *CONSCIENCE AND SOCIETY* 176 (1945).

⁵See Stedman, *Invention and Public Policy*, *infra*, esp. note 34, p. 657.

science for humanity and in the institutions through which the benefits of science are to be cultivated and applied. The patent system cannot be adjusted to these developments without undergoing new stresses, nor without searching reevaluation under the impact of each great change. In this generation we have twice had occasion to consider the effect of the patent system on our ability to wage technological war, and on the costs of the undertaking. The aftermath of the more recent and exacting of these experiences finds science established as a prime national resource, and the national government itself the undisputed leader in research and development. On an unprecedented scale the scientific facilities of colleges and universities are being drafted by both government and industry. The nationalization of industry in foreign countries raises new and important problems of the relation between patents and international trade and policy. And with the announcement that an atomic bomb had been exploded over Hiroshima we were suddenly confronted with a whole new universe of "invention" and exploitation which had developed quite independently of our eighteenth-century program for science, and which seems destined to continue its development largely outside that program.

The patent system has been as unyielding to change as it has been provocative of proposals for change. In precipitating further discussion, therefore, one aims at enlightenment rather than reform. If the patent system invited critical appraisal by the Temporary National Economic Committee before the war,⁶ it demands intensive study now. In the hope of contributing to the productiveness of that necessary study, *LAW AND CONTEMPORARY PROBLEMS* presents this group of eight papers by distinguished observers, and will present a second symposium on the patent system early in 1948.

BRainerd CURRIE.

⁶ HAMILTON, *op. cit. supra*, note 1, at 27.

