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WILLIAM MACOMBER

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THE WAR AND OUR PATENT LAWS

The European War is instructive as well as destructive. Its teaching is very general. We are a complacent people,—in some respects we are a most bumptiously conceited people. Before this war our spread-eagle sufficiency was rampant. The small storekeeper at the cross-roads handed out the information along with a pair of blue overalls that “we can lick the rest of the world in no time.” That blatant patriot is now discovering that he cannot sell blue overalls; he can sell gray or butternut, but not blue. He did not know that so simple a thing as the color of a pair of breeches involved international relations and international interdependency.

One of the few blessings of this unspeakable war is an awakening of the public mind to the inadequacy of our patent system; and it may be that this public mind has been galvanized sufficiently to make it perceptive of some constructive statement.

To establish a point of departure, let us take a typical and not uncommon case. I go to my druggist for a remedy for which I have paid twenty-five cents a dozen tablets in the past, and now find I must pay double that price. Still later I go for more and cannot get them at any price. Why? Because that particular drug is patented in the United States, made exclusively in Germany and exported therefrom by a powerful drug concern which holds that patent and will neither manufacture in the United States nor permit any one else so to do.

In times of peace this concern charges a price for this drug which makes twenty-five cents a dozen the necessary retail price.

Prefatory note.—This paper is not a review of our patent system; neither is it the ordinary type of discussion of a patent-law question. It follows rather the suggestion of Judge Swayze, in addressing the graduating class of the Yale Law School last year, that “We already look to the law reviews from the various law schools for the scholarly and scientific discussion and development of the law rather than the opinions of the courts.” Yale Law Journal, Nov., 1915, p. 19.

By taking a specific and confessed defect, given special emphasis by the European war, it undertakes to show (1) that proposed remedial legislation affecting organic law fails when directed against specific evils or individuals; (2) that only with a broad, unbiased, constructive vision can a remedial act be drawn; (3) that such evils are met by removing the motive, rather than attempted inhibition of conditions which are normal consequences of improper, inadequate, or archaic statute. It is, therefore, I trust, suggestive on broad lines to the lawyer as a legislator.
There is no contract resale-price regulation, for the wholesale price automatically fixes that figure, while the actual production cost probably does not exceed that price per thousand. In time of war, when this German concern cannot export, the American public, which has over-graciously given this foreign corporation a closed monopoly, cannot buy at any price, nor can it manufacture.

This illustration is a class-specimen of a genus our patent laws have created; and from it, and without limiting it to acts of foreign holders of United States patents, I may state this general proposition:

Our patent laws permit any owner of a United States patent, whether citizen or foreigner, to lock it up for 17 years, and to deny to the American people, if he chooses, that which every other country may enjoy to the full during that period. Or, by a dominating, generic patent, he may stop the wheels of progress in that particular art in the United States for 17 years, while the rest of the world goes forward.

Herein lies a large cause of the superiority of Germany and France in many arts, and why a general war in Europe leaves many American industries crippled. Prior to this war any suggestion that any foreign country was leagues in advance of us in any art would have been scouted by all but a very few.

Another consideration: During recent years efforts have been made by the committees on patents in the Congress to remedy certain evils which have grown up about the patent monopoly. Notable among these is the Oldfield Bill of the Sixty-third Congress. This bill sought, among other things, to inhibit unconscionable monopoly sheltering itself under the patent laws by a compulsory license provision, best understood by quoting its main features:

Sec. 3. That the district court wherein the owner of a patent or of any interest therein is an inhabitant or may be found, shall have jurisdiction to compel the granting of a license under such patent under the circumstances hereinafter set forth.

The person applying for such license shall file a bill in equity setting forth briefly the facts and circumstances, and the court shall thereupon hear the person applying for such license and the owner of the patent. If the applicant shall allege and prove to the satisfaction of the court that the patented invention is being withheld or suppressed by the owner of the patent, or those claiming under
him, for the purpose or with the result of preventing any other person from using the patented process, or making, using, and selling the patented article in the United States in competition with another article or process, patented or unpatented, used, or made, used, and sold, in the United States by the owner of the patent or those claiming under him or authorized by him, and also allege and prove that the application for said patent was filed in this country more than three years prior to the filing of such bill in equity, the court shall order the owner of the patent to grant a license to the applicant in such form and upon such terms as to the duration of the license, the amount of royalty, the security for payment thereof, and otherwise as the court, having regard to the nature of the invention and the circumstances of the case, deems just: Provided, however, that nothing herein contained shall be construed to authorize the court to compel the granting of a license by the original inventor who has not obligated himself or empowered another person to suppress or withhold such invention.

This provision, as clearly appears from the numerous and interesting committee hearings, was directed against the "monopoly of monopolies," by such great concerns as General Electric, International Harvester, Western Electric, Shoe Machinery and others—all of whom keep in cold-storage thousands of patents. Bitter opposition to this section came from eminent patent attorneys and manufacturers, and it failed to become law. While a great part of the opposition came from patent attorneys who represent big business, it must be conceded that they had the best of the argument, and also that they evinced a sincere broad-mindedness worthy of our calling.

I desire to point out why this section of the Oldfield Bill failed, and, inferentially, why such proposed legislation inevitably must fail. Merely noting the fact that it is of exceeding doubtful constitutionality, note these facts:

First, in effect, the section amounts to shooting at the wolf in the flock with a shot-gun. Whether it would kill the wolf or not, it most certainly would wound or kill some of the sheep. Inevitably, opening the way for such attack upon great corporations must also open the way for the great corporations to attack and financially cripple the less strong patent owner, whether the attempt to compel a license succeeded or not. I am unable to understand why this fact did not impress the Oldfield Committee with killing effect.
Second, this provision is a species of attempted legislation affecting a class or faction, wholly without generality of application. This, in itself, is sufficient to condemn it as an attempt to revise the organic patent law upon which our genius and industry so largely depend.

Now, with the evident need of revision of the patent law brought home to us, is there not some way in which it can be modernized to the benefit of all? I believe there is; but this cannot be done while the vision of the law-maker is holding in focus some special evil, such as unconscionable monopoly or according to foreign patentee-manufacturers such undue advantage as I have mentioned. Such specific examples serve to illustrate the need of revision, perhaps suggest lines of legislation; but never should they be the objective of legislation.

And before passing to my next main point, this is to be considered in connection with the above section of the Oldfield bill: Legislation, such as the adoption of a compulsory license provision, akin to the compulsory license provisions which exist in several foreign countries, is so distinctly un-American that our sense of liberty rebels, even if that sense of liberty borders the "laissez-faire" still ingrained in our industrial mind. And it must never be overlooked that, even if a provision of this sort—contrary to common sentiment—gets onto the statute books, it promptly takes its place with the great mass of non-enforced, non-enforceable laws.

In approaching such a problem, we must abandon the old idea that a business merely because it is big is therefore pernicious. Great industries rarely start in a village blacksmith shop. While it is true that many patent-protected enterprises start small and grow from the inside out, it is equally true that many industries must start large and grow at first from outside in. In other words, there are many industries which can begin only with enormous capital,—industries which, if they are to compete successfully and successfully supply the enormous demands of the present day, must be big business from the very start. Big business, per se, is not only legitimate but absolutely necessary.

But it will be promptly and properly said that such big business as General Electric with the alleged possession of 10,000 to 15,000 patents, International Harvester with 17,000 patents (Oldfield Committee Hearings, pp. 32 and 112), and other concerns less obnoxious only because their field is smaller, are a menace to our industrial progress. Grant that such is the case; and then
let us ask why it is that these great concerns build up such a fortification of patents. Is it purely and solely because they fear that those inventions, if outside their control, would eventuate in successful competition? This is the question which does not occur to the would-be reformer; and in its answer we may get some wisdom. Assuming the total number of patents owned by the General Electric to be 15,000, there is not the smallest probability that if the five per cent or less that they actually use were kept and the balance abandoned to public use, or even assigned to another concern, there would arise any substantial business competition. But what would happen would be the entanglement of General Electric in a hornet's-nest of pestiferous litigation, hampering it in its progress and passing on the cost of that litigation to the ultimate consumer of electric energy. Such would be the case with International Harvester or any other big concern. In short, it is not half so much that these large concerns take out, buy up and store away these vast numbers of patents to prevent competition as to prevent continual litigation. If these large concerns and numerous smaller concerns could be relieved of the burden of suits brought on small improvement patents which afford no broad basis of industry, they would be far less inclined to store their vaults with hundreds of patents which they do not use and never expect to use. Upon this point the following statement of Mr. Von Briesen, one of our ablest and experienced patent attorneys, made to the Oldfield Committee is impregnable:

The 17,000 patents which the International Harvester Co. holds sound more formidable than they really are. Very few of them will stand the test of litigation. They are mostly a lot of weak patents taken out simply to preserve the equilibrium of the concern and to prevent its inventions from being wrongfully appropriated by people who never made them. (Oldfield Committee Hearings, p. 112.)

In other words, the International Harvester Co. knows that if it does not patent every minor improvement arising from day to day, some outsider will patent those very things and subject the company to endless and senseless litigation. The motive, therefore, is protective, rather than monopolistic.

Hence, if we are to legislate to remedy this condition along with others, if we can destroy the motive of the evil we will have destroyed the evil itself, at least in large measure.
This extended preliminary discussion has been necessary to clear the foreground for what I am now to state.

We grant patents for 17 years, a much longer period than most countries. We grant them without any requirement of compliance with the very thing the framers of the Constitution had definitely in mind. When those men undertook to “promote the progress of science and useful arts,” they had not the vaguest notion that they were providing for the hoarding of progress for 17 years or any other period; and in “exclusive right to their respective writings and discoveries,” they had no more idea that an inventor would patent a thing and lock it up than that an author would write a book and hide it away to be read only with his last will and testament. By “exclusive right” they meant exclusive use, and nothing else.

Let us come at last to a proposed revision of one section of the patent statute, radically different in range and aim from the Oldfield provision, and which, in my opinion, with proper wording and with very slight amendment to other sections, will reach this condition generally, affecting rich and poor, big and small, alike. The following is Sec. 4884 of the United States Revised Statutes with my proposed amendments and additions in italics:

Sec. 4884. Every patent shall contain a short title or description of the invention or discovery, correctly indicating its nature and design, and a grant to the patentee, his heirs or assigns for the term of (seventeen) seven years, with the conditional right to an extension for an additional period of ten years, as hereinafter in this section provided, of the exclusive right to make, use, and vend his invention or discovery throughout the United States and the Territories thereof. A copy of the specification and drawings shall be annexed to the patent and be a part thereof.

2. Every original grant under this section may be extended for the additional period of ten years, as herein provided, either by the patentee, his executors or administrators, or any assignee of the whole or any part thereof, or any licensee holding any license or right thereunder, upon due proof to the Commissioner of Patents of any such right or interest, and upon due proof that the invention of the patent, or some part thereof distinctly claimed therein, is regularly and commercially manufactured and sold, or made and used or employed in manufacture, within the United States by a person, firm or corporation doing a regular business within the United States, under conditions of manufacture, or use, or under terms of sale or license, in good faith,
or has been and is being in good faith and with diligence developed commercially within the United States, and upon proof that the same is not held, or used, or suppressed in restraint of manufacture or trade, or in support of unlawful or inequitable monopoly.

3. Such extension shall be granted only upon petition duly verified by such patentee, executor, administrator, assignee or licensee, or committee of incompetent person, filed in the Patent Office not earlier than five years after the date of the original grant, nor later than six years thereafter; and such petition shall set forth all of the proofs and conditions of paragraph 2, above, and in addition thereto the names and residences of all persons, firms, and corporations owning or claiming any interest, legal or equitable, in said patent, to the best of the petitioner's information and belief, and the place or places where and the periods of time during which, the same has been manufactured, or used, or sold.

4. It shall be the duty of the Commissioner of Patents to satisfy himself of the prima facie correctness and sufficiency of such petition, and upon such finding and coincident with the expiration of said first period of seven years to grant and issue an extension for an additional period of ten years.

5. Provided however: That any citizen of the United States of lawful age, or any domestic firm or corporation doing a regular business within the United States, may file with the Commissioner of Patents within sixty days after the filing of such petition a duly verified opposition thereto, controverting any substantial allegation of such petition; and in such case the Commissioner of Patents shall issue a provisional ten-year extension of said original grant, and shall forthwith certify to the judges of the United States district court within which such petitioner resides such petition and opposition.

6. That thereupon such United States district court shall record and set down such petition and opposition as and for pleadings under Sec. 4915 of the United States Revised Statutes, notify the parties thereto of such issue by registered mail, and in due course and as a preferred cause under the rules of such court, proceed to a hearing and determination of the issue in like manner and with like force and effect as an action brought under said section to compel the issue of a patent; and that appeal from any decree therein shall be allowed in like manner, but within thirty days from the entry of such decree.
7. That upon the entry of a final and non-appealable decree therein by such court, a certified copy thereof shall be transmitted to the Commissioner of Patents by said court; and thereupon the Commissioner of Patents shall make said provisional extension full and final or revoke the same in accordance with such decree.

8. It shall be the duty of the Commissioners of Patents to publish notice of the filing of every such petition and opposition, together with the names and addresses of all of the parties, in the next following issue of the Official Gazette; and such publication shall be deemed due and sufficient notice to all persons. And upon the certification of any such petition and opposition to a district court, any person not named in such petition, upon showing some interest under said patent, shall be made a party to such proceeding.

9. This act shall take effect immediately, and shall apply to all pending patent applications, but shall not apply to any patent issued prior to this act.

While the effect of such an act is entirely obvious to those familiar with patent matters, the following should be especially noted:

First, it would kill and remove from the path of legitimate progress a vast number of small, impossible, unused patents, without value to the owners and obstacles to those who are actually engaged in production.

Second, it would largely remove the incentive to suppress or hoard great numbers of small patents by large concerns, because the chief incentive so to do—the prevention of litigation and business disturbance—would be removed.

Third, it would throw open to the public, without giving any license advantage to any individual, all patents which such large concerns may attempt to hold and suppress.

Fourth, it would completely and entirely eliminate foreign domination of American industry by large foreign corporations holding American patents and manufacturing abroad. It will "promote the progress of science and useful arts," as contemplated by the Constitution, rather than permitting the blocking of such progress by a foreign monopoly by using our generosity as a club to maintain foreign domination of certain arts.

Fifth, it would encourage the development of patented invention. This I regard a most valuable feature of such an act. It is well know that the tendency of a very large number of patentees is, once the patent is secured, to slumber and await some
possible development without any aggressive act. The patentee
cannot complain, because he has at least six years of absolute
monopoly to exploit his invention. If he cannot do it in that
time, there is small probability he ever can.

Sixth, it stands clear, I believe, of every substantial objection
to the Oldfield bill; it is non-discriminating and is democratic
rather than paternalistic.

Seventh, it is not going back to the old extension system of our
early patent statute; for there the basis of extension resided in an
individual showing of alleged needed extension of the monopoly
in a specific instance—a proposition wholly at variance with the
broad and general provision I have sought to embody.

Eighth, it is devoid of the objections readily raised against the
"working" provisions of the patent acts of certain foreign
countries—provisions which are readily avoided, and which
afford no relief from suppression or monopoly.

Finally, without organic change of the patent statute, it leaves
the patent monopoly absolute in the hands of a legitimate and
industrious owner. It leaves the monopoly absolutely absolute—
if one may so speak—for seven years and leaves the way open
for an extension of the absolute monopoly for an additional ten
years, if the owner in good faith manufactures or uses as the
Constitution contemplates he shall do, and does not attempt to
build up an unconscionable monopoly by misuse of the patent
privilege.

BUFFALO, N. Y.

WILLIAM MACOMBER.