PATENTS, CONGRESS AND THE NATION

A Statement

BY

THE BOSTON PATENT LAW ASSOCIATION

PATENTS, CONGRESS AND THE NATION.

The patent system is again under attack by persons who would destroy it because they do not understand it.

Exercise of normal legal patent rights, even the ownership of patents, is characterized as unpatriotic and bills have been introduced for permanent legislation which would emasculate our patent system.

These bills are presented to Congress with the argument that because certain great corporations have been built up on patents and have indulged in monopolistic practices, patents and the patent system are the cause of the trouble.

There are two bills now pending in the Senate Committee (S.2303 and S.2491) which, if they become law, will give the Government in war times certain additional powers and in peace time will effect three fundamental changes in the patent system.

Already the Government has broad powers over patents. On July 1, 1918, the Act of June 25, 1910, was amended at the instance of President Roosevelt, then Assistant Secretary of the Navy, to provide that:

> "Whenever an invention described in and covered by a patent of the United States shall hereafter be used or manufactured by or for the United States without license of the owner or lawful right to manufacture the same, such owner's remedy shall be by suit against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture . . ."
>
> U.S.C. Tit. 35, Sec. 68 as amended.

The courts have held this law to be constitutional and to extend to assignees of the patent owner and to sub-contractors of the Government. It applies to all United States

patents, whether owned here or abroad. This frees the Government and also its contractors and subcontractors completely from all troubles over infringements of patents.

No legislation is necessary because the Government is already in a position to proceed with the war effort without regard to patents. While it cannot seize the patents itself, it and its contractors, or anyone producing goods for the Government, can make the goods and leave the patentee to recoup himself by suit in the Court of Claims.

Now what is Congress proposing to do?

Senate Bill S.2303 permits the Government in war time to seize any patent upon mere notice, the owner's only recourse being by a suit in the Court of Claims. No provision is made for the return of the patent to the owner when the war is over or for limiting the term of any licenses which may be granted, and after seizure the owner may not even operate under his own patent. This bill also permits the Government to grant licenses as it chooses and says that the President shall prescribe a reasonable royalty but makes no provision for its payment either by the Government or the licensee. While the bill allows the patentee to have recourse to the courts, it prohibits the courts from awarding more than the amount prescribed by the President. This means not only that a man's patent can be taken away by executive order, but that the inventor's remuneration will be fixed by some underling in a Washington department and that the courts cannot disturb his decision. Our American system of law revolts at such undemocratic procedure, even if the Constitution would permit it.

The Second Bill (S.2491) is even more serious. It reconstructs the patent system, and is permanent legislation,—not a war measure. The bill contains three substantive

provisions each of which diminishes the rights of the patentee.

First: After three years, the Commissioner of Patents may grant a license under any patent, under which there has been a failure to manufacture or grant licenses on reasonable terms.

Second: No license may be granted which limits the quantity of licensed goods produced, the price at which they are sold, the use to which they are to be put, or the region in which they are sold. This provision is retroactive and applies to all existing licenses.

Third: No patentee may sue the seller or user of a patented article unless he has first sued the manufacturer successfully.

Other provisions require that all licenses must be in writing and be recorded; and give the Federal Trade Commission supervision over the enforcement of the Act, thereby dividing the patent system between the Patent Office and Federal Trade Commission. There is also a blanket provision against monopolistic practices.

The *compulsory license* provisions of Bill S.2491 are vicious for various reasons:

The inventor or his assignee will have to crowd the commercial exploitation of invention into three years under penalty of having to license someone who may become his competitor. As an illustration, the Klixon thermostat whose development required several years of patient persistent work and a hundred thousand dollars of invested capital would not have given its inventor, a mechanic working at the bench, any substantial return, if, at the end of three years the electrical equipment companies had been able to force a compulsory license from him. He would not have been able to build up his own independent and competitive business.

The compulsory license provision will be a brutal weapon in the hands of the big corporation. At the end of three years, the corporation can say to the inventor "Give me a license on my terms. If you don't, I'll put you to the killing expense of a proceeding for a compulsory license before the Commissioner of Patents. If you oppose it, you will spend all your money. If you don't, the Commissioner will probably give me the license on my terms."

And finally this provision, if enacted will force established corporations to stake out their claims on the inventor's estate lest their competitors do so first. Once a compulsory license is issued to a company having facilities sufficient to supply the public demand no one else is qualified to apply for one. Therefore, in effect the law guarantees a monopoly, not to the inventor as intended by the Constitution, but to the compulsory licensee who first perfects his claim. Activities under this provision of the bill would be comparable to the claim-jumping practices of frontier days.

The prohibition on limited or restricted licenses is equally objectionable. Manufacturers needing the protection of a patent against direct competition are often able and willing to license their patents to others who are not competitors, and who will manufacture for a different kind of market, or a different price market, or for a territory not covered by the patent owner's sales organization. It is to the public interest that the patented goods be made available everywhere, for all purposes and in all price ranges. If S.2491 should become law, such licenses will be illegal. Inability to grant limited licenses would deprive the public of full enjoyment of the patented invention and the patent owner of a legitimate income, discouraging rather than encouraging manufacture, business and employment.

The right to limit a license geographically is an absolute

necessity. Otherwise, only large companies with nation-wide sales organizations will be candidates for licenses or for the purchase of patents. A great variety of articles must be made and sold locally. This is the way to utilize the national resources completely and reduce unnecessary transportation. To take away the right to grant territorial licenses will hamper industry as badly as would a provision that no license can be granted which shall extend beyond the limits of a single state.

The prohibition against licenses containing price restrictions is also objectionable. A manufacturer serving the public with a high-priced line of goods who is unwilling to license his competitors generally may nevertheless be willing to license a manufacturer who will make only a low-priced line of goods. It is to the interest of the public that inventions should be made available in different price ranges.

The prohibition of licenses which are limited to a particular use of the invention will also work serious harm to inventors and the public interest. For instance, the provision would prevent a manufacturer of electric insulation who holds a patent on a process of making enamel ware from granting separate licenses to non-competing manufacturers who would like to use the process in the manufacture of other articles such as refrigerators, kitchen ware or bath room fixtures.

The provision as to quantity produced also has its objections. An illustration will point them. A small tractor company faced by a big competitor was able to make a trade under an entire group of patents which enabled the small company to continue its manufacturing business which was the principal support of an entire small community when its big competitor would not have been willing to grant an unlimited license.

The bill provides that *no patentee may sue the seller or user of a patented article unless he has first sued the manufacturer.* This provision plays directly into the hands of the big corporation. Under the present law, the owner of a patent having the exclusive right to make, use and sell may sue the user or seller. He can bring suit in his own district or at the nearest point where he can find someone who sells or uses the infringing goods. If the proposed provision becomes a law the patentee who lives in Massachusetts may have to sue in California in order to prevent an infringement in his own town. The provision will force him to employ local counsel in California in addition to his own counsel. If the law now in force creates any hardship that hardship falls not on the patentee but on the big manufacturing company.

This bill strikes a more serious blow at the future of industry than appears from a casual study of its details, because it lessens the reward for invention and hence the incentive to invent.

The grant of a patent is the one quick direct path to riches and comfort open on equal terms to every individual in this country. Invention is the poor man's sweepstakes in which he may win a fortune. Who has not dreamed of doing so! Every machinist, every workman, every laboratory worker, every householder carries the key to riches and fame as each of Napoleon's soldiers carried the baton of a field marshal in his knapsack.

The patent system is not only the bulwark of the inventor but of the manufacturer. To have something for the production department to make and the sales department to sell, the manufacturing company must rely on some genius who has seen something which his fellowman did not.

These possibilities for rich and poor exist because

Thomas Jefferson foresaw what the proper protection of inventors would do for the country.

The inventor is usually a poor business man; inventive genius and business acumen rarely go together. The inventor must have a market for his inventions. If the inventor is to get the reward of his genius, neither he nor the exploiter of his inventions must be hampered by needless restrictions. Any restrictions on the exercise of patent rights reduces the value of the grant, narrows the inventor's market, reduces the amount he receives and in the long run slows down industrial progress.

A patent is a potent weapon for a David business to use against a Goliath monopoly. To the huge corporation a patent is less vital than to a small one or to an individual. A patent in the hands of an individual or a small company puts them on even terms with the great corporation.

Because the bills are sure to hamper industry they reduce the amount that industry can pay for inventions and by so much the reward of the inventor and his incentive to invent. This in turn reacts on industry.

As already stated these bills are presented to Congress with the argument that because certain great corporations have been built up on patents and have become monopolies, patents are the cause of the trouble. This does not follow. Neither inventions nor patents are harmful, but only when they are used improperly. Our statute books contain ample remedies against monopolies and combinations in restraint of trade. If there are abuses, as there are, the fault is not in patents, but in the use which is made of them, and the remedy lies in enforcement of the Anti-Trust laws and not in destruction of the patent system. It is not necessary to burn down the house to get rid of the mice. If monopolistic practices continue to exist, the fault lies with the Department of Justice.

The bankruptcy laws are designed to protect creditors but are frequently used to defraud them. However, no one suggests that the remedy lies in the repeal of the bankruptcy law.

This is not the time to tamper with the patent system. After every war there follows a reconstruction period which has been accelerated by the contributions of inventive genius. After the Civil War there was the development of the telegraph system, the building of the railroads and the development of the textile and shoe industries, all based on invention. After the first World War the development of automobile, radio, electrical household appliances and motion pictures helped to bring the country back to normalcy. The industries which best survived the depression of 1929 and afforded steady employment and stable investment were the new industries founded on invention, such as electrical refrigeration, air conditioning, cellophane, rayon, and plastics, to name only a few of the contributions to our present new world. After this greatest of all wars more than ever incentives to invention will be necessary if the nation is to again become prosperous in peace time pursuits.

Our Senators and Congressmen are anxious for the facts; they advocate or oppose bills in the interests of their constituents; many have not the time nor the industrial experience to enable them to appreciate the far-reaching effects of the proposed legislation. So, the Boston Patent Law Association suggests that you write your Senator and Congressman, or better still, talk with them, and make them realize that you will be injured by the passage of these bills.

Anyone who has facts which the Senate Committee should know is urged to communicate with Honorable Homer T. Bone, Senate Building, Washington. If it is impossible to appear in person, to testify, please write the facts to

Senator Bone with a request that they be presented to the Committee.

THE BOSTON PATENT LAW ASSOCIATION,
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