A New Patent Act—But the Same Basic Problem *

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I begin my talk with a bit of history, well known to all of you. I do it in order to set the stage for the basic philosophy upon which I rest my case, as stated in the title, "A New Patent Act—But The Same Basic Problem."

When we think of the patent system, if we would think clearly, we start with that provision of our Constitution which is the genesis of that system. We read and hear it read over and over, and that is as it should be, authorizing Congress—"To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Acting upon the authority thus granted, the Congress enacted 163 years ago our first Patent Act. From time to time down through the years the Congress has continued to exercise this grant of power. In 1874 there were 77 Sections of the Revised Statutes dealing with the patent laws. Since then 67 statutes had been enacted up to the approval on July 19, 1952 of Public Law 593, 82nd Congress, 2nd Session, referred to as The Patent Act of 1952. And behind all this legislative activity are the common law and equitable doctrines which have played so important a part in the development of the system through judicial interpretation.

I turn next to a brief view of the treatment of the system by the Courts, relying naturally, upon the Court of last resort in our federal judiciary—The Supreme Court of the United States. For my purposes here it will be sufficient to refer to two extremes. In 1876 Mr. Justice Swayne, in the opinion in the *Consolidated Fruit-*

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Jar case used this language "A patent for an invention is as much property as a patent for land. The right rests on the same foundation and is surrounded and protected by the same sanctions." Illustrative of the other extreme is the use in the majority opinion in the *Cuno* case in 1941, of Mr. Justice Bradley's language in *Atlantic Works* v. *Brady* in 1882 speaking of patentees as "a class of speculative schemers who make it their business to watch the advancing wave of improvement and gather its foam in the form of patented monopolies which enable them to lay a heavy tax upon the industry of the country . . . . " Little wonder that the occasion should arise for Mr. Justice Jackson's comment in his dissenting opinion in the *Jungersen* case in 1949, that ". . . the only patent that is valid is one which this Court has not been able to get its hands on."

This bit of history merely serves to document the observation that our patent system, at the hands of the legislative and the judiciary has been the subject of numerous, and at times significant, amendments and changes. Yet there is one factor bearing upon the problem which has remained constant—our form of government, our political system. I wonder how many stop to think of its fundamental relation to the patent system, as to all social and economic institutions that go to make up what is referred to—and too often tritely—as The American Way of Life.

Our form of government, as conceived and thank the Lord as still maintained, is a constitutional republicanism—or for those who still prefer it, a representative democracy. And what does that adjective constitutional connote when speaking of our political system? It means that under our Constitution the sovereign power, which is exercised through elected representatives, rests, not in just a certain body of people, as Webster's Dictionary defines it, but in all the people. It means, to put it more plainly with respect to the patent system—as an example of one of our institutions—that the system should be, in the long haul, what the people want it to be.

At this point the thought may occur to some that this is obvious insofar as legislative and executive power is concerned, because the electorate has the final say with respect to the encumbents in these two branches of government. But how about the courts, to which we point with pride as comprising an independent judiciary? Let me refute immediately any suggestion that I concur in the loose talk of cynics who ascribe to federal judges the habit of watching the results at the polls and of permitting their judgment and opinions to be influenced thereby. On the other hand, not only are our judges citizens like you and I, with the same responsibilities which attach to that status, but also they are committed to preserving our basic institutions within the framework of our Constitution and the laws enacted thereunder. And finally, the appointive and confirming power over the organization of our federal judiciary rests with elected representatives.

So I say that our patent system will be vitalized or devitalized, liberal or illiberal, effective or ineffective in our industrial economy on the basis of the attitude of our people towards it. That attitude can be one of indifference, in which case our political system will have failed, in the sense that the sovereign power over the patent system will rest by default in the hands of a few. Or that attitude can be enlightened, born of understanding, and hence truly American. In this respect we must avoid the tendency to think of the patent system as something highly technical, beyond the comprehension of those not dealing directly with it. No, like all institutions under our political system it is for the benefit of and belongs to all, and hence must be made understandable by all.

So let us consider that attitude as The Patent Act of 1952 begins to operate—what it is and how it has developed.

Occasionally newspapers and periodicals print stories about a government agency doing a good job in a quiet,

efficient, economical way. But much more frequently, the stories printed about the Government and its agencies are in the nature of exposés. For instance, we are all familiar with the recent tax scandals, the mink-coat deals, and the butter surplus problems. People are naturally more interested in such revelations than in the reporting of day-to-day facts.

This seems to be typical in most forms of human activity. The patent system is no exception. The sensational type of case seems to draw the public, as well as professional, interest. The sensational case will provoke newspaper articles and comments. Speeches, as well as small talk, will naturally center upon the unusual case. Down through the years we have experienced such cases which, each in turn, have created a furor. Newspapers have filled their pages with extreme articles about monopoly. Readers of such articles would be left with an association of ideas—they would associate monopoly, using that term in the opprobrious sense, with patents. Or, more recently, the *A & P* case has given rise to public comment on the patent system as a whole, not so much because of the judgment in the case, but largely because of *dicta* appearing in the concurring opinion of two justices. The reader of the usual newspaper report on the *A & P* case would not remember the facts of the case; they are a little complicated and not very interesting. But the criticism of the Patent Office would be remembered, and the subject of public conversation. If the man in the street has any impression of the patent system today, chances are it was created by newspaper reports such as the *A & P* case.

One can only surmise concerning the effect upon the minds of inferior court judges, of the more sensational aspects of so-called big cases. But we do know that these sensational aspects are, as a rule, those which are or appear critical of the patent system or its administration. The *A & P* case, for instance, merely holds that there was no invention in the particular combination of elements claimed in the patent in issue. But the concurring

opinion goes further than this and says that not only was there no invention in the claimed combination, but also that the standard of invention in general has been too low; that it must be raised to the level of pushing back the frontiers of science. That is "catchy" language. It is sensational in its style and approach. It is much more easily remembered than the opinion of the Court. It not only affects the attitude of the layman, but, if allowed to stand unchallenged, is reflected in the lower courts where it will be cited as authority.

Some courts, as for instance in the *Ever Ready Label* case, have gone as far as to use the concurring opinion in the *A & P* case to support their conclusions as to the standard of invention. In any particular case this may be indicative of a judicial frame of mind toward the patent system in general, but also it may be due to the lack of effective analysis of the economic or social theory upon which the concurring opinion was based.

In like manner, members of the patent bar, inventors, and industrialists in recent years have been concerned by the attitude of some courts with respect to the presumption of validity of a patent. This presumption has in a few cases been completely repudiated, while in other cases it has been given what appears to be lip service but little more.

This trend towards weakening the presumption became noticeable, I believe, in the early 30's but has acquired momentum in more recent years. As an example the Circuit Court of Appeals for the 8th Circuit spoke, in the *Graham Paper Co.* case, in this fashion, "How strong this presumption of validity may be is debatable, in view of the multiplicity of patents being issued." The trend cannot be attributed to a general disintegration of the faith of the judiciary in the administrative process, since during this same period the decisions of other administrative agencies were being accorded greater and greater weight, albeit the Patent Office is one of our oldest and most experienced administrative agencies. What then is the reason for this change in attitude toward patents?

One reason which has been advanced is succinctly stated by the Court of Appeals for the District of Columbia in the *Magnaflux* case in these terms:

> The frequency with which the Supreme Court, notwithstanding the presumption of validity, has overruled the Patent Office on the issue of invention in infringement suits indicates that Patent Office standards of invention in the past have been too low.

Whether or not the Supreme Court has intended to raise the standard of invention is not always the prime issue, if lower courts construe their opinions as doing just that. The client, through his attorney, must deal with practicalities, not with the presumed intent of the justices. When a judge voices the view that "We cannot ignore the change in recent years in the standard of invention adopted by the Supreme Court," as did Judge Learned Hand in the *Taylor Instrument Co.* case, we have the situation of an attitude, if so it was initially, which has crystallized into judicial opinion. Short of a Supreme Court decision holding that opinion in error, those who feel that it is, must give their attention to changing the attitude.

Or, to put it the other way, if a higher judicial standard of invention is relied upon as a reason for the change in attitudes towards the presumption, it must be determined what the cause behind this standard is, if anything is to be done about it.

Let us look briefly at other indications or sign posts pointing to the attitudes that have a bearing upon the problems faced by the patent system.

For example, we are reminded of the ideas voiced in Monograph 31 by Mr. Hamilton after his study of the evidence introduced before the Temporary National Economic Committee. This Monograph was cited as authority in the *Cuno* case, from which I just quoted. Monograph 31 is replete with statements such as a patent "is a privilege in the public domain"; "a private stake in the public domain"; or "a private privilege in the public domain."

May I pause here to comment that there would seem to be need in the interest of our social order, of which treatment of the patent system in such language is merely illustrative, to examine critically this philosophy that the public domain, or the public interest, and private interests are mutually exclusive. I venture to say that a pretty good case can be made for a contrary view, that private interests and the public interest, in general, go hand-in-hand. If properly understood, they are not mutually exclusive.

But, to return to the views expressed in Monograph 31, and the like, they seem to have been carried to their extreme in the concurring opinion in the *A & P* case decided in 1950. There it was stated that—

> The invention, to justify a patent, had to serve the ends of science—to push back the frontiers of chemistry, physics and the like; . . . The Constitution never sanctioned the patenting of gadgets. Patents serve a higher end—the advancement of science.

The clause in the Constitution, which I quoted earlier and upon which this paragraph in the *A & P* case is based, is the one in which by historical accident patents and copyrights were lumped together. Numerous writers, including Mr. Karl Lutz of Pittsburgh, have discussed this clause, maintaining that it was intended to grant to authors exclusive right to their writings for limited times in order to promote "science" and, in the same clause, promote the progress of "useful arts" by securing to inventors the exclusive right to their discoveries. This merger of the patent right and the copyright in one clause has led and probably will continue to lead the courts and the public into confusion. The report of the House Judiciary Committee on the 1952 Revision explains this Constitutional clause as follows—

> The background, the balanced construction, and the usage current then and later, indicate that the Constitutional provision is really two provisions merged into one. The purpose of the first provision is to promote the progress of science by securing for limited times to authors the exclusive right to their writings,

the word "science" in this connection having the meaning of knowledge in general, which is one of its meanings today. The other provision is that Congress has the power to promote the progress of useful arts by securing for limited times to inventors the exclusive right to their discoveries. The first Patent Law and all patent laws up to a much later period were entitled "Acts to promote the progress of Useful Arts."

It is only by collecting and studying the facts and properly publishing the coordinated information that we will be able to deal with confused thinking where it exists in such areas as this. If we are to keep the patent system alive and vital we must constantly "dig" for the facts and present them clearly and simply so that all may see and understand, to determine what is good.

But is all this discussion of mine merely an academic exercise in view of the new Patent Act? I think not. Yet in expressing that opinion I would not care to be understood as indicating a lack of appreciation of the importance of that Act to the patent system as a whole. Rather it is that, while viewing it with approval, sight should not be lost of the importance of continually pursuing the truth with respect to the system, as an integral part of that industrial and technological position which is the cause of wonder throughout the world—the object of admiration by friendly peoples or of envy and suspicion by the unfriendly.

Surely I cannot predict, and I doubt that others can, the treatment which certain key provisions of the Act will receive when tested by litigation. But I do maintain that, whether in their present language or eventually in other language, these provisions should, in the final analysis, reflect the will of our society.

I believe it may be said, from a careful reading of the 1952 Act, that Congress has not changed the law basically. Nevertheless, much has been added to the Statute, much has been cleared up. Hence, the same problems of keeping debris from collecting around the law faces us today as faced us before the 1952 Act. And with old debris cleared away there is more room for new debris to collect.

Certain sections, as for instance Section 282, seem to furnish partial answers to judicial decisions which have been viewed with apprehension, even dismay, by many.

Section 282 states that,

> A patent is presumed valid. The burden of establishing invalidity of a patent shall rest on a party asserting it.

But will such language, used for the first time in a statute, change forthwith the tendency previously mentioned of slighting the presumption of validity? The House report on the bill says of Section 282 that it is declaratory of the existing presumption. Further, as indicated by language such as I just quoted from the *Magnaflux* case, the presumption of validity is not an abstraction, but may be considered in conjunction with the standard of invention. When this happens, as the courts raise the standard, they can materially weaken the presumption of validity.

Looking at another problem, the Act now specifically states that the patent grants "the right to exclude others from making, using or selling the invention." This simple fact, what the patent grant is, has been cloaked in mystery for generations for some. Why has it taken so long to penetrate and disseminate the real meaning of the patent grant? Perhaps because formerly it was expressed in language taken directly from the Constitution—which language in the old statute may have been the source of misunderstanding. As Daniel Webster put it one hundred years ago, in defense of the patent on vulcanized rubber—"The Constitution does not attempt to give an inventor a right to his invention, or to an author a right to his literary productions. But the Constitution recognizes an original, preexisting, inherent right of property . . ., and authorizes Congress to secure . . . the enjoyment of that right." Will the straightforward language in the present Statute, clearly defining the grant, as the right to exclude others, and calling the right personal property, with an unequivocable presumption of validity attached thereto, now be followed by the courts without question—or change? I wonder.

Then again, let us consider Section 103 of the new law. For the first time there has been put in statutory law a condition that existed by judicial interpretation for more than 100 years. This condition of inventiveness has been expressed in a variety of ways by the courts and text writers. The new provision on inventiveness paraphrases language often used in court decisions. But the report states that this is intended merely to have some stabilizing effect and will serve as a basis for the addition at a later time of some criteria which may be worked out. Until that happens, this is clearly a field wide open to experimental treatment by the courts. Despite the fact that the wording of this provision has been drafted with almost scientific precision, the basic criterion used is still the subjective one of "obviousness," and, further, there is the standing invitation to improve and add more precise criteria.

I could continue citing examples of opportunities for further contributions to the 1952 Act, in order to point up and emphasize the necessity for maintaining a high order of vigilance so that the law will not re-collect the granite-like incrustations the revisors worked so hard to clear away—incrustations of a type which statutes have a habit of forming about themselves when the people do not understand or are no longer concerned with adequate understanding of them.

Moreover, other matters were not dealt with in the Revision because of their very controversial nature. These too constitute areas for constant study and analysis of the facts for the drawing of reliable conclusions from such facts and the proper dissemination of the results—for the benefit of judges, legislators, and all the people.

The following language is from the opinion in *Thys Co.* v. *Oest,* recently handed down in the District Court for the Northern District of California, (96 U.S.P.Q. 294) purportedly decided under the new Patent Act. In quot-

ing it I do not imply that it constitutes an indication of what we may expect generally, but rather as an example of the possibilities.

Ecclesiastes tells us that men "have sought out many inventions." Consequently—to paraphrase the same preacher—of making many patents there is no end.

Frequently, however, patents have been improvidently granted. In the words of Mr. Justice Douglas, "The Patent Office like most administrative agencies, has looked with favor on the opportunity which the exercise of discretion affords to expand its own jurisdiction. And so it has placed a host of gadgets under the armour of patents—gadgets that obviously have no place in the constitutional scheme of advancing scientific knowledge."

And so I stand here today—although fully aware of the remarkable accomplishments of the 1952 Revision and the splendid spirit in which it was done—and suggest that we continue on the alert, to give attention in the American Way to the system that many of us believe has played a vital role in making and keeping our country a leader in technology and industrial development. The 1952 Act indeed improved and benefited the patent system through clarification and through dispelling a noticeable fog which had settled over numerous areas, but our basic problem to further improve, to understand, to teach, to guard and preserve the system is still with us. That problem continues to remain the same. Its treatment in the American tradition is of prime importance.

So it is that I adopted the title of this talk—"A New Patent Act—But the Same Basic Problem."