

system to nothing more strenuous than a once-over-lightly. The style in which it is written is in keeping with this role. The wide use of staccato sentences, interesting asides, and snappy quotations prevent it from acquiring the ponderousness to which tax talk is susceptible. The book has more of a popular than an academic type of composition. This raises the dilemma which is in the background throughout. A popularized treatment of federal taxation is not likely to satisfy those who have been initiated into the intricacies of the subject. On the other hand, streamlining is probably not enough to make the subject attractive to those not already fairly well acquainted with it.

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There Is No Mystery about Patents. By William R. Ballard. New York: J. M. Barrett, 1946. Pp. xv, 120. \$2.00.

This pocket-size treatise on patents owes its existence to a patent lawyer's belief that a concerted effort is being made by protagonists of "un-American theories" to undermine the patent system. Such theories could best be combated, it seemed, by presenting the fundamentals of the patent laws in language understandable to the layman. Hence this volume, which in large part is devoted to an attempt to show that various proposed substantive changes in the patent system are unnecessary and to suggest that the advocates of such changes have ulterior motives. However, Mr. Ballard's six-page postscript, which purports to deal with the administrative and procedural aspects of the patent problem, discusses the faults of the patent system in language not appreciably different from that used by those whom he charges with resorting to any pretext to discredit the patent system.

Mr. Ballard's position with respect to substantive changes in the patent system may be summarized as follows:

1. The patent system has admirably served its purpose of promoting the progress of science and the useful arts.¹ Far from being outmoded, it has stimulated a steady stream of inventions. It is true that a great proportion of inventions in recent years has come from the large research laboratories, but is this cause for concern? We must beware of a "frothy monopolifobia" which might cause us to overlook the benefits of laboratory research.
2. Conflict between the patent laws and the antitrust laws is nonexistent.² The impression of

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¹ An opposite view appears in the testimony of Hon. William C. Clark, United States District Judge for the District of New Jersey, in Hearings on H.R. 4523 before the House Committee on Patents, 74th Cong. 1st Sess., Part I, at 1074-75 (1936). "In my 10 years in the consideration of patent causes, it has been impossible not to become cognizant of the very serious evils of our patent system as it is now operating. . . . By definition almost the patent system is intended to benefit three classes of individuals, the inventor, the producer of the invention, and the consumer or user of the patented article. It is my emphatic opinion that today it operates to the very great injury of all three of the beneficiaries intended by the framers of our Constitution when they included the promotion of science and the useful arts among the Federal functions. In fact, as I view it, the only persons helped by the patent law are the attorneys at present made necessary by those laws. . . . In my own experience I have had only one case where the inventor appeared to have any interest whatever in the outcome of the proceedings."

² But in *United States v. National Lead Co.*, 63 F. Supp. 513, 528 (N.Y., 1945), Judge Rifkind found otherwise. The court found that National Lead had organized a patent cartel in 1920, and in 1933 invited du Pont to join. "The reasons assigned by du Pont for its refusal

conflict is being fostered by persons interested in rendering the patent laws ineffectual. Proposals for amendments to prohibit license restrictions as to time, place, or use have no merit except to facilitate the work of some "befuddled antitrust lawyer." The patent license is sound both legally and economically. The licensee, instead of being restricted to make or use a patented invention for a specified purpose actually obtains by means of a license the removal of the restriction that prevented him from utilizing the patented invention. Licensing and cross-licensing of patents are commendable, but patent-pooling should be condemned because of the restraints which it imposes both on members and outsiders and because the patent-pool is in effect "a nullification of the patent system." The fact that illegal acts, combinations or agreements are invalidated when brought to the attention of the courts demonstrates conclusively that patents have never proved a successful cloak for such unlawful activities.

3. The patent system is not at fault because improvement patents are sometimes taken out in order to perpetuate an existing patent monopoly. The life of a patent is limited by statute to seventeen years and cannot be prolonged by improvement patents.³ Nor can the holder of a patent prevent anyone who chooses from making and patenting improvements. In fact, nothing could be quite so conducive to promoting the progress of science and the useful arts as two or more individuals or concerns vigorously exercising their inventive ingenuity in order to "hedge" or "fence" in the products of each other. But it is doubted that this form of competition is practised to any great extent.⁴

[to join] were several, and varied from time to time but always conspicuous among them was the claim that its adherence was forbidden by the antitrust laws. Jebson [Norwegian Associate of National Lead], unfamiliar with American laws, would not credit this reason, for he could not understand how National Lead had undertaken to do that which the du Pont lawyers claimed was prohibited. But perhaps National Lead was right after all since for twenty-five years it proceeded unmolested and succeeded, with the aid of the unlawful conspiracy, to build a highly profitable business and to retain a dominant position in the industry."

³ A contrary view is expressed by Stephen P. Ladas in 12 *Encyc. Soc. Sci.* 24 (1933). He writes:

"The prevention of the application of new inventions for the general good is accomplished under the existing patent system by virtue of the fact that large economic units usually control basic patents. By filing new applications and delaying the grant of patents they succeed in entangling rivals through interference proceedings. They also prevent the use of improvements of inventions covered by their basic patents, since the improvements cannot be legally worked if they involve the use of the basic invention without the consent of the owners of the basic patents. Even when the patent is such that this consent is not necessary, the application of the improvements by independent inventors or rival competitors is often prevented by long litigations financed by the large means of big corporations and prosecuted by patent lawyers of great ingenuity and skill. Thus the opposition is usually bought off. The patented improvement will then either serve to prolong the monopoly of the large economic unit or will be suppressed if it involves the scrapping of existing equipment or the reduction of dividends. Although this suppression of the invention is contrary to the whole theory of the patent system, great outcries have been raised against past attempts of Congress to remedy the situation. Whatever explanations may be given for the suppression of a patented invention, there can be no excuse for maintaining its protection for the whole term of the patent and thus clogging the freedom of industry to build thereon new improvements. If it be said that the scrapping of existing equipment is wasteful, the decision thereon should not be left with the monopolistic interests but with an impartial authority which would take into consideration the whole scheme of interests involved."

⁴ A glaring example of "hedging" and "fencing in" the products of competitors by means of patents was the conduct of the defendant in *Hartford-Empire Co. v. United States*, 323 U.S. 386 (1945). It started out to acquire a monopoly in a large segment of the glass industry and achieved this result largely through the manipulation of patents and licensing agreements. The District Court had accepted in evidence a memorandum from the files of the Hartford-Empire Company which stated that one of its objectives in taking out patents was to block the de-

4. Patent suppression, a rarity, if not actually nonexistent,⁵ is neither immoral nor illegal. Self-interest can be depended upon to bring any worthwhile invention into the open.
5. A patent is a property right whose possessor is under no obligation whatsoever to make use of his patented invention.⁶ Some of the criticism of the patent system doubtlessly emanates from "collectivists" who are attacking property rights in patents as part of their broader campaign against property rights in general.

Mr. Ballard, in his eagerness to defend the patent system, has failed to distinguish clearly between proposals to overhaul the patent system and criticisms of its abuses. It might even be said that Mr. Ballard is in substantial agreement with his unidentified "well known to be protagonists of collectivism" insofar as procedural changes in the patent laws are concerned. He agrees, for example, that too many patents are issued where novelty is lacking; that patents frequently do not comply with the law through failure to describe the invention in such a way as to enable it to be distinguished from the prior art; and that the patent monopoly can be prolonged by keeping an application pending in the Patent Office for an extended period. As an illustration of the latter abuse, he cites an example of a patent application which remained pending for thirty-six years and finally issued with claims dominating the production of moving pictures. Since this so obviously defeats the purpose of the patent system as to call for remedial action, Mr. Ballard considers it less dangerous than the practice of issuing patents where genuine invention is lacking or concealing improvements in a multiplicity of claims. He is convinced, however, of the desirability of legislation to limit the life of a patent so that it will expire not more than twenty years from the date on which the original application was filed. Such legislation was recommended by the Temporary National Economic Committee as part of its program for eliminating abuses of the patent system.⁷

The TNEC proposed drastic measures to "eliminate the use of patents in ways inimical to the public policy inherent in the patent laws, as well as that of the anti-trust laws." It recommended legislation requiring compulsory licensing of patents and prohibiting the holder of a patent from restricting a licensee "in respect of the amount of any article he may produce, the price at which he may sell, the purpose for which or the manner in which he may use the patent or any article produced thereunder, or the geographical area within which he may produce or sell such article." The patent

velopment of similar machines by others and to "fence in" competing machines and prevent their reaching an improved stage. See Petro, *Patents: Judicial Developments and Legislative Proposals*, 12 *Univ. Chi. L. Rev.* 80 and 352 (1944), for a detailed discussion of the facts and legal issues involved in the Hartford case as background for an evaluation of legislative proposals for reform of the patent system.

⁵ For a discussion of this problem see *Patents and Free Enterprise*, TNEC Monograph No. 31, at 136-37 (1941); *Hartford Empire Co. v. United States*, 323 U.S. 386, 400 (1945).

⁶ The position that a patent is a franchise and a privilege is taken throughout in *Patents and Free Enterprise*, TNEC Monograph No. 31 (1941).

⁷ The National Association of Manufacturers in its *Review of Proposals for Revision of the United States Patent System* 45 (1946), also proposed such legislation on the assumption that it would "discontinue the possibility of a patent controlling an art for an indefinite period after the invention has gone into commercial use." This publication of the NAM states on page 8 that "the Temporary National Economic Committee following the proposals made by Mr. Thurman Arnold did, apparently unwittingly, adopt recommendations that would strike at the heart of the system." However, the NAM found itself in agreement with more of the Committee's recommendations than did Mr. Ballard.

was to be forfeit in case of violation. It was the TNEC and not the "protagonists of collectivism" which charged that the privilege accorded by the patent monopoly was being used for purposes completely at variance with the ideal of promoting the progress of science and the useful arts. In fact, Mr. Ballard's arguments appear to be directed primarily at the TNEC, which, in its Final Report and Recommendations, concluded that the patent monopoly has been used "as a device to control whole industries, to suppress competition, to restrict output, to enhance prices, to suppress inventions, and to discourage inventiveness."⁸ In reaching this conclusion, the TNEC was drawing upon a record that antedated the first World War.⁹ It was not a modern "collectivist," but Mr. Louis Brandeis who suggested that patents used for illegal purposes should be forfeit. In 1912, he testified before the Senate Committee on Interstate Commerce: "Now, if a decree of dissolution should be entered, or a decree entered declaring the defendant guilty of violating the law, and resulting in injunctions of one kind or another, there ought to be express power in the court to declare invalid a patent used for an illegal purpose."¹⁰

It is to be regretted that Mr. Ballard did not make a critical appraisal of the proposals he condemns, for, in the words of one of the critics of the patent system, "there are serious doubts that the theory of the patent law responds to present-day economic realities."¹¹ One "very serious defect of the present patent system is the fact that no economic reward is granted to persons making scientific discoveries or discoveries of 'principles' on which patentable inventions are based."¹²

From time to time the question has been raised as to whether, in view of the increasing complexity of economic life resulting from industrialization, the right to exclude others from making, using, and selling a given article for seventeen years is a satisfactory means of promoting the progress of science and the useful arts. Individual

⁸ S. Doc. 35, 77th Cong. 1st Sess. (1941). Members of the committee who were present at the meeting of March 26, 1941, at which action was taken upon the recommendations were: Joseph C. O'Mahoney, Senator from Wyoming, chairman; Hatton W. Sumners, Representative from Texas, vice-chairman; Wallace H. White, Jr., Senator from Maine; B. Carroll Reece, Representative from Tennessee; Thurman W. Arnold, Assistant Attorney General, Department of Justice; Wayne C. Taylor, Under Secretary, Department of Commerce; Garland S. Ferguson, Commissioner, Federal Trade Commission; Sumner T. Pike, Commissioner, Securities and Exchange Commission; A. Ford Hinrichs, Acting Commissioner of Labor Statistics, Department of Labor, alternate for Commissioner Isador Lubin; Joseph J. O'Connell, Jr., Special Assistant to the General Counsel, Department of the Treasury. Proposals for the following were approved by the TNEC without objection: unrestricted licenses; recording of transfers and agreements; limitation on suits for infringement; single Court of Patent Appeals; limitation on period of patent monopoly. Representative Sumners and Under Secretary Taylor were the only members of the Committee to dissent from the recommendation for compulsory licensing. Mr. Taylor was the only one to oppose the proposal for forfeiture of patent for violation.

⁹ Hearings on H.R. 23417 before the House Committee on Patents, 62d Cong. 1st Sess. (1912); Hearings on H.R. 15989 before the House Committee on Patents, 63d Cong. 2d Sess. (1914); Hearings on H.R. 4523 before the House Committee on Patents, 74th Cong. 1st Sess. (1936); Hearings on S. 2783 before the Senate Committee on Patents, 70th Cong. 1st Sess. (1928); Hearings on S. 4442 before the Senate Committee on Patents, 71st Cong. 2d Sess. (1930).

¹⁰ Hearings before the Senate Committee on Interstate Commerce, 62d Cong. 1st Sess., at 1167 (1912).

¹¹ 12 Encyc. Soc. Sci. 23 (1923).

¹² *Ibid.*, at 24.

research that characterized the handicraft economy of colonial America has been supplanted by group research. Industrial research laboratories are usually affiliated with the nation's leading corporations which in order to maintain their dominance must engage in large-scale developmental work. How many small inventors can undertake to finance the development of their own inventions? Corporations with industrial research laboratories are equipped to do so. Consequently they have become the principal market for patented inventions. It was Thomas Edison and not a "protagonist of collectivism" who testified before a congressional committee that "the inventor is now a dependent, a hired person to the corporation."¹³ The emphasis in industry tends to be placed on the kind of research that can be readily translated into profits either in the form of new products or by safeguarding one's position through "hedging" or "fencing" in a competitor's product.¹⁴ Mr. Ballard recognizes that there are types of research which industry cannot be expected to undertake of its own volition. Such fields as national defense, he rightly points out, are the responsibility of the government. However, his choice of synthetic rubber as an example of one of the subjects of research that private enterprise should not be expected to undertake is unfortunate, as leading chemical, petroleum, and rubber tire companies were engaged in such research for a number of years before the war. Nevertheless, the government has financed both directly and indirectly research for war purposes on a scale impossible for private industry. The development of the atomic bomb is an outstanding example. But such problems as cancer, which many believe would be wiped out if only the necessary research could be financed, are neglected. Perhaps it is too much to expect the development of such questions in a volume of this size, twenty-five pages of which are

¹³ Quoted in Judge Clark's testimony in Hearings on H.R. 4523 before the House Committee on Patents, 74th Cong. 1st Sess., Part 1, at 1076 (1936). Mr. Edison attributed this to "the long delays and enormous costs incident to the procedure of the courts" which he stated had been "seized upon by capitalists to enable them to acquire inventions for nominal sums that are entirely inadequate to encourage really valuable inventions." In a similar vein, President Taft, in his message to Congress in 1912 stated: "Large corporations, by absorbing patents relating to particular arts, have succeeded in dominating entire industries, and the only market to which an inventor of improvements upon such machines may offer his patents for sale is to such corporations."

¹⁴ See Hearings before the TNEC, 76th Cong. 1st Sess., Part 3, at 1089 (1939). George Baekeland, Vice President of the Bakelite Corporation, testified: "We can't permit our research men to work on their own. They might go into very interesting fields, which would be of no use to us, not commercial. We do not run an academic laboratory. We are in business, and although we do some molecule chasing and let a few men have their heads in work along lines in which they might feel inclined to do something, a greater part of our research work is directly applied to the needs of the business, and much of the research work is dictated by our customers or by prospective customers." Mr. Baekeland also reported that the Bakelite Corporation's budget for 1938 included \$682,000 for research, that 250 men were employed in the laboratory, and that the company had acquired 365 patents of which 265 were in force.

The following paragraph from Petro, *op. cit.* supra note 4, at 378, is of interest in the light of Dr. Jewett's laudatory introduction to Mr. Ballard's book: "As defensive measures, mass purchase and production of patents have served the monopolies in excellent fashion. Its venture into radio produced a situation highly satisfactory to A. T. & T. 'As I look back on it,' Dr. Jewett reminisced, 'it seems to me that this enlarged and enhanced position [in radio research] played no small part in enabling us to reach our present satisfactory understanding with the General Electric Company and the Radio Corporation of America, and that if we never derive any other benefit from our work than that which follows the safeguarding of our wire interests we can look upon the time and money as having been returned to us many times over.'"

devoted to quotations from statutes and congressional hearings, but the author might at least have mentioned them.

It has become fashionable of late to dismiss proposals for change by tagging them with labels intended to discourage serious consideration of such proposals. So far as is known, Mr. Ballard's booklet represents the first attempt to deal with patent problems in this manner. No evidence whatsoever has been advanced to support the contention that proposals for revamping the patent system reflect a conspiracy against property rights. To the extent that such expressions as "un-American" have any meaning, they presumably characterize prevalent accepted theories of Americans in a given field. If the British, Dutch, French, and Germans or others for that matter, hold similar views—and they certainly do so far as the notion that a patent is a property right is concerned—conflicting views, such as the Jeffersonian concept of a patent as a franchise become not only "un-American" but also "un-British," "un-Dutch," "un-French," "un-German," and so forth. Such an approach contributes no more to an understanding of the problem than do derogatory remarks about the ancestry of one's opponents.

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Concept of the Corporation. By Peter F. Drucker. New York: John Day and Co., 1946. Pp. ix, 290. \$3.00.

Often a judge must feel a flush of pleasure when he at last picks up a pleading which points out the issues in the case. The brief may be clumsy, the style turgid, and the judge frequently feels that he himself could have said it much better and supplied a better interpretation of this or that facet. Nonetheless, he has seen the issues at last. Such, I think, will be the reaction of many readers on first reading Mr. Drucker's essay. Here is the anatomy of an institution laid out in 290 pages of erratic text, unpleasant style, and often unfathomable prose. But with patience in reading, one learns that a social scientist has analyzed a dominant institution of our time in terms of its relations to human beings instead of its relation to other institutions.

Mr. Drucker spent eighteen months in the employ of General Motors as a managerial consultant. This book is his personal interpretation of the data he gathered there. As a consequence it is largely concerned with the internal structure of General Motors, instead of with its relations to the American economy. This means that his economic analysis is less well-prepared, and it is at this point that he is least convincing. This reviewer feels more sympathetic to the author's point of view than to that of any other social scientist he has read recently; but a better case for Big Business can be made than the one Mr. Drucker has made.

Mr. Drucker's analysis of GM in particular happens to be accidental; but he could not have picked a better subject for dissection. GM is not a regulated utility, such as A T & T, and it is not a family business like Ford. It is in what is still a relatively competitive field, and hence does not exhibit the peculiar characteristics of ALCOA. It is young enough to be comparatively rational, and hence lacks the weight of custom and tradition binding on the railroads and U.S. Steel. GM combines such features as vertical integration, assembling of purchased parts, and retail sales. It impinges upon about every class with which we are concerned in economic analysis. And, furthermore, it is self-consciously and rationally organized. After reading Mr. Drucker's work, and realizing that such a person as Mr. Drucker was hired at all, this reviewer is prepared to smile a wry smile whenever the next GM officer rises to denounce a planned economy.

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