THE PATENT INFRINGEMENT SUIT—
ORDEAL BY TRIAL

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THE LIFE of the law has not been logic, it has been experience." Holmes's famous statement has certain implications directly
relevant to the issue of patent litigation and the role which it
occupies in a dynamic, technological economy. Experience is a notoriously
expensive school, and its costs increase with every failure of society to
shorten the lag between the vast changes in economic life and the canons
and procedures of judicial review.

Within America's economic system the problems of patent litigation
represent a focal point in a larger context: the problem of monopoly. It is
clear that correction of procedures, while essential in itself, cannot and will
not affect the conditions which make patent litigation a critical weakness
in the competitive evolution of the economy. The cure for the problems of
patent litigation must be found in the ceaseless effort to inhibit monopoly
growth. "Size" is relative to the market, and not a target of first impor-
tance. It is the domination of the market by unfair means, the ability to
preclude competition, not by valid patents but by abuses, which must be
fought. A solution to the general question of monopoly thus carries an
inherent solution to many of the worst difficulties encountered in patent
litigation. Power corrupts patents as surely, as Lord Acton informed us,
as it corrupts men, and in so doing perverts the role of the patent system
and the function of the courts.

The revival of the anti-trust movement in the past decade has estab-
lished, with an unusually high degree of certainty, the standards of market
behavior of businessmen. The courts have increasingly indicated that to
divide industrial fields into noncompetitive areas; to divide markets terri-
torially; to place quotas and limits upon the quantity and quality of pro-
duction; to engross whole industries or forestall development—these ac-
tions using the patent as a vehicle to give color of legality, are misuses of
the patent grant. In other words, the courts have defined the market be-
havior by which a patent may be abused to such an extent that the busi-
nessman now has a reasonably clear-cut guide to policy conforming to the
general law and to the Sherman Act.

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Nevertheless, there remains what is in some respects the most important of all phases of the problem of misuse: that is, the process of litigation within the confines of the patent grant. The anti-trust campaign has erected signposts of market behavior, but has left unresolved the difficulty posed by patent litigation as a device in which the nature of the patent itself becomes an instrument of monopoly aggression.

Three basic reasons work to increase the gravity of all patent litigation in postwar America. First, patent litigation uniquely concerns the dynamic force of American industry—scientific developments capable of productive application. Second, the degree of public interest in both basic and applied technology is automatically enlarged with every addition to the interdependence of industry. Third, both international balance and national security are directly at stake in the maintenance of technological superiority—technological supremacy is a basic issue in all patent litigation. It is therefore essential to recognize that when a patent suit is decided, something more than the respective rights of the litigants is involved. In a very real sense, our national position and the progress of our economic institutions have become factors in patent litigation.

At the outset of patent litigation an element is introduced which has nothing to do with the merit of contesting claims but which controls the ability to endure trial. This element is economic strength. So important has this become that it can be stated as a generality that conclusive decisions as a result of full legal review of patent conflict are possible only where the plaintiff and defendant are economic equals. Moreover, the level of equality must be high—far beyond the average resources of individual inventors or typical small business firms. Under these circumstances, even assuming that the technical merits or demerits are well defined on both sides, adjudication must result in partial, ambiguous conclusions to the economic problems posed. Moreover, the defeat of justice implicit in such circumstances is translated generally into a defeat for the principles of competition and the legitimate purposes of the patent grant.

It may be argued that this factor of economic inequality is a condition of nearly all litigation and is so recognized by the legal profession. But there is an inescapable difference in kind between a case involving, let us say, trespass, in which the contending parties are financially unequal, and a case of infringement of patents in which this inequality exists. The trespass involves primarily the rights of the litigants and only generally the rights of the public and the nature of the law. But a patent infringement suit is predominantly a problem in public interest (it is in the public interest that the patent system finds its justification), and a problem in the
relation between economic law and technology. The rights of the litigants are embraced within the public interest at issue and dependent upon it for the exceptional character of the rights contested.

During the two decades prior to the anti-trust crusade, independents in many fields were being driven from the market place, either by notices of infringement or by the actual filing of suits. Colorful, albeit opprobrious, epithets were hurled by the contestants. The entrenched groups referred to the independents as "bootleggers" and "counterfeiters." Such terminology, by indirection at least, presupposed that the large monopoly and panopoly groups considered themselves as "governments." The independents, on the other hand, referred to the flood of infringement notices and suits as "patent racketeering."

The attitude of an official of a small Texas glass container company was typical of the feeling of independents in the radio, electric lamp, optical, chemical, aeronautical and other fields with a high incidence of patent infringement suits. In testifying about his company's experience in dealing with the Hartford-Empire Company, S. A. Coleman of the Knape-Coleman Glass Company stated:

In Texas within my lifetime I had seen men hanging in trees for doing less than what the Hartford-Empire was trying to do to my small company.... We naturally were finally forced to hire a patent attorney. We had to acquire the services of a Texas attorney, and I think there are some two or three patent attorneys in the State. They brought us into court in April of 1935, as I recall. Well, when I arrived in San Angelo and met them there in the hotel, I can conservatively say there was a half train load of attorneys and equipment. There were motion picture projectors and attorneys all over the place. I don't know anyone of the Hartford legal staff that was not there. They were prepared to give us a nice battle. Well, I had only one attorney and he was considerably lost in that crowd. I wish you might have seen his face that morning. So I promptly asked for a recess until the afternoon, in order to see if we couldn't settle the case out of court.²

There is almost complete uniformity among observers, representing many different perspectives, on this economic qualification of the ends of judicial procedure in patent infringement suits. The situation places an individual inventor at the most disadvantageous odds vis-à-vis a stronger opponent. It means that an inventor cannot enforce his rights, let alone protect them against invasion, unless, in addition to the patent, he also possesses what may be called "litigation capital" ranging from several thousand to several hundreds of thousands of dollars.² Thus the small

¹ ²Hearings before the TNEC, 76th Cong. 1st Sess., at 614 (1939).
² Rice, History of Patent Law, 1 Hearings before Committee on Patents on H.R. 4523, 74th Cong. 1st Sess., at 1136 (1935).
concern, or individual inventor, who is unable to establish his rights, is a hapless target for litigation. If the small independent elects to defend, he may win at law and lose his business anyway. If he capitulates and settles he sacrifices his independence, his competitive position, and probably some major part of his patent position as well. This outcome may occur even where the smaller party has the stronger patent position, or where the larger party is armed with patents of doubtful validity. The results to the competitive system, and to the independent, are the same.

The initial adversity to the small as against the large litigant is tremendously enhanced if, as is the more common case, the infringement litigation involves patent consolidations. With each claim of every patent in the pool representing a potential source of litigation, and with no sure means of knowing in advance which of these claims will be upheld by the courts, the enormity of the task facing the outsider should be apparent. It is not necessary to dwell at length upon the background of patent combinations, pools, cross-licensing agreements, and patent cartels so prevalent in vital areas of modern industry. The whole advance of cartelization, the gradual and drastic displacement of competition by controlling power groups in industry, has to a large extent been made using patent agreements as a vehicle.

We must recognize that, given the patent system as it is—a product of the handicraft era projected into the industrial environment of the twentieth century—patent consolidation is for economic and technical reasons almost unavoidable. Invention is now in great part an industry, and a large-scale accompaniment of large-scale production in a complex economy.

The point here is that patent consolidation is pro tanto a reformation of the patent system and that the dilemma resulting from a reformation in fact, which is only obliquely dealt with in law, brings about a grotesque maladjustment in the efficacy of the law in attaining public purpose. We may mask, but we cannot conceal, the reality of patent consolidation or its consequences in further complicating the judicial contest respecting individual patent rights.

That this aspect of litigation has assumed a stature of awesome proportions is indicated clearly by the part it has come to play in international economic warfare as well as in domestic strife between monopoly and competitive forces. Thus, instance after instance was adduced in the hearings before the Senate Patents Committee during the war years in which

3 On this question see, e.g., Hearings before Senate Committee on Patents on S. 2303, 77th Cong. 2d Sess., passim (1942).
litigation, contemplated, potential, or actual, served as the battering ram in the creation and maintenance of cartel positions. These included magnesium, synthetic rubber, petroleum, dyestuffs, optical instruments, machine tools, and others.4

The pattern is similar domestically. The great patent combines in such major industries as electronics, communications, chemicals, light metals, aeronautical equipment and other fields of equal rank, recognize that as a by-product of the divisions of interests there is created a "no-man's land" in which joint interest seeks to prevent competition. The methods of "blocking off and fencing in" exemplified in the Hartford-Empire case5 are generalized in less crude form. The "no-man's land" is "policed" with the threat of litigation, and the courts become the unwilling guardians of the approaches to the market.

It is a characteristic reaction when patent litigation is threatened by a powerful adversary for the smaller opponent to surrender to onerous terms in a cross-licensing or pooling arrangement. The smaller producer thereupon enters into patent peonage. Under this system of technological servitude, the capitulating party agrees to turn over rights to existing patents and all future developments and patents.6 Both his patent incentive and his industrial initiative are to this extent surrendered.7

It may often be true, as in United States v. Carboloy,8 that the inducements held out to other groups, by one seeking a monopolistic position of freedom from litigation, are seemingly persuasive and profitable, assuring mutual security in a shared market. But a high price for acquiescence to restriction does not diminish the restriction. Whether the arrangement results from the initiative of a licensor or a potential licensee is beside the point—it is the resulting impediment upon industry which is the issue, and the resultant injury to the competitive process which damages public interest. Moreover, the fact that patent litigation may be employed reciprocally emphasizes its use as an instrument of economic duress. The peonage may be idyllic with respect to both aggressor and submittant, but it remains a device of restriction.

4 Ibid.
6 But the ability to cross-license future patents is limited by the dictum in Transparent-Wrap Machine Corp. v. Stokes & Smith Co., 329 U.S. 637, 646 (1947).
7 Borkin, Patents and the New Trust Problem, 7 Law & Contemp. Prob. 74 (1940).
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Infrequently this arrangement of monopoly tactics encounters unex-
pected opposition and defeat, as in the early stages of the automobile in-
dustry, where the obduracy of Ford in the various Selden suits ultimately
freed the entire industry and brought about a complete revamping of the
patent situation. But against this must be balanced the overwhelming
experience of the industries which have witnessed the capitulation of
competition when confronted with the prospect of ordeal by infringement
suits.

Inasmuch as patent consolidations are invariably carried through by
enterprises making use of the corporate form, a collateral question pre-
sents itself for discussion. At the present time the preponderant majority
of significant inventions are financed, planned and developed by corpora-
tions. Yet today a corporation may not take out a patent. In a legal sense
it may not assume the role of an inventor. As a result, a whole class of in-
ventors, known opprobriously as “captives,” are removed from the full
incentive held out by law. Before the individual scientist places a pencil
on a drawing board or begins to compound chemicals, the fruit of his cre-
avtive work is already pledged to an employer in return for a wage. This
condition is the crux of the lag between the fictions of the law and the
reality of technology.

The creative contribution of the corporation is, however, both large
and necessary. Without the large laboratories, enormous expenditures of
risk capital, and the ceaseless exploration of new technological frontiers
made possible by the corporations, invention today would be reduced to
the dimensions of handicraft. Indeed, invention could no longer be car-
rried on by individuals acting alone. The dimensions of technology require
cooperative, expensive and organized research. The corporation now pro-
vides the creative matrix in which these necessary factors are combined.

In order to permit the corporation to assume the role of the inventor
a whole array of artful dodges has been developed in the form of assign-
ments, licenses, and automatic transfer of the grant. How much more
realistic it would be to give legal recognition to organized research con-
ducted by corporations, and then to regulate patents in accordance with
the facts of modern technology.


See Potts v. Coe, 140 F. 2d 470, 474 (App. D.C., 1944), where Justices Arnold and Miller
stated: “In other words, patents are not intended as a reward for a highly skilled scientist
who completes the final step in a technique, standing on the shoulders of others who have gone
before him. By the same token they are not intended as a reward for the collective achievement
of a corporate research organization. Today routine experimentation in the great corporate
Patent litigation is no longer a straightforward encounter at law, with limited antecedents, firm precedents, and few consequences of importance to the economy. Even the least complex patent litigation today has ramifications reaching to the roots of the industrial structure. Major patent litigation may decide the whole course of development of an industry. Access to the market, industrial policy, and even the direction of industrial regulation by government, may be shaped or strongly influenced by the outcome of a dispute in which patents are the weapons as well as the stakes of the immediate engagement. Economic power and economic development are the ultimate interests touched by the fray.

The peculiar importance of patent litigation is a product of several factors. In addition to the strategic value of the grant in a technical environment of interlocked, interdependent yet fluid processes, the causes of actions are as wide as industry and as narrow as the finest line of distinction between patent claims. The judicial review of what is essentially an administrative law issue raises questions of broad legal and economic consequence.

If patent litigation is viewed in terms of the function which it performs most frequently under present conditions, it becomes at once apparent that the legal phase of the struggle is part of a much wider economic process. Patent litigation may be invoked tactically or employed as a flanking maneuver in a competitive skirmish. It may be used in efforts to gain economic ends by bluff or intimidations. It may be a routinized variation in that intricate counterpoint by which industrial interests are merged, with the goal not victory over an adversary, but establishment of the terms of alliance. The patent contest, potential or actual, may be the offensive or defensive screen by which industrial fields are pre-empted,
guarded or explored for conquest. The relative importance of patent litigation is dependent not upon any objective merits and issues at all, but rather upon the alternatives available to policy makers in industry.

Obviously, to weigh patent litigation in terms of its functional aspects is to recognize that it is at the present time a supple, protean instrument of economic and technical policy. It is not possible to limit in advance the manifold uses of patent litigation as an economic device, or to exhaust the variety of settings in which the litigation may be central or tangent to the real issues involved.

At this point, it is desirable to emphasize certain peculiarly important conclusions which emerge from the analysis. First, with respect to competition, the fact of litigation may in itself be decisive, regardless of any outcome in court. Second, markets of a defendant in patent litigation may easily dry up and disappear or be diverted beyond recall during pendency. Contributory infringement is a potent discouragement to buyers, in a case of any weight, and can serve as an effective side-attack to cut off the economic support of a small producer.11

Called upon to decide the profound issue of determining where history has ended and where the "flash of genius" begins, the courts are handicapped by the limitations of their training. No law school combines the advanced training in technology required to decide what is novel in chemistry, physics and mathematics, with the standard training in legal canons. Viewing the situation realistically, judges and their law clerks are not sufficiently skilled to determine the answers. To thrust upon the courts problems of this character and scope is to guarantee the anathemas of the law: uncertainty, ambiguity, and confusion.12

Moreover, in consequence of the evolution of the economy, courts are transformed from arbiters judging between adversaries in the light of law and policy into participants in the high economic strategy of monopoly groups. Against their will and in contradiction of their intended function, the courts become arenas of economic warfare selected not for their capacity to settle issues, but simply as sites which are favorable for the prolongation, threatened or real, of costly conflict. In the haute politique of monopoloid assault on competitors, the courts become a decisive means of forcing checkmate, stalemate, or the abandonment of the competitive struggle.

11 Testimony of J. Borkin, Hearings before a Subcommittee of the Select Committee on Small Business of the House of Representatives, 80th Cong. 2d Sess., at 1037 (1949).
12 See Cuno Engineering Corp. v. Automatic Devices Corp., 314 U.S. 84 (1941); Marconi Wireless Telegraph Co. of America v. United States, 320 U.S. 1, dissenting opinion at 60 (1943).
It is the misuse of patents, the abuses in pooling and cross-licensing, the perverting of organized research, and the deliberate misemployment of instruments of law designed to give justice, that render patent litigation so dangerous a tool in the hands of monopoly groups. Litigation and threats of litigation may often be more effective in establishing and perpetuating monopolistic control than any other recourse available to industrial giants bent upon eliminating competition. Patent piled upon patent, like Ossa piled on Pelion, becomes the base for assault upon competition and upon the dispensation of justice by the courts.

Neither courts nor commissions have been blind to the implications of this condition. Courts have long recognized that threat of infringement suits made to harass competitors is in itself unfair competition. But although spurious and vexatious litigation as such are violations of the Sherman Act, the legal determination of their existence is difficult. The establishment of "intent" and "motive," which is the current element in the proof of vexatious or spurious suits is therefore rare. Proof in such cases, unless it is substantiated by clear-cut documentary evidence, strains the judicial process.

But whether the litigation is vexatious, in bad faith, or for purposes other than adjudicating legitimate dispute in the courts, is beside the point. What is needed is recognition that litigation may be oppressive per se, and is an integral part of the pattern of monopoly abuse of the patent or patents. All through the anti-trust campaign against patent abuses the powerful effect of the infringement suit, threatened or actual, has been emphasized. From the pleadings in the government's actions one may surmise that litigation has been used as a device to force recalcitrant members of an industry to fix prices, divide geographical areas and fields of industry, limit production, and in effect perform many of the acts which the courts have now condemned. It is in this respect that some major

13 United States v. Hartford-Empire Co., note 5 supra; United States v. Vehicular Parking, Ltd., 54 F. Supp. 828, 832, 839 (Del., 1944); Patterson v. United States, 222 Fed. 599 (C.A. 6th, 1915), cert. den. 238 U.S. 635 (1915); Lynch v. Magnavox, 94 F. 2d 883 (C.A. 9th, 1938); United States Consolidated Seeded Raisin Co. v. Griffin & Skelley Co., 126 Fed. 364 (C.A. 9th, 1903). See Commercial Acetylene Co. v. Avery Portable Lighting Co., 152 Fed. 642 (C.C. Wis., 1906); Stewart-Warner Corp. v. Staley, 42 F. Supp. 140, 146 (Pa., 1941); "As to the charge against plaintiff of bringing unwarranted patent suits, it is true that the plaintiff had a legal right to bring suits on patents owned by it for alleged infringement. But where, as alleged in the amended counterclaim, such suits were brought without probable cause, that is an element to consider in connection with the charges made by the defendant of violation by plaintiff of the anti-trust laws."


15 For example, United States v. A. B. Dick Co., D.C. N.D. Ohio E.D., Civil Action 24188, complaint at 24 (1946), where the government charged Dick with "conducting and threatening
cases have pointed to the increasing gravity of litigation as a monopoly device, and to possible avenues of improvement.

In a long series of cases decided within the past two decades the courts have moved steadily to cut down the claimed rights of the patentee. In most of these decisions, the patent infringement suit plays an important part. Frequently it was the desire to avoid potential infringement suits which induced the adoption of a practice later held to be illegal.\textsuperscript{16} More common, perhaps, is the situation where a patentee, dubious about the strength of his own patent position, establishes an attractive licensing or pooling system in order to "buy off" potential infringers while at the same time preventing his patents from reaching adjudication.\textsuperscript{17}

In still another class of cases it was the infringement suit itself which provided the court with an opportunity to lay down rules of conduct. The most important of these decisions is \textit{Morton Salt Co. v. Suppiger Co.}\textsuperscript{18} Although prior decisions had held that suit could not successfully be brought against a contributory infringer, or even a direct infringer, by a patentee who required the use of unpatented materials, the \textit{Morton Salt} case can nevertheless be said to "mark a milestone."\textsuperscript{19} Chief Justice Stone, speaking for a unanimous court, said:

\begin{quote}

to conduct oppressive patent litigation for the purpose of harassing competitors and their customers." A consent decree enjoining these practices resulted. In the government's complaint against the Bendix Aviation Corp. and others, charging monopolistic control by patents of hydraulic braking systems for automobiles, there appears the following: "Throughout the period covered by this complaint the defendants jointly and severally have systematically acquired and utilized large numbers of patents relating to braking systems for the following specific purposes, among others: (a) Through sheer force of numbers of patents to intimidate and discourage other manufacturers contemplating the production of braking systems and thereby prevent their entry into such production; (b) To harass competitors in the production of braking systems by threatening and conducting oppressive patent litigation against them; ... (i) to prevent patent litigation from proceeding to final adjudication when such adjudication might invalidate or otherwise prejudice patents already owned or controlled by the defendants." \textit{United States v. Bendix Aviation Corp., D.C. S.D. N.Y.}, complaint at 15. And in the government's suit charging a conspiracy to monopolize the manufacture, distribution, and patents relating to fluorescent lamps and fixtures, it is alleged that: "Supported by this illegal pool of patents, patent rights and licenses, General Electric and Westinghouse have threatened to institute and have instituted patent infringement suits against potential and actual competitive manufacturers of fluorescent lamps and against those companies that might serve these potential and actual competitors with lamp parts, with the view to eliminating such sources of competition from the lamp market." \textit{United States v. General Electric Co., 82 F. Supp. 753} (N.J., 1949), complaint at 18.
\end{quote}

\textsuperscript{16} For example, \textit{United States v. Line Material Co.}, 333 U.S. 287 (1948).

\textsuperscript{17} For example, \textit{United States v. Hartford-Empire Co.}, note 5 supra; \textit{United States v. Masonite Corp.}, 316 U.S. 265 (1942); \textit{United States v. United States Gypsum Co.}, 333 U.S. 364 (1948).

\textsuperscript{18} 314 U.S. 488 (1942).

\textsuperscript{19} Borkin, Patent Abuses, Compulsion to License and Recent Decisions, 43 Col. L. Rev. 720 (1943).
It is a principle of general application that courts, and especially courts of equity, may appropriately withhold their aid where the plaintiff is using the right asserted contrary to the public interest... Equity may rightly withhold its assistance from such a use of the patent by declining to entertain a suit for infringement, and should do so at least until it is made to appear that the improper practice has been abandoned, and that the consequences of the misuse of the patent have been dissipated.20

In its narrowest construction the decision means that a patentee who has misused a patent will be temporarily deprived of that patent. But a considerably broader significance for the Morton Salt decision is indicated in Mercoid Corp. v. Minneapolis-Honeywell Regulator Co.,21 where Justice Douglas states: “The legality of any attempt to bring unpatented goods within the protection of the patent is measured by the anti-trust laws and not by the patent law.”

The multiple effects of these decisions have been manifest both in subsequent private litigation and in the application of the anti-trust laws. The full consequences of this position can become evident only over a considerable period, but it is already apparent that a long step was taken in the Morton Salt decision toward redressing the balance which monopolistic tendencies had destroyed between the legitimate and the improper uses of a patent; and between litigation necessary to clear obstacles from the path of economic and technical advances, and litigation used to club competition out of the market. The decision should give pause to large corporations and industrial consolidations contemplating infringement suits. The nature of their adversaries’ defense may well rob them of the infringement suit weapon. An arrow in the quiver is more valuable than one expended on a missed target. The danger is compounded when the bow itself may be confiscated.

Two recent lower court decisions serve strikingly to illustrate the part which infringement actions may play in the attempt to regiment an industry. In the Carboloy case22 the almost prohibitory expense involved in the defending of an infringement suit gave the Carboloy Corporation many years time in which to build up an entrenched position in the cemented carbide field—a position based almost entirely on invalid patents. It was only after an unusually tenacious independent, spurning all offers of compromise, had forced Carboloy to carry the patents through to adjudication that the door was finally opened to competition.23 It is to be regretted that this result did not occur some twelve years earlier.

22 United States v. Carboloy, note 8 supra.
The opinion in *United States v. General Electric Co.*,\(^{24}\) filed early in 1949, reveals a pattern of direct aggressive use of the patent infringement suit in the attempt to achieve and secure a monopoly position. Without delving into all of the issues in this case, it may be remarked that the asserted patent position and the monopoly control by General Electric and the other defendants touched nearly every phase of the lamp-making field, including automatic lamp-making machinery, lamp base-making machinery, bulbs, tubing and tungsten wire.

The government, as in many other cases, charged that "the patents themselves were made conspiratorial devices to function by weight of number."\(^{25}\) Finding that General Electric had violated Sections 1 and 2 of the Sherman Act, and noting that the company had developed a "model of industrial efficiency," Judge Forman stated:

> On the other hand, there can be no doubt that it paced its industrial achievements with efforts to insulate itself from competition. It developed a tremendous patent framework and sought to stretch the monopoly acquired by patents far beyond the intendment of these grants. It constructed a great network of agreements and licenses, national and international in scope, which had the effect of locking the door of the United States to any challenge to its supremacy in the incandescent electric lamp industry arising from business enterprises indigenous to this country or put forth by foreign manufacturers.\(^{26}\)

It is evident that patent litigation played an important role as an auxiliary consideration in the creation and maintenance of the "patent network." The suit brought by Corning against Demuth when it was "recalcitrant" about taking a license under one of the patents in the general structure, is but one instance.

Despite the emphasis by the Department of Justice in this case on the use of patent litigation as an aggressive business weapon, the court could not find that the patent suits engaged in by the company were in fact vexatious. Certainly failure to succeed in the litigation cannot be construed as a test of spuriousness; at least it cannot be so construed in the absence of more cogent evidence—the discovery of which may have to be left to devices occult rather than legal. In examining the question of "vexatious litigation," Judge Forman's opinion reflects the nature of the problem:

> In its argument that General Electric prosecuted vexatious and oppressive patent litigation in order to maintain its monopoly position, the Government refers to a number of patent suits which it alleges were brought without probable cause. . . . It


stressed the uniform lack of success by General Electric in all of this litigation as in itself sustaining the charge that the suits were brought without probable cause. General Electric, on the other hand, denied that it used its patents as a means of wearing out its competitors by vexatious litigation... It contended that it acted only within its rights in bringing patent infringement suits to protect its inventions.

There appears to be little merit to the Government's charge of vexatious litigation for the very nature of a patent grants to the owner the right to protect it against infringers. Normally the patent owner is under no requirement to license the use of patents or even to use it himself. It seems apropos on the arguments of both the Government and General Electric at this phase of the case to raise the question of efficacy of the present patent system which permits the issuance of patents in the number disclosed in this case which, when subjected to the test of litigation, results in invalidating the work of the patent authorities.27

Stress may be placed upon another phase of this opinion, one that aims directly toward a technical source of difficulties in patent litigation. Patents issuing from the Patent Office have presumptive validity, but a large number, estimated at more than three-fourths of those adjudicated, are held invalid by the courts.28 It might seem, therefore, that a strong case can be made that many of the possibilities of vexatious litigation, as well as of illegal arrangements to protect a structure of weak patents, arise from the prevalence of invalid grants. But much of the harassment arises from the threat of litigation and is not directly affected by validity or invalidity.29 The ultimate question, however, is of greater importance. Even if all patents were valid, there would still remain, under the present economic and technical circumstances, the problems of misuse, of deliberate patent aggression, of purposeful "vexation at law." And public interest in the results of patent contests would continue unabated. The General Electric case is important as a culminating effort in a long case history of anti-trust litigation between an industry and the government. From the standpoint of this inquiry, however, it has certain other aspects which are met over and over again in both anti-trust enforcement and patent discussion. Thus, the basic purposes of patent amalgamations, such as that which the court found to exist in this instance, are directly related to the question of litigation.

With respect to the pooling of patents, it has long been recognized that

27 Ibid., at 816–17.


29 While most potential defendants are undoubtedly in a position to judge accurately the probable validity or invalidity of the industry's patents, the fact remains that it costs just as much to defend an infringement suit based on invalid patents as one based on valid patents. But the greater likelihood of a successful defense in the former case may sometimes be the deciding factor in the question of whether to defend or to capitulate.
the purpose of pools is the reduction or elimination of patent conflict and patent litigation among the participants. Aside from technical necessities met by pooling or consolidation, "pools and cross-licensing agreements are . . . designed . . . to eliminate patent conflicts and reduce patent litigation."30 But at the same time, and by the same token, the consolidation has as an inherent aim the strengthening of the litigating position of the participants toward outsiders. Even if the strong temptation to use the resulting superiority aggressively is avoided, the mere existence of the consolidation is usually sufficient to achieve the end of monopolization. At the same time the normal risks of legal action are reduced.

This feature is emphasized by Wood: "Patent litigation is one of the most universally criticized features of the system. It involves tremendous consumption of money and time; and it creates that most dreaded of all factors in any business undertaking—uncertainty."31 Again, while Wood considers the reduction of litigation as one basic incentive in pooling, he points out that, "In the case of combining owners the danger of abuse varies with the dominance of the members of the interchange in the industry, the importance and relationship of the patents pooled, and the extent to which competitors are excluded from the benefits. It is not the presence of any single element of restraint so much as it is the entire collection of factors which frequently threatens the security of the other members of the industry."32

It is a truism that the patent grant is an invitation to sue and be sued. Courts have entertained actions involving trespass against the boundaries of patents ever since the early Case of Monopolies. The strict legal view of the considerations entering into an infringement case has undergone relatively little change in the interim. Indeed, the entire industrial evolution occurred without fundamentally altering the judicial conception of "the nature of the case" arising from an incursion of the borders of a patent. At the same time, the status of the patent itself has been immeasurably transformed. The patent in modern industry has become a strange, mutated variant of that limited monopoly promoting science and useful arts envisioned by the authors of the Constitution or the venerable jurists of the common law.

Fundamentally, all of the baffling difficulties attending the operation of

30 Welsh, Report to Committee on Patents, 1 Hearings before Committee on Patents on H.R. 4523, 74th Cong. 1st Sess., at 1147 (1935).
31 Wood, Patents and Antitrust Law (1942). Wood estimates minimum cost of final determination of validity of a patent to be $50,000.
32 Ibid., at 102.
the patent system arise from this basic and increasing gap between law and technology. It must be emphasized that between the spirit of the legal philosophy which created political democracy and the progress of science there is no conflict. The disparity is one of form: between eighteenth- and early nineteenth-century definitions of the grant and twentieth-century technology. The draftsmen of the Constitution foresaw and specifically attempted to avert certain dangers of monopoly. But they could not at the time forecast the colossal economic machine of the present day, or the fact of corporate research and cooperative invention. While the patent system has spurred invention, law and policy have failed to keep pace with technology. The disparity therefore becomes cumulatively more serious.

The major proposals that have been made for meeting and correcting the problem posed by patent litigation fall into a few main categories. The first group of suggestions may be reduced to methods of increasing the standard of patentability, and thereby enhancing the presumptive validity of the grant. The second type of proposal envisions the creation of a single Court of Patent Appeals or some similarly specialized tribunal, within the framework of the judicial system. The third set of oft-repeated recommendations, in a multitude of variations, offers designs for compulsory licensing—a form of relief granted by courts upon occasion in recent years, but not on a scale commensurate with the scope of the problems considered here. A fourth recommendation frequently advocated, which has some grounds of experience in anti-trust litigation, is the adoption of a statute permitting the government to intervene as a party in patent suits when there are aspects which touch the public interest. The fifth major group of solutions includes creation of a patent commission, the formulation of a new system of patent review, or the provision of panels of experts to assist the courts in patent disputes. In recent years, the TNEC, the various patent inquiries by special committees such as the President's Patent Planning Commission, and a legion of congressional resolutions, have recapitulated the principal solutions offered.

It may be remarked that in view of the high proportion of patents found to be invalid by the courts, an increase in the standard of patentability for inventions would seem to be desirable. But this approach must be considered in terms of relative rather than absolute validity. To require the present Patent Office to issue patents having a "guaranteed" validity would impose an almost impossible task, necessitating an immense and

34 Borkin, op. cit. supra note 19.
unwieldy magnification in its size. The number of patents issued would no doubt decrease. But, the core of the question would remain unresolved. As an administrative grant, the patent could not be given absolute validity without, in effect, removing the judicial function of review, a step questionable in principle and having serious implications for the meaning of the patent system. It is traditionally one of the major purposes of the patent system to encourage the individual, to stimulate the creative, even "gadgeteering" efforts of the American people by awarding a "diploma of recognition" to those whose ideas pass certain minimum, rather than maximum, tests of novelty and ingenuity. So to elevate the initial test of invention as to affirm validity by the grant itself would not only discourage the individual incentive of thousands of aspirants, but would probably mean that patents would become concentrated in fewer hands. Moreover, litigation could still not be entirely precluded without thereby reducing the scope of the judicial responsibility to pass upon the patent from standpoints other than those of validity. Absolute validity and practical immunity from challenge, even for abuses, would certainly tend to coalesce.

As presented by Dr. Vannevar Bush to the TNEC, the Report of the Science Advisory Board recommends "that there be established a single Court for Patent Appeals in order to establish and maintain harmony and accuracy in judicial interpretations of patent questions, by confining the appellate jurisdiction in civil patent causes to one court, composed of permanent judges having the necessary scientific or technical background." 35 Supplementing this recommendation is the further suggestion that "there be provided scientific or technical advisors or juries to furnish adequate scientific or technical assistance to courts of first instance equity patent causes." 36 The Board, according to Dr. Bush, made no "recommendation in regard to the distribution of functions between the courts of first instance and the Court of [Patent] Appeals." 37

How may this scheme be appraised? Some of the inequitable features of present procedure would doubtless be mitigated, but establishment of a Court of Patent Appeals, and the provision of technical advisers for courts of first instance, would scarcely meet fundamental objections. The small producer would still be liable to attack by predatory larger combines. The adverse effects of patent monopoly abuse on the competitive system would not be cured. Conceding all the claims that are advanced to buttress the

35 3 Hearings before the TNEC, 76th Cong. 1st Sess., at 1142 (1939).
36 Ibid., at 1143.
37 Ibid., at 906.
recommendation, it is still, primarily, a procedural rather than a substantive reform.

Turning to the proposal that the government be permitted to intervene in infringement proceedings, a legislative proposal to achieve this objective is contained in H.R. 97, introduced by Representative Voorhis of California in 1945. Section 27 of the proposed statute would authorize the United States to intervene in any proceeding in the federal courts where the issue of patent infringement or validity is raised.\textsuperscript{38}

Such a step would combine two basic objectives: combatting restraints of trade, and "equalizing" the position of the litigating parties. As an extension of the active public participation in the processes of industrial patent struggles, such a step is in some ways a logical corollary to the position of the Department of Justice toward abuses of patents. It would inject a novel contingency into the fray, especially where oppressive or monopolistic tactics are present. The difficulties of the courts themselves would not be lessened, however, nor is there any reason to assume that intervention in this manner would automatically deter litigants from attempts to use the suit for the same purposes that are now so manifest. A shift in emphasis would probably result in the tactics of patent pressure groups. But at best the entrance of the government as a potential or actual party to every dispute is an expedient device, not a recasting of the problem. To be effective, the proposal for a federal "intervention division" would have to be spelled out by supplementary policies giving coherence, setting up standards, and avoiding further encumbrance of already tortuous proceedings. With these provisos, however, it should be said that this proposal merits the serious consideration of Congress.

Of the many lines of suggestion advanced, the most fruitful would seem to point to the creation of a special administrative body, apart from the

\textsuperscript{38} In this connection, see the statement of Mr. Wendell Berge, then Assistant Attorney General, before the Subcommittee of the Judiciary Committee of the House of Representatives, Feb. 14, 1945. "It is a matter of acute public concern that the special privileges conferred by the patent statutes, which are granted for the sole purpose of stimulating the arts and sciences, should be relegated to their true sphere. At the present time, the function of the Government in confining patent privileges to their legitimate sphere stops with the issue of the patent except insofar as the Government in Antitrust proceeding may attack the misuse of patent claims. Because a patent is a Government grant and constitutes a limitation upon the freedom of trade and competition, determination of enforceability, scope and validity once a patent has been issued should not be left exclusively to private negotiation and private litigation.

"The Government, in intervening in infringement proceedings as the guardian of the public interest, would assure that special privileges, which the Government itself has granted for a specific and limited purpose, are kept within their legitimate boundaries. Grant of the right to intervene would not mean that this power would be exercised in every infringement suit. As a matter of policy, the power would be exercised only where a significant point of law is involved, where the patents involved relate to considerable commercial and public importance, or where there was doubt as to the ability or willingness of the defendant to litigate the issue effectively and uncompromisingly."
Patent Office itself, to review questions of validity. Such a body would determine the factual background of patents involved in litigation, leaving to the courts the determination of applicable law and public interest. A Board of Patent Review, similar to the NLRB or the SEC in structure and scope of jurisdiction, would be able to unify the gargantuan task of determining validity; and by sifting out complex factual issues, greatly reduce the proportions of litigation necessitating trial in the courts.

The creation of a patent review commission would place the entire problem of patent infringement in the area of administrative law. This approach would seem to provide the most feasible form of attack upon the problems defined here. It is questionable, however, that the entirety of the infringement question could be dealt with administratively. A commission, dealing primarily with questions of fact, would give to the courts predigested and verified data upon which to construct sound decisions. As an instrument of public policy, such a commission would be able for the first time to survey technological trends and coordinate patent policies in publicly financed research and in those critical areas where military security, industrial development and private rights converge.

Admittedly, the creation of a new commission adds to the vast array of agencies now regulating or influencing the behavior of industry. But the importance of the problem fully justifies the assertion of public interest in the area of patent litigation. Such a commission should be empowered to act as the determining agent in all questions touching the validity of patent grants. In other words, patent grants that have entered the market and are in dispute would become the subject of review by this commission.

Here, then, is where litigation would begin. The commission would bear the burden of determination—and of cost—that now results in inequality between litigants. The basis of the commission’s work would be the public interest not only in the issuance of a grant, but also in the effects of disputed technical significance, and in the consequences for competition. Investigation, clarification, and determination of validity at public expense, for public purpose, would be the job of the commission. Its status would have to be such that the courts viewed its finding of fact with the same respect accorded to the factual data of, say, the FTC or the FCC. Obviously, such a body cannot be a part of the existing Patent Office, nor can the latter assume the duties of both issuance and review of the grants.

Appeals from commission decision might be taken to the courts—perhaps to a single appeals court. Meanwhile, the initial effects of the commission’s decision would obviate the tendency, now so widespread, for

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markets of the weaker litigant to disappear under the shadow of contributory infringement. The commission, having made its finding, would be committed to support it throughout subsequent action. Size would no longer be the arbiter of disputes, and a test at law would be substituted for a test of strength. The effect upon the patent system, as upon industry, could only be salutary, strengthening the grants passing in review before the commission, and removing the uncertainty now handicapping enterprise.

Beyond this point, a complete re-examination and re-evaluation of the patent system may be necessary to strike at the substance of the problem, rather than its procedural aspects. The anti-trust approach has been, up to the present time, the only effective force driving in the direction of a solution. The conditions that create monopoly create also the evils of patent litigation. It follows that in the final resort, a large and formidable question is raised: Can the patent system be so modified by the creation of a "validating commission" as to prevent the present evils from subverting the entire purpose of the patent grant? If not, then the unavoidable alternative is to throw open the whole patent question and to inquire whether some other methods of promoting science and industry need to be developed. It is this point of view which underlies the numerous designs for compulsory licensing. But compulsory licensing may create, if it is a general and not a special relief, problems as great as those with which the economy and the courts now strive to cope. Small manufacturers can be as readily injured by blind compulsion to license as large ones. The solution does not lie here, as far as experience and opinion can guide us. Rather, compulsory licensing begs the question asked by patent litigation—how to prevent monopolistic abuses of the grant. It is a counsel of desperation rather than an intelligent and long-term arrangement capable of balancing the interests affected.

It is this task, of balancing the requirements of a dynamic technology, access to market by competitive enterprise, and public interest in the maintenance of full economic opportunity and scientific advancement, that inclines the scales toward the use of the commission principle. But if a commission properly organized and defined in its powers is not established, time and technology will not wait. The patent system will then depart more and more from its aims, and the realities of science and the law will in time compel recognition that delay has destroyed the vitality of the system. Should this occur, reform will become moot, if not futile, and in all likelihood the moment of grace will have vanished irrevocably.