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A Few Common Misconceptions About Patents

By Donald H. Sweet, C. K. '21.

The following is not intended as a resume of what the average person outside the profession should know about patents. Such a discussion would be almost entirely a duplication of excellent work already done.

However, a considerable number, perhaps even a majority, of live business men who occasionally have some contact with patents, have one or more of a miscellaneous assortment of mistaken impressions relating to certain minor aspects of patents, and much time in business negotiations is wasted in eliminating such misunderstandings. An attempt will be made here to point out some of these.

What Is Invention?

An invention consists in finding out a new way of making or doing something, or something new to make or do. It must represent the exercise of ingenuity amounting to more than the skill of an ordinary worker in the art, or luck amounting to more than mere good judgment in the selection of alternatives. The newness need only extend to one minor detail or feature of something that is otherwise old, but so far as the newness does extend, it must be entirely new. That means that, with a few minor exceptions, it must not be found in the sum total of human knowledge up to the time of making the invention.

Patent Right Purely Preventive

No patent gives the holder any right to use the invention himself, because, so far as his own patent is concerned, he already had that right without any patent. The patent merely authorizes him for the first seventeen years after its

issue to prevent others from using the same invention also. In a very real sense, it is a fence around the activities he is pursuing, put there for the sole and only purpose of keeping others out.

Analysis and Claiming

In the modern world where nearly every invention is a change or improvement of some previous practice, the detailed definition in a patent of just what others working along similar lines can and cannot do without using part or all of the inventor's contribution, is naturally the vital part of the patent. Just as the correct identification of a plat of ground in a deed to real estate is essential to make sure that the buyer is getting what he thinks he is, the claims that define what applicant's invention includes (and by inference what it does not include), are the measure of how much monopoly has been granted to this particular inventor. The great difficulty lies in the fact that abstract subject matter cannot be defined by the points of the compass and by distances in feet, as real estate can, so that a correct analysis of the principles of an invention and a correct and properly comprehensive definition of what the invention includes, becomes not only the most important but the most difficult part of the work leading up to the issue of the patent document.

Ingenuity vs. Value

Because the patent is a mere fence to keep others out, it will be obvious that if the practice of the invention does not show a money profit, the patent is merely a fence around nothing. One of the patent lawyer's commonest nuisances is the client who has a delightfully in-

genious way of doing something no one wants to do. He seems to think his ingenuity deserves some reward, and that when a patent has been sealed and issued to prove how ingenious he has been, people will buy the device merely because it is patented. It is hard for him to realize that patents cannot create value, but can merely protect such new creations as have a value of their own and therefore need the protection.

Related Monopolies Overlapping in Point of Time

Because a patent represents an entirely negative or preventive right, the grant of a patent is no guarantee that the owner of the patent can proceed to make the device or practice the process described. His contribution may represent an improvement on some other earlier contribution that is still within its seventeen-year period of monopoly. An excellent theoretical illustration of this can be based on the present day electric light using an incandescent filament.

Consider the predicament of the inventor of the ductile tungsten filament, if he had made his invention during the seventeen years when Thomas A. Edison had a monopoly on an evacuated bulb with any filament of a specified high resistance inside it. The later inventor would be granted the right to prevent anyone else, including Edison, from using the improved filament; while Edison still held the right to prevent anyone else, including the later inventor, from using the bulb and filament combination without which the improved filament could not be used. Unless some voluntary compromise could be worked out, the tungsten filament could not have been used at all until after Edison's earlier patent had expired. However, if the tungsten filament were not invented until after the basic Edison patent had expired, no delay in the use of the tungsten filament could be caused by the earlier monopoly on the bulb and filament combination.

Novelty and Infringement Investigations

This will explain why the man who has an invention involving features he knows to be profitable need only ascertain whether they are new, before claiming a seventeen-year monopoly of them; whereas, the man who wishes to make and sell the new article must first find out whether any of the many features embodied in it are still subject to an outstanding monopoly held by someone else. The two inquiries are entirely independent, and the second one is usually much more extensive and harder to answer than the first.

Protect Only What Needs Protection

All the foregoing considerations lend force to the general statement of policy that patents should be strictly subordinate to commercial profit, either actual or quite definitely in prospect. The patenting of ingenious uselessness, and of items that are immaterial or trivial, is largely responsible for the volume of chaff that is mixed with real golden grains treasured in the government archives and released in a continuous flood as the patents expire. Any elimination of this chaff would not only save the effort spent to create it, but would relieve the contributions of real value from the burden of sorting over the additional material in appraising each new contribution and assigning it to its place in the development of the arts and sciences.

Relation to Common Knowledge and to Progress

The patent system as a whole represents a narrow fringe of reserved areas along the edge of a vast expanse thickly peopled with the useful and valuable devices and practices constituting the public domain of common knowledge. Many of the devices in this public domain originated in the creative effort of inventive genius seeking its own advantage, and found their way through the period of monopoly and then into their

present freedom, open to the use of everyone.

This narrow fringe advances rapidly because of the reward offered to the individual pioneer. Its rear or inner edge coincides with the advancing edge of the public domain. Especially in the physical sciences, this secondary boundary line between unexpired and expired monopolies has progressed far beyond what the outer boundary line of all human knowledge might have been without the stimulus of individual reward. We venture to surmise that if the patent system were more extensively utilized by professional men interested in the medical and natural sciences, on such a basis as to assist in maintaining the highest ethical standards throughout those professions, the frontiers of progress along those lines would certainly not advance any the less rapidly on that account.

There is every reason to believe that we have only traversed the vestibule of the storehouse of nature's laws and secrets, and that mankind now stands upon the threshold of much greater achievements than those already recorded.

Heard from the Second Floor Front

Mr. Campbell: "How do you know the Hotel Company was acting ultra vires in maintaining the taxicab service, did you see its charter?"

Mr. K.: "Well, I knew one of the drivers."

Mr. Bullard: "It's quite a relief this evening, to have these cases which are so simple as compared with those of last Tuesday. Miss Dicker, will you state the first case, please?"

Miss Dicker: "Er—Uh!—A—Hem—I—er—didn't find these cases—er—quite as simple as—er—you did, sir."

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