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Patents: Action by United States Government for Infringement of Government Patent

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> justification the racial classification . . . is reduced to an invidious discrimination forbidden by the Equal Protection Clause.[17]

It was also pointed out in *McLaughlin* that the interpretation of the equal protection clause handed down in *Pace* had been swept away by subsequent decisions of the Court. With the overruling of the effect of *Pace,* the basis of the *Stevens* case and ultimately the basis for upholding the miscegenation statutes like that in Oklahoma was greatly diminished.

Where are state courts to turn? The Oklahoma court was faced with abundant precedent upholding the constitutionality of these statutes and at the same time faced with a liberal trend on a national level, which can only be resolved by the United States Supreme Court which has been reluctant to decide this issue. The Court had an opportunity to decide the question in *Naim v. Naim,*[18] but refused certiorari on a procedural point. Likewise, as indicated above, they had an opportunity to go more directly to the issue at hand in *McLaughlin,* but chose not to.

The next move is up to the Supreme Court, because of the reluctance of the state courts to lead in changing and the vast amount of case law supporting constitutionality. Until the highest Court either upholds or voids these laws, they will continue in force on this uncertain footing. In forecasting the outcome of this situation, Mr. Justice Stewart's concurring opinion in *McLaughlin* should be noted, for he indicated that ". . . it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor. Discrimination of that kind is invidious *per se.*" [19]

Problems of racial discrimination are of growing concern in our country. The civil rights of all citizens of the United States must be protected in an equal manner. As long as laws exist which make it a crime to marry another because one is a member of the African race and the other is of another race, or which prohibit marriage for the same reason, it cannot be said that equal protection exists.

John Turner

PATENTS: ACTION BY UNITED STATES GOVERNMENT FOR INFRINGEMENT OF GOVERNMENT PATENT

The United States Court of Claims held in the recent case of *Tektronix Inc. v. United States* [1] that the general policy of free-use of government patents over the past 100 years gives an unlicensed user an implied license

[17] *Id.* at 192-93.
[18] 350 U.S. 985 (1956).
[19] McLaughlin v. Florida, *supra* note 14, at 198.

[1] 351 F.2d 630 (Ct. Cl. 1965).

which precludes an infringement action by the United States Government. As pointed out in the case, this is the first time that the government has attempted to sue for infringement of one of its patents.

In *Tektronix* the plaintiff manufacturer brought a patent infringement action against the United States. In its unprecedented counterclaim the government alleged that since the plaintiff was the unlicensed user of certain government patents, plaintiff was liable for damages thereon. The Court of Claims stated that: ". . . [T]he government's tacit approval of the unlicensed use of the patents in suit during the period of the alleged infringement granted to plaintiff an implied license, which precludes defendant from recovering on its counterclaim."[2]

Patent law has its foundation in Article I, Section 8 of the United States Constitution: "The Congress shall have the power . . . to promote the progress of science and useful arts by securing for limited times to the authors and inventors the exclusive right to their respective writings and discoveries." But both the Constitution and the most recent codification of the patent laws in Title 35, U.S.C. are silent as to authority for suits by the government for infringement of its patents.

At the time of the framing of the Constitution there was probably very little thought given to the possibility that the government would become a holder of patents; but the government gradually began to acquire title to a number of patents, largely as a result of the confiscation of alien properties during two world wars.[3] This trend was accelerated by the passage of the Atomic Energy Act of 1954[4] and the National Aeronautics and Space Act of 1958[5], both of which contain provisions whereunder the government may take title to inventions developed on government sponsored research and development contracts.[6] Consequently, today the government holds more patents than any individual or corporation in the United States.[7]

There has developed over the years a general policy of giving any interested party a nonexclusive, royalty-free license of any government-owned patent.[8] This policy amounts to little more than a public dedication of government-owned patents. That the government is aware of and

[2] *Id.* at 633.

[3] See 1 Report and Recommendations of the Attorney General to the President, Investigation of Government Patent Practices and Policies 111, 112 (1947) [hereinafter cited as Att'y Gen. Rep.]; see generally Sommerich, *Treatment by United States of World War I and II enemy-Owned Patents and Copyrights,* 4 AM. J. COMP. L. 587 (1955).

[4] 68 Stat. 943-48, 42 U.S.C. §§ 2181-90 (1958).

[5] 72 Stat. 426, 42 U.S.C. § 2451 (1958).

[6] See Daddario, *A Patent Policy for a Free Enterprise Economy,* 47 A.B.A.J. 671, 673 (1961).

[7] Watson, *Management of Government-Owned Inventions,* 21 FED. B.J. 121, 123 (1961).

[8] See Att'y Gen. Rep., *op. cit. supra* note 3, Vol. 1 113, 114.

has given its tacit approval to the unlicensed use of government patents by not enforcing them is well documented in several government publications.[9] So, in the absence of any statutory procedure, a policy of free-use of government-owned patents has developed.

The government recognized in its allegations in the *Tektronix* case that there is no statutory authority for an infringement action, and that the free-use policy has existed for over 100 years. However, it maintained that: (1) the Attorney General always has the power to sue for the misuse of government property; and (2) there was an established policy contrary to the free-use policy which applied to these particular patents.

In analyzing the case the court paralleled the law in the government-owned patent field with that of the free-use of public lands prior to the passage of regulations governing their use. In finding that there was an implied license to use, the court quoted from *Light v. United States:*

> And so, without passing a statute, or taking any affirmative action on the subject, the United States suffered its public domain to be used for such purposes. There thus grew up a sort of implied license that these lands, thus left open, might be used so long as the Government did not cancel its tacit consent.[10]

Thus, in holding that there was an implied license, the court rebutted the government's allegation of the power of the attorney general to sue for a misuse of government property. In answer to the government's argument of a special policy pertaining to these particular patents, the court indicated that there was no evidence to establish this policy during the period of the counterclaim. It was pointed out also that licensing agreements for these patents entered into by the government subsequent to the filing of the counterclaim obviously did not establish any exception. Further, in the absence of any specific recommendation regarding the treatment of these particular patents, there is no support for the government's contention that there is an exception which ". . . applies to a concern which occupies a dominant position in an industry and is the principal beneficiary of such dedication."[11]

It can be concluded from *Tekronix* that the courts will uphold the free-use policy as it applies to government-owned patents to which no special treatment is accorded until the government takes some action to negate its implied consent. Until such time, the public shall continue to enjoy at will the utilization of these government-owned patents.

That the counterclaim was filed at all is indicative of government dissatisfaction with past patent administration of government-owned patents.

[9] See, *e.g.,* Att'y Gen. Rep., *op. cit. supra* note 3, Vol. 2 at 312.
[10] 220 U.S. 523, 535 (1911).
[11] Tektronix Inc. v. United States, *supra* note 1, at 634.