

Patent Rights—Are There Any?

This interesting view on the much-discussed matter of patents, by O. B. JOHANSEN, appeared as a letter to the editor in The Wall Street Journal of April 24, 1943. The editor of the Journal considered it of sufficient importance to warrant an editorial rejoinder in the same issue of the paper. Both articles are reprinted here by permission.

Of himself the author writes: "To keep my stomach full, I work for a large steel corporation. To satisfy my creative instincts, I write articles for magazines and letters to newspapers. The articles have the homing instinct—they always come back. . . I don't know the first thing about writing but write as I please. I don't know when to use shall or will, should or would, and don't intend to find out. I wouldn't know a split infinitive if I met one face to face. . . As with most Americans the subject I studied I don't work at—that's engineering. The work I really care about is teaching the philosophy of freedom. As a member of the faculty of the Jersey school, I have taught Progress and Poverty in various communities. . . I am a monopolist, having the sole and exclusive possession of approximately one acre of God's good earth for which I do not pay society its full annual rental value and don't intend to if I can help it. . . Though skeptical of hero worship, I admire profoundly Henry George and Thomas Paine. My real hero, of course, is the King of Kings—the common man."

★ IT IS RATHER discouraging to note that as eminent a newspaper as The Wall Street Journal, which is well in the forefront in the fight to maintain economic freedom and property rights, should fall into the error of considering patents as private property. It occurred to the writer, who is a layman in this matter, that a perusal of some of the fundamentals involved might be of interest.

In the first place, all inventions are common inventions. No one man, or group of men, ever actually invented anything. Inventions are the logical developments resulting from an advancing civilization acquiring a greater knowledge of the laws of Nature. Every invention requires previous inventions—every invention is the result of men working on the particular problem or related problems for many years. The man finally recognized as the creator actually is the man who has put the

finishing touches on the work of those before him. With no intention to detract from the important contribution the so-called inventor may have made, it nevertheless cannot be claimed that he was the sole creator. Why, therefore, render to him a monopoly prohibiting all others from producing that invention, including, mind you, men who may have contributed to his success by their own attempts and failures? The fact that often the same invention occurs in different parts of the world at about the same time by different men is an indication of the fact that inventions are really the product of society's advancing knowledge. When the gasoline engine was produced, it was inevitable that the airplane would result, and as a matter of fact, it was invented almost simultaneously in America and in Europe.

Second: Men constantly improve, that is, invent, not because there is a patent law in existence; on the contrary, probably in spite of the law. Men invent because they are motivated by the desire to produce wealth with the least effort, and as long as they are so constituted they will continually try to produce things the easiest way—that is, to invent. Therefore, to state that a patent law encourages inventions is to ascribe credit to a restrictive act for something which is the result of man's natural instincts.

Third: Economic freedom, if it means anything, is the freedom of men to produce wealth qualified only to the extent that they do not interfere with the equal freedom of other men to produce wealth. A patent obviously violates this concept of freedom and on the erroneous assumption of encouraging men to do things which they can't help but do. If the highest type of society men can develop is one in which the greatest degree of economic freedom prevails, a view which I believe your newspaper would support, then patents as well as other monopolies are obstructions to man's progress, and the sooner removed the better.

Fourth: Paradoxically, a system of patent rights which is designed to "encourage invention" actually results in practically forcing inventors to work behind sealed doors, as though they were engaged in some nefarious enterprise, with their fellow man knowing little or nothing of what they are doing. Is it not reasonable to assume that if men work freely and openly, that the advice and aid of their contemporaries is more likely to assist them and add to rather than detract from the sum total of inventions?

Fifth: When reviewing the history of the patent law, one is hardly to be overwhelmed by its just and equitable working. Rather, as the public is beginning to learn, it has given rise to all forms of abuses from such crude forms of skullduggery as the stealing of inventions to the more subtle form of extortion known as the international patent cartels, designed certainly not to "encourage invention" but rather to extract from all men throughout the world the highest price possible for

a particular invention. And The Wall Street Journal raises the fine point as to whether patents fit a strained definition of monopoly!

Sixth: It has been stated that justice and wisdom are two aspects of the same thing. That which is just is wisest, and that which is wisest is just. Has the patent law given rise to harmonious relationships among men such as a just law would, or has it not been the basis of many incredible forms of injustice? If it is not just, and certainly it does not accord with the principles of economic freedom, nor the rights of society to its inventions, then clearly it is not good, and therefore not wise for society.

Seventh: Is a patent private property? This is vital for unless men clearly determine what is and what is not private property, eventually the abuses arising from lumping common property rights with private property rights, tend to make men assume that all things are common property, with the consequent social, moral and political degradation which follows when private property is outlawed. A privilege never has been and never can be justly private property, no matter how many courts may have attempted to so state. The final arbitrament of this question is not a court of law composed of a few men, but the precepts of justice as understood by all men. If a privilege is justly private property, then anything can be justly private property, whether it be men's bodies, the earth, the air, the waters of the seas, and the like. Society recognizes today that private property in men is an injustice which will ultimately destroy any civilization built on that basis—some day it may recognize that a society which permits other privileges as patents and the earth to be considered private property will also eventually bring that civilization to ruin.

A man is entitled to the things he produces. The inventor is entitled to the machine he made, but not the privilege society would give him of prohibiting other men from making similar machines. Private property derives from the fact that men are entitled to their own bodies. To maintain their bodies they need sustenance, i.e., wealth. Therefore, wealth is private property with the same force as a man's body is his own. But wealth is something tangible produced by human labor. A franchise, as a patent, is nothing but an act of law prohibiting all but certain individuals from producing wealth. If this be private property, then all restrictions and prohibitions are private property to be bought and sold as wealth, and the richest nation will be the one which has the greatest number of prohibitions on the production of wealth and buys and sells these restrictions. If that is so, then The Wall Street Journal's fight for economic freedom is based on a faulty premise, and the planners' ideas of regimentation are correct. All we have to do is to make all their restrictive acts on production private property to be bought and sold, and America will be in Utopia, and rich beyond her wildest dreams.

In the last analysis the problem comes down to the question, not of how to improve the patent law, but whether there should be one at all. Far better to have the law as at present with all its obvious evils and ab-

surdities than some botched up job which will pass as correcting the abuses and lull people into thinking the problem has been solved. If the law is unjust there is but one possible solution, and only one, the complete eradication of the law from the statute books. Anything less than that cannot and will not work.

Following is The Wall Street Journal's reply to Mr. Johansen's article:

In another column on this page appears a letter in which the writer comments on an editorial in The Wall Street Journal of April 13 discussing a survey of the present legal position of patent rights made by a committee of the National Association of Manufacturers. In the editorial this newspaper expressed its own agreement with a line of court decisions holding that patent rights are property.

Our correspondent, not content to reject the concept of patents as property, asserts that there is no such thing as invention. "Inventions," he writes, "are the logical developments resulting from an advancing civilization acquiring a greater knowledge of the laws of nature." It follows, then, that Eli Whitney, Alexander Graham Bell, Edison, Westinghouse, Marconi, Pupin, Houdry and their ilk never did anything but stand on the curbstone and watch advancing civilization march by, gathering such knowledge of mechanics, chemistry and electro-dynamics as they had merely by seeing the procession moving under its own power. Just what "advancing civilization" consists of Mr. Johansen does not say, but evidently individuals have no essential part in it. They only purloin from it what they need to make out a patent application.

It is true that inventors have usually profited by the labors of those who have preceded them in their field but that is only to say that no one man ever by himself developed a science. If some knowledge of the action of electric currents had not existed before his time, neither Bell nor Edison nor Marconi could have done what he did. Mr. Johansen in effect says that no one of them ever did do more than some manual or clerical work in or around the laboratory of advancing civilization; he then proceeds to contradict this inference by asserting that inventors invent because they cannot help but invent by instinct. So, they should be rewarded for inventing—something they do by instinct and don't do, either—no more than for eating bread or drinking water. But men who invent or "improve" must eat and without reward they cannot.

Contrary to the argument of our correspondent's third point, patents are not "as well as other monopolies." The previous editorial quoted Mr. Justice Roberts' clear distinction between the true monopoly, which deprives the public of something it has freely enjoyed, and an invention covered by a patent, which confers on society a benefit it has not previously had. A patent gives the inventor the exclusive right to make or use his invention for a limited time. It is of no value to him unless he puts it at the disposal of the public for a fee, which fee must be reasonable if the value of the patent is to be exploited to the full. Patent rights have been abused,

though not on such a scale as ambitious politicians have often pictured. As with all law and all government, the task here is to prevent the abuse without destroying the use.

Mr. Johansen says: "A franchise, as a patent, is nothing but an act of law prohibiting all but certain individuals from producing wealth. If this be private property, then all restrictions and prohibitions are private property, to be bought and sold as wealth and the richest nation will be the one which has the greatest number of prohibitions on the production of wealth and buys and sells these restrictions." This is plain nonsense. Such reasoning, if it were true, would destroy every form of private property. A man's home is his property because of the restriction of law which prevents others from invading and appropriating it to their own use. Mr. Johansen would call a man's use of his own home a privilege; we prefer to call it a property right.