Again, some one may say that this trading in German dyes by America will tend more nearly to equalize the rate of exchange. Yes, just about like the pouring of a bucket of water into the ocean would lead the promenaders on the boardwalk at Atlantic City to scurry to high ground for fear of a tidal wave.

Not alone from Germany direct will this flood of dyes come, if not controlled by a license law, but from neutral countries wherever dyes may now be stored and possibly also from the countries of our allies in the war, for these, under the Peace Treaty, will be entitled to purchase from Germany their share of the option on 50 per cent of existing stocks. These amounts

may prove in excess of their domestic needs. Why look for any better market than America with its high wages of labor?

No wonder the old German dye agents have been, and doubtless still are, moving heaven and earth to defeat license legislation by Congress. They know this rate of exchange game. With the defeat of this legislation they see visions of an early return to the feeding troughs, with an extra large amount of material on which to gorge thrown in.

I do not believe that any of our representatives in Congress will stand for such a deal.

PARIS, September 21, 1919

CHAS. H. HERTY

NOTES AND CORRESPONDENCE

SHOULD GRANTED PATENTS BE SUBJECT TO ANNUAL FEES?¹

By BERT RUSSELL, Secretary Patent Office Society, Washington, D. C.

The accurate description of some more or less surprising, useful innovation in an industrial means or method is understood to be the essential consideration in return for which American patents are granted. When the inventive contribution happens to interest and please a great multitude or to effect important economies in the execution of methods previously in wide use, the financial return to the successful inventor may be very great; and it seems generally to be regarded as equitable that the return to the patentee should thus be at least roughly proportionate to use which the public makes of his contribution.

Since the term for which patents are granted is very arbitrarily fixed at seventeen years, it would, however, appear inadmissible to assert—even if there were no improper granting of patents and no pirating of inventions—that the inventor's reward is satisfactorily fixed by the operation of anything resembling natural law: for evidently a longer period would work to the immediate advantage of patentees, whereas any shortening of the period would work to the advantage of the public—at least until the discouragement of invention should produce an opposite effect.

The bargain between the inventor and the public being aimed, not directly to the establishment or protection of any natural equity, but rather to the nationalistic or humanistic purpose of "promoting the progress of science and the useful arts," no reason is apparent why (short of killing the goose that lays the golden egg) the public should not drive with the inventor as sharp a bargain as may be found practicable. From this point of view, and bearing in mind that the uses of fees, as a special form of taxation, ordinarily are either regulation, or revenue, it seems to be in order to inquire:

1—Is there some important regulative effect to be best attained by the imposition of annual renewal fees?

2—Should such fees be imposed as a means of raising revenue for the administration of the Patent Office?

3—If such fees are to be imposed, what adjustment thereof can accomplish the most useful effects?

(1) As to possible regulative effects, it should not be forgotten that, however critical one may be of this system that it is our duty to perfect, the system as it stands is still the object of contemporary admiration among industrial nations, and our industrial success may fairly be deemed sufficient to justify hesitancy in any wide departure from the main features of our present law.

The imposition of annual fees seems to count among its supporters chiefly those who would advocate a "compulsory working" clause and who seem to feel that annual fees would be paid

only upon patents that were being successfully worked. It is naturally felt inequitable that an exclusive power "to make and use" should continue lodged in wholly inactive hands, *i. e.*, that a dog-in-the-manger policy should not be tolerated. Thus arises the necessity for a consideration of numerous collateral questions such as:

(a) Should the owner of two or more alternative devices or processes be compelled "to use" even the *least satisfactory* of these, under penalty of surrendering it free to his rivals in case he prefers to employ only his most economical embodiment? To one who is opposed to any effort at compulsory working; *i. e.*, to one who believes that the public is entitled in advance of the expiration of each patent to nothing whatever but an adequate disclosure of some actual invention clearly defined, it seems especially clear that what might be termed the "right of suppression" should be carefully preserved not only to the inventor but to his "heirs and assigns"—not "forever," but for the agreed statutory term of seventeen years. Any less degree of certitude as to the completeness and stability of rights under a patent would appear inevitably to undermine the value of patents and correspondingly to diminish the incentive to invent and to patent.

(b) Can the inventor of an important improvement, cutting in at (say) about the middle of the term of a basic patent, properly be compelled to choose between making terms with the original inventor, or paying renewal fees on a patent which he cannot independently work until the basic patent shall have run its term? Those who would compel an inventor to work his patent should not forget that he may not have the legal right to do this; or that the owner of the basic rights cannot legally or equitably be compelled to make terms surrendering any portion of his monopoly to the subsequent inventor of an improvement.

(c) Is there any general agreement as to what constitutes "working" of a patent? An inventor of three alternative forms embodying the same broad ideas may take out three separate patents, and he may arbitrarily embody his broadest and most valuable claims in any one of the three grants—but not in all three. The chances may be two to three that the specific form with which his broad claims are associated will *not* be the form that best satisfies market conditions. If the owner of this patent, containing the broad claims that effectively forbid competition, omits to manufacture articles in accord with its specific disclosure, should he be or should he not be deemed to have "suppressed" the invention of this patent?

(d) Is there some distinguishable type or variety of patent that can fairly be referred to odiously as a "blocking" or "protecting" patent? In this connection, should it not be recalled that it is the function of patents to "protect," and that they can protect only in so far as they "block" competitors from the unauthorized use of the thing patented? The "right to exclude" is of course the essence of patent protection. No doubt the issuance of improper grants is an all too common occurrence; and no doubt it is often only the wealth of corporations that is

¹ Mr. Russell was unable to be present during the discussion of this subject at the Philadelphia meeting of the American Chemical Society, and his manuscript was received too late for inclusion in the account of the symposium in the October issue of THIS JOURNAL. Since this paper was prepared Mr. Russell has left the government service, after many years devoted to chemical application, in order to participate in the chemico-legal work incidental to the patent practice of Messrs. Prindle, Wright & Small, of New York.

adequate to the legal defense of doubtful grants; but the correction of these evils would appear to await an improved administration of the Patent Office, an elevation of the standards of patentability, and the strengthening of the informative resources of the Office by more liberal appropriations and otherwise.

There appears then to be no valid reason to suppose that the imposition of annual renewal fees could be relied on to serve any useful regulative effect. Such fees appear adapted to break no unjust monopoly, to open up no fields to inventive effort. If levied on a "flat" basis, regardless of the value of the patent or the extent of its working, such fees evidently might operate to the discouragement of invention, or of patenting as a means of protection. Renewal fees would operate as a hardship to the poor inventor, without reliably serving any clear economic or technical purpose.

(2) But the Patent Office is poverty stricken; and, perhaps partly for that reason, the Patent Office is ignorant. Legislation now pending (H. R. 7010) proposes specific general increases, long overdue, in the compensation of members of the examining corps, and increased appropriations for books and periodicals. Chairman Nolan, of the House Committee on Patents, has indicated the prevalence of a feeling among congressmen that the Office should continue self-supporting. The patent system being designed to serve the entire public, no rational foundation for this requirement is apparent, nor is it obvious that a moderate increase in the filing fee (as proposed in H. R. 5011) would fail to meet the proposed additional cost. But the circumstances seem to justify a consideration of our third major question:

(3) If annual fees are to be imposed, what adjustment thereof can accomplish the most useful effects?

In the first place, it may be urged that the first seven years, (which might be characterized as the period of development) should be exempt from any additional charge. With reasonable improvement in the appellate system (*e. g.*, such as is contemplated by H. R. 5012) this interval should suffice for the terminating of litigation, as well as the interesting of capital and the development of plant. If a device has merit, or if the claims drawn thereon have value by reason of the breadth of the monopoly created, that fact should be determinable within seven years.

The testimony of those who have observed the operation of fee systems in foreign countries is found to be so conflicting that the arguments herein are intended to be based squarely upon recognized economic principles and the ordinary laws governing human behavior under the guidance of the principle of self interest. No argument would appear necessary to establish that no other tax could appear so equitable to the inventor—that no other tax could so little check the disposition to invent—as would a tax computed as a percentage upon net earnings or upon the market value of patent rights.

To obviate all risk of misunderstanding, it is suggested that every patent grant might well include the words "subject to the pre-existent rights of others and subject to a right of revocation or transfer for non-payment of such annual fees as may from time to time be assessed," and that the official appraisal, due to be made at the end of (say) the seventh year of the life of every patent, might well take into consideration, not only the representations of each owner, but also every bid, regularly received, in response to invitation by advertisement, and constituting a *bona fide* offer for the unexpired term of the patent in question, if the same should become forfeit for non-payment of fees.

The standards of patentability enforced by the Patent Office have fallen so low, and the uncertainties inherent in a form of property that may at any moment be rendered obsolete by the successful efforts of a rival inventor are so great, that probably no value justifying taxation could be assigned to one recent patent in a hundred. It is by no means clear that the rest—

the 99 out of each hundred—should be declared forfeit; and no doubt it may be assumed that any charge made would be redistributed upon the consuming public; but it seems clear that a very small and uniform percentage of the declared or established values of the few successful and important inventions of each year would, under this system, suffice to create and maintain, with hardship to no one, an American Patent Office worthy of the name.

For what are additional fees needed?

It seems proper to conclude this paper with a brief consideration of the needs of the Patent Office, as viewed by one now withdrawing—reluctantly—from its examining corps after some fifteen years of service therein. It seems fair to state that the corps generally is not understood to share the views attributed to the Commissioner of Patents (1) that any grammar-school boy ("copy-puller") can in some two weeks' time be sufficiently trained to pass upon the scientific and legal problems involved in the grant of patents, or (2) that the classification of patents can be tolerably completed without any general plan, or (3) that neither the betterment of working equipment, organization and conditions to permit a genuine specialization on the part of the men nor the increasing of compensation can be relied on to hold the qualified members of the corps for a much longer average term of service.

The salaries of assistant examiners of patents now range from \$1500 to \$2400, with a temporary bonus of \$240 per year, and the salaries of the chiefs of examining divisions are \$2700, with a bonus of \$40. In view of the outside demand for men of technical training versed in patent law, the rate of registration is stated to have risen to 25 per cent per year. Second, third and even fourth assistant examiners are leaving to accept an initial compensation greater than that paid to chiefs of divisions. To meet this situation, many "temporaries" have been added—some 20 per cent of the corps now being men who have never passed an entrance examination—even though it is true that recently entrance standards have been so lowered that a man may now receive a regular appointment without even having taken a college course or passed an entrance examination in physics, chemistry or mathematics. Without adequate informative materials, without an adequate classification *in esse* or in prospect, without effective or appreciative supervision by men really qualified therefor by any profound or detailed knowledge of particular arts, and deeply discouraged and chagrined by the conditions, the standards and the consequent reputation under which they are forced to continue if they remain in the service, even those who would otherwise prefer to be content with a modest competence are finding it more and more of a tax upon their self-respect to continue in this branch of the public service—more and more natural to adopt the current view attributed to those in authority, more and more natural to cut corners in every search, and to ignore imperfections in disclosure, while concentrating attention rather upon those purely legal studies upon which the "powers that be" choose to rely in the making of promotions, and by which the men may earn a larger competence after early resignation. The seriousness of the consequent situation, as viewed from the standpoint of the inventor, can hardly be exaggerated; and its rectification—to make the corps a body of disinterested and competent experts, equipped and qualified to pass promptly an enlightened judgment upon the complex problems incidental to the advance of science and industry—may require, not only the passage of legislation pending (in H. R. 5011, H. R. 5012, and H. R. 7010, upon which it is felt that the members of this Society should concentrate their present effort), but also the finding of very considerable additional funds. And it is believed that a substantial portion of these funds *might* without *serious* disadvantage be levied by a wisely-adjusted system of fees collectable during the last decade of the life of each patent.