SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 8 | Issue 2 Article 7

1957

Practice of Expired Patents

Karl A. Limbach

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INTRODUCTION

The justification for the government's grant of patent monopolies is found in the Constitution of the United States, which gives to Congress the power "to promote the progress of science and useful arts, by securing *for limited times* to authors and inventors the exclusive right to their respective writings and discoveries."[1] (Emphasis added). From this justification emanates the basic principle of patent law that every patent must expire, and that the public has an interest in the subject matter of expired patents. This principle has two major aspects: first, that any member of the public may practice the specific subject matter of an expired patent;[2] second, that the public as a whole has an interest in free, unhindered competition in the manufacture, use and sale of the subjects which were at one time protected by patent monopolies.[3]

During the life of a patent every member of the public has been restrained from competing with the owner of the patent and hence has suffered a detriment by being precluded from making some article which, theoretically, he knew about and wanted to sell. Presumably, people wanted to buy the article and the potential manufacturer could make a profit selling it because it was not being manufactured and sold in an open market. Because this potential competitor has suffered such a detriment while the patent owner reaped the proceeds of an exclusive market, the competitor has a right to practice the invention of the patent when the patent monopoly expires.[4]

The public as a whole is interested in preventing unreasonable restraints on competition in all markets. It is interested to an even greater extent in preventing restraints on competition in goods of expired patents, because it has permitted monopoly in the exploitation of the patented commodity during the life of the patent.[5]

Furthermore, while the patent owner has enjoyed the benefits of his patent, the public as a whole has paid the price of a restricted market.

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[1] U. S. CONST. art. I, § 8.

[2] Throughout this article the phrase "practice the subject matter of an expired patent" and its equivalents are used for convenience as generic phrases which include "making, using, or selling the device shown in the patent" and "using the method described in the patent."

[3] Scott Paper Co. v. Marcalus Mfg. Co., 326 U.S. 249 (1945); Singer Mfg. Co. v. June Mfg. Co., 163 U.S. 169 (1896).

[4] Singer Mfg. Co. v. June Mfg. Co., 163 U.S. 169 (1896); West Point Mfg. Co. v. Detroit Stamping Co., 222 F.2d 581 (6th Cir. 1955), *cert. denied*, 350 U.S. 840 (1956).

[5] Scott Paper Co. v. Marcalus Mfg. Co., 326 U.S. 249 (1945).

The patent owner has been free to charge the public the price he wants for his goods, without losing his business to competitors who are either more economical manufacturers or willing to sell their goods at a smaller profit. Because of this detriment the public is rewarded with a free competitive market in the commodity of the patent owner as soon as the patent expires.

One of the basic principles of patent law might therefore be stated as follows: the subject matter of expired patents is the property of the public, and any person is free to make, use or sell the devices and methods covered by these expired patents.

It is understood, of course, that this principle applies only to the specific disclosure of the expired patent and that even though some device may have been covered by the claims of a broad basic expired patent, it may still be the subject matter of a subsequent narrower patent. This is illustrated by the situation in which a patent was granted covering a sponge made out of substance X, which had unique cleaning characteristics, and a subsequent patent was granted covering the sponge impregnated with soap. When the first patent expired, everyone would be free to make the sponge provided they did not impregnate it with soap. The claims of the first patent covered all sponges made of substance X, whether impregnated with soap or not, but the sponge impregnated with soap was not part of the disclosure of the first patent.

The purpose of this article is to analyze the extent to which this principle of public property in expired patents is followed, and the extent to which it is modified where it conflicts with various other principles.

Contracts In General

One of the fundamental concepts on which our free society is founded is the principle that parties are free to contract as they wish. However, in many situations, outside the scope of this article, this principle is limited where the parties wish to form an agreement in which some element is illegal or violates some strong public policy.

Relying on this principle of freedom of contract, patent owners have attempted to extend the terms of patents beyond their normal expirations, and have found that the concept of public property in expired patents restricts freedom of contract. No case has been found where the parties to a contract have specifically agreed, that, as between them, a patent will not expire until after its normal expiration date, and that one of the parties could be sued for infringement of the patent after it had expired. Such a contract would be so blatant an attack upon the principle of public property of expired patents that none would expect

its validity to be sustained. However, many contractual devices have been conceived to achieve the result by indirect means.

The owner of a patent on a machine contracts to sell the machine and the right to use it to a purchaser, who in return promises to buy from the owner all of the unpatented supplies needed for the operation of the machine. Whether the unpatented supplies are the subject of an expired patent[6] or were never patented at all,[7] the promise of the purchaser is unenforceable because it substantially lessens competition between the patent owner and other manufacturers of the unpatented supplies in violation of section three of the Clayton Act.[8] Here the antitrust laws cooperate with the principle of public property in expired patents to prevent the extension of the monopoly of an expired patent by tying the unpatented goods to other patented goods.[9]

This protection of the public's interest in unpatented articles from contracts tying unpatented goods to patented goods is further extended by prohibiting the owner of a patented combination of unpatented component parts from licensing a customer to use the combination, on the condition that he purchase all or any of the component parts from the patent owner.[10]

In one case, the prohibition against tying unpatented goods to patented ones was overlooked where the sale of automobiles to franchised dealers was accompanied by a covenant by the dealer to buy all of his replacement parts from the manufacturer.[11] The covenant was sustained on the ground that the manufacturer who guaranteed the cars for a short period, and whose name and future sales would be injured by defects in the car, had a right to control the quality of the car in the hands of the ultimate consumer. The court stressed the fact that such quality would remain associated with the manufacturer, because the servicing of the

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[6] Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917)

[7] I. B. M. v. United States, 298 U.S. 131 (1936); Carbice Corp. v. American Patents Development Corp., 283 U.S. 27 (1931).

[8] 38 STAT. 731, 15 U.S.C. § 14 (1914); which provides, "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods of a competitor or competitors of the lessor or sellor, where the effect of such lease, sale or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

[9] I. B. M. v. United States, 298 U.S. 131 (1936).

[10] R. C. A. v. Lord, 28 F.2d 257 (3d Cir. 1928), *cert. denied,* 278 U.S. 648 (1928).

[11] Pick Mfg. Co. v. General Motors, 80 F.2d 641 (7th Cir. 1935), *aff'd mem.,* 299 U.S. 3 (1936).

car was always done at one of the manufacturer's franchised dealers. However, this holding is strictly limited to its facts and from its very nature is applicable to only a few cases. Furthermore, considering the Supreme Court's present strict attitude toward monopolies, it is doubtful that the Court would follow it in any case today.[12]

LICENSES

Between a patent owner and his licensees, the patent monopoly terminates when the obligation of the licensee to pay royalties terminates, since one of the basic elements of the relationship betwen licensee and patent owner is the duty of the former to pay. Because of the principle that the patent monopoly ceases to exist and the invention becomes public property when the patent expires, a patent license is presumed to terminate upon the expiration of the patent.[13]

However, a debtor can agree to pay his debt on any installment plan or deferred payment plan which he can persuade his creditor to accept, and there seems to be no reason why this principle would not apply to patent royalties as readily as it does to the purchase price of a household appliance. The parties to a license agreement, therefore, may contract for the payment of royalties after the patent expires.[14]

While the courts indicate that the parties may contract for the payment of royalties after the patent expires, they are reluctant to hold that the particular license in question was intended to continue beyond the expiration of the patent.[15] In the case of *Sproull v. Pratt & Whitney Co.*[16] a federal court of appeals considered a group of licenses for three similar articles and a machine for making one of them. The court held that while some licenses could be construed as a unit so as to expire when

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[12] Standard Oil Co. v. United States, 337 U.S. 293 (1949).

[13] Eskimo Pie Corp. v. National Ice Cream Co., 20 F.2d 1003 (W.D. Ky. 1927), *aff'd*, 26 F.2d 901 (6th Cir. 1928); Pressed Steel Car Co. v. Union Pacific Ry. Co., 270 Fed. 518 (2d Cir. 1920); Sproull v. Pratt & Whitney Co., 108 Fed. 963 (2d Cir. 1901); *cf.* Mitchell v. Hawley, 83 U.S. (16 Wall.) 544 (1872)

[14] Squibb & Sons Co. v. Chemical Foundation, 93 F.2d 475 (2d Cir. 1937); Pressed Steel Car Co. v. Union Pacific Ry. Co., 270 Fed. 518 (2d Cir. 1920); H-P-M Development Co. v. Watson-Stillman Co., 71 F. Supp. 906 (D.C.N.J. 1947). In *Six Star Lubricants Co. v. Morehouse*, 101 Colo. 491, 497, 74 P.2d 1239, 1242 (1938), the court stated: "There is no legal inhibition against a party contracting to pay royalty on a patented article or formula for a period beyond the date of expiration of the patents."

[15] "Although the general rule is that liability to pay royalties terminates upon the expiration of the patent, the parties may contract to the contrary. We discover nothing in the contract to the contrary." Pressed Steel Car Co. v. Union Pacific Ry. Co., 270 Fed. 518, 524 (2d Cir. 1920).

[16] 108 Fed. 963 (2d Cir. 1901).

the last patent expired, the language of these particular licenses was not sufficiently clear to overcome the presumption that each license expired with its own patent. In *Squibb & Sons v. Chemical Foundation,*[17] the same circuit court, considering five licenses for five patents covering a product, its ingredients and means for administering it, held that if the parties wish to make royalties payable after expiration of the patent, they must state so expressly.

Though no cases have been decided on the point, it is quite apparent from the courts' attitude in these cases that the power to contract for payment of royalties after the expiration of a patent is allowed under the principle of freedom of contract, but will not be extended in any way so as to modify the principle of public property in expired patents.

If the period of royalty payment after the patent expired were excessively long, the courts would probably hold that the royalty provision of the license was invalid, on the ground that its intent was to extend the patent monopoly rather than to provide an agreeable payment plan. Certainly a license for the payment of royalties indefinitely would be invalid as an attempt to extend the monopoly. Similarly, a license for a million years, though for a finite period, would be the equivalent of a license for an indefinite period. In determining what would be a valid period of royalty payment after the patent expires, the test of "a finite period" is not acceptable. Rather, the yardstick of a "reasonable period" should be applied.

Contracts Not to Compete

The patent owner may attempt to extend the term of his patent monopoly by obtaining from his most important competitor a contractual promise not to compete. This attempt may be effective on a limited scale, but no such restraint is permitted where the effect thereof would be to continue the patent owner's monopoly for any substantial time or in any substantial market.

Certainly, where the patent owner's most important potential competitor is one of his employees, a contract not to compete may be sustained.[18] However, such contracts between employer and employee are sustained only where the restrictions on the employee are for a reasonable time and geographic area.[19]

While contracts not to compete have been sustained on a limited scale,

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[17] 93 F.2d 475 (2d Cir. 1937).

[18] Broxham v. Borden's Farm Products, 53 F.2d 946 (7th Cir. 1931); Wark v. Ervin Press, 48 F.2d 152 (7th Cir. 1931).

[19] Oregon Stream Navigation Co. v. Winsor, 87 U.S. (20 Wall.) 64 (1873).

no case has been found where one of the parties expressly contracted not to practice an expired patent. It seems clear, however, that such a contract would not be enforced. In addition, it may be that in construing the reasonableness of the future restrictions of an employment contract, the court would consider the fact that competition between employer and employee is in the field of goods which were covered by an expired patent.[20] If the goods were covered by an expired patent, the court would probably view the employment contract with a more jaundiced eye.

ESTOPPEL

A person who contracts with the patent owner to pay the latter a royalty in return for the privilege of practicing the invention of the patent, that is a licensee, is accepting the benefits of the patent. Because the licensee accepts the benefits of the patent, he is held to have admitted the patent's validity.[21] Therefore, if the patent owner sues him for royalties due under the license, the licensee is estopped from claiming that the patent is invalid and hence that his promise to pay royalties is not supported by consideration.[22]

Invalidity of a patent can be based on several grounds, one of which is that the invention was patented in this country before the patentee conceived the invention.[23] Therefore, in an infringement suit, the defendant may introduce in evidence prior patents which he contends disclosed the invention before the patent owner or his assignor conceived it, or which he contends disclosed the invention more than a year prior to the time when the plaintiff's patent was applied for.[24] These prior patents which

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[20] "The trend of modern authorities is that such covenants, when reasonably limited as to time and place, and when reasonably calculated to protect the lawful business of the employer, will be enforced." Wark v. Ervin Press, 48 F.2d 152, 155 (7th Cir. 1931). If the effect of the contract were to extend the patent monopoly of the employer, would not a court refuse to enforce the covenant on the ground that it was not designed to protect the *lawful business* of the employer?

[21] E-I-M Co. v. Philadelphia Gear Works, 223 F.2d 36 (5th Cir. 1955), *cert. denied,* 350 U.S. 933 (1956); Reynolds Metals Co. v. Skinner, 166 F.2d 66 (6th Cir. 1948), *cert. denied,* 334 U.S. 858 (1948); *cf.* Scott Paper Co. v. Marcalus Mfg. Co., 326 U.S. 249 (1945).

[22] Reynolds Metals Co. v. Skinner, 166 F.2d 66 (6th Cir. 1948), *cert. denied,* 334 U.S. 858 (1948)

[23] 66 STAT. 797, 35 U.S.C. § 102 (1952) The section provides a number of other grounds on which a patent may be held invalid, among which is the fact that the invention was "patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States." The section, therefore, prescribes several other grounds of invalidity which will be considered subsequently, viz: (a) publication a year prior to application, (b) patenting a year prior to application, and (c) public use and sale a year prior to application.

[24] *Id.* at (b).

invalidate a patent on either of these grounds are said to "anticipate" the patent owner's invention.

In a suit between the patent owner and a licensee in which the latter defends solely on the ground that certain prior patents anticipate the owner's patent, the patent owner will generally prevail on the ground that the licensee is estopped from contesting the validity of the patent under which he is licensed.[25]

This doctrine of estoppel of the licensee is substantially limited, however, by the principle that the licensee may rely on prior patents to limit the scope of the patent under which he is licensed,[26] even if such limitation results in so narrow a scope that, in effect, the patent is invalid.[27] This principle is based on practical considerations in that the owner of a patent cannot make his licensees pay royalties on every article they produce, regardless of whether the article is within the scope of the patent. In an extreme hypothetical case, a patent owner who licensed a tire manufacturer to manufacture and sell a particular type of snow tire could not compel the manufacturer to pay him royalties on all the regular tires it produced. Permitting the licensee to refer to prior patents to ascertain the scope of the patent under which he is licensed is the simplest way of defining the scope of that patent.

The doctrine of estoppel of the licensee is further modified where the licensee proves that he is practicing the exact subject matter disclosed in an expired patent. In such a case the court may hold for the licensee without even considering the fact that he may still be practicing the invention exactly as it is defined in the patent under which he is licensed. In holding for the licensee, the court is, in effect, permitting him to contest the validity of the patent under which he is licensed.[28] Here the principle that everyone is free to practice an expired patent completely supersedes the doctrine of estoppel of the licensee.

These principles of estoppel of the licensee also extend to the case of an assignor or seller of a patent who is said to be estopped from contesting the validity of the patent which he sold and impliedly warranted as

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[25] Reynolds Metals Co. v. Skinner, 166 F.2d 66 (6th Cir. 1948), *cert. denied*, 334 U.S. 858 (1948); *cf.* E-I-M Co. v. Philadelphia Gear Works, 223 F.2d 36 (5th Cir. 1955), *cert. denied*, 350 U.S. 933 (1956).

[26] Hall Laboratories v. National Aluminate Corp., 224 F.2d 303 (3d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956); Sinko Tool & Mfg. Co. v. Casco Products Corp., 89 F.2d 916 (7th Cir. 1937).

[27] Westinghouse Electric & Mfg. Co. v. Formica Insulation Co., 266 U.S. 342 (1924); Garland v. Remington Arms Co., 137 F. Supp. 622 (S.D.N.Y. 1956).

[28] Hall Laboratories v. National Aluminate Corp., 224 F.2d 303 (3d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956).

valid.[29] But where the assignor is sued for infringing the patent which he sold, his proof that he is practicing the invention of an expired patent is an absolute defense to any suit for infringement of a patent, even though he may have received consideration for such patent.[30]

It is therefore apparent that the principles of estoppel of the licensee or assignor do not in any way modify the principle that everyone is free to practice the invention of an expired patent. Indeed, these principles of estoppel are being restricted to such a point that their vitality is greatly diminished. There is still an argument[31] on the question of whether the licensee is estopped from showing invalidity of a patent by means of prior publication or prior use.[32] If this conflict is resolved so as to permit such a showing, as seems likely, what estoppel will be left?

Unfair Competition

The one area in which the principle that everyone is free to practice the invention of an expired patent is seriously restricted is in the area of unfair competition. Here, courts prohibit parties competing with the owner of an expired patent from copying the formerly patented articles.

The law of unfair competition originated in the doctrine that one man cannot palm off his goods as those of another. "Palming off" was the essential element in unfair competition, though it would be found without proof of misrepresentation.[33]

Today, the direct imitation of a design, whether the design was the subject of an inspired patent or not, will be enjoined as unfair competition, where the imitation will lead to confusion in the mind of the consumer regarding the source of the goods.[34]

In order to prove unfair competition in the copying of a design, it is necessary for a plaintiff to prove that his design had acquired a secondary meaning; that is, that in the mind of the consumer the design meant that the article was made by the plaintiff.[35] The secondary meaning must

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[29] *cf.* Westinghouse Electric & Mfg. Co. v. Formica Insulation Co., 266 U.S. 342 (1924).

[30] Scott Paper Co. v. Marcalus Mfg. Co., 326 U.S. 249 (1945).

[31] Hall Laboratories v. National Aluminate Corp., 224 F.2d 303 (3d Cir. 1955), *cert. denied,* 350 U.S. 932 (1956), wherein the majority and dissenting opinions disagreed on this point.

[32] See note 23, sections (a) and (c).

[33] Yale & Towne Mfg. Co. v. Alder, 154 Fed. 37 (2d Cir. 1907); Enterprise Mfg. Co. v. Landers, 131 Fed. 240 (2d Cir. 1904).

[34] Lucien Lelong v. Lander Co., 164 F.2d 395 (2d Cir. 1947).

[35] Saxlehmer v. Wagner, 216 U.S. 375 (1910); Bowdil Co. v. Central Mine Equip. Co., 216 F.2d 156 (8th Cir. 1954), *cert. denied,* 348 U.S. 936 (1955); Ross-Whitney Corp. v. Smith Kline & French Laboratories, 207 F.2d 190 (9th Cir.

be part of the plaintiff's good will rather than the good will of the product itself.[36] Furthermore, in order to establish unfair competition the plaintiff must show that the defendant's imitation of the plaintiff's goods confuses the consumer as to the origin of the goods,[37] and in some circuits the plaintiff must also show that the consumer purchases the goods because of their origin.[38]

Although the copying of an article will be enjoined under the doctrine of unfair competition regardless of whether it is the subject of an expired patent, the courts, in deciding if the design has acquired a secondary meaning, require a greater association between the plaintiff and his design if the design was the subject of an expired patent,[39] or was used on a machine which was the subject of an expired patent.[40]

Prohibiting a member of the public from practicing the invention of an expired patent violates a strong public policy, but injuring a man by permitting his business to be stolen and at the same time permitting the "palming off" of another's goods violates an even stronger public policy. Therefore, the doctrine of unfair competition serves to modify the principle that everyone is permitted to practice the invention of an expired patent.

TRADEMARKS

A trademark is a name which, as distinguished from a patent, does not indicate the goods on which it is used, but instead indicates the person who manufactured the goods. A consideration of trademarks in the field of expired patents should first include a warning to the owner of a trademark on a patented article; he must be careful that his trademark is used in such a way that it designates the manufacturer rather than the

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1953); Lucien Lelong v. Lander Co., 164 F.2d 395 (2d Cir. 1947); American Enameled Products Co. v. Illinois Porcelain Enamel, 123 F.2d 631 (7th Cir. 1941); Upjohn Co. v. William S. Merrill Chemical Co., 269 Fed. 209 (6th Cir. 1920), *cert. denied*, 257 U.S. 638 (1921).

[36] Singer Mfg. Co. v. June Mfg. Co., 163 U.S. 169 (1896); West Point Mfg. Co. v. Detroit Stamping Co., 222 F.2d 581 (6th Cir. 1955), *cert. denied*, 350 U.S. 840 (1955).

[37] Ross-Whitney Corp. v. Smith Kline & French Laboratories, 207 F.2d 190 (9th Cir. 1953); Paramount Industries v. Solar Products Corp., 186 F.2d 999 (2d Cir. 1951).

[38] Upjohn Co. v. William S. Merrill Chemical Co., 269 Fed. 209 (6th Cir. 1920), *cert. denied*, 257 U.S. 638 (1921).

[39] Lucien Lelong v. Lander Co., 164 F.2d 395 (2d Cir. 1947).

[40] Singer Mfg. Co. v. June Mfg. Co., 163 U.S. 169 (1896); West Point Mfg. Co. v. Detroit Stamping Co., 222 F.2d 581 (6th Cir. 1955), *cert. denied*, 350 U.S. 840 (1955).

goods on which it is used. If the name is used in such a sense that it is a generic term for articles produced under a patent, the name does not function in a trademark sense, and hence will become dedicated to the public along with the patented article when the patent expires.[41] Similarly, when the patent expires, a trademark will become dedicated to the public where the owner of the trademark permits the public to adopt it as a generic term for the patented article, even though the trademark originally connoted the patent owner and at all times was part of its corporate name.[42]

These results are based on the ground that a term, in order to be an enforceable trademark, must connote the source of the goods on which it is used. When, instead, it functions as a name for the goods, it merges with the goods so that anyone free to make the goods is also free to use the term on them. This requirement — that a name to be a valid trademark must designate the source of the goods — suggests a possible means of effectively extending the term of a monopoly which was once maintained by a patent.

When a trademark owner develops a well-known trademark for a patented commodity, while preserving the trademark for himself by educating the public to use another term as the generic name for the commodity, competitors and customers will want to use the trademark after the patent expires. To do so, they will take licenses to use it. However, since the use of a person's trademark on any goods must indicate that the goods were made by him, or at least made under his control, the law insists, to the trademark owner's extreme joy, that he must either make or control the manufacture of any goods bearing his trademark.[43] The law therefore insists that if the ower of an expired patent licenses the whole industry to use his trademark, he must insist that they buy the goods from him or from some plant operated under his supervision.

This practice, while it may create an actual monopoly, does not contravene the principal of public property of expired patents because everyone is free to make, use and sell the patented commodity without using the patent owner's trademark. The legality of the practice is based on the theory that if the trademark owner does not control the quality of the goods bearing his trademark, a fraud is perpetrated upon the purchasers of the goods who buy them believing that they are his goods.

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[41] Kellogg Co. v. National Biscuit Co., 305 U.S. 111 (1938).

[42] Singer Mfg. Co. v. June Mfg. Co., 163 U.S. 169 (1896).

[43] Crown Beverage Corp. v. Nehi Corp., 196 Misc. 715, 92 N.Y.S.2d 902 (Sup. Ct. 1949); Coca Cola Co. v. State, 225 S.W 791 (Tex. Civ. App. 1920).

CONCLUSION

Patents fulfill their purpose of promoting science and the useful arts in that the subject matter of the patent is the property of the public when it expires, and the article or process of the expired patent can be freely exploited by any member of the public. This principle is altered only in the situation where it conflicts with the principles of copying of design in the law of unfair competition.

The patent monopoly which protected the commodities forming the subject matter of the patent cannot be extended by a contract to pay royalties after the patent expires or by contracts tying such commodities to patented goods, since the doctrine of freedom of contract is modified by the rule that patents must expire. Nor can a patent monopoly be extended by including it within an invalid unexpired patent, and estopping the infringer from contesting the validity of the patent.

Contracts not to compete are ineffective in extending the term of an expired patent monopoly for any substantial area or period, because such contracts are strictly construed. If such contracts extended a patent monopoly, they would be construed even more strictly. Where the effect of a contract not to compete is to extend a patent monopoly, the courts will refuse to enforce the contract, even though its restrictions are reasonable in time and extent.

Finally, royalties may be collected by the patent owner after the patent expires either under a patent license extending beyond the expiration of the patent or under a trademark license, but these licenses do not preclude other members of the public from practicing the invention of the expired patent and hence do not extend the patent monopoly.

Only when another member of the public deceives the consumer as to the origin of the goods will the monopoly previously established by a patent be extended beyond the expiration date of the patent. It is convincingly argued that even this extension should not be permitted because the very existence of the patent monopoly has permitted the patent owner to develop such a secondary meaning in his goods that he can later prevail in an unfair competition action. But the copier is always free to make the patented article without imitating the design which the patent owner has made popular. The copier can develop his own design for the device and market it as his own without seeking a free ride on the good will developed by the pioneer in the field.

KARL A. LIMBACH