THE RESULT OF THE ALIEN PROPERTY CUSTODIAN'S PATENT POLICY

(Lecture given in Yale on March 28, 1947)

I.

The policy of the United States in regard to German technology was announced to be in favor of opening all German technology to the forces of free trade. The policy was pursued by three different means:

1. The Alien Property Custodian announced that every American national can seek a non-exclusive license on German patents in consideration for a regular fee of $2.50.

2. The United States joined with all other allied nations in an "accord" that all former German patents shall not only be licensed to nationals of each country but to all allies, with the effect tha, for instance, Americans can use former German patents in England and Brazil, etc.

3. By Executive Order the President established the procedure to collect technology found in defeated Germany and to distribute it freely to any one who asked for it the description of the technological processes found in Germany.

We have to contrast with these three steps of the U.S. policy three facts with which we are confronted today:

1. The Senate Committee for investigation of petroleum resources learned that the United States has to make very risky investments in the Near East because of the threatened shortage of oil in this country. Senator O'Mahoney repeatedly asked why the German processes for the manufacture of synthetic oil from lignite, of which we have abundant reserves, have not been used by any one.

2. The Russian government found the German color film developed during the war of such an excellent type that the official Russian war film is going to come out using this color procedure. Where is this color film process here?

3. The Swiss papers recently asked the following question: How did it happen that the pharmaceutical prices at the end of the war did not move at all, although all the German pharmaceutical processes came in the open and became the free property of the whole world?

The purpose of this lecture is to try to reconcile these three facts with the policy and the devices used by the United States.

II.

Recently the Decartelization Office of the Military Government in Germany published an interesting document on I.G. Farben's patent position in the dyestuff field. In accordance to this paper I.G. Farben had 16,711 patents and patent applications in the dyestuff field in the whole world. About 63% of these patents were taken out in Germany, Great Britain, France, Italy and Switzerland. In the United States about 3,000 were taken out, while in Germany only 2,279 patents existed. The reason for the greater number in the United States is of mere procedural character: In Germany the patentee has to pay increasing annual fees from year to year, while in the United States only one fee is paid for the whole life of the patent. Out of the 2,279 German patents and patent applications, I.G. only used about 700 commercially. Since the foreign and German patents are more or less the same it can be assumed that the percentage of the patents used in the United States is about the same as it was in Germany.

This report of the Decartelization Office might give us the first hint why the U.S. patent policy in regard to German patents did not succeed. Only a small number of patents ever were used, and all other patents were determined to protect the small number of actually used patents against attack. However, no one can expect to use the protective patents alone without having control over the few actually used patents.

The Alien Property Custodian was asked for a license on about 5% of all vested German patents. If we keep in mind this ratio, established by the Decartelization Office (2,279 to 700) we understand one important reason for the small number.

This, however, is only one-third of the explanation to be given. I.G. Farben used in the dyestuff field in the United States only a very small number of patents as protection of its own import into the United States. The majority of the dyestuff patents were used in two different ways:

(a) I.G. gave a license to its American outlet, General Aniline & Film Corporation. After the outbreak of the European war, as of which date the above mentioned figures have been established, General Aniline was given a position as an exclusive licensee or even assignee of these patents. The activities of General Aniline & Film Corp. was limited to the production of specialties in the dyestuff field, while they did not enter the general dyestuff production.

At this point of the discussion we can already realize some characteristics of the conditions in which the licensee of the Alien Property Custodian brings himself. If he acquires licenses on the protective patents of I.G. Farben in the specialties field he comes necessarily in trouble with the General Aniline &

Film patents which are written with the intention of supplementing each other.

The general dyestuff production in this country was taken care of by such concerns as Allied Chemical, National Aniline & Dupont. They were given licenses in connection with the general cartel policy pursued by the German, English and American concerns in the pre-World War II period. In the hands of these firms the patents obtained an extremely powerful position because they were combined with their own inventions and patents by these concerns. An American licensee of the Alien Property Custodian's patents in the dyestuff field would be confronted with the patents of General Aniline and of this group of American concerns.

We can observe similar developments in almost all other important fields: electrical, radio, pharmaceutical, etc.

III.

Does not at least the last step of American policy - the opening of the technological processes found in Germany - offer a radical remedy to the situation discussed above? Necessarily the opening of German technological experience had one limitation from the very beginning: processes patented within the United States are not opened. Since a certain presumption exists that processes developed before 1938 are already matured into patent applications before the outbreak of the war, all information developed before the outbreak of the war was under patent protection in the United States. The control over them is completely covered by the conditions discussed in II.

Certainly much research was developed after 1938, expecially after the outbreak of the war. All this information disclosed in Germany might give a very substantial contribution in the realm of open technology. Mr. Molotov. in

the Moscow conference, attacked General Marshall on this point, alleging that the Americans have taken very substantial reparations from Germany by just opening this technology for themselves. Does that actually mean that this technology developed after 1938 is in the realm of open and free technology? In discussing this problem we have to watch the following:

(a) Technology does not develop in sudden, surprising steps, but develops logically from phase to phase. Therefore in most cases the technology developed after 1938 can only be used by persons who have control over patents developed before 1938.

(b) During the war the German industry work closely with industry of all European countries occupied by or otherwise dependent on the Germans. Certainly it is true that the patent is supposed to disclose the name of the inventor, but who is, in modern research practice, the real inventor? It is already difficult to decide within one research laboratory who can actually be considered as the inventor, if no one else but the research laboratory participated in the development. How much more difficult is it if we have research laboratories working together on one development. They exchange views, they visit each other's plants. They report to each other daily developments. It is not absolutely necessary that an actual perjury takes place to bring many processes dependent on German research under patent protection of other countries and other nationals. The recently enacted Boyken Act provides that every person who has made a patent application in any foreign country (with the exception of enemy countries) after September 8, 1938, can file patent applications in this country within a period of one year and claim all

protection of priority provided for by the patent set-up. The peace treaty with Italy has given Italy practically the same protection. Under these conditions an American who wishes to use information distributed by the Department of Commerce in accordance to the President's Executive Order on German technology, has to envisage that he will be subject to claims on the basis of patents which are not even applied for in the United States at the present time. Under these conditions, what patent attorney in this country can dare to advise his client to use the information distributed by the Department of Commerce, unless the client has himself control of the basic patents or is, at least on the basis of his cartel contracts, convinced that he will get the patents under his control.