A Special Court for Patent Litigation?

The Danger of a Specialized Judiciary

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■ In this article, Judge Rifkind answers the recurring demand that a special court for trying patent cases be created. His argument rests on the assumption that judges should be men with a broad outlook upon the law and he declares that creating specialized judges in the patent field would soon lead to sterility in that area of the law.

■ Periodically one hears the suggestion that patent cases should be tried before patent judges. The proposals take a variety of forms but they all revolve about the proposition that the judicial product of patent litigation would be improved if the trials were conducted by judges specializing in patent cases.

I deny this pivotal proposition; consequently I am opposed to patent courts or patent judges.

The highly industrialized society in which we live has a great appetite for "know-how". Such a society elevates and aggrandizes the position of the expert. His is the voice with the ready answer. His opinions become the facts upon which lesser mortals—laymen—risk life and fortune.

Against the citadel of the expert I tilt no quixotic lance. My contention is that the judicial process requires a different kind of *expertisse* —the unique capacity to see things in their context. Great judges embrace within their vision a remarkably ample context. But even lesser men, presiding in courts of wide jurisdiction, are constantly exposed to pressures that tend to expand the ambit of their ken.

The patent law does not live in the seclusion and silence of a Trappist monastery. It is part and parcel of the whole body of our law. It ministers to a system of monopolies within a larger competitive system.

This monopoly system is separated from the rest of the law not by a steel barrier but by a permeable membrane constantly bathed in the general substantive and procedural law. Patent lawyers tend to forget that license agreements are essentially contracts subject to the law of contracts; that infringements are essentially trespasses subject to the law of torts; that patent rights are a species of property rights; and that proof in patent litigation is subject to the laws of evidence. Changes in all these branches of the law today have an effect on the patent law as well. As long as judges exercising a wide jurisdiction also try patent cases, so long do the winds of doctrine, the impulses towards slow change and accommodation, affect the patent law to the same degree as they affect the general body of the law.

In a democratic society the law, in the long run, tends to approach commonly accepted views of right and wrong. Thereby it continues its hold on the respect and allegiance of the people—in the last analysis its major sanction. Once you segregate the patent law from the natural environment in which it now has its being, you contract the area of its exposure to the self-correcting forces of the law. In time such a body of law, secluded from the rest, develops a jargon of its own, thought-patterns that are unique, internal policies which it subserves and which are different from and sometimes at odds with the policies pursued by the general law.

Such conflicts, when they emerge in spectacular form, induce a public cynicism about the law and a sense of injustice. In such a climate the patent system may not fare too well.

Specialized Judiciary Leads to Decadence of Law

Moreover, a specialized patent court would breed other unfortunate consequences. The patent Bar is already specialized. At present, however, patent lawyers practice before nonspecialized judges and accommodate themselves to the necessity of conveying the purposes of their calling to laymen. Once you complete the circle of specialization by having a specialized court as well as a spe-

cialized Bar, then you have set aside a body of wisdom that is the exclusive possession of a very small group of men who take their purposes for granted. Very soon their internal language becomes so highly stylized as to be unintelligible to the uninitiated. That in turn intensifies the seclusiveness of that branch of the law and that further immunizes it against the refreshment of new ideas, suggestions, adjustments and compromises which constitute the very tissue of any living system of law. In time, like a primitive priestcraft, content with its vested privileges, it ceases to proselytize, to win converts to its cause, to persuade laymen of the social values that it defends. Such a development is invariably a cause of decadence and decay.

The root of the matter is that there is a difference between specialization on the administrative level and specialization on the judicial level. On the administrative level there is advantage to be derived from close familiarity with the pattern of activity which is the subject of administrative action and regulation. The very essence of the judicial function, however, is a detachment from, a dispassionateness about the activity under scrutiny.

The views thus far expressed are of general derivation. They are not especially related to the patent law. They are equally pertinent to the admiralty law, to bankruptcy, to security regulation, or any other of the great provinces of the law. The views expressed stem from a conception of the place and function of the law in a democratic society as the arbiter and mediator of conflicting social interests and demands. A one-function court cannot assist the law to discharge that responsibility.

No Benefit Will Be Obtained from Having Patent Court

The patent law itself contributes a number of considerations which weigh against the proposal for a patent court. One of these is that the benefits of expert knowledge which are forecast by the proponents of the change will not be realized in any substantial degree. It is hardly to be supposed that the members of a patent court will be so omniscient as to possess specialized skill in chemistry, in electronics, mechanics and in vast fields of discovery as yet uncharted. The expert in organic chemistry brings no special light to guide him in the decision of a problem relating to radioactivity. Consequently, even judges serving upon a specialized patent court will, in any particular case, prove to be non-experts except only with respect to the patent law itself. But knowledge of the patent law has never presented any grave problem. The patent law presents no greater difficulties to its mastery than any other branch of the law. Reading the judicial literature created through patent litigation I am not aware of any marked deficiency on the part of the present judiciary in comprehending the principles of law relevant to a decision in patent cases.

Another consideration derived from the patent law is that changes in patent litigation have already made the proposal stale. Patent litigation has overflowed its ancient channel. Today one who can navigate only in so called pure patent law is inadequate as a patent lawyer and insufficient as a patent judge. Today patent litigation is most frequently met with in close association with other branches of the law such as unfair competition, trade-marks, confidential submissions, antitrust and corporate reorganizations. It is apparent that the patent expert can be only moderately learned in all these additional departments. It follows that, like most experts, he can bring his special knowledge to bear on the problem but is not especially fitted to perform the judicial task of extracting

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a solution by subjecting the problem to the filtering process of many strata of knowledge.

Very recently, Judge Harold Medina in an address to the patent Bar, widely published, described the distressing experiences he encountered in trying his first patent case. The address was very entertaining as it was meant to be. However, it did not support the inference which some have drawn from it that the cure for such judicial distress is a special patent Bench. Every new judge is confronted by cases in fields of law in which he had not previously practiced. Every competent judge overcomes this handicap of lack of familiarity within a reasonable time. If the patent law has already become so esoteric a mystery that a man of reasonable intelligence cannot comprehend it, then something has gone seriously wrong with the patent law. If that is so--and I do not hold this view—the cure lies in correcting the law, not in tinkering with the Bench.