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# FOREWORD

*Edmund J. Sease\**

## I. INTRODUCTION

Drake University Law School's patent law program began 54 years ago in 1966, the year of the seminal case *Graham v. Deere*.<sup>1</sup> I was in that very first class! Now in the twilight of a career in patent law, I approached Dean Jerry Anderson about a possible special law review issue dedicated to controversial and timely patent law topics. He graciously agreed.

If you read the table of contents of this special patent policy issue, you will see several controversial titles. This is intended. The purpose of this issue is not only to educate but to make you think. We live in an information age where there is a tsunami of information and no hierarchy of what is important and what is not. Our authors cover a series of important topics. Hopefully, you will be entertained and educated, and the articles will make you think: what should the patent law be?

A favorite quote of mine is from *Alice in Wonderland*. Alice, as she runs into the Cheshire Cat, asks for directions. The Cat asks, "Where do you want to go?" Alice answers vaguely and then the Cat responds: "If you don't know where you want to go, then it doesn't matter which path you take."

Here we hope to make you think about which path you want to take, and which path is best for a robust patent system. But, as you might guess, there are many different views of what constitutes a robust patent system. These articles will start you thinking in policy terms, forcing you to step back, take a breath, and direct your mind to policy rather than everyday practice.

If these articles together can measure up to the 37 pages of Laurence Dodd and Francis Crotty's *The New Doctrinal Trend* in the *Journal of the Patent Office Society*, then we have done our job.<sup>2</sup> In that short 1948 article, it was pointed out that unless the direction of the patent law changed, it was getting to the point where Edison's light bulb, Alexander Graham Bell's telephone, Tesla's induction motor, Westinghouse's air brake, and Glidden's barbed wire all would have been declared invalid because of close prior art.<sup>3</sup>

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1. 383 U.S. 1 (1966).

2. See Laurence B. Dodds & Francis W. Crotty, *The New Doctrinal Trend*, 30 J. PAT. OFF. SOC'Y 83 (1948).

3. *Id.* at 83.

Indeed, hindsight was beginning to swallow most inventions. The point was made that without change, some of the world's greatest inventions would have gone to the boneyard of invalidity.<sup>4</sup> The result was the 1952 Patent Act and its definition of obviousness in 35 U.S.C. § 103, which forbids hindsight.<sup>5</sup> The article was republished in the congressional record.<sup>6</sup>

We start off with an article by the Honorable Chief Judge Paul R. Michel (ret.) of the U.S. Court of Appeals for the Federal Circuit and his co-author Matthew J. Dowd.<sup>7</sup> Together, they write broadly and boldly of the transformation of our patent system in the past 15 years from the recognized world leader to a diminished patent system, now ranked much lower with decreased reliability for U.S. patents. It happened through several Supreme Court decisions (on injunctive relief, patent eligibility, and obviousness law), increased uncertainty in antitrust enforcement, and the enactment of the America Invents Act in 2011, which empowered agency practice that too easily takes away granted U.S. patent rights. They warn of the need to strengthen our patent system to improve the U.S. innovation ecosystem and to restore uniformity of application of innovation law.

The second article by Drake's Adjunct Professor of Patent Law, Ed Sease, takes a broad look at the "perfect storm" of seemingly unrelated legal events that have contributed to a weakened patent right, and even provided a huge incentive for some innovators to rely upon trade secrets, not patents.<sup>8</sup> Those events began in 1985 with the presumption of validity and ended with a 2016 strengthened federal trade secret law offering nationwide remedies.

Professor Sarah Hinchliffe, Associate Professor at Long Island University, dives into the depths with an interesting analysis of business method patents, and the fiscal effects of those patents, noting the chaos the U.S. Supreme Court has created in the infamous 2014 case, *Alice Corp. v. CLS Bank Int'l*.<sup>9</sup> Her combined business, economic, and legal skills bring a unique perspective to the issue of business method patents.

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4. *See id.*

5. 35 U.S.C. § 103 (1952).

6. S. Res. 32 on S.643, 1253 and S1255, part 2, 92nd Cong. (1971).

7. Paul R. Michel & Matthew J. Dowd, *From a Strong Property Right to a Fickle Government Franchise: The Transformation of the U.S. Patent System in 15 Years*, 69 DRAKE L. REV. 1 (2021).

8. Edmund J. Sease, *Court Decisions and Recent Legislation Are Creating a "Perfect Storm" Incentive for Inventors to Rely on Trade Secrets, Not Patents*, 69 DRAKE L. REV. 53 (2021).

9. Sarah Hinchliffe, *Class 705 Business Method Patents in the United States: A Study from 1998 to 2010*, 69 DRAKE L. REV. 73 (2021); 573 U.S. 208 (2014).

Finally, Professor Jason Rantanen of the University of Iowa College of Law, and Director of the Innovation Center, and his co-author Madison Murhammer Colon examine the tension between open records laws and patentability as they explore the very real possibility that public university invention records may indeed be legal printed publications, which could be held to be prior art.<sup>10</sup>

Reading this patent policy issue will help you arrive at your own conclusion as to which path patent law should take. I am ever grateful to our invited authors who are all busy practitioners, professors, or both. To divert time away from their busy practices and professional responsibilities to assist in this project was not an easy thing to do. Hopefully, the resulting product is worth it. Our patent law is not carved in stone and must change with the time as experience warrants.

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10. Jason Rantanen & Madison Murhammer Colon, *Can Public Universities Patent Their Research?: The Tension Between Open Records Laws and Patentability*, 69 DRAKE L. REV. 117 (2021).