

Michigan Law Review

Volume 56 | Issue 5

1958

Vaughan: The United States Patent System

Arthur M. Smith

University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Intellectual Property Law Commons](#), [Law and Economics Commons](#), and the [Legal Writing and Research Commons](#)

Recommended Citation

Arthur M. Smith, *Vaughan: The United States Patent System*, 56 MICH. L. REV. 836 (1958).

Available at: <https://repository.law.umich.edu/mlr/vol56/iss5/18>

This Book Reviews is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

THE UNITED STATES PATENT SYSTEM. By *Floyd L. Vaughan*. Norman, Oklahoma: University of Oklahoma Press. 1956. Pp. xvi, 355. \$8.50.

The sub-title "Legal and Economic Conflicts in American Patent History" states the thesis of this book. The title is a misnomer. The United States Patent System is treated casually in the introductory chapter as the "Background of the Problem." This book is concerned primarily with the problems which arise after issuance of the patent. As such it is at best an updated version of the Temporary National Economic Committee (T.N.E.C.) Monograph No. 31, "Patents and Free Enterprise" written by Walton Hamilton and published in 1941.

The disappointing aspect of this book is that the author accepts without questioning the criticisms of the patent system which have been forcefully stated by Professor Hamilton, Justice Douglas, and other voluble critics of the system. One would expect that a book written and published as late as 1956 would include an objective appraisal of the United States patent system since 1941 and would have given recognition to the corrective aspects of the Patent Act of 1952.

The reader should be cautioned that this book is essentially an enlarged brief of an advocate who is attacking the fundamental propositions on which the United States patent system is based. It treats both the real and the imagined abuses which may arise after a patent has been issued to an inventor or his assignee. The author does not seem willing to admit that the Patent law and the Antitrust law each has its own place in our legal system. The Patent laws provide a needed stimulus to invention. The Antitrust laws prevent monopolistic abuses, however they may arise. It is true that uses may be made of patents which violate the Antitrust laws. This book does an excellent job in reporting the cases in which such abuses of the patent privilege have resulted in an antitrust violation. It also shows how the broad remedies available to the courts in such cases have been applied effectively to protect the public interest against such errant patent owners.

No one will deny the validity of the author's proposition in Chapter 1 that there is a need for closing the gap between the administrative concept of "invention" as applied by the patent office and the judicial requirement of "invention." The treatment of this problem in the book is either superficial or is intentionally abbreviated. In either case, it seems inexcusable in a book of this type for an author to disregard the reasons for the existence of such a gap. The Patent Office has been understaffed, it has operated on an inadequate budget, its system of classification has been allowed to stagnate, no incentive has been provided to build up a professional corps of competent and experienced examiners. In addition, the Patent Office has been given no authority, nor does it have the legal machinery available to it, to develop the factual backgrounds on which every court decision is based in which "invention" is in issue. Also, one

important criterion of invention which the courts consider in such cases is "commercial success." In most instances, evidence of commercial success does not come into existence until after the patent has been issued. The inventor, caught between the Patent Office and the courts, has been the real victim. The Patent Office, sensitive to such criticisms, has attempted to apply a judicial "standard of invention" by becoming increasingly strict in its rejections. This has so increased costs to the inventor that it has forced many of them "out of the market." The courts have not defined a "standard of invention" which is susceptible of application by administrative personnel operating within the framework of an administrative tribunal. Congress has not seen fit to legislate a "standard" of patentability except for the provision of "obviousness" in 35 U.S.C., section 103. These are all matters which one critical of the patent system should weigh and appraise before concluding that the patent system needs the extensive re-vamping called for by the "remedies" which the author proposes in Chapter X.

Books such as this perform a service in presenting to the informed reader much data and information. It can, however, be a disservice to the uninformed reader or the student who does not have the necessary background to appraise the criticisms properly and to evaluate the "remedies" proposed.

Underlying both this book and the T.N.E.C. Monograph No. 31 is a basic philosophy which appears to be opposed to the accepted philosophy of the United States Patent System. Perhaps it is time to resolve this basic conflict. Paying "lip service" to the patent system as the author does here, while proposing changes which would in effect abolish its basic concepts, does not seem to be in accord with the constitutional purpose of the patent system.

The author's position seems to be based on the syllogism: Monopolies are bad; patents are a monopoly; therefore patents are bad. Basically all property is a "monopoly," i.e., the right to exclude others from its enjoyment or to fix the terms on which it is to be enjoyed by those who do not own it. The concept that "property" may exist in something as intangible as an "invention" has been a comparatively recent development in the law. Those who, like the author of this book, would restrict patent rights to "independent" inventors as distinguished from "hired" inventors are essentially focusing their attack, not on abuses arising under the patent system, but on the basic legal concept that there can be a property right in an intangible idea.

As a treatise on "The United States Patent System," this book is lacking in completeness and objectivity. As a record of the "Legal and Economic Conflicts in American Patent History" it is a scholarly compilation of data and information useful to those interested in the relationship between the antitrust laws and the patent laws. As an exposition of the author's social and economic views, it is highly subjective.

In short, the book is essentially the brief of an advocate setting forth arguable issues rather than an objective treatise on the United States Patent System.

*Arthur M. Smith,
Professor of Law,
University of Michigan*