

sory licensing is scarcely used. At least there is practically never in any country,⁴⁵⁴ an application for it that succeeds through official action. In England, e.g., there were 5 successful applications in 20 years.⁴⁵⁵ Various students have argued that the law can be effective without enforcements, through patentees obeying its spirit and granting licenses on acceptable terms; but it is hard for the present writer to believe that any law inherently difficult to enforce can be effective if it is practically never enforced. If people act properly it is probably from other motives than fear of a scarcely enforced law.

[467] *Why* is this law, almost everywhere approved, almost never enforced? Simply because it requires too heavy a burden of proof from the complainant. He must be, in the usual case, a manufacturer able and anxious to work a patent, which has remained unworked, or little worked, in his country, or which has been used oppressively, or licensed at too high a price. These claims he must prove; but most of the facts are hid under the hat of his opponent—what the invention is really worth, what plans the owner has for working it, or how much it is worked, or how much if at all the country suffers through importing instead of making it. Furthermore, the complainant must counter the tradition that a patent is property, which its owner is entitled to keep. As Lincoln said, "Possession is 9 points (9/12) of the law." The burden upon the complainant is simply too great. Furthermore, very few are eligible to complain; there are other means to enter that production, e.g., by a consented license; there are other fields to turn to; and that patent is only one of countless things needed to enter a line successfully. One may need other firms' patents too, costly development, know-how, the trademark, goodwill, experience, lower royalties, more capital, alliances, what not.

[468] This much is the clear teaching of the rest of the world's experience: now to apply it to America. Here we are still more devoted to legalism, our litigation is more expensive, our *laissez-faire* tradition of capitalist liberty is stronger, our liking for bureaucratic administration less—so one may expect that the usual compulsory licensing would fail here still worse than elsewhere. It would remain a dead letter, a mere complication of the statutes, often thought of, rarely heeded, and practically never successfully invoked.

[469] But this is not to say that *another kind* of compulsory licensing law, one that would greatly ease the burden on the complainant, might not succeed here. Indeed, the kind our courts invented, compulsory licensing as an abatement and punishment for industrial monopoly, imposed by a Federal court in an antitrust action usually brought by the Government, has become decidedly important, probably more so than all the compulsory license laws in any foreign country. *Business Week*, reviewing the Senate study,⁴⁵⁶ found compulsory licensing involved in 81 of 107 cases between 1941 and 1956; in 31 no patent license was issued, and in most cases few, but in some cases the resultant licenses were numerous and important. The conclusion was that where an industry has been dominated by one company, compulsory license is not a substitute for dissolving the monopoly.

[470] It is quite possible, for aught this writer knows, that a general compulsory license law aimed at various "evils" complained of in various countries, might succeed in America, if the suits were filed, fought through, and from time to time reopened for readjustment not