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**Controlling IP at War: the US Alien Property Custodian and the German
Patents during WWII**

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Intellectual property enforcement requires control mechanisms which are implemented in a variable way and which are highly sensitive to the context. Wars constitute a very special one : not only do they break normal economic circulations but they also lead to a redefinition of the economic regulations once the conflict is over. They constitute turning points, which provide a very interesting field of analysis in order to describe both continuous processes and ruptures. In other terms, beyond the control of intellectual property in times of war, the question is how such an exceptional situation can lead to structural changes.

Such a process of suspension and redefinition of intellectual property took place as early as the First World War. The Versailles Treaty dealt with the industrial property system and confirmed the measures that the US and British governments had taken against German IP during the war. In the United States, the role of the Alien Property Custodian (APC) was particularly important (Wilkins 2004; Steen 2014). The Great War was thus the occasion of an expropriation of US patents held by Germans. This was particularly the case in the field of chemistry.

With the beginning of the new conflict, the APC came back into force, whereas several aspects of intellectual property - in particular the patent system - had been challenged since the 1930s. Nevertheless, the APC policy on intellectual property during WWII was apparently much more intense than in the previous conflict. It allowed the control or even the dispossession of German IP assets thanks to a well organized administration. But, at the same time, the APC policy faced important issues about patent, especially concerning antitrust policy. This paper aims to understand how the patent policy of the APC regarding the German owned patents resulted from an unstable compromise between different expectations: the mobilization of German technical knowledge, the

Americanization of the US industry and the antitrust struggle against the abuse of patents. The first section deals with the origins of the APC and reminds its creation during WWI and the debate about the patent policy during the Interwar period. Section 2 focuses on the policy and the organization of the OAPC during WWII and discusses its results. Section 3 illustrates the contradiction of the APC by examining the policy related to the General and Aniline Firm Corporation.

The origins of the Alien Property Custodian

On October 12, 1917, the Alien Property Custodian was established by an Executive Order under authority of the Trading with Enemy Act, which had been adopted almost at the same time. As in other belligerent countries, some measures were quickly taken about industrial property. However, the importance of patenting within the U.S. economy and the willingness to limit the influence of German industry led to adopt more restrictive provisions. All this policy represented an important milestone when WWII broke out.

The WWI legacy

The early 20th century was characterized by the importance of patent in the regulation of U.S. capitalism. Whereas WWI had begun in Europe, fierce debates and litigations occurred in the US about patent. This situation sometimes made necessary a governmental intervention such as the creation of the Manufacturer's Aircraft Association in 1917, a patent pool set up under governmental pressure. Moreover, the shortage of German pharmaceutical products, which could not be easily imported anymore, made clear that a domestic production was indispensable but needed to use the patents hold by German firms (Steen 2001; Cooper 2012; Steen 2014). So before the U.S. went to war, patents had become a strategic issue.

After joining the war, the U.S. government faced a concrete but difficult problem about

procedures related to patent application. Had he to allow nationals from enemy countries to file patent application? Could he took some measures against their U.S. patents even if there was a risk for retaliation? The Trading with the Enemy Act (October 6, 1917) ensured a compromise between two tendencies. The law provided that any enemy could file a patent application – but also trademark and copyright – and pay for this purpose all taxes provided for. On the other hand, a licensing system was introduced under the auspices of the Federal Trade Commission to exploit a patent. Thus, the Trading with the Enemy Act enshrined a balance between the respect of the enemy's rights and the necessities of the US industry.¹

This balance, however, was broken with the adoption of an amendment to the Trading with the Enemy Act in March 1918. This latter was largely inspired by the Alien Property Custodian, A. Mitchell Palmer, who worked to “the americanization” of German companies. Palmer succeeded to convince president Wilson to pass through Congress a bill authorizing him to sell the companies placed under receivership. A last obstacle, however, had to be lifted because the Department of Justice had expressed doubts about the legality of such a seizure of patents. On November 4, 1918, a new amendment to the Trading with the Enemy Act was approved and promulgated and allowed the sale of the patents seized. A few weeks later, the APC sold the US Bayer subsidiary and its 1 200 patents to the Sterling Products Company of Wheeling for more than \$ 5 million.²

During the Inter-war period, the role of the APC during the First World War was subject to fierce criticism. In 1919, the sale of approximately 4 800 German owned-patents to the Chemical Foundation occurred for only \$250.000 whereas this patent portfolio was much more valuable. Besides, the WWI APC policy did not prevent German firms from

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- 1 US Congress, « An Act To define, regulate, and punish trading with the enemy, and for other purposes », *United States Statutes at Large*, 65th Congress, 1st session, chapter 106, 1917, p. 411.
 - 2 US Alien Property Custodian, *Alien Property Custodian Report*, Washington, Government Printing Office, 1919, p. 186.

taking back the control of their own interests, especially concerning industrial property. In 1934, the APC was integrated to the Department of Justice as the Alien Property Bureau. When WWII broke out, the APC experience during the previous conflict would appear as an example not to follow.

The debates on patents during the Inter-war period

These controversies about the APC were followed by fiercer debates concerning the patent themselves. The use of patents by big firms to establish dominant positions appeared to be more and more abusive. In 1930 the Department of Justice sued Radio Corporation of America, General Electric, Westinghouse and AT & T to force them to end with their agreement on patents (Barnouw 1966, 1:252; Hart 1998, 54). In 1931, the Supreme Court judged the case *Standard Oil of Indiana Co. vs United States*, which had been initiated in 1924 by the US government against an alleged monopoly on gasoline based on patent contracts. Although the Supreme Court ruled against the US government, its decision was ambivalent and could be understood as an invitation to closely examine the effects of patent contracts on competition. In 1932 several bills were introduced to reform the legislation but these attempts remained unsuccessful³.

During the New Deal, patent reform continued to be the leverage of anti-trust action (Hart 1998, chapter 4). Some attempts were made on the legislative field. In 1935, a bill providing for patent pooling agreements and contracts with the Commissioner of patents was introduced by William I. Sirovich, Representative from New-York, and led to important hearings⁴. Three years later, William D. McFarlane, Representative from Texas, had a same initiative in order to create a general compulsory licensing system. Although he tried to modify his project slightly in a second version, McFarlane's project

3 *General Revision and Amendment of the Patent Law*, Washington, Government Printing Office, 1932.

4 *Pooling of Patents. Hearings before the Committee on Patents, House of Representatives, Seventy-Fourth Congress, First Session on H.R. 4523, a Bill Providing for Patent Pooling Agreements and Contracts with the Commissioner of Patents*, 1936.

gave rise to a so strong opposition that it resulted in a real fiasco⁵.

However, the administration continued its struggle against the abuse of patents and in 1938 the Assistant Attorney General Thurman Arnold, in charge of the Antitrust division of the Department of Justice, was asked by the Temporary National Economic Committee (TNEC) to investigate about the patent system. Arnold's investigations were taken into account in the final report of the TNEC, which was published in 1941 and required the mandatory licensing of patents at fair prices (Waller 2004). But anti-trust patent mobilization were not limited to legislative initiative: it had also implications in courts. In December 1939, Arnold initiated an action against the glass-maker firm Hartford-Empire, which was accused to have created a cartel in the glass container industry thanks to a broad license contracts systems. On the eve of WWII, "patent battles" had already begun⁶. Controlling patents had thus several meanings : preventing the abuse of patents by big firms and also controlling the German influence on the US industry in the context of war.

Controlling Enemy Patents

Accordingly, the role of the APC during WWII depended on two different stakes : the control of enemy patents, which could help to the Americanization of the US industry, and also the quest of a new regulation against patent monopolies.

Defining a policy

The Trading with the Enemy Act of 1917 gave to the President of the United States the right to "investigate, regulate, or prohibit" different kinds of transactions during a conflict. However, the First War Powers Act, which was put into law on December 18,

5 Compulsory Licensing of Patents. A Legislative History. Study of the Subcommittee on Patents, Trademarks, and Copyright of the Committee of the Judiciary. Washington: Government Printing Office, 1958, p. 15.

6 "Patent Battles Begin", *Business Week*, December 16, 1939, 18-20 quoted by Hart, 1998, 91, n. 18.

1941, reinforced these presidential prerogatives. In February 1942, some of them were delegated to the Secretary of Treasury, who began to vest some enemy interest such as 97% of the shares of the General Aniline and Film company (GAF), the US – indirect – subsidiary of the German chemical firm IG Farben. On March 11, 1942, Executive Order No. 9095 established the Office of Alien Property Custody (OAPC) and four months later a new Executive Order no. 9193 specified its prerogatives, which would also deal with patents, copyright and trademarks.⁷

In April 1942, President Roosevelt took the opportunity of a press conference to give his intentions about this patent policy. His purpose was to make freely available for war production and national needs all patents which were controlled either directly or indirectly by enemies. When he was asked about bona fide American patents that were pooled with enemy-patents, Roosevelt had this very pragmatic answer:

“Well, my idea is we take everything we need, no matter what the technicalities are. The first thing to do is to win the war”⁸

Leo T. Crowley, had been nominated on March 11, 1942 as the new APC despite Secretary of Treasury’s opposition (Weiss 1996, chapter 8). He was all the more ready to implement such a policy so since he was a key actor of Roosevelt’s administration. In the early 1930s, his action at the head of the Bank of Wisconsin had been noticed by Roosevelt so that he had been nominated chairman of the Federal Deposit Insurance Corporation (FDIC) in 1934 (Weiss 1996). During the 1936 and 1940 elections, Crowley supported actively FDR and reinforced his place into the administration. His authority became stronger just after the US went to war since he held until 9 government positions. Being the new APC, Crowley benefited a strong institutional position, especially concerning the relation to other departments such as the Department of Justice.

7 *Federal Register*, vol. 7, no. 131, July 9, 1942, p. 1.

8 *Public Papers of the Presidents of the United States: F.D. Roosevelt, 1942*. Vol. 11. New-York, Harper, 1950, p. 213. The press conference took place on April 21, 1942.

The task however remained overwhelming. In a testimony given to the US Senate Committee on Patents, Crowley recognized that he ignored “the size of the problem [...], exactly how many enemy owned or controlled patents are of subject to vesting, or which of these are important and which are of relatively little significance”⁹ Despite this situation, he suggested six aims for his policy : 1°) taking possession of all enemy owned or controlled patent as rapidly as possible, 2°) breaking any restrictive holds about these patents, 3°) making these patents freely available to American industry, 4°) permitting vested corporations to remain their patents and to manage those of their patents which were necessary and useful to their business, 5°) considering the possibility of turning seized patents to a Government-owned and operated corporation, 6°) using the income deriving from patents in order to finance the control itself but also research projects.

If these principles looked quite clear in Crowley’s statement, it appeared that the definition of patent policy was actually much more complex. As suggested by the weekly reports of the APC Patent Administration Division, at least five months were necessary to write a patent policy statement, especially because the patent policy of corporations under APC control required some negotiations.¹⁰ This time span can be explained by the tension which still existed about the issue. In February 1942, senators O’Mahoney, Bone and LaFollette had introduced a new bill in order to give to the President the power to grant a license for any patented production which could be in the interest of national defense or of the prosecution of war. At last, the war context provided the opportunity to change the patent law even in a limited scale but, on the

9 *Hearings before the Committee on Patents, United States Senate, Seventy-Seventh Congress, Second Session, on S.2303, a Bill to Provide for the Use of Patents in the Interest of National Defense or the Prosecution of the War, and for Other Purposes.* Washington : Government Printing Office, 1942, 27 April, p. 1182.

10 NARA, RG 131, , Progress Report of the Patent Administration Division, especially October 3, November 2, December 15 1942. On October 3, a draft was submitted to the Custodian and to the members of the Executive Committee. On November 2, the statement was reported to be redrafted. On November 7, some discussions on the patent policy of corporations are mentioned and also discussion between “the Chief” and the representatives about Swiss Embassy about the GAF patents. On December 7, the statement was sent to President Roosevelt.

other hand, such temptation was counterbalanced by those who were attached to maintain intact the US patent system.

In January 1943, the policy statement about patents was published at last by the APC and spread on a large scale.¹¹ Its principle was quite clear:

“National policy clearly dictates that this Government should seize, and turn to the advantage of all its citizens, rights to the discoveries of our present enemies which have been protected in this country by patents issued by an agency of this Government. Accordingly, title to United States patents and patent applications owned by the enemy is being vested in the name of the United States Government.”¹²

For the APC, these patents should be available readily and immediately to serve all American industry by licensing, by using the technical knowledge embedded in these patents or by encouraging research on the inventions. Actually, the American industry was invited “to put to work patents formerly owned by the enemy.”¹³

Such a statement echoed implicitly a criticism against the abuse of patents in general. Putting enemy-owned patents into work meant that some patents had been usefulness. Of course, this dealt with “the very patents by which [the] enemies hoped to keep exclusive control of many manufacturing and scientific fields.”¹⁴ The embezzlement of patents, which had made enemies capable of impeding war production, was denounced but, at the same time, the limitations of the US patent system, which had made this situation possible, were implicitly recognized. This was the reason why “the free licensing policy of this Office [was] designed to prevent the use of patents or licenses under its jurisdiction to further any monopoly or cartel contrary to national interest.”¹⁵

11 *Patents at work. A Statement of Policy by the Alien Property Custodian of the United States*, January 1943.

12 *Ibid.*, p. 5.

13 *Ibid.*, p. 2.

14 *Ibid.*, p. 22.

15 *Ibid.*, p. 18

Table 1: The OAPC licensing policy (source : *Patents at Work*, January 1943)

	Enemy patents and patent applications not exclusively licensed to American industry	Non-enemy patents and patent applications not exclusively licensed to American industry	Patents exclusively licensed	Patents held by corporations supervised or controlled by the Alien Property Custodian
License application fee	\$50 for each single patent, plus \$5 for each additional related patent to be covered in the same license		Any American exclusive licensee can retain his sole right to exploitation of the patent. The royalties are paid to the OAPC. In case of war production necessity, possibility to deliver additional licenses.	<i>Ad hoc</i> policy Management of these patents by the management of these corporations, in accordance with broad policies laid down by the OAPC
Beneficiary	Any reputable American firm or individual			
Exclusivity	Non exclusive / non assignable			
Royalties	Royalty-free	Royalty-free for the duration of the war. Reasonable post-war royalties		
Duration	The life of the patent			
Reporting	Annual report to the APC			
Revocability	Revocable for failure to live up to the license agreement			

Actually OAPC “free licensing policy” was less clear than its stated principle (see table 1). If licenses could be delivered for every enemy-patent which had not already been licensed to American industry, two important reservations were adopted. In the case of exclusively licensed patents, the American patentee could keep his exclusive license by paying royalties to the OAPC. If the OAPC reserved its right to deliver additions licenses in case of war production, the initial licensee’s interests were preserved. The case of vested corporations was more essential. The management of the vested or supervised corporations kept the control of their patents “in the legitimate interests of these corporations and of their American shareholders”, who had to be preserved. Although this direct administration had to be compatible with the OAPC

policy, these corporations had flexible leeway for adopting their own licensing policy. Actually the patent policy of the OAPC was an asymmetrical one.

Building an Organization

Such a control of “enemy patents” required a strong organization and several OAPC entities were in charge of this patent policy. Legal issues about patenting in the war context were studied by two sections of the Office of the General Counsel: the Legislative Section – which became the Legislative and Patent Problems Section from July 1, 1944 – and the Corporate Owned Patent Section. The General Counsel was first A. Matt Werner and then Raoul Berger, who had been Special Assistant to US Attorney General and member of the OAPC from 1942.

Two other operative entities were responsible for the control itself. Within the Division of Investigation and Research, which was managed by the economist Homer Jones, almost 200 members conducted inquiries about property subject to the authority of the OAPC. The Patent Section was one of its three investigative sections and controlled activities related to patents but also to copyright and trademarks. Moreover, the Research section of the Division of Investigation and Research played an important role by providing advice and analysis of policies questions to the APC and by representing him on different committees, especially concerning the patent policy of the OAPC.

The administration of vested patents was addressed by the Division of Patent Administration, which, with more than 100 employees, one of the largest OAPC divisions. A large part of the almost 800 employees of the OAPC worked on the patent policy, which was an essential issue for the office.

Ambivalent Outcomes

Torn Control : The contradictions of APC patent policy

The heterogeneity and ambiguity of the control by the OAPC was particularly obvious for enemy patents held by the vested companies. In this respect, GAF was an emblematic case. In the 1930s, American IG Chemical, the US subsidiary of a Swiss affiliate of IG Farben, controlled several US firms, which were the depository of its own patents. At the beginning of WWII in Europe, American IG Chemical changed its name to that of General Aniline and Film (GAF) corporation. A few months later, in the spring of 1940, IG Farben sold nearly 800 of his patents to the GAF in order to avoid possible seizure by the American authorities. GAF controlled also other IG Farben's patents through its control on other subsidiaries (O'Reilly 2006).

Who controls GAF patents?

After the US entered the war, the Secretary of the Treasury, by virtue of powers temporarily delegated by the President of the United States, had seized the GAF (16 February 1942) and set up a new Executive Board. GAF's portfolio represented more than 3900 patents and was considered more important than the other 40,000 patents under the OAPC's control¹⁶. Thus, the new direction quickly addressed the issue of patents and established its own policy on the subject:

- “1. All patent holdings will be available for licensing for war requirements upon request of the proper Government authority.
2. Patent rights in these fields in which General Aniline and Film corporation is not actually engaged will be offered to American industry for licensing on reasonable terms and royalty so that most effective use may be made of the inventions covered thereby and in the many and varied phases of war production.
3. Patent rights in these fields in which General Aniline and Film Corporation is actually engaged will also be granted by it for the duration of the war on reasonable terms and royalties to responsible and capable licensees. The income which the Corporation derives from such licenses will be used, during the war period for further research directed toward the successful prosecution of the war.”¹⁷

16 Hoover Institution, Fritz Machlup papers, Box 277, folder 3, “Government-Wide Activities concerning Captive Patents of Vested Corporations – especially GAF” [thereafter “Government-Wide Activities”], excerpt of Homer Jones memorandum, February 5, 1944, p. 56.

17 “Government-Wide Activities”, excerpt of GAF's report, May 5, 1942, p. 32.

Appointed APC in the meantime, Leo T. Crowley opposed this policy being endorsed and published. For him, the management of the GAF had to comply with APC's general principles, which aimed to make these patents easily available to the American industry. In November 1942, Crowley asserted to President Roosevelt himself that GAF had to respect the government's intentions. GAF, for its part, argued that a general availability of patents would put the company at the mercy of its rivals in a very competitive context. These negotiations, as we have seen, resulted in the compromise expressed in the brochure *Patents at Work*.

However, other administrations put pressure on GAF leadership. In June 1943, the Department of Justice suggested adopting compulsory licensing of GAF patents¹⁸. The GAF management then expressed its strong opposition and continued to pursue its own policy. However, these latter did not really comply with APC purpose since in September 1943 GAF had granted only one license. Another front was opened against the GAF patent policy regarding the contracts which had been concluded with IG Farben in 1940 in order to sell its patents. In December 1943, the Interdepartmental Committee on Private Monopolies and Cartels adopted a program to seize patents subject to such illegal contracts. This program did not target only GAF but also the head of the APC, who was increasingly sensitive to GAF arguments. This change in attitude was reinforced when Crowley left and was replaced by his deputy James E. Markham on March 27, 1944.¹⁹

The tension between the APC and other agencies grew with the creation of the Executive Committee of Economic Foreign Policy in April 1944. One year before, a Committee on Post-War Economic Foreign Policy had been created and its Steering Committee had set up a Special Committee on Private Monopolies and Cartels. The increasingly influence of the Committee on Post-War Economic Foreign Policy led to a reform in April 1944 and the Committee was transformed into the ECEFP, which took

¹⁸ Hoover Institution, Fritz Machlup papers, Box 277, folder 4, "Chronology of Developments concerning Captive Patents of GAF", [May 1946], p. 1.

¹⁹ James E. Markham became APC on March 27, 1944. He was a former counsel of FDIC.

over the work of the Committee on Private Monopolies and Cartel (Cartel Committee). One of its goals was to struggle against German participation in international cartels and combinations.

This Cartel Committee quickly took up the question of illegal contracts and, more generally, of patents. In the autumn of 1944 he started to examine the APC policy and in April 1945 sent a memorandum to the ECEFP on the generalization of non-exclusive licenses as one means of ending the cartels dominated by the Germans²⁰.

This memorandum constituted a real challenge to the APC policy about “captive patents” – ie the patents controlled by vested companies – and GAF ones. Throughout 1945, Markham tried to convince the ECEFP to renounce to its policy of general licensing.

But, in fact, Truman's arrival in the presidency changed the situation. As the former chairman of the Special Committee to Investigate the National Defense Program (so called “Truman Committee”), Truman had been sensitized to the issue of patent abuse. In June 1942, he had already denounced the behavior of Standard Oil of New Jersey, which had helped IG Farben to protect its patents (Wilkins 2004, 533). When Truman came to the White House, he quickly initiated a reform of the patent law and invited the Secretary of Commerce to carry out an investigation in this direction.²¹ Challenging OAPC's policy on captive patents resulted not only from the ECEFP objective to dismantle German cartels but, more generally, from the desire to combat patent abuses by the big firms.

This change in the balance of power explains why Markham failed to convince Truman to end the ECEFP approach. On February 7, 1946, Truman decided in favor of the ECEFP, which had been also supported by the Secretary of State. Finally, the ECEFP policy drew a distinction between the firms wholly-owned and those only partially-owned by the APC. On the one hand, all patents had to be vested and licensed for an

²⁰ “Government -Wide”, p. 134.

²¹ Harry S. Truman: "Letter to Secretary Wallace Requesting a Study of the Patent Laws.," April 26, 1945. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=12372>.

nonexclusive royalty-free basis; moreover any exclusive license had to be removed in order to make possible their most widespread use. On the other hand, all patents acquired by vested firms through cloaking transactions, such as the IG Farben ones in 1940, had also to be licensed on a nonexclusive royalty-free basis. Vested companies had also to be used in order to make unvested interests follow the nonexclusive royalty-free patent policy²². Such a policy, which had been the result of a conflicting process, was a step toward the adoption of London Patent Accord in July 1946, which aimed “either 1°) to put at the disposal of the public or to throw into public domain all existing patents which belonged to Germans and were in their possession or under their control according to their legislation or 2°) to grant royalty-free licenses to nationals” (Ladas 1975, 1836).

From division to treason ? Opening APC blackbox

The tensions within the US administration over the control of German patents resulted from antagonist positions regarding anti-trust measures, from divergent analysis of the situation depending on actor’s disciplines – the opposition economists vs lawyers looked important – and maybe from obscure political reasons, which remain to be highlighted. However, they not only opposed the institutions to each other, but they opposed people within these latter, especially within the OAP. In the fall 1943, when the Cartel Committee began considering the introduction of an anti-cartel program, Homer Jones, assisted by Victor Abramson, Aaron Director and Fritz Machlup, prepared a memorandum describing how the OAPC could contribute to such a plan²³. This initiative showed that some OAPC members defended an anti-monopoly line. Soon after, in July 1943, “a clear split on the vesting issue began to appear among the Custodian's aids”²⁴.

22 “Terminal Report [of the] Office of Alien Property Custodian”, October 1946.

23 “Government-wide”, p. 110.

24 “Government-wide”, p. 54.

Actually Jones, Abramson, Director and then Machlup were linked by strong personal and/or intellectual affinities. In the 1930s, Jones had taught at Rutgers University – where he was Milton Friedman’s mentor – before working for the Federal Deposit Insurance Corporation in Washington DC. As one of Frank Knight’s former students, Jones had been involved in the famous economic debate on capital theory, which opposed Knight to Friedrich Hayek and some other Austrian economists in the mid-1930s (Caldwell 2004; Emmett 2009). Victor Abramson was also an economist. He had been a research fellow at the Brookings Institution and then member of its staff until 1940. From 1941, he became economic adviser at the Office of Price Administration and then at the OAPC (Abramson 1948). Aaron Director was also an economist who had taught at the University of Chicago from 1930 to 1934. Being in England in 1937, he had befriended Hayek (Emmett 2010, 265). These intellectual and personal connections were completed by familial ones since Director’s sister married Milton Friedman in 1938.

Last but not least, the last comer in this team played an important role. Born in 1902 in Austria, Fritz Machlup was trained as an economist at the University of Vienna, where he obtained his PhD in economics in 1923 under Ludwig von Mises’ supervision. There he participated to his supervisor’s seminar with Friedrich Hayek, who became his friend. In 1933, he obtained a Rockefeller fellowship and came in the US before being appointed by the University of Buffalo in 1935.²⁵ In the early 1940s, Machlup was more and more interested in the problems of monopoly and had the project of studying patents. This is precisely because of this interest that Jones suggested him to join the OAPC :

“ It occurred to me that because of your work on patent problems and knowledge of European economic organization you might be especially interested in that part of our work related to the renegotiation of patent contracts, the restoration a maintenance of competition in industries in which there are important vested

25 Hoover Institution, Fritz Machlup papers, Box 3, folder 2, application for federal employment.

properties, and post-war requirements for the restoration of international trade and investment.”²⁶

Machlup was hired by the Office as a consultant in July 1943 and as the chief of the Research section from September 1943. In late 1944, Homer Jones went back to the FDIC as its Chief of the Division of Research and Statistics and became also director of the Clearing Office for Foreign Transaction and Reports of the Foreign Economic Administration, which Leo Crowley took the head in September 1943²⁷. Under that circumstance, Machlup became Acting Chief of the Division of Investigation and Research from December 1944 to February 1945, when the Research Section was transformed into a specific division entrusted to him. In late September 1946, just before the termination of the OAPC, Machlup resigned from his function.²⁸

The divergence of opinion between economists and the head of the OAPC degenerated into tensions in the second half of 1945. At this moment, the Cartel Committee strengthened its position in favor of extended licensing of captive patents and of challenging illegal contracts. In September 1945, Abramson, who was the principal economist of the patent contract section, considered that “there [were] no serious legal impediments to initiate a program of cancellation or renegotiation of the vigorous illegal patent contract”.²⁹ The lack of real initiative in this matter was regarded as genuine sabotage by certain members of the Office³⁰. By the autumn 1945, the tension had increased considerably, while the ECEFP had been asked by the Cartel Committee to re-examine its positions. Raoul Berger, General Counsel of the Office, did his utmost to impose his own presence on the Cartel Committee and to weaken that of Machlup, whose position was seen as contradictory to his own.

26 Hoover Institution, Fritz Machlup papers, box 3, folder 2, letter from Homer Jones to Fritz Machlup, March 25, 1943.

27 Hoover Institution, Fritz Machlup Papers, box 3, folder 2, memorandum from Homer Jones to the staff, November 30, 1944.

28 Hoover Institution, Fritz Machlup Papers, box 3, folder 2.

29 Memorandum from Victor Abramson to Howland H. Sargeant, “Report of the Subcommittee on APC treatment of Patent and Technology”, September 11, 1945, quoted in « Government-Wide », p. 168.

30 “Government-wide”, p. 89.

This led to a violent conflict, which carries important lessons (appendix 1). First of all, the OAPC economists had in fact invested the Cartel Committee to circumvent the internal resistance against a policy of opening captive patents. Second, there was a strong antagonism between the economic approach in favor of the abolition of monopolies and a much more conciliatory legal approach. Third, Markham's role appeared more and more ambiguous. After Truman's decision in favor of an open policy, Markham adopted what appeared as an obstructive attitude.

All the documentation reveals the lack of understanding and even the suspicions inspired by the wait-and-see attitude of the OAPC. In June 1946 Machlup sent a memorandum to himself expressing his reservations about Markham's proximity to IG Chemie's lawyer John J. Wilson. Anxious to prevent IG Chemie from suing the US government under Section 9 of the Trading with the Enemy Act, Markham wishes to pledge to the management of IG Chemie his proper management of the GAF. In May 1946, he planned to communicate to Wilson internal documents of the Office. On this occasion, Machlup told him of his fierce opposition by saying in substance: "Jim, I believe that you are engaging in trading with the enemy. Do not forget that we have always considered I.G. Chemie a cloak of the German I.G. Farben-industry. If you do not know what to do with the enemy."³¹ Although such reservations did not prevent president Truman from praising Markham's integrity when the OAPC was reinstated in the Ministry of Justice in October 1946, this episode illustrates how the entity in charge of the control of the German patents was far from being a monolithic organization.³²

Conclusion

Much work remains to be done to understand the issues related to the control of industrial property implemented by the PCA during WWII. This work is all the more

31 Box 277, folder 4, memorandum from Fritz Machlup to himself, June 24, 1946.

32 Harry S. Truman: "Letter to James E. Markham Upon the Conclusion of His Duties as Alien Property Custodian.," October 14, 1946. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=12525>

necessary because these issues are linked to even greater stakes such as the relations maintained by certain American companies with Germany during the conflict, for example, or as the evolution of economic relations between Switzerland And the United States after the war. Despite these limitations, it is possible to draw some provisory conclusions about the control of German patents.

The first conclusion is methodological. It is necessary to open the black box of this control not only to understand all the issues at stakes but also to be able to analyze the chaotic process of its implementation. In other words, this involves opening archival boxes, crossing the various available printed sources and putting the actors in context. In short, to make history.

Such an approach makes it possible to understand that the control of German patents during WWII was thought of in relation to what had happened during the First World War and the scandals that followed. Moreover, the war was for some actors the means of pursuing their own political objectives by other means. So is anti-trust policy, for example. In fact, the control of German intellectual property was also a means of achieving control - and reform - of US intellectual property. Legislative initiatives subsequently confirmed this conclusion.

Finally, a detailed analysis of this policy prompts us to question the weight of this experiment on economists with a liberal tendency towards their conception of intellectual property. This will be the subject of another project.

Appendix 1

“It became quickly apparent that Mr. Berger and Mr. Shaulin had attempted to scheme against my work in the Committee. This became quite clear to me when Mr. Markham told me once that it was Mr. Berger’s feeling that I should take him, Berger, along to the Cartel Committee meetings. Mr. Sargeant joined me as in a discussion with Mr. Markham, in which I made it clear that Mr. Berger would probably antagonize the whole Committee and create hostile sentiment against the APC. When Markham suggested that I could take M. Julius Cohen, then a lawyer in General Counsel’s office, to the meetings, I pointed out that the whole Committee discussions had absolutely no legal contents or implications, that I was serving on the Committee as an economist and because of my expert knowledge of the problems of cartels and monopolies and that lawyers had no business in the formulation of purely economic policies. Mr. Markham accepted these explanations.

It didn’t take long until Mr. Berger called me up on the telephone and told me that it was the Custodian’s wish (sic) that he accompany me to the Cartel Committee meetings. I answered that this was ill-tempered and said that if I didn’t believe him he would see to it that the Custodian would give it to me in writing that Berger should accompany me to the meetings. (Of course such a thing never happened.) He went on to say that he felt it was a very abnormal situation, that the APC should be represented in the State Department by a person who had views from the Custodian on important matters of policy. My reply to this was, in substance ‘I am astonished to learn that the Custodian had a policy on captive patents. I had been led to believe during the past years that it was nothing but legal obstacles which prevented the Custodian from applying to captive patents the policy which was adopted for loose patents. Over and over again I had been assured by Berger and Markham that the legal rights of minorities and other legal matters were the only explanation for our failure to open up the captive patents.’ This gave Mr. Berger a short pause, but he recovered and answered, in substance: ‘I, too, believed for a long time that merely legal reasons were behind our inaction concerning captive patents. During the past few weeks, however, I have become convinced that Mr. Markham did have a policy and that it was his policy to leave the patent position of GAF position intact or even to strengthen it.’ I said that this was new to me but that nevertheless I saw no reason to have economic expert accompanied by the legal expert”³³

33 Interview with Fritz Machlup, March 14, 1946 quoted in “Government-wide”, p. 194-195.

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