Preface

The word ‘patent’ does not appear in its title yet the Statute of Monopolies, passed by the English Parliament in 1623, is the mother of modern patent law in all common law countries. It became law in 1624 near the end of the reign of James I,¹ at a time when Parliament was asserting its political independence of the King and dealt with one of a number of issues that contributed to the growing tension between them and, ultimately, the King’s heir, Charles I.²

When James I inherited the throne of England and Ireland in 1603 on the death of Elizabeth I,³ he also inherited her dislike of Parliamentary interference. He considered himself divinely appointed and resented Parliament’s claim that he was subject to its law; he dissolved it eight years later in 1611. Unfortunately for him, since Edward III had been forced to concede the royal prerogative power of taxation to Parliament in April 1341, his ability to replenish his treasury was restricted and so he, like his predecessor, sold monopolies, titles and other offices (including judicial offices) as a means of overcoming the fiscal consequences that came with this political independence. In time his excessive spending and the economic impact of the abusive monopolies, which his exercise of crown privileges created, led to his growing unpopularity, and with England in recession he begrudgingly recalled Parliament in 1621. This time however the parliamentarians were not in a forgiving mood; they realized that as long as the King had the power to finance his treasury without recourse to taxation, by bestowing monopolies as he saw fit, not only did he have the power to distort prices and the availability of commodities at will, but he could, as he had done for 10 years, rule without Parliament. This option was no longer acceptable to the Puritan parliamentarians, whose vision for England had no place for the powers expected by James I.

Regrettably the war of words begun between James I and Parliament was to end badly for Charles I, who, lacking his father’s judgement, took the argument with Parliament into the battlefields of England. Having started a civil war against Parliamentary forces in 1642, when he lost in 1645 he refused to negotiate a power sharing agreement with Cromwell. Instead, during his captivity at Hampton Court Palace and, after a failed escape, at Carisbrooke Castle on the Isle of Wight, he preferred negotiating with the Scots, who promptly avenged him with a second civil war. This
was to seal his fate. Failing to triumph in battle, in 1648 he was handed over to the Parliamentary army, placed in custody, charged with treason, tried, convicted and finally publicly executed at Whitehall on 30 January 1649 as a traitor. He died holding the firm belief that as King he was accountable to no man, no court and no Parliament and that, as a divinely anointed agent of God, he was answerable to no law other than His. Charles I’s execution had a profound impact upon England, leading not only to the formation of a republic, albeit briefly, but to reforms in the law and the system of justice. With the Restoration of Charles II to the throne in 1660, many of those reforms were disposed of, but never again would an English King raise his standard against an English Parliament.

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With this brief glimpse into the political scene that existed around the time of the Statute of Monopolies, it is worth emphasizing that the modern Anglo-American patent systems that are its progeny are intimately connected to these events. Although the present politics and economics of the world are unquestionably unique, the history of the origins of the patent systems provides useful insights into their constructions, purposes, objectives and, most importantly, limitations. Modern proponents of patents will often refer to only one objective: a reward for those who have disclosed to the world an invention. They cite this as if all other objectives of these patent systems are irrelevant. They ignore or are ignorant of their history. They suggest that the term ‘invention’ even extends to naturally occurring biological materials that have been removed from their natural environments – that is, isolated. They claim ‘anything under the sun made by man’, including a genetically modified organism, is an ‘invention’ – because in 1980 the US Supreme Court held in the famous case of Diamond v Chakrabarty that a genetically modified bacterium, a life form, was properly the subject of a patent under US patent law. They also argue that it is right to patent even isolated human genes or gene mutations, that is those genes which are linked to human illnesses such as cystic fibrosis and breast and ovarian cancer. They say that without patents the risky and expensive research and development needed to compensate investors in the pharmaceutical and biotechnology industries would evaporate. But are they right? Louis Pasteur, Joseph Lister, Alexander Fleming, Howard Florey, James Watson and Francis Crick, to name a few, are persons of science whose discoveries and work were risky and time-consuming, yet they did not patent the results of their humanitarian work (although Pasteur was awarded US patents for inventions relating to beer production). Pasteur discovered that bacteria transmitted infection and developed methods
Joseph Lister discovered that carbolic acid could be used to sterilize surgical equipment, wounds and surgeons’ hands; Alexander Fleming observed that a fungal spore killed a bacterium and named this natural substance ‘penicillin’; Howard Florey pursued Fleming’s research to develop penicillin as a medicine; James Watson and Francis Crick produced a model of the molecular structure of DNA. Each have been revered for their breakthroughs in science, yet each of them was hardly motivated by the promise of a patent. In commenting on how the patent system has motivated inventors, Christine MacLeod and Alessandro Nuvolari noted that during the nineteenth century ‘in Britain one could become a “great inventor” without obtaining a patent’, and speculated, ‘it may owe something to the high esteem in which the British held public-spirited inventors who foresware intellectual property rights, thereby enhancing their reputation as disinterested benefactors’. Pasteur was buried in the Cathedral of Notre Dame, but his body now lies in the Institute Pasteur, a research institution established in his honour; Lister was made a Baron by Queen Victoria; Fleming was Knighted by King George VI and shared the Nobel Prize with Florey and Chain; Florey was made a Baron by Queen Elizabeth II; and Watson and Crick were awarded the Nobel Prize. Each of them made contributions to science and humanity, improving and saving the lives of millions. We, and future generations, owe a great deal to each of them, but had they faced the multitude of patents that face medical and scientific researchers today – patents over genes, non-genes, gene mutations, and other biological materials – would they have been free to undertake their work, to make their discoveries?

As the economic fortunes of countries and empires have waxed and waned, the walls of protection around each have gone up and down. Patents have long held a traditional role as a tool for sovereignties and governments to assist in the protection of economies; yet as the post-World War II world has firmly entered the era of free trade, the monopolies which patents create sit on the landscape like crumbling ruins of a bygone age. For many decades prior to this modern era, passionate legislative debate about the patent system was a colourful feature on both sides of the Atlantic, but this has quietened to an uneasy hum as a new patent paradigm has emerged – no longer seen as a protectionist tool, the monopoly has assumed the role of a legitimate reward for innovation, granted increasingly to multinational corporations which paradoxically hold no allegiance to any one country. And as new technologies enter the field these monopolies are now automatically granted, even when innovation is hard to discern. The once-limited monopoly of the traditional patent can now be manipulated to cover too widely and for periods many times longer than
deemed appropriate. Yet there is disquiet among legislators, the judiciary, scientists and academics alike over the role that patents play in the free-trade world, and indeed they are torn over whether they should play any role at all, as the far-reaching consequences of patents are being felt.

This book seeks to trace how we have arrived at this situation, re-examining within their historical and economic contexts the legislative debates and key judicial arguments that the patent community now dismisses as historically quaint and irrelevant, convinced as it is of the patent’s legitimacy and permanency while its eyes are firmly fixed to the future. But there are strong lessons to be gleaned from turning over the debates of the past, especially for the developing world that, too, is being swept along by the enthusiasm for patents, either willingly or forcibly through international treaty, and it is this fast-growing sector that the author hopes will also find salient truths.

NOTES

1. 1566–1625; reigned as James VI of Scotland from 1567 and as James I of Great Britain from 1603.
2. 1600–1649; King of England, Scotland and Ireland, 1625–1649.
3. 1533–1603; Queen of England and Ireland, 1588–1603.
4. 1630–1685; King of Scotland, 1649–1660; King of England, Scotland and Ireland, 1660–1685.
9. Ibid.