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Samuel Tanner Lowe
University of Georgia School of Law

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WESTERNGECO AND THE PATENT ACT: AN ANALYSIS OF THE PATENT ACT AND THE PRESUMPTION AGAINST EXTRATERRITORIALITY

Samuel Tanner Lowe[1]

[1] J.D. Candidate, 2020.

I. INTRODUCTION

The sovereignty of nation states is of particular interest in this time of increasing globalization and integration. Of course, that is to be expected as sovereign power has changed throughout time, taking on new aspects and shedding old ones. This transient nature will undoubtedly affect or try to affect those parts of the law that depend on sovereignty such as patent law, which is the subject of this Note. But first, in order to understand this, the nature of sovereignty must be determined.

An adequate definition might be elusive given the changing nature of the subject, but Daniel Philpott, a professor from Notre Dame, has provided a definition that is quite suitable due to its specificity and simplicity.[2] Philpott defines sovereignty as "supreme authority within a territory".[3] Under this "supreme authority" arose the concepts of patents and the notorious presumption against extraterritoriality that rests within American law. What then are these concepts and how do they fit within the binding system that is our law?

A patent is something that "cover{s} practical inventions in the 'useful arts'."[4] In order for an individual to be granted a patent, it must be "new and nonobvious."[5] It remains open for a period of twenty years, and during that twenty years, no one can "make, use, sell, offer to sell, or import the invention."[6] Regarding the scope, it has been famously said that patents can cover "anything under the sun that is made by man."[7] This scope, however, has been built off of and limited by domestic concerns.[8] It is this limitation to domestic concerns in our law that is also the basis of the presumption against extraterritoriality.

What is this presumption? The presumption against extraterritoriality is the concept that when a court is analyzing a law, it is to be presumed that the law only applies domestically with no foreign effect.[9] If the law is to have foreign effect, Congress must explicitly state that motivation.[10] The Supreme Court has stated that the "[c]ourts presume that federal statutes apply only within the territorial jurisdiction of the United States."[11] The Court further notes that this is because of "the commonsense notion that Congress generally legislates with domestic concerns in mind."[12]

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[2] Daniel Philpott, *Sovereignty*, The Stanford Encyclopedia of Philosophy (Mar. 26, 2016), https://plato.stanford.edu/archives/sum2016/entries/sovereignty.

[3] *Id.*

[4] ALAN L. DURHAM, PATENT LAW ESSENTIALS, A CONCISE GUIDE 14 (5th ed. 2018).

[5] *Id.* at 15.

[6] *Id.*

[7] *Id.* at 25 (quoting Diamond v. Chakrabarty, 447 U.S. 303, 309 (1980)).

[8] *Id.* at 15.

[9] WesternGeco LLC v. ION Geophysical Corp, 138 S.Ct. 2129, 2136 (2018).

[10] *Id.*

[11] *Id.*

[12] *Id.*

How then does this presumption affect patents? *WesternGeco LLC v. ION Geophysical Corp.* provides the requisite backdrop for the presumption.[13] The Court analyzed the Patent Act and looked at whether or not some of the stipulations of the Patent Act rebutted the presumption against extraterritoriality, thereby extending the Patent Act to a direct foreign effect.[14] The Court decided not to answer that question, as it did not see a need to do so.[15] Additionally, the Court thought that in answering the question, it would raise issues that it thought unwise to answer.[16] The goal of this Note will be to take up where the Court left off and provide an adequate answer to the question. First, I will provide background on the history of patents, the presumption against extraterritoriality, and the *WesternGeco LLC* case. Next, I will contend that the Patent Act does not rebut the presumption against extraterritoriality. In light of this interpretation, I will argue that Congress should not rewrite the law so as to rebut the presumption because to do so would extend the reach of sovereignty beyond its reasonable limit.

II. BACKGROUND

A. TRACING THE HISTORICAL ORIGINS OF PATENT LAW

First, the history of patent law and the Patent Act must be detailed. Patent law has a fascinating history.[17] Part of what makes it so intriguing is that there is a noticeable lack of documentation describing the advent of patent law.[18] In fact, one author notes, "patent history is a subject that is still largely waiting to be written."[19] However, that has not stopped some from trying. In his book, *Patent Law Essentials: A Concise Guide*, Alan Durham attempts to briefly describe the origin and evolution of patent law in the United States.[20] He notes that United States patent law, as in many other areas, had its origin in England.[21] Until the seventeenth century, patents were, as Durham describes it, a "legally sanctioned monopoly."[22] While this concept of patents continued for some time, it ultimately evolved:

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[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* at 2136-37.

[17] *See* Phillip Johnson, Privatized Law Reform: A History of Patent Law Through Private Legislation, 1620-1907 (2018).

[18] *Id.* at 1.

[19] *Id.*

[20] Durham, *supra* note 3, at 1.

[21] *Id.*

[22] *Id.*

> Undoubtedly popular with the government and with the patent owners, these "odious monopolies" were a source of resentment to consumers and potential competitors. In 1624, the Crown relented and the Statute of Monopolies, abolishing the general power of the monarch to grant exclusive rights, became law. Importantly, the statute ending the general practice of monopolies specifically exempted patents allowing inventors the exclusive right to their inventions.[23]

This "exclusive right" was carried over to the colonies, which eventually became the United States.[24] The idea was so compelling that it was put into the United States Constitution, which gives Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[25] Durham correctly notes that this clause is the source of patent law for this country.[26] Durham continues his introduction to patents by describing some of the theoretical frameworks behind the concept.[27] One such theory is that inventors have a "natural right" over their inventions.[28] Another theory, which Durham articulates as more apparent in the Constitution itself, is one that is more pragmatic in form. Under this theory, a patent's purpose is to provide incentive for inventors to act. Because patents provide protection for new ideas, inventors will seek to invent because they can adequately profit from it.[29] Additionally the patent system allows for inventions to be adequately described for the use of the public so as to further increase social usefulness.[30]

Patents further evolved through the 1836 Patent Act.[31] The modern Patent Office was created by this act in order to evaluate applications for patents.[32] However, that was not the only major change. Additionally, the rationale underlying patent law shifted from concepts of productivity and social usefulness to one of property rights for the inventor (regardless of whether the invention was at all useful).[33] In this way, economic development no longer became the primary question when determining whether to issue or approve a patent.[34]

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[23] *Id.*

[24] *Id.*

[25] U.S. CONST. art. I, § 8, cl. 8.

[26] See Durham, *supra* note 3, at 20.

[27] *Id.* at 2.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] Herbert Hovenkamp, *The Emergence of Classical American Patent Law*, 58 ARIZ. L. REV. 263, 293-97 (2016).

[32] *Id.* at 263.

[33] *Id.*

[34] *Id.*

The Patent Act continued to change over the next century. In 1984, Congress added amendments to the Act, which are quite important to the discussion this note focuses on.[35] These amendments are 271(f)(1) and 271(f)(2), which state as follows:

> (f)(1) Whoever without authority supplies or causes to be supplied in or from the United States all or a substantial portion of the components of a patented invention, where such components are uncombined in whole or in part, in such manner as to actively induce the combination of such components outside of the United States in a manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer;[36]
>
> (f)(2) Whoever without authority supplies or causes to be supplied in or from the United States any component of a patented invention that is especially made or especially adapted for use in the invention and not a staple article or commodity of commerce suitable for substantial non-infringing use, where such component is uncombined in whole or in part, knowing that such component is so made or adapted and intending that such component will be combined out- side of the United States in a manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer.[37]

These amendments are the focus on whether or not the Patent Act rebuts the presumption against extraterritoriality.

B. THE PRESUMPTION AGAINST EXTRATERRITORIALITY IN PATENT LAW

The presumption is an old rule that extends far back in time.[38] One example of its use is the case of *Am. Banana Co. v. United Fruit Co.*, in which the Supreme Court had to reckon with the idea of extraterritoriality.[39] In that case, the defendant company had created an alleged monopoly and hindered the business of the plaintiff.[40] However most of the defendants' actions were done outside

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35 Patent Law Amendments of 1984, H.R. 6286, 98th Cong. (1984).

36 35 U.S.C. § 271(f)(1)(2010).

37 35 U.S.C. § 271(f)(2)(2010).

38 *See* William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 Berkeley J. Int'l L. 85, 85 (1998).

39 *Id.*; *see also* Am. Banana Co. v. United Fruit Co., 213 U.S. 347(1909).

40 *Id.* at. 355.

the territory of the United States.[41] The Court wrote as follows regarding the extraterritorial nature of the case:

> No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such countries may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive. They go further, at times, and declare that they will punish anyone, subject or not, who shall do certain things, if they can catch him, as in the case of pirates on the high seas. In cases immediately affecting national interests they may go further still and may make, and, if they get the chance, execute similar threats as to acts done within another recognized jurisdiction. . .But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.[42]

The general rule of law then is that the law of the country where the act is done is the binding law.[43] This naturally excludes the law of the United States as the act was done within the bounds of another sovereign country. The Court echoed this in explaining the nature of the presumption.[44] The Court stated, "all legislation is prima facie territorial."[45] In other words, legislation is presumed to only affect the territory under the sovereignty of the United States until proven otherwise. This was considered a strong point in time for the presumption's influence.[46] In more modern times, it has been said that the presumption has weakened, including the antitrust issues found in *Am. Banana Co.*[47] However, as William S. Dodge comments, this is an exaggeration:

> Like Mark Twain's death, however, reports of the presumption's demise were greatly exaggerated. In its 1991 decision in *E.E.O.C. v. Arabian American Oil Co.* ("Aramco"), the Supreme Court applied the presumption against extraterritoriality to Title VII, concluding that the statute did not apply to employment

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41 *Id.*

42 *Id.* at 355-356 (citation omitted).

43 *Id.*

44 *Id.* at 513.

45 *Id.* (internal citations omitted).

46 Dodge, *supra* note 37, at 85-86.

47 *Id.*

> discrimination by an American company against an American citizen that occurred abroad.[48]

Dodge further notes that while there was good evidence in that case that Congress had intended to apply Title VII extraterritorially, the Court ruled otherwise. Rather than looking at Congress' intent, the Court instead held that a "clear statement" was needed in the statute for the law to apply extraterritorially.[49] The above case shows that even if Congress is explicit in its action, the court may nevertheless apply the presumption against extraterritoriality.[50] In light of the Court's reasoning, it appears that the presumption is very much alive and well. This is not to say, however, that Congress cannot make laws with extraterritorial application or that the presumption is as strong as it once was. It is only to say that the presumption is still something courts apply. This is evident in the case of *WesternGeco LLC v. ION Geophysical Corp.*,[51] which is the focus of this Note.

The Court in *WesternGeco* provides the answer to the question on how to rebut the presumption. The Court states:

> It can be rebutted only if the text provides a "clear indication of an extraterritorial application." If the presumption against extraterritoriality has not been rebutted, the second step of our framework asks "whether the case involves a domestic application of the statute." Courts make this determination by identifying "the statute's 'focus'" and asking whether the conduct relevant to that focus occurred in United States territory. If it did, then the case involves a permissible domestic application of the statute.[52]

A clear indication then is required by Congress in order to rebut the presumption. However, the nature of a "clear indication" is hotly debated.[53] Dodge notes that there are three views on the subject. The first is that acts of Congress only apply to the United States itself, even if foreign action has an effect on the United States.[54] A second view is that acts of Congress apply "only to conduct that has effects within the United States, regardless of where the conduct

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[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] WesternGeco LLC v. ION Geophysical Corp., 138 S.Ct. 2129, 2136 (2018).

[52] *Id.* (first quoting Morrison v. National Australia Bank Ltd., 561 U.S. 247, 255, 130 S. Ct. 2869 (2010); then quoting RJR Nabisco, 579 U.S., 136 S. Ct. 2090 (2016)).

[53] Dodge, *supra* note 37, at 88.

[54] *Id.* at 89-90.

occurs."[55] A third view is that Congressional acts apply to conduct within the United States or that has effects within the United States.[56]

Congress then would need to provide a clear indication to extend a law beyond these types of situations at the very least.[57] The question then is whether the Patent Act clearly indicates Congress's intention to extend beyond at least these three views. The answer to that question would undoubtedly solve the problem posed in *WesternGeco*.[58]

C. LOOKING AT THE PRESUMPTION AGAINST EXTRATERRITORIALITY WITHIN THE CONTEXT OF *WESTERNGECO LLC V. ION GEOPHYSICAL CORP.*

The case of *WesternGeco* is the focus of this note, and a brief explanation of its history is needed. In this case, WesternGeco LLC, the owner of a patent system which was used to survey the ocean floor, was suing ION Geophysical Corp. for selling parts which were in turn used to create the patented system in another country.[59] At trial, the jury found for WesternGeco and ordered ION to pay for lost profits stemming from the sale of the identical survey invention.[60] ION moved to set aside the verdict on the grounds that patents do not apply extraterritorially.[61] The Federal Circuit agreed with ION, noting that WesternGeco could not recover lost profits because Section 271(f) does not apply extraterritorially.[62] The case then went to the Supreme Court. The Court laid down its step-by-step analysis in order to determine whether WesternGeco could receive lost profits.[63] The Court noted that there are two steps to determine whether or not there has been an improper extension of a law from domestic application to foreign application.[64] The first step deals with the presumption of extraterritoriality; however, the Court refused to answer the question as to whether the Patent Act, specially 271(f), rebutted the presumption against extraterritoriality.[65] Instead, the Court chose to skip to the second step, as it is allowed to do.[66] The Court noted that "while 'it will usually be preferable' to begin with step one, courts have the discretion to begin at step two 'in appropriate cases.'"[67] The second step deals with the notion of "domestic

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[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] WesternGeco LLC v. ION Geophysical Corp., 138 S.Ct. 2129, 2136-37 (2018).
[59] *Id.* at 2135.
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.* at 2136.
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*(quoting RJR Nabisco, 579 U.S., 136 S. Ct. 2090 (2016)).

application."[68] If the law has a valid domestic application and applies in the case, then there is no invalid foreign application.[69] The Court took this position in allowing the recovery of lost profits.[70] The Court ruled that the Act's domestic application was meant to stop people from exporting parts from the U.S. to foreign countries to build the invention.[71] The penalty, then, is not for the building of the item in a foreign country per se but the exporting of items from the United States to the foreign entity.[72]

Why did the Court decide not to answer the first step? The reason the Court gives is that it is not required to do so and that it would be unwise to do so in this specific case.[73] Justice Thomas expands upon this point as follows:

> We resolve this case at step two. While "it will usually be preferable" to begin with step one, courts have the discretion to begin at step two "in appropriate cases." One reason to exercise that discretion is if addressing step one would require resolving "difficult questions" that do not change "the outcome of the case," but could have far-reaching effects in future cases. That is true here. WesternGeco argues that the presumption against extraterritoriality should never apply to statutes, such as § 284, that merely provide a general damages remedy for conduct that Congress has declared unlawful. Resolving that question could implicate many other statutes besides the Patent Act. We therefore exercise our discretion to forgo the first step of our extraterritoriality framework.[74]

The Court thinks it wise to forgo an answer, as the answer would open up Pandora's box, so to speak.[75] To expound further, the questions raised in answering the question posed by the first step would lead to unintended side effects that could easily be avoided by skipping to the second step of the analysis.[76] The purpose of this Note therefore will be to answer that first question the Court decided to forgo: Does the presumption against extraterritoriality apply to the Patent Act specifically sections 271(f)(1)[77] and 271(f)(2)?[78] The answer is, emphatically, yes.

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[68] *Id.* at 2137.
[69] *Id.* at 2138.
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.* at 2136.
[74] *Id.* at 2136-37 (citation omitted).
[75] *Id.*
[76] *Id.*
[77] 35 U.S.C. § 271 (2010).
[78] *Id.*

III. ANALYSIS

The presumption of extraterritoriality applies to the Patent Act. The sections in question, as stated previously, are sections 271(f)(1)[79] and 271(f)(2).[80] The first issue is whether Congress gave a clear indication through the language of the amendments to extend the Patent Act beyond our domestic borders. This does not appear to be the case. Oddly enough, it is the Court's language in *WesternGeco* that provides this rationale despite the fact that it refused to answer the question directly. In order to answer the second step, as previously described, the Court needed to establish the statute's focus:

> When determining the focus of a statute, we do not analyze the provision at issue in a vacuum. If the statutory provision at issue works in tandem with other provisions, it must be assessed in concert with those other provisions. Otherwise, it would be impossible to accurately determine whether the application of the statute in the case is a "domestic application.
>
> And determining how the statute has actually been applied is the whole point of the focus test. Applying these principles here, we conclude that the conduct relevant to the statutory focus in this case is domestic.[81]

The Court emphasizes here that the focus of the statute is the domestic application of it.[82] Although one might argue that a statute's domestic focus does not preclude the possibility that Congress intended the statute to have extraterritorial effect, such an effect would be a secondary focus as opposed to the primary focus. As such, any argument in favor of Congress' intent for it to apply extraterritorially would ultimately fail because the Court places a lot of emphasis on how the statute is to apply domestically. The Court states:

> Section 271(f)(2) focuses on domestic conduct. It provides that a company "shall be liable as an infringer" if it "supplies" certain components of a patented invention "in or from the United States" with the intent that they "will be combined outside of the United States in a manner that would infringe the patent if such combination occurred within the United States." The conduct

[79] *Id.*

[80] *Id.*

[81] *WesternGeco LLC*, 138 S.Ct. at 2137 (citation omitted).

[82] *Id.* at 2138.

> that § 271(f)(2) regulates—i.e., its focus—is the domestic act of "suppl[ying] in or from the United States."[83]

The problem then with the hypothetical objection previously mentioned is that the secondary application of extraterritorial effect would contradict the primary application of domestic regulation. The Court here interprets the language of the statute as only dealing with actions within the United States itself.[84] If there were to be a secondary extraterritorial intention then it would have to be said that actions within the United States and its jurisdiction are both territorial and extraterritorial in the same manner. In this case, the limitation placed on the exportation of certain components from the United States would itself be extraterritorial. This cannot be the case, however, as the act of exporting is an act done by the exporter within the jurisdiction it is exporting from. Thus, to regulate this domestic act would then suggest that it is not to regulate any foreign party's action outside the United States; as such, it cannot be extraterritorial.

For illustration of this point, imagine there are three individuals: A, B, and C. Next, imagine that A gives B an item on the condition that B will not give that item to C. If B gives C the item, then A will punish B by taking the value of the item from B, but will not, however, take the item away from C. A then is not regulating or punishing any action of C. A is only regulating the actions of B. In the same way, the Patent Act (A) is only regulating the actions of exporters within the United States (B) who export certain items to foreign actors (C). The act is not regulating the actions of the foreign actors, as there is neither punishment affecting them nor prohibition of action to punish.

Additional problems arise if the regulation of the act of exporting is deemed extraterritorial because of its down the line effect on foreign entities. First, the presumption is not only rebuttable by the Patent Act, but by all laws generally since any language used could have extraterritorial effect through a long causal chain and, as such, could be said to have extraterritorial effect. In the case of the Patent Act, the act prevents the exporting of components from the United States to other countries. The regulatory action directly affects the action of those exporting from within the territory of the United States. To say that the law has extraterritorial application when regulating actions within the United States would extend the presumption too far.

There is an old proverb that states that whenever a butterfly flaps its wings, it causes a hurricane on the other side of the world.[85] What this saying means is that a minor action can have great causal effect through long causal chains.[86]

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[83] *Id.* at 2137-38.

[84] *Id.*

[85] What is Chaos Theory?, FRACTAL FOUNDATION https://fractalfoundation.org/resources/what-is-chaos-theory/ (last visited Aug. 21, 2019).

[86] *Id.*

However, this long causal chain cannot be the basis of determining extraterritorial effect and the need to rebut the presumption against extraterritoriality. Any law ever made could be said to have some foreign effect through long causal chains as the butterfly example implies. The presumption is a unique and defined concept that should not be extended to the point that it adopts a sweeping definition that covers anything and everything. If the presumption is interpreted in this way, it would lose any definitive application in future cases.

One might argue that the Patent Act's supposed foreign effect is not like a long causal chain in that the first cause is only indirectly causing some other thing down the line. Rather, in the case of the Patent Act, there is a direct link between the limitation of the exporting of components and the foreign effect. While this sounds reasonable at first blush, the objection is simply untenable. In this case of the Patent Act, foreign affairs are only affected indirectly. As the Court already noted in *WesternGeco*, the Patent Act regulates the "domestic."[87] It regulates the actions of those companies that happen within the United States and not the actions that come later.[88] In other words, it directly affects domestic companies while only indirectly affecting foreign affairs. Another way to put it is that the Patent Act positively affects domestic actors while at best only providing a negative cause for foreign actors. Jonathan Edwards, in his book On the *Freedom of the Will,* provides an illustration of the philosophical concept of a negative cause:

> As there is a vast difference between the sun's being the cause of the lightsomeness and warmth of the atmosphere, and [the] brightness of gold and diamonds, by its presence and positive influence; and its being the occasion of darkness and frost, in the night, by its motion, whereby it descends below the horizon. The motion of the sun is the occasion of the latter kind of events; but it is not the proper cause, efficient or producer of them; though they are necessarily consequent on that motion, under such circumstances.[89]

The Patent Act is like the sun in the illustration. It positively and efficiently regulates or acts on the domestic exporters of this country. However, the effect on the foreign actors though a necessary consequence of the actions taken domestically are not positively and efficiently caused by those actions. To claim this as direct would open up any causal chain to being direct in the manner thought by the objection as all consequents, as opposed to only those things

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[87] *WesternGeco LLC*, 138 S.Ct. at 2138.

[88] *Id.*

[89] JONATHAN EDWARDS, FREEDOM OF THE WILL, *reprinted in* THE WORKS OF JONATHAN EDWARDS, Vol. 1, 404 (Paul Ramsey ed., 1957)(2011).

positively caused, would be considered direct. However, could it not be the case that the intentional language of stopping the export of certain items because they are used for the building of patented items in foreign nations is the direct link needed to establish a direct causal chain? I answer in the negative. If Congress wished to make a true extraterritorial effect then why not make the actions done outside the United States punishable instead? This language would certainly have a direct effect on foreign lands and would rebut the presumption quite easily. Congress elected not to do this, however, and instead chose to only make punishable those actions done within the United States.[90] Because of this indirect link, it cannot be said that the Patent Act rebuts the presumption against extraterritoriality, as there is no extraterritorial application in the first place.

Even though the presumption against extraterritoriality is not rebutted regarding the Patent Act, Congress could still update the Act to do so. The better question is whether they should. My answer is that they should not update the Patent Act. First, patents, as previously noted, are of a domestic concern that serves the public.[91] The public, in this instance, cannot be the public of the world or of some foreign country.[92] The public, as it is understood here, is the public of the United States and the Patent Act serves and binds within that sphere.[93] Second, it must also be noted that while ideas are forms of property and protected by the patent system, patented items are unlike other forms of property.[94] It is not okay to steal real tangible items from a person within the United States. It does not matter how long you have owned the item—the item is yours and cannot be used or taken by another without your permission (in most cases). This is not the case with patents. Patents do not possess the permanence of normal everyday property.[95] There is a limit to how long they have effect as they are unlike tangible ownership and some forms of intangible ownership.[96]

Similarly, a patent extends beyond the ordinary ownership of property.[97] A patent not only protects against the theft from nefarious actors, but from the use of the idea discovered independent of the original patent owner.[98] This intangibility aspect where person A can discover the patented idea completely independently of person B divorces patents from the concept of ownership of tangible property. Indeed, tangible ownership of real and personal property are

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90 35 U.S.C. § 271 (2010).

91 Durham, *supra* note 3, at 15.

92 *Id.* at 9.

93 *Id.*

94 *Id.* at 9-16.

95 *Id.*

96 *Id.*

97 *Id.*

98 *Id.*

instances of owning something that is finite. To say one owns an idea is to say one owns something beyond this or that particular example of that idea.[99]

The extension of patent law then over foreign sovereignties would be quite the mess. First, the logistics would require a system where both countries are truthful to the fullest extent. Second, it would require some form of higher authority to hold both accountable. The problem with the higher authority is that it does not automatically provide for U.S. patent law to extend to other countries. Rather, it provides for a neutral third-party to govern patents. Furthermore, it raises the question of sovereign empathy.[100] Would Americans be okay with other countries attempting to enforce their own patent law system when one of our own citizens independently discovers an idea and wants to use it within our own jurisdiction? I think not. But, if we can acknowledge that we would not wish that to occur to in our own country, then we should not wish it to happen to other foreign jurisdictions eithers. The logistical problem previously mentioned naturally also plays a role in this problem.[101] The extension would cause tension and flare-ups between countries that could lead to consequences not intended.[102] Paired with the idea that patents are intended to be domestic concerns that promote the discovery of new ideas and inventions within a certain jurisdiction and the case for extraterritorial extension of the Patent Act seems even more unwise.[103]

IV. CONCLUSION

WesternGeco is a fascinating case that covers multiple problems and illuminates new paths and ideas. The Court reasoned that it would be wise to answer the question regarding the presumption against extraterritoriality another day and chose to look to the second step of the test. However, the Court should have answered in the affirmative that the Patent Act does not rebut the presumption against extraterritoriality. To allow the Patent Act to rebut the presumption would allow any law to rebut it with any language. The language of the Patent Act only regulates the domestic actors within the United States itself. Additionally, Congress should not update the Patent Act in order to apply a foreign application. The logistics of doing so would be catastrophic.

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[99] Mary C. MacLeod, *Universals, Internet Encyclopedia of Philosophy, https://www.iep.utm.edu/universa/*

[100] Dodge, *supra* note 37, 15.

[101] *Id.*

[102] *Id.*

[103] Durham, *supra* note 3, 15.