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### Patent Abolition: A Real-Life Historical Case Study

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# PATENT ABOLITION: A REAL-LIFE HISTORICAL CASE STUDY

STEF VAN GOMPEL\*

I. INTRODUCTION .....	878
II. A BRIEF OVERVIEW OF NINETEENTH-CENTURY DUTCH PATENT LEGISLATION .....	882
III. THE PATENT ACT OF 1817 AND ITS DEFICIENCIES .....	883
IV. CALLS FOR PATENT REFORM .....	890
A. INDUSTRY REPORTS .....	891
B. ACADEMIC DEBATE .....	895
V. POLITICAL RESPONSE AND THE ADOPTION OF THE PATENT ABOLITION ACT .....	902
VI. MOTIVATIONS AND CONSIDERATIONS BEHIND THE ADOPTION OF THE PATENT ABOLITION ACT.....	908
A. LEGAL ARGUMENTS .....	908
B. ECONOMIC ARGUMENTS .....	911
C. PRACTICAL ARGUMENTS .....	915
D. POLITICAL ARGUMENTS .....	917
VII. CONCLUSION .....	919

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## I. INTRODUCTION

Because of the monopoly they convey to owners of useful inventions, patents often stir controversy. This has given rise to calls for patent reform to mitigate their adverse effects.<sup>1</sup> Sometimes these calls go to the extreme, where scholars take the position that patents should be abolished.<sup>2</sup> Recently, at the start of the millennium, a new wave of scholarly literature on patent abolitionism has appeared.<sup>3</sup> This literature echoes the strong anti-patent sympathies that existed in Europe in the second half of the nineteenth century.<sup>4</sup> In reality, however, these debates are almost entirely theoretical. No country has

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1. See generally F.M. Scherer, *The Political Economy of Patent Policy Reform in the United States*, 7 J. TELECOMM. & HIGH TECH. L. 167 (2009) (discussing important legislative, judicial, and diplomatic initiatives designed to strengthen patent enforcement systems domestically and abroad).

2. See generally Mark Janis, *Patent Abolitionism*, 17 BERKELEY TECH. L.J. 899, 925 (2002) (discussing the debate among scholars regarding the abolition of the patent system: specifically, alleged defects in the judicial administration of the patent system, philosophical justifications, and free trade arguments).

3. See generally JAMES BESSEN & MICHAEL J. MEURER, *PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK* (2008) (presenting empirical evidence to suggest that the patent system is broken and in need of comprehensive reform); MICHELE BOLDRIN & DAVID K. LEVINE, *AGAINST INTELLECTUAL MONOPOLY* (2008) (arguing that intellectual property law concerning copyright and patent constitutes a government grant of a costly and dangerous private monopoly over ideas); ADAM B. JAFFE & JOSH LERNER, *INNOVATION AND ITS DISCONTENTS: HOW OUR BROKEN PATENT SYSTEM IS ENDANGERING INNOVATION AND PROGRESS, AND WHAT TO DO ABOUT IT* (2004) (suggesting a three-pronged solution for restoring the patent system: “create incentives to motivate parties who have information about the novelty of a patent; provide multiple levels of patent review; and replace juries with judges and special masters to preside over certain aspects of infringement cases.”); Michele Boldrin & David K. Levine, *The Case Against Patents*, 27 J. ECON. PERSP. 3 (2013) (arguing that there is no empirical evidence to show that patents increase innovation and productivity); Liliane Hilaire-Pérez et al., *Innovation Without Patents: An Introduction*, 64 REVUE ÉCONOMIQUE 1 (2013) (providing a preface to an entire special issue on the topic of innovation without patents); William Kingston, *Innovation Needs Patents Reform*, 30 RES. POL’Y 403 (2001) (arguing that the current patent system fails to deliver adequate protection due to its inability to address the behavior of many “commercially valuable, cutting-edge intellectual creations.”); see also Richard Stallman, *Patent Law Is, at Best, Not Worth Keeping*, 45 LOY. U. CHI. L.J. 389 (2013) (rebutting arguments in favor of keeping the patent system and ultimately concluding that patent law should be abolished).

4. Janis, *supra* note 2, at 922 (providing a historical overview of the nineteenth century patent abolitionist movement in England).

ever gone so far as to actually eliminate patents, with one notable exception.

The one and only country ever to abandon patents was the Netherlands.<sup>5</sup> In 1869, the Dutch terminated their patent system and stopped issuing patents until 1912, when the patent system was restored.<sup>6</sup> The unique and unprecedented case of the Netherlands is often mentioned or briefly discussed in the literature on patent abolition.<sup>7</sup> Yet, scholars give different explanations of what precisely motivated the Dutch government to take the radical step of eliminating patents, as opposed to governments in other countries that witnessed similar anti-patent sympathies around the same period.<sup>8</sup>

Machlup & Penrose, for example, suggest that the free-trade movement—which purports to eliminate artificial restrictions upon commerce, including patents—was particularly strong in the Netherlands.<sup>9</sup> Yet, there is no evidence that this movement was stronger in the Netherlands than, for example, in Great Britain or elsewhere in Europe.<sup>10</sup>

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5. See, e.g., ERIC SCHIFF, *INDUSTRIALIZATION WITHOUT NATIONAL PATENTS: THE NETHERLANDS, 1869-1912; SWITZERLAND, 1850-1907* 14 (1971) (discussing how Switzerland is another industrial country that is often presented as a direct accomplice of the nineteenth-century anti-patent movement, alongside the Netherlands. However, a key difference with the Netherlands is that Switzerland had no patent law at the time and repeatedly opposed the adoption of patent legislation. Accordingly, Switzerland never abolished patents, but simply did not enact patent legislation. From a legislative viewpoint, this requires an entirely different (and arguably less contentious) decision to be taken by the legislator).

6. *Id.*

7. See generally ROBERT ANDREW MACFIE, *RECENT DISCUSSIONS ON THE ABOLITION OF PATENTS FOR INVENTIONS IN THE UNITED KINGDOM, FRANCE, GERMANY, AND THE NETHERLANDS* (London, Longmans et al. 1869) (presenting a collection of arguments in favor of abolishing the present patent system, reasoning, for example that the present system “gives the minimum advantage to the inventor, and inflicts the maximum disadvantage on the public.”).

8. See generally *id.* (presenting a nice overview of the anti-patent movement in Europe in those days).

9. Fritz Machlup & Edith Penrose, *The Patent Controversy in the Nineteenth Century*, 10 J. ECON. HIST. 1, 5 (1950).

10. See GEORGE ARMITAGE-SMITH, *THE FREE TRADE MOVEMENT AND ITS RESULTS* 9, 145-46 (London, Blackie & Son 1898) (stating that free-trade policy was essentially confined to the British Isles, although it was also followed in countries such as Switzerland, the Netherlands, Belgium, Denmark, and Norway).

They further contend that the Dutch were unconvinced that patent law could be reformed in such a way as to produce satisfactory outcomes for all parties concerned.<sup>11</sup> This is true, but only partially. Patent abolitionists indeed were “thoroughly persuaded that a good law of patents is an impossibility,”<sup>12</sup> but the Dutch government was well aware of examples of foreign patent laws that could cure several deficiencies of the Patent Act of 1817, which was enacted in the Netherlands at the time.<sup>13</sup>

A third—more populist—argument advanced to explain the patent abolition is that Dutch industries in the nineteenth century had fallen behind and that patents were removed to enhance industrial progress by allowing the industries to freely use foreign inventions and technologies.<sup>14</sup> The Netherlands at the time was in a somewhat lesser state of industrial development than neighbouring countries,<sup>15</sup> but it seems rather unlikely that this alone would justify patent abolition. Arguably, the Netherlands was not in such dire straits that it would

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11. Machlup & Penrose, *supra* note 9, at 5.

12. Verslag der Handelingen van de Tweede Kamer der Staten-Generaal, Afschaffing van het Verleenen van Uitsluitende Regten op Uitvindingen en Verbeteringen van Kunst en Volksvlijt, Bijblad tot de Nederlandsche Stcrt. 1868/69 II, 1471 (Neth.) [hereinafter *Deliberations of the House on the Patent Abolition Bill*] (Godefroi).

13. Wet Omtrent het Verleenen van Uitsluitende Regten op Uitvindingen en Verbeteringen van Voorwerpen van Kunst en Volksvlijt, Stb. 1817, 6 (Neth.) [hereinafter *Patent Act of 1817*].

14. FRITS GERZON, NEDERLAND, EEN VOLK VAN STRUIKROVERS? DE HERINVOERING VAN DE NEDERLANDSE OCTROOIWET (1869-1912) 6–8 (1986); TH.C.J.A. VAN ENGELN, PRESTATIEBESCHERMING EN ONGESCHREVEN INTELLECTUELE EIGENDOMSRECHTEN 152 (1994).

15. I. J. BRUGMANS, PAARDENKRACHT EN MENSENKRACHT: SOCIAAL-ECONOMISCHE GESCHIEDENIS VAN NEDERLAND 1795–1940 83 (1961) (discussing that only after 1860 industrialization in the Netherlands began to set in. Compared with Belgium, which in 1844 had 1,448 steam engines in operation with a total of 37,400 Hp., the industries in the Netherlands only ran seventy-two steam engines with a total of 1,120 Hp. in 1837, and 392 steam engines with a total of 7,193 Hp. in 1853); JAN AART DE JONGE, DE INDUSTRIALISATIE IN NEDERLAND TUSSEN 1850 EN 1914 176, 495 (1976) (finding that the number of steam engines for industrial use in the Netherlands would grow to 1,815 with a total of 21,403 Hp. in 1872, and 3,519 with a total of 44,603 Hp. in 1883. Between 1853 and 1872, the increased steam engine capacity was used mostly for the food processing and textile industries, and between 1872 and 1883 for the manufacture of bricks, tiles, pottery, glassware, wood, and metal industries).

risk getting isolated internationally by courageously abolishing patents only with a view to boost their own national economy.

In practice, the circumstances under which the Dutch patent abolition occurred must have been much more complex. This paper asserts that the decision to eliminate patents can only be explained through a combination of different legal, economic, practical, and political factors, which has not been integrally discussed in literature so far.

This paper, therefore, investigates which joint factors led to the abolition of patents in the Netherlands in 1869.<sup>16</sup> To enable a full understanding of the dynamics behind the Patent Abolition Act, it first gives a brief overview of nineteenth-century Dutch patent law (Part II) and sets out the deficiencies of the Patent Act of 1817 (Part III).

Then the paper describes how, from the mid-nineteenth century onwards, these deficiencies elicited calls for patent reform from the industries and scholars (Part IV). It is in these debates that propositions to abolish patents were first made. Unlike other writings on the topic, this paper will not systematically cluster the arguments in favour and against patents under specific headings,<sup>17</sup> as the objective is not to outweigh the arguments put forward by both sides. Instead, it examines from where the calls for patent reform originated and what the different groups actually called for: a revision of patent law or its abolition.<sup>18</sup> For this purpose, the paper separates industry reports from

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16. Accordingly, this paper neither assesses the effects and implications of the patent abolition on industrial development in the Netherlands, nor examines the reasons for reintroducing patent law in 1912. *See generally* GERZON, *supra* note 14, at 31-113; SCHIFF, *supra* note 5, at 17-82; Petra Moser, *How Do Patent Laws Influence Innovation? Evidence from Nineteenth-Century World's Fairs*, 95 AM. ECON. REV. 1214 (2005) (discussing how, for example, the share of Dutch innovations in food processing increased from eleven to thirty-seven percent after the Netherlands abolished the patent system in 1869).

17. Machlup & Penrose, *supra* note 9, at 10-28 (portraying the discussions by representing the four main arguments used by patent advocates to justify patent protection and challenged by opponents of the patent system); *see also* D. den Hertog, *De Anti-octrooibewegingen in Nederland (1850-1886)*, 44 BIJLAD BIJ DE INDUSTRIËLE EIGENDOM 27, 30-35 (1976); H. I. DUTTON, *THE PATENT SYSTEM AND INVENTIVE ACTIVITY DURING THE INDUSTRIAL REVOLUTION, 1750-1852* 17 (1984); GERZON, *supra* note 14, at 9-29.

18. *See* ADRIAN JOHNS, *PIRACY: THE INTELLECTUAL PROPERTY WARS FROM GUTENBERG TO GATES* 247-89 (2009) (displaying a similar approach).

academic writings on the patent issue in those days. As will be seen, both the industries and scholars had patent revisionists and abolitionist amongst them, some of which had much political influence.

Subsequently, the paper explores how politics responded to the calls for patent reform (Part V). It will demonstrate that the choice between revising the law and abolishing patents was not so easy and that it took long before the Dutch government came to a resolution. The result is known: a bill was presented to terminate patents. To identify what motivated the government to propose the bill and what considerations prompted Parliament to adopt it, the paper delves into the preparatory legislative materials and parliamentary history to expose the legal, economic, practical, and political considerations behind it (Part VI). Part VII concludes and puts the findings in a broader, contemporary perspective.

## II. A BRIEF OVERVIEW OF NINETEENTH-CENTURY DUTCH PATENT LEGISLATION

As in most other European countries, from the sixteenth until the end of the eighteenth century, invention protection in the Netherlands was contingent on privileges granted by local or state authorities.<sup>19</sup> The privilege system was abolished after the French army had invaded and occupied the Netherlands in 1795 and brought with it the liberal ideals of the French Revolution.<sup>20</sup> In 1809, under the reign of King Louis Napoleon, the first patent law of the Netherlands was established,<sup>21</sup> but already in 1810, when the Dutch territory was annexed into the First French Empire, this law was replaced by the French patent decrees of 1791.<sup>22</sup>

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19. *See generally* GERARD DOORMAN, *OCTROOIEN VOOR UITVINDINGEN IN DE NEDERLANDEN UIT DE 16E-18E EEUW: MET BESPREKING VAN ENKELE ONDERWERPEN UIT DE GESCHIEDENIS DER TECHNIEK* (1942).

20. *See Batavian Republic*, ENCYC. BRITANNICA, <https://www.britannica.com/place/Batavian-Republic> (last visited May 12, 2019).

21. *Besluit, Houdende Eene Wet op het Verleenen van Octrooijen op Nieuwe Uitvindingen, Ontdekkingen en Verbeteringen Binnen het Koninkrijk*, *Stcrt.* 1809, 101 (Neth.) [hereinafter *Patent Act of 1809*].

22. GERRIT LUTTENBERG, *REGISTER DER WETTEN EN BESLUITEN, BETREKKELIJK HET OPENBAAR BESTUUR IN DE NOORD-NEDERLANDEN, SEDERT 1796 TOT 1813* 50 (Zwolle, Doijer 1834).

After the Netherlands regained their independence in 1813, the Dutch legislator adopted the Patent Act of 28 January 1817 (Act regarding the granting of exclusive rights to inventions and improvements of objects of industrial art and people's diligence).<sup>23</sup> It remained in place until the government, by virtue of the Act of 15 July 1869, ceased to grant new patents while phasing out existing patents.<sup>24</sup> This Act, which had immediate effect, marked the beginning of a patentless era that would last until 1 June 1912, when the 1910 Patent Act entered into force.<sup>25</sup>

### III. THE PATENT ACT OF 1817 AND ITS DEFICIENCIES

The Patent Act of 1817 differed significantly from its French counterparts. While under the French decrees of 1791, inventors enjoyed exclusive rights to obtain patents. Under the Dutch Patent Act, patents were granted at the King's discretion.<sup>26</sup> This made the patent process arbitrary and rather unpredictable.<sup>27</sup> The government could attach restrictive conditions to patent grants, e.g. to permit certain industries to use patented inventions for particular beneficial purposes, or exclude particular types of innovations from patent protection to enhance competition.<sup>28</sup> This being reminiscent of old feudal practices, calls were made to replace the patent grant by royal favour with a legal entitlement to obtain patents upon fulfilment of statutory formalities, as existed in other countries.<sup>29</sup> It was also suggested that patents should

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23. Patent Act of 1817, *supra* note 13.

24. Wet tot Afschaffing van het Verleenen van Uitsluitende Rechten op Uitvindingen en Verbeteringen van Voorwerpen van Kunst- en Volksvlijt, Stb. 1869, 126 (Neth.) [hereinafter Patent Abolition Act of 1869].

25. Wet tot Regeling van het Octrooirecht voor Uitvindingen, Stb. 1910, 313 (Neth.).

26. Patent Act of 1817, *supra* note 13, art. 1.

27. LODEWIJK W.P. PESSIONS, THE INVENTIVENESS REQUIREMENT IN PATENT LAW: AN EXPLORATION OF ITS FOUNDATIONS AND FUNCTIONING 220, n.804 (2016).

28. Gerard Doorman, *Patent Law in the Netherlands: Suspended in 1869 and Reestablished in 1910 Part I*, 30 J. PAT. OFF. SOC'Y 225, 226-27 (1948).

29. See J. Heemskerk Az., *Iets over de Nederlandsche Wet van 1817 over de Octrooijen voor Uitvindingen, enz.*, 2 DE VOLKSVLIJT 15, 26-28 (1855); see also W. Sassen, *Iets over Octrooien van Uitvinding, van Verbetering en van Invoer, en de Deswege Bestaande Wetgeving in België*, 3 THEMIS 140, 150 (1856).



be granted without a prior examination.<sup>30</sup>

The Patent Act of 1817 differentiated three types of patents. First, patents could be granted for new inventions originating in the Netherlands.<sup>31</sup> Commentators criticised the requirement of domestic origin as inequitable, ineffective, and redundant, especially since the location of an inventive act was often impossible to establish and foreign inventors could always choose domicile in the Netherlands.<sup>32</sup> Moreover, while the law required absolute novelty,<sup>33</sup> in practice, patents were also granted to new applications of old products.<sup>34</sup> Absent plain definitions, the law further failed to identify protectable subject-matter and clearly delineate its boundaries.<sup>35</sup> It seemingly conferred patent protection on the concrete product in which the invention was incorporated, rather than on the invention itself.<sup>36</sup> Indeed, in 1850, the Supreme Court of the Netherlands ruled that the patent for an energy-efficient stove with heating and circulation pipes gave the inventor the exclusive right to apply the invention to the particular stove invented, but not to other—equivalent—types of stoves, hearths, or fireplaces.<sup>37</sup>

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30. See A.J.B. STOFFELS, *DE WETGEVING OP DE OCTROOIEN VOOR UITVINDING, VERBETERING EN EERSTE INVOERING: EENE STAATHUISHOUDKUNDIGE PROEVE* 54–63 (Leiden, Gebhard & Hazenberg 1851); see also *Heemskerk Az.*, *supra* note 29, at 27; Sassen, *supra* note 29, at 153.

31. Patent Act of 1817, *supra* note 13, art. 1.

32. See J. HEEMSKERK AZ., *VOORDRAGTEN OVER DEN EIGENDOM VAN VOORTBRENGSELEN VAN DEN GEEST* 32 (Amsterdam, Beerendonk, 2d rev. ed. 1869); STOFFELS, *supra* note 30, at 126–27; *Heemskerk Az.*, *supra* note 29, at 21.

33. STOFFELS, *supra* note 30, at 126; see also *Heemskerk Az.*, *supra* note 29, at 40 (suggesting that an absolute novelty criterion was too far-reaching, as it could not be expected from inventors that they had read all the books, magazines, and journals written on their respective expertise in any language in the world).

34. See Doorman, *supra* note 28, at 227.

35. See *Heemskerk Az.*, *supra* note 29, at 21–23; see also S. Bleekrode, *Nalezing op het Iets over de Nederlandsche Octrooiwet des Heeren Mr. J. Heemskerk Az.*, 2 *DE VOLKSVLIJT* 43, 46–47 (1855) [hereinafter Bleekrode, *Nalezing op het Iets over de Nederlandsche Octrooiwet des Heeren Mr. J. Heemskerk Az.*].

36. See *Gemeenzaam Onderhoud, over de Octrooien voor Uitvindingen, in VOORLEZINGEN OVER DE GESCHIEDENIS DER NIJVERHEID IN NEDERLAND* 159, 167–68 (Haarlem, Kruseman 1856) [hereinafter *Gemeenzaam Onderhoud*] (J. Boelen J. Rzn. and E.H. von Baumhauer).

37. Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands] 25 januari 1850, 34 *NEDERLANDSCHE REGTSPRAAK* 331 (Neth.) (upholding the decision by the Court of Appeals of South-Holland of 30 June 1849).

Second, patents were available for substantial improvements of inventions.<sup>38</sup> While anyone could obtain patents on improvements, the law did not adequately regulate the relation between first inventors and third party improvers.<sup>39</sup> There was only a by-law, which stated that patents for improvement pertained to the separate application of the improvement, not to the initially patented object, and that first inventors could not apply patented improvements owned by third parties to objects first patented.<sup>40</sup> As a consequence, if third parties obtained patents on improvements of a product, the first inventor would be disadvantaged, because the success of a product often relied on small improvements.<sup>41</sup> Therefore, commentators suggested that the law should be changed to give first inventors a certain grace period to improve their inventions and secure improvement patents, before others be eligible to apply for the same.<sup>42</sup>

Third, patents could be obtained for the first importation or application in the Netherlands of foreign inventions or improvements.<sup>43</sup> Their duration could not exceed the foreign term of protection and their grant was subject to the patented objects being manufactured in the Netherlands.<sup>44</sup> While importation patents were designed to reward companies that invested in studying, familiarizing and applying foreign inventions to enhance national industrial progress,<sup>45</sup> they often were obtained by companies that did not intend to exploit foreign inventions themselves, but rather speculated on licensing or selling the patents to third parties if the inventions appeared successful.<sup>46</sup> This harmed foreign inventors, domestic

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38. See Patent Act of 1817, *supra* note 13, art. 1.

39. *Id.*

40. Reglement ter Uitvoering der Wet van den 25 januarij 1817, op het Uitgeven van Octrooijen voor Uitvindingen, Invoeringen en Verbeteringen, Bijv. Stb. 1817, IV, 62 & 262, §§ 8-10 (Neth.) [hereinafter Patent Regulations of 1817].

41. See *Verslag van de Eerste Openbare Vergadering der Vereeniging voor Volkswlijt, Gehouden te Amsterdam op Donderdag 26 October 1854 in het Odéon*, 1 DE VOLKSVLIJT 528, 544 (1854) [hereinafter *Verslag Vereeniging voor Volkswlijt 1854*] (S. Bleekrode).

42. See Heemskerk Az., *supra* note 29, at 23-25.

43. Patent Act of 1817, *supra* note 13, art. 1.

44. *Id.* art. 5.

45. Bleekrode, *Nalezing op het Iets over de Nederlandsche Octrooiwet des Heeren Mr. J. Heemskerk Az.*, *supra* note 35, at 48.

46. *Id.*

industries, and the Dutch society at large, as it deprived them of the possibility to use foreign inventions until the importation patent is annulled, for example, for reasons of *non-usus*.<sup>47</sup> This ground for annulment, however, could only be invoked if two years had lapsed since the patent grant.<sup>48</sup>

The patent fees required by law also attracted criticism.<sup>49</sup> Patents were granted for an initial term of five, ten, or fifteen years. Upon request, five and ten-year patents were renewable until a maximum term of fifteen years, but only for important reasons.<sup>50</sup> The law stipulated that the fees varied between 150 and 750 guilders, depending on the importance of an invention, but in reality they varied according to the patent's duration: 150 guilders for a five-year patent, 300 guilders for a ten-year patent, and 600 guilders for a fifteen-year patent.<sup>51</sup> These fees were considered to be prohibitively high, especially compared with other countries.<sup>52</sup> Moreover, they had to be paid in full within three months after the patent was granted, otherwise the patent would become null and void.<sup>53</sup> Commentators believed that such fees discouraged inventors to apply for patent protection and exploit their inventions in the Netherlands.<sup>54</sup>

In practice, inventors were sometimes better off patenting inventions in other countries first and later applying for importation patents in the Netherlands if their inventions proved successful.<sup>55</sup> The

47. Patent Act of 1817, *supra* note 13, art. 8(c).

48. *Id.*

49. Heemskerk Az., *supra* note 29, at 30.

50. Patent Act of 1817, *supra* note 13, arts. 3–4.

51. Heemskerk Az., *supra* note 29, at 30.

52. Cf. B. Zorina Khan, *An Economic History of Patent Institutions*, EH.NET, <https://eh.net/encyclopedia/an-economic-history-of-patent-institutions/> (last visited May 12, 2019) (discussing high costs in European patent systems).

53. See HEEMSKERK AZ., *supra* note 32, at 42; STOFFELS, *supra* note 30, at 131.

54. See Heemskerk Az., *supra* note 29, at 30; see also B.W.A.E. Sloet tot Oldhuis, *Eenige Aanmerkingen op de Wet van 25 Januarij, 1817, Omtrent het Verleenen van Uitsluitende Regten op Uitvindingen en Verbeteringen van Kunst en Volksvlijt*, 1 TIJDSCHRIFT VOOR STAATHUISHOUDKUNDE EN STATISTIEK 50, 55 (1842) [hereinafter Sloet tot Oldhuis, *Eenige Aanmerkingen op de Wet van 25 Januarij, 1817*].

55. Admittedly, inventors could only do so if no other person had obtained an importation patent on their inventions. Yet, because of the practical application of their inventions abroad, there was a good chance that they had subsequently

patent annulment rules in the Patent Act of 1817 also encouraged inventors to take this route.<sup>56</sup> These rules prevented Dutch patent holders from seeking patent protection abroad by stipulating that their patents be nullified if they obtained a foreign patent for the same object after the patent grant.<sup>57</sup> Inventors could circumvent this, however, by first obtaining a patent in another country and then applying for an importation patent in the Netherlands.<sup>58</sup> It is unclear whether the high percentage of importation patents in the Netherlands was caused by a supremacy of foreign inventions over Dutch inventions or by Dutch inventors taking the foreign route to evade the sharp edges of the Patent Act of 1817, but their relatively large number is certainly striking, as Table 1 corroborates.<sup>59</sup>

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improved their inventions, enabling them to apply for an importation patent on improvements of their inventions that would still give them considerable competitive advantage.

56. Sloet tot Oldhuis, *Eenige Aanmerkingen op de Wet van 25 Januarij, 1817*, *supra* note 54, at 56–57.

57. Patent Act of 1817, *supra* note 13, art. 8(d).

58. STOFFELS, *supra* note 30, at 138–39; Heemskerk Az., *supra* note 29, at 41; Sloet tot Oldhuis, *Eenige Aanmerkingen op de Wet van 25 Januarij, 1817*, *supra* note 54, at 57.

59. Memorie van Toelichting bij het Ontwerp van Wet tot Afschaffing van het Verleenen van Uitsluitende Regten op Uitvindingen en Verbeteringen van Voorwerpen van Kunst en Volksvlijt, *Bijblad tot de Nederlandsche Stcrt. 1868/69 II, 708, 710* (Neth.) [hereinafter Explanatory Memorandum].

Table 1. Patents granted in the Netherlands for inventions of Dutch and foreign origin 1851-1865

(Source: Bijblad tot de Nederlandsche Stcrt. 1868/69 II, 710).

Period	Obtained patents (fees timely paid)			Nullified patents (fees not timely paid)			Total patents granted (before fees were due)		
	Dutch	Foreign	Total	Dutch	Foreign	Total	Dutch	Foreign	Total
1851	7	36	43	7	56	63	14	92	106
1852	14	24	38	6	41	47	20	65	85
1853	11	42	53	10	86	96	21	128	149
1854	6	29	35	4	81	85	10	110	120
1855	14	35	49	11	89	100	25	124	149
1856	7	38	45	4	115	119	11	153	164
1857	4	29	33	3	86	89	7	115	122
1858	7	23	30	6	97	103	13	120	133
1859	3	26	29	9	82	91	12	108	120
1860	14	36	50	4	106	110	18	142	160
1861	2	35	37	6	125	131	8	160	168
1862	8	42	50	5	111	116	13	153	166
1863	15	32	47	5	107	112	20	139	159
1864	13	40	53	6	83	89	19	123	142
1865	21	36	57	4	98	102	25	134	159
Yearly average	10	34	43	6	91	97	16	124	140

The Patent Act of 1817 lost much of its significance after the Supreme Court of the Netherlands in 1846 had given a devastatingly restrictive interpretation of the exclusive rights accruing to patent owners.<sup>60</sup> The law gave patent owners exclusive rights to manufacture and sell patented objects or to have them manufactured and sold.<sup>61</sup> The Supreme Court held the words “to manufacture and sell” to be inseparable, thus affirming that the mere manufacturing or the mere selling of patented objects constituted no infringement.<sup>62</sup> This permitted anyone to manufacture patented objects for their own private or commercial use,<sup>63</sup> rendering the exclusive rights of patent

60. Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands] 20 maart 1846, 22 NEDERLANDSCHE REGTSPRAAK 377 (Neth.).

61. Patent Act of 1817, *supra* note 13, art. 6.

62. HR 20 maart 1846, 22 NEDERLANDSCHE REGTSPRAAK 337.

63. *Id.*

owners ineffective and virtually meaningless.<sup>64</sup> However, this did not significantly thwart the number of requests for patents in the Netherlands,<sup>65</sup> as Table 1 illustrates. Between 1851 and 1865, the Dutch authorities granted 140 patents per year on average, of which forty-three patents were actually validly obtained.<sup>66</sup> Figures for 1831-1842 show that in that period a total number of 509 patents (of which 319 importation patents) were validly obtained in the Netherlands, which is an average of 42,4 patents (26,6 importation patents) granted per year.<sup>67</sup> Accordingly, the statistics did not meaningfully change, although compared to other European countries the number of Dutch patent grants was certainly low.<sup>68</sup>

The Patent Act of 1817 further lacked acceptable rules for publication of patents.<sup>69</sup> The law required specifications and drawings to be disclosed after the lapse or annulment of a patent, although disclosure could be delayed if reasons of great importance (e.g. political or commercial reasons) so demanded.<sup>70</sup> In practice, publication never took place.<sup>71</sup> Most probably this was cost-related, but it also did not help that the law did not prescribe a specific time and manner of publication.<sup>72</sup> The fact that inventions were not

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64. Heemskerk Az., *supra* note 29, at 34; Sassen, *supra* note 29, at 149, 155.

65. Explanatory Memorandum, *supra* note 59, at 710.

66. *Id.*

67. See S. Bleekrode, *Overzicht van de Vorderingen der Verschillende Takken van Nijverheid, of Verslag van de Technologische Wetenschappen Gedurende 1843 en 1844*, 9 TIJDSCHRIFT TER BEVORDERING VAN NIJVERHEID 339, 348 (1845).

68. *Id.* at 348 (calculating between the years of 1831 and 1841 a total of 1593 patent grants, with 403 importation patents in Belgium and a total of 6753 patent grants, with 781 importation patents in France which is a yearly average of 144,8 patent grants, with 36,6 importation patents in Belgium and 613,9 patent grants, with 71 importation patents in France; and calculating between the years of 1838 and 1843 a total of 2452 patent grants, with 213 importation patents in Great Britain which is a yearly average of 408,7 patent grants, with 35,5 importation patents).

69. Patent Act of 1817, *supra* note 13, art. 7.

70. *Id.*; Patent Regulations of 1817, *supra* note 40, § 14.

71. STOFFELS, *supra* note 30, at 137; Heemskerk Az., *supra* note 29, at 37.

72. HEEMSKERK AZ., *supra* note 32, at 47; Heemskerk Az., *supra* note 29, at 37; J.L. De Bruyn Kops, *Toespraak bij de Opening van den Cursus in de Staathuishoudkunde 1867-68, Gehouden in het Auditorium der Polytechnische School*, 17 DE ECONOMIST 150, 151 (1868) (referring to the enormous cost of more than one million guilders that the English Government had paid to establish records of patent grants in its country).

disclosed deemed to be against the public interest, which had a right to know—either upon termination of the patent grant or earlier if possible—what secrets lie behind patented inventions.<sup>73</sup>

Other elements of the Patent Act of 1817 that were disputed included the absence of a procedure to appeal royal decisions to deny or annul patents;<sup>74</sup> the unclarity of judicial power to annul patents in accordance with the law;<sup>75</sup> the fact that the transfer of patents was subject to royal authorization;<sup>76</sup> that fees were due for the transfer and inheritance of patents;<sup>77</sup> and that patent fees were never used to grant prizes or rewards for the encouragement of industry, as the law required (although the purpose of this rule was also criticized, as it implied that patent holders were subsidizing competitors).<sup>78</sup>

#### IV. CALLS FOR PATENT REFORM

Because the Patent Act of 1817 had many shortcomings, calls for reform were increasingly made.<sup>79</sup> While little criticism was heard in the first half of the nineteenth century,<sup>80</sup> voices to change the Patent Act of 1817—or to abolish it altogether—became especially strong after the adoption of the Belgian Patent Act in 1854.<sup>81</sup> The Dutch followed the establishment of the new Belgian Patent Act very closely, because after the Belgians had separated from the Netherlands in the 1830s, Dutch patent law continued to apply in Belgium until 1840 and, in amended form, until 1854.<sup>82</sup> Some commentators considered the

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73. See STOFFELS, *supra* note 30, at 85–88 (suggesting that during the patent term the invention should at least be open for public inspection by way of a consultation of the registers).

74. *Id.* at 139–40.

75. Heemskerk Az., *supra* note 29, at 39.

76. STOFFELS, *supra* note 30, at 131; Heemskerk Az., *supra* note 29, at 32.

77. STOFFELS, *supra* note 30, at 130–31; Sassen, *supra* note 29, at 158.

78. STOFFELS, *supra* note 30, at 132–33; Heemskerk Az., *supra* note 29, at 42; Sloet tot Oldhuis, *Eenige Aanmerkingen op de Wet van 25 Januarij, 1817*, *supra* note 54, at 56.

79. Doorman, *supra* note 28, at 231.

80. *Id.*

81. WETGEVING EN ANDERE OFFICIELE STUKKEN BETREFFENDE DE OCTROOIJEN VAN UITVINDING, INVOER EN VERBETERING IN NEDERLAND EN ZIJNE OVERZEESCHE BEZITTINGEN, BENEVENS REGTSPRAAK, AANTEKENINGEN EN BIBLIOGRAPHIE NOPENS HET ONDERWERP 87 ('s Gravenhage, Belinfante, 2nd rev. ed. 1867).

82. *Id.* at 83; S. Bleekrode, *De Belgische Wet van 24 Mei 1854, op de Octrooijen*

Belgian Patent Act to be a useful guiding point for patent reform in the Netherlands, but others were unconvinced of the operation of *any* patent system and called for the complete abolition of the Patent Act of 1817.<sup>83</sup>

#### A. INDUSTRY REPORTS

A first influential report that criticized the operation of the Patent Act of 1817 was released by the *Nederlandse Maatschappij ter Bevordering van Nijverheid*, the Dutch Society for the Promotion of Industry (the Society).<sup>84</sup> Consistent with its broad mission to promote trade, industry and social welfare generally, the Society was engaged in all sorts of activities, varying from educating the industries to alleviating poverty by securing employment for the poor.<sup>85</sup> Serving the general interests of both businesses and the people, it not only stood up against governmental policies that affected trade and the industries, but also wrote petitions against foodstuff fraud, water and air pollution and child labour.<sup>86</sup>

In 1854, the Society appointed a committee, consisting of J.C. Faber van Riemsdyk (a counselor-at-law, conservative politician, and entrepreneur), G. Simons (a professor of mechanics and director of the Royal Academy in Delft, conservative politician and later Minister of the Interior from 1856 to 1857), and J. Ackersdyk (a lawyer, economist, and professor of statistics at the University of Utrecht), to examine the objections which the Patent Act of 1817 raised for the industries.<sup>87</sup> It concluded that patents are unfavourable, as they restrict the industries and obstruct competition. Disqualifying them as “remnants of historical errors”, the committee called for a repeal of the Patent Act of 1817.<sup>88</sup>

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*van Uitvinding*, 1 DE VOLKSVLIJT 357 (1854).

83. See HEEMSKERK AZ., *supra* note 32, at 7, 21.

84. See J.C. Faber van Riemsdyk et al., *Rapport over het Onderzoek der Bezwaren, Welke voor de Nijverheid in de Wet op de Octrooijen Gelegen Zijn*, 17 TIJDSCHRIFT TER BEVORDERING VAN NIJVERHEID 282 (1854).

85. See generally J. BIERENS DE HAAN, VAN OECONOMISCHE TAK TOT NEDERLANDSCHE MAATSCHAPPIJ VOOR NIJVERHEID EN HANDEL: 1777-1952 (1952).

86. *Id.* at 95-96.

87. Faber van Riemsdyk et al., *supra* note 84, at 282-93.

88. See *id.* at 283-85, 293.



To support its views, the committee debunked three main economic arguments entertained in favour of patents.<sup>89</sup> First, it disagreed with the idea that patents are the best means for securing inventors a just reward for their labour.<sup>90</sup> The committee found that a genius does not need monetary incentives and that most inventions in history had occurred without patent protection.<sup>91</sup> Often it was only a matter of time before someone made a particular invention, rendering the priority of inventing a sheer coincidence.<sup>92</sup>

Second, the committee opposed the idea that patents are needed to give inventors a time-limit exclusivity to enable them to charge higher prices for their products, so as to recoup the costs for putting new inventions on the market.<sup>93</sup> It argued that the head-start profits that inventors could make would generally suffice to financially reward them, especially since imitators, who must also incur costs, will usually not enter the market unless the products prove to generate a reasonable turnover.<sup>94</sup>

Third, the committee resisted the argument that, in return for temporary protection, patent law properly induces inventors to disclose their inventions to the public instead of keeping them secret.<sup>95</sup> It argued that inventors who knew how to keep their inventions secret would not apply for time-limited patents, but rather conceal their inventions to enjoy an enduring monopoly until the secrecy got broken.<sup>96</sup> Only those who were unable to keep their inventions secret and who faced the risk of instant competition would seek patent protection.<sup>97</sup> The benefits of patents thus accrued too one-sidedly to inventors who sought to eliminate competition, without giving the public anything in return.<sup>98</sup>

The committee found an additional argument for the abolition of the

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89. *See id.* at 285–88.

90. *See id.* at 285–86.

91. *See id.* at 286.

92. *See id.*

93. *See id.* at 286–87.

94. *See id.* at 286.

95. *See id.* at 287–88.

96. *See id.* at 287.

97. *See id.*

98. *See id.* at 288.

patent system in the example of Switzerland, a country without patent protection but with a thriving industry.<sup>99</sup> It saw in this example substantive proof to corroborate that the patent law could be abolished to enhance industrial progress.<sup>100</sup>

Interestingly, the committee found it necessary to consider the economic effects of patents on the industry only, without discussing legal arguments of the right and equity of patent protection.<sup>101</sup> It simply denied that inventors had a “right” to receive protection for their inventions and maintained that no reasons of justice could justify obstructions of the industry.<sup>102</sup>

Still, the committee was politically aware enough to realise that patent abolition would not be foreseeable soon.<sup>103</sup> It therefore proposed ten modifications that the legislator could adopt to make patent law clearer, more effective, and slightly less attractive to inventors.<sup>104</sup> To give further effect to the report, an address was sent to the King expressing the wish to abolish the Patent Act of 1817 or amend it as proposed.<sup>105</sup>

An opposite position was taken by the *Vereniging voor Volksvlijt*, the Association for People’s Diligence (the Association), which was founded in 1852 to aid in the exercise of trade, industry, and agriculture by exchanging knowledge, organising exhibitions, and swiftly informing the public of useful inventions and improvements.<sup>106</sup> At its 1854 Amsterdam meeting, the Association concluded that the Netherlands should maintain patents, but that the law must be amended by fitting legal provisions.<sup>107</sup> During the discussions, the Association assumed that inventors have a right to patent protection, although this went without any discussion as to the legal basis or

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99. *See id.*

100. *See id.*

101. *See id.*

102. *See id.*

103. *See id.*

104. *See id.* at 289–92.

105. *See* Ingekomen Verzoekschriften, Bijblad tot de Nederlandsche Stert. 1854/55 II, 31, 492 (Neth.).

106. *See* *Het Paleis voor Volksvlijt*, 4 DE AMSTERDAMSCH GIDS 218, 219 (1929), also available at: <http://www.paleisvoorvolksvlijt.nl/amsterdamschegids.shtml> (last visited May 12, 2019).

107. *See* *Verslag Vereeniging voor Volksvlijt 1854*, *supra* note 41, at 538–45.

merits of such a right.<sup>108</sup> While a few members did acknowledge that patents came with certain objections, the Association generally found that these could not outweigh the advantages that industry could reap from patents.<sup>109</sup> Having no time to discuss how Dutch patent law could be improved, the Association suggested that the 1854 Belgian Patent Act could perhaps serve as a blueprint for patent law reform.<sup>110</sup>

Accordingly, industry representatives in the Netherlands were not univocal in their calls for patent reform.<sup>111</sup> This became even clearer after the board of the *Vereniging ter Bevordering van Fabriek- en Handwerksnijverheid in Nederland*, the Association for the Promotion of Industry and Crafts in the Netherlands, which had sent an address to the King on 17 October 1855 expressing the wish to replace the Patent Act of 1817 with a law similar to the 1854 Belgian Patent Act,<sup>112</sup> forwarded the address to different Chambers of Commerce in the Netherlands, inviting them to send letters of support to the government. A group of industrials from Maastricht and eleven Chambers of Commerce supported the address,<sup>113</sup> but the Rotterdam Chamber of Commerce strongly dissented and argued that patents hindered the Dutch industries.<sup>114</sup> The Rotterdam Chamber of Commerce particularly condemned importation patents that prevented Dutch companies from importing foreign inventions from abroad.<sup>115</sup> As a result, these inventions were available from domestic suppliers only, often against higher prices and in poorer quality, if available at all.<sup>116</sup> It further asserted that, since the marketplace in the Netherlands

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108. *See id.* at 544.

109. *See id.* at 540–43.

110. *See id.* at 545.

111. Sassen, *supra* note 29, at 140–41.

112. *See* Ingekomen Verzoekschriften, Bijblad tot de Nederlandsche Stcrt. 1855/56 II, 49 (Neth.). However, in 1868, the *Vereniging ter Bevordering van Fabriek- en Handwerksnijverheid in Nederland* changed its opinion and supported patent abolition, as it believed this would “free national industry from oppressing and inefficient trammels”. *See* Ingekomen Verzoekschriften, Bijblad tot de Nederlandsche Stcrt. 1868/69 II, 1467 (Neth.).

113. *See* Explanatory Memorandum, *supra* note 59, at 708.

114. *See Adres van de Kamer van Koophandel en Fabrieken te Rotterdam, in VOORDRAGTEN OVER DEN EIGENDOM VAN VOORTBRENGSELEN VAN DEN GEEST 25–29* (Amsterdam, Beerendonk, 2d rev. ed. 1869).

115. *See id.* at 27.

116. *See id.* at 28.

is small, patents offered little incentives for companies to innovate and were frequently used to prevent competition rather than to put inventions to practical use.<sup>117</sup> The Rotterdam Chamber of Commerce, therefore, wrote an address to the Commissioner of the King in South-Holland urging the abolition of the Patent Act of 1817,<sup>118</sup> which was supported by twelve other Chambers of Commerce.<sup>119</sup>

In the years that followed, industry representatives remained strongly disunited on the patent issue, although everyone agreed that something had to be done.<sup>120</sup> The calls for abolishing the Patent Act of 1817 were taken very seriously though. In 1861 and 1864, an anonymous patent supporter, who was also a member of the *Nederlandse Maatschappij ter Bevordering van Nijverheid*, even wrote two extensive booklets attempting to single-handedly dismiss all the arguments put forward against patents.<sup>121</sup> He even went so far as to call for an indefinitely renewable property right in inventions,<sup>122</sup> but – unsurprisingly – such pleas would never receive much support in the Netherlands.

#### B. ACADEMIC DEBATE

The positions of Dutch academics on patent protection were as strongly divided as those of the industries. Patent advocates, calling for a modernization of the Dutch Patent Act, included notable persons like S. Bleekrode (professor of chemical technology at the Delft Royal

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117. *See id.* at 28–29.

118. *See id.* at 25–29.

119. *See* Explanatory Memorandum, *supra* note 59, at 708.

120. *See* HEEMSKERK AZ., *supra* note 32, at 7–8; *Gemeenzaam Onderhoud*, *supra* note 36, at 159 (H.J. Koenen).

121. *See generally* BEOORDEELING DER GRONDEN VOOR EN TEGEN HET BILLIJKE, EN VOOR DE NIJVERHEID AL OF NIET WENSCHELIJKE VAN HET DAARSTELLEN EENER ALGEMEENE WET OP UITVINDIGEN EN VERBETERINGEN IN NEDERLAND: BENEVENS DE GRONDSLAGEN, WAAROP EENE DUSDANIGE WET BIJ EVENTUELE DAARSTELLING ZOU KUNNEN BERUSTEN (Deventer, Van den Sigtenhorst 1864) [hereinafter BEOORDEELING DER GRONDEN VOOR EN TEGEN HET BILLIJKE]; BESCHOUWING OVER HET WENSCHELIJKE DER DAARSTELLING EENER ALGEMEEN WERKENDE WET TER VERKZEKERING VAN HET REGT OP UITVINDINGEN EN VERBETERINGEN (VERVANGING DER OCTROOIWET) EN HET NAAUWE VERBAND TUSSCHEN DAT REGT EN HET REGT VAN COPY (Deventer, Hoovenaar Rutering 1861).

122. *See* BEOORDEELING DER GRONDEN VOOR EN TEGEN HET BILLIJKE, *supra* note 121, at 73.

Academy),<sup>123</sup> J. Heemskerk Az. (an eminent lawyer, judge, and liberal—though later conservative—politician, who served as Minister of the Interior from 1866-1868, 1874-1877, and 1883-1888, as Prime Minister of the Netherlands from 1874-1877 and 1883-1888 and as Minister of State from 1885-1897),<sup>124</sup> A.F. de Savornin Lohman (a noble, judge, lecturer in law at the Free University in Amsterdam and anti-revolutionary Protestant-Christian parliamentarian, who acted as Minister of the Interior from 1890-1891),<sup>125</sup> and others.<sup>126</sup>

These advocates generally argued that the patent system, while in need of reform, was “the most powerful means to support Dutch industries.”<sup>127</sup> Without patent protection, inventors might keep their inventions secret or move their businesses to other countries that granted patent protection.<sup>128</sup> They maintained that patents were either a necessary encouragement to invent or a reward for the time, labour, and money expended in creating new inventions.<sup>129</sup> Additionally, they asserted that, as nearly all other civilized countries had patent legislation, the principle of patent protection was internationally recognized.<sup>130</sup> They, therefore, concluded that inventors had a right to patent protection and that it would be immoral, unjust, and illegitimate

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123. See Bleekrode, *Nalezing op het Iets over de Nederlandsche Octrooiwet des Heeren Mr. J. Heemskerk Az.*, *supra* note 35, at 43–46; *Gemeenzaam Onderhoud*, *supra* note 36, at 160 (S. Bleekrode); *Verslag Vereeniging voor Volkswlijt 1854*, *supra* note 41, at 538–44 (Prof. Bleekrode).

124. See HEEMSKERK AZ., *supra* note 32, at 1–24, 52–53; see generally Heemskerk Az., *supra* note 29.

125. See generally A.F. De Savornin Lohman, *Over de Regten van den Uitvinder*, 9 THEMIS 213 (1862) [hereinafter De Savornin Lohman, *Over de Regten van den Uitvinder*]; see also A.F. De Savornin Lohman, *Grond en Omvang van het Regt van Schrijver en Uitvinder*, 16 BIJDRAGEN TOT DE KENNIS VAN HET STAATS-, PROVINCIAAL- EN GEMEENTE-BESTUUR IN NEDERLAND 1 (1870) [hereinafter De Savornin Lohman, *Grond en Omvang van het Regt van Schrijver en Uitvinder*].

126. See, e.g., STOFFELS, *supra* note 30, at 3–28; see generally Sassen, *supra* note 29.

127. See *Verslag Vereeniging voor Volkswlijt 1854*, *supra* note 41, at 539 (Prof. Bleekrode); see also HEEMSKERK AZ., *supra* note 32, at 12.

128. See HEEMSKERK AZ., *supra* note 32, at 12, 18; Heemskerk Az., *supra* note 29, at 17.

129. See STOFFELS, *supra* note 30, at 18; HEEMSKERK AZ., *supra* note 32, at 6–7, 18; Heemskerk Az., *supra* note 29, at 17; Sassen, *supra* note 29, at 145–46; *Verslag Vereeniging voor Volkswlijt 1854*, *supra* note 41, at 539 (Prof. Bleekrode).

130. See Heemskerk Az., *supra* note 29, at 17–18.

to deny them such right.<sup>131</sup> They further urged that no self-respecting government could openly favour copycats over inventors by abolishing patent law.<sup>132</sup> Instead, they believed that the flaws of the Patent Act of 1817 could be cured by taking example of better laws existing elsewhere.<sup>133</sup>

This was contested by B.W.A.E. Sloet tot Oldhuis (an economist, lawyer, and liberal parliamentarian),<sup>134</sup> E. Star Busmann (a lawyer and judge at the Amsterdam Court of Appeal),<sup>135</sup> J. Freseman Viëtor (professor of law at the University of Groningen),<sup>136</sup> and A.M. Pareau (a lawyer, judge, and vice-president of the Amsterdam District Court), among others.<sup>137</sup> Moreover, the editors of the Dutch journal *De Economist* also published a series of articles in favour of abolishing patents.<sup>138</sup>

These opponents asserted that inventors had no inherent right to inventions and that it would not be unjust or illegitimate to deny them protection against imitation by others.<sup>139</sup> They maintained that inventors were able to make a living without patents, because good

131. See HEEMSKERK AZ., *supra* note 32, at 53; De Savornin Lohman, *Over de Regten van den Uitvinder*, *supra* note 125, at 216–21; Sassen, *supra* note 29, at 143.

132. HEEMSKERK AZ., *supra* note 32, at 53.

133. See HEEMSKERK AZ., *supra* note 32, at 21; Sassen, *supra* note 29, at 150; *Verslag Vereeniging voor Volksvlijt 1854*, *supra* note 41, at 539 (Prof. Bleekrode).

134. See Sloet tot Oldhuis, *Eenige Aanmerkingen op de Wet van 25 Januarij, 1817*, *supra* note 54, at 50–52, 57; B.W.A.E. Sloet tot Oldhuis, *Over de Wetgeving op de Octrooijen*, 6 TIJDSCHRIFT VOOR STAATHUISHOUDKUNDE EN STATISTIEK 340, 340–46 (1855) [hereinafter Sloet tot Oldhuis, *Over de Wetgeving op de Octrooijen*].

135. See EDUARD STAR BUSMANN, *OCTROOIJEN VAN UITVINDING* (Groningen, Wolters 1867).

136. See J. Freseman Viëtor, *Eene Bijdrage tot het Leerstuk van den Intellectueelen Eigendom: Octrooijen van Uitvinding – Acad. Proefschrift van E. Star Busmann, Groningen, 1867*, 15 BIJDRAGEN TOT DE KENNIS VAN HET STAATS-, PROVINCIAAL- EN GEMEENTE-BESTUUR IN NEDERLAND 1, 113 (1869).

137. See A.M. Pareau, *Octrooijen*, 10 DE ECONOMIST 143 (1861).

138. See generally *De Octrooijen van Uitvinding: Balans van Voor- en Nadeelen*, 18 DE ECONOMIST 145 (1869); *Een Dringend Woord over Eene Niet-Politieke Hervorming*, 17 DE ECONOMIST 1, 189 (1868); *Nog een Woord over Octrooi-Heffing: Regt en Nut*, 18 DE ECONOMIST 777 (1869); *Octrooijen van Uitvinding*, 16 DE ECONOMIST 247 (1867); *Staten-Generaal: Octrooijen*, 18 DE ECONOMIST 601 (1869).

139. See STAR BUSMANN, *supra* note 135, at 15–68; Pareau, *supra* note 137, at 145–50; Sloet tot Oldhuis, *Over de Wetgeving op de Octrooijen*, *supra* note 134, at 340–43; Freseman Viëtor, *supra* note 136, at 10.

inventions would always find their reward.<sup>140</sup> Moreover, the ability to first exploit their inventions before others could step in, also gave inventors strong financial advantages.<sup>141</sup> They further doubted that patents actually encouraged inventors to make inventions,<sup>142</sup> as the level of innovation in the Netherlands in those days was low to begin with.<sup>143</sup> Some scholars even saw patents as “a premium for incompetence, inadequacy and laziness,” as they feared that the efficiency of inventors might be impeded through the prospect of having their efforts and costs be recouped by patents.<sup>144</sup> Overall, patents were considered to be welfare-reducing, because they hindered industrial progress and because the public ultimately had to pay higher prices resulting from patent monopolies, mostly to the benefit of foreign inventors that owned the majority of Dutch patents.<sup>145</sup> Therefore, they concluded that the patent system could better be abolished.<sup>146</sup>

Others took a more neutral standpoint, signifying the intricacy of the matter. J. de Bosch Kemper, a moderate conservative politician and law professor at the Amsterdam Athenaeum Illustre, conceded that he could not deny that fairness warranted protection for inventors. However, as it could easily occur that two persons simultaneously came to the same invention, he regarded it as unfair if protection only accrued to the person first filing a patent application.<sup>147</sup>

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140. See STAR BUSMANN, *supra* note 135, at 15–68; Pareau, *supra* note 137, at 145–50; Sloet tot Oldhuis, *Over de Wetgeving op de Octrooijen*, *supra* note 134, at 340–43; Freseman Viëtor, *supra* note 138, at 10.

141. See STAR BUSMANN, *supra* note 135, at 73–75; Pareau, *supra* note 137, at 149, 151; Sloet tot Oldhuis, *Eenige Aanmerkingen op de Wet van 25 Januarij, 1817*, *supra* note 54, at 51–52; Freseman Viëtor, *supra* note 136, at 149–53.

142. See STAR BUSMANN, *supra* note 135, at 87; Pareau, *supra* note 137, at 152–53; Sloet tot Oldhuis, *Eenige Aanmerkingen op de Wet van 25 Januarij, 1817*, *supra* note 54, at 50–51; Sloet tot Oldhuis, *Over de Wetgeving op de Octrooijen*, *supra* note 134, at 343.

143. See Pareau, *supra* note 137, at 152.

144. *Id.* at 149.

145. See *id.* at 152 (stating that eighty percent of all patents in the Netherlands were granted to foreigners); see also STAR BUSMANN, *supra* note 135, at 102–06; Freseman Viëtor, *supra* note 136, at 160.

146. See STAR BUSMANN, *supra* note 135, at 102–06; Pareau, *supra* note 137, at 153; Freseman Viëtor, *supra* note 136, at 165–68.

147. *Gemeenzaam Onderhoud*, *supra* note 36, at 160–61.

Likewise, E.H. von Baumhauer, a professor of chemistry and medical science at the Amsterdam Athenaeum Illustre, contended that patents had positive as well as negative effects.<sup>148</sup> While patents assured that inventors were rewarded for the time, labour, and money spent, industries often prevented scientists from reaping the fruits of their work by getting hold of their ideas and patents on their inventions.<sup>149</sup> He openly queried whether patents should be maintained to uphold their favourable effects or abolished to prevent their adverse effects, admitting though that “the objections are certainly strong.”<sup>150</sup>

J.L. de Bruyn Kops, a liberal politician, economist and professor of statistics at the Polytechnic School of Delft, took a more critical stance and called upon the government to quickly resolve the matter.<sup>151</sup> He clearly favoured industrial freedom over patent protection, especially for the Dutch industries, which were not known for their inventiveness but which could benefit from the ability of using foreign inventions if patents were abolished.<sup>152</sup>

The academic debate largely mirrored the arguments put forward in favour and against patents by the industries,<sup>153</sup> but with one important exception. Many academics situated the debate in a more principled legal discourse by invoking theories on the legal basis and principles of patent protection to support their positions.

Virtually all commentators, including advocates of patent protection, rejected the idea of patents as property, since inventions are insusceptible to being owned, unless they are kept secret.<sup>154</sup> Once an innovative idea is shared with others, the inventor loses exclusive control over it: he no longer can exercise key attributes of private property, such as the right to use, enjoy and dispose of it in the manner as he pleases.<sup>155</sup>

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148. *Id.* at 161.

149. *Id.*

150. *Id.* at 162.

151. De Bruyn Kops, *supra* note 72, at 151–52.

152. *Id.* at 152.

153. *See infra* Part IV.A.

154. STOFFELS, *supra* note 30, at 3–16.

155. *See id.*; STAR BUSMANN, *supra* note 135, at 20–32; HEEMSKERK AZ., *supra* note 32, at 2–4; Heemskerk Az., *supra* note 29, at 15–26; Sassen, *supra* note 29, at 140, 143; Pareau, *supra* note 137, at 145–49; Sloet tot Oldhuis, *Eenige*



De Savornin Lohman, however, maintained that while no property can exist in ideas, inventors own a property on the authority to exploit their inventions at the exclusion of others.<sup>156</sup> The object of the inventor's property is thus not the invention itself, but the exclusive power to put it into circulation as an object of trade.<sup>157</sup> He held that inventors were entitled to this property because of the labour they exert in making inventions.<sup>158</sup> Star Busmann and Freseman Viëtor contested this theory, arguing that a right in rem could exist in incorporeal assets, such as usufructs or pledges, but not in theoretically construed powers.<sup>159</sup>

Other patent advocates argued that patent protection was based on a social contract.<sup>160</sup> In return for the disclosure of their ideas, which allowed society to enjoy new inventions and build upon them, the state agreed to grant inventors a time-limited statutory right to protect them against imitation of their ideas.<sup>161</sup> Freseman Viëtor, however, held that it may be fair to reward inventors for the services they render to society, but this does not yet give them a right to claim a reward, unless agreed upon in advance.<sup>162</sup> Otherwise, anyone providing a useful service to society could demand such right.<sup>163</sup>

Patent advocates also referred to the principle of fairness to claim that inventors had a right to obtain patents for inventions.<sup>164</sup> They

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*Aanmerkingen op de Wet van 25 Januarij, 1817, supra note 54, at 340–41; Freseman Viëtor, supra note 136, at 16–25.*

156. De Savornin Lohman, *Over de Regten van den Uitvinder, supra note 125, at 222–29.*

157. De Savornin Lohman, *Grond en Omvang van het Regt van Schrijver en Uitvinder, supra note 125, at 98.*

158. De Savornin Lohman, *Over de Regten van den Uitvinder, supra note 125, at 230.*

159. STAR BUSMANN, *supra note 135, at 28; Freseman Viëtor, supra note 136, at 31.*

160. HEEMSKERK AZ., *supra note 32, at 5–7.*

161. *Id.*; *see also* STOFFELS, *supra note 30, at 16–28; Sassen, supra note 29, at 144–45.*

162. Freseman Viëtor, *supra note 136, at 35; see also* STAR BUSMANN, *supra note 135, at 41.*

163. Freseman Viëtor, *supra note 136, at 151* (referring to tradesmen discovering new trade routes, who cannot claim exclusivity to use such routes); *see also* Pareau, *supra note 137, at 149* (referring to tradesmen that start a new market, who cannot claim exclusivity to operate on that market).

164. STOFFELS, *supra note 30, at 18.*

contended that fairness required society to grant patent protection to properly reward inventors for their inventions and prevent unjust enrichment by imitators.<sup>165</sup> Since patents were granted to the first applicant and not to the true inventor, however, opponents argued that patent law did not guarantee that inventors received a fair reward.<sup>166</sup> Freseman Viëtor, moreover, repeated that it may be fair, on principle, to reward inventors, but that fairness could never be a ground for the state to grant patent rights unless the public interest so requires.<sup>167</sup>

Taking the public interest as a starting point for legislative action, Freseman Viëtor clearly was a proponent of utilitarian principles.<sup>168</sup> For reasons stated above, he denied that inventors had a right to patent protection based on property, social contract or fairness theories.<sup>169</sup> The lawmaker could grant patent rights, but only if this were useful and not in conflict with the public interest.<sup>170</sup> Such rights, he argued, were a legislative creation, not a natural or pre-existing entitlement.<sup>171</sup> Applying the public interest test, he concluded (i) that the value of the service that inventors rendered to society was limited, as most inventions are a natural result of scientific progress and will likely occur anyway; (ii) that inventors did not need patents to secure a proper income, because they can benefit from the honour and reputation conferred upon them and from a first-mover advantage, enabling them to make head-start profits and to improve inventions before others can do; (iii) that patents imposed costs on inventors, including costs of obtaining patents and of possible legal proceedings, while not providing them with true legal certainty; and (iv) that patents cause detriment to society by allowing patent holders to charge monopoly prices, making the public pay more for patented objects than it would pay for the same objects in a free competition.<sup>172</sup> He thus

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165. See HEEMSKERK AZ., *supra* note 32, at 6–7 (proper reward); De Savornin Lohman, *Grond en Omvang van het Regt van Schrijver en Uitvinder*, *supra* note 125, at 17–44 (unjust enrichment); De Savornin Lohman, *Over de Regten van den Uitvinder*, *supra* note 125, at 234–35 (unjust enrichment).

166. STAR BUSMANN, *supra* note 135, at 76, 109–10.

167. Freseman Viëtor, *supra* note 136, at 41–42.

168. *Id.* at 9.

169. *Id.* at 4–9.

170. *Id.* at 9.

171. *Id.* at 42–43.

172. *Id.* at 143–68.

found that there was no utility in granting patents and that the lawmaker should better abolish them.<sup>173</sup>

Accordingly, there was strong disagreement among Dutch legal thinkers about the legal basis and principles of patent protection.<sup>174</sup> In the absence of a commonly accepted theory, the debate essentially resolved around the question whether patents were in the public interest.<sup>175</sup>

Patent advocates asserted that the public interest required patents to be continued.<sup>176</sup> Arguing that inventors had a right to patents, they insisted that this right ought to be recognized and enforced, otherwise it would destroy the foundations of society and, with it, society itself.<sup>177</sup> But even if inventors had no natural right to protection, it would be in the public interest to reward inventors for the service they render to society by granting them protection against imitation.<sup>178</sup>

Opponents, on the other hand, maintained that the public had nothing to win with patents, because inventions would be made regardless of their legal protection, whereas patents only resulted in higher prices for society and obstructed industrial progress.<sup>179</sup> Being detrimental to the public interest, so they argued, patents had to be abolished so that industrial freedom could prevail.<sup>180</sup>

## V. POLITICAL RESPONSE AND THE ADOPTION OF THE PATENT ABOLITION ACT

What did the Dutch government have to make of all of the above? The opinions of scholars and the industries at the time diverged so

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173. *Id.* at 165–68.

174. See De Savornin Lohman, *Grond en Omvang van het Regt van Schrijver en Uitvinder*, *supra* note 125, at 1–4.

175. *Id.* at 4 (admitting that there were conflicting theories on the nature and legal basis of patents in the Netherlands and contending that, because of this, the legislator could only rely on a sense of fairness, which in his view was equivalent to sailing without a compass).

176. STOFFELS, *supra* note 30, at 3, 18–20.

177. De Savornin Lohman, *Over de Regten van den Uitvinder*, *supra* note 125, at 252–54.

178. STOFFELS, *supra* note 30, at 125.

179. STAR BUSMANN, *supra* note 135, at 86–106; Pareau, *supra* note 137, at 155; Sloet tot Oldhuis, *Over de Wetgeving op de Octrooijen*, *supra* note 134, at 343–46.

180. Freseman Viëtor, *supra* note 136, at 167–68.

widely that no uniform conclusion could be drawn from them. So how did this translate into politics?

From 1855 onwards, the question of whether patent law should be reformed or abolished was repeatedly raised during parliamentary deliberations on the State Budget.<sup>181</sup> In 1855, the Minister of the Interior acknowledged that there were strong differences of opinion on this matter, but that he was investigating it and would afterwards propose a bill to end the controversy.<sup>182</sup> In the following years, parliamentarians recurrently called upon the government to act.<sup>183</sup> The consecutive Ministers of the Interior responded that they were looking into the matter. They all agreed that the Patent Act of 1817 did not function adequately but did not yet disclose whether the government favoured patent reform or abolition.<sup>184</sup> In 1857, the conservative Minister Van Rappert stated that the government was unwilling to propose patent reform until convinced that patent law should not be repealed altogether.<sup>185</sup> Liberal-conservative cabinets that ruled in

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181. *Een Dringend Woord over eene Niet-Politieke Hervorming*, *supra* note 138, at 201–04.

182. Staatsbegrooting voor 1855, Bijblad tot de Nederlandsche Stcrt. 1854/55 I, 84 (Neth.). *See id.* at 81, 88 (illustrating the different viewpoints expressed by senator Regout, calling for an improvement of the patent law and senator Van Rijckevorsel, calling for complete freedom of trade and the abolition of patents).

183. Staatsbegrooting voor het Dienstjaar 1858, Voorloopig Verslag der Commissie van Rapporteurs voor Hoofdstukken IV en V, Bijblad tot de Nederlandsche Stcrt. 1857/58 I, 46 (Neth.); Staatsbegrooting voor het Dienstjaar 1859, Beraadslaging over hoofdstuk V, Bijblad tot de Nederlandsche Stcrt. 1858/59 I, 95 (Neth.) (Regout); Staatsbegrooting voor het Dienstjaar 1859, Voorloopig Verslag der Commissie van Rapporteurs voor Hoofdstuk V, Bijblad tot de Nederlandsche Stcrt. 1858/59 II, 314 (Neth.); Staatsbegrooting voor het Dienstjaar 1860, Beraadslaging over hoofdstuk V, Bijblad tot de Nederlandsche Stcrt. 1859/60 II, 468 (Neth.) (Wintgens); Staatsbegrooting voor het Dienstjaar 1860, Voorloopig Verslag der Commissie van Rapporteurs voor Hoofdstuk V, Bijblad tot de Nederlandsche Stcrt. 1859/60 II, 229 (Neth.); Staatsbegrooting voor het Dienstjaar 1861, Voorloopig Verslag der Commissie van Rapporteurs voor Hoofdstuk V, Bijblad tot de Nederlandsche Stcrt. 1860/61 II, 353 (Neth.); Staatsbegrooting voor het Dienstjaar 1862, Voorloopig Verslag der Commissie van Rapporteurs voor Hoofdstuk V, Bijblad tot de Nederlandsche Stcrt. 1861/62 II, 193 (Neth.).

184. *See Een Dringend Woord over eene Niet-Politieke Hervorming*, *supra* note 138, at 201–02.

185. *See* Memorien van Antwoord der Regering op het Verslag der onderscheidene Commissien van Rapporteurs omtrent de begrooting van Staatsuitgaven en Middelen voor het Dienstjaar 1858, Bijblad tot de Nederlandsche

subsequent years repeated that, given the uncertainties on the matter, government had not yet taken any decision.<sup>186</sup> In 1861, by contrast, the pragmatic-liberal Minister Van Heemstra suggested that patent reform seemed not so urgent, because the industry appeared to attach value to patent protection, given the increased number of patent applications.<sup>187</sup>

Parliamentary discussions in ensuing years reveal that the calls of parliamentarians got stronger while opinions on the matter got further divided.<sup>188</sup> In 1862, the Dutch government was again called upon to resolve the issue. Some parliamentarians urged the government to abolish patents, arguing that patents do not benefit a relative small country such as the Netherlands and produce needless obstacles for the industries, while others stated that patents should be maintained to safeguard the natural rights of inventors, but in such a way that they do not favour foreign over Dutch inventors.<sup>189</sup> Reports on the State Budget for 1864 to 1866 contain similarly divided calls for legislative action.<sup>190</sup>

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Stcrt. 1857/58 I, 55 (Neth.).

186. See Staatsbegrooting voor het Dienstjaar 1859, Beraadslaging over hoofdstuk V, *supra* note 183, at 97 (J.G.H. van Tets van Goudriaan); Staatsbegrooting voor het Dienstjaar 1859, Memorie van Beantwoording van het Voorlopig Verslag der Commissie van Rapporteurs voor Hoofdstuk V, Bijblad tot de Nederlandsche Stcrt. 1858/59 II, 406 (Neth.); Staatsbegrooting voor het Dienstjaar 1860, Memorie van Beantwoording van het Voorlopig Verslag der Commissie van Rapporteurs, Bijblad tot de Nederlandsche Stcrt. 1859/60 II, 301 (Neth.); Staatsbegrooting voor het Dienstjaar 1861, Memorie van Beantwoording van het Voorlopig Verslag der Commissie van Rapporteurs, Bijblad tot de Nederlandsche Stcrt. 1860/61 II, 445 (Neth.).

187. See Memorie van Beantwoording van het Voorlopig Verslag der Commissie van Rapporteurs voor het Ontwerp van Wet tot Vaststelling van Hoofdstuk V der Begrooting van Staatsuitgaven voor het Dienstjaar 1862, Bijblad tot de Nederlandsche Stcrt. 1861/62 II, 399 (Neth.).

188. See *Een Dringend Woord over eene Niet-Politieke Hervorming*, *supra* note 138, at 203.

189. See Staatsbegrooting voor het Dienstjaar 1863, Voorloopig Verslag der Commissie van Rapporteurs voor Hoofdstuk V, Bijblad tot de Nederlandsche Stcrt. 1862/63 II, 290 (Neth.).

190. Staatsbegrooting voor het Dienstjaar 1864, Voorloopig Verslag der Commissie van Rapporteurs voor Hoofdstuk V, Bijblad tot de Nederlandsche Stcrt. 1863/64 II, 309 (Neth.); Staatsbegrooting voor het Dienstjaar 1865, Voorloopig Verslag der Commissie van Rapporteurs voor Hoofdstuk V, Bijblad tot de Nederlandsche Stcrt. 1864/65 II, 336 (Neth.); Staatsbegrooting voor het Dienstjaar 1866, Voorloopig Verslag der Commissie van Rapporteurs voor Hoofdstuk V,

In 1862, the liberal Minister Thorbecke initially asked time to prepare a bill,<sup>191</sup> but the following year he still had not taken up the matter.<sup>192</sup> This prompted Heemskerk Az. to hold a plea before Parliament, urging the Minister to take the issue seriously, thereby emphasizing that an abolition of patents would be highly unfair and ineffective, forcing inventors to seek protection abroad.<sup>193</sup> He rather saw the Dutch government adopting the example of the 1854 Belgium Patent Act.<sup>194</sup> Thorbecke replied that he could not promise any bill at the time.<sup>195</sup>

In 1864 and 1865, Wintgens defended the opposite position.<sup>196</sup> He stated that the patent controversy could simply be resolved by repealing the patent law.<sup>197</sup> He argued that, in the interest of industries and inventors themselves, patents should be abolished.<sup>198</sup> He referred to French reports and British authorities to support his position, including reports of Legrand and Chevalier,<sup>199</sup> which the government would later use to defend the Patent Abolition Bill.<sup>200</sup>

Thorbecke responded that, while the idea of abolishing patents was tempting, doing so would not be so easy.<sup>201</sup> He observed that a patent

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Bijblad tot de Nederlandsche Stcrt. 1865/66 II, 553 (Neth.).

191. See Staatsbegrooting voor het Dienstjaar 1863, Memorie van Beantwoording van het Voorlopig Verslag der Commissie van Rapporteurs voor Hoofdstuk V, Bijblad tot de Nederlandsche Stcrt. 1862/63 II, 345 (Neth.).

192. See Staatsbegrooting voor het Dienstjaar 1864, Memorie van Beantwoording van het Voorlopig Verslag der Commissie van Rapporteurs voor Hoofdstuk V, Bijblad tot de Nederlandsche Stcrt. 1863/64 II, 353 (Neth.).

193. Staatsbegrooting voor het Dienstjaar 1864, Beraadslaging over hoofdstuk V, Bijblad tot de Nederlandsche Stcrt. 1863/64 II, 258/1 (Neth.).

194. *Id.* at 258/1.

195. *Id.* at 258/4.

196. Staatsbegrooting voor het Dienstjaar 1865, Beraadslaging over hoofdstuk V, Bijblad tot de Nederlandsche Stcrt. 1864/65 II, 349 (Neth.); Staatsbegrooting voor het Dienstjaar 1866, Beraadslaging over hoofdstuk V, Bijblad tot de Nederlandsche Stcrt. 1865/66 II, 256 (Neth.).

197. See Staatsbegrooting voor het Dienstjaar 1865, Beraadslaging over hoofdstuk V, *supra* note 196, at 349.

198. See Staatsbegrooting voor het Dienstjaar 1866, Beraadslaging over hoofdstuk V, *supra* note 196, at 256.

199. See Staatsbegrooting voor het Dienstjaar 1865, Beraadslaging over hoofdstuk V, *supra* note 196, at 349.

200. See Explanatory Memorandum, *supra* note 59, at 708.

201. See Staatsbegrooting voor het Dienstjaar 1865, Memorie van Beantwoording

industry had gradually been established that yielded a lot of money, but he could not assess whether that industry was useful and in the interest of companies.<sup>202</sup> He argued that any resolution should be informed not just by common understanding, but by examining the matter in relation to the state of the industry as a whole and the laws in other countries.<sup>203</sup> Hence, Thorbecke was careful not to take uninformed decisions.<sup>204</sup> *De Economist* reported that, before his resignation, Thorbecke was working on a bill to abolish patents.<sup>205</sup> However, it was never presented before Parliament, as the cabinet Thorbecke-II fell in early 1866.<sup>206</sup>

The political situation changed under the conservative cabinet Van Zuylen-Van Nijvelt, when Heemskerk Az. became Minister of the Interior. While parliamentarians continued their calls for patent reform or abolition,<sup>207</sup> Heemskerk Az. stated that, as long as other larger nations had not taken steps to abolish patents, the government was unsympathetic to the idea to do so in the Netherlands.<sup>208</sup> Until patent laws were repealed in other countries, the Minister was in favour of a continuation of patents along the lines of the 1854 Belgian Act.<sup>209</sup> He also considered patent abolition unadvisable, because in the absence

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van het Voorlopig Verslag der Commissie van Rapporteurs voor Hoofdstuk V, Bijblad tot de Nederlandsche Stcrt. 1864/65 II, 411 (Neth.).

202. See Staatsbegrooting voor het Dienstjaar 1865, Beraadslaging over hoofdstuk V, *supra* note 196, at 356/2.

203. *Id.* at 356/2; see also Staatsbegrooting voor het Dienstjaar 1866, Beraadslaging over hoofdstuk V, *supra* note 196, at 262/1.

204. Staatsbegrooting voor het Dienstjaar 1866, Memorie van Beantwoording van het Voorlopig Verslag der Commissie van Rapporteurs voor Hoofdstuk V, Bijblad tot de Nederlandsche Stcrt. 1865/66 II, 591 (Neth.).

205. *Een Dringend Woord over eene Niet-Politieke Hervorming*, *supra* note 138, at 204.

206. *Id.* at 204.

207. See Staatsbegrooting voor het Dienstjaar 1867, Voorloopig Verslag der Commissie van Rapporteurs voor Hoofdstuk V, Bijblad tot de Nederlandsche Stcrt. 1866/67 II, 377 (Neth.); Staatsbegrooting voor het Dienstjaar 1868, Voorloopig Verslag der Commissie van Rapporteurs voor Hoofdstuk V, Bijblad tot de Nederlandsche Stcrt. 1867/68 II, 268 (Neth.); Staatsbegrooting voor het Dienstjaar 1869, Voorloopig Verslag der Commissie van Rapporteurs voor Hoofdstuk V, Bijblad tot de Nederlandsch Stcrt. 1868/69 II, 579 (Neth.).

208. Staatsbegrooting voor het Dienstjaar 1867, Memorie van Beantwoording van het Voorlopig Verslag der Commissie van Rapporteurs voor Hoofdstuk V, Bijblad tot de Nederlandsche Stcrt. 1866/67 II, 483 (Neth.).

209. *Id.* at 483.

of a right, inventors could not protect their inventions, except by keeping them secret.<sup>210</sup> The cabinet Van Zuylen-Van Nijevelt thus preferred to reform patent law,<sup>211</sup> but it fell before it got the opportunity to start crafting a bill to that effect.<sup>212</sup>

In 1868, the Dutch patent controversy finally got resolved under the liberal cabinet Van Bosse-Fock.<sup>213</sup> This cabinet took things forward much more vigorously. Despite the concerns about abolishing patents under the former cabinet, on 29 November 1868, within six months from its inauguration, the cabinet Van Bosse-Fock proposed a bill to dismantle the Patent Act of 1817.<sup>214</sup> The preamble reveals that the bill was put forward as “the grant of exclusive rights on inventions and improvements or the first importation of industrial objects supported neither the true interests of the industries nor the public interest”.<sup>215</sup> Containing only two provisions, the bill set out that no new patents would be granted from and after 1 January 1870 (Article 1), but that existing patents could still be renewed in accordance with the Patent Act of 1817 (Article 2).<sup>216</sup> Accordingly, the bill did not repeal the Patent Act of 1817, but effectively suspended its practical operation.<sup>217</sup>

Minister Fock managed to have the bill pass Parliament very smoothly. It faced opposition *inter alia* from Heemskerk Az., Van Zinnicq Bergmann and Van Bylandt, who held pleas against it during the plenary debates in the House and Senate.<sup>218</sup> This did not have a

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210. Staatsbegroting voor het Dienstjaar 1868, Memorie van Beantwoording van het Voorlopig Verslag der Commissie van Rapporteurs voor Hoofdstuk V, Bijblad tot de Nederlandsche Stcrt. 1867/68 II, 400 (Neth.).

211. *See id.* at 400.

212. *See* Deliberations of the House on the Patent Abolition Bill, *supra* note 12, at 1476 (containing Heemskerk Az.’s statement that no patent reform bill had been drafted during the time that he was Minister of the Interior).

213. *See* Machlup & Penrose, *supra* note 9, at 4–5 (“The debate ended with a victory for the abolitionists: in July 1869 the patent law was repealed.”).

214. Ontwerp van Wet tot Afschaffing van het Verleenen van Uitsluitende Regten op Uitvindingen en Verbeteringen van Voorwerpen van Kunst en Volksvlijt, Bijblad tot de Nederlandsche Stcrt. 1868/69 II, 708 (Neth.) [hereinafter Patent Abolition Bill].

215. *Id.* at 708.

216. *Id.*

217. J.C.TH. RESIUS UITVINDING, UITVINDER EN OCTROOI VOLGENS DE OCTROOIWET 1910 32 (1913).

218. Deliberations of the House on the Patent Abolition Bill, *supra* note 12, at



great impact. The House of Representatives adopted the bill with a vote of forty-nine against eight and the Senate with a vote of twenty-nine against one.<sup>219</sup> The bill was passed with only one amendment, namely that the discontinuation of patent grants should take effect not on 1 January 1870, but directly with the publication of the law,<sup>220</sup> on 15 July 1869.<sup>221</sup>

## VI. MOTIVATIONS AND CONSIDERATIONS BEHIND THE ADOPTION OF THE PATENT ABOLITION ACT

The previous section has shown that the decision to put forward a bill to abolish the patent system rather than to reform the law was not so easy and straightforward. It took roughly thirteen years of deliberation by different cabinets before a bill was presented before Parliament. This raises the question what motivated the cabinet Van Bosse-Fock to propose the bill and what considerations prompted Parliament to adopt it.

### A. LEGAL ARGUMENTS

A first and very significant step towards the adoption of the Patent Abolition Bill was the refusal to accept that inventors have a pre-existing right in their inventions which the state needs to protect.<sup>222</sup> The government acknowledged that this question dominated all other

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1457–64, 1467–81 (Van Zinnicq Bergmann and Heemskerk Az.); Verslag der Handelingen van de Eerste Kamer der Staten-Generaal, Afschaffing van het Verleenen van Uitsluitende Regten op Uitvindingen en Verbeteringen van Kunst en Volkswlijt, Bijblad tot de Nederlandsche Stcrt. 1868/69 I, 344–46 (Neth.) [hereinafter *Deliberations of the Senate on the Patent Abolition Bill*] (Van Bylandt).

219. *Deliberations of the House on the Patent Abolition Bill*, *supra* note 12, at 1480–81; *Deliberations of the Senate on the Patent Abolition Bill*, *supra* note 218, at 346.

220. *Aanwijzing Eener Verandering in het Ontwerp van Wet tot Afschaffing van het Verleenen van Uitsluitende Regten op Uitvindingen en Verbeteringen van Voorwerpen van Kunst en Volkswlijt*, Bijblad tot de Nederlandsche Stcrt. 1868/69 I, 334 (Neth.); *Deliberations of the House on the Patent Abolition Bill*, *supra* note 12, at 1480 (showing that this amendment was proposed by Lenting).

221. *Patent Abolition Act of 1869*, *supra* note 24.

222. *Explanatory Memorandum*, *supra* note 59, at 709; *Memorie van Antwoord*, Bijblad tot de Nederlandsche Stcrt. 1868/69 I, 338, 339 (Neth.) [hereinafter *Memorandum in Reply*].

issues.<sup>223</sup> If it could be established that inventors have a right of property or other ownership right in their inventions, then such a right ought to be recognized.<sup>224</sup>

The government refuted, however, that inventors have a natural right from which they cannot be legally deprived.<sup>225</sup> It simply denied that inventors have a property right in their inventions, because no country thus far had conferred perpetual protection on inventors, which it considered to be an essential attribute of property.<sup>226</sup> It further argued that, if inventors had a right to be rewarded for their services to society, then this should not have to exist in a right to prevent others from exploiting a useful product.<sup>227</sup> The fact that some industries, which also provided useful services to society, were excluded from patent protection was reason enough not to accept the establishment of such a right.<sup>228</sup> For additional arguments, the government simply referred to academic writings on this matter and to the reports of Michel Chevalier and Arthur Legrand, which were included (in a Dutch translation) as an appendix to the explanatory memorandum.<sup>229</sup>

During the parliamentary discussions, Van Zinnicq Bergmann, Heemskerk Az., and Van Bylandt challenged the government's viewpoint that inventors have no natural right in their inventions.<sup>230</sup> They insisted that the temporariness of protection was not a reason to refuse patents the status of property,<sup>231</sup> because property can always

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223. Explanatory Memorandum, *supra* note 59, at 709.

224. *Id.* at 709; Memorandum in Reply, *supra* note 222, at 339.

225. Deliberations of the Senate on the Patent Abolition Bill, *supra* note 218, at 346 (Minister Fock).

226. Explanatory Memorandum, *supra* note 59, at 709.

227. *Id.*

228. *Id.*

229. Bijlage B: Exposition Universelle de Londres de 1862 - Rapports des Membres de la Section Française du Jury International sur l'Ensemble de l'Exposition Publiés sous la Direction de M. Michel Chevalier, Président de la Section Française du Jury International. Introduction pag. CLXI-CLXXII. Legislation des Brevets d'Invention a Réformer (Vertaling), Bijblad tot de Nederlandsche Stcrt. 1868/69 II, 713 (Neth.).

230. See Deliberations of the House on the Patent Abolition Bill, *supra* note 12, at 1458 (Van Zinnicq Bergmann), 1459–60, 1475 (Heemskerk Az.); Deliberations of the Senate on the Patent Abolition Bill, *supra* note 218, at 345 (Van Bylandt).

231. Deliberations of the House on the Patent Abolition Bill, *supra* note 12, at 1458 (Van Zinnicq Bergmann).

be restricted by the state.<sup>232</sup> Heemskerk Az. moreover argued that inventors have a right to protection, first, because on the basis of the Roman principle of *occupatio*, inventions become the property of the first person taking possession of them; and, second, because no one may enrich himself at the expense of others, while imitators clearly enrich themselves at the expense of inventors.<sup>233</sup> He said that government could not deny a right, which has been recognized in Dutch laws and in the laws of all civilized countries for a century.<sup>234</sup>

Most parliamentarians, however, supported the government's position. They argued that the characteristics of patents, namely that they are limited in time and granted only upon the payment of fees, conflict with the notion of property.<sup>235</sup> They further rejected the principle of acquisition of patents through *occupatio*, because *occupatio* is meant to prevent others from appropriating a good, which can apply only to tangible objects, not to inventions.<sup>236</sup> They stated moreover that imitators, while possibly frustrating the profit expectations of inventors, do not unjustly enrich themselves at their expense.<sup>237</sup> Lastly, they regarded patents as remnants of abolished monopolies based on royal favour and considered it a historical mistake if they were given the status of intellectual property.<sup>238</sup>

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232. Verslag der Commissie van Rapporteurs Omtrent het Ontwerp van Wet tot Afschaffing van het Verleenen van Uitsluitende Regten op Uitvindingen en Verbeteringen van Voorwerpen van Kunst en Volksvlijt, Bijblad tot de Nederlandsche Stcrt. 1868/69 I, 338 (Neth.) [hereinafter Senate Report on the Patent Abolition Bill].

233. Deliberations of the House on the Patent Abolition Bill, *supra* note 12, at 1459–60, 1475.

234. *Id.* at 1460.

235. Eindverslag der Commissie van Rapporteurs voor het Ontwerp van Wet tot Afschaffing van het Verleenen van Uitsluitende Regten op Uitvindingen en Verbeteringen van Voorwerpen van Kunst en Volksvlijt, Bijblad tot de Nederlandsche Stcrt. 1868/69 II, 1160, 1161 (Neth.) [hereinafter Final Report of the House on the Patent Abolition Bill]; *see also* Deliberations of the House on the Patent Abolition Bill, *supra* note 12, at 1467–68 (Van houten), 1469 (Godefroi), 1479 (Gefken).

236. Deliberations of the House on the Patent Abolition Bill, *supra* note 12, at 1468 (Van Houten), 1469 (Godefroi).

237. *Id.* at 1468 (Van Houten).

238. Final Report of the House on the Patent Abolition Bill, *supra* note 235, at 1161. *But see* Deliberations of the House on the Patent Abolition Bill, *supra* note 12, at 1459 (containing Heemskerk Az.'s argument that, historically speaking,

Accordingly, neither the government nor the majority of Parliament accepted that inventors have a property right or other ownership right that entitled them to patent protection.<sup>239</sup> As a result, the utility of patents became the central issue on which the faith of Dutch patent law came to rest.<sup>240</sup> The Patent Abolition Bill deliberations thus turned into an appraisal of (i) the interest of inventors versus the interest of the public in patent protection, (ii) the ability of patent law to accommodate both interests, and (iii) the consequences of abolishing patent law.<sup>241</sup> This shifted the debate largely from the legal domain, in which the proposal was tested against questions of right and equity, to the economic domain, in which the general welfare effects of the proposal were to be measured by balancing the interests of inventors against those of the public.<sup>242</sup>

## B. ECONOMIC ARGUMENTS

The utilitarian approach adoption turned out to be a step to decide the patent controversy in favour of the patent abolitionists. Assessing patent law against principles of utility and the public interest, the government – and ultimately Parliament, too – concluded that patents should be abolished, because they “supported neither the true interests

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patents had their origin in the liberation and cultivation of free spirits and the ennobling of intellectual labour).

239. Explanatory Memorandum, *supra* note 59, at 709; Memorandum in Reply, *supra* note 222, at 339; Final Report of the House on the Patent Abolition Bill, *supra* note 235, at 1161.

240. Many politicians supported a utilitarian approach. *See* Deliberations of the House on the Patent Abolition Bill, *supra* note 12, at 1462–64, 1477–78 (De Bruyn Kops), 1468–69 (Van Houten), 1469–71, 1478–79 (Godefroi), 1471–72 (Du Marchie van Voorthuysen), 1479 (Gefken); Deliberations of the Senate on the Patent Abolition Bill, *supra* note 218, at 345–46 (Cremers).

241. Explanatory Memorandum, *supra* note 59, at 709–11.

242. Illustrative is the address of the director of the *Société Céramique* and twenty-four factories in Maastricht calling upon the Senate not to abolish but to revise patent law, thus “abstaining from favouring the public interest over principles of right and equity.” By contrast, the *Vereniging ter Bevordering van Fabriek- en Handwerksnijverheid in Nederland* and F. van Motman, an inventor from the province of Frisia, wrote addresses asking Parliament to adopt the Patent Abolition Bill. *See* Ingekomen Verzoekschriften, Bijblad tot de Nederlandsche Stcrt. 1868/69 I, 344 (Neth.); Ingekomen Verzoekschriften, Bijblad tot de Nederlandsche Stcrt. 1868/69 II, 1448 (Neth.).

of the industries nor the public interest”.<sup>243</sup> The economic appraisal thus carried much weight, urging some lawyers to state somewhat sarcastically that the abolition of patents was eventually the result of “economists-patent-abolitionists”.<sup>244</sup>

Putting patent law to the test, the government held that, while patents might bring some inventors an uncertain benefit, overall, they appear not to favour them.<sup>245</sup> The law basically required inventors to obtain patents, because otherwise a third person might do so and hold the patents against them, thus preventing true inventors from exploiting their own inventions.<sup>246</sup> Inventors were also confronted with higher prices if the resources they need for making inventions were patented.<sup>247</sup> The government further asserted that patent law gave rise to many legal disputes.<sup>248</sup> Heemskerk Az., however, rightly pointed out that this argument was false. He could only recall two patent cases since the Patent Act was adopted in 1817.<sup>249</sup> Minister Fock, who had to admit the mistake, replied that the small number of patent cases was caused by the defectiveness of the Patent Act of 1817 and how it does not really provide true protection to inventors.<sup>250</sup>

The government further expected that abolishing patents would not hurt the Dutch industries.<sup>251</sup> Pointing at the number of patents granted in the Netherlands between 1851 and 1865 (see Table 1 above), the

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243. Patent Abolition Bill, *supra* note 214, 708 (preamble).

244. De Savornin Lohman, *Over de Regten van den Uitvinder*, *supra* note 125, at 219. See also De Savornin Lohman, *Grond en Omvang van het Regt van Schrijver en Uitvinder*, *supra* note 125, at 15 (stating that “with those kinds of utility-teachers no legal debate can be started”).

245. Explanatory Memorandum, *supra* note 59, at 709.

246. *Id.*

247. *Id.*

248. *Id.*

249. Deliberations of the House on the Patent Abolition Bill, *supra* note 12, at 1461; Deliberations of the Senate on the Patent Abolition Bill, *supra* note 218, at 338.

250. See Memorandum in Reply, *supra* note 222, at 339.

251. To support this, it attached the 1854 report of the *Nederlandse Maatschappij ter Bevordering van Nijverheid* as an appendix to the explanatory memorandum. See Bijlage A: Rapport eener Commissie uit de Nederlandsche Maatschappij ter Bevordering van Nijverheid, over “het Onderzoek der Bezwaren, Welke voor de Nijverheid in de Wet op de Octrooijen Gelegen Zijn”, Bijblad tot de Nederlandsche Stert. 1868/69 II, 711 (Neth.).

government concluded that, on average, Dutch inventors obtained only ten patents per year, implying that patent law was largely a redundant institution.<sup>252</sup> Moreover, ninety percent of all patents (124 out of 140) were granted to foreigners, who allegedly applied for Dutch patents with the purpose not to exploit their inventions in the Netherlands, but to prevent competition by Dutch companies or to speculate on selling their patents to Dutch industries.<sup>253</sup> If the risk of their inventions being exploited by others waned, they often let their patents lapse by not paying the required fees.<sup>254</sup> This gave them a significant head-start over possible Dutch competitors.<sup>255</sup>

The government also deemed that patents were against the public interest, because, due to monopoly rents, patented objects tend to be more expensive than those produced in free competition.<sup>256</sup> Furthermore, it argued that during the time of patent protection, the development of patented objects halted.<sup>257</sup> While the government admitted that it could be questioned whether useful inventions would still take place if patents were abolished, it saw in Switzerland an example of a country without patent protection that still had a flourishing industry.<sup>258</sup> It therefore posited that, if all agree on the system of free trade, why not eliminate the barriers that patents still create for industry, too?<sup>259</sup>

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252. Deliberations of the House on the Patent Abolition Bill, *supra* note 12, at 1472 (Minister Fock). *See also* Final Report of the House on the Patent Abolition Bill, *supra* note 235, at 1161. *But see* Deliberations of the House on the Patent Abolition Bill, *supra* note 12, at 1461 (containing Heemskerk Az.'s argument that the small number of patents obtained by Dutch inventors could not be used as a reason to abolish patent law, because it did not prove that the patent system had failed).

253. *See* Christopher May & Susan Sell, Presentation at Birkbeck College, University of London, Forgetting History is not an Option! Intellectual Property, Public Policy and Economic Development in Context, 12 (Sept. 15, 2006), <http://www.dime-eu.org/files/active/0/MaySell.pdf> (last visited May 12, 2019).

254. Explanatory Memorandum, *supra* note 59, at 710.

255. As observed, the patent fees were due within three months after the patent grant. STOFFELS, *supra* note 30, at 131. On request of the applicants, however, the three-month term could be extended. HEEMSKERK AZ., *supra* note 32, at 42.

256. Explanatory Memorandum, *supra* note 59, at 709.

257. *Id.*

258. *Id.*

259. *Id.*

During the parliamentary debates, most politicians supported the government's views.<sup>260</sup> However, Heemskerk Az., insisted that societal interest required a continuation of patent law, because inventions took time and capital and without patents, inventions either would not take place or would be kept secret to protect the investments made.<sup>261</sup> Other politicians contested this and argued that inventors could keep their inventions secret even if patents were maintained.<sup>262</sup> Moreover, regardless of patents, industries would undoubtedly continue to innovate, as it was in their own interest to improve their businesses.<sup>263</sup> History showed that big inventions were made even without patents and the number of inventions which the industries produced also exceeded the number of patent grants by far.<sup>264</sup> This implied that patents were not critical for big inventions and that small inventions could do without them.<sup>265</sup>

Heemskerk Az. further argued that patents were required to secure a proper income for the inventor's labour,<sup>266</sup> but others disputed that patents were needed for this and contended that the prospect of marketing their innovations first gave inventors enough financial advances to compensate them.<sup>267</sup>

Strikingly, the evidence that the two opposing camps put forward to support their positions was largely anecdotal and argumentative.<sup>268</sup>

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260. See Deliberations of the House on the Patent Abolition Bill, *supra* note 12, at 1457–64, 1467–81 (De Bruyn Kops, Van Houten, Godefroi, Du Marchie van Voorthuysen, Gefken and Lenting); Deliberations of the Senate on the Patent Abolition Bill, *supra* note 218, at 344–46 (Fransen van de Putte, Messchert van Vollenhoven and Cremers).

261. Deliberations of the House on the Patent Abolition Bill, *supra* note 12, at 1460.

262. *Id.* at 1478 (De Bruyn Kops).

263. Final Report of the House on the Patent Abolition Bill, *supra* note 235, at 1161.

264. Deliberations of the House on the Patent Abolition Bill, *supra* note 12, at 1468–69 (Van Houten).

265. *Id.* at 1468–69 (Van Houten).

266. *Id.* at 1460.

267. *Id.* at 1468 (Van Houten).

268. The statistic table reproduced in this paper (Table 1) was essentially the only empirical evidence used in the debate. Other empirical evidence, e.g. on whether useful inventions would still take place if patents were abolished, was more difficult to produce. See Explanatory Memorandum, *supra* note 59, at 709 (explaining that drawing a comparison between inventions made in countries with and without patent

Particularly, the case of patentless Switzerland was a rich source of debate.<sup>269</sup> Heemskerk Az. argued that there was no proof that the Swiss could do without patent protection, since many Swiss inventors obtained patents for their inventions abroad.<sup>270</sup> He further took Switzerland for “a robber state”, as Swiss industries benefited from the absence of patents to imitate foreign inventions, urging Parliament not to cooperate to turn the Dutch industries into a “disloyal, immoral industry of imitation”, too.<sup>271</sup>

Other parliamentarians, however, observed that various foreign companies moved to Switzerland to escape the difficulties caused by patent laws in their home countries.<sup>272</sup> They also did not find it immoral if, due to an abolition of patent law, Dutch industries were permitted to imitate foreign inventions.<sup>273</sup> It would be robbery only if someone’s property was infringed, but that was not the case where inventions lacked property status.<sup>274</sup> By contrast, they believed that the freedom to imitate had positive effects, as it offered a training-school to educate the industries.<sup>275</sup> The Swiss textile industry, which initially did not possess the necessary equipment, but after imitating foreign inventions, became an important independent industry, served as an example.<sup>276</sup>

### C. PRACTICAL ARGUMENTS

Equally important was that most parliamentarians doubted that any

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protection was impossible, because the latter countries held no records of inventions and improvements thereof; and neither could anything be said about the usefulness of inventions generally).

269. Explanatory Memorandum, *supra* note 59, at 709.

270. Deliberations of the House on the Patent Abolition Bill, *supra* note 12, at 1461.

271. *Id.* at 1475, 1480.

272. *Id.* at 1464 (De Bruyn Kops).

273. *Id.* at 1477–78.

274. *Id.*

275. *Id.* at 1478.

276. Final Report of the House on the Patent Abolition Bill, *supra* note 235, at 1161. *But see* Moser, *supra* note 16, at 1220–33 (arguing that the growth of the textile industry in Switzerland can be explained by the fact that the textile industry was largely a secrecy industry, as innovations of dye stuffs, in particular, “were extremely difficult to reverse-engineer and therefore less dependent on patent protection”).



law could cure the intrinsic objections raised against patents.<sup>277</sup> Examples of patent laws existing in other countries, both with and without a prior examination of patents, were considered to be imperfect.<sup>278</sup> Prior examination was costly and placed a heavy administrative burden on the state, while it still could not conclusively establish that an invention was new.<sup>279</sup> In a system without prior examination, on the other hand, patent applicants would *a priori* be regarded as inventors.<sup>280</sup> This took all force out of the argument that fairness required inventors to be rewarded through patents, as patents were granted to the first applicant and not to the true inventor.<sup>281</sup> Or, as Godefroi consequently queried: “if a Government is not in a position to establish whether the claimant of a patent has a right to it, can it be sanctioned that it *blindly* grants a right that vests a temporary monopoly?”<sup>282</sup>

The idea that constructing a good and efficient law of patents was simply impossible convinced many politicians, even some who did believe that inventors had a right in their inventions,<sup>283</sup> that there was no alternative but to abolish patents. Politicians that stayed unconvinced, however, maintained that abolishing patents was a step backward and that the only way forward was to improve the law.<sup>284</sup> Yet, when they were asked to give evidence of how patent law could

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277. Final Report of the House on the Patent Abolition Bill, *supra* note 235, at 1161–62; Deliberations of the House on the Patent Abolition Bill, *supra* note 12, at 1464, 1477 (De Bruyn Kops), 1471 (Godefroi).

278. See, e.g., Explanatory Memorandum, *supra* note 59, at 709–10; Memorandum in Reply, *supra* note 222, at 338; Deliberations of the House on the Patent Abolition Bill, *supra* note 12, at 1480 (Minister Fock); Deliberations of the Senate on the Patent Abolition Bill, *supra* note 218, at 346 (Minister Fock).

279. Deliberations of the House on the Patent Abolition Bill, *supra* note 12, at 1463, 1477 (De Bruyn Kops), 1471, 1479 (Godefroi).

280. *Id.* at 1463 (De Bruyn Kops).

281. *Id.* at 1463 (De Bruyn Kops), 1468 (Van Houten), 1472 (Du Marchie van Voorthuysen); see also Deliberations of the Senate on the Patent Abolition Bill, *supra* note 218, at 345 (Fransen van de Putte).

282. Deliberations of the House on the Patent Abolition Bill, *supra* note 12, at 1471.

283. Deliberations of the Senate on the Patent Abolition Bill, *supra* note 218, at 345 (Fransen van de Putte; Messchert van Vollenhove).

284. Deliberations of the House on the Patent Abolition Bill, *supra* note 12, at 1458–59, 1476 (Van Zinnicq Bergmann), 1459, 1462, 1474 (Heemskerk Az.).

be amended to accommodate the concerns expressed,<sup>285</sup> they failed to provide any examples to support their position.<sup>286</sup> This backfired on them, as it gave opponents of the patent system the ammunition they needed to thoroughly persuade the Parliament to put an end to patents.<sup>287</sup>

#### D. POLITICAL ARGUMENTS

A last important element that facilitated patent abolition in the Netherlands was the arrival of the cabinet Van Bosse-Fock, which practiced a liberal-economic policy.<sup>288</sup> From the very start of its operations, Van Bosse said: “Our course is unmistakably a course of progress”.<sup>289</sup> Amongst the liberal measures which this cabinet took were the abolition of the stamp duty on printed matter and newspaper advertisements; the introduction of uniform postage for letters sent from anywhere in the Netherlands; the abolition of the death penalty; and the reform of agriculture in the colonies.<sup>290</sup> The abolition of patents fits neatly in the liberal-economic progress under the cabinet Van Bosse-Fock.<sup>291</sup>

Despite the progressive policy, some parliamentarians cautioned that a Dutch patent abolition could meet international repercussions.<sup>292</sup> They feared that other countries would get displeased if Dutch law

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285. *Id.* at 1468 (Van Houten), 1471, 1478–79 (Godefroi).

286. *Id.* at 1476, 1479–80 (Heemskerk Az.).

287. Interestingly, in the United Kingdom, a similar situation took place, but with the exact opposite effect. *See* JOHNS, *supra* note 18, at 282 (observing that, when MacFie and other patent opponents were asked to provide “empirical evidence of actual hardship caused by patents”, they “failed to point to concrete, empirical instances of either suppression or extortionate royalty demands. The antipatent case suddenly seemed to rest on a rather abstract extrapolation from political-economic theory”).

288. Den Hertog, *supra* note 17, at 29–30.

289. *Regeling der Werkzaamheden, Bijblad tot de Nederlandsche Stcrt.* 1867/68 II, 413 (Minister of Finance, Van Bosse, stating: “Onze rigting is bepaaldelijk eene rigting van vooruitgang”).

290. P.J. OUD & J. BOSMANS, *STAATKUNDIGE VORMGEVING IN NEDERLAND, DEEL 1: 1840-1940* 86–88 (11th rev. ed. 1997).

291. Den Hertog, *supra* note 17, at 29–30.

292. *See, e.g.*, *Deliberations of the Senate on the Patent Abolition Bill*, *supra* note 218, at 346 (urging Parliament to be cautious, as England had not yet abolished patents, despite its large industries and free trade policy).

permitted companies to imitate inventions patented abroad.<sup>293</sup> Moreover, they argued that if international law required the Netherlands to protect patents, the law under consideration would have to be withdrawn, which should better be prevented.<sup>294</sup>

Other politicians did not understand how patent abolition could cause international problems, as the Netherlands had full autonomy to regulate this matter.<sup>295</sup> The most progressive ones maintained that it would look favourably on the Netherlands to lead the battle against patents.<sup>296</sup> Given the strong anti-patent movements in several other industrialized countries,<sup>297</sup> the government also expected patent abolition to create no international difficulties.<sup>298</sup> Minister Fock concluded: "The Netherlands has followed many nations in abolishing the tax on knowledge: let the Netherlands now be the first to introduce the system of industrial freedom by abolishing patents. That is not an act of reaction, but an act of progress on the way to free development of the industries."<sup>299</sup>

The government, in fact, anticipated that many countries would follow the Dutch example.<sup>300</sup> That was not without reason: the anti-patent movement in Europe was so strong that it was to be expected that other countries would follow suit.<sup>301</sup> However, in the early 1870s,

293. Final Report of the House on the Patent Abolition Bill, *supra* note 235, at 1162; Senate Report on the Patent Abolition Bill, *supra* note 232, at 338.

294. Deliberations of the House on the Patent Abolition Bill, *supra* note 12, at 1459 (Van Zinnicq Bergmann).

295. Deliberations of the Senate on the Patent Abolition Bill, *supra* note 218, at 345 (Fransen van de Putte).

296. Deliberations of the House on the Patent Abolition Bill, *supra* note 12, at 1464 (De Bruyn Kops).

297. Memorandum in Reply, *supra* note 222, at 339. Whether the anti-patent movement in Europe was in decline or fully alive was fiercely debated in Parliament. See, e.g., Deliberations of the House on the Patent Abolition Bill, *supra* note 12, at 1461–62, 1474 (Heemskerk Az.), 1470–71 (Godefroi) (both referring to foreign legal authorities in support of their opposing positions).

298. Deliberations of the Senate on the Patent Abolition Bill, *supra* note 218, at 346 (Minister Fock).

299. Deliberations of the House on the Patent Abolition Bill, *supra* note 12, at 1473.

300. Deliberations of the Senate on the Patent Abolition Bill, *supra* note 218, at 346 (Minister Fock).

301. See, e.g., *Correspondance*, 1 REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE 310, 311 (1869) (highlighting that should European

the free-trade movement in Europe weakened as a result of a severe economic depression, upon which the anti-patent sympathies in Europe rather suddenly disappeared.<sup>302</sup> The Dutch patent abolition thus remained an isolated case.

## VII. CONCLUSION

From a contemporary perspective, the Dutch patent abolition can be regarded as a pretty radical act and perhaps even as a revolt against the established order. Back then, however, it seemed to be a logical step to abolish patents, which were perceived as old remnants from the privilege system standing in the way of industrial progress. The step to actually remove patents was not taken lightly though. However, in the Netherlands at the end of the 1860s, there were various persuading factors that made the Dutch government decide that abolishing patents was the right thing to do.

First, given the deep anti-patent sympathies in Europe in those days, the Netherlands believed they had nothing less to expect than that other nations would soon follow their example.<sup>303</sup> This shows that the Dutch patent abolition unmistakably was an act of political opportunism. Yet, as history reveals, the course of events changed so abruptly that in the end no other country ventured to join the Dutch in their patents abolition.

This change was not foreseeable by the Dutch government at the time. Yet, the fact that the legislator assumed that the Netherlands would not be alone in their endeavours clearly indicates that its decision to abolish patents was not motivated by the thought to bring the Netherlands economically back on par with other industrialized countries, as is sometimes suggested in literature.<sup>304</sup> Obviously, while the Dutch patent abolition had the *effect* of allowing Dutch industries to freely imitate and use foreign inventions and technologies, it was not inspired by the *motive* to turn the Netherlands into a robber state.

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countries repeal their patent laws, the United States would certainly follow suit as they would not permit themselves to have lesser liberties than other industrialized countries).

302. See Machlup & Penrose, *supra* note 9, at 5–6.

303. See Janis, *supra* note 2.

304. See GERZON, *supra* note 14, at 6–8; VAN ENGELEN, *supra* note 14, at 152.

As the parliamentary history shows, the decision to abolish patents was not made overnight, but took roughly thirteen years.<sup>305</sup> Indeed, the Dutch legislator acted consciously and cautiously not to upset international affairs. However, as it expected other states to follow suit, it was confident that its international relations would not be hurt.

Apart from an accommodating international political climate, the home situation in the Netherlands also called for a radical change. In fact, the Dutch patent law in place at the time was so bad that it only seemed a small step for the legislator to abolish patents. Of course, government could have also opted for a major patent reform, which it clearly and deliberately considered, but because it found no good example in any foreign patent law, it was convinced that there was no other option but to abolish patents.

Additionally, the Dutch legislator's mind-set was not yet infused with a deep legal-theoretical (ideological or dogmatic) view on patents, allowing it to adopt a pragmatic position towards the question of patent abolition. The fact that it did not accept, neither as a matter of principle nor as a matter of right, that inventors have pre-existing rights in their inventions was a critical first step without which the case for eliminating patents would have been much harder, if not impossible, to make. As observed, this resulted in the adoption of an economic-utilitarian approach by which the legislator evaluated patent law against principles of utility and the public interest. This provided sufficient arguments for the lawmaker to kill the patent system, as it could not see how patents supported the true interests of the industries and of the public at large.

This brings us to the last ingredient, namely the political economy in the Netherlands in the late 1860s. As observed, the state of industrial development in the Netherlands at the time was less established than in neighbouring countries. In fact, industrialization in the Netherlands began to set in only after 1860.<sup>306</sup> This explains why the Dutch patent abolition met with little opposition from the industries. The Netherlands knew very few, if any, patent-sensitive industries and most Dutch industries would actually benefit from an absence of

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305. See discussion *supra* Part V.

306. BRUGMANS, *supra* note 15, at 83.

patents. So, with the arrival of the progressive cabinet Van Bosse-Fock in 1868, which followed a liberal-economic course with a strong accent on free trade, the time was right for the Dutch to finally conclude the case for patent abolition.

Other than setting historical records straight, the question remains what lessons this historical case study holds for current discourse. What is striking about the Dutch case is that all the necessary ingredients for a patent abolition were present in the Netherlands in the late 1860s. It was a country in industrial development with a progressive liberal-economic government, an international accommodating environment, a malfunctioning patent law and a strong movement in favour of patent abolition that faced little-to-no opposition from the industries. Translating this to today's reality, it is questionable if we will ever witness another situation where all these ingredients will so neatly coincide to allow a developed country to abolish patents, as modern literature is calling for.<sup>307</sup>

For one thing, there is no developed nation in the world where the industries are not reliant on patents. So, if a country would raise the issue of patent abolition, it is likely to attract fierce opposition. For fear of harming their economies, therefore, governments will be less susceptible to walk out on patents. In addition, the international world order has changed so radically, that patent abolition is essentially impossible. It would require governments to depart from international patent treaties, including multi-lateral and bi-lateral trade-agreements offering protection for patents. These did not yet exist in the 1860s.<sup>308</sup> Accordingly, the present-day situation is so entirely different that, even if one would endorse the current calls for patent abolition, it would be very difficult to talk any developed nation into eliminating patents, unless perhaps by convincing multiple large industrial states to take concerted action. However, a simultaneous patent abolition in

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307. See generally BESSEN & MEURER, *supra* note 3; BOLDRIN & LEVINE, *supra* note 3; JAFFE & LERNER, *supra* note 3; Boldrin & Levine, *supra* note 3; Hilaire-Pérez et al., *supra* note 3; Kingston, *supra* note 3; Stallman, *supra* note 3.

308. Indeed, when taking the decision to abolish patents in 1869, the Netherlands was not yet bound by international treaties. One reason why the Netherlands restored patents in 1912 was the international pressure to that effect by parties to the 1883 Paris Convention for the Protection of Industrial Property, to which the Netherlands was one of the first signatories. RESIUS UITVINDING, *supra* note 217, at 33.

several countries around the globe is unlikely to occur soon, if ever. So it may very well be that the Dutch patent abolition will forever remain an isolated case.