



Tom Clark

## LICENSING AND LAW

by  
The Honorable Tom C. Clark\*

Introduction: by Art Sloan\*\*

The greatest difficulty in introducing our next speaker is in abbreviating all of the material that's available about his many outstanding accomplishments. Our next speaker is Associate Justice Tom Clark, retired Justice of the United States Supreme Court. I really don't feel that the designation "retired" is appropriate, since Justice Clark seems to be active every minute of the day since his supposed retirement, and, is still actively sitting as a judge in Courts of Appeals and Trial Courts all over the United States. Just last week, I believe it was, Justice Clark mentioned to me that he was sitting as a judge in the United States Customs and Patent Appeals, and he is proceeding from this meeting directly to Houston where he will sit for a month on the Trial Court in Houston, so I think that this designation "retired" is not appropriate at all.

Justice Clark received his initial education at the Virginia Military Institute, after which he got back on the straight path and received degrees from the University of Texas. We are very proud to have Justice Clark as a native son of the state of Texas. He originated from Dallas, and, in looking over some of Justice Clark's academic credentials, I find that he's been awarded approximately twenty honorary doctorates from various institutions which cover geographically the broad expanse of the United States. Justice Clark, in addition to having his own law practice in Dallas for a number of years, served as District Attorney of Dallas County, and, in 1943, he assumed the position of Assistant Attorney General

in charge of the Anti-Trust Division. From that position, he went to assume the duties of Assistant Attorney General in charge of the Criminal Division until 1945, and, he served from 1945 to 1949 as Attorney General of the United States. From 1949 until 1967 he was active as an Associate Justice of the United States Supreme Court, responsible for many, many noteworthy decisions which I'm sure many of you have studied.

Justice Clark is the proud father of a daughter, Mildred, and, of a son, Ramsey, who, I think all of you have heard of and who has followed in his father's footsteps with the Justice Department; and, he's also the very proud grandfather of a grandson, Tom, Jr., who is now a sophomore at Duke University.

Not the least of Justice Clark's achievements was a stint on the National Council of the Boy Scouts, and, Mrs. Clark mentioned to me last night that he served at one time as a Scout Leader when he was with the Justice Department out in California along with Admiral Byrd, I believe it was. In the last few years, Justice Clark has been very active in trying to improve the efficiency of the administration of justice within this country, and, has been active in attempting to speed up the judicial process, and, I believe that he feels very strongly that justice delayed is justice denied. He also has done a great deal toward improving the administration of criminal justice. I could go on and use up all the speaker's time telling about some of his achievements, but I'd like at this time to call on Justice Tom Clark to deliver his talk on "Licensing and Law".

## JUSTICE CLARK

Mr. Sloan, my brothers of the bench (I think there are one or two lawyers here), my brothers of the bar, and ladies and gentlemen. Mr. Sloan, you were very kind in your introduction; it was much better than the one I got over in Salt Lake the other night, when I was presented as the "late Mr. Justice Clark". That has certain connotations, somewhat like the language in a patent case, but I did appreciate all you said. Wish my father and mother had been here. Both of them are gone. My father would not have believed any of it, but he would have chuckled over it, but my mother would have loved it and believed every word of it.

You know some of you, particularly those of you who are visiting here for the first time, may get a little irked with us Texans. I was born in Dallas (and that's Mr. Sloan's hometown too) and we have "some ego" so they say, in Texas, so you'll have to sort of squeeze us a little bit to get us down to earth. I was over in London last summer and I had to call several times to Dallas since my brother was ill, to see how he was, and I thought that when I got my bill at the hotel, it was pretty large. Those calls were \$18.00 a shot, some of them longer. So I called the hotel and they said, "Well, we don't have anything to do with that, that bill is from the telephone company". So I called the telephone company and they give me the regular rigamarole, so I told them, "Look, down in Texas we could call hell and back cheaper than that",

and, they said to me, "Well, down there that would be a local call." Well, I was stuck, so I went on and paid the bill.

You know, I have a confession to make. It's very seldom I make confessions. I'm not familiar with your organization. I'm ashamed to admit it, because since reading your LES NOUVELLES, I found so much information. I read quite a few trade journals and things like that, particularly on anti-trust. I'm an old trust buster. I had not read LES NOUVELLES, and, I must say that it had more really meat (nuts and bolts, I call it) than any organization paper I've read and it gave me an insight into the men and women who are behind your organization. I want to congratulate you upon it. It's very seldom I do this because, oh well, you know how those things are. You're really deserving of it. I really admire it, not only the calibre of the people you have in your group, but also the straightforwardness, the devotion and dedication, and, I think you'd say "know-how" — the "know-how" that you have. I want to congratulate you upon it. That's not to say that I might not step on some of your toes in my talk, because I try to speak very frankly, and, call them as I see them. If I do, I hope we will continue to be friends. There's no use us breaking up over my position or your position, particularly with matters of anti-trust or patents and things of that kind.

It's not unlike the story that Bob Hope told me when I went over to Friendship not too long ago to go to New York — I don't know why Miss Maggie put me into Friendship; it took me longer to get there than it would to get to New York, particularly from National, but she did — and, as I walked into the terminal Sargent Shriver was coming out (this is not a political plug at all, it's really a true story). Sargent had been in the Department (nobody knows this, but we had a girl in our department who was a Kennedy, Eunice, — her Daddy had called me up many years ago and said that he had a daughter named Eunice who was in social work in New York, and he would like to get her into my Committee on Juvenile Opportunity. I said, "Well, we don't have any money, Mr. Ambassador, I'm sorry". He said, "Oh, we don't need any money", (as if I didn't know that). So I closed up my dining room, which was next door to my office, where incidentally I had settled the Alcoa Patent Case way back with Mr. Davis. He'd told me, and I believe you'll appreciate this, "Well, Mr. Attorney General, I'll have to choose sides and give it to you as the head of Surplus Crop Deal at the time" — we were trying to settle the whole Alcoa Case by sort of twisting his arm and getting him to agree to license their patents. He said, "Well I have, Mr. Attorney General, 6,000 patents and we're going to make the deal and we're not going to give them any "know-how". I'll never be able to use the patents, so evidently the "know-how" is more important than the patents, from what he said. Anyway, after reading your magazine for the last three or four issues, I rather think that that perhaps is true.

Well, getting back to Sargent, he said that Bob Hope was downstairs in a plane that had come from

Dallas, where he had given a little gift to SMI (I finally found out it was \$100,000) — Dr. Tate told me that — he was president of the University. He said he almost fainted when Bob called him up to the podium and said, "I have a small check for you". I said I thought Bob should have given \$500,000 (Dallas did give him his start). Then I went on downstairs and I met Bob as Bob was taking his seat. I sat down and said, "What are you going to do in New York?" He said, "I'm not going to New York, I'm going to Philadelphia." I said, "The plane doesn't stop there", and he said, "I think it will", and it did. On the way up he told me several stories, but I can only tell you one (since there are some ladies here). This was about Sister Agnes. She was a devout nun and she died one day and found herself in hell and she was very much disappointed. She called St. Peter and said, "Hello, St. Peter, this is Sister Agnes. Did you know I was down here?" "Oh yes, Sister Agnes. We're a little crowded up here and I'll send down for you in about a week, be patient". So she waited, and then she called St. Peter the second time. "Hello, St. Peter, this is Sister Agnes, I'm calling back. You know, they're teaching me to drink down here, and smoke, and I'm getting worried. If you don't hurry something may happen." And St. Peter said, "Now, Sister, I've told you to be patient. We're a little crowded, but I'll be down there myself in my chariot in about a week." So she waited about a week and she didn't hear anything the third time, so she called again and said, "Hello, Pete, this is Ag. Just forget about the whole damn thing." So, if I step on your toes, just forget about the whole damn thing. We'll still be friends, and, maybe something will come out of it. You can't ever tell.

Well, I was supposed to talk about Patents and the situation with reference to Patents as I see it today. I have had the good fortune of being on the Board of Customs and Appeals three or four times and have seen the situation from that point. I have never been in the Patent Office itself, but I have written some things about it. Some people say they were scurrilous. I did read over several times several years ago President Nixon's report which I did with the same thing everybody else did — either threw it in the wastebasket or put it on the shelf where it still is, so I have a smattering idea about patents. I wrote three patent cases, a trilogy, you remember of Graham, Adams, etc., away back. What impressed me more about those cases was that that was the first of a number of cases, indeed it was the first case they had taken since AP which Bill Douglas had written and which coined the phrase "flash of genius", whatever that meant. I tried to squelch it and Graham and I went around and asked Bill, "What does it mean?" He said, "Well, I don't know; maybe we can set down something". I said, "You write out what it means," — I was trying to be sure I'd get him of my opinion and so he wrote it out and we finally incorporated what we thought it meant, which I hope watered it down a bit. Of course the bar knew what it meant. So my experience in patents is not too deep. Certainly it's not over a very long period. While I

was a lawyer I don't believe I ever had a patent case. I did get some pin trays from a man named Clarence Oberon. You'd put them on your desk, and, back there then, to show you how old I am, why it had three compartments in this little box, sort of like the jewel box your wife might have if you have any jewels. In one compartment you put pen points. Back there then you had to change your pen points every now and then. We didn't have fountain pens and things like gadgets, ball point pens and what have you. In another one you'd put your clips, and they were sort of rugged, too. We didn't have any of these fancy, automatic clips back there then. You'd put pins in the third one. That was to sort of jog you up now and then. When you closed it, why the thing that jumped out at you was Clarence J. Oberon, Patent Counsel, Washington, D.C. And that's the closest I ever got to a patent. So I feel free to be critical and I would say that I enjoyed Mr. Tegtmeyer's speech, but, I think it would be better if we devoted our energies — I'm strongly in favor of foreign relations (I'm not an isolationist at all) and I know that the licensing in these foreign nations is very important. In fact, it brings in about three billion a year on our payments. But, I rather think we ought to focus, if you understand what that means — I used that word in a case one time and a lawyer asked me what I meant by "focus", and I said, "I tell you the truth, I don't know, I guess I was thinking about my Eastman Kodak camera." But, if you would focus on our own backyard and the frontyard, too, and, maybe the house and try to get it in order, why I think we would be doing ourselves a great favor. At the same time, we might carry on these foreign negotiations and bring about a better rapport with all of our brothers and sisters throughout the world. I say that because on the Court of Patent Appeals, I had a case there that was twelve years old, and, I asked some of the brothers there what took so long. They said well they had to print up the records and that they had to do this and that and the other, and, it had been near two years. My goodness, no wonder justice has a pretty bad image. I don't believe even the District Courts in any of our states have cases that old. I don't know of many in the Trial Courts, although I have tried one or two since that time. They were seven and eight years old. And I found out that there was one case that was twenty-six years old. Now that's not a laughable matter at all — just think of those people that were engaged in that case. I don't know whether the lawyers were to blame or whether the system was to blame or whether the Patent Office was to blame or the Court of Patent Appeals was to blame or who was to blame. But the fact that the case was there twelve years makes me believe it really didn't do justice, even though it came out favorable to one party. And I think we ought to straighten this out. I also notice that everything is printed. We don't even do that in the Supreme Court and we can have some pretty heavy licking over there. And still everybody has to print up everything, I understand, at great expense to the bar, sometimes to the lawyers, or to the clients. Of course, the clients pay it most of the time, but sometimes an affluent lawyer may pay a little if his client didn't have it.

Then the delay of two years in the Court of Customs and Patent Appeals, I think is uncalled for. And I noticed the mixer cases, mostly of no consequence. I don't say that because I sat on the Supreme Court at all, because we had some like that too. I've sat in all circuits of Court since I retired (sat in eight this year) and they have a lot too. In fact, the circuit in which you're sitting today, the Fifth Circuit, has about twenty-eight hundred cases and I dare say half of them are frivolous. Well, certainly half of the cases I heard the last three or four times I've been on the Court of Customs and Patent Appeals were frivolous cases and had no substance to them. Still they didn't have any techniques that would screen those out and they continued to grind and grind and grind trying to dispose of them. Those are matters we ought to correct.

I noticed in the Patent Office it's taking years and years to dispose of things there; they need to have one or two appeals which takes a long time. I noticed that some of the things are slow. I heard about the shoe boxes over there and I wondered about them. I found out that they put the papers in shoe boxes, or things that look like shoe boxes. Now they're computerizing it. It took them three years to computerize one-quarter of it and only three quarters are left, so it will take nine more years assuming that the present time table is correct. Now that's a fine system, isn't it? Here you are representing great organizations, you're doing over three billion dollars exchange with foreign nations, you're basing all of that on the validity of patents that come through this organization that I've been talking about, the Patent Office and the Court of Patent Appeals, and, you have to wait twenty-six years. That's a great help in foreign negotiations, isn't it? You don't even know if the patent is valid or not, in all that time. I don't say that that's the average case, of course; I just say that's an example of the slowness that's involved. Now I think that with all the ingenuity, the "know-how" and one thing or another that you can work this out to where it would be advanced, not only in the works of the Court but also in the works of the Patent Office. As a consequence, I think you would have a much better opportunity in which to determine some of these ticklish problems that plague you. That is the validity or invalidity of patents, just what the extent of what their coverage is, and things of that kind that go through two or three court systems after they get out of the Patent Office itself. So I would hope that if I could impress upon you one thing today that would be the importance of putting your minds to improving the judicial process, as well as the administrative process, in the matter of patents and trademarks and copyrights.

I was greatly impressed by the fact that you have developed over the years such a great exchange or sale of licensing of property over the world. Indeed, it's possible that in the next few years, they say, for you to double that in light of the great advances that have been made in the negotiations that Mr. Tegtmeyer spoke about in eastern Europe. Looks like a challenge may come around, and, if it does, you'd have a great opportunity there to increase the licensing of your

patents and other matters in other parts of the world which you haven't enjoyed heretofore to any extent. As a result, why, if you had this basic evaluation of patents with respect to validity, as well as copyrights and trademarks, why you would be able to negotiate, as many of your sticklers have indicated, with a much stronger hand, because you would have a stronger Patent Office, you'd have a stronger Court, and you'd have a stronger patent — you'd know where you stood, and you'd be able to negotiate with much better strength than you could if you did not have that validity. So I would be hopeful that this would also create a better image of the administrative and judicial process.

I read in one of the issues of LES NOUVELLES where the gentleman from Canada had said, "Well, he didn't know just what the Patent System was all about and he thought it might just be better not have any system at all." He gave some examples, one of which was that the government itself had over-reached, not in the granting of the patent and things of that kind, but in the use of patents, and, it brought me back to Adams, which I wrote, which was a wet battery invention. The government there had been developing this invention in cold climates up around the North Pole, Alaska and all around, in an effort to try to find a gadget that would be able to withstand — (watch alarm goes off and Justice Clark comments, Mary gave me this watch and said, "I love you, Tom, but when you get to talking, you don't know when to turn off the facilities.") — However, I think you folks could last a few minutes longer before going to lunch. I think if we could increase the facility of disposition, that we'd also have a much better consideration of the patent system and of patents as they come through the system. I think that in that way we would be able to develop better records, better briefs than we have. And, I think that you must remember that in the nineteen years that I was active on the Supreme Court there were only four cases taken in the patent area and that was AP (which is this little gadget your wife puts the groceries inside the little fence and pulls it up toward the cash register when you go to check out), I indicated before that Bill had said that was not a flash of genius and therefore it would not patent well. Then along came the trilogy of Graham, John Deere Plow, etc., and that was all that came while I was there.

So what does that tell us as lawyers? It tells us that really the final court, insofar as the validity of the Patent Office is concerned, is the Court of Customs and Patent Appeals, because the Supreme Court is so reticent to accept such appeals or what-have-you in this area. Now, it's true we have taken some that came out of the Federal Court System (that is, the District Court of Appeals), but those are included in the four I mentioned before. We very, very seldom grant an appeal out of the Court of Customs and Patent Appeals. I don't know that they've granted one since I've been off the Court — I haven't checked up with it. Not many, I'm sure, have ever been granted.

So what does that tell you? I think that should be notice to you that you should have on the Court strong judges, ones that have been versed in patents, copy-

rights, trademarks and things that the Court has the function of determining. I believe if you devoted yourselves to that, you could do some good. Some say that you should try to amend the law through the Scott amendment. I have some misgivings about that. You know, Article I of the Constitution has the provision in there about patents, so I rather think that the Court System is going to construe that Article of the Constitution rather than the statute in the light of the Article. So you have to cross that bridge to cross which you don't have in ordinary litigations.

I rather think that instead of devoting yourselves to trying to amend the statute that if you would devote yourselves to trying to improve that which you have, you will possibly come out better. If you amended the statute, then you would have to have construction of the statute. That's somewhat like when people say we ought to amend the Sherman Law. Well, I thought some days when I used to be in the Anti-Trust Division that it would be a good thing, but I decided that the Court would have to interpret that statute — would have to go back maybe to the very beginning of what we'd been doing all those-almost one hundred years now, since 1890 when the Sherman was adopted. I decided that it would be better to do it on a case basis. I know that many, possibly your corporation, if you are office counsel, would think that that was a strange way to do it because its slow, not definitive, and quite often raises more questions than some of the opinions do than they decide, but I think that you would find that in the long run, particularly in the area where there's been so much litigation, that you'd possibly have a greater stability even before the statute than you would afterward because there would be so many attacks on the interpretations of it. I think you must remember that all statutory processes are compromises. One group wants to put through a statute on something, we'll say, for example, a patent law. The other group's against it — then the two groups come together, and, something comes out of it, if you can get enough votes, and the authors try to get enough votes for something to come out of it, just like they've tried to do on the Scott amendment. What comes out is a compromise and there's always some language put in there (don't know whether it's put in there deliberately or not), but I've construed many, many statutes since 1949 since I have been in the Courts and I find that controversial matters of this type always have some language in them that its so broad you can construe it two or three ways. When you construe it some way, why then the Congress very, very seldom (in fact all the time I sat on the Court I don't think the Congress ever did pass a statute other than in the field of tax when there was some deduction on depreciation). I wrote a case that they passed, a statute that clarified it — and we invite that. But I don't remember any other case in all the time I was there, the thousands of cases we would get (it started out at about nine hundred cases a year, ended up at about thirty-five hundred when I went off, and now it's about five thousand a year) where the Congress overturned even the interpretation of the Supreme Court, and, so I'm just suggesting that if you had the statute, you