

# DO “BAD” PATENTS BLOCK COMPETITION OR HARM INNOVATION?

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# Patents of “dubious validity” with “overly-broad claims”

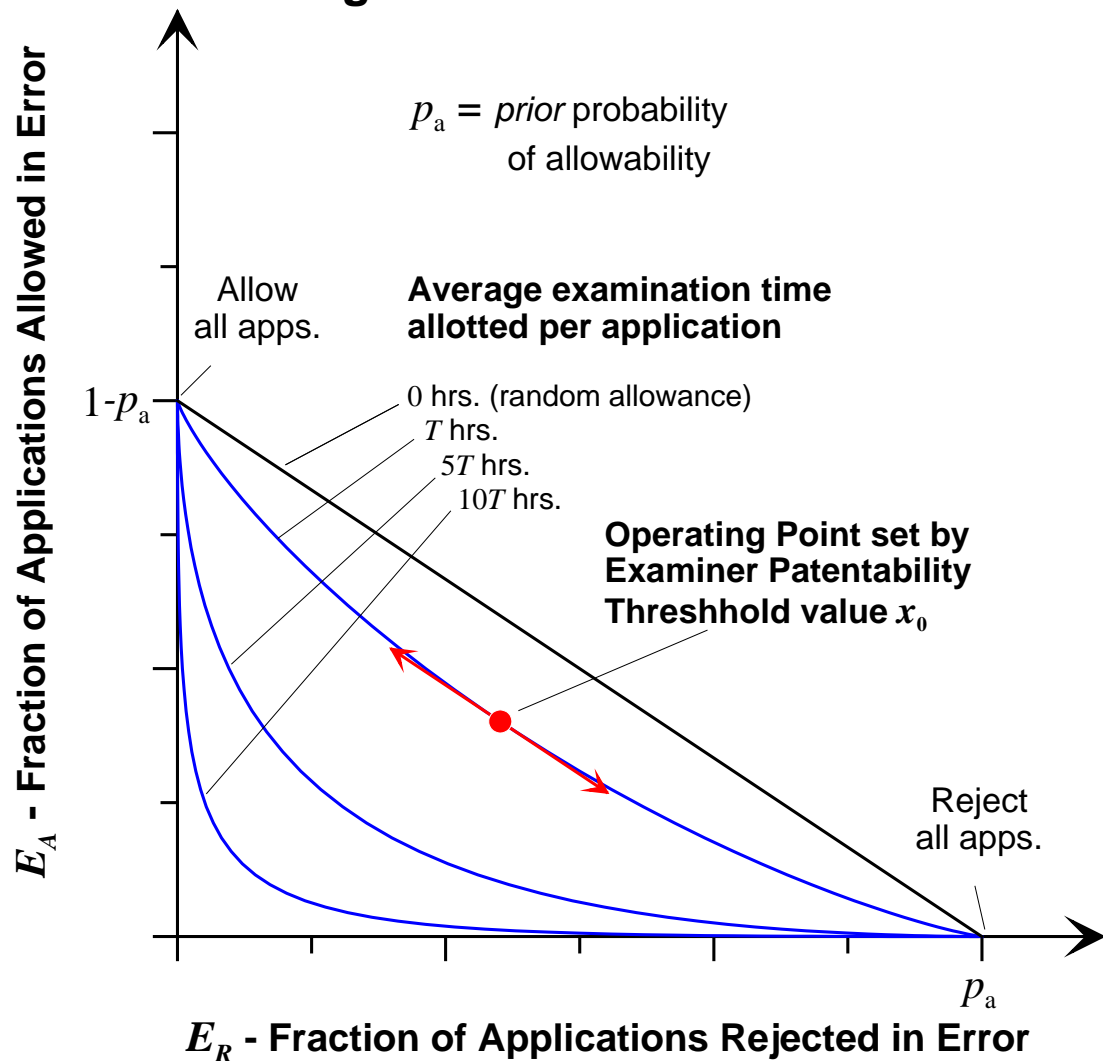
- “A poor quality or *questionable patent* is one that is *likely invalid* or contains claims that are *likely overly-broad*. Hearings participants raised concerns about the number of questionable patents issued. *Such patents can block competition and harm innovation* in several ways.”

— FTC, “*To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*,” 2003, p5. (emphasis added).

- We find no evidence that supports FTC’s statement of harm
- What is “questionable” about a patent? Who answers the “question”? Once rival innovators answer the “question” for themselves, as they must, can the patent really block them or harm their innovation?
  - If the answer is “likely invalid” or “overly-broad,” then they can defend a business decision to move forward anyway.
  - If the answer is likely valid, or not “overly-broad,” they would likely strike a bargain with the patentee and/or take a license.
  - Either way, competition or innovation are not “blocked”

# Patent examination errors are inevitable

Trading off allowance errors with rejection errors under average examination time constraints



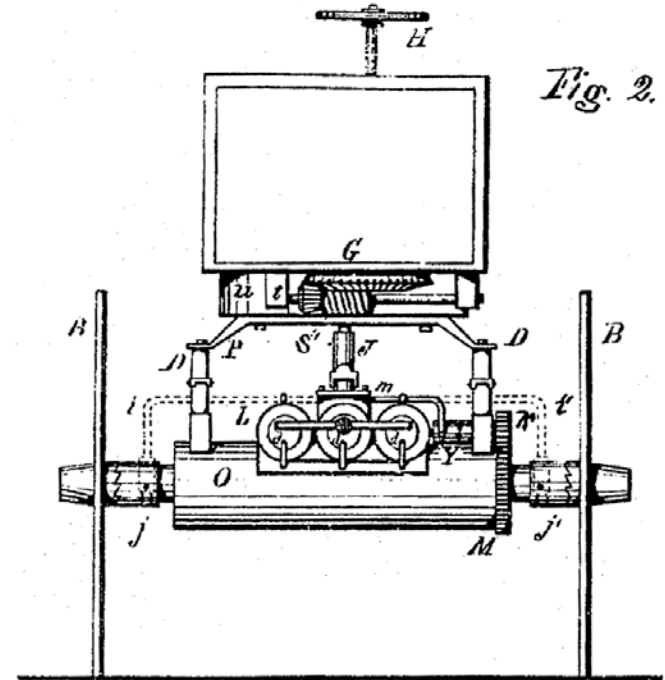
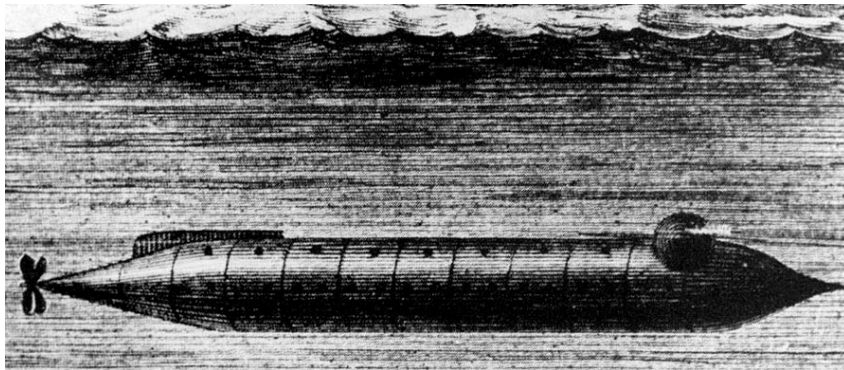
- By the USPTO's own quality measures of final disposition, 4% of issued patents are allowed erroneously.
- With about 325,000 patents issued per year, this corresponds to about 13,000 "bad" patents issued per year.
- With so many ostensibly "bad" patents, where is the evidence that competition or innovation is "blocked"?

# The archetypical “overly-broad” Selden patent

**George Selden, Road Engine**

**US Pat. 549,160, filed May 8, 1879 and issued on November 5, 1895.**

■ Secretly prosecuted in the Patent Office for more than 16 years; specifications and claims amended to track industry developments; notorious 19<sup>th</sup> century “submarine” patent.



■ Became the key patent of the Association of Licensed Automobile Manufacturers (ALAM) patent consortium.

■ ALAM demanded 1.25 % royalty and signed up more than 25 manufacturers. Ford did not take a license and was sued in 1903.

# Ford was confident enough to publicly indemnify all distributors and users

## **NOTICE!**

To Dealers, Importers, Agents and Users of Our

## **GASOLINE AUTOMOBILES**

We will protect you against any prosecution for alleged infringements of patents. Regarding alleged infringement of the Selden patent we beg to quote the well-known Patent Attorneys, Messrs. Parker and Burton: "The Selden patent is not a broad one, and if it was it is anticipated. It does not cover a practicable machine, no practicable machine can be made from it and never was so far as we can ascertain. It relates to that form of carriage called a FORE CARRIAGE. None of that type has ever been in use, all have been failures. No court in the United States has ever decided in favor of the patent on the merits of the case, all it has ever done was to record a prior agreement between parties."

We are the pioneers of the GASOLINE AUTOMOBILE. Our Mr. Ford made the First Gasoline Automobile in Detroit and the third in the United States. His machine made in 1903 is still in use. Our Mr. Ford also built the famous "999" Gasoline Automobile, which was driven by Barney Oldfield in New York on July 25, 1903, a mile in 55 4-5 seconds on a circular track, which is the world's record.

Mr. Ford, driving his own machine, beat Mr. Winton at Grosse Pointe track in 1901. We have always been winners.

## **FORD MOTOR COMPANY**

688-692 Mack Avenue, Detroit, Mich.

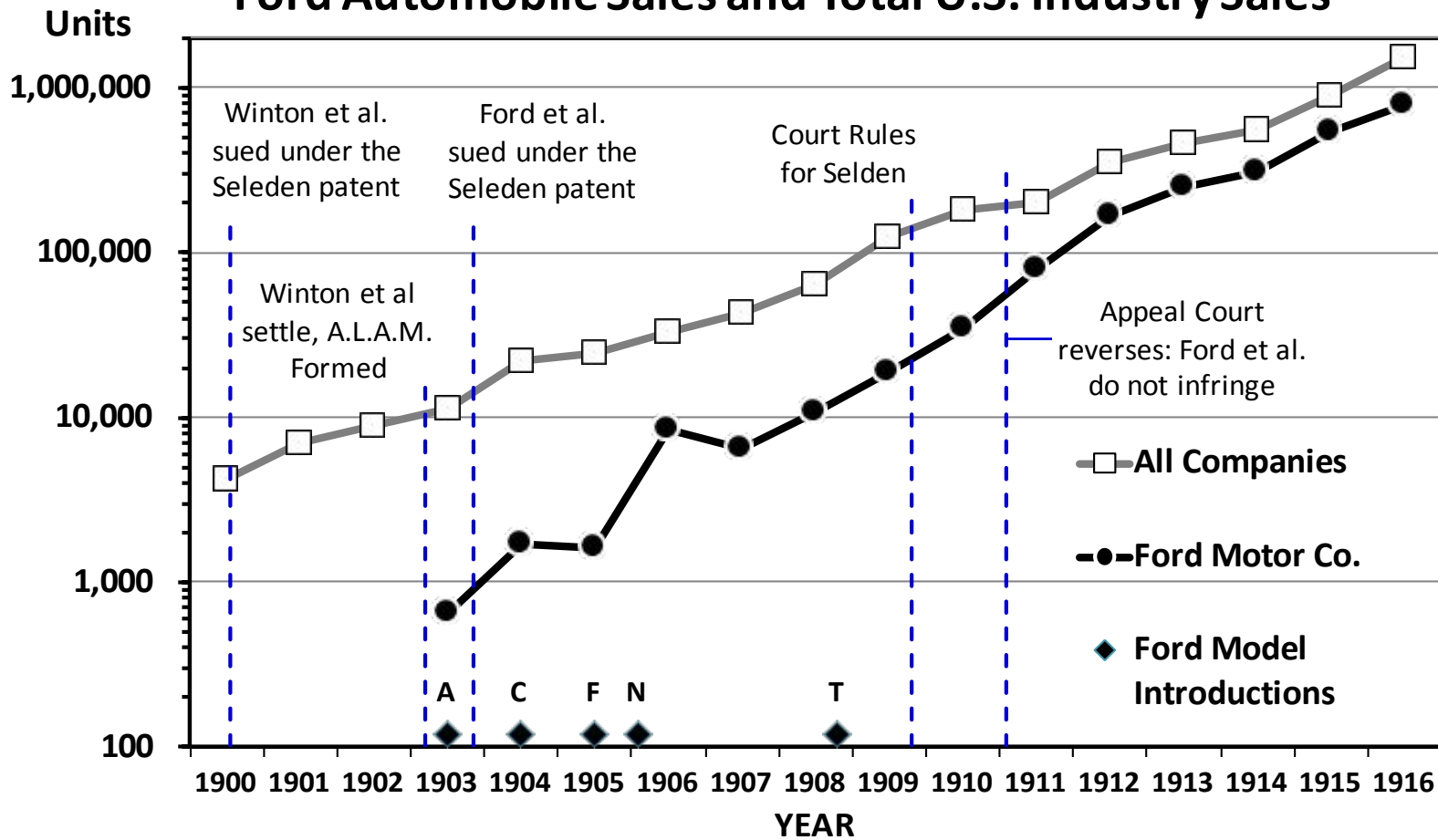
- Through the Selden patent enforcement period, many in industry (including Ford) had obtained legal opinions of its invalidity or a claim construction much narrower than ALAM had asserted.
- Ford's public defiance was in keeping with his claim to have been the "pioneer," who made "the first gasoline automobile in Detroit and the third in the United States."
- Ford's litigation costs in 1904 were less than 0.9% of sales, an expense with publicity that generated substantial marketing benefits at substantially less than the 1.25% royalty that Ford would otherwise have to pay to the ALAM.

*Detroit Free Press, July 28, 1903.*

**Assertion: The Selden patent “did not stop Mr Ford, but it did certainly slow him down” -- Merges and Nelson (1990), p. 890**

**Facts: Ford was not ‘slowed down’; Ford was the fastest growing mfg.**

### Ford Automobile Sales and Total U.S. Industry Sales

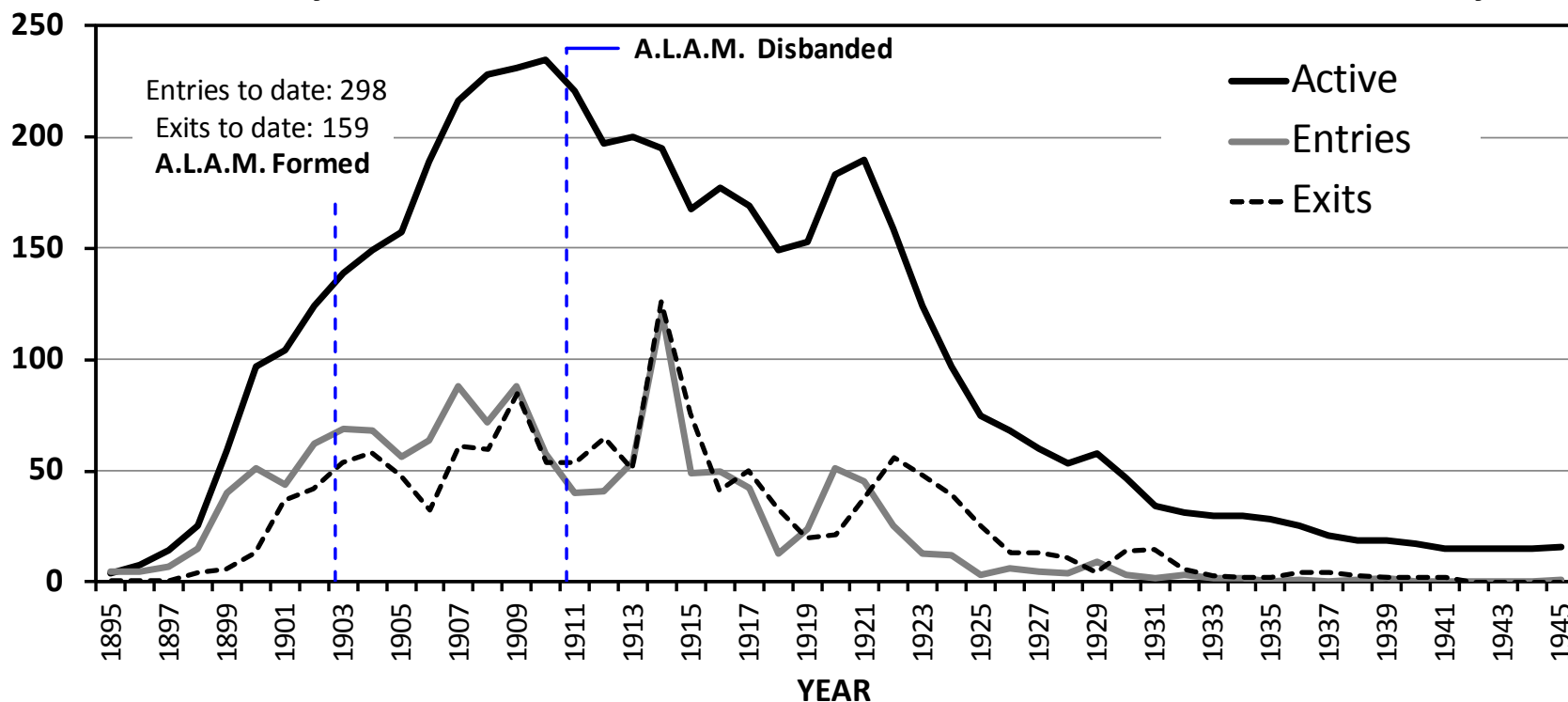


Sources: Automobile Manufacturers Association, *A Chronicle of the Automotive Industry in America 1893-1952*, (1953); P.H. Smith, *Wheels Within Wheels* (1970), p23; Ford Motor Co., *Facts from Ford* (1920), p29.

**Assertion: “the [ALAM] purpose was to ... perhaps control competition in the industry, rather than to facilitate orderly technological development” -- Merges and Nelson 1990, p. 889**

**Facts: The ALAM did not control competition in the industry**

**Entry and Exit of Manufacturer Makes in the U.S. Automobile Industry**



Source: G. Rosegger, and R.N. Baird, Entry and Exit of Makes in the Automobile Industry, 1895-1960: An International Comparison, *OMEGA, International Journal of Management Science*, 15, (2), pp. 93-102, (1987)

# Conclusion



- The patent system does not regulate a zero-sum game – successful commercial development yields an economic surplus not otherwise available without the exploitation of new inventions.
- Important patents never remain “questionable.” Parties are, and always have been, sufficiently motivated to answer the “question” for themselves. They employ expert legal advice to evaluate patent claims, determine their scope and validity, and establish the contours of their “freedom to operate.”
- We show that in the most prominent case of an “overly-broad” patent, the Selden patent, allegations that the competition was “slowed down” or “blocked,” or otherwise that it “harmed innovation” have no bases in fact.
- On the contrary: we show that vigorous development occurred during the very period of the Selden patent enforcement.



## Underlying Work

John Howells and Ron D. Katznelson, “The 'Overly-Broad' Selden Patent, Henry Ford and Development in the Early US Automobile Industry” (June 27, 2016). Available at <http://ssrn.com/abstract=2801309>

# THANK YOU

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