The Great Pharmaceutical Patent Robbery, and the Curious Case of the Chemical Foundation

BACKGROUND
- Many contemporary commentators express a need for a model of a public-private, policy-oriented, non-profit-making patent pool to administer licences under pharmaceutical patents for the benefit of AIDS sufferers in developing countries.
- At issue is whether events and arrangements in the history of the patent system have implications for the resolution of present day problems.

METHODOLOGY
- The author undertakes a case study of events which took place in the United States in 1919.

KEY FINDINGS
The Chemical Foundation
- In the decades prior to the First World War, the German organic chemistry industry was completely dominant. A highly favourable patent system in the US had not resulted in a domestic organic chemical industry of any significance.
- The Trading with the Enemy Act 1917, and amendments to the Act in 1918, facilitated the confiscation and sale of the assets of the German chemical and pharmaceutical industries, including intellectual property assets. Former patent owners were effectively denied all compensation.
- These assets were transferred at very low valuations to the Chemical Foundation, a private, non-governmental company. The Foundation promised to license use of the assets on a non-exclusive basis to any reputable and domestically-owned manufacturer for the public good. The income, less costs, was re-invested in support of badly needed scientific and technical education and research in the United States.
- Under the new regime, the aggregate royalty rate for non-exclusive licences under four key patents was set at just 5% for commercial firms, a stimulus was provided to the domestic organic chemical industry, and prices fell to less than 20% of what they had been before.
- Royalties from licences effectively funded a protectionist regime, preventing importation and giving time for the development of American manufacture. In this way, the expedient of the Chemical Foundation made it possible for the United States to have, in effect, a patent system which was both weak and discriminatory in relation to organic chemistry, where the United States was atypically backward, combined with a strong patent system for everything else.

Modern parallels
- It is often said that developing countries benefit from having a weak patent system (or no system at all) for as long as their industries are relatively backward, switching to a strong system as soon as those industries have caught up with the developing world and are ready to make inventions of their own.
- However, there are limits on the extent to which the Chemical Foundation offers a model solution to present day problems. Commentators disagree about the contribution of the Foundation to the development of the chemical industry, and its effectiveness in raising funds through licensing income and then dispersing those funds.
Recent disagreement over compulsory licensing has been accompanied by a change in the language of debate to emphasise ‘piracy’. As a result, the objective of helping consumers is not seen to justify the appropriation of technology.