

Judges lash out at patent-fostered monopolies, canceling their patents in great blocks, or more often imposing a system of compulsory license to all applicants, at royalties to be set by the court, failing agreement. This is an institution essentially different from the patent system, although it uses patents. It has recently been installed by court order or pressure in wide sections of industry, and will be discussed later. (§ 415, 463-477.) A cynical Socialist might say: What does it matter? Let the monopolies feed on patents as they please: the fuller becomes their monopoly, the surer the state will come to control or own them. A philosopher might suggest that patents are by definition state-protected monopolies, and hence inherently opposed to free, competitive enterprise, at least to some extent; and to that extent our efforts to protect both patents and competition are contradictory and self-defeating. There still remains a real issue, he would say, but not so grave a one as we thought, since in fostering the one desideratum, we must lose the other in part. Furthermore, he would point out that we might avoid conflict of purposes by a more basic view of our aims. We do not desire patents because they are a prime, inherent good; they are only an instrumental good; what we want them for is to get inventions. Well then, we have said there are 16 other means in use today for eliciting inventions beside the patent system, and still others are possible. Foster some of these, more than patents, if you are strongly opposed to monopoly.¹⁹⁷

[160] The main *raison d'être* on which patents have rested is very simple. We grant the monopoly of a patent (although in general, classic liberal economists rather oppose monopoly, and government interference in business) when this patent, this monopoly and interference, seems likely to do more good than harm, chiefly through rewarding sufficiently useful inventive work *which might not have been done without* that prospective reward, or not done soon enough. And conversely, a patent is unnecessary, and wrongly gives away the people's freedom, to a merely lucky, adventitious monopolist, when it gives him the ownership of an invention *that would have been made without* a patent reward, nearly as soon, either by him or by someone else somewhere in the world.

[161] The repartition of the inventions, into those that merit a patent reward and those that do not, can in practice be done only when the invention is brought to patent application stage, and conclusively only much later and retrospectively, in patent infringement suits. So the Patent Office and the courts struggle to establish general principles for appraising the merit, i.e., patentability of inventions. To do so and assign each individual case is extremely hard, since inventions are by definition ever new and never twice the same.

[162] The general principle that patents should be granted where and only where needed has also always been the basis for granting patents for inventions won by genius, vast labor, luck, or whose success was immediate and great although the invention seemed easy,²⁰ and denying them to inventions that could have been made by anyone skilled in the art, or that follow logically from already known prin-

¹⁹⁷ Similarly Victor Abramson points out that some hail the patent system as a defender of competition, through its value to some small firms. On *laissez-faire* principles he thinks the effect on size should be disregarded. *The Pat. System: its econ. & soc. basis*: Study No. 26 of the present series, 1960, 25 pp., p. 10, 11.