

CHAPTER 6

PATENTS PROTECT ONLY CERTAIN TYPES OF INVENTIVE PROGRESS

[199] Either by legal exclusion or by economic unprofitability, the patent system leaves outside its direct jurisdiction, protection, and help, the greatest part, far more than half, of all the activities that we should call invention, beside scientific and other labors that are necessary preludes or accompaniments to invention. To be sure, much of these may be paid for indirectly, through the practical coverage and rewards of a patent, when the discoverer is able to get an enforceable patent on some key phase of his work.

[200] In drawing up table 6 we calculated a guess that patents motivate about one-fifth of American inventing today. We seek now a different approach to a related problem, viz., to list what kinds of invention and invention-helping work are patentable, and what are not. Be it noted that an invention might be patentable and yet a patent be little or no motive in its contriving: this happens constantly in the great governmental and monopolistic laboratories. Or work might be done for a patent motive, even very good and successful work, and yet nothing patentable come out of it. In short, patentability, patent motivation, and patenting are three separate matters, with some tendency to concomitance. We now examine the first, patentability.

[201] Allowed for patent are in general new products, devices, and ways for making material things, bacterial processes for manufacture, new compositions of matter, and a few new plants capable of asexual reproduction, chiefly of the rosaceous family (fruits and roses). A particular artistic design for a usable article can receive a Design Patent for $3\frac{1}{2}$, 7, or 14 years, for fees of \$10 to \$30. But design patents are outside the field of this monograph and of our statistics. Plant patents are also unconsidered and few (106 in 1961).

INVENTIONS LEGALLY BARRED FROM PATENT

[202] 1. Legally excluded are *scientific discoveries*, however essential and even practically sufficient to teach an invention, and all discoveries of the nature of any existing thing, such as a mineral deposit, or the source of a trouble in working a process. But any of these might be in a way patented under the guise of a new apparatus or process for using the discovery, yet with a likelihood that someone else could invent around this patent, thus appropriating the discovery. A sort of patent on scientific discoveries, or rather a compulsory license, entitling the author to collect a royalty on all remunerative uses of his discovery, has been often proposed, but rightly rejected as too bothersome.²²⁶