The Principles of Patentability*

By Giles S. Rich †

I. Introduction

The stimulus for the ensuing discussion is a recent encounter with the unsound notion that to be patentable an invention must be better than the prior art.

What are the statutory requirements for patentability? Looking at the Patent Act of 1952,[1] wherein all of the statutory and much of the case law on the subject has been gathered together, revised, and newly arranged in an orderly fashion, we find a division of the statute entitled "Part II—Patentability of Inventions and Grant of Patents."[2] The first chapter thereunder, chapter 10, is entitled "Patentability of Inventions" and therein one would expect to find the answer to the question: "What are the statutory prerequisites to patentability?" There are five sections in that chapter. The first, section 100, is a definition section, to clarify and establish the meanings of the terms used, and the last, section 104, deals with inventions made abroad. Ignoring the special problems of the latter situation, we are left with three sections dealing with patentability.

Section 101, entitled "Inventions patentable," enumerates the categories of inventions subject to patenting. Of course, not every kind of an invention can be patented. Invaluable though it may be to individuals, the public, and national defense, the invention of a more effective organization of the materials in, and the tech-

*Reprinted from The George Washington University Law Review, Volume 28, January 1960, pages 393-407. Reproduced substantially as presented in speeches to the Rochester Patent Law Association, Rochester, N. Y., September 28, 1959, and The Dayton Patent Law Association, Dayton, Ohio, December 11, 1959.

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[1] 35 U. S. C. §§ 1-293 (1958).

[2] 35 U. S. C. §§ 100-188 (1958).

niques of teaching a course in physics, chemistry, or Russian is not a patentable invention because it is outside of the enumerated categories of "process, machine, manufacture, or composition of matter, or any new and useful improvement thereof." Also outside that group is one of the greatest inventions of our times, the diaper service. Section 101 lays down too, with respect to all categories of patentable inventions, the basic requirements of novelty and utility.

Sections 102 and 103 both have headings which commence with the words "Conditions for Patentability." Section 102 adds the subheading, "novelty and loss of right to patent" and deals, primarily, with what is known in this field of law as "prior art" and "statutory bars," stating the legal conditions pertaining to the novelty which is required by section 101. Section 103 adds the further condition, well-described in its subheading as "non-obvious subject matter," about which more will be said later on.

From sections 101, 102, and 103, therefore, we get the trio: novelty, utility, and unobviousness, referred to prior to the 1952 Patent Act—and unfortunately still generally referred to—as novelty, utility, and "invention."

Whichever way we express the prerequisites to patentability, where do we find any requirement that the invention must be *better* than the prior art? Yet we frequently read or are told, and some court opinions have said, that unless an invention is better than the prior art it is not patentable. If one asks what basis there is in the law for such a proposition, the usual answer will be, "Why, it is required by article I, section 8, clause 8 of the Constitution, the fundamental basis of all our patent law." This proposition will now be examined.

II. Constitutional Basis of Patent Law

The brief and familiar words of the Constitutional clause say:

The Congress shall have Power: . . .

To promote the Progress of *Science and useful Arts,* by securing for limited Times to *Authors and Inventors* the exclusive Right to their respective *Writings and Discoveries.*[3]

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.[4]

This certainly does not *say* that Congress has the power to secure to an inventor the exclusive right to his discovery only if it is better than what was known to the art. It just says that Congress has the *power* to secure exclusive rights to inventors for a certain purpose, namely, "To promote the progress of . . . useful Arts." To that end it is left to Congress to make, or not to make, the laws in implementation of the authority granted.

It is reasonably predictable that the last statement will be questioned on the ground that the constitutional purpose behind the patent system is, "To promote the progress of Science and useful Arts," but that would be a misconstruction. Let us digress for a moment to consider this point. To say that the purpose of the patent system is to promote the progress of science and useful arts involves an erroneous reading of what is actually written in the Constitution. Many people have been so conditioned by reading the constitutional clause uncritically, and by reading the plethora of judicial opinions reiterating the phrase, "To promote the progress of Science and useful Arts. . . ." that they have come to think that that is the purpose of the patent system.

It is unnecessary here to go into great detail about what the constitutional clause quite clearly says, once its true meaning has been revealed, as the subject has been thoroughly explored by Karl B. Lutz in his article entitled "Patents and Science, A Clarification of the Patent Clause of the United States Constitution."[5] Moreover, he was not the first in modern times to explain the matter as he takes his basic concept from DeWolf's

[3] *U. S. Const.* art. I, § 8, cl. 8. (Emphasis added).
[4] *U. S. Const.* art. I, § 8, cl. 18. (Emphasis added).
[5] 18 *Geo. Wash. L. Rev.* 50 (1949).

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An Outline of Copyright Law[6] published 24 years earlier. The conclusion they both reached is here recapitulated.

Clause 8 of article I, section 8 is a "balanced" sentence dealing with two distinct subjects, now known as copyrights and patents. It refers to them alternately, along with what is related to them.

What is to be promoted? "Science and useful Arts."

Who is to get rights? "Authors and Inventors."

In what are the rights? "Writings and Discoveries."

The clause was a consolidation of two proposals which got packaged together. One was to grant copyrights to authors. The other was to grant patents to inventors. Both involve rights to exclude and were recognized forms of lawful monopolies. Neither was a new idea. They were both known in England and the colonies. Now they were being made the subjects of delegated powers. Congress was given power to promote the progress of "science" not by protecting inventors, but by securing to authors exclusive rights to their writings. What was meant by "science" in that context? It meant knowledge in any field and it included all fields. Dr. Samuel Johnson's Dictionary,[7] contemporaneous with the Constitution, defines "science" as:

1. Knowledge
2. Certainty grounded on demonstration
3. Art attained by precepts, or built on principles
4. Any art or species of knowledge

   I present you with a man Cunning in music and mathematicks. To instruct her fully in those *sciences.* *Shaksp.*

5. One of the seven liberal arts, grammar, rhetorick, logick, arithmetick, musick, geometry, astronomy.

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[6] DeWolf, *An Outline of Copyright Law* 15 (1925). Mr. DeWolf, now deceased, was at one time Acting Register of Copyrights.

[7] Johnson, *English Language Dictionary* (1st Amer. ed. 1818).

> Good sense, which only is the gift of heaven,
> And, though no *science,* fairly worth the seven.
> *Pope.*

The Oxford Dictionary of 1914 [8] indicates that in *modern* usage the word "science" is often treated as synonymous with the natural sciences. An illustration from literature under the date 1884 quotes a writer as saying:

> I remember him years ago as a logic and *science* coach. I don't mean for cutting up cats, but what *science* meant then, Ethics, Butler, and such like.[9]

A reference to Dr. Johnson's definition of "scientifick" will show, furthermore, that the natural science which the present connotation of the word calls to mind was, in the days when the Constitution was written, referred to as "natural philosophy." "Science" meant knowledge;[10] "scientifick" meant producing demonstrative knowledge, producing certainty;[11] and "scientifically" meant in such a manner as to produce knowledge. The promotion of science in this sense was something Congress was empowered to do by the protection of the writings of authors.

The other and separate objective was to promote "useful Arts" and Congress was empowered to do this by protecting the discoveries of inventors. If the promotion of both "Science and useful Arts" be ascribed as the object of the patent system, then the copyright system would have no stated object.

The authors of the first patent act, which was presented to Congress on February 16, 1790,[12] in the second session of the first Congress, understood the distinction. That act was entitled, "An Act to promote the progress of useful arts." So were the subsequent acts of 1793,[13] 1794,[14] and 1836.[15] By contrast, the copyright law of

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[8] *A New English Science Dictionary,* definition 5b (Murray ed. 1914).
[9] *Id.* at definition 5c.
[10] Johnson, *op. cit. supra* note 7.
[11] Johnson, *op. cit. supra* note 7.
[12] 1 Stat. 109 (1790).
[13] 1 Stat. 318 (1793).
[14] 1 Stat. 393 (1794).
[15] 5 Stat. 117 (1836).

1790,[16] was entitled, "An act for the encouragement of learning." The only word in the constitutional clause corresponding to learning is "science."

By some peculiar slip, the 1837 patent act [17] was entitled "An Act in addition to the act to promote the progress of science and useful arts," but there was no such act thus entitled! The 1839 act,[18] in its heading, corrected the mistake, which was never made again.

When the bill which became the Patent Act of 1952 [19] was submitted to Congress, the usual House [20] and Senate committee reports [21] were submitted with it and therein were concise statements of the point just discussed. As a matter of legislative history therefore, the clear intent of Congress was, as always, to promote progress in "useful Arts."

III. Advancement of the Art Concept

Returning to consideration of the proposition—that to be patentable an invention must be better than the prior art, clearly no support for it is to be found in the present statutes. There was once a provision which seemed to imply that the Commissioner had authority to pass on relative superiority.[22] It last appeared in R. S. 4893 and it said that the Commissioner of Patents might issue a patent on an application if it appeared to him, first, that the applicant was justly entitled to it under the law and second, if it appeared to him that the invention "is sufficiently useful and important." This was a strange mixture of concepts, the applicant's right to a patent under the law and the Commissioner's simultaneously existing power to withhold it; the latter clause does not appear in the 1952 act. The revision note says that it was omitted "as unnecessary, the requirements for patentability being stated in sections 101, 102, and

[16] 1 Stat. 124 (1790).
[17] 5 Stat. 191 (1837).
[18] 5 Stat. 353 (1839).
[19] H. R. 7794, 82d Cong., 2d Sess. (1952).
[20] *H. R. Rep.* No. 1923, 82d Cong. 1st Sess. 4 (1952).
[21] *S. Rep.* No. 1979, 82d Cong., 2d Sess. 3 (1952).
[22] 1 Stat. 110 (1790); 5 Stat. 120 (1836); *Rev. Stat.* § 4893 (1875).

103."[23] The Federico Commentary on the New Patent Act adds the following:

> The meaning of this old phrase was obscure and it has seldom been resorted to either in the Patent Office or in the Courts.[24]

The old phrase, "sufficiently useful and important," was in fact deleted because of the possibility that, although disused and moribund, it might be construed as imposing some limitation on the statutory requirements for patentability over and above the requirements of sections 101, 102 and 103.[25] With this deletion, the corresponding section of the 1952 act, section 131, provides only that if the Commissioner's examination of an application shows that the applicant is entitled to a patent *under the law,* he shall issue a patent. The law is now all in the statute—conceding that it has to be construed and applied[26]—and nowhere do the statutes say an invention must be better to be patentable.

What if any support for the contention that a requirement that an invention to be patentable must be better than the prior art is to be found in the Constitution? If any is to be found there, it must lurk either in the phrase "To promote the progress of . . . useful Arts" or in the words "Inventors" and "Discoveries."

Let us consider first "progress in the useful arts." How is such progress actually made? For one thing it is made by the constant increment of improvements on what we already have, produced both by the expected skill of ordinary workers in the arts and by the unobvious developments which would not occur spontaneously from the application of such ordinary skill. The former improvements are never patentable. Why? Because they will be made anyway, without the "fuel of interest" which the patent system supplies. The unobvious improvements, if new and useful, are patentable if proper

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[23] 35 U. S. C. A. § 131 revision note (1954).

[24] Federico, *Commentary on the New Patent Act* in 35 U. S. C. A. § 1 at p. 36 (1954).

[25] Writer's personal knowledge as one of the drafters of the Patent Act of 1952.

[26] Lyon v. Bausch & Lomb Optical Co., 224 F.2d 530, 535 (2d Cir. 1955).

steps are taken, and the bulk of issued patents are probably granted for this class of inventions.

In contending for the patentability of such improvement inventions, attorneys get used to arguing that they are patentable by pointing out how they *are* better than the prior art. An "improvement" is, by definition, necessarily better. On the other side, the Patent Office examiners get so used to these arguments that they come to expect them, indeed to ask for them, and some examiners are inclined to insist on their rejections when they are not forthcoming. But have they any legal right to insist on proof or convincing argument that an invention is better? Is it a proper ground of rejection to say that an invention is no better than the prior art? Analysis will show it is not.

Progress in useful arts is made as well by what may be called enrichment as it is by improvement, by the duplication of means for doing any given job. The patent system, by its very nature tends to promote this kind of progress for as soon as a patented device, for example, meets with popular demand, forces are set in motion to design around the patent, to avoid infringement and at the same time produce another device to do the same job, preferably just as well or better. Take the case, however, where the new device is not only no better but not quite as good, or even recognizably inferior but possibly cheaper to make.

To illustrate the point without particular reference to patentable inventions, consider the progress made as a result of that cheap, inferior, rattletrap Model T Ford which, according to some points of view, was inferior to every other automobile on the market. But people began going places and a new era was born. For that matter, as means of transportation suited to the times, were the first automobiles actually better than the horse?

Who is to say which is best as between the Mimeograph, the Ditto, the Multigraph, Multilith, Thermofax, Photostats, Photo-Offset, Verifax, Xerography and other systems of like nature? Has no real progress been made in the useful art of reproduction because we have these

alternative means? Useful arts which start out by being competitive end up by cross fertilizing each other as the telegraph, the telephone and radio have borrowed from and supplemented each other.

At the inception of the talking pictures industry, which was better, sound-on-film or sound-on-disc? At the time of the first commercialization both had been invented but the discs were first used because those making the choice thought they were better. Today they are all but obsolete and sound-on-film prevails; but to be commercially practicable and better than discs it had to await development of auxiliary equipment. How could a patent examiner pass judgment on such a matter at a time when the industry itself did not know the answer?

We need not confine ourselves to thinking about invention on the grand scale. In the remote corners of the most crowded arts, progress is made by the proliferation of ideas, different and unobvious ways of doing the same thing, so that the reservoir of inventions fills up. It should never be forgotten that *patented* inventions are published and become a part of the technical literature. This publication itself promotes progress in the useful arts and it is the prospect of patent rights which induces the disclosure and the issuance of the patent which makes it available. Whenever novel subject matter, unobvious to the workers of ordinary skill in an art, is published, progress in the art is promoted. The literature of the art is enriched, another way of doing something is made known and even if it be inferior to the means already known, there is no telling when it may give another inventor an idea or when someone will improve on it in such a way as to surpass all that is known. Everyone can learn from mistakes, including the mistakes of others, provided he can find out about them. *Patents* on inventions that have failed can promote progress. Abandoned applications cannot.

The patent system does not promote progress merely by rewarding those who succeed commercially. It promotes it by stimulating inventive activity, by bringing about a disclosure of the results of that activity, and by

encouraging investment in the production and marketing of inventions as well as in research and development. It is not to be expected that everything which this stimulus succeeds in producing will be of equally good quality.

The situation is comparable to the effects of the copyright system. The stimulus it gives to the production of literature, art, and music is bound to produce the bad along with the good. So is it in the patent system, but by producing the whole lot you get the good. There is no way to get cream without producing milk. Retard milk production and you will get less cream.

A serious objection to the notion that an invention must be better to be patentable is that it would require the Patent Office and the courts reviewing its final rejections to make a value judgment of a kind they are not equipped to make and should not be asked to make. Patent applications must as a rule be made and examined soon after the invention is made. At this stage who can tell whether an invention is better? Of what use is a new born baby? Many are the inventions which cannot be tried out except by putting them on the market and which nobody will risk putting on the market unless there is patent protection. Without the test of time it is often impossible to say what is better and what is worse, which is important and which is not important. The sort of commercial success, evidence of which is produced in infringement suits, which may demonstrate that an invention is better, occurs only after the invention has proved itself in the market place. Such evidence is not in existence at the patenting stage except in unusual cases. This is a cogent reason why the patent issuing agency should not have the power to pass on the question of relative superiority or to demand evidence of it as a prerequisite to patentability.

To do the job of promoting progress, the incentives afforded by patent protection have to be maintained to the point where they will encourage production, even of things that patent office examiners may think are inferior. They could be wrong and the inventor should

have his chance. The marketplace will pass judgment. If that judgment goes against the patentee, as it frequently does, even with respect to inventions which look good to the patent office, there has been no loss to the public. It is difficult to understand the attitude of those who feel that *ideally* a patent should be granted only for the meritorious invention which is capable of being a commercial success. Patents are not Nobel or Pulitzer prizes! They are not for *exceptional* inventors but for average inventors and should not be made hard to get. True, they are temporary monopolies, but therein alone lies their power as inducements to invent, to disclose, to invest, and to design around. Why must an invention be a commercially hot number to be patentable? If it is a total dud, how is the public injured by a patent on it? A monopoly on something nobody wants is pretty much of a nullity. That is one of the beauties of the patent system. The reward is measured automatically by the popularity of the contribution. People don't get excited about the copyright monopoly on last year's newspapers, yet it is just as complete a monopoly and lasts much longer. The only possibility of doing damage is so to construe a patent on a dud as to cover a commercially meritorious invention made by a more competent inventor, but it is not noticeable that courts have a tendency to do that.

To sum up on whether the promotion of progress clause requires that inventions be better than the prior art to be patentable—clearly it does not. Progress is most effectively promoted by protecting those who enrich the art as well as those who improve it. Even though their inventions are not as good as what really exists, such inventors are not being rewarded for standing still or for retrogressing, but for having invented something. The system is not concerned with the individual inventor's progress but only with what is happening to technology. It is advanced by every new thing contributed to it, whether or not that thing by itself is better at the time of its creation.

IV. Limitation on Patentability

Of course, not every new contribution, even within the statutory categories, should be patented, and there is the question of where to draw the line. This we can consider in the course of discussing the words "Inventors" and "Discoveries" in the constitutional clause. They certainly have had an effect on the decisions of the courts as to what inventions are patentable. At least, they have frequently been used in rationalizing decisions on patentability.

As long ago as the Act of 1793, there was a declaration that "simply changing the form or proportions of any machine, or composition of matter, in any degree, shall not be deemed a discovery."[27] Behind this there was apparently an assumption that if the inventor had not made a "discovery," he was not entitled to a patent.

The word "Inventors" appears also to have been seized upon at an early date as a basis for saying that to have anything patentable, there must in fact be an "invention." Since, in the early acts, the words, "invention" and "discovery" were used interchangeably, we have evidently had from the very outset of our patent system a working rule that no patent would be granted unless there was what was deemed to be an "invention" or "discovery." This led to all sorts of semantic difficulties, for the word "invention" thus came to be used to refer to the thing invented and also to some vague quality necessary to patentability.

In the papers of Thomas Jefferson, who was a member of the first patent "Board" which granted patents, is a proposed revision of the 1790 act, in which he suggested adding the statutory defense that, "The invention is so unimportant and obvious that it ought not to be the subject of an exclusive right."[28] He clearly comprehended that one might have invented something, and hence have *an* invention, which was nevertheless unpatentable. He

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[27] 1 Stat. 321 (1793).

[28] Draft of a Proposed Bill to Promote the Progress of the Useful Arts in 5 *The Writings of Thomas Jefferson*, 1788-1792 at 279 (P. L. Ford ed. 1895). This proposed bill was drafted by Jefferson, and introduced into the House of Representatives Feb. 7, 1791, by White. *Id.* at 278 n. 1.

spoke with greater clarity than most of his successors who fall into the "lack of invention" jargon.

It has generally been stated to be the law that, in addition to being new and useful, an invention, to be patentable, must involve "invention." Merely to state that proposition, in the absence of an initiation into the mysteries, sounds ridiculous. A neophyte might well ask, "What do you mean, an invention must involve invention?" The sophisticates would answer saying, " 'Invention,' the Supreme Court has held 'cannot be defined.'[29] It is 'that impalpable something' which you must have to get a patent. Experienced patent lawyers, the Patent Office, and the courts understand what it means, only they never agree."

The various meaningless phrases which have been used to express this essential mystery—something akin to a religious belief—are familiar to everyone:

Patentable novelty, or simply patentable invention.[30]
Exercise of the inventive faculty,[31] the creative faculty,[32] inventive skill,[33] or inventive effort.[34]
The creative work in the inventive faculty.[35]
A substantial invention or discovery.[36]
The flash of creative genius.[37]

Very recently a Louisiana District Judge charged a jury that the status of invention is achieved only when "something new, unexpected *and exciting*"[38] results—that, in an automobile transmission!

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[29] McClain v. Ortmayer, 141 U. S. 419, 427 (1891).
[30] United Chromium, Inc. v. International Silver Co., 53 F.2d 390, 393 (D. Conn. 1931), *aff'd* 60 F.2d 913 (2d Cir. 1932).
[31] Potts v. Creager, 155 U. S. 597, 608 (1895).
[32] Hammond Buckle Co. v. Goodyear Rubber Co., 58 Fed. 411, 413 (2d Cir. 1893).
[33] Ansonia Brass & Copper Co. v. Electrical Supply Co., 144 U. S. 11, 18 (1892).
[34] Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, 497 (1876).
[35] Hollister v. Benedict & Burnham Mfg. Co., 113 U. S. 59, 73 (1885)
[36] Atlantic Works v. Brady, 107 U. S. 192, 200 (1882).
[37] Cuno Engineering Corp. v. Automatic Devices Corp., 314 U. S. 84, 91 (1941).
[38] The appeal court, while reversing on other grounds, said:

> In the total context we do not regard this as harmful but we do feel that this was an unfortunate choice of words for the Trial Court to use in describing the standard of invention.

Thurber Corp. v. Fairchild Motor Corp., 270 F.2d 841, 849, 122 U. S. P. Q 305, 311 (5th Cir. 1959).

No one could operate exclusively by such indeterminate standards and so a whole series of negative rules for testing the existence of "invention" evolved, such as "mere rearrangement of parts does not *normally* amount to 'invention,' " and to each of these rules well-founded exceptions developed in the case law.

In the final analysis, all it amounted to was that if the court thought the invention, though new and useful, was not patentable, then it did not involve "invention" and vice versa. The requirement for "invention" was the plaything of the judges who, as they became initiated into its mysteries, delighted to devise and expound their own ideas of what it meant, some very lovely prose resulting.

In the course of the long struggle with that obscure requirement that to be patentable an invention must involve "invention" or, stated another way, that an invention must *really* be an invention or a discovery, untold quantities of argument have been submitted to the Patent Office and the courts in an effort to show that "invention" was present, bearing on the alleged superiority of the thing invented over the prior art. Where there has been success in obtaining or sustaining a patent, it has often been argument along these lines which has succeeded. However, it does not logically follow from the fact that a thing which *is* better than the prior art is patentable, that to be patentable a thing *must be* better. The words "Inventors" and "Discoveries" no more dictate that an invention must be better than does the promotion of progress clause. The Constitution, therefore, contains no such requirement.

To conclude on this question of patentability, there are some things about the Patent Act of 1952 which neither the bar nor the courts seem to have fully comprehended. The bar, of course, takes up opposite sides and confuses the courts, so the courts may be forgiven for taking so long to reach *Lyon* v. *Bausch & Lomb*,[39] the first opinion thanks to the perception of Judge Learned Hand, to

[39] Lyon v. Bausch & Lomb Optical Co., *supra* note 26.

press clearly what was actually in the minds of the drafters of the act.

With respect to what *used* to be called the requirement of "invention"—and the use of the past tense in referring to it cannot be too strongly urged—the 1952 act did three things:

1. *It put the requirement into the statutes for the first time, in section 103.* The "sufficiently useful and important" clause in R. S. 4893 never seems to have been regarded as the true basis for the requirement of "invention," which was treated as the creation of the courts. Though one may call section 103 "codification" it took a case law doctrine, expressed in hundreds of different ways, and put it into statutory language in a single form approved by Congress. In such form it became law superior to that which may be derived from any prior court opinion.

2. *The Patent Act of 1952 expresses this prerequisite to patentability without any reference to "invention" as a legal requirement.* Nowhere in the entire act is there any reference to a requirement of "invention" and the drafters did this deliberately in an effort to free the law and lawyers from bondage to that old and meaningless term. The word "invention" is used in the statute only to refer to the thing invented. That is why the requirement of "invention" should be referred to, if at all, only with respect due to that which is dead.

3. *The act sets as the standard of patentability the unobviousness of the invention, at the time it was made, to a person having ordinary skill in the art.* Therefore, what we have today, and have had since January 1, 1953, is a requirement of *unobviousness,* rather than a requirement of "invention." (It is assumed, of course, that the invention is new and useful and has not run afoul of any statutory provisions such as a statutory bar.)

The question will, of course, be asked, "What difference does it make, it must still be a subjective decision?" True, but now the statute provides a standard according to which the subjective decision must be made. There is a vast difference between basing a decision on exercise

of the inventive or creative faculty, or genius, ingenuity, patentable novelty, flashes, surprises and excitement, on the one hand, and basing it on unobviousness to one of ordinary skill in the art on the other. It is possible to determine what art is involved, what type of skill is possessed by ordinary workers in it, and come to some conclusion as to what "ordinary skill" would be at a given time. This may present knotty problems but it is a definite pattern of thinking and does not leave the Patent Office or the courts free to conclude that a thing is not patentable for any old reason and then stand on the proposition that something indefinable and impalpable called "invention" was not involved. At least they have to talk in terms of obviousness to a man of ordinary skill in the art. While the ultimate decision as to what his skill would be and what would be obvious to him is subjective, it is one definite proposition on which evidence can be adduced. The best the courts could do in the past was to assume, under certain sets of circumstances such as the existence of a long-felt want and an immediate market acceptance of an invention, that there must have been "invention." This was nothing but a labeling process, like calling unpatentable combinations "aggregations" and public use that should not be a bar "experimental use."

The law then is that inventions within the statutory categories which are new, useful, and unobvious are patentable to inventors who proceed in accordance with the statutes.

We have come a long way in understanding our own patent system since 1790 and we have learned a lot about how to express the principles according to which it operates. We have gotten rid of the 1790 expression of the patent right, for example, which was stated in the statute to be "the sole and exclusive right and liberty"[40] of practicing the invention and the more recent but also misleading "exclusive right to make, use and vend,"[41]

[40] 1 Stat. 109 (1790).
[41] 16 Stat. 201 (1870).

substituting the simple and accurate "right to exclude others from making, using, or selling,"[42] which is and always has been the patent right.

The drafters of the present statute did their best to take out of the law the undefinable concept of "invention." Whether lawyers will now take advantage of the terminology which has been provided and stop talking nonsense is up to them.

[42] 35 U. S. C. § 154 (1958).

Republication of Rules of Practice in Federal Register *

The Federal Register for December 22, 1959, contains a republication of the Rules of Practice of the United States Patent Office in Patent Cases, the Trademark Rules of Practice, and the forms included with each. This republication was made at the request of the Federal Register in order to have an official publication of the rules in one place. It supersedes the previous publications in the Federal Register of the original rules and the various amendments thereto which had been made from time to time. No changes have been made in any of the rules except for small editorial revisions. In the forms concerning patent cases, part 3, the wording is as it appears in the pamphlet edition of the rules of practice, published by the Patent Office. Other forms which appeared in the pamphlet edition and did not previously appear in the Federal Register have been added.

The rules as republished in the Federal Register will not be published in the OFFICIAL GAZETTE; but the next printings of the pamphlet editions of the Rules of Practice of the United States Patent Office in Patent Cases and the Trademark Rules of Practice will include whatever changes have been made.

ROBERT C. WATSON,
Commissioner of Patents.

Dec. 22, 1959.

* Notice appearing in 750 O. G. 251 (January 12, 1960).