

## WHY SO MUCH LESS OF INVENTION IS NOW PATENTED

[114] We set down at the conclusion of our patent history, some reasons why the patent system has held up as well as it has, enjoying an absolute importance likely as great as ever (§ 36). Now to examine why it has nonetheless *relatively* fallen away in such a swift and accelerating decline in the last two generations to a few percent of its 1880 proportion to invention. One cause would certainly be the judicial disfavor demonstrated (table 2); but this in turn must have had causes.<sup>126</sup> One might well be finding more patents on old stuff, due to the increasing difficulty to harried examiners to search in few hours (§ 295) through the ever vaster world of present and past published technology, while their unexamined applications pile up. However, this would have a first effect of multiplying patents. Numerous recent antitrust judgments, requiring licensing or even cancellation of great blocks of patents, as in the Hartford-Empire bottle, GE, RCA, Bell, and United Shoe Machinery verdicts, must have been an influence against taking further patents. One study shows a decline of at least 20%,<sup>127</sup> and much more in the companies hardest hit. "It has been the policy of the Bell System Co. since 1949 to license anyone for any purpose."<sup>128</sup> So the telecommunications and broadcasting companies, recently hard hit by the courts, had pending applications in 1953 amounting only to 2% of their patents in nominal force, versus 29% for all other companies.<sup>129</sup> Although Government business would be one explanation of this great and sudden check to their patenting, the fall in judicial favor would presumably be another.

[115] Another great cause of patents' relative decline is certainly the vast growth of inventing by or for the Government, which kind was near zero in 1880, but absorbs 61% of all organized inventive and pertinent scientific research today,<sup>130</sup> to which Solo would add 30% of that paid for by industry, but done to get Government contracts.<sup>670</sup>

[116] A part of the decline of patenting would be more numerical than important, due to the rising quality and significance of the average American patent.<sup>131</sup> Sanders<sup>132</sup> finds that today about 60% are put in production at one time or another,<sup>133</sup> and another 15% found of some benefit. But a study of 1951 or earlier estimated only 20-25% used. Still earlier authorities, such as Jewett,<sup>134</sup> merely guessing, doubted if 10% were used, and Vaughan<sup>135</sup> in 1925 that more than that ever paid for their fees, which Kaempffert<sup>136</sup> in 1912 and 1923 thought were paid by less than 5%; another 1912 claim was that only 1% of the patentees were financially successful.<sup>137</sup> Another suggestion of rising quality of inventions patented is in the percentage assigned to a corporation, reflecting chiefly or entirely the proliferation of corporations and of laboratories. Assignments on issue rose from about 12% in 1885, to be about 61% of patents currently issued to Americans,<sup>138</sup> ever since 1940. This will be increased to about 64% by later acquisitions. The 1938 figure on original issuance had been 51.7%,

<sup>131</sup> Lutz says "The courts have raised the standard of invention to keep pace with progress in technology, and the Patent Office has followed this standard as it has progressed", so that it may be pointless to cite old patents. K. B. Lutz: *Are the Courts Carrying Out Constitutional Public Policy on Patents?*; *JPOS* 34: 766-91, 1952: p. 780.

<sup>133</sup> Of the patented inventions 40.2% are being worked currently, 17.8% have been in the past, and 1.4% are expected to be in the near future. Based on statements of the patentee and/or assignee. N 132. The currently worked include 53% of the mechanical patents, 40% of the electrical, and 33% of the chemical. N 165 & ftN 152.