

ventions originally brought to the attorney's office. Many others must have been eliminated *before* that stage, because the inventor had discovered before he got to the law office, that his bright idea was old stuff, or too logically based on the old to be patentable. In short, it would seem that around 91% of inventions are duplicated, at least by starts; incipient inventions, that could and sometimes would have been carried through to patenting and fruition, if the evidence of their anticipation, either fully or in the essentials, had not come to light. Duplication is normal with modern invention. Q.E.D.

[147] If a patent attorney really believed the classic theory he so often expounds,<sup>191</sup> he would tell his clients that they have no reason to search the prior art, nor to hurry to the Patent Office, nor to fear receiving from it a "prior reference," since inventions are never duplicated. And if the Office should nonetheless refuse them a patent, he would tell his client he had lost little, since he could still practice his invention in secret, say an improved mousetrap, keep all the profits permanently, and no one but him and the mice would ever know of it.

[148] We have not before criticized this third orthodox basic idea of patents, that a patent is a free contract, by which the inventor gives up his right to practice his invention in secret, in return for a 17-year legal monopoly. A few words should be enough to minimize this theory, a few reminders of well known facts. The inventor has no such possibility of secret working, save temporarily, and in a few *process* inventions, mostly chemical, and finally with inventions so poor that one may contemplate secrecy with *nonuse* at least for the present, as the alternative to patenting. This is chiefly the case where a manufacturer has a preferred method, and expects to continue it. It is impossible to practice secretly and abundantly any transportation device, or any product sold to the public or Government, or anything too big to hide behind walls, nor, despite a nominal legal protection, a secret known to many workmen. One of the older writers gave a good formula in four syllables for breaking open a secret process: "A pint of beer." We shall speak later (§ 272ff., 419, 425, 582ff.) of the problem of secrecy in the chemical and temporary situations where it does exist, and of the sale of know-how, i.e., many little, unpatentable details which *could* be worked out or found out, but which are easier and better purchased. With almost all patentable inventions such secrecy as patents break down, must be dismissed from our thinking as no large possibility save temporarily and anent details. In general, the inventor has no alternative to *publicity-and-use*, with or without a patent. Having no alternative to publicity, there is no bargain with the Government, and no rights of the inventor therefrom, but only such privileges as the Government has chosen to give him, in order to stimulate his precious activity.

[149] A devoted and intelligent defender of classical theory on patents might respond that while he has given up the natural rights theory, and will concede that the prior art helps the inventor, still there is no need to acknowledge nor pay for this last (unless currently patented). And he may concede our last point too, that long secret use of an invention is almost always impossible, so that a real bargain with the Patent Office is rare; and he may concede too that inventions are usually duplicated so that the particular inventor is replaceable. But this intelligent defender still would insist that *unless* there were a