

port for the patent system; it is using a patent to get around the effect of patents. Cf. ¶ 504.

[169] The fourth economic justification for patents is to *prevent* many inventions from being used, despite the popular, uninformed idea that the suppression of inventions is a great count *against* the patent system. The plain fact is that most inventions, even about half of those still being patented, are at a given time bad ones, inferior ways of doing something, or ways to do something not worth thus doing, and they would not be utilized at that time in the absence of a patent system. But when the best way is patented by someone else, a competitor may find more profit in using an unpatented inferior method than in paying for a license on the best one (supposing its patentee will grant one)—especially when the patent is only on a minor step of a big production. So it may pay the patentee of the best way to protect or buy up the inferior methods also, thus preventing their use by any competitor, and either licensing the best method on royalty, or keeping all for himself. In these cases the question arises whether we should try, as all other countries have, to weaken industrial monopoly by a Compulsory License law. It is a big question, which we take up later (¶ 463ff.). We must likewise defer consideration of the great popular myth, that good inventions are suppressed by use of patents; both reason and authority deny this much importance (¶ 304). In any case where the invention is an inferior one, that would not come into use in the absence of patents, the technologic economic interest of the public calls for it to be suppressed, out of use, but yet not out of mind, published and available in case changed circumstances later make it worthwhile, or in case someone gets a good idea for modifying it. To accomplish the useful ban on use, given our present patent system we have no instrument but further use of patents, to cover and smother the inferior inventions and to give the whole production to the best.

[170] This fourth proper purpose for patents is, like the third one (defensive patenting), a way of using patents to overcome some of the misuses of patents, combating evils that would not exist but for patents. Every law creates evils, including waste of energy in struggles to get around the law. A law can be justified only by doing, on the whole, more good than harm, and by yielding a larger such surplus than can be expected from any substitute arrangement.

[171] It is often and well said that a great benefit of patents is to give protection for the long and costly *developmental* period of an invention, after its basic patent has been applied for, and while its details, design, production, markets, and advertising are being worked out, often at much more cost than the original invention. Without patents most of such work could be seized free by imitators, as well as the original idea, as soon as the invention's value was proved. This service of patents is really a special aspect of our first, main justification, viz., that patents elicit useful work that would not be done, without the prospect of that (or some substitute) reward.²¹⁵ It is

²¹⁵ This helpfulness of a patent for the developmental period means that the patent's protection is extended to cover *other* inventions, perfectings and discoveries not specified in the patent, not yet devised, and mostly unpatentable by law. That everyone approves this stretching a patent is a point to remember, if we later wax indignant over the stretching of patents in scope, in denouncing industrial monopolists, or "crafty" patent lawyers trying to sweep up other people's developments by a "dragnet" patent. Yet there is a big difference, in that those people are grasping at the work of others, while our patentee of an invention under development is seeking only protection for his own useful further work. It is an economic difference, and points up again that patents must be judged by economic, and not by primarily physical nor legal principles.