

[481] But let us leave further discussion of patent pooling to the following chapter, wherein we shall propose a new means for greatly encouraging it.

[482] 15. KNOW-HOW SALES, and 17. SECRECY. The latter we scarcely attempted to measure; the former we estimated at a half of 1%, in the payment and motivation of R&D. This teaching of a new art, patented or not, with sometimes the training of personnel, is a sort of unofficial patent system, which has grown up as a supplement for it, and for the oldtime training of apprentices, and migration of key craftsmen. The law⁴⁶⁵ has previously tended to regard know-how, whether sold, stolen, or kept close, as a private matter with which law is unconcerned, except where there occurred a breach of promise, as by a trusted employee going to work for a competitor in defiance of a fair contract he had made,⁴²⁰ or through a breach of confidence. But in recent years the law has sometimes recognized that impartible know-how, about the same thing as trade secrets, is a kind of private patent, and hence should be subject to laws like those of compulsory licensing. Indeed, the know-how often includes a possibly illegal, secret annex to a patent, necessary to make it really workable and perhaps known to the inventor at the time of patent application, yet omitted from this. So in Britain⁴²¹ and America in wartime, firms possessing needed secrets have been ordered to impart them to rival firms needing them on munitions contracts. And in American antitrust court decrees compulsory licensing "is usually accompanied by other positive measures, such as the obligation to furnish necessary unpatented 'know-how' and to provide licensees with the assistance of engineering experts."⁴⁶⁶ The National Association of Manufacturers has recommended that where the Government forces transfer of trade secrets it should award compensation.⁴⁶⁷

[483] All these measures seem justified and meriting further extension, if we look at trade secrets and know-how as kinds of private patent protection, and note that they differ from public patents in four respects: (1) They may be more extensive and important, extending to the smallest details and to diverse parts of an art. (2) They are kept secret and restricted in use instead of being published to the world as a patent is when issued. (3) In some cases they continue their secrecy and restriction for more than 17 years, even though most patents and secrets lose value before then. (4) If a secret discovery or invention, say a commercial analysis of a problem and proposals for meeting it, never comes into use, as is true of 40% of patents (§ 116), there is no way provided by which the world will ever be instructed. Yet the secrets doubtless contain useful findings, even if only negative ones, that something could *not* be done. Patent applications dropped for any reason, about 38% of all, are likewise filed in "Limbo," the cave of perpetual secrecy.

[484] These four considerations point up that secrecy is a great evil, one which the patent system is always praised for combating (despite its frequent sharing in the same evil (§ 272-280)). Measures are called for to reduce secrecy and get the best know-how quickly spread to all who need it. This is true despite the counterposed fact that secrecy and the sale of know-how serve also the useful purpose of partly paying for some of research and invention. If this present