

system is unavoidable, then the good in it is to be subtracted from the bad, or vice versa, whichever is less; but if we could by other arrangements, such as our plan of the next chapter, and by present non-commercial R&D, separate and get rid of the bad (secrecy), without loss of the good (invention), we should be much better off. Granting patents with less than the present average delay of 3 or 4 years (§ 301) would reduce one great form of secrecy, and so would the 20-year law (§ 302), and measures for opening applications too long pending. And if we wished, less legal protection for trade secrets. But best of all, trade association organization (ch. 11).

[485] 16. PATENTS. This factor for invention and research we were likewise unable to measure, so fall back on our variously illumined "guesstimate" that very likely patents are a serious factor in about one-fifth of invention, R&D. As to the history, merits, shortcomings, and best fields for the patent system we have already said much in chapters 2, 5-7 and in sections 9, 11, and 16 of chapter 9, and elsewhere. In the present chapter we should only gather together and cross-reference recommendations and suggestions for the improvement of the patent system. And this the present writer ought to do most cautiously, passing along suggestions rather than passing upon their merits, because there are thousands who have more professional acquaintance and detailed knowledge of the patent system and its proposed reforms, than he.

[486] But yet there is need here for an outsider having some acquaintance with the system, and a lifelong concern about it. In the inventional history of the ship it was noted that though the great bulk of her improvements were made by insiders, her revolutionary changes like steam propulsion were due to outsiders, who yet knew their footing on water, and in other needed realms. "The professional devotees of the ancient, well-loved, and piously revered ship are forever perfecting her, but had as lief capsize her as turn her upside down."⁴⁶⁸ Joseph Bailey Brown, an honored patent attorney, notes that institutions do not reform themselves voluntarily, but by compulsion from outsiders, as in the reforms of banking, stock exchanges, oil and gas conservation, and criminal law and jury procedure.⁴⁶⁹ Patent litigation has become a game, he says, and "the better the player, the more complicated and uncertain he likes the game to be, and the more likely the result is to be a triumph of the skill of counsel, rather than a determination of the real merit of the patent or the defenses." E.g., his skill in choosing the best circuit to appeal in, would be wasted should a single appeals court be established.⁴⁷⁰

[487] Perceiving this professional bias toward the old game, the Senate's antitrust patent hearings of 1942 called no patent attorney nor Commissioner Coe.⁴⁷¹ And President Franklin D. Roosevelt when he created the National Patent Planning Commission to reconsider

⁴⁷⁰ C. W. Rivise said: "Inventors and technical men, who should really take the initiative in demanding that Congress make the necessary changes in our laws, have always been inclined to leave the matter in the hands of the lawyers. The lawyers, on the other hand, appear to be the greatest enemies of improvement, not alone in our patent system but in all our other legal institutions as well. . . . The only hope for a thorough overhauling of the patent system and correction of its defects and abuses lies in the forcing of action by men outside the legal profession." The trade associations could help here, he said, and patent pooling. *Tech. Asns. & the Pat. Situation; Paper Trade J.* 96:33-5, Jan. 26, 1933, p. 35.

⁴⁷¹ *Fortune* tells how 50 patent bills had recently died in committee or under "attack of a patent bar that had acquired a vested interest in chaos." N 234.