

Favoring Exclusive Patent Rights

A strong position favoring use of exclusive patent rights to stimulate exploitation of government-owned patents

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Selecting a topic for presentation for this occasion has been particularly difficult. Why seems clear when looking at the churning policy pronouncements emanating from different focal points in Washington.

For example, note the following statements from the State of the Union Address and Assistant Attorney General Shenefield in his recent testimony before the Nelson hearings on Government Patent Policy.

In the State of the Union Address the President indicated: "We should rely on the private sector to lead the economic expansion and to create new jobs for a growing labor force."

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Further, "We need to realize that there is a limit to the role and function of government . . . Government cannot eliminate poverty, reduce inflation, save our cities, cure illiteracy, provide energy, or mandate goodness. Only a true partnership between government and the people can hope to reach these goals. Those who govern can sometimes inspire, and we can identify needs and marshal resources, but we cannot be the managers of everything and everybody."

Later he indicated that: "Private business, not the government, must lead an effort toward economic expansion."

He suggested that this would be accomplished through at least: "Strong additional incentives for business investment through additional cuts in corporate tax rates and improvements in the investment tax credit." (Government funded patents not listed.)

In addition to the comments from the State of the Union Address, the President has indicated himself on many occasions a foe of needless rules, regulations and paperwork.

Now consider from his presentation before Senator Nelson how Mr. Shenefield would implement these concepts: In the main he would as a general policy retain ownership of all inventions generated with government funding. In support of this policy he indicates that he is: "not aware of any convincing showing that exclusive rights in government-financed inventions need be granted to contractors in order to induce them

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to accept government R&D contracts, which themselves confer many benefits beyond the simple contract price."

Further, Mr. Shenefield indicates: "A major rationale for a 'license' policy is allegedly to facilitate commercialization of these inventions. We do not believe that a factual basis exists for the belief. In fact, we do believe that available evidence is to the contrary." (Emphasis added.)

It is doubtful that there is a single member of this Society who has operated in the area of government patent policy who would agree with Mr. Shenefield's statements as being generally accurate. In fact, those of you with the greatest operating experience would deem them to be in direct conflict with fact and a denial of your very existence. But more important — how can it be reasonably argued that Mr. Shenefield's philosophy will lead to the kind of partnership with the private sector leading to economic expansion and elimination of needless rules, regulations and paperwork envisioned by the President. The answer to most would seem obvious — the implementation contradicts the goals espoused. In addition to Mr. Shenefield's position, there is a growing indication emerging at DHEW that elements of the department support the Shenefield position at least in situations involving case-by-case waiver requests, thus adding to my personal concern in determining the direction of policies in this area.

Hearing Conclusion

My office had made available to all the members of the Society the December 9, 1977, press release by Senator Nelson announcing his intent to conduct hearings on government patent policy on December 19-21, 1977. The release and the witness list indicated that the hearings would result only in a conclusion supporting government ownership of inventions generated with its funding (and of course they did). One would wonder then why the hearings were necessary if a conclusion on its findings had already been reached?

It is clear both from the release and the testimony that Senator Nelson was well aware of the progress that was being made toward policies nurtured and supported by this Society and, in particular, their adoption in the form of H. R. 8596 (the Thornton Bill). It is also clear from the release and the testimony that it was the intent of these hearings to undermine this progress. If it can be said that an organization is known by its enemies, you are indeed confronted by an array of powerful individuals.

When reviewing the testimony of these individuals, it is evident that the philosophy of government owner-

ship is primarily supported by a single argument — that ownership in the contractor of government financed inventions is anticompetitive, as it promotes industrial concentration. I believe objective review indicates otherwise.

A strong argument can be made that allowing contractors and grantees to retain patent rights will tend to promote competition, whereas if the government adopts a policy of normally dedicating the invention to the public or licensing on a nonexclusive basis, concentration and monopoly will be enhanced. The proposition that title in the contractor can lead to concentration is very much dependent upon the assumption of a competitive marketplace in which all concerns start with equal capacities. In fact, many industries are currently oligarchial in structure and do not fit the model of pure competition. When this is the case, the retention of rights in the government and a policy of nonexclusive dedication or licensing tends to serve the interests of the *dominant firms* for whom patent rights are not normally a factor in maintaining dominance. Rather, control of resources, extensive marketing and distribution systems, and superior financial resources are more important factors in maintaining dominance and preventing entry of new firms and ideas. It is important to note that dominant firms may well be foreign based and dominate due to subsidization by their governments, making the inadequacies of a policy of normally licensing on a nonexclusive basis or dedicating even more pronounced. No one should agree that the government should be conducting R&D and permitting the results to enure to the benefit of foreign governments willing to subsidize development of ideas placed into the public domain by our government to the detriment of our own economy.

On the other hand, smaller firms in an industry and firms requiring pre-market clearance by the government must by necessity rely on a proprietary position in new innovations and products in order to protect their investment in foreign and domestic markets. Thus, patent rights tend to be a much more significant factor affecting their investment decisions. They may need the exclusivity of patent rights to offset the probability that a successful innovation will lead to copying by a dominant firm which would soon undercut their position through marketing, financing, and other commercial techniques. Accordingly, nonexclusive licensing or dedication may in fact be anti-competitive, since it encourages the status quo by discouraging promotion of innovations which displace old technology. Also, it is clear that the government can determine with whom it wishes to contract and rule out contracts to firms it deems to be dominant if deemed appropriate.

Further, there is a growing number of experts in the field of antitrust law that question the thesis that oligopolies are per se anticompetitive. There seems to be no question that some industries dominated by oligopolies are as competitive and efficient as would be expected if otherwise occupied by a large number of small firms. Some examples noted by experts are the auto, steel and cereal industries. To extend this doubtful thesis into the area of government patent policy appears to be a case of overreaching on the part of the antitrust division. This overreaching is further evi-

denced by indications that antitrust personnel view patents as monopolies.

The classic definition of monopoly involves a group of individuals who join to take away something that exists in nature and was susceptible to ownership by everyone. Patents, to the contrary, cover embodiments of novel ideas that never existed and, therefore, cannot be presumed to take anything from the public, but are in fact enlarging the alternative products available to the public. This is supported by some case law holding that concentration based on internal scientific research and development is not an antitrust violation.

Review of the Nelson testimony and the knowledge that that forum was denied to many who might have brought the problems of this area into clearer focus reminded me of the following observation by Edmund Burke:

"Because half-a-dozen grasshoppers under a fern make the field ring with their importunate chink, whilst thousands of great cattle, repose beneath the shadow of the British Oak, chew the cud and are silent, pray do not imagine that those who make the noise are the only inhabitants in the field."

I'm delighted to know that the members of the Society made an extra effort to indicate that they will not remain silent and are "inhabitants in the field." From the number of copies of letters received in my office in opposition to the ideology expressed in Senator Nelson's press release and the media's apathy to Senator Nelson's indignant remarks indicate that the public may have moved past the time when a simplistic cry of government "giveaway" generates the knee-jerk reaction characteristic of the 1960s.

While it is clear that the Nelson hearings have provided by their abrasive and bias nature an unexpected ability and sincere desire on the part of many to both explain and listen to the patent philosophy shared by this Society, I must advise that some policymakers less sophisticated with the stakes involved have indicated a degree of temerity about proceeding in clarifying the area.

These "stakes" were more dramatically spelled out in Senator Nelson's press release than I ever could hope to explain. Senator Nelson is probably correct in indicating that the government is now funding two-thirds of the country's research. He does not explain that this is in many situations "seed money" that generates ideas and inventions which must be developed at private expense or left indefinitely undeveloped. He then continues that on the basis of government funding of those ideas and inventions they should be government owned. Now presuming that the percentage of government funding increases to 70, 80, or even ultimately 100% and we are correct in maintaining that patent rights are a primary factor in obtaining commitment of private resources for development of government funded inventions, does not the government then control whether most new ideas are developed or not? Is not the control of development of all ideas the ultimate regulation and supports Henry Ford II's recent admonition that the government's growing web of industrial regulations is fast bringing

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