"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."

Edmond Burke

With a keen eye for the opportunities which reduced competition can bring, Senator Gaylord Nelson made another bid for media coverage by convening his Small Business subcommittee during the recent Christmas recess. The topic of conversation - announced with colorful headline-hinting references to Santa Claus and the Tooth Fairy - was whether it is better to allow avaricious businessmen to retain any rights in their government-funded discoveries or, by damming the rascals, to insure reelection the next time around. As befits such an orchestrated event, the witness list was tightly controlled. The National Small Business Association, and the universities, and the research community can all be heard later. What we need now is impact! Who's going to write our kind of story if one of those X!%#$ universities is in here saying we ought to be giving away invention rights!

Now that the grasshoppers have had their say, it is well to remember that they are not the only occupants of the field.

Inventions which can be used, but are not used, are worse than useless; the costs associated with their discovery are wasted assets. The government owns thousands upon thousands of such inventions. There are several reasons for this phenomenon. One of the most important

is the fact that businessmen are understandably reluctant to invest risk capital in the commercial development of unproven technologies unless they are assured of a reasonable measure of exclusivity in the marketplace. To take an analogy from the trademark field, who would spend millions of dollars promoting the mark "Coca-Cola" if anyone could market a cola under that name?

Universities are not unlike the government in the sense that they have no control over manufacturing facilities. Like the government, they must transfer their inventions to the commercial sector. Here the analogy ends, for universities are 600 percent more efficient than the government in commercializing their inventions, principally because of their ability to license exclusively.

No one is suggesting that taxpayers do not have a right to own the inventions produced at their expense. What is being suggested is that well-informed taxpayers would gladly exchange these stagnant assets for the new products, new jobs and increased tax revenues which private patent-based enterprises have traditionally lavished on our economy.

To give the devil his due, Senator Nelson is probably no less interested in new jobs, new products and new tax revenues than you or I. He is mesmerized by the notion that patents are monopolies, and all monopolies lead to that greatest of evils: industrial concentration (much worse, mind you, than a pile of unused inventions).

Okay, let's give the angels their due also. We agree that concentration poses a possible problem, and we are prepared to meet it, not by relying on the anti-trust laws alone, but by tying a string onto every right which the inventing institution is allowed to retain. One false move and zap!. The string has many strands, each one of which is known as a march-in right. Senator Nelson claims that these strings have never been pulled, and he's right.

Now all he has to do is show us a case where it should have been pulled.

It's your turn, Senator.

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In December of 1977 Senator Gaylord Nelson announced and conducted hearings on the allocation of invention rights generated by government R & D grants and contracts. From the announcement and choice of witnesses one may conclude that the Senator fervently supports only a policy of government ownership and public dedication of such inventions. The fact that the forum was denied to many who have studied this problem carefully is reminiscent of the Edmond Burke observation that:

> "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."

Government ownership and dedication was primarily supported by one argument -- such ownership is anti-competitive, as it promotes industrial concentration. Another view believes that allowing contractors to retain invention rights promotes competition. The stakes involved in the controversy over ownership of government funded inventions are made even more apparent from the Senator's announcement of the hearings. He indicates that the government is now funding two-thirds of the country's research. It is not explained that such funding is "seed money" that generally produces inventions which must be developed and marketed at private expense.

That ownership in the contractor can lead to concentration is dependent upon a marketplace in which all concerns start with equal capacities. In fact, many industries are currently shared by a few

companies due to the requirement for huge capital investments. In such cases a dedication policy tends to serve the interests of such companies, since ownership of such inventions is not a major factor in maintaining their market position if they choose to develop such inventions. Rather, extensive marketing distribution systems and superior financial resources are more important in maintaining market position and preventing entry of new firms and ideas than invention ownership. Worse, such companies may well be foreign based and dominate due to subsidization by their governments, making the inadequacies of a dedication policy even more pronounced, since the results of Federal R & D can enure to the benefit of such companies if their governments are willing to subsidize development of ideas in the public domain.

To aspiring firms and firms needing to undertake costly premarket clearance by the government, invention ownership tends to be a significant factor affecting their investment decisions. Ownership is necessary to offset the possibility that a successful innovation will prompt a dominant firm to undercut its position through superior marketing and financing. Accordingly, public dedication encourages the status quo by discouraging promotion of innovations which displace old technology.

Further, the thesis that market shared by a few firms are per se anti-competitive is questionable, since there is evidence that some industries dominated by such firms are as competitive and efficient as

would be expected if otherwise occupied by a large number of small firms. To use this doubtful thesis to support government ownership of inventions generated with its funding is unconvincing.

The Senator, suggesting "occasional situations" where commercial use and exploitation of worthwhile inventions are discouraged by the need for a substantial investment, nevertheless indicates that rather than surrendering any inventions rights in exchange for this investment, it supports the thesis that "the government should finance such operation, in whole or in part, to demonstrate or prove the commercial value of the invention." Presuming that the percentage of government funding increases to 70, 80 or ultimately 100 percent, and it is correct that invention rights are a primary factor in obtaining commitment of private resources for development of such inventions, does not the government then control their development?

It seems clear that adoption of the Senator's philosophy will start our country down a road to mediocrity, as industry's effectiveness in sensing the needs of our society and investing in development of innovations to fulfill these needs would be discouraged by denying to them the right to own the inventions which they believe attractive investments.