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TO: Holders of DHEW Institutional Patent Agreements

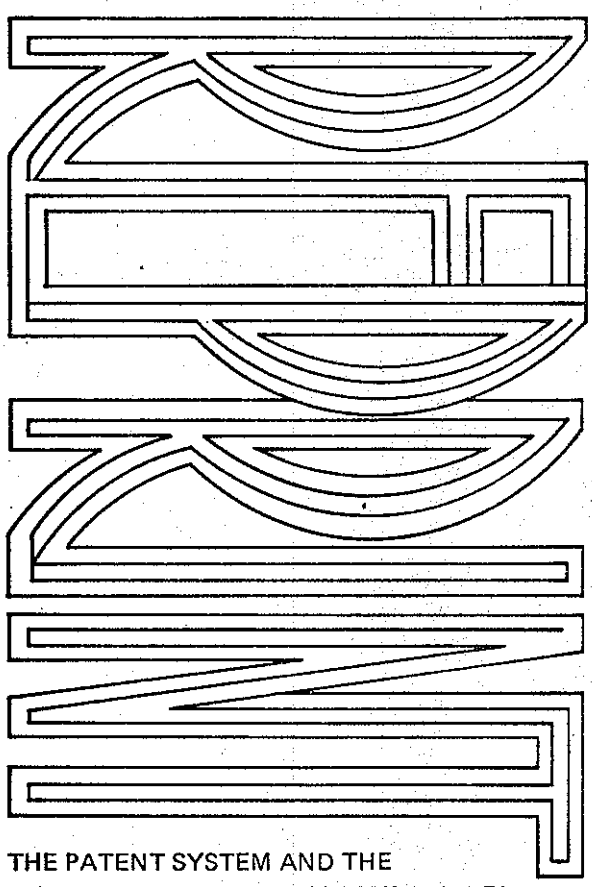
SUBJECT: Information Item No. 34

Attached is an interesting article written by Mr. Roger G. Ditzel, Assistant Manager of the Iowa State University Research Foundation, Inc.

Sincerely yours,

Norman J. Latker
Patent Counsel

Enclosure



THE PATENT SYSTEM AND THE UNIVERSITY – ARE THEY COMPATIBLE?

ROGER G. DITZEL

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THE PATENT SYSTEM AND THE UNIVERSITY – ARE THEY COMPATIBLE?

ROGER G. DITZEL

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Within the past few years, there has been an increasing awareness of the need for utilizing the results of research flowing from federal space and defense programs for solving major problems in other areas of national need, such as environmental improvement, fire prevention and energy conservation. Accordingly results of federally sponsored research are being more widely disseminated, with the expectation of utilization of those results outside the area for which the research was funded. These efforts have had an impact, but that impact has not been as dramatic as some had hoped.

As a result, new studies have been directed at understanding the process of the transfer of technology from one sector of the economy to another, and major research programs combining elements of various sectors have been initiated.

The university research community, as a part of the academic sector, is a prime generator of technology due to the generally basic nature of university research. The basic research has been taken on an even more importance national role in recent years, as industrial research has shifted toward applied research areas.

Historically, inventions arising from industrial research have been placed under the protection of the patent system. Only a small fraction of the equally valuable inventions arising from university research have been so protected. There are a variety of historical reasons for this difference, some of which may no longer be valid in light of what is now known about the technology transfer process.

There is no doubt that the patent system has a substantial positive impact on the rate of technological change. By protecting the pantentee against unauthorized use of his invention, it causes others to seek new ways

system in the university context is also important to increasing the rate of transfer.

Need for Broader Understanding

However intrigued the industrial community may be by any new technology developed in a university, a decision must be made relative to the substantial risk capital required to adapt the technology to a commercially viable product or service. Ways to reduce this risk are needed, and the statutory protection of a patent is one way risk reduction can be accomplished. Assuming that reduction of risk to a satisfactory level is a prerequisite to an investment of risk capital, and that the investment of risk capital is necessary to allow technology transfer to take place from a university to industry, then technology protected by a patent has a greater chance of being transferred than that this is not so protected.

One must ask whether the intrinsic nature of the patent system limits its use to only those organizations which are dollar profit oriented. If the answer is positive, there is no need for further concern about misunderstanding of the patent system among non-industrial segments of our society, at least to the extent of trying to increase the rate of technology transfer.

If, on the other hand, one can validly argue that the patent system is valuable aside from, or in addition to, its use by the industrial community for a profit motive (including risk reduction), one should be able to make some contribution to the rate of adoption of new technology through that argument, and establish a position for greater trust and interdependence between the industrial and university communities.

It is proposed that such an argument is both possible and tenable, and we wish to advance it. It is further proposed that those members of the industrial community desirous of accommodating technology transfer from universities may find the reasoning helpful in their dealings with the university research community.

Research administrators particularly, both university and industrial, must understand how the patent system can be supportive of the university system, since they bear the responsibility for developing a framework within which technology transfer can take place.

The University Context

While a university is a "profit-making" institution, its profit is not measured in dollars, and not on a short term basis. The profit resulting from the existence of a university is measured over decades in higher standards of living, greater satisfaction in the physical and philosophical values of life, the meeting of human need. The profits accrued rest on the success of the university in finding new knowledge, and in successfully transferring that knowledge via technology to the industrial community.

To understand how the patent system can be related to the university profit measure, it is important, albeit elementary, to review the goals of a university. These goals set the framework for the conduct of university research, a substantial source of new technology. These form a philosophical base for viewing the patent system in the university context.

as dollar profit, inhibition of the use of the patent system at a university can occur. Such a narrow definition of progress is inappropriate.

Progress does come from the results of university research when results are disseminated. There is an obligation incumbent upon the university to disseminate research results, and they are published in a variety of ways to meet this obligation. In the learned journals, a technically specialized audience is informed. Through the popular press, an attempt is made to call attention of the general public to the significance of the results.

A different audience may be informed of research results and how they can be usefully applied, by publishing within the patent system when appropriate. This is a most important audience to the university. It is the audience that takes the invention or discovery, invests money and innovates, bringing about progress and technology transfer.

This audience is made up of the members, and particularly the leaders and decision makers of industry. Whatever new the university may discover, nothing will happen without industry involvement with it to make the new blossom forth into action. Universities may plant seeds of the new, but without industry to cultivate the garden and harvest a crop, those seeds will be totally unproductive and a wasted effort. The interface with industry is a critical one for the university in many ways, which need not be elaborated here.

It is at this interface that difficulties arise due to lack of common understanding of how patents contribute to the progress of science and the useful arts from the university's viewpoint in a manner distinct from that of industry.

University faculty and administrators must understand that industry has its own use of the patent system and its own goals. Industry uses the patent system extensively for very valid reasons. But that does not mean that a university must have the same basic reasons as industry for using the system, or that a university, being a "non-profit" entity (in terms of dollars) must therefore reject the patent system. In fact, the patent system has been under-utilized by most universities. This state of affairs needs to be changed.

What then should be the underlying philosophy for a university's involvement in the patent system?

The University Patent Philosophy

Universities are concerned with the broad dissemination of information. They should use all of those systems available to them for such dissemination, including the patent system. Too few university people realize the patent system involves one of the largest, if not the largest, body of useful knowledge in existence today, with a well organized, systematic approach that makes information retrieval reasonably practical. It is a unique library.

Patenting a university invention places the useful results of research in the midst of this library, a library used by industry personnel when searching for a new way to do things, and by people from all disciplines. Patenting an invention certainly is consistent with the university's goal of disseminating information. The patent system should be used for this purpose by universities.

define the objectives of such a program to assure consistency with general univeristy goals. Projected dollar income must never be the objective when a university decides to first establish a patent program.

With an understanding within the university of how the patent system does support the goals of the university and its employees, and an understanding on the part of industry of why a university uses the patent system, one of the barriers to technology transfer will be reduced.

It is where the legitimate goals of a university are recognized, and decisions on patent matters are made to further those goals, that a strong and viable patent program will result. In such situations, the patent system and the university are not only compatible, but in fact mutually supportive. Increased technology transfer will occur, resulting in the action desired by both the university and the industrial communities.

IN FUTURE ISSUES

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ISSUE TO BE RESOLVED:

Does the Federal Property and Administrative Services Act (40 USC) authorize the disposal of Government owned patents? And, if so, must patents be disposed of by public sale after advertising as generally required by the Act, or do patents fall within one of the sections which in certain circumstances allow property to be disposed of by negotiated sale?

CONCLUSION:

Both the language and the legislative history of the Federal Property and Administrative Services Act (40 USC) evidence that Government owned patents are included as property which can be disposed of under the Act. A strict construction of the language of section 484 (e)(5) - which in our opinion is in accord with the explanation of the section in the legislative history and in the Committee report - would relieve all Government-owned patents as a class of property from the general requirement for disposal by public sale of the Act, if the Administrator determines that negotiated disposal of Government patents at a fixed price will best serve the interests of the Government. However, regardless of the interpretation of section 484(e)(5); patents whose subject matter promotes the health, the safety, or the national security of the public, may be exempt under 40 USC(e)(3)(B) from the requirement of disposal by public sale.

HISTORY OF THE INCLUSION OF PATENTS IN THE SURPLUS PROPERTY ACT OF 1944

The Surplus Property Act of 1944 was passed to authorize the disposal of Government property which had been purchased for the war effort and now was no longer needed or obsolete.

The Act contained a provision which required Agency heads to notify the Attorney General prior to the sale of certain types of property. Patents were positively listed among the types of property for which such notice was required. Accordingly, by negative implication it was clear, patents were surplus property which could be disposed of under the Surplus Property Act.

The inclusion of patents as disposable property under the Surplus Property Act of 1944 was consciously considered by the members of Congress. Originally, only the Senate bill S. 2065 required that the Attorney General be notified about the sale of patents prior to the transaction. The House's notification provision in H.R. 5125 listed all the same types of property as the Senate bill with the exception of patents. The conference compromise accepted the Senate rather than the House version of the notification provision as the final provision for the Act.

Further evidence of the conscious consideration to include patents as disposable property is noted from the following remarks made by Senator Stewart, during the Senate hearing on that bill:

"I know of no estimate of the value of this great variety of intangible property, including industrial techniques, processes, and inventions which have been developed in Government plants, at Government expense, or under Government sponsorship, or which have been vested in the Alien Property Custodian under the Trading With the Enemy Act. These, too, will become Government surplus and should be made available to industry in such a way as will best promote the public interest.

It is well remembered that during World War No. 1 there was a concentrated technical development incident to production for war equal to a far greater span of peacetime years. There is every evidence that our technical strides in the present conflect are even more spectacular. These new techniques constitute an important property and their disposal is a matter of concern, not merely to the individuals and corporations that may obtain them, but to our society as a whole. They are of peculiar interest to small business. They might become a fateful instrument in the hands of monopoly. Their distribution may be a determining factor in the character of our future economy.

The question of the Government's protection of this property against attempts to secure private patents thereon apparently must be considered with that of disposal, if the Government is to have this property to dispose of. Already there have been reports

of private individuals securing patents on processes developed in Government plants, in the development of which they had no part. The War Production Chairman, Donald Nelson, recently said that this very thing had been giving him a great deal of concern, and that there had been no machinery set up to prevent it.

It appears that little if anything in the way of public policy has been determined with regard to this intangible property. This phase of the subject has had little investigation. In the interest of a socially sound distribution of war-surplus property and in the particular interest of small business disposition of this class of property should be fully studied and carefully planned.

Thus it is highly important that technical intangibles be included in the planning list. I should like to add that this class has also been included in the classification of property for the disposal of which the board must obtain specific clearance from the Attorney General. It is important an contribution which the Military Affairs Committee made to the bill." (Emphasis added)

90 Congressional Record 7251

HISTORY OF THE INCLUSION OF PATENTS IN THE FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949

The Federal Property and Administrative Services Act of 1949 (40 USC) was passed to provide a more efficient system of management for Government property. In order to accomplish this goal Congress established a special agency and delegated to it; the power to purchase, the power to utilize, and the power to dispose of Government property. The disposal authority granted under the Federal Property and Administrative Services Act of 1949 approximated the authority given in the Surplus Property Act. The provision of the earlier act which called for notification of the Attorney General prior to the disposal of a patent, was incorporated into the later Act at 40 USC 207. So, again, by negative implication Government owned patents were disposable under 40 USC 203, "by sale, exchange, lease, permit, or transfer."

In 1958 the section of the '49 Act which called for notification of the Attorney General prior to the disposition of certain types of property was amended as 40 USC 488. Although certain property was deleted from the list of property for which notification of the Attorney General was required prior to disposal, patents were not so deleted. And as the Act presently stands patents are included in this notification section.

Since Congress delegated its Constitutional authority to dispose of surplus Government property, first in the Surplus Property Act of 1944 and later in the Federal Property and Administrative Services Act of '49, patents have been included as the type of property for which notification of the Attorney General prior to disposal was required. If Congress did not want patents included, it would have deleted patents in the later Act or one of the Amendments to the later Act. Clearly, Congress intended, and did include patents as property which could be disposed of under the '49 Act (40 USC).

NEGOTIATED SALES UNDER THE FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949

The major purpose of the 1958 Amendment to the Federal Property and Administrative Services Act of 1949, based on S. 2224 was:

> "to prescribe the situations in which disposal of surplus Federal property ... must be accomplished by public advertising, and those in which disposals of such property may be accomplished by negotiation."

Congress intended that this amendment

> "would provide a "charter" in the field of surplus property disposal comparable to the one contained in title III of the Federal Property and Administrative Services Act of 1949 applicable to the procurement of property and services." Ibid

This Amendment established permanent authority to dispose of surplus property by negotiated sale in certain defined instances. Before its passage there had been a succession of temporary grants of such authority. Twice, in the nine years prior to the grant of permanent authority, the temporary authority lapsed. If the Administrator felt it was in the public interest to dispose of surplus property by negotiated sale, during the time when the temporary authority had lapsed, the Administrator would have to obtain special legislation authorizing him to negotiate a sale. Also, if the Administrator felt that disposal to a particular party was desirable and in the public interest, he would have to obtain special legislation enabling him to negotiate a sale with such party.

In order to remedy the problems created by having to periodically seek special legislation due to the inadequacies of the temporary authority, the General Services Administrator submitted a bill (S. 2224) which provided for

a permament authority for negotiated sales in certain situations. The proposed bill was submitted to the Committee on Government Operations. The Committee, having studied negotiated sales for a number of years felt that disposal by negotiated sale was, in the situations designated by the bill, in the public interest. Accordingly, the Committee after making slight alterations to the bill, passed it to Congress, who enacted it as 40 USC 484.

OPTIMUM RESULTS FROM PATENT DISPOSITION CAN ONLY BE ACHIEVED THROUGH NEGOTIATED DISPOSALS

For reasons which are discussed below, the authority to dispose of Government patents by negotiation is necessary to insure disposition of patents in a reasonable manner and to secure the rapid transfer of technology to the public market place.

A patent is a collection of rights, the right to make, the right to use, the right to sell, and the right to exclude others from using any of the aforementioned rights. A patent holder can assign all his rights to one person, or he can transfer a more limited right to one or more persons. Thereby the patent holder can license- a means for transferring rights- one person or several persons to make, use, and sell the invention under an infinite variety of conditions, or the patent holder can transfer the whole patent. The only practical method of sale, which will provide a vehicle whereby both the vendee and the vendor can consider and agree upon what combination of rights and conditions under the patent, they will respectively buy and sell, is a negotiated sale.

In order to be commercially useful, a substantial number of patented inventions licensed by the Government, need further development. Therefore, when licensing a patent, the Government must insure that the licensee has the qualifications necessary for developing the invention covered. If patents were licensed under the general disposal provision of this Act, which requires a public sale after advertising, patents would have to be licensed to the highest bidder regardless of whether such bidder was considered qualified to develop the patent. Again, negotiation is the only practical method of disposal which would allow the selection of a qualified licensee.

We believe that Congress intended to authorize the disposition of Government owned patented through negotiated sale in the Federal Property and Administrative Services Act. Evidence which supports this belief is set forth below:

A. The purpose of the '58 Amendment was to provide a charter in the field of disposal comparable to the one for procurement contained in Title III. And more specifically, as pointed out by Mr. Gasque during the Senate Hearings of the Committee on Government Operation, the purpose was to provide a permanent charter for negotiated sales, which would correspond to the authority for negotiated procurement in title III.

The procurement authority granted in Title III extended

> "to the General Services Administration the principles of the Armed Services Procurement Act of 1947, with appropriate modification principally designed to eliminate provisions applicable primarily to the military." S. Rept. No. 1158, 81 Cong., 1st Sess. (1949) p. 94

Title III adopted most of the sections of the Armed Services Procurement Act of 1947, including those which authorized procurement by negotiation, such as section (2)(c)(10). This section authorized procurement by negotiation of property and services for which it is impracticable to secure competition. According to the Senate Committee that reviewed this section of the Armed Services Procurement Act of 1974, patent coverage was listed as

a reason making it impracticable to secure competition and justifying the procurement of the property or services through negotiation. Since under Title III patent coverage could be cited as a reason for negotiation, it could be concluded from Congress's stated intent, that there was to be a corresponding section in this amendment which involved patents as a justification for disposal of property through negotiation. This conclusion is not disturbed by the Comptroller General's interpretation of 10 USC 2304 (a)(10) (former section (2)(c)(10) of the Armed Services Protection Act) in 119 USPQ 187 (Oct. 6, 1958), requiring purchase from a low bidder whether or not the patent holder, since this opinion was given months after the '58 Amendment was enacted.

B. Another section of Title III (41 USC 252 (11)) authorizes the procurement of research and development work by negotiation. Again, considering the purpose of the '58 Amendment as pointed out by Mr. Gasque, it would seem that Congress would provide for a corresponding section for disposal by negotiation of patented inventions in return for their further development. There is little difference between the Government licensing a patented invention to a party who will develop it to the point of commercial utility, and the Government procurement of that same development for a fee. The only difference here would lie in the consideration being offered by the Government - a license under a patent rather than a fee.

C. Since negotiation is the only practical method for disposition of Governemnt owned patents, the authority to dispose of patents by negotiation is necessary for the normal performance of agency duties. It would be logical to assume that Congress would authorize such for an orderly performance of agency duties.

D. When Senator Stewart addressed the issue of patent disposal during the Senate hearings on Senate Bill S.2065, he stressed the need for special treatment of disposal of this property. Obviously, no such special disposal provision was written into either the Surplus Property Act, or the first draft of the Federal Property and Administrative Services Act. Since patents were clearly property which could be disposed of under the Act, Congress must have been satisfied that, the general disposal language of the Acts adequately provided for the disposition of patents. This conclusion is supported by the fact that the Surplus Property Act of 1944 authorized negotiated disposal of substantially all surplus property without requiring special authority to do so. Further, the first draft of the Federal Property and Administrative Services Act also provided such a general authority, although only for a year.

In 1958, several years after the year long general authority granted in the Federal Property and Administrative Services Act lapsed, an Amendment was enacted which granted permanent authority to dispose of surplus property by negotiation in defined instances. Because the former Acts granted the authority to dispose of patents by negotiation, an inference can be drawn, that the '58 Amendment

was intended to provide the same authority as that granted in the earlier Act. This inference is buttressed by the following argument: Patents had always been included as property which was disposable under the Acts either by advertisement or through negotiation at the Administrator's discretion. Since patents were not specifically excluded in the '58 Amendment, patents can be presumed to be disposable by negotiation, as long as the circumstances surrounding the disposition comply with one of the instances for which disposal by negotiation is authorized.

EXAMINATION OF THE NEGOTIATION AUTHORITY IN THE ACT FOR A SECTION WHICH COULD SUPPORT A GOVERNMENT-WIDE PATENT LICENSING POLICY

The Act requires, in all but a few instances, that surplus property be disposed of by public sale after advertising. The exceptions to the public sale requirement, or the instances in which disposal by negotiated sales are authorized, were incorporated into the Act by Amendment in 1958 as 40 USC 484. These provisions were designed to provide for the instances in which the General Services Administrator found it beneficial to dispose of surplus property by negotiation.

To insure disposition of Government patents in a reasonable manner, under the Federal Property and Administrative Services Act, it is necessary to find a section which authorizes the disposal of Government patents by negotiated sale in the Act. And further, if uniformity is to be maintained for the disposal of all Government patents authority must be found in the Act which could support a Government-wide patent policy which would be equally applicable to all patent disposals for all Executive Departments and Agencies.

After examining each exception, as set forth as follows, to determine whether it was capable of supporting a Government-wide patent licensing policy as mentioned above, it was concluded for reasons which follow each exception section respectively, that only section (e)(5) could possibly support such a policy.

484 (e)(3)

Disposals and contracts for disposal may be negotiated under regulations prescribed by the Administrator, without regard to paragraphs (1) and (2) of this subsection (the provisions for public sale) but subject to obtaining such competition as is feasible under the circumstances if: (parenthetical added)

(A) Necessary in the public interest during the period of national emergency declared by the President or the Congress, with respect to a particular lot or lots of personal property or, for a period not exceeding three months, property as determined by the Administrator;

Comment: A Government-wide patent policy cannot be based upon the limitation that a license may only be granted during a National emergency or for three months as determined by the Administrator.

(B) The public health,safety,or national security will thereby be promoted by a particular disposal of personal property;

Comment: A Government-wide patent policy cannot be limited to subject matter which is classified only in the health, safety, or national security areas, but a policy applicable to HEW, VA, and DOT, could be based upon this Section since substantially all the inventions of these agencies are in the area of health and safety.

From the following example, given during the Senate Committee hearings on S. 2224, it appears that an overriding concern of the drafters was, quick delivery of the health product.

"(B) If the public health, safety, or national security will thereby be promoted. There are three elements in there: Health, safety, and national security. We would like to cite an example of the public health aspect.

We had a case several years ago where specially designed equipment was manufactured for the Government to make

yellow fever vaccine during a period when no manufacturer could be found who would undertake manufacture of the vaccine.

The Government finally found one such company. If he could buy this Government equipment, he could be in production in 60 days: otherwise this production would start in about 6 months. Only a 90-day total inventory of yellow fever vaccine was available so that speed was important. If he brought new equipment then the Government-owned equipment would be worthless, since he was the only manufacturer would could use that equipment." Hearings before Senate Committee on S. 2224 (Federal Property and Records Management), 85th Cong., 1st Sess. (1957) p. 27.

From the following example, also given during the Senate Committee hearings, it seems that the drafters did not feel wide scale advertising was necessary in disposing under this section. The drafters believed that the Agency officials would know who was interested in the product, from experience the Agency officials had in the area.

"Mr. Tuttle, Yes sir. There are cases where a Government agency, such as in the medicine case, has such technical knowlege of a particular drug, who its suppliers are, who its manufacturers are, that it is a very simple matter to determine who is interested in buying this deteriorated drug and to determine that there is no use trying wide-advertising.

We must try to sell it to somebody who can handle it." (Id. at p. 21-22)

(C) Public exigency will not admit of the delay incident to advertising certain personal property;

Comment: From the legislative history of the Act this section is directed towards perishable whose value or usefulness rapidly diminishes. Patent property does not rapidly diminish in value or utility, therefore, patents are not property which could be disposed of under this section.

(D) The personal property involved is of a nature and quantity which, if disposed of under paragraphs (1) and (2) of this subsection, it would cause such an impact on an industry or industries as adversely to effect the national economy, and the estimated fair market value of such property other satisfactory terms disposal can be obtained by negotiation;

Comment: From the legislative history of the Act this section is directed towards the disposal of a large quantity of goods. A sound govern-wide-wide patent policy must require patents to be disposed of on a case by case basis, therefore this section could not support a Government-wide patent policy.

(E) The estimate fair market value of the property involved does not exceed $1,000;

Comment: A Government-wide patent licensing policy cannot be constrained by price limitations.

(F) Bid prices after advertising therefore are not reasonable (either as to all or some part of the property) or have not been independently arrived at in open competition;

Comment: A basic requirement of a Government-wide patent policy is that it enables negotiation from the inception of the disposal. Since this section allows negotiation only after an unsuccessful public sale has been conducted, it is not capable of supporting the aforementioned policy.

(G) With respect to real property only, the character or condition of the property or unusual circumstances make it impractical to advertise publicly for competitive bids and the fair market value of the property and other satisfactory terms of disposal can be obtained by negotiation;

Comment: Since this section authorized the negotiated disposal of real property only, patents, which are personal property could not be disposed of under this section

(H) The disposal will be to States, territories, possessions, political subdivisions thereof, or taxsupported agencies therein, and the estimated fair market value of the property and other satisfactory terms of disposal are obtained by negotiation;

Comment: A Government-wide patent cannot be restricted to the limited number of potential purchasing parties listed in this section especially in light of the fact that the parties listed here have little, if any, capability to bring the patented invention involved to the marketplace.

(I) Otherwise authorized by this Act;

Comment: There is no other section in this Act which authorizes the disposal of patents by negotiated sale.

484 (e)(4)

Disposals and contracts for disposal of surplus real and related personal property through contract realty brokers employed by the Administrator shall be made in the manner followed in similar commercial transactions under such regulations as may be prescribed by the Administrator: Provided, that such regulations shall require that wide public notice of availability of the property for disposal be given by the brokers.

Comment: This section authorized disposal of real property and related personeal property. Since patents are personal property they cannot be disposed of under this section.

484 (e)(5)

Negotiated sales of personal property at 'fixed prices' may be made by the Administrator either directly or through the use of disposal contractors without regard to the limitation set forth in paragraphs (1) and (2) of this subsection: Provided, that such sales shall be publicized to the extent consistent with the value and nature of the property involved, that the prices established shall reflect the estimated fair market value thereof, and that such sales shall be limited to those categories of personal property as to which the Administrator determines that such method of disposal will best serve the interests of the Government; (emphasis added)

Comment: The language of this section clearly authorized the Administrator to dispose of certain classes of personal property by negotiated sale, when he determines that in the interests of the Government this class of property should be so disposed. Therefore; if the Administrator determined that in the interests of the Government, patents, as a class of property, should be disposed of by negotiated sale; this section could support a Government-wide patent policy.

From an explanation appearing in the committee reports, section 484(e)(5) authorizes the Administrator to make a determination that a certain class of property should be disposed of by a negotiated sale, and it further authorizes the Administrator to exercise his discretion as to whether to dispose of the property himself or to dispose of the property through a disposal contractor. The authority, to hire a disposal contractor was suggested by the Hoover Commission as being necessary,

"that in certain selected, highly technical categories the Government ought to endeavor to use commercial concerns highly qualified in the marketing of such items." Hearings before Senate Committee on S. 2224 (Federal Property and Records Management), 85th Cong., 1st Sess. (1957), p. 27.

The following, is the only example cited in the Committee Reports as being within 484(e)(5):

"greater net revenues can be obtained by selling certain types of surplus personal property at fixed prices in advance of sale at current market levels with wide advertising of these fixed prices.(emphasis added)

Examples are complete aircraft having commercial value, aircraft engines, vehicles, and in some cases spare parts." (Ibid)

Considering the inordinate stress which was placed upon the authority to hire disposal contractors in the legislative history, and the purpose given for the hiring of these contractors, and the type of property listed in the above examples; we feel that this section was designed, primarily for the disposal of highly technical classes of personal property in which patents must surely be included. Based on the explanation of this section by Mr. Tuttle during the Senate Committee hearings (Ibid) we also feel that the Administrator is authorized to dispose of such property himself if he possesses the necessary expertise, or is authorized to employ disposal contractors if he does not possess the technical expertise required to make a proper disposal. This alternative discretion in the Administrator appears to be antipatory of the licensing function undertaken by NTIS. The Government would not undertake disposal of the highly technical class of personal

property to be covered by this section, before an expertise equal to that of the described disposal contractors was developed in the Government.

Before this section can be used there are two requirements which must be satisfied, the first is notice of sale, and the second is that the property disposed of, must be sold at a fixed price. Since the means for compliance with the first requirement is obvious, it need not be covered here. As to the second requirement of fixed price, there is no explanation of this term in the Legislative history. We have interpreted fixed price to mean the "best deal" for the Government, rather than maximum monetary return. This interpretation will allow the Administrator to fix the price of what is being sold in money, other consideration or some combination of the two. This broad interpretation is necessary because there will be instances in which it is in the public interest, and therefore the "best deal" for the Government to fix consideration in terms rather than money. An example of such a situation usually occurs when the Government is to license a patent generated by a Research and Development Agency.

Patented inventions generated by these agencies in large measure require further testing and development before they are commercially useful. These inventions ordinarily represent a substantial improvement to the technology existing in the market place. It would therefore seem that the "best deal" for the public and the Government would be the rapid delivery of these inventions to the public at a reasonable cost.

If the Government charges large licensing fees, it could result in increasing the cost to the public of the invention, for the cost of the goods to the public will be figured by adding the cost of the license to the cost of the reduction to practice of the invention. Therefore, under these circumstances, the most important part of the "fixed price" is the plan of development which a licensee is willing to be committed to, rather than a money return to the Government.

We have not investigated section 484(e)(5) further because as previously mentioned section 484(e)(3)(B) authorizes the disposal by negotiated sale of patents in which HEW, VA, or DOT have a proprietary interest.

P.S. An amusing corollary to the above is that if you accept the argument used in Public Citizen, that the Departments must have statutory authority to dispose of future inventions, the above would support an argument that the Act provides such authority.