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OFFICE OF
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April 8, 1977

Dr. Frank Press
Office of Science and Technology Policy
1600 Pennsylvania Avenue
Washington, D.C.

PATENT BRANCH, OGC
DHEW

APR 12 1977

Dear Dr. Press:

I believe you will be interested in the attached very thoughtful paper entitled "The Impact of Laws and Regulations on the Innovative Process" by Norman J. Latker, who is Patent Counsel for the Department of Health, Education and Welfare. The talk was given before a group of university patent administrators.

In the matter of national science and technology policies, there is a tendency to overlook the process by which the useful results of the scientific and technological effort in this country are brought forward to public use and benefit. It has been observed that most research grant-givers and research grant-getters alike tend to consider the innovative process as an abstraction. Very few concern themselves with laws and regulations which impact the innovative process unless such laws and regulations also may interrupt the flow of research grants. Yet surely the American taxpayer supports the funding of research primarily on the promise of useful results of practical value such as cures to diseases and enhanced U.S. competitiveness in world trade, and secondarily, for advancement of knowledge per se.

Mr. Latker, among Government agency patent counsels, is by far the most effective and is most supportive of efforts of those involved in the process of innovation of research results. As Mr. Latker's talk observes, however, various laws and regulations established for other purposes negatively impact on the innovation process. This should be a matter of deep concern from a national science and technology policy point of view.

I recommend that early contact be made by your office with Mr. Latker to discuss obstacles to innovation of the fruits of our national research effort and bases for involvement of the Office of Science and Technology Policy.

Very truly yours,

Niels J. Reimers
Manager, Technology Licensing

cc: Norman Latker ←
Attachment
NJR:sh

his bookcase

EXCLUSIVE LICENSING OF GOVERNMENT-OWNED PATENTS:

A Conception Which Has Not Been Reduced to Practice

A Paper by

H. M. HOUGEN

Advanced Topics in Patent Law - Law 527

National Law Center

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SCOPE

An examination of the attempt to implement the Government patent policy of exclusive patent licensing of Government-owned patents, the attack on such efforts alleging a lack of authority in the executive branch to grant such licenses, and an analysis of that authority.

THE ATTEMPT TO IMPLEMENT A NEW PATENT POLICY

After prolonged debate over the reasons why so few patents owned by the United States Government were being used by the general public or in commercial industry, even though most of them were available for the asking,[1] proponents of the concept of exclusive licensing of those patents when necessary to attract risk capital and substantial development investment seemed to win the day. The President announced an updated Government patent policy in 1971,[2] which provided in part:

> Under regulations prescribed by the Administrator of General Services, Government-owned patents shall be made available and the technological advances covered thereby brought into being in the shortest time possible through dedication or licensing, either exclusive or nonexclusive, and shall be listed in official Government publications or otherwise.[3]

This language changed the previously stated Government patent policy[4] by permitting the exclusive licensing of patents when necessary to achieve commercial utilization of some inventions.[5]

In response to the President's direction, the General Services Administrator (hereinafter GSA Administrator), who is charged by Congress generally with the responsibility to supervise and direct the disposition of Government-owned property,[6] issued amendments (hereinafter GSA Regulations)[7] to the Federal Property Management Regulations. The GSA Regulations prescribe the terms, conditions, and procedures for the licensing of Government-owned patents by the various federal agencies under the supervision of the GSA Administrator. They granted discretion to the various agencies

having custody of inventions and patents to determine whether exclusive or nonexclusive licensing or public dedication will best assist in making an invention available to the public in the shortest possible time and in achieving a dynamic and efficient economy. As a matter of policy, the GSA Regulations recognized that, while nonexclusive licenses are generally preferable, exclusive licenses may be necessary as an incentive for the investment of risk capital to achieve practical application of an invention.[8] A required series of events must precede such exclusive licensing, including publication of the fact that the patent is available for licensing; solicitation of those interested in nonexclusive licensing; determination by the agency head that exclusive licensing may cause the invention to be brought to practical application, that nonexclusive licensing has not done so, and that the desired practical application is not likely to be expeditiously achieved under either a nonexclusive license or Government-funded research and development; and, finally, a last-chance for challenge of the agency decision by anyone interested in a nonexclusive license.[9] Several limitations on the terms of the licenses were established, including duration, mandatory utilization requirements, mandatory sublicenses as appropriate, and the retention of a royalty-free right of the Government to practice the invention.[10]

An attempt by the Department of Agriculture to implement the Government patent policy was quickly aborted.[11] Before any of the other federal agencies could implement the GSA Regulations and issue exclusive licenses thereunder, a suit to void the GSA

Regulations was filed by a Nader-affiliated group and several individual members of Congress,[12] alleging that the GSA Administrator had no authority to promulgate regulations disposing of such property and that the issuance of the GSA Regulations had not been in compliance with the Administrative Procedure Act.[13]

The issue of compliance with the Administrative Procedure Act is not discussed herein; if the Circuit Court upholds that portion of the decision, necessary compliance with the Act is comparatively simple. What is of more importance is the basic authority of the executive branch, as represented by the GSA Administrator, to make such disposition of Government-owned patents. It is the contention of the author that the executive branch does have such authority, that the plaintiffs and trial court disregarded the clear meaning of the statute, and that counsel for the defendant GSA Administrator have lost sight of that clear authority during the course of the litigation and have adopted a fatal theory of congressional authorization on appeal.

THE ISSUES AND RESULT AT TRIAL

At the core of the problem is the constitutional provision granting Congress the sole power to dispose of and make rules respecting property belonging to the United States.[14] This provision has consistently been interpreted to require specific authorization by Congress before there could be a sale or other disposition of Government property to outsiders, i.e. those not using it on Government business.[15]

Congress has given patents the attributes of personal property. In 1919, the Attorney General recognized that the United States Government could exercise the usual proprietary rights of a patent owner, including assignment and licensing, subject to the existance of specific enabling legislation from Congress.[17] In 1924, the Attorney General reiterated the absolute need for specific statutory authority for any patent disposition by which the Government's title, control, or possession is "lost, reduced, or abridged," finding an implied power in any federal agency to grant limited, nonexclusive licenses.[18] The constitutionality of a statute permitting the executive branch to dispose of patents was soon thereafter upheld by the Supreme Court.[19] The exclusive licensing of Government-owned intellectual property (the use of geographical drawings by a commercial firm to make globes) was later specifically found to amount to such a diminution of the property of the Government or of its control over such property as to be an improper disposal thereof, in the absence of congressional authority.[20]

On appeal, the defendant has abandoned any argument that the executive branch has any implied authority to dispose of so much of the patent as includes the right of any licensee to exclude competitors from infringing the patent, in the absence of any congressional authority.[21] In view of the consistent judicial and administrative acceptance of that proposition, the defendant's acceptance thereof is wise.

Before the trial court, plaintiffs argued that the grant of an exclusive license amounts to a disposition within the sole power of

Congress, since it abridges the Government's interest in the patent; that the authority to dispose of surplus property given in the Federal Property and Administrative Services Act of 1949 (hereinafter Federal Property Act)[22] is not applicable because a patent could never be surplus property; and that Congress would have used express language in any statute permitting exclusive licensing, as it did in the National Aeronautics and Space Act of 1958,[23] if it had intended to permit such disposition.[24] The rationale for concluding that patents could not be surplus property was supported only by the assertion that:

> It cannot be seriously contended that patents and inventions, valuable enough to warrant the granting of an exclusive license, are not usable by any federal agency.[25]

The defendant's counter-argument at the trial court was based on the theory that the limited patent license authorized by the GSA Regulations would not constitute such a disposition of the property as to require specific congressional authorization and that the Federal Property Act did contain broad authority to manage Government property which included the requisite authority to license patents.[26]

In granting summary judgement for the plaintiffs, the trial judge held in part that Congress had not authorized the defendant GSA Administrator to grant exclusive licenses.[27] He did not issue any opinion or reasoning in support of his decision.

THE APPEAL

The defendant has appealed the decision below; no hearing has

been held thereon.[28] In the appeal, the defendant has abandoned his theory, advanced below, that Congress authorized the exclusive licensing of patents in the Federal Property Act.[29] Instead, he argues that the general congressional authorization of all patentees to convey exclusive rights in their patents[30] also empowers federal agencies which "own" patents to dispose of them by exclusive licensing. He also argues that a subsequent change in the GSA Regulations[31] which provides that the right to sue infringers shall be retained by the Government converts the license into something less than disposition of the property.

The defendant's reliance on the general power of a patent owner to convey his property is misplaced, indicating that he has lost sight of the reason for the attack on the GSA Regulation. The plaintiffs do not question the general authority of the United States Government, as a patent owner, to dispose of patents as it deems appropriate. The power to grant nonexclusive licenses or, when properly authorized, to grant exclusive licenses is discussed above. The issue in this case is whether Congress has granted the defendant GSA Administrator authority to provide for the disposition of Government-owned patents by exclusive licensing. The agencies involved are only custodians of the patent property; it is the Congress rather than the agency which can exercise the powers of the owner.[32] Section 261 of the patent laws does not authorize the defendant to do anything.

The attempted solution of the problem by amending the GSA Regulations to provide that the Government will retain the right to

sue infringers may moot the issue, but it does not support the patent policy that the GSA Regulations were intended to further. As noted in the change:

> The property interest in a patent is the right to exclude. It is not the intent of the Government to transfer the property right in a patent when a license is issued pursuant to this subpart. Accordingly, the right to sue for infringement shall be retained with respect to all licenses so issued by the Government. [33]

It is that very right to exclude others that protects the exclusive rights of the proposed licensee. He has no right to sue infringers in his own name,[34] and the Government would have no duty to sue infringers at the behest of the licensee.[35] If the GSA Regulations were interpreted to mean that the supposed exclusive licensee had the power to compel the Government to become a party to an infringement action and had thus abridged Government control of the patent, then there would have been such a disposition of property as to require congressional authorization.[36] If there is some sort of understanding that the Government will protect the licensee against infringers, the changed language of the GSA Regulations would be a sham, and the disposition would still require congressional authorization. If there is clearly no responsibility of the Government to prevent infringement, then the licensee has only a nonexclusive license to practice the patent.[37] That result would resolve the issues in this lawsuit, because the other portions of the GSA Regulations permitting the grant of nonexclusive licenses have not been attacked on the grounds of the lack of authorization for such disposition. It will not serve the announced purpose of

attracting risk capital in exchange for the exclusive right to practice the invention.

If the defendant GSA Administrator cannot find authority for agency disposition of the patents in the general patent laws or avoid the problem by establishing a purported exclusive license that is not in fact an exclusive license, he must look to the Federal Property Act for his authority to dispose of Government-owned patents by exclusive license.

THE FEDERAL PROPERTY ACT

Congress intended, in enacting the Federal Property Act, to provide "an economical and efficient system for (a) the procurement . . . of personal property . . . ; (b) the utilization of available property; [and] (c) the disposal of surplus property . . . ."[38] To that end, it gave the defendant GSA Administrator and his designated executive agencies broad power to dispose of surplus property in such manner as he deems proper, including sale, exchange, lease, permit, or transfer.[39] It would appear that the power to authorize the grant of an exclusive license to a patent is specifically encompassed thereby, if the matter thus disposed of constitutes surplus property.

The term "property" is very broadly defined in the statute to include any interest in property, with certain exceptions not here relevant.[40] Since Congress has defined patents as having the attributes of property,[41] both the patent itself and that lesser portion thereof evidenced by an exclusive license would presumably

come within that definition. The statute then goes on to categorize property which is not required for the needs of any particular agency as "excess property"[42] and such excess property which is not required for the needs of any federal agency as "surplus property."[43]

Thus, unneeded patent rights would seem to be clearly within the meaning of the term "surplus property" as defined in the Federal Property Act. If the rights to any particular patent should be beyond the needs of the several federal agencies, they could be disposed of by sale or otherwise within the terms and authority of that statute. That has been the specific understanding of the General Services Administration as indicated to Congress. In its 1959 report on patent practices, the agency stated:

> The /Federal Property/ act provides that the Administrator of General Services shall have supervision and direction over the disposition of surplus property held by executive agencies (40 U.S.C. 484). Such property would include surplus patents or patent rights.[44]

At least one knowledgeable member of Congress accepted that interpretation, because the Chairman of the Subcommittee thereupon noted that the previous patent activity of this agency involved its "responsibility for the disposition of Government surplus property."[45]

The particular kind of disposition of property involved in the instant controversy over the GSA Regulations is even more clearly an example of the disposal of property excess to the needs of any federal agency. As a practical matter, every right over the patent that the Government or any agency would need is retained under the terms of the license; that quantum of property which the

license transfers is of no need to any agency.

Under the terms of the GSA Regulations, each and every federal agency would retain the "irrevocable royalty-free right to practice and have practiced the invention by and on behalf of the Government of the United States."[46] Thus, the exclusive license would not deprive any agency of the right to use the patent. If there were some governmental reason, such as public health and safety, to prevent all private exploitation of the patent, that patent would not have been advertised as being available for public licensing in the first place, and the process would not have begun. If some agency has an alternative plan to bring the invention to the point of practical application, it would be able to enter the decision-making process prior to the grant of the license. Finally, the power to require the licensee to issue sublicenses can be reserved in the initial license, if any agency has reason to want other parties to be able to obtain the right to practice the invention.[47]

Therefore, when an exclusive license is granted, the only property which the Government has disposed of is the right to exclude that particular licensee from practicing the invention so long as he conforms to the terms of the agreement and the concomitant right to refrain from excluding other, unlicensed private parties. That right to exclude is, of course, the real property right of the patent.[48] The right of any agency to exclude the proposed licensee is pure surplusage to the needs of that agency. The property conveyed in the exclusive license envisioned by the GSA Regulations is the perfect example of property that is truly excess

to the needs of all federal agencies. The license seems to fully and precisely meet the definition of surplus property as used in the Federal Property Act.

In this context, it is appropriate to examine the plaintiffs' argument, mentioned above, that patents valuable enough to warrant an exclusive license must be usable by other agencies by virtue of that value and could therefore never be surplus property. Such an argument confuses value with need. The statute does not define surplusage in terms of the presence or absence of value; it speaks of the needs of the Government. Items of great value may well be excess to the needs of the various federal agencies. For example, the disposal of surplus property upheld by the Supreme Court in Ashwander v. Tennessee Valley Authority[49] involved the electric power generated by a large hydroelectric dam. In 1946, 71 Government-owned patents pertaining to automotive inventions, which had earned royalties or saved royalties of a total value in excess of $ 3 million, were declared to be surplus and offered for sale;[50] the disposal was ultimately cancelled for lack of acceptable bids. In addition, an agency can still use the invention, as discussed above. These exclusive licenses will only be granted for inventions that are otherwise not usable for the public good.

It thus appears from the plain language of the statute that the power to permit exclusive licensing of patents is contained therein.

There is further specific statutory evidence that Congress understood such power to be encompassed within the Federal Property

Act. When the statute was initially enacted, Congress provided:

> Whenever any executive agency shall begin negotiations for the disposition to private interests . . . of patents, processes, techniques, or inventions . . . the executive agency shall promptly notify the Attorney General of the proposed disposal and the probable terms or conditions thereof. (Emphasis added) [51]

The Attorney General is then required to consider possible conflicts with the antitrust laws. Since all those things disposed of under the terms of this statute are surplus property by definition, it is obvious that Congress included patents within the definition of property which, if not required for the needs of any agency, could be disposed of by the defendant and by agencies designated by him. In its amended form, the statute says essentially the same thing, although in a negative fashion. [52]

Additional statutory evidence of Congress' understanding of the authority contained in the Federal Property Act can be found in later statutes incorporating the Federal Property Act by reference. In creating the National Institute of Education in 1972, Congress specifically authorized the Director of the Institute to:

> acquire . . . and to lease to others or to sell such property in accordance with the provisions of the Federal Property and Administrative Services Act, patents . . . or any form of property and any rights thereunder. [53]

Congress thus expressly recognized that the power and mechanism to lease or sell patents was contained within the Federal Property Act. Also, in the course of establishing a research and development program for fish protein concentrate, Congress empowered the Secretary of the Interior to acquire patents, know-how, and

equipment needed to set up experiment and demonstration plants and, when no longer needed, to sell such plants and equipment under the Federal Property Act.[54] By implication, patents were therein recognized as being disposable surplus property within the terms of the Federal Property Act.

The prior history of the Federal Property Act strengthens this interpretation. It replaced and generally repealed the Surplus Property Act of 1944,[55] which had established an orderly method for the disposal of the vast surplus property generated during World War II. The term "property" was defined therein in similar scope to its definition in the Federal Property Act; the term "surplus property" was the equivalent of the term "excess property" as used in the later act.[56] The language about patents contained in the antitrust report requirements in the Federal Property Act was taken directly from a similar provision in the earlier act.[57] Additionally, in section 19, Congress delineated twelve classes of disposable surplus property concerning which it desired certain information prior to disposition. On of these classes of disposable surplus property was "patents, processes, techniques, and inventions."[58] Congress then went on to place such patents in the category of surplus property which the agency could lease for a term of five years or less without any further congressional consideration or, upon giving Congress 30 days to react to a proposal, make any other disposition thereof. This statutory list of reportable classes of surplus property was not carried over to the later act, because the GSA Administrator was given the duty to receive such

reports and monitor disposition.[59]

It is therefore clear that Congress, while making provision for the disposal of the surplus property accumulated during the war, considered patents as one of the many kinds of property which could be surplus to the needs of the federal agencies and disposable by sale or lease. In 1949 Congress expanded that authority to allow the executive agencies to dispose of all items which were surplus to the needs of the various agencies and generated from the overall operations of the Government in peacetime as well as wartime. Its continued use of the same definitions concerning property and same discussion of patents as disposable property indicated that Congress still considered patents to be within the kinds of surplus property which the GSA Administrator was authorized to sell or lease within those terms and conditions which he deemed appropriate.

Congress has given the GSA Administrator specific authority to grant exclusive licenses to Government-owned patents.

OTHER STATUTES CONCERNING THE LICENSING AND DISPOSAL OF PATENTS

It is appropriate to look at the various categories of statutes in which Congress has discussed patent licensing to see if they contradict the above conclusion.

One category of such acts consists of those predating the Federal Property Act. In 1917 Congress gave the President the power to grant exclusive or nonexclusive licenses under patents owned by enemies and their allies.[60] The Supreme Court expanded that authority in United States v. Chemical Foundation[61] to permit

actual sales of such patents by the Alien Property Custodian as a trustee. In 1933 just a few days after the Supreme Court had announced in United States v. Dubilier Condensor Corp.[62] that Congress had failed to provide the requisite authority for the Government to acquire patents generated as a result of employees' work-related inventions, Congress created the Tennessee Valley Authority.[63] In specific response to the Dubilier case, Congress provided that the Authority would acquire ownership of all patents arising from the activities of employees and could grant licenses thereunder.[64] Such patents appear to be exempted from the provisions of the Federal Property Act.[65] There was no provision for disposition of patents otherwise within the control of the Authority. While these acts predate the property disposal acts, they do indicate an awareness on the part of Congress of the need to provide a method for disposal of patents, by sale, lease, or otherwise, when the Government finds itself in possession or control thereof. They are one manifestation of congressional effort to provide such a method in the same statutory context in which Congress authorized the acquisition of those patents.

A second category of statutes involves those areas wherein Congress has been sufficiently concerned with the dissemination of knowledge and patents obtained during the course of Government-sponsored research and development to provide expressly for dedication to the public or to indicate a clear desire that the agency involved should make the patents generally available to the public, either by licensing or by contract provision. Those statutes range

chronologically from those involving research of helium gas, written in 1925,[66] to consumer product safety, written in 1972.[67] Each of these statutes evidences a particular congressional interest in widespread use of the technology discovered and provides instructions to the agency concerned about the specific method for achieving such use. The discretion allowed the agencies under the Federal Property Act is withheld in these statutes as a matter of policy. In effect, these statutes direct the choice of the agency between the implied power to grant nonexclusive licenses and the specific authority in the Federal Property Act to make other disposition.

A third category of statutes involves those areas of particularly complicated technology, with huge research and development programs, in which Congress has set forth very detailed rules concerning the acquisition by the Government of patents resulting from research sponsored by the Government and the use of such patents, including licensing. These comprehensive patent programs have been established for research into atomic energy, aerospace, and nonnuclear energy development.

The Atomic Energy Commission was created in 1946, before the Federal Property Act existed; the Commission was subsequently exempted from the operation of the Federal Property Act.[68] The initial act contained several detailed provisions concerning the acquisition, utilization, and disposition of patents, including Government seizure of licenses, automatic sublicenses to certain industries, condemnation of patents, and denial of the remedy of injunctive relief against infringement of certain patents.[69] The

1954 revision retained several of the earlier provisions and changed some.[70] It gave the Commission the specific authority to license Government-owned as well as privately-owned patents.[71]

The original administration proposal to create a space agency in 1958 contained no reference to patents; late in the congressional proceedings, there arose concern about the effects of privately-owned patents on the space program. To avoid the problem, a comprehensive patent provision taken largely from the Atomic Energy Act, was inserted in the National Aeronautics and Space Act of 1958 and passed without serious consideration by Congress.[72] Incident to a lengthy discussion of the powers of the Administrator to take title to patents, he was authorized to license those patents on such conditions as he determines to be appropriate.[73]

These statutes deal with the specific congressional intent to control patent activity of the Government and of private industry in certain fields of endeavor where national interests are particularly important. Following the lead of the earlier law creating the Tennessee Valley Authority, Congress joined patent licensing provisions to the patent acquisition provisions. In addition to the broad powers given the agency heads to control and manage patents in those areas, they were given discretionary control of patent licensing.

These provisions set the pattern followed most recently in the Federal Nonnuclear Energy Research and Development Act of 1974, which permits the agency head to grant exclusive licenses to Government-owned patents under essentially the same conditions set

by the Government patent policy and the GSA Regulations.[74] The congressional motivation for these detailed patent-licensing provisions is clear, because they were added after Congress was informed of the decision of the trial judge in Public Citizen I and the serious question raised thereby concerning the authority of federal agencies to grant exclusive patent licenses.[75] Congressional response was clear and to the point, so far as patents arising from the energy reasearch program are concerned. Although the language of section 9(g)(1) of the Act would apparently authorize the Energy Research and Development Administrator to license any patent owned by the United States, it is doubtful that such language would be construed to allow him to license a patent not within the particular control of the Administrator or otherwise closely connected with the nonnuclear energy field. As with the earlier comprehensive patent management statutes, this most recent set of congressional instructions on disposition of patent rights in a particular area of congressional concern does not indicate any congressional intent to diminish authority which Congress has otherwise granted for disposition of other property, including surplus patents in unrelated fields. Rather, it illustrates congressional recognition of an unsettled problem pending in the courts and a desire to avoid that problem in a specific, important legislative area.

A fourth category of statute includes the two mentioned above in which Congress explicitly or implicitly directed that surplus patent rights be disposed of under the general provisions of the Federal Property Act.[76]

An additional statute, the Military Leasing Act, would only apply to patents if the lower court decision in Public Citizen I were affirmed. That statute empowers the military agencies to lease personal property under their control and not needed for public use, if such action would be in the public interest. The statute exempts "excess property" as defined by the Federal Property Act. If a Government-owned patent under the control of a military department and the rights thereunder were not capable of being "surplus property" by reason of authoritative judicial interpretation of the Federal Property Act and if it were not within the specific needs of some other federal agency so as to satisfy the distinction between "excess property" and "surplus property," then the patent in question would not be "excess property" and would be capable of being leased or licenses under the Military Leasing Act. The military departments could still comply with the Government patent policy even if the Federal Property Act were construed to deprive the agencies of the power to dispose of surplus patents. Of course, this additional authority does not itself diminish the general authority granted by the Federal Property Act.

CONCLUSION

Congress has, by its various legislative activities, divided Government-owned patent rights into three groups: those in areas of sufficient interest to cause Congress to express specific intent that the patent rights be dedicated to the public or readily available for general licensing upon demand; those in particular

fields in which Congress has established comprehensive programs of patent management; and those which Congress has not specifically mentioned. Failing some particular category created by Congress, this last group of patents thus becomes a part of the general property owned by the Government.

The power of the Government to exercise the rights of a property owner over these patents has long been recognized, provided that the agency making any disposition beyond that involved in a nonexclusive license has received congressional authority for its actions. The vacuum surrounding the vast majority of Government-owned patents was first filled by the Surplus Property Act of 1944, which recognized that patents were a part of the wartime surplus property of the Government capable of disposal by the custodial agencies by sale or lease or otherwise, with only minimal congressional oversight. That Act was temporary in nature. In 1949, Congress established the General Services Administration as the agency to oversee the disposal of surplus Government property. Congress did not narrow the definition of property; rather it expanded it to include all property which the Government did not need for its operations, whether generated in wartime or peacetime. By the clear terms of the Federal Property Act, those patents and patent rights which had been capable of disposal under the wartime provisions were now matter to be disposed of by the GSA Administrator and his designated agencies in such manner as he determined to be appropriate. Patents are specifically mentioned in the terms of the Act, and Congress has subsequently directed that certain kinds of patents and related

property are to be disposed of in accordance with the provisions of the Act.

When Congress was told by the General Services Administration that the agency understood the mandate of the statute which authorized its operations to include the power to make appropriate disposition of patents, no legislation was issued to change that understanding. None of the several statutes otherwise discussing patent activity contain any language indicating that the Federal Property Act lacks authority to dispose of patent rights, except as to the specific kinds of patents arising from the research activities controlled by each specific statute.

The President, by adopting the Government patent policy statement, has effectively directed the GSA Administrator to provide a mechanism to allow private industry the exclusive use of Government-owned patents when necessary to attract the investment necessary to bring the invention to the point of commercial use for the public benefit. The GSA Administrator has been given such authority by Congress. The GSA Regulations were intended to exercise that authority to comply with the President's direction, until the trial court in Public Citizen I halted that activity. Hopefully, the appellate court will look more carefully at the authority given the defendant and permit him to fulfill his obligations to the President, the Congress, and the public.

FOOTNOTES

1. See generally Harbridge House, Inc., Government Patent Policy Study, vols. I-IV (1968); Raskin, Government Patent Policy Revisited: Reflections Occasioned by President's 1971 Memorandum, 15 Idea 340 (1971).

2. Memorandum and Statement of Government Patent Policy, August 23, 1971, 36 Fed. Reg. 16887 (1971).

3. Id. § 2.

4. Memorandum and Statement of Government Patent Policy, October 10, 1963, 28 Fed. Reg. (1963).

5. Office of Science and Technology, Executive Office of the President, Explanation of Changes, August 24, 1971, 42 BNA Patent, Trademark, and Copyright Journal /hereinafter BNA Pat. J./ D-3 (1971).

6. Federal Property and Administrative Services Act of 1949, 40 U.S.C. §§ 471 et seq. (1970).

7. 41 C.F.R. Part 101-4 (1974).

8. Id. § 101-4.101.

9. Id. § 101-4.103-3(a).

10. Id. § 101-4.103-3(c).

11. Hearings on H.R. 6602 and Related Bills Before the Subcomm. on the Environment of the House Comm. on Interior and Insular Affairs, 93d Cong., 1st & 2d Sess., ser. 93-19, at 486 (1974).

12. Public Citizen, Inc. v. Sampson, 180 U.S.P.Q. 497 (1974). This case is hereinafter cited as Public Citizen I to distinguish it from a concurrent case involving the same parties and the issue of permitting contractors to retain title to patents arising from federal contracts.

13. Plaintiffs' Motion for Summary Judgement and Argument, Public Citizen I, 162 BNA Pat. J. E-2 (1974).

14. U.S. Const. art. IV, § 3, cl. 2.

15. United States v. Nicoll, 27 F. Cas. 149 (No. 15,879) (C.C.N.Y. 1826); Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936); Royal Indemnity Co. v. United States, 313 U.S. 289 (1941).

16. 35 U.S.C. § 261 (1970).

17. 31 Op. Att'y Gen. 463 (1919).

18. 34 Op. Att'y Gen. 320 (1924).

19. United States v. Chemical Foundation, 272 U.S. 1 (1926).

20. 25 Comp. Gen. 909 (1946).

21. Brief for Defendant-Appellant, Public Citizen, Inc. v. Sampson, No. 74-1619 (D.C.Cir., filed Oct. 30, 1974), 201 BNA Pat. J. D-1 (1974).

22. 40 U.S.C. §§ 471 et. seq. (1970).

23. 42 U.S.C. § 2457 (1970).

24. Plaintiffs' Argument, supra note 13.

25. Id. at E-3.

26. Defendant's Memorandum in Opposition, Public Citizen I, 162 BNA Pat. J. E-5 (1974).

27. Supra note 12.

28. Public Citizen, Inc. v. Sampson, No. 74-1619 (D.C.Cir., filed Oct. 30, 1974).

29. Supra note 21.

30. 35 U.S.C. § 261 (1970).

31. 39 Fed. Reg. 28288 (1974).

32. Supra note 17.

33. 39 Fed. Reg. 28288, § 101-4.105 (1974).

34. Waterman v. MacKenzie, 138 U.S. 252 (1891).

35. Lathrop v. Rice & Adams Corp., 17 F. Supp. 622, 33 U.S.P.Q. 72 (1936); Hazeltine Research, Inc. v. DeWald Radio Mfg. Corp., 84 N.Y.S. 2d 597, 79 U.S.P.Q. 446 (N.Y. Sup. Ct. 1948); Universal Oil Prods. Co. v. Vickers Petroleum Co., 49 U.S.P.Q. 333 (Del. Sup. Ct. 1941).

36. Independent Wireless Telegraph Co. v. Radio Corp. of America, 269 U.S. 459 (1926); Channel Master Corp. v. JFD Electronics Corp. 260 F. Supp. 568, 151 U.S.P.Q. 498 (E.D.N.Y. 1966).

37. Waterman v. MacKenzie, supra note 34.

38. 40 U.S.C. § 471 (1970).

39 40 U.S.C. § 484(c) (1970).

40. 40 U.S.C. § 472(d) (1970).

41. 35 U.S.C. § 261 (1970).

42. 40 U.S.C. § 472(e) (1970).

43. 40 U.S.C. § 472(g) (1970).

44. Preliminary Report of the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary, 86th Cong., 1st Sess., Patent Practices of the General Services Administration 1 (Comm. Print 1959).

45. Id. Foreword by Senator O'Mahoney at III.

46. 41 C.F.R. § 101-4.103-3(c)(6) (1974).

47. 41 C.F.R. § 101-4.103-3(c)(7) (1974).

48. N.V. Philips' Gloeilampenfabrieken v. Atomic Energy Comm'n, 316 F.2d 401, 137 U.S.P.Q. 90 (D.C.Cir. 1963).

49. Supra note 15.

50. Supra note 44, at 4, 13.

51. Ch. 288, § 207, 63 Stat. 391.

52. 40 U.S.C. § 488 (1970).

53. 20 U.S.C. § 1221e(f)(1)(E) (Supp.II, 1972).

54. 16 U.S.C. § 778e (1970).

55. Ch. 479, 58 Stat. 765.

56. Id. at § 3.

57. Id. at § 20.

58. Id. at § 19.

59. 40 U.S.C. 483(b) (1970).

60. Trading with the Enemy Act, 50 App. U.S.C. § 10 (1970).

61. Supra note 19.

62. 289 U.S. 178 (1933).

63. 77 Cong. Rec. 2626-29 (1933) (remarks of Senator Norris).

64. 16 U.S.C. § 831d(i) (1970).

65. 40 U.S.C. § 474(12) (1970).

66. 50 U.S.C. § 167b (1970).

67. 15 U.S.C. § 2054 (Supp.II, 1972). Other examples include provisions pertaining to research concerning:
    synthetic liquid fuels, 30 U.S.C. § 323 (1970);
    the National Science Foundation, 42 U.S.C. § 1876(a) (1970);
    coal, 30 U.S.C. § 666 (1970);
    coal mine health and safety, 30 U.S.C. § 952 (1970);
    arms control and disarmament, 22 U.S.C. § 2572 (1970);
    water resources, 42 U.S.C. § 1961c-3 (1970);
    Appalachian regional development, 40 App. U.S.C. § 302(e) (1970);
    solid waste disposal, 42 U.S.C. § 3253 (1970), which incorporates the terms of the 1963 Government patent policy by reference;
    motor vehicle safety standards, 15 U.S.C. § 1395(c) (1970);
    saline water conversion, 42 U.S.C. § 1954d (Supp.II 1972).

68. 40 U.S.C. § 474(13) (1970).

69. Ch. 724, § 11, 60 Stat. 769.

70. 42 U.S.C. §§ 2181-90 (1970).

71. 42 U.S.C. § 2186 (1970).

72. Hearings before the Special Subcomm. on Patents and Scientific Inventions of the House Comm. on Science and Astronautics on H.R. 1934 and H.R. 6030, 87th Cong., 1st Sess., No. 20, pt. 1, at 1-2 (1961) (opening remarks of Chairman Daddario).

73. 42 U.S.C. § 2457 (1970).

74. Pub. L. 93-577, § 9, 88 Stat. 1887.

75. Hearings on H.R. 6602, supra note 11, at 448.

76. See text accompanying notes 51-52.

77. 10 U.S.C. § 2667 (1970).