B. Allocation of Patent Rights

1. Historical Background

Prior to World War II, few problems surrounded the allocation of patent rights in the inventions resulting from Government research and development (hereinafter "R&D") probably for the reason that most of the R&D was performed by government employees. Where R&D was contracted for, no established uniform patent policy was used by the government agencies. Some agencies, notably the Departments of War and Navy, developed a policy of acquiring a royalty-free license to resulting inventions for governmental purposes, leaving the contractor with title, or what might otherwise be described as exclusive commercial rights. Other agencies, primarily those more oriented toward conducting research of interest to the public sector of our economy, such as the Departments of Agriculture and Interior, acquired title to resulting inventions, while some agencies simply ignored the existence of the issue, which had the effect of permitting the contractor to retain all rights to inventions with the Government obtaining a license or no rights at all.[32/]

During World War II, as the Government's R&D programs grew, Congress began to react to this issue. In 1943, Senator Kilgore of West Virginia introduced a Bill for a Science and Technical Mobilization Act, which was designed to prevent the patent system from working against the

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32/ Ordnance Engineering v. United States, 68 Ct. Cl. 301 (1929); Hobbs v. United States, 376 F.2d 488 (5 Cir. 1967); 32 Op. Att'y Gen. 556 and 563 (1924).

public interest, especially by fostering industrial concentration. This Bill proposed to stimulate technological innovation, the commercialization of new products and processes, and small business entry into markets, in part by compelling the disclosure and nondiscriminatory dissemination of information developed in corporate laboratories. A new Federal Office was to be granted ownership and be empowered with the exclusive right to use or license "any invention, discovery, patent, or patent right" which had resulted from federally supported research with "any money, credit, physical facilities, or personnel" since the declaration of national emergency in 1941.[33/] This portion of Senator Kilgore's Bill provoked considerable opposition from industry, trade associations, scientists, and the military departments.[34/]

By war's end, the title policy and the license policy advocates became entrenched. Each side marshaled a major study to bolster its position. On the side supporting the license policy, there was the

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33/ S. 702, 78th Cong., 1st Sess., §7 (1943); See also Collins et al., Patent Policy, Technological Innovation, and Government Contracts: A Selective Critique; California Institute of Technology, Division of the Humanities and Social Sciences, (June 1974).

34/ Id. For typical expressions of opposition, Hearings on Technological Mobilization Before the Senate Subcomm. of the Comm. on Military Affairs, 77th Cong., 2nd Sess. at 240-41, 271 (1942).

National Patent Planning Commission report.[35/] The Commission, created by President Franklin D. Roosevelt at the end of 1941, was to investigate patent abuses spotlighted by the Temporary National Economic Committee.[36/] The Commission recommended that the Government should not normally assert full ownership of patents, except in the public health or safety field. The Commission urged that patents should be available on an exclusive basis, as "It often happens, . . . particularly in new fields, that what is available for exploitation by everyone is undertaken by no one."[37/]

The title policy advocates found support in the U.S. Attorney General's Report on Government Patent Practices and Policies.[38/] The report urged the establishment of a Government Patents Administrator

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35/ Report of the National Patent Planning Commission, H.R. Doc. 239, 78th Cong., 1st Sess. (1943); Second Report of the National Patent Planning Commission, H.R. Doc. 22, 79th Cong., 1st Sess. (1945); Third Report of the National Patent Planning Commission, H.R. Doc. 283, 79th Cong., 1st Sess. (1945).

36/ Investigation of Concentration of Economic Power: Final Report and Recommendation of the Temporary Economic Committee (Pursuant to Public Resolution No. 113, 75th Congress), No. 35, 77th Cong., 1st Sess. (1941).

37/ Second Report of the National Patent Planning Commission, supra note 35, at 5.

38/ U. S. Department of Justice, Investigation of Government Patent Practices and Policies, Report and Recommendations of The Attorney General to The President, 3 Vols., Washington, D. C. (1947).

to administer a uniform patent policy. The basic policy recommended was that all government contracts for research and development should contain a requirement that the Government be entitled to all rights to inventions produced in the performance of the contract.

However, this report did recognize a need in certain situations that exceptions could be made. Specifically, if the contractor prior to the contract has already made a substantial independent contribution, and other qualified organizations were unavailable, or in the case of cooperative research projects, exceptions could be made. In such cases the contractor should grant the United States a nonexclusive royalty-free license to make, have made, use and dispose of any invention. In addition, the contractor was to agree to place these inventions in adequate commercial use within a designated period, and, if such use was not being made, to license all applicants at a reasonable royalty. The report also recommended royalty-free licensing or dedication of all government patents.

The Attorney General, Tom Clark, advised President Truman to publish the report and wait for a more favorable moment to implement its recommendations.[39/] The military departments strenuously objected to the proposed title policy. In contrast, the Secretaries of Commerce and Interior, and the Federal Security Agency urged the adoption of this policy.[40/]

39/ Supra note 33, Collins et al., at 25 (except for the government employee rights question which resulted in Executive Order 10096).

40/ Supra note 33, at 26.