Superseded

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Mr. Ralph Nader
2000 P Street, N.W.
Suite 708
Washington, DC 20036

Dear Mr. Nader:

In a March 20, 1978, letter (co-authored by Sidney M. Wolfe), you made a number of critical comments regarding Amendment No. 187, January 20, 1978, to the Federal Procurement Regulations (FPR) which concerned Institutional Patent Agreements (IPAs).

You initially question the constitutionality of Amendment 187 and cite as support a court case (Public Citizen v. Arthur F. Sampson, Civil 781-73-DDC, January 17, 1974). The case is commonly referred to as Public Citizen No. 1, and it was decided in favor of the Government in the Circuit Court of Appeals for the District of Columbia. Lack of standing to sue was the basis for the decision. The referenced case was directed at a regulation dealing with the licensing of Government-owned patents and not at a regulation dealing with patents that stem from ongoing Government research and development (R & D) contracts. Amendment No. 187 concerns the latter situation.

In discussing the constitutionality of the Amendment, you also mention a legal opinion that originated in the Department of Justice in October 1972, which is known as the Cramton Memorandum. It is true, as you say, that the memorandum was endorsed by Attorney General Richardson. It is also true, however, that Acting Attorney General Silberman subsequently stated on June 14, 1974, that the memorandum "does not accurately reflect what we believe to be the state of the law." (See page 61 of the enclosure.)

With respect to your remarks regarding the disposal of Government property, the entire matter was addressed in a brief (see enclosure) filed by the Department of Justice in the Circuit Court of Appeals for the District of Columbia. The brief responded to your appeal (Docket No. 74-1849) in connection with a lawsuit (Public Citizen v. Arthur F. Sampson) which has become known as Public Citizen No. 2.

Public Citizen No. 2 concerned the patent regulations issued in the FPR regarding the allocation of rights in inventions that originate under Government R & D contracts. Amendment 187 was an addition to that regulation. Public Citizen No. 2 also was decided in favor of the Government on grounds of lack of standing to sue. However, we sincerely believe that the weight of the legal arguments on the merits strongly favor the Government.

Institutional Patent Agreements are not new. IPAs have been used in the past by several agencies. Although executed as separate agreements, IPAs function with R & D contracts as the patent clause in the contracts. They are simply variations of the clauses originally prescribed by the FPR on September 4, 1973. Differences reflect the fact that the IPAs operate in terms of educational institutions (rather than commercial organizations) which conduct R & D activities and have established patent management capabilities.

IPAs benefit the public by facilitating the development of practical applications of inventions through licenses issued by the institutions. Royalties that flow back to the institutions are used to expand the research capabilities of the institutions. The Government is benefited through the availability of improved and enlarged research capabilities.

Amendment 187 was developed by the Committee on Government Patent Policy (now the Committee on Intellectual Property) in accordance with the Statement of Government Patent Policy issued by President Nixon on August 23, 1971. The amendment does not add to or take away any agency authority to act. It simply provides a basis for uniform action. In no way is there a "give away" of Government patent rights.

Following the issuance of the Amendment 187, the Administrator, Office of Federal Procurement Policy, requested that the effective date be postponed 120 days to permit the Executive Office of the President and certain Congressional Committees to complete ongoing deliberations regarding Government patent policy. The effective date was extended as requested.

We appreciate the opportunity to respond to your correspondence.

Sincerely,

Jay Solomon
Administrator

Enclosure