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January 27, 1978

FILE:

PATENT BRANCH, OGC
DHEW

FEB 7 1978

Mr. Joel Davidow
Director of Policy Planning
Antitrust Division
Department of Justice
Washington, D. C.

Re: Department of Justice advocacy with respect to Government patent policy

Dear Mr. Davidow:

From all that I read about the testimony before Senator Nelson's committee this past month, and from all of my experience relating to the issue of government patent policy since I as a Department of Justice lawyer participated to a minor extent in an original draft of what became Presidential Order 10096 about 1950, it appears that the Department of Justice Antitrust Division tends always to hold the popularist view that the public is served by dedicating new patents to use by everybody. It seems also that this view is contrary to that held over the years by a majority of the governmental agencies which are closer to the problem of getting technology into private use and enjoyment than are Department lawyers, Admiral Rickover to the contrary notwithstanding.

There is a reason.

The Department's view seems to be an opinion based upon abstract assumptions that the views of private title policy are false. But I find no evidence that they are and much evidence to the contrary.

Those who have been paying attention have observed the decline of judicial enforcement of patent rights and of technology licensing freedoms over the last several years and a concurrent decline of private sector research and

development, and perhaps more significantly, of private sector accumulation of capital for the development and marketing of previously made inventions.

One of the fundamentals that seems little understood or appreciated by the likes of Admiral Rickover or anyone else who has never been out in the real world of privately financing new technology, is that the making of a patentable invention (which normally is as far as government finance goes in bringing technology to private enjoyment) is a very small part of the total undertaking of bringing new technology actually into public enjoyment. --Very small by comparison with such matters as the cost of production engineering plus the cost accumulation of capital for the undertaking and marketing of the product, not to mention the technical development of the invention for each commercial application. The biggest lie ever told was "Build a better mousetrap and the world will beat a path to your door." That occurs only after major investment in technology application, capital accumulation and market development. --If you are lucky.

Some small understanding of that theme may be discerned by reference to the enclosed paper, one prepared by the World Future Society personnel who have no background or experience in patents as such, and no ax to grind with respect to ownership of patents issued on inventions made with some government support.

Sure, if there is not an invention made, then efficacy studies, safety engineering, technical development for each individual application, production engineering, capital accumulation, marketing, and all the other related efforts, will never precipitate around a new technology.

But the biggest deficiency in the process by which new technology reaches public enjoyment has been proven again and again to be lack of adequate protection of investment in these inevitably high economic risk undertakings that are necessary to convert any patented invention from a piece of paper on the government shelf into something the public actually enjoys.

Assistant Attorney General Shenenfield has referred to "concentration of economic power in large corporation" and

to "exorbitant monopolist profits" in a context such as to imply that he has concrete evidence that these things commonly result from the circumstance of government R & D contractors retaining title to inventions they make. So far as I know, there is no evidence to support his contention. Rather he appears merely reflecting an intuitive bias in this direction, without support by any evidence known to me, at least--and I have been in the arena where such evidence would likely come to my attention if it existed to any material degree.

The story is told so often, sometimes with an isolated example alleged to support it but which often does not support it when the example is examined, and the story is so self-selling, that we all tend at first to believe it as I did in 1950. But I'm convinced it is false--and nobody is paying me to say so to you or suggesting I say so.

What is happening is that the patent system is being gradually sterilized by Department of Justice antitrust and judicial attitudes and rulings, such that it is losing its capacity to provide incentive not only for privately funded research and development but for the absolutely necessary capital accumulation and marketing effort without which technology does reach the marketplace.

Every writer that I have read on the subject has opined in one manner or another to the effect that government's research and development has proved to be an exceedingly inefficient source of technology for public enjoyment significantly because government owned technology in most areas is not effectively transferred to public availability. We can speculate that this is because government researchers are stupid but that would fly into the teeth of the success of such as the space program. It seems much more likely that the reason this is true is because of the lack of incentive for anybody to accumulate and spend his risk capital trying to develop a new market for a new technology unless he has some protection for that risky investment, a risk that the second participant in the market avoids in large part.

This issue of how to get technology at government expense or with government sponsorship into public enjoyment,

is an issue too important to be shunted into a category by political cliches condemning "windfall profits" that cannot be proved to occur but rarely if at all, much less to occur with sufficient frequency to justify the loss of the incentive for private capitalists to bring technology to public enjoyment.

I encourage your office to undertake a study not biased by its being staffed by persons with anti-monopoly blood in their veins or by persons who are traditional patent lawyers. Let your office determine on the real evidence whether government owned technology gets into commercial use and public enjoyment to any important degree, unless either the government accumulates and risks the capital itself (which has many bad connotations in a free society) or unless an incentive is provided for the accumulation and risk of private capital in the technical and market development of a previously made invention.

If this be done, then perhaps for the first time we will have some straight views from the Department of Justice rather than pontifical opinions by persons who never really experienced the chores and risks of accumulation and application of risk capital to the marketing of new technology.

Yours truly,

Tom Arnold

Tom Arnold

TA:scl

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