



EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
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OFFICE OF FEDERAL  
PROCUREMENT POLICY

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STATEMENT BY THE  
HONORABLE LESTER A. FETTIG  
ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY  
OFFICE OF MANAGEMENT AND BUDGET  
BEFORE THE SUBCOMMITTEE ON  
MONOPOLY AND ANTICOMPETITIVE ACTIVITIES  
OF THE SENATE  
SELECT COMMITTEE ON SMALL BUSINESS

Mr. Chairman and Members of the Subcommittee:

I am pleased to have the opportunity to appear here today and give the views of the Office of Federal Procurement Policy (OFPP) on Government patent policy and contribute to these hearings on the use of Institutional Patent Agreements (IPAs) as an implement of that policy.

Mr. Chairman, I believe the question of the use of IPAs should be answered in the context of overall Federal Government patent policy. While I am not in the position to present to the Subcommittee the Administration's view on the subject, I will share with you my thinking on patent policy. Further, patent policy is not an isolated issue and needs to be put in the context of a number of related policies.

BACKGROUND -- OFPP

First, perhaps it would be appropriate to review the role of OFPP in this subject area. OFPP was established in 1974 by Public Law 93-400. The prescribed authority is as follows:

"Section 6.(a) the Administrator shall provide overall direction of procurement policy. To the extent he considers appropriate and with due regard to the program activities of the executive agencies, he shall prescribe policies, regulations, procedures, and forms, which shall be in accordance with applicable laws and shall be followed by executive agencies (1) in the procurement of -

- (A) property other than real property in being;
- (B) services, including research and development;
- (C) construction, alteration, repair, or maintenance of real property;

and, (2) in providing for procurement by recipients of Federal grants or assistance of items specified in clauses (A), (B), and (C) of this subsection, to the extent required for performance of Federal grant or assistance programs." (emphasis added)

Public Law 93-400 clearly gives to OFPP the authority to prescribe policies and regulations in the procurement of research and development.

### Procurement vs. Assistance

Second, it should be equally appropriate to review Public Law 95-224 which distinguishes between procurement and assistance transaction. Section 4 defines a procurement transaction and directs the use of a procurement contract:

"whenever the principal purpose of the instrument is the acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government."

and in Sections 5 and 6 defines an assistance transaction and directs the use of grants or cooperative agreements whenever:

"the principal purpose of the relationship is the transfer of money, property, services, or anything of value to the State or local government or the recipient to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government."

Federal research and development involves both procurement and assistance and it is important to consider the type of transaction when we consider patent policy.

However, regardless of whether it is an assistance or procurement transaction, a patent, if one results from the effort, is a by-product -- something not contracted for nor specified to be accomplished as part of the grant activity -- an extra benefit.

### Cost Sharing

The question of Federal funding also needs to be considered. For example, in assistance transactions supporting research activities, cost sharing by the recipient is required by Federal Management Circular (FMC) 73-3 which is still in effect. For other R & D

assistance transactions, OMB through the budget process by policy requires cost sharing -- in some cases up to fifty percent (coal gasification demonstration conducted by the Department of Energy).

### Recoupment

Similarly, in procurement transactions, when there is a clear potential benefit that commercial sales will result from a Federal R & D contract, the Council on International Economic Policy Decision Memorandum 23 of August 1974 requires that a recoupment provision be in the contract. This policy is still in effect and a most used example is the C-5A engine contract with General Electric (GE) which has resulted in the Federal Government receiving approximately \$18,000 for each commercial engine that GE sells for use on the DC-10, 747 and A-300 airbus.

OFPP is in the final stages of development of a procurement policy on R & D contracting which will include an executive branch implementation of the Decision Memorandum.

### Science and Technology Policy

There is one more public law that should be included in this background for discussing patent policy and that is Public Law 94-282, the National Science and Technology Policy, Organization, and Priorities Act of 1976. Section 102(a) on the declaration of policy states:

". . .the Congress declares that the United States shall adhere to a national policy for science and technology which includes the following principles:

- "(5) The development and maintenance of a solid base for science and technology in the United States, including:
  - (A) strong participation of and cooperative relationships

with State and local governments and the private sector; (B) the maintenance and strengthening of diversified scientific and technological capabilities in government, industry, and the universities, and the encouragement of independent initiatives based on such capabilities, together with elimination of needless barriers to scientific and technological innovation."

Section 102(c) states:

"(4) Federal patent policies should be developed, based on uniform principles which have as their objective the preservation of incentives for technological innovation and the application of procedures which will continue to assure the full use of beneficial technology to serve the public."

#### Acquisition Policy

Finally, as the last item of background is the Federal Acquisition Act of 1977 -- S. 1264 -- which has been reported out of the Governmental Affairs Committee. This Bill in Section 2(b) states:

"It is the policy of the United States that when acquiring property and services for the use of the Federal Government, the Government shall, whenever practicable rely on the private sector, and shall act so as to --"

- "(2) maintain the independent character of private enterprise by substituting the incentives and constraints of effective competition for regulatory controls;
- (3) encourage innovation and the application of new technology as a primary consideration by stating agency needs so that prospective suppliers will have maximum latitude to exercise independent business and technical judgments in offering a range of competing alternatives;
- (4) maintain and expand the available Federal supply base by judicious acquisition practices designed to assure Government contracting with new and small business concerns to the maximum practicable extent."

ALLOCATION OF RIGHTS

With the background of these related policies I will now turn to the basic question of Federal patent policy -- the allocation of rights. This question arises because it is the policy of the Federal Government to rely on the private free enterprise system for the goods and services needed by the Government and because it has been determined to be in the public interest to assist and support organizations performing research and working in certain technology areas (such as energy). A primary goal of Federal patent policy is and should be the utilization or commercialization of the technology.

Mr. Chairman, I believe that this is the most important aspect of the questions surrounding Federal patent policy -- it's objectives. In one word it is commercialization. It gets back to the basics of why we have patents in the first place -- to get commercialization. Commercialization means increased productivity, better and more products, improved standards of living, anti-inflation (such as demonstrated in miniature electronics), improved trade balances (high technology industries continue with positive balances), and employment. Commercialization is clearly in the public interest.

But, what about other aspects of public interest. How do we protect the public interest from "windfall" profits and from inventions being suppressed? Such protection must be provided. To protect against "windfall" profits we should

continue the use of cost sharing in assistance and recoupment in procurement contracts. Perhaps we should also consider requiring royalty payments to the Government.

With respect to suppression of inventions, the Federal Government should have and use march-in rights if utilization of a patent is restrained. Fortunately, the competitors will help the Government monitor possible suppression and can help initiate the march-in process.

On the other hand, we must provide incentives to encourage disclosure of inventions so that patents will be filed. Suppression of disclosure must also be protected against.

#### PROCUREMENT

Let us examine, in procurement, how the commercialization goal can be met and how the question of allocation of rights might be answered. When the Government enters the commercial marketplace it either accepts normal commercial practices or, through regulations, it modifies the marketplace practices to the Government's end purposes. The enormous problems of regulations lead to the establishment by Congress of the Commission on Government Procurement. The Commission, which recommended and Congress then established the Office of Federal Procurement Policy, also recommended that a uniform patent policy be established which would replace the 19 statutes currently covering patents.

The Commission recognized in commercial practice the seller, not the buyer, retains title to all patents resulting from the performance of a contract and that the question of patent rights should be measured against commercial practices to determine its affect on the marketplace.

"Promoting fair dealing and equitable relationships among the parties in Government contracting" is another mandate of Public Law 93-400 on OFPP. A question of equity arises when the Federal Government in an R&D contract both obtains title to resulting patents and requires recoupment.

Similarly, an assistance transaction which is in the public interest which requires cost sharing by the recipient and does not let the recipient retain title to resulting patents also raises a question of equity.

#### FEDERAL PAPERWORK

Another objective we have within OMB is to minimize the differences in administrative requirements between procurement contracts and grants/cooperative agreements. The Commission on Federal Paperwork specifically recommended that this be done for colleges and universities. It appears to me that a uniform Federal patent policy to be applied in both assistance and procurement is desirable.

FEDERAL PATENT POLICY    IPAs

Dr. Baruch has described the efforts underway in the Executive Office of the President and among the executive agencies to make a determination on Federal patent policy. Within the context of these many considerations, we are still examining the final rule on IPAs in the Federal Procurement Regulations published in the Federal Register on February 2, 1978.

Mr. Chairman, if you or any members of the Subcommittee have recommendations regarding the rule, we would appreciate receiving them by July 18, 1978.

ANSWERS TO QUESTIONS

With respect to the questions contained in your letter of invitation of June 12, 1978, Mr. Chairman, HEW and NSF would be required to adopt the IPA in the FPR if it is released, and a comparable amendment is not planned for the Armed Services Procurement Regulation because DOD permits the universities to retain title without the use of an IPA.

Mr. Chairman that concludes my statement. It is evident that much work needs to be done before the question of Federal patent policy is resolved. You are to be commended for undertaking this study and holding hearings such as these. The record of these hearings should greatly facilitate the resolution on these questions.

I will be pleased to answer any questions. Thank you.