

FAX HEADER 1: BROWDY AND NEIMARK
FAX HEADER 2:

TRANSMITTED/STORED : JUL. 2. 2008 1:28PM
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REASON FOR ERROR
E-1) HANG UP OR LINE FAIL
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BROWDY AND NEIMARK, P.L.L.C.

ATTORNEYS AT LAW

PATENT AND TRADEMARK CAUSES

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IVER P. COOPER
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TELEFAX CONTROL SHEET

SENT TO:

JOE ALLEN

DATE SENT:

7/2/08

SUBJECT:

Delegations

No. of pages (including this cover sheet):

FROM:

Norm LATKER 202-628-5197

Remarks:

Joe

*Joe you are at the Crystal "GATE"
Not Crystal "City".
Enclosed is the original letter
to commence asking them to accept
the delegation. (I have the acceptance
letter somewhere in my files)
Read the entire letter - I think it
is helpful. Attached to the letter
are a list of authorities proposed
by the White House. Also attached
is a list I compiled later.
I also attached the first page of
EO 13526 (which is my work) that
integrated many of the authorities.*

CONFIDENTIALITY NOTE

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If this transmission is not well received, please advise us at our telecopier no. 202-737-3528 or by e-mail at mail@browdyneimark.com, or call our voice telephone no. 202-628-5197.

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RESULT PAGE

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BROWDY AND NEIMARK, P.L.L.C.

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JAN 12 1982

MEMORANDUM FOR: HONORABLE MALCOLM BALDRIDGE
SECRETARY OF COMMERCE

FROM: DAVID A. STOCKMAN D. A. S.
DIRECTOR

SUBJECT: Assignment of Lead Agency for
Implementation of P.L. 96-517

As you may know, we will soon issue a new OMB Circular which provides uniform implementing guidance for the Government patent policy section of Public Law 96-517, "The Patent and Trademark Amendments of 1980." This Act gives nonprofit organizations and small businesses a first right of refusal to title in inventions they have made in performance of Government grants and contracts. The Act takes precedent over approximately 26 conflicting statutory and administrative policies.

Since the Act is a fundamental change in the more traditional policy of Government ownership to inventions made with its support, we believe it is essential that a lead agency be designated to review agency implementing regulations; disseminate and collect information; monitor administrative or compliance measures; evaluate the Act's implementation; and recommend appropriate changes to OMB/OFPP. (A more detailed list of proposed lead agency functions and staffing is provided in Attachment A.)

The Department of Commerce seems the natural choice for assignment of this new lead agency function due to its prior experience and wide ranging interest in technology transfer, productivity, innovation and Government patent policy. In order to take full advantage of Commerce's experience and to support the expansion of the concept of P.L. 96-517 to all recipients of Federal research and development funding, the proposed functions include authority to collect information and recommend policy and regulatory changes that affect recipients beyond those covered by the Act.

11088

I hope you will accept the responsibility for the lead agency which we believe will be challenging and rewarding. I would appreciate your designating an official to work with my staff in developing the details necessary to assure smooth implementation of the Circular and the lead agency.

I have designated Don Sowle, the Administrator of the Office of Federal Procurement Policy as my staff focal point, who has responsibility for issuing patent policy regulations implementing P.L. 96-517.

The Director

Donald E. Bowle

SUBJECT: Decision Paper - Assignment of Lead Agency for
"Patent & Trademark Amendments Act of 1980" (P.L.
96-517)

Issue

Establishment of uniform regulations implementing the subject Act requires that OMB decide which agency should receive the lead agency assignment to oversee implementation of the law and regulations.

Background

The "Patent and Trademark Amendments Act of 1980" repeals 26 agency statutes and regulations and establishes a set of guidelines for giving universities, non-profit organizations and small businesses the right of first refusal of title to inventions resulting from performance of Government grants and contracts. As noted in the Senate Report accompanying the bill, "patent policies . . . represent a serious impediment to the effective transferral of new technologies." The bill represents "an important first step in turning around the undesirable productivity and innovation slumps that the United States is now experiencing."

On June 3, 1981, the Office of Federal Procurement Policy (OFPP) sought your decision about whether "uniform Government-wide regulations implementing the Act for both procurement and grant transactions (should) be issued by OMB." You concurred, and OFPP, with the support of Intergovernmental Affairs Division (IGA), issued Bulletin 81-22, "Patents--Small Business Firms and Non-Profit Organizations, setting forth interim regulations with public comments due by September 1. We have completed the assessment of comments received and will soon be submitting a revised Circular for your signature.

In order to complete preparation of a Final Circular, the issue of which agency should be assigned lead responsibility must be decided. On the earlier memo cited above, you selected the lead agency alternative rather than other approaches and suggested the Department of Commerce.

Discussion

The Act itself specifies no lead agency, nor does the legislative history indicate any desire for such a mechanism. The Act applies statutory requirements on all Federal agencies generally, with only limited citation of specific agencies for technical or pro forma functions. The following discusses the choices, then recommends that the Department of Commerce be assigned the role.

Relationship to Current Situation. Recently the Congress has stipulated a lead agency to implement a similar bill introduced by Senator Harrison Schmitt (R. -New Mex.). This bill (S. 1657) extends to all private organizations, regardless of size, the rights to patents as are now conferred on small businesses and non-profit organizations. There is a companion measure in the House (H.R. 4564) introduced by Congressman Allen Ertel (D. PA). The Schmitt bill designates Commerce as lead agency, while the Ertel bill cites a special coordinating council. The Administration has testified in support of the Schmitt Lead Agency concept, although reserving to the President the choice of which agency to serve as lead.

Also, the OMB Associate Director for Management has an initiative under way to designate or redesignate lead agency responsibility for all 61 generally applicable requirements tied to assistance programs. Assignment of a lead agency for the new patent requirement is fully consistent with that program.

Lead Agency Selection. To assess which agency should receive the lead, it is necessary to identify the functions that a lead agency would fulfill. In general, the agency would provide advocacy, and assess effectiveness of P.L. 96-517. It would review agency implementing regulations and procedures and disseminate information both within and without Government; evaluate the Act's implementation and recommend

make changes to OMB/DFPP; and oversee necessary administrative or other compliance measures. A more detailed list of proposed lead-agency functions is shown in Attachment A.

commercialization process. The Justice Department

In light of the foregoing, we have applied the following criteria to assessing which agency to designate:

1. Does the agency have existing responsibilities in any of the following areas:
 - a. Patents and patent law;
 - b. Technological innovation and commercialization;
 - c. Technology transfer;
 - d. Small business advocacy?
2. Does the agency have sufficient personnel skilled in the above areas, and in the area of grants and contract monitoring or cross-agency relations?
3. Is the agency likely to be supportive of the law?
4. Could the agency expand to take on a larger policy role regarding patents and innovation if the Administration should so determine?

Assessment of Choices. In summary, the following organizations show limited capacity to meet the above criteria:

- General Services Administration -- GSA has existing responsibilities in the areas of procurement and property management and regulations. It is also geared to deal with a wide variety of agencies. It is argued, however, that GSA is not well suited to leading the effort to translate intellectual property into new commercial enterprises. Further, GSA has neither R & D nor patent programs and would have difficulty in coordinating cabinet-level agencies outside of its Government licensing functions.
- Department of Justice -- This choice might allow any enforcement function to take on a certain formalistic strength. But our review does not suggest an appropriate affiliation within Justice, and there is reluctance to

attach a litigational mentality to implementing this law. The Department is unlikely to want new functions not directly related to its present law enforcement functions and would have little active interest in the commercialization process. The Justice Department has in the past taken a position against private ownership of patents resulting from Government sponsored R & D.

-- National Science Foundation and HHS. -- These agencies have a strong commitment to basic research and have close connections to the university community, where much basic research and invention takes place. But these agencies are less familiar with the business world, and would not be seen by the business community as an effective advocate of applied research and technology transfer.

-- OMB/-OFPP/-OSTP -- The Executive Office, primarily OFPP, has a statutory role in the law and is well situated to pressure operating agencies not in compliance. It can also serve as a prominent spokesman for efforts to promote innovation. While the Executive Office may be a suitable policy broker and "court of appeals," however, placing the daily implementation burden here would increase the number of operating functions to Presidential staff.

-- Small Business Administration -- This agency has a Chief Counsel for Advocacy with responsibilities in aiding small business innovation. It also has staff dedicated to funneling Government grants and contracts to small business. On the other hand, the agency has little experience with the university and non-profit communities; it also could not naturally expand to cover large businesses should such legislation be enacted. It would have limited clout among Cabinet-level departments.

-- Patent and Trademarks Office -- This office within the Department of Commerce deals principally with the technical merits of patent applications and has little involvement with patent ownership problems, innovation, productivity issues, or broad patent policy issues. The Department of Commerce has recently testified in behalf of strengthening PTO as part of an overall effort to strengthen its patent policy functions, but PTO in its present form could not encompass the lead agency role.

agency function be assigned to the Department of Commerce for the following reasons:

1. The Department has a natural scope and previous experience covering patents, commercial affairs and technological innovation. Critics might argue that it is less experienced in technology transfer and has limited involvement with the academic community (compared to NSF & HHS). However, the Department is moving to strengthen its ability to address issues of productivity and innovation. It is presently reorganizing its economic affairs activities to comprise an Undersecretary for Economic Affairs supervising an Assistant Secretary for Productivity, Technology and Innovation (PTI). Furthermore, OSTP recommends that the academic view, where Commerce is weak, could be strengthened via an advisory group utilizing its statutorily created FCCSET, as well as NSF.
2. The new Assistant Secretary (PTI) was conceived to use existing staff resources to concentrate on sector analysis of major industries. This would give little attention to technological innovation in the small business and non-profit sectors. As a Cabinet agency already overseeing staffs for small business, patents, promotion of commerce, and industrial analysis, however, the Department is best able of all the candidates to reassign or recruit sufficient staff for the proposed function.
3. Although it may be difficult to oversee such Departments as Defense and Health and Human Services, who may resist intrusion by a lead agency into disposition of their own substantial research programs, a Cabinet agency is more likely to succeed than are other candidates. Even the Executive Office would fail to provide the detailed daily oversight necessary to implement the law. The Assistant Secretary (PTI) could represent this function with suitable rank for most purposes, then have recourse, as necessary, through the Cabinet and working with Executive Office Staff.
4. Commerce has expressed support, in principle, for updating the patent system as an incentive to industrial productivity. The Department has recently requested more

resources to strengthen its patent licensing functions, and the Schmitt bill would definitely require Commerce to take the lead in patent reform.

5. The Schmitt bill exemplifies the possibility for Commerce to grow beyond implementation of the present Act into a broadened strategy for innovation and productivity. Of all the agencies, it is best equipped by size and mission to provide the "line" forces in such an effort.

Decision

OMB assign the lead agency function specifically to the Department of Commerce.

Concur; designation letter for OMB Director to sign to Secretary of Commerce is attached.

Not concur.

Other

Comments

cc:

Official File

DO Records

Mr. Sowle

Mr. Carpenter

OFPP:Chron/Read

OFPP:JCarpenter/12/21/81:bfh

Sample List of Policy Functions

A. Functions Specific to Public Law 96-517:

1. Review agency implementation to determine compliance with the Act and OFPP regulations.
2. Develop formats and procedures for the collection of utilization information from contractors and grantees. Collect and publish utilization information.
3. Provide, as determined necessary, recommendations to OFPP/OMB on changes to Government-wide implementing regulations.
4. As part of carrying out of functions of A.1-3, establish and chair an advisory group or groups, including representatives of the agencies and the grantee/contractor community and other private organizations.
5. Operate the NTIS Government licensing program under the authority of P.L. 96-517 and provide, when determined necessary, recommendations on improvements that could be made in this area.

B. General Functions

1. Review and evaluate the effectiveness of existing Government policies on the ownership of inventions by Government contractors, and make recommendations to OMB as to how such policies could be improved to more effectively stimulate innovation and productivity.
2. Collect and maintain statistics on Government patent policies and practices to provide a base for policy development and evaluation.
3. Establish and chair an advisory group or groups, including representatives of agencies and performers of Government research, to discuss issues related to Government policies on ownership of inventions made with Government support. FCSSET & NSF should participate.
4. Coordinate administration positions on proposed legislation related to ownership of inventions made with Government support.
5. Operate the PTO government-employee invention disposition program and provide, when determined necessary, recommendations on improvements that could be made in this area.

FEDERAL TECHNOLOGY MANAGEMENT POLICY DIVISION
AUTHORITIES RELATED TO THE TECHNOLOGY TRANSFER PROCESS CHART

"GOVERNMENT RESEARCH ESTABLISHMENTS" -- (GOGOs)

- P.L. 96-517 -- Basic invention ownership and Government licensing policies
- P.L. 98-620 -- Regulations for licensing Government-owned patents
- P.L. 98-622 -- Report on Government use of Statutory Invention Registration
- P.L. 96-480 -- Section 5 on innovation, including Stevenson/Wydler report and support of Section 11 on Federal laboratories.
- E.O. 10096 -- Policies and operation of Government employee inventor program
- H.R. 3773/
S. 1914 -- Model agreements for laboratory/industry collaboration
- Advice on evaluating commercial potential of inventions
- Bi-annual report on agency use of provisions

"UNIVERSITIES AND RESEARCH COUNCILS" -- (All Government-funded non-profit R&D organizations including GOCO contractors)

- P.L. 96-517 -- Basic policies
- Cir. A-124 -- OMB Implementing regulations, lead agency assignment
- P.L. 98-620 -- DOC implementing regulations, particularly for GOCOs, statutory lead agency assignment
- FAR -- Guide FAR implementation of 98-620
- Guide FAR implementation of Technical Data

"INVENTOR ENTREPRENEURS" -- (Small business)

- P.L. 96-517 -- Basic policies
- P.L. 97-219 -- Small Business Innovation Research Program, based on patent policies in 96-517
- P.L. 98-620 -- DOC regulations for small business
- FAR -- Technical data provisions

"CONTRACT RESEARCH AND RAs" -- All other R&D contractors

- OMB memo delegating DOC as policy lead agency
- Presidential Patent Policy Memorandum
- FAR -- Uniform provisions for all contractors including for-profit operators of GOCOs
- S. 64 -- Coordinate Administration support

"COMPANY LABORATORIES"

- P.L. 98-622 -- Study of employed inventors' rights

"FOREIGN SOURCES" ?

THE WHITE HOUSE

Office of the Press Secretary
(Los Angeles, California)

For Immediate Release

April 10, 1987

EXECUTIVE ORDER

FACILITATING ACCESS TO SCIENCE AND TECHNOLOGY

By the authority vested in me as President by the Constitution and laws of the United States of America, including the Federal Technology Transfer Act of 1986 (Public Law 99-502), the Trademark Clarification Act of 1984 (Public Law 98-620), and the University and Small Business Patent Procedure Act of 1980 (Public Law 96-517), and in order to ensure that Federal agencies and laboratories assist universities and the private sector in broadening our technology base by moving new knowledge from the research laboratory into the development of new products and processes, it is hereby ordered as follows:

Section 1. Transfer of Federally Funded Technology.

(a) The head of each Executive department and agency, to the extent permitted by law, shall encourage and facilitate collaboration among Federal laboratories, State and local governments, universities, and the private sector, particularly small business, in order to assist in the transfer of technology to the marketplace.

(b) The head of each Executive department and agency shall, within overall funding allocations and to the extent permitted by law:

(1) delegate authority to its government-owned, government-operated Federal laboratories:

(A) to enter into cooperative research and development agreements with other Federal laboratories, State and local governments, universities, and the private sector; and

(B) to license, assign, or waive rights to intellectual property developed by the laboratory either under such cooperative research or development agreements and from within individual laboratories.

(2) identify and encourage persons to act as conduits between and among Federal laboratories, universities, and the private sector for the transfer of technology developed from federally funded research and development efforts;

(3) ensure that State and local governments, universities, and the private sector are provided with information on the technology, expertise, and facilities available in Federal laboratories;

(4) promote the commercialization, in accord with my Memorandum to the Heads of Executive Departments and Agencies of February 18, 1983, of patentable results of

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federally funded research by granting to all contractors, regardless of size, the title to patents made in whole or in part with Federal funds, in exchange for royalty-free use by or on behalf of the government;

(5) implement, as expeditiously as practicable, royalty-sharing programs with inventors who were employees of the agency at the time their inventions were made, and cash award programs; and

(6) cooperate, under policy guidance provided by the Office of Federal Procurement Policy, with the heads of other affected departments and agencies in the development of a uniform policy permitting Federal contractors to retain rights to software, engineering drawings, and other technical data generated by Federal grants and contracts, in exchange for royalty-free use by or on behalf of the government.

Sec. 2. Establishment of the Technology Share Program.

The Secretaries of Agriculture, Commerce, Energy, and Health and Human Services and the Administrator of the National Aeronautics and Space Administration shall select one or more of their Federal laboratories to participate in the Technology Share Program. Consistent with its mission and policies and within its overall funding allocation in any year, each Federal laboratory so selected shall:

(a) Identify areas of research and technology of potential importance to long-term national economic competitiveness and in which the laboratory possesses special competence and/or unique facilities;

(b) Establish a mechanism through which the laboratory performs research in areas identified in Section 2(a) as a participant of a consortium composed of United States industries and universities. All consortia so established shall have, at a minimum, three individual companies that conduct the majority of their business in the United States; and

(c) Limit its participation in any consortium so established to the use of laboratory personnel and facilities. However, each laboratory may also provide financial support generally not to exceed 25 percent of the total budget for the activities of the consortium. Such financial support by any laboratory in all such consortia shall be limited to a maximum of \$5 million per annum.

Sec. 3. Technology Exchange -- Scientists and Engineers.

The Executive Director of the President's Commission on Executive Exchange shall assist Federal agencies, where appropriate, by developing and implementing an exchange program whereby scientists and engineers in the private sector may take temporary assignments in Federal laboratories, and scientists and engineers in Federal laboratories may take temporary assignments in the private sector.

Sec. 4. International Science and Technology. In order to ensure that the United States benefits from and fully exploits scientific research and technology developed abroad,

(a) The head of each Executive department and agency, when negotiating or entering into cooperative research and development agreements and licensing arrangements with foreign persons or industrial organizations (where these entities are directly or indirectly controlled by a foreign company or government), shall, in consultation with the United States Trade Representative, give appropriate consideration:

(1) to whether such foreign companies or governments permit and encourage United States agencies, organizations, or persons to enter into cooperative research and development agreements and licensing arrangements on a comparable basis;

(2) to whether those foreign governments have policies to protect the United States intellectual property rights; and

(3) where cooperative research will involve data, technologies, or products subject to national security export controls under the laws of the United States, to whether those foreign governments have adopted adequate measures to prevent the transfer of strategic technology to destinations prohibited under such national security export controls, either through participation in the Coordinating Committee for Multilateral Export Controls (COCOM) or through other international agreements to which the United States and such foreign governments are signatories.

(b) The Secretary of State shall develop a recruitment policy that encourages scientists and engineers from other Federal agencies, academic institutions, and industry to apply for assignments in embassies of the United States; and

(c) The Secretaries of State and Commerce and the Director of the National Science Foundation shall develop a central mechanism for the prompt and efficient dissemination of science and technology information developed abroad to users in Federal laboratories, academic institutions, and the private sector on a fee-for-service basis.

Sec. 5. Technology Transfer from the Department of Defense. Within 6 months of the date of this Order, the Secretary of Defense shall identify a list of funded technologies that would be potentially useful to United States industries and universities. The Secretary shall then accelerate efforts to make these technologies more readily available to United States industries and universities.

Sec. 6. Basic Science and Technology Centers. The head of each Executive department and agency shall examine the potential for including the establishment of university research centers in engineering, science, or technology in the strategy and planning for any future research and development programs. Such university centers shall be jointly funded by the Federal Government, the private sector, and, where appropriate, the States and shall focus on areas of fundamental research and technology that are both scientifically promising and have the potential to contribute to the Nation's long-term economic competitiveness.

Sec. 7. Reporting Requirements. (a) Within 1 year from the date of this Order, the Director of the Office of Science and Technology Policy shall convene an interagency task force comprised of the heads of representative agencies and the directors of representative Federal laboratories, or their designees, in order to identify and disseminate creative approaches to technology transfer from Federal laboratories. The task force will report to the President on the progress of and problems with technology transfer from Federal laboratories.

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(b) Specifically, the report shall include:

- (1) a listing of current technology transfer programs and an assessment of the effectiveness of these programs;
- (2) identification of new or creative approaches to technology transfer that might serve as model programs for Federal laboratories;
- (3) criteria to assess the effectiveness and impact on the Nation's economy of planned or future technology transfer efforts; and
- (4) a compilation and assessment of the Technology Share Program established in Section 2 and, where appropriate, related cooperative research and development venture programs.

Sec. 8. - Relation to Existing Law. Nothing in this Order shall affect the continued applicability of any existing laws or regulations relating to the transfer of United States technology to other nations. The head of any Executive department or agency may exclude from consideration, under this Order, any technology that would be, if transferred, detrimental to the interests of national security.

RONALD REAGAN

THE WHITE HOUSE,
April 10, 1987.

#

THE WHITE HOUSE

Office of the Press Secretary
(Los Angeles, California)

For Immediate Release

April 10, 1987

FACT SHEET

"Facilitating Access to Science and Technology"

The Executive Order on Facilitating Access to Science and Technology initiates a number of steps designed to promote cooperation between the Federal Government, State and local governments, industry and academia in cooperative research and the commercialization of research. These steps will:

1. Direct Federal departments and agencies to improve the transfer of federally developed technology and technical information to the marketplace by:
 - encouraging Federal laboratories to collaborate with State and local governments, universities and business, particularly small business, through cooperative research and development agreements;
 - licensing intellectual property developed through the cooperative research and development agreements or by individual Federal laboratories;
 - encouraging "science entrepreneurs" to act as conduits between Federal laboratories, universities, and the private sector;
 - implementing royalty-sharing programs for Federal inventors; and
 - developing a uniform Federal policy permitting Federal contractors to retain rights to software, engineering drawings, and other federally generated technical data, in exchange for royalty-free use by the government.
2. Direct the Secretaries of Agriculture, Commerce, Energy, and Health and Human Services and the Administrator of the National Aeronautics and Space Administration to select one or more of their laboratories to participate in the "Technology Share Program," involving multi-year joint basic and applied research with consortia of U.S. firms and universities.
3. Direct the President's Commission on Executive Exchange to assist Federal agencies in developing and implementing an exchange program whereby scientists and engineers in the private sector may take temporary assignments in Federal laboratories and scientists and engineers in Federal laboratories may take temporary assignments in the private sector.
4. Direct:
 - a. Federal agencies, when negotiating or entering into cooperative research and development agreements and licensing arrangements with foreign persons or industrial organizations directly or indirectly controlled by a foreign company or government, to give consideration in consultation with the

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(OVER)

United States Trade Representative to whether the country: offers comparable research and development and licensing opportunities for U.S. nationals and companies and protects U.S. intellectual property rights;

- b. the Secretary of State to develop a recruitment policy encouraging scientists and engineers from across the Federal Government, academia, and industry to serve in U.S. embassy assignments abroad; and
 - c. the Secretaries of State and Commerce and the Director of the National Science Foundation to develop a central mechanism for the prompt and efficient dissemination of science and technology information developed abroad to users in Federal laboratories, academic institutions, and the private sector on a fee-for-service basis.
5. Direct the Secretary of Defense to identify within 6 months a list of funded technologies that would be potentially useful to U.S. industries and universities and to then accelerate efforts to make these technologies more readily available.
 6. Direct Federal agencies to examine the potential for including the establishment of university-based research centers in engineering, science, or technology in the strategy and planning for any future R&D programs. Such centers would be jointly funded by the Federal Government, the private sector, and, where appropriate, the States and would focus on areas of fundamental research and technology that are both scientifically promising and have the potential to contribute to the nation's long-term economic competitiveness.
 7. Direct the Director of the Office of Science and Technology Policy to convene within 1 year an interagency task force of Federal research agencies and their laboratories to assess the progress in transferring technologies from Federal laboratories and to develop and disseminate additional creative approaches to technology transfer.

The President's intention to issue an Executive order was announced in January as part of his 43-point Competitiveness Initiative.

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THE WHITE HOUSE

Office of the Press Secretary
(Los Angeles, California)

For Immediate Release

April 10, 1987

STATEMENT BY THE PRESIDENT

I believe a vigorous science and technology enterprise involving the private sector is essential to our economic and national security as we approach the 21st century. Accordingly, I have today issued an Executive Order "Facilitating Access to Science and Technology."

It is important not only to ensure that we maintain American preeminence in generating new knowledge and know-how in advanced technologies, but also that we encourage the swiftest possible transfer of federally developed science and technology to the private sector. All of the provisions of this Executive order are designed to keep the United States on the leading edge of international competition.

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