January 18, 1978

The Honorable Griffin Bell
Attorney General
U.S. Department of Justice
Justice Building, Room 5111
Constitution Avenue
Washington, D.C. 20530

Dear Mr. Bell:

Over a number of years, the Department of Justice has had a consistent stand with respect to government patent policy. This consistent position has apparently derived from a 1947 Department of Justice report (which had no operational data) on government patent policy. I believe you will find after careful study that the position of the Department of Justice in government patent policy has been, and is, in error, will achieve greater, not lesser, industry concentration, will result in much less utilization of government research results for the benefit of the public, and in particular will be detrimental to small business. I do not believe any university that has attempted to license its research, nor any small business that has attempted to develop a government research-derived invention, will be in disagreement with the foregoing. Let me explain.

By way of background, I am responsible for a program at a university involving a directed effort to obtain utilization of results of the extensive research program at that university. Much of that research is funded by various agencies of our government. Clearly, we also hope that this utilization program may also bring in royalty income, which income will go back into education and research, with the potential for producing yet other research advancements for the benefit of the public, in a self-regenerative manner. As a university is not a manufacturer, it must make arrangements with industry to further develop basic research results to products and processes for the public. It is from this base of experience that I write.

Very simply, we have found that with rare exception, we are only able to encourage development at risk by industry if we are able to offer the incentive of <u>exclusive</u> rights in an invention. Turning to inventions conceived under government research with private industry, the same mechanisms apply. That is, the patent incentive, enabling a company to justify expending its risk capital (100 times the investment of the invention) to attempt to develop a commercial product or process, is absolutely critical. A market dominating company, however, can freeze entry to its market by means of

government research-derived technology by advocating the same position as Justice--i.e., non-exclusive access to government technology.

In the current hearings of the Small Business Subcommittee chaired by Senator Gaylord Nelson, it was argued by Assistant Attorney General John H. Shenenfield and others that there was "no evidence" to support the view that patents from government funding should not be made freely available on a non-exclusive basis to prevent "windfall profits," "concentration of economic power in large corporations," "exorbitant monopolistic profits," etc. To the contrary, for evidence one need only peruse the hearing record of H.R. 8596, "Uniform Federal Research Utilization Act" of 1977. But where is the Department of Justice's evidence that its advocated policy will not result in increased industrial concentration and also low utilization of the fruits of the taxpayers' research?

A particular evidentiary item is the report of the Comptroller General to Congress entitled "Problem Areas Affecting Usefulness of Government-Sponsored Research in Medicinal Chemistry," Report No. B-164031(2). This report, dated August 12, 1968, noted that during the period of years from 1962 to 1968, only nonexclusive rights were allowed, and no new drugs were developed from research covering that period. There were certainly no "monopolistic profits" during that period, but neither did the taxpayers benefit from the research.

A few years ago I wrote to the then Assistant Attorney General of the Antitrust Division with regard to the position that the Department of Justice was taking on government patent policy at that time and presented arguments supporting a contrary viewpoint. The response from the Department of Justice was simply to quote from Admiral Rickover. If the Department of Justice's position is correct on this matter, it should have factual evidence, rather than to simply rely on the statements of Admiral Rickover.

Ironically, what is needed are cases where government contractors have been able to make "monopolistic profits" from sales in the commercial sector as a result of patent protection derived from government research. Such cases would encourage others that there is indeed something useful in results of government research. Are there any cases of which the Department of Justice is aware where patent rights derived from government research have set the price of goods to the public, rather than competition, and where the profit was disproportionate to the risk capital contribution of the company in making the technology available? The problem at this juncture is not excessive profits from commercializing patented government research results, but minimal commercialization and profits.

As federal research has been increasing and private research has been decreasing, small companies, at least in high technology, are finding the government is their greatest competitor. Market dominating companies, with the nonexclusive patent policy favored by the Department of Justice, can treat government technology as a large patent pool, with no threat to their market dominance. Even growth of large companies, however, seems now to come not through new products and processes from research but through acquisition and merger.

An important factor to consider is that if only nonexclusive licenses are available, then foreign industry has equal advantage to U.S. industry in utilization of the results of U.S. government funded research. As innovation in the U.S. is more dependent upon the personal incentive than that of other countries, you may find that the nonexclusive policy benefits not only large corporations but more the foreign competitors than U.S. industry. To check out this assertion, you might contact our National Technical Information Service to determine just who are their best customers. That foreign companies know how to play the game is illustrated by these recent occurrences. After we issued an exclusive license to a variation of an existing instrument to a small company, we were challenged by a foreign manufacturer with an argument that "how could your university give exclusive rights to an invention from public-funded research?" For the same invention, another foreign firm (the market leader) obtained from the NSF, through a Freedom of Information Act request, our research files. We are now in patent interference with that foreign firm, and the invention is yet to be developed.

It is well reported that innovation in the U.S. is in sharp decline as well as the U.S. market share in technology-intensive products, which has been a vital segment of our foreign trade. Is it not an appropriate time for the Department of Justice to take a fresh look at its role in the problem, in particular the validity of its position on government patent policy?

Very truly yours,

Niels J. Reimers
Manager, Technology Licensing

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