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Mr. Robert L. Bartley
Editorial Page Editor
THE WALL STREET JOURNAL
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Dear Mr. Bartley:

This is in regard to an article by Edward E. David that appeared on your editorial page Friday, Aug. 2, entitled: Moon Technology - Five Years Later.

This was an excellent article and did point up some of the problems in transferring technology from Federally sponsored research into the channels of commerce. Mr. David was correct in his observation that, for all of the billions of dollars that have been spent, there is darn little to show that is of tangible benefit to the taxpayer.

Many companies want and need new products and processes that might aid or expand their business. Many would like to take advantage of the wealth of technology that has been generated by the space age research. The problem is: How to do it?

One serious obstacle to such transfer, that was barely touched on by Mr. David, has to do with the handling of patent rights. This is one with which I am personally familiar. I am a patent lawyer, have been for 18 years, and for the last 10 years have been involved in the licensing of inventions that have evolved from University Research. Much, if not most, of this University research has been sponsored by the Federal Government.

On numerous occasions I have tried to interest a company in taking on the development and marketing of a University Invention. The reaction I frequently have received goes something like this: "Look, we like your invention and would like to do something with it, but if it is going to be tied up in a lot of damn Government red tape, we are not going to waste any of our time or money on it.

There are several agencies of the Federal Government that sponsor research at the Universities. Each agency has a different patent policy, and every one places some restrictions on what a University can or cannot do with an invention that evolves from such sponsored work. Unless a particular University has some sort of policy or program of its own for handling patents, the Government generally takes title to the inventions. This in spite of the stated policies of two Presidents (Kennedy, 1963 & Nixon, 1971) to ease up on this practice.

The controversy over whether the Government should take title or only a license to inventions it sponsors has been waging for years. Most of the fight has been with companies that are very protective of their proprietary rights. The Universities have been caught in the middle of this controversy. For the most part, they have no vested business interest to protect, and usually give in to the Government on patent rights.

This is a shame too, because there are a great number of useful inventions that are not even reported because the investigator does not want to fight the red tape.

The question of whether the Government should take title to an invention at all is an interesting legal one. The Constitution gives the Federal Government the power to grant patents - - - but to itself?

When the Government does take title to a patent, that is a little like you or I writing a check to ourselves on our own account. There may be a reason for doing so, but it is silly to think anything really tangible is created thereby.

The patent only gives the patentee the right to exclude others from making, using or selling the invention. But the Government does not exclude anyone; or at least did not, until it started to grant exclusive licenses. If the Government is going to continue to do that, sooner or later, it is going to have to be prepared to take the next step, i.e. to sue infringers. Beyond that, any suit for infringement is going to have to prove damages. How is the Government damaged by such infringement? The ultimate conclusions become absurd.

The fundamental notion prevails throughout many Federal agencies, University communities, and with some members of Congress that because Government money was spent on an invention, it should be freely available to all. This notion should be subjected to close scrutiny to see if it really serves the public interest.

Firstly, the idea that everything should be thrown into a communal storehouse where it is available to all was tried by the Pilgrims. It did not work then and will not work now, and for precisely the same reasons.

Secondly, assume that the invention is a new computer, a new nuclear reactor, or some such and is properly patented. Now you and I and the milkman and your barber all have the right, presumably, to a royalty free license under that patent. Now that we have that right, what do we do with it? The fact is that such a right is meaningless to us as individuals and such an invention may benefit only a very few companies. If they want it, why not let them pay for it? Why should we?

Thirdly, what is the effect on investment into a new venture that is freely available to all? As an example, the FHA insures home mortgages. Suppose the FHA were to write in a restriction that a person planning to build a home with a FHA insured loan must agree to allow any hippie or derelict to move in and live there at his discretion. How many people would build and maintain a home with that kind of restriction?

Who is going to spend money to develop and market an invention with that sort of restriction? Most inventions are a far cry from being a marketable product.

Beyond these practical considerations, there are some philosophical connotations to the word free. Everyone knows there is no free lunch. Anything that is free is often considered to be free because it is not worth anything.

Who is going to tell a research investigator who has struggled for years to solve an important problem that his solution is not worth anything?

Another unfortunate aftermath of a Government policy that is too restrictive is that it may actually encourage dishonesty.

An inventor who has worked long and diligently to come up with an important solution may be placed in the dilemma of reporting it to the Government for zilch, or taking it out the back door.

If he were to choose the latter course, who is to blame?

As I said above, the battle with the Government over patent rights has been going on for years. The Department of Defense finally reached an accord with Industry on this. The companies best equipped to provide the goods and services the DOD needed were generally the ones most protective of their patent rights. The Government gave in a little.

The AEC has always had a very restrictive patent policy. There were, presumably, and still may be, National Security reasons for this. However, I believe it is significant that, some 30 years later, less than 5% of our electricity is generated by nuclear power. This after all the hullabaloo over the benefits we were going to realize from nuclear energy.

The first NASA act carried patent restrictions similar to those of the AEC. There was a real howl over this because most of the contractors dealing with NASA had become used to the DOD policy.

These brief reflections are not without a purpose. The current Energy Bill before Congress, purportedly, carries some of the same restrictive and regressive patent provisions of the past. If you and I are to see any long range relief from the energy crisis, why adopt policies tailored to discourage innovation and private investment?

Lest I sound totally anti-Government on invention matters, let me say that Government support of inventions in the past has been productive. Morse's first telegraph line was built with Government support. The Wright Brothers' airplane received considerable support. Even the railroads were built on land granted by the Government.

I have tried to place in perspective the effects of Governmental policy on the workings of the patent system as applicable to Universities. The Universities are really in an awkward position with regard to patents. They do an enormous amount of scientific research - in excess of a billion dollars annually; but no University is in a position to capitalize directly on the inventions that evolve from such research. That is, no University is going into the business of manufacturing and selling products. The only real outlet for the results of their creative work is by way of a license to a company. This requires some attention to patent matters if anything viable is to be transferred.

As a closing point, I wish to say that we, as taxpayers, have great National resources in the talents of the University research investigators and in their facilities. I only wish that these resources might be utilized as effectively as possible for the benefit of the public. This requires an environment in which transfer of new knowledge to Industry can take place in an orderly fashion. This can be done best by returning to the principles governing inventions as set forth in the Constitution. That is, of granting patents to inventors or their assignees rather than to the Federal Government.

Thank you for reading this far. This is much longer than I had intended. If anything I have said is of interest to you, please use it as you wish.

Very truly yours,