"Federal patent giveaway" draws fire

Sen. Nelson, other critics argue that rights to an invention developed privately at federal expense should be retained by the government

"I believe in free enterprise and in a competitive system. But the proposal that the government spend large sums of money for research and development and then hand the patents stemming from such research over to private contractors is not consistent with free enterprise." Surprisingly, that personal opinion comes from the chief patent counsel of Firestone Tire & Rubber Co., Stanley M. Clark.

Clark is talking about the apparently common practice by government agencies of dispensing large amounts of R&D money to private firms—the Defense Department is a good example—and then allowing contractors to retain exclusive rights to any products or processes that result. Apparently, too, many government contractors insist on such arrangements. They argue that without assurance of patent rights, much government-sponsored R&D is just too risky financially.

Big money is at stake. Indeed, federal funding for R&D has grown from a relatively small $7.5 million in 1940 to a hefty $26 billion this past year (the increase, of course, was fueled by several wars along the way). These federal funds account for about 65% of all domestic R&D.

Although much of the federal R&D dollar goes toward military and related areas (such as space research), the fruits of government-financed R&D often find their way into the public sector. For example, Louisiana Democrat Russell B. Long, chairman of the Senate Appropriations Committee, can recite a litany of government-sponsored research projects that have benefited civilians. Sen. Long conceded at Small Business Subcommittee antimonopoly hearings, chaired by the ever-interested Gaylord Nelson (D.-Wis.), that "the government plays an important role in bringing about innovations much earlier than might normally be the case."

Yet Long told Nelson that there is increasing concern among government officials and Congressmen that the taxpayers might not be getting their money's worth from federal R&D spending. In other words, Long declares, "Inventions should belong to those who pay to have them created." This principle has been applied by Congress to several agencies, including the Energy Research & Development Administration (now part of the Department of Energy), the Agriculture Department, and the National Aeronautics & Space Administration, among others, which in theory must retain full rights for any invention they pay for.

However, even where rights to an invention developed at federal expense are to be retained by the government, contractors can seek a patent waiver that will allow them to keep exclusive rights. Congressional critics of this so-called federal patent giveway, such as Sen. Nelson, claim that prohibitions aside, the way rules are currently administered actually encourages contractors to ask for, and get, patent waivers from agencies.

So far, there is no uniform federal law regulating the patent agreements that federal agencies enter into with their contractors, which is the reason for Nelson's hearings in the first place. However, there have been policies enunciated by several previous Administrations that outlined when an agency should take title to an invention and when it should license the invention to all interested parties.

Assistant Attorney General John H. Shenefield, who heads up the Justice Department's antitrust division, told the Nelson subcommittee that the Carter Administration currently is working up its own government patent policy and that the White House position is expected to be unveiled by the end of this month. Shenefield and his antitrusters are helping write the new Administration policy, and doubtless it will embody the concept of as few patent waivers as possible. Observes Shenefield, "There are several arguments in support of this policy. When public monies are spent, the public as a whole should benefit, as it would from the availability of nonexclusive, nondiscriminatory licenses to qualified applicants, resulting in the maximum availability of the invention. . . . Government control of inventions . . . assures that they will be used to promote the public interests, rather than the not necessarily synonymous interests of private parties."

Although Shenefield does not believe that the Justice Department should be the federal policeman for granting patent waivers to contractors, he suggests that a uniform procedure for granting waivers should be institutionalized through the agencies. Such a procedure would include public hearings similar to those used in agency rule-making that would give interested parties, for example, public interest groups, an opportunity to intervene. Sen. Nelson apparently is not impressed with Administration policy statements. He asks rhetorically, "Are we going to continue to lather and never shave?"

But even if federal restrictions on granting exclusive patent rights to federal contractors are tightened substantially, federal contracts are not likely to go begging. After all, firms receive significant intangible benefits from federal contract research—benefits such as the technical know-how that comes from intimate participation in specialized R&D, better utilization of R&D capacity (particularly in slack business cycles). And in the words of Firestone's Clark, "In any event there are no risks involved—the government assumes all of those."

Chris Murray, C&EN Washington

Shenefield: uniform procedure needed

Nelson: lather and never shave