The parties manufacture industrial measuring equipment. Appellee wishes to register "Accura-Flo" for a metering flume for the measurement of sewage and industrial waste; appellant owns several stylized registrations of ACCURAY for industrial measurement and control equipment and systems for measuring such things as thickness, density, fluid level, moisture content, and other industrial "process variables." The fact that the goods of both parties are sold to the same class of purchasers, which includes construction and consulting engineers, sewage and industrial waste plant engineers, and public agencies, does not preclude concurrent use of the marks, the majority says.

Considering the marks in their entireties, there are "substantial differences in sound, appearance, connotation, and 'commercial impression,'" even though each mark suggests the idea of "accuracy." Under ordinary circumstances, such differences "might not be sufficient" to insure proper designation of source of origin, the court concedes, but finds that purchases of goods bearing the marks in suit are apt to take place "under conditions calculated to insure care," and that "purchasers would inevitably be aware of the actual source of the goods."

Judge Baldwin, "respectfully" disagreeing, would reverse the board decision on the authority of Torr X-Ray Corp. v. Sierra Engineering Co., 471 F.2d 1247, 176 USPQ 342 (CCPA 1973), 114 PTCJ A-6, which upheld an opposition to RADIFLUOR for flouroscopic testing units by the owner of RADIFLO for leak testing apparatus. That case, too, Judge Baldwin notes, involved "engineering firms" as purchasers of the trademarked goods; nevertheless, the court rejected the argument there that technical expertise would prevent confusion.

- 0 - Attachment 2

"TECHNOLOGY TRANSFER" IS
SUBJECT OF RECENT PROGRAM

A conference on "The Availability of New Technology to Industry from American Universities and Technological Institutes" was held April 2-5 at the Research Institute of the Illinois Institute of Technology. One of its purposes was to respond to criticisms by many of the nation's leading scientists that industry, universities, and Government have not cooperated "in developing civilian technology in the way they produced defense, space, and atomic tools."

Norman J. Latker, Chief of the Patent Branch, Office of General Counsel, Department of Health, Education, and Welfare, said that the "sheer magnitude of Government support of research and development at universities demands evidence of useful results if it is to be continued in the prevailing competition for the federal dollar." (In fiscal 1970, approximately one quarter--$3 billion--of the Government's total expenditures for R&D outside its own laboratories "went in the form of grants and contracts to universities.") In his estimation, therefore, future emphasis will be on the "identifiable" results of such programs, i.e., the justification for their existence.

"I am not at all convinced that because inventive results are not readily identifiable as being generated with Government support that meaningful bases of scientific information upon which industry builds are not being generated," said Mr. Latker. Nonetheless, "it appears evident that a better job of transferring technology from the universities can and should be accomplished."

The Government's role in technology transfer is currently being studied by the University Subcommittee on Patent Policy, an interagency group ultimately responsible to the Federal Council for Science and Technology. Although the review by the subcommittee is not yet complete, Mr. Latker discussed some of the obstacles to effective technology transfer that have been identified in the course of study.

"First, and thought to be the most important, was the conclusion that universities do not generally have an adequate management capability to facilitate the transfer of their inventive results to industrial concerns that might make use of them."

Second, there is a "not-invented-here" syndrome--the tendency of industry to develop the fruits of "in-house" research rather than university research input.

Third, there is uncertainty over ownership of inventions made at universities because of "collaborative relationships."

Fourth is the problem of contamination. "As used by industry and institution investigators, 'contamination' means the potential compromise of rights in proprietary research resulting from exposure of an organization to ideas, compositions, and/or test results arising from Government-sponsored research." For example, an invention made at an institution under a Government-funded research program is looked into by a company doing parallel research. "If the company incorporates into its research program some of the research findings of the institution and then develops a marketable product patentably distinct from the institution's invention, the company fears that the Government is in a position to assert claims to their product."

[Text] To overcome the above barriers to technology transfer, it appeared essential to the subcommittee that the Government persuade universities to provide a management capability within the institution that will serve as a focal point for receipt of the inventive results of institutional research for later dissemination by itself or other management organizations to those industrial concerns most likely to utilize such results. It was the conclusion of the subcommittee that this might be accomplished by guaranteeing to universities at the time of funding patent rights in Government-supported inventions in return for establishment of a management capability created to undertake transfer of the inventive results of university research. The guarantee of patent rights to the university carries with it the right to license commercial concerns, thus creating the incentive necessary for development in those situations where collaboration would not otherwise be accomplished and lessening or eliminating industry fear of contamination. Further, under such a policy, collaborative arrangements could be made wherein industry's participation is protected before it is even clear whether or not inventions will be made. Such prior arrangements should minimize the problem of the "not-invented-here" syndrome, since a collaborator would not be viewed as an "outsider".

As noted previously, the subcommittee identified the problem as finding the means to induce voluntary integration into a system that results in technology transfer. We believe our recommendation provides such an inducement for all three of the parties involved through recognition of their equities.

First, the Government, as the representative of the public, would have created the atmosphere necessary to transfer the results of university research to the marketplace where the taxpayer may utilize it. Of course, such end products will increase the nation's potential to employ labor and raise the level of its exports. Further, industrial participation will increase the Government's ability to focus public funds on the kinds of research and development which have high, long-run social value, but could not be undertaken by industry alone due to the risk involved and the initial poorly defined profit opportunities. Rights will be reserved under the policy to assure against individual abuse of the privileges retained by the university and industry.

Second, the university will be permitted to recover royalties through the licensing of their inventions. The policy requires that a substantial portion of royalty receipts be utilized for educational or research purposes, with a lesser portion available for distribution to inventors. Further, ownership in the university will permit the University to pursue or direct development of the invention as it deems appropriate.

And third, industry's investment can be protected through some exclusivity.

The basic recommendations of the subcommittee are still under review. However, at the present time, the Department of Health, Education, and Welfare (DHEW) and the Department of Defense (DOD) have policies similar to that recommended, which guarantee selected institutions who have previously demonstrated a patent management capability and/or a patent policy considered in the public interest a first option to administer title to inventions generated with Department support, subject to conditions considered necessary in the public interest. The DOD policy extends only to inventions that are generated under grants and contracts that do not fall within the provisions of Section 1(a) of the President's Statement. DOD grants and contracts with institutions that are identified as falling within Section 1(a) contain patent clauses that give the Government the first option to any inventions made in performance of the contract.

I have been advised that the National Science Foundation will within the next few weeks issue regulations which will substantially follow the recommendations of the subcommittee. Further, I am advised by NASA that NASA regulations presently provide for Institutional Patent Agreements (IPA's) with universities NASA deems to have adequate patent management capabilities. I understand that both agencies are willing to entertain requests for IPA's.

I think it is important to note that the total amount of funds administered by the above four agencies for use in funding university research approximates $2 billion of the $3 billion noted above. The remaining $1 billion is administered by the remaining Executive agencies, the largest portion of which is $630 million being administered by A. E. C.

Although I cannot predict how each of the four above agencies will treat individual university requests for IPA's, I believe it fair to say that the concept of IPA's is here to stay and grow because it basically reflects a grass-roots desire * * *.

Before closing, I would like to pass to a slightly different topic [the rapid growth of Japan and West Germany]. I believe there is a growing body of evidence that some of the products generated by these countries are the outgrowth of university technology. It seems to me that the IPA program could be a partial response to this problem if it encourages the timely filing of both domestic and foreign patent applications. Of course, the filing of foreign patent applications is an expensive matter which could be resolved by a meaningful Patent Cooperation Treaty, which I encourage you to support whenever possible. [End Text]

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CCPA AFFIRMS AWARD OF PRIORITY DESPITE ALLEGED DEFECTS IN OATH

While it may well be better practice for the Patent Office to dispose of questions concerning oaths before final determination of priority in an interference proceeding, a divided U. S. Court of Customs and Patent Appeals declares that this need not always be done. Since the sufficiency of the reissue oath in this case was not "ancillary to priority," the court feels justified in upholding a priority decision despite unanswered questions about the oath. (Techler v. Norstrud, 4/5/73)