GOVERNMENT PATENT POLICY

HEARINGS

BEFORE THE

SUBCOMMITTEE ON

PATENTS, TRADEMARKS, AND COPYRIGHTS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

EIGHTY-NINTH CONGRESS

FIRST SESSION

PURSUANT TO S. RES. 48

ON

S. 789, S. 1809, S. 1899, and S. 2326

PART 2

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developmental work in the future. Applicants should have available to them, we believe, the same kind of administrative hearings and judicial review provided for in sections 5 and 6 of S. 1809, in the event of agency denial of a reasonable period of exclusivity.

Thank you Mr. Chairman and members of the subcommittee, for this opportunity to present the statement to you.

Senator McClellan. Thank you very much, Dr. Zucker. That is a very interesting statement. I appreciate, too, your suggestion about what amendments would be advantageous and beneficial to the proposed legislation.

Mr. Zucker. Thank you.

Senator McClellan. Off the record.

(Discussion off the record.)

Senator McClellan. Very well. Our next witness?

Mr. Brennan. Mr. Robert F. Conrad.

Senator McClellan. Will you come around, please, Mr. Conrad?

Mr. Conrad. Yes, sir.

STATEMENT OF ROBERT F. CONRAD, REPRESENTING TEKTRONIX, INC.; ACCOMPANIED BY THE VICE PRESIDENT, WILLIAM WEBBER, AND J. RUSSELL VERBRYCKE III, AN ATTORNEY

Senator McClellan. All right, Mr. Conrad, if you will identify yourself and also your associate, then you may proceed. I see you have a prepared statement.

Mr. Conrad. Yes, sir; I also wish to make additional comments.

Mr. Chairman, I am Robert F. Conrad, a patent attorney with offices at 815 Connecticut Avenue NW., Washington, D.C. I am a member of the bar of the District of Columbia, and of the American Patent Law Association. My practice is concerned almost exclusively with patent litigation. My appearance is on behalf of Tektronix, Inc., a manufacturer of electronic equipment, including oscilloscopes, which are electronic devices designed for precision measurement.

On my right is Mr. Verbrycke, who is an associate in my office. We also have with us, in the back row, Mr. Webber, who is an officer of the Tektronix, Inc.

Senator McClellan. Very well, you may proceed, Mr. Conrad.

Mr. Conrad. Our comments will be directed exclusively to section 8 of the bill S. 1809.

We have comments of two kinds about the provisions of section 8. The first is with respect to the technical language of the bill.

It appears to us that under the present language, the purposes which the committee have in mind may not be accomplished; and secondly, we object to some of the philosophy of section 8, particularly that which enables the Government to bring suit on Government-owned patents against citizens of the United States and collect damages.

First, with respect to the technical matters, which I think can be discussed with reference to the first sentence of section 8(b): You will notice that the first sentence of section 8(b) provides that: "Each agency head may grant an exclusive or nonexclusive license for the practice of any invention for which he holds a patent acquired under this act on behalf of the United States."

Now, at the moment, the Government owns somewhat more than 10,000 patents. Those patents are presently existing, and their average remaining life may be in the neighborhood of 8 years.

Senator McCLELLAN. This is the overall total, is it? The aggregate?

Mr. CONRAD. Yes, sir.

Senator McCLELLAN. This is not in just one specific field?

Mr. CONRAD. It is the overall, Your Honor. The last statement I saw was in the neighborhood of 13,000.

Now, of course, section 8(b) obviously is directed to the administration of patents which are owned by the Government. It details the kind of license that may be granted under the act.

The point which we wish to bring to the committee's attention is that the present language of the act would leave completely in limbo the patents presently owned by the U.S. Government, which number well over 10,000.

Senator McCLELLAN. When you say "the act" you mean the bill that I introduced, S. 1809?

Mr. CONRAD. Yes, sir; I meant the bill S. 1809.

Senator McCLELLAN. Yes.

Mr. CONRAD. We assume that it was intended that the provisions of 8(b) apply to Government-owned patents, presently owned as well as those acquired in the future. This appears in the technical amendments which would repeal certain administrative rules with respect to patents now owned by particular departments.

So, if it was the intention of the committee to bring within the ambit of 8(b) the presently owned patents of the Government, which, of course, will represent the real problem over the next several years, then some amendment to the present language will have to be made.

Now, another technical aspect with respect to section 8 is that the sentence which I have read also provides that the agency head may grant an exclusive license. Ordinarily an exclusive license is literally what the word "exclusive" means, and the agency head, under the present language of 8(b), would be entitled to, if not actually required to, grant a license which would even preclude any rights in the Government.

For example, under this section, the agency head might grant an exclusive license. That exclusive licensee might later turn around and insist that the Government pay a royalty on the very patent which had been exclusively licensed by the Government, the development of which had, of course, been fully paid for by the Government.

This result could be avoided simply by saying that the exclusive license which the agency head is entitled to grant shall be subject to the same kind of a reservation which is described in section 3(b)(5) of the bill.

Those are the only two comments we have with regard to the language of the bill.

The provision that we are most concerned with is made in the last two sentences of section 8(a). These sentences read:

> Each agency head shall take such action as may be required to protect and preserve the property rights of the United States in any patent so issued to him. Upon request made by any agency head, the Attorney General shall take such action as he shall determine to be required for that purpose.

Now, I think this might be regarded, really, as a rather significant piece of antitrust legislation. What this provision represents is a departure from historic Government patent policy. Except for one single recent instance, the Government has never brought suit against any of its citizens for infringement of Government-owned patents. This language which I have read would seem to authorize such suits.

Now, we know that suits on Government-owned patents could be—and according to the present policy of the Department of Justice would me—used to actually regulate competition in an industry, and suits on such patents could be usd to regulate competition within industry, even thought that industry or that particular company in the industry was not involved at the moment in anything that was in violation of present antitrust law.

In other words, this provision would give the Department of Justice a new and additional tool with which to regulate competition in any given industry.

The regulation, of course, would be achieved by filing an infringement action against a particular company, and not against others in the industry, with the idea that it would saddle onto that particular company the requirement to pay a royalty which its competitors would not be paying.

It would, of course, undertake to do this only when it thought that adding such a royalty to the costs of one company would result in equalizing the competitive situation in that company's industry.

Now, this is not a speculation on my part. This is the position which the Department of Justice has actually taken in a case which is now pending in the U.S. Court of Claims.

Another aspect of giving the Government the right to sue on its patents is that it really sets up a very unfair contest. For example, there is a very clear Supreme Court law on the proposition that the Government is not subject to any statute of limitations.

Now, with respect to authorizing the Government to bring suits on its patents against its citizens, that rule would have this effect: The Government could today file suit in a U.S. district court and ask for damages for infringement of a Government-owned patent which, say, might have expired as many as 30 years ago.

It could, for example, under the provisions of this section authorizing infringement actions, go back and sue, for example, the electronic companies such as Westinghouse, RCA, and General Electric, for infringement of Government-owned patents which occurred during the last war.

The fact that it has delayed suing for so long a time has led these companies, and perhaps also its policy of not suing on any of its patents for so long a time, into the reasonable belief that it would never sue on them, could not be raised as a defense in any such action, because another firmly established rule of law is that an estoppel or laches cannot be urged against the Government.

Consequently, we would suggest some change in language in section 8 which would put the onus of suing for infringement of any Government-owned patents on the exclusive licensee. This would then set up the usual situation one faces in court in a patent litigation case. In connection with a free, nonexclusive license, of course, the Government

couldn't show any damages, even if it did sue for infringement, so it is unlikely that such actions would be brought.

In connection with a royalty bearing nonexclusive license, a complaining licensee might be authorized to bring the suit.

But, in any event, it seemed to us that this provision, section 8, should be amended in some way that takes the Government out as a litigant in patent cases involving Government-owned patents on which infringement suits are brought, simply to avoid the inequities which would follow from the Government participating as a plaintiff.

Now, one other comment we have about section (b) is that it provides that licenses such as are authorized by portions of the provision should be granted with or without the payment of royalty.

Now, it seems that the suggestion that the Government might in some cases want to collect a royalty was simply based on the thought that it would be a sound business practice to do so, it would be prudent as a business matter to collect a royalty where the Government could collect a royalty practically.

We think this overlooks a rather basic consideration. Of course, the Government should follow prudent business practices wherever it can, but we think that such practices have to give way where they conflict with some basic governmental principle such as a provision, for example, in the Constitution.

Now, the patent provision in the U.S. Constitution has, of course, been commented on a great deal by the courts, and over a long period of time the courts have analyzed its purpose as being to increase the storehouse of knowledge which is freely available for all to use. The particular way in which the constitutional provision is written seems to require this interpretation.

Now, of course, when the Government charges a royalty for use of patented knowledge, it is to that extent discouraging the use of that knowledge, and it certainly is not increasing the storehouse of knowledge which is freely available for all to use. To that extent, where it charges a royalty, it is taking a position which seems to us to be inconsistent with the purposes of the constitutional provision.

Also, it is said that the reason for providing for the issuance of exclusive licenses is to encourage the use of these ideas which might otherwise die on the shelf. That, of course, is a laudatory purpose. But consistently with the purpose of the Constitution, it could be even still furthered by omitting to charge a royalty for the exclusive license. That would be, of course, an even further inducement to exclusive licensees to make a success of their ventures with the Government.

Now, in connection with this purpose of encouraging industry to develop, make things practical which otherwise would remain simply as patents on the shelf, gathering dust, I would like to point out that the provision which enables the Government to bring suit on Government-owned patents, under the present policy of the Department of Justice, thwarts this objective.

You might be interested in the case of Tektronix. Tektronix started out not many years ago on a capital of about $20,000, I believe. They were in competition in the oscilloscope business with RCA, Westinghouse, Dumont, and a number of other very large companies, but they offered a better product at a lower price, and the public rewarded them

by buying their products, and they are now a very, very substantial company.

They made the developments at their own expense. These developments, for the purposes of this discussion, can be regarded as improvements on two Government-owned patents which were in fact gathering dust on the shelf until Tektronix improved them and made them practical and embodied them in a commercially useful instrument.

Now, what was the accolade which this company gathered as a result of making this development of the patented Government idea which was moldering away on the shelf? They were rewarded as follows: They were the first company in the history of this country that was sued for infringement of a Government-owned patent. The Government procured their competitors to manufacture Chinese copies of the instrument which the company had developed at its own expense.

Now the Government is taking the position that if Tektronix wishes to use these Government-owned patents, then it must pay damages—that was its first position. It then altered its position to say, "Well, at least you must give to the Government and your competitors, insofar as Government use is concerned, rights under the developments which you made."

We think this is manifestly unfair.

Senator McClellan. How much did you spend on the development?

Mr. Conrad. Sir?

Senator McClellan. How much did you spend on the development of the product?

Mr. Conrad. Well, I don't have the exact figures, Senator, but I could say very safely that it was in the hundreds of thousands of dollars and took place over quite a long period of time.

Now, the provisions of the bill, rather than discouraging this kind of actual retribution against one who develops a Government idea, makes it possible and actually confirms the position which the Department of Justice has recently taken on this.

The Department of Justice has taken a position that it needs no legislation in order to sue on Government-owned patents. But whenever it thinks it is in the public interest to do so, it will bring suit; this, despite the fact that there is no statute authorizing such action; this, despite the fact that there are no standards set out as to what shall govern this determination of public interest, nor who shall make it, and despite the fact that there are no regulations on that.

They also take the position that once thev make this determination, it is not subject to review by any court. Well, we think that suit on Government patents is properly a matter that should be resolved by Congress, if in fact any branch of the Government has power to authorize such suits in view of the purpose of the patent provision of the Constitution.

Mr. Chairman, we have prepared a supplement to our prepared statement, in which we make suggested amendments to section 8.

Senator McClellan. Very well. Let it be filed and put in the record, along with your prepared statement.

Mr. Conrad. We think it will continue to carry out the objectives the committee had in mind in writing section 8 and, at the same time, avoid some of these matters which we regard as problems.

Senator McCLELLAN. All right, sir. Do you have anything further?

Mr. CONRAD. No, your Honor.

Senator McCLELLAN. As I said, your statement and the supplement will be inserted in the record.

(The prepared statement of Mr. Conrad together with the supplement referred to follow:)

STATEMENT OF ROBERT F. CONRAD ON BEHALF OF TEKTRONIX, INC.

Mr. Chairman and members of the committee, I am Robert F. Conrad, a patent attorney with offices at 815 Connecticut Avenue NW., Washington, D.C. I am a member of the Bar of the District of Columbia, and of the American Patent Law Association. My practice is concerned almost exclusively with patent litigation. My appearance is on behalf of Tektronix, Inc., a manufacturer of oscilloscopes, which are electronic devices designed for precision measurement.

While we have an overall interest in Senator McClellan's bill, we are primarily concerned with a portion of section 8(a) and with certain of the licensing provisions which would involve the use of that section. The partciular part of section 8(a) which we wish to discuss consists of the last two sentences of that subsection which extend from line 23 on page 14 to line 2 on page 15, which read as follows:

"Each agency head shall take such action as may be required to protect and preserve the property rights of the United States in any patent so issued to him. Upon request made by any agency head, the Attorney General shall take such action as he shall determine to be required for that purpose."

This language appears to give congressional sanction to an administrative concept which has recently resulted in a complete reversal in the Department of Justice of a patent policy which has been recognized by both Congress and the executive departments since World War I. Specifically it would authorize the U.S. Government to sue its citizens for the infringement of Government-owned patents.

It is our belief that this committee has not been fully advised how section 8, if enacted, will be administered by the executive departments. Tektronix, Inc., is currently engaged in patent litigation with the United States in the Court of Claims. In this action the Government is attempting, through a patent infringement counterclaim instigated by the Department of Justice, to accomplish the following results:

(a) To extend the antitrust authority of the Department of Justice beyond its present statutory limits.

(b) To control competition within a particular industry, by using Government-owned patents as a means for prosecuting acts which are not violative of the antitrust or any other laws.

It also appears that section 8 involves complications of basic law which also have not been presented to this committee:

First, a serious question of constitutional law is involved. The obvious purpose of article 1, section 8 is to promote the useful arts by enlarging the storehouse of knowledge concerning them to which the public has free and unrestricted access. Any action which the Government might take to prevent the free use of knowledge concerning the useful arts through enforcement of a Government-owned patent thwarts the purpose of this constitutional provision. Therefore, a suit upon a Government-owned patent necessarily wrongfully delays fulfillment of the primary purpose of article 1, section 8.

Second, the enactment of section 8 of the bill would create an injustice by placing the Government in a legal position superior to that of the private patent owner. For example, the Government as a sovereign would have the following unfair advantages in patent litigation:

(a) *Statute of limitations.*—The private owner of patents as plaintiff may not bring an action for any infringement which occurred more than 6 years prior to his action by virtue of 35 U.S.C. 286. The U.S. Government on the other hand has long been held by the Supreme Court not to be prevented by a statute of limitations from asserting rights vested in the Government as a sovereign power. *United States* v. *Nashville, Chattanooga, and St. Louis R.R., etc.*, 118 U.S. 120, is typical of many such decisions.

(b) *Laches.*—The United States as plaintiff, unlike a private company, is not barred by the laches of its officials, however gross, from bringing a suit as a

sovereign government to enforce a public right or to assert a public interest. *United States* v. *Insley*, 130 U.S. 263.

(c) *Declaratory judgment actions.*—Where one is accused of infringing a privately owned patent he may bring a declaratory judgment action to test the validity of that patent. The United States, however, cannot be sued under the Declaratory Judgment Act, 28 U.S.C. 2201, even though it may threaten to enforce its patents against persons accused of infringement. The United States can be sued only to the extent that it has waived its sovereign immunity, and it has not consented to be sued under this statute.

(d) *Patent misuse.*—The courts in a long series of cases have refused to allow the patent owner to enforce his patent, even though it be of unquestioned validity, where he has been guilty of some one of the many practices which constitute "misuse of patents." Again the unique position of the United States as sovereign would make it impossible to assert these defenses should the Government institute an action for patent infringement.

(e) *Right of licensee to test validity.*—In a number of decisions the Supreme Court has stated that it is in the public interest to insure a licensee the opportunity to free itself from licensing restrictions which are imposed under a patent which may be invalid. It has recognized that the licensee must have access to the courts to test the validity of the patent where the restrictive conditions, but for the patent, would be contrary to the Sherman and Clayton Acts. *Katzinger Co.* v. *Chicago Metallic Mfg. Co.* (329 U.S. 394), *Macgregor* v. *Westinghouse Elect. and Mfg. Co.* (329 U.S. 402). Where the Government is licensor, the licensee is deprived of this means of litigating the patent under this body of case law, and the United States has still another unfair advantage when compared to private owners of patents.

CONCLUSIONS

One does not have the same rights against the Government as the party asserting the proprietary rights under a patent as one does against a private patent holder. The unfairness of creating a litigant in the unique position of a sovereign becomes even more serious when it is considered that the Government is one of the world's largest owners of patents, and that these patents cover inventions in virtually every technology. Additionally and aside from the constitutional and other legal questions, it is inappropriate for the Government with its limitless resources of public funds and vast legal staff, to set itself up in the patent business. The average litigant is simply not able to exercise his normal legal rights where the Government is a party litigant.

Therefore, the last two sentences of section 8(a) should be deleted. The United States has all the authority it needs to carry out its historical functions of obtaining and preserving patent rights. These include:

(*a*) Authority to acquire title to inventions financed with public funds;

(*b*) Authority to assert invalidity of patents defensively in the Court of Claims on which infringement claims are filed against the Government; and

(*c*) Authority to participate in interference proceedings in the Patent Office.

In order to eliminate any need for the portion of section 8(a) to which objection is made, section 8(b) should be amended to eliminate the authority of the agency head to issue any license which is not nonexclusive, royalty-free, and equally available to all applicants.

Should the committee, however, feel that in exceptional circumstances the public interest requires the granting of an exclusive license, such license should be royalty-free, and should provide that the licensee would be solely responsible for the prosecution of infringers and defense of the patent to the same extent as if it were the owner as well as the licensee. The bill should also contain a provision which would prevent any participation whatsoever in any such litigation by the United States as either plaintiff or defendant.

If thus amended, the more serious objections to the bill would be eliminated. The Government's traditional rôle in patent litigation would not be enlarged, and it would continue to participate as defendant in the Court of Claims under section 1498 of title 28.

Having concluded my comments as to the bill itself, I will briefly highlight the case of *Tektronix, Inc.* v. *The United States*, so that the committee will be completely aware of the manner in which the Department of Justice will exercise the authority which section 8 would confer.

In 1961 Tektronix brought a patent infringement action in the Court of Claims against the United States. In patent parlance it took the position that the United States had awarded a series of contracts to Tektronix's competitors to make "Chinese copies" of Tektronix's patented oscilloscope. This was an ordinary infringement suit, which became unique when 2 years later the Government filed a counterclaim against Tektronix. This is the first time in history that the United States has asserted a patent against one of its citizens, and has thus questioned the right of all people to make free use of its patents. From its briefs and oral arguments the Government's position is as follows:

(*a*) Tektronix patented oscilloscopes employ two patented electric circuits the ownership of which was assigned by the inventors to the Departments of the Army and Navy, respectively. These two Government patents as well as those of Tektronix are embodied in the Tektronix instrument.

(*b*) Tektronix made use of the two Government-owned patents without having first applied for a license from the Army and the Navy.

(*c*) Tektronix must now agree to a cross-license under which the Government and its contractors will be licensed retroactively to use the patents of Tektronix in exchange for the right of Tektronix to use the two Government patents.

(*d*) There is no statutory authority for the compulsory cross-licensing which the Department of Justice is attempting to force upon Tektronix, but it has the inherent authority to determine where the public interests lie and to use its patents to enforce such determinations.

(*e*) It is "in the public interest" for the Department of Justice to promote competition in the oscilloscope industry and to put Tektronix "in the same position as other members of the oscilloscope industry" and to "equalize opportunities" in the competition for Government purchases of oscilloscopes.

The Department of Justice states that it has the inherent authority to make the determinations involved and to enforce them even though the action was taken without the knowledge of either the Department of the Army or the Navy, the Departments to which these two patents are assigned. The Justice Department states that it needs no authority from Congress to make and enforce these "public interest determinations." It even goes so far as to contend that these decisions are beyond the reach of the courts in that they are the exercise of administrative discretion.

The main theme of President Kennedy's directive on Government patent policy and the announced objective of this committee is to foster the commercial application of Government-owned inventions. It should be assumed for purposes of this discussion that Tektronix did make use of the Government-owned patents in producing its new oscilloscopes. No one contests the fact that Tektronix did introduce a new instrument which is cheaper and far superior to any oscilloscope which had been available previously. It is also admitted that the new instruments were the result of the expenditure of a great deal of time and money, all of which was borne by Tektronix. Nevertheless the United States is now suing Tektronix for developing two Government-owned patents to the point of great commercial utility because it did not first obtain a license to do so. Obviously the patent policy currently being followed by the Department of Justice is completely at odds with the objectives of this committee. There can be no clearer indication of the manner in which the broad delegation of authority contained in section 8 would be administered, if this section should be enacted.

I fully concur in the recommendations of the American Bar Association, the American Patent Law Association, the National Association of Manufacturers, the National Small Business Association, and the many others who appeared before this committee and recommended against the enactment of so much of section 8 as authorizes the U.S. Government to initiate patent litigation against the citizens of this country.

The opportunity to present these views is greatly appreciated, and it is hoped that the information which has been furnished will focus attention upon an area which requires careful study by this committee.

SUPPLEMENT TO STATEMENT OF ROBERT F. CONRAD ON BEHALF OF TEKTRONIX, INC.,

SUGGESTED AMENDMENTS TO SECTIONS 8 AND 3 OF S. 1809

SEC. 8. (a) Whenever an agency head has taken title to any invention by declaration of acquiring which has become final or by authority of any other provision of this Act, *or otherwise has heretofore acquired ownership of an invention*, and he has reason to believe that such invention is patentable, he may make application to the Commissioner of Patents for the issuance of a patent therefor to such agency head on behalf of the United States. If the Commissioner determines that such invention is patentable, he shall issue to such agency head on behalf of the United States a patent therefor. [Each agency head shall take such action as may be required to protect and preserve the property rights of the United States in any patent so issued to him. Upon request made by any agency head, the Attorney General shall take such action as he shall determine to be required for that purpose.]

(b) Each agency head [may] *shall offer to* grant an exclusive *license subject to a reservation to the United States the same as that set forth in Section 3(b) (2)* or non-exclusive licenses for the practice of any invention for which he holds a patent *heretofore or hereafter* acquired [under this Act] on behalf of the United States. Any such *exclusive* license shall *convey the sole right to sue for infringement and shall* be granted *royalty free to a citizen of the United States* under such *additional* terms and conditions as the agency head shall determine to be in the public interest. Any such *non-exclusive license shall be irrevocable, for the life of the patent, and royalty free and shall* be granted [for the effective period of the patent or for a more limited period of time, and may be granted with or without the payment of royalty to the United States] *to any United States citizen who applies under such additional uniform terms and conditions as the agency head shall determine to be in the public interest.*

To make the remaining provisions of the bill consistent with the changes suggested above with respect to section 8, the following change should be made in section 3(b) (5):

Page 5, line 2, following "licenses" add "such as provided for in section 8(b)".

Page 5, lines 3 and 4, cancel "upon such reasonable terms and conditions as the agency may prescribe".

Senator McCLELLAN. I believe there is one witness remaining on the list of those scheduled for this morning, Dean Nobles. Will you come around, please.

STATEMENT OF DEAN W. LEWIS NOBLES, GRADUATE SCHOOL, UNIVERSITY OF MISSISSIPPI

Senator McCLELLAN. I note that you have quite a lengthy statement. Are you willing to have it printed in the record in full, and then just comment on it?

Mr. NOBLES. Yes, Mr. Chairman, I would like to request it, please.

Senator McCLELLAN. Just glancing at your statement, I would think it will take 2 or 3 hours to read it.

Mr. NOBLES. Yes.

Senator McCLELLAN. So let it be printed in the record, and you may highlight it now.

Mr. NOBLES. Yes.

Senator McCLELLAN. Off the record.

(Discussion off the record.)

Senator McCLELLAN. Back on the record.

(The prepared statement of Dean Nobles follows:)

STATEMENT OF DEAN W. LEWIS NOBLES

Mr. Chairman and distinguished members of the Subcommittee on Patents, Trademarks, and Copyrights, of the Senate Judiciary Committee, my name is Lewis Nobles and I appear before you today as an individual vitally interested