Guest Opinion: Pending Patent and Antitrust Legislation Will Help Strengthen U.S. Competitiveness in Technology

by Senator Robert Dole (R-Kansas)

Senator Dole discusses two measures designed to strengthen America's technological leadership: (1) S. 1561, his bill for encouraging joint research and development ventures; and (2) S. 1535, the Mathias patent bill which he is co-sponsoring.

Senator Dole is a member of the Judiciary Subcommittee on Patents, Copyrights and Trademarks. He is chairman of the Finance Committee and holds memberships on other key committees and commissions. A recent survey of "Who Runs America" in U.S. News and World Report *ranked him as the 14th most influential American.*

America today faces serious challenges to its technological leadership and competitiveness in the world marketplace. Maintaining this country's strong international position will depend on its ability to find and develop new technologies. The antitrust and patent laws, obviously, have a very significant effect on incentives to engage in R & D in the private sector. In this guest column, I would like to discuss two pending proposals of particular interest to IPO members, which should help stimulate needed investment in R & D.

On June 28, I introduced S. 1561, the "National Joint Research and Development Policy Act." This legislation is designed to promote and encourage joint research and development ventures by removing unnecessary disincentives to undertake such ventures which presently exist under our antitrust laws.

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The development of new technology is an expensive and speculative undertaking, the profits of which may not emerge for several years. By permitting firms to pool their resources and share the risks, joint R & D ventures can lead to important advances in new technology, which otherwise would not be achieved because of excessive risk or cost to the individual firm. Joint R & D ventures can also result in the rapid and wide dissemination of new technology, because the results of the venture's activities are immediately available to all participating firms. Finally — and perhaps most importantly — such ventures promote greater efficiency in the use of resources (particularly scarce scientific and engineering talent) by permitting firms to combine, instead of duplicate, their R & D efforts.

The advantages of joint research and development have not escaped our trading partners. For example, Japan and members of the European Economic Community have undertaken intensive collaborative R & D in targeted advanced technology industries where the United States enjoys a lead, such as high capacity integrated circuits. The result is that the U.S. position in many of these industries has become vulnerable.

U.S. firms have consistently expressed reluctance to invest in joint R & D ventures because of the threat of an antitrust challenge. For there is no guarantee that all courts will properly consider the important procompetitive benefit of such cooperative efforts in determining whether they violate the antitrust laws. Companies contemplating joint research and development fear the courts will not distinguish between a cartel of competitors seeking to gain an unfair advantage through price-fixing and similar activities, on the one hand, and an open, above-board pooling of research efforts for the purpose of developing new technologies, on the other. This uncertainty is compounded by the high risk of costly litigation. In order to encourage vigorous antitrust enforcement by the private sector, the law entitles successful plaintiffs to three times the actual damages they have suffered. The result is a "stacked deck" which favors litigation, with potentially huge money judgments as the stakes.

My bill is designed to remove these unnecessary deterrents to joint R & D activities, while maintaining strong protections for the consumer against conduct which actually restricts beneficial competition.

Specifically, my bill would clarify that joint R & D ventures are not unlawful, per se, under the antitrust laws. This provision would not permit anticompetitive conduct to escape condemnation; but it would ensure that courts weigh the procompetitive benefits of such ventures before determining whether they violate the antitrust laws. The bill further provides that a joint R & D venture which has been fully disclosed to the Department of Justice may be liable only for the actual damages caused by its conduct if the court finds a violation.

The purpose of S. 1535 is to strengthen the patent system

This same approach was embodied in a package of amendments to the antitrust and intellectual property laws proposed by the Administration this fall. As President Reagan emphasized in transmitting the legislation to Congress, this approach should stimulate the formation of procompetitive joint R & D and will do so with a minimal amount of bureaucratic interference.

Other proposals now pending in Congress would set up a Justice Department certification system to provide an antitrust immunity from the ordinary workings of our antitrust laws. One problem I have with this approach is that it would place a heavy, regulatory workload on the Justice Department which consists, for the most part, of prosecutors ill suited for the task. In addition, because the effect of DOJ certification would be an antitrust exemption, DOJ officials might be inclined to error on the side of caution and certify very few ventures.

Another proposal is to grant joint R & D ventures antitrust immunity if they meet certain specified criteria relating to such factors as the venture's participation requirements, organization, and activities. An advantage of this approach is that it leaves the Justice Department in the role of prosecutor, not regulator. On the other hand, requiring joint R & D ventures to conform to a particular statutory scheme is, in my view, inconsistent with the need to minimize governmental interference in the marketplace, and could preclude other types of structures which might be more efficient and better business.

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All of these proposals have a worthy objective: to remove unnecessary deterrents to procompetitive joint R & D ventures under the antitrust laws. However, I believe the simple approach embodied in my bill, and in the Administration's package, offers the best solution to the problem.

Another bill of interest to IPO members is Senator Mathias' bill for increasing the effectiveness of the patent laws, S. 1535. This bill was developed through consultation with the patent counsel for several major technology-based companies.

The purpose of S. 1535 is to strengthen the patent system and streamline some of the administrative procedures for securing a patent. We also need to be sure we are getting as much help as possible from the patent system in the struggle to keep the United States at the forefront of technology. Many of the proposals in S. 1535 have been considered before, but I believe it is time for another look. The bill would change the patent code in five areas.

First, it would eliminate loopholes that encourage manufacture of patented inventions outside the United States. One such loophole involves importation into the United States of products manufactured abroad by a process patented here. Another loophole involves supplying components of a patented invention for final assembly abroad for the purpose of avoiding the patent.

Second, S. 1535 would reduce the burden of the requirement to obtain a license from the Patent and Trademark Office before filing in foreign patent offices.

Third, the bill would clarify aspects of the patent code that are important to research organizations which employ several inventors. One provision of the bill makes clear that unpublished information known within the inventor's organization may not be used to block the granting of a patent. Another provision clarifies the law for determining whether two or more inventors may obtain a patent jointly.

Fourth, the bill would streamline certain features of patent interferences, which are the proceedings conducted in the Patent and Trademark Office to determine which rival inventor made the invention first.

Fifth, S. 1535 strengthens the rights of a patent owner in a patent license agreement in situations where the licensee asserts that the patent is invalid.

When considering a technical bill like S. 1535, the advice of industry, inventors and patent lawyers is of great assistance to members of Congress. With the help of IPO members and others, I am confident that we can make whatever changes are needed to ensure that the patent system functions with maximum effectiveness to stimulate new technology.

Meeting the serious challenges which confront America's international competitiveness in technology will require many and varied actions. These include legislation such as S. 1561 and S. 1535 which would stimulate the creation and develpment of new technology. The Congress should not delay in enacting them.

Note: After this article was written, Senator Dole on November 18 also introduced S. 2171, which would create a uniform policy concerning patent rights in inventions made with federal assistance.

Inventor of The Year Nominations Sought

IPO is soliciting nominations for its 1983 Inventor of the Year Award. IPO members are urged to publicize the award, and to consider nominating their own inventors.

The Inventor of the Year Award has been given each year since 1973. It honors an American inventor whose invention was either patented or first commercially available during the year for which the award is given. The winner will receive $1,000, a plaque, and an expenses-paid trip to Washington to attend the award ceremony.

Last year's winner was Dr. Robert K. Jarvik, president of Kolff Medical in Salt Late City, UT, whose Jarvik 7 artificial heart was implanted for 105 days in the late Barney Clark at the University of Utah.

Other winners have included Donald L. Ausmus, a paraplegic from Independence, MO, who invented a battery-powered device called a Moto-Stand that allows physically handicapped people to move about in a standing position; and Paul Macready, honored for his "Gossamer Condor," a human-powered airplane that was pedalled across the English Channel.

Nominations are due at IPO's offices by 5 p.m., Tuesday, January 31, 1984. All that is required is a picture and description of the invention and a one-page biography of the inventor. Anyone can submit a nomination.

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If you wish to have a Washington representative added to the mailing list, please write or call the IPO office.