Collection: Roberts, John G.: Files
Folder Title: JGR/National Productivity and Innovation Act of 1983 (1 of 2)
Box: 33

THE WHITE HOUSE

WASHINGTON

September 6, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Draft Legislation regarding National Productivity and Innovation Act of 1983

Richard Darman has asked for comments by September 8 on the above-referenced draft legislation, section-by-section analysis, and accompanying Presidential transmittal letter. The legislation emerged from the Cabinet Council on Commerce and Trade, and the letter was drafted by the Department of Justice.

Title II of the bill provides that joint research and development projects are not per se illegal under the antitrust laws, and limits recovery under those laws for conduct that is part of a joint R&D project to actual, rather than treble, damages. The damage limitation only applies if particulars of the joint R&D project have been reported to the FTC and the Attorney General. Title III provides that certain licensing arrangements are not per se violative of the antitrust laws, and limits damages as in Title II. Title IV specifies that certain arrangements in connection with patent or copyright licensing are not per se illegal, and Title V closes a loophole in the patent laws by providing that importers of products produced abroad by a protected process are liable for patent infringement.

The proposed Presidential letter reviews the significance of R&D to industrial competitiveness, reviews what we have done to aid R&D to date, and provides an overview of the legislation. The letter states that the bill will require courts to consider the procompetitive effects of joint R&D projects challenged under the antitrust laws. This is an accurate shorthand, since proscribing per se treatment means that the projects will be analyzed under the "rule of reason" approach, i.e., balancing procompetitive against anticompetitive effects.

I have no substantive objections.

Attachment

THE WHITE HOUSE

WASHINGTON

September 6, 1983

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: Draft Legislation regarding National Productivity and Innovation Act of 1983

Counsel's Office has reviewed the above-referenced draft legislation and the accompanying section-by-section analysis and transmittal letter, and finds no objection to these items from a legal perspective. In the first line of the carryover paragraph between page 2 and 3 of the letter, "insure" should be "ensure."

FFF:JGR:aea 9/6/83

cc: FFFielding
JGRoberts
Subj.
Chron

THE WHITE HOUSE

WASHINGTON

September 6, 1983

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Draft Legislation regarding National Productivity and Innovation Act of 1983

Counsel's Office has reviewed the above-referenced draft legislation and the accompanying section-by-section analysis and transmittal letter, and finds no objection to these items from a legal perspective. In the first line of the carryover paragraph between page 2 and 3 of the letter, "insure" should be "ensure."

FFF:JGR:aea 9/6/83

cc: FFFielding
JGRoberts
Subj.
Chron

ID # CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) / /

Name of Correspondent: RICHARD G. DARMAN

☐ **MI Mail Report**   **User Codes:** (A) ____ (B) ____ (C) ____

Subject: Draft Legislation re: National Productivity and Innovation Act of 1983

ROUTE TO: / ACTION / DISPOSITION

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CU011	ORIGINATOR	83/09/02			/ /
	Referral Note:				
CUAT09	D	83/09/02		S	83/09/08
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				

ACTION CODES:
- A - Appropriate Action
- C - Comment/Recommendation
- D - Draft Response
- F - Furnish Fact Sheet to be used as Enclosure
- I - Info Copy Only/No Action Necessary
- R - Direct Reply w/Copy
- S - For Signature
- X - Interim Reply

DISPOSITION CODES:
- A - Answered
- B - Non-Special Referral
- C - Completed
- S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments:

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

SEP 2

Document No. ____________________

WHITE HOUSE STAFFING MEMORANDUM

DATE: 9/2/83 ACTION/CONCURRENCE/COMMENT DUE BY: September 8th

SUBJECT: DRAFT LEGISLATION RE NATIONAL PRODUCTIVITY AND INNOVATION ACT OF 1983

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	[ ]	[ ]	HERRINGTON	[ ]	[ ]
MEESE	[ ]	[x]	JENKINS	[ ]	[ ]
BAKER	[ ]	[x]	McMANUS	[ ]	[ ]
DEAVER	[ ]	[x]	MURPHY	[ ]	[ ]
STOCKMAN	[ ]	[ ]	ROGERS	[ ]	[ ]
CLARK	[ ]	[ ]	ROLLINS	[ ]	[ ]
DARMAN	[ ]	[x]	SVAHN	[x]	[ ]
DUBERSTEIN	[x]	[ ]	VERSTANDIG	[x]	[ ]
FELDSTEIN	[ ]	[ ]	WHITTLESEY	[x]	[ ]
FIELDING	[x]	[ ]	BRADY/SPEAKES	[ ]	[x]
FULLER	[x]	[ ]	____________	[ ]	[ ]
GERGEN	[x]	[ ]	____________	[ ]	[ ]

REMARKS:

Please provide any comments on the attached draft legislation by Thursday, September 8th.

Thank you.

RESPONSE:

Richard G. Darman

Received S S

1983 SEP -2 PM 12: 21

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

SEP 2 1983

MEMORANDUM FOR RICHARD DARMAN

FROM: DAVID A. STOCKMAN

SUBJECT: Draft Legislation, "National Productivity and Innovation Act of 1983"

Attached for transmittal to Congress by the President is the "National Productivity and Innovation Act of 1983," a bill prepared by the Department of Justice. Also attached is a section-by-section analysis of the bill and a transmittal letter. A fact sheet to accompany the transmittal of this legislation is being prepared by OPD (Lehman Li) and the Department of Justice.

Justice and OPD are seeking transmittal of the legislation prior to September 12, 1983, so that the bill can be introduced before a September 14 hearing scheduled by the House Judiciary Committee.

This draft bill is the product of deliberations of the Cabinet Council on Commerce and Trade. In accordance with established procedures, the bill has been coordinated with the Departments of Commerce, the Treasury, Defense, Health and Human Services, Energy, State, and the National Science Foundation, the National Aeronautics and Space Administration, the Small Business Administration, the Federal Trade Commission, the Office of the United States Trade Representative, the Council of Economic Advisers, the Office of Science and Technology Policy, and the Office of Policy Development. The transmittal letter was drafted by the Department of Justice and reviewed by my staff and the staffs of the Office of Policy Development and the Office of Science and Technology Policy.

The bill's major provisions would:

— insure that the antitrust laws do not inhibit U.S. firms from pooling their resources to engage jointly in research and development projects by (1) requiring that courts may not find that a joint R&D venture violates the antitrust laws without first considering its procompetitive benefits and (2) permitting suit for only actual damages, instead of treble damages as is the case under current law, against joint R&D ventures if they have been fully disclosed to the Department of Justice and the Federal Trade Commission;

— prohibit courts from finding that an intellectual property licensing arrangement violates the antitrust laws without first considering its procompetitive benefits; and

— close a loophole in existing patent law which permits foreign parties to use a U.S. process patent outside the United States to produce a product for import to the United States and not be guilty of patent infringement.

Attached is an original and 15 copies each of the transmittal letter, bill, and section-by-section analysis.

Attachment

TO THE CONGRESS OF THE UNITED STATES:

I am transmitting to the Congress today a legislative proposal entitled, the "National Productivity and Innovation Act of 1983." The bill would modify the Federal antitrust and intellectual property laws in ways that will enhance this country's productivity and the ability of our industries to compete in international markets.

As you know, one of the most important goals of my Administration has been the revitalization of the competitiveness and productivity of American industry. Tax cuts proposed by my Administration and enacted during the 97th Congress have greatly stimulated economic activity. In addition, our efforts to rationalize Federal rules and regulations have significantly enhanced the efficiency of our economy. For the first time in over a decade, there exists the foundation for a period of strong and sustained economic growth.

The ability of the United States to improve industrial productivity and competitiveness will also depend largely on our ability to create and develop new technologies. Advances in technology provide our economy with the means to produce new or improved goods and services and to produce at lower cost those goods and services already on the market. It is difficult to overstate the importance of technological development to a strong and healthy United States economy. It has been estimated that advances in scientific and technological knowledge have been responsible for almost half of the increase in this country's labor productivity over the last 50 years. New technology also creates new jobs and gives this country an advantage in world markets. For example, the computer industry, which was in its infancy just a short time ago, employs more than 1.5 million Americans.

The private and public sectors must spend a great deal of time, money, and effort to discover and develop new technologies. My Administration has moved to bolster research and development

(R&D) in the public sector by proposing in our 1984 budget to increase Federal funding of R&D by 17 percent, to $47 billion. However, it is vital that our laws affecting the creation and development of new technologies properly encourage private sector R&D as well.

The antitrust and intellectual property laws have a very significant effect on private investment in R&D. The antitrust laws are designed to protect consumers from anticompetitive conduct. While the economy generally benefits most from vigorous competition among independent businesses, the antitrust laws recognize that in some areas, like the creation and development of technology, cooperation among producers, even competititors, can actually serve to maximize the well-being of consumers.

The intellectual property laws, for example, those dealing with patents and copyrights, also serve to promote the interests of consumers. The promise of the financial reward provided by exclusive rights to intellectual property induces individuals to compete to create and develop new and useful technologies.

After reviewing the effect of the antitrust and intellectual property laws on the creation and development of new technologies and after consultations with key members of Congress, I have concluded that the antitrust laws can be clarified in some respects and modified in other respects to stimulate significantly private sector R&D. This can be done while maintaining strong safeguards to protect the economy against collusive actions that would improperly restrict competition. The National Productivity and Innovation Act of 1983, which embodies those changes, is a package of four substantive proposals that deals with all phases of the innovation process.

Title II of the bill will insure that the antitrust laws do not unnecessarily inhibit United States firms from pooling their resources to engage jointly in R&D projects. Joint ventures often may be necessary to lower the risk and cost associated with R&D. So long as the venture does not threaten to facilitate price fixing or to reduce innovation, such ventures do not violate the antitrust laws. Nevertheless, the risk remains that some courts may not fully appreciate the beneficial aspects of joint R&D. This risk is unnecessarily magnified by the fact that a successful antitrust claimant is automatically entitled to three times the damages actually suffered.

Title II will alleviate the adverse deterrent effect that this risk may have on procompetitive joint R&D ventures. This title provides that the courts may not find that a joint R&D venture violates the antitrust laws without first considering its procompetitive benefits. In addition, Title II provides that a joint R&D venture that has been fully disclosed to the Department of Justice and the Federal Trade Commission may be sued only for the actual damage caused by its conduct. This combination of changes will encourage the formation of procompetitive joint R&D ventures. And unlike some other proposals currently before Congress, it will do so with the minimal amount of bureaucratic interference in the functioning of those ventures.

If we are to assure that our laws stimulate investment in new technologies, however, it is not enough merely to correct the adverse deterrent effect the antitrust laws may have on procompetitive joint R&D. Rather, we must also assure that the antitrust and intellectual property laws allow--indeed encourage--those who create new technologies to bring their technology to market in the most efficient manner. Only in this way can those who invest their time, money, and effort in R&D be assured of earning the maximum legitimate reward.

Titles III and IV recognize that very frequently the most efficient way to develop new technology is to license that technology to others. Licensing can enable intellectual property owners to employ the superior ability of other enterprises to market technology more quickly and at lower cost. This can be particularly important for small businesses that do not have the ability to develop all possible applications of new technologies by themselves. However, the courts have not always been sympathetic to these procompetitive benefits of licensing.

Title III will prohibit courts from finding that an intellectual property licensing arrangement violates the antitrust laws without first considering its procompetitive benefits. In addition, the title will eliminate the potential of treble damage liability under the antitrust laws for intellectual property licensing. Although those who suffer antitrust injury as a result of licensing will still be able to sue for their actual damages plus prejudgment interest, Title III will minimize the deterrence that the antitrust laws currently may have on potentially beneficial licensing of technology.

Title IV will also encourage the procompetitive licensing of intellectual property. Pursuant to this title, the courts may refuse to enforce a valid patent or copyright on the ground of misuse only after considering meaningful economic analysis.

Finally, our proposal will close a loophole in the patent laws that not only has discouraged investment in efficiency-enhancing technologies but also has needlessly caused the migration of jobs out of this country. Currently, if someone uses a United States process patent outside this country without the owner's consent and then imports the resulting product into the United States, the importer is not guilty of infringement. Title V of the bill will close this loophole so that owners of process patents can earn their rightful reward by preventing the unauthorized use their technology.

We must not delay making the necessary changes in the law to stimulate the creation and development of new technology, to increase this country's productivity, and to enable our industries to compete more effectively in international markets. We must act now. I therefore urge prompt consideration and passage of this legislative proposal.

RONALD REAGAN

THE WHITE HOUSE, SEPTEMBER , 1983.

98th CONGRESS
1st Session

A BILL

To promote research and development, encourage innovation, stimulate trade, and make necessary and appropriate amendments to the antitrust, patent, and copyright laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I--SHORT TITLE

SEC. 101. This Act may be cited as the "National Productivity and Innovation Act of 1983".

TITLE II--JOINT RESEARCH AND DEVELOPMENT VENTURES

SEC. 201. For purposes of this Title--

(1) the term "joint research and development program" means

(A) theoretical analysis, exploration, or experimentation, or

(B) the extension of investigative findings and theories of a scientific or technical nature into practical application, including the experimental production and testing of models, devices, equipment, materials, and processes;

to be carried out by two or more independent persons; provided, that for purposes of this Title, such a program may include the establishment of facilities for the conduct of research, the collecting and exchange of research information, the conduct of research on a protected and proprietary basis, the prosecution of applications for patents, the granting of licenses, and any other conduct reasonably necessary and appropriate to such program;

(2) the term "antitrust laws" has the meaning given it in Section 1 of the Clayton Act (15 U.S.C. § 12), except that the term shall also include Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) to the extent that said Section 5 applies to unfair methods of competition;

(3) the term "Attorney General" means the Attorney General of the United States; and

(4) the term "Commission" means the Federal Trade Commission.

SEC. 202. No joint research and development program shall be deemed illegal per se in any action under the antitrust laws.

SEC. 203. (a) Notwithstanding the provisions of Section 4 of the Clayton Act (15 U.S.C. § 15), any person entitled to recovery in an action under said Section 4 based on conduct that is part of a research and development program and that is engaged in after a notification disclosing such conduct has been filed with the Attorney General and the Commission pursuant to Section 204 shall recover the actual damages by him sustained, interest calculated in accordance with the provisions of Section 1961 of Title 28, United States Code, on such actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, such interest to be adjusted by the court if it finds that the award of all or part of such interest is unjust in the circumstances, and the cost of suit, including a reasonable attorney's fee.

(b) Notwithstanding the provisions of Section 4C of the Clayton Act (15 U.S.C. § 15c), any State entitled to monetary relief in an action under said Section 4C based on conduct that is part of a research and development program and that is engaged in after a notification disclosing such conduct has been filed with the Attorney General and the Commission pursuant to Section 204 shall be awarded as monetary relief the total damage sustained as described in paragraph (1) of subsection (a) of said Section 4C, interest calculated in accordance with the provisions of Section 1961 of Title 28, United States Code, on such total damage for the period beginning on the date of service of such State's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, such interest to be adjusted by the court if it finds that the award of all or part of such interest is unjust in the circumstances, and the cost of suit, including a reasonable attorney's fee.

SEC. 204. (a) Any person participating in a joint research and development program may file with the Attorney General and the Commission a notification disclosing such program. Such notification shall specify the identity of the parties participating in the program, the nature, scope and duration of the program, and any and all ancillary agreements or understandings. Only conduct specified in a notification filed pursuant to this section shall be entitled to the protections of Section 203.

(b)(1) Except as provided in subsection (d), within 30 days of the filing of any notification pursuant to this section, the Commission shall cause to be published in the Federal Register notice of such notification, describing in general terms the participants, the program, and its objectives.

(2) Except as provided in subsections (c) and (d), all information and documentary material submitted as part of a notification filed pursuant to this section shall be available to the public upon request within 30 days after their submission to the Attorney General and the Commission.

(c) Any person filing a notification pursuant to this section may request that information or documentary material submitted as part of such notification not be made public. Any such request shall specify precisely what information or documentary material should not be made public, state the minimum period of time during which nondisclosure to the public is considered necessary, and justify the request for nondisclosure to the public both as to content and time. The Attorney General and the Commission shall consult with one another with respect to any such request, and each in its sole discretion shall make a final determination as to whether good cause for nondisclosure to the public has been shown. Any information or documentary material that is withheld from disclosure to the public pursuant to this subsection shall be exempt from disclosure under Section 552 of Title 5, United States Code.

(d) Any person who has filed a notification pursuant to this section may withdraw such notification prior to the time at which notice of such notification is published in the Federal Register and information and documentary material submitted as part of such notification is made publicly available pursuant to subsection (b). Any notification so withdrawn shall have no force or effect, notice of such notification shall not be published in the Federal Register, and no information or documentary material submitted as part of such notification shall be made publicly available.

(e) Actions taken or not taken by the Attorney General or Commission in response to or with respect to notifications filed pursuant to this section, including without limitation determinations regarding the content of notices published or to be published in the Federal Register pursuant to subsection (b), the withholding from public disclosure of information or documentary material pursuant to subsection (c), and whether to institute antitrust or other investigations or enforcement actions shall not be subject to judicial review.

TITLE III--INTELLECTUAL PROPERTY LICENSING
UNDER THE ANTITRUST LAWS

SEC. 301. The Clayton Act, as amended (15 U.S.C. § 12 et seq.), is amended by renumbering Section 27 as Section 28 and by adding the following new Section 27:

"Sec. 27. (a) Agreements to convey rights to use, practice, or sublicense patented inventions, copyrights, trade secrets, trademarks, know-how, or other intellectual property shall not be deemed illegal per se in actions under the antitrust laws.

"(b)(i) Notwithstanding the provisions of Section 4 of this Act, any person entitled to recovery in an action under said Section 4 based on an agreement described in subsection (a) of this section shall recover the actual damages by him sustained, interest calculated in accordance with the provisions of Section 1961 of Title 28, United States Code, on such actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, such interest to be adjusted by the court if it finds that the award of all or part of such interest is unjust in the circumstances, and the cost of suit, including a reasonable attorney's fee.

(ii) Notwithstanding the provisions of Section 4C of this Act, any State entitled to monetary relief in an action under said Section 4C based on an agreement described in subsection (a) of this section shall be awarded as monetary relief the total damage sustained as described in paragraph (1) of subsection (a) of said Section 4C, interest calculated in accordance with the provisions of Section 1961 of Title 28, United States Code, on such total damage for the period beginning on the date of service of such State's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, such interest to be adjusted by the court if it finds that the award of all or part of such interest is unjust in the circumstances, and the cost of suit, including a reasonable attorney's fee.".

TITLE IV--PATENT AND COPYRIGHT MISUSE

SEC. 401. Section 271 of Title 35, United States Code, is amended--

(a) by redesignating subsection (c) as paragraph (c)(1);

(b) by redesignating subsection (d) as paragraph (c)(2); and

(c) by adding the following new subsection (d):

"(d) No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following, unless such conduct, in view of the circumstances in which it is employed, violates the antitrust laws: (1) licensed the patent under terms that affect commerce outside the scope of the patent's claims, (2) restricted a licensee of the patent in the sale of the patented product or in the sale of a product made by the patented process, (3) obligated a licensee of the patent to pay royalties that differ from those paid by another licensee or that are allegedly excessive, (4) obligated a licensee of the patent to pay royalties in amounts not related to the licensee's sales of the patented product or a product made by the patented process, (5) refused to license the patent to any person, or (6) otherwise used the patent allegedly to suppress competition.".

SEC. 402. Subsection (a) of Section 501 of Title 17, United States Code, is amended by adding at the end thereof the following:

"No copyright owner otherwise entitled to relief for infringement of a copyright under this Title shall be denied relief or deemed guilty of misuse or illegal extension of the copyright by reason of his having done one or more of the following, unless such conduct, in view of the circumstances in which it is employed, violates the antitrust laws: (1) licensed the copyright under terms that affect commerce outside the scope of the copyright, (2) restricted a licensee of the copyright in the sale of the copyrighted work, (3) obligated a licensee of the copyright to pay royalties that differ from those paid by another licensee or that are allegedly excessive, (4) obligated a licensee of the copyright to pay royalties in amounts not related to the licensee's sales or use of the copyrighted work, (5) refused to license the copyright to any person, or (6) otherwise used the copyright allegedly to suppress competition.".

TITLE V--PROCESS PATENTS

SEC. 501. Section 154 of Title 35, United States Code, is amended by inserting after "invention" the second time it appears the words ", and if the invention is a process of the right to exclude others from using or selling products produced thereby,".

SEC. 502. Section 271 of Title 35, United States Code, is amended--

(a) by redesignating subsection (a) as paragraph (a)(1); and

(b) by inserting the following new paragraph (a)(2):

"(a)(2) If the patented invention is a process, whoever without authority uses or sells in the United States during the term of the patent therefor a product produced by such process infringes the patent.".

SEC. 503. Title 35, United States Code, is amended by adding the following new Section 295:

"§ 295. Presumption: Product Produced by Patented Process.

In actions alleging infringement of a process patent based on use or sale of a product produced by the patented process, if the court finds (1) that a substantial likelihood exists that the product was produced by the patented process and (2) that the claimant has exhausted all reasonably available means through discovery or otherwise to determine the process actually used in the production of the product and was unable so to determine, the product shall be presumed to have been so produced, and the burden of establishing that the product was not produced by the process shall be on the party asserting that it was not so produced.".

SECTION BY SECTION ANALYSIS
"NATIONAL PRODUCTIVITY AND INNOVATION ACT OF 1983"

Title I--Short Title

Title I provides that the Act may be cited as the "National Productivity and Innovation Act of 1983."

Title II--Joint Research and Development Ventures

Title II is designed to promote research and development ("R&D") by clarifying the antitrust standard applicable to joint R&D ventures, and by giving participants in joint R&D programs the option of filing a notification disclosing their conduct with the Attorney General and the Federal Trade Commission, thereby limiting their exposure to possible liability for antitrust damages to actual, rather than treble, damages.

Section 201 defines key terms. A "joint research and development program" is defined to mean theoretical analysis, exploration or experimentation, or the extension of basic scientific knowledge into practical application, including prototype development. Such programs specifically may include the establishment of research facilities, the collection and exchange of research information, the conduct of research on a proprietary basis, the prosecution of patent applications, and the granting of licenses. In order to provide necessary flexibility, a research and development program also may include "any other conduct reasonably necessary and appropriate to such program." Only research and development programs carried out jointly--"by two or more independent persons"--are covered by the title. "Independent persons" refers to separate firms, and not to subsidiaries of the same corporate family or natural persons associated with the same firm.

Section 201 also defines the "antitrust laws" to match the definition of those laws in the Clayton Act (primarily the Sherman and Clayton Acts), and adds to that definition Section 5 of the FTC Act insofar as it applies to unfair methods of competition. Finally, the terms "Attorney General" and "Commission" are appropriately defined.

Section 202 states clearly and unequivocally that joint research and development programs are not to be considered illegal "per se" under the antitrust laws. Section 202 thus assures consideration of the actual competitive effects of such programs under the antitrust "rule of reason." Under this standard courts must make legally and economically realistic evaluations of the competitive effects of any challenged joint R&D ventures. Section 202 does not create new law; rather, it clarifies existing legal standards and so eliminates any misconception that present law imposes sweeping and categorical rules against R&D programs conducted jointly by competitors.

Nevertheless, here as in other contexts, applicability of the "rule of reason" shall not be taken to imply that the courts must take into account each and every aspect and idiosyncracy of the individual arrangement and the surrounding circumstances. Rather, the courts may, to the extent they find them useful and persuasive, adopt rules or presumptions based on general characteristics of arrangements, including, without limitation, scale economies associated with the project, the percentage of firms in the market or markets with which the participants are identified that is included within the project, the level of concentration in those markets, and so forth.

Section 203 of the proposed legislation recognizes that assurance as to the antitrust standards applicable to joint R&D programs may not by itself adequately foster such programs because of the possibility of treble damage liability should a court later disagree with the parties' assessment of likely competitive effects. Current law requires the trebling of damages in all cases brought by private parties under Section 4 of the Clayton Act or by states as parens patriae under Section 4C of that Act. Section 203 limits possible liability in any such case based on conduct that is part of a joint R&D program to actual damages only (plus interest on such actual damages in order to provide a more fully compensatory actual damage remedy) as long as adequate disclosure of such conduct is made to the antitrust enforcement agencies prior to its inception. Such disclosure should enable those agencies to investigate any program with potential anticompetitive effects and challenge it before any harm can occur. Under the provisions of Section 204, to be discussed <u>infra</u>, disclosure to the antitrust enforcement agencies will trigger public awareness of the program as well, thus assuring that private parties will be in a position to inform the enforcement agencies of behavior that would be unlawful and harmful to their interests. Of course, nothing in Section 203's limitation on damages affects antitrust actions by the Attorney General or the FTC, or private actions seeking injunctive relief.

The limitation in Section 203 on recovery of monetary damages allegedly sustained as the result of R&D programs should largely eliminate the perceived antitrust deterrent to beneficial joint R&D. While Section 203 is a serious step given the important incentives and disincentives that treble damage actions generally are intended to create on the part of injured parties and potential antitrust violators respectively, this limitation has inherent safeguards that make it acceptable in these circumstances. Notification directly to the antitrust enforcement agencies and indirectly to interested private parties has been noted above. Equally important is the fact that the other carefully preserved public and private enforcement remedies will be sufficient to avoid or provide fair compensation for injury that joint R&D that is, on balance, anticompetitive might cause. It is important to note that, unlike the immediate harm caused by straightforward price fixing or market allocation, any harm stemming from allegedly anticompetitive joint R&D generally will not develop immediately, and should be avoidable with adequate notice.

Moreover, as Section 202 expressly recognizes, joint R&D is not one of the classic cartel activities, such as price fixing or bid rigging, that have been deemed illegal "per se" by the courts, and deterrence of which is unambiguously beneficial. Rather, joint R&D can contribute importantly to the ability of American industries to develop new goods and services, to produce goods and services more efficiently, to speed their adjustment to changing markets and demands, and to keep pace with overseas competitors. Thus, the deterrence that the trebling of antitrust damages provides generally is unnecessary and inappropriate with respect to such conduct.

Section 204 sets out the manner in which participants in joint R&D may disclose their program to the antitrust enforcement agencies and thereby avoid treble damages. Subsection 204(a) makes clear that only conduct specified in such a disclosure is entitled to such protection.

Subsection 204(b) directs the FTC to publish a general notice of any program that is disclosed within 30 days, and provides that information and documentary materials submitted as part of a disclosure shall be publicly available. Thus, private parties will have the opportunity to protect their rights.

Subsection 204(c) provides those who wish to disclose an R&D program with an opportunity to seek confidential treatment of information or documentary materials submitted as part of their disclosure. Such confidential treatment may be necessary and appropriate where the particulars of such a program are competitively or commercially sensitive. Materials afforded such treatment also will be exempt from disclosure under the Freedom of Information Act.

Subsection 204(d) allows any person who has filed a notification disclosing a research and development program to withdraw that notification prior to the time at which notice is published in the Federal Register and information and documentary materials are made available to the public. The practical effect of this subsection is to give a person who has filed a notification the opportunity to withdraw it if no agreement can be reached with the Attorney General and the FTC regarding the public availability of supporting information and documentary material. Of course, withdrawing the notification forfeits any treble-damage protection that it otherwise would have afforded, and will not preclude or otherwise affect further investigation or enforcement action by the agencies.

Subsection 204(e) assures that the Title will not be misconstrued as any sort of federal regulation of joint R&D, or become the basis for extensive litigation, particularly that which might be employed as a tactic to force the disclosure of details of competitively sensitive American joint R&D. The purpose of the Title is simple and limited: to remove the possibility that a penalty in the form of the trebling of antitrust damages might be assessed against the participants in joint R&D, in return for notice to the enforcement agencies of the program. No one is required by the Title to disclose R&D activities; joint R&D, which carries in any event little antitrust risk, can be conducted freely without filing a notification and obtaining the protection of Section 203, at the option of the participants. The Title does not contemplate government approval or disapproval of joint R&D programs or notifications; the investigatory and enforcement powers and responsibilities of the Attorney General and the Commission with respect to noticed programs continue to rest on the Sherman Act, the Federal Trade Commission Act, and other laws.

Title III--Intellectual Property Licensing Under the Antitrust Laws

Section 301 adds a new Section 27 to the Clayton Act, providing that "[a]greements to convey rights to use, practice, or sublicense patented inventions, copyrights, trade secrets, know-how, or other intellectual property shall not be deemed illegal per se in actions under the antitrust laws." This assures that intellectual property licensing arrangements will be evaluated under the "rule of reason" in antitrust cases, which requires a realistic economic analysis of the actual competitive effects of a challenged practice. Courts will not be able to condemn arrangements involving new technology under the antitrust laws without considering their business justifications and procompetitive aspects.

It should be stressed that new Section 27 will not allow anticompetitive behavior to escape condemnation under the antitrust laws. Proscription of a per se approach merely obliges the courts to hear evidence on the probable economic effects of a challenged practice before ruling upon the antitrust legality of the practice. Truly anticompetitive conduct will remain illegal.

New Section 27 also recognizes that the current requirement in Sections 4 and 4C of the Clayton Act that plaintiffs' damages be trebled in all actions brought under those sections is inappropriate when applied to intellectual property licensing arrangements. The trebling of damages provides a strong deterrent to anticompetitive behavior. However, it may well overdeter procompetitive licensing arrangements that allow American firms to realize fully their investments in innovative research and development. Subsection (b) of new Section 27 solves this problem by limiting damages in antitrust cases based on intellectual property licensing arrangements to actual damages only (plus interest on such actual damages in order to preserve a more fully compensatory actual damage remedy). All other public and private antitrust enforcement remedies are, of course, unaffected by this section.

Title IV--Patent and Copyright Misuse

Title IV is a modest but significant reform of the doctrines of patent and copyright misuse, which can be invoked to deprive a patentee or copyright holder of his rights under the patent or copyright. Section 401 amends Section 271 of

Title 35 by redesignating subsections (c) and (d) as new subsections (c)(1) and (c)(2), respectively. Existing subsection (c) defines contributory infringement; existing subsection (d) lists three activities that patentees may engage in, primarily to combat contributory infringement, without being found guilty of patent misuse or illegal extension of a patent. */ Redesignation will leave these provisions intact, and thus leave unchanged existing law regarding the extent to which and manner in which a patentee may prohibit the sale by others of commodities that have no substantial use other than those that would infringe his patent. **/

Section 401 also replaces the redesignated subsection (d) with a new subsection (d), which lists several patent licensing practices that cannot provide the basis for a finding of misuse or illegal extension of a patent unless such practices, in the circumstances in which they are employed, violate the antitrust laws. These practices include the following:

(1) licensing the patent under terms that affect commerce outside the scope of the patent's claims (e.g., requiring a licensee to purchase unpatented materials from the licensor,

---

*/ These activities are (1) deriving revenue from acts which if performed by another without his consent would constitute contributory infringement, (2) licensing or authorizing another to perform such acts, and (3) seeking to enforce his patent rights against infringement or contributory infringement.

**/ *See generally* Dawson Chemical Co. v. Rohm & Haas Co., 448 U.S. 176 (1980).

requiring a licensee to assign to the patentee a patent that may be issued to the licensee after the licensing arrangement is executed, restricting a licensee's freedom to deal in products or services outside the scope of the patent, requiring the licensee to become a licensee of a second patent);

(2) restricting a licensee of the patent in the sale of the patented product or in the sale of an unpatented product made by the patented process;

(3) obligating a licensee of the patent to pay royalties that differ from those paid by another licensee or that are allegedly excessive;

(4) obligating a licensee of the patent to pay royalties in amounts that are not related to the licensee's sales of the patented product or an unpatented product made by the patented process;

(5) refusing to license the patent to any person; or

(6) otherwise using the patent in a manner that allegedly suppresses competition.

New subsection 271(d) carefully limits the patent misuse doctrine but does not eliminate it. Courts will still have the discretion to refuse to enforce a valid, infringed patent on competitive grounds whenever the challenged conduct violates the antitrust laws, as well as on grounds not related to competition (e.g., fraud on the Patent Office). This will give patentees greater flexibility in realizing the full benefits of their patents and thereby encourage investment in research and development.

Section 402 amends 17 U.S.C. § 501(a) to do for copyright law what new subsection 271(d) of Title 35 does for patent law. Thus, under the amended Section 501(a) copyright owners will have greater flexibility in licensing their copyrights, and further development of literary and artistic works will be encouraged.

Title V--<u>Process Patents</u>

Sections 501 and 502 amend 35 U.S.C. §§ 154 and 271 to, in effect, extend the exclusive rights of the holder of a process patent to products made by the patented process. The amendment to § 154 grants to process patentees the right to exclude others from using or selling such products; the complementary amendment to § 271 makes the use or sale of such products infringement. This general approach to the scope of process patents has been adopted in many foreign countries.

Under these amendments, use or sale of products made by patented processes will constitute infringement regardless of where such products were made. However, because a process patentee can prevent the use of his patented process by domestic manufacturers directly, their primary effect will be on foreign manufacturing. The amendments will not prevent foreign manufacturers from using patented processes abroad, so long as the products they make thereby are sold and used abroad. But the amendments will prevent circumvention of a U.S. process patentee's rights through manufacture abroad and subsequent importation into the United States of products made by his patented process.

Providing process patentees with infringement remedies against users or sellers of products made by their patented processes may not, however, be sufficient to protect their rights against the threat of foreign manufacture and importation. Proof of infringement will require proof that the patented process was actually used in the manufacture of the product in question, and a patentee may be unable to provide such proof where the foreign manufacturer is not subject to service of process in the United States. To remedy this problem, Section 503 adds a new § 295 to Title 35, to establish, in carefully defined circumstances, a rebuttable presumption that a product that could have been made by use of a patented process was in fact so made. The burden of overcoming this presumption will be on the defendant in an infringement suit, regardless of whether it is a foreign manufacturer, an importer, or a subsequent purchaser. While the defendant may not necessarily have in its possession the means necessary to rebut the presumption, it is likely to be in a far better position than the patentee to obtain them. Importers, for example, because of their relationships with foreign manufacturers, may be able to exert pressure on such manufacturers to produce the necessary information. Purchasers from importers may in turn be able to exert similar pressure on those importers, which would be transmitted to foreign manufacturers. Of course, purchasers also would possess whatever rights to indemnification they may have under applicable state law.

Presumptions of manufacture by a patented process, however, should not be casually established. Importers and subsequent purchasers may be unable to obtain the information needed to overcome such presumptions, even where the products in question were in fact not made by patented processes. At a minimum, the presumption will subject any party who uses or sells any product that might have been made by a patented process to increased litigation risks. Indeed, there is some risk that the presumption might induce frivolous litigation intended to discourage firms from carrying products that compete with the patentee's product. To minimize these possibilities, new § 295 requires two conditions to be satisfied before a product will be presumed to have been made by a patented process.

First, the patentee must demonstrate on the basis of the evidence that is available that a "substantial likelihood" exists that the product was made by the patented process. Such evidence could include indications or "marks" on the product itself, as well as expert testimony regarding known methods of production at costs that would justify sale of the product at the prices being charged. Exactly how much evidence will be needed in particular situations to satisfy the "substantial likelihood" condition will develop in case law. A patentee's burden obviously should be somewhat less than that of proving successfully at trial that a product in question was in fact made by his patented process. On the other hand, a patentee will have to establish more than a slight, even if reasonable, possibility that the product was so made. Second, the patentee must show that he has exhausted "all reasonably available means" through discovery and otherwise to determine what process was used in the manufacture of the product in question and was unable to do so. Thus, patentees must make initial, good-faith efforts to prove this key element in their infringement cases. Patentees will have to use normal discovery channels, as well as other good-faith methods, as courts deem appropriate. This burden should eliminate frivolous or unsound suits.

TO THE CONGRESS OF THE UNITED STATES:

I am transmitting to the Congress today a legislative proposal entitled, the "National Productivity and Innovation Act of 1983." The bill would modify the Federal antitrust and intellectual property laws in ways that will enhance this country's productivity and the ability of our industries to compete in international markets.

As you know, one of the most important goals of my Administration has been the revitalization of the competitiveness and productivity of American industry. Tax cuts proposed by my Administration and enacted during the 97th Congress have greatly stimulated economic activity. In addition, our efforts to rationalize Federal rules and regulations have significantly enhanced the efficiency of our economy. For the first time in over a decade, there exists the foundation for a period of strong and sustained economic growth.

The ability of the United States to improve industrial productivity and competitiveness will also depend largely on our ability to create and develop new technologies. Advances in technology provide our economy with the means to produce new or improved goods and services and to produce at lower cost those goods and services already on the market. It is difficult to overstate the importance of technological development to a strong and healthy United States economy. It has been estimated that advances in scientific and technological knowledge have been responsible for almost half of the increase in this country's labor productivity over the last 50 years. New technology also creates new jobs and gives this country an advantage in world markets. For example, the computer industry, which was in its infancy just a short time ago, employs more than 1.5 million Americans.

The private and public sectors must spend a great deal of time, money, and effort to discover and develop new technologies. My Administration has moved to bolster research and development

(R&D) in the public sector by proposing in our 1984 budget to increase Federal funding of R&D by 17 percent, to $47 billion. However, it is vital that our laws affecting the creation and development of new technologies properly encourage private sector R&D as well.

The antitrust and intellectual property laws have a very significant effect on private investment in R&D. The antitrust laws are designed to protect consumers from anticompetitive conduct. While the economy generally benefits most from vigorous competition among independent businesses, the antitrust laws recognize that in some areas, like the creation and development of technology, cooperation among producers, even competititors, can actually serve to maximize the well-being of consumers.

The intellectual property laws, for example, those dealing with patents and copyrights, also serve to promote the interests of consumers. The promise of the financial reward provided by exclusive rights to intellectual property induces individuals to compete to create and develop new and useful technologies.

After reviewing the effect of the antitrust and intellectual property laws on the creation and development of new technologies and after consultations with key members of Congress, I have concluded that the antitrust laws can be clarified in some respects and modified in other respects to stimulate significantly private sector R&D. This can be done while maintaining strong safeguards to protect the economy against collusive actions that would improperly restrict competition. The National Productivity and Innovation Act of 1983, which embodies those changes, is a package of four substantive proposals that deals with all phases of the innovation process.

Title II of the bill will insure that the antitrust laws do not unnecessarily inhibit United States firms from pooling their resources to engage jointly in R&D projects. Joint ventures often may be necessary to lower the risk and cost associated with R&D. So long as the venture does not threaten to facilitate price fixing or to reduce innovation, such ventures do not violate the antitrust laws. Nevertheless, the risk remains that some courts may not fully appreciate the beneficial aspects of joint R&D. This risk is unnecessarily magnified by the fact that a successful antitrust claimant is automatically entitled to three times the damages actually suffered.

Title II will alleviate the adverse deterrent effect that this risk may have on procompetitive joint R&D ventures. This title provides that the courts may not find that a joint R&D venture violates the antitrust laws without first considering its procompetitive benefits. In addition, Title II provides that a joint R&D venture that has been fully disclosed to the Department of Justice and the Federal Trade Commission may be sued only for the actual damage caused by its conduct. This combination of changes will encourage the formation of procompetitive joint R&D ventures. And unlike some other proposals currently before Congress, it will do so with the minimal amount of bureaucratic interference in the functioning of those ventures.

If we are to assure that our laws stimulate investment in new technologies, however, it is not enough merely to correct the adverse deterrent effect the antitrust laws may have on procompetitive joint R&D. Rather, we must also assure that the antitrust and intellectual property laws allow--indeed encourage--those who create new technologies to bring their technology to market in the most efficient manner. Only in this way can those who invest their time, money, and effort in R&D be assured of earning the maximum legitimate reward.

Titles III and IV recognize that very frequently the most efficient way to develop new technology is to license that technology to others. Licensing can enable intellectual property owners to employ the superior ability of other enterprises to market technology more quickly and at lower cost. This can be particularly important for small businesses that do not have the ability to develop all possible applications of new technologies by themselves. However, the courts have not always been sympathetic to these procompetitive benefits of licensing.

Title III will prohibit courts from finding that an intellectual property licensing arrangement violates the antitrust laws without first considering its procompetitive benefits. In addition, the title will eliminate the potential of treble damage liability under the antitrust laws for intellectual property licensing. Although those who suffer antitrust injury as a result of licensing will still be able to sue for their actual damages plus prejudgment interest, Title III will minimize the deterrence that the antitrust laws currently may have on potentially beneficial licensing of technology.

Title IV will also encourage the procompetitive licensing of intellectual property. Pursuant to this title, the courts may refuse to enforce a valid patent or copyright on the ground of misuse only after considering meaningful economic analysis.

Finally, our proposal will close a loophole in the patent laws that not only has discouraged investment in efficiency-enhancing technologies but also has needlessly caused the migration of jobs out of this country. Currently, if someone uses a United States process patent outside this country without the owner's consent and then imports the resulting product into the United States, the importer is not guilty of infringement. Title V of the bill will close this loophole so that owners of process patents can earn their rightful reward by preventing the unauthorized use their technology.

We must not delay making the necessary changes in the law to stimulate the creation and development of new technology, to increase this country's productivity, and to enable our industries to compete more effectively in international markets. We must act now. I therefore urge prompt consideration and passage of this legislative proposal.

RONALD REAGAN

THE WHITE HOUSE, SEPTEMBER , 1983.

THE WHITE HOUSE

WASHINGTON

September 8, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Draft Statement and Fact Sheet Regarding National Productivity and Innovation Act of 1983

Richard Darman has asked for comments by 5:00 p.m. today on the above-referenced draft statement and fact sheet. These items are largely drawn from the previously reviewed proposed letter from the President transmitting the legislation to Congress. By memorandum, dated September 6, you noted no legal objection to the bill or to the transmittal letter. I have noted several stylistic points in the attached draft memorandum to Darman, but see no legal objections.

Attachment

THE WHITE HOUSE

WASHINGTON

September 8, 1983

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING FFF/RAA
COUNSEL TO THE PRESIDENT

SUBJECT: Draft Statement and Fact Sheet Regarding National Productivity and Innovation Act of 1983

Counsel's Office has reviewed the above-referenced draft statement and fact sheet and finds no objection to them from a legal perspective.

In the last line of page 2 of the draft statement, and in the first line of page 2 of the fact sheet, "insure" should be "ensure." In line 6 on page 3 of the statement, we recommend changing "ignore" to the less confrontational "overlook," and in line 7 of page 2 of the fact sheet, "to" should be deleted.

Attachment

FFF:JGR:aea 9/8/83

cc: FFFielding
JGRoberts
Subj.
Chron

THE WHITE HOUSE

WASHINGTON

September 8, 1983

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Draft Statement and Fact Sheet Regarding National Productivity and Innovation Act of 1983

Counsel's Office has reviewed the above-referenced draft statement and fact sheet and finds no objection to them from a legal perspective.

In the last line of page 2 of the draft statement, and in the first line of page 2 of the fact sheet, "insure" should be "ensure." In line 6 on page 3 of the statement, we recommend changing "ignore" to the less confrontational "overlook," and in line 7 of page 2 of the fact sheet, "to" should be deleted.

Attachment

FFF:JGR:aea 9/8/83

cc: FFFielding
JGRoberts
Subj.
Chron

ID # CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) ___ / ___ / ___

Name of Correspondent: RICHARD G. DARMAN

☐ **MI Mail Report** **User Codes: (A)** ______ **(B)** ______ **(C)** ______

Subject: Draft Statement and Fact Sheet re: National Productivity and Innovation Act of 1983

ROUTE TO: Office/Agency (Staff Name)	ACTION: Action Code	Tracking Date YY/MM/DD	DISPOSITION: Type of Response	Code	Completion Date YY/MM/DD
CUHOll	ORIGINATOR	83/09/06			/ /
	Referral Note:				
CUATH 18	D	83/09/06		S	83/09/08 5:00 pm
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				

ACTION CODES:
- A - Appropriate Action
- C - Comment/Recommendation
- D - Draft Response
- F - Furnish Fact Sheet to be used as Enclosure
- I - Info Copy Only/No Action Necessary
- R - Direct Reply w/Copy
- S - For Signature
- X - Interim Reply

DISPOSITION CODES:
- A - Answered
- B - Non-Special Referral
- C - Completed
- S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: ______

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

Document No. ____________________

WHITE HOUSE STAFFING MEMORANDUM

DATE: 9/6/83 ACTION/CONCURRENCE/COMMENT DUE BY: 5:00 September 8th

SUBJECT: DRAFT STATEMENT AND FACT SHEET RE NATIONAL PRODUCTIVITY AND INNOVATION ACT OF 1983

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☐	HERRINGTON	☐	☐
MEESE	☐	✓	JENKINS	☐	☐
BAKER	☐	✓	McMANUS	☐	☐
DEAVER	☐	✓	MURPHY	☐	☐
STOCKMAN	✓	☐	ROGERS	☐	☐
CLARK	☐	☐	ROLLINS	✓	☐
DARMAN	☐P	✓SS	SPEAKES	☐	✓
DUBERSTEIN	✓	☐	SVAHN	☐	☐
FELDSTEIN	☐	☐	VERSTANDIG	✓	☐
FIELDING	✓	☐	WHITTLESEY	✓	☐
FULLER	✓	☐	ELLIOTT	✓	☐
GERGEN	✓	☐	____________	☐	☐

REMARKS:

Please provide any edits/comments on the attached by 5:00 p.m. Thursday, September 8th.

Thank you.

RESPONSE:

SEP 6

Richard G. Darman
Assistant to the President
Ext. 2702

DRAFT PRESIDENTIAL STATEMENT ON THE
NATIONAL PRODUCTIVITY AND INNOVATION ACT OF 1983

Today I am proposing legislation entitled the National Productivity and Innovation Act of 1983. The bill would modify antitrust, patent, and copyright laws in a way that should greatly enhance this country's productivity and the ability of U.S. industry to compete in world markets.

The ability of the United States to improve industrial productivity and competitiveness will depend largely on our ability to create and develop new technologies. Advances in technology provide our economy with the means to produce new or improved goods and services and to produce at lower cost those goods and services already on the market. Over the last eighty years, the development of new technologies has accounted for almost half of the growth in our real per capita income. New technology creates new jobs and gives this country a competitive edge in world markets. The U.S. computer industry, for example, directly provides jobs for about 830,000 people, and is a leader in world markets.

Although new technologies are sometimes created by luck, the public and private sectors must generally spend a great deal of time, money, and effort to discover and develop new technologies. With this in mind, I proposed in my FY1984 budget to increase Federal funding of research and development (R&D) by 17 percent to $47 billion.

It is also important to encourage private sector R&D by improving the economic and legal climate.

We have already done a number of things to improve the economic climate. For example, the Economic Recovery Tax Act of 1981 provides a 25 percent tax credit to encourage firms to invest in additional R&D. Our economic program has helped reduce inflation and interest rates and thus, has lowered substantially the cost of conducting research.

When enacted, the National Productivity and Innovation Act will improve the legal climate by clarifying and modifying the Federal antitrust and intellectual property laws. Those laws have a substantial effect on private investment in R&D. The antitrust laws are designed to protect consumers from anticompetitive conduct. While vigorous competition among independent businesses generally serves the economy best, the antitrust laws recognize that in some areas, like the creation and development of technology, cooperation may be necessary to maximize the benefits to consumers. Similarly, the intellectual property laws, such as those dealing with patents and copyrights, encourage competition in the creation and development of new and useful technologies, by providing individuals with exclusive rights to their technology.

My proposed legislation would assure that the antitrust and intellectual property laws are fully compatible with the efficient creation and development of technology while maintaining strong safeguards to protect the economy against anticompetitive behavior.

Title II of the bill would insure that the antitrust laws do not unnecessarily inhibit the formation of procompetitive joint R&D ventures. Joint ventures often may be necessary to lower the risk and cost associated with R&D. So long as these ventures do not facilitate price fixing or reduce innovation, such ventures do not violate the antitrust laws. Nevertheless, the risk remains that some courts may ignore the beneficial aspects of joint R&D. This risk is unnecessarily magnified by the fact that an injured private party who wins an antitrust damage suit is automatically entitled to three times the damages actually suffered.

Title II would reduce the adverse deterrent effect that this risk may have on procompetitive joint R&D ventures. The title provides that the courts may not find a joint R&D venture to violate the antitrust laws without first considering its procompetitive benefits. In addition, Title II provides that a joint R&D venture that has been fully disclosed to the Department of Justice and the Federal Trade Commission may be sued only for the actual damage, plus prejudgment interest, caused by its conduct.

Title III would assure that the antitrust laws encourage procompetitive intellectual property licensing, which greatly enhances our economy's ability to create and develop technology. Intellectual property owners often cannot obtain their legitimate reward from R&D unless they license their technology to others. Such licensing can enable intellectual property owners to utilize the superior ability of other enterprises to market their technology more quickly and at lower cost.

Recognizing the importance of licensing, we have designed Title III to assist intellectual property owners to enjoy fully the fruits of their ingenuity. First, the title would prohibit courts from condemning an intellectual property licensing arrangement without first considering its procompetitive benefits. Second, the title would eliminate the potential of treble damage liability under the antitrust laws for intellectual property licensing. Although those who suffer antitrust injury as a result of licensing could still sue for their actual damages plus prejudgment interest, Title III would minimize the deterrence that the antitrust laws currently may have on potentially beneficial licensing.

Similarly, Title IV would encourage the procompetitive use of intellectual property. Courts would be able to refuse to enforce a valid patent or copyright on the grounds of misuse only after considering meaningful economic analysis.

Title V of the Act would increase Federal protection for process patents. Currently, if someone practices a process patent outside the country without the owner's consent and then imports the resulting product into the United States, the importer is not guilty of violating patent law. Our bill would close this loophole so that owners of process patents could earn their rightful reward by preventing such unauthorized use of their technology.

The net effect of this proposed legislation would be to stimulate the creation and development of new technology, to increase this country's productivity, and to enable our industries to compete more effectively in world markets. I strongly urge Congress to enact this proposed legislation as a means of encouraging innovation, and hence of increasing the employment opportunities and standard of living for all Americans.

FACT SHEET

THE NATIONAL PRODUCTIVITY AND INNOVATION ACT OF 1983

I. Introduction

The National Productivity and Innovation Act of 1983 is part of the Administration's overall effort to encourage the creation and development of new technology. The proposed bill recognizes the important role of new technology in enhancing the competitiveness and productivity of American industry.

The Administration has already moved to strengthen research and development in the public sector by proposing in the FY1984 budget an increase in Federal funding of R&D of 17 percent to $47 billion. The Administration has also already encouraged private sector R&D with a 25 percent tax credit.

After reviewing the laws that affect private sector R&D and after consulting with key members of Congress, the Administration has determined that several clarifications and modifications in the antitrust and intellectual property laws -- such as patent, copyright, trade secret, and trademark laws -- could further improve the climate for private investment in R&D. The National Productivity and Innovation Act embodies those modifications, which together deal with all phases of the innovation process.

The bill contains the following four substantive titles. (Title I simply names the bill.)

II. Title II

Title II would insure that the antitrust laws do not unnecessarily inhibit United States firms from pooling their resources to engage jointly in procompetitive R&D projects. Joint ventures often may be necessary to lower the risk and cost associated with R&D. So long as ventures do not facilitate price fixing -- for example, through exchange of information on prices or production levels -- or to reduce innovation -- for example, by a tacit agreement to underinvest in R&D -- the ventures do not violate the antitrust laws.

Nevertheless, because an injured private party who wins an antitrust damage suit is automatically entitled to treble damages, the threat of such suits may inhibit the formation of joint R&D ventures that would improve the well-being of consumers.

Title II would reduce this threat by providing that the courts may not find a joint R&D venture to be illegal in and of itself under the antitrust laws. Specifically, it will prevent courts from finding that any joint R&D venture violates the antitrust laws without first finding that it actually has anticompetitive effects which outweigh its procompetitive effects.

A second provision of Title II would provide that firms operating a joint R&D venture that has been fully disclosed to the Department of Justice and the Federal Trade Commission may be sued only for the amount of the actual damage caused by any anticompetitive conduct, plus prejudgment interest, and not for three times the damage. These changes should encourage the formation of additional procompetitive joint R&D ventures. And unlike some other proposals currently before Congress, they will do so with a minimal amount of bureaucratic interference.

III. Titles III and IV

To assure that our laws do not discourage procompetitive private sector R&D efforts, it is not enough to remove the adverse deterrent effect the antitrust laws may have on joint R&D. The antitrust and intellectual property laws must allow and even encourage those who create new technologies to bring their technology to the market in all of its useful applications.

Titles III and IV recognize that licensing can enable intellectual property owners to employ the superior ability of other enterprises to market new applications more quickly and at lower cost. Both titles would encourage procompetitive licensing of intellectual property.

Title III would prohibit courts from condemning under the antitrust laws an intellectual property licensing arrangement without first considering its procompetitive benefits. It also would eliminate the potential of treble damage liability under the antitrust laws for intellectual property licensing. Those who suffer antitrust injury as a result of licensing will still be able to sue for actual damages plus prejudgment interest.

Under Title IV, courts would be able to refuse to enforce a valid patent or copyright on the grounds of misuse only after considering meaningful economic analysis.

IV. Title V

Title V would close a loophole in the patent laws that has discouraged investment in efficiency-enhancing technologies. Creation of and improvements in the process of making products can be just as important as creating and improving the product itself. Currently, if someone practices a United States process patent outside this country without the owner's consent and then imports the resulting product into the United States, the importer is not guilty of infringement. Title V would enable owners of process patents to prevent such unauthorized use of their technology.

V. Conclusion

In sum, this legislative package proposes clarifications and modifications in the antitrust and intellectual property laws that should strongly encourage innovation in the United States, which in turn should enhance the competitiveness and productivity of American industry. By removing unnecessary deterrents and protecting the rights of innovators to their legitimate financial rewards, this proposal would strengthen incentives for Americans to create and develop new technologies. The President has urged all Members of Congress to give this proposal careful consideration and to work for its enactment during the 98th Congress.

THE WHITE HOUSE

Office of the Press Secretary

EMBARGOED FOR RELEASE AT 3:30 PM EDT September 12, 1983

FACT SHEET

THE NATIONAL PRODUCTIVITY AND INNOVATION ACT OF 1983

I. Introduction

The National Productivity and Innovation Act of 1983 is part of the Administration's overall effort to encourage the creation and development of new technology. The proposed bill recognizes the important role of new technology in enhancing the competitiveness and productivity of American industry.

The Administration has already moved to strengthen research and development in the public sector by proposing in the FY 1984 budget an increase in Federal funding of R&D of 17 percent to $47 billion. The Administration has also already encouraged private sector R&D with a 25 percent tax credit.

After reviewing the laws that affect private sector R&D and after consulting with key members of Congress, the Administration has determined that several clarifications and modifications in the antitrust and intellectual property laws -- such as patent, copyright, and trademark laws -- could further improve the climate for private investment in R&D. The National Productivity and Innovation Act embodies those modifications, which together deal with all phases of the innovation process.

The bill contains the following four substantive titles. (Title I simply names the bill.)

II. Title II

Title II would ensure that the antitrust laws do not unnecessarily inhibit United States firms from pooling their resources to engage jointly in procompetitive R&D projects. Joint ventures often may be necessary to lower the risk and cost associated with R&D. So long as ventures do not facilitate price fixing (for example, through exchange of information on prices or production levels), or reduce innovation (for example, by a tacit agreement to underinvest in R&D), the ventures do not violate the antitrust laws.

Nevertheless, because an injured private party who wins an antitrust damage suit is automatically entitled to treble damages, the threat of such suits may inhibit the formation of joint R&D ventures that would improve the well-being of consumers.

Title II would reduce this threat by providing that the courts may not find a joint R&D venture to be illegal in and of itself under the antitrust laws. Specifically, it will prevent courts from finding that any joint R&D venture violates the antitrust laws without first finding that it actually has anticompetitive effects which outweigh its procompetitive effects.

more

(OVER)

A second provision of Title II would provide that firms operating a joint R&D venture that has been fully disclosed to the Department of Justice and the Federal Trade Commission may be sued only for the amount of the actual damage caused by any anticompetitive conduct, plus prejudgment interest, and not for three times the damage. These changes should encourage the formation of additional procompetitive joint R&D ventures. And unlike some other proposals currently before Congress, they will do so with a minimal amount of bureaucratic interference.

III. Titles III and IV

To insure that our laws do not discourage procompetitive private sector R&D efforts, it is not enough to remove the adverse deterrent effect the antitrust laws may have on joint R&D. The antitrust and intellectual property laws must allow and even encourage those who create new technologies to bring their technology to the market in all of its useful applications.

Titles III and IV recognize that licensing can enable intellectual property owners to employ the superior ability of other enterprises to market new applications more quickly and at lower cost. Both titles would encourage procompetitive licensing of intellectual property.

Title III would prohibit courts from condemning under the antitrust laws an intellectual property licensing arrangement without first considering its procompetitive benefits. It also would eliminate the potential of treble damage liability under the antitrust laws for intellectual property licensing. Those who suffer antitrust injury as a result of licensing will still be able to sue for actual damages plus prejudgment interest.

Under Title IV, courts would be able to refuse to enforce a valid patent or copyright on the grounds of misuse only after meaningful economic analysis.

IV. Title V

Title V would close a loophole in the patent laws that has discouraged investment in efficiency-enhancing technologies. Creation of and improvements in the process of making products can be just as important as creating and improving the product itself. Currently, if someone practices a United States process patent outside this country without the owner's consent and then imports the resulting product into the United States, the importer is not guilty of patent infringement. Title V would enable owners of process patents to prevent such unauthorized use of their technology.

V. Conclusion

In sum, this legislative package proposes clarifications and modifications in the antitrust and intellectual property laws that should strongly encourage innovation in the United States, which in turn should enhance the competitiveness and productivity of American industry. By removing unnecessary deterrents and protecting the rights of innovators to their legitimate financial rewards, this proposal would strengthen incentives for Americans to create and develop new technologies. At the same time, the antitrust laws would continue to protect American businesses and consumers from anti-competitive activities. The President has urged all Members of Congress to give this proposal careful consideration and to work for its enactment during the 98th Congress.

# # # # # # #

THE WHITE HOUSE

Office of the Press Secretary

EMBARGOED FOR RELEASE AT 3:30 PM EDT September 12, 1983

STATEMENT BY THE PRESIDENT

Today I am proposing legislation entitled the "National Productivity and Innovation Act of 1983." When enacted the bill will modify antitrust, patent, and copyright laws in a way that will greatly enhance this country's productivity and the ability of U.S. industry to compete in world markets.

Improving domestic industrial productivity and competitiveness will depend largely on our ability to create and develop new technologies. Technological advances provide our economy with the means to produce new or improved goods and services at lower cost than those already on the market. Over the last eighty years, the development of new technologies accounted for almost half of the growth in our real per capita income. New technology creates jobs and gives this country a competitive edge. The U.S. computer industry, for example, directly provides jobs for about 830,000 people, and is a leader in world markets.

New technologies are seldom created by luck; they are instead the result of private and public sector investments of time, money, and effort. With this in mind, we propose to increase Federal funding of research and development (R&D) by 17 percent to $47 billion in 1984 and to encourage private sector R&D by improving the economic and legal climate for such efforts.

A number of things have already been done to encourage private sector efforts. The Economic Recovery Tax Act of 1981, for example, provides a 25 percent tax credit to firms which invest in additional R&D. And by reducing inflation and interest rates our economic program has lowered substantially the cost of conducting research.

When enacted, the National Productivity and Innovation Act will improve the legal climate for technological advancement by clarifying and modifying the Federal antitrust and intellectual property laws. Those laws have a substantial effect on private investment in R&D. The antitrust laws are designed to protect consumers from anticompetitive conduct. Yet we must recognize that while vigorous competition among independent businesses generally serves the economy best, in some areas, like the creation and development of technology, cooperation is necessary if American industry is to compete internationally. Similarly, the intellectual property laws, such as those dealing with patents and copyrights, encourage competition by providing individuals with exclusive rights to their technology.

My proposed legislation will insure that the antitrust and intellectual property laws are fully compatible with efficient creation and development of technology, while, at the same time, maintaining strong safeguards against anticompetitive behavior.

more

(OVER)

Title II of the bill will ensure that antitrust laws do not unnecessarily inhibit the formation of joint R&D ventures. Joint ventures often may be necessary to lower the risk and cost associated with R&D. So long as these ventures do not facilitate price fixing or reduce innovation, such ventures should not be considered a violation of antitrust laws. Nevertheless, the risk remains that some courts may overlook the beneficial aspects of joint R&D. This risk is unnecessarily magnified by the triple damages awarded to an injured private party who wins an antitrust damage suit.

Title II will reduce the adverse deterrent effect that triple damages have on procompetitive joint R&D ventures. The title mandates that the courts may not find a joint R&D venture in violation of the antitrust laws without first considering its procompetitive benefits. In addition, Title II provides that a joint R&D venture that has been fully disclosed to the Department of Justice and the Federal Trade Commission found in violation of antitrust laws may be sued only for the actual damage, plus prejudgment interest, caused by its conduct.

Title III will insure that antitrust laws encourage procompetitive intellectual property licensing, which greatly enhances our economy's ability to create and develop technology. Intellectual property owners often cannot obtain their legitimate reward from R&D unless they license their technology to others. Such licensing enables intellectual property owners to use the superior ability of other enterprises in the marketing of their technology. This can be particularly important for small businesses that do not have sufficient resources to develop the full range of applications of a new technology discovered through their research efforts.

Recognizing the significance of licensing, we have designed Title III to ensure intellectual property owners the fruits of their ingenuity. First, the title prohibits courts from condemning an intellectual property licensing arrangement without first considering its procompetitive benefits. Second, the title eliminates the potential of triple damage liability under the antitrust laws for intellectual property licensing. Although those who suffer antitrust injury as a result of licensing could still sue, Title III would minimize the deterrence that antitrust laws currently have on beneficial licensing.

Similarly, Title IV encourages the procompetitive use of intellectual property. Courts will be able to refuse to enforce a valid patent or copyright because of misuse only after considering the economic ramifications.

Title V of the Act increases Federal protection for process patents. Currently, if someone violates a process patent outside the country and then imports the resulting product into the United States, the importer is not guilty of violating patent law. Our bill closes this loophole, permitting the owners of process patents to obtain their rightful reward by preventing such unauthorized use of their technology.

This legislation will, if enacted, stimulate the creation and development of new technology, increase this country's productivity, and enable our industries to compete more effectively in world markets while continuing to protect the interests of American consumers. I strongly urge Congress to move forward on this proposed legislation, and by doing so, encourage innovation and increase the employment opportunities and standard of living for all Americans.

# # # # # #

THE WHITE HOUSE

Office of the Press Secretary

EMBARGOED FOR RELEASE AT 3:30 PM EDT   September 12, 1983

TO THE CONGRESS OF THE UNITED STATES:

I am transmitting to the Congress today a legislative proposal entitled, the "National Productivity and Innovation Act of 1983." The bill would modify the Federal antitrust and intellectual property laws in ways that will enhance this country's productivity and the competitiveness of U.S. industries in international markets.

As you know, one of the most important goals of my Administration has been to revitalize the competitiveness and productivity of American industry. Tax cuts proposed by my Administration and enacted during the 97th Congress have greatly stimulated economic activity. In addition, our efforts to rationalize Federal rules and regulations have significantly enhanced the efficiency of our economy. For the first time in over a decade, there exists the foundation for a period of strong and sustained economic growth.

The ability of the United States to improve productivity and industrial competitiveness will also depend largely on our ability to create and develop new technologies. Advances in technology provide our economy with the means to produce new or improved goods and services and to produce at lower cost those goods and services already on the market. It is difficult to overstate the importance of technological development to a strong and healthy United States economy. It has been estimated that advances in scientific and technological knowledge have been responsible for almost half of the increase in this country's labor productivity over the last 50 years. New technology also creates new jobs and gives us an advantage in world markets. For example, the U.S. computer industry, which was in its infancy just a short time ago, directly provides jobs for about 830,000 Americans and is a leader in world markets.

The private and public sectors must spend a great deal of time, money, and effort to discover and develop new technologies. My Administration has moved to bolster research and development (R&D) in the public sector by proposing in our 1984 budget to increase Federal funding of R&D by 17 percent, to $47 billion. However, it is vital that our laws affecting the creation and development of new technologies properly encourage private sector R&D as well.

The Economic Recovery Tax Act of 1981 provides a 25 percent tax credit to encourage firms to invest in additional R&D. Our economic program has helped reduce inflation and interest rates and thus has lowered substantially the cost of conducting research.

more

(OVER)

The antitrust and intellectual property laws also have a very significant effect on private investment in R&D. The antitrust laws are designed to protect consumers from anti-competitive conduct. While the economy generally benefits most from vigorous competition among independent businesses, the antitrust laws recognize that in some areas, like the creation and development of technology, cooperation among producers, even competitors, can actually serve to maximize the well-being of consumers.

The intellectual property laws, for example, those dealing with patents and copyrights, also serve to promote the interests of consumers. The promise of the financial reward provided by exclusive rights to intellectual property induces individuals to compete to create and develop new and useful technologies.

After reviewing the effect of the antitrust and intellectual property laws on the creation and development of new technologies and after consultations with key members of Congress, I have concluded that the antitrust laws can be clarified in some respects and modified in other respects to stimulate significantly private sector R&D. This can be done while maintaining strong safeguards to protect the economy against collusive actions that would improperly restrict competition. The National Productivity and Innovation Act of 1983, which embodies those changes, is a package of four substantive proposals that deals with all phases of the innovation process.

Title II of the bill would ensure that the antitrust laws do not unnecessarily inhibit United States firms from pooling their resources to engage jointly in procompetitive R&D projects. Joint ventures often may be necessary to reduce the risk and cost associated with R&D. So long as the venture does not threaten to facilitate price fixing or to reduce innovation, such ventures do not violate the antitrust laws. Nevertheless, the risk remains that some courts may not fully appreciate the beneficial aspects of joint R&D. This risk is unnecessarily magnified by the fact that a successful anti-trust claimant is automatically entitled to three times the damages actually suffered.

Title II would alleviate the adverse deterrent effect that this risk may have on procompetitive joint R&D ventures. This title provides that the courts may not find that a joint R&D venture violates the antitrust laws without first considering its procompetitive benefits. In addition, Title II provides that a joint R&D venture that has been fully disclosed to the Department of Justice and the Federal Trade Commission may be sued only for the actual damage caused by its conduct plus prejudgment interest. This combination of changes will encourage the formation of procompetitive joint R&D ventures. And unlike some other proposals currently before Congress, it will do so with the minimal amount of bureaucratic interference in the functioning of those ventures.

If we are to assure that our laws stimulate investment in new technologies, however, it is not enough merely to correct the adverse deterrent effect the antitrust laws may have on procompetitive joint R&D. Rather, we must also assure that the antitrust and intellectual property laws allow -- indeed encourage -- those who create new technologies to bring their technology to market in the most efficient manner. Only in this way can those who invest their time, money, and effort in R&D be assured of earning the maximum legitimate reward.

Titles III and IV recognize that very frequently the most efficient way to develop new technology is to license that technology to others. Licensing can enable intellectual property owners to employ the superior ability of other enterprises to market technology more quickly and at lower cost. This can be particularly important for small businesses that do not have the ability to develop all possible applications of new technologies by themselves. However, the courts have not always been sympathetic to these procompetitive benefits of licensing.

Title III would prohibit courts from finding that an intellectual property licensing arrangement violates the antitrust laws without first considering its procompetitive benefits. In addition, the title would eliminate the potential of treble damage liability under the antitrust laws for intellectual property licensing. Although those who suffer antitrust injury as a result of licensing would still be able to sue for their actual damages plus prejudgment interest, Title III would minimize the deterrence that the antitrust laws currently may have on potentially beneficial licensing of technology.

Title IV would also encourage the procompetitive licensing of intellectual property. Pursuant to this title, the courts may refuse to enforce a valid patent or copyright on the ground of misuse only after considering meaningful economic analysis.

Finally, Title V will close a loophole in the patent laws that has discouraged investment in efficiency-enhancing technologies. Creation of and improvements in the process of making products can be just as important as creating and improving the product itself. Currently, if someone uses a United States process patent outside this country without the owner's consent and then imports the resulting product into the United States, the importer is not guilty of infringement. Title V of the bill would close this loophole so that owners of process patents can earn their rightful reward by preventing the unauthorized use of their technology.

We must not delay making the necessary changes in the law to encourage the creation and development of new technology, to increase this country's productivity, and to enable our industries to compete more effectively in international markets. We must act now. I therefore urge prompt consideration and passage of this legislative proposal.

RONALD REAGAN

THE WHITE HOUSE,
September 12, 1983.

# # # # # # # #