

NYPLA ANNUAL MEETING

The annual meeting of the Association was convened by outgoing **President John N. Cooper** on May 26, 1966, who reported briefly on the Association's activities during the past year.

Mr. Cooper stated that one facet of the patent system that has caused a great deal of discussion and controversy was that of **Government patent policy** with respect to research and development programs supported in whole or in part by **Government funds**. Following hearings on the several proposed bills, this **Association** expressed support of McClellan bill S. 1809 as recognizing the contributions of both **Government and contractors**. The Association also offered to present a limited number of minor amendments to S. 1809.

In August of 1965 the Chairman of the **President's Commission on the Patent System** requested suggestions and recommendations from this Association for its consideration in evaluating the changes, if any, which should be made with respect to that system. A **Special Committee** was formed in the latter part of September under the chairmanship of **Albert C. Johnston**. **W. Houston Kenyon** served as vice chairman. This **Special Committee** considered many aspects of the patent system and proposals for changes. The Board of Governors adopted the recommendations of the committee except for the recommendation of doing away with interferences altogether and this report, as approved by the Board of Governors, was forwarded to the Commission on December 15, 1965, two weeks past the deadline of December 1 originally suggested by the Chairman. Copies of that report were circulated among the members of this association.

The Patent Office continued to "tinker" with the **Patent Office rules** by revising and suggesting revisions thereto. These also have been the subject of committee study and recommendations were made on them. ••• **Patent Office relocation plans** appear dormant, despite the need for larger and better quarters. ••• A Special Committee of the Board of Governors has considered the desirability of establishing an **Office of Permanent Secretary** for the Association as a more effective means of coordinating all the activities and functions of the Association. This committee concluded that such a position should be established in view of the size of the Association and the number of committees but that, from a financial viewpoint, the Association could not afford such a permanent secretary at the present time without a substantial increase in dues which, to your Board of Governors, did not

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With this issue, Volume 5 of the BULLETIN closes. Publication resumes in October.
The Staff wishes all of its readership an enjoyable summer.

SMALL BUSINESS AND PATENTS IS SUBJECT OF ADDRESS BY ZEIDMAN

Philip F. Zeidman, General Counsel, Small Business Administration, addressed the annual meeting of the NYPLA on May 26, 1966, on the topic "**The Small Business Community and the Patent System**".

Emphasizing the importance of the patent system to the Small Business Administration, Mr. Zeidman outlined the value of the patent system to the small businessman and the independent inventor and the role that SBA can play in exploiting patents.

Mr. Zeidman noted that the SBA is quite knowledgeable about the patent system, and reminded the audience that the President named the SBA Administrator as one of the four Government members of the President's Commission on the Patent System.

SBA Role Goes Far Beyond Making Of Loans. Contrary to popular impression, SBA has been selected to carry out a national policy "to aid, counsel, assist and protect," small business in order to preserve the free competitive enterprise. Mindful of this mandate, SBA considers the patent system potentially one of the most helpful techniques yet devised to realize the high aspirations of small business.

Profit Motive Paramount. Recognizing the historic significance of the patent system, the speaker noted that to survive, it must rest upon principles which retain their validity in mid-twentieth century. He suggested that the principle motivation to the business enterprise is a profit motive whether it be a large or a small business enterprise. Although the independent and employed inventor may desire recognition by their contemporaries for advances made, they too, desire the more tangible rewards that flow to the successful inventor.

Mr. Zeidman suggested that this powerful drive for profit and recognition can be harnessed for the benefit of society by a patent system which provides issuance of a patent to the inventor and a limited exclusivity for the owner. The alternative is a drying up of the motivation for research, innovation and progress. For example, in Italy, where there are no pharmaceutical patents, there is no pharmaceutical research worthy of mention.

Small Concerns And Individual Inventors Have A Stake In Patent System. Challenging those economists and theoreticians who would take the position that the patent system favors the large corporation to the disadvantage of their smaller competitors, Mr. Zeidman suggested that their approach proceeds from the assumption that the larger the financial resources the easier to perform research. He challenged the correlation between the financial ability to engage in large-scale research and the amount of *meaningful* research performed; and between the *scope* of research performed and the *number and importance* of the discoveries.

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PRESIDENT ALBERT JOHNSTON'S COMMENTS AT ANNUAL MEETING

In his opening address before the Association, incoming President Albert C. Johnston thanked the membership for the privilege of being elected president of the NYPLA and outlined his experience in patent law which began in the Patent Office in 1930. Five years later he left the Office to spend one year in general legal practice with the Government and then in 1936 began a career in the practice of patent law in New York City.

With this background, Mr. Johnston expressed the hope that the genius of creative individuals will blossom for the good of the whole public and for the profession and noted that in achieving this goal there is the problem of a growing gap between the public understanding of the creative process and the few creative people in the world. He emphasized the unique responsibility of the patent, trademark and copyright bar as interpreters between the client and the public and suggested that the members of the profession must provide bridging understanding between the client and the public.

USE OF COMMUNITY TV ANTENNA HELD TO INFRINGE COPYRIGHT

Operation of a community antenna television (CATV) system which received television signals by means of a master antenna coupled by cables and amplifying devices to subscribers' television receiver sets in homes was held to be a public performance and to infringe the copyrights of plaintiff whose copyrighted motion picture films were transmitted by licensed television transmitting stations. *United Artists Television, Inc. v. Fortnightly Corporation*, Civil Action 60-2583, decided May 23, 1966, by the Honorable William B. Herlands, District Judge, United States District Court, Southern District of New York.

The case posed novel questions involving interpretations of certain provisions of the Copyright Act, 17 USC Section 1 et seq. In sustaining the plaintiff's charge of copyright infringement, Judge Herlands ruled that the amplifiers of the defendant's CATV system produce an output signal which is a reproduction of the essential characteristics of the received signals and that, under the facts of the case, they constitute such a reproduction and duplication as will support a charge of copyright infringement.

In reaching this conclusion, the decision points out that the input signals representing both the video and sound do not move as preserved electronic entities through the system, for at each stage of amplification or modulation a duplicate of the input is made and that the input signals are dissipated and lost and do not join or become part of the output signals. The net effect of defendant's electronic processing is to transmit through defendant's coaxial cables to its subscribers reproduced signals on new carrier waves.

BOARD OF GOVERNORS ELECTS NEW MEMBERS

The following new members of the Association were elected by the Board of Governors at its meeting following the annual business meeting on May 26: Miss Diana J. Auger, Iain Cameron Baillie, Donald S. Dowden, Gerald J. Flintoft, Marvin N. Gordon, Ronald Budd Hildreth, Evans Kahn, Lawrence G. Kastriner, Arthur M. Lieberman, David A. Roth, James E. Siegel, and Benjamin T. Sporn.

THE CONSTITUTIONALITY OF FEE BILL IS UNDER ATTACK IN D. C.

In an action recently filed in the U. S. District Court for the District of Columbia, the plaintiff-applicant is seeking an order requiring the defendant Commissioner of Patents to accept a \$30 issue fee for a patent application, even though the notice of allowance was entered after the effective date of the fee bill (P. L. 89-93, eff. Oct. 25, 1965) which prescribes a substantially higher fee. The application had been filed prior to that date.

Alleging that an implied contract exists between the applicant and the Government by the filing of the application while the law specified a \$30 issue fee, the complaint assails the unconstitutionality of the fee bill with respect to such applications on the grounds that:

- It deprives the applicant of his property without due process of law;
- It is an *ex post facto* law;
- It is a direct tax on patent applications filed before the act's effective date.

The answer in behalf of the Commissioner of Patents denies the existence of an implied contract and the alleged unconstitutionality of the fee legislation.

PROF. GIBBONS RECEIVES AWARD

At the dinner following the Annual Meeting of the NYPLA, President Johnston presented the NYPLA award for the best law review article on the subject of patents published during the past year. The recipient was Gerald R. Gibbons, Associate Professor at Rutgers University School of Law, South Jersey Division, for an article published in the *Columbia Law Review*, March 1966 issue, on "Field Restrictions in Patent Transactions: Economic Discrimination and Restraint of Competition."

This is one of four articles in a series prepared by Professor Gibbons.

FREDERICK BACHMAN

Mr. Frederick Bachman, a member of the NYPLA since 1922, died May 13, 1966, at the age of 81.

Mr. Bachman's early patent experience was with Thomas A. Edison, Inc. where he worked on the development of the phonograph and the movies.

A former partner in the firm of Kenyon & Kenyon, Mr. Bachman received his B.S. degree from MIT and his law degree from National University.

VIRGIL C. KLINE

Virgil C. Kline died May 26, 1966, at the age of 73.

After graduation from the University of Missouri Mr. Kline obtained his law degree from George Washington University while serving as an Examiner with the Patent Office. He thereafter worked for Johns-Manville, The Texas Company, and the firms of Kenyon & Kenyon and Townsend & Decker.

Mr. Kline was a life member of the Association, a former member of its Board of Governors, and a Second Vice President.

Comments from Members

Editor, NYPLA BULLETIN:

The remark in an earlier NYPLA BULLETIN [April 1966] that the proposed World Patent Index "could lead the way to a World Patent System", might have misled some readers into a belief that such a system is "just around the corner".

As you requested, I am summarizing the proposition as we understand it from our meetings with Dr. Bogsch.

The recent visit of Dr. Bogsch, Deputy Director of BIRPI to New York and to Washington to explain the proposed World Patent Index was for the purpose of making a "market survey" of prospective use of the service by American industry and the patent profession. A large number of questionnaires have been returned and are now being analyzed. Dr. Bogsch made it clear that the service was not intended to be retroactive (at least when first established); i.e. not intended to include patents granted before the Index goes into operation, except to furnish such information as the lapsing of such patents for failure to pay maintenance fees. There will be some retroactive aspects in that, after a firm decision is made to proceed with the project, a staff will be assembled which will prepare material from official journals issued from that date forward which may refer to earlier-filed related applications. This will be the input to the computer when the latter is installed and will be used in fulfilling information requests. To this extent only, the service will be retroactive.

It should be kept in mind that no information as to filing of an application in a given country will be furnished unless such information is already made known to the public through an official journal. Applications are thus preserved in secrecy to the same extent as heretofore.

—ERNEST A. FALLER,
Program Director, Office
of International Patent
and Trademark Affairs,
U. S. Patent Office

Editor, NYPLA BULLETIN:

Fifty years ago, on July 1st, I entered the United States Patent Office as an Assistant Examiner. I remember the first case that I took up. It was directed to a multiply [sic]-adjustable wrench, a clever idea but mechanically inoperative. The case was rejected on that ground.

I mention this as of interest in view of the novelty-only type examination recently proposed under the imprimatur of this Association. Under that practice, I would apparently have had to let the case be published as a Provisional Patent. The alternative would be to keep searching (even yet?) for that non-existent anticipation.

Perhaps it is not such a bad idea to permit the Examiner to reject a case on any statutory ground that he finds applicable, including obviousness, rather than place him in a strait-jacket.

—HARRY A. BURGESS

GOLF SCORES AT JUNE OUTING

The golf scores chalked up at the June outing were not available when this BULLETIN went to the printer. They will be printed in the October issue. Be patient!

NYPLA BULLETIN, Vol. 5, No. 9, June, 1966

RECENT CASES OF SPECIAL INTEREST

Unfair Competition. The defendant's taking of information from plaintiff's teletype news service is an act of unfair competition which should be enjoined. **The Bond Buyer v. Dealers Digest Pub. Co.**, 267 N. Y. S. 2d 944, 149 USPQ 465 (1st Dept., App. Div. 1966). The plaintiff published a news letter about the market in municipal bonds and operated the wire news service giving advance immediate information on bond offerings. Defendant appropriated the information from the wire service enabling it to publish this information at the same time as plaintiff. Plaintiff's rights lie in the saleable organization of material attained through the expenditure of considerable effort, skill and money.

Patents—Venue. That a wholly-owned subsidiary corporation of a parent corporation maintains a permanent place of business in a district is an insufficient basis for acquiring proper venue as to the parent corporation under 28 U. S. C. 1400 (b), the patent venue statute. As long as the two corporations maintain the formalities of two separate corporate entities, the parent is not amenable to suit because the subsidiary is the instrumentality for its doing business in the district. The directors of the corporations were overlapping, the subsidiary bought all its machines from the parent, and the parent dominated and controlled the subsidiary; yet, since the corporate formalities are observed, *held* there is no jurisdiction over the parent company, **Kearney & Trecker Corp. v. The Cincinnati Milling Machine Co.**, 149 USPQ 551 (N. D. Ill. 1966).

Trademarks—Descriptive. The incorporation of a word, previously adjudged descriptive, into a slogan, where the word is prominent need not bar the slogan from registration, **In re Preformed Line Products Co.**, 149 USPQ 569 (CCPA 1966). *Preformed* for electrical hardware had been previously denied registration as being descriptive. "You can look up to Preformed" was denied registration in that the prominence of *Preformed* made the slogan descriptive. *Reversed*, on grounds that the slogan, viewed in its entirety, functions to distinguish the applicant's goods.

PATENTS TO BE MICROFILMED

On June 30th the Patent Office announced that it had signed a two million dollar contract with the Eastman subsidiary Recordak Corporation to place all patents since 1790 on microfilm within the next two years. Over 3 million patents will be filmed.

System Faster and Cheaper. Under the new system the Patent Office will Xerox a requested patent from the film, which will cost 50¢. Attorneys can also purchase classified patents on the microfilm cards, which will be about 3 by 6 inches in size. They can be used with a "reader." Commissioner Brenner has said that the new system should save the Patent Office \$500,000 a year in operating expenses. It should also permit the Office to give quicker service on patent copies. The microfilming is expected to start this fall.

It has been suggested that this may make it possible to scatter several complete search rooms around the country.

SMALL BUSINESS AND PATENTS IS MAY MEETING TOPIC

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Recognizing the limitations in evaluating fruitful research, the speaker referred to a recent study made by the Patent Trademark and Copyright Research Institute of the George Washington University pointing to the importance of the individual inventor. Also the White House Committee on Small Business 1962 Report to the President characterized small business as "a vast seed bed for technological developments and innovation." The White House Committee pointed out that a searching study of 61 twentieth century fundamental inventions indicated that more than half were by inventors working on their own rather than backed by a research organization.



Philip F. Zeidman

Even in areas where large concerns dominate Government-financed research and development they often look to small sub-contractors for technological expertise and innovation.

The experience at SBA leads to agreement with a study by Professor Joseph Scherer of the staff of the Federal Reserve Bank of New York which demonstrated that inventive output as measured by patents granted does not either increase proportionally with the volume of business, or bear a systematic relationship to variations in market power.

Patent System Should Yield Three Benefits. Firstly, expeditious and accurate patent issuance; secondly, inexpensive adjudication of disputes between inventor and unauthorized users; and, thirdly, assistance to exploit and market their innovations.

While the first of the three, the importance of an expeditious and accurate issuance system is self-evident, the second two benefits are deserving of further discussion.

The problem of patent enforcement is a very real one for many concerns and for many inventors. Rightful alarm has been raised at the present tendency of courts to permit far ranging discovery and other pretrial proceedings, thus imposing enormous expense on the litigants. To the extent that such high costs of litigation prevent individual inventors from asserting their patents, they are effectively denied due process of law. The small firm or individual unable to challenge the validity of a patent because of litigation expenses is likewise denied due process. In both instances this is bound to result in adverse public opinion and something must be done and soon.

While noting that he did not wish to suggest that he is privy to the thinking of the President's Patent Commis-

sion the speaker suggested that it is safe to assume that the Commission will make some recommendation on this issue. He solicited suggestions from the audience on this point.

SBA is quite concerned over recent court decisions on the question of misuse and expressed doubts whether the small business community on the whole really understands the present state of the law or the position of the Department of Justice. This is because the law is quite complex.

The small businessman's reaction is typically to ignore the problem. Mr. Zeidman suggested that the Patent Bar should reduce the misuse and anti-trust issues to understandable proportions and be certain that small business clients receive the message.

An Unexploited Patent Is Of Little Value to the Owner or Society. The technical and financial requirements for success for exploitation in the nature of available resources have received too little attention from the financial community, the industrial community and even the patent community.

Exploitation can be more expensive than the research which lead to the invention. The speaker cited Dr. Land's rule of thumb that for every dollar of research there must be ten dollars invested in development and one hundred dollars in production and marketing.

Roll of SBA in Production and Marketing. SBA can publicize the invention and its availability through its Products List Circular.

SBA can also obtain anti-trust immunity for those small concerns which desire to join forces with other small concerns in a research program and in the exploitation of patents resulting from this joint research.

SBA and the Economic Development Administration within the department of Commerce also can make loans to develop and exploit new products and new ideas. Unfortunately, these lending programs do not offer much hope for the average inventor because SBA's regular business loan program requires that the loans be of sound value or so secured as reasonably to assure repayment. As one disgruntled loan applicant has put it, "If you need it you can't get it; if you can get it, you don't need it."

The Department of Commerce under the State Technical Services Act of 1965 can cooperate with States in assisting local concerns to make the maximum use of new technologies.

Other Help. Some assistance is also available from many states who will help finance projects based upon the exploitation of new products, but these too have been of little value and frequently too late.

In summary, both the Federal Government and the States do not and cannot make more than a small impact on the total problem and attention must be directed to more conventional sources of private financing which themselves are restrained by either law or self-imposed reluctance to expose their resources to the risks entailed in assisting exploitation of new ideas developed by independent inventors and small concerns.

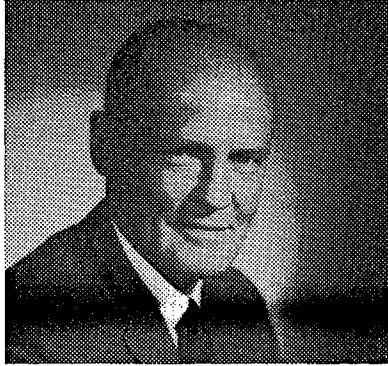
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COMMENTARY ON THE ANNUAL MEETING OF THE NYPLA

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appear to be justified at this time. The committee recommended that the matter of a permanent secretary be re-evaluated in three years.

The 44th Annual Dinner again filled the Waldorf Ballroom and happily produced a slight profit instead of the usual net loss. ••• Mr. Cooper extended thanks on behalf of all the members to those charged with getting out the YEARBOOK and the BULLETIN. He commented that the BULLETIN has again shown improvement both in quality and in the variety of subjects covered and that the YEARBOOK again shows the result of careful editing and proofreading.



Incoming President
Albert C. Johnston

As to finances, the Association is solvent and it took in more than expended last year as indicated by the Treasurer's report.

Mr. Cooper regretfully reported the death of 14 members of the Association whose obituaries will appear in the YEARBOOK. In conclusion he expressed his deep appreciation to the officers, members of the Board of Governors, committee and subcommittee chairmen and to all the members of the committees who have served throughout the year.

Following the President's report the individual committees submitted their reports. The Treasurer reported a slight gain in the Association's assets for the year. ••• The Committee on Admissions reported 78 new members with twelve others being processed. ••• Meetings and Forums reported on nine affairs throughout the year and thanked all the members and officers for their cooperation in making the year a success. ••• The Committee on Ethics and Grievances reported that it was concerned principally with the unlawful practice of patent law by agents. The Attorney General relies on the local bar association to pursue these cases. In New York City this devolves upon the New York County Lawyer's Association which has asked the NYPLA for funds and manpower to handle such cases in the patent area. ••• The Committee on Patent Law and Practice was concerned principally with matters related to the Presidential Commission as reported by Mr. Cooper. The committee suggested review of pretrial practices in the Federal Courts of the Southern District and Eastern District of New York. This committee suggested a rule change concerning the authority of an attorney to abandon a case, which now has been approved by the Patent Office.

In the trademark areas, the former Lindsay bill has now been changed over to an amendment of the 1946 Trademark Act rather than a separate bill. ••• There

were two new adherences to the International Copyright Convention. ••• The Committee on Employment reported that recent graduates are available as patent trainees and a list of prospects is available through the committee. ••• The Library Committee requests back numbers of the NYPLA YEARBOOK 1950 to 1960 and especially 1954, 1956 and 1962. ••• Legal Aid indicated that inventors appear to be able to manage without their help since they had no inquiries over the year. ••• The Committee on Economic Matters Affecting the Profession investigated the problems of obtaining professional liability insurance. The questionnaire recently circulated to the members is to provide data so that an insurance company can determine what will be involved in writing such insurance. Indications are that the risk in the case of patent attorneys may not be so high as in the case of attorneys in general practice. ••• The Committee on Public Information and Education reported that its speakers bureau presented a three day seminar at Brooklyn Polytechnic and two speaking engagements before engineering societies. Three articles were published or reviewed and two broadcasts were presented on FM educational stations.



Outgoing President
John N. Cooper

The Committee on Publications noted that the BULLETIN has now completed five years of publication. A request was made for more material for publication from the members and especially from the committees of the Association. For the most part, such material has been developed by the members of the staff whereas it would be most helpful if other members of the association, particularly those serving on committees, would be able to volunteer information for publication. ••• The Committee on Arbitration presented three closed session meetings during the year on copyrights, patents and trademarks, respectively. Each meeting was attended by a panel of recognized experts in the respective field and a stenographic record of the dialogue was taken down by a court reporter, later edited and prepared for publication in the Arbitration Journal. The copyright session has already been published and the other two sessions are to be published in later issues. It was the recommendation of this special committee that, since it had accomplished its purpose in its first year, it be discontinued.

The amendment to the constitution of the Association establishing a new class of retired members was unanimously carried by voice vote. ••• Upon approval of the report of the Nominating Committee a new slate of officers and Board of Governors were voted into office and outgoing president, John Cooper handed the gavel over to incoming president, Albert C. Johnston.

USTMA HOLDS ANNUAL MEETING

The United States Trademark Association held its 89th Annual Meeting recently and the schedule of events featured a number of speakers who were also members of the NYPLA.

The first business session presented an interesting analysis of State trademark matters by Bert A. Collison. His speech was followed by Paul Hoffmann on the very interesting subject of the use of a plurality of trademarks on the same product. The business meeting was concluded by Dr. Droste of Hamburg, Germany, who reviewed recent German trademark and unfair competition developments.

Workshops Held. The following day simultaneous workshops were conducted. The first workshop involved *Trademarks & Advertising: A Bridge or a Barricade?*, in which vice-presidents of two advertising agencies discussed this subject matter. Following this workshop, W. Thomas Hofstetter, Alfred T. Lee, and Julius R. Lunsford, Jr., discussed means of protecting packages and labels under the copyright, unfair competition and trademark laws.

The other workshop involved Lewis S. Garner, Frank J. Sullivan, and William Hedelund, who gave informal advice on pressing and resisting infringement claims short of litigation. The question and answer period following this workshop also proved most interesting.

The final item on the business agenda was a discussion by Lewis G. Rudnick and Robert D. Mulhollen on *The Franchiser's Dilemma: Can He Satisfy Trademark Requirements Without Exposing Himself to Other Undue Legal Risks?*

UNAUTHORIZED PRACTITIONER INDICTED

An 11 count indictment under 35 USC 33 was obtained by the U. S. Attorney General's Office recently against a woman charged with holding herself out to inventors as "being qualified to prepare and prosecute applications for patent" although not registered to practice before the Patent Office. The offense is a misdemeanor carrying a maximum penalty of \$1,000 in fines.

The indictment culminates substantial effort on the part of the D. C. Bar in cooperation with the Patent Office to rid the Patent field of those not qualified to practice.

SMALL BUSINESS AND PATENTS

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The best present sources are those companies which are expressly created to make risk investments such as American Research and Development Corporation and the Rockefeller Brothers.

Additionally, Small Business Investment Companies make investments in growth type organizations and are part of a new type of banking system licensed, regulated and sometimes financed by SBA. This new banking system was established by Congress in 1958. Today there are 700 SBIC's ranging in size from \$300,000 to about \$25,000,000 and they have provided more than \$800,000,000 to more than 20,000 financings of both debt and equity nature.

Suggests Study. There is no single or perhaps even combination of currently available resources that can do the total job which our growing economy requires. Mr. Zeidman suggested that a study by committees of the NYPLA may lead to new ways in which the Federal and State Governments, directly or through Government assisted private organizations, such as SBIC's and state and local development companies can make their programs more useful, more attractive, and better known to the individual inventor and small concern. SBA invites these ideas even if they entail the development of new programs or require new legislation.

It has already been suggested that the Federal Reserve Banks could provide leadership to the formation of capital banks to provide venture capital. It has also been suggested that a Federal agency be established for this purpose. A National Research Development Corporation has also been proposed. Another possibility is a publicly owned corporation, controlled—as is the Communications Satellite Corporation—by a board elected in part by the stockholders and appointed in part by the President of the United States.

SEARCH ROOM TO BE COOLER

Anyone who has occasion to use the Public Search Room of the Patent Office will be happy to know that the installation of air-conditioning equipment is well under way. It is hoped that the installation will be finished in time to be of use this summer.

BULLETIN

of The New York Patent Law Association

165 Broadway, New York, New York 10006

Volume 5.

JUNE 1966

Number 9.

The BULLETIN is published monthly (except in July, August, and September) for the members of The New York Patent Law Association. Annual Non-Member Subscriptions \$4.00/year. Correspondence may be directed to The Editor, 90 Broad Street, New York, N. Y. 10004

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