

THE REPORT OF THE PRESIDENT'S COMMISSION

PROPOSALS WOULD BRING U. S. CLOSER TO FOREIGN SYSTEMS

One of the stated objectives of the Commission was to make U. S. practice more compatible with that of other major countries. The extent to which the recommendations promote this objective will be evident from the following comparison.

First to File. The "first to file system" (Recommendation I) is being followed throughout the world except Canada and the Philippines, both having laws largely derived from the United States. The Canadian Royal Commission some years ago recommended new legislation basing priority rights on the filing date but nothing has since been done to carry out this recommendation.

Prior Art. In defining prior art in Recommendation I, the Commission evidently tried to keep abreast of recently proposed European legislation. The proposed definition includes publication in any form anywhere and use anywhere. This is somewhat less broad than the definition in Section 2 of the proposed Scandinavian Law. "Everything made available to the public by writing, lectures, working, or otherwise shall be considered as known", which includes oral disclosure. Article 11 of the proposed European Draft Convention defines "The state of the art shall be held to comprise everything made available to the public by means of a written or oral description, by use, or in any other way, before the date of filing the application for a European patent".

The Scandinavian and European draft laws and the Commission's proposal provide that the contents of an application of earlier date should be considered as part of the state of the art, even though published at a later date.

Preliminary Applications. Recommendation II proposes adoption of the long established British practice of filing provisional applications. A British "provisional" need not contain drawings nor claims but it should contain a detailed description of the preferred embodiments and a definition of the broad inventive concept. Unless the disclosure in the "provisional" is substantially complete, problems may arise as to priority dates for claims filed with the complete specification.

Exhibitions. Recommendation III (1), exempting publication at an exhibition corresponds to a provision

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CALENDAR

- Jan. 31, 1967—Dinner meeting, Hotel Roosevelt
Topic: "The Report of The
President's Commission"
- Feb. , 1967—Anti-Trust Meeting
- Mar. 17, 1967—Annual Dinner in honor of the
Federal Judiciary

WHERE DO WE GO FROM HERE?

On December 2, 1966, the long-awaited report of The President's Commission on The Patent System was officially presented to President Johnson at the Texas White House. It has since been published and may be obtained from the Government Printing Office for \$.65 a copy.

The report itself takes the form of a series of recommendations, 35 in number, printed in bold-face type, each followed by an explanation of the Commission's position. No attempt is made to offer specific legislation to implement the recommendations, but Number XXXI strongly urges that the necessary laws be enacted "as soon as practical".

Patent Office to Prepare Bill. The Patent Office itself is charged with preparing the proposed bill and by this time it is probably well under way, if not already completed. The normal procedure would be first to obtain approval of the executive branch, after circulating the bill amongst interested Government agencies, and then filing the bill in the House of Representatives and/or the Senate.

It may be as long as three months before the proposed legislation reaches Congress and some months after that before hearings are commenced by the Judiciary Subcommittees of both Houses. Many controversial bills take two years or more before being signed into law.

NYPLA Prepares. NYPLA President Johnston has already taken steps to prepare a statement of the Association's position on the Report, appointing a Special Study Group under the leadership of John Kelton.

The January 31, 1966 meeting of the Association will be presided over by Mr. Kelton and will be devoted entirely to a discussion of the Report. Every member should make the time to attend this meeting.

Reaction Favorable. Reports thus far received indicate that The Commission's Report has had generally favorable reactions from industry and the patent bar, although individual proposals have been questioned.

CITY BAR TALK ON COPYRIGHT REVISION

"A Survey of the Pending Copyright Revision Bill" is the subject of a talk to be given by NYPLA member John Schulman at the House of The Association of The Bar of The City of New York, 42 West 44th Street, New York, N. Y., on Thursday, January 19, 1967 at 8:00 P.M.

All members of the Bar are invited.

The Clerk of the U. S. District Court for the Eastern District of N. Y. has reminded us that it is the custom of the court to have briefs and memoranda of law submitted on *brief* size paper, and pleadings and affidavits on *legal* size paper. Every effort should be made to conform to this custom.

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of the International (Paris) Convention. Similar provisions are to be found in the British law (Section 51 (2)), the German law (Section 7), the proposed Scandinavian law (Section 2), and the European Patent Draft Convention, (Article 12). In practice, this provision will probably be little used since notice in the format of a preliminary application must be filed in the Patent Office before the opening of the exhibition.

Unauthorized Disclosure—The concepts embodied in Recommendation III (2) are also found in the British law (Section 50). The German and Japanese law go a step further and excuse publication by or derived from the inventor within six months prior to filing but not prior to the Convention date.

Patentable Subject Matter—Foreign countries generally have separate statutes for protecting designs and plant patents. The British in 1950 took out all design provisions from the Patent Statutes and enacted a separate design law. Most other foreign designs are still being registered at the respective Patent Offices.

Plant patents are granted by a number of foreign countries including Germany, Great Britain, South Africa, France, Belgium, Luxembourg and Italy.

Filing and Examination—Foreign countries generally permit the filing of applications by the assignee. In a number of countries, an assignment from the inventor has only to be filed to establish a proper chain of title for a Convention applicant. Others (Germany, Switzerland, Luxembourg) require inventorship declaration forms and the name of the inventor has to be mentioned. Great Britain requires a signed consent from the inventor in non-Convention applications.

In most countries, it is possible to correct fairly easily after filing but before grant the naming of the wrong inventor or the omission of the inventor. Nowhere, except in Canada and the Philippines, is a patent invalidated merely because the wrong inventor was named.

In most foreign countries it is possible to secure a filing date without the inventor's signature. The assignment, where required, can invariably be filed usually a month or two after filing. In Great Britain, Luxembourg and some other countries, the local attorney can sign the papers to secure a filing date, and properly signed papers can be filed later.

Priority Claim—Most foreign countries insist on the claim for priority to be made at the time of filing the Convention application. In some (Great Britain, New Zealand) a wrong date claimed can void the entire application. Germany provides a two months term for correcting or adding a priority claim. About half the prosecution countries require filing of certified copies.

Publication—Recommendation VII to publish pending applications 18 to 24 months after filing is in line with the new Dutch practice under which all applications are published 18 months after filing or after the convention priority date claimed irrespective of the state of prosecution. If a novelty report has already been made, this is published together with the application and the applicant's comments, if so desired. Early publication is also proposed in the European Draft (Section 85) and in the Scandinavian Law. Germany, which has now legislation for a deferred examination system in the legislative hopper, proposes early publication. Australia now publishes all applications 18 months after the Australian filing date.

In Belgium, patents are granted no later than 6 months after filing. In France, publication takes place on grant

about 12-18 months after filing. In Great Britain, all cases have to be allowed within about 3 years of filing and applications are then published for opposition.

Ireland publishes 18 months from the Convention date, if claimed, and otherwise 18 months from the filing date in Ireland. In most other countries, publication is deferred until allowance. The English speaking countries publish on filing the name of the applicant, title and convention date in the official gazette, but in most other countries including Germany, Sweden, Japan, there is complete secrecy until allowance.

Sweden also has a provision for early publication which is designed to warn potential infringers.

Continuation Applications—Most foreign countries with the notable exceptions of Canada, Brazil, Mexico provide for the filing of Patents of Addition which expire with the main or parent patent. No maintenance taxes are payable on such Patents of Addition and in some countries (Great Britain, New Zealand, Australia) these are not invalidated by prior publication of the parent. In others (Germany, Holland) the Patent of Addition must be inventive over the previously published parent and is treated almost as an independent application.

Deferred Examination—A deferred examination system has been in effect in Holland since January 1, 1964. The Dutch system provides for voluntary request for novelty examination within 7 years from filing. In 1964 and 1965 for 35.4% of applications filed in 1964, novelty examination was requested. Under the Dutch system, after receipt of the novelty report, the applicant has the option to request continuation of examination any time within 7 years from the date of filing. So far 44.2% of applications examined for novelty in 1964 have received such request for continued examination. It has been estimated that ultimately novelty reports will be received on about two-thirds of all filed applications and requests for continued examination will be made in respect of about two-thirds of those cases which have been examined for novelty.

A similar system for deferred examination is at present being considered by the German legislature. It is proposed that applications would initially only be formally examined for novelty. They are then to be published and the thorough examination as to inventive height and advance in the art will only be resumed by the Patent Office on the applicant making a special request which can be lodged at any time within 5 years from filing.

The Applicant's Burden—The effect of Recommendation X placing on the applicant the burden of persuading the Patent Office that a claim is patentable is difficult to assess. Foreign laws generally do not express in statutory language a similar requirement. However, in practice, the Dutch and Japanese Patent Offices place a heavy burden on the applicant. The German Patent Office Examiners often volunteer claims which they consider allowable. The British Patent Office usually resolves all doubts in the applicants' favors and final rejections by Examiners are quite unusual.

Citation Period—Recommendation XI permits citation by third parties of pertinent prior art within six months after publication. This corresponds to Dutch practice under section 22F or British section 15, and is somewhat like the opposition practice followed by many foreign countries except that it is *ex parte*. The opposition period abroad is usually 2 to 3 months after publication. Where the opponent is fully participating, the proceedings are often drawn out and costly. To make the citation procedure *ex parte* should eliminate these drawbacks.

HOW THE COMMISSION'S RECOMMENDATIONS WOULD AFFECT US

Editor's Note—The following paragraphs are numbered in accordance with The Commission's Report and briefly hint at the possible effects of the respective Recommendations should implementing legislation be enacted. To save space, the substance of each Recommendation has been identified by a brief title and, obviously, not all possible effects could be included. We would welcome additional comments from the readership.

I. Prior Art. This recommendation would have the effect of establishing a priority system based upon the first filed application, thereby *eliminating interferences*. Rule 131 affidavit practice, to overcome prima facie prior art, would also be eliminated, since there would be no grace period (subject to Recommendation III concerning displays at recognized international exhibits and unauthorized disclosures noted below). The scope of effective prior art would be further expanded by including *foreign knowledge, use and sale* prior to the filing date of an application.

Prior art would not be limited to *printed* publications since any information made available to the public in a "tangible (non-oral) form," including "typewritten copy, microfilm [and] computer print-out" would be included. In addition the disclosure in a patent or published complete application would have, as its effective filing date, the date of its earliest filing in the United States or a foreign country.

II. Preliminary Applications. The *preliminary application* is intended to provide an "*instant*" form of disclosure free from the delays and expense of a formal application to establish an inventor's right to an early filing date. However, the effectiveness of a preliminary application will depend greatly on the adequacy of its disclosure. It need comply only with minimal formal requirements so that it could be "prepared by someone having little knowledge of patent law and procedure."

The disclosure in a subsequently filed complete application, if published, would constitute prior art as early as its first presentation in a preliminary application.

The Commission did not indicate how the statutory fees of a preliminary application would compare with those of a complete application, a factor which will have an important effect on the use of this procedure.

III. Exceptions to Prior Art. The two exceptions, recognized international exhibitions and unauthorized public divulgence, are presently covered by the one year grace period. However, a complete application must be filed within 6 months in each case.

IV. Patentable Subject Matter. This recommendation would end the practice of granting patents on designs and plants, and whatever possibility now exists under the present statutes of granting patents on computer programs. The Commission suggests that some means outside the patent system be developed for the protection of ornamental designs.

V. Assignee Filing and Joinder of Inventors. This recommendation provides for the filing of an application by an assignee, whether or not the inventors are available to sign. The inventors must be named,

however, and a "statement of originality" and evidence of a recorded assignment must be filed prior to publication of the application. Whether or not the patent will actually be issued to the assignee is not stated; presumably it won't as is the present practice.

The effects on validity of non-deceptive misjoinder and non-joinder are minimized and the latter are correctable at any time.

VI. Claim for Priority Date. This recommendation requires that a claim for priority based on an earlier U. S. or foreign application be made at the time the complete application is filed. At present, it is possible up to the payment of the final fee.

VII. Publication. This recommendation provides for an entirely new procedure: the publishing of all applications 18 to 24 months after its earliest effective filing date or promptly after allowance or appeal. Published applications would then become part of the prior art and be available as references against later filed applications.

VIII. Continuing Applications. This recommendation limits the conditions under which continuing applications will be entitled to the parent application filing date: a continuation must be filed before abandonment, allowance or appeal in the parent; a c-i-p must be filed before any of its parent applications is *published*; a division must be filed in response to a requirement and during the pendency of the application in which the restriction was first required, or during the pendency of the original parent application.

IX. Standby Optional Deferred Examination. This recommendation provides that although not proposed at present, an optional deferred examination system should be provided for in case of a future need, without then having to obtain enabling legislation. The standby qualification reflects a split among the Commission members as to when and how such authority should be exercised.

X. Burden of Persuasion. This recommendation specifically does away with the Patent Office policy of resolving reasonable doubts in favor of the applicant and requires the applicant, in all cases, to persuade the Patent Office "by a preponderance of proof" that his claims are allowable. Exactly how this principle is to be applied to an obviousness question under Sec. 103, for example, is not indicated.

XI. Citation Period. This recommendation provides an entirely new procedure in setting up an opposition period, extending six months from the date of publication of an allowed or appealed application, during which any-

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one may cite prior art against claims of an application. The applicant will be notified and the question resolved *ex parte* (with the applicant having the burden of persuasion).

Applicants will have to watch carefully all published applications in their fields and must be prepared for further prosecution after allowance by the Patent Office.

XII. Quality Control. This recommendation provides for a system of quality control in the Patent Office to maintain examination standards. This has been tried in the past.

XIII. Presumption of Correctness. This recommendation, in conjunction with Recommendation X, would limit the scope of review by the courts of a Patent Office decision *refusing a claim*. This would make it more difficult to have a Board of Appeals decision reversed and could have the effect of reducing the number of appeals.

XIV. Review by the Court of Appeals. This recommendation provides another appellate level between the CCPA and the Supreme Court. This should eliminate inconsistencies between the CCPA and The District Court of The District of Columbia.

XV. Cancellation. This recommendation enables the cancellation of claims of issued patents if invalidating prior art is cited by anyone within three years of issue, an entirely new procedure. *Ex parte* consideration of the reference would be provided. Conceivably, failure to challenge a patent within three years after issuance could make its validity incontestible as to references available during that period.

XVI. Reissue. This recommendation eliminates the broadened reissue practice of 35 U. S. C. 251 (fourth paragraph), along with its many problems.

XVII. Interim Liability. This provides damages for infringement *prior to issuance of a patent*, provided the claim appears both in the patent and application as initially published, but only from a time following (1) initial publication *and* (2) holding of allowability of such claim *and* (3) transmittal of actual notice indicating how particular acts infringe. At present, no infringement can occur until the patent issues.

XVII. Term of Patent. This recommendation provides that the patent term shall expire 20 years after its earliest effective U. S. filing date, as opposed to the present 17 years from the date of issuance.

The longest possible effective *patent* term would thus be necessarily less than 20 years, but the right to damages could extend for substantially the entire period (see XVII).

The term of a continuing application would expire on the same day as one issued on its parent application, which differs from the present law. The recommendation does not explicitly state whether or not this would also apply to a continuation-in-part application.

XIX. Secrecy Order. This recommendation provides that a patent, whose issuance has been delayed as

a result of a secrecy order, shall be extended for a period equal to the delay after Notice of Allowance.

Under the present law an applicant who has received a notice of allowability may be entitled to compensation for use of the invention by the Government for damages caused by the secrecy order.

In accordance with the proposed change, a question may be raised as to whether applicant may be entitled to compensation from the date when his application would have been initially published, except for the secrecy order, until the date of allowability if he provides the Government with actual notice of the infringement pursuant to proposal number XVII.

XX. Terminal Disclaimer. This recommendation provides that the filing of a terminal disclaimer shall have no effect in overcoming a holding of double patenting, resolving the apparent difference on this point between the Court of Appeals for the District of Columbia Circuit and the Court of Customs and Patent Appeals.

XXI. Importation. This recommendation would broaden a patentee's rights since under current law the use of the process abroad is not an infringement.

The presently available relief against importation of a product made abroad by a process patented in the U. S. is under the Tariff Act of 1930 and requires a showing of a tendency to cause substantial injury to an efficient domestic industry, a burden the patent owner has little chance of sustaining.

XXII. Patent Right Transferability. This recommendation, in two parts, relates to a balancing of purpose and effort between the Antitrust and Patent laws.

It contains a specific recommendation, part 1, that field of use licenses, i.e. "field of use to which the subject matter of the claims of the patent are decidedly applicable" are to be declared reasonable and valid licenses. This Recommendation is more of a codification suggestion than a new substantive proposal.

Part 2 is general and merely states that there is no misuse if a contractual restriction has a direct relation to the patent specification, and the performance of such contract is reasonable to secure the reward to the inventor.

Part 2 generally reaffirms the rule of reason approach and contains no specific proposals for statutory enactments or repeals.

XXIII. In Rem Invalidity. This recommendation provides *in rem* invalidity, after a final Federal judicial determination, but validity holdings would continue to be *in personam*.

This could reduce the volume of litigation, but would encourage "forum shopping." It also raises a question in the event of an invalidity holding (*in rem*) in one circuit, following a validity holding (*in personam*) in a different circuit.

XXIV. Civil Commissioners. This recommendation provides for a Civil Commissioner to conduct and preside at all pretrial proceedings. Such a procedure could simplify and decrease the cost to litigants of dis-

NEWS FROM ABROAD

Australia—A timely decision was recently handed down by the Australian Patent Office refusing for lack of novelty an application relating to artificial trees. The principal reference in the name of Warren Christmas Trees Inc. disclosed an artificial tree having a supporting framework made up of readily separable members, adapted to be fitted together to simulate the trunk and branches of a tree. The trunk was adapted to stand upright on a base member, the branches were provided with a number of laterally extending pins and a plurality of foliage units were removably attached to the framework.

The Hearing Officer held that in order to simulate certain types of tree foliage such as that of the birch tree, the mat-like members of the present case might be more natural than those of the prior case. However, the respective shapes of plastic parts simulating foliage members would not of themselves suffice to create a differentiating feature, the High Court having made it clear that in order to confer novelty, differences from devices previously disclosed must concern more than mere appearance. (*Reg. A. Bell Pty. v. Walter Francis Krauss* in Application 244,553).

Canada—In the much-discussed case of *Boehringer Sohn vs. Bell-Craig* the Exchequer Court had held in 1960 that a claim directed to a specific product must be dependent on a process claim which particularly described the production of that substance, and which process claim also had to be a valid process claim. This judgment was affirmed by the Supreme Court of Canada. To correct deficiencies in patents granted before this decision the practice developed to file re-issue applications under Section 50.

More recently in *Farbwerke Hoechst vs. The Commissioner of Patents*, the Supreme Court of Canada found on April 26, 1966 that deficiencies in claims present in view of the *Boehringer Sohn vs. Bell-Craig* decisions were not errors of the type for which Section 50 of the Patent Act was intended to provide relief. Re-issue applications filed to correct such decisions have been rejected by the Patent Office.

Indonesia—The term of an Indonesian trademark registration was twenty years prior to the amendment of the Law which was made on November 11, 1961 and which provided for a term of ten years. There being no provision in the amendment law which specifically changed the term of registrations effected or renewed prior to that date, it was understood that their term continued to be twenty years.

In a recent Court of First Instance decision (*Farbwerke Hoechst A. G. v. P. T. Soho Industri Farmasi*), it was decided that all trademark registrations have a term of ten years, regardless of whether they were issued before or after November 11, 1961. An appeal from that decision was not taken although it is believed that, if a similar case should arise which was taken up on appeal, the Supreme Court would overrule that decision and hold that registrations issued prior to November 11, 1961 retain their original twenty-years term. The Indonesian Registrar, however, is still accepting renewal applications prior to the expiration of twenty years on registrations issued prior to November 11, 1961.

THE BOARD OF GOVERNORS

The Board of Governors met on December 19th, with all members present.

The meeting was called primarily to consider what Association action was required as a result of the issuance of the Report of the **President's Commission on the Patent System**. President Johnston reported that he had, upon the issuance of the Report, appointed a Special Study Group consisting of First Vice President John Kelton, Allen Weise, Louis Reed, W. Houston Kenyon, Jr., Charles Bauer, Robert Dunham, and William Barnes to formulate a statement of the Association's position on the Report. He also reported that the National Council of Patent Law Associations will hold a meeting on January 23rd at which it requests an expression of views by member associations. • • • William Conner, Chairman of the Committee on Meetings announced that the January Forum of the NYPLA will be devoted to a discussion of the Report. John Kelton will preside. • • • While the board members were of the opinion that it would not be profitable to poll the membership on the Report, the Special Study Group has been asked to recommend whether a questionnaire should or should not be circulated among the members.

There was an informal discussion of the need for educating the non-trademark members of the Association on the pros and cons of the **Madrid Situation**. William Woodward, Chairman of the Committee on Foreign Patents and Trademarks, advised the Board that the BULLETIN is planning an objective article on the situation for one of its winter issues. Advance copies of the proposed article were made available to Board members for review, by Mr. Woodward.

Formal steps were taken to assure that the proposal that judges of the CCPA should automatically become **Honorary Members of the Association** would be presented to the membership for vote at the Annual Meeting in May.

The Committee on Meetings reported that 189 persons attended the **Christmas Dinner-Dance** compared with 201 last year. It was stated that as a result of the increase in the ticket price the deficit on the affair would be very small.

The proposal of the Philadelphia Patent Law Association that the NYPLA collaborate with it and the New Jersey Patent Law Association to put on a **Regional Patent Symposium** consisting of a one or two day meeting which would be devoted to a discussion in depth of one or two areas of patent law was considered at length. It was concluded that this is not a propitious time to set up such a program, particularly in view of the time which will have to be devoted to matters growing out of the Report of the President's Commission, and the invitation will accordingly be declined.

It was decided by the Board that a new letter should be sent out to the membership again directing attention to the Association's **Disability Group Insurance**.

Robert Osann, Chairman of the **Committee on Public Relations and Awards** advised the Board that the NYPLA has received a request for assistance in presenting a patent program for the AICChE and has been asked to propose candidates who have made a truly outstanding invention contribution, for the Scott Award.

HOW THE COMMISSION'S RECOMMENDATIONS WOULD AFFECT US

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covery procedure. Such a benefit would make the enforcement of their patents as well as defense against the patents of others more feasible to individuals and small businesses.

XXV. Expedited Procedure for Limited Claims. This recommendation encourages the use of stipulations of fact and affidavits in place of discovery. At present, a somewhat similar procedure allows submission of cases on agreed sets of facts, and various motions to dismiss or for summary judgment are now proper where there is no factual dispute.

As an inducement to an accused infringer, no injunctive relief would be granted to the patent owner. A penalty, reasonable litigation expenses, is imposed on an alleged infringer who refuses to consent to the procedure.

XXVI. Statutory Advisory Council. This recommendation provides for the establishment of a standing advisory body of public members to evaluate the operation and "health" of the patent system on a continuing basis. No such body is presently in existence.

XXVII. Patent Office Financing. This recommendation states the Commission's belief that the Patent Office should be adequately financed to provide first class service but should not be required to be self sustaining. Fees should be set in accordance with the cost of providing the services.

XXVIII. Propriety of Final Rejection. This recommendation provides that an applicant should be permitted to amend his case after any new ground of objection or rejection, except where the new ground is necessitated by a prior amendment. This will promote second action final rejections but allow further amendment if the new reference is a better one as to features previously claimed. This is essentially the practice now in effect.

XXIX. Classification and Information Retrieval. This recommendation provides for a study group to engage, on an international basis, in an effort to facilitate the searching process. This is presently being done on a limited basis.

XXX. Information Dissemination. This recommendation urges the implementation of its search file microfilm program, which is already underway, and cooperation with foreign patent offices, which has also begun.

XXXI. Transition. This recommendation urges prompt implementing legislation for these recommendations and suggests how it should be applied to pending applications.

XXXII. Government Patent Policy. This recommendation merely states the Commission's decision not to address itself to the question of patent rights in Government sponsored research.

XXXIII. Inventor's Certificates. This recommendation urges that the U. S. back a revision of the Paris Convention which would recognize an inventor's Certificate for priority purposes. Such documents are issued by the U. S. S. R. but presently are not sufficient to establish priority under the International Convention.

XXXIV. Term Measurement. This recommendation urges that the Paris Convention be modified to enable the measurement of terms of all patents from an effective foreign filing date. This would be consistent with Recommendation XVIII.

XXXV. Universal Patent System. This recommendation urges the ultimate institution of a universal patent and suggests that steps be taken in that direction.

DANIEL LEIGH MORRIS

Daniel Leigh Morris, long a member of The NYPLA, died at his home in Massapequa, Long Island, on December 26, 1966, at the age of 76.

Mr. Morris was born in Washington, D.C., where he was buried, but he practiced patent law in New York for more than forty years. He has been a member of the firm of Curtis, Morris & Safford and its predecessors, since 1936.

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