

recently dealt with the latter issue, and this will be discussed in Chapters V, *infra*.⁶⁰

C. Government Rights

1. Non-Exclusive License

The funding federal agency gains, at a minimum, a nonexclusive license to practice for or on behalf of the United States and subject invention throughout the world.⁶¹ This provision has been criticized by some as being too narrow in international scope, and by others as too broad with respect to available uses.⁶² Additionally, the license refers to the subject invention itself and not to the rights in patents covering such inventions.⁶³ Thus, a government license on a patentable product that was derived from a federally funded invention may not cover the use of all claims, and in effect may make full use of the patentable product impossible.

2. March-in Rights

One of the most contentious provisions of Bayh-Dole is the allowance for a government agency to "march in" and perform actions on an invention if the action is necessary because of any one of four enumerated situations. The funding agency can, under explicit circumstances, require the contractor to grant licenses or even to grant the licenses itself.⁶⁴ The effect of the march-in provision is to ensure that the government still has the ability to ensure an invention is achieving the policy

60 The Supreme Court noted in *Stanford v. Roche* that this (or any other) provision of Bayh-Dole does not reorder the "well-established" hierarchy of patent rights: absent an assignment of his rights, the title to the invention is initially vested in the inventor himself. *See* *Stanford*, *supra* note 10.

61 *See* 35 U.S.C. § 202(c)(4) (2009). The license is further irrevocable, nonexclusive, and paid up. *See* Nash and Rawicz, *supra* note 36, at 310.

62 *See* Nash and Rawicz, *supra* note 36, at 311. "Some argue that this license is too broad in that it applies to all federal agencies for all uses and not just for the funding agency's use; others view this license as too narrow, as this license should be available to international health organizations... so that developing countries may be able to obtain the drugs at acceptable costs."

63 *See id.* at 313.

64 The most relevant of these circumstances are the lack of the contractor taking steps to achieve practical application of the subject invention and to alleviate health or safety needs. *See* 35 U.S.C. § 203 (2009); *See* Nash and Rawicz, *supra* note 36, at 330.