

To the U.S. Patent and Trademark Office  
via email to SecrecyOrder.Comments@USPTO.gov April 28, 2012

This is in response to the April 20, 2012 PTO Federal Register notice requesting comments on the feasibility of imposing secrecy orders on economically significant patent applications.

I would recommend against adopting such a policy for the following reasons:

Elevating patent applications to the status level of national security will inhibit free market conditions that benefit from transparent access to market information. Economic security is decreased by extending secretive legal status to business innovations that involve patents. Current examples of this exist where legal status suppresses pluralistic competition amongst U.S. businesses. The non-publication of sensitive details may be a better alternative, but requiring the American public to bear the economic consequence of protecting the rights of commercial interests places an undue burden on the well-being of Americans and privileges special interests. Extreme legal protections subvert risk management behaviors provided by the self-correcting nature of free market competition.

A parallel of this privilege can be discerned by a review of the current legal status pertaining to the data security standards enjoyed by the credit card brands. Credit card technology has gained inappropriate legal protections at State and Federal levels, which serves to suppress business initiative in related and unrelated markets. The credit card brands utilize vulnerable antiquated authorization and authentication technology and exploit legal protections to increase market share while perpetuating risks, which are inappropriately transferred to unrelated parties via draconian legal protections. The credit card brands have used the profits from this behavior to lobby for additional legal protections. This behavior can be observed in a review of Congressional and Senate testimonies. Protecting patents as proposed will have the same unintended consequences.

Arguably, the credit card brands understand that fixing the flaws in their technologies will cause them to lose market share. Corporate governance requires that management pursue such strategies regardless of the impact on society. Such companies are not legally capable of self-correcting behavior that does not maximize stockholder profits.

Seeking unfair legal protections is an inevitable risk management approach for these companies, but this is not a true risk management strategy that fixes underlying issues or serves the American interest.

Extending legal protections like this to patents will encourage similar opportunistic behavior. Free market competition is the best guarantee of American economic interests.

Further, such protections will inhibit innovation. A company may choose not to investigate new patent ideas because it is unable to confirm the existence of similar patents. Profit driven research may avoid real innovation and speculate in other forms of risk-taking that is not productive. Areas like pharmaceutical research could suffer impacts that have direct impacts on lives of Americans. The ability of IP generating institutions, such as universities, to recruit talent which ultimately adds to the U.S. economy, may also suffer. Thus, the proposed type of legal protections could cause a complex, subtle chain of economic consequences that ultimately contributes to the overall economic decline of America. Yu Hsing conducted academic research on this topic which studies the topic of U.S. well-being alongside the number of patents issued. An abstract of his research is here:

<http://www.emeraldinsight.com/journals.htm?articleid=1505834&show=abstract>

. Suppressing research harms Americans, especially if U.S.

institutions, such as colleges, lose international appeal and prestige.

Further, such legal status may suppress security research and business security. Protecting patents as national secrets may exacerbate this issue. Corporate technology firms are notoriously slow to respond to security threats introduced by their inadequate development and quality control processes. Giving such companies the ability to suppress public disclosure by hiding flaws in a pending secretive legal status may subvert the intention of such protections. Add to this the the idea of suppressed competitive alternatives for the reasons outlined above and the negative consequences are cumulative and dramatic. Further, the ability and legal requirement for customers and researchers to validate and own their specific security and compliance positions by performing research is vital to American interests. Disclosure of vulnerabilities promotes economically responsible behavior and improves the viability of companies that rely on such technologies. Suppressing research by enabling large financial interests to pursue a secretive legal status for flawed, dangerous technologies will impact American business interests. Innovative brainpower will relocate to research-friendly nations or researchers outside the sphere of U.S. law will obtain technological and competitive advantage because the legal consequence to do so is not prohibitive.

Lastly, legal details related to this idea can be explored at <http://cr.yip.to/export.html> . Dan Bernstein, a research professor at the University of Illinois at Chicago vetted a similar issue by bringing legal action against the U.S. to challenge export laws that were put in place to suppress terrorist threats. Time has demonstrated Bernstein's position to be helpful.

Thank you for including these comments in your review process.

Victor Nardo