

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re: Changes to Require Identification
of Attributable Owner

Docket No. PTO-P-2013-0040
79 Fed. Reg. 4105

COMMENTS OF PUBLIC KNOWLEDGE

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Public Knowledge respectfully submits the following comments in response to the request for comments on Changes to Require Identification of Attributable Owner dated January 16, 2014.

Briefly, Public Knowledge strongly supports the PTO's efforts to gather complete and accurate patent ownership information. Public disclosure of ownership information is important to the PTO, third parties, researchers, policymakers, and the public. As observed in these comments, transparency of ownership information is not a problem unique to patents: other areas, especially the financial sector, have dealt with substantial fallout due to lack of complete information on ownership, as explained below. The lessons learned from these related institutions both support the PTO's efforts toward patent ownership transparency and suggest further ways to strengthen these efforts.

I. Accurate, Timely Patent Ownership Information Is a Critically Important Resource

As the Notice of Proposed Rulemaking observed, collection of attributable ownership information will be valuable both to the PTO and to third parties. Ownership

information will assist the PTO in dispatching its responsibilities of oversight of patent applicants and parties to post-grant proceedings, and it will assist third parties by informing them about the competitive environment, enhancing technology transfer, reducing abusive patent litigation, and leveling the playing field for innovators.

Public disclosure of attributable ownership information will have further benefits beyond those recognized by the PTO: such information will provide valuable empirical data necessary to policymakers and researchers, both within the PTO and beyond the Office, seeking to craft effective policy on patent reform. As Public Knowledge has observed in related comments before the Federal Trade Commission:

[B]road empirical data remains lacking, as noted by stakeholders as diverse as the Retail Industry Leaders Association and the Innovation Alliance....Quality empirical data, even in the aggregate, would empower various parts of the government, including the FTC, United States Patent and Trademark Office (USPTO), the International Trade Commission, and the Executive Office of the President, to formulate sounder policies to preserve competition and protect consumers. Groups outside of government, too, would be more able to pinpoint accurately the problems with demand letter campaigns and suggest solutions tailored to protecting consumers while preserving a competitive and vibrant innovation economy.¹

Accordingly, the proposed efforts in collection and publication of attributable ownership information will have wide-ranging benefits to the public, as well as to individual third parties and to the PTO.

Concerns that attributable ownership information will reveal corporate secrets are unfounded. Such concerns, some of which were expressed at the roundtable on this topic,² assume that a company should be able to use patent ownership tactics to conceal its research and development efforts, even though that company has filed and published a patent application fully specifying those research and development efforts. But if the company desires secrecy in its research, it has the option of requesting non-publication of its applications, using Track III to control the time of examination, or even

¹ Pub. Knowledge et al., *Comments Before the Fed. Trade Comm'n on Agency Information Collection Activities 2–4* (Dec. 16, 2013), available at http://www.ftc.gov/sites/default/files/documents/public_comments/2013/12/00039-87898.pdf.

² See, e.g., Transcript of Attributable Ownership Public Hearing 69–70 (Mar. 13, 2014) (testimony of Morgan Reed).

opting for trade secret protection rather than patents. Hiding behind shell corporations to conceal ownership is neither necessary nor proper in view of these other options. The suggestion that patent *ownership* merits concealment in order to permit concealment of *business strategy*, despite a simultaneous willingness to reveal that business strategy through a patent application filing, is contradictory, misguided, and of minimal weight in view of the much more critical policy and public interest concerns that demand transparency of accurate, public ownership information.

II. Ownership Transparency in Other Fields Is a Relevant Guide in Crafting Patent Ownership Transparency Policy

The problems that have necessitated the PTO's action on attributable ownership information are not unique to the patent system. Many other institutions have experienced a need for public disclosure of ownership information. For example, municipalities maintain registries of deeds for ownership of land, to ensure that homebuyers can be certain in their purchases. Courts universally require a statement of corporate ownership to assist judges in identifying conflicts of interest. And much work is being done in the area of corporate disclosure in the area of campaign finance, to ensure fairness and transparency in elections.

One area of particular interest is transparency in the financial sector. Lack of information on ownership of financial instruments gave rise to many of the problems in the financial crisis of 2007–2008, and the developing solutions in that area can provide useful insight into solving problems of patent ownership.

A. The Problems with Patent Ownership Share Close Parallels with the Problems of Financial Instrument Ownership

In 2008, the financial firm Lehman Brothers collapsed and declared bankruptcy. At the time, Lehman Brothers had \$600 billion in debt through transactions with other financial institutions, and the collapse meant that every one of those institutions had to scramble to determine its potential losses due to the bankruptcy.

The problem was that there was a lack of consistent data for ownership of financial instruments. A derivative contract for debt could pass between multiple hands, with ownership being identified by proprietary numbers or inconsistent names.³ A (1) lack of complete ownership data, combined with (2) an event necessitating immediate determination of ownership, thus led to a great deal of panic and confusion in the financial industry.

This exact problem plagues the patent system today. Patents can pass through multiple owners, with ownership being recorded not at all, or with potentially inconsistent names. Thus, there is (1) a lack of complete ownership data. The patent can be used to send out demand letters or initiate infringement lawsuits, and the targeted parties must quickly determine the owner of the party to know whether both whether the allegations are legitimate and how to proceed in view of the true owner of the patent. Thus, there is (2) an event necessitating immediate determination of ownership. Combined, these have led to a great deal of panic and confusion in the innovation industry.

There are further parallels between the need for ownership transparency in the financial sector and the need for ownership transparency in patents. The PTO seeks ownership information to assist with oversight of patent applicants and parties to post-grant proceedings; financial regulators seek ownership information to assist with oversight of parties to financial transactions. Patent ownership information helps third parties understand the competitive technology environment and engage in technology transfer; financial ownership information helps third parties understand the financial environment and engage in transfer of assets.

Accordingly, the problems that the financial industry has faced due to lack of ownership transparency are very close to those problems that the patent system has faced. It is thus worth considering solutions to ownership transparency in the financial sector, as the PTO develops its attributable ownership rules.

³ See Office of Fin. Research, U.S. Dep't of the Treasury, *Frequently Asked Questions: Global Legal Entity Identifier (LEI)* 1 (Aug. 2012), http://www.treasury.gov/initiatives/wsr/ofr/Documents/LEI_FAQs_August2012_FINAL.pdf.

B. Lessons from the Financial Industry Can Inform the PTO in Developing its Attributable Ownership Rules

The currently developing solution to ownership information in the financial sector is known as the “legal entity identifier” (LEI). It is being developed through a multistakeholder process under the guidance of numerous companies and organizations.⁴ The LEI proposal, which is in use already but still undergoing development, can provide useful guidance to the PTO in developing its attributable ownership rules.

The LEI is a unique identification number, assigned by one of a number of organizations. Any corporate entity may apply for an LEI by providing appropriate information about its corporate structure; such information is associated with the assigned LEI and then stored in a publicly accessible database. Currently in discussion are policies for defining parent entities, and linking the LEI records of those parent entities to their subsidiaries within the database.⁵

The information being collected within the LEI system is thus very similar to the information the PTO wishes to gather with its attributable ownership rulemaking. At least three suggestions arise from this relationship.

- **The PTO should look to the LEI process in developing its attributable ownership rulemaking.** The multistakeholder decisionmaking process used to arrive at the LEI has identified areas of difficulty and innovative solutions reached. These will likely assist with the attributable ownership rulemaking. Public Knowledge is happy to provide further information and references to experts on these subjects.
- **Ownership information should be robust.** Identifying corporate entities by name and place of incorporation is subject to typographical errors and name changes over time; this will reduce the usefulness of attributable ownership

⁴ See *Requirements for a Global Legal Entity Identifier (LEI) Solution* (May 2011), http://www.gfma.org/uploadedfiles/initiatives/legal_entity_identifier_%28lei%29/requirementsforagloballeisolution.pdf.

⁵ See Nicholas Hamilton, *FSB Plans to Include Hierarchical Data with LEI*, *WatersTechnology* (Dec. 11, 2012), <http://www.waterstechnology.com/inside-reference-data/news/2231191/fsb-plans-to-include-hierarchical-data-with-lei>.

information. Many states issue a corporate entity identification number, which is less prone to error and less subject to name changes.

- **Attributable ownership information might optionally include an LEI.** Since the objective of the attributable ownership rulemaking is to gather identity information, and the LEI is a corporate identifier, the PTO could easily simplify the attributable ownership process by optionally allowing patent owners to provide an LEI rather than other identity information.
- **The PTO might participate in the LEI process.** The problems that the developers of the LEI are facing currently, such as selecting a standard for parent entities, are similar to the ones that the PTO is considering in this rulemaking. Participation in that process would likely generate new ideas for both sides.

III. Conclusion

The PTO's attributable ownership rulemaking moves in the right direction by gathering information of critical importance to the PTO, to third parties, to policymakers, and to the public. Through this rulemaking, the PTO is tackling a problem of ownership transparency that policymakers have faced in many other fields, particularly the financial sector as described above. Through the shared lessons from these diverse fields, the PTO can develop an attributable ownership program that will achieve these necessary benefits, protect the public interest, and promote innovation.

Respectfully submitted,

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