

Before the
Department of Commerce
United States Patent & Trademark Office
Alexandria, Virginia

In re

Request for Comments on the Feasibility of
Placing Economically Significant Patents
Under a Secrecy Order and the Need To
Review Criteria Used in Determining
Secrecy Orders Related to National
Security

Docket No. PTO-P-2012-0012

**COMMENTS OF
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION**

Pursuant to the request for comments published by the Patent & Trademark Office (USPTO) in the Federal Register at 77 Fed. Reg. 23,662 (Apr. 20, 2012), the Computer & Communications Industry Association (CCIA) submits the following comments on the subject of placing economically significant patents under a secrecy order.

I. About CCIA

CCIA represents large, medium and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. Our members employ nearly half a million workers and generate approximately a quarter of a trillion dollars in annual revenue.¹ CCIA members are substantially affected by the patent system and depend upon it to fulfill its constitutional purpose.

II. Comments on Economic Security-Based Secrecy Orders

The following comments respond to questions 1, 2 and 5 in the Notice.

1. *Should the USPTO institute a plan to identify patent applications relating to critical technologies or technologies important to the United States economy to be placed under secrecy orders?*

Economic security is of vital importance to the United States, our trading partners, and indeed, the entire global economy. However, efforts to advance or protect economic

¹ For a complete listing of CCIA members see <http://www.ccianet.org/members>.

security should be properly framed and conducted with a clear understanding of what “economic security” entails and the appropriate tools for promoting it.

Insofar as the Subcommittee’s concern is that foreign companies may use published patent applications to design around pending patents, it should be noted that – unless substantial evidence is provided in response to this Notice – there is no proof this is a problem. Certainly, to the extent evidence of such a problem may be brought forward, it would need to be sufficiently compelling to merit a drastic solution that would greatly expand the federal government’s presence in the economy.

Indeed, the patent system has been traditionally viewed as encouraging innovation through design-arounds. U.S. companies are free to design around applications published in other countries, and there is no evidence that U.S. companies are any less adept at doing so than foreign competitors. To the extent a new economic security doctrine were to discourage design-arounds as a matter of U.S. policy, it would amount to an expansion of the patent right beyond present law and beyond the international consensus on the proper scope of patents.

As the USPTO knows, the current rule of publication of patent applications at 18 months is the accepted, negotiated norm. Attempts to change that consensus unilaterally may invite unilateral responses from our trading partners and undermine long-standing efforts to harmonize intellectual property practice in support of international trade. Moreover, by appearing to manipulate the patent system in support of particular U.S. interests, changes to procedure invoking economic security may jeopardize U.S. efforts to enforce consensus-based standards of intellectual property protection.

The alternative acknowledged by the USPTO in the Notice is addressing the underlying problem of delays in issuance. While expediting patent examination would be a positive development under any circumstances, it is particularly relevant here, where the resources that would inevitably need to be invested in reviewing patents for their relevance to economic security could instead be invested in reviewing patents *for their eligibility*. Instituting a review process in response to delays in the existing review process is second-order solution that need not be pursued if the first-order problem can be adequately mitigated.

2. *Which governmental body should be designated by the President to provide the USPTO with the final determination as to which applications should receive this treatment?*

and

5. *Would regulations authorizing economic secrecy orders be covered by the current statutory authority provided to the USPTO, or would such orders require a new statutory framework?*

Pursuing the approach suggested by the Subcommittee would likely require additional legislation by Congress. First, no one U.S. agency possesses clear competence to define the precise boundaries of national economic security, let alone adjudicate whether pre-issuance publication of particular technologies (which may or may not be patentable) would jeopardize it. Legislation would be required to constitute both the authority and the competency within a particular agency to execute and implement the proposed review.

Second, Congress would need to create a statutory definition for “economic security” if that objective were to form the basis for regulatory actions. Absent a clear statutory definition, it may prove difficult for the USPTO or any other agency to justify prohibiting publication in a manner that remains consistent with accepted principles of administrative procedure.

Finally, however “economic security” is defined and approached, the USPTO, as presently funded and operated, lacks the analytic capacity to implement any program for differentiating among technologies in terms of national economic security. Accordingly, additional resources and expertise would likely be necessary to properly execute the proposed course of action.

Respectfully submitted,



Matthew Schruers
VP, Law & Policy
Brian Kahin
Senior Fellow
Computer & Communications Industry Association
900 Seventeenth Street NW, 11th Floor
Washington, D.C. 20006
(202) 783-0070