

Patent Office Rules Allow Simple Access to Tax, Financial Data

by Warren Rojas

In a practice that brings up serious personal privacy issues, the U.S. Patent and Trademark Office routinely makes available to the public tax returns and other personal information about inventors, an investigation by Tax Analysts has revealed.

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In a practice that brings up serious personal privacy issues, the U.S. Patent and Trademark Office (USPTO) routinely makes available to the public tax returns and other personal information about inventors, an investigation by Tax Analysts has revealed.

Few inventors are aware that their tax and financial records, which they are often required to submit to the USPTO if they fall behind on their patent maintenance fees, are available for public inspection.

During recent trips to the USPTO file information unit in Crystal City, Va., Tax Analysts retrieved more than a dozen patent files on inventors from across the country that contain individual and joint federal tax returns, wage and withholding reports, monthly bank statements, Social Security Administration benefit statements, credit reports, and mortgage foreclosure warnings. Included in those documents are names, Social Security numbers, credit card numbers, bank account numbers, home addresses, income data, mortgage histories, and student identification numbers.

IRS and Treasury officials maintain that information obtained by other government agencies -- in this case, taxpayer-furnished data sent to the USPTO in return for commercial protection -- is exempt from the stringent antidisclosure provisions in section 6103 of the tax code.

"There are significant privacy concerns, but they don't have anything to do with [section] 6103," a Treasury counsel said. Other tax officials remained baffled by the disclosure issue, questioning whether the USPTO policies run counter to the Privacy Act of 1974 (P.L. 93-579), section 6103, or both.

At least one inventor was floored that his financial records were out in the open. "I'm totally out there exposed, and I don't know how to shut it off," he said.

Another inventor was equally jarred by the disclosure, but said, "I don't want to cause any more grief with the patent office than I've already got."

Full Disclosure and Zero Discretion

USPTO spokesman Richard Maulsby said the USPTO is required to make patents part of the public record under 35 U.S.C. 122 (b). The statute requires the publication of all patent applications within 18 months of filing to preserve the "public interest."

Tax Analysts reviewed the Manual of Patent Examination Procedures (MPEP) and confirmed the 18-month publication rule. But the MPEP would seem to suggest that the USPTO is obligated to publish only those documents deemed "material to patentability."

According to the USPTO manual:

Each individual associated with the filing and prosecution of a patent application has a duty of candor and good faith in dealing with the Office, which includes a duty to disclose to the Office all information known to that individual to be material to patentability as defined in this section. The duty to disclose information exists with respect to each pending claim until the claim is cancelled or withdrawn from consideration, or the application becomes abandoned.

The manual also notes, however, that:

There is no duty to submit information which is not material to the patentability of any existing claim.

The issue of materiality appears most relevant once nontechnical information becomes a part of the existing patent file.

Maulsby said inventors who fall behind on their maintenance payments, which are due at the 3-1/2-, 7-1/2-, and 11-1/2-year marks after the patent is granted, are occasionally required to submit confidential information to validate claims of financial hardship.

"If people are having a problem with their maintenance fee, there is a procedure whereby they can request a waiver," he said. "And in conjunction with that, it may be that they have to provide documentation that would involve financial information . . . medical records and that kind of thing."

Maulsby stressed, however, that "the office never asks for or requires sensitive information like Social Security numbers or account numbers that could lead to identity theft."

Of course, if unnecessary financial or personal information trickles through, it still goes into the patent file.

Retired inventor David Brown said he stumbled on the disclosure issues while waging his own war against the maintenance fee structure at the USPTO. Brown ultimately lost one of his patents after he declined to submit myriad income and expenditure reports to validate his claims of financial hardship, but during the process he realized that other inventors' personal financial information is exposed.

According to Brown, the fastest way to find taxpayer data is to seek out the files of financially distressed inventors forced to file a Petition to Accept Unavoidably Delayed Payment of Maintenance Fee in an Expired Patent (37 CFR 1.378(b)) [Form PTO/SB/65].

Brown said he pulled roughly 800 of those files during one trip to the Patent Office's file information unit and departed with more than 1,700 pages of sensitive information about inventors. "Just find out who's had to file this form. Once you do that, you know that when you look at their patent wrapper it's going to be personal information," he said.

A Freedom of Information Act request filed by Tax Analysts turned up over 150 patents with attached PTO/SB/65 petitions filed since the beginning of 2005. Brown said his own FOIA requests netted roughly 850 petitions filed from 1995 through 2000 and have continued to identify roughly 300 filers per year over the past five years.

Brown attempted to litigate the USPTO maintenance schedule and disclosure policy in late 2003, but eventually settled out of court. As part of the deal, the USPTO agreed to attach a privacy act statement to every information request by 2007 -- a minor victory in Brown's estimation.

According to Maulsby, only three petitioners have logged complaints against the USPTO for potential identity theft violations. However, Maulsby said the agency has decided to defuse the disclosure issue by warning inventors to better secure their confidential information.

"There has always been a process whereby you can ask that certain information . . . would not be part of the file," Maulsby said. "But we have not done the kind of job that we should do in terms of publicizing that, and we are taking steps to correct that."

The USPTO added a prominent anti-identity-theft warning to its Web page timed to coincide with an intellectual property rights conference that took place at its Alexandria, Va., headquarters on August 12. Maulsby said USPTO help-desk operators and aides at the nationwide patent depository libraries are also being trained to warn inventors about the importance of deleting sensitive information from their filings.

Maulsby added that the Office of the Commissioner of Patents plans to make several recommendations about the long-standing disclosure policies to the USPTO director by September 15.

The proposed changes appeared to provide little comfort to inventors previously unaware that they had to specifically ask to keep their financial records off limits.

"I understood it was confidential information," one individual said. The USPTO "requested this information . . . they said you have to prove everything."

Another complained about spending over four hours on the phone getting bounced between various USPTO departments without being able to contact anyone who knew how to remove the critical data from his file.

"Most people don't even understand the problem," he said. "It's discouraging."

For Public Inspection

The sensitive legal and financial information Tax Analysts uncovered includes:

- several years' worth of individual federal tax returns as well as retirement statements (IRS Forms 1099-R) for the widow of a Connecticut inventor;
- multiple tax refund intercept notices (name, SSN, civil penalty seizure amounts) from the U.S. Treasury and the Colorado Department of Revenue sent to a Michigan inventor;
- identifying information for 11 employees (names, SSNs, payroll history) on state quarterly wage and withholding reports filed by a California small-business owner;
- annual benefit statements from the Social Security Administration (SSNs, net benefits), joint federal tax returns (SSNs, income data), and monthly bank statements (daily account balances) for a Texas couple;
- an Equifax credit report (name, age, date of birth (DOB), home address, SSN, credit card and bank account numbers) for a California inventor;
- a Canadian passport scan (name, DOB, passport number) for the wife of an Ontario inventor, along with copies of a dependent's tuition bills (student ID, home address) and the family's monthly mortgage statement (mortgage history, bank particulars); and
- a foreclosure warning (name, mortgage information), multiple child support enforcement notices (name, past-due amounts), a full credit report, and several years' worth of joint federal and corporate tax returns for an Arkansas couple.

Tax Analysts is making available a sample of the documents that were obtained from the Patent Office. Those documents, which have been redacted to remove all personal, tax, and financial information, are available at *Doc 2005-18316* [\[PDF\]](#).

No one in the Patent Office's file information unit objected when the above documents were taken from their folders and photocopied (25 cents per page) at one of the 30 industrial copiers that dominate the USPTO research center, which is open to the public.

The copy machines are typically staffed by several patent researchers, many of whom told Tax Analysts they copy patent files for eight hours a day, five days a week -- often without stopping to question their client's motive or examine the materials.

Sympathetic Ears, Tied Hands

One attorney familiar with privacy issues labeled the USPTO disclosure policy "fascinating," suggesting only that the interaction between the various privacy laws and mandatory publishing statutes might deserve closer examination.

"The [antidisclosure] statutes and the [USPTO] regulation appear to be at least in tension with each other, if not in outright conflict," the privacy lawyer said.

Christopher S. Rizek, a former Treasury associate legislative counsel and now a partner at Caplin & Drysdale in Washington, urged caution as well, saying that "the [USPTO] statute . . . really needs to be interpreted much more narrowly by USPTO -- or modified by Congress."

National Taxpayer Advocate Nina E. Olson said her office would investigate the matter, but stopped short of calling for an immediate legislative fix.

An IRS spokesman cited a pair of legal decisions -- *Stokwitz v. Dept. of the Navy*, 831 F.2d, 893 (9th Cir. 1987), *cert. denied*, 485 U.S. 1033 (1988); and Office of Legal Counsel Opinion 79-30, May 11, 1979, S. Rep. No. 94-938, 94th Cong., 2nd Sess. 331, 1976-3CB 369 (1976) -- as confirmation that "tax data that does not come from IRS files, directly or indirectly, isn't subject to section 6103."

Case law or not, former IRS Commissioner Don Alexander urged the administration to take the lead and protect inventors from further embarrassment.

"Treasury should take this matter up with [the Department of] Commerce, explain the problem, and ask Commerce to instruct the Patent Office not to make tax returns (and any tax return information) public. That should stop this practice," he said.

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Tax Analysts Information

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