

Does "Public Use" Mean the Same Thing It Did Last Year?

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In 2011, Congress enacted the America Invents Act (AIA), the most substantial overhaul of the patent system in the past sixty years. The most significant change in the AIA was the move from a first to invent regime to a first inventor to file regime. The goal of the move to first to file, besides harmonization, is to encourage inventors to move with alacrity to share their invention with the world. There is an ambiguity in the AIA, however, that threatens that disclosure objective. Some commentators have argued that Congress intended to fundamentally change the rules of prior art in a way that would encourage secrecy rather than disclosure. Under this interpretation of the new law, an inventor can use its process in secret for commercial purposes, potentially forever, and still file a patent on that invention at some point in the future. Far from encouraging disclosure, on this interpretation the effect of the AIA is to encourage secrecy and delay in patenting. Curiously, the argument is that Congress signaled its intent to make this fairly radical change by re-enacting language that had been in the Patent Act for the last 140 years: the words "public use." Because two of these commentators, Bob Armitage and Joe Matal, were involved in the drafting of the AIA, this argument has carried substantial weight, and the PTO in 2013 adopted regulations that read the term "public use" in the AIA as meaning something completely different than it had for the century before 2011. In this paper, I make two points. First, as a matter of statutory interpretation it is unlikely that Congress intended to make such a change, not only because they readopted existing statutory language but because other parts of the statute make no sense under such an interpretation. Second, reading the AIA as making such a change would be unwise as a policy matter, not only because it would encourage secrecy but because it would undermine confidence that other terms reenacted in the AIA have the same meaning they have accrued in decades of common law.

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