Secret Inventions

Traditionally, innovation policy has been conceptualized as antithetical to the use of secrecy. The patent system is structured in a manner that requires inventors to disclose their secrets. Various patent doctrines are designed to encourage inventors to patent rather than keep inventions as secrets. Furthermore, the rhetorical conceptualization of the patent system suggests that patents are designed to lure secret inventions out of the private darkness of trade secrecy and into the public light of patent protection.

This conceptualization, however, is incomplete. Secrecy can promote innovation in ways that are often underappreciated. For instance, trade secrets can encourage a targeted form of disclosure, which is the primary public benefit that patents provide over secrets. Secrecy can also increase the competition for innovation and the incentives for improving and commercializing inventions. Secrecy can often provide sufficient incentives for investment in innovative activity and, at times, can provide stronger incentives than patenting can offer. The patent system should therefore attempt to distinguish those cases in which secrecy provides sufficient (if not optimal) incentives to innovation from those cases in which patents are required to spur technological invention.

This article begins to construct a framework that balances the trade-offs of patenting and secrecy. It highlights the potential benefits of encouraging secrecy and identifies areas in which secrecy can encourage innovation. The framework demonstrates instances in which innovation can be advanced by encouraging secrecy, rather than patenting. The policy framework is then applied to certain aspects of current patent law. Changes to the patent system are proposed, including the creation of prior user rights for first inventors and changes to the standards for determining patent priority. The article concludes by examining whether certain categories of invention that can be appropriated through secrecy should be excluded from patent protection.