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## Duty Of Disclosure – Time To Reconsider After The Dawn Of The Information Age

David R. Soucy Esq.

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# DUTY OF DISCLOSURE – TIME TO RECONSIDER AFTER THE DAWN OF THE INFORMATION AGE

DAVID R. SOUCY, ESQ.\*

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## I. INTRODUCTION

We currently live in the information age<sup>1</sup> in fact, we are nearing the start of its sixth decade.<sup>2</sup> It is a period of rapid transformation to a society based on information technology and the exchange of information.<sup>3</sup> The impact of this

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\* David is currently practicing as a senior legal counsel for intellectual property at a leading home security technology company that continues to disrupt the market for home security products and services. He is responsible for the company's patent application preparation and prosecution efforts as well as other legal technology issues involving open source compliance, product clearance studies, and third-party patent assertions. Previously, he was an intellectual property attorney with a multinational software company. In that role, he managed an international patent portfolio and led invention harvesting efforts to gather new ideas and raise intellectual property awareness. Before going inhouse, David was a patent attorney at a patent boutique law firm. His experience included preparation and prosecution of patent applications in a variety of technical disciplines including software, mechanical and electrical technologies. David wishes to extend his sincere appreciation to Thomas J. McGinnis, Esq. and Christopher S. Daly, Esq. for their peer reviews of my article. He is grateful for the opportunity to have two well-respected and longtime patent practitioners review and comment on his work. David would also like to thank Jon R. Cavicchi, Esq., Professor of Legal Research and Intellectual Property Librarian at the Franklin Pierce School of Law at the University of New Hampshire, for his assistance in the research for this article: he was very kind to assist David with tracking down a couple of beneficial intellectual property articles.

1. Information Age in English, Cambridge Dictionary (last visited Apr. 12, 2021), <https://dictionary.cambridge.org/us/dictionary/english/information-age>; Information Age, Merriam-Webster (Apr. 12, 2021), <https://www.merriam-webster.com/dictionary/Information%20Age>.

2. Information Age, HISTORY OF TECHNOLOGY (last visited Apr. 12, 2021), <https://historyoftechnologyif.weebly.com/information-age.html>.

3. See *Effects Of Technology On The World Of Information And Knowledge*, NATIONAL ASSESSMENT GOVERNING BOARD (last visited Apr. 28, 2021), [https://www.nagb.gov/naep-frameworks/technology-and-engineering-literacy/2014-technology-framework/toc/ch\\_2/society/society3.html](https://www.nagb.gov/naep-frameworks/technology-and-engineering-literacy/2014-technology-framework/toc/ch_2/society/society3.html).

transformation on society is incalculable, as individuals are no longer isolated from one another. Rather, we all are part of a global community in which information is now more freely available than ever before in human history. People can access vast sources of information, both free and pay services, to gain knowledge or otherwise learn about the happenings in the world.

The United States Patent and Trademark Office (“the Office”) is a willing participant in this global community; this is especially true in the examination of patent applications. For instance, the Office has taken steps towards collaborative patent examinations with other national patent offices. Through initiatives such as the IP5,<sup>4</sup> the Office continues to seek ways to improve patent examination.<sup>5</sup> As the Office hurries to participate with the international community, the rules that mandate disclosure of information material to patentability lag behind other advances in patent examination. The rules appear outdated at best, and at worst function as impediments to efficient operation of the U.S. patent system. The duty imposed by the rules no longer promotes American innovation but rather discourages it. I respectfully submit that it is time to change these rules in view of the circumstances in which we now live.

## II. HISTORICAL CONTEXT OF THE DUTY TO DISCLOSE

The modern patent system came into existence in 1836.<sup>6</sup> An applicant’s duty to disclose prior art, however, was not established until 1977.<sup>7</sup> So after nearly 150 years, why did the Office impose such a duty on those members of the public who seek patent protection? To understand this change, one must consider the events and circumstances overtaking the Office at that time. In the early 1960s, the Office was in crisis. The post-war innovation boom was

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4. *About IP5 co-operation*, FIVE IP OFFICES (last visited Apr. 12, 2021), <https://www.fiveipoffices.org/about> (“The five IP offices (IP5) is the name given to a forum of the five largest intellectual property offices in the world that was set up to improve the efficiency of the examination process for patents worldwide. The members of IP5 are the European Patent Office (EPO); the Japan Patent Office (JPO); the Korean Intellectual Property Office (KIPO); the National Intellectual Property Administration of the People’s Republic of China (CNIPA); and the United States Patent and Trademark Office (USPTO).”).

5. *Id.* IP5 vision statement (“For the first ten years of their co-operation, the IP5 Offices’ focus was on “the elimination of unnecessary duplication of work among the offices, enhancement of patent examination efficiency and quality, and guarantee of the stability of patent right. To cover evolving user needs, in 2017, the five offices defined their new vision of IP5 co-operation as: patent harmonization of practices and procedures, enhanced work-sharing, high-quality and timely search and examination results, and seamless access to patent information to promote an efficient, cost-effective and user-friendly international patent landscape.”).

6. HARRY KURSH, *INSIDE THE U.S. PATENT OFFICE; THE STORY OF THE MEN, THE LAWS, AND THE PROCEDURES OF THE AMERICAN PATENT SYSTEM* 22–23 (1959).

7. Duty of Disclosure, 42 Fed. Reg. 5589, 5590 (Jan. 28, 1977).

nearing a climax<sup>8</sup> with the annual number of patent applications received by the Office nearly doubling between the years 1943 and 1962.<sup>9</sup> In particular, applications annually received by the Office went from 43,870 applications in the year 1943 to 85,265 applications in 1962.<sup>10</sup> More alarming was the Office's meager rate of disposal of applications, which resulted in a large backlog of pending applications. In 1962, the Office disposed of 89,051 applications, just barely keeping ahead of receipt of new applications, which totaled 85,265.<sup>11</sup> The number of newly received applications that year was the largest of any year in the previous 30 years.<sup>12</sup> The resultant backlog was daunting. By 1962, the total number of applications under examination at the Office was 197,397.<sup>13</sup>

Not only was the Office receiving more applications per year, but turnover in the patent examining corps was also becoming a serious problem.<sup>14</sup> In 1962, the Office reported a turnover rate of patent examiners of 20-percent per annum.<sup>15</sup> In an effort to reduce losses in the examining corps, the Office introduced several new initiatives.<sup>16</sup> Unfortunately, little progress was made to address the turnover in the examining corps or the pending backlog of applications as reported by the Office in 1963.<sup>17</sup>

As the decade progressed, the Office had very little to show for their efforts to reduce the growing backlog of applications, which still remained high.<sup>18</sup> The

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8. See Lauri Scherer, *World War II R&D Spending Catalyzed Post-War Innovation Hubs* National Bureau of Economic Research, NATIONAL BUREAU OF ECONOMIC RESEARCH (last visited Apr. 28, 2021), <https://www.nber.org/digest/sep20/world-war-ii-rd-spending-catalyzed-post-war-innovation-hubs>.

9. LUTHER H. HODGES & DAVID L. LADD, ANNUAL REPORT OF THE COMMISSIONER OF PATENTS 6 (1962).

10. *Id.*

11. *Id.* at 1, 5.

12. *Id.* at 1, 1.

13. *Id.* at 1, 7.

14. Joseph Rossman, *The Obstacles and Pitfalls of Inventors*, 12 J. PAT. OFF. SOC'Y 195, 208 (1930) ("Another serious obstacle to inventors is the delay in obtaining patents. The Patent Office is literally swamped with thousands of applications awaiting to be acted on. Congress has not provided an [*sic*] adequate personnel and has made little or no efforts to retain the examiners who leave the Patent Office for more lucrative positions in the industries. The quality of the work performed by the Patent Office is thus seriously impaired by the constant stream of experience examiners leaving the office.")

15. HODGES & LADD, *supra* note 9.

16. *Id.* (discussing initiatives including: formal training program for examiners; research and development program directed to alleviating the burden of examining patent applications through the development of machine-assisted search of patent and other literature; and explored additional sources of recruitment).

17. LUTHER H. HODGES & DAVID L. LADD, ANNUAL REPORT OF THE COMMISSIONER OF PATENTS 3, 5 (1963).

18. LUTHER H. HODGES & DAVID L. LADD, ANNUAL REPORT OF THE COMMISSIONER OF PATENTS 1 (1964).

reasons varied but included factors such as complexity of applications, rapidity of change in technology in many of the arts, and an increased volume of literature to be searched, all of which contributed to the backlog in one way or another.<sup>19</sup> The problems at the Office were serious, which government officials readily acknowledged. In fact, the Commissioner of Patents identified several immediate concerns in 1964, which included: (1) present and future pendency of patent applications, (2) increases in the backlog of applications, (3) the rise in the number of applications awaiting action by examiners, and (4) an uptick in new applications awaiting first action.<sup>20</sup> As the decade advanced, the situation started to improve, but significant gains in the reduction of pending applications remained out of reach. For instance, in 1965, the Office reported a record setting 102,000 disposals, which was a 35-percent increase over the preceding two years.<sup>21</sup> The backlog of applications, however, was only reduced slightly to 206,922 pending applications at the end of 1965, compared to 219,641 in 1964.<sup>22</sup>

By the end of the decade, the Office was still struggling to deal with the backlog of pending applications, which stood at 184,660.<sup>23</sup> It was at this time that the notion to require applicants to submit prior art first appeared in an annual report issued by the Office. In its report for 1969, the Office made clear its intention to adopt a new rule that would require applicants to submit a patentability brief before examination of patent applications.<sup>24</sup> Among other conditions, the brief would include a new requirement to identify all patents and publications specifically considered by applicants in the preparation of patent applications.<sup>25</sup> The reasons given by the Office to justify this change in procedure were to expedite prosecution of applications and to strengthen the presumption of validity of issued patents.<sup>26</sup>

The inventor's duty of disclosure was codified in the Code of Federal Regulations (CFR) in 1977,<sup>27</sup> which was around the beginning of the information age. Accessibility to information remained limited, and the primary medium of technical information was still paper in the form of books,

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19. *Id.*

20. *Id.*

21. JOHN CONNOR & EDWARD J. BRENNER, ANNUAL REPORT OF THE COMMISSIONER OF PATENTS 1 (1965).

22. *Id.* at 1, 14.

23. MAURICE H. STANS & WILLIAM E. SCHUYLER, JR., ANNUAL REPORT OF THE COMMISSIONER OF PATENTS 1 (1969).

24. *Id.* at 3.

25. *Id.*

26. *Id.*

27. Duty of Disclosure, 42 Fed. Reg. at 5589-91.

periodicals, patents, and other texts available in libraries or document depositories, such as the Office. Printed information, however, was not freely available to nor easily discoverable by many. In fact, the patent rules initially required a copy of each patent or publication, including U.S. patents, to accompany the prior art statement because of the substantial time and effort often needed to locate a document in the Office's own files.<sup>28</sup> These files included more than 6,000,000 foreign patents and 3,000,000 U.S. patents as early as 1959.<sup>29</sup>

### III. RATIONALE FAILS TO JUSTIFY THE DUTY IMPOSED

In the intervening years between the Office's initial pronouncement of the duty to its codification, the first stated justification for the new rule (i.e., expedited prosecution) is unfounded. After 1969, application backlog declined from 196,338 applications at the end of the 1960s to a nadir of 142,379 pending application in 1976.<sup>30</sup> Similarly, application pendency also fell to its lowest in 1976.<sup>31</sup> Thus, both application backlog and pendency were coincidentally at their lowest before the codification of the duty of disclosure in 1977. If application backlog and pendency were both declining without a duty, then why impose one? Perhaps, the Office was hoping for further or faster reductions in one or both conditions.

Unfortunately, patent statistics for the fiscal years subsequent to codification of the duty do not bear this out. Rather, both application backlog and pendency rose in the years immediately following codification of the rule. By 1984, the backlog of applications had exceeded 200,000, with a high of 223,101 applications in 1983, up from 144,542 in 1977.<sup>32</sup> This was a striking increase of over 50-percent. Pendency of applications also rose from around 20 months in 1977 to 25 months by 1984.<sup>33</sup> A number of factors likely contributed to the rise in both application pendency and backlog, but it is safe to conclude that codification of the duty of disclosure did not provide much, if any, measurable benefit to the patent examination process as initially expected by the Office. In fact, the rule may have contributed to the increase in numbers because examiners were now spending additional time reviewing art submitted by applicants.

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28. *Id.* at 5591.

29. KURSH, *supra* note 6, at 106-107.

30. MALCOLM BALDRIDGE & GERALD J. MOSSINGHOFF, ANNUAL REPORT OF THE COMMISSIONER OF PATENTS 50 (1984).

31. *Id.* at 25 fig. 9.

32. *Id.* at 50 tbl. 8.

33. *Id.* at 21, 25 fig. 9.

The second stated reason for the rule (i.e., to strengthen the presumption of validity of issued patents) also rings hollow. By 1969, the presumption of a patent's validity had been codified into law for 17 years.<sup>34</sup> Subsequent amendments to that section of the 1952 Patent Act prior to 1969 have only strengthened or clarified that presumption.<sup>35</sup> In retrospect, this part of the Office's justification appears to be the applesauce that hides the medicine. It was a justification that all patent owners could support<sup>36</sup> while drawing their attention away from the onerous obligation now being thrust upon them.

Perhaps the use of the phrase "presumption of validity" was an unartful one. A literal reading of the phrase does not make much sense for the reasons stated above, so it is likely that the Office was referring to improvements in patent quality. Again, improvement in patent quality is an ideal that all patent owners and the public can agree is a desirable one because strong patents make for a robust patent system. Yet over 20 years later in the first decade of the new millennium, the Office continued to express concerns about the quality of its patents.<sup>37</sup> In 2010, the Office established a taskforce and invested resources of over \$1.7 million to address those concerns.<sup>38</sup> Even today, patent quality remains a top priority for the Office.<sup>39</sup> Over time the twin pillars of expedited prosecution and strengthened presumption of validity have proven to be mere hollow posts rather than solid columns on which to support the requirement to disclose prior art. As such, it is clear that those logical pillars cannot possibly serve as the solid foundation on which to maintain such a heavy burden on members of the public who seek patent protection.

The Office's statements accompanying the proposed changes to patent procedures are the most revealing and honest justifications for the duty. Those statements clearly indicate an intention to make the examination of patents easier, faster, and less expensive for the Office by shifting some of the burden

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34. Act of July 19, 1952, Pub. L. No. 82-593, 66 Stat. 792 (codified as amended at 35 U.S.C. § 282).(an Act to revise and codify the laws relating to patents and the Patent Office and to enact the laws into titles 35 of the United States Code).

35. Act Amending Interstate Com Act, Pub. L. No. 89-93, 79 Stat. 284 (1965).

36. See Carl Richards et al., *Panel Discussion: Recent Developments in Patent Law*, in 1996 PATENT LAW ANNUAL 266-67 (Matthew Bender & Co. publ'g, 1966). ("It's hoped by both the Patent Office and by attorneys generally that the voluntary action in reporting the pertinent art will take care of the situation and not require further action. In view of the necessity of preserving the presumption of validity, it's more desirable that we make the best prior art of record, and it should not be necessary to require it by rule.").

37. U.S. PAT. AND TRADEMARK OFF., PERFORMANCE AND ACCOUNTABILITY REP. FISCAL YEAR 2003, 2-3 (2003).

38. U.S. PAT. AND TRADEMARK OFF., PERFORMANCE AND ACCOUNTABILITY REP. FISCAL YEAR 2010, 11, 16 (2010).

39. U.S. PAT. AND TRADEMARK OFF., FY 2020 PERFORMANCE AND ACCOUNTABILITY REPORT, 2, 4 (2020).

of examination onto individuals seeking patent protection. For instance, the Office stated that patentability statements would assist examiners by informing them of relevant prior art considered by the applicant and giving an explanation of the most relevant references *before they (the examiners) undertake their search*. The statement is to be *a starting point and supplement for the search*.<sup>40</sup> Other statements made by the Office in support of the duty included: (1) “While patents are of course available in the Office, if the applicant does not include copies *the examiner will have to interrupt his examination* until copies can be ordered”;<sup>41</sup> and (2) “Several comments questioned the need for burdening the applicant to supply copies of materials that are present in the Office’s own files. However, *substantial time and effort often is [sic] needed to locate a document* in the Office’s files.”<sup>42</sup> I will not say whether shifting some of the burdens of examination onto those members of the public who seek patent protection was the right or wrong thing to do. The Office was in a difficult position as its manual processes and primitive information management systems could not keep pace with the rapid innovation happening at that time. However, many of those processes are now electronic and automated using mature and highly advanced technologies that are available today. The time has arrived to reconsider the duty of disclosure in view of the 21<sup>st</sup> century version of the Office, not the one from the 1970s.

#### IV. THE 21<sup>ST</sup> CENTURY PATENT OFFICE

Technology today makes information abundantly available, especially materials regarding high-tech developments and consumer products. We are no longer confined within the walls of our local library for our knowledge. Rather, information is being disseminated instead of collected and deposited. This dissemination is happening at a greater pace and over a wider range of people than ever before. Advancements in data searching, machine learning, and artificial intelligence (AI) provide useful tools to improve access to information and methods to analyze it. The Office has joined this technological revolution by taking steps to incorporate the use of AI in the examination of patent applications.<sup>43</sup> Patent officials have recognized the exponential growth of prior art and that examiners are in need of help with discovery of relevant

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40. Patentability Statement, 41 Fed. Reg. 43705, 43730 (Oct. 4, 1976).

41. *Id.*

42. Duty of Disclosure, 42 Fed. Reg. at 5589-91.

43. Drew Hirshfeld, *Artificial Intelligence Tools at the USPTO*, UNITED STATES PATENT AND TRADEMARK OFFICE, (last visited Mar. 18, 2021), [https://www.uspto.gov/blog/director/entry/artificial-intelligence-tools-at-the?utm\\_campaign=subscriptioncenter&utm\\_content=&utm\\_medium=email&utm\\_name=&utm\\_source=govdelivery&utm\\_term=](https://www.uspto.gov/blog/director/entry/artificial-intelligence-tools-at-the?utm_campaign=subscriptioncenter&utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=)



art.<sup>44</sup> This help, however, is not decades away but rather is available today. As of this writing, the Office has now developed an AI-based prototype search system that identifies relevant documents and provides search suggestions.<sup>45</sup> As we move forward in the 21<sup>st</sup> century, these advances will only continue. Today's technology provides the Office with its most powerful and useful means to find relevant prior art. Now more than any time before, technology has set inventor and examiner on equal footing regarding access to technical information that is useful in examination of patent applications. Such equal access to information cannot justify the continued arduous burden saddled onto those individuals seeking patent protection in order to provide the Office with information to which it already has reasonable access or the technological means to find.

Over the years, the Office has continued to refine its processes and procedures to ensure the continued effectiveness of our patent system. Some of those efforts have produced improvements in access to information useful in making determinations about patentability. Efforts such as PCT Collaborative Search and Examination (CS&E) Pilot,<sup>46</sup> Expanded Collaboration Search Pilot (CSP) Program,<sup>47</sup> Global Dossier,<sup>48</sup> and the Patent Prosecution Highway<sup>49</sup>

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44. *Id.*

45. *Id.*

46. *PCT Collaborative Search and Examination Pilot*, UNITED STATES PATENT AND TRADEMARK OFFICE (July 1, 2020), <https://www.uspto.gov/patents/basics/international-protection/patent-cooperation-treaty/pct-collaborative-search>. (the PCT Collaborative Search and Examination Pilot (CS&E) improves international work sharing further by streamlining examination and search procedures for patent examiners in multiple countries).

47. *Collaborative Search Pilot*, UNITED STATES PATENT AND TRADEMARK OFFICE (last visited Apr. 17, 2021), <https://www.uspto.gov/patents/search/international-protection> (“It is designed to accelerate examination and provide the applicant with more comprehensive prior art by combining the search expertise of examiners at the USPTO and the Japan Patent Office (JPO) or the Korean Intellectual Property Office (KIPO) before issuing a first office action. Benefits include: greater consistency in examination across offices leading to more certainty of IP rights; applications will be taken out of turn resulting in expedited first action on merits; combined search expertise provides more comprehensive prior art; collaborative examination requires fewer office actions to complete prosecution (on average, compared to non-CSP applications).”).

48. *Global Dossier*, UNITED STATES PATENT AND TRADEMARK OFFICE (last visited Apr. 17, 2021), <https://www.uspto.gov/patents/basics/international-protection/global-dossier-initiative> (“Global Dossier is a set of business services that provides IP stakeholders free, secure, one-stop access to the dossier information of all applications that comprise a family and that have been filed in participating IP offices. It represents a significant move towards technical harmonization by enabling the exchange of patent information between foreign patent offices, patent examiners, and the public worldwide. Benefits include: real-time access to patent family application information from participating offices in a single location; machine translations of foreign IP5 patent documents; improved ease of filing internationally; time and cost savings using new efficiencies and worksharing opportunities; and improved worldwide patent quality, resulting in higher value patents.”).

49. *Patent Prosecution Highway (PPH) - Fast Track Examination of Applications*, UNITED STATES PATENT AND TRADEMARK OFFICE (last visited Apr. 17, 2021),

provide the Office with information it may not have otherwise had access to previously and renders that information more readily available. Collectively, these initiatives remove barriers to information that hindered the Office's ability to make accurate determinations about patentability. In addition, these initiatives provide useful input about whether or not to grant applications. Such information can reduce the time needed to examine applications and provide the Office with the confidence that its decisions about patentability are the right ones. For example, one goal of the CSP program is to increase the quality of examinations of patent applications through multiple searches done by several different patent offices.<sup>50</sup> The search results are shared and used to determine patentability of applications.<sup>51</sup> Initiatives like these support changes to the duty owed by applicants because the Office is no longer acting alone to make determinations about patentability. Instead, the process appears to be a collaborative one in which the applicant's contributions are likely duplicative and unnecessary to examiners at best, or burdensome and unhelpful at worst. Although there are some benefits from applicant-cited prior art, the value of such benefits is likely diminished by such initiatives. In addition, that benefit comes at a price to members of the public who seek patent protection in the form of additional complexity and increased costs to participate in our patent system. This price discourages American innovation. The greater policy question is whether the benefits of applicant-cited prior art outweigh the burden to provide such material. As information sharing amongst the different patent offices increases, the cost-benefit analysis for the duty of disclosure weighs more heavily against asking applicants to submit prior art.

## V. CONCLUSION

As Congress begins again to revisit changes to the patent laws of the United States, I would urge members to closely study the duty of disclosure rules promulgated by the Office. The duty neither expedited prosecution of patent

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<https://www.uspto.gov/patents/basics/international-protection/patent-prosecution-highway-pph-fast-track> ("The Patent Prosecution Highway (PPH) speeds up the examination process for corresponding applications filed in participating intellectual property offices. Under PPH, participating patent offices have agreed that when an applicant receives a final ruling from a first patent office that at least one claim is allowed, the applicant may request fast track examination of corresponding claim(s) in a corresponding patent application that is pending in a second patent office. PPH leverages fast-track examination procedures already in place among participating patent offices to allow applicants to reach final disposition of a patent application more quickly and efficiently than standard examination processing.").

50. See Gregory Wayne, *USPTO Patent Quality Chat*, UNITED STATES PATENT AND TRADEMARK OFFICE (Apr. 23, 2020), <https://rev-vbrick.uspto.gov/#/videos/ba08bf86-07b4-46d3-b7dc-d764359c3f0e?startAt=13m54s> [<https://perma.cc/3UEY-7SZQ>].

51. *Id.*

applications nor strengthened the presumption of validity of issued patents, as originally intended by the Office. These justifications no longer support continued requirement of that mandate. As such, modification of the patent rules governing the duty of disclosure is now necessary as the duty fails to achieve its policy goals. Furthermore, the duty of disclosure is a relic from a time gone by, a time when information was physically kept in cold, grey, metal filing cabinets in oversized government buildings. Today, information is ubiquitous; it is readily available in electronic form to both the public and the Office alike. In view of the information-sharing initiatives among patent offices around the world, the Office now has far better access to technical information related to inventions than the general public. Technological advances in the Office also give significant and meaningful assistance to examiners in their review of patent applications. Such advances in technology over time will likely yield higher quality patent examinations and render prior art submissions by applicants as having little to no additional examination value. Finally, the Office no longer examines applications in isolation. Rather, through programs such as CSP, the Office has other higher quality, more relevant sources of information regarding patentability of inventions than the public. The times have changed—the information age is no longer in its infancy. Rather, we are living at an innovative inflection point in which technology is moving from being a mere tool dependent upon human input and instruction to autonomous assistants that perform and suggest courses of action. It is now time to change the patent rules that mandate disclosure of prior art to reflect the technological reality of the world in which we live, and not of a time decades long since passed.