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## OPEN FOR TROUBLE: AMENDING WASHINGTON'S OPEN PUBLIC MEETINGS ACT TO PRESERVE UNIVERSITY PATENT RIGHTS

Vladimir Lozan

*Abstract:* Times have changed. Science is no longer “a perfect working model of democracy,” so transparent that it does not need supervision by outsiders.<sup>1</sup> Instead, science is now regulated at the federal and state level. At the federal level, laws and regulations require peer review meetings for research at state public universities to ensure compliance with federal funding mandates. At the state level, the Washington Open Public Meetings Act (OPMA) requires that peer review meetings at state universities be open to the public. When a scientist presents during one of these peer review meetings, the state university may lose patent rights because the presentation may contain intellectual property information that, once made public, forfeits patentability. This is certainly true for foreign patent rights and, in more limited circumstances, also true for rights under United States patent law. Though OPMA has exemptions that allow for closed sessions to discuss sensitive information, these exemptions do not encompass patent rights. This scheme conflicts not only with foreign and federal patent law goals, but also with the Washington Public Records Act (PRA). This Comment argues that OPMA should be amended to preserve a state university’s patent rights, consistent with patent law goals and the PRA.

### INTRODUCTION

The Washington Open Public Meetings Act (OPMA) was enacted to promote government openness.<sup>2</sup> OPMA requires that public agency meetings be open to the general public.<sup>3</sup> This public meeting requirement applies to state public universities and their decisionmaking bodies.<sup>4</sup> State universities hold a host of decisionmaking meetings,

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1. See Sheila Jasanoff, *Transparency in Public Science: Purposes, Reasons, Limits*, 69 *LAW & CONTEMP. PROBS.* 21, 23 (2006) (discussing Michael Polanyi, *The Republic of Science*, 1 *MINERVA* 54, 54–74 (1962); Roy Macleod, *Science and Democracy: Historical Reflections on Present Discontents*, 35 *MINERVA* 369 (1997)).

2. WASH. REV. CODE § 42.30.010 (2010); *Miller v. City of Tacoma*, 138 Wash. 2d 318, 324, 979 P.2d 429, 432–33 (1999).

3. WASH. REV. CODE § 42.30.030; *Miller*, 138 Wash. 2d at 324–25, 979 P.2d at 433.

4. See *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wash. 2d 243, 248, 884 P.2d 592, 595 (1994) (“As the University noted at oral argument, the animal care committee meets pursuant to the Open Public Meetings Act of 1971, RCW 42.30 . . . .”); *Cathcart v. Andersen*, 85 Wash. 2d 102, 104, 530 P.2d 313, 315 (1975); *Refai v. Cent. Wash. Univ.*, 49 Wash. App. 1, 11, 742 P.2d 137, 144 (1987) (showing Central Washington University did not dispute its status as a public agency).

including peer review meetings discussing scientific research, as mandated by federal law.<sup>5</sup> During peer review meetings, a scientist may reveal sensitive information that, once made public, may jeopardize patentability<sup>6</sup> both under foreign patent regimes and, in more limited circumstances, under U.S. law.<sup>7</sup>

At state universities, the patents generated by research belong to the university under the Bayh–Dole Act.<sup>8</sup> Since the enactment of the Bayh–Dole Act, state universities have used patents as an extra source of funding and revenue by licensing or co-funding with the private sector.<sup>9</sup> This relationship not only helps secure private research funding but also bridges the gap between research and product commercialization.<sup>10</sup>

Because of the financial value patent rights provide for public universities, some states completely exclude the public from any meetings related to state university research.<sup>11</sup> Specifically, Ohio and Indiana have statutory schemes that extend intellectual property protection to their public meetings laws.<sup>12</sup> Washington State provides some protection for intellectual property by exempting intellectual

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5. See *Progressive Animal Welfare Soc’y*, 125 Wash. 2d at 248, 884 P.2d at 595; Sean B. Seymore, *The “Printed Publication” Bar After Klopfenstein: Has the Federal Circuit Changed the Way Professors Should Talk About Science?*, 40 AKRON L. REV. 493, 510 (2007); Telephone Interview with Nona Phillips, Dir., Office of Animal Welfare, Univ. of Wash. (Jan. 22, 2009); cf. *Cathcart*, 85 Wash. 2d at 104, 530 P.2d at 315 (1975); *Refai*, 49 Wash. App. at 11, 742 P.2d at 144.

6. Edwin S. Flores Troy, Comment, *Publish and Perish: Patentability Aspects of Peer Review Misconduct*, 5 TEX. INTELL. PROP. L.J. 47, 48–49 (1996); see also Seymore, *supra* note 5, at 509–10.

7. See *infra* Part V.C.

8. See 35 U.S.C. § 202(a) (2006 & Supp. III 2010).

9. See Letter from Sheldon Elliot Steinbach, Vice President & Gen. Counsel of the Am. Council on Educ., to Senator DeConcini, Chair of Senate Judiciary Subcommittee on Patents, Copyrights & Trademarks (May 16, 1994), reprinted in *The Bayh-Dole Act, A Review of Patent Issues in Federally Funded Research, Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 103d Cong. (1994)); Mary Eberle, Comment, *March-in Rights Under the Bayh-Dole Act: Public Access to Federally Funded Research*, 3 MARQ. INTELL. PROP. L. REV. 155, 158–59 (1999) (citing *The Bayh-Dole Act, A Review of Patent Issues in Federally Funded Research, Before the Subcomm. on Patents, Copyrights & Trademarks of the S. Comm. on the Judiciary*, 103d Cong. at 34 (1994) (written statement of Howard Bremer, the Ass’n of Univ. Tech. Managers & the Council on Governmental Relations)).

10. See Pat Shockley, Comment, *The Availability of “Trade Secret” Protection for University Research*, 20 J.C. & U.L. 309, 309 (1994) (citing Michael Davis, Comment, *University Research and the Wages of Commerce*, 18 J.C. & U.L. 29, 34–36 (1991)).

11. See, e.g., *State ex rel. Besser v. Ohio State Univ. Bd. of Trs.*, 843 N.E.2d 174, 180–81 (Ohio 2006) (describing how meetings were closed to the public while scientist at a state university discussed research results under an intellectual property exemption).

12. See, e.g., IND. CODE ANN. §§ 5-14-1.5-6.1(b)(1), 5-14-3-4(a)(6) (LexisNexis 2006 & Supp. 2010); OHIO REV. CODE ANN. §§ 121.22(G)(5), 149.43(A)(1)(m) (LexisNexis 2007 & Supp. 2010).

property from disclosure under the Public Records Act (PRA).<sup>13</sup> However, this protection does not apply to public meetings governed by OPMA.<sup>14</sup> OPMA allows the public to attend any research peer review meetings at a state university, even when sensitive patent material is being discussed.<sup>15</sup>

This Comment argues that OPMA conflicts with the goals of foreign and domestic patent law. OPMA is also inconsistent with the PRA, which protects patentable material.<sup>16</sup> Amending OPMA to protect patent rights at public universities is important in Washington, where the University of Washington receives the most federal funding out of any public institution in the nation—funding used for potentially patentable research.<sup>17</sup> OPMA should be amended to parallel the intellectual property protections already provided by the PRA, similar to protective schemes in place in other states.

Part I discusses how OPMA operates and how it affects state university research. Part II provides background on how OPMA undermines foreign patent rights. Part III provides background on the threat OPMA poses to domestic patent rights. Part IV discusses other state equivalents of OPMA, and the intellectual property protection they provide. Finally, Part V argues that OPMA should be amended. Amending OPMA is necessary to protect patent rights under foreign patent law as well as domestic law and to align OPMA with the goals of the Bayh–Dole Act.

## I. OPMA REQUIRES THAT PEER REVIEW MEETINGS AT PUBLIC UNIVERSITIES ARE OPEN TO THE PUBLIC

The Washington Open Public Meetings Act (OPMA) requires that all public agencies and any other bodies with delegated decisionmaking power open their meetings to the general public.<sup>18</sup> This public meeting

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13. See WASH. REV. CODE § 42.56.270(1) (2010).

14. See *id.* § 42.30.110, particularly section 42.30.110(1)(l)–(n); see also *infra* Part V.A.

15. See *infra* Parts I.B., V.A.

16. See WASH. REV. CODE § 42.56.270(1); *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wash. 2d 243, 255, 884 P.2d 592, 599 (1994).

17. Univ. of Wash. Office of Research, *Summary of Sponsored Programs for the Fiscal Year Ending June 30, 2009*, [http://www.washington.edu/research/SITEPARTS/documents/reportsGC/Summary/01Prior\\_Years/05Summary\\_-\\_Fiscal\\_Year\\_2009.pdf](http://www.washington.edu/research/SITEPARTS/documents/reportsGC/Summary/01Prior_Years/05Summary_-_Fiscal_Year_2009.pdf), 13 (last visited Mar. 8, 2011).

18. WASH. REV. CODE § 42.30.010 (“[T]he intent of this chapter [is that public agencies’] actions be taken openly and that their deliberations be conducted openly.”); *Miller v. City of Tacoma*, 138 Wash. 2d 318, 324–25, 979 P.2d 429, 433 (1999) (discussing how action taken by a public agency must be at a public meeting).

requirement applies to peer review meetings at state universities like the University of Washington.<sup>19</sup>

A. *OPMA Requires that Public Agency Meetings Be Open to the Public*

The Washington State Legislature enacted OPMA in 1971.<sup>20</sup> OPMA's purpose is to promote openness in governmental actions and deliberations.<sup>21</sup> The Legislature used strong language in OPMA to ensure it would be "liberally construed."<sup>22</sup> OPMA requires all public agency meetings to be open to the public.<sup>23</sup> The statute broadly defines a public agency to cover most government entities at the state or local level.<sup>24</sup> These public agencies must provide public notice of time and

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19. WASH. REV. CODE § 42.30.030; *Progressive Animal Welfare Soc'y*, 125 Wash. 2d at 248, 884 P.2d at 595 ("As the University noted at oral argument, the animal care committee meets pursuant to the Open Public Meetings Act of 1971, RCW 42.30 . . ."); *Cathcart v. Andersen*, 85 Wash. 2d 102, 104, 530 P.2d 313, 315 (1975); *Refai v. Cent. Wash. Univ.*, 49 Wash. App. 1, 11, 742 P.2d 137, 144 (1987) (showing Central Washington University did not dispute its status as a public agency).

20. Open Public Meetings Act, ch. 250, 1971 Wash. Sess. Laws 1113 (codified as amended at WASH. REV. CODE §§ 42.30.010–42.30.920).

21. WASH. REV. CODE § 42.30.010 ("[T]he intent of this chapter [is that public agencies'] actions be taken openly and that their deliberations be conducted openly."); *Miller*, 138 Wash. 2d at 324, 979 P.2d at 432–33 (discussing how action taken by a public agency must be at a public meeting).

22. WASH. REV. CODE § 42.30.910 ("The purposes of this chapter are hereby declared remedial and shall be liberally construed."); see also *Eugster v. City of Spokane*, 110 Wash. App. 212, 222, 39 P.3d 380, 384 (2002) ("[T]he statement of purpose in the OPMA 'employs some of the strongest language used in any legislation[.]'" (quoting *Equitable Shipyards, Inc. v. State*, 93 Wash. 2d 465, 482, 611 P.2d 396, 406 (1980))).

23. WASH. REV. CODE § 42.30.030; *Miller*, 138 Wash. 2d at 324–25, 979 P.2d at 433 (1999).

24. WASH. REV. CODE § 42.30.020 ("(1) 'Public agency' means: (a) Any state board, commission, committee, department, educational institution, or other state agency which is created by or pursuant to statute, other than courts and the legislature; (b) Any county, city, school district, special purpose district, or other municipal corporation or political subdivision of the state of Washington; (c) Any subagency of a public agency which is created by or pursuant to statute, ordinance, or other legislative act, including but not limited to planning commissions, library or park boards, commissions, and agencies; (d) Any policy group whose membership includes representatives of publicly owned utilities formed by or pursuant to the laws of this state when meeting together as or on behalf of participants who have contracted for the output of generating plants being planned or built by an operating agency."); cf. *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wash. App. 185, 188, 181 P.3d 881, 882–83 (2008) (holding that a private corporation that received the bulk of its funding from taxpayer money and was subject to regular government oversight was the equivalent of a public agency under the Public Disclosure Act); *Telford v. Thurston Cnty. Bd. of Comm'rs*, 95 Wash. App. 149, 165–66, 974 P.2d 886, 895 (1999) (holding that associations of public officials are public agencies under the Public Disclosure Act).

Both the Open Public Meetings Act and the Public Disclosure Act serve the same purpose of promoting government openness. See Leslie L. Marshall, Note, *Telford: Casting Sunlight on Shadow Governments—Limits to the Delegation of Government Power to Associations of Officials*

place of their meetings that is annually published in the Washington state register.<sup>25</sup> Regular meetings do not require an agenda or other description of the business to be transacted.<sup>26</sup>

To help ensure that OPMA is followed, the law provides that any ordinance, resolution, rule, regulation, order, or directive adopted in secret or in violation of OPMA is void.<sup>27</sup> A court can hold participants of a secret meeting personally liable and impose a civil fine.<sup>28</sup> Ultimately, the purpose of OPMA is to safeguard the public's ability to observe all steps of government decisionmaking.<sup>29</sup>

*B. OPMA Requires State Universities to Open Meetings to the Public, Including Peer Review Meetings*

Washington's universities are public agencies and are subject to OPMA.<sup>30</sup> As such, the meetings of state governing bodies must comply with OPMA.<sup>31</sup> Further, some of these state governing bodies must also comply with federal laws in order to receive federal funding.<sup>32</sup>

For instance, the Health Research Extension Act of 1985 requires that an Animal Care Committee (ACC) reviews and directs animal research

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*and Agencies*, 24 SEATTLE U. L. REV. 139, 140 (2000) ("In Washington State, the Public Disclosure Act and the Open Public Meetings Act, which are sometimes collectively referred to as the Sunshine Laws, open government agencies to full public view . . ."); Teresa Dale Pupillo, Note, *The Changing Weather Forecast: Government in the Sunshine in the 1990s—An Analysis of State Sunshine Laws*, 71 WASH. U. L. Q. 1165, 1165 n.1 (1993).

25. WASH. REV. CODE § 42.30.075.

26. *Hartman v. State Game Comm'n*, 85 Wash. 2d 176, 181, 532 P.2d 614, 617 (1975); *Dorsten v. Port of Skagit Cnty.*, 32 Wash. App. 785, 789–90, 650 P.2d 220, 223 (1982). However, other laws may pose additional requirements. See, e.g., WASH. REV. CODE § 35.23.221 (2010) (requiring public notice of hearings and meeting agendas for upcoming city council meetings). WASH. REV. CODE § 35A.12.160 (2010) is similar to WASH. REV. CODE § 35.23.221, but involves mayor-council plan of government.

27. WASH. REV. CODE § 42.30.060; see *Mason Cnty. v. Pub. Emp't Relations Comm'n, Teamsters Union, Local No. 378*, 54 Wash. App. 36, 37–38, 771 P.2d 1185, 1186 (1989) (holding that the decision and agreement between a union and a county reached during a meeting that was conducted in violation of the Open Public Meetings Act are void).

28. WASH. REV. CODE § 42.30.120(1).

29. *Cathcart v. Andersen*, 85 Wash. 2d 102, 107, 530 P.2d 313, 316 (1975).

30. *Cathcart*, 85 Wash. 2d at 104, 530 P.2d at 315 (1975); *Refai v. Cent. Wash. Univ.*, 49 Wash. App. 1, 11, 742 P.2d 137, 144 (1987) (showing Central Washington University did not dispute it is a public agency).

31. WASH. REV. CODE § 42.30.030; *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wash. 2d 243, 248, 884 P.2d 592, 595 (1994) ("As the University noted at oral argument, the animal care committee meets pursuant to the Open Public Meetings Act of 1971, RCW 42.30 . . .")

32. See *Progressive Animal Welfare Soc'y*, 125 Wash. 2d at 248, 884 P.2d at 595.

in compliance with federal regulations.<sup>33</sup> Scientists present their research to the ACC to help ensure federal compliance.<sup>34</sup> The ACC is subject to OPMA.<sup>35</sup> While the project review forms are designed to be generally disclosable<sup>36</sup> and intellectual property can be further redacted in compliance with the Public Records Act,<sup>37</sup> scientists may still be required to visually or orally present sensitive information—intellectual property—in order to answer questions targeted at candid peer review, which, in turn, helps ensure compliance with federal law.<sup>38</sup> Even if federal compliance is not the reason behind the peer review meeting, these types of meetings are an essential part of the research process to evaluate merits of the research. These peer review meetings typically reveal confidential information.<sup>39</sup> Even less formal presentations, such as “chalk talks,”<sup>40</sup> can reveal such information.<sup>41</sup> Publicly disclosing confidential information negates the novelty of an invention, a requirement for patentability.<sup>42</sup>

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33. 42 U.S.C. § 289d(b)(3)(A) (2006).

34. See *Progressive Animal Welfare Soc’y*, 125 Wash. 2d at 248, 884 P.2d at 595.

35. *Id.*

36. *Id.*

37. WASH. REV. CODE § 42.56.270(1) (2010); see *infra* Part IV.B.

38. Seymore, *supra* note 5, at 510; Telephone Interview with Nona Phillips, Dir., Office of Animal Welfare, Univ. of Wash. (Jan. 22, 2009).

39. Troy, *supra* note 6, at 48–49.

40. A “chalk talk” is a lecture given with a piece of chalk and a clean blackboard (or a marker and a blank overhead transparency). The “chalk talk” is a “less formal” and “more interactive” talk which gives the speaker and the audience “more opportunity to explore ideas, direction of work, and some perspective of the field.” Jim Austin, *You’ve Worked Hard to Get This Far*, SCIENCE CAREERS (Nov. 22, 2002), [http://sciencecareers.sciencemag.org/career\\_development/previous\\_issues/articles/2030/you\\_ve\\_worked\\_hard\\_to\\_get\\_this\\_far/](http://sciencecareers.sciencemag.org/career_development/previous_issues/articles/2030/you_ve_worked_hard_to_get_this_far/) (last visited Mar. 21, 2011) (explaining that a faculty candidate in a science department is often asked to give a “chalk talk” to a mock class as part of the on-campus interview). “Chalk talks” are invaluable during the question-and-answer portion of a seminar:

In all of this we have ignored the one time-tested visual that has served scientific speakers for centuries: the blackboard. In many settings, there will, of course, be no blackboards. Where they are available, blackboards are most useful during the question and answer period that follows most talks. Then, blackboards are invaluable to draw new relationships, structures, and so on, that were not included in the talk but are needed to illustrate answers to questions from the audience.

IVAN VALIELA, DOING SCIENCE: DESIGN, ANALYSIS, AND COMMUNICATION OF SCIENTIFIC RESEARCH 153–54 (2001).

41. Seymore, *supra* note 5, at 509–10.

42. See *id.* at 494–95 (“The § 102(b) printed publication bar terrifies university technology transfer offices because, in academic research, patentability and validity ‘can be derailed by the kind of disclosure that is a normal part of routine scientific discourse.’” (quoting Jeff Rothenberg, *A Scientific Presentation Can Defeat Patentability*, BUS. REV. (Dec. 2, 2005))), available at <http://www.bizjournals.com/albany/stories/2005/12/05/smallb3.html?page=2>; *infra* Part III.A.

## II. PATENT RIGHTS ARE DESTROYED UNDER MOST FOREIGN PATENT LAWS ONCE AN INVENTION IS REVEALED PUBLICLY

OPMA requires researchers at state universities to reveal their intellectual property to the public.<sup>43</sup> Under most foreign patent laws, any public disclosure of intellectual property immediately destroys all patent rights to that property.<sup>44</sup> As such, this public meeting requirement threatens the ability of those researchers to patent their intellectual property.<sup>45</sup>

Most foreign patent laws address novelty differently than U.S. patent law.<sup>46</sup> The critical distinction between foreign and domestic patent laws is their respective methods of recognizing an invention's ownership.<sup>47</sup> The United States patent system follows a first-to-invent principle, whereby inventors may take up to one year after a public disclosure to file a patent for an invention they have created.<sup>48</sup> All other countries

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43. See *supra* Part I.B.

44. See *infra* Part V.C.1.

45. See *infra* Part V.C.

46. See 3A DONALD S. CHISUM, CHISUM ON PATENTS § 10.01 (rev. ed. 2005); Ryan M. Corbett, *Harmonization of U.S. and Foreign Patent Law and H.R. 2795: The Patent Reform Act of 2005*, 18 FLA. J. INT'L L. 717, 719 (2006) ("Almost every other country in the world employs a 'first-to-file' system, which grants priority to the first applicant who files a patent application for the invention, regardless of whether that applicant actually invented the device first."); Toshiko Takenaka, *The Best Patent Practice or Mere Compromise? A Review of the Current Draft of the Substantive Patent Law Treaty and A Proposal for A "First-to-Invent" Exception for Domestic Applicants*, 11 TEX. INTELL. PROP. L.J. 259, 313 (2003); see also *Tronzo v. Biomet, Inc.*, 156 F.3d 1154, 1162 (Fed. Cir. 1998) (Newman, J., concurring) (discussing applicants filing for foreign patents based of the first-to-file rule); Erin Shinneman, Comment, *Owning Global Knowledge: The Rise of Open Innovation and the Future of Patent Law*, 35 BROOK. J. INT'L L. 935, 953 (2010) ("The United States is the only patent-issuing nation in the world to maintain a first-to-invent priority system. . . . Outside the U.S., the first-to-file priority system grants the patent to the first applicant, regardless of whether he was actually the original inventor." (citations omitted)). However, the actual practice of first-to-file systems is more complicated than that, with many countries utilizing limited grace periods. See Takenaka, *supra* at 313–14.

47. See *supra* note 46.

48. 35 U.S.C. §§ 101, 102(b) (2006); Corbett, *supra* note 46, at 719; see also 35 U.S.C. § 102(f), (g); *Apotex USA, Inc. v. Merck & Co., Inc.*, 254 F.3d 1031, 1035 (Fed. Cir. 2001) ("Section 102(g) operates to ensure that a patent is awarded only to the 'first' inventor in law."). All of the novelty and priority provisions of 35 U.S.C. § 102 are beyond the scope of this Comment. It should be noted that some scholars would argue that the complexity of the U.S. first-to-invent rules makes it more akin to a first-to-file system. See generally Toshiko Takenaka, *Rethinking the United States First-to-Invent Principle from A Comparative Law Perspective: A Proposal to Restructure § 102 Novelty and Priority Provisions*, 39 HOUS. L. REV. 621 (2002); cf. Gerald J. Mossinghoff, *The U.S. First-to-Invent System Has Provided No Advantage to Small Entities*, 84 J. PAT. & TRADEMARK OFF. SOC'Y 425, 428 (2002) (discussing that U.S. first-to-invent system potentially adds "hundreds of thousands of dollars" to the cost of patent prosecution.).



utilize a first-to-file system, where the first person to file gets the patent and any prior disclosure forfeits the patent rights.<sup>49</sup> Because a majority of U.S. patent applicants are interested in securing patents outside the United States, most applicants have adopted a first-to-file practice.<sup>50</sup> To comply with the first-to-file system, patent applicants may not publish or reveal their intellectual property in any way before the patent application is filed.<sup>51</sup>

The European Community provides the most significant example of a first-to-file patent recognition scheme. Inventors seeking a foreign patent typically do so in Europe<sup>52</sup> because the European Community is the world's largest trading bloc.<sup>53</sup> In this trading bloc, the European Patent Convention (EPC) has harmonized the patent laws of European Union Member States as well as other contracting states.<sup>54</sup> With just one application, an inventor can obtain a "basket of national patents" with the desired member states.<sup>55</sup> As of March 2011, the EPC had twenty-seven European Union Member States, with nine candidate and potential candidate countries.<sup>56</sup> Thus, while there are other ways to get patent protection in Europe,<sup>57</sup> the EPC is a good framework for an exemplary analysis because of its popularity and breadth.<sup>58</sup>

Under the EPC, the first-to-file principle is part of the novelty analysis to determine patentability.<sup>59</sup> The EPC provides that an invention is novel if it is not encompassed by the "state of the art."<sup>60</sup> The "state of

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49. See *supra* note 46.

50. See Takenaka, *supra* note 46, at 301–02, 315.

51. See *infra* notes 59–61 and accompanying text.

52. GUY TRITTON, ET AL., INTELLECTUAL PROPERTY IN EUROPE 61 (3d ed. 2008).

53. *Id.* (largest trading bloc of the developed world).

54. *Id.* at 49, 85–87.

55. Convention on the Grant of European Patents (European Patent Convention), Art. 2(2), Oct. 5, 1973, as amended Nov. 29, 2000, <http://www.epo.org/law-practice/legal-texts/html/epc/2010/e/ma1.html> (last visited Mar. 22, 2011) [hereinafter European Patent Convention] ("The European patent shall, in each of the Contracting States for which it is granted, have the effect of and be subject to the same conditions as a national patent granted by that State, unless otherwise provided in this Convention."); TRITTON, *supra* note 52, at 84; Andrew R. Sommer, Comment, *Trouble on the Commons: A Lockean Justification for Patent Law Harmonization*, 87 J. PAT. & TRADEMARK OFF. SOC'Y 141, 144 (2005).

56. See *The 27 Member Countries of the European Union*, EUROPA, [http://europa.eu/about-eu/member-countries/index\\_en.htm](http://europa.eu/about-eu/member-countries/index_en.htm) (last visited Mar. 22, 2011).

57. See TRITTON, *supra* note 52, at 215–220.

58. See *id.* at 84–85, 217 ("[The European Patent Convention] has proved to be a very popular route for obtaining patents in Western European countries.")

59. See generally European Patent Convention, *supra* note 55, at art. 54.

60. *Id.* at art. 54(1).

the art” is everything that is revealed to the public through public use, written or oral description, or “in any other way” before the filing date of the patent application.<sup>61</sup> Thus, if an invention is revealed “in any other way” to the public before the filing date of the patent application, patent rights to that invention are destroyed.

### III. UNDER DOMESTIC PATENT LAW, PUBLIC DISCLOSURE OF AN INVENTION CAN THREATEN PATENT RIGHTS

As discussed above, revealing an invention to the public threatens patent rights under the European Patent Convention and other important foreign patent laws.<sup>62</sup> Under U.S. patent law, a public meeting’s threat to patent rights is less direct.<sup>63</sup> While the EPC destroys patent rights as soon as an invention is disclosed to the public, U.S. law is more lenient.<sup>64</sup> U.S. law grants a one-year grace period to file a patent application after an invention has been disclosed.<sup>65</sup> Under U.S. law, this one-year clock starts to run as soon as (1) the invention has been disclosed in a printed publication, or (2) the invention is placed in public use.<sup>66</sup>

#### A. *A “Printed Publication” Need Not Be Printed, but Needs to Be Publicly Accessible*

Under U.S. patent law, inventors lose their patent rights when they describe an invention in a “printed publication” more than one year before filing a patent application.<sup>67</sup> The rationale behind this prohibition is “that once an invention is in the public domain, it is no longer patentable by anyone.”<sup>68</sup> A printed publication is formed when an inventor creates a “reference”—such as a paper, document presentation slide, or recording—that anticipates the eventual patent claims for the

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61. *Id.* at art. 54(2).

62. *See supra* Part II.

63. *See infra* Part V.C.2.

64. *See supra* Part II.

65. 35 U.S.C. § 102(b) (2006).

66. *Id.*

67. *See id.*

68. *In re Hall*, 781 F.2d 897, 898 (Fed. Cir. 1986) (citing *In re Bayer*, 568 F.2d 1357, 1361 (C.C.P.A. 1978)).

invention at issue.<sup>69</sup> If the “reference” enables persons ordinarily skilled in the field to implement the invention without extensive experimentation, the “reference” is a “printed publication.”<sup>70</sup>

The one-year clock to file a patent application actually starts when a printed publication has been “published.”<sup>71</sup> Because a printed publication need not actually be printed,<sup>72</sup> the date that the publication is “published” is the date it becomes “publicly accessible.”<sup>73</sup> Public accessibility requires that “persons interested and ordinarily skilled in the subject matter or art” can locate the publication by “exercising reasonable diligence.”<sup>74</sup> Evidence of someone actually locating the reference is not necessary.<sup>75</sup>

The U.S. Court of Appeals for the Federal Circuit has expanded the definition of “printed publication” to include visual presentations.<sup>76</sup> In *In re Klopfenstein*,<sup>77</sup> the Federal Circuit held that posters displayed at a trade show constituted a printed publication.<sup>78</sup> The court listed four factors to determine when an ephemeral reference becomes a “printed publication”: (1) “length of time the display was exhibited,”<sup>79</sup> (2) “expertise of the target audience,”<sup>80</sup> (3) “existence (or lack thereof) of reasonable expectations that the material displayed would not be copied,”<sup>81</sup> and (4) “the simplicity or ease with which the material

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69. *Verdegoal Bros. v. Union Oil Co. of Cal.*, 814 F.2d 628, 631 (Fed. Cir. 1987) (“A [patent] claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.”).

70. *See SRI Int’l, Inc. v. Internet Sec. Sys.*, 511 F.3d 1186, 1193–94 (Fed. Cir. 2008).

71. *Id.* at 1194 (quoting *Bruckelmyer v. Ground Heaters, Inc.*, 445 F.3d 1374, 1378 (Fed. Cir. 2006)).

72. *See generally In re Klopfenstein*, 380 F.3d 1345 (Fed. Cir. 2004).

73. *Hall*, 781 F.2d at 898–99 (“Because there are many ways in which a reference may be disseminated to the interested public, ‘public accessibility’ has been called the touchstone in determining whether a reference constitutes a ‘printed publication’ bar under 35 U.S.C. § 102(b).”); *see also SRI Int’l, Inc.*, 511 F.3d at 1194; *Klopfenstein*, 380 F.3d at 1348; *In re Cronyn*, 890 F.2d 1158, 1160 (Fed. Cir. 1989) (quoting *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1568 (Fed. Cir. 1988)).

74. *SRI Int’l Inc.*, 511 F.3d at 1194 (quoting *Bruckelmyer*, 445 F.3d at 1378); *see also Kyocera Wireless Corp. v. Int’l Trade Comm’n*, 545 F.3d 1340, 1350 (2008).

75. *SRI Int’l Inc.*, 511 F.3d at 1197; *Constant*, 848 F.2d at 1569.

76. *See Klopfenstein*, 380 F.3d at 1350–52.

77. *Id.*

78. *Id.* at 1350.

79. *Id.*

80. *Id.*

81. *Id.*

displayed could have been copied.”<sup>82</sup> This inquiry is approached on a case-by-case basis.<sup>83</sup>

The *Klopfenstein* factors were developed to assess “public accessibility” from the perspective of a person ordinarily skilled in the art exercising reasonable diligence to locate the reference.<sup>84</sup> Members of the public may vary from laypersons to those ordinarily skilled in the art and who are not bound by confidentiality.<sup>85</sup> Attendance of persons ordinarily skilled in the art may make a presentation a printed publication, “‘however ephemeral its existence,’ . . . if it ‘goes direct to those whose interests make them likely to observe and remember whatever it may contain that is new and useful.’”<sup>86</sup> Simply being able to access unknown information by searching in a directory does not meet the “publicly accessible” element.<sup>87</sup>

### *B. Public Use Can Be Negated by Experimental Use*

As discussed above, if an invention is disclosed in a “printed publication” more than one year before the patent application is filed, the inventor loses all patent rights to the invention.<sup>88</sup> Likewise, if an inventor places an invention in “public use” more than one year before filing a patent application, the inventor loses all patent rights.<sup>89</sup> Besides the inventor using the invention, public use also includes use by any other person who does not have an obligation of secrecy to the inventor.<sup>90</sup>

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82. *Id.*

83. *Id.* (citing *In re Cronyn*, 890 F.2d 1158, 1161 (Fed. Cir. 1989)); *In re Hall*, 781 F.2d 897, 899 (Fed. Cir. 1986)).

84. *Klopfenstein*, 380 F.3d at 1348–50 (analyzing *Cronyn*, 890 F.2d 1158; *Hall*, 781 F.2d 897; *Mass. Inst. of Tech. v. AB Fortia*, 774 F.2d 1104 (Fed. Cir. 1985); and *In re Wyer*, 655 F.2d 221 (C.C.P.A. 1981)).

85. See WASH. REV. CODE § 42.30.040 (2010) (“A member of the public shall not be required, as a condition to attendance at a meeting of a governing body, to register his name and other information, to complete a questionnaire, or otherwise to fulfill any condition precedent to his attendance.”).

86. *Klopfenstein*, 380 F.3d at 1351 (quoting Judge Learned Hand in *Jockmus v. Leviton*, 28 F.2d 812, 813–14 (2d Cir. 1928)).

87. See *SRI Int’l, Inc. v. Internet Sec. Sys.*, 511 F.3d 1186, 1197–98 (Fed. Cir. 2008).

88. 35 U.S.C. § 102(b) (2006).

89. See *id.*

90. *Lough v. Brunswick Corp.*, 86 F.3d 1113, 1119 (Fed. Cir. 1996) (quoting *In re Smith*, 714 F.2d 1127, 1134 (Fed. Cir. 1983) (citing *Egbert v. Lippmann*, 104 U.S. 333, 336 (1881))).

The policies behind public use include:

- (1) discouraging the removal, from the public domain, of inventions that the public reasonably has come to believe are freely available;
- (2) favoring the prompt and widespread disclosure of inventions;
- (3) allowing the inventor a reasonable amount of time following sales activity to

It is not public use when the inventor, or someone under the inventor's control, uses the invention to bring it to perfection.<sup>91</sup> Bringing the invention to perfection is considered to be "experimental," not "public."<sup>92</sup> One commentator divided the elements of experimental use into three main categories:<sup>93</sup>

(1) whether the use in question was primarily for the purpose of experimentation or commercial exploitation;<sup>94</sup> (2) how much control the inventor exercised over the use;<sup>95</sup> and (3) to what extent the invention needs further experimentation or testing in order to be complete.<sup>96</sup>

Of these three factors, case law has uniformly shown that an inventor's control of the invention's use is the most important factor in determining whether the use is public or experimental.<sup>97</sup>

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determine the potential economic value of a patent; and (4) prohibiting the inventor from commercially exploiting the invention for a period greater than the statutorily prescribed time.

*Lough*, 86 F.3d at 1119 (Fed. Cir. 1996) (quoting *Tone Bros. v. Sysco Corp.*, 28 F.3d 1192, 1198 (Fed. Cir. 1994)). A court may consider additional factors based on the totality of the circumstances. *Allied Colloids Inc. v. Am. Cyanamid Co.*, 64 F.3d 1570, 1574 (Fed. Cir. 1995) (citing *Baker Oil Tools, Inc. v. Geo Vann, Inc.*, 828 F.2d 1558, 1564 (Fed. Cir. 1987)).

91. *City of Elizabeth v. Am. Nicholson Pavement Co.*, 97 U.S. 126, 134 (1877).

92. *Lough*, 86 F.3d at 1120 (citing *TP Labs., Inc. v. Prof'l Positioners, Inc.*, 724 F.2d 965, 971 (Fed. Cir. 1984)).

93. Eyal H. Barash, Comment, *Experimental Uses, Patents, and Scientific Progress*, 91 NW. U. L. REV. 667, 674 (1997).

In *Electromotive Division of General Motors Corp. v. Transportation Systems Division of General Electric Co.*, 417 F.3d 1203, 1213 (Fed. Cir. 2005), the Federal Circuit reiterated a more extensive list of thirteen objective factors to be considered:

(1) the necessity for public testing; (2) the amount of control over the experiment retained by the inventor; (3) the nature of the invention; (4) the length of the test period; (5) whether payment was made; (6) whether there was a secrecy obligation; (7) whether records of the experiment were kept; (8) who conducted the experiment; (9) the degree of commercial exploitation during testing; (10) whether the invention reasonably requires evaluation under actual conditions of use; (11) whether testing was systematically performed; (12) whether the inventor continually monitored the invention during testing; and (13) the nature of the contacts made with potential customers.

These were originally enumerated in *Allen Eng'g Corp. v. Bartell Indus., Inc.*, 299 F.3d 1336, 1353 (Fed. Cir. 2002) (citing *EZ Dock v. Schafer Sys., Inc.*, 276 F.3d 1347, 1357 (Fed. Cir. 2002) (Linn, J., concurring)).

94. *Smith*, 714 F.2d at 1134.

95. *In re Hamilton*, 882 F.2d 1576, 1580 (Fed. Cir. 1989).

96. *Pfaff v. Wells Elecs., Inc.*, 525 U.S. 55, 66–69 (1998).

97. *Electromotive Div. of Gen. Motors*, 417 F.3d at 1214–15 (Fed. Cir. 2005) ("[C]ontrol . . . must be proven if experimentation is to be found."); see also *Netscape Comm'ns Corp. v. Konrad*, 295 F.3d 1315, 1320–21 (Fed. Cir. 2002); *Lough v. Brunswick Corp.*, 86 F.3d 1113, 1121–22 (Fed. Cir. 1996); *Allied Colloids Inc. v. Am. Cyanamid Co.* 64 F.3d 1570, 1575 (Fed. Cir. 1995); *Beachcombers v. WildeWood Creative Prods., Inc.*, 31 F.3d 1154, 1160 (Fed. Cir. 1994); *Hamilton*, 882 F.2d at 1581; *Moleculon Research Corp. v. CBS, Inc.*, 793 F.2d 1261, 1266 (Fed. Cir. 1986); *TP Labs., Inc. v. Prof'l Positioners, Inc.*, 724 F.2d 965, 972 (Fed. Cir. 1984);

An inventor controls the use of the invention if the inventor never uses the invention or never allows its use in any circumstance where the inventor lacks “a legitimate expectation of privacy and confidentiality.”<sup>98</sup> Privacy and confidentiality are maintained where the inventor controls “the distribution of information concerning” the invention.<sup>99</sup> Closeness and an ongoing relationship between the inventor and audience during a presentation do not necessarily determine control;<sup>100</sup> instead, the circumstances under which the invention is disclosed determine the expectation of confidentiality.<sup>101</sup>

For example, in *TP Laboratories, Inc. v. Professional Positioners, Inc.*,<sup>102</sup> a dentist–inventor had used an orthodontic invention on his patients over the course of six years before filing for a patent application.<sup>103</sup> The Federal Circuit recognized this limited use as “experimental,” not “public,” holding the patent to be valid.<sup>104</sup> The court reasoned that the dentist–patient relationship was experimental use based on implied confidentiality, even though the patients most likely showed the invention to others who would understand and want to duplicate it.<sup>105</sup>

However, if the inventor does not control the use of the invention, most uses will likely be held “public.”<sup>106</sup> In *Netscape Communications*

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*Smith*, 714 F.2d at 1136; *Kock v. Quaker Oats Co.*, 681 F.2d 649, 655 (9th Cir. 1982); *Omark Indus., Inc. v. Carlton Co.*, 652 F.2d 783, 787 (9th Cir. 1980); *Dart Indus., Inc. v. E. I. DuPont DeNemours & Co.*, 489 F.2d 1359, 1366–67 (7th Cir. 1973); *Cali v. E. Airlines, Inc.*, 442 F.2d 65, 69 (2d Cir. 1971); *Tool Research and Eng'g Corp. v. Honcor Corp.*, 367 F.2d 449, 453 (9th Cir. 1966). The U.S. Supreme Court recognized this limitation very early in the public use jurisprudence. *City of Elizabeth v. Am. Nicholson Pavement Co.*, 97 U.S. 126, 135 (1877) (“So long as [the inventor] does not voluntarily allow others to make it and use it, and so long as it is not on sale for general use, he keeps the invention under his own control, and does not lose his title to a patent.”); *Egbert v. Lippmann*, 104 U.S. 333, 336 (1881) (“If an inventor, having made his device, gives or sells it to another, to be used by the donee or vendee, without limitation or restriction, or injunction of secrecy, and it is so used, such use is public . . .”).

98. *Moleculon Research*, 793 F.2d at 1265.

99. *Beachcombers*, 31 F.3d at 1160 (discussing *Moleculon Research*, 793 F.2d 1261).

100. *Id.* (concluding there was public use when the inventor displayed the invention at a *private* party and “notwithstanding the closeness and ongoing nature of [the inventor’s] relationship with her guests”).

101. *Xerox Corp. v. 3Com Corp.*, 26 F. Supp. 2d 492, 496–97 (W.D.N.Y. 1998); *see also Moleculon Research*, 793 F.2d at 1266 (Fed. Cir. 1986) (concluding there was no public use “based on the personal relationships and surrounding circumstances” when the inventor presented fully functional prototypes of the invention to his friends and colleague at a university).

102. 724 F.2d 965 (Fed. Cir. 1984).

103. *Id.* at 967–68.

104. *Id.* at 972–73.

105. *Id.* at 972.

106. *Netscape Commc’ns Corp. v. Konrad*, 295 F.3d 1315, 1322 (Fed. Cir. 2002); *Baxter Int’l, Inc. v. Cobe Labs., Inc.*, 88 F.3d 1054, 1056, 1060–61 (Fed. Cir. 1996).

*Corp. v. Konrad*,<sup>107</sup> the inventor “simply turn[ed] on the [invention] and let people try it out” without his presence.<sup>108</sup> Because the inventor did not monitor the use of his invention, it was a public use.<sup>109</sup> Similarly, in *Baxter International, Inc. v. Cobe Laboratories, Inc.*,<sup>110</sup> the use was public when the inventor allowed another researcher to use the invention without the inventor’s control or oversight even though both worked in the same public laboratory.<sup>111</sup>

Even if the inventor maintains control and is in the experimental stages with an invention, patentability of that invention is destroyed if the invention is disclosed in a printed publication.<sup>112</sup> For example, in *In re Hassler*,<sup>113</sup> the United States Court of Customs and Patent Appeals held that a newspaper article reporting the progress of experiments by an inventor and his colleagues was a printed publication under U.S. patent law.<sup>114</sup> The court rejected the inventor’s argument that the publication should be exempt because the invention was in the experimental stages.<sup>115</sup> Thus, not only does the inventor have to maintain control during experimental use, but also the invention cannot be disclosed in a printed publication.<sup>116</sup>

#### IV. OTHER STATES’ OPEN PUBLIC MEETINGS STATUTES EXEMPT MEETINGS DISCUSSING PATENTABLE MATERIAL FROM BEING OPEN TO THE PUBLIC

Washington is not the only state with an open public meetings law.<sup>117</sup> Unlike Washington, however, some of these other states exclude the public from meetings in which state university scientists discuss

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107. 295 F.3d 1315 (Fed. Cir. 2002).

108. *Netscape Commc’ns*, 295 F.3d at 1322.

109. *Id.*

110. 88 F.3d 1054 (Fed. Cir. 1996).

111. *Baxter Int’l, Inc.*, 88 F.3d at 1056, 1060–61.

112. *In re Hassler*, 347 F.2d 911, 912 (C.C.P.A. 1965); *see also* *Pickering v. Holman*, 459 F.2d 403, 407 (9th Cir. 1972) (discussing *Hassler* with approval).

113. 347 F.2d 911 (C.C.P.A. 1965).

114. *Hassler*, 347 F.2d at 912; *see also* *Pickering*, 459 F.2d at 407 (discussing *Hassler* with approval).

115. *Hassler*, 347 F.2d at 913; *see also* *Pickering*, 459 F.2d at 407 (“Any publication, regardless of the purposes behind it, violates the policies behind the publication bar. Publication pursuant to experiment is no exception.” (discussing *Hassler*)).

116. *Electromotive Div. of Gen. Motors Corp. v. Transp. Sys. Div. of Gen. Electric Co.*, 417 F.3d 1203, 1214–15 (Fed. Cir. 2005); *Hassler*, 347 F.2d at 912–13.

117. *See, e.g.*, OHIO REV. CODE ANN. § 121.22 (LexisNexis 2007 & Supp. 2010).

research.<sup>118</sup> For example, Ohio and Indiana have written especially protective laws that help safeguard state university intellectual property.<sup>119</sup> In these states, the public records and the open meetings laws work jointly to close meetings to the public in which university research is discussed.<sup>120</sup> Though Washington's public records law provides similar protections,<sup>121</sup> Washington's OPMA does not have an exemption to help safeguard state university intellectual property.<sup>122</sup>

A. *Ohio and Indiana Exempt Meetings Discussing Patentable Material from Their Public Meeting Requirement*

Other states have enacted statutory schemes that illustrate how to protect state university intellectual property.<sup>123</sup> Ohio is an example of particularly strong protection; that state's laws operate to completely bar the public from any meetings involving university research.<sup>124</sup> Ohio's open meetings law and Public Records Act working together protect intellectual property. Under Ohio's open meetings law, a public body<sup>125</sup> can meet in "executive session"—completely closed to the public—any time the public body considers "[m]atters required to be kept confidential by . . . state statutes."<sup>126</sup> Because the Ohio Public Records Act protects "intellectual property records,"<sup>127</sup> the public meetings law

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118. *See, e.g.*, OHIO REV. CODE ANN. §§ 121.22(G)(5), 149.43(A)(1)(m) (LexisNexis 2007 & Supp. 2010); IND. CODE ANN. §§ 5-14-1.5-6.1(b)(1), 5-15-3-4(a)(6) (LexisNexis 2006 & Supp. 2010); *see also* State *ex rel.* Physicians Comm. for Responsible Med. v. Ohio State Univ. Bd. of Trs., 843 N.E.2d 174, 179–81 (Ohio 2006) (discussing that meetings were closed to the public while scientists at a state university discussed research results under an intellectual property exemption).

119. *See supra* note 118.

120. *See Physicians Comm.*, 843 N.E.2d at 179–81 (discussing that meetings were closed to the public while scientists at a state university discussed research results under an intellectual property exemption).

121. WASH. REV. CODE § 42.56.270(1) (2010).

122. *See infra* Part V.A.

123. *See, e.g.*, OHIO REV. CODE ANN. §§ 149.43(A)(1)(m), (A)(1)(v), A(5); IND. CODE ANN. §§ 5-14-1.5-6.1(b)(1), 5-14-3-4(a)(6).

124. *See Physicians Comm.*, 843 N.E.2d at 180–81.

125. "Public body" is defined as "[a]ny board, commission, committee, council, or similar decision-making body of a state agency, institution, or authority, and any legislative authority or board, commission, committee, council, agency, authority, or similar decision-making body of any . . . school district, or other political subdivision or local public institution." OHIO REV. CODE ANN. § 121.22(B)(1).

126. *Id.* § 121.22(G)(5).

127. *Id.* § 149.43(A)(1)(m).



allows professors at state universities to keep their peer review meetings private under the “state statutes” exemption.<sup>128</sup>

The Supreme Court of Ohio has interpreted the Ohio Public Records Act’s “intellectual property records” protection to keep university research closed to the public.<sup>129</sup> In *State ex rel. Physicians Committee for Responsible Medicine v. Ohio State University Board of Trustees*,<sup>130</sup> the Court concluded that photographs, videos, and audio tapes documenting spinal-cord research using laboratory animals at Ohio State University were properly excluded under the intellectual property exemption.<sup>131</sup> The Court reasoned that the meetings discussing this research were properly closed to the general public and that the research had not been “publicly released.”<sup>132</sup>

Indiana has a statutory scheme similar to Ohio’s and is therefore likely to provide comparable protection for university research. Indiana’s public meetings law (Open Door Law) allows an executive session “[w]here authorized by federal or state statute.”<sup>133</sup> Similar to Ohio’s intellectual property exemption,<sup>134</sup> Indiana’s public records law exempts from disclosure “[i]nformation concerning research, including actual research documents, conducted under the auspices of an institution of higher education . . . .”<sup>135</sup> Thus, just like in *Physicians Committee*,<sup>136</sup> an Indiana court is likely to exempt state university research information and allow an executive session to discuss the material, especially because an Indiana court has already applied the research exemption of the public records law to research committees.<sup>137</sup>

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128. *Physicians Comm.*, 843 N.E.2d at 179–81.

129. *Id.*

130. 843 N.E.2d 174 (Ohio 2006).

131. *Id.* at 179–81.

132. *Id.*

133. IND. CODE ANN. § 5-14-1.5-6.1(b)(1) (LexisNexis 2006 & Supp. 2010).

134. *See supra* notes 125–28 and accompanying text.

135. IND. CODE ANN. § 5-14-3-4(a)(6).

136. *Physicians Comm.*, 843 N.E.2d at 179–81.

137. *Robinson v. Ind. Univ.*, 638 N.E.2d 435, 438–39 (Ind. Ct. App. 1994).

B. *Unlike Ohio and Indiana, Washington's OPMA Does Not Incorporate the PRA Exemptions to Provide Executive Sessions to Discuss University Research*

Washington has recognized the importance of state university intellectual property.<sup>138</sup> The Washington Public Records Act (PRA) exempts certain “proprietary information” from public disclosure, including “valuable formulae, designs, drawings, computer source code or object code, and research data obtained by any agency within five years of the request for disclosure when disclosure would produce private gain and public loss.”<sup>139</sup> In *Progressive Animal Welfare Society v. University of Washington*,<sup>140</sup> the Washington State Supreme Court reiterated that “[t]he clear purpose of the exemption is to prevent private persons from using the Act to appropriate potentially valuable intellectual property for private gain.”<sup>141</sup> The Court approved a broad excision of data, hypotheses, and “other information” from documents the plaintiffs sought to obtain from the University of Washington Animal Care Committee (ACC).<sup>142</sup> The Court pointed out that the redaction met the federal requirements of the Bayh–Dole Act and patent law to protect intellectual property.<sup>143</sup>

However, this intellectual property protection is not found in Washington’s OPMA.<sup>144</sup> In fact, not only does OPMA fail to provide a safety net allowing for executive sessions where other statutes prohibit disclosure,<sup>145</sup> OPMA actually forecloses this option: “If any provision of

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138. See *Progressive Animal Welfare Soc’y. v. Univ. of Wash.*, 125 Wash. 2d 243, 265–66, 884 P.2d 592, 605 (1994).

139. WASH. REV. CODE § 42.56.270(1) (2010).

140. 125 Wash. 2d 243, 884 P.2d 592 (1994).

141. *Id.* at 255, 884 P.2d at 599; see also Tammy L. Lewis & Lisa A. Vincler, *Storming the Ivory Tower: The Competing Interests of the Public’s Right to Know and Protecting the Integrity of University Research*, 20 J.C. & U.L. 417, 425 (1994) (“[P]ublic disclosure law provides a mechanism through which ideas in grant proposals could be revealed and utilized by competitors, especially in fast-moving fields such as molecular biology.” (citing Rachel Nowak, *FOIA: A License to Plagiarize Science?*, 4 J. NIH RES. 27, 28–29 (Apr. 1992))).

142. *Progressive Animal Welfare Soc’y.*, 125 Wash. 2d at 255, 884 P.2d at 599. The Court did not consider the issue of whether the ACC directly derived its authority from the Board of Regents or if it was a purely federal agency. The Court characterized the ACC as a state agency and dismissed any federal preemption claims under the Federal Freedom of Information Act. *Id.* at 266–67, 884 P.2d at 605–06.

143. *Id.* at 265–66, 605 (reasoning that the Washington PRA’s “proprietary information” exemption and the Bayh–Dole Act protect the same type of information).

144. See *infra* Part V.A.

145. See *infra* Part V.A.; cf. WASH. REV. CODE § 42.30.110 (2010).

this chapter conflicts with the provisions of any other statute, the provisions of *this chapter shall control*.”<sup>146</sup> This seems in contrast with the PRA, which specifically exempts proprietary information such as “research data.”<sup>147</sup>

## V. THE WASHINGTON STATE LEGISLATURE SHOULD AMEND OPMA TO PROTECT INTELLECTUAL PROPERTY

The Washington State Legislature should amend OPMA to protect intellectual property rights. Unlike legislation in states such as Ohio and Indiana, Washington’s OPMA does not include exemptions that adequately protect intellectual property disclosed at peer review meetings at state universities.<sup>148</sup> Amending the law to include such exemptions would be consistent with the purpose of the Bayh–Dole Act.<sup>149</sup> As such, the Legislature should amend OPMA to parallel states like Ohio and Indiana, thus protecting foreign and domestic patent rights.

### A. *Current Exemptions to OPMA Do Not Protect Intellectual Property*

Like public meeting laws in Ohio and Indiana, Washington’s OPMA allows public agencies to exclude the public from public meetings using executive session exemptions.<sup>150</sup> However, unlike the laws in those states, OPMA does not provide a blanket executive session exemption whenever disclosure would conflict with another state law.<sup>151</sup> Instead, Washington’s OPMA lists a series of very specific exemptions from the public meeting requirement, none of which cover intellectual property at state universities.<sup>152</sup> Because OPMA mandates a liberal construction, Washington courts infer a corresponding mandate that the exemptions be “narrowly confined.”<sup>153</sup>

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146. WASH. REV. CODE § 42.30.140 (emphasis added).

147. *Id.* § 42.56.270(1).

148. *See infra* Part V.A.

149. *See infra* Part V.B.

150. WASH. REV. CODE § 42.30.110.

151. *Cf. id.* § 42.30.110.

152. *See id.* § 42.30.110.

153. *Miller v. City of Tacoma*, 138 Wash. 2d 318, 324, 979 P.2d 429, 433 (1999) (quoting *Mead Sch. Dist. v. Mead Educ. Ass’n*, 85 Wash. 2d 140, 145, 530 P.2d 302, 305 (1975)).

As such, OPMA's narrow exemptions do not encompass most university research.<sup>154</sup> For instance, OPMA has a "health care services" exemption to allow public officials to hold executive sessions closed from the public in order to protect "proprietary or confidential unpublished information."<sup>155</sup> While this language sounds protective of intellectual property, the exemption is limited to government contracts for goods and services<sup>156</sup> and state-purchased health care services.<sup>157</sup> Contracts for goods and services do not typically encompass university research.<sup>158</sup> Other specific exemptions in OPMA are similarly unprotective of intellectual property.<sup>159</sup>

*B. Amending OPMA to Protect University Research Would Be Consistent with the Bayh–Dole Act*

Congress enacted the Bayh–Dole Act in response to the recession of the 1970s and 1980s, attempting to exploit technological innovation as a national asset for economic benefit.<sup>160</sup> Before the enactment of the

154. See WASH. REV. CODE § 42.30.110, particularly section 42.30.110(1)(l)–(n).

155. *Id.* § 42.30.110(1)(l).

156. WASH. REV. CODE § 41.05.026(1) (2010).

157. *Id.* § 41.05.026(2)–(4).

158. A state university is not in the business of procuring goods and services. For instance, the University of Washington's mission statement expounds, "The primary mission of the University of Washington is the preservation, advancement, and dissemination of knowledge." UW Role and Mission Statement, UNIV. OF WASH., <http://www.washington.edu/home/mission.html>, (last visited Jan. 8, 2011); *see also* Wash. Research Project, Inc. v. Dep't of Health, Educ. & Welfare, 504 F.2d 238, 244 (D.C. Cir. 1974) ("[A] noncommercial scientist's research design is not literally a trade secret or item of commercial information, for it defies common sense to pretend that the scientist is engaged in trade or commerce.").

159. Other exemptions within OPMA, including the "life sciences" exemption and the "health sciences" exemption are similarly not protective. The life sciences discovery fund exemption does not apply because it protects only *private* losses. WASH. REV. CODE § 42.30.110(1)(m). A state university cannot sustain private losses because it is a public agency. *See* Cathcart v. Andersen, 85 Wash. 2d 102, 104, 530 P.2d 313, 315 (1975); Refai v. Cent. Wash. Univ., 49 Wash. App. 1, 11, 742 P.2d 137, 144 (1987) (showing that Central Washington University did not dispute its public agency status). The health sciences and services exemption is also limited to protecting private losses. WASH. REV. CODE § 42.30.110(1)(n).

160. Eberle, *supra* note 9, at 157 (citing H.R. Rep. No. 96-1307, Part I at 2 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6460, 6461)). The policy and objectives of the Bayh–Dole Act are as follows:

It is the policy and objective of the Congress to use the patent system to promote the utilization of inventions arising from federally supported research or development; to encourage maximum participation of small business firms in federally supported research and development efforts; to promote collaboration between commercial concerns and nonprofit organizations, including universities; to ensure that inventions made by nonprofit organizations and small business firms are used in a manner to promote free competition and enterprise without unduly encumbering future research and discovery; to promote the commercialization and public availability of inventions made in the United States by United States industry and labor; to ensure that the Government obtains sufficient rights in federally supported inventions

Bayh–Dole Act, it took an average of fifteen to twenty years for published research to be incorporated into commercial products.<sup>161</sup> This largely stemmed from private industry refusing to invest in commercializing research that did not provide market exclusivity.<sup>162</sup>

The Bayh–Dole Act allows universities to retain title to patents that arose from federally funded research.<sup>163</sup> The universities can then license these inventions to private industry.<sup>164</sup> Under the Bayh–Dole Act, universities have successfully acquired patents in increasing numbers and the licensing of federally funded discoveries has increased.<sup>165</sup> For these reasons, many consider the Bayh–Dole Act a success,<sup>166</sup> so much so that other countries have enacted similar statutes.<sup>167</sup>

Because of the Bayh–Dole Act, patents are a state university resource.<sup>168</sup> When state university patent rights are threatened, the state and public stand to lose title to a valuable asset.<sup>169</sup> In Washington, OPMA is undermining the assets of the very public it is designed to serve.<sup>170</sup> As currently written, OPMA can cause state universities to lose licensing revenues on top of beneficial products not being commercialized.<sup>171</sup> OPMA should be amended to explicitly incorporate the PRA exemptions to allow executive session for the preservation of state university intellectual property. Alternatively, at a minimum,

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to meet the needs of the Government and protect the public against nonuse or unreasonable use of inventions; and to minimize the costs of administering policies in this area.

35 U.S.C. § 200 (2006) (emphasis added).

161. Margo A. Bagley, *The Need for Speed (and Grace): Issues in A First-Inventor-to-File World*, 23 BERKELEY TECH. L.J. 1035, 1044–45 (2008) (citing generally David C. Mowery et al., *IVORY TOWER AND INDUSTRIAL INNOVATION: UNIVERSITY-INDUSTRY TECHNOLOGY BEFORE AND AFTER THE BAYH–DOLE ACT 9-34* (2004)).

162. *Id.*

163. *See* 35 U.S.C. § 202(a) (2006 & Supp. III 2010).

164. *See id.* § 202(c)(7)(D), (E).

165. Eberle, *supra* note 9, at 158–59.

166. Eberle, *supra* note 9, at 158; Takenaka, *supra* note 46, at 314–15.

167. Renee E. Metzler, Comment, *Not All Grace Periods Are Created Equal: Building A Grace Period from the Ground Up*, 13 MARQ. INTELL. PROP. L. REV. 371, 381 (2009) (citing John A. Tessensohn & Shusaku Yamamoto, *Japan's Novelty Grace Period Solves the Dilemma of 'Publish and Perish'*, 25 NATURE BIOTECHNOLOGY 55, 55 (2007)); *see generally* Stephen W. Chen, Comment, *Comparison of National Innovation Systems in China, Taiwan and Singapore: Is Bayh-Dole One-Size That Fits All?*, 2 TOMORROW'S TECH. TRANSFER 26 (2010).

168. *See* 35 U.S.C. § 202(a).

169. *Cf.* Eberle, *supra* note 9, at 158–59 (noting that the licensing of federally funded discoveries in the wake of the Bayh–Dole Act has garnered millions of dollars in royalties for some universities).

170. *See infra* Part V.C.

171. *See infra* Part V.C.

OPMA should have a safety net “other statute” provision that invokes the PRA exemptions.<sup>172</sup> Ohio and Indiana statutory schemes provide good examples to follow.<sup>173</sup>

*C. Amending OPMA Would Protect Patent Rights Under Foreign Law and Extend Domestic Protection of Patent Rights*

Most foreign patent laws foreclose patentability when an invention is publicly disclosed.<sup>174</sup> However, OPMA mandates public disclosure of an invention during peer review meetings at state universities.<sup>175</sup> OPMA, therefore, destroys foreign patent rights.<sup>176</sup> Further, in more limited circumstances, OPMA also destroys domestic patent rights.<sup>177</sup> Even though a public peer review meeting is not a printed publication or a public use, OPMA allows a public member to create a printed publication that negates patentability.<sup>178</sup> As such, OPMA should be amended to provide protection for foreign and domestic patent rights.

*1. Amending OPMA Would Protect Patent Rights Under Foreign Law*

Most foreign patent law recognition schemes sanction an inventor for disclosing information about an invention to the public.<sup>179</sup> Because OPMA requires university researchers to disclose such information at peer review meetings, OPMA destroys foreign patent rights for inventors in Washington.<sup>180</sup> For instance, under the European Patent Convention

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172. See OHIO REV. CODE ANN. § 121.22(G)(5) (LexisNexis 2007 & Supp. 2010) (Ohio’s open meetings law (Sunshine Law) allows an executive session to consider “matters required to be kept confidential by federal law or regulation or state statutes.”); IND. CODE ANN. § 5-14-1.5-6.1(b)(1) (LexisNexis 2006 & Supp. 2010) (Indiana’s Open Door Law allows an executive session “where authorized by federal or state statute”). This would also bring OPMA in line with standard court procedures that exclude the public in order to protect sensitive information, where the stakes are arguably even higher than a public agency meeting. See Glenn A. Guarino, Annotation, *Propriety of Federal Court’s Exclusion of Public from Criminal or Civil Trial in Order to Protect Trade Secrets*, 69 A.L.R. FED. 892 (1984 & Supp. 2010). For instance, in *Progressive Animal Welfare Soc’y. v. Univ. of Wash.*, 125 Wash. 2d 243, 884 P.2d 592 (1994), the Washington State Supreme Court performed an in camera review of the requested documents to protect potentially patentable information. *Id.* at 267, 605–06.

173. See *supra* Part IV.A.

174. See sources cited *supra* note 46.

175. See *supra* Part I.B; *infra* Part V.C.1.

176. See European Patent Convention, *supra* note 55, at art. 54; *supra* Part I.B.

177. See 35 U.S.C. § 102(b) (2006); *infra* Part V.C.2.

178. See 35 U.S.C. § 102(b); *infra* Part V.C.2.

179. See *supra* note 174.

180. See European Patent Convention, *supra* note 55, at art. 54; *supra* Part I.B.

(EPC), a public peer review meeting is a public disclosure that negates novelty and forfeits patentability.<sup>181</sup> While there are other ways to get foreign patent protection, even in Europe,<sup>182</sup> the EPC is a good framework for an exemplary analysis because of its popularity and breadth.<sup>183</sup>

The EPC novelty bar has exemptions that preserve patentability even if information about an invention becomes public. Particularly, the EPC allows for a six-month grace period under two exemptions to the general rule that public disclosure destroys patentability; however, this grace period is virtually meaningless when compared to the U.S. grace period.<sup>184</sup> The first exemption requires that the disclosure be “an evident abuse of in relation to the applicant or his legal predecessor.”<sup>185</sup> This is a narrow exemption because it requires a relationship between the patentee and the discloser.<sup>186</sup> The second exemption requires that the disclosure be in the form of “display[ing] the invention at an official, or officially recognised, international exhibition falling within the terms of the Convention on international exhibitions . . . .”<sup>187</sup> This is also a narrow exemption because there is typically not more than one exhibition a year and not even every year.<sup>188</sup>

An OPMA public meeting would not qualify under the first abuse-of-relation exemption because there is not a relationship between the inventor and public members.<sup>189</sup> Likewise, an OPMA public meeting

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181. See European Patent Convention, *supra* note 55, at art. 54(2) (negating novelty when the invention is disclosed through public use, written or oral description, or “in any other way” before the filing date of the patent application).

182. See TRITTON, *supra* note 52, at 215–220.

183. See *id.* at 84–85, 217 (“[The European Patent Convention] has proved to be a very popular route for obtaining patents in Western European countries.”).

184. Bagley, *supra* note 161, at 1055.

185. European Patent Convention, *supra* note 55, at art. 55(1)(a); see also TRITTON, *supra* note 52, at 96–97.

186. TRITTON, *supra* note 52, at 97.

187. European Patent Convention, *supra* note 55, at art. 55(1)(b).

188. For a list of past exhibitions, see *Shanghai 2010*, BUREAU INT’L DES EXPOSITIONS, <http://www.bie-paris.org/site/en/library-a-publications/shanghai-2010.html>, (last visited Nov. 13, 2010); see also ALAN JOHNSON, CONCISE EUROPEAN PATENT LAW 50 (Richard Hacon et al. eds., 2d ed. 2008); Metzler, *supra* note 167, at 398 n.188 (noting one officially recognized exhibition in 2008, none in 2009, and one slated for 2010).

189. See TRITTON, *supra* note 52, at 97 (discussing that the requirement may “work hardship” as illustrated by a Technical Board of Appeal (TBA) holding where “a premature disclosure of an application of the closest prior art document by the Brazilian Patent Office was not an evident abuse . . . because there existed no relationship between the patentee and the Brazilian Patent Office and the disclosure was a mere error.” (citing *Unilever PLC v. Bayer AG*, T-585/92, 1996 E.P.O.R. 579)). If a court will not find a relationship between a patentee and an entity that the patentee

would not qualify under the second international-exhibition exemption because peer review meetings at a state university will never be a recognized international exhibition.<sup>190</sup> In addition, if a member of the public publishes a recording of the peer review meeting, that publication negates patentability because it will be a demonstration of the invention.<sup>191</sup> In sum, unlike the more lenient grace period under domestic law, foreign patent law immediately forecloses patentability after the public meeting. Washington should amend OPMA to protect locally developed intellectual property from losing patentability overseas.

2. *Amending OPMA Would Also Protect Domestic Patent Rights from Members of the Public Creating Printed Publications*

A peer review meeting itself does not negate U.S. patent rights.<sup>192</sup> Domestic patent law discourages an inventor from disclosing an invention in a “printed publication” or placing it in “public use” more than one year before filing a patent application.<sup>193</sup> However, a public peer review meeting is not a “printed publication” that would negate patentability.<sup>194</sup> Likewise, a public peer review meeting does not place an invention in “public use.”<sup>195</sup> Thus, the mere holding of a public peer review meeting itself does not threaten patent rights under U.S. law, but does allow a member of the public to create a printed publication.

Under the “printed publication” bar, a peer review meeting is not “publicly accessible” and would not be a printed publication that forfeits

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explicitly entrusts with her confidential material, then it is highly unlikely that a patentee will have any relationship with a member of the public attending an open public meeting.

190. A public peer review at a state university is too small and occurs too often to be an international exhibition. *Cf. Shanghai 2010*, *supra* note 188 (discussing that the last expo that qualified as an international exhibition was over the course of many months at Shanghai, China, had participants from around the world, and focused on sustainable urban development); Metzler, *supra* note 167, at 398.

191. European Patent Office, *Guidelines for Examination in the European Patent Office*, [http://documents.epo.org/projects/babylon/eponet.nsf/0/1afc30805e91d074c125758a0051718a/\\$file/guidelines\\_2009\\_complete\\_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/1afc30805e91d074c125758a0051718a/$file/guidelines_2009_complete_en.pdf), D-V, 3.1.1, (last visited Nov. 13, 2010) (making the invention available “by demonstrating an object or process in specialist training courses or on television” or “the exploitation of technical progress” constitutes prior art under EPO Article 54(2) as “made any other way”). Utilizing new technologies, such as podcasting, will count as public disclosures. JOHNSON, *supra* note 188, at 40.

192. *See infra* notes 196–207 and accompanying text.

193. 35 U.S.C. § 102(b) (2006).

194. *See infra* notes 196–202 and accompanying text.

195. *See infra* notes 205–07 and accompanying text.



patent rights.<sup>196</sup> Persons interested and ordinarily skilled in the art have access to only the time and place of the meeting.<sup>197</sup> An interested member of the public, even if informed of an invention's existence, would not know exactly at which meeting a potentially enabling presentation will be made.<sup>198</sup> The available time and place of the meeting does not provide a meaningful catalog or index for an interested person to attend the right meeting.<sup>199</sup> Sitting through many public meetings, waiting for a particular presentation, is unlikely to be "reasonable diligence";<sup>200</sup> nor is hoping to wander into the correct meeting.<sup>201</sup> Thus, a court is unlikely to find that an enabling presentation at a public meeting is "publicly accessible" because an interested person ordinarily skilled in the art utilizing reasonable diligence would not be able to know when a presentation on a particular topic is occurring.<sup>202</sup>

Nor would a peer review meeting place an invention into public use under the "public use" bar.<sup>203</sup> Such meetings are analogous to a dentist's

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196. See *infra* notes 196–202 and accompanying text.

197. See WASH. REV. CODE § 42.30.075 (2010) (requiring only time and place of the meeting to be published in the Washington State Register).

198. See *SRI Int'l, Inc. v. Internet Sec. Sys.*, 511 F.3d 1186, 1195–98 (Fed. Cir. 2008) (finding no public accessibility even though anyone could have freely "wandered" onto the reference; the prior art was not "publicized or placed in front of the interested public" because File Transfer Protocol (FTP) knowledge of the subdirectory was required, equivalent to a "poster at an unpublicized conference without a conference index of the location of the various poster presentations").

199. See *id.*; *In re Cronyn*, 890 F.2d 1158, 1161 (Fed. Cir. 1989) (finding no printed publication because the thesis paper was catalogued in a library only under the author's name and a customary search would not have yielded the paper where the thesis topic bore no relationship to the author's name).

200. See *SRI Int'l*, 511 F.3d at 1194 (stating public accessibility requires that "persons interested and ordinarily skilled in the subject matter or art, exercising reasonable diligence, can locate it" (quoting *Bruckelmyer v. Ground Heaters, Inc.*, 445 F.3d 1374, 1378 (Fed. Cir. 2006))); *supra* note 198; see also *Kyocera Wireless Corp. v. Int'l Trade Comm'n*, 545 F.3d 1340, 1350 (Fed. Cir. 2008).

201. See *SRI Int'l*, 511 F.3d at 1197–98.

202. *In re Klopfenstein*, 380 F.3d 1345 (Fed. Cir. 2004), is not discussed here because it does not help guide the analysis. Its four-factor test for assessing public accessibility of a visual presentation, see *supra* notes 78–82 and accompanying text, is an inconclusive two-two tie when applied to a public peer review meeting. Factor one, the length of time displayed, will be relatively short compared to a tradeshow and falls against finding public accessibility. Factor two, the expertise of the intended audience, is high because the audience includes fellow colleagues; however, because the colleagues are bound by professional confidentiality, this factor falls against finding public accessibility. Factor three, a reasonable expectation that the material displayed will not be copied, is absent at a public meeting and falls in favor of finding public accessibility. Factor four, the simplicity of copying the material displayed, is easy with a video camera that is allowed under OPMA and falls in favor of finding public accessibility. Because the factors split evenly, the four-factor test is inconclusive.

203. See *infra* notes 205–07 and accompanying text.

use of his invention on patients at issue in *TP Laboratories*,<sup>204</sup> which the court deemed to be “experimental use.”<sup>205</sup> Like the dentist–inventor benefitting from implied confidentiality that was part of the dentist–patient relationship, an inventor presenting to his professional peers at a public peer review meeting does not need an express pledge of confidentiality.<sup>206</sup> The public will almost certainly—“beyond reasonable probability”—observe or have the ability to observe the invention at the public meeting, but public presence does not necessarily negate experimental use.<sup>207</sup> Thus, a court is likely to find a public peer review meeting to be an experimental use instead of a public use.

In at least one narrow circumstance, however, an OPMA public review meeting could still threaten patent rights under U.S. law. While part of OPMA’s purpose is to allow members of the public to attend official meetings,<sup>208</sup> there are exemptions.<sup>209</sup> Currently, nothing in Washington’s OPMA prevents a member of the public attending a peer review meeting from recording that meeting with a video camera<sup>210</sup> Likewise, OPMA does not prohibit the member of the public from publishing the recording, by, for example, posting it on the Internet.<sup>211</sup> This posting will trigger the printed publication bar if the patent claims

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204. *TP Labs., Inc. v. Prof’l Positioners, Inc.*, 724 F.2d 965 (Fed. Cir. 1984).

205. *See id.* at 967–73.

206. *Cordis Corp. v. Boston Sci. Corp.*, 561 F.3d 1319, 1334 (Fed. Cir. 2009) (professional norms at a university support the expectations of confidentiality); *see also TP Labs.*, 724 F.2d at 972.

207. *See Moleculon Research Corp. v. CBS, Inc.*, 793 F.2d 1261, 1266 (Fed. Cir. 1986) (inventor showed fully working prototypes in at a university, yet maintained control over the invention without express confidentiality agreements); *TP Labs., Inc.*, 724 F.2d at 972–73 (dentist used invention on patients without express confidentiality agreements, yet maintained control because of dentist–patient relationship despite the ability of the public to observe the invention); *Xerox Corp. v. 3Com Corp.*, 26 F. Supp. 2d 492, 496–97 (W.D.N.Y. 1998) (submission of how the invention worked for consideration to present at an international conference not public use because of expectation of professional confidentiality). *But see Netscape Commc’ns Corp. v. Konrad*, 295 F.3d 1315, 1321–22 (Fed. Cir. 2002) (the inventor not maintaining oversight over the invention’s use constituted public use even though the invention was used at his work place).

208. WASH. REV. CODE § 42.30.010 (2010) (“[T]he intent of this chapter [is that public agency] actions be taken openly and that [its] deliberations be conducted openly.”); *Miller v. City of Tacoma*, 138 Wash. 2d 318, 324, 979 P.2d 429, 432–33 (1999) (discussing how action taken by a public agency must be at a public meeting); *Cathcart v. Andersen*, 85 Wash. 2d 102, 107, 530 P.2d 313, 316 (1975).

209. WASH. REV. CODE § 42.30.110.

210. *See id.* § 42.30.050 (allowing “representatives of the press or other news media” to attend a public meeting); Telephone Interview with Nona Phillips, Dir., Office of Animal Welfare, Univ. of Wash. (Jan. 22, 2009).

211. *See* WASH. REV. CODE § 42.30.050; *cf. id.* § 42.30.040 (attendance cannot be conditioned on any requirement of the public).

are anticipated.<sup>212</sup> *In re Hassler*<sup>213</sup> illustrates the point. In *Hassler*, the court held that a newspaper article that reported the progress of experiments by an inventor was a printed publication even though the invention was in the experimental stages.<sup>214</sup> Once a printed publication exists for more than a year, patentability in the recorded invention is forfeited.<sup>215</sup> OPMA should be amended to prevent members of the public from recording meetings at which patentable material is discussed, thereby threatening patent rights under domestic patent law.

## CONCLUSION

OPMA allows executive sessions, which exclude the public from an otherwise public meeting, for limited purposes. These limited purposes do not typically allow for an executive session to protect state university intellectual property. As such, OPMA almost certainly undermines foreign patent rights. Further, the statute also conflicts with federal patent goals under the Bayh–Dole Act and is inconsistent with other Washington law, particularly the PRA because a member of the public can publish a video of the peer review meeting. Such a video may constitute a printed publication, foreclosing U.S. patentability.

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212. *See* CA, Inc. v. Simple.com, Inc., 2009 U.S. Dist. LEXIS 27092, 48–9 (E.D.N.Y. 2009) (a reference posted on the internet is prior art); Symantec Corp. v. Computer Assocs. Int'l., 2006 U.S. Dist. LEXIS 95078, 28–9 (E.D. Mich. 2006) (posting a reference on the internet and indicating in forums to those interested in the art where to get a copy made the reference prior art). A public member creating prior art also raises the nonobviousness bar to patentability. 35 U.S.C. § 103 (2006); *see also* KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398, 399 (2007) (citing *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 17–18 (1966)). The nonobvious standard requires that the invention is an advance over the prior art, *Graham*, 383 U.S. at 14, which is compared to a combination of references or the prior art taken as a whole. *In re Beattie*, 974 F.2d 1309, 1312 (Fed. Cir. 1992); *In re Merck & Co., Inc.*, 800 F.2d 1092, 1098 (Fed. Cir. 1986); *Deep Welding, Inc. v. Sciaky Bros., Inc.*, 417 F.2d 1227, 1234 (7th Cir. 1969). Because obviousness involves looking at known elements, other patents, and knowledge of person having ordinary skill in the art “like pieces of a puzzle,” an exploration of it in the abstract is beyond the scope of this Comment. *See KSR Int'l*, 550 U.S. at 402 (2007); 2, CHISUM, *supra* note 46, at § 5.01 (rev. ed. 2010) (“A patent monopoly may issue only for those literally new solutions that are beyond the grasp of the ordinary artisan who had a *full* understanding of the *pertinent* prior art.”) (emphasis added). However, it should be noted that this is an important issue, 2 CHISUM, *supra* note 46, at § 5.06 (rev. ed. 2010) (“The nonobviousness requirement of Section 103 is the most important and most litigated of the conditions of patentability.”), when a public member records and publishes a video of the meeting.

213. 347 F.2d 911 (C.C.P.A. 1965).

214. *Hassler*, 347 F.2d at 912–13; *see* *Pickering v. Holman*, 459 F.2d 403, 407 (9th Cir. 1972) (“Any publication, regardless of the purposes behind it, violates the policies behind the publication bar. Publication pursuant to experiment is no exception.” (discussing *Hassler*)).

215. *See* 35 U.S.C. § 102(b).

In *Progressive Animal Welfare Society v. University of Washington*, the Washington State Supreme Court sanctioned the redaction of documents requested under the PRA. The documents were redacted to exclude any potential intellectual property. The Washington State Legislature should amend OPMA to create intellectual property protections similar to those that exist under the PRA. This amendment would not result in the complete exclusion of the public from the details of state university research; instead, the public should be excluded only when potentially patentable material is being discussed.

In high-stakes litigation, an infringing defendant will be motivated to great lengths to negate the novelty of a patent. If a Washington state university ever grapples in court with the issue of a public peer review meeting serving as prior art, it will be precisely because the patent is a valuable asset and is worth protecting. It is wasteful for Washington itself to undermine the validity of these valuable public patents.