



February 8, 2021

## **Re: Request for Comments on the National Strategy for Expanding American Innovation**

The Institute for Intellectual Property and Social Justice (IIPJSJ) submits the below in response to the United States Patent and Trademark Office's (USPTO) recent request for comments on developing a national strategy to address disparities in inventorship and entrepreneurship.

IIPJSJ was established to address the social justice implications of intellectual property law and policy both domestically and globally. IIPJSJ's work ranges broadly, and includes the scholarly examination of intellectual property law from the social justice perspective; advocacy for social justice-cognizant interpretation, application, and revision of the intellectual property law; efforts to increase the diversity of the intellectual property legal bar; and programs to empower historically and currently disadvantaged and marginalized communities through the development, protection, use, and exploitation of intellectual property.

Diversity in IP enterprise and innovation is critical and long overdue. The need has been highlighted in the USPTO report in response to the SUCCESS Act. In order to achieve its social purpose, the intellectual property regime must be conceived and structured to promote the most widespread and socially equitable participation in the resulting IP ecosystem. The social justice rationale of intellectual property acknowledges this innate and interdependent relationship between the social utility function of IP protection and its social justice obligations and effects.

IIPJSJ applauds the establishment of the NCEAI and supports the goals of this initiative. We welcome this opportunity to comment on the plans needed to reach those goals. The challenge of addressing the steps necessary to make a genuine and systemic impact are broad in scope. The questions listed in the request for comments appear to identify and organize the information and steps needed for a detailed strategic plan. While we will address the specific questions presented, we begin with a general outline of some needed resources in response to question 17. Then in response to the remaining 16 questions presented we will point to the outline while identifying specific steps toward addressing each of those questions.

### **17. General Feedback**

To be successful, NCEAI must begin with a comprehensive strategic plan which includes methodologies and goals that are both short-term and long-term. There are several major areas that must be addressed in this strategic plan. Some of those areas are:

- continuity of the plan to make a real impact;
- continued data collection on the barriers to achieve greater diversity in this area as well as the impact of any efforts by the NCEAI;
- grassroots IP awareness and education initiatives; and
- provision of financial and pro bono IP legal resources and support.



Both government and private sector diversity support initiatives will be needed to carry out the strategic plan. The more detailed explanation below will provide the framework for creating this strategic plan.

### Continuity

There must be a plan in place to ensure that this initiative continues, even when government administrations change or there are changes in the public attention on the need to improve diversity in our country. An institutional commitment must be made to have a real impact on improving the diversity of the innovation pipeline. This will include the need to identify permanent term funding to support this initiative as well as both public and private institutions to commit to continuing the initiative.

### The Need for Data Collection

Data collection is critical to determine and monitor the effectiveness of regulations over time. We recommend that the council create a commission to collect and analyze data related to this initiative. In addition to members from the NCEAI, the commission should include individuals whose capabilities include IP expertise and experience in communicating with the targeted communities. By utilizing IP experts rather than general community organizers, meaningful end-goals and targeted assessment metrics can be developed to ensure overall program efficacy and success.

In previous comments to the USPTO IIP SJ has also supported the establishment of an independent non-profit organization to collect demographics on patent filers. The purpose of establishing an independent entity is to avoid any appearance of bias on the part of the USPTO.

In addition to collecting this demographic data, the organization can collect additional data directly from filers to determine their path to filing and any difficulties they faced. This will help the council to continue to understand the barriers and create programs to reduce them.

Lastly, the organization can collect data on the impact of any NCEAI programs. The data will need to be tracked over years to document any true impact on increasing the diversity pipeline.

### Community-based IP Awareness and Education Programs

One major area affecting underrepresented inventors is insufficient education in STEAM subjects, on IP protection, and monetization of IP. IIP SJ believes (1) reform is necessary in school education and (2) that the USPTO should work to implement community education programs.

#### a. School Education

We need to educate all American youth but particularly those in marginalized communities about the relationship of STEAM to the creation of intellectual property. Students should be educated not only as to the innate value of creative and innovative endeavors but also as to the prospects for personal and communal socio-political and economic empowerment from such activities through education on IP ownership and monetization. Below are some suggestions for accomplishing this goal:



- Schools nationwide should have required coursework or programs teaching STEAM. These programs should feature basic education on STEAM topics, basic IP principles, and IP ownership and monetization. The level of detail these programs would provide would depend on the age level of the students. But these topics should at least be introduced as early as the late elementary to early middle school levels.
- Schools, including and especially those in marginalized communities, should be given financial resources to obtain, or direct access to, up to date technology and education on the use of these technologies.

#### b. Community Education

In addition to schools, other organizations can support community programs that feature similar education on STEAM topics. In addition to basic education, IP owners need additional education about protecting and monetizing their IP rights. Agencies that register IP ownership rights do not actively enforce these ownership rights and consequently IP owners must police the marketplace to protect their interests, however, many lack the requisite information to do so. Below are some suggestions for accomplishing this goal:

- General programs on monetizing IP rights, such as IP licensing and business ownership programs.
- General adult-education programs providing basic education on STEAM topics.
- IP education programs for professionals, e.g. lawyers, engineers, scientists, and entrepreneurs. These programs can focus on careers in IP as well as IP ownership and monetization.

#### Financial and Legal Resources

Another barrier to increasing diversity is the lack of financial and legal resources. The proposed commission to undertake data collection should research where the key difficulties lie, identify needed financial and legal resources and recommend to the council programs to assist with these concerns. Once the appropriate programs have been created, the council should engage IP experts to work with community leaders and representatives to ensure that the resources are being connected with the people that need them.

One possible mechanism for effectuating this objective would be a collaborative initiative between the Small Business Administration (“SBA”) and USPTO, for the purpose of

- Creating a fund to which marginalized creators could apply for innovation development resources.
- Identifying individuals in need of IP information, education, and technical assistance.
- Establishing a centralized repository of programs and resources with plain language explanations of their functions.

In addition to funding support, marginalized innovators require legal support to protect and monetize their IP. Legal and business assistance programs to serve minority communities are a must to encourage growth of minority IP ownership.



Legal assistance is needed to help individuals with applying for a patent, trademark, or copyright. It is also needed to assist IP owners in identifying when their IP rights have been violated and how to take steps against those infringing their rights. Marginalized constituents in the IP ecosystem also need legal assistance to respond to claims that they are violating others' ownership rights, especially to address instances of overreaching such as trademark bullying and copyright infringement claims when the fair use doctrine may apply. Below are some suggestions for accomplishing this goal:

- Business education programs providing information on business organization and incorporation, as well as IP protection and commercialization.
- Public and private sector partnerships to provide pro bono legal support, including online informational fora and networking groups to advise and guide underrepresented inventors and entrepreneurs.

The foregoing is intended to provide a general framework for a strategic plan for this initiative. In addition, below are responses to specific questions not addressed by the above general framework.

1. The council can better support underserved inventors and entrepreneurs by creating community-based education and assistance programs that work with local community organizations.

2. First, we recommend that the council utilize a group to continue to survey these groups to determine what their actual barriers are. Barriers such as lack of education and access to financial and legal resources are discussed above, as are suggestions on ways government organizations can help overcome these barriers.

In addition, government organizations can look inward to their own practices to find additional ways to support these inventors. Consider lowering the costs for these individuals to apply for patents and conducting internal studies to determine if there are any unconscious biases leading to higher rates of denials for these groups and related training to addresses those biases.<sup>1</sup>

3. Better connect by creating programs where these underrepresented inventors and entrepreneurs are. For example, for minorities, consider programs at historically black colleges and universities. Also working with organizations that work with these groups, such as sororities.

6. In addition to the suggestions in the general comments, new channels to deliver information should focus on delivering educational content in plain, everyday language on widely used channels such as social media sites.

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<sup>1</sup> See e.g., Miriam Marcowitz-Bitton and Emily Michiko Morris, *The Distributive Effects of IP Registration*, 23 Stan. Tech. L. Rev. 306, 309 (2020) "[T]he registration process itself can also systematically restrict access to full IP rights. Three major characteristics of the various intellectual property regimes cause this long-overlooked lack of accessibility. The first is the cost of the registration process, including filing and maintenance fees, legal advice, and more....The second characteristic is examination by human agents as a condition for registration and the inevitable biases, whether conscious or unconscious, to which this gives rein....The third characteristic is that registering for IP rights requires at least some understanding of the registration process and the advantages it can offer. Inventors and creators who lack access to the requisite knowledge will thus be at a disadvantage in protecting their works."



7-9. We recommend creating a group of educators representing the communities with which the council seeks to connect. These teachers are on the front lines of working with students and understanding what they will respond to. Research and development grants should be provided toward the development of appropriate curricula.

10. In IP education programs, include information on the benefits of invention and entrepreneurship, e.g. monetization of IP and potential career impact.

12. Providing free and low-cost access to financial and legal resources will help to better support individual inventors and small businesses so they can successfully translate their skills and creativity into the acts of invention, intellectual property protection, and entrepreneurship.

13. The council can promote diversity with IP attorneys and agents by encouraging diversity not just in hiring but also in management and leadership positions.

16. The council can make these programs more accessible by building an information network that connects these groups with the organizations already working within the communities you want to reach.

#### Conclusion

We submit these comments to support the purpose and objective of the NCEAI. IIP SJ strongly believes that by developing a plan for continuity of this initiative, collecting additional data, focusing on the areas of education, and increasing the financial and legal resources for these underrepresented groups, the PTO can promote diversity within the IP community.

Respectfully Submitted,  
The Institute for Intellectual Property and  
Social Justice