

Before the
United States Patent and Trademark Office
Alexandria, VA

In re

Draft 2022-2026 Strategic Plan

**COMMENTS OF
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION
AND
HIGH TECH INVENTORS ALLIANCE**

The Computer & Communications Industry Association (CCIA)¹ and the High Tech Inventors Alliance submit the following comments in response to the U.S. Patent and Trademark Office’s January 6, 2023, Request for Comments.²

CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For more than fifty years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy.

CCIA members are at the forefront of research and development in technological fields such as artificial intelligence and machine learning³, quantum computing⁴, and other computer-related inventions. CCIA members are also active participants in the patent system, holding approximately 5% of all active U.S. patents and significant patent holdings in other jurisdictions such as the EU and China.

The High Tech Inventors Alliance (“HTIA”)⁵ represents leading technology providers and includes some of the most innovative companies in the world. HTIA exists to promote innovation and American jobs through equitable patent policies and a more efficient, effective, and inclusive patent system. HTIA member companies are some of the world’s largest funders of corporate research and development, collectively investing more than \$165 billion in R&D activities annually. They are also some of the world’s largest patent owners and collectively own more than 240,000 patents.

¹ A list of CCIA members is available online at <https://www.ccianet.org/about/members>.

² USPTO, *USPTO seeks public comments on draft 2022-2026 Strategic Plan* (Jan. 6, 2023), <https://www.uspto.gov/about-us/news-updates/uspto-seeks-public-comments-draft-2022-2026-strategic-plan> (the “Draft Strategic Plan”).

³ USPTO, *Inventing AI*, Fig. 6 (Oct. 2020), <https://www.uspto.gov/sites/default/files/documents/OCE-DH-AI.pdf>.

⁴ See Elliott Mason, *Trends in quantum computing patents* (May 24, 2021), <https://quantumconsortium.org/blog/trends-in-quantum-computing-patents/>.

⁵ HTIA’s members are listed at <https://www.hightechinventors.com>.

I. Summary

CCIA and HTIA appreciate the Office’s continued attention to its important mission of helping the patent system promote innovation by determining whether patents should be granted or upheld. The Draft Strategic Plan emphasizes several critical aspects of this mission, including bringing innovation through to a positive impact, ensuring that innovation is inclusive, and providing reliable IP rights.

However, there are a number of aspects of the Draft Strategic Plan that raise concerns. In particular, CCIA and HTIA are concerned by the Office’s focus on applicants’ interests to the exclusion of the public’s interests and to the exclusion of the progress of the useful arts. This includes:

- 1) The Draft Strategic Plan’s ongoing treatment of applicants as customers of a business, rather than as applicants seeking a government-granted monopoly franchise.
- 2) The Draft Strategic Plan’s focus on the interests and needs of patent applicants and owners without any countervailing focus on the needs and interests of the public.
- 3) The focus on efficient delivery of IP rights, rather than on efficient determination of if those rights should be granted through a robust and reliable examination process.
- 4) The implicit assumption that more patents means more innovation, and the resultant use of patent data as a proxy for innovation.

While CCIA and HTIA note with appreciation that some progress has been made on some of these concerns in the time since the 2018-2022 Strategic Plan, we reiterate our concerns regarding these issues. In addition, we note that Objective 3.1 Strategy 2 is unclear and respectfully request that further explanation be included in the Office’s 2022-2026 Draft Strategic Plan to ensure that it sets forth clear objectives.

II. Patent Applicants Are Not Customers

While a focus on applicant experience is positive, the USPTO’s ongoing habit of considering applicants to be its “customers” remains concerning. CCIA and HTIA acknowledge and appreciate that the 2022-2026 Draft Strategic Plan has made substantial improvements in this regard over the 2018-2022 Strategic Plan,⁶ but the concern remains a significant one.

The Office is an agency of the Executive Branch, not a business, despite its focus on “customers.” Its mission is to promote the Constitutional objective of the progress of the useful arts in the national and public interest. It does this in large part by determining if the grant of a patent is appropriate. Its role is not simply to provide patents to those who pay fees to the Office

⁶ The 2018-2022 Strategic Plan used the term “customers” 70 times, while using the terms “inventor”, “invention”, “invent”, and “applicant” less than a dozen times combined. The 2022-2026 Draft Strategic Plan improves significantly in this regard, with “customer” appearing only 22 times. At the same time, the term “applicant” only appears 5 times, suggesting that room for improvement remains.

or to treat their interests as having priority over the public's interest. Considering applicants to be "customers" suggests the Office exists to provide patent services to applicants and implicitly elevates their interests over those of the public. Striving to provide efficient, convenient, and timely services to applicants is a desirable goal, but not one that should be placed above the Office's Constitutional purpose or the national interest.

The public relies on the Office to properly perform its mission in order to ensure that members of the public can practice what is already known and build on that knowledge. Without an appropriate balance between the various stakeholders, the Office runs the risk of prioritizing the grant of patents over advancing innovation or advancing the national and public interests. This in turn risks tying up broad areas of technology and blocking the public's use of known technologies. This is particularly problematic when broad patents are improvidently granted in newly developing areas (e.g., artificial intelligence, autonomous vehicles, augmented reality, or additive manufacturing), where smaller innovators may not have the resources to challenge patents and as a result may decide to innovate in other areas—or not at all.

During the early 2000s, the Office's Corporate Plan defined its primary mission as "to help customers get patents."⁷ Perhaps not coincidentally, during this same era the Office helped its "customers" obtain a significant number of low-quality patents, some of which were the impetus for the establishment of the covered business method review program and the America Invents Act.⁸ The Office should not repeat its earlier mistake.

III. The Office Should Emphasize The Perspective Of The Public

The Draft Strategic Plan's first goal is to "[d]rive inclusive U.S. innovation and global competitiveness."⁹ The IP system is capable of being an engine that helps drive innovation, pushing forward technology in ways that might not have occurred without a patent system. Engaging potential innovators and working to ensure that the innovation ecosystem is as broad as possible is a critical priority and placing it as the Office's most important goal will help ensure that the USPTO is truly "promot[ing] the progress of ... useful arts."

At the same time, the Draft Strategic Plan suggests accomplishing this goal by focusing solely on bringing "innovators, creators, entrepreneurs, and brand owners" to the Office. This ignores the very real costs that IP can have on those same innovators, creators, entrepreneurs, and brand owners. IP litigation remains an expensive proposition, one that only well-resourced companies can engage in. As a result, the threat of a lawsuit over a patent or trademark—even one of dubious validity—is often enough to deter a potential innovator from pursuing an idea, or an entrepreneur from investing in a new business enterprise. And while the Office offers a significant number of resources for those who might wish to obtain a patent or trademark on their idea, and even coordinates pro bono resources for potential applicants, this effort is not matched by help on the other side. The Office offers only the most basic informational resources to those who have been sued or received a demand letter and lacks any sort of pro bono coordination for defendants in litigation or petitioners at the PTAB.

⁷ USPTO Corporate Plan at 20 (2000).

⁸ See H.R. Rep. No. 112-98 at 54 (2011) ("the issuance of poor [quality] business-method patents during the late 1990's through the early 2000's led to the patent 'troll' lawsuits that compelled the Committee to launch the patent reform project 6 years ago").

⁹ Draft Strategic Plan at 9.

Further, simply granting more patents is unlikely to enhance American competitiveness in the global marketplace. The majority of U.S. patents have been granted to foreign inventors for many years. But those patents can only be enforced against entities in the United States, meaning that increased patent grants are likely to increase costs and decrease competition and market access in the United States. And the principle of national treatment enshrined in the TRIPS Agreement ensures that anyone seeking to obtain or owning a U.S. patent is on a level playing field, regardless of the patentee’s country of origin. In order to maximize competition, the USPTO should ensure that only truly innovative technologies are patented, avoiding the potential for foreign-backed entities to abuse low-quality patents to the disadvantage of American companies and consumers.

The Draft Strategic Plan’s second goal, to “Promote the efficient delivery of reliable IP rights,” does help mitigate this concern. Reliability—ensuring that a patent has satisfied the statutory requirements—is a crucial goal. Large and small American businesses need to be certain of their ability to practice that which was already known and to innovate in new areas of technology without the risk of overly broad patents pre-empting the entire area. And the Draft Strategic Plan’s acknowledgement that patent claims can “overreach and stunt innovation and economic growth”¹⁰ and that those claims should be amended or voided reflects recognition that, in practice, IP is not always a positive for innovation. But the strategies proposed for addressing this concern similarly fail to acknowledge that the public at large has an interest in this, instead choosing to measure success in this arena via surveys of “patent customers.”¹¹

The public—ranging from established competitors to startups looking to create new innovations to the interest of the public at large in being free to practice the known and the obvious without threat of litigation—has a significant interest in Office operations, and the Draft Strategic Plan must recognize those interests, provide strategies for the Office to incorporate those interests into its operations, and measure success in part via how successfully the Office has done so. Possible approaches to incorporate the public interest perspective would be to affirmatively seek out and consider analyses of the interaction between patents, innovation, and public welfare from sources such as the National Bureau of Economic Research (NBER), academics, and other sources of research and analysis.

CCIA and HTIA appreciate the Office’s recognition that the issuance of invalid patents can deter, rather than promote, innovation, depriving the public of new advances and stifling economic growth. But the lack of any sufficient recognition of these public interests in the Draft Strategic Plan renders it insufficient and imbalanced.

IV. The Office’s Mission Is To Determine Whether A Patent Should Be Granted Or Upheld, Not To Grant And Uphold Patents

The Draft Strategic Plan describes the Office’s fundamental mission as becoming an “agency that issues, upholds, and protects robust and reliable IP rights.”¹² However, the Office’s primary mission is not to issue, protect, and uphold IP rights, but to determine whether an applicant has satisfied the statutory requirements that determine whether an exclusive right should be recognized at all. A jury’s mission in a criminal trial is to determine if the defendant is

¹⁰ *Id.* at 14.

¹¹ *Id.* at 15.

¹² Draft Strategic Plan at 6.

guilty, but no one would describe the role of the jury as “finding defendants guilty.” Phrasing the Office’s mission as “issu[ing], protect[ing], and uphold[ing] IP rights” ignores the examination and review roles of the Office in favor of its role as grantor, implicitly prioritizing grants over examination and review. The Office’s mission is to advance innovation—issuing, protecting, and upholding IP rights is merely a means to that end.

The implicit focus on the grant of patents, rather than the robust assessment of whether a grant is warranted, is reflected in the Office’s fee structure. The Office collects only 30% of patent fees from filing, search, and examination,¹³ despite those tasks consuming the vast majority of the Office’s patent budget. These fees significantly underfund the Office’s examinational activities, with the operating costs met only if the Office grants a sufficient number of patents. As a single example, an applicant for patent pays a \$700 search fee and an \$800 examination fee.¹⁴ However, the cost to the Office to provide these services is approximately \$4,700.¹⁵ The inverse relationship is found in issue and maintenance fees, which have minimal cost to the Office but require substantial payments from applicants. The Office’s fee structure thus prioritizes issuance of patents. While keeping the front-end cost low for smaller applicants may have benefits in avoiding barriers to entry to the IP system, those benefits are dwarfed by the costs to the system when considering large applicants. CCIA and HTIA support the restructuring of patent fees so that for large entity applicants more of the cost of examination is collected at the time of examination, while maintaining a lower entry cost for small and micro entities. This would allow the Office to avoid its current reliance on uncertain issuance and maintenance fees, thereby improving the Office’s ability to serve the public interest.

Similar to the “customer” focus described above, a focus on granting rights over determining whether grant is appropriate runs the risk of tipping the balance in favor of patent applicants and away from other stakeholders, with the concomitant risk of choking off economic growth and the innovation of others.

One key method by which the Office can account for this risk is by ensuring that there is a reliable path for addressing whether rights should have been granted via *inter partes* review (IPR) and post-grant review (PGR) procedures. The Draft Strategic Plan should explicitly recognize the role of IPR and PGR in ensuring that patent rights were properly granted, thereby promoting reliability and certainty for all stakeholders. Unfortunately, defining the USPTO’s role as “protecting and upholding” IP rights is at odds with its Congressionally-mandated role as an arbiter of whether a granted right should be maintained. This role, as exemplified in *ex parte* reexamination and *inter partes* reviews, is a significant portion of the Office’s work. An Administrative Patent Judge whose agency defines their role as “protecting and upholding” IP rights might well see that as an instruction to leave in force patents that ought to have been invalidated due to lack of novelty, lack of clarity, or other failures to comply with the patent statutes. Especially given the recent report regarding management interference by the prior Director in APJ decision-making,¹⁶ any hint of placing a thumb on the scales should be avoided.

¹³ See USPTO Fiscal Year 2017 Performance and Accountability Review at 30 (2017).

¹⁴ See USPTO Fee Setting Table of Patent Fees — Current, Proposed and Unit Cost (2020), <https://www.uspto.gov/about-us/performance-and-planning/fee-setting-and-adjusting>.

¹⁵ *Id.*

¹⁶ See GAO, *Increased Transparency Needed in Oversight of Judicial Decision-Making*, GAO-23-105336 (Dec. 2022), <https://www.gao.gov/assets/gao-23-105336.pdf>.

V. Measuring Innovation Using Patent Data Will Result In More Patents, Not More Innovation

There is an aphorism in business management—“what you measure is what you get.” This is all to the good if you can directly and accurately measure what you want, but in the real world it is often impossible to directly measure your goal, forcing reliance on proxy measurements that provide some indication of the desired goal. As just one example, judging a football team by number of first downs and plays run doesn’t always correlate to success—just ask Ohio State.¹⁷ No football team would try to maximize how many plays they run and how many first downs they get, rather than maximizing points scored, even though those measurements often do correlate to wins.

Similarly, even though patents often do roughly correlate with innovation, maximizing the number of patents issued is clearly not an optimal strategy for maximizing innovation. A recent natural experiment in this regard occurred in China. The Chinese government, in order to promote innovation, created a program that provided financial and other incentives to file patents.¹⁸ But in 2021, the Chinese government ended those subsidies. Citing government and applicant behaviors that “blindly pursue quantitative indicators,” resulting in abnormal behaviors that “do not aim at protecting innovation,”¹⁹ the Chinese government abolished funding for patent applications over the subsequent six months and targeted elimination of all patent subsidies for granted patents by 2025. Instead, the Chinese government determined that the focus should be on “increasing support for subsequent transformation and use.”²⁰ And to reinforce this point, the notice specifically stated that patent-related determinations “should not simply take the number of patent applications and authorizations as the main condition.”²¹

In other words, China tried to pursue innovation by simply measuring (and maximizing) the number of patents filed. This resulted in a flood of low-quality patents, not in a flood of innovation. They got what they measured—patents—not innovation.

Objective 1.1, KPI A, measures the USPTO’s performance based on “U.S. innovation, especially in key technology areas, **as measured by patent data.**”²² The Chinese experience illustrates the flaws in this simplistic approach. While measuring innovation directly is notably difficult, that does not mean that the task should be abandoned in favor of simply measuring patents. Patent data may be one component of this KPI, but it should not be the exclusive focus. Instead, the Office should aim to develop a more meaningful and accurate measure of innovation. One example is WIPO’s Global Innovation Index, which considers dozens of factors and categories, only a few of which relate to patents or patenting. While the Index has flaws of its own—measuring the number of GitHub commits may overvalue a large number of minor bug fixes compared to large innovative updates, for example—the broad set of indicators it uses to help measure innovation is a far better approach than a simplistic patent data approach.

¹⁷ See *Ohio State v. Michigan* (Nov. 26, 2022) (Michigan beat Ohio State 45-23, despite running fewer plays and having fewer first downs.)

¹⁸ See Stephen Yang, “Ending Patent Subsidies in China”, *Landslide* (Dec./Jan. 2022).

¹⁹ CNIPA, *Notice of the State Intellectual Property Office on Further Strictly Regulating Patent Application Behavior* (Jan. 27, 2021), https://www.cnipa.gov.cn/art/2021/1/27/art_545_156433.html.

²⁰ *Id.*

²¹ *Id.*

²² Draft Strategic Plan at 11 (emphasis added).

CCIA and HTIA strongly suggest the Office modify Objective 1.1, KPI A to “U.S. innovation, especially in key technology areas, as measured by a variety of innovation metrics.”

VI. Objective 3.1, Strategy 2 Lacks Clarity

Objective 3.1, Strategy 2 is to “Clarify, revise, and formalize appropriate use of discretion in AIA trial proceedings to address and deter process abuse and promote alignment with the USPTO’s mission and the intent of the AIA.” It is unclear what abuse this references and intends to correct. For example, the recent *OpenSky* and *PQA* cases would not have been deterred by exercises of discretion, as the alleged abusive behaviors appear to have occurred after institution.²³ Further, had the prior petitioner’s meritorious petitions not been discretionarily denied, the validity challenges would have been determined in an earlier proceeding and one in which the petitioner had a direct interest and significant financial incentive to prevail.

To the extent this strategy refers to an intent that the Office eliminate *Fintiv* and *General Plastic* in order to avoid litigation gamesmanship, that is a worthwhile goal. A defendant should not be excluded from access to IPR because of an arbitrary trial schedule that is unlikely to be followed, or because someone else previously filed an IPR after being sued. Congress set a time frame—one year from the initiation of litigation—and did not create a rule that would block access if someone else had previously filed a petition. Congress also chose not to impose a standing requirement on IPR and PGR petitioners, despite imposing such a requirement on CBM petitioners.²⁴ Where, as here, Congress has spoken clearly, the USPTO should not use discretion to avoid Congress’s choices.

CCIA and HTIA remain concerned that this strategy might be used to impose restrictions that impermissibly overrule the determinations Congress made under the guise of discretion. We hope that the final Draft Strategic Plan will clarify USPTO’s intent and align the strategy to the requirements created by Congress.

VII. Conclusion

The Office’s operations have an important function in ensuring that the American economy thrives, providing applicants with a reward for innovation. However, the Office’s operations also create the risk of choking off innovation and economic growth by granting patents that should not have issued. In order to ensure that this risk is avoided, the Office must ensure that the interests of all stakeholders—applicants, other innovators, and the public—are represented within strategic planning, and that no undue deference is provided to any one stakeholder group, regardless of whether they use the Office’s services directly.

²³ These cases are also unlikely to be repeated absent a source of viable IPR petitions that were denied for non-merits reasons. The elimination of *Fintiv* and/or *General Plastic* would also eliminate such petitions.

²⁴ Compare 35 U.S.C. §§ 311, 321 with § 18(a)(1)(B), 125 Stat. 330.

Respectfully submitted,

Joshua Landau
Reg. No. 71,491
Senior Counsel for Innovation Policy
Computer & Communications Industry Association
25 Massachusetts Ave NW
Suite 300C
Washington, DC 20001
jlandau@ccianet.org