

**From:** Raph Kim [email redacted]  
**Sent:** Wednesday, May 20, 2015 11:01 PM  
**To:** WorldClassPatentQuality  
**Cc:** [emails redacted]  
**Subject:** [UIA/AU IP CLINIC] Re-Submission of Written Comments on Enhancing Patent Quality to Replace the

Dear Mr. Cygan

According to the “Extension of the Period for Comments on Enhancing Patent Quality” published on May 11, 2015, 80 FR 26914, we re-submit an updated comment **to replace** the previously submitted comment on May 6, 2015, along with the cover-letter requesting the replacement.

Please kindly confirm the receipt of the updated comment and cover-letter attached. Thank you.

Best Regards,

Raph Y. Kim & Sarah Frank, Student Attorneys  
Glushko-Samuelsan Intellectual Property Law Clinic  
American University Washington College of Law  
4801 Massachusetts Avenue, NW, Washington, DC 20016-8184  
Phone: [202-274-4148](tel:202-274-4148)  
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On Wed, May 6, 2015 at 11:42 PM, Raph Kim <[\[email redacted\]](#)> wrote:  
Dear Mr. Cygan,

We are Glushko-Samuelsan Intellectual Property Law Clinic at American University and submitting Written Comments on Enhancing Patent Quality on behalf of United Inventors Association of America.

Please kindly confirm the receipt of the comment. Thank you.

Best Regards,

Raph Y. Kim & Sarah Frank, Student Attorneys  
Glushko-Samuelsan Intellectual Property Law Clinic  
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Submitted via an email



GLUSHKO-SAMUELSON  
INTELLECTUAL PROPERTY  
LAW CLINIC

May 20, 2015

Mr. Michael Cygan  
Senior Legal Advisor, Office of Patent Legal Administration  
Office of the Deputy Commissioner for Patent Examination Policy

Mail Stop Comments—Patents,  
Commissioner for Patents,  
P.O. Box 1450,  
Alexandria, Virginia 22313-1450  
WorldClassPatentQuality[at]uspto.gov

**RE: Re-Submission to Replace the Previously Submitted Comment on May 6, 2015, in Response to Request for Comments on Enhancing Patent Quality. 80 Fed. Reg. 6475 (February 5, 2015)**

Dear Mr. Cygan:

On May 6, 2015, on behalf of United Inventors' Association of America, we submitted a comment to the United States Patent and Trademark Office addressed to WorldClassPatentQuality[at]uspto.gov and also to Regulations.gov, in response to "Request for Comments on Enhancing Patent Quality." 80 Fed. Reg. 6475.

According to the "Extension of the Period for Comments on Enhancing Patent Quality" published on May 11, 2015, 80 FR 26914, we hereby attach and submit an updated comment **to replace** the previously submitted comment. Please direct any question or comment regarding the replacement submission to [email redacted].

Sincerely,

Raph Younghoon Kim, Sarah Frank and Alexandra El-Bayeh, Student Attorneys  
David G. Grossman, Esq., Supervising Attorney  
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GLUSHKO-SAMUELSON  
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May 20, 2015



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Mr. Michael Cygan  
Senior Legal Advisor, Office of Patent Legal Administration  
Office of the Deputy Commissioner for Patent Examination Policy

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**RE: Response to Request for Comments on Enhancing Patent Quality. 80 Fed. Reg. 6475  
(February 5, 2015)**

Dear Mr. Cygan:

The United Inventors Association of America (“UIA”) is pleased to have this opportunity to present its response with respect to the Request for Comments on Enhancing Patent Quality. 80 Fed. Reg. 6475. The Request for Comments seeks to support the continued efforts towards enhancing patent quality by the United States Patent and Trademark Office (“USPTO”). In particular, in these comments we address Proposal 2 of Pillar 1, in which the USPTO is exploring the implementation of an automated pre-examination search (“APEX”) to assist examiners in identifying the best prior art as soon as possible in the examination process. The UIA proposes that the USPTO make this APEX system publicly available and freely accessible online. As an initial step, the UIA recommends that the USPTO implement a pilot program granting independent inventors online access to APEX.

The UIA is a non-profit educational foundation dedicated to providing educational resources to the inventing community, while encouraging honest and ethical business practices among industry service providers. The UIA was formed in 1990 under sponsorship by the U.S. Department of Energy to address the needs of America's independent inventors. The UIA aims to provide resources to small inventors for their quality patent filings. As the voice of the independent inventing community, the organization advocates for legislation and regulation protecting inventor rights in Washington, DC. The UIA has a principal focus on providing inventor/entrepreneur information and support, as well as serving in an advisory capacity to public and private sector institutions. The UIA currently represents more than 15,000 inventors worldwide with a mission to coordinate individual inventors and inventor associations for the express purpose of actively addressing their issues and challenges at both the national and global level.

## **I. The UIA Proposes Granting Independent Inventors Online Access to APEX.**

The UIA believes that granting the public online access to APEX will ultimately serve to improve the quality of all filed patent applications and patents. Given such access, applicants will be able to utilize the prior art identified by APEX online in evaluating and improving their own patent applications **before filing**. The proposed pilot program is a modest first step to test this theory with an easily identifiable sub-group of patent applicants.

### **A. Independent Inventors Are Disadvantaged Because They Have Limited Search Abilities to Identify Relevant Prior Art.**

Independent inventors provide significant benefits to the public through their innovations. In the 19th century, patent applications were often filed by independent inventors or small enterprises.<sup>1</sup> These applications appeared to decline during the 20<sup>th</sup> century.<sup>2</sup> Now, due to growth in entrepreneurship and innovation hubs in universities and throughout the country, it is likely that greater contributions will be made by independent inventors and small businesses.<sup>3</sup> These smaller entities can be powerful engines of innovation if they are given the opportunity to receive protection and transfer their innovations into the market place.<sup>4</sup> Director of the USPTO,

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<sup>1</sup> See Naomi Lamoreaux and Kenneth Sokoloff, *Market Trade in Patents and the Rise of a Class of Specialized Inventors in the 19th-Century*, THE AMERICAN ECONOMIC REVIEW 39 (May 2001).

<sup>2</sup> *Id.*

<sup>3</sup> See Jennifer Case, *Article: How The America Invents Act Hurts American Inventors and Weakens Incentives to Innovate*, 82 UMKC L. Rev. 29, 43-44. (“Small businesses outperform larger businesses in patent issuance. In fact, firms with less than twenty-five employees produce the most patents per employee. More importantly, patents from small businesses outperform patents from large firms in many ways, including patent growth, impact, generality, and originality. Also critical, small innovative businesses typically specialize in cutting edge, high growth industries like biotechnology, medical devices, pharmaceuticals, and information technology.”)

<sup>4</sup> See Gene Quinn, *John Calvert, A Champion for Independent Inventors*, IPWatchdog, (Sept. 20, 2014), <http://www.ipwatchdog.com/2014/09/20/john-calvert-champion-independent-inventors/id=51218/>. (“There’s a lot of independent inventors and small business people that are very innovative if we could just give them a chance and be

Michelle K. Lee, described the success story of a young female inventor at the Patent Quality Summit held on March 25, of 2015, who invented “a hand-held device that uses a micro-needle to take a very small sample of blood, run a chemistry lab in its cartridge, and transmit the findings to patients and doctors.”<sup>5</sup> Director Lee observed, “[t]hat kind of success story is a win-win for everyone: the inventor, the patients who use her device, the employees hired by her company, and our economy and society in general. That is precisely why we want to . . . ensure that the USPTO is issuing the best quality patents possible.”<sup>6</sup>

Nevertheless, many independent inventors are inexperienced and uneducated about the complexities of the patent system and the prosecution journey, which makes the process a challenging one. Take, for example, a young inventor, “Ted,” who has an idea for a substantially improved medical implant to treat hearing impairments. Ted thinks he has a unique idea, and decides he wants to file a patent application because he has learned from television shows that owning patents adds great value to businesses. Ted performs research on Google, and does not find any implant he thinks to be similar. Ted goes a bit farther than the general public would, and looks up additional options to search existing patents. He learns that a professional search or law firm assistance could cost thousands of dollars. Since he is a small business owner without much capital, he decides that his Google search is sufficient and proceeds to file a patent application and pay the filing fee without conducting any additional searches. Ted does not know that prior art exists because he does not have access to a better search tool. Once the patent application reaches the patent examiner, the patent examiner spends valuable time locating and applying prior art (that the additional prior art search would have identified) to Ted’s claimed invention. On receiving and reviewing the first Office Action from the patent examiner, Ted will realize that he wasted time and money on an expensive patent application. Frustrated, Ted decides not to file any more applications for his future inventions, and instead keeps his inventions secret. In this situation, Ted, the patent examiners, and the public, would lose.

Creating a new business involves a litany of expenses. The costs associated with filing a patent are a significant burden, which can discourage independent inventors from seeking patent protection due to their limited budgets.<sup>7</sup> Costs for filing and prosecuting a patent application can

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able to help them get protection and then get into the marketplace. And I think that’s the biggest problem right now that I see is because of the recession, because it’s languishing, and it really hasn’t been a fast recovery it’s languishing recovery we’re going through, that I think that’s hurting that independent inventor, that small business man because there’s no money for them to be able to find anywhere[, ]suggesting that high costs limit inventors’ ability to apply for patent protection”).

<sup>5</sup> Michelle Lee, *Remarks by Michelle K. Lee at the Patent Quality Summit*, USPTO WEBSITE (Mar. 25, 2015), <http://www.uspto.gov/about-us/news-updates/remarks-michelle-k-lee-patent-quality-summit.html>.

<sup>6</sup> *Id.*

<sup>7</sup> *See* Case, *supra* note 3, at 50 (“The cost of enforcing a patent is also a problem. This is especially true for small businesses. Small firms are particularly sensitive to the . . . cost[s] for maintaining and enforcing patents.”).

be anywhere in the range of \$5,000 – 15,000,<sup>8</sup> and many independent inventors lack the resources to perfect their patent rights.<sup>9</sup>

Cost issues also greatly limit independent inventors' ability to identify relevant prior art. In order to keep costs down, independent inventors and small businesses frequently attempt to reduce patent prosecution costs. Independent inventors try to accomplish this by foregoing a prior art search,<sup>10</sup> as a professional search can cost between \$1,000-\$3,000.<sup>11</sup> Because such searches are not required for filing patent applications, independent inventors often skip this crucial step before filing.<sup>12</sup> A reliable search of the relevant prior art is a necessary and prudent precautionary measure to ensure the patent's validity.<sup>13</sup> It helps inventors evaluate the patentability of an idea and reduce the risk of wasting patent prosecution costs for pursuing a previously existing idea. A reliable pre-filing prior art search better informs independent inventors about whether to file a patent application with a reasonable risk assessment. The pre-filing prior art search also helps independent inventors draft higher quality patent applications in light of the searched prior art. Failure to identify relevant prior art often puts independent inventors at risk of losing significant investment in patent applications, as the applications or even the issued patents are likely to be rejected or invalidated.

If cost-effective tools to reasonably assist pre-filing prior art searches are made available, independent inventors will be better able to identify relevant prior art, make more informed decisions on whether to file patent applications accounting the associated risk reasonably, and draft higher quality patent applications. Our proposal for a pilot program granting independent inventors access to APEX would go a long way to solving these problems and improving patent quality.

### **B. The UIA Proposes a USPTO Pilot Program Granting Online Access to APEX.**

The UIA believes that making APEX available online could be a vital tool to assist independent inventors in locating prior art before filing a patent application. As the first step to explore the potential impact on patent quality, the UIA proposes that the USPTO first launch a preliminary pilot program granting independent inventors online access to APEX. If this online access proves beneficial for patent applicants, and overall patent quality, the UIA proposes that the USPTO then consider the possibility of granting full public online access to APEX.

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<sup>8</sup> See Constance Gustke, *More Older Adults Are Becoming Inventors*, N.Y. TIMES, (Apr. 17, 2015), [http://www.nytimes.com/2015/04/18/your-money/more-older-adults-are-becoming-inventors.html?\\_r=0](http://www.nytimes.com/2015/04/18/your-money/more-older-adults-are-becoming-inventors.html?_r=0).

<sup>9</sup> See Valerie Calloway, *In the Process of Controverting Its Constitutionally Given Purpose the U.S. Patent System Discriminates Against Inventors with Limited Financial Means*, 11 LAW & INEQ. 565, 565 (1992-1993).

<sup>10</sup> See Gene Quinn, *The Cost of Obtaining a patent in the US*, IPWATCHDOG (Apr. 4, 2015), <http://www.ipwatchdog.com/2015/04/04/the-cost-of-obtaining-a-patent-in-the-us/id=56485/>

<sup>11</sup> *Id.*

<sup>12</sup> See Jeff A. Ronspies, Comment, *Does David Need a New Sling? Small Entities Face a Costly Barrier to Patent Protection*, 4 J. MARSHALL REV. INTELL. PROP. L. 184, 199 (2004).

<sup>13</sup> See *Graham v. John Deere Co.*, 383 U.S. 1, 36 (1966).

Online access to APEX could transform the patent process and improve overall patent quality because it will inform inventors of potentially relevant prior art before filing a patent application. This step will empower inventors to be more knowledgeable about prior art when drafting applications, and to better evaluate key inventiveness prior to filing.

### **C. The Proposed Pilot Program Will Improve Patent Quality and Save Examiner Resources.**

Taking the hypothetical from above, Ted would benefit enormously if he had access to APEX. Here, Ted is able to discover prior art from APEX to find out if his invention is truly unique and novel. This discovery is mutually beneficial for the patent examiner who receives the application, and for Ted. The discovery of prior art through APEX will presumably have three benefits: (1) Ted can decide against submitting a low quality application or further innovate on his initial ideas to create a new and useful invention that is not antedated by the identified prior art; (2) With the improved invention, Ted could rigorously prepare an extensive Information Disclosure Statement (“IDS”) and add material in his application that explicitly states why his invention is not antedated by prior art identified by APEX; and (3) Ted could argue the novelty of his invention better by efficiently communicating with the examiner through Ted’s vetted IDS submission, benefitting the examiner and Ted by addressing the antecedent issue early.

#### **1. The Pilot Program Will Facilitate Higher Quality Applications.**

With online access to APEX, independent inventors will be able to file higher quality applications because they will be able to self-identify patentability issues with their inventions using prior art identified by APEX. Independent inventors will be able to decide the patentability of their inventions before filing an application and protect themselves from investing in poor quality applications. Alternatively, independent inventors would be motivated to further improve their inventions based on this knowledge and file applications for more innovative inventions. Consequently, the USPTO will likely receive fewer applications, and the quality of the applications received are likely to be improved because they will be claiming novel and not obvious inventions. This will in turn reduce examiners’ time and resources now wasted on conducting research and preparing Office Actions for applications found to be anticipated by prior art.

Better patent applications lead to higher quality patents, whereas poor quality patent applications, if they survive the patent examination process, mature into poor quality patents. These poor quality applications, if litigated, are likely to be invalidated by the Courts at great expense to the independent inventors and to our judicial system. The proposed pilot program will enable independent inventors to prepare better quality patent applications from the beginning, thereby reducing the issuance of poor quality patent applications issue.

## **2. The Pilot Program Will Generate More Extensive Prior Art Disclosures.**

Patent examiners will have the benefit of receiving more extensive IDS's from better-informed applicants. These IDS's will identify the most relevant prior art from APEX results. Additionally, the IDS's may identify further prior art that applicants are led to after analyzing APEX results. This would lead the examiner to better understand the scope of the claimed invention in the application.

Independent inventors will be able to make improvements on APEX search results. For example, an independent inventor will be able to closely review the prior art publications listed in APEX results, and determine their relevancy to the potential application. The inventor will also be able to subtract the irrelevant publications from the list. Moreover, the inventor will be able to study the related prior art publications and cite them in the IDS.

Many prior art publications listed in APEX search results will be previously issued patents or published patent applications, which include lists of related patents. The inventor will be able to review these lists and will be able to identify and set out more relevant prior publications in the IDS. This process will generate better IDS's, and eventually reduce examiners' time to review the IDS. Ultimately, examiners who receive more extensive lists of prior art will be able to conduct better examinations. This is in line with the USPTO's interests since the USPTO already promotes similar processes, such as the Accelerated Examination Program.

Extensive prior art information obtained from APEX will also help applicants affirmatively address potential issues that could be raised later in Office Actions, and communicate the issues affirmatively with examiners prior to the first Office Action. For example, independent inventors may choose to address the issues in the specification of the application. If APEX identifies prior art that is not exactly on point, applicants will have a chance to study the prior art and explain distinctions in their specifications.

## **3. Extensive Prior Art Disclosures Promote More Efficient Communication between Inventors and Examiners.**

Under the pilot program, when examiners issue Office Actions, independent inventors will be able to better understand the objections made by the examiners and will prepare responses more efficiently. Moreover, with extensive information disclosures from independent inventors, examiners will take better notice of the scope of the invention and correctly understand the independent inventors before issuing Office Actions. This is highly probable because they will have generated similar search results from APEX, and independent inventors will be able to explain why they deleted or added the cited prior art from the list generated by APEX. This will facilitate and improve the communication between the examiners and applicants, both saving examiners' resources and improving the quality of the issued patent.



In particular, by granting online access to APEX, the USPTO will be able to provide the benefits of the Full First Action Interview Program more effectively. In 2011, to facilitate better communications with patent applicants, the USPTO initiated the Full First Action Interview Pilot Program. The Program allows eligible applicants to have first action interviews with the examiners prior to the first Office Action on the merits and discuss the identified prior art with the examiners. In this program, the examiners conduct a prior art search and provide applicants with condensed pre-interview communications citing relevant prior art and identifying proposed rejections. In response, applicants have thirty days to schedule interviews with examiners and submit proposed amendments and arguments. At the interview, applicants and examiners discuss the relevant prior art, proposed rejections, amendments and arguments. The USPTO reported that participants in the program have experienced several benefits including:

- (1) Effectively advancing prosecution of an application before issuance of an Office action;
- (2) enhanced interaction between the applicant and the examiner before issuance of an Office action;
- (3) resolving patentability issues one-on-one with the examiner at the beginning of the prosecution process, rather than after a first Office action; and
- (4) expedited allowance of an application, relative to standard examination, due to the program's enhanced communication and shorter time periods for response.<sup>14</sup>

By granting online access to APEX, the USPTO will be able to provide these benefits more effectively. Independent inventors will be able to have similar opportunities to review the relevant prior art before filing applications without consuming examiners' resources for searches. The independent inventors will also have more than thirty days to review the prior art and deliberate their decisions before filing applications. When independent inventors file patent applications and request the Full First Action Interview Pilot Program, they will be able to better equipped to navigate the patent prosecution process because they already had chance to deliberate at least some of the prior art the examiners will be citing.

## **II. If the Pilot is Successful, the UIA Proposes Granting the Public Online Access to APEX.**

While the UIA initially only proposes a pilot program to make APEX available to independent inventors, the UIA ultimately believes APEX should be made freely available to the public. The UIA feels strongly that every member of the public is a potential inventor who can contribute to innovation. Making APEX available online to the public will let every member of the public

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<sup>14</sup> 77 Fed. Reg. 40342

enjoy the same benefits of the proposed pilot program outlined above. Moreover, it will help the USPTO promote government initiatives of openness and transparency.

#### **A. Public Online Access to APEx Promotes Innovation.**

“[O]ne of the purposes of the patent system is to encourage dissemination of information concerning discoveries and inventions.”<sup>15</sup> Many people, at some point in their lives, come up with innovative concepts, including many recent entrepreneurial college graduates who attempt to achieve their goals with innovative ideas. People are trying to capitalize on their ideas later in life, as well; the New York Times recently reported that older adults are pursuing goals of inventorship in retirement.<sup>16</sup> The advancement of technology is pivotal to the growth of the U.S. economy.<sup>17</sup> Given the impact made by small businesses and independent inventors on the U.S. economy, a reduction in the number of innovations contributed to society by small businesses is a “pressing concern.”<sup>18</sup>

To address these concerns, the Congress, the Executive Branch, and the USPTO have historically been interested in assisting independent inventors and small entrepreneurs. They have all recognized the importance of promoting and protecting innovation and contributions of small inventors. As an example, reduced fees have served the general purpose of encouraging independent inventors to disclose their innovations.<sup>19,20</sup> These policies promoting small inventors have also been central to the Leahy-Smith America Invents Act (“AIA”). For example, Section 28 of the AIA calls for an ombudsman program to offer assistance before, during, and after an applicant gets to the patent office. In addition, Section 32 of the AIA mandates that the USPTO must encourage intellectual property associations to form pro bono programs to assist financially under-resourced inventors and small businesses.

Granting online access to APEx is consistent with the government’s policy interests of achieving these underlying constitutional goals of the Constitution’s Patent Clause<sup>21</sup>. Allowing potential inventors to freely access APEx online will significantly help them save excess prior art search costs and better navigate the patent prosecution process with reasonably calculated risks. Online access to APEx will also promote creativity, in that it would promote creative thinking, and ultimately, enhance the marketplace of ideas.

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<sup>15</sup> *Bilski v. Kappos*, 561 U.S. 593, 652 (2010) (quoting *Brenner v. Manson*, 383 U.S. 519, 533, 86 S. Ct. 1033, 16 L. Ed. 2d 69, 1966 Dec. Comm’r Pat. 74 (1966)).

<sup>16</sup> See *Gustke*, *supra*. note 8.

<sup>17</sup> See *Calloway*, *supra* note 9. at 566.

<sup>18</sup> See *Ronspies*, *supra*. note 12 at 204.

<sup>19</sup> See *id.* at 195.

<sup>20</sup> See *Calloway*, *supra* note 9. at 579.

<sup>21</sup> See U.S. Const. art. I, § 8. (“ . . . To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries . . . .”)

## **B. Public Online Access to APEX Would Promote Government Initiatives on Openness and Transparency.**

Granting the public online access to APEX would be a model program for promoting government openness and transparency initiatives. These initiatives have come to the forefront in recent years with President Obama's Executive Order in 2013 titled "Making Open and Machine Readable the New Default for Government Information, the White House" ("2013 Executive Order").<sup>22</sup> Following this Order, and even before,<sup>23</sup> agencies were encouraged to adopt a variety of new initiatives and goals to urge openness in government, which "strengthens our democracy, promotes the delivery of efficient and effective services to the public, and contributes to economic growth."

The USPTO has itself endorsed openness through numerous initiatives of its own and has deemed these initiatives a "priority."<sup>24</sup> Allowing the public online access to APEX would be a model program under the Executive Order and administrative initiatives, and go a long way to furthering the USPTO's own openness goals.

The proposed pilot program would advance these goals by creating a more open, accessible system. This greater accessibility would in turn produce higher quality patents because a wider audience would be made aware of relevant prior disclosures, and would be able to contribute to innovation.

### **1. Access to Information Increases Innovative and Constructive Public Engagement.**

Open access furthers innovation and creativity. Not only does open access create a wider audience for work, it encourages people to comment and engage with work that used to be unavailable by normal means.<sup>25</sup> The availability of work allows others to comment, create, and reuse that work for new and innovative purposes. It encourages people to collaborate, thus leading people to devise more creative solutions than one or two individuals could devise on

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<sup>22</sup> See Exec. Order No. 13,642, 78 FR 28111, (May 14, 2013) [hereinafter Executive Order].

<sup>23</sup> President Obama has been supporting open government initiatives since the beginning of his presidency. See About Open Government, The White House, <https://www.whitehouse.gov/open/about> (last visited April 28, 2015) ("On his first day in Office, President Obama signed the Memorandum on Transparency and Open Government, ushering in a new era of open and accountable government meant to bridge the gap between the American people and their government.").

<sup>24</sup> *Open Data*, USPTO, <http://www.uspto.gov/products/mobile/data.jsp> (last modified Nov. 21, 2014 3:08 PM) ("Open Data is a priority for the USPTO.").

<sup>25</sup> Alison J. Head, *Peter Suber: The Imperative of Open Access*, Project Information Literacy (Mar. 27, 2013), <http://projectinfolit.org/smart-talks/item/100-peter-suber> (interviewing Peter Suber, notable open access scholar: "I discovered an audience. When I started putting my print publications online, some of them were over ten years old. But I'd received little serious or useful feedback on them from scholars. However, as soon as I started making my work OA, I started receiving serious, useful, stimulating correspondence from colleagues in philosophy and law, my two fields. I also started receiving serious correspondence from scholars in other fields where I never would have guessed that my work had implications").

their own.<sup>26</sup> In addition, it encourages important dialogue that promotes progress and change.<sup>27</sup> More information allows citizens to engage in a more active and educated way to support innovation. Greater access also allows people to build off one another's work and not have to waste time or materials reinventing steps that others have already overcome. In this way, greater access to information encourages collaboration, efficiency, and progress, which are key to a successful society.

## **2. The Administration is Committed to Openness and Accessibility.**

The current administration has continued government efforts to provide better access to information with the 2013 Executive Order. This open government movement is part of an international Open Government Partnership, which boasts sixty-five participating countries, including the United States as one of its founding members.<sup>28</sup> The Executive Order calls on all branches of the government to implement comprehensive policies, and encourages independent agencies to do so as well.<sup>29</sup>

In compliance with the Executive Order, the Office of Management and Budget at the White House ("OMB") released a Memorandum that "require[d] agencies to collect or create information in a way that supports downstream information processing and dissemination activities."<sup>30</sup> OMB specifically stated this "involves agencies building or modernizing information systems in a way that maximizes interoperability and information accessibility."<sup>31</sup>

The Food and Drug Administration ("FDA") has undertaken initiatives and proposed rulemakings "relat[ing] to FDA's proactive disclosure of information the Agency has in its possession, and how to make information about Agency activities and decision-making more transparent, useful, and understandable to the public."<sup>32</sup> The Federal Trade Commission ("FTC") has discussed the openness push and how it can better serve the public by encouraging greater

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<sup>26</sup> See Testimony of Dr. Beth S. Noveck, Hearing of the Standing Committee on Access to Information, Privacy, and Ethics House of Commons Canada (Mar. 2, 2011) *available at* [http://cairns.typepad.com/blog/2011/03/testimony-before-the-standing-committee-on-access-to-information-privacy-and-ethics-of-the-canadian-.html#\\_ftn1](http://cairns.typepad.com/blog/2011/03/testimony-before-the-standing-committee-on-access-to-information-privacy-and-ethics-of-the-canadian-.html#_ftn1) [hereinafter Noveck Testimony].

<sup>27</sup> See *id.* (discussing the merits of open government and its ability to promote democratic principles).

<sup>28</sup> *What is the Open Government Partnership*, OPEN GOVERNMENT PARTNERSHIP, <http://www.opengovpartnership.org> (last visited May 5, 2015).

<sup>29</sup> *Id.* Sec.2.(b).

<sup>30</sup> Office and Management and Budget, Memorandum on Open Data Policy – Managing Information as an Asset, M 13-13, 1 (May 9, 2013) <https://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-13.pdf>

<sup>31</sup> *Id.* at 2.

<sup>32</sup> FDA TRANSPARENCY INITIATIVE: DRAFT PROPOSALS FOR PUBLIC COMMENT REGARDING DISCLOSURE POLICIES OF THE U.S. FOOD AND DRUG ADMINISTRATION 13 (2010) *available at* <http://www.fda.gov/downloads/AboutFDA/Transparency/PublicDisclosure/GlossaryofAcronymsandAbbreviations/UCM212110.pdf>

transparency in commercial entities.<sup>33</sup> As part of the FTC’s Open Government Plan “[a]s the FTC continues to improve its redesigned website, it is working with its vendor to make its public data assets more readily available for download and use through an application programming interface[.]”<sup>34</sup> The Federal Communication Commission (“FCC”), as an independent agency, also has numerous open government initiatives.<sup>35</sup> Many of these initiatives support access to openness because “[b]y better involving data in open and transparent rulemaking, the FCC can better serve the public while enabling public innovation.<sup>36</sup> The spectrum inventory, for example, provides an important searchable database for innovators, or those entering the marketplace, to understand the landscape before expending valuable resources.<sup>37</sup> These examples demonstrate a growing trend towards greater and more useful public access to government data.

The USPTO has indicated that it not only has numerous current initiatives to open access to patent data, but that it hopes to broaden the scope of such efforts as well.<sup>38</sup> Beth Noveck, the former U.S. Deputy Chief Technology Officer for Open Government and key leader of the White House’s initiatives, specifically mentioned patent accessibility as important to the public.<sup>39</sup> The USPTO’s own programs have encouraged open collaboration, and making APEX available online to the public is a logical and simple next step to these initiatives. For example, The Peer to Patent program at New York Law School encourages a collaborative environment for engineers, inventors, scientists, and other members of the public to crowd source the prior art portion of examination.<sup>40</sup> This program is supported by the USPTO and has clearly demonstrated that collaboration and access by the interested public can save valuable time and resources for the PTO and strengthen patent quality.

### **3. The USPTO Should Expand Upon its Own Open Access Initiatives Through Implementation of the Proposed Pilot Program.**

Inventors are the backbone of discovery and innovation in this country. They stand to benefit the most and have been a vital consideration in this administration’s policy initiative. For years, open access models have been encouraged in scientific and technology communities as a means to promote innovation and encourage progress.<sup>41</sup> The first section of the 2013 Executive Order

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<sup>33</sup> See Latanya Sweeney, *Transparency establishes trust*, FEDERAL TRADE COMMISSION (Apr. 3, 2014), <https://www.ftc.gov/news-events/blogs/techftc/2014/04/transparency-establishes-trust>

<sup>34</sup> FEDERAL TRADE COMMISSION 2014 OPEN GOVERNMENT PLAN 1 (2014), *available at* <https://www.ftc.gov/system/files/attachments/open-government/opengovplan.pdf>.

<sup>35</sup> *Open Government at the FCC*, FCC (May 16, 2014) <http://www.fcc.gov/open>.

<sup>36</sup> *Data*, FCC, <http://www.fcc.gov/data> (last visited Apr. 29, 2015).

<sup>37</sup> *Spectrum Inventory*, FCC, <http://www.fcc.gov/data/spectrum-inventory> (last visited Apr. 29, 2015).

<sup>38</sup> See *USPTO Open Data*, *supra* note 25.

<sup>39</sup> See Noveck testimony, *supra* note 38 (“[B]y starting with high value data and steering clear initially of national security data or personally identifiable information, government officials can publish data about bridge safety or patent filing and create a widespread culture change quickly.”).

<sup>40</sup> *Peer to Patent*, NEW YORK LAW SCHOOL, <http://www.peertopatent.org/> (last visited Apr. 29, 2015).

<sup>41</sup> See *supra* Part II.B.1. [orts%20innovation%20entrepreneurship&lr&pg=PA129#v=onepage&q&f=false](https://www.ftc.gov/2014/04/2014-04-03-open-government-plan) [will provide additional sources]

states “one vital benefit of open government, making information resources easy to find, accessible, and usable can fuel entrepreneurship, innovation, and scientific discovery that improves Americans' lives and contributes significantly to job creation.” It notes that access to government information has allowed “entrepreneurs and innovators . . . to develop a vast range of useful new products and businesses using these public information resources, creating good jobs in the process.”<sup>42</sup> The partnership’s Open Government Declaration also states the member countries are committed to several principles encouraging open government access and public participation.<sup>43</sup> One of the principles is to “increase availability of information about governmental activities” and it states member countries “commit to pro-actively provide high-value information, including raw data, in a timely manner, in formats that the public can easily locate, understand and use, and in formats that facilitate reuse.”<sup>44</sup> Another principle calls for “[i]ncrease[d] access to new technologies for openness and accountability” and states member countries “commit to developing accessible and secure online spaces as platforms for delivering services, engaging the public, and sharing information and ideas.”<sup>45</sup>

These principles plainly support the UIA’s proposal for online access to APEX. Online access to APEX online would give all inventors a powerful tool for bringing their inventions to the market. Access to APEX would improve patent quality and promote the creation of useful new products, businesses, and many jobs in the process. Such access would create a far more constructive and accessible patent system for independent and ultimately all inventors. Not only does this proposed pilot program promote the USPTO’s patent policies and government openness initiatives, it will clearly encourage innovation and will ultimately serve to improve the quality of all filed patent applications and patents.

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<sup>42</sup> See Executive Order, *supra* note 21, at § 1.

<sup>43</sup> *Open Government Declaration*, OPEN GOVERNMENT PARTNERSHIP (2011), <http://www.opengovpartnership.org/about/open-government-declaration#sthash.y8Q5k3CD.dpuf>

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

Thank you for allowing the UIA the opportunity to provide comments on this initiative. The UIA would be pleased to engage in further dialog with the USPTO on this proposal. Please direct any questions or comments to [email redacted].

Sincerely,

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