

Question for the Record from Rep. Issa for Mr. Joshua Landau
“Artificial Intelligence and Intellectual Property: Part III – IP Protection for AI-Assisted
Inventions and Creative Works”
April 10, 2024

1. In some industries more than others, significant investment is needed to develop a product following an initial discovery or innovation, even when AI is used to assist in those initial stages. How would you respond to those who express concerns that restricting patent protection, such as for AI use, harms those industries because they rely on patents to recoup their investments? How would you respond to those who express concerns that USPTO’s case-by-case inquiry into the “significant human contribution” in each invention creates uncertainty that will chill investments in innovation?

Questions from Chairman Issa for Joshua Landau, Senior Counsel, Innovation, CCIA Witness for the House Judiciary Committee Subcommittee on Courts, Intellectual Property, and the Internet Hearing “Artificial Intelligence and Intellectual Property: Part III – IP Protection for AI-Assisted Inventions and Creative Works”

1. In some industries more than others, significant investment is needed to develop a product following an initial discovery or innovation, even when AI is used to assist in those initial stages.
 - a. How would you respond to those who express concerns that restricting patent protection, such as for AI use, harms those industries because they rely on patents to recoup their investments?
 - b. How would you respond to those who express concerns that USPTO’s case-by-case inquiry into the “significant human contribution” in each invention creates uncertainty that will chill investments in innovation?

AI and Patent Protection, In General

In the experience of CCIA’s members, there is not currently a situation in which the use of AI would actually restrict the availability of patent protection. In fact, current AI technologies are not capable of proposing a patentable idea absent a significant human contribution in the process. And, as USPTO’s recent guidance made clear, “the use of an AI system by a natural person(s) does not preclude a natural person(s) from qualifying as an inventor (or joint inventors) if the natural person(s) significantly contributed to the claimed invention”¹ because that human inventor can be listed as the named inventor on a patent. Mere AI usage thus does not present any restrictions on obtaining a patent. Only if an AI were to have created an invention independently of any significant human contribution—which, again, the experience of CCIA’s members suggests is not presently possible—would it be impossible to patent the AI’s invention.

Other IP rights, including trade secret protection, might be sufficient in many cases. And other alternate mechanisms already exist, or could be created if needed, to provide needed protection. Congress has created such mechanisms in the past such as the *sui generis* vessel hull and semiconductor mask rights.² Other potential mechanisms include prize approaches, where a fixed prize is awarded for a desired product, or relying on other economic advantages such as the first-mover advantage of being first to have a product on market.³ And sometimes the best solution may not require any protection at all. As is clear from the massive success of open-source software over the past few decades, successful products and businesses can even be built on the back of technology which is not only unpatented but is affirmatively shared with everyone who might wish to use it.

An open-source approach will not be the right approach in every situation. But protection does not need to be one-size-fits-all; in some industries, a patent or patent-like approach may be most effective, while in other industries other approaches may be ideal. As one example, the pharmaceutical industry is often pointed to as the prime example of patent protection being necessary for recouping investment.⁴ However, because of the strong regulatory requirements

¹ USPTO, *Inventorship Guidance for AI-Assisted Inventions*, 89 Fed. Reg. 10043, 10046 (Feb. 13, 2024).

² See 17 U.S.C. § 1301; 17 U.S.C. § 909.

³ See, e.g., Abramowicz, *Prize and Reward Alternatives to Intellectual Property* (2019), in *Research Handbook on the Economics of Intellectual Property Law* (P.S. Menell & B. Depoorter eds., 2019).

⁴ See Lemley, *The Myth of the Sole Inventor*, 110 Mich. L. Rev. 709 (2012)(“There is one industry in which the commercialization story actually seems to work: pharmaceuticals.”)

before a drug can be sold, a simple market exclusivity could be awarded by the FDA.⁵ In fact, such exclusivities already exist—there is a five-year data exclusivity already provided regardless of patent protection.⁶

However, even if AI becomes capable of independently creating a technological invention without any significant human contribution, the solution should not be to modify patent law away from its core purpose of promoting human innovation and the progress of the useful arts. Patent law is not our only tool for industrial policy, and attempts to force it into that mold are likely to create more harm to other industries than benefits to those industries who would be rewarded by providing patent protection to independent AI output.

USPTO Inquiries, “Significant Human Contribution”

With respect to the USPTO’s case-by-case inquiry, CCIA submits that USPTO’s recent guidance has been significantly misinterpreted. USPTO already employs a similar case-by-case approach to the question of which human is the inventor, and that approach essentially trusts that the applicant has told the truth. This reliance on a duty of candor and good faith has been viable for many decades and will continue to be viable in addressing the question of AI inventorship.

As USPTO’s guidance states, “to meet their duty of disclosure, applicants rarely need to submit information regarding inventorship.”⁷ Rather, USPTO has clearly stated that absent some evidence that an applicant has failed to disclose pertinent information regarding AI inventorship, they will not inquire further. Only in situations like those present in the recent *Thaler* case, in which the applicant has publicly represented that the actual inventor was an AI system, would USPTO conduct any further inquiry into AI inventorship. For these reasons, the current USPTO process is entirely reasonable in achieving the goals of ensuring significant human contributions without imposing any chilling effect on investments into innovation.

⁵ *Id.* (“The need for a special incentive to bring existing drugs to market is a function of the regulatory barriers to market entry, though, and not a general fact about innovation”).

⁶ 21 U.S.C. § 355(c)(3)(E)(ii).

⁷ *Inventorship Guidance*, 89 Fed. Reg. at 10049.