900 17th Street, N.W.
Suite 1100
Washington, DC 20006
Phone: 202.783.0070
Fax: 202.783.0534
Web: www.ccianet.org
Computer & Communications Industry Association

ABSTRACT

PATENT REFORM

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- *Patent law should promote innovation, not patents. Real patent reform must optimize innovation in all fields for which patents are available.*
- *The high-tech sectors, beset by low standards, excessive patenting, and inefficient strategic behavior, no longer benefit from the unitary patent system. Recent patent reform proposals in Congress fail to address these core problems in the system.*
- *The sheer volume of patenting in IT must be reduced. Patent reform must address the application stage as well as the litigation stage.*

***Background*:** Patents are one of many means used to profit from innovation. In some industries, such as pharmaceuticals, they are extremely important. Individual patents are less important in IT because an IT product or service can contain tens of thousands of patentable functions. IT products and services are complex, interconnected, and standards-dependent and, therefore, are especially vulnerable to assertions of patent infringement. Today, our one-size-fits-all system is optimized for billion-dollar drugs. As a consequence, it favors patents over products in IT. This threatens to divert investment away from IT and into other industries where the patent system works better.

With the inauguration of the Court of Appeals for the Federal Circuit in 1982, patent institutions effectively dominated policy and legal debate up through the notorious *State Street* decision in 1998. With a direct economic interest in expanding the scope and scale of the patent system, the patent bar has consistently argued for permissive standards, harsh remedies, unlimited scope of patentable subject matter, and other legal standards that increase demand for patents.

Beginning with the FTC/Justice hearings of 2002, the consequences of an overextended patent system have become increasingly apparent, especially in IT where the troll phenomenon has gained considerable attention. The Supreme Court has since taken an unusual number of patent cases and reversed Federal Circuit law in a number of high-profile cases. The Patent and Trademark Office dropped its "help customer get patents" mission, and, for a while, appeared to have tightened its standards. Unfortunately, this trend has just been reversed, with 2010 witnessing a large jump to record number of patents issued.

Major patent reform legislation was introduced in Congress in 2005 and in subsequent Congresses. The IT and services sectors have pushed hard for modest reforms, but other interests, including pharma, biotech, patent departments in mature industries, independent inventors, universities, as well as the patent bar, have resisted. From the IT perspective, key issues include: post-grant review with a second window as an alternative to litigation, calculation of damages based on the economic contribution of the patented technology, venue reform that

limits the flood of cases filed in the Eastern District of Texas, and additional rule-making authority for the PTO. Broader reforms are needed to address the structural problems of overpatenting, notice failure, low quality, and the failure of the disclosure function.

A patent reform bill, the "America Invents Act," passed the Senate in March (S.23), and a similar bill (H.R.1249) has been approved by the House Judiciary Committee. However, many in high tech see these bills as a step backwards. A new FTC report, The Evolving IP Marketplace, builds on the 2003 report by examining the practices and effects of "patent assertion entities" (trolls) and making recommendations for addressing notice failure and proportionality in assessing damages, but Congress has shown little interest in notice failure and has abandoned efforts to rein in damages.

***CCIA's Position*:** Today's patent system hinders high-tech more than it helps. Dramatic reform is necessary in order to spare U.S. technology producers from crippling litigation and wasteful over-patenting. Neither S.23 nor H.R.1249 propose the degree of reform necessary to fully address this spiraling rate of marginal patenting or the plague of patent litigation that is stalking technology innovation.

CCIA has fought for greater rationality in patent law with *amicus* briefs filed in numerous Supreme Court cases in recent years, where judicial decisions have made some progress. In most recent cases, the Supreme Court has favored CCIA's perspective, including *Bilski v. Kappos*, which repudiated in part the reasoning behind the now-infamous *State Street* decision that unleashed a flood of broad and sweeping business method patents. Court decisions are unlikely to fully rein in the patent litigation that consumes the attention, resources, however, and substantial legislative reform, remains necessary.

***Current Status*:** The likelihood of patent legislation passing is increasing, but with a net negative effect on high tech. Important disputes, such as the Supreme Court case *Microsoft v. i4i* (addressing the burden of overcoming the presumption of patent validity), remain before the courts and have yet to be resolved.