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

REAL PATENT REFORM

May 2008

- *Patent law should promote innovation, not patents. Real patent reform must optimize innovation in all fields that the system covers.*
- *Patent reform must address the application stage (e.g., raise the standard of patentability, implement peer review, encourage submission of prior art) as well as the litigation stage (e.g., preventing patent ambush of open standards).*
- *Current legislation is modest, yet has been opposed by a wider variety of other interests. More progress has been made in litigation before the Supreme Court.*

***Background*:** Narrow interests have driven a relentless expansion of the scope and scale of the patent system. As a consequence patents are sometimes wrongly viewed as an end in themselves, rather than a means to "add the fuel of self-interest to the fire of genius." Patent lawyers often oversell patents as the exclusive means of securing returns to innovation, when patents are in fact only one of many means that innovative companies use to profit from innovation. At the same time, the organized patent bar has generally advocated in favor of permissive standards, automatic injunctions, unlimited scope of patentable subject matter, and other standards that increase demand for patents.

IT products and services are especially vulnerable to claims of patent infringement because IT is complex, interconnected, and standards-dependent. IT has suffered disproportionately under a one-size-fits-all system optimized for billion-dollar drugs. A more flexible system is needed to avoid diverting investment away from IT.

***CCIA's Position*:** CCIA supports real patent reform. While the Supreme Court has taken important steps in cutting back the excesses of the specialized patent appeals court, legislative action is needed. CCIA has supported the Patent Reform Act in the House and Senate. CCIA has fought for greater rationality in patent law to the Supreme Court with *amicus* briefs addressing the Federal Circuit's patent activism in *LabCorp v. Metabolite*, *eBay v. MercExchange*, *KSR International v. Teleflex*, and *Quanta v. LG Electronics*. CCIA recently filed an amicus brief before the Federal Circuit in *In re Bilski* urging the court to repudiate the reasoning behind the notorious *State Street* decision, which unleashed a flood of business method patents on the economy.

CCIA generally supports the IT-industry consensus proposals for reform, including post-grant review with a second window, restrictions on limitless continuations, curtailing willful infringement, and lowering the presumption of patent validity. However, CCIA believes that over the long term, reforms must go deeper and proposes the following measures to address the roots of the patent crisis:

1. Tailor patent protection to reflect the diversity of innovation environments. It is time to end the pretense that one size fits all and to encourage judges to do what they are already doing without acknowledging it – applying patent laws in ways that reflect real-world conditions.

2. Raise the basic threshold: Eliminate the "ordinary" from patent law. Changing "ordinary skill" to "recognized skill" as the benchmark for determining obviousness in 35 U.S.C. § 103(a) would raise the low standard that presently drives patent inflation.

3. Implement peer review for patent applications. CCIA supports the efforts of the PTO and leading patent holders in IT to experiment with peer review in patent examination.

4. Reward submissions of prior art that invalidate defective patents. Those who bear the costs of locating, documenting, and submitting prior art to the PTO should be rewarded. As it is, few bother to read published applications in IT, let alone oppose them.

5. Require registration of notice letters. Vague notice letters alleging infringement are increasingly used so that plaintiffs can seek quick settlements and treble damages for "willful" infringement – and intimidate those who lack resources to defend themselves. Those granted patent rights should be required to deposit copies of such letters with the PTO and FTC.

6. Condition PTO funding on accountability. The PTO needs adequate funds to do its job, but it must be held accountable to objective metrics of patent quality. We believe that present PTO management has taken important steps to improve quality, but that more formal and lasting measures are required.

7. Put PTO in the forefront of knowledge management and information science. As an agency designed to promote innovation, PTO should be committed to R&D to support its core operations and enhance its own performance over the long term.

8. Stop the ambush of openly developed standards. The IT sector is heavily dependent on irreversible investments in standards that enable components and products to work together. The equitable principle of *laches* should be adapted to prevent the ambush of duly publicized open standards by opportunistic patent holders.

9. Reengineer patent institutions to promote innovation, not patents. Satisfying "customers," boosting patent counts, and "strengthening" patents by favoring patent applicants and patent owners have too often been framed as ends in themselves. Patent agencies and courts should be designed and accountable for producing genuine innovation and positive economic results. This requires building objective, independent economic analysis into the patent system.

***Key Players and Positions*:** The high-tech industry, financial services industry, and others have called for strong patent reform. However, key reforms have been opposed by the pharmaceutical and biotechnology industries, patent licensors, independent inventors, including universities, and the patent bar. As in the previous attempt at patent reform (1997-1999), xenophobia has emerged as an emotional argument against any perceived weakening of patent rights.

***Current Status*:** As of this writing, reform legislation has passed the House and has been marked up by the Senate Judiciary Committee. Managers have repeatedly promised to bring the Senate version to the floor soon, and Senate leaders have given the bill a high priority. Nonetheless, the diverse and often shrill nature of the opposition makes prediction difficult.