



COMMENTS OF
THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION
IN RESPONSE TO THE COMMISSION'S QUESTIONNAIRE
ON THE PATENT SYSTEM IN EUROPE

The Computer & Communications Industry Association is a mission-focused association that subscribes to the vision of “open markets, open systems, and open networks.” CCIA has long been active in European policies that affect information and communications technology (ICT) industries and sectors. CCIA has been particularly concerned about the evolution of patent policy and practice, and we are currently active in the debate over patent reform in the United States.

These comments focus on Section I of the Questionnaire. The comments begin with an ICT perspective of the European patent system. The comments assert that a properly optimized patent system should not focus on investment to the exclusion of genuine invention or to the detriment of real innovation. The comments further examine how an optimal patent system compares to the features stated in the Questionnaire. Finally, the comments introduce a set of principles for patent reform, developed by CCIA with members and with public interest organizations. We believe that these principles should inform and guide sound patent policy, whether in Europe or in the United States.

Introduction: *An ICT Perspective on the European Patent System*

While patent law is territorial in effect, patent practice has become global in many respects, especially in highly globalized markets such as ICTs. Software presents an extreme case, since it can be developed and distributed with little regard for political and geographic barriers. U.S. ICT industries have a significant interest in the proper functioning of the European patent system, just as European industries have a significant industry in the functioning of the U.S. system.

Important distinctions can and should be drawn between the U.S. and European patent systems. In the 1997 Green Paper on the Community Patent and the 1999 Communication to the Parliament, the Commission references certain features of U.S. system, including low application fees and acceptance of software patents as desirable characteristics to which Europe should aspire. Since that time there has been growing awareness of some of the problems of the U.S. system – including the fact that cheap, easy-to-get patents contributes to problematic phenomena such as strategic patenting, portfolio races, patent thickets, and patent trolls. Software patents are especially prone to these phenomena, producing extraordinarily high information costs relative to low costs of creating software.

In some ways, Europe benefits from the relatively high cost of securing patents, as well as more rigorous patent examination, absence of continuation applications, a less litigious

culture, less acceptance of contingency fees to fund litigation, and other factors. However, Europe is not immune from the same economic and institutional interests that have driven the evolution of the U.S. system. European policymakers therefore may want consider the structural problems increasingly manifest in the U.S. system.

Policymakers should bear in mind that one of the institutional defects in the patent is the absence of regularly collected empirical evidence of how the patent system works in practice, in particular how it influences innovation and competition. We therefore support collection of information that enables a more objective assessment of the value, costs, and risks of patents. This is essential for achieving the kind of evidence-based policy development that is needed to evaluate the expanding use and importance of the patent system. Getting patent policy wrong can have devastating results for innovation and competition.

Consultation Section 1 - Basic principles and features of the patent system

The idea behind the patent system is that it should be used by businesses and research organisations to support innovation, growth and quality of life for the benefit of all in society. Essentially the temporary rights conferred by a patent allow a company a breathing-space in the market to recoup investment in the research and development which led to the patented invention. It also allows research organisations having no exploitation activities to derive benefits from the results of their R&D activities. But for the patent system to be attractive to its users and for the patent system to retain the support of all sections of society it needs to have the following features:

- clear substantive rules on what can and cannot be covered by patents, balancing the interests of the right holders with the overall objectives of the patent system*
- transparent, cost effective and accessible processes for obtaining a patent*
- predictable, rapid and inexpensive resolution of disputes between right holders and other parties*
- due regard for other public policy interests such as competition (anti-trust), ethics, environment, healthcare, access to information, so as to be effective and credible within society.*

1.1 Do you agree that these are the basic features required of the patent system?

CCIA Response to Section 1.1:

(a) *Patent policy should not focus on investment to the exclusion of innovation.* The Commission's vision is framed entirely in terms of "investment" with no mention of "invention" as the essence of what the patent system is designed to promote and protect. As stated in the Commission's introductory paragraph:

"Essentially the temporary rights conferred by a patent allow a company a breathing-space in the market to recoup investment in the research and development which led to the patented invention. It also allows research organizations having no exploitation activities to derive benefits from the results of their R&D activities."

We are concerned that this formulation is imprecise and requires elaboration to clarify where patents may or may not be needed. In particular, we note that patents are useful and perhaps necessary in some contexts to support post-invention investment in testing, refining, adapting, and commercialization. The need depends in part on how close the patented technology is to a marketable product. This rationale is distinct from the initial incentive to invent and is especially applicable to inventions enabled by public funding. In fact, post-invention commercialization was the primary rationale for the Bayh-Dole Act in the United States – not providing additional benefits to universities and other research organizations.

We note that this expressed rationale is essentially that of the controversial directive on database protection currently undergoing reevaluation – i.e., protecting investment against free-riding by others. While protecting investment is an important aspect of the patent system, most private-sector investments go unprotected in a free-market economy. This is as it should be. Routine public-sector intervention in protecting investments would raise difficult questions about which investments are substantial enough to protect against what forms of behavior by whom – and whether such protection may undermine competition. The European experiment with database protection, for example, is now undergoing reevaluation because the creation of entirely investment-justified property rights may have actually weakened the European database industry.

Focusing on investment to the exclusion of invention leads to an undisciplined approach to patent policy. This in turn leads to the phenomena that currently plague the U.S. patent system, where up to 95% of patent applications may ultimately be granted when counting continuation applications.

Unfortunately, entrenched professional and institutional interests, as well as established business practices (portfolio races), make it difficult to address patent inflation through the basic requirement of invention. Ironically, the patent system ends up with a purely economic justification (investment) but without an economic framework for ensuring that the benefits outweigh the costs and risks.

It is therefore helpful to recognize that both genuine invention and a need for protecting investment are essential prerequisites for patent protection. This helps keep the patent system confined to where it is actually needed to promote innovation. It helps avoid the overpatenting, patent thickets, and the systemic opacity that result when patents are too easy to get.

The Questionnaire suggests a test consisting of four features, or more accurately, characteristics, for maintaining the attractiveness and political support of the patent system. However, the test is formulated as a political test, rather a cost-benefit analysis or other economic test. The Commission may wish to consider whether this is a desirable approach since it will tend to subject patent policy to continual lobbying rather than empirical evaluation. These four features are addressed individually in the following sections.

(b) *Patents are instrumental rights, not natural rights.* The Questionnaire’s first proposed feature is “clear substantive rules on what can and cannot be covered by patents, balancing the interests of the right holders with the overall objectives of the patent system.” This feature misstates the policy framework. Patents are not natural rights to be balanced against the purpose of the system. They derive from the overall objective of promoting innovation – and do not benefit society independently from those purposes.

More specifically, since patents do not allow for independent creation, a creator can be deprived of the right to use his or her own original intellectual property because someone else sought a patent on some underlying process or product. This perceived injustice was at the root of the resistance to the software patent directive, and the dangers and costs of inadvertent infringement need to be taken into account in formulating patent policy.

Clear substantive rules may be an unattainable ideal as a practical matter, even when the law as written is clear as a matter of semantics. For example, the determination of inventiveness (“inventive step”) is inherently subjective (unlike the novelty test, which can be applied with some objectivity if the ambiguities of language are acknowledged). As the Commission is well aware, the ambiguity around the meaning of “technical” was a source of much of the political debate around the failed directive on software patents. While patents may be formally bounded by their claims, these boundaries are fuzzy and poorly defined by comparison with the boundaries property real property and tangible personal property.

(c) *A customer-oriented approach to patents risks losing sight of the goal of promoting innovation.* The Questionnaire’s second proposed feature is “transparent, cost effective and accessible processes for obtaining a patent.” As the U.S. experience shows, this is perhaps too easy to achieve. “Helping customers get patents” is not the same as promoting innovation. Transparency, cost-effectiveness, and accessibility are desirable characteristics for the system as whole, which includes not just obtaining patents, but asserting patents, defending against patents, and navigating and avoiding patents.

(d) *Administrative solutions to patent litigation can reduce the costs of the patent system.* The Questionnaire’s third proposed feature is “predictable, rapid and inexpensive resolution of disputes between right holders and other parties.” However, since there is little evidence that practical solutions are achievable, greater emphasis should be placed on the avoidance of disputes in the first place. This requires a high standard of patentability that limits the likelihood of inadvertent infringement.

At the same, alternatives to litigation should be pursued. Unfortunately, in the United States, constitutional limitations circumscribe the government’s ability to develop administrative alternatives to litigation. Since Europe is not confronted with such limitations, there is greater freedom (and greater motivation) to experiment with alternative administrative means to resolve infringement disputes.

1.2 Are there other features that you consider important?

CCIA Response to Section 1.2:

The most conspicuous omission from the Commission's list of features concerns the quality of patent information and the transparency of the patent landscape. Knowledge about patents should be readily available, transparent, and useful. Low standards of inventiveness result in patents of dubious validity that contain little information of technical value. If the landscape is thick with patents that are a poor source of information, only lawyers will read them. As a consequence, the disclosure function of the patent system fails, and navigating patents becomes burdensome and impractical, especially for small and medium-sized enterprises (SMEs).

1.3 How can the Community better take into account the broader public interest in developing its policy on patents?

CCIA Response to Section 1.3:

This is a critically important feature. It argues strongly for integration of the European patent system into the European Union where patent policy and law can be subject to democratic oversight and the judicial oversight of generalist courts that are appropriately sensitive to the full range of public policy interests. It is important that patent policy be developed not only with full democratic oversight but also within the larger framework of innovation policy. Europe should be wary of the U.S. experience with the Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over patent appeals and has shown an institutional bias toward championing patents at the expense of other policy interests and values.

This is a difficult undertaking, because patent law and practice are highly technical, and sound quantitative data is lacking. However, patents have become so pervasive and significant that public policy cannot be relegated to those versed in the mechanics of the system. Fee funding combined with bureaucratic insulation too often creates a narrow, dogmatic view of patent agency mission that invites capture by users of the system. Expertise in innovation policy can ensure that patent policy reflects a complete and balanced understanding of the roles that different motivations and mechanisms, including patents, play in different technological and market environments.

To support informed policy development, the Commission needs to encourage greater corporate reporting on the value and use of patents, licensing (both in and out), and related intangibles. A sustained effort must be made to collect information that shows the growth and evolution of patent practice.

As a tool for developing sound policies in the public interest, CCIA has worked with members and certain public interest organizations to develop principles for patent reform. These principles are attached. They offer basic notions of how a patent system should work at a somewhat more concrete level than the features proposed by the Commission. We hope the Commission and others will consider whether these principles can help forge a new consensus on how the patent system should work.

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ATTACHMENT

CCIA PRINCIPLES FOR PATENT REFORM



PRINCIPLES FOR PATENT REFORM

The fundamental purpose of patents is to promote innovation, not patents. Patents are one tool in an ecology of knowledge, innovation, and commercialization that varies across technology and market environments. The patent system should be designed to optimize innovation, commercialization of technology, and dissemination of knowledge in all fields that it covers.

Patent law and policy should be sensitive to the different social and economic contexts in which it operates. The relative contribution of patented inventions to finished products and services varies greatly. Patent policy should recognize that competition is a primary motivator of innovation in free markets and that there are means other than patents for securing returns from innovation. Patent incentives should be balanced against other values, including public health, freedom of expression, security, and voluntarism. Investments in developing and implementing open standards should not be jeopardized by patents.

Threshold requirements for patenting should be sufficiently high that inadvertent infringement rarely occurs. Standards of inventiveness (nonobviousness) should reflect rising expectations of competence resulting from globalization of knowledge and innovation, increased competition, multidisciplinary teams, and technological advance. The likelihood of independent invention anywhere in the world should be reflected in a high threshold of patentability to minimize chances of inadvertent infringement. The length of any *ex parte* process after filing contributes to risks and costs of inadvertent infringement.

Public disclosure is an essential function of the patent bargain. Disclosure is not merely a legal formality; it must be measured by the quality, usability, timeliness, cost, availability, and actual use of patent information. Effective disclosure requires that patents be read for their technical content as distinct from business intelligence or legal implications and that there is no risk of being penalized for reviewing patents. Patent information must be diffused in a timely and efficient manner in order to avoid inadvertent infringement.

Invalidation of questionable patents should be encouraged. Questionable patents are a burden and threat to innovators and users of technology. The invalidation or clarification of questionable patents is a public good that should be encouraged through appropriate incentives. Patents should not carry an extraordinary presumption of validity absent an objective judicial or administrative determination that such a standard is justified.

The patent system should be limited to fields and applications where benefits outweigh the costs. Patent policy must take into account the costs of asserting, avoiding, and adjudicating patents. Patents should be available only when and where researching

patents to avoid infringement can be justified as cost-effective. Patents should not be asserted against consumers and other end users who have no practical ability to research and evaluate patents that may affect them.

Patents should not endanger investments in other forms of knowledge creation and use. Patent policy and practice should respect the creation, management, and exchange of knowledge developed under incentives other than exclusionary rights. Patent rights should be limited to the scope of the new knowledge disclosed. They should not inhibit use of patented technology that is limited to understanding and building on the technology. The patent incentive should not be enhanced by opportunities for surprise, hold-up, and extortion.

National and international patent policy should be advanced by informed democratic policymaking. The development of patent policy should be open, transparent, and broadly representative. It should guard against capture by professional, institutional, and economic self-interest. Policy development should not be constrained by treaty provisions negotiated under outdated assumptions, incomplete knowledge, or the undue influence of particular stakeholders.

Governments should monitor and evaluate the impact of the patent system on an ongoing basis. Patent agencies should develop open metrics for different aspects of patent quality and patent practice. Standards for inventiveness and the scope of the patent right should be reviewed by recognized experts to ensure that patents in their field are not overbroad, trivial, questionable, excessive, or otherwise inhibiting innovation.