



COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION

Open Markets, Open Systems, Open Networks

September 25, 2006

RE: Computer & Communications Industry Association concerns about the proposed European Patent Litigation Agreement (EPLA)

Dear Member of the European Parliament:

The European Parliament is being asked to vote on the future direction of European patent policy including the creation of a European Patent Court system.

We are concerned that the proposed European Patent Litigation Agreement appears to be modeled upon the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") in creating a separate European Patent Judiciary (EPJ). This is not only a questionable model for Europe to follow but the proposed European system would be far more insular in the following respects:

No legislative oversight. In the United States, Congress is directly empowered to change patent law and patent institutions. Neither national legislatures nor the European Parliament would have this power.

No judicial oversight. In the United States, the Supreme Court can review Federal Circuit decisions, and it has granted review frequently in the last two years as concerns about the malfunctioning of the patent system have grown.

No independent judiciary. EPJ judges would be appointed by the EPO Administrative Council for limited terms, whereas Federal Circuit judges are appointed by the President for life.

Wholly specialized. EPJ would be exclusively focused on patents. Although the Federal Circuit has made its mark on patent policy, it has other responsibilities as well.

Even if these problems could be addressed, the Federal Circuit is a dangerous model for Europe to emulate. The Federal Circuit's expansion of the scale and scope of the patent system is unwise even though applauded by patent practitioners. The Federal Circuit has:

Lowered the threshold standard of patentability – an issue which the Supreme Court has accepted for review (*KSR International v. Teleflex*)

Encouraged extortionate demands and settlements by making injunctive relief automatic, a practice just recently reversed by the Supreme Court (*eBay v. MercExchange*), and by making patents very difficult to invalidate despite widespread concerns about the deficiencies of patent examination.

Eliminated virtually all limits on patentable subject matter. The Supreme Court accepted a review of a case on patentable subject matter, but then declined to do so, because the issues were not adequately presented (*Labcorp v. Metabolite*).

Endowed issued patents with an unjustifiably high presumption of validity despite widespread concerns about the quality of patents and the limitations of the examination process.

The Computer & Communications Industry Association is a trade association with a long history of promoting “open markets, open systems, and open networks.” We have been active in the European policy arena for many years in competition policy, interoperability, copyright, and patents.

CCIA members make extensive use of the patent system. We need a patent system that is responsive to the concerns of industry and the public. However, we, and others in the Information and Communications Technology (ICT) sector, have been concerned about trends in patent law and practice in the U.S. We are strong advocates for meaningful patent reform that addresses core problems – not just symptoms.

The patent-specialized Court of Appeals for the Federal Circuit has made patents more potent, easy to get, easy to assert, and available for a virtually unlimited range of subject matter. As shown in the 2002 joint Department of Justice/Federal Trade Commission (FTC) hearings, this has led to over-patenting, portfolio racing, opportunism, extortionate settlements, and failure of the public disclosure function. As the final FTC report, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*, makes clear, the ill effects have been borne disproportionately by the ICT sector.

Need for Accountability

The EPJ system of specialized courts would recreate the problems experienced with the Federal Circuit in the United States, yet with no effective legislative or judicial oversight. Furthermore, by vesting the power of appointing judges under the European Patent Organisation, it would tie the new patent judiciary closely to the fee-funded patent granting agencies.

EPLA would insulate the patent system from the broader policy interests that the patent system is intended to serve: innovation, adoption of technology, support for standards, and advancement of public science. It would make the patent system captive to its own logic and its own institutional interests with little obligation or inclination to understand the economic and social context in which it operates.

Whatever may be said about the Federal Circuit, it is consistent with American federalism. Providing further institutional infrastructure outside the European Union in the name of uniformity, however, would endanger the enterprise of European integration as a whole. It would set an unfortunate precedent for other insular *sui generis* solutions that deprive EU institutions and the European public of oversight of social and economic questions of growing importance.

Today, the U.S. is vigorously debating the nature and scope of patent reform, and the alignment on the issues clearly shows that the present system advantages some sectors to the detriment of others. Under EPLA, EU institutions would be unable to address these critical policy issues. In effect, the patent judiciary would develop its own industrial policy with little fear of democratic review. We note that many of the most deeply problematic rulings of the Federal Circuit have come before the Supreme Court only in the last year or two, including automatic injunctive relief, the Federal Circuit's low inventive step standard, and its unconstrained view of patentable subject matter. Under EPLA, these fundamental issues of innovation policy would not be subject to outside review.

Certainty and predictability remains fundamental problems for the patent system. Disputes are prohibitively costly, especially for SMEs. Insurance markets remain underdeveloped. The Federal Circuit has not resolved these problems. In many cases, this specialized court has made them worse, in part because it is reluctant to reexamine its own thinking and to acknowledge the problems it has created.¹

Before abdicating control over patent policy, the Commission and the Parliament should take a long hard look at these problems. They will not be resolved by making the entire patent system more autonomous and unaccountable. Turning absolute control of the system over to fee-funded specialists and institutions – in the name of achieving incremental cost savings for high-end pan-European litigation – would do a great disservice to SMEs whose ability to use patents and to avoid patent infringement is already marginal. The consequence, as we have seen in the United States,² will be a rising spiral of more low-quality patents, more disputes, increased demand for legal services, higher costs, and increased opportunism.

¹ The institutional problems of the Federal Circuit are examined in a working paper just published by professors John Duffy and Craig Nard, Rethinking Patent Law's Uniformity Principle, available at <http://patentsanddiversity.com/resources/nard-duffy.pdf> and on the Social Science Research Network (www.ssrn.org). Because the paper analyzes the general problem of uniformity and focuses on optimization as an alternative to extremes, it is useful background to the European debate over specialization and centralization.

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Today, Europe benefits from a less litigious culture and fewer patents. Yet under EPLA the European system would be far more captive, centralized, insular, and disconnected from democratic, evidence-based policy-making than the U.S. system on which it is modeled.

Sincerely,

A handwritten signature in black ink that reads "Ed Black". The signature is written in a cursive style with a large, stylized "E" and "B".

Ed Black
President and CEO