The Computing Technology Industry Association

Statement for the Record

"Patent Reform Act of 2009," H.R. 1260

Committee on the Judiciary

U.S. House of Representatives

Thursday, April 30, 2009

Dear Chairman Conyers, Ranking Member Smith, and Members of the Committee:

On behalf of the Computing Technology Industry Association (CompTIA), we thank you for your ongoing interest in patent reform and appreciate the opportunity to submit the following views. In sum, CompTIA supports the "Patent Reform Act of 2009," H.R. 1260, and urges its prompt enactment.

The Computing Technology Industry Association (CompTIA) is the voice of the world's $3 trillion information technology industry. CompTIA membership extends into more than 100 countries and includes companies at the forefront of innovation; including, the channel partners and solution providers they rely on to bring their products to market, and the professionals responsible for maximizing the benefits organizations receive from their technology investments. The promotion of policies that enhance growth and competition within the computing world is central to CompTIA's core functions. Further, CompTIA's mission is to facilitate the development of vendor-neutral standards in e-commerce, customer service, workforce development, and ICT (Information and Communications Technology) workforce certification.

CompTIA's members include thousands of small computer services businesses called Value Added Resellers ("VARs"), as well as nearly every major computer hardware manufacturer, software publisher and services provider. Our membership also includes thousands of individuals who are members of our "IT Pro" and our "TechVoice" groups. Further, we are proud to represent a wide array of entities including those that are highly innovative and entrepreneurial, develop software and hold patents. Likewise we are proud to represent the American IT worker whom relies on this technology to enhance the lives and productivity of our nation. Based upon a recent CompTIA survey, we estimate that

one in twelve, or about 12 million American adults, consider themselves to be IT workers.[1] This is larger than the number of American adults classified by the Bureau of Labor Statistics ("BLS") as employed in farming, mining, and construction combined. This is also close to the number of adults classified by BLS as working in manufacturing or transportation. CompTIA has concluded that the IT workforce is now one of the largest and most important parts of the American political community. Accordingly CompTIA believes that "The Patent Reform Act of 2009," H.R. 1260, is a critical solution to the longstanding problems facing the ICT industry and the American IT worker. Thus, the solutions arising from "The Patent Reform Act of 2009" will serve as an economic stimulus and virtually without any cost to the U.S. taxpayer.

We urge the prompt consideration of the "Patent Reform Act of 2009" for numerous reasons. These reasons include the need to harmonize certain aspects of the U.S. patent system, provide common-sense litigation reform, and modernize the operations of the U.S. Patent and Trademark Office ("PTO") for the 21st century and the knowledge economy.

I. Litigation Reform

CompTIA believes that patent litigation reform will help the U.S. small business community and its innovators. The case for reforming the patent litigation system has been soundly articulated by Members of this Committee, the National Academy of Sciences, the Federal Trade Commission, the patent bar, consumer groups, and numerous other entities.[2] The impact of patent litigation can be catastrophic for a company, in particular a small business, such as any of our ICT members. The enormous expense of patent litigation is often disastrous to small businesses, who have limited resources to endure a legal challenge, let alone the multiple challenges associated with the patent thicket surrounding ICT products. As one observer testified, "[p]atent litigation is notoriously known as 'bet the company' litigation. The stakes are enormously high, beyond multi-million dollar verdicts."[3] The legal fees and cost of patent litigation has been estimated as high as a million dollars per year per side.

It is obvious that the astronomical cost of litigation is disastrous for many small U.S. businesses, and it requires settlement by the accused infringer. The frequent litigation surround the "patent thicket" can chill economic investment (*e.g.*, venture capital and other R&D spending) and destroy a start-up's attempt to enter the market and create jobs. We invite your attention to the patent litigation statistics

[1] http://www.comptia.org/issues/us.aspx.

[2] *See generally* PATENTS IN THE KNOWLEDGE-BASED ECONOMY (Wesley M. Cohen & Stephen A. Merrill eds., 2003); FEDERAL TRADE COMMISSION, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW POLICY (Oct. 2003), *available at* http://www.ftc.gov/os/2003/10/investmentrpt.pdf; NAT'L RESEARCH COUNCIL OF THE NAT'L ACADEMIES, A PATENT SYSTEM FOR THE 21ST CENTURY (2004), *available at* http://www.nap.edu/html/patentsystem/0309089107.pdf; http://www.aipla.org.

[3] *Improving the Federal Adjudication of Patent Cases, Hearing Subcommittee on Courts, the Internet, and Intellectual Property: Hearing before the Subcomm. on the Courts, Internet, and Intellectual Property Comm. on the Judiciary*, 109th Cong. at 29 (2005).

published by many sources, including the Administrative Office of the United States Courts.[4] However we wish to emphasize that such published statistics only tell a part of the whole story. In reality the abusive legal action taken against small IT companies is often unreported. The high cost, uncertainty, stress and time associated with litigation essentially demands that small businesses settle before any formal court action commences. Thus, we caution that many of the published statistics only tell part of the story. Likewise, it is uncontested that at least several thousand new patent suits are filed every year. Accordingly the delay of the "Patent Reform Act" results in the continued filing of hundreds of these suits against small ICT businesses and start-ups each month under the current flawed legal framework.

Second, we fully support enhancing the available post-grant review of a patent subject to litigation. This includes the provisions of H.R. 1260 that enhance the current administrative system of reviewing a patent's claims, through reexamination, as well as establishing a post-grant or other administrative claim cancellation procedure. The modern patent reexamination system promised a swift and cost-effective review of poor quality patent claims. It is regrettable that the system is not as widely-used as it should be in the 21st century to address the disputes concerning patents affecting the ICT industries. This is not without the efforts of the last two PTO Directors who, to their credit, established the PTO's Central Reexamination Unit (CRU) and provided increased resources for this task.

Finally, on behalf of the ICT industry and IT workers, we welcome the Committee's interest in enhancing the system for adjudicating patent disputes. An essential element of any patent reform is improving the federal adjudication of patent disputes. Accordingly we support the proposed federal district court pilot program pursuant to Rep. Issa's legislation, H.R. 628, reported by the full U.S. House of Representatives earlier this year.[5] We urge the Committee to consider this meritorious legislation either as part of a comprehensive patent bill, as it has as a stand-alone measure. In addition, the recruitment and retention of a new generation of federal judges is vital for a system to responsibly adjudicate patent, as well as other civil, disputes. Accordingly we support judicial pay equity.

Modernizing the PTO

The importance of a well-functioning PTO cannot be overstated, both as a gate-keeper for technology and as a storehouse of knowledge for the public. The PTO concedes that it faces numerous challenges at present, including ensuring a high level of patent quality, crisis level workloads, and human capital challenges.[6] Critics and scholars have observed that the agency is fighting an impossible task, striving to perform its mission in the 21st century with mere 19th century policies and tools. We urge Congress to continue to provide the PTO with the tools and resources it requires for its mission, including full adequate funding and ending the diversion of user fees. Likewise, we encourage the House and Senate Committees on the Judiciary, as well as others, to maintain vigorous oversight over the PTO to

[4] *E.g.*, http://www.uscourts.gov/caseload2008/tables/C00Mar08.pdf .

[5] *See also*, S. 299 (the companion Senate legislation).

[6] *See generally* PTO annual performance reports, *infra* at 8; U.S. GOV'T ACCOUNTABILITY OFFICE, USPTO HAS MADE PROGRESS IN HIRING EXAMINERS, BUT CHALLENGES TO RETENTION REMAIN (2005) (GAO-05-720); *Perfect Happiness: Game Theory as a Tool for Enhancing Patent Quality*, 10 YALE J. L. & TECH. 360 (2008).

ensue it remains a good steward of all public funds and resources in connection with its workforce, IT infrastructure, the panoply of contractors, and other mission critical needs.

As part of its mission, we believe that it is critical for the PTO maintain a high level of patent examination quality. The goal of enhancing patent quality entails many components, including the review of publicly available applications. The 1999 American Inventors Protection Act ("AIPA") provided for the limited publication of patent applications.[7] The AIPA's revision of the U.S. Patent Act (*i.e.*, 35 U.S.C. §122(b)) has proven useful as a means of ensuring patent quality. Most importantly, in the near decade since the change to publication was made to U.S. law, we know of no deleterious effects of the early publication of pending applications. In fact, the number of patent applications from small entities has risen dramatically in the almost ten year period since this change.[8] Further the early publication of applications has permitted the novel initiatives, such as patent office rule 37 C.F.R. 1.99 and the Peer-to-Patent Pilot program.[9] This initiative has permitted limited third-party participation in the patent examination process. Again, in sum, we know of no deleterious effects arising from this initiative or early publication in general.

The current version of H.R. 1260 misses an important opportunity; namely, the ability to provide for the early publication of all pending patent applications (*e.g.*, "Sec.9. Preissuance Submission by Third Parties"). We would urge the Committee to amend the bill to require the early publication of pending applications during further congressional consideration. This change is sound technology policy and of enormous benefit to inventors and the public at large. Where clearly relevant prior art bearing on the patentability of a proposed claim is available prior to grant (the proverbial "smoking gun prior art"), a third-party should make it available to the PTO. Consequently, the inability to require the early publication of applications may contribute to the issuance of poor quality patents that should not have otherwise been granted. The government's grant of a knowingly poor quality patent hurts the public immediately upon its issuance. This result contributes to uncertainty for economic investment, chills innovation, is disruptive to the business ecosystem, and undermines faith in the patent system.

II. Conclusion

It is uncontested that the U.S. patent system is the finest in the world and the envy of the world. This is a direct result of this Committee's stewardship of the system for more than two centuries. Again, thank you for your consideration of these comments, and we are happy to be a resource as the Committee continues its critical work in enhancing the U.S. patent system for the 21st century and advancing the IT industry.

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[7] Public Law No. 106-113 (§ 4502).

[8] *See* U.S.P.T.O. Annual Performance and Accountability Report; http://www.uspto.gov/web/offices/com/annual/2008/index.html

[9] *See* http://www.peertopatent.org/. For a detailed description of how Peer-to-Patent functions, *see* Beth Simone Noveck, *"Peer to Patent": Collective Intelligence, Open Review, and Patent Reform*, 20 HARV. J.L. & TECH. 123, 143-151 (2006).