Computer & Communications Industry Association
WWW.CCIANET.ORG
666 Eleventh Street, N.W., Sixth Floor
Washington, D.C. 20001
202.783.0070 Fax 202.783.0534

COMMENTS OF THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)

WORKING GROUP ON THE NEW ECONOMY

Examination of the reports on the patent system by the National Academies Technology, and Economic Policy and the Federal Trade Commission

1) *Do the reports fully capture the role of patents and developments in patent-related activity (e.g., applications, grants, licensing, and litigation) over the past 25 years?*

No, because information about licensing activity and assertions of infringement is private information that is not captured in statistics. As it is, both reports had to rely on testimonial evidence. This evidence is carefully documented in the FTC report and in record developed in the FTC hearings, whereas the NAS study synthesizes from meetings and informal input. The FTC report is also more complete in terms of how well it captures patent practice and effects in the four sectors that it examines in depth. In terms of the sectors with which CCIA is familiar, we believe the FTC report is accurate.

It is important to bear in mind that the two reports have somewhat different foci despite their close association as policy studies. The FTC analysis is more contextual, whereas NAS study is more focused on the operation of the patent system.

2) *Are the concerns or problems regarding the operation of the patent system identified in the two reports well-founded?*

Yes.

3) *Which, if any, of the recommendations for changes to the patent system made in those two reports should be adopted?*

We generally support the full set of FTC recommendations. More particularly, we support:

Greater use of empirical evidence and economic analysis. Antitrust has benefited greatly from the integration of legal and economic perspectives, which would benefit patent law and policy as well. This could ultimately enable greater uniformity in results across different sectors of technology.

Adjusting the presumption of validity. An artificially high presumption of validity provides unwarranted and dangerous leverage to holders of questionable patents.

Eliminate the combination test for obviousness. The Federal Circuit's requirement of a specific suggestion to combine old elements in order to show obviousness departs from the Supreme Court standard and should be eliminated. It vitiates the non-obviousness standard, turning it into a variation of the novelty standard.

Consider the costs and benefits of the patent system before extending into new areas. This FTC recommendation is in effect a critique of the activist policymaking record of the specialized Court of Appeals for the Federal Circuit in allowing patents for virtually all activities, transforming patent into a law of general applicability without direction from Congress. Software and business method patents have implications for antitrust in that many are broad enough to confer market power, even though they may ultimately be vulnerable to attack on the basis of overbreadth.

4) *Are there other issues regarding the operation of the patent system not addressed in either report that should be considered by the Antitrust Modernization Commission? Please be specific in identifying any issue and the reasons for its importance.*

Abuse of transaction costs. Neither study addressed the prohibitive costs that small entities face in contesting patent claims despite widely publicized assertions by Pangea IP and SBC against simple e-commerce websites. This use of patents against ordinary users of technology, knowing that they simply cannot afford to mount a defense should be recognized as a form of patent abuse. The practice should be documented and addressed both as a matter of competition policy and patent policy.

The need to address the quality problem scientifically In the debate over patent policy, "quality" is used loosely to mean many different things. Ultimately investments in the patent examination process must be justified in terms of quality output and the optimal functioning of the system. The PTO should not be entitled to funding at an arbitrary level without showing meaningful results. The second-pair-of-eyes initiative for business method patents offers a useful framework that should be institutionalized and refined.