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Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy

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Thank you Mr. Chairman and Commissioners for allowing me the opportunity to be here and express the views of the Computer & Communications Industry Association (CCIA) on this important and timely topic: the intersection of intellectual property and competition policy. CCIA has a very active history on this subject, and at its roots was founded to help ensure that the high-tech industry would maintain vibrant, open markets with dynamic competition. While this task is never complete, in our over 30 years of existence, I believe we have done an excellent job in working towards this goal.

Since its founding in 1972, CCIA and its members have had a substantial interest in antitrust matters concerning the industry, having been integrally involved in some of the most important competition cases and legislation in the last three decades. CCIA was a leading advocate for the Tunney Act, an important antitrust law passed in the early 1970's, and regularly participates in academic, legislative and regulatory discussions on the impact of current and proposed antitrust law and its relationship to the high-technology sector.

CCIA was a major supporter of the Department of Justice's efforts to release the software industry from the domination of IBM in the early 1970's, and actually took part in several of the lawsuits to have the court's evidence open to public inspection. In the 1980's, CCIA championed the Justice Department's successful break up of the Bell monopoly.

Similarly, CCIA has a robust history in the field of intellectual property. We have consistently supported the basic rights of copyright holders and have backed efforts aimed at preventing software piracy in the United States and abroad. However, as policy makers and courts address the protection of intellectual property rights in various fora, we have also been very concerned that the scope of copyright protection not be improperly extended so as to unreasonably impede the development of innovative hardware and software products that interoperate with other products in the marketplace. We are also vigilant in efforts to maintain the openness of the Internet and the smooth operation of modern telecommunications networks. CCIA is the leading industry advocate for the application of legal standards that will effectuate the constitutional mandate to ensure authors "the right to their original expression" while encouraging competitors "to build freely upon the ideas and information conveyed by a [copyrighted] work."[1]

An important issue on which CCIA has led the industry is the copyright protection available to computer interfaces, and to software that implements computer interfaces. CCIA has been a staunch advocate for the principle that copyright protection should apply to the expression in any form or part of a computer program, but should not extend to the ideas and principles underlying the program. Therefore, those ideas and principles that individually or collectively permit the computer to communicate, interoperate, or work with another computer program or other product are not protected by copyright. Furthermore, copyright law should not restrict the extensive observation and analysis of the input, output, and operation of a computer program for the purpose of designing functionally compatible systems and software otherwise independently developed to interoperate with the program, and for the purposes of discovery of the underlying ideas,

[1] *Feist Publications v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991).

principles, and data. We believe that these issues are central to competition in computer and software markets, and will have important implications for the future of the technology industry.

Our history includes strong action in litigation and legislative activities that have significantly impacted these user rights. This includes our work in such seminal cases as *Sega Enterprises, Ltd. v. Accolade,* [2] *Inc., Lotus Development Corporation v. Borland International,* [3] and also the Digital Millennium Copyright Act (DMCA). Additionally, CCIA worked to incorporate safeguards for Internet service providers, website owners, and telecommunications carriers for secondary liability for copyright infringement into multilateral treaties negotiated under the auspices of the World Intellectual Property Organization (WIPO).

Because of the broad rights conferred to patent and copyright holders under many intellectual property regimes, an intellectual property rights holder has broad discretion in controlling protected content for specified rights terms. This gives that right holder a government sanctioned and enforced monopoly, and that brings us to today's discussion: the intersection of intellectual property and competition policy. CCIA believes that for several years, many have been seeking to move the policy focus away from the careful balance that has been achieved, concentrating almost entirely on expanding intellectual property rights to the detriment of a robust competitive landscape and free and open discourse.

At the outset, it is important to emphasize that our antitrust laws are in no way subordinate to intellectual property laws. This point was made clear as recently as last June, when the United States Court of Appeals for the District of Columbia, delivering its unanimous en banc decision in *United States v. Microsoft,* responded to Microsoft's claims that their IP rights excused conduct that would otherwise violate antitrust laws:

> Microsoft's primary copyright argument borders upon the frivolous. The company claims an absolute and unfettered right to use its intellectual property as it wishes: "[I]f intellectual property rights have been lawfully acquired," it says, then "their subsequent exercise cannot give rise to antitrust liability." Appellant's Opening Br. at 105. That is no more correct than the proposition that use of one's personal property, such as a baseball bat, cannot give rise to tort liability. As the Federal Circuit succinctly stated: "Intellectual property rights do not confer a privilege to violate the antitrust laws." [4]

It is this wise jurisprudence that should guide our thinking on this matter. While intellectual property rights are essential to encourage innovation and creativity, strong safeguards against the abuse of those rights are equally important.

Also, of critical importance for the high-tech community are open standards and systems. When companies use proprietary formats, or attempt to restrict others from accessing their interfaces and thereby reducing interoperability, users are not able to take full

[2] *Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992).
[3] *Lotus Dev. Corp. v. Borland Int'l*, 516 U.S. 233 (1996).
[4] *United States v. Microsoft Corp*., 253 F.3d 34, 63 (D.C. Cir. 2001) (per curiam)

advantage of advanced computing technology and telecommunications networks. This was in evidence during the IBM antitrust trial, the Bell System proceedings, and this practice still goes on today. Often, dominant companies talk of embracing and then extending industry standards, whether it is security standards such as Kerberos or the HTML standard , when in actuality they intend to embrace, extend, and extinguish the threat of the open standard to their dominance.

I would like to spend my time today addressing several issues related to these concerns, posing a threat to open competition: the proliferation of business method patents; the Digital Millennium Copyright Act (DMCA); and attempts to provide unconstitutional protections for facts underlying databases. I would also be remiss if I did not discuss what is the one of the most significant applications of this debate today: the aforementioned Microsoft antitrust trial.

BUSINESS METHOD PATENTS

A "business method patent," which is not recognized as a separate category by the U.S. Patent and Trademark Office (PTO), refers to patents for business and Internet strategies and techniques. There is little debate that a mechanical process in the offline world can be patented. However, in recent years some patent applicants have claimed patent rights for taking a commercial process or business method that has existed in the brick-and-mortar world and promulgating it online. CCIA believe that these kinds of patent claims do not serve the purpose of the patent laws.

The relative ease with which business method patents can now be obtained has spawned thousands of such applications. No prudent business would allow its competitors to patent key business processes without attempting to obtain some patents of their own. And so, virtually every large Internet company must accept the law as it is and aggressively attempt to obtain patents wherever possible. This comes at great cost for the industry and our nation's economy: in addition to the substantial direct legal costs of prosecuting new patent applications, technical and programming staff is required to devote enormous time to development of patent applications, taking them away from developing true innovations.

Amazon's One-click Purchase Patent

In September 1999, the PTO issued a patent to Amazon.com for "one-click purchasing," and within three weeks Amazon.com had sued competitor barnesandnoble.com for patent infringement. The controversy arose because barnesandnoble.com's website allowed customers to purchase of items by clicking just once on an icon, permitting the website to access pertinent personal information previously stored in barnesandnoble.com's database. According to the Amazon.com claims validated by the PTO, this concept was novel, unique, [5] and not obvious "to a person having ordinary skill" in the field. [6]

[5] 35 U.S.C. 102
[6] 35 U.S.C. 103(a)

The concept of one-click shopping, while perhaps new to the world of electronic commerce, is not much different than many other means of shopping. For decades it has been common for catalogue and mail order companies to maintain customer records, including billing information, in order to complete a purchase with minimal additional input from the purchaser. However by merely transferring this process onto the Internet and asserting patent rights, Amazon.com has attempted to create a competitive advantage for itself, to the detriment of the development of e-commerce. In addition, Amazon.com has assured that it will not be sued by a competitor asserting similar claims in the future.

The one-click purchase patent thus illustrates a major problem created by business method patents. Often, these claims seek to exploit obvious and well-known ideas for competitive advantage in the online world. In addition, the existing patent regime creates a tremendous burden for online businesses to file defensive claims merely to protect existing practices. Entrepreneurs are forced to bear tremendous legal and administrative burdens to protect business methods that they may deem obvious or not novel.

Interestingly, Amazon.com founder Jeff Bezos has recognized this problem and has come to champion efforts to reform the current patent system, calling for shorter patent terms and improved review processes. Mr. Bezos experience demonstrates that while it may make business sense to patent a business method before someone else can and lock out competitors, this is not a logical or desirable system.

Earlier this month, the two parties finally reached a settlement. However, this details of this settlement are not public, and moreover, there is no clear rules to emerge from this case to apply to future similar cases.

Reverse Auctions on the Internet

Another illustrative example of a questionable "business method" patent is related to the subject of auctions on the Internet. Public auctions took place as early as ancient Greece, and have been used for products ranging from tobacco leaves to fine art. This traditional concept of an auction has been applied to the Internet arena with great success. The most prominent firm in this sector is of course eBay. eBay was founded in September 1995, and today is the world's largest online trading community with 18.9 million registered users, and is among the most popular shopping sites on the Internet. However, eBay does not have an overarching business method patent on online auctions, and plenty of other Internet sites, including Yahoo!, CNet, Amazon, ZDNet, and Excite have established competing online auctions. The result is ferocious competition among the various industry participants to see who can provide the best auction service, and today, millions of people participate in and benefit from online auctions.

However, compare the success of the traditional online auction to so-called "reverse auctions." In a reverse auction, the buyer announces his or her preferred price, and sellers are allowed to bid in response. Of course, like the traditional auction, reverse auctions have existed in various forms in the offline world, including the Dutch auction. But when Walker Asset Management was issued U.S. Patent No. 5,794,207 on August 11, 1998, it was clear that there would be no widespread implementation of or technology competition as to reverse auctions over the Internet.

The Walker Asset Management patent, which is used by Priceline.com, is described as "method and apparatus for a cryptographically assisted commercial network system designed to facilitate buyer-driven conditional purchase offers." For example, a customer can specify that he is willing to pay $250 for an airline ticket between Washington and Los Angeles, departing on April 14 and returning on April 17. If that price offer is acceptable to one of Priceline's participating airlines, the customer's credit card is charged and the ticket is issued. If it's not acceptable, the customer's offer is declined. The airline flight inventory that Priceline is selling is not necessarily unique, but because Priceline has enjoyed a well-publicized patent on "name your own price online," few companies have entered the field of reverse auctions via the Internet, lessening the amount of technical innovation. Moreover, the patent has effectively limited the methods by which discounted or last-minute travel inventory can be presented to consumers. So although there is substantial doubt as to the validity of the Walker Asset Management patent, any company seeking to employ reverse auction sales on the Internet risks being sued and possibly become involved in a protracted and expensive lawsuit.

Hyperlinking

Perhaps the most striking example of a patent that could have a devastating impact on the technology industry is British Telecom's claim to own a patent on "hyperlinking," a fundamental tool for traversing the World Wide Web. In 1980, BT applied for a U.S. patent for a functionality that is somewhat similar to that of a hyperlink. While this patent was sought about 10 years before anyone ever heard of the Web, and well before its development as a core element of communications and commerce, BT has just recently attempted to assert claims under the patent. The existence of the patent was only recently discovered by BT during routine maintenance in the summer of 2000.

The essence of the BT patent divides the information on a particular page of software code into two categories: visible data, and data that can influence the display in response to a keyboard entry signal. While an interesting idea, it seems quite a stretch to assert that this claim was either unique or non-obvious -- even in 1980. Furthermore, the BT patent applied strictly to terminal apparatuses, not personal computers.

British Telecom faces another challenge to the patent from reports of "prior art" indicating that this form of organizational system had been developed and used by others as early as 1960. One programmer recently claimed that he invented a similar scheme, but recognizing the potential for the idea chose to publish his findings in an article instead of patenting it.

The enforceability of BT's patent will ultimately be resolved in the courts, as BT has sued Prodigy, one of the earliest commercial online services. The trial court recent issued a ruling that appears to significantly narrow the scope of the patent. However, the litigation may continue for years, and during its pendency a sword of Damocles will be hanging over the Internet industry. This leads to a very basic question: how do we avoid the circumstance in which one company claims ownership over an obvious, previously published, and widely used concept such as hyperlinking? Certainly, this broad form of

intellectual property protection does little "to promote the progress of science and useful arts."[7]

Addressing the Problem

The experience with one-click purchases, reverse auctions, and hyperlinking are illustrative of how the liberal issuance of business method patents can create perverse results. One shudders to think what might have happened if these kinds of patents had been liberally permitted throughout the last half century. Signature Financial Group obtained a patent on the hub-and-spoke system for mutual fund investment allocations, so shouldn't similar protection have logically been available for the original hub-and-spoke system of the airline industry? If electronic coupons distributed online can be patented, then what of paper coupons? If the technique of hyperlinking were controlled by a single company, what would the Internet even look like today?

Our Patent and Trademark Office is clearly overburdened by the huge number of patent applications for business methods and, lacking the resources to conduct a thorough prior art review for each such application, the results are predictable. In order to remedy this situation, Congress and the PTO must institute some basic changes to the procedures by which business method patents are examined as well as provide more meaningful opportunity for the affected business community to challenge the validity of a business method patent claim.

As a threshold matter, we do not accept the contention that business method patents are no different than any other patent. Clearly, these patents can be distinguished from more traditional patents, and are already subject to different rules than other patent claims. For instance, pursuant to the American Inventors Protection Act, enacted into law last Congress, business method patents may not be enforced against prior users. The PTO's Business Methods Patent Initiative also properly recognizes these patents as a distinct class. (Indeed, many foreign jurisdictions do not recognize business method patents at all.)

CCIA has advocated that the patent process for business method patents be made more transparent and provide greater opportunity for input by experts and those knowledgeable in the field. Many of these applications are highly technical or involve the identification of "prior art" that may not be easily unearthed by a patent examiner.

Business method patent claims based on Internet applications of obvious or well-known "bricks and mortar" business techniques should also be given greater scrutiny than a truly novel business method claim. Merely transferring a familiar or obvious process into a new communications medium should not provide an "inventor" with a twenty-year monopoly on that procedure. In the dynamic and innovative world of the Internet, transient monopolies and the leverage of "first movers" are common phenomena. However, if these nascent powers are given exclusive control over a mode of business *by statute*, then innovation, consumer choice, and competition will founder. Congress and

[7] U.S. CONST. Art. I, § 8, cl. 8.

the PTO should be reluctant to provide this monopoly status without a fair degree of certainty that the patent claims are valid.

Finally, the patent system should permit a more equitable means of challenging the validity of a patent grant. For instance, as discussed above, we are convinced that the "reverse auction" patent was wrongly issued. However, in order to vindicate this position, a competitor would be forced to initiate litigation that would likely end up costing their company hundreds of thousands of dollars, if not millions. For an Internet company striving to achieve profitability, such a significant charge on earnings without any assurance of success is not a good investment. There ought to be recourse other than the costly path of litigation to discharge this and other flawed patents. Sensible legislation would release competitive forces in otherwise stagnant areas of business.

CCIA recognizes that the Patent and Trademark Office has undertaken steps to address some of the complaints regarding business method patents. The PTO reports that it has hired additional, highly qualified examiners, and that it is providing added educational and training assistance for these examiners. Improving the Scientific & Technical Information Center - Electronic Information Center and supplementing other PTO resources are also important and useful undertakings. The PTO is also apparently reviewing patent review guidelines and procedures, which is obviously necessary.

Another recommendation, originally put forward by the American Intellectual Property Law Association, is to amend current law to provide for early reexamination of patents with a right of judicial appeal by a third party, and with no estoppel attaching to PTO determinations not reviewed by the court. While the reexamination process is often biased in favor of patent holders and appellate litigation is often a difficult and costly proposition, third parties should at least have the option to actively participate in these proceedings and should not be prejudiced in court by determinations made by the PTO Board of Patent Appeals and Interferences.

We also strongly support the longstanding efforts to restore all patent fees to the use of the PTO, rather than having them diverted to the general Treasury. Patent owners and applicants should not be forced to fund unrelated government programs, particularly in an era of budget surpluses. Such a "tax on innovation" is intolerable in a nation that thrives on the power of its ideas and ingenuity.

At bottom, we believe even more must be done to resolve the problems we are addressing in this hearing. Legislation introduced by Congressmen Berman and Boucher in the last Congress, H.R. 5364, the Business Method Patent Improvement Act, would be a significant advance in addressing this problem.

Congressman Howard Coble (R-North Carolina), Chairman of House Subcommittee on Courts, the Internet, and Intellectual Property, has also introduced legislation, H.R. 1886, which would provide for limited appeals by third parties for patent reexamination. While CCIA recognizes this legislation as being an important first step to open up the reexamination proposal, we believe the reforms in this proposal are too limited and do not address underlying concerns about the patent grant process. H.R. 1886 has passed the House of Representatives and awaits consideration by the Senate.

CCIA believes that urgent action is necessary and that significant harm could occur to important sectors of our economy if current policies and practices remain in place. The PTO has taken positive steps toward addressing the shortcomings in its review process, and some progress has been made. Other proposals to modify the examination and post-grant challenge process, such as those by Congressmen Berman and Boucher, should also be quickly adopted.

SECTION 1201 OF THE DMCA

As we anticipated at the time of the enactment of the anticircumvention provisions of the DMCA by Congress, the Act's fundamentally flawed constructs and the progress of technology have produced the need for additional exceptions to the circumvention prohibitions in the statute. Legitimate efforts to deliver new and innovative products to the market and to consumers have been thwarted or have been challenged as violations of the Copyright Act as amended by the DMCA.

We have recently observed the rise of litigation involving the reverse engineering of the encryption protecting Digital Versatile Disks. This litigation exemplifies the undue narrowness of the DMCA's reverse engineering exception, but to be clear, we support broadening the reverse engineering exception to facilitate the interoperability of any storage format with any operating system or software platform.

A Digital Versatile Disk, or DVD, is an optical storage disk that stores digitized data in essentially the same manner as a Compact Disk (CD), but has far greater storage capacity. In order to prevent unauthorized copying of the video and audio content on DVDs, a consortium of content producers and consumer electronics companies (the DVD Content Control Association (DVD-CCA)) created a method of protecting the data on DVDs. The Content Scrambling System (CSS) encrypts the data on each disk so that unauthorized users cannot play the DVD. The DVD-CCA has licensed a DVD decryption program to manufacturers of DVD players that attach to televisions, and also to manufacturers of DVD drives that run on personal computers that utilize the Microsoft Windows operating system. These DVD devices can play DVDs, but cannot copy them.

Unfortunately, until recently, DVDs were not usable by the growing number of computers operating with a Linux operating system. Linux is an open-source operating software program derived from another operating system known as Unix. Linux is envisioned by many as a potential competitor to Microsoft Windows as a platform for personal computing or workstations. Many members of CCIA are developing Linux products and are enthusiastic about its potential as an alternative operating platform for software applications and computing devices. However, the viability of Linux as a mainstream operating system will almost certainly depend on its ability to provide the most popular applications and to playback the most popular content formats, including DVDs.

It appears that Linux developers could not obtain a license for the CSS because they could not meet all of the secrecy conditions required for the license; the Linux movement is based on open-source software. Accordingly, Linux developers reverse engineered the CSS security and developed a program that implements the same decryption process used

in DVD players. As a result, Linux users could play DVDs and Linux vendors were provided the opportunity to be competitive with Windows and other commercial operating systems.

However, a program based on code from the Linux DVD project, DeCSS, was subsequently posted widely on the Internet. DeCSS does not appear to have the copy controls built into CSS, and the widespread availability of a means of circumventing the CSS control prompted the Motion Picture Association of America (MPAA) to bring suit in federal court in New York against operators of websites containing information and code related to CSS, including but not limited to those containing DeCSS. [8] The MPAA also sued an Internet Service Provider that hosted such websites. The court found against the defendants for violating the circumvention provisions of the DMCA.

Further, the court ruled specifically that the reverse engineering exception did not apply for three reasons. First, the court saw no evidence that the defendants actually were trying to promote interoperability. Second, the reverse engineering exception requires that the product that enables interoperability be used solely for that purpose. DeCSS, however, is a Windows program designed to decrypt video streams from DVDs and write them to disk. (The court neglected to distinguish other websites related to CSS and the Linux DVD player.) Because DeCSS can run on Windows as well as Linux, the court reasoned, it has purposes other than permitting interoperability. Third, the reverse engineering exception is available for achieving interoperability between computer programs, but the DVDs now available on the market contain motion pictures, not computer programs.

The judge's third rationale precludes the current development of a Linux-compatible DVD driver, or relegates such development to the control of DVD manufacturers. CCIA believes, however, that once a consumer purchases a DVD, he should be able to view it on any platform he pleases; he should not be locked into a specific platform mandated by the manufacturer. Accordingly, CCIA supports an exception to Section 1201 that would permit the development, sale, and use of a product that enables DVDs to run on Linux or another operating system.

In the Senate Judiciary Committee's report on the DMCA, [9] the Committee made clear that reverse engineering for the purposes of promoting competition and innovation was a primary purpose of the interoperability exceptions to the Act's prohibitions on circumvention of copyright protection measures.

> Sections 1201(g)-(j) are intended to allow legitimate software developers to continue engaging in certain activities for the purpose of achieving interoperability to the extent permitted by law prior to the enactment of this chapter. The objective is to ensure that the effect of current case law interpreting the Copyright Act is not changed by enactment of this legislation for certain acts of identification and analysis done in respect of computer programs. See *Sega Enterprises Ltd. v Accolade, Inc.*, 977 F.2d 1510, 24 U.S.P.Q.2d 1561 (9th Cir. 1992.). The purpose of this section is to foster competition and innovation in the computer and software industry.[10]

[8] *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).
[9] S.Rpt. 105-190.
[10] Id., page 29.

Clearly, the needs of Linux developers and users to make use of DVDs are within the intent and purpose of the DMCA interoperability exceptions. However, as the court in the DVD case noted, the Committee Report goes on to say that "interoperability" as contemplated within those exceptions is limited only to computer programs:

> This provision applies to computer programs as such, regardless of their medium of fixation and *not to works generally, such as music or audiovisual works*, which may be fixed and distributed in digital form. Accordingly, since the goal of interoperability is the touchstone of the exceptions contained in subsections 1201(g) through (j), nothing in those subsections can be read to authorize the circumvention of any technological protection measure that controls access *to any work other than a computer program*, or the trafficking in products or services for that purpose. [11]

Therefore, although the Congress intended for the DMCA "to foster innovation and competition in the computer and software industry," the Act does not seem to permit access to information other than computer programs for purposes of promoting competition. We believe that the reverse engineering exception should be broadened to allow this sort of activity.

I hasten to add that CCIA takes no position on whether all of the particular defendants named in the DVD action were in fact engaged in an a Linux interoperability exercise, or instead were seeking to facilitate piracy of films stored on DVDs. CCIA, of course, does not condone conduct aimed at facilitating piracy. However, CCIA believes that the DMCA should not stand in the way of legitimate Linux interoperability activities. Thus, we believe that reverse engineering resulting in the development of programs which allows DVDs to run on Linux, while at the same time preventing the copying of the content stored on the DVD, should be permitted.

DATABASE PROTECTION

For several years Congress has considered but declined to enact legislation to protect owners of established databases from competition. Claiming to be victims of database piracy or "free-riding," Reed-Elsevier, West Publishing Co., the New York Stock Exchange, and others now advocate passage of legislation, championed last Congress by Congressman Howard Coble (R-N.C.), to provide additional legal protections to databases. Others in business, the sciences and the non-profit arena believe an entirely new regime of intellectual property law is unnecessary, unwise and could have serious negative results impacting the flow of important information on the Internet and in an open society.

Creators of original works of authorship are afforded copyrights as a means of protecting their intellectual property. Just as one cannot seize the real property of another, copyright protection acts to ensure that one who uses another's intellectual property must compensate the creator of the work. Originality, however, is a constitutional prerequisite to obtaining copyright protection. The mere compilation of facts already in the public domain, in whatever form, does not meet this constitutional standard unless there is

[11] Id., at page 30 (emphasis added).

original selection, coordination, or arrangement in the compilation. This fact was driven home in the U.S. Supreme Court's decision in *Feist Publications Inc*.[12]

Congressman Coble's proposed legislation gave the owner of the database (the compiler of facts) unprecedented control over the use or reuse of the information contained in the database. A small group of database owners supported this legislation including Reed-Elsevier, the largest publisher of scientific journals, West Publishing Co., the largest legal publisher, the New York Stock Exchange, and the American Medical Association, which publishes the Physicians Desktop Reference. The Coble legislation would permit these companies and a few others to maintain a stranglehold on the compilation of facts and take ownership over information now in the public domain. In the Information Age, this sort of control could prove even more detrimental than may have historically been the case. It seems quite clear that such legislation, if enacted, would provide a significant financial benefit to a few who have undertaken the mere compilation of facts, while doing substantial harm to the Internet, scientific research, and scholarly studies.

Both this Commission and the Department of Justice have voiced objections to the Coble bill, citing serious constitutional reservations and concerns about the effect this legislation would have on competition and the spread of information. In addition, when Congressman Coble sought to include his database legislation as part of the Digital Millennium Copyright Act (DMCA) in the fall of 1998, the Senate opposed the proposal.

Last Congress, CCIA supported an approach taken by former House Commerce Committee Chairman Thomas Bliley (R-Virginia). Congressman Bliley's legislation, H.R. 1858, the Consumer and Investor Access to Information Act, sought to address the issue of piracy or "free-riding" directly. It would have created a right of action for the Federal Trade Commission to pursue those who misappropriated all or portions of another's database. In so doing, this bill would have added to the variety of existing protections database owners may assert to pursue "database pirates." These existing rights of action include, but are not limited to, copyright law, state contract laws, state misappropriation statutes, technical protection measures, and the prohibition of circumvention devices under the DMCA.

During days of hearings over the past several years on database protection legislation, supporters of the Coble bill and its predecessors have never been able to identify a single example of piracy that forced a company to close its doors. In the array of cases cited by those who supported the Coble bill, virtually every case was resolved under existing law in favor of the database publisher. While supporters of the Coble approach have failed to justify congressional enactment of major database legislation, CCIA believes the approach taken by former Chairman Bliley would adequately fill in whatever gaps may exist in the current fabric of database protection law that may exist. Most importantly, CCIA will oppose any database legislation that purports to create an implied property right in the underlying facts used to create databases.

In testimony on the Bliley bill before the House Telecommunications Subcommittee, I invoked the "law of unintended consequences" in reviewing the Coble database bill.

[12] *Feist Publications Inc.*, 499 U.S.

While we can all agree to oppose wholesale copying or unlawful duplication of databases, overly broad proposals would have harmful effects on the useful sharing of data, the growth of the Internet, development of e-commerce, and the ability of all consumers to benefit from the Information Age.

If a party who first publishes a database is able legally to control or restrict the development of other databases that simply utilize the same underlying facts, this will cripple the dissemination of information, especially that which can be delivered electronically. Facts have always been in the public domain. However, no one can deny that the manner in which facts are uniquely used, cataloged, analyzed or "massaged" may create a proprietary interest on behalf of the creator of the database. Nonetheless, facts can be used and databases developed for more than one purpose, and compilations of facts can be built upon with new information that in turn creates new databases. These transformative uses would be fully protected under the Bliley bill, but the creation of these new databases would be left to the whim of the original database creator under Mr. Coble's proposed legislation.

The development of transformative databases is an essential component in the advancement of scientific and scholarly research. The almost instant availability of work done by another over the Internet has added significantly to new scientific and scholarly research activities. It makes no sense to risk of reducing the flow of information while the Internet -- a revolutionary communications medium -- is in its infancy. If legislation is necessary, it should be balanced to protect only the ability of the author to be compensated for his or her original work and promote the development of new databases.

This Congress, the House Judiciary and Energy and Commerce Committees have struggled to formulate a consensus bill. If legislation does ultimately get introduced, we urge the Commission and the Antitrust Division to review it carefully to determine its impact on competition in the information sector of our economy. CCIA stresses the importance of not granting government sanctioned monopolies, through intellectual property rights, to the underlying facts of a database.

SOFTWARE AND IP

CCIA believes that these issues are particularly important in the development of products for the consumer and enterprise software markets. Because of Microsoft's dominant position in these markets, it has attempted to utilize the Copyright Act to achieve its anticompetitive objectives. Restrictive licenses required of computer manufacturers and zealous protection and concealment of interface specifications are among the primary tools that Microsoft has used to protect and extend its monopoly position and thwart effective competition in related markets. As a leading supporter of the Justice Department's case against Microsoft, CCIA recognizes that antitrust enforcement alone is not sufficient to restrain an aggressive monopoly. The protection of vital user rights under the Copyright Act is also essential to the preservation of competition and innovation in the software and computer industries.

As noted, CCIA has been an active participant in the antitrust proceedings against Microsoft, both in the United States and in Europe.

Microsoft's conscious and strategic exclusionary application of intellectual property rights on the markets in which it is active over the last fifteen years underscores the need to ensure that appropriate antitrust and intellectual property measures prevent an intellectual property owner from using his intellectual property rights to eliminate competition on the market. Over the years, Microsoft has used its intellectual property rights to maintain and strengthen its desktop operating system monopoly and to extend it into new markets by a variety of well-publicized means.

The case against Microsoft is currently pending, and there has been much discussion about it, but let me briefly fill in a few examples.

Microsoft has frequently used licensing practices to hinder innovation and new competition to its core monopolies. This is evident in their OEM licensing practices, which led to a settlement with United States and European authorities in the mid-1990s and which is today once again in the spotlight. As recently as this week, evidence has come out in the ongoing trial that Microsoft threatened OEMs who distributed Linux, a rival operating system to Windows. Recently released internal Microsoft e-mails discuss "hitting the OEM [Dell] harder than in the past with anti-Linux actions," while other e-mails urged Bill Gates and Steve Ballmer to remind Dell "of the meat of why it's smart to be partnered with Microsoft." [13] Additionally, Microsoft has used licenses with Internet Service Providers to lock out competitors and promote Microsoft products.

Microsoft has repeatedly refused to comply with open standards and often engages in the tactic of extending open standards and then protecting such extensions through intellectual property rights so as to make them proprietary, such as Microsoft's COM and DHTML. The end result is that developers must conform to the monopoly standard, a mutated form of the open standard. This gives Microsoft leverage to build products around their standards, and forecloses competitors from being able to offer suitable, competitive alternatives.

Microsoft also leverages its intellectual property to new markets, by a variety of means such as discriminatory licensing and bundle licensing. For example, Microsoft hides behind copyright protection to justify repeated refusals to disclose interface information related to its monopoly desktop operating system and personal productivity applications, and engages in discriminatory behavior toward competitors, aimed at conquering neighboring markets such as server operating systems and middleware markets. By denying competitors in neighboring markets the opportunity to achieve interoperability with its monopoly desktop operating system and personal productivity products, Microsoft is able to drive the adoption of Microsoft products by existing Microsoft customers dependent on this privileged degree of interoperability.

As a result of their entrenched monopoly and dominant position, Microsoft is able to leverage its desktop monopolies into new markets through copyright protection and its practice of bundling an ever increasing number of previously independent programs with its monopoly desktop operating system. In doing so, Microsoft has exploited the company's exclusive access to the principal software distribution channel (OEM sales of

[13] Jonathan Krim, "Microsoft Still a Monopolist, Holdout States Say" Washington Post (March 19, 2002).

computers) and has thereby effectively preempted consumer demand for competitors' products. If one already has Microsoft MediaPlayer on one's desktop, why take the trouble to locate, download and store a competitor's product?

I mention Microsoft solely in the context of it being the 800-pound gorilla in the corner, it would be impossible to have a discussion on the intersection of IP and competition policy in the high-tech sector without doing so. Clearly, if we are to discuss the role of license agreements, patents, and monopoly power, we must look at Microsoft as the prime example of the need for a robust competition policy. The resolution of this case and the remedies imposed upon Microsoft will be a primary determinant of the future of the competitive environment of this industry.

CONCLUSION

Clearly, this is an area that is rife with debate and one that we do not anticipate being settled in the near future. For that reason alone, we commend the Commission for holding this comprehensive series of hearings. It is important to understand, over the sometimes loud, rancorous debate, that a good middle ground can and should be found. Again, I return to the D.C. Court of Appeals admonition that IP laws should not trump or restrict antitrust laws. Just as our IP system is designed with the goals of fostering innovation and spurring competitive growth, we have seen many instances where the overbroad extension of these rights has done precisely the opposite.

Intellectual property should not be a tool to allow the first movers of obvious or widespread ideas from the brick and mortar world to gain a monopoly for these same practices in the online world. Facts underlying a database should not be afforded constitutional protection that the founders never envisioned and runs contrary to some of our most cherished rights. Programmers and academics should not be prevented from discovering the inner-workings of proprietary systems in an effort to develop new technologies or allow greater consumer choice. All these would have the unfortunate consequence of eliminating competition, and causing serious consumer harm to innovation and technological development.

How do we prevent all this from happening? The courts on the whole have been doing a good job preserving the fundamental balance between protection and competition that is found in the Intellectual Property Clause of the Constitution. However, I think that the other two branches of government haven't done as good a job, for obvious reasons. During the 1990s, some dominant companies persuaded Congress and the Executive that stronger intellectual property meant more jobs and more exports. The House Subcommittee on Courts the Internet, and Intellectual Property, and the Patent and Trademark Office within the Department of Commerce have been particularly persuaded by these arguments. Accordingly, intellectual property legislation over the past decade has steadily ratcheted up the level of protection, with less concern for balance, the public domain, and fair use.

Where can we find countervailing forces to the politically influential content industries? The courts can only do so much. They cannot create exceptions and limitations Congress explicitly rejected. Indeed, all the courts can do is find that the unbalanced statutes violate

the Constitution's Intellectual Property Clause. For its part, the Patent and Trademark Office is in the business of granting patents and registering trademarks. It would be unrealistic to expect the PTO to advocate strongly against the expansion of its jurisdiction and against the interests of its customers that fund its operations.

I submit that the Commission and the Division are the logical countervailing forces to the content industries. Their role is to protect the public against monopoly power, and the various corporate interests seek to expand their intellectual property monopolies through legislation. To some extent, the Commission and the Division have acted in this capacity with respect to various pieces of legislation on an ad hoc basis. I would urge both the Commission and the Division to increase their intellectual property policy capabilities significantly, so that they participate aggressively in the interagency and inter-branch process on behalf of competition, rather than deferring to agencies with merely technical expertise, such as the PTO.

I thank the commission for allowing me to speak on this matter and welcome any questions.