



Statement of the
National Retail Federation
National Council of Chain Restaurants
and
Shop.org
submitted to the
U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Commerce, Manufacturing and Trade
for its hearing on
“Update: Patent Demand Letter Practices and Solutions”
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Chairman Burgess, Ranking Member Schakowsky and members of the House Energy and Commerce Subcommittee on Commerce, Manufacturing and Trade, on behalf of the National Retail Federation (NRF) and its communities the National Council of Chain Restaurants and Shop.org, I appreciate the opportunity to submit this written statement to the Committee in connection with its hearing entitled “Update: Patent Demand Letter Practices and Solutions” held on February 26, 2015.

NRF is the world’s largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation’s largest private sector employer, supporting one in four U.S. jobs – 42 million working Americans. Contributing \$2.6 trillion to annual GDP, retail is a daily barometer for the nation’s economy. Retailers create opportunities for life-long careers, strengthen communities, and play a critical role in driving innovation.

Retailers are Significantly Impacted by Patent Troll Demand Letters

Members of the National Retail Federation appreciate the attention the Committee is paying to the issue of false and deceptive demand letters and their harmful effect on competitiveness and innovation. Many retailers are using capital resources to settle with or fight patent trolls’ infringement claims that they would otherwise use to invest in their businesses, engage in their communities, and create jobs.

Retail, at its core, is a highly competitive industry, and many retailers are using innovative technology creatively to expand and grow their businesses. Patent trolls, who are not investing in technological innovation, providing jobs or giving back to their communities, employ tactics that cut at the heart of this growth and ingenuity.

In recent years, hundreds of retailers have contacted NRF about this issue because they have been, or are currently, the target of patent trolls’ abusive behavior. The threat typically comes from firms whose business model is buying obscure patents that are about to expire and then either licensing the patents to retailers through the threat of litigation or filing lawsuits in an effort to force a settlement. Often retailers will choose to pay the licensing fee because patent litigation is prohibitively expensive.

Patent trolls sued more non-tech Main Street companies than tech companies in 2012.¹ Regrettably there is no concrete data on demand letters because, unlike lawsuits, they are not officially filed. Patent trolls employ a strategy that focuses on businesses such as retailers and restaurants because businesses that “use” technology, but don’t manufacture it, are more numerous. One manufacturer or vendor may supply a product or service to thousands of retail end-users. Thus, there are many more entities from which to demand a royalty. End-user retailers are also easy prey because they lack the legal resources and in-house expertise to fight complex patent infringement claims. Compared to high tech companies, retailers typically operate on thin profit margins. Patent trolls, knowing that retailers lack technical expertise, retail

¹ Colleen Chien, “Patent Trolls by the Numbers,” Patently-O, March 14, 2013.
<http://www.patentlyo.com/patent/2013/03/chien-patent-trolls.html>

stores operate on thin margins, and patent litigation is exorbitantly expensive, will often price a settlement demand (which may still be in the millions) below the cost of litigating, effectively blackmailing a retailer into settlement. This is an abuse of the system.

Patent trolls assert infringement claims often by sending reams of vague, misleading, or deceptive letters to businesses. The trolls demand that those businesses immediately purchase expensive licenses of uncertain value or face the threat of protracted and costly patent litigation. These claims are often based on broad concepts and general business methods (such as operating a retail business “online”), covering the use of technology in all areas of e-commerce and mobile retailing, in addition to specific software innovations. This approach is especially damaging to retailers, who rely on new technology to better serve their customers.

Trolls’ claims not only affect e-commerce and mobile retailing but also the operations of traditional “brick and mortar” retail stores. Some examples of the latter are claims that purport to cover the printing of receipts at cash registers, the sale of gift cards, and the connection of any device (such as a computer or printer) to an Ethernet network. Recently, patent trolls have sent demand letters to dozens of retailers and other Main Street businesses on technology directed to arrival and status messaging systems and methods for transportation, transportation logistics, cargo shipment, package delivery, package tracking and related industries. This is a primary function of a retail business dealing with supply chain logistics.

These cases rarely go to trial because the patent troll has no intention of ever taking the retailer or Main Street business to court. They know that their damages claims are so exorbitant, and the prospect of relief through litigation so time-consuming, that retailers will make a sound business decision and settle, rather than litigate. It has been reported that trolls lose 92 percent of cases that proceed to merits judgments; but, as noted, it is infrequent that a defendant has the fortitude to litigate.² Smaller retailers, in particular, may find themselves ill-equipped legally or financially to defend themselves from abusive claims, and dealing with these claims certainly inhibits their ability to innovate and grow.

The exorbitant costs associated with seeing a court case through to final adjudication are startling for retailers, especially small businesses. We have heard from our members that they spend as much as one million dollars or more annually on patent troll-related expenses and settlement agreements. These expenditures and the employee hours diverted to fighting patent trolls are precious capital resources that retailers would rather reinvest in their businesses. It is important to note, however, that many retailers do not have these types of resources to redirect to fight patent trolls. Therefore, those retailers often will settle the claim when they receive their first demand letter to make the problem go away.

NRF Support for Patent Legislation

NRF is engaged in discussions with Members of the Committee and Congress to address patent trolls’ tactics, including vague and deceptive demand letters and the abusive litigation practices patent trolls utilize.

² John R. Allison, Mark A. Lemley, and Joshua Walker, *Patent Quality and Settlement Among Repeat Patent Litigants*, 99 GEO. L.J. 677, 694 (2011).

Demand letters and new cases pile up while the court cases proceed. Retailers need certainty and clarity that only multi-pronged legislation, targeted at the asymmetry in the system that patent trolls exploit, will provide. Legislation, which should require that patent trolls include correct information and communicate fairly, should give Main Street businesses that certainty and clarity by making patent trolls explain their claims, protect innocent customers, make patent litigation more efficient, stop discovery abuses, make abusive trolls pay and allow for less expensive alternatives to litigation.

Conclusion

By papering Main Street businesses, including retailers, with broad and vague demand letters and filing an endless series of lawsuits against retail end-users alleging the same patent infringement claims alleged against manufacturers and service providers of a particular device or technology, patent trolls are able to cast a very wide net that hauls in a lucrative catch. They have proven that many of the companies they target will settle given the extraordinarily high demands they make and the costs those companies know it will take to fight even the most frivolous of alleged claims.

Addressing this abusive and growing patent litigation problem with common sense reform will help release retailers from the controlling grip on their industry that patent trolls currently enjoy. Because the retail industry contributes \$2.6 trillion to our nation's annual GDP, removing or even loosening this grip on retailers will allow innovation and growth to flourish, and undoubtedly benefit the overall U.S. economy.

Multi-faceted patent litigation reform, which includes requiring transparency and fairness in demand letters, is about stopping the lucrative business model used by patent trolls of asserting meritless patents and getting shakedown settlements. Only Congress can pass reform needed to put them out of business for good.

We appreciate your leadership and the Subcommittee's work on strengthening enforcement and dramatically reducing the number of bad faith demand letters that our businesses receive. With the possible exception of the patent-holding community, few businesses have either the expertise or the wherewithal to take multiple, million dollar patent claims to court. Trolls target Main Street businesses for just this reason, and thus are able to extract exorbitant settlements from each. NRF looks forward to working with you to address this growing and costly problem.