

April 8, 2014

Testimony of

Rheo Brouillard

On behalf of the

American Bankers Association

for the hearing

“Trolling for a Solution: Ending Abusive Patent Demand Letters.”

before the

Subcommittee on Commerce, Manufacturing, and Trade

of the

Committee on Energy and Commerce

United States House of Representatives



American
Bankers
Association

Rheo Brouillard
On behalf of the
American Bankers Association
before the
Subcommittee on Commerce, Manufacturing, and Trade
of the
Committee on Energy and Commerce
United States House of Representatives
April 8, 2014

Chairman Terry and Ranking Member Schakowsky, my name is Rheo Brouillard, Director, President and Chief Executive Officer of the Savings Institute Bank & Trust. My bank is a \$1.3 billion community bank headquartered in Willimantic, Connecticut. We serve communities throughout eastern Connecticut and Southern Rhode Island and have been in business since 1842. I appreciate the opportunity to be here to represent the American Bankers Association (ABA) regarding the impact of abusive patent demand letters on businesses. The ABA represents banks of all sizes and charters and is the voice for the nation's \$14 trillion banking industry and its two million employees.

Abusive patent litigation remains a serious threat for banks and financial institutions of all sizes across the country. Banks are often end users of technology and as a result, have been inundated by abusive and deceptive patent demand letters by patent assertion entities (PAEs), commonly referred to as "patent trolls." These patent trolls use overly broad patents, threats of litigation, and licensing fee demands in an effort to extort payments from banks across the country. These demand letters often prey on small businesses of all kinds, which do not have the resources to fight such false claims. Fighting these claims has a real cost: for banks it means less capital and fewer resources available for making the loans that drive economic growth.

At present patent trolls are able to make patent infringement claims for nothing more than the price of a postage stamp and the paper the claim is written on. These claims are often intentionally vague and based on shaky legal standing. However, when confronted with threats of expensive litigation, many banks—especially smaller banks—find that their only option is to settle, rather than paying millions to defend against extortive claims of patent infringement. Well-funded and sophisticated patent trolls take advantage of community banks with limited resources and little patent experience, and have amassed significant "licensing" fees from banks.

I have seen this first hand at my bank. We, along with 30+ other Connecticut banks, received a vague notice from a firm called Automatic Transactions LLC (ATL). The notice asserted that our ATMs operated in a way that infringed upon their “patent portfolio,” and simply listed thirteen sets of seven digit numbers as proof. What the notice failed to mention was that similar suits in other states had already been overturned. A settlement would have cost at least \$27,000 for my bank alone, and would likely have amounted to \$300,000 for the 30 Connecticut banks targeted. Fortunately, we found out about the cases that were dismissed and did not settle. My bank’s case is far from unique, and ATL is far from the only perpetrator using intimidation to target small businesses.

We thank Congress for seriously addressing this issue, and in particular commend the House for passing bipartisan legislation—H.R. 3309, the Innovation Act. This bill contains important reforms to help deal with the patent troll problem and is an important first step, but more could be done, especially by this committee. There are a number of actions that can be taken to protect small businesses against these abusive patent demand letters, which will also help protect the holders of legitimate patents. Chief among these is to ensure that more details are included, in other words more “transparency,” in any allegation of a patent infringement.

In my testimony today I would like to make the following three points:

- Patent trolls prey on small businesses, seeking to extort payments via underhanded tactics;
- The costs of “patent trolling” are real and measurable for the institutions targeted; and
- There are additional measures that Congress can take to protect American businesses while strengthening the rights of legitimate patent holders.

Patent trolls are able to prey on all small businesses¹—not just banks—because they believe that these companies lack the resources in either time or money to fight back. These targeted businesses face enormous costs from such unfounded lawsuits. We urge Congress to take action to ensure that our small businesses cannot be taken advantage of by patent trolls.

I. Patent Trolls Prey on Small Businesses, Seeking to Extort Payments Via Underhanded Tactics

Banks and small businesses of all types, face a serious threat from patent trolls that acquire portfolios of patents for the express purpose of extracting payments from anyone to whom the patent could possibly apply.

¹ ABA is working with the Main Street Patent Coalition, which consists of organizations representing banks, credit unions, retailers, app developers, hotels, restaurants, grocery stores, advertisers, direct marketers, and many other businesses that have been similarly victimized by patent trolls. www.mainstreetpatents.org

Protecting the rights of legitimate patent holders is critical for our economy; however, unlike legitimate patent holders, patent trolls use underhanded tactics to intimidate businesses into paying “licensing fees” to make them go away.

There is almost no cost for a patent troll to make a patent infringement claim. They are able to acquire numerous patents from bankrupt companies for next to nothing. They then must simply pay for the postage to send a letter alleging a patent infringement.

The letters that these patent trolls send are often purposely vague, providing little if any information that would justify the claim or enable a reasonable investigation of it. As noted above, some demand letters provide nothing more than a series of patent numbers as proof of a violation. My understanding is that in many cases there is little legal standing to their claim.

Typically, the patent troll strategy is to present a very short timeline—such as two weeks—within which to pay a settlement, threatening to escalate the action if payment is not made. The goal is clearly to scare targets into paying. Finally, to further encourage banks and other businesses to settle quickly, the patent troll will often file suit against one or more smaller entities in a particulate state in order to drive settlements and serve to intimidate others in that state to settle.

Simply put, patent trolls often target small businesses believing that these companies lack the resources in either time or money to fight back. Often these companies do not have a lawyer on staff competent to evaluate the demands. Even if a business can properly evaluate a patent demand letter and determine it has no legal standing, the legal costs involved in fighting the false claim often outweigh the cost of simply paying the patent troll. Patent trolls count on small businesses to take the least costly route and pay them regardless of their legitimacy.

II. The Costs of “Patent Trolling” are Real and Measurable for the Institutions Targeted

The costs of settling allegations of patent infringement are significant for the businesses targeted by patent trolls. As I noted at the outset, my bank was targeted by just such an attack. In some respects we were luckier than other troll victims, as we learned this patent troll had already had its claims overturned in another state. But settling would have cost my bank \$27,000 plus attorney fees, which would have been a needless loss that would have had a real impact on my bank.

Let me give some specifics of this attack. On January 3, 2013, my bank, and more than 30 other banks in Connecticut, received a single page letter (Exhibit A) from a firm called Automatic Transactions LLC (ATL). This firm purported that it held a “patent portfolio” which covers the manner in which ATMs communicate over the internet. The letter included an exhibit which simply listed thirteen sets of seven digit

numbers (Exhibit B). Further it claimed that an investigation had shown that our ATMs operated in a way that made them subject to the patents. It is interesting to note that among the Connecticut banks that received this demand letter, at least one does not operate any ATMs of its own thus drawing into question the validity of the claim of having conducted an investigation.

The letter stated that the sender had sub-licensed to more than one hundred financial institutions the right to continue to operate with the patents. It added that it had thus far brought suit against approximately ten financial institutions where an amicable solution could not be reached and provided a two week window for resolution.

On January 15, 2013, I wrote back indicating that two weeks was insufficient time to conduct research into the claim and make a decision and noted that, contrary to his claim, our ATMs did not operate on the internet but were rather connected to our core IT processor by hard land based phone line. On the 17th of January ATL responded with an offer to extend his deadline until February, 4, 2013.

For the \$0.44 cost of postage and several pieces of stationary, trolls like this one prey on the fact that litigation to defend one's self against patent infringement claims are very expensive, often times reaching seven figures. This type of conduct is not an appropriate use of both the U.S. mail system the U.S. patent systems.

ATL is far from the only patent troll targeting banks, and banks are not the only industry being targeted. This is a widespread problem, with businesses of all sizes seeing such attacks. Not only is the problem widespread, but it is getting worse, with the number of demand letters rising sharply each year. The costs associated with this problem are real for American businesses of all kinds and a significant drain on the U.S. economy.

III. Congress Should Take Action to Protect American Businesses While Strengthening the Rights of Legitimate Patent Holders

The issue of abusive patent demand letters is a serious one. Thankfully, there is straightforward action Congress can take that will both protect businesses as well as legitimate patent holders. We applaud Congress for actions it has already taken on the issue, such as passing H.R. 3309, the Innovation Act. This is a good first step, but more must be done. Any action to address this issue should include the following:

First and foremost, all patent demand letters must be made more transparent. Congress should fight deceptive practices by requiring basic information be included in letters seeking to enforce patents and there needs to be an effective enforcement mechanism for this at the Federal level. Requiring greater details about the patent that is allegedly infringed, how the person receiving the letter is infringing, who the real owner of the patent is, whether the patent has expired or has been invalidated, will disrupt the business model of those that are abusing the system. Patent trolls will have to do their homework and cannot simply send out

hundreds or thousands of letters without due diligence. This would also benefit legitimate patent holders as they would know what clearly constitutes a deceptive demand letter, providing them with certainty of how to assert a patent without any risk that it could be labeled unfair or deceptive.

Second, a demand letter registry should be created and made available to the public. Any entity that sends numerous demand letters in a single year should be required to enter them into the registry. This would provide patent troll victims and enforcement authorities with the information needed to identify and take action against the trolls that are sending abusive demand letters. It would also allow those targeted in the letters to more effectively form joint defense groups by pooling their knowledge about certain patent trolls, identifying counsel familiar with these trolls, and potentially reducing defense costs.

Third, entities found to be abusing the U.S. patent system should be required to reimburse the business that they have harmed for the costs associated with fighting the false claims. As it stands now, trolls face little risk in making claims, as the worst that can happen to them is for their case to be thrown out. This would discourage them by making them liable for the costs they force upon businesses if they are found to be at fault.

Finally, vendors should take responsibility regarding allegations of patent infringement. Any legislation enacted into law seeking to remedy abusive activities by patent trolls must also deal effectively with a related dilemma facing banks and other “end users” of technology. As I have experienced, simply purchasing a product and using it in the way that was intended by the manufacturer, distributor, or producer triggered a demand letter. No business should be threatened by a lawsuit from a patent troll simply for buying a product or service that they had nothing to do with creating. Vendors should protect their customers and intervene in cases where patent trolls are making infringement allegations based on the purchase of their products or services.

Conclusion

Abusive and deceptive patent demand letters are a serious risk for businesses of all sizes across the country. Small businesses—including banks—are the most vulnerable because these patent trolls know these firms have much fewer resources or experience to defend themselves. The demand letters use deceptive and threatening language and set short timeframes for payments in an attempt to scare businesses into settlements. Congress should act and lift this unnecessary risk from the shoulders of our small businesses.