

Abusive patent infringement claims threaten community banks

On behalf of the Independent Community Bankers of America (ICBA) and the nearly 7,000 community banks we represent, thank you for convening this important hearing entitled “Protecting Small Businesses and Promoting Innovation by Limiting Patent Troll Abuse.” We appreciate the opportunity to put forth our views on the issue of abusive patent litigation brought by patent assertion entities (PAEs), popularly referred to as “patent trolls,” which assert infringement of dubious-quality patents against legitimate businesses, including many community banks.

According to a recent study, direct costs associated with litigation brought by PAEs are substantial, totaling an estimated \$29 billion in accrued litigation and non-litigation cost in 2011.¹ Managing these aggressive and frivolous patent lawsuits has become an expensive distraction for an increasing number of community banks that often lack the financial and legal resources to properly dispute these claims and are forced to settle out of court. These claims and settlements sap valuable monetary, management and legal resources from community banks that would otherwise be directed toward serving the financial needs of their customers. What’s more, PAEs use settlements to build war chests to target other legitimate small businesses. We need tools to stop this vicious cycle.

ICBA appreciates the efforts of Congress in 2011 to pass the Leahy-Smith America Invents Act, which established a transitional proceeding at the Patent and Trademark Office (PTO), known as a Covered Business Method (CBM) review, to re-examine the validity of dubious business method patents. We are encouraged by the initial efforts of the PTO to “stand-up” the CBM program. If made permanent and more accessible to smaller community banks that may lack financial resources to cover the initial filing fees, the CBM review will mature into a valuable tool to combat these frivolous claims.

However, further steps are needed. Below, we suggest additional measures to protect community banks from the abuses perpetrated by PAEs.

Demand Letters

Community bankers across the country have seen a dramatic increase in the number of demand letters received from law firms representing PAEs. The typical letter states that the community bank is in violation of a patent or a suite of patents held by the PAE. Typically, the PAE is willing to settle or sell a sub-license, often a “limited or one-time offer,” to the community bank for using the technology in question. These letters are often accompanied by a list of patent numbers from the PTO but contain no description of what the actual patents are or how the community bank is in violation. The community banker is then forced to choose between costly and time-consuming litigation to challenge the patent or compliance with the letter’s demands, regardless of how dubious the infringement claims are. Compliance with the demand letter strengthens the PAE’s incentive to target additional community banks to extract exorbitant and fraudulent fees. Furthermore, if a demand letter is ignored, a second more threatening letter is often issued along a dramatic increase in the settlement or sub-licensing fee further illustrating the extortive nature of this act.

¹ The Direct Costs from NPE Disputes by James Bessen and Michael J. Meurer (Boston University School of Law) 6/22/12

To address this issue, ICBA urges Congress to pursue legislation that would strengthen demand letter transparency. Each demand letter sent by a PAE should be detailed and personalized to each recipient and not sent “scatter-shot” to dozens of community banks in a given state. Each demand letter should provide a detailed description of the patent, including each claim of each patent that is allegedly infringed, as well as a detailed description of the alleged infringement. The letter should also disclose the actual owner of the patent and all relevant case history involving the patent.

Additionally, a PAE that sends more than 10 demand letters in a calendar year should be required to enter these letters and other detailed information regarding their patents and their assertions of infringement in a Federal database housed at the PTO or the Federal Trade Commission (FTC). This would increase transparency in an extremely murky area and allow those accused of infringement to identify other similarly situated businesses to enter into joint defense funds and pool valuable legal resources. This would also decrease the tool of intimidation used by PAEs by letting those that receive demand letters know that they are not alone in this process.

Demand letters are a considerable drain on a community bank’s finite resources, even though community banks often opt to settle on receipt of a demand letter. Legislation that increases demand letter transparency would go a long way to helping community banks make informed decisions on whether to settle (“feed the troll”) or to fight the claim through litigation.

End User Indemnification/Warrantees

Community banks often white-label products that are purchased from vendors to serve their customers. Community banks are “end-users,” not creators of these products and services and should not be on the hook for the infringement claims of PAEs. Community banks are especially vulnerable to being sued because they lack the resources and market power to fairly negotiate the protections they need when contracting with large sophisticated vendors. Additionally, the vendors that provide these products and services to community banks often do not stand behind them with regard to patent issues. As a result, when a community bank is accused of infringement, the vendor, often better situated to refute the claim, sits on the sidelines and refuses to defend its customers.

To address this problem, Congress should amend current law to ensure that vendors that sell products or services to community banks provide the appropriate warranties and indemnification to protect the end users from patent infringement claims.

Thank you again for convening this very important hearing. We look forward to working with this committee to curb abusive patent infringement claims that threaten community banks and the customers and communities they serve.