



**FEDERAL TRADE COMMISSION
Washington, D.C. 20580**

**Comments of the
National Retail Federation
submitted to the
Federal Trade Commission
on June 18, 2014
regarding
Patent Assertion Entities**

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Patent Assertion Entity ("PAE"); Project No. P131203

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Introduction

The National Retail Federation (“NRF”) appreciates the opportunity to submit comments on the proposed information requests to Patent Assertion Entities (“PAEs”). The Commission’s study, pursuant to its authority under the Federal Trade Commission Act, 15 U.S.C. 46(b) (“6(b) study”), is a unique opportunity to gain a complete picture of patent troll activity through the collection of nonpublic information including licensing agreements, patent acquisition information, and data on PAEs’ costs and revenue.

PAEs have increasingly targeted retailers and chain restaurants and other end users of technology products, processes and systems over the past decade. A significant portion of the patent trolls’ business model is focused on pre-litigation tactics and settlements that include non-disclosure agreements, all of which have clouded the understanding of the PAE business model and obscured transparency into their practices. No one knows just how many thousands of patent-related demand letters are sent out by trolls each year; statistics only track actual patent infringement litigation in federal courts. The troll has to actually file a case in court before a judge is even made aware of the infringement claim, therefore it is impossible to get an accurate understanding of the full breadth of this problem. We do know, however, that more and more retailers and chain restaurants have notified NRF of this escalating problem. NRF appreciates and supports the Commission’s leadership in initiating this comprehensive 6(b) study to thoroughly examine the deceptive practices of patent trolls. The Commission’s 6(b) study is an important opportunity to shed much needed light on the shrouded activities of patent trolls.

As the world’s largest retail trade association and the voice of retail worldwide, NRF represents retailers of all types and sizes, including chain restaurants and industry partners, from the United States and more than 45 countries abroad. Retailers operate more than 3.6 million U.S. establishments that support one in four U.S. jobs – 42 million working Americans. Founded in 1996, Shop.org’s 600 members include the 10 largest online retailers in the U.S. and more than 60 percent of the *Internet Retailer* Top 100 E-Retailers. The National Council of Chain Restaurants has worked to advance sound public policy that serves restaurant businesses and the millions of people they employ for over 40 years. NCCR members include the country’s most respected quick-service and table-service chain restaurants. Retailers create opportunities for life-long careers, strengthen communities at home and abroad, and play a leading role in driving innovation.

Comments

Understanding the full spectrum of patent trolls’ strategies and tactics is critical for retailers to find relief from patent trolls’ abuse. Patent trolls are increasingly targeting traditional brick-and-mortar merchants, e-commerce companies, and chain restaurants alike. Trolls target retailers because, as end users of technology, they are more numerous than manufacturers and suppliers, and therefore are more profitable to the trolls. Trolls also know that retailers have less technological expertise to defend the allegedly infringing products. Retailers also operate on thin profit margins and rarely have the resources to fight back. Patent troll demands hamper technological innovation and adoption, crowd our court system, inhibit job creation, and ultimately drive up costs for retailers and prices for consumers.

In 2012, 62% of all patent litigation in the United States was initiated by patent trolls, and their lawsuits cost the economy tens of billions of dollars per year. According to a Boston University study, patent trolls cost businesses \$29 billion in 2011 alone. Patent trolls' litigation tactics force individual businesses to spend between \$350,000 and \$3 million on discovery for each lawsuit.¹ A LexMachina study recently found that plaintiffs filed 12.4% more patent cases in 2013 than 2012, showing a clear continuation of the trend towards increasing patent litigation.²

It is also important to note that patent trolls filed litigation against more non-technology companies than technology companies in 2012.³ The majority of these lawsuits are against retailers and other small businesses, 55% of which make \$10 million or less annually. Retailers of all sizes operate on thin profit margins and simply do not have the resources to fight back. The expensive nature of patent litigation allows patent trolls to take advantage of retailers and restaurants who do not have technical expertise and legal resources.

The litigation expenses retailers' face creates an economic incentive for patent trolls to engage in deceptive pre-litigation tactics. These include sending thousands, if not millions, of vague demand letters to end-users of allegedly infringing technology – including technology that is widely used and oftentimes previously licensed – even when the patent trolls have no intention of filing a lawsuit. At their core, demand letters use the threat of litigation as leverage to extract a “licensing fee” from the recipient business. Retailers often simply settle these nuisance claims rather than run the risk of protracted litigation in federal court. Put simply, it is often much more expensive to hire a lawyer to review or defend against a suspect claim than it is to pay the requested “fee.” This is the trolls' business model against retailers of all sizes, but especially small businesses.

Retailers often settle these nuisance claims because it is much more expensive for a retailer to consult with an attorney to determine the merits of the claim than it is to settle. Knowing this, trolls prey on retailers and send these vague and intimidating letters *en masse*. PAEs engage in harmful activity for which there is no compensating benefit and that imposes costs retailers and chain restaurants cannot reasonably avoid. Retailers consider the Commission uniquely positioned to adequately address the unfair and deceptive demand letters that patent trolls employ to extort licensing fees and/or settlement payments from Main Street businesses, and curbing PAE abuse is an important priority for our industry.

Retailers, chain restaurants, state Attorneys General, and manufacturers have shared anecdotal evidence of patent trolls' activity in several Congressional hearings recently which demonstrate how widespread and pervasive a problem patent trolls have become in the last decade. The Commission's 6(b) study will collect important information from a wider range of PAEs, further shedding light on the drain this activity has on the American economy.

¹ James E. Besson and Michael J. Muerer, “The Direct Costs from NPE Disputes” Boston Univ. School of Law, Law and Economics Research Paper No. 12-34, June 28, 2012.

² <https://lexmachina.com/2014/05/patent-litigation-review/>

³ Colleen Chien, “Patent Trolls by the Numbers,” Patently-O, March 14, 2013.
<http://www.patentlyo.com/patent/2013/03/chien-patent-trolls.html>

By sending demand letters and filing frivolous litigation, patent trolls hamper technological innovation and adoption, crowd our court system, inhibit job creation, and ultimately drive up costs for retailers and prices for consumers. Retailers would much prefer to serve our customers, create jobs, invest in innovation, and engage in our communities rather than fight or settle with patent trolls. We appreciate the work the Commission is doing to help understand and curb the patent trolls' extortionist tactics.