



National Retail Federation[®]

The Voice of Retail Worldwide

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

Comments of the

National Retail Federation

submitted to the

Federal Trade Commission

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regarding

Patent Assertion Entities

PAE Reports: Paperwork Comment; 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.

Over the last decade, end-users of technology products, processes and systems, including retailers and chain restaurants, have increasingly been targeted by PAEs (or “patent trolls”). 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. A recent Government Accountability Office study reported that the breadth of pre-litigation tactics used by PAEs are “unclear because we were not able to find reliable data on patent assertion outside of the court system.”¹ Therefore, understanding the full spectrum of patent trolls’ strategies and tactics is a critical element in patent litigation reform, and the Commission’s 6(b) study is an important opportunity to shed much needed light on the shrouded activities of patent trolls. NRF appreciates and supports the Commission’s leadership in initiating this comprehensive 6(b) study to thoroughly examine the deceptive practices of patent trolls.

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 \$2.5 trillion to annual GDP, retail is a daily barometer for the nation’s economy. 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, a division of the National Retail Federation, 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. Contributing \$2.5 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.

Comments

Patent trolls have taken advantage of brick and mortar stores, e-commerce sites, and chain restaurants by exploiting their inexperience in the traditional patent community through litigation and deceptive demand letters. We are encouraged that the Commission recognizes the negative impact this activity has on Main Street businesses and on our economy. When retailers weigh the costs and time involved in investigating the claim and litigating through judgment, even when they have discovered they are not infringing, they will often settle because they

¹ GAO-13-465, “Intellectual Property: Assessing Factors That Affect Patent Infringement Litigation Could Help Improve Patent Quality.” August 2013, pg 26, available at <http://www.gao.gov/assets/660/657103.pdf>.

simply do not have the resources to put up a lengthy legal battle. Fully understanding the resources and economic incentives driving the PAE litigation model with the Commission's comprehensive study is an important step in the patent reform process.

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, and as their activity has increased over the past two years, this number has likely risen dramatically. Additionally, patent trolls' litigation tactics force individual businesses to spend between \$350,000 and \$3 million on discovery for each lawsuit.² These lawsuits hamper technological innovation and adoption, crowd our court system, inhibit job creation, and ultimately drive up costs for retailers and prices for consumers.

A lesser known but equally important aspect of patent troll litigation is that more non-technology companies than technology companies were sued by patent trolls in 2012.³ The majority of these lawsuits are against retailers and other small businesses, 55% of whom make \$10 million or less annually. Patent trolls are increasingly targeting traditional brick-and-mortar merchants, e-commerce companies, and chain restaurants because, as end-users of technology products, processes and systems, they are more numerous than manufacturers and suppliers, and exponentially increase the return on the trolls' small investments in litigation expenses. Trolls also know that retailers have less technological expertise and no access to the manufacturer's proprietary design information to defend against the claims of infringement. Retailers of all sizes operate on thin profit margins and simply do not have the resources to fight back.

The high cost of defending against these suits creates an economic incentive for patent trolls to engage in deceptive pre-litigation tactics. These include sending thousands 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. 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*. It is important to the retail community that legislation addressing patent litigation reform also addresses the unfair and deceptive demand letters they employ to extort licensing fees and/or settlement payments.

The recent anecdotal evidence of patent trolls' activity offered by retailers, chain restaurants, state Attorneys General, and manufacturers who have testified before the Senate Subcommittee on Consumer Protection, Product Safety, and Insurance,⁴ and the House Energy and Commerce Subcommittee on Oversight and Investigations⁵ has demonstrated how widespread and pervasive of a problem patent trolls have become in the last six years. The

² 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.

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

⁴ <https://www.federalregister.gov/articles/2013/10/03/2013-24230/agency-information-collection-activities-proposed-collection-comment-request>

⁵ <http://energycommerce.house.gov/hearing/impact-patent-assertion-entities-innovation-and-economy>

Commission's 6(b) study will collect information from a wider range of PAEs than has been accessible up to this point.

We are particularly encouraged that the Commission has included Request F – “How do PAEs engage in assertion activity (i.e. demand, litigation, and licensing behavior)?” in the 6(b) study. However, it is vitally important that the other information request elements are included in the study to bring to light the entire scope of the patent troll business model and how they have effectively targeted end-users across the country and across industries costing the U.S. economy tens of billions of dollars in lost investment opportunities, jobs, and innovation.

Combating the rise of patent trolls is a priority for retailers so that we may get back to serving our customers, creating jobs, investing in innovation, and engaging in our communities. We appreciate the work the Commission is doing to help understand and root out the patent trolls' abusive litigation tactics.