

Statement for the Hearing
“S. 1137, the ‘PATENT ACT’ – Finding Effective
Solutions to Address Abusive Patent Practices”

Before the United States Senate
Committee on the Judiciary

Diane Lettelleir
Senior Managing Counsel - Litigation
J.C. Penney Corporation, Inc.

May 7, 2015

Chairman Grassley, Ranking Member Leahy, and members of the Judiciary Committee, I am Diane Lettelleir, Senior Managing Counsel – Litigation of J.C. Penney Corporation, Inc. I want to thank you for giving me the opportunity to testify today about the devastating impact of abusive patent litigation practices on J.C. Penney Corporation, Inc., (“JCPenney”). It is an honor to present our Company’s perspective, and I can assure you that our views are shared by other Main Street businesses around the country, including retailers, grocers, home builders, convenience stores, advertisers, restaurants, realtors and hoteliers.

And, on behalf of JCPenney I also want to thank the bipartisan sponsors of the Protecting American Talent and Entrepreneurship (“PATENT”) Act for their commitment to tackling this very important issue. This legislation will go a long way in addressing the abuses in these frivolous and damaging lawsuits that JCPenney and other Main Street businesses are facing.

J.C. Penney Corporation, Inc.

On April 14, 1902 James Cash Penney opened his first store in Kemmerer, Wyoming. Since that humble beginning 113 years ago, JCPenney has grown to be one of the nation’s largest apparel and home furnishing retailers. Today, JCPenney has over 1,060 stores employing approximately 114,000 associates across 49 states and Puerto Rico. We are headquartered in Plano, Texas.

JCPenney’s business model is simple – we sell quality, affordable men’s and women’s apparel, footwear and home products. While the business model is simple, the means we use to promote, sell, and deliver our products and services to our customers are not. As our customers embrace and utilize technology in their daily lives they expect retailers to do the same.

Therefore, to support and deliver the services our customers want and deserve, we employ innovative technologies to enhance the shopping experience both in our stores and online. Though we are experts in the retail business, JCPenney, like most Main Street businesses, have been ravaged by the exponential growth and aggressiveness of the patent troll industry.

JCPenney agrees that innovation and the US patent system are important to the economy and JCPenney respects the intellectual property rights of others. While patent protection and the right to enforcement are two important components of the innovation ecosystem, adoption of innovation is equally important. Innovation without the opportunity for commercial adoption of that innovation does not lead to economic growth or further innovation. The current patent infringement litigation reality is undercutting the opportunity for commercialization of innovation.

The Effects of Abusive Patent Litigation

The retail industry represents a large contribution to the national economy. There are currently just under 3.8 million retail establishments supporting 42 million jobs that contribute \$2.6 trillion annually to U.S. gross domestic product. The vast majority of the retail industry is made up of franchises and small businesses. In fact 98.6% of all retail businesses employ fewer than 50 people.¹

As members of this Committee know, abusive patentees continue to negatively impact JCPenney and other Main Street businesses. Each year, we collectively spend millions of dollars and thousands of hours of employee time fighting abusive patent litigation. Many smaller retailers who lack the resources to fight patent litigation have no option but to pay the demanded settlements because they do not have the expertise or money to fight in court. This money could have been used to expand their business, hire new workers or invest in new technology.

And, unfortunately, the problem continues to grow. While abusive patentees initially targeted the high-tech industry, they have expanded their focus to include Main Street businesses. In fact, in 2012, for the first time, non-practicing entities (“NPE”) reportedly sued more Main Street companies than tech companies.² The motivation for the shift in abusive patentees targeting strategy is easy to understand. Main Street businesses that only “use” technology are easy prey because they often lack the legal resources and technical expertise to fight complex patent infringement claims. Abusive patentees take advantage of these weaknesses and strategically offer settlements at a level set below the cost of litigation. The settlements offered are not based on the value of the claimed invention in the asserted patent or the merits of the asserted claims. Faced with this calculus and having little or no understanding of the merits of the claims, many Main Street businesses are forced to pay.

JCPenney’s Experience

JCPenney’s experience is similar to other retailers and provides a framework for understanding why this legislation is so important to Main Street businesses. JCPenney has been a defendant in 30 NPE lawsuits in the last six years and has had as many as a dozen active cases at any one time. In addition, JCPenney has and continues to receive threatening demand letters. None of these NPE lawsuits or demand letters relates to the items we sell; every claim relates to the technology we use to operate either the brick and mortar business or the ecommerce business. NPEs frequently seek tens of millions of dollars in damages in these cases.

¹ NRF, The Economic Impact of the U.S. Retail Industry, <https://nrf.com/resources/retail-library/the-economic-impact-of-the-us-retail-industry>.

² Chien, Colleen V., Patent Trolls by the Numbers (March 13, 2013). Santa Clara Univ. Legal Studies Research Paper No. 08-13. Available at SSRN: <http://ssrn.com/abstract=2233041>.

In parallel to the direct cost of defending patent infringement allegations, the steady stream of frivolous assertions has disrupted JCPenney's adoption of innovation from small inventors and small technology companies. The disruption manifests itself in two ways. First, JCPenney knows that by taking the step of adopting new technology, it becomes a target for abusive patentees. Second, the small inventor or technology company itself becomes a target of abusive patentees by virtue of its efforts to commercialize its innovation. In both instances, JCPenney knows that the small technology company or inventor will not have the financial strength to defend itself or JCPenney against those threats.

This dynamic has caused a shift in how JCPenney and many other Main Street businesses approach the adoption of new technology. JCPenney has a storied history as a driver and an early adopter of new technology. In the past, JCPenney provided many opportunities for small companies to pilot new technology in a limited manner. If the technology proved successful a small company had the potential to have that technology implemented more broadly. This was a win for JCPenney, our customers and for small technology companies providing new technology. Unfortunately, the cost to defend or settle abusive patent lawsuits has forced JCPenney to shy away from adopting technology offered by small inventors and small technology companies. JCPenney's shift away from start-ups and small technology companies has not been driven by concerns that the new technology actually infringed any patent. In most cases, the start-ups or small technology companies themselves own patents covering aspects of the technology they offered to JCPenney. JCPenney's shift away from start-ups and small technology companies is driven by the risk and expense of abusive patent litigation.

Solutions

I can confidently speak not only for JCPenney but also for similarly situated Main Street businesses when I say that Congress must step in to curb the abuse. This targeted legislation will address the existing asymmetries, and strengthen and restore a balance that has been missing for years in abusive patent litigation. While I believe all the provisions are important to curb these abusive suits I will focus in particular on three areas: demand letters, heightened pleading and customer stay.

The first is demand letters. Abusive patentees are continually harassing Main Street businesses with vague, misleading, and deceptive demand letters. The demand letters usually fail to include basic facts that any business would need to make an informed decision or an explanation of what the defendant makes or does that allegedly infringes. As a recipient of such letters, JCPenney has no way of determining its potential liability or making an informed decision about the best way to respond. This harmful and deceptive practice needs to be stopped.

The second is a heightened pleading standard. Under current law, a patent holder is not required to give notice in the complaint as to how a patent is infringed or even to identify a specific accused product or a specific asserted claim. Abusive patentees, therefore, are able to file cookie-cutter complaints based on little or no investigation with only threadbare, boilerplate recitals. An accused infringer is left without knowing what actions or products are accused of infringement, how to investigate the claim, prepare an answer, or which documents need to be preserved or produced. Discovery becomes an unfettered fishing expedition when the case is not defined in the complaint. Requiring a patent holder to give notice of the basis for alleged infringement will deter vague assertions and the resulting irrelevant discovery.

The third measure is customer stay. Parallel to filing suit against JCPenney for using a particular technology product, the abusive patentee may separately file a lawsuit against a manufacturer of the accused technology product. In some instances, a manufacturer of a technology product that learns that a number of its customers are being sued by the same patentee on the same patent may proactively file a separate lawsuit against the patentee for non-infringement or invalidity. Currently, when a second case is pending between the patentee and the manufacturer the judge in the customer case against JCPenney may agree to stay the case against JCPenney. If a stay is granted, the customer case against JCPenney is put on hold until the case involving the manufacturer is over. Then, if necessary, the customer case against JCPenney would resume.

The current motion practice associated with customer stays is expensive and drags out for months. The frequent denial of stays in customer cases by district courts allows abusive patentees to force the customer defendants to continue to spend significant amounts in defense costs and thereby perpetuates the abusive patent litigation model of forcing settlements not based on the value of the claimed invention but solely based on the avoidance of the costs of defense. The abusive patentee knows its cases against the customers likely will not be put on hold and that most customers will not have ready access to the evidence needed to defend themselves or the financial wherewithal to bear the high cost of litigation.

Customers and end-users should not be required to go forward defending patent infringement suits when there is a parallel pending action against the manufacturer of the same accused technology. A manufacturer is in the best position to defend against claims that its products are infringing, and indeed many manufacturers launch successful defenses, proving that the patents are invalid or not infringed. Allowing suits to go forward against customers while the manufacturers are still defending only enables the extortion tactics of abusive patentees, as the cost of defense is often too much to overcome for the end-users and they are forced to settle. In patent infringement suits against end-users, all proceedings should be stayed until resolution of the claims against the manufacturer.

The goal for retailers and other Main Street businesses is to have workable statutory stay language that provides an even application of the stay across all district courts.

Along with these important provisions the PATENT Act contains a number of other reforms and corrective measures, and of course some of these measures will be more effective for certain parties at dealing with the abusive patentees, while other reforms will be more effective at dealing with the situations faced by other parties. While we are especially concerned about implementing demand letter standards, heightened pleading standards and customer stay reform; JCPenney supports all the provisions contained in the PATENT Act.

In closing, let me be clear that we fully support the ability of small individual inventors and legitimate patent holders to market their products and bring claims to protect their intellectual property. But we believe that appropriate patent litigation reform can promote incentives for innovation and still curb the abuses rampant in patent litigation today.

Thank you, once again, Chairman Grassley, Ranking Member Leahy, and members of this Committee for holding this critical hearing. This is a vital step in shedding light on the growing problem of NPEs and the negative affect they have on business, innovation, and the economy. We urge Congress to pass meaningful reforms, without delay, so JCPenney and other Main Street businesses can spend more on jobs creation and productive endeavors that benefit the American economy, and less on abusive patent lawsuits.