

**Hearing: “Protecting Small Businesses and Promoting Innovation
by Limiting Patent Troll Abuse”
Question for the Record of Sen. Patrick Leahy**

Question for Dr. Steve Bossone, VP of Intellectual Property, Alnylam

You have expressed concern that some efforts to address the problem of patent trolls may have unintended consequences for legitimate patent holders seeking to protect their rights. What do you think are the best strategies for addressing abuses in the system in a meaningful way, without unduly burdening the rights of legitimate patent holders?

Answer

In my opinion, the bad faith-assertion of patents against small businesses is a discrete, and relatively recent, development that requires a relatively discrete solution. Seen this way, the implementation of generalized patent litigation reforms that would operate on all litigants in patent cases, that would - on balance - work to the benefit of defendants and against patentees, and that would make the enforcement of patents more costly and difficult for legitimate and illegitimate patent enforcers alike would seem to go too far.

Thus, in the first instance Congress should ask which of the many proposed provisions in the multitude of pending bills would most benefit small-business recipients of abusive demand letters? I believe that small businesses would be best served by:

1. Ensuring that demand letters be clearer and carry less of an “in terrorem” effect, so that unsophisticated small businesses would not be prematurely and unfairly “goaded” into paying unjustified and inflated claims;
2. Empowering willing manufacturers of allegedly infringing products to step in and test the validity of the claims on behalf of their customers, and thereby take enforcement pressure off end-users and retailers, including through a properly-crafted “customer stay” provision;
3. Ensure transparency and disclosure in the sending of widespread patent demand letters, which will facilitate the creation of registries where small-business recipients of demand letters can access information about the enforcement activity, get in contact with each other, learn about steps the manufacturer may have taken to resolve the issues, and explore joint action such as joint defense agreements or jointly approaching the manufacturer;
4. Exploring the role of public authorities such as the FTC in policing bad-faith demand letters as a matter of consumer fraud, unfair trade practices, and small-business protection.

I believe that S. 1720 would lay the basis for many of these concepts. In contrast, I do not believe that small businesses would greatly benefit from the generalized litigation reform provisions of other bills – certainly not to a degree that would justify the systemic burden on the vast majority of legitimate patentees who must defend their businesses against patent infringement. Litigation reform most benefits those who have the money and the will to litigate. The prototypical small

business that receives, for example, an out-of-the-blue demand for \$1,000 per employee because it uses scan-to-fax technology in its office simply will not benefit from the ability to engage in preliminary motion practice because a patent complaint did not comply with new enhanced pleading requirements. Such a business would not benefit from the ability to implead third party plaintiffs, from discovery stays pending claim construction, from “requester pays” provisions for electronic discovery, and other patent litigation reform concepts. Leveraging each of these provisions is costly and requires expensive lawyer time. Abusive patent enforcers will be acutely aware of that cost, and will always be ready to propose a settlement over an amount that is commercially more rational than litigating the claim. In other words, the proposed litigation reforms might “move the needle” on the amount needed to pay off a frivolous claim, but in the long run abusers of the system would simply demand “less money from more people.” The result would be that legitimate patent owners would be burdened with more cost and complication in enforcing their patents, while nothing meaningful is accomplished against the practices of abusers of the system. As sure as the sun rises tomorrow, Congress would be faced with more calls for more patent litigation reform in two years.

I would also note that many calls for generalized patent litigation reform are accompanied in public discourse by expressions of frustration over judicial inertia. It has been said that courts, or at least certain courts, are supposedly too slow in reacting to fast-developing abusive practices, unwilling to rein in out-of-control discovery practices, taking a laissez-faire approach to patent case management, and the like. On the other hand, most stakeholders seem to agree that courts already have the authority to implement much of what is now being called for in the form of hard-wired litigation reform legislation. I believe the judiciary should be given a chance to run its process. I also believe that at least some complaints are grounded in resource problems that should be addressed in the first instance. Just like there is broad support among the patent stakeholder community for adequately funding patent examination and patent review in the USPTO, there ought to be broad support for adequately funding the adjudication of patent disputes in the federal courts. I am perplexed that our nation would be willing to dedicate enhanced resources to administrative patent examination (or to the policing of demand letters by the FTC), but to not authorize the hiring of even a few additional law clerks in the federal district courts under the 2011 Patent Cases Pilot Program. For example, I am not aware of any inquiry as to whether perhaps 10 or 15 U.S. magistrate judges, strategically placed in the patent-busiest districts, might not have an enormous impact on patent case management, discovery management, and the like. Providing adequate judicial resources, in whatever form, seems to me an entirely overlooked aspect that really ought to be explored before turning to heavy-handed legislation that, on balance, is likely to carry a much greater societal price tag.

Thank you for the opportunity to comment.

**Hearing: “Protecting Small Businesses and Promoting Innovation by
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Question for the Record of Sen. Sheldon Whitehouse**

Proactive Action by Corporate Defendants

Many Rhode Island businesses have been the victims of patent troll abuse, receiving bad-faith demand letters and being forced to settle lawsuits or engage in costly litigation based on dubious patent claims. Small and medium-sized companies, many of whom do not have an attorney on staff, often do not have the resources to effectively fight patent troll abuse, which is why reforms such as prohibiting bad-faith demand letters and allowing manufacturers to stay suits against customers are necessary and appropriate.

Large corporate defendants, on the other hand, may have additional resources at their disposal that could allow them to take proactive steps to combat abuses by patent trolls. Consideration of such steps should be included in the discussion of how to address patent troll abuses.

Independent of legislation to reform the patent litigation system, what are some proactive steps that large corporations that are frequently defendants in patent suits could take to better defend themselves against patent troll abuses? In particular, please address the positive and negative aspects of the following potential actions:

- Referring patent trolls and their attorneys who initiate frivolous lawsuits and fraudulent and harassing conduct to the appropriate law enforcement authorities and disciplinary bodies, including, in the case of attorneys, state bar disciplinary boards;
- Pursuing equitable remedies, such as injunctions against future suits by trolls with a demonstrated record of frivolous litigation, fraud, and harassment;
- Pursuing Rule 11 sanctions against attorneys bringing frivolous suits;
- Increased use of joint defense agreements;
- Purchase of patent litigation insurance;
- Increased licensing and purchase of relevant patents; and
- Simply refusing to pay unjustified claims.

Answer

Thank you for the opportunity to comment. As a development-stage business with fewer than 200 employees, Alnylam does not have a developed position on the strategies and proactive steps that may be taken by large corporations to protect themselves from meritless infringement allegations by patent assertion entities. Accordingly, any attempt of mine to address in detail the above-described options would involve a great amount of speculation. I do believe, however, that several of the described options are already being employed. For example, I believe that non-payment of unjustified claims is not uncommon among large corporations. Likewise, referral of abusive demand letters to state authorities is occurring with some frequency and seems to be bearing fruit, if the recent settlement of the New York State Attorney General with the sender of the “scan-to-fax” mass demand letters is any indication. See: <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-groundbreaking-settlement-abusive-%E2%80%9Cpatent-troll%E2%80%9D>