

Targeted Reforms Needed to Protect Community Banks from Patent Abuse

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 on “Improving the Patent System to Promote American Innovation and Competitiveness.” The purpose of this submission is to explain the unique perspective of community banks and to provide recommendations based solely on that perspective. ICBA is an active participant in a diverse coalition representing the greater financial services industry and strongly supports their concerns as well. 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 trolling,” which assert infringement of poor-quality business-method 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. These claims sap valuable monetary, time and legal resources from community banks, and exhaust resources that would otherwise be directed toward serving the financial needs of their customers. PAEs often use the settlements to build considerable war chests to assert more patent claims against other legitimate small businesses, including community banks.

ICBA appreciates the efforts of Congress in 2011 to pass the Leahy-Smith America Invents Act, which establishes a transitional proceeding at the Patent and Trademark Office (PTO), known as a Section 18 proceeding, to re-examine the validity of certain low-quality business method patents. We are encouraged by the initial efforts of the PTO to “stand-up” Section 18 and are confident that, if made permanent, it will mature into a valuable tool to combat these frivolous lawsuits. However, PAEs still pose a significant threat to community banks. We urge Congress to strengthen the current Section 18 proceeding by making it more accessible for community banks and to provide relief from PAE “demand letters.” Congress should also toughen current law to make it clear that vendors must provide appropriate warranties and indemnification for patents related to products and services they provide to community banks.

Demand Letters

Community bankers across the country have seen a dramatic increase in the number of demand letters they have 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. Oftentimes 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 patents 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 demand letter, however frivolous it is. Compliance with the demand letter strengthens the PAE’s incentive to target additional community banks to extract exorbitant and fraudulent fees.

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 strengthen the current Section 18 proceeding by making it more accessible for community banks. We commend Judiciary Committee Chairman Goodlatte and the original cosponsors of H.R. 3309, the Innovations Act of 2013, for including an ICBA-advocated provision in the bill that provides the PTO with discretion to waive the costly filing fee required to initiate a Section 18 proceeding. Absent a waiver, it would be cost prohibitive for community banks to petition the PTO in this manner.

Community banks are also seeking clarity whether receipt of a demand letter in itself provides the recipient with sufficient grounds to open a Section 18 proceeding. To the extent that there is doubt as to what constitutes an accusation of infringement, warranting a Section 18 proceeding, Congress should clarify that a demand letter or other pre-litigation communication effectively asserts infringement thereby allowing the recipient to petition for a review proceeding based on such a communication.

Demand letters are a considerable drain on a community bank's finite resources. Any legislation that would increase the accessibility of a Section 18 proceeding to the community banking sector will bring more poor-quality business-method patents under review. Legitimate patents have nothing to fear from the Section 18 proceeding.

End User Indemnification/Warrantees

Community banks often white-label products that are purchased from vendors to serve their customers. As "end-users" of these products and services community banks 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. 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 their 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 infringement claims.

Closing

Thank you again for convening this hearing. ICBA is encouraged by the introduction of H.R. 3309, and we look forward to working with Chairman Goodlatte and the rest of the Judiciary Committee to address the proliferation of warrantless lawsuits brought by PAEs against legitimate small businesses including many community banks.