



April 28, 2014

The Honorable Patrick J. Leahy
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Charles E. Grassley
Ranking Member, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: Real Estate's Stake in "Patent Troll" Reform

Dear Chairman Leahy and Ranking Member Grassley:

The undersigned organizations represent all facets of the U.S. real estate industry. Our members construct, own, manage, lease, broker, and finance all types of properties across the country, including office buildings, single-family homes, apartments, hotels, industrial plants, retail, health care, and other establishments.

We write to explain how the real estate sector has been impacted by specious infringement claims asserted by non-practicing entities (NPEs), or "patent trolls." We urge your committee to swiftly pass meaningful reform legislation to curtail abuses when NPEs claim intellectual property rights in "sham" patents that are overly broad and lack integrity; send poorly researched but threatening demand letters to extort licensing fees from business owners; and file vague and frivolous lawsuits.

In 2012, patent trolls sued more non-tech companies than tech companies, at an estimated cost to the U.S. economy of \$80 billion on court battles. The number of defendants in patent lawsuits increased roughly 129 percent over the four year period from 2007-2011, according to the U.S. Government Accountability Office. Real estate businesses, tenants, brokers and service providers have been threatened and targeted with spurious patent infringement claims, in contexts that include the following:

- Building owners and tenants that use standard, off-the-shelf routers to provide Wi-Fi access for hotspots in lobbies, restaurants, atriums, and other common areas of buildings;
- Retail establishments that offer "store locator" functions and on-line platforms to enable purchases through credit, debit, and gift cards that assist consumers in deciding whether, where and how they buy ordinary goods and services;
- Lenders that offer web-based technologies at the core of the 21st-century banking experience such as check imaging, mortgage comparison shopping, and mobile banking apps that drive real estate transactions;

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- Hospitality establishments with websites providing on-line features and drop-down menus for business and vacation travelers to search for, reserve and purchase room stays;
- The Multiple Listing Service, a critical tool for real estate agents that uses location-based search capabilities to identify homes and other properties available for sale or lease;
- Businesses that attach scanned documents to emails to execute contracts, closings, and other commonplace real estate transactions; and
- Home builders and their contractors who use obvious processes to ensure that wood construction framing is sufficiently free of moisture for habitable, sustainable, and well-built environments.

Rather than researching and litigating patent infringement claims, our members wish to channel their resources to serve their core functions to satisfy the real estate needs of the American people – and create jobs in the process. To that end, we ask your committee to enact a package of common sense patent reform measures that includes:

- ***Improved Demand Letter Transparency.*** Reform legislation should effectively curb the widespread sending of vague, unclear, or misleading bad-faith demand letters. Legislation should require that demand letters contain certain basic information, such as a description of the patent at issue, a description of the product or service that allegedly infringes it, the names and contact information for the patent's owners, and disclosures of ongoing reexaminations or litigations involving that patent.
- ***Cheaper, Swifter Administrative Reviews of Poor-Quality Patents.*** As an alternative to expensive litigation, Congress should authorize more efficient administrative review procedures allowing the U.S. Patent and Trademark Office (PTO) to consider the validity of low-quality patents covering broader categories of software-related business applications. As trolls have expanded their targets outside of the financial services sector, such administrative proceedings should also allow for post-grant PTO review of patents that cover intangible methods of doing business with computers – where the evidence substantiates that the plaintiff is a troll. Improved post-grant review procedures should also be available for poor quality business method patents that seek to restrict access to commonly used business practices and processes. The post-grant review procedures in current law should also be made permanent.
- ***Heightened Pleading Requirements and Focused Discovery Procedures.*** In civil suits, parties with the burden to ultimately prove infringement claims should plead initial allegations at a level of specificity to identify each patent purportedly infringed, the products or methods that are the alleged instrumentalities of infringement, and the identity of all parties known to have an interest in the patent(s) at issue. Also, judges should be permitted to limit the scope of discovery (often the most expensive phase of litigation) if they determine that a threshold ruling to construe a patent's very terms and meaning is necessary.
- ***Fee Shifting and Bonding Provisions to Deter Frivolous Cases.*** Plaintiffs should show that their claims were reasonable and justified if they lose a case. If the party alleging infringement cannot convince a judge that it had a valid claim, then it should pay the attorneys' fees and costs borne by the party that had to defend the frivolous suit. Defendants should also be given the opportunity to request a bond up front to ensure that the party seeking a claim on the patent has adequate resources to turn over to the prevailing party that successfully defends against a claim.

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To be clear, validly issued patents warrant full protection to spur American innovation and ensure that U.S. businesses thrive in increasingly competitive marketplaces at home and abroad. Our concerns are with patent trolls who have no interest in producing any goods or services, have not put the sweat equity into the innovations they purport to protect, and simply wish to sue or otherwise coerce payments from real estate and other companies. The reforms we suggest above would not have a chilling effect on inventors who legitimately seek to protect their hard-earned intellectual property. Our recommendations would provide the U.S. real estate sector with the freedom it needs to operate within a rebounding economy.

We look forward to working with you as patent reform legislation moves through your committee and the full Senate.

American Gaming Association

American Hotel & Lodging Association

American Resort Development Association

Building Owners and Managers Association International

International Council of Shopping Centers

Leading Builders of America

National Apartment Association

National Association of Home Builders

National Association of REALTORS®

National Multifamily Housing Council

The Real Estate Roundtable

cc: Members of the U.S. Senate Judiciary Committee