

**Abusive Patent Litigation: The Impact on American Innovation & Jobs, and
Potential Solutions**

U.S. House of Representatives

Committee on Judiciary

Subcommittee on Courts, Intellectual Property and the Internet

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jcpenny

Good morning, Chairman Coble, Ranking Member Watt, and members of the Subcommittee. Thank you for the opportunity to testify today.

Every day, stories are written or broadcast about patent lawsuits between technology companies. But very little is ever reported about the large number of abusive patent lawsuits filed against retailers like jcpenny. Through my testimony I hope the Subcommittee will have a better understanding of the constant struggle, by jcpenny and other retailers, to contain the damaging effects of the abusive lawsuits that are brought by an ever growing group of increasingly sophisticated and well financed patent trolls.

My name is Janet Dhillon. I am Executive Vice President, General Counsel and Corporate Secretary of jcpenny. jcpenny is a 111-year old company founded by James Cash Penney in 1902 and today has 1,100 stores in 49 states and employs over 110,000 team members. We are headquartered in Plano, Texas.

jcpenny's business model is simple – we sell quality, affordable men's and women's apparel, footwear and a collection of 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 are employing innovative technologies to heighten the shopping experience both in our stores and online.

The fact that we reside in the Eastern District of Texas and that we are increasing our use of technology are two reasons that jcpenny became the target of patent trolls. Patent trolls know the cost of defense for retailers can be high and they use this as leverage to negotiate settlements. These lawsuits and settlements divert valuable resources away from our business and the communities we serve. Unlike retail, patent trolls do not manufacture or sell products to the American consumer. They don't build stores, contribute to charitable and civic organizations or create local jobs. They produce lawsuits against retailers and other businesses to enrich themselves and their investors.

Let me be more specific about the trolls' measurable impact on jcpenny. When I joined the company 4-years ago jcpenny had no patent cases. Over the last four years the company has had to defend or settle over two-dozen patent infringement lawsuits that have nothing to do with the products jcpenny actually sells. Keep in mind this number does not include those claims that are settled upon receipt of demand letters.

This onslaught of cases forced the company, for the first time, to invest in an infrastructure to respond to these cases including hiring an experienced patent litigator. I want to be clear. Patents play a very important role in our society and our economy. I appreciate the years of work this committee put into crafting and passing the America Invents Act (AIA). The legislation made important improvements to the United States Patent and Trademark Office (PTO) by increasing funding, organizational changes and enhanced post-grant and inter partes review procedures, which will protect the true inventors, reward true innovation and hopefully prevent the future issuance of more questionable patents the Non-Practicing Entities (NPE) are using to sue retailers.

However, more needs to be done because these lawsuits continue to proliferate. In 2012 the number of patent cases increased over the 3,600 cases filed in 2011. And for the first time a majority of the cases filed were by patent trolls. A recent study concluded that in 2007, 22% of patent cases filed were filed by patent trolls. In 2011 that number had risen to 40%.¹ Professor Chien of Santa Clara University Law School has found that upwards of 60% of all patent cases filed in 2012 were filed by trolls and virtually every patent case brought against a retailer is over a broadly defined and questionable patent.

The core of the problem is that patent trolls attempt to extend the reach of the issued patent far beyond the metes and bounds of what was allowed by the PTO. The PTO awards the inventor a narrow invention, but long after issuance, most times near the end of the life of the patent, the patent is acquired by a troll who then attempts to enforce the patent far beyond the invention taught in the patent.

¹ Sara Jeruss, Robin Feldman & Joshua Walker, "The America Invents Act 500: Effects of Patent Monetization Entities on U.S. Litigation," at 5 & 43-57, *Duke Law & Tech Review*, forthcoming.

For example, we have been sued for displaying catalog images and having drop down menus on our website, activating a gift card at the point of sale, browsing a website on a mobile phone or enabling a customer to put her purchases in an electronic shopping bag or cart. We have been subjected to multiple claims for providing information regarding our store locations to a mobile phone. These patents date back to the late 80's and early to mid-90's and all have had multiple owners with minimal or no continuing involvement of the actual inventor.

Defending suits against broadly asserted patents that are 15 to 25 years old is very difficult. Trolls know the evidence necessary to invalidate these patents has often been destroyed, potential witnesses have died or memories have faded, which makes reconstructing the prior art and proving the patent invalid almost impossible and extremely expensive. And the cost of defense is why so many of these cases settle without a judgment on the merits, which means that companies often settle even though no actual infringement might have occurred and patent holders are compensated far beyond any incremental value of the claimed invention.

A study by the American Intellectual Property Law Association reported the median cost of litigating a patent case asserting a single patent through trial is \$650,000 where less than \$1 million is at risk; \$2.5 million where between \$1 million and \$25 million is at risk; and \$5 million where there is more than \$25 million at risk. The discovery phase alone costs \$350,000 in the first category, \$1.5 million in the second category, and \$3 million in the third category.² In the retail business our margins are already thin and the decision to settle or go to trial and spend millions of dollars litigating what we know is a junk or hyperextended patent has to be weighed against the effect on our core business function of selling goods.

² American Intellectual Property Law Association, Report of the Economic Survey 2011.

All these lawsuits highlight one glaring problem. There is little downside to the patent trolls filing lawsuit after lawsuit. The trolls are experts in their ability to manipulate the process and suffer no disruption to an underlying business enterprise, which gives them the incentive to continue to harass retailers. If a retailer does challenge and ultimately proves it does not infringe, the ruling does not spell the end of the abuse because other retailers will be sued over the same patents and will have to decide whether they settle or face significant litigation costs. In other words, a finding of non-infringement in one case does not foreclose a different finding in the multiple other cases the troll has filed on the very same patent against other similarly situated retailers.

At the end of the day, jcpenny and other retailers have to ask the simple question: do we pay to settle or spend millions to invalidate patents we know are simply junk? It is a situation no company should have to answer but it is one we face on a regular basis. That is why I look forward to continuing this dialogue with the Committee in hopes of finding some sensible solutions to curtail these abusive suits while maintaining a robust patent system.

Thank you and I would be glad to answer any questions.