

HEARING: H.R. 9, "THE INNOVATION ACT"

HEARING
BEFORE THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED FOURTEENTH CONGRESS

April 14, 2015

Testimony of Kevin T. Kramer
Vice President and Deputy General Counsel
Intellectual Property
Yahoo! Inc.

Testimony of Kevin T. Kramer,
Vice President and Deputy General Counsel Intellectual Property
Yahoo! Inc.
Before the House Committee on the Judiciary
“H.R. 9, the Innovation Act”
April 14, 2015

Chairman Goodlatte, Ranking Member Conyers, and members of the committee, thank you for convening this hearing and for inviting me to testify today about reducing the impact of abusive patent litigation on American innovation, job creation and economic growth in the high-tech sector. Thank you, also, for listening to countless innovators and entrepreneurs for whom abusive patent litigation represents a real drain on resources, and for the excellent legislation you have put forward.

I'll speak about our experience at Yahoo with patent assertion entities, commonly referred to as patent trolls, and some of the common sense reforms that we think would make a difference. In particular, I discuss below the proposed reforms related to genuine notice pleading, prioritizing claim construction, establishing presumptive limits on discovery, and clarifying when prevailing parties can be awarded attorneys' fees.

Yahoo is a founding member of the Internet Association, a trade group representing the fastest growing sector of the US economy – the Internet. Through the Internet Association, we have been working with fellow Internet companies raise awareness of how abusive patent litigation harms our economy.

To begin, I'd like to offer some background about Yahoo's experience with patent trolls.

Introduction

Yahoo was one of the early pioneers of the World Wide Web and today serves more than 1 billion Internet users around the world. We are a global technology company focused on being an indispensable guide to digital information for our users. We provide products and services, many personalized, including search, content, and communications tools—all of them daily habits for hundreds of millions of users, on the Web and on mobile devices. Most of our products are available in more than 45 languages in 60 countries.

I came to Yahoo in 2009 to run IP litigation after many years in private practice litigating patent cases. Prior to that, I litigated cases for the US Patent and Trademark Office as a trial attorney in the USPTO Solicitor's Office. I also previously worked at the World Intellectual Property Organization, where I helped administer the Patent Cooperation Treaty.

As a patent litigator, I understand the need for companies and individuals to assert their intellectual property rights in a responsible manner to protect their investments in innovation.

However, I believe that the current patent system is being abused. I'm here today to share Yahoo's experiences with patent trolls and to tell you why Yahoo believes changes are still needed to restore balance to the system and to discourage abuse.

Our Experience with Patent Litigation Abuse

First, let me make clear that Yahoo believes in patents and the patent system. Patents have a positive role to play in society: they encourage investment, enable entrepreneurship and facilitate employment. At Yahoo, we have over 2,000 issued United States patents, a substantial portion of which cover software-related inventions. We invest millions of dollars every year on research, development and innovation to advance the technology that underpins our services and the Internet. Our patents help protect that investment against unauthorized use by competitors. We also currently have an active licensing program. Simply put, we value patents, participate in the system, and generally believe that the patent system works well for its intended purpose.

However, the patent litigation system is out of balance. Systematic abuse has led to increasing waste, inefficiency and unfairness. The historical trend of litigation illustrates the problem well. For example, from 1995, when Yahoo was founded, through 2006, Yahoo had between two to four defensive patent cases on its active docket at any given time. In stark contrast, since the beginning of 2007, Yahoo has had between 18 and 25 cases on its active docket at any given time. This dramatic increase in patent litigation is not unique to my company. Patents covering inventions applicable to the Internet are litigated nine times more often than other types of patents.¹ Accordingly, the dockets of many of our peer companies in the Internet industry have risen dramatically in the last eight years compared to historical norms.

Along with the increase in numbers, many cases filed against Yahoo have been of questionable merit. A few examples illustrate this point:

- In a case brought by a patent troll called Bright Response, the patent-in-question described ways to process incoming electronic messages, such as emails and voice messages. However, Bright Response overstretched the meaning of its patent claims and accused Yahoo's paid search advertising of infringement. Moreover, the asserted patent was based on a provisional application which explained that the claimed invention had already been in public use more than one year prior to the filing of that application. Thus, the patent, by its own admission, was invalid. Despite this, Bright Response pursued the case all the way through trial anyway. Although Yahoo prevailed as the jury found the patent both invalid and not infringed, it required years of litigation and a significant investment in money and resources to do so.
- In another case brought by a patent troll called Eolas and the University of California, Yahoo was successful in obtaining a jury verdict of invalidity of two asserted patents,

¹ John R. Allison, Emerson H. Tiller, Samantha Zyontz, Tristan Bligh, Patent Litigation and the Internet, STANFORD TECH. L. REV. 3, 7 (2012).

only to see Eolas continue to assert those same patents against others in the Internet industry.

- In yet another case, brought by a patent troll called Portal Technologies, the patent described a method for easily updating the information on a public kiosk. However, Portal overstretched the meaning of its patent claims in an attempt to cover the My Yahoo product, which offers personalized web pages for individual users – the exact opposite of a public kiosk.
- In a case brought by a patent troll called API, the patent disclosed a computerized method for conducting automobile diagnostic tests, yet API overstretched the meaning of the claims in an attempt to cover Yahoo's application programming interfaces.
- Another troll accused our maps service of infringing an Audubon Society patent for tracking the migration of birds.
- We were recently accused of infringing patent claims requiring a digital camera apparatus, which we do not sell.
- Recently, one troll filed a complaint against Yahoo in an effort to trigger a settlement with a third-party patent aggregator to which we have no relationship.
- And, one of our customers has been sued on a patent covering package tracking technology, even though we do not offer such technology or provide it to our customers. This patent is so broad that it could arguably be infringed it by someone shipping you something, watching UPS pick it up, then calling you to tell you they picked it up and asking if you want to contact UPS. The troll has asserted this patent in at least 70 other cases.

These types of cases are not substantially justified and impose needless burdens on our company. They should not have been brought in the first place.

The burdens imposed by patent trolls are real. Yahoo has spent about \$100 million since 2007 on outside counsel fees defending baseless cases like these. Every time a complaint is filed against Yahoo, it typically takes about two years to resolve and costs several million dollars. If the case actually goes to trial, it typically lasts at least another year and costs several million dollars more.

All of this represents lost opportunity. The time and money spent defending against abusive patent litigation could be spent more productively on jobs, new products, equipment or other investments.

Troll Litigation Remains at Historically High Levels

Opponents of patent litigation reform argue that patent troll cases are declining. In fact, patent litigation brought by trolls remains at historically high levels and the recent trend is upward.

According to Unified Patents, a company organized to track and combat patent troll assertions, in the first quarter of this year there were 13% more district court patent cases initiated

compared to the same period in 2014 and 29% more than in the last quarter of 2014. Unified reports that troll litigation accounted for 62% of cases filed in the first quarter of 2015, which is comparable with the percentage of cases filed in the first quarter of 2014. Unified also reports that troll assertions made up 84% of Q1 2015 high-tech cases, compared to 70% in Q1 2014 and 63% in Q4 2014.²

Companies and the PTO Have Roles but Cannot Solve the Problem

Two issues that deserve discussion are the role that defendants play in the system, particularly large corporate defendants who are often the target of patent troll litigation, and the ability of the PTO to curtail abuses through the patent process.

Yahoo believes we should do our part to address the troll problem. As such, we do several things to shape the landscape as best we can. First, we defend ourselves zealously and try cases when we have to. Second, we look to participate as a friend of the court in other significant cases before the United States Court of Appeals for the Federal Circuit or the United States Supreme Court. Third, we act responsibly when prosecuting our own patents before the USPTO. As a result, we have pursued fewer applications than we otherwise might have and have published more papers instead. Finally, we act responsibly when selling patents. Our policy is to sell patents only to operating entities rather than to non-practicing entities. We do not want our patents to be obtained by trolls and irresponsibly asserted against others in the Internet industry. But absent legislation, activities such as these will not restore balance to the litigation system.

Nor will improving patent quality through better initial examination, which is often discussed as a solution to the problem. Software development is an iterative, ongoing, evolutionary process that takes place on computers and servers around the world. That work typically does not find its way into patents or printed publications that the examiners at the PTO can easily access. As a result, the hard-working examiners at the PTO will never have all of the art needed to comprehensively examine every software patent application. Consistent with this reality, the law already recognizes that the PTO is not omniscient and never will be. This is why the Patent Act provides that issued patents are entitled only to a presumption of validity and gives defendants the ability to challenge patent validity in the context of infringement cases.

Congress Must Pass Common Sense Reform

By instituting common sense reforms that level the playing field and make patent litigation more just, speedy and efficient for all entities, Congress can make a meaningful difference.

Thank you, Chairman Goodlatte, and members of this committee for your straightforward approach to addressing a significant problem. I applaud the reintroduction of the Innovation

² See www.unifiedpatents.com for reports.

Act, H.R. 9, and urge this Committee to pass it again without delay so that countless American companies like Yahoo will have the tools to defend against patent trolls.

Below, I would like to highlight the legislation's provisions that would make patent litigation more efficient throughout the lifecycle of a case: genuine notice pleading, prioritizing claim construction, establishing presumptive limits on discovery, and clarifying when attorneys' fees should be granted to prevailing parties.

1. Require Genuine Notice Pleading

Meaningful reform would start by requiring genuine notice pleading in patent cases. We support the Innovation Act's provisions on this point.

Our experience may help shed light on the problem. More often than not, when a complaint is filed against Yahoo, we are left guessing as to the scope of the case. Since 2007, 79 patent cases have been filed against Yahoo. Only 15 of these cases -- just 19% -- identified the asserted claims of the patents in their complaints. Because patent claims are infringed, not patents, it is insufficient to identify only the asserted patent and not the asserted claims of that patent. Furthermore, although 61 of the complaints against us identified at least one accused product, only 28 identified the accused feature within the product that was alleged to have infringed. Because asserted patents are typically much narrower in scope than our products, such as Yahoo Sports, Finance or News, the relevant information is the accused feature, which is only provided about 35% of the time. Finally, only six patent complaints against us since 2007 provided both asserted claims and accused features of products. Thus, only in about 7% of our cases do we have genuine insight at the pleading stage into what those cases are about. In the other 93% of cases, we are required to litigate just to determine what is really at issue.

Yahoo's experience is consistent with patent infringement litigation as a whole. Yahoo recently commissioned Lex Machina, a leading legal analytics company, to conduct a study of complaints filed in patent cases in 2014. They found that in a sample of 500 cases filed last year, less than 1% of complaints identified a particular product feature or function and compared that feature to the specific claims at issue. That is, regardless of industry, *most patent cases get started without either party committing to what is specifically at issue.*

Consequences of lack of information.

Without this basic information, it is very difficult to begin to defend ourselves. For example, we cannot identify potentially relevant witnesses in order to institute hold notices to prevent inadvertent document destruction or determine our potential non-infringement arguments. We are forced to wait months until sometime during discovery when plaintiffs are required to provide infringement contentions or expert reports to learn what the case is really about. Accordingly, not providing the necessary information at the beginning of a case in the complaint slows down the litigation and makes it inefficient and expensive for both parties.

Notice pleading not a burden.

Opponents of reform argue that heightened notice pleading is not possible because plaintiffs do not know whether a product infringes until they have obtained discovery. But that is false and highlights the problems with the current system.

There is no reason that patent plaintiffs cannot be more detailed in their complaints and identify both asserted claims and the accused features of the defendants' products at issue. Right now, Rule 11 of the Federal Rules of Civil Procedure requires plaintiffs to conduct adequate pre-filing investigations prior to filing complaints. These investigations should include a comparison of the asserted patent claims to the accused products. Given that plaintiffs typically are required to do this work anyway, it is no burden to require more than bare-bones pleading in a patent complaint.

In fact, complaints filed in the International Trade Commission under Section 337 are often very detailed, including the identification of asserted claims and a detailed comparison of those claims to the features of the products at issue. If complainants before the ITC can plead patent cases with particularity, there is no reason not to expect the same from plaintiffs in district court cases.

Filing a complaint comes with responsibility.

We believe that filing a complaint comes with a social responsibility. When filing, plaintiffs are asking the levers of government to act on their behalf, including judges, juries, clerks and administrative staff. Plaintiffs absolutely have the right to come to court seeking justice for their perceived injuries; however, they should be fully prepared when they do so and should be encouraged to focus the litigation from the outset. In the patent context, this means providing more than just simple notice that they have a patent and a lawsuit. Rather, as proposed in the Innovation Act, this means "identification of each claim" of the patent allegedly infringed, and "identification of each accused process, machine, manufacture, or composition of matter. . . alleged to infringe the claim." If the plaintiff cannot include this information about each asserted claim, then that claim should not be included in the complaint.

These common sense proposals in the Innovation Act will help to focus litigation from the start, and make it more efficient for all parties.

2. Limit Discovery Pending Claim Construction

Another area where Congress can bring meaningful reform is in the staging of events in patent cases. In particular, we support the Innovation Act's presumptive limits on discovery pending claim construction.

Claim construction represents a decisive point in most patent cases. Once the court construes the claims at issue in the case, the parties have much more clarity as to the issues to be

litigated, if any. In fact, claim construction often determines infringement. To this point, Yahoo has had numerous cases be resolved either on summary judgment or through outright voluntary dismissal by the plaintiff shortly after the district court has issued claim construction. In several other cases, claim construction has resolved the district court phase of the litigation pending review by the Federal Circuit.

Given the potential impact of claim construction, it is only logical that it take place early in the case and before any unnecessary discovery is required. In fact, several of our cases have previously adopted this type of a schedule, including in the Western District of Texas and a recent case in Delaware. The Innovation Act would simply encourage that this common sense approach be adopted more broadly.

Appropriately, the proposal in the Innovation Act allows the district court discretion to expand the scope of discovery during the claim construction phase when the facts of the case warrant. Accordingly, we believe that the proposal in the Innovation Act presents a balanced approach.

3. Establish Presumptive Limits on Discovery

Discovery is a vital part of the legal process. However, discovery without limits enables abuse. Because placing sensible, presumptive limits on discovery will help level the playing field between patent trolls and those defending themselves, we support the Innovation Act's provisions on this point.

Again, our experience sheds light on why presumptive limits are necessary. In a typical troll case, we are asked to provide *hundreds of thousands of pages of documents*, including emails from *anyone* with relevant information, their attachments to those emails, such as word processing documents, spreadsheets and presentations. For typical defendants, the more information processed for discovery, the more costs are incurred given both processing fees and time for attorney review. Despite all of this cost and production, emails and their attachments do not typically describe how our products perform or why. As a result, in the four trials that we have had, relatively few emails or electronic documents got introduced as evidence or exhibits. In my experience, *less than 1%* of the electronic documents that get produced actually get used at trial.

In contrast, because patent trolls are typically shell corporations that do not make any products or services and have few employees, they are immune from the rigors of the discovery process. That is, trolls are free to harass defendants with repeated overbroad discovery requests without fear of reprisal because their own discovery obligations are negligible given that they have no documents or electronic information to identify, collect, process, and produce.

In the typical case, what is needed to assess whether a Yahoo product infringes a patent claim is the source code for that product or feature at issue. In fact, in each of the three trials we have had where our infringement was at issue (one trial only covered invalidity of the plaintiffs' patents), our source code was a central part of the case.

As a result of this experience, it makes practical sense to presumptively limit discovery in the first instance to core documents. We applaud the prior effort of the United States Court of Appeals for the Federal Circuit, which had previously issued a model order that district courts could use to help alleviate the burdens in troll litigation by placing presumptive limits on discovery. In addition, we believe that it makes practical sense for the Judicial Conference to develop rules that will allow for additional discovery “if such party bears the reasonable costs, including reasonable attorney’s fees, of the additional document discovery” as proposed in the Innovation Act. Such rules would encourage all parties in litigation to act more responsibly by focusing the case on those things that matter to the outcome of the litigation.

4. Clarify When Prevailing Parties Can Recover Fees

One of the most beneficial things Congress can do to bring balance to the system is to clarify the fee-shifting provision that exists in current law. We appreciate the Innovation Act addressing this important issue.

The concept of fee-shifting is not new or radical. In fact, the Patent Act has included fee-shifting in Section 285 since 1952. The current standard for awarding fees is that the case must be “exceptional.” Last year, the Supreme Court clarified that “exceptional” means “exceptional” and rejected the prior requirement to show that a losing party’s case was both objectively baseless and brought with bad faith. However, the Supreme Court also held that district courts have the discretion to determine what “exceptional” means in any given case.

Given that the discretion to award fees remains with the district court judges, and that discretion may be exercised differently by different judges, the plaintiff’s choice of forum will impact a winning defendant’s ability to recover fees. For example, the judge with the largest patent docket in the country, in the Eastern District of Texas, recently gave an interview in which he said that he did not see the Supreme Court’s cases on this issue “changing what we would have determined was appropriate for an award of fees even before that case came out.”³ Of course, before the Supreme Court cases on this issue, the award of attorneys’ fees to a prevailing defendant was extremely rare.

Despite prevailing at trial three times and winning eight summary judgments in the last seven years, Yahoo has not been awarded attorneys’ fees. The prevailing wisdom in our cases seems to be that we should be happy we won and simply walk away without continued motions practice, regardless of how egregious the merits of the underlying case brought against us. Without a change in the law, this judicial reluctance toward granting attorneys fees will continue. And without that threat of fees, there is no disincentive for plaintiffs to file weak cases or, worse yet, bring weak cases to trial and force defendants to spend large amounts of money to defend themselves.

³ “Judge Gilstrap Keeps Eastern District’s Tight Ship Afloat,” IPLaw 360 (March 6, 2015).

The Innovation Act would ensure that judges shift fees in unreasonable cases, creating a presumption of fee shifting unless the non-prevailing party's position and conduct are reasonably justified in law and fact or special circumstances indicate that an award would be unjust. That is, if the non-prevailing party has a reasonable case, then the court should not award fees. As a society, that seems like the least we should expect from the parties to a civil action -- reasonable behavior. Accordingly, we support these provisions.

5. Identification of, and Joinder of, The Real-Parties-in-Interest

In most cases, a defendant goes to court knowing who is on the other side. In stark contrast, the troll model is such that a patent defendant often does not know, beyond the name of a shell corporation plaintiff, who has an interest in the litigation and the patent at issue. Yet this is knowledge that will inform decisions around every facet of a case, including whether and when to settle.

Again, our experience plays a role in our viewpoint on this issue. In several cases, settlement has been complicated by the "investors" or "partners" that had a financial interest in the litigation against Yahoo. This often comes to light during mediation or settlement talks when a plaintiff reveals that it cannot accept a lower offer because it would not satisfy unnamed investors in the endeavor. Transparency into the ownership stakes in a patent or in the plaintiff would help to ensure that the parties at the bargaining table are the ones with the ability to settle the litigation.

Further, it is worth noting that a patent is a government grant. Like real property or any other government grant, it is reasonable to expect that the government's records disclose who owns that right. If anything, the expectation should be greater in patent cases given the ability to enforce that right through litigation and the strict liability for infringement.

Finally, there is a fundamental fairness about transparency of ownership that should be considered. In any case, a defendant should be entitled to face their accuser. Absent transparency of ownership, and the ability to join real-parties-in interest to the litigation, a patent defendant may not have that opportunity.

For these reasons, we support the proposals in the Innovation Act to require the disclosure of those who own a financial stake in the patents in lawsuits and the plaintiffs in those lawsuits, as well as those proposals which allow courts to join interested parties such as assignees, those who have a right to enforce or sublicense, and those with a direct financial interest in the patent or patents at issue.

The Courts Cannot Legislate

Opponents of patent litigation reform argue that reform is not needed because a series of decisions by the Supreme Court have greatly changed the landscape. This is wrong for several reasons.

First, the Supreme Court's rulings, while touching on some of the issues causing abuse in the patent system, are constrained by the letter of the patent statute and make only incremental changes to the common law that are directly applicable to the litigants before them. In sharp contrast, Congress can change the law for everyone and can provide more comprehensive changes necessary to balance the playing field.

Second, although there have been cases benefiting patent defendants, many cases make patent litigation more complex and difficult. For example, whereas the Supreme Court's *KSR* decision made the obviousness inquiry more flexible and less mechanical, the Supreme Court's *i4i* decision upheld the high burden of proof needed to prove a patent claim invalid. Whereas the Supreme Court's decision in *Nautilus* clarified the indefiniteness standard, the Supreme Court's decision in *Teva* determined that there are indeed fact questions underlying the claim construction inquiry. This last case may result in longer and more complex claim construction proceedings in which expert testimony may be required. While *Alice* should help rein in assertions on patents claiming only abstract ideas, its applicability will have to be assessed on a case-by-case basis and it will likely not impact cases in which the asserted patents claim specific computer hardware apparatus.

Third, federal judges must treat all corporations as equal in the eyes of the law. That is, they cannot draw distinctions between non-operating shell corporations and operating companies that make products and employ thousands of people and decide which one is better for American society. In sharp contrast, Congress has the freedom, privilege and power make broad policy changes through legislation and distinguish between certain types of activity. Only Congress can change the law to prevent the federal courts from being used as a sword to extort money from operating companies.

Finally, developing the common law is a long and slow process. The patent troll phenomenon has been particularly acute since 2007, and despite the dedication of zealous litigants and hard-working judges, the problem continues and has recently been on the upswing. In sharp contrast, Congress has the ability to act decisively to restore balance and transparency to the system so that patent litigation levels return to prior levels.

Conclusion

Thank you again to the Committee for your ongoing leadership in promoting American innovation, and for your time today discussing how to reduce meritless patent litigation by giving defendants the tools to defend themselves, and restore needed balance to the system.

The bottom line is that abusive practices by patent trolls harm our business, the Internet industry, the US economy and the innovation ecosystem. To make the entire system work better we understand that we in industry need to do our part, but some common sense reforms are needed too. Only Congress can advance these reforms.

Because Yahoo has been both a defendant and plaintiff in patent litigation cases, we appreciate how very important it is that Congress get this right. We need a solution to the patent troll problem that curtails abuse, but allows for the assertion of reasonable cases. H.R. 9, the Innovation Act, is that solution. The Innovation Act would help restore the desired balance between encouraging innovation and discouraging abuse. It would do that by focusing the litigation from the start, prioritizing important decisions like claim construction, limiting unnecessary discovery, joining real parties in interest to the litigation, and establishing a presumption toward fee shifting for unreasonable cases. These common sense changes would benefit both plaintiffs and defendants alike, while still giving the district courts the necessary autonomy to manage their dockets.

Thank you to the members of this committee who supported the Innovation Act in the 113th Congress. For those who did not, I hope the facts I have laid out for the committee today will allow you to lend your support now. We encourage Congress to move quickly to pass H.R. 9.