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Patent Trolls Continue to Target Financial Institutions, but Change May Be Near

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For patent trolls, the end may be near. After years of extorting tribute from America's financial institutions, patent trolls can expect 2014 to be the year of living dangerously.

A patent troll is an entity created solely to make money by claiming intellectual property rights and filing lawsuits.

Once upon a time, patent trolls challenged the Googles and Oracles of the world. Patent trolls have already demanded billions of dollars from grocers, hotels and retailers without the time or money to litigate. According to press accounts, one patent troll sent 8,000 letters to small businesses demanding compensation because the companies provided Wi-Fi to customers.

As New York's Attorney General Eric Schneiderman has stated, "so-called 'patent trolls' exploit loopholes in the patent system and have become a scourge on the business community."

Recently the financial services industry has been increasingly targeted by patent trolls. In fact, since May 2013, one of the world's largest patent-holding companies has filed infringement lawsuits against eight leading U.S. banks. In many cases the patents referenced in these suits are alleged to cover standard functions such as ATMs and mobile and online banking platforms as well as data security methods. But patent trolls are not targeting just large financial services providers. Oftentimes, their legal strategy involves targeting community banks and credit unions that are more likely to settle because they may not have access to the resources to fight patent trolls in drawn out litigation.

The problem is growing. Litigation has threatened to replace innovation as a way to make money. A Boston University study found that in 2011, 2,150 companies were forced to mount 5,842 defenses in lawsuits filed

by patent trolls, up from roughly 1,400 in 2005.

Fortunately, the rules of the game may change. Patent trolls face life-threatening challenges on numerous fronts. President Barack Obama has said patent trolls "hijack somebody else's idea and see if they can extort some money out of them." In his State of the Union address, Obama urged Congress to "pass a patent reform bill that allows our businesses to stay focused on innovation, not costly, and needless litigation."

Despite the partisan divide in Washington, the president may get his wish. The House overwhelmingly passed legislation to eliminate abusive patent lawsuits against corporations and small businesses that purchased high-technology. The bill requires companies filing infringement lawsuits to disclose more information and encourages judges to require losing plaintiffs to pay defendants' legal fees. Senate Judiciary Committee chairman Patrick Leahy (D-VT), introduced a similar bill late last year.

The U.S. Federal Trade Commission (FTC) may join the effort, deploying its broad consumer protection powers. The FTC has threatened to sue arguably one of the worst — and most innovative — patent trolls, MPHJ, for deceptive trade practices. The company holds a set of patents covering the process of scanning a document and then e-mailing the file with a single click. MPHJ does not challenge the scanner manufacturers, but it has sued more than 16,000 small businesses, requesting licensing fees or demanding a halt to the use of the scanner technology.

The U.S. Supreme Court could deliver a knockout punch to patent trolls. The court has accepted an unprecedented six patent cases for review this term. Expectations are high that the court will reign in abusive patent litigation, perhaps by forcing patent holders to pay attorney fees if they lose in court. In late January, the court ruled 9-0 and reversed the Federal Circuit in the first of the six cases, a decision interpreted as a signal of the court's readiness to reset the patent rules.

Also, in mid-January, the court declined Soverain Software's appeal in what many saw as a frivolous lawsuit against e-commerce company Newegg. A circuit court held that Soverain's patents for online electronic shopping carts used by retailers were invalid because the patents simply applied the common sense concept of a shopping cart to the Internet.

At the state level, aggressive attorneys general in Vermont, Minnesota, Nebraska and New York are attacking patent trolls and winning. New York reached a settlement with MPHJ that blocks the company from harassing business that the company previously contacted and requires refunds for companies forced to pay for a product license.

For patent trolls, it's been a bad year. But recent developments produce a celebration for financial institutions, small businesses and the innovators driving the economy forward.

Financial institutions can take steps now to prepare for patent trolls, regardless of the outcome of current legislative activity. Before going to market with a new product or service, search for existing patents that may cause problems. If a problem is identified, there are several options including licensing, purchasing or redesigning the patent. Additionally, financial institutions should review their technology vendor contracts and ensure that they contain an indemnity agreement that passes such risks and defense costs to the vendor.

If you have any questions regarding patent trolls, or if your financial institution receives a demand letter alleging patent infringement, contact your Vorys attorney for assistance.