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Major retailers and tech companies support Netflix over attorney fees

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Netflix Inc.'s bid for the U.S. Court of Appeals for the Federal Circuit to hold an en banc hearing on the legal standard for district court awards of attorney fees in patent cases is generating a groundswell of support from major technology and Internet retail companies.

Five Internet retailers have filed an amicus brief, and seven technology companies asked the court for permission to file a brief supporting the movie rental company this week.

The technology companies' July 7 motion follows the retailer amici's July 6 joint brief supporting Netflix's July 1 petition in *Media Queue v. Netflix*. Netflix, the technology companies and the retailers believe that it's too hard for defendants to recoup attorney fees when they're hit with frivolous lawsuits.

Seven top technology companies joined the motion for leave to file an amicus filed by Portland, Ore.'s Klarquist Sparkman. The filers include Amazon.com Inc., Facebook Inc., Microsoft Corp., Oracle Corp., Samsung Electronics Co. Ltd., Toyota Motor Sales U.S.A. Inc. and Yahoo! Inc.

Plaintiffs can bring weak or overreaching patent infringement cases without any downside, and there are very few ways for companies to prevent them, said John Vandenberg, an intellectual property litigation partner at Klarquist.

"There aren't too many tools the courts can use to police that, but one of them is awarding attorneys' fees in the right cases," Vandenberg said. "The trial court should at least have the discretion to find [that a matter is] an exceptional case."

The retailer amici claim they're frequent targets for patent infringement cases because they operate e-commerce Web sites. The companies, which are represented by Peter Brann, a partner at Lewiston, Maine-based Brann & Isaacson, are Crutchfield Corp., J.C. Penney Corp. Inc., L.L. Bean Inc., Newegg Inc. and Overstock.com. They claim that the section of the patent code that gives district court judges the discretion to award attorney fees in exceptional cases should apply equally to defendants and plaintiffs.

The retailers are frequently on the receiving end of dubious lawsuits with flimsy claims, but it costs far more to fight than settle, Brann said. "Because the scales are not balanced on the attorneys' fees awards, you don't have the prospect of saying: 'If we draw the line in sand here, maybe we can deter others,'" Brann said.

Netflix filed its petition in Media Queue's appeal of a Northern District of California ruling that Netflix did not infringe its patent. Netflix disputes the lower court finding that Netflix "had not met its high burden to show by clear and convincing evidence that Media Queue's claims were brought in bad faith or that the claims were objectively baseless."

Netflix argued in its brief that "the current restrictive rule permits abusive patent litigation." Netflix's brief also claims that the patentee is a disgruntled Netflix customer whose patent is based on "a purported improvement" to Netflix's system. The company also contends that the patentee sold the patent to Media Queue, "a non-practicing entity created for the single purpose of the present lawsuit."

In October 2008, Media Queue sued Netflix, Blockbuster Inc., Greencine Holdings and a couple of other companies since dismissed from the case for allegedly infringing its patent for a notification system and method for a media queue.

Blockbuster hasn't taken a position on Netflix's petition for an en banc hearing, said Scott Breedlove, a Dallas intellectual property litigation partner at Houston-based Vinson & Elkins, and one of the company's attorneys on the Federal Circuit appeal.

One of Netflix's lawyers on the case, Stanford Law School professor Mark Lemley, declined to comment. Lemley is also the director of the Stanford Program in Law, Science, and Technology and a partner at San Francisco-based Durie Tangri.

Netflix spokesman Steve Swasey said the company believes "enough is enough" when it comes to defending weak patent lawsuits. "These weak patent lawsuits really do take time and energy and money out of the companies," Swasey said. "If there are weak suits, the parties that bring them should compensate [the other side] for the distraction. We're attempting to change the law with our appeal."

Michael Newton, a Dallas partner at Atlanta's Alston & Bird and one of Media Queue's lawyers in the case, said that Media Queue believes this is the wrong case to file the en banc petition because the Federal Circuit won't uphold the lower court's summary judgment ruling against Media Queue.

Netflix appears to be seizing on recent U.S. Supreme Court decisions rejecting bright-line tests in intellectual property cases, said Erik Belt, a Boston intellectual property partner at Newark, N.J.-based McCarter & English who isn't involved in the case. In [last week's ruling in *Bilski v. Kappos*](#), for example, the Supreme Court said that business method patents don't need to be related to a new machine or transform an article into something else. It thus held that the Federal Circuit's so-called machine or transformation test should not be the sole test, but it did not suggest another test.

"The Supreme Court has said...these bright-line tests...don't find support in the statutes," Belt said.

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