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## TESTIMONY OF

VINCE MALTA  
2015 LAW & POLICY LIAISON  
NATIONAL ASSOCIATION OF REALTORS®

ON BEHALF OF  
THE NATIONAL ASSOCIATION OF REALTORS®  
AND  
THE UNITED FOR PATENT REFORM COALITION

BEFORE THE

UNITED STATES HOUSE ENERGY AND COMMERCE  
COMMITTEE  
COMMERCE, MANUFACTURING AND TRADE SUBCOMMITTEE

HEARING TITLED  
UPDATE: PATENT DEMAND LETTER PRACTICES AND  
SOLUTIONS

FEBRUARY 26, 2015

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REALTOR® is a registered collective membership mark which may be used only by real estate Professionals who are members of the NATIONAL ASSOCIATION OF REALTORS® and subscribe to its strict Code of Ethics.



## Summary

The National Association of REALTORS® (NAR) and the United for Patent Reform Coalition wish to see Congress pass strong, common sense patent reform legislation that addresses crucial issues to the American business community.

Patent trolls have targeted REALTOR® brokers, agents and multiple listing services for implementing technologies on their websites that simply provide a computerized means for delivering real estate services that consumers have always received from our members. For example, patent trolls have alleged infringement of a method of providing a searchable database of property listings, locating points of interest on a map, and providing updates to consumers when properties matching their search criteria come on the market. Our members also receive demand letters from the MPHJ Technologies troll that notoriously sent over 16,000 demand letters to businesses demanding payment for using basic “scan to email” technology.

Patent trolls typically operate through an opaque and interconnected network of shell companies; they send form demands to hundreds or even thousands of businesses at a time claiming with little to no evidence that they are “infringing” their patents. Very often, the sender has conducted no prior investigation as to whether the recipient of the demand is actually using the method or technology in question.

Congress should require that patent demand letters include truthful, basic information including the relevant patent claims at issue; how the business has allegedly infringed, including a description of the patent trolls investigation into the alleged infringing activity, and the real parties in interest to the dispute. Legislation should ensure that it does not limit Federal Trade Commission authority to enforce against deceptive and unfair trade practices and should clearly state that false statements in demand letters violate the FTC Act.

## **Introduction**

Chairman Burgess, Ranking Member Schakowsky, and members of the subcommittee; my name is Vincent Malta. I am the broker of record for Malta & Company in San Francisco California. I serve as the 2015 National Association of REALTORS® Liaison for Law and Policy. I am here today to testify on behalf of the over one million members of the National Association of REALTORS® who were each impacted by a patent troll in 2007 and many of whom continue to be targeted today. I'm also here on behalf of the United for Patent Reform Coalition. United for Patent Reform is the preeminent national voice for the strongest possible patent litigation reform legislation. The members of United for Patent Reform are a broad and diverse group of Main Street, high tech, and manufacturing companies—from brick-and-mortar retail stores to Wi-Fi technology providers from automobile manufacturers to home builders and real estate professionals—that have united in making sure Congress passes strong, common sense patent reform.

Last year's efforts on patent litigation reform were a good start and we thank Congress for its work on this matter. Now we have another opportunity to get it done. We need this subcommittee, together with your Congressional colleagues, to pass multi-faceted patent reform that addresses crucial issues to America's businesses. We believe any bill passed by Congress must address seven key issues: reforming abusive demand letters; making trolls explain their claims; protecting innocent customers; making patent litigation more efficient; stopping discovery abuses; making abusive trolls pay; and providing less expensive alternatives to litigation. Today we will focus on addressing abusive demand letters.

## **PATENT TROLLS HARM BUSINESS AND THE ECONOMY**

Abusive patent litigation remains a serious threat for REALTORS<sup>®</sup> and main street businesses of all sizes across the country. REALTORS<sup>®</sup> are often end users of technology and, as a result, have been inundated by abusive and deceptive patent demand letters by patent assertion entities (PAEs), commonly referred to as “patent trolls.” These patent trolls use vague allegations of infringement and overly broad patents, threats of litigation, and licensing fee demands in an effort to extort payments from real estate businesses across the country. Real estate firms vary widely in size, but the overwhelming majority of realty firms are very small entities. NAR’s most recent surveys indicate that more than half of all realty firms have less than twenty-five agents and that the typical REALTOR<sup>®</sup> is affiliated with an independent realty firm with only one office.

Patent trolls often prey on small businesses of all kinds, which do not have the resources to fight such false claims. Fighting these claims has a real cost: for REALTORS<sup>®</sup> it means less capital and fewer resources available for investing back into our businesses that in turn drive economic growth.

In 2013, more than 2,600 companies were sued by patent trolls representing 67 percent of all patent infringement cases brought that year.<sup>1</sup> Small and medium sized companies paid on average \$1.33 million to settle patent troll cases and \$ 1.75 million in average in court defense costs for patent troll litigation.<sup>2</sup> Economists estimate that in 2011, patent trolls cost operating companies \$80 billion in direct and indirect costs.<sup>3</sup> The numbers show that the patent troll problem for American business is real and a solution is urgently needed.

American businesses of all sizes and from all industry sectors are being held hostage by frivolous lawsuits and overly broad allegations made by patent trolls. This must change. The time is now to

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<sup>1</sup> RPX Litigation Report 2013

<sup>2</sup> Colleen V. Chien, Santa Clara University School of Law Startups and Patent Trolls

<sup>3</sup> James Besson & Michael J. Meurer, Boston University Study “The Direct Costs from NPE Disputes”

take back the patent litigation system and return it to its original purpose: fostering innovation and investment that benefits the entire economy.

NAR and the United for Patent Reform coalition seek the following reforms:

**Reform abusive demand letters:** Require that patent demand letters include truthful, basic information that describes the allegations and the patent owner with specificity. Patent trolls send vague and deceptive letters alleging patent infringement to demand unjustified payments from innocent individuals and businesses. Vague demand letters should not be used to bully innocent businesses into paying what amounts to protection money.

**Make trolls explain their claims:** Require patent owners to explain in detail the basis for the alleged infringement when they file a complaint. Current law does not require that a patent holder explain how a patent is infringed, or even identify the product involved, which makes it nearly impossible someone who has been sued to evaluate the case and decide how to proceed.

**Protect innocent customers:** Ensure that claims between a patent owner and a manufacturer proceed before claims between the patent owner and the manufacturer's end users. Under current law, anyone can be sued for infringement for simply using a product, system or method. We don't want to change that. Instead, it simply makes sense for cases against end users to be stayed in favor of cases involving the manufacturer.

**Make patent litigation more efficient:** Make patent litigation more efficient so that weak cases can be dismissed before expensive discovery. Requiring patentees to explain and judges to decide what a patent means at the beginning of a case—the Markman hearing—narrows the case to the actual legal issues in question, drives early resolutions and avoids unnecessary and expensive discovery.

**Stop discovery abuses:** Require trolls to pay for the discovery they request beyond core documents so that they cannot run up costs just to force a settlement. Since trolls don't actually make or create anything, they have few documents to produce and no incentive to be reasonable in their discovery requests. Making trolls responsible for the costs of their discovery requests that go beyond the core documents needed to decide most patent issues will stop unreasonable demands made for negotiation leverage.

**Make abusive trolls pay:** Require that a losing party who brings a frivolous case pay the other side's attorney's fees—and make sure the troll can pay. Trolls currently have few barriers to litigation with no significant costs. A stronger presumptive fee-shifting statute and a mechanism to ensure court ordered fee shifting is enforceable will deter nuisance suits.

**Provide less expensive alternatives:** Maintain and improve administrative alternatives to litigation. Ensuring access to efficient and fair mechanisms to re-examine questionable patents will reduce litigation abuses and strengthen the patent system.

### **PATENT DEMAND LETTERS TARGET MAIN STREET BUSINESSES**

Patent trolls continuously expand their reach to small businesses, which are unfamiliar to the complex world of patent litigation and lack the resources and expertise to properly defend themselves. Businesses facing the daunting and costly prospect of litigation are left to either take time away from their work priorities to research and respond to a typically vague demand letter or simply succumb to the demand to avoid being sued. Unfortunately, due to the intentionally vague nature of these letters along with the calculated demands, many businesses view settlement as the only rational business decision.

In the real estate industry, patent trolls have targeted REALTOR<sup>®</sup> brokers, agents and multiple listing services for implementing technologies on their websites that simply provide a computerized means for delivering real estate services that consumers have always received from our members. For example, patent trolls have alleged infringement of a method of providing a searchable database of property listings, locating points of interest on a map, and providing updates to consumers when properties matching their search criteria come on the market. Our members also received demand letters from the MPHJ Technologies troll that notoriously sent over 16,000 demand letters to businesses demanding payment for using basic "scan to email" technology.

Homebuilders have received demand letters from a company alleging to own a patent on a moisture removal process used in home construction. Unfortunately, the process described in the patent is one that anyone using a dehumidifier, fan, heater or dryer could unintentionally run afoul of while attempting to remove water from a construction site.

Mr. Jim's Pizza based in Farmers Branch, Texas was sued alongside 50 others in the restaurant industry for allegedly violating a patent that relates to online search engines featuring their store information on a map. Again, all of these patent trolls provided businesses with over broad descriptions of the patents at issue and vague allegations of infringement.

Numerous other examples like these exist in nearly every sector of our economy. America's patent system has long served to foster innovation while rewarding inventors for their contributions to progress and innovation. Unfortunately today, the actions of rogue actors increasingly undermine the patent system and unduly burden many of our country's small businesses.

## **DEMAND LETTERS ARE VAGUE UNFAIR AND DECEPTIVE**

Patent trolls typically operate through an opaque and interconnected network of shell companies, send form demand letters to dozens, hundreds, or even thousands of businesses at a time claiming with little or no evidence that they are “infringing” the troll’s patents. Typically, the sender will list a patent number only—with no reference to which claim within the patent is alleged to infringe. The letters are often intentionally vague, providing little in the way of factual allegations as to how the business has infringed the patent in question. Very often the sender has conducted no prior investigation as to whether the recipient of the demand is actually using the method or technology that is alleged to infringe. The letters go on to demand a “licensing fee” or threaten litigation.

Patent trolls are notoriously savvy. The license demand is often calculated to be an amount that is more advantageous for the demand letter recipient to pay rather than incur the expenses of investigating the vague allegations or consulting with a lawyer. If the business does take the step to speak with a lawyer, they are often advised to pay the fee rather than risk a ruinous patent infringement lawsuit. When discussing the matter with the business, patent trolls typically emphasize the threat of litigation and future cost burdens to the business and not the merits of the patent or alleged infringement. NAR members and other small businesses rightfully feel extorted by this process.

## **DEMAND LETTER REFORM MUST WORK FOR THOSE TARGETED BY ABUSE**

In the last Congress this Subcommittee passed legislation aimed at addressing demand letter abuse. NAR and the Coalition appreciates the Subcommittee’s work on the Targeting Rogue and Opaque Letters Act (“TROL Act”), a bill aimed at strengthening enforcement and reducing the number of bad faith demand letters that our businesses receive. As the subcommittee considers legislation in



this Congress we ask that you consider the following three priorities: 1) require specificity and transparency in patent demand letters 2) take care not to limit the Federal Trade Commission's (FTC) enforcement authority and 3) Make clear that false statements are FTC Act violations.

### **Patent Demand Letters Must be Made More Transparent**

Fundamentally, patent demand letters must specify the relevant patent claims at issue; how the business has allegedly infringed, including a description of the patent troll's investigation of the alleged infringing activity, and the real parties in interest to the dispute. This minimum information will help recipients to thoughtfully review whether infringement allegations merit an agreement to license.

As detailed earlier in this testimony, patent trolls send vague and deceptive letters alleging patent infringement to demand unjustified payments from individuals and businesses. Vague demand letters should not be used for extortion.

### **Do Not Limit Enforcement Authority**

The Subcommittee should ensure that legislation does not limit Federal Trade Commission authority to enforce against deceptive and unfair practices in any way whatsoever. Instead, legislation should clarify and sharpen FTC authority, but should not expand or contract its authority. This is especially important since the TROL Act from last Congress preempted state action.

### **False Statements Are FTC Act Violations**

False statements in demand letters are inherently unfair and deceptive. Legislation addressing abusive demand letters should clearly state that false statements violate the FTC Act.

## **CONCLUSION**

Deceptive demand letters alleging patent infringement represent a real and significant threat to American businesses. Patent trolls intentionally target small businesses and end user customers of technology precisely because they lack the resources and expertise to defend against the intentionally vague claims of infringement contained in many demand letters. Policymakers can have a positive and important impact on reducing patent litigation abuse, thus redirecting billions of dollars to productive use to grow the American economy, all without compromising the rights of legitimate patent holders. NAR and the United for Patent Reform Coalition urge Congress to act swiftly to enact meaningful demand letter reform, which will deter the patent troll business model of extracting settlements by sending deceptive settlement demands. Thank you for your consideration of our views.

# UNITED for PATENT REFORM

A diverse group of American businesses have united in making sure Congress passes strong, common sense patent reform. It's time we take back our patent system from trolls. Learn more at [UnitedforPatentReform.com](http://UnitedforPatentReform.com) or follow [@U4PatentReform](https://twitter.com/U4PatentReform) on Twitter.





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INTELLECTUAL PROPERTY LAW

Alexander Solo  
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[REDACTED] 2013

General Counsel

[REDACTED]  
[REDACTED]  
[REDACTED]

Re: [REDACTED]  
Notice of Infringement of United States Patent No. [REDACTED]

Dear Sir or Madam:

We are intellectual property counsel to [REDACTED] ("[REDACTED]"). [REDACTED] is the owner of U.S. Patent No. [REDACTED] ("the [REDACTED] Patent") entitled "[REDACTED]." (Attached hereto)

By way of background, the [REDACTED] Patent relates to a system that provides agents and/or users with an online searchable real estate database where the agents and/or users can save their searches, their favorite properties, and their notes and receive update messages when new properties matching their criteria come on the market or the status of properties that they are monitoring changes. This invention is very valuable in the real estate industry because a vast portion of new real estate buyers begin their searches for a new home online. These users also rely on message updates to keep abreast of new listings or changes to the properties they are interested in.

It is our belief that the websites and services offered and promoted by [REDACTED], namely the system found on the website [REDACTED], use, induce others, or contribute to the performance of one or more of the claims of the patent. Accordingly, by this letter, we are putting you on notice that we and [REDACTED] believe that [REDACTED] directly and indirectly infringes the [REDACTED] Patent.

A non-exclusive license under the [REDACTED] Patent is available on fair and reasonable terms. We invite you to schedule a meeting to open discussions regarding licensing the [REDACTED] Patent.

[REDACTED]



General Counsel  
[REDACTED] 2013  
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In the meantime, if you have any questions about the [REDACTED] Patent, the technology covered by the [REDACTED] Patent, and terms for resolution, please do not hesitate to contact us.

Sincerely yours,

LERNER, DAVID, LITTENBERG,  
KRUMHOLZ & MENTLIK, LLP

ALEXANDER SOLO

AS

Enclosure - Patent No. [REDACTED]

cc: [REDACTED]

[REDACTED]