

UNITED *for* PATENT REFORM

April 15, 2015

The Honorable Michael Burgess
Chairman, Subcommittee on Commerce,
Manufacturing and Trade
Committee on Energy and Commerce
United States House of Representatives
Washington, D.C. 20515

The Honorable Jan Schakowsky
Ranking Member, Subcommittee on Commerce,
Manufacturing, and Trade
Committee on Energy and Commerce
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman and Ranking Member Schakowsky,

We appreciate your leadership and the Subcommittee's work on the Targeting Rogue and Opaque Letters Act ("TROL Act"), a bill aimed at strengthening enforcement and dramatically reducing the number of bad faith demand letters that our businesses receive.

Patent trolls often send vague, misleading, or deceptive letters to businesses, demanding that those businesses immediately purchase expensive licenses of uncertain value or be threatened with protracted and costly patent litigation ("demand letters"). Few businesses have either the expertise or the wherewithal to take multiple, million dollar patent claims to court. Trolls target businesses of all sizes across a broad swath of industries for just this reason, and thus are able to extract exorbitant settlements from each.

While we appreciate the addition of disclosure and transparency requirements to the original version of the Discussion Draft introduced last summer, we have concerns that the current draft could do far more to help our members fight abusive demand letters. We suggest the following changes to the current draft:

- 1. Remove requirement of "a pattern or practice of sending" demand letters.** The "pattern or practice" language creates unnecessary ambiguity about the number of letters that must be sent. Removing the term would make clear that even a single communication sent in "bad faith" would be considered an unfair or deceptive act or practice and allows a court more flexibility in identifying misconduct covered by the statute.
- 2. Remove definition of "bad faith."** In the original proposed text, "bad faith" was defined in terms of the sender's knowledge or awareness of the false or misleading nature of representations or omissions. In the mark-up, this definition was removed to be more consistent with current consumer protection law, which focuses on the effect on consumers rather than the knowledge of the violator. Indeed, recipients of demand letters can be harmed by misrepresentations or omissions regardless of whether the party making them knows them to be false or misleading. Instead of defining bad faith, we suggest listing misconduct that can be considered "factors" in determining bad faith,

including making representations without basis in fact or law, seeking compensation for invalid, unenforceable, expired patents or licensed activity, or failing to include critical information regarding the asserted patent and alleged infringement.

3. Removed separate “bad faith” requirement from the listed factors. In the original text, certain factors evidencing “bad faith” also required a separate showing that the listed conduct was performed in “bad faith.” Requiring that “bad faith” be demonstrated to establish a violation, however, could nullify the Act’s provisions. For example, under the original draft, the failure to include any of the information required by section 2(b)(5) would have been a violation only if the information was omitted with knowledge or awareness of a high probability to deceive. This would have the effect of nullifying the Act’s disclosure requirements.

4. Misrepresentations relating to third party licensees (factor 2) and prior knowledge of non-infringement (factor 3). We suggest separating these items as their own factors instead of including them within factor 1, which requires a separate showing that assertions were made without a reasonable basis in fact or law. The conduct covered in factors 2 and 3, on the other hand, is, by definition, without reasonable basis in fact such that a separate showing is not necessary.

5. List of material information (factor 5). We suggest adding a sub-part that, in effect, requires the sender to identify allegedly infringed claims. The Supreme Court’s *Twombly* and *Iqbal* decisions require that a complaint include a plausible basis for relief, which, in the patent context, would require a specific identification of infringed claims. Failure to include such information in a demand letter is evidence that the assertion is objectively baseless and thus made in bad faith

6. Remove affirmative defense. The affirmative defense would create a loophole that avoids application of the Act even if the sender was found to have acted in bad faith. Instead of an affirmative good faith defense we propose a list of factors relevant to showing a sender has not acted in bad faith.

We remain committed to work diligently with the Committee to develop demand letter legislation that will protect our member businesses from patent trolls while not compromising the rights of legitimate patent holders, and that that the designated enforcers themselves support.

We urge the Committee to continue its work with stakeholders until this legislation has language that will provide effective relief from patent trolls.

Sincerely,



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