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3 HIF112.170

4 MARKUP ON H.R. _____, THE TARGETING ROGUE AND OPAQUE LETTERS

5 ACT OF 2015

6 WEDNESDAY, APRIL 22, 2015

7 House of Representatives,

8 Subcommittee on Commerce, Manufacturing, and Trade

9 Committee on Energy and Commerce

10 Washington, D.C.

11 The Subcommittee met, pursuant to call, at 12:14 p.m.,
12 in Room 2123 of the Rayburn House Office Building, Hon.
13 Michael C. Burgess [Chairman of the Subcommittee] presiding.

14 Members present: Representatives Burgess, Lance,
15 Blackburn, Harper, Guthrie, Kinzinger, Bilirakis, Brooks,
16 Mullin, Upton (ex officio), Schakowsky, Clarke, Kennedy,
17 Cardenas, Rush, Welch, and Pallone (ex officio).

18 Staff present: Nick Abraham, Legislative Associate,

19 Energy and Power; Charlotte Baker, Deputy Communications
20 Director; Karen Christian, General Counsel; James Decker,
21 Policy Coordinator, Commerce, Manufacturing, and Trade;
22 Graham Dufault, Counsel, Commerce, Manufacturing, and Trade;
23 Melissa Froelich, Counsel, Commerce, Manufacturing, and
24 Trade; Kirby Howard, Legislative Clerk; Peter Kielty, Deputy
25 General Counsel; Paul Nagle, Chief Counsel, Commerce,
26 Manufacturing, and Trade; Tim Pataki, Professional Staff
27 Member; Graham Pittman, Legislative Clerk; Olivia Trusty,
28 Professional Staff, Commerce, Manufacturing, and Trade;
29 Jessica Wilkerson, Legislative Associate, Oversight and
30 Investigations; Michelle Ash, Democratic Chief Counsel,
31 Commerce, Manufacturing, and Trade; Jen Berenholz, Democratic
32 Chief Clerk; Christine Brennan, Democratic Press Secretary;
33 Jeff Carroll, Democratic Staff Director; Elizabeth Ertel,
34 Democratic Deputy Clerk; Lisa Goldman, Democratic Counsel;
35 Brendan Hennessey, Democratic Policy and Research Advisor;
36 Tim Robinson, Democratic Chief Counsel; and Ryan Skukowski,
37 Democratic Policy Analyst.

|
38 H.R. _____

39 Mr. {Burgess.} Subcommittee will come to order. The
40 Chair recognizes himself for the purposes of an opening
41 statement. And I do want to welcome everyone to the
42 subcommittee markup for the Targeting Rogue and Opaque
43 Letters Act of 2015.

44 We certainly continue to hear from a wide variety of
45 industries that patent demand letters are a major problem.
46 All sides of the issue believe that congressional action is
47 an important undertaking. Finding a way forward is
48 necessarily not easy, but it is doable.

49 A patent is a property right bestowed by the Federal
50 Government pursuant to Article 1, Section 8 of the
51 Constitution. Any limits on patent demand letters are then
52 limits on the First Amendment free speech rights with respect
53 to a right conferred by the government. Patent rights are
54 constitutionally protected and federally conferred. Patents,
55 therefore, do come with the right to notify others of their
56 existence.

57 Ultimately, we must insist on respecting the
58 constitutional rights of patent holders, and in doing so, we
59 vote today on a proposal that provides a constitutionally
60 permissible avenue for consumer protection. Not only are

61 these constitutional issues necessary to protect patent
62 ownership, ignoring them risks leaving consumers exposed to
63 judicial uncertainty and reversal. So caution is prudent
64 when we try and introduce the Federal Trade Commission and
65 State Attorneys General, who are not themselves patent
66 experts, into determining what patent holders can and cannot
67 say.

68 I was just at the Federal Trade Commission earlier this
69 week, talking about a number of issues. And I certainly want
70 to thank the Federal Trade Commission for their work on the
71 MPHJ Technologies case, but there was also talk about how,
72 given the breadth and broadness of many patents, it is
73 difficult to find culpability in many demand letters. Patent
74 breadth or broadness is not an issue that can be addressed
75 through either the Federal Trade Commission or the State
76 Attorney Generals' Offices. What we can try to do is
77 identify baseless threats and deceptive acts in letters and
78 provide civil penalties where it is clear that abusive patent
79 holders intentionally violated those bad acts.

80 The Federal Trade Commission today has certain minimum
81 knowledge requirements in order to impose civil penalties,
82 and I believe the Targeting Rogue and Opaque Letters Act will
83 be consistent in that regard. And civil penalty authority is
84 significant. MPHJ was the essential troll, and even in that

85 case the Federal Trade Commission could not bring an action
86 for civil penalties. The Federal Trade Commission had
87 evidence that through 81 companies, MPHJ sent over 31,000
88 deceptive demand letters across the country. The strongest
89 enforcement tool available to the Federal Trade Commission
90 was a settlement barring MPHJ from making deceptive
91 representations when asserting patent rights in the future.

92 This Act under consideration today gives the Federal
93 Trade Commission and State Attorneys General the authority to
94 go straight to civil penalties for bad faith demand letters.
95 This is clearly a stronger position than under current law.
96 This bill also identifies certain basic information that must
97 be included in a demand letter so that recipients--letter
98 recipients have a starting place to determine if the sender
99 is, indeed, legitimate. There may be some ability to do more
100 in this space with limited claim information. We may also be
101 able to lower the burden of proof for penalties around
102 disclosures in some instances. And we hope that all
103 interested parties will work with us on these issues.

104 Not only do we empower State Attorneys General to
105 enforce provisions of this legislation, the bill preserves
106 the ability to enforce their state consumer protection laws
107 of general applicability. We are also preserving the Federal
108 Trade Commission's ability to bring cases under its Section 5

109 unfair and deceptive acts or practices authority in deceptive
110 demand letter cases that fall outside the scope of bad acts
111 covered in the bill.

112 We have heard concerns about the legitimate--we have
113 heard concerns about the affirmative defense in the bill. We
114 will offer an amendment today to mirror the language that was
115 in the Fair Debt Collection Practices Act for bona fide
116 mistakes, as was suggested by the minority witness in last
117 week's hearing. There is no doubt that abusive patent demand
118 letters can wreak havoc on smaller businesses and drive up
119 costs for consumers. I hope that more stakeholders will work
120 with us within the confines of what we can do
121 constitutionally to provide additional avenues of
122 enforcement.

123 On that note, I want to thank stakeholders who have
124 persisted and worked with us on the legislative process. The
125 door, of course, remains open as we continue to move forward.
126 I hope that we can do so together as opposed to splintering
127 off and dividing at a crucial time. With an eye towards
128 protecting small businesses and consumers within the
129 constitution, I hope my colleagues will join me in advancing
130 this bill today.

131 [The prepared statement of Mr. Burgess follows:]

132 ***** COMMITTEE INSERT *****

|
133 Mr. {Burgess.} I yield back my time and recognize the
134 gentlelady from Illinois, Ms. Schakowsky, 5 minutes for the
135 purpose of an opening statement.

136 Ms. {Schakowsky.} Thank you very much, Mr. Chairman.

137 We all understand the patent troll--that patent trolls
138 threaten consumers and businesses all across the country.
139 They extract settlements in the thousands of dollars from
140 businesses that can't afford to go to court. Worse still is
141 the fact that trolls have no legitimate patent infringement
142 claim.

143 It costs patent trolls virtually nothing to send patent
144 demand letters, but they have cost American businesses
145 literally tens of billions of dollars in the past few years.

146 I am interested, as I know the chairman is, in finding a
147 solution to this problem that protects businesses and
148 consumers against patent trolls, and that solution must also
149 recognize the legitimate rights of patent holders to protect
150 their ideas and technology. I appreciate the bill's attempt
151 to balance those two priorities. It is not easy work, and
152 unfortunately, as is, I think the bill misses the mark.

153 There are two major loopholes that essentially make the
154 bill unenforceable, and enable patent trolls to continue
155 operating uninterrupted. They must both be addressed in

156 order for this legislation to truly curb deceptive patent
157 assertion entities.

158 First, excuse me, this bill requires the Federal Trade
159 Commission to prove bad faith of the sender in order for
160 patent demand letters to be considered an unfair or deceptive
161 act or practice. In short, this means that the FTC has to be
162 able to prove that the sender of a patent demand letter
163 knowingly made false statements, or was aware that the
164 recipient would be deceived. That is virtually impossible to
165 prove, meaning victims will be left in the same position they
166 are today.

167 Second, the bill's affirmative defense clause presents
168 major problems. Basically, this provision means that if a
169 patent assertion entity, in the regular course of business,
170 sends any regular written communication that does not violate
171 the provision of the bill, then they are not in violation of
172 the law. So unless you troll 100 percent of the time, you
173 are not considered a troll, and that is kind of crazy. And
174 any business that currently trolls 100 percent of the time
175 can easily modify their behavior to avoid liability if this
176 law passes. This eliminates any consumer protections this
177 bill would otherwise guarantee. And I understand--I hope I
178 am right that the majority plans to offer amendments to
179 partially address these two issues, and I genuinely

180 appreciate their willingness to improve the bill.
181 Nonetheless, there are other serious problems with the TROL
182 Act. The TROL Act sets arbitrary caps on penalties for
183 unfair, deceptive patent assertions. I believe that the
184 punishment should always fit the crime, and that the scope of
185 the crime and the ability to pay should be considered in
186 determining fines for violations of this Act. There should
187 not be a cap on liability for the sake of a cap. This bill
188 also preempts 20 existing state laws that hold patent trolls
189 accountable, including one in my home State of Illinois. In
190 many ways, these state protections exceed those that would be
191 guaranteed under the TROL Act. We should not preempt state
192 laws with a weaker federal standard.

193 I look forward very much to working to improve this
194 legislation to make sure that it adequately addresses the
195 issue of patent trolls. And with that, Mr. Chairman, I yield
196 back.

197 [The prepared statement of Ms. Schakowsky follows:]

198 ***** COMMITTEE INSERT *****

|
199 Mr. {Burgess.} Chair thanks the gentlelady. Gentlelady
200 yields back.

201 The chair now recognizes the vice chair of the full
202 committee, the gentlelady from Tennessee, Mrs. Blackburn, 5
203 minutes.

204 Mrs. {Blackburn.} Thank you, Mr. Chairman.

205 Those of us that have innovators in our district hear
206 from them fairly regularly about demand letters that come
207 from patent trolls. These are really a thorn in the side of
208 these innovative, new-start businesses and new-start
209 concepts. And it is a practice that really does cost our
210 economy billions of dollars a year because of the uncertainty
211 that it interjects into the system.

212 So the TROL Act, Targeting Rogue and Opaque Letters Act,
213 would crackdown on patent trolls by zeroing in on these
214 persons who engage in a pattern or practice of sending demand
215 letters, and who act in bad faith when communicating, or
216 failing to communicate, information within such
217 correspondence. Violations under the TROL Act will be
218 treated as an unfair and deceptive practice act. It is
219 enforceable by the FTC. The Act will preempt state laws.
220 State Attorneys General will still have a mechanism by which
221 they can enforce the Act and seek civil penalties.

222 So, Mr. Chairman, good work on bringing this forward,
223 and we appreciate the way you have continued to work to
224 address this issue that affects so many of our constituents.

225 And with that, I yield back the balance of my time.

226 [The prepared statement of Mrs. Blackburn follows:]

227 ***** COMMITTEE INSERT *****

|
228 Mr. {Burgess.} The chair thanks the gentlelady. The
229 gentlelady yields back.

230 The chair now recognizes the gentleman from New Jersey 5
231 minutes for an opening statement, sir.

232 Mr. {Pallone.} Thank you, Mr. Chairman.

233 Today, the subcommittee will be marking up Chairman
234 Burgess' draft bill on patent demand letters. The patent
235 system plays a crucial role in the economy by promoting
236 innovation, yet we have heard that some businesses commonly
237 known as patent trolls have been taking advantage of the
238 patent system, using abusive patent demand letters. The
239 recipients of these letters are often small, main street
240 businesses like coffee shops, realtors, hotels, and
241 restaurants.

242 The purpose of the bill before us is to encourage
243 targeted enforcement, and ultimately stop such abusive
244 tactics by patent trolls. I could support demand letter
245 legislation that advances consumer protection, but I can't
246 support this bill which I believe creates a disincentive to
247 enforcement by tying the hands of State Attorney Generals,
248 and by creating barriers to FTC enforcement that are simply
249 too high.

250 Some State Attorneys General have taken legal action to

251 protect their citizens from unfair and deceptive demand
252 letters. In addition, 20 states have already enacted
253 legislation to tackle this abusive activity. This bill would
254 completely preempt the 20 laws that expressly address abusive
255 patent assertion communications. It also severely constrains
256 states' abilities to take an active role by limiting
257 available remedies and placing an arbitrary cap on civil
258 penalties. Just like with the data breach bill, if Congress
259 seeks to preempt specific state laws, especially on issues on
260 which the states have been leaders fighting unfair and
261 deceptive acts, such as false and misleading demand letters,
262 the federal efforts should be at least as strong as those
263 state laws. Moreover, the bill would place a number of
264 additional burdens on enforcers at both the state and federal
265 levels, particularly by requiring proof that the sender knew
266 that representations in the letter were false or misleading.
267 This knowledge requirement is an unusual element that would
268 make investigations and enforcement far more difficult.

269 The FTC staff, in comments on this draft, explained, and
270 I quote, ``Consumers can be harmed by misrepresentations
271 regardless of whether the party making the representations
272 knows them to be false. The staff further stated that
273 proving knowledge would be a significant and
274 counterproductive departure from existing law. Furthermore,

275 the affirmative defense in the draft creates a loophole so
276 large it could completely eliminate liability for unfair or
277 deceptive demand letters, creating yet another barrier to
278 enforcement.

279 So, Mr. Chairman, I will support efforts to ensure that
280 states and the FTC continue to be able to enforce against
281 fraudulent actors, and are able to collect civil penalties
282 from wrongdoers, however, I cannot support the bill before us
283 today without some significant changes. So let's work
284 together to craft legislation that will protect the rights of
285 patent holders, while ensuring the appropriate tools exist to
286 enforce against abusive practices.

287 I yield back, Mr. Chairman. Thank you.

288 [The prepared statement of Mr. Pallone follows:]

289 ***** COMMITTEE INSERT *****

|
290 Mr. {Burgess.} The chair thanks the gentleman. The
291 gentleman yields back.

292 The chair reminds members that pursuant to committee
293 rules, all members' opening statements will be made part of
294 the record.

295 Are there further opening statements on the majority
296 side?

297 Are there further opening statements on the minority
298 side?

299 Seeing none, the chair then calls up the committee print
300 and asks the Clerk to report.

301 The {Clerk.} Discussion draft, to provide that certain
302 bad faith communications in connection with the assertion of
303 the United States patent are unfair deceptive acts or
304 practices, and for other purposes.

305 [The bill follows:]

306 ***** INSERT 1 *****

|
307 Mr. {Burgess.} Without objection, the first reading of
308 the bill is dispensed with, and the bill will be open for
309 amendment at any point. So ordered.

310 Are there bipartisan amendments to the bill?

311 Seeing none, we will consider other amendments, and the
312 chair will recognize himself for the purposes of offering an
313 amendment. Manager's Amendment 1.

314 The {Clerk.} Amendment to the discussion draft offered
315 by Mr. Burgess.

316 [The amendment of Mr. Burgess follows:]

317 ***** INSERT 2 *****

|
318 Mr. {Burgess.} Recognize myself for 5--without
319 objection the hearing of the amendment is dispenses with, and
320 I will recognize myself for 5 minutes in support of the
321 amendment.

322 This amendment would replace the affirmative defense in
323 the base draft bill with a more narrow approach, and the
324 reason we are making this change is straightforward. Some
325 stakeholders have worried that the affirmative defense in the
326 base draft would create a loophole for bad behavior. For
327 example, some worry that a bad actor could benefit from the
328 affirmative defense simply by establishing a record of good
329 behavior before embarking upon bad behavior. So we adopted a
330 suggestion that was brought to us by the minority witness at
331 our legislative hearing last week from public knowledge to
332 use the bona fide error defense in the Fair Debt Collection
333 Practices Act. Specifically, the amendment would provide an
334 affirmative--that an affirmative defense is available if the
335 defendant can show by a preponderance of the evidence that a
336 violation was not intentional and resulted from an--a bona
337 fide error, notwithstanding the maintenance of procedures
338 reasonably adapted to avoid such error.

339 I understand that many would like to remove the
340 affirmative defense altogether, but I believe this amendment

341 provides a good compromise.

342 And I will yield back and ask if there are others who
343 wish to speak on the amendment.

344 The chair recognizes the gentlelady for--or for what
345 purpose does the gentlelady seek recognition?

346 Ms. {Schakowsky.} To strike the last word.

347 Mr. {Burgess.} The gentlelady is recognized for 5
348 minutes.

349 Ms. {Schakowsky.} I will not take 5 minutes. I support
350 this amendment. It makes the bill better, changes the
351 affirmative defense provision to require more evidence. The
352 patent demand letters that violate this Act are sent in
353 error. I think that is a helpful change. I don't think
354 there needs to be an affirmative defense, but if there is,
355 this is a sensible way to address the issue. I plan to vote
356 for this amendment, but I just wanted to indicate that I
357 find--still find the underlying bill problematic but I will
358 certainly support this amendment.

359 I yield back.

360 Mr. {Burgess.} Is there other discussion on the
361 amendment?

362 If there is no further discussion, the vote then occurs
363 on the amendment.

364 All those in favor shall signify by saying aye.

365 All those opposed, nay.

366 The ayes appear to have it. The ayes have it and the
367 amendment is agreed to.

368 Are there other amendments as a--is there--are there
369 other amendments that would like to be offered?

370 Ms. {Schakowsky.} Mr. Chairman, I have an amendment at
371 the desk.

372 Mr. {Burgess.} The clerk will report the amendment.

373 Ms. {Schakowsky.} 159.

374 The {Clerk.} 164.

375 Ms. {Schakowsky.} Sorry, 164.

376 The {Clerk.} Amendment to the discussion draft offered
377 by Ms. Schakowsky.

378 [The amendment of Ms. Schakowsky follows:]

379 ***** INSERT 3 *****

|
380 Mr. {Burgess.} Without objection, a reading of the
381 amendment is dispensed with, so the gentlelady is recognized
382 for 5 minutes in support of the amendment.

383 Ms. {Schakowsky.} I believe that the TROL Act
384 unfortunately has a number of fatal flaws, and the amendment
385 I am offering fixes those flaws and strikes the right balance
386 between protecting the targets of unfair and deceptive demand
387 letters, and the rights of legitimate patent holders.

388 Under this amendment, the FTC is directed to issue rules
389 that prohibit the sending of unfair and deceptive demand
390 letters. The rules would take into account the list of false
391 or misleading representations and omissions included in the
392 draft bill as a guide for those regulations. This rulemaking
393 would provide certainty to the senders of demand letters, and
394 would give the Federal Trade Commission the enforcement
395 flexibility necessary to combat abusive letters.

396 Recognizing that states are the leaders in protecting
397 the targets of unfair and deceptive demand letters, this
398 amendment also gives State Attorneys General the ability to
399 effectively enforce the law, and brings a federal standard to
400 the 30 states that do not have laws on patent demand letters.
401 It also allows states to continue their ongoing efforts to
402 combat abusive demand letters through the state laws already

403 on the books, as well as through general consumer protection
404 laws and common law.

405 Many of the businesses that have been targets of unfair
406 and deceptive demand letters have expressed their concern
407 that the TROL Act as currently drafted will discourage
408 enforcement because of the many obstacles that it creates for
409 the State Attorneys General and the FTC. This amendment
410 removes those barriers to enforcement by removing the pattern
411 or practice requirement, the bad faith requirement, and the
412 unnecessary and overly broad affirmative defense provision.

413 A bill that can never realistically be enforced is not
414 useful. This amendment threads the needle to combat unfair
415 and deceptive demand letters, while avoiding catching
416 legitimate patent holders in the net.

417 I would urge my colleagues to support this amendment.
418 And I could yield to someone, or--shall I--you have more
419 than--okay, I yield to the chairman of the--the ranking
420 member of the full committee.

421 Mr. {Pallone.} Thank you. And I want to support Ms.
422 Schakowsky's amendment. The amendment makes several
423 improvements by strengthening the FTC, removing barriers to
424 enforcement, and preserving the power of the states to
425 address patent demand letter abuses.

426 The FTC has significant expertise with regard to unfair

427 and deceptive acts over many years, and I strongly support
428 giving the agency the relevant rulemaking authority to
429 prohibit the ending of unfair and deceptive demand letters.
430 Furthermore, the elimination of the affirmative defense and
431 bad faith, and pattern or practice requirements is a much
432 needed improvement that would plug any loopholes created as a
433 result of the bill's overly broad language.

434 As we heard during last week's legislative hearing,
435 abusive patent assertion entities may be engaged in abusive
436 behavior, despite not having a prior record of abuse. I am
437 also pleased that the amendment includes a no preemption
438 clause that preserves the growing number of state laws
439 intended to curb abusive patent demand letters, as well as a
440 provision to ensure that State Attorney Generals are able to
441 assert a state law claim in a civil action.

442 So I urge my colleagues to support this amendment, and
443 yield back to the gentlewoman.

444 Ms. {Schakowsky.} And I yield back. Thank you.

445 Mr. {Burgess.} The chair thanks the gentlelady.

446 Gentlelady yields back.

447 The chair then recognizes himself to strike the
448 requisite number of words, and will recognize myself for 5
449 minutes to speak against the Federal Trade Commission having
450 rulemaking authority.

451 You know, protecting small businesses from bad faith
452 demand letters is not an area where Congress should delegate
453 its authority to the Federal Trade Commission when, in fact,
454 we can clearly delineate what constitutes a bad faith demand
455 letter in legislation. The committee has developed an
456 extensive record--or the subcommittee has developed an
457 extensive record clearly documenting the problem that bad
458 faith demand letters create for small and medium-sized
459 businesses across the country. There is no need to grant the
460 Federal Trade Commission rulemaking authority to flush out
461 those details further.

462 This Act gives the Federal Trade Commission additional
463 tools to go after bad faith demand letters, and protects
464 those good faith actors asserting their rights within the 4
465 corners of the bill. Granting the Federal Trade Commission
466 rulemaking authority in this area delegates Congress'
467 authority unnecessarily.

468 Yes, in the past, Congress has granted the Federal Trade
469 Commission limited Administrative Procedures Act rulemaking
470 authority, but those have been limited to instances where all
471 sides have agreed that there are pieces of an issue that need
472 to be filled in by the Federal Trade Commission through the
473 rulemaking process. That is not the case with this issue.
474 Additionally, granting the Federal Trade Commission

475 rulemaking authority will only further delay civil penalty
476 actions against entities sending out bad faith demand
477 letters. The political reality is the Federal Trade
478 Commission rulemaking authority in this area is not viable,
479 and we should act to help the businesses harmed by bad faith
480 demand letters sooner rather than later.

481 And I would be happy to yield to others on the majority
482 side. Chair yields to Mr. Lance.

483 Mr. {Lance.} thank you, Mr. Chairman. I speak on my
484 belief in a strong preemption, and I think that is important
485 for this legislation.

486 A patchwork of state laws is not, in my judgment, the
487 most effective way to address the issue of patent trolls who
488 are sending letters nationwide. The appropriate way to
489 address this issue is at the federal level, and to set one
490 national standard that is enforced by the FTC and by State
491 Attorneys General.

492 We are talking about a federally conferred right created
493 by the Constitution of the United States. The effectiveness
494 of existing state laws is still unclear. It is very possible
495 that the federal courts will find that states are preempted
496 from acting in this space as a result of the Noerr-Pennington
497 Doctrine. And if this were to happen, it would leave states
498 only able to act in the event of sham litigation, which only

499 applies if the patent assertion is objectively baseless.
500 This is an extremely high burden to carry, and was rejected
501 as a standard by both the FTC and the recipient community
502 very early in our negotiations. Fifty state laws with
503 different court interpretations will add expense and
504 complications to an already complicated field, and hurt
505 innovation. Moreover, mistakes, innocent technical mistakes,
506 will inevitably be made, adding additional costs.

507 I believe that setting a single national standard will
508 ensure that we act to stop patent trolls, and we are not
509 adding to the compliance burden or confusion for businesses.

510 And I yield back to you, Mr. Chairman.

511 Mr. {Burgess.} The chair thanks the gentleman. The
512 chair yields back the balance of the time.

513 Other members seeking time on the amendment?

514 Seeing none, if there is no further discussion, the vote
515 occurs on the amendment.

516 All those in favor shall signify by saying aye.

517 All those opposed, nay.

518 Ms. {Schakowsky.} I would like a roll call vote.

519 Mr. {Burgess.} The ayes have it. The amendment is not
520 agreed to. The gentlelady requests a roll call vote.

521 The clerk will call the roll.

522 The {Clerk.} Mr. Lance?

523 Mr. {Lance.} No.

524 The {Clerk.} Mr. Lance votes no.

525 Mrs. Blackburn?

526 Mrs. {Blackburn.} No.

527 The {Clerk.} Mrs. Blackburn votes no.

528 Mr. Harper?

529 Mr. {Harper.} No.

530 The {Clerk.} Mr. Harper votes no.

531 Mr. Guthrie?

532 Mr. {Guthrie.} No.

533 The {Clerk.} Mr. Guthrie votes no.

534 Mr. Olson?

535 [No response.]

536 The {Clerk.} Mr. Pompeo?

537 [No response.]

538 The {Clerk.} Mr. Kinzinger?

539 Mr. {Kinzinger.} No.

540 The {Clerk.} Mr. Kinzinger votes no.

541 Mr. Bilirakis?

542 Mr. {Bilirakis.} No.

543 The {Clerk.} Mr. Bilirakis votes no.

544 Mrs. Brooks?

545 Mrs. {Brooks.} No.

546 The {Clerk.} Mrs. Brooks votes no.

547 Mr. Mullin?
548 Mr. {Mullin.} No.
549 The {Clerk.} Mr. Mullin votes no.
550 Chairman Upton?
551 The {Chairman.} No.
552 The {Clerk.} Chairman Upton votes no.
553 Ms. Schakowsky?
554 Ms. {Schakowsky.} Aye.
555 The {Clerk.} Ms. Schakowsky votes aye.
556 Ms. Clarke?
557 Ms. {Clarke.} Aye.
558 The {Clerk.} Ms. Clarke votes aye.
559 Mr. Kennedy?
560 Mr. {Kennedy.} Aye.
561 The {Clerk.} Mr. Kennedy votes aye.
562 Mr. Cardenas?
563 Mr. {Cardenas.} Aye.
564 The {Clerk.} Mr. Cardenas votes aye.
565 Mr. Rush?
566 Mr. {Rush.} Aye.
567 The {Clerk.} Mr. Rush votes aye.
568 Mr. Butterfield?
569 [No response.]
570 The {Clerk.} Mr. Welch?

571 Mr. {Welch.} Yes.

572 The {Clerk.} Mr. Welch votes aye.

573 Mr. Pallone?

574 Mr. {Pallone.} Aye.

575 The {Clerk.} Mr. Pallone votes aye.

576 Chairman Burgess?

577 Mr. {Burgess.} No.

578 The {Clerk.} Chairman Burgess votes no.

579 Mr. {Burgess.} Are there other members seeking to be
580 recorded? If not, the clerk will report the result.

581 The {Clerk.} Mr. Chairman, on that vote, there were 7
582 ayes and 10 nays.

583 Mr. {Burgess.} The amendment is not agreed to.

584 The chair recognizes himself for purposes of striking
585 the requisite number of words, and to offer an amendment.

586 This is Manager's Amendment Number 2. And just for planning
587 purposes, this amendment will be withdrawn at the conclusion
588 of its offering.

589 The clerk will report.

590 The {Clerk.} Amendment to the discussion draft offered
591 by Mr. Burgess.

592 [The amendment of Mr. Burgess follows:]

593 ***** INSERT 4 *****

|
594 Mr. {Burgess.} Chair will recognize himself for 5
595 minutes to speak on the amendment.

596 There are some concerns regarding the draft legislation
597 that the Federal Trade Commission will have difficulty in
598 proving bad faith. I believe the bad faith definition does
599 strike a good balance in protecting legitimate patent
600 assertions, avoiding enforcement actions for mistakes, while
601 ensuring that the bad actors are indeed held accountable.
602 However, I am offering and then withdrawing this amendment to
603 show that we are willing to lower the bar to enforcement
604 cases where senders of demand letters don't provide
605 meaningful information. This amendment would provide a
606 presumption that the sender of a demand letter acted in bad
607 faith in cases where the recipient asked for certain
608 information, and the sender failed to supply it within a
609 reasonable time frame. The amendment also provides that a
610 demand letter recipient can ask for a patent claim at issue,
611 and if one is not provided, a presumption of bad faith may be
612 triggered.

613 The language is not finalized. It is a work in
614 progress, and we hope that stakeholders will be willing to
615 continue to work with us. We do hope to get a compromise
616 position so that this bill has the right balance, and

617 certainly look forward to working with everyone on this
618 provision as we go forward.

619 I would be happy to yield time to any member seeking
620 recognition.

621 The chair recognizes the gentlelady.

622 Ms. {Schakowsky.} Thank you for the time, Mr. Chairman.

623 I look forward to working with you. I think this
624 amendment was moving in the right direction, and I am hoping
625 that we can come to an agreement on an amendment we can all
626 support.

627 And I don't know if anyone else wants time.

628 Mr. {Burgess.} Very well--

629 Ms. {Schakowsky.} Okay, I yield back.

630 Mr. {Burgess.} --the gentlelady yields back. And I
631 will yield back the balance of the time.

632 Any further discussion on the amendment?

633 The chair will withdraw the amendment.

634 Further amendments on the bill?

635 Ms. {Schakowsky.} Mr. Kennedy.

636 Mr. {Burgess.} For purposes, the gentleman from
637 Massachusetts seeks recognition.

638 Mr. {Kennedy.} Thank you, Mr. Chairman. Move to strike
639 the last word. Amendment at the desk, excuse me.

640 Mr. {Burgess.} Clerk will report.

641 The {Clerk.} What is the title?

642 Mr. {Kennedy.} It is COMB 02.

643 The {Clerk.} Amendment to the discussion draft offered
644 by Mr. Kennedy.

645 [The amendment of Mr. Kennedy follows:]

646 ***** INSERT 5 *****

|
647 Mr. {Burgess.} The gentleman is recognized for 5
648 minutes on his amendment.

649 Mr. {Kennedy.} Thank you, Mr. Chairman. I won't take
650 all that time.

651 Mr. Chairman, I appreciate the--your efforts to make
652 this bill stronger. I do believe it still needs some
653 significant improvements before I can support it.

654 The amendment makes changes that remove the barriers to
655 enforcement currently in the bill. If we intend to pass a
656 bill that effectively combats unfair and deceptive patent
657 demand letters, we must ensure that the enforcers are
658 properly equipped with the necessary--and that the necessary
659 obstacles are removed.

660 First, this amendment removes the pattern or practice
661 requirement. In addition to being ambiguous, it requires the
662 FTC or State Attorneys General to investigate and provide
663 evidence of multiple letters from the same sender. Because
664 patent trolls send letters privately and often hide their
665 identities, this could be an extremely barrier, which is
666 likely why none of the 20 state laws include a pattern or
667 practice requirement.

668 This amendment also removes the bad faith requirement.
669 The bad faith standard will require enforcers to prove the

670 state of mind of the sender of the unfair or deceptive
671 letters, which is a highly unusual requirement in consumer
672 protection cases. Regulation of unfair and deceptive demand
673 letters is a run-of-the-mill for the--for FTC and State
674 Attorneys General. This does not require a specialization
675 patent law. The bad faith requirement is potentially an
676 insurmountable barrier to enforcement.

677 Similarly, this amendment removes the affirmative
678 defense language and clause. And, Mr. Chairman, while I
679 appreciate the amendment that you adopted and authored to try
680 to find an accommodation here, I still believe that it is
681 unnecessary to protect good actors, and it would be to the--
682 this clause, as amended, could easily be exploited by bad
683 actors.

684 Finally, this bill corrects a conflict in the preemption
685 language. It is clear that the intent of this preemption
686 language is to limit the preemption only to state laws that
687 specifically address abusive patent demand letters. The
688 savings clause is clearly intended to preserve state common
689 law, and the states' general consumer protection laws. This
690 correction is made--the correction made by this amendment
691 simply clarifies that intent.

692 The changes made by this amendment, Mr. Chairman,
693 reflect a minimum that needs to be done to make this bill

694 more effective, to protect targets from unfair and deceptive
695 patent demand letters. I urge my colleagues to support it.

696 Thank you, and I yield back.

697 Mr. {Burgess.} The chair thanks the gentleman. The
698 gentleman yields back.

699 The chair will recognize himself for the purposes of
700 striking the requisite number of words, and recognize myself
701 for 5 minutes to speak against the amendment.

702 Look, there is a concrete defined harm before us today.
703 We should not legislate to address hypothetical problems like
704 one-off demand letters. The business model we have heard
705 about over and over does not include one-off letters. We
706 should address the harms that are clearly in front of us.

707 The actual language of the bill states that ``It shall
708 be an unfair or deceptive act or practice to engage in a
709 pattern or practice of sending written communications that
710 state or represent that the recipients are or may be
711 infringing, or may have infringed, the patent and bear
712 liability, and owe compensation to another.'' It goes on to
713 list the prohibited misrepresentations, and the disclosure
714 that the sender must make in a demand letter.

715 The entire business model that we have been hearing
716 about for years is that a patent assertion entity will send
717 hundreds or thousands of demand letters to relatively

718 unsophisticated businesses, hoping to extort a licensing fee,
719 and calculate it to come in just below the cost of
720 litigation, without having to do much more than hit the send
721 button or stuff some mail in envelopes. In fact, this
722 subcommittee has received multiple examples of these demand
723 letters from the recipient community, and not one was
724 submitted as an example of a one-off demand letter. They are
725 all part of larger campaigns.

726 This Act would explicitly grant the Federal Trade
727 Commission civil penalty authority to go after those bad
728 actors for the 12 misrepresentations listed in the bill, and
729 the 5 required disclosures.

730 This is a major improvement from the status quo, and
731 removing the pattern or practice, as this amendment suggests,
732 will not move the ball forward toward final passage.

733 And the chair would be happy to recognize other members
734 on the majority side who wish to speak.

735 The chair recognizes the gentleman from Mississippi.

736 Mr. {Harper.} Thank you, Mr. Chairman. I also speak in
737 opposition to this amendment. I think the remedies we
738 provide for State Attorneys General are sufficient under the
739 draft legislation, and we provide civil penalties up to \$5
740 million and injunctions. Moreover, we authorize the State
741 Attorney General to bring an action under the Act. Action by

742 a state AG should be sufficient to protect the interests of
743 the state, and there is no reason to enable private
744 enforcement of a harm that affects the interests of a state.

745 The state AG is the proper enforcer for the Act when a
746 state interest is affected by abusive demand letters, not
747 private litigation firms.

748 We use the same construct as is currently used in the
749 Sherman Antitrust Act. State Attorneys General have robust
750 enforcement programs under the Sherman Act. The language we
751 use, which invokes the interests of the state, ensures that
752 the state AGs have standing to sue under the Act. We know
753 this because the language is worked in the Sherman Act
754 context. Other language constructs are less certain, so the
755 preferred language is what we currently have in the draft
756 text.

757 And I yield back, Mr. Chairman.

758 Mr. {Burgess.} The gentleman yields back.

759 The chair will yield back the time.

760 Is there further discussion on the amendment?

761 Chair recognizes the gentlelady from Illinois.

762 Ms. {Schakowsky.} Thank you, Mr. Chairman. I--

763 Mr. {Burgess.} For what purpose does the gentlelady
764 from Illinois seek recognition?

765 Ms. {Schakowsky.} I move to strike the last word.

766 Mr. {Burgess.} Gentlelady is recognized for 5 minutes.

767 Ms. {Schakowsky.} Thank you.

768 This amendment addresses many of the concerns I and
769 others have with the legislation, and since the previous
770 democratic amendment which I offered did not pass, I hope my
771 colleagues will support this narrowly tailored approach.

772 This amendment addresses the two glaringly obvious
773 problems with the bill; the bad faith and affirmative defense
774 provisions. The bad faith requirement calls for an
775 understanding of the knowledge and intent of a patent
776 assertion entity at the time a demand letter is sent. The
777 affirmative defense provision states that as long as letters
778 do not violate this Act, are sent in the regular course of
779 business, no letters will--everyone knows what that is. And
780 I know that we just passed an amendment that I think does
781 improve the bill, but it seems to me that if we truly want to
782 address the issues of patent demand letters, these provisions
783 should be scrapped, and that is what this amendment does.

784 The amendment also addresses less noticeable but still
785 important problems with the bill. It eliminates the
786 requirement that a pattern or practice of sending demand
787 letters that violate this Act be established in order to go
788 after bad actors. And, Mr. Chairman, I think that we
789 certainly want first-time offenders too to be caught under

790 this, even though there may not be a long history, but if
791 they start to get into the business of sending demand
792 letters, yes, I realize we are not talking about one-off
793 letters, but we certainly make--want to make sure that we
794 capture everyone. And as Mr. Kennedy pointed out, that can
795 be virtually impossible to show that--the pattern or
796 practice, especially for a first offense, given the nature of
797 the letters and the businesses and individuals that they
798 target.

799 And this amendment removes barriers to enforcement of
800 states' small businesses and consumer protection statutes, as
801 well as common law. We should maximize existing protections
802 against patent demand letter abuse.

803 So again, I support the amendment. It is narrowly
804 drafted. I urge my colleagues to support it. And I yield to
805 the gentleman from New Jersey.

806 Mr. {Pallone.} I thank the gentlewoman.

807 I just want to say the Kennedy amendment is another
808 worthy attempt to correct some of the shortcomings of the
809 underlying bill, specifically when it comes to barriers to
810 enforcement and state law preemption.

811 Like the Schakowsky amendment, the Kennedy amendment
812 also strikes the bad faith requirement, a highly unusual
813 standard that adds an unnecessary hurdle to law enforcement

814 when pursuing patent trolls. And the Kennedy amendment also
815 removes the affirmative defense clause, which serves no other
816 purpose than to shield bad actors from liability.

817 By passing this amendment, we would close a gaping
818 loophole in the underlying bill that currently allows senders
819 of patent demand letters to demonstrate good faith through
820 previous written communications that do not violate the
821 provisions of the Act, or simply through other evidence.
822 Additionally, while this amendment does not remove the
823 preemption of the 20 state laws already passed targeting
824 abusive patent demand letters, it does ensure that states
825 have the ability to appropriately punish bad actors, and
826 ensures that state consumer protection and common laws are
827 not preempted.

828 So I would urge my colleagues to support the Kennedy
829 amendment. And yield back to the gentlewoman.

830 Ms. {Schakowsky.} Is there anyone who would like to
831 speak in favor of the amendment on our side? Then I yield
832 back.

833 Mr. {Burgess.} The chair thanks the gentlelady.
834 Gentlelady yields back.

835 Other members seeking recognition on the amendment? If
836 not, the vote occurs on the amendment.

837 All those in favor will say aye.

838 All those opposed, nay.

839 Ms. {Schakowsky.} We would like a roll call.

840 Mr. {Burgess.} The gentlelady requests a roll call

841 vote.

842 The clerk will call the roll.

843 The {Clerk.} Mr. Lance?

844 Mr. {Lance.} No.

845 The {Clerk.} Mr. Lance votes no.

846 Mrs. Blackburn?

847 Mrs. {Blackburn.} No.

848 The {Clerk.} Mrs. Blackburn votes no.

849 Mr. Harper?

850 Mr. {Harper.} No.

851 The {Clerk.} Mr. Harper votes no.

852 Mr. Guthrie?

853 Mr. {Guthrie.} No.

854 The {Clerk.} Mr. Guthrie votes no.

855 Mr. Olson?

856 [No response.]

857 The {Clerk.} Mr. Pompeo?

858 [No response.]

859 The {Clerk.} Mr. Kinzinger?

860 Mr. {Kinzinger.} No.

861 The {Clerk.} Mr. Kinzinger votes no.

862 Mr. Bilirakis?

863 Mr. {Bilirakis.} No.

864 The {Clerk.} Mr. Bilirakis votes no.

865 Mrs. Brooks?

866 Mrs. {Brooks.} No.

867 The {Clerk.} Mrs. Brooks votes no.

868 Mr. Mullin?

869 Mr. {Mullin.} No.

870 The {Clerk.} Mr. Mullin votes no.

871 Chairman Upton?

872 The {Chairman.} No.

873 The {Clerk.} Chairman Upton votes no.

874 Ms. Schakowsky?

875 Ms. {Schakowsky.} Yes.

876 The {Clerk.} Ms. Schakowsky votes yes.

877 Ms. Clarke?

878 Ms. {Clarke.} Yes.

879 The {Clerk.} Votes aye. Ms. Clarke votes yes.

880 Mr. Kennedy?

881 Mr. {Kennedy.} Yes.

882 The {Clerk.} Mr. Kennedy votes yes.

883 Mr. Cardenas?

884 Mr. {Cardenas.} Yes.

885 The {Clerk.} Mr. Cardenas votes yes.

886 Mr. Rush?

887 Mr. {Rush.} Yes.

888 The {Clerk.} Mr. Rush votes yes.

889 Mr. Butterfield?

890 [No response.]

891 The {Clerk.} Mr. Welch?

892 Mr. {Welch.} Yes.

893 The {Clerk.} Mr. Welch votes yes.

894 Mr. Pallone?

895 Mr. {Pallone.} Yes.

896 The {Clerk.} Mr. Pallone votes yes.

897 Chairman Burgess?

898 Mr. {Burgess.} No.

899 The {Clerk.} Chairman Burgess votes no.

900 Mr. {Burgess.} The clerk will report the result.

901 The {Clerk.} Mr. Chairman, on that vote, there were 7

902 ayes and 10 nays.

903 Mr. {Burgess.} Then the amendment is not agreed to.

904 Are there members seeking recognition for further

905 amendments?

906 If there are no members seeking further amendments, the

907 question now occurs on forwarding the committee print as

908 amended to the full committee.

909 All those in favor will say aye.

910 All those opposed, nay.

911 The ayes appear to have it. The ayes have it. The bill
912 is favorably forwarded.

913 Ms. {Schakowsky.} We would like a roll call.

914 Mr. {Burgess.} The gentlelady requests a roll call
915 vote.

916 The clerk will call the roll.

917 The {Clerk.} Mr. Lance?

918 Mr. {Lance.} Yes.

919 The {Clerk.} Mr. Lance votes aye.

920 Mrs. Blackburn?

921 Mrs. {Blackburn.} Aye.

922 The {Clerk.} Mrs. Blackburn votes aye.

923 Mr. Harper?

924 Mr. {Harper.} Aye.

925 The {Clerk.} Mr. Harper votes aye.

926 Mr. Guthrie?

927 Mr. {Guthrie.} Aye.

928 The {Clerk.} Mr. Guthrie votes aye.

929 Mr. Olson?

930 [No response.]

931 The {Clerk.} Mr. Pompeo?

932 [No response.]

933 The {Clerk.} Mr. Kinzinger?

934 Mr. {Kinzinger.} Aye.

935 The {Clerk.} Mr. Kinzinger votes aye.

936 Mr. Bilirakis?

937 Mr. {Bilirakis.} Aye.

938 The {Clerk.} Mr. Bilirakis votes aye.

939 Mrs. Brooks?

940 Mrs. {Brooks.} Aye.

941 The {Clerk.} Mrs. Brooks votes aye.

942 Mr. Mullin?

943 Mr. {Mullin.} Aye.

944 The {Clerk.} Mr. Mullin votes aye.

945 Chairman Upton?

946 The {Chairman.} Aye.

947 The {Clerk.} Chairman Upton votes aye.

948 Ms. Schakowsky?

949 Ms. {Schakowsky.} No.

950 The {Clerk.} Ms. Schakowsky votes no.

951 Ms. Clarke?

952 Ms. {Clarke.} No.

953 The {Clerk.} Ms. Clarke votes no.

954 Mr. Kennedy?

955 Mr. {Kennedy.} No.

956 The {Clerk.} Mr. Kennedy votes no.

957 Mr. Cardenas?

958 Mr. {Cardenas.} No.

959 The {Clerk.} Mr. Cardenas votes no.

960 Mr. Rush?

961 Mr. {Rush.} No.

962 The {Clerk.} Mr. Rush votes no.

963 Mr. Butterfield?

964 [No response.]

965 The {Clerk.} Mr. Welch?

966 Mr. {Welch.} No.

967 The {Clerk.} Mr. Welch votes no.

968 Mr. Pallone?

969 Mr. {Pallone.} No.

970 The {Clerk.} Mr. Pallone votes no.

971 Chairman Burgess?

972 Mr. {Burgess.} Aye.

973 The {Clerk.} Chairman Burgess votes aye.

974 Mr. Chairman, on that vote there were 10 ayes and 7

975 nays.

976 Mr. {Burgess.} The ayes have it, and the bill is agreed

977 to.

978 Without objection, the staff is authorized to make

979 technical and conforming changes to the legislation approved

980 by the subcommittee today. So ordered.

981 Without objection, the subcommittee stands adjourned.

982 [Whereupon, at 12:56 p.m., the Subcommittee was
983 adjourned.]