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H.R. ____, THE TARGETING ROGUE AND OPAQUE LETTERS ACT

THURSDAY, APRIL 16, 2015

House of Representatives,

Subcommittee on Commerce, Manufacturing, and Trade,

Committee on Energy and Commerce,

Washington, D.C.

The subcommittee met, pursuant to call, at 11:04 a.m., in Room 2123, Rayburn House Office Building, Hon. Michael C. Burgess, M.D., [chairman of the subcommittee] presiding.

Present: Representatives Burgess, Lance, Guthrie, Bilirakis, Brooks, Mullin, Schakowsky, Clarke, Kennedy, Cardenas, and Pallone (ex officio).

Staff Present: Charlotte Baker, Deputy Communications Director; James Decker, Policy Coordinator, CMT; Graham Dufault, Counsel, CMT; Melissa Froelich, Counsel, CMT; Kirby Howard,

Legislative Clerk; Paul Nagle, Chief Counsel, CMT; Olivia Trusty, Professional Staff, CMT; Michelle Ash, Minority Chief Counsel, CMT; Christine Berenholz, Minority Chief Clerk; Jeff Carroll, Minority Staff Director; Lisa Goldman, Minority Counsel; Brendan Hennessey, Minority Policy and Research Advisor; and Ryan Skukowski, Minority Policy Analyst.

Mr. Burgess. The Subcommittee on Commerce, Manufacturing, and Trade will now come to order.

The chair will recognize himself for 5 minutes for the purpose of an opening statement.

And I do want to welcome all to our legislative hearing to consider the Targeting Rogue and Opaque Letters Act of 2015.

Last year, the subcommittee held a series of negotiations resulting in the draft legislation we consider today. Although the draft bill passed this subcommittee with bipartisan support, there are some who believe the text could be amended narrowly to achieve better protections for those who receive demand letters. So today we look forward to hearing from our panelists about how we can make some targeted changes to the draft text to achieve this goal.

The problem of abusive demand letters has set off a surge in State activity to address this issue. Unfortunately, many States have unintentionally created problems for patent holders in trying to address the harms created by bad actors. For example, State courts should not be empowered to determine the reasonable cost of a patent license. Nor should the definition of a bad-faith demand letter be allowed to disregard the First Amendment rights of patent owners.

Causes of action under State law are in trouble in the demand letter space when they have been removed to Federal court. Federal Circuit doctrine generally controls patent matters. As we

heard at our first demand letter hearing earlier this year, the Federal Circuit jurisprudence preempts all but a narrow set of cases in the demand letter context.

When Nebraska attempted to enjoin MPHJ Technology Investments from victimizing Nebraska businesses and residents, the case wound up in Federal court. There, it was dismissed under the Federal court's Noerr-Pennington doctrine, among other things.

Most of us agree that the MPHJ was indeed attempting to trick demand letter recipients into paying undue license fees. Federal legislation would provide State attorneys general a remedy for those demand letter recipients who may not be protected because State-level safeguards are negated.

These are a couple of the compelling reasons for Federal legislation and preempting the State laws that directly deal with demand letters. We do aim to move this bill forward, and I believe it could become law so long as it narrowly addresses the demand letter problem with due respect to the Constitution.

I want to thank the witnesses for being here. You will all be introduced, but, Ms. Lettelleir, as a fellow Texan, I particularly want to welcome you to our panel today.

I would like to recognize the ranking member of the full committee, Mr. Pallone, for 5 minutes for an opening statement.

Sir, you are recognized.

[The prepared statement of Mr. Burgess follows:]

***** COMMITTEE INSERT *****

Mr. Pallone. Thank you, Mr. Chairman.

The patent system plays a crucial role in promoting innovation by providing an incentive to inventors to make costly and time-consuming investments in research and development of new inventions. At the same time, the system requires that the inventions be disclosed so that others can build upon the inventions.

At our last hearing on this issue in February and as early as the fall of 2013 in the Subcommittee on Oversight Investigations, we heard from stakeholders that some businesses, especially small, Main Street ones like coffee shops, realtors, hotels, restaurants, and retailers, have been receiving abusive patent demand letters. Efforts to combat abusive demand letters have already begun, and some State attorney generals have taken legal action to protect their citizens from unfair and deceptive demand letters. In addition, 20 States have already enacted legislation to tackle this abusive activity.

Furthermore, the FTC brought an administrative complaint against MPHJ Technologies, a well-known patent troll. That case was recently settled through a consent order that prohibits MPHJ from making deceptive statements in its demand letters.

The question before us is simple: Are those current efforts enough to combat the problem, or should Congress legislate in this area? Legislative solutions to address these vague, threatening, unsubstantiated, and often inaccurate letters have received

bipartisan support, so I have hope that we can find a solution that all Members are able to support.

Last Congress, this committee held three hearings, and the subcommittee marked up a bill. And while I support efforts to find a tailored relief for our constituents receiving these abusive letters, we should not undermine the great work already occurring. For example, I will support efforts to ensure that States and the FTC continue to be able to enforce against fraudulent actors and are able to collect civil penalties from wrongdoers.

The States and the FTC are experts in consumer protection. These are not complicated patent law cases, as some suggest, but, instead, garden-variety fraud and deception cases. States may be particularly well suited to handle these issues because they best understand the circumstances of their residents.

However, I cannot support the bill before us today. It includes problematic language that does not move us forward. Among other things, it created a knowledge standard, one not typically needed to prove fraud, and it preempts stronger State laws.

As I said yesterday in the context of data security and breach notification, if we as a Congress choose to legislate, we need to make sure that we are furthering the interests of consumers. As I also mentioned yesterday, if Congress seeks to preempt specific State laws, especially on issues in which the

States have been leaders fighting unfair and deceptive acts, such as false and misleading demand letters, the Federal effort should be at least as strong as those State laws.

The goal of this legislation might be well intentioned, but the drafting is flawed. I am happy that this issue is going through regular order anew this Congress, and I urge my Republican colleagues to work with us in a bipartisan fashion to get the language right.

And thank you, Mr. Chairman. I yield back.

[The prepared statement of Mr. Pallone follows:]

***** COMMITTEE INSERT *****

Mr. Burgess. The chair thanks the gentleman. The gentleman yields back.

Let me just ask on the Republican side, is there any member who seeks time for an opening statement?

Seeing no request for time, I would ask the ranking member of the full committee, is there any member on the Democratic side who seeks time for an opening statement?

Mr. Pallone. No.

Mr. Burgess. Very well. Seeing none, that concludes time for the opening statements.

Again, I want to welcome all of our witnesses and thank all of you for agreeing to testify before the committee today.

Our witness panel for today's hearing will include Mr. David W. Long, a partner at Kelley Drye & Warren, testifying on behalf of the Innovation Alliance; Mr. Gregory Dolin, associate professor of law and co-director of the Center for Medicine and Law at the Baltimore University School of Law; Ms. Diane Lettelleir, senior managing counsel, litigation, J.C. Penney Corporation, testifying on behalf of United for Patent Reform; and Mr. Charles Duan, director of the Patent Reform Project for Public Knowledge.

Our first witness today will be Mr. David Long.

Sir, you are recognized for 5 minutes for a summarization of your testimony. And thank you for being here. You are recognized.

STATEMENTS OF DAVID W. LONG, PARTNER, KELLEY DRYE & WARREN, ON BEHALF OF INNOVATION ALLIANCE; GREGORY DOLIN, ASSOCIATE PROFESSOR OF LAW, BALTIMORE UNIVERSITY SCHOOL OF LAW; DIANE LETTELLEIR, SENIOR MANAGING COUNSEL, LITIGATION, J.C. PENNEY CORPORATION, INC., ON BEHALF OF UNITED FOR PATENT REFORM; AND CHARLES DUAN, DIRECTOR, PATENT REFORM PROJECT, PUBLIC KNOWLEDGE

STATEMENT OF DAVID W. LONG

Mr. Long. Thank you, Chairman Burgess. I am David Long, a patent attorney at the Kelley Drye & Warren law firm.

I am here today on behalf of Innovation Alliance to discuss patent demand letters. Innovation Alliance is a coalition of research-and-development-focused companies that believe in a strong patent system in which innovative businesses can thrive. Innovation Alliance supports the draft legislation we are discussing today and encourages its introduction as a balanced approach to address the vast majority of abusive patent behavior that has garnered so much attention.

Now, the resultant negative views of patent law from such negative attention is unfortunate and unwarranted. I love innovation, and I am very proud of our U.S. patent system that has fueled it. Before entering the legal profession, I earned a master's degree in electrical engineering and worked about 5 years in industry. In fact, I was a rocket scientist.

I have practiced U.S. patent law for about 20 years now. I started as a law clerk at the U.S. Court of Appeals for the Federal Circuit in 1995 and have since focused on patent counseling and representation before courts and the U.S. Patent and Trademark Office. I am very active in national and international patent law organizations, and I have seen firsthand that the U.S. patent system is the greatest known system for innovation.

Now, consider the telecommunications industry in which my practice is focused. Not too long ago, a so-called mobile phone was actually a suitcase-size device lugged around by the privileged elite. Today, everyday people everywhere carry mobile phones in their pockets, and they do many remarkable things with them. And patents fueled that innovation every step of the way.

So the patent system certainly is not broken, as some have suggested, but, like all thriving systems, it must be tweaked from time to time, and that is why we are here today.

So a fundamental goal of the U.S. patent system is to encourage patent owners to provide notice of their patent rights to potential infringers. That way, they can determine whether to stop the alleged infringement, negotiate a license, design around the patent, or otherwise take some appropriate action.

By and large, the bulk of business-to-business patent notice letters, or what the draft legislation calls patent demand letters, are legitimate efforts to give notice and to start a

dialogue that allows the parties to negotiate and reach a reasonable business solution.

What brings us here today is concern about deceptive demand letters. These generally arise from a few opportunistic bad actors with certain business models, what some call patent assertion entities, who mass-mail demand letters to small businesses that are not familiar with patents or the underlying technology, and, therefore, they maybe vulnerable to deceptive demand letters.

Businesses typically turn to in-house or outside counsel to address the specific legal issues that arise as a normal part of their business. For example, they turn to employment lawyers who address human resources issues, they turn to transactional lawyers who address commercial contract issues. Technology-oriented businesses routinely turn to patent counsel to address patent demand letters that arise as a normal part of their business. But certain small businesses outside the technology sector may not have such patent counsel or experience, and, therefore, they may be vulnerable to deceptive demand letters.

So the draft legislation we are discussing today is a properly balanced and measured response to this patent demand letter concern.

First, the draft legislation properly is directed to entities that have a pattern and practice of sending deceptive demand letters, what some have called a smash-and-grab practice, where,

at the nominal cost of a stack of form letters, envelopes, and postage stamps, deceptive demand letters are mass-mailed in hopes of getting a large return in the aggregate from many small nuisance settlements paid by vulnerable targets. That smash-and-grab model simply does not work if sending one or just a few demand letters, so a pattern and practice of deceptive demand letters is where the problem lies.

Second, the draft legislation properly focuses on bad-faith demand letters. This avoids the act being used as a gotcha against otherwise good corporate citizens whose demand letters technically may have fallen short of the act's requirement but there is no harm and no harm intended.

Moreover, the Constitution requires a showing of bad faith when it comes to government action against patent demand letters. This protects a patent owner's First Amendment right to petition the government for redress of grievances. And there is universal agreement among the courts that this First Amendment protection includes patent demand letters.

Third, the draft legislation properly preempts State laws, while allowing State attorney generals to protect their constituents from deceptive demand letters by invoking this act.

The key to our U.S. patent system's success is that our Constitution specifically entrusts Congress with the power to promote the progress of science and useful arts through uniform patent rights. The Federal Government has the experience and the

authority needed to address patent right concerns holistically and uniformly in order to maintain a balanced and thriving patent system.

Thank you, and I look forward to answering your questions.

[The prepared statement of Mr. Long follows:]

***** INSERT 1-1 *****

Mr. Burgess. The chair thanks the gentleman. The gentleman yields back.

The chair recognizes Mr. Gregory Dolin for 5 minutes for the purpose of an opening statement, sir.

STATEMENT OF GREGORY DOLIN

Mr. Dolin. Thank you, Mr. Chairman.

Chairman Burgess, Ranking Member Pallone, members of the subcommittee, thank you for this opportunity to speak with you today about the draft bill prohibiting false statements and mandating disclosures in demand letters.

My name is Gregory Dolin. I would like to note that I am speaking in my personal capacity as a law professor at the University of Baltimore School of Law and not on behalf of my employer or any other organization that I am affiliated with.

This draft bill is directed at bad actors who engage in bad-faith communications in asserting patents against alleged infringers. These communications are known as demand letters.

At the outset, let me state that this bill is an admirable attempt to address bad behavior by some patent owners who abuse the civil litigation system. Furthermore, the bill is a significant improvement over previous attempts to address this problem.

Specifically, the bill commendably preempts State-based

legislation that is purportedly aimed at the same problem but, in reality, starts to undermine the uniformity of our Nation's patent laws. An owner of the Federal property right should be able to enforce it on equal terms in every part of the country.

The bill is also praiseworthy for its attempts to provide a flexible standard against which to judge the patentee's bad faith.

Nonetheless, the bill continues to have significant problems. In an attempt to address bad-faith communications by bad actors, the bill mandates specific disclosures in all demand letters sent by all patent owners. This approach may end up discouraging all such communications by legitimate and illegitimate claimants alike. Unfortunately, as a result, the draft bill is likely to have significant but unintended negative consequences of increasing the amount of overall cost of litigation.

My testimony will focus on two provisions of the draft bill which I believe may undermine legitimate patentees' rights to enforce their patents while encouraging more unnecessary litigation.

First, the significant legal penalties proposed in this bill may discourage patentees from sending demand letters. This would actually be an unfortunate outcome. A demand letter serves the function of informing the recipient that it is infringing on property rights secured under Federal law.

At the same time, demand letters are not a legal prerequisite for filing a patent infringement lawsuit. Instead, a demand

letter allows the patentee and the accused infringer to begin the process of privately evaluating the legal claims and, if warranted, entering into a settlement agreement.

Our justice system has long preferred out-of-court settlements, where the parties can strike an agreement making both of them better off, to costly judicial interventions which result in a clear winner and a clear loser. Our markets also prefer private resolutions of legal claims, as evidenced by stock price fluctuations whenever a significant lawsuit is filed against a company.

Without the ability to begin the process of private resolution through sending of demand letters, patentees are likely to resort to lawsuit filings as their initial, as opposed to final, attempt to resolve patent disputes.

Under the current law, legal filings, such as complaints, answers, and motions, are immune from imposition of liability. Thus, under the present bill, a patentee may be more at risk for sending a demand letter than he would be for filing a civil action.

Faced with this choice, a reasonable actor would always prefer a lawsuit to a demand letter. In other words, a reasonable actor would act completely contrary to the societal preference for private resolution of legal disputes. Not only will this place additional burdens on our already overworked judges, but it will ultimately increase costs for both patentees and accused

infringers and, therefore, consumers.

Second, the provisions of this bill seem to paradoxically require more disclosures from a patentee who sends a demand letter than from one who files a civil action seeking to enforce his patent rights in court.

The Federal rules of civil procedure require a plaintiff to do nothing more than to provide a, quote, "short and plain statement of the claim," end quote. This requirement is satisfied by identifying the patent which the plaintiff alleges the defendant infringes and the allegedly infringing product. The rules, unlike this present bill, do not require a patentee to identify a specific claim that is infringed or to describe in detail how the product infringes the identified patent and the patent's claim. These additional burdens on the patentees will again drive them away from demand letters and toward litigation.

In conclusion, safeguarding the patent system from abuses by bad actors is an important and laudable goal. Abuses in the system undermine the efficient operation of our patent laws and, with them, the growth of the innovation economy.

However, in drafting solutions to an admittedly real and serious problems, Congress must be careful to ensure that its cure is not worse than the disease. Congress should heed the lessons of past patent reforms, which have often created as many problems as they have solved, and avoid repeating this mistake.

Whatever route Congress chooses to take, it should ensure

that it does not undermine legitimate patentees' ability to enforce their patents, less it undermine the necessary incentives for innovation and economic growth.

I thank you, and I look forward to your questions.

[The prepared statement of Mr. Dolin follows:]

***** INSERT 1-2 *****

Mr. Lance. [Presiding.] Thank you very much, Mr. Dolin.

The committee is going to adjourn. We have just had a call for votes on the floor, and we will return to the committee -- recess. We will return after our votes.

We apologize. I consider this a personal plot against me. I have been in the chair for 2 minutes, and now votes have been called. But we look forward to the testimony of the two remaining witnesses and for questions from the committee members following that, and we will return as quickly as possible upon completion of votes on the floor.

And so the committee stands in adjournment -- recess, recess. And I would imagine, perhaps, 30 minutes or 35 minutes. Thank you very much.

[Recess.]

Mr. Burgess. [Presiding.] The subcommittee will come back to order.

I believe, when we adjourned, we were to receive the testimony of Ms. Lettelleir.

You are recognized for 5 minutes for a summarization of your testimony, please.

STATEMENT OF DIANE LETTELLEIR

Ms. Lettelleir. Chairman Burgess, Ranking Member Schakowsky, and members of the Energy and Commerce Subcommittee on Commerce, Manufacturing, and Trade, I am Diane Lettelleir, senior managing counsel of litigation at J.C. Penney.

J.C. Penney is a 113-year-old company headquartered in Plano, Texas. Today, J.C. Penney has over 1,000 stores in 49 States and Puerto Rico and employs more than 116,000 associates nationwide.

I am testifying on behalf of United for Patent Reform, which is a diverse group of businesses that includes retailers, grocers, convenience stores, auto companies, auto dealers, trucking companies, hoteliers, realtors, homebuilders, and technology companies and many other Main Street businesses.

Patent trolls have a significant impact on Main Street business. Since 2012, patent trolls have sued more Main Street companies than even technology companies, which means each year Main Street businesses are spending millions of dollars and thousands of employee man-hours fighting patent trolls. It should not be lost that the same money could have been used to expand their business, hire new workers, or invest in new technologies.

The trolls target Main Street businesses because they often lack the legal and technical expertise and the money required to fight complex patent infringement claims. Patent trolls take

advantage of these weaknesses and strategically offer settlements at a level set below the cost of litigation. The settlements offered are not based on the value of the claimed invention but, rather, on the cost of defense.

This results in a particularly malicious form of blackmail. The Main Street company must pay the unjustified settlement or take its chances in litigation, where the best-case scenario is spending potentially millions of dollars simply to prove that they had done nothing wrong.

This is compounded by the fact that demand letters are often vague, misleading, and deceptive. The demand letters usually fail to include basic facts that any business would need in order to make informed decisions or even an explanation of what the defendant makes or does that allegedly infringes. The recipient of such a letter has no way of determining their potential liability or making an informed decision about the best way to respond.

This harmful and deceptive practice needs to be stopped. That is why members of the United for Patent Reform appreciate your leadership and the subcommittee's work on strengthening enforcement. Although we have some concerns about certain details of the proposed legislation, we urge the subcommittee to continue its important work.

I will briefly touch on important changes we would like to see. A more detailed description is included in my written

testimony.

First, we seek the removal of a 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.

Second, the definition of "bad faith" should be removed. The focus should be on the effect on the target companies that receive these demand letters, rather than proof of the knowledge of the sender. Recipients of demand letters can be harmed by misrepresentations or omissions regardless of whether the party making them acknowledges that they are false or misleading.

We also seek the removal of a separate bad-faith requirement from the listed factors. In the original text, certain factors also required establishing bad faith as a separate showing. Requiring that bad faith be demonstrated to establish a violation, however, could nullify the act's provisions.

We also propose a few changes in the structure of the factors, which is set forth in more detail in my written testimony.

In addition, we suggest adding a sub-part that, in effect, requires the sender to identify the claims of the patent alleged to be infringed by the recipient. Failure to include such information in a demand letter is evidence that the assertion is objectively baseless and, thus, made in bad faith.

Finally, we request the removal of the 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 support a list of factors relevant to showing that a sender has not acted in bad faith.

We remain committed to working 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 the designated enforcer will support.

Thank for the opportunity to testify, and I welcome your questions.

[The prepared statement of Ms. Lettelleir follows:]

***** INSERT 1-3 *****

Mr. Burgess. The gentlelady yields back. The chair thanks the gentlelady.

Mr. Duan, you are recognized for 5 minutes for summarization of your testimony, please.

STATEMENT OF CHARLES DUAN

Mr. Duan. Thank you.

Chairman Burgess, Ranking Member Schakowsky, and members of the subcommittee, thank you for inviting me to testify today. My name is Charles Duan, and I am the director of the Patent Reform Project at Public Knowledge. We are a nonprofit organization that works at the intersection of technology and consumer policy. I previously worked as a software developer and also as a patent attorney.

I would like to start today by talking about an event from 1976, a hearing held in this very building. The hearing featured a witness who literally wore a mask as he testified about abuses in the debt collection industry. The practices he described were frightening: calling debtors every 5 minutes, intimidating children, pretending to be attorneys, and threatening lawsuits. These aggressive tactics ultimately led Congress in 1977 to pass the Fair Debt Collection Practices Act, one of the strongest Federal consumer protection laws on the books today.

These strong-arm tactics are at work again, now in the

service of abusive patent demand letters. This committee has already held three hearings over the last 2 years where witnesses recounted the threats, misrepresentations, and deceptive practices used by unscrupulous asserters of patent rights. The situations are highly analogous. The bad debt collectors of the 1970s are the bad patent royalty collectors of today.

I would thus commend and thank the subcommittee for taking on this issue that affects most directly the smallest American businesses and the smallest American consumers, the ones most in need of protection. The members of the subcommittee have worked hard, with the aim of crafting a patent demand letter bill that will best protect consumers.

But while the subcommittee has made great strides toward that goal, the current draft bill doesn't adequately protect the consumer interests. In particular, we provide the following four recommendations to improve the bill.

First, the preemption of existing State laws will undesirably weaken, rather than strengthen, consumer protection. Right now, there are 20 State laws which provide the citizens of those States with protections against abusive demand letter practices. Some of these State laws provide protections beyond what the current TROL Act contemplates. That means that residents of those States would actually lose protections from abusive demand letters, the opposite result from what this bill intends to accomplish.

And it is not just existing State protections that stand to

be lost by preemption. The States have historically served as laboratories of policy experimentation, developing new and innovative solutions to a changing landscape of problems, creating a marketplace of ideas from which Congress may draw. Preemption could cut that off, and that is not what we want. The TROL Act should be a floor, not a ceiling, for consumer protection, allowing States to solve the problems of the future with new laws of the future.

Second, the affirmative defense provision is simply too broad. Read literally, it immunizes any demand letter sender who issues a few legitimate letters that comply with the bill. Clever schemers could easily use this by sending a mix of legitimate and abusive letters or sending letters with deceptions different from the ones in the bill, thus harming consumers while still following the letter of the law. The affirmative defense should be removed or tightened to avoid these sorts of loopholes.

Third, the bill identifies 17 specific acts that could be considered unfair or deceptive practices, but demand letters can be unfair or deceptive in far more than 17 ways. The State laws alone identify several others, and who knows what other deceptions will be invented in the future. So the bill should include a catchall provision to protect consumers from bad practices beyond the 17 listed in the bill.

Fourth, the bill only prohibits a, quote, "pattern or practice" of sending improper demand letters in, quote, "bad

faith." These two extra requirements only make it harder for enforcement officials to protect consumers. The requirements are meant to protect legitimate patent asserters who make innocent mistakes, but that would be better done with something like the bona fide mistake provision in the FDCA, not by these two requirements.

We ask the subcommittee to incorporate these suggestions into the draft bill, and we continue to support the subcommittee's efforts here. Certainly, the TROL Act is no substitute for broader patent reform, such as H.R. 9. No demand letter can block and stop abusive litigation. Still, the demand letter piece of the patent reform puzzle is critical, as it affects the smallest businesses and the weakest consumers, ones that this subcommittee should be proud to protect.

Thank you again for inviting me to testify. I look forward to your questions.

[The prepared statement of Mr. Duan follows:]

***** INSERT 1-4 *****

Mr. Burgess. The gentleman yields back. The chair thanks the gentleman.

I think that concludes all of our witness statements, and we will move into the Q&A part of the hearing. And I will recognize myself for 5 minutes for questions.

And I want to ask a question of the entire panel, and I would like for each of you to answer.

It seems like over the past year we have heard a lot of different stories about various patent assertion entities that have targeted a wide variety of industries. Would each of you describe the trajectory of this problem? And then, in particular, I am interested in your opinion, is the problem getting worse or getting better?

Mr. Long, let's start with you.

Mr. Long. Thank you, Chairman Burgess.

I think the trajectory is actually going down. When you look at -- some of the biggest concerns was this MPHJ, or what some people called the patent scanner troll. And the FTC stepped in in that case, and they entered a consent order. I believe that was finalized just a few months ago.

You look at the Innovatio case; it has been a poster child for patent abuse, so to speak. It concerned someone sending letters to mom-and-pop coffee shops, to hotels about their WiFi. And we see that case was handled, and very appropriately, by Judge Holderman in the Northern District of Illinois, and it actually

has reached, I think, a settlement on all those issues.

So I think, as the public becomes more informed of what is going on, given all the resources that we have on the Internet and even at the Patent Office to investigate someone you receive a letter from, I think things are going much better.

Mr. Burgess. Thank you.

Mr. Dolin, your comments on the trajectory of the problem? Better or worse?

Mr. Dolin. Thank you, Mr. Chairman.

I would like to answer your question by pointing out that one person's patent troll is another person's innovator.

Certainly, I am not here to dispute that there are bad actors in the system, just like there are bad actors in any system, just like there are bad actors in medical malpractice litigation or any other civil litigation. So I certainly agree that there are actors who deform the system, and those should be dealt with.

But nonpracticing entities and patent distortion entities include our universities, who develop cutting-edge technologies. They include companies that allow people to invest money in innovation and essentially provide funds to small inventors.

So, on one hand, certainly there are these mom-and-pop shops that are faced with bad-faith demand letters, and those should be protected. But let's not forget that on the other side there are equally small mom-and-pop-shop innovators who come up with new research and technology that ultimately is used to develop new

cell phones, new medications, new machinery that actually makes our lives so much better.

So I think the problem is there, but the problem is I don't think as bad as has been portrayed. And I think that problems, just like many problems, have -- that coin has two sides.

Mr. Burgess. Thank you.

Ms. Lettelleir?

Ms. Lettelleir. Thank you, Chairman.

We see a continued and steady stream of demand letters being received by the members of United for Patent Reform. I can speak from personal experience that at J.C. Penney, for example, we have received three in just the last 45 days, one of which was not even more than 200 words in length.

So it is a continual problem that our membership is facing. And I think it is important to note that the United for Patent Reform includes in its members companies like Oracle, like Bell, Samsung, huge owners of patent rights who are very interested in preserving the right to innovate and the right to protect those innovations, and yet they support the changes we are suggesting to this legislation. And that is because they are also targeted by demand letters; they see their customers targeted by demand letters. It is really only an issue of scale in terms of how much is demanded in these letters.

And while it is a huge problem for the smaller members of our constituency in United for Patent Reform, those small members are

customers of our larger members. And, also, J.C. Penney is a consumer, for example, of small innovative businesses. When a small innovator receives a demand letter, I have to be concerned, as counsel for a major company that is considering using or adopting their innovation. The very fact that they have already been targeted by one or more trolls interferes in our ability to adopt their innovation, because it is now no longer a small transaction for J.C. Penney. We may be looking at a \$100,000 contract with a small company to adopt their technology, but, suddenly, by adopting that technology, J.C. Penney is added to the target list of the trolls, and now I am looking at legal bills of \$2 million and \$3 million to defend against the troll.

Mr. Burgess. Thank you.

Mr. Duan, do you have an observation? Getting better or getting worse?

Mr. Duan. Yeah, you know, I think I will make just a couple quick points.

The first point is, you know, I think that we have seen some data that shows that patent litigation continues to rise. There was a brief downtick, but, you know, that has not proved to be a long-term thing.

The second thing I would point out is we should be worried about the future. Right? You know, a lot of the patents that we are talking about are related to, like, old software technologies on very broad concepts. But, you know, my organization works on a

lot of future technologies. We are doing this great event on 3D printing in the next few weeks, which I would encourage you all to attend.

But one of the things that I worry about whenever I see some of these new technologies is, are we just opening up a door to the next wave of patent trolls? Are we just opening up the door to a whole range of patents on 3D printing that will ultimately stifle a growing industry?

And so, you know, I think that the work that the subcommittee is doing in trying to deal with this problem initially will not only fix a problem that is current but will also fix problems that will come down the road as new technologies arise. So I think that is a important thing to remember.

Mr. Burgess. The chair thanks the gentleman, all members of the panel.

Ms. Schakowsky, 5 minutes for your questions, please.

Ms. Schakowsky. Thank you.

Let me just say a few things, and then, Mr. Duan, I have some questions for you.

Section 2(b) of the draft bill contains an affirmative defense that statements, representations, or omissions are not made in bad faith if the sender can prove that they were mistakes made in good faith.

The draft bill text states that good faith made be demonstrated by, quote, "evidence that the sender, in the usual

course of business, sends written communications that do not violate the provisions of this act." But it also says that good faith may be demonstrated by, quote, "other evidence."

So, Mr. Duan, just to be clear, could this affirmative defense provision permit a bad actor to avoid liability simply because he did not have a history of sending deceptive letters, even though those other letters in consideration were not patent assertion letters?

Mr. Duan. Yeah, I think that, you know, you are hitting the nail exactly on the head. The problem with the affirmative defense provision is that it provides just so many opportunities for finding loopholes to allow for somebody to send out abusive demand letters that just happen to comply with the particular provisions or that manage to convince a court that they comply with the specific provision of the law, even though they actually are abusing consumers.

The two examples that I provided in my testimony were, first of all, you know, somebody could send out a number of legitimate letters possibly to just their friends and then send out abusive letters and thereby be able to show that they had a pattern or practice of sending out reasonable letters. Similarly, you know --

Ms. Schakowsky. So these letters don't have to have anything to do with patents?

Mr. Duan. It doesn't --

Ms. Schakowsky. The friendly letters.

Mr. Duan. Yeah. I mean, it doesn't seem like the provision would require that.

And, similarly, the provision only requires that, in order to take advantage of the provision, one only has to send letters that comply with the specific requirements of the law. And the specific requirements of the law are those 17 requirements that I laid out. It says nothing about whether or not those letters are abusive or misleading or deceptive in any other way.

And, you know, the State laws that I have looked through extensively give numerous other examples of ways in which demand letters could be misleading or deceptive. You know, they could demand an amount that is far beyond the reasonable licensing arrangement for the patents. North Carolina has a very interesting provision relating to threatening an injunction against someone when have you no right to obtain an injunction.

There are lots of different ways that a letter could be abusive that fall outside of the scope of what this bill provides, and that affirmative defense would effectively immunize those actions.

Ms. Schakowsky. So do you agree that section 2(b), then, is not nearly specific enough?

Mr. Duan. Yes.

Ms. Schakowsky. In your written testimony, you suggest borrowing language from the Fair Debt Collection Practices Act,

which you used as a first example, which allows debt collectors to avoid liability if they can prove the violation was a bona fide mistake.

Can you explain why you think this language is better than the affirmative defense currently in the draft bill?

Mr. Duan. Well, I think that the idea behind the bona fide mistake is that it actually captures the thing that we are try to protect.

We are trying to protect the small inventor who, you know, maybe for some reason or other accidentally doesn't comply with the law because, you know, they misread it or they failed to include a certain piece of information. And, you know, I don't think that that sort of activity should be punished, as long as the person is reasonable about it, attempts to fix the problem, attempts to fix the problem within a reasonable amount of time. You know, that is not the kind of thing that we want to be punishing.

But what we don't want is a provision that, in order to keep that sort of case out of the courts, also keeps a whole bunch of other cases out of the courts, cases that ought to be there, cases that ought to be unfair and deceptive practices.

And, you know, I think that the caselaw that I have seen on the FDCPA indicates that that provision has worked well in that context, and I think it can work well here.

Ms. Schakowsky. Thank you.

And I yield back.

Mr. Burgess. The gentlelady yields back. The chair thanks the gentlelady.

The chair recognizes the vice chair of the subcommittee, Mr. Lance, for 5 minutes for your questions, please.

Mr. Lance. Thank you, Mr. Chairman.

Mr. Long, I would like to get your thoughts on one possible alteration of the draft legislation. As you know, the draft bill prohibits patent owners from omitting certain information if the omission were made in bad faith. This bad-faith provision protects patent owners from an FTC enforcement action when their omission was a mistake.

Critics of the text have said that it would be difficult for the FTC to enforce the provisions because it would be hard to prove bad faith.

What if we made some changes to the bill to lower the FTC's enforcement burden with respect to required disclosures? For example, could the enforcement bar be lowered in cases where a patent owner refuses to provide information a second time after the demand letter recipient requests that information?

Mr. Long. Thank you, Congressman Lance.

So I am looking at that provision. I recall reviewing information from the FTC staff last year, and, when they talked about this provision, about an issue of did you omit some detail that the act had asked for, it is my understanding they thought

that omitting that information, actually, in the normal course, wouldn't be harmful and wouldn't do any harm.

And so their concern was actually, well, if omitting it doesn't do any harm and you require a bad-faith omission, what good does that provision do? And it is because of the concern that omitting that information may not necessarily harm somebody that you have that extra protection for the bad faith if something was omitted.

I think, otherwise, when we talk about changing the burden if there is a second request, it is so circumstance-driven what that second request might be. I certainly don't think you would want a bright-line rule in that regard.

Often, the patent portfolios are at issue when you are talking about businesses sending letters to other businesses. They may have been very innovative in the particular space that their patents cover and have a lot of patents, so it may be that the second response may not be some of the requested information. It might be more, let's figure out the most efficient way to see what information we need to do this, to reach a reasonable business decision.

Thank you.

Mr. Lance. Thank you.

Would anyone else on the panel like to comment?

Ms. Lettelleir?

Ms. Lettelleir. Yeah, I am not sure I totally understand

what is being proposed, but I think one of the things you have to keep in mind is much of what occurs with respect to these demand letters occurs under a veil of secrecy.

What will happen typically is, after you receive the first demand letter, then when you request additional information, you will receive a typical response along the lines of, "We would be happy to share more information with you just as soon as you sign a nondisclosure agreement." And that nondisclosure agreement is typically very far-reaching and prohibits you from discussing anything that is discussed with the patent troll with any third party, even your vendors, perhaps.

And so I think that runs into some problems, because I can see a response being, "Well, we offered more information. We just asked them to sign a nondisclosure agreement, and they refused, so that is why we didn't provide the information in response to the second request." And I am not sure how the rubric that you are proposing would fit within the realities of what is happening with the patent trolls and their requirements for nondisclosure agreements.

Mr. Lance. Thank you.

Mr. Dolin?

Mr. Dolin. If I may --

Mr. Lance. Absolutely.

Mr. Dolin. Thank you, Congressman.

I think I disagree with, sort of, the concern that was just

raised, in part because nondisclosure agreements or filing under seal is so common in civil litigation. And so, again, to the extent that the patentee will have to jump through more hoops while sending a demand letter which ultimately serves to amicably resolve any legal disputes -- now, again, I want to emphasize that there are sometimes these bad actors who don't have any legal basis for their claims and they are simply acting as extortion artists.

But, plenty of times, these patentees have valid patents, and they seek to resolve their legal disputes without resorting to courts. And requiring them to provide more information under broader requirements than they would have to comply with in civil litigation seems to me to be somewhat counterproductive.

It seems me to push those patentees towards the route of litigation, which is ultimately a defeat for consumers, defeat for patentees, and defeat at the end of the day for people who have to defend against these patents, because, as was mentioned, that would cost a couple of million dollars as opposed to settling it amicably.

Mr. Lance. Thank you.

Mr. Duan?

Mr. Duan. I will just add a couple of words.

You know, I think that, certainly, if somebody accidentally omits some information that is required and is requested to provide it and they provide it, you know, I think that is what

ordinarily happens in any sort of situation, not just the patent demand letter situation. If somebody makes a small technical error, then, you know, they fix it.

I think the more important point, though, is that, you know, these aren't terribly hard requirements to comply with. They are fairly simple pieces of information that are being requested. They are information that ought to be in the hands of the asserter of the patent if they are to make a legitimate assertion in the first place.

So it should be a fairly simple thing to comply with, and, you know, if they happen to do it in two letters because of an unintentional omission, you know, I think that is reasonable.

Mr. Lance. Thank you very much.

And, Mr. Chairman, I yield back 19 seconds.

Mr. Burgess. The gentleman yields back. The chair thanks the gentleman.

The chair recognizes the gentlelady from New York, Ms. Clarke, for 5 minutes for your questions, please.

Ms. Clarke. I thank you, Mr. Chairman. And I thank our ranking member. I thank our panelists for sharing the information with us today.

In addition to preempting more consumer-protective State laws, the draft bill contains a \$5 million cap on civil penalties that can be collected by State attorneys general for section 2 violations.

Mr. Duan, let's imagine a recipient of an abusive demand letter suffers damages in excess of \$5 million. In this case, what good is the cap on civil penalties?

Mr. Duan. It certainly is problematic, and I thank you for the question.

You know, I think that the problem is that it is very hard to tell right now what the problems of the future will look like. It is entirely possible that, you know, someone will come up with some sort of very expensive type of demand. And, as a result, I think that, you know, tying the hands the State attorneys general through the civil cap penalty or through some of the other sorts of means that are in this bill would be substantially problematic to full enforcement.

Now, I know that the FTC has enforcement capabilities, as well. But the FTC is a single agency, and, you know, it only has so much capacity. So we need to rely on other parties to fully enforce these sorts of issues, particularly when it comes to some of the smaller patent assertion entities, you know, who possibly will fly under the radar of Federal authorities.

As a result, I think that we want to avoid tying the hands of State attorneys general in being able to protect the consumers in the individual States. You know, consumer protection has been long the province of the States, and I don't see why that should be any different here.

Ms. Clarke. On the note of the FTC, it is a relatively small

agency and has limited resources, so State enforcement is crucial and complementary to the FTC's efforts to protect consumers.

Under its current budget, how large of a role do you think the Commission could reasonably play in combating abusive demand letters?

Mr. Duan. So I personally don't know the budget of the FTC. I unfortunately did not read that --

Ms. Clarke. Okay.

Mr. Duan. -- in the many volumes of texts that I have read in preparation for this hearing.

Ms. Clarke. Sure. Sure.

Mr. Duan. But what I will point out is, you know, the FTC, you know, should be applauded for their settlement with MPHJ. They spent a lot of time working on that, and I think it was an important settlement. But that is one settlement in however many years they have been looking at this. That, I think, is indicative of what their resources are capable of.

And I think the fact that MPHJ is probably the biggest and most notorious of the patent trolls out there really shows that that is what the FTC is going to be able to look at. They are not going to be able to go after, you know, the smaller patent troll who goes after restaurants or who goes after, you know, retail shops. They are going to look for the bigger ones.

And that is why I think we need to have State attorneys general who are able to, you know, be on the ground, take care of

the individual problems that are harming the consumers of their respective States.

Ms. Clarke. So, much of the enforcement action against the senders of abusive demand letters has occurred at the State level. How important is it to preserve the ability of State attorneys general to continue their enforcement efforts?

Mr. Duan. Well, I think that, you know, the past enforcement actions are indicative of how much they really care about this issue. You know, we have had the Vermont's State attorney general testify, I think, before this committee. I think we have had the attorney general from Nebraska also testify on this issue. Both of them have indicated that they are very, very interested and very, very concerned for their consumers. And, you know, I think that that level of enthusiasm to protect the consumer interest demonstrates that they are a valuable resource in dealing with this consumer protection problem.

Ms. Clarke. The remedies available to State attorneys general under this bill are more limited. How would that effect the continued enforcement by State attorneys general?

Mr. Duan. Well, you know, again, I think that anytime that you are tying the hands of State attorneys general, it makes it much more difficult for them to be able to protect their consumers. You know, if they start having to prove additional factors, such as, you know, the bad faith or a pattern or practice, you know, I think that will make them less inclined to

deal with this issue, which would really be an unfortunate thing for the small businesses and consumers who are receiving these demand letters.

Ms. Clarke. Very well. I appreciate your response.

And I yield back the balance of my time, Mr. Chairman.

Mr. Burgess. The chair recognizes the gentlelady. The gentlelady yields back.

The chair recognizes the gentlelady from Indiana, Ms. Brooks, for 5 minutes for your questions, please.

Mrs. Brooks. Thank you, Mr. Chairman.

And I learned in preparation for this hearing that, in Indiana, currently, State lawmakers are currently working on legislation to prohibit a person from asserting a bad-faith claim of patent infringement.

And, while the legislation is still being perfected, I would sense that there is probably some disagreement in the panel regarding bad faith. And I apologize that I was not here at the beginning of the testimony and so forth but would like to dig in a little bit with respect to bad faith. And I would like to hear again from each of you what your views are with respect to the use of bad faith in this legislation.

Mr. Duan, would you please share with us what your thoughts are as to whether or not it should be included at all? I heard from Ms. Lettelleir that she would not like it included, I believe, and it should be removed.

And so I would like -- "bad faith," and then I would also like to move to a question with respect to the term "pattern and practice" and what we should do with respect to that term.

Mr. Duan. Thank you. That is an excellent question.

You know, I think our position is that we think that the bad-faith element is not required and basically only adds to the burden of enforcement officials, who will have to somehow prove the mental state of the person who was sending a letter in order to prove their case.

That it is not required, you know, I think as demonstrated by the Fair Debt Collection Practices Act. There have been a number of challenges under Noerr-Pennington saying that, you know, the requirements that debt collectors only call between certain hours and include certain disclosures in their debt collection notices, there have been challenges to that, saying that these are unconstitutional impingements upon the right to petition. The Sixth Circuit has in no uncertain terms said that that is not the case.

The cases that are relied on in the patent context to suggest that that is not the case are fairly unreliable. I think that they have been overruled, to a certain extent, by the Supreme Court. So, you know, I don't think that those arguments hold up anymore.

That it is bad for the overall system, you know, I think is demonstrated by the fact that the FTC currently doesn't require

any sort of bad faith in order obtain just injunctive relief. And that makes sense. The idea is that, if the FTC sees somebody who is sending out demand letters that are improper just on the basis of the letter, they should be able to tell them, "Stop doing that. We can get an injunction against you from doing that. We don't have to prove your mental faith in order to keep you from deceiving consumers." So I think that that is an important point for why it would be problematic.

Did you want me to answer the "pattern or practice" right now?

Mrs. Brooks. Certainly. Go ahead.

Mr. Duan. So, you know, I think that the pattern or practice is additionally problematic. Again, it adds to the enforcement burden.

The real problem is that, as was discussed previously, a lot of these demand letters go unnoticed. They fly under the radar because they are sent privately. So, you know, if I receive a demand letter and I go to my State attorneys general or I go to the FTC and say, hey, you know, I need you to look into these guys, they are going to have to find somebody else who received a letter. And who knows where they are going to find that, right? Because there is no registry of these letters. They are not going to be able to identify it, so they won't be able to bring the case.

And that is going to be a real problem for enforcement just

as a practical matter. Because of the fact that these are private, it won't be possible all the time to find multiple letters, and, as a result, it won't be possible to protect consumers in the way that is necessary.

Mrs. Brooks. Who else would like to -- Ms. Lettelleir? And I would also like you to, if you could, list some of the factors that you think should be included in order to remove affirmative defense language from the text.

You mentioned that you thought there could be a list of factors. So I am sorry, I jumped to a different question, but you mentioned that you thought it could include a list of factors to show that the sender didn't act in bad faith. And what are some of those factors you would like included in order to remove the affirmative defense language?

Ms. Lettelleir. I don't think we have, at this point, proposed specific factors, but --

Mrs. Brooks. Okay.

Ms. Lettelleir. -- I think there is a logical way that that could be viewed, in terms of, for example, if letters have been sent in which they have only omitted one of the required disclosures and they can show that they had other letters in which that one particular one was not omitted, for example.

And I think as a practical matter that, before a letter is going to bubble to the surface and to the attention of the FTC or an enforcement agency, it is going to be one of those in which it

is wholly uncompliant with the act. There are going to be substantial issues with the letter. And I think you can account for how close do they come, you know, and what they are able to articulate about why it was omitted. Because, in some instances, perhaps in their view it didn't apply for some reason. That might be -- if they can articulate a reason that a particular disclosure they did not feel was appropriate for that particular demand for some reason. It is hard for me to imagine that scenario, because, you know, what is required to be disclosed is very rudimentary, really. It is not a burdensome thing to disclose.

So I think that there is a lot of flexibility in terms of what those could be and are really going to be commonsense factors about what would be omitted and why it was omitted.

Mrs. Brooks. Thank you all for sharing. My time is up.

I yield back. Thank you.

Mr. Burgess. The gentlelady yields back. The chair thanks the gentlelady.

The chair recognizes the gentleman from California, Mr. Cardenas, for 5 minutes for your questions, please.

Mr. Cardenas. Thank you very much, Mr. Chairman.

I appreciate all the witnesses being here today to help enlighten us on what is going on out there in the real world.

I just want to point out that the targets of patent demand letters are often small businesses and that do not necessarily have a large legal team at their disposal, especially a legal team

equipped to handle patent matters.

As we have heard so many times from the owners of these small businesses, the high cost of dealing with abusive patent demand letters do significant harm to their business and their livelihood and, in some cases, cripple that small business or even end that small business, and there go jobs.

The targets of these unfair and deceptive demand letters have explained that the letters they receive rarely contain enough information for them to evaluate the allegations of infringement or the demands for compensation without the help of a patent lawyer. And when targets consult lawyers, the lawyers must spend a significant amount of time, energy, and money to conduct an investigation of the claims made in these letters, which costs targets extraordinarily high to these small businesses when it comes to legal fees and other matters.

The draft bill attempts to address that lack of detail in a demand letter through section 2(a)(3), which requires certain information be included in the demand letters.

Mr. Duan, do you think the five elements required in this section would create enough transparency and allow the average recipient of these misleading leaders to avoid costly patent lawyer fees?

Mr. Duan. Thank you for the question. I think that it is an excellent question.

I think that they are an important start. The elements that

are listed there are probably some of the most critical elements -- you know, the identification of the patents, identification of the person who asserts the right. You know, those are definitely the most critical pieces that would enable somebody to, you know, look at this and really figure out what is going on here.

I think that the requirements for explaining the basis of the infringement allegations could be strengthened. Right now, some of those are in there, but they do not include a requirement, for example, for identifying particular claims. They sometimes allow for exceptions in situations where -- they allow for certain exceptions, in which somebody might be able to avoid having to disclose that sort of information.

Excuse me. I have a bit of a cold.

Anytime that you send out a demand letter, at least if you are sending it legitimately -- you know, I did this when I was practicing as a patent attorney -- you do the investigation. You know what the basis is for the infringements. You have investigated the products, you have investigated the patent, you understand what is going on. You wouldn't send out the letter, as a matter of legal ethics, if that weren't the case. And that is what legitimate people do.

All that is being asked here is to put that into the record so that the person has a fair shot at understanding what is going on. That is what is being asked here.

Mr. Cardenas. Thank you.

The first requirement of this section is that the sender of a patent demand letter include the identity of the person asserting the right to license the patent to or enforce the patent against the recipient. That language may only require disclosure of the identity of the person sending the letters and not, for example, the identity of the parent company.

Mr. Duan, do you think that this section needs further clarification so that recipients and State attorneys general and the FTC know exactly who is behind the patent demand letter?

Mr. Duan. Certainly. I think that, you know, identification of the real party in interest can be very important in a lot of situations.

You know, I think that there are some examples -- particular examples aren't coming to mind, but I think there are situations where, for example, the person who is receiving the letter might have already taken a license, or somebody upstream might have already taken a license, and knowing the real party in interest could reveal that information and, you know, allow them to simply dismiss the letter, saying, you know, I already have a license to this.

In other cases, for example, with MPHJ, the center of the letters uses a bunch of shell companies, which makes it hard at the beginning to figure out that all of these demand letters are coming from the same place. So disclosure of the real party in

interest could allow for that to happen, which would allow for the State attorney general to identify a pattern or practice if that element is left in.

So, you know, I think that that element is fairly critical in a lot of situations to proper enforcement.

Mr. Cardenas. Okay. Thank you.

Ms. Lettelleir -- I am sorry if I butchered your name -- J.C. Penney is not a small company. Thank you so much for coming forward and testifying today. But what elements do you think that J.C. Penney, for example, sees in that section that could be improved?

Ms. Lettelleir. Well, we would like to see a specific identification of the claim in the patent that they are asserting as being infringed. We think that is very fundamental to understanding what is being asserted against you and is fundamental to any business being able to make an informed decision about how to respond to the letter.

And to your point in terms of, you know, the need for legal counsel -- and while I am here and I work for J.C. Penney, I am representing the United for Patent Reform that has many members that are very small and do not have on-staff patent attorneys at their disposal to advise them. One of the things that is very important in terms of disclosure of the real party in interest and the claims that are specifically being infringed is it does help a small-business owner identify what company they may have acquired

product from that is in fact the source of the accused infringement.

And many times it is very difficult to sift through and understand what is even being accused. And if you don't understand what is being accused, a business owner has no chance of properly identifying and then communicating with the vendor that may have sold them the product.

And we have experienced firsthand an incident where we received a demand on a product that we acquired from Adobe, and, once we figured it out after an extensive amount of work, Adobe had already taken a license to those patents and had sought to protect their customers as part of that license.

So getting to who is taking the action, who owns the rights, and what exactly you are being accused of is key for a small business to ever get to who is behind and who they should be looking to for assistance.

Mr. Cardenas. Thank you.

Thank you, Mr. Chairman. Yield back.

Mr. Burgess. The gentleman's time has expired.

The chair recognizes the gentleman from Kentucky for 5 minutes for your questions, please.

Mr. Guthrie. Thank you, Mr. Chairman.

Sorry for bouncing in and out. We have a competing hearing going on right now in another subcommittee.

So, Mr. Long, does the legislation preserve the FTC's section

5 authority? And could the FTC continue to bring actions against patent trolls for deceptive demand letters under section 5 authority if the bill were enacted?

Mr. Long. Yes. Thank you for your question. It absolutely does. It has a provision that says, nothing within this act is meant to keep the FTC from doing what it otherwise could do. So that certainly is a catchall that could catch some of these concerns people have that may not be delineated in the proposed act.

Mr. Guthrie. Also for you, Mr. Long, could the State attorneys general continue to bring cases under their many FTC acts under the bill?

Mr. Long. And that is such a good question. I will have to say that is not clear to me. I haven't looked at that issue, and so I would have to look more to see what the State attorney general is asked to do.

But I know that an important part of this act and an important part of the compromise, given all the work that has been done to get us here, is that it does, indeed, allow the State attorney generals to use this act as a vehicle to address the concerns of their constituents when they face these issues.

Mr. Guthrie. Could you submit an answer to that when you have the opportunity to review it to the level -- I know you said you didn't have an opportunity to review to the level you want to to feel comfortable, so would you submit a written answer?

Mr. Long. Yes.

[The information follows:]

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Mr. Guthrie. We will make sure you get the question again.

And, also, Mr. Long, the bad-faith standard -- the bill also includes a bad-faith requirement. Why is "bad faith" necessary, and why is "bad faith" required by the First Amendment at all?

Mr. Long. Very good questions. There are two reasons.

There is a practical reason why you want to have "bad faith" in what is going on here. There is a lot of -- and, by and large, the bulk of patent demand letters are all legitimate demand letters. You want to have "bad faith" because you don't want this to be a vehicle for a gotcha. A patent owner may have inadvertently for whatever reason sent something that fell short of the act, but there is no harm and there is no intent to get harm, so we want to have that "bad faith." So I think that is a good practical issue to have.

But, more importantly, and directly to your constitutional law question, it is indeed a constitutional First Amendment right, the right to petition the government for redress. And that includes, for example, cases, the right to go to the court and not be punished because you exercised the right to do what you should be allowed to do.

Courts have universally applied that caselaw through patent demand letters. And so the exception, where the First Amendment right won't protect you, is for what is called a sham litigation, where the reason you brought the case was not because you wanted the outcome of what the case would be, what the royalty would be

that the jury would give you, but because of what would happen because you brought the process to begin with.

For example, in terms of patent assertion entities, the concern is you brought the case not because you want the royalty that the court would give you but because you want that expense or that process to force whoever your target is to give you money that may not be warranted by your patent. And that requirement, that sham litigation aspect, can apply if what has been done has been done in bad faith. So it is an important First Amendment protection.

Mr. Guthrie. Thank you.

And I have one more for you, Mr. Long. What information is disclosed in professionally written demand letters? And is that information different from what is required in the TROL Act? And is the information requirement burdensome so as to cause an infringed party to file a suit to avoid writing a demand letter?

Mr. Long. A very good question.

When I look at -- and we are talking particularly about the things that are required to be disclosed -- those are typical things you will find in a typical legitimate demand letter. You are identifying who has the right to the patent. You are identifying what the patent is. You are identifying perhaps a claim that you think that person may be practicing. You identify what particular product they may be using. And you describe in the level of detail that is needed in that first instance, why you

think they infringed. Those are typical things that are not too onerous.

The problem comes particularly in what you would require someone to reasonably disclose, because there are all kinds of circumstances. For example, if you have a large portfolio of patents, you are not going to disclose every claim in every part of those patents that you think are infringed. It may not be worth that. Often the parties will agree, let's select a representative set of your patents to talk about.

And another issue is that often you may not know why they infringe. All the information you could find seems to indicate they may be using your invention, but the heart of their product that you think may use your invention could be in a microchip that you don't have access to or in source code and you don't know how it is written. And so that provision there varies, as far as showing and explaining why there is infringement, varies significantly from circumstance to circumstance.

Mr. Guthrie. Thank you, Mr. Long.

My time has expired, and I yield back.

Mr. Burgess. The gentleman's time has expired. The gentleman yields back. The chair thanks the gentleman.

Seeing no further questions --

Ms. Schakowsky. Mr. Chairman, can I just submit for the record my opening statement and four letters from State attorneys general?

Mr. Burgess. Without objection, so ordered.

[The prepared statement of Ms. Schakowsky follows:]

***** COMMITTEE INSERT *****

[The information follows:]

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Mr. Burgess. If there are no further members wishing to ask questions, I would like to thank the witnesses and the members for their preparation and their participation in today's hearing.

Before we conclude, I would like to include the following document to be submitted for the record by unanimous consent: a letter from the National Association of Convenience Stores; a statement for the record on behalf of the American Hotel and Lodging Association; a joint letter on behalf of the American Bankers Association, the Clearinghouse Payments Company, the Credit Union National Association, Financial Services Roundtable, Independent Community Bankers of America, and the National Association of Federal Credit Unions.

[The information follows:]

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Mr. Burgess. Pursuant to committee rules, I remind members they have 10 business days to submit additional questions for the record.

[The information follows:]

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Mr. Burgess. And I ask the witnesses to submit their responses within 10 business days upon receipt of the questions.

[The information follows:]

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Mr. Burgess. Without objection, the subcommittee is adjourned.

[Whereupon, at 1:04 p.m., the subcommittee was adjourned.]