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1 {York Stenographic Services, Inc.}

2 RPTS BROWN

3 HIF318.020

4 THE IMPACT OF PATENT ASSERTION ENTITIES ON INNOVATION AND THE  
5 ECONOMY

6 THURSDAY, NOVEMBER 14, 2013

7 House of Representatives,

8 Subcommittee on Oversight and Investigations

9 Committee on Energy and Commerce

10 Washington, D.C.

11 The Subcommittee met, pursuant to call, at 2:00 p.m., in  
12 Room 2123 of the Rayburn House Office Building, Hon. Tim  
13 Murphy [Chairman of the Subcommittee] presiding.

14 Members present: Representatives Murphy, Griffith,  
15 DeGette, Lujan and Welch.

16 Staff present: Carl Anderson, Counsel, Oversight;

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17 Charlotte Baker, Press Secretary; Sean Bonyun, Communications  
18 Director; Matt Bravo, Professional Staff Member; Karen  
19 Christian, Chief Counsel, Oversight; Brad Grantz, Policy  
20 Coordinator, Oversight and Investigations; Brittany Havens,  
21 Legislative Clerk; Gib Mullan, Chief Counsel, Commerce,  
22 Manufacturing, and Trade; John Stone, Counsel, Oversight; Tom  
23 Wilbur, Digital Media Advisor; Brian Cohen, Democratic Staff  
24 Director, Oversight and Investigations; and Kiren Gopal,  
25 Democratic Counsel.

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|

26           Mr. {Murphy.} Well, good afternoon. We convene this  
27 hearing of the Subcommittee on Oversight and Investigations  
28 to gain a better understanding of the impact abusive patent  
29 assertion practices are having on businesses, jobs, and the  
30 economy.

31           Back in August of 1787 when James Madison was drafting  
32 the Constitution, he and Charles Pinckney offered amendments  
33 dealing with copyrights and premiums for the advancement of  
34 useful knowledge and discoveries. In September of 1787, the  
35 wording included in the Constitution in Article I, Section A,  
36 Clause A, discussed the powers to secure for unlimited times  
37 to inventors the exclusive rights to their discoveries. This  
38 is the basis of U.S. patent law, and patents and trademarks  
39 are covered in the Commerce Clause which makes this issue a  
40 defined jurisdiction of the Energy and Commerce Committee.

41           Now, let me state at the outset that a strong and fair  
42 patent system is essential to an innovative marketplace.  
43 Inventors and companies should be encouraged to research and  
44 develop ideas, technologies, and products and be rewarded for  
45 their risk and investment. In addition, I fully recognize  
46 that patent rights are only as valuable as the holder's

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47 ability to enforce them.

48       The intent of today's hearing is not to assess the  
49 current state of our Nation's patent system or to opine on  
50 the various legislative proposals that have recently been  
51 introduced or discussed in this area, nor is this hearing  
52 intended to be a comprehensive look at all the patent  
53 assertion activity that occurs in advance of litigation.  
54 This is about gathering facts about the nature and scope of  
55 this problem. Our purpose in holding this hearing is to  
56 learn more about a number of questionable practices that have  
57 recently proliferated and the significant direct and indirect  
58 costs they have imposed on businesses, large and small.

59       Specifically, most of the witnesses testifying today are  
60 representatives of companies from different industries who  
61 have received letters from various entities demanding  
62 licensing fees or threatening litigation over the purported  
63 use of patented technologies or products. Frequently, they  
64 are little more than form letters blasted off to hundreds or  
65 even thousands of recipients with the hope that some of them  
66 will quickly cave in order to avoid the prospect of expensive  
67 litigation. It has been estimated that the average patent  
68 trial can last over a year and cost upwards of \$6 million.

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69 This is simply not a viable course of action for a small  
70 business, and unfortunately, this makes them attractive  
71 targets.

72 We will hear today about some of the more egregious  
73 types of demand letters and whether they even contain  
74 sufficient information to allow for an informed response.  
75 Most importantly, we will hear about how responding to such  
76 demanding letters impacts a business's ability to attract new  
77 capital, utilize new technologies, hire new workers and  
78 ultimately grow their company and our overall economy. One  
79 recent study from researchers at Boston University calculated  
80 that patent assertion activity directly cost defendants and  
81 licensees \$29 billion in 2011. This figure represents a 400  
82 percent increase since 2005 and does not even include the  
83 indirect costs to businesses such as diversion of resources,  
84 delays in new products and loss of market share.

85 A number of other studies on patent assertion, entitled  
86 PAEs, have recently been conducted. We will hear from a  
87 number of individuals with significant experience in this  
88 area about how such practices have evolved, whether more  
89 egregious tactics are currently being employed and, if so,  
90 what can be done to stop them without weakening legitimate

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91 intellectual property rights, enforcement activities and pre-  
92 litigation communications.

93 Further, the Federal Trade Commission announced in  
94 September that it will be conducting a formal inquiry  
95 examining the business practices of patent assertion entities  
96 in order to expand the empirical picture on the costs and  
97 benefits of PAE activity. We look forward to reviewing the  
98 results of this inquiry and in the meantime will continue to  
99 further our understanding of such practices. As always, we  
100 will follow the facts so that our oversight can inform any  
101 solutions that may be proposed to address the underlying  
102 problems relating to abusive demand letters and related  
103 practices. Today is a first step in that process. I look  
104 forward to hearing the examples and perspectives provided by  
105 our witnesses, and I look forward to hearing from those who  
106 may disagree with them in the near future. I fully  
107 anticipate that we can work together on a bipartisan basis on  
108 these issues going forward.

109 [The prepared statement of Mr. Murphy follows:]

110 \*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*

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|

111           Mr. {Murphy.} With that I recognize the Ranking Member  
112 of the Subcommittee, Diana DeGette, for an opening statement,  
113 and I know she has a high level of interest in this issue.

114           Ms. {DeGette.} Thank you very much, Mr. Chairman, and I  
115 do believe we can work together in a bipartisan basis on this  
116 because it is a real concern, and it is a concern that has  
117 been increasing a lot. Several people have bills that they  
118 are planning to introduce, and I think this would give us  
119 some good facts as we look toward writing legislation.

120           In the past few years, a number of companies have  
121 emerged and their sole business model is to assert overly  
122 broad patent rights and use the threat of litigation to  
123 extort settlements. This is an abuse of the patent process  
124 which, as the Chairman accurately said, is a very important  
125 process, but recently we have seen the abuses getting worse  
126 and worse as these actors are targeting not just large  
127 corporations but also small businesses who are just using  
128 everyday technology like office scanners or wireless routers.  
129 The small businesses, nonprofits and startups using these  
130 technologies lack the expertise and resources to litigate the  
131 questionable infringement claims, and frankly they are being

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132 singled out because they cannot afford to defend themselves.  
133 And so what they end up doing is paying money so they can  
134 return to focusing on their business.

135         Now, clearly, this is not acceptable. It is extortion,  
136 plain and simple, and it results in significant harm to  
137 inventors, small businesses, and start-ups. It costs the  
138 economy over \$80 billion a year. And you know, I agree, the  
139 U.S. patent system is an incredible tool for innovation and  
140 economic growth. In theory, legitimate patent assertion  
141 entities could protect small investors by enforcing their  
142 rights if in fact those rights are legitimate against more  
143 powerful companies. But in practice some of these firms  
144 transfer only a small amount of settlements or funds back to  
145 technology, inventors and producers. They have purchased  
146 these patents or acquired them in some way, and then they are  
147 asserting their rights over people who cannot afford to  
148 defend themselves. And that is why we have the name patent  
149 troll because of these predatory tactics.

150         One notorious patent troll, Inevado, sent over 13,000  
151 demand letters to users of Wi-Fi routers. Small businesses  
152 have received intimidating and harassing letters demanding  
153 costly settlements or licensing fees. Too many of these Mom-

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154 and-Pop establishments pay hefty settlement fees just to  
155 avoid protracted, multi-million dollar patent litigation.

156       Last week Nebraska's Attorney General testified in the  
157 Senate about an elderly gentleman, Mr. Eldon Steinbrink, who  
158 received a demand letter from MPHJ Technologies alleging  
159 infringing use of a scan-to-email patent through his work for  
160 Phelps County Emergency Management. Well, in fact, Mr.  
161 Steinbrink never worked for the county. He once served on  
162 the county board many years ago, and now he lives in a  
163 nursing home. Patent tolls like MPHJ fail to do even basic  
164 due diligence about their targets, and I think that is  
165 because frankly they just do not care. They hope somebody  
166 will pay the money.

167       So I think it is important that we find the right  
168 balance with patents, but I think we can all agree that these  
169 end users should not be targeted at all by patent tolls and  
170 the abusive and harassing practices have got to stop.

171       And so, you know, I think there is a lot we can do. The  
172 demand letter should be transparent. They should contain  
173 meaningful information. My colleague, Jared Polis, is  
174 looking at legislation that has more registration of people  
175 who are sending these letters out. There is a lot going on,

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176 and I think because of this Committee's history of protecting  
177 consumers and small businesses, this is the perfect place.

178 So I want to thank our witnesses. This is going to be a  
179 good hearing.

180 [The prepared statement of Ms. DeGette follows:]

181 \*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*

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182 Ms. {DeGette.} And I want to yield my last minute to  
183 Mr. Welch if he would like to have it. Oh, do you want 5  
184 minutes?

185 Mr. {Welch.} Yeah, that is good.

186 Ms. {DeGette.} Then I will yield back and he will just  
187 take our other 5 minutes.

188 Mr. {Welch.} Thank you.

189 Mr. {Murphy.} I do not think we have anybody else on  
190 our side with an opening statement and you are recognized.  
191 We are going to have votes soon if you want to--

192 Ms. {DeGette.} Go ahead.

193 Mr. {Murphy.} --take the next one.

194 Mr. {Welch.} Well, just to--

195 Mr. {Murphy.} Recognized.

196 Mr. {Welch.} I do appreciate it, just a minute, Mr.  
197 Chairman. I appreciate the hearing. This is an unbelievable  
198 rip-off, obviously, and it is incredibly detrimental to large  
199 businesses and to small non-profits. And my concern is  
200 because in Vermont, we have just been getting hammered.  
201 MyWebGrocer, which is a start-up company doing really well,  
202 has 180 employers, they have had six patent troll attacks,

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203 and it has resulted in that company not being able to hire  
204 eight to ten people.

205         Then at the other end we have got a small non-profit  
206 where they provide help for disabled kids, and it is a hand-  
207 to-mouth operation. They are raising money from folks in the  
208 local community doing work that is incredibly important to  
209 those kids and to the parents. They got attacked by patent  
210 trolls. They are in no position to do it. They opened up  
211 the mail, and it is a demand letter, all formal, all  
212 threatening, all you are going to--this is the end of the  
213 world. And it creates enormous emotional anxiety as well as  
214 financial peril. And it is such a small community in Vermont  
215 where it is not just the big business and the small business.  
216 There is a real ripple effect in the community that the  
217 Attorney General in the State has taken the lead in bringing  
218 the first-in-the-Nation lawsuit against the patent troll,  
219 MPHJ Technologies based on our consumer protection laws. And  
220 the State itself, under Governor Shumlin, has passed a bill  
221 that makes it a civil offense if there are bad-faith  
222 assertions of patent infringement and allows victims to see  
223 actual and punitive damages.

224         So we are trying to act as a State, but this clearly is

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225 something that requires a national attention. So I am so  
226 grateful to each of you to be here today to help the Congress  
227 get focused, and you have got a bipartisan buy-in here in the  
228 halls of Congress. So we have got a chance to break the mold  
229 and actually get something that needs to be done, done. And  
230 with your help, we will succeed. Thank you. I yield back.

231 [The prepared statement of Mr. Welch follows:]

232 \*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*

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233           Mr. {Murphy.} The gentleman yields back. Just for the  
234 members here, we know we are going to have votes probably  
235 about 20 of or a quarter of the hour. So we believe during  
236 that time between now and then we can get through all of your  
237 testimony and then try and start some questions. Immediately  
238 after votes we will reconvene and be able to continue on with  
239 other questions.

240           So I would now like to introduce the witnesses for  
241 today's hearing, quite a distinguished panel. Our first  
242 witness is Robin Feldman, the Director of the Institute for  
243 Innovation Law at the University of California Hastings  
244 College of Law. She has written extensively on patent  
245 assertion practices and how they have changed over time.

246           Our second witness is Charles Duan. He is the Director  
247 of the Patent Reform Project of Public Knowledge. Public  
248 Knowledge is dedicated to promoting technological innovation,  
249 protecting the rights of all users in technology and ensuring  
250 technology law serves the public interest.

251           Our third witness is Lee Cheng. He is the Chief Legal  
252 Officer at Newegg, Inc. Newegg is a global internet retailer  
253 that is the largest privately held e-commerce company in

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254 North America.

255           Our fourth witness is Daniel Seigle. He is the  
256 cofounder and Director of Business Operations at  
257 FindTheBest.com. FindTheBest is an online research engine  
258 that equips people with information and tools to make  
259 informed consumer decisions. I felt like I just did a  
260 commercial there.

261           Ms. {DeGette.} You did.

262           Mr. {Murphy.} And act now and you get one more free.  
263 Next we have Justin Bragiel. He is a General Counsel for the  
264 Texas Hotel & Lodging Association. He manages and oversees  
265 the legal program servicing over 2,500 Association members.  
266 He serves as the primary legal counsel to over ten local  
267 lodging associations across Texas.

268           Our last witness is Jamie Richardson. He is the Vice  
269 President of Government and Shareholder Relations for White  
270 Castle Restaurants.

271           I will now swear in the witnesses. Now, you are all  
272 aware that the Committee is holding an investigative hearing,  
273 and when doing so has a practice of taking testimony under  
274 oath. Do you have any objections to testifying under oath?  
275 None of the witnesses have objected to that. So the Chair

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276 then advises you that under the Rules of the House and the  
277 Rules of the Committee, you are entitled to be advised by  
278 counsel. Do any of you desire to be advised by counsel  
279 during your testimony today? None of the witnesses have said  
280 they wanted to be advised by counsel. In that case, if you  
281 all please rise and raise your right hand, I will swear you  
282 in.

283 [Witnesses sworn.]

284 Mr. {Murphy.} All right. Thank you. All answered in  
285 the affirmative. You are now under oath and subject to the  
286 penalties set forth in Title 18 Section 1001 of the United  
287 States Code. You will now begin a 5-minute summary of your  
288 written statement beginning with Ms. Feldman. Welcome. You  
289 have 5 minutes.

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290 ^TESTIMONY OF ROBIN FELDMAN, DIRECTOR, INSTITUTE FOR  
291 INNOVATION LAW, UNIVERSITY OF CALIFORNIA HASTINGS COLLEGE OF  
292 THE LAW; CHARLES DUAN, DIRECTOR, PATENT REFORM PROJECT,  
293 PUBLIC KNOWLEDGE; LEE CHENG, CHIEF LEGAL OFFICER, NEWEGG,  
294 INC.; DANIEL SEIGLE, DIRECTOR, BUSINESS OPERATIONS,  
295 FINDTHEBEST.COM; JUSTIN BRAGIEL, GENERAL COUNSEL, TEXAS HOTEL  
296 & LODGING ASSOCIATION; AND JAMIE RICHARDSON, VICE PRESIDENT,  
297 GOVERNMENT AND SHAREHOLDER RELATIONS, WHITE CASTLE SYSTEM,  
298 INC.

|

299 ^TESTIMONY OF ROBIN FELDMAN

300 } Ms. {Feldman.} Mr. Chairman and esteemed members of the  
301 Committee, I am honored to be here today. As an academic, I  
302 have studied patent assertion behavior both in the litigation  
303 context, and in the pre-litigation context.

304 And in recent years, a new business model of patent  
305 demands has exploded on the scene. It preys on people's  
306 fears of the costs and risks of litigation, and it takes  
307 place largely outside the courthouse with no judge, jury or  
308 regulator in sight. Much of the time, it is shrouded in

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309 nondisclosure agreements, so no one is allowed to talk  
310 afterwards.

311         The behavior is based on the following. There are  
312 millions of patents outstanding, and it is very difficult to  
313 know what any patent covers. It will cost about \$1 million  
314 to \$6 million dollars in litigation expenses to find out.  
315 And if you take the litigation route, there is a risk. If  
316 you lose, you could be subject to massive penalties for  
317 damages and you could also have your product shut down.

318         So with that leverage, here is a sample of some of the  
319 modern techniques that have appeared. The first is what one  
320 could call the peddler's bag. Suppose you are a computer  
321 manufacturer, and I claim that your manufacturing process  
322 infringes my gumball patent. Now, you may think that is  
323 pretty far-fetched. But suppose that I threaten to throw 50  
324 more patents at you as well. You may be tempted to fight the  
325 first, you may not have the stomach or the litigation budget  
326 to fight off all 50 of them. The cost of investigating 50  
327 patents is substantial, also the risks of litigation. Maybe  
328 not the gumball patent but maybe something in there will  
329 stick. So perhaps it is better just to pay a license fee.

330         Another behavior is what I call the assault rifle

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331 technique. With this approach, patent assertion entities  
332 target a vast number of people, hoping to obtain moderate  
333 settlement amounts from as many of them as possible. For  
334 example, patent assertion entities have targeted small  
335 businesses for using scanner equipment they have purchased  
336 and coffee shops for using Wi-Fi equipment. Those who  
337 receive the letters know nothing about the patents that are  
338 involved and have no idea how to respond to these demands.

339         Still another behavior is known as privateering. If I  
340 am a company and I launch my products against a competitor,  
341 ordinarily that competitor will launch its products back at  
342 me and put my products at risk. So I might not bother. But  
343 in this new world of entities that don't make any products, I  
344 have many options. I can transfer some of my patents to an  
345 assertion entity that could target my competitors. I could  
346 even structure the transfer so that I share in the returns.  
347 In that way, I damage my rivals, get a return on some of my  
348 patents and my hands are clean.

349         These three are samples of the techniques that are being  
350 utilized, and as with many pressure sales techniques, the  
351 demand letters may say things like the settlement cost will  
352 go up if you consult a lawyer, if you ask for more

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353 information, if you wait until a lawsuit is filed or if you  
354 wait until others accept the offer. Some demand letters  
355 require that the company sign a broad nondisclosure agreement  
356 even to get basic information.

357 This leads me to one of the many troubling aspects of  
358 this behavior which is that much of it is shrouded in  
359 nondisclosure agreements and hidden behind layers of shell  
360 companies. This makes it very difficult for regulators to  
361 see bad behavior when it is occurring. It is also difficult  
362 to hold anyone accountable because the shells may have no  
363 meaningful assets at the end of the day.

364 Now, the impact of these patent demands on companies  
365 large and small is troubling. A recent study of mine showed  
366 that one in three startup companies has received patent  
367 demands and that most of these demands are coming from  
368 assertion entities that don't make any products. Other  
369 scholars have estimated that very little of the vast amount  
370 of money changing hands ever gets back to the inventors who  
371 filed for the patents. And really, it does not take fancy  
372 economics to know that time spent analyzing patent demands is  
373 time away from innovating, and money spent on patent demands  
374 is money not spent hiring workers.

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375           In closing, I do want to stress one important issue.  
376 Patents are essential for innovation in this country, and  
377 patent rights are useless if they cannot be enforced. I am  
378 not talking about the legitimate protection of an invention.  
379 I am talking about shadow games that prey on people's fears  
380 and that exploit the system.

381           I have submitted several pieces of my research as my  
382 full testimony for the record, and I look forward to  
383 answering any questions. Thank you.

384           [The prepared statement of Ms. Feldman follows:]

385 \*\*\*\*\* INSERT A \*\*\*\*\*

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386           Mr. {Murphy.} Thank you for staying both under the time  
387 limit. I am impressed you have memorized most of your  
388 document. Thank you so much.

389           Mr. Duan, you are recognized for 5 minutes.

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390 ^TESTIMONY OF CHARLES DUAN

391 } Mr. {Duan.} Thank you, Chairman. Mr. Chairman Murphy--  
392 sorry, is this on? Yes. Mr. Chairman Murphy, Ranking Member  
393 DeGette, and members of the Subcommittee, thank you for  
394 inviting me to testify today on this important issue. My  
395 name is Charles Duan, and I am the Director of the Patent  
396 Reform Project at Public Knowledge.

397 As a bit of background, Public Knowledge is a nonprofit  
398 organization dedicated to ensuring that technology law serves  
399 the public interest. Prior to working at Public Knowledge, I  
400 served as a patent attorney where I both obtained patents and  
401 defended against demand letters. I also worked as a Silicon  
402 Valley software developer, and these experiences along with  
403 my conversations with various stakeholders inform my views on  
404 the patent system.

405 We are here today to discuss the role of patents in our  
406 innovation economy, and it is worth beginning from the  
407 beginning, I think. The principle behind the patent system  
408 is an exchange. Patents are granted to encourage inventors  
409 to contribute their inventions to the public. Our patent

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410 system ultimately serves the public interest, and in many  
411 areas of our patent system, it does indeed work this way.  
412 But far too often scheming speculators and clever lawyers  
413 find ways to abuse patents and profit off of the system while  
414 detracting from the social good.

415         The most egregious among these abusers include patent  
416 assertion entities and so-called patent trolls. Instead of  
417 innovating and creating jobs for Americans, patent trolls  
418 manipulate the small businesses and individuals who actually  
419 innovate and create these jobs extorting unjustified fees  
420 through nuisance threats of litigation.

421         One of the ways they succeed in doing so is through the  
422 sending of demand letters. These letters assert that the  
423 recipient infringes a patent and then demand a settlement or  
424 a license fee. Abusive demand letters exploit at least two  
425 problematic techniques. First, many demand letters are  
426 vague, misleading and deceptive. They are threateningly  
427 intimidating and yet wholly uninformative, failing to explain  
428 what products infringed the patents, how they infringe or  
429 even why. Some of the letters that I have seen fail to  
430 demonstrate even basic knowledge of the businesses of the  
431 recipients. MPHJ, for example, which we have talked about,

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432 merely alleges that ``a substantial majority--okay. Worse  
433 yet, some demand letters contain plain falsehoods and  
434 deceptions. I once represented this client who received a  
435 demand letter, and when we actually investigated the patent,  
436 we found that the patent had been invalidated in court. The  
437 sender simply bet that the targets would settle before those  
438 targets discovered that the patents were actually worthless.

439         The sender could win that bet because of the second  
440 exploited technique, sending letters to small, unprepared  
441 businesses. Small businesses lack the resources, funding and  
442 expertise to fight an expensive and complex patent lawsuit  
443 and are often forced to succumb to the letter's demands.  
444 This is especially true of non-technology businesses, like  
445 the hotels, restaurants and retailers represented by my  
446 colleagues. Just to give a sense of the price comparison, at  
447 the start-up that I worked at, we ran our entire operation  
448 off of a couple hundred thousand dollars of angel  
449 investments. Now, \$100,000 will buy you perhaps a single  
450 detailed analysis of a certain patent by a lawyer like  
451 myself. The full lawsuit will cost in the millions. This is  
452 an unfair situation that must be addressed.

453         These abuses take advantage of two-way symmetries of

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454 information. First, demand letter recipients lack  
455 information to react on an informed basis. Second,  
456 researchers and regulators lack information about the  
457 shrouded world of demand letters and the abuses therein.  
458 I'll present solutions for both.

459       The first solution I call demand letter transparency.  
460 Senders of demand letters in appropriate situations should be  
461 required to disclose relevant details of their campaigns.  
462 Those disclosed details should be aggregated into a  
463 searchable database accessible to individuals, businesses,  
464 researchers and regulators. All of these parties stand to  
465 benefit from demand letter transparency. The only parties  
466 who stand to lose are abusers of the patent system.

467       The second solution I call truth-in-demand letters.  
468 Congress has repeatedly dealt with misleading advertisements,  
469 loan offers and other solicitations by requiring solicitors  
470 to prominently disclose truthful, relevant information in the  
471 text of the message. A patent demand letter is no different.  
472 It is an uninvited solicitation to purchase an intangible  
473 product, namely a patent license. And it should be regulated  
474 as such. Senders ought to be required to disclose truthful,  
475 relevant information in their demands.

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476           These are straight-forward reforms that would minimally  
477 burden legitimate patent owners, provide fairness to small  
478 business, aid regulators in crafting good policy and prevent  
479 abusive practices that ultimately detriment the public  
480 interest in promoting innovation. I urge Congress to  
481 consider them closely.

482           I thank the Committee for taking on this important and  
483 timely topic. Thank you for inviting me to testify, and I  
484 look forward to your questions.

485           [The prepared statement of Mr. Duan follows:]

486           \*\*\*\*\* INSERT B \*\*\*\*\*

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|

487           Mr. {Murphy.} Thank you, and I also appreciate you  
488 staying within the time as well.

489           Mr. Cheng, you are recognized for 5 minutes.

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|

490 ^TESTIMONY OF LEE CHENG

491 } Mr. {Cheng.} Thank you, Mr. Chairman and Members of the  
492 Subcommittee--thank you, Mr. Chairman and Members of the  
493 Subcommittee.

494 Patent trolling is a growing and uniquely American  
495 problem caused by loopholes in patent law that were estimated  
496 to cost the American economy over \$80 billion in 2011 and  
497 probably a lot more today.

498 American businesses and consumers, who ultimately pay  
499 higher costs for everything because of patent trolling, need  
500 relief from Congress, and soon.

501 I am the Chief Legal Officer of Newegg.com, an internet  
502 retailer. We are members of the Consumer Electronics  
503 Association which represents the interests of over 2,000  
504 members of the innovation industry. We deeply appreciate  
505 patents and innovation.

506 Newegg is a uniquely American success story, founded by  
507 four immigrants in 2000 on a shoestring budget to sell  
508 electronics products online. We are now the second largest  
509 online-only retailer, after Amazon. We employ almost 1,000

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510 Americans. We have always been profitable in a notoriously  
511 low-margin business and achieve profitability largely by  
512 keeping our costs down. I work in a cube in a warehouse, we  
513 serve Folgers in our office, and everywhere I go I fly coach.

514       Upon joining Newegg in 2005, I was very surprised to get  
515 a number of demand letters asserting that we infringed  
516 someone's patents because we don't really make anything. We  
517 are a retailer, buying products containing from innovative  
518 companies and selling them to end user customers. The demand  
519 letters were generally vague, and the patents asserted  
520 against us covered common and obvious functionalities used in  
521 every e-commerce web site, like the shopping cart or search  
522 boxes.

523       In one instance, a patent troll sent us a demand letter  
524 claiming we infringed six of their patents. After being told  
525 that our patent counsel said we didn't infringe on any valid  
526 patent claims, the troll told us that they had thousands of  
527 patents, that we likely infringed something and to just pay  
528 up. Many, if not most demand letters declare that the troll  
529 is the owner either of patents or patent portfolios without  
530 much if any analysis as to why the alleged infringer actually  
531 infringes. They allude to the high cost of litigation and

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532 suggest that it makes sense to resolve the issue early by  
533 having the infringer pay money to take a license. These  
534 letters may reference other companies who have taken such  
535 forced licenses to add credibility to a demand. And for a  
536 small company that gets such a letter, the only practical  
537 path is to pay up, and serially. Patent trolls and their  
538 contingency fee lawyers view small companies as sheep to be  
539 sheered every couple of months. And these demand letters can  
540 be crippling to a start-up company.

541 In Newegg's case, the trolls who hit us offered to  
542 settle for, initially, high six figures to low seven figures,  
543 and all of our co-defendants in the early cases settled,  
544 sometimes for millions of dollars. Not being a seasoned  
545 patent litigator or patent attorney, I wasn't smart enough to  
546 not ask some basic questions like why do we have to pay  
547 millions of dollars for utter crap, and soon realized that  
548 patent trolling was a complete scam like securities class  
549 action litigation. Settling with trolls to avoid the cost  
550 and inconvenience of litigation might save a little bit of  
551 money up front but would encourage more and more lawsuits.  
552 Settling would simply feed the beast.

553 Since Newegg's profit margins are low, we simply could

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554 not afford to serially cut settlement checks. We also  
555 couldn't spend what our competitors spent on legal defense.  
556 We needed another path. I spent a lot of time and effort on  
557 ways lower defense costs without compromising quality.

558 I was very nervous when the jury for our shopping cart  
559 case in Texas came out of deliberations, and they could have  
560 awarded the troll \$34 million. They didn't, and on appeal,  
561 we invalidated all of their patents. Despite being sued or  
562 threatened over 30 times in 8 years, Newegg has never lost a  
563 patent suit after appeal, and not surprisingly, smart trolls  
564 don't sue us anymore.

565 Unfortunately, we are the exception to the rule. Small  
566 companies and startups don't have the resources to fight.  
567 Large companies settle because it is cheaper to do so. The  
568 overwhelming majority of patent troll suits settle, even when  
569 the asserted patents are terrible quality or when a defendant  
570 likely does not infringe because of the high cost of defense.

571 Although our strategy of resisting frivolous lawsuits  
572 appears to be working, we remain committed to helping reform  
573 patent law. We stay in the fight because not long ago we  
574 were a small company and could not possibly have launched if  
575 our programmers had to look over their shoulders and pay

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576 millions of dollars every single time they wrote a line of  
577 code. Moreover, it is just the right thing to do.

578 Patents are legal monopolies, granted under a visionary  
579 piece of legislation to spur innovation to benefit society.  
580 The Patent Act was not passed to reward extortionists who are  
581 taking advantage of loopholes in patent laws to force honest,  
582 hardworking businesspeople and entrepreneurs to pay premiums  
583 to avoid the cost of litigation. It was passed to benefit  
584 society. Those who abuse patents do not deserve windfall  
585 profits.

586 Congress must step in. Common sense steps can be taken  
587 to increase the cost of abusively asserting patents and to  
588 allow small companies and startups to innovate and operate  
589 without fear. Provisions included in H.R. 3309, the  
590 Innovation Act, and also heightened requirements for demand  
591 letters would be a great start.

592 Thank you again for the opportunity to testify.

593 [The prepared statement of Mr. Cheng follows:]

594 \*\*\*\*\* INSERT C \*\*\*\*\*

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|

595           Mr. {Murphy.} Thank you. Just made it. We are going  
596 to try and get through a couple more before we have to run to  
597 the Floor and vote.

598           Mr. Seigle?

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|

599 ^TESTIMONY OF DANIEL SEIGLE

600 } Mr. {Seigle.} Chairman Murphy, Ranking Member DeGette,  
601 and Members of the Subcommittee, thank you very much for this  
602 opportunity to testify in front of you on this pivotal issue  
603 of the abuse of the patent system and demand letter reform.

604 I am Danny Seigle, Director of Operations at  
605 FindTheBest, a research platform that helps 20 million  
606 consumers and businesses each month get the information they  
607 need to make an informed decision on a variety of topics.

608 In the last 6 months, we have unfortunately received two  
609 demand letters. The first was from the shell company, Lumen  
610 View. It is a 5-page document as you can see here. You  
611 would think in these 5 pages they could provide some details  
612 into how we actually infringe on their said patent. But  
613 aside from naming the patent and naming the feature that  
614 infringes, there are no specifics. The rest of the 5 pages  
615 are simply spent using threats to scare us into settlement.  
616 These threats include full-motion litigation that they are  
617 prepared if we defend ourselves, protracted discovery process  
618 and settlement escalations if we defend ourselves. In other

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619 words, if you try to defend yourselves, they will make it an  
620 expensive and time-consuming process for us.

621         The correct business decision for us would have been to  
622 accept their 1-day, special offer of \$50,000 and have this  
623 issue go away. However, that is just blatant extortion. We  
624 were even told by the Plaintiff that this was the correct  
625 business decision and our investors and board members would  
626 have preferred we did this as well. However, our CEO, Kevin  
627 O'Connor, took a different stance. He decided to do what was  
628 right and personally finance litigation to prove that we were  
629 innocent and to call out the scam that was going on.

630         Yesterday morning the judge on the case denied the  
631 protective motion for the gag order that they filed against  
632 us. They wanted to silence us so we could not share this  
633 story with you today.

634         The second demand letter we received was a four-sentence  
635 demand letter as you can see here, all of four sentences. It  
636 simply states we infringe on their auto scrolling technology,  
637 names three possible patents and then gives a link to our  
638 homepage as evidence of infringement. These three patents  
639 have 78 claims. That is a lot of claims for a small company  
640 like ourselves to go through and figure out if we actually

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641 infringe or not. Without inside counsel and scarce  
642 resources, it takes a lot of time and effort for us to go and  
643 decide what the best course of action is. Additionally, they  
644 sent this letter certified mail so we could be in violation  
645 of willful infringement if we do not actually do our proper  
646 research. We had to hire an outside counsel to spend several  
647 thousand dollars investigating this to write a letter of  
648 reply. In our letter of reply, we asked for specifics  
649 because we can't figure out how we actually infringe. These  
650 vague tactics are all too common in these demand letters.

651 I wish I could say that our story was unique, but it is  
652 not. The only unique thing about our story is our public  
653 stance. We have heard from hundreds of people in similar  
654 situations like us that wish they had a voice, that wish they  
655 could talk out about this. They have been coerced into  
656 signing NDAs in order to settle, and their voice has been  
657 silenced. I am here today to represent them as well.

658 Comprehensive patent litigation reform is necessary, and  
659 demand letter reform is essential. Proper disclosure  
660 guidelines would greatly help companies like FindTheBest  
661 understand how we actually infringe, which claims we actually  
662 infringe on and provide details so we could actually research

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663 this in a matter to resolve the issue.

664           The FCC should also look into investigating several of  
665 these unfair, corrupt practices. It is very blatant there is  
666 no good-faith examples of how we actually infringe and how we  
667 infringe.

668           We did what was right. We fought this patent. We did  
669 not have to. In fact, taking the \$50,000 settlement would  
670 have been the easy and less costly option, and I ask that you  
671 guys do what is right and stop this abuse of the patent  
672 system. Thank you.

673           [The prepared statement of Mr. Seigle follows:]

674 \*\*\*\*\* INSERT D \*\*\*\*\*

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|

675           Mr. {Murphy.} Thank you. Mr. Bragiel, you may take 5  
676 minutes.

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|

677 ^TESTIMONY OF JUSTIN BRAGIEL

678 } Mr. {Bragiel.} Thank you, Mr. Chairman and Members of  
679 the Committee. My name is Justin Bragiel. I am General  
680 Counsel at Texas Hotel and Lodging Association. Thank you  
681 for inviting me to testify today.

682 We represent approximately 2,000 hotels across the great  
683 State of Texas, about 500 additional members on top of that.  
684 We have been in existence since 1903, and our mission is to  
685 advocate for and serve the Texas lodging industry.

686 Our members work and live all across Texas, but one  
687 region in particular of the State has been plagued recently  
688 by a great deal of patent litigation activity, and this is,  
689 for historical reasons the Eastern District of Texas, known  
690 often as the rocket docket, sees and hears more cases related  
691 to patents per capita than any other jurisdiction in the  
692 United States.

693 Our members sell a product we are all familiar with,  
694 hotel rooms, right? I represent the hotel industry. It is  
695 really simple. And so oftentimes I have been asked over the  
696 last couple of days, why are you going to Washington to

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697 testify at a patent issue? What in the world does a hotel do  
698 that is related to patents? Our members, our operators,  
699 don't understand patents. We don't file for patents when we  
700 build our lodging properties, nor when we operate them. But  
701 our members have been given and served with not only demand  
702 letters but actually lawsuits as well for failing to answer  
703 demand letters, simply for providing Wi-Fi in the hotels to  
704 guests. We all understand that concept as well. Our guests  
705 expect and demand wireless technology. It is a part of this  
706 day and age in staying at a hotel. It is a very simple  
707 product that we offer. And yet, we have been sued, our  
708 members have been sued. Almost 100 hotels across the State  
709 of Texas were sued in the last 6 months or 9 months for  
710 allegedly infringing upon the Wi-Fi patent held by one  
711 particular patent troll.

712         The letters start as a shakedown. Pay us \$5,000. This  
713 is a significantly smaller sum, but a sum that would be  
714 attractive for an independent lodging operator to seize upon  
715 to settle. Pay us \$5,000 as a licensing fee, and we won't  
716 file suit against you. If our member, our hotelier ignores  
717 that letter, they receive a lawsuit in the mail months later  
718 that alleges the hotel is continuing to infringe upon the

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719 patent holder's patent by providing Wi-Fi to hotel guests,  
720 and a suit like this, as we have heard, can cost upwards of a  
721 million dollars to defend, \$100,000 just to start the process  
722 with an IP attorney. And again, all our hotelier does is  
723 operate a hotel, right? We don't deal with patents. We have  
724 no way to know when we buy a wireless access point or a  
725 wireless router whether or not the manufacturer has provided  
726 all pertinent licensing on fees and patents to the patent  
727 holders. We don't know that. We are not in that business.  
728 We have no way of knowing which brands of equipment will be  
729 singled out. We have no way of identifying which one of our  
730 members will be targeted for a demand letter or a lawsuit.  
731 It is really incredible.

732         So I get calls every day from hoteliers across the State  
733 of Texas with legal questions. They ask the most basic legal  
734 questions you can imagine oftentimes, and usually all of our  
735 questions are related to how can I avoid potential  
736 litigation, how can I avoid potential liability. I have no  
737 answer for any my members on this issue, none at all. There  
738 is not a brand of Wi-Fi router or piece of equipment that I  
739 can tell them and assure them that they will not be sued for  
740 purchasing and operating. It is a real problem for us.

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741           So we are here to ask for smart patent reform to look at  
742 this process. We need some protection for the end users  
743 here. We are not experts in the patent field, we are not.  
744 And, you know, to be targeted like this, it really is just a  
745 shakedown.

746           I am here for questions. Thank you so much for inviting  
747 me to testify.

748           [The prepared statement of Mr. Bragiel follows:]

749 \*\*\*\*\* INSERT E \*\*\*\*\*

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|

750 Mr. {Murphy.} Thank you. I think we can--do you have a  
751 full 5 minutes you need because we will have to come back  
752 then and--

753 Ms. {DeGette.} Okay. I am going to go vote.

754 Mr. {Richardson.} I have time to do this.

755 Mr. {Murphy.} All right. I will do it. Real quick  
756 then, thank you. Go ahead.

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|

757 ^TESTIMONY OF JAMIE RICHARDSON

758 } Mr. {Richardson.} Chairman and Ranking Member DeGette  
759 and esteemed Members of the Committee, thank you so much for  
760 the chance to testify on behalf of White Castle and the  
761 National Restaurant Association.

762 For us, White Castle is a family-owned business. It  
763 started in 1921 in Wichita, Kansas. Today we are based in  
764 Columbus, Ohio. But throughout our entire history, it is  
765 been a history of famous firsts. So we are big believers in  
766 intellectual property rights and understand the importance of  
767 this debate when it comes to patents.

768 But for White Castle specifically, what we have been  
769 faced to deal with in the past year are four specific patent  
770 troll cases that we have had to face. And a lot of it has to  
771 do with how we connect with our customers. So we have lots  
772 of new technologies that we are trying to employ. For  
773 instance, the CR codes, the QR codes, that will go on a  
774 package that make it easy to scan and to find out for a  
775 customer how to link to information, we got a letter about  
776 that, asking that we refrain from using that further. We had

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777 a second one show up because we inserted a link into a  
778 customer email, to once again make it easier for customers to  
779 get the information they crave and received a letter on that.  
780 Most recently we received a letter about having our White  
781 Castle logo appear on a White Castle map on our mobile app  
782 that we have created for our phone with a firm claiming that  
783 they own the patent to place a logo on a map. And most  
784 discouraging of all is we are trying to be compliant with  
785 things like menu labeling that require that we soon post  
786 nutritional information on our menu boards. We have started  
787 to look at digital menu boards. Along the path towards  
788 implying digital menu boards, we didn't even get the benefit  
789 of a demand letter, we got a suit filed by one of the patent  
790 trolls. And that is what we are going to call them at White  
791 Castle because that is what they are to us. And in that suit  
792 it claimed that we can't transfer information electronically  
793 to our digital menu boards, that that is an infringement.

794       Unfortunately for us, we are small. We are a medium-  
795 sized fast-foot chain. We are a family-owned business. We  
796 don't have the dollars to litigate. We have got two very  
797 gifted attorneys internally. They are awesome, but we have  
798 to rely on outside counsel when these patent cases come up to

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799 try to get the right guidance to understand where we can go  
800 with it.

801           So what it is caused us to do, it is stopped us in our  
802 tracks when it comes to moving forward in talking to our  
803 customers. So the patent trolls are living under the bridge  
804 to tomorrow, and as we are trying to progress and move  
805 forward, they are slapping duct tape over our face and not  
806 allowing us to share with our customers what's really going  
807 on in providing the information that they want.

808           So it is a real issue for us. We have chose not to  
809 pursue these technologies. We have had to set them on the  
810 shelf. We can't afford to get involved in some type of  
811 settlement. Who knows how high that is going to go, nor can  
812 we risk litigation because we are not going to bet the White  
813 Castle system and the 10,000 people who rely on us for their  
814 livelihoods and the communities that rely on us because some  
815 folks have decided that it is okay to not obey the law and  
816 just go outside of that on their own.

817           So thank you for the chance to share.

818           [The prepared statement of Mr. Richardson follows:]

819 \*\*\*\*\* INSERT F \*\*\*\*\*

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|

820           Mr. {Murphy.} Thank you. I appreciate your winding  
821 that up. We have zero time left, so we have to run to the  
822 Floor and vote real quick. I will be back here within half-  
823 an-hour, so don't go too far away, and we will be right back.  
824 Thank you.

825           [Recess.]

826           Mr. {Murphy.} Thank you. We are reconvening this  
827 hearing of the Oversight and Investigation hearing on patent  
828 assertion practices, and thank you for your patience,  
829 panelists, as we move forward with this.

830           A number of my colleagues are on the Floor in speeches,  
831 et cetera. We will go through and perhaps I might ask if it  
832 is a matter that we may--we will go through our questions  
833 back and forth, but if I have a couple extra questions on  
834 behalf of other members, I don't think we will be going much  
835 more than probably a half-an-hour behind.

836           Ms. {DeGette.} That is fine, and you know, this  
837 Committee has a history of allowing questions in writing.  
838 And Mr. Chairman, if you would agree to that, unfortunately,  
839 most of the rest of the Democrats probably won't be back  
840 because we have a Democratic Caucus meeting right now, and I

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841 don't know what the Republicans have going.

842 But I know that Members on this Subcommittee are very  
843 concerned about this issue. So if we could allow members to  
844 submit written questions, that would be wonderful.

845 Mr. {Murphy.} I absolutely will. And so what I will do  
846 is I will take 5 minutes, yourself and then if--

847 Ms. {DeGette.} Sure.

848 Mr. {Murphy.} --go to a colleague there and I may ask  
849 couple other questions with unanimous consent. We will  
850 proceed from there. See how nice we get along? This is an  
851 important issue to all of us.

852 Well, obviously from the panelists here, and I will  
853 start with myself for 5 minutes, you have similar  
854 perspectives on the impact of these demand letters that had  
855 on your companies or on businesses in general. They are  
856 rather remarkable, the vagueness of them and the content and  
857 the impact they have.

858 For those of you who have actually received demand  
859 letters, is this a recent phenomenon? Who can speak to that?  
860 Who received this? Mr. Cheng, did you receive one of those  
861 letters? Is this a recent issue?

862 Mr. {Cheng.} Well, we have been getting them for about

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863 8 years. So it depends on how you--what you define as  
864 recent, right? So it somewhat coincided with my arrival at  
865 Newegg, but I had nothing to do with it.

866 So we crossed the billion dollar revenue mark right  
867 around that time. Historically trolls, they just had such a  
868 wide field, easy pickings, that they would literally go down  
869 lists of the largest or the largest companies or the most  
870 accessible companies. Getting your name as the fastest-  
871 growing company in the Los Angeles Business Journal was going  
872 to make you--that is what they based their demand letters on.  
873 And in recent years, you know, as the trolling industry has  
874 demonstrated how lucrative trolling can be, more and more  
875 companies are getting demand letters.

876 In some areas, demand letter, the volume of demand  
877 letters is actually declining with larger trolls. They just  
878 go straight to litigation because under the Medtronic, you  
879 know--there is case law that states that a demand letter that  
880 is very detailed will give a prospective defendant the right  
881 to file declaratory judgment action in a venue not of the  
882 troll's choosing.

883 So with larger defendants, sometimes the trolls will  
884 actually just go straight to litigation now. But for the

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885 smaller companies and start-ups, in all likelihood, their  
886 demand letter volume is increasing.

887 Mr. {Murphy.} Ms. Feldman, why have these trends gone  
888 the way they have, with more of these taking place and with  
889 the kind of problems that have been described here today?

890 Ms. {Feldman.} I think some very clever and very  
891 sophisticated people figured out how to game the system.  
892 Once that had happened, it was so lucrative that everyone  
893 became interested in jumping on the bandwagon.

894 In the start-up study that I mentioned, most of those  
895 who financed start-up companies say that these demands have  
896 increased dramatically in the last 5 years against the  
897 portfolio companies.

898 Mr. {Murphy.} Ms. Feldman, you are an attorney,  
899 correct?

900 Ms. {Feldman.} I am a professor.

901 Mr. {Murphy.} Anybody here who is an attorney in this?  
902 Mr. Duan, you are an attorney. Why hasn't the Bar  
903 Association brought up ethics concerns against those who just  
904 do this without information and just move forward?

905 Mr. {Duan.} Well, I think there are a number of  
906 concerns, you know. Number one, as I think a number of the

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907 witnesses have alluded to, we often don't know who is behind  
908 a lot of these sorts of things. You know, they hide behind  
909 shell companies, we don't know all who is, you know, who is  
910 really behind a lot of the demand letters. So, you know, it  
911 would be hard for the bar to go after them.

912         Now, in terms of what the lawyers are sending out, you  
913 know, they are sending out letters that are threatening, they  
914 are sending out letters that are uninformative. But they are  
915 not sending out letters that are illegal. Everything that  
916 they are saying is, you know, just communication, and there  
917 is nothing wrong with communication. The problem is that the  
918 underlying demands, which are being made not by the law firms  
919 themselves but by the companies that are being represented by  
920 the law firms, those are the aspects that are problematic.  
921 There is also--

922         Mr. {Murphy.} But what separates a good-faith request  
923 or good-faith letter from one that is a trolling one?

924         Mr. {Duan.} Well, I think it starts from the  
925 investigation that goes behind the letter. You know, in my  
926 practice, if we thought that still is infringement of a  
927 legitimate patent, we would look at the products, we would  
928 identify what features the product infringed, why they

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929 infringed, we looked carefully at the patents to make sure  
930 that everything was set and then we would have a  
931 conversation.

932         What I think we are seeing with a lot of these demand  
933 letters, they are taking the shotgun approach that Professor  
934 Feldman talked about. We are not seeing the sort of  
935 investigation. I think we--you know, I mentioned that MPHJ  
936 has sent out letters that don't even talk about what the  
937 business itself does to infringe. The simply say that  
938 businesses like yours infringe. So therefore you should pay  
939 us a licensing fee. You know, I think there are plenty of  
940 examples. If you take a look at some of the demand letters  
941 on EFF's Trolling Effects Web site, you'll see plenty of  
942 examples of letters that really evince no knowledge of what  
943 the company does, why they think the products infringe, what  
944 they think is wrong and what they want the companies to do.  
945 And, you know, that is where the abuse comes in.

946         Mr. {Murphy.} Real quickly, Ms. Feldman, I have just a  
947 few seconds left, you testified that in recent years a new  
948 business model of patent demands have developed. Can you  
949 expand on what this old business model entailed, why it is  
950 changed, what impact this change has had on businesses and

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951 consumers?

952 Ms. {Feldman.} Yes, traditionally most patents didn't  
953 garner a return. It is very difficult to translate a patent  
954 into an actual product. It normally takes lots of patents  
955 and lots of knowhow to do that. The Patent Office has about  
956 18 hours over a period of 2 years to look at patents, and  
957 these patents may have dozens of claims in them.

958 So no one really worried that lots and lots of patents  
959 were being granted because the ones we cared about ended up  
960 in court. With a new business model, all of these patents,  
961 each individual ones, can be separated out and launched  
962 against companies. It is that particular business model that  
963 is wreaking havoc for companies across the country.

964 Mr. {Murphy.} Thank you. I see my time--I appreciate  
965 it. I now recognize Ms. DeGette for 5 minutes.

966 Ms. {DeGette.} Well, following up on that, Ms. Feldman,  
967 and then what happens? So there are all these patents that  
968 were granted. The review, the patent examiner was minimal in  
969 many cases. So there are a lot of patents, and a lot of them  
970 are duplicative, right?

971 Ms. {Feldman.} Yes, and also a legitimate patent  
972 doesn't mean that you are launching it at an appropriate

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973 target.

974 Ms. {DeGette.} Right.

975 Ms. {Feldman.} You may have a valid patent. You are  
976 just sending it indiscriminately to lots of people.

977 Ms. {DeGette.} And it doesn't mean that the people who  
978 you are targeting have in any way infringed against that  
979 patent, right?

980 Ms. {Feldman.} That is right.

981 Ms. {DeGette.} And most of these patents that we are  
982 talking about here are patents that have been obtained by  
983 these third parties. So it is not like it is the inventor  
984 who filed the patent application and had it granted. It is  
985 some third party, right?

986 Ms. {Feldman.} It is true, although there is a new  
987 approach that appear to be happening which is let's file  
988 patents and see if we can go after companies with these.

989 The key question is, are there products being made or  
990 are you just knocking on the door of existing companies  
991 asking for a handout?

992 Ms. {DeGette.} Right. I was--when Mr. Duan and Ms.  
993 Feldman, when you were answering that question, I was reading  
994 one of the letters that Mr. Cheng was referring to where it

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995 says FindtheBest is using automatic scrolling technology on  
996 their Web site, technology which we believe to be covered,  
997 and it doesn't even say specifically what that is, right?

998 Mr. {Cheng.} It is actually--

999 Ms. {DeGette.} Oh, it is Mr. Seigle?

1000 Mr. {Cheng.} --Seigle's letter--

1001 Ms. {DeGette.} Sorry.

1002 Mr. {Cheng.} --but we have gotten letters like that,  
1003 too.

1004 Ms. {DeGette.} Yeah. Sorry, Mr. Seigle.

1005 Mr. {Seigle.} Yes. When you get this letter, and you  
1006 are not a legal expert like me, you have to start  
1007 investigating this, and there is 78 claims in those three  
1008 patents and you have noticed they don't mention which claims  
1009 we can be infringing on.

1010 Ms. {DeGette.} Right.

1011 Mr. {Seigle.} So there is no due diligence on their  
1012 part. There is no reason to believe they have a good-faith  
1013 reason to believe we infringe. They just take this template,  
1014 insert company name, insert link to home page and send it  
1015 out.

1016 Ms. {DeGette.} Yeah. I mean, I can see that. Mr.

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1017 Chairman, I don't know if these are in the record, but I  
1018 would like to put these two letters that Mr. Seigle had  
1019 referred to in the record because it is frightening.

1020 [The information follows:]

1021 \*\*\*\*\* INSERT G \*\*\*\*\*

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|

1022 Ms. {DeGette.} And you know, even if you are a legal  
1023 expert, if you look at these--I am sure you sent them along  
1024 to your lawyer, and then the lawyer is having to--because I  
1025 myself am a lawyer, and I used to represent companies before  
1026 I came to Congress, and I had clients who got letters like  
1027 this. And we had to comb through the patents, and it is even  
1028 confusing to the lawyers.

1029 You know, this goes back, Mr. Chairman, to what you were  
1030 asking about, why doesn't the Bar Association enforce this.  
1031 Oftentimes if the patent trolls are the legal owners of these  
1032 patents, then it is really legally a matter for the court to  
1033 decide whether or not they are infringing. And it is really  
1034 a problem.

1035 I wanted to ask both you, Mr. Duan, and you, Professor  
1036 Feldman, what separates a so-called patent troll from a  
1037 legitimate company asserting its patent? Can we really come  
1038 up with a bright line here?

1039 Ms. {Feldman.} I think the question to focus on is  
1040 whether there are new products coming out of this. There has  
1041 been a lot of attention on patent trolling, and no one wants  
1042 to be the bad guy and everyone wants to draw a definition

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1043 that says I am not a bad guy, that is over there. And you  
1044 can parse these in many different ways, but it all comes back  
1045 to, it seems to me, grant patents in order to get new  
1046 products out for society and strengthen the economy. And the  
1047 question is, where are the new products of this activity? Is  
1048 any of that coming out of here or is this just a tax on  
1049 current production? You have to pay it in order to go about  
1050 your business.

1051 Ms. {DeGette.} What do you think, Mr. Duan?

1052 Mr. {Duan.} So I agree. You know, I think there is a  
1053 very simple definition for what a patent troll is. A patent  
1054 troll is somebody who uses patents to abuse the system to  
1055 reduce social value for their own personal profit.

1056 Ms. {DeGette.} Okay, but that is not a legal standard.

1057 Mr. {Duan.} I don't think that--I understand that it is  
1058 not a legal standard. I think that when we look at what we  
1059 want to do in terms of regulation, right, we shouldn't be  
1060 focusing on, you know, how are you making your money. We  
1061 should really be focusing on, you know, what is the behavior  
1062 that you are taking advantage of, right?

1063 In this case, you know, the behavior that they are  
1064 taking advantage of in order to threaten people in detriment

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1065 to society is they are sending out letters that really don't  
1066 provide information, that basically just tax companies that  
1067 are actually producing and on the flipside, you know, they  
1068 don't produce anything themselves.

1069 Ms. {DeGette.} Well, you know, there are lot of  
1070 suggestions different people have, both in front of the  
1071 Judiciary Committee and this Committee and in the Senate, so  
1072 I would ask both of you and also the rest of the panel, if  
1073 you have ideas for things we can do in statute to help  
1074 prevent this kind of behavior, you know, to set that bright  
1075 line, that would be really helpful to us. And I yield back.  
1076 Thank you, Mr. Chairman.

1077 Mr. {Murphy.} Thank you, yield back. Now we will go to  
1078 the gentleman from Virginia, Mr. Griffith, for 5 minutes.

1079 Mr. {Griffith.} Thank you, Mr. Chairman. Following up  
1080 on that, Mr. Seigle, I was intrigued with some of your  
1081 comments in regard to what Ms. DeGette was just talking  
1082 about, some ideas. And I believe, if I remember your  
1083 testimony correctly, what you indicated was that if you were  
1084 going to send a letter of this nature, because you might have  
1085 a legitimate claim, then make it a requirement that that  
1086 claim be stated up front. Did I understand that correctly

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1087 and would you expand on that, please?

1088 Mr. {Seigle.} That is correct. If they actually had  
1089 proof that they did proper due diligence to have a reasonable  
1090 belief that we infringed, we would happily discuss the  
1091 infringement contentions with them and try to come to a  
1092 resolution if they were in good faith. It is very clear from  
1093 the letters we have been getting that they do not have that  
1094 good-faith intention. It is spray and play, although the  
1095 demand letters are all the same, just with a different  
1096 company name.

1097 Mr. {Griffith.} And so all they say we have reason to  
1098 believe that you may have violated--

1099 Mr. {Seigle.} Yeah.

1100 Mr. {Griffith.} --the terms of our patent and therefore  
1101 pay up?

1102 Mr. {Seigle.} And then when we called them at Lumen  
1103 View, it was very clear they hadn't even been to our Web  
1104 site, didn't really understand the functionality, didn't even  
1105 understand their patent that well, too. So it is very hard  
1106 to deal with the situation when they are actually more  
1107 concerned on the cost of defense as their main reason for  
1108 exercising these demand letters as opposed to the merits of

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1109 the infringement.

1110 Mr. {Griffith.} Right. Of course, it is not always  
1111 easy to figure that out, and somebody may have a legitimate  
1112 claim. Even though their motives may not be great, they may  
1113 actually have a legitimate claim. But it does seem to me  
1114 that we ought to be able to work out some language probably  
1115 in the Judiciary Committee, but perhaps we can in this  
1116 Committee as well figure out some language that ought to be  
1117 included in that letter that would be a requirement that you  
1118 notify the company prior to filing a lawsuit. I don't think  
1119 you can say necessarily the first letter, but you could say  
1120 that prior to filing a lawsuit on such a claim, you have to  
1121 provide the defendant company with the or defendant  
1122 individual, whichever it may be, with the following  
1123 information and then go A, B, C, D, E to basically, you know,  
1124 to state a reasonably articulate theory of why you think you  
1125 have been damaged.

1126 Mr. {Seigle.} Yes, and at a very minimum, the claims  
1127 and the patent that they are actually inserting, there is  
1128 usually lots of claims on a given patent. In our case, they  
1129 don't mention which claims. And so that has an undue amount  
1130 of work and time and effort on our part to then have to

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1131 research every claim. So at a minimum, they should disclose  
1132 which claims, provide some evidence of due diligence, screen  
1133 shots from your Web site, what evidence they have to believe  
1134 that you infringe, and with that, we are okay with those.  
1135 That shows they have a good intent to potentially resolve  
1136 this issue. It is this type of behavior that we think needs  
1137 to stop, and I think a lot of it is just because it is so  
1138 easy to send a demand letter. There should be some minimum  
1139 standards of what that should entail.

1140 Mr. {Griffith.} Well, I appreciate that very much. Mr.  
1141 Richardson, you indicated that you all had gotten a letter  
1142 for just linking a site? Was it the site that they were  
1143 upset about or the fact that you used linking technology  
1144 because I am surprised--

1145 Mr. {Richardson.} Yes--

1146 Mr. {Griffith.} --every Member of--if it is linking  
1147 technology, I am surprised every Member of Congress hadn't  
1148 gotten a letter. I link stuff through my Web site every day.

1149 Mr. {Richardson.} You never know. Today's mail might  
1150 not be here yet.

1151 Mr. {Griffith.} Well, that is a good point.

1152 Mr. {Richardson.} That is exactly what the claim was,

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1153 and it was insertion of a hyperlink, you know, a URL into  
1154 Tweets, into a customer email, just to make it easier to, you  
1155 know, direct our customers who had opted in, you know, who  
1156 wanted this information, an easier path to get to it.

1157 Mr. {Griffith.} Wow. And then of course there is the  
1158 safety factor because not only are there more requirements in  
1159 regard to service of food as your industry does with White  
1160 Castle and lots of other fast-food chains out there, people  
1161 want to know what all those ingredients are. And it is not  
1162 only the calorie intake, it is, you know, what are you  
1163 actually putting in there because food allergies are on the  
1164 rise. And you are saying that you got a letter on trying to  
1165 do something like that, too, that you had to put on the shelf  
1166 because you just couldn't afford to the price of litigation?

1167 Mr. {Richardson.} Very similar to that because as we  
1168 are looking at new menu board technologies to make it easier  
1169 to share that nutritional information or to change a price or  
1170 change an offer, the claim there was that that was a  
1171 violation actually because of how we were using the internet  
1172 to send the information digitally. We would be okay if we  
1173 wanted to put it on a jump drive and drive from Columbus to  
1174 Louisville. But not to be able to use the internet to do

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1175 that just didn't seem to make much sense to us. But that is  
1176 one where they didn't even send us a letter. It went  
1177 straight to litigation as others have referenced.

1178 Mr. {Griffith.} Wow. That is incredible. I will tell  
1179 you that that is of great concern because particularly for  
1180 the smaller chains or the Mom and Pops, you know, they just  
1181 don't have the ability to get that information out there if  
1182 they can't put it on the internet. And that is a real  
1183 problem that will affect their businesses.

1184 Mr. Chairman, I appreciate you doing this hearing. I  
1185 appreciate all our witnesses being here. This is a subject  
1186 area--I, too, am a lawyer, but this was--but I never  
1187 represented corporations. Unless they were small Mom and  
1188 Pops, I didn't do this kind of work. But I really appreciate  
1189 this has been an eye-opening hearing, and thank you so much  
1190 for doing it. I yield back.

1191 Mr. {Murphy.} The gentleman yields back. I now  
1192 recognize Mr. Lujan for 5 minutes.

1193 Mr. {Lujan.} Mr. Chairman, thank you very much. Mr.  
1194 Chairman, I appreciated it very much a point that you made in  
1195 your written testimony about focusing on the abuse of  
1196 activity itself rather than the form of the party involved.

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1197 The point that I would like to make is your promotion of the  
1198 term abusive patent asserter as opposed to the more commonly  
1199 used terms of non-practicing entity and patent assertion  
1200 entity because national labs-universities fall into that  
1201 category. And so I am hopeful that as we talk about  
1202 developing our legislation that we are very careful to go  
1203 after the bad actors and make a clear differentiation between  
1204 universities and the national labs coming from a State that  
1205 has two national labs and a district that has what I would  
1206 describe as the strongest and best national lab in the  
1207 country.

1208 But with that being said, Mr. Cheng, to you and to all  
1209 of the witnesses, I would like your thoughts on that as we  
1210 target this area, what can we do in that specific arena, or  
1211 are you seeing activity coming from any entities such as  
1212 those that I have described?

1213 Mr. {Cheng.} Big picture, Congressman Lujan, I think  
1214 that reform efforts at some point have to take the economic  
1215 incentive to engage in abusive patent litigation away or they  
1216 have to give the victims this type of litigation some  
1217 recourse. Presently the system is very, very asymmetrically  
1218 stacked, both substantively and procedurally against parties

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1219 that get demand letters and parties that get sued. It is  
1220 very easy not just to crank out demand letters but also to  
1221 crank out lawsuits. You know, filing a lawsuit is actually  
1222 not much more expensive, a form lawsuit not much more  
1223 expensive than sending out a demand letter. And in all sorts  
1224 of different ways, you know, in the ways for example a shell  
1225 entity can be created to file lawsuits and issue demand  
1226 letters with no recourse for the victims at all, even when  
1227 they win, right? I mean, there are opportunities I think for  
1228 Congress to take a look at what is being done by these  
1229 abusive patent asserters.

1230 In my written testimony that you cited, my goal is to  
1231 focus not on the form of the sinner but on the sin itself.  
1232 We love the sinners or you know, we could, but it is their  
1233 actions and activities that actually are causing a lot of  
1234 harm to society. It is causing companies and entrepreneurs  
1235 not be able to start their companies, not be able to spend  
1236 money on creating jobs and making products that your  
1237 constituents use.

1238 Mr. {Lujan.} Okay. Anyone else? Mr. Seigle?

1239 Mr. {Seigle.} I agree that educational institutions are  
1240 in this weird area where they are not practicing entities,

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1241 but I believe their belief in creating this technology is to  
1242 license it out so that it can become a product and help spur  
1243 innovation and help consumers. When I have been lobbied on  
1244 The Hill the last couple of days, I have heard that the  
1245 University of California school system has been against  
1246 patent reform, and as a graduate of the University of  
1247 California at Berkeley, I am not so happy with that. But I  
1248 think they have a good faith in what they are doing with  
1249 their patents, and I would be okay with them having exclusion  
1250 for being an educational institution.

1251 Mr. {Lujan.} I appreciate that, Mr. Seigle.

1252 Ms. {Feldman.} Sir, may I comment?

1253 Mr. {Lujan.} Professor?

1254 Ms. {Feldman.} Yes.

1255 Mr. {Lujan.} Dr. Feldman, Ms. Feldman?

1256 Ms. {Feldman.} Thank you. The universities have a  
1257 unique position as keepers of the academic flame and also  
1258 recipients of taxpayer money. There is increasing pressure  
1259 on universities to transfer their patents to those who would  
1260 assert patents in licensing and litigation. The Association  
1261 of University Technology Managers has just announced that it  
1262 is going to rethink its policy of not transferring patents to

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1263 non-practicing entities, and that can be troubling. So in  
1264 any legislation you draft, you might want to be careful about  
1265 how you craft it because if you leave out universities and  
1266 joint ventures, you may create large loopholes for those who  
1267 would simply purchase from, purchase rights from or join  
1268 hands and hide behind universities for their activities.

1269 Mr. {Lujan.} Very important point. I appreciate that,  
1270 Professor Feldman. Mr. Bragiel?

1271 Mr. {Bragiel.} We would like to see some protections  
1272 for end users. You know, again, our operators don't  
1273 manufacture the technology. They just purchase it off a  
1274 shelf and then installed at their property and operate it for  
1275 the public.

1276 So some sort of protection that, you know, provides  
1277 protection for the end user would be fantastic. You know, it  
1278 is not just the hotelier that could be sued for a Wi-Fi  
1279 infringement. It could be you or I for purchasing a Wi-Fi  
1280 product and operating it out of our household. Allegedly we  
1281 would be violating that same patent.

1282 So we would like to see some sort of reform that  
1283 involves protecting the end users, having us last in line for  
1284 a lawsuit for technology we don't understand, we don't

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1285 manufacture, we just merely purchase and use.

1286           Mr. {Lujan.} I appreciate that. As my time has run  
1287 out, Mr. Chairman, I want to commend both the majority and  
1288 minority staff for the witnesses that we have today and would  
1289 invite their input and recommendations to the Committee that  
1290 we could get to the FTC with the upcoming study in 2013, and  
1291 I think it would be great if the FTC would actually invite  
1292 the witnesses to sit down and have serious conversations with  
1293 them to include those aspects of the study's law.

1294           So thanks again, Mr. Chairman, to you and to the staff  
1295 and Ranking Member DeGette.

1296           Mr. {Murphy.} Thank you. The gentleman's time has  
1297 expired, and he yields back.

1298           Speaking of the FTC, so let me follow up on that. I  
1299 want to--just so you know that they are going to be  
1300 conducting a formal inquiry, touch on many of the issues you  
1301 have discussed today. Has any one of you had a chance to  
1302 review the proposed scope of the FTC inquiry?

1303           Ms. {Feldman.} I have looked at it.

1304           Mr. {Murphy.} Ms. Feldman? Can you talk about that?

1305           Ms. {Feldman.} I think it is an important step. We  
1306 can't solve what we can't see, and much of this is shrouded

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1307 in non-disclosure agreements. I applaud those who are here  
1308 and willing to speak because people have been afraid to share  
1309 their experiences for fear that they will be targeted by  
1310 those who propagate these lawsuits.

1311 The FTC action contemplates looking at 25 patent  
1312 assertion entities. That is a start, but it is a small piece  
1313 of the puzzle. My own view is that it will probably take  
1314 several types of steps so there is low-hanging fruit that can  
1315 be addressed now, and then there will probably be some  
1316 longer-term efforts once we understand the problem better  
1317 once the FTC has finished its investigation.

1318 Mr. {Murphy.} Have any of you met with the FTC in this  
1319 issue?

1320 Ms. {Feldman.} I have spoken to staff members.

1321 Mr. {Murphy.} Have you have done that? Let me ask of  
1322 this of other people or two. Are there any specific issues  
1323 you have encountered prior to litigation that you think the  
1324 FTC should prioritize or other areas you think are receiving  
1325 less attention that they should, especially those who have  
1326 been involved with litigation? Mr. Seigle, is there anything  
1327 that you think they should prioritize?

1328 Mr. {Seigle.} What I was most surprised about prior to

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1329 litigation was just how deceptive they are. It is very much  
1330 a corrupt behavior. We were--they threatened criminal  
1331 charges against us for calling them patent trolls at one  
1332 point. So behavior like that, where it is very clear just  
1333 how corrupt and unfair it is, I think you will see a lot of  
1334 it out there. It would be interesting for the FTC to  
1335 investigate that, and I think specifically a demand letter  
1336 registry would be interesting as well because I don't think  
1337 anyone knows the complete scope of how many demand letters  
1338 have been out there because there is no way to track it.

1339         And if you are given a patent, you are basically given a  
1340 golden ticket, the right to have a monopoly, and with that  
1341 responsibility comes the right to act in good faith. And I  
1342 think it would be reasonable to have them register all the  
1343 demand letters they send because we are giving them that  
1344 monopoly.

1345         Mr. {Murphy.} Thank you. Mr. Bragiel, do you have some  
1346 comments on this in terms of what the FTC should look at?

1347         Mr. {Bragiel.} Yeah, you know, and again, I think, you  
1348 know, some sort of protection for end users here is really  
1349 key, you know, some sort of regulation by the FTC would be  
1350 helpful that prohibited this sort of predatory behavior on

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1351 behalf of patent trolls prior to filing a lawsuit, be that a  
1352 registry, be that some sort of a system or mechanism in place  
1353 that prevents them from filing just masses of lawsuits. This  
1354 is a numbers game for my clients. You know, these patent  
1355 trolls will sue hundreds of individuals and corporations all  
1356 with one form letter just swapping out the name of the  
1357 company. So some sort of regulation that prohibits that type  
1358 of behavior from occurring would be very beneficial to us.  
1359 We would see quite a bit fewer lawsuits filed I think in the  
1360 State of Texas.

1361 Mr. {Murphy.} Mr. Richardson, can you talk about any  
1362 comments you would want the FTC to pay attention to?

1363 Mr. {Richardson.} Yeah, we would echo the sentiment  
1364 that it needs to be focused on the end user. A registry is a  
1365 great idea, but we think it is a two-step, that it is real  
1366 important to look at the demand letter as well and to get the  
1367 clarity and understand that. You know, in our instance to  
1368 echo that sentiment, one of the things we have had to deal  
1369 with is using outside counsel, but our legal cost is a  
1370 percentage of--our legal cost has gone from a quarter of 1  
1371 percent for patent-related issues to 20 percent in the most  
1372 recent year. So it is real cost.

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1373           And Congresswoman, you referenced abuse, and the victims  
1374 of the abuse are our customers and our team members and it is  
1375 not just the companies, it is our neighborhoods that are  
1376 suffering as a result of this.

1377           Mr. {Murphy.} Curious, what does it add to the cost of  
1378 your products, all this?

1379           Mr. {Richardson.} You know, at this point, the real  
1380 cost is opportunity cost because we are avoiding moving  
1381 forward with the technology because that is our only defense.  
1382 So we haven't had the big lawsuit or had any big settlements.  
1383 But it is holding us back. That is the big issue.

1384           Mr. {Murphy.} Then let me ask you this. Are there  
1385 other areas outside of technology that have been impacted by  
1386 these recent patent assertions? Anybody?

1387           Ms. {Feldman.} So in this start-up demand study, 70  
1388 percent of those who financed start-ups said that they had  
1389 seen this in technology, but the 30 percent said that they  
1390 are seeing it in life sciences as well. We know anecdotally  
1391 that we are also seeing it everywhere, Mom-and-Pop stores,  
1392 restaurants, coffee shops across the board. It started in  
1393 technology, but it seems to have spread.

1394           Mr. {Murphy.} Thank you. Mr. Cheng?

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1395           Mr. {Cheng.} Yes, Mr. Chairman, we are a retailer, and  
1396 it is all over--they have been targeting retailers for a  
1397 couple of years already. They are hitting logistics  
1398 companies. It is literally anybody with a business they  
1399 think they can get money from.

1400           But if I could have your indulgence and just to echo and  
1401 expand on what Mr. Bragiel was saying earlier, you know, in  
1402 terms of protections for end users I think is some sort of  
1403 regulation that could expand the doctrine of exhaustion to  
1404 help at least end users at least have a defense up front to  
1405 patent infringement assertion as long as they are licensing  
1406 or purchasing technology or products in good faith from  
1407 another party. That would be very, very helpful.

1408           Mr. {Murphy.} Thank you very much. I see my time has  
1409 expired. I really wanted to ask Mr. Richardson if square  
1410 burgers were patented but--

1411           Mr. {Richardson.} The five holes are.

1412           Mr. {Murphy.} Five holes, thank you. Okay. Thank you.

1413 Ms. DeGette?

1414           Ms. {DeGette.} Thank you. Mr. Chairman, just a couple  
1415 of questions. Mr. Richardson, you talked about Congress  
1416 doing something about the demand letters, and that is I think

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1417 a good idea. Some people have suggested that the FTC should  
1418 establish a demand letter database. I am wondering what our  
1419 witnesses think about that. Let us start with you, Ms.  
1420 Feldman.

1421 Ms. {Feldman.} I think some type of registry would be  
1422 very important. Patent is supposed to be a notice system,  
1423 and a lot of those in assertion behavior claim that the way  
1424 they are asserting their patents is something that is private  
1425 to them. But what you claim as your territory is something  
1426 that everybody should have notice of.

1427 Ms. {DeGette.} Right. Yeah.

1428 Ms. {Feldman.} And that is important. These non-  
1429 disclosure agreements are very corrosive for getting  
1430 information about what's happening.

1431 Ms. {DeGette.} Mr. Duan, what do you think?

1432 Mr. {Duan.} So I agree. I think that it is important  
1433 that we have this sort of information about the demand letter  
1434 economy, about what sort of assertion is going on. You know,  
1435 I think it helps out a lot of parties. It helps out the  
1436 businesses that receive the demand letters because they are  
1437 able to see, you know, a lot of the facts that they may not  
1438 be presented with immediately. It helps related businesses

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1439 in that they can see what sort of patents have been asserted,  
1440 and they know what sort of technologies they should look at  
1441 and what sort of technologies they should avoid if they have  
1442 to avoid infringements. It helps researchers obviously  
1443 because they will be able to do better studies, and I think  
1444 it helps lawmakers like you.

1445 Ms. {DeGette.} Well, it would help regulate them, too.

1446 Mr. {Duan.} Because--

1447 Ms. {DeGette.} There are unfair trade practices going  
1448 on, right?

1449 Mr. {Duan.} I think that is the first step, you know.  
1450 I definitely am -- I definitely applaud the FTC for taking on  
1451 their six-piece study of patent assertion.

1452 But you know, I think an important point to realize is  
1453 that for every one of these big patent assertion entities  
1454 that we are talking about, there are dozens or hundreds of  
1455 much smaller ones, the ones we have been talking about today  
1456 that would just fly under the radar. The FTC would never  
1457 find out about them, Congress would never find out about  
1458 them. You know, the only people that would find out about  
1459 them are the people who receive the letters.

1460 Ms. {DeGette.} Well, unless you had a demand letter

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1461 database.

1462 Mr. {Duan.} Exactly.

1463 Ms. {DeGette.} Yeah.

1464 Mr. {Duan.} And I think that is the importance of that-

1465 -

1466 Ms. {DeGette.} Mr. Cheng, you are nodding your head

1467 yes.

1468 Mr. {Cheng.} In complete agreement, and also I think

1469 one of the other benefits of a demand letter registry is

1470 simply to let victims know they are not alone.

1471 Ms. {DeGette.} Uh-huh.

1472 Mr. {Cheng.} A lot of people who get these letters,

1473 they don't know what to do, they don't know who to turn to.

1474 It is going to help defendants in some cases organize a

1475 legitimate defense against sometimes truly, truly craptastic

1476 patents.

1477 Ms. {DeGette.} Mr. Seigle, let me ask you and others as

1478 well, if there was a demand letter database and you knew

1479 about it, then I would assume if you got a demand letter,

1480 that would help you try to figure out--

1481 Mr. {Seigle.} That would be an absolute huge help.

1482 When I got my first demand letter, I went and searched for

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1483 the docket to see who else they had sued, and I reached out  
1484 to 20 people on LinkedIn. We formed a joint defense group.  
1485 It took a lot of time and effort to email them all  
1486 individually, see where they were, and of course, the  
1487 litigation. If that was made available and easy, it would  
1488 have been--saved me a lot of time.

1489 And ironically, when I reached out to them, their reply  
1490 was that was so smart of you to try to pull us together. I  
1491 didn't think of that, which, I know it sounds funny, but it  
1492 is actually what happens.

1493 I have heard from the meetings they have had on The Hill  
1494 that the U.S. PTO or FTC doesn't want to have to deal with  
1495 the administration or technology burden of hosting a  
1496 registry. I would like to offer that at FindTheBest, we are  
1497 a data company. We deal with data a lot, and we can easily  
1498 do that and we would be happy to work with the public sector  
1499 and host that for them.

1500 Ms. {DeGette.} Well, you know there is some debate  
1501 about whether the PTO is the office to do it or the FTC, and  
1502 you know, the FTC is more used to taking issues like this.  
1503 Mr. Bragiel, what do you think?

1504 Mr. {Bragiel.} Well, you know, like everyone else on

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1505 the panel I think that is a good first step. But from our  
1506 standpoint it is not just the demand letters we are dealing  
1507 with. There are actual lawsuits that have been filed. And  
1508 so, you know, some of those, most of those did--were preceded  
1509 by a demand letter, but either way, the lawsuit was going to  
1510 be filed because it is relatively inexpensive to file a  
1511 lawsuit and extract a \$5,000 settlement from, you know, my  
1512 member at that point.

1513 In our case, it wasn't difficult to organize. They are  
1514 all members of mine. So I know who these folks are that have  
1515 been sued. They all called my office, you know, immediately  
1516 upon receiving the lawsuit. But the question was once they'd  
1517 been sued, they have to individually defend themselves so we  
1518 couldn't do some sort of joint, mass defense like a reverse  
1519 class action. And so, you know, we were forced to inform  
1520 clients that they should consider settlement.

1521 So but you know, again, it is always good to know who is  
1522 after you, right, and it is good to know who is behaving in  
1523 this sort of behavior. And there is so much in terms of  
1524 hiding behind shell corporations and whatnot that this would  
1525 lend some transparency to that. So we would support that.

1526 Ms. {DeGette.} Mr. Richardson, you are the one that

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1527 started the conversations about the demand letters. So what  
1528 do you think about this?

1529 Mr. {Richardson.} As a family-owned business, for us it  
1530 is about mutual gain through voluntary exchange. That is how  
1531 for the past 92 years we have built our business. And patent  
1532 trolls don't use that business model, they use coercion. So  
1533 anything, the registry, other things that can shed more light  
1534 on it, we think turn the tables and start to, you know, get  
1535 us back to an even keel and bring more truth to the  
1536 situation.

1537 Ms. {DeGette.} Thank you. Thanks to all of you for  
1538 coming. This is a good hearing.

1539 Mr. {Murphy.} Thank you. Mr. Griffith, you are  
1540 recognized for 5 minutes for final questions.

1541 Mr. {Griffith.} Thank you, Mr. Chairman. I would be  
1542 interested in hearing from any of you in regard to--and I  
1543 think it was the hotel folks that said, you know, they were  
1544 being sued for using Wi-Fi. They bought it from a, you know,  
1545 Best Buy or other provider, from a manufacturer, but they,  
1546 you know, they purchased it. The hotel purchases the Wi-Fi  
1547 unit, installs it and then they are the ones getting sued.  
1548 And I am wondering if anybody has looked at seeing if one of

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1549 the manufacturers or the big retailers would be willing to  
1550 support some of these defense lawsuits, either by warranty of  
1551 their product or in some other way. Has anybody heard  
1552 anything in that regard?

1553 Ms. {Feldman.} Some of the larger manufacturers have  
1554 tried to step into court and defend these lawsuits, and they  
1555 have been rebuffed. They are not allowed to because those  
1556 who are bringing the demands are smart enough not to see the  
1557 big guys, they just see the little guys. And so they can't  
1558 get in there. So rule along those lines would be important.

1559 Mr. {Griffith.} So perhaps we as a Congress, it may not  
1560 be our Committee but as we as a Congress look at this, we may  
1561 want to look at some standing issues and create some special  
1562 standing for the manufacturer if they are the folks who put  
1563 it into the Wi-Fi in the example that we are using.

1564 Ms. {Feldman.} I think the other--

1565 Mr. {Griffith.} They would have the right to come in  
1566 and defend themselves or defend their product in such a suit.

1567 Ms. {Feldman.} I think that is right, sir, and the key  
1568 issue is to get only interested parties in the courtroom or  
1569 in whatever the bargaining room is. So one of the problems  
1570 is you can't figure out who is behind these letters, so some

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1571 type of disclosure of who has a beneficial interest in these  
1572 companies, then you could figure out that perhaps you  
1573 actually did buy something that comes with a license or  
1574 regulators could see what's happening behind the scenes.  
1575 There is just no way to penetrate through all these shells  
1576 and figure out where it is coming from.

1577           Mr. {Griffith.} And also, correct me if I am wrong and  
1578 I know we have got a couple of attorneys on the panel, but if  
1579 we bring all the parties to the table, wouldn't we be able to  
1580 use collateral estoppel res judicata and then future  
1581 litigations and then shut it down nationwide if we got one,  
1582 good lawsuit on the Wi-Fi situation? What do our lawyers  
1583 have to say about that? Yes, sir.

1584           Mr. {Duan.} I think that is correct, and that is the  
1585 reason that you don't see them going after the big  
1586 manufacturers. They could just go after the company who  
1587 makes the Wi-Fi router, right? If they did that, they would  
1588 get one settlement, that would be the end and there would be  
1589 no further lawsuits.

1590           Instead, they can go after as many people as they want  
1591 by never touching the manufacturers. And this is really what  
1592 creates the incentive for a lot of these abusive companies to

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1593 go after end users rather than to go after the manufacturers.  
1594 The fact that instead of having just one lawsuit that you  
1595 fight and, you know, maybe you win, maybe you lose, you have  
1596 an endless stream of revenue.

1597 Mr. {Griffith.} All right.

1598 Mr. {Bragiel.} If it is not Wi-Fi today, it is our lock  
1599 system tomorrow we are afraid of that treadmill in our  
1600 fitness center. Where does this end? That is where we are  
1601 with this, and you know, if we settle one case, does that  
1602 make us a target for additional patent trolls that may say we  
1603 are an easy target?

1604 Mr. {Griffith.} And once they find that you are not an  
1605 easy target, then they go after the individual consumers who  
1606 may have purchased the same product for their home.

1607 Mr. {Bragiel.} That is correct.

1608 Mr. {Griffith.} They may not be asking for the \$5,000,  
1609 but they might very well be asking for, you know \$150 or  
1610 \$200. And I can assure you, most households are not prepared  
1611 to receive a letter of that nature.

1612 I have about a minute-and-a-half left. Does anybody  
1613 have something that we haven't touched on today that they  
1614 would like to bring up? Yes, sir?

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1615           Mr. {Cheng.} In touching on the subject of getting  
1616 manufacturers--people upstream to stand behind their product,  
1617 one of the unfortunate side-effects of patent trolling is the  
1618 fact that a lot of suppliers have actually stopped honoring  
1619 their indemnification obligations. We have actually had to  
1620 sue one of our technology platform providers because after  
1621 being sued twice, after they honored the first indemnity  
1622 obligation, they just decided it was too expensive to keep  
1623 stepping up.

1624           And so even though we are not being--I have submitted  
1625 this in my written testimony--even though we are not really  
1626 being sued anymore, we are still in the game because we are  
1627 still paying. We are still paying, and our customers are  
1628 still paying. And patent trolling is a toll on everybody.

1629           Ms. {Feldman.} I would like to stress the important  
1630 role that this Committee has to play. According to the  
1631 figures in the White House report this summer, conservative  
1632 estimates show that 90 percent of this activity never  
1633 proceeds to the courthouse. And so the Committee has an  
1634 important role to play in establishing what are fair and  
1635 reasonable business practices as opposed to deceptive  
1636 practices in this particular area of commerce.

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1637           Mr. {Griffith.} Thank you very much. I yield back, Mr.  
1638 Chairman.

1639           Mr. {Murphy.} Thank you, and I want to thank everyone  
1640 for being part of this hearing today and also to note that  
1641 you have stepped forward and gave some valuable information.  
1642 And those of you who were willing to come forward in this I  
1643 think also inspired, hopefully inspired, many other  
1644 businesses not only to step forward when they have these  
1645 concerns, do the kind of things you have done to reach out  
1646 and form some coalitions to fight this but also shine some  
1647 light on this for those who did not even know it was coming.  
1648 And I hope that we will continue this.

1649           I ask unanimous consent that written opening statements  
1650 from the members be introduced in the record, and without  
1651 objection the documents will be entered into the record.

1652           [The information follows:]

1653 \*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*

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1654           Mr. {Murphy.} So in conclusion, once again, I thank all  
1655 the witnesses and all the members who attended today. I  
1656 remind members they have 10 business days to submit further  
1657 questions for the record, and I hope you will be willing to  
1658 respond to those letters. Thank you very much, and please  
1659 respond promptly to them.

1660           With that, this hearing is adjourned.

1661           [Whereupon, at 4:00 p.m., the Subcommittee was  
1662 adjourned.]