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UPDATE: PATENT DEMAND LETTER PRACTICES AND SOLUTIONS

THURSDAY, FEBRUARY 26, 2015

House of Representatives,

Subcommittee on Manufacturing and Trade

Committee on Energy and Commerce

Washington, D.C.

The subcommittee met, pursuant to call, at 10:17 a.m., in Room 2322 of the Rayburn House Office Building, Hon. Michael Burgess [Chairman of the Subcommittee] presiding.

Members present: Representatives Burgess, Lance, Harper, Guthrie, Olson, Kinzinger, Bilirakis, Brooks, Mullin, Schakowsky, Clarke, Kennedy, Cardenas, and Pallone (ex officio).

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

Staff present: Charlotte Baker, Deputy Communications Director; Leighton Brown, Press Assistant; James Decker, Policy Coordinator, Commerce, Manufacturing and Trade; Graham Dufault, Counsel, Commerce, Manufacturing and Trade; Melissa Froelich, Counsel, Commerce, Manufacturing and Trade; Kirby Howard, Legislative Clerk; Paul Nagle, Chief Counsel, Commerce, Manufacturing and Trade; Olivia Trusty, Professional Staff, Commerce, Manufacturing and Trade; Michelle Ash, Democratic Chief Counsel, Commerce, Manufacturing and Trade; Lisa Goldman, Democratic Counsel, Commerce, Manufacturing and Trade; Tiffany Guarascio, Democratic Deputy Staff Director; and Jeff Carroll, Democratic Staff Director.

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

The chair recognizes himself for 5 minutes for the purposes of an opening statement. And I certainly want to welcome everyone on our panel to the hearing, to provide an update on patent demand letters, the practices and possible solutions.

Unfortunately, abusive patent demand letters are not a new problem, and they are not new to this subcommittee. Patent trolls continue to send demand letters in bulk to induce victims to pay unjustified license fees rather than fight back. Last year, under Subcommittee Chairman Terry, this Subcommittee held an oversight hearing, a legislative hearing, and eventually produced and marked up draft legislation targeting bad-faith demand letters. As this subcommittee learned through its process, the act of defining a so-called troll is a difficult task. In protecting companies from trolls, legislation must also not prevent legitimate patent holders from protecting their rights from being infringed upon by other actors. But a task that is

difficult is not a task that is impossible, and I have a sincere belief that in the realm of patent demand letters, like so many other areas under the jurisdiction of this subcommittee, can effect a bipartisan agreement and legislation.

So here we are in the new year, in a new Congress, and we renew the effort to forge ahead to achieve this goal. We again take aim to solve a small piece of the patent world that has caused some of the greatest consternation. I sincerely believe that a targeted solution to this problem is the best one, and I hope that our hearing today will restart the conversations on how best to stop this activity, yet allow legitimate patent holders to proceed.

The truth is that the destructive business model of the so-called patent troll has largely skated just beyond the reach of law, and as a result, crime pays. And because federal law has been slow to keep up with the evolving world of patent trolls, even in a subject area where federal jurisdiction is clearly delineated in the Constitution's Article I enumerated powers of Congress, the states now have felt an obligation to begin looking at ways to protect their

constituent companies. Protection of intellectual property rights is a federal issue. Indeed, Article I, Section 8, clause 8 clearly envisions Congress as having both the power and the duty to promote the Progress of Science and useful Arts, by securing for limited Times to authors and inventors the exclusive rights to their respective writings and Discoveries. It would appear from the stories we have all heard about patent trolls that the protection of these rights is not being considered. This committee wishes to change that equation.

I am especially concerned about the effects these fraud schemes have on small businesses. When a business receives a demand letter, especially one that is intentionally vague or misleading, many small business owners simply lack the tools necessary to distinguish a bogus assertion from a legitimate infringement claim. However, the United States Patent Office lists three Web sites; Stand Up To the Demand, ThatPatentTool, and Trolling Effects, as resources that companies can use to protect themselves. There is work going on beyond this subcommittee to address some of this--these issues. For example, a number of Web sites have popped up

for demand letter recipients to verify the legitimacy of infringement claims against them. Eighteen states have also enacted legislation, and a handful of state attorneys general have brought cases under their consumer protection laws.

As we will discuss today, it may be that state efforts to curb patent abuses are on uncertain legal footing due to preemption of the First Amendment doctrines that were developed by the federal courts. These doctrines are designed to protect the fair assertion of patent rights, and any legislation this subcommittee produces must allow legitimate assertions. It is my intention that this committee can work with companies who own large patent holdings to address this issue. As many companies have seen, illegitimate claims could ultimately undercut the value of legitimate patents. To help us strike the proper balance, we will hear from experts in the field as well as representatives from both abusive demand letter victims and a large patent holder. We hope this information--this will inform the direction of whatever legislation this subcommittee ultimately produces. I hope that we may use last year's draft, the Targeting Rogue and Opaque Letters

Act, as a place to begin the discussion. One area where we will need to focus on is how the bad faith standard in that legislation would work with the required disclosures in the Act. Further, how those required disclosures fit with the prohibited bad acts included in the draft legislation, and I hope that is an area we can examine closely. The subcommittee is eager to work with the panelists before us and others to address this problem.

I thank the witnesses for their testimonies, and I certainly look forward to the discussion today.

[The prepared statement of Mr. Burgess follows:]

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Mr. {Burgess.} And the chair now recognizes the subcommittee ranking member, Ms. Schakowsky, from Illinois for 5 minutes for the purpose of an opening statement.

Ms. {Schakowsky.} Thank you, Mr. Chairman. And much of what I will say will echo the things that you have said. The--along the lines of the problems of patent trolls. I see the rise of these entities as a serious threat to consumers and businesses all across the country, and I want to explore whether we can strengthen existing protections against them as well.

Patent assertion entities typically purchase patents and then assert that those patents have been infringed, sending vague and threatening letters to hundreds or even thousands of end users, typically, small businesses or entrepreneurs. Those businesses are told that they can pay the patent troll to continue using the technology. And considering the cost and resources needed to vet and fight a patent infringement claim, although the chairman did point out some resources that are available, many small businesses do choose to settle the claim by paying the troll. Others investigate and fight

the claims, draining precious resources and stunting the growth of their businesses.

It costs patent trolls virtually nothing to send patent demand letters, but they have cost American businesses tens of billions of dollars in recent years. At best, patent trolls are misleading, and at worst, they are extortionists.

This is fundamentally a fairness issue. As the subcommittee charged with protecting consumers and promoting fair business practices, we must work to reduce frivolous patent claims. I am glad that the FTC is using its existing authority to order injunctions on patent assertion entities that are determined to engage in unfair deceptive acts or practices. I believe that if we legislate on this issue, we should include new authority for the FTC to collect civil penalties for those abuses.

While we should also make sure that important consumer and business protections are guaranteed and enforced at the state level, including Illinois, remain in place. Federal legislation could also ensure the transparency and baseline standards are required for patent demand letters.

There are many ideas about how to increase transparency,

including proposals to require information in patent demand letters, about the patent-alleged infringement that--the patent that is allegedly infringed, and the technology used that allegedly infringes on the patent.

As we consider acting on this issue, we must also recognize that many patent infringement claims are reasonable efforts, as the chairman mentioned, reasonable efforts to protect intellectual property. We also need to be careful to make sure that universities, research institutions, and others that develop and hold patents, but may not develop products for sale, are not unfairly labeled as patent trolls. We should not undermine the ability of innovators to develop and defend their patents.

I look forward to hearing the ideas of the panel about how we could move forward with legislation, and how it should be structured to make sure that patent demand letters are more fair and transparent moving forward.

And I thank you again, Mr. Chairman, for holding this hearing. I yield back.

[The prepared statement of Ms. Schakowsky follows:]

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Mr. {Burgess.} The gentlelady yields back.

This is the point where the chair would normally recognize the chair of the full committee, but seeing that--and I do want to explain to our witnesses, there is a concurrent hearing--subcommittee hearing downstairs, and you--we may well see Members come in and out today, and it is not a sign of disrespect, it is a sign of there is just a lot of work to be done this morning.

Mr. Mullin, would you seek time for an opening statement?

Mr. {Mullin.} No, thank you.

Mr. {Burgess.} Gentleman does not seek time.

Chair recognizes the ranking member of the full committee, Mr. Pallone, for purposes of an opening statement, 5 minutes.

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

The patent system plays a crucial role in promoting innovation. It provides an incentive to inventors to make costly and time-consuming investments in research and development of new inventions. At the same time, the system

requires that the inventions be disclosed so that others can build upon the inventions. Unfortunately, there are a number of problems with the patent system, and reforms are needed.

I have long pushed to reduce the backlog of patent applications at the Patent and Trade Office, but we also need to work to address the concerns that some applications are being approved for inventions that are not truly new or non-obvious. In addition, the patent litigation system must be streamlined.

While most patent-related issues are under the purview of the Judiciary Committee, and I look forward to its action on patent system reform, the Energy and Commerce Committee is responsible for efforts to curb fraud. And one part of the patent litigation area in need of attention is the rise of so-called patent trolls, and the sometimes fraudulent demand letters they send to small businesses. This trolling activity is a problem. Patent trolls do not invent, make or sell anything. Instead, they buy up large numbers of patents, often of suspect validity, and then send demand letters or bring law suits using the complexity of the patent system and the high cost of litigation as leverage to force

licensing fees or settlements. It is not fair to the targets of these predatory tactics, nor does it serve the interests of true innovators.

And efforts to combat abusive demand letters have already begun. Some state attorney generals have taken legal action to protect their citizens from unfair and deceptive demand letters. In addition, 18 states have already enacted legislation to tackle this abusive activity. Furthermore, the FTC brought an administrative complaint against MPH Technologies, a well-known patent troll. That case was recently settled through a consent order that prohibits MPHJ from making deceptive statements in its demand letters.

Last Congress, this committee held three hearings, and the subcommittee marked up a bill which I believe included problematic language. Among other things, it created a knowledge standard, one not typically needed to prove fraud, and it preempted stronger state laws. I am happy that this issue is being given a fresh review this Congress in an effort to get the language right and work in a bipartisan fashion. If we as a Congress choose to legislate in this area, we need to make sure that we are furthering the

interests of the consumer, end users and small businesses, while protecting the vitality of the patent system.

So today's hearing presents an opportunity to hear from witnesses about how big is the problem of fraudulent demand letters, and whether there is an appropriate legislative fix. And I look forward to hearing the witnesses' thoughts on this issue, and their ideas for possible solutions.

I yield back.

[The prepared statement of Mr. Pallone follows:]

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Mr. {Burgess.} The gentleman yields back.

This concludes opening statements.

We want to welcome all of our witnesses, and thank you for agreeing to testify before the subcommittee today. Our witness panel for today's hearing will include Ms. Laurie Self, the Vice President and Counsel of Government Relations, will be testifying on behalf of Qualcomm; Mr. Vince Malta, Liaison for Law Policy at the National Association of Realtors; Mr. Paul Gugliuzza, close enough, Associate Professor at Boston University School of Law; and Ms. Vera Ranieri, Staff Attorney for the Electronic Frontier Foundation. We welcome you all to the committee.

And, Ms. Self, we will start with you. You are recognized 5 minutes for the purposes of an opening statement.

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^STATEMENTS OF LAURIE SELF, VICE PRESIDENT AND COUNSEL, GOVERNMENT AFFAIRS, QUALCOMM; VINCE MALTA, LIAISON FOR LAW AND POLICY, NATIONAL ASSOCIATION OF REALTORS; PAUL GUGLIUZZA, ASSOCIATE PROFESSOR, BOSTON UNIVERSITY SCHOOL OF LAW; AND VERA RANIERI, STAFF ATTORNEY, ELECTRONIC FRONTIER FOUNDATION

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^STATEMENT OF LAURIE SELF

} Ms. {Self.} Thank you. Chairman Burgess, Ranking Member Schakowsky and Members of the subcommittee, thank you for the opportunity to appear today to discuss patent demand letters. My name is Laurie Self, and I am Vice President and Counsel, Government Affairs for Qualcomm. Qualcomm is a member of the Innovation Alliance, a coalition of research and development focused companies that believe in the critical importance of maintaining a strong patent system.

Qualcomm is a major innovator in the wireless communications industry, and the world's leading supplier of chipsets that enable 3G and 4G smartphones, tablets and other devices. Qualcomm's founders are the quintessential example

of American inventors in the garage who build one of the world's foremost technology companies. Today, the technologies invented by our engineers help make nearly everything you do with your smartphone--help everything you do with your smartphone, from browsing the internet, to sharing videos, to using GPS navigation. We are an invention hub for the mobile age, having spent more than $34 billion on R and D since the company was founded in 1985. Through the broad licensing of our patented technologies, Qualcomm has helped foster a thriving mobile industry that accounts for more than one million jobs, and $548 billion of U.S. gross domestic product. Qualcomm itself has more than 31,000 employees, the vast majority of whom are engineers based in the United States.

It is worth noting that Qualcomm is not a plaintiff in any pending patent litigation, but we are a defendant in several patent infringement law suits, some of which were brought by so-called patent assertion entities. However, I am not here to criticize or defend PAEs, but instead to address what we believe should be the proper focus of any patent demand letter legislation; namely, targeting abusive

demand letter activities without unintentionally damaging important patent rights.

Notice letters play an important role in the patent system for both patent holders and accused infringers. Patent law encourages, and sometimes requires patent holders to take reasonable steps to notify others of possible infringement. Meaningful patent protection including the ability to provide notice is a key factor for companies like Qualcomm in deciding whether to invest in new products and technologies. Qualcomm appreciates the committee's interest in curtailing abusive demand letter activities. At the same time, we urge the committee to be cautious so as to not inadvertently hinder legitimate patent enforcement practices. A demand letter law that makes patent notification or enforcement too burdensome, too costly or too risky may deter appropriate notice activity. If valid patent owners are afraid to seek compensation for use of their inventions, the whole patent-based system of incentivizing innovation is undermined.

Qualcomm supports the Demand Letter Bill that passed this committee in July 2014, the Targeting Rogue and Opaque

Letters Act. The TROL Act includes several key features that are necessary to strike the appropriate balance. First, the bill clarifies rather than expands the FTC's existing authority under Section 5 to address abusive demand letters.

Second, the bill is limited to situations in which the sender has engaged in a pattern or practice of mailing bad faith demand letters to consumers. The pattern or practice requirement appropriately targets the mass mailing of deceptive demand letters, and it is consistent with the FTC's Section 5 authority. An explicit bad faith requirement is necessary to protect patent holders' constitutional rights. Patent property rights are rooted in Article I of the Constitution, and the First Amendment provides strong protections for patent demand letters. As courts across the country have recognized, pre-law suit communications implicate both the freedom of speech and the constitutional right to petition the government. To conform with the constitution, legislation must avoid punishing patent holders for good faith conduct. By clarifying the FTC's enforcement authority under Section 5, the bill is limited to communications sent to consumers, including mom and pop

retailers, which protects those most vulnerable to abusive demand letters, while reducing the risk that the FTC will be drawn into business-to-business disputes.

Third, the bill clearly describes the conduct that will be considered unfair and deceptive, and does not impose overly burdensome disclosure requirements.

Fourth, the bill preempts state demand letter laws that allow state attorneys general to bring enforcement actions under the federal statute.

With nearly 20 state legislatures having passed such bills over the past 2 years, and another dozen considering such a bill now, it would be extremely burdensome to subject patent owners to a patchwork of different demand letter requirements in every state. Preemption is appropriate and necessary in the demand letter context because unlike the TROL Act, many of these state demand letter laws are overly broad in scope, highly burdensome to patent owners, and risk penalizing ordinary commercial and pre-litigation communications, which are protected under the First Amendment.

These four features are critical to Qualcomm's support,

and we urge the committee to retain these requirements and limitations in the bill. Qualcomm looks forward to working with the committee in its efforts to achieve a balanced and narrowed-tailored bill.

Thank you for allowing me to testify today, and I look forward to answering your questions.

[The prepared statement of Ms. Self follows:]

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Mr. {Burgess.} Gentlelady yields back. Thank you for your testimony.

The chair recognizes Mr. Malta 5 minutes for the purposes of an opening statement please.

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^STATEMENT OF VINCE MALTA

} Mr. {Malta.} Chairman Burgess, Ranking Member Schakowsky, and Members of the subcommittee, my name is Vincent Malta. I am the broker of record for Malta and Company in San Francisco, California. I serve as the 2015 National Association of Realtors, Liaison for Law and Policy, and I am here to testify on behalf of the one million members of NAR.

I am also here representing United for Patent Reform Coalition, a broad and diverse group of Main Street, high tech and manufacturing companies that have united to urge the passing of strong, commonsense patent reform.

In the real estate industry, patent trolls have targeted realtor brokers, agents and multiple listing services for implementing simple Web site technologies. Here are 5 examples where patent trolls have alleged infringement. First, the Real Estate Alliance Ltd. Filed an infringement law suit against a broker and other unnamed defendants, charging that zooming in to locate points on a map was an

infringement. The case was eventually dropped after 2 years.

Second, a company called Civix-Ddi LLC charged that providing a searchable data base of property listings infringes its patents. Civix have targeted not only multiple listing services in the real estate industry, but Microsoft, Expedia, Move and other companies. NAR decided to settle this case for $7.5 million, fearing that the cost of letting the case go to trial would be exponentially more expensive.

Third, Data Distribution Technologies charged that a number of real estate firms were in patent violation by providing updates to consumers when properties matched their search criteria are coming on the market. This patent is undeniably abstract because it describes what any real estate professional already does. The real estate companies had to expend time and money to challenge the validity of this abstract patent, finally settling after 2 years.

The Austin Board of Realtors received a demand letter alleging patent infringement for having a drop-down menu on their Web site.

And finally, NAR members received abusive demand letters from the MPHJ Technologies troll that notoriously sent over

16,000 demand letters to businesses, demanding payment for using basic scan-to-mail technology.

Simply put, these patent trolls make everyday business practices potential law suits. Patent trolls typically start by sending form demand letters to dozens, hundreds, or even thousands of businesses at a time. They claim these businesses are infringing on patents, but provide little to no evidence. Typically, the sender will list a patent number only, with no reference to which claim within the patent is alleged to have been infringed. The letters are often intentionally vague, and demand a licensing fee or threaten litigation. If the business does speak with a lawyer, they are often advised to pay the fee rather than risk very costly infringement law suits. This essentially is a junk mail approach that is clogging up our legal system. NAR members and other small businesses rightfully feel extorted by this process.

In 2013, more than 2,600 companies were sued by patent trolls, representing 60 percent of all patent infringement cases brought that year. Small and medium-sized companies paid on average $1 1/3 million dollars to settle patent troll

cases, and $1.7 million on average in court defense costs for patent troll litigation. Economists estimate that in 2011, patent trolls cost operating companies $80 billion in direct and indirect costs. That is more than the $66 billion state budget of Illinois, and in 2013, almost reaches the $96 billion state budget in Texas. This is a serious problem for the American business community, in particular, small businesses who lack the resources to fight these pointless battles. NAR's most recent surveys indicate that more than half of all realty firms have less than 25 agents.

In the last Congress, this subcommittee passed legislation aimed at addressing demand letter abuse. NAR and the Coalition appreciated the subcommittee's work on the Targeting Rogue and Opaque Letters Act. As the subcommittee considers legislation in this Congress, we ask that you consider a few essential guidelines. Fundamentally, patent demand letters must be held to a practical standard of transparency. They must specify the relevant patent claim at issue, they must detail all businesses allegedly infringed, they must include a description of the patent troll's investigation of the alleged infringing activity, and they

must disclose the real parties and interest to the dispute. This minimum information will help recipients to thoughtfully review whether infringement allegations merit an agreement to license.

In conclusion, NAR and the United for Patent Reform Coalition urge Congress to act swiftly to enact meaningful demand letter reform for the good of our Nation's small business community, and while demand letter reform is crucial, as an important first step towards broader patent reform, it requires comprehensive and multifaceted reforms.

Thank you for your consideration of our views.

[The prepared statement of Mr. Malta follows:]

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Mr. {Burgess.} Gentleman yields back. Chair thanks the gentleman for his testimony.

Professor Gugliuzza, you are now recognized for 5 minutes for the purposes of an opening statement.

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^STATEMENT OF PAUL GUGLIUZZA

} Mr. {Gugliuzza.} Chairman Burgess, Ranking Member Schakowsky, Members of the subcommittee, thank you for inviting me to testify. My name is Paul Gugliuzza, and I am an associate professor of law at Boston University School of Law.

My research focuses on patent law and patent litigation. Most relevant to this hearing, I have spent the past 2 years studying the issue of patent demand letters, focusing in particular on efforts by both state governments and the Federal Government to address the problem of unfair and deceptive conduct in patent enforcement.

To briefly summarize my conclusions, a small number of patent holders, often called bottom feeder patent trolls, have been abusing the patent system. These patent holders blanket the country with thousands of letters demanding that the recipients purchase a license for a few thousand dollars, or else face an infringement suit. The letters are usually sent to small businesses, nonprofits that do not have the

resources to defend against claims of patent infringement. And the letters often contain false or misleading statements, calculated to scare the recipient into purchasing a license without investigating the merits of the allegations.

In response to this troubling behavior, legislatures in 18 states have adopted statutes that, generally speaking, outlawed bad faith assertions of patent infringement. These statutes, however, may be unconstitutional. The U.S. Court of Common Pleas Appeals for the Federal Circuit, which hears all appeals in patent cases nationwide, has held that patent holders are immune from civil claims challenging their acts of enforcement unless the patent holder knew that its infringement allegations were objectively baseless. This rule could provide patent holders with nearly absolutely immunity from liability under the new statutes. In fact, the rules already immunize two notorious trolls; Innovatio IP Ventures and MPHJ Technology Investments, from legal challenges to their enforcement campaigns under state consumer protection laws.

Although the federal circuit has sometimes called this immunity rule a matter of the Federal Patent Acts' preemption

of state law, this rule could also limit the ability of the Federal Government to regulate patent enforcement behavior. This is because the federal circuit's decisions are not grounded in the Constitution's Supremacy Clause, which is the usual source of preemption doctrine, but in the First Amendment right to petition the government. Unlike the Supremacy Clause, the First Amendment limits the power of the Federal Government, not just state governments. Accordingly, patent holders may also be able to invoke this immunity to thwart federal initiatives to fight patent trolls, including any legislation this committee might consider.

To be clear, no court has yet addressed the constitutionality of the new state statutes. Moreover, as I discuss in more detail in my written statement, there is a strong argument that the federal circuit's immunity doctrine is wrong as a matter of law, policy and historical practice. So it is entirely possible that the federal circuit can revise its immunity doctrine to accommodate greater regulation of patent enforcement conduct. Indeed, the federal circuit keeps close watch when Congress is considering amending patent law, and in the past decade, the

court has repeatedly revised its case law to align with proposed legislation.

This hearing provides a welcome occasion to discuss the innovative steps that state governments have taken to combat unfair and deceptive patent enforcement. Any bill advanced by this committee should, in my view, capitalize on the respective strengths of state governments and the Federal Government in this area. The strengths of state governments include, first, the quantity of law enforcement resources that could be provided by dozens of states attorneys general offices cooperating to fight abusive patent enforcement. And second, the accessibility of state governments to the small businesses, nonprofits and local governments most likely to be targeted by deceptive campaigns of patent enforcement. By contrast, federal legislation on patent demand letters would provide the benefits of legal uniformity and predictability for patent holders about whether or not their enforcement actions are legal. In addition, as I explained in my written testimony, federal legislation could clarify difficult jurisdictional issues that currently arise in cases challenging the lawfulness of patent enforcement conduct.

If this committee determines that federal legislation is warranted, that legislation should, in my view, specifically condemn bad faith assertions of patent infringement. Until the federal circuit adopted its objective baselessness requirement, courts had applied a bad faith standard for nearly a century, striking an appropriate balance between the goals of punishing extortionate schemes of patent enforcement, and respecting patent holders' rights to make legitimate allegations of infringement.

Thank you again for inviting me to testify, and I would be pleased to answer any questions the committee might have for me.

[The prepared statement of Mr. Gugliuzza follows:]

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Mr. {Burgess.} Gentleman yields back. The chair thanks the gentleman for his testimony.

Ms. Ranieri, you are recognized for 5 minutes for the purposes of an opening statement.

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^STATEMENT OF VERA RANIERI

} Ms. {Ranieri.} Mr. Chairman, Ranking Member Schakowsky, and Members of the subcommittee, thank you for the opportunity to be here today.

For those of you who aren't familiar with my organization, the Electronic Frontier Foundation, or EFF, we are a nonprofit organization dedicated to protecting consumer interests, innovation and free expression in the digital world. As part of that work, we regularly advocate for reform of the patent system in courts, Congress, and at the Patent and Trademark Office. EFF is greatly encouraged by Congress' interest in the important issue of deceptive and abuse patent rule demand letters, and its impact on consumers and small businesses.

EFF is one of the few nonprofit legal services organizations that small businesses and innovators can turn to in order to get help when faced with a patent troll demand letter. Unfortunately, we cannot help everyone, and more importantly, because of a lack of meaningful, manageable

legal options, we are too often unable to help push back against those who use deceptive patent demand letters in order to extract money from their victims.

The problem of abusive patent rule demand letters is a result of a perfect storm of circumstances. Patent owners sending these letters use vague and overbroad patents that likely never should have issued, in order to confuse and obfuscate. Patent owners rely on the eye-popping cost of litigation in order to intimidate, and patent owners take advantage of their victims' relative lack of experience with technology and the legal system to ensure improper claims of infringement go unchallenged. For example, in 2011, a company known as Eclipse IP sent demand letters to various retailers alleging infringement of patents on tracking packages through the use of UPS tracking. Eclipse demanded licenses in the hundreds of thousands of dollars. Seeing their customers being targeted, UPS filed a declaratory judgment of non-infringement and invalidity, but before the court could address whether Eclipse's claims of infringement had merit, Eclipse filed what is known as a covenant not to sue. In doing so, Eclipse ensured that its patent rights

would not actually be litigated, that is, they did everything in their power to stop the court from deciding the merits of its claims. Eclipse apparently merely wanted to extract settlements from its victims, despite assertions in its demand letter that it would engage in litigation if its licensing demands were not met. Since 2011, Eclipse has sued over 100 companies and presumably sent letters to countless others.

Letters and actions like Eclipse's are all too common. Other letters employ tactics such as not mentioning licenses that likely exhaust patent rights, or use complex and vague nonsense terms from the patent in order to make infringement claims that would never have been apparent to someone reading the patent. Dealing with even the most frivolous of letters takes time and money away from what small businesses should be doing, which is growing their business and creating jobs.

I could tell many more stories, but most demand letters never see the light of day. Recipients of letters from patent trolls are often afraid of speaking out, and no wonder, by speaking out, they worry they would become an even bigger target and subject to even larger demands they cannot

afford. Patent trolls use this fact to hide their practices from scrutiny and from lawmakers and the public.

Deceptive and unfair patent troll demand letters must be addressed, but it is important to address them in a way that makes sense. Specifically, Congress should not limit the ability of state attorneys general to protect their citizens, whether that be through state laws addressing abusive demand letters, or through their own little FTC acts. State AGs are often the closest to the problem, and in the best position to address deceptive practices targeted at their citizens. Second, Congress should allow for flexibility in the law. Overly-rigid rules regarding what constitutes bad faith will allow patent trolls to comply with the letter of the law but not the spirit. As a lawyer, I can assure you that we are enterprising people. If there is a loophole to be found, we will find it. Flexibility is key to ensuring patent trolls don't find new ways to deceive their targets.

Finally, in order to protect technology end users such as retailers and tracking--such as retailers implementing tracking technology, or the coffee shop offering Wi-Fi, Congress should mandate disclosure requirements. Through

these disclosure requirements, Congress can better understand the scope of the problem, and agencies such as the PTO, the FTC, and nonprofit organizations such as EFF, can better target those practices and those patents that are being abused.

Addressing the deceptive patent troll demand letter problem is an important piece of broader patent reform. In tandem with other measures, we can limit the ability of patent holders to use patents that never should have been issued, to extort undeserved money from those who just want to pursue their livelihoods.

Thank you, and I look forward to your questions.

[The prepared statement of Ms. Ranieri follows:]

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Mr. {Burgess.} Gentlelady yields back. The chair thanks the gentlelady and all the witnesses for their testimony this morning. Very informative, very helpful. Professor, I am now reminded why I didn't go to law school. But complex discussion, and certainly the issues you bring before us are of importance.

Chair now moves to the questioning part of the hearing. I want to recognize myself 5 minutes for questions.

Also, just an observation. When this issue came up in previous Congress, when Chairman Terry was in charge of the subcommittee, I think it actually to the--before the Rules Committee, and we had a Member who appeared before the Rules Committee and said he was conflicted because some days he was asserting he was a patent troll, other days he was not, and defending a patent. So it does--did underscore for me how there could be actually people on both sides of the issue.

But let me just ask this question to start off for the entire panel. I would like to get everyone's thoughts on this. And, Ms. Self, we will start with you and then move down the panel. How does the--has the concept of bad faith

been applied in patent law, and how should it apply to the demand letter context?

Ms. {Self.} I think the concept of bad faith is critical in the patent demand letter context because it prevents the use of antitrust or Section 5 enforcement authority in a manner that would violate the patent owner's constitutional rights, and as has been said, those rights include First Amendment rights of free speech, rights to petition, but also the right to communicate about your patent is fundamental to your ability to enforce your patent.

If you think about how patent owners sort of alert the world to the fact that they have a patented invention, and this has been true from the first, you know, the first days of our patent system, you make a public disclosure of the patent application as kind of a quid pro quo, if you will, for the right to enforce your patent, but your ability to enforce your patent is dependent on communication. If you are stifled in your ability to communicate about your patent, to make good faith communications about your patent, then effectively your patent is not enforceable.

So bad faith is really critical to delineate the kind of

conduct that would be appropriate for FTC enforcement. And I think it is also important to send a signal to state enforcement authorities that legitimate patent demand correspondence should not be the subject of state enforcement activity or federal enforcement activity.

So bad faith is really the cornerstone, if you will, in our ability to strike that right balance between protecting the interests of recipients who may be receiving these deceptive communications, but also supporting the vast majority of legitimate communications that are really fundamental to our innovation economy.

Mr. {Burgess.} I might come back to you because you brought up the issue of pattern of practice, but I want to go down the panel for just a moment.

Mr. Malta, the concept of bad faith?

Mr. {Malta.} Chairman Burgess, I am a realtor and my members sell the American dreams. And entrepreneurs in the coalition are hard-working business people that are trying to provide services to Americans every day.

The concept of bad faith is a legal one, and that involves an attorney, and that involves time and money, and I

can give you examples of what our members have gone through just on its face. This is not about stifling innovation, this is about stopping deceptive practices. So when I hear bad faith it means that my members will have to go to an attorney, seek counsel. I have many small business members as well as in the coalition. So that does not resolve the issue, especially for the small business people of America.

Mr. {Burgess.} And, Professor, defining bad faith?

Mr. {Gugliuzza.} Yeah, fortunately, there is a lot of judicial case law applying in bad faith standard. At the time the federal circuit was created, which is back in 1982, the lower federal courts for nearly a century had been addressing this question of when may a patent holder be liable for its enforcement conduct, and they had enjoined patent holders from making infringement allegations in bad faith. But the federal circuit has largely ignored that long line of decisions, instead demanding that anybody who challenges patent enforcement conduct prove that the infringement allegations were objectively baseless.

Historically, you know, the courts treated bad faith as sort of a flexible standard that had both subjective and

objective components. So under the standard, courts--you would see courts enjoining or punishment enforcement campaigns, for example, where the patent holder threatened a large number of accused infringers, or threatened law suits but failed to actually ever file them. But at the same time, I think these cases where enforcement conduct was punished were usually egregious and they often involved claims that were objectively weak on the merits. And so I think a good faith standard, particularly when it is grounded in that pre-federal circuit case law, would protect patent holders' ability to provide legitimate notice of their patent rights, but also offer the government some leeway to punish the most deceptive and problematic behavior.

Mr. {Burgess.} And, Ms. Ranieri, on the concept of bad faith?

Ms. {Ranieri.} The Electronic Frontier Foundation, as a digital civil rights and civil liberties organization, is a strong believer in the First Amendment. At the same time, I would like to echo what Professor Gugliuzza, apologies, said, that I believe the federal circuit has narrowly ruled in a way that is inconsistent with precedent and the law, and I

believe its ruling about what constitutes bad faith is overly narrow.

There is room within the Constitution to regulate bad faith behavior, as well as respecting First Amendment rights. I would echo Professor Gugliuzza's statements that the courts are very good at determining what bad faith is, and I think we should leave it to them and also to agencies who are used to seeing bad faith behavior to figure out what exactly the contours of that is.

Mr. {Burgess.} My time has expired. I thank the panelists for their responses.

Recognize Ms. Schakowsky 5 minutes for questions please.

Ms. {Schakowsky.} Thank you, Mr. Chairman.

So states have, up until now, been leaders in the effort to combat abusive patent trolls. Currently 18 states including mine, Illinois, have enacted legislation regulating patent demand letters, and some state attorneys general have initiated legal action against patent trolls under their consumer protection authority. Under both the new patent demand letter laws and general state consumer protection laws, many state attorneys general have certain remedies

available to them, including equitable relief, civil penalties and attorneys fee.

The TROL Act that passed out of the subcommittee last Congress included a provision that would preempt the state laws that regulate patent demand letters.

So first, Ms. Ranieri, you testified that federal legislation, in fact, should not preempt state laws that address issues those states have encountered with patent trolls. So why is it important do you think that we not preempt state laws?

Ms. {Ranieri.} Thank you. That is a good question. One of the most important reasons that this government should not preempt federal--or, sorry, state patent troll demand letter laws is that people who receive these letters often don't know who to turn to, and the first person they often turn to are the state AGs and the state agencies. And they are often the first line of defense for people to protect themselves. The state AGs have the most experience with what their citizens are receiving, and they are in the best position to see new developments in the patent troll demand letters, and to see the new deceptive practices as they

arise, and legislate against that type of activity.

Ms. {Schakowsky.} So have we seen any instances where there has been any problem with the fact that state attorneys general have been exercising that authority?

Ms. {Ranieri.} None that I am aware of.

Ms. {Schakowsky.} Okay. Professor, let us establish how your name is actually pronounced. Say it again.

Mr. {Gugliuzza.} Good, because I was about to apologize to the committee because I feel like this issue has sort of taken over the entire hearing.

Ms. {Schakowsky.} No, I think we should apologize. Go ahead.

Mr. {Gugliuzza.} It is Gugliuzza.

Ms. {Schakowsky.} It is--okay, Gugliuzza. Okay.

Mr. {Gugliuzza.} Very good.

Ms. {Schakowsky.} The benefit of preemption would be to provide a uniform legal standard. In your testimony though you raised the question of whether uniformity is, in fact, an important enough policy goal that it should outweigh the benefits of state laws on demand letters. I am wondering if you could expand on the benefits--also expand on the benefits

of not preempting state laws.

Mr. {Gugliuzza.} Sure. You know, one of the benefits, as Ms. Ranieri mentioned, obviously, is the enforcement capabilities of dozens of states attorneys general offices might bring to the table. The other is the accessibility of the state governments or some of these small organizations that might be targeted. And then third, you know, I think the--in terms of forming the substance of a law, I think, you know, what we can see from some of these states' statutes are maybe some examples that might be informative to Congress if you were to choose to decide to legislate federally. So allowing these ideas to percolate among the state legislatures allow the states to try to figure out, you know, how do we draw the line from the--between the bad actors and the patent holders who are asserting their rights legitimately. I think the state legislation can shed a lot of light on those questions.

Ms. {Schakowsky.} Thank you.

Ms. Ranieri, in addition to the issue of preemption, you testified that Congress should not prohibit or discourage enforcement of the FTC Act by states. Can you expand on why

state enforcement in this instance is so critical?

Ms. {Ranieri.} I think it is for the similar reasons that I just mentioned, and also that Professor Gugliuzza also mentioned. State AGs have resources that the FTC might not have. The FTC might only have the ability to go after the worst actors, but that doesn't mean that there are others that are abusing the system. And state AGs provide a secondary line of defense in order to go after those who are targeting particular citizens in those states.

Ms. {Schakowsky.} And last to you as well. The last Congress TROL Act limited the remedies available to state attorneys general to an injunction and compensatory damages on behalf of recipients who suffered actual harm. Would the limitation of remedies discourage states from enforcing patent demand legislation?

Ms. {Ranieri.} It may, and I think that is a definite concern that this committee should have. Importantly, this sort of regulating unfair and deceptive practices is usually considered to be an equitable sort of action. Courts are very good at fashioning under-equitable remedies; the type of remedy that is appropriate given the circumstance. And it

may, if absent, more punitive consequences to patent hold demand letters, they may just shift their activities, seeing no actual consequence to their bad activities.

Ms. {Schakowsky.} Thank you. Clearly, this will be an issue that we will want to discuss further among our Members, so I thank you.

And I yield back.

Mr. {Burgess.} Chair thanks the gentlelady. The gentlelady yields back.

The chair would like to recognize the attendance of a Member who is not a member of the subcommittee, but Mr. Tom Massie from Kentucky, from the bluegrass state, and a noted and world famous inventor. We welcome your presence here today. Thank you.

The chair would now recognize Mr. Mullin from Oklahoma for 5 minutes for questions please.

Mr. {Mullin.} Thank you, Mr. Chairman. And just so I don't mess up your last name, Paul came and introduced himself to me earlier. He is from the great state of Oklahoma, went to Bishop Kelley in Tulsa, Oklahoma, and I guess your parents still live in Bixby?

Mr. {Gugliuzza.} That is correct.

Mr. {Mullin.} And so it is always good to see a friendly face in town.

My first question would be for Mr. Malta. We just heard the conversation about our attorney generals, and so I am going to kind of stay on that focus. My own state of Oklahoma has laws specifically against abuse of patent demand letters. I want to make sure that my constituents are also protected from these type of letters, and if our committee drafts legislation prohibiting these types of letters, should attorney generals be able to enforce those laws?

Mr. {Malta.} Our members believe that, yes, that they should, and that there--that we are more concerned about the outcome as to the protections because our members are in all 50 states. So if you are arguing preemption, et cetera, that at least there be some immediate baseline standard that is created, and that if states want to come and they want to make laws that are even more restrictive, by all means, go ahead, but we want something done in the very near term that affects our members in all 50 states.

Mr. {Mullin.} My next question is for Ms. Self. What

if Qualcomm was hit from a law suit, let us say, from Oklahoma's attorney general then Vermont's attorney general, then say Illinois' attorney general, should a company be exposed to liability from every state enforcement agency? If not, why not?

Ms. {Self.} Thank you for that question. Sorry, thank you for that question. And before I respond to that specific question, let me just say something about the preemption issue and the way the TROL Act was structured last year, at least. It did permit state attorneys general to bring enforcement actions under the federal framework that was set out in the statute, and it would have, to your question, allowed more than one state attorney general to bring an action, assuming that the Federal Trade Commission had not already brought an action. And we thought that that was a balanced approach to the problem. The challenge that we are seeing at the state level with nearly 20 laws that have passed, and another dozen or so that are pending, is that you are seeing a patchwork, if you will, of demand letter laws that all include different standards, different penalties. Some are very broad in scope. They don't clearly delineate

the kind of activity that would fall within the demand letter. Sixteen out of eighteen would include a private cause of action. And, you know, to the point that was made about enterprising lawyers, I think it is inevitable that you will see a cottage industry evolve around harassing inventors under these laws. So the preemption language of the bill is really critical to make sure that you have a nationwide uniform framework that provides consumers, recipients with the guidance they need to understand what is deceptive behavior. And again, I think the bill does a good job of delineating what is deceptive statements in the context of a demand letter, as well as required disclosures, but it also puts the millions of small inventors in this country on notice as to what is appropriate or inappropriate.

And so as we think about traditional state enforcement under unfair trade practices laws, we have to keep in mind that these are communications involving patent rights. These are rights that are rooted in the Constitution, they are dependent on the ability of the patent owner to exercise their First Amendment rights. And so this is really a very different dynamic than the normal activities that state

enforcement authorities focus on.

So we think the approach of the TROL Act is really the right approach, and it protects all interests in a balanced way.

Mr. {Mullin.} Thank you. And I will try to be quick on this last question for Mr. Malta. The realtors that you represent are exactly the type of small businesses that are near and dear to my heart. Could you please tell us specifically the type of information that needs to be included in a demand letter that would allow businesses that receive them to understand what they are accused of, and to what extent they need to take legal action on?

Mr. {Malta.} Okay, thank you. Yes, in creating greater transparency, 4 items, okay. First one, specify the relevant patent claim that is at issue. Very basic. Secondly, detail how a business has allegedly infringed the patent. Thirdly, include a description of the patent troll's investigation of the alleged infringing activity. And fourth, disclose the real parties in interest to the dispute, as many of these letters come from attorneys and they don't state who the party in interest is that is trying to enforce the claim, or

enforce their patent.

Mr. {Mullin.} Thank you.

I yield back.

Mr. {Burgess.} Chair thanks the gentleman. Gentleman yields back.

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

Ms. {Clarke.} I thank you, Mr. Chairman. And I would like to thank our witnesses for their testimony this morning.

In addition to serving on the Energy and Commerce Committee, I also serve on the Small Business Committee in our House, and our small business community lists fear of patent litigation as one of the biggest issues they face. So I am pleased that we are taking up this issue today.

Frequently, patent trolls target end users of patented technology, such as small, local businesses who have simply purchased or use off-the-shelf products like a wireless router or scanner. These small businesses often lack expertise in patent law, and have few resources. When faced with the cost of defending even perfectly reasonable behavior, they find it is cheaper just to make a payment to

settle the case.

Ms. Ranieri, to what extent do patent trolls target the little guy, small businesses, startup, and mom and pop establishments, and what are some examples of everyday products that patent trolls are now claiming infringe their intellectual property?

Ms. {Ranieri.} Thank you. The extent of the problem isn't known, but I can tell you as a legal services lawyer, I receive about one call a week. And to be clear, these are the people that have managed to find us. There are so many more people out there that don't realize that they should be contacting people like--or--and organizations like EFF. So unfortunately, the full scope of the problem isn't clear, but to be clear, it is a problem.

The type of activity that we have seen is, for example, one of the patent trolls that we are looking at right now has accused people of using maps as infringing their intellectual property. This patent troll has gotten licenses, it appears, from litigations that they filed and settled, which usually, in patent litigation that means a settlement has occurred, has gotten licenses from everybody down the spectrum from

handset carriers to the cell phone companies, to the makers of applications, and now they are targeting even smaller parties in the play--in the space. We believe that these patent rights have been fully exhausted, but because of the cost of litigation, the cost of figuring out whether those patent rights have been exhausted, these trolls can continue to be able to assert patent infringement with essentially impunity.

So the problem is large, and we believe it requires action, and we also believe that it needs the disclosure requirements so we can understand the true scope of its effect on our innovation economy.

Ms. {Clarke.} Let me ask you then, what options do small businesses or startup companies currently have when they receive a vague threatening demand letter, and do patent holders, other than trolls, routinely target end users? Could there be legitimate reasons to send demand letters to end users?

Ms. {Ranieri.} The large number of letters that we have seen targeted at end users are from patent trolls. I have yet to see letters that don't come from patent trolls. They

may exist, but I have not yet seen one. And, sorry--

Ms. {Clarke.} What options.

Ms. {Ranieri.} What options. Unfortunately, there aren't many right now. The cost of litigation for a small business of under $10 million in revenue, the cost of litigation through trial is over $1 million. When that means that employees might have to be laid off, and research and development can't happen, this is the cost to the patent troll--or to the alleged infringer, sorry. And unfortunately, as a lawyer, what ends up happening is that if someone comes to us, oftentimes we can only advise them to settle because it just is not possible, given the current available options, to actually fight back and show that they aren't violating anyone's rights.

Ms. {Clarke.} Can you take a moment and sort of speak to the cost of patent litigation, and the feasibility of a small business mounting an adequate defense?

Ms. {Ranieri.} Sure. So on a whole to our economy, it is estimated to cost in the billions of dollars, and those are often tangible costs. And intangible costs are things such as time--

Ms. {Clarke.} Um-hum.

Ms. {Ranieri.} --and stress, taken away--or--and taking people away from growing their business. The options that are currently available to those receiving demand letters, those who are end users who are implementing technology made by others, if they have connections with the companies that make these products that are accused of infringement, sometimes they can get help through the companies. That--I--like in the example that I mentioned before, UPS stepped up to protect its customers, and that was a great thing for UPS to do. Unfortunately, for many of these companies, they don't have the connections to do that. They don't have the resources and the knowledge to know that that is something that they should try to do. And oftentimes, there are no other viable options.

Even filing an inter partes review at the Patent Office, which we commend these new procedures and we encourage them, even to get in the door, not even lawyer fees, which, as a lawyer, and I am sure many of you are lawyers--

Ms. {Clarke.} Um-hum.

Ms. {Ranieri.} --we know are extremely expensive,

filing an inter partes review is over $20,000. That is the salary of a worker, that is money that could go in towards building a business. Many businesses just simply do not have this money.

Ms. {Clarke.} I thank you. And I yield back. Thank you, Mr. Chairman.

Mr. {Burgess.} Chair--the gentlelady yields back. The chair thanks the gentlelady.

The chair recognizes the gentleman from Florida, Mr. Bilirakis, 5 minutes for questions please.

Mr. {Bilirakis.} Thank you, Mr. Chairman. I appreciate it so very much, and I thank the panel for their testimony.

Patent demand letters reform is an important part of curbing abusive practices that hurt legitimate businesses, as you know. However, I am concerned that overly-broad definitions of patent assertion entities in other provisions that have been proposed, such as fee shifting and joinder, will limit our Nation's research universities, and their ability to have patented research discoveries transferred to start up receiving venture funding that can develop and commercialize these early discoveries.

The University of South Florida, just outside of my district in Tampa, Florida, is a world leader in university-based patents, licenses and startup companies, and is a major regional economic hub and job creator in our area.

Again, Ms. Ranieri and Professor Gugliuzza, excuse me if I mispronounce, what do you believe is the appropriate balance to ensure that the technology transfer process thrives, while simultaneously implementing the real reform targeted at bad actors with no intention to commercialize innovations?

Mr. {Gugliuzza.} Thanks. I think a lot can be done by sort of looking at--as I was talking about the history--a long history of courts prohibiting bad faith assertions of patent infringement. A lot can be looked at by looking at some of the examples that courts have condemned in the past. They look extraordinarily similar to what we see these bottom-feeding patent trolls doing today; sending out massive amounts of demand letters, targeting the customers of the firms that actually manufacture the allegedly infringing technology, making claims that they couldn't--making claims that they could not have possibly investigated the merits of.

So, you know, I think if you look back at those types of cases, you actually can see there is a very clear line between, you know, what is really abuse--so abusive as to be considered in bad faith, and the efforts of, say, an operating entity or legitimate efforts by a company to try to license their patents or resolve a dispute before it goes to court. Those lines have been drawn by courts for over 100 years, and I think they are lines the courts can continue to draw.

Mr. {Bilirakis.} Thank you.

Ms. {Ranieri.} I would agree with Professor Gugliuzza, and I understand your question to be how do we allow for legitimate letters and still legislate against the bad faith letters. And I think what is important to know is that those who are sending legitimate letters, they include the patent numbers in their letters where possible. They will include why they believe someone is infringing, and they will include information so as to allow the parties to really understand the scope of the claims, and why there is a claim of infringement or why the patent is not invalid. This is the activity that patent--bad faith patent demand letters don't

include. And so I would agree with Professor Gugliuzza that there is a long line of cases that see this distinction and make the distinction, and I don't think legitimate patent holders should be concerned about any legislation against bad faith letters.

Mr. {Bilirakis.} Thank you. Anyone else on the panel like to respond to that question? Okay, thank you. I will move on if that is okay.

Ms. Ranieri and Professor Gugliuzza, what factors do you believe should be prioritized when determining standards for demanding--demand letters that would address the abusive patent troll practices, while still preserving the legitimate patent holder's ability to negotiate license agreements with potential infringers?

Mr. {Gugliuzza.} Just very briefly, a couple of factors that I think we have talked about so far. One is to the number of letters that have been sent out, right? If a patent holder is sending one letter to one specific company, well, it seems fairly likely that that letter is based on some sort of investigation that gives the patent holder a good faith belief that that recipient is infringing. When

you send out, as MPHJ did, 16,000 letters to users of common office scanners, it is extremely unlikely that MPHJ has actually investigated the allegedly infringing conduct.

So the number of the letters can be a nice source of indication of whether the investigation has happened, and also the specificity with which the letters both describe the patent claims, and also the allegedly infringing technology.

Mr. {Bilirakis.} Thank you.

Ms. {Ranieri.} I hesitate to give a complete list of factors, and the reason is this. Oftentimes what we see as--when letters are shown to us is that it is not one statement in isolation that is a problem, it is the totality of the letter that makes clear that the patent holder has not done an investigation, is trying to extract money. For example, references to the extreme cost of litigation, and I have seen letters with actual links to tables showing the recipient how much money they can receive.

Litigation does cost a lot of money, that is true, but it is the fact that they put these statements in there, along with a--other vaguely threatening language that together be--makes us recognize a bad faith letter. So I hesitate to say

these certain things make a bad faith letter, it is oftentimes when we see it all together that we can tell that this is not being set--sent for legitimate purposes.

Mr. {Bilirakis.} Thank you very much.

I yield back, Mr. Chairman. Appreciate that.

Mr. {Burgess.} Chair thanks the gentleman. Gentleman yields back.

The chair recognizes the gentleman from Massachusetts, Mr. Kennedy, 5 minutes for questions please.

Mr. {Kennedy.} Thank you, Mr. Chairman. I want to thank the witnesses for testifying today and for your attention to an important topic.

Professor Gugliuzza, thanks for bringing the Boston weather with you. I wish you would have left it at home, but nevertheless, appreciate it.

I want to flush out a little bit of a conversation we have had in the--before as well. My First Amendment law, while being a lawyer, is perhaps a little shaky. So there has been, I think some testimony that has touched already on the Noerr-Pennington doctrine, which touches on immunity of parties who are petitioning the government for certain types

of liability. Generally speaking, it is my understanding that this doctrine began in an antitrust base, but it has been steadily expanded over the course of case law throughout the years.

So, Professor, starring with you, with regard to the Noerr-Pennington doctrine, I think that there are two open areas here, right? One is, does it apply to patent demand letters, and does it apply in the consumer protection context? And I was hoping you can just start with those-- kind of that basic framework.

Mr. {Gugliuzza.} I have some comments that hopefully are sort of somewhat responsive to it. So the Noerr-Pennington doctrine, you are correct, that it was initially developed by the Supreme Court as an interpretation of the Sherman Act, in light of the First Amendment, right? So what happens in these cases was, defendants to law suits would turn around and sue the original plaintiffs and say, you know, you are a plaintiff, you have sued me and, you know, you have your--you have market power, your are a monopolist and, therefore, your law suit against me is anticompetitive and violates the Sherman Act. And what the court said was,

well, you know, under the Sherman Act, litigation activity is actually not antitrust--illegal under the antitrust laws, the reason being twofold. One, the Sherman Act was intended to regulate business activity, not litigation activity. And two, to make unlawful the conduct of filing a law suit would potentially violate the First Amendment right to petition the government. Right?

The issue--the main issue that I see in applying that line of cases to these patent demand letters is that a patent demand letter between two private companies is just not a petition to the government, it is a private communication among two private parties. So I think that is one main problem with extending, you know, main problem of constitutional law with extending First Amendment petition clause protection to these letters.

Mr. {Kennedy.} And so given that is the case though, but you are asking the--it is between two companies, but you are asking the government to enforce a patent--a protection action, right, that patent--

Mr. {Gugliuzza.} Yeah.

Mr. {Kennedy.} --in that context?

Mr. {Gugliuzza.} But the law can, you know, there are lots of consumer protection laws that are similar, that I think were similar to what this committee is considering. The example that I like to invoke is the Fair Debt Collection Practices Act.

Mr. {Kennedy.} Um-hum.

Mr. {Gugliuzza.} Right? When an attorney, acting as an attorney, sends a letter that is an act of debt collection, it may even be the filing of a law suit, right, those actions under the Fair Debt Collection Practices Act aren't subject to Noerr-Pennington immunity. Courts have largely--have upheld the fair--the constitutionality of the Fair Debt Collection Practices Act. So I think, you know, a similar statute that condemns patent enforcement activity, much like debt collection activity, should be on the same solid constitutional footing.

Mr. {Kennedy.} And then, Ms. Ranieri, could you just give a little bit--you were talking about the totality of the circumstances of the letters and such a moment ago, but in your review of the legal literature, do you believe that the general content of demand letters is protected speech?

Ms. {Ranieri.} So as I mentioned, EFF is a digital civil rights and civil liberties organization, and the First Amendment is very important to us. At the same time, I don't believe that the Noerr-Pennington doctrine extends as far as the federal circuit would have it, and in fact, this recent Supreme Court decisions just won last year, the legal underpinnings of the federal circuit's decision applying the Noerr-Pennington doctrine to the demand letters was recently questioned in another case on a related issue, and I believe there is room within the First Amendment, respecting First Amendment rights, to allow for regulation of demand letters.

To be clear, what we think the First Amendment does is it makes sure that legitimate patent holders can enforce--can send demand letters, but what it doesn't protect is bad faith assertions, false statements, that are within the demand letter.

Mr. {Kennedy.} And you think that the--you think that case law or legislation can be developed that is going to be sufficiently narrowly tailored that will provide for a definition of good faith that the courts would uphold?

Ms. {Ranieri.} I think what actually could happen is

that Congress could leave open the definition of bad faith, and courts themselves will narrowly tailor it to make sure that it is consistent with the First Amendment.

Mr. {Kennedy.} Professor?

Mr. {Gugliuzza.} I agree, and I think it is very possible that the courts, especially seeing the interest from Congress on this particular issue, would be very--would try very hard to interpret any legislation consistent with the First Amendment.

Mr. {Kennedy.} Thank you both. Thank you all.

Yield back.

Mr. {Burgess.} Chair thanks the gentleman.

Chair now recognizes the gentleman from Texas, Mr. Olson, 5 minutes for questions please.

Mr. {Olson.} I thank the chair. And welcome to our witnesses. Ms. Self, Mr. Malta, Ms. Ranieri, and certainly no disrespect, but can I call you Professor G? Is that okay, because--

Mr. {Gugliuzza.} You may.

Mr. {Olson.} --if I try pronouncing it with my thick Texas tongue, I am going to be exposing myself to a law suit

for cruel and unusual punishment. All people here watching on TV, so Professor G is okay? Great.

My first question for all the panelists, and starting off with you, Professor G, as you know, there are 18 states right now that have state laws that fight abusive patent letter demands. The lovely State of Texas is one of the 32 that doesn't have those such laws, but they are being authored right now and this issue is on the table. And so they are in session for 140 days every 2 years, so it is a brief window of time here. So put your cowboy hat on and come to Texas. How would you best like me to advise the people there what should they do, what should they not do if Texas steps out and does--some laws fighting abuse patent demand letters? Yeah.

Mr. {Gugliuzza.} So, you know, I think the concerns we have been talking about about, you know, the difficulty and sort of fragmentation of different states have different legal standards for demand letters is certainly a valid one, particularly for large, innovative firms. I think one thing that your state might consider is looking to the Vermont statute as an example. It has been sort of the most

influential of the statutes. It has been adopted by 13 other states. It sets out very simply that it is unlawful to make a bad faith assertion of patent infringement, and it sets out some factors under which courts may determine whether an assertion is in bad faith or is not. And so I think if Texas were to do that, it would be joining a fairly large cohort of other states that have adopted similar legislation.

Mr. {Olson.} Okay. Thank you.

Ms. {Self.} Can I--

Mr. {Olson.} Ms. Self, can you comment? Anything you can advise our legislature?

Ms. {Self.} Yes, and in fact, just so you know, we have actually been in conversation with the state legislatures in Texas to talk about this very issue.

Mr. {Olson.} Expected. You guys are great. That was expected.

Ms. {Self.} Let me just say that--so we do think, again, sort of following the model of the TROL Act, that there is, you know, a version of state legislation that would appropriately balance the interests of potential recipients of these letters and the very large number of small patent

holders that could potentially get, you know, unintentionally get caught up in legislation of this type. I think the challenge with the--with some of these state letter--state demand letter bills that we have seen, as I said previously, over breadth in terms of capturing activity that could just be normal commercial communications, and I should say that I, with all due respect, disagree with the Professor's analysis of Noerr-Pennington. I think there is a lot of scholarship and case law that affirms that the First Amendment does extend to pre-litigation communications, particularly when you are talking about the enforcement of a property right. But again, the private cause of action that is included in the Vermont statute, and several other statutes, is really troubling. And so one of the pieces of advice that we have extended to folks in Texas is do not include a private cause of action. You are going to create far more problems than you can--are trying to solve by subjecting small inventors to harassment. And again, as with the structure of the TROL Act, to clearly delineate activity that is objectively deceptive; trying to enforce a patent that has expired, claiming you are the owner of a patent when you are not, and

limiting affirmative disclosures to the kind of information that small inventors can reasonably disclose, because it is important to keep in mind that the vast majority of inventors in this country are also small businesses--

Mr. {Olson.} Yeah.

Ms. {Self.} --and they may not have all of the information that they need to know whether, in fact, infringement is occurring, or the nature of that infringement, particularly when you are talking about negotiations or discussions with much larger product manufacturers.

So finding a balance that protects both the interests of small patent owners as well as small business owners, small end users, I should say, is really--should really be the goal in any state. And again, just to reiterate my previous context--contents--or comments, rather, sorry, we believe that the structure of the TROL Act is that right balance, and again, it would permit state attorneys general, or--in Texas and other states, to enforce against deceptive activity under that framework.

Mr. {Olson.} Thank you. And, Mr. Malta, no intention

to put you between two different people on different sides of the issue, but you are right there, my friend. How about your comments? What can I take back home?

Mr. {Malta.} Comments are, get it done.

Mr. {Olson.} Well, that is easy--

Mr. {Malta.} And if you get it done in the state of Texas, then perhaps that will provide the patchwork that will force the Federal Government to finally step in and say we need to make sense of this so that people can work under a set of rules, and we can get back to business in some of these areas. So--

Mr. {Olson.} Okay. And, Ms. Ranieri, your comments on Texas? Get 'er done, is that--do you echo those comments?

Ms. {Ranieri.} I would agree, and I would also like to add that, although we are in the patent context, and Ms. Self raised the issue of it might be difficult for patent owners to be able to comply with a patchwork of laws. To be clear, states have long had different laws when it comes to consumer protection, and companies have had no problems with complying with all those laws. And we don't think that the patent context needs to change--or--that, and companies still can

comply with all the laws. We think if some--if a patent owner wants to purposefully avail himself of sending a letter to a state, they can comply with the laws, and look up the laws and make sure that their letter is appropriate.

Mr. {Olson.} I am out of time. Thank you.

Yield back.

Mr. {Burgess.} Gentleman yields back. Chair thanks the gentleman.

Chair recognizes the gentleman from California, Mr. Cardenas, for 5 minutes for purposes of questions please.

Mr. {Cardenas.} Thank you very much, Mr. Chairman. And I appreciate this opportunity to discuss this important issue that really is hampering our economic ability throughout the country. One of the things that the United States has been recognized for, and we should be very proud of, is we are the innovative capital of the world, but when we have people who take opportunity to try to thwart that, that is something that, to me, strikes at the core of our ability to continue to be an economic driver, not only for ourselves as a country but for the world.

Last year, I introduced a bipartisan bill to address

patent troll abuse at the International Trade Commission. Patent trolls have been impacting businesses in every forum, and we should do everything that we can to curb their ability to exploit businesses of every size, small and large. Patent trolls' abuse of the complicated patent system can harm our economy, and hamper innovation by imposing huge litigation costs on productive companies.

I would like to get a sense of the significance of the problem that we--that faces us here today. Ms. Ranieri, in your testimony, you quoted Seventh Circuit Judge Posner's statement, and I am paraphrasing, patent trolls are not trying to protect the market for products they want to produce, but instead, lay traps for producers. How does patent toll activity negatively affect the economy and innovation as far as you are concerned?

Ms. {Ranieri.} So let me give an example. What we see in the Bay Area is a lot of people who are developing new technologies, and, for example, apps on a smartphone. These innovators, they want to bring a new product to the market, they are very excited. They come out and they bring the--bring it to market and hopefully it becomes successful. What

then happens is later, they will receive a demand letter or a filing of a litigation claiming that they infringe on patent rights. These innovators have not seen these patents before. These are not cases of copying others' ideas, this is a case--these are cases of innovators who independently created works and brought them to market, and tried to grow their business, and once they become successful, become targets of patent trolls. And this is the cost to our economy. It is people who are independently creating, independently innovating, that then get targeted by those who have created nothing, and instead, wait for someone else to do the hard work of developing products, testing, marketing, things like that. And not only is the financial cost significant, the settlement demands are extreme, but also it takes away time and energy from actually growing the business. Instead, it directs it towards stress, gathering documents, and although this might be good for the lawyers, it is not good for the companies.

Mr. {Cardenas.} So, for example, what you just described, I would imagine could, in fact, wreak havoc on a small inventor, a small company, maybe with 5 employees, or

10 or 20 employees, that that particular product is the reason for their existence as a company. Could that kind of activity actually bring such a company like that to bankruptcy or to actually fold? And when I say fold, that means that that 5 or 10 or 20 employees in that scenario now will have to go look for work elsewhere. Do--have you ever seen that happen?

Ms. {Ranieri.} We have. Actually, there was a case very recently. Someone contacted us and they were being sued by a patent troll, and the patent was on placing photos from sports events online, and allowing someone to search those sports events for their bid number in order to order a picture. And there is actually a patent on that. And it was a small, four-person business, and he was extremely scared that he was going to have to lay-off employees in order to fight back. He chose to fight back, but in doing so, he spent a significant amount of resources, and eventually this patent was actually invalidated, but the amount of money and time and stress that that took was significant.

Mr. {Cardenas.} Upwards of how much did he spend? I mean was it only $5,000, $10,000, $50,000 perhaps?

Ms. {Ranieri.} So I can't--I don't know his particular case, but having been in private practice, the amount--what I saw happen in his case, I would estimate anywhere from $200,000 to $250,000.

Mr. {Cardenas.} Exactly. That is a small business. Very few small businesses can part with those kinds of resources and stay in business, and that is at the core of what the problem is. The problem here is, in my opinion, we have individuals and law firms that are just preying on people without even any regard or concern for the cause and the consequence of what happens. And to lose in such a case, or what have you, it appears, in my opinion, that an organization that would bring that upon a small business would probably still flourish and go on, probably have many irons in the fire, such as the one you just described, but you have a small business, one after another, after another, who just disappear because of this practice that should not be allowed.

Thank you very much, Mr. Chairman. I yield back.

Mr. {Burgess.} Gentleman yield back. Chair thanks the gentleman very much for his questions.

Chair recognizes the gentleman from Illinois, Mr. Kinzinger, 5 minutes for your questions please.

Mr. {Kinzinger.} Thank you, Mr. Chairman. And again, to our witnesses, thank you for being here today and spending some time with us.

Ms. Self, companies like Qualcomm have large patent portfolios because they have invested a large amount of money in new patents and the creation of new products. And presumably, many of Qualcomm's patents can be similar to patents held by other companies. When Qualcomm believes a similar company with a large patent portfolio may be infringing on its patents, how does Qualcomm open communications with that company?

Ms. {Self.} Well, let me just say at the outset that, you know, Qualcomm, we are--we have been existence for 30 years. Today, we are a large mature company, as you said, with one of the world's largest wireless communications portfolios, but we--our roots were as a startup, you know, seven engineers, seven academics, who had what they believed was a highly effective solution to what was then viewed as an intractable problem in wireless communications. And solving

that problem has allowed this mobile ecosystem to grow, and we would not have an app development community or industry without the hard work that engineers at Qualcomm and other inventive companies undertook.

So today, our--basically, our portfolio is very well known. Most--if you have a smart device, a 3G, 4G device, you use Qualcomm technology, and you--and if you are, you know, a legitimate player, you come to Qualcomm and seek a license, but that dynamic is entirely different for small inventors in this country. And I just wanted to take issue with the characterization of inventors as creating nothing, and all the hard work being done by product manufacturers. Inventors in this county are, I think responsible for the vast majority of economic growth and success that we have seen over the last 200 years, and so characterizing inventors as doing nothing simply because they don't--

Mr. {Kinzinger.} Right, I--

Ms. {Self.} --manufacture a product really does disservice.

Mr. {Kinzinger.} I get that, and I will let you, on somebody else's time, can expand on that, but my question is

if you have a company with a large patent portfolio--

Ms. {Self.} Um-hum.

Mr. {Kinzinger.} --that you believe is impinging potentially on what you guys have, how do you open communications with that company?

Ms. {Self.} You know, you--I mean, candidly, I am not part of our licensing team, but I--as a lawyer, I am assuming that you send a letter, you pick up the phone, you send an email communication, you initiate a conversation about the fact that you believe that the other company's products may be infringing or reading upon some aspect of your portfolio. So again--

Mr. {Kinzinger.} But--

Ms. {Self.} --it is the communication.

Mr. {Kinzinger.} And, Professor, I am curious as to how private causes of actions have worked in the states. Have they been effective?

Mr. {Gugliuzza.} So, no. As far as I know, there actually is not yet--the statutes are so new, there actually has not yet been a private cause of action actually asserted under any of the statutes. The claims that we have seen so

far challenging these mass enforcement campaigns actually come under sort of preexisting general consumer protection and deceptive trade practices laws.

Mr. {Kinzinger.} Okay, all right. Another--are there other theories rooted in tort law that would allow businesses or individuals to reclaim money that they lost to a patent troll?

Mr. {Gugliuzza.} Absolutely. You know, for--even--so as I mentioned the example of general consumer protection deceptive trade practices laws, there are theories of tort law available, tortious interference with business relationships, if a patent troll is targeting your customers, you might be able to assert that claim. You can assert claims of unfair competition under state common law. Under federal law, for example, when Innovatio sent letters to 8,000 users of wireless internet routers, the manufacturer of those routers, Sysco, Netgear, Motorola, actually sued Innovatio under the Federal RICO Statute--

Mr. {Kinzinger.} Okay.

Mr. {Gugliuzza.} Racketeer--Corrupt Organization--

Mr. {Kinzinger.} And--

Mr. {Gugliuzza.} --Statute. Sorry.

Mr. {Kinzinger.} And I have one more question for you. In your testimony, you mentioned Illinois and a couple of other states have taken a slightly different tactic on dealing with patent trolls; namely, they focus on specific acts or omissions that violate the statute, rather than prohibiting false or bad faith assertion. As I am sure you are aware, the business community in Illinois appears to be more comfortable with this approach. What lessons should Congress learn from this approach as we try to balance going after patent trolls with protecting legitimate communications between businesses?

Mr. {Gugliuzza.} Sure. You know, certainty is important, and I think that sort of purveys a lot of the discussion both in terms of should the Federal Government regulate this or should the state government regulate this, and also the question of what should the standard we are judging this under be. And one that provides certainty is important so that, you know, legitimate assertions of infringement are not punished, but deceptive assertions that intentionally target small businesses, as these mass

enforcement campaigns do, are punished.

Mr. {Kinzinger.} Okay. Mr. Chairman, I will yield back. Thank you.

Mr. {Burgess.} Chair thanks the gentleman.

Chair recognizes the gentlelady from Indiana, Mrs. Brooks, 5 minutes for your questions please.

Mrs. {Brooks.} Thank you, Mr. Chair.

Profession Gugliuzza, I am worried about the widespread practice of sending abusive demand letters. As we have heard, it is a drain on employers and a drain on jobs. And apparently, according to a University of California Hastings College of Law study, 70 percent of venture capitalists had portfolio companies that received patent demand letters. It is a--it does seem suspicious to see so many startups hit with patent claims, and it is troubling to think, and as we have heard, that startups in particular may have a good bit of their funding and money going into fighting patent claims right off the bat.

Do you have any sense, or have you seen anything that talks about how much money and how many jobs are being impacted in our economy to fight off these types of abusive

demand letters?

Mr. {Gugliuzza.} So quantifying the effect of these demand letters is incredibly difficult because the persons who are targeted with them or the persons who purchase licenses because of them, are not very willing to identify themselves or disclose what they have done. The reason being that it just makes them a target for the next round of demand letters.

Mrs. {Brooks.} And, Mr. Malta, do you have any sense from those you are representing how many job losses there have been among your members?

Mr. {Malta.} So the job loss is direct and indirect. Direct when a company is put out of business, okay, and that is more quantifiable, but it is also indirect. We could provide an example such as J.C. Penney who now has a policy of no longer employing or hiring a startup company, in getting them the latest technology, out of fear of being sued because lawyers go where the money is. And so they will go with the startups and then, of course, they will go for the deep pockets in some of the major corporations. So that is affecting small businesses in a great way, when they are not

being hired by larger businesses out of fear that they will be sued by patent trolls in relation to their work.

Mrs. {Brooks.} Do we have any information as to how many companies have been put out of business? Has there been--and while I recognize that that could be difficult, Ms. Ranieri, anyone know if we have an estimates of how many companies have been put out of business, whether it is startup or larger?

Ms. {Ranieri.} To be frank, it--we can't figure that out right now. Patent trolls take advantage of the fact that this occurs in the shadows, and that is why we at EFF think it is really important to have--to implement disclosure requirements so we can understand the true scope of the problem, and the effect that it is having on our economy.

Mrs. {Brooks.} Thank you. And finally, Ms. Self, certainly, I am concerned about protection of property rights, ensuring that innovators have the confidence that their patent rights are going to be secure, and you have made a great point in your testimony that IP-intensive industries account for more than 1/3 of U.S. GDP, and directly or indirectly support over 40 million jobs in this country. If

we do move forward, and I appreciate your point on the TROL Act from last Congress, but if we approve the legislation, what is the most important thing, the most important thing you think we need to focus on to get it right in order to protect legitimate patent holders' ability to communicate with potential infringers or licensees?

Ms. {Self.} Thank you for that question. I, you know, it hard to point to just one piece of this bill that is, you know, the most important factor. It--the framework of the bill, I think, the four factors that I mentioned in my oral statement, the fact that it is limited to bad faith communications, the fact that it clearly delineates categories of deceptive activity as well as required disclosures, but in a way that is balanced and respectful of the rights of patent owners. The preemption issue, again, I think the combination of preemption with the authority of state attorneys general to enforce the law under the federal framework. Those components, I think, are really critical. And I think, again, it is that framework that provides the balance and, you know, not just one particular component. So I think all of those components work together to provide an

effective solution to what we, I think, all agree is a problem, but without creating unintended problems for patent owners because, you know, the other part of this calculus, if you will, is that if you make it so onerous for patent owners to enforce their rights, then they will become the target of abuse by infringers, by opportunistic lawyers who use state laws to harass them. So that is another important focus to keep in mind as we try to chart forward with the right path.

Mrs. {Brooks.} Thank you. Thank you for the thoughtful response, and for all of your work and all of the input all of you are providing us. Thank you.

I yield back.

Mr. {Burgess.} Gentlelady yields back.

Chair now recognizes the gentleman from Kentucky, Mr. Guthrie, 5 minutes for questions please.

Mr. {Guthrie.} Thank you, Mr. Chairman. Thank the panel for being here.

Sorry, I was in another hearing so--of this same committee, in another subcommittee, so I apologize that I may ask questions and you all sort of repeat a little bit of Mrs. Brooks just asked, but I think a lot of us here are just

trying to get our heads around this. I think when you talk about the sports--I can--my son played little league, because I know there are guys in my area go online, you can buy pictures, and I can see where that-- I mean, $250,000, and those stories are out there, they are real. And that is clear, we need to stop that. Then I have my friend, Thomas Massie here, who represents the northern part of Kentucky, District 4, 3 or--I am 2, so 4 maybe, 4, in Kentucky, he was an inventor. And so when we hear the story like you, Ms. Ranieri, and it is like, well, this is simple, we need to fix this, so that is obviously--obviously needs to be fixed. And then you hear people say, well, if people have patents, if they are not using them, that is a good way--like the manufacturer. Well, then Thomas explains in a long dissertation at breakfast one day about how a lot of people who are legitimate patent holders, who will legitimately invent, hold these patents because they don't have the means or the ability, they are trying to move forward. And so if you do this and this kind of--that kind of reaction to stop patent trolls is going to--could stop the small entrepreneurial inventor, and so you have unintended

consequences.

So I am--I guess what I am asking, is there any of this expert panel--where can we delineate between--what--you know, was the old Justice Potter, I know it when I see it. I can't really describe it, but I know it when I see it. And how do you delineate between what is clearly somebody out there patent trolling, versus, you know, somebody like Thomas who works in his garage and comes up with--essentially what you did, come up with several patents that, you know, takes him a while to find the resources to move forward. And so the question is the people just out searching, and then you have trolling, and then you have the people who are legitimate small folks. And that is what we are trying to find with the balance, because we want to fix the problem, but we don't want to have unintended consequences. So I will kind of open it up to the panel.

Mr. {Malta.} Thank you. With an issue like this, there is a starting point, and you are here at the starting point, and that is to stop deceptive practices.

Mr. {Guthrie.} Um-hum.

Mr. {Malta.} And the way--and we are not stopping

innovation. And so you are right, it is that balance, but let us stop deception. And that is why we are suggesting and recommending that these letters have basic information in it. And basically stated earlier, state the claim, who is the part at interest, et cetera.

Mr. {Guthrie.} Um-hum.

Mr. {Malta.} And that would be the start to a much greater reform that will probably evolve over time, that will deal with the balancing that needs to be done to preserve innovation.

Mr. {Gugliuzza.} Yeah, let me--you know, the enforcement efforts I think this committee should focus on are particularly egregious, right? They, for example, are targeting large numbers of end users of relatively commonplace technology, right? MPHJ sends 16,000 letters out alleging infringement of use of a common office scanner. Innovatio sends out 8,000 letters alleging infringement because of the use of common wireless internet routers. That is--so these are, you know, egregious, they are sending out large numbers of letters focusing on end users, and also the claim--the patents themselves are sort of--you might say they

are objectively weak. So an example of this is a troll up in the Pacific Northwest called Savannah IP. It sent letters to home builders throughout the Pacific Northwest alleging infringement of a patent on a ``moisture removal system'' to dry lumber during construction. So if you were using a fan to dry your lumber during construction, you may be infringing Savannah IP's patent.

Mr. {Guthrie.} Well--

Mr. {Gugliuzza.} There were real questions about whether that patent is valid, and those sorts of assertions are the ones--

Mr. {Guthrie.} No, I agree with you 100 percent. So you walk out of that and you are going, boy, this is easy to get behind. Let us get onboard, let us move forward, I like the legislation. And then you a have the talk with Thomas and say, well, these are some of the consequences that could come from that, and you walk out going--I mean we are really trying to figure out exactly what the right thing to do is, because we all want to solve the problem. I think even people who you are probably hearing oppose the current bill will say I--I have heard Thomas say it, I recognize there is

a problem that needs to be solved.

Mr. {Gugliuzza.} Yeah.

Mr. {Guthrie.} And so what we are trying to figure out, where is that--I mean what--every situation you just described where somebody is patenting a fan, we all agree needs to be fixed.

Mr. {Gugliuzza.} Yeah.

Mr. {Guthrie.} I think most all of us--

Mr. {Gugliuzza.} I would--

Mr. {Guthrie.} --would agree.

Mr. {Gugliuzza.} I would just encourage you to trust the courts. They know--they can tell the difference between the good actors and the bad actors. And--

Mr. {Guthrie.} Well, the problem is a lot of people go through court--the problem is the expense of going to court.

Mr. {Gugliuzza.} Yeah.

Mr. {Guthrie.} So I mean that is what we are trying to solve. That is one of the problems we are trying to solve is--

Mr. {Gugliuzza.} Well--

Mr. {Guthrie.} --that people are just paying--they are

sending out 8,000 letters, if 1,000 people paid and not go to court, so just using that as a solution, that is actually part of the problem we are trying to solve.

Mr. {Gugliuzza.} So if you have enforcement by state attorneys general or the Federal Government, that can help rectify the sort of resource imbalance that you are talking about, I think.

Mr. {Guthrie.} Yeah, but just relying on the courts is what we are trying to solve, the problem, the expense of that.

Ms. {Self.} Can I--

Mr. {Guthrie.} I think I am out of time. So I don't know if the chairman wants to--

Mr. {Burgess.} Chair will allow both Ms. Self and Ms. Ranieri to respond.

Ms. {Self.} Yeah. I just wanted to echo part of the comments that the Professor made. First of all, the bad faith requirement, I think, is an important, you know, dividing line between legitimate communications and communications that are appropriate for FTC enforcement authority. And again, the goal, at least from our

perspective, the goal here is not to expand FTC authority, it is to clarify it. But the pattern or practice component, I think does help, again, further delineate because--I have seen--we have seen at the state level proposals, for example, that any demand--any patent owner that sends 10 demand letters is, you know, automatically subject to enforcement. That is really not an appropriate approach. Pattern or practice denotes widespread communications that meet a standard of deception, and I agree that that standard will evolve through the courts. I think the TROL Act helps--is a starting point because it clearly identifies some areas where, you know, you do have clear objectively, you know, verifiable deception as well as some, you know, some minimal baseline affirmative disclosure requirements. But also the FTC authority has traditionally been limited to consumers, and that means small businesses, nonprofits, as well as individual recipients. I think that is another dividing line that helps with the problem that, I think, you have rightly laid out for us.

If large companies are receiving demand letters, that is a very different dynamic than small mom and pops, and it

should be treated differently under the law. So I think all of these various, what I would consider to be safeguards, if you will, that are set forward in the TROL Act, I think, help solve the problem that you have articulated.

Mr. {Burgess.} Ms. Ranieri?

Ms. {Ranieri.} I just wanted to add that EFF is--our constituency are the small innovator and inventors, and unfortunately, as Mr. Malta said, this is a starting point, the deceptive letter practices, but our position is until we get better patents issuing out of the patent office, and until we stop the flow of patents that should never be issued, we cannot solve this problem. And that is why broader reform is needed. Once patents become more--sorry, once patents that issue out of the patent office can actually be looked at and seen as actual inventions, this will make it much easier and clearer to solve all of these problems.

Mr. {Guthrie.} I think that is the argument Thomas Massie made, but he made it in 30 minutes, you have made it in 1, so I appreciate that very much.

Mr. {Burgess.} Gentleman's time has expired.

Chair would ask of the ranking member, do you have a

follow-up question?

Ms. {Schakowsky.} I do not.

Mr. {Burgess.} Ranking member has no follow-up question.

I--the only thing I was going to ask in follow-up, and Professor and Ms. Ranieri, you all talked about flexibility, but then, Ms. Ranieri, you had given us an admonition earlier, don't give us loopholes or we will drive a truck through them. So how do we achieve that balance between flexibility and loopholes?

Ms. {Ranieri.} That is a good question, and I think that is where the courts and the attorneys general, and the FTC and other agencies like the FTC come into play. They can recognize these activities. And as I mentioned, at its base, these laws are meant to target unfair and deceptive trade practices, and these are activities that states have a lot of competency with, in that they see them a lot in different industries, and they can apply the knowledge that they have learned in those industries to this context.

Patents are involved, yes, so that changes it slightly, but at the base, the types of deceptive and unfair practices

1942 often span many different industries.

1943 Mr. {Gugliuzza.} Yeah, I agree. I think, you know,

1944 the--allowing the courts flexibility rather than sort of

1945 hamstringing them with a complicated statutory definition of

1946 bad faith, or a long list of factors of bad faith, is very

1947 important in allowing courts in a case-by-case basis to try

1948 to close those loopholes.

1949 Mr. {Burgess.} Chair thanks all of our witnesses. And

1950 seeing no further Members wishing to ask questions, again,

1951 thank the witnesses for their participation.

1952 Before we conclude, I would like to include the

1953 following documents to be submitted for the record by

1954 unanimous consent: A letter on behalf of the National

1955 Association of Federal Credit Unions, a letter on behalf of

1956 the Direct Marketing Association, a joint letter on behalf of

1957 the American Bankers Association, the American Insurance

1958 Association, the Clearinghouse Payments Company, Credit

1959 Unions National Association, Financial Services Roundtable,

1960 Independent Community Bankers of America, National

1961 Association of Federal Credit Unions, and the National

1962 Association of Mutual Insurance Companies. Pursuant to

committee rules, I remind members that they have 10 business days to submit additional questions for the record. I ask that witnesses submit their responses within 10 business days upon receipt of the questions.

{Voice.} We also have a letter from the National Retail Federation.

Mr. {Burgess.} My understanding is a late arrival, a letter from the National Retail Federation, which we will make part of the record. And--

Ms. {Schakowsky.} Without objection.

Mr. {Burgess.} Without objection, so ordered.

[The information follows:]

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

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Mr. {Burgess.} And then without objection, the subcommittee is adjourned. And I thank the witnesses.

Ms. {Schakowsky.} Thank you.

[Whereupon, at 11:56 a.m., the subcommittee was adjourned.]