

Statement of

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Introduction

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 Incorporated.

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 that supports innovative enterprises of all sizes.

Qualcomm and the Innovation Alliance applaud the House Energy and Commerce Committee for their work last year to achieve a meaningful, balanced bill on the issue of demand letters that will address the abusive behavior that small businesses and retail interests face. We support the approach taken in the Targeting Rogue and Opaque Letters Act, which passed this Subcommittee on July 10, 2014. We believe the Act appropriately targets abusive behavior rather than particular types of patent owners, while maintaining the integrity of legitimate patent enforcement practices for all patent holders.

Qualcomm, Patents and Innovation

Qualcomm's founders are the quintessential example of the storied American "inventors in the garage" who built one of the world's foremost technology companies on the foundation of highly innovative technology and strong patent rights. Since our founding in 1985, Qualcomm has evolved into a leading innovator in the wireless communications industry, and a recognized pioneer in the development of 3G and 4G wireless technology.

Qualcomm designs, has manufactured on its behalf, markets, and sells products and services based on these and other digital communications technologies. Our products consist principally of integrated circuits (also known as chips or chipsets) and system software used in mobile devices and in wireless networks. Seventy percent of our 31,000 employees (65 percent of whom are engineers) are based in the United States. Qualcomm invests about 20% of its annual revenue in research and development. Since the company was founded in 1985, Qualcomm has spent more than \$34.2 billion on R&D. For the 2013 fiscal year alone, R&D expenditures totaled approximately \$5 billion. As we develop new technologies, we patent them to protect that investment. In the United States alone, Qualcomm has approximately 13,000 issued patents and approximately 10,000 pending patent applications.

Through ongoing investments in research and development (R&D) and broad licensing of our patented technologies, Qualcomm facilitates billions of dollars in exports, while creating thousands of well-paying jobs for U.S. workers. Moreover, through our R&D investments and licensing program, Qualcomm has helped create a thriving mobile ecosystem. Qualcomm's core wireless technologies are integral to 3G and 4G mobile phones, tablets, e-readers, mobile applications, and a host of other wireless devices and services. Qualcomm is the world's leading supplier of chipsets that enable these 3G and 4G devices.

Qualcomm is not a plaintiff in any currently pending patent litigation. At present, we are a defendant in several patent infringement lawsuits, some of which were brought by so-called patent assertion entities (PAEs) asserting questionable infringement claims based on patents of dubious validity. However, the objective of my testimony is neither to criticize nor defend PAEs. Rather, I am here today to testify regarding what Qualcomm believes should be the proper focus of the Committee’s legislation—abusive demand letter conduct—and the best way to target such conduct without unintentionally damaging important patent protections.

Qualcomm is pleased that the bill previously proposed by this Committee has a number of strengths that other proposed measures relating to demand letters do not have. For example, the TROL Act focuses on those engaged in a pattern or practice of sending unfair and deceptive demand letters to consumers or end users. Additionally, the bill contains reasonable disclosure requirements, specifically sets forth the conduct that would be considered unfair and deceptive, and does not give the Federal Trade Commission discretion to regulate demand letter content. As drafted, the bill successfully focuses on the bad faith actors that are the cause of the problem and does not contain broad provisions that undermine the appropriate exercise of patent rights.

Notice letters and licensing communications are an important part of the U.S. patent system

A strong patent system, which has its roots in Article 1, Section 8 of the U.S. Constitution, is an essential part of America’s economic success, contributing to economic growth, higher income, and more jobs. Strong patent rights incentivize investments in technological innovation. IP-intensive industries account for more than one third of U.S. GDP, and directly or indirectly support approximately 40 million jobs. It is critically important to maintain a strong patent system that promotes innovative enterprises of all sizes.

Notice letters play an important role in the patent system. Indeed, as the Supreme Court has explained, “[p]atents would be of little value if infringers of them could not be notified of the consequences of infringement.” *Virtue v. Creamery Package Mfg., Co.*, 227 U.S. 8, 37-38 (1913).

Patent law encourages patent holders to take reasonable steps to notify others of existing or pending patent rights and their possible infringement. In some instances, federal patent law requires patent holders to send notice letters to accused infringers to preserve their patent enforcement rights and ability to collect damages. Notice letters and licensing communications can also serve the interests of accused infringers. Once a patent holder has made its rights known, the accused infringer can determine whether to cease the allegedly infringing activities, negotiate a license, or decide to continue its activities based on an assessment of non-infringement or invalidity. Moreover, knowledge that new products or products in development may practice the patent or patents of another allows potential infringers an opportunity to design around existing intellectual property while still producing a product that is socially and economically beneficial, or even perhaps improve upon the invention or invent an alternative.

Any demand letter legislation must be careful not to discourage legitimate patent-related communications, which are integral to the functioning of the patent system and the resolution of patent disputes, including possible resolution without resorting to litigation.

Abusive demand letters

We have all heard stories of the mass mailing of bad faith patent demand letters by PAEs or “patent trolls” to small businesses, consumers, and technology end users. Through the indiscriminate sending of bad faith demand letters, some bad actors have co-opted and distorted an otherwise legitimate patent enforcement practice in an attempt to extract payment from groups of people who are generally unfamiliar with the patent system.

Qualcomm understands and appreciates the Committee’s interest in curtailing the abusive activities of these bad actors. At the same time, we urge caution and balance to ensure that efforts to address this problem do not inadvertently harm legitimate patent enforcement practices.

Unnecessarily broad legislation will cause unwanted “collateral damage”

A demand letter law that is too broad or too punitive may deter appropriate and useful efforts to provide notice of patent infringement activity and runs the risk of undermining incentives to innovate. The value of a patent rests in the patent holder’s ability to enforce it in a meaningful way. Innovators must assess their ability to enforce and license the intellectual property relating to their inventions when deciding whether to make the significant investments necessary to develop and/or commercialize new products and technologies. The availability of meaningful patent protection is also key to the development of business partnerships and cooperative relationships in key technology areas. Making notification obligations or enforcement of patent rights too burdensome, too costly, or too risky will adversely affect the dynamics of innovation investment. Accordingly, any legislation should target remedying the problem of abusive mass demand letter campaigns, without harming patent holders engaged in legitimate patent enforcement activities.

An effective solution does not require sweeping legislation or an expansion of the FTC’s authority to police the enforcement-related communications of all patent holders. Indeed, the FTC already has the authority to protect consumers from unscrupulous actors who engage in the mass mailing of blatantly unfair or deceptive demand letters. Indeed, the FTC has taken action against such bad actors under its existing authority. Last year, the FTC investigated and charged a PAE, MPHJ Technology Investments, with making deceptive representations when asserting its patent rights. A bill that injects the FTC into private disputes over the validity or worth of patents would adversely affect both patent holders and accused infringers. Private disputes and negotiations do not need to be regulated in this manner.

The TROL Act properly clarifies, rather than expands, FTC authority. The proposed legislation draws a clear line between deceptive shakedown scenarios warranting FTC enforcement and

routine individualized patent correspondence between companies, the vast majority of which is legitimate. FTC enforcement authority granted by the bill is limited to those situations in which the sender has engaged in a pattern or practice of mailing bad faith demand letters to recipients likely to lack a familiarity with patent law or the resources necessary to evaluate and respond to a demand letter.

By clarifying that certain practices are unfair or deceptive under the Federal Trade Commission Act, the bill furthers the goal of protecting those most vulnerable to abusive demand letters while reducing the risk that the FTC will be drawn into individual disputes between patent owners and potential licensees or alleged infringers. The “pattern or practice” requirement is appropriate because the purported need for demand letter legislation stems from just this kind of activity—the mass mailing of demand letters by patent trolls. The “bad faith” requirement is necessary to capture the requirements of current case law and protect patent holders’ First Amendment rights. These requirements are consistent with the requirements imposed on the FTC by Section 5 of the Federal Trade Commission Act and existing case law. Indeed, limiting the bill to instances in which there is a “pattern or practice” of behavior is not only consistent with the FTC’s Section 5 authority, but similar provisions can also be found in other specific FTC statutes. Inclusion of these requirements will help to strike the correct balance between identifying the situations in which FTC can and should take action, and protecting the rights of patent holders.

Furthermore, if Congress is going to legislate in the area of demand letters, Congress should specifically describe the conduct that would be considered unfair and deceptive. This clarity is necessary to prevent the bill from being misinterpreted and to put patent holders on notice of what type of conduct is prohibited.

Legislation should avoid overly burdensome disclosure requirements

The TROL Act avoids imposing overly burdensome disclosure requirements that fail to account for the realities of patent enforcement and licensing negotiations. Not all licensing communications involve a handful of patents and a small number of commercially available accused products. Often, licensing negotiations involve a portfolio of hundreds or thousands of patents and numerous different devices, product models, or manufacturing processes. Some or all of these potentially infringing devices, product models, or processes may not be available to the patent holder. Even assuming such information is readily available to a patent holder, requiring disclosure of highly detailed information in a demand letter (such as an identification of each asserted claim and each accused product model or process, and a detailed explanation of how each claim is infringed) would impose an undue burden on patent owners and could result in voluminous communications. For some patent holders, particularly small inventors, start-ups and those lacking extensive resources to devote to patent enforcement, such a burden would be enormous, expensive and impractical, and could impair their ability to enforce their intellectual property rights.

Legislation should protect good faith conduct and the constitutional rights of patent holders

We ask that the Committee refrain from creating a framework under which a patent holder could be punished for good faith conduct. Indeed, the First Amendment affords broad protection for activities relating to the enforcement and communication of patent rights, and courts have repeatedly held that a patent holder should not be penalized for communicating its patent rights or an allegation of infringement in good faith. The proposed legislation accomplishes this goal through the inclusion of an affirmative defense for mistakes made in good faith.

The real consumer protection threat posed by demand letters results from the sending of bad faith communications to unsophisticated recipients. The appropriate goal of the legislation should be to identify, and empower the FTC to address, only those demand letters that are sent in bad faith.

Federal preemption of state demand letter laws is necessary for clarity and uniformity

Congressional demand letter legislation must preempt state demand letter bills. Patent law has long been the exclusive province of the federal government. However, over the past two years, almost twenty states have passed legislation relating to patent demand letters. At least a dozen others are considering legislation this year. These state bills contain disparate requirements and prescriptions. Ensuring compliance with federal legislation, as well as a patchwork of state laws, will make enforcement of patent rights extremely burdensome and, for some patent holders, prohibitively expensive, which in turn will chill the sending of patent-related communications, even those communications which are entirely legitimate and made in good faith.

Furthermore, some of the recently passed state bills contain provisions that could be subject to abuse by accused infringers. For example, many state bills allow the recipient of a demand letter to pursue a private cause of action against a patent holder and seek tens of thousands of dollars in punitive damages. As a result, patent holders may find themselves the target of private plaintiffs threatening or instituting litigation in order to extract nuisance settlements. Provisions of this nature are likely to incentivize, rather than prevent, vexatious litigation. The federal government is best positioned to address the problem through balanced legislation that will be applied uniformly throughout the nation.

Conclusion

Qualcomm respects the Committee's efforts to find a sensible solution to the problem of abusive demand letters. As noted, the TROL Act has a number of strengths. For example, the bill appropriately focuses on those engaged in a pattern or practice of sending unfair and deceptive demand letters. It correctly focuses on letters sent to consumers. The bill sets forth reasonable, but not unduly burdensome, disclosure requirements. It specifically describes the conduct that would be considered unfair and deceptive, and does not give the FTC discretion to regulate demand letter content.

It is critical to retain these requirements and limitations. Qualcomm could not support a bill that expands the FTC's authority, punishes good faith conduct, imposes onerous disclosure requirements, or fails to preempt the litany of state laws that impose an assortment of differing rules on patent owners.

Qualcomm looks forward to working with the Committee in its efforts to achieve a balanced and narrowly tailored bill. Thank you for allowing me to testify today, and I look forward to answering your questions.