



U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON ENERGY AND COMMERCE

April 20, 2015

TO: Members, Subcommittee on Commerce, Manufacturing, and Trade

FROM: Committee Majority Staff

RE: Subcommittee markup of a Discussion Draft entitled “H.R. ____, Targeting Rogue and Opaque Letters (TROL) Act”

The Subcommittee on Commerce, Manufacturing, and Trade will meet in open markup on Wednesday, April 22, 2015, at 12:00 p.m. in 2123 Rayburn House Office Building to consider the following:

- H.R. ____, Targeting Rogue and Opaque Letters (TROL) Act.

In keeping with Chairman Upton’s announced policy, Members must submit any amendments they may have two hours before they are offered during this markup. Members may submit amendments by email to Peter.Kielty@mail.house.gov. Any information with respect to the amendment’s parliamentary standard (e.g., its germaneness) should be submitted at this time as well.

I. BACKGROUND

Businesses and consumers across the nation have been victimized on a large scale by patent holders who mislead them with vague and deceptive demand letters into paying undue license or settlement fees. These types of scams typically, but not always, target end users of patented technology with little patent expertise and inadequate resources to defend against infringement allegations.

As of today, twenty State laws have been enacted—each within the last two years—addressing abusive demand letters.¹ The State laws generally list a series of prohibited bad acts with respect to patent demand letters. Four States include an exhaustive list of bad acts defining whether a demand letter is unlawful,² and the other sixteen States allow a State court to draw upon any other factor the court finds relevant in determining whether a demand letter is unlawful.³ To date, no State attorney general has brought a case under a State law that specifically addresses demand letters. As witnesses before the Subcommittee have testified, cases brought under State patent demand letter laws may be precluded under the Federal Circuit’s *Noerr-Pennington* doctrine, unless they also allege bad faith on the part of the

¹ Alabama, Georgia, Idaho, Illinois, Louisiana, Maine, Maryland, Mississippi, Missouri, New Hampshire, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Utah, Vermont, Virginia, and Wisconsin.

² Illinois, Oklahoma, Tennessee, and Wisconsin.

³ See, e.g., H.B. 1163, 64th Leg. (ND 2015).

defendant.⁴ Moreover, because *Noerr-Pennington* is rooted in the First Amendment, it may preclude certain Federal enforcement as well, unless it only addresses bad faith conduct.⁵ Four State attorneys general have taken action against a single patent assertion entity, but those investigations were conducted under State consumer protection laws of general applicability.⁶ These general consumer protection laws, which are preserved by the base draft, are often referred to as “mini-FTC Acts” for their resemblance to the Federal Trade Commission’s (FTC) organic statute.⁷

The TROL Act addresses the abusive demand letter problem by authorizing the FTC to seek civil penalties where patent demand letters make certain misstatements or omissions in bad faith. Under its current Section 5 authority, the FTC cannot obtain civil penalties unless a defendant has violated an FTC rule or a consent order. To allow the FTC to bring cases involving misstatements or omissions not enumerated in the TROL Act, the draft legislation would specifically preserve the FTC’s Section 5 authority to enjoin unfair or deceptive acts or practices. Although the TROL Act preempts State laws specifically addressing patent demand letters, it also preserves the authority of State attorneys general to enforce their own mini-FTC Acts and authorizes state attorneys general to enforce the provisions of the TROL Act.

II. SECTION-BY-SECTION

Section 1. Short Title.

This Act may be cited as the “Targeting Rogue and Opaque Letters (TROL) Act.”

Section 2. Unfair or Deceptive Acts or Practices in Connection with the Assertion of a United States Patent.

This section establishes that it is an unfair or deceptive act or practice under the FTC Act to engage in a pattern or practice of sending demand letters if the communications, in bad faith, include any of the twelve prohibited elements enumerated in paragraphs (1) or (2), or fail to include any of the five elements enumerated in paragraph (3). Section 2 also sets forth an affirmative defense that statements, representations, or omissions were not made in bad faith if the sender can demonstrate that such statements, representations, or omissions were mistakes, including by evidence that the sender does not send letters in violation of this Act in the usual course of business.

⁴ *Update: Patent Demand Letter Practices and Solutions: Hearing Before the Subcomm. on Commerce, manuf., and Trade*, 114th Cong. 12 (2015) (statement of Paul R. Gugliuzza, Associate Professor of Law, Boston University School of Law) (“Although no court has yet applied this standard to the new state statutes, it seems to ensure that most tactics employed by bottom-feeder trolls will remain legal.”).

⁵ *Globetrotter Software, Inc. v. Elan Computer Grp., Inc.*, 362 F.3d 1367 (Fed. Cir. 2004) (holding that *Noerr-Pennington* shields communications such as demand letters from both state and federal laws, unless they are narrowed to bad faith conduct).

⁶ Nebraska, Vermont, and Minnesota each have brought suits under consumer protection laws against abusive demand letter activity.

⁷ See *Vermont v. Int’l Collection Serv., Inc.*, 594 A.2d 426, 430-31 (Vt. 1991).

Section 3. Enforcement by Federal Trade Commission.

Section 3 establishes that a violation of section 2 shall be treated as a violation of a rule defining an unfair or deceptive act or practice prescribed under the FTC Act. This enables the FTC to seek civil penalties for violations; whereas, under its current authority, it could only seek an injunction against a sender of an unfair or deceptive demand letter. Section 3 also clarifies that the FTC's existing powers and enforcement authority are preserved.

Section 4. Preemption of State Laws on Patent Demand Letters and Enforcement by State Attorneys General.

Section 4 preempts State laws, rules, regulations, standards, and other provisions having the effect of law expressly relating to the transmission or contents of patent demand letters, while preserving other State laws of general applicability, such as the State consumer protection laws of general applicability. Section 4 also permits State attorneys general to enforce the Act and to seek civil penalties for violations. Section 4 requires the attorney general of a State to provide the FTC with prior written notice of any action taken to enforce the law and also provides the FTC authority to intervene in the action. It further provides that no State action may be brought if the FTC has a civil action pending against any named defendant.

Section 5. Definitions.

Section 5 defines certain terms used throughout the draft legislation, including "bad faith" as it pertains to the representations or omissions enumerated in section 2.

III. STAFF CONTACTS

If you have questions on this markup, please contact Paul Nagle or Graham Dufault of the Committee staff at (202) 225-2927.