[DISCUSSION DRAFT]

MAY 15, 2014

113TH CONGRESS
2D SESSION

H. R. _____

To provide that certain bad faith communications in connection with the assertion of a United States patent are unfair or deceptive acts or practices, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

M. ______ introduced the following bill; which was referred to the Committee on ____________.

A BILL

To provide that certain bad faith communications in connection with the assertion of a United States patent are unfair or deceptive acts or practices, and for other purposes.

1    Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

2    SECTION 1. SHORT TITLE.

3    This Act may be cited as the [“_________ Act of 2014”].
SEC. 2. UNFAIR OR DECEPTIVE ACTS OR PRACTICES IN CONNECTION WITH THE ASSERTION OF A UNITED STATES PATENT.

(a) In General.—It shall be an unfair or deceptive act or practice within the meaning of section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)) for a person, in connection with the assertion of a United States patent, to engage in a pattern or practice of sending written communications to consumers, end users, or systems integrators that state or imply that the recipients are or may be infringing, or have or may have infringed, the patent and bear liability or owe compensation to another, if—

(1) the person asserting the patent is not a person with the right, or does not represent a person with the right, to license or enforce the patent at the time the communications are sent;

(2) the sender of the communications, in bad faith, states or implies in the communications that—

(A) litigation for infringement of the patent has been filed against the recipient;

(B) litigation for infringement of the patent has been filed against other persons;

(C) legal action for infringement of the patent will be taken against the recipient;
(D) the sender is the exclusive licensee of
the patent asserted in the communications;

(E) persons other than the recipient pur-
chased a license for the patent asserted in the
communications;

(F) persons other than the recipient pur-
chased a license, and the sender does not dis-
close that such license is unrelated to the al-
leged infringement or the patent asserted in the
communications;

(G) an investigation of the recipient’s al-
leged infringement occurred; or

(H) the sender, a subsidiary of the sender,
or an affiliate of the sender previously filed a
civil action asserting a claim of infringement of
the patent against one or more persons other
than the recipient when the sender knew such
claim was dismissed with prejudice;

(3) the sender of the communications, in bad
faith, seeks compensation for—

(A) a patent claim that has been held to
be invalid in a final determination;

(B) activities undertaken by the recipient
after expiration of the patent asserted in the
communications; or
(C) activity of the recipient that the sender knew was authorized, with respect to the patent claim or claims that are the subject of the communications, by a person with the right to license the patent; or

(4) the communications fail to include—

(A) the identity of the person asserting a right to license the patent to, or enforce the patent against, the recipient;

(B) an identification of at least one patent issued by the United States Patent and Trademark Office alleged to have been infringed;

(C) an identification, to the extent reasonable under the circumstances, of at least one product, service, or other activity of the recipient that is alleged to infringe the identified patent or patents;

(D) a description, to the extent reasonable under the circumstances, of how the product, service, or other activity of the recipient infringes the identified patent or patents; or

(E) a name and contact information for a person the recipient may contact about the assertions or claims relating to the patent or patents contained in the communications.
(b) REBUTTABLE PRESUMPTION.—There shall be a rebuttable presumption, with respect to subsection (a)(4), that sending written communications to consumers, end users, or systems integrators stating that the recipients are infringing or have infringed a patent and bear liability or owe compensation to another is not an unfair or deceptive act or practice within the meaning of section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)) if—

(1) a good faith effort is made to include the information listed in subparagraphs (A) through (E) of subsection (a)(4) in such communications; and

(2) there is no violation of paragraphs (1) through (3) of subsection (a).

c) RULE OF CONSTRUCTION.—For purposes of sections 3 and 4, the commission of an act or practice that is declared under this section to be an unfair or deceptive act or practice within the meaning of section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)) shall be considered to be a violation of this section.

SEC. 3. ENFORCEMENT BY FEDERAL TRADE COMMISSION.

(a) VIOLATION OF RULE.—A violation of section 2 shall be treated as a violation of a rule defining an unfair or deceptive act or practice prescribed under section

(b) **Powers of Commission.**—The Commission shall enforce this Act in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) were incorporated into and made a part of this Act. Any person who violates section 2 shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act.

(c) **Effect on Other Laws.**—Nothing in this Act shall be construed in any way to limit or affect the authority of the Commission under any other provision of law.

**SEC. 4. PREEMPTION OF STATE LAWS ON PATENT DEMAND LETTERS AND ENFORCEMENT BY STATE ATTORNEYS GENERAL.**

(a) **Preemption.**—

   (1) **In General.**—This Act preempts any law, rule, regulation, requirement, standard, or other provision having the force and effect of law of any State, or political subdivision of a State, expressly relating to the transmission or contents of communications relating to the assertion of patent rights.
(2) Effect on other state laws.—Except as provided in paragraph (1), this Act shall not be construed to preempt or limit any provision of any State law, including any State consumer protection law, any State law relating to acts of fraud or deception, and any State trespass, contract, or tort law.

(b) Enforcement by State attorneys general.—

(1) In general.—In any case in which the attorney general of a State has reason to believe that an interest of the residents of that State has been adversely affected by any person who violates section 2, the attorney general of the State, as parens patriae, may bring a civil action on behalf of such residents of the State in a district court of the United States of appropriate jurisdiction—

(A) to enjoin further such violation by the defendant; or

(B) to obtain compensatory damages on behalf of recipients who suffered actual damages as a result of such violation.

(2) Intervention by the FTC.—

(A) Notice and intervention.—The attorney general of a State shall provide prior written notice of any action under paragraph
(1) to the Commission and provide the Commis-
sion with a copy of the complaint in the action,
except in any case in which such prior notice is
not feasible, in which case the attorney general
shall serve such notice immediately upon insti-
tuting such action. The Commission shall have
the right—

(i) to intervene in the action;

(ii) upon so intervening, to be heard

on all matters arising therein; and

(iii) to file petitions for appeal.

(B) LIMITATION ON STATE ACTION WHILE
FEDERAL ACTION IS PENDING.—If the Commis-
sion has instituted a civil action for violation of
section 2, no State attorney general may bring
an action under this subsection during the
pendency of that action against any defendant
named in the complaint of the Commission for
any violation of such section alleged in the com-
plaint.

(3) CONSTRUCTION.—For purposes of bringing
any civil action under paragraph (1), nothing in this
Act shall be construed to prevent the attorney gen-
eral of a State from exercising the powers conferred
on the attorney general by the laws of that State
to—

(A) conduct investigations;
(B) administer oaths or affirmations; or
(C) compel the attendance of witnesses or
the production of documentary and other evi-
dence.

SEC. 5. DEFINITIONS.

In this Act:

(1) BAD FAITH.—The term “bad faith” means,
with respect to the representations described in
paragraphs (2) and (3) of section 2(a), that the
sender made such representations with actual knowl-
dge or knowledge fairly implied on the basis of ob-
jective circumstances that such representations were
false.

(2) COMMISSION.—The term “Commission”
means the Federal Trade Commission.

(3) CONSUMER.—The term “consumer” means
an individual who purchases or contracts for pur-
chase, rents, leases, or otherwise legally obtains or
uses a product, device, business method, service,
software, technology, website, or other merchandise
for the personal use of such individual, or of a mem-
ber of the household of such individual, and not for commercial resale purposes.

(4) *End User.*—The term “end user” means a person who—

(A) purchases or contracts for purchase, rents, leases, or otherwise legally obtains or uses a product, device, business method, service, software, technology, website, or other merchandise; and

(B) uses such product, device, business method, service, software, technology, website, or other merchandise for its intended purpose and not for commercial resale.

(5) *Final Determination.*—The term “final determination” means, with respect to the invalidity of a patent, that the invalidity has been determined by a court of the United States or the United States Patent and Trademark Office in a final decision that is unappealable or for which any opportunity for appeal is no longer available.

(6) *Recipient.*—The term “recipient” means a consumer, end user, or systems integrator who receives a communication alleging patent infringement and who has had no established business relationship with the sender.
(7) SENDER.—The term “sender” means, with respect to a written communication alleging patent infringement, a person who has the right to license or enforce the patent at the time the communication is sent, or a person who represents such person, or both.

(8) SYSTEMS INTEGRATOR.—The term “systems integrator” means a person who develops or contracts for the development of a website or mobile application that incorporates retail software or services (including website, network, or analytics services) intended for direct sale or license to consumers or end users.]