

**[DISCUSSION DRAFT]**

JULY 7, 2014

113<sup>TH</sup> CONGRESS  
2<sup>D</sup> 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.

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**IN THE HOUSE OF REPRESENTATIVES**

M\_\_\_\_. \_\_\_\_\_ introduced the following bill; which was referred to the Committee on \_\_\_\_\_

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**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 Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Targeting Rogue and  
5 Opaque Letters Act of 2014”.

1 **SEC. 2. UNFAIR OR DECEPTIVE ACTS OR PRACTICES IN**  
2 **CONNECTION WITH THE ASSERTION OF A**  
3 **UNITED STATES PATENT.**

4 (a) IN GENERAL.—It shall be an unfair or deceptive  
5 act or practice within the meaning of section 5(a)(1) of  
6 the Federal Trade Commission Act (15 U.S.C. 45(a)(1))  
7 for a person, in connection with the assertion of a United  
8 States patent, to engage in a pattern or practice of send-  
9 ing written communications that state or represent that  
10 the recipients are or may be infringing, or have or may  
11 have infringed, the patent and bear liability or owe com-  
12 pensation to another, if—

13 (1) the sender of the communications, in bad  
14 faith, states or represents in the communications  
15 that—

16 (A) the sender is a person with the right  
17 to license or enforce the patent at the time the  
18 communications are sent, and the sender is not  
19 a person with such a right;

20 (B) a civil action asserting a claim of in-  
21 fringement of the patent has been filed against  
22 the recipient;

23 (C) a civil action asserting a claim of in-  
24 fringement of the patent has been filed against  
25 other persons;

1 (D) legal action for infringement of the  
2 patent will be taken against the recipient;

3 (E) the sender is the exclusive licensee of  
4 the patent asserted in the communications;

5 (F) persons other than the recipient pur-  
6 chased a license for the patent asserted in the  
7 communications;

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

13 (H) an investigation of the recipient's al-  
14 leged infringement occurred; or

15 (I) the sender or an affiliate of the sender  
16 previously filed a civil action asserting a claim  
17 of infringement of the patent based on the ac-  
18 tivity that is the subject of the written commu-  
19 nication when the sender knew such activity  
20 was held, in a final determination, not to in-  
21 fringe the patent;

22 (2) the sender of the communications, in bad  
23 faith, seeks compensation for—

24 (A) a patent claim that has been held to  
25 be unenforceable due to inequitable conduct, in-

1 valid, or otherwise unenforceable against the re-  
2 cipient, in a final determination;

3 (B) activities undertaken by the recipient  
4 after expiration of the patent asserted in the  
5 communications; or

6 (C) activity of the recipient that the sender  
7 knew was authorized, with respect to the patent  
8 claim or claims that are the subject of the com-  
9 munications, by a person with the right to li-  
10 cense the patent; or

11 (3) the sender of the communications, in bad  
12 faith, fails to include—

13 (A) the identity of the person asserting a  
14 right to license the patent to, or enforce the  
15 patent against, the recipient, including the iden-  
16 tity of any parent entity and the ultimate par-  
17 ent entity of such person, unless such person is  
18 a public company and the name of the public  
19 company is identified;

20 (B) an identification of at least one patent  
21 issued by the United States Patent and Trade-  
22 mark Office alleged to have been infringed;

23 (C) an identification, to the extent reason-  
24 able under the circumstances, of at least one  
25 product, service, or other activity of the recipi-

1 ent that is alleged to infringe the identified pat-  
2 ent;

3 (D) a description, to the extent reasonable  
4 under the circumstances, of how the product,  
5 service, or other activity of the recipient in-  
6 fringes an identified patent and patent claim; or

7 (E) a name and contact information for a  
8 person the recipient may contact about the as-  
9 sertions or claims relating to the patent con-  
10 tained in the communications.

11 (b) **AFFIRMATIVE DEFENSE.**—With respect to sub-  
12 section (a), there shall be an affirmative defense that  
13 statements, representations, or omissions were not made  
14 in bad faith (as defined in subparagraphs (B) and (C) of  
15 section 5(1)) if the sender can demonstrate that such  
16 statements, representations, or omissions were mistakes  
17 made in good faith. Evidence that the sender in the usual  
18 course of business sends written communications that do  
19 not violate the provisions of this Act shall be sufficient  
20 to demonstrate good faith. Good faith may also be dem-  
21 onstrated by other evidence.

22 (c) **RULE OF CONSTRUCTION.**—For purposes of sec-  
23 tions 3 and 4, the commission of an act or practice that  
24 is declared under this section to be an unfair or deceptive  
25 act or practice within the meaning of section 5(a)(1) of

1 the Federal Trade Commission Act (15 U.S.C. 45(a)(1))  
2 shall be considered to be a violation of this section.

3 **SEC. 3. ENFORCEMENT BY FEDERAL TRADE COMMISSION.**

4 (a) VIOLATION OF RULE.—A violation of section 2  
5 shall be treated as a violation of a rule defining an unfair  
6 or deceptive act or practice prescribed under section  
7 18(a)(1)(B) of the Federal Trade Commission Act (15  
8 U.S.C. 57a(a)(1)(B)).

9 (b) POWERS OF COMMISSION.—The Commission  
10 shall enforce this Act in the same manner, by the same  
11 means, and with the same jurisdiction, powers, and duties  
12 as though all applicable terms and provisions of the Fed-  
13 eral Trade Commission Act (15 U.S.C. 41 et seq.) were  
14 incorporated into and made a part of this Act. Any person  
15 who violates section 2 shall be subject to the penalties and  
16 entitled to the privileges and immunities provided in the  
17 Federal Trade Commission Act.

18 (c) EFFECT ON OTHER LAWS.—Nothing in this Act  
19 shall be construed in any way to limit or affect the author-  
20 ity of the Commission under any other provision of law.

21 **SEC. 4. PREEMPTION OF STATE LAWS ON PATENT DEMAND**  
22 **LETTERS AND ENFORCEMENT BY STATE AT-**  
23 **TORNEYS GENERAL.**

24 (a) PREEMPTION.—

1           (1) IN GENERAL.—This Act preempts any law,  
2 rule, regulation, requirement, standard, or other pro-  
3 vision having the force and effect of law of any  
4 State, or political subdivision of a State, expressly  
5 relating to the transmission or contents of commu-  
6 nications relating to the assertion of patent rights.

7           (2) EFFECT ON OTHER STATE LAWS.—Except  
8 as provided in paragraph (1), this Act shall not be  
9 construed to preempt or limit any provision of any  
10 State law, including any State consumer protection  
11 law, any State law relating to acts of fraud or decep-  
12 tion, and any State trespass, contract, or tort law.

13           (b) ENFORCEMENT BY STATE ATTORNEYS GEN-  
14 ERAL.—

15           (1) IN GENERAL.—In any case in which the at-  
16 torney general of a State has reason to believe that  
17 an interest of the residents of that State has been  
18 adversely affected by any person who violates section  
19 2, the attorney general of the State, may bring a  
20 civil action on behalf of such residents of the State  
21 in a district court of the United States of appro-  
22 priate jurisdiction—

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

1 (B) to obtain civil penalties on behalf of  
2 recipients who suffered actual damages as a re-  
3 sult of such violation.

4 (2) MAXIMUM CIVIL PENALTY.—Notwith-  
5 standing the number of actions which may be  
6 brought against a person under this subsection, a  
7 person may not be liable for a total of more than  
8 \$5,000,000 for a series of related violations of sec-  
9 tion 2.

10 (3) INTERVENTION BY THE FTC.—

11 (A) NOTICE AND INTERVENTION.—The at-  
12 torney general of a State shall provide prior  
13 written notice of any action under paragraph  
14 (1) to the Commission and provide the Commis-  
15 sion with a copy of the complaint in the action,  
16 except in any case in which such prior notice is  
17 not feasible, in which case the attorney general  
18 shall serve such notice immediately upon insti-  
19 tuting such action. The Commission shall have  
20 the right—

21 (i) to intervene in the action;

22 (ii) upon so intervening, to be heard  
23 on all matters arising therein; and

24 (iii) to file petitions for appeal.



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

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

16 (A) conduct investigations;

17 (B) administer oaths or affirmations; or

18 (C) compel the attendance of witnesses or  
19 the production of documentary and other evi-  
20 dence.

21 **SEC. 5. DEFINITIONS.**

22 In this Act:

23 (1) BAD FAITH.—The term “bad faith” means,  
24 with respect to section 2(a), that the sender—

1 (A) made knowingly false or knowingly  
2 misleading statements, representations, or omis-  
3 sions;

4 (B) made statements, representations, or  
5 omissions with reckless indifference as to the  
6 false or misleading nature of such statements,  
7 representations, or omissions; or

8 (C) made statements, representations, or  
9 omissions with awareness of the high prob-  
10 ability of the statements, representations, or  
11 omissions to deceive and the sender inten-  
12 tionally avoided the truth.

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

15 (3) FINAL DETERMINATION.—The term “final  
16 determination” means, with respect to the invalidity  
17 or unenforceability of a patent, that the invalidity or  
18 unenforceability has been determined by a court of  
19 the United States or the United States Patent and  
20 Trademark Office in a final decision that is  
21 unappealable or for which any opportunity for ap-  
22 peal is no longer available.