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TESTIMONY BEFORE THE  
U.S. HOUSE COMMITTEE ON SMALL BUSINESS

HEARING ENTITLED “INTELLECTUAL PROPERTY 101: HOW SMALL  
BUSINESS OWNERS CAN UTILIZE INTELLECTUAL PROPERTY  
PROTECTIONS IN THEIR BUSINESSES”

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Chairman Chabot, Ranking Member Velázquez, and Members of the House Small Business Committee, thank you for the invitation and the opportunity to speak with you on the importance of intellectual property protections for small businesses.

My name is David Graham, and I am the CEO of Code Ninjas, the fastest growing and largest kids coding franchise in the United States. After nearly twenty years as a professional software developer and entrepreneur, I founded Code Ninjas in 2016 because I believe that coding is not just a great career choice but also a valuable life skill.

A recent study out of Australia looked at the future of the global job market and concluded that over 70% of the jobs in 2035 would be in positions that don't exist today, working on technology that has yet to be invented. The only practical way to prepare our children for this future is by creating a generation of problem solvers that can take on the challenges when presented, no matter what field, technology, or industry they are involved in.

At our centers, kids learn to code using a game-based curriculum in a fun, safe, and inspiring learning environment. Our curriculum focuses on teaching kids to code, but the goal is to teach them how to think and solve problems. We do this by engaging with the children at their level, on a topic that they enjoy and can stay engaged with over a four-year period: video game development.

Our students are called "ninjas" and our teachers are "Code Senseis" (which is a pending trademark). Ninjas and Code Senseis work inside of the "dojo" to create games from the kids' imaginations as well as fix problems that we present to them to teach a particular topic. To the ninjas, nothing is academic, because everything at Code Ninjas is designed to engage the children in a fun way. We believe playing is the very best way to learn something for a lifetime.

We stress teamwork, collaborations, and effective communication throughout the entire process. As I traveled around the country talking with parents about what Code Ninjas means to their families, a resonating theme emerged – they have finally found a place for their kids to feel comfortable with other kids like them and how wonderful it is to be able to call Code Ninjas their second home. Many parents have come in with children that are even on the autism spectrum and have noted marked improvements in their ability to relate and communicate in other parts of their lives outside of the dojo.

Our Code Senseis are usually advanced seniors in high school or undergraduates in college. These are the kids that I would have loved to hang out with when I was young – the geeks and the nerds. But what was once a stigma is now worn as a badge of honor. The creativity and ingenuity of our Code Senseis when we give them a project to work on never ceases to amaze. They are constantly inventing new ways to teach problem solving skills to our ninjas in ways that the adults in the room would never consider. For this reason and more, we have setup a certification program for the Code Senseis so that they can add their skillsets to their applications going into college and resumes for their first careers, whether as programmers or in another field.

I am not only testifying today on behalf of Code Ninjas, but also as a member of the International Franchise Association (IFA), the world's oldest and largest organization representing franchising worldwide. IFA works to protect and promote franchising through advocacy and education on behalf of more than 733,000 franchise establishments and the 7.7 million people who support them. IFA members include franchise companies of all shapes and sizes, in over 300 different business format categories, including individual franchisees and companies that support the industry in marketing, law, technology, and business development. Franchising altogether accounts for \$674 billion in economic output for the U.S. economy and makes up 2.5 percent of GDP.

Code Ninjas has been a member of IFA since 2016. At that time, we had only one company center and had not sold any franchised centers. In March of 2017, we started franchising to expand our brand and we have grown to more than 250 centers in more than 30 states. None of this would have been possible without the franchising business model and the IP protections it relies on.

When Code Ninjas was ready to expand, I chose the franchising model, in part, because of this country's strong intellectual property protections. These protections give me, and other small business franchisors, the confidence that we are not just licensing our products and services, but also their quality. Because of these protections, I know that ninjas in our centers in Florida are receiving the same quality coding education as our ninjas in our Texas flagship location.

When people think of a franchise, they often picture large networks that operate nationally and internationally, like McDonald's, KFC, or Holiday Inn and Marriott. Those are great, high profile examples of franchising. But that's not the whole story. There is a wide range of size, market power, experience, and products and services among franchising companies. In fact, small businesses constitute a large majority of franchisors. These are small businesses like any other – they have a limited footprint, limited financial resources, often fledgling advertising programs, and relatively challenging competitive positions. In between these two extremes is Code Ninjas and other franchisors that have grown beyond the start-up phase and are becoming national competitors. Code Ninjas what the franchising community calls an “emerging franchisor”.

Franchising covers a broad spectrum of distribution relationships, but the majority fall into the “business format” category. These involve a license from the franchisor to the franchisee for the development of a business, an operating system for the business, and a trade identity under which the business will operate. In a business format franchise network, the structural emphasis is on maintaining the specifications, standards, and operating procedures that are essential to the establishment and operation of a business that reflects the franchisor's format, system, and quality of service standards. The common denominator in franchises is that they rely on a small business model and use economies of scale to grow. In Code Ninjas' case, we used economies of scale to teach youth STEM education at an accelerated rate, as well as

reduce the upfront costs to open such a facility by leveraging the buying power of our numerous small business franchisees as one.

Because franchisees are individual owners, ensuring brand protection is key to ensuring the customer's experience with the brand is of a consistent quality. The only way to give legal effect to brand protection is through intellectual property protection, specifically trademarks, service marks, trade dress, patents, copyrights, and trade secrets. In other words, franchising should be understood as a system of licensing intellectual property where the franchises are small businesses that hire, fire and set the hours of their own people - but the brand controls the look and feel of the system so the customer experience is consistent.

Significantly, the use of these protections by franchises has had a net-positive effective on the U.S. economy, helping to fuel the economy and spur growth both at home and overseas. And we're seeing franchising grow overseas, which brings money back through royalty fees.

In July 1946, recognizing the need to rebuild the economy and the importance that the licensing of intellectual property was to that essential effort, Congress passed the Federal Lanham (Trademark) Act. The Lanham Act is the primary federal trademark statute in the United States. Because of the actions by Congress, trademarks and service marks can be licensed and protected. Trademarks have long been an indicator of quality and source. Because of the Lanham Act, and its requirements that licensors police the use of its intellectual property licensed to third parties, franchisors have the right and the obligation to determine how their marks are used and do so in a way that protects the consuming public. The essential elements of brand standards and controls was carried into the rules promulgated by the Federal Trade Commission when they began to define and regulate franchising in 1979. Combined with the Lanham Act, the FTC Franchise Rule enabled small independent businesses to grow as part of a shared brand experience with other franchisees in a network.

The value of a franchise is in the franchisor's brand and how well the franchisor is allowed, under the law, to protect its use in delivering its products and services safely to consumers. This is the fundamental success story of the Lanham Act because it enabled franchisors to establish and preserve brand standards and ensured the consistent and sustainable replication of products and services throughout the United States.

Our goal, as a franchisor that considers itself a "franchisee support company", is to provide franchisees the tools they need to be successful. Franchisees come to us as teachers, lawyers, programmers, and sometimes experienced entrepreneurs, but there are always some parts of the process, curriculum, or operations that they would not be able to do easily or effectively without our help. We fill in the blanks that they have in order to give them the best chance at success. This means that we have to have a standardized set of training materials, branded uniforms, sales processes, and even jargon to use with parents so that Code Ninjas isn't distilled into a simple curriculum that can be found online, but instead an amazing experience for our ninjas and their parents as well. In fact, one of our trademarks is the term "Kids have fun, Parents see results" and this is the soul of our brand. It is obvious in all of the materials that we

produce and the policies that we make that this is our DNA as a company. Franchisees and customers alike come to expect this from us in everything we do and say, from the new curriculums that we produce to the posts we make on Facebook. Without it, we are like any other company with a computer and access the internet.

We need our messaging, logos, curriculums, training materials, and even our fully integrated and customized point of sale system to make our end to end experience special. Effective and fair IP protections in the US play a huge part in making all of this work effectively.

This is all to say that intellectual property protections are vital to the franchising model. Without these protections, Code Ninjas wouldn't be as successful as it is. But there are some areas in our IP protections fall short or can be improved.

**First**, registering your Franchise Discloser Document (FDD) with various states is important for franchises, but the process is laborious, costly, and must be improved. Some states make the process relatively easy. For example, North Carolina, South Carolina, Connecticut, and Maine exempt franchisors from registration requirements so long as the franchise already has a federally registered and approved trademark. But some states have much more cumbersome requirements, and this patchwork has put up roadblocks and unneeded costs to getting started.

In the end, registering with states individually has taken longer than we had hoped, cost us capital that could be more effectively spent on our business, and has slowed us down as we were planning to grow. A national solution to the franchise disclosure process that is fair, simple, and without unneeded costly provisions would give a single authority to work with and a simple set of conditions to comply with in order to operate on a national scale in the US, saving everyone time, effort and money.

**Second**, the ongoing protection of our IP rights can be improved. We have seen a number of companies apply for trademarks that would have confused our brand with theirs. We need a more immediate feedback loop from the government on our registered trademarks so that we can be alerted when terms or marks are attempted to be registered that are like our own. This will make it easier for us to identify copycats. The current process can linger for months before the existing owner is notified, if at all.

**Third**, we need stronger international protections. In the digital realm, it's difficult to keep our brand separate from those in other countries. Even in our first year, we have seen copycats in the UK and elsewhere who were essentially squatting on our brand. These squatters are able to game the system in part because there are no implicit protections for URLs that contain our US registered trademarks, codeninjas.eu for example, which means we have no remedy to address these squatters other than paying them an effective ransom for something that should be ours by registration. As Code Ninjas is filing our trademarks through the Madrid System (WIPO), we are especially concerned about these weak protections in other countries as it pertains to existing trademarks in the US.

**Fourth**, we need to strengthen our protections against misleading advertisements. We fortunately haven't experienced negative reputation issues from misleading advertisements, but we do see our trademarks being used by others as search terms or in their ad space. Our largest competitor, for example, used our trademark "Code Ninjas" in their advertisement in an effort to funnel people interested in Code Ninjas to other companies instead. There aren't strong protections to help us remedy this IP infringement, and this is especially true for social media platforms like Glassdoor, Instagram, and Twitter where there is zero protection outside of what the respective companies' policies dictate. Google does provide some tools to enforce registered trademarks in the actual text of the ads, which is a good start, but they still allow our competitors to show their ads when Google users search the term "Code Ninjas", effectively usurping our brand when our customers are clearly looking to make a purchase from us.

**Fifth**, we need to clarify the joint employer standard and give franchisees the predictability they need to hire new employees, train existing ones, and unlock the full economic potential of their communities. For example, I am concerned that if I provide certain training materials to my franchisees – which are important materials for brand consistency and that add real value to their small businesses – provisions of those materials could be construed as creating a joint employer relationship. The legal risk of providing these materials is bad for both the franchisor and the franchisee, not to mention the employees. Fortunately, last fall, the House passed the "Save Local Business Act," which is a commonsense bill with bipartisan support that protects business relationships and promotes economic growth. IFA and its membership strongly recommend that Congress enact this legislative solution.

**Sixth**, too many franchise small business owners are preyed upon by 'patent trolls.' These patent trolls send vague and deceptive demand letters alleging infringement and demand unjustified payments from small business owners. Code Ninjas hasn't yet needed to fight these patent trolls, but no small businesses are immune from them.

To address these concerns and others felt by the franchising industry, the regulatory and legal landscape needs to be reformed to:

- Require demand letters to include truthful, basic information;
- Require patent owners to explain in detail exactly how infringement occurs when they file a complaint, including an explanation of the claim, the product involved, and how the patent is infringed;
- Allow the patent owner and manufacturer's case to proceed first;
- Clarify FTC exiting enforcement authority on demand letters;
- Eliminate the confusing patchwork of state IP laws in favor of 'one right, everywhere';
- Consider English rule if frivolous claims are made;
- Fee diversion; and
- Revamp the PTO to provide less expensive alternatives to litigation, ensuring a fair oversight mechanism for questionable patents, rather than deferring to lawyers.

Thank you for your time and for hearing my perspective on the importance of IP protections, and I hope the Committee will continue to work with the International Franchise Association to support small franchise entrepreneurs and ensure that the franchise business model remains viable for the thousands of Americans who want to start their own small business.