



THE COALITION FOR 21<sup>ST</sup> CENTURY PATENT REFORM

Protecting Innovation to Enhance American Competitiveness

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## **21C Commends Chairman Burgess for Moving the "Targeting Rogue and Opaque Letters Act of 2015"**

The Coalition for 21<sup>st</sup> Century Patent Reform ("21C") strongly supports the efforts of the Commerce, Manufacturing, and Trade Subcommittee of the House Energy and Commerce Committee, under the leadership of Chairman Michael Burgess, to move forward with legislation to address bad faith patent demand letters. Such letters, designed to intimidate or coerce recipients who lack the expertise or resources to investigate or defend against bad faith assertions of patent infringement into extortionist settlements, have no place in a well-functioning patent system.

On the other hand, given the critical role that patent licensing plays in stimulating and protecting our nation's innovators, 21C continues to urge caution and balance to ensure that efforts to address what may be a small subset of egregious patent demand letter abuses do not inadvertently chill legitimate patent licensing communications. The patent system is designed to encourage notice and communication to foster respect for patent rights, licensing and technology dissemination, and legislation addressing demand letters should be carefully-tailored so that it does not impede legitimate communications that are so crucial to our nation's innovation ecosystem.

The Targeting Rogue and Opaque Letters Act of 2015 (TROL Act) achieves this crucial balance. It effectively identifies and targets abusive behavior while being narrowly-tailored and measured to avoid the risk of unintended consequences or collateral damage to legitimate patent licensing communications. It appropriately empowers the United States Federal Trade Commission (FTC), and the attorneys general in each of the 50 states, with civil remedies against any pattern or practice of objectively defined and identifiable unfair or deceptive acts or practices in connection with the sending of patent demand letters in bad faith. Upon enactment, the TROL Act will provide recipients of patent demand letters and patent holders alike with clear, uniform, nationwide rules governing the content of patent assertion and licensing communications.

The TROL Act represents a targeted and balanced approach to solving this problem that reflects substantial input and negotiations among stakeholders representing multiple industries and business models. 21C supports the TROL Act as a fair and effective solution to put a stop to bad faith demand letters across the nation and 21C urges lawmakers to resist calls to dismantle or restructure its carefully-crafted framework of provisions through amendments that will upset the balance and compromises it reflects.

## **The Problem of Bad Faith Patent Demand Letters Requires a Uniform Federal Solution**

The public and patent owners alike will benefit from the adoption of clear, balanced and uniform federal legislation addressing patent demand letters on a nationwide basis. From its origins in the Constitution, patent law has always been exclusively within the province of federal statutes and courts, and so too should issues relating to patent demand letters be applied consistently and uniformly nationwide through federal legislation, regulation and judicial action. The current patchwork of differing – and often inconsistent – state patent demand letter laws that has arisen over the past two years risks weakening our patent system by making patent licensing and enforcement more difficult, costly, and less certain. Ironically, the difficulty of navigating through the growing maze of differing state laws may incent patent owners to adopt a “sue first, talk later” approach, resulting in more, not less, patent litigation.

Thus, it is imperative that federal legislation provide nationwide “rules of the road” for patent demand letters to replace the current mix of differing state laws. The TROL Act would achieve this goal by applying clear and consistent standards to patent demand letters nationwide, and it would bring those same standards to the more than 20 states that have not enacted patent demand letter laws. Importantly, however, the TROL Act would deliver this uniformity in a manner that does not preclude the states from taking action to protect their citizens from bad faith demand letters. Both the FTC and the state attorneys general would be authorized to bring civil actions in federal court alleging violations of the TROL Act. In this manner, the TROL Act would preserve the roles of the states in fulfilling their traditional consumer protection function.

### **Legislation Should Target the “Pattern or Practice” of Sending Bad Faith Demand Letters**

Patent owners engaged in legitimate patent licensing communications have no desire to deceive or mislead any recipients of their communications. To the contrary, it is in their interest to provide sufficient information to make clear their ownership of the patent rights in question and their intentions to license or enforce those rights. In contrast, the problem that needs to be addressed is caused by those patent owners who have made it their “business model” to engage in a pattern or practice of sending patent demand letters intended to deceive or mislead enough recipients to extort a series of settlements. They literally send hundreds – even thousands – of letters to small businesses or individuals with false or misleading threats of litigation and demand for payment. All the stories of patent demand letter abuses of which we are aware have involved this “business model” based on the widespread sending of bad faith demand letters, in hopes that some percentage of smaller or unsophisticated recipients will be coerced into settling.<sup>1</sup>

Thus, a “pattern or practice” of sending deceptive or misleading patent demand letters is one important way to distinguish between legitimate patent licensing communications and schemes to extract extortionist settlements. Focusing enforcement authority on a “pattern or practice” of sending bad faith demand letters will not curtail or diminish the ability of the

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<sup>1</sup> *In the Matter of MPHJ Technology Investments, Jay Mac Rust LLC, and Farney Daniels, P.C.*, FTC, File No. 142 3003 (available at <https://www.ftc.gov/system/files/documents/cases/141106mphjagree.pdf>); See also *In re Innovatio IP Ventures, LLC Patent Litig.*, 921 F. Supp.2d 903 (N.D. Ill. 2013) (available at <http://www.leagle.com/decision/In%20FDCO%2020130205842>).

FTC or state attorneys general to protect the public against the extortionist “business model” that has led to widespread calls for patent demand letter legislation. But by targeting enforcement authority against a “pattern or practice” of sending bad faith demand letters, the TROL Act effectively stops that “business model” while reducing the risk of unintended consequences to legitimate licensing communications.

Moreover, the “pattern or practice” language in the TROL Act is important to ensure that the FTC and state attorneys general will not be drawn into individual disputes between patent owners and particular potential licensees or alleged infringers. Congress should not create the possibility that the recipient of a single demand letter, or a defendant in an ensuing infringement suit, could seek to draw the FTC or its state attorney general’s office into the dispute to exert leverage against the patent owner, under the guise of consumer protection. Such individual patent disputes should be decided on their merits by the federal courts applying the Patent Act, not by invoking federal or state enforcement authority under what is designed to be a statute to protect the public against unfair or deceptive acts or practices. The “pattern or practice” requirement guards against this risk of misuse by ensuring that enforcement authority vests only when a “pattern or practice” of bad faith demand letters has made it appropriate for the FTC or a state attorney general to protect the public.

**The Bad Faith Requirement is Essential to Distinguish  
Legitimate Communications from Bad Faith Demand Letters**

The appropriate goal of legislation should be to identify, and empower the FTC and state attorneys general to address through clearly-defined enforcement powers, those demand letters which are truly and clearly intended to deceive or mislead their recipients. In addition, legislation should not infringe the constitutional protections under the First Amendment long afforded to legitimate licensing or assertion communications by patent owners. The bad faith requirement is an essential element of the TROL Act for both of these reasons. 21C thus believes it is imperative, both in the interests of sound patent law and policy, and to ensure the constitutionality of the TROL Act, to preserve the bad faith requirement and to define bad faith as “knowingly false or knowingly misleading statements or representations, or statements or representations made with reckless disregard for the truth or falsity of such statements or representations.”

This bad faith requirement is essential to ensure that the legislation does not impede or chill legitimate patent licensing and enforcement communications. Those bad actors who engage in the “business model” of sending false or deceptive patent demand letters clearly do so in bad faith under this definition. Their letters contain statements or representations that are either knowingly false or misleading, or that are made with reckless disregard for their truth or falsity. For example, they may falsely state that litigation has been filed against the recipient, or they may seek compensation for activities undertaken after a patent has expired, or has been held to be invalid. Enforcement by the FTC or a state attorney general should be targeted against such bad faith communications, not against any patent demand letter that a recipient may allege is wrong, mistaken or inadequately researched. Again, those are substantive patent law disputes that should be resolved by the federal courts applying the Patent Act, not by the FTC or a state attorney general invoking laws designed to protect the public against unfair or deceptive acts or practices.

This definition of “bad faith” also would help to ensure that the legislation is not vulnerable to challenge on constitutional grounds as intruding upon protected rights of free speech.

Courts have held that patent demand letters fall within the First Amendment’s guarantee of “the right of the people . . . to petition the Government for a redress of grievances,” U.S. Const. Amend. I.<sup>2</sup> Thus, First Amendment law is instructive in seeking an appropriate balance between addressing fraudulent activity while not inhibiting free speech rights associated with patent licensing and enforcement communications. In *New York Times v. Sullivan*, the Supreme Court held that, under the First and Fourteenth Amendments, factual error is insufficient to warrant an award of damages for false statements unless “actual malice” – *i.e.*, knowledge that a statement is false or in reckless disregard of the truth – is proven.<sup>3</sup> This same standard provides a well-tailored, balanced and effective way to identify bad faith patent demand letters. By targeting patent demand letters that contain “knowingly false or knowingly misleading statements or representations, or statements or representations made with reckless disregard for the truth or falsity of such statements or representations,” the legislation will achieve the appropriate balance. It will empower the FTC and state attorneys general to stop the bad actors (whose letters easily meet this standard), protect patent holders engaging in legitimate licensing and enforcement communications (who do not send out letters that meet this standard) and ensure that the legislation is not vulnerable to challenge on constitutional grounds.

### **An Affirmative Defense Is Needed to Protect Patent Owners Acting in Good Faith**

The TROL Act’s affirmative defense, affording an inventor or patent owner the right to prove that letters seeking to license patent rights were sent in good faith, also helps to ensure that the bill strikes the right balance. The affirmative defense further balances the need to provide an effective solution to stop the sending of bad faith patent demand letters against the risk that overly-broad legislation will stifle legitimate patent licensing communications. The targets of this legislation are, and should be, those patent owners who have made it their business practice to send bad faith demand letters. In the language of the affirmative defense, they do not, in the usual course of their business, send written communications that do not violate the Act. Thus, the affirmative defense will not allow them to avoid liability. On the other hand, a legitimate inventor or patent owner who is not the target of the Act should be entitled to prove it was not acting in bad faith by demonstrating that its communications sent in the usual course of business do not violate the provisions of the Act. Such evidence should remove any basis for a finding that a particular letter was sent in bad faith and will avoid the risk that the Act imposes liability on an inventor or patent owner who is not acting in bad faith.

### **The 21C Pledges to Continue its Work with Congress to Achieve Legislation Targeting Abusive Behavior That It Can Strongly Support**

As the TROL Act moves through the legislative process, 21C looks forward to continuing to work to ensure that it targets the abusive behavior it is intended to stop while safeguarding legitimate patent licensing and enforcement communications. The definition of “bad faith” is one area where 21C believes the bill can be improved, by applying the definition discussed above. Overall, however, 21C believes that the TROL Act effectively identifies and targets

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<sup>2</sup>*See, e.g., In re Innovatio IP Ventures, LLC Patent Litig.*, 921 F. Supp.2d 903, 910 (N.D. Ill. 2013) (available at <http://www.leagle.com/decision/In%20FDCO%2020130205842>).

<sup>3</sup> 376 U.S. 254 (1964).

abusive behavior while being narrowly-tailored and measured to avoid the risk of unintended consequences to legitimate patent communications, and it achieves the important goal of applying clear and consistent standards to patent demand letters nationwide while preserving the roles of the states in fulfilling their traditional consumer protection function.

We thank Chairman Burgess, the Commerce, Manufacturing, and Trade Subcommittee of the House Energy and Commerce Committee, and their staffs for their hard work to find a balanced and effective solution to the problem of abusive patent demand letters. 21C pledges to work with Chairman Burgess and the members of the House Energy and Commerce Committee, their staffs and other stakeholders to further improve the TROL Act as it moves through the legislative process.

The Coalition for 21st Century Patent Reform has more than 40 members from 18 diverse industry sectors and includes many of the nation's leading manufacturers and researchers. The coalition's steering committee includes 3M, Bristol-Myers Squibb, Caterpillar, ExxonMobil, General Electric, Procter & Gamble, Johnson & Johnson, and Eli Lilly. For more information, visit <http://www.patentsmatter.com>.