H. R. 114TH CONGRESS 1ST SESSION

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

Mr. Burgess 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 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 2015”.

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 that state or represent 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 sender of the communications, in bad faith, states or represents in the communications that—

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

(B) a civil action asserting a claim of infringement of the patent has been filed against the recipient;

(C) a civil action asserting a claim of infringement of the patent has been filed against other persons;
(D) legal action for infringement of the patent will be taken against the recipient;

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

(F) persons other than the recipient purchased a license for the patent asserted in the communications;

(G) persons other than the recipient purchased a license, and the sender does not disclose that such license is unrelated to the alleged infringement or the patent asserted in the communications;

(H) an investigation of the recipient’s alleged infringement occurred; or

(I) the sender or an affiliate of the sender previously filed a civil action asserting a claim of infringement of the patent based on the activity that is the subject of the written communication when the sender knew such activity was held, in a final determination, not to infringe the patent;

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

(A) a patent claim that has been held to be unenforceable due to inequitable conduct, in-
valid, or otherwise unenforceable against the recip-
cient, 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

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

(A) the identity of the person asserting a right to license the patent to, or enforce the patent against, the recipient, including the identity of any parent entity and the ultimate parent entity of such person, unless such person is a public company and the name of the public company is identified;

(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 recipi-
ent that is alleged to infringe the identified pat-
ent;

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

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

(b) AFFIRMATIVE DEFENSE.—With respect to sub-
section (a), there shall be an affirmative defense that
statements, representations, or omissions were not made
in bad faith (as defined in subparagraphs (B) and (C) of
section 5(1)) if the sender can demonstrate that such
statements, representations, or omissions were mistakes
made in good faith, which may be demonstrated by a pre-
ponderance of evidence that the violation was not inten-
tional and resulted from a bona fide error notwithstanding
the maintenance of procedures reasonably adapted to
avoid any such error.

(c) RULE OF CONSTRUCTION.—For purposes of sec-
tions 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 18(a)(1)(B) of the Federal Trade Commission Act (15 U.S.C. 57a(a)(1)(B)).

(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, 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 civil penalties.
(2) MAXIMUM CIVIL PENALTY.—Notwithstanding the number of actions which may be brought against a person under this subsection, a person may not be liable for a total of more than $5,000,000 for a series of related violations of section 2.

(3) 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 Commission 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 instituting 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 Commission 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 complaint.

(4) CONSTRUCTION.—For purposes of bringing any civil action under paragraph (1), nothing in this Act shall be construed to prevent the attorney general 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 evidence.

SEC. 5. DEFINITIONS.

In this Act:

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

(A) made knowingly false or knowingly misleading statements, representations, or omissions;
(B) made statements, representations, or omissions with reckless indifference as to the
false or misleading nature of such statements, representations, or omissions; or

(C) made statements, representations, or omissions with awareness of the high probability of the statements, representations, or omissions to deceive and the sender intentionally avoided the truth.

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

(3) FINAL DETERMINATION.—The term “final determination” means, with respect to the invalidity or unenforceability of a patent, that the invalidity or unenforceability 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.