

**[DISCUSSION DRAFT]**

MAY 15, 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 [“\_\_\_\_\_ Act  
5        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 to consumers, end users, or  
10 systems integrators that state or imply that the recipients  
11 are or may be infringing, or have or may have infringed,  
12 the patent and bear liability or owe compensation to an-  
13 other, if—

14 (1) the person asserting the patent is not a per-  
15 son with the right, or does not represent a person  
16 with the right, to license or enforce the patent at the  
17 time the communications are sent;

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

20 (A) litigation for infringement of the pat-  
21 ent has been filed against the recipient;

22 (B) litigation for infringement of the pat-  
23 ent has been filed against other persons;

24 (C) legal action for infringement of the  
25 patent will be taken against the recipient;

1 (D) the sender is the exclusive licensee of  
2 the patent asserted in the communications;

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

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

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

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

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

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

23 (B) activities undertaken by the recipient  
24 after expiration of the patent asserted in the  
25 communications; or

1 (C) activity of the recipient that the sender  
2 knew was authorized, with respect to the patent  
3 claim or claims that are the subject of the com-  
4 munications, by a person with the right to li-  
5 cense the patent; or

6 (4) the communications fail to include—

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

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

13 (C) an identification, to the extent reason-  
14 able under the circumstances, of at least one  
15 product, service, or other activity of the recipi-  
16 ent that is alleged to infringe the identified pat-  
17 ent or patents;

18 (D) a description, to the extent reasonable  
19 under the circumstances, of how the product,  
20 service, or other activity of the recipient in-  
21 fringes the identified patent or patents; or

22 (E) a name and contact information for a  
23 person the recipient may contact about the as-  
24 sertions or claims relating to the patent or pat-  
25 ents contained in the communications.

1 (b) REBUTTABLE PRESUMPTION.—There shall be a  
2 rebuttable presumption, with respect to subsection (a)(4),  
3 that sending written communications to consumers, end  
4 users, or systems integrators stating that the recipients  
5 are infringing or have infringed a patent and bear liability  
6 or owe compensation to another is not an unfair or decep-  
7 tive act or practice within the meaning of section 5(a)(1)  
8 of the Federal Trade Commission Act (15 U.S.C.  
9 45(a)(1)) if—

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

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

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

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

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

1 18(a)(1)(B) of the Federal Trade Commission Act (15  
2 U.S.C. 57a(a)(1)(B)).

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

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

15 **SEC. 4. PREEMPTION OF STATE LAWS ON PATENT DEMAND**  
16 **LETTERS AND ENFORCEMENT BY STATE AT-**  
17 **TORNEYS GENERAL.**

18 (a) PREEMPTION.—

19 (1) IN GENERAL.—This Act preempts any law,  
20 rule, regulation, requirement, standard, or other pro-  
21 vision having the force and effect of law of any  
22 State, or political subdivision of a State, expressly  
23 relating to the transmission or contents of commu-  
24 nications relating to the assertion of patent rights.

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

7           (b) ENFORCEMENT BY STATE ATTORNEYS GEN-  
8 ERAL.—

9           (1) IN GENERAL.—In any case in which the at-  
10 torney general of a State has reason to believe that  
11 an interest of the residents of that State has been  
12 adversely affected by any person who violates section  
13 2, the attorney general of the State, as *parens*  
14 *patriae*, may bring a civil action on behalf of such  
15 residents of the State in a district court of the  
16 United States of appropriate jurisdiction—

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

19                   (B) to obtain compensatory damages on  
20 behalf of recipients who suffered actual dam-  
21 ages as a result of such violation.

22           (2) INTERVENTION BY THE FTC.—

23           (A) NOTICE AND INTERVENTION.—The at-  
24 torney general of a State shall provide prior  
25 written notice of any action under paragraph

1 (1) to the Commission and provide the Commis-  
2 sion with a copy of the complaint in the action,  
3 except in any case in which such prior notice is  
4 not feasible, in which case the attorney general  
5 shall serve such notice immediately upon insti-  
6 tuting such action. The Commission shall have  
7 the right—

8 (i) to intervene in the action;

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

11 (iii) to file petitions for appeal.

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

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



1 on the attorney general by the laws of that State  
2 to—

3 (A) conduct investigations;

4 (B) administer oaths or affirmations; or

5 (C) compel the attendance of witnesses or  
6 the production of documentary and other evi-  
7 dence.

8 **SEC. 5. DEFINITIONS.**

9 In this Act:

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

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

19 (3) **CONSUMER.**—The term “consumer” means  
20 an individual who purchases or contracts for pur-  
21 chase, rents, leases, or otherwise legally obtains or  
22 uses a product, device, business method, service,  
23 software, technology, website, or other merchandise  
24 for the personal use of such individual, or of a mem-

1 ber of the household of such individual, and not for  
2 commercial resale purposes.

3 (4) **END USER.**—The term “end user” means a  
4 person who—

5 (A) purchases or contracts for purchase,  
6 rents, leases, or otherwise legally obtains or  
7 uses a product, device, business method, service,  
8 software, technology, website, or other merchan-  
9 dise; and

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

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

21 (6) **RECIPIENT.**—The term “recipient” means a  
22 consumer, end user, or systems integrator who re-  
23 ceives a communication alleging patent infringement  
24 and who has had no established business relation-  
25 ship with the sender.

1           (7) SENDER.—The term “sender” means, with  
2           respect to a written communication alleging patent  
3           infringement, a person who has the right to license  
4           or enforce the patent at the time the communication  
5           is sent, or a person who represents such person, or  
6           both.

7           **[(8) SYSTEMS INTEGRATOR.—The term “sys-**  
8           **tems integrator” means a person who develops or**  
9           **contracts for the development of a website or mobile**  
10          **application that incorporates retail software or serv-**  
11          **ices (including website, network, or analytics serv-**  
12          **ices) intended for direct sale or license to consumers**  
13          **or end users.】**