To strengthen the position of the United States as the world’s leading innovator by amending title 35, United States Code, to protect the property rights of the inventors that grow the country’s economy.

IN THE SENATE OF THE UNITED STATES

MARCH 3, 2015

Mr. COONS (for himself, Mr. DURBIN, and Ms. HIRANO) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To strengthen the position of the United States as the world’s leading innovator by amending title 35, United States Code, to protect the property rights of the inventors that grow the country’s economy.

Be it enacted by the Senate and House of Representa-
tives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) Short Title.—This Act may be cited as the “Support Technology and Research for Our Nation’s Growth Patents Act of 2015” or the “STRONG Patents Act of 2015”.

1  114TH CONGRESS
2  1ST SESSION
3  S. 632

To strengthen the position of the United States as the world’s leading innovator by amending title 35, United States Code, to protect the property rights of the inventors that grow the country’s economy.
(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.

TITLE I—STRONG PATENTS ACT

Sec. 101. Findings.
Sec. 102. Inter partes review.
Sec. 103. Post-grant review.
Sec. 104. Composition of post-grant review and inter partes review panels.
Sec. 105. Reexamination of patents.
Sec. 106. Elimination of Form 18.
Sec. 107. Elimination of USPTO fee diversion.
Sec. 108. Willful infringement.
Sec. 109. Divided infringement.
Sec. 110. Institutions of higher education.
Sec. 111. Assisting small businesses in the U.S. patent system.

TITLE II—TARGETING ROGUE AND OPAQUE LETTERS

Sec. 201. Definitions.
Sec. 202. Unfair or deceptive acts or practices in connection with the assertion of a United States patent.
Sec. 203. Enforcement by Federal Trade Commission.
Sec. 204. Preemption of State laws on patent demand letters and enforcement by State attorneys general.

3 TITLE I—STRONG PATENTS ACT

4 SEC. 101. FINDINGS.

Congress finds that—

(1) the patent property rights enshrined in the Constitution of the United States provide the foundation for the exceptional innovation environment in the United States;

(2) strong patent rights encourage United States inventors to invest their resources in creating new inventions;

(3) patent protection has led to patient cures, positive changes to the standard of living for all peo-
people in the United States, and improvements to the agricultural, telecommunications, and electronics industries, among others;

(4) the United States patent system is an essential part of the country’s economic success;

(5) strong patent protection improves the chances of success for small companies and increases their chances of securing financing from investors;

(6) intellectual property-intensive industries in the United States generate tens of millions of jobs for individuals in the United States;

(7) intellectual property-intensive industries in the United States account for more than one-third of the country’s gross domestic product;

(8) in the highly competitive global economy, the United States needs to uphold strong patent protections to maintain its position as the world’s premier innovative country;

(9) Congress last enacted comprehensive reforms of the patent system only a few years ago, in 2011;

(10) unintended consequences of the comprehensive 2011 reform of patent laws are continuing to become evident, including the strategic fil-
ing of post-grant review proceedings to depress stock
prices and extort settlements;

(11) the Judicial Conference of the United
States is in the process of making significant revi-
sions to rules governing pleadings and discovery in
the Federal Rules of Civil Procedure, with changes
scheduled to take effect in December 2015;

(12) the Supreme Court recently issued rulings
in Octane Fitness, LLC v. Icon Health & Fitness,
Inc., 134 S.Ct. 1749 (2014) and Highmark Inc. v.
1744 (2014) that significantly reduced the burden
on an alleged infringer to recover attorney fees from
the patent owner, and increased the incidence of fees
shifted to the losing party; and

(13) efforts by Congress to reform the patent
system without careful scrutiny create a serious risk
of making it more costly and difficult for legitimate
innovators to protect their patents from infringe-
ment, thereby weakening United States companies
and the United States economy.

SEC. 102. INTER PARTES REVIEW.

(a) CLAIM CONSTRUCTION.—Section 316(a) of title
35, United States Code, is amended—
(1) in paragraph (12), by striking “; and” and inserting a semicolon;
(2) in paragraph (13), by striking the period at the end and inserting “; and”; and
(3) by adding at the end the following:
“(14) providing that for all purposes under this chapter—

“(A) each claim of a patent shall be construed as the claim would be construed under section 282(b) in an action to invalidate a patent, including by construing each claim of the patent in accordance with—

“(i) the ordinary and customary meaning of the claim as understood by a person having ordinary skill in the art to which the claimed invention pertains; and

“(ii) the prosecution history pertaining to the patent; and

“(B) if a court has previously construed a claim of a patent or a claim term in a civil action to which the patent owner was a party, the Office shall consider that claim construction.”.

(b) AMENDMENT OF CLAIMS.—Section 316(d) of title 35, United States Code, is amended to read as follows:

“(d) AMENDMENT OF THE PATENT.—
“(1) IN GENERAL.—During an inter partes review instituted under this chapter, the patent owner may move to amend the patent in 1 or more of the following ways:

“(A) Cancel any challenged patent claim.

“(B) For each challenged claim, propose a reasonable number of substitute claims.

“(2) INITIAL AMENDMENT.—If the patent owner has not amended the patent under this subsection, a motion to amend filed by the patent owner shall be granted if the proposed number of substitute claims is reasonable.

“(3) ADDITIONAL AMENDMENTS.—

“(A) PERMISSION TO FILE MOTIONS.—If the patent owner has amended the patent under this subsection, additional motions to amend may be permitted upon—

“(i) the joint request of the petitioner and the patent owner to materially advance the settlement of a proceeding under section 317; or

“(ii) the request of the patent owner for good cause shown.

“(B) DISCRETION TO GRANT MOTIONS.—

The Patent Trial and Appeal Board shall deter-
mine, in its discretion, whether to grant or deny
a motion filed under this paragraph.

“(4) Scope of claims.—An amendment to a
patent under this subsection may not enlarge the
scope of the claims of the patent or introduce new
matter.”.

(e) Burden of Proof.—Section 316(e) of title 35,
United States Code, is amended to read as follows:

“(e) Evidentiary Standards.—

“(1) Presumption of validity.—The pre-
sumption of validity under section 282(a) shall apply
to a previously issued claim that is challenged dur-
ing a proceeding under this chapter.

“(2) Burdens of proof.—In an inter partes
review instituted under this chapter, the petitioner
shall have the burden of proving—

“(A) a proposition of unpatentability of a
previously issued claim by clear and convincing
evidence; and

“(B) a proposition of unpatentability of a
proposed amended claim by a preponderance of
the evidence.”.

(d) Standing.—Section 311 of title 35, United
States Code, is amended by adding at the end the fol-
lowing:
“(d) PERSONS THAT MAY PETITION.—

“(1) DEFINITION.—In this subsection, the term ‘charged with infringement’ means a real and substantial controversy regarding infringement of a patent exists such that the petitioner would have standing to bring a declaratory judgment action in Federal court.

“(2) NECESSARY CONDITIONS.—A person may not file with the Office a petition to institute an inter partes review of a patent unless the person, or a real party in interest or privy of the person, has been—

“(A) sued for infringement of the patent;

or

“(B) charged with infringement under the patent.”.

(e) DISCOVERY OF REAL PARTY IN INTEREST.—Section 316(a)(5) of title 35, United States Code, is amended to read as follows:

“(5) setting forth standards and procedures for discovery of relevant evidence, including that such discovery shall be limited to—

“(A) the deposition of witnesses submitting affidavits or declarations;
“(B) evidence identifying the petitioner’s real parties in interest; and

“(C) what is otherwise necessary in the interest of justice;’’.

(f) Evidence Supporting Preliminary Response.—Section 313 of title 35, United States Code, is amended—

(1) by striking “If an” and inserting the following:

“(a) IN GENERAL.—If an’’; and

(2) by adding at the end the following:

“(b) SUPPORTING EVIDENCE.—In filing a preliminary response under subsection (a), the patent owner may present any supporting evidence that the petitioner is permitted to present under section 312(a)(3).

“(c) REPLY AND SURREPLY.—If the Patent Trial and Appeal Board permits the petitioner to submit a reply to a preliminary response filed under subsection (a) and the petitioner presents additional evidence in that reply, the patent owner may submit a brief surreply, which shall be limited to addressing the additional evidence, including with appropriate rebuttal evidence.”.

(g) Coordination of Proceedings.—Section 314(a) of title 35, United States Code, is amended—
(1) by striking “Threshold.—The Director” and inserting the following: “Requirements for Authorization by Director.—

“(1) Threshold.—The Director”; and

(2) by adding at the end the following:

“(2) Patents that are subjects of other proceedings.—The Director may not institute an inter partes review of a patent while the patent is the subject of a—

“(A) reissue proceeding under chapter 25; or

“(B) reexamination proceeding under chapter 30.”.

SEC. 103. POST-GRANT REVIEW.

(a) Claim Construction.—Section 326(a) of title 35, United States Code, is amended—

(1) in paragraph (11), by striking “; and” and inserting a semicolon;

(2) in paragraph (12), by striking the period at the end and inserting “; and”; and

(3) by adding at the end the following:

“(13) providing that for all purposes under this chapter—

“(A) each claim of a patent shall be construed as the claim would be construed under
section 282(b) in an action to invalidate a patent, including by construing each claim of the patent in accordance with—

“(i) the ordinary and customary meaning of the claim as understood by a person having ordinary skill in the art to which the claimed invention pertains; and

“(ii) the prosecution history pertaining to the patent; and

“(B) if a court has previously construed a claim of a patent or a claim term in a civil action to which the patent owner was a party, the Office shall consider that claim construction.”.

(b) AMENDMENT OF CLAIMS.—Section 326(d) of title 35, United States Code, is amended to read as follows:

“(d) AMENDMENT OF THE PATENT.—

“(1) IN GENERAL.—During a post-grant review instituted under this chapter, the patent owner may move to amend the patent in 1 or more of the following ways:

“(A) Cancel any challenged patent claim.

“(B) For each challenged claim, propose a reasonable number of substitute claims.

“(2) INITIAL AMENDMENT.—If the patent owner has not amended the patent under this sub-
section, a motion to amend filed by the patent owner shall be granted if the proposed number of substitute claims is reasonable.

“(3) ADDITIONAL AMENDMENTS.—

“(A) PERMISSION TO FILE MOTIONS.—If the patent owner has amended the patent under this subsection, additional motions to amend may be permitted upon—

“(i) the joint request of the petitioner and the patent owner to materially advance the settlement of a proceeding under section 327; or

“(ii) the request of the patent owner for good cause shown.

“(B) DISCRETION TO GRANT MOTIONS.—

The Patent Trial and Appeal Board shall determine, in its discretion, whether to grant or deny a motion filed under this paragraph.

“(4) SCOPE OF CLAIMS.—An amendment to a patent under this subsection may not enlarge the scope of the claims of the patent or introduce new matter.”.

(e) BURDEN OF PROOF.—Section 326(e) of title 35, United States Code, is amended to read as follows:

“(e) EVIDENTIARY STANDARDS.—
“(1) Presumption of validity.—The presumption of validity under section 282(a) shall apply to a previously issued claim that is challenged during a proceeding under this chapter.

“(2) Burdens of proof.—In a post-grant review instituted under this chapter, the petitioner shall have the burden of proving—

“(A) a proposition of unpatentability of a previously issued claim by clear and convincing evidence; and

“(B) a proposition of unpatentability of a proposed amended claim by a preponderance of the evidence.”.

(d) Standing.—Section 321 of title 35, United States Code, is amended by adding at the end the following:

“(d) Persons that may petition.—

“(1) Definition.—In this subsection, the term ‘charged with infringement’ means a real and substantial controversy regarding infringement of a patent exists such that the petitioner would have standing to bring a declaratory judgment action in Federal court.

“(2) Necessary conditions.—A person may not file with the Office a petition to institute a post-
grant review of the patent unless the person, or a real party in interest or privy of the person, demonstrates—

“(A) a reasonable possibility of being—

“(i) sued for infringement of the patent; or

“(ii) charged with infringement under the patent; or

“(B) a competitive harm related to the validity of the patent.”.

(e) DISCOVERY OF REAL PARTY IN INTEREST.—Section 326(a)(5) of title 35, United States Code, is amended to read as follows:

“(5) setting forth standards and procedures for discovery of relevant evidence, including that such discovery shall be limited to—

“(A) the deposition of witnesses submitting affidavits or declarations; and

“(B) evidence identifying the petitioner’s real parties in interest.”.

(f) EVIDENCE SUPPORTING PRELIMINARY RESPONSE.—Section 323 of title 35, United States Code, is amended—

(1) by striking “If a” and inserting the following:
“(a) IN GENERAL.—If a”; and

(2) by adding at the end the following:

“(b) SUPPORTING EVIDENCE.—In filing a preliminary response under subsection (a), the patent owner may present any supporting evidence that the petitioner is authorized to present under section 322(a)(3).

“(c) REPLY AND SURREPLY.—If the Patent Trial and Appeal Board permits the petitioner to submit a reply to a preliminary response filed under subsection (a) and the petitioner presents additional evidence in that reply, the patent owner may submit a brief surreply, which shall be limited to addressing that evidence, including with appropriate rebuttal evidence.”.

(g) COORDINATION OF PROCEEDINGS.—Section 324(a) of title 35, United States Code, is amended—

(1) by striking “THRESHOLD.—The Director” and inserting the following: “REQUIREMENTS FOR AUTHORIZATION BY THE DIRECTOR.—

“(1) THRESHOLD.—The Director”; and

(2) by adding at the end the following:

“(2) PATENTS THAT ARE SUBJECTS OF OTHER PROCEEDINGS.—The Director may not institute a post-grant review of a patent while the patent is the subject of a—
“(A) reissue proceeding under chapter 25; or

“(B) reexamination proceeding under chapter 30.”.

SEC. 104. COMPOSITION OF POST-GRANT REVIEW AND INTER PARTES REVIEW PANELS.

Section 6(c) of title 35, United States Code, is amended to read as follows:

“(c) 3-MEMBER PANELS.—

“(1) IN GENERAL.—Each appeal, derivation proceeding, post-grant review, and inter partes review shall be heard by at least 3 members of the Patent Trial and Appeal Board, who shall be designated by the Director.

“(2) INELIGIBILITY TO HEAR REVIEW.—A member of the Patent Trial and Appeal Board who participates in the decision to institute a post-grant review or an inter partes review of a patent shall be ineligible to hear the review.

“(3) REHEARINGS.—Only the Patent Trial and Appeal Board may grant rehearings.”.

SEC. 105. REEXAMINATION OF PATENTS.

(a) REQUEST FOR REEXAMINATION.—Section 302 of title 35, United States Code, is amended to read as follows:
§ 302. Request for reexamination

“Any person at any time may file a request for reexamination by the Office of any claim of a patent on the basis of any prior art cited under the provisions of section 301. The request must be in writing and must be accompanied by payment of a reexamination fee established by the Director pursuant to the provisions of section 41. The request must identify all real parties in interest and certify that reexamination is not barred under section 303(d). The request must set forth the pertinency and manner of applying cited prior art to every claim for which reexamination is requested. Unless the requesting person is the owner of the patent, the Director promptly will send a copy of the request to the owner of record of the patent.”.

(b) Reexamination Barred by Civil Action.—

Section 303 of title 35, United States Code, is amended by adding at the end the following:

“(d) An ex parte reexamination may not be instituted if the request for reexamination is filed more than 1 year after the date on which the requester or a real party in interest or privy of the requester is served with a complaint alleging infringement of the patent.”.

SEC. 106. ELIMINATION OF FORM 18.

Effective 1 year after the date of enactment of this Act, the Supreme Court, using existing resources, shall eliminate Form 18 in the Appendix to the Federal Rules
of Civil Procedure (relating to Complaint for Patent Infringement), if Form 18 remains in existence at that time.

**SEC. 107. ELIMINATION OF USPTO FEE DIVERSION.**

(a) **FUNDING.**—Section 42 of title 35, United States Code, is amended—

(1) in subsection (b), by striking “Patent and Trademark Office Appropriation Account” and inserting “United States Patent and Trademark Office Innovation Promotion Fund”;

(2) in subsection (c)—

(A) in paragraph (1)—

(i) by striking “To the extent” and all that follows through “fees” and inserting “Fees”; and

(ii) by striking “shall be collected by and shall, subject to paragraph (2), be available to the Director” and inserting “shall be collected by the Director and shall be available to the Director until expended”;

(B) by striking paragraph (2); and

(C) by redesignating paragraph (3) as paragraph (2);

(3) by redesignating subsections (d) and (e) as subsections (e) and (f), respectively;
(4) by inserting after subsection (e) the follow-

ing:

“(d) REVOLVING FUND.—

“(1) DEFINITIONS.—In this subsection—

“(A) the term ‘Fund’ means the United States Patent and Trademark Office Innovation Promotion Fund established under paragraph (2); and

“(B) the term ‘Trademark Act of 1946’ means the Act entitled ‘An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes’, approved July 5, 1946 (15 U.S.C. 1051 et seq.) (commonly referred to as the ‘Trademark Act of 1946’ or the ‘Lanham Act’).

“(2) ESTABLISHMENT.—There is established in the Treasury a revolving fund to be known as the ‘United States Patent and Trademark Office Innovation Promotion Fund’.

“(3) DERIVATION OF RESOURCES.—There shall be deposited into the Fund any fees collected under—

“(A) this title; or
“(B) the Trademark Act of 1946.

“(4) EXPENSES.—Amounts deposited into the Fund under paragraph (3) shall be available, without fiscal year limitation, to cover—

“(A) all expenses to the extent consistent with the limitation on the use of fees set forth in subsection (c), including all administrative and operating expenses, determined in the discretion of the Director to be ordinary and reasonable, incurred by the Director for the continued operation of all services, programs, activities, and duties of the Office relating to patents and trademarks, as such services, programs, activities, and duties are described under—

“(i) this title; and

“(ii) the Trademark Act of 1946; and

“(B) all expenses incurred pursuant to any obligation, representation, or other commitment of the Office.”;

(5) in subsection (e), as redesignated, by striking “The Director” and inserting “REFUNDS.—The Director”; and

(6) in subsection (f), as redesignated, by striking “The Secretary” and inserting “REPORT.—The Secretary”.
(b) Effective Date; Transfer From and Termination of Obsolete Funds.—

(1) Effective date.—The amendments made by subsection (a) shall take effect on the first day of the first fiscal year that begins on or after the date of enactment of this Act.

(2) Remaining balances.—There shall be deposited in the Fund, on the effective date described in paragraph (1), any available unobligated balances remaining in the Patent and Trademark Office Appropriation Account, and in the Patent and Trademark Fee Reserve Fund established under section 42(c)(2) of title 35, United States Code, as in effect on the date before the effective date.

(3) Termination of Reserve Fund.—Upon the payment of all obligated amounts in the Patent and Trademark Fee Reserve Fund under paragraph (2), the Patent and Trademark Fee Reserve Fund shall be terminated.

SEC. 108. WILLFUL INFRINGEMENT.

Section 284 of title 35, United States Code, is amended to read as follows:

“§284. Damages

“(a) Upon finding for the claimant the court shall award the claimant damages adequate to compensate for
the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.

When the damages are not found by a jury, the court shall assess them.

“(b) In either event the court may exercise its discretion to increase the damages up to 3 times the amount found or assessed upon determining, by a preponderance of the evidence, that the infringement was willful or in bad faith.

“(c) Increased damages under this section shall not apply to provisional rights under section 154(d).”.

SEC. 109. DIVIDED INFRINGEMENT.

Section 271 of title 35, United States Code, is amended by adding at the end the following:

“(j) For a finding of liability for actively inducing infringement of a process patent under subsection (b), or for contributory infringement of a process patent under subsection (c), it shall not be a requirement that the steps of the patented process be practiced by a single entity.”.

SEC. 110. INSTITUTIONS OF HIGHER EDUCATION.

Section 123(d) of title 35, United States Code, is amended to read as follows:
“(d) INSTITUTIONS OF HIGHER EDUCATION.—For purposes of this section, a micro entity shall include an applicant who certifies that—

“(1) the applicant’s employer, from which the applicant obtains the majority of the applicant’s income, is an institution of higher education as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a));

“(2) the applicant has assigned, granted, conveyed, or is under an obligation by contract or law, to assign, grant, or convey, a license or other ownership interest in the particular applications to such an institution of higher education;

“(3) the applicant is an institution of higher education as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)); or

“(4) the applicant is an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code that holds title to patents and patent applications on behalf of such an institution of higher education for the purpose of facilitating commercialization of the technologies of the patents and patent applications.”.
SEC. 111. ASSISTING SMALL BUSINESSES IN THE U.S. PATENT SYSTEM.

(a) Definition.—In this section, the term “small business concern” has the meaning given the term in section 3 of the Small Business Act (15 U.S.C. 632).

(b) Small Business Administration Report.—
Not later than 1 year after the date of enactment of this Act, the Small Business Administration, using existing resources, shall submit to the Committee on Small Business and Entrepreneurship of the Senate and the Committee on Small Business of the House of Representatives a report analyzing the impact of—

(1) patent ownership by small business concerns; and

(2) civil actions against small business concerns arising under title 35, United States Code, relating to patent infringement.

(c) Expansion of Patent Pilot Program in Certain District Courts.—

(1) In general.—Not later than 6 months after the date of enactment of this Act, the Director of the Administrative Office of the United States Courts shall designate not fewer than 6 of the district courts of the United States that are participating in the patent cases pilot program established under section 1 of Public Law 111–349 (28 U.S.C.
137 note) for the purpose of expanding that pro-
gram to address special issues raised in patent in-
fringement suits against individuals or small busi-
ness concerns.

(2) PROCEDURES FOR SMALL BUSINESSES.—
Not later than 2 years after the date of enactment
of this Act, each district court designated under
paragraph (1) shall develop procedures for exped-
diting cases in which an individual or small business
concern is accused of patent infringement.

(3) PARTICIPATING JUDGES.—

(A) IN GENERAL.—In each district court
designated under paragraph (1), each district
court judge participating in the patent cases
pilot program established under section 1 of
Public Law 111–349 may appoint 1 additional
law clerk or secretary in excess of any other
limitation on the number of such employees.

(B) EDUCATION AND TRAINING.—The
Federal Judicial Center, using existing re-
sources, shall prepare educational and training
materials to assist district court judges de-
scribed in subparagraph (A) in developing ex-
pertise in patent and plant variety protection
cases.
(4) Funds.—There are authorized to be appropriated such sums as may be necessary to carry out paragraph (3)(A).

(d) Free Online Availability of Public Search Facility Materials.—Section 41(i) of title 35, United States Code, is amended by adding at the end the following:

“(5) Free online availability of public search facility materials.—The Director shall make available online and at no charge all patent and trademark information that is available at the Public Search Facility of the Office located in Alexandria, Virginia, including—

“(A) search tools and databases;

“(B) informational materials; and

“(C) training classes and materials.”.

TITLE II—TARGETING ROGUE AND OPAQUE LETTERS

SEC. 201. DEFINITIONS.

In this title:

(1) Bad faith.—The term “bad faith” means, with respect to section 202(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 prob-
ability of the statements, representations, or
omissions to deceive and the sender inten-
tionally 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 ap-
peal is no longer available.

**SEC. 202. 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
for a person, in connection with the assertion of a United
States patent, to engage in a pattern or practice of send-
ing 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 com-
pensation 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 in-
fringement of the patent has been filed against
the recipient;

(C) a civil action asserting a claim of in-
fringement 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, invalid, or otherwise unenforceable against the recipient, 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 recipient that is alleged to infringe the identified patent;
(D) a description, to the extent reasonable under the circumstances, of how the product, service, or other activity of the recipient infringes an identified patent and patent claim; or

(E) a name and contact information for a person the recipient may contact about the assertions or claims relating to the patent contained in the communications.

(b) AFFIRMATIVE DEFENSE.—With respect to subsection (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 201(1)) if the sender can demonstrate that such statements, representations, or omissions were mistakes made in good faith. Evidence that the sender in the usual course of business sends written communications that do not violate the provisions of this title shall be sufficient to demonstrate good faith. Good faith may also be demonstrated by other evidence.

(c) RULE OF CONSTRUCTION.—For purposes of sections 203 and 204, 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.
SEC. 203. ENFORCEMENT BY FEDERAL TRADE COMMISSION.

(a) VIOLATION OF RULE.—A violation of section 202 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 title 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 title. Any person who violates section 202 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 title shall be construed in any way to limit or affect the authority of the Commission under any other provision of law.

SEC. 204. PREEMPTION OF STATE LAWS ON PATENT DEMAND LETTERS AND ENFORCEMENT BY STATE ATTORNEYS GENERAL.

(a) PREEMPTION.—
(1) IN GENERAL.—This title 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 title 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 202, 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 on behalf of recipients who suffered actual damages as a result of such violation.

(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 202.

(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 202, 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 title 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.