114TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
114–877

TARGETING ROGUE AND OPAQUE LETTERS ACT OF 2015

DECEMBER 16, 2016.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. UPTON, from the Committee on Energy and Commerce, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 2045]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the bill (H.R. 2045) 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, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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PURPOSE AND SUMMARY

The purposes of H.R. 2045 are: (1) to prevent anyone from coercing or deceiving victims into paying license fees or settlements based on spurious claims or meritless suggestions of patent infringement in written communications; and (2) to ensure that recipients of such communications receive enough information regarding the patent and corresponding allegations such that a recipient can begin to determine whether the letter identifies a legitimate patent claim. H.R. 2045 applies specifically to a "pattern or practice" of sending written communications in connection with the assertion of a United States patent. Such written communications are commonly referred to as patent demand letters.

H.R. 2045 authorizes the Federal Trade Commission (FTC) to seek civil penalties for two types of deceptive behavior with respect to a pattern or practice of sending patent demand letters. First, H.R. 2045 prohibits a sender of a patent demand letter from making any of a list of specific false statements or representations. These prohibitions correspond to specific misrepresentations observed in practice that may intimidate unsophisticated patent demand letter recipients into entering settlement agreements despite a lack of merit or the use of deception in the underlying allegations in the patent demand letters.[1] Second, H.R. 2045 prohibits a sender of a patent demand letter from omitting any of a series of required disclosures. By requiring disclosures, H.R. 2045 seeks to prevent a sender from withholding information that is essential for a recipient to fairly make an independent determination of the patent demand letter's merits. H.R. 2045 is not intended to sweep in patent communications, including demand letters, between sophisticated patent holders with large patent portfolios.

Instances of abusive demand letter practices involving the sending of only a few patent demand letters may occur, but are not prevalent in the record. Those responsible for the abusive patent demand letters covered by H.R. 2045 send large numbers of such letters in hope of deceiving a portion of the recipients of those letters.[2] The scheme is dependent on volume, so H.R. 2045 is limited to situations where repeated behavior is demonstrated. Nonetheless, the term "pattern or practice" is intentionally undefined to give the FTC leeway in determining the threshold, which the Committee recognizes will be a context-driven determination.[3]

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[1] *See Trolling for a Solution: Ending Abusive Patent Demand Letters: Hearing before the Subcomm. on Commerce, Manuf., and Trade*, 113th Cong. 5 (statement of Rheo Brouillard on behalf of American Bankers Association) (describing a patent demand letter received by several banks claiming that their ATMs infringed a patent held by the sender, and that the sender researched the alleged infringement, even though at least one recipient bank did not operate any ATMs).

[2] *See* MPHJ Technology Investments, LLC, Fed. Trade Comm'n, Proposed Consent Agreement (adopted Nov. 6, 2014), available at *http://www.ftc.gov/system/files/documents/cases/141106mphjagree.pdf*.

[3] For an example of how a court has treated the concept of "pattern or practice" in the FTC Act, see Tennessee v. Lexington Law Firms, 1997-1 Trade Cas. (CCH) P71,820, 9-10 (M.D. Tenn. 1997) ("Here, the complaint indicates that the Tennessee attorney general's alleged discovery that one or two violations have already been committed gave it reason to believe that Defendant was or is engaged in a pattern or practice of committing such violations. As such, Defendant's argument [that, as a matter of law, the *Tennessee* attorney general had no reason to believe a pattern or practice existed] cannot prevail."). Although the statute at issue in Tennessee is further tempered by requiring only that a State attorney general have a "reason to believe" that a defendant is engaging in a pattern or practice—which is not present in H.R. 2045—H.R. 2045

BACKGROUND AND NEED FOR LEGISLATION

Businesses and consumers across the nation have been victimized on a large scale by patent holders who misled them with vague and deceptive demand letters into paying undue license or settlement fees.[4] These types of scams typically, but not always, target end users of patented technology with little patent expertise or for whom the cost of defending against the letter exceeds the business' resources, forcing it to pay the sender, regardless of whether the underlying claim is meritorious.

A violation of H.R. 2045 is treated as a violation of a Federal Trade Commission rule defining an unfair or deceptive act or practice prescribed under 15 U.S.C. § 57a(a)(1)(B). As a result, a violation of H.R. 2045 is punishable by civil penalties as provided at 15 U.S.C. § 45(m).

H.R. 2045 provides an affirmative defense for defendants to show that alleged violations of the Act were actually mistakes made in good faith. The affirmative defense allows defendants to show that its allegedly unlawful statements, representations, or omissions were mistakes made in good faith, which may be demonstrated by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. The affirmative defense in H.R. 2045 mirrors the operative language of the affirmative defense in the Fair Credit Reporting Act.[5] The burden of production and persuasion with respect to the affirmative defense is on the accused sender of the patent demand letter, and in order to meet that burden, the sender must show that a procedure reasonably adapted to avoid the error was in place when the error was made.

H.R. 2045 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. When the Committee reported H.R. 2045, over twenty State statutes expressly relating to patent demand letters had been enacted[6] and several States were considering similar bills. Importantly, however, H.R. 2045 bars a court from construing the preemption provision to preempt any State consumer protection law, any State law relating to acts of fraud or deception, and any State trespass, contract, or tort law. As a result, H.R. 2045 has no effect on State consumer protection statutes—often referred to as "mini-FTC Acts" for their resemblance to the FTC's organic stat-

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is nonetheless intended to grant similar discretion to the FTC on pattern or practice determinations.

[4] *See Trolling for a Solution: Ending Abusive Patent Demand Letters: Hearing Before the Subcomm. on Commerce, Manuf., and Trade*, 113th Cong. (2014), *H.R. ____, a bill to enhance federal and state enforcement of fraudulent patent demand letters: Legislative Hearing before the Subcomm. on Commerce, Manuf., and Trade*, 114th Cong. (2014), *Update: Patent Demand Letter Practices and Solutions: Hearing Before the Subcomm. on Commerce, Manuf., and Trade*, 114th Cong. (2015), *H.R. ____, Targeting Rogue and Opaque Letters (TROL) Act: Legislative Hearing Before the Subcomm. on Commerce, Manuf., and Trade*, 114th Cong. (2015).

[5] *H.R. ____, the Targeting Rogue and Opaque Letters (TROL) Act: Legislative Hearing Before the Subcomm. on Commerce, Manuf., and Trade*, 114th Cong. 13 (2015) (statement of Charles Duan, Director, Patent Reform Project, Public Knowledge).

[6] Alabama, Georgia, Idaho, Illinois, Louisiana, Maine, Maryland, Mississippi, Missouri, New Hampshire, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, and Wisconsin.

ute—nor does it touch other State and local provisions of general applicability.

The State laws expressly related to patent demand letters generally list a series of prohibited bad acts with respect to patent demand letters. Four States include an exhaustive list of bad acts defining whether a demand letter is unlawful,[7] and the other States allow a court to draw upon any other factor the court finds relevant in determining whether a demand letter is unlawful.[8] To date, no State attorney general has brought a case under a State law that specifically addresses demand letters. As witnesses before the Subcommittee have testified, cases brought under State patent demand letter laws may be precluded under the Federal Circuit's *Noerr-Pennington* doctrine, unless they also allege bad faith on the part of the defendant.[9] Moreover, because *Noerr-Pennington* is rooted in the First Amendment, it may preclude certain Federal enforcement as well, unless it only addresses bad faith conduct.[10] Four State attorneys general have taken action against a single patent assertion entity, but those investigations were conducted under State consumer protection laws of general applicability.

State attorneys general may enforce the provisions of H.R. 2045. 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 to enjoin further such violation by the defendant or to obtain civil penalties. Civil penalties for State attorneys general are limited to $5,000,000 for a series of related violations. A State attorney general shall provide prior written notice of any enforcement action authorized under Section 4 to the FTC and provide the FTC 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 FTC shall have the right to intervene in the action, and upon so intervening, to be heard on all matters arising therein. The FTC shall also have the right to petition for appeal. If the FTC has instituted a civil action for violation of Section 2, no State attorney general may bring an action under H.R. 2045 during the pendency of that action against any defendant named in the FTC complaint for any violation of such section alleged in the complaint. H.R. 2045 preserves the State attorney general's ability to exercise the powers conferred on the attorney general by the laws of that State to conduct investigations, administer oaths or affirmations, or compel the attendance of witnesses or the production of documentary and other evidence.

Under H.R. 2045, bad faith means that the sender made knowingly false or knowingly misleading statements, representations, or

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[7] Illinois, Oklahoma, Tennessee, and Wisconsin.

[8] *See, e.g.*, H.B. 1163, 64th Leg. (ND 2015).

[9] *Update: Patent Demand Letter Practices and Solutions: Hearing Before the Subcomm. on Commerce, Manuf., and Trade*, 114th Cong. 12 (2015) (statement of Paul R. Gugliuzza, Associate Professor of Law, Boston University School of Law) ("Although no court has yet applied this standard to the new state statutes, it seems to ensure that most tactics employed by bottom-feeder trolls will remain legal.").

[10] *Globetrotter Software, Inc. v. Elan Computer Grp., Inc.*, 362 F.3d 1367 (Fed. Cir. 2004) (holding that *Noerr-Pennington* shields communications such as demand letters from both state and federal laws, unless they are narrowed to bad faith conduct).

omissions; made statements, representations, or omissions with reckless indifference as to the false or misleading nature of such statements, representations, or omissions; or 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. This construct seeks to preserve the First Amendment rights of patent holders to assert their patents, inoculate H.R. 2045 from First Amendment challenges under *Noerr-Pennington*,[11] avoid enforcement actions in cases of good faith mistakes, and narrow the legislation to actual harmful activity observed in the marketplace. The bad faith definition largely mirrors the legal standard developed under the FTC Act provision authorizing the FTC to obtain restitution from individual corporate officers involved in fraud schemes. Specifically, Federal courts have determined that in order to obtain restitution from an individual defendant, the FTC must show that he or she "had knowledge of material misrepresentations, [was] recklessly indifferent to the truth or falsity of a misrepresentation, or had an awareness of a high probability of fraud along with an intentional avoidance of the truth." [12]

Under its current Section 5 authority, the FTC cannot obtain civil penalties unless a defendant has violated an FTC rule or a consent order. In a recent investigation under Section 5 against MPHJ—an entity that directed over 31,000 letters through 31 subsidiaries—the FTC obtained a consent decree barring MPHJ from making deceptive representations when asserting patent rights. To allow the FTC to bring cases involving misstatements or omissions not enumerated in H.R. 2045, the draft legislation would specifically preserve the FTC's Section 5 authority to enjoin unfair or deceptive acts or practices. Although the TROL Act preempts State laws specifically addressing patent demand letters, it also preserves the authority of State attorneys general to enforce their own mini-FTC Acts and authorizes State attorneys general to enforce the provisions of the TROL Act.

HEARINGS

The Subcommittee on Commerce, Manufacturing, and Trade held a hearing on H.R. 2045 on February 26, 2015. The Subcommittee received testimony from:

- Paul Gugliuzza, Associate Professor, Boston University School of Law;
- Vince Malta, Liaison for Law and Policy, National Association of Realtors;
- Vera Ranieri, Staff Attorney, Electronic Frontier Foundation; and
- Laurie Self, Vice President and Counsel, Government Affairs, Qualcomm.

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[11] Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1965). The Federal Circuit has held that *Noerr-Pennington* immunity applies to patent demand letters, immunizing patent assertion activity unless it is both "objectively baseless" and done in subjective bad faith. Globetrotter Software, Inc. v. Elan Computer Grp., Inc., 362 F.3d 1367, 1377 (Fed. Cir. 2004).

[12] Fed. Trade Comm'n v. Publ'g Clearing House, Inc., 104 F.3d 1168, 1171 (9th Cir. 1997) (quoting American Standard Credit Systems, 874 F.Supp. 1080, 1089 (C.D. Cal. 1994) and Fed. Trade Comm'n v. Army Travel Svc., Inc., 875 F.2d 564, 573–74 (N.D. Ill. 1988)).

COMMITTEE CONSIDERATION

On April 22, 2015, the Subcommittee on Commerce, Manufacturing, and Trade met in open markup session and forwarded a discussion draft entitled "Targeting Rogue and Opaque Letters Act" to the full Committee, as amended, by a record vote of 10 yeas and 7 nays. On April 29, 2015, the full Committee on Energy and Commerce met in open markup session and ordered H.R. 2045 reported to the House, without amendment, by a record vote of 30 yeas and 22 nays.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto.

COMMITTEE ON ENERGY AND COMMERCE -- 114TH CONGRESS
ROLL CALL VOTE # 13

BILL: H.R. 2045, the "Targeting Rogue and Opaque Letters Act of 2015"

AMENDMENT: An amendment offered by Ms. Eshoo, No. 1, to strike language regarding the affirmative defense and the term "bad faith" as applied throughout the Act.

DISPOSITION: NOT AGREED TO, by a roll call vote of 19 yeas and 29 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Upton		X		Mr. Pallone	X		
Mr. Barton		X		Mr. Rush	X		
Mr. Whitfield		X		Ms. Eshoo	X		
Mr. Shimkus		X		Mr. Engel			
Mr. Pitts		X		Mr. Green			
Mr. Walden		X		Ms. DeGette	X		
Mr. Murphy		X		Ms. Capps	X		
Mr. Burgess		X		Mr. Doyle	X		
Mrs. Blackburn		X		Ms. Schakowsky	X		
Mr. Scalise				Mr. Butterfield	X		
Mr. Latta		X		Ms. Matsui	X		
Mrs. McMorris Rodgers		X		Ms. Castor	X		
Mr. Harper		X		Mr. Sarbanes	X		
Mr. Lance		X		Mr. McNerney	X		
Mr. Guthrie		X		Mr. Welch	X		
Mr. Olson		X		Mr. Lujan	X		
Mr. McKinley		X		Mr. Tonko	X		
Mr. Pompeo				Mr. Yarmuth			
Mr. Kinzinger		X		Ms. Clarke	X		
Mr. Griffith		X		Mr. Loebsack	X		
Mr. Bilirakis		X		Mr. Schrader			
Mr. Johnson		X		Mr. Kennedy	X		
Mr. Long		X		Mr. Cardenas	X		
Mrs. Ellmers		X					
Mr. Bucshon		X					
Mr. Flores		X					
Mrs. Brooks		X					
Mr. Mullin		X					
Mr. Hudson		X					
Mr. Collins		X					
Mr. Cramer		X					

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COMMITTEE ON ENERGY AND COMMERCE -- 114TH CONGRESS
ROLL CALL VOTE # 14

BILL: H.R. 2045, the "Targeting Rogue and Opaque Letters Act of 2015"

AMENDMENT: An amendment offered by Ms. Schakowsky, No. 3, to strike language regarding the preemption of requirements, standards, rules, and provision relating to the transmission or contents of communications in asserting a patent.

DISPOSITION: NOT AGREED TO, by a roll call vote of 21 yeas and 29 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Upton		X		Mr. Pallone	X		
Mr. Barton		X		Mr. Rush	X		
Mr. Whitfield		X		Ms. Eshoo	X		
Mr. Shimkus		X		Mr. Engel			
Mr. Pitts		X		Mr. Green	X		
Mr. Walden		X		Ms. DeGette	X		
Mr. Murphy		X		Ms. Capps	X		
Mr. Burgess		X		Mr. Doyle	X		
Mrs. Blackburn		X		Ms. Schakowsky	X		
Mr. Scalise				Mr. Butterfield	X		
Mr. Latta		X		Ms. Matsui	X		
Mrs. McMorris Rodgers		X		Ms. Castor	X		
Mr. Harper		X		Mr. Sarbanes	X		
Mr. Lance		X		Mr. McNerney	X		
Mr. Guthrie		X		Mr. Welch	X		
Mr. Olson		X		Mr. Lujan	X		
Mr. McKinley		X		Mr. Tonko	X		
Mr. Pompeo				Mr. Yarmuth			
Mr. Kinzinger		X		Ms. Clarke	X		
Mr. Griffith		X		Mr. Loebsack	X		
Mr. Bilirakis		X		Mr. Schrader	X		
Mr. Johnson		X		Mr. Kennedy	X		
Mr. Long		X		Mr. Cardenas	X		
Mrs. Ellmers		X					
Mr. Bucshon		X					
Mr. Flores		X					
Mrs. Brooks		X					
Mr. Mullin		X					
Mr. Hudson		X					
Mr. Collins		X					
Mr. Cramer		X					

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COMMITTEE ON ENERGY AND COMMERCE -- 114TH CONGRESS
ROLL CALL VOTE # 15

BILL: H.R. 2045, the "Targeting Rogue and Opaque Letters Act of 2015"

AMENDMENT: A motion by Mr. Upton to order H.R. 2045 favorably reported to the House. (Final Passage)

DISPOSITION: AGREED TO, by a roll call vote of 30 yeas and 22 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Upton	X			Mr. Pallone		X	
Mr. Barton	X			Mr. Rush		X	
Mr. Whitfield	X			Ms. Eshoo		X	
Mr. Shimkus	X			Mr. Engel		X	
Mr. Pitts	X			Mr. Green		X	
Mr. Walden	X			Ms. DeGette		X	
Mr. Murphy	X			Ms. Capps		X	
Mr. Burgess	X			Mr. Doyle		X	
Mrs. Blackburn	X			Ms. Schakowsky		X	
Mr. Scalise	X			Mr. Butterfield		X	
Mr. Latta	X			Ms. Matsui		X	
Mrs. McMorris Rodgers	X			Ms. Castor		X	
Mr. Harper	X			Mr. Sarbanes		X	
Mr. Lance	X			Mr. McNerney		X	
Mr. Guthrie	X			Mr. Welch		X	
Mr. Olson	X			Mr. Lujan		X	
Mr. McKinley	X			Mr. Tonko		X	
Mr. Pompeo				Mr. Yarmuth			
Mr. Kinzinger	X			Ms. Clarke		X	
Mr. Griffith	X			Mr. Loebsack		X	
Mr. Bilirakis	X			Mr. Schrader		X	
Mr. Johnson	X			Mr. Kennedy		X	
Mr. Long	X			Mr. Cardenas		X	
Mrs. Ellmers	X						
Mr. Bucshon	X						
Mr. Flores	X						
Mrs. Brooks	X						
Mr. Mullin	X						
Mr. Hudson	X						
Mr. Collins	X						
Mr. Cramer	X						

04/29/2015

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee held hearings and made findings that are reflected in this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

The purposes of H.R. 2045 are (1) to prevent patent owners or those holding themselves out to be patent owners from coercing or deceiving victims into paying license fees or settlements based on spurious claims or meritless suggestions of infringement; and (2) to ensure that recipients of such communications receive enough information regarding the patent and corresponding allegations such that a demand letter recipient with little or no expertise in patent law can understand the letter's claims and how to respond. H.R. 2045 applies specifically to a "pattern or practice" of sending written communications in connection with the assertion of a United States patent. These communications are commonly referred to as patent demand letters.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee finds that H.R. 2045 would result in no new or increased budget authority, entitlement authority, or tax expenditures or revenues.

EARMARK, LIMITED TAX BENEFITS, AND LIMITED TARIFF BENEFITS

In compliance with clause 9(e), 9(f), and 9(g) of rule XXI of the Rules of the House of Representatives, the Committee finds that H.R. 2045 contains no earmarks, limited tax benefits, or limited tariff benefits.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 28, 2015.

Hon. FRED UPTON,
Chairman, Committee on Energy and Commerce,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2045, the Targeting Rogue and Opaque Letters Act of 2015.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susan Willie.

Sincerely,

KEITH HALL.

Enclosure.

H.R. 2045—Targeting Rogue and Opaque Letters Act of 2015

H.R. 2045 would establish as an unfair or deceptive act sending letters to companies and individuals claiming infringement of a patent when those letters include certain statements, as outlined in the bill, that are known by the sender to be false or misleading. Similarly, the bill would establish as an unfair or deceptive act sending such letters if, in bad faith, the sender fails to include certain other information also outlined in the bill. H.R. 2045 would authorize the Federal Trade Commission (FTC) to seek civil penalties for violations of the new prohibitions.

Based on information from the FTC, CBO estimates that the cost of implementing H.R. 2045 would not be significant because the agency is able to enforce similar prohibitions under its existing general authorities. CBO estimates that enacting H.R. 2045 would increase federal revenues from the added authority to collect civil penalties; therefore, pay-as-you-go procedures apply. However, we expect those collections would be insignificant because of the small number of cases that the agency would probably pursue. Enacting the bill would not affect direct spending.

H.R. 2045 contains intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA). The bill would preempt some state and local laws related to patent rights. The bill also would impose notification requirements and limitations on state attorneys general. Because the limits on state and local authority would impose no duties with costs and because the notification requirements would result in minimal additional spending, CBO estimates the costs of the mandates would be small and would not exceed the threshold established in UMRA for intergovernmental mandates ($77 million in 2015, adjusted annually for inflation). H.R. 2045 contains no private-sector mandates as defined in UMRA.

The CBO staff contact for this estimate is Susan Willie. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

DUPLICATION OF FEDERAL PROGRAMS

No provision of H.R. 2045 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The Committee estimates that enacting H.R. 2045 specifically directs to be completed 0 rule makings within the meaning of 5 U.S.C. 551.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Short title

This Act may be cited as the "Targeting Rogue and Opaque Letters (TROL) Act."

Section 2. Unfair or deceptive acts or practices in connection with the assertion of a United States patent

This section establishes that it is an unfair or deceptive act or practice under the FTC Act to engage in a pattern or practice of sending patent demand letters if the communications, in bad faith, include any of the twelve prohibited elements enumerated in paragraphs (1) or (2), or fail to include any of the five elements enumerated in paragraph (3). Section 2 also sets forth an affirmative defense that was altered at Subcommittee markup. The new affirmative defense provides that statements, representations, or omissions were not made in bad faith if the sender can demonstrate that such statements, representations, or omissions were mistakes, which may be demonstrated by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

Section 3. Enforcement by Federal Trade Commission

Section 3 establishes that a violation of Section 2 shall be treated as a violation of a rule defining an unfair or deceptive act or practice prescribed under the FTC Act. This enables the FTC to seek civil penalties for violations; whereas, under its current authority, it could only seek an injunction against a sender of an unfair or deceptive demand letter. Section 3 also clarifies that the FTC's existing powers and enforcement authority are preserved.

Section 4. Preemption of State laws on patent demand letters and enforcement by State attorneys general

Section 4 preempts State laws, rules, regulations, standards, and other provisions having the effect of law expressly relating to the transmission or contents of patent demand letters, while preserving other State laws of general applicability, such as the State consumer protection laws of general applicability. Section 4 also per-

mits State attorneys general to enforce the Act and to seek civil penalties for violations. Section 4 requires the attorney general of a State to provide the FTC with prior written notice of any action taken to enforce the law and also provides the FTC authority to intervene in the action. It further provides that no State action may be brought if the FTC has a civil action pending against any named defendant.

Section 5. Definitions

Section 5 defines certain terms used throughout the draft legislation, including "bad faith" as it pertains to the representations or omissions enumerated in Section 2.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

This legislation does not amend any existing Federal statute.

DISSENTING VIEWS

We cannot support H.R. 2045, the Targeting Rogue and Opaque Letters Act of 2015. Although we could support efforts to curb deceptive patent demand letters, this bill does not accomplish that goal. Instead, this bill creates a disincentive to enforcement by tying the hands of state attorneys general and by creating barriers to Federal Trade Commission (FTC) enforcement that are simply too high.

This bill requires the FTC and state attorneys general to prove "bad faith" of the sender in order for patent demand letters to be considered an unfair or deceptive act or practice. In short, this means that the FTC has to be able to prove that the sender of a patent demand letter knowingly made false statements or was aware that the recipient would be deceived. This knowledge requirement is an unusual element that would make investigations and enforcement far more difficult. Consumers can be harmed by misrepresentations regardless of whether the party making the representations knows them to be false. The knowledge requirements would be a significant and counterproductive departure from existing law.

The majority asserts that the knowledge requirement is necessary to protect First Amendment rights under the *Noerr-Pennington* doctrine. However, whether *Noerr-Pennington* applies outside of the antitrust context, i.e., whether it immunizes entities from anything other than antitrust liability, is at best a matter of debate.[1] Some courts have found that it is a general rule of construction that applies expansively.[2] Other courts, however, have concluded that the *Noerr-Pennington* doctrine does not apply outside the antitrust context, and further, that threats made before litigation commences and communicated solely between private parties are not afforded broad immunity under the First amendment.[3] Because this remains an open question of law, establishing a knowledge requirement for FTC actions is unnecessary and potentially damaging.

In addition to concerns regarding the knowledge requirement, we have serious concerns about this bill's preemption of state laws. Twenty states, at the time of Committee consideration of H.R. 2045, had already enacted specific policies to curb trolling. In many ways, these state protections exceed those that would be guaranteed under the TROL Act. This bill would completely preempt the 20 laws that expressly address abusive patent assertion communications. It would also severely constrain the ability of states to take an active role in guarding against unfair and deceptive patent demand letters by limiting available remedies and placing an arbi-

[1] *Shirokov*, 2012 U.S. Dist. LEXIS 42787 at *52–53.
[2] *See e.g., Sosa* v. *DIRECTV, Inc.*, 437 F.3d 923, 937 (9th Cir. 2006).
[3] *Cardtoons, L.C.* v. *Major League Baseball Players Ass'n*, 208 F.3d 885, 891 (10th Cir. 2000).

trary cap on civil penalties. The cap on civil penalties creates a loophole whereby patent trolls may be willing to accept the maximum civil penalty because they can collect much more through deceptive demand letters. If Congress seeks to preempt specific state laws—especially on issues on which the states have been leaders fighting unfair and deceptive acts, such as false and misleading demand letters—the federal effort should be at least as strong as those state laws.

For the reasons stated above, we dissent from the views contained in the Committee's report.

FRANK PALLONE, Jr.,
Ranking Member.
JAN SCHAKOWSKY,
Ranking Member, Subcommittee on Commerce, Manufacturing, and Trade.

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