



ELECTRONIC FRONTIER FOUNDATION

**Committee on Energy & Commerce
Subcommittee on Commerce, Manufacturing, and Trade
U.S. House of Representatives**

**Hearing
“Update: Patent Demand Letter Practices and Solutions”**

**Testimony of Vera Ranieri
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February 26, 2015

SUMMARY OF TESTIMONY

Patent troll demand letters continue to frustrate and intimidate small businesses and innovators. Through the use of vague statements and legalese, and by exploiting asymmetries in information and resources, patent trolls sending unfair and deceptive letters have been able to receive undeserved “licenses” from their victims with relative impunity.

All of this often happens in the shadows. Recipients of letters from patent trolls are often afraid of speaking out, believing that may make them a bigger target. Patent trolls use this fact to hide their practices from scrutiny by lawmakers and the public.

The Electronic Frontier Foundation is encouraged by Congress’ efforts to address this problem through legislation targeting the deceptive and unfair business practices of patent trolls who send these letters. We hope that in enacting any legislation, Congress gives tools to all those who can stop deceptive business practices, and leaves flexibility in the law to ensure new tactics can be addressed as they arise. We also urge Congress to view efforts to curb unfair patent troll demand letters as an essential part of, but not a substitute for, broader reform that targets the true source of patent trolls’ power.

The Electronic Frontier Foundation also encourages Congress to enact disclosure requirements that would allow lawmakers, and the public more generally, the ability to better understand how demand letters negatively impact our innovation economy.

**Full Testimony of Vera Ranieri
Electronic Frontier Foundation
Before the House Energy & Commerce Committee Subcommittee on Commerce,
Manufacturing, and Trade
February 26, 2015**

Chairman Burgess, Ranking Member Schakowsky, and members of the subcommittee, thank you for holding this hearing and inviting me to testify today about deceptive practices by Patent Assertion Entities (“PAEs”). We are greatly encouraged by your interest in this important issue and its impact on consumers and small businesses.

I am a Staff Attorney at the Electronic Frontier Foundation, a non-profit civil liberties organization that has worked for almost 25 years to protect consumer interests, innovation, and free expression in the digital world. Founded in 1990, EFF represents more than 25,000 active members. Many of those members are small businesses, innovators, and tinkerers who often find themselves facing unfair patent litigation or demands. Through litigation, the legislative process, and administrative advocacy, EFF seeks to represent those members’ interests and promote a patent system that facilitates, rather than impedes, what the Constitution defines as “the Progress of Science and useful Arts.”

Defining the Patent Troll Demand Letter Problem

For more than a decade, a crucial part of EFF’s work has been addressing the rising problem of PAEs, sometimes also known as non-practicing entities (NPEs) or, colloquially as patent trolls or patent bullies. These entities usually neither make nor sell anything but litigation and paperwork. Rather than relying on patents to protect their ability to bring new products to market, they acquire and use patents solely to sue, or threaten to sue, unsuspecting businesses. As Judge Posner of the Seventh Circuit Court of

Appeals explained, patent trolls “are companies that acquire patents not to protect their market for a product they want to produce—patent trolls are not producers—but to lay traps for producers, for a patentee can sue for infringement even if it doesn’t make the product that it holds a patent on.”¹

One tactic is to use the threat of patent litigation to extort settlements in the form of letters demanding “licensing deals.” These “licensing deals,” however, are not the kind of responsible technology transfer that benefits consumers. Rather, they are intended to extract rents from legitimate businesses who have no idea, until they get a demand letter, that they might be infringing any patent and, very often, little ability to investigate the claim and fight back where appropriate.

EFF previously testified on the problem of patent troll demand letters in 2013. Unfortunately, little has changed for small businesses and innovators since then.

A. Patent Troll Demand Letters Are Used To Threaten and Intimidate Consumers and Small Businesses

Patent trolls continue to cause enormous harm to innovators and consumers, not to mention job creators. Companies that actually create products, services, and jobs find themselves under siege by trolls wielding vague and overbroad patents to launch or threaten expensive litigation. Addressing this conduct, and finding solutions to curb further abuse, is a priority for this Congress, as it should be. The harm to consumers,

¹ Richard A. Posner, *Why There Are Too Many Patents in America*, The Atlantic (July 12, 2012), <http://www.theatlantic.com/business/archive/2012/07/why-there-are-too-many-patents-in-america/259725/>.

however, does not only arise out of actual lawsuits; an often-invisible part of the problem comes from dangerous and irresponsible demand letter campaigns.

Specifically, patent trolls often send letters with vague and threatening language to small businesses and innovators knowing that it is likely the recipients have little, if any, experience with patent law or the judicial system more generally. These demand letters often lack basic detail of what the recipient does to allegedly infringe the patent at issue, if the specific patent is mentioned at all. Where the letters do mention the patents, they often list patent numbers without detailing which parts of the patent—which typically comprises many pages of dense technical content and legalese—are relevant. The recipient of the letter, often an entrepreneur focused on building her business, likely has few connections that would be able to help them understand the legitimacy of the claim. Where the companies do have legal counsel, those lawyers may not be patent specialists. Indeed, the demand letters often tell small businesses that they must speak to a more specialized lawyer, one who may charge significant amounts of money just to evaluate the claims..

Some of the language used by patent trolls to intimidate the targets of their letters includes:

- “As background, our firm practices nationally and specializes solely in patent litigation and licensing”²
- “We believe you will find that Landmark’s patent teaches technologies which are contributing significantly to [redacted] bottom line[.]”³

² Letter from Activision TV, Inc., (Mar. 1, 2013), *available at* <https://trollingeffects.org/demand/activision-tv-inc-2013-03-01>.



- “As your organization almost certainly uses in its day-to-day operations [the patented technology], you should enter into a license agreement with us at this time. If you believe you are in the unusual position of not have a system [that practices the patented technology], please contact us so we may discuss means for confirming that....The materials we likely would require could include copies of the user manuals for your office copying/scanning equipment, along with the IP addresses and 2012 daily activity logs for each of them, as well as the registry of each of the email servers and file servers used in your company.”⁴
- “As you may know, a United States patent grants its owner the right to exclude others from using products that fall within the scope of the claimed invention and collect damages not less than a reasonable royalty.”⁵

Those familiar with patent law—or even the legal system more generally—might recognize many of these statements as bluster. To those unfamiliar with the system, however, the threats are confusing, opaque, and esoteric.

This is intentional. Patent trolls exploit asymmetry of information. As an example, letters often include a “deadline” to respond by, leaving implicit the “or else.”⁶ The recipient has no legal obligation to reply, but she might not know that. In fact, the senders often include “draft complaints” and other enclosures in an attempt to threaten real

³ Letter from Landmark Technology, LLC, (July 23, 2013), *available at* <https://trollingeffects.org/demand/landmark-technology-llc-2013-07-23>.

⁴ Letter from HarNol, LLC/MPHJ Technologies, (Jan. 17, 2013), *available at* <https://trollingeffects.org/demand/harnol-llc-2013-01-17>.

⁵ Letter from Treehouse Avatar Technologies, (July 30, 2013), *available at* <https://trollingeffects.org/demand/treehouse-avatar-technologies-inc-2013-07-30>.

⁶ *See, e.g.*, Letter from Lodsyst, (July 15, 2011) (“We are interested in reaching a negotiated non-litigation licensing arrangement with you for all of your uses of the Lodsyst Patents under your brand name and would like to discuss this matter with you within 21 days of your receipt of this letter”), *available at* <https://trollingeffects.org/demand/lodsyst-llc-2011-07-15>.

litigation in order to make the claim even more immediate, threatening, and intimidating, even though the patent holders may have no intention of actually bringing a suit in court. And this is no surprise, as the letters' targets are often individuals and small companies whose entire annual revenue would not cover the cost of a lawyer's time to obtain the information necessary to respond to the letter.

If the target does consult a lawyer, moreover, she will quickly learn something else: the tremendous costs of patent litigation are, put simply, more than most people could ever afford. If taken to verdict, defending a lawsuit can easily cost several million dollars.⁷ Even if the case is dismissed early, legal costs will often run into the six and seven figures.⁸ It is no wonder many customers and small businesses feel compelled to pay the troll.

Even though a demand letter is not a legal complaint, and even if it makes specious claims, the serious costs it can impose have been well-documented. As one study found:

Patent demands can be costly to resolve, and particularly so for small companies. The overwhelming majority of companies said that resolving the demand required founder time (73%) and distracted from the core

⁷ See American Intellectual Property Law Association, *Report of the Economic Survey* (2013) (reporting median litigation costs for lawsuits brought by NPEs to be between \$600,000 and \$4 million, depending on the amount in controversy); see also Jim Kerstetter, *How Much is That Patent Lawsuit Going to Cost You?*, CNET, (Apr. 2, 2012), http://news.cnet.com/8301-32973_3-57409792-296/how-much-is-that-patent-lawsuit-going-to-cost-you.

⁸ *Id.*; see also Colleen V. Chien & Edward Reines, *Why Technology Customers are Being Sued En Masse for Patent Infringement & What Can Be Done*, Santa Clara Univ. Sch. of Law Working Paper No. 20-13, at 3 (Aug. 2013) ("Chien & Reines"), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2318666.

business (89%); most experienced a financial impact as well (63%). However, responses and the costs of these responses ran the gamut; for example, 22% of those surveyed said they “did nothing” to resolve the demand.⁹

The serious problem of patent troll demand letters is part of a larger trend: an explosion of patent troll litigation. The number of patent suits filed by PAEs has increased, on average, by 22% *per year* since 2004.¹⁰ Indeed, there were more cases filed by PAEs in *one month* in January 2015 than in the *entire year* of 2004.¹¹ Since 2002, litigation at the hands of patent trolls has grown from just five percent of total patent litigation to a majority of all patent cases.¹² Moreover, patent trolls are targeting smaller companies, such as startups, that lack the resources to defend against patent suits and thus have no choice but to pay extortionate settlement demands.¹³ The burden of patent troll litigation falls particularly hard on small companies. Professor Colleen Chien recently

⁹ Colleen V. Chien, *Startups and Patent Trolls*, 17 Stan. Tech. L. Rev. 461, 472 (2014) (“Chien 2014”).

¹⁰ See *Litigations Over Time*, PATENT FREEDOM, <https://www.patentfreedom.com/about-npes/litigations/> (last visited Feb. 23, 2015).

¹¹ Compare *id.* (showing 235 cases filed by PAEs in 2004) with UNIFIED PATENTS, *January 2015 Patent Dispute Report*, <http://unifiedpatents.com/january-2015-patent-dispute-report/> (last visited Feb. 23, 2015) (showing 250 cases filed by PAEs in January 2015 alone).

¹² James Bessen, Jennifer Ford and Michael Meurer, *The Private and Social Costs of Patent Trolls*, Boston Univ. School of Law, Law and Economics Research Paper No. 11-45 (“Bessen 2011”) at 7, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1930272; Colleen V. Chien, *Patent Assertion Entities*, Presentation to the December 10, 2012 DOJ/FTC Hearing on PAEs, (“Chien Slides”), at slides 23-24, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2187314.

¹³ Chien 2014 at 464-65.

found that at least 55 percent of unique defendants in patent troll suits have revenues under \$10 million per year.¹⁴

Of particular note, the patent troll problem is quite often a software patent problem. Software patents are an attractive tool for patent trolls because they are notoriously difficult to understand and interpret, which means that unscrupulous patent owners can claim that their patent covers a wide range of technology.¹⁵ It is no coincidence that more than 65 percent of troll suits involve software-related claims.¹⁶ And those same “fuzzy boundaries” provide allow patent holders to send menacing demand letters to a broader range of unsuspecting targets.

The harms caused by patent troll demand letters are not abstract. They affect real people everyday. In one case, Innovatio IP Ventures, sent over 13,000 letters to small businesses such as cafes and hotels demanding payment for providing Wi-Fi.¹⁷ In a campaign EFF believes was fundamentally unethical and deceptive, Innovatio targeted users of millions of devices that were already protected by patent licenses.¹⁸ Another troll called MPHJ sent over 16,000 letters to small businesses demanding payment for using

¹⁴ *Id.* at 461.

¹⁵ In other words, “software patents have ‘fuzzy boundaries’: they have unpredictable claim interpretation and unclear scope . . . and the huge number of software patents granted makes thorough search to clear rights infeasible, especially when the patent applicants hide claims for many years by filing continuations. This gives rise to many situations where technology firms inadvertently infringe.” Bessen 2011 at 24.

¹⁶ See Brian J. Love, *An Empirical Study of Patent Litigation Timing: Could a Patent Term Reduction Decimate Trolls Without Harming Innovators?* 161 U. Penn. L. Rev. 1309, 1344 (2013).

¹⁷ Chien & Reines at 19-20.

¹⁸ *Id.* at 19.

basic “scan to email” technology.¹⁹ To hide who was really behind this campaign, MPHJ set up a dizzying array of shell companies.

MPHJ presents an important case study of the difficulty presented by the patent troll demand letter problem. After MPHJ’s activities came to light, several manufacturers of the accused products challenged MPHJ’s patents at the Patent Office in *inter partes* review proceedings.²⁰ Those proceedings led to the invalidation of most of the claims in the challenged patents.²¹ Furthermore, MPHJ recently settled with the FTC after the FTC investigated MPHJ’s demand letter writing campaign.²² Despite MPHJ being hobbled, it has asked a court to allow it to continue to send demand letters.²³

Most troubling, the letters MPHJ wants to send continue the practice of exploiting asymmetry of information. In particular, although they admit that they do not have information that the recipient is infringing (nor could they, given the limited scope of the sole remaining claim it asserts), they ask the recipient “whether [it] would be willing to

¹⁹ See Susan Decker, *Notorious ‘Patent Troll’ MPHJ will Ease Tactics: FTC*, BLOOMBERG BUSINESS (Nov. 6, 2014), <http://www.bloomberg.com/news/articles/2014-11-06/notorious-patent-troll-mphj-will-ease-tactics-ftc>.

²⁰ See, e.g., *Ricoh Americas Corp. et al. v. MPHJ Tech. Invs., LLC*, IPR2013-00302 (filed May 23, 2013); *Hewlett-Packard, Co. v. MPHJ Tech. Invs., LLC*, IPR2013-00309 (filed May 24, 2013).

²¹ *Id.*

²² See *In re MPHJ Tech. Invs., LLC et al.*, FTC File No. 142 3003, Agreement Containing Consent Order, available at <http://www.ftc.gov/system/files/documents/cases/141106mphjagree.pdf>.

²³ See *MPHJ Tech. Invs., LLC v. Sorrell*, Case No. 2:14-cv-00191-wks, First Am. Compl. and Assoc. Exhs., ECF No. 18 (D. Vt. filed Dec. 29, 2014).

provide us with information sufficient to confirm whether [the] company is making use of the invention[.]”²⁴

As with letters that demand a response date, this sort of language relies on the relative lack of sophistication regarding the legal system to imply recipients have a duty to MPHJ that does not exist. Recipients who lack legal counsel may feel they are required to provide information to MPHJ and, as a result, will waste time and resources assisting MPHJ with its fishing expedition.

B. The Difficulty In Information Sharing Exacerbates the Problem

Massive PAE demand-letter campaigns like these lead to additional problems surrounding the sharing of and reporting on information. Because the demands by definition exist pre-complaint, they usually create no public record. And once a license or settlement is signed, it most likely will include a non-disclosure provision leaving the recipient unable to share its experience. This causes two problems: asymmetry of information and underreporting.

The asymmetry of information problem is simple: the PAE knows all about its claims and options, while the recipient knows very little. Without simple facts about the alleged threat it faces, such as who is really behind the demand and whether the PAE’s history makes it likely to further pursue its threats, a demand recipient is unable to assess its risk. It is left with a set of undesirable choices: to hire a lawyer, to pay the PAE to go away, or to do nothing and simply hope the PAE disappears. In most instances, the PAE

²⁴ *Id.* at ECF No. 18-13.

risk was not one that the recipient bargained for when it bought the product at issue or started its business, yet it finds itself with no choice but to face it.

For example, just a few weeks ago EFF heard from a small four-person business that had received a demand letter. The letter threatened a lawsuit and demanded a settlement payment that was more than the salary of many people in this country. Although the letter was lengthy and included copious amounts of legal and technical jargon, one key fact was conspicuously absent: the accused product was almost surely licensed as a result of an infringement lawsuit the troll had previously brought against the supplier of the accused product. The patent owner surely knew this, yet sent the letter anyway, likely hoping the recipient would never find out.

Fortunately, with our pro bono assistance, this small business was able to respond appropriately. But a small non-profit like EFF cannot help everyone, and not everyone will know to reach out. Had we not been contacted, it is unclear what would have happened. Most likely, the small business would be forced to settle and pay the troll to go away, never knowing that the troll *had likely already been paid* and was asserting frivolous claims.

The second problem is underreporting. Because the vast majority of the deals entered into between PAEs and their targets are not public, the exact scope and contours of PAE activity is difficult for policymakers and others to properly understand.

To combat these concerns, in 2013 EFF, along with a broad coalition, launched Trolling Effects, a database to collect demand letters.²⁵ The site allows demand letter recipients to post the documents online, find letters received by others, and research who is really behind the threats. The site also features comprehensive guides to the patent and additional relevant information. Finally—and most importantly—all of the information is freely available, not only to those who receive PAE demands, but to academics, policy makers, and the general public.

Unfortunately, our experience thus far with Trolling Effects has confirmed that many demand recipients are reluctant to publicly share their letters. This has to do in large part with the public nature of the database and the fact that, even with redactions, it is virtually impossible to safely anonymize letter recipients. Demand recipients, both large and small, often chose to keep their identity hidden.²⁶ Larger, more established companies fear that making these demands public “paints a target on their back.” Smaller companies and individuals are often even more afraid. It appears that ensuring more thorough transparency will require action from Congress.

²⁵ See TROLLINGEFFECTS, <https://www.trollingeffects.org>.

²⁶ Professor Robin Feldman came to a similar conclusion: “for a number of years, companies have been reluctant to speak to reporters or researchers, partly out of fear of retaliation by large players with large patent portfolios.” Robin Feldman, *Patent Demands & Startup Companies: The View from the Venture Capital Community* (Oct. 28, 2013), UC Hasting Research Paper No. 75 (“Feldman”) at 36, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2346338.

Statutory Intervention is Necessary to Protect Consumers

While questions of patent law usually find themselves before the Judiciary Committee, this Committee should consider and correct the negative impact that demand letter-sending practices have on consumers. Below, we set forth some potential targeted legislative solutions.

A. Defining Relevant Practices that Violate Consumer Protection Statutes.

Section 5 of the FTC Act declares unlawful “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.”²⁷ Abusive demand letters are both an unfair method of competition and a deceptive practice. A law explicitly identifying improper demand letter tactics as unfair methods of competition would more clearly trigger not just Section 5, but many similar state law provisions already on the books.

The FTC Act was enacted to protect consumers from the type of demand-letter practices many PAEs have lately practiced. By statutorily defining certain of those practices as “unfair methods of competition” or “unfair or deceptive acts or practices,” Congress could better ensure that existing Section 5 protections were applied to demand letters. For instance, the following demand-sending behaviors might be explicitly addressed:

- Demands falsely threatening litigation;²⁸

²⁷ 15 U.S.C.A. § 45(a)(1).

²⁸ *See, e.g.*, The Federal Fair Debt Collections Practices Act, 15 U.S.C. § 1692(e), limiting the scope of threats that can be made in a debt collection letter.



- Demands sent without specifically listing the patents and claims that are allegedly infringed;
- Demands sent without listing the products and services that allegedly infringe those patents;
- Demands sent without any clear indication of who owns the patent at issue;
- Demands sent following a failure to perform any pre-demand investigation into the recipient; and
- Demands sent to businesses with the direct knowledge that those businesses can neither afford to take a license or defend themselves in federal court.

PAEs routinely send demands that do all of these things. Recipients lack the information they need to assess their liability, with means they may feel they have little choice but to take an unearned license. Such business practices are unfair and deceptive, and they should be regulated by consumer protection statutes. As the Commission itself has stated, it can target “[c]onduct that results in harm to competition, and in turn, in harm to consumer welfare, [which] typically does so through increased prices, reduced output, diminished quality, or weakened incentives to innovate.”²⁹

²⁹ Statement of Commissioner Joshua D. Write, Proposed Policy Statement Regarding Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (June 19, 2013) at 7, *available at* <http://www.ftc.gov/speeches/wright/130619umcpolicystatement.pdf>.

Defining the types of practices that PAEs like MPHJ rely on as unfair or deceptive allows the FTC and various states with statutes similar to Vermont's to take advantage of existing statutory frameworks and end the dangerous PAE demand-sending campaigns. Moreover, it would present no risk to companies who engage in responsible licensing practices and technology transfer, who could easily obtain the information necessary to pursue their business interests fairly.

To be clear, the FTC has already recognized it has the power under Section 5 to respond to misleading and deceptive patent demand letters.³⁰ But making such authority explicit will encourage FTC investigations and enforcement, and will make explicit to those sending letters that they risk such action.

It is vitally important, however, that Congress ensure that states are able to address behavior occurring in their states through their own patent troll demand letter laws or "little-FTC Acts." Specifically, Congress should not pre-empt state laws which may address issues those states have encountered with patent trolls.

Relatedly, Congress should not discourage or prohibit enforcement of the FTC Act by state agencies. As often the primary contact for those targeted by patent trolls, State Attorneys General are often the most aware of improper activity occurring in their jurisdiction. Indeed, several State Attorneys General have been very active in attempting

³⁰ See, e.g., *In re MPHJ Tech. Inv., LLC et al.*, Docket No. C-142 3003, FTC Compl., available at <http://www.ftc.gov/system/files/documents/cases/141106mphjcmpt.pdf>.

to limit patent troll demand letters in their states.³¹ These Attorneys General should be encouraged. Congress should not take away flexibility from State Attorneys General and state laws that are invaluable resources in helping ensure patent troll demand letters do not extract undeserved payouts from hard-working small businesses and consumers.

Congress should also ensure that any law passed to address patent troll demand letters allows for flexible applicability based on changing tactics. Patent trolls will likely act quickly to try to find “loopholes” in any restrictions placed on their improper letter writing campaigns. Thus flexibility is vitally important to ensure that the FTC and State Attorneys General can react to changing deceptive practices.

Importantly, any definition of “bad faith” in sending demand letters, if included, should be by way of examples (using “such as” language), rather than through an exhaustive list. It is difficult for Congress to anticipate all ways that a PAE might engage in deceptive conduct through a demand letter. Thus, there is a risk that an exhaustive list of potentially actionable conduct will exclude some kinds of harmful and deceptive representations or omissions.³² For these reasons, Congress should draft legislation that allows the FTC, State Attorneys General, and the Courts to review practices made by a

³¹ See Pamela M. Prah, *State AGs target patent trolls to protect business*, USA Today, (Nov. 25, 2013), available at <http://www.usatoday.com/story/news/nation/2013/11/25/state-ag-patent-trolls/3696889/>.

³² To be clear, there is little or no risk that an open-ended definition will be read too broadly to capture legitimate, non-deceptive demand letters because such letters are generally given protection by the First Amendment. See, e.g., *Sosa v. DIRECTV, Inc.*, 437 F.3d 923 (9th Cir. 2006). Nevertheless, the First Amendment does not protect sham litigation, nor does it protect intentionally deceptive demand letters. See *Rock River Commc’ns, Inc. v. Universal Music Grp., Inc.*, 745 F.3d 343, 353 (9th Cir. 2014).

patent troll and determine whether they are abusive in light of the totality of the circumstances.

Finally, it is important that any bill to address patent troll demand letters does not become a replacement for broader reform. Patent trolls are able to send demand letters because of the high costs associated with litigation and the overly broad, vague, and invalid patents issued by the Patent Office. Without fundamental reform to address these issues, PAEs will continue to exploit the system for their undeserved gains.

B. Creating Public Registries of Relevant PAE Information

Because a patent is a government-granted monopoly, the government may impose conditions on that grant. Indeed, it does that all the time by requiring that certain conditions be met before a patent is granted and that patent holders keep their records up-to-date by, for instance, reporting on changes in ownership. Likewise, a patent holder should be required to provide certain information to the Patent Office when it asserts infringement of that patent in a letter, just as Courts report the assertion of patents in litigation.

Patent owners could be required to report information such as how many demand letters have been sent regarding a specific patent; identification of all parties who stand to benefit financially from any resulting license; identification of any obligation to license the patents at issue on fair or reasonable terms; and how many times the holder has filed suit based on the patent at issue.

There are various reasonable triggers that could require such reporting, such as a certain number of letters sent in a set period of time or notification to the Patent Office of a threshold number of letter recipients.

At a minimum, reporting this information to the Patent Office would make it public (assuming the Patent Office provided it in a publicly-accessible database, which it should be required to do). This information would fundamentally change the unfair information asymmetry facing demand recipients—armed with more facts, they will be better able to assess their options.

Collecting the information might also assist the Patent Office in initiating *sua sponte* review of certain patents. If the Office has information regarding which patents are most often used as weapons by PAEs, it might prioritize those for such review. Indeed, in a world with literally millions of existing patents, it makes sense to focus challenges on those that pose the greatest threat to consumers.³³ It is not until those patents are asserted in demands that we can ascertain just which patents will cause harm. Requiring reporting to the Patent Office will help the Office determine which patents it should target for additional review.³⁴ (The potential for Patent Office review of existing patents may likewise serve as an incentive for demand-letter recipients to provide information as well.)

It is not just the Patent Office that may decide to subject existing patents to additional review (indeed, this is a very rare practice, though there is no reason it could not happen more). Better public information would improve the ability of third parties—including public interest groups like EFF or the manufacturers of the accused products—

³³ Dan L. Burk & Mark Lemley, *Policy Levers in Patent Law*, 89 Va. L. Rev. 1575 (2003).

³⁴ See Chien & Reines at 6.

to identify patents that deserve legal challenge. EFF alone has made more than 15 third-party patent challenges to patents and patent applications. These challenges require significant resources, both financial and otherwise, and it is helpful to know which patents pose the greatest threat to consumers, end-users, and those who may not be in a position to put forth such a challenge themselves.

In the alternative, the FTC could also house a similar registry of patent demands. It already does this in various other contexts, such as the Do Not Call Registry. When a certain threshold number of demands are sent involving a particular patent, or from a particular sending party, the FTC might initiate an investigation. Similar to a registry at the Patent Office, one at the FTC might be made up of patent holders self-reporting or consumers submitting information on the demands they receive. Given the FTC's expertise in consumer-facing issues, it would be well-equipped to house the latter type of registry; given the Patent Office's expertise in dealing with patent owners, it might focus on the former.

Conclusion

EFF has grave concerns about the impact that PAE activities are having on consumers. Today's hearing is important particularly because PAEs conduct the vast majority of their business behind a veil of secrecy. Individual consumers, small start-ups, and ordinary Americans find themselves facing patent troll threats everyday, yet even the most basic information on those threats is often unattainable. Just having us here today to talk about this problem is a crucial step toward solving it. We encourage Congress to continue this important conversation and consider legislative proposals that would limit

the harm to consumers from PAE activity, including particularly the direct harm that comes from demand letters.