

EXHIBIT I

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How Vermont could save the nation from patent trolls

By Timothy B. Lee, Updated: August 1, 2013

Patent law is traditionally the domain of the federal government. But recently, patent litigation has become such a nuisance that state officials have started looking for ways to address the problem.

Jon Bruning, the attorney general of Nebraska, is one of them. Last month, he sent a letter to the law firm of Farney Daniels, LLP, warning the firm to leave Nebraska businesses alone.

Farney Daniels represents companies like the one that claims to own the concept of scanning documents to e-mail. In his letter, Bruning warned Farney Daniels that it would face serious consequences under Nebraska law if it engaged in "baseless harassment" of Nebraska businesses or pursued "costly and destructive litigation."

Nebraska is the second state whose officials have tried to shield local businesses from frivolous lawsuits by patent holders. Bruning credits Vermont attorney general William Sorrell for drawing his attention to the problem. Sorrell filed a lawsuit in May against the scanner patent company after it threatened numerous Vermont businesses and even two Vermont charities.

'It's been so maddening'

While Sorrell was the direct inspiration for Bruning's move, both men's interest in the issue is driven by grass-roots outrage over the growth of patent litigation. Such litigation used to be mostly confined to large companies in patent-dependent industries such as pharmaceuticals. But times have changed. Today, companies of all sizes in a wide variety of industries are facing patent threats. Critics have dubbed the new breed of patent litigators, whose only business model is to threaten firms who accidentally infringe their patents, as "patent trolls."

Vermont has emerged as a hotbed of anti-troll activism. Not only did Sorrell sue a patent troll, but the Vermont legislature passed an anti-patent troll bill this year. Both developments were prompted by lobbying by an ad-hoc coalition of Vermont businesses, represented by Vermont attorney Peter Kunin, who were looking to put a damper on frivolous patent lawsuits.

"Vermont has a history of political activism by companies," Kunin says. "Companies like Ben & Jerry's demonstrated to the business community at large that if there's something really wrong with the system, you don't have to take it lying down."

The ringleader of Vermont's anti-troll coalition was one of Kunin's longtime clients. This Vermont technology company has around 100 employees, and it was first

threatened by a patent holder about five years ago. Being threatened by patent holders was bad enough. The firm really became outraged when patent threats against the firm's clients started to cost it business.

"We had two projects that we were close to doing," says the firm's chief financial officer, who asked to remain anonymous because he fears retaliation from patent trolls. "Then our clients contacted us saying, 'We're being threatened by patent trolls.' Both projects were cancelled, nixing the firm's plans to hire several new employees.

"I couldn't believe this kind of thing was allowed in this country," the executive says. "I've had dialog with many of these guys. They know how costly litigation is. You can't get a judge to rule without spending a million dollars. So someone says, 'Hey, you can spend that or pay us \$100k and we'll go away.' Based on principle, we haven't settled, it's cost us more money in some cases and it's been so maddening."

Convinced that the system needed to be changed, the executive began talking to Vermont's elected officials. When the governor's office began getting similar complaints from other businesses, it passed the comments along. Soon the technology company had emerged as a de facto leader of the state's anti-troll movement.

Kunin also played an essential role in organizing the anti-troll coalition. "Kunin was working with me on our specific issue," the CFO says. But he also provided legal advice to a number of other Vermont businesses. When other Kunin clients were threatened with patent litigation, he made introductions.

The technology CFO organized a coalition of about a dozen Vermont technology and e-commerce companies who had faced threats from patent holders. The firms pooled their money and hired Kunin to craft a legal strategy for responding to the troll threat.

Vermont fights back

The members of the coalition "felt a deep sense of anxiety and frustration with the legal system and powerlessness," Kunin says. "We felt we needed to do something to level the playing field."

"The patent system is a federal system," Kunin says. "The challenge for us at these companies and for me as a lawyer was is there anything we can do under Vermont state law without being preempted by federal law."

"We came up with a legal theory under Vermont's Consumer Protection Act," Kunin says. "The legal theory basically goes like this: If a troll makes a threat in bad faith, that is a violation of state consumer protection laws," which also protect Vermont businesses against frivolous legal threats.

"The patent system is federal, but it works hand in glove with state law," Kunin says. For example, he notes, questions about who owns a patent are generally litigated under state law. Similarly the sale and licensing of patents is often governed by state laws.

Kunin and his clients began talking to elected officials about their idea. "We're a small state," he says. "Our governor, our senators, our legislators, they're easy to talk to. They're willing to listen to the business community."

Kunin testified about the legislation in April, and the legislation passed the legislature easily in May.

Vermont's legislation gives the recipient of a "bad faith" accusation of patent infringement the right to counter-sue in state court. While no specific definition of bad faith is offered, the law offers several criteria that a judge can use to determine whether a threat was made in bad faith.

Possible signs of bad faith include a lack of specificity about an alleged infringement, demands for excessive licensing fees, and unreasonably short deadlines for payment. Firms that do not themselves use the technology claimed by the patent — a.k.a. trolls — are also more vulnerable to accusations of bad-faith litigation.

National implications

The idea of using state laws as a club against patent trolls is so new that it hasn't yet been tested in court. There's a possibility that the Vermont legislation, as well as the efforts of the Vermont and Nebraska attorneys general, will fall prey to preemption, the legal principle that bars states from interfering with the enforcement of federal law.

But Camilla Hrdy, a legal scholar at Yale, says the state efforts have a good shot at standing up in court. "I don't think it's necessarily preempted," she says. Federal courts have generally allowed the states to police bad-faith patent assertions, but only if the state courts apply the same legal standards that would apply in federal courts.

Hrdy predicts that if a "patent is obviously invalid or plainly not infringed," then accusations of bad faith are likely to stick against the patent holder. But in less clear-cut cases, the stricter federal standards may work in the patent holder's favor.

The idea of using state consumer protection law against patent trolls could spread to additional states in the coming months. Bruning, the Nebraska attorney general, says he has been evangelizing the idea to his peers in other states, with positive results.

"The attorneys general, we know each other well," Bruning says. "There are good friends across party lines."

Bruning is slated to lead the intellectual property committee of the National Association of Attorneys General next year. And he plans to make the fight against patent trolling the "primary issue" of the committee.

"It's a transfer of wealth that occurs via a perversion of the court system," Bruning says.

If the other forty-eight states follow Vermont and Nebraska's lead, it could make the legal system much less hospitable to patent trolls. Trolling takes advantage of economies of scale. A trolling firm can send out thousands of demand letters, counting on the fact that some fraction of the recipients will settle just to avoid the hassle and expense of hiring a lawyer. And because few of the cases ever go to trial, the cost to the troll can be very low.

But if other states adopt anti-troll measures, that calculus could change. Suddenly, sending out a thousand demand letters would trigger responses from dozens of state

attorneys general, who *do* have the resources and expertise to fight back. Trolls could be forced to respond to dozens of subpoenas and appear in dozens of state courts to address charges that they were engaging in bad-faith litigation. That could make patent trolling a much less lucrative business model, helping to bring the patent litigation explosion under control.

"This isn't a Republican or Democratic issue," says Bruning, a Republican.
"Companies that aren't violating anyone's patents are settling these cases just to avoid the cost of litigation. That's not what the courts are designed for."

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