

**THE FIGHT AGAINST “PATENT TROLLS:” WILL STATE LAW
COME TO THE RESCUE?**

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Patent trolls are companies that do not invent or manufacture any products. These companies acquire patents for routine activities, such as scanning documents to email. They then send out thousands of letters to potential infringers, demanding exorbitant fees for a license to engage in the patented activity, and threatening suit if the recipient fails to pay for a license. Vermont has taken patent trolls head on—its Attorney General filed suit against a patent troll under state consumer protection law and the Vermont legislature passed a law this year punishing companies that assert patent infringement in bad faith. Patent law, however, is traditionally a federal matter and, thus, federal law may preempt Vermont’s efforts. This Recent Development argues that Vermont has avoided preemption by tailoring its efforts to conform to federal guidelines. Although Vermont has avoided preemption, this Recent Development goes on to argue that Congress should take action against patent trolls, as Congressional action would not be subject to preemption. Additionally, nationwide legislation would be a more efficient way to combat patent trolls, as opposed to a state-by-state effort.

I. INTRODUCTION

Steve Vicinanza owns BlueWave Computing, an Atlanta-based IT consulting firm.¹ BlueWave has around 100,000 employees, and installs—but does not produce—office equipment.² In 2012, Vicinanza received a letter alleging that BlueWave had infringed

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¹ Kris Frieswick, *The Real Toll of Patent Trolls*, INC.COM (Feb. 14, 2013), <http://www.inc.com/magazine/201202/kris-frieswick/patent-troll-toll-on-businesses.html>.

² *Id.*

on a patent owned by Project Paperless.³ The patent that BlueWave allegedly infringed was for the practice of scanning paper documents directly into an email attachment.⁴ Project Paperless claimed ownership of the patent rights to scanning paper documents directly into emails.⁵ As the patent owner, Project Paperless demanded that BlueWave pay a one-time license fee of \$1,000 per employee for the ability to scan documents into email.⁶ The demand “struck Vicinanza as so crazy that he ignored it”—that is, until Project Paperless hit him with a lawsuit.⁷ The suit named Vicinanza and one hundred of his clients, who were allegedly infringing by using BlueWave’s printer and IT networks, as co-defendants.⁸ Faced with the suit, Vicinanza had to choose whether to fight Project Paperless in court or whether to pay a license fee of \$200,000.⁹

Businesses like Project Paperless recognize that intellectual property resources, such as patents, are a source of tremendous value.¹⁰ This value stems from the exclusive rights that accompany a valid patent, including “the right to exclude others from making, using, offering for sale, or selling the invention.”¹¹ Accordingly, patent holders can seek an injunction in court “to prevent the violation of any right secured by patent”¹² and can also seek monetary damages from infringers.¹³ Incident to these

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Miranda Jones, *Permanent Injunction, A Remedy by Any Other Name Is Patently Not the Same: How Ebay v. Mercexchange Affects the Patent Right of Non-Practicing Entities*, 14 GEO. MASON L. REV. 1035, 1035 (2007).

¹¹ Paul M. Mersino, *Patents, Trolls, and Personal Property: Will Ebay Auction Away A Patent Holder's Right to Exclude?*, 6 AVE MARIA L. REV. 307, 307 (2007) (quoting 35 U.S.C. § 154(a)(1) (2000)).

¹² 35 U.S.C. § 283 (2012).

¹³ 35 U.S.C. § 284 (2012) (“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.”).

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exclusive rights is a patent holder's ability to sell or license the patent for valuable consideration.¹⁴

Recognizing these rights, many companies have emerged whose sole function is to acquire patents in order to enforce their patent rights against organizations that use their patents. These businesses require organizations using their patents to pay license fees by threatening to take legal action for patent infringement.¹⁵ These entities are known as Non-Practicing Entities ("NPEs").¹⁶ When an NPE purchases a patent from an inventor, it appears, on its face, to be a mutually beneficial transaction allowing the inventor to focus on inventing, while the NPE can focus on enforcing the patent right.¹⁷ NPEs, however, have earned a negative reputation for "demand[ing] licensing fees that are higher than the patented technologies are worth but lower than the cost of defending against an infringement lawsuit."¹⁸ For this reason, NPEs are perhaps more fittingly referred to as "patent trolls."¹⁹

¹⁴ 35 U.S.C. § 261 (2012) ("Applications for patent, patents, or any interest therein, shall be assignable in law by an instrument in writing."); *see also* Cutter Labs. v. Lyophile-Cryochem Corp., 179 F.2d 80, 84 (9th Cir. 1949) ("It must be remembered that the patent laws give the patentee a monopoly. He may make, use or sell the patented product, license others, on an exclusive or nonexclusive basis, to do so, authorize the issuance of sublicenses, or assign the patent itself for a consideration. The sole limitation is, that he must not use his legitimate patent monopoly as a means of suppressing competition or acquiring a monopoly outside of the area of monopoly which the patent grants.").

¹⁵ Jones, *supra* note 10, at 1036; *see also* Frieswick, *supra* note 1.

¹⁶ Jones, *supra* note 10, at 1036.

¹⁷ Jones, *supra* note 10, at 1036.

¹⁸ Editorial, *Congress vs. the "Patent Trolls"*, L.A. TIMES (Oct. 28, 2013), <http://www.latimes.com/opinion/editorials/la-ed-patent-trolls-goodlatte-20131028,0,5998339.story#axzz2jJPYsML7>; *see also* Cecile LeBlanc, *Why Everyone Despises Patent Trolls*, ARIZ. DAILY SUN (July 21, 2013, 5:00AM), http://azdailysun.com/business/local/why-everyone-despises-patent-trolls/article_720076ec-f104-11e2-af99-001a4bcf887a.html ("Patent trolls have been in the news lately. President Barack Obama recently called attention to patent trolls for diverting resources away from research in technology, requiring companies instead to focus on litigation fees.").

¹⁹ Peter Detkin, the former Assistant General Counsel for Intel, coined the term "Patent Troll," explaining that "[a] patent troll is somebody who tries to make a lot of money off a patent that they are not practicing and have no intention of practicing and in most cases never practiced." Mersino, *supra* note

The term “patent troll” applies to an NPE that grants licenses for the use of its patents, often at exorbitant prices.²⁰ In addition to offering licenses at exorbitant prices, patent trolls assert “ridiculously broad patents over well-established techniques, such as transmitting audio and video online, or stretching old patents to cover new technologies that weren’t contemplated by the original inventor.”²¹ To enforce their rights, patent trolls often send demand letters to alleged infringers that threaten litigation if the infringer does not agree to pay a license for the patent.²²

The NPE business model is to send demand letters to organizations offering licenses at a price low enough to make fighting infringement claims economically irrational.²³ In some cases, recipients are so intimidated by the threat of suit that they will immediately agree to pay for a license.²⁴ In other cases, such as with BlueWave, the NPE’s targets believe the assertions are baseless, but they are not willing or able to spend the time and money required to litigate the issue.²⁵ Even baseless patent

11, at 314–15. For the purposes of this Recent Development, the terms NPE and patent troll will be used interchangeably.

²⁰ *Id.*

²¹ L.A. Times Editorial, *supra* note 18.

²² Eric Goldman, *Vermont Enacts the Nation’s First Anti-Patent Trolling Law*, FORBES (May 22, 2013, 2:22 PM), <http://www.forbes.com/sites/ericgoldman/2013/05/22/vermont-enacts-the-nations-first-anti-patent-trolling-law>. A White House study indicates that Patent Trolls sent out 10,000 letters threatening to sue for patent infringement in 2012 alone. Gene Sperling, *Taking on Patent Trolls to Protect American Innovation*, THE WHITE HOUSE BLOG (June 4, 2013, 1:55 PM), <http://www.whitehouse.gov/blog/2013/06/04/taking-patent-trolls-protect-american-innovation>.

²³ Timothy B. Lee, *Patent Trolls Have a New Enemy: Martha Stewart*, WASH. POST (Sept. 26, 2013, 3:52 PM), <http://www.washingtonpost.com/blogs/the-switch/wp/2013/09/26/patent-trolls-have-a-new-enemy-martha-stewart/>.

²⁴ Goldman, *supra* note 22. Another example is that of Chris Friedland. Friedland’s business Build.com, which sells home improvement and plumbing equipment online, has received eighteen patent infringement notices. Friedland read the first patent infringement notice as being so broad that it “would affect anyone who had ever used the Internet,” but agreed to pay for a license at the advice of his attorney thinking the problem would go away. Frieswick, *supra* note 1.

²⁵ Goldman, *supra* note 22.

infringement suits can require a defendant to spend thousands of dollars getting the claim dismissed.²⁶ Fighting a full patent lawsuit is even more difficult, as cases are rarely decided quickly²⁷ and can cost millions of dollars to defend.²⁸

A Boston University study estimated that, in 2011 alone, the NPE's actions cost U.S. businesses \$29 billion in legal fees and settlement costs.²⁹ Troubled by this realization, several states have been looking for solutions to fight patent trolling.³⁰ The Attorneys General of Vermont and Nebraska, for example, have separately taken action against patent trolls by suing under state consumer protection laws.³¹ In Minnesota, the Attorney General has reached a settlement with an NPE that will impose civil penalties on the NPE if it is found that the NPE extracted payments from Minnesota companies or residents following assertions of

²⁶ *Id.*; see also Lee, *supra* note 23 (“The legal fees required to fight a patent infringement lawsuit are vastly more than [the offer for a license], so a rational firm will just write a check to make the troll go away.”); Jim Kerstetter, *How Much is that Patent Lawsuit Going to Cost You?*, CNET (Apr. 5, 2012, 7:00 AM), http://news.cnet.com/8301-32973_3-57409792-296/how-much-is-that-patent-lawsuit-going-to-cost-you/ (“For a claim that could be worth less than \$1 million, median legal costs are \$650,000. When \$1 million to \$25 million is considered ‘at risk,’ total litigation costs can hit \$2.5 million. For a claim over \$25 million, median legal costs are \$5 million.”).

²⁷ See PWC, 2013 PATENT LITIGATION STUDY 5 (2013), available at <http://www.pwc.com/us/en/forensic-services/publications/2013-patent-litigation-study.jhtml> (“[T]he median time-to-trial has remained fairly constant, averaging 2.3 years since 1995.”).

²⁸ Timothy B. Lee, *How Vermont Could Save the Nation From Patent Trolls*, WASH. POST (Aug. 1, 2013, 10:05 AM), <http://www.washingtonpost.com/blogs/the-switch/wp/2013/08/01/how-vermont-could-save-the-nation-from-patent-trolls/>; see also PWC, *supra* note 27 (identifying three cases that resulted in awards of \$1 billion or greater: *Monsanto v. DuPont*; *Apple v. Samsung*; and *Carnegie Mellon University v. Marvell*).

²⁹ James E. Bessen & Michael J. Meurer, *The Direct Costs from NPE Disputes*, 99 CORNELL L. REV. (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2091210.

³⁰ Walter Judge, *Alleged Patent Troll Targeted by Vermont Attorney General*, THE IP STONE (Sept. 25, 2013), <http://theipstone.com/2013/09/25/alleged-patent-troll-targeted-by-vermont-attorney-general>.

³¹ Lee, *supra* note 28.

infringement.³² In addition to actions taken by its Attorney General, the Vermont legislature, on May 22, 2013, enacted a state tort law claim that specifically targets NPEs.³³ The Vermont legislation punishes bad faith assertions of patent infringement by NPEs by giving recipients of patent infringement letters the right to counter sue in state court.³⁴

These states' actions against patent trolls have sparked controversy, primarily over who has the authority to regulate NPEs and associated patent infringement claims. Generally, Congress is seen to control patent law, not the states.³⁵ Accordingly, this Recent Development considers whether current and future state efforts to regulate NPEs are, or will be, preempted by federal law by examining Vermont's newly passed legislation targeting patent trolls against relevant federal regulations. If patent trolls can be prosecuted under state law, such laws would provide a valuable weapon for organizations targeted by patent trolls. Any time a successful legal challenge is brought against an NPE, the NPE is deprived of revenue that it would otherwise use to target other businesses or organizations.³⁶ The potential cumulative impact of forcing NPEs to defend suits across the country could make NPEs seriously reconsider threatening organizations with baseless

³² Jennifer Bjorhus, *Minnesota Targets East Coast 'Patent Troll'*, STAR TRIBUNE (Aug. 27, 2013, 9:20 AM), <http://www.startribune.com/business/220375171.html>. This settlement, however, only applies to one patent troll. See Press Release, Minnesota Attorney General Lori Swanson, Attorney General Lori Swanson Announces First-In-The-Nation Order To Stop Delaware Company From "Patent Trolling" Minnesota (Aug. 20, 2013), available at <http://www.ag.state.mn.us/Consumer/PressRelease/130820StopPatentTrolling.asp> [hereinafter Press Release].

³³ *Governor Shumlin Signs Nation's First Patent Protection Law Against Bad Faith Claims*, VERMONT BUSINESS MAGAZINE (May 22, 2013), <http://www.vermontbiz.com/news/may/governor-shumlin-signs-nations-first-patent-protection-law-against-bad-faith-claims>.

³⁴ An Act Relating to Amending Consumer Protection Provisions for Bad Faith Assertions of Patent Infringement, H. 299, 2013 Session (VT 2013), <http://www.leg.state.vt.us/docs/2014/Acts/ACT044.pdf> [hereinafter H.299].

³⁵ Lee, *supra* note 28.

³⁶ Serdar Yegulalp, *Beyond the Bottom Line: The True Cost of Patent Trolls*, INFOWORLD (Oct. 4, 2013), <http://www.infoworld.com/t/intellectual-property/beyond-the-bottom-line-the-true-cost-of-patent-trolls-228170?page=0,1>.

litigation.³⁷ Depriving states of the ability to prosecute patent trolls for bad faith claims of patent infringement would be an affirmation of NPEs' conduct and could effectively be seen as an endorsement of patent trolling.

This Recent Development argues that federal law does not preempt Vermont's anti-patent trolling efforts. Vermont's efforts conform to a Federal Circuit standard, which allows states to provide tort claims for patent assertions that are held to be "objectively baseless." Additionally, this Recent Development argues that Congress should enact federal anti-patent trolling legislation to render the preemption issue moot. Part II provides a general overview of federal patent law and the concept of preemption. Part III discusses the right to sue for patent infringement. Part IV discusses Vermont's efforts to combat patent trolling using state law. Part V examines why Vermont's statute is not preempted, and Part VI explores why Vermont's fight against patent trolls remains difficult despite this conclusion. Finally, Part VII argues that Congress should obviate the need for state level anti-patent trolling legislation by passing a federal anti-patent trolling law.

II. BACKGROUND: PREEMPTION IN FEDERAL PATENT LAW

The Constitution's Patent Clause grants Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."³⁸ This clause reflects the

³⁷ *Id.* ("When notorious patent troll Lodsys recently tried to demand money from antivirus makers Kaspersky, Lodsys found Kaspersky quite willing to go to court. Lodsys settled—for a total payment of \$0—rather than face a trial.")

³⁸ U.S. CONST. art. I, § 8, cl. 8. Authors and inventors, however, cannot gain exclusive rights for every writing or discovery. *See, e.g.*, Sharon Brawner McCullen, *The Federal Circuit and Ninth Circuit Face-Off: Does A Patent Holder Violate the Sherman Act by Unilaterally Excluding Others from A Patented Invention in More Than One Relevant Market?*, 74 TEMP. L. REV. 469, 472–73 (2001) ("The inventor [] must meet five statutory requirements of statutory subject matter, usefulness, novelty, non-obviousness and the objective disclosure requirement of enablement and written description, before receiving [a] patent grant.").

Framers' desire to balance the need for inventors to reap the benefits of their inventions against the fear of stifling future innovation through patent monopolies.³⁹ Over the years, Congress has achieved this balance with the creation of the federal patent system:

The federal patent system embodies a carefully crafted bargain for encouraging the creation and disclosure of new, useful, and nonobvious advances in technology and design in return for the exclusive right to practice the invention for a period of years.⁴⁰

This patent system has “enormous competitive significance.”⁴¹ In essence, when the system works correctly, it motivates inventors to invent.⁴²

³⁹ See, e.g., *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989) (“The Patent Clause itself reflects a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the ‘Progress of Science and useful Arts.’”).

⁴⁰ *Id.* at 150–51. In *Bonito*, a Florida manufacturer (Bonito Boats) developed and manufactured a fiberglass boat hull that it eventually marketed and sold not only in Florida, but other states as well. Bonito did not apply for a federal patent for its fiberglass hull manufacturing process. Six years after the hull was developed, Florida enacted a statute that afforded “patent-like” protection to boat hull manufacturers, which prevented other manufacturers from duplicating the hull-making process without written permission. In essence, the statute prevented reverse engineering of Bonito’s hulls. Bonito sued Thunder Craft Boats under the Florida statute, but the Supreme Court found Florida’s statute to be preempted. The Court noted that “[r]everse engineering . . . often leads to significant advances in technology” in holding that prevention of reverse engineering “could pose a substantial threat to the patent system’s ability to accomplish its mission of promoting progress in the useful arts.” *Id.* at 161.

⁴¹ James R. Atwood, *Securing and Enforcing Patents: The Role of Noerr/Pennington*, 83 J. PAT. & TRADEMARK OFF. SOC’Y 651 (2001) (“[This competitive significance can be] both good and bad. When the system works right, an inventor is motivated to develop a novel, non-obvious, and useful invention. Then—in exchange for public disclosure—the inventor is justly rewarded by the government’s grant of a property right that gives him the exclusive right to exploit the invention for a period of time, or to license others. But, if the system goes wrong, substantial harm can result. An invalid patent can deter innovation by others, intimidate competitors or customers, or be used as a fig leaf to cover improper market-allocation agreements.”).

⁴² *Id.*

The exclusive right granted to patent owners is significant because it not only grants patent holders the ability to use their invention, but it also grants patent holders the ability to exclude others from using their inventions for a set period of time.⁴³ Thus, the patent holder can choose whether to enforce their rights, or, alternatively, to sell or license the rights.⁴⁴ In this sense, the issuance of a patent alone does not allow the patent holder to realize any economic benefit.⁴⁵ To monetize a patent right it must be enforced.⁴⁶

Congress determines when the desired balance has been struck between encouraging invention and allowing an inventor to exclusively reap the benefits of an invention for a period of years.⁴⁷ The states are not free to second-guess this determination.⁴⁸ As a result, states are largely preempted from enacting their own patent legislation in such instances.⁴⁹ The origins of the Patent Clause support the concept that federal law would take precedence over state law in the area of intellectual property.⁵⁰ In fact, one of the

⁴³ Ahmed J. Davis & Karolina Jesien, *The Balance of Power in Patent Law: Moving Towards Effectiveness in Addressing Patent Troll Concerns*, 22 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 835, 838–39 (2012).

⁴⁴ *Id.* at 839. While it may seem that patent holders would always choose to enforce their rights—that is not necessarily the case. As Davis and Jesien explain, “[i]f the cost of enforcement is too high, the market dictates that the patent owner will either not take steps to enforce the patent or will sell or license the patent to another entity that has the resources to enforce it.” *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* For example, if someone creates an invention, obtains a patent, and begins to sell that invention, they have realized an economic benefit. That benefit, however, has nothing to do with the issuance of a patent. But if a competing company began to sell his invention, he could enforce the patent and benefit economically by reaping profits that otherwise would go to his competitor.

⁴⁷ *See Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 152 (1989).

⁴⁸ *See id.*

⁴⁹ *See id.* (“[O]ur past decisions have made clear that state regulation of intellectual property must yield to the extent that it clashes with the balance struck by Congress in our patent laws.”).

⁵⁰ This can be seen by looking back to the debates prior to ratification of the Constitution. *See, e.g.*, Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 84 *J. PAT. & TRADEMARK OFF. SOC’Y* 909,

primary purposes of the Patent Clause was to establish nationwide uniformity in intellectual property law.⁵¹ Accordingly, Congress granted the federal courts exclusive jurisdiction over actions “arising under” the patent laws.⁵² Vesting the federal courts with exclusive jurisdiction means that, generally, disputes over patent ownership and rights are heard at the federal level.⁵³ To this end, Congress created the United States Court of Appeals for the Federal Circuit in 1982, and gave it exclusive jurisdiction to hear appeals brought under federal patent legislation.⁵⁴ Giving exclusive jurisdiction to the Federal Circuit centralizes patent appeals to a single forum, and, thus, promotes Congress’s goal of uniformity.⁵⁵

The Federal Circuit, in *Globetrotter Software v. Elan Computer Group*,⁵⁶ reaffirmed its position that tort liability for good faith patent assertions under state law is an area that cannot coexist with

924 (2002) (“What is clear from the Federalist is that Madison believed that the state copyright laws were ineffectual. This point was also made during the ratification debates by Thomas McKean of Pennsylvania, and future Justice James Iredell of North Carolina.”).

⁵¹ See THE FEDERALIST NO. 43, at 309 (James Madison) (Benjamin Wright ed., 1961) (“The States cannot separately make effectual provisions for [the right to useful inventions], and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.”).

⁵² 28 U.S.C. § 1338 (2012).

⁵³ Although there is some debate over how broadly or narrowly to interpret the words “arising under,” state courts generally refuse to hear those cases. See Timothy E. Grimsrud, *Holmes and the Erosion of Exclusive Federal Jurisdiction over Patent Claims*, 87 MINN. L. REV. 2133, 2140–42 (2003).

⁵⁴ See 28 U.S.C. § 1295 (2012). The Federal Circuit was created largely in reaction to lack of uniformity in the application of patent law among the circuit courts of appeals. Granting the Federal Circuit exclusive appellate jurisdiction was intended to promote uniformity in patent law and reduce forum shopping among the circuit courts. Grimsrud, *supra* note 53, at 2142–43.

⁵⁵ “The purpose of placing jurisdiction of these appeals in the United States Court of Appeals for the Federal Circuit is to centralize patent appeals in a single forum and, as a result, to promote uniformity in the application of the law.” S. REP. NO. 97-275, at 21 (1982), reprinted in 1982 U.S.C.C.A.N 11, 31.

⁵⁶ 362 F.3d 1367 (Fed. Cir. 2004).

federal patent law.⁵⁷ Although state patent regulation must yield to federal law where the two conflict, not every instance of state regulation involving intellectual property is prohibited.⁵⁸

In *Globetrotter*, the court held that federal law preempted a state law claim for tortious interference with a prospective economic advantage that was based on allegations of patent infringement.⁵⁹ The court found preemption for two reasons. The first was the desire to maintain the federal patent system's precedence over state law.⁶⁰ This desire was implicated because the patent holder in the case had a right to sue for patent infringement under federal law. The second reason was the First Amendment's protection of certain types of expression.⁶¹ The First Amendment was implicated when the patent holder sent emails to the alleged infringer indicating an intent to exercise his right to sue under federal patent law.⁶²

III. THE RIGHT TO SUE FOR PATENT INFRINGEMENT

One type of expression protected by the First Amendment is the right to petition the government.⁶³ Incident to that right is the

⁵⁷ *Id.* at 1377 (“We have held that federal patent law preempts state-law tort liability for a patent holder’s good faith conduct in communications asserting infringement of its patent and warning about potential litigation.”).

⁵⁸ *See* Aronson v. Quick Point Pencil Co., 440 U.S. 257, 262 (1979) (“State law is not displaced merely because the contract relates to intellectual property which may or may not be patentable; the states are free to regulate the use of such intellectual property in any manner not inconsistent with federal law.”). For example, state law claims of misappropriation of trade secrets are not preempted simply because patents figure into the evidence. *See, e.g.*, Joel Leeman, *Federal Preemption Has Its Limits: State Law Governs Theft of Trade Secrets Even When A Patent Is Involved*, SUNSTEIN (Feb. 2009), <http://sunsteinlaw.com/federal-preemption-has-its-limits-state-law-governs-theft-of-trade-secrets-even-when-a-patent-is-involved/>.

⁵⁹ *See Globetrotter*, 362 F.3d at 1377.

⁶⁰ *Id.* (“The federal patent laws preempt state laws that impose tort liability for a patentholder’s good faith conduct in communications asserting infringement of its patent and warning about potential litigation.”).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *See* U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging

right to notify a potential defendant indicating an intent to sue (in this case, to sue for patent infringement).⁶⁴ As the Supreme Court held over one hundred years ago, “[p]atents would be of little value if infringers of them could not be notified of the consequences of infringement, or proceeded against in the courts.”⁶⁵ Accordingly, a patent holder must be allowed to notify a potential infringer of the patent holder’s rights so the potential infringer can decide whether to cease the practice, negotiate a license to continue the practice, or ignore the issue and run the risk of liability.⁶⁶ However, any notification indicating intent to sue for patent infringement must be made in good faith.⁶⁷ For example, a patent owner’s letter to defendants alleging patent infringement cannot contain inaccurate or false information or misleading statements.⁶⁸ Essentially, actions that appear to be directed at petitioning the government will not receive protection if they “[are] a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.”⁶⁹

The court in *Globetrotter* held that any patent legislation enacted by states regarding good faith claims is automatically preempted by federal legislation.⁷⁰ However, this holding indicates that states can avoid preemption when state tort liability against

the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”)

⁶⁴ See Justin McCabe, *A New England Attorney General is Trolling a “Patent Troll”*, BUS. INSIDER (July 7, 2013, 10:08 AM), <http://www.businessinsider.com/vermont-attorney-general-sues-2013-7>.

⁶⁵ *Virtue v. Creamery Package Mfg. Co.*, 227 U.S. 8, 37–38 (1913).

⁶⁶ See *Virginia Panel Corp. v. MAC Panel Co.*, 133 F.3d 860, 869 (Fed. Cir. 1997).

⁶⁷ See *id.* (“A patentee that has a good faith belief that its patents are being infringed violates no protected right when it so notifies infringers.”).

⁶⁸ See McCabe, *supra* note 64; see also *Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700, 710 (Fed. Cir. 1992) (outlining the following as examples of bad faith in previous cases: making threats without intending to file suit, sending notices indiscriminately to all members of a trade, and when the patentee had no good faith belief in the validity of the patent).

⁶⁹ *E. R. R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961).

⁷⁰ *Globetrotter Software, Inc., v. Elan Computer Grp., Inc.*, 362 F.3d 1367, 1377 (Fed. Cir. 2004).

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patent holders is based on a showing of “bad faith” in asserting the patent infringement.⁷¹ The Supreme Court articulated the standard for bad faith in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industry, Inc.*:⁷²

[T]he lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized.⁷³

Although *Professional Real Estate* did not involve state law tort claims for patent asserting entities, the Federal Circuit applied the “objectively baseless” standard to state-law claims in *Globetrotter*.⁷⁴

In *Globetrotter*, Rainbow Technologies was in negotiations to acquire all of the outstanding shares of Elan Computer Group.⁷⁵ During the course of these negotiations, Globetrotter Software notified Rainbow Technologies that Elan Computer Group might have been infringing on multiple patents owned by Globetrotter.⁷⁶ Elan believed that Globetrotter sent these notifications in bad faith for the sole purpose of causing Rainbow to abandon the proposed acquisition of Elan.⁷⁷ As a result, Elan’s CEO filed claims against Globetrotter under state law for tortious interference with a prospective economic advantage and unfair competition.⁷⁸

⁷¹ *Zenith Elecs. Corp. v. Exzec, Inc.*, 182 F.3d 1340, 1355 (Fed. Cir. 1999).

⁷² 508 U.S. 49, 57 (1993).

⁷³ *Id.* at 60; *see also* *In re Innovatio IP Ventures, LLC Patent Litig.*, 921 F. Supp. 2d 903, 914 (N.D. Ill. 2013) (“[F]or bad faith to exist, the claims must be ‘so baseless that no reasonable litigant could realistically expect to secure favorable relief.’” (quoting *Prof'l Real Estate*, 508 U.S. at 60)).

⁷⁴ *Globetrotter*, 362 F.3d at 1376. *Professional Real Estate* applied the objectively baseless standard to pre-litigation communications in the context of an anti-trust lawsuit. The *Globetrotter* court held that the First Amendment policy reasons justifying this standard for antitrust suits applied equally to the realm of state law tort suits. *Id.* at 1377.

⁷⁵ *Id.* at 1370.

⁷⁶ *Id.*

⁷⁷ *Id.* Rainbow Technologies did in fact abandon the proposed acquisition, but later acquired Elan at a much lower price than originally discussed. *Id.*

⁷⁸ *Id.*

The *Globetrotter* court held that Elan's state law claims were preempted because Elan failed to prove that Globetrotter Software's patent infringement notifications were objectively baseless, and therefore made in bad faith.⁷⁹ As Elan conceded at oral argument, the only proof of objective baselessness was the fact that the district court ruled on a motion for summary judgment that Elan did not infringe on Globetrotter's patent.⁸⁰ This proof was unpersuasive to the Federal Circuit, which reversed the district court's order of summary judgment.⁸¹ Therefore, the court held Elan's bad faith claims to be based solely on attempts to demonstrate *subjective* bad faith, which failed to satisfy the objectively baseless standard.⁸² The court explained that, "an objectively reasonable effort to litigate cannot be sham regardless of subjective intent."⁸³

IV. VERMONT: COMBATING PATENT TROLLS THROUGH THE USE OF STATE LAW

While California, home to high profile technology companies such as Google and Apple,⁸⁴ may seem to be a fitting leader in the movement to confront patent trolls, it is Vermont that has taken the lead in the fight against NPEs. Perhaps surprisingly, Vermont has more patents per capita than any other state.⁸⁵ The large IBM

⁷⁹ *Id.* at 1377.

⁸⁰ *Id.* at 1375.

⁸¹ *Id.*

⁸² *Id.* at 1375–77. Elan presented the following as evidence of subjective bad faith: the timing of Globetrotter's e-mail and letters alleging infringement, Globetrotter's belief that the patent was invalid and that Globetrotter never actually sued for infringement of the patents. *Id.*

⁸³ *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 57 (1993).

⁸⁴ See Marcus Wohlsen, *The 10 Silicon Valley Companies You Wish You Worked For (Or Started)*, WIRED (Nov. 3, 2012, 6:30 AM), <http://www.wired.com/business/2012/11/best-silicon-valley-tech-companies/>.

⁸⁵ See Eric Thompson & William Walstad, STATE ENTREPRENEURSHIP INDEX, BUSINESS IN NEBRASKA, at Table 6 (September 2012), *available at* http://bbr.unl.edu/documents/September_2012_BIN.pdf. Vermont holds 3.5 patents for every 1,000 residents. *Id.* Only four other states have more than 3 patents per 1,000 residents. *Id.*

manufacturing plant in the state, as well as strong life sciences, food manufacturing, and microbrewing industries, all combine to generate Vermont's sizeable patent activity.⁸⁶ Due to the high concentration of patents in the state, Vermont has a clear incentive for getting involved in patent policy, particularly policy pertaining to patent trolls.⁸⁷

Aside from the high concentration of patents in Vermont, NPE's recently targeted two of Vermont's non-profit organizations, compelling state politicians to act. One of the Vermont non-profits targeted by an NPE is Lincoln Street, whose mission is to "assist individuals with developmental disabilities to identify their needs and provide the quality services that empower them to reach their potential" by providing them with home care.⁸⁸ The other non-profit is ARIS Solutions, which provides fiscal and payroll services to non-profits that aim to support the developmentally disabled (such as Lincoln Street).⁸⁹ For politicians in Vermont, it is politically advantageous to step in and protect Vermont-based non-profit organizations like Lincoln Street and ARIS Solutions that promote and carry out altruistic goals, especially when those organizations are unfamiliar with patent law and are without the resources to fight a patent suit.⁹⁰

⁸⁶ See Parija Kavilanz, *10 Most Inventive States*, CNN MONEY (Oct. 26, 2012, 2:37 PM), <http://money.cnn.com/gallery/smallbusiness/2012/10/24/states-patent-invention/index.html>.

⁸⁷ As Betsy Bishop, president of the Vermont Chamber of Commerce put it, "Vermont is forging ahead in technology innovation, biotech and bioscience. [Vermont's new law punishing bad faith patent infringement claims] will help protect our industries and new businesses." Parija Kavilanz, *Vermont Fights Back Against Patent Trolls*, CNN MONEY (May 24, 2013, 10:09 AM), <http://money.cnn.com/2013/05/24/smallbusiness/patent-trolls/>.

⁸⁸ LINCOLN STREET, INC., <http://www.lincolnstreetinc.org/index.php> (last visited Oct. 20, 2013); Joe Mullin, *Patent troll that wants \$1,000 per worker gets sued by Vermont A-G*, ARSTECHNICA (May 22, 2013, 2:20 PM), <http://arstechnica.com/tech-policy/2013/05/patent-troll-that-wants-1000-per-worker-gets-sued-by-vermont-a-g/>.

⁸⁹ See Mullin, *supra* note 88; ARIS SOLUTIONS, <http://www.aris-solutions.net/mission.php> (last visited Oct. 20, 2013).

⁹⁰ The targeting of Lincoln Street and ARIS Solutions caused consternation among a number of Vermont companies, which were forced to hire private legal

There is also an *ad hoc* coalition of about a dozen Vermont-based technology and e-commerce companies, represented by attorney Peter Kunin, that has successfully lobbied Vermont elected officials to take action against patent trolls.⁹¹ Perhaps what made these lobbying efforts successful—and what makes Vermont a logical choice for initiating the anti-patent trolling movement—is the state’s small size.⁹² As Kunin put it, “We’re a small state[.] . . . Our governor, our senators, our legislators, they’re easy to talk to. They’re willing to listen to the business community.”⁹³

As a result of the increased pressure to legislate against patent trolls, Vermont enacted a statute in 2013, which states that a person “shall not make a bad faith assertion of patent infringement.”⁹⁴ The statute, however, does not provide a definition of what constitutes bad faith.⁹⁵ Instead, the statute lays out a number of factors that can serve as evidence of bad faith in a patent infringement claim.⁹⁶ One factor involves failure to include certain information—such as the patent number, information about the patent holder, or specific factual allegations relating to the alleged infringement—in a demand letter sent to an alleged infringer.⁹⁷ Under the statute, an NPE’s failure to provide this information when requested by the target of the demand letter is also evidence of a bad faith assertion.⁹⁸ Essentially, the statute

counsel. *See* Mullin, *supra* note 88. This alerted the Attorney General, who stepped in to protect these Vermont businesses. *Id.*

⁹¹ *See* Lee, *supra* note 28. The ringleader of the anti-trolling coalition is a technology company (which remains anonymous for fear of retribution from NPEs) that began to lose business after its clients were threatened by NPEs. As Kunin says, “Vermont has a history of political activism by companies 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.” *Id.*

⁹² *See* UNITED STATES CENSUS BUREAU, RESIDENT POPULATION JULY 2009, available at <http://www.census.gov/compendia/statab/2012/ranks/rank01.html>. Vermont is the second least populous state in the union. *Id.*

⁹³ Lee, *supra* note 28 (internal quotation marks omitted).

⁹⁴ VT. STAT. ANN. tit. 9, § 4197 (West 2013).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

places requirements on NPEs that are designed to prevent them from sending a demand letter when they are not even sure that the recipient of the letter has done anything to infringe the patent. Failure to include specific factual allegations may indicate that an NPE has no evidence of infringement, and is simply issuing demand letters in the hope that it will scare the receiving party into paying a fee to avoid litigation. For example, a demand letter may say, “[O]ur investigation has shown that most businesses have migrated to the usage of corporate email servers running Exchange or Lotus Domino/Notes and have further incorporated digital scanning into their workflows.”⁹⁹ While the practice described broadly alleges some sort of patent infringement,¹⁰⁰ the language contains zero specific allegations that would demonstrate that the recipient of this particular letter had infringed. It instead relies on broad language, implying that because “most businesses” engage in this practice, and the recipient of the letter is a business, they

⁹⁹ See Consumer Protection Complaint Exhibit A at 4, *Vermont v. MPHJ Techs, Inc.*, No: 282-5-13WNCU (Super. Ct. Vt. 2013), available at <http://www.atg.state.vt.us/assets/files/Vermont%20v%20MPHJ%20Technologies%20Complaint.pdf> [hereinafter Complaint]; see also Daniel Fisher, *Hard Times For Trolls As Vermont Sues Patent Mill Over Demand Letters*, FORBES (May 24, 2013, 5:06 PM), <http://www.forbes.com/sites/danielfisher/2013/05/24/hard-times-for-trolls-as-vermont-sues-patent-mill-over-demand-letters/>. Aside from being potential evidence of a bad faith assertion, Professor Kenneth Port argues that such superficial research may violate Rule 11 of the Federal Rules of Civil Procedure, which requires lawyers to make a good faith investigation of claims. *Id.*

¹⁰⁰ The patent allegedly infringed in this letter is U.S. Patent No. 6,771,381. As described in the patent’s abstract:

In its simplest form it extends the notion of copying from a process that involves paper going through a conventional copier device, to a process that involves paper being scanned from a device at one location and copied to a device at another location The [Virtual Copier] invention is software that manages paper so that it can be electronically and seamlessly copied in and out of devices and business applications (such as Microsoft Office, Microsoft Exchange, Lotus Notes) with an optional single-step Go operation.

U.S. Patent No. 6,771,381 (filed Aug. 3, 2004), available at <http://patft.uspto.gov/netacgi/nphzParser?Sect2=PTO1&Sect2=HITOFF&p=1&u=/netahtml/PTO/search-bool.html&r=1&f=G&l=50&d=PALL&RefSrch=yes&Query=PN/6771381>.

must be infringing. Under Vermont’s anti-patent trolling legislation, such language can be used as evidence of bad faith.

Sending letters demanding payment within an unreasonably short time frame¹⁰¹ and making offers to license the patent for an excessive amount of money are also considered to be evidence of bad faith under the Vermont statute.¹⁰² Furthermore, the statute prohibits asserting a meritless patent infringement claim that the person knew or should have known was meritless.¹⁰³ Other evidence of bad faith includes prior attempts to enforce the patent infringement claim in which the court found the claim to be meritless.¹⁰⁴

In addition to passing the anti-patent trolling statute, Vermont’s Attorney General has filed a first-of-its-kind suit against the NPE MPHJ Technologies (“MPHJ”)¹⁰⁵ under a previously existing state consumer protection law.¹⁰⁶ MPHJ drew the attention of Vermont investigators after it sent letters threatening to sue Vermont organizations if they refused to pay approximately \$1,000 per worker for a license to use scanners.¹⁰⁷ Investigators discovered that MPHJ controls more than forty shell companies that have been sending thousands of threat letters across the country.¹⁰⁸

Vermont claimed that MPHJ violated the Vermont Consumer Protection Act¹⁰⁹ by sending letters to Vermont businesses and non-profit organizations that threatened patent litigation if the

¹⁰¹ While the statute does not specify a time frame, the demand letters from MPHJ may serve as a guide. The demand letters stated that if they did not receive a response within two weeks, they would file suit. Complaint, *supra* note 99, at Exhibit B.

¹⁰² See VT. STAT. ANN. tit. 9, § 4197 (West 2013). Take Vermont IP attorney Peter Kunin’s description of the practice, “[m]y clients have received letters out of the blue that say, Pay us \$25,000 in licensing fees [now] or we’ll raise it to \$50,000 in three months.” Kavilanz, *supra* note 87.

¹⁰³ VT. STAT. ANN. tit. 9, § 4197 (West 2013).

¹⁰⁴ *Id.*

¹⁰⁵ Mullin, *supra* note 88.

¹⁰⁶ Complaint, *supra* note 99.

¹⁰⁷ Mullin, *supra* note 88.

¹⁰⁸ Mullin, *supra* note 88.

¹⁰⁹ VT. STAT. ANN. tit. 9, § 2451 (West 2013).

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business or non-profit did not pay a licensing fee.¹¹⁰ The complaint alleges that these letters constitute unfair and deceptive practices in violation of Vermont consumer protection law because, *inter alia*, MPHJ was unprepared for litigation at the time when it sent the letters, had no independent evidence of patent infringement, and targeted small organizations that would be unlikely to afford litigation or even patent counsel.¹¹¹ The complaint also alleges that MPHJ's demand letters claimed that most, if not all, businesses were interested in purchasing a license, and stated that the target of the demand letter was receiving its third letter, when in fact the first two were never actually sent.¹¹²

The letters sent by MPHJ began by stating, "we have identified your company as one that *appears* to be using the patented technology"¹¹³ and go on to "suggest a 'good faith' payment of \$900 to \$1,200 per employee."¹¹⁴ The letters further stated that MPHJ would file suit if the recipient failed to make the suggested payment within two weeks of receiving the letter, implying that MPHJ was, and is, prepared to go to court with an infringement claim.¹¹⁵ It seemed, however, that MPHJ was not prepared to go to court, as MPHJ has never filed suit in Vermont, or anywhere else.¹¹⁶ As a result of its deception, Vermont's Attorney General

¹¹⁰ Complaint, *supra* note 99, at 1.

¹¹¹ Complaint, *supra* note 99, at 8–9.

¹¹² Complaint, *supra* note 99, at 8–9.

¹¹³ Fisher, *supra* note 99 (emphasis added).

¹¹⁴ Fisher, *supra* note 99. Ironically, the allegedly infringed patents were purchased by MPHJ from Project Paperless, the NPE discussed in this Recent Development's introduction. Joe Mullin, *Meet the Nice-Guy Lawyers Who Want \$1,000 per Worker for Using Scanners*, ARSTECHNICA (Apr. 7, 2013, 9:00 PM), <http://arstechnica.com/tech-policy/2013/04/meet-the-nice-guy-lawyers-who-want-1000-per-worker-for-using-scanners/>.

¹¹⁵ Fisher, *supra* note 99.

¹¹⁶ Mullin, *supra* note 114. Included with the letters were questionnaire forms that essentially asked recipients to do MPHJ's investigative work themselves, so MPHJ could use that information if they did decide to file suit. The forms asked questions like, "does your company use Microsoft Exchange/Outlook[?]" and "does your company use document scanning equipment that is network addressable[?]" Fisher, *supra* note 99 (answering yes to both would effectively admit infringement).

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took action against MPHJ by bringing suit under Vermont's Consumer Protection Act.¹¹⁷

The parties are currently litigating proper venue, after MPHJ successfully had the case removed from state to federal court.¹¹⁸ MPHJ moved for removal from Vermont court to federal court because it argued that Vermont's complaint implicates both the Supremacy¹¹⁹ and Patent Clauses¹²⁰ of the United States Constitution, as well as various federal statutes.¹²¹ MPHJ's removal notice claims that Vermont's suit presents a federal question related to the validity, infringement, and enforcement of patents, to which the state law consumer protection claims are supplemental.¹²²

Vermont argued in its motion to remand that federal question jurisdiction does not extend as far as MPHJ claims, asserting:

This is a state-law case and it belongs in state court. True, the letters sent by MPHJ alleged patent infringement. But *the State's consumer fraud claims have nothing to do with the validity of MPHJ's patents*. Nor does the State's complaint address whether, in fact, any Vermont businesses are infringing the patents. Even assuming the patents may be valid, and some Vermont businesses may have infringed those patents, the letters sent to Vermont consumers were unfair and deceptive. Although federal jurisdiction over patent law is broad, it does not stretch this far. This Court lacks jurisdiction and the case should be remanded to state court.¹²³

¹¹⁷ Vermont v. MPHJ Techs., Inc., No. 213-cv-170 (D. Vt. 2013).

¹¹⁸ Notice of Removal at 1, *MPHJ Techs.*, No. 213-cv-170 (D. Vt. 2013), available at <http://essentialpatentblog.com/wp-content/uploads/2013/06/State-of-Vermont-v-MPHJ-Technology-Investments-LLC-Notice-of-Removal.pdf> [hereinafter Notice of Removal].

¹¹⁹ U.S. CONST. art. VI, cl. 2.

¹²⁰ U.S. CONST. art. I, § 8.

¹²¹ *See, e.g.*, 28 U.S.C. § 1338 (2012) (“The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents No state court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents”); 35 U.S.C. §§ 1–42 (2012); 28 U.S.C. § 2072 (2012).

¹²² Notice of Removal, *supra* note 118, at 2.

¹²³ Motion to Remand at 1, Vermont v. MPHJ Techs., Inc., (D. Vt. 2013) (No. 213-cv-00170-wks) (emphasis added), available at <http://greenmountainip.com/motion-to-remand/> [hereinafter Motion to Remand].

Vermont's motion to remand the MPHJ suit to state court contends that there is no federal question raised relating to the validity, infringement, and enforcement of patents, and that the state law claims of unfair and deceptive trade practices can be litigated without implicating federal patent law.¹²⁴ While the outcome of the litigation has yet to be determined, based on Vermont's strategic statutory language, preemption should not be found.

V. WORKING AROUND THE FEDERAL FRAMEWORK: HOW VERMONT HAS AVOIDED PREEMPTION

Although the issue of federal preemption appears to threaten the future of the Vermont anti-patent trolling statute, Vermont has tailored its statute sufficiently to comply with *Globetrotter's* "objectively baseless" standard to avoid federal preemption. The objectively baseless standard must be satisfied because the federal patent scheme preempts states from regulating good faith assertions of patent infringement.¹²⁵ A patent infringement assertion is not considered made in good faith if it is objectively baseless.¹²⁶ As discussed above, to satisfy this standard, it must be proved that "no reasonable litigant could realistically expect success on the merits."¹²⁷ Vermont has satisfied *Globetrotter* by targeting the conduct that surrounds assertions of patent infringement. This allows state courts to examine an NPE's behavior without requiring them to analyze the validity of the patent itself. Forcing state courts to analyze the validity of patents would inevitably intrude upon federal courts' jurisdiction over disputes "arising under" federal patent laws.¹²⁸

One issue that has been raised by Professor Eric Goldman is the idea that in order to analyze bad faith in a patent infringement claim, Vermont courts would inevitably have to make

¹²⁴ *Id.*

¹²⁵ *Supra* section IV.

¹²⁶ *Supra* section IV.

¹²⁷ *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 57 (1993).

¹²⁸ 28 U.S.C. § 1338 (2012).

determinations of patent validity and infringement.¹²⁹ Because federal courts have exclusive jurisdiction to make these determinations, Professor Goldman argues that such a requirement would render the Vermont statute impermissible under the federal patent scheme.¹³⁰ Professor Goldman's argument, while seemingly fatal to Vermont's efforts to fight patent trolls, is unpersuasive. Consider Vermont's current suit against MPHJ, in which the state has conceded that Vermont companies may in fact be in violation of MPHJ's patents.¹³¹ The issue of validity or infringement has no bearing on the merits of the state law consumer protection claim because Vermont's challenge to NPEs focuses on their behavior in asserting patent infringement, not the patent itself. Even assuming that MPHJ held valid patents, and assuming that the targets of MPHJ's demand letters were in fact infringing on those patents, the state consumer protection claim remains as an unrelated cause of action.

Indeed, the strongest argument for the validity of the Vermont law is that, like the state consumer protection claims brought against MPHJ, state courts would not be required to conduct an analysis into the merits of the patent's validity. State courts could take an NPE's claim that their patent was infringed as true, and still be able to analyze the NPE's conduct under the anti-patent trolling statute. The ability of patent holders to assert their patent rights is undisputed,¹³² however, there must be limits on how they go about enforcing those rights. Failure to place meaningful limits on what patent holders can demand gives them too much power to

¹²⁹ Eric Goldman, *Vermont Enacts the Nation's First Anti-Patent Trolling Law*, FORBES (May 22, 2013, 2:22 PM), <http://www.forbes.com/sites/ericgoldman/2013/05/22/vermont-enacts-the-nations-first-anti-patent-trolling-law/>. Eric Goldman is a professor at Santa Clara University School of Law, where he teaches and writes about Internet Law, Intellectual Property and Advertising Law. Prior to becoming a fulltime professor he practiced technology law in Silicon Valley. *Id.*

¹³⁰ *Id.*; see 28 U.S.C. § 1338 (2012) ("No state court shall have jurisdiction over . . . patents.").

¹³¹ Motion to Remand, *supra* note 123, at 1.

¹³² As Vermont's anti-patent trolling bill said, "[p]atent holders have every right to enforce their patents when they are infringed, and patent enforcement litigation is necessary to protect intellectual property." H.299, *supra* note 34.

enforce these rights in bad faith. This is how state law can provide relief to the targets of NPEs. Taking the asserted infringement as true obviates the need for state courts to encroach on the federal courts' jurisdiction over "any civil action arising under any Act of Congress relating to patents."¹³³ If the patents need not be discussed in order to reach the claims of bad faith, such actions can hardly be said to arise under federal patent law.¹³⁴ This theory can be seen in *ClearPlay, Inc. v. Abecassis*.¹³⁵ In this case, the Federal Circuit held that it did not have jurisdiction to hear a case in which ClearPlay brought six state law claims against the defendant because "in the case of each asserted claim, there [was] at least one theory of relief that would not require the resolution of a patent law issue."¹³⁶

The court in *ClearPlay* applied the following test, extending "arising under" jurisdiction only when:

a well-pleaded complaint establishes either [1] that federal patent law creates the cause of action or [2] that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims.¹³⁷

Because ClearPlay's complaint was entirely devoted to state law claims, the Federal Circuit held that the first part of the test was not satisfied—there was not a federal patent law cause of

¹³³ 28 U.S.C. § 1338 (2012).

¹³⁴ "In enacting § 1331, Congress did not clearly demark the jurisdiction of the federal courts due to the ambiguity surrounding the import of 'arising under' as it appears in the statute. This has allowed the judiciary to play a prominent role in determining the circumstances that raise a federal question. These judicial interpretations of § 1331 have evolved into the 'well-pleaded complaint rule,' which dictates that '[t]he presence or absence of federal-question jurisdiction' is determined by whether 'a federal question is presented on the face of the plaintiff's properly pleaded complaint.' Accordingly, provided that the plaintiff properly pleads a federal question of law, the plaintiff is the master of the complaint and controls the forum for the lawsuit." Grimsrud, *supra* note 53.

¹³⁵ 602 F.3d 1364, 1366 (Fed. Cir. 2010).

¹³⁶ *ClearPlay*, 602 F.3d at 1368.

¹³⁷ *Id.* at 1366 (applying the standard outlined in *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988)).

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action.¹³⁸ Similar to *ClearPlay*, Vermont raised only state law claims in its complaint against MPHJ,¹³⁹ thus the first part of the test was not satisfied for the purpose of removing the case to federal court.

After concluding the first part of the test had not been satisfied, the court in *ClearPlay* went on to examine the second portion.¹⁴⁰ *ClearPlay*'s complaint alleged, *inter alia*, that defendant Nissim had violated Florida's Deceptive and Unfair Trade Practices Act¹⁴¹ by entering into a license agreement in bad faith, seeking to disrupt *ClearPlay*'s business relationships, and threatening *ClearPlay*'s business partners with patent infringement suits.¹⁴² The Federal Circuit found that "[while it may be true] that the dispute between these parties is patent-based . . . [i]t is not enough that patent law issues are in the air" to invoke federal jurisdiction.¹⁴³ As a result, the court held that liability under Florida law did not require resolution of the patent law issue.¹⁴⁴ It would appear, then, that because threats to bring patent suits did not require resolution of the patent law issue in *ClearPlay*, similar threats made by MPHJ will not require resolution of the patent law issue in Vermont's case.

In essence, it is not the ability to assert the right that is at issue, but MPHJ's conduct in exercising that ability. Conduct, such as sending letters threatening litigation without actually being prepared to engage in litigation, demanding payment within two weeks of receipt of the letter, and sending letters without any independent evidence that the recipients actually infringed on the patent, is what the Vermont seeks to prohibit.¹⁴⁵ Determining

¹³⁸ *Id.* at 1367.

¹³⁹ Complaint, *supra* note 99, at 8–10.

¹⁴⁰ *ClearPlay*, 602 F.3d at 1367.

¹⁴¹ FLA. STAT. ANN. § 501.201 (West). "(1) Unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." *Id.* at § 501.204.

¹⁴² *ClearPlay*, 602 F.3d at 1367–68.

¹⁴³ *Id.* at 1369.

¹⁴⁴ *Id.*

¹⁴⁵ Complaint, *supra* note 99, at 8–9.

whether the defendant engaged in such conduct is fully within the purview of a state court's jurisdiction. These factual inquiries could occur without the need for state courts to engage in any sort of analysis as to the validity of the patents.

Vermont's anti-patent trolling statute, which punishes conduct surrounding a patent assertion, also comports with the "objectively baseless" standard described in *Globetrotter*.¹⁴⁶ Similar to the state's consumer protection claims, Vermont's new law, aimed at combating NPEs, does not seek to prevent patent holders from asserting their patent rights, but does endeavor to prevent them from asserting those rights in a deceptive or unfair manner. As the bill describes:

Patents are essential to encouraging innovation, especially in the IT and knowledge based fields Patent holders have every right to enforce their patents when they are infringed, and patent enforcement litigation is necessary to protect intellectual property The General Assembly does not wish to interfere with the good faith enforcement of patents or good faith patent litigation. The General Assembly also recognizes that Vermont is preempted from passing any law that conflicts with federal patent law.¹⁴⁷

Many of the bad faith factors outlined in Vermont's anti-patent trolling statute, if present in a state law tort claim, could certainly lead to the conclusion that no reasonable litigant could realistically expect success on the merits.¹⁴⁸ For instance, failure to include specific factual allegations relating to the alleged infringement could indicate that the NPE asserting the patent right has no evidence of infringement.¹⁴⁹ Without evidence, it is difficult to see

¹⁴⁶ *Globetrotter Software, Inc., v. Elan Computer Grp., Inc.*, 362 F.3d 1367 (Fed. Cir. 2004).

¹⁴⁷ H.299, *supra* note 34.

¹⁴⁸ *Globetrotter* does not outline what kind of evidence would suffice to make a finding of objective baselessness, simply saying that the Plaintiff did not attempt to make such a showing. *Globetrotter*, 362 F.3d at 1377. It does, however, hint that proving that the patents were either invalid or plainly not infringed would demonstrate objective baselessness. *Globetrotter*, 362 F.3d at 1375 ("Greer made no effort to establish that the claims asserted by Globetrotter . . . were objectively baseless, either because those patents were obviously invalid or plainly not infringed.").

¹⁴⁹ VT. STAT. ANN. tit. 9, § 4197 (West 2013).

how reasonable litigants could possibly expect to prevail on the merits of their claim. Furthermore, an NPE's failure to provide this information when requested by the recipient of the demand letter, or an NPEs demanding of payment within a short period of time, can also indicate a lack of evidence of infringement, and thus casts doubt upon the asserter's ability to make a successful claim.¹⁵⁰

Other bad faith factors included in Vermont's law are tailored more directly to fit the *Globetrotter* standard. These include asserting a meritless patent infringement that "the person knew, or should have known" was meritless, as well as prior attempts to enforce the patent infringement claim in which the "court found the claim to be meritless."¹⁵¹ A finding that these two factors were present would satisfy the "objectively baseless" standard because no reasonable litigant could expect success on the merits of a claim that has already been dismissed as meritless in the past.

VI. IMPLICATIONS OF AVOIDING PREEMPTION: VERMONT'S FIGHT AGAINST NPEs REMAINS DIFFICULT

While avoiding preemption by satisfying the bad faith standard outlined in *Globetrotter* may seem like a victory for Vermont, this "victory" may not be as sweeping as it appears. Satisfying the bad faith standard may not turn out to be a revolutionary change in the fight against patent trolls. The standard existed long before Vermont decided to take action, and, yet, has not served as a significant deterrent to NPEs bringing patent infringement claims.¹⁵² This may be because the Federal Circuit's "objectively baseless" standard has been interpreted similarly to the standard for "objective recklessness"—an increasingly high burden to meet.¹⁵³

¹⁵⁰ *Id.* § 4197(b)(3)–(4).

¹⁵¹ *Id.* § 4197(b)(6)–(8).

¹⁵² Sperling, *supra* note 22 ("The number of these suits has exploded in recent years.").

¹⁵³ Justin McCabe, *High Hurdle for State Laws to Curtail Patent Troll Activities*, GREEN MOUNTAIN IP (April 30, 2013), <http://greenmountainip.com/high-hurdle-for-state-laws-to-curtail-patent-troll-activities/>.

The Federal Circuit applies the “objective recklessness” standard when determining whether a patent has been willfully infringed.¹⁵⁴ Perhaps what makes this standard such a high burden to meet is that the intent of the alleged infringer is irrelevant.¹⁵⁵ Applying this reasoning to Vermont’s case against MPHJ means that even if Vermont proved MPHJ subjectively knew its patent infringement assertions were made in bad faith, Vermont would still need to have evidence to prove that the assertions were made objectively in bad faith.

The fact remains that proving a bad faith patent assertion will likely require this high burden of “objectively baseless” to be met.¹⁵⁶ And while Vermont’s new statute lays out several factors that may lead a court to conclude that an assertion attempt is objectively baseless, it is unclear how many, and to what degree, these factors must be present for a court to make such a finding. Unfortunately, for those opposed to patent trolling, the best way to prove a bad faith patent claim is to find that the “patent is obviously invalid or plainly not infringed.”¹⁵⁷ What is most unfortunate, perhaps, is that these two justifications for finding bad faith would require courts to analyze the validity of the patent itself. This, of course, would implicate a federal question, which Vermont tried to avoid in its motion to remand the MPHJ suit back

¹⁵⁴ *In re Seagate Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007) (“ ‘[T]he civil law generally calls a person reckless who acts . . . in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known.’ Accordingly, to establish willful infringement, a patentee must show by clear and convincing evidence that the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent.”) (internal citations omitted).

¹⁵⁵ Christopher Ryan Lanks, Note, *In Re Seagate: Effects and Future Development of Willful Patent Infringement*, 111 W. VA. L. REV. 607, 619 (2009).

¹⁵⁶ McCabe, *supra* note 153.

¹⁵⁷ Lee, *supra* note 28 (quoting Camilla Hrdy, a patent law scholar at Yale Law School); see also Camilla A. Hrdy, *What is Happening in Vermont? Patent Law Reform From the Bottom Up*, PATENTLY-O (May 27, 2013), <http://www.patentlyo.com/patent/2013/05/what-is-happening-in-vermont-patent-law-reform-from-the-bottom-up.html>.

to state court.¹⁵⁸ If, consequently, the court holds that Vermont is preempted from bringing claims against patent trolls under state law, it could have a chilling effect on state efforts to combat patent trolls.¹⁵⁹ However, if the law is held not to be preempted, other states may soon follow Vermont's lead by passing similar legislation prohibiting bad faith assertions of patent infringement.¹⁶⁰

Despite the high burden to establish bad faith, perhaps the best consequence of states beginning to take action against NPEs is the potential deterrent impact. If other states follow Vermont's lead, it could significantly frustrate the NPE business model.¹⁶¹ A NPE hopes that some fraction of the thousands of recipients of NPE letters will settle to avoid the hassle and expense of hiring a lawyer.¹⁶² Because so few recipients are willing to take on the burden of going to trial, the cost to the troll can be very low.¹⁶³ If Vermont's efforts were duplicated in other states, sending out thousands of demand letters would trigger responses from state

¹⁵⁸ Motion to Remand, *supra* note 123, at 1 (“But the State’s consumer fraud claims have nothing to do with the validity of MPHJ’s patents. Nor does the State’s complaint address whether, in fact, any Vermont businesses are infringing the patents.”).

¹⁵⁹ See generally McCabe, *supra* note 64 (claiming that if Vermont law is preempted by federal law from sanctioning bad-faith demand letters from a patentee, there will be “substantial ramifications . . . to other states to curb patent troll activities.”).

¹⁶⁰ McCabe, *supra* note 64.

¹⁶¹ Lee, *supra* note 28. In fact, it appears that other states are already beginning to follow Vermont's lead. In August 2013, the Attorney General of Minnesota announced it had reached a settlement with MPHJ that prevents MPHJ from sending demand letters in the state without prior permission from the AG. See Press Release, *supra* note 32. It is believed to be the first ever settlement of its kind. *Id.* Nebraska's Attorney General has also targeted MPHJ. Stephanie Francis Ward, *Nebraska AG Goes After Alleged Patent Trolls*, ABA Journal (Sept. 13, 2013, 10:50 AM), http://www.abajournal.com/news/article/nebraska_ag_says_law_firm_accused_of_patent_trolling_may_be_violating_unfai/. When the law firm representing MPHJ, Farney Daniels, sued the Nebraska AG, he filed a motion to dismiss arguing that sending demand letters without intending to sue violates Nebraska consumer protection law. *Id.*

¹⁶² Lee, *supra* note 28.

¹⁶³ Lee, *supra* note 28.

attorneys general from across the nation who have the resources and expertise to fight back on behalf of the recipients.¹⁶⁴ There would be enormous costs associated with responding to subpoenas to appear in courts across the country in order to dispute charges that they were engaging in bad-faith assertions of patent infringement.¹⁶⁵ Such a sweeping movement could, potentially, put NPEs out of business.

VII. CONGRESS SHOULD FOLLOW VERMONT'S LEAD AND ENACT SIMILAR FEDERAL LEGISLATION

While Vermont's efforts appear encouraging to NPE opponents and may prove to have a radical impact across the nation, a more efficient method of combating NPEs is for Congress to step in and act.¹⁶⁶ U.S. Senator Patrick Leahy—unsurprisingly, of Vermont—is at the forefront of Congress's efforts to regulate patent trolls. Senator Leahy was behind the Leahy-Smith America Invents Act (“AIA”) of 2011,¹⁶⁷ which set into motion “the most significant changes to the U.S. patent system since 1836,”¹⁶⁸ signaling a Congressional willingness to reform the patent system.

Among these significant changes to the United States patent system was the shift from a “First to Invent” to a “First to File” system.¹⁶⁹ While this shift was the crux of the law, the legislation

¹⁶⁴ Lee, *supra* note 28.

¹⁶⁵ Lee, *supra* note 28.

¹⁶⁶ In announcing Minnesota's settlement with MPHJ, Attorney General Lori Swanson stated “the practice of ‘patent trolling’ will continue until Congress enacts laws to prohibit such activity.” Press Release, *supra* note 32.

¹⁶⁷ Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified in sections of 35 U.S.C.).

¹⁶⁸ U.S. DEP'T OF COMMERCE, *USPTO Marks Second Anniversary of Milestone Patent Law – The America Invents Act* (Sept. 16, 2013, 4:30 PM), <http://www.commerce.gov/blog/2013/09/16/uspto-marks-second-anniversary-milestone-patent-law%E2%80%94america-invents-act>.

¹⁶⁹ Nathan Hurst, *How the America Invents Act Will Change Patenting Forever*, WIRED (Mar. 15, 2013, 6:30 AM), <http://www.wired.com/design/2013/03/america-invents-act/>. Previously, someone could apply for a patent after someone else had already filed an application for the same invention. *Id.* If the second person to file could prove that they had invented the idea first (for example, by providing dated lab books), they would be entitled to the patent. *Id.*

was aimed at combating NPEs as well.¹⁷⁰ In particular, the AIA adds a section to the United States Code that limits joinder in a single suit of unrelated parties.¹⁷¹ NPEs often join defendants from across the country, who have little in common in terms of industry or products and services provided.¹⁷² Because defendants are not concentrated in a particular area, a venue that is convenient for a majority of the defendants does not exist.¹⁷³ NPEs use this tool to capitalize on economies of scale and assert a single patent against a “laundry list of defendants,” often in patentee-friendly jurisdictions likely to award greater damages.¹⁷⁴

The AIA, however, may serve to eliminate this tool by requiring that there be another basis for joinder, aside from alleging that the defendants all infringed on the same patent.¹⁷⁵ This has the practical effect of forcing the patent holder to file as many lawsuits as there are defendants, as well as requiring the patent holder to file in a venue where each defendant has its principal place of business.¹⁷⁶ This would not only reduce the efficiency of the NPE business model, but also it would cause the validity of the patent to be placed at risk with each different lawsuit.¹⁷⁷

The new system “better aligns U.S. patent law with other patent systems throughout the world. It also simplifies the process of acquiring rights while also supporting innovators—both large and small—as they acquire venture capital, begin manufacturing their innovations, and seek out both domestic and foreign markets.” U.S. DEP’T OF COMMERCE, *supra* note 168.

¹⁷⁰ Davis & Jesien, *supra* note 43, at 848.

¹⁷¹ 35 U.S.C. § 299 (2012) (effective January 14, 2013); Davis & Jesien, *supra* note 43, at 848.

¹⁷² Davis & Jesien, *supra* note 43, at 848–49.

¹⁷³ *Id.* at 849.

¹⁷⁴ *Id.* at 849–50.

¹⁷⁵ *Id.* However, recognizing that there may be value in allowing defendants to act collectively, Congress has allowed defendants to waive this requirement. 35 U.S.C. § 299(c) (2012).

¹⁷⁶ Davis & Jesien, *supra* note 43, at 849.

¹⁷⁷ Davis & Jesien, *supra* note 43, at 849. As noted earlier, if a patent is held invalid, under Vermont’s law, sending a demand letter related to that patent would be in bad faith. VT. STAT. ANN. tit. 9, § 4197(8) (West 2013). Not only would the NPE lose the ability to make money off of the patent, but they would also be liable for damages. *Id.* § 4199(b) (“A court may award the following

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Additionally, Section 34 of the AIA directs the Comptroller General of the United States to conduct a study of the consequences of patent-related litigation by NPEs.¹⁷⁸ It directs the study to investigate the “[t]he economic impact of such litigation on the economy of the United States, including the impact on inventors, job creation, employers, employees, and consumers” and “[t]he benefit to commerce, if any, supplied by [NPEs] or patent assertion entities that prosecute such litigation.”¹⁷⁹ The Comptroller General is then required to file a report on the study within one year of enactment of the AIA, “including recommendations for any changes to laws and regulations that will minimize any negative impact of patent litigation that was the subject of such study.”¹⁸⁰

It appears that certain members of Congress are ready to evolve patent law even further, this time focusing on combating NPEs. In an opinion editorial piece published September 15, 2013, Senators Leahy and Mike Lee took aim directly at patent trolls.¹⁸¹ In the op-ed, the Senators stated:

remedies to a plaintiff who prevails in an action brought pursuant to this subsection: (1) equitable relief; (2) damages; (3) costs and fees, including reasonable attorney’s fees; and (4) exemplary damages in an amount equal to \$50,000.00 or three times the total of damages, costs, and fees, whichever is greater.”).

¹⁷⁸ Leahy-Smith America Invents Act, Pub. L. 112-29 § 34(a), 125 Stat. 284 (2011).

¹⁷⁹ Davis & Jesien, *supra* note 43, at 848 (quoting Leahy-Smith America Invents Act at § 34(b)(5),(6)).

¹⁸⁰ Leahy-Smith America Invents Act, Pub. L. 112-29 § 34(c), 125 Stat. 284 (2011). The study, released in August 2013, yielded only one recommendation: essentially calling for a different study to be conducted, focusing on trends in patent litigation including the types and of patents and issues in dispute. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-465, ASSESSING FACTORS THAT AFFECT PATENT INFRINGEMENT LITIGATION COULD HELP IMPROVE PATENT QUALITY 46 (2013), *available at* <http://www.gao.gov/products/gao-13-465>. Despite this outcome, the fact that Congress mandated the study to be conducted shows that Congress is interested in curbing NPE activity.

¹⁸¹ Sen Patrick Leahy & Sen. Mike Lee, *Opinion: America’s Patent Problem*, POLITICO (Sep. 15, 2013, 9:25 PM), http://www.politico.com/story/2013/09/patrick-leahy-war-on-patent-trolls-96822.html#ixzz2iIKlusO_. Congressman Peter DeFazio has also introduced anti-NPE legislation. Press Release,

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Unfortunately, some patent holders are abusing the system. Rather than incentivizing the creation of the next-generation iPhone or a lifesaving drug, they are misusing patents by suing unsuspecting consumers and extorting settlements. In some cases, patent abusers who maintain that a Wi-Fi router infringes on their patents have sued hotels or small coffee shops that bought the routers, instead of the routers' manufacturers. If the patent holder has a legitimate claim, it is against the company that makes the router, not the small business that bought it, yet retailers are being targeted in a pressure quest for easy settlements.¹⁸²

Although it is uncertain what this legislation will ultimately look like, the op-ed provides what may be a significant clue. It appears Senators Leahy and Lee will propose legislation that requires NPEs to target the manufacturer of the technology (e.g., the company that produced the Wi-Fi router), rather than targeting the user of technology (e.g., hotels or small coffee shops that use Wi-Fi routers).¹⁸³ Preventing this type of action would protect small business owners, like BlueWave's Steve Vicinanza, as well as non-profits like Lincoln Street, which use but do not produce technology.¹⁸⁴ Stopping the production of an infringing product would seem to be far more efficient than attempting to track down and stop each individual user of that product. Efficiency would likely be important to a patent holder that is truly concerned about curbing an infringing practice, rather than simply extracting payment.

In addition to this potential proposal, Congress could enact a law similar to Vermont's anti-patent trolling statute that penalizes bad faith assertions of patent infringement.¹⁸⁵ If Congress takes this course of action, it should lay out factors that indicate when a patent infringement assertion is made in bad faith to give courts

Congressman Peter DeFazio, DeFazio Introduces SHIELD Act to Protect American Innovation, Jobs (Aug. 1, 2012), *available at* <http://defazio.house.gov/media-center/press-releases/defazio-introduces-shield-act-to-protect-american-innovation-jobs>. He claims the SHIELD Act, "will force patent trolls to take financial responsibility for their lawsuits by allowing defendants to recoup money spent to successfully defend themselves against junk lawsuits." *Id.*

¹⁸² Leahy & Lee, *supra* note 181.

¹⁸³ Leahy & Lee, *supra* note 181.

¹⁸⁴ Frieswick, *supra* note 1; *see also* Mullin, *supra* note 88.

¹⁸⁵ VT. STAT. ANN. tit. 9, § 4197 (West 2013).

guidance.¹⁸⁶ In providing this guidance, it would make sense for Congress to expand on Vermont's law and include which factors deserve more weight than others.¹⁸⁷ Specifically, Congress could provide that certain factors raise a presumption of bad faith, which must be rebutted by the NPE. One of these potential factors could be an attempt to assert an invalid patent.¹⁸⁸ Congressional action would avoid the issue of preemption altogether. By passing a federal law aimed at patent trolls, Congress could further the aim of promoting uniformity in patent law and obviate the need for states to address the NPE problem one-by-one.¹⁸⁹

VI. CONCLUSION

When MPHJ Technologies began sending demand letters to Vermont businesses and non-profit organizations, it likely underestimated the determination of Vermont's legislature and its Attorney General. Now, as a result of Vermont's resolve to take NPEs head on, a national debate has been sparked as to the legality of pursuing state law remedies to curb patent trolling. At the heart of the controversy is the federal patent scheme, leading to the question of whether states are preempted from combating NPEs through the use of state statutes. If a court finds Vermont's attempts to prosecute MPHJ to be preempted under state law, it would signal to patent trolls that they can continue their exploitative practices.

The Federal Circuit requires that an NPE's patent assertion be made in bad faith to allow a state law tort action against the NPE. This bad faith standard, requires a showing that the patent assertion be "objectively baseless," or put differently, that no reasonable litigant could expect success on the merits. Vermont's claims,

¹⁸⁶ See *id.* (outlining factors indicating a bad faith infringement).

¹⁸⁷ See *id.* (outlining factors, but failing to indicate which ones are more indicative of bad faith or whether the presence of any single factor is sufficient to find bad faith).

¹⁸⁸ See *Globetrotter Software, Inc., v. Elan Computer Group, Inc.*, 362 F.3d 1367, 1375 (Fed. Cir. 2004) (stating that attempting to assert a patent that was "obviously invalid" would be objectively baseless).

¹⁸⁹ See THE FEDERALIST, *supra* note 51 (discussing the Framers' desire for uniformity in patent law).

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both under preexisting state law and its new anti-patent trolling law, appear to be sufficiently tailored to fit the *Globetrotter* standard and avoid federal preemption by prosecuting the conduct surrounding the assertion of a patent right, and not the ability to assert that right.

Even if Vermont's claims are not preempted, the state must still meet the high (and unclear) burden of proving bad faith. To avert the need for states to test this standard by passing anti-NPE laws on a state-by-state basis, Congress should step in and pass nationwide legislation. This would not only avoid the issue of preemption altogether, but would also be more efficient than waiting on Vermont's efforts to be replicated in the remaining states.