Colorado Legislature Passes “Anti-Troll” Statute

By Amanda Tessar

COLORADO’S GOVERNOR last month signed into law an “anti-troll” statute that makes illegal certain patent activities considered by many to be damaging to small businesses.

Titled “Concerning Prohibited Communications Regarding Patents,” the law targets the letter-writing campaigns that many “non-practicing entities” (generally those companies that don’t make and sell products of their own) launch, usually based on patents they have purchased. Most critically, the statute forbids these patent owners from sending out demand letters that are written in bad faith and defines circumstances that a court can consider as evidence of such bad faith. Approximately two dozen other states have also passed laws that target various demand letter patent assertion practices in the past few years.

High-profile examples of non-practicing entities that have sent out hundreds, or even thousands, of demand letters abound and have spurred states to action. Many business owners have felt that they are being shaken down by patent holders they identify as trying to shake them down for $1,000 per employee. They have not been happy about the situation; however, and many businesses feel they have little choice but to pay the patent holder. They have not been happy about the situation, however, and there have been efforts to apply

long-existing general state consumer protection actions against companies like MPHJ.

There has also been a groundswell of support for targeted new patent-focused statutes like the one that Colorado just passed.

Colorado’s statute, which goes into effect on August 5, makes it illegal for patent owners to send letters that demand monetary compensation for alleged patent infringement in bad faith, as evidenced by, for instance: a letter that falsely says that litigation has already been filed; or a letter containing assertions that lack a reasonable basis in fact or law. On the latter point, the statute gives examples of the types of statements that might lack a reasonable basis in fact or law, such as that the letter seeks compensation on patents that have expired or been invalidated or that the letter provides insufficient information to identify the party asserting the patent, the patent number itself or the accused products.

Importantly, the statute lists a series of exclusions. Most importantly, it expressly does not apply to any operating company (i.e., “any owner of a patent who is using the patent in connection with substantial research, development, production, manufacturing, processing or delivery of products or materials”), any institution of higher education or a technology transfer organization that works in conjunction with institutes of higher learning.

There is no private enforcement right now for Colorado’s new statute. Instead, the Attorney General is responsible for enforcing the law and can seek compensatory damages, costs and fees, in addition to a civil penalty of up to $5,000 per violation.

Colorado’s legislation sailed through the state house and Senate easily, receiving broad and bipartisan support. It was adopted on a consent agenda after having received unanimous votes in the relevant subcommittees. Numerous business and legal leaders from the community spoke in support of the bill, as well as a representative of the Attorney General.

Interestingly, no cases have yet been publicly prosecuted under any of the various state anti-troll statutes across the country, so it remains to be seen whether these bills will survive judicial scrutiny.

If and when enforced, it is fully possible that the patent holders whose activities are curtailed by these laws might raise federal pre-emption and First Amendment challenges, among others.

Indeed, in Vermont, where MPHJ was sued by the Attorney General under the state’s consumer protection statute (i.e., not a patent-specific statute), MPHJ has raised and is litigating arguments that its rights under the First, Fifth and 14th Amendments, the Supremacy Clause and the Patent Clause are being violated. This may become a moot point, though, as the federal legislature is now considering multiple patent reform acts that would address at least some of the issues that are the target of Colorado’s new law.

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