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Facing Down the Trolls: States Stumble on the Bridge to Patent-Assertion Regulation

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Facing Down the Trolls: States Stumble on the Bridge to Patent-Assertion Regulation

David Lee Johnson*

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I. Introduction

Over the course of nine months ending in early 2013, MPHJ Technology Investments, LLC (MPHJ) sent over sixteen thousand letters to small businesses throughout the United States.¹ MPHJ chose these businesses from a commercial database with the intent to target employers of fewer than one hundred individuals.² The letters claimed that each business was “likely” infringing MPHJ’s patents covering the use of a scanner to send documents over a network to a computer.³ After receiving very few responses, MPHJ’s attorney sent a second round of letters

1. See Complaint at 18, MPHJ Tech. Invs., LLC v. FTC, No. 6:14-cv-11 (W.D. Tex. filed Jan. 13, 2014) [hereinafter MPHJ Complaint] (“The essential message of this First Letter was an indication that MPHJ felt it likely that the recipient infringed, . . .”). For a copy of a letter sent to Vermont businesses by MPHJ, see Complaint at Exhibit A, State v. MPHJ Tech. Invs., LLC, No. 282-5-13 Wncv (Vt. Super. Ct. filed May 8, 2013) [hereinafter Vermont Complaint], <http://www.atg.state.vt.us/assets/files/Vermont%20v%20MPHJ%20Technologies%20Complaint.pdf>.

2. See MPHJ Complaint, *supra* note 1, at 16 (describing MPHJ’s process of selecting which businesses to target).

3. See *id.* at 9–11 (describing MPHJ’s patent claims, common methods of infringement, and suggested remedies).

demanding that the businesses prove noninfringement, enter a licensing agreement, or face potential litigation.⁴ Still receiving little response, the attorney sent more letters threatening that “if we do not hear from you within two weeks from the date of this letter, our client will be forced to file a Complaint against you for patent infringement.”⁵ Rather than respond to MPHJ’s threats, many businesses complained to state attorneys general, which provoked state⁶ and federal investigations of MPHJ’s campaign.⁷

A heated debate exists regarding whether patent-assertion campaigns, like MPHJ’s demand-letter campaign, are—on the one hand—legal uses of federally created patent rights or—on the other—abusive business practices.⁸ The issue is before Congress, where many patent reform bills have recently been introduced.⁹

4. See *id.* at 20–21 (describing the second round letters).

5. *Id.* at 22. For a copy of a second round letter sent by MPHJ, see Vermont Complaint, *supra* note 1, at Exhibit B. For a copy of a draft complaint that MPHJ’s attorney sent to Vermont businesses, see Vermont Complaint, *supra* note 1, at Exhibit C. On November 19, 2013, MPHJ filed its first and only infringement suit against a letter recipient, a market research and “digital data collection” company. Complaint ¶ 8, MPHJ Tech. Invs., LLC v. Research Now, Inc., No. 2:13-cv-00962, 2013 WL 6684224 (E.D. Tex. filed Nov. 19, 2013).

6. See MPHJ Complaint, *supra* note 1, at 27 (noting that several state attorneys general were investigating MPHJ).

7. See *id.* (“[T]he FTC Defendants followed the trend of the Attorney Generals [sic], and served a subpoena on MPHJ.”).

8. See *infra* Part II.B (describing the dialectic).

9. See Innovation Protection Act, H.R. 3349, 113th Cong. (1st Sess. 2013) (proposing the establishment of a revolving fund for the United States Patent and Trademark Office supported by its collected fees that “shall be available for use by the Director without fiscal year limitation”); Patent Transparency and Improvements Act of 2013, S. 1720, 113th Cong. (1st Sess. 2013) (focusing on end-user protection including protection from demand letters sent in bad faith); Demand Letter Transparency Act, H.R. 3540, 113th Cong. (1st Sess. 2013) (proposing the creation of a national database to which patent holders must submit their letters and creating minimum letter content requirements); End Anonymous Patents Act, H.R. 2024, 113th Cong. (1st Sess. 2013) (requiring disclosure of patent owners and real parties in interest); Patent Litigation and Innovation Act of 2013, H.R. 2639, 113th Cong. (1st Sess. 2013) (requiring that civil actions alleging patent infringement include details of the infringing product, how the product infringes, and information about the patent and patentee); Transparency in Assertion of Patents Act, S. 2049, 113th Cong. (2d Sess. 2014) (proposing the establishment of minimum requirements for notice of patent infringement); Patent Fee Integrity Act, S. 2146, 113th Cong. (2d Sess. 2014) (proposing creation of a revolving fund for the United States Patent and Trademark Office supported by the fees it collects); Trade Protection Not Troll Protection Act, H.R. 4763, 113th Cong. (2d Sess. 2014) (proposing amendments

In the summer of 2013, state legislators entered the debate when Vermont passed a first-of-its-kind law prohibiting “bad faith” patent assertions.¹⁰ Despite criticism that federal law governs patent rights and preempts states from regulating patent assertions in this way,¹¹ on February 25, 2014, Oregon followed Vermont’s lead by unanimously passing a structurally and substantively similar law.¹² By September 2014, fourteen other states had passed laws modeled on Vermont’s regulation of bad-faith patent assertions.¹³

to the law that governs which companies can assert patent infringement within the International Trade Court so as to limit PAEs’ ability to seek relief before that tribunal); *see also* Jeffrey C. Morgan, *Do Patent Trolls Have a Future?*, FED. LAW., Oct.–Nov. 2013, at 46, 48–49 (summarizing pending patent reform bills).

10. *See* Act of July 1, 2013, No. 44, § 6, 2013 Vt. Legis. Serv. 44 (West) (codified at VT. STAT. ANN. tit. 9, §§ 4195–99 (2013)) (creating a private cause of action for businesses that are victim to bad-faith assertions of patent infringement); Peter Kunin, *Vermont Approves Legislation Prohibiting Bad Faith Patent Infringement Claims*, THE IP STONE (May 23, 2013), <http://theipstone.com/2013/05/23/vermont-approves-legislation-prohibiting-bad-faith-patent-infringement-claims> (last visited Sept. 24, 2014) (explaining the impetus for the Vermont law) (on file with the Washington and Lee Law Review).

11. *See* Eric Goldman, *Vermont Enacts the Nation’s First Anti-Patent Trolling Law*, FORBES (May 22, 2013), <http://www.forbes.com/sites/ericgoldman/2013/05/22/vermont-enacts-the-nations-first-anti-patent-trolling-law/> (last visited Sept. 24, 2014) (“[D]ue to federal preemption doctrines, states cannot enact their own patent laws, and that preemption principle may apply to this law.”) (on file with the Washington and Lee Law Review); Mike Masnick, *Vermont Declares War on Patent Trolls: Passes New Law and Sues Notorious Patent Troll*, TECHDIRT (May 23, 2013), <http://www.techdirt.com/articles/20130523/10255023186/vermont-declares-war-patent-trolls-passes-new-law-sues-notorious-patent-troll.shtml> (last visited Sept. 24, 2014) (agreeing with Goldman that “a state-based solution is neither a good idea for this, nor is it probably legal”) (on file with the Washington and Lee Law Review). *But see* T. Christian Landreth, *The Fight Against “Patent Trolls:” Will State Law Come to the Rescue?*, 15 N.C. J.L. & TECH. ONLINE EDITION 100, 120–25 (2014) (arguing that the Vermont law’s bad-faith standard is consistent with the federal standard necessary to avoid preemption).

12. S.B. 1540, 77th Leg. Assemb., Reg. Sess. (Or. 2014), *available at* <https://olis.leg.state.or.us/liz/2014R1/Downloads/MeasureDocument/SB1540/Enrolled>; *see also* Bryan Denson, *“Patent Trolling” Bill Hailed by Oregon Attorney General as it Passes in Legislature*, OREGONLIVE (Feb. 25, 2014, 2:18 PM), http://www.oregonlive.com/politics/index.ssf/2014/02/patent_trolling_bill_hailed_by.html (last visited Sept. 24, 2014) (summarizing the passage and contents of the Oregon law) (on file with the Washington and Lee Law Review).

13. *See infra* note 61 (listing states with bad-faith assertion laws).

By regulating patent assertions, Vermont, Oregon, and the replica state laws¹⁴ test a very fine line between a patent holder's right to exclude others from infringing its patents and a state's consumer protection obligation.¹⁵ That line is drawn by the federal preemption doctrine. Federal law protects a patent holder's right to promote its patents in good faith.¹⁶ The Vermont law purports to respect this right by only regulating bad-faith patent assertions, as identified by a list of factors that courts may use as evidence of bad faith.¹⁷ This Note argues that several elements of the Vermont law's concept of bad faith fall short of the federal bad-faith standard, causing the law to cross the line into patent-use regulation that is preempted by federal law.¹⁸

This Note is not the first to reach the conclusion that parts of the Vermont law may be preempted, but it is the first to identify which specific provisions are preempted in light of current federal patent-law jurisprudence.¹⁹ By comparing the Vermont law's definition of bad faith to the current federal patent-law concept of

14. This Note principally refers to the Vermont law because the Oregon law and the pending state bills mirror the structure and much of the substance of the Vermont law. *See infra* Part III (describing the structure of the Vermont and Oregon laws and the replica state bills).

15. *See infra* Part V.B (describing the federal patent law preemption standard in the patent promotion context).

16. *See infra* Part V.B.1 (describing the federal protection of patent promotions).

17. *See infra* Part VI.B (describing the Vermont law's concept of bad faith in detail).

18. *See infra* Part VI.B.3 (identifying the elements of the Vermont law argued to be preempted).

19. *See* Landreth, *supra* note 11, at 126 (“[W]hile 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.”); Camilla A. Hrды, *What is Happening in Vermont? Patent Law Reform from the Bottom Up*, PATENTLYO (May 27, 2013), <http://patentlyo.com/patent/2013/05/what-is-happening-in-vermont-patent-law-reform-from-the-bottom-up.html> (last visited Sept. 24, 2014) (arguing that the Vermont law is not necessarily preempted, “so long as courts apply the law in a way that satisfies the Federal Circuit’s standard for a finding of ‘bad faith’”) (on file with the Washington and Lee Law Review); Justin McCabe, *High Hurdle for State Laws to Curtail Patent Troll Activities*, GREEN MOUNTAIN IP (Apr. 30, 2013), <http://greenmountainip.com/high-hurdle-for-state-laws-to-curtail-patent-troll-activities/> (last visited Sept. 24, 2014) (arguing that some sections of the law safely avoid preemption while others are likely preempted) (on file with the Washington and Lee Law Review).

bad faith, this Note may guide judges interpreting bad-faith assertion laws, businesses hoping to bring suit under these laws, and, legislators in the states currently considering adopting similar laws.²⁰

To determine the proper relationship between state and federal regulation of the patent system, it is first helpful to identify the patent uses that states are attempting to regulate. To that end, Part II introduces the players in the patent ecosystem.²¹ Part III describes the Vermont and Oregon bad-faith patent assertion laws and similar state bills.²² To assess whether state bad-faith patent-assertion legislation is preempted by federal patent law, Parts IV and V develop the general doctrine of federal preemption and its specific application to patent law.²³ Part VI applies this preemption analysis to the Vermont law to reach the conclusion that much of the law is likely dead letter because it is preempted by federal patent law.²⁴ Part VII argues that the inoperability of the law is normatively justified, especially in light of the potential value of preempted law, described in Part VIII.²⁵

II. The Patent Ecosystem

A. Participants in the Patent Ecosystem

Patent-assertion campaigns like MPHJ's are only one of many potential strategies for patent use.²⁶ More generally, a patent grants the patent holder a property right,²⁷ which includes the right to exclude others from infringing on that property.²⁸ The

20. See *infra* Part VI.B (conducting a detailed preemption review of the Vermont law).

21. *Infra* Part II.

22. *Infra* Part III.

23. *Infra* Part III–IV.

24. *Infra* Part V.

25. *Infra* Part VII.

26. See John R. Allison et al., *Extreme Value or Trolls on Top? The Characteristics of the Most Litigated Patents*, 158 U. PA. L. REV. 1, 10 (2009) (identifying at least twelve categories of patent actors).

27. See 35 U.S.C. § 261 (2012) (“Subject to the provisions of this title, patents shall have the attributes of personal property.”).

28. See *id.* § 281 (“A patentee shall have remedy by civil action for

patent grant serves the Patent Act's²⁹ purpose of promoting invention while preserving competition.³⁰

Broadly speaking, there are two classes of patent holders: practicing entities and nonpracticing entities.³¹ Practicing entities are companies that produce a product or technology related to their patents.³² Nonpracticing entities, by contrast, employ their patents by selling them, licensing them for fees, or asserting them for infringement damages.³³ Although nonpracticing entities are not *per se* problematic to the patent system,³⁴ some commentators view them as abusive because they are often “focused on the enforcement, rather than the active development or commercialization of their patents.”³⁵ A member of this group of nonpracticing entities is referred to as a patent assertion entity (PAE), or pejoratively as a patent troll.³⁶ This

infringement of his patent.”); Andrew Beckerman-Rodau, *Patents Are Property: A Fundamental But Important Concept*, 4 J. BUS. & TECH. L. 87, 88–89 (2009) (discussing the exclusion right inherent in personal property and patents).

29. 35 U.S.C. §§ 1–376.

30. See *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 230–31 (1964) (“Thus the patent system is one in which uniform federal standards are carefully used to promote invention while at the same time preserving free competition.”).

31. See, e.g., Colleen V. Chien, *From Arms Race to Marketplace: The Complex Patent Ecosystem and its Implications for the Patent System*, 62 HASTINGS L.J. 297, 320–32 (2010) (dividing her analysis of the patent ecosystem along lines of practicing and nonpracticing entities).

32. See, e.g., Allison, *supra* note 26, at 11 (describing a practicing company as a “patent owner that actually makes products”).

33. See Daniel P. McCurdy, *Patent Trolls Erode the Foundation of the U.S. Patent System*, SCI. PROGRESS, Fall & Winter 2008–2009, at 80–81 (describing patent use strategies in the “Patent Troll Realm”).

34. See PRESIDENT’S COUNCIL OF ECON. ADVISERS, ET AL., EXEC. OFFICE OF THE PRESIDENT, PATENT ASSERTION AND U.S. INNOVATION 2 (2013), http://www.whitehouse.gov/sites/default/files/docs/patent_report.pdf (“Firms that aggregate and manage patents can play an important intermediary role, bringing value to society by more efficiently matching inventors to patent users in an otherwise illiquid market, and by developing expertise in legitimately protecting patents from infringement.”).

35. Chien, *supra* note 31, at 328.

36. See Robin M. Davis, *Failed Attempts to Dwarf the Patent Trolls: Permanent Injunctions in Patent Infringement Cases Under the Proposed Patent Reform Act of 2005 and eBay v. MercExchange*, 17 CORNELL J.L. & PUB. POL’Y 431, 431 (2008) (“[P]atent trolls are individuals or corporations that hoard patents for the sole purpose of collecting licensing fees and damage awards from patent infringement suits, rather than their intended purpose—protection of an

vivid characterization is based on PAEs' familiar practice of unexpectedly surfacing to demand infringement payment from manufacturing companies for a patented invention that the troll neither practices nor developed.³⁷ To avoid the prejudicial term "patent troll" and to distinguish among the many legitimate nonpracticing entity business strategies,³⁸ this Note refers to nonpracticing entities that engage in the aggressive litigation and licensing of patents as a principal source of revenue as PAEs.³⁹

exclusive, profitable technology."); James F. McDonough III, *The Myth of the Patent Troll: An Alternative View of the Function of Patent Dealers in an Idea Economy*, 56 EMORY L.J. 189, 189 (2006) ("A patent troll is a person or entity who acquires ownership of a patent without the intention of actually using it to produce a product. Instead, the patent troll buys the patent and either licenses the technology . . . or it sues . . ."). Allegedly, former assistant general counsel for Intel Corp. Peter Detkin coined the term "patent troll" after he was sued for libel for referring to the same bad actors as "patent extortionists." See Brenda Sandburg, *You May Not Have a Choice. Trolling for Dollars*, RECORDER (S.F., Cal.) (July 30, 2001), <http://www.phonetel.com/pdfs/LWTrolls.pdf> (interviewing Detkin).

37. See Gerard N. Magliocca, *Blackberries and Barnyards: Patent Trolls and the Perils of Innovation*, 82 NOTRE DAME L. REV. 1809, 1819–22 (2007) (finding evidence of "patent sharks" demanding royalty payments from farmers allegedly infringing dormant design patents in the post-Civil War era); Chien, *supra* note 31, at 311–12 (finding roots of modern PAE strategies in independent inventor Jerome Lemelson's success at licensing his inventions to large manufacturers for fees totaling well over one billion dollars in the 1980s and 1990s); Klint Finley, *World's Most Innovative Patent Troll Sues the Government*, WIRED (Jan. 15, 2014, 7:59 PM), <http://www.wired.com/business/2014/01/mphj-ftc-patent/> (last visited Sept. 24, 2014) ("It's no surprise when a patent troll sues a big tech company like Apple and Google. We've grown accustomed to these tiny outfits that use their patents solely to attack other, wealthier operations.") (on file with the Washington and Lee Law Review).

38. Although the choice of characterization is contentious, this use of terminology is consistent with other commentators. See, e.g., Allison, *supra* note 26, at 10 (identifying twelve categories of patent plaintiffs, only one of which is a practicing entity).

39. See S.B. 1563, 216th Leg., Reg. Sess. § 1(b) (N.J. 2014), available at http://www.njleg.state.nj.us/2014/Bills/S2000/1563_I1.HTM (last visited Sept. 24, 2014) ("Patent Assertion Entities (PAEs, also commonly known as 'patent trolls') . . . focus on aggressive litigation . . .") (on file with the Washington and Lee Law Review).

B. The Patent-Assertion Entity Dialectic

A fervent debate exists between critics and proponents of PAEs, with each side accusing the other of supporting its position with anecdotal, or less than anecdotal, evidence.⁴⁰ Those who argue against PAEs can point to recent studies noting huge private and social losses of wealth associated with PAE lawsuits,⁴¹ damaging effects on innovation, and increased product costs as manufacturers pass the threat of litigation on to consumers through higher prices.⁴² Defenders of PAEs see the patent-assertion business model as a viable use of a federally granted property right and a natural step in the progression to an idea economy.⁴³ They argue that PAEs act as patent-market makers by increasing demand for patents, make patents more easily transferable, and provide new revenue sources for inventors.⁴⁴ Defenders also argue that patent-market stimulation increases liquidity for failed startups that have patents as

40. See, e.g., Allison, *supra* note 26, at 2 (“Far too much of this debate is based on anecdote and assumption, not real data.”).

41. See James Bessen & Michael J. Meurer, *The Direct Costs from NPE Disputes*, 99 CORNELL L. REV. (forthcoming 2014) (estimating a direct accrued costs to patent-assertion defendants of \$29 billion in 2011 from suits brought by nonpracticing entities); James Bessen et al., *The Private and Social Costs of Patent Trolls*, REG., Winter 2011–2012, at 26, 31 (finding a mean loss of public company value of \$120 million per patent infringement lawsuit as measured by decreased stock value). *But see* H.R. REP. NO. 113-279, at 20–21 n.15 (2013) (referring to the \$29 billion figure as likely based on a sample size prone to selection bias).

42. See, e.g., Robert P. Merges, *Introductory Note to Brief of Amicus Curiae in eBay v. MercExchange*, 21 BERKELEY TECH. L.J. 997, 1009 (2005) (“[T]hese costs (as well as legal defense fees) [are] eventually passed on to consumers—leading to economic deadweight loss—but in addition innovation may suffer because some companies will refrain from introducing certain products for fear of hold-up.” (internal quotation marks omitted)).

43. See, e.g., McDonough, *supra* note 36, at 218–20 (arguing that PAEs serve a valuable function that has advanced the economy).

44. See *id.* at 211–18 (arguing that NPEs positively alter patent market dynamics); Sannu K. Shrestha, *Trolls or Market-Makers? An Empirical Analysis of Nonpracticing Entities*, 110 COLUM. L. REV. 114, 145–46, 150 (2010) (finding empirical evidence that NPEs promote innovation by identifying and acquiring high-value patents). *But see* Michael Risch, *Patent Troll Myths*, 42 SETON HALL L. REV. 457, 491 (2012) (agreeing that NPEs facilitate patent markets, but questioning whether those markets actually promote invention and social value).

assets.⁴⁵ Perhaps the most compelling argument in support of PAEs is that they act as valuable resources for independent inventors that lack the skill, scale, or sophistication to effectively commercialize their inventions.⁴⁶

Within the dialectic, the sharpest criticism of the PAE business strategy is aimed at those entities that attempt to assert patents against end users, rather than manufacturers.⁴⁷ For example, one PAE notoriously filed infringement lawsuits against coffee shops, restaurants, department stores, and hotel chains for offering customers common Wi-Fi services.⁴⁸ Even one self-described “patent troll” objects to the practice of pursuing infringement claims against end users.⁴⁹ End users and consumers can be particularly vulnerable to PAE abuses because they often lack the resources to properly assess the validity of a threat of patent infringement.⁵⁰ The Vermont law principally

45. See John E. Dubiansky, *An Analysis for the Valuation of Venture Capital-Funded Startup Firm Patents*, 12 B.U. J. SCI. & TECH. L. 170, 171–72 (2006) (finding that increased liquidity in the patent market has “increased the attractiveness of using technology transfer as an exit strategy”). *But see* Risch, *supra* note 44, at 493 (“[I]f NPEs are supposed to be a source of post-failure liquidity in order to encourage venture funding, then they are doing a seemingly poor job of it in practice.”).

46. See McDonough, *supra* note 36, at 209–12 (arguing that without PAEs, inventors and small entities would not have the clout to effectively enforce their patents).

47. See, e.g., H.R. REP. NO. 113-279, at 26–28 (2013) (recording congressional testimony rebuking infringement suits brought against consumers).

48. See Gregory Thomas, *Innovatio’s Infringement Suit Rampage Expands to Corporate Hotels*, PAT. EXAMINER (Sept. 30, 2011), <http://patentexaminer.org/2011/09/innovatio-infringement-suit-rampage-expands-to-corporate-hotels/> (last visited Sept. 24, 2014) (describing this PAE’s “infringement suit rampage”) (on file with the Washington and Lee Law Review).

49. “*Notorious Patent Troll*” Supports 10 out of 12 of the White House’s “Anti-Troll” Measures, IPNAV BLOG (June 6, 2013), <http://www.ipnav.com/blog/e2809cnotorious-patent-trolle2809d-supports-10-out-of-12-of-the-white-housee28099s-e2809canti-trolle2809d-measures/> (last visited Sept. 24, 2014) (“As long as the consumer has not modified the product, the manufacturer is the one that should be held liable, not the consumer.”) (on file with the Washington and Lee Law Review).

50. See Press Release, Eric T. Schneiderman, Attorney Gen., A.G. Schneiderman Announces Groundbreaking Settlement with Abusive “Patent Troll” (Jan. 14, 2014), <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-groundbreaking-settlement-abusive-%E2%80%9Cpatent-troll%E2%80%9D> (last visited Sept. 24, 2014) (explaining that PAE campaigns

aims to regulate the bad-faith assertion of patent infringements against these end users.⁵¹

III. State Bad-Faith Assertion Legislation

The Vermont statute addresses a narrow class of actors within the patent ecosystem, entities that assert patent infringement in bad faith against Vermont businesses and citizens.⁵² The main substantive provision of the statute states that a “person shall not make a bad-faith assertion of patent infringement.”⁵³ Rather than define bad faith directly, the statute provides a nonexclusive list of factors that a court may consider as evidence of bad faith or lack thereof.⁵⁴ Part VI analyzes those factors in detail.⁵⁵ The legislature codified a statement of the act’s purpose, which includes the desire to help Vermont businesses avoid expenses associated with bad-faith patent assertions “without conflicting with federal law.”⁵⁶

Seemingly motivated by similar concerns, many other states have taken notice of Vermont’s law.⁵⁷ On February 25, 2014, Oregon became the second state to directly regulate bad-faith patent assertions by unanimously passing a bill modeled on the Vermont law.⁵⁸ The speed with which the Oregon legislature

aimed at end users often succeed because “smaller businesses often do not have the experience or resources needed to fully evaluate the patents”) (on file with the Washington and Lee Law Review).

51. See VT. STAT. ANN. tit. 9, § 4195(a)(6) (2013) (“[A] business that receives a letter asserting such claims faces the threat of expensive and protracted litigation and may feel that it has no choice but to settle and pay a licensing fee, even if the claim is meritless.”).

52. See *id.* § 4195(b) (describing the “narrow focus” of the bad-faith assertion law).

53. *Id.* § 4197.

54. See *id.* § 4197(b)–(c) (listing factors that a court may consider as evidence of good or bad faith).

55. *Infra* Part VII.

56. Tit. 9, § 4195(a)(4).

57. See 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/> (last visited Sept. 24, 2014) (noting that the law was untested as of August 1, 2013) (on file with the Washington and Lee Law Review).

58. See Denson, *supra* note 12 (describing the Oregon law).

passed this law was staggering; the bill went from the Senate floor to the signing desk in only twenty-four calendar days.⁵⁹ The Oregon law follows the Vermont law's structure by prohibiting bad-faith patent assertions and providing courts a list of potential indicators of good- or bad-faith assertions.⁶⁰ By September 2014, fourteen more states had passed laws substantively and structurally similar to Vermont's regulation of bad-faith patent assertions.⁶¹ By adopting the bad-faith standard developed in the Vermont law, large portions of these bills will be dead on arrival because they are preempted by federal patent law.⁶²

59. See S.B. 1540 A, OREGON ST. LEGIS., <https://olis.leg.state.or.us/liz/2014R1/Measures/Overview/SB1540> (last visited Sept. 24, 2014) (providing the history of the bill's passage) (on file with the Washington and Lee Law Review).

60. See Act of Mar. 3, 2014, ch. 19, §§ 1–5 (to be codified at OR. REV. STAT. §§ 646.605–.652); Denson, *supra* note 12 (summarizing the passage and contents of the Oregon law).

61. S.B. 121, 2014 Gen. Assemb., Reg. Sess. (Ala. 2014) (enacted Mar. 18, 2014), <http://alisondb.legislature.state.al.us/acas/ACTIONViewFrameMac.asp?TYPE=Substitute&AMDSUB=157933-3&DOCNAME=157933-3.pdf&DOCPATH=searchableinstruments/2014RS/Printfiles&INST=SB121>; Act of Mar. 26, 2014, ch. 277, §§ 1–2 (to be codified at IDAHO CODE ANN. §§ 48-1701 to -1708); S.B. 143, 2014 Gen. Assemb., 88th Sess. (S.D. 2014) (enacted Mar. 31, 2014), <http://legis.sd.gov/docs/legsession/2014/Bills/SB143S.pdf>; Act of Apr. 1, 2014, ch. 310, §§ 1–5 (to be codified at UTAH CODE ANN. §§ 78B-6-1901 to -1904); Act of Apr. 14, 2014, ch. 543 (to be codified at ME. REV. STAT. ANN. tit. 14, § 757); Act of May 1, 2014, ch. 879, § 1 (to be codified at TENN. CODE ANN. §§ 29-40-101 to -104); Act of May 5, 2014, ch. 307, (to be codified at MD. CODE ANN., COM. LAW §§ 11-1601 to -1605); H.B. 2837, 54th Leg., 2d Sess. (Okla. 2014) (enacted May 16, 2014), http://webserver1.lsb.state.ok.us/cf_pdf/2013-14%20INT/hB/HB2837%20INT.PDF; Act of May 23, 2014, ch. 819 (to be codified at VA. CODE ANN. §§ 59.1-215.1 to -215.4); Act of May 28, 2014, ch. 297, § 1 (to be codified at LA. REV. STAT. ANN. § 51:1428); Act of July 1, 2014, ch. 513, §§ 1–2 (to be codified at GA. CODE ANN. § 10-1-770); Act of July 11, 2014, ch. 197, §§ 1–3 (codified as amended at N.H. REV. STAT. ANN. § 359-M:1–5 (2014)); S.B. 706, 97th Gen. Assemb., Reg. Sess. (Mo. 2014) (enacted Aug. 28, 2014) (codified as amended at MO. REV. STAT. § 416.650–.658 (2014)); Act effective Jan. 1, 2015, No. 098-1119 (Aug. 26, 2014) (to be codified at 815 ILL. COMP. STAT. 505/2RRR (2014)). Additionally, Wisconsin passed a law that requires patent holders to include specified information in infringement notifications, but does not prohibit expressly prohibit bad-faith patent assertions. Act of Apr. 23, 2014, ch. 339 (to be codified at WIS. STAT. § 100.197).

62. See *infra* Part VI.B.3 (describing those provisions of the Vermont law that are likely preempted by federal patent law).

IV. Federal Preemption Law Generally

The Supremacy Clause of the U.S. Constitution⁶³ states that the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme law of the Land.”⁶⁴ The Supreme Court articulated the meaning of this clause in *Gibbons v. Ogden*,⁶⁵ when Chief Justice John Marshall said that if state law is “opposed to, or inconsistent with, any constitutional power which Congress has exercised, then, so far as the incompatibility exists, the [state] grant is nugatory and void, necessarily by reason of the supremacy of the law of Congress.”⁶⁶

The Supreme Court has interpreted the Supremacy Clause to preempt state law in three general contexts: explicit preemption, field preemption, and conflict preemption.⁶⁷ When Congress includes a statement in a statutory scheme that makes federal law the exclusive authority, state regulation in the area is explicitly preempted.⁶⁸ When no explicit preemption provision exists, courts may find that federal law impliedly preempts state law through field or conflict preemption.⁶⁹ Field preemption exists when Congress enacts a legislative scheme so pervasive that it occupies the regulatory field, leading to the reasonable inference that Congress intended to exclude state regulation in that field.⁷⁰ Conflict preemption, by comparison, exists when a state law directly interferes with a federal law.⁷¹ Conflict

63. U.S. CONST. art. VI, § 1, cl. 2.

64. *Id.*

65. 22 U.S. 1 (1824).

66. *Id.* at 30.

67. See *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (describing the three categories of preemption).

68. See, e.g., Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334(b) (2012) (“No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.”).

69. See *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (“Absent explicit preemptive language, we have recognized at least two types of implied pre-emption: field pre-emption . . . and conflict pre-emption . . .”).

70. See *id.* (defining field preemption).

71. See *English*, 496 U.S. at 79 (“[S]tate law is pre-empted to the extent that it actually conflicts with federal law.”).

preemption can occur when it is impossible to simultaneously comply with both state and federal law,⁷² or when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress.”⁷³ The Court has acknowledged that the boundaries of these three categories are not rigidly drawn, which can cause ambiguous distinctions in the case law.⁷⁴

Two principles guide the preemption analysis. First, respect for federalism requires that preemption analysis begin with the presumption that Congress does not “cavalierly” preempt state law.⁷⁵ This presumption is particularly strong when Congress legislates in a field traditionally within the state police powers.⁷⁶ Second, preemption analysis is fundamentally a determination of congressional purpose.⁷⁷ Statements of express preemption present the most obvious analysis of congressional purpose because the purpose is embodied in the statute’s text.⁷⁸ Inferring Congress’s intent to impliedly preempt state regulation is more demanding because it requires an examination of the statute’s language, structure, and inherent objective.⁷⁹ The Supreme Court

72. *See id.* (“[T]he court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements . . .”).

73. *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

74. *See id.* at 79 n.5 (“By referring to these three categories, we should not be taken to mean that they are rigidly distinct.”).

75. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

76. *See id.*

In all pre-emption cases, and particularly in those in which Congress has ‘legislated . . . in a field which the states have traditionally occupied,’ we ‘start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

(quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

77. *See id.* (“[O]ur analysis of the scope of the statute’s pre-emption is guided by our oft-repeated comment, . . . that ‘[t]he purpose of Congress is the ultimate touchstone’ in every pre-emption case.”); *English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79 (1990) (“Pre-emption fundamentally is a question of congressional intent . . .”).

78. *See English*, 496 U.S. at 79 (“[W]hen Congress has made its intent known through explicit statutory language, the courts’ task is an easy one.”).

79. *See Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 96 (1992) (“To discern Congress’ intent we examine the explicit statutory language and the structure and purpose of the statute.”).

has assessed the congressional objective underlying federal patent law in the preemption context on several occasions.⁸⁰

V. Federal Preemption in Patent Law

Congressional authority to establish a patent system originates from the enumerated power of Article I, Section 8, Clause 3 of the U.S. Constitution.⁸¹ Under this authority, Congress passed the first federal patent statute in 1790.⁸² After several iterations, the modern Patent Act⁸³ developed from the Patent Act of 1952.⁸⁴ Unlike the Copyright Act's⁸⁵ explicit preemption language stating that "no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State,"⁸⁶ the Patent Act contains no explicit preemption provision.⁸⁷ The Supreme Court, however, has found that federal patent law impliedly preempts state law in several instances.⁸⁸

80. See *infra* Part V (describing the Supreme Court's analysis of federal patent law's preemptive effect).

81. See U.S. CONST. art. I, § 8, cl. 8 ("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.").

82. Act of April 10, 1790, ch. 7, 1 Stat. 109; see also Frank D. Prager, *Historic Background and Foundation of American Patent Law*, 5 AM. J. LEGAL HIST. 309, 320–24 (1961) (providing a legislative history of the first patent act).

83. 35 U.S.C. §§ 1–376 (2012); see also P.J. Federico, *Commentary on the New Patent Act*, 75 J. PAT. & TRADEMARK OFF. SOC'Y 161, 163–70 (1993) (providing a history of the development of federal patent law and a legislative history of the 1952 Act).

84. See JANICE M. MUELLER, AN INTRODUCTION TO PATENT LAW 30–31 (2d ed. 2006) (recounting the historical development of U.S. patent law).

85. 17 U.S.C. §§ 101–805.

86. *Id.* § 301.

87. See 35 U.S.C. §§ 1–376 (excluding an express preemption provision); *Hunter Douglas, Inc. v. Harmonic Design, Inc.*, 153 F.3d 1318, 1332 (Fed. Cir. 1998) ("Because federal patent law plainly does not provide for explicit preemption, we of course agree with the district court that there is no preemption on this ground.").

88. See *infra* Part V.A (describing the Supreme Court's patent preemption case law).

A. Implied Preemption of State Law

The Supreme Court has concluded that state attempts to grant patent-like protection to unpatentable inventions can conflict with the objectives of federal patent law.⁸⁹ These Supreme Court decisions do not directly control whether states can regulate patent assertions or bad-faith assertions, but they do identify patent law's objectives.⁹⁰ These objectives are important because implied preemption analysis is “fundamentally a question of congressional intent.”⁹¹

The Supreme Court addressed the potential conflict between state unfair competition law and federal patent law in two cases decided on March 9, 1964.⁹² In *Sears, Roebuck & Co. v. Stiffel Co.*,⁹³ the Court considered whether the manufacturer of an unpatented “light pole” could use Illinois’s unfair competition law to obtain an injunction and damages against a company selling a nearly identical product.⁹⁴ Similarly, in *Compco Corp. v. Day-Brite Lighting, Inc.*,⁹⁵ a manufacturer of fluorescent light fixtures sought to use the same Illinois law against a competitor that copied the manufacturer’s light fixture design.⁹⁶ The Court began its preemption analysis in *Sears* by stating that federal patent law would preempt state attempts to protect intellectual property

89. See *infra* notes 93–95 and accompanying text (describing cases in which the Supreme Court found state law preempted by federal patent law); Caroline Marsili, Note, *The Preemptive Power of Federal Patent Law: A Framework for Analyzing State Antitrust Challenges to Pay-for-Delay Settlements*, 14 MINN. J.L. SCI. & TECH. 849, 864–870 (2013) (reviewing Supreme Court decisions interpreting the preemptive effect of federal patent law to determine if federal law preempts state antitrust laws).

90. See *Hunter*, 153 F.3d at 1333 (looking to Supreme Court precedent to “set forth the essential criteria—the ‘objectives of the federal patent laws’—for determining whether there is field or conflict preemption”).

91. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79 (1990).

92. See *infra* notes 93–106 and accompanying text (describing these cases).

93. 376 U.S. 225 (1964).

94. See *id.* at 225–26 (“The question in this case is whether a State’s unfair competition law can, consistently with the federal patent laws, impose liability for or prohibit the copying of an article which is protected by neither a federal patent nor a copyright.”).

95. 376 U.S. 234 (1964).

96. See *id.* at 234–35 (stating the factual background of the case).

in a manner inconsistent with federal patent law.⁹⁷ The Illinois law created an intellectual property right in nonpatentable products, like the light pole and light fixtures, because it allowed manufacturers to exclude others from replicating those products.⁹⁸ Creating this property right conflicted with several federal patent law objectives.⁹⁹

One patent law objective is to promote innovation by granting an exclusive right to use an invention for a limited period of time.¹⁰⁰ By limiting the period of exclusive use, patent law seeks to increase the amount of new knowledge that becomes available for public use after a patent has expired.¹⁰¹ Patent law also retains general knowledge in the public domain by imposing strict standards on the class of inventions that can be granted rights of exclusive use.¹⁰² By prohibiting the copying of unpatentable light poles and light fixture designs, the Illinois law effectively granted a right of exclusive use to the manufacturers.¹⁰³ This exclusionary power removed inventions from the public domain that federal law dictated should remain available for public use.¹⁰⁴ This conflict with an objective of federal patent law resulted in the preemption of Illinois's unfair

97. *See Sears*, 376 U.S. at 231 (“Obviously a State could not, consistently with the Supremacy Clause of the Constitution, extend the life of a patent beyond its expiration date or give a patent on an article which lacked the level of invention required for federal patents.”).

98. *See id.* at 232–33 (describing the lower court’s application of Illinois’s unfair competition law as granting a patent-like protection to nonpatentable inventions).

99. *See id.* at 229–32 (identifying federal patent law’s objectives).

100. *See id.* at 229 (“Patents . . . are meant to encourage invention by rewarding the inventor with the right, limited to a term of years fixed by the patent, to exclude others from the use of his invention.”).

101. *See id.* at 230 (describing the tradeoff between a grant of exclusion and eventual public disclosure of knowledge).

102. *See id.* (noting the adherence to strict standards for patentable inventions).

103. *See id.* at 231 (discussing the effect of the Illinois law).

104. *See id.* at 231–32 (“To prevent the copying of an article which represents too slight an advance to be patented would be to permit the State to block off from the public something which federal law has said belongs to the public.”); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237 (1964) (“To forbid copying would interfere with the federal policy . . . of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain.”).

competition law as applied to the facts in *Sears*¹⁰⁵ and *Day-Brite*.¹⁰⁶

The Court continued this reasoning in *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*,¹⁰⁷ by finding that federal law preempted a Florida law that prohibited the use of a “direct molding process” to replicate an unpatented boat design.¹⁰⁸ The Court’s conflict preemption analysis reiterated that the removal of an unpatented process from the public domain “constrict[s] the spectrum of useful public knowledge,”¹⁰⁹ “erod[es] the general rule of free competition upon which the attractiveness of the federal patent bargain depends,”¹¹⁰ and “impermissibly contravenes the ultimate goal of public disclosure and use which is the centerpiece of federal patent policy.”¹¹¹

In *Bonito Boats*, the Court extended the preemption analysis of *Sears* and *Day-Brite* one step further. The Court found that federal patent law preempted the *field* that the Florida law sought to regulate.¹¹² The Florida law aimed at “promoting intellectual creation by substantially restricting the public’s ability to exploit ideas.”¹¹³ Problematically, this is “a field of regulation which the patent laws have reserved to Congress.”¹¹⁴ As such, federal law preempted the Florida law that prohibited the replication of unpatented designs through an unpatented process.¹¹⁵

105. See *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 232 (1964) (finding the Illinois law preempted).

106. See *Day-Brite*, 376 U.S. at 239 (“Since the judgment below forbids the sale of a copy of an unpatented article and orders an accounting for damages for such copying, it cannot stand.”).

107. 489 U.S. 141 (1989).

108. See *id.* at 168 (finding the Florida law preempted).

109. *Id.* at 159.

110. *Id.* at 161.

111. *Id.* at 157.

112. See *id.* at 167 (“The patent statute’s careful balance between public right and private monopoly to promote certain creative activity is a ‘scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.’” (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))).

113. *Id.*

114. *Id.*

115. See *id.* at 168 (finding the Florida law preempted by federal patent law).

Although these cases could be read to substantially foreclose states from regulating intellectual property,¹¹⁶ the Court discouraged such a broad interpretation by noting that states have leeway to create some intellectual property rights.¹¹⁷ Federal patent law, for example, does not preempt state creation of trade secrets¹¹⁸ or regulation of trade dress.¹¹⁹

These cases identify the objectives of the federal patent system that inform an implied preemption analysis.¹²⁰ Federal patent law seeks to promote the “Progress of Science”¹²¹ through fostering and rewarding invention.¹²² Patent law promotes innovation by granting limited exclusive property rights in exchange for the public disclosure of the invention.¹²³ That

116. *See id.* at 154 (“Read at their highest level of generality, [*Sears* and *Day-Brite*] could be taken to stand for the proposition that the States are completely disabled from offering any form of protection to articles or processes which fall within the broad scope of patentable subject matter.”).

117. *See id.* (“That the extrapolation of such a broad pre-emptive principle from *Sears* is inappropriate is clear from the balance struck in *Sears* itself.”).

118. *See Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 492 (1974) (“Neither complete nor partial pre-emption of state trade secret law is justified.”). When finding that states can protect trade secrets, the Court looked beyond trade secret law’s purpose of encouraging invention. *Id.* at 481–82. The Court acknowledged that trade secret law also sought to maintain “standards of commercial ethics.” *Id.* Ultimately, the Court found that trade secret law is not preempted because it has a distinguishable purpose from federal law and because it provides an additional incentive for invention that does not remove information from the public domain or obfuscate disclosure. *See id.* at 484–92 (explaining why trade secret law is not preempted by federal patent law).

119. *See Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 154 (1989) (“Trade dress is, of course, potentially the subject matter of design patents. Yet our decision in *Sears* clearly indicates that the States may place limited regulations on the circumstances in which such designs are used in order to prevent consumer confusion as to the source.”).

120. *See Hunter Douglas, Inc. v. Harmonic Design, Inc.*, 153 F.3d 1318, 1333 (Fed. Cir. 1998) (“Although this quintet of cases does not decide the preemption issue on appeal here, it sets forth the essential criteria—the ‘objectives of the federal patent laws’—for determining whether there is field or conflict preemption.”).

121. U.S. CONST. art. I, § 8, cl. 8.

122. *See Kewanee*, 416 U.S. at 480 (acknowledging the constitutional powers that motivated Congress’s passage of the patent laws).

123. *See Bonito Boats*, 489 U.S. at 157 (describing the eventual disclosure of inventions to the public as “the centerpiece of federal patent policy”); *Kewanee*, 416 U.S. at 480 (describing the incentives generated by federal patent law); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964) (“Patents . . . are meant to encourage invention by rewarding the inventor with the right, limited

promotion, however, is carefully balanced with the maintenance of free competition.¹²⁴ Balance is maintained by strictly limiting those inventions which are patentable in a uniform way, thereby retaining unpatentable inventions within the public domain for public benefit.¹²⁵

B. The U.S. Court of Appeals for the Federal Circuit's Preemption Standard

Rather than create additional protections for intellectual property that might implicate Supreme Court conflict precedent,¹²⁶ the Vermont law *limits* the potential uses of a patent.¹²⁷ The prevailing standards for evaluating state regulation of patent use come from the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) because the Supreme Court has not considered the issue.¹²⁸ Although the regional circuit courts previously employed their own federal patent preemption

to a term of years fixed by the patent, to exclude others from the use of his invention.”); Mark A. Lemley, *The Myth of the Sole Inventor*, 110 MICH. L. REV. 709, 753–54 (2012) (proposing that the incentive of a patent accelerates innovation). *But see* Lea Shaver, *Illuminating Innovation: From Patent Racing to Patent War*, 69 WASH. & LEE L. REV. 1891, 1944–47 (2012) (finding evidence in a historical case study of the light bulb that the patent system could harm innovation in the long run).

124. *See Sears*, 376 U.S. at 230–31 (identifying objectives of federal patent law).

125. *See Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 481 (1974) (acknowledging this patent law objective).

126. *See Hunter Douglas, Inc. v. Harmonic Designs, Inc.*, 153 F.3d 1318, 1333 (Fed. Cir. 1998) (“In *Dow Chemical*, we understood the Supreme Court precedent to preempt state laws that ‘seek to offer patent-like protection to intellectual property inconsistent with the federal scheme.’” (quoting *Dow Chem. Co. v. Exxon Corp.*, 139 F.3d 1470, 1475 (Fed. Cir. 1998))).

127. *See* VT. STAT. ANN. tit. 9, § 4195(a)(2) (2013) (“The General Assembly does not wish to interfere with the good faith enforcement of patents or good faith patent litigation.”); Tim Wu, *How to Make War on Patent Trolls*, THE NEW YORKER (June 3, 2013), <http://www.newyorker.com/online/blogs/elements/2013/06/how-to-make-war-on-patent-trolls.html> (last visited Sept. 24, 2014) (quoting Vermont Attorney General William Sorrell as saying that the Vermont law is “not anti-patent,” but rather “anti-abuse of patent rights”) (on file with the Washington and Lee Law Review).

128. *See Hunter*, 153 F.3d at 1333 (identifying the limited guidance of Supreme Court precedent when considering preemption of state business tort claims).

analysis, that power now squarely resides with the Federal Circuit, which has appellate jurisdiction over patent matters.¹²⁹ Applying Federal Circuit preemption standards adds uniformity and stability to the interpretation of federal patent law.¹³⁰

In its preemption analysis, the Federal Circuit has found that by passing the patent laws, Congress did not intend to occupy the *field* of state unfair competition law.¹³¹ The Patent Act occupies the field of granting patents, while state unfair competition laws occupy the field of commercial marketplace interactions, such as everyday business transactions.¹³² Thus, state unfair competition laws are not preempted through field preemption.¹³³ Declining to find field preemption in this context has the effect of limiting state tort preemption analysis to a case-by-case determination, rather than facially preempting the state laws.¹³⁴ In other words, if state laws regulating patent use are preempted, they will be preempted *as applied*.¹³⁵

State tort laws could conflict with federal patent law if the state law is applied to interfere with “conduct that is protected or governed by federal patent law.”¹³⁶ One important area of conduct that federal patent law protects is the good-faith assertion or

129. See *Midwest Indus., Inc. v. Karavan Trailers, Inc.*, 175 F.3d 1356, 1358 (Fed. Cir. 1999) (adopting Federal Circuit law as the governing standard for preemption analysis).

130. See *id.* at 1360 (“In order to fulfill our obligation of promoting uniformity in the field of patent law, it is equally important to apply our construction of patent law to the questions whether and to what extent patent law preempts or conflicts with other causes of action.”).

131. See *Hunter*, 153 F.3d at 1333 (finding no “clear and manifest purpose” of Congress to preempt state unfair competition law).

132. See *id.* at 1334 (distinguishing between federal patent law and state unfair competition law).

133. See *id.* at 1333 (“Because of the lack of such congressional intent, in conjunction with the underlying presumption disfavoring preemption, there is no field preemption of state unfair competition claims that rely on a substantial question of federal patent law.”).

134. See *id.* at 1335 (“As the Supreme Court noted, a state law is not per se preempted unless every fact situation that would satisfy the state law is in conflict with federal law.”).

135. See *id.* (limiting the potential preemption of state tort laws to “instances when the application of state law would conflict with federal law” rather than finding facial preemption).

136. *Id.*

promotion of patents.¹³⁷ The Vermont law problematically seeks to regulate patent assertions, albeit those made in bad faith.¹³⁸ Defining what constitutes a federally protected patent promotion establishes the patent uses that states cannot regulate without conflicting with federal law.¹³⁹ After the following section describes that boundary, Part VI.B argues how Vermont law treads upon the regulation of patent promotion that is protected by federal law.¹⁴⁰

1. *The Right of Patent Promotion*

The Patent Act grants that a “patentee shall have remedy by civil action for infringement of his patent.”¹⁴¹ Inherent in that infringement remedy is the patent holder’s power to “make its rights known to a potential infringer so that the latter can determine whether to cease its allegedly infringing activities, negotiate a license if one is offered, or decide to run the risk of liability.”¹⁴² This patent promotion right is protected by federal patent law.¹⁴³ Federal law would preempt a state law that conflicts with this right.¹⁴⁴ Federal patent law, however, does not protect bad-faith patent promotion.¹⁴⁵ Because it is beyond the

137. See *id.* at 1336 (identifying patent promotion and inequitable conduct before the U.S. Patent and Trademark Office as two areas protected by federal patent law); Peter J. Wied, *Patently Unfair: State Unfair Competition Laws and Patent Enforcement*, 12 HARV. J.L. & TECH. 469, 479–87 (1999) (summarizing the Supreme Court and Federal Circuit patent law preemption analysis and identifying conduct protected by patent law).

138. See *infra* Part VI.B (describing why the Vermont bad faith factor is problematic on preemption grounds).

139. See *Hunter Douglas, Inc. v. Harmonic Designs, Inc.*, 153 F.3d 1318, 1335 (Fed. Cir. 1998) (“If a plaintiff bases its tort action on conduct that is protected or governed by federal patent law, then the plaintiff may not invoke the state law remedy, which must be preempted for conflict with federal patent law.”).

140. See *infra* Part VI.B (applying the federal preemption standard to the Vermont bad faith factors).

141. 35 U.S.C. § 281 (2012).

142. *Va. Panel Corp. v. MAC Panel Co.*, 133 F.3d 860, 870 (Fed. Cir. 1997).

143. See *id.* (defining the promotion right).

144. See *Hunter*, 153 F.3d at 1335–37 (explaining conflict preemption).

145. See *id.* at 1336 (“[F]ederal patent law bars the imposition of liability for publicizing a patent in the marketplace unless the plaintiff can show that the

protection of federal law, states can regulate bad-faith patent promotion without implicating federal preemption.¹⁴⁶ Even state laws that do not require bad faith as an element may be used to regulate patent promotion if bad faith is proven in addition to the elements of the state claim.¹⁴⁷

The Vermont law prohibits bad-faith patent assertions, which could fall outside of the protection of federal law.¹⁴⁸ Bad faith, however, is a term of art in the Vermont law and in federal jurisprudence.¹⁴⁹ Furthermore, “a party attempting to prove bad faith on the part of a patentee enforcing its patent rights has a heavy burden to carry.”¹⁵⁰ Patents are presumed to be valid¹⁵¹ and patent promotion is presumed to be in good faith.¹⁵² To rebut these presumptions, a party must demonstrate bad faith in accordance with the federal standard,¹⁵³ which is significantly more onerous than the concept of bad faith that the Vermont law develops.¹⁵⁴

patent holder acted in bad faith.”).

146. See, e.g., *Zenith Elecs. Corp. v. Exzec, Inc.*, 182 F.3d 1340, 1355 (Fed. Cir. 1999) (“In [*Hunter Douglas*] we opined that there is no conflict-type preemption of various state law claims based on publicizing an allegedly invalid and unenforceable patent in the marketplace as long as the claimant can show that the patent holder acted in bad faith in publication of the patent.”).

147. See *id.* (“[T]o avoid patent law preemption of such state law tort claims, bad faith must be alleged and ultimately proven, even if bad faith is not otherwise an element of the tort claim.”).

148. See VT. STAT. ANN., tit. 9, § 4197(a) (2013) (prohibiting bad-faith assertions of patent infringement).

149. See *infra* Part V.B.2 (describing the federal bad-faith standard).

150. *800 Adept, Inc. v. Murex Sec., Ltd.*, 539 F.3d 1354, 1370 (Fed. Cir. 2008) (internal citations omitted).

151. See 35 U.S.C. § 282 (2012) (“A patent shall be presumed valid. . . . The burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity.”).

152. See *Golan v. Pingel Enter., Inc.*, 310 F.3d 1360, 1371 (Fed. Cir. 2002) (“The law recognizes a presumption that the assertion of a duly granted patent is made in good faith; this presumption is overcome by affirmative evidence of bad faith.”).

153. See *infra* Part V.B.2 (describing the federal bad-faith standard).

154. See *infra* Part VI.B.3 (describing the portions of the Vermont law that are likely preempted).

2. The Federal Bad-Faith Standard

Protecting good-faith patent promotion is justified by a patent holder's First Amendment right to petition the government and federal preemption doctrine.¹⁵⁵ In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,¹⁵⁶ the Court considered whether the act of petitioning government officials to enact legislation could be regulated by the federal antitrust laws because of the anticompetitive effect that legislation would have.¹⁵⁷ The Court reasoned that “[t]he right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.”¹⁵⁸ Based on that reasoning, the Court found that federal antitrust law did not limit the constitutionally protected freedom to petition the legislature.¹⁵⁹ The Court subsequently extended the *Noerr* immunity beyond petitioning the political branches to petitions for government redress through litigation.¹⁶⁰ Thereafter, regional circuit courts and the Federal Circuit broadly applied *Noerr* immunity to patent holders by treating prelitigation patent promotions as akin to court petitions.¹⁶¹ This means that asserting patent rights through a demand letter or cease-and-desist letter is constitutionally

155. See *Globetrotter Software, Inc. v. Elan Computer Grp., Inc.*, 362 F.3d 1376, 1377 (Fed. Cir. 2004) (“Our decision to permit state-law tort liability for only objectively baseless allegations of infringement rests on both federal preemption and the First Amendment.”).

156. 365 U.S. 127 (1961).

157. See *id.* at 136 (considering whether federal antitrust law prohibited an agreement to lobby for legislation that was intended to harm a competitor).

158. *Id.* at 138.

159. See *id.* at 135 (finding that federal antitrust liability “cannot be predicated upon mere attempts to influence the passage or enforcement of laws”).

160. See *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (“Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition.”).

161. See *Globetrotter Software, Inc. v. Elan Computer Grp., Inc.*, 362 F.3d 1367, 1376 (Fed. Cir. 2004) (“[O]ur sister circuits, almost without exception, have applied the *Noerr* protections to pre-litigation communications.”).

protected in a manner similar to petitions directly to the legislature or the courts.¹⁶²

Noerr immunity, however, does not protect government petitions that are a “mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.”¹⁶³ For over thirty years, the lower courts developed varying definitions of sham litigation,¹⁶⁴ until the Court clarified that petitions are not shams unless they are objectively baseless and brought in subjective bad faith.¹⁶⁵ A petition is objectively baseless when “no reasonable litigant could realistically expect success on the merits.”¹⁶⁶ Under this standard, even scurrilous and malintentioned government petitions aimed at damaging a competitor are protected by the *Noerr* doctrine if the legal viability of the lawsuit is not objectively baseless.¹⁶⁷

To continue its interpretation that patent promotions are a form of government petition, the Federal Circuit incorporated the objective baselessness requirement into its bad-faith preemption standard.¹⁶⁸ Thereafter, litigants attempting to employ state law to regulate prelitigation patent promotion, such as demand letters, must prove both objective baselessness and subjective bad faith.¹⁶⁹ This two-prong analysis is not novel to determining

162. *See id.* at 1376–77 (describing the constitutional rationale for protecting prelitigation patent assertions).

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

164. *See Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 55 n.3 (1993) (summarizing the standards applied by the federal courts of appeals).

165. *See id.* at 57 (“We now . . . hold that an objectively reasonable effort to litigate cannot be sham regardless of subjective intent.”).

166. *Id.* at 60.

167. *See id.* at 59 (“[W]e have repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham.”); *Mikohn Gaming Corp. v. Acres Gaming, Inc.*, 165 F.3d 891, 897 (Fed. Cir. 1998) (“[A] competitive commercial purpose is not of itself improper, and bad faith is not supported when the information is objectively accurate.”).

168. *See Globetrotter, Software, Inc. v. Elan Computer Grp., Inc.*, 362 F.3d 1367, 1375–77 (Fed. Cir. 2004) (describing the adaptation of the *Noerr* doctrine to patent infringement suits).

169. *See 800 Adept, Inc. v. Murex Sec., Ltd.*, 539 F.3d 1354, 1370 (Fed. Cir. 2008) (“This ‘bad faith’ standard has objective and subjective components.”).

whether state laws survive preemption review.¹⁷⁰ The Federal Circuit requires proving objective baselessness and subjective bad faith when a patent holder seeks enhanced damages for “willful infringement.”¹⁷¹ Similarly, prior to the 2014 Supreme Court decision of *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*,¹⁷² Federal Circuit precedent did not permit infringement defendants to recover attorney’s fees unless the defendants satisfied the same objective baselessness and subjective bad-faith elements, or the case involved material inappropriate conduct.¹⁷³ Although defining “[e]xactly what constitutes bad faith remains to be determined on a case by case basis,”¹⁷⁴ Federal Circuit precedent from these areas provide substantial guidance on what factual scenarios could satisfy the objective-baselessness-plus-subjective-bad-faith standard.¹⁷⁵ Satisfying this standard is essential to the viability of the Vermont law because attempts to regulate patent promotions that do not meet the federal standard of bad faith are preempted.¹⁷⁶

a. The Objective-Baselessness Prong

Federal Circuit interpretations of the objective-baselessness standard create a fuller picture of what it means to have no objectively realistic expectation of success on the merits.¹⁷⁷ The

170. See *Profl Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 61 (1993) (developing the “two-tiered process” that underlies several Federal Circuit standards).

171. See *In re Seagate Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007) (distinguishing between the objective and subjective components necessary for a court to award enhanced damages).

172. 134 S. Ct. 1749 (2014).

173. See *id.* at 1751 (holding that district courts can award fee shifting in patent cases without finding objective baselessness and subjective bad faith); *iLOR, LLC v. Google, Inc.*, 631 F.3d 1372, 1377 (Fed. Cir. 2011) (“The objective baselessness standard for enhanced damages and attorneys’ fees against a non-prevailing plaintiff . . . is identical to the objective recklessness standard for enhanced damages and attorneys’ fees against an accused infringer for § 284 willful infringement actions . . .”).

174. *Zenith Elecs. Corp. v. Exzec, Inc.*, 182 F.3d 1340, 1354 (Fed. Cir. 1999).

175. *Infra* Part V.B.2.

176. See *supra* notes 141–47 and accompanying text (describing the federal protection of good-faith patent promotions).

177. Cf. Landreth, *supra* note 11, at 124 n.148 (“*Globetrotter* does not outline

Federal Circuit ruled that a district court had not found objective baselessness when the district court stated that “it cannot be said that either one side or the other will prevail on the ultimate issues.”¹⁷⁸ The district court further failed to find objective baselessness when it stated that allegation of infringement presented a “close question” and that “the patent is not necessarily invalid and the court could not conclude that there was no infringement.”¹⁷⁹ These statements illustrate the difficulty of proving that a reasonable patent holder could not have a realistic expectation of success, except in those instances when the patents are “obviously invalid or plainly not infringed”¹⁸⁰ or the “claims of infringement were factually unsound.”¹⁸¹ Satisfying the objective baselessness threshold is made even more demanding by courts’ practice of evaluating the objective merits of a claim before considering and without any reference to the subjective intent of the patent holder.¹⁸² A court will proceed to consider the subjective bad faith of the patent holder only after finding objective baselessness.¹⁸³

b. The Subjective Bad-Faith Prong

Subjective bad faith exists when the party threatening or initiating legal action is not motivated by a “subjective expectation of success” in the underlying litigation.¹⁸⁴ For

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.”)

178. *GP Indus., Inc. v. Eran Indus., Inc.*, 500 F.3d 1369, 1375 (Fed. Cir. 2007).

179. *Id.*

180. *Globetrotter Software, Inc. v. Elan Computer Grp., Inc.*, 362 F.3d 1367, 1375 (Fed. Cir. 2004).

181. *Dominant Semiconductors Sdn. Bhd. v. OSRAM GmbH*, 524 F.3d 1254, 1264 (Fed. Cir. 2008).

182. *See GP Indus.*, 500 F.3d at 1375 (“Subjective considerations of bad faith are irrelevant if the assertions are not objectively baseless.” (quoting *Profl Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993))).

183. *See, e.g., Judkins v. HT Window Fashion Corp.*, 529 F.3d 1334, 1338 (Fed. Cir. 2008) (“[O]nce the court concludes that the claims of infringement are objectively baseless, the court must then consider whether the claims were made in subjective bad faith.”).

184. *Profl Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508

example, accusing a competitor of patent infringement while the competitor is contemplating a business acquisition could demonstrate the patent holder's intent to frustrate the pending deal rather than its intent to win the infringement suit.¹⁸⁵ Some believe that the PAE business model is built around a subjective intent to avoid litigation rather than win infringement suits.¹⁸⁶ Common PAE practices of pricing licenses below the cost of defending an infringement suit and asserting patents against unsophisticated parties support this argument.¹⁸⁷ Even if the PAE business strategy is not inherently an indicator of subjective bad faith, accused infringers have several other methods of demonstrating that a PAE is not motivated by success on the merits of an infringement claim.¹⁸⁸

The clearest proof of subjective bad faith comes from direct evidence that a patent holder asserted a patent "with knowledge of [the infringement allegation's] incorrectness or falsity, or disregard for either."¹⁸⁹ Recently, however, the Federal Circuit acknowledged that finding direct evidence of a patent holder's state of mind is akin to "essentially requiring the discovery of a smoking gun."¹⁹⁰ The difficulty of producing direct evidence that a patent holder knew or should have known that its claim was baseless proved to be too onerous a burden.¹⁹¹ Perhaps in an effort to prevent Congress or the Supreme Court from interfering with patent jurisprudence,¹⁹² the Federal Circuit recently

U.S. 49, 57 (1993).

185. See *Globetrotter*, 362 F.3d at 1375 (using this example of subjective bad faith).

186. See Morgan, *supra* note 9 (noting this belief).

187. See *id.* (describing PAE practices aimed at avoiding litigation on the merits); see, e.g., *Eon-Net LP v. Flagstar Bancorp*, 653 F.3d 1314, 1327 (Fed. Cir. 2011) (finding evidence of subjective bad faith in a patent holder's filing of many infringement suits followed "with a demand for a quick settlement at a price far lower than the cost to defend the litigation").

188. See *infra* notes 190–98 and accompanying text (describing how subjective bad faith can be demonstrated).

189. *Golan v. Pingel Enter., Inc.*, 310 F.3d 1360, 1371 (Fed. Cir. 2002).

190. *Kilopass Tech., Inc. v. Sidense Corp.*, 738 F.3d 1302, 1311 (Fed. Cir. 2013).

191. See *id.* ("Lack of *direct* proof of subjective bad faith should not alone free a party from the threat of assessment of attorney's fees under § 285.").

192. See Ryan Davis, *Fed. Cir. Fee Ruling Arms Foes of "Patent Troll" Bills*, LAW360 (Jan. 6, 2014, 7:41 PM), <http://www.law360.com/articles/498167/fed->

broadened the acceptable methods of demonstrating subjective bad faith to permit a consideration of the totality of the circumstances.¹⁹³ Potential indicators of subjective bad faith within this inquiry could include “failure to conduct an adequate pre-suit investigation, vexatious or unduly burdensome litigation tactics, misconduct in procuring the patent, or an oppressive purpose.”¹⁹⁴

Several of these circumstantial indicators resemble the bad-faith factors included in the Vermont law.¹⁹⁵ But even under this loosened standard, several of the Vermont bad-faith factors are inoperable because they demonstrate only subjective bad faith and fail to incorporate objective considerations.¹⁹⁶ Before describing why much of the Vermont law conflicts with federal patent protections, the following subpart argues why the Vermont law is not *field* preempted by federal patent law.¹⁹⁷

VI. Analyzing the Vermont Law Under the Federal Preemption Standard

A. Federal Law Does Not Preempt the Field of Bad-Faith Patent Assertion Legislation

The Patent Act preempts the limited field of the “creation and disclosure of new, useful, and nonobvious advances in technology and design in return for the exclusive right to practice

circ-fee-ruling-arms-foes-of-patent-troll-bills (last visited Sept. 24, 2014) (noting that the loosening subjective bad-faith standard could be an effort to preempt federal patent-reform bills and pending Supreme Court cases that could impose new standards for awarding attorneys’ fees) (on file with the Washington and Lee Law Review).

193. See *Kilopass*, 738 F.3d at 1311–12 (ruling that a finding of objective baselessness should weigh heavily in a totality-of-the-circumstances analysis of whether the claim was made in subjective bad faith).

194. *Id.* at 1311.

195. See *infra* Part VI.B (analyzing the Vermont bad-faith factors in depth).

196. See *Kilopass Tech., Inc. v. Sidense Corp.*, 738 F.3d 1302, 1310 (Fed. Cir. 2013) (“[T]o the extent that the district court did not require actual knowledge of objective baselessness, it erred.”); *infra* Part VI.B.3 (arguing that several of the Vermont factors are likely preempted).

197. *Infra* Part VI.A.

the invention for a period of years.”¹⁹⁸ State consumer protection and unfair competition laws, by contrast, regulate in the field of marketplace interactions.¹⁹⁹ The Federal Circuit distinguished these two fields by ruling that “there is no reason to believe that the clear and manifest purpose of Congress was for federal patent law to occupy exclusively the field pertaining to state unfair competition law.”²⁰⁰

Despite this seemingly clear precedent, the Vermont law is arguably distinguishable from general consumer protection laws.²⁰¹ The Vermont law aims to exclusively regulate patent assertions, whereas general consumer protection laws prohibit “[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce.”²⁰² Although the form of the Vermont law more directly implicates the field of patent creation than generalized statutes, the substance of the law is only a particularized instance of the state’s consumer protection function.²⁰³ The law grants the attorney general the same rulemaking and remedial authority that he possesses under the state’s consumer protection chapter, which is meant to “complement the enforcement of federal statutes . . . in order to protect the public and encourage fair and honest competition.”²⁰⁴ Viewed in this light, courts should find that the Vermont law, like other state consumer protection and unfair competition laws, is not *field* preempted by federal patent law.²⁰⁵

198. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150–51 (1989).

199. *See Hunter Douglas, Inc. v. Harmonic Designs, Inc.*, 153 F.3d 1318, 1334 (Fed. Cir. 1998) (“Both the Supreme Court and this court have distinguished between the two fields in which federal patent law and state unfair competition law operate.”).

200. *Id.* at 1333.

201. *Cf. Landreth, supra* note 11, at 121–25 (concluding that the Vermont law avoids federal preemption without considering the question of field preemption).

202. VT. STAT. ANN., tit. 9, § 2453(a) (2013).

203. *See id.* § 4199(a) (granting the attorney general the same authority under the bad-faith assertion law as under the general consumer-protection statute); Lee, *supra* note 57 (interviewing a drafter of the Vermont law).

204. *Id.* § 2451; *see also id.* § 4199(a) (describing the attorney general’s authority under the bad-faith assertion law).

205. *See Hunter Douglas, Inc. v. Harmonic Designs, Inc.*, 153 F.3d 1318, 1333 (Fed. Cir. 1998) (finding no field preemption in the application of state tort

Recent federal patent reforms did not alter the field regulated by federal law in a way that would create preemption concerns for the Vermont law.²⁰⁶ In September 2011, Congress passed the America Invents Act (AIA),²⁰⁷ which “arguably makes the most substantial changes to the law since those imposed by the Patent Act of 1836.”²⁰⁸ The primary goal of the reform was to “[i]mprove the application process by transitioning to a first-inventor-to-file system; improve the quality of patents issued by the [U.S. Patent and Trademark Office] . . . ; and provide more certainty in litigation.”²⁰⁹ The AIA legislative history indicates that concern about abusive patent assertions partially motivated the adoption of reforms limiting the joinder of defendants in infringement litigation and changing the review rules for business-method patents.²¹⁰ Yet the sparse mentions of PAEs within the legislative history fall short of demonstrating Congress’s clear and manifest intent to exclude state regulation of bad-faith patent assertions.²¹¹ Field preemption does not exist where such a clear and manifest demonstration is absent.²¹²

laws, including California’s unfair competition act, negligence, international interference with prospective economic advantage, and negligent interference with prospective economic advantage).

206. See, e.g., *Sukumar v. Nautilus, Inc.*, 829 F. Supp. 2d 386, 395 (W.D. Va. 2011) (arguing unsuccessfully that the AIA “altered the Patent Act so substantially that it evinces the intent of Congress to completely occupy the field of false marking law”).

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

208. Joe Matal, *A Guide to the Legislative History of the America Invents Act: Part I of II*, 21 FED. CIR. B.J. 435, 435 (2012).

209. 157 CONG. REC. S131 (Jan. 25, 2011) (statement of Sen. Leahy).

210. See *id.* (“Patents of low quality and dubious validity . . . enable patent trolls and constitute a drag on innovation. Too many dubious patents also unjustly cast doubt on truly high quality patents.”); Joe Matal, *A Guide to the Legislative History of the America Invents Act: Part II of II*, 21 FED. CIR. B.J. 539, 590–93, 626–27 (2012) (finding references to “patent trolls” within the compiled legislative history of the AIA).

211. See Wes Klimczak, *IP: How the AIA has Affected Patent Litigation: Part Two of a Guide to Approaching the New Patent System*, INSIDE COUNS. (June 18, 2013), <http://www.insidecounsel.com/2013/06/18/ip-how-the-aia-has-affected-patent-litigation> (last visited Sept. 24, 2014) (finding pretrial joinder operations under the AIA to be very similar to pretrial operations prior to the passage of the AIA) (on file with the Washington and Lee Law Review).

212. See *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (describing the “clear and manifest purpose” standard necessary to infer field preemption of a

By describing the field preemption doctrine as a “blunt tool,” the Federal Circuit has demonstrated a preference for analyzing potential preemption under a case-by-case conflict preemption analysis.²¹³ The following subpart applies that analysis to find that much of the Vermont law and similarly modeled patent-assertion laws are likely inoperable because they conflict with federal patent law.²¹⁴

B. The Vermont Law Conflicts with Federal Patent Law

As described in Part V.B, federal patent law protects patent holders’ good-faith patent assertions.²¹⁵ This protection relegates states to regulating patent assertions shown to be made in bad faith.²¹⁶ The Vermont statute purports to adhere to this standard by prohibiting only a “bad faith assertion of patent infringement.”²¹⁷ Rather than define bad faith directly, the Vermont law provides a nonexclusive list of factors that a court may consider as evidence of bad faith, including:

- (1) The demand letter does not contain the following information: (A) the patent number; (B) the name and address of the patent owner or owners and assignee or assignees, if any; and (C) factual allegations concerning the specific areas in which the target’s products, services, and technology infringe the patent or are covered by the claims in the patent.
- (2) Prior to sending the demand letter, the person fails to conduct an analysis comparing the claims in the patent to the target’s products, services, and technology, or such an analysis was done but does not identify specific areas in which the products, services, and technology are covered by the claims in the patent.

field traditionally regulated by the states).

213. See *Hunter Douglas, Inc. v. Harmonic Design, Inc.*, 153 F.3d 1318, 1334–35 (Fed. Cir. 1998) (describing conflict preemption as a “better choice” than field preemption to analyze whether a state unfair competition law is preempted by federal patent law).

214. *Infra* Part VI.B.

215. *Supra* Part V.B.2.

216. *Supra* Part V.B.2.

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

- (3) The demand letter lacks the information described in subdivision (1) of this subsection, the target requests the information, and the person fails to provide the information within a reasonable period of time.
- (4) The demand letter demands payment of a license fee or response within an unreasonably short period of time.
- (5) The person offers to license the patent for an amount that is not based on a reasonable estimate of the value of the license.
- (6) The claim or assertion of patent infringement is meritless, and the person knew, or should have known, that the claim or assertion is meritless.
- (7) The claim or assertion of patent infringement is deceptive.
- (8) The person or its subsidiaries or affiliates have previously filed or threatened to file one or more lawsuits based on the same or similar claim of patent infringement and: (A) those threats or lawsuits lacked the information described in subdivision (1) of this subsection; or (B) the person attempted to enforce the claim of patent infringement in litigation and a court found the claim to be meritless.²¹⁸

Despite the Vermont law's expressed respect for federal patent law,²¹⁹ several of these bad-faith indicators do not meet the federal bad-faith standard, which requires objective baselessness *and* subjective bad faith.²²⁰ Thus, several of the Vermont factors cannot independently serve as indicators of bad faith without violating a patent holder's federally protected right to assert its patent.²²¹ Only one factor independently satisfies the

218. *Id.*

219. *See id.* § 4195(a)(3) ("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.").

220. *See supra* Part V.B.2 (describing the objective and subjective bad-faith concepts).

221. *See Mikohn Gaming Corp. v. Acres Gaming, Inc.*, 165 F.3d 891, 897 (Fed. Cir. 1998) ("It has long been recognized that 'Patents would be of little value if infringers of them could not be notified of the consequences of infringement or proceeded against in the courts. Such action considered by itself cannot be said to be illegal.'" (quoting *Virtue v. Creamery Package Mfg. Co.*, 227 U.S. 8, 37–38 (1913))); tit. 9, § 4195(a)(2) ("Patent holders have every right to enforce their patents when they are infringed, and patent enforcement litigation is necessary to protect intellectual property.").

federal bad-faith standard.²²² The following sections identify which factor clearly survives preemption review,²²³ which factor likely survives preemption review,²²⁴ and which factors are likely preempted.²²⁵

1. *The Vermont Factor That Survives Preemption Review*

Of the eight bad-faith factors listed in the Vermont law, only factor six independently satisfies the federal bad-faith standard.²²⁶ Factor six permits a finding of bad faith when a “claim or assertion of patent infringement is meritless, and the person knew, or should have known, that the claim or assertion is meritless.”²²⁷ The Federal Circuit has found that “obviously, if the patentee knows that the patent is invalid, unenforceable, or not infringed, yet represents to the marketplace that a competitor is infringing the patent, a clear case of bad-faith representation is made out.”²²⁸

Factor six presents such a “clear case,” because it contains both the objective and subjective components of the bad-faith standard. Recall that objective baselessness exists when no reasonable patent holder “could realistically expect success on the merits.”²²⁹ Like reasonableness analysis in other tort contexts,²³⁰ the *actual* patent holder’s knowledge is imputed onto the

222. See *infra* Part VI.B.1 (describing the factor that survives preemption review).

223. *Infra* Part VI.B.1.

224. *Infra* Part VI.B.2.

225. *Infra* Part VI.B.3.

226. See McCabe, *supra* note 19 (concluding that factors six, seven, and, arguably, eight contain criteria sufficient to satisfy the objective-baselessness standard). *But see* Landreth, *supra* note 11, at 124–25 (concluding that factors six and seven satisfy the objective-baselessness standard, but arguing that many of the other factors are sufficient as well).

227. VT. STAT. ANN., tit. 9, § 4197(b)(7) (2013).

228. Zenith Elecs. Corp. v. Exzec, Inc., 182 F.3d 1340, 1354 (Fed. Cir. 1999).

229. 800 Adept, Inc. v. Murex Sec., Ltd., 539 F.3d 1354, 1370 (Fed. Cir. 2008) (quoting Profl Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60 (1993)).

230. See, e.g., DAN B. DOBBS, THE LAW OF TORTS 280 (2000) (“The reasonable person . . . is said to have these attributes: . . . all the additional intelligence, skill, or knowledge actually possessed by the individual actor . . .”).

reasonable patent holder.²³¹ If the *actual* patent holder knew or should have known that its claim of infringement is meritless, the *reasonable* patent holder could not realistically expect success on the merits.²³² Factor six mirrors this analysis by permitting a finding of bad faith if the claim is “meritless, and the person knew, or should have known, that the claim or assertion is meritless.”²³³ Because it incorporates objective baselessness through subjective knowledge of meritlessness, factor six would survive preemption review.

2. *The Vermont Factor That Might Survive Preemption Review*

Factor eight permits a court to find bad faith when the patent holder “has *previously* filed or threatened to file one or more lawsuits based on the same or similar claim of patent infringement and: . . . (B) the person attempted to enforce the claim of patent infringement in litigation and a court found the claim to be meritless.”²³⁴

The presence of repetitive filings or repetitive threats to sue raises a threshold question of whether the two-step sham litigation exception even applies. The Ninth,²³⁵ Second,²³⁶ and Fourth²³⁷ Circuits narrowly read the Supreme Court’s two-step standard to apply only to single-suit shams. For repetitive filings,

231. See *Golan v. Pingel Enter., Inc.*, 310 F.3d 1360, 1372 (Fed. Cir. 2002) (considering whether the *specific patent holder* accused of bad-faith patent assertion had a reasonable basis to believe its patents were infringed).

232. See, e.g., *Kilopass Tech., Inc. v. Sidense Corp.*, 738 F.3d 1302, 1309–12 (Fed. Cir. 2013) (discussing the objective and subjective implications of looking at what the patent holder knew or should have known about its claim).

233. VT. STAT. ANN., tit. 9, § 4197(b)(7) (2013).

234. *Id.* § 4197(b)(8)(B) (emphasis added).

235. See *USS-Posco Indus. v. Contra Costa Cnty. Bldg. & Constr. Trades Council, AFL-CIO*, 31 F.3d 800, 810–11 (9th Cir. 1994) (distinguishing between single actions and a “whole series of legal proceedings” for purposes of the *Noerr* sham litigation exception).

236. See *PrimeTime 24 Joint Venture v. Nat’l Broad. Co., Inc.*, 219 F.3d 92, 101 (2nd Cir. 2000) (limiting its application of the two-step sham inquiry to single actions).

237. See *Waugh Chapel S., LLC v. United Food & Commercial Workers Union Local 27*, 728 F.3d 354, 364 (4th Cir. 2013) (“We distinguish *PREI* because it is ill-fitted to test whether a series of legal proceedings is sham litigation.”).

however, these circuits consider whether “the legal challenges ‘are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival.’”²³⁸ The Federal Circuit has recognized the potential for a distinct test to assess whether repetitive filings are shams, but has never deviated from the two-step objective baselessness and subjective bad faith standard.²³⁹ Even if the Federal Circuit was to adopt a distinct repetitive-filing exception, the alleged infringer would still have to demonstrate that the patent holder filed “simultaneous and voluminous” actions against it.²⁴⁰ Since the Federal Circuit has never endorsed nor applied a distinct repetitive suit sham definition, this Note considers the bad faith factor eight under the standard two-step test. As shown below, this factor is likely preempted, but could comply with the objective-baselessness standard in limited circumstances.²⁴¹

The question of objective baselessness posed by this factor is whether a reasonable patent holder whose prior assertion of infringement was found to be meritless could realistically expect to succeed in a later case. Commentator T. Christian Landreth answers this question in the negative, finding that “no reasonable litigant could expect success on the merits of a claim that has already been dismissed as meritless in the past.”²⁴² This factor, however, is subject to at least two interpretations that have opposite implications for preemption analysis.

First, the factor’s reference to a prior “claim” dismissed as meritless could refer to the statements on a patent application that define the “subject matter which the applicant regards as his invention.”²⁴³ A claim in this sense states “the metes and bounds of the right which the patent confers on the patentee to exclude

238. *PrimeTime 24*, 219 F.3d at 101.

239. See *ERBE Elektromedizin GmbH v. Canady Tech. LLC*, 629 F.3d 1278, 1291 (Fed. Cir. 2010) (“On these particular facts . . . we need not determine whether to adopt the test of our sister courts because there is no ‘series’ of legal proceedings.”).

240. See *id.* at 1292 (concluding that the patent holder’s filing of three relevant lawsuits against the alleged infringer was not sufficiently to “implicate a test for ‘a whole series of legal proceedings’”).

241. See McCabe, *supra* note 19 (concluding that this provision possibly satisfies the objective-baselessness standard, but that it “would be a stretch”).

242. Landreth, *supra* note 11, at 125.

243. 35 U.S.C. § 112 (2012).

others from making, using or selling the protected invention.”²⁴⁴ In other words, a claim “defines the propriety boundaries of the invention.”²⁴⁵ Under this interpretation, a prior court determination that the patent holder’s defined boundaries of its patent claims are meritless could defeat its ability to subsequently realistically believe that the same claim could be infringed.²⁴⁶ But claim construction is “not always an exact science, and it is not unusual for parties to offer competing definitions of even the simplest claim language.”²⁴⁷ Thus, even a prior baseless claim interpretation may not necessarily indicate that a subsequent similar claim interpretation is objectively baseless.²⁴⁸

Under a second likely interpretation, “claim” could mean “the aggregate of operative facts giving rise to a right enforceable by a court” or the complaint itself.²⁴⁹ Oregon’s new law avoids the Vermont law’s ambiguity by adopting this second interpretation.²⁵⁰ Oregon replaced the word “claim” with “complaint,” defined as a document filed with an adjudicative body or sent to another party to initiate a judicial proceeding.²⁵¹ Under Oregon’s definition, a court may find evidence of bad faith

244. *Corning Glass Works v. Sumitomo Elec. U.S.A., Inc.*, 868 F.2d 1251, 1257 (Fed. Cir. 1989).

245. Craig Allen Nard, *A Theory of Claim Interpretation*, 14 HARV. J.L. & TECH. 1, 3 (2000).

246. *See e.g.*, *iLOR, LLC v. Google, Inc.*, 631 F.3d 1372, 1379 (Fed. Cir. 2011) (looking to a patent’s prosecution history to determine if a subsequent claim was objectively baseless).

247. *Q-Pharma, Inc. v. Andrew Jergens Co.*, 360 F.3d 1295, 1301 (Fed. Cir. 2004).

248. *See iLOR*, 631 F.3d at 1379 (“Even when presented with ‘simple’ claim terms, courts may differ in their interpretation of those terms.”).

249. BLACK’S LAW DICTIONARY 281 (9th ed. 2009).

250. *Compare* VT. STAT. ANN., tit. 9, § 4197(b)(8)(B) (2013) (using the phrase “a court found the claim to be meritless”), *with* S.B. 1540, 77th Leg. Assemb., Reg. Sess. § 2(2)(b) (Or. 2014), *available at* <https://olis.leg.state.or.us/liz/2014R1/Downloads/MeasureDocument/SB1540/Enrolled> (using the phrase “dismissed the complaint as frivolous”).

251. *See* Or. S.B. 1540, § 2(2)(b) (“A court, . . . dismissed the complaint as frivolous or without merit at any point during a proceeding before the court, the panel or the body.”).

if the patent holder previously brought a similar complaint and a court “dismissed the complaint as frivolous or without merit.”²⁵²

By clarifying that its statute does not refer to “claim” in the patent claim sense, Oregon’s bad-faith factor is less ambiguous, but also less likely to satisfy the federal bad-faith standard. Under the Oregon interpretation, the objective-baselessness question becomes whether a prior court finding that a previous *complaint* was meritless means that “no reasonable litigant could realistically expect to prevail” on a similar complaint.²⁵³ What a prior court finding of meritlessness communicates to the reasonable patent holder about its chances for success in a future complaint, however, is a highly fact-specific inquiry.²⁵⁴ It is imaginable that a finding of meritlessness could defeat a litigant’s realistic expectation of success if the court’s finding relates directly to the patent’s validity and the allegedly infringing products in the two cases are very similar.²⁵⁵ For example, no patent holder could realistically expect to prove infringement if a court previously found the patent had expired and the patent holder subsequently alleges infringement during the time the patent was known to be expired.²⁵⁶

In the alternative, it is just as easy to imagine a court dismissing a complaint as meritless for reasons that do not relate to the objective validity of the patent or theory of infringement. A claim dismissed for a procedural error, such as insufficient service of process, would not affect the reasonable patent holder’s expectation of success in subsequent complaints. Neither would a substantive finding that product *X* does not infringe a patent

252. *Id.* § 2(4)(g)(B).

253. *Judkins v. HT Window Fashion Corp.*, 529 F.3d 1334, 1338 (Fed. Cir. 2008) (citing *Profl Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993)).

254. See HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 708 (3d ed. 2005) (“Ultimately the meaning of repetitive claims presents a fact question, just as the question of substantive reasonableness itself.”).

255. See *id.* (“The fact that challenged claims are repetitive can be of great importance, especially if the first dismissal gave the claimant objectively sound reasons for thinking that the subsequent claim is without merit.”).

256. See *Golan v. Pingel Enter., Inc.*, 310 F.3d 1360, 1372 (Fed. Cir. 2002) (implying that asserting a patent that is known to be invalid would constitute bad faith).

necessarily destroy the reasonable patent holder's expectation of success against product Y. Thus, the likelihood that factor eight survives preemption review is influenced by whether "claim" is interpreted as a patent claim or a general complaint.²⁵⁷ The justification for the prior court's finding of meritlessness is also an important consideration. To the extent that dismissals of prior cases do not relate to the objective substance of a patent's validity, reliance on those dismissals as evidence of bad faith would be preempted.

3. Preempted Vermont Factors

Factor six and possibly factor eight should survive preemption review because they require the court to evaluate the objective merits of the patent-assertion claim.²⁵⁸ Based on either of these factors, a court could reach the conclusion that no reasonable litigant could realistically expect to succeed on the merits.²⁵⁹ Thus, those factors can independently satisfy the objective-baselessness standard.²⁶⁰ The remaining Vermont factors, however, do not relate to the objective merits of the claim of infringement.²⁶¹ Thus, none of the remaining factors could individually or in conjunction satisfy the federal bad-faith standard without the plaintiff separately proving objective baselessness.²⁶² These factors fail to carry the heavy burden of satisfying the federal bad-faith standard and would be preempted, if applied as written.²⁶³

257. See *supra* notes 243–50 and accompanying text (identifying different likely interpretations).

258. See *supra* Part VI.B.1–2 (arguing that factor six and possibly factor eight will survive preemption review).

259. See *Profl Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 57 (1993) (defining the objective-baselessness standard).

260. See *supra* Part V.B.2.a (describing the objective-baselessness standard).

261. See *infra* Part VI.B.3.a–d (analyzing Vermont factors (b)(1), (b)(2), (b)(3), (b)(4), (b)(5), and (b)(7)).

262. Cf. Landreth, *supra* note 11, at 126 (“[W]hile 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.”).

263. See *800 Adept, Inc. v. Murex Sec., Ltd.*, 539 F.3d 1354, 1370 (Fed. Cir. 2008) (“[A] party attempting to prove bad faith on the part of a patentee

a. Deceptive Patent Assertions

Factor seven permits a finding of bad faith if the “claim or assertion of patent infringement is deceptive.”²⁶⁴ Commentator Justin McCabe argues that this factor includes sufficient criteria for a court to find objective baselessness.²⁶⁵ A close reading, however, reveals that a deceptive assertion does not likely satisfy the objective-baselessness standard.²⁶⁶

The Vermont legislature has defined what constitutes a deceptive act for particular industries,²⁶⁷ but did not define “deceptive” in the context of bad-faith patent assertions.²⁶⁸ In an effort to align themselves with other states and federal law,²⁶⁹ Vermont courts interpret deceptive acts or practices in the consumer protection context to require three elements: (1) a representation likely to mislead consumers; (2) consumer interpretation of the representation must be reasonable under the circumstances; and (3) “the misleading representation was material in that it affected the consumer’s purchasing decision.”²⁷⁰ Applying these elements to the concept of deceptive patent assertions fails the objective-baselessness standard for at least two reasons.

First, Vermont law evaluates deception from the wrong perspective. The objective analysis under the consumer protection concept of deception requires that the reasonable *consumer* would be misled.²⁷¹ The objective-baselessness standard, however,

enforcing its patent rights has a heavy burden to carry . . .” (internal citations omitted); *supra* Part V.B.2.a (describing the objective-baselessness standard).

264. VT. STAT. ANN., tit. 9, § 4197(b)(7) (2013).

265. *See* McCabe, *supra* note 19 (arguing that factor seven is consistent with federal court findings of objective baselessness).

266. *See infra* notes 271–83 and accompanying text (analyzing the deceptive-assertion factor).

267. *See* tit. 9, § 4724 (providing a long list of acts relating to banking and insurance that are deceptive).

268. *See id.* § 4196 (defining only two words in the chapter, neither of which is “deceptive”).

269. *See* *Jordan v. Nissan N. Am., Inc.*, 853 A.2d 40, 43 (Vt. 2004) (“We note that our construction of Vermont’s Consumer Fraud Act takes into account interpretations of similar protections under the Federal Trade Commission Act and other state laws.”).

270. *Id.*

271. *See id.* at 44 (“Under the Act’s objective standard, a consumer

considers whether a reasonable *patent holder* could realistically expect success on the merits.²⁷² This difference in perspective is important because, in the patent context, what the accused infringer—or customer—believes is irrelevant to whether the customer is liable for patent infringement.²⁷³ Patent infringement is a strict liability offense, meaning “innocent (i.e., unintentional or inadvertent) infringement is not a defense to a patent infringement claim.”²⁷⁴ In this way, focusing on the reasonableness of the wrong party in the patent-assertion action fails to address the threshold issue of objective baselessness.

Second, the deception concept of materiality is insufficient to constitute objective baselessness because it does not relate to an issue central to the infringement claims.²⁷⁵ Under Vermont law, an act is materially deceptive if the act affected the consumer’s purchasing decision.²⁷⁶ Many representations in a demand letter could satisfy this materiality standard by causing an alleged infringer to negotiate a license or stop its alleged infringement.²⁷⁷ Vermont identified several of these factors in its consumer-protection complaint against MPHJ, including MPHJ’s overstatement of the value of the license, misrepresentation of the number of licenses previously granted, and claims that its licensing program “had received a positive response from the business community.”²⁷⁸

establishes the first element if she proves that the representation or omission had the tendency or capacity to deceive a reasonable consumer.”).

272. See, e.g., *Judkins v. HT Window Fashion Corp.*, 529 F.3d 1334, 1338 (Fed. Cir. 2008) (defining objective baselessness as “meaning no reasonable litigant could realistically expect to prevail in a dispute over the infringement of the patent”).

273. See Roger D. Blair & Thomas F. Cotter, *Strict Liability and Its Alternatives in Patent Law*, 17 BERKELEY TECH. L.J. 799, 800–01 (2002) (finding that patent infringement is a strict liability tort, but that damages are not awarded until the infringer is put on notice).

274. *Id.* at 800.

275. See *In re Innovatio IP Ventures, LLC Patent Litig.*, 921 F. Supp. 2d 903, 921 (N.D. Ill. 2013) (requiring that misstatements be “sufficiently central” to the claims of infringement to make the “entire licensing campaign a sham”).

276. See *Jordan v. Nissan N. Am., Inc.*, 853 A.2d 40, 44 (Vt. 2004) (defining the Vermont concept of deceptive acts or practices).

277. See, e.g., *infra* note 278 and accompanying text (providing examples).

278. Vermont Complaint, *supra* note 1, at 9–10.

Defining materiality as those acts that influence consumer decisions, however, conflicts with the *Noerr* sham doctrine that underlies the bad-faith standard.²⁷⁹ That standard requires that “any misrepresentation exception to the doctrine should be limited to misrepresentations respecting the substance of the claim to show that the party’s litigation position had no objective basis.”²⁸⁰ Aligning itself with several circuits, the U.S. District Court for the Northern District of Illinois recently rejected the argument that misrepresentations like those complained of in the Vermont complaint could render a demand letter a “sham” under the *Noerr* doctrine.²⁸¹ The Federal Circuit, however, has not yet considered the proper interpretation of materiality in the patent preemption context.²⁸² By conflicting with the *Noerr* conception of materiality and considering objective factors from the wrong perspective, however, the consumer-protection interpretation of deceptive conduct likely does not satisfy the objective-baselessness standard.²⁸³ Thus, factor seven, if applied alone, would be preempted.

b. Unreasonable Demands

Factors number four and five permit a court to find evidence of bad faith based on the reasonableness of demands made within a demand letter.²⁸⁴ A court may find bad faith in a letter that

279. See *Globetrotter Software, Inc. v. Elan Computer Grp., Inc.*, 362 F.3d 1367, 1375–77 (Fed. Cir. 2004) (describing the doctrinal development of the objective-baselessness standard).

280. See *id.* at 1375 (applying *Noerr* immunity to prelitigation communications).

281. See *In re Innovatio IP Ventures, LLC Patent Litig.*, 921 F. Supp. 2d 903, 920 (N.D. Ill. 2013) (declining to find the sham exception satisfied by demand letter misrepresentations about the number of licenses granted under the patent, the value of licenses, and the number of patents held valid by a court or reexamination proceeding).

282. See *id.* at 921 (“The court has not found, and the parties do not cite, any case in which the Federal Circuit has addressed whether misstatements of only tangential relevance to an infringement claim can render the assertion of that claim in pre-suit demand letters an objectively baseless sham.”).

283. See *supra* notes 271–81 and accompanying text (identifying defects in the deceptive assertion factor).

284. See *infra* notes 285–86 (quoting the Vermont law’s reasonableness factors).

demands a response in an unreasonably short period of time²⁸⁵ or that offers an unreasonably priced license.²⁸⁶ Unreasonable demand letters are not indicative of objective baselessness for reasons similar to why deceptive demand letters fail to satisfy the objective standard.²⁸⁷

First, the unreasonableness of a demand letter is not material to the issue of infringement.²⁸⁸ The request of an unreasonable license fee or demanding an unreasonably prompt response has no bearing on whether the allegation of infringement “presents a close question.”²⁸⁹ Sending an unreasonable demand letter may be abusive,²⁹⁰ but it does not mean that the question of infringement is any less “open to debate.”²⁹¹ Second, this factor attempts to shift the burden from the accused infringer to the patent holder. Finding bad faith in the unreasonableness of the demand letter is akin to requiring the patent holder to prove good faith. But the accused infringer bears the burden of demonstrating that the reasonable patent holder could have had no realistic expectation of success on the merits.²⁹² Because the unreasonableness of the demand letter does not affirmatively prove objective baselessness, even

285. See VT. STAT. ANN., tit. 9, § 4197(b)(4) (2013) (“The demand letter demands payment of a license or fee or response within an unreasonably short period of time.”).

286. See *id.* § 4197(b)(5) (“The person offers to license the patent for an amount that is not based on a reasonable estimate of the value of the license.”).

287. See *supra* Part VI.B.3.a (analyzing the Vermont law’s deceptive-demands factor).

288. See *In re Innovatio IP Ventures, LLC Patent Litig.*, 921 F. Supp. 2d 903, 921 (N.D. Ill. 2013) (requiring that demand letter misrepresentations be “sufficiently central” to the claims of infringement for the misrepresentation to satisfy the sham doctrine).

289. *GP Indus., Inc. v. Eran Indus., Inc.*, 500 F.3d 1369, 1375 (Fed. Cir. 2007).

290. See H.R. REP. NO. 113-279, at 22–23 (2013) (providing industry witness testimony of the disruption caused by ambiguous or incomplete demand letters).

291. *Judkins v. HT Window Fashion Corp.*, 529 F.3d 1334, 1342 (Fed. Cir. 2008).

292. See *Hunter Douglas, Inc. v. Harmonic Designs, Inc.*, 153 F.3d 1318, 1336 (Fed. Cir. 1998) (placing the burden on the party attempting to prove bad faith).

unreasonable letters are protected by federal law from state regulation.²⁹³

c. Insufficient Investigation

Vermont factor two permits finding bad faith in the patent holder's failure to compare patent claims with the allegedly infringing product or in the patent holder's failure to identify specific instances of infringement.²⁹⁴ Although a direct comparison of patent claims to a product may be necessary to avoid Federal Rule of Civil Procedure 11²⁹⁵ sanctions,²⁹⁶ failure to investigate is not determinative of objective baselessness.²⁹⁷

Asserting infringement without evidence does make it “difficult to see how reasonable litigants could possibly expect to prevail on the merits” and “casts doubt upon the asserter's ability to make a successful claim.”²⁹⁸ Yet “doubt” and difficulty to

293. See *supra* Part V.B.1 (describing why state regulation of good-faith patent promotion is preempted).

294. VT. STAT. ANN., tit. 9, § 4197(b)(2) (2013).

295. See FED. R. CIV. P. 11(b)–(c) (establishing the conditions for imposing sanctions for actions improperly brought before a court).

296. See *Q-Pharma, Inc. v. Andrew Jergens Co.*, 360 F.3d 1295, 1300–01 (Fed. Cir. 2004) (“In the context of patent infringement actions, we have interpreted Rule 11 to require, at a minimum that an attorney interpret the asserted patent claims and compare the accused device with those claims before filing a claim alleging infringement.”). The Federal Circuit has expressly declined to equate the bad-faith standard with the Rule 11 investigation standard. See *Dominant Semiconductors, Sdn. Bhd. v. OSRAM GmbH*, 524 F.3d 1254, 1262 (Fed. Cir. 2008) (“We have never stated that the Rule 11 standard is the same as the standard applied in the line of cases following *Professional Real Estate* and *Globetrotter*.”). Important in this determination was that Rule 11 applies to court pleadings, whereas the bad-faith standard for demand letters applies to “pre-litigation infringement allegations.” *Id.*

297. See, e.g., *Dominant*, 524 F.3d at 1263–64 (finding that failures to investigate are “probative of subjective baselessness, but they do not help to show that a jury reasonably could find . . . objective baselessness”); *Fisher Tool Co., Inc. v. Gillet Outillage*, 530 F.3d 1063, 1066–67 (9th Cir. 2008) (applying the Federal Circuit standard to find no bad faith because the patent holder “relied on its lawyers to draft the letters” after examining the patent and the alleged infringer's product); *GP Indus., Inc. v. Eran Indus., Inc.*, 500 F.3d 1369, 1375 (Fed. Cir. 2007) (finding that lack of product examinations by a company president or an expert are “not convincing objective factors”).

298. Landreth, *supra* note 11, at 124–25.

foresee success do not mean that a claim is objectively baseless.²⁹⁹ In clear language, the Federal Circuit has concluded that failure to conduct a sufficient analysis has “nothing to do with the issue of whether” infringement claims are “objectively baseless.”³⁰⁰ In *Dominant Semiconductors v. OSRAM*,³⁰¹ the Federal Circuit considered an allegation of bad faith based on the patent holder’s failure to compare its patent claims to the alleged infringer’s product before the patent holder sent demand letters.³⁰² The Federal Circuit stated that allegations of insufficient investigation “might be probative of subjective baselessness, but they do not help to show that a jury reasonably could find that . . . [the patent holder’s] infringement allegations were objectively baseless.”³⁰³

The presumptions underlying a patent infringement claim may help justify this seemingly counterintuitive classification. Patents are presumed to be valid³⁰⁴ and patent assertions are presumed to be brought in good faith.³⁰⁵ Failure to investigate may indicate a lack of evidence of infringement,³⁰⁶ but it does not defeat the presumption that a patent is valid and that the claim of infringement is brought in good faith.³⁰⁷ It is not always

299. See *infra* notes 300–08 and accompanying text (arguing that investigation is not a prerequisite for avoiding objectively baseless infringement claims).

300. *Dominant*, 524 F.3d at 1264.

301. 524 F.3d 1254 (Fed. Cir. 2008).

302. See *id.* at 1263 (“[Dominant’s] focus in the district court and on appeal is on its contention that the [infringement letter] was based on inadequate research.”).

303. *Id.* at 1263–64. *But see* *Kilopass Tech., Inc. v. Sidense Corp.*, 738 F.3d 1302, 1314–1316 (Fed. Cir. 2013) (calling into question whether the bad-faith standard for permitting awards of alleged infringers’ attorneys’ fees should be proven by clear and convincing evidence).

304. See 35 U.S.C. § 282 (2012) (“A patent shall be presumed valid. . . . The burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity.”).

305. See *Golan v. Pingel Enter., Inc.*, 310 F.3d 1360, 1371 (Fed. Cir. 2002) (“The law recognizes a presumption that the assertion of a duly granted patent is made in good faith, this presumption is overcome by affirmative evidence of bad faith.”).

306. See *Landreth*, *supra* note 11, at 124–25 (considering this argument sufficient to establish objective baselessness).

307. See *Dominant Semiconductors Sdn. Bhd. v. OSRAM GmbH*, 524 F.3d 1254, 1263–64 (Fed. Cir. 2008) (discussing the alleged infringer’s burden in

necessary to compare patent claims with an allegedly infringing product to create a reasonable expectation of success.³⁰⁸ Therefore, federal law would preempt factor two's attempt to define bad faith exclusively based on a proven failure to investigate.

d. Demand Letters with Insufficient Information

Several Vermont factors permit courts to find bad faith from a patent holder's failure to include sufficient information in a demand letter for a recipient to efficiently respond.³⁰⁹ PAEs use the tactic of providing sparse information in demand letters to limit the alleged infringer's ability to investigate the merits of a claim of infringement, thus increasing the informational asymmetry that advantages PAEs in licensing negotiations.³¹⁰ The information-defect factors support Vermont's desire to facilitate "the efficient and prompt resolution of patent infringement claims."³¹¹ Despite that honorable intention, informational defects are not probative of objective baselessness.³¹²

As the previous subsection described, a patent holder need not present direct evidence of infringement in order to avoid the bad-faith standard.³¹³ If the patent holder need not possess

demonstrating objective baselessness).

308. *See id.* at 1264 (finding that the complexity of the product does not change the determination that lack of investigation indicates only subjective bad faith).

309. VT. STAT. ANN., tit. 9, § 4197(b)(1)(A)–(C) (2013).

310. *See* H.R. REP. NO. 113-279, at 22–23 (2013) (providing witness testimony before congressional committee that infringement pleading deficiencies limit the alleged infringers ability to investigate the infringement, to prepare a defense, and cause inefficient delays and expenses).

311. Tit. 9, § 4195(b).

312. *See infra* notes 313–17 and accompanying text (analyzing the informational-defect factors).

313. *Supra* Part VI.B.3.c; *see also* *Dominant Semiconductors Sdn. Bhd. v. OSRAM GmbH*, 524 F.3d 1254, 1264 (Fed. Cir. 2008) (“[T]he contention that there was no indication that [patent holder] had performed a sufficient analysis, though arguably relevant on the issue of subjective intent, had nothing to do with the issue of whether [patent holder’s] contentions were *objectively* baseless.”).

specific evidence of infringement, then it need not disclose that information to alleged infringers when asserting its patent right. Furthermore, the party attempting to prove bad faith bears the burden.³¹⁴ Finding bad faith in the patent holder's failure to include certain information in a demand letter essentially requires the *patent holder* to demonstrate *good faith*.³¹⁵ Failing to include sufficient information in a letter for a recipient to respond may indicate subjective bad faith,³¹⁶ but it does not help an alleged infringer carry the burden of demonstrating objective baselessness.³¹⁷ Thus, the information-defect factors would conflict with the federal bad-faith standard if not accompanied by an independent showing of objective baselessness.

Failure to include sufficient evidence for a letter recipient to respond, like the other factors in this section, may be relevant in a totality-of-the-circumstances consideration of subjective bad faith.³¹⁸ But by emphasizing indicators of subjective, rather than objective, bad faith, Vermont chose the wrong prong on which to base its bad-faith definition.³¹⁹ The Federal Circuit may be loosening the concept of subjective bad faith, but the objective-baselessness prong remains a threshold element that the accused infringer must prove to avoid preemption.³²⁰ An attempt to use any of the purely subjective bad-faith factors without an attendant finding of objective baselessness would be preempted by federal patent law.³²¹

314. See *Globetrotter Software, Inc. v. Elan Computer Grp., Inc.*, 362 F.3d 1367, 1374 (Fed. Cir. 2004) (“[T]o avoid preemption, ‘bad faith must be alleged and ultimately proven’” (quoting *Zenith Elecs. Corp. v. Exzec, Inc.*, 182 F.3d 1340, 1355 (Fed. Cir. 1999))).

315. See, e.g., *Dominant*, 524 F.3d at 1263 (ruling that the patent holder “did not bear the burden of proving that it made its communications in good faith”).

316. See *supra* Part V.B.2.b (describing the subjective bad-faith standard).

317. See *supra* Part V.B.2 (describing the bad-faith standard).

318. See *Kilopass Tech., Inc. v. Sidense Corp.*, 738 F.3d 1302, 1311 (Fed. Cir. 2013) (listing conduct similar to several of the Vermont factors as evidence of subjective bad faith).

319. See McCabe, *supra* note 19 (arguing that the Vermont law would be stronger if it provided more emphasis on objective baselessness and required an objective-baselessness component for each factor).

320. See *Kilopass*, 738 F.3d at 1314 (broadening the subjective bad-faith standard but leaving the objective-baselessness standard intact).

321. See *supra* Part V.B.2.b (describing why regulating solely subjectively bad-faith assertions is preempted by federal law).

This conclusion would render many of the Vermont bad-faith factors inoperable, but it does not completely destroy the applicability of the law itself.³²² The principal provision of the law prohibits only a “bad faith assertion of patent infringement.”³²³ A court could disregard those purely subjective factors and simply adopt the federal bad-faith standard.³²⁴ In this way, the law itself is not facially preempted because not “every fact situation that would satisfy the state law is in conflict with federal law.”³²⁵ A court could also resort to the subjective factors *after* separately finding objective baselessness.³²⁶ In this way, the law may not be applicable in the manner that its drafters intended,³²⁷ but it can still have an impact on the PAE business model and serve local businesses.³²⁸

VII. States Should Not Define Bad Faith

As argued above, many components of the Vermont law are likely inoperable because they conflict with federal law.³²⁹ In addition to this doctrinal preemption finding, preempting the Vermont law and other similarly structured state laws is also prudentially justified because the cost of applying the Vermont law as written outweighs the benefits.

322. See Hrды, *supra* note 19 (concluding that the law is not necessarily preempted, depending on its application).

323. VT. STAT. ANN., tit. 9, § 4197(a) (2013).

324. See *id.* § 4197(b)(9), (c)(9) (permitting the court to consider any other factors it finds relevant); McCabe, *supra* note 19 (arguing that the law falters by deviating from the federal bad-faith standard, but that it is still applicable if that standard is satisfied).

325. *Hunter Douglas, Inc. v. Harmonic Designs, Inc.*, 153 F.3d 1318, 1335 (Fed. Cir. 1998).

326. See *Zenith Elecs. Corp. v. Exzec, Inc.*, 182 F.3d 1340, 1355 (Fed. Cir. 1999) (“[B]ad faith must be alleged and ultimately proven, even if bad faith is not otherwise an element of the tort claim.”).

327. See Kunin, *supra* note 10 (identifying the prevention of aggressive demand-letter campaigns like MPHJ’s as a motivator for passing the Vermont law).

328. See *infra* Part VIII (describing the Vermont law’s applicability when interpreted consistently with the federal bad-faith standard).

329. See *supra* Part VI.B (identifying which Vermont factors likely are or likely are not preempted).

Permitting states to define bad faith without respect to federal precedent would permit states to establish divergent bad-faith standards. State officials may argue that variant state standards benefit individual states by creating a “race to the top.”³³⁰ But different definitions of bad faith would upset Congress’s intent of creating a system “in which uniform federal standards are carefully used to promote invention while at the same time preserving free competition.”³³¹ Altering the ways a patent holder may assert its patent alters the value and nature of the patent right itself.³³² Reducing the value of a patent could discourage innovation by decreasing the incentive to obtain a patent.³³³ Differences in the patent holder’s right to assert its patents are already evidenced by the slight deviations in the bad-faith standards developed by Vermont and Oregon.³³⁴ The proliferation of state laws will further complicate the value of a

330. Wu, *supra* note 127. Vermont legislators demonstrated their “race to the top” motivations by codifying their desire to “build an entrepreneurial and knowledge based economy. Attracting and nurturing small and medium sized internet technology (“IT”) and other knowledge based companies is an important part of this effort and will be beneficial to Vermont’s future.” VT. STAT. ANN., tit. 9, § 4195(a)(1) (2013).

331. Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 230–31 (1964). *But see* Camilla A. Hrdy, *Dissenting State Patent Regimes*, 3 IPTHEORY 78, 90–97 (2013) (arguing for state patent creation as a viable alternative to federal patents); Hrdy, *supra* note 19 (identifying benefits from state patent experimentation, including laws tailored to local needs, mitigating federal consolidation of authority, and experimentation).

332. *See* Brooks Furniture Mfg., Inc. v. Dutailier Int’l, Inc., 393 F.3d 1378, 1384 (Fed. Cir. 2005) (“Patent rights are useful only if they can legally exclude others from the patented subject matter.”). *But see* Wu, *supra* note 127 (quoting Vermont Attorney General William Sorrell as distinguishing between patent-rights regulation and patent-abuse regulation); Bernard Nash, *Massachusetts Attorney General Martha Coakley Looks to Slay Patent Trolls*, INSIDE COUNSEL (Jan. 28, 2014), <http://www.insidecounsel.com/2014/01/28/massachusetts-attorney-general-martha-coakley-look> (last visited Sept. 24, 2014) (“It is not the patent process itself that AGs are focusing on[.] . . . our focus is the abuse of the system by bad actors.” (statement of Mass. Attorney Gen. Martha Coakley)) (on file with the Washington and Lee Law Review).

333. *See* Beckerman-Rodau, *supra* note 28, at 93 (“Absent the ability to assert patent property rights, fewer inventions will be patented and the public storehouse of knowledge will decrease without the public disclosure from those patents.”).

334. *See, e.g., supra* Part VI.B.2 (describing the preemption implications of the Vermont law using the word “claim” compared to the Oregon law’s use of the word “complaint”).

patent holder's property right and upset the delicate balance pursued by federal patent law.³³⁵

This risk to the federal patent system is made more unjustifiable when compared with the marginal benefits states gain from bad-faith assertion laws. Bad-faith assertion laws are largely redundant of existing authority created by state consumer protection and deceptive acts and practices statutes.³³⁶ The National Association of Attorneys General believes that attorneys general can enforce *existing* state consumer-protection laws against patent holders for the same acts that bad-faith assertion laws would regulate, including:

making false or deceptive statements in demand letters; targeting large numbers of businesses with demand letters with little or no investigation about whether the targeted businesses are actually infringing; intentionally targeting small businesses that may not have the resources to dispute a claim; and threatening litigation when no litigation is planned.³³⁷

The Vermont attorney general illustrated that abusive demand letter campaigns can be attacked through existing laws by filing suit against MPHJ under its existing statutes.³³⁸ The fact that attorneys general already have this authority makes the Vermont law largely symbolic.³³⁹

335. See Beckerman-Rodau, *supra* note 28, at 96 (considering the effect of PAEs and concluding that “[t]he weakening or limiting of property-based remedies for patent infringement is not justified due to countervailing policies”). But see Frank H. Easterbrook, *Intellectual Property is Still Property*, 13 HARV. J.L. & PUB. POL’Y 108, 116 (1990) (“Federal law does not preempt all bad state laws, and the existence of a ‘balance’ in federal law does not mean that states must adopt the same policy.”).

336. See *Vermont and Nebraska Attorneys General Take Patent Trolls Head On*, NAAGAZETTE, <http://www.naag.org/vermont-and-nebraska-attorneys-general-take-patent-trolls-head-on.php> (last visited Sept. 24, 2014) (describing attorneys general’s existing authority to regulate bad-faith patent assertions) (on file with the Washington and Lee Law Review).

337. *Id.*

338. See Vermont Complaint, *supra* note 1, at 2 (bringing an action against MPHJ based on the attorney general’s authority to enforce the state’s unfair-and-deceptive-acts-and-practices statutes).

339. The Vermont law does contain a defendant bond provision, which would require a patent holder to put forward a bond equal to treble the total of a “good faith estimate of the target’s costs to litigate the claims and amounts reasonably likely to be recovered” upon a showing of “a reasonable likelihood that a person

*VIII. Inoperability Does Not Destroy the Law's Ability to Combat
PAEs*

Referring to the law's value as symbolic is not meant to trivialize the potential application of the law, even if preempted. The preempted provisions may serve a valuable function merely by remaining in the statute books.³⁴⁰ The preempted factors could communicate to businesses that they have legal recourse for *some* of the demand letters they receive.³⁴¹ Even if a business cannot determine if demand letters are objectively baseless, or is completely unaware of the objective-baselessness standard, the existence of the statute could prompt a demand-letter recipient to inform its attorney general.³⁴² The attorney general might then be in a better position to investigate and bring legal action on behalf of a large number of letter recipients.³⁴³

Because PAEs often rely on the lack of sophistication of small business owners to extract illegitimate licenses,³⁴⁴ better informing businesses of their rights could weaken the PAE business model.³⁴⁵ At least one federal reform bill embraces this concept by proposing small-business education programs as a

has made a bad-faith assertion of patent infringement." VT. STAT. ANN., tit. 9, § 4198 (2013).

340. See William Hubbard, *Competitive Patent Law*, 65 FLA. L. REV. 341, 379–82 (2013) (arguing that laws affect the social meaning of an activity and can stimulate behavioral changes through increasing the salience of the issue).

341. See Press Release, *supra* note 50 (hoping that settlement terms reached with MPHJ will influence the behavior of subsequent senders and recipients of demand letters in New York).

342. See McCabe, *supra* note 19 (arguing that the law would be stronger if it forced the attorney general to investigate demand letter complaints because it would allow the attorney general to discover more instances of objectively baseless demands).

343. See Wu, *supra* note 127 (finding attorneys general a more effective plaintiff in bad-faith assertion suits than small business owners); Lee, *supra* note 57 (“[I]f other states adopt anti-troll measures . . . 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.”).

344. See, e.g., Magliocca, *supra* note 37, at 1823–24 (finding that nineteenth-century patent sharks and modern PAEs succeed in extracting licenses because of the infringement defendant's lack of sophistication).

345. See Lee, *supra* note 57 (describing the effect bad-faith assertion laws could have on the calculus underlying the PAE business model).

remedy to patent system abuses.³⁴⁶ If the effect of the statute is to decrease the likelihood that businesses respond to frivolous demand letters, then the PAE business model will be substantially weakened.³⁴⁷ In this way, the impact of the law is, ironically, not necessarily dependent on the operability of its provisions.

IX. Conclusion

Demand-letter campaigns like MPHJ's predatorily target small businesses as a matter of strategy.³⁴⁸ The public outcry for protection from this practice is strong and multiple political and judicial actors are currently considering various approaches to reform.³⁴⁹ State bad-faith patent-assertion laws may provide some protection for businesses, but likely not the breadth of protection desired by their proponents.³⁵⁰ Federal law would preempt many applications of the law, and perhaps those applications that state legislatures desired most.³⁵¹ Normatively, preemption of state laws *as applied* is a solution well balanced to protect federal patent rights while allowing state legislatures and executives to take some action to protect small businesses from abusive business practices.³⁵² The Vermont law and others like it

346. See Innovation Act, H.R. 3309, 113th Cong. § 7 (1st Sess. 2013) ("Using existing resources, the Director shall develop educational resources for small businesses to address concerns arising from patent litigation.").

347. See Wu, *supra* note 127 (arguing that the calculus underlying the PAE business model could be substantially frustrated if more patent-assertion complaints were directed to attorneys general).

348. See *supra* Part I (describing MPHJ's demand-letter campaign).

349. See sources cited *supra* note 9 (listing pending federal reform bills); Office of the Press Sec'y, *Fact Sheet: White House Task Force on High-Tech Patent Issues*, THE WHITE HOUSE (June 4, 2013), <http://www.whitehouse.gov/the-press-office/2013/06/04/fact-sheet-white-house-task-force-high-tech-patent-issues> (last visited Sept. 24, 2014) (outlining the President's reform initiative) (on file with the Washington and Lee Law Review).

350. See Landreth, *supra* note 11, at 125 ("Satisfying the bad-faith standard may not turn out to be a revolutionary change in the fight against patent trolls.").

351. See *supra* Part VI.B.3 (identifying the provisions of the law argued to be preempted).

352. See *supra* Part VII (describing why state laws should be limitedly preempted).

can still serve a valuable function despite this finding of preemption, although that function is more symbolic than substantive.³⁵³

353. See *supra* Part VIII (describing the symbolic value of the law).