

Note

Closing in on the Patent Troll: State Legislatures' Role in Combatting Trolling Behavior

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In the United States, entities known as patent trolls purchase patents solely for the purpose of threatening and bringing litigation and present a significant threat to innovation and economic progress. The question is: Who will rise to the occasion and stop them? In the face of federal inaction, state legislatures have stepped in, enacting laws to combat bad faith assertions of patent infringement. This Note examines the efficacy and constitutionality of state anti-patent troll statutes, analyzing how they operate within the broader framework of federal patent law.

State legislatures have taken various approaches to address patent trolling. Some statutes have survived legal scrutiny, empowering successful challenges against patent trolls. Others face obstacles under the Federal Circuit's stringent bad faith preemption doctrine, which imposes a high bar for proving bad faith claims of patent infringement. Despite these challenges, recent litigation demonstrates that well-crafted state statutes can survive

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preemption challenges and meaningfully deter patent trolls. This Note argues that states should continue to refine and experiment with anti-patent troll legislation, leveraging the benefits of jurisdictional diversity and iterative legal reform to disrupt trolling tactics. For these reasons, state-level efforts offer a promising path to protecting innovators from predatory litigation, ultimately reinforcing the patent system's core purpose—to incentivize and reward genuine innovation.

INTRODUCTION

Millions of dollars are at risk every time a patent holder brings a lawsuit in federal district court.¹ Small businesses, large corporations, and solo inventors all take on the risk of litigation for the chance to realize such money for their patented inventions. However, they are not the only ones looking to do so. Enter the patent troll.

Patent law, like many legal disciplines, is best understood via the policy goals it aims to achieve. While patent law is a lucrative field,² the U.S. patent system does not revolve solely around money. The most common justification for the U.S. patent system is utilitarian in nature—the benefits of granting patent rights outweigh the administrative and social costs of protecting such inventions.³ The rights granted by a patent reward the inventor’s innovation and incentivize people to bring new information into the public domain, allowing them to exclusively practice their invention.⁴ However, the U.S. patent system is not without its flaws as it unintentionally creates perverse incentives.⁵ Patent trolls know just how to take advantages of these incentives.

One might ask how a fictional character from the pages of a fantasy novel has made its way into the lexicon of the patent

1. See JOHN JAROSZ ET AL., YEARBOOK 2019, at 131 (2019) (“[T]he median damages award for [NPE litigation] was \$14.8 million from 2013 to 2017, compared to just \$4.2 million for [litigation involving] practising entities.”).

2. See, e.g., KEVIN J. HICKEY, CONG. RSCH. SERV., R46525, PATENT LAW: A HANDBOOK FOR CONGRESS 1 (2020) (noting that patent-intensive industries added 3.9 million jobs and \$881 billion in U.S. gross domestic product (GDP) to the U.S. economy).

3. JONATHAN S. MASUR & LISA LARRIMORE OUELLETTE, PATENT LAW: CASES, PROBLEMS, AND MATERIALS 33 (3d ed. 2023). *But cf.* Elizabeth L. Rosenblatt, *Intellectual Property’s Negative Space: Beyond the Utilitarian*, 40 FLA. ST. U. L. REV. 441, 453–59 (2013) (discussing various theoretical justifications for patent law).

4. See *Graham v. John Deere Co.*, 383 U.S. 1, 9 (1966) (“The patent monopoly was not designed to secure to the inventor his natural right in his discoveries. Rather, it was a reward, an inducement, to bring forth new knowledge.”); 35 U.S.C. § 271 (describing the exclusive rights of the patent owner to make, use, and sell their patented invention).

5. See, e.g., Julien Pénin, *Strategic Uses of Patents in Markets for Technology: A Story of Fabless Firms, Brokers and Trolls*, 84 J. ECON. BEHAV. & ORG. 633, 633 (2012) (noting that many authors are concerned about “the emergence of perverse patenting strategies adopted by patent trolls . . . [and] their potential detrimental effect on R&D investments”).

attorney. Patent trolls earn their sordid nickname by acquiring low-quality patents, ones likely to be invalidated,⁶ as a basis for abusive litigation practices—costing practicing companies (ones who either make, use, or sell their patented invention) at least twenty-nine billion dollars annually in direct litigation costs.⁷ For example, starting in January of 2019, Landmark Technology A (LTA) sent demand letters to almost 1,200 small businesses across the country threatening to sue if the recipient did not pay a \$65,000 licensing fee.⁸ The known patent troll collected quick settlements from several Washington small businesses—even though the patent LTA relied on is likely invalid.⁹ The Washington state Attorney General, Bob Ferguson, chastises patent trolls like LTA because they do not themselves make products, instead basing their entire business model on extorting small businesses by demanding licensing fees.¹⁰ This example of trolling behavior directly conflicts with the justification for patent rights—rewarding and incentivizing innovation.

6. When a patent is invalidated, the owner can no longer enforce their rights to the claimed invention. *Cf.* MASUR & OUELLETTE, *supra* note 3, at 11 (“Patent law . . . giv[es] the inventor a right to exclude competitors for a limited period. This prevents it from being undersold, allows it to charge higher prices, and thereby enables it to recoup its R&D investments.”).

7. See, e.g., Max Baucus, *It’s Time for the U.S. to Tackle Patent Trolls*, HARV. BUS. REV. (Sept. 16, 2022), <https://hbr.org/2022/09/its-time-for-the-u-s-to-tackle-patent-trolls> [<https://perma.cc/5AGU-WTTN>] (“According to one study, each year, patent trolls create \$29 billion in direct, out-of-pocket costs from the companies they go after.”).

8. See Paul Roberts, *‘Any Business with a Web Presence Is a Potential Target’: State Sues ‘Patent Troll’ Targeting Washington Firms*, SEATTLE TIMES (May 14, 2021), <https://www.seattletimes.com/business/local-business/a-patent-troll-targeting-small-businesses-is-sued-by-washington-state> [<https://perma.cc/Q4FL-PNMD>] (“[LTA] sent ‘identical form demand letters’ to nearly 1,200 small businesses across the country. Companies were told they had infringed on a patent owned by LTA that covers a broad swath of e-commerce operations and in many cases were threatened with litigation unless they paid Landmark a \$65,000 licensing fee.”).

9. See, e.g., *id.* (“[T]he United States Patent and Trademark Office determined that the patent in question would likely be ruled invalid because it ‘does not recite a technological feature that is novel and unobvious over the prior art, and is therefore not a technological invention.’”).

10. See Press Release, Wash. State Off. of the Att’y Gen., AG Ferguson Files Lawsuit Against “Patent Troll” Targeting Small Businesses (May 14, 2021), <https://www.atg.wa.gov/news/news-releases/ag-ferguson-files-lawsuit-against-patent-troll-targeting-small-businesses> [<https://perma.cc/F3AQ-XE64>] (“Landmark extorts small businesses, demanding payment for webpages that are essential for running a business . . .”).

The question remains who will step in to protect small businesses, and even larger corporations providing products for consumers, from vexatious and litigious patent trolls.¹¹ Because patent law is inherently federal, Congress and the federal courts may be the first candidates that jump to mind.¹² However, both branches have been ineffective at curbing trolling behavior.¹³ In response, starting in 2013, state legislatures began to pass legislation arming companies and/or state attorneys general with a right to sue patent trolls for bad faith assertions of patent infringement.¹⁴ Such legislation initially sparked hope across the country.¹⁵

However, the validity of state anti-patent troll legislation was quickly called into doubt by many patent law scholars.¹⁶ As

11. See generally Paul Sawers, *The Anatomy of a Patent Litigation Target*, TECHCRUNCH (July 28, 2023), <https://techcrunch.com/2023/07/28/the-anatomy-of-a-patent-litigation-target> [https://perma.cc/NK2F-4ELW] (identifying the characteristics of ideal targets for patent litigation).

12. See U.S. CONST. art. I, § 8, cl. 8 (giving Congress the “Power . . . [t]o 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”); 28 U.S.C. § 1338(a) (granting federal district courts original jurisdiction in cases “arising under” patent statutes); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 162 (1989) (discussing the importance of “national uniformity in the realm of intellectual property” and the exclusive jurisdiction of federal courts regarding patent laws).

13. See discussion *infra* Part I.B (noting the lack of Congressional action and attention from federal courts); *2020 Patent Dispute Report: Year in Review*, UNIFIED PATS. (Jan. 1, 2021), <https://www.unifiedpatents.com/insights/2020-patent-dispute-report-year-in-review> [https://perma.cc/HT7T-2667] (showing a rise in non-practicing-entity-related patent litigation since 2019).

14. Since 2013, over thirty states have passed similar legislation. Matthew Bultman, *State Laws Fighting Patent System’s ‘Dark Underbelly’ Put to Test*, BLOOMBERG L. (June 15, 2021), https://www.bloomberglaw.com/bloomberglaw/news/ip-law/XATPOP84000000?bna_news_filter=ip-law#jcite. See also *infra* Part III for a detailed discussion.

15. See Timothy B. Lee, *How Vermont Could Save the Nation from Patent Trolls*, WASH. POST (Aug. 1, 2013), <https://www.washingtonpost.com/news/the-switch/wp/2013/08/01/how-vermont-could-save-the-nation-from-patent-trolls> [https://perma.cc/33NR-CQZE] (“If the other forty-eight states follow Vermont and Nebraska’s lead, it could make the legal system much less hospitable to patent trolls.”).

16. See, e.g., Paul R. Gugliuzza, *Patent Trolls and Preemption*, 101 VA. L. REV. 1579, 1629 (2015) [hereinafter Gugliuzza 2015] (“[T]he Federal Circuit’s expansive application of *Noerr* immunity renders the states—and the federal government—almost powerless.”); Ryan DeSisto, Note, *Vermont vs. the Patent*

the federal court with exclusive appellate jurisdiction over patent cases,¹⁷ the Federal Circuit's extension of its so-called "bad-faith preemption doctrine" to the patent enforcement context caused their concern.¹⁸ Now, under this Federal Circuit precedent, state anti-patent troll statutes could be "preempted" for failing to require a showing of objective baselessness of the claims being brought by the patent owner.¹⁹ This distorts the traditional federal preemption analysis by incorporating a definition of "bad faith" arising from an entirely different body of law,²⁰ and likely renders both state anti-patent troll legislation and potential federal legislation on the topic essentially useless.²¹ However, until the Federal Circuit or the Supreme Court expressly weighs in on the issue, the fate of state anti-patent troll laws remains uncertain.²² In the meantime, parties continue to use state anti-patent troll legislation to fight back and have experienced some success.²³ Such statutes provide injunctive relief and monetary damages for accused infringers who successfully allege a "bad faith assertion of patent infringement"

Troll: Is State Action a Bridge Too Far?, 48 SUFFOLK U. L. REV. 109, 127 (2015) ("[T]he Act is impotent in the great bulk of patent-trolling cases.").

17. 28 U.S.C. § 1295(a)(1).

18. See *infra* Part III.B (discussing the development of the Federal Circuit's bad-faith preemption analysis).

19. See *infra* Part III.B for a discussion on the current preemption framework.

20. See Gugliuzza 2015, *supra* note 16, at 1603 ("The Supreme Court's . . . implied preemption framework . . . looks nothing like the *Noerr*-based 'preemption' test the Federal Circuit has applied to state law claims challenging a patent holder's enforcement behavior.").

21. See *id.* at 1631 ("This broad immunity for pre-suit communications gives courts a clear path to find some of the new state statutes invalid and to limit the application of others.").

22. See *generally, e.g.*, Corrected Opening Brief of Appellants Katana Silicon Technologies LLC & Longhorn IP, LLC, Micron Tech., Inc. v. Longhorn IP, LLC, No. 23-02007 (Fed. Cir. Feb. 22, 2024) (challenging an Idaho statute which allowed imposition of an \$8 million bond before prosecuting patent infringement); Notice of Docketing, Katana Silicon Techs. LLC v. Micron Tech., Inc., No. 23-2095 (Fed. Cir. June 29, 2023) (noticing appeal of the same); Paul R. Gugliuzza, *State Anti-Troll Statutes at the Federal Circuit. Or Not.*, 51 AIPLA Q.J. 395, 411 (2023) [hereinafter Gugliuzza 2023] ("But the unanswered—and increasingly important—questions of constitutional law at the heart of the cases might tempt the Federal Circuit into hearing the appeals anyway.").

23. See *infra* Part IV.A (identifying successful claims of bad faith assertion of patent infringement in Washington and Idaho).

and can be brought as an independent claim or a counterclaim to patent infringement.²⁴

This Note argues that, in the absence of a federal solution to the pervasive problem of patent trolling, legislators must continue to innovate at the state level and create bad faith assertion of patent infringement claims that narrowly target patent trolls by using objective criteria.²⁵ Recent successes in federal courts suggest that states are not far from creating a tenable solution despite the potential for being stymied by the Federal Circuit's preemption jurisprudence.²⁶ Though relying on states to legislate trolling behavior introduces variation into the patent system, one that prides itself on uniformity, this Note argues that all states should continue to legislate on the issue of patent trolling because the benefits of jurisdictional diversity will help destroy the leverage patent trolls currently have in the context of their national litigation schemes.

Part I explains what a patent troll is and considers the ongoing debate of whether non-practicing entities (NPEs), or just patent trolls, are harmful enough to warrant legislation. Because of the harms caused by patent trolls, this Part also addresses federal legislative and judicial efforts to curb trolling behavior.

Next, Part II identifies the types of state anti-patent troll legislation passed in response to Congress's inaction on the subject. There are some commonalities between certain states' legislative schemes regarding patent trolls, and identifying the

24. *Katana Silicon Techs. LLC v. Micron Tech., Inc.*, 671 F. Supp. 3d 1138, 1146 (D. Idaho 2023); *see also id.* at 1147 (“[Micron asserted] a counterclaim under the Act and seeking equitable relief, costs and fees, and damages.”); IDAHO CODE § 48-1703(1) (2025) (“It is unlawful for a person to make a bad faith assertion of patent infringement in a demand letter, a complaint or any other communication.”).

25. This Note draws significant inspiration from Gugliuzza 2015, *supra* note 16. Professor Gugliuzza concludes, “The objective of this Article has not been to argue that regulation of patent enforcement should be left to the states. Rather, the aim has been to highlight that, under Federal Circuit law, no government body—state or federal; legislative, administrative, or judicial—can meaningfully police dubious tactics of patent enforcement.” *Id.* at 1646. Parts III.C and IV of this Note pick up where he left off, assessing the efficacy and benefits of state anti-patent troll legislation in light of recent district court decisions and providing guidance to state legislatures for improving their schemes.

26. *See infra* Part III.C (describing how the Federal Circuit's standard presents challenges to state anti-patent troll statutes).

unique characteristics of these legislative schemes will be helpful for subsequent analysis.

Part III addresses the constitutionality of the state anti-patent troll legislation discussed in Part II. First, Part III addresses the Supreme Court's federal preemption analysis as it relates to patent issues and emphasizes the consensus among scholars that state anti-patent troll legislation would survive such a constitutional challenge under the Supremacy Clause. Next, Part III examines the Federal Circuit's development of its bad-faith preemption doctrine and identifies tensions between it and the Supreme Court's preemption analysis. Then, Part III uses recent district court litigation to demonstrate issues litigants face when attempting to use state anti-patent troll legislation to protect themselves from abusive litigation.

Finally, Part IV addresses how states should proceed in light of the Federal Circuit's troll-friendly bad faith preemption doctrine. First, Part IV takes advantage of recent federal district court decisions to consider what it means to successfully curb patent trolling and whether state anti-patent troll laws are working. Next, Part IV argues that the patent system will benefit from legislative experimentation at the state level as legislators identify objective criteria for defining troll behavior that satisfies the Federal Circuit's notion of bad faith. Additionally, by refining their statutory definitions of bad faith assertion of patent infringement, states will ensure they more narrowly target trolls and do not expose less culpable entities to liability. Finally, Part IV argues that states are better suited to address patent trolling because jurisdictional diversity increases the burden for patent trolls to litigate.

I. PATENT TROLLS—WHAT ARE THEY, AND HOW ARE WE STOPPING THEM?

Before proceeding to identify solutions to the issue of patent trolling, it is important to understand exactly the nature and severity of the problem. While most agree on how to define patent trolls, there is no consensus as to the extent of harm they cause or if they cause any harm at all. Section A focuses on defining what patent trolls are, what they are not, and whether they are as harmful as their name suggests. With a common understanding established, Section B covers how the federal government has responded, or failed to respond, to the issue of patent trolling

in the United States. By identifying where the federal government has failed to address the problem, it is clear why states felt the need to intervene in the battle against patent trolls.

A. DEFINING “PATENT TROLL”

Pejoratively referred to as patent trolls, NPEs or patent assertion entities (PAEs)²⁷ acquire intellectual property rights without any intention of practicing the claimed invention, and assert these rights against infringing parties to extract settlements as a source of revenue.²⁸ The term patent troll was popularized in 1999 by Peter Detkin, then in-house counsel at Intel Corporation, to describe “companies with no products that brought what he believed were meritless patent suits.”²⁹ In fact, patent trolling is recognized by many as a lucrative business model.³⁰ International scholars in technology and innovation have characterized the “defined structure” of this potentially lucrative model: “evaluate, purchase, and secure patents; hide until the market for a certain technology develops and the patents become economically indispensable; and finally turn patents against manufacturers to obtain high royalty fees.”³¹ This framework helps delineate between patent trolls and other NPEs.

For example, research universities are technically NPEs, but they evade the “patent troll” nomenclature by offering fair licensing agreements and being forthcoming about their patent portfolio.³² Scientists at the University of Florida originally invented and received the patent for Gatorade, but immediately assigned it to Stokely Van Camp, Inc., a beverage company

27. See David L. Schwartz & Jay P. Kesan, *Analyzing the Role of Non-practicing Entities in the Patent System*, 99 CORNELL L. REV. 425, 426 (2014) (discussing the naming conventions).

28. See Tim Pohlmann & Marieke Opitz, *Typology of the Patent Troll Business*, 43 R&D MGMT. 103, 103–04 (2013) (discussing NPE’s and patent trolls).

29. Robert L. Stoll, *Patent Trolls: Friend or Foe?*, WIPO MAG. (Apr. 30, 2014), https://www.wipo.int/wipo_magazine/en/2014/02/article_0007.html [<https://perma.cc/3FHJ-VFMK>].

30. See Pohlmann & Opitz, *supra* note 28, at 104–05 (discussing the patent troll business model).

31. *Id.* at 104.

32. See *id.* at 105 (“Universities are nonpracticing-entities that share some characteristics with trolls. Though, the differences are, that (a) the universities do not hide their patents, and (b) most universities offer fair license agreements to provide valuable know-how and increase technology transfer.” (citation omitted)).

capable of bringing the product to market.³³ No one calls the University of Florida a patent troll for agreeing to have another company produce their invention. Likewise, a solo inventor does not earn the title of patent troll for sitting on a patent in order to secure funding for manufacturing, to identify a licensee or buyer for the invention, or to wait for the market to become more advantageous to launch.

These examples illustrate the distinctions between NPEs and undesirable patent trolls. First, because patent trolls do not themselves invest in research and development (R&D)—a way to quantify value in the utilitarian patent system—the larger business community frowns upon their business model for abusing the patent incentive.³⁴ But, if that were the only standard upon which a patent troll is defined, many NPEs that specialize in monetizing intellectual property rights would be trolls.³⁵ Thus, there must be something further that distinguishes a patent troll.³⁶

33. See U.S. Patent No. 4,981,687 (filed July 17, 1989) (listing the inventors and assignee for Gatorade, or “Compositions and Methods for Achieving Improved Physiological Response to Exercise”).

34. See Pohlmann & Opitz, *supra* note 28, at 103 (“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, and in many cases did not engage in developing the technology.”); see also *supra* notes 1–3 and accompanying text (discussing the incentives for patent rights and the utilitarian justification for the U.S. patent system).

35. See Matteo Sabattini, *NPEs vs Patent Trolls: How to Build a Healthy Innovation Ecosystem*, IPWATCHDOG (Feb. 4, 2015), <https://ipwatchdog.com/2015/02/04/npe-patent-trolls-innovation-ecosystem/id=54427> [<https://perma.cc/VH4Q-HC2K>] (“[A] non-practicing entity, or NPE . . . [is] a firm that does not commercialize any product or service, but fosters innovation by monetizing intellectual property rights (IPRs) through licensing and technology transfer.”).

36. There is a lot of scholarship discussing whether patent trolls, and NPEs more broadly, positively or negatively impact innovation. See, e.g., Stoll, *supra* note 29 (“While the fear of trolls has pushed legislators to address some of the problems of the US patent system as it currently exists, at the end of the day, legislators must judiciously focus their attention on the potential for abuse not only by so-called trolls, but by anyone.”); Michael Risch, *Patent Troll Myths*, 42 SETON HALL L. REV. 457, 462 (2012) (“Part I presents some background about the NPE debate, including a discussion of the various criticisms of and justifications for NPEs.”); David S. Abrams et al., *The Patent Troll: Benign Middleman or Stick-Up Artist?* 2 (Becker Friedman Inst. for Econ. at the Univ. of Chi., Working Paper No. 2019-51, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3361215 [<https://perma.cc/5SBS-XN3M>] (“[T]he market for patents requires intermediation to facilitate inventors monetizing their ideas and

Studies have identified that patent trolls earn their name when they engage in behaviors that negatively affect innovation.³⁷ First, patent trolls are distinguishable from other NPEs because they extort their targets for excessive licensing and royalty fees.³⁸ They capitalize on the cheap acquisition of questionable patents by seeking excessive licensing fees in hopes that the costs of litigation³⁹ and the potential reputational and productivity harms will force large and small companies alike to settle.⁴⁰

Still, this is not sufficient to define trolling behavior.⁴¹ Second, patent trolls are identified by their ability to leverage their market position and target cash-rich entities, large and small, to quickly generate revenue.⁴² This is important to the business model because it dictates the patents they pursue. Weaker patents are less likely to succeed on the merits during litigation but nevertheless often generate revenue for patent trolls when threatening lengthy and costly litigation.⁴³ Therefore, as simple

overcoming the frictions noted in the opening quote. Thus, inventors who are not well-positioned to fully utilize their invention may sell or license them through an NPE's large network of industrial companies.”).

37. See Pohlmann & Opitz, *supra* note 28, at 104 (“We then more precisely delimit troll strategies from other IPR enforcement mechanism [sic] and assess whether the troll business can be beneficial or harmful for manufacturers, innovators, and industries.”).

38. See *id.* at 117 (“[O]nly one category of nonproducers and non-innovators may always cause negative effects on innovation incentives. We have called these firms excessive royalty extortionists, since they extort licenses due to their leverage potential.”).

39. According to one study, the average cost of litigating a single patent in the United States exceeded three million dollars. Gregory Day & Steven Udick, *Patent Law and the Emigration of Innovation*, 94 WASH. L. REV. 119, 119 (2019).

40. Cf. Grace Heinecke, Note, *Pay the Troll Toll: The Patent Troll Model is Fundamentally at Odds with the Patent System's Goals of Innovation and Competition*, 84 FORDHAM L. REV. 1153, 1174 (2015) (“Patent trolls need not worry themselves with reputational harms, disruption to a product line, and other indirect costs.”).

41. See Pohlmann & Opitz, *supra* note 28, at 117 (“However, we provide evidence that firms . . . [that] do not exploit their market position, might also increase incentives to innovate.”).

42. See *id.* (discussing market tactics employed by patent trolls); Lauren Cohen et al., *Patent Trolls: Evidence from Targeted Firms*, 65 MGMT. SCI. 5461, 5478 (2019) (“NPEs appear to behave as opportunistic patent trolls. They sue cash-rich firms . . .”).

43. See Joseph Farrell & Carl Shapiro, *How Strong Are Weak Patents?*, 98 AM. ECON. REV. 1347, 1362 (2008) (“Weak patents . . . can lead to costly litigation.”); John R. Allison et al., *Patent Quality and Settlement Among Repeat*

as it sounds, patent trolls can be defined as NPEs that exhibit trolling behavior. This involves exploiting weak patents by targeting entities motivated to settle quickly.⁴⁴

Returning to the example in Washington, LTA meets both prongs of this patent troll definition. First, LTA asserted an exceptionally weak patent covering e-commerce tools as generic as customer login pages and online shopping carts.⁴⁵ The patent LTA asserted was held to be unpatentable, and the court made it clear that arguments in favor of patentability “miss[] the mark.”⁴⁶ Second, LTA targeted companies who would be motivated to settle quickly, including a focus on small businesses unprepared to defend against patent infringement litigation.⁴⁷ In the state of Washington alone, LTA extracted four separate settlements from small business ranging from \$15,000 to \$20,000.⁴⁸ Therefore, LTA profited off a weak patent worth nothing, as later litigation would show,⁴⁹ all at the expense of small business owners, earning them the title—patent troll.⁵⁰

Armed with the ability to identify trolling behavior, one must consider whether it is harmful enough to warrant further discussion. Most studies point to the ultimate conclusion that patent trolls do cause quantifiable harm.⁵¹ Aggregate annual

Patent Litigants, 99 GEO. L.J. 677, 694 (2011) (finding that operating company suits were much more likely to succeed than troll suits).

44. For a discussion of these characteristics, see *supra* notes 37–43 and accompanying text.

45. See *Washington v. Landmark Tech. A, LLC*, 637 F. Supp. 3d 1154, 1158 (W.D. Wash. 2022) (“Landmark primarily targets customer log-in pages on company websites, but has also demanded license fees for webpages containing privacy practices, shopping carts, products for sale, and company home pages.”); accord *Roberts*, *supra* note 8 (“[A]ny business with a web presence is a potential target for LTA.”).

46. *In re Lockwood*, 679 F. App’x 1021, 1028 (Fed. Cir. 2017).

47. See *Roberts*, *supra* note 8 (“Landmark extorts small businesses . . . It backs them into a corner—pay up now, or get buried in legal fees.”).

48. See *id.* (“[F]our Washington companies have settled with LTA for between \$15,000 and \$20,000.”).

49. See *Lockwood*, 679 F. App’x at 1028 (finding LTA’s patent unpatentable).

50. Cf. *Roberts*, *supra* note 8 (“[Washington’s Attorney General] said he’s ‘putting patent trolls on notice: Bully businesses with unreasonable patent assertions, and you’ll see us in court.’”).

51. See James Bessen, *The Evidence Is In: Patent Trolls Do Hurt Innovation*, HARV. BUS. REV. (Nov. 2014), <https://hbr.org/2014/07/the-evidence-is-in-patent-trolls-do-hurt-innovation> [<https://perma.cc/GG6Q-8V34>] (“But the

costs of patent troll litigation are estimated to have reached \$29 billion in 2011,⁵² and this number will continue to grow as the percentage of patent cases brought by NPEs, both of the trolling variety and otherwise, rises.⁵³ However, beyond increasing litigation costs, patent trolling has chilling effects on innovation outside of the courtroom. According to one study, a firm targeted by patent troll litigation reduces R&D investments in the following two years by up to \$163 million on average, which directly contradicts the intended purpose of the patent system—to incentivize innovation.⁵⁴

Despite these figures, other studies claim that NPEs, and thus patent trolls, still add value by defending the intellectual property rights of small firms to free them up to continue innovating.⁵⁵ Additionally, other scholars view all NPEs as a valuable intermediary for individual inventors when selling their patents to large manufacturers.⁵⁶ However, both of these arguments describe behaviors attributable to true NPEs and not the types of firms that exhibit abusive trolling behaviors. Legislators tend to agree with this distinction and have identified a consensus in the patent field that trolling behaviors are harmful

weight of the evidence from these many studies cannot be ignored; patent trolls do, indeed, cause harm.”).

52. See James Bessen & Michael J. Meurer, *The Direct Costs from NPE Disputes*, 99 CORNELL L. REV. 387, 408 (2014) (“Aggregate direct costs of NPE patent assertions grew rapidly from about \$7 billion in 2005 to \$29 billion in 2011.”).

53. See *What 15 Years of US Patent Litigation Data Reveal About the IP Market*, RPX EMPOWER (Jan. 25, 2021), <https://insight.rpxcorp.com/news/65081-what-15-years-of-us-patent-litigation-data-reveal-about-the-ip-market> [<https://perma.cc/4AAJ-RFVM>] (“Total patent litigation more than doubled from 2005 to a peak in 2011-2012 but has halved since then. Most of that long-term trend has been driven by NPE activity. . . . [D]efendants added to litigation by NPE plaintiffs in 2020 is up about 9% . . .”).

54. Cohen et al., *supra* note 42, at 5477.

55. See Abrams et al., *supra* note 36, at 38 (“NPEs create value by defending the intellectual property of small firms who do not have sufficient means to defend their patents. . . . [T]his protection incentivizes small firms to innovate more . . .”).

56. See *id.* (“The second role of the NPEs have been as middleman in the market for patents, which suffer deeply from informational asymmetry. By having access to the full broker network around the country, NPEs can allocate patents to better users.”).

and demand attention.⁵⁷ Recognizing that patent trolls, when identified correctly, cause serious harm to innovation, the question becomes what legal tools exist to curb the negative effects patent trolls have on innovation.

B. THE FEDERAL GOVERNMENT AND PATENT TROLLS

Again, patent law is generally considered a matter reserved for the federal government as courts have emphasized the importance for uniformity across the country regarding patent rights.⁵⁸ Federal courts and Congress alike have wrestled with the patent troll problem for decades.⁵⁹ The former seek to curb trolling behavior through their jurisprudence regarding many patentability doctrines,⁶⁰ while the latter has yet to formally combat patent trolls via federal legislation.⁶¹

First, this Section addresses how federal courts have attempted to curb patent trolling by analyzing recent Supreme Court decisions. In light of this activity in federal courts, a congressional response to patent trolling is expected, though it has yet to occur. Second, this Section discusses proposed federal legislation that successfully identified patent trolling as a hindrance to innovation but has yet to be enacted.

57. See, e.g., H.R. REP. NO. 114-235, at 21–22 (2015) (“The harm inflicted on American innovation and manufacturing by various abusive patent-enforcement practices has been widely known and acknowledged for most of the last decade. Some of these problems clearly have grown worse even since the AIA’s enactment. . . . [I]ndustry leaders from different sectors have reached broad agreement on a common set of reforms that will address the most serious abuses currently afflicting the patent-enforcement system.”); Bessen, *supra* note 51 (arguing the weight of the evidence establishes that patent trolls are harmful by citing several studies conducted).

58. See, e.g., *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 162 (1989) (discussing the importance of “national uniformity in the realm of intellectual property”). But see *Gugliuzza* 2015, *supra* note 16, at 158–90 (discussing the ways in which state law applies to patents).

59. See generally Robert H. Resis, *History of the Patent Troll and Lessons Learned*, INTELL. PROP. LITIG., Winter 2006, at 1, 1–3 (discussing the history of patent trolling and attention surrounding it during 2006 due to the Supreme Court’s upcoming decision in *eBay Inc. v. MercExchange, L.L.C.*).

60. See *infra* Part I.B.1 (presenting examples of such cases).

61. See *infra* Part I.B.2 (highlighting Congress’s failure to enact patent troll legislation).

1. Federal Courts Attempt to Address Patent Trolls Through Patentability Jurisprudence

In recent years, the Supreme Court has taken a special interest in crafting its patent law jurisprudence with the patent troll front of mind.⁶² The justices have considered the implications of patent trolling when handing down major decisions in patentability cases related to nonobviousness and patentable subject matter and when interpreting statutory provisions regarding attorney's fees in patent litigation.⁶³ Each of these decisions will be discussed as they relate to the problem of patent trolling in order to answer the question of whether federal courts alone can combat the patent troll.

In 2006, the Supreme Court granted certiorari in *KSR International Co. v. Teleflex Inc.* to assess the current version of the test for nonobviousness endorsed by the Federal Circuit.⁶⁴ A valid patent must embody a nonobvious invention; that is, an invention that is more than an incremental improvement that a person having skill in the art would have made in light of other prior art references.⁶⁵ Prior to *KSR*, the Federal Circuit endorsed the TSM test for nonobviousness, which required "a teaching, suggestion, or motivation to combine known elements" in order to establish obviousness.⁶⁶ The Court found the TSM test to be

62. See Gene Quinn, *The Collapse of U.S. Patent Policy by a Supreme Court Preoccupied with Patent Trolls*, IPWATCHDOG (June 4, 2018), <https://ipwatchdog.com/2018/06/04/collapse-patent-policy-supreme-court-patent-trolls/id=97985> [<https://perma.cc/W29W-XRQD>] ("The Supreme Court has been so concerned about patent trolls that in decision after decision concern over the chaos wrought by patent trolls has been explicitly discussed by the Court and explicitly lamented.").

63. See *infra* notes 64–79 and accompanying text for a discussion of such cases.

64. *Teleflex, Inc. v. KSR Int'l Co.*, 119 F. App'x 282 (Fed. Cir. 2005), *cert. granted*, 548 U.S. 902 (2006), *rev'd*, 550 U.S. 398 (2007). The doctrine of nonobviousness precludes a patent when "the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art to which the claimed invention pertains." 35 U.S.C. § 103.

65. See MASUR & OUELLETTE, *supra* note 3, at 133–35 (describing the non-obviousness requirement). The goal of the nonobviousness requirement is to avoid awarding patents for activities that increase social costs (i.e. taking the time and money to file and enforce several patents on obvious combinations and incremental improvements) where little social benefit is received. *Id.* at 133.

66. *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007).

unnecessarily rigid and formulaic because it does not encompass other obvious inventions that may lack “a teaching, suggestion, or motivation.”⁶⁷ Instead, the Court returned to the traditional interpretation of nonobviousness set forth in *Graham v. John Deere Co.*,⁶⁸ which gives a court greater latitude to invalidate obvious patents.⁶⁹ This shift in nonobviousness jurisprudence makes an early decision of invalidity easier in patent troll cases because those companies prioritize acquiring and enforcing lower-quality patents that are more likely to be obvious.⁷⁰ In turn, without mentioning patent trolls once, the *KSR* decision reduces the patent troll’s leverage against potential defendants and prospective licensees.⁷¹

In 2014, the Court revisited another patentability doctrine when delineating the test for whether an abstract idea constituted patentable subject matter.⁷² In *Alice Corp. v. CLS Bank*

67. See *id.* at 419 (“Helpful insights, however, need not become rigid and mandatory formulas; and when it is so applied, the TSM test is incompatible with our precedents. The obviousness analysis cannot be confined by a formalistic conception of the words teaching, suggestion, and motivation . . .”).

68. See *id.* at 406 (providing the *Graham* framework for nonobviousness (quoting *Graham v. John Deere Co.*, 383 U.S. 1, 17–18 (1966))).

69. See Katherine M.L. Hayes, Note, *Three Years Post-KSR: A Practitioner’s Guide to “Winning” Arguments on Obviousness and a Look at What May Lay Ahead*, 9 NW. J. TECH. & INTELL. PROP. 243, 243 (2010) (suggesting the intent of the *KSR* ruling was to make patents harder to obtain).

70. See Todd Klein, Comment, *eBay v. MercExchange and KSR Int’l Co. v. Teleflex, Inc.: The Supreme Court Wages War Against Patent Trolls*, 112 PENN ST. L. REV. 295, 314 (2007) (“Additionally, by overturning the Federal Circuit’s teaching, suggestion, motivation test for obviousness, the Supreme Court has taken the first step towards preventing patent trolls from being able to sue companies for infringement when those companies are actually utilizing technology that is already in public use or obvious variations thereof.”).

71. See Sue Ann Mota, *Medimmune, Microsoft, and KSR: The United States Supreme Court in 2007 Tips the Balance in Favor of Innovation in Patent Cases, and Thrice Reverses the Federal Circuit*, 12 MARQ. INTELL. PROP. L. REV. 89, 105 (2008) (“[T]he power of so-called ‘patent trolls’ has been weakened . . .”); Stephen G. Kunin & Andrew K. Beverina, Commentary, *KSR’s Effect on Patent Law*, 106 MICH. L. REV. FIRST IMPRESSIONS 50, 54 (2007) (concluding that questionable, formulaic patents are more vulnerable after the *KSR* decision).

72. *Alice Corp. v. CLS Bank Int’l*, 573 U.S. 208 (2014). The doctrine of patentable subject matter is rooted in 35 U.S.C. § 101 and has long included “implicit exception[s]” for “[l]aws of nature, natural phenomena, and abstract ideas.” *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 589 (2013). Under the *Mayo* test, the court first asks whether the claims at issue are directed to an abstract idea. *Alice*, 573 U.S. at 217 (citing *Mayo Collaborative*

International, the Court invalidated patent claims that merely implemented the abstract idea of intermediated settlement on a generic computer.⁷³ This decision drastically affected the litigation of software patents, a type of patent favored by patent trolls, and tipped the scale in favor of defendants in infringement litigation.⁷⁴ Many scholars believe the patentable subject matter decision in *Alice* has greatly deterred patent trolling by offering a quicker route to invalidating weak software patents which decreases a patent troll's settlement leverage.⁷⁵

Finally, also in 2014, the Court granted certiorari in a case to clear up uncertainty regarding the Patent Act's fee-shifting provision.⁷⁶ In the United States, "court[s] in exceptional cases may award reasonable attorney fees to the prevailing party."⁷⁷ Here, the Court reversed the Federal Circuit's "unduly rigid" interpretation of when granting attorney's fees is appropriate in patent cases and lowered the applicable evidentiary standard.⁷⁸

Servs. v. Prometheus Lab'ys, Inc., 566 U.S. 66, 77 (2012)). If so, then the court will ask "what else is there in the claims before us?" *Id.* (quoting *Mayo*, 566 U.S. at 78). To be patent-eligible subject matter, there must be an "inventive concept" beyond the abstract idea. *Id.*

73. *Alice*, 573 U.S. at 225–26.

74. See Joseph Saltiel, *In the Courts: Five Years After Alice - Five Lessons Learned from the Treatment of Software Patents in Litigation*, WIPO MAG. (Aug. 29, 2019), https://www.wipo.int/wipo_magazine/en/2019/04/article_0006.html [<https://perma.cc/V4UZ-XFTK>] ("*Alice* allows for quick resolution of litigation involving software patents of questionable validity."); Joe Mullin, *Seeing Patent Trolls Clearly: 2022 in Review*, ELEC. FRONTIER FOUND. (Jan. 1, 2023), <https://www.eff.org/deeplinks/2022/12/seeing-patent-trolls-clearly-2022-review> [<https://perma.cc/TLA6-KMJY>] ("Very often, [patent trolls] use software patents to sue over basic business processes . . .").

75. See, e.g., Steven Seidenberg, *After Alice: Business-Method and Software Patents May Go Through the Looking Glass*, A.B.A. J., Feb. 2015, at 19, 20 (arguing that the *Alice* decision's effect on the doctrine of patentable subject matter decreases the amount of leverage patent trolls have over defendants). But see Mark A. Lemley & Samantha Zyontz, *Does Alice Target Patent Trolls?*, 18 J. EMPIRICAL LEGAL STUD. 47, 88 (2021) (concluding that *Alice* does not deter patent trolls as strongly as suggested).

76. *Icon Health & Fitness, Inc. v. Octane Fitness, LLC*, 496 F. App'x 57 (Fed. Cir. 2012), *cert. granted*, 570 U.S. 948 (2013), *rev'd*, 572 U.S. 545 (2014).

77. 35 U.S.C. § 285.

78. See *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553, 557 (2014) ("The framework established by the Federal Circuit in *Brooks Furniture* is unduly rigid, and it impermissibly encumbers the statutory grant of discretion to district courts. . . . [W]e reject the Federal Circuit's requirement that patent litigants establish their entitlement to fees under § 285 by 'clear and convincing evidence.'").

By lowering the bar for receiving attorney's fees in patent litigation, the Court disincentivized patent trolls from bringing frivolous lawsuits unlikely to succeed on the merits but perfect for extracting a quick and profitable settlement.⁷⁹

While scholars have touted the potential benefits of these cases in the fight against patent trolls, none involved patent trolls as parties, so the issue has yet to come squarely before the Court.⁸⁰ Nevertheless, many have criticized the Court for making substantive patent law decisions with implicit policy goals—such as curbing patent trolls—in mind.⁸¹ These concerns have merit despite the potential benefits of a troll-averse Supreme Court. The legislative branch, empowered by the Constitution's Intellectual Property Clause,⁸² is tasked with weighing such policy considerations and is the branch of government best suited to address the goal of curbing patent trolling.⁸³ Given this preference for legislators to address these policy issues head on, the next Section analyzes proposed federal legislation targeting patent trolls.

79. See Aria Soroudi, Comment, *Defeating Trolls: The Impact of Octane and Highmark on Patent Trolls*, 35 LOY. L.A. ENT. L. REV. 319, 319 (2015) (“Octane and Highmark are able to hinder patent troll litigation because they reduce the standard by which attorney fees may be awarded to the prevailing party.”).

80. See Quinn, *supra* note 62 (“All the while the Court never once had the opportunity to decide a case involving a patent troll . . .”).

81. See, e.g., *id.* (“Making policy decisions is not what a court on any level is supposed to do, particularly so when there is no effective review and the decisions effectively eviscerate what is constitutionally supposed to be a co-equal branch of government actually tasked with making laws and setting policy.”).

82. See U.S. CONST. art. I, § 8, cl. 8 (giving Congress the “Power . . . [t]o 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.”).

83. See T. Christian Landreth, Recent Development, *The Fight Against “Patent Trolls:” Will State Law Come to the Rescue?*, 15 N.C. J.L. & TECH. ON. 100, 133 (2014) (“To avert the need for states to test this standard by passing anti-NPE laws on a state-by-state basis, Congress should step in and pass nationwide legislation.”); see also Daniel A. Tagliente, Comment, *Shooting Blanks: The Ineffectiveness of the Executive Branch’s Entrance into the Great Patent Troll Hunt*, 45 SETON HALL L. REV. 311, 316 (2015) (noting the “judiciary’s suggestion to leave the power of policing and governing the patent system to Congress”).

2. Congress Has Identified the Trolling Problem but Failed to Solve It

There can be little disagreement that Congress could step up to solve the issue of patent trolls as it relates to the U.S. patent system; it falls squarely within their authority.⁸⁴ Several patent scholars have proposed congressional action to directly address the issue at the federal level.⁸⁵ However, Congress has failed to enact any legislation addressing the issue,⁸⁶ even though there have been several pieces of proposed legislation both directly targeting patent trolls and addressing them via a larger patent reform bill.⁸⁷

Representative Michael Burgess introduced the Targeting Rogue and Opaque Letters (TROL) Act every year from 2015 until 2019.⁸⁸ This piece of proposed legislation would deter patent trolling by targeting abusive demand letters.⁸⁹ The bill

84. See *supra* notes 81–83 and accompanying text (highlighting Congress’s authority over patent law).

85. See, e.g., Tara Feld, Note, *States Hold the Sword to Force “Patent Trolls” Back Under Their Bridges*, 2016 U. ILL. L. REV. 1123, 1154 (“Congress can simply pass legislation stating that state anti-patent trolls laws are not preempted by federal patent law.”); *Update: Patent Demand Letter Practices and Solutions: Hearing Before the Subcomm. on Com., Mfg., & Trade of the H. Comm. on Energy & Com.*, 114th Cong. 31–32 (2015) [hereinafter *Patent Demand Letter Hearing*] (statement of Paul R. Gugliuzza, Associate Professor of Law, Boston University School of Law) (suggesting that committee hearings could prompt Federal Circuit action and stressing the benefits of uniformity in the patent system when attacking the problem from the federal level).

86. See Baucus, *supra* note 7 (“It is past time for Washington to fix this broken part of our patent system and ensure innovators and entrepreneurs have the tools they need not just to get by, but to get ahead.”).

87. See *infra* notes 88–96 and accompanying text for a discussion of such proposals.

88. Michael M. Rosen, *Reintroduction of TROL Act Targets Patent Abusers*, AM. ENTER. INST. (Apr. 15, 2019), <https://www.aei.org/technology-and-innovation/intellectual-property/reintroduction-of-trol-act-targets-patent-abusers> [https://perma.cc/LM8C-EWAN] (noting that Rep. Michael Burgess introduced the act “in each congressional session since 2015”); see, e.g., Targeting Rogue and Opaque Letters Act of 2015, H.R. 2045, 114th Cong. (2015) (proposed federal patent troll legislation); Targeting Rogue and Opaque Letters Act of 2019, H.R. 108, 116th Cong. (2019) (same).

89. See Press Release, Cameron Harley, Burgess TROL Act Approved by Full Committee (Apr. 29, 2015), [https://web.archive.org/web/20230716105116/https://burgess.house.gov/news/documentsingle.aspx?DocumentID=397668] (“‘Abusive patent letters unjustly threaten small business owners and drive up prices for consumers,’ Rep. Burgess said. ‘I am pleased by the passage of this

empowers the Federal Trade Commission (FTC) to bring actions against patent plaintiffs for (1) misrepresenting information in bad faith; (2) seeking compensation in bad faith; and (3) failing to include certain information in bad faith in demand letters.⁹⁰ Notably, the proposed scheme also includes an enforcement mechanism for state attorneys general subject to FTC intervention.⁹¹ A committee report from the House Committee on Energy and Commerce suggests that the TROL Act has been unsuccessful in Congress because of barriers at the Federal Circuit and optimism for state legislation.⁹² Many of the provisions in proposed federal legislation are present in state anti-patent troll legislation, and, as such, the enforcement mechanisms and policy concerns will be discussed further in Part II.⁹³

In addition to proposed legislation specifically targeting patent trolls, members of Congress have proposed broader patent reform legislation including troll provisions. For example, the Innovation Act of 2015 proposed heightened pleading standards and delayed discovery mechanisms for patent infringement cases to protect vulnerable companies from patent-enforcement abuse.⁹⁴ There have been numerous other proposals taking a similar indirect approach in targeting patent trolls.⁹⁵ These

critical bill, which stops bad-faith litigators from using our courts to prey on both aspiring and accomplished entrepreneurs. This is a necessary solution that balances first amendment rights of legitimate patent holders and filters out letters that lack legitimacy.”).

90. See H.R. 2045 § 2 (listing these general grounds for liability and specific examples of each).

91. See *id.* § 4(b) (permitting state attorney general enforcement and FTC intervention in state actions).

92. See H.R. REP. NO. 114-877, at 14–15 (2015) (discussing dissenting views on the TROL Act of 2015, including concerns regarding a rigid “bad faith” requirement and overbroad preemption of state anti-patent troll laws); see also *infra* Parts III.B–III.C (discussing the Federal Circuit’s bad faith preemption doctrine and the issues it presents for patent litigants and legislators).

93. See *infra* Part II (examining state anti-patent troll legislation).

94. See Innovation Act, H.R. 9, 114th Cong. § 3(a), (d) (2015) (establishing specific pleading requirements for claimants and stayed discovery upon various motions by defendants); see also H.R. REP. NO. 114-235, at 23 (2015) (“It is the goal of this Committee to ensure that American manufacturing, small businesses, and start-up companies are protected against patent-enforcement abuse, while also ensuring that the patent system continues to protect and encourage American ingenuity.”).

95. *E.g.*, Protecting American Talent and Entrepreneurship Act of 2015, S. 1137, 114th Cong. (2015); Advancing America’s Interests Act, H.R. 5184, 117th Cong. (2021).

proposed pieces of patent legislation have failed for a multitude of reasons.⁹⁶

Based on the lack of success in passing the Innovation Act or TROL Act, Congress is reluctant to legislate on the patent troll problem. Some members of Congress object to federal action because they hesitate to preempt state anti-patent troll statutes already in place by enacting weaker federal protections.⁹⁷ Such concerns are a problem of Congress's own making, as their lack of action led states to act in the first place.⁹⁸ Others believe federal action "severely constrain[s] the ability of states to take an active role in guarding against unfair and deceptive patent demand letters."⁹⁹ The unique position of states to address these issues will be discussed in Part IV. The most warranted objection to federal anti-patent troll legislation has been the overly broad impact it will have on other patent holders who do not exhibit trolling behaviors.¹⁰⁰ Regardless of the reason, this lack of cohesive and effective federal action has prompted states to pass their own anti-patent troll legislation in hopes of protecting innovation and progress from the greedy hands of trolling entities.¹⁰¹

96. See, e.g., H.R. REP. NO. 114-235, at 167 ("The bill is overly broad, unbalanced, and will impede rather than promote innovation. In particular, we oppose the legislation because the bill: (1) includes one-sided changes to our civil justice system that limit the rights of all patent holders and fails to target so-called 'patent trolls'; (2) fails to effectively address the extortionate use of demand letters; (3) does not fully address abuse of post grant proceedings at the U.S. Patent and Trademark Office (USPTO); (4) continues fee diversion from the USPTO; and (5) ignores the changing landscape in patent litigation.").

97. See H.R. REP. NO. 114-877, at 14 ("[W]e have serious concerns about this bill's preemption of state laws. Twenty states . . . had already enacted specific policies to curb trolling. In many ways, these state protections exceed those that would be guaranteed under the TROL Act. This bill would completely preempt [those] laws . . .").

98. See *infra* Part II (discussing the growth of state anti-patent troll laws).

99. H.R. REP. NO. 114-877, at 14.

100. See, e.g., H.R. REP. NO. 114-235, at 169 ("We support a targeted approach to curbing abusive patent litigation practices. However, the Innovation Act is overly broad and goes well beyond the problem of abusive patent litigation. It could harm legitimate patent holders and individual inventors by potentially weakening every single patent in America.").

101. See DeSisto, *supra* note 16, at 109–10 (implying Vermont took action against patent trolls in the absence of federal action).

II. THE RISE OF STATE ANTI-PATENT TROLL LEGISLATION

In the absence of a federal anti-patent troll scheme, many states rose to the occasion and took a stab at addressing the problem themselves. These efforts resulted in three categories of state anti-patent troll statutes,¹⁰² each differently situated in their ability to withstand a preemption challenge—under either the traditional Supremacy Clause analysis or the Federal Circuit’s bad-faith preemption doctrine.¹⁰³ Section A describes each of the three types of statutory regimes in detail. Then, Section B identifies the various mechanisms employed by the statutes and how effective they are in addressing patent trolling.

A. THE THREE TYPES OF STATE ANTI-PATENT TROLL STATUTORY REGIMES

Before moving forward, let’s return to LTA and the approximately 1,200 manipulative demand letters they sent to small businesses across the country.¹⁰⁴ Prior to 2013, there was no clear legal path to remedies for victims of such a patent trolling scheme.¹⁰⁵ Under circumstances similar to what LTA did, the Vermont attorney general brought a lawsuit against MPHJ Technology Investments (“MPHJ”) in state court for violating a state consumer protection law.¹⁰⁶ At the time, the consumer protection theory was novel in allowing a state attorney general to hold a patent troll liable without federal preemption concerns, and the case was later removed to federal court to prompt an answer to that exact question.¹⁰⁷ The tactic eventually proved

102. See generally Gugliuzza 2015, *supra* note 16, at 1590–99 (defining the three types of state anti-patent troll regimes).

103. For a discussion of the traditional patent preemption analysis rooted in the Supremacy Clause conducted by the Supreme Court, see *infra* Part III.A. For a discussion of the Federal Circuit’s bad-faith preemption doctrine, see *infra* Part III.B.

104. See *supra* note 8 and accompanying text (highlighting this practice).

105. See Lee, *supra* note 15 (discussing the Vermont attorney general’s novel legal approach to combatting patent trolls).

106. *Vermont v. MPHJ Tech. Invs., LLC*, 803 F.3d 635, 638 (Fed. Cir. 2015) (alleging deceptive trade practices under the Vermont Consumer Protection Act (VCPA)).

107. See Lee, *supra* note 15 (minimizing the federal preemption concerns posed by the theory); *MPHJ*, 803 F.3d at 641 (discussing the removal to federal court to consider the effects of federal preemption on the Bad Faith Assertions of Patent Infringement Act (BFAPIA)).

successful as the Federal Circuit affirmed the district court's decision to remand the case to state court because federal patent law does not preempt such consumer protection claims.¹⁰⁸

This case was decided on the heels of anti-patent troll momentum. Anti-troll activists in Vermont had previously advocated for the state to pass anti-patent troll legislation targeting signs of, and behaviors indicating, bad faith accusations of patent infringement.¹⁰⁹ In 2013, Vermont passed the Bad Faith Assertions of Patent Infringement Act (BFAPIA) identifying the state's interest in protecting local business from abusive patent litigation practices without encroaching on the territory of federal patent law.¹¹⁰ Soon after, many other state legislatures followed Vermont's lead and passed anti-patent troll legislation of their own—over thirty states have done so thus far.¹¹¹ While most states implemented a scheme similar to Vermont's, there are a few different types of state anti-patent legislation emerging, the characteristics of which warrant discussion.

Being the first state to pass such a law, many states modeled their scheme off the Vermont BFAPIA, creating the first group of state anti-patent troll regimes.¹¹² Vermont's law states that “[a] person shall not make a bad faith assertion of patent infringement.”¹¹³ It then goes on to list nine factors a court may consider as evidence of bad faith, including missing material information in the demand letter, requesting an unreasonable licensing fee, using deceptive language in the demand letter, and previously engaging in abusive litigation practices.¹¹⁴ The statute also lists seven factors that indicate there is not bad faith,

108. *MPHJ*, 803 F.3d at 651–52 (finding “no basis for removal to federal court” because the state's action was not premised on the BFAPIA, but consumer protection law).

109. See Lee, *supra* note 15 (noting that a Vermont attorney, who helped to organize an “anti-troll” coalition, “testified about the legislation in April, and the legislation passed the legislature easily in May. Vermont's legislation gives the recipient of a ‘bad faith’ accusation of patent infringement the right to counter-sue in state court.”).

110. VT. STAT. ANN. tit. 9, § 4195(a)(3), (b) (2025).

111. Bultmann, *supra* note 14.

112. See Gugliuzza 2015, *supra* note 16, at 1593 (“Although over a dozen states have mimicked Vermont's statute by outlawing bad faith assertions of patent infringement, there are some differences among the statutes adopted in those states.” (footnote omitted)).

113. VT. STAT. ANN. tit. 9, § 4197(a) (2025).

114. *Id.* § 4197(b).

many of which delineate behaviors opposite of the kind described above.¹¹⁵ Many states have passed legislation similar to the BFAPIA, including Idaho and Washington.¹¹⁶ Anti-patent troll legislation of this first category maintains the same general structure while the factors prescribed by the legislature for the courts to consider vary.¹¹⁷

Some of these factors are straightforward to apply. For example, under Vermont's BFAPIA, a demand letter that lacks a patent number and factual allegations of infringement is evidence of bad faith.¹¹⁸ Liability for such a lack of information in the demand letter prevents patent trolls from taking advantage of less sophisticated defendants when sending demand letters and ensures the asserting entity is clear about the patented claim being infringed. This is most important for targets less familiar with substantive patent law and evaluating demand letters and/or unable to retain knowledgeable patent counsel.¹¹⁹

Other provisions also directly target similar trolling behaviors but are much less objective in their application. For example, in Vermont, a court can consider, as evidence of bad faith, the fact that the person suing for patent infringement knew or should have known the assertion is meritless.¹²⁰ This raises a few issues. First, such a determination on knowledge of lack of merit is difficult for courts to apply consistently.¹²¹ Second, weighing the merits of a patent infringement claim begins to creep into the purview of federal patent law, beyond the

115. *Id.* § 4197(b)–(c).

116. *See generally* IDAHO CODE § 48-1703 (2025); WASH. REV. CODE § 19.350.020 (2024).

117. *See* Gugliuzza 2015, *supra* note 16, at 1593–94 (discussing Vermont-style anti-patent troll statutes).

118. *See* VT. STAT. ANN. tit. 9, § 4197(b)(1)(A), (C) (2025).

119. *See* Pamela M. Prah, *State AGs Target Patent Trolls to Protect Business*, USA TODAY (Nov. 25, 2013), <https://www.usatoday.com/story/news/nation/2013/11/25/state-ag-patent-trolls/3696889> [<https://perma.cc/PA97-ESJA>] (“More recently, they’ve gone after grocery stores, restaurants and nonprofits—attractive targets because they generally lack the resources to defend a lengthy lawsuit.”).

120. *See* tit. 9, § 4197(b)(6).

121. *See* Gugliuzza 2015, *supra* note 16, at 1633 (noting that the Federal Circuit applies a higher standard for finding bad faith than the “knew or should have known the claim was meritless” language found in some anti-patent troll statutes).

capabilities and jurisdiction of state courts.¹²² Finally, more subjective factors such as this implicate the Federal Circuit’s bad-faith preemption doctrine.¹²³

In 2014, when Wisconsin passed its own state anti-patent troll legislation, a new category of statutes emerged.¹²⁴ Wisconsin’s statute introduced a new structure where “patent notifications,” including letters, e-mails, and other written communication, must include six pieces of information related to the patents and claims being asserted.¹²⁵ The legislature included two potential violations in the statute—one if the patent notification lacks required information and another if it contains “false, misleading, or deceptive information.”¹²⁶ The Wisconsin statute is different in structure from the Vermont-style anti-patent troll schemes, lacking factors that indicate bad faith, but it suffers from similar issues.¹²⁷ Both include a mixture of overly objective criteria—ones that alone are easy to identify in a demand letter but may not be indicative of objective baselessness (i.e. a typo in the patent number)—and overly subjective criteria that require a review a substantive patent law—a subject outside the purview of state courts.¹²⁸ As will become clear later in the Note, the “false, misleading, or deceptive” language in Wisconsin raises significant issues under current Federal Circuit jurisprudence for not including objective indicators of bad faith that a court could wrestle with.¹²⁹

Finally, a third category of anti-patent troll legislation emerged and is distinguished by its narrow application to

122. See, e.g., Andrew Salomone, Comment, *Protecting Wisconsinites from Trolls: The Federal Circuit’s “Bad Faith” Preemption and Its Restrictive Effect*, 23 MARQ. INTELL. PROP. L. REV. 195, 210 (2019) (discussing legislative tensions between drafting claims that belong in state court and the exclusive jurisdiction of federal courts over cases involving patent infringement).

123. See *infra* Parts III.B and III.C for a discussion of how the Federal Circuit’s bad-faith preemption doctrine interacts with subjective evidence of bad faith and state anti-patent troll legislation.

124. See Gugliuzza 2015, *supra* note 16, at 1595–96 (discussing the emergence of Wisconsin’s anti-patent troll statute).

125. WIS. STAT. § 100.197(1)(a), (2)(a) (2024).

126. *Id.* § 100.197(2)(b)–(c).

127. Compare *id.*, with VT. STAT. ANN. tit. 9, § 4197 (2025).

128. See *supra* notes 114–23 and accompanying text (discussing the difference between objective and subjective factors in Vermont’s BFAPIA).

129. See *infra* notes 220–27 and accompanying text; § 100.197(2)(b).

demand letters sent to end users of the patented technology.¹³⁰ Texas follows this structure by identifying specific instances of bad faith as opposed to identifying statutory factors for a judge to consider.¹³¹ For example, in Texas, a communication is in bad faith if it “falsely states that the sender has filed a lawsuit in connection with the claim.”¹³² This provision directly addresses the goal of curbing patent trolling behavior without giving the court the discretion inherent in providing a list of factors, distinguishing the Texas-style statutory design from the other two categories.¹³³ In fact, the Texas statute further distinguishes itself by including the “objectively baseless” language from the Federal Circuit’s bad-faith preemption jurisprudence.¹³⁴ Along with diversity in the definitions of bad faith assertion of patent infringement, state anti-patent troll legislation includes a variety of enforcement and remedy mechanisms.

B. THE DIFFERENT TOOLS USED BY STATES TO ATTACK PATENT TROLLS

First, some states include a bond provision which may require a party asserting patent infringement in bad faith to post the estimated cost of litigation and damages in bond.¹³⁵ The purpose of including a bond provision is to require a patent troll to “put skin in the game” which disrupts the leverage they have in extracting profitable settlements.¹³⁶

130. See Gugliuzza 2015, *supra* note 16, at 1596–97 (discussing the third type of statute); TENN. CODE ANN. §§ 29-10-101 to -104 (2025).

131. See Gugliuzza 2015, *supra* note 16, at 1596 n.111 (discussing the differences between the Vermont-style and Texas-style schemes); TEX. BUS. & COM. CODE ANN. § 17.952 (West 2023).

132. BUS. & COM. § 17.952(b)(1).

133. See Gugliuzza 2015, *supra* note 16, at 1596 n.111 (distinguishing the Texas-style scheme).

134. BUS. & COM. § 17.952(b)(2); see *infra* note 206 and accompanying text (identifying the “objective baselessness” standard used by the Federal Circuit regarding bad faith assertions of patent infringement).

135. Compare VT. STAT. ANN. tit. 9, § 4198 (2025) (capping bond at \$250,000), with IDAHO CODE § 48-1707 (2025) (missing a statutory limit on bond amount), and *Katana Silicon Techs. LLC v. Micron Tech., Inc.*, 671 F. Supp. 3d 1138, 1160 (D. Idaho 2023) (imposing an \$8 million dollar bond).

136. Ray Starling, *To Bond or Not to Bond?*, NC CHAMBER: LEGAL INST. SIDEBAR (Aug. 3, 2022), <https://ncchamber.com/2022/08/03/to-bond-or-not-to-bond> [https://perma.cc/D6GB-BK9M].

Another difference in enforcement mechanisms among states is whether the statute includes a private right of action or remains enforced solely by the state attorney general.¹³⁷ The ability of a private entity to bring a claim of bad faith assertion of patent infringement could deter patent trolls from targeting jurisdictions that allow a private right of action.¹³⁸ Instead, they may target jurisdictions with only attorney general enforcement in the hopes that the attorney general will choose not to enforce the anti-patent troll legislation.¹³⁹ Finally, there are a variety of remedy schemes employed in addition to traditional monetary damages.¹⁴⁰ While these differences each serve their individual purposes, diversity in state anti-patent troll schemes introduces benefits discussed in Part IV.B.¹⁴¹

Recent litigation sheds light on how these relatively new state statutes operate. In 2022, Katana Silicon Technologies (Katana), an affiliate entity of known NPE Longhorn IP (Longhorn), sued semiconductor manufacturer Micron Technology (Micron) for patent infringement in the Western District of Texas.¹⁴² In the past, Micron had been targeted by other Longhorn affiliates, so the manufacturer brought a counterclaim under Idaho's Bad Faith Assertions of Patent Infringement Act, asking the court to transfer the case to Idaho federal court, and sued Longhorn in Idaho state court.¹⁴³ The cases were

137. Compare IDAHO CODE § 48-1706 (2025) (creating a private right of action), with TEX. BUS. & COM. CODE ANN. § 17.955 (West 2023) (precluding a private right of action explicitly), and TEX. BUS. & COM. CODE ANN. § 17.953 (West 2023) (reserving enforcement authority for the Texas Attorney General).

138. See Qian Huang et al., *Navigating the Landscape of Anti-Trolling Legislation*, INTELL. PROP. MAG., June 2016, at 54, 56 (“Also, if a venue with an anti-trolling law cannot be avoided, select one where only the Attorney General is empowered to pursue bad-faith claims.”).

139. See *id.* (“Avoid a venue where an accused infringer can directly bring a private action.”).

140. See, e.g., BUS. & COM. § 17.953 (allowing for injunctive relief and a civil penalty); VT. STAT. ANN. tit. 9, § 4199 (2025) (allowing for equitable relief, damages, costs and fees, including reasonable attorney's fees, and exemplary damages).

141. See *infra* Part IV.B.2 (discussing the benefits of jurisdictional diversity in hindering patent trolls ability to litigate in multiple forums).

142. Katana Silicon Techs. LLC v. Micron Tech., Inc., 671 F. Supp. 3d 1138, 1147 (D. Idaho 2023).

143. *Id.*

consolidated in Idaho federal court to hear Longhorn/Katana's motion to dismiss and Micron's motion to bond.¹⁴⁴

In considering the motions, the court addressed several questions affecting the validity of Idaho's anti-patent troll statute. Most importantly, the court considered whether the federal Patent Act preempted the statute under a traditional Supremacy Clause analysis and whether a *Noerr-Pennington* defense may succeed at the motion-to-dismiss stage.¹⁴⁵ The Court upheld the Idaho bad faith assertion of patent infringement statute in the face of a preemption challenge, failing to find any portion of the Idaho statute that directly conflicted with the policy goals of federal patent law.¹⁴⁶ Though not indicative of how all district courts across the country are ruling on these issues, the *Katana* case is an example of how the analysis is currently structured and what legal questions arise regarding the validity of state anti-patent troll legislation.

This example leads to a very important question. Despite legislative momentum and efforts targeting patent trolls, are state anti-patent troll laws preempted by federal law? Even the best designed patent troll schemes are of limited use if the answer to this question is yes.

III. PATENT PREEMPTION AND THE DEVELOPMENT OF A TROLL-FRIENDLY STANDARD AT THE FEDERAL CIRCUIT

Despite legislative momentum at the state level to address the problem of patent trolling,¹⁴⁷ there are legal barriers impeding meaningful progress. Congressional inaction on the subject not only suggests reluctance by the federal government to enter the space,¹⁴⁸ but also prompts the question of whether state legislatures have the authority to interfere with patent

144. *Id.*

145. See *id.* at 1155 (discussing preemption and how the court concludes that whether the *Noerr-Pennington* sham litigation exception applies is a fact-intensive question not appropriate for the motion-to-dismiss-stage); see also *infra* Parts III.B–III.C and accompanying text (discussing the incorporation of the *Noerr-Pennington* doctrine into the Federal Circuit's bad-faith preemption analysis and its application to state anti-patent troll statutes).

146. *Katana*, 671 F. Supp. 3d at 1160.

147. See *supra* Part II (describing state anti-patent troll legislation).

148. See *supra* Part I.B.2 (discussing Congress's authority to amend the Patent Act and inaction on the matter of patent trolling).

infringement litigation by creating bad faith assertion of patent infringement claims. Courts typically address this issue via a federal preemption framework, stemming from the Constitution's Supremacy Clause.¹⁴⁹ However, the Federal Circuit has exclusive appellate jurisdiction over cases relating to patents.¹⁵⁰ Its case law pertaining to preemption and patent law has stepped beyond this traditional analysis and introduced a new bad-faith preemption standard—the doctrine causing much of the concern for state anti-patent troll legislation's validity.¹⁵¹

Section A first addresses the current body of Supreme Court jurisprudence on patent law preemption, showing that the Court is unlikely to invalidate state anti-patent troll legislation under their current standards. Next, Section B presents the development of the bad-faith preemption standard and how the Federal Circuit extended the concept of *Noerr* petitioner immunity to the patent litigation context. Finally, Section C addresses the criticisms of this move by the Federal Circuit and what it means for the fate of state anti-patent troll legislation.

A. THE SUPREME COURT'S TRADITIONAL PREEMPTION ANALYSIS

As a matter of constitutional law, the federal preemption doctrine finds its roots in the Supremacy Clause and allows Congress to displace state laws when acting under its Article I authority.¹⁵² There are two categories of federal preemption: express and implied.¹⁵³ Express preemption requires an explicit statement by Congress preventing state action, which the body

149. See *infra* Part III.A (discussing the traditional federal preemption framework blessed by the Supreme Court).

150. 28 U.S.C. § 1295(a)(1).

151. See *infra* Part III.B (introducing the Federal Circuit's bad faith preemption doctrine which creates tension with the current framework endorsed by the Supreme Court).

152. U.S. CONST. art. I, § 8, cl. 8 (giving Congress the "Power . . . [t]o 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."); *id.* art. VI, cl. 2 (the Supremacy Clause); see also Gugliuzza 2015, *supra* note 16, at 1601 ("Federal preemption doctrine permits Congress, by virtue of the Supremacy Clause, to displace state laws when exercising its legislative powers under Article I.").

153. See Gugliuzza 2015, *supra* note 16, at 1601–02 ("Express preemption doctrine is largely irrelevant in patent matters. . . . Patent preemption disputes therefore focus on implied preemption.").

of federal patent law lacks.¹⁵⁴ Therefore, much of patent preemption jurisprudence focuses on implied preemption; Congress impliedly preempts state action either by field preemption or conflict preemption, both of which courts wrestle with in the context of patent law.¹⁵⁵ Field preemption occurs when Congress has so comprehensively regulated the space that it has left no room for states to legislate on the same subject.¹⁵⁶ Conflict preemption involves a state law that “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁵⁷

There are two seminal cases which address issues of patent preemption that suggest how the Supreme Court might address the preemption question in the context of state anti-patent troll legislation. First, in *Kewanee Oil Co. v. Bicron Corp.*, the Court had to decide whether state trade secret protections are preempted by federal patent law.¹⁵⁸ In answering this question, the Court first held that state trade secret protections do not expressly violate the Intellectual Property Clause¹⁵⁹ because the Constitution does not grant exclusive authority to Congress to legislate over all “writings” even though such can be included under the broad umbrella of intellectual property.¹⁶⁰ Next the Court addressed whether state trade secret law conflicts with

154. See *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, see 35 U.S.C. §§ 1–376, we of course agree with the district court that there is no preemption on this ground.”); Gugliuzza 2015, *supra* note 16, at 1601–02 (“As the Federal Circuit has noted, the federal Patent Act ‘plainly does not provide for’ express preemption.”).

155. See Gugliuzza 2015, *supra* note 16, at 1602 (discussing the implied preemption doctrine).

156. See *id.* (“Field preemption arises when there is a framework of regulation ‘so pervasive . . . that Congress left no room for the States to supplement it’ or when there is a ‘federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.’” (alteration in original) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))).

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

158. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 472 (1974).

159. See *generally* U.S. CONST. art. I, § 8, cl. 8.

160. See *Kewanee Oil*, 416 U.S. at 479 (“Just as the States may exercise regulatory power over writings so may the States regulate with respect to discoveries. . . . The only limitation on the States is that in regulating the area of patents and copyrights they do not conflict with the operation of the laws in this area passed by Congress, and it is to that more difficult question we now turn.”).

the purposes of Congress in granting patent protections.¹⁶¹ When comparing the purposes of patent law: “to provide an incentive for inventors; to induce disclosure of inventions; and . . . to ensure that ideas in the public domain stay there”;¹⁶² to the purposes of trade secret law: “maintaining standards of commercial ethics and encouraging invention”;¹⁶³ the Court found that allowing states to create trade secret protections did not conflict with Congress’s goals in creating patent rights.¹⁶⁴ The decision in *Kewanee Oil* emphasizes the importance of the states’ interest in regulating the marketplace.¹⁶⁵

Next, in *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, the Court struck down a Florida statute that granted patent-like protections to an unpatentable invention.¹⁶⁶ The Florida statute at issue made it “unlawful for any person to use the direct molding process to duplicate for the purpose of sale any manufactured vessel hull or component part of a vessel made by another without the written permission of that other person.”¹⁶⁷ The statute prohibited “knowingly sell[ing] a vessel hull or component part of a vessel duplicated in violation of” the first provision.¹⁶⁸ The language of this statute parallels the language of the federal patent statute for infringement.¹⁶⁹ While the claims in *Kewanee Oil* relied on traditional trade secret protections not covered by U.S. patent law, the claims at issue in *Bonito Boats* focused on this state statute that prohibits infringement for a specific

161. See *id.* (“The question of whether the trade secret law of Ohio is void under the Supremacy Clause involves a consideration of whether that law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” (quoting *Hines*, 312 U.S. at 67)).

162. Gugliuzza 2015, *supra* note 16, at 1604 (citing *Kewanee Oil*, 416 U.S. at 480–81).

163. *Id.* (citing *Kewanee Oil*, 416 U.S. at 481).

164. See *Kewanee Oil*, 416 U.S. at 492–93 (“Our conclusion [is] that patent law does not pre-empt trade secret law Trade secret law and patent law have co-existed in this country for over one hundred years. Each has its particular role to play, and the operation of one does not take away from the need for the other.”).

165. See Gugliuzza 2015, *supra* note 16, at 1604 (“[T]he Court [in *Kewanee*] noted the states’ interest in regulating the ethics of the marketplace . . .”).

166. 489 U.S. 141, 144 (1989).

167. *Id.* at 144–45 (citing FLA. STAT. § 559.94 (1987)).

168. *Id.* at 145.

169. Compare § 559.94 (prohibiting duplicating and selling another’s boat parts without permission), with 35 U.S.C. § 271(a) (prohibiting selling patented inventions).

unpatented product, trampling all over the purview of patent protections.¹⁷⁰ The Court affirmed the approach used in *Kewanee Oil*¹⁷¹ and held that states were preempted from creating pseudo-patent rights for unpatentable inventions because that disrupts the policy decision made by Congress in passing the Patent Act.¹⁷²

With these two cases in mind, the structure of the patent preemption analysis seems straightforward—identify the goals of federal patent law and the state law in question and see if they overlap in such a way that offends Congress’s decision to enter the space.¹⁷³ It is important to note that neither case addresses field preemption because the Federal Circuit holds that patent law does not pervasively occupy the field as it relates to unfair competition and tort claims that happen to interface with patent protections.¹⁷⁴

Under this federal preemption framework, courts have upheld state anti-patent troll legislation as constitutional.¹⁷⁵ Many scholars who have written about state anti-patent troll legislation believe the laws could withstand a patent preemption challenge because state anti-patent troll legislation does not contradict the purposes of federal patent law.¹⁷⁶ It is difficult to see how

170. See *Bonito Boats*, 489 U.S. at 167 (“[T]he Florida statute represents a break with the tradition of peaceful co-existence between state market regulation and federal patent policy . . . [by] restrict[ing] the public’s ability to exploit an unpatented design in general circulation . . .”).

171. See *id.* at 156 (“We have since reaffirmed the pragmatic approach which *Kewanee* takes to the pre-emption of state laws dealing with the protection of intellectual property.”).

172. See *id.* at 168 (“By offering patent-like protection for ideas deemed unprotected under the present federal scheme, the Florida statute conflicts with the ‘strong federal policy favoring free competition in ideas which do not merit patent protection.’” (quoting *Lear, Inc. v. Adkins*, 395 U.S. 653, 656 (1969))).

173. See generally Gugliuzza 2015, *supra* note 16, at 1603–05 (discussing patent preemption at the Supreme Court).

174. See *Hunter Douglas, Inc. v. Harmonic Design, Inc.*, 153 F.3d 1318, 1333–34 (Fed. Cir. 1998) (“We readily conclude that, in accordance with *Dow Chemical*, 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.” (citing *Dow Chemical Co. v. Exxon Corp.*, 139 F.3d 1470, 1479 (Fed. Cir. 1998))).

175. See *infra* Part IV.A (discussing examples of federal district courts upholding state anti-patent troll statutes).

176. See, e.g., Gugliuzza 2015, *supra* note 16, at 1608 (“[I]t is impossible to forecast with certainty whether the Supreme Court would find preempted state

an anti-patent troll statute would disrupt the purposes of federal patent law identified in *Kewanee Oil* because the purpose of anti-patent troll legislation is to target deceptive enforcement conduct and not address the merits of the patents themselves.¹⁷⁷ The Federal Circuit itself has ruled that state law tort claims that implicate patent rights are not preempted under the traditional patent preemption analysis.¹⁷⁸

However, the Federal Circuit upset the consensus on how to conduct patent preemption analysis before state anti-patent troll laws gained popularity.¹⁷⁹ The following Section tracks the development of Federal Circuit jurisprudence on patent preemption and outlines the current bad-faith preemption rule endorsed by the Federal Circuit.¹⁸⁰

B. HOW THE FEDERAL CIRCUIT DISTORTED ITS PREEMPTION ANALYSIS BY INVOLVING *NOERR* IMMUNITY

Although the Supreme Court has endorsed a very clean, workable patent preemption analysis rooted in the Supremacy Clause,¹⁸¹ the Federal Circuit has developed a second type of

statutes regulating patent enforcement. My point here, though, is simple: Under a traditional, Supremacy Clause-based preemption analysis—unlike under the Federal Circuit’s First Amendment-based ‘preemption’ rule—the states arguably have the authority to regulate patent enforcement.”); Salomone, *supra* note 122, at 207 (“Should the Supreme Court consider this particular preemption issue using either the approach from *Allen* or *Kewanee/Bonito Boats*, it is likely that Wisconsin’s anti-PAE statute would survive.”).

177. See Gugliuzza 2015, *supra* note 16, at 1605 (“To begin with, it is difficult to see how any of the three objectives of federal patent law identified in *Kewanee* would be compromised by state law claims challenging bad faith or deceptive enforcement conduct.”).

178. See *Dow Chemical*, 139 F.3d at 1478–79 (“[B]ecause the cause of action alleged by Dow for intentional interference with prospective and actual contractual relations does not stand as an impermissible obstacle to the accomplishment and execution of the patent laws and because the cause of action requires entirely different elements from the defense of inequitable conduct under the federal patent laws, we must reverse the judgment of the district court.”).

179. See Gugliuzza 2015, *supra* note 16, at 1617 (“Federal law has long protected the right of patent holders to make ‘good faith’ allegations of patent infringement. Yet the Federal Circuit has turned what was initially a flexible standard grounded in equity into a rigid, two-part test that is exceedingly difficult for plaintiffs to satisfy.”).

180. See *infra* Part III.B.

181. The Supreme Court often disagrees with the Federal Circuit on these kinds of tests. See Daniel Kazhdan, *Beyond Patents: The Supreme Court’s*

preemption analysis that finds its roots in a different part of the Constitution—the First Amendment’s Petition Clause.¹⁸² Before contemplating how such a preemption doctrine interacts with assertions of patent infringement, it is crucial to first understand how the doctrine developed.

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, the Supreme Court held that construing a federal antitrust statute to prevent railroads from soliciting “governmental action with respect to the passage and enforcement of laws” would offend the First Amendment right to petition.¹⁸³ The Court has defined the First Amendment right “to petition the Government for a redress of grievances” as a right to “use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests.”¹⁸⁴ The *Noerr* doctrine, a type of petitioner immunity, was developed to protect companies from antitrust lawsuits that would abridge their right to petition the government.¹⁸⁵ Therefore, it represents the balance struck by the Supreme Court between an entity’s First Amendment interest in lobbying for their interests before a government body and Congress’s antitrust policy goals embodied in the Sherman Act.¹⁸⁶

Evolving Relationship with the Federal Circuit, 94 J. PAT. & TRADEMARK OFF. SOC’Y 275, 276–77 (2012) (“[S]cholars note that the Supreme Court criticizes the Federal Circuit’s patent jurisprudence as being overly formalistic . . .”).

182. See U.S. CONST. amend. I (“Congress shall make no law . . . abridging . . . the right . . . to petition the Government for a redress of grievances.”).

183. 365 U.S. 127, 138 (1961).

184. U.S. CONST. amend. I; *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972). The question becomes whether this First Amendment protection applies equally when petitioning judges (via legal action) as opposed to a congressional representative or an agency bureaucrat. See David McGowan & Mark A. Lemley, *Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment*, 17 HARV. J.L. & PUB. POL’Y 293, 361–62 (1994) (questioning whether “the role of judges is akin to that of congressional representatives or the head of the Federal Energy Regulatory Commission” under *Noerr*).

185. See Gugliuzza 2015, *supra* note 16, at 1609–10 (“‘The right of petition,’ the Court explained, ‘is one of the freedoms protected by the Bill of Rights, and we cannot . . . lightly impute to Congress an intent to invade these freedoms.’” (alteration in original) (quoting *Noerr*, 365 U.S. at 138)).

186. See FED. TRADE COMM’N, ENFORCEMENT PERSPECTIVES ON THE NOERR-PENNINGTON DOCTRINE 12–15 (2006) (describing the doctrinal underpinnings of *Noerr* immunity). The Sherman Act is the first of Congress’s three

In *Noerr*, however, the Court was careful not to leave the newly announced petitioner immunity unchecked. First, the Court held there was a sham exception to *Noerr* immunity.¹⁸⁷ The sham exception prevents a litigant from claiming *Noerr* immunity when the petition “is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.”¹⁸⁸ Second, it was unclear whether *Noerr* immunity would apply directly to litigation activity.¹⁸⁹

The Court soon took the opportunity to extend *Noerr* immunity to litigation activity.¹⁹⁰ The expansion of *Noerr* to protect litigants’ right to petition courts was justified on the grounds “that it would be destructive of rights of association and of petition to hold that groups with common interests may not . . . [use] courts to advocate their causes and points of view . . . *vis-à-vis* their competitors.”¹⁹¹ By better defining the contours of *Noerr* immunity, the sham exception counteracted concerns of such a broad expansion.¹⁹² In 1993, the Court took an opportunity to

major pieces of antitrust legislation—the Sherman Act of 1890, the Federal Trade Commission (FTC) Act of 1914, and the Clayton Act of 1914—outlawing “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States.” 15 U.S.C. § 1; *see also The Antitrust Laws*, FED. TRADE COMM’N, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws> [<https://perma.cc/XGP8-EGXV>] (summarizing the three main pieces of federal antitrust legislation in the United States).

187. *See Noerr*, 365 U.S. at 144 (“There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.”).

188. *Id.*

189. *Cf. Gugliuzza* 2015, *supra* note 16, at 1610 (“Although the *Noerr* decision itself immunized from antitrust liability the act of lobbying the legislature and the executive, the Court later extended *Noerr* immunity to the act of pursuing litigation.”).

190. *See Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (“The same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government.”).

191. *Id.* at 510–11.

192. *See id.* at 511 (“We said, however, in *Noerr* that there may be instances where the alleged conspiracy ‘is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a

define the sham exception to *Noerr* immunity in hopes of avoiding lawsuits that amount to “a mere sham that cloaked underlying acts of monopolization and conspiracy to restrain trade.”¹⁹³ For a lawsuit to be considered a “sham litigation,” the Supreme Court developed a two-step inquiry:

First, the lawsuit must be *objectively baseless* in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr* Only if challenged litigation is objectively meritless may a court examine the litigant’s subjective motivation. [Second], the court should focus on whether the baseless lawsuit conceals “an attempt to interfere *directly* with the business relationships of a competitor,” through the “use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon.”¹⁹⁴

This characterization of the sham litigation exception to *Noerr* immunity would go on to influence the Federal Circuit’s bad-faith preemption doctrine.¹⁹⁵ However, the extension of *Noerr* to the patent enforcement context was not a foregone conclusion.¹⁹⁶ In several cases, the Supreme Court had the opportunity to affirm the Federal Circuit’s choice to extend *Noerr* immunity beyond the antitrust context and into the realm of patent litigation and chose not to.¹⁹⁷

Nevertheless, the Federal Circuit continued to incorporate *Noerr* immunity and the sham exception into their bad-faith

competitor and the application of the Sherman Act would be justified.” (quoting *Noerr*, 365 U.S. at 144)).

193. *Pro. Real Est. Invs., Inc. v. Columbia Picture Indus., Inc.*, 508 U.S. 49, 52 (1993). In the case, plaintiff sued defendant for copyright infringement, so the defendant raised antitrust counterclaims because the copyright lawsuit was solely for the purpose of restricting trade. *Id.*

194. *Id.* at 60–61 (internal citations omitted) (emphasis added).

195. See Gugliuzza 2015, *supra* note 16, at 1610 (“In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, the Court elaborated on the showing required to establish the sham exception, adopting the two-part test that would heavily influence the Federal Circuit’s preemption rule.” (footnote omitted)).

196. See *id.* at 1611 (“Although *Noerr* immunity is now firmly embedded in the Supreme Court’s antitrust case law, the Court has never held that defendants can invoke *Noerr* as protection against claims *not* sounding in antitrust.”).

197. See, e.g., *McDonald v. Smith*, 472 U.S. 479, 485 (1985) (“[T]here is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions.”); *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 555–57 (2014) (declining to extend *Noerr* immunity to fee shifting provisions in a patent case).

preemption doctrine as it relates to patent litigation activity. This perversion of the traditional preemption standard began when the Federal Circuit recognized that “federal patent law bars the imposition of liability for publicizing a patent in the marketplace unless the plaintiff can show that the patentholder acted in bad faith.”¹⁹⁸ The Federal Circuit explained that this ruling meant a state tort claim imposing liability on a patentholder could only survive a federal preemption challenge if a showing of bad faith was made.¹⁹⁹ This marked the first time the concept of bad faith, a doctrine rooted in the First Amendment, was linked to federal preemption, a body of law relying on the Supremacy Clause.²⁰⁰ However, at the time, the concept of bad faith was more flexible than the “objectively baseless” standard of bad faith imparted by *Noerr*.²⁰¹

It was not until the Federal Circuit decided *Globetrotter Software, Inc. v. Elan Computer Group, Inc.* that the link between its bad-faith preemption doctrine and *Noerr* immunity crystallized.²⁰² The case started with Globetrotter suing Elan for patent infringement.²⁰³ However, prior to filing a complaint, Globetrotter sent letters about the patent infringement to Elan, its CEO, and another company Elan was negotiating a sale of shares to.²⁰⁴ Elan argued that Globetrotter’s assertion of patent infringement was made in bad faith to interfere with the

198. *Hunter Douglas, Inc. v. Harmonic Design, Inc.*, 153 F.3d 1318, 1336 (Fed. Cir. 1998).

199. *See id.* (“Accordingly, in a case involving a patentholder’s conduct in obtaining or publicizing its patent, if the plaintiff were to fail to allege that the defendant patentholder was guilty of fraudulent conduct before the [U.S. Patent and Trademark Office] or bad faith in the publication of a patent, then the complaint would be dismissed for failure to state a claim upon which relief can be granted because of federal preemption.”).

200. *See* Gugliuzza 2015, *supra* note 16, at 1624 (“*Hunter Douglas* marked the first time that the Federal Circuit equated bad faith with conflict preemption under the Supremacy Clause. Yet the bad faith standard was not created as a rule of preemption.”).

201. *See id.* (“[B]ad faith was originally a flexible concept that allowed courts to police unfair or deceptive assertions of patent rights while protecting legitimate claims of patent infringement.”).

202. *See id.* at 1625 (“The court finally drew an explicit link between its bad faith preemption doctrine and *Noerr* immunity in *Globetrotter Software, Inc. v. Elan Computer Group, Inc.*”).

203. *Globetrotter Software, Inc. v. Elan Comput. Grp., Inc.*, 362 F.3d 1367, 1368 (Fed. Cir. 2004).

204. *Id.* at 1370.

proposed sale, so the company brought state-law counterclaims of tortious interference with prospective economic advantage and unfair competition.²⁰⁵ In its *Globetrotter* decision, the Federal Circuit held that the defendant had not made a showing that the patent infringement case was objectively baseless, so its counterclaims were dismissed.²⁰⁶

This high bar of objective baselessness raises concerns for the validity of state anti-patent troll statutes.²⁰⁷ Though the Federal Circuit has not expressly extended its bad-faith preemption doctrine to these types of laws, such an opportunity is inevitable.²⁰⁸ To this day, scholars and federal courts wrestle with its application and the viability of different states' anti-patent troll regimes,²⁰⁹ and these discussions contain valuable insights for advising state legislatures in continuing to refine their approach in combatting patent trolls.

Many advocate against the expansion of *Noerr*'s sham litigation standard of bad faith to the realm of pre-litigation communications in a patent case because it was developed under a conceptually different policy background, namely in the context of antitrust litigation.²¹⁰ In *Professional Real Estate*, Justice Stevens wrote a concurrence recognizing that the sham litigation standard applied to the case at hand, but he advocated against a broad holding that may extend to a more complex case.²¹¹ Stevens concurring opinion asserted that courts should examine "[t]he distinction between abusing the judicial process to restrain competition and prosecuting a lawsuit that, if successful,

205. *Id.*

206. *See id.* at 1377, 1381 (affirming the district court's decision to dismiss the state tort law claims).

207. *See* Gugliuzza 2015, *supra* note 16, at 1631 ("This broad immunity for pre-suit communications gives courts a clear path to find some of the new state statutes invalid and to limit the application of others.").

208. *See* sources cited *supra* note 22.

209. *See* sources cited *infra* note 218 (cataloging articles on the issue).

210. *See* Gugliuzza 2015, *supra* note 16, at 1627 ("To be sure, many federal courts of appeals have, like the Federal Circuit, applied the sham litigation test to all types of civil claims, not just antitrust claims. But the Federal Circuit in *Globetrotter* did not even analyze whether that expansion was warranted." (footnote omitted)).

211. *See* *Pro. Real Est. Invs., Inc. v. Columbia Picture Indus., Inc.*, 508 U.S. 49, 68 (1993) (Stevens, J., concurring) ("[T]he Court should avoid an unnecessarily broad holding that it might regret when confronted with a more complicated case.").

will restrain competition” when deciding “whether a particular filing, or series of filings, is a sham.”²¹² Most patent cases, if successful, restrain competition, as that is the purpose of intellectual property rights.²¹³ However, patent trolls abuse the court system to extract quick settlements on weaker patents.²¹⁴ Therefore, the complexity of the situation when trolls send abusive demand letters to less sophisticated parties is the exact kind of situation Justice Stevens foreshadowed in his *Professional Real Estate* concurrence.²¹⁵ This kind of deeper analysis of the purposes of patent law versus the purposes of the sham litigation exception was lacking in the *Globetrotter* decision and suggests the Federal Circuit chose the wrong starting point by not including a patent preemption analysis like the one in *Kewanee Oil* and *Bonito Boats*.²¹⁶ But, what does all of this mean for state anti-patent troll statutes?

C. THE FEDERAL CIRCUIT’S BAD-FAITH PREEMPTION DOCTRINE HINDERS STATE ANTI-PATENT TROLL LEGISLATION

In the years since the Federal Circuit decided *Globetrotter*, there has been no shortage of criticism of their move to incorporate the sham litigation standard into the federal preemption framework.²¹⁷ However, attention to the issue increased after the passage of state anti-patent troll legislation.²¹⁸

212. *Id.*

213. See *Graham v. John Deere Co.*, 383 U.S. 1, 9 (1966) (“The grant of an exclusive right to an invention was the creation of society—at odds with the inherent free nature of disclosed ideas—and was not to be freely given.”).

214. See *supra* notes 37–44 and accompanying text (discussing what distinguishes patent trolls from NPEs).

215. See Thomas S. Vaseliou, Comment, *Trolls & the Preemption Dilemma*, 167 U. PA. L. REV. ONLINE 125, 159 (2019) (“Patent troll demand-letter practices are just this complex situation that the current rule doesn’t work for.”).

216. See *Pro. Real Est.*, 508 U.S. at 67–68 (Stevens, J., concurring) (noting the shortcomings of the majority’s broad ruling); see also *supra* notes 158–72 and accompanying text (discussing the Supreme Court’s approach to patent preemption involving the weighing of each laws’ purposes).

217. See, e.g., McGowan & Lemley, *supra* note 184, at 391–92 (criticizing the “sham” exception); see also *supra* notes 209–16 and accompanying text (discussing some criticisms).

218. See, e.g., Jason D. Gardner & Stephen J.E. Dew, *North Carolina Abusive Patent Assertions Act: A Powerful Gun, But Will It Hold Up in a Gun Fight?*, 17 N.C. J.L. & TECH. 391, 425 (2016) (“In order to show that the infringement claim was false, a plaintiff would have to attack one of the elements of patent

Along with the concerns previously mentioned, the Federal Circuit's bad-faith preemption doctrine shockingly creates a legal right to lie in patent pre-litigation communications because some misrepresentations in demand letters do not necessarily mean that the claims asserted are objectively baseless.²¹⁹ Recall that many state anti-patent troll statutes prevent entities asserting patent infringement from including false or misleading information.²²⁰ The goal of state anti-patent troll legislation is to prohibit such information in demand letters to keep patent trolls from leveraging settlements out of fear of costly litigation.²²¹ In 2013, a district court held that, despite licensing letters containing fraudulent misrepresentations, such false and misleading information does not rise to the level of objective baselessness required for the sham litigation exception to apply.²²² Here, the court distinguished fraudulent misrepresentations directed at the substance of the claims as opposed to the mere form of the pre-suit communication.²²³ The implication of such a holding is

infringement: the patent's validity, infringement analysis, or that some other part of the patent infringement statute was not met. Unfortunately, this approach is problematic for several reasons."); Salomone, *supra* note 122, at 205 ("This bad faith standard is, according to multiple critics, a very high standard that is nearly insurmountable for those facing the typical PAE claim."); Vase-liou, *supra* note 215, at 159 ("As Justice Stevens noted, this rule isn't workable for complex cases. Patent troll demand-letter practices are just this complex situation that the current rule doesn't work for." (footnote omitted)).

219. See Gugliuzza 2015, *supra* note 16, at 1631 ("[S]o long as infringement allegations themselves are not objectively baseless, patent holders have, in essence, 'a legal right to lie.'" (citing Steven Seidenberg, *Patent Trolls Are Getting First Amendment Protection for Their Demand Letters*, A.B.A. J. (May 1, 2014), https://www.abajournal.com/magazine/article/patent_trolls_are_getting_first_amendment_protection_for_demand_letters [<https://perma.cc/4C5Y-W2V5>])).

220. E.g., WIS. STAT. § 100.197(2)(b) (2024) ("A patent notification may not contain false, misleading, or deceptive information."); IDAHO CODE § 48-1703(2)(g) (2025) ("The claim or assertion of patent infringement is deceptive.").

221. See VT. STAT. ANN. tit. 9, § 4195(a)(6) (2025) ("Abusive patent litigation, and especially the assertion of bad faith infringement claims, can harm Vermont companies. 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 to pay a licensing fee, even if the claim is meritless.").

222. See *In re Innovatio IP Ventures, LLC Pat. Litig.*, 921 F. Supp. 2d 903, 922 (N.D. Ill. 2013) ("The MAC's allegations, taken as true, do not establish that Innovatio's licensing campaign alleging infringement of the Innovatio Patents is a sham.").

223. See *id.* at 921 ("None of those alleged misstatements is sufficiently central to Innovatio's infringement claims to make its entire licensing campaign a

that patent trolls are now allowed to falsely threaten infringement litigation in demand letters, which enhances their ability to extract settlements out of fear.²²⁴

Finally, besides creating a policy contradicting the goals of state legislatures in passing anti-patent troll statutes, the Federal Circuit's bad-faith preemption standard directly calls into question the validity of these laws.²²⁵ For example, the Wisconsin statute is particularly vulnerable because even if a demand letter is missing information required by the statute or contains false information, that does not necessarily mean the patent infringement allegation is objectively baseless, unless the missing information under the statute affects the substance of the lawsuit, which is unlikely.²²⁶ This is particularly ironic as the Wisconsin statute seems to create more objective indications of abusive behavior to avoid state courts considering the merits of patent infringement case.²²⁷ Instead, that choice is still not objective enough to meet the Federal Circuit's high bar of bad faith, as discussed in Part IV.A.

While the Wisconsin statute seems doomed,²²⁸ even the more robust Vermont-style statutes contain two fatal flaws

sham. . . . [T]he Seventh Circuit has established that a misrepresentation can render an adjudicative proceeding a sham under *Noerr-Pennington* only if the misrepresentation is material enough to 'actually alter[] the outcome of the proceeding.'" (alteration in original) (quoting *Mercatus Grp., LLC v. Lake Forest Hosp.*, 641 F.3d 834, 843 (7th Cir. 2011))).

224. See Gugliuzza 2015, *supra* note 16, at 1631 ("Allowing patent holders to falsely threaten infringement litigation and to fabricate stories about the success of a licensing program enhances the ability of patent holders to intimidate accused infringers into settlement.").

225. See *id.* ("This broad immunity for pre-suit communications gives courts a clear path to find some of the new state statutes invalid and to limit the application of others.").

226. See WIS. STAT. § 100.197 (2024); Gugliuzza 2015, *supra* note 16, at 1631–32 (discussing the weaknesses of the Wisconsin statute under Federal Circuit law); see also *Innovatio Pat. Litig.*, 921 F. Supp. 2d at 921 (noting that misrepresentations must affect the outcome of the litigation).

227. See Salomone, *supra* note 122, at 209 ("Wisconsin's anti-PAE statute is preempted because it operates beyond the narrow circumstances defined by bad faith. However, Wisconsin's anti-PAE statute seemingly operates beyond the bounds of bad faith precisely in an effort to avoid the merits of patent law. In this way, the Federal Circuit's standard preempts carefully constructed state laws and thus frustrates states' efforts to protect their constituents in a way that avoids any unnecessary wading into substantive patent law.").

228. See *id.* ("Wisconsin's anti-PAE statute is almost certainly preempted by imposing liability for good faith conduct of patent holders.").

leading to their limited enforcement capabilities.²²⁹ First, none of the anti-patent troll statutes in this category require a showing of bad faith by clear and convincing evidence.²³⁰ This is a problem because the Federal Circuit endorses the higher burden of proving bad faith by clear and convincing evidence.²³¹ Additionally, some of the Vermont-style statutes include factors allowing courts to consider the patent holder's "subjective bad faith" which directly offends the objectively baseless standard.²³² Therefore, even statutes that survive on validity grounds are rendered difficult to enforce because the language of the statute is not harmonious with the Federal Circuit's characterization of what bad faith requires.²³³

The question becomes: What can be done to curb patent trolling and protecting innovators with all of the barriers in place to prevent the efficacy of state anti-patent troll legislation? Some have called upon the Federal Circuit to reconsider their extension of *Noerr*'s sham litigation standard to the patent enforcement context, something it has the opportunity to do in the near future as such cases have reached the appellate phase.²³⁴ Others believe the solution will not come until the Supreme Court has the chance to correct course and return to the

229. See Gugliuzza 2015, *supra* note 16, at 1633 (discussing the two weaknesses of the Vermont-style statutes).

230. See *id.* ("But, as an initial matter, none of the statutes require courts to find bad faith by clear and convincing evidence, which the Federal Circuit has held is required to condemn patent enforcement conduct.").

231. See *id.*

232. See *id.* ("In addition, the versions of the Vermont statute adopted in Idaho and Virginia make the patent holder's 'subjective bad faith' a factor in determining whether the statute has been violated, but the Federal Circuit has made clear that '[s]ubjective considerations of bad faith are irrelevant if the [infringement] assertions are not objectively baseless.'" (alterations in original) (footnote omitted) (first quoting IDAHO CODE § 48-1703(2)(f) (2014); then quoting VA. CODE ANN. § 59.1-215.2(B)(5) (2014); and then quoting GP Indus., Inc. v. Eran Indus., Inc., 500 F.3d 1369, 1375 (Fed. Cir. 2007))).

233. See *id.* at 1634 ("Not only could Federal Circuit case law limit the impact of the new state statutes, it may impede state law enforcement actions against patent holders.").

234. See *id.* at 1639 ("Accordingly, the Federal Circuit en banc . . . should force a return to a narrower, more flexible immunity standard that accommodates the courts' historical practice of condemning unfair and deceptive acts of patent enforcement."); see also sources cited *supra* note 22 (identifying the Federal Circuit's opportunity to hear an appeal about the preemption of Idaho's anti-patent troll statute).

traditional patent preemption analysis endorsed in *Kewanee Oil* and its progeny.²³⁵ Finally, others, despite the persistent legislative inaction on the subject to date, have proposed that Congress explicitly announce that state anti-patent troll statutes are not preempted by federal law.²³⁶ However, this would not guarantee immunity from the bad-faith preemption doctrine rooted in the *Noerr* doctrine, which is separate from a Supremacy Clause-based preemption analysis.²³⁷ While these proposed solutions could address the tension created by the Federal Circuit's bad faith preemption analysis, none of them provide immediate answers for states committed to addressing the issue of patent trolling. State legislative activity is the last place to look for answers.

IV. STATES ARE THE BEST LINE OF DEFENSE AGAINST PATENT TROLLS DESPITE BARRIERS AT THE FEDERAL CIRCUIT

In order to provide guidance for state legislatures itching to tackle the problem of patent trolling, the remainder of this Note identifies the benefits of state legislation in addressing the problem and proposes changes states can make to their laws. Unlike early scholarship on the topic of state anti-patent troll legislation, this Note benefits from several recent cases that enlighten how federal courts conduct patent preemption analysis with

235. See, e.g., Salomone, *supra* note 122, at 212 (“[T]he Supreme Court should weigh in and replace the Federal Circuit’s bad faith preemption standard with either its *Allen* or *Kewanee Oil Co.* and *Bonito Boats* standard.”); Gugliuzza 2015, *supra* note 16, at 1639 (“[T]he Supreme Court should force a return to a narrower, more flexible immunity standard that accommodates the courts’ historical practice of condemning unfair and deceptive acts of patent enforcement.”); Jeremy W. Bock, *Forcing Supreme Court Review by the Federal Circuit*, 71 BUFF. L. REV. 83 (2023) (advocating for a mechanism to have the Federal Circuit use its expertise to direct a case for Supreme Court review).

236. See Feld, *supra* note 85, at 1154 (“Congress can simply pass legislation stating that state anti-patent trolls laws are not preempted by federal patent law.”).

237. See Gugliuzza 2015, *supra* note 16, at 1638 (“But the Federal Circuit’s expansive immunity standard precludes all three branches of government at both the state and federal levels from regulating the enforcement tactic that is most troublesome: sending demand letters that contain weak (but not frivolous) allegations of infringement and that use misleading, deceptive, or false statements in an attempt to intimidate recipients into quickly purchasing a license.”).

respect to these relatively new laws.²³⁸ Section A discusses some of this litigation with an eye towards identifying the benefits of state-led efforts against patent trolls. By analyzing the outcomes in recent litigation and the more certain fate of specific state anti-patent troll statutes, state legislatures can learn how to successfully legislate within the bounds of the bad-faith preemption doctrine announced by the Federal Circuit, at least until a more final solution is reached.²³⁹

While it would be ideal if the high bar of bad faith requiring objective baselessness was abandoned sooner rather than later, the effort spent by state legislatures innovating in the realm of state patent troll enforcement is not wasted.²⁴⁰ In light of recent patent troll litigation outcomes, Section B identifies the advantages of state-level experimentation and jurisdictional diversity in addressing patent trolling.

A. SUCCESS STORIES IN THE WAR ON PATENT TROLLS

Despite the pessimism felt immediately following the passage of anti-patent troll legislation at the state level, some states' statutes have been met with success in federal district court litigation.²⁴¹ Returning to the *Katana* case mentioned above,²⁴² the judge denied the patentee's motion to dismiss, holding that Idaho's Bad Faith Assertion of Patent Infringement Act was not preempted under an analysis rooted in the Supremacy Clause²⁴³

238. See *id.* at 1634 (“No court has definitively ruled on the constitutionality of any of the new state statutes [as of 2015] . . .”).

239. See *supra* notes 234–36 and accompanying text (discussing more drastic solutions out of the states' control that will address this tension).

240. See *infra* Part IV.B (discussing the benefits of state legislative experimentation and geographic diversity in addressing the problem of patent trolling).

241. Compare Gugliuzza 2015, *supra* note 16, at 1631 (“This broad immunity for pre-suit communications gives courts a clear path to find some of the new state statutes invalid and to limit the application of others.”), with Gugliuzza 2023, *supra* note 22, at 397 (“So far, the courts hearing those cases have mostly rejected arguments that federal patent law preempts state statutes regulating patent enforcement . . .”).

242. See *supra* notes 142–46 and the accompanying text (discussing how the court analyzed the validity of Idaho's anti-patent troll statute and the adequacy of the claimant's pleadings).

243. See *Katana Silicon Techs. LLC v. Micron Tech., Inc.*, 671 F. Supp. 3d 1138, 1149–60 (D. Idaho 2023) (upholding the Idaho statute under a traditional preemption analysis).

and the question of *Noerr*'s bad faith standard was premature at the motion to dismiss stage.²⁴⁴ A similar decision was reached in Washington in a case brought by the attorney general against patent troll Landmark Technology.²⁴⁵

These decisions force legislatures to consider the fact that the post-discovery application of *Noerr* doctrine means that statutes drafted and enforced like the Idaho anti-patent troll statute in *Katana* can be effective in combatting trolling behavior. Patent trolls attempt to extract quick settlements and prefer to leverage the fear of litigation over accused infringers rather than engage in actual litigation.²⁴⁶ Delaying a decision on the showing of bad faith until the end of discovery will likely curb trolling behavior because it forces patent trolls to shoulder the expenses of litigation which eliminates their incentive to act quick and extract settlements.²⁴⁷ This should ensure that the statutory regime targets the types of behaviors state legislatures set out to stop—acquiring and asserting weak patents to extract quick settlements.²⁴⁸ States without an anti-patent troll regime should learn from these decisions when drafting their own statutes and should consider that courts are less likely to dismiss a claim under *Noerr* grounds at the early stages of discovery.

Along with successfully surviving an early motion to dismiss, the plaintiff in *Katana* claiming a bad faith assertion of patent infringement convinced the court to grant their motion to bond.²⁴⁹ The Idaho anti-patent troll law contains a bond provision that provides a mechanism for a court to require the bad faith accuser to “post a bond in an amount equal to a good faith estimate of the target’s costs to litigate the claim and amounts

244. See *id.* at 1155 (“The Court may take up these arguments upon the completion of discovery, but it will not dismiss any complaints on *Noerr-Pennington* grounds before then.”).

245. See *Washington v. Landmark Tech. A, LLC*, 637 F. Supp. 3d 1154, 1162–63 (W.D. Wash. 2022) (holding that Washington’s anti-patent troll law was not preempted and the question of *Noerr* immunity is premature at the motion-to-dismiss-stage).

246. See *supra* Part I.A (identifying distinguishable trolling behavior).

247. See *supra* Part I.A (discussing trolling behaviors).

248. See IDAHO CODE § 48-1701(2) (2025) (“[T]he legislature seeks to facilitate the efficient and *prompt* resolution of patent infringement claims . . . while at the same time carefully not interfering with legitimate patent enforcement actions.” (emphasis added)).

249. See *Katana*, 671 F. Supp. 3d at 1160 (granting Micron’s motion for bond and denying Longhorn’s and Katana’s motions to dismiss).

reasonably likely to be recovered.”²⁵⁰ In *Katana*, the court held that a bond of \$8 million was appropriate under the Idaho statute given the cost of litigating the number of patents in this case and the potential damages.²⁵¹ Such a large bond amount is clearly indicative of Idaho’s disregard for abusive patent litigation tactics and will likely have a chilling effect on trolling behavior in the state because it disrupts the economic advantage patent trolls have in quickly seeking settlement before reaching the merits of the suit.²⁵² In light of this decision in *Katana*, other states should consider the implementation of an uncapped bond provision in their anti-patent troll regime to reduce the patent troll’s leverage in threatening litigation.²⁵³

Not all state anti-patent troll laws have fared so well. For example, in 2022, Reck-n-Rack, a fishing lure designer and producer, filed a lawsuit alleging Just Encase violated Wisconsin’s patent trolling statute by falsely accusing them of patent infringement.²⁵⁴ Reck-n-Rack alleged that the letters Just Encase sent them, threatening litigation for Red-n-Rack’s alleged infringement, included false factual allegations.²⁵⁵ Notably, however, Reck-n-Rack made no arguments regarding the motivation of bad faith displayed by Just Encase.²⁵⁶ Given Reck-n-Rack’s inadequacy in pleading bad faith, the judge granted Just Encase’s motion to dismiss the claim as preempted by federal law.²⁵⁷

Though not struck down, Wisconsin’s anti-patent troll statute was neutered by this decision, as predicted.²⁵⁸ Despite an

250. IDAHO CODE § 48-1707 (2025).

251. See *Katana*, 671 F. Supp. 3d at 1160 (determining the appropriate bond amount).

252. See *supra* Part I.A (defining trolling behavior).

253. See Starling, *supra* note 136 (“The economics of patent trolling depends on the NPE not having to have skin in the game.”). Compare VT. STAT. ANN. tit. 9, § 4198 (2025) (capping bond at \$250,000), with IDAHO CODE § 48-1707 (2025) (lacking a statutory limit on bond amount).

254. *Reck-n-Rack LLC v. Just Encase Prods. Inc.*, 649 F. Supp. 3d 734, 736 (E.D. Wis. 2023).

255. See *id.* at 740 (“[T]he complaint alleges that Just Encase’s infringement allegations are incorrect . . .”).

256. See *id.* (“[T]he complaint says nothing about Just Encase’s state of mind in sending the patent notification communication. . . . [T]here is no contention that the threat was made in bad faith.”).

257. See *id.* (granting the defendant’s motion to dismiss).

258. See Gugliuzza 2015, *supra* note 16, at 1631–32 (discussing the limited applicability of Wisconsin’s narrow patent trolling statute).

unfavorable opinion, the decision on the Wisconsin statute provides useful insights for future patent troll legislation. Drafters of anti-patent troll laws should avoid overly objective requirements for patent demand letters, such as those exhibited in the Wisconsin statute, because they are incapable of supporting an adequate pleading of bad faith; instead, as the court in *Katana* held, the factors included in the Idaho Bad Faith Assertion of Patent Infringement Act are sufficient to overcome the presumption of good faith.²⁵⁹ Therefore, though counterintuitive, states drafting (or amending) their anti-patent troll statutes should avoid overly formalistic requirements in favor of factors that allow for a pleading of bad faith that could potentially meet the objective baselessness standard. However, legislators must balance such a shift by avoiding overly subjective factors that lead to a conclusion of bad faith assertion of patent infringement, as the Federal Circuit has explicitly warned against such arguments.²⁶⁰

As cases continue to progress, state legislatures will continue to receive guidance from federal judges on how to craft their patent trolling regime to efficiently target patent trolls without being preempted by federal law. However, the iteration and effort required by state legislatures demands more justification to be advantageous over more sweeping federal solutions identified previously.²⁶¹

B. THE ROLE OF STATE LEGISLATURES REMAINS VITAL IN COMBATTING PATENT TROLLS

State legislators can justify their anti-patent troll efforts over federal action through the benefits of (1) state-level legislative experimentation and (2) jurisdictional diversity in anti-patent troll efforts. For these two reasons, state legislative efforts

259. See *supra* notes 142–46 and accompanying text. Compare *Reck-n-Rack*, 649 F. Supp. 3d at 740 (discussing Reck-n-Rack’s deficiencies in pleading bad faith), with *Katana Silicon Techs. v. Micron Tech.*, 671 F. Supp. 3d 1138, 1159 (D. Idaho 2023) (“The bottom line is that Micron’s complaint pleads enough facts to allow a finding under the statutory factors that Longhorn and Katana acted in bad faith.”).

260. See Gugliuzza 2015, *supra* note 16, at 1633 (discussing the Federal Circuit’s hostility towards relying on “[s]ubjective considerations of bad faith”).

261. See *supra* notes 234–36 and accompanying text (identifying proposed solutions to the anti-patent troll law preemption issue at the Federal Circuit).

to curb patent trolling may prove to be more effective in tackling the issue than any federal solution.

1. State Experimentation in the Face of the Federal Circuit's High Bar for Bad Faith

By allowing each individual state to craft their own anti-patent troll regime, the national interest in curbing trolling behavior benefits from experimentation and an iterative legislative process at the state level. The notion of states acting as “laboratories of democracy” arises in many legal contexts and is relevant to the current situation.²⁶² The idea is that state legislatures experiment with legal solutions and learn from one another to solve difficult problems, benefiting the country as a whole.²⁶³ Though Congress could preempt state anti-patent troll legislation with the enactment of their own legislative scheme, the federal government similarly benefits by leaving legislative efforts up to each individual state. Opportunities to revise and improve current anti-patent troll legislation will continue to present themselves as lower courts wrestle with these issues. While the Wisconsin law has struggled, the state legislature could revisit their patent trolling laws in light of the rulings in the *Katana* case and pass a new patent trolling statute with factors that promote the pleading of bad faith in accordance with the Federal Circuit's bad-faith preemption doctrine.²⁶⁴ Such collaborative innovation in anti-patent trolling efforts is not feasible if Congress steps in to unilaterally occupy the field.²⁶⁵

Instead, the benefits of experimentation and iteration work on two levels. First, as alluded to above, experimentation and

262. See Lisa Larrimore Ouellette, *Patent Experimentalism*, 101 VA. L. REV. 65, 69 (2015) (“The role of so-called laboratories of experimentation has long been viewed as a benefit of federalism . . .”).

263. See Charles W. Tyler & Heather K. Gerken, *The Myth of the Laboratories of Democracy*, 122 COLUM. L. REV. 2187, 2188 (2022) (“[Federalism] thus creates fifty state ‘laboratories,’ whose officials toil to ‘devise[] solutions to difficult legal problems.’ And the nation benefits from knowing whether, and under what conditions, those solutions work.” (alteration in original) (footnote omitted) (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 817 (2015))).

264. See *supra* notes 258–60 and accompanying text (discussing potential revisions to the Wisconsin statute in light of the decision in *Katana*).

265. See Gugliuzza 2015, *supra* note 16, at 1646 (“Accordingly, the proposed federal TROL Act would expressly preempt the new state statutes regulating patent enforcement.”).

iteration can help states legislate within the confines of Federal Circuit's bad faith standard and promote progress in patent troll policy.²⁶⁶ There are components of current anti-patent troll laws ripe for such experimentation. Just as the efficacy of an uncapped bond provision has begun to materialize,²⁶⁷ further decisions in cases where a claim of bad faith assertion of patent infringement is brought will educate state legislatures on how to improve their own regimes.²⁶⁸ Navigating the rigorous bad faith standard of the Federal Circuit is a difficult legal problem facing those legislatures motivated to curb patent trolling,²⁶⁹ but collaborative iteration between federal courts and the states could be the key to overcoming it. Out of such a system, state legislatures could identify new objective factors that support adequate pleading of bad faith or craft regimes that do not reach the merits of the patent infringement case, so that claims of bad faith assertion of patent infringement can remain in state court.²⁷⁰

In addition to experimentation for the purpose of avoiding federal preemption, innovation on the part of state legislatures can help refine anti-patent troll legislation to ensure it narrowly targets the type of undesirable trolling behavior it purports to address.²⁷¹ State anti-patent troll legislation does not achieve its policy goals if it indiscriminately targets patent trolls and

266. See Ouellette, *supra* note 262, at 127 ("I have argued that empirical progress depends critically on policy variation, but also on the *right kind* of policy variation."); *supra* Part IV.A (proposing revisions states can make to their patent trolling laws in light of recent federal court decisions).

267. See *supra* notes 249–53 and the accompanying text (weighing the efficacy of bond provisions in anti-patent troll legislation).

268. See Rebecca Aviel, *Second-Bite Lawmaking*, 100 N.C. L. Rev. 947, 947 (2022) ("When a law is struck down because it is constitutionally defective, the architects of the defeated law frequently go back to the drawing board and try again, making modifications they hope will allow the new version to survive another round of litigation.").

269. See Gugliuzza 2015, *supra* note 16, at 1631–35 (noting the implications of the Federal Circuit's bad-faith preemption doctrine on new state anti-patent troll statutes).

270. See *id.* at 1633 (discussing pleading issues with respect to bad faith factors prescribed in anti-patent troll legislation); Salomone, *supra* note 122, at 210 (discussing how state legislatures prioritize providing a forum for their constituents and regulating instances of bad faith assertion of patent infringement in light of obstacles in federal courts).

271. See, e.g., IDAHO CODE § 48-1701(c) (2025) ("The legislature does not wish to interfere with the good faith enforcement of patents or good faith patent litigation.").

benevolent NPEs alike.²⁷² In fact, advocates of the Vermont anti-patent troll law are skeptical of its ability to distinguish legitimate and illegitimate assertions of patent infringement, especially as trolling tactics evolve in response to attention from state legislatures.²⁷³ In general, there is concern that patent trolls can adapt their behavior to evade enforcement faster than legislators can update laws to be more narrowly tailored.²⁷⁴ Therefore, it is crucial that state legislatures act swiftly and update their definitions of bad faith criteria to address trolling behavior as they see fit in their state.

Some may argue that Congress is equally capable of such evaluation and legislative updating.²⁷⁵ However, the iterative process of creating instances of bad faith that narrowly encompass true trolling behavior is enhanced by having multiple states doing so at once.²⁷⁶ By allowing state experimentation and innovation, Congress benefits from the collective insight gained by state legislatures and can craft more sweeping patent troll legislation at an appropriate time, once members of Congress have seen what works well and what does not.²⁷⁷

With the benefits of sustained experimentation and iteration come tradeoffs. In the interim, while state legislatures are left working to solve the issue of patent trolling in the United States, the Federal Circuit and/or the Supreme Court could

272. See *supra* Part I.A (discussing the difference between benevolent, and even necessary, NPEs and the undesirable patent troll).

273. See Eric Goldman, *Vermont Enacts the Nation's First Anti-Patent Trolling Law*, FORBES (May 22, 2013), <https://www.forbes.com/sites/ericgoldman/2013/05/22/vermont-enacts-the-nations-first-anti-patent-trolling-law> [<https://perma.cc/G88T-95WP>] (discussing Vermont's anti-patent trolling law and noting that the author is "skeptical of this attempt to distinguish legitimate from illegitimate patent assertions").

274. See *id.* (discussing the 1999 Anti-Cybersquatting Consumer Protection Act (ACPA) and noting that potential violators quickly changed their practices to avoid breaking the law).

275. See *Patent Demand Letter Hearing*, *supra* note 85, at 31–32 (statement of Paul R. Gugliuzza, Associate Professor of Law, Boston University School of Law) (discussing the relative strengths of the federal government and state government in combatting patent trolls).

276. See sources cited *infra* note 284 (discussing the benefits of legislative experimentation across the country).

277. See H.R. Rep. No. 114-235, at 169 (2015) ("We support a targeted approach to curbing abusive patent litigation practices. However, the Innovation Act is overly broad and goes well beyond the problem of abusive patent litigation.").

weigh in and disrupt the legal landscape that necessitated such experimentation in the first place.²⁷⁸ But, whether the bad-faith preemption standard is overturned or reinforced, the benefits of letting the laboratories of democracy work are not wasted. If the rigorous objective baselessness standard is abandoned for a looser version of bad faith, any legislative progress towards drafting laws that narrowly target patent trolls will still serve the primary goals of anti-patent troll legislation.²⁷⁹ Alternatively, if a court were to affirm the Federal Circuit's bad-faith preemption doctrine and expressly render existing anti-patent troll laws preempted, continued state experimentation will hopefully lead to creative solutions that can effectively curb patent trolling without violating federal constitutional law.

2. Benefits of Jurisdictional Diversity in Combatting Patent Trolls

Beyond the benefits of experimentation and state-level legislative innovation, the issue of patent trolling is best served by state legislatures for another logistical reason. Jurisdictional diversity and variation in patent troll legislation plays a huge role in disrupting the patent troll's advantage when starting a new trolling scheme.²⁸⁰ Though patent law values national uniformity,²⁸¹ it is only logical that a patent troll would prefer to defend themselves against one counterclaim—maybe an unfair competition suit brought by the FTC or a single claim of bad faith assertion of patent infringement under a law passed by

278. See Gugliuzza 2015, *supra* note 16, at 1639 (suggesting the Federal Circuit en banc or Supreme Court review the bad-faith preemption standard).

279. See, e.g., IDAHO CODE ANN. § 48-1701(2) (2025) (“Through this narrowly focused chapter, the legislature seeks to facilitate the efficient and prompt resolution of patent infringement claims, protect Idaho businesses from abusive and bad faith assertions of patent infringement and build Idaho’s economy, while at the same time carefully not interfering with legitimate patent enforcement actions.”).

280. See Gugliuzza 2015, *supra* note 16, at 1647 (noting that the prospect of “defend[ing] against multiple lawsuits in multiple states” could likely be “a significant deterrent” to patent trolls).

281. See *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 162 (1989) (“One of the fundamental purposes behind the Patent and Copyright clauses of the Constitution was to promote national uniformity in the realm of intellectual property.”); cf. Ouellette, *supra* note 262, at 68 (arguing that empirical progress in patent policy depends on greater legal diversity).

Congress.²⁸² By having a variety of anti-patent troll legislation across the country, trolls are required to defend themselves in multiple forums under different statutory schemes.²⁸³

When considering the benefits of jurisdictional diversity, it seems that a mixture of privately enforced and attorney-general-enforced anti-patent trolls statutes would be ideal. The cost and expertise required to litigate bad faith assertions of patent infringement on multiple fronts, from state attorney general and private litigants alike, will significantly deter patent trolling as it disrupts the calculus that makes their business model lucrative.²⁸⁴ Allowing Congress to monopolize anti-patent troll efforts surrenders these benefits to an entity less enthusiastic about curbing trolling behavior.²⁸⁵

CONCLUSION

It would be alarmist to group all NPEs into the category of patent trolls and try to remove them from the intellectual property market entirely.²⁸⁶ However, attention to patent trolling has increased in the 21st century because patent trolls cause significant economic harms, so legislators have the responsibility to

282. See Gugliuzza 2015, *supra* note 16, at 1647 (“State-by-state regulation has the potential to turn the table. Rather than defending against, say, one unfair competition suit brought by the FTC, a patent holder might instead need to defend against multiple lawsuits in multiple states, brought by both private plaintiffs and state attorneys general.”).

283. *Id.*

284. See *id.* (“The prospect of ex post litigation on multiple fronts could be a significant deterrent to unfair or deceptive assertions of patent infringement.”); Rebecca Schoff Curtin, *Slapping Patent Trolls: What Anti-Trolling Legislation Can Learn from the Anti-SLAPP Movement*, 18 STAN. TECH. L. REV. 39, 63 (2014) (“Further, it has been observed that the diversity of state anti-[trolling] laws only increases the uncertainty faced by litigants, and increased uncertainty is a form of increased cost. In the patent infringement context, it seems clear that the state anti-trolling laws are intended to increase the cost of sending patent demand letters.” (footnote omitted)); see also *supra* note 30 and accompanying text (identifying patent trolling as a lucrative business model).

285. Compare *supra* Part I.B.2 (discussing Congress’s failure to address the patent troll issue), with *Patent Trolling*, OFF. OF THE VT. ATT’Y GEN., <https://ago.vermont.gov/divisions/consumer-protection/consumer-resources/patent-trolling> [<https://perma.cc/VP25-SWH5>] (“The Vermont Attorney General’s Office has played an active and leading role in the national effort to reduce the cost and burdens of abusive patent enforcement practices, sometimes called ‘patent trolling.’”).

286. Cf. *supra* notes 32–36 and accompanying text (identifying examples of harmless NPEs).

carefully identify and target the undesirable behaviors of patent trolls and their inhibitive effects on innovation.²⁸⁷ While there has been little momentum at the federal level to address the problem,²⁸⁸ many states have expressed enthusiasm for stopping patent trolls from wreaking havoc on unsuspecting business and stifling innovation within their states.²⁸⁹

Like any problem worth solving, there are barriers preventing the quick resolution of the U.S. patent trolling problem. Tension between Federal Circuit jurisprudence and the policy goals of troll-averse state legislatures has bailed out patent trolls for the time being.²⁹⁰ Despite a daunting bad faith standard endorsed by the Federal Circuit,²⁹¹ there is still room for innovation to craft anti-patent troll legislation that appropriately and precisely targets unwanted trolling behaviors.²⁹² While it is unclear when the Federal Circuit or Supreme Court will intervene to clear up this mess,²⁹³ it is very clear that, in the interim, state legislatures are crucial in tackling the trolling problem.²⁹⁴ Over time, states can experiment with ways to legislate around the Federal Circuit's bad-faith preemption standard and even craft new schemes for preventing patent trolls²⁹⁵—all in hopes of defeating the troll once and for all and protecting innovation in their state.

287. See *supra* notes 45–54 and accompanying text (discussing prominent examples of patent trolls and the economic harms they cause).

288. See *supra* Part I.B (discussing the lack of progress on addressing patent trolls at the federal level).

289. See, e.g., *Patent Trolling*, *supra* note 285 (“The Vermont Legislature, in 2013, led the way in passing a state law directed at patent-related demand letters sent in bad faith. . . . A number of states followed Vermont’s lead and passed similar laws in the past year.”).

290. See *supra* Part III.

291. See *supra* Part III.B (describing the Federal Circuit’s bad faith standard).

292. See *supra* Part IV.B for a discussion of such opportunities.

293. See sources cited *supra* note 22.

294. See *supra* Part IV (arguing the importance of state involvement in anti-patent troll legislative efforts).

295. See *supra* Part IV.
