LEGISLATURE OF NEBRASKA
ONE HUNDRED THIRD LEGISLATURE
SECOND SESSION

LEGISLATIVE BILL

Introduced by
Read first time
Committee:

A BILL

1 FOR AN ACT relating to consumer protection; to amend section 87-302,
   Revised Statutes Cumulative Supplement, 2012; to adopt
   the Nebraska Patent Abuse Prevention Act; to harmonize
   provisions; to provide severability; and to repeal the
   original section.

6 Be it enacted by the people of the State of Nebraska,
Section 1. Sections 1 to 5 of this act shall be known and may be cited as the Nebraska Patent Abuse Prevention Act.

Sec. 2. For purposes of the Nebraska Patent Abuse Prevention Act:

(1) Demand letter means a letter, email, or other communication asserting or claiming that the target has engaged or may be engaging in patent infringement.

(2) Target means a Nebraska person:

(a) Who has received a demand letter or against whom an assertion or allegation of patent infringement has been made;

(b) Who has been threatened with litigation or against whom a lawsuit has been filed alleging patent infringement; or

(c) Whose customers have received a demand letter asserting that the person's goods, services, or technology, or the person's use thereof, has infringed a patent.

Sec. 3. (1) A person shall not make a bad faith assertion of patent infringement.

(2) A court may consider the following factors as evidence that a person has made a bad faith assertion of patent infringement:

(a) The demand letter does not contain the following information:

(i) The patent number;

(ii) The name and address of the patent owner or owners and assignee or assignees, if any; and
(iii) Factual allegations concerning the specific areas
in which the target's goods, services, or technology, or the target's
use thereof, infringe the patent or are covered by the claims in the
patent:

(b) Prior to sending the demand letter, the person fails
to conduct an analysis comparing the claims in the patent to the
target's goods, services, or technology, or the target's use thereof,
or such an analysis was done but does not identify specific areas in
which the goods, services, or technology, or the target's use
thereof, are covered by the claims in the patent;

(c) The demand letter lacks the information described in
subdivision (2)(a) of this section, the target requests the
information, and the person fails to provide the information within a
reasonable period of time;

(d) The demand letter demands payment of a license fee or
response within an unreasonably short period of time;

(e) The person offers to license the patent for an amount
that is not based on a reasonable estimate of the value of the
license;

(f) The claim or assertion of patent infringement is
meritless, and the person knew, or should have known, that the claim
or assertion is meritless;

(g) The person or its subsidiaries or affiliates have
previously filed or threatened to file one or more lawsuits based on
the same or similar claim of patent infringement and those threats or
lawsuits lacked the information described in subdivision (2)(a) of this section; and

(h) Any other factor the court finds relevant.

(3) A court may consider the following factors as evidence that a person has not made a bad faith assertion of patent infringement:

(a) The demand letter contains the information described in subdivision (2)(a) of this section;

(b) Where the demand letter lacks the information described in subdivision (2)(a) of this section and the target requests the information, the person provides the information within a reasonable period of time;

(c) The person engages in a good faith effort to establish that the target has infringed or may be infringing the patent and to negotiate an appropriate remedy;

(d) The person makes a substantial investment in the use of the patent or in the production or sale of a good, process, or design covered by the patent;

(e) The person is:

(i) The inventor or joint inventor of the patent or, in the case of a patent filed by and awarded to an assignee of the original inventor or joint inventor, is the original assignee; or

(ii) An institution of higher education or a technology transfer organization owned or affiliated with an institution of higher education;
(f) The person has:

(i) Demonstrated good faith business practices in previous efforts to enforce the patent, or a substantially similar patent; or

(ii) Successfully enforced the patent, or a substantially similar patent, through litigation; and

(g) Any other factor the court finds relevant.

Sec. 4. Any person who sends, transmits, or otherwise conveys demand letters to twenty-five or more targets in any three-hundred-sixty-five-day period shall notify the Attorney General. Such notification shall include the name and address of each target to which demand letters were sent and the number of the patent that is allegedly infringed.

Sec. 5. (1) A violation of section 3 or 4 of this act shall constitute a deceptive trade practice under the Uniform Deceptive Trade Practices Act, and shall be subject to any remedies or penalties available for a violation under the Uniform Deceptive Trade Practices Act.

(2) The Nebraska Patent Abuse Prevention Act shall not be construed to limit rights and remedies available to the State of Nebraska or to any person under the law.

Sec. 6. Section 87-302, Revised Statutes Cumulative Supplement, 2012, is amended to read:

87-302 (a) A person engages in a deceptive trade practice when, in the course of his or her business, vocation, or occupation,
he or she:

(1) Passes off goods or services as those of another;

(2) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

(3) Causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another;

(4) Uses deceptive representations or designations of geographic origin in connection with goods or services;

(5) Represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he or she does not have;

(6) Represents that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand, except that sellers may repair damage to and make adjustments on or replace parts of otherwise new goods in an effort to place such goods in compliance with factory specifications;

(7) Represents that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

(8) Disparages the goods, services, or business of another by false or misleading representation of fact;

(9) Advertises goods or services with intent not to sell
them as advertised or advertises the price in any manner calculated
or tending to mislead or in any way deceive a person;

(10) Advertises goods or services with intent not to
supply reasonably expectable public demand, unless the advertisement
discloses a limitation of quantity;

(11) Makes false or misleading statements of fact
concerning the reasons for, existence of, or amounts of price
reductions;

(12) Uses or promotes the use of or establishes,
operates, or participates in a pyramid promotional scheme in
connection with the solicitation of such scheme to members of the
public. This subdivision shall not be construed to prohibit a plan or
operation, or to define a plan or operation as a pyramid promotional
scheme, based on the fact that participants in the plan or operation
give consideration in return for the right to receive compensation
based upon purchases of goods, services, or intangible property by
participants for personal use, consumption, or resale so long as the
plan or operation does not promote or induce inventory loading and
the plan or operation implements an appropriate inventory repurchase
program;

(13) With respect to a sale or lease to a natural person
of goods or services purchased or leased primarily for personal,
family, household, or agricultural purposes, uses or employs any
referral or chain referral sales technique, plan, arrangement, or
agreement;
(14) Knowingly makes a false or misleading statement in a privacy policy, published on the Internet or otherwise distributed or published, regarding the use of personal information submitted by members of the public;

(15) Uses any scheme or device to defraud by means of:

(i) Obtaining money or property by knowingly false or fraudulent pretenses, representations, or promises; or

(ii) Selling, distributing, supplying, furnishing, or procuring any property for the purpose of furthering such scheme;

(16) Offers an unsolicited check, through the mail or by other means, to promote goods or services if the cashing or depositing of the check obligates the endorser or payee identified on the check to pay for goods or services. This subdivision does not apply to an extension of credit or an offer to lend money;

(17) Mails or causes to be sent an unsolicited billing statement, invoice, or other document that appears to obligate the consumer to make a payment for services or merchandise he or she did not order;

(18)(i) Installs, offers to install, or makes available for installation or download a covered file-sharing program on a computer not owned by such person without providing clear and conspicuous notice to the owner or authorized user of the computer that files on that computer will be made available to the public and without requiring intentional and affirmative activation of the file-sharing function of such covered file-sharing program by the owner or
authorized user of the computer; or

(ii) Prevents reasonable efforts to block the installation, execution, or disabling of a covered file-sharing program; or

(19) Violates any provision of the Nebraska Foreclosure Protection Act; or

(20) Violates any provision of the Nebraska Patent Abuse Prevention Act.

(b) In order to prevail in an action under the Uniform Deceptive Trade Practices Act, a complainant need not prove competition between the parties.

(c) This section does not affect unfair trade practices otherwise actionable at common law or under other statutes of this state.

Sec. 7. If any section in this act or any part of any section is declared invalid or unconstitutional, the declaration shall not affect the validity or constitutionality of the remaining portions.

Sec. 8. Original section 87-302, Revised Statutes Cumulative Supplement, 2012, is repealed.