

REQ 03798
NPN - 12/05/2013

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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,
2 Revised Statutes Cumulative Supplement, 2012; to adopt
3 the Nebraska Patent Abuse Prevention Act; to harmonize
4 provisions; to provide severability; and to repeal the
5 original section.
6 Be it enacted by the people of the State of Nebraska,

1 Section 1. Sections 1 to 5 of this act shall be known and
2 may be cited as the Nebraska Patent Abuse Prevention Act.

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

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

8 (2) Target means a Nebraska person:

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

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

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

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

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

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

23 (i) The patent number;

24 (ii) The name and address of the patent owner or owners
25 and assignee or assignees, if any; and

1 (iii) Factual allegations concerning the specific areas
2 in which the target's goods, services, or technology, or the target's
3 use thereof, infringe the patent or are covered by the claims in the
4 patent;

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

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

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

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

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

23 (g) The person or its subsidiaries or affiliates have
24 previously filed or threatened to file one or more lawsuits based on
25 the same or similar claim of patent infringement and those threats or

1 lawsuits lacked the information described in subdivision (2)(a) of
2 this section; and

3 (h) Any other factor the court finds relevant.

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

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

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

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

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

19 (e) The person is:

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

23 (ii) An institution of higher education or a technology
24 transfer organization owned or affiliated with an institution of
25 higher education;

1 (f) The person has:

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

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

7 (g) Any other factor the court finds relevant.

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

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

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

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

24 87-302 (a) A person engages in a deceptive trade practice
25 when, in the course of his or her business, vocation, or occupation,

1 he or she:

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

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

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

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

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

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

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

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

25 (9) Advertises goods or services with intent not to sell

1 them as advertised or advertises the price in any manner calculated
2 or tending to mislead or in any way deceive a person;

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

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

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

21 (13) With respect to a sale or lease to a natural person
22 of goods or services purchased or leased primarily for personal,
23 family, household, or agricultural purposes, uses or employs any
24 referral or chain referral sales technique, plan, arrangement, or
25 agreement;

1 (14) Knowingly makes a false or misleading statement in a
2 privacy policy, published on the Internet or otherwise distributed or
3 published, regarding the use of personal information submitted by
4 members of the public;

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

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

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

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

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

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

1 authorized user of the computer; or

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

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

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

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

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

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

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