**A** **BILL**

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING SECTION 39‑5‑190 SO AS TO PROVIDE THAT IT IS AN UNLAWFUL TRADE PRACTICE FOR A PERSON OR ENTITY TO MAKE A BAD FAITH ASSERTION OF PATENT INFRINGEMENT, TO PROVIDE EVIDENTIARY CONSIDERATIONS, AND TO PROVIDE REMEDIES.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Article 1, Chapter 5, Title 39 of the 1976 Code is amended by adding:

“Section 39‑5‑190. (A) For purposes of this section:

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

(2) ‘Target’ means a South Carolina person or entity:

(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 product, service, or technology has infringed a patent.

(B) It is an unlawful trade practice for a person or entity to make a bad faith assertion of patent infringement. This offense is a violation of Section 39‑5‑20.

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

(1) the demand letter does not contain the following information:

(a) the patent number;

(b) the name and address of the patent owner or owners and assignee or assignees, if any; and

(c) factual allegations concerning the specific areas in which the target’s products, services, and technology infringe the patent or are covered by the claims in the patent;

(2) prior to sending the demand letter, the person fails to conduct an analysis comparing the claims in the patent to the target’s products, services, and technology, or the analysis was done but does not identify specific areas in which the products, services, and technology are covered by the claims in the patent;

(3) the demand letter lacks the information described in item (1), the target requests the information, and the person fails to provide the information within a reasonable period of time;

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

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

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

(7) the claim or assertion of patent infringement is deceptive;

(8) the person or its subsidiaries or affiliates have previously filed or threatened to file one or more lawsuits based on the same or similar claim of patent infringement and:

(a) those threats or lawsuits lacked the information described in item (1); or

(b) the person attempted to enforce the claim of patent infringement in litigation and a court found the claim to be meritless; and

(9) any other factor the court finds relevant.

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

(1) the demand letter contains the information described in subsection (C)(1);

(2) where the demand letter lacks the information described in subsection (C)(1) and the target requests the information, the person provides the information within a reasonable period of time;

(3) the person engages in a good faith effort to establish that the target has infringed the patent and to negotiate an appropriate remedy;

(4) the person makes a substantial investment in the use of the patent or in the production or sale of a product or item covered by the patent;

(5) the person is:

(a) 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

(b) an institution of higher education or a technology transfer organization owned or affiliated with an institution of higher education;

(6) the person has:

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

(b) successfully enforced the patent, or a substantially similar patent, through litigation;

(7) any other factor the court finds relevant.

(E) Upon motion by a target and a finding by the court that a target has established a reasonable likelihood that a person has made a bad faith assertion of patent infringement in violation of this section, the court shall require the person to post a bond in an amount equal to amounts reasonably likely to be recovered pursuant to Section 39‑5‑140, conditioned upon payment of any amounts finally determined to be due to the target. A hearing shall be held if either party so requests. A bond ordered pursuant to this section shall not exceed two hundred fifty thousand dollars. The court may waive the bond requirement if it finds the person has available assets equal to the amount of the proposed bond or for other good cause shown.

(F)(1) The Attorney General has the same authority to act on a violation of this section as is provided in this article.

(2) A target of conduct involving assertions of patent infringement, or a person aggrieved by a violation of this chapter may bring an action for relief. A court may award the following remedies to a target who prevails in an action brought pursuant to this section:

(a) equitable relief;

(b) actual damages;

(c) costs and fees, including attorney’s fees; and

(d) punitive damages in an amount equal to fifty thousand dollars or three times the total of damages, costs, and fees, whichever is greater.

(3) Any target of conduct involving assertions of patent infringement that suffers loss as the result of a violation of this section, or any other person aggrieved by a violation of this section, shall be entitled to initiate an action to recover actual damages. If the trier of fact finds that the violation was wilful, it may increase damages to an amount not exceeding three times the actual damages sustained or fifty thousand dollars, whichever is greater. In addition to any damages awarded, such target or other person also may be awarded reasonable attorney’s fees and court costs.

(4) This section shall not be construed to limit rights and remedies available to the State or to any person under any other law and shall not alter or restrict the Attorney General’s authority with regard to conduct involving assertions of patent infringement.”

SECTION 2. This act takes effect July 1, 2014.

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