

Patent Preemption

Paul Gugliuzza

Associate Professor, Boston University School of Law
Gainesville, FL

Patent law is usually thought to be the domain of the federal government, not state governments. Yet fourteen states have recently passed statutes outlawing false or bad faith assertions of patent infringement. Those statutes are primarily aimed at fighting patent trolls, particularly those who send letters to thousands of end users of supposedly patented technology demanding that the user purchase a license for a few thousand dollars or else face an infringement suit (which, in fact, the patent holder often does not bother to file). As this article shows, however, current preemption doctrine effectively prohibits the states from regulating the enforcement of federal patents. Moreover, because the Federal Circuit has grounded this "preemption" doctrine in the First Amendment (rather than solely in the Supremacy Clause), the federal government, too, has little power to outlaw malicious patent enforcement tactics. Accordingly, the article argues for a re-imagined patent "preemption" standard, one that is consistent with the long history of federal courts enjoining unfair and deceptive tactics of patent enforcement - a history that the Federal Circuit has mostly ignored.

Email: prg1@bu.edu

Gugliuzza