

Colorado Legislative Council Staff Fiscal Note

**STATE
FISCAL IMPACT**

Drafting Number: LLS 15-0357
Prime Sponsor(s): Rep. Pabon
 Sen. Balmer

Date: January 27, 2015
Bill Status: House Business, Affairs & Labor
Fiscal Analyst: Alex Schatz (303-866-4375)

BILL TOPIC: PROHIBITED COMMUNICATIONS CONCERNING PATENTS

Fiscal Impact Summary*	FY 2015-2016	FY 2016-2017
State Revenue	Increase.	
General Fund	See State Revenue section.	
State Expenditures	<u>\$93,275</u>	<u>\$79,223</u>
General Fund	81,385	65,710
Centrally Appropriated Costs**	11,890	13,513
FTE Position Change	0.8 FTE	1.0 FTE
Appropriation Required: \$81,385 - Department of Law (FY 2015-16)		

* This summary shows changes from current law under the bill for each fiscal year.

** These costs are not included in the bill's appropriation. See the State Expenditures section for more information.

Summary of Legislation

This bill establishes a framework for communications between private parties concerning patent rights. The bill prohibits certain communications, permits certain other communications, and establishes a cause of action for the Attorney General's Office (AGO) in the Department of Law to enforce the bill.

The bill prohibits a person from asserting through written or electronic communication any claim that the recipient of the communication is liable for infringement of a patent if the communication:

- falsely states that litigation has been initiated;
- threatens litigation but is part of a pattern of such threats when no litigation is ultimately filed; or
- is legally or factually defective.

The bill creates a safe harbor for a patent holder to communicate with others concerning:

- ownership status, sales offers, or licensing arrangements for the patent;
- infringement issues, following procedures in federal law;
- claims for compensation after a good faith investigation that supports an infringement claim; and
- patents in the context of research and development by the patent holder, institutions of higher education, and certain technology transfer organizations.

The AGO has exclusive authority to investigate and enforce the provisions of the bill. The court hearing a patent communication case brought by the AGO may award ordinary damages, costs including attorneys fees, and, as punitive damages, the greater of \$50,000 or treble damages.

Background

The practice of contacting patent holders to extract financial consideration without legitimate legal grounds to assert an infringement claim is known as patent trolling. Businesses across the United States spent at least \$29 billion in legal fees in one year to defend against defective patent assertions. The Consumer Protection Section of the AGO occasionally receives complaints about patent trolling but is not specifically equipped to investigate or pursue enforcement actions regarding these complaints.

Patents are generally the province of federal law. In 2013 Congress considered but tabled legislation that would have empowered the Federal Trade Commission to treat bad faith demand letters as an unfair trade practice. States have recently enacted legislation to curb the practice of patent trolling. In 2013, Vermont passed the first state bill to prohibit companies from making bad faith patent assertions. In 2014, patent trolling legislation was enacted in 17 additional states.

State Revenue

The bill increases state General Fund revenue the Department of Law receives as awards of attorney fees and damages in patent communication cases. The bill will also increase General Fund revenue from state income taxes, as patent holders pay income tax on any damages awarded to them and claim fewer deductions from taxable income for legal expenses associated with patent communications.

Assumptions. The AGO will actively enforce the provisions of the bill, resulting in court awarded costs and damages. Damage awards are exempt from TABOR.

Department of Law. The AGO is the sole party that may bring legal action against violators of the bill. To the extent that courts award attorneys fees under the bill, the Department of Law will recoup litigation costs on a case-by-case basis. If damages are awarded to the state in a patent communication case, this will be considered unclassified fines revenue and deposited in the state General Fund.

State income tax. If damages are awarded to private parties aggrieved by patent trolling, this will increase taxable income and state income tax revenue to the General Fund. See the Technical Note section for further discussion of court awarded costs and damages.

State Expenditures

The bill increases state expenditures in the Department of Law by **\$93,275 and 0.8 FTE in FY 2015-16** and by **\$79,223 and 1.0 FTE in FY 2016-17**. Table 1 shows the Department of Law's expenditures in the first two fiscal years of the bill. Personal services costs in FY 2015-16 are adjusted to reflect the General Fund pay date shift and effective date of the bill.

Table 1. Expenditures Under HB 15-1063		
Cost Components	FY 2015-16	FY 2016-17
Personal Services	\$69,796	\$63,800
FTE	0.8	1.0
Operating Expenses	1,592	1,910
Capital Outlay Costs	9,997	0
Centrally Appropriated Costs*	11,890	13,513
TOTAL	\$93,275	\$79,223

* Centrally appropriated costs are not included in the bill's appropriation.

Assumptions. Active enforcement of patent communications by the AGO will require subject matter expertise and sufficient time to manage associated investigations, litigation, and administration. The Department of Law will expend the equivalent of 1.0 FTE to implement the bill.

Department of Law. The AGO will hire an Assistant Attorney General (AAG) for the Consumer Protection Section to lead enforcement efforts under the bill. Based on the need for subject matter expertise, the new hire is budgeted at the midrange of the AAG payscale. The AAG will also require specialized operating expenses and capital outlay, including legal software.

Centrally appropriated costs. Pursuant to a Joint Budget Committee policy, certain costs associated with this bill are addressed through the annual budget process and centrally appropriated in the Long Bill or supplemental appropriations bills, rather than in this bill. The centrally appropriated costs subject to this policy are estimated in the fiscal note for informational purposes and summarized in Table 2.

Table 2. Centrally Appropriated Costs Under HB 15-1063*		
Cost Components	FY 2015-16	FY 2016-17
Employee Insurance (Health, Life, Dental, and Short-term Disability)	\$6,480	\$8,053
Supplemental Employee Retirement Payments	5,410	5,460
TOTAL	\$11,890	\$13,513

*More information is available at: <http://colorado.gov/fiscalnotes>

Technical Note

The bill does not specify who will receive court awarded costs and damages. The fiscal note assumes that this lack of specificity permits the court to fashion an appropriate remedy and award damages and costs within its discretion, including damages as restitution to the patent holder.

Effective Date

The bill takes effect August 5, 2015, if the General Assembly adjourns on May 6, 2015, as scheduled, and no referendum petition is filed.

State Appropriations

The bill requires a FY 2015-16 appropriation of \$81,385 General Fund to the Department of Law, and an allocation of 0.8 FTE.

State and Local Government Contacts

Judicial Department
Law
Revenue
Regulatory Agencies

Office of Economic Development and International Trade
Office of Information Technology
Property Taxation