If you call this firm a “patent troll,” it might sue for defamation

Enlarge / These trolls, once pretty profitable.

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We’re not going to say that Automated Transactions LLC is a “patent troll,” but several others have. The American Bankers Association has called ATL a troll. The Credit Union National Association called ATL a troll—they even illustrated the accusation with a picture of a troll. Individual lawyers, legal commentators, and banks have all described ATL as a troll.

Inventor and ATL founder David Barcelou got so fed up with people labeling his firm a patent troll that he sued about a dozen individuals and organizations for libel in 2016. Last year, a New Hampshire state judge dismissed Barcelou’s lawsuit.

And on Thursday, February 14, the New Hampshire Supreme Court heard oral arguments about whether to overrule the lower court’s decision and allow the lawsuit to move forward.

The stakes are high. If Barcelou succeeds, we can expect other alleged patent trolls to flock to New Hampshire to sue their detractors for libel.

But under the law, defamation is limited to factual claims that can be shown to be clearly false. Mere statements of opinion or the use of vague terms without a clear definition cannot be defamatory. Defendants argue that "patent troll" fits into this latter category—as do other terms they've used when talking about ATL, including "blackmail," shakedown," and "extortion." Critics warn that if ATL's lawsuit succeeds, it could chill public debate about patent reform and violate the First Amendment.

Banks rallied against ATL's litigation campaign

ATL owns several patents related to automatic teller machines but hasn't tried to commercialize its technology in over a decade. Instead, the firm has been sending out demand letters to a large number of banks and credit unions threatening to sue them if they don't license the patents. At its peak between 2011 and 2012, ATL's licensing campaign generated more than $3 million in licensing revenue.

But then, in 2012, a federal appeals court ruled that several of ATL's key patent claims were invalid, taking the wind out of ATL's licensing efforts. Still, the American Bankers Association wrote that ATL continued to "assert those patents and sue banks across the country, including banks that do not even have ATMs." Some critics viewed this as classic patent troll behavior.

ATL's targets got organized and began presenting a united front against ATL's threats. A 2013 article described how a group of New England banks had banded together to fight ATL in court, represented by attorney Bob Stier. Stier said the "Automated Transaction's suit amounts to nothing more than a shakedown of community banks and that the company has intimidated more than 140 banks into settling," the *Boston Business Journal* reported.

An article on the website of Stier's law firm boasts that "after more than 100 banks were brought together in 2012 to defend against a patent troll that demanded licenses for their ATMs, that particular patent troll lost its appetite for the patent litigation and abandoned its claims."

ATL became a poster child for patent reform activists. The American Bankers Association mentioned ATL during legislative testimony about the patent troll problem, arguing that smaller banks "find that their only option is to settle rather than face paying millions to defend against extortive claims of patent infringement."

ATL also targeted credit unions, prompting a response from the Credit Union National Association. A lawyer for the group, Robin Cook, began making presentations showing a "derogatory picture of a troll" and warning that troll tactics amounted to a "shakedown." The presentation listed ATL as a "well-known troll."

ATL responded by suing several of its critics. It sued the ABA. It sued the CUNA. It sued Robert Stier and his law firm. It sued several others who made similar comments—those labeling ATL a "troll" or describing ATL's demand letters as a "shakedown" or "outright blackmail." Again, ATL's initial lawsuit was dismissed by a trial judge last year.

The stakes are high

In Thursday's oral arguments at the New Hampshire Supreme Court, ATL attorney Steve Gordon urged the New Hampshire justices to overrule that initial dismissal of the lawsuit.

"The gist or sting of the statements at issue was that my clients were extortionists, shakedown artists, preying on small banks seeking to license patents that were of no value," Gordon said.

Gordon argued that none of this was true. Critics said ATL wasn't selling any products, but Gordon noted that his client did try to commercialize his patents many years ago. Critics said ATL was engaged in a shakedown. "This is not a shakedown," Gordon said.

At one point, Gordon argued that one of the defendants had defamed ATL by claiming its patents had been invalidated. Gordon said that this was false and defamatory because only certain claims of its patents had been invalidated; others remained valid.

But justices seemed skeptical. "Wasn't the gist of the statement correct?" one justice asked.

The main question confronting the justices was whether it was proper to grant the defendants' motion to dismiss—one of the first steps of the litigation process—or whether the judge should have allowed the process to move forward and ruled on the legal merits later in the case.

A motion to dismiss is filed prior to discovery, the legal process where plaintiffs and defendants get to rummage around in one another's files for evidence to substantiate their respective cases. Discovery is an expensive process; by dismissing the case pre-discovery, the judge saved the defendants a lot of money on legal fees.

Gordon argued that ATL should have gotten a chance to build its case via discovery before a judge decides whether the case has merit. But when a justice asked what information he'd like to seek during the discovery process, the attorney's answer was a little vague. Gordon said that he'd like to depose defendants, asking questions like "what were the facts that you relied upon when you made a statement of shakedown?"

But it's not clear that these kinds of questions would be all that illuminating. The core of the defendants' case is that terms like "shakedown" are fundamentally matters of opinion.

Courts have long held that opinionated terms like “rip-off” and “snake-oil” could not be defamatory. The defendants argue that labeling someone a troll or accusing them of blackmail falls into the same category.

Moreover, allowing the case to drag on to the discovery phase could give alleged patent trolls a powerful weapon against their critics. The discovery process in a defamation case can easily cost defendants thousands of dollars—giving potential critics a powerful incentive not to speak out against the tactics of alleged trolls in the first place. Such a looming threat could chill free speech if defendants ultimately win these kinds of fights.

Additionally, the targets ATL chose for its litigation campaign illustrate the free speech values at issue here. The people ATL sued were not just engaged in idle commentary when they labeled ATL a troll. Rather, they were working together to organize a defense against ATL’s allegedly trolling conduct.

Some of the defendants were lobbying Congress to pass reform legislation. Others were organizing mutual defense against ATL’s litigation campaign. If labeling someone a troll—or an extortionist, shakedown artist, or blackmail practitioner, for that matter—became grounds for a defamation lawsuit, it would become more difficult for the targets of patent holders to organize their defenses.

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