

Chapter 19.330 RCW
STOLEN OR MISAPPROPRIATED INFORMATION TECHNOLOGY

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RCW 19.330.010 Definitions. The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Article or product" means any tangible article or product, but excludes: (a) Any services sold, offered for sale, or made available in this state, including free services and online services; (b) any product subject to regulation by the United States food and drug administration and that is primarily used for medical or medicinal purposes; (c) food and beverages; and (d) restaurant services.

(2) "Copyrightable end product" means a work within the subject matter of copyright as specified in section 102 of Title 17, United States Code, and which for the purposes of this chapter includes mask works protection as specified in section 902 of Title 17, United States Code.

(3) "Essential component" means a component of an article or product provided or to be provided to a third party pursuant to a contract, including a purchase order, without which the article or product will not perform as intended and for which there is no substitute component available that offers a comparable range and quality of functionalities and is available in comparable quantities and at a comparable price.

(4) "Manufacture" means to directly manufacture, produce, or assemble an article or product subject to RCW 19.330.020, in whole or substantial part, but does not include contracting with or otherwise engaging another person, or that person engaging another person, to develop, manufacture, produce, or assemble an article or product subject to RCW 19.330.020.

(5) "Material competitive injury" means at least a three percent retail price difference between the article or product made in violation of RCW 19.330.020 designed to harm competition and a directly competing article or product that was manufactured without the use of stolen or misappropriated information technology, with such a price difference occurring over a four-month period of time.

(6) "Retail price" means the retail price of stolen or misappropriated information technology charged at the time of, and in the jurisdiction where, the alleged theft or misappropriation occurred, multiplied by the number of stolen or misappropriated items

used in the business operations of the person alleged to have violated RCW 19.330.020.

(7) (a) "Stolen or misappropriated information technology" means hardware or software that the person referred to in RCW 19.330.020 acquired, appropriated, or used without the authorization of the owner of the information technology or the owner's authorized licensee in violation of applicable law, but does not include situations in which the hardware or software alleged to have been stolen or misappropriated was not available for retail purchase on a stand-alone basis at or before the time it was acquired, appropriated, or used by such a person.

(b) Information technology is considered to be used in a person's business operations if the person uses the technology in the manufacture, distribution, marketing, or sales of the articles or products subject to RCW 19.330.020. [2011 c 98 s 1.]

RCW 19.330.020 Unfair acts. Any person who manufactures an article or product while using stolen or misappropriated information technology in its business operations after notice and opportunity to cure as provided in RCW 19.330.050 and, with respect to remedies sought under RCW 19.330.060(6) or 19.330.070, causes a material competitive injury as a result of such use of stolen or misappropriated information technology, is deemed to engage in an unfair act where such an article or product is sold or offered for sale in this state, either separately or as a component of another article or product, and in competition with an article or product sold or offered for sale in this state that was manufactured without violating this section. A person who engages in such an unfair act, and any articles or products manufactured by the person in violation of this section, is subject to the liabilities and remedial provisions of this chapter in an action by the attorney general or any person described in RCW 19.330.060(5), except as provided in RCW 19.330.030 through 19.330.090. [2011 c 98 s 2.]

RCW 19.330.030 Acts not constituting violation of chapter. No action may be brought under this chapter, and no liability results, where:

(1) The end article or end product sold or offered for sale in this state and alleged to violate RCW 19.330.020 is:

(a) A copyrightable end product;

(b) Merchandise manufactured by or on behalf of, or pursuant to a license from, a copyright owner and which displays or embodies a name, character, artwork, or other indicia of or from a work that falls within (a) of this subsection, or merchandise manufactured by or on behalf of, or pursuant to a license from, a copyright or trademark owner and that displays or embodies a name, character, artwork, or other indicia of or from a theme park, theme park attraction, or other facility associated with a theme park; or

(c) Packaging, carrier media, or promotional or advertising materials for any end article, end product, or merchandise that falls within (a) or (b) of this subsection;

(2) The allegation that the information technology is stolen or misappropriated is based on a claim that the information technology or its use infringes a patent or misappropriates a trade secret under

applicable law or that could be brought under any provision of Title 35 of the United States Code;

(3) The allegation that the information technology is stolen or misappropriated is based on a claim that the defendant's use of the information technology violates the terms of a license that allows users to modify and redistribute any source code associated with the technology free of charge; or

(4) The allegation is based on a claim that the person violated RCW 19.330.020 by aiding, abetting, facilitating, or assisting someone else to acquire, appropriate, use, sell, or offer to sell, or by providing someone else with access to, information technology without authorization of the owner of the information technology or the owner's authorized licensee in violation of applicable law. [2011 c 98 s 3.]

RCW 19.330.040 Injunction or attachment order—Persons violating RCW 19.330.020. No injunction may issue against a person other than the person adjudicated to have violated RCW 19.330.020, and no attachment order may issue against articles or products other than articles or products in which the person alleged to violate RCW 19.330.020 holds title. A person other than the person alleged to violate RCW 19.330.020 includes any person other than the actual manufacturer who contracts with or otherwise engages another person to develop, manufacture, produce, market, distribute, advertise, or assemble an article or product alleged to violate RCW 19.330.020. [2011 c 98 s 4.]

RCW 19.330.050 Notice of violation required. (1) No action may be brought under RCW 19.330.020 unless the person subject to RCW 19.330.020 received written notice of the alleged use of the stolen or misappropriated information technology from the owner or exclusive licensee of the information technology or the owner's agent and the person: (a) Failed to establish that its use of the information technology in question did not violate RCW 19.330.020; or (b) failed, within ninety days after receiving such a notice, to cease use of the owner's stolen or misappropriated information technology. However, if the person commences and thereafter proceeds diligently to replace the information technology with information technology whose use would not violate RCW 19.330.020, such a period must be extended for an additional period of ninety days, not to exceed one hundred eighty days total. The information technology owner or the owner's agent may extend any period described in this section.

(2) To satisfy the requirements of this section, written notice must, under penalty of perjury: (a) Identify the stolen or misappropriated information technology; (b) identify the lawful owner or exclusive licensee of the information technology; (c) identify the applicable law the person is alleged to be violating and state that the notifier has a reasonable belief that the person has acquired, appropriated, or used the information technology in question without authorization of the owner of the information technology or the owner's authorized licensee in violation of such applicable law; (d) to the extent known by the notifier, state the manner in which the information technology is being used by the defendant; (e) state the articles or products to which the information technology relates; and

(f) specify the basis and the particular evidence upon which the notifier bases such an allegation.

(3) The written notification must state, under penalty of perjury, that, after a reasonable and good faith investigation, the information in the notice is accurate based on the notifier's reasonable knowledge, information, and belief. [2011 c 98 s 5.]

RCW 19.330.060 Who may bring an action—Injunction—Damages—Dismissal—Court authority. (1) No earlier than ninety days after the provision of notice in accordance with RCW 19.330.050, the attorney general, or any person described in subsection (5) of this section, may bring an action against any person that is subject to RCW 19.330.020:

(a) To enjoin violation of RCW 19.330.020, including by enjoining the person from selling or offering to sell in this state articles or products that are subject to RCW 19.330.020, except as provided in subsection (6) of this section. However, such an injunction does not encompass articles or products to be provided to a third party that establishes that such a third party has satisfied one or more of the affirmative defenses set forth in RCW 19.330.080(1) with respect to the manufacturer alleged to have violated RCW 19.330.020;

(b) Only after a determination by the court that the person has violated RCW 19.330.020, to recover the greater of:

(i) Actual direct damages, which may be imposed only against the person who violated RCW 19.330.020; or

(ii) Statutory damages of no more than the retail price of the stolen or misappropriated information technology, which may be imposed only against the person who violated RCW 19.330.020; or

(c) In the event the person alleged to have violated RCW 19.330.020 has been subject to a final judgment or has entered into a final settlement, or any products manufactured by such a person and alleged to violate RCW 19.330.020 have been the subject of an injunction or attachment order, in any federal or state court in this state or any other state, arising out of the same theft or misappropriation of information technology, the court shall dismiss the action with prejudice. If such a person is a defendant in an ongoing action, or any products manufactured by such a person and alleged to violate RCW 19.330.020 are the subject of an ongoing injunction or attachment order, in any federal or state court in this state or any other state, arising out of the same theft or misappropriation of information technology, the court shall stay the action against such a person pending resolution of the other action. In the event the other action results in a final judgment or final settlement, the court shall dismiss the action with prejudice against the person. Dismissals under this subsection are res judicata to actions filed against the person alleged to have violated RCW 19.330.020 arising out of the same theft or misappropriation of information technology.

(2) After determination by the court that a person has violated RCW 19.330.020 and entry of a judgment against the person for violating RCW 19.330.020, the attorney general, or a person described in subsection (5) of this section, may add to the action a claim for actual direct damages against a third party who sells or offers to sell in this state products made by that person in violation of RCW

19.330.020, subject to the provisions of RCW 19.330.080. However, damages may be imposed against a third party only if:

(a) The third party's agent for service of process was properly served with a copy of a written notice sent to the person alleged to have violated RCW 19.330.020 that satisfies the requirements of RCW 19.330.050 at least ninety days prior to the entry of the judgment;

(b) The person who violated RCW 19.330.020 did not make an appearance or does not have sufficient attachable assets to satisfy a judgment against the person;

(c) Such a person either manufactured the final product or produced a component equal to thirty percent or more of the value of the final product;

(d) Such a person has a direct contractual relationship with the third party respecting the manufacture of the final product or component; and

(e) The third party has not been subject to a final judgment or entered into a final settlement in any federal or state court in this state or any other state arising out of the same theft or misappropriation of information technology. However, in the event the third party is a party to an ongoing suit for damages, or has entered an appearance as an interested third party in proceedings in rem, in any federal or state court in this state or any other state arising out of the same theft or misappropriation of information technology, the court shall stay the action against the third party pending resolution of the other action. In the event the other action results in a final judgment, the court shall dismiss the action with prejudice against the third party and dismiss any in rem action as to any articles or products manufactured for such a third party or that have been or are to be supplied to such a third party. Dismissals under this subsection are res judicata to actions filed against the person alleged to have violated RCW 19.330.020 arising out of the same theft or misappropriation of information technology.

(3) An award of damages against such a third party pursuant to subsection (2) of this section must be the lesser of the retail price of the stolen or misappropriated information technology at issue or two hundred fifty thousand dollars, less any amounts recovered from the person adjudicated to have violated RCW 19.330.020, and subsection (4)(a) of this section does not apply to such an award or recovery against the third party.

(4) In an action under this chapter, a court may:

(a) Against the person adjudicated to have violated RCW 19.330.020, increase the damages up to three times the damages authorized by subsection (1)(b) of this section where the court finds that the person's use of the stolen or misappropriated information technology was willful;

(b) With respect to an award under subsection (1) of this section only, award costs and reasonable attorneys' fees to: (i) A prevailing plaintiff in actions brought by an injured person under RCW 19.330.020; or (ii) a prevailing defendant in actions brought by an allegedly injured person; and

(c) With respect to an action under subsection (2) of this section brought by a private plaintiff only, award costs and reasonable attorneys' fees to a third party for all litigation expenses (including, without limitation, discovery expenses) incurred by that party if it prevails on the requirement set forth in subsection (2)(c) of this section or who qualifies for an affirmative defense under RCW 19.330.080. However, in a case in which the third

party received a copy of the notification described in subsection (2)(a) of this section at least ninety days before the filing of the action under subsection (2) of this section, with respect to a third party's reliance on the affirmative defenses set forth in RCW 19.330.080(1) (c) and (d), the court may award costs and reasonable attorneys' fees only if all of the conduct on which the affirmative defense is based was undertaken by the third party, and the third party notified the plaintiff of the conduct, prior to the end of the ninety-day period.

(5) A person is deemed to have been injured by the sale or offer for sale of a directly competing article or product subject to RCW 19.330.020 if the person establishes by a preponderance of the evidence that:

(a) The person manufactures articles or products that are sold or offered for sale in this state in direct competition with articles or products that are subject to RCW 19.330.020;

(b) The person's articles or products were not manufactured using stolen or misappropriated information technology of the owner of the information technology;

(c) The person suffered economic harm, which may be shown by evidence that the retail price of the stolen or misappropriated information technology was twenty thousand dollars or more; and

(d) If the person is proceeding in rem or seeks injunctive relief, that the person suffered material competitive injury as a result of the violation of RCW 19.330.020.

(6)(a) If the court determines that a person found to have violated RCW 19.330.020 lacks sufficient attachable assets in this state to satisfy a judgment rendered against it, the court may enjoin the sale or offering for sale in this state of any articles or products subject to RCW 19.330.020, except as provided in RCW 19.330.040.

(b) To the extent that an article or product subject to RCW 19.330.020 is an essential component of a third party's article or product, the court shall deny injunctive relief as to such an essential component, provided that the third party has undertaken good faith efforts within the third party's rights under its applicable contract with the manufacturer to direct the manufacturer of the essential component to cease the theft or misappropriation of information technology in violation of RCW 19.330.020, which may be satisfied, without limitation, by the third party issuing a written directive to the manufacturer demanding that it cease the theft or misappropriation and demanding that the manufacturer provide the third party with copies of invoices, purchase orders, licenses, or other verification of lawful use of the information technology at issue.

(7) The court shall determine whether a cure period longer than the period reflected in RCW 19.330.050 would be reasonable given the nature of the use of the information technology that is the subject of the action and the time reasonably necessary either to bring such use into compliance with applicable law or to replace the information technology with information technology that would not violate RCW 19.330.020. If the court deems that a longer cure period would be reasonable, then the action shall be stayed until the end of that longer cure period. If by the end of that longer cure period, the defendant has established that its use of the information technology in question did not violate RCW 19.330.020, or the defendant ceased use of the stolen or misappropriated information technology, then the action must be dismissed. [2011 c 98 s 6.]

RCW 19.330.070 Attachment of articles or products. (1) In a case in which the court is unable to obtain personal jurisdiction over a person subject to RCW 19.330.020, the court may proceed in rem against any articles or products subject to RCW 19.330.020 sold or offered for sale in this state in which the person alleged to have violated RCW 19.330.020 holds title. Except as provided in RCW 19.330.040 and subsection[s] (2) through (4) of this section, all such articles or products are subject to attachment at or after the time of filing a complaint, regardless of the availability or amount of any monetary judgment.

(2) At least ninety days prior to the enforcement of an attachment order against articles or products pursuant to subsection (1) of this section, the court shall notify any person in possession of the articles or products of the pending attachment order. Prior to the expiration of the ninety-day period, any person for whom the articles or products were manufactured, or to whom the articles or products have been or are to be supplied, pursuant to an existing contract or purchase order, may:

(a) Establish that the person has satisfied one or more of the affirmative defenses set forth in RCW 19.330.080(1) with respect to the manufacturer alleged to have violated RCW 19.330.020, in which case the attachment order must be dissolved only with respect to those articles or products that were manufactured for such a person, or have been or are to be supplied to such a person, pursuant to an existing contract or purchase order; or

(b) Post a bond with the court equal to the retail price of the allegedly stolen or misappropriated information technology or twenty-five thousand dollars, whichever is less, in which case the court shall stay enforcement of the attachment order against the articles or products and shall proceed on the basis of its jurisdiction over the bond. The person posting the bond shall recover the full amount of such bond, plus interest, after the issuance of a final judgment.

(3) In the event the person posting the bond pursuant to subsection (2)(b) of this section is entitled to claim an affirmative defense in RCW 19.330.080, and that person establishes with the court that the person is entitled to any affirmative defense, the court shall award costs and reasonable attorneys' fees to the person posting the bond and against the plaintiff in the event the plaintiff proceeds with an action pursuant to RCW 19.330.060(2) against the person posting the bond.

(4) In the event that the court does not provide notification as described in subsection (2) of this section, the court, upon motion of any third party, shall stay the enforcement of the attachment order for ninety days as to articles or products manufactured for the third party, or that have been or are to be supplied to the third party, pursuant to an existing contract or purchase order, during which ninety-day period the third party may avail itself of the options set forth in subsection (2)(a) and (b) of this section. [2011 c 98 s 7.]

RCW 19.330.080 Third parties. (1) A court may not award damages against any third party pursuant to RCW 19.330.060(2) where that party, after having been afforded reasonable notice of at least ninety days by proper service upon such a party's agent for service of process and opportunity to plead any of the affirmative defenses set forth in this subsection, establishes by a preponderance of the evidence any of the following:

(a) Such a person is the end consumer or end user of an article or product subject to RCW 19.330.020, or acquired the article or product after its sale to an end consumer or end user;

(b) Such a person is a business with annual revenues not in excess of fifty million dollars;

(c) The person acquired the articles or products:

(i) And had either: A code of conduct or other written document governing the person's commercial relationships with the manufacturer adjudicated to have violated RCW 19.330.020 and which includes commitments, such as general commitments to comply with applicable laws, that prohibit use of the stolen or misappropriated information technology by such manufacturer; or written assurances from the manufacturer of the articles or products that the articles or products, to the manufacturer's reasonable knowledge, were manufactured without the use of stolen or misappropriated information technology in the manufacturer's business operations. However, with respect to this subsection (c) (i), within one hundred eighty days of receiving written notice of the judgment against the manufacturer for a violation of RCW 19.330.020 and a copy of a written notice that satisfies the requirements of RCW 19.330.050, the person must undertake commercially reasonable efforts to do any of the following:

(A) Exchange written correspondence confirming that such a manufacturer is not using the stolen or misappropriated information technology in violation of RCW 19.330.020, which may be satisfied, without limitation, by obtaining written assurances from the manufacturer accompanied by copies of invoices, purchase orders, licenses, or other verification of lawful use of the information technology at issue;

(B) Direct the manufacturer to cease the theft or misappropriation, which may be satisfied, without limitation, by the third party issuing a written directive to the manufacturer demanding that it cease such theft or misappropriation and demanding that the manufacturer provide the third party with copies of invoices, purchase orders, licenses, or other verification of lawful use of the information technology at issue; and for purposes of clarification, the third party need take no additional action to fully avail itself of this affirmative defense; or

(C) In a case in which the manufacturer has failed to cease such a theft or misappropriation within the one hundred eighty-day period, and the third party has not fulfilled either option (c) (i) (A) of this subsection or option (c) (i) (B) of this subsection, cease the future acquisition of the articles or products from the manufacturer during the period that the manufacturer continues to engage in the theft or misappropriation subject to RCW 19.330.020 where doing so would not constitute a breach of an agreement between the person and the manufacturer for the manufacture of the articles or products in question that was entered into on or before one hundred eighty days after July 22, 2011; or

(ii) Pursuant to an agreement between the person and a manufacturer for the manufacture of the articles or products in question that was entered into before one hundred eighty days after July 22, 2011. However, within one hundred eighty days of receiving written notice of the judgment against the manufacturer for a violation of RCW 19.330.020 and a copy of a written notice that satisfies the requirements of RCW 19.330.050, the person must undertake commercially reasonable efforts to do any of the following:

(A) Obtain from the manufacturer written assurances that such a manufacturer is not using the stolen or misappropriated information technology in violation of RCW 19.330.020, which may be satisfied, without limitation, by obtaining written assurances from the manufacturer accompanied by copies of invoices, purchase orders, licenses, or other verification of lawful use of the information technology at issue;

(B) Direct the manufacturer to cease the theft or misappropriation, which may be satisfied, without limitation, by the third party issuing a written directive to the manufacturer demanding that it cease such theft or misappropriation and demanding that the manufacturer provide the third party with copies of invoices, purchase orders, licenses, or other verification of lawful use of the information technology at issue; and for purposes of clarification, the third party need take no additional action to fully avail itself of this affirmative defense; or

(C) In a case in which the manufacturer has failed to cease the theft or misappropriation within the one hundred eighty-day period, and the third party has not fulfilled either option (c)(ii)(A) of this subsection or option (c)(ii)(B) of this subsection, cease the future acquisition of the articles or products from the manufacturer during the period that the manufacturer continues to engage in the theft or misappropriation subject to RCW 19.330.020 where doing so would not constitute a breach of such agreement;

(d) The person has made commercially reasonable efforts to implement practices and procedures to require its direct manufacturers, in manufacturing articles or products for such person, not to use stolen or misappropriated information technology in violation of RCW 19.330.020. A person may satisfy this subsection (1)(d) by:

(i) Adopting and undertaking commercially reasonable efforts to implement a code of conduct or similar written requirements, which are applicable to the person's direct manufacturers, that prohibit the use of stolen or misappropriated information technology by such a manufacturer, subject to a right of audit, and the person either: (A) Has a practice of auditing its direct manufacturers on a periodic basis in accordance with generally accepted industry standards; or (B) requires in its agreements with its direct manufacturers that they submit to audits by a third party, which may include a third-party association of businesses representing the owner of the stolen or misappropriated intellectual property, and further provides that a failure to remedy any deficiencies found in such an audit that constitute a violation of the applicable law of the jurisdiction where the deficiency occurred constitutes a breach of the contract, subject to cure within a reasonable period of time; or

(ii) Adopting and undertaking commercially reasonable efforts to implement a code of conduct or similar written requirements, which are applicable to the person's direct manufacturers, that prohibit use of stolen or misappropriated information technology by such a manufacturer, and the person undertakes practices and procedures to address compliance with the prohibition against the use of the stolen or misappropriated information technology in accordance with the applicable code of conduct or written requirements; or

(e) The person does not have a contractual relationship with the person alleged to have violated RCW 19.330.020 respecting the manufacture of the articles or products alleged to have been manufactured in violation of RCW 19.330.020.

(2) A third party must have the opportunity to be heard regarding whether an article or product is an essential component provided or to be provided to a third party, and must have the right to file a motion to dismiss any action brought against it under RCW 19.330.060(2).

(3) The court may not enforce any award for damages against such a third party until after the court has ruled on that party's claim of eligibility for any of the affirmative defenses set out in this section, and prior to such a ruling may allow discovery, in an action under RCW 19.330.060(2), only on the particular defenses raised by the third party.

(4) The court shall allow discovery against a third party on an issue only after all discovery on that issue between the parties has been completed and only if the evidence produced as a result of the discovery does not resolve an issue of material dispute between the parties.

(5) Any confidential or otherwise sensitive information submitted by a party pursuant to this section is subject to a protective order. [2011 c 98 s 8.]

RCW 19.330.090 Third parties—Time for award of damages. A court may not enforce an award of damages against a third party pursuant to RCW 19.330.060(2) for a period of eighteen months from July 22, 2011. [2011 c 98 s 9.]

RCW 19.330.100 Application of consumer protection act. A violation of this chapter may not be considered a violation of the state consumer protection act, and chapter 19.86 RCW does not apply to this chapter. The remedies provided under this chapter are the exclusive remedies for the parties. [2011 c 98 s 10.]