
SENATE BILL 5449

State of Washington

62nd Legislature

2011 Regular Session

By Senators Brown, Pflug, Carrell, Harper, Murray, Hobbs, Fain, Delvin, Roach, Ericksen, Shin, Tom, Kohl-Welles, and Kilmer

Read first time 01/26/11. Referred to Committee on Labor, Commerce & Consumer Protection.

1 AN ACT Relating to the unfair competition that occurs when stolen
2 or misappropriated information technology is used to manufacture
3 products sold or offered for sale in this state; adding a new chapter
4 to Title 19 RCW; and prescribing penalties.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 NEW SECTION. **Sec. 1.** The definitions in this section apply
7 throughout this chapter unless the context clearly requires otherwise.

8 (1) "Manufacture" means to develop, manufacture, produce, or
9 assemble an article or product, in whole or substantial part.

10 (2) "Stolen or misappropriated information technology" means
11 hardware or software that a person acquired, appropriated, or used in
12 violation of applicable law.

13 (3) "Using information technology in business operations" means to
14 use such technology to support in any way the design, manufacture,
15 distribution, marketing, or sales of the articles or products subject
16 to section 2 of this act.

17 NEW SECTION. **Sec. 2.** (1) A person who manufactures an article or
18 product while using stolen or misappropriated information technology in

1 its business operations is deemed to engage in unfair competition where
2 such an article or product is sold or offered for sale in this state,
3 either separately or as a component of another article or product, and
4 in competition with an article or product that was manufactured without
5 the use of the stolen or misappropriated information technology in
6 violation of this section. Any person who engages in this unfair
7 competition, and any articles or products manufactured by the person in
8 violation of this chapter, are subject to the liabilities and remedial
9 provisions of this chapter, except as otherwise provided in sections 3,
10 4, and 8 of this act.

11 (2) In an action under this chapter, the use of stolen or
12 misappropriated information technology may be established from the
13 business records of a person subject to this section, by evidence
14 derived from techniques used by the information technology owner to
15 establish use of stolen or misappropriated information technology, or
16 by other competent evidence.

17 (3) No action may be brought under this chapter where:

18 (a) The end product or article sold or offered for sale in this
19 state and alleged to violate subsection (1) of this section is a
20 copyrightable work under the United States copyright act;

21 (b) The allegation that the information technology is stolen or
22 misappropriated is based on a claim that the information technology
23 infringes a patent or trade secret under applicable law or that could
24 be brought under any provision of Title 35 of the United States Code;
25 or

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

31 NEW SECTION. **Sec. 3.** (1) No action may be brought under section
32 2 of this act unless the person subject to section 2 of this act
33 received written notice of its alleged use of the stolen or
34 misappropriated information technology from the owner of the
35 information technology or the owner's authorized representative and the
36 person failed to cease use of the owner's stolen or misappropriated

1 information technology within ninety days after receiving such a
2 notice, subject to any extension approved in writing by the information
3 technology owner or its authorized representative.

4 (2) To satisfy the requirements of this section, a written notice
5 must: (a) Identify the stolen or misappropriated information
6 technology; (b) identify the lawful owner of the information
7 technology; (c) state that the notifier has a reasonable belief that
8 the person has acquired, appropriated, or used the information
9 technology in question in violation of applicable law; and (d) if known
10 by the notifier, state the manner in which the information technology
11 is being used by the defendant.

12 NEW SECTION. **Sec. 4.** In an action under section 2 of this act, a
13 defendant may avoid liability by proving by a preponderance of the
14 evidence that: (1) The aggregate retail value of the stolen or
15 misappropriated information technology at the time of the alleged
16 violation is less than ten thousand dollars; or (2) the stolen or
17 misappropriated information technology constitutes a de minimis
18 integrated component of a separate information technology product, and
19 the component was not available for retail purchase on a stand-alone
20 basis at the time it was acquired by the defendant. The retail value
21 of stolen or misappropriated information technology is the retail price
22 of the information technology in this state, multiplied by the number
23 of stolen or misappropriated items used in the business operations of
24 the person alleged to have violated section 2 of this act.

25 NEW SECTION. **Sec. 5.** In any action under this chapter, the court
26 shall, pursuant to applicable rules of discovery, permit the plaintiff
27 or its representative or, where appropriate, a judicially appointed
28 designee, to enter onto the defendant's business premises to inspect
29 any information technology, records, files, or other evidence relevant
30 to the alleged use of stolen or misappropriated information technology
31 in violation of section 2 of this act. Any discovery taken pursuant to
32 this section is in addition to, and does not limit, any other discovery
33 permitted under the applicable rules, including rules providing for
34 entry onto land or other property for inspection and other purposes.

1 NEW SECTION. **Sec. 6.** (1)(a) At least ninety days after the
2 provision of notice in accordance with section 3 of this act, the
3 attorney general, or any person injured by reason of a violation of
4 section 2 of this act, or any association of businesses representing
5 such a person may bring an action against any person, article, or
6 product that is subject to section 2 of this act for the following:

7 (i) To enjoin violation of section 2 of this act, including by
8 enjoining such a person from selling or offering to sell in this state
9 articles or products that are subject to section 2 of this act.

10 (ii) To recover the greater of:

11 (A) Actual damages; or

12 (B) For each product sold or offered for sale in violation of
13 section 2 of this act, an amount of up to twenty percent of the retail
14 price in this state of such an article or product.

15 (b) In any action for injunctive relief under this chapter,
16 irreparable harm and interim harm to the plaintiff shall be presumed
17 where the court finds that articles or products subject to section 2 of
18 this act are being sold or offered for sale in this state.

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

20 (a) Increase the damages up to three times the damages authorized
21 by subsection (1)(a)(ii) of this section where the court finds that the
22 defendant's use of the stolen or misappropriated information technology
23 was willful; and

24 (b) Award costs and reasonable attorneys' fees to: (i) A
25 prevailing plaintiff in all actions brought under section 2 of this
26 act; or (ii) a prevailing defendant in actions brought by an injured
27 person.

28 (3) A person is deemed to have been injured by the sale or offer
29 for sale of an article or product subject to section 2 of this act if
30 the person establishes by a preponderance of the evidence that:

31 (a) The person manufactures articles or products that are sold or
32 offered for sale in this state in competition with articles or products
33 that are subject to section 2 of this act; and

34 (b) The person's articles or products were not manufactured using
35 the stolen or misappropriated information technology in violation of
36 section 2 of this act.

37 (4) If the court determines that a person found to have violated
38 section 2 of this act lacks sufficient attachable assets in this state

1 to satisfy a judgment rendered against it, the court shall enjoin the
2 sale or offering for sale in this state of any articles or products
3 subject to section 2 of this act, except as provided in section 8 of
4 this act. Any person who is served with or otherwise subject to an
5 order for injunctive relief issued under this section must be afforded
6 reasonable notice and opportunity to be heard.

7 NEW SECTION. **Sec. 7.** The court may proceed in rem against any
8 articles or products alleged to be subject to section 2 of this act,
9 including any articles or products sold or offered for sale in this
10 state. Except as provided in section 8 of this act, all such articles
11 or products are subject to attachment at or after the time of filing a
12 complaint, regardless of: (1) The availability or amount of any
13 monetary judgment; (2) who has title to the articles or products; and
14 (3) the existence of the grounds specified in RCW 6.25.030. If the
15 court determines that any of the articles or products violate section
16 2 of this act, the court shall, acting in rem, enjoin the sale or
17 offering for sale in this state of the articles or products, except as
18 provided in section 8 of this act. Any third party who is served with
19 or otherwise subject to an order for attachment or an injunction acting
20 in rem must be afforded reasonable notice and opportunity to be heard.

21 NEW SECTION. **Sec. 8.** A court may not enforce an order for
22 attachment or injunctive relief under section 6(4) or 7 of this act
23 against a person, other than the manufacturer of the articles or
24 products, who has an interest in an article or product subject to
25 section 2 of this act where such a person establishes by a
26 preponderance of the evidence that:

27 (1) Such a person is the end consumer of an article or product
28 subject to such an order, or acquired the article or product after its
29 sale to an end consumer;

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

32 (3) The person acquired the articles or products in good faith
33 reliance on written assurances from the manufacturer or supplier of the
34 articles or products that the articles or products were manufactured
35 without the use of stolen or misappropriated information technology,
36 provided that within one hundred eighty days of receiving a written

1 notice that satisfies the requirements of section 3(2) of this act, the
2 person implements commercially reasonable practices and procedures to:
3 (a) Cause such a manufacturer or supplier to cease such a theft or
4 misappropriation; or (b) prevent future acquisition of articles or
5 products from such a manufacturer or supplier subject to section 2 of
6 this act; or

7 (4) The person has made commercially reasonable efforts to prevent
8 the acquisition of articles or products subject to section 2 of this
9 act and has acted in good faith to ensure compliance with these
10 practices and procedures to prevent acquisition of these articles and
11 products. A person may satisfy this subsection by proving that its
12 contracts with the manufacturer or supplier of an article or product
13 subject to section 2 of this act prohibits the use of stolen or
14 misappropriated information technology, subject to a right of audit,
15 and such a person has an established practice of auditing its
16 manufacturers and has made good faith efforts to verify compliance with
17 the prohibition during the course of the audits.

18 NEW SECTION. **Sec. 9.** (1) The legislature finds that the practices
19 covered by this chapter are matters vitally affecting the public
20 interest for the purpose of applying the consumer protection act,
21 chapter 19.86 RCW. A violation of this chapter is not reasonable in
22 relation to the development and preservation of business and is an
23 unfair or deceptive act in trade or commerce and an unfair method of
24 competition for the purpose of applying the consumer protection act,
25 chapter 19.86 RCW.

26 (2) The penalties, remedies, and procedures provided by chapter
27 19.86 RCW may not be construed to limit the liabilities and remedial
28 provision of this chapter.

29 NEW SECTION. **Sec. 10.** If any provision of this act or its
30 application to any person or circumstance is held invalid, the
31 remainder of the act or the application of the provision to other
32 persons or circumstances is not affected.

33 NEW SECTION. **Sec. 11.** Sections 1 through 10 of this act

1 constitute a new chapter in Title 19 RCW.

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