

HOUSE No. 2842

The Commonwealth of Massachusetts

PRESENTED BY:

Michael J. Moran

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act relative to unfair competition.

PETITION OF:

NAME:

Michael J. Moran

DISTRICT/ADDRESS:

18th Suffolk

HOUSE No. 2842

By Mr. Moran of Boston, a petition (accompanied by bill, House, No. 2842) of Michael J. Moran relative to the use of stolen or misappropriated information technology in the manufacturing of goods. The Judiciary.

The Commonwealth of Massachusetts

—————
In the Year Two Thousand Eleven
—————

An Act relative to unfair competition.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 Section 1. Chapter 93 of the General Laws is hereby amended by adding the following
2 new section:

3 Section 115. (a) (1) Unfair competition. — Any person who manufactures any article or
4 product while using stolen or misappropriated information technology in its business operations
5 shall be deemed to engage in unfair competition where such article or product is sold or offered
6 for sale in this state, either separately or as a component of another article or product, and in
7 competition with an article or product that was manufactured without the use of such stolen or
8 misappropriated information technology in violation of this subsection (a). Any person who
9 engages in such unfair competition, and any articles or products manufactured by such person in
10 violation of this subsection (a), shall be subject to the liabilities and remedial provisions of this
11 Section, except as provided in subsections (b), (c), and (g).

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

17 (3) Definitions. — For purposes of this Section:

18 (A) “manufacture” means to develop, manufacture, produce, or assemble an article or
19 product subject to subsection (a), in whole or substantial part, but shall not include contracting
20 with or otherwise engaging another person to develop, manufacture, produce, or assemble an
21 article or product subject to subsection (a).

22 (B) “stolen or misappropriated information technology” means hardware or software that
23 the person referred to in subsection (a)(1) acquired, appropriated, or used in violation of
24 applicable law, but shall not include hardware or software that was not available for retail
25 purchase on a standalone basis at or before the time it was acquired, appropriated, or used by
26 such person.

27 (C) information technology shall be considered to be used in a person’s business
28 operations if the person uses such technology to support in any way the design, manufacture,
29 distribution, marketing, or sales of the articles or products subject to subsection (a).

30 (D) “article or product” shall exclude any services sold or offered for sale in this state.

31 (4) Limitations on subsection (a). -- No action may be brought under this section, and no
32 liability shall result, where --

33 (A) Sale of copyrightable end products. — the end article or end product sold or offered
34 for sale in this state and alleged to violate subsection (a)(1) is a copyrightable work under the
35 U.S. Copyright Act;

36 (B) Claims based on patent or trade secret infringement. — the allegation that the
37 information technology is stolen or misappropriated is based on a claim that such information
38 technology infringes a patent or trade secret under applicable law or that could be brought under
39 any provision of Title 35 of the United States Code; or

40 (C) Claims involving open-source licenses. -- the allegation that the information
41 technology is stolen or misappropriated is based on a claim that the defendant's use of the
42 information technology violates the terms of a license that allows users to modify and re-
43 distribute any source code associated with the technology free of charge.

44 (b) (1) Notice and opportunity to cure. — No action may be brought under subsection (a)
45 unless the person subject to subsection (a) received written notice of its alleged use of the stolen
46 or misappropriated information technology from the owner of the information technology or the
47 owner's authorized representative and the person failed to cease use of the owner's stolen or
48 misappropriated information technology within 90 days after receiving such notice, subject to
49 any extension approved in writing by the information technology owner or its authorized
50 representative.

51 (2) Notice requirements. — To satisfy the requirements of this subsection, a written
52 notice must: (A) identify the stolen or misappropriated information technology; (B) identify the
53 lawful owner of the information technology; (C) state that the notifier has a reasonable belief that
54 the person has acquired, appropriated, or used the information technology in question in

55 violation of applicable law; and (D) if known by the notifier, state the manner in which such
56 information technology is being used by the defendant.

57 (c) Affirmative defense to claims based on de minimis uses of stolen information
58 technology. — In an action under subsection (a), a person shall avoid liability by proving by a
59 preponderance of the evidence that (i) the aggregate retail value of the stolen or misappropriated
60 information technology at the time of the alleged violation is less than \$10,000. The “retail
61 value” of stolen or misappropriated information technology is the retail price of the information
62 technology in this state, multiplied by the number of stolen or misappropriated items used in the
63 business operations of the person alleged to have violated subsection (a).

64 (d) Right to inspect. — In any action under this Section, the court shall, pursuant to
65 applicable rules of discovery, permit the plaintiff or its representative or, where appropriate, a
66 judicially appointed designee, to enter onto the defendant’s business premises to inspect any
67 information technology, records, files, or other evidence relevant to the alleged use of stolen or
68 misappropriated information technology in violation of subsection (a)(1). Any discovery taken
69 pursuant to this subsection (d) shall be in addition to, and shall not limit, any other discovery
70 permitted under the applicable rules, including rules providing for entry onto land or other
71 property for inspection and other purposes.

72 (e) (1) Remedies. — No earlier than 90 days after the provision of notice in accordance
73 with subsection (b), the Attorney General, or any person injured by reason of a violation of
74 subsection (a), or any association of businesses representing any such person, may bring an
75 action against any person, article, or product that is subject to subsection (a):

76 (A) Injunctive relief. — to enjoin violation of subsection (a), including by enjoining any
77 such person from selling or offering to sell in this state articles or products that are subject to
78 subsection (a).

79 (B) Actual or statutory damages. — to recover the greater of:

80 (i) actual damages; or

81 (ii) statutory damages of no more than three times the retail value of the stolen or
82 misappropriated information technology, which shall be available only if the court finds that the
83 value of the stolen or misappropriated information technology at issue was material.

84 (C) In any action for injunctive relief under this Section, irreparable harm and interim
85 harm to the plaintiff shall be presumed where the court finds that articles or products subject to
86 subsection (a) are being sold or offered for sale in this state.

87 (2) Award of enhanced damages and attorney’s fees. —In an action under this Section, a
88 court may:

89 (A) increase the damages up to three times the damages authorized by subsection
90 (e)(1)(B) where the court finds that the defendant’s use of the stolen or misappropriated
91 information technology was willful; and

92 (B) award costs and reasonable attorney’s fees to (i) a prevailing plaintiff in all actions
93 brought under subsection (a); or (ii) a prevailing defendant in actions brought by an injured
94 person.

95 (3) Injured persons defined. — A person shall be deemed to have been injured by the sale
96 or offer for sale of an article or product subject to subsection (a) if the person establishes by a
97 preponderance of the evidence that:

98 (A) the person manufactures articles or products that are sold or offered for sale in this
99 state in competition with articles or products that are subject to subsection (a); and

100 (B) the person's articles or products were not manufactured using such stolen or
101 misappropriated information technology in violation of subsection (a).

102 (4) Enforcement of injunctive relief. — If the court determines that a person found to
103 have violated subsection (a) lacks sufficient attachable assets in this state to satisfy a judgment
104 rendered against it, the court shall enjoin the sale or offering for sale in this state of any articles
105 or products subject to subsection (a), except as provided in subsection (g) below. Any third party
106 who is served with or otherwise subject to an order for injunctive relief issued hereunder shall be
107 afforded reasonable notice of at least 90 days and opportunity to plead any of the affirmative
108 defenses set forth in subsection (g) below, and no injunction may be enforced against such third
109 party until its eligibility for such affirmative defense is resolved.

110 (f) In rem jurisdiction. — The court may proceed in rem against any articles or products
111 alleged to be subject to subsection (a), including any articles or products sold or offered for sale
112 in this state. Except as provided in subsection (g), all such articles or products shall be subject to
113 attachment at or after the time of filing a complaint, regardless of the availability or amount of
114 any monetary judgment and regardless of who has title to the articles or products. If the court
115 determines that any such articles or products violate subsection (a), the court shall, acting in rem,
116 enjoin the sale or offering for sale in this state of such articles or products, except as provided in

117 subsection (g) below. Any third party who is served with or is otherwise subject to an order for
118 attachment or an injunction acting in rem shall be afforded reasonable notice of at least 90 days
119 and opportunity to plead any of the affirmative defenses set forth in subsection (g) below, and no
120 attachment order may be enforced against such third party until its eligibility for such affirmative
121 defense is resolved.

122 (g) Affirmative defenses for third parties. — A court may not enforce an order for
123 attachment or injunctive relief under subsection (e)(4) or subsection (f) against a person (other
124 than the manufacturer of such articles or products) who has an interest in an article or product
125 subject to subsection (a) where such person establishes by a preponderance of the evidence that
126 —

127 (1) End consumers. — such person is the end-consumer of an article or product subject to
128 such order, or acquired the article or product after its sale to an end-consumer;

129 (2) Small or medium enterprises. — such person is a business with annual revenues not in
130 excess of \$50 million;

131 (3) Products acquired in good faith. — the person acquired the articles or products in
132 good-faith reliance on either (1) a code of conduct or similar written document that governs the
133 person's commercial relationships with the manufacturer alleged to have violated subsection
134 (a)(1) and which includes commitments that prohibit use of the stolen or misappropriated
135 information technology at issue by such manufacturer, or (2) written assurances from the
136 manufacturer or supplier of such articles or products that such articles or products, to the best of
137 the manufacturer's or supplier's knowledge, were manufactured without the use of stolen or
138 misappropriated information technology in the manufacturer's or supplier's business operations;

139 provided, however, that within 180 days of receiving service under subsection (e)(4) or (f) or
140 receiving a written notice that satisfies the requirements of subsections (b)(1) and (b)(2), the
141 person uses commercially reasonable efforts to implement commercially reasonable practices
142 and procedures to: (i) cause such manufacturer or supplier to cease such theft or
143 misappropriation; or (ii) to prevent future acquisition of articles or products from such
144 manufacturer or supplier subject to subsection (a);

145 (4) Implementation of responsible supply chain practices. — the person has made
146 commercially reasonable efforts to prevent the acquisition of articles or products subject to this
147 subsection (a) by: (i) acting in good faith to require its manufacturers and suppliers not to use
148 stolen or misappropriated information technology in a manner that would violate subsection (a);
149 and (ii) using commercially reasonable efforts to implement such practices and procedures to
150 prevent acquisition of such articles and products. A person may satisfy this subparagraph (4) by
151 demonstrating that its contracts with direct manufacturers, or any code of conduct or similar
152 written document to which the person adheres and which is applicable to such direct
153 manufacturers, prohibit the use of the stolen or misappropriated information technology at issue
154 by such manufacturer, subject to a general right of audit, and such person has a practice of
155 auditing its direct manufacturers on a periodic basis in accordance with generally accepted
156 industry standards; or

157 (5) No contractual relationship. -- the person does not have a contractual relationship
158 with the person alleged to have violated subsection (a) respecting the manufacture or supply of
159 the articles or products alleged to have been manufactured in violation of subsection (a).

160 (h) Transition period. -- A court may not enforce an order issued pursuant to subsection
161 (e)(4) or (f) of this section against a third party for a period of eighteen months from the date of
162 enactment of this Act.

163 (i) Severability. — If any subsection, clause, sentence, paragraph, or part of this Section
164 shall be adjudged by any court of competent jurisdiction to be invalid, that judgment shall not
165 affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the
166 clause, sentence, paragraph, section or part thereof directly involved in the controversy in which
167 the judgment shall have been rendered.