

SSB 5449 - S AMD 116

By Senators Brown, Hill

ADOPTED 03/03/2011

1 Strike everything after the enacting clause and insert the
2 following:

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

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

11 (2) "Copyrightable end product" means a work within the subject
12 matter of copyright as specified by section 102 of the United States
13 copyright act.

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

21 (4) "Manufacture" means to directly manufacture, produce, or
22 assemble an article or product subject to section 2 of this act, in
23 whole or substantial part, but does not include contracting with or
24 otherwise engaging another person, or that person engaging another
25 person, to develop, manufacture, produce, or assemble an article or
26 product subject to section 2 of this act.

27 (5) "Material competitive injury" means at least a three percent
28 retail price difference between the article or product made in
29 violation of section 2 of this act designed to harm competition and a

1 directly competing article or product that was manufactured without the
2 use of stolen or misappropriated information technology, with such a
3 price difference occurring over a four-month period of time.

4 (6) "Retail price" means the retail price of stolen or
5 misappropriated information technology charged at the time of, and in
6 the jurisdiction where, the alleged theft or misappropriation occurred,
7 multiplied by the number of stolen or misappropriated items used in the
8 business operations of the person alleged to have violated section 2 of
9 this act.

10 (7)(a) "Stolen or misappropriated information technology" means
11 hardware or software that the person referred to in section 2 of this
12 act acquired, appropriated, or used without the authorization of the
13 owner of the information technology or the owner's authorized licensee
14 in violation of applicable law, but does not include situations in
15 which the hardware or software alleged to have been stolen or
16 misappropriated was not available for retail purchase on a stand-alone
17 basis at or before the time it was acquired, appropriated, or used by
18 such a person.

19 (b) Information technology is considered to be used in a person's
20 business operations if the person uses the technology in the
21 manufacture, distribution, marketing, or sales of the articles or
22 products subject to section 2 of this act.

23 NEW SECTION. **Sec. 2.** Any person who manufactures an article or
24 product while using stolen or misappropriated information technology in
25 its business operations after notice and opportunity to cure as
26 provided in section 5 of this act and, with respect to remedies sought
27 under section 6(6) or 7 of this act, causes a material competitive
28 injury as a result of such use of stolen or misappropriated information
29 technology, is deemed to engage in an unfair act where such an article
30 or product is sold or offered for sale in this state, either separately
31 or as a component of another article or product, and in competition
32 with an article or product sold or offered for sale in this state that
33 was manufactured without violating this section. A person who engages
34 in such an unfair act, and any articles or products manufactured by the
35 person in violation of this section, is subject to the liabilities and
36 remedial provisions of this chapter in an action by the attorney

1 general or any person described in section 6(5) of this act, except as
2 provided in sections 3 through 9 of this act.

3 NEW SECTION. **Sec. 3.** No action may be brought under this chapter,
4 and no liability results, where:

5 (1) The end article or end product sold or offered for sale in this
6 state and alleged to violate section 2 of this act is:

7 (a) A copyrightable end product;

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

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

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

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

29 (4) The allegation is based on a claim that the person violated
30 section 2 of this act by aiding, abetting, facilitating, or assisting
31 someone else to acquire, appropriate, use, sell, or offer to sell, or
32 by providing someone else with access to, information technology
33 without authorization of the owner of the information technology or the
34 owner's authorized licensee in violation of applicable law.

35 NEW SECTION. **Sec. 4.** No injunction may issue against a person
36 other than the person adjudicated to have violated section 2 of this

1 act, and no attachment order may issue against articles or products
2 other than articles or products in which the person alleged to violate
3 section 2 of this act holds title. A person other than the person
4 alleged to violate section 2 of this act includes any person other than
5 the actual manufacturer who contracts with or otherwise engages another
6 person to develop, manufacture, produce, market, distribute, advertise,
7 or assemble an article or product alleged to violate section 2 of this
8 act.

9 NEW SECTION. **Sec. 5.** (1) No action may be brought under section
10 2 of this act unless the person subject to section 2 of this act
11 received written notice of the alleged use of the stolen or
12 misappropriated information technology from the owner or exclusive
13 licensee of the information technology or the owner's agent and the
14 person: (a) Failed to establish that its use of the information
15 technology in question did not violate section 2 of this act; or (b)
16 failed, within ninety days after receiving such a notice, to cease use
17 of the owner's stolen or misappropriated information technology.
18 However, if the person commences and thereafter proceeds diligently to
19 replace the information technology with information technology whose
20 use would not violate section 2 of this act, such a period must be
21 extended for an additional period of ninety days, not to exceed one
22 hundred eighty days total. The information technology owner or the
23 owner's agent may extend any period described in this section.

24 (2) To satisfy the requirements of this section, written notice
25 must, under penalty of perjury: (a) Identify the stolen or
26 misappropriated information technology; (b) identify the lawful owner
27 or exclusive licensee of the information technology; (c) identify the
28 applicable law the person is alleged to be violating and state that the
29 notifier has a reasonable belief that the person has acquired,
30 appropriated, or used the information technology in question without
31 authorization of the owner of the information technology or the owner's
32 authorized licensee in violation of such applicable law; (d) to the
33 extent known by the notifier, state the manner in which the information
34 technology is being used by the defendant; (e) state the articles or
35 products to which the information technology relates; and (f) specify
36 the basis and the particular evidence upon which the notifier bases
37 such an allegation.

1 (3) The written notification must state, under penalty of perjury,
2 that, after a reasonable and good-faith investigation, the information
3 in the notice is accurate based on the notifier's reasonable knowledge,
4 information, and belief.

5 NEW SECTION. **Sec. 6.** (1) No earlier than ninety days after the
6 provision of notice in accordance with section 5 of this act, the
7 attorney general, or any person described in subsection (5) of this
8 section, may bring an action against any person that is subject to
9 section 2 of this act:

10 (a) To enjoin violation of section 2 of this act, including by
11 enjoining the person from selling or offering to sell in this state
12 articles or products that are subject to section 2 of this act, except
13 as provided in subsection (6) of this section. However, such an
14 injunction does not encompass articles or products to be provided to a
15 third party that establishes that such a third party has satisfied one
16 or more of the affirmative defenses set forth in section 8(1) of this
17 act with respect to the manufacturer alleged to have violated section
18 2 of this act;

19 (b) Only after a determination by the court that the person has
20 violated section 2 of this act, to recover the greater of:

21 (i) Actual damages, which may be imposed only against the person
22 who violated section 2 of this act; or

23 (ii) Statutory damages of no more than the retail price of the
24 stolen or misappropriated information technology, which may be imposed
25 only against the person who violated section 2 of this act; or

26 (c) In the event the person alleged to have violated section 2 of
27 this act has been subject to a final judgment or has entered into a
28 final settlement, or any products manufactured by such a person and
29 alleged to violate section 2 of this act have been the subject of an
30 injunction or attachment order, in any federal or state court in this
31 state or any other state, arising out of the same theft or
32 misappropriation of information technology, the court shall dismiss the
33 action. If such a person is a defendant in an ongoing action, or any
34 products manufactured by such a person and alleged to violate section
35 2 of this act are the subject of an ongoing injunction or attachment
36 order, in any federal or state court in this state or any other state,
37 arising out of the same theft or misappropriation of information

1 technology, the court shall stay the action against such a person
2 pending resolution of the other action. In the event the other action
3 results in a final judgment or final settlement, the court shall
4 dismiss the action against the person.

5 (2) After determination by the court that a person has violated
6 section 2 of this act and entry of a judgment against the person for
7 violating section 2 of this act, the attorney general, or a person
8 described in subsection (5) of this section, may add to the action a
9 claim for actual damages against a third party who sells or offers to
10 sell in this state products made by that person in violation of section
11 2 of this act, subject to the provisions of section 8 of this act.
12 However, damages may be imposed against a third party only if:

13 (a) The third party was provided a copy of a written notice sent to
14 the person alleged to have violated section 2 of this act that
15 satisfies the requirements of section 5 of this act at least ninety
16 days prior to the entry of the judgment;

17 (b) The person who violated section 2 of this act did not make an
18 appearance or does not have sufficient attachable assets to satisfy a
19 judgment against the person;

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

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

26 (e) The third party has not been subject to a final judgment in any
27 federal or state court in this state or any other state arising out of
28 the same theft or misappropriation of information technology. However,
29 in the event the third party is a party to an ongoing suit for damages,
30 or has entered an appearance as an interested third party in
31 proceedings in rem, in any federal or state court in this state or any
32 other state arising out of the same theft or misappropriation of
33 information technology, the court shall stay the action against the
34 third party pending resolution of the other action. In the event the
35 other action results in a final judgment, the court shall dismiss the
36 action against the third party and any in rem action as to any articles
37 or products manufactured for such a third party or that have been or
38 are to be supplied to such a third party.

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

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

9 (a) Against the person adjudicated to have violated section 2 of
10 this act, increase the damages up to three times the damages authorized
11 by subsection (1)(b) of this section where the court finds that the
12 person's use of the stolen or misappropriated information technology
13 was willful;

14 (b) With respect to an award under subsection (1) of this section
15 only, award costs and reasonable attorneys' fees to: (i) A prevailing
16 plaintiff in actions brought by an injured person under section 2 of
17 this act; or (ii) a prevailing defendant in actions brought by an
18 allegedly injured person; and

19 (c) With respect to an action under subsection (2) of this section
20 brought by a private plaintiff only, award costs and reasonable
21 attorneys' fees to a third party who qualifies for an affirmative
22 defense under section 8 of this act. However, in a case in which the
23 third party received a copy of the notification described in subsection
24 (2)(a) of this section at least ninety days before the filing of the
25 action under subsection (2) of this section, with respect to a third
26 party's reliance on the affirmative defenses set forth in section 8(1)
27 (c) and (d) of this act, the court may award costs and reasonable
28 attorneys' fees only if all of the conduct on which the affirmative
29 defense is based was undertaken by the third party, and the third party
30 notified the plaintiff of the conduct, prior to the end of the ninety-
31 day period.

32 (5) A person is deemed to have been injured by the sale or offer
33 for sale of a directly competing article or product subject to section
34 2 of this act if the person establishes by a preponderance of the
35 evidence that:

36 (a) The person manufactures articles or products that are sold or
37 offered for sale in this state in direct competition with articles or
38 products that are subject to section 2 of this act;

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

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

7 (d) If the person is proceeding in rem or seeks injunctive relief,
8 that the person suffered material competitive injury as a result of the
9 violation of section 2 of this act.

10 (6)(a) If the court determines that a person found to have violated
11 section 2 of this act lacks sufficient attachable assets in this state
12 to satisfy a judgment rendered against it, the court may enjoin the
13 sale or offering for sale in this state of any articles or products
14 subject to section 2 of this act, except as provided in section 4 of
15 this act.

16 (b) To the extent that an article or product subject to section 2
17 of this act is an essential component of a third party's article or
18 product, the court shall deny injunctive relief as to such an essential
19 component, provided that the third party has undertaken good faith
20 efforts within the third party's rights under its applicable contract
21 with the manufacturer to direct the manufacturer of the essential
22 component to cease the theft or misappropriation of information
23 technology in violation of section 2 of this act, which may be
24 satisfied, without limitation, by the third party issuing a written
25 directive to the manufacturer demanding that it cease the theft or
26 misappropriation and demanding that the manufacturer provide the third
27 party with copies of invoices, purchase orders, licenses, or other
28 verification of lawful use of the information technology at issue.

29 (7) The court shall determine whether a cure period longer than the
30 period reflected in section 5 of this act would be reasonable given the
31 nature of the use of the information technology that is the subject of
32 the action and the time reasonably necessary either to bring such use
33 into compliance with applicable law or to replace the information
34 technology with information technology that would not violate section
35 2 of this act. If the court deems that a longer cure period would be
36 reasonable, then the action shall be stayed until the end of that
37 longer cure period. If by the end of that longer cure period, the
38 defendant has established that its use of the information technology in

1 question did not violate section 2 of this act, or the defendant ceased
2 use of the stolen or misappropriated information technology, then the
3 action must be dismissed.

4 NEW SECTION. **Sec. 7.** (1) In a case in which the court is unable
5 to obtain personal jurisdiction over a person subject to section 2 of
6 this act, the court may proceed in rem against any articles or products
7 subject to section 2 of this act sold or offered for sale in this state
8 in which the person alleged to have violated section 2 of this act
9 holds title. Except as provided in section 4 of this act and
10 subsection (2) through (4) of this section, all such articles or
11 products are subject to attachment at or after the time of filing a
12 complaint, regardless of the availability or amount of any monetary
13 judgment.

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

22 (a) Establish that the person has satisfied one or more of the
23 affirmative defenses set forth in section 8(1) of this act with respect
24 to the manufacturer alleged to have violated section 2 of this act, in
25 which case the attachment order must be dissolved only with respect to
26 those articles or products that were manufactured for such a person, or
27 have been or are to be supplied to such a person, pursuant to an
28 existing contract or purchase order; or

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

36 (3) In the event the person posting the bond pursuant to subsection
37 (2)(b) of this section is entitled to claim an affirmative defense in

1 section 8 of this act, and that person establishes with the court that
2 the person is entitled to any affirmative defense, the court shall
3 award costs and reasonable attorneys' fees to the person posting the
4 bond and against the plaintiff in the event the plaintiff proceeds with
5 an action pursuant to section 6(2) of this act against the person
6 posting the bond.

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

15 NEW SECTION. **Sec. 8.** (1) A court may not award damages against
16 any third party pursuant to section 6(2) of this act where that party,
17 after having been afforded reasonable notice of at least ninety days
18 and opportunity to plead any of the affirmative defenses set forth in
19 this subsection, establishes by a preponderance of the evidence any of
20 the following:

21 (a) Such a person is the end consumer or end user of an article or
22 product subject to section 2 of this act, or acquired the article or
23 product after its sale to an end consumer or end user;

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

26 (c) The person acquired the articles or products:

27 (i) In good faith reliance on either: (A) A code of conduct or
28 other written document that governs the person's commercial
29 relationships with the manufacturer adjudicated to have violated
30 section 2 of this act and which includes commitments, such as general
31 commitments to comply with applicable laws, that prohibit use of the
32 stolen or misappropriated information technology by such manufacturer;
33 or (B) written assurances from the manufacturer of the articles or
34 products that the articles or products, to the manufacturer's
35 reasonable knowledge, were manufactured without the use of stolen or
36 misappropriated information technology in the manufacturer's business
37 operations. However, with respect to both (c)(i)(A) and (B) of this

1 subsection, within one hundred eighty days of receiving written notice
2 of the judgment against the manufacturer for a violation of section 2
3 of this act and a copy of a written notice that satisfies the
4 requirements of section 5 of this act, the person must undertake
5 commercially reasonable efforts to do any of the following:

6 (I) Exchange written correspondence confirming that such a
7 manufacturer is not using the stolen or misappropriated information
8 technology in violation of section 2 of this act, which may be
9 satisfied, without limitation, by obtaining written assurances from the
10 manufacturer accompanied by copies of invoices, purchase orders,
11 licenses, or other verification of lawful use of the information
12 technology at issue;

13 (II) Direct the manufacturer to cease the theft or
14 misappropriation, which may be satisfied, without limitation, by the
15 third party issuing a written directive to the manufacturer demanding
16 that it cease such theft or misappropriation and demanding that the
17 manufacturer provide the third party with copies of invoices, purchase
18 orders, licenses, or other verification of lawful use of the
19 information technology at issue; or

20 (III) In a case in which the manufacturer has failed to cease such
21 a theft or misappropriation within the one hundred eighty-day period,
22 and the third party has not fulfilled either option (c)(i)(A) or (B) of
23 this subsection, prevent the future acquisition of the articles or
24 products from the manufacturer during the period that the manufacturer
25 continues to engage in the theft or misappropriation subject to section
26 2 of this act where doing so would not constitute a breach of an
27 agreement between the person and the manufacturer for the manufacture
28 of the articles or products in question that was entered into on or
29 before one hundred eighty days after the effective date of this
30 section; or

31 (ii) Pursuant to an agreement between the person and a manufacturer
32 for the manufacture of the articles or products in question that was
33 entered into before one hundred eighty days after the effective date of
34 this section. However, within one hundred eighty days of receiving
35 written notice of the judgment against the manufacturer for a violation
36 of section 2 of this act and a copy of a written notice that satisfies
37 the requirements of section 5 of this act, the person must undertake
38 commercially reasonable efforts to do any of the following:

1 (A) Obtain from the manufacturer written assurances that such a
2 manufacturer is not using the stolen or misappropriated information
3 technology in violation of section 2 of this act, which may be
4 satisfied, without limitation, by obtaining written assurances from the
5 manufacturer accompanied by copies of invoices, purchase orders,
6 licenses, or other verification of lawful use of the information
7 technology at issue;

8 (B) Direct the manufacturer to cease the theft or misappropriation,
9 which may be satisfied, without limitation, by the third party issuing
10 a written directive to the manufacturer demanding that it cease such
11 theft or misappropriation and demanding that the manufacturer provide
12 the third party with copies of invoices, purchase orders, licenses, or
13 other verification of lawful use of the information technology at
14 issue; or

15 (C) In a case in which the manufacturer has failed to cease the
16 theft or misappropriation within the one hundred eighty-day period, and
17 the third party has not fulfilled either option (c)(ii)(A) or (B) of
18 this subsection, cease the future acquisition of the articles or
19 products from the manufacturer during the period that the manufacturer
20 continues to engage in the theft or misappropriation subject to section
21 2 of this act where doing so would not constitute a breach of such
22 agreement;

23 (d) The person has made commercially reasonable efforts to
24 implement practices and procedures to require its direct manufacturers,
25 in manufacturing articles or products for such person, not to use
26 stolen or misappropriated information technology in violation of
27 section 2 of this act. A person may satisfy this subsection (1)(d) by:

28 (i) Adopting and undertaking commercially reasonable efforts to
29 implement a code of conduct or similar written requirements, which are
30 applicable to the person's direct manufacturers, that prohibit the use
31 of stolen or misappropriated information technology by such a
32 manufacturer, subject to a right of audit, and the person either: (A)
33 Has a practice of auditing its direct manufacturers on a periodic basis
34 in accordance with generally accepted industry standards; or (B)
35 requires in its agreements with its direct manufacturers that they
36 submit to audits by a third party, which may include a third-party
37 association of businesses representing the owner of the stolen or
38 misappropriated intellectual property, and further provides that a

1 failure to remedy any deficiencies found in such an audit that
2 constitute a violation of the applicable law of the jurisdiction where
3 the deficiency occurred constitutes a breach of the contract, subject
4 to cure within a reasonable period of time; or

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

13 (e) The person does not have a contractual relationship with the
14 person alleged to have violated section 2 of this act respecting the
15 manufacture of the articles or products alleged to have been
16 manufactured in violation of section 2 of this act.

17 (2) A third party must have the opportunity to be heard regarding
18 whether an article or product is an essential component provided or to
19 be provided to a third party, and must have the right to file a motion
20 to dismiss any action brought against it under section 6(2) of this
21 act.

22 (3) The court may not enforce any award for damages against such a
23 third party until after the court has ruled on that party's claim of
24 eligibility for any of the affirmative defenses set out in this
25 section, and prior to such a ruling may allow discovery, in an action
26 under section 6(2) of this act, only on the particular defenses raised
27 by the third party.

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

33 (5) Any confidential or otherwise sensitive information submitted
34 by a party pursuant to this section is subject to a protective order.

35 NEW SECTION. **Sec. 9.** A court may not enforce an award of damages
36 against a third party pursuant to section 6(2) of this act for a period
37 of eighteen months from the effective date of this section.

1 NEW SECTION. **Sec. 10.** A violation of this chapter may not be
2 considered a violation of the state consumer protection act, and
3 chapter 19.86 RCW does not apply to this chapter. The remedies
4 provided under this chapter are the exclusive remedies for the parties.

5 NEW SECTION. **Sec. 11.** If any provision of this act or its
6 application to any person or circumstance is held invalid, the
7 remainder of the act or the application of the provision to other
8 persons or circumstances is not affected.

9 NEW SECTION. **Sec. 12.** Sections 1 through 10 of this act
10 constitute a new chapter in Title 19 RCW."

SSB 5449 - S AMD
By Senators Brown, Hill

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11 On page 1, line 3 of the title, after "state;" strike the remainder
12 of the title and insert "adding a new chapter to Title 19 RCW; and
13 prescribing penalties."

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