

---

## Judiciary Committee

---

### HB 1495

**Title:** An act relating to the unfair competition that occurs when stolen or misappropriated information technology is used to manufacture products sold or offered for sale in this state.

**Brief Description:** Regarding the unfair competition that occurs when stolen or misappropriated information technology is used to manufacture products sold or offered for sale in this state.

**Sponsors:** Representatives Eddy, Rodne, Kirby, Armstrong, Hunter, Hinkle, Chandler, Pettigrew, Carlyle, Springer, Maxwell, Anderson, Clibborn, Kelley and Kenney.

#### Brief Summary of Bill

- Creates a new civil cause of action against businesses that use stolen or misappropriated information technology (IT) to manufacture products sold in Washington in competition with products that do not use stolen or misappropriated IT, subject to certain exemptions.
- Allows a court to order that a product made using stolen or misappropriated IT not be sold in Washington or award damages.

**Hearing Date:** 2/2/11

**Staff:** Parker Howell (786-5793) and Trudes Tango (786-7384).

#### **Background:**

##### Consumer Protection Act.

The state's Consumer Protection Act (CPA) prohibits unfair or deceptive acts or practices and unfair methods of competition in the conduct of trade or commerce that directly or indirectly affect the people of Washington. Several statutes specify practices that constitute unfair acts, but they do not provide an exhaustive list. A court may find that conduct not specifically enumerated in statute may constitute an unfair or deceptive act.

---

*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

Either private plaintiffs or the Attorney General may bring civil actions to enjoin future violations of the CPA or to recover damages caused by an unfair act. Private plaintiffs may recover actual damages and costs, including reasonable attorneys' fees. Courts also may award private plaintiffs damages of as much as three times actual damages, in an amount not to exceed \$25,000.

#### "Personal" vs. "In Rem" Jurisdiction.

In order for a court to hear and determine a controversy, it must have jurisdiction over the matter. Often, courts have "personal" jurisdiction over a person sued in a civil lawsuit because the person made certain minimum contacts with the state; for purposes of the CPA, this includes transacting business within Washington.

Foreign defendants whose actions give rise to a lawsuit in a Washington court but who have never visited the state and who have no assets within Washington might not be subject to personal jurisdiction. Yet state courts may have jurisdiction to enter judgment regarding property located within the state, even if the courts do not have personal jurisdiction over that defendant. Such actions against property are called proceedings "in rem."

#### Intellectual Property.

Federal and state laws protect certain intellectual property rights in creations, such as computer software (programs) and hardware (equipment). A federal copyright gives the owner of an original work that expresses ideas, such as certain software, exclusive rights to copy, distribute, and adapt the work. A federal patent may protect a publicly disclosed computer-related invention for a period of time. Federal and state trade secret laws prohibit misappropriation of trade secrets, such as formulas, programs, and techniques.

Some holders of software copyrights license other people to modify and redistribute source code for those programs for free. Such programs commonly are called "open source" software.

#### Laws in Other States.

In 2010, the Louisiana Legislature enacted a bill making it illegal for a person to develop or manufacture a product or supply a service using stolen or misappropriated property, including software, where the product or service is offered for sale in competition with others in the state. A breach of the law constitutes a violation of Louisiana's Unfair Trade Practices and Consumer Protection Law.

#### **Summary of Bill:**

A business that manufactures a product while using stolen or misappropriated information technology ("stolen IT") in its business operations engages in unfair competition when the product is sold in Washington, either separately or as a component of another product, in competition with a product made without use of stolen IT. A new cause of action allows private plaintiffs or the Attorney General to sue anyone who engages in this unfair competition, or bring a claim against products made using stolen IT.

"Stolen or misappropriated" IT is defined as hardware or software that a person acquired, appropriated, or used unlawfully. "Using information technology in business operations" means using IT to support in any way the design, manufacture, distribution, marketing, or sales of products.

#### Notice.

Before an injured plaintiff can file suit, the owners of stolen IT must provide written notice to the person allegedly using the stolen IT giving the person ninety days to stop using it, subject to any extensions approved by the owner. The notice must state: (1) the identity of the IT; (2) the identity of the lawful owner; (3) that the notifier reasonably believes the person has acquired, appropriated, or used the IT unlawfully; and (4) the manner in which the IT is being used, if known.

#### Jurisdiction.

A court may proceed *in rem* against any products allegedly made using stolen or misappropriated IT. All such products are subject to attachment. If a court determines that any of the products violate the bill's provisions, the court must enjoin their sale or offering for sale in Washington, subject to certain exceptions.

#### Elements of a Claim.

A person is injured by the sale of a product if the person establishes by a preponderance of the evidence that:

- the person manufactures products sold or offered for sale in Washington in competition with articles or products made using stolen IT; and
- the person's articles or products were not manufactured using stolen IT.

#### Discovery.

A court must allow the plaintiff or a judicially appointed designee to enter the defendant's business premises to inspect any IT, records, files, or other evidence relevant to the alleged use of stolen IT, pursuant to applicable rules of discovery.

#### Remedy.

If the use of stolen IT continues despite the owner of the stolen IT providing the ninety days' notice, any injured person, an association of businesses representing an injured person, or the Attorney General may bring an action against any person, article, or product to ask the court to enjoin violations of the bill's provisions, including ordering a person not to sell certain products in Washington. A plaintiff also may ask for the greater of actual damages or an amount of up to 20 percent of the retail price in Washington of each product sold or offered for sale.

If a person found to have violated the bill's provisions lacks sufficient attachable assets in Washington, a court may enjoin the sale or offering for sale in the state of any products made using stolen or misappropriated IT. A person subject to an order for injunctive relief must be given reasonable notice and opportunity to be heard.

A court may award as much as three times the damages normally allowed when it finds that the defendant willfully used stolen IT. A court also may award costs and reasonable attorneys' fees to the prevailing plaintiff in all actions, or to a prevailing defendant in action brought by an injured person.

#### Exceptions.

A person may not sue under this cause of action when: (1) the end product sold or offered for sale in Washington is a copyrightable work under the United States Copyright Act; (2) the allegation that the IT is stolen is based on a claim that the IT infringes on patents or trade secrets; or (3) the allegation that the IT is stolen is based on a claim that the use of the IT violates the terms of an open source software license.

A defendant may avoid liability by proving by a preponderance of the evidence that: (1) the aggregate retail value of the stolen IT at the time of the alleged violation is less than \$10,000; or (2) the stolen IT constitutes a *de minimis* integrated component of a separate IT product and the component was not available for retail purchase by itself at the time the defendant acquired it. The aggregate retail value of stolen or misappropriated IT is the retail price of IT in Washington multiplied by the number of stolen items used in the business operations of the person who allegedly violated the bill's provisions.

A court may not enforce an order for attachment or injunctive relief against a person, other than the manufacturer of the products, who has an interest in a product when the person establishes that he or she:

- is the end consumer of a product or acquired the product after its sale to an end consumer;
- is a business with annual revenues of less than \$50 million;
- acquired the products in good-faith reliance on written assurances from the manufacturer or supplier of the products that they were made without the use of stolen IT, as long as within 180 days of receiving a written notice that satisfies the requirements of the bill the person implements commercially reasonable practices and procedures that cause a manufacturer or supplier to cease theft or that prevent future acquisition of products from such a manufacturer or supplier; or
- made commercially reasonable efforts to prevent acquisition of such products and has acted in good faith to ensure compliance with these practices and procedures to prevent such acquisition.

#### Consumer Protection Act.

A violation of the provisions in this bill is a violation of the CPA. The penalties, remedies, and procedures of the CPA may not be construed to limit liabilities and remedies of the act.

**Appropriation:** None.

**Fiscal Note:** Not requested.

**Effective Date:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.