

**HOUSE . . . . . No. 02842**

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The Commonwealth of Massachusetts

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PRESENTED BY:

*Michael J. Moran*

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*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 passage of the accompanying bill:

An Act relative to unfair competition.

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PETITION OF:

NAME:

*Michael J. Moran*

DISTRICT/ADDRESS:

*18th Suffolk*

# HOUSE . . . . . No. 02842

By Mr. Moran of Boston, a petition (accompanied by bill, House, No. 2842) of Moran relative to the use of stolen or misappropriated information technology in the manufacturing of goods Joint Committee on 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 new
- 2 section:
- 3 Section 115. (a) (1) Unfair competition. — Any person who manufactures any article or product
- 4 while using stolen or misappropriated information technology in its business operations shall be
- 5 deemed to engage in unfair competition where such article or product is sold or offered for sale
- 6 in this state, either separately or as a component of another article or product, and in competition
- 7 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 product  
19 subject to subsection (a), in whole or substantial part, but shall not include contracting with or  
20 otherwise engaging another person to develop, manufacture, produce, or assemble an article or  
21 product subject to subsection (a).

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

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

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

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

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

34 Copyright Act;

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

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

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

50 (2) Notice requirements. — To satisfy the requirements of this subsection, a written notice must:

51 (A) identify the stolen or misappropriated information technology; (B) identify the lawful owner  
52 of the information technology; (C) state that the notifier has a reasonable belief that the person  
53 has acquired, appropriated, or used the information technology in question in violation of

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

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

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

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

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

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

79 (i) actual damages; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

129 (3) Products acquired in good faith. — the person acquired the articles or products in good-faith  
130 reliance on either (1) a code of conduct or similar written document that governs the person's  
131 commercial relationships with the manufacturer alleged to have violated subsection (a)(1) and  
132 which includes commitments that prohibit use of the stolen or misappropriated information  
133 technology at issue by such manufacturer, or (2) written assurances from the manufacturer or  
134 supplier of such articles or products that such articles or products, to the best of the  
135 manufacturer's or supplier's knowledge, were manufactured without the use of stolen or  
136 misappropriated information technology in the manufacturer's or supplier's business operations;  
137 provided, however, that within 180 days of receiving service under subsection (e)(4) or (f) or



138 receiving a written notice that satisfies the requirements of subsections (b)(1) and (b)(2), the  
139 person uses commercially reasonable efforts to implement commercially reasonable practices  
140 and procedures to: (i) cause such manufacturer or supplier to cease such theft or  
141 misappropriation; or (ii) to prevent future acquisition of articles or products from such  
142 manufacturer or supplier subject to subsection (a);

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

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

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

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