

AMENDED IN ASSEMBLY APRIL 25, 2011

AMENDED IN ASSEMBLY APRIL 7, 2011

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL

No. 473

Introduced by Assembly Member Charles Calderon

February 15, 2011

An act to add ~~Section 17052 to Chapter 4.5 (commencing with Section 17120) to Part 2 of Division 7 of the Business and Professions Code, relating to unfair competition.~~

LEGISLATIVE COUNSEL'S DIGEST

AB 473, as amended, Charles Calderon. Unfair competition.

Existing law defines unfair competition and makes unlawful specified business practices intended to injure competitors or destroy competition. Existing law specifies criminal penalties and civil remedies for violations, including injunctive relief and damages.

This bill would make it unlawful for any person to manufacture any article or product that is sold or offered for sale in this state while using stolen or misappropriated information technology, as defined, in its business operations in competition with another article or product manufactured without the use of stolen or misappropriated information technology, except as specified. The bill would require written notice containing specified information under penalty of perjury to be provided to a defendant prior to commencement of an action under these provisions. The bill would make violations of its provisions subject to specified civil remedies, including injunctive relief and recovery of damages, would provide that existing criminal penalties would not apply to those violations, and would authorize certain persons and entities,

including the Attorney General, to bring actions under these provisions. The bill would authorize claims for damages against certain 3rd parties who sell or offer for sale products made in violation of these provisions, except as specified.

Because this bill would expand the scope of the existing crime of perjury, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.

State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. The Legislature finds and declares all of the
2 following:

3 (a) Manufacturers are a vital source of jobs and economic growth
4 in the State of California. Law-abiding manufacturers in this state
5 suffer lost sales, market share, and jobs when they are forced to
6 compete against companies that use stolen or misappropriated
7 information technology to reduce production costs and gain a
8 competitive edge.

9 (b) The theft of American information technology is particularly
10 rampant in foreign markets, reaching as high as 90 percent in some
11 countries. Intellectual technology theft costs the United States
12 economy thousands of jobs and billions of dollars in economic
13 growth.

14 (c) The use of stolen or misappropriated information technology
15 ~~can unfairly lowers~~ lower manufacturers' costs of production by
16 tens if not hundreds of thousands of dollars. Manufacturers that
17 knowingly use significant amounts of stolen or misappropriated
18 information technology to reduce their costs should not be allowed
19 to benefit from their illegal acts.

20 (d) Existing laws relating to unfair trade practices do not *always*
21 adequately address the harm that occurs when manufacturers use
22 stolen or misappropriated information technology to gain an unfair
23 competitive advantage over companies that play by the rules.

(e) It is the purpose of this act to enable effective recourse against manufacturers that obtain an unlawful competitive advantage by using stolen or misappropriated information technology to make goods.

(f) To accomplish this purpose, law-abiding manufacturers who have suffered economic harm from a directly competing manufacturer's sale of products made using stolen or misappropriated information technology should be allowed to pursue a cause of action against the company that used the stolen or misappropriated information technology.

(g) The remedies available to the law-abiding manufacturer in these cases should be limited to ensure that the relief obtained is proportional to the harm and should protect businesses that make good faith efforts to act in accordance with their legal responsibilities.

(h) It is the intent of the Legislature that this act shall be construed in ways that appropriately remedy the competitive harm that occurs when articles or products manufactured by businesses using stolen or misappropriated information technology are sold or offered for sale in this state.

~~SEC. 2. Section 17052 is added to the Business and Professions Code, to read:~~

~~17052.~~

SEC. 2. Chapter 4.5 (commencing with Section 17120) is added to Part 2 of Division 7 of the Business and Professions Code, to read:

CHAPTER 4.5. STOLEN AND MISAPPROPRIATED INFORMATION TECHNOLOGY

17120. (a) (1) For purposes of this section, the following definitions apply:

(A) "Article or product" means any tangible article or product, but shall exclude: (i) any services sold, offered for sale, or made available in this state, including free services and online services, (ii) any product subject to regulation by the United States Food and Drug Administration and that is primarily used for medical or medicinal purposes, (iii) food and beverages, and (iv) restaurant services.

1 (B) “Copyrightable end product” means a work within the
2 subject matter of copyright as specified in Section 102 of Title 17
3 of the United States Code and, *for the purposes of this section*,
4 includes mask works ~~protection~~ *protection* as specified in Section
5 902 of Title 17 of the United States Code.

6 (C) “Essential component” means a component of an article or
7 product provided or to be provided to a ~~third party~~ *third party*
8 pursuant to a contract, including a purchase order, without which
9 that article or product will not perform as intended and for which
10 there is no substitute component available that offers a comparable
11 range and quality of functionalities and is available in comparable
12 quantities and at a comparable price.

13 (D) “Manufacture” means to directly manufacture, produce, or
14 assemble an article or product subject to paragraph (2), in whole
15 or substantial part, but shall not include contracting with or
16 otherwise engaging another person (or that person engaging another
17 person) to develop, manufacture, produce, or assemble an article
18 or product subject to paragraph (2).

19 (E) “Material competitive injury” means at least a 3 percent
20 retail price difference between the article or product made in
21 violation of paragraph (2) designed to harm competition and a
22 directly competing article or product that was manufactured without
23 the use of stolen or misappropriated information technology, the
24 price difference occurring over a four-month period of time.

25 (F) “Retail price” of stolen or misappropriated information
26 technology is the retail price of the information technology charged
27 at the time of, and in the jurisdiction where, the alleged theft or
28 misappropriation occurred, multiplied by the number of stolen or
29 misappropriated items used in the business operations of the person
30 alleged to have violated paragraph (2).

31 (G) (i) “Stolen or misappropriated information technology”
32 means hardware or software that the person referred to in paragraph
33 (2) acquired, appropriated, or used without the authorization of
34 the owner of the information technology or the owner’s authorized
35 licensee in violation of applicable law, but shall not include
36 situations in which the hardware or software alleged to have been
37 stolen or misappropriated was not available for retail purchase on
38 a stand-alone basis at or before the time it was acquired,
39 appropriated, or used by the person.

1 (ii) Information technology shall be considered to be used in a
2 person's business operations if the person uses the technology in
3 the manufacture, distribution, marketing, or sales of the articles
4 or products subject to paragraph (2).

5 (2) Any person who manufactures any article or product while
6 using stolen or misappropriated information technology in its
7 business operations after notice and opportunity to cure as provided
8 in subdivision (b) and, with respect to remedies sought under
9 paragraph (6) of subdivision (c) or subdivision (d), causes a
10 material competitive injury as a result of the use of stolen or
11 misappropriated information technology, shall be deemed to engage
12 in an unfair act if the article or product is sold or offered for sale
13 in this state, either separately or as a component of another article
14 or product, and in competition with an article or product sold or
15 offered for sale in this state that was manufactured without
16 violating this subdivision. Any person who engages in a violation
17 of this subdivision, and any articles or products manufactured by
18 the person in violation of this subdivision, shall be subject to the
19 liabilities and remedial provisions of this section in an action by
20 the Attorney General or any person described in paragraph (5) of
21 subdivision (c), except as provided in paragraphs (3) and (4) and
22 in subdivisions (b) to (f), inclusive.

23 (3) No action may be brought under this section, and no liability
24 shall result, under any of the following:

25 (A) The end article or end product sold or offered for sale in
26 this state and alleged to violate paragraph (2) is:

27 (i) A copyrightable end product.

28 (ii) Merchandise manufactured by or on behalf of, or pursuant
29 to a license from, a copyright owner and which displays or
30 embodies a name, character, artwork, or other indicia of or from
31 a work that falls within clause (i), or merchandise manufactured
32 by or on behalf of, or pursuant to a license from, a copyright or
33 trademark owner and which displays or embodies a name,
34 character, artwork, or other indicia of or from a theme park, theme
35 park attraction, or other facility associated with a theme park.

36 (iii) Packaging, carrier media, or promotional or advertising
37 materials for any end article, end product, or merchandise that falls
38 within clause (i) or (ii).

39 (B) The allegation that the information technology is stolen or
40 misappropriated is based on a claim that the information technology

1 or its use infringes a patent or misappropriates a trade secret under
2 applicable law or that could be brought under any provision of
3 Title 35 of the United States Code.

4 (C) The allegation that the information technology is stolen or
5 misappropriated is based on a claim that the defendant's use of
6 the information technology violates the terms of a license that
7 allows users to modify and redistribute any source code associated
8 with the technology free of charge.

9 (D) The allegation is based on a claim that the person violated
10 paragraph (2) by aiding, abetting, facilitating, or assisting someone
11 else to acquire, appropriate, use, sell, or offer to sell, or by
12 providing someone else with access to, information technology
13 without authorization of the owner of that information technology
14 or the owner's authorized licensee in violation of applicable law.

15 (4) No injunction may be issued against a person other than the
16 person adjudicated to have violated paragraph (2), and no
17 attachment order may be issued against articles or products other
18 than articles or products in which the person alleged to violate
19 paragraph (2) holds title. A person other than the person alleged
20 to violate paragraph (2) includes any person other than the actual
21 manufacturer who contracts with or otherwise engages another
22 person to develop, manufacture, produce, market, distribute,
23 advertise, or assemble an article or product alleged to violate
24 paragraph (2).

25 (5) A violation of this section shall not be subject to ~~Section~~
26 ~~17100 and the provisions of Chapter 4 (commencing with Section~~
27 ~~1700) or Chapter 5 (commencing with Section 17200) of Part 2~~
28 ~~of Division 7 and the provisions of those chapters~~ shall not apply
29 to this section. The remedies provided under this section are the
30 exclusive remedies for the parties.

31 (b) (1) No action may be brought under paragraph (2) of
32 subdivision (a) unless the person subject to those provisions
33 received written notice of the alleged use of the stolen or
34 misappropriated information technology from the owner or
35 exclusive licensee of the information technology or the owner's
36 agent and the person did either of the following:

37 (A) Failed to establish that its use of the information technology
38 in question did not violate paragraph (2) of subdivision (a).

39 (B) Failed, within 90 days after receiving *the* notice, to cease
40 use of the owner's stolen or misappropriated information

1 technology; provided, however, that if the person commences and
2 thereafter proceeds diligently to replace the information technology
3 with information technology whose use would not violate
4 paragraph (2) of subdivision (a), that period shall be extended for
5 an additional period of 90 days, not to exceed 180 days total. The
6 information technology owner or its agent may extend any period
7 described in this paragraph.

8 (2) To satisfy the requirements of this subdivision, a written
9 notice shall, under penalty of perjury:

10 (A) Identify the stolen or misappropriated information
11 technology.

12 (B) Identify the lawful owner or exclusive licensee of the
13 information technology.

14 (C) Identify the applicable law the person is alleged to be
15 violating and state that the notifier has a reasonable belief that the
16 person has acquired, appropriated, or used the information
17 technology in question without authorization of the owner of the
18 information technology or the owner's authorized licensee in
19 violation of the applicable law.

20 (D) To the extent known by the notifier, state the manner in
21 which the information technology is being used by the defendant.

22 (E) State the articles or products to which such information
23 technology relates.

24 (F) Specify the basis and the particular evidence upon which
25 the notifier bases the allegation.

26 (3) The written notification shall state that, after a reasonable
27 and good faith investigation, the information in the notice is
28 accurate based on the notifier's reasonable knowledge, information,
29 and belief. This written notification shall be made under penalty
30 of perjury.

31 (c) (1) No earlier than 90 days after the provision of notice in
32 accordance with subdivision (b), the Attorney General, or a person
33 described in paragraph (5), may bring an action against any person
34 that is subject to paragraph (2) of subdivision (a):

35 (A) To enjoin a violation of paragraph (2) of subdivision (a),
36 including by enjoining the person from selling or offering to sell
37 in this state articles or products that are subject to paragraph (2)
38 of subdivision (a), except as provided in paragraph (6); provided
39 that the injunction shall not encompass articles or products to be
40 provided to a ~~third party~~ *third party* that establishes that the

1 ~~third party~~ *third party* has satisfied one or more of the affirmative
2 defenses set forth in paragraph (1) of subdivision (e) with respect
3 to the manufacturer alleged to have violated paragraph (2) of
4 subdivision (a).

5 (B) ~~After~~ *Only after* a determination by the court that the person
6 has violated paragraph (2) of subdivision (a), to recover the greater
7 of either of the following:

8 (i) Actual direct damages, which may be imposed only against
9 the person who violated paragraph (2) of subdivision (a).

10 (ii) Statutory damages of no more than the retail price of the
11 stolen or misappropriated information technology, which may be
12 imposed only against the person who violated paragraph (2) of
13 subdivision (a).

14 (2) If the person alleged to have violated paragraph (2) of
15 subdivision (a) has been subject to a final judgment or has entered
16 into a final settlement, or any products manufactured by the person
17 and alleged to violate paragraph (2) of subdivision (a) have been
18 the subject of an injunction or attachment order, in any federal or
19 state court in this state or any other state, arising out of the same
20 theft or misappropriation of information technology, the court shall
21 dismiss the action with prejudice. If the person is a defendant in
22 an ongoing action, or any products manufactured by the person
23 and alleged to violate paragraph (2) of subdivision (a) are the
24 subject of an ongoing injunction or attachment order, in any federal
25 or state court in this state or any other state, arising out of the same
26 theft or misappropriation of information technology, the court shall
27 stay the action against the person pending resolution of the other
28 action. In the event the other action results in a final judgment or
29 final settlement, the court shall dismiss the action with prejudice
30 against the person. Dismissals under this paragraph shall be res
31 judicata to actions filed against the person alleged to have violated
32 paragraph (2) of subdivision (a) arising out of the same theft or
33 misappropriation of information technology.

34 (3) (A) After determination by the court that a person has
35 violated paragraph (2) of subdivision (a) and entry of a judgment
36 against the person for violating those provisions, the Attorney
37 General, or a person described in paragraph (5), may add to the
38 action a claim for actual direct damages against a ~~third party~~ *third*
39 *party* who sells or offers to sell in this state products made by that
40 person in violation of paragraph (2) of subdivision (a), subject to

1 the provisions of subdivision (e); provided, however, that damages
2 may be imposed against a ~~third party~~ *third party* only if all of the
3 following apply:

4 (i) The ~~third party's~~ *third party's* agent for service of process
5 was properly served with a copy of a written notice sent to the
6 person alleged to have violated paragraph (2) of subdivision (a)
7 that satisfies the requirements of subdivision (b) at least 90 days
8 prior to the entry of the judgment.

9 (ii) The person who violated paragraph (2) of subdivision (a)
10 did not make an appearance or does not have sufficient attachable
11 assets to satisfy a judgment against the person.

12 (iii) The person either manufactured the final product or
13 produced a component equal to 30 percent or more of the value
14 of the final product.

15 (iv) The person has a direct contractual relationship with the
16 ~~third party~~ *third party* respecting the manufacture of the final
17 product or component.

18 (v) The ~~third party~~ *third party* has not been subject to a final
19 judgment or entered into a final settlement in any federal or state
20 court in this state or any other state arising out of the same theft
21 or misappropriation of information technology; provided, however,
22 that in the event the ~~third party~~ *third party* is a party to an ongoing
23 suit for damages, or has entered an appearance as an interested
24 ~~third party~~ *third party* in proceedings in rem, in any federal or state
25 court in this state or any other state arising out of the same theft
26 or misappropriation of information technology, the court shall stay
27 the action against the ~~third party~~ *third party* pending resolution of
28 the other action. In the event the other action results in a final
29 judgment *or final settlement*, the court shall dismiss the action
30 with prejudice against the ~~third party~~ *third party* and dismiss any
31 in rem action as to any articles or products manufactured for the
32 ~~third party~~ *third party* or that have been or are to be supplied to
33 that ~~third party~~ *third party*. Dismissals under this ~~section~~ *paragraph*
34 shall be res judicata to actions filed against the person alleged to
35 have violated paragraph (2) of subdivision (a) arising out of the
36 same theft or misappropriation of information technology.

37 (B) An award of damages against the ~~third party~~ *third party*
38 pursuant to this paragraph shall be the lesser of the retail price of
39 the stolen or misappropriated information technology at issue or
40 two hundred fifty thousand dollars (\$250,000), less any amounts

1 recovered from the person adjudicated to have violated paragraph
2 (2) of subdivision (a), and subparagraph (A) of paragraph (4) shall
3 not apply to the award or recovery against the ~~thirdparty~~ *third*
4 *party*.

5 (C) An award of damages pursuant to this paragraph shall not
6 be ~~made~~ *enforced against a third party* prior to July 1, 2013.

7 (4) A court may do any of the following in an action under this
8 section:

9 (A) In an action against the person adjudicated to have violated
10 paragraph (2) of subdivision (a), increase the damages up to three
11 times the damages authorized by subparagraph (B) of paragraph
12 (1) if the court finds that the person's use of the stolen or
13 misappropriated information technology was willful.

14 (B) With respect to an award under paragraph (1) only, award
15 costs and reasonable attorney's fees to either of the following:

16 (i) A prevailing plaintiff in actions brought by an injured person
17 under paragraph (2) of subdivision (a).

18 (ii) A prevailing defendant in actions brought by an allegedly
19 injured person.

20 (C) With respect to an action under paragraph (3) brought by a
21 private plaintiff only, award costs and reasonable attorney's fees
22 to a ~~thirdparty~~ *third party* for all litigation expenses, including,
23 without limitation, discovery expenses, incurred by that party if it
24 prevails on the ~~requirements~~ *requirement* set forth in clause (iii)
25 of subparagraph (A) of paragraph (3) or to a ~~thirdparty~~ who
26 qualifies for an affirmative defense under subdivision (e); provided,
27 however, in a case in which the ~~thirdparty~~ *third party* received a
28 copy of the notification described in clause (i) of subparagraph
29 (A) of paragraph (3) at least 90 days before the filing of the action
30 under paragraph (3), that with respect to a ~~thirdparty's~~ *third-party's*
31 reliance on the affirmative defenses set forth in subparagraphs (C)
32 and (D) of paragraph (1) of subdivision (e), the court may award
33 costs and reasonable attorney's fees only if all of the conduct on
34 which the affirmative defense is based was undertaken by the
35 ~~thirdparty~~ *third party*, and the ~~thirdparty~~ *third party* notified the
36 plaintiff of that conduct, prior to the end of the 90-day period.

37 (5) A person shall be deemed to have been injured by the sale
38 or offer for sale of a directly competing article or product subject
39 to paragraph (2) of subdivision (a) if the person establishes all of
40 the following by a preponderance of the evidence:

1 (A) The person manufactures articles or products that are sold
2 or offered for sale in this state in direct competition with articles
3 or products that are subject to paragraph (2) of subdivision (a).

4 (B) The person's articles or products were not manufactured
5 using stolen or misappropriated information technology of the
6 owner of the information technology.

7 (C) The person suffered economic harm, which may be shown
8 by evidence that the retail price of the stolen or misappropriated
9 information technology was twenty thousand dollars (\$20,000) or
10 more.

11 (D) If the person is proceeding in rem or seeks injunctive relief,
12 that the person suffered material competitive injury as a result of
13 the violation of paragraph (2) of subdivision (a).

14 (6) (A) If the court determines that a person found to have
15 violated paragraph (2) of subdivision (a) lacks sufficient attachable
16 assets in this state to satisfy a judgment rendered against it, the
17 court may enjoin the sale or offering for sale in this state of any
18 articles or products subject to paragraph (2) of subdivision (a),
19 except as provided in paragraph (4) of subdivision (a).

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

35 (7) The court shall determine whether a cure period longer than
36 the period ~~established~~ *reflected* in subdivision (b) would be
37 reasonable given the nature of the use of the information
38 technology that is the subject of the action and the time reasonably
39 necessary either to bring the use into compliance with applicable
40 law or to replace the information technology with information

1 technology that would not violate paragraph (2) of subdivision (a).
2 If the court deems that a longer cure period would be reasonable,
3 the action shall be stayed until the end of that longer cure period.
4 If by the end of that longer cure period, the defendant has
5 established that its use of the information technology in question
6 did not violate paragraph (2) of subdivision (a), or the defendant
7 ceased use of the stolen or misappropriated information technology,
8 the action shall be dismissed.

9 (d) (1) In a case in which the court is unable to obtain personal
10 jurisdiction over a person subject to paragraph (2) of subdivision
11 (a), the court may proceed in rem against any articles or products
12 that are subject to paragraph (2) of subdivision (a) and sold or
13 offered for sale in this state in which the person alleged to have
14 violated paragraph (2) of subdivision (a) holds title. Except as
15 provided in paragraph (4) of subdivision (a) and paragraphs (2) to
16 (4), inclusive, all such articles or products shall be subject to
17 attachment at or after the time of filing a complaint, regardless of
18 the availability or amount of any monetary judgment.

19 (2) At least 90 days prior to the enforcement of an attachment
20 order against articles or products pursuant to paragraph (1), the
21 court shall notify any person in possession of the articles or
22 products of the pending attachment order. Prior to the expiration
23 of the 90-day period, any person for whom the articles or products
24 were manufactured, or to whom the articles or products have been
25 or are to be supplied, pursuant to an existing contract or purchase
26 order, may do either of the following:

27 (A) Establish that the person has satisfied one or more of the
28 affirmative defenses set forth in paragraph (1) of subdivision (e)
29 with respect to the manufacturer alleged to have violated paragraph
30 (2) of subdivision (a), in which case the attachment order shall be
31 dissolved only with respect to those articles or products that were
32 manufactured for the person, or have been or are to be supplied to
33 the person, pursuant to an existing contract or purchase order.

34 (B) Post a bond with the court equal to the retail price of the
35 allegedly stolen or misappropriated information technology or
36 twenty-five thousand dollars (\$25,000), whichever is less, in which
37 case the court shall stay the enforcement of the attachment order
38 against those articles or products and shall proceed on the basis of
39 its jurisdiction over the bond. The person posting the bond shall

1 recover the full amount of the bond, plus interest, after the issuance
2 of a final judgment.

3 (3) If the person posting the bond pursuant to subparagraph (B)
4 of paragraph (2) is entitled to claim an affirmative defense in
5 subdivision (e), and that person establishes with the court that it
6 is entitled to that affirmative defense, the court shall award costs
7 and reasonable attorney's fees to the person posting the bond and
8 against the plaintiff in the event the plaintiff proceeds with an
9 action pursuant to paragraph (3) of subdivision (c) against the
10 person posting the bond.

11 (4) If ~~that~~ the court does not provide notification as described
12 in paragraph (2), the court, upon motion of any ~~third party~~ *third*
13 *party*, shall stay the enforcement of the attachment order for 90
14 days as to articles or products manufactured for the ~~third party~~ *third*
15 *party*, or that have been or are to be supplied to the ~~third party~~ *third*
16 *party*, pursuant to an existing contract or purchase order, during
17 which 90-day period the ~~third party~~ *third party* may avail itself of
18 the options set forth in paragraph (2).

19 (e) (1) A court shall not award damages against any ~~third party~~
20 *third party* pursuant to paragraph (3) of subdivision (c) if that
21 party, after having been afforded reasonable notice of at least 90
22 days by proper service upon the party's agent for service of process
23 and an opportunity to plead any of the affirmative defenses set
24 forth in this paragraph, establishes by a preponderance of the
25 evidence any of the following:

26 (A) The person is the end consumer or end user of an article or
27 product subject to paragraph (2) of subdivision (a), or acquired
28 the article or product after its sale to an end consumer or end user.

29 (B) The person is a business with annual revenues not in excess
30 of fifty million dollars (\$50,000,000).

31 (C) The person either:

32 (i) Acquired the articles or products and had code of conduct
33 or other written document governing the person's commercial
34 relationships with the manufacturer adjudicated to have violated
35 paragraph (2) of subdivision (a) that includes commitments, such
36 as general commitments to comply with applicable laws, that
37 prohibit use of the stolen or misappropriated information
38 technology by the manufacturer, or written assurances from the
39 manufacturer of the articles or products that the articles or products,
40 to the manufacturer's reasonable knowledge, were manufactured

1 without the use of stolen or misappropriated information
2 technology in the manufacturer's business operations; provided,
3 that within 180 days of receiving written notice of the judgment
4 against the manufacturer for violation of paragraph (2) of
5 subdivision (a) and a copy of a written notice that satisfies the
6 requirements of subdivision (b), the person undertakes
7 commercially reasonable efforts to do any of the following:

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

15 (II) Direct the manufacturer to cease the theft or
16 misappropriation, which may be satisfied, without limitation, by
17 the ~~thirdparty~~ *third party* issuing a written directive to the
18 manufacturer demanding that it cease the theft or misappropriation
19 and demanding that the manufacturer provide the ~~thirdparty~~ *third*
20 *party* with copies of invoices, purchase orders, licenses, or other
21 verification of lawful use of the information technology at issue.
22 A ~~thirdparty~~ *third party* shall not be required to take any other
23 action to fully avail itself of this *affirmative* defense.

24 (III) In a case in which the manufacturer has failed to cease the
25 theft or misappropriation within the 180-day period, and the
26 thirdparty has not fulfilled either subclause (I) or (II), cease the
27 future acquisition of the articles or products from the manufacturer
28 during the period in which the manufacturer continues to engage
29 in the theft or misappropriation subject to paragraph (2) of
30 subdivision (a) where doing so would not constitute a breach of
31 an agreement between the person and the manufacturer for the
32 manufacture of the articles or products in question that was entered
33 into on or *before* July 1, 2012.

34 (ii) Acquired the articles or products pursuant to an agreement
35 between the person and a manufacturer for the manufacture of the
36 articles or products in question that was entered into on or *before*
37 July 1, 2012; provided that within 180 days of receiving written
38 notice of the judgment against the manufacturer for violation of
39 paragraph (2) of subdivision (a) and a copy of a written notice that

1 satisfies the requirements of subdivision (b), the person undertakes
2 commercially reasonable efforts to do any of the following:

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

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

17 A ~~thirdparty~~ *third party* shall not be required to take any other
18 action to fully avail itself of this *affirmative* defense.

19 (III) In a case in which the manufacturer has failed to cease the
20 theft or misappropriation within the 180-day period, and the
21 ~~thirdparty~~ *third party* has not fulfilled either subclause (I) or (II),
22 cease the future acquisition of the articles or products from the
23 manufacturer during the period that the manufacturer continues to
24 engage in the theft or misappropriation subject to paragraph (2)
25 of subdivision (a) where doing so would not constitute a breach
26 of the agreement.

27 (D) The person has made commercially reasonable efforts to
28 implement practices and procedures to require its direct
29 manufacturers, in manufacturing articles or products for the person,
30 not to use stolen or misappropriated information technology in
31 violation of paragraph (2) of subdivision (a). A person may satisfy
32 this subparagraph by doing either of the following:

33 (i) Adopting and undertaking commercially reasonable efforts
34 to implement a code of conduct or similar written requirements
35 that are applicable to the person's direct manufacturers and that
36 prohibit use of stolen or misappropriated information technology
37 by the manufacturer, subject to a right of audit, and the person
38 either (I) has a practice of auditing its direct manufacturers on a
39 periodic basis in accordance with generally accepted industry
40 standards, or (II) requires in its agreements with its direct

1 manufacturers that they submit to audits by a ~~third party~~ *third party*,
2 which may include a ~~third party~~ *third-party* association of
3 businesses representing the owner of the stolen or misappropriated
4 intellectual property, and further provides that a failure to remedy
5 any deficiencies found in the audit that constitute a violation of
6 the applicable law of the jurisdiction where the deficiency occurred
7 shall constitute a breach of the contract, subject to cure within a
8 reasonable period of time.

9 (ii) Adopting and undertaking commercially reasonable efforts
10 to implement a code of conduct or similar written requirements
11 that are applicable to the person's direct manufacturers and that
12 prohibit use of stolen or misappropriated information technology
13 by the manufacturer, and the person undertakes practices and
14 procedures to address compliance with the prohibition against the
15 use of the stolen or misappropriated information technology in
16 accordance with the applicable code of conduct or written
17 requirements.

18 (E) The person does not have a contractual relationship with
19 the person alleged to have violated paragraph (2) of subdivision
20 (a) respecting the manufacture of the articles or products alleged
21 to have been manufactured in violation of paragraph (2) of
22 subdivision (a).

23 (2) A ~~third party~~ *third party* shall have the opportunity to be
24 heard regarding whether an article or product is an essential
25 component provided or to be provided to the ~~third party~~ *third party*,
26 and shall have the right to file a motion to dismiss any action
27 brought against it under paragraph (3) of subdivision (c).

28 (3) The court shall not enforce any award for damages against
29 the ~~third party~~ *third party* until after the court has ruled on that
30 party's claim of eligibility for any of the affirmative defenses set
31 out in this subdivision, and prior to the ruling may allow discovery,
32 in an action under paragraph (3) of subdivision (c), only on the
33 particular defenses raised by the ~~third party~~ *third party*.

34 (4) The court shall allow discovery against a ~~third party~~ *third*
35 *party* on an issue only after all discovery on that issue between the
36 parties has been completed and only if the evidence produced as
37 a result of the discovery does not resolve an issue of material
38 dispute between the parties.

1 (5) Any confidential or otherwise sensitive information
2 submitted by a party pursuant to this subdivision shall be subject
3 to a protective order.

4 (f) The provisions of this section are severable. If any provision
5 of this section or its application is held invalid, that invalidity shall
6 not affect other provisions or applications that can be given effect
7 without the invalid provision or application.

8 SEC. 3. No reimbursement is required by this act pursuant to
9 Section 6 of Article XIII B of the California Constitution because
10 the only costs that may be incurred by a local agency or school
11 district will be incurred because this act creates a new crime or
12 infraction, eliminates a crime or infraction, or changes the penalty
13 for a crime or infraction, within the meaning of Section 17556 of
14 the Government Code, or changes the definition of a crime within
15 the meaning of Section 6 of Article XIII B of the California
16 Constitution.