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AGs to the Front Lines: State Attorneys General Begin Wielding Unfair Competition Laws against Foreign IP Thieves

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Companies victimized by intellectual property theft may have a new weapon: asking state attorneys general for civil prosecution under unfair competition laws. Three states have used this tactic already—each time directed at foreign entities.

Massachusetts Attorney General Martha Coakley (<http://www.marthacoakley.com/>) brought the first action in 2012. The case (<http://www.mass.gov/ago/news-and-updates/press-releases/2012/2012-10-18-narong-seafood-co.html>) alleged that Narong Seafood, a Thai seafood-processing company operating worldwide, was using unlicensed software programs, giving Narong an unfair advantage over local businesses. In response to this action, Narong signed an "Assurance of Discontinuance," (https://docs.google.com/file/d/0B0EWPO_JDHhwenJEU0V0aEZIS3M/edi)

t?usp=sharing&pli=1) paid a \$10,000 penalty to the Commonwealth of Massachusetts, and agreed to comply with the Massachusetts unfair competition statute (<https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXV/Chapter93A/Section2>).

California joined Massachusetts in early 2013, when Attorney General Kamala Harris (<http://www.kamalaharris.org/>) sued two foreign apparel manufacturers (<http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-files-unfair-competition-lawsuits-over-use>) — one Indian and one Chinese — under the state's unfair competition statute (<http://www.leginfo.ca.gov/cgi-bin/displaycode?section=bpc&group=17001-18000&file=17200-17210>). The complaints allege that the companies use pirated computer software programs as part of their manufacturing process, and that this piracy allows the foreign companies to save costs and gain a substantial and unfair advantage over competitors in California who pay for the software they use. Both of these cases are still pending while the complaints are being served under the Hague convention. (As we reported previously, serving a foreign individual or company overseas can be difficult (<http://blogs.orrick.com/trade-secrets-watch/2013/07/11/the-short-arm-of-the-law-u-s-problems-prosecuting-foreigners-for-trade-secret-theft/>),)

Washington is another state to use similar tactics. Relying on a newly-adopted unfair competition law (<http://apps.leg.wa.gov/rcw/default.aspx?cite=19.330&full=true>) targeting "Stolen or Misappropriated Property," then-Attorney General Rob McKenna (<http://www.orrick.com/Lawyers/Robert-McKenna/Pages/default.aspx>) wrote in the fall of 2012 to Brazilian company Embraer, the world's fourth-largest aircraft manufacturer, about concerns that Embraer was using Microsoft software programs without the appropriate licenses. The issue was resolved (<http://www.atg.wa.gov/pressrelease.aspx?id=31143>) without the filing of a civil case when Embraer assured the attorney general that it would compete fairly with other aircraft manufacturers by properly licensing the software.

As affected companies become aware of this avenue for recourse, more states may join Massachusetts, California, and Washington in civil enforcement of intellectual property rights. To be sure, referral to a state attorney general may not replace traditional remedies such as the victim filing a lawsuit, referring the matter for criminal prosecution (<http://blogs.orrick.com/trade-secrets-watch/2013/05/29/power-move-referring-trade-secrets-theft-to-the-government-for-criminal-prosecution/>), or filing a complaint with the International Trade Commission (<http://blogs.orrick.com/trade-secrets-watch/2013/06/11/its-not-just-for-patents-anymore-using-the-itc-to-combat-theft-of-trade-secrets/>), but it is one additional tool for a company that falls victim to an intellectual property crime to use in the right situation.

6

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