## **SENATE BILL 65**

I4 7lr0886 (PRE–FILED)

By: Senator Reilly

Requested: October 17, 2016

Introduced and read first time: January 11, 2017

Assigned to: Finance

## A BILL ENTITLED

4	A 7 T		•
l	AN	ACT	concerning

## 2 Commercial Law - Copyright Infringement - Assertions Made in Bad Faith

- 3 FOR the purpose of prohibiting a person from making certain assertions of copyright 4 infringement in bad faith; authorizing a court to consider certain factors as evidence 5 of whether a person has made an assertion of copyright infringement in bad faith or 6 in good faith; altering the authority of the Attorney General and the Division of 7 Consumer Protection of the Office of the Attorney General to take certain actions; 8 altering the scope of individuals authorized to bring a civil action in a certain court 9 to recover for certain injuries or losses sustained as a result of a violation of this Act; 10 altering the circumstances in which a court may award certain damages and 11 remedies under certain circumstances; altering certain definitions; and generally 12 relating to bad faith assertions of copyright infringement.
- 13 BY repealing and reenacting, with amendments,
- 14 Article Commercial Law
- 15 Section 11–1601 and 11–1603
- 16 Annotated Code of Maryland
- 17 (2013 Replacement Volume and 2016 Supplement)
- 18 BY repealing and reenacting, without amendments,
- 19 Article Commercial Law
- 20 Section 11–1604 and 11–1605
- 21 Annotated Code of Maryland

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- 22 (2013 Replacement Volume and 2016 Supplement)
- 23 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND,
- 24 That the Laws of Maryland read as follows:

## Article - Commercial Law

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- 1 11–1601. 2 In this subtitle the following words have the meanings indicated. (a) "Claim" means the scope of [the]: 3 (b) **(1)** THE patent owner's exclusive rights to the use and control of the patent 4 5 owner's invention; OR 6 **(2)** THE COPYRIGHT OWNER'S EXCLUSIVE RIGHTS TO REPRODUCE, 7 DISPLAY, PERFORM, OR OTHERWISE USE THE COPYRIGHT OWNER'S WORK. 8 (c) "Demand letter" means a letter, an electronic mail, or any other written 9 communication asserting that a person has engaged in patent OR COPYRIGHT 10 infringement. 11 (d) "Division" means the Division of Consumer Protection of the Office of the 12 Attorney General. "Target" means a person: 13 (e) Who has received a demand letter or against whom an assertion of 14 (1) 15 patent OR COPYRIGHT infringement has been made; 16 (2) Who has been threatened with litigation or against whom a lawsuit has been filed alleging patent OR COPYRIGHT infringement; or 17 18 Who has at least one customer who has received a demand letter (3)19 asserting that the person's product, service, [or] technology, OR WORK has infringed a 20patent OR COPYRIGHT. 21 11-1603.22 A person may not make an assertion of patent OR COPYRIGHT infringement against another in bad faith. 2324 A court may consider the following factors as evidence that a person has (b) made an assertion of patent OR COPYRIGHT infringement in bad faith: 25 26 (i) The demand letter sent by the person does not contain:
- 29 2. The name and address of the patent **OR COPYRIGHT** 30 owner or assignee, if any; or

The alleged patent number OR A COPY OF THE

1.

CERTIFICATE OF COPYRIGHT REGISTRATION:

1 2 3	3. Facts relating to the specific areas in which the target's product, service, [or] technology, OR WORK infringes the patent OR COPYRIGHT or is covered by the claims in the patent OR COPYRIGHT;
4 5 6	(ii) The target requested the information described in item (i) of this paragraph, and the person failed to provide the information within a reasonable period of time;
7 8 9 10 11	(iii) Before sending the demand letter, the person did not conduct an analysis comparing the claims in the patent OR COPYRIGHT to the target's product, service, [or] technology, OR WORK, or the analysis was conducted but does not identify specific areas in which the product, service, [or] technology, OR WORK is covered by the claims in the patent OR COPYRIGHT;
12 13	(iv) The demand letter demanded a response or payment of a licensing fee within an unreasonably short period of time;
14 15	(v) The person offered to license the patent <b>OR COPYRIGHT</b> for an amount that is not based on a reasonable estimate of the value of the license;
16 17	(vi) The assertion of patent <b>OR COPYRIGHT</b> infringement is without merit, and the person knew, or should have known, that the assertion is without merit;
18 19	(vii) The assertion of patent <b>OR COPYRIGHT</b> infringement is deceptive;
20 21 22	(viii) 1. The person, or a subsidiary or an affiliate of the person, previously has filed or threatened to file one or more lawsuits based on the same or a similar assertion of patent <b>OR COPYRIGHT</b> infringement; and
23 24	2. A. The threats or lawsuits did not provide the information described in item (i) of this paragraph; and
25 26	B. A court found the person's assertion to be without merit; and
27	(ix) Any other factor the court determines to be relevant.
28 29	(2) The court may consider the following factors as evidence that a person has made an assertion of patent <b>OR COPYRIGHT</b> infringement in good faith:
30	(i) If the demand letter sent by the person does not contain the

information described in paragraph (1)(i) of this subsection, the person provides the

information to the target within a reasonable period of time;

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damages, the court also may award:

1	(ii)	The person has:
2 3	has infringed the patent	1. Engaged in a good faith effort to establish that the target <b>OR COPYRIGHT</b> ; and
4		2. Attempted to negotiate an appropriate remedy;
5	(iii)	The person has:
6 7	efforts to enforce a pater	1. Demonstrated good faith business practices in previous at <b>OR COPYRIGHT</b> ; or
8 9	litigation;	2. Successfully enforced a patent OR COPYRIGHT through
10 11 12	(iv) patent OR COPYRIGHT, patent OR COPYRIGHT;	The person has made a substantial investment in the use of the or in the production or sale of a product <b>OR WORK</b> covered by the
13	(v)	The person is:
14		1. An inventor of the patent or an original assignee; [or]
15 16	THE COPYRIGHT OR AN	2. AN AUTHOR OF THE ORIGINAL WORK PROTECTED BY ORIGINAL ASSIGNEE; OR
17 18	a technology transfer org	[2.] 3. A representative of an institution of higher education or ganization affiliated with an institution of higher education; and
19	(vi)	Any other factor the court determines to be relevant.
20	11–1604.	
21 22 23	•	neral and the Division shall have the same authority under this cions, conduct investigations, and bring civil and criminal actions f this article.
24	11–1605.	
25 26 27	Title 13 of this article, a	to any action by the Division or Attorney General authorized by target may bring an action in an appropriate court to recover for as a result of a violation of this subtitle.

If a target prevails in an action brought under this subtitle and is awarded

1	(1)	Court	costs and fees, including reasonable attorney's fees;
2	(2)	Exem	plary damages in an amount not to exceed the greater of:
3		(i)	\$50,000; or
4		(ii)	Three times the total of damages, costs, and fees; and
5	(3)	Any e	equitable relief that the court considers appropriate.
6 7	SECTION 2 October 1, 2017.	2. AND	BE IT FURTHER ENACTED, That this Act shall take effect