

STATE OF NEW YORK

10708

IN ASSEMBLY

September 18, 2024

Introduced by COMMITTEE ON RULES -- (at request of M. of A. Vanel) --
read once and referred to the Committee on Judiciary

AN ACT to amend the general business law, in relation to prohibiting bad
faith assertions of copyright infringement

The People of the State of New York, represented in Senate and Assem-
bly, do enact as follows:

1 Section 1. The general business law is amended by adding a new article
2 24-AA to read as follows:

ARTICLE 24-AA

BAD FAITH ASSERTIONS OF COPYRIGHT INFRINGEMENT

Section 370. Definitions.

6 370-a. Bad faith assertions of copyright infringement prohibit-
7 ed.

8 370-b. Penalties.

9 370-c. Severability.

10 § 370. Definitions. The following terms shall have the following mean-
11 ings:

12 1. "Demand" or "assertion" shall mean a letter, e-mail, or other
13 communication asserting or claiming that the target has engaged in copy-
14 right infringement.

15 2. "Target" shall mean a New York resident:

16 (a) Who has received a demand letter or against whom an assertion or
17 allegation of copyright infringement has been made;

18 (b) Who has been threatened with litigation or against whom a lawsuit
19 has been filed alleging copyright infringement; or

20 (c) Whose customers have received a demand letter asserting that the
21 person's product, service, or technology has infringed on a copyright.

22 § 370-a. Bad faith assertions of copyright infringement prohibited. 1.
23 A person shall not make a bad faith assertion of copyright infringement.

24 2. An assertion of copyright infringement is presumptively made in bad
25 faith when:

26 (a) The amount demanded by the person making the assertion was not
27 made in good faith; or

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

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1 (b) The claim or assertion of copyright infringement is based on copy-
2 righted material that is in the public domain or for which the asserter
3 lacks the authority to enforce the copyright.

4 3. A court determining whether an amount demanded was made in good
5 faith shall consider the following factors:

6 (a) the amount of the demand that makes up the cost of the copyrighted
7 material;

8 (b) the amount of the demand that makes up any reasonable costs and
9 attorney's fees incurred in making the assertion, provided however that
10 where the assertion was made through automated means or the costs
11 incurred to make and communicate the assertion were de minimis, the
12 court shall find that the cost incurred in making the assertion is zero
13 dollars;

14 (c) the amount of the demand that makes up damages related to the use
15 of the copyrighted material, including reputational damages, lost
16 licensing revenue, lost sales, punitive damages and any other financial
17 loss associated with the infringement, provided however that a court
18 shall assess the veracity of such damages and the amount claimed by such
19 damages;

20 (d) the amount of the demand that makes up any other costs;

21 (e) the amount that is generally awarded for similar claims where a
22 person asserting copyright infringement prevails, other than such
23 amounts described in paragraph (b) of this subdivision;

24 (f) the amount that a willing buyer of the relevant copyrighted mate-
25 rial is willing to pay a willing seller. To determine such amount a
26 court may examine:

27 (i) existing listings, sales and negotiations for sales, whether pres-
28 ently or previously occurring;

29 (ii) the cost of other, similar copyrighted material that the asserter
30 has listed, sold and negotiated, whether presently or previously occur-
31 ring; and

32 (iii) the overall market for similar copyrighted materials;

33 (g) the ratio between the different categories of all amounts
34 asserted, in relation to the overall amount of the demand;

35 (h) whether such amounts demanded from the asserter evince an intent
36 to compel the recipient to settle for a significantly higher sum than
37 the typical cost of the copyrighted material to avoid the costs of liti-
38 gating a claim. The court may consider any relevant non-privileged
39 information in making this determination; and

40 (i) the amount that the asserter would have recovered or did recover
41 had they been successful or when they were successful in an action to
42 enforce the copyrighted material, other than such amounts described in
43 paragraph (b) of this subdivision.

44 4. Where subdivision two of this section does not apply, a court may
45 consider the following factors as evidence that a person has made a bad
46 faith assertion of copyright infringement:

47 (a) The demand letter does not contain a reference to the copyrighted
48 material and the name and address of the copyright owner or owners and
49 assignee or assignees, if any;

50 (b) The demand letter demands payment of a license fee or response
51 within an unreasonably short period of time;

52 (c) The claim or assertion of copyright infringement is deceptive;

53 (d) The claim or assertion of copyright infringement is meritless, and
54 the person knew, or should have known, that the claim or assertion is
55 meritless;

1 (e) The person or their subsidiaries or affiliates have previously
2 filed or threatened to file one or more lawsuits based on the same or
3 similar claim of copyright infringement, and;

4 (i) those threats or lawsuits lacked the information described in
5 paragraph (a) of this subdivision; or

6 (ii) the person attempted to enforce the claim of copyright infringe-
7 ment in litigation, and a court found the claim to be meritless; and

8 (f) Any other factor the court finds relevant.

9 5. With respect to a court's assessment under subdivisions three and
10 four of this section, a court may consider the following factors as
11 evidence that a person has not made a bad faith assertion of copyright
12 infringement:

13 (a) The demand letter contains the information described in paragraph
14 (a) of subdivision four of this section;

15 (b) Where the demand letter lacks the information described in para-
16 graph (a) of subdivision four of this section and the target requests
17 the information, the person provides the information within a reasonable
18 period of time;

19 (c) The person engages in a good faith effort to establish that the
20 target has infringed the copyright and to negotiate an appropriate reme-
21 dy;

22 (d) The person is:

23 (i) the creator or author of the copyrighted material or, in the case
24 of a copyright filed by and awarded to an assignee of the original crea-
25 tor or author or joint creator or author, is the original assignee; or

26 (ii) an institution of higher education or a technology transfer
27 organization owned or affiliated with an institution of higher educa-
28 tion;

29 (e) The person has demonstrated good faith business practices in
30 previous efforts to enforce the copyright, or a substantially similar
31 copyright; and

32 (f) Any other factor the court finds relevant.

33 6. Nothing in this section shall be construed as limiting, expanding
34 or altering any parties' rights with respect to a copyright infringement
35 claim brought in a court of competent jurisdiction.

36 7. The fact that a demand was made through automated means, in whole
37 or in part, shall not be a defense to this section.

38 § 370-b. Penalties. 1. A person who is the recipient of a bad faith
39 assertion of copyright infringement may bring a civil action in a court
40 of competent jurisdiction and, upon a finding that the person violated
41 the provisions of this article, the court shall award such recipient of
42 a bad faith assertion of copyright infringement:

43 (a) Equitable relief, as the court deems proper;

44 (b) Reasonable attorney's fees and costs;

45 (c) Exemplary damages in an amount of ten thousand dollars or three
46 times the total of damages, costs, and fees, whichever is greater; and

47 (d) Any other relief the court deems proper.

48 2. A court, in its discretion, may award to any party or attorney in
49 any action brought under this section costs in the form of reimbursement
50 for actual expenses reasonably incurred and reasonable attorney's fees,
51 resulting from frivolous conduct as defined in section 130-1.1 of title
52 twenty-two of the New York codes, rules and regulations, as amended from
53 time to time.

54 3. Wherever the attorney general shall find that a person has engaged
55 in a persistent course of conduct in violation of this article, an
56 application may be made by the attorney general in the name of the

1 people of the state of New York to a court of justice having jurisdic-
2 tion to issue an injunction, and upon notice to the defendant of not
3 less than five days, to enjoin and restrain the continuance of such
4 violations; and if it shall appear to the satisfaction of the court or
5 justice, that the defendant has, in fact, violated this section an
6 injunction may be issued by such court or justice enjoining and
7 restraining any further violation, without requiring proof that any
8 person has, in fact, been injured or damaged thereby. In any such
9 proceeding, the court may make allowances to the attorney general as
10 provided in paragraph six of subdivision (a) of section eighty-three
11 hundred three of the civil practice law and rules, and direct restitu-
12 tion. Whenever the court shall determine that a violation of this
13 section has occurred, the court may impose a civil penalty of not more
14 than ten thousand dollars per bad faith assertion of copyright infringe-
15 ment or three times the total of damages, costs, and fees, whichever is
16 greater. In connection with any such proposed application, the attorney
17 general is authorized to take proof and make a determination of the
18 relevant facts and to issue subpoenas in accordance with the civil prac-
19 tice law and rules.

20 § 370-c. Severability. If any clause, sentence, paragraph, section or
21 part of this article shall be adjudged by any court of competent juris-
22 isdiction to be invalid and after exhaustion of all further judicial
23 review, the judgment shall not affect, impair or invalidate the remain-
24 der thereof, but shall be confined in its operation to the clause,
25 sentence, paragraph, section or part of this article directly involved
26 in the controversy in which the judgment shall have been rendered.

27 § 2. This act shall take effect on the one hundred eightieth day after
28 it shall have become a law.