

108TH CONGRESS
2D SESSION

S. 2242

To prevent and punish counterfeiting and copyright piracy, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 26, 2004

Mr. BIDEN (for himself and Mr. NELSON of Nebraska) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To prevent and punish counterfeiting and copyright piracy,
and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Anticounterfeiting Act
5 of 2004”.

6 **SEC. 2. FINDINGS.**

7 Congress finds that—

8 (1) American innovation, and the protection of
9 that innovation by the government, has been a crit-

1 ical component of the economic growth of this Na-
2 tion throughout the history of the Nation;

3 (2) copyright-based industries represent one of
4 the most valuable economic assets of this country,
5 contributing over 5 percent of the gross domestic
6 product of the United States and creating significant
7 job growth and tax revenues;

8 (3) the American intellectual property sector
9 employs approximately 4,300,000 people, rep-
10 resenting over 3 percent of total United States em-
11 ployment;

12 (4) the proliferation of organized criminal coun-
13 terfeiting enterprises threatens the economic growth
14 of United States copyright industries;

15 (5) the American intellectual property sector
16 has invested millions of dollars to develop highly so-
17 phisticated authentication features that assist con-
18 sumers and law enforcement in distinguishing gen-
19 uine intellectual property products and packaging
20 from counterfeits;

21 (6) in order to thwart these industry efforts,
22 counterfeiters traffic in, and tamper with, genuine
23 authentication features, for example, by obtaining
24 genuine authentication features through illicit means

1 and then commingling these features with counter-
 2 feit software or packaging;

3 (7) Federal law does not provide adequate civil
 4 and criminal remedies to combat tampering activities
 5 that directly facilitate counterfeiting crimes; and

6 (8) in order to strengthen Federal enforcement
 7 against counterfeiting of copyrighted works, Con-
 8 gress must enact legislation that—

9 (A) prohibits trafficking in, and tampering
 10 with, authentication features of copyrighted
 11 works; and

12 (B) permits aggrieved parties an appro-
 13 priate civil cause of action.

14 **SEC. 3. PROHIBITION AGAINST TRAFFICKING IN ILLICIT**
 15 **AUTHENTICATION FEATURES.**

16 (a) IN GENERAL.—Section 2318 of title 18, United
 17 States Code, is amended—

18 (1) by striking the heading and inserting
 19 **“Trafficking in counterfeit labels, illicit**
 20 **authentication features, or counterfeit**
 21 **documentation or packaging”**;

22 (2) by striking subsection (a) and inserting the
 23 following:

24 “(a) Whoever, in any of the circumstances described
 25 in subsection (c), knowingly traffics in—

1 “(1) a counterfeit label affixed to, or designed
2 to be affixed to—

3 “(A) a phonorecord;

4 “(B) a copy of a computer program;

5 “(C) a copy of a motion picture or other
6 audiovisual work; or

7 “(D) documentation or packaging;

8 “(2) an illicit authentication feature affixed to
9 or embedded in, or designed to be affixed to or em-
10 bedded in—

11 “(A) a phonorecord;

12 “(B) a copy of a computer program;

13 “(C) a copy of a motion picture or other
14 audiovisual work; or

15 “(D) documentation or packaging; or

16 “(3) counterfeit documentation or packaging,
17 shall be fined under this title or imprisoned for not
18 more than 5 years, or both.”;

19 (3) in subsection (b)—

20 (A) in paragraph (2), by striking “and” at
21 the end;

22 (B) in paragraph (3)—

23 (i) by striking “and ‘audiovisual work’
24 have” and inserting the following: “,

1 ‘audiovisual work’, and ‘copyright owner’
2 have’’; and

3 (ii) by striking the period at the end
4 and inserting a semicolon; and

5 (C) by adding at the end the following:

6 “(4) the term ‘authentication feature’ means
7 any hologram, watermark, certification, symbol,
8 code, image, sequence of numbers or letters, or other
9 physical feature that either individually or in com-
10 bination with another feature is used by the respec-
11 tive copyright owner to verify that a phonorecord, a
12 copy of a computer program, a copy of a motion pic-
13 ture or other audiovisual work, or documentation or
14 packaging is not counterfeit or otherwise infringing
15 of any copyright;

16 “(5) the term ‘documentation or packaging’
17 means documentation or packaging for a phono-
18 record, copy of a computer program, or copy of a
19 motion picture or other audiovisual work; and

20 “(6) the term ‘illicit authentication feature’
21 means an authentication feature, that—

22 “(A) without the authorization of the re-
23 spective copyright owner has been tampered
24 with or altered so as to facilitate the reproduc-
25 tion or distribution of—

- 1 “(i) a phonorecord;
- 2 “(ii) a copy of a computer program;
- 3 “(iii) a copy of a motion picture or
4 other audiovisual work; or
- 5 “(iv) documentation or packaging;
- 6 in violation of the rights of the copyright owner
7 under title 17;
- 8 “(B) is genuine, but has been distributed,
9 or is intended for distribution, without the au-
10 thorization of the respective copyright owner; or
- 11 “(C) appears to be genuine, but is not.”;
- 12 (4) in subsection (c)—
- 13 (A) by striking paragraph (3) and insert-
14 ing the following:
- 15 “(3) the counterfeit label or illicit authentica-
16 tion feature is affixed to, is embedded in, or en-
17 closes, or is designed to be affixed to, to be embed-
18 ded in, or to enclose—
- 19 “(A) a phonorecord of a copyrighted sound
20 recording;
- 21 “(B) a copy of a copyrighted computer
22 program;
- 23 “(C) a copy of a copyrighted motion pic-
24 ture or other audiovisual work; or

1 “(D) documentation or packaging; or”;
2 and

3 (B) in paragraph (4), by striking “for a
4 computer program”;

5 (5) in subsection (d)—

6 (A) by inserting “or illicit authentication
7 features” after “counterfeit labels” each place
8 it appears;

9 (B) by inserting “or illicit authentication
10 features” after “such labels”; and

11 (C) by inserting before the period at the
12 end the following: “, and of any equipment, de-
13 vice, or materials used to manufacture, repro-
14 duce, or assemble the counterfeit labels or illicit
15 authentication features”; and

16 (6) by adding at the end the following:

17 “(f) CIVIL REMEDIES FOR VIOLATION.—

18 “(1) IN GENERAL.—Any copyright owner who
19 is injured by a violation of this section or is threat-
20 ened with injury, may bring a civil action in an ap-
21 propriate United States district court.

22 “(2) DISCRETION OF COURT.—In any action
23 brought under paragraph (1), the court—

24 “(A) may grant 1 or more temporary or
25 permanent injunctions on such terms as the

1 court determines to be reasonable to prevent or
2 restrain violations of this section;

3 “(B) at any time while the action is pend-
4 ing, may order the impounding, on such terms
5 as the court determines to be reasonable, of any
6 article that is in the custody or control of the
7 alleged violator and that the court has reason-
8 able cause to believe was involved in a violation
9 of this section; and

10 “(C) may award to the injured party—

11 “(i) reasonable attorney fees and
12 costs; and

13 “(ii)(I) actual damages and any addi-
14 tional profits of the violator, as provided
15 by paragraph (3); or

16 “(II) statutory damages, as provided
17 by paragraph (4).

18 “(3) ACTUAL DAMAGES AND PROFITS.—

19 “(A) IN GENERAL.—The injured party is
20 entitled to recover—

21 “(i) the actual damages suffered by
22 the injured party as a result of a violation
23 of this section, as provided by subpara-
24 graph (B); and

1 “(ii) any profits of the violator that
2 are attributable to a violation of this sec-
3 tion and are not taken into account in
4 computing the actual damages.

5 “(B) CALCULATION OF DAMAGES.—The
6 court shall calculate actual damages by multi-
7 plying—

8 “(i) the value of the phonorecords or
9 copies to which counterfeit labels, illicit au-
10 thentication features, or counterfeit docu-
11 mentation or packaging were affixed or
12 embedded, or designed to be affixed or em-
13 bedded; by

14 “(ii) the number of phonorecords or
15 copies to which counterfeit labels, illicit au-
16 thentication features, or counterfeit docu-
17 mentation or packaging were affixed or
18 embedded, or designed to be affixed or em-
19 bedded, unless such calculation would un-
20 derestimate the actual harm suffered by
21 the copyright owner.

22 “(C) DEFINITION.—For purposes of this
23 paragraph, the term ‘value of the phonorecord
24 or copy’ means—

1 “(i) the retail value of an authorized
2 phonorecord of a copyrighted sound record-
3 ing;

4 “(ii) the retail value of an authorized
5 copy of a copyrighted computer program;
6 or

7 “(iii) the retail value of a copy of a
8 copyrighted motion picture or other audio-
9 visual work.

10 “(4) STATUTORY DAMAGES.—The injured party
11 may elect, at any time before final judgment is ren-
12 dered, to recover, instead of actual damages and
13 profits, an award of statutory damages for each vio-
14 lation of this section in a sum of not less than
15 \$2,500 or more than \$25,000, as the court considers
16 appropriate.

17 “(5) SUBSEQUENT VIOLATION.—The court may
18 increase an award of damages under this subsection
19 by 3 times the amount that would otherwise be
20 awarded, as the court considers appropriate, if the
21 court finds that a person has subsequently violated
22 this section within 3 years after a final judgment
23 was entered against that person for a violation of
24 this section.

1 “(6) LIMITATION ON ACTIONS.—A civil action
2 may not be commenced under this section unless it
3 is commenced within 3 years after the date on which
4 the claimant discovers the violation.

5 “(g) OTHER RIGHTS NOT AFFECTED.—Nothing in
6 this section shall enlarge, diminish, or otherwise affect li-
7 ability under section 1201 or 1202 of title 17.”.

8 (b) TECHNICAL AND CONFORMING AMENDMENT.—
9 The item relating to section 2318 in the table of sections
10 at the beginning of chapter 113 of title 18, United States
11 Code, is amended by inserting “or illicit authentication
12 features” after “counterfeit labels”.

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