

AMENDMENT NO. _____ Calendar No. _____

Purpose: To provide a complete substitute.

IN THE SENATE OF THE UNITED STATES—107th Cong., 2d Sess.

S. 2395

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

Referred to the Committee on _____
and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by

Viz:

1 Strike all after the enacting clause and insert the fol-
2 lowing:

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Anticounterfeiting
5 Amendments of 2002”.

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, IL-**
20 **LICIT AUTHENTICATION FEATURES, OR COUN-**
21 **TERFEIT 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 more
18 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', 'sound recording', and
2 'copyright owner' 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 feature that either individually or in combination
10 with another feature is used by the respective copy-
11 right owner to verify that a phonorecord, a copy of
12 a computer program, a copy of a motion picture or
13 other audiovisual work, or documentation or pack-
14 aging is not counterfeit or otherwise infringing of
15 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) is genuine in origin, but, without the
23 authorization of the respective copyright owner,
24 has been tampered with or altered for the pur-

1 pose of inducing a third party to reproduce or
2 accept distribution of—

3 “(i) a phonorecord;

4 “(ii) a copy of a computer program;

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

7 “(iv) documentation or packaging;

8 where such reproduction or distribution violates
9 the rights of the copyright owner under title 17;

10 “(B) is genuine, but has been distributed,
11 or is intended for distribution, without the au-
12 thorization of the respective copyright owner
13 and not in connection with the lawfully made
14 copy or phonorecord to which such authentica-
15 tion feature was intended to be affixed or em-
16 bedded by the respective copyright owner; or

17 “(C) appears to be genuine, but is not.”;

18 (4) in subsection (c)—

19 (A) by striking paragraph (3) and insert-
20 ing the following:

21 “(3) the counterfeit label or illicit authentica-
22 tion feature is affixed to, is embedded in, or en-
23 closes, or is designed to be affixed to, to be embed-
24 ded in, or to enclose—

1 “(A) a phonorecord of a copyrighted sound
2 recording;

3 “(B) a copy of a copyrighted computer
4 program;

5 “(C) a copy of a copyrighted motion pic-
6 ture or other audiovisual work; or

7 “(D) copyrighted documentation or pack-
8 aging; or”; and

9 (B) in paragraph (4), by striking “for a
10 computer program”;
11 (5) in subsection (d)—

12 (A) by inserting “or illicit authentication
13 features” after “counterfeit labels” each place
14 it appears;

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

17 (C) by inserting before the period at the
18 end the following: “, and of any equipment, de-
19 vice, or materials used to manufacture, repro-
20 duce, or assemble the counterfeit labels or illicit
21 authentication features”; and

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

23 “(f) CIVIL REMEDIES FOR VIOLATION.—

24 “(1) IN GENERAL.—Any copyright owner who
25 is injured by a violation of this section or is threat-

1 ened with injury, may bring a civil action in an ap-
2 propriate United States district court.

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

5 “(A) may grant 1 or more temporary or
6 permanent injunctions on such terms as the
7 court determines to be reasonable to prevent or
8 restrain violations of this section;

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

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

17 “(i) reasonable attorney fees and
18 costs; and

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

22 “(II) statutory damages, as provided
23 by paragraph (4).

24 “(3) ACTUAL DAMAGES AND PROFITS.—

1 “(A) IN GENERAL.—The injured party is
2 entitled to recover—

3 “(i) the actual damages suffered by
4 the injured party as a result of a violation
5 of this section, as provided by subpara-
6 graph (B); and

7 “(ii) any profits of the violator that
8 are attributable to a violation of this sec-
9 tion and are not taken into account in
10 computing the actual damages.

11 “(B) CALCULATION OF DAMAGES.—The
12 court shall calculate actual damages by
13 multiplying—

14 “(i) the value of the 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; by

20 “(ii) the number of phonorecords or
21 copies to which counterfeit labels, illicit au-
22 thentication features, or counterfeit docu-
23 mentation or packaging were affixed or
24 embedded, or designed to be affixed or em-
25 bedded,

1 unless such calculation would underestimate the
2 actual harm suffered by the copyright owner.

3 “(C) DEFINITION.—For purposes of this
4 paragraph, the term ‘value of the phonorecord
5 or copy’ means—

6 “(i) the retail value of an authorized
7 phonorecord of a copyrighted sound record-
8 ing;

9 “(ii) the retail value of an authorized
10 copy of a copyrighted computer program;
11 or

12 “(iii) the retail value of an authorized
13 copy of a copyrighted motion picture or
14 other audiovisual work.

15 “(4) STATUTORY DAMAGES.—The injured party
16 may elect, at any time before final judgment is ren-
17 dered, to recover, instead of actual damages and
18 profits, an award of statutory damages for each vio-
19 lation of this section in a sum of not less than
20 \$2,500 or more than \$25,000, as the court considers
21 appropriate.

22 “(5) SUBSEQUENT VIOLATION.—The court may
23 increase an award of damages under this subsection
24 by 3 times the amount that would otherwise be
25 awarded, as the court considers appropriate, if the

1 court finds that a person has subsequently violated
2 this section within 3 years after a final judgment
3 was entered against that person for a violation of
4 this section.

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

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

12 (b) TECHNICAL AND CONFORMING AMENDMENT.—
13 The item relating to section 2318 in the table of sections
14 at the beginning of chapter 113 of title 18, United States
15 Code, is amended to read as follows:

“2318. Trafficking in counterfeit labels, illicit authentication features, or coun-
terfeit documentation or packaging.”