

Calendar No. 500

107TH CONGRESS
2^D SESSION

S. 2395

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

IN THE SENATE OF THE UNITED STATES

APRIL 30, 2002

Mr. BIDEN (for himself, Mr. ALLEN, Mr. HOLLINGS, Mrs. BOXER, Mrs. MURRAY, Mr. SMITH of Oregon, Mr. NELSON of Nebraska, Mr. DORGAN, Mr. CONRAD, Mr. HATCH, Mr. LEAHY, Mrs. FEINSTEIN, Mr. DEWINE, and Mr. THURMOND) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

JULY 18, 2002

Reported by Mr. LEAHY, with an amendment

[Strike out all after the enacting clause and insert the part printed in *italic*]

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~~
5 ~~Amendments of 2002~~”.

1 **SEC. 2. FINDINGS.**

2 Congress finds that—

3 (1) American innovation, and the protection of
4 that innovation by the government, has been a crit-
5 ical component of the economic growth of this Na-
6 tion throughout the history of the Nation;

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

12 (3) the American intellectual property sector
13 employs approximately 4,300,000 people, rep-
14 resenting over 3 percent of total United States em-
15 ployment;

16 (4) the proliferation of organized criminal coun-
17 terfeiting enterprises threatens the economic growth
18 of United States copyright industries;

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

25 (6) in order to thwart these industry efforts,
26 counterfeiters traffic in, and tamper with, genuine

1 authentication features, for example, by obtaining
 2 genuine authentication features through illicit means
 3 and then commingling these features with counter-
 4 feit software or packaging;

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

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

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

14 (B) permits aggrieved parties an appro-
 15 priate civil cause of action.

16 **SEC. 3. PROHIBITION AGAINST TRAFFICKING IN ILLICIT**
 17 **AUTHENTICATION FEATURES.**

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

20 (1) by striking the heading and inserting
 21 **“TRAFFICKING IN COUNTERFEIT LABELS, IL-**
 22 **LICIT AUTHENTICATION FEATURES, OR COUN-**
 23 **TERFEIT DOCUMENTATION OR PACKAGING”;**

24 (2) by striking subsection (a) and inserting the
 25 following:

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

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

5 “(A) a phonorecord;

6 “(B) a copy of a computer program;

7 “(C) a copy of a motion picture or other
8 audiovisual work; or

9 “(D) documentation or packaging;

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

13 “(A) a phonorecord;

14 “(B) a copy of a computer program;

15 “(C) a copy of a motion picture or other
16 audiovisual work; or

17 “(D) documentation or packaging; or

18 “(3) counterfeit documentation or packaging;

19 shall be fined under this title or imprisoned for not more
20 than 5 years, or both.”;

21 (3) in subsection (b)—

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

24 (B) in paragraph (3)—

1 (i) by striking “and ‘audiovisual work’
2 have” and inserting the following: “,
3 ‘audiovisual work’, and ‘copyright owner’
4 have”; and

5 (ii) by striking the period at the end
6 and inserting a semicolon; and

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

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

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

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

24 “(A) without the authorization of the re-
25 spective copyright owner has been tampered

1 with or altered so as to facilitate the reproduc-
 2 tion or 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 in violation of the rights of the copyright owner
 9 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; or

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

14 (4) in subsection (c)—

15 (A) by striking paragraph (3) and insert-
 16 ing the following:

17 “(3) the counterfeit label or illicit authentica-
 18 tion feature is affixed to, is embedded in, or en-
 19 closes, or is designed to be affixed to, to be embed-
 20 ded in, or to enclose—

21 “(A) a phonorecord of a copyrighted sound
 22 recording;

23 “(B) a copy of a copyrighted computer
 24 program;

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

3 “(D) documentation or packaging; or”;
4 and

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

7 (5) in subsection (d)—

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

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

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

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

19 “(f) CIVIL REMEDIES FOR VIOLATION.—

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

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

1 “(A) may grant ~~1~~ or more temporary or
2 permanent injunctions on such terms as the
3 court determines to be reasonable to prevent or
4 restrain violations of this section;

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

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

13 “(i) reasonable attorney fees and
14 costs; and

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

18 “(II) statutory damages, as provided
19 by paragraph (4).

20 ~~“(3) ACTUAL DAMAGES AND PROFITS.—~~

21 ~~“(A) IN GENERAL.—The injured party is~~
22 entitled to recover—

23 “(i) the actual damages suffered by
24 the injured party as a result of a violation

1 of this section, as provided by subpara-
2 graph (B); and

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

7 “(B) CALCULATION OF DAMAGES.—The
8 court shall calculate actual damages by
9 multiplying—

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

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

22 unless such calculation would underestimate the
23 actual harm suffered by the copyright owner.

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

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

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

10 “(iii) the retail value of a copy of a
11 copyrighted motion picture or other audio-
12 visual work.

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

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

1 was entered against that person for a violation of
2 this section.

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

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

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

15 **SECTION 1. SHORT TITLE.**

16 *This Act may be cited as the “Anticounterfeiting*
17 *Amendments of 2002”.*

18 **SEC. 2. FINDINGS.**

19 *Congress finds that—*

20 (1) *American innovation, and the protection of*
21 *that innovation by the government, has been a critical*
22 *component of the economic growth of this Nation*
23 *throughout the history of the Nation;*

24 (2) *copyright-based industries represent one of*
25 *the most valuable economic assets of this country, con-*

1 *tributing over 5 percent of the gross domestic product*
2 *of the United States and creating significant job*
3 *growth and tax revenues;*

4 *(3) the American intellectual property sector em-*
5 *loys approximately 4,300,000 people, representing*
6 *over 3 percent of total United States employment;*

7 *(4) the proliferation of organized criminal coun-*
8 *terfeiting enterprises threatens the economic growth of*
9 *United States copyright industries;*

10 *(5) the American intellectual property sector has*
11 *invested millions of dollars to develop highly sophisti-*
12 *cated authentication features that assist consumers*
13 *and law enforcement in distinguishing genuine intel-*
14 *lectual property products and packaging from coun-*
15 *terfeits;*

16 *(6) in order to thwart these industry efforts,*
17 *counterfeiters traffic in, and tamper with, genuine*
18 *authentication features, for example, by obtaining*
19 *genuine authentication features through illicit means*
20 *and then commingling these features with counterfeit*
21 *software or packaging;*

22 *(7) Federal law does not provide adequate civil*
23 *and criminal remedies to combat tampering activities*
24 *that directly facilitate counterfeiting crimes; and*

1 (8) *in order to strengthen Federal enforcement*
 2 *against counterfeiting of copyrighted works, Congress*
 3 *must enact legislation that—*

4 (A) *prohibits trafficking in, and tampering*
 5 *with, authentication features of copyrighted*
 6 *works; and*

7 (B) *permits aggrieved parties an appro-*
 8 *priate civil cause of action.*

9 **SEC. 3. PROHIBITION AGAINST TRAFFICKING IN ILLICIT AU-**
 10 **THENTICATION FEATURES.**

11 (a) *IN GENERAL.*—*Section 2318 of title 18, United*
 12 *States Code, is amended—*

13 (1) *by striking the heading and inserting*
 14 **“TRAFFICKING IN COUNTERFEIT LABELS, IL-**
 15 **LICIT AUTHENTICATION FEATURES, OR COUN-**
 16 **TERFEIT DOCUMENTATION OR PACKAGING”;**

17 (2) *by striking subsection (a) and inserting the*
 18 *following:*

19 “(a) *Whoever, in any of the circumstances described*
 20 *in subsection (c), knowingly traffics in—*

21 “(1) *a counterfeit label affixed to, or designed to*
 22 *be affixed to—*

23 “(A) *a phonorecord;*

24 “(B) *a copy of a computer program;*

1 “(C) a copy of a motion picture or other
2 audiovisual work; or

3 “(D) documentation or packaging;

4 “(2) an illicit authentication feature affixed to
5 or embedded in, or designed to be affixed to or embed-
6 ded in—

7 “(A) a phonorecord;

8 “(B) a copy of a computer program;

9 “(C) a copy of a motion picture or other
10 audiovisual work; or

11 “(D) documentation or packaging; or

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

15 (3) in subsection (b)—

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

18 (B) in paragraph (3)—

19 (i) by striking “and ‘audiovisual work’
20 have” and inserting the following: “, ‘audio-
21 visual work’, ‘sound recording’, and ‘copy-
22 right owner’ have”; and

23 (ii) by striking the period at the end
24 and inserting a semicolon; and

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

1 “(4) the term ‘authentication feature’ means any
2 hologram, watermark, certification, symbol, code,
3 image, sequence of numbers or letters, or other feature
4 that either individually or in combination with an-
5 other feature is used by the respective copyright owner
6 to verify that a phonorecord, a copy of a computer
7 program, a copy of a motion picture or other audio-
8 visual work, or documentation or packaging is not
9 counterfeit or otherwise infringing of any copyright;

10 “(5) the term ‘documentation or packaging’
11 means documentation or packaging for a phono-
12 record, copy of a computer program, or copy of a mo-
13 tion picture or other audiovisual work; and

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

16 “(A) is genuine in origin, but, without the
17 authorization of the respective copyright owner,
18 has been tampered with or altered for the pur-
19 pose of inducing a third party to reproduce or
20 accept distribution of—

21 “(i) a phonorecord;

22 “(ii) a copy of a computer program;

23 “(iii) a copy of a motion picture or
24 other audiovisual work; or

25 “(iv) documentation or packaging;

1 *where such reproduction or distribution violates*
2 *the rights of the copyright owner under title 17;*

3 *“(B) is genuine, but has been distributed, or*
4 *is intended for distribution, without the author-*
5 *ization of the respective copyright owner and not*
6 *in connection with the lawfully made copy or*
7 *phonorecord to which such authentication feature*
8 *was intended to be affixed or embedded by the re-*
9 *spective copyright owner; or*

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

11 *(4) in subsection (c)—*

12 *(A) by striking paragraph (3) and inserting*
13 *the following:*

14 *“(3) the counterfeit label or illicit authentication*
15 *feature is affixed to, is embedded in, or encloses, or*
16 *is designed to be affixed to, to be embedded in, or to*
17 *enclose—*

18 *“(A) a phonorecord of a copyrighted sound*
19 *recording;*

20 *“(B) a copy of a copyrighted computer pro-*
21 *gram;*

22 *“(C) a copy of a copyrighted motion picture*
23 *or other audiovisual work; or*

24 *“(D) copyrighted documentation or pack-*
25 *aging; or”;* and

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

3 (5) in subsection (d)—

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

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

9 (C) by inserting before the period at the end
10 the following: “, and of any equipment, device,
11 or materials used to manufacture, reproduce, or
12 assemble the counterfeit labels or illicit authen-
13 tication features”; and

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

15 “(f) *CIVIL REMEDIES FOR VIOLATION.*—

16 “(1) *IN GENERAL.*—Any copyright owner who is
17 injured by a violation of this section or is threatened
18 with injury, may bring a civil action in an appro-
19 priate United States district court.

20 “(2) *DISCRETION OF COURT.*—In any action
21 brought under paragraph (1), the court—

22 “(A) may grant 1 or more temporary or
23 permanent injunctions on such terms as the
24 court determines to be reasonable to prevent or
25 restrain violations of this section;

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

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

9 “(i) reasonable attorney fees and costs;
10 and

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

14 “(II) statutory damages, as provided
15 by paragraph (4).

16 “(3) ACTUAL DAMAGES AND PROFITS.—

17 “(A) IN GENERAL.—The injured party is
18 entitled to recover—

19 “(i) the actual damages suffered by the
20 injured party as a result of a violation of
21 this section, as provided by subparagraph
22 (B); and

23 “(ii) any profits of the violator that
24 are attributable to a violation of this section

1 *and are not taken into account in com-*
2 *puting the actual damages.*

3 “(B) *CALCULATION OF DAMAGES.—The*
4 *court shall calculate actual damages by*
5 *multiplying—*

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

12 “(ii) *the number of phonorecords or*
13 *copies to which counterfeit labels, illicit au-*
14 *thentication features, or counterfeit docu-*
15 *mentation or packaging were affixed or em-*
16 *bedded, or designed to be affixed or embed-*
17 *ded,*

18 *unless such calculation would underestimate the*
19 *actual harm suffered by the copyright owner.*

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

23 “(i) *the retail value of an authorized*
24 *phonorecord of a copyrighted sound record-*
25 *ing;*

1 “(ii) the retail value of an authorized
2 copy of a copyrighted computer program; or

3 “(iii) the retail value of an authorized
4 copy of a copyrighted motion picture or
5 other audiovisual work.

6 “(4) *STATUTORY DAMAGES.*—*The injured party*
7 *may elect, at any time before final judgment is ren-*
8 *dered, to recover, instead of actual damages and prof-*
9 *its, an award of statutory damages for each violation*
10 *of this section in a sum of not less than \$2,500 or*
11 *more than \$25,000, as the court considers appro-*
12 *priate.*

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

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

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

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

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

Calendar No. 500

107TH CONGRESS
2^D SESSION

S. 2395

A BILL

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

JULY 18, 2002

Reported with an amendment