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ANTICOUNTERFEITING CONSUMER PROTECTION ACT OF 1995

NOVEMBER 28, 1995.—Ordered to be printed

Mr. HATCH, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 1136]

The Committee on the Judiciary, to which was referred the bill (S. 1136) to control and prevent commercial counterfeiting, having considered the same, reports favorably thereon, with an amendment, and recommends that the bill, as amended, do pass.

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I. PURPOSE

Existing Federal law is not adequate to protect consumers and American businesses from the crime of counterfeiting copyrighted and trademarked products. Such counterfeiting is not harmless, and is not limited to minor sectors of inconsequential markets. Today, counterfeit products cost American businesses an estimated $200 billion each year. Counterfeiting is a drain on the American economy, on the Federal treasury, and costs American jobs. Organized crime is increasingly involved in this illegal business, reaping profits from the investment of legitimate companies which are plowed back into other activities traditionally associated with orga-

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nized crime. Counterfeiters are increasingly sophisticated and traffic in every kind of product, including auto parts, pharmaceuticals, and food products. Some of these counterfeits threaten the health and safety of American citizens.

S. 1136 seeks to correct the deficiency by making sure that Federal law adequately addresses the scope and sophistication of modern counterfeiting. The legislation provides important weapons in the fight against counterfeiters in four principal areas. First, it increases criminal penalties for counterfeiting and allows law enforcement to fight counterfeiters at the organizational level by making trafficking in counterfeit goods or services an offense under the Racketeer Influenced and Corrupt Organizations (RICO) Act, thereby providing increased jail time, criminal fines, and asset forfeiture against those involved in criminal counterfeiting enterprises. Second, the bill enhances law enforcement's ability to fight counterfeiting more effectively by increasing the involvement of all levels of law enforcement in this area and expanding their power to seize counterfeit goods and the tools of the counterfeiters' trade. Third, the legislation helps staunch the flow of counterfeit goods by making it easier to find counterfeit goods in transit and making it more difficult for seized goods to reenter the stream of commerce. And fourth, the bill strengthens the hand of businesses harmed by counterfeiters by updating existing statutes and providing stronger civil penalties against counterfeiters, including civil fines tied to the value of genuine goods and statutory damage awards of up to $1,000,000 per mark.

II. Legislative History

Counterfeiting of trademarked and copyrighted merchandise costs legitimate American businesses billions of dollars and results in a multimillion dollar loss in sales and tax revenues. Congress recognized the gravity of this problem when it enacted the Trademark Counterfeiting Act of 1984. Both the Senate and House Reports accompanying that legislation emphasized the harm associated with counterfeiting. The Senate Report stated that counterfeiting

> defrauds purchasers, who pay for brand-name quality and take home only a fake. It cheats manufacturers of sales that their reputation has earned them, and tarnishes that reputation when the manufacturers are blamed for the flaws of goods they did not produce. Finally, it injures unwitting retailers, who must face the ire of customers who discover that their brand name purchases are in fact counterfeits.[1]

The House Report similarly observed that, in addition to presenting "grave risks to the health and safety of consumers of these articles," counterfeiting has a "dire effect on the economy":

> Businesses are unjustly criticized for having sold substandard products, when in fact the products are fake. Consumers buy products that fall apart after minimal use. Trademark owners lose sales to counterfeiters, when con-

[1] S. Rept. 98–526, 98th Cong., 2d sess. 4 (June 21, 1984).

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sumers seeking the genuine article mistakenly buy the counterfeit. As businesses suffer economically, workers suffer a corresponding loss of jobs.[2]

Unfortunately, no one predicted the phenomenal growth of the crime of counterfeiting, nor the increased availability of technology that makes counterfeiting both easy and inexpensive. In 1982, counterfeiting losses were estimated at $5.5 billion. Today, such losses are estimated in excess of $200 billion. In addition, no one could have predicted the extent to which organized crime syndicates, often operating on an international level, would become directly involved in the manufacturing, distributing, selling, and financing of counterfeit products.

For these reasons, the chairman of the committee, Senator Hatch, who was joined by Senators Leahy, Thurmond, Brown, Kyl, Abraham, and Feinstein, introduced S. 1136, in the 104th Congress, on August 9, 1995.[3] Senators Simpson, D'Amato, Lautenberg, Heflin, and Moseley-Braun subsequently joined as cosponsors of the legislation.

The Senate Judiciary Committee held hearings on the bill on October 10, 1995, at which testimony was given by Leonard Walton, Deputy Assistant Commissioner, Office of Investigations, U.S. Customs Service; Thomas McGann, executive vice-president, Burton Snowboards; Dempster Leech, president, Harper Associates, a private investigation firm that has extensive experience investigating product counterfeiting cases; and John S. Bliss, president of the International Anticounterfeiting Coalition. The committee received additional written testimony from a number of representatives of the law enforcement and business communities.

III. DISCUSSION

THE NEED FOR S. 1136

Traditionally, counterfeiting was thought to be a small-time criminal operation, a victimless crime, consisting of the sale of cheap watches and sunglasses. Today, however, counterfeiting has grown into a multibillion dollar, highly sophisticated illegal business, increasingly involving organized crime syndicates. According to some estimates, it costs American business more than $200 billion every year in lost revenue. And, according to the U. S. Customs Service, it results in a loss of up to an estimated 750,000 jobs. Increasingly, counterfeit products pose significant health and safety risks as well.

Counterfeit products range from watches and sunglasses to automobile and airplane parts; from baby formula and other food products to computer software and packaging. Counterfeited automobile parts such as brake pads and oil filters cost the domestic auto industry losses of more than $12 billion. The auto industry has estimated that if the sales of these counterfeit products were eliminated, an additional 200,000 workers could be hired.

The U.S. software industry has estimated that sales of pirated software equal more than 40 percent of the industry's total reve-

[2] H. Rept. 98–997, 98th Cong., 2d sess. 5–6 (Sept. 7, 1984).
[3] S. 1136, 104th Cong., 1st sess. (1995).

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nues, which is greater than some estimates of the entire industry's profits. The committee was shown counterfeit software labels and packages that were copied with such sophistication that they even included hologram labels on phony certificates of authenticity. These packages and documents appeared identical in every respect to the genuine articles.

American companies spend millions of dollars to research, develop, test, and market their products. Developing high-quality goods requires substantial investment before profits can be recouped. The theft of the value of intellectual property is devastating, regardless of whether the product is a shoe, a software program, or a motion picture. It often costs hundreds of thousands of dollars to prepare a product for market. Once such a product is sold, a counterfeiter, using powerful computers and copying equipment, can quickly manufacture and sell knock-offs for a fraction of the legitimate company's costs. The sales of knock-offs can reduce the legitimate company's opportunity to recoup its investment in the product. Counterfeiters and intellectual property pirates are increasingly efficient at getting knock-offs to market in a way to reap profits from legitimate businesses' investments. For example, according to John Bliss, president of the International Anti-counterfeiting Coalition, before even the theatrical release of the much-hyped movie "Waterworld," which had estimated production costs in excess of $100 million, pirated videos of the film were being sold on the streets of New York.

American companies invest in quality to develop valuable consumer goodwill and brand loyalty. Thomas McGann, executive vice-president of Burton Snowboards, testified before the committee that, while the injury to his company from displaced sales by cheap knock-offs was substantial, the real injury to businesses like his comes from erosion of a company's reputation through association of their trademark and company name with falsely marked products, which are likely to be of lower quality than the genuine ones.

Counterfeiters can trade on the investment of genuine businesses in quality and goodwill, reaping profits from the work of others. And often, because of the sophisticated computers and copying equipment, organized crime syndicates can reproduce the products for only a few dollars. For example, Dempster Leech testified before the committee that counterfeiters can have a low-quality quartz watch, similar in outward appearance to a high-priced designer watch, shipped to the United States from Hong Kong for as little as $3. The counterfeiter attaches a counterfeit trade name and logo on the watch for 50 cents. The watch can then be sold on the street for $15 to $20, or more.

Syndicates can generate millions of dollars in profit every year in what has been traditionally thought to be a low-risk criminal venture. Product counterfeiting is perceived to be low-risk because the perceived likelihood of being caught and punished is not very high and because the penalties, if caught, are not too great. The perception of counterfeiting as a high-profit, low-risk venture has enticed more and more organized crime syndicates into the business. For example, David Thai, the former head of the Born to Kill gang based in New York City, recently stated that he made an estimated $13 million a year selling counterfeit Rolex and Cartier

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watches. Because of the high profit ratio compared to the small risk of being arrested, prosecuted, and punished, it has not taken long for organized crime syndicates like Mr. Thai's gang to dominate this illegal industry.

In three recent raids in Los Angeles, counterfeit software and other material with a potential retail value in excess of more than $10.5 million was seized. Three Chinese triads were implicated in the activity. Law enforcement officials seized software, manuals, and hologram labels. They were surprised also to find four pounds of plastic explosives, two pounds of TNT, shotguns, handguns, and silencers.

Sometimes the counterfeiting business becomes not just a method of generating money to support other nefarious activities, but also a low-risk method of furthering the more traditional criminal businesses themselves. Recently, $400,000 worth of counterfeit handbags was seized in New Jersey. During the raid, law enforcement officials using drug sniffing dogs discovered that heroin had been stitched into the linings of the counterfeit Louis Vuitton handbags. The more high-risk contraband was masked by the apparently low-risk contraband. The committee has also been informed that counterfeiting businesses can provide a convenient method of laundering profits from other criminal enterprises such as drug trafficking.

Perhaps the most disturbing element of the counterfeit consumer product business, however, is the increasing threat these products pose to the health and safety of every American man, woman, and child. For example, there have been recent seizures of counterfeit knock-offs of a popular infant formula. These counterfeit formulas could be deadly to any child who is allergic to the contents of the fake products and there is no guarantee that the counterfeit baby formulas were produced in safe and sanitary conditions.

Law enforcement officials have seized counterfeit brake pads made from wood chips and other substandard materials that will fail significantly sooner than the genuine articles. Counterfeit brake pads made of such substandard materials have been found to have caused automobile traffic fatalities. Recent attention has been focused on the increasing danger from bogus airplane parts made to substandard quality which can interfere with the proper functioning of airplanes and, therefore, endanger the safety of passengers.

Given these facts, one would expect that counterfeiting crimes would be a priority for law enforcement officials. In fact, the reverse has often been the case. This is partly a problem of the law itself and partly a problem of educating both some sectors of law enforcement and the public. Leonard Walton, Deputy Assistant Commissioner, Office of Investigations, U.S. Customs Service, testified before the committee that these crimes are often not taken as seriously as other crimes because of a lack of understanding of the real harms suffered by consumers and businesses and a lack of awareness of the close connection between these crimes and the more violent ones they often support.

Existing law is still premised upon the myth that counterfeiting is primarily a crime committed by individuals operating in isolation. The law does not recognize that today most counterfeiters are

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part of an organized structure that more closely resembles a sophisticated international corporation. To combat such criminals, law enforcement officers must be free to attack the entire organization instead of a single person somewhere within the structure.

This reality was underscored by written testimony received from Sgt. Tom Budds, Chief, Asian Organized Crime Unit, Los Angeles Sheriff's Department. He reported that the Los Angeles U.S. Attorney's office refused to take part in a case involving the seizure of more than $10.5 million in counterfeit software products, in part because the criminal RICO laws they traditionally use to combat such criminal organizations would not apply, since the RICO laws have no predicate offense involving counterfeiting.

Moreover, there is the persistent assumption that counterfeiting is primarily a victimless crime. Many consumers are unaware of the dangerous collateral activities they are financing when they purchase even such seemingly harmless items as a counterfeit watch, handbag, or tee-shirt. According to testimony received by the committee, the Born to Kill gang in New York used the profits made from selling counterfeit watches to finance a variety of criminal activities in three different States. These included robbery, extortion, and murder. In fact, Mr. Thai, the leader of that gang, is now serving three consecutive life sentences following his conviction for multiple counts of murder, robbery, and extortion.

The Anticounterfeiting Consumer Protection Act, S. 1136, seeks to make the dangerous crime of counterfeiting a higher priority for law enforcement and to provide those charged with enforcing the laws the tools they need to do the job. The committee believes that the bill will aid in fighting this drain on the U.S. economy, and this threat to the health and well-being of American citizens, and recommends its adoption by the Congress.

IV. VOTE OF THE COMMITTEE

On October 26, 1995, with a quorum present, the Senate Committee on the Judiciary accepted an amendment offered by Senator Leahy by unanimous consent, and then, by unanimous consent, ordered S. 1136 favorably reported.

The amendment offered by Senator Leahy clarified the language of Section 10 of the bill to make clear that those subject to civil penalties for participating in the importation of counterfeit goods should include those who "aid and abet" rather than those "in any way concerned in" the activity, and that those penalties should be meted out at the discretion of the U.S. Customs Service, within the boundaries set out by Congress in the bill.

The bill, as amended, is as follows:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Anticounterfeiting Consumer Protection Act of 1995".

SEC. 2. FINDINGS.

The counterfeiting of trademarked and copyrighted merchandise—

(1) has been connected with organized crime;

(2) deprives legitimate trademark and copyright owners of substantial revenues and consumer goodwill;

(3) poses health and safety threats to American consumers;

(4) eliminates American jobs; and

(5) is a multibillion-dollar drain on the United States economy.

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SEC. 3. COUNTERFEITING AS RACKETEERING.

Section 1961(1)(B) of title 18, United States Code, is amended by inserting ", section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2320 (relating to trafficking in goods or services bearing counterfeit marks)" after "sections 2314 and 2315 (relating to interstate transportation of stolen property),".

SEC. 4. APPLICATION TO COMPUTER PROGRAMS, COMPUTER PROGRAM DOCUMENTATION, OR PACKAGING.

Section 2318 of title 18, United States Code, is amended—

(1) in subsection (a), by inserting "a computer program or computer program documentation or packaging or" after "copy of";

(2) in subsection (b)(3), by inserting "computer program," after "motion picture,"; and

(3) in subsection (c)(3), by inserting "a copy of a computer program or computer program documentation or packaging," after "enclose,".

SEC. 5. TRAFFICKING IN COUNTERFEIT GOODS OR SERVICES.

Section 2320 of title 18, United States Code, is amended by adding at the end the following new subsection:

"(e) Beginning with the first year after the date of enactment of this subsection, the Attorney General shall include in the report of the Attorney General to Congress on the business of the Department of Justice prepared pursuant to section 522 of title 28, on a district by district basis, for all actions involving trafficking in counterfeit labels for phonorecords, copies of computer programs or computer program documentation or packaging, copies of motion pictures or other audiovisual works (as defined in section 2318 of title 18), criminal infringement of copyrights (as defined in section 2319 of title 18), or trafficking in goods or services bearing counterfeit marks (as defined in section 2320 of title 18, an accounting of—

"(1) the number of open investigations;

"(2) the number of cases referred by the United States Customs Service;

"(3) the number of cases referred by other agencies or sources; and

"(4) the number and outcome, including settlements, sentences, recoveries, and penalties, of all prosecutions brought under sections 2318, 2319, and 2320 of title 18.".

SEC. 6. SEIZURE OF COUNTERFEIT GOODS.

Section 34(d)(9) of the Act of July 5, 1946 (60 Stat. 427, chapter 540; 15 U.S.C. 1116(d)(9)), is amended by striking the first sentence and inserting the following: "The court shall order that service of a copy of the order under this subsection shall be made by a Federal law enforcement officer (such as a United States marshal or an officer or agent of the United States Customs Service, Secret Service, Federal Bureau of Investigation, or Post Office) or may be made by a State or local law enforcement officer, who, upon making service, shall carry out the seizure under the order.".

SEC. 7. RECOVERY FOR VIOLATION OF RIGHTS.

Section 35 of the Act of July 5, 1946 (60 Stat. 427, chapter 540; 15 U.S.C. 1117), is amended by adding at the end the following new subsection:

"(c) In a case involving the use of a counterfeit mark (as defined in section 34(d) (15 U.S.C. 1116(d)) in connection with the sale, offering for sale, or distribution of goods or services, the plaintiff may elect, at any time before final judgment is rendered by the trial court, to recover, instead of actual damages and profits under subsection (a), an award of statutory damages for any such use in the amount of—

"(1) not less than $500 or more than $100,000 per counterfeit mark per type of goods or services sold, offered for sale, or distributed, as the court considers just; or

"(2) if the court finds that the use of the counterfeit mark was willful, not more than $1,000,000 per counterfeit mark per type of goods or services sold, offered for sale, or distributed, as the court considers just.".

SEC. 8. DISPOSITION OF EXCLUDED ARTICLES.

Section 603(c) of title 17, United States Code, is amended in the second sentence by striking "as the case may be," and all that follows through the end and inserting "as the case may be.".

SEC. 9. DISPOSITION OF MERCHANDISE BEARING AMERICAN TRADEMARK.

Section 526(e) of the Tariff Act of 1930 (19 U.S.C. 1526(e)) is amended—

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(1) in the second sentence, by inserting "destroy the merchandise. Alternatively, if the merchandise is not unsafe or a hazard to health, and the Secretary has the consent of the trademark owner, the Secretary may" after "shall, after forfeiture,";

(2) by inserting "or" at the end of paragraph (2);

(3) by striking ", or" at the end of paragraph (3) and inserting a period; and

(4) by striking paragraph (4).

SEC. 10. CIVIL PENALTIES.

Section 526 of the Tariff Act of 1930 (19 U.S.C. 1526) is amended by adding at the end the following new subsection:

"(f)(1) Any person who directs, assists financially or otherwise, or aids and abets the importation of merchandise for sale or public distribution that is seized under subsection (e) shall be subject to a civil fine.

"(2) For the first such seizure, the fine shall be not more than the value that the merchandise would have had if it were genuine, according to the manufacturer's suggested retail price, determined under regulations promulgated by the Secretary.

"(3) For the second seizure and thereafter, the fine shall be not more than twice the value that the merchandise would have had if it were genuine, as determined under regulations promulgated by the Secretary.

"(4) The imposition of a fine under this subsection shall be within the discretion of the United States Customs Service, and shall be in addition to any other civil or criminal penalty or other remedy authorized by law.".

SEC. 11. PUBLIC DISCLOSURE OF AIRCRAFT MANIFESTS.

Section 431(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1431(c)(1)) is amended—

(1) in the matter preceding subparagraph (A), by inserting "vessel or aircraft" before "manifest";

(2) by amending subparagraph (D) to read as follows:

"(D) The name of the vessel, aircraft, or carrier.";

(3) by amending subparagraph (E) to read as follows:

"(E) The seaport or airport of loading."; and

(4) by amending subparagraph (F) to read as follows:

"(F) The seaport or airport of discharge.".

SEC. 12. CUSTOMS ENTRY DOCUMENTATION.

Section 484(d) of the Tariff Act of 1930 (19 U.S.C. 1484(d)) is amended—

(1) by striking "Entries" and inserting "(1) Entries"; and

(2) by adding at the end the following new paragraph:

"(2) The Secretary, in prescribing regulations governing the content of entry documentation, shall require that entry documentation contain such information as may be necessary to determine whether the imported merchandise bears an infringing trademark in violation of section 42 of the Act of July 5, 1946 (60 Stat. 440, chapter 540; 15 U.S.C. 1124) or any other applicable law, including a trademark appearing on the goods or packaging.".

SEC. 13. UNLAWFUL USE OF VESSELS, VEHICLES, AND AIRCRAFT IN AID OF COMMERCIAL COUNTERFEITING.

Section 80302(a) of title 49, United States Code, is amended—

(1) by striking "or" at the end of paragraph (4);

(2) by striking the period at the end of paragraph (5) and inserting "; or"; and

(3) by adding at the end the following new paragraph:

"(6)(A) A counterfeit label for a phonorecord, computer program or computer program documentation or packaging or copy of a motion picture or other audiovisual work (as defined in section 2318 of title 18);

"(B) a phonorecord or copy in violation of section 2319 of title 18; or

"(C) any good bearing a counterfeit mark (as defined in section 2320 of title 18).".

SEC. 14. REGULATIONS.

Not later than 6 months after the date of enactment of this Act, the Secretary of the Treasury shall prescribe such regulations or amendments to existing regulations that may be necessary to implement and enforce this Act.

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V. SECTION-BY-SECTION ANALYSIS

SECTION 1. SHORT TITLE

This section sets forth the title of the Act, the "Anticounterfeiting Consumer Protection Act of 1995".

SECTION 2. FINDINGS

This section contains the findings, which state that the counterfeiting of trademarked and copyrighted merchandise (1) has been connected with organized crime; (2) deprives legitimate trademark and copyright owners of substantial revenues and consumer goodwill; (3) poses health and safety threats to American consumers; (4) eliminates American jobs; and (5) is a multibillion-dollar drain on the United States economy.

SECTION 3. COUNTERFEITING AS RACKETEERING

This section amends section 1961(1)(B) of title 18 to make trafficking in counterfeit goods a Racketeer Influenced and Corrupt Organizations (RICO) predicate offense. By extending the Federal RICO statute to cover criminal infringement and trafficking in counterfeit products, including phonorecords, computer programs, and video products, the act expands the power of law enforcement to seize the fruits, raw materials, and tools of criminal counterfeiting enterprises and provides an additional statutory basis for prosecution of counterfeiters. This section makes it possible to combat the entire structure of a counterfeiting organization, from those providing the financing to those involved in the manufacture, distribution, and sale of the copies. And, it enhances the penalties faced by those criminal organizations engaging in this illegal enterprise.

SECTION 4. APPLICATION TO COMPUTER PROGRAMS, COMPUTER PROGRAM DOCUMENTATION, OR PACKAGING

This section amends section 2318 of title 18 to make it a crime to traffic in computer software programs, computer program labels and computer software packaging. The prohibition in current law only applies to record and video labels. The section will make sure that the same protections provided these products will also be available for the computer industry, one of the primary targets of counterfeiting operations today. In addition, by including the trafficking of counterfeit labels and packaging under RICO, a counterfeiter will no longer be able to traffic in the components of a computer software product, closing a potential legal loophole.

SECTION 5. TRAFFICKING IN COUNTERFEIT GOODS OR SERVICES

This section, which amends section 2320 of title 18, requires the U.S. Attorney General to include in his or her annual report to Congress statistics relating to all criminal counterfeiting actions. This provision will make it easier to assess the extent to which commercial counterfeiting is being investigated and prosecuted by federal officials. In addition, according to testimony received by the committee, several witnesses concluded that requiring statistical

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reporting by the Attorney General of anticounterfeiting activities will facilitate prosecution of these offenses.

SECTION 6. SEIZURE OF COUNTERFEIT GOODS

This provision amends section 34(d)(9) of the Lanham Act to make it clear that in a civil action, any Federal or local law enforcement officer can execute a seizure order, which reduces the risk that seizure orders will go unexecuted because of a personnel shortage of any particular law enforcement department. This provision also removes any confusion about whether local law enforcement officers may execute a Federal court's seizure order. This provision does not interfere with constitutional concerns relating to comity between Federal and State governments, however. The language allowing State and local law enforcement officers to carry out seizure orders is permissive, not mandatory. Consequently, a State or local law enforcement officer could not be compelled to execute a Federal court's order. Moreover, by making it clear that any Federal or local officer may carry out the seizure, it may be easier for civil litigants to actually seize counterfeit goods before the counterfeiters are able to move their products to another jurisdiction.

SECTION 7. RECOVERY FOR VIOLATION OF RIGHTS

This section amends section 35 of the Lanham Act, allowing civil litigants the option of obtaining discretionary, judicially imposed damages in trademark counterfeiting cases, instead of actual damages. The committee recognizes that under current law, a civil litigant may not be able to prove actual damages if a sophisticated, large-scale counterfeiter has hidden or destroyed information about his counterfeiting.

Moreover, counterfeiters' records are frequently nonexistent, inadequate or deceptively kept in order to willfully deflate the level of counterfeiting activity actually engaged in, making proving actual damages in these cases extremely difficult if not impossible. Enabling trademark owners to elect statutory damages is both necessary and appropriate in light of the deception routinely practiced by counterfeiters. The amounts are appropriate given the extent of damage done to business goodwill by infringement of trademarks.

SECTION 8. DISPOSITION OF EXCLUDED ARTICLES

This section eliminates a provision found in section 603(c) of title 17 that has been interpreted to allow seized pirated goods to be returned to the importer. Custom officials have complained of a frustrating cycle under current law. Pirated goods are seized at one location and then returned to the importer. This individual then tries to bring the same products into the country at a different location. There have been times when U.S. Customs Service officials have seized the same goods three and four times. Under this section, the rule would be for government officials to destroy pirated products once they are seized.

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SECTION 9. DISPOSITION OF MERCHANDISE BEARING AMERICAN TRADEMARK

This provision amends section 526(e) of the Tariff Act to ensure that counterfeits of American products are routinely destroyed, unless there is no public safety risk and the trademark owner agrees to some other disposition of the merchandise (e.g., delivery of the merchandise to charity). Once again, this provision is necessary to ensure that counterfeited merchandise is not returned to the criminal importer who will simply redistribute the counterfeit goods.

SECTION 10. CIVIL PENALTIES

This section amends section 526 of the Tariff Act to allow a U.S. Customs Service officer to impose civil fines on those involved in the importation of counterfeit goods. This provision gives the U.S. Customs Service the discretion to impose a fine, up to the value of the merchandise if it were genuine, for the first seizure. For the second and subsequent seizures, the fine may be an amount up to twice the value of the merchandise if it were genuine. This provision has two primary purposes. First, it will provide a deterrent to counterfeiting in cases in which resources are not available to bring a criminal case. Second, it makes penalties related to counterfeit products at least as stringent as those penalties applied to counterfeits made in this country.

SECTION 11. PUBLIC DISCLOSURE OF AIRCRAFT MANIFESTS

This section amends section 431(c)(1) of the Tariff Act to permit public disclosure of aircraft manifests under the same terms currently allowed for sea shipments. Under current law, the U.S. Customs Service routinely discloses information relating to the nature of shipments imported by sea. This information has proven to be extremely valuable to U.S. trademark holders who are trying to trace or interdict the entry of counterfeit goods.

Additional authority is needed, however, to disclose the same information for shipments by air. Since most low-weight, high value counterfeits are shipped by air, trademark holders need access to air shipment data as well as sea shipment data if they are to be able to better assist enforcement officials in identifying counterfeiters and stopping the flow of fraudulent goods transported in this manner. Moreover, this provision eliminates the unwarranted and out-of-date distinction between information required about goods shipped by sea as compared to goods shipped by air.

SECTION 12. CUSTOMS ENTRY DOCUMENTATION

This section amends section 484(d) of the Tariff Act to require that the U.S. Customs Service's entry documentation, required to be completed by importers, provide information about trademarks on their goods or packaging that would help the U.S. Customs Service to determine whether those trademarks are valid.

This provision enables the Customs Service, assisted by trademark owners, to identify shipments likely to contain counterfeit products because they come from a location where goods bearing a particular mark are not legitimately manufactured. For example, information that a shipment of Rolex watches originated from

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China would cause concern since Rolex watches are manufactured only in Switzerland.

This provision should not be burdensome to legitimate businesses or to the U.S. Customs Service since most businesses already identify their trademarks on shipping documents, and identification of the trademark would add very little to the other shipping data already required to be recorded. Requiring trademark information to appear on entry documentation could significantly assist both law enforcement personnel and trademark owners to identify counterfeit goods and to locate both counterfeiters and importers of counterfeit goods. Because of the role of trademark owners in this process, the trademark information contained in the entry documentation should be made publicly available in a form that permits the trademark owner to discover shipments purporting to contain its products.

In promulgating regulations under this section, the Secretary should ensure that such information is made publicly available in an expeditious and efficient manner. To accomplish this end, the Secretary may require that trademark information be included on vessel or aircraft manifests (as prescribed by 19 U.S.C. 1431). If the Secretary does so, this information should be made publicly available in a manner consistent with the way other manifest data is made publicly available.

SECTION 13. UNLAWFUL USE OF VESSELS, VEHICLES, AND AIRCRAFT IN AID OF COMMERCIAL COUNTERFEITING

This section amends section 80302(a) of title 49 to include counterfeit goods as "contraband" items. This allows law enforcement officials to seize vehicles, vessels, and aircraft used in counterfeiting operations. This provision will assist law enforcement officials to combat today's highly organized counterfeiters. Since other contraband products already listed under current law, such as narcotics, are routinely shipped by organized crime syndicates, this provision simply adds the most recent of organized crime's illegal product lines to the list of contraband products. Indeed, the committee heard testimony regarding an instance in which counterfeit handbags were imported into the United States carrying concealed quantities of other contraband, including drugs such as heroin.

SECTION 14. REGULATIONS

This section requires the Secretary of the Treasury to prescribe any necessary regulations governing application of this act no later than 6 months after the date of enactment of this act.

VI. COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, November 2, 1995.

Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 1136, the Anticounterfeiting Consumer Protection Act of

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1995, as ordered reported by the Senate Committee on the Judiciary on October 26, 1995. CBO estimates that enacting this legislation would have no significant impact on the federal budget. While the bill could lead to increases in both direct spending and receipts, the amounts involved would be less than $500,000 a year. Because S. 1136 could affect direct spending and receipts, pay-as-you-go procedures would apply. The bill would not affect the budgets of state or local governments.

S. 1136 would make several changes to current law that aim to prevent commercial counterfeiting. Violators of certain provisions would be subject to civil or criminal fines, or forfeiture of assets.

Enacting S. 1136 could increase governmental receipts from additional fine collections, but we estimate that any such increase would be less than $500,000 annually. Civil penalties would be recorded in the budget as miscellaneous receipts to the Treasury. Criminal fines would be deposited in the Crime Victims Fund and would be spent in the following year. (Thus, direct spending from the fund would match the increase in revenues with a one-year lag.) Enacting this legislation also could increase governmental receipts from additional forfeitures of criminals' assets, but we estimate that any such increase also would be less than $500,000 annually in value. Proceeds from the sale of any such assets would be deposited as revenues into the Assets Forfeiture Fund of the Department of Justice and spent out of the fund in the same year. Thus, direct spending from the Assets Forfeiture Fund would match any increase in revenues.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz.

Sincerely,

JUNE E. O'NEILL, *Director.*

VII. REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b), rule XXVI of the Standing Rules of the Senate, the Committee, after due consideration, concludes that the act will not have significant regulatory impact.

VIII. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the changes in existing law made by the bill, as reported by the committee, are shown as follows (existing law proposed to be omitted is enclosed in bold brackets, new matter is printed in italic, and existing law with no changes is printed in roman):

UNITED STATES CODE

* * * * * * *

TITLE 15—COMMERCE AND TRADE

* * * * * * *

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CHAPTER 22—TRADEMARKS

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§ 1116. Injunctive relief

(a) JURISDICTION; SERVICE.—* * *

* * * * * * *

(d) CIVIL ACTIONS ARISING OUT OF USE OF COUNTERFEIT MARKS.—(1)(A) In the case of a civil action arising under section 1114(1)(a) of this title or section 380 of Title 36 with respect to a violation that consists of using a counterfeit mark in connection with the sale, offering for sale, or distribution of goods or services, the court may, upon ex parte application, grant an order under subsection (a) of this section pursuant to this subsection providing for the seizure of goods and counterfeit marks involved in such violation and the means of making such marks, and records documenting the manufacture, sale, or receipt of things involved in such violation.

* * * * * * *

(9) [The court shall order that a United States marshal or other law enforcement officer is to serve a copy of the order under this subsection and then is to carry out the seizure under such order.] *The court shall order that service of a copy of the order under this subsection shall be made by a Federal law enforcement officer (such as a United States marshal or an officer or agent of the United States Customs Service, Secret Service, Federal Bureau of Investigation, or Post Office) or may be made by a State or local law enforcement officer, who, upon making service, shall carry out the seizure under the order.* The court shall issue orders, when appropriate, to protect the defendant from undue damage from the disclosure of trade secrets or other confidential information during the course of the seizure, including, when appropriate, orders restricting the access of the applicant (or any agent or employee of the applicant) to such secrets or information.

* * * * * * *

§ 1117. Recovery for violation of rights

(a) PROFITS; DAMAGES AND COSTS; ATTORNEY FEES.—* * *

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(c) In a case involving the use of a counterfeit mark (as defined in section 34(d) (15 U.S.C. 1116(d)) in connection with the sale, offering for sale, or distribution of goods or services, the plaintiff may elect, at any time before final judgment is rendered by the trial court, to recover, instead of actual damages and profits under subsection (a), an award of statutory damages for any such use in the amount of—

(1) not less than $500 or more than $100,000 per counterfeit mark per type of goods or services sold, offered for sale, or distributed, as the court considers just; or

(2) if the court finds that the use of the counterfeit mark was willful, not more than $1,000,000 per counterfeit mark per type of

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goods or services sold, offered for sale, or distributed, as the court considers just.

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TITLE 17—COPYRIGHTS

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CHAPTER 6—MANUFACTURING REQUIREMENTS AND IMPORTATION

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§ 603. Importation prohibitions: Enforcement and dispositions of excluded articles

(a) The Secretary of the Treasury and the United States Postal Service shall separately or jointly make regulations for the enforcement of the provisions of this title prohibiting importation.

* * * * * * *

(c) Articles imported in violation of the importation prohibitions of this title are subject to seizure and forfeiture in the same manner as property imported in violation of the customs revenue laws. Forfeited articles shall be destroyed as directed by the Secretary of the Treasury or the court, [as the case may be, however, the articles may be returned to the country of export whenever it is shown to the satisfaction of the Secretary of the Treasury that the importer had no reasonable grounds for believing that his or her acts constituted a violation of law] *as the case may be.*

* * * * * * *

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

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CHAPTER 96—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

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§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating

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to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891–894 (relating to extortionate credit transactions), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461–1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2258 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property) *section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2320 (relating to trafficking in goods or services bearing counterfeit marks)*, section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341–2346 (relating to trafficking in contraband cigarettes), section 2421–24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of that title [1]), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

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CHAPTER 113—STOLEN PROPERTY

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§ 2318. Trafficking in counterfeit labels for phonorecords and copies of motion pictures or other audiovisual works

(a) Whoever, in any of the circumstances described in subsection (c) of this section, knowingly traffics in a counterfeit label affixed or designed to be affixed to a phonorecord, or a copy of *a computer program or computer program documentation or packaging or* a motion picture or other audiovisual work, shall be fined under this title or imprisoned for not more than five years, or both.

(b) As used in this section—

(1) the term "counterfeit label" means an identifying label or container that appears to be genuine, but is not;

(2) the term "traffic" means to transport, transfer or otherwise dispose of, to another, as consideration for anything of value or to make or obtain control of with intent to so transport, transfer or dispose of; and

(3) the terms "copy", "phonorecord", "motion picture", *"computer program,"* and "audiovisual work" have, respectively, the meanings given those terms in section 101 (relating to definitions) of title 17.

(c) The circumstances referred to in subsection (a) of this section are—

(1) the offense is committed within the special maritime and territorial jurisdiction of the United States; or within the special aircraft jurisdiction of the United States (as defined in section 46501 of title 49);

(2) the mail or a facility of interstate or foreign commerce is used or intended to be used in the commission of the offense; or

(3) the counterfeit label is affixed to or encloses, or is designed to be affixed to or enclose, *a copy of a computer program or computer program documentation or packaging,* a copyrighted motion picture or other audiovisual work, or a phonorecord of a copyrighted sound recording.

* * * * * * *

§ 2320. Trafficking in counterfeit goods or services

(a) Whoever intentionally traffics or attempts to traffic in goods or services and knowingly uses a counterfeit mark on or in connection with such goods or services shall, if an individual, be fined not more than $2,000,000 or imprisoned not more than 10 years, or both, and, if a person other than an individual, be fined not more than $5,000,000. In the case of an offense by a person under this section that occurs after that person is convicted of another offense under this section, the person convicted, if an individual, shall be fined not more than $5,000,000 or imprisoned not more than 20 years, or both, and if other than an individual, shall be fined not more than $15,000,000.

* * * * * * *

(e) Beginning with the first year after the date of enactment of this subsection, the Attorney General shall include in the report of the Attorney General to Congress on the business of the Department of Justice prepared pursuant to section 522 of title 28, on a district

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by district basis, for all actions involving trafficking in counterfeit labels for phonorecords, copies of computer programs or computer program documentation or packaging, copies of motion pictures or other audiovisual works (as defined in section 2318 of title 18), criminal infringement of copyrights (as defined in section 2319 of title 18), or trafficking in goods or services bearing counterfeit marks (as defined in section 2320 of title 18, an accounting of—

(1) the number of open investigations;

(2) the number of cases referred by the United States Customs Service;

(3) the number of cases referred by other agencies or sources; and

(4) the number and outcome, including settlements, sentences, recoveries, and penalties, of all prosecutions brought under sections 2318, 2319, and 2320 of title 18.

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TITLE 19—CUSTOMS DUTIES

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CHAPTER 4—TARIFF ACT OF 1930

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§ 1431. Manifests; requirement, form, and contents

(a) IN GENERAL.—Every vessel required to make entry under section 1434 of this title or obtain clearance under section 91 of the Appendix to Title 46 shall have a manifest that complies with the requirements prescribed under subsection (d) of this section.

* * * * * * *

(c) PUBLIC DISCLOSURE OF INFORMATION.—(1) Except as provided in subparagraph (2), the following information, when contained in such *vessel or aircraft* manifest, shall be available for public disclosure:

(A) The name and address of each importer or consignee and the name and address of the shipper to such importer or consignee, unless the importer or consignee has made a biennial certification, in accordance with procedures adopted by the Secretary of the Treasury, claiming confidential treatment of such information.

(B) The general character of the cargo.

(C) The number of packages and gross weight.

[(D) The name of the vessel or carrier.]

(D) The name of the vessel, aircraft, or carrier.

[(E) The port of loading.]

(E) The seaport or airport of loading.

[(F) The port of discharge.]

(F) The seaport or airport of discharge.

(G) The country of origin of the shipment.

* * * * * * *

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§ 1484. Entry of merchandise

(a) REQUIREMENT AND TIME.—(1) Except as provided in sections 1490, 1498, 1552, 1553, and 1336(j) of this title, one of the parties qualifying as "importer of record" under paragraph (2)(B), either in person or by an agent authorized by the party in writing, shall, using reasonable care—

* * * * * * *

(d) SIGNING AND CONTENTS.—**[**Entries**]** *(1) Entries* shall be signed by the importer of record, or his agent, unless filed pursuant to an electronic data interchange system. If electronically filed, each transmission of data shall be certified by an importer of record or his agent, one of whom shall be resident in the United States for purposes of receiving service of process, as being true and correct to the best of his knowledge and belief, and such transmission shall be binding in the same manner and to the same extent as a signed document. The entry shall set forth such facts in regard to the importation as the Secretary may require and shall be accompanied by such invoices, bills of lading, certificates, and documents, or their electronically submitted equivalents, as are required by regulation.

(2) The Secretary, in prescribing regulations governing the content of entry documentation, shall require that entry documentation contain such information as may be necessary to determine whether the imported merchandise bears an infringing trademark in violation of section 42 of the Act of July 5, 1946 (60 Stat. 440, chapter 540; 15 U.S.C. 1124) or any other applicable law, including a trademark appearing on the goods of packaging.

* * * * * * *

§ 1526. Merchandise bearing American trademark

IMPORTATION PROHIBITED

(a) Except as provided in subsection (d) of this section, it shall be unlawful to import into the United States any merchandise of foreign manufacture if such merchandise, or the label, sign, print, package, wrapper, or receptacle, bears a trademark owned by a citizen of, or by a corporation or association created or organized within, the United States, and registered in the Patent and Trademark Office by a person domiciled in the United States, under the provisions of sections 81 to 109 of Title 15, and if a copy of the certificate of registration of such trademark is filed with the Secretary of the Treasury, in the manner provided in section 106 of said Title 15, unless written consent of the owner of such trademark is produced at the time of making entry.

* * * * * * *

(e) MERCHANDISE BEARING COUNTERFEIT MARK; SEIZURE AND FORFEITURE; DISPOSITION OF SEIZED GOODS.—Any such merchandise bearing a counterfeit mark (within the meaning of section 1127 of Title 15) imported into the United States in violation of the provisions of section 1124 of Title 15, shall be seized and, in the absence of the written consent of the trademark owner, forfeited for violations of the customs laws. Upon seizure of such merchandise,

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the Secretary shall notify the owner of the trademark, and shall, after forfeiture, *destroy the merchandise. Alternatively, if the merchandise is not unsafe or a hazard to health, and the Secretary has the consent of the trademark owner, the Secretary may* obliterate the trademark where feasible and dispose of the goods seized—

(1) by delivery to such Federal, State, and local government agencies as in the opinion of the Secretary have a need for such merchandise,

(2) by gift to such eleemosynary institutions as in the opinion of the Secretary or have a need for such merchandise, *or*

(3) more than 1 year after the date of forfeiture, by sale by appropriate customs officers at public auction under such regulations as the Secretary prescribes, except that before making any such sale the Secretary shall determine that no Federal, State, or local government agency or eleemosynary institution has established a need for such merchandise under paragraph (1) or (2)**[**, or**]**.

[(4) if the merchandise is unsafe or a hazard to health, by destruction.**]**

(f)(1) Any person who directs, assists financially or otherwise, or is in any way concerned in the importation of merchandise for sale or public distribution that is seized under subsection (e) shall be subject to a civil fine.

(2) For the first such seizure, the fine shall be equal to the value that the merchandise would have had if it were genuine, according to the manufacturer's suggested retail price, determined under regulations promulgated by the Secretary.

(3) For the second seizure and thereafter, the fine shall be equal to twice the value that the merchandise would have had if it were genuine, as determined under regulations promulgated by the Secretary.

(4) The imposition of a fine under this subsection shall be within the discretion of the United States Customs Service, and shall be in addition to any other civil or criminal penalty or other remedy authorized by law.

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TITLE 49—TRANSPORTATION

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CHAPTER 803—CONTRABAND

* * * * * * *

§ 80302. Prohibitions

(a) DEFINITION.—In this section, "contraband" means—

(1) a narcotic drug (as defined in section 102 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 802)), including marijuana (as defined in section 102 of that Act (21 U.S.C. 802)), that—

* * * * * * *

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(4) material or equipment used, or intended to be used, in making a coin, obligation, or other security referred to in clause (3) of this subsection; [or]

(5) a cigarette involved in a violation of chapter 114 of title 18 or a regulation prescribed under chapter 114[.]; *or*

(6)(A) A counterfeit label for a phonorecord, computer program or computer program documentation of packaging or copy of a motion picture or other audiovisual work (as defined in section 2318 of title 18);

(B) a phonorecord or copy in violation of section 2319 of title 18; or

(C) any good bearing a counterfeit mark (as defined in section 2320 of title 18).

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