

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 523 Session of
2007

INTRODUCED BY YOUNGBLOOD, CRUZ, MELIO, READSHAW, SIPTROTH, MOUL,
PAYNE, GODSHALL, HORNAMAN, HESS, K. SMITH, THOMAS AND
CALTAGIRONE, MARCH 6, 2007

AS AMENDED ON THIRD CONSIDERATION, HOUSE OF REPRESENTATIVES,
OCTOBER 29, 2007

AN ACT

1 Amending Title 18 (Crimes and Offenses) of the Pennsylvania
2 Consolidated Statutes, further providing for trademark
3 counterfeiting; PROHIBITING THE SALE OF FOOD, NONPRESCRIPTION <—
4 DRUGS AND COSMETICS UNDER CERTAIN CIRCUMSTANCES; AND IMPOSING
5 PENALTIES.

6 The General Assembly of the Commonwealth of Pennsylvania
7 hereby enacts as follows:

8 Section 1. Section 4119 of Title 18 of the Pennsylvania
9 Consolidated Statutes is amended to read:

10 § 4119. Trademark counterfeiting.

11 (a) Offense defined.--Any person who knowingly manufactures,
12 uses, displays, advertises, distributes, transports, offers for
13 sale, sells or possesses with intent to sell or distribute any
14 items or services bearing or identified by a counterfeit mark
15 shall be guilty of the crime of trademark counterfeiting.

16 [(b) Presumption.--A person having possession, custody or
17 control of more than 25 items bearing a counterfeit mark may be
18 presumed to possess said items with intent to sell or

1 distribute.]

2 (c) Penalties.--

3 (1) Except as provided in paragraphs (2) and (3), a
4 violation of this section constitutes a misdemeanor of the
5 first degree.

6 (2) A violation of this section constitutes a felony of
7 the third degree if:

8 (i) the defendant has previously been convicted
9 under this section; or

10 (ii) the violation involves more than 100 but less
11 than 1,000 items bearing a counterfeit mark or the total
12 retail value of all items or services bearing or
13 identified by a counterfeit mark is more than \$2,000, but
14 less than \$10,000[.]; or

15 (iii) bodily injury to another results from a
16 violation of this section.

17 (3) A violation of this section constitutes a felony of
18 the second degree if:

19 (i) the defendant has been previously convicted of
20 two or more offenses under this section;

21 (ii) the violation involves the manufacture or
22 production of items bearing counterfeit marks; [or]

23 (iii) the violation involves 1,000 or more items
24 bearing a counterfeit mark or the total retail value of
25 all items or services bearing or identified by a
26 counterfeit mark is more than \$10,000[.]; or

27 (iv) serious bodily injury to another results from a
28 violation of this section.

29 (d) Quantity or retail value.--The quantity or retail value
30 of items or services shall include the aggregate quantity or

1 retail value of all items or services [bearing or identified by
2 every counterfeit mark] the defendant manufactures, uses,
3 displays, advertises, distributes, offers for sale, sells or
4 possesses.

5 (e) Fine.--Any person convicted under this section shall be
6 fined in accordance with existing law or an amount up to three
7 times the retail value of the items or services bearing or
8 identified by a counterfeit mark, whichever is greater.[, unless
9 extenuating circumstances are shown by the defendant.]

10 (f) Seizure, forfeiture and disposition.--

11 (1) Any items bearing a counterfeit mark, any property
12 constituting or derived from any proceeds obtained, directly
13 or indirectly, as the result of an offense under this section
14 and all personal property, including, but not limited to, any
15 items, objects, tools, machines, equipment, instrumentalities
16 or vehicles of any kind, [knowingly employed or] used in
17 connection with a violation of this section [may] shall be
18 seized by [any] a law enforcement officer.

19 (2) All seized personal property referenced in paragraph
20 (1) shall be forfeited in accordance with applicable law.
21 [unless the prosecuting attorney responsible for the charges
22 and the intellectual property owner consent in writing to
23 another disposition.] Upon the conclusion of all criminal and
24 civil forfeiture proceedings, the court shall order that
25 forfeited items bearing or consisting of a counterfeit mark
26 be destroyed or alternatively disposed of in another manner
27 with the written consent of the trademark owners and the
28 prosecuting attorney responsible for the charges.

29 (3) If a person is convicted of an offense under this
30 section, the court shall order the person to pay restitution

1 to the trademark owner and to any other victim of the
2 offense. In determining the value of the property loss
3 involving an offense against the trademark owner, a court
4 shall grant restitution for all amounts, including expenses
5 incurred by the trademark owner in the investigation and
6 prosecution of the offense as well as the disgorgement of any
7 profits realized by a person convicted of the offense.

8 (g) Evidence.--Any Federal or State certificate of
9 registration [of any intellectual property] shall be prima facie
10 evidence of the facts stated therein.

11 (h) Remedies cumulative.--The remedies provided for in this
12 section shall be cumulative to the other civil and criminal
13 remedies provided by law.

14 (i) Definitions.--As used in this section, the following
15 words and phrases shall have the meanings given to them in this
16 subsection:

17 "Bodily injury." The term shall have the same meaning given
18 it under section 2301 (relating to definitions).

19 "Counterfeit mark." [Any of the following:

20 (1) Any unauthorized reproduction or copy of
21 intellectual property.

22 (2) Intellectual property affixed to any item knowingly
23 sold, offered for sale, manufactured or distributed or
24 identifying services offered or rendered, without the
25 authority of the owner of the intellectual property.] A
26 spurious mark that meets all of the following:

27 (1) Is applied to, used or intended to be used in
28 connection with an item or service.

29 (2) Is identical with or substantially indistinguishable
30 from a mark registered and in use in this Commonwealth, any

other state or on the principal register in the United States
Patent and Trademark Office, whether or not the person knew
the mark was registered.

(3) The application of which is either:

(i) likely to cause confusion, to cause mistake or
to deceive; or

(ii) otherwise intended to be used on or in
connection with the item or service for which the mark is
registered.

["Intellectual property." Any trademark, service mark, trade
name, label, term, device, design or word adopted or used by a
person to identify that person's goods or services.]

"Item." Any of the following:

(1) Goods.

(2) Labels.

(3) Patches.

(4) Fabric.

(5) Stickers.

(6) Wrappers.

(7) Badges.

(8) Emblems.

(9) Medallions.

(10) Charms.

(11) Boxes.

(12) Containers.

(13) Cans.

(14) Cases.

(15) Hangtags.

(16) Documentation.

(17) Packaging.

1 (18) Any other components of a type or nature that are
2 designed, marketed or otherwise intended to be used on or in
3 connection with any goods or services.

4 "Retail value." [The counterfeiter's regular selling price
5 for the item or service bearing or identified by the counterfeit
6 mark. In the case of items bearing a counterfeit mark which are
7 components of a finished product, the retail value shall be the
8 counterfeiter's regular selling price of the finished product on
9 or in which the component would be utilized.] One of the
10 following:

11 (1) The counterfeiter's regular selling price for the
12 item or service bearing or identified by a counterfeit mark,
13 except that it shall be the retail price of the authentic
14 counterpart if the item or service bearing or identified by a
15 counterfeit mark would appear to a reasonably prudent person
16 to be authentic. If no authentic reasonably similar
17 counterpart exists, the retail value shall be the
18 counterfeiter's regular selling price.

19 (2) If the items bearing a counterfeit mark are
20 components of a finished product, the retail value shall be
21 treated as if each component were a finished good and valued
22 under paragraph (1).

23 "Serious bodily injury." The term shall have the same
24 meaning given it under section 2301 (relating to definitions).

25 SECTION 2. TITLE 18 IS AMENDED BY ADDING A SECTION TO READ: <—
26 § 7331. UNLAWFUL SALE OF FOOD, NONPRESCRIPTION DRUGS AND
27 COSMETICS.

28 (A) GENERAL RULE.--NO PERSON SHALL SELL OR OFFER TO SELL TO
29 THE PUBLIC:

30 (1) ANY NONPRESCRIPTION DRUG, INFANT FORMULA OR BABY

FOOD WHICH IS SUBJECT TO EXPIRATION DATING REQUIREMENTS
ISSUED BY THE FOOD AND DRUG ADMINISTRATION OR OTHER FOOD
BEARING AN EXPIRATION DATE ON ITS LABEL OR PACKAGING IF THE
DATE OF EXPIRATION HAS PASSED; OR

(2) ANY INFANT FORMULA OR BABY FOOD WHICH IS SUBJECT TO
EXPIRATION DATING REQUIREMENTS ISSUED BY THE FOOD AND DRUG
ADMINISTRATION, ANY NONPRESCRIPTION DRUG OR COSMETIC OR ANY
OTHER FOOD BEARING AN EXPIRATION DATE ON ITS LABEL OR
PACKAGING UNLESS THAT PERSON PRESENTS, WITHIN FIVE DAYS OF
THE REQUEST, A WRITTEN RECORD OF THE PURCHASE OF THAT
PRODUCT, WHICH RECORD OR INVOICE SHALL:

(I) SPECIFICALLY IDENTIFY THE PRODUCT BEING SOLD BY
THE PRODUCT NAME, QUANTITY PURCHASED, THAT QUANTITY BEING
DENOTED BY ITEM, BOX, CRATE, PALLET OR OTHERWISE, AND
DATE OF PURCHASE; AND

(II) CONTAIN THE COMPLETE NAME OR BUSINESS NAME,
ADDRESS AND TELEPHONE NUMBER OF THE PERSON FROM WHOM THAT
PRODUCT WAS PURCHASED.

(B) APPLICABILITY.--THE PROVISIONS OF SUBSECTION (A) SHALL
NOT APPLY TO A TRANSACTION INVOLVING LESS THAN \$50 OF PRODUCT
BETWEEN PERSONS SELLING THAT PRODUCT IN THE SAME GENERAL MARKET
AREA ON THE SAME DAY.

(C) PENALTY.--A PERSON WHO VIOLATES THIS SECTION SHALL, UPON
CONVICTION, BE SENTENCED TO:

(1) A FINE NOT TO EXCEED \$300, FOR A FIRST OFFENSE;

(2) A FINE NOT TO EXCEED \$300, OR A TERM OF IMPRISONMENT
FOR NOT MORE THAN 90 DAYS, OR BOTH, FOR A SECOND OFFENSE; OR

(3) A REVOCATION OF ANY LICENSE, INCLUDING A BUSINESS
PRIVILEGE LICENSE OR SALES LICENSE, HELD BY SUCH PERSON TO
OPERATE THE BUSINESS IN WHICH THE PRODUCT WAS SOLD, FOR A

1 THIRD OR SUBSEQUENT OFFENSE.

2 Section ~~2~~ 3. This act shall take effect in 60 days.

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