

# The following is the latest draft of proposed changes to Statute 2320. It is a compilation of input from AGMA members as well as other organizations such as Intellectual Property Owners Association.

# 18 U.S. Code § 2320 - Trafficking in counterfeit goods or services

(a) **Offenses.—** Whoever intentionally—

(1) traffics in goods or services and knowingly uses a counterfeit mark on or in connection with such goods or services,

(2) traffics in labels, patches, stickers, wrappers, badges, emblems, medallions, charms, boxes, containers, cans, cases, hangtags, documentation, or packaging of any type or nature, knowing that a counterfeit mark has been applied thereto, the use of which is likely to cause confusion, to cause mistake, or to deceive,

(3) traffics in goods or services knowing that such good or service is a counterfeit military good or service the use, malfunction, or failure of which is likely to cause serious bodily injury or death, the disclosure of classified information, impairment of combat operations, or other significant harm to a combat operation, a member of the Armed Forces, or to national security, or

(4) traffics in a counterfeit drug,

or attempts or conspires to violate any of paragraphs (1) through (4) shall be punished as provided in subsection (b).

(b) **Penalties.—**

(1) **In general.—** Whoever commits an offense under subsection (a)—

(A) if an individual, shall 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, shall be fined not more than $5,000,000; and

(B) for a second or subsequent offense under subsection (a), 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.

(2) **Serious bodily injury or death.—**

(A) **Serious bodily injury.—** Whoever knowingly or recklessly causes or attempts to cause serious bodily injury from conduct in violation of subsection (a), if an individual, shall be fined not more than $5,000,000 or imprisoned for not more than 20 years, or both, and if other than an individual, shall be fined not more than $15,000,000.

(B) **Death.—** Whoever knowingly or recklessly causes or attempts to cause death from conduct in violation of subsection (a), if an individual, shall be fined not more than $5,000,000 or imprisoned for any term of years or for life, or both, and if other than an individual, shall be fined not more than $15,000,000.

(3) **Counterfeit military goods or services and counterfeit drugs.—** Whoever commits an offense under subsection (a) involving a counterfeit military good or service or counterfeit drug—

(A) if an individual, shall be fined not more than $5,000,000, imprisoned not more than 20 years, or both, and if other than an individual, be fined not more than $15,000,000; and

(B) for a second or subsequent offense, if an individual, shall be fined not more than $15,000,000, imprisoned not more than 30 years, or both, and if other than an individual, shall be fined not more than $30,000,000.

(c) **Forfeiture and Destruction of Property; Restitution.—** Forfeiture, destruction, and restitution relating to this section shall be subject to section [2323](http://www.law.cornell.edu/uscode/text/18/2323), to the extent provided in that section, in addition to any other similar remedies provided by law.

(d) **Defenses.—** All defenses, affirmative defenses, and limitations on remedies that would be applicable in an action under the Lanham Act shall be applicable in a prosecution under this section. In a prosecution under this section, the defendant shall have the burden of proof, by a preponderance of the evidence, of any such affirmative defense.

(e) **Presentence Report.—**

(1) During preparation of the presentence report pursuant to Rule 32(c) of the Federal Rules of Criminal Procedure, victims of the offense shall be permitted to submit, and the probation officer shall receive, a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim, including the estimated economic impact of the offense on that victim.

(2) Persons permitted to submit victim impact statements shall include—

(A) producers and sellers of legitimate goods or services affected by conduct involved in the offense;

(B) holders of intellectual property rights in such goods or services; and

(C) the legal representatives of such producers, sellers, and holders.

(f) **Definitions.—** For the purposes of this section—

(1) the term “counterfeit mark” means—

(A) a spurious mark—

(i) that is used in connection with trafficking in any goods, services, labels, patches, stickers, wrappers, badges, emblems, medallions, charms, boxes, containers, cans, cases, hangtags, documentation, or packaging of any type or nature;

(ii) that is identical with, or substantially indistinguishable from, a mark registered on the principal register in the United States Patent and Trademark Office and in use, whether or not the defendant knew such mark was so registered;

(iii) that is applied to or used in connection with the goods or services for which the mark is registered with the United States Patent and Trademark Office, or is applied to or consists of a label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature that is designed, marketed, or otherwise intended to be used on or in connection with the goods or services for which the mark is registered in the United States Patent and Trademark Office; and

(iv) the use of which is likely to cause confusion, to cause mistake, or to deceive; or

(B) a spurious designation that is identical with, or substantially indistinguishable from, a designation as to which the remedies of the Lanham Act are made available by reason of section [220506](http://www.law.cornell.edu/uscode/text/36/220506) of title [36](http://www.law.cornell.edu/uscode/text/36);

(C) the term counterfeit mark under subsections (A) or (B) includes a mark or designation, application of which was originally authorized by the holder of the right to use such mark or designation or by persons authorized by the rights holder, but which is used in connection with:

1. goods or servicesthat are manufactured, produced, or rendered by any person not authorized by the holder of the right to use such mark or designation or by persons authorized by the rights holder; or
2. goods or services that have been materially altered or remarked by any person not authorized by the holder of the right or by persons authorized by the rights holder; or
3. packaging, labels, or accompanying documentation that has been materially altered or remarked by any person not authorized by the holder of the right or by persons authorized by the rights holder;

For the purposes of subsections (2) and (3),

* + - * “materially altered” shall mean any alteration which would be

relevant to or would tend to affect the purchasing decision of consumers of such goods or services;

* alteration may consist of one or more alterations that are physically or electronically made to the goods or services, or alterations or remarking of information applied to the goods, packaging or accompanying documentation, which may consist of, without limitation, alteration or remarking of any model, speed, capacity, safety, composition, rating, or ingredient designation, serial or registration number, warranty information, claims of compliance with federal or state regulations, or of certifications by an independent agency;
* “materially altered” shall not include (i) reconditioned goods that are clearly identified and marked as such and in a manner that does not falsely imply that such reconditioning has been authorized by the rights holder, or (ii) unaltered goods that are repackaged and marked as such and in a manner that does not falsely imply that such repackaging has been authorized by the rights holder;

(D) but such term does not include any mark or designation used in connection with goods or services, or a mark or designation applied to labels, patches, stickers, wrappers, badges, emblems, medallions, charms, boxes, containers, cans, cases, hangtags, documentation, or packaging of any type or nature used in connection with such goods or services, of which the manufacturer or producer was, at the time of the manufacture or production in question, authorized to use the mark or designation for the type of goods or services so manufactured or produced, by the holder of the right to use such mark or designation;

(2) the term “financial gain” includes the receipt, or expected receipt, of anything of value;

(3) the term “Lanham Act” means the Act entitled “An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes”, approved July 5, 1946 ([15](http://www.law.cornell.edu/uscode/text/15) U.S.C. [1051](http://www.law.cornell.edu/uscode/text/15/1051) et seq.);

(4) the term “counterfeit military good or service” means a good or service that uses a counterfeit mark on or in connection with such good or service and that—

(A) is falsely identified or labeled as meeting military specifications, or

(B) is intended for use in a military or national security application;

(5) the term “traffic” means to transport, transfer, or otherwise dispose of, to another, for purposes of commercial advantage or private financial gain, or to make, import, export, obtain control of, or possess, with intent to so transport, transfer, or otherwise dispose of; and

(6) the term “counterfeit drug” means a drug, as defined by section 201 of the Federal Food, Drug, and Cosmetic Act, that uses a counterfeit mark on or in connection with the drug.

(g) **Limitation on Cause of Action.—** Nothing in this section shall entitle the United States to bring a criminal cause of action under this section for the repackaging of genuine goods or services not intended to deceive or confuse.

(h) **Report to Congress.—**

(1) 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](http://www.law.cornell.edu/uscode/text/28/522) of title [28](http://www.law.cornell.edu/uscode/text/28), an accounting, on a district by district basis, of the following with respect to all actions taken by the Department of Justice that involve 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](http://www.law.cornell.edu/uscode/text/18/2318) of this title), criminal infringement of copyrights (as defined in section [2319](http://www.law.cornell.edu/uscode/text/18/2319) of this title), unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances (as defined in section [2319A](http://www.law.cornell.edu/uscode/text/18/2319A) of this title), or trafficking in goods or services bearing counterfeit marks (as defined in section [2320](http://www.law.cornell.edu/uscode/text/18/usc_sec_18_00002320----000-) of this title):

(A) The number of open investigations.

(B) The number of cases referred by the United States Customs Service.

(C) The number of cases referred by other agencies or sources.

(D) The number and outcome, including settlements, sentences, recoveries, and penalties, of all prosecutions brought under sections [2318](http://www.law.cornell.edu/uscode/text/18/2318), [2319](http://www.law.cornell.edu/uscode/text/18/2319), [2319A](http://www.law.cornell.edu/uscode/text/18/2319A), and [2320](http://www.law.cornell.edu/uscode/text/18/usc_sec_18_00002320----000-) of title [18](http://www.law.cornell.edu/uscode/text/18).

(2)

(A) The report under paragraph (1), with respect to criminal infringement of copyright, shall include the following:

(i) The number of infringement cases in these categories: audiovisual (videos and films); audio (sound recordings); literary works (books and musical compositions); computer programs; video games; and, others.

(ii) The number of online infringement cases.

(iii) The number and dollar amounts of fines assessed in specific categories of dollar amounts. These categories shall be: no fines ordered; fines under $500; fines from $500 to $1,000; fines from $1,000 to $5,000; fines from $5,000 to $10,000; and fines over $10,000.

(iv) The total amount of restitution ordered in all copyright infringement cases.

(B) In this paragraph, the term “online infringement cases” as used in paragraph (2) means those cases where the infringer—

(i) advertised or publicized the infringing work on the Internet; or

(ii) made the infringing work available on the Internet for download, reproduction, performance, or distribution by other persons.

(C) The information required under subparagraph (A) shall be submitted in the report required in fiscal year 2005 and thereafter.

(i) **Transshipment and Exportation.—** No goods or services, the trafficking in of which is prohibited by this section, shall be transshipped through or exported from the United States. Any such transshipment or exportation shall be deemed a violation of section 42 of an Act to provide for the registration of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes, approved July 5, 1946 (commonly referred to as the “Trademark Act of 1946” or the “Lanham Act”).