

## Council Substitute for House Bill No. 1417

An act relating to counterfeit goods; amending s. 831.03, F.S.; creating and revising definitions; creating s. 831.031, F.S.; providing that possession of more than a specified number of counterfeit items, unless satisfactorily explained, allows an inference that such property is possessed with intent to offer it for sale or distribution in certain circumstances; providing that a state or federal certificate of registration of trademark shall be prima facie evidence of the facts stated therein; creating s. 831.032, F.S.; prohibiting specified offenses concerning involving forging or counterfeiting private labels; providing penalties; providing for reclassification of specified offenses; providing for fines based on the retail value of goods in certain circumstances; providing for restitution; providing applicability of certain defenses and limitations on remedies to prosecutions under the section; creating s. 831.033, F.S.; providing for destruction or forfeiture of goods to which the forged or counterfeit trademarks or service marks were attached; providing for forfeiture of property constituting or derived from any proceeds of a counterfeiting offense; permitting alternative disposal of forfeited items bearing or consisting of a counterfeit trademark with the written consent of the trademark owners; providing for the costs of such alternative disposition; creating s. 831.034, F.S.; providing that prosecution under specified provisions does not preclude the applicability of any other provision of the law that applies or may in the future apply to any transaction which violates specified provisions, unless such provision is inconsistent with the terms of those provisions; repealing s. 831.05, F.S., relating to vending goods or services with counterfeit trademarks or service marks; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 831.03, Florida Statutes, is amended, to read:

(Substantial rewording of section. See s. 831.03, F.S., for present text.)

831.03 Forging or counterfeiting private labels; definitions.—As used in ss. 831.03-831.034, the term:

(1) “Bodily injury” means:

(a) A cut, abrasion, bruise, burn, or disfigurement;

(b) Physical pain;

(c) Illness;

(d) Impairment of the function of a bodily member, organ, or mental faculty; or

(e) Any other injury to the body, no matter how temporary.

(2) “Culpable negligence” means reckless disregard of human life or safety and consciously doing an act or following a course of conduct that the actor knew, or reasonably should have known, was likely to cause bodily injury.

(3) “Forged or counterfeit trademark or service mark” refers to a mark:

(a) That is applied to or used in connection with any goods, services, labels, patches, stickers, wrappers, badges, emblems, medallions, charms, boxes, containers, cans, cases, hangtags, documentation, or packaging or any other components of any type or nature that are designed, marketed, or otherwise intended to be used on or in connection with any goods or services;

(b) That is identical with or an imitation of a mark registered for those goods or services on the principal register in the United States Patent and Trademark Office or the trademark register for the State of Florida or any other state, or protected by the Amateur Sports Act of 1978, 36 U.S.C. s. 380, whether or not the offender knew such mark was so registered or protected;

(c) The use of which is unauthorized by the owner of the registered mark; and

(d) The application or use of which is either likely to cause confusion, to cause mistake, or to deceive or is otherwise intended to be used on or in connection with the goods or services for which the mark is registered.

An otherwise legitimate mark is deemed counterfeit for purposes of this definition if, by altering the nature of any item to which it is affixed, the altered item bearing the otherwise legitimate mark is likely, in the course of commerce, to cause confusion, to cause mistake, or to deceive.

(4) “Retail value” means:

(a) The counterfeiter’s regular selling price for the goods or services, unless the goods or services bearing a counterfeit mark would appear to a reasonably prudent person to be authentic, then the retail value shall be the price of the authentic counterpart; or, if no authentic reasonably similar counterpart exists, then the retail value shall remain the counterfeiter’s regular selling price.

(b) In the case of labels, patches, stickers, wrappers, badges, emblems, medallions, charms, boxes, containers, cans, cases, hangtags, documentation, or packaging or any other components of any type or nature that are designed, marketed, or otherwise intended to be used on or in connection with any goods or services, the retail value shall be treated as if each component was a finished good and valued as described in paragraph (a).

(5) “Serious bodily injury” means bodily injury that involves:

(a) A substantial risk of death;

(b) Extreme physical pain;

(c) Protracted and obvious disfigurement; or

(d) Protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

Section 2. Section 831.031, Florida Statutes, is created to read:

831.031 Evidence.—In any proceeding under or related to ss. 831.03-831.034:

(1) Proof that a person is in possession of more than 25 goods, labels, patches, stickers, wrappers, badges, emblems, medallions, charms, boxes, containers, cans, cases, hangtags, documentation, or packaging or any other components of any type or nature bearing a counterfeit mark, unless satisfactorily explained, gives rise to an inference that such property is being possessed with intent to offer it for sale or distribution.

(2) A state or federal certificate of registration of trademark shall be prima facie evidence of the facts stated therein.

Section 3. Section 831.032, Florida Statutes, is created to read:

831.032 Offenses involving forging or counterfeiting private labels.—

(1) Whoever, knowingly and willfully, forges or counterfeits, or causes or procures to be forged or counterfeited, manufactures, distributes or transports, or possesses with intent to distribute or transport, upon or in connection with any goods or services, the trademark or service mark of any person, entity, or association, which goods or services are intended for resale, or knowingly possesses tools or other reproduction materials for reproduction of specific forged or counterfeit trademarks or service marks commits the crime of counterfeiting.

(2) Whoever knowingly sells or offers for sale, or knowingly purchases and keeps or has in his or her possession, with intent that the same shall be sold or disposed, or vends any goods having thereon a forged or counterfeit trademark, or who knowingly sells or offers for sale any service which is sold in conjunction with a forged or counterfeit service mark, of any person, entity, or association, knowing the same to be forged or counterfeited, commits the crime of selling or offering for sale counterfeit goods or services.

(3)(a) Violation of subsection (1) or subsection (2) is a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083, except that:

1. A violation of subsection (1) or subsection (2) is a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the offense involves 100 or more but less than 1,000 items bearing one or more counterfeit marks or if the goods involved in the offense have a total retail value of more than \$ 2,500, but less than \$20,000.

2. A violation of subsection (1) or subsection (2) is a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the offense involves 1,000 or more items bearing one or more counterfeit marks or if the goods involved in the offense have a total retail value of \$20,000 or more.

3. A violation of subsection (1) or subsection (2) is a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084 if, during the commission or as a result of the commission of the offense, the person engaging in the offense knowingly or by culpable negligence causes or allows to be caused bodily injury to another.

4. A violation of subsection (1) or subsection (2) is a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084 if, during the commission or as a result of the commission of the offense, the person engaging in the offense knowingly or by culpable negligence causes or allows to be caused serious bodily injury to another.

5. A violation of subsection (1) or subsection (2) is a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084 if, during the commission or as a result of the commission of the offense, the person engaging in the offense knowingly or by culpable negligence causes or allows to be caused death to another.

(b) For any person who, having previously been convicted for an offense under this section, is subsequently convicted for another offense under this section, such subsequent offense shall be reclassified as follows:

1. In the case of a felony of the second degree, to a felony of the first degree.

2. In the case of a felony of the third degree, to a felony of the second degree.

3. In the case of a misdemeanor of the first degree, to a felony of the third degree. For purposes of sentencing under chapter 921 and determining incentive gain-time eligibility under chapter 944, such offense is ranked in level 4 of the offense severity ranking chart.

For purposes of sentencing under chapter 921 and determining incentive gain-time eligibility under chapter 944, a felony offense that is reclassified under this paragraph is ranked one level above the ranking under s. 921.0022 or s. 921.0023 of the felony offense committed.

(c) In lieu of a fine otherwise authorized by law, when any person has been convicted of an offense under this section, the court may fine the person up to three times the retail value of the goods seized, manufactured, or sold, whichever is greater, and may enter orders awarding court costs and the costs of investigation and prosecution, reasonably incurred. The court shall hold a hearing to determine the amount of the fine authorized by this paragraph.

(d) When a person is convicted of an offense under this section, the court, pursuant to s. 775.089, shall order the person to pay restitution to the trademark owner and any other victim of the offense. In determining the value of the property loss to the trademark owner, the court shall include expenses incurred by the trademark owner in the investigation or prosecution of the offense as well as the disgorgement of any profits realized by a person convicted of the offense.

(4) All defenses, affirmative defenses, and limitations on remedies that would be applicable in an action under the Lanham Act, 15 U.S.C. ss. 1051 et seq., or to an action under s. 495.131 shall be applicable in a prosecution under this section.

Section 4. Section 831.033, Florida Statutes, is created to read:

831.033 Forging or counterfeiting private labels; destruction; forfeiture.—

(1)(a) Any goods to which forged or counterfeit trademarks or service marks are attached or affixed or any tools or other materials for the reproduction of any specific forged or counterfeit trademark or service mark which are produced or possessed in violation of this section may be seized by any law enforcement officer.

(b) Any personal property, including, but not limited to, any item, object, tool, machine, or vehicle of any kind, employed as an instrumentality in the commission of, or in aiding or abetting in the commission of, the crime of counterfeiting, as proscribed by ss. 831.03-831.034, and not otherwise included in paragraph (a), may be seized and is subject to forfeiture pursuant to ss. 932.701-932.704.

(2) The court, in imposing sentence on a person convicted of an offense under this section, shall order, in addition to any other sentence imposed, that the person forfeit to the state the following:

(a) Any property constituting or derived from any proceeds the person obtained, directly or indirectly, as the result of the offense.

(b) Any of the person's property used, or intended to be used, in any manner or part, to commit, facilitate, aid, or abet the commission of the offense.

(c) Any item that bears or consists of a counterfeit mark used in committing the offense.

(3) At the conclusion of all forfeiture proceedings, the court shall order that any forfeited item bearing or consisting of a counterfeit mark be destroyed or alternatively disposed of in another manner with the written consent of the trademark owners. The owners of the registered or protected mark shall be responsible for the costs incurred in the disposition of the forged or counterfeit items.

Section 5. Section 831.034, Florida Statutes, is created to read:

831.034 Prosecutions.—Notwithstanding any other provision of the law, prosecution may be had for any and all violations of ss. 831.03-831.033 and for any other criminal violations that may apply. Prosecution for violation of any of the offenses described in ss. 831.03-831.033 shall not be construed to preclude the applicability of any other provision of the law which presently applies or may in the future apply to any transaction that violates ss. 831.03-831.033, unless such provision is inconsistent with the terms of ss. 831.03-831.033.

Section 6. Section 831.05, Florida Statutes, is repealed.

Section 7. This act shall take effect October 1, 2008.

Approved by the Governor July 2, 2008.

Filed in Office Secretary of State July 2, 2008.