

105TH CONGRESS  
2D SESSION

# H. R. 3891

To amend the Trademark Act of 1946 to prohibit the unauthorized destruction, modification, or alteration of product identification codes, and for other purposes.

---

## IN THE HOUSE OF REPRESENTATIVES

MAY 19, 1998

Mr. GOODLATTE introduced the following bill; which was referred to the Committee on the Judiciary

---

## A BILL

To amend the Trademark Act of 1946 to prohibit the unauthorized destruction, modification, or alteration of product identification codes, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Trademark  
5 Anticounterfeiting Act of 1998”.

6 **SEC. 2. PROHIBITION AGAINST UNAUTHORIZED ALTER-**  
7 **ATION OF PRODUCT IDENTIFICATION CODES.**

8 (a) IN GENERAL.—Title VIII of the Act entitled “An  
9 Act to provide for the registration and protection of trade-

1 marks used in commerce, to carry out the provisions of  
2 certain international conventions, and for other pur-  
3 poses.”, approved July 5, 1946 (commonly referred to as  
4 the “Lanham Act” and the “Trademark Act of 1946”)  
5 is amended by inserting after section 43 (15 U.S.C. 1125)  
6 the following:

7 “UNAUTHORIZED MODIFICATIONS OF PRODUCT  
8 IDENTIFICATION CODES

9 “SEC. 43A. (a) DEFINITIONS.—In this section—

10 “(1) the term ‘consumer’—

11 “(A) means—

12 “(i) the ultimate user or purchaser of  
13 a good; or

14 “(ii) any hotel, restaurant, or other  
15 provider of services that must remove or  
16 alter the container, label, or packaging of  
17 a good in order to make the good available  
18 to the ultimate user or purchaser; and

19 “(B) does not include any retailer or other  
20 distributor who acquires a good for resale;

21 “(2) the term ‘good’ means any article, product,  
22 or commodity that affects interstate or foreign com-  
23 merce and that is customarily produced or distrib-  
24 uted for consumption by individuals or use by indi-  
25 viduals, and any container, packaging, label, or com-  
26 ponent thereof;

1           “(3) the term ‘manufacturer’ includes the origi-  
2           nal manufacturer of a good and a duly appointed  
3           agent or representative of that manufacturer acting  
4           within the scope of its agency or representation;

5           “(4) the term ‘product identification code’—

6           “(A) includes any number, letter, symbol,  
7           mark, date (including an expiration date), code,  
8           software, or other technology that is affixed to  
9           or embedded in any good, by which the manu-  
10          facturer may trace a product back to a particu-  
11          lar production lot or batch or date of removal,  
12          or otherwise identify the source of the product;  
13          and

14          “(B) does not include copyright manage-  
15          ment information conveyed in connection with  
16          copies or phonorecords of a copyrighted work or  
17          any performance or display of a copyrighted  
18          work;

19          “(5) the term ‘Universal Product Code’ refers  
20          to the multidigit bar code and number representing  
21          goods in retail applications; and

22          “(6) the term ‘value’ means the face, par, or  
23          market value, whichever is the greatest.

24          “(b) PROHIBITED ACTS.—Except as otherwise au-  
25          thorized by Federal law, it shall be unlawful for any per-

1 son, other than the consumer or the manufacturer of a  
2 good, knowingly and without authorization of the manu-  
3 facturer—

4 “(1) to directly or indirectly alter, conceal, re-  
5 move, obliterate, deface, strip, or peel any product  
6 identification code affixed to or embedded in any  
7 good;

8 “(2) to directly or indirectly affix or embed a  
9 product identification code to or in that good which  
10 is intended by the manufacturer for a different good,  
11 such that the code no longer accurately identifies the  
12 source of the good;

13 “(3) to directly or indirectly affix to or embed  
14 in that good any number, letter, symbol, mark, date,  
15 code, or other technology intended to simulate a  
16 product identification code; or

17 “(4) to import, export, sell, distribute, or broker  
18 that good, the product identification code for which  
19 has been altered, concealed, removed, obliterated, de-  
20 faced, stripped, peeled, affixed, or embedded in viola-  
21 tion of paragraph (1) or (2), or that bears an unau-  
22 thorized number, letter, symbol, mark, date, or other  
23 code in violation of paragraph (3).

24 “(c) APPLICABILITY.—The prohibitions set forth in  
25 subsection (b) shall apply to product identification codes

1 (or simulated product identification codes with respect to  
2 subsection (b)(3)) affixed to, or embedded in, any good  
3 held for sale or distribution in interstate or foreign com-  
4 merce or after shipment therein, including any good held  
5 in a bonded warehouse designated under section 555 of  
6 the Tariff Act of 1930 or in a foreign trade zone estab-  
7 lished under the Foreign Trade Zones Act.

8 “(d) EXCLUSION.—Nothing in this section prohibits  
9 a retailer from affixing a Universal Product Code or other  
10 electronic pricing code to a good if that code does not (or  
11 can be removed so as not to) permanently alter, conceal,  
12 remove, obliterate, deface, strip, or peel any product iden-  
13 tification code.

14 “(e) CRIMINAL PENALTIES.—Any person who know-  
15 ingly violates this section shall be punished as provided  
16 in section 1365A of title 18.

17 “(f) CIVIL REMEDIES.—

18 “(1) IN GENERAL.—Any person who is injured  
19 by a violation of this section, or threatened with  
20 such injury, may bring a civil action in an appro-  
21 priate United States district court against the al-  
22 leged violator.

23 “(2) IMPOUNDING AND DISPOSITION OF  
24 GOODS.—In any action under paragraph (1), the  
25 court may—

1           “(A) grant 1 or more temporary, prelimi-  
2 nary, or permanent injunctions on such terms  
3 as the court determines to be reasonable to pre-  
4 vent or restrain the violation;

5           “(B) at any time while the action is pend-  
6 ing, order the impounding, on such terms as  
7 the court determines to be reasonable, of any  
8 good that is in the custody or control of the al-  
9 leged violator and that the court has reasonable  
10 cause to believe was involved in the violation;  
11 and

12           “(C) as part of a final judgment or de-  
13 cree—

14           “(i) order the destruction of any good  
15 involved in the violation that is in the cus-  
16 tody or control of the violator or that has  
17 been impounded under subparagraph (B);  
18 or

19           “(ii) if the court determines that any  
20 good is not unsafe or a hazard to health,  
21 dispose of the good by delivery to such  
22 Federal, State, or local government agen-  
23 cies as, in the opinion of the court, have a  
24 need for such good, or by gift to such char-  
25 itable or nonprofit institutions as, in the

1           opinion of the court, have a need for such  
2           good, if such disposition would not other-  
3           wise be in violation of law, and if the man-  
4           ufacturer consents to such disposition and  
5           is given the opportunity to recode the  
6           good.

7           “(3) DAMAGES.—

8           “(A) IN GENERAL.—Subject to subpara-  
9           graph (B), in any action under paragraph (1),  
10          the plaintiff shall be entitled to recover the ac-  
11          tual damages suffered by the plaintiff as a re-  
12          sult of the violation, and any profits of the vio-  
13          lator that are attributable to the violation and  
14          are not taken into account in computing the ac-  
15          tual damages. In establishing the violator’s  
16          profits, the plaintiff shall be required to present  
17          proof only of the violator’s sales, and the viola-  
18          tor shall be required to prove all elements of  
19          cost or deduction claimed.

20          “(B) STATUTORY DAMAGES.—In any ac-  
21          tion under paragraph (1), the plaintiff may  
22          elect, at any time before final judgment is ren-  
23          dered, to recover, instead of actual damages  
24          and profits described in subparagraph (A), an

1 award of statutory damages for any violation  
2 under this section in an amount equal to—

3 “(i) not less than \$500 and not more  
4 than \$100,000, with respect to each type  
5 of goods involved in the violation; and

6 “(ii) if the violation threatens the  
7 health and safety of the public, as deter-  
8 mined by the court, not less than \$5,000  
9 and not more than \$1,000,000, with re-  
10 spect to each type of goods involved in the  
11 violation.

12 “(4) COSTS AND ATTORNEY’S FEES.—In any  
13 action under paragraph (1)—

14 “(A) in addition to any damages recovered  
15 under paragraph (3), a prevailing plaintiff may  
16 recover the full costs of the action; and

17 “(B) the court, in its discretion, may also  
18 award reasonable attorney fees to the prevailing  
19 party.

20 “(5) REPEAT VIOLATIONS.—

21 “(A) TREBLE DAMAGES.—In any case in  
22 which a person violates this section within 3  
23 years of the date on which a final judgment was  
24 entered against that person for a previous viola-  
25 tion of this section, the court, in an action

1 brought under this subsection, may increase the  
2 award of damages for the later violation to not  
3 more than 3 times the amount that would oth-  
4 erwise be awarded under paragraph (3), as the  
5 court considers appropriate.

6 “(B) BURDEN OF PROOF.—A plaintiff that  
7 seeks damages as described in subparagraph  
8 (A) shall bear the burden of proving the exist-  
9 ence of the earlier violation.

10 “(6) LIMITATIONS ON ACTIONS.—No civil ac-  
11 tion may be commenced under this section later than  
12 3 years after the date on which the claimant discov-  
13 ers the violation.

14 “(g) ENFORCEMENT ACTIONS.—

15 “(1) IN GENERAL.—The Attorney General and  
16 the Secretary of the Treasury shall enforce the re-  
17 quirements of this section. In addition, the head of  
18 a department or agency of the Federal Government  
19 (including the Commissioner of Food and Drugs and  
20 the Secretary of Agriculture) may investigate any  
21 violation of this section involving a good that is reg-  
22 ulated by a provision of law administered by that de-  
23 partment or agency.”.

24 (b) CONFORMING AMENDMENT.—The heading for  
25 title VIII of the Act of July 5, 1946, is amended by strik-

1 ing “**AND DILUTION**” and inserting “**DILUTION,**  
2 **AND ADULTERATION OF PRODUCT**  
3 **CODES**”.

4 **SEC. 3. CRIMINAL PENALTIES.**

5 (a) IN GENERAL.—Chapter 65 of title 18, United  
6 States Code, is amended by inserting after section 1365  
7 the following:

8 “§ 1365A. Unauthorized modification of product iden-  
9 tification codes

10 “(a) CRIMINAL PENALTIES.—Any person who know-  
11 ingly violates section 43A of the Act of July 5, 1946 (com-  
12 monly referred to as the ‘Trademark Act of 1946’) shall—

13 “(1) be fined under this title, imprisoned not  
14 more than 1 year, or both;

15 “(2) if the total retail value of the good or  
16 goods involved in the violation is greater than  
17 \$5,000, be fined under this title, imprisoned not  
18 more than 5 years, or both;

19 “(3) if the person acts with reckless disregard  
20 for the risk that the health or safety of the public  
21 would be threatened and under circumstances mani-  
22 festing extreme indifference to such risk, and the  
23 violation threatens the health or safety of the public,  
24 be fined under this title, imprisoned not more than  
25 10 years, or both;

1           “(4) if the person acts with reckless disregard  
2 for the risk that another person will be placed in  
3 danger of death or bodily injury and under cir-  
4 cumstances manifesting extreme indifference to such  
5 risk and—

6           “(A) serious bodily injury to any individual  
7 results, be fined under this title, imprisoned not  
8 more than 20 years, or both; or

9           “(B) death of an individual results, be  
10 fined under this title, imprisoned for any term  
11 of years or for life, or both; and

12           “(5) with respect to any second or subsequent  
13 violation, be subject to twice the maximum term of  
14 imprisonment that would otherwise be imposed  
15 under this subsection, fined under this title, or both.

16           “(b) IMPOUNDING, FORFEITURE, AND DISPOSITION  
17 OF GOODS.—

18           “(1) IMPOUNDING.—In any prosecution under  
19 this section, upon motion of the United States, the  
20 court may—

21           “(A) grant 1 or more temporary, prelimi-  
22 nary, or permanent injunctions on such terms  
23 as the court determines to be reasonable to pre-  
24 vent or restrain the alleged violation; and

1           “(B) at any time during the proceedings,  
2           order the impounding, on such terms as the  
3           court determines to be reasonable, of any good  
4           that is in the custody or control of the defend-  
5           ant and that the court has reasonable cause to  
6           believe was involved in the violation.

7           “(2) FORFEITURE AND DISPOSITION OF  
8           GOODS.—Upon conviction of any person of a viola-  
9           tion of this section, the court shall—

10           “(A) order the forfeiture of any good in-  
11           volved in the violation that is in the custody or  
12           control of the defendant or that has been im-  
13           pounded under paragraph (1)(B); and

14           “(B) either—

15           “(i) order the destruction of each  
16           good forfeited under subparagraph (A); or

17           “(ii) if the court determines that any  
18           good forfeited under subparagraph (A) is  
19           not unsafe or a hazard to health, dispose  
20           of the good by delivery to such Federal,  
21           State, or local government agencies as, in  
22           the opinion of the court, have a need for  
23           such good, or by gift to such charitable or  
24           nonprofit institutions as, in the opinion of  
25           the court, have a need for such good, if the

1 manufacturer consents to such disposition  
2 and is given the opportunity to recode the  
3 good.”.

4 (b) CONFORMING AMENDMENT.—The table of sec-  
5 tions for chapter 65 of title 18, United States Code, is  
6 amended by inserting after the item relating to section  
7 1365 the following:

“1365A. Unauthorized modification of product identification codes.”.

8 **SEC. 4. ATTORNEY GENERAL REPORTING REQUIREMENTS.**

9 Section 2320(f) of title 18, United States Code, is  
10 amended—

11 (1) by inserting “criminal tampering with prod-  
12 uct identification codes (as defined in section  
13 1365A),” after “involve”; and

14 (2) in paragraph (4), by inserting “1365A,”  
15 after “sections”.

○