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CS/HB 1417

2008 Legislature

1                                   A bill to be entitled  
2       An act relating to counterfeit goods; amending s. 831.03,  
3       F.S.; creating and revising definitions; creating s.  
4       831.031, F.S.; providing that possession of more than a  
5       specified number of counterfeit items, unless  
6       satisfactorily explained, allows an inference that such  
7       property is possessed with intent to offer it for sale or  
8       distribution in certain circumstances; providing that a  
9       state or federal certificate of registration of trademark  
10      shall be prima facie evidence of the facts stated therein;  
11      creating s. 831.032, F.S.; prohibiting specified offenses  
12      concerning involving forging or counterfeiting private  
13      labels; providing penalties; providing for  
14      reclassification of specified offenses; providing for  
15      fines based on the retail value of goods in certain  
16      circumstances; providing for restitution; providing  
17      applicability of certain defenses and limitations on  
18      remedies to prosecutions under the section; creating s.  
19      831.033, F.S.; providing for destruction or forfeiture of  
20      goods to which the forged or counterfeit trademarks or  
21      service marks were attached; providing for forfeiture of  
22      property constituting or derived from any proceeds of a  
23      counterfeiting offense; permitting alternative disposal  
24      of forfeited items bearing or consisting of a counterfeit  
25      trademark with the written consent of the trademark  
26      owners; providing for the costs of such alternative  
27      disposition; creating s. 831.034, F.S.; providing that  
28      prosecution under specified provisions does not preclude

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CODING: Words ~~stricken~~ are deletions; words underlined are additions.

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29 the applicability of any other provision of the law that  
30 applies or may in the future apply to any transaction  
31 which violates specified provisions, unless such provision  
32 is inconsistent with the terms of those provisions;  
33 repealing s. 831.05, F.S., relating to vending goods or  
34 services with counterfeit trademarks or service marks;  
35 providing an effective date.

36

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

38

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

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

43 831.03 Forging or counterfeiting private labels;  
44 definitions.--As used in ss. 831.03-831.034, the term:

45 (1) "Bodily injury" means:

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

47 (b) Physical pain;

48 (c) Illness;

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

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

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

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56           (3) "Forged or counterfeit trademark or service mark"  
 57 refers to a mark:  
 58           (a) That is applied to or used in connection with any  
 59 goods, services, labels, patches, stickers, wrappers, badges,  
 60 emblems, medallions, charms, boxes, containers, cans, cases,  
 61 hangtags, documentation, or packaging or any other components of  
 62 any type or nature that are designed, marketed, or otherwise  
 63 intended to be used on or in connection with any goods or  
 64 services;  
 65           (b) That is identical with or an imitation of a mark  
 66 registered for those goods or services on the principal register  
 67 in the United States Patent and Trademark Office or the  
 68 trademark register for the State of Florida or any other state,  
 69 or protected by the Amateur Sports Act of 1978, 36 U.S.C. s.  
 70 380, whether or not the offender knew such mark was so  
 71 registered or protected;  
 72           (c) The use of which is unauthorized by the owner of the  
 73 registered mark; and  
 74           (d) The application or use of which is either likely to  
 75 cause confusion, to cause mistake, or to deceive or is otherwise  
 76 intended to be used on or in connection with the goods or  
 77 services for which the mark is registered.  
 78  
 79 An otherwise legitimate mark is deemed counterfeit for purposes  
 80 of this definition if, by altering the nature of any item to  
 81 which it is affixed, the altered item bearing the otherwise  
 82 legitimate mark is likely, in the course of commerce, to cause  
 83 confusion, to cause mistake, or to deceive.

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84           (4) "Retail value" means:

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

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

100           (5) "Serious bodily injury" means bodily injury that  
 101 involves:

102           (a) A substantial risk of death;

103           (b) Extreme physical pain;

104           (c) Protracted and obvious disfigurement; or

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

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

109           831.031 Evidence.--In any proceeding under or related to  
 110 ss. 831.03-831.034:

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

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

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

124 831.032 Offenses involving forging or counterfeiting  
 125 private labels.--

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

136 (2) Whoever knowingly sells or offers for sale, or  
 137 knowingly purchases and keeps or has in his or her possession,  
 138 with intent that the same shall be sold or disposed, or vends

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139 any goods having thereon a forged or counterfeit trademark, or  
140 who knowingly sells or offers for sale any service which is sold  
141 in conjunction with a forged or counterfeit service mark, of any  
142 person, entity, or association, knowing the same to be forged or  
143 counterfeited, commits the crime of selling or offering for sale  
144 counterfeit goods or services.

145 (3) (a) Violation of subsection (1) or subsection (2) is a  
146 misdemeanor of the first degree, punishable as provided in s.  
147 775.082 or s. 775.083, except that:

148 1. A violation of subsection (1) or subsection (2) is a  
149 felony of the third degree, punishable as provided in s.  
150 775.082, s. 775.083, or s. 775.084, if the offense involves 100  
151 or more but less than 1,000 items bearing one or more  
152 counterfeit marks or if the goods involved in the offense have a  
153 total retail value of more than \$ 2,500, but less than \$20,000.

154 2. A violation of subsection (1) or subsection (2) is a  
155 felony of the second degree, punishable as provided in s.  
156 775.082, s. 775.083, or s. 775.084, if the offense involves  
157 1,000 or more items bearing one or more counterfeit marks or if  
158 the goods involved in the offense have a total retail value of  
159 \$20,000 or more.

160 3. A violation of subsection (1) or subsection (2) is a  
161 felony of the third degree, punishable as provided in s.  
162 775.082, s. 775.083, or s. 775.084 if, during the commission or  
163 as a result of the commission of the offense, the person  
164 engaging in the offense knowingly or by culpable negligence  
165 causes or allows to be caused bodily injury to another.

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166 4. A violation of subsection (1) or subsection (2) is a  
 167 felony of the second degree, punishable as provided in s.  
 168 775.082, s. 775.083, or s. 775.084 if, during the commission or  
 169 as a result of the commission of the offense, the person  
 170 engaging in the offense knowingly or by culpable negligence  
 171 causes or allows to be caused serious bodily injury to another.

172 5. A violation of subsection (1) or subsection (2) is a  
 173 felony of the first degree, punishable as provided in s.  
 174 775.082, s. 775.083, or s. 775.084 if, during the commission or  
 175 as a result of the commission of the offense, the person  
 176 engaging in the offense knowingly or by culpable negligence  
 177 causes or allows to be caused death to another.

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

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

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

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

191  
 192 For purposes of sentencing under chapter 921 and determining  
 193 incentive gain-time eligibility under chapter 944, a felony

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194 offense that is reclassified under this paragraph is ranked one  
195 level above the ranking under s. 921.0022 or s. 921.0023 of the  
196 felony offense committed.

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

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

213 (4) All defenses, affirmative defenses, and limitations on  
214 remedies that would be applicable in an action under the Lanham  
215 Act, 15 U.S.C. ss. 1051 et seq., or to an action under s.  
216 495.131 shall be applicable in a prosecution under this section.

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

219 831.033 Forging or counterfeiting private labels;  
220 destruction; forfeiture.--



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

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

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

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

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

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

246       (3) At the conclusion of all forfeiture proceedings, the  
247 court shall order that any forfeited item bearing or consisting  
248 of a counterfeit mark be destroyed or alternatively disposed of

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249 in another manner with the written consent of the trademark  
 250 owners. The owners of the registered or protected mark shall be  
 251 responsible for the costs incurred in the disposition of the  
 252 forged or counterfeit items.

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

255 831.034 Prosecutions.--Notwithstanding any other provision  
 256 of the law, prosecution may be had for any and all violations of  
 257 ss. 831.03-831.033 and for any other criminal violations that  
 258 may apply. Prosecution for violation of any of the offenses  
 259 described in ss. 831.03-831.033 shall not be construed to  
 260 preclude the applicability of any other provision of the law  
 261 which presently applies or may in the future apply to any  
 262 transaction that violates ss. 831.03-831.033, unless such  
 263 provision is inconsistent with the terms of ss. 831.03-831.033.

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

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