

ANTI-COUNTERFEITING AMENDMENTS ACT OF 2004

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JULY 13, 2004.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed
—————

Mr. SENSENBRENNER, from the Committee on the Judiciary,
submitted the following

R E P O R T

[To accompany H.R. 3632]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3632) to prevent and punish counterfeiting of copyrighted copies and phonorecords, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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THE AMENDMENT

The amendment is as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Anti-counterfeiting Amendments Act of 2004”.

SEC. 2. PROHIBITION AGAINST TRAFFICKING IN COUNTERFEIT COMPONENTS.

(a) IN GENERAL.—Section 2318 of title 18, United States Code, is amended—

(1) by striking the section heading and inserting the following:

“§ 2318. Trafficking in counterfeit labels, illicit labels, or counterfeit documentation or packaging”;

(2) by striking subsection (a) and inserting the following:

“(a) Whoever, in any of the circumstances described in subsection (c), knowingly traffics in—

“(1) a counterfeit label or illicit label affixed to, enclosing, or accompanying, or designed to be affixed to, enclose, or accompany—

“(A) a phonorecord;

“(B) a copy of a computer program;

“(C) a copy of a motion picture or other audiovisual work;

“(D) a copy of a literary work;

“(E) a copy of a pictorial, graphic, or sculptural work;

“(F) a work of visual art; or

“(G) documentation or packaging; or

“(2) counterfeit documentation or packaging,

shall be fined under this title or imprisoned for not more than 5 years, or both.”;

(3) in subsection (b)—

(A) in paragraph (2), by striking “and” after the semicolon;

(B) in paragraph (3)—

(i) by striking “and ‘audiovisual work’ have” and inserting the following: “‘audiovisual work’, ‘literary work’, ‘pictorial, graphic, or sculptural work’, ‘sound recording’, ‘work of visual art’, and ‘copyright owner’ have”; and

(ii) by striking the period at the end and inserting a semicolon; and

(C) by adding at the end the following:

“(4) the term ‘illicit label’ means a genuine certificate, licensing document, registration card, or similar labeling component—

“(A) that is used by the copyright owner to verify that a phonorecord, a copy of a computer program, a copy of a motion picture or other audiovisual work, a copy of a literary work, a copy of a pictorial, graphic, or sculptural work, a work of visual art, or documentation or packaging is not counterfeit or infringing of any copyright; and

“(B) that is, without the authorization of the copyright owner—

“(i) distributed or intended for distribution not in connection with the copy, phonorecord, or work of visual art to which such labeling component was intended to be affixed by the respective copyright owner; or

“(ii) in connection with a genuine certificate or licensing document, knowingly falsified in order to designate a higher number of licensed users or copies than authorized by the copyright owner, unless that certificate or document is used by the copyright owner solely for the purpose of monitoring or tracking the copyright owner’s distribution channel and not for the purpose of verifying that a copy or phonorecord is noninfringing;

“(5) the term ‘documentation or packaging’ means documentation or packaging, in physical form, for a phonorecord, copy of a computer program, copy of a motion picture or other audiovisual work, copy of a literary work, copy of a pictorial, graphic, or sculptural work, or work of visual art; and

“(6) the term ‘counterfeit documentation or packaging’ means documentation or packaging that appears to be genuine, but is not.”;

(4) in subsection (c)—

(A) by striking paragraph (3) and inserting the following:

“(3) the counterfeit label or illicit label is affixed to, encloses, or accompanies, or is designed to be affixed to, enclose, or accompany—

“(A) a phonorecord of a copyrighted sound recording or copyrighted musical work;

“(B) a copy of a copyrighted computer program;

“(C) a copy of a copyrighted motion picture or other audiovisual work;

“(D) a copy of a literary work;

“(E) a copy of a pictorial, graphic, or sculptural work;

“(F) a work of visual art; or

“(G) copyrighted documentation or packaging; or”; and

(B) in paragraph (4), by striking “for a computer program”; and

(5) in subsection (d)—

(A) by inserting “or illicit labels” after “counterfeit labels” each place it appears; and

(B) by inserting before the period at the end the following: “, and of any equipment, device, or material used to manufacture, reproduce, or assemble the counterfeit labels or illicit labels”.

(b) CIVIL REMEDIES.—Section 2318 of title 18, United States Code, is further amended by adding at the end the following:

“(f) CIVIL REMEDIES.—

“(1) IN GENERAL.—Any copyright owner who is injured, or is threatened with injury, by a violation of subsection (a) may bring a civil action in an appropriate United States district court.

“(2) DISCRETION OF COURT.—In any action brought under paragraph (1), the court—

“(A) may grant 1 or more temporary or permanent injunctions on such terms as the court determines to be reasonable to prevent or restrain a violation of subsection (a);

“(B) at any time while the action is pending, may order the impounding, on such terms as the court determines to be reasonable, of any article that is in the custody or control of the alleged violator and that the court has reasonable cause to believe was involved in a violation of subsection (a); and

“(C) may award to the injured party—

“(i) reasonable attorney fees and costs; and

“(ii) (I) actual damages and any additional profits of the violator, as provided in paragraph (3); or

“(II) statutory damages, as provided in paragraph (4).

“(3) ACTUAL DAMAGES AND PROFITS.—

“(A) IN GENERAL.—The injured party is entitled to recover—

“(i) the actual damages suffered by the injured party as a result of a violation of subsection (a), as provided in subparagraph (B) of this paragraph; and

“(ii) any profits of the violator that are attributable to a violation of subsection (a) and are not taken into account in computing the actual damages.

“(B) CALCULATION OF DAMAGES.—The court shall calculate actual damages by multiplying—

“(i) the value of the phonorecords, copies, or works of visual art which are, or are intended to be, affixed with, enclosed in, or accompanied by any counterfeit labels, illicit labels, or counterfeit documentation or packaging, by

“(ii) the number of phonorecords, copies, or works of visual art which are, or are intended to be, affixed with, enclosed in, or accompanied by any counterfeit labels, illicit labels, or counterfeit documentation or packaging.

“(C) DEFINITION.—For purposes of this paragraph, the ‘value’ of a phonorecord, copy, or work of visual art is—

“(i) in the case of a copyrighted sound recording or copyrighted musical work, the retail value of an authorized phonorecord of that sound recording or musical work;

“(ii) in the case of a copyrighted computer program, the retail value of an authorized copy of that computer program;

“(iii) in the case of a copyrighted motion picture or other audiovisual work, the retail value of an authorized copy of that motion picture or audiovisual work;

“(iv) in the case of a copyrighted literary work, the retail value of an authorized copy of that literary work;

“(v) in the case of a pictorial, graphic, or sculptural work, the retail value of an authorized copy of that work; and

“(vi) in the case of a work of visual art, the retail value of that work.

“(4) STATUTORY DAMAGES.—The injured party may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for each violation of subsection (a) in a sum of not less than \$2,500 or more than \$25,000, as the court considers appropriate.

“(5) SUBSEQUENT VIOLATION.—The court may increase an award of damages under this subsection by 3 times the amount that would otherwise be awarded, as the court considers appropriate, if the court finds that a person has subsequently violated subsection (a) within 3 years after a final judgment was entered against that person for a violation of that subsection.

“(6) LIMITATION ON ACTIONS.—A civil action may not be commenced under section unless it is commenced within 3 years after the date on which the claimant discovers the violation of subsection (a).”

(c) CONFORMING AMENDMENT.—The item relating to section 2318 in the table of sections for chapter 113 of title 18, United States Code, is amended to read as follows:

“2318. Trafficking in counterfeit labels, illicit labels, or counterfeit documentation or packaging.”.

SEC. 3. OTHER RIGHTS NOT AFFECTED.

(a) CHAPTERS 5 AND 12 OF TITLE 17; ELECTRONIC TRANSMISSIONS.—The amendments made by this Act—

(1) shall not enlarge, diminish, or otherwise affect any liability or limitations on liability under sections 512, 1201 or 1202 of title 17, United States Code; and

(2) shall not be construed to apply—

(A) in any case, to the electronic transmission of a genuine certificate, licensing document, registration card, similar labeling component, or documentation or packaging described in paragraph (4) or (5) of section 2318(b) of title 18, United States Code, as amended by this Act; and

(B) in the case of a civil action under section 2318(f) of title 18, United States Code, to the electronic transmission of a counterfeit label or counterfeit documentation or packaging defined in paragraph (1) or (6) of section 2318(b) of title 18, United States Code.

(b) FAIR USE.—The amendments made by this Act shall not affect the fair use, under section 107 of title 17, United States Code, of a genuine certificate, licensing document, registration card, similar labeling component, or documentation or packaging described in paragraph (4) or (5) of section 2318(b) of title 18, United States Code, as amended by this Act.

PURPOSE AND SUMMARY

H.R. 3632, the “Anti-counterfeiting Amendments Act of 2004,” would expand the criminal provisions of 18 U.S.C. § 2318 to combat the trafficking of counterfeit intellectual property products.

BACKGROUND AND NEED FOR THE LEGISLATION

Counterfeiting of intellectual property continues to grow because of its high profitability and the difficulty of prosecuting individuals and groups connected with it. H.R. 3632 arises from a new activity associated with software counterfeiting. To deter counterfeiting, software companies increasingly use sophisticated identification features to verify product authenticity. Since the authentication features cannot be added to the actual product, they are bundled with, or placed on, the product packaging. Many of these features are found in U.S. and foreign currency, including holograms, micro-printing, and special ink.

Because of the enormous opportunities for profits and the low risk of prosecution and significant punishment, the bundling of authentic labeling components with counterfeit software has become part of an intricate web of international organized crime. Although crime groups based in Asia produce the largest quantity of sophisticated counterfeits, manufacturing and distribution centers exist throughout the world. In fact, the State of California is a major entry and assembly point for counterfeit software, CD-ROMs, and components. In November 2001, Operation “White Horse” led to a U.S. Customs seizure of approximately \$100 million in counterfeit software that was brought into the port of Long Beach, California. However, other such components were not seized by U.S. Customs in northern California due to questions surrounding the existence of legal authority to seize such components that were not affixed to or bundled with counterfeit items.

Consumers are now accustomed to looking for these authentication features to protect themselves from being defrauded into buying counterfeit products. Legitimate authentication features are in high demand by those who seek to pass off counterfeit software as authentic. There has been a sharp increase in the theft of legitimate authentication features from factories that produce them and from shipment facilities that store and transport them. One American software company estimates that over 500,000 of its legitimate authentication features have been stolen from authorized replicators. These features are then bundled with counterfeit products. At times, the legitimate authentication features are trafficked online so that the person or groups who originally obtained the authentication features have no actual knowledge of how the authentication feature will be used in the future. The Committee is also aware of a recent case in which U.S. Attorneys declined to prosecute an individual trafficking in legitimate authentication features due to the difficulty in proving his intent to bundle them with counterfeit software. The Committee believes that in almost all instances, those who handle counterfeit authentication features are extremely likely to be engaged in fraudulent activity.

The Committee was primarily aware of this problem in crimes involving software counterfeiting, although there have been occurrences where it exists with other types of intellectual property. The Committee fully intends that this law apply to other products not just software.

The legislation creates a new definition of illicit labels as genuine labels that are:

- 1) being used or otherwise distributed without the authorization of the copyright owner, or
- 2) knowingly falsified to indicate a higher number of licensed users or copies than authorized by the copyright owner unless the certificate or document is used by the copyright owner solely to monitor or track the copyright owner's distribution channel.

H.R. 3632 also requires the forfeiture and destruction of any equipment, device, or material used to manufacture, reproduce, or assemble the counterfeit labels or illicit labels. The Committee intends this requirement to apply broadly to ensure that illegal actors do not resurface months or years after conviction using the same equipment another individual used previously.

The Committee consulted with the Justice Department to ensure that the legislation does not create additional burdens for legitimate businesses. The Committee accepted all of the recommendations of the Justice Department, except its recommendation to place the civil provisions in Title 17. Noting the existence of other civil provisions in Title 18, the Committee felt that placement of the civil provisions in the legislation in Title 18 instead of Title 17 would avoid the potential for confusing the traditional Title 17 civil actions regarding online activities with those engaged in the illicit trafficking of authentication features.

The "grey-marketing" community alerted the Committee to their concerns that early drafts of this legislation might penalize the sale of "grey-market" goods. The legislation is drafted in a manner to avoid any potential impact on the "grey-marketing" community,

with the following exception: the legislation would prohibit the changing of a label that would indicate an increase in the number of authorized users. For example, it would be illegal under this act to add a "0" to a "10-user" license authentication label in an attempt to make the label appear to be for a "100-user" license. It is not the Committee's intent at this time to expand, limit, or otherwise modify existing jurisprudence of Congressional intent on grey marketing operations.

The Committee does not intend that a legitimate, general-purpose Internet marketplace site, such as eBay, Amazon, Froogle, or Yahoo!, through which third parties may list a wide variety of items for sale be considered to "otherwise dispose" of those items within the meaning of section 2318(b)(2) if the Internet marketplace site does not direct or request the offer or sale of the specific item, but rather it is initiated by an unaffiliated third party, and the Internet marketplace site does not own or take custody of the item. The Committee expects that such legitimate sites will have terms of service that prohibit the use of their sites to sell illegal items and reasonably implement these terms of service.

Similar legislation was not enacted during the last Congress because of a dispute over its application to digital authentication features. Some advocacy groups were concerned that unintended consequences would arise if digital authentication features were covered. The Committee is not aware of any digital authentication features that have been counterfeited at this time and did not include them in the scope of the legislation at this time. The Committee is likely to hold additional hearings and possibly introduce legislation related to this issue if it is made aware of such activity actually occurring. This legislation does not cover goods distributed or sold electronically.

HEARINGS

The Committee's Subcommittee on Courts, the Internet, and Intellectual Property held one hearing on H.R. 3632 on February 12, 2004. Testimony was received from four witnesses representing four organizations: Richard C. LaMagna, Senior Manager, Worldwide Investigations, Law and Corporate Affairs, Microsoft Corporation, Emery Simon, Counsel, Business Software Alliance, Brad Buckles, Executive Vice President, Anti-Piracy Recording Industry Association of America, David Green, Vice President, Technology and New Media.

COMMITTEE CONSIDERATION

On March 31, 2004, the Subcommittee on Courts, the Internet, and Intellectual Property met in open session and ordered favorably reported the bill H.R. 3632 with an amendment by a voice vote, a quorum being present. On June 23, 2004, the Committee met in open session and ordered favorably reported the bill H.R. 3632 with an amendment by voice vote, a quorum being present.

VOTE OF THE COMMITTEE

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee notes that there were no recorded votes during the Committee consideration of H.R. 3632.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 3632, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 2, 2004.

Hon. F. JAMES SENSENBRENNER, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3632, the Anti-counterfeiting Amendments Act of 2004.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz, who can be reached at 226-2860.

Sincerely,

DOUGLAS HOLTZ-EAKIN.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 3632—Anti-counterfeiting Amendments Act of 2004.

CBO estimates that implementing H.R. 3632 would have no significant cost to the Federal Government. Enacting the bill could affect direct spending and revenues, but CBO estimates that any such effects would not be significant. H.R. 3632 contains no inter-governmental or private-sector mandates as defined in the Unfunded Mandates Reform Act, and would not affect the budgets of State, local, or tribal governments.

H.R. 3632 would establish new Federal crimes against trafficking in licensing documents or other authentication components for sound recordings, computer programs, audiovisual works, and similar products, and would permit copyright owners to bring civil actions in Federal court for violations of these laws. Thus, the government would be able to pursue cases that it otherwise would not be able to prosecute. However, we expect that H.R. 3632 would

apply to a relatively small number of additional offenders, so any increase in costs for law enforcement, court proceedings (including new civil actions), or prison operations would not be significant. Any such costs would be subject to the availability of appropriated funds.

Because those prosecuted and convicted under H.R. 3632 could be subject to criminal fines, the Federal Government might collect additional fines if the legislation is enacted. Collections of such fines are recorded in the budget as revenues, which are deposited in the Crime Victims Fund and later spent. CBO expects that any additional revenues and direct spending would not be significant because of the small number of cases involved.

The CBO staff contact for this estimate is Mark Grabowicz, who can be reached at 226–2860. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 3632 is designed to reduce counterfeiting activities by penalizing trafficking in illicit labels as defined in the bill.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article 1, section 8, clause 8 of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Section 2318 of Title 18 currently prohibits trafficking in counterfeit labels for phonorecords and copies of computer programs or audiovisual works, as well as trafficking in counterfeit documentation or packaging for a computer program. The proposed bill would amend §2318 to prohibit knowingly trafficking in genuine authentication components in cases where such genuine authentication components are: (i) distributed or intended for distribution on a standalone basis; (ii) fraudulently bundled with counterfeit copies or copies not intended by the copyright owner; or (iii) in the case of a computer program, altered or removed in order to falsify the number or type of users or the type of computer program. The key provisions of the bill are summarized below:

Sec. 1.—*Short Title.* The Act may be cited as the “Anti-counterfeiting Amendments Act of 2004.”

Sec. 2.—*Amendment to 18 U.S.C. §2318.* Section 2 of H.R. 3632 significantly expands 18 U.S.C. §2318. The scope of works covered includes “illicit labels,” designed to be affixed to works identified in the existing statute. The scope of works covered is also expanded to include counterfeit and illicit labels designed to be affixed to literary works; pictorial, graphic, or sculptural works; works of visual art; or counterfeit documentation and packaging for all types of works.

The definition of “illicit label” also specifically excludes labels that are solely used by the copyright owner for the purpose of monitoring or tracking the copyright owner’s distribution channel and not for the purpose of verifying that a copy or phonorecord is non-

infringing. This exclusion ensures that legitimate “grey-market” activities are not covered by the legislation, although the Committee is unaware of any activity that occurs currently that would implicate such activity.

The bill would authorize forfeiture of equipment, devices, or materials used to manufacture, reproduce, or assemble counterfeit or illicit labels.

In addition to existing criminal penalties provided under § 2318, the bill would provide civil remedies for violations of the Act, including the following:

1. Civil damages, including both actual damages and profits, or upon election of the plaintiff, statutory damages. Damages are measured by the retail value of the authorized copyrighted work. In addition, the plaintiff may seek treble damages in the event of repeat violations made within 3 years of the original violation;
2. Attorneys’ fees and costs;
3. Injunctive relief; and
4. Impoundment of articles that violate the Act.

The bill would provide for a 3-year statute of limitations from the date upon which the person injured discovers the violation.

Sec. 3.—*Savings Clauses.* Section 3 of the legislation makes clear that its provisions:

1. Do not modify in any way §§ 512, 1201, or 1202 of Title 17 concerning online infringement, copyright protection systems, and integrity of copyright management information.
2. Do not apply to the electronic transmissions of a genuine certificate, licensing document, registration card, similar labeling component, or documentation or packaging described in paragraphs (4) and (5) of 18 U.S.C. § 2318(b), as amended.
3. Do not apply to civil suits under 18 U.S.C. § 2318(f) to the electronic transmission of a counterfeit label or counterfeit packaging defined in paragraphs (1) or (6) of 18 U.S.C. § 2318(b), as amended.
4. Do not apply to any fair use under 17 U.S.C. § 107 of a genuine certificate, licensing document, registration card, similar labeling component, or documentation or packaging described in paragraphs (4) or (5) of 18 U.S.C. § 2318, as amended.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

CHAPTER 113 OF TITLE 18, UNITED STATES CODE

CHAPTER 113—STOLEN PROPERTY

Sec.

2311. Definitions.

* * * * *

2318. Trafficking in counterfeit labels for phonorecords, copies of computer programs or computer program documentation or packaging, and copies of motion pictures or other audio visual works, and trafficking in counterfeit computer program documentation or packaging.】

2318. *Trafficking in counterfeit labels, illicit labels, or counterfeit documentation or packaging.*

* * * * *

【§ 2318. Trafficking in counterfeit labels for phonorecords, copies of computer programs or computer program documentation or packaging, and copies of motion pictures or other audio visual works, and trafficking in counterfeit computer program documentation or packaging

【(a) Whoever, in any of the circumstances described in subsection (c) of this section, knowingly traffics in a counterfeit label affixed or designed to be affixed to a phonorecord, or a copy of a computer program or documentation or packaging for a computer program, or a copy of a motion picture or other audiovisual work, and whoever, in any of the circumstances described in subsection (c) of this section, knowingly traffics in counterfeit documentation or packaging for a computer program, shall be fined under this title or imprisoned for not more than five years, or both.】

§ 2318. Trafficking in counterfeit labels, illicit labels, or counterfeit documentation or packaging

(a) *Whoever, in any of the circumstances described in subsection (c), knowingly traffics in—*

(1) *a counterfeit label or illicit label affixed to, enclosing, or accompanying, or designed to be affixed to, enclose, or accompany—*

- (A) *a phonorecord;*
- (B) *a copy of a computer program;*
- (C) *a copy of a motion picture or other audiovisual work;*
- (D) *a copy of a literary work;*
- (E) *a copy of a pictorial, graphic, or sculptural work;*
- (F) *a work of visual art; or*
- (G) *documentation or packaging; or*

(2) *counterfeit documentation or packaging,*
shall be fined under this title or imprisoned for not more than 5 years, or both.

(b) As used in this section—

(1) * * *

(2) the term “traffic” means to transport, transfer or otherwise dispose of, to another, as consideration for anything of value or to make or obtain control of with intent to so transport, transfer or dispose of; **【and】**

(3) the terms “copy”, “phonorecord”, “motion picture”, “computer program”, [and “audiovisual work” have] “audiovisual work”, “literary work”, “pictorial, graphic, or sculptural work”, “sound recording”, “work of visual art”, and “copyright owner” have, respectively, the meanings given those terms in section 101 (relating to definitions) of title 17[.];

(4) the term “illicit label” means a genuine certificate, licensing document, registration card, or similar labeling component—

(A) that is used by the copyright owner to verify that a phonorecord, a copy of a computer program, a copy of a motion picture or other audiovisual work, a copy of a literary work, a copy of a pictorial, graphic, or sculptural work, a work of visual art, or documentation or packaging is not counterfeit or infringing of any copyright; and

(B) that is, without the authorization of the copyright owner—

(i) distributed or intended for distribution not in connection with the copy, phonorecord, or work of visual art to which such labeling component was intended to be affixed by the respective copyright owner; or

(ii) in connection with a genuine certificate or licensing document, knowingly falsified in order to designate a higher number of licensed users or copies than authorized by the copyright owner, unless that certificate or document is used by the copyright owner solely for the purpose of monitoring or tracking the copyright owner’s distribution channel and not for the purpose of verifying that a copy or phonorecord is noninfringing;

(5) the term “documentation or packaging” means documentation or packaging, in physical form, for a phonorecord, copy of a computer program, copy of a motion picture or other audiovisual work, copy of a literary work, copy of a pictorial, graphic, or sculptural work, or work of visual art; and

(6) the term “counterfeit documentation or packaging” means documentation or packaging that appears to be genuine, but is not.

(c) The circumstances referred to in subsection (a) of this section are—

(1) * * *

* * * * *

[(3) the counterfeit label is affixed to or encloses, or is designed to be affixed to or enclose, a copy of a copyrighted computer program or copyrighted documentation or packaging for a computer program, a copyrighted motion picture or other audiovisual work, or a phonorecord of a copyrighted sound recording; or]

(3) the counterfeit label or illicit label is affixed to, encloses, or accompanies, or is designed to be affixed to, enclose, or accompany—

(A) a phonorecord of a copyrighted sound recording or copyrighted musical work;

(B) a copy of a copyrighted computer program;

(C) a copy of a copyrighted motion picture or other audiovisual work;

- (D) a copy of a literary work;
- (E) a copy of a pictorial, graphic, or sculptural work;
- (F) a work of visual art; or
- (G) copyrighted documentation or packaging; or

(4) the counterfeited documentation or packaging [for a computer program] is copyrighted.

(d) When any person is convicted of any violation of subsection (a), the court in its judgment of conviction shall in addition to the penalty therein prescribed, order the forfeiture and destruction or other disposition of all counterfeit labels or *illicit labels* and all articles to which counterfeit labels or *illicit labels* have been affixed or which were intended to have had such labels affixed, and of any equipment, device, or material used to manufacture, reproduce, or assemble the counterfeit labels or *illicit labels*.

* * * * *

(f) *CIVIL REMEDIES.*—

(1) *IN GENERAL.*—Any copyright owner who is injured, or is threatened with injury, by a violation of subsection (a) may bring a civil action in an appropriate United States district court.

(2) *DISCRETION OF COURT.*—In any action brought under paragraph (1), the court—

(A) may grant 1 or more temporary or permanent injunctions on such terms as the court determines to be reasonable to prevent or restrain a violation of subsection (a);

(B) at any time while the action is pending, may order the impounding, on such terms as the court determines to be reasonable, of any article that is in the custody or control of the alleged violator and that the court has reasonable cause to believe was involved in a violation of subsection (a); and

(C) may award to the injured party—

(i) reasonable attorney fees and costs; and

(ii) (I) actual damages and any additional profits of the violator, as provided in paragraph (3); or

(II) statutory damages, as provided in paragraph

(4).

(3) *ACTUAL DAMAGES AND PROFITS.*—

(A) *IN GENERAL.*—The injured party is entitled to recover—

(i) the actual damages suffered by the injured party as a result of a violation of subsection (a), as provided in subparagraph (B) of this paragraph; and

(ii) any profits of the violator that are attributable to a violation of subsection (a) and are not taken into account in computing the actual damages.

(B) *CALCULATION OF DAMAGES.*—The court shall calculate actual damages by multiplying—

(i) the value of the phonorecords, copies, or works of visual art which are, or are intended to be, affixed with, enclosed in, or accompanied by any counterfeit labels, illicit labels, or counterfeit documentation or packaging, by

(ii) the number of phonorecords, copies, or works of visual art which are, or are intended to be, affixed

with, enclosed in, or accompanied by any counterfeit labels, illicit labels, or counterfeit documentation or packaging.

(C) DEFINITION.—For purposes of this paragraph, the “value” of a phonorecord, copy, or work of visual art is—

(i) in the case of a copyrighted sound recording or copyrighted musical work, the retail value of an authorized phonorecord of that sound recording or musical work;

(ii) in the case of a copyrighted computer program, the retail value of an authorized copy of that computer program;

(iii) in the case of a copyrighted motion picture or other audiovisual work, the retail value of an authorized copy of that motion picture or audiovisual work;

(iv) in the case of a copyrighted literary work, the retail value of an authorized copy of that literary work;

(v) in the case of a pictorial, graphic, or sculptural work, the retail value of an authorized copy of that work; and

(vi) in the case of a work of visual art, the retail value of that work.

(4) STATUTORY DAMAGES.—The injured party may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for each violation of subsection (a) in a sum of not less than \$2,500 or more than \$25,000, as the court considers appropriate.

(5) SUBSEQUENT VIOLATION.—The court may increase an award of damages under this subsection by 3 times the amount that would otherwise be awarded, as the court considers appropriate, if the court finds that a person has subsequently violated subsection (a) within 3 years after a final judgment was entered against that person for a violation of that subsection.

(6) LIMITATION ON ACTIONS.—A civil action may not be commenced under section unless it is commenced within 3 years after the date on which the claimant discovers the violation of subsection (a)

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MARKUP TRANSCRIPT

BUSINESS MEETING

WEDNESDAY, JUNE 23, 2004

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:09 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. [Chairman of the Committee] presiding.

[Intervening business.]

Chairman SENSENBRENNER. The next item on the agenda is H.R. 3632, the “Anti-counterfeiting Amendments of 2003.” The Chair recognizes the gentleman from Texas, Mr. Smith, the Chairman of

the Subcommittee on Courts, the Internet, and Intellectual Property.

Mr. SMITH. Thank you, Mr. Chairman. Mr. Chairman, the Subcommittee on Courts, the Internet, and Intellectual Property reports favorably the bill H.R. 3632 with a single amendment in the nature of a substitute and moves its favorable recommendation to the full House.

Chairman SENSENBRENNER. Without objection, the bill will be considered as read and open for amendment at any point.

[The Amendment in the Nature of a Substitute to H.R. 3632 follows:]

**AMENDMENT IN THE NATURE OF A SUBSTITUTE
TO H.R. 3632, AS REPORTED BY THE
SUBCOMMITTEE ON COURTS, THE INTERNET, AND
INTELLECTUAL PROPERTY**

Strike all after the enacting clause and insert the following:

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Anti-counterfeiting
3 Amendments Act of 2004”.

4 **SEC. 2. PROHIBITION AGAINST TRAFFICKING IN COUNTER-**
5 **FEIT COMPONENTS.**

6 (a) IN GENERAL.—Section 2318 of title 18, United
7 States Code, is amended—

8 (1) by striking the section heading and insert-
9 ing the following:

10 **“§ 2318. Trafficking in counterfeit labels, illicit labels,**
11 **or counterfeit documentation or pack-**
12 **aging”;**

13 (2) by striking subsection (a) and inserting the
14 following:

15 “(a) Whoever, in any of the circumstances described
16 in subsection (c), knowingly traffics in—

1 “(1) a counterfeit label or illicit label affixed to,
2 enclosing, or accompanying, or designed to be af-
3 fixed to, enclose, or accompany—

4 “(A) a phonorecord;

5 “(B) a copy of a computer program;

6 “(C) a copy of a motion picture or other
7 audiovisual work;

8 “(D) a copy of a literary work;

9 “(E) a copy of a pictorial, graphic, or
10 sculptural work;

11 “(F) a work of visual art; or

12 “(G) documentation or packaging; or

13 “(2) counterfeit documentation or packaging,

14 shall be fined under this title or imprisoned for not more
15 than 5 years, or both.”;

16 (3) in subsection (b)—

17 (A) in paragraph (3)—

18 (i) by striking “and ‘audiovisual work’
19 have” and inserting the following: “,
20 ‘audiovisual work’, ‘literary work’, ‘pic-
21 torial, graphic, or sculptural work’, ‘sound
22 recording’, ‘work of visual art’, and ‘copy-
23 right owner’ have”; and

24 (ii) by striking the period at the end
25 and inserting a semicolon; and

1 (B) by adding at the end the following:

2 “(4) the term ‘illicit label’ means a genuine cer-
3 tificate, licensing document, registration card, or
4 similar labeling component—

5 “(A) that is used by the copyright owner
6 to verify that a phonorecord, a copy of a com-
7 puter program, a copy of a motion picture or
8 other audiovisual work, a copy of a literary
9 work, a copy of a pictorial, graphic, or sculp-
10 tural work, a work of visual art, or documenta-
11 tion or packaging is not counterfeit or infring-
12 ing of any copyright; and

13 “(B) that is, without the authorization of
14 the copyright owner—

15 “(i) distributed or intended for dis-
16 tribution not in connection with the copy,
17 phonorecord, or work of visual art to which
18 such labeling component was intended to
19 be affixed by the respective copyright
20 owner; or

21 “(ii) altered or removed to falsify the
22 number of authorized copies or users, type
23 of authorized user, or edition or version;

24 “(5) the term ‘documentation or packaging’
25 means documentation or packaging, in physical

1 form, for a phonorecord, copy of a computer pro-
2 gram, copy of a motion picture or other audiovisual
3 work, copy of a literary work, copy of a pictorial,
4 graphic, or sculptural work, or work of visual art;
5 and

6 “(6) the term ‘counterfeit documentation or
7 packaging’ means documentation or packaging that
8 appears to be genuine, but is not.”;

9 (4) in subsection (c)—

10 (A) by striking paragraph (3) and insert-
11 ing the following:

12 “(3) the counterfeit label or illicit label is af-
13 fixed to, encloses, or accompanies, or is designed to
14 be affixed to, enclose, or accompany—

15 “(A) a phonorecord of a copyrighted sound
16 recording;

17 “(B) a copy of a copyrighted computer
18 program;

19 “(C) a copy of a copyrighted motion pic-
20 ture or other audiovisual work;

21 “(D) a copy of a literary work;

22 “(E) a copy of a pictorial, graphic, or
23 sculptural work;

24 “(F) a work of visual art; or

1 “(G) copyrighted documentation or pack-
2 aging; or”; and

3 (B) in paragraph (4), by striking “for a
4 computer program”; and

5 (5) in subsection (d)—

6 (A) by inserting “or illicit labels” after
7 “counterfeit labels” each place it appears; and

8 (B) by inserting before the period at the
9 end the following: “, and of any equipment, de-
10 vice, or material used to manufacture, repro-
11 duce, or assemble the counterfeit labels or illicit
12 labels”.

13 (b) CIVIL REMEDIES.—Section 504 of title 17,
14 United States Code, is amended by adding at the end the
15 following:

16 “(f) CIVIL REMEDIES FOR VIOLATION OF SECTION
17 2318 OF TITLE 18.—

18 “(1) IN GENERAL.—Any copyright owner who
19 is injured, or is threatened with injury, by a viola-
20 tion of section 2318 of title 18 may bring a civil ac-
21 tion in an appropriate United States district court.

22 “(2) DISCRETION OF COURT.—In any action
23 brought under paragraph (1), the court—

24 “(A) may grant 1 or more temporary or
25 permanent injunctions on such terms as the

1 court determines to be reasonable to prevent or
2 restrain a violation of section 2318 of title 18;

3 “(B) at any time while the action is pend-
4 ing, may order the impounding, on such terms
5 as the court determines to be reasonable, of any
6 article that is in the custody or control of the
7 alleged violator and that the court has reason-
8 able cause to believe was involved in a violation
9 of section 2318 of title 18; and

10 “(C) may award to the injured party—

11 “(i) reasonable attorney fees and
12 costs; and

13 “(ii) (I) actual damages and any addi-
14 tional profits of the violator, as provided in
15 paragraph (3); or

16 “(II) statutory damages, as provided
17 in paragraph (4).

18 “(3) ACTUAL DAMAGES AND PROFITS.—

19 “(A) IN GENERAL.—The injured party is
20 entitled to recover—

21 “(i) the actual damages suffered by
22 the injured party as a result of a violation
23 of section 2318 of title 18, as provided in
24 subparagraph (B); and

1 “(ii) any profits of the violator that
2 are attributable to a violation of section
3 2318 of title 18 and are not taken into ac-
4 count in computing the actual damages.

5 “(B) CALCULATION OF DAMAGES.—The
6 court shall calculate actual damages by
7 multiplying—

8 “(i) the value of the phonorecords,
9 copies, or works of visual art which are, or
10 are intended to be, affixed with, enclosed
11 in, or accompanied by any counterfeit la-
12 bels, illicit labels, or counterfeit docu-
13 mentation or packaging, by

14 “(ii) the number of phonorecords, cop-
15 ies, or works of visual art which are, or are
16 intended to be, affixed with, enclosed in, or
17 accompanied by any counterfeit labels, il-
18 licit labels, or counterfeit documentation or
19 packaging.

20 “(C) DEFINITION.—For purposes of this
21 paragraph, the ‘value’ of a phonorecord, copy,
22 or work of visual art is—

23 “(i) in the case of a copyrighted
24 sound recording, the retail value of an au-

1 thorized phonorecord of that sound record-
2 ing;

3 “(ii) in the case of a copyrighted com-
4 puter program, the retail value of an au-
5 thorized copy of that computer program;

6 “(iii) in the case of a copyrighted mo-
7 tion picture or other audiovisual work, the
8 retail value of an authorized copy of that
9 motion picture or audiovisual work;

10 “(iv) in the case of a copyrighted lit-
11 erary work, the retail value of an author-
12 ized copy of that literary work;

13 “(v) in the case of a pictorial, graphic,
14 or sculptural work, the retail value of an
15 authorized copy of that work; and

16 “(vi) in the case of a work of visual
17 art, the retail value of that work.

18 “(4) STATUTORY DAMAGES.—The injured party
19 may elect, at any time before final judgment is ren-
20 dered, to recover, instead of actual damages and
21 profits, an award of statutory damages for each vio-
22 lation of section 2318 of title 18 in a sum of not less
23 than \$2,500 or more than \$25,000, as the court
24 considers appropriate.

1 “(5) SUBSEQUENT VIOLATION.—The court may
2 increase an award of damages under this subsection
3 by 3 times the amount that would otherwise be
4 awarded, as the court considers appropriate, if the
5 court finds that a person has subsequently violated
6 section 2318 of title 18 within 3 years after a final
7 judgment was entered against that person for a vio-
8 lation of that section.

9 “(6) LIMITATION ON ACTIONS.—A civil action
10 may not be commenced under section unless it is
11 commenced within 3 years after the date on which
12 the claimant discovers the violation of section 2318
13 of title 18.”.

14 (c) CONFORMING AMENDMENT.—The item relating
15 to section 2318 in the table of sections for chapter 113
16 of title 18, United States Code, is amended to read as
17 follows:

“2318. Trafficking in counterfeit labels, illicit labels, or counterfeit documenta-
tion or packaging.”.

18 **SEC. 3. OTHER RIGHTS NOT AFFECTED.**

19 (a) CHAPTER 12 OF TITLE 17; ELECTRONIC TRANS-
20 MISSIONS.—The amendments made by this Act shall not
21 enlarge, diminish, or otherwise affect any liability under
22 section 1201 or 1202 of title 17, United States Code, or
23 be construed to apply to the electronic transmission of a
24 genuine certificate, licensing document, registration card,

1 similar labeling component, or documentation or pack-
2 aging described in paragraph (4) or (5) of section 2318(b)
3 of title 18, United States Code, as amended by this Act.

4 (b) FAIR USE.—The amendments made by this Act
5 shall not affect the fair use, under section 107 of title 17,
6 United States Code, of a genuine certificate, licensing doc-
7 ument, registration card, similar labeling component, or
8 documentation or packaging described in paragraph (4)
9 or (5) of section 2318(b) of title 18, United States Code,
10 as amended by this Act.

Chairman SENSENBRENNER. The Subcommittee amendment in the nature of a substitute, which the Members have before them, will be considered as read and considered as the original text for purposes of amendment and open for amendment at any point.

The Chair recognizes the gentleman from Texas, Mr. Smith, to strike the last word.

Mr. SMITH. Mr. Chairman, in that case, I would move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SMITH. Mr. Chairman, counterfeiting, in all of its guises, is a mask of deceit. It is the functional equivalent of a lie, often intended to dupe an unwitting consumer into buying something they do not want. Multiplied by millions of transactions, the result to legitimate businesses is lost profits, lost jobs and lost tax revenue on a scale that compromises the health of otherwise vibrant industries.

For many years, software publishers have attempted to thwart counterfeiting activity by developing physical authentication components called COAs that help consumers and law enforcement agencies distinguish between genuine software and sophisticated counterfeits. Due to the increasing sophistication of genuine physical authentication components, counterfeiters are now combining pirated CD-ROMs in packaging with genuine components obtained through theft or fraud.

For example, Microsoft has reported thefts of more than 540,000 genuine certificates of authenticity with an estimated value of \$50 million. Genuine COAs and other physical authentication components are in high demand among counterfeiters because they significantly increase the marketability and selling price of counterfeit software.

Even though standalone COAs have no intrinsic value or legitimate use other than to authenticate the software publisher's genuine software, they sell on the open market for upwards of \$90 or \$100 or even \$200 apiece because of their value to counterfeit operations.

One Website recently advertised a Microsoft Office COA for \$225 with the statement, quote, no software included. Clearly, the broker offering the standalone COA knew full well that the component would be purchased by a counterfeiter and ultimately resold to an unsuspecting consumer in combination with pirated software.

Nevertheless, because Federal law does not prohibit trafficking in genuine physical authentication components, prosecutors find it impossible to take any legal action against these brokers. As a result, this activity has become a highly profitable and largely risk-free business for an increasing number of brokers, who act with complete disregard for the obvious effect of their actions on counterfeit sales and consumers.

This loophole in Federal law has frustrated anti-counterfeiting enforcement efforts throughout the United States. H.R. 3632 will close this loophole and empower Federal authorities to prosecute counterfeiting activity on a greater scale with better results.

At the appropriate time, I will offer a manager's amendment to ensure that the concerns of gray marketers and online service providers are addressed, but I urge my colleagues to support the man-

ager's amendment and the underlying bill, and I yield back the balance of my time.

Chairman SENSENBRENNER. In the absence of the gentleman from California, Mr. Berman, who wishes to give the Democratic opening statement, the gentleman from California, Mr. Schiff, is recognized for 5 minutes.

Mr. SCHIFF. Mr. Chairman, I thank you for the opportunity to address the bill, and I want to also raise my support for this. The counterfeiting of authentication documents is an extraordinarily difficult problem, a very costly one for the industry, and I want to thank the gentleman from Texas for his work on the issue.

There is a related issue that I think is also very significant, and if the gentleman from Texas would allow me to make an inquiry, and that is the problem of the counterfeiting of digital authentication features. Is it the gentleman's intention to come back in subsequent legislation to address that issue? If it is, it is something I would certainly very much like to work with him on, and I would be delighted to yield to the gentleman.

Mr. SMITH. If the gentleman will yield, the digital authentication is a problem, and I acknowledge that. We will, I hope, address it in future legislation, but one reason for not including it in this legislation, as I think the gentleman understands, is because it is controversial, and we are trying to get this legislation through and signed into law in this session of Congress, and by leaving out the digital component, that will enable us to be successful with this bill.

We need to still work out some wrinkles in how to address the digital, and I will be happy to work with the gentleman from California in doing so.

Mr. SCHIFF. Reclaiming my time, I thank the gentleman. It is not my purpose today to offer an amendment on that issue, because I know it would complicate the task at hand, and there is no desire to slow down or in any way impede the current contents of the bill. But I do look forward to working with the gentleman and appreciate his interest in continuing to work on that issue and with that urge my colleagues to support the measure, and I yield back the balance of my time.

Chairman SENSENBRENNER. Without objection, all Members' opening statements will appear in the record at this point.

[The prepared statement of Ms. Jackson Lee follows:]

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND RANKING MEMBER, SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CLAIMS

I thank Chairman Sensenbrenner and Ranking Member Conyers for holding today's markup of H.R. 3632, the Anti-counterfeiting Act of 2003. Fortunately, the Subcommittee on Courts, the Internet and Intellectual Property successfully marked this bill up and reported it out favorably on March 31, 2004, as its provisions will address some serious concerns.

The trafficking of security components, for example Certificates of Authenticity (COAs) is a problem that the current law does not adequately address. Logistically, since the security components are useless without the actual product, such action serves no legitimate business purpose. Furthermore, criminal prosecutors have a hard time attaching crimes to the counterfeit sales made by these traffickers.

To address this problem, H.R. 3632 would amend Section 2318 of Title 18 to prohibit trafficking of these products. With this narrowly-tailored amendment to Section 2318, federal law enforcement and copyright owners will have the tools needed to prevent trafficking in genuine physical security components.

The Anticounterfeiting Amendments will help combat the growing threat of international counterfeiting crimes by ensuring that U.S. laws address all aspects of counterfeiting activities.

In Texas, a crime ring was implicated that was believed to have imported over 100 million counterfeit cigarettes, mislabeling shipping documents by indicating that they were importing toys or plastic parts.

Passage of this important bill with the amendments that will be offered to improve its scope will, in the long run, improve the quality of our intellectual property and technological developments. Moreover, with adequate legal checks put in place to reduce trafficking of security products will foster a more competitive environment. For the above reasons, Mr. Chairman and Mr. Ranking Member, I support this legislation.

Thank you.

Chairman SENSENBRENNER. Are there amendments?

The Chair recognizes the gentleman from Texas, Mr. Smith, for purposes of offering a manager's amendment.

Mr. SMITH. Mr. Chairman, I have an amendment at the desk.

Chairman SENSENBRENNER. The Clerk will report the amendment.

The CLERK. Amendment to the amendment in the nature of a substitute to H.R. 3632—

Mr. SMITH. Mr. Chairman, I ask unanimous consent that the amendment be considered as read.

Chairman SENSENBRENNER. Without objection, so ordered.

[The amendment offered by Mr. Smith follows:]

**AMENDMENT TO THE AMENDMENT IN THE
NATURE OF A SUBSTITUTE TO H.R. 3632
OFFERED BY MR. SMITH OF TEXAS**

Page 3, strike lines 21 through 23 and insert the following:

1 “(ii) in connection with a genuine cer-
2 tificate or licensing document, knowingly
3 falsified in order to designate a higher
4 number of licensed users or copies than
5 authorized by the copyright owner, unless
6 that certificate or document is used by the
7 copyright owner solely for the purpose of
8 monitoring or tracking the copyright own-
9 er’s distribution channel and not for the
10 purpose of verifying that a copy or phono-
11 record is noninfringing;”.

Page 4, line 16, insert “or copyrighted musical work” after “recording”.

Page 5, strike lines 13 through 17 and insert the following:

1 (b) CIVIL REMEDIES.—Section 2318 of title 18,
2 United States Code, is further amended by adding at the
3 end the following:

4 “(f) CIVIL REMEDIES.—

Page 5, line 20, strike “section 2318 of title 18”
and insert “subsection (a)”.

Page 6, lines 2, 9, and 23, strike “section 2318 of
title 18” and insert “subsection (a)”.

Page 6, line 24, insert “of this paragraph” after
“subparagraph (B)”.

Page 7, lines 2 and 3, strike “section 2318 of title
18” and insert “subsection (a)”.

Page 7, line 24, insert “or copyrighted musical
work” after “recording”.

Page 8, line 2, insert “or musical work” before the
semicolon.

Page 8, line 22, strike “section 2318 of title 18”
and insert “subsection (a)”.

Page 9, line 6, strike “section 2318 of title 18” and
insert “subsection (a)”.

Page 9, line 8, strike “section” and insert “sub-
section”.

Page 9, lines 12 and 13, strike “section 2318 of title 18” and insert “subsection (a)”.

Page 9, strike line 19 and all that follows through page 10, line 3, and insert the following:

1 (a) CHAPTERS 5 AND 12 OF TITLE 17; ELECTRONIC
2 TRANSMISSIONS.—The amendments made by this Act—
3 (1) shall not enlarge, diminish, or otherwise af-
4 fect any liability or limitations on liability under sec-
5 tions 512, 1201 or 1202 of title 17, United States
6 Code; and
7 (2) shall not be construed to apply—
8 (A) in any case, to the electronic trans-
9 mission of a genuine certificate, licensing docu-
10 ment, registration card, similar labeling compo-
11 nent, or documentation or packaging described
12 in paragraph (4) or (5) of section 2318(b) of
13 title 18, United States Code, as amended by
14 this Act; and
15 (B) in the case of a civil action under sec-
16 tion 2318(f) of title 18, United States Code, to
17 the electronic transmission of a counterfeit label
18 or counterfeit documentation or packaging de-
19 fined in paragraph (1) or (6) of section 2318(b)
20 of title 18, United States Code.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SMITH. Mr. Chairman, the manager's amendment represents a compromise between content owners, whose interests are harmed by the illicit trafficking in legitimate and counterfeit authentication labels and two groups: gray marketers and Internet service providers. Gray marketers, who reimport noncounterfeited goods back into the United States after they have already been exported, had expressed some initial concerns that their activities could be penalized under this legislation.

In a bipartisan effort, we worked with gray marketers to ensure that their activities are not penalized by this legislation so long as they do not modify COAs to show a higher number of authorized users.

Internet and online service providers were concerned that this legislation could result in some of their routine, day-to-day actions as service providers being subject to some additional liability. The manager's amendment clarifies that they do not face any new liability for their routine activities. Several of these groups have also submitted letters to the Committee noting that their concerns have been addressed.

Finally, Mr. Chairman, the legislation does not apply to electronic transmissions of authentication features. Trying to address electronic transmissions of authentication materials in the last Congress is what prevented similar legislation from being enacted. By narrowing the scope to nonelectronic transmissions, it is my expectation that this bill will be enacted this Congress with no opposition, and that was the subject that Mr. Schiff asked me about a minute ago.

Mr. Chairman, I urge my colleagues to support the manager's amendment as well as the underlying bill and yield back the balance of my time.

Chairman SENSENBRENNER. The question is on the manager's amendment offered by the gentleman from Texas, Mr. Smith.

Those in favor will say aye.

Opposed, no.

The ayes appear to have it. The ayes have it. The amendment is agreed to.

Are there further amendments?

If there are no further amendments, without objection, the Subcommittee amendment in the nature of a substitute laid down as the base text as amended is adopted.

A reporting quorum is present.

The question occurs on the motion to report the bill, H.R. 3632, favorably as amended.

All in favor will say aye.

Opposed, no.

The ayes appear to have it, the ayes have it, and the motion to report favorably is agreed to.

Without objection, the bill will be reported favorably to the House in the form of a single amendment in the nature of a substitute incorporating the amendments adopted here today.

Without objection, the Chairman is authorized to move to go to conference pursuant to House rules.

Without objection, the staff is directed to make any technical and conforming changes, and all Members will be given 2 days, as provided by the House rules, in which to submit additional, dissenting, supplemental or minority views.

