

House Engrossed Senate Bill

**FILED**

**JANICE K. BREWER  
SECRETARY OF STATE**

State of Arizona  
Senate  
Forty-eighth Legislature  
Second Regular Session  
2008

CHAPTER 121

**SENATE BILL 1038**

AN ACT

AMENDING SECTIONS 13-3705 AND 44-1453, ARIZONA REVISED STATUTES; RELATING TO  
THE REGISTRATION AND PROTECTION OF TRADEMARKS AND SERVICE MARKS.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Section 13-3705, Arizona Revised Statutes, is amended to  
3 read:

4 13-3705. Unlawful copying or sale of sounds or images from  
5 recording devices; true name and address of  
6 articles; definitions; classification

7 A. A person commits unlawful copying or sale of sounds or images from  
8 recording devices by knowingly:

9 1. Manufacturing an article without the consent of the owner.

10 2. Distributing an article with the knowledge that the sounds thereon  
11 have been so transferred without the consent of the owner.

12 3. Distributing or manufacturing an article on which sounds or images  
13 have been transferred which does not bear the true name and address of the  
14 manufacturer in a prominent place on the outside cover, box, ~~or~~ jacket OR  
15 LABEL.

16 4. Distributing or manufacturing the outside packaging intended for  
17 use with articles which does not bear the true name and address of the  
18 manufacturer in a prominent place on the outside cover, box, ~~or~~ jacket OR  
19 LABEL.

20 5. Transferring or causing to be transferred to an article any  
21 performance, whether live before an audience or transmitted by wire or  
22 through the air by radio or television without the consent of the owner and  
23 with the intent to obtain commercial advantage or personal financial gain.

24 6. Distributing an article with knowledge that the performance on the  
25 article, whether live before an audience or transmitted by wire or through  
26 the air by radio or television, has been transferred without the consent of  
27 the owner.

28 B. This section shall not apply to any person or persons engaged in  
29 radio or television broadcasting who transfers, or causes to be transferred,  
30 any such sounds, other than from the sound track of a motion picture,  
31 intended for, or in connection with, broadcast transmission or related uses,  
32 including the making of commercials and films, or for archival purposes.

33 C. Subsection A, paragraphs 1 and 2 of this section apply only to  
34 recordings first fixed in a phonorecord before February 15, 1972.

35 D. Notwithstanding any other law and in the absence of a written  
36 agreement, the performer of a live performance is presumed to own the rights  
37 to record the performance.

38 E. The person who maintains custody and control over the business  
39 records of the owner is the proper witness regarding the issue of consent.

40 F. On conviction of a violation of this section, the court shall  
41 order:

42 1. The forfeiture and destruction of the articles and outside  
43 packaging.

1           2. The forfeiture pursuant to chapter 39 of this title of any  
2 implement, device or equipment used to manufacture or distribute the article  
3 or outside packaging.

4           3. THE DEFENDANT TO MAKE RESTITUTION TO ANY OWNER OR LAWFUL PRODUCER  
5 OF A MASTER RECORDING, MASTER DISC, MASTER TAPE, MASTER VIDEOTAPE, MASTER  
6 FILM OR OTHER DEVICE OR ARTICLE FROM WHICH SOUNDS OR VISUAL IMAGES ARE  
7 DERIVED THAT HAS SUFFERED INJURY RESULTING FROM THE VIOLATION, OR TO THE  
8 TRADE ASSOCIATION REPRESENTING THE OWNER OR LAWFUL PRODUCER. THE ORDER OF  
9 RESTITUTION SHALL BE BASED ON THE AGGREGATE WHOLESALE VALUE OF LAWFULLY  
10 MANUFACTURED AND AUTHORIZED RECORDED DEVICES CORRESPONDING TO THE  
11 NONCONFORMING RECORDED DEVICES INVOLVED IN THE VIOLATION AND SHALL INCLUDE  
12 INVESTIGATIVE COSTS RELATING TO THE VIOLATION. PROOF OF THE SPECIFIC  
13 WHOLESALE VALUE OF EACH NONCONFORMING DEVICE SHALL NOT BE REQUIRED.

14           G. In this section, unless the context otherwise requires:

15           1. "AGGREGATE WHOLESALE VALUE" MEANS THE AVERAGE WHOLESALE VALUE OF  
16 LAWFULLY MANUFACTURED AND AUTHORIZED SOUND OR AUDIO VISUAL RECORDINGS  
17 CORRESPONDING TO THE NONCONFORMING RECORDED DEVICES INVOLVED IN THE OFFENSE.

18           ~~1-~~ 2. "Article" means the tangible medium on which sounds or images  
19 are recorded including any original phonograph record, disc, compact disc,  
20 tape, audio or video cassette, wire, film or other medium now known or later  
21 developed on which sounds or images are or can be recorded or otherwise  
22 stored, or any copy or reproduction which duplicates in whole or in part the  
23 original.

24           ~~2-~~ 3. "Distributing" means the actual, constructive or attempted  
25 sale, rental, delivery, possession, transportation, exhibition or  
26 advertisement of an article with intent to obtain commercial advantage or  
27 personal financial gain or to promote the sale of any goods.

28           ~~3-~~ 4. "Fixation of sounds" means the master recording from which  
29 copies can be made of the series of sounds constituting the sound recording.

30           ~~4-~~ 5. "Manufacturing" means transferring or causing to be transferred  
31 any sounds or images recorded on one article to another article with the  
32 intent to distribute the article.

33           ~~5-~~ 6. "Owner" means the person who owns the original fixation of  
34 sounds or images embodied in the master phonograph record, master disc,  
35 master compact disc, master tape, master film or other device used for  
36 reproducing recorded sounds on phonograph records, discs, compact discs,  
37 tapes, films or other articles on which sound is or can be recorded, and from  
38 which the transferred recorded sounds are directly or indirectly derived, or  
39 the person who owns the rights to record or authorize the vending of a live  
40 performance.

41           ~~6-~~ 7. "Phonorecord" means the material object in which sounds other  
42 than those accompanying a motion picture or other audiovisual work are fixed  
43 by any method now known or later developed, and from which can be perceived,  
44 reproduced or otherwise communicated directly or with the aid of a machine or

1 device. Phonorecord includes the material object in which the sound is first  
2 fixed.

3 H. Unlawful copying or sale of sounds or images involving one ~~thousand~~  
4 HUNDRED or more articles containing sound recordings or one hundred or more  
5 articles containing audiovisual recordings is a class 3 felony. Unlawful  
6 copying or sale of sounds or images involving ~~one hundred~~ TEN or more but  
7 less than one ~~thousand~~ HUNDRED articles containing sound recordings or ten or  
8 more but less than one hundred articles containing audiovisual recordings is  
9 a class 6 felony. Unlawful copying or sale of sounds or images involving  
10 less than ~~one hundred~~ TEN articles containing sound recordings or less than  
11 ten articles containing audiovisual recordings is a class 1 misdemeanor.

12 Sec. 2. Section 44-1453, Arizona Revised Statutes, is amended to read:  
13 44-1453. Counterfeit marks; violation; classification;  
14 presumption; seizure; forfeiture; remedies;  
15 definitions

16 A. Except as provided in subsections B, ~~and~~ C AND D OF THIS SECTION, a  
17 person who knowingly and with intent to sell or distribute uses, displays,  
18 advertises, distributes, offers for sale, sells or possesses any item that  
19 bears a counterfeit mark or any service that is identified by a counterfeit  
20 mark is guilty of a class 1 misdemeanor.

21 B. A person who commits any act proscribed in subsection A OF THIS  
22 SECTION is guilty of a class 6 felony if either:

23 1. The person has one previous conviction under this section.

24 2. At least one of the following is true:

25 (a) The violation involves more than one hundred but fewer than one  
26 thousand items that bear the counterfeit mark.

27 (b) The total retail value of all of the items or services that bear  
28 or are identified by the counterfeit mark is more than one thousand dollars  
29 but less than ten thousand dollars.

30 C. A person who knowingly manufactures or produces with intent to sell  
31 or distribute any item that bears a counterfeit mark or any service that is  
32 identified by a counterfeit mark is guilty of a class 5 felony.

33 D. A person who commits any act proscribed by subsection A OF THIS  
34 SECTION is guilty of a class 5 felony if either:

35 1. The person has two or more previous convictions under this section.

36 2. At least one of the following is true:

37 (a) The violation involves at least one thousand items that bear the  
38 counterfeit mark.

39 (b) The total retail value of all of the items or services that bear  
40 or are identified by the counterfeit mark is at least ten thousand dollars.

41 E. A person who knowingly has possession, custody or control of at  
42 least twenty-six items that bear a counterfeit mark is presumed to possess  
43 the items with intent to sell or distribute the items.

1 F. In any criminal proceeding in which a person is convicted of a  
2 violation of this section, the court may order the convicted person to pay  
3 restitution to the intellectual property owner.

4 G. A law enforcement officer may seize any item that bears a  
5 counterfeit mark and all other personal property that is employed or used in  
6 connection with a violation of this section, including any items, objects,  
7 tools, machines, equipment, instrumentalities or vehicles. All personal  
8 property seized pursuant to this section shall be forfeited pursuant to title  
9 13, chapter 39.

10 H. After a disposition or final judgment, on the request of the  
11 intellectual property owner, a law enforcement officer shall release all  
12 seized items that bear a counterfeit mark to the intellectual property owner  
13 for destruction or disposition. If the intellectual property owner does not  
14 request the release of the seized items that bear a counterfeit mark, the law  
15 enforcement officer shall destroy the items unless the intellectual property  
16 owner consents to another form of disposition.

17 I. Any certificate of registration pursuant to this article or federal  
18 law of any intellectual property is prima facie evidence of the facts stated  
19 in the certificate of registration.

20 J. In addition to the remedies provided in section 44-1451, an  
21 intellectual property owner who sustains a loss as a result of a violation of  
22 this section may file an action in superior court for recovery of up to  
23 treble damages and the costs of the suit including reasonable attorney fees.

24 K. The remedies provided in this section are cumulative to all other  
25 civil and criminal remedies provided by law.

26 L. For the purposes of this section, the quantity or retail value of  
27 items or services includes the aggregate quantity or retail value of all  
28 items that the defendant manufactures, uses, displays, advertises,  
29 distributes, offers for sale, sells or possesses and that bear a counterfeit  
30 mark or that are identified by a counterfeit mark.

31 M. For the purposes of this section:

32 1. "Counterfeit mark" means:

33 (a) Any unauthorized reproduction or copy of intellectual property.

34 (b) Intellectual property that is affixed to any item that is  
35 knowingly sold, offered for sale, manufactured or distributed or to any  
36 identifying services offered or rendered without the authority of the  
37 intellectual property owner.

38 2. "Intellectual property" means any trademark, service mark, trade  
39 name, label, term, device, design or word that is adopted or used by a person  
40 to identify that person's goods or services.

41 3. "ITEM" INCLUDES:

42 (a) ANY COMPONENT THAT IS DESIGNED, MARKETED OR OTHERWISE INTENDED TO  
43 BE USED ON OR IN CONNECTION WITH ANY GOODS OR SERVICES.

44 (b) ANY COMPONENT OF A FINISHED PRODUCT.

1           ~~3-~~ 4. "Retail value" means:

2           (a) For items that bear a counterfeit mark and that are components of  
3 a finished product, the counterfeiter's regular selling price of the finished  
4 product on or in which the component would be utilized.

5           (b) For all other items that bear a counterfeit mark or services that  
6 are identified by a counterfeit mark, the counterfeiter's regular selling  
7 price for those items or services.

APPROVED BY THE GOVERNOR APRIL 29, 2008.

FILED IN THE OFFICE OF THE SECRETARY OF STATE APRIL 29, 2008.

Passed the House April 7, 2008,

by the following vote: 55 Ayes,

0 Nays, 5 Not Voting

*[Signature]*

Speaker of the House

*[Signature]*

Chief Clerk of the House

Passed the Senate February 25, 2008,

by the following vote: 28 Ayes,

1 Nays, 1 Not Voting

*[Signature]*

President of the Senate

*[Signature]*

Secretary of the Senate

**EXECUTIVE DEPARTMENT OF ARIZONA  
OFFICE OF GOVERNOR**

This Bill was received by the Governor this

\_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_,

at \_\_\_\_\_ o'clock \_\_\_\_\_ M.

\_\_\_\_\_  
Secretary to the Governor

Approved this \_\_\_\_\_ day of

\_\_\_\_\_, 20\_\_\_\_,

at \_\_\_\_\_ o'clock \_\_\_\_\_ M.

\_\_\_\_\_  
Governor of Arizona

S.B. 1038

**EXECUTIVE DEPARTMENT OF ARIZONA  
OFFICE OF SECRETARY OF STATE**

This Bill was received by the Secretary of State

this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_,

at \_\_\_\_\_ o'clock \_\_\_\_\_ M.

\_\_\_\_\_  
Secretary of State

SENATE CONCURS IN HOUSE  
AMENDMENTS AND FINAL PASSAGE

Passed the Senate April 23, 2008

by the following vote: 28 Ayes,

0 Nays, 2 Not Voting

Timothy S. Bee  
President of the Senate

Charmain Bellington  
Secretary of the Senate

EXECUTIVE DEPARTMENT OF ARIZONA  
OFFICE OF GOVERNOR

This Bill received by the Governor this

23rd day of April, 2008

at 3:59 o'clock p. M.

Jennifer Ibarra  
Secretary to the Governor

Approved this 29 day of

April

at 140 o'clock P. M.

Jan Brewer  
Governor of Arizona

EXECUTIVE DEPARTMENT OF ARIZONA  
OFFICE OF SECRETARY OF STATE

This Bill received by the Secretary of State

this 29 day of April, 2008

at 4:07 o'clock P. M.

Janice K. Brewer  
Secretary of State