Fiscal Impact Statement for Proposed Legislation

Virginia Criminal Sentencing Commission

Senate Bill No. 577

(Patron – Saslaw)

LD#: 08-0337806 **Date:** 1/10/2008

Topic: Registration and protection of trademarks and service marks

Fiscal Impact Summary:

- **State Adult Correctional Facilities:** Cannot be determined, likely to be small
- **Local Adult Correctional Facilities:** Negligible
- **Adult Community Corrections Programs:** Cannot be determined, likely to be small
- **Juvenile Correctional Centers:** Cannot be determined, likely to be negligible
- **Juvenile Detention Facilities:** Cannot be determined, likely to be negligible

Summary of Proposed Legislation:

The proposal amends §§ 59.1-92.2, 59.1-92.12 and 59.1-92.13 to expand the scope of laws protecting trademarks and service marks to include those marks registered with other states or the federal government. Currently, violation is a Class 2 misdemeanor for the first offense and a Class 6 felony for any second or subsequent offense. The proposal increases the penalty for a first offense to a Class 1 misdemeanor. In addition, the proposal defines four new felony crimes: (1) a Class 6 felony for any offense involving 100 or more items bearing a counterfeit mark; (2) a Class 6 felony for any offense involving items bearing a counterfeit mark that have a retail value of more than $200; (3) a Class 6 felony for any violation of these provisions if the offender causes or attempts to cause bodily injury to another; and (4) a Class 3 felony for such a violation if the offender maliciously causes or attempts to cause bodily injury. This proposal differs from previous versions only in the substitution of the word "handtags" for "handbags".

The proposal defines "bodily injury" within the context of the trademark and service mark statutes, makes the counterfeit articles subject to forfeiture, and allows violators to be subject to a fine of up to three times the retail value of the counterfeit goods.

Analysis:

According to calendar year (CY) 2005 and CY2006 Court Automated Information System (CAIS) data for general district courts, 12 offenders have been convicted of a misdemeanor for trademark or service mark infringement; two of these offenders were given a local-responsible (jail) term of 15 and 20 days respectively, the remaining 10 were not given an active term of incarceration to serve after sentencing.

No felony convictions under § 59.1-92.12 were found in existing data sources.

Impact of Proposed Legislation:

State adult correctional facilities. The impact of expanding trademark laws to cover marks registered with other states or the federal government cannot be determined. By creating new felony violations, the proposal may increase the need for state-responsible (prison) beds. Recent data indicate that 12 offenders have been convicted of misdemeanor violations under existing provisions during a recent two-year period; therefore, the impact of increased penalties for a subset of the violations meeting the specified criteria is expected to be small. The proposal also defines two assaults in conjunction with violation of trademark laws. These assaults are most likely covered currently by § 18.2-51, which contains the same penalty structure as the one proposed; therefore, this element of the proposal is not expected to have an impact on prison bed space needs.

Local adult correctional facilities. Increasing the penalty for counterfeit marks from a Class 2 misdemeanor (punishable by up to 6 months) to a Class 1 misdemeanor (punishable by up to 12 months in jail) is expected to increase the need for local-responsible (jail) beds. When analyzed, the impact was estimated to be negligible (less than one bed).

Adult community corrections resources. Increasing the penalty for certain violations from a Class 1 misdemeanor to a Class 6 felony may decrease the demand for local community-based probation services and increase the need for state community corrections resources. The *Code of Virginia*, however, allows judges to utilize local community-based probation programs for Class 5 and Class 6 felons as well as misdemeanants. Data are not available to estimate the impact on local or state community corrections resources that may result from the proposal.

Virginia's sentencing guidelines. Convictions under § 59.1-92.12 are not covered by the sentencing guidelines as the primary (most serious) offense. However, if the primary (most serious) offense at conviction is a covered offense, then convictions under § 59.1-92.12 would augment the sentencing recommendation. No adjustment to the guidelines would be necessary under the proposal.

Juvenile correctional centers. The Department of Juvenile Justice (DJJ) reports that the impact under the proposal cannot be determined, but is likely to be negligible. Creating new felonies and raising misdemeanor penalties could result in additional commitments to the Department. Existing *Code* specifies that a juvenile is eligible for commitment if he is adjudicated for a felony, has a prior felony adjudication, or has accumulated a total of four Class 1 misdemeanor adjudications. A juvenile adjudicated for one of the proposed felonies would automatically be eligible for commitment. By increasing the penalty for misdemeanor violations of § 59.1-92.12 from a Class 2 to a Class 1 misdemeanor, some juveniles may become eligible for commitment through the accumulation of four Class 1 misdemeanors.

Juvenile detention facilities. The Department of Juvenile Justice reports that the impact on the bed space needs of juvenile detention facilities cannot be determined, but is likely to be negligible.

Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot be determined for periods of imprisonment in state adult correctional facilities and cannot be determined for periods of commitment to the custody of the Department of Juvenile Justice.

Assumptions underlying the analysis include:
General Assumptions

1. State and local responsibility is based on § 53.1-20 as analyzed for the Secretary of Public Safety's Committee on Inmate Forecasting in 2007.
2. Cost per jail bed was based on The Compensation Board's FY2006 Jail Cost Report. The state cost was calculated from the revenue portion and the resulting sum was $28.42 per day or $10,381 per year. The local

cost was calculated by using the daily expenditure cost of $61.48 per inmate (not including capital accounts or debt service) as the base, and subtracting revenues accrued from the state and federal governments, which resulted in $28.51 per day or $10,413 per year. ***Where the estimated bed space impact included a portion (or fraction) of a bed, a prorated cost was included in the estimate.*** Note: The Compensation Board does not include data from jails that were not in operation for the entire fiscal year. Middle River Regional Jail was excluded because it opened during FY2006, while Augusta and Tazewell Counties were excluded because their jails were closed during the same time period; Augusta County now participates in the new Middle River Regional Jail and Tazewell County now participates in the Southwest Virginia Regional Jail.

Assumptions relating to sentence lengths

1. The impact of the proposed legislation, which would be effective on July 1, 2008, is phased in to account for case processing time.
2. The local-responsible bed-space impact was derived by estimating the difference between expected dates of release under current law and under the proposed legislation. Release dates were estimated based on the average rates at which inmates in local jails were earning sentence credits as of December 31, 2006. For misdemeanor crimes, this rate was 60.34%.
3. To gauge the impact of proposed misdemeanor, it was assumed that the distribution of sentences under the proposed Class 1 misdemeanor will be similar to the distribution of sentences for other Trade and Commerce crimes that carry the same statutory maximum of 12 months.

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