



Fiscal Impact Statement for Proposed Legislation

Virginia Criminal Sentencing Commission

House Bill No. 2148

(Patron – Cline)

LD#: 11101065

Date: 1/13/2011

Topic: Trademark infringement

Fiscal Impact Summary:

- **State Adult Correctional Facilities:**
 - None (\$0)
- **Local Adult Correctional Facilities:**
 - Cannot be determined
- **Adult Community Corrections Programs:**
 - Cannot be determined

- **Juvenile Correctional Centers:**
 - None (\$0)
- **Juvenile Detention Facilities:**
 - None (\$0)

Summary of Proposed Legislation:

The proposal amends §§ 59.1-92.2, 59.1-92.12, and 59.1-92.13 relating to trademark infringement. Under the current § 59.1-92.2, a mark is deemed to be in “use” when it is placed on goods or their containers and the goods are sold or distributed in commerce. The proposal would expand the definition of “use” to include merely possessing the marked goods in the Commonwealth. The proposal would also replace the term “registrant” with “owner of a registered mark” under §§ 59.1-92.12 and 59.1-92.13. The definition of “registrant” under § 59.1-92.2 is any person to whom the registration of a mark, under the chapter or prior law, is issued. However, the proposal does not define “owner of a registered mark” nor does it remove or redefine the term “registrant”.

Finally, the proposal would add paragraph (E) to § 59.1-92.13 stating that in any criminal proceeding pursuant to this section, upon motion of the Commonwealth the court shall order any material that violates § 59.1-92.12 that is in possession of the defendant to be destroyed or delivered to an officer of the court or the owner of the registered mark for destruction, etc.

Analysis:

According to the Circuit Court Automated Information System (CAIS) for fiscal years (FY) 2009 and FY2010, 10 offenders were convicted of a Class 6 felony under § 59.1-92.12 for (1) a second or subsequent violation of using a trademark without consent, (2) a second or subsequent violation of reproducing/counterfeiting registered marks, or (3) possessing 100 or more counterfeit marks valued at \$200 or more. In these cases, the trademark violation was the primary, or most serious, offense. Six of these offenders received a suspended sentence without an active term of incarceration. The other four received a local-responsible (jail) term, for which the median sentence was approximately eight months. None of these offenders received a state-responsible (prison) term for this Class 6 felony.

During the same two-year period, the General District Court Automated Information System (CAIS) indicates that 42 offenders were convicted of a Class 1 misdemeanor for a first offense of using a trademark without consent or a first offense of reproducing/counterfeiting a registered mark in violation of § 59.1-92.12. The majority of these offenders (95%) received a suspended sentence without an active term of incarceration; two defendants received a jail term of one month each.

Impact of Proposed Legislation:

State adult correctional facilities. By broadening the definition of “using a trademark” to include simply possessing marked goods, enactment of the proposal could result in additional felony convictions under § 59.1-92.12. During a recent two-year period, however, there were only 10 felony convictions for using a trademark under this provision (as the primary offense) and none of the offenders convicted of this crime received a prison sentence. Therefore, expanding this provision to include simple possession of marked goods is not expected to increase future state-responsible (prison) bed space needs of the Commonwealth.

Local adult correctional facilities. Because it could result in additional felony and misdemeanor convictions for trademark infringement, and thereby increase the number offenders sentenced to serve a jail term, the proposal may increase local-responsible (jail) bed space needs. Data are insufficiently detailed, however, to estimate the magnitude of the impact.

Adult community corrections resources. Similarly, the proposal may increase the need for state and local community corrections services. Since the number of cases that may be affected cannot be determined, the potential impact on community corrections resources cannot be estimated.

Virginia’s sentencing guidelines. Currently, violations of trademark infringement under § 59.1-92.12 are not covered by the guidelines when one of these crimes is the primary (most serious) offense. However, a conviction under this statute may augment the guidelines recommendation if the most serious offense at sentencing is covered by the guidelines. No adjustment to the guidelines would be necessary under the proposal.

Juvenile correctional centers. According to the Department of Juvenile Justice (DJJ), the proposal will not increase juvenile correctional center (JCC) bed space needs.

Juvenile detention facilities. According to the Department of Juvenile Justice (DJJ), the proposal will not increase bed space needs in juvenile detention facilities.

Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation is \$0 for periods of imprisonment in state adult correctional facilities and is \$0 for periods of commitment to the custody of the Department of Juvenile Justice.

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