

CRIMINOLOGY

PRODUCT COUNTERFEITING LEGISLATION IN THE UNITED STATES: A REVIEW AND ASSESSMENT OF CHARACTERISTICS, REMEDIES, AND PENALTIES†

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Product counterfeiting crimes have detrimental effects on consumers, brand owners, public health, the economy, and even national security. Over

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time, as product counterfeiting crimes and the response to them have evolved, U.S. federal legislation has developed and state legislation has followed suit, but with considerable variation across the states. The purpose of this article is to place product counterfeiting in the context of intellectual property rights, provide a historical review of relevant federal legislation, and systematically examine the extent to which state laws differ in terms of characteristics, remedies, and penalties. Additionally, we calculate indices of civil and criminal protections that illustrate the overall strength of each state's legislative framework. Collectively, this assessment provides a solid foundation for understanding the development of product counterfeiting legislation and serves as a basis for advancing research, policy, and practice.

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INTRODUCTION

Product counterfeiting presents an enormous threat to brand owners, manufacturers, governments, and consumers around the world.¹ While luxury brand items are commonly associated with counterfeits, any manufactured good can be counterfeited, including aircraft and automobile parts, artwork, batteries, agricultural products, chemicals and pesticides, clothing, collectables, electronics, food and drinks, healthcare products, household products, jewelry, tobacco, and toys.² Hundreds of millions of dollars in sales revenue are diverted annually through the manufacturing and trafficking of counterfeit goods.³ The Organization for Economic Co-Operation and Development estimated that international trade in counterfeit goods was as much as \$461 billion in United States Dollars (USD) in 2013, up from an earlier estimate of \$200 billion USD in 2005,⁴ while Business Action to Stop Counterfeiting and Piracy, an initiative of the International Chamber of Commerce, estimated the total annual cost of counterfeiting to be over \$650 billion USD as of 2008.⁵ However, because of the illicit nature of counterfeiting, it is extremely difficult to obtain an accurate estimate of its economic impact on society. A 2010 report issued by the U.S. Government Accountability Office contended that estimates circulated and recycled by the media, government, and non-government agencies cannot be substantiated due to limitations in their underlying research methodologies.⁶ Nevertheless, these estimates consistently point to product counterfeiting as a growing global problem.

In addition to the direct and immediate loss of sales revenue by manufacturers whose goods are counterfeited, businesses also face the potential loss of goodwill due to consumer dissatisfaction from experiences

¹ Jeremy M. Wilson & Rod Kinghorn, *The Global Risk of Product Counterfeiting: Facilitators of the Criminal Opportunity*, A-CAPP BACKGROUNDER, Feb. 2015, http://a-capp.msu.edu/sites/default/files/PC_Opportunity_Background_02.18.15FINAL_0.pdf.

² ORG. FOR ECON. CO-OPERATION & DEV. (OECD) & EUROPEAN UNION INTELLECTUAL PROP. OFFICE (EUIPO), *TRADE IN COUNTERFEIT AND PIRATED GOODS: MAPPING THE ECONOMIC IMPACT* 49–50 (2016); OECD, *THE ECONOMIC IMPACT OF COUNTERFEITING AND PIRACY* 12 (2008) [hereinafter OECD REPORT].

³ OECD REPORT, *supra* note 2, at 18.

⁴ OECD REPORT, *supra* note 2, at 13.

⁵ FRONTIER ECON., *ESTIMATING THE GLOBAL ECONOMIC AND SOCIAL IMPACTS OF COUNTERFEITING AND PIRACY: A REPORT COMMISSIONED BY BUSINESS ACTION TO STOP COUNTERFEITING AND PIRACY (BASCAP)* 5, 46, 51–52 (2011) (basing estimates and projections on 2008 data).

⁶ U.S. GOV'T. ACCOUNTABILITY OFFICE, GAO-10-423, *INTELLECTUAL PROPERTY: OBSERVATIONS ON EFFORTS TO QUANTIFY THE ECONOMIC EFFECTS OF COUNTERFEIT AND PIRATED GOODS* 18–19 (2010), <http://gao.gov/new.items/d10423.pdf>.

with the inferior quality of some counterfeited goods.⁷ Moreover, if the product being counterfeited poses a serious threat to public health and safety, such as with pharmaceuticals, consequences extend beyond economic loss. For instance, in 2008, the blood thinner Heparin was found to have counterfeit active ingredients, and it was eventually linked to eighty-one deaths in the United States.⁸ More recently in early 2016, at least six deaths in California were linked to counterfeit fentanyl,⁹ as well as numerous additional overdoses across the U.S. since 2015.¹⁰

Despite federal and state legislation in the U.S. combating product counterfeiting, it remains an understudied area, but research and policy interests in it are increasing. Therefore, as a necessary foundation, it is important for scholars, practitioners, and policymakers to better understand the legal development surrounding this crime problem, particularly as it relates to providing protection against trademark infringement.

To help provide a foundation for this area of growing scholarship, the purpose of this Article is threefold. First in Introduction Subpart A, we review the various forms of intellectual property to illustrate the ‘family’ of violations in which product counterfeits are considered and highlight the key characteristics that distinguish it from the others. Second, in Introduction Subpart B, we provide a historical review of federal legislation aimed at combating product counterfeiting. This illustrates how the federal legal response has developed and changed over time, relative to the scope of coverage and penalties. Then, in Part I, we conduct a systematic analysis of the extent to which state laws offer protection against product counterfeiting, both civilly and criminally. To support these analyses, we consulted existing literature, as well as the corresponding federal and state laws. We then coded state statutes in terms of scope and potential damages and penalties, allowing us to calculate the proportion of states granting different forms of protection. In Part II, we compare the relative strength of state civil and criminal anti-counterfeiting statutes. In the Discussion and

⁷ DAVID. M. HOPKINS ET AL., *COUNTERFEITING EXPOSED: PROTECTING YOUR BRAND AND CUSTOMERS* 151 (2003).

⁸ Paul Toscano, *The Dangerous World Of Counterfeit Prescription Drugs*, USA TODAY (Oct. 7, 2011), <http://usatoday30.usatoday.com/money/industries/health/drugs/story/2011-10-09/cnbc-drugs/50690880/1>.

⁹ Soumya Karlamangla & Joseph Serna, *Painkiller Fentanyl Linked to Six Deaths and Numerous Overdoses in Sacramento Area*, L.A. TIMES (Mar. 31, 2016, 7:00 AM), <http://www.latimes.com/local/lanow/la-me-ln-fentanyl-contaminated-street-drugs-20160330-story.html>.

¹⁰ Susan Zalkind, *‘Death Pill’: Fentanyl Disguised as Other Drugs Linked to Spike in US Overdoses*, THE GUARDIAN (May 10, 2016, 8:58 AM), <https://www.theguardian.com/society/2016/may/10/fentanyl-drug-overdoses-xanax-painkillers>.

Conclusion part, we discuss how this assessment provides a solid foundation for understanding the legislative development of product counterfeiting to serve as the basis for advancing research, policy, and practice.

A. FORMS OF INTELLECTUAL PROPERTY

Unlike many definitions of counterfeit goods, which often include piracy (e.g. unauthorized sharing of digital files containing movies, music, and computer software), the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights directly links the term counterfeiting to trademarks.¹¹ In this part, we distinguish trademark counterfeiting from other types of intellectual property theft. Specifically, intellectual property generally takes one of three primary forms: copyrights, patents, and trademarks.¹²

Copyright is protection covering all original published and unpublished works of authorship, including literary, theatrical, musical, and artistic,¹³ such as poetry, novels, photographs, movies, songs, and computer software. Copyright gives the owner exclusive rights to reproduce, alter, distribute, perform, and display the work.¹⁴

Patents protect inventions and discoveries.¹⁵ A patent for an invention is issued by the U.S. Patent and Trademark Office for a term of 20 years from the filing date, allowing the patent-holder to exclude others from producing, using, selling, or importing the invention into the U.S.¹⁶ Once a patent has been issued, the patent-holder has the responsibility to take civil

¹¹ TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, art. 51, n.14(a), 1869 U.N.T.S. 299, 33 I.L.M. 1197 [hereinafter TRIPS]. TRIPS intentionally differentiates counterfeit *trademark* goods from pirated *copyright* goods. *Id.* at art. 51, n.14 (a)–(b). It defines a counterfeit as any good, including packaging, bearing without authorization a trademark identical to the one validly registered in respect of such good, or one that cannot be distinguished in its essential aspects from such a trademark, therefore infringing the rights of the owner of the trademark in question under the law of the country of importation. *Id.* at art. 51, n.14 (a).

¹² BLACK'S LAW DICTIONARY 359 (9th ed. 2009) (listing also secondary rights of trade-secret, publicity, moral and unfair competition). Trade secrets are often considered a fourth main type of intellectual property, particularly by the US Patent and Trademark Office, but we review only the primary categories.

¹³ *Id.* at 146; *see also* U.S. CONST. art. I, § 8, cl. 8; Copyright Act of 1976, 17 U.S.C. § 2(a) (2012).

¹⁴ BLACK'S LAW DICTIONARY, *supra* note 12, at 146; 17 U.S.C. § 106.

¹⁵ BLACK'S LAW DICTIONARY, *supra* note 12, at 517; *see also* 35 U.S.C. § 101 (2012).

¹⁶ 35 U.S.C. § 154(a) (2012). *See generally Patent FAQs*, U.S. PATENT & TRADEMARK OFFICE, <http://www.uspto.gov/inventors/patents.jsp> (last visited October 31, 2016).

action against potential violators for monetary damages.¹⁷ While no criminal law exists providing for the enforcement of patent rights, a patent-holder may obtain a limited or general exclusion order, which can be enforced by U.S. Customs and Border Protection, to prevent the importation of goods that would infringe on patent rights.¹⁸

Trademarks protect words, phrases, names, symbols, designs, and logos used in federally regulated commerce to identify the source of products or services and distinguish them from other products and services.¹⁹ Trademark rights are intended to prevent others from using a confusingly similar mark, but cannot be used to prevent others from producing or selling the same products or services under a clearly different mark.²⁰ Trademark protections last for ten years, but can be renewed with an affidavit attesting that the rights holder continues to use the trademark.²¹

Although copyrights, patents, and trademarks protect the rights of the owner in various ways, the different kinds of intellectual property sometimes overlap, and differences between a counterfeited and a pirated product are not always clear. Even though copying music tends to infringe upon a copyright (piracy), in some cases, it may simultaneously fall under trademark infringement (counterfeiting), if the physical copy of the item closely resembles the actual product.²² Although some counterfeited products may fit the definition of more than one type of intellectual property, the purpose of this study is to review laws that prohibit product counterfeiting in the U.S., which is a violation of trademark rights. Therefore, our investigation focuses exclusively on trademark laws.

¹⁷ 35 U.S.C. § 284, para. 1 (2012).

¹⁸ 35 U.S.C. §§ 154(a)(1), 271(a) (2012); 19 U.S.C. § 1337 (providing the International Trade Commission with the power to issue the exclusion order); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-78, INTELLECTUAL PROPERTY: HOW THE U.S. CUSTOMS AND BORDER PROTECTION COULD BETTER MANAGE ITS PROCESS TO ENFORCE EXCLUSION ORDERS 6 (2014) (describing the process from filing for an exclusion order to enforcement by the U.S. Customs and Border Protection).

¹⁹ BLACK'S LAW DICTIONARY, *supra* note 12, at 715–16; Lanham (Trademark) Act of 1946, 15 U.S.C. § 1127 (2006). *See generally Trademarks FAQs*, U.S. PATENT & TRADEMARK OFFICE, <http://www.uspto.gov/inventors/trademarks.jsp> (last visited October 31, 2016).

²⁰ 15 U.S.C. § 1125(a)(1) (2012).

²¹ 15 U.S.C. §§ 1058(a)–(b) (2010).

²² *See* 15 U.S.C. § 1125(a) (protecting trade dress); *id.* § 1127 (defining various marks that are protected) (2006); 17 U.S.C. § 102 (1990) (copyright violation); 18 U.S.C. § 2318(e)(1) (2016) (knowingly trafficking in a counterfeit label).

B. AN OVERVIEW OF FEDERAL ANTI-COUNTERFEITING LAWS

Table 1. History of Federal Anti-Counterfeiting Legislation

Year	Statute
1870	An Act to Revise, Consolidate and Amend the Statutes Relating to Patents and Copyrights ²³
1881	Act to Revise, Consolidate and Amend Trademarks and Protect the Same ²⁴
1946	Lanham (Trademark) Act ²⁵
1984	Trademark Counterfeiting Act ²⁶
1995	Federal Trademark Dilution Act ²⁷
1996	Anti-Counterfeiting Consumer Protection Act ²⁸
1999	Anti-Cybersquatting Consumer Protection Act ²⁹
2006	Stop Counterfeiting in Manufactured Goods Act ³⁰
2008	Prioritizing Resources and Organization for Intellectual Property (Pro-IP) Act ³¹

U.S. federal trademark legislation has gone through numerous iterations over its 150-year history.³² Prior to the first federal trademark law being passed in 1870, states were responsible for regulating trademarks, and trademark holders relied upon common law causes of action to protect their marks and recover damages.³³ When the U.S. Congress passed the 1870

²³ Act of Jul. 8, 1870, ch. 230, 16 Stat. 198 (1870) (revising, consolidating, and amending the statutes relating to patents and copyrights).

²⁴ Act of Mar. 3, 1881, ch. 138, 21 Stat. 502 (1881) (authorizing registration of trademarks and protecting the same).

²⁵ Lanham (Trademark) Act of 1946, 15 U.S.C. §§ 1051–1411 (1946).

²⁶ Trademark Counterfeiting Act of 1984, Pub. L. No. 98-473, 98 Stat. 2179 (codified at 18 U.S.C. § 2320 (1984)).

²⁷ Federal Trademark Dilution Act, Pub. L. No. 104-98, 109 Stat. 98 (codified at 15 U.S.C. § 1125(c) (1995)).

²⁸ Anti-Counterfeiting Consumer Protection Act, Pub. L. No. 104-153, 110 Stat. 1386 (codified at 18 U.S.C. § 2311 (1996)).

²⁹ Anti-Cybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d) (1999).

³⁰ Stop Counterfeiting in Manufactured Goods Act, Pub. L. No. 109-181, 120 Stat. 285 (codified as amended at scattered sections of 18 U.S.C. (2006)).

³¹ Prioritizing Resources and Organization for Intellectual Property (Pro-IP) Act., Pub. L. No. 110-403, 122 Stat. 4256 (codified as amended at 15 U.S.C. § 8101 (2008)).

³² See *infra* Table 1 (listing these statutes and year each was passed).

³³ Beverly W. Pattishall, *Two Hundred Years of American Trademark Law*, 68 TRADEMARK REP. 121, 123–28, 131 (1978) (discussing early state cases and relying on other causes such as trade identity common law).

federal trademark law,³⁴ it was titled “An Act to Revise, Consolidate and Amend the Statutes Relating to Patents and Copyrights,” which reflected confusion that existed between the various intellectual property rights at the time.³⁵ It was based on the Patent and Copyright clauses of the Constitution, but would later be struck down by the U.S. Supreme Court for exceeding the authority of those clauses to cover rights that now are covered under trademark law.³⁶ Congress then revised the law in 1876 and included criminal sanctions with penalties or fines up to \$1,000 and imprisonment for up to two years.³⁷ This new law also gave law enforcement the ability to obtain search warrants and destroy all counterfeit marks, packaging, and instrumentalities associated with the crime.³⁸ Interestingly, in 1879, the U.S. Supreme Court found the 1870 and 1876 trademark laws to be unconstitutional on the grounds that Congress improperly used the Patent and Copyright clauses of the Constitution to regulate trademarks.³⁹ As a result, Congress revised their previous work and in 1881 passed a new trademark law, “An Act to Authorize the Registration of Trademarks and Protect the Same.”⁴⁰ Unlike the previous laws that were passed under the Patent and Copyright clauses of the Constitution, this new law was passed under the Commerce Clause and did not include any criminal sanctions.⁴¹ The 1881 law went through two changes, one in 1905 and another in 1920. Since then, Congress has passed seven main pieces of legislation regarding trademarks, each of which will be discussed in this part.⁴²

I. Lanham Act

The Lanham Act, passed by Congress in 1946, is the primary federal

³⁴ Act of Jul. 8, 1870, ch. 230, 16 Stat. 198 (1870) (revising, consolidating, and amending the statutes relating to patents and copyrights), *invalidated by* Trade-Mark Cases, 100 U.S. 82 (1879).

³⁵ Pattishall, *supra* note 33, at 129; *see also* FRANCIS H. UPTON, A TREATISE ON THE LAW OF TRADE MARKS 17–19 (1860).

³⁶ *Trade-Mark Cases*, 100 U.S. at 96–99.

³⁷ Act of Aug. 14, 1876, ch. 274, 19 Stat. 141, §§ 1, 8 (1876) (punishing the counterfeiting of trade-marks and the sale or dealing in of counterfeit trade-mark goods), *invalidated by* Trade-Mark Cases, 100 U.S. 82 (1879).

³⁸ *Id.* § 7.

³⁹ *Trade-Mark Cases*, 100 U.S. at 96–98.

⁴⁰ Act of Mar. 3, 1881, ch. 138, 21 Stat. 502 (1881) (authorizing registration of trademarks and protecting the same).

⁴¹ *Id.*; Jed S. Rakoff & Ira B. Wolff, *Commercial Counterfeiting: The Inadequacy Of Existing Remedies*, 73 TRADEMARK REP. 493, 511 (1983).

⁴² *See infra* Introduction Subpart B.1–7 and accompanying notes 34–79; *see also* Lanham (Trademark) Act of 1946, 15 U.S.C. §§ 1051–1141(n) (2012).

statute relating to trademarks in the U.S. The Lanham Act prohibits false designations, advertising, and descriptions, as well as the selling of one's goods under the name of another.⁴³ The goals of the Lanham Act were to: (1) eliminate consumer confusion by assuring the application of appropriate legal trademarks; and (2) allow trademark right holders to exercise control over the reputation of their products by providing civil remedies for trademark infringements.⁴⁴ Additionally, brand owners could record registered trademarks with the U.S. Customs Service (now U.S. Customs and Border Protection and U.S. Immigration and Customs Enforcement) to prevent the import of products illegally bearing those marks.⁴⁵

Although the Lanham Act was a significant piece of anti-counterfeiting legislation, some accounts now consider it ineffective given the complexities of the counterfeiting operations in different industries (e.g., luxury goods versus pharmaceuticals) facing society today.⁴⁶ The Lanham Act originally included criminal sanctions, but these were dropped and a system of civil remedies including injunctions⁴⁷; treble damages⁴⁸; confiscation of the defendant's profits⁴⁹; destruction of all labels and signs bearing the counterfeit mark and destruction of all plates and other equipment used to produce the counterfeit mark⁵⁰; a temporary restraining order that may be issued ex parte;⁵¹ and the enabling of U.S. Marshalls to search and seize counterfeits.⁵² Courts have traditionally been unwilling to impose some of the remedies under the Lanham Act because Federal

⁴³ 15 U.S.C. §§ 1051–1141(n).

⁴⁴ S. REP. NO. 79-1333, at 1 (1946), *reprinted in* 1946 U.S.C.C.A.N. 1274; *see also* Dallas Cowboy Cheerleaders v. Pussycat Cinemas, 604 F.2d 200, 205 (2d Cir. 1979); Shashank Upadhye, *Rewriting the Lanham Trademark Act to Prohibit the Importation of All Gray Market Goods*, 20 SETON HALL LEGIS. J. 59, 73–74 (1996).

⁴⁵ 15 U.S.C. § 1124; *see also* Robert J. Abalos, *Commercial Trademark Counterfeiting in the United States, the Third World and Beyond: American and International Attempts to Stem the Tide*, 5 B.C. THIRD WORLD L.J. 151, 165–170 (1985).

⁴⁶ Sandra L. Rierson, *Pharmaceutical Counterfeiting and the Puzzle of Remedies*, 8 WAKE FOREST INTELL. PROP. L.J. 433, 454–55 (2008).

⁴⁷ 15 U.S.C. § 1116.

⁴⁸ *Id.* § 1117.

⁴⁹ *Id.*

⁵⁰ *Id.* § 1118.

⁵¹ *Id.* § 1116(a).

⁵² *Id.* § 1116(d)(9); *see also* Gabrielle Levin, *Desperate Times, Desperate Measures? Reconceptualizing Ex Parte Seizure Orders to More Effectively Fight the War on Trademark Counterfeiting*, 14 U. BALT. INTELL. PROP. L.J. 171, 175 (2006); Jed S. Rakoff & Ira B. Wolff, *Commercial Counterfeiting and the Proposed Trademark Counterfeiting Act*, 20 AM. CRIM. L. REV. 145, 162–63 (1982).

Sentencing Guidelines discouraged it.⁵³ Moreover, the Lanham Act places the burden of tracking down, building, and establishing a case in court against the counterfeiters on brand owners, which are essentially costs lost to their competitor—the unseen competitor, or the counterfeiter.⁵⁴ As a result of these and other challenges in dealing with the growing complexity of trademark counterfeiting, a series of laws were passed beginning in the 1980s to supplement and strengthen the provisions of the Lanham Act.

2. *The Trademark Counterfeiting Act*

Congress passed the Trademark Counterfeiting Act of 1984 to increase criminal penalties for product counterfeiting.⁵⁵ With this Act, Congress intended to deter product counterfeiting by criminalizing the activity and establishing larger monetary fines.⁵⁶ The Trademark Counterfeiting Act criminalized the counterfeiting of trademarks, authorized treble damages and attorney's fees in civil cases, and authorized ex parte orders for seizure of counterfeit goods.⁵⁷ More specifically, the penalties for trafficking in counterfeit products carried fines of up to \$250,000 and up to five years in prison for a first offense and additional offenses carried fines up to \$1,000,000 and up to 15 years in prison.⁵⁸ Further legislation would be enacted in the following decades in response to the growing concern over counterfeit goods.

3. *Federal Trademark Dilution Act*

A related piece of legislation expanding and strengthening the protection of trademarks was the Federal Trademark Dilution Act (FTDA)

⁵³ HOPKINS ET AL., *supra* note 7, at 243.

⁵⁴ Rod Kinghorn & Jeremy M. Wilson, *Anti-Counterfeit Strategy for Brand Owners*, A-CAPP BACKGROUND, Oct. 2013, http://a-capp.msu.edu/sites/default/files/Business_Solutions_FINAL.pdf. See generally Jeremy M. Wilson & Rodney Kinghorn, *A Total Business Approach to the Global Risk of Product Counterfeiting*, 10 GLOBAL EDGE BUS. REV. 1 (2016).

⁵⁵ Trademark Counterfeiting Act of 1984, Pub. L. No. 98-473, 98 Stat. 2178 (codified as amended at 18 U.S.C. § 2320 (2012)); David J. Goldstone & Peter J. Toren, *The Criminalization of Trademark Counterfeiting*, 31 CONN. L. REV. 1, 6 (1998).

⁵⁶ 18 U.S.C. § 2320; B. J. Kearney, *The Trademark Counterfeiting Act of 1984: A Sensible Legislative Response to the Ills of Commercial Counterfeiting*, 14 FORDHAM URB. L.J. 115, 121 (1986).

⁵⁷ 18 U.S.C. §§ 2320 (a)–(d).

⁵⁸ *Id.* § 2320(b); PETER HLAVNICKA ET AL., PROTECTING THE BRAND: COUNTERFEITING AND GRAY MARKETS § 11.02 (2013) (describing the evolution of the Trademark Counterfeiting Act).

of 1995.⁵⁹ The FTDA provided protection for famous trademarks from dilution, by providing a new cause of action.⁶⁰ In *Moseley v. Victoria Secret Catalogue, Inc.*,⁶¹ the Supreme Court held that a party claiming dilution of its trademark must provide proof of actual dilution rather than likelihood of dilution.⁶² Following *Moseley*, trademark owners lobbied Congress to enact a law replacing the FTDA's actual dilution requirement with a likelihood of dilution standard which would help them prevent the dilution of their trademarks and Congress ultimately passed the Trademark Dilution Revision Act of 2006 overruling *Moseley* and replacing the FTDA.⁶³

4. The Anticounterfeiting Consumer Protection Act

Groups that originally supported the Trademark Counterfeiting Act came to realize that the trade in counterfeit goods was rapidly changing in scope and scale mainly due to globalization and the increased involvement of organized crime groups.⁶⁴ As a result, weaknesses in the law were soon evident and businesses and consumer advocacy groups once again mobilized to campaign Congress for tougher federal legislation,⁶⁵ ultimately resulting in the Anticounterfeiting Consumer Protection Act of 1996 (hereinafter "ACCPA of 1996").⁶⁶ The ACCPA of 1996 was thought to be a significant achievement for anti-counterfeiting and consumer advocacy groups as it strengthened both the criminal and civil provisions of the Lanham Act and the 1984 Trademark Counterfeiting Act.⁶⁷ The ACCPA of 1996 gave the then U.S. Customs Service enhanced authority to levy fines, destroy counterfeit products, and provide information to trademark holders.⁶⁸ The ACCPA of 1996 also directed law enforcement to spend more time focusing on the illegal importation of counterfeit goods and

⁵⁹ Federal Trademark Dilution Act, Pub. L. No. 104-98, 109 Stat. 985 (1996) (codified at 15 U.S.C. § 1125(c), 1127); HLAVNICKA, *supra* note 58, at § 5.03.

⁶⁰ 15 U.S.C. § 1125; HLAVNICKA, *supra* note 58, at § 5.03.

⁶¹ 537 U.S. 418 (2003).

⁶² *Id.* at 433; *see also* David S. Welkowitz, *State of the State: Is There a Future for State Dilution Laws?*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 681, 691 (2008).

⁶³ Trademark Dilution Revision Act (TDRA), Pub. L. No. 109-312, 120 Stat. 1730 (codified at 15 U.S.C. § 1501); *see also* Welkowitz, *supra* note 62, at 692.

⁶⁴ *See* HOPKINS ET AL., *supra* note 7, at 225.

⁶⁵ *See id.*

⁶⁶ Anticounterfeiting Consumer Protection Act of 1996, Pub. L. No. 104-153, 110 Stat. 1386 (codified as amended in scattered sections of 18 U.S.C.).

⁶⁷ *See* HLAVNICKA ET AL., *supra* note 58, at § 11.02[5].

⁶⁸ Anticounterfeiting Consumer Protection Act §§ 6, 8, 9–10.

investigating cases linked to organized crime groups.⁶⁹ To help law enforcement achieve this goal, the ACCPA of 1996 made counterfeiting a predicate act under the Racketeer Influenced and Corrupt Organizations Act,⁷⁰ providing law enforcement and prosecutors more resources and strategies to go after counterfeiters.⁷¹ In addition to strengthening the federal government's enforcement abilities, the ACCPA of 1996 provided trademark holders and private businesses with more robust civil remedies.⁷²

5. Anticybersquatting Consumer Protection Act

Another significant piece of trademark legislation is the Anticybersquatting Consumer Protection Act (ACPA) of 1999.⁷³ Notably, the ACPA of 1999 was the first piece of federal legislation specifically addressing trademark counterfeiting on the Internet.⁷⁴ The 1999 Act was passed to deter individuals from registering domain names that contain a trademark with the intention of later selling the domain name to the trademark holder or a third party at a higher price.⁷⁵ Under the ACPA of 1999, legal action can be taken against a domain registrant who traffics in or uses a domain name that is identical or confusingly similar to the name, mark, or symbol owned by a trademark holder.⁷⁶ In 2011, the Stop Online Piracy Act (SOPA) was introduced in Congress with the aim of expanding the ability of federal law enforcement to fight the online trafficking of copyrighted intellectual property and counterfeit.⁷⁷ Because of strong opposition to the bill from groups who claimed that it would threaten free

⁶⁹ *Id.* §§ 2–3.

⁷⁰ *Id.* § 3.

⁷¹ See HOPKINS ET AL., *supra* note 7, at 226–27. The penalties under the RICO statute are also significant, as a counterfeiter found guilty under RICO faces up to 20 years in prison and/or fines of \$250,000, or twice the gross profits of the offense. Counterfeiters who are not charged under the RICO statute also face stiffer penalties than they did under the 1984 Act. For individuals, the new penalties include fines of up to \$2 million and 10 years in prison for the first offense; for repeated offenses, an individual faces fines of up to \$5 million and 20 years in prison. Companies can receive a \$5 million fine for the first offense and up to \$15 million if repeated. *Id.*

⁷² See *id.* at 230. For example, the court will award treble damages in most cases, and the Act makes the ex parte seizure of counterfeit products easier.

⁷³ Anti-Cybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d) (1999); see also 15 U.S.C. § 1125(a)–(c) (section 43 of the Lanham Act) (2012).

⁷⁴ HLAVNICKA ET AL., *supra* note 58, at § 13.02[2].

⁷⁵ 15 U.S.C. § 1125(d)(1).

⁷⁶ *Id.* § 1125(d)(2).

⁷⁷ Sajid Farooq, *Google power delays PIPA vote; SOPA withdrawn*, NBC 7 SAN DIEGO (Jan. 20, 2012), <http://www.nbcsandiego.com/blogs/press-here/Google-Power-Delays-PIPA-Vote-137755378.html>.

speech and innovation, as well as a coordinated Silicon Valley tech company blackout,⁷⁸ Congress put SOPA on hold in 2012. Despite this, the increasing use of the Internet by counterfeiters as a forum to sell counterfeit products and violate individuals' intellectual property rights will likely force Congress to revisit this issue in the future.

6. *Stop Counterfeiting in Manufactured Goods Act*

The Stop Counterfeiting in Manufactured Goods Act (SCMGA) of 2006 was drafted to close a loophole in existing trademark law by prohibiting the trafficking of labels, tags, and various types of packaging bearing counterfeit marks.⁷⁹ Previous anti-counterfeiting legislation did not prohibit the trafficking of unattached counterfeit labels, prompting counterfeiters to ship un-affixed labels into the U.S. and later attach them to counterfeit products. SCMGA of 2006 further strengthened previous trademark law in several other ways.⁸⁰ First, the law extended forfeitable property to include any equipment used to make the counterfeits.⁸¹ Second, it required the destruction or disposal of counterfeit items after they have been forfeited.⁸² Third, it required counterfeiters to turn over their illicit profits and reimburse the legitimate businesses they exploited.⁸³

7. *PRO-IP Act*

A final piece of anti-counterfeiting legislation is the Prioritizing Resources and Organization for Intellectual Property (PRO-IP) Act of 2008.⁸⁴ The PRO-IP Act of 2008 increased protections against product counterfeiting in numerous ways. First, it increased both civil and criminal penalties for intellectual property offenses by doubling potential statutory damages.⁸⁵ Second, it created a new interagency advisory committee

⁷⁸ David A. Fahrenthold, *SOPA protests shut down Web sites*, WASH. POST (Jan. 18, 2012), https://www.washingtonpost.com/politics/2012/01/17/gIQA4WYI6P_story.html.

⁷⁹ Stop Counterfeiting in Manufactured Goods Act, Pub. L. No. 109-181, 120 Stat. 285 (2006) (amending 18 U.S.C. § 1 (2012)).

⁸⁰ See Press Release, White House, Fact Sheet: President Bush Signs the Stop Counterfeiting in Manufactured Goods Act (Mar. 16, 2006), <https://georgewbush-whitehouse.archives.gov/news/releases/2006/03/20060316-6.html>.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Prioritizing Resources and Organization for Intellectual Property (Pro-IP) Act of 2008, Pub. L. No. 110-403, 122 Stat. 4256 (2008) (amending federal intellectual property law).

⁸⁵ *Id.* § 103–04. Statutory damages for counterfeit trademarks were doubled from \$500–\$100,000 to \$1,000–\$200,000, and statutory damages for the willful use of a counterfeit

responsible for establishing a joint strategic plan for developing solutions to domestic and international counterfeiting.⁸⁶ Third, it created a federal grant program supporting federal, state, and local law enforcement training and enhanced the investigative and forensic resources necessary to enforce intellectual property laws.⁸⁷ Fourth, it enhanced civil and criminal forfeiture provisions, going beyond the items counterfeited to include all property used to commit the offenses and any property derived from proceeds obtained directly or indirectly from counterfeiting.⁸⁸ Finally, the Intellectual Property Enforcement Coordinator (IPEC) was established to coordinate efforts across federal agencies to protect intellectual property and chair an advisory committee composed of representatives from various federal agencies including the U.S. Departments of Agriculture, Commerce, Health and Human Services, Homeland Security, Justice, and State, the Office of the U.S. Trade Representative, and the U.S. Copyright Office.⁸⁹ The creation of the IPEC illustrated the importance the federal government has placed on the protection and enforcement of intellectual property rights.

I. ANALYSIS OF CURRENT STATE ANTI-COUNTERFEITING LAWS

Although federal statutes are the primary means of protecting trademarks in the U.S., each state has established a statutory framework governing intellectual property, including a trademark registration system and civil and criminal protections and penalties, which will be discussed in this part. States have concurrent jurisdiction with federal courts for trademark offenses. If an offense occurs within a state, state charges are permissible in addition to, or in place of, federal charges, regardless of where the goods were manufactured or sold.⁹⁰ Therefore, states play an important role in the enforcement of trademark rights.

At the state level, anti-counterfeiting laws vary significantly from state to state and they also differ in various ways from federal statutes.⁹¹ Generally, state trademarks are only protected within the state of registration, whereas a federally registered trademark is protected throughout the U.S. Therefore, trademarks registered at the federal level

mark doubled from \$1 million to \$2 million. *Id.* Additionally, the law provided penalties of up to twenty years' incarceration (in event of a death) for any bodily harm resulting from trafficking counterfeit goods. *Id.* § 205.

⁸⁶ *Id.* § 301(b)(3)(A).

⁸⁷ *Id.* § 401.

⁸⁸ *Id.* §§ 201, 206–07.

⁸⁹ *Id.* § 301.

⁹⁰ HLAVNICKA ET AL., *supra* note 58, at § 9.02.

⁹¹ *Id.*; *see also* HOPKINS ET AL., *supra* note 7, at 230–31.

tend to provide a wider jurisdictional scope of legal protection to the right holder than state trademarks, making it advantageous for businesses involved in interstate commerce to register their trademarks federally. However, businesses planning to operate only in one state may choose to register their trademark only at the state level because the filing process is cheaper and tends to be quicker to obtain than federal registration.⁹² When making the decision to register at the state or federal level, it is also important for right holders to consider the potential remedies and damages.

State anti-counterfeiting legislation is a critical step in combating product counterfeiting crimes in the U.S. As of 2016, all fifty states have enacted some type of anti-counterfeiting legislation.⁹³ However,

⁹² HLAVNICKA ET AL., *supra* note 58, at § 9.02.

⁹³ Table 2(a): ALA. CODE § 8-12-16 (1980); ALASKA STAT. § 45.50.170 (1961); ARIZ. REV. STAT. ANN. § 44-1453 (1998); ARK. CODE ANN. § 4-71-212 (1997); CAL. BUS. & PROF. CODE § 14245 (West 2007); COLO. REV. STAT. § 6-1-105 (1963); CONN. GEN. STAT. ANN. § 35-18h (West 1967); DEL. CODE ANN. tit. 6, § 3312 (1976); FLA. STAT. ANN. § 495.131 (West 1967); GA. CODE ANN., § 10-1-451 (1893); HAW. REV. STAT. ANN. § 482-31 (West 2001); IDAHO CODE ANN. § 48-512 (West 1996); 765 ILL. COMP. STAT. 1036/60 (1998); IND. CODE. § 24-2-1-13 (1955); IOWA CODE § 548.112 (1994); KAN. STAT. ANN. § 81-213 (1999); KY. REV. STAT. ANN. § 365.601 (1994); LA. REV. STAT. ANN. § 51:222 (1954); ME. REV. STAT. tit. 10, § 1529 (1980); MD. CODE ANN., BUS. REG. § 1-414 (West 1992); MASS. ANN. LAWS. ch. 110H, § 12 (LexisNexis 2006); MICH. COMP. LAWS ANN. § 429.42 (West 1969); MINN. STAT. ANN. § 333.28 (West 1959); MISS. CODE ANN. § 75-25-23 (1997); MO. REV. STAT. § 417.056 (1973); MONT. CODE ANN. § 30-13-333 (1979); NEB. REV. STAT. § 87-139 (2000); NEV. REV. STAT. ANN. § 600.420 (West 1979); N.H. REV. STAT. ANN. § 350-A:11 (1969); N.J. STAT. ANN. § 56:3-13.16 (West 1987); N.M. STAT. ANN. § 57-3B-14 (1997); N.Y. GEN. BUS. LAW § 360-k (Consol. 1997); N.C. GEN. STAT. § 80-11 (1967); N.C. GEN. STAT. § 80-12 (1995); N.C. GEN. STAT. 75-1.1 (1979); N.D. CENT. CODE § 47-22-11 (1957); OHIO REV. CODE ANN. § 1329.65 (West 1978); OKLA. STAT. tit. 78, § 31 (1959); OR. REV. STAT. ANN. § 647.095 (West 1961); 54 PA. CONS. STAT. ANN. § 1123 (1982); 6 R.I. GEN. LAWS § 11-17-1 (1975); S.C. CODE ANN. § 39-15-1160 (1994); S.D. CODIFIED LAWS 37-6-25 (1955); TENN. CODE ANN. § 47-25-512 (2000); TEX. BUS. & COM. CODE § 16.102 (West 2012); UTAH CODE ANN. 70-3a-402 (West 2002); VT. STAT. ANN. tit. 9, § 2529 (1957); VA. CODE ANN. § 59.1-92.12 (1998); WASH. REV. CODE ANN. § 19.77.140 (West 2003); W. VA. CODE § 47-2-12 (1996); WIS. STAT. ANN. § 132.033 (West 1985); WYO. STAT. ANN. § 40-1-111 (1997). Note that any type of civil statute that a counterfeiting case could be brought under was included in this table, such as unlawful business practices.

Table 4(a): ARIZ. REV. STAT. ANN. § 44-1453 (1998); CAL. PENAL CODE § 350 (West 1872); COLO. REV. STAT. § 18-5-110.5 (2001); CONN. GEN. STAT. ANN. § 53-347a (West 1963); DEL. CODE ANN. tit. 11, § 926 (2005); GA. CODE ANN. § 10-1-454 (1996); HAW. REV. STAT. ANN. § 708-875 (West 1997); IDAHO CODE ANN. § 18-3614 (West 1972); IDAHO CODE ANN. § 18-3615 (West 1972); 410 LL. COMP. STAT. 620/3.16 (1985); 765 LL. COMP. STAT. 1040/4 (1955); 815 LL. COMP. STAT. 425/2 (1986); 815 LL. COMP. STAT. 425/3 (1986); IOWA CODE § 714.26 (2004); KAN. STAT. ANN. § 21-5825 (2011); KY. REV. STAT. ANN. § 365.241 (2000); LA. REV. STAT. ANN. § 14:229 (1984); MD. CODE ANN., CRIM. LAW § 8-611 (2002); MASS. ANN. LAWS. ch. 266, § 147 (LexisNexis 1998); MICH. COMP. LAWS ANN. § 750.263 (West 1931); MINN. STAT. ANN. § 333.42 (West 1986); MINN. STAT. ANN. § 609.895 (1999);

understanding the substantial variation across states in terms of the comprehensiveness of anti-counterfeiting legislation regarding civil remedies and criminal sanctions is crucial.

First, we compiled each state's civil and criminal statutes in 2015-16 concerning product counterfeiting from individual states' legislatures' websites. Second, we then coded and assessed each state's statutory characteristics, including remedies and penalties. Through this effort, we identified common themes and notable deviations from those themes across all fifty states. Third, we examined civil remedies, followed by criminal sanctions. Finally, we created indices to evaluate the relative strength of civil and criminal statutes, incorporating numerous indicators of the strength or weakness of protections and legal remedies against product counterfeiting. We describe our findings below.

A. CIVIL REMEDIES

1. Policy Characteristics

Table 2 presents an overview of the civil policy characteristics of anti-counterfeiting laws in all fifty states. Each state has statutes that provide civil injunctions and monetary damages for the statutory violation of counterfeiting.⁹⁴ However, in forty-nine of the fifty states, a trademark

MISS. CODE ANN. § 97-21-53 (2011); MISS. CODE ANN. § 97-21-55 (2011); MISS. CODE ANN. § 97-21-57 (2012); MO. REV. STAT. § 570. 103 (1998); MONT. CODE ANN. § 30-13-338 (2009); NEV. REV. STAT. ANN. § 205.205 (1911); NEV. REV. STAT. ANN. § 205.210 (1911); N.H. REV. STAT. ANN. § 638:6-b (2009); N.J. STAT. ANN. § 2C:21-32 (West 1997); N.Y. PENAL LAW § 165.71-74 (Consol. 1992); N.Y. ARTS & CULT. AFF. LAW § 33.07 (Consol. 1983); N.Y. ARTS & CULT. AFF. LAW § 33.09 (Consol. 1983); N.C. GEN. STAT. § 80-11.1 (1967); N.D. CENT. CODE § 51-07-04 (1975); OHIO REV. CODE ANN. § 2913.34 (West 1996); OKLA. STAT. tit. 21, § 1990.2 (1999); OR. REV. STAT. ANN. § 647.140 (West 1999); OR. REV. STAT. ANN. § 647.145b (West 1999); OR. REV. STAT. ANN. § 647.150 (West 1999); 18 PA. CONS. STAT. ANN. § 4119 (1996); 11 R.I. GEN. LAWS § 11-17-117-13 (1997); S.C. CODE ANN. § 39-15-1190 (1994); S.D. CODIFIED LAWS § 37-6-2 (1939); S.D. CODIFIED LAWS § 37-6-3 (1939); TENN. CODE ANN. § 39-14-152 (2000); TEX. PENAL CODE § 32.23 (1997); VT. STAT. ANN. tit. 9, § 2530 (1957); VA. CODE ANN. § 59.1-92.13 (West 1998); WASH. REV. CODE ANN. 9.16.020 (2011); WASH. REV. CODE ANN. § 9.16.030 (West 1999); WASH. REV. CODE ANN. § 9.16.035 (West 1999); WIS. STAT. ANN. § 132.02 (West 1985); W. VA. CODE § 47-2-14(a)-(d); WYO. STAT. ANN. § 6-3-610 (1982).

⁹⁴ Table 2(b): ALA. CODE 8-12-18 (1980); ALASKA STAT. § 45.50.180 (1961); ARIZ. REV. STAT. ANN. § 32-1985 (2005); ARK. CODE ANN. § 4-71-214 (1997); CAL. BUS. & PROF. CODE § 14250 (West 2007); COLO. REV. STAT. § 6-1-109 (1963); CONN. GEN. STAT. ANN. § 35-11i (West) (1963); DEL. CODE ANN. tit. 6, § 3314 (1976); FLA. STAT. ANN. § 495.141 (West) (1967); GA. CODE ANN., § 10-1-451 (1893); HAW. REV. STAT. ANN. § 482-33 (West 2001); IDAHO CODE ANN. § 48-514 (West 1996); 765 ILL. COMP. STAT. 1036/70 (1998); 815 ILL. COMP. STAT. 425/4 (1986); IND. CODE. § 24-2-1-14 (1955); IOWA CODE § 548.114 (1994); KAN. STAT. ANN. § 81-215 (1999); KY. REV. STAT. ANN. § 365.603 (West 1994); LA. REV.

must be registered (either in the state or federally) for an infringement lawsuit to be filed in the state court.⁹⁵ The only exception is Colorado,

STAT. ANN. § 51:223 (1954); ME. REV. STAT. tit. 10, § 1531 (1980); MD. CODE ANN., BUS. REG. § 1-414 (West 1992); MASS. ANN. LAWS. ch. 110H, § 13 (LexisNexis 2006); MICH. COMP. LAWS § 429.43 (1969); MINN. STAT. ANN. § 333.29 (1959); MISS. CODE ANN. § 75-25-27(1997); MO. REV. STAT. § 417.061 (2) (1973); MONT. CODE ANN. § 30-13-335 (1979); MONT. CODE ANN. § 50-31-508 (2009); NEB. REV. STAT. § 87-141 (2000); NEV. REV. STAT. ANN. § 600.430 (1979); N.H. REV. STAT. ANN. § 350-A:13 (1969); N.J. STAT. ANN. § 56:3-13.16 (West 1987); N.M. STAT. ANN. § 57-3B-16 (1997); N.Y. GEN. BUS. LAW § 360-m (Consol. 1997); N.C. GEN. STAT. § 80-11 (1967); N.D. CENT. CODE § 47-22-12 (1957); OHIO REV. CODE ANN. § 1329.66 (West) (1978); OKLA. STAT. tit. 78, § 32 (1959); OR. REV. STAT. ANN. § 647.105 (West 1961); 54 PA. CONS. STAT. ANN. § 1125 (1982); 6 R.I. GEN. LAWS § 11-17-12-13 (1975); S.C. CODE ANN. § 39-15-1170 (1994); S.D. CODIFIED LAWS § 37-6-24 (1939); TENN. CODE ANN. § 47-25-514 (1989); TEX. BUS. & COM. CODE § 16.104 (West 2012); UTAH CODE ANN. § 70-3a-404 (West 2002); VT. STAT. ANN. tit. 9, § 2529 (1957); VA. CODE ANN. § 59.1-92.13 (1998); WASH. REV. CODE ANN. § 19.77.150 (West 2003); W. VA. CODE § 47-2-14 (1996); WIS. STAT. ANN. § 132.033 (West 1985); WYO. STAT. ANN. § 40-1-112 (1997).

Table 2(c): ALA. CODE § 8-12-18 (1980); ALASKA STAT. § 45.50.180 (1961); ARIZ. REV. STAT. ANN. § 44-1451 (1959); ARK. CODE ANN. § 4-71-214 (1997); CAL. BUS. & PROF. CODE § 14250 (West 2007); COLO. REV. STAT. § 6-1-113 (1963); CONN. GEN. STAT. ANN. § 35-11i (West) (1963); DEL. CODE ANN. tit. 6, § 3314 (1976); FLA. STAT. ANN. § 495.141 (West) (1967); GA. CODE ANN., § 10-1-450 (1893); HAW. REV. STAT. ANN. § 482-33 (West 2001); HAW. REV. STAT. ANN. § 328-7 (1941); IDAHO CODE ANN. § 48-514 (West 1996); 765 ILL. COMP. STAT. ANN. § 1036/70 (1998); 815 ILL. COMP. STAT. § ANN. 425/4 (1986); IND. CODE § 24-2-1-14 (1955); IOWA CODE § 548.114 (1994); KAN. STAT. ANN. § 81-215 (1999); KY. REV. STAT. ANN. § 365.603 (West 1994); LA. REV. STAT. ANN. § 51:223 (1954); ME. REV. STAT. tit. 10, § 1531 (1980); MD. CODE ANN., BUS. REG. § 1-414 (West 1992); MASS. ANN. LAWS. ch. 110H, § 14 (LexisNexis 2006); MICH. COMP. LAWS § 429.43 (West 1969); MINN. STAT. ANN. § 333.29 (1959); MISS. CODE ANN. § 75-25-27 (1997); MO. REV. STAT. § 417.056 (1973); MO. REV. STAT. § 417.061 (1973); MONT. CODE ANN. § 30-13-335 (1979); NEB. REV. STAT. § 87-141 (2000); NEV. REV. STAT. ANN. § 600.430 (1979); N.H. REV. STAT. ANN. § 350-A:13 (1969); N.J. STAT. ANN. § 56:3-13.16 (West 1987); N.M. STAT. ANN. § 57-3B-16 (1997); N.Y. GEN. BUS. LAW § 360-m (Consol. 1997); N.C. GEN. STAT. § 80-11 (1967); N.D. CENT. CODE § 47-22-12 (1957); OHIO REV. CODE ANN. § 1329.66 (West) (1978); OKLA. STAT. tit. 78, § 32 (1959); OR. REV. STAT. ANN. § 647.105 (West 1961); 54 PA. CONS. STAT. ANN. § 1125 (1982); 6 R.I. GEN. LAWS § 11-17-12-13 (1975); S.C. CODE ANN. § 39-15-1170 (1994); S.D. CODIFIED LAWS § 37-6-26 (1955); TENN. CODE ANN. § 47-25-514 (1989); TEX. BUS. & COM. CODE § 16.104 (West 2012); UTAH CODE ANN. § 70-3a-404 (West 2002); VT. STAT. ANN. tit. 9, § 2529 (1957); VA. CODE ANN. § 59.1-92.13 (1998); WASH. REV. CODE ANN. § 19.77.150 (West 2003); W. VA. CODE § 47-2-14 (1996); WIS. STAT. ANN. § 132.08 (West 1901); WYO. STAT. ANN. § 40-1-112 (1997).

⁹⁵ Table 2(d): ALA. CODE § 8-12-16 (1980); ALASKA STAT. § 45.50.170 (1970); ARIZ. REV. STAT. § 44-1451 (1959); ARIZ. REV. STAT. § 44-1444; ARK. CODE ANN. § 4-71-212 (1997); CAL. BUS. & PROF. CODE § 14245 (West 2007); CONN. GEN. STAT. ANN. § 35-11i (1963); CONN. GEN. STAT. ANN. § 35-18h (1967); DEL. CODE ANN. tit. 6, § 3312 (1976); FLA. STAT. ANN. § 495.131 (1967); GA. CODE ANN., § 10-1-451 (1893); HAW. REV. STAT. ANN. § 482-31 (West 2001); IDAHO CODE ANN. § 48-512 (West 1996); 765 ILL. COMP. STAT. ANN. 1036/60 (1998); IND. CODE § 24-2-1-13 (1955); IOWA CODE § 548.112 (1994); KAN. STAT.

where owners of unregistered trademarks are still protected.⁹⁶ Although all states, except for Colorado and North Carolina, deem the civil seizure and destruction of counterfeit articles to be an important step in addressing counterfeiting,⁹⁷ the seizure of instrumentalities is only required in

ANN. § 81-213 (1999); KY. REV. STAT. ANN. § 365.601 (West 1994); LA. REV. STAT. ANN. § 51:222 (1954); ME. REV. STAT. tit. 10, § 1529 (1980); MD. CODE ANN., BUS. REG. § 1-414 (West 1992); MASS. ANN. LAWS. ch. 110H, § 12 (LexisNexis 2006); MICH. COMP. LAWS SERV. § 429.42 (LexisNexis 1969); MINN. STAT. ANN. § 333.28 (1959); MISS. CODE ANN. § 75-25-23 (1997); MO. REV. STAT. § 417.056 (1973); MONT. CODE ANN. § 30-13-333 (1979); NEB. REV. STAT. § 87-139 (2000); NEV. REV. STAT. ANN. § 600.420 (1979); N.H. REV. STAT. ANN. § 350-A:11 (1969); N.J. STAT. ANN. § 56:3-13.16 (West 1987); N.M. STAT. ANN. § 57-3B-14 (1997); N.Y. GEN. BUS. LAW § 360-k (Consol. 1997); N.C. GEN. STAT. § 80-11 (1967); N.D. CENT. CODE § 47-22-11 (1957); OHIO REV. CODE ANN. § 1329.65 (West) (1978); OKLA. STAT. tit. 78, § 31 (1959); OR. REV. STAT. ANN. § 647.095 (West 1961); 54 PA. CONS. STAT. ANN. § 1123 (1982); 6 R.I. GEN. LAWS § 2-11-17-1 (1975); S.C. CODE ANN. § 39-15-1160 (1994); S.D. CODIFIED LAWS § 37-6-25 (1955); TENN. CODE ANN. § 47-25-512 (2000); TEX. BUS. & COM. CODE § 16.102 (West 2012); UTAH CODE ANN. § 70-3a-402 (West 2002); VT. STAT. ANN. tit. 9, § 2529 (1957); VA. CODE ANN. § 59.1-92.12 (1998); WASH. REV. CODE ANN. § 19.77.140 (West 2003); W. VA. CODE § 47-2-12 (1996); WIS. STAT. ANN. § 132.033 (West 1985); WYO. STAT. ANN. § 40-1-111 (1997). States have differing requirements for filing a trademark infringement lawsuit. Generally, the variants include: registration in state where suit is filed; federal registration as an alternative to state registration; or federal registration or registration in any state (not restricted to where the state suit is filed).

⁹⁶ Table 2(d): ALA. CODE § 8-12-16 (1980); ALASKA STAT. § 45.50.170 (1970); ARIZ. REV. STAT. § 44-1444; ARIZ. REV. STAT. § 44-1451 (1959); ARK. CODE ANN. § 4-71-212 (1997); CAL. BUS. & PROF. CODE § 14245 (West 2007); CONN. GEN. STAT. ANN. § 35-11i (1963); CONN. GEN. STAT. ANN. § 35-18h (1967); DEL. CODE ANN. tit. 6, § 3312 (1976); FLA. STAT. ANN. § 495.131 (1967); GA. CODE ANN., § 10-1-451 (1893); HAW. REV. STAT. ANN. § 482-31 (West 2001); IDAHO CODE ANN. § 48-512 (1996); 765 ILL. COMP. STAT. ANN. 1036/60 (1998); IND. CODE § 24-2-1-13 (1955); IOWA CODE § 548.112 (1994); KAN. STAT. ANN. § 81-213 (1999); KY. REV. STAT. ANN. § 365.601 (West 1994); LA. REV. STAT. ANN. § 51:222 (1954); ME. REV. STAT. tit. 10, § 1529 (1980); MD. CODE ANN., BUS. REG. § 1-414 (West 1992); MASS. ANN. LAWS. ch. 110H, § 12 (LexisNexis 2006); MICH. COMP. LAWS SERV. § 429.42 (LexisNexis 1969); MINN. STAT. ANN. § 333.28 (1959); MISS. CODE ANN. § 75-25-23 (1997); MO. REV. STAT. § 417.056 (1973); MONT. CODE ANN. § 30-13-333 (1979); NEB. REV. STAT. § 87-139 (2000); NEV. REV. STAT. ANN. § 600.420 (1979); N.H. REV. STAT. ANN. § 350-A:11 (1969); N.J. STAT. ANN. § 56:3-13.16 (West 1987); N.M. STAT. ANN. § 57-3B-14 (1997); N.Y. GEN. BUS. LAW § 360-k (Consol. 1997); N.C. GEN. STAT. § 80-11 (1967); N.D. CENT. CODE § 47-22-11 (1957); OHIO REV. CODE ANN. § 1329.65 (West) (1978); OKLA. STAT. tit. 78, § 31 (1959); OR. REV. STAT. ANN. § 647.095 (West 1961); 54 PA. CONS. STAT. ANN. § 1123 (1982); 6 R.I. GEN. LAWS § 2-11-17-1 (1975); S.C. CODE ANN. § 39-15-1160 (1994); S.D. CODIFIED LAWS § 37-6-25 (1955); TENN. CODE ANN. § 47-25-512 (2000); TEX. BUS. & COM. CODE § 16.102 (West 2012); UTAH CODE ANN. § 70-3a-402 (West 2002); VT. STAT. ANN. tit. 9, § 2529 (1957); VA. CODE ANN. § 59.1-92.12 (1998); WASH. REV. CODE ANN. § 19.77.140 (West 2003); W. VA. CODE § 47-2-12 (1996); WIS. STAT. ANN. § 132.033 (West 1985); WYO. STAT. ANN. § 40-1-111 (1997).

⁹⁷ Table 2(f): ALA. CODE § 8-12-18 (1980); ALASKA STAT. § 45.50.180 (1961); ARIZ. REV. STAT. § 44-1451 (1959); ARK. CODE ANN. § 4-71-214 (1997); CAL. BUS. & PROF. CODE § 14250 (West 2007); CONN. GEN. STAT. ANN. § 35-11i (1963); CONN. GEN. STAT. ANN. 35-

California.⁹⁸ In this regard, counterfeit articles are seized and destroyed, but offenders are left with the tools necessary to produce more counterfeits. This appears to be inconsistent with the seizure and destruction policy states have otherwise embraced.

Table 2. Civil Policy Characteristics

	State Legal Characteristics	No. of States
a.	Have civil infringement/counterfeiting	50 (100%)
b.	Have injunctions	50 (100%)
c.	Award damages	50 (100%)
d.	Registration required	49 (98%)
e.	Destroy counterfeit articles	48 (96%)
f.	Seize all counterfeits	48 (96%)
g.	Seize instrumentalities	1 (2%)
h.	Intent to deceive is required for damages	49 (98%)

2. Damages

All fifty states have statutes awarding damages to the plaintiff for trademark counterfeiting infringement.⁹⁹ While Georgia is the only state

18h (1967). DEL. CODE ANN. tit. 6, § 3314 (1976); FLA. STAT. ANN. § 495.141 (1967); GA. CODE ANN., § 10-1-451 (1893); HAW. REV. STAT. ANN. § 482-33 (West 2001); IDAHO CODE ANN. § 48-512 (1996); 765 ILL. COMP. STAT. ANN. 1036/70 (1998); IND. CODE § 24-2-1-14 (1955); IOWA CODE § 548.112 (1994); KAN. STAT. ANN. § 81-215 (1999); KY. REV. STAT. ANN. § 365.603 (West 1994); LA. REV. STAT. ANN. § 51:223 (1954); ME. REV. STAT. tit. 10, § 1531 (1980); MD. CODE ANN., BUS. REG. § 1-414 (West 1992); MASS. ANN. LAWS. ch. 110H, § 14 (LexisNexis 2006); MICH. COMP. LAWS SERV. § 429.42 (LexisNexis 1969); MINN. STAT. ANN. § 333.29 (1959); MISS. CODE ANN. § 75-25-27 (1997); MO. REV. STAT. § 417.061 (1973); MONT. CODE ANN. § 30-13-335 (1979); NEB. REV. STAT. § 87-141 (2000); NEV. REV. STAT. ANN. § 600.430 (1979); N.H. REV. STAT. ANN. § 350-A:13 (1969); N.J. STAT. ANN. § 56:3-13.16 (West 1987); N.J. STAT. ANN. § 56:3-13.17 (1987); N.M. STAT. ANN. § 57-3B-16 (1997); N.Y. GEN. BUS. LAW § 360-m (Consol. 1997); N.D. CENT. CODE § 47-22-12 (1957); OHIO REV. CODE ANN. § 1329.66 (West) (1978); OKLA. STAT. tit. 78, § 32 (1959); OR. REV. STAT. ANN. § 647.111 (West 1985); 54 PA. CONS. STAT. ANN. § 1125 (1982); 6 R.I. GEN. LAWS § 11-17-12-13 (1975); S.C. CODE ANN. § 39-15-1170 (1994); S.D. CODIFIED LAWS § 37-6-24 (1939); TENN. CODE ANN. § 47-25-514 (1989); TEX. BUS. & COM. CODE § 16.104 (West 2012); UTAH CODE ANN. § 70-3a-404 (West 2002); VT. STAT. ANN. tit. 9, § 2529 (1957); VA. CODE ANN. § 59.1-92.13 (1998); WASH. REV. CODE ANN. § 19.77.150 (West 2003); W. VA. CODE § 47-2-14 (1996); WIS. STAT. ANN. § 132.033 (West 1985); WYO. STAT. ANN. § 40-1-112 (1997).

⁹⁸ Table 2(g): CAL. BUS. & PROF. CODE 14250 (West 2007).

⁹⁹ Table 2(c): ALA. CODE § 8-12-18 (1980); ALASKA STAT. § 45.50.180 (1961); ARIZ. REV. STAT. ANN. § 44-1451 (1959); ARK. CODE ANN. § 4-71-214 (1997); CAL. BUS. & PROF. CODE § 14250 (West 2007); COLO. REV. STAT. § 6-1-113 (1963); CONN. GEN. STAT. ANN.

awarding minimum damages (\$10,000),¹⁰⁰ each state has established maximum damages that can be awarded to the plaintiff.¹⁰¹ However, the

§ 35-11i (West) (1963); DEL. CODE ANN. tit. 6, § 3314 (1976); FLA. STAT. ANN. § 495.141 (West) (1967); GA. CODE ANN., § 10-1-450 (1893); HAW. REV. STAT. ANN. § 482-33 (West 2001); HAW. REV. STAT. ANN. § 328-7 (1941); IDAHO CODE ANN. § 48-514 (1996); 765 ILL. COMP. STAT. ANN. 1036/70 (1998); 815 ILL. COMP. STAT. ANN. 425/4 (1986); IND. CODE § 24-2-1-14 (1955); IOWA CODE § 548.114 (1994); KAN. STAT. ANN. § 81-215 (1999); KY. REV. STAT. ANN. § 365.603 (West 1994); LA. REV. STAT. ANN. § 51:223 (1954); ME. REV. STAT. tit. 10, § 1531 (1980); MD. CODE ANN., BUS. REG. § 1-414 (West 1992); MASS. ANN. LAWS ch. 110H, § 14 (LexisNexis 2006); MICH. COMP. LAWS § 429.43 (1969); MINN. STAT. ANN. § 333.29 (1959); MISS. CODE ANN. § 75-25-27 (1997); MO. REV. STAT. § 417.056 (1973); MO. REV. STAT. § 417.061 (1973); MONT. CODE ANN. § 30-13-335 (1979); NEB. REV. STAT. 87-141 (2000); NEV. REV. STAT. ANN. 600.430 (1979); N.H. REV. STAT. ANN. 350-A:13 (1969); N.J. STAT. ANN. § 56:3-13.16 (West 1987); N.M. STAT. ANN. § 57-3B-16 (1997); N.Y. GEN. BUS. LAW § 360-m (Consol. 1997); N.C. GEN. STAT. § 80-11 (1967); N.D. CENT. CODE § 47-22-12 (1957); OHIO REV. CODE ANN. § 1329.66 (West) (1978); OKLA. STAT. tit. 78, § 32 (1959); OR. REV. STAT. ANN. § 647.105 (West 1961); 54 PA. CONS. STAT. ANN. § 1125 (1982); 6 R.I. GEN. LAWS § 11-17-12-13 (1975); S.C. CODE ANN. § 39-15-1170 (1994); S.D. CODIFIED LAWS § 37-6-26 (1955); TENN. CODE ANN. § 47-25-514 (1989); TEX. BUS. & COM. CODE § 16.104 (West 2012); UTAH CODE ANN. § 70-3a-404 (West 2002); VT. STAT. ANN. tit. 9, § 2529 (1957); VA. CODE ANN. § 59.1-92.13 (1998); WASH. REV. CODE ANN. § 19.77.150 (West 2003); W. VA. CODE § 47-2-14 (1996); WIS. STAT. ANN. § 132.08 (West 1901); WYO. STAT. ANN. § 40-1-112 (1997).

¹⁰⁰ Table 3(b): GA. CODE ANN. § 10-1-450 (1988).

¹⁰¹ Table 3(c)(1): ARK. CODE ANN. § 4-71-212 (1997); ARK. CODE ANN. § 4-71-214 (1997); COLO. REV. STAT. § 6-1-113 (1963); CONN. GEN. STAT. ANN. § 35-18h (West 1967); HAW. REV. STAT. ANN. § 482-33 (West 2001); IDAHO CODE ANN. § 48-514 (West 1996); 765 ILL. COMP. STAT. § 1036.70 (1998); IND. CODE § 24-2-1-14 (1955); IOWA CODE § 548.114 (1994); KAN. STAT. ANN. § 81-215 (1999); KY. REV. STAT. ANN. § 365.603 (West 1994); MASS. ANN. LAWS ch. 110H, § 14 (LexisNexis 2006); MINN. STAT. ANN. § 333.29 (West 1959); MISS. CODE ANN. § 75-25-27 (West 1997); MONT. CODE ANN. § 30-13-335 (1979); N.J. STAT. ANN. § 56:3-13.16 (West 1987); N.M. STAT. ANN. § 57-3B-16 (1997); N.Y. GEN. BUS. LAW § 360-m (LexisNexis 1997); OR. REV. STAT. ANN. § 647.105 (West 1961); 54 PA. CONS. STAT. ANN. § 1125 (West 1982); S.C. CODE ANN. § 39-15-1170 (1994); TENN. CODE ANN. § 47-25-514 (1989); TEX. BUS. & COM. CODE ANN. 16.102 (West 2012); WASH. REV. CODE ANN. § 19.77.150 (West 2003); WIS. STAT. ANN. § 132.033 (West 1985); W. VA. CODE § 47-2-14 (1996); WYO. STAT. ANN. § 40-1-112 (1997).

Table 3(c)(2): ALA. CODE § 8-12-18 (1980); ALASKA STAT. § 45.50.180 (1961); ARIZ. REV. STAT. ANN. § 44-1453 (1998); CAL. BUS. & PROF. CODE § 14250 (2007); FLA. STAT. ANN. § 495.141 (West 1967); IND. CODE § 24-2-1-14 (1995); MO. REV. STAT. § 570.103 (1998); NEV. REV. STAT. ANN. § 600.430 (West 1979); OKLA. STAT. tit. 21, § 1990.2 (1999); UTAH CODE ANN. § 70-3a-404 (LexisNexis 2002).

Table 3(c)(3): ARIZ. REV. STAT. ANN. § 44-1451 (1959); DEL. CODE ANN. tit. 6, § 3314 (1976); GA. CODE ANN., § 10-1-450 (1893); ME. REV. STAT. tit. 10, § 1531 (1980); MD. CODE ANN., BUS. REG. § 1-414 (LexisNexis 1992); MICH. COMP. LAWS § 429.42-.43 (1969); NEB. REV. STAT. § 87-141 (2000); NEV. REV. STAT. ANN. § 600.430 (West 1979); N.H. REV. STAT. ANN. § 350-A:13 (1969); N.C. GEN. STAT. § 80-11 (1967); N.D. CENT. CODE § 47-22-12 (1957); OHIO REV. CODE ANN. § 1329.66 (West 1978); OKLA. STAT. tit. 78, § 32 (1959); R.I. GEN. LAWS § 6-2-13 (1975); S.D. CODIFIED LAWS § 37-6-25, -26 (1955); VA. CODE

maximum monetary damages awarded to the plaintiff varies by state. This statutory provision is important; if the maximum damages are increased, brand owners may be more likely to pursue trademark counterfeiting cases in state court. Brand owners may be more likely to make an investment in litigating cases in state courts if their return on investment is higher. In terms of the determination of damages, nineteen (38% of) states provide awards for some combination of profits, damages, or cost of litigation.¹⁰² Some states provide damage enhancements for specific situations; for example, thirty-nine (78% of) states include costs and attorney fees when awarding damages, which can be substantial when litigating a product counterfeiting case.¹⁰³ In addition, twenty-five (50% of) states provide enhancements of three times profits or treble damages, or both, for knowledge, bad faith, intent to deceive and/or willful infringement¹⁰⁴ and

ANN. § 59.1-92.13 (1998); WIS. STAT. ANN. § 132.033 (West 1985).

Table 3(c)(4): VT. STAT. ANN. tit. 9, § 2531 (1957).

¹⁰² Table 3(c)(3): ARIZ. REV. STAT. ANN. § 44-1451 (1959); DEL. CODE ANN. tit. 6, § 3314 (1976); GA. CODE ANN., § 10-1-450 (1893); LA. STAT. ANN. § 51:223 (1968); ME. REV. STAT. tit. 10, § 1531 (1980); MD. CODE ANN., BUS. REG. § 1-414 (LexisNexis 1992); Mich. Comp. Laws § 429.42 (1969); Mich. Comp. Laws § 429.43 (1969); Neb. Rev. Stat. § 87-141 (2000); N.H. Rev. Stat. Ann. § 350-A:13(1969); N.C. Gen. Stat. § 80-11 (1967); N.C. Gen. Stat. § 80-12 (1995); N.C. Gen. Stat. § 75-1.1 (1979); N.D. Cent. Code § 47-22-12 (1957); Ohio Rev. Code Ann. § 1329.66 (West 1978); Okla. Stat. tit. 78, § 32 (1959); 6 R.I. Gen. Laws 2-13 (1975); S.D. Codified Laws §37-6-25, 26 (1955); Va. Code Ann. § 59.1-92.13 (1998); Vt. Stat. Ann. tit. 9, § 2531 (1957); Wis. Stat. Ann. § 132.033 (West 1985).

¹⁰³ Table 3(a): ALA. CODE § 8-12-18 (1980); ALASKA STAT. § 45.50.537 (1998); ARIZ. REV. STAT. ANN. § 44-1451 (1959); ARIZ. REV. STAT. ANN. § 44-1453 (1998); ARK. CODE ANN. § 4-71-214 (1997); COLO. REV. STAT. § 6-1-113 (1963); CONN. GEN. STAT. ANN. § 35-11i (West 1963); CONN. GEN. STAT. ANN. § 35-18h (West 1967); DEL. CODE ANN. tit. 6, § 3314 (1976); FLA. STAT. ANN. § 495.141 (West 1967); GA. CODE ANN., § 10-1-451 (1893); HAW. REV. STAT. ANN. § 482-33 (West 2001); IDAHO CODE ANN. § 48-514 (West 1996); 765 ILL. COMP. STAT. § 1036/70 (1998); IND. CODE § 24-2-1-14 (1955); IOWA CODE § 548.114 (1994); KAN. STAT. ANN. § 81-215 (1999); KY. REV. STAT. ANN. § 365.603 (West 1994); ME. REV. STAT. tit. 10, § 1531 (1980); MASS. ANN. LAWS. ch. 110H, § 14 (LexisNexis 2006); MINN. STAT. ANN. § 333.29 (West 1959); MISS. CODE ANN. § 75-25-27 (West 1997); MO. REV. STAT. § 407.020 (2008); MONT. CODE ANN. § 30-13-335 (1979); NEB. REV. STAT. § 87-141 (2000); NEV. REV. STAT. ANN. § 600.430 (West 1970); N.H. REV. STAT. ANN. § 638:6-b (2009); N.J. STAT. ANN. § 56:3-13.16 (West 1987); N.M. STAT. ANN. § 57-3B-16 (1997); N.Y. GEN. BUS. LAW § 360-m (LexisNexis 1997); N.C. GEN. STAT. § 80-12 (1995); N.C. GEN. STAT. § 75-15.2 (1993); N.C. GEN. STAT. § 75-16.1 (1973); N.C. GEN. STAT. § 75-1.1 (1979); OR. REV. STAT. ANN. § 647.105 (West 1961); 54 PA. CONS. STAT. ANN. § 1125 (West 1982); S.C. CODE ANN. § 39-15-1170 (1994); TENN. CODE ANN. § 47-25-514 (1989); TEX. BUS. & COM. CODE §§ 16.102, 16.104 (2012); UTAH CODE ANN. § 70-3a-404 (LexisNexis 2002); VA. CODE ANN. § 59.1-92.13 (1998); WASH. REV. CODE ANN. § 19.77.150 (West 1981); W. VA. CODE § 47-2-14 (1996); WIS. STAT. ANN. § 132.033 (West 1985); WYO. STAT. ANN. § 40-1-112 (1997).

¹⁰⁴ Table 3(c)(1): ARK. CODE ANN. § 4-71-212 (1997); ARK. CODE ANN. § 4-71-214

eleven (22%) provide awards for three times the actual profits and/or damages.¹⁰⁵ Meanwhile, Arizona offers an alternative statutory damages scheme in addition to three times the damages, costs and attorney fees of the greater amount of \$500 per counterfeit or MSRP times the number of counterfeits.¹⁰⁶

Table 3. Civil Damages

	Types of Damages	No. of States
a.	States with costs and attorney fees included	39 (78%)
b.	States with minimum damages	1 (2%)
c.	States with maximum damages	50 (100%)
	1. Enhancements of 3x for knowledge, bad faith, intent to deceive and/or willful infringement	25 (50%)
	2. 3x profits and/or damages	11 (22%)
	3. Profits, damages and/or cost	19 (38%)

In general, our analysis of state anti-counterfeiting policies revealed a relatively consistent approach in providing civil remedies for product counterfeiting violations. Although differences were found across states, these were mostly related to how damages are awarded. Conversely, our evaluation of anti-counterfeiting policy for criminal sanctions resulted in a wider inter-state variation and is discussed more thoroughly in the next part.

(1997); COLO. REV. STAT. § 6-1-113 (1963); CONN. GEN. STAT. ANN. § 35-18h (West 1967); HAW. REV. STAT. ANN. § 482-33 (West 2001); IDAHO CODE ANN. § 48-514 (West 1996); 765 ILL. COMP. STAT. § 1036.70 (1998); IND. CODE § 24-2-1-14 (1955); IOWA CODE § 548.114 (1994); KAN. STAT. ANN. § 81-215 (1999); KY. REV. STAT. ANN. § 365.603 (West 1994); MASS. ANN. LAWS ch. 110H, § 14 (LexisNexis 2006); MINN. STAT. ANN. § 333.29 (West 1959); MISS. CODE ANN. § 75-25-27 (West 1997); MONT. CODE ANN. § 30-13-335 (1979); N.J. STAT. ANN. § 56:3-13.16 (West 1987); N.M. STAT. ANN. § 57-3B-16 (1997); N.Y. GEN. BUS. LAW § 360-m (LexisNexis 1997); OR. REV. STAT. ANN. § 647.105 (West 1961); 54 PA. CONS. STAT. ANN. § 1125 (West 1982); S.C. CODE ANN. § 39-15-1170 (1994); TENN. CODE ANN. § 47-25-514 (1989); TEX. BUS. & COM. CODE ANN. 16.102 (West 2012); WASH. REV. CODE ANN. 19-77-150 (West 2003); W. VA. CODE § 47-2-14 (1996); WIS. STAT. ANN. § 132.033 (West 1985); WYO. STAT. ANN. § 40-1-112 (1997).

¹⁰⁵ Table 3(c)(2): ALA. CODE § 8-12-18 (1980); ALASKA STAT. § 45.50.180 (1961); ARIZ. REV. STAT. ANN. § 44-1453 (1998); CAL. BUS. & PROF. CODE § 14250 (2007); FLA. STAT. ANN. § 495.141 (West 1967); IND. CODE § 24-2-1-14 (1955); MO. REV. STAT. § 570.103 (1998); NEV. REV. STAT. ANN. § 600.430 (West 1979); OKLA. STAT. tit. 21, § 1990.2 (1999); UTAH CODE ANN. § 70-3a-404 (LexisNexis 2002).

¹⁰⁶ ARIZ. REV. STAT. ANN. § 44-1451 (1998).

B. CRIMINAL SANCTIONS

1. Policy Characteristics

While each state has established civil law for anti-counterfeiting,¹⁰⁷ there is tremendous variation in criminal law across the fifty states. Notably, New Mexico does not have a dedicated general criminal statute protecting trademarks, although the state does have a statute dealing specifically with pharmaceuticals, medical devices, and cosmetics¹⁰⁸ and it may be possible to bring counterfeit claims under forgery statutes, but this is not specifically outlined in the statute itself. The lack of legislation substantially limits existing legal protections for rights holders, as criminal law provides powerful legal remedies beyond civil law, such as formal criminal charges and sanctions.

Table 4 outlines criminal statutes and trademark registration requirements. While most states (82%, $n = 41$) include product counterfeiting under a criminal trademark counterfeiting statute,¹⁰⁹ several

¹⁰⁷ Table 2(a): ALA. CODE § 8-12-16 (1980); ALASKA STAT. § 45.50.170 (1961); ARIZ. REV. STAT. ANN. § 44-1453 (1998); ARK. CODE ANN. § 4-71-212 (1997); CAL. BUS. & PROF. CODE § 14245 (West 2007); COLO. REV. STAT. § 6-1-105 (1963); CONN. GEN. STAT. ANN. § 35-18h (West 1967); DEL. CODE ANN. tit. 6, § 3312 (1976); FLA. STAT. ANN. § 495.131 (West 1967); GA. CODE ANN., § 10-1-451 (1893); HAW. REV. STAT. ANN. § 482-31 (West 2001); IDAHO CODE ANN. § 48-512 (West 1996); 765 ILL. COMP. STAT.1036/60 (1998); IND. CODE. § 24-2-1-13 (1955); IOWA CODE § 548.112 (1994); KAN. STAT. ANN. § 81-213 (1999); KY. REV. STAT. ANN. § 365.601 (1994); LA. REV. STAT. ANN. § 51:222 (1954); ME. REV. STAT. tit. 10, § 1529 (1980); MD. CODE ANN., BUS. REG. § 1-414 (West 1992); MASS. ANN. LAWS. ch. 110H, § 12 (LexisNexis 2006); MICH. COMP. LAWS ANN. § 429.42 (West 1969); MINN. STAT. ANN. § 333.28 (West 1959); MISS. CODE ANN. § 75-25-23 (1997); MO. REV. STAT. § 417.056 (1973); MONT. CODE ANN. § 30-13-333 (1979); NEB. REV. STAT. § 87-139 (2000); NEV. REV. STAT. ANN. § 600.420 (West 1979); N.H. REV. STAT. ANN. § 350-A:11 (1969); N.J. STAT. ANN. § 56:3-13.16 (West 1987); N.M. STAT. ANN. § 57-3B-14 (1997); N.Y. GEN. BUS. LAW § 360-k (Consol. 1997); N.C. GEN. STAT. § 80-11 (1967); N.C. GEN. STAT. § 80-12 (1995); N.C. GEN. STAT. 75-1.1 (1979); N.D. CENT. CODE § 47-22-11(1957); OHIO REV. CODE ANN. § 1329.65 (West 1978); OKLA. STAT. tit. 78, § 31 (1959); OR. REV. STAT. ANN. § 647.095 (West 1961); 54 PA. CONS. STAT. ANN. § 1123 (1982); R.I. GEN. LAWS § 11-17-1 (1975); S.C. CODE ANN. § 39-15-1160 (1994); S.D. CODIFIED LAWS 37-6-25 (1955); TENN. CODE ANN. § 47-25-512 (2000); TEX. BUS. & COM. CODE § 16.102 (West 2012); UTAH CODE ANN. 70-3a-402 (West 2002); VT. STAT. ANN. tit. 9, § 2529 (1957); VA. CODE ANN. § 59.1-92.12 (1998); WASH. REV. CODE ANN. § 19.77.140 (West 2003); W. VA. CODE § 47-2-12 (1996); WIS. STAT. ANN. § 132.033 (West 1985); WYO. STAT. ANN. § 40-1-111 (1997).

¹⁰⁸ N.M. STAT. ANN. § 26-1-6 (1972).

¹⁰⁹ Table 4(a)(1): ARIZ. REV. STAT. ANN. § 44-1453 (1998); CAL. PENAL CODE § 350 (West 1872); COLO. REV. STAT. § 18-5-110.5 (2001); CONN. GEN. STAT. ANN. § 53-347a (West 1963); DEL. CODE ANN. tit. 11, § 926 (2005); GA. CODE ANN., § 10-1-454 (1996); HAW. REV. STAT. ANN. § 708-875 (West 1997); IDAHO CODE ANN. § 18-3614 (West 1972);

states have either an additional type or an alternative type of statute, including: criminal simulation (28%, $n = 14$),¹¹⁰ forgery (12%, $n = 6$),¹¹¹ and theft of trademarks (4%, $n = 2$).¹¹² In terms of trademark protection, thirty-one (62% of) states protect both registered and unregistered trademarks,¹¹³ while the remaining states protect trademarks registered by either the state or by the federal government (34%, $n = 17$).¹¹⁴ The exceptions are Vermont

IDAHO CODE ANN. § 18-3615 (West 1972); 410 ILL. COMP. STAT. § 620/3.16 (1985); 765 ILL. COMP. STAT. § 1040/4 (1955); 815 ILL. COMP. STAT. § 425/2 (1986); 815 ILL. COMP. STAT. § 425/3 (1986); IOWA CODE § 714.26 (2004); KAN. STAT. ANN. § 21-5825 (2011); KY. REV. STAT. ANN. § 365.241 (West 2000); LA. STAT. ANN. § 14:229 (1984); MD. CODE ANN., CRIM. LAW § 8-611 (LexisNexis 2002); MASS. ANN. LAWS ch. 266, § 147 (LexisNexis 1998); MICH. COMP. LAWS § 750.263 (1931); MINN. STAT. ANN. § 333.42 (West 1986); MINN. STAT. ANN. § 609.895 (West 1999); MISS. CODE ANN. § 97-21-53 (West 2011); MISS. CODE ANN. § 97-21-55 (West 2011); MISS. CODE ANN. § 97-21-57 (West 2012); MO. REV. STAT. § 570.103 (1998); MONT. CODE ANN. § 30-13-338 (2009); NEV. REV. STAT. ANN. § 205.205 (West 1911); NEV. REV. STAT. ANN. § 205.210 (West 1911); N.H. REV. STAT. ANN. § 638:6-b (2009); N.J. Stat. Ann. § 2C:21-32 (West 1997); N.Y. PENAL LAW § 165.71-74 (LexisNexis 1992); N.Y. ARTS & CULT. AFF. LAW § 33.07 (LexisNexis 1983); N.Y. ARTS & CULT. AFF. LAW § 33.09 (LexisNexis 1983); N.C. GEN. STAT. § 80-11.1 (1967); N.D. CENT. CODE § 51-07-04 (1975); OHIO REV. CODE ANN. § 2913.34 (West 1996); Okla. Stat. tit. 21, § 1990.2 (1999); Or. Rev. Stat. Ann. § 647.140 (West 1999); Or. Rev. Stat. Ann. § 647.145 (West 1999); OR. REV. STAT. ANN. § 647.150 (West 1999); 18 PA. CONS. STAT. ANN. § 4119 (West 1996); R.I. GEN. LAWS § 11-17-13 (1997); S.C. CODE ANN. § 39-15-1190 (1994); S.D. CODIFIED LAWS § 37-6-2 (1939); S.D. CODIFIED LAWS § 37-6-3 (1939); TENN. CODE ANN. § 39-14-152 (2000); TEX. PENAL CODE ANN. § 32.23 (West 1997); VT. STAT. ANN. tit. 9, § 2530 (1957); VA. CODE ANN. § 59.1-92.13 (1998); WASH. REV. CODE ANN. § 9.16.020 (West 2011); WASH. REV. CODE ANN. § 9.16.030 (West 1999); WASH. REV. CODE ANN. § 9.16.035 (West 1999); W. VA. CODE § 47-2-14a-d (1996); WIS. STAT. ANN. § 132.02 (West 1985); WYO. STAT. ANN. § 6-3-610 (1982).

¹¹⁰ Table 4(a)(3): ALA. CODE § 13A-9-10 (1977); ALASKA STAT. § 11.46.530 (1978); ARK. CODE ANN. § 5-37-213 (1975); COLO. REV. STAT. § 18-5-110 (1987); HAW. REV. STAT. ANN. § 708-855 (West 1972); KY. REV. STAT. ANN. § 516.110 (West 1975); ME. REV. STAT. tit. 17-A, § 705 (1976); NEB. REV. STAT. § 28-606 (1977); OHIO REV. CODE ANN. § 2913.32 (West 1972); OR. REV. STAT. ANN. § 165.037 (West 1971); 18 PA. CONS. STAT. ANN. § 4102 (West 1972); TENN. CODE ANN. § 39-14-115 (1989); TEX. PENAL CODE ANN. § 32.22 (West 1974); UTAH CODE ANN. § 76-6-518 (LexisNexis 1973).

¹¹¹ Table 4(a)(2): FLA. STAT. ANN. § 831.032 (West 2008); GA. CODE ANN., § 10-1-454 (1996); IDAHO CODE ANN. § 18-3614 (West 1972); IDAHO CODE ANN. § 18-3615 (West 1972); IND. CODE § 35-43-5-2(d) (1976).

¹¹² Table 4(a)(4): ALA. CODE § 13A-8-10.4 (1983); IND. CODE § 35-43-4-1(a) (1976); IND. CODE ANN. § 35-43-4-2(a) (1976).

¹¹³ These states do not have statutory requirements for registration.

¹¹⁴ Table 4(b): CAL. PENAL CODE § 350 (West 1872); GA. CODE ANN. § 10-1-454 (1996); HAW. REV. STAT. ANN. § 708-875 (West 1997); 765 ILL. COMP. STAT. § 1040/1 (1955); LA. STAT. ANN. § 14:229 (1984); MASS. ANN. LAWS ch. 266, § 147 (1998); NEV. REV. STAT. ANN. § 205.205 (West 1911); NEV. REV. STAT. ANN. § 205.210 (West 1911); NEV. REV. STAT. ANN. § 600.450 (West 1907); N.H. REV. STAT. ANN. § 638:6-b (2009); N.J. STAT. ANN. § 2C:21-32 (West 1997); N.C. GEN. STAT. § 80-11.1 (1967); OHIO REV. CODE

and Wisconsin, which require proof of state registration.¹¹⁵

Table 4. Criminal Statutes and Registration

	Variables	No. of States
a.	Statute	
1.	Trademark Counterfeiting	41 (82%)
2.	Forgery (applicable to counterfeiting)	6 (12%)
3.	Criminal Simulation	14 (28%)
4.	Theft of Trademarks	2 (4%)
b.	Registration Required	
1.	None	31 (62%)
2.	State	2 (4%)
3.	Federal or State	17 (34%)

Table 5 demonstrates the wide variation in state criminal policy characteristics. The most common characteristics are penalizations for value (78%, $n = 39$)¹¹⁶ and number (46%, $n = 23$) of counterfeit items,¹¹⁷

ANN. § 2913.34 (West 1996); OR. REV. STAT. ANN. § 647.135 (West 1999); 18 PA. CONS. STAT. ANN. § 4119 (West 1996); 6 R.I. GEN. LAWS § 11-17-13 (1997); S.C. CODE ANN. § 39-15-1190 (1994); TEX. PENAL CODE ANN. § 32.23 (West 1997); VA. CODE ANN. § 59.1-92.12 (1998); VA. CODE ANN. § 59.1-92.13 (1998); VT. STAT. ANN. tit. 9, § 2530 (1957); WIS. STAT. ANN. § 132.01(1) (2011).

¹¹⁵ Table 4(b)(2): VT. STAT. ANN. tit. 9, § 2530; WIS. STAT. ANN. § 132.01(1).

¹¹⁶ Table 5(b): ALASKA STAT. § 11.46.530 (1978); ARIZ. REV. STAT. § 44-1453 (1998); ARK. CODE ANN. § 5-37-213 (1975); CAL. PENAL CODE § 350 (West 2013); COLO. REV. STAT. § 18-5-110.5 (2001); DEL. CODE ANN. tit. 11, § 926 (2005); FLA. STAT. ANN. § 831.032 (West 2008); GA. CODE ANN. § 10-1-454 (1996); HAW. REV. STAT. ANN. § 712A-5.5 (West 1996); 765 ILL. COMP. STAT. ANN. 1040/8 (West 1997); IND. CODE ANN. § 35-43-4-2(a) (West 2014); IOWA CODE. § 714.26 (2004); KAN. STAT. ANN. § 21-5825 (2011); KY. REV. STAT. ANN. § 365.241 (West 2000); LA. REV. STAT. ANN. § 14:229 (1984); ME. REV. STAT. tit. 17-A, § 705 (1976); ME. REV. STAT. tit. 17-A, 703 (2008); MD. CODE ANN., CRIM. LAW § 8-611 (West 2002); MASS. ANN. LAWS ch. 266, § 147 (LexisNexis 1998); MICH. COMP. LAWS SERV. § 750.263 (LexisNexis 1931); MINN. STAT. ANN. § 609.895 (West 1999); MISS. CODE ANN. § 97-21-53 (2009); MO. REV. STAT. § 570.103 (1998); MONT. CODE ANN. § 30-13-338 (2009); NEV. REV. STAT. ANN. § 205.210 (West 1911); N.J. STAT. ANN. § 2C:21-32 (West 1997); N.Y. PENAL LAW § 165.73 (McKinney 1992); N.C. GEN. STAT. § 80-11.1 (1995); OHIO REV. CODE ANN. § 2913.32 (West 2011); OKLA. STAT. tit. 21, 1990.2 (1999); OR. REV. STAT. ANN. 647.140 (1999); 18 PA. CONS. STAT. § 4119 (2010); 11 R.I. GEN. LAWS § 11-17-13 (1997); S.C. CODE ANN. 39-15-1190 (2006); TENN. CODE ANN. § 39-14-105 (1989); TEX. PENAL CODE ANN. § 32.23 (West 2015); UTAH CODE ANN. § 76-6-518 (West 2010); VA. CODE ANN. 59.1-92.13 (2011); WASH. REV. CODE ANN. § 9.16.035 (West 1999).

¹¹⁷ Table 5(e): ARIZ. REV. STAT. ANN. § 44-1453 (1998); CAL. PENAL CODE § 350 (West 2013); COLO. REV. STAT. § 18-5-110.5 (2001); DEL. CODE ANN. tit. 11, § 926 (2005); FLA. STAT. ANN. § 831.032 (West 2008); 765 ILL. COMP. STAT. ANN. 1040/8 (West 1997); IOWA

penalty increases for prior offense (60%, $n = 30$),¹¹⁸ and the requirements of forfeiture (62%, $n = 31$)¹¹⁹ and destruction (54%, $n = 27$) of counterfeit items.¹²⁰ Just over one-third of the states provide enhancements for

CODE § 714.26 (2004); KAN. STAT. ANN. § 21-5825 (2011); KY. REV. STAT. ANN. § 365.241 (LexisNexis/West 2000); LA. REV. STAT. ANN. § 14:231 (2003); MASS. ANN. LAWS ch. 266, § 147 (LexisNexis 1998); MICH. COMP. LAWS SERV. § 750.263 (LexisNexis 1931); MINN. STAT. ANN. § 609.895 (West 1999); MO. REV. STAT. § 570.103 (1998); MONT. CODE ANN. § 30-13-338 (2009); NEV. REV. STAT. ANN. § 205.210 (West 1911); N.J. STAT. ANN. § 2C:21-32 (West 1997); OHIO REV. CODE ANN. § 2913.34 (West 2011); OKLA. STAT. tit. 21, § 1990.2 (1999); OR. REV. STAT. ANN. § 647.140 (1999); OR. REV. STAT. ANN. § 647.145 (1999); OR. REV. STAT. ANN. § 647.150 (1999); 18 PA. CONS. STAT. § 4119 (2010); VA. CODE ANN. § 59.1-92.13 (2011); WASH. REV. CODE ANN. 19.77.140 (West 2003).

¹¹⁸ Table 5(c): ALASKA STAT. § 12.55.015; ARIZ. REV. STAT. ANN. § 44-1453 (1998); CAL. PENAL CODE § 350 (West 2013); COLO. REV. STAT. § 18-5-110.5 (2001); DEL. CODE ANN. tit. 11, § 926 (2005); FLA. STAT. ANN. § 831.032 (West 2008); GA. CODE ANN. § 10-1-454 (1996); 765 ILL. COMP. STAT. ANN. 1040/8 (West 1997); IOWA CODE § 714.26 (2004); KAN. STAT. ANN. § 21-5825 (2011); KY. REV. STAT. ANN. § 365.241 (West 2000); MD. CODE ANN., CRIM. LAW § 8-611 (West 2002); MASS. ANN. LAWS ch. 266, § 147 (LexisNexis 1998); MD. CODE ANN., CRIM. LAW § 8-611 (2002); MICH. COMP. LAWS SERV. § 750.263 (LexisNexis 1931); MINN. STAT. ANN. § 609.895 (West 1999); MO. REV. STAT. § 570.103 (1998); MONT. CODE ANN. § 30-13-338 (2009); NEV. REV. STAT. ANN. § 205.210 (West 1911); N.H. REV. STAT. ANN. § 638.6-b (2010); N.J. STAT. ANN. § 2C:21-32 (West 1997); OKLA. STAT. tit. 21, § 1990.2 (1999); OR. REV. STAT. ANN. § 647.145 (West 1999); OR. REV. STAT. ANN. § 647.150 (West 1999); 18 PA. CONS. STAT. § 4119 (2010); 11 R.I. GEN. LAWS § 11-17-13 (1997); S.C. CODE ANN. § 39-15-1195 (2006); TENN. CODE ANN. § 40-35-111 (2007); TEX. HEALTH & SAFETY CODE ANN. § 431.059 (West 2015); VA. CODE ANN. § 18.2-10 (2008); WASH. REV. CODE ANN. § 9.16.035 (West 1999).

¹¹⁹ Table 5(a): ARIZ. REV. STAT. ANN. § 44-1453 (1998); ARK. CODE ANN. § 5-5-101 (West 2011); CAL. PENAL CODE § 350 (West 2013); DEL. CODE ANN. tit. 6, § 3314 (1976); GA. CODE ANN. § 10-1-454 (1996); HAW. REV. STAT. ANN. § 708-875 (West 1997); 765 ILL. COMP. STAT. ANN. 1040/9 (West 1997); IND. CODE ANN. § 34-24-1-1 (2015); IOWA CODE § 714.26 (2004); KY. REV. STAT. ANN. § 365.241 (West 2016); MD. CODE ANN., CRIM. LAW § 8-611 (West 2002); MASS. GEN. LAWS ANN. ch. 266, § 147 (LexisNexis 1998); MICH. COMP. LAWS SERV. § 750.263 (LexisNexis 1931); MINN. STAT. ANN. § 609.895 (West 1999); MISS. CODE ANN. § 97-21-57 (2009); MO. REV. STAT. § 570.105 (1998); MONT. CODE ANN. § 30-13-338 (2009); N.H. REV. STAT. ANN. § 638:6-b (2010); N.J. STAT. ANN. § 2C:21-32 (West 1997); N.Y. PENAL LAW § 165.74 (McKinney 1992); N.C. GEN. STAT. § 80-11.1 (1995); OHIO REV. CODE ANN. § 2913.34 (West 1996); OKLA. STAT. tit. 21, § 1990.2 (1999); OR. REV. STAT. ANN. § 647.145 (West 1999); 18 PA. CONS. STAT. § 4119 (1996); 11 R.I. GEN. LAWS § 11-17-13 (1997); S.C. CODE ANN. § 39-15-1190 (1994); TENN. CODE ANN. § 39-14-152 (2000); VA. CODE ANN. § 59.1-92.13 (2011); WASH. REV. CODE ANN. § 9.16.041 (West 1999).

¹²⁰ Table 5(d): ARIZ. REV. STAT. ANN. § 44-1453 (1998); ARK. CODE ANN. § 5-5-101 (West 2011); CAL. PENAL CODE § 350 (West 2013); GA. CODE ANN. § 9-16-19 (West 2015); HAW. REV. STAT. ANN. § 708-875 (West 1997); 765 ILL. COMP. STAT. ANN. 1040/9 (West 1997); IOWA CODE § 714.26 (2004); KY. REV. STAT. ANN. § 365.241 (West 2000); MASS. ANN. LAWS ch. 266, § 147 (LexisNexis 1998); MICH. COMP. LAWS SERV. § 750.263 (LexisNexis 1931); MINN. STAT. ANN. § 609.895 (West 1999); MO. REV. STAT. § 570.105 (1998); MONT. CODE ANN. § 30-13-338 (2009); N.H. REV. STAT. ANN. § 638:6-b (2009); N. J.

manufacturing of counterfeit goods or marks (36%, $n = 18$)¹²¹ and require the seizure of instrumentalities (36%, $n = 18$)¹²² or the means and equipment used to create the counterfeits. Meanwhile, only fifteen (30% of) states require intent to deceive or defraud¹²³ and nineteen (36% of) states require state registration for prima facie evidence.¹²⁴ Additionally,

STAT. ANN. § 2C:64-6 (1993); N.Y. PENAL LAW § 165.74 (McKinney 1992); N.C. GEN. STAT. § 80-11.1 (1995); OHIO REV. CODE ANN. § 1329.66 (West 1978); OHIO REV. CODE ANN. § 2913.34 (West 2011); OKLA. STAT. tit. 21, § 1990.2 (1999); OKLA. STAT. tit. 78, § 32 (1959); OKLA. STAT. tit. 21, § 1990.2 (1999); OR. REV. STAT. ANN. § 647.155 (2009); OR. REV. STAT. ANN. § 647.105 (2009); 18 PA. CONS. STAT. ANN. § 4119 (2010); 54 PA. CONS. STAT. ANN. § 1125 (1998); 6 R.I. GEN. LAWS § 6-2-13 (2014); 11 R.I. GEN. LAWS § 11-17-13 (1997); TENN. CODE ANN. § 39-14-152 (2005); TENN. CODE ANN. § 47-25-514 (2000); VT. STAT. ANN. tit. 9, § 2529 (1957); VA. CODE ANN. § 59.1-92.13 (2011); WASH. REV. CODE ANN. § 19.77.150 (West 2003); WASH. REV. CODE ANN. § 9.16.041 (West 1999); WASH. REV. CODE ANN. 19.77.150 (2003); WIS. STAT. ANN. § 132.033 (West 2002).

¹²¹ Table 5(f): ARIZ. REV. STAT. ANN. § 44-1453 (1998); DEL. CODE ANN. tit. 11, § 926 (2005); 765 ILL. COMP. STAT. ANN. 1040/8 (West 1997); IOWA CODE § 714.26 (2004); MASS. ANN. LAWS ch. 266 § 147 (LexisNexis 1998); MICH. COMP. LAWS SERV. § 750.263 (LexisNexis 1931); MINN. STAT. ANN. § 609.895 (West 1999); MO. REV. STAT. § 570.103 (1998); N.C. GEN. STAT. § 80-11.1 (1995); OHIO REV. CODE ANN. § 4549.20 (West 2013); § 2913.34 (West 2011); OKLA. STAT. tit. 21, § 1990.2 (1999); OR. REV. STAT. ANN. § 647.135 (West 1999); OR. REV. STAT. ANN. § 647.145 (West 1999); 18 PA. CONS. STAT. ANN. § 4119 (2010); 6 R.I. GEN. LAWS § 6-2-13 (2014); S.C. CODE ANN. § 39-15-1195 (2006); S.C. CODE ANN. § 39-15-1170 (1994); S.C. CODE ANN. 39-15-1195 (2006); TENN. CODE ANN. § 39-14-152 (2005); WASH. REV. CODE ANN. § 9.16.035 (West 1999).

¹²² Table 5(g): ARIZ. REV. STAT. ANN. § 44-1453 (1998); CAL. PENAL CODE § 350 (West 2013); DEL. CODE ANN. tit. 11, § 926 (2005); FLA. STAT. ANN. § 831.032 (West 2008); HAW. REV. STAT. ANN. § 708-875 (West 1997); 765 ILL. COMP. STAT. ANN. 1040/9 (West 1997); IOWA CODE § 714.26 (2004); KY. REV. STAT. ANN. § 365.241 (West 2000); MASS. ANN. LAWS ch. 266, § 147 (LexisNexis 1998); MINN. STAT. ANN. § 609.895 (West 1999); MISS. CODE ANN. § 97-21-101 (2011); MISS. CODE ANN. § 97-21-103 (2011); MISS. CODE ANN. § 97-21-55 (2009); REV. STAT. § 570.105 (1998); MONT. CODE ANN. § 30-13-338 (2009); N.H. REV. STAT. ANN. § 638:6-b (2009); N.J. STAT. ANN. § 2C:21-32 (West 1997); N.Y. PENAL LAW § 165.74 (McKinney/LexisNexis/Consol. 1992); N.C. GEN. STAT. § 80-11.1 (1995).

¹²³ Table 5(h): ALASKA STAT. § 11.46.530 (1978); ARIZ. REV. STAT. ANN. § 44-1453 (1998); ARK. CODE ANN. § 5-37-213 (1975); COLO. REV. STAT. § 18-5-110 (1987); CONN. GEN. STAT. ANN. § 53-347A (West 1963); IDAHO CODE ANN. § 18-3614 (West 1972); ME. REV. STAT. tit. 17-A, § 705 (1976); MICH. COMP. LAWS SERV. § 750.263 (LexisNexis 1931); NEB. REV. STAT. ANN. § 28-606 (West 1977); N.J. STAT. ANN. § 2C:21-32 (1997); N.Y. PENAL LAW § 165.71 (McKinney 1992); N.Y. PENAL LAW § 165.72 (McKinney 1992); N.Y. PENAL LAW § 165.73 (McKinney 1992); S.D. CODIFIED LAWS § 37-6-25 (1980); S.D. CODIFIED LAWS § 37-6-26 (1980); UTAH CODE ANN. § 70-3a-402 (West 2010); WIS. STAT. ANN. § 132.01(1) (West 2011); WIS. STAT. ANN. § 132.02 (1991); WIS. STAT. ANN. § 132.20 (West 2002); WIS. Stat. Ann. § 132.02 (West 1991); WYO. STAT. § 35-7-1033(a) (2009); WYO. STAT. Ann. § 40-1-111 (1997); WYO. STAT. ANN. § 6-3-610 (1983), 40-1-111 (1997).

¹²⁴ Table 5(i): ARIZ. REV. STAT. ANN. § 44-1453 (1998); COLO. REV. STAT. § 18-5-110.5 (1987); DEL. CODE ANN. tit. 11, § 926 (2005); IOWA CODE § 714.26 (2004); KAN. STAT. ANN. § 81-202 (2013); KAN. STAT. ANN. § 21-5825 (2011); KAN. STAT. ANN. § 81-202 (West

twelve states have increased penalties for the number and value of items, prior offense, and manufacturing of counterfeits.¹²⁵

On the other end of the spectrum, Alabama and North Dakota do not incorporate any of the policy characteristics outlined in Table 5. Connecticut, Idaho, Nebraska, South Dakota, and Wyoming also do not include any of these criminal policy characteristics in Table 5, and additionally do not require proof of intent. Meanwhile, Maine and Utah only penalize for the value of items,¹²⁶ and Vermont and Wisconsin only require the destruction of counterfeit items.¹²⁷ The remaining states incorporate some, but not all, of these policy characteristics.

Table 5. Criminal Policy Characteristics

Characteristics	No. of States
a. States requiring forfeiture of counterfeit items	31 (62%)
b. States penalizing for the value of items	39 (78%)
c. States increasing penalties for prior offense	30 (60%)
d. States requiring destruction of counterfeit items	27 (54%)
e. States penalizing for the number of items	23 (46%)
f. States with enhancements for manufacturing	18 (36%)
g. States requiring seizure of instrumentalities	18 (36%)
h. States requiring intent to deceive/defraud	15 (30%)
i. States requiring registration for prima facie evidence	19 (36%)

Our analysis of state anti-counterfeiting policy characteristics suggests

1999); MD. CODE ANN., CRIM. LAW § 8-611 (West 2002); MASS. ANN. LAWS ch. 266, § 147 (LexisNexis 1998); MINN. STAT. ANN. § 609.895 (West 1999); MO. REV. STAT. § 570.103 (1998); N.J. STAT. ANN. § 2C:21-32 (West 1997); OKLA. STAT. tit. 21, § 1990.2 (1999); OR. REV. STAT. ANN. § 647.045 (1961); 18 PA. CONS. STAT. ANN. § 4119 (2010); S.C. CODE ANN. § 39-15-1125 (1994); TEX. PENAL CODE ANN. § 32.23 (West 1997); UTAH CODE ANN. 70-3a-304 (West 2008); VA. CODE ANN. § 59.1-92.13 (2011); WASH. REV. CODE ANN. § 9.16.030 (West 1999).

¹²⁵ These states include Arizona, Delaware, Iowa, Illinois, Massachusetts, Michigan, Minnesota, Missouri, Oklahoma, Oregon, Pennsylvania, and Washington. California, Colorado, Kansas, Kentucky, Montana, New Jersey, Nevada, and Virginia would have been included in this group but they do not provide enhancements for manufacturing counterfeit articles. Similar observations were made with Georgia, Rhode Island, South Carolina, and Tennessee, which do not penalize for the number of counterfeit items, and Ohio, which does not increase penalties for prior offenses.

¹²⁶ ME. REV. STAT. tit.17-A, § 703 (2007); UTAH CODE ANN. § 76-6-518 (West 2010).

¹²⁷ VT. STAT. ANN. tit. 9, § 2529 (1957); WIS. STAT. ANN. § 132.033 (West 2002).

that states can be categorized into groups depending on the comprehensiveness of their policies. As we discussed above, intent to deceive is difficult to prove in both civil and criminal cases, but in criminal cases, the burden of proof is much greater. Therefore, states not requiring proof of intent to deceive and incorporating all the characteristics identified in Table 5 are considered to have more comprehensive policies against product counterfeiting, while states lacking some or all of these characteristics and requiring proof of intent are considered less comprehensive.

2. Punishment

Although each state offers fines and/or incarceration for product counterfeiting convictions,¹²⁸ criminal charges and penalties vary across

¹²⁸ Table 6(c): ALA. CODE § 13A-5-11 (2006); ALA. CODE § 13A-8-10.4 (1984); ALA. CODE § 13A-5-11 (2006); ALASKA STAT. § 11.46.530 (2016); ALASKA STAT. § 12.55.035 (2015); ARIZ. REV. STAT. ANN. § 44-1453 (2015); ARIZ. REV. STAT. ANN. § 13-801 (1977); ARK. CODE ANN. § 5-37-213 (1975); ARK. CODE ANN. § 5-37-201 (West 2013); CAL. PENAL CODE § 350 (West 2012); CAL. PENAL CODE § 351a (West 1983); COLO. REV. STAT. § 18-5-110.5 (2001); COLO. REV. STAT. § 18-1.3-501 (2002); CONN. GEN. STAT. ANN. § 53-347a (West 2013); DEL. CODE ANN. tit. 11, § 926 (2005); FLA. STAT. ANN. § 831.032 (West 2008); FLA. STAT. ANN. § 775.083 (West 2010); GA. CODE ANN. § 10-1-454 (2015); HAW. REV. STAT. ANN. § 482-31 (West 2008); HAW. REV. STAT. ANN. § 482-33 (West 2001); HAW. REV. STAT. ANN. § 328-29 (West 1959); IDAHO CODE ANN. § 18-3614 (West 1972); IDAHO CODE ANN. § 18-113 (West 2005); IDAHO CODE ANN. § 18-3614 (West 1972); 765 ILL. COMP. STAT. 1040/8 (2010); 730 ILL. COMP. STAT. 5/5-4.5-50 (2009); IND. CODE § 35-43-5-2(a) (2016); IND. CODE § 35-50-2-7 (2013); IOWA CODE § 714.16 (2015); IOWA CODE § 902.9 (1978); KAN. STAT. ANN. § 21-5825 (2011); KAN. STAT. ANN. § 81-215 (1999); KY. REV. STAT. ANN. § 365.241 (West 2000); KY. REV. STAT. ANN. § 532.030 (West 1994); LA. REV. STAT. ANN. § 14:229 (2011); ME. REV. STAT. ANN. tit. 17-A, § 705 (2015); ME. REV. STAT. ANN. tit. 17-A, § 1301 (1991); MD. CODE ANN., CRIM. LAW § 8-611 (West 2002); MASS. ANN. LAWS. ch. 266, § 147 (LexisNexis 1998); MICH. COM. LAWS § 750.263 (2003); MINN. ANN. § 609.02 (West 2016); MINN. STAT. ANN. § 609.895 (West 1995); MINN. STAT. ANN. § 333.42 (West 1986); MISS. CODE ANN. § 97-21-53 (2012); MISS. CODE ANN. § 97-21-57 (2012); MO. REV. STAT. § 570.103 (2017); MO. REV. STAT. § 558.002 (2017); MONT. CODE ANN. § 30-13-338 (2011); NEB. REV. STAT. § 28-606 (1977); NEB. REV. STAT. § 28-106 (1977); NEV. REV. STAT. ANN. § 205.210 (West 1999); NEV. REV. STAT. ANN. § 193.130 (West 1999); N.H. REV. STAT. ANN. § 638:6-b (2010); N.J. STAT. ANN. § 2C:21-32 (West 2000); N.Y. PENAL LAW 80.00 (McKinney 2014); N.Y. PENAL LAW § 165.73 (McKinney 1995); N.C. GEN. STAT. § 15A-1340.17 (2013); N.C. GEN. STAT. § 80-11.1 (1995); N.C. GEN. STAT. 15A-1340.17 (2013); N.D. CENT. CODE § 51-07-04 (1975); N.D. CENT. CODE § 12.1-32-01.1 (1975); N.D. CENT. CODE § 12.1-32-02 (1973); OHIO REV. CODE ANN. § 2929.18 (West 2015); OHIO REV. CODE ANN. § 2913.34 (West 2011); OKLA. STAT. tit. 21, § 1990.2 (1999); OR. REV. STAT. ANN. § 647.150 (West 1999); OR. REV. STAT. ANN. § 161.625 (West 1971); 18 PA. CONS. STAT. ANN. § 4119 (2010); 11 R.I. GEN. LAWS 11-17-13 (1997); S.C. CODE ANN. § 39-15-1190 (2006); S.D. CODIFIED LAWS § 22-6-2 (2005); S.D. CODIFIED LAWS § 37-6-2 (1977); TENN. CODE ANN. § 40-35-111 (2007); TENN. CODE ANN. 39-14-105 (1989); TENN. CODE ANN. § 39-

states (Table 6), as forty-four (88% of) states have misdemeanor offenses¹²⁹

14-152 (2005); TENN. CODE ANN. § 39-14-105 (1989); TEX. PENAL CODE § 32.23 (West 2015); TEX. PENAL CODE ANN. § 12.32 (West 2009); TEX. PENAL CODE 32.23 (2015); UTAH CODE ANN. § 76-3-301 (West 1995); VT. STAT. ANN. tit. 9, § 2531 (1971); VA. CODE ANN. § 59.1-92.13 (2011); VA. CODE ANN. § 18.2-10 (2008); WASH. REV. CODE ANN. § 9A.20.021 (West 2015); WASH. REV. CODE ANN. § 9.16.035 (West 1999); WASH. REV. CODE ANN. 9A.20.021 (2015); WIS. STAT. ANN. § 132.20 (West 2002); WIS. STAT. ANN. § 939.50 (West 2001); WYO. STAT. ANN. § 35-7-1033(a) (West 2009); WYO. STAT. ANN. § 6-3-610 (1983); WYO. STAT. ANN § 6-3-601 (West 1982); WYO. STAT. ANN § 6-3-602 (West 1982).

Table 6(d): ALA. CODE § 13A-5-11 (2006); ALA. CODE § 13A-8-10.4 (1984); ALA. CODE § 13A-5-11 (2006); ALASKA STAT. § 11.46.530 (2016); ALASKA STAT. § 12.55.035 (2015); ARIZ. REV. STAT. ANN. § 44-1453 (2015); ARIZ. REV. STAT. ANN. 13-801 (2016); ARK. CODE ANN. § 5-37-213 (1975); ARK. CODE ANN. 5-37-201 (West 2013); CAL. PENAL CODE § 350 (West 2012); CAL. PENAL. CODE § 351a (West 1983); COLO. REV. STAT. § 18-5-110.5 (2001); COLO. REV. STAT. § 18-1.3-501 (2002); CONN. GEN. STAT. ANN. § 53-347a (West 2013); DEL. CODE ANN. tit. 11, § 926 (2005); FLA. STAT. ANN. § 831.032 (West 2008); FLA. STAT. ANN. § 775.083 (West 2010); GA. CODE ANN. § 10-1-454 (2015); HAW. REV. STAT. ANN. § 482-31 (West 2008); HAW. REV. STAT. ANN. § 482-33 (West 2001); HAW. REV. STAT. ANN. § 328-29 (West 1959); IDAHO CODE ANN. § 18-113 (West 2005); § 18-3614 (West 1972); IDAHO CODE ANN. 18-113(2005); 765 ILL. COMP. STAT. 1040/8 (2010); 730 ILL. COMP. STAT. 5/5-4.5-50 (2009); IND. CODE § 35-43-5-2(a) (2016); IND. CODE § 35-50-2-7 (2013); IOWA CODE § 714.16 (2015); IOWA CODE § 902.9 (1978); KAN. STAT. ANN. § 21-5825 (2011); KAN. STAT. ANN. § 81-215 (1999); KY. REV. STAT. ANN. § 365.241 (West 2000); KY. REV. STAT. ANN. § 532.030 (West 1994); LA. REV. STAT. ANN. § 14:229 (2011); ME. REV. STAT. tit. 17-A, § 705 (2015); ME. REV. STAT. tit. 17-A, § -1301(1991); MD. CODE ANN., CRIM. LAW § 8-611 (West 2002); MASS. ANN. LAWS. ch. 266, § 147 (LexisNexis 1998); MICH. COMP. LAWS § 750.263 (2003); MINN. STAT. ANN. § 609.02 (West 2016); MINN. STAT. ANN. § 609.895 (1995); MINN. STAT. ANN. § 333.42 (West 1986); MINN. STAT. ANN. 609.02 (2016); MINN. STAT. ANN. 609.895 (1995); MISS. CODE ANN. § 97-21-53 (2012); MISS. CODE ANN. § 97-21-57 (2012); MO. REV. STAT. § 558.002 (2017); MO. REV. STAT. § 570.103 (2017); MONT. CODE ANN. § 30-13-338 (2011); NEB. REV. STAT. § 28-606 (1977); NEB. REV. STAT. § 28-106 (1977); NEV. REV. STAT. ANN. § 205.210 (1999); NEV. REV. STAT. ANN. § 193.130 (1999); N.H. REV. STAT. ANN. § 638:6-b (2010); N.J. STAT. ANN. § 2C:21-32 (West 2000); N.Y. PENAL LAW § 80.00 (McKinney 2014); N.Y. PENAL LAW § 165.73 (McKinney 1995); N.C. GEN. STAT. § 15A-1340.17 (2013); N.C. GEN. STAT. § 80-11.1 (1995); N.C. GEN. STAT. 15A-1340.17 (2013); N.D. CENT. CODE § 51-07-04 (1975); N.D. CENT. CODE § 12.1-32-01.1 (1975); N.D. CENT. CODE § 12.1-32-02 (1973); OHIO REV. CODE ANN. § 2913.34 (West 2011); OHIO REV. CODE ANN. § 2929.18 (West 2015); OKLA. STAT. tit. 21, § 1990.2 (1999); OR. REV. STAT. ANN. § 647.150 (West 1999); OR. REV. STAT. ANN. § 161.625 (West 1971); 18 PA. CONS. STAT. ANN. § 4119 (2010); 11 R.I. GEN. LAWS § 11-17-13 (1997); S.C. CODE ANN. § 39-15-1190 (2006); S.D. CODIFIED LAWS § 22-6-2 (2005); S.D. CODIFIED LAWS § 37-6-2 (1977); TENN. CODE ANN. § 40-35-111 (2007); TENN. CODE ANN. § 39-14-152 (2005); TENN. CODE ANN. § 39-14-105 (1989); TEX. PENAL CODE ANN. § 32.23 (West 2015); TEX. PENAL CODE ANN. § 12.32 (West 2009); VT. STAT. ANN. tit. 9, § 2531 (1971); VA. CODE ANN. § 59.1-92.13 (2011); VA. CODE ANN. § 18.2-10 (2008); WASH. REV. CODE ANN. § 9A.20.021 (West 2015); WASH. REV. CODE ANN. § 9.16.035 (West 1999); WIS. STAT. ANN. § 132.20 (West 2002); WIS. STAT. ANN. § 939.50 (West 2001); WYO. STAT. ANN. § 35-7-1033(a) (West 2009); WYO. STAT. ANN. § 6-3-601 (West 1982); WYO. STAT. ANN. § 6-3-602 (West 1982).

¹²⁹ Table 6(a): ALA. CODE § 13A-9-10 (1977); ALASKA STAT. § 11.46.530 (2016); ARIZ.

and forty-three (84%) have felonies.¹³⁰ While most state statutes (74%, $n = 37$) include both felony and misdemeanor charges,¹³¹ twelve states (24%)

REV. STAT. ANN. § 44-1453 (2015); ARK. CODE ANN. § 5-37-213 (1975); CAL. PENAL CODE § 350 (West 2012); COLO. REV. STAT. § 18-5-110.5 (2001); DEL. CODE ANN. tit. 11, § 926 (2005); FLA. STAT. ANN. § 831.032 (West 2008); GA. CODE ANN., § 10-1-454 (2015); IDAHO CODE ANN. § 18-3615 (West 1972); 765 ILL. COMP. STAT. 1040/2 (2010); 765 ILL. COMP. STAT. 1040/3 (2010); 765 ILL. COMP. STAT. 1040/8 (2010); 765 ILL. COMP. STAT. 1040/4 (1997); 765 ILL. COMP. STAT. 1040/8 (2010); 815 ILL. COMP. STAT. 425/2 (1986); 815 ILL. COMP. STAT. 425/3 (1986); IND. CODE ANN. § 35-43-4-2(a) (2014); IOWA CODE § 714.26 (2013); KAN. STAT. ANN. § 21-5825 (2011); KY. REV. STAT. ANN. § 365.241 (2000); ME. REV. STAT. tit. 17-A, § 705 (2015); MD. CODE ANN., CRIM. LAW § 8-611 (West 2012); MASS. ANN. LAWS. ch. 266, § 147 (1998); MICH. COMP. LAWS § 750.263 (2003); MINN. STAT. ANN. § 333.42 (West 1986); MISS. CODE ANN. § 97-21-53 (2011); MO. REV. STAT. § 570.103 (2014); MONT. CODE ANN. § 30-13-338 (2009); NEB. REV. STAT. § 28-606 (1977); NEV. REV. STAT. ANN. § 205.210 (1999); NEV. REV. STAT. ANN. § 205.195 (1967); NEV. REV. STAT. ANN. § 205.200 (1967); NEV. REV. STAT. ANN. § 205.205 (1967); NEV. REV. STAT. ANN. 205.210 (1999); N.H. REV. STAT. ANN. § 638:6-b (2009); N.Y. PENAL LAW § 165.71 (McKinney 1992); N.C. GEN. STAT. § 80-11.1 (1995); N.D. CENT. CODE § 51-07-04 (1975); OHIO REV. CODE ANN. § 2913.34 (West 2011); OKLA. STAT. tit. 21, § 1990.2 (1999); OR. REV. STAT. ANN. § 647.140 (West 1999); 18 PA. CONS. STAT. ANN. § 4119 (2010); 11 R.I. GEN. LAWS § 11-17-13 (1997); S.C. CODE ANN. § 39-15-1190 (2006); S.D. CODIFIED LAWS § 37-6-2 (1977); S.D. CODIFIED LAWS § 37-6-3 (1977); TENN. CODE ANN. § 39-14-152 (2005); TEX. PENAL CODE ANN. § 32.23 (West 2015); UTAH CODE ANN. § 76-6-518 (West 2010); VT. STAT. ANN. tit. 9, § 2531 (1971); VA. CODE ANN. § 59.1-92.13 (2011); WASH. REV. CODE ANN. § 9.16.035 (West 1999); WYO. STAT. ANN. § 6-3-610 (West 1983).

¹³⁰ Table 6(b): ALA. CODE § 13A-8-10.4 (1984); ALASKA STAT. § 11.46.530 (2016); ARIZ. REV. STAT. ANN. § 44-1453 (2015); ARK. CODE ANN. § 5-37-213 (1975); CAL. PENAL CODE § 350 (West 2012); CONN. GEN. STAT. ANN. § 53-347a (West 2013); DEL. CODE ANN. tit. 11, § 926 (2005); FLA. STAT. ANN. § 831.032 (West 2008); GA. CODE ANN. § 10-1-454 (2015); HAW. REV. STAT. ANN. § 708-875 (West 1997); 410 ILL. COMP. STAT. 620/5 (2012); 765 ILL. COMP. STAT. 1040/8 (2010); IND. CODE § 35-43-5-2(a) (2016); IOWA CODE § 714.26 (2013); KAN. STAT. ANN. § 21-5825 (2011); KY. REV. STAT. ANN. § 365.241 (West 2000); LA. REV. STAT. ANN. § 14:229 (2011); ME. REV. STAT. ANN. tit.17-A, § 703 (2008); MD. CODE ANN., CRIM. LAW § 8-611 (West 2002); MASS. ANN. LAWS. ch. 266, § 147 (LexisNexis 1998); MICH. COMP. LAWS § 750.263 (2003); MINN. STAT. ANN. § 609.895 (West 1999); MISS. CODE ANN. § 97-21-53 (2011); MO. REV. STAT. § 570.103 (2014); NEV. REV. STAT. ANN. § 205.210 (West 1999); N.H. REV. STAT. ANN. § 638:6-b (2010); N.J. STAT. ANN. § 2C:21-32 (West 2000); N.Y. PENAL LAW § 165.72 (McKinney 1995); N.Y. PENAL LAW § 165.73 (McKinney 1995); N.C. GEN. STAT. § 80-11.1 (1995); N.D. CENT. CODE § 12.1-24-01 (2013); OHIO REV. CODE ANN. § 2913.34 (West 2011); OKLA. STAT. tit. 21, § 1990.2 (1999); OR. REV. STAT. ANN. § 647.145 (West 1999); OR. REV. STAT. ANN. § 647.150 (West 1999); 18 PA. CONS. STAT. ANN. § 4119 (2010); 11 R.I. GEN. LAWS § 11-17-13 (1997); S.C. CODE ANN. § 39-15-1190 (2006); TENN. CODE ANN. § 39-14-152 (2005); TEX. PENAL CODE § 32.23 (West 2015); UTAH CODE ANN. § 76-6-518 (West 2010); VA. CODE ANN. § 59.1-92.13 (2011); WASH. REV. CODE ANN. § 9.16.035 (West 1999); WIS. STAT. ANN. § 132.20 (West 2002); WYO. STAT. ANN. § 6-3-601 (West 1982); WYO. STAT. ANN. § 6-3-602 (West 1982).

¹³¹ ALA. CODE § 13A-9-10 (1977); ALA. CODE § 13A-8-10.4 (1984); ALASKA STAT. § 11.46.530 (2016); ARIZ. REV. STAT. ANN. § 44-1453 (2015); ARK. CODE ANN. § 5-37-213 (1975); CAL. PENAL CODE § 350 (West 2012); DEL. CODE ANN. tit. 11, § 926 (2005); FLA.

have one or the other.¹³²

Table 6 shows the variation of minimum and maximum fines. Although most states (92%) do not have minimum fines imposed by the court, there are four exceptions: Colorado, Delaware, Illinois, and Iowa.¹³³

Conversely, each state has a maximum fine. Maximum fines are determined in a variety of ways, but the most common (58%, $n = 29$) is a set dollar amount, typically with a range of values providing judges some discretion over the fine amount imposed.¹³⁴ The majority (58%, $n = 29$) of

STAT. ANN. § 831.032 (West 2008); GA. CODE ANN. § 10-1-454 (2015); 765 ILL. COMP. STAT. 1040/2 (2010); 765 ILL. COMP. STAT. 1040/3 (2010); 765 ILL. COMP. STAT. 1040/4 (1997); 765 ILL. COMP. STAT. 1040/8 (2010); 815 ILL. COMP. STAT. 425/2 (1986); 410 ILL. COMP. STAT. 620/5 (2012); 765 ILL. COMP. STAT. 1040/8 (2010); 815 ILL. COMP. STAT. 425/3 (1986); IND. CODE ANN. § 35-43-4-2(a) (2014); IND. CODE § 35-43-5-2(a) (2016); IOWA CODE 714.26 (2013); KAN. STAT. ANN. § 21-5825 (2011); KY. REV. STAT. ANN. § 365.241 (2000); ME. REV. STAT. ANN. tit. 17-A, § 703 (2007); ME. REV. STAT. ANN. tit. 17-A, § 705 (2015); MD. CODE ANN., CRIM. LAW § 8-611 (2012); MA. GEN. LAWS ch. 266, § 147 (1998); MICH. COMP. LAWS § 750.263 (2003); MINN. STAT. § 333.42 (1986); MINN. STAT. § 609.895 (1999); MISS. CODE ANN. § 97-21-53 (2011); MO. REV. STAT. § 570.103 (2014); NEV. REV. STAT. § 205.195 (1967); NEV. REV. STAT. § 205.200 (1967); NEV. REV. STAT. § 205.205 (1967); NEV. REV. STAT. § 205.210 (1999); N.H. REV. STAT. ANN. § 638:6-b (2010); N.Y. PENAL LAW § 165.71 (1992); N.Y. PENAL LAW § 165.72 (Consol. 1995); N.Y. PENAL LAW § 165.73 (Consol. 1995); N.C. GEN. STAT. § 80-11.1 (1995); N.D. CENT. CODE § 51-07-04 (1975); N.D. CENT. CODE § 12.1-24-01 (2013); OHIO REV. CODE ANN. § 2913.34 (West 2011); OKLA. STAT. tit. 21, § 1990.2 (1999); OR. REV. STAT. § 647.140 (1999); OR. REV. STAT. § 647.145 (1999); OR. REV. STAT. § 647.150 (1999); 18 PA. CONS. STAT. § 4119 (2010); 11 R.I. GEN. LAWS § 17-13 (1997); S.C. CODE ANN. § 39-15-1190 (2006); TENN. CODE ANN. § 39-14-152 (2005); TEX. PENAL CODE ANN. § 32.23 (2015); UTAH CODE ANN. § 76-6-518 (2010); VA. CODE ANN. § 59.1-92.13 (2011); WASH. REV. CODE § 9.16.035 (1999); WYO. STAT. ANN. § 6-3-601 (West 1983); WYO. STAT. ANN. § 6-3-602 (West 1983); WYO. STAT. ANN. § 6-3-610 (West 1983).

¹³² Colorado, Idaho, Montana, Nebraska, South Dakota, and Vermont only consider product counterfeiting crimes to be misdemeanor offenses. COLO. REV. STAT. § 18-5-110.5 (2001); IDAHO CODE § 18-3615 (1972); MONT. CODE ANN. § 30-13-338 (2009); NEB. REV. STAT. § 28-606 (1977); S.D. CODIFIED LAWS § 37-6-2 (1977); S.D. CODIFIED LAWS § 37-6-3 (1977); VT. STAT. ANN. tit. 9, § 2531 (1971). Whereas, Connecticut, Hawaii, Louisiana, New Jersey, and Wisconsin only classify product counterfeiting crimes as felony offenses. CONN. GEN. STAT. ANN. § 53-347a (West 2013); HAW. REV. STAT. § 708-875 (1997); LA. STAT. ANN. § 14:229 (2011); N.J. STAT. ANN. § 2C:21-32 (2000); WIS. STAT. § 132.20 (2002).

¹³³ Table 6(f): COLO. REV. STAT. § 18-5-110.5 (2001); COLO. REV. STAT. § 18-1.3-501 (2015); DEL. CODE ANN. tit. 11, § 926 (2005); 765 ILL. COMP. STAT. 1040/8 (2010); IOWA CODE § 714.16 (2015); IOWA CODE § 902.9 (2014).

¹³⁴ Table 6(g)(2): ALASKA STAT. § 11.46.530 (2016); ALASKA STAT. § 12.55.035 (2015); ARIZ. REV. STAT. ANN. § 44-1453 (2015); ARIZ. REV. STAT. ANN. § 13-801 (1978); CAL. PENAL CODE § 350 (2012); CONN. GEN. STAT. ANN. § 53-347(a) (West 2013); IDAHO CODE § 18-3614 (1972); IDAHO CODE § 18-113 (2005); IND. CODE § 35-43-5-2(a) (2016); IND. CODE § 35-50-2-7 (2013); IOWA CODE § 714.16 (2015); IOWA CODE § 902.9 (2014); LA. STAT. ANN. § 14:229 (2011); MD. CODE ANN., CRIM. LAW § 8-611 (2002); MISS. CODE ANN. § 97-21-53 (2012); MISS. CODE ANN. § 97-21-57 (2012); MO. REV. STAT. § 570.103 (2017); MO. REV. STAT. § 558.002 (2017); MONT. CODE ANN. § 30-13-338 (2011); NEB. REV. STAT. § 28-606

states have maximum fine amounts of less than \$20,000,¹³⁵ while nine (18%) have fines greater than \$100,000.¹³⁶ Seventeen states (34%) use the higher of either a dollar amount or the value of the goods or pecuniary gains (i.e., the amount of money derived by the defendant from the illegal activity).¹³⁷ Only North Carolina gives the judge full discretion over the

(1977); NEB. REV. STAT. § 28-106 (1977); NEV. REV. STAT. § 205.210 (1999); NEV. REV. STAT. § 193.130 (1999); N.H. REV. STAT. ANN. § 638:6-b (2010); N.D. CENT. CODE § 51-07-04 (1975); N.D. CENT. CODE § 12.1-32-01.1 (2013); N.D. CENT. CODE § 12.1-32-02 (2009); OHIO REV. CODE ANN. § 2913.34 (West 2011); OHIO REV. CODE ANN. § 2929.18 (West 2015); OR. REV. STAT. ANN. § 647.150 (1999); OR. REV. STAT. ANN. § 161.625 (1971); 11 R.I. GEN. LAWS § 17-13 (1997); S.C. CODE ANN. § 39-15-1190 (2006); S.D. CODIFIED LAWS § 22-6-2 (2005); S.D. CODIFIED LAWS § 37-6-2 (1977); TENN. CODE ANN. § 40-35-111 (2007); TENN. CODE ANN. § 39-14-105 (1989); TENN. CODE ANN. § 39-14-152 (2005); TEX. PENAL CODE ANN. § 12.32 (2009); TEX. PENAL CODE § 32.23 (2015); UTAH CODE ANN. § 76-3-301 (1995); VT. STAT. ANN. tit. 9, § 2531 (1971); VA. CODE ANN. § 59.1-92.13 (2011); VA. CODE ANN. § 18.2-10 (2008); W. VA. CODE § 47-2-14(a)-(d) (1996); WIS. STAT. § 132.20 (2002); WIS. STAT. § 939.50 (2001); WYO. STAT. ANN. § 35-7-1033(a) (2009).

¹³⁵ Table 6(h)(1): COLO. REV. STAT. § 18-5-110.5 (2001); COLO. REV. STAT. § 18-1.3-501; IDAHO CODE § 18-3614 (1972); IDAHO CODE § 18-113 (2005); ME. REV. STAT. tit. 17-A, § 705 (2015); ME. REV. STAT. tit. 17-A, § 1301 (1991); NEB. REV. STAT. § 28-606 (1977); NEB. REV. STAT. § 28-106 (2016); NEV. REV. STAT. § 205.210 (1999); NEV. REV. STAT. § 193.130 (1999); N.H. REV. STAT. ANN. § 638:6-b (2010); N.Y. PENAL LAW § 165.73 (Consol. 1995); N.Y. PENAL LAW § 80.00 (Consol. 2014); S.D. CODIFIED LAWS § 22-6-2 (2005); S.D. CODIFIED LAWS § 37-6-2 (1977); VA. CODE ANN. 59.1-92.13 (2011); VT. STAT. ANN. tit. 9, § 2531 (1971); VA. CODE ANN. § 18.2-10 (2008); WYO. STAT. ANN. § 35-7-1033(a) (2009).

Table 6(h)(2): ALA. CODE § 13A-8-10.4 (1984); ALA. CODE § 13A-5-11 (2006); ARK. CODE ANN. § 5-37-213 (1975); ARK. CODE ANN § 5-37-201 (2013); FLA. STAT. ANN. § 831.032 (West 2008); FLA. STAT. ANN. § 775.083 (West 2013); HAW. REV. STAT. § 706-640 (1997); HAW. REV. STAT. ANN. § 708-875 (1997); IND. CODE § 35-43-5-2(A) (2016); IND. CODE § 35-50-2-7 (2013); IOWA CODE § 714.16 (2015); IOWA CODE § 902.9 (2014); KY. REV. STAT. ANN. § 365.241 (2000); KY. REV. STAT. ANN. § 532.030 (1994); LA. STAT. ANN. § 14:229 (2011); MD. CODE ANN., CRIM. LAW § 8-611 (2002); MISS. CODE ANN. § 97-21-57 (2012); MO. REV. STAT. § 570.103 (2017); MO. REV. STAT. 558.002 (2017); MONT. CODE ANN. 30-13-338 (2011); OHIO REV. CODE ANN. § 2913.34 (West 2011); OHIO REV. CODE ANN. § 2929.18 (2015); 11 R.I. GEN. LAWS § 17-13 (1997); TEX. PENAL CODE ANN. § 12.32 (2009); TEX. PENAL CODE ANN. § 32.23 (2015); WASH. REV. CODE § 9.16.035 (1999); WASH. REV. CODE § 9a.20.021 (2015); WYO. STAT. ANN § 6-3-601 (1983); WYO. STAT. ANN § 6-3-602 (1983).

¹³⁶ Table 6(h)(5); ARIZ. REV. STAT. ANN. § 44-1453 (2015); ARIZ. REV. STAT. ANN § 13-801 (1978); CAL. PENAL CODE § 350 (2012); CONN. GEN. STAT. ANN. § 53-347(a) (West 2013); GA. CODE ANN. § 10-1-454 (2015); KAN. STAT. ANN. § 21-5825 (2011); KAN. STAT. ANN. § 21-4503(a) (2012); MINN. STAT. § 609.895 (1999); N.J. STAT. ANN. § 2C:21-32 (2000); OR. REV. STAT. ANN. 647.150 (1999); OR. REV. STAT. § 161.625 (1971); WIS. STAT. ANN. § 132.20 (2002); WIS. STAT. ANN. § 939.50 (2001).

¹³⁷ Table 6(g)(3): COLO. REV. STAT. § 18-5-110.5 (2001); COLO. REV. STAT. § 18-1.3-501 (2015); DEL. CODE ANN. tit. 11, § 926 (2005); FLA. STAT. ANN. § 831.032 (West 2008); FLA. STAT. ANN. § 775.083 (West 2010); GA. CODE ANN. § 10-1-454 (2015); 765 ILL. COMP. STAT.

maximum amount of the fine imposed on the offender.¹³⁸

The variation in sentencing practices across states is equally interesting. Only eleven states have mandatory minimum sentences,¹³⁹ while each state has a maximum sentence. Eighteen (36% of) states have maximum sentences of less than five years.¹⁴⁰ Among those, three states impose a maximum sentence of less than one year: Nebraska has maximum sentence lengths of only three months, while Maine and Idaho have six months.¹⁴¹ Meanwhile, other states have much longer maximum sentence

1040/8 (2010); 730 ILL. COMP. STAT. 5/5-4.5-50 (2009); 18 PA. CONS. STAT. § 4119 (2010); WASH. REV. CODE § 9.16.035 (1999); WASH. REV. CODE § 9a.20.021 (2015).

Table 6(g)(4): ALA. CODE § 13A-8-10.4 (1984); ALA. CODE § 13A-5-11 (2006); ARK. CODE ANN. § 5-37-213 (1975); ARK. CODE ANN. § 5-37-201 (1975); HAW. REV. STAT. § 706-640 (1997); HAW. REV. STAT. § 708-875 (1997); KAN. STAT. ANN. § 21-5825 (2011); KAN. STAT. ANN. § 21-4503(a) (2012); KY. REV. STAT. ANN. § 365.241 (2000); KY. REV. STAT. ANN. § 532.030 (1994); ME. STAT. tit. 17-A, § 705 (2015); ME. STAT. tit. 17A, § 1301(1991); MICH. COMP. LAWS § 750.263 (2003); MINN. STAT. § 609.895 (1999); N.Y. PENAL LAW § 165.73 (Consol. 1995); N.Y. PENAL LAW § 80.00 (Consol. 2014).

Table 6(g)(5): LA. STAT. ANN. § 14:229 (2011).

Table 6(g)(6): MASS. GEN. LAWS. ch. 266, § 147 (1998); N.J. STAT. ANN. § 2C:21-32 (1997); OKLA. STAT. tit. 21, § 1990.2 (1999).

¹³⁸ Table 6(g)(1): N.C. GEN. STAT. § 80-11.1 (1995); N.C. GEN. STAT. § 15A-1340.17 (2013).

¹³⁹ Table 6(i): ALA. CODE § 13A-8-10.4 (1984); ALA. CODE § 13A-5-6 (2005); ARIZ. REV. STAT. ANN. § 44-1453 (2015); ARIZ. REV. STAT. ANN. § 13-702 (2008); CAL. PENAL CODE § 350 (2012); COLO. REV. STAT. § 18-5-110.5 (2001); COLO. REV. STAT. § 18-1.3-501; CONN. GEN. STAT. ANN. § 21a-90 (West 2015); CONN. GEN. STAT. ANN. § 53a-35a (2007); 765 ILL. COMP. STAT. 1040/8 (2010); 730 ILL. COMP. STAT. 5/5-4.5-55; IND. CODE § 35-43-5-2(a) (2016); IND. CODE § 35-50-2-7 (2013); KAN. STAT. ANN. § 21-5825 (2011); N.H. REV. STAT. ANN. § 638:6-b (2010); N.H. REV. STAT. ANN. § 625:9 (2009); N.C. GEN. STAT. § 80-11.1 (1995); UTAH CODE ANN. § 76-3-203 (2003); UTAH CODE ANN. § 76-6-518 (2010).

¹⁴⁰ Table 6(j)(1): IDAHO CODE § 18-113 (2005); ME. STAT. tit. 17-A, § 705 (2015); ME. STAT. tit. 17-A, § 1252 (2003); NEB. REV. STAT. § 28-606 (1977); NEB. REV. STAT. § 28-106 (2016); S.D. CODIFIED LAWS § 22-6-2 (2005); S.D. CODIFIED LAWS § 37-6-2 (1977).

Table 6(j)(2): ARIZ. REV. STAT. ANN. § 44-1453 (2015); ARIZ. REV. STAT. ANN. § 13-702 (1978); CAL. PENAL CODE § 350 (2012); COLO. REV. STAT. § 18-5-110.5 (2001); COLO. REV. STAT. § 18-1.3-501 (2015); DEL. CODE ANN. tit. 11, § 926 (2005); DEL. CODE ANN. tit. 11, § 4205 (1989); IND. CODE § 35-43-5-2(a) (2016); IND. CODE § 35-50-2-7 (2013); KAN. STAT. ANN. § 21-5825 (2011); MONT. CODE ANN. § 30-13-338 (2011); NEV. REV. STAT. § 205.210 (1999); NEV. REV. STAT. § 193.130 (1999); N.C. GEN. STAT. § 80-11.1 (1995); N.C. GEN. STAT. § 15A-1340.17 (2013); N.D. CENT. CODE § 51-07-04 (1975); N.D. CENT. CODE § 12.1-32-01(1973); N.Y. PENAL LAW § 70.00 (1965); OHIO REV. CODE ANN. § 2929.14(3)(B) (2015); OKLA. STAT. tit. 21, § 1990.2 (1999); OKLA. STAT. tit. 21, § 9 (1999); S.D. CODIFIED LAWS § 22-6-2 (2005); S.D. CODIFIED LAWS § 37-6-2 (1977); VT. STAT. ANN. tit. 9, § 2531 (1971).

¹⁴¹ Table 6(j)(1): IDAHO CODE § 18-113 (2005); ME. REV. STAT. tit. 17-A, § 705 (2015); ME. REV. STAT. tit. 17-A, § 1252 (2003); NEB. REV. STAT. § 28-606 (1977); NEB. REV. STAT. § 28-106 (2016).

lengths, including four (8% of) states imposing maximum sentences of ten to twenty years,¹⁴² Florida and Tennessee with thirty years,¹⁴³ and Texas with ninety-nine years.¹⁴⁴ However, half of the states have maximum sentences lying somewhere between these two extremes, ranging between five and ten years of incarceration.¹⁴⁵ In addition to fines and/or incarceration, every state with a criminal statute except Alaska, Delaware, and West Virginia has restitution policies requiring offenders to repay money or donate services to the victim personally or society at large.¹⁴⁶

¹⁴² Table 6(j)(4): GA. CODE ANN. § 10-1-454 (2015); 765 ILL. COMP. STAT. 1040/8 (2010); 730 ILL. COMP. STAT. 5/5-4.5-30 (2012); MD. CODE ANN., CRIM. LAW § 8-611 (2002); UTAH CODE ANN. § 76-3-203 (2003); UTAH CODE ANN. § 76-6-518 (2010).

¹⁴³ TENN. CODE ANN. § 40-35-111 (2007); TENN. CODE ANN. § 39-14-105 (1989); TENN. CODE ANN. § 39-14-152 (2005).

¹⁴⁴ FLA. STAT. ANN. § 831.032 (West 2008); FLA. STAT. ANN. § 775.082 (West 2016); TEX. PENAL CODE ANN. § 12.32 (2009); TEX. PENAL CODE ANN. § 32.23 (2015).

¹⁴⁵ Table 6(j)(3): ALA. CODE § 13A-8-10.4 (1984); ALA. CODE § 13A-5-6 (2005); ALASKA STAT. § 11.46.530 (2016); ALASKA STAT. § 12.55.125 (2012); ARK. CODE ANN. § 5-37-213 (1975); ARK. CODE ANN. § 5-37-401 (2003); CONN. GEN. STAT. ANN. § 21a-90 (West 2015); CONN. GEN. STAT. ANN. § 53a-35a (West 2007); HAW. REV. STAT. ANN. § 708-875 (1997); HAW. REV. STAT. § 706-660 (1986); IOWA CODE § 714.16 (2015); IOWA CODE § 902.9 (1978); KY. REV. STAT. ANN. § 365.241 (2000); KY. REV. STAT. ANN. § 532.060 (2011); LA. STAT. ANN. § 14:229 (2011); MASS. GEN. LAWS. ch. 266, § 147 (LexisNexis 1998); MICH. COMP. LAWS § 750.263 (2003); MINN. STAT. § 609.895 (1999); MISS. CODE ANN. § 97-21-53 (2012); MISS. CODE ANN. § 97-21-57 (2012); MO. REV. STAT. § 570.103 (2017); MO. REV. STAT. § 558.011 (2017); N.H. REV. STAT. ANN. § 638:6-b (2010); N.H. REV. STAT. ANN. § 625:9 (2009); N.J. STAT. ANN. § 2C:21-32 (2000); N.J. STAT. ANN. § 2C:43-6 (2013); OHIO REV. CODE ANN. § 2913.34 (West 2011); OHIO REV. CODE ANN. § 2929.14 (3)(b) (West 2015); OR. REV. STAT. § 647.150 (1999); OR. REV. STAT. § 161.605 (1971); 18 PA. CONS. STAT. § 4119 (2010); 18 PA. CONS. STAT. § 106 (1997); 11 R.I. GEN. LAWS § 17-13 (1997); S.C. CODE ANN. § 39-15-1190 (2006); VA. CODE ANN. § 59.1-92.13 (2011); VA. CODE ANN. § 18.2-10 (2008); WASH. REV. CODE § 9.16.035 (1999); WASH. REV. CODE § 9A.20.021 (2015); WIS. STAT. ANN. § 132.20 (2002); WIS. STAT. ANN. § 939.50 (2001); WYO. STAT. ANN. § 6-3-601 (1983); WYO. STAT. ANN. § 6-3-602 (1983).

¹⁴⁶ Table 6(e): ALA. CODE § 15-18-66 (1980); ARIZ. REV. STAT. ANN. § 44-1453 (2015); ARIZ. REV. STAT. ANN. § 13-804 (1978); ARK. CODE ANN. § 5-4-205 (2014); CAL. PENAL CODE § 350 (2012); COLO. REV. STAT. § 18-1.3-603 (2016); CONN. GEN. STAT. ANN. § 21a-90 (West 2015); CONN. GEN. STAT. ANN. § 53a-28 (West 1971); FLA. STAT. ANN. § 831.032 (West 2008); GA. CODE ANN. § 17-14-3 (2010); HAW. REV. STAT. § 706-646 (1972); IDAHO CODE § 19-5304 (2008); 765 ILL. COMP. STAT. 1040/8 (2010); IND. CODE § 35-40-5-7 (1999); IOWA CODE § 915.100 (2003); KAN. STAT. ANN. § 81-215 (1999); KAN. STAT. ANN. § 211-6604 (2015); KY. REV. STAT. ANN. § 365.241 (2000); LA. REV. STAT. ANN. § 46:1844(M) (1985); LA. CODE CRIM. PROC. ANN. art. 883.2 (2000); Me. Rev. Stat. Ann. tit. 17A, § 1325 (2016); MD. CODE ANN., CRIM. LAW § 11-603 (2001); MASS. GEN. LAWS ch. 258B, § 3(o) (2012); MICH. COMP. LAWS § 780.766 (2013); MINN. STAT. § 333.28 (1959); MINN. STAT. § 333.29 (1998); MISS. CODE ANN. § 99-37-3 (2013); MO. REV. STAT. § 559.105(1) (2013); MO. REV. STAT. § 595.020 (1981); MONT. CODE ANN. § 30-13-338 (2011); NEB. REV. STAT. § 29-2280 (1992); NEV. REV. STAT. § 176.033 (1995); N.H. REV. STAT. ANN. § 638:6-b (2010); N.J. STAT. ANN. § 2C:44-2 (1991); N.Y. PENAL LAW § 60.27 (Consol. 2013); N.C.

Table 6. Criminal Penalties and Charges

Fines and Sentences		No. of States
a.	States with misdemeanor charge	44 (88%)
b.	States with felony charge	43 (84%)
c.	States with fines	49 (98%)
d.	States with incarceration	49 (98%)
e.	States with restitution	46 (92%)
f.	States with minimum fine	4 (8%)
g.	States with maximum fine	49 (98%)
1.	Courts' discretion	1 (2%)
2.	Dollar amount only	29 (58%)
3.	Dollar amount or multiple value of good	7 (14%)
4.	Dollar amount or multiple value of pecuniary gain	9 (18%)
5.	Dollar amount or multiple value of good or pecuniary gain	1 (2%)
6.	Function of values (i.e., 2x or 3x value of goods)	3 (6%)
h.	Dollar amount of maximum fine	44 (88%)
1.	\$500 to \$9,999	10 (20%)
2.	\$10,000 to \$19,999	19 (38%)
3.	\$20,000 to \$49,999	2 (4%)
4.	\$50,000 to \$99,999	4 (8%)
5.	\$100,000 or more	9 (18%)
i.	States with minimum sentence	11 (22%)
j.	States with maximum sentence	49 (98%)
1.	Less than 1 year	3 (6%)
2.	1 year to under 5 years	14 (28%)
3.	5 years to 10 years	25 (50%)
4.	10 years + 1 day to 20 years	4 (8%)
5.	20 years + 1 day to 99 years	3 (6%)

GEN. STAT. § 15A-1340.34 (1998); N.D. CENT. CODE § 51-07-04 (1975); N.D. CENT. CODE § 12.1-32-02 (2009); OHIO REV. CODE ANN. § 2913.34 (West 2011); OHIO REV. CODE ANN. § 2929.18 (West 2015); OKLA. STAT. tit. 21, § 1990.2 (1999); OR. REV. STAT. § 137.106 (2016); 18 PA. CONS. STAT. § 1106 (2004); 12 R.I. GEN. LAWS § 28-5.1 (2013); S.C. CODE ANN. § 17-25-322 (1996); S.D. CODIFIED LAWS § 23A-28-1(1997); S.D. CODIFIED LAWS § 22-6-2 (2005); TENN. CODE ANN. § 39-11-118 (1996); TEX. PENAL CODE ANN. § 42.037 (2017); UTAH CODE ANN. § 77-38a-302 (2016); VT. STAT. ANN. tit. 9, § 2531 (1971); VA. CODE ANN. § 19.2-305.1 (2015); WASH. REV. CODE ANN. 9.94A.750 (2003); WASH. REV. CODE ANN. 9A.20.030 (1982); WIS. STAT. ANN. § 973.20 (2015); WYO. STAT. ANN. § 7-9-102 (1991).

Overall, we found wider variation in criminal statutes compared to civil statutes. All states have criminal statutes with potential fines and incarceration along with maximum damages/penalties, but other policy characteristics vary widely. In the next part, we expand on this examination of state civil and criminal statutes by creating indices measuring their relative protectiveness and punitiveness across states.

II. COMPARING CIVIL AND CRIMINAL STATE STATUTES

To further analyze differences across states and compare the relative strength of civil and criminal anti-counterfeiting statutes, we created two indices: one for civil remedies and another for criminal sanctions. We then compared these indices across states.

A. CIVIL REMEDIES INDEX

The civil remedies index accounts for both protective and restrictive factors in determining the strength of existing civil anti-counterfeiting statutes. The following protective factors are included in the civil remedies index: civil injunction, awarding damages, destruction of counterfeit articles, seizure of counterfeits, seizure of instrumentalities, inclusion of costs and legal fees in damages, minimum damages, and penalty enhancements of maximum damages. We coded the presence of a protective factor as 1, or 0 otherwise. The following restrictive factors are included in the civil remedies index: requirement of state trademark registration, maximum damages, and intent to deceive or defraud for awarding damages; thus, we coded the absence of a restrictive factor as 1, or 0 otherwise. These scores were totaled for each state and divided by the total number of factors to obtain individual state scores in the civil remedies index with higher scores suggest greater strength of the anti-counterfeiting statutes. The index ranged from 0.36 to 0.55 with a mean of 0.50 (*s.d.* = 0.07). Most states ($n = 32$, 64%) had the highest score (0.55), eight (16%) had the second lowest score (0.36), and the remaining ten (20%) had a score in between the highest and lowest scores (0.45).

B. CRIMINAL SANCTIONS INDEX

Like the civil remedies index, the criminal sanctions index accounts for both protective and restrictive factors in determining the strength of existing criminal anti-counterfeiting statutes. The following factors are included in the criminal sanctions index: forfeiture and/or destruction of counterfeit goods, penalties for the number and/or value of items, increased penalties for prior offense, enhancements for manufacturing counterfeits, availability of misdemeanor and/or felony charges, incarceration and

restitution as possible penalties, and minimum fine and minimum sentence. The presence of a protective factor was coded as 1, or 0 otherwise. The following restrictive factors are included in the criminal sanctions index: the requirement of trademark registration for prima facie evidence and intent to deceive or defraud, along with a maximum fine of less than \$20,000 and a maximum sentence of less than five years incarceration. Absence of a restrictive factor was coded as 1, or 0 otherwise. These scores were totaled for each state and divided by the total number of factors to obtain the individual state scores in the criminal sanctions index. The index ranged from 0.00 to 0.94 with a mean of 0.59 (*s.d.* = 0.19). Illinois was the highest scoring state (0.94) and Massachusetts, Minnesota, Iowa, and California the second highest (0.82). Meanwhile, the lowest scoring states (aside from New Mexico, which does not have a dedicated criminal trademark counterfeit statutes) were South Dakota, Nebraska, and Idaho (0.24).

C. CIVIL REMEDIES VERSUS CRIMINAL SANCTIONS INDICES

Several notable findings come to light when comparing states across the civil remedies and criminal sanctions indices.¹⁴⁷ The first is that while average civil and criminal index scores are roughly similar (at 0.50 and 0.59, respectively), there is much greater variation in scores in the criminal rather than civil index. The standard deviation for criminal statutes is nearly three times that of civil statutes, indicating a much wider variation in terms of the criminalization of product counterfeiting at the state level.¹⁴⁸

A second finding is that states high on one index are not necessarily high on the other. Interestingly, these two indices are not highly correlated ($r = 0.11$), further suggesting variation between civil and criminal anti-counterfeiting protections across states. Table 7 lists the states in each of four categories: (1) low civil, low criminal; (2) low civil, high criminal; (3) high civil, low criminal; and (4) high civil, high criminal. A threshold level of 0.50 was used to determine whether each state was high or low on each index, where states with scores less than or equal to 0.50 are low and states greater than 0.50 are high. Table 8 lists the average index scores for states

¹⁴⁷ Some of the indicators used to create these indices may be considered more important than others, and therefore a valid argument could be made that these indicators should be given greater weight. However, we constructed basic indices based on common items found in civil and criminal statutes using equal weights for each measure as a starting point for determining statute strength and comparing across states. Future research could explore how the indices change by assigning indicators different weights.

¹⁴⁸ This is at least partially due to the greater number of indicators used to create the criminal index (fifteen) as opposed to the civil index (eleven).

falling into each of these four categories.

Table 7. Civil vs. Criminal Index Quadrants

Civil ↑	High	AR CT ID NM TX UT WI WV WY	AK AZ CA FL GA HI IA IL IN KS KY MA MN MO MS MT NJ NY OR PA SC TN WA
	Low	CO LA ME ND NE SD VT	AL DE MD MI NC NH NV OH OK RI VA
		Low	High
		Criminal →	

While just under half of the states are high on both the civil and criminal indices,¹⁴⁹ indicating a strong commitment to the protection of intellectual property rights, nine (18% of) states are high in civil and low in criminal: Arkansas, Connecticut, Idaho, New Mexico, Texas, Utah, Wisconsin, West Virginia, and Wyoming.¹⁵⁰ For these states, civil remedies are provided but criminal sanctions are comparatively lacking. This indicates that while civil remedies are provided for those whose intellectual property was stolen, criminal law has not yet caught up to sufficiently address product counterfeiting as a crime. An additional eleven (22% of) states have low civil and high criminal scores: Alabama, Delaware, Maryland, Michigan, North Carolina, New Hampshire, Nevada, Ohio, Oklahoma, Rhode Island, and Virginia.¹⁵¹ Interestingly, these states do not have strong civil protections from intellectual property theft, but much stronger criminal ones, suggesting that while they have enacted the means to address product counterfeiting through official government legal action,

¹⁴⁹ See *supra* Table 8.

¹⁵⁰ See *supra* Table 8.

¹⁵¹ See *supra* Table 8.

redress for individual victims to pursue their own remedies is more limited. Finally, seven (14% of) states are low in both civil and criminal protections: Colorado, Louisiana, Maine, North Dakota, Nebraska, South Dakota, and Vermont.¹⁵² These state statutes do not have strong indicators of providing sufficient civil or criminal protections against counterfeiting.

Table 8. Average Civil and Criminal Quadrant Index Scores

Index Quadrant	<i>N</i>	Civil	Criminal
Low Civil, Low Criminal	7	0.42 (0.05)	0.34 (0.09)
Low Civil, High Criminal	11	0.41 (0.05)	0.67 (0.08)
High Civil, Low Criminal	9	0.55 (0.00)	0.36 (0.15)
High Civil, High Criminal	23	0.55 (0.00)	0.70 (0.11)

Mean index scores (standard deviation in parentheses).

DISCUSSION AND CONCLUSION

In this article, we focused on the federal and state statutes pertaining to the counterfeiting of intellectual property, specifically trademarks on physical goods. We illuminated the different types of intellectual property violations, distinguishing product counterfeits as a crucial area of focus from both practical and scholarly perspectives. We first reviewed the development of relevant federal legislation before examining state statutes more in-depth. Federal legislation has changed extensively over time, gradually increasing both the scope of legal protection and punitiveness of penalties for product counterfeiting crimes and violations.¹⁵³ We found state legal provisions to be more sporadic, with different variants of civil and criminal protections and remedies for addressing intellectual property violations pertaining to trademarks.

Our review of the history of federal legislation uncovered substantial changes in how the federal government has regulated against product counterfeiting crimes. Federal legislation began with limited civil provisions protecting trademarks, gradually expanding over the course of the previous 150 years to eventually incorporate criminal penalties.¹⁵⁴ As lawmakers, enforcement officials, and brand owners recognized existing legal frameworks were limited in scope and used ineffectively in anti-counterfeiting efforts, new legislation has enhanced the tools for enforcing

¹⁵² See *supra* Table 8.

¹⁵³ See *supra* Introduction Subpart B; notes 23–89 and accompanying text.

¹⁵⁴ See *supra* Introduction Subpart B; notes 23–89 and accompanying text.

trademark protections.¹⁵⁵ Additional protections were added with new pieces of legislation as intellectual property theft became more complex.¹⁵⁶ While these efforts have been crucial to the fight against anti-counterfeiting, further enhancements to federal statutes will be necessary in the future as the nature of product counterfeiting crimes continues to evolve.

In addition to federal legislation, state laws are also important to gain a fuller understanding of the existing legal protections for intellectual property. Many of these state statutes mirror federal laws in terms of their scope and scale of restrictive and protective factors against product counterfeiting, although states vary widely on many of these characteristics. Our analysis of the relevant state anti-counterfeiting policies revealed more consistent civil remedies than criminal sanctions. All states have civil provisions, including injunctions and damages. Most also require the registration of trademark and the seizure and destruction of counterfeit goods, although not the destruction of instrumentalities, or the means of creating the counterfeits. Differences in civil statutes tend to revolve around specific elements of how damages are awarded to plaintiffs.

While all states have civil remedies, all but one state (New Mexico) has some type of criminal sanction for violating anti-counterfeiting law.¹⁵⁷

¹⁵⁵ See *supra* Introduction Subpart B; notes 23–89 and accompanying text.

¹⁵⁶ See *supra* Introduction Subpart B; notes 23–89 and accompanying text.

¹⁵⁷ Table 4(a)(1): ARIZ. REV. STAT. ANN. § 44-1453 (1998); CAL. PENAL CODE § 350 (West 1872); COLO. REV. STAT. § 18-5-110.5 (2001); CONN. GEN. STAT. ANN. § 53-347a (West 1963); DEL. CODE ANN. tit. 11, § 926 (2005); GA. CODE ANN. § 10-1-454 (1996); HAW. REV. STAT. ANN. § 708-875 (West 1997); IDAHO CODE ANN. § 18-3614 (West 1972); IDAHO CODE ANN. § 18-3615 (West 1972); 410 ILL. COMP. STAT. § 620/3.16 (1985); 765 ILL. COMP. STAT. § 1040/4 (1955); 815 ILL. COMP. STAT. § 425/2 (1986); 815 ILL. COMP. STAT. § 425/3 (1986); IOWA CODE § 714.26 (2004); KAN. STAT. ANN. § 21-5825 (2011); KY. REV. STAT. ANN. § 365.241 (West 2000); LA. STAT. ANN. § 14:229 (1984); MD. CODE ANN., CRIM. LAW § 8-611 (LexisNexis 2002); MASS. ANN. LAWS ch. 266, § 147 (LexisNexis 1998); MICH. COMP. LAWS § 750.263 (1931); MINN. STAT. ANN. § 333.42 (West 1986); MINN. STAT. ANN. § 609.895 (West 1999); MISS. CODE ANN. § 97-21-53 (West 2011); MISS. CODE ANN. § 97-21-55 (West 2011); MISS. CODE ANN. § 97-21-57 (West 2012); MO. REV. STAT. § 570.103 (1998); MONT. CODE ANN. § 30-13-338 (2009); NEV. REV. STAT. ANN. § 205.205 (West 1911); NEV. REV. STAT. ANN. § 205.210 (West 1911); N.H. REV. STAT. ANN. § 638:6-b (2009); N.J. STAT. ANN. § 2C:21-32 (West 1997); N.Y. PENAL LAW § 165.71-74 (LexisNexis 1992); N.Y. ARTS & CULT. AFF. LAW § 33.07 (LexisNexis 1983); N.Y. ARTS & CULT. AFF. LAW § 33.09 (LexisNexis 1983); N.C. GEN. STAT. § 80-11.1 (1967); N.D. CENT. CODE § 51-07-04 (1975); OHIO REV. CODE ANN. § 2913.34 (West 1996); OKLA. STAT. tit. 21, § 1990.2 (1999); OR. REV. STAT. ANN. § 647.140 (West 1999); OR. REV. STAT. ANN. § 647.145 (West 1999); OR. REV. STAT. ANN. § 647.150 (West 1999); 18 PA. CONS. STAT. ANN. § 4119 (West 1996); R.I. GEN. LAWS § 11-17-13 (1997); S.C. CODE ANN. § 39-15-1190 (1994); S.D. CODIFIED LAWS § 37-6-2 (1939); S.D. CODIFIED LAWS § 37-6-3 (1939); TENN. CODE ANN. § 39-14-152 (2000); TEX. PENAL CODE ANN. § 32.23 (West 1997); VT. STAT. ANN. tit. 9, § 2530 (1957); VA. CODE ANN. § 59.1-92.13 (1998); WASH. REV. CODE ANN.

However, we found much greater variation in the specific punitive elements of those criminal statutes. While almost every state with a criminal statute provides for fines, incarceration, and restitution as potential punishments, states differ widely in terms of forfeiture and destruction of counterfeits and penalty increases for the number and value of counterfeit items, manufacturing, prior offenses, intent to deceive or defraud, registration requirements, and minimum and maximum fines and sentences.

Our creation and evaluation of indices using various protections and restrictions revealed several important findings. First, greater uniformity exists with civil remedies, as the civil statutes generally offer more consistent anti-counterfeiting protections across the states than the criminal statutes. Nonetheless, nearly half of the states with strong civil protections concurrently offer strong criminal sanctions. Twenty additional states have either stronger civil or criminal statutes. States are less likely to have either weak civil and criminal protections or strong criminal and weak civil protections. This result is not particularly surprising, as civil law traditionally addressed product counterfeiting to a greater extent than criminal law; thus, greater uniformity in state civil laws exists because it has had a longer time to develop. The deviations in criminal statutes are important to examine further and address from a policy standpoint to decrease uncertainty in legal provisions across states. Given the serious violation of intellectual property rights resulting from the manufacture and sales of counterfeit products, the most effective legal approach for states to combat this problem is to have both strong civil and criminal protections.

Given the relative underdevelopment of examination into this unique area of law that is growing in interest, this inquiry is helpful for brand owners, law enforcement, legislators, and scholars to frame the historical and contemporary legal status of product counterfeiting. These findings are

§ 9.16.020 (West 2011); WASH. REV. CODE ANN. § 9.16.030 (West 1999); WASH. REV. CODE ANN. § 9.16.035 (West 1999); W. VA. CODE § 47-2-14a-d (1996); WIS. STAT. ANN. § 132.02 (West 1985); WYO. STAT. ANN. § 6-3-610 (1982).

Table 4(a)(2): FLA. STAT. ANN. § 831.032 (West 2008); GA. CODE ANN. § 10-1-454 (1996); IDAHO CODE ANN. § 18-3614 (West 1972); IDAHO CODE ANN. § 18-3615 (West 1972); IND. CODE § 35-43-5-2(d) (1976).

Table 4(a)(3): ALA. CODE § 13A-9-10 (1977); ALASKA STAT. § 11.46.530 (1978); ARK. CODE ANN. § 5-37-213 (1975); COLO. REV. STAT. § 18-5-110 (1987); HAW. REV. STAT. ANN. § 708-855 (West 1972); KY. REV. STAT. ANN. § 516.110 (West 1975); ME. REV. STAT. tit. 17-A, § 705 (1976); NEB. REV. STAT. § 28-606 (1977); OHIO REV. CODE ANN. § 2913.32 (West 1972); OR. REV. STAT. ANN. § 165.037 (West 1971); 18 PA. CONS. STAT. ANN. § 4102 (West 1972); TENN. CODE ANN. § 39-14-115 (1989); TEX. PENAL CODE ANN. § 32.22 (West 1974); UTAH CODE ANN. § 76-6-518 (LexisNexis 1973).

Table 4(a)(4): ALA. CODE § 13A-8-10.4 (1983); IND. CODE § 35-43-4-1(a) (1976); IND. CODE ANN. § 35-43-4-2(a) (1976).

helpful for the business community to better understand the legal protections afforded to them in different states. By knowing the differences in civil and criminal provisions in two different states, businesses can better assess where they can expect to receive the greatest protections, thereby influencing decisions on where to locate and conduct their operations. Efforts to lobby legislatures for greater civil and criminal protections from product counterfeiting could also be enhanced. Comparative research, such as this study, can help law enforcement understand the strengths and limitations of statutes in their state and others, potentially enhancing collaborative opportunities while giving them further basis to push legislatures for enhancing tools for anti-counterfeiting enforcement. Additionally, states could find it helpful in benchmarking themselves against others to better assess their attractiveness to businesses and to create protective environments for business to thrive without the fear of lack of redress for theft of their intellectual property. Finally, this study is useful for scholars as it illustrates variations in intellectual property protections across states and lays the foundation for exploring how different factors affect, or are affected by these variations, thus enhancing theory and policy development.

Considering the importance of the findings of this study, several interesting areas of additional research emerge. One area is the differences in enforcement of these statutes. One of the limitations of this research is that we examined only the existence of state statutes, but not how these statutes are applied. It is important to recognize the differences in *de jure* and *de facto* law. While this work has not yet been conducted at the state level, we do have some information on criminal intellectual property enforcement at the federal level. For instance, while investigations of intellectual property violations have increased in recent years, corresponding prosecution rates have remained steady.¹⁵⁸ However, this is only a preliminary review of the numbers provided by the Department of Justice and more in-depth examinations of the enforcement of civil and criminal statutes pertaining to product counterfeiting are warranted. Examining the relationship between changes in criminal statutes and enforcement patterns will also be a fruitful endeavor.

Finally, it will be interesting to further examine how state statutes change over time and what has influenced these changes. This study was limited to the examination of the existence or absence of attributes of civil

¹⁵⁸ See U.S. DEP'T OF JUSTICE, FY 2012 PERFORMANCE AND ACCOUNTABILITY REPORT (2012). In fiscal years 2011 and 2012, investigations increased to 330 and 314, respectively, compared to 243 investigations in fiscal year 2009. However, prosecutions were roughly the same, with 150 in fiscal year 2009 and 152 in fiscal year 2012. *Id.*

and criminal statutes at one point in time, but intellectual property statutes change as legislatures modify them to better address the relevant issues. A follow-up replication of the current study in several years will determine how intellectual property law shifts over time and provide a more in-depth understanding of legal change. These dynamics could be linked with other external influences, such as legislative makeup, political environment, economic activity, industry lobbying, and federal legislative changes to see the effects of these factors on state legislation. These future studies will provide a more complete picture of the impact of state legislation on businesses, law enforcement, and society at large.

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