

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** HB 1133

Unauthorized Copies of Recordings

**SPONSOR(S):** Domino

**TIED BILLS:**

**IDEN./SIM. BILLS:** SB 1692

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| <b>REFERENCE</b>   | <b>ACTION</b>    | <b>ANALYST</b>    | <b>STAFF DIRECTOR</b> |
|--|------------------|-------------------|-----------------------|
| 1) <u>Committee on Homeland Security &amp; Public Safety</u> | <u>11 Y, 0 N</u> | <u>Cunningham</u> | <u>Kramer</u>         |
| 2) <u>Safety &amp; Security Council</u>                      | <u></u>          | <u></u>           | <u></u>               |
| 3) <u></u>   | <u></u>          | <u></u>           | <u></u>               |
| 4) <u></u>   | <u></u>          | <u></u>           | <u></u>               |
| 5) <u></u>   | <u></u>          | <u></u>           | <u></u>               |

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**SUMMARY ANALYSIS**

Currently, s. 540.11(3)(a), F.S., in part, makes it unlawful to:

- Knowingly, for commercial advantage or private financial gain, sell any phonograph record, disk, wire, tape, film, or other article on which sounds are recorded, unless the outside cover, box, or jacket clearly and conspicuously discloses the actual name and address of the manufacturer thereof, and the name of the actual performer or group.
- Sell any article with the knowledge, or with reasonable grounds to know, that the sounds thereon have been transferred without the consent of the owner.
- Sell any article embodying any performance recorded without the consent of the performer.

The penalties for violating the above provisions range from 1<sup>st</sup> degree misdemeanors to 3<sup>rd</sup> degree felonies, depending on the circumstances of the offense.

HB 1133 requires persons who violate s. 540.11(3)(a), F.S., to make restitution to the owner of lawful producer of a master recording, master disc, master tape, master videotape, master film, or other device or article from which sounds or visual images were derived who suffered injury resulting from the violation or to the trade association representing such owner or lawful producer. The bill also specifies that the order of restitution shall be based on the aggregate wholesale value of lawfully manufactured and authorized recorded devices corresponding to the nonconforming recorded devices involved in the offense and must include investigative costs relating to the offense.

This bill does not appear to have a fiscal impact.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Promote Personal Responsibility – This bill requires persons who violate s. 540.11(3)(a), F.S., to make restitution to the owner of lawful producer of a master recording, master disc, master tape, master videotape, master film, or other device or article from which sounds or visual images were derived who suffered injury resulting from the violation or to the trade association representing such owner or lawful producer.

#### B. EFFECT OF PROPOSED CHANGES:

##### Restitution

A judge is required to order a defendant to make restitution to a victim for damage or loss caused directly or indirectly by the defendant's offense and damage or loss related to the defendant's criminal episode unless the judge finds clear and compelling reasons not to order such restitution.<sup>1</sup> The purpose of restitution is two-fold: (1) it acts to compensate the victim; and (2) serves the rehabilitative, deterrent, and retributive goals of the criminal justice system.<sup>2</sup> Thus, the prime concerns underlying restitution are to give the perpetrator of a crime an opportunity to make amends, and to make the victim whole again, to the extent it is possible to do so.<sup>3</sup>

##### Unauthorized Articles

Section 540.11, F.S., defines the term "article" as, "the tangible medium upon which sounds or images are recorded or any original phonograph record, disk, tape, audio or video cassette, wire, film, or other medium now known or later developed on which sounds or images are or can be recorded or otherwise stored, or any copy or reproduction which duplicates, in whole or in part, the original."

Currently, s. 540.11(3)(a), F.S., makes it unlawful to:

1. Sell or offer for sale or resale, advertise, cause the sale or resale of, rent, transport or cause to be rented or transported, or possess for any of these purposes any article with the knowledge, or with reasonable grounds to know, that the sounds thereon have been transferred without the consent of the owner<sup>4</sup>.
2. Sell or offer for sale or resale, advertise, cause the sale or resale of, rent, transport or cause to be rented or transported, or possess for any of these purposes any article embodying any performance, whether live before an audience or transmitted by wire or through the air by radio or television, recorded without the consent of the performer.
3. Knowingly, for commercial advantage or private financial gain, sell or resell, offer for sale or resale, advertise, cause the sale or resale of, rent, transport or cause to be rented or transported, or possess for such purposes, any phonograph record, disk, wire, tape, film, or other article on which sounds are recorded, unless the outside cover, box, or jacket clearly and conspicuously discloses the actual name and address of the manufacturer thereof, and the name of the actual performer or group.

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<sup>1</sup> s. 775.089, F.S.

<sup>2</sup> 15A Fla. Jur 2d Criminal Law § 2619 (citing *Glaubius v. State*, 688 So. 2d 913, [Fla. 1997]).

<sup>3</sup> 15A Fla. Jur 2d Criminal Law § 2619 (citing *L.O. v. State*, 718 So. 2d 155, [Fla. 1998]).

<sup>4</sup> Section 540.11, F.S., defines the term "owner" as, "the person who owns the original sounds embodied in the master phonograph record, master disk, master tape, master film, or other device used for reproducing sounds on phonograph records, disks, tapes, films, or other articles upon which sound is recorded, and from which the transferred recorded sounds are directly or indirectly derived, or the person who owns the rights to record or authorize the recording of a live performance."

A person who otherwise violates the above provisions commits a 1<sup>st</sup> degree misdemeanor<sup>5</sup>, punishable as provided in s. 775.082, by a fine of up to \$25,000, or both. However, the following enhanced penalties apply in the following circumstances:

- If the offense involves at least 1,000 unauthorized articles embodying sound or at least 65 unauthorized audiovisual articles during any 180-day period, the offense is a 3<sup>rd</sup> degree felony<sup>6</sup>, punishable as provided in s. 775.082, by a fine of up to \$250,000, or both.
- If the offense involves more than 100 but less than 1,000 unauthorized articles embodying sound or more than 7 but less than 65 unauthorized audiovisual articles during any 180-day period, the offense is a 3<sup>rd</sup> degree felony, punishable as provided in s. 775.082, by a fine of up to \$150,000, or both.
- If the offense is a second or subsequent conviction of either of the above, the offense is a 3<sup>rd</sup> degree felony, punishable as provided in s. 775.082, by a fine of up to \$250,000, or both.

*Effect of the Bill*

HB 1133 requires persons who violate s. 540.11(3)(a), F.S., to make restitution to the owner or lawful producer of a master recording, master disc, master tape, master videotape, master film, or other device or article from which sounds or visual images were derived who suffered injury resulting from the violation or to the trade association representing such owner or lawful producer. The bill also specifies that the order of restitution shall be based on the aggregate wholesale value of lawfully manufactured and authorized recorded devices corresponding to the nonconforming recorded devices involved in the offense and must include investigative costs relating to the offense.

C. SECTION DIRECTORY:

**Section 1.** Amends s. 540.11, F.S., relating to unauthorized copying of phonograph records, disk, wire, tape, film, or other article on which sounds are recorded.

**Section 2.** This bill takes effect July 1, 2008.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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<sup>5</sup> A first degree misdemeanor is punishable by a term of imprisonment not exceeding 1 year. *See* s. 775.082, F.S.

<sup>6</sup> A third degree felony is punishable by up to five years imprisonment. *See* s. 775.082, F.S.

There will be a fiscal impact on persons and entities who violate s. 540.11(1)(a), F.S., and are ordered to pay restitution.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill uses the following terms without providing definitions: "lawful producer," "device," "authorized recorded devices," and "nonconforming recorded devices."

D. STATEMENT OF THE SPONSOR

No statement submitted.

### IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On March 19, 2008, the Homeland Security & Public Safety Committee adopted a strike-all amendment and an amendment to the strike-all amendment and reported the bill favorably as amended. The strike-all amendment makes technical changes conforming terminology and clarifying language relating to restitution. The amendment to the strike-all amendment adds a provision exempting communication service providers, commercial mobile service providers, and providers of information services from the criminal penalties contained within s. 540.11, F.S.