

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Commerce and Tourism Committee

BILL: SB 432

INTRODUCER: Senator Flores and others

SUBJECT: Unauthorized Copying of Recordings

DATE: January 6, 2012

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Juliachs	Hrdlicka	CM	Favorable
2.	_____	_____	CJ	_____
3.	_____	_____	BC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

SB 432 amends Florida statutes relating to the unauthorized copying of sound recordings, s. 540.11, F.S., and restitution, s. 775.089, F.S.

Specifically, the bill amends s. 540.11, F.S., by providing the remedy of restitution to any owner or lawful producer of a master recording or to their respective trade association for the violation of s. 540.11(3)(a)(3), F.S., otherwise known as Florida's "truth in labeling-law."

As such, s. 775.098, F.S., Florida's restitution statute, is amended to include a trade association under the definition of victim.

This bill amends ss. 540.11 and 775.089, F.S.

II. Present Situation:

Unauthorized Copying of Sound Recordings

The Copyright Clause found in Article 1, Section 8, Clause 8 of the United States Constitution authorizes Congress “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹ Until 1976, the power to regulate copyright was shared concurrently by both the federal and state government. Congress, however, enacted the Copyright Act of 1976, which expressly preempted the rights and remedies available under state copyright law with respect to sound recordings fixed² *after* February 15, 1972.³

In an effort to curtail music piracy, states continue to regulate the unauthorized copying of recordings in primarily two ways. First, states control copyright infringement through the use of “unauthorized duplication” statutes. Under the federal copyright law, states can only regulate the unauthorized duplication of any fixed sound recording created prior to February 15, 1972. Accordingly, the application of such state statutes is limited to sound recordings fixed prior to the federally mandated cut-off date.

Second, states have also enacted “truth in labeling” laws or “true name and address” statutes. “In states that have enacted these laws, it is illegal to manufacture, sell, distribute, or possess a variety of items and commodities, with intent to sell, re-sell, distribute, or rent, that do not bear the name and address of the manufacturer.”⁴ With these statutes, application is much broader, seeing that they regulate *all* sound recordings. Federal preemption is not at issue because the objective of these statutes is to protect the consumer and public at large as opposed to protecting the rights of artists and recording companies, who are protected exclusively under federal copyright law.

Section 540.11, F.S., regulates the unauthorized copying of sound recordings in this state. Specifically, s. 540.11(3)(a)(1), F.S., refers to Florida’s “unauthorized duplication” statute regarding the unlawful sale, advertisement, rent, or transportation of a fixed sound recording. Section 540.11(3)(a)(3), F.S., is Florida’s “true name and address statute” and provides as follows:

It is unlawful . . . [k]nowingly, for commercial advantage or private financial gain to 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

¹ U.S. CONST. art. I, s. 8, cl.8.

² 17 U.S.C. s. 101 (2006) (“A work is “fixed” in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is “fixed” for purposes of this title if a fixation of the work is being made simultaneously with its transmission.”).

³ 17 U.S.C. s. 301 (2006)

⁴ David Goldstone, PROSECUTING INTELLECTUAL PROPERTY CRIMES, 123 (2001).

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.⁵

Restitution

Section 775.089, F.S., deals with restitution. Florida courts have repeatedly provided that “the purpose of restitution is twofold: (1) to compensate the victim and (2) to serve the rehabilitative, deterrent, and retributive goals of the criminal justice system.”⁶ The objective is to make the victim whole;⁷ thus, restitution must be ordered absent a finding by the court of “clear and compelling reasons not to order restitution.”⁸ As stipulated by the Florida Supreme Court, “restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused.”⁹

Presently, under the restitution statute, a victim is defined as follows:

[A] person who suffers property damage or loss . . . as a result of the defendant’s offense or criminal episode, and also includes the victim’s estate if the victim is deceased, and the victim’s next of kin if the victim is deceased as a result of the offense. . .¹⁰

In short, those entitled to restitution are the victim or, if deceased, the victim’s estate and next of kin.

III. Effect of Proposed Changes:

Section 1 requires those who violate s. 540.11(3)(a)(3), F.S., to make restitution to any owner or lawful producer of a master recording¹¹ that has suffered injury resulting from the offense, or to the authorized trade association representing that owner or lawful producer. Restitution will be based on the aggregate wholesale value of lawfully manufactured and authorized recordings corresponding to the number of nonconforming recordings involved in the offense unless a greater value can be proven. The order of restitution must also include investigative costs.

⁵ Section 540.11(3)(a)(3), F.S. (2011)

⁶ *Kirby v. State*, 863 So. 2d 238, 243 (Fla. 2003); *State v. Castro*, 965 So. 2d 216, 218 (Fla. 3d DCA 2007); *L.H. v. State*, 803 So. 2d 862, 863-864 (Fla. 4th DCA 2002); *Kolie v. State*, 902 So. 2d 822, 827 (Fla. 5th DCA 2005).

⁷ *Santana v. State*, 795 So. 2d 1112, 1113 (Fla. 5th DCA 2001).

⁸ Section 775.089(1)(a), F.S. (2011)

⁹ *Kirby*, 863 So. 2d at 243.

¹⁰ Section 775.089 (1)(c), F.S. (2011)

¹¹ Section 540.11(1), F.S., defines the term “master recording” as “the original fixation of sounds upon an article from which copies can be made.”

Section 2 amends the definition of the term “victim” in s. 775.089, F.S., to include a victim’s trade association if the offense is in violation of s. 540.11(3)(a)(3), F.S., and the victim has granted the trade association written authorization to represent the victim’s interests in criminal legal proceedings and to collect restitution on the victim’s behalf.

Section 3 provides that this act shall take effect October 1, 2012.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

There will be a fiscal impact on any persons or entities that violate s. 540.11(3)(a)(3), F.S., and are ordered to pay restitution.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

The bill uses the terms “lawful producer” and “trade association” without providing definitions. Given that this bill relates to the music industry, “lawful producer” may have a particularly confusing interpretation because “producer” is a music industry-specific term.

VII. Related Issues:

None.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
