

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 Criminal Justice Committee

BILL: SB 432

INTRODUCER: Senator Flores and others

SUBJECT: Unauthorized Copying of Recordings

DATE: January 11, 2012 REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|------------|----------------|-----------|--------------------|
| 1. | Juliachs | Hrdlicka | CM | Favorable |
| 2. | Clodfelter | Cannon | CJ | Pre-meeting |
| 3. | _____ | _____ | BC | _____ |
| 4. | _____ | _____ | _____ | _____ |
| 5. | _____ | _____ | _____ | _____ |
| 6. | _____ | _____ | _____ | _____ |

I. Summary:

Senate Bill 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., to require a sentencing court to order restitution to any owner or lawful producer of a master recording who is the victim of a violation of the truth in labeling law set forth in s. 540.11(3)(a)3., F.S. It also provides that restitution can be made to a trade association representing the owner or lawful producer.

Section 775.089, F.S., Florida’s restitution statute, is amended to include a trade association within the definition of “victim” for a violation of s. 540.11(3)(a)3., F.S., if authorized by the owner or lawful producer.

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

II. Present Situation:

Unauthorized Copying of Sound Recordings

The Copyright Clause 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,

¹ U.S. CONST. art. I, s. 8, cl.8.

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 because 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, and s. 540.11(3)(a)3., F.S., is a “true name and address statute” that provides the following:

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 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

Whether violation of the statute is a first degree misdemeanor or a third degree felony, and the maximum fine that can be adjudged, depends on the number of unauthorized articles involved in the offense.

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,

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).

⁵ Section 540.11(3)(a)3., F.S. (2011)

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 stated 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 who 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.

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.

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); *Koile 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, quoting *People v. Bernal*, 101 Cal.App.4th 155, 123 Cal.Rptr.2d 622 (2002).

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.”

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.