

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 271 Consumer Protection
SPONSOR(S): Business & Professions Subcommittee; Nuñez
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 604

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Business & Professions Subcommittee	12 Y, 0 N, As CS	Butler	Luczynski
2) Civil Justice Subcommittee	12 Y, 0 N	Malcolm	Bond
3) Regulatory Affairs Committee			

SUMMARY ANALYSIS

The bill creates the "True Origin of Digital Goods Act," which requires owners and operators of websites that electronically disseminate commercial recordings and audiovisual works to provide their name, address, and telephone number or e-mail address on the website. An owner or licensee of a commercial recording or audiovisual work may bring a cause of action for declaratory and injunctive relief against an owner or operator of a website that has failed to disclose the required information. Prior to filing a claim, the aggrieved party must provide the website owner or operator notice and an opportunity to cure 14 days before filing the claim. If a claim leads to the filing of a lawsuit, the prevailing party is entitled to recover expenses and attorney fees.

The bill does not appear to have a fiscal impact on local or state government.

The bill has an effective date of July 1, 2015.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Copyright Law

A “copyright” is defined as a form of protection provided to the authors of original works, including published and unpublished literary, dramatic, musical, artistic, and other intellectual works.¹ A copyright exists from the moment the work is fixed in a permanent or stable form, such as a recording or copy.² The copyright immediately becomes the author’s property without further action by the author.³ However, to pursue and protect his or her rights under copyright law, the author must register his or her copyright with the copyright office.⁴

Article I, s. 8, cl. 8, of the United States Constitution grants Congress the power to create and regulate copyright law.⁵ Federal law expressly preempts all state copyright law for music recordings copyrighted on or after February 15, 1972.⁶ As a result, Florida copyright law is limited to recordings fixed prior to February 15, 1972.⁷

Congress passed the Digital Millennium Copyright Act (DMCA) to extend copyright protections to sound recordings commercially broadcasted on the internet.⁸ To prevent a chilling effect on internet speech, the DMCA also generally protects internet service providers (ISPs) from civil liability for publishing infringing material on the sites they host.⁹

Enforcement of Copyright Laws

Enforcement of one’s copyright against an anonymous copyright infringer on the internet can be difficult. Websites that sell counterfeit goods are far less likely to have a U.S. phone or address listed than an authorized website that sells legitimate goods.¹⁰ Because ISPs generally fall under the DMCA’s safe harbor, owners of infringed copyright material must locate the actual infringing actor in order to enforce their copyrights. The DMCA provides a procedure by which a copyright owner can obtain the name and contact information of a copyright infringer by request to the ISP. Additionally, upon a copyright owner’s request, an ISP must take down the identified infringing material in order to remain under the DMCA’s safe harbor and must also provide notice of the complaint to the copyright infringer.¹¹ Some ISPs have successfully refused to disclose the identity of the copyright infringer.¹²

¹ *Circular 1: Copyright Basics*, United States Copyright Office (2012), 1, available at <http://www.copyright.gov/circs/circ01.pdf> (last accessed March 9, 2015).

² *Id.*

³ “No publication or registration or other action in the Copyright Office is required to secure a copyright.” *Id.*

⁴ 17 U.S.C. § 411.

⁵ “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.” Art. I, § 8, cl. 8, U.S. Const.

⁶ 17 U.S.C. §301(a)

⁷ Section 540.11(2)(a), F.S.

⁸ 17 U.S.C. §512.

⁹ *Id.*

¹⁰ Jeremy Wilson and Roy Fenokff, *Distinguishing Counterfeit from Authorized Retailers in the Virtual Marketplace*, 39 *International Criminal Justice Review*, 24(1), 2014.

¹¹ 17 U.S.C. §512(d)(3).

¹² See Mikel Boeve, *Will Internet Service Providers Be Forced to Turn in Their Copyright Infringing Customers? The Power of the Digital Millennium Copyright Act’s Subpoena Provision After In Re Charter Communications*, 29 *Hamline L. Rev.* 115, 118-19 (2006).

State Copyright Law

In 2004, California passed the “True Name and Address” act, which makes the knowing electronic dissemination of a commercial recording or audiovisual work to more than 10 people without the disclosure of the disseminator’s e-mail address a misdemeanor.¹³

Tennessee followed suit in July 2014, with the passage of their True Origin of Goods Act.¹⁴ This law requires the owner or operator of a website dealing in electronic dissemination of commercial recordings or audiovisual works to clearly post his or her true and correct name, physical address, and telephone number. If the website’s owner fails to disclose his or her address, he or she may be enjoined to enforce compliance and fined for failure to do so.¹⁵ Tennessee requires these actions to be initiated and sustained by the Tennessee Attorney General’s Office.¹⁶

Effect of the Bill

The bill creates s. 501.155, F.S., the “True Origin of Digital Goods Act,” to require owners or operators of websites¹⁷ that disseminate commercial recordings or audiovisual works to Florida consumers to clearly post on the website and make readily accessible to a consumer using or visiting the website the following information:

- The true and correct name of the operator or owner;
- The operator or owner’s physical address; and
- The operator or owner’s telephone number or e-mail address.

“Commercial recordings or audiovisual works” are defined broadly in the bill to include a recording or audiovisual work whose owner, assignee, authorized agent, or licensee has disseminated or intends to disseminate such work for sale, rental, or performance or exhibition to the public, regardless of whether the person seeks commercial advantage or private financial gain from the dissemination. The definition excludes “an excerpt consisting of less than substantially all of a recording or audiovisual work” as well as video games, video game streaming, or depictions of video game.

The bill provides a right to injunctive relief for owners, assignees, authorized agents, or licensees of a commercial recording or audio visual work whose work appears on a website that is in violation of the bill. Prior to initiating the civil action provided for in the bill, the aggrieved party must make reasonable efforts to put the violating website on notice that they may be in violation of this section and that failure to cure the violation within 14 days may result in civil action. The prevailing party in a civil action may also obtain necessary expenses and reasonable attorney’s fees. These remedies are available as a supplement to other state and federal criminal and civil law provisions.

B. SECTION DIRECTORY:

Section 1 creates s. 501.155, F.S., related to the electronic dissemination of commercial recordings or audiovisual works; required disclosures; and injunctive relief.

Section 2 provides an effective date.

¹³ Cal. Penal Code §653aa.

¹⁴ Tenn. Code Ann. §47-18-5601 – 47-18-5606 (2014).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ The bill specifically exempts providers of interactive computer services, communication services, commercial mobile services, information services that provide transmission, storage, or caching of electronic communications or other related telecommunications service, and commercial mobile radio services.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

For a court to exercise jurisdiction over a corporation or individual, the court must have both personal jurisdiction and subject matter jurisdiction. State courts have general jurisdiction, therefore a claim made under a state statute meets the subject matter jurisdiction requirement. Personal jurisdiction requirements ensure that a defendant has sufficient notice and due process required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution before his or her rights are subjected to the Court.¹⁸ Specifically, due process requires that a defendant have minimum contacts with the state in which the court sits.¹⁹ A non-resident defendant may have sufficient contacts with Florida if he or she commits acts expressly enumerated in Florida's long-arm statute.²⁰ Alternately, the non-resident defendant may be subject to a Florida court's personal jurisdiction because he or she has minimum contacts with the state that are otherwise unrelated to the matter that brings him or her into court "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"²¹

¹⁸ *Walden v. Fiore*, 134 S. Ct. 1115, 1121, (2014).

¹⁹ *Id.*

²⁰ *Caiazzo v. American Royal Arts Corp.*, 73 So. 3d 245, 250 (Fla. 4th DCA 2011); s. 48.193, F.S.

²¹ *Walden*, 134 S. Ct. at 1121; *Caiazzo*, 73 So. 3d at 250.

A defendant's minimum contacts sufficient to create specific jurisdiction must be contacts that the defendant him or herself has created with the state itself and not with persons who reside there.²² "Due process requires that a defendant be haled into court in a forum state based on his own affiliation with the state, not based on the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the state."²³ Examples of sufficient minimum contacts include frequent business travel to the state, owning a company with a Florida office branch, or subjecting him or herself to the court's jurisdiction by being present in the Florida court.²⁴ Additionally, intentional conduct by an out-of-state tortfeasor that creates contacts with the forum state may be sufficient for a court to exercise jurisdiction over the defendant.²⁵ However, a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction.²⁶

Whether a non-resident website owner or operator that electronically disseminates commercial recordings or audiovisual works into Florida has sufficient minimum contacts with the state is a fact-specific question that would likely need to be addressed on a case-by-case basis by a court.²⁷

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The phrase "less than substantially all" is not defined. It is unclear when a "commercial recording or audiovisual work" is no longer "substantially all" of the work, or at what point an excerpt would no longer be considered a "commercial recording or audiovisual work" under the bill.

As noted above, it is unclear if Florida could assert jurisdiction over foreign websites should an aggrieved party attempt to enforce the disclosure requirements of this bill against a website owner or operator located outside of Florida. Proponents do not expect websites owners or operators located outside of Florida to respond to lawsuits or submit willingly to jurisdiction in Florida courts. As such, proponents expect for any proceedings against owners or operators of websites located outside of Florida to end in default judgments and the issuance of an injunction. The injunction may be used to prove to the host ISP that the website violated state law, and therefore is in violation of the ISP's terms of service agreement.²⁸ The ISP generally revokes its contract with the website based on such violation and shuts down the website. Proponents argue that bad actors are unlikely to disclose the required information, and thus, the bill will allow owners of copyrighted works to indirectly protect their intellectual property.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 3, 2015, the Business & Professions Subcommittee considered and adopted three amendments. These amendments:

- Define "website";
- Provide that the person with a cause of action against a website is the owner, assignee, authorized agent, or licensee of a "work" that was electronically disseminated by the website that failed to meet the disclosure requirements of this bill; and,
- Require that a person knowingly violate the disclosure requirements of this bill, and prior to filing a cause of action created by this bill, the aggrieved party must make reasonable efforts to place the owner or operator on notice of the violation and provide an opportunity to cure.

²² *Walden*, 134 S. Ct. at 1121.

²³ *Id.* at 1123.

²⁴ *Caiazza*, 73 So. 3d at 250.

²⁵ *Walden*, 134 S. Ct. at 1123.

²⁶ *Id.*

²⁷ See *Caiazza*, 73 So. 3d 245; *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

²⁸ ISPs' Terms of Service Agreements frequently forbid the user website from engaging in illegal activity.

The staff analysis is drafted to reflect the committee substitute.