

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 189 Unauthorized Copying of Recordings
SPONSOR(S): Justice Appropriations Subcommittee; Young and others
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 432

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	13 Y, 0 N	Smith	Cunningham
2) Justice Appropriations Subcommittee	14 Y, 0 N, As CS	Toms	Jones Darity
3) Judiciary Committee		Smith	Havlicak

SUMMARY ANALYSIS

Section 540.11, F.S., contains a variety of provisions making it unlawful, based on specified circumstances and subject to certain exceptions, to make and sell unauthorized copies of another person's creative work. This practice is often referred to as "piracy."

Subparagraph (3)(a)3. of the statute provides that it is unlawful for a person to:

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.

The penalty for violating the above provision ranges from a 1st degree misdemeanor to a 3rd degree felony, depending on the circumstances of the offense.

The bill requires those who are convicted of violating s. 540.11(3)(a)3., F.S., to make restitution to any owner or lawful producer of a master recording that has suffered injury resulting from the offense, or to the authorized trade association representing that owner or lawful producer. The bill specifies that the order of restitution must 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.

The bill provides that any entity that provides the transmission, routing, or connections for online communications who does not knowingly contribute to the unlawful act of a user of such online communications shall be exempt from section 540.11, F.S.

The bill also amends s. 775.089, F.S., relating to restitution, to include a victim's trade association in the definition of the term "victim."

The bill does not appear to have a fiscal impact.

The bill is effective October 1, 2012.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Unauthorized Copying of Recordings

Section 540.11, F.S., contains a variety of provisions making it unlawful, based on specified circumstances and subject to certain exceptions, to make and sell unauthorized copies of another person's creative work. This practice is often referred to as "piracy."

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A person who violates the above provisions commits a 1st degree misdemeanor, punishable as provided in s. 775.082, F.S.,¹ by a fine of up to \$25,000, or both.² 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 3rd degree felony, punishable as provided in s. 775.082, F.S.,³ 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 3rd degree felony, punishable as provided in s. 775.082, F.S., 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 3rd degree felony, punishable as provided in s. 775.082, F.S., by a fine of up to \$250,000, or both.⁴

The criminal provisions of s. 540.11, F.S., do not apply to:

- Any broadcaster who, in connection with, or as part of, a radio, television, or cable broadcast transmission, or for the purpose of archival preservation, transfers any such sounds recorded on a sound recording.
- Any person who transfers such sounds in the home for personal use and without compensation for such transfer.
- Any not-for-profit educational institution or any federal or state governmental entity, if certain conditions exist.⁵

Restitution

Section 775.089, F.S., requires a judge 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. Restitution must be ordered unless the judge finds clear and compelling reasons not to do so.⁶ The purpose of restitution is two-fold: (1) it acts to compensate the victim; and

¹ A first degree misdemeanor is punishable by a term of imprisonment not exceeding 1 year. *See* section 775.082, F.S.

² Section 540.11(3)(b), F.S.

³ A third degree felony is punishable by up to five years imprisonment. *See* section 775.082, F.S.

⁴ Section 540.11(3)(b)1., F.S.

⁵ Section 540.11(6), F.S.

⁶ Section 775.089, F.S.

(2) serves the rehabilitative, deterrent, and retributive goals of the criminal justice system.⁷ 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.⁸

Currently, s. 775.089(1)(c), F.S., defines “victim” as “each person who suffers property damage or loss, monetary expense, or physical injury or death as a direct or indirect 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.”

Effect of the Bill

The bill requires those who are convicted of violating s. 540.11(3)(a)3., to make restitution to any owner or lawful producer of a master recording⁹ that has suffered injury resulting from the offense, or to the authorized trade association representing that owner or lawful producer.

The bill requires the order of restitution to 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.

The bill also amends the definition of the term “victim” in s. 775.089, F.S., to include a victim’s trade association if the offense is a 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.

The bill provides that any provider of online or network access or other entity that provides the transmission, routing, or connections for online communications, by virtue of being used by another person to transport any article unless the entity knowingly and willfully aids in the violation of the law or is substantially engaged in the unlawful reproduction, is exempt from violating section 540.11, F.S. Such providers would not be responsible for users that knowingly and willfully transfer, distribute, or manufacture any sound recordings or image without consent of the owner or performer.

B. 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. Amends s. 775.089, F.S., relating to restitution.

Section 3. Provides that the act shall take effect October 1, 2012.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

⁷ 15B Fla. Jur 2d Criminal Law s. 2886 (citing *Kirby v. State*, 863 So.2d 238 (Fla. 2003)).

⁸ *Id.* (citing *L.O. v. State*, 718 So.2d 155 (Fla. 1998)).

⁹ 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. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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. Victims could potentially recover losses through the receipt of restitution.

D. FISCAL COMMENTS:

The bill does not appear to have a fiscal impact.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

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

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On November 16, 2011, the Justice Appropriations Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Clarifies that a person who is convicted of violating subparagraph 3(a) is required to make restitution to the lawful owner/producer of the recording that has suffered injury from the crime committed.
- Provides that any entity that provides the transmission, routing, or connections for online communications who does not knowingly contribute to the unlawful act of a user of such online communications shall be exempt from section 540.11, F.S.

This analysis is drafted to the committee substitute as passed by the Justice Appropriations Subcommittee.