

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** PCS for HB 1551 Department of the Lottery  
**SPONSOR(S):** Environment & Natural Resources Council  
**TIED BILLS:** **IDEN./SIM. BILLS:**

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Environment & Natural Resources Council	_____	Valenstein	Hamby
1) _____	_____	_____	_____
2) _____	_____	_____	_____
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

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**SUMMARY ANALYSIS**

The Department of Lottery (DOL) was delegated authority by the Legislature to hold copyrights, trademarks, and service marks and to enforce its rights thereto when it was created in 1987. This bill amends s. 24.105(10), F.S., granting the DOL the authority to obtain patents as well. The bill requires the DOL to notify the Department of State in writing whenever it secures a patent, just as it must when it secures a copyright or trademark.

The Lottery could receive license fees from any private entity wishing to commercialize the Lottery's patented idea(s).

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. HOUSE PRINCIPLES ANALYSIS:

**Provide Limited Government:** This bill expands the powers of the Department of Lottery.

### B. EFFECT OF PROPOSED CHANGES:

#### **Current Situation:**

Section 8, Art. I of the U.S. Constitution provides that Congress has the power 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.

The Federal Copyright Act of 1976<sup>1</sup> protects

. . . original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

To be subject to copyright, a work must be original, an independent creation of the author, and “fixed in any tangible medium,” such as the written word, sound recordings, and visual images. Copyright protection is available only for an *expression* of an idea and not for the idea itself.<sup>2</sup>

The United States Patent and Trademark Office<sup>3</sup> define trademarks and service marks as follows:

- A trademark is a word, phrase, symbol or design, or a combination of words, phrases, symbols or designs, that identifies and distinguishes the source of the goods of one party from those of others.
- A service mark is the same as a trademark, except that it identifies and distinguishes the source of a service rather than a product. Throughout this booklet, the terms “trademark” and “mark” refer to both trademarks and service marks.

The United State Patent and Trademark Office describes a patent as follows:

A patent for an invention is the grant of a property right to the inventor, issued by the Patent and Trademark Office. The term of a new patent is 20 years from the date on which the application for the patent was filed in the United States or, in special cases, from the date an earlier related application was filed, subject to the payment of maintenance fees. US patent grants are effective only within the US, US territories, and US possessions.

The right conferred by the patent grant is, in the language of the statute and of the grant itself, “the right to exclude others from making, using, offering for sale, or selling” the invention in the United States or “importing” the invention into the United States. What is granted is not the right to make, use, offer for sale, sell or import, but the right to exclude others from making, using, offering for sale, selling or importing the invention.<sup>4</sup>

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<sup>1</sup> 17 U.S.C. 2. 102(a).

<sup>2</sup> *Circular 1, Copyright Protection*, U.S. Copyright Office

<sup>3</sup> [http://www.uspto.gov/web/offices/tac/doc/basic/trade\\_defin.htm](http://www.uspto.gov/web/offices/tac/doc/basic/trade_defin.htm) (last visited March 10, 2007)

<sup>4</sup> <http://www.uspto.gov/web/offices/pac/doc/general/whatis.htm>

Works created by an officer or employee of the U.S. government as a part of his or her duties are in the public domain and may not be copyrighted.<sup>5</sup> Federal law, however, does not prohibit copyright of works produced by other governmental entities.<sup>6</sup> As a result, state and local governments may copyright their works, depending upon the law of the jurisdiction.<sup>7</sup> Some states have permitted agencies to copyright agency-created software (some examples include California,<sup>8</sup> Alaska,<sup>9</sup> Minnesota,<sup>10</sup> Oregon,<sup>11</sup> and North Dakota,<sup>12</sup> among others). As state governments do not come under the federal prohibition,<sup>13</sup> Florida law determines whether an agency may obtain a copyright.<sup>14</sup>

An agency may not copyright or obtain a trademark or patent for its works without a statutory delegation of authority to do so.<sup>15</sup> In Florida, a state agency is created by statute. As such, it has only those rights and privileges given to it by the Legislature:<sup>16</sup>

An agency has only such power as expressly or by necessary implication is granted by legislative enactment. An agency may not increase its own jurisdiction and, as a creature of statute, has no common law jurisdiction or inherent power such as might reside in, for example, a court of general jurisdiction. When acting outside the scope of its delegated authority, an agency acts illegally and is subject to the jurisdiction of the courts when necessary to prevent encroachment on the rights of individuals.<sup>17</sup>

The Legislature has not provided general statutory authority to all agencies to copyright or patent their work products.<sup>18</sup> The Legislature, however, has delegated the authority to obtain copyrights or patents to specific agencies. For example,

The Department of State is authorized to do and perform any and all things necessary to secure letters patent, copyright and trademark on any invention or otherwise, and to enforce the rights of the state therein; to license, lease, assign, or otherwise give written consent to any person, firm or corporation for the manufacture or use thereof, on a royalty basis, or for such other consideration as said department shall deem proper; to take any and all action necessary, including legal actions, to protect the same against improper or unlawful use or infringement, and to enforce the collection of any sums due the state . . . .<sup>19</sup>

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<sup>5</sup> 17 U.S.C. s. 5.

<sup>6</sup> See *Bldg. Officials & Code Adm'rs v. Code Tech. Inc.*, 628 F.2d 730, 735-36 (1<sup>st</sup> Cir. 1980); and see, *County of Suffolk, N.Y. v. First Am. Real Estate Solutions*, 261 F.3d 179, 188 (2<sup>nd</sup> Cir. 2001).

<sup>7</sup> The U.S. Copyright Office states in *The Compendium of Copyright Office Practices* that legislative enactments, judicial opinions and administrative rulings, whether federal or state, are ineligible for federal copyright protection for public policy reasons.

<sup>8</sup> See, s. 6254.9 *Cal. Gov. Code*, in which agency-produced software is defined not to be a public record and which is permitted to be copyrighted.

<sup>9</sup> Sec. 44.99.400, *Alaska Statutes*.

<sup>10</sup> Sec. 13.03, *Minnesota Statutes*.

<sup>11</sup> Sec. 291.042, *Oregon Revised Statutes*.

<sup>12</sup> Sec. 44-04-18.5, *North Dakota Statutes*.

<sup>13</sup> *Ibid.* See also, *Bldg. Officials & Code Adm'rs v. Code Tech. Inc.*, 628 F.2d 730, 735-36 (1<sup>st</sup> Cir. 1980); and see, *County of Suffolk, N.Y. v. First Am. Real Estate Solutions*, 261 F.3d 179, 188 (2<sup>nd</sup> Cir. 2001).

<sup>14</sup> *Microdecisions, Inc.*, *supra* at 874.

<sup>15</sup> AGO 2000-13.

<sup>16</sup> *Seaside Properties, Inc., v. State Road Department*, 190 So.2d 391 (3rd DCA 1966).

<sup>17</sup> *Lee v. Division of Florida Land Sales and Condominiums*, 474 So.2d 282 (5th DCA 1985).

<sup>18</sup> See, *Microdecisions, Inc. v. Skinner*, 889 So.2d 871 at 875 (2<sup>nd</sup> DCA 2005), noting that no statute authorizes a county property appraiser to hold a copyright. See also, AGO 2003-42, noting no statute generally authorizes counties or county agencies to secure copyrights. See also, AGO 2000-13 holding that "a state agency is not authorized to secure or hold a trademark in the absence of specific statutory authority to do so."

<sup>19</sup> Section 286.031, F.S., originally enacted by s. 2, ch. 21959 (1943).

In addition, the Legislature has delegated statutory authority to the Department of Transportation,<sup>20</sup> the Department of Citrus,<sup>21</sup> water management districts,<sup>22</sup> and the Florida Institute of Phosphate Research<sup>23</sup> to obtain copyrights, patents, and trademarks.<sup>24</sup>

In some instances, the Legislature has *required* an agency to obtain a copyright. For example, the Department of State (DOS) is required to obtain a copyright for the Florida Administrative Code.<sup>25</sup>

Section 286.021, F.S., establishes legal title to patents, trademarks, and copyrights obtained by the state or any of its boards, commissions, or agencies in the DOS. Consent of the DOS is required for use.<sup>26</sup> There are, however, numerous statutory exceptions to this general rule that establish legal title in other agencies.<sup>27</sup>

On February 22, 2000, the Attorney General issued an advisory legal opinion to the DOS advising that in order for the DOS to apply for and enforce a patent on behalf of another agency, that other agency had to have independent statutory authority to hold and enforce patents.<sup>28</sup>

Although the DOL was delegated authority by the Legislature to hold copyrights, trademarks, and service marks, it has not been granted the right to hold patents.

### Effect of Proposed Changes

Although the DOL was delegated authority by the Legislature to hold copyrights, trademarks, and service marks and to enforce its rights thereto when it was created in 1987, it has not been granted the right to hold patents.. This bill grants the DOL the authority to obtain patents, as well. The bill requires the DOL to notify the DOS in writing whenever it secures a patent, just as it must when it secures a copyright or trademark.

#### C. SECTION DIRECTORY:

Section 1. Amends subsection (10) of s. 24.105, F.S., to provide the DOL with authority to hold patents; and directs the DOL to notify the Department of State when securing a patent.

Section 2. Provides an effective date of July 1, 2007.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: The DOL states that its ability to hold patents would create a new source of revenue for the Educational Enhancement Trust Fund, by introducing new lottery games and gaming systems. The DOL may also charge a licensing fee for other gaming organizations to use the patented product, resulting in increased revenue.

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<sup>20</sup> Section 334.049, F.S.

<sup>21</sup> Section 601.101, F.S.

<sup>22</sup> Section 373.608, F.S.

<sup>23</sup> Section 378.101, F.S.

<sup>24</sup> This list is not a comprehensive list of all delegations of statutory authority to obtain copyrights, patents, or trademarks.

<sup>25</sup> Section 120.55(1)(a) 1., F.S.

<sup>26</sup> Originally enacted by s. 1, ch. 21959 (1943). See AGO 2000-13 noting that “[n]othing in these sections (referring also to s. 286.031, F.S.) would authorize the Department of State to apply for trademarks on behalf of an agency that could not demonstrate *independent statutory authority* for securing a trademark [*emphasis added*].”

<sup>27</sup> See, for example, s. 331.355, F.S., vesting ownership in Space Florida and s. 334.049, F.S., vesting ownership in the Department of Transportation.

<sup>28</sup> See Fla. AGO 2000-13 (2003).

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Currently, the DOL is unable to patent lottery games or lottery systems. Under the bill, if a private company wished to copy a patented DOL lottery game or lottery system it may be restricted by patent law, more so than the DOL's current ability to restrict the copying of games by copyright and trade secret laws. Such a restriction could limit private industry's ability to take advantage of popular state lottery games or lottery systems.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because the bill does not: require counties or municipalities to spend funds or to take an action requiring the expenditure of funds; reduce the percentage of a state tax shared with counties or municipalities; or reduce the authority that counties and municipalities have to raise revenue.

2. Other:

Public Records/Open Meetings Issues:

The DOL is created in s. 20.317, F.S., and meets the definition of "agency" in s. 119.011(2), F.S., for public records requirements. Section 24, Art. I of the State Constitution provides a substantive right for any person to inspect or copy a public record. "Public record" is defined to mean

. . . all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

The Legislature has not provided general patent or copyright authority for work products of agencies. The DOL's current authority to obtain copyrights and trademarks existed prior to the enactment of the Sunshine Amendment, s. 24, Art. I of the State Constitution, and is therefore grandfathered into law. The same is true for the DOL's authority to keep private certain trade secrets under s. 24.105, F.S.

Trademarks, copyrights, and patents all provide some restriction on the copying and dissemination of protected material, which when done by a state agency may run afoul of state public records laws and s. 24, Art. I of the State Constitution, unless an exemption is provided.

Since the adoption of s. 24, Art. I of the State Constitution, the legislature must follow strict procedures when creating a public records exemption. These requirements may be necessary for patenting a lottery game or lottery system because the patent would restrict the access and use of certain material. For example, although in 2001 the legislature provided agencies with the authority to copyright data processing software, which is included in the definition of a public record.<sup>29</sup> The law enacting this authority contained a statement of public necessity, necessary for a public records exemption, in support of the authority delegated.<sup>30</sup> The Second District Court of Appeal noted that

. . . Florida's Constitution and its statutes do not permit public records to be copyrighted unless the legislature specifically states they can be.<sup>31</sup>

Further, the court stated

To be sure, the legislature may exempt specific public records from the public records law *[citations omitted]*. The Sunshine Amendment permits the legislature, by two-thirds vote, to enact exemptions for public records, but only after specifically defining a public necessity and narrowly tailoring the exemption to that necessity *[citations omitted]*. Accordingly, the legislature has allowed restrictions on the unlimited access to some public records by enacting specific statutes authorizing certain agencies to obtain copyrights in particular circumstances *[citations omitted]*. . . .*A law permitting copyright protection of public records creates a public records exemption as contemplated in the Sunshine Amendment [emphasis added]. . . .*<sup>32</sup>

In summary, although the Second District Court of Appeal addressed copyrights held by agencies, the courts do not appear to have addressed whether a patent held by an agency would require both specific authority to hold a patent and a public records exception. Currently, the DOL has public records exemptions for copyrights and trade secrets, but does not have a public records exemption specifically for patents.

**B. RULE-MAKING AUTHORITY:**

The bill does not provide any rule-making authority.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**D. STATEMENT OF THE SPONSOR**

N/A

**IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES**

N/A

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<sup>29</sup> Section 119.084, F.S.

<sup>30</sup> Ch. 2001-251, L.O.F.

<sup>31</sup> See, *Microdecisions, Inc., supra*, at 876.

<sup>32</sup> *Ibid* at 875.