

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 Committee on Commerce and Tourism

BILL: CS/SB 604

INTRODUCER: Commerce and Tourism Committee and Senator Flores

SUBJECT: Consumer Protection

DATE: March 3, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harmsen	McKay	CM	Fav/CS
2.			JU	
3.			AP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 604 creates the True Origin of Digital Goods Act, which creates an injunctive remedy for parties aggrieved by a website’s failure to clearly post its owner’s or operator’s identifying information. In order to be subject to this disclosure requirement, a website must knowingly electronically disseminate commercial recordings or audiovisual works to Florida consumers. The owner, assignee, authorized agent, or licensee of a commercial recording or audio visual work that is electronically disseminated by a violating website may enjoin the violating website to require compliance with the bill, and recover necessary expenses and reasonable attorney’s fees.

II. Present Situation:

Copyright Law

The United States Copyright Office defines “copyright”¹ as a form of protection provided to the authors of original works, including both published and unpublished literary, dramatic, musical, artistic, and certain other intellectual works.² A copyright exists from the moment the work is

¹ Copyright protection for an original work of authorship does not extend to an “idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described[...].” Moreover, an “original work” must possess a minimal degree of creativity. 18 Am. Jur. 2d *Copyright and Literary Property* § 21 (2015).

² *Circular 1: Copyright Basics*, available at <http://www.copyright.gov/circs/circ01.pdf>.

fixed in a permanent or stable form, such as a recording or copy.³ The copyright immediately becomes the author's property without further action by the author.⁴ However, to pursue and protect her rights under copyright law, the author must register her copyright with the copyright office.⁵

Article I, s. 8, cl. 8, of the United States Constitution grants Congress the power to create and regulate copyright law.⁶ However, no unified federal copyright law was created until the passage of 17 U.S.C. §301, which expressly preempted all state copyright law for music recordings copyrighted on or after February 15, 1972.^{7,8} As a result, Florida copyright law is limited to recordings fixed prior to February 15, 1972.⁹

To adapt to new questions related to copyrighted material and the internet, Congress passed the Digital Millennium Copyright Act ("DMCA"), which extended copyright protections to sound recordings commercially broadcasted on the internet.¹⁰ 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.¹¹ In order to qualify for this safe harbor, an ISP may not:¹²

- Receive a financial benefit directly attributable to the infringing material;
- Be aware of the presence of infringing material, or of any "red flags" that indicate infringing material; or
- Fail to "act expeditiously" to remove or disable infringing material after notice of the existence of infringing material on its websites.

Enforcement of Copyright Laws

Enforcement of one's copyrights 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.¹³ Because ISPs generally fall under the DMCA's safe harbor, owners of infringed copyright material must seek out the actual infringing actor in order to enforce their copyrights. Under the DMCA, a copyright owner may

³ *Id.*

⁴ "No publication or registration or other action in the Copyright Office is required to secure a copyright." *Id.*

⁵ 17 U.S.C. § 411.

⁶ "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.

⁷ 17 U.S.C. §301(a) "On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State."

⁸ Julee Milham, *The Practice of Music Law in Florida*, 2006.

⁹ §540.11 (2)(a), F.S.

¹⁰ 17 U.S.C. §512.

¹¹ 17 U.S.C. §512.

¹² 17 U.S.C. §512(c).

¹³ Jeremy Wilson and Roy Fenokff, *Distinguishing Counterfeit from Authorized Retailers in the Virtual Marketplace*, 39 International Criminal Justice Review, 24(1), 2014.

obtain the name and contact information of the copyright infringer by request to the ISP, where the copyright owner provides:¹⁴

- A signature of the person authorized to act on behalf of the copyright owner;
- Identification of the infringed copyrighted work;
- Identification of the material or activity that should be disabled in order to cure the infringement of copyrighted material;
- Contact information of the copyright owner or person authorized to act on her behalf;
- Statement by copyright owner or person authorized to act on her behalf that she has a good faith belief that the copyright infringement is not authorized by its copyright owner, or the law; and
- Statement made under penalty of perjury that the information is accurate, and that the complaining party is authorized to act on the copyright owner's behalf.

Upon receipt of the above information, 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 individual copyright infringer.¹⁵ Some ISPs have had success in courts pursuant to their refusal to comply with these subpoenas.¹⁶

Alternately, copyright owners may pursue a "John Doe" case in order to enforce their rights under federal law. This process involves filing a suit in court against an unknown respondent, or "John Doe." Once the case has been initiated, the petitioner may use the subpoena power of the court to require the ISP to divulge the copyright infringer's contact information, at which point the actual name will be substituted for the "John Doe" in the case. Courts have mixed responses to this tactic.

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.¹⁷

Tennessee followed suit in July, 2014, with the passage of their True Origin of Goods Act.¹⁸ This law requires the owner or operator of a website dealing in electronic dissemination of commercial recordings or audiovisual works to clearly post her true and correct name, physical address, and telephone number. If the website's owner fails to disclose her address, she may be enjoined to enforce compliance, and fined for failure to do so.¹⁹ Tennessee requires these actions to be initiated and sustained by the Tennessee Attorney General's Office.²⁰

¹⁴ 17 U.S.C. §512(c) (3)a. i-iv.

¹⁵ 17 U.S.C. §512 (d)(3).

¹⁶ 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).

¹⁷ Cal. Penal Code §653aa.

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

¹⁹ *Id.*

²⁰ *Id.*

III. Effect of Proposed Changes:

Section 1 creates the “True Origin of Digital Goods Act,” which requires owners or operators of websites 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.

This bill does not protect copyrighted material, but rather governs “commercial recordings or audiovisual works,” which 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. This bill therefore appears to apply to websites that disseminate copyrighted material as well as any disseminated recording or audiovisual work, regardless of the disseminator’s intent to seek commercial advantage or financial gain from the work.

Section 1 also establishes 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 under this act may also obtain necessary expenses²¹ and reasonable attorney’s fees. These remedies are available as a supplement to other state and federal criminal and civil law provisions.

The injunction, once obtained, 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.²² The ISP generally revokes its contract with the website based on such violation.

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.

Section 2 provides an effective date of July 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

²¹ While “necessary expenses” is not defined by this bill, s. 112.061(2)(g), F.S., defines the term as “the usual ordinary and incidental expenditures necessarily incurred by a traveler.”

²² ISPs’ Terms of Service Agreements frequently forbid the user website from engaging in illegal activity.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

For a court to exercise its jurisdiction over a corporation or individual (hereinafter “respondent”), there must be personal jurisdiction and subject matter jurisdiction. State courts have general jurisdiction, and therefore a claim made under a state statute meets the subject matter jurisdiction requirement.²³ Personal jurisdiction is a constitutional requirement that a respondent have minimum contacts with the state in which the court sits so that the court may exercise power over the respondent.²⁴ A non-resident respondent may have sufficient contacts with Florida if she commits acts expressly enumerated in Florida’s long-arm statute.²⁵ Alternately, the non-resident respondent may be subject to a Florida court’s personal jurisdiction because she has minimum contacts with the state that are otherwise unrelated to matter that brings her into court.²⁶ Examples of sufficient minimum contacts include frequent business travel to the state, owning a company with a Florida office branch, or subjecting herself to the court’s jurisdiction by presenting herself in the Florida court.²⁷ These jurisdictional requirements ensure that a respondent has sufficient notice and due process afforded to her under the Constitution before her rights are subjected to the Court.²⁸

Whether a non-resident internet company 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.²⁹

Content-neutral regulations are legitimate if they advance important governmental interests that are not related to suppression of free speech, and do not substantially burden more speech than necessary to further those interests.³⁰ However, a law may be determined to be overbroad if a “substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.”³¹

²³ *Caiazza v. American Royal Arts Corp.*, 73 So. 3d 245, 250 (Fla. 4th DCA 2011).

²⁴ *Id.*

²⁵ *Id.*; §48.193, F.S.

²⁶ *Caiazza v. American Royal Arts Corp.*, 73 So. 3d 245, 250 (Fla. 4th DCA 2011).

²⁷ *Id.*

²⁸ *Id.* at 250-251.

²⁹ *See Caiazza v. American Royal Arts Corp.*, 73 So. 3d 245, (Fla. 4th DCA 2011); *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

³⁰ *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180,189 (U.S. 1997).

³¹ *U.S. v. Stevens*, 559 U.S. 460 (2010), quoting, *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n. 6, (2008).

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

Parties involved in the litigation provided for in the bill will incur costs related to bringing or defending the action.

C. Government Sector Impact:

Florida courts may see an increase in case filings under this law, which may result in extra costs.³²

VI. Technical Deficiencies:

None.

VII. Related Issues:

It is possible that a prevailing party to a s. 501.155(4)(a) action may never recover the fees and costs ordered by a court because of lack of personal jurisdiction over the offending party, which results in an inability to enforce the order.

VIII. Statutes Affected:

This bill creates s. 501.155, F.S.

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Commerce and Tourism on March 2, 2015:

- Clarifies that an owner, assignee, authorized agent, or licensee of a commercial recording or audiovisual work may only pursue an injunction against a website that electronically disseminates his or her commercial recording or audiovisual work, versus any commercial recording or audiovisual work;
- Requires that a website must knowingly commit, or be likely to commit a violation of the committee substitute to be subject to the civil action provided for in the committee substitute;
- Provides that an aggrieved party must make reasonable efforts to place the violating website on notice of its alleged violation and allow 14 days for the violating website

³² State Courts Administrator, *SB 604 Agency Analysis* (March 2, 2015) (on file with the Senate Committee on Commerce & Tourism.)

to cure the violation before the aggrieved party may file for an injunction under the bill; and

- Defines the term, “website,” which excludes “channels” or homepages that are not operated by the top-level domain or website on which the channel or homepage appears. This ensures that the owner or operator of, e.g., YouTube itself, rather than users who post information to a channel on YouTube, will be subject to the civil action provided for in this committee substitute.

B. Amendments:

None.