

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 637 CS Consumer Protection
SPONSOR(S): Seiler
TIED BILLS: None **IDEN./SIM. BILLS:** SB 202

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Agriculture Committee</u>	<u>9 Y, 0 N</u>	<u>Blanchette</u>	<u>Reese</u>
2) <u>Civil Justice Committee</u>	<u>6 Y, 0 N</u>	<u>Shaddock</u>	<u>Bond</u>
3) <u>Judiciary Appropriations Committee</u>	<u>4 Y, 0 N</u>	<u>Brazzell</u>	<u>DeBeaugrine</u>
4) <u>State Resources Council</u>	<u>7 Y, 0 N, w/CS</u>	<u>Blanchette</u>	<u>Hamby</u>
5) _____	_____	_____	_____

SUMMARY ANALYSIS

The bill amends the Florida Deceptive and Unfair Trade Practices Act to clarify that the court may allow a court-appointed person such as a receiver to address wrongdoing by bringing an action in the name of and on behalf of a defendant, such as the corporation over which the receiver has been appointed.

The bill provides that actions based upon use of a creation that is not protected under federal copyright law shall not give rise to a claim or cause of action unless the parties to the claim or cause of action have executed a writing sufficient to indicate that a contract has been made between them governing such use.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard Individual Liberty: There is a possibility that this bill could be interpreted to prohibit certain litigant's access to the courts.

B. EFFECT OF PROPOSED CHANGES:

Current Law

Florida Deceptive and Unfair Trade Practices Act

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA)¹ was enacted "[t]o protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce."²

Businesses and individuals are afforded broad protection from unfair or deceptive acts or practices under the FDUTPA. The FDUTPA states a broad proscription that applies through civil enforcement across industries and business conduct generally in any medium. The FDUTPA, Part II of ch. 501, F.S., provides remedies and penalties for "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce..."³

Under the FDUTPA, the Attorney General or other enforcing authority may bring an action on behalf of a consumer⁴ and seek the appointment of a receiver⁵ or fiduciary to seek redress. A receiver only has the powers given to him or her by statute or by order of appointment.⁶ Under most circumstances, it is the receiver's duty to safeguard the property in his or her custody and to protect the rights and interests of all claimants while still maintaining neutrality.⁷ A receivership allows the court to accomplish "complete justice," with the goal of providing protection to the property at issue until the final disposition of the matter.⁸ An appointment of a receiver is an equitable question and not a matter of right.⁹ Typically, the appointment of a receiver is an ancillary remedy and can only be obtained in connection with some other action to obtain a specific relief.¹⁰

It is unclear whether under the FDUTPA a receiver or other court-appointed person has standing to bring a proceeding on behalf of defendants against a third party who may have an involvement in the wrongdoing.

¹ Sections 501.201-501.213, F.S.

² Section 501.202(2), F.S.

³ Section 501.204, F.S.

⁴ Section 501.207(1)(c), F.S.

⁵ A "receiver" is defined as "[a] disinterested person appointed by a court, or by a corporation or other person, for the protection or collection of property that is the subject of diverse claims." Black's Law Dictionary 1275 (7th ed. 1999).

⁶ 44 Fla. Jur. 2d Receivers s. 49 (2005).

⁷ *Id.*

⁸ 44 Fla. Jur. 2d Receivers s. 2 (2005).

⁹ 44 Fla. Jur. 2d Receivers s. 3 (2005).

¹⁰ *Id.*

Copyright Law¹¹

The United States Patent and Trademark Office provide the following definitions:

- a “patent”¹² for an invention is the grant of a property right to the inventor, issued by the Patent and Trademark Office;
- a “trademark”¹³ is a word, name, symbol or device which is used in trade with goods to indicate the source of the goods and to distinguish them from the goods of others; and
- a “servicemark” is the same as a trademark except that it identifies and distinguishes the source of a service rather than a product.¹⁴

The United States Copyright Office (Copyright Office) defines “copyright”¹⁵ as a form of protection provided to the authors of “original”¹⁶ works of authorship” including literary, dramatic, musical, artistic, and certain other intellectual works, both published and unpublished. A “patent” protects the substance or the idea embodied in a work, whereas a “copyright” protects the manner of expression of the work.¹⁷ It is important to note that copyright protection exists from the time the work is created in a fixed form (i.e., copy or phonorecord).¹⁸ The copyright in the work of authorship immediately becomes the property of the author who created the work.¹⁹ It is a common misconception that a work is not protected by copyright until it is registered with the Copyright Office, however “[n]o publication or registration or other action in the Copyright Office is required to secure copyright.”²⁰

A “tradename” is an individual name, surname, or firm name used by a manufacturer and others to identify its business.²¹ While a “trademark” is typically a specific word, phrase, or design, “trade dress” usually is a combination of sometimes unrelated elements.²² A “trade secret” is information including a “formula, pattern, compilation, program, device, method, technique or process, that derives independent economic value, actual or potential,” from not being generally known to or readily ascertainable by other persons who can obtain “economic value from its disclosure or use, and that is the subject of efforts that are reasonable under the circumstances to maintain secrecy.”²³

Title 17 of the United States Code s. 204(a) provides that “[a] transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent.” The writing requirement contained within this provision is “sometimes called the copyright statute of frauds.”²⁴

¹¹ Copyright law is a federal body of law and not a state concept.

¹² 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.

¹³ The terms “trademark” and “mark” are commonly used to refer to both trademarks and servicemarks.

¹⁴ www.uspto.gov/web/offices/pac/doc/general/whatis.htm (April 13, 2006).

¹⁵ Copyright protection for an original work of authorship does not extend to the following: “idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” 18 Am. Jur. 2d Copyright and Literary Property s. 21 (2005).

¹⁶ In this regard, “original” means only that it possesses at least some minimal degree of creativity. The level of creativity required is extremely low; originality is something less than the novelty or uniqueness necessary for patent protection. 18 Am. Jur. 2d Copyright and Literary Property s. 18 (2005).

¹⁷ 77 Am. Jur. 449 Trials s. 10.

¹⁸ 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. www.copyright.gov/circs/circ1.html#wci. (April 13, 2006).

¹⁹ www.copyright.gov/circs/circ1.html#wci (April 13, 2006).

²⁰ *Id.*

²¹ 47 Am. Jur. 2d Proof of Facts 643 s. 1.

²² 55 Am. Jur. 3d Proof of Facts 383 s. 3.

²³ Uniform Trade Secrets Act, 59 A.L.R.4th 641 s. 3.

²⁴ *Lyrick Studios, Inc. v. Big Idea Productions, Inc.*, 420 F.3d 388, 392 (5th Cir. 2005).

Nevertheless, state statutes of frauds are different than the provisions of the Copyright Act.

Although section 204 is often referred to as the "copyright statute of frauds," it actually differs materially from state statutes of frauds. While the latter may be satisfied by a writing not intended as a memorandum of contract, not communicated to the other party, and even made in pleadings or testimony years after the alleged agreement, see Restatement (Second) of Contracts [section] 133 cmts. b, d (1981), section 204 may not. State statutes of frauds serve a purely evidentiary function--to prevent enforcement through fraud or perjury of fictitious agreements. *Id.* [section] 131 cmt. c. Thus, agreements subject to statutes of frauds may be perfectly valid, yet unenforceable without evidence of a writing.

By contrast, a transfer of copyright is simply "not valid" without a writing. 17 U.S.C. § 204(a).²⁵

Florida's statute of frauds s. 725.01, F.S., bars actions on an oral "agreement that is not to be performed within the space of 1 year from the making thereof."²⁶ A person could initiate and succeed on a lawsuit to enforce an oral agreement so long as that agreement was capable of being fully performed within one year of when it was entered into.

When a person shares an idea with another party, but he or she has not:

- protected the idea under federal copyright law, or
- executed a writing sufficient to indicate a contract²⁷ governing use of that idea,

then that person will have difficulty bringing a claim or cause of action against the party who has allegedly misappropriated that work.

Even though an unregistered copyright is valid, before an action for infringement can be commenced the copyright must be registered or it will be dismissed for lack of subject-matter jurisdiction. The registration may be obtained at any time during the copyright term. "The fact that plaintiff did not register a copyright until after an alleged infringement has occurred does not preclude the plaintiff from recovering for infringement of copyrights occurring before the date of registration."²⁸

Effect of Bill

The bill authorizes a court to permit actions in the name of and on behalf of the defendant enterprise. This would allow a receiver or other court-appointed person to address wrongdoing by filing suit on behalf of a defendant, such as a corporation over which the receiver has been appointed, against a third party who played some role in the alleged wrongdoing.

The bill creates s. 501.927, F.S., to provide that actions based upon use of a creation that is not protected under federal copyright law shall not give rise to a claim or cause of action unless the parties to the claim or cause of action have executed a writing sufficient to indicate that a contract has been made between them governing such use. The bill would eliminate lawsuits that the

²⁵ *Konigsberg Int'l. Inc. v. Rice*, 16 F.3d 355, 357 (9th Cir. 1994).

²⁶ *Korman v. Iglesias*, 736 F.Supp. 261, 267 (S.D. Fla. 1990).

²⁷ At a minimum the writing must state with reasonable certainty: (a) the identity of both contracting parties; (b) the subject matter of the contract so that it can be identified either from the writing or if the writing is not clear by the aid of extrinsic evidence; (c) the essential terms and conditions of all the promises constituting the contract and by whom and to whom the promises are made. Rest.2d §131.

²⁸ 18 Am. Jur. 2d Copyright and Literary Property s. 145 (2005).

statute of frauds would not have prohibited. No longer would a person be able to initiate and succeed on a lawsuit to enforce an oral agreement where that agreement was capable of being fully performed within one year of when it was entered into. The bill does not limit an individual's ability to seek relief under "any cause of action based in copyright, trademark, patent, or trade secret; or any defense raised in connection" with that cause of action.

The bill also amends ss. 501.203 and 501.204, F.S., to capture changes in federal law from 2001 to 2006.²⁹

C. SECTION DIRECTORY:

Section 1. Amends s. 501.203, F.S., to change dates to capture changes in federal law up to July 1, 2006.

Section 2. Amends s. 501.204, F.S., to change dates to capture changes in federal law up to July 1, 2006.

Section 3. Amends s. 501.207, F.S., to broaden the powers of a receiver.

Section 4. Creates s. 501.927, F.S., to provide that actions based upon use of a creation that is not protected under federal copyright law shall not give rise to a claim or cause of action unless the parties to the claim or cause of action have executed a writing sufficient to indicate that a contract has been made between them governing such use.

Section 5. Provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

²⁹ To directly link the statute to the interpretation of the federal courts and the Federal Trade Commission would be an unlawful delegation of legislative power. Therefore, the dates in the statute must be periodically updated.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This 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:

Access to Courts

"The right to go to court to resolve disputes is a fundamental right. Whether represented by an attorney or proceeding pro se, all litigants are afforded equal access to the courts. The Florida Constitution establishes the right commonly known as access to courts. It provides that the courts shall be open to any person for the redress of any injury and justice shall be administered without sale, denial, or delay."³⁰

"There is no principle of law more fundamental than that which declares for every wrong there is a remedy. The constitutional right of access to courts guaranteed by the Florida Constitution protects only rights that existed at common law or by statute prior to the enactment of the Declaration of Rights of the Florida Constitution. In order to make a colorable claim of denial of access to courts, an aggrieved party must demonstrate that the Legislature has abolished a common-law right previously enjoyed by the people of Florida."³¹ However, "[a] reasonable restriction, or a condition precedent, to the filing of a claim is not a denial of access to courts."³²

The portion of this bill limiting certain lawsuits related to copyrights may perhaps be challenged because it eliminates a cause of action without providing a reasonable alternative.

Single Subject Rule

Art. III, s. 6 of the State Constitution requires that a bill must pertain to a single subject, briefly stated in the bill's title. Courts have interpreted this to mean that all provisions of a bill must be "properly connected" to the subject of the bill in a "natural or logical" way.³³ This bill may raise single-subject concerns because the two provisions of the bill may not appear to be naturally and logically connected, although both sections relate in a general way to lawsuits. The title of the bill includes the relating to clause "consumer protection."

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Subsection 501.927(2) reads, "any cause of action based in copyright, trademark, patent, or trade secret; or [a]ny defense raised in connection with a cause of action described in paragraph (a)." The bill does not mention tradename, servicemark, trade dress, or unfair competition. These additional terms encompass the possible scope of a cause of action that a party might raise for the misappropriation of his or her idea.

³⁰ 10A Fla. Jur 2d Constitutional Law s. 360.

³¹ *Id.*

³² 10A Fla. Jur 2d Constitutional Law s. 362.

³³ See, e.g., *Franklin v. State*, 887 So. 2d 1063, 1078-79 (Fla. 2004); *Envtl. Confed. of Sw. Fla. v. State*, 886 So. 2d 1013, 1018-19 (Fla. 1st DCA 2004).

The bill appears to be unclear regarding copyrightable material. It is unclear when the bill provides that an idea "is not a work of authorship protected under federal copyright law" if the bill is referencing an idea that has not yet been copyrighted or if it is material that is unable to be copyrighted.

The bill appears to be unclear regarding when the parties must contract. When a person shares an idea with another party, and there is no resulting transfer of authorship or other written agreement, it is unclear whether the bill still requires a written contract governing the party's continued ownership of that idea.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On April 10, 2006, the State Resources Council adopted one amendment which creates s. 501.927 F.S. The amendment provides that actions based upon use of a creation that is not protected under federal copyright law shall not give rise to a claim or cause of action unless the parties to the claim or cause of action have executed a writing sufficient to indicate that a contract has been made between them governing such use.