

**HOUSE OF REPRESENTATIVES
FINAL BILL ANALYSIS**

BILL #:	CS/CS/HB 271	FINAL HOUSE FLOOR ACTION:	
SPONSOR(S):	Regulatory Affairs Committee; Business & Professions Subcommittee; Nuñez and others	78 Y's	38 N's
COMPANION BILLS:	CS/SB 604	GOVERNOR'S ACTION:	Approved

SUMMARY ANALYSIS

CS/CS/HB 271 passed the House on April 24, 2015, as CS/SB 604.

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 true and correct name, address, and telephone number or e-mail address on the website.

An owner, assignee, authorized agent, 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 personal 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.

Proponents argue that bad actors are unlikely to disclose the personal information required by this bill, and thus, this bill will allow owners of copyrighted works to indirectly protect their intellectual property.

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

The bill was approved by the Governor on May 21, 2015, ch. 2015-53, L.O.F., and will become effective on July 1, 2015.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Current Situation

The Internet and Intellectual Property

The rise of the Internet has provided many opportunities and challenges for the free communication of thoughts and ideas. Among these challenges is the effective protection of intellectual property and copyrights when individuals can quickly and efficiently distribute creative works with virtually no barriers to reproduction. The Internet presents unique obstacles to legislating solutions because the Internet does not observe political boundaries and laws addressing conduct on the Internet may unduly restrict a person's inalienable rights of speech and expression. Here, the rights of creative content producers to choose how their works are displayed and distributed are contrasted with an individual's right to freely speak, express themselves, and share knowledge.

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

It is possible that the Federal Copyright Act may "completely preempt" any state laws related to a copyrighted work produced after 1972. Under the "complete preemption doctrine," state law claims that are "arising under" the subject matter of the federal law are invalidated if Congress intended for the federal remedy to be the exclusive remedy for an injury related to the federal law. As such, federal courts are granted exclusive jurisdiction to decide claims and causes of action related to the federal law.⁸

Several Federal Circuit Courts have held that the "complete preemption doctrine" can be applied to Federal Copyright Law; however, the Eleventh Circuit Court of Appeals, which directly controls questions of Federal law within Florida, has not held whether the complete preemption doctrine applies to Copyright Law.⁹

¹ United States Copyright Office, *Copyright Basics* 1, (2012), 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." U.S. CONST. art. I, § 8, cl. 8.

⁶ 17 U.S.C. §301(a).

⁷ s. 540.11(2)(a), F.S.

⁸ 17 U.S.C § 301 (2012); *Briarpatch Ltd., L.P v. Phoenix Pictures, Inc.*, 373 F.3d 296, 303 (2d Cir. 2004).

⁹ *Stuart Weitzman, LLC v. Microcomputer Res., Inc.*, 542 F.3d 859, 864 (11th Cir. 2008) (noting that the First, Second, Fourth and Sixth Circuits have all held that the Copyright Act has complete preemptive effect).

Internet Copyright Law

The Digital Millennium Copyright Act¹⁰ (DMCA) was passed in 1998 to update and modernize the United States' copyright protections for the Internet age. The DMCA criminalizes production and dissemination of technology used to circumvent digital rights management software (DRM) and other types of access controls, and heightens the penalties for copyright infringement on the Internet. The DMCA also provides several "safe harbor" provisions for providers of online services (such as YouTube) that provide hosting for user generated content. Under the DMCA's safe harbor provisions, online services that follow the DMCA's takedown procedures are able to limit their liability for the copyright infringement of users of their service.¹¹

When used appropriately, the DMCA's safe harbor provisions protect copyright owners. However, there are many reports of bad actors abusing DMCA takedown requests to remove completely legal content. In order to benefit from the protections of the DMCA's safe harbor provisions, an online service must immediately remove any content that is identified as offending at the request of a self-identified content owner or face financial liability for possible infringements. Many online services do not have the ability to review every takedown request and simply remove any flagged content. Further, it is difficult to hold persons accountable who abuse the DMCA takedown provisions as a tool for censorship.¹²

Some examples of improper takedown requests include misidentification of copyrighted works,¹³ meritless takedown requests of political ads,¹⁴ or takedown requests performed with malice and the intent to harm the content producer's reputation or revenue.¹⁵ DMCA takedown notices used improperly can be used to censor speech and may have a chilling effect on free speech.¹⁶

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.¹⁷ Owners of infringed copyright material must locate the actual infringing actor in order to enforce their copyrights.

The Copyright Office of the United States has identified bad actors who build online businesses based upon infringing copyright and engaging in related illegal activity.¹⁸ The operators of these sites are able to act with impunity because there is little expectation of enforcement of copyright or other laws on content that is hosted outside of the United States.

These rogue websites flagrantly engage in activities that ignore federal copyright law, and offer for sale or download many copyrighted movies, music, books, and software produced and created within the

¹⁰ Digital Millennium Copyright Act, PL 105–304, Oct. 28, 1998, 112 Stat 2860.

¹¹ See generally, *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 25 (2d Cir. 2012).

¹² See generally, Lydia Pallas Loren, *Deterring Abuse of the Copyright Takedown Regime by Taking Misrepresentation Claims Seriously*, 46 Wake Forest L. Rev. 745, 746 (2011) (discussing copyright takedown abuse, and noting that "misrepresentation claims have been brought [against abusers of takedown notices], and the early interpretations of the [misrepresentation] provisions have limited their effectiveness in curbing abuse").

¹³ See John Schwartz, *She Says She's No Music Pirate. No Snoop Fan, Either*, N.Y. TIMES (September 25, 2003), <http://www.nytimes.com/2003/09/25/business/media/25TUNE.html>.

¹⁴ Center for Democracy & Technology, *CDT Releases Report on Meritless DMCA Takedowns of Political Ads*, (Oct. 12, 2010), <https://cdt.org/insight/cdt-releases-report-on-meritless-dmca-takedowns-of-political-ads/>.

¹⁵ See generally, Google, *Transparency Report*, <http://www.google.com/transparencyreport/removals/copyright/faq/> (Listing several "inaccurate or intentionally abusive copyright removal requests" submitted to Google).

¹⁶ Wendy Seltzer, *Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 Harv. J.L. & Tech. 171 (2010).

¹⁷ Jeremy Wilson and Roy Fenokff, *Distinguishing Counterfeit from Authorized Retailers in the Virtual Marketplace*, 39 International Criminal Justice Review 24(1), 2014.

¹⁸ Maria A. Pallante, Acting Register of Copyrights, *Promoting Investment and Protecting Commerce Online: Legitimate Sites v. Parasites, Part I*, (Mar. 14, 2011), available at <http://www.copyright.gov/docs/regstat031411.html>.

United States. Many rogue websites make money through both direct transactions (selling copyrighted content) and indirect transactions (ad revenue or subscription services).

Rogue websites may also attempt to steal a consumer's financial information and take advantage of unsuspecting consumers private information. Some rogue websites may falsely state that they have relationships with well-known payment processing services (such as credit cards); however, when a consumer attempts to pay, the website redirects payment to alternative and possibly unsecure services.

Attempted Federal Solutions

The Stop Online Privacy Act (SOPA) was introduced to Congress on October 26, 2011, with the intent to expand the ability of United States law enforcement to combat online copyright infringement and the online trafficking of counterfeit goods. The bill faced intense scrutiny after its introduction.

Provisions included requesting court orders to bar advertising networks and payment facilities from conducting business with infringing websites, preventing search engines from linking to identified rogue websites, and expediting court orders to require Internet service providers block access to rogue websites. The proposed law would have expanded criminal laws to include unauthorized streaming of copyrighted content and imposed a maximum penalty of five years in prison.

Proponents stated the legislation would protect the intellectual-property market and corresponding industry, jobs, and revenue, and was necessary to bolster enforcement of copyright laws, claiming current laws do not cover foreign-owned or operated websites, and citing examples of rogue websites that were flagrantly offending federal copyright law.¹⁹

Opponents claimed the proposed legislation was expansive and would impose liability on many more entities than just rogue websites. Opponents argued that the bill threatened freedom of speech and innovation on the Internet, would bypass the safe harbor provisions of the DMCA, and would even expose libraries to prosecution for previously completely legal and free speech conduct.²⁰

In protest of SOPA and its House counterpart the PROTECT IP Act (PIPA), many online services, websites, and consumers organized an online blackout in an attempt to illustrate the possible repercussions should they be passed. On January 18, 2012, the English Wikipedia, Google, Reddit, and an estimated 7,000 websites coordinated a service blackout in protest against the bills.²¹ A petition at Google recorded over 4.5 million signatures;²² and lawmakers reportedly collected "more than 14 million names—more than 10 million of them voters—who contacted them to protest" the bills.²³ The bills were ultimately postponed until an agreement on a solution could be found.

Protecting Personal Information on the Internet

There is an inherent risk involved when disclosing private information on the Internet. Bad actors can use information found on the Internet to assist in identity theft, use personal information to harass, extort, coerce, or publicly shame a person by violating their online privacy, and even trick an

¹⁹ David Carr, *The Danger of an Attack on Piracy Online*, N.Y. TIMES (Jan. 2, 2012), at B1, available at

<http://www.nytimes.com/2012/01/02/business/media/the-danger-of-an-attack-on-piracy-online.html>.

²⁰ *Id.*

²¹ Rob Waugh, *U.S. Senators withdraw support for anti-piracy bills as 4.5 million people sign Google's anti-censorship petition*, DAILYMAIL.COM (Jan. 20, 2012), <http://www.dailymail.co.uk/sciencetech/article-2088860/SOPA-protest-4-5m-people-sign-Google-anti-censorship-petition.html>.

²² Deborah Netburn, *Wikipedia: SOPA protest led 8 million to look up reps in Congress*, L.A. TIMES BLOGS (Jan. 19, 2012), available at <http://latimesblogs.latimes.com/technology/2012/01/wikipedia-sopa-blackout-congressional-representatives.html>.

²³ Jonathan Weisman, *After an Online Firestorm, Congress Shelves Antipiracy Bills*, N.Y. TIMES, (Jan. 21, 2012) at B6, available at <http://www.nytimes.com/2012/01/21/technology/senate-postpones-piracy-vote.html>.

emergency service into dispatching a police response team to a target's address based on false reports of imminent danger or injury.²⁴

Balanced Solutions for Protecting Copyrighted Works Outside of Federal 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.²⁵

This law exempts several legal dissemination methods from requiring personal disclosure, such as dissemination on personal networks, persons acting with permission of the copyright owner (licensees), persons acting under the authority of the copyright owner (agents), and works that have been freely disseminated without limitation. At least one commentator has argued that California's law should be preempted by federal copyright law.²⁶

Tennessee passed a law in July 2014 similar to this bill with criminal penalties and enforcement.²⁷ 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.²⁸ Tennessee requires these actions to be initiated and sustained by the Tennessee Attorney General's Office.²⁹

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 websites³⁰ that deal "in substantial part" with the dissemination of third-party commercial recordings or audiovisual works 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.

The phrase "in substantial part" is not defined. It is unclear how many "commercial recordings or audiovisual works" must be disseminated by a website before the website or online service is considered to be dealing "in substantial part" in the dissemination of such under this bill.

²⁴ Sasha Goldstein, *Suburban Denver 'swatting' incident caught on gamer's camera*, N.Y. DAILY NEWS (Aug. 27, 2014), <http://www.nydailynews.com/news/national/suburban-denver-swatting-incident-caught-gamer-camera-article-1.1919640> (reporting on YouTube user Jordan Mathewson being swatted and broadcasted the incident live while streaming playing games over the Internet); Brian Crecente, *Destiny developer startled awake by police sheriff's helicopter after faked 911 call*, POLYGON (Nov. 7, 2014), <http://www.polygon.com/2014/11/7/7172827/destiny-swatting> (Unnamed Destiny video game developer is a victim of a swatting in Washington State home).

²⁵ Cal. Penal Code §653aa.

²⁶ Brian McFarlin, *From the Fringes of Copyright Law: Examining California's "True Name and Address" Internet Piracy Statute*, 35 *Hastings Const. L.Q.* 547, 557 (2008).

²⁷ Tenn. Code §47-18-401 – 47-18-407 (2014).

²⁸ *Id.*

²⁹ *Id.*

³⁰ The bill specifically exempts providers of an interactive computer service, communications service, commercial mobile service, or information service, including, but not limited to, an Internet access service provider, advertising network or exchange, domain name registration provider, and a hosting service provider, if they provide the transmission, storage, or caching of electronic communications or messages of others or provide another related telecommunications service, commercial mobile radio service, or information service from first party liability.

The term “third party” is not defined. The disclosure requirements of this bill may still be required even if all recordings or audiovisual works disseminated by the website are owned by the website owner. While the intention of “third-party” may be to allow the owner of a work to not have to disclose under this bill, it is uncertain if a licensee, assignee, or authorized agent, or any other person with a legal right to disseminate the commercial recording would be considered a first or third-party.

Further, it is uncertain who is a “third party” when a work is created in collaboration with several parties or when a person creates a new work that incorporates elements of another’s original work or recording. In these situations, the creator or owner of the commercial recording or audiovisual work may still be considered to be disseminating a third party work.

The bill defines a “commercial recording or audiovisual work,” as a:

[A] recording or audiovisual work whose owner, assignee, authorized agent, or licensee has disseminated or intends to disseminate such recording or audiovisual work for sale, for rental, or for performance or exhibition to the public, including under license, but does not include an excerpt consisting of less than substantially all of a recording or audiovisual work. A recording or audiovisual work may be commercial regardless of whether a person who electronically disseminates it seeks commercial advantage or private financial gain from the dissemination. The term does not include video games, depictions of video game play, or the streaming of video game activity.

A “recording or audiovisual work” that is disseminated or intended to be disseminated for sale, rental, performance or exhibition, appears to include all video or audio content available on the Internet. Any recording or audiovisual work that is on the Internet is likely exhibited to the public. The definition “commercial recording or audiovisual work” appears to include commercial and noncommercial recordings and audiovisual works as it does not require a person to seek commercial advantage or private financial gain to be considered “commercial” in this bill.

The definition excludes “an excerpt consisting of less than substantially all of a recording or audiovisual work”. This language seems to limit the definition of “commercial recording or audiovisual work” to only those works that are complete, and not to include simply portions or excerpts of said works. In some cases, an excerpt may be considered a “commercial recording or audiovisual work” completely independent of the original work.

The definition explicitly excludes video games, video game streaming, or depictions of video game play from the definition of “commercial recording or audiovisual work.” This exception would remove a significant amount of content from the definition of “commercial recording or audiovisual work.”

Video or audio content on a website will thus be excluded, so long as the video or audio content only contains “video games, depictions of video game play, or the streaming of video game activity.” Additional content within such videos such as commentary, music, soundtracks, or other non-video game related content may cause such videos to be considered “commercial recordings or audiovisual works” under this bill and subject to the disclosure requirements.

The bill defines a “website” as a “set of related webpages served from a single web domain.” Further, the bill clarifies that the term “website” does not include “a home page or channel page for the user account of a person who is not the owner or operator of the website upon which such user home page or channel page appears.”

The bill defines “electronic dissemination” to mean the transmission of, making available, or otherwise offering a “commercial recording or audiovisual work” for distribution through the Internet. The definition of electronic dissemination includes many forms of hosting content on the Internet, including directly

hosting, linking to content hosted elsewhere, or otherwise distributing information where “commercial recordings or audiovisual works” may be located.

The bill exempts providers of an interactive computer service, communications service as defined in s. 202.11(1), F.S., commercial mobile service, or information service, including, but not limited to, an Internet access service provider, an advertising network or exchange, a domain name registration provider, or a hosting service provider, if they provide the transmission, storage, or caching of electronic communications or messages of others or provide another related telecommunications service, commercial mobile radio service, or information service, for use of such services by another person from the disclosure requirements of the bill.

Injunctive Relief

The bill allows an “owner, assignee, authorized agent, or licensee” of a “commercial recording or audiovisual work” that was electronically disseminated by a website or online service where the owner or operator of said website or online service knowingly failed to disclose their personal information to bring a private cause of action to enforce the disclosure requirements of this bill.

As a condition precedent to filing suit under the cause of action created by this bill, the individual must make reasonable efforts to place the owner or operator on notice of the violation and that failure to cure within 14 days may result in a civil action filed in a court of competent jurisdiction.

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 or online service owner or operator located outside of Florida. Proponents do not expect website or online service owners or operators located outside of Florida to respond to law suits or submit willingly to jurisdiction in Florida courts. As such, proponents expect for any proceedings against owners or operators of websites or online services located outside of Florida to end in default judgments.

Following a default or other declaratory judgment, proponents intend to proceed with third party injunctions to discourage Internet service providers, hosting services, payment services or other Internet website services from working with websites that fail to disclose their personal information required by this bill.

Proponents argue that bad actors are unlikely to disclose the personal information required by this bill, and thus, this bill will allow owners of copyrighted works to indirectly protect their intellectual property.

The bill allows prevailing party in a cause under this section is entitled to recover necessary expenses and reasonable attorney fees.

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.