

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: SB 288

INTRODUCER: Senator Garcia

SUBJECT: Electronic Dissemination of Commercial Recordings and Audiovisual Works

DATE: November 1, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Harmsen</u>	<u>McKay</u>	<u>CM</u>	Favorable
2.	_____	_____	<u>JU</u>	_____
3.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 288 subjects websites that electronically transmit, make available, or offer a commercial recording or audiovisual work for distribution, *display or performance* to the Florida True Origin of Digital Goods Act. These websites will therefore be required to post their operator's or owner's contact information and will be subject to injunction for failure to do so.

The bill takes effect on July 1, 2022.

II. Present Situation:

Florida True Origin of Digital Goods Act

The True Origin of Digital Goods Act (Act)¹ requires the owners or operators of websites that electronically disseminate commercial recordings or audiovisual works to Florida consumers to clearly post their true and correct name(s), physical address, and telephone number or e-mail address on their website.

A website electronically disseminates a commercial recording or audiovisual work by initiating the transmission of, making available, or otherwise offering it for distribution through the internet or another digital network. Any website that electronically disseminates such works must therefore post the above specific contact information.

An owner, assignee, authorized agent, or licensee of a commercial recording or audiovisual work that appears on a website that lacks its owner's or operator's contact information may bring a private cause of action to obtain a declaratory judgment that the owner or operator's failure violates the Act. The owner, assignee, authorized agent, or licensee of the copyrighted work may

¹ Section 501.155, F.S.

also request an injunction to compel the website to comply with the Act. Prior to bringing a civil action, however, the aggrieved party must first make reasonable efforts to place the website's owner or operator on notice that they are violating the Act and that his or her failure to cure the violation within 14 days may result in the filing of a civil action.

Federal Copyright Law

The owner of original, copyrighted material has the exclusive rights to do and authorize any of the following:

- Reproduce the copyrighted work;
- Prepare derivative works based on the copyrighted work;
- Distribute copies of the copyrighted work to the public by sale, rental, lease, or lending;
- Publicly perform (or control the public performance of) the copyrighted work if it is a literary, musical, dramatic, choreographic, pantomime, motion picture, or other audiovisual copyrighted work;
- Publicly display (or control the public display of) the copyrighted work, if it is a literary, musical, dramatic, choreographic, pantomime, pictorial, graphic, or sculptural work—including individual images of a motion picture or audiovisual work; and
- Publicly perform sound recordings by means of a digital audio transmission.²

A display or performance is publicly available when it is (1) open or transmitted to the public or to any place where a substantial number of persons outside of a family and its friends are gathered, or (2) transmitted or communicated to the public through a device or process—whether or not the viewers view it in the same place or time.³

To display a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process. To perform a work means to recite, render, play, dance, or act it, either directly or by means of any device or process.⁴ Generally, the only distinction between a performance and a display of copyrighted material on the internet is that a performance occurs in a sequential, ongoing manner, while a display is static.⁵

Technological advances, such as faster internet connection and more powerful computer processors, have resulted the proliferation of streaming services, which in turn have made the public performance and display of copyrighted works over the internet more prevalent.⁶ Streaming copyrighted material over the internet has clearly been interpreted to constitute a

² 17 U.S.C. §§ 106-122, Copyrights. *See also*, U.S. Copyright Office, *Circular 1: Copyright Basics*, pp. 1-2 (Sept. 2021), <https://www.copyright.gov/circs/circ01.pdf> (last visited Nov. 1, 2021).

³ 17 U.S.C. § 101. *See also*, John Kennedy, Mary Rasenberger, Lorraine Ford and Joseph Fazio, *Internet Law and Practice- Intellectual Property Issues: Copyright: Public Performance and Display*, §12:13 (Nov. 2021).

⁴ 17 U.S.C. § 101. *See also*, *Information Law- Digital Copyright and Cyberspace- Network and Internet Issues, Public Display and Performance*, ch. 4 § 4:82 (May 2021).

⁵ *Id.*

⁶ U.S. Department of Commerce Internet Policy Task Force, *White Paper on Remixes, First Sale, and Statutory Damages: Copyright Policy, Creativity, and Innovation in the Digital Economy*, pp. 40-43 (Jan. 2016), <https://www.uspto.gov/sites/default/files/documents/copyrightwhitepaper.pdf> (last visited Nov. 1, 2021). *See also*, Congressional Research Service, *Illegal Internet Streaming of Copyrighted Content: Legislation in the 112th Congress* (Aug. 29, 2011), <https://www.everycrsreport.com/reports/R41975.html#fn19> (last visited Nov. 1, 2021).

public performance by courts throughout the U.S., but if done with proper authorization to distribute or perform the material from the copyright holder, is permissible under copyright law.⁷

Federal Digital Millennium Copyright Act

The Digital Millennium Copyright Act (DMCA) updated federal copyright law to address the relationship between copyrighted material and the internet. To provide certainty regarding liability for copyright infringement while balancing the rights of copyright holders, the DMCA created the notice-and-takedown system.⁸ This system requires online service providers to expeditiously remove infringing content after receipt of notice from a copyright holder.⁹ As the internet, related consumer activity, and specifically third party posting of copyrighted content continues to grow, so have takedown notices.¹⁰ For example, Google received take down notices for approximately three million URLs in 2013, as of October 21, 2021, it received notices identifying 5.3 billion URLs to be taken down.¹¹

The DMCA also requires online service providers to designate an agent to receive copyright owners' notices, and provide the agent's contact information on their websites.

Protecting Lawful Streaming Act

The Consolidated Appropriations Act of 2021 created the Protecting Lawful Streaming Act (PLSA),¹² which increases the federal penalty for illegal streaming from a misdemeanor to a felony. The act of offering copyrighted material for download without specific license or authorization is separately classified a felony under the No Electronic Theft (NET) Act, but this provision did not cover streaming copyrighted material.¹³

Specifically, the PLSA targets individuals who act (1) willfully, (2) for purposes of commercial advantage or private financial gain, and (3) offer or provide to the public a digital transmission service. Additionally, their digital transmission service must:¹⁴

⁷ See, e.g., *Warner Bros. Entertainment Inc. v. WTV Systems, Inc.*, 824 F. Supp.2d 1003, 1010-1011 (C.D. Cal. 2011). *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp.2d 896 (N.D. Cal. 2000), *aff'd in relevant part*, 239 F.3d 1004 (9th Cir. 2001).

⁸ 17 U.S.C. § 512 (2)(b)-(d). U.S. Copyright Office, *The Digital Millennium Copyright Act: Section 1202- Copyright Management Information Protection*, <https://www.copyright.gov/dmca/> (last visited Nov. 1, 2021). See also, U.S. Copyright Office, *Section 512 Report*, pp. 1, 8 (May 2020), available at <https://www.copyright.gov/policy/section512/section-512-full-report.pdf> (last visited Nov. 1, 2021).

⁹ U.S. Copyright Office, *Section 512 of Title 17: Resources on Online Service Provider Safe Harbors and Notice-and-Takedown System* (May 21, 2020), <https://www.copyright.gov/512/> (last visited Nov. 1, 2021). See also, 17 U.S.C. §§512(b)-(d)

¹⁰ See also, U.S. Copyright Office, *Section 512 Report*, pp. 10 (May 2020), available at <https://www.copyright.gov/policy/section512/section-512-full-report.pdf> (last visited Nov. 1, 2021).

¹¹ *Id.* at 31-32, citing Google, *How Google Fights Piracy* (2018), https://www.blog.google/documents/25/GO806_Google_FightsPiracy_eReader_final.pdf (last visited Nov. 1, 2021). See also, *Google Transparency Report*, available at <https://transparencyreport.google.com/copyright/overview> (last visited Nov. 1, 2021).

¹² 18 U.S.C. 2319C, "Illicit Digital Transmission Services."

¹³ 17 U.S.C. 506. See also, Michael Antonucci, *New Legislation: CASE Act and Protecting Lawful Streaming Act* (Mar. 18, 2021), <https://www.mondaq.com/unitedstates/trademark/1047506/new-legislation-case-act-and-protecting-lawful-streaming-act> (last visited Nov. 1, 2021).

¹⁴ See generally, Kevin Madigan, Copyright Alliance, *Protecting Lawful Streaming Act Signed Into Law: What you Need to Know* (Jan. 12, 2021), <https://copyrightalliance.org/protecting-lawful-streaming-act-signed/> (last visited Nov. 1, 2021).

- Be primarily designed or provided for the purpose of publicly performing copyright-protected works by digital transmission without the copyright owner’s authority;
- Have no commercially-significant purpose or use other than to publicly perform copyright-protected work by an unauthorized digital transmission; or
- Be intentionally marketed by or at the direction of a person to promote its use in publicly performing copyright-protected works by means of an unauthorized digital transmission.

III. Effect of Proposed Changes:

Section 1 amends s. 501.155, F.S., to expand the definition of “electronic dissemination” to include transmitting, making available, or otherwise offering a commercial recording or audiovisual work for distribution, *display, or performance*. As a result, any website that electronically transmits, makes available, or offers a display or performance must post the website operator’s or owner’s contact information and is subject to injunction and other judgments under the Florida True Origin of Digital Goods Act.

The terms “display” and “performance” are not defined by Florida law.

Section 2 provides that the bill takes effect on July 1, 2022.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

For a court to exercise jurisdiction over a respondent, it must have subject matter jurisdiction and personal jurisdiction. State courts have general jurisdiction, and therefore a claim made under a state statute meets the subject matter jurisdiction requirement.¹⁵ 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.¹⁶ A non-resident respondent may have sufficient contacts with Florida if

¹⁵ *Caiazza v. American Royal Arts Corp.*, 73 So. 3d 245, 250 (Fla. 4th DCA 2011).

¹⁶ *Id.*

he or she commits acts expressly enumerated in Florida's long-arm statute.¹⁷ Alternately, the non-resident respondent may be subject to a Florida court's personal jurisdiction because he or she has minimum contacts with the state that are otherwise unrelated to matter that brings him or her into court.¹⁸ Examples of sufficient minimum contacts include frequent business travel to the state, owning a company with a Florida office branch, or subjecting oneself to the court's jurisdiction by presenting oneself in the Florida court.¹⁹ These jurisdictional requirements ensure that a respondent has sufficient notice and due process afforded to him or her under the U.S. Constitution before his or her rights are subjected to the court.²⁰

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.²¹

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.²² 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."²³

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Parties involved in the litigation provided for under the Act 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.

VI. Technical Deficiencies:

None.

¹⁷ *Id.*; § 48.193, F.S.

¹⁸ *Caiazza v. American Royal Arts Corp.*, 73 So. 3d 245, 250 (Fla. 4th DCA 2011).

¹⁹ *Id.*

²⁰ *Id.* at 250-251.

²¹ *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).

²² *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180,189 (U.S. 1997).

²³ *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).

VII. Related Issues:

It is unclear whether Florida could assert jurisdiction over foreign websites should an aggrieved party attempt to enforce the disclosure requirements of this bill against a website owner or operator located outside of Florida. It can be assumed that website owners or operators located outside of Florida are not expected to respond to lawsuits or submit willingly to jurisdiction in Florida courts. As such, any proceedings against owners or operators of websites located outside of Florida would be expected to end in default judgments.

Following a default or other declaratory judgment, the aggrieved party could 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. For example, ISP Terms of Service Agreements frequently forbid the user website from engaging in illegal activity.

This legislation captures a wide array of behaviors due to the broad definitions of the terms “commercial recording or audiovisual work,” “electronic dissemination,” “performance,” and “display” used. As a result, many, if not all, private individuals having a website may be required to disclose their true and correct name, physical address, and telephone number or e-mail address. For example, under these definitions, a teenager who creates her own website for the purpose of posting self-produced recordings or audiovisual works would be required to provide the identifying information. Moreover, the true target for the injunction and further consequences apparently are those websites that do not provide the identifying information.

An individual may be able to display or perform a commercial recording or audiovisual work for distribution to a sufficiently narrow group so that the act does not constitute a “public” display or performance under federal copyright law. However, this bill does not discern between a public or private display or performance.

VIII. Statutes Affected:

This bill substantially amends section 501.155 of the Florida Statutes.

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

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

None.

B. Amendments:

None.