

By: Patrick

S.B. No. 1835

A BILL TO BE ENTITLED

AN ACT

relating to the offenses of unauthorized duplication, unauthorized recording, and improper labeling of recordings.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 641, Business & Commerce Code, is transferred to Chapter 32, Penal Code, redesignated as Subchapter E, Chapter 32, Penal Code, and amended to read as follows:

SUBCHAPTER E [~~CHAPTER 641~~]. UNAUTHORIZED RECORDINGS

~~[SUBCHAPTER A. GENERAL PROVISIONS]~~

Sec. 32.71 [~~641.001~~]. DEFINITIONS. In this subchapter [~~chapter~~]:

(1) "Fix" means to embody in a recording or other tangible medium of expression, by or under the authority of the author, so that the matter embodied is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.

(2) "Live performance" means a recitation, rendering, or playing of a series, in an audible sequence, of:

(A) images;

(B) musical, spoken, or other sounds; or

(C) a combination of images and sounds.

(3) "Owner" means a person who owns the sounds fixed in a master phonograph record, master disc, master tape, master film, or other recording:

(A) on which sound is recorded; and

(B) from which the transferred recorded sounds are directly or indirectly derived.

(4) "Recording" means a tangible medium on which sounds, images, or both are recorded or otherwise stored, including:

(A) an original phonograph record, disc, tape, audio or video cassette, wire, film, electronic storage device, or other medium now existing or later developed; or

(B) a copy or reproduction that wholly or partly duplicates the original.

~~[SUBCHAPTER B. PROHIBITED PRACTICES, PENALTIES]~~

Sec. 32.72 ~~[641.051]~~. UNAUTHORIZED DUPLICATION OF CERTAIN RECORDINGS. (a) This section applies only to a recording that was initially fixed before February 15, 1972.

(b) A person commits an offense if the person:

(1) knowingly reproduces for sale or causes to be transferred any recording with intent to sell the recording or cause the recording to be sold or use a recording or cause the recording to be used for commercial advantage or private financial gain through public performance without the consent of the owner;

(2) with the knowledge that the sounds on a recording have been reproduced or transferred without the consent of the owner, transports the recording within this state for commercial advantage or private financial gain; or

(3) with the knowledge that a recording has been reproduced or transferred without the consent of the owner:

1 (A) advertises, offers for sale, sells, or rents  
2 the recording;

3 (B) causes the sale, resale, or rental of the  
4 recording; or

5 (C) possesses the recording for a purpose  
6 described by Paragraph (A) or (B).

7 (c) ~~[An offense under this section is punishable by:~~

8 ~~[(1) imprisonment for a term of not more than five~~  
9 ~~years, a fine not to exceed \$250,000, or both, if:~~

10 ~~[(A) the offense involves at least 1,000~~  
11 ~~unauthorized recordings during a 180-day period; or~~

12 ~~[(B) the defendant has been previously convicted~~  
13 ~~under this section;~~

14 ~~[(2) imprisonment for a term of not more than two~~  
15 ~~years, a fine not to exceed \$250,000, or both, if the offense~~  
16 ~~involves more than 100 but fewer than 1,000 unauthorized recordings~~  
17 ~~during a 180-day period; or~~

18 ~~[(3) confinement in the county jail for a term of not~~  
19 ~~more than one year, a fine not to exceed \$25,000, or both, if the~~  
20 ~~offense is not otherwise punishable under Subdivision (1) or (2).~~

21 ~~[(d)]~~ This section does not apply to any fees due to the  
22 American Society of Composers, Authors and Publishers.

23 Sec. 32.73 ~~[641.052]~~. UNAUTHORIZED RECORDING OF LIVE  
24 PERFORMANCE. (a) A person commits an offense if the person, with  
25 the knowledge that a live performance has been recorded or fixed  
26 without the consent of the owner:

27 (1) for commercial advantage or private financial

1 gain, advertises, offers for sale, sells, rents, or transports,  
2 causes the sale, resale, rental, or transportation of, or possesses  
3 for one or more of these purposes a recording containing sounds of  
4 the live performance; or

5 (2) with the intent to sell for commercial advantage  
6 or private financial gain, records or fixes the live performance,  
7 or causes the live performance to be recorded or fixed on a  
8 recording.

9 (b) ~~[An offense under this section is punishable by:~~

10 ~~[(1) imprisonment for a term of not more than five~~  
11 ~~years, a fine not to exceed \$250,000, or both, if:~~

12 ~~[(A) the offense involves at least 1,000~~  
13 ~~unauthorized recordings embodying sound or at least 65 unauthorized~~  
14 ~~audiovisual recordings during a 180-day period; or~~

15 ~~[(B) the defendant has been previously convicted~~  
16 ~~under this section;~~

17 ~~[(2) imprisonment for a term of not more than two~~  
18 ~~years, a fine not to exceed \$250,000, or both, if the offense~~  
19 ~~involves more than 100 but fewer than 1,000 unauthorized recordings~~  
20 ~~embodying sound or more than seven but fewer than 65 unauthorized~~  
21 ~~audiovisual recordings during a 180-day period; or~~

22 ~~[(3) confinement in the county jail for a term of not~~  
23 ~~more than one year, a fine not to exceed \$25,000, or both, if the~~  
24 ~~offense is not otherwise punishable under Subdivision (1) or (2).~~

25 ~~[(c)]~~ In the absence of a written agreement or law to the  
26 contrary, the performer or performers of a live performance are  
27 presumed to own the rights to record or fix those sounds.

1        (c) ~~[(d)]~~ For purposes of this section, a person authorized  
2 to maintain custody and control over business records that reflect  
3 whether the owner of a live performance consented to having the live  
4 performance recorded or fixed is a proper witness in a proceeding  
5 regarding the issue of consent. A witness called under this  
6 subsection is subject to the rules of evidence relating to the  
7 competency of a witness to testify and the relevance and  
8 admissibility of the testimony offered.

9        Sec. 32.74 ~~[641.053]~~. UNAUTHORIZED OPERATION OF RECORDING  
10 DEVICE IN MOTION PICTURE THEATER. (a) In this section:

11            (1) "Audiovisual recording function" means the  
12 capability of a device to record or transmit a motion picture or any  
13 part of a motion picture by means of any technology now known or  
14 later developed.

15            (2) "Motion picture theater" means a movie theater,  
16 screening room, or other place primarily used to exhibit a motion  
17 picture.

18            (b) A person commits an offense if, without the consent of  
19 the owner of the theater, the person, with the intent to record a  
20 motion picture, knowingly operates the audiovisual recording  
21 function of any device in a motion picture theater while the motion  
22 picture is being exhibited.

23            (c) ~~[An offense under this section is a Class A misdemeanor,~~  
24 ~~except that the offense is:~~

25            ~~[(1) a state jail felony if the person has been~~  
26 ~~previously convicted one time of an offense under this section; or~~

27            ~~[(2) a felony of the third degree if the person has~~

1 ~~been previously convicted two or more times of an offense under this~~  
2 ~~section.~~

3       ~~[(d)]~~ It is a defense to prosecution under this section that  
4 the audiovisual recording function of the device was operated  
5 solely for official law enforcement purposes.

6       (d) ~~[(e)]~~ If conduct constituting an offense under this  
7 section also constitutes an offense under another law, the actor  
8 may be prosecuted under this section, the other law, or both.

9       (e) ~~[(f)]~~ A person who reasonably believes that another has  
10 knowingly operated the audiovisual recording function of a device  
11 in a motion picture theater in violation of this section is  
12 privileged to detain that other person in a reasonable manner and  
13 for a reasonable time to allow for the arrival of law enforcement  
14 authorities.

15       Sec. 32.75 ~~[641.054]~~. IMPROPER LABELING. ~~[(a)]~~ A person  
16 commits an offense if:

17               (1) for commercial advantage or private financial  
18 gain, the person knowingly:

19                       (A) advertises, offers for sale, sells, rents, or  
20 transports a recording;

21                       (B) causes the sale, resale, rental, or  
22 transportation of a recording; or

23                       (C) possesses a recording for a purpose described  
24 by Paragraph (A) or (B); and

25               (2) the outside cover, box, label, or jacket of the  
26 recording does not clearly and conspicuously disclose~~+~~

27                       ~~[(A)]~~ the actual name and address of the

1 manufacturer ~~[, and~~

2 ~~[(B) the name of the performer or group].~~

3 ~~[(b) An offense under this section is punishable by:~~

4 ~~[(1) imprisonment for a term of not more than five~~  
5 ~~years, a fine not to exceed \$250,000, or both, if:~~

6 ~~[(A) the offense involves at least 65~~  
7 ~~unauthorized recordings during a 180-day period; or~~

8 ~~[(B) the defendant has been previously convicted~~  
9 ~~under this section;~~

10 ~~[(2) imprisonment for a term of not more than two~~  
11 ~~years, a fine not to exceed \$250,000, or both, if the offense~~  
12 ~~involves more than seven but fewer than 65 unauthorized recordings~~  
13 ~~during a 180-day period; or~~

14 ~~[(3) confinement in the county jail for a term of not~~  
15 ~~more than one year, a fine not to exceed \$25,000, or both, if the~~  
16 ~~offense is not otherwise punishable under Subdivision (1) or (2).]~~

17 Sec. 32.76. PENALTIES. (a) Except as provided by  
18 Subsection (b), an offense under this subchapter is:

19 (1) a Class C misdemeanor if the value of pecuniary  
20 loss to the owner of or lawful producer of the recording is less  
21 than \$50;

22 (2) a Class B misdemeanor if the value of pecuniary  
23 loss to the owner of or lawful producer of the recording is \$50 or  
24 more but less than \$500;

25 (3) a Class A misdemeanor if the value of pecuniary  
26 loss to the owner of or lawful producer of the recording is \$500 or  
27 more but less than \$1,500;

1           (4) a state jail felony if the value of pecuniary loss  
2 to the owner of or lawful producer of the recording is \$1,500 or  
3 more but less than \$20,000; or

4           (5) a felony of the third degree if the value of  
5 pecuniary loss to the owner of or lawful producer of the recording  
6 is \$20,000 or more.

7           (b) The punishment prescribed for an offense that is  
8 punishable under Subsection (a)(1), (2), (3), or (4) is increased  
9 to the next highest category of offense if the defendant has one or  
10 more times been previously convicted of or received a grant of  
11 deferred adjudication community supervision for an offense under  
12 this subchapter.

13           Sec. 32.77 [~~641.055~~]. FORFEITURE. If a person is  
14 convicted of an offense under [~~a violation of~~] this subchapter  
15 [~~chapter~~], the court in its judgment of conviction shall order the  
16 forfeiture and destruction or other disposition of:

17           (1) all recordings on which the conviction is based;  
18 and

19           (2) all devices and equipment used or intended to be  
20 used in the manufacture of the recordings on which the conviction is  
21 based.

22           Sec. 32.78. RESTITUTION. (a) If a person is convicted of  
23 an offense under this subchapter, the court shall order the person  
24 to make restitution to:

25           (1) an owner or lawful producer of a master recording  
26 who has suffered pecuniary loss as a result of the offense; or

27           (2) a trade association that represents an owner or



1 lawful producer described by Subdivision (1).

2 (b) The court shall base the amount of restitution on the  
3 value of the recordings involved in the offense, as determined  
4 under Section 32.02

5 ~~[Sec. 641.056. PRIVATE RIGHTS AND REMEDIES NOT AFFECTED.~~  
6 ~~Sections 641.051, 641.052, and 641.054 do not affect the rights and~~  
7 ~~remedies of a party in private litigation.~~

8 ~~[Sec. 641.057. PENALTIES CUMULATIVE. A penalty provided by~~  
9 ~~this chapter is in addition to any other penalty provided under~~  
10 ~~other law].~~

11 SECTION 2. The change in law made by this Act applies only  
12 to an offense committed on or after the effective date of this Act.  
13 An offense committed before the effective date of this Act is  
14 governed by the law in effect at the time the offense was committed.  
15 For purposes of this section, an offense was committed before the  
16 effective date of this Act if any element of the offense occurred  
17 before that date.

18 SECTION 3. This Act takes effect September 1, 2009.

COMMITTEE AMENDMENT NO. 1

Amend S.B. 1835 as follows:

(1) On page 2, between lines 11 and 12 insert the following:

"(5) "Artist" means a natural person or an entity that contracts to perform or entertain at a live entertainment event.

(6) "Live Entertainment Event" means an event that occurs on a specific date to which tickets are sold and at which:

(A) a natural person or a group of natural persons, physically present at the venue, performs for the purpose of entertaining a ticket holder who is present at the event;

(B) a traveling circus or animal show performs for the purpose of entertaining a ticket holder who is present at the event;  
or

(C) a historical, museum-quality artifact is on display at an exhibition.

(7) "Promoter" means an individual contracted by an Artist to promote, organize, coordinate, operate and manage a live entertainment event. The term includes services related to:

(A) the provision of staff for the live entertainment event; or

(B) the scheduling and promotion of an artist performing or entertaining at the live entertainment event."; and

On page 5, between lines 8 and 9, insert the following:

"(d) A contract or written agreement between a Promoter and an Artist for a Live Performance at a Live entertainment event creates a fiduciary responsibility between the parties to flow through any recording revenue and event proceeds, in the form of

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1 payments to each other as contractually stipulated, and that both  
2 parties are required to secure mutual permission in writing before  
3 producing a recording of a live entertainment event."

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