

1-1 By: Patrick S.B. No. 1835
1-2 (In the Senate - Filed March 11, 2009; March 20, 2009, read
1-3 first time and referred to Committee on Criminal Justice;
1-4 April 29, 2009, reported adversely, with favorable Committee
1-5 Substitute by the following vote: Yeas 6, Nays 1; April 29, 2009,
1-6 sent to printer.)

1-7 COMMITTEE SUBSTITUTE FOR S.B. No. 1835 By: Patrick

1-8 A BILL TO BE ENTITLED
1-9 AN ACT

1-10 relating to the offenses of unauthorized duplication, unauthorized
1-11 recording, and improper labeling of recordings.

1-12 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-13 SECTION 1. Chapter 641, Business & Commerce Code, is
1-14 transferred to Chapter 32, Penal Code, redesignated as Subchapter
1-15 E, Chapter 32, Penal Code, and amended to read as follows:

1-16 SUBCHAPTER E [~~CHAPTER 641~~]. UNAUTHORIZED RECORDINGS

1-17 [~~SUBCHAPTER A. GENERAL PROVISIONS~~]

1-18 Sec. 32.71 [~~641.001~~]. DEFINITIONS. In this subchapter
1-19 [~~chapter~~]:

1-20 (1) "Estimated wholesale value" means the average
1-21 wholesale value of lawfully manufactured and authorized recordings
1-22 corresponding to the number of unlawful recordings involved in the
1-23 offense.

1-24 (2) "Fix" means to embody in a recording or other
1-25 tangible medium of expression, by or under the authority of the
1-26 author, so that the matter embodied is sufficiently permanent or
1-27 stable to permit it to be perceived, reproduced, or otherwise
1-28 communicated for a period of more than transitory duration.

1-29 (3) [~~(2)~~] "Live performance" means a recitation,
1-30 rendering, or playing of a series, in an audible sequence, of:

1-31 (A) images;

1-32 (B) musical, spoken, or other sounds; or

1-33 (C) a combination of images and sounds.

1-34 (4) [~~(3)~~] "Owner" means a person who owns the sounds
1-35 fixed in a master phonograph record, master disc, master tape,
1-36 master film, or other recording:

1-37 (A) on which sound is recorded; and

1-38 (B) from which the transferred recorded sounds
1-39 are directly or indirectly derived.

1-40 (5) [~~(4)~~] "Recording" means a tangible medium on which
1-41 sounds, images, or both are recorded or otherwise stored,
1-42 including:

1-43 (A) an original phonograph record, disc, tape,
1-44 audio or video cassette, wire, film, electronic storage device, or
1-45 other medium now existing or later developed; or

1-46 (B) a copy or reproduction that wholly or partly
1-47 duplicates the original.

1-48 [~~SUBCHAPTER B. PROHIBITED PRACTICES, PENALTIES~~]

1-49 Sec. 32.72 [~~641.051~~]. UNAUTHORIZED DUPLICATION OF CERTAIN
1-50 RECORDINGS. (a) This section applies only to a recording that was
1-51 initially fixed before February 15, 1972.

1-52 (b) A person commits an offense if the person:

1-53 (1) knowingly reproduces for sale or causes to be
1-54 transferred any recording with intent to sell the recording or
1-55 cause the recording to be sold or use a recording or cause the
1-56 recording to be used for commercial advantage or private financial
1-57 gain through public performance without the consent of the owner;

1-58 (2) with the knowledge that the sounds on a recording
1-59 have been reproduced or transferred without the consent of the
1-60 owner, transports the recording within this state for commercial
1-61 advantage or private financial gain; or

1-62 (3) with the knowledge that a recording has been
1-63 reproduced or transferred without the consent of the owner:

2-1 (A) advertises, offers for sale, sells, or rents
2-2 the recording;
2-3 (B) causes the sale, resale, or rental of the
2-4 recording; or
2-5 (C) possesses the recording for a purpose
2-6 described by Paragraph (A) or (B).

2-7 (c) An offense under this section is punishable by:
2-8 (1) imprisonment for a term of not more than five
2-9 years, a fine of not less than \$500 and not more than ~~[to exceed]~~
2-10 \$250,000, or both imprisonment and the fine, if:

2-11 (A) the offense involves 65 or more ~~[at least~~
2-12 ~~1,000]~~ unauthorized recordings during a 180-day period; or

2-13 (B) the defendant has been previously convicted
2-14 under this section;

2-15 (2) imprisonment for a term of not more than two years,
2-16 a fine of not less than \$250 and not more than ~~[to exceed]~~ \$250,000,
2-17 or both imprisonment and the fine, if the offense involves more than
2-18 7 ~~[100]~~ but fewer than 65 ~~[1,000]~~ unauthorized recordings during a
2-19 180-day period; or

2-20 (3) confinement in the county jail for a term of not
2-21 more than one year, a fine of not less than \$100 and not more than
2-22 ~~[to exceed]~~ \$25,000, or both confinement and the fine, if the
2-23 offense is not otherwise punishable under Subdivision (1) or (2).

2-24 (d) This section does not apply to any fees due to the
2-25 American Society of Composers, Authors and Publishers.

2-26 Sec. 32.73 ~~[641.052]~~. UNAUTHORIZED RECORDING OF LIVE
2-27 PERFORMANCE. (a) A person commits an offense if the person, with
2-28 the knowledge that a live performance has been recorded or fixed
2-29 without the consent of the owner:

2-30 (1) for commercial advantage or private financial
2-31 gain, advertises, offers for sale, sells, rents, or transports,
2-32 causes the sale, resale, rental, or transportation of, or possesses
2-33 for one or more of these purposes a recording containing sounds of
2-34 the live performance; or

2-35 (2) with the intent to sell for commercial advantage
2-36 or private financial gain, records or fixes the live performance,
2-37 or causes the live performance to be recorded or fixed on a
2-38 recording.

2-39 (b) An offense under this section is punishable by:
2-40 (1) imprisonment for a term of not more than five
2-41 years, a fine of not less than \$500 and not more than ~~[to exceed]~~
2-42 \$250,000, or both imprisonment and the fine, if:

2-43 (A) the offense involves 65 or more ~~[at least~~
2-44 ~~1,000]~~ unauthorized recordings ~~[embodying sound or at least 65~~
2-45 ~~unauthorized audiovisual recordings]~~ during a 180-day period; or

2-46 (B) the defendant has been previously convicted
2-47 under this section;

2-48 (2) imprisonment for a term of not more than two years,
2-49 a fine of not less than \$250 and not more than ~~[to exceed]~~ \$250,000,
2-50 or both imprisonment and the fine, if the offense involves more than
2-51 7 ~~[100]~~ but fewer than 65 ~~[1,000]~~ unauthorized recordings
2-52 ~~[embodying sound or more than seven but fewer than 65 unauthorized~~
2-53 ~~audiovisual recordings]~~ during a 180-day period; or

2-54 (3) confinement in the county jail for a term of not
2-55 more than one year, a fine of not less than \$100 and not more than
2-56 ~~[to exceed]~~ \$25,000, or both confinement and the fine, if the
2-57 offense is not otherwise punishable under Subdivision (1) or (2).

2-58 (c) In the absence of a written agreement or law to the
2-59 contrary, the performer or performers of a live performance are
2-60 presumed to own the rights to record or fix those sounds.

2-61 (d) For purposes of this section, a person authorized to
2-62 maintain custody and control over business records that reflect
2-63 whether the owner of a live performance consented to having the live
2-64 performance recorded or fixed is a proper witness in a proceeding
2-65 regarding the issue of consent. A witness called under this
2-66 subsection is subject to the rules of evidence relating to the
2-67 competency of a witness to testify and the relevance and
2-68 admissibility of the testimony offered.

2-69 Sec. 32.74 ~~[641.053]~~. UNAUTHORIZED OPERATION OF RECORDING

3-1 DEVICE IN MOTION PICTURE THEATER. (a) In this section:
 3-2 (1) "Audiovisual recording function" means the
 3-3 capability of a device to record or transmit a motion picture or any
 3-4 part of a motion picture by means of any technology now known or
 3-5 later developed.
 3-6 (2) "Motion picture theater" means a movie theater,
 3-7 screening room, or other place primarily used to exhibit a motion
 3-8 picture.
 3-9 (b) A person commits an offense if, without the consent of
 3-10 the owner of the theater, the person, with the intent to record a
 3-11 motion picture, knowingly operates the audiovisual recording
 3-12 function of any device in a motion picture theater while the motion
 3-13 picture is being exhibited.
 3-14 (c) An offense under this section is a Class A misdemeanor,
 3-15 except that the offense is:
 3-16 (1) a state jail felony if the person has been
 3-17 previously convicted one time of an offense under this section; or
 3-18 (2) a felony of the third degree if the person has been
 3-19 previously convicted two or more times of an offense under this
 3-20 section.
 3-21 (d) It is a defense to prosecution under this section that
 3-22 the audiovisual recording function of the device was operated
 3-23 solely for official law enforcement purposes.
 3-24 (e) If conduct constituting an offense under this section
 3-25 also constitutes an offense under another law, the actor may be
 3-26 prosecuted under this section, the other law, or both.
 3-27 (f) A person who reasonably believes that another has
 3-28 knowingly operated the audiovisual recording function of a device
 3-29 in a motion picture theater in violation of this section is
 3-30 privileged to detain that other person in a reasonable manner and
 3-31 for a reasonable time to allow for the arrival of law enforcement
 3-32 authorities.
 3-33 Sec. 32.75 [~~641.054~~]. IMPROPER LABELING. (a) A person
 3-34 commits an offense if:
 3-35 (1) for commercial advantage or private financial
 3-36 gain, the person knowingly:
 3-37 (A) advertises, offers for sale, sells, rents, or
 3-38 transports a recording;
 3-39 (B) causes the sale, resale, rental, or
 3-40 transportation of a recording; or
 3-41 (C) possesses a recording for a purpose described
 3-42 by Paragraph (A) or (B); and
 3-43 (2) the outside cover, box, label, or jacket of the
 3-44 recording does not clearly and conspicuously disclose ~~+~~
 3-45 [~~(A)~~] the actual name and address of the
 3-46 manufacturer ~~[, and~~
 3-47 [~~(B) the name of the performer or group~~].
 3-48 (b) An offense under this section is punishable by:
 3-49 (1) imprisonment for a term of not more than five
 3-50 years, a fine of not less than \$500 and not more than ~~[to exceed]~~
 3-51 \$250,000, or both, if:
 3-52 (A) the offense involves ~~[at least]~~ 65 or more
 3-53 improperly labeled ~~[unauthorized]~~ recordings during a 180-day
 3-54 period; or
 3-55 (B) the defendant has been previously convicted
 3-56 under this section;
 3-57 (2) imprisonment for a term of not more than two years,
 3-58 a fine of not less than \$250 and not more than ~~[to exceed]~~ \$250,000,
 3-59 or both imprisonment and the fine, if the offense involves more than
 3-60 seven but fewer than 65 improperly labeled ~~[unauthorized]~~
 3-61 recordings during a 180-day period; or
 3-62 (3) confinement in the county jail for a term of not
 3-63 more than one year, a fine of not less than \$100 and not more than
 3-64 ~~[to exceed]~~ \$25,000, or both confinement and the fine, if the
 3-65 offense is not otherwise punishable under Subdivision (1) or (2).
 3-66 Sec. 32.76 [~~641.055~~]. FORFEITURE. If a person is convicted
 3-67 of an offense under ~~[a violation of]~~ this subchapter ~~[chapter]~~, the
 3-68 court in its judgment of conviction shall order the forfeiture and
 3-69 destruction or other disposition of:

4-1 (1) all recordings on which the conviction is based;
4-2 and
4-3 (2) all devices and equipment used or intended to be
4-4 used in the manufacture of the recordings on which the conviction is
4-5 based.

4-6 Sec. 32.77. RESTITUTION. (a) If a person is convicted of
4-7 an offense under this subchapter, the court shall order the person
4-8 to make restitution to:

4-9 (1) an owner or lawful producer of a master recording
4-10 that has suffered injury as a result of the offense; or

4-11 (2) a trade association that represents an owner or
4-12 lawful producer of a master recording that has suffered a financial
4-13 loss as a result of the offense.

4-14 (b) The amount of restitution ordered shall be the greater
4-15 of:

4-16 (1) the actual wholesale value of the recordings
4-17 involved in the offense;

4-18 (2) the estimated wholesale value of the recordings
4-19 involved in the offense if the recordings had been legally
4-20 manufactured and recorded; or

4-21 (3) the actual loss to the owner, lawful producer, or
4-22 trade association.

4-23 (c) The court may not require proof of the specific
4-24 wholesale value of each of the unlawful recordings to determine the
4-25 estimated wholesale value.

4-26 [~~Sec. 641.056. PRIVATE RIGHTS AND REMEDIES NOT AFFECTED.~~
4-27 ~~Sections 641.051, 641.052, and 641.054 do not affect the rights and~~
4-28 ~~remedies of a party in private litigation.~~

4-29 [~~Sec. 641.057. PENALTIES CUMULATIVE. A penalty provided by~~
4-30 ~~this chapter is in addition to any other penalty provided under~~
4-31 ~~other law.~~]

4-32 SECTION 2. The change in law made by this Act applies only
4-33 to an offense committed on or after the effective date of this Act.
4-34 An offense committed before the effective date of this Act is
4-35 governed by the law in effect at the time the offense was committed.
4-36 For purposes of this section, an offense was committed before the
4-37 effective date of this Act if any element of the offense occurred
4-38 before that date.

4-39 SECTION 3. This Act takes effect September 1, 2009.

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