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CALIFORNIA LEGISLATURE—2009—10 REGULAR SESSION

ASSEMBLY BILL

No. 819

**Introduced by Assembly Member Charles Calderon
(Coauthors: Assembly Members Blumenfield, Jones, Lieu,
Portantino, Smyth, and Tran)**

February 26, 2009

An act to *amend Sections 350, 653h, 653s, 653u, 653w, 653z, 653aa, and 1202.4 of, and to add Chapter 5.8 (commencing with Section 13849) to Title 6 of Part 4 of, the Penal Code, relating to intellectual property piracy, ~~making an appropriation therefor,~~ and declaring the urgency thereof, to take effect immediately.*

LEGISLATIVE COUNSEL'S DIGEST

AB 819, as amended, Charles Calderon. Intellectual property piracy. *Existing law makes it a crime for a person to willfully manufacture, intentionally sell, or knowingly possess for sale any counterfeit mark registered with the Secretary of State or registered on the Principal Register of the United States Patent and Trademark Office. Existing law imposes specified imprisonment and fines based upon the number of counterfeit marks involved in the offense and if the person is an individual or a business entity. Existing law also specifies certain*

imprisonment and fines for a subsequent conviction of this offense and provides other specified penalties if the conduct that was the basis of the conviction has directly and foreseeably caused death or great bodily injury to another through reliance on the counterfeited item for its intended purpose.

This bill would instead make it a crime for a person to willfully manufacture, sell, use, display, advertise, distribute, transport, offer for sale, or knowingly possess any goods, services, labels, patches, fabric, stickers, wrappers, badges, emblems, medallions, charms, boxes, containers, cans, cases, hangtags, documentation, or packaging or any other component of any type or nature that are designed, marketed, or otherwise intended to be used on or in connection with any goods or services bearing, or identified by, a counterfeit mark registered with the Secretary of State or any other state or registered on the Principal Register of the United States Patent and Trademark Office. The bill would delete the punishment for this offense based upon the number of counterfeit marks involved in the offense, would increase the various fines for a first conviction and a 2nd or subsequent conviction, as specified, and would increase the fine, as specified, for a conviction where the conduct caused death or great bodily injury. By changing the definition of a crime the bill would impose a state-mandated local program.

Existing law makes it a crime for a person to knowingly and willfully transfer or cause to be transferred any sounds that have been recorded on a phonograph record, disc, wire, tape, film, or other article on which sounds are recorded, with intent to sell or cause to be sold, or to use or cause to be used for commercial advantage or private financial gain through public performance, the article on which the sounds are so transferred, without the consent of the owner. Existing law specifies certain penalties for a violation of these provisions, and certain other provisions regarding the transportation of an article with the knowledge that the sounds thereon have been so transferred without the consent of the owner, if the offense involves the transfer or transportation, or conduct causing that transfer or transportation, of not less than 1,000 of the articles. Existing law also specifies certain other penalties for any other violation of these provisions and for a 2nd or subsequent conviction.

This bill would also make these crimes applicable to the transfer or transportation of unauthorized recorded audiovisual work, as defined. The bill would revise the fines imposed for a violation of these provisions

based on the number of recordings or audiovisual works involved in the offense and would increase the fines for any other violation of these provisions and for a 2nd or subsequent conviction, as specified. The bill would also make these same penalty provisions applicable to the offense of selling or reselling an article with knowledge that the sounds or audiovisual work has been transferred without the consent of the owner. By changing the definition of a crime the bill would impose a state-mandated local program.

Existing law makes it a crime for any person to transport or cause to be transported for monetary or other consideration within the state, any article containing sounds of a live performance with the knowledge that the sounds thereon have been recorded or mastered without the consent of the owner of the sounds of the live performance. Existing law specifies certain penalties for a violation of these provisions if the offense involves transporting or causing to be transported not less than 1,000 articles. Existing law also specifies certain other penalties for any other violation of these provisions and for a 2nd or subsequent conviction.

This bill would also make this crime applicable to the transportation of unauthorized audiovisual work, as defined, containing sounds of a live performance. The bill would revise the fines imposed for a violation of these provisions based on the number of articles or audiovisual works involved in the offense and would increase the fines for any other violation of these provisions and for a 2nd or subsequent conviction, as specified. The bill would also make these same penalty provisions applicable to the offense of selling or reselling an article containing sounds of a live performance with knowledge that the sounds have been recorded or mastered without the consent of the owner. By changing the definition of a crime the bill would impose a state-mandated local program.

Existing law makes it a crime for any person to record or master or cause to be recorded or mastered on any article, with the intent to sell for commercial advantage or private financial gain, the sounds of a live performance with the knowledge that the sounds thereon have been recorded or mastered without the consent of the owner of the sounds of the live performance. Existing law specifies certain penalties for a violation of these provisions if the offense involves the recording, mastering, or causing the recording or mastering of at least 1,000 articles. Existing law also specifies certain other penalties for any other violation of these provisions and for a 2nd or subsequent conviction.

This bill would also make this crime applicable to the unauthorized recording or mastering on an audiovisual work, as defined, of the sounds of a live performance. The bill would revise the fines imposed for a violation of these provisions based on the number of articles or audiovisual works involved in the offense and would increase the fines for any other violation of these provisions and for a 2nd or subsequent conviction, as specified. By changing the definition of a crime the bill would impose a state-mandated local program.

Existing law provides that a person is guilty of failure to disclose the origin of a recording or audiovisual work if, for commercial advantage or private financial gain, he or she knowingly advertises, sells, rents, manufactures, or possesses for those purposes, a recording or audiovisual work that does not disclose the name of the manufacturer, author, artist, performer, or producer, as specified. Failure to disclose the origin of a recording or audiovisual work is punishable by imprisonment in a county jail, imprisonment in the state prison, or a fine, or by both imprisonment and a fine, as specified, depending on the number of articles of audio recordings or audiovisual works involved, and whether the offense is a first offense, or 2nd or subsequent offense.

This bill would delete the element of commercial advantage or private financial gain from that crime, would include within that crime the distribution, including electronic dissemination, of the recording or audiovisual work, and would expand on the definition of recording to include memory cards, flash drives, hard drives, and data storage devices. The bill would also revise the fines imposed for violations based on the number of recordings or audiovisual works involved in the offense, as specified, and would impose corresponding penalties, as specified, for a 2nd or subsequent conviction. The bill would increase the fines for any other violation of these provisions and for a corresponding 2nd or subsequent conviction, as specified. By changing the definition of a crime the bill would impose a state-mandated local program.

Existing law provides that every person who operates a recording device in a motion picture theater while a motion picture is being exhibited, for the purpose of recording a theatrical motion picture and without the express written authority of the owner of the motion picture theater, is guilty of a public offense and shall be punished by imprisonment in a county jail not exceeding one year, by a fine not exceeding \$2,500, or by both that fine and imprisonment.

This bill would increase the maximum fine to \$25,000. The bill would also impose a fine of \$50,000 for a 2nd offense and \$100,000 for a 3rd or subsequent offense.

Statutory law that became inoperative on January 1, 2010, provided that it was a crime, punishable by a fine not exceeding \$2,500, imprisonment in a county jail for a period not exceeding one year, or by both that fine and imprisonment for a person located in California who knew that a particular recording or audiovisual work was commercial, to knowingly electronically disseminate all or substantially all of that commercial recording or audiovisual work to more than 10 other people without disclosing his or her e-mail address, and the title of the recording or audiovisual work. That statutory law also provided that a minor who violated these provisions was punishable by a fine not exceeding \$250 for a first or 2nd offense and by a fine not exceeding \$1,000, imprisonment in a county jail, or by both that fine and imprisonment for a 3rd or subsequent violation.

This bill would again make operative those provisions and, with respect to that crime not involving a minor, increase the maximum fine to \$25,000. This bill would impose a maximum fine of \$50,000 for a 2nd offense and a maximum fine of \$100,000 for a 3rd or subsequent conviction. For a minor who violates these provisions, the bill would increase the maximum fine to \$500 for a first or 2nd offense and, for a 3rd or subsequent offense, would increase the maximum fine to \$2,000. By creating a new crime, the bill would impose a state-mandated local program.

Existing law provides that, in addition to any other penalty or fine, a court shall order any person who has been convicted of any violation of certain provisions of law relating to the transfer or transportation of misappropriated recorded music, the transportation of an article containing unauthorized recordation of sounds of live performances, the unauthorized recording of sounds of live performances, or the failure to disclose the origin of a recording or audiovisual work to make restitution to the owner or lawful producer, or trade association acting on behalf of the owner or lawful producer, of the phonograph record, disc, wire, tape, film, or other device or article from which the sound or visual images were derived that suffered economic loss resulting from the violation. Existing law provides how value is to be determined for the purpose of calculating restitution.

This bill would also require a court to order restitution when the person has been convicted of violating certain other provisions of law

relating to the manufacture or sale of a counterfeit registered mark and the electronic transmission of all or substantially all of a commercial recording or audiovisual work. The bill would require the order of restitution to include either proven economic loss incurred from lost profits or no less than 5 times the aggregate value of each nonconforming article or device, in the case of an unreleased audio work or an audiovisual work that has not been made available for sale to the general public.

Existing law establishes various crime prevention and prosecution programs.

This bill would create, within the Department of Justice, the Division of Organized Crime and Intellectual Piracy—~~(OCIP)~~ (DOCIP) to investigate and prosecute organized crime in connection with crimes of intellectual property theft, with emphasis on intellectual property theft within the motion picture industry. The bill would require the ~~OCIP~~ DOCIP to submit a report to the Legislature with information on disbursements from the Intellectual Property Piracy Prevention and Prosecution Fund.~~The~~

~~The bill would establish the Intellectual Property Piracy Prevention and Prosecution Fund, a continuously appropriated fund, to provide funding for costs incurred by local law enforcement agencies that provide assistance to the OCIP DOCIP, as specified. This bill would become operative only if AB 711 of the 2009–10 Regular Session is enacted.~~

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

This bill would declare that it is to take effect immediately as an urgency statute.

Vote: $\frac{2}{3}$. Appropriation: ~~yes~~-no. Fiscal committee: yes. State-mandated local program: ~~no~~-yes.

The people of the State of California do enact as follows:

1 SECTION 1. Section 350 of the Penal Code is amended to
2 read:

1 350. (a) Any person who willfully manufactures, intentionally
2 sells, uses, displays, advertises, distributes, transports, offers for
3 sale, or knowingly possesses for sale any goods, services, labels,
4 patches, fabric, stickers, wrappers, badges, emblems, medallions,
5 charms, boxes, containers, cans, cases, hangtags, documentation,
6 or packaging or any other component of any type or nature that
7 are designed, marketed, or otherwise intended to be used on or in
8 connection with any goods or services bearing, or identified by,
9 a counterfeit mark registered with the Secretary of State or any
10 other state or registered on the Principal Register of the United
11 States Patent and Trademark Office, shall, upon conviction, be
12 punishable as follows:

13 (1) ~~When the offense involves less than 1,000 of the articles~~
14 ~~described in this subdivision, with a total retail or fair market value~~
15 ~~less than that required for grand theft as defined in Section 487,~~
16 ~~and if~~ If the person is an individual, he or she shall be punished
17 by a fine of not more than ~~five thousand dollars (\$5,000)~~ two
18 million dollars (\$2,000,000), or by imprisonment in a county jail
19 for not more than one year, or by both that fine and imprisonment;
20 or, if the person is a business entity, by a fine of not more than ~~one~~
21 hundred thousand dollars ~~(\$100,000)~~ five million dollars
22 (\$5,000,000).

23 (2) ~~When the offense involves 1,000 or more of the articles~~
24 ~~described in this subdivision, or has a total retail or fair market~~
25 ~~value equal to or greater than that required for grand theft as~~
26 ~~defined in Section 487 and~~ Upon a second or subsequent
27 conviction, if the person is an individual, he or she shall be
28 punished by imprisonment in a county jail not to exceed one year,
29 or in the state prison for 16 months, or two or three years, or by a
30 fine not to exceed ~~two hundred fifty thousand dollars (\$250,000)~~
31 five million dollars (\$5,000,000), or by both that imprisonment
32 and fine; or, if the person is a business entity, by a fine not to
33 exceed ~~five hundred thousand dollars (\$500,000)~~ fifteen million
34 dollars (\$15,000,000).

35 (b) ~~Any person who has been convicted of a violation of either~~
36 ~~paragraph (1) or (2) of subdivision (a) shall, upon a subsequent~~
37 ~~conviction of paragraph (1) of subdivision (a), if the person is an~~
38 individual, be punished by a fine of not more than fifty thousand
39 dollars (\$50,000), or by imprisonment in a county jail for not more
40 than one year, or in the state prison for 16 months, or two or three

1 years, or by both that fine and imprisonment; or, if the person is
2 a business entity, by a fine of not more than two hundred thousand
3 dollars (\$200,000).

4 (e)

5 (b) Any person who has been convicted of a violation of
6 subdivision (a) and who, by virtue of the conduct that was the basis
7 of the conviction, has directly and foreseeably caused death or
8 great bodily injury to another through reliance on the counterfeited
9 item for its intended purpose shall, if the person is an individual,
10 be punished by a fine of not more than ~~fifty thousand dollars~~
11 ~~(\$50,000)~~ *five million dollars (\$5,000,000)*, or by imprisonment
12 in the state prison for two, three, or four years, or by both that fine
13 and imprisonment; or, if the person is a business entity, by a fine
14 of not more than ~~two hundred thousand dollars (\$200,000)~~ *fifteen*
15 *million dollars (\$15,000,000)*.

16 (d)

17 (c) (1) Except as provided in paragraph (2), in any action
18 brought under this section resulting in a conviction or a plea of
19 nolo contendere, the court shall order the forfeiture and destruction
20 of all of those marks and of all goods, articles, or other matter
21 bearing the marks, and the forfeiture and destruction or other
22 disposition of all means of making the marks, and any and all
23 electrical, mechanical, or other devices for manufacturing,
24 reproducing, transporting, or assembling these marks, that were
25 used in connection with, or were part of, any violation of this
26 section.

27 (2) Upon request of any law enforcement agency and consent
28 from the specific registrants, the court may consider a motion to
29 have the items described in paragraph (1), not including recordings
30 or audiovisual works as defined in Section 653w, donated to a
31 nonprofit organization for the purpose of distributing the goods to
32 persons living in poverty at no charge to the persons served by the
33 organization.

34 (3) Forfeiture of the proceeds of the crime shall be subject to
35 Chapter 9 (commencing with Section 186) of Title 7 of Part 1.
36 However, no vehicle shall be forfeited under this section that may
37 be lawfully driven on the highway with a class 3 or 4 license, as
38 prescribed in Section 12804 of the Vehicle Code, and that is any
39 of the following:

1 (A) A community property asset of a person other than the
2 defendant.

3 (B) The sole class 3 or 4 vehicle available to the immediate
4 family of that person or of the defendant.

5 (C) Reasonably necessary to be retained by the defendant for
6 the purpose of lawfully earning a living, or for any other reasonable
7 and lawful purpose.

8 (e)

9 (d) For the purposes of this section, the following definitions
10 shall apply:

11 (1) When counterfeited but unassembled components of
12 computer software packages are recovered, including, but not
13 limited to, counterfeited computer diskettes, instruction manuals,
14 or licensing envelopes, the number of “articles” shall be equivalent
15 to the number of completed computer software packages that could
16 have been made from those components.

17 (2) “Business entity” includes, but is not limited to, a
18 corporation, limited liability company, or partnership. “Business
19 entity” does not include a sole proprietorship.

20 (3) “Counterfeit mark” means a spurious mark that is identical
21 with, or confusingly similar to, a registered mark and is used, or
22 intended to be used, on or in connection with the same type of
23 goods or services for which the genuine mark is registered. It is
24 not necessary for the mark to be displayed on the outside of an
25 article for there to be a violation. For articles containing digitally
26 stored information, it shall be sufficient to constitute a violation
27 if the counterfeit mark appears on a video display when the
28 information is retrieved from the article. The term “spurious mark”
29 includes genuine marks used on or in connection with spurious
30 articles and includes identical articles containing identical marks,
31 where the goods or marks were reproduced without authorization
32 of, or in excess of any authorization granted by, the registrant.
33 When counterfeited but unassembled components of any articles
34 described under subdivision (a) are recovered, including, but not
35 limited to, labels, patches, fabric, stickers, wrappers, badges,
36 emblems, medallions, charms, boxes, containers, cans, cases,
37 hangtags, documentation, or packaging, or any other components
38 of any type or nature that are designed, marketed, or otherwise
39 intended to be used on or in connection with any articles described
40 under subdivision (a), the number of “articles” shall be equivalent

1 to the number of completed articles that could have been made
2 from those components.

3 (4) “Knowingly possess” means that the person possessing an
4 article knew or had reason to believe that it was spurious, or that
5 it was used on or in connection with spurious articles, or that it
6 was reproduced without authorization of, or in excess of any
7 authorization granted by, the registrant.

8 (5) Notwithstanding Section 7, “person” includes, but is not
9 limited to, a business entity.

10 (6) “Registrant” means any person to whom the registration of
11 a mark is issued and that person’s legal representatives, successors,
12 or assigns.

13 (7) “Sale” includes resale.

14 (8) “Value” has the following meanings:

15 (A) When counterfeit items of computer software are
16 manufactured or possessed for sale, the “value” of those items
17 shall be equivalent to the retail price or fair market price of the
18 true items that are counterfeited.

19 (B) When counterfeited but unassembled components of
20 computer software packages or any other articles described under
21 subdivision (a) are recovered, including, but not limited to,
22 counterfeited digital disks, instruction manuals, licensing
23 envelopes, labels, patches, fabric, stickers, wrappers, badges,
24 emblems, medallions, charms, boxes, containers, cans, cases,
25 hangtags, documentation, or packaging, or any other components
26 of any type or nature that are designed, marketed, or otherwise
27 intended to be used on or in connection with any articles described
28 under subdivision (a), the “value” of those components shall be
29 equivalent to the retail price or fair market value of the number of
30 completed computer software packages or other completed articles
31 described under subdivision (a) that could have been made from
32 those components.

33 (C) “Retail or fair market value” of a counterfeit article means
34 a value equivalent to the retail price or fair market value, as of the
35 last day of the charged crime, of a completed similar genuine article
36 containing a genuine mark.

37 (f)

38 (e) This section shall not be enforced against any party who has
39 adopted and lawfully used the same or confusingly similar mark
40 in the rendition of like services or the manufacture or sale of like

1 goods in this state from a date prior to the earliest effective date
2 of registration of the service mark or trademark either with the
3 Secretary of State *or any other state*, or on the ~~Principle~~ *Principal*
4 Register of the United States Patent and Trademark Office.

5 ~~(g)~~

6 (f) An owner, officer, employee, or agent who provides, rents,
7 leases, licenses, or sells real property upon which a violation of
8 subdivision (a) occurs shall not be subject to a criminal penalty
9 pursuant to this section, unless he or she sells, or possesses for
10 sale, articles bearing a counterfeit mark in violation of this section.
11 This subdivision shall not be construed to abrogate or limit any
12 civil rights or remedies for a trademark violation.

13 ~~(h)~~

14 (g) This section shall not be enforced against any party who
15 engages in fair uses of a mark, as specified in Section 14247 of
16 the Business and Professions Code.

17 ~~(i)~~

18 (h) When a person is convicted of an offense under this section,
19 the court shall order the person to pay restitution to the trademark
20 owner and any other victim of the offense pursuant to Section
21 1202.4.

22 *SEC. 2. Section 653h of the Penal Code is amended to read:*

23 653h. (a) Every person is guilty of a public offense punishable
24 as provided in subdivisions (b) ~~and~~, (c), *and* (d), who:

25 (1) Knowingly and willfully transfers or causes to be transferred
26 any sounds *or audiovisual work* that have been recorded on a
27 phonograph record, disc, wire, tape, film, or other article on which
28 sounds are recorded, with intent to sell or cause to be sold, or to
29 use or cause to be used for commercial advantage or private
30 financial gain through public performance, the article on which
31 the sounds are so transferred, without the consent of the owner.

32 (2) Transports for monetary or like consideration within this
33 state or causes to be transported within this state any such article
34 with the knowledge that the sounds *or audiovisual work* thereon
35 have been so transferred without the consent of the owner.

36 (3) *Offers for sale or resale, or sells or resells, or causes the*
37 *sale or resale of, or rents, or possesses for these purposes, any*
38 *article described in paragraph (1) with the knowledge that the*
39 *sounds or audiovisual work thereon have been transferred onto*
40 *that article without the consent of the owner.*

1 (b) Any person who has been convicted of a violation of
 2 subdivision (a) shall be punished by imprisonment in the county
 3 jail not to exceed one year, or by a fine not to exceed one hundred
 4 fifty thousand dollars (\$150,000), or by both that imprisonment
 5 and fine, if the offense involves at least 100, but less than 1,000,
 6 recordings or at least seven, but less than 65, audiovisual works.

7 ~~(b)~~

8 (c) Any person who has been convicted of a violation of
 9 subdivision (a), shall be punished by imprisonment in the county
 10 jail not to exceed one year, by imprisonment in the state prison for
 11 two, three, or five years, or by a fine not to exceed two hundred
 12 fifty thousand dollars (\$250,000), or by both *that imprisonment*
 13 *and fine*, if the offense involves the transfer or transportation, or
 14 conduct causing that transfer or transportation, of not less than
 15 1,000 of the articles recordings or of at least 65 audiovisual works
 16 as described in subdivision (a).

17 ~~(e)~~

18 (d) Any person who has been convicted of any other violation
 19 of subdivision (a) not described in subdivision (b) *or (c)*, shall be
 20 punished by imprisonment in the county jail not to exceed one
 21 year, or by a fine of not more than twenty-five thousand dollars
 22 (\$25,000), or by both *that imprisonment and fine*. A second or
 23 subsequent conviction under subdivision (a) not described in
 24 subdivision (b) *or (c)* shall be punished by imprisonment in the
 25 state prison, or by a fine not to exceed one hundred thousand
 26 dollars (\$100,000), or by both *that imprisonment and fine*.

27 ~~(d) Every person who offers for sale or resale, or sells or resells,
 28 or causes the sale or resale, or rents, or possesses for these
 29 purposes, any article described in subdivision (a) with knowledge
 30 that the sounds thereon have been so transferred without the
 31 consent of the owner is guilty of a public offense.~~

32 ~~(1) A violation of subdivision (d) involving not less than 100
 33 of those articles shall be punishable by imprisonment in a county
 34 jail not to exceed one year or by a fine not to exceed ten thousand
 35 dollars (\$10,000), or by both. A second or subsequent conviction
 36 for the conduct described in this paragraph shall be punishable by
 37 imprisonment in the county jail not to exceed one year or in the
 38 state prison, or by a fine not to exceed twenty-five thousand dollars
 39 (\$25,000), or by both.~~

1 ~~(2) A person who has been convicted of any violation of this~~
2 ~~subdivision not described in paragraph (1) shall be punished by~~
3 ~~imprisonment in the county jail not to exceed six months or by a~~
4 ~~fine not to exceed five thousand dollars (\$5,000), or by both. A~~
5 ~~second conviction for the conduct described in this paragraph shall~~
6 ~~be punishable by imprisonment in the county jail not to exceed~~
7 ~~one year or by a fine not to exceed ten thousand dollars (\$10,000);~~
8 ~~or by both. A third or subsequent conviction for the conduct~~
9 ~~described in this paragraph shall be punishable by imprisonment~~
10 ~~in the county jail not to exceed one year or in the state prison, or~~
11 ~~by a fine not to exceed twenty-five thousand dollars (\$25,000), or~~
12 ~~by both.~~

13 (e) As used in this section, “person” means any individual,
14 partnership, partnership’s member or employee, corporation,
15 limited liability company, association or corporation or association
16 employee, officer or director; “owner” means the person who owns
17 the original master recording embodied in the master phonograph
18 record, master disc, master tape, master film, or other article used
19 for reproducing recorded sounds on phonograph records, discs,
20 tapes, films, or other articles on which sound is or can be recorded,
21 and from which the transferred recorded sounds are directly or
22 indirectly derived; ~~and~~ “master recording” means the original
23 fixation of sounds upon a recording from which copies can be
24 made; *and “audiovisual work” and “recording” shall have the*
25 *same meaning as in Section 653w.*

26 (f) This section shall neither enlarge nor diminish the right of
27 parties in private litigation.

28 (g) This section does not apply to any person engaged in radio
29 or television broadcasting who transfers, or causes to be transferred,
30 any such sounds (other than from the sound track of a motion
31 picture) intended for, or in connection with broadcast transmission
32 or related uses, or for archival purposes.

33 (h) This section does not apply to any not-for-profit educational
34 institution or any federal or state governmental entity, if the
35 institution or entity has as a primary purpose the advancement of
36 the public’s knowledge and the dissemination of information
37 regarding America’s musical cultural heritage, provided that this
38 purpose is clearly set forth in the institution’s or entity’s charter,
39 bylaws, certificate of incorporation, or similar document, and the
40 institution or entity has, prior to the transfer, made a good faith

1 effort to identify and locate the owner or owners of the sound
2 recordings to be transferred and, provided that the owner or owners
3 could not be and have not been located. Nothing in this section
4 shall be construed to relieve an institution or entity of its
5 contractual or other obligation to compensate the owners of sound
6 recordings to be transferred. In order to continue the exemption
7 permitted by this subdivision, the institution or entity shall make
8 continuing efforts to locate such owners and shall make an annual
9 public notice of the fact of the transfers in newspapers of general
10 circulation serving the jurisdictions where the owners were
11 incorporated or doing business at the time of initial affixations.
12 The institution or entity shall keep on file a record of the efforts
13 made to locate such owners for inspection by appropriate
14 governmental agencies.

15 (i) This section applies only to such articles that were initially
16 mastered prior to February 15, 1972.

17 *SEC. 3. Section 653s of the Penal Code is amended to read:*

18 653s. (a) Any person who *offers for sale or resale, or sells or*
19 *resells, or causes the sale or resale of, or rents, or possesses for*
20 *these purposes, or transports or causes to be transported for*
21 *monetary or other consideration within this state, any article or*
22 *audiovisual work containing sounds of a live performance with*
23 *the knowledge that the sounds thereon have been recorded or*
24 *mastered without the consent of the owner of the sounds of the*
25 *live performance is guilty of a public offense punishable as*
26 *provided in subdivision (g)-~~or~~, (h), or (i).*

27 (b) As used in this section and Section 653u:

28 (1) “Live performance” means the recitation, rendering, or
29 playing of a series of musical, spoken, or other sounds in any
30 audible sequence thereof.

31 (2) “Article” means the original disc, wire, tape, film,
32 phonograph record, or other recording device used to record or
33 master the sounds of the live performance and any copy or
34 reproduction thereof which duplicates, in whole or in part, the
35 original.

36 (3) “Person” means any individual, partnership, partnership
37 member or employee, corporation, association, or corporation or
38 association employee, officer, or director, limited liability
39 company, or limited liability company manager or officer.

1 (4) “Audiovisual work” shall have the same meaning as in
2 Section 653w.

3 (c) In the absence of a written agreement or operation of law to
4 the contrary, the performer or performers of the sounds of a live
5 performance shall be presumed to own the right to record or master
6 those sounds.

7 (d) For purposes of this section, a person who is authorized to
8 maintain custody and control over business records reflecting the
9 consent of the owner to the recordation or master recording of a
10 live performance shall be a proper witness in any proceeding
11 regarding the issue of consent.

12 Any witness called pursuant to this section shall be subject to
13 all rules of evidence relating to the competency of a witness to
14 testify and the relevance and admissibility of the testimony offered.

15 (e) This section shall neither enlarge nor diminish the rights and
16 remedies of parties to a recording or master recording which they
17 might otherwise possess by law.

18 (f) This section shall not apply to persons engaged in radio or
19 television broadcasting or cablecasting who record or fix the sounds
20 of a live performance for, or in connection with, broadcast or cable
21 transmission and related uses in educational television or radio
22 programs, for archival purposes, or for news programs or purposes
23 if the recordation or master recording is not commercially
24 distributed independent of the broadcast or cablecast by or through
25 the broadcasting or cablecasting entity to subscribers or the general
26 public.

27 (g) Any person who has been convicted of a violation of
28 subdivision (a) shall be punished by imprisonment in the county
29 jail not to exceed one year, or by a fine not to exceed one hundred
30 fifty thousand dollars (\$150,000), or by both that imprisonment
31 and fine, if the offense involves at least 100, but less than 1,000,
32 articles or at least seven, but less than 65, audiovisual works.

33 ~~(g)~~

34 (h) Any person who has been convicted of a violation of
35 subdivision (a); shall be punished by imprisonment in the county
36 jail not to exceed one year, or by imprisonment in the state prison
37 for two, three, or five years, or by a fine not to exceed two hundred
38 fifty thousand dollars (\$250,000), or by both *that imprisonment*
39 *and fine*, if the offense involves ~~the transportation or causing to~~

1 ~~be transported~~ of not less than 1,000 articles *or not less than 65*
2 *audiovisual works as described in subdivision (a).*

3 ~~(h)~~

4 (i) Any person who has been convicted of any other violation
5 of subdivision (a) not described in subdivision (g) *or (h)* shall be
6 punished by imprisonment in the county jail not to exceed one
7 year, or by a fine not to exceed twenty-five thousand dollars
8 (\$25,000), or by both *that imprisonment and fine*. A second or
9 subsequent conviction under subdivision (a) not described in
10 subdivision (g) *or (h)* shall be punished by imprisonment in the
11 county jail not to exceed one year or in the state prison, or by a
12 fine not to exceed one hundred thousand dollars (\$100,000), or by
13 both *that imprisonment and fine*.

14 (i) ~~Every person who offers for sale or resale, or sells or resells,~~
15 ~~or causes the sale or resale, or rents, or possesses for these~~
16 ~~purposes, any article described in subdivision (a) with knowledge~~
17 ~~that the sounds thereon have been so recorded or mastered without~~
18 ~~the consent of the owner of the sounds of a live performance is~~
19 ~~guilty of a public offense.~~

20 (1) ~~A violation of subdivision (i) involving not less than 100 of~~
21 ~~those articles shall be punishable by imprisonment in a county jail~~
22 ~~not to exceed one year or by a fine not to exceed ten thousand~~
23 ~~dollars (\$10,000), or by both. A second or subsequent conviction~~
24 ~~for the conduct described in this paragraph shall be punishable by~~
25 ~~imprisonment in the county jail not to exceed one year or in the~~
26 ~~state prison, or by a fine not to exceed twenty-five thousand dollars~~
27 ~~(\$25,000), or by both.~~

28 (2) ~~A person who has been convicted of any violation of this~~
29 ~~subdivision not described in paragraph (1) shall be punished by~~
30 ~~imprisonment in the county jail not to exceed six months or by a~~
31 ~~fine not to exceed five thousand dollars (\$5,000), or by both. A~~
32 ~~second conviction for the conduct described in this paragraph shall~~
33 ~~be punishable by imprisonment in the county jail not to exceed~~
34 ~~one year or by a fine not to exceed ten thousand dollars (\$10,000),~~
35 ~~or by both. A third or subsequent conviction for the conduct~~
36 ~~described in this paragraph shall be punishable by imprisonment~~
37 ~~in the county jail not to exceed one year or in the state prison, or~~
38 ~~by a fine not to exceed twenty-five thousand dollars (\$25,000), or~~
39 ~~by both.~~

40 SEC. 4. Section 653u of the Penal Code is amended to read:

1 653u. (a) Any person who records or masters or causes to be
2 recorded or mastered on any article *or audiovisual work* with the
3 intent to sell for commercial advantage or private financial gain,
4 the sounds of a live performance with the knowledge that the
5 sounds thereon have been recorded or mastered without the consent
6 of the owner of the sounds of the live performance is guilty of a
7 public offense punishable as provided in subdivisions (d) ~~and~~, (e),
8 *and* (f).

9 (b) In the absence of a written agreement or operation of law
10 to the contrary, the performer or performers of the sounds of a live
11 performance shall be presumed to own the right to record or master
12 those sounds.

13 (c) For purposes of this section, a person who is authorized to
14 maintain custody and control over business records reflecting the
15 consent of the owner to the recordation or master recording of a
16 live performance shall be a proper witness in any proceeding
17 regarding the issue of consent.

18 Any witness called pursuant to this section shall be subject to
19 all rules of evidence relating to the competency of a witness to
20 testify and the relevance and admissibility of the testimony offered.

21 (d) *Any person who has been convicted of a violation of*
22 *subdivision (a) shall be punished by imprisonment in the county*
23 *jail not to exceed one year, or by a fine not to exceed one hundred*
24 *fifty thousand dollars (\$150,000), or by both that imprisonment*
25 *and fine, if the offense involves at least 100, but less than 1,000,*
26 *articles or at least seven, but less than 65, audiovisual works.*

27 ~~(d)~~

28 (e) Any person who has been convicted of a violation of
29 subdivision (a) shall be punished by imprisonment in the county
30 jail not to exceed one year, or by imprisonment in the state prison
31 for two, three, or five years, or by a fine not to exceed two hundred
32 fifty thousand dollars (\$250,000), or by both *that imprisonment*
33 *and fine*, if the offense involves the recording, mastering, or
34 causing to be recorded or mastered *of* at least 1,000 articles *or at*
35 *least 65 audiovisual works as* described in subdivision (a).

36 ~~(e)~~

37 (f) Any person who has been convicted of any other violation
38 of subdivision (a) not described in subdivision (d) *or* (e), shall be
39 punished by imprisonment in the county jail not to exceed one
40 year, or by a fine not to exceed twenty-five thousand dollars

1 (\$25,000), or by both *that imprisonment and fine*. A second or
2 subsequent conviction under subdivision (a) not described in
3 subdivision (d) *or (e)* shall be punished by imprisonment in the
4 county jail not to exceed one year or in the state prison, or by a
5 fine not to exceed one hundred thousand dollars (\$100,000), or by
6 both *that imprisonment and fine*.

7 (g) *As used in this section, “article” shall have the same*
8 *meaning as in Section 653s and “audiovisual work” shall have*
9 *the same meaning as in Section 653w.*

10 SEC. 5. *Section 653w of the Penal Code is amended to read:*

11 653w. (a) A person is guilty of failure to disclose the origin
12 of a recording or audiovisual work if, ~~for commercial advantage~~
13 ~~or private financial gain~~, he or she knowingly advertises or offers
14 for sale or resale, or sells or resells, or causes the rental, sale or
15 resale *of*, or rents, or manufactures, *or distributes, including*
16 *electronic dissemination*, or possesses for these purposes, any
17 recording or audiovisual work, the cover, box, jacket, or label of
18 which does not clearly and conspicuously disclose the actual true
19 name and address of the manufacturer thereof and the name of the
20 actual author, artist, performer, producer, programmer, or group
21 thereon. This section does not require the original manufacturer
22 or authorized licensees of software producers to disclose the
23 contributing authors or programmers.

24 As used in this section, “recording” means any tangible medium
25 upon which information or sounds are recorded or otherwise stored,
26 including any phonograph record, disc, tape, audio cassette, wire,
27 film, *memory card, flash drive, hard drive, data storage device*,
28 or other medium on which information or sounds are recorded or
29 otherwise stored, but does not include sounds accompanying a
30 motion picture or other audiovisual work.

31 As used in this section, “audiovisual works” are the physical
32 embodiment of works that consist of related images that are
33 intrinsically intended to be shown using machines or devices such
34 as projectors, viewers, or electronic equipment, together with
35 accompanying sounds, if any, regardless of the nature of the
36 material objects such as films or tapes on which the works are
37 embodied.

38 (b) Any person who has been convicted of a violation of
39 subdivision (a) shall be punished as follows:

1 (1) *If the offense involves at least 25, but less than 100,*
2 *recordings or at least seven, but less than 65, audiovisual works*
3 *as described in subdivision (a), the person shall be punished by*
4 *imprisonment in a county jail not to exceed one year, or by a fine*
5 *not to exceed one hundred fifty thousand dollars (\$150,000), or*
6 *by both that imprisonment and fine. If the person has a prior*
7 *conviction under this paragraph or paragraph (2), the person shall*
8 *be punished by imprisonment in a county jail not to exceed one*
9 *year, or in the state prison, or by a fine not to exceed two hundred*
10 *fifty thousand dollars (\$250,000), or by both that imprisonment*
11 *and fine.*

12 ~~(1)~~

13 (2) ~~If the offense involves the advertisement, offer for sale or~~
14 ~~resale, sale, rental, manufacture, or possession for these purposes,~~
15 ~~of at least 100 articles of audio recordings or 100 articles of 65~~
16 ~~audiovisual works described in subdivision (a), the person shall~~
17 ~~be punished by imprisonment in a county jail not to exceed one~~
18 ~~year, or by imprisonment in the state prison for two, three, or five~~
19 ~~years, or by a fine not to exceed two hundred fifty thousand dollars~~
20 ~~(\$250,000), or by both that imprisonment and fine. If the person~~
21 ~~has a prior conviction under this paragraph or paragraph (1), the~~
22 ~~person shall be punished by imprisonment in a county jail not to~~
23 ~~exceed one year, or in the state prison for two, three, or five years,~~
24 ~~or by a fine not to exceed five hundred thousand dollars~~
25 ~~(\$500,000), or by both that imprisonment and fine.~~

26 ~~(2)~~

27 (3) Any other violation of subdivision (a) not described in
28 paragraph (1) or (2), shall, upon a first offense, be punished by
29 imprisonment in a county jail not to exceed one year, or by a fine
30 not to exceed ~~twenty-five thousand dollars (\$25,000)~~ *fifty thousand*
31 *dollars (\$50,000), or by both that imprisonment and fine.*

32 ~~(3)~~

33 (4) A second or subsequent conviction under subdivision (a)
34 not described in paragraph (1) or (2), shall be punished by
35 imprisonment in a county jail not to exceed one year or in the state
36 prison, or by a fine not to exceed one hundred thousand dollars
37 (\$100,000), or by both *that imprisonment and fine.*

38 *SEC. 6. Section 653z of the Penal Code is amended to read:*

39 653z. (a) Every person who operates a recording device in a
40 motion picture theater while a motion picture is being exhibited,

1 for the purpose of recording a theatrical motion picture and without
2 the express written authority of the owner of the motion picture
3 theater, is guilty of a public offense and shall be punished by
4 imprisonment in a county jail not exceeding one year, by a fine
5 not exceeding ~~two thousand five hundred dollars (\$2,500)~~
6 *twenty-five thousand dollars (\$25,000)*, or by both that fine and
7 imprisonment.

8 (b) *For a second conviction under subdivision (a), the person*
9 *shall be punished by imprisonment in a county jail not exceeding*
10 *one year, by a fine not exceeding fifty thousand dollars (\$50,000),*
11 *or by both that fine and imprisonment.*

12 (c) *For a third or subsequent conviction under subdivision (a),*
13 *the person shall be punished by imprisonment in a county jail not*
14 *exceeding one year, by a fine not exceeding one hundred thousand*
15 *dollars (\$100,000), or by both that fine and imprisonment.*

16 (b)

17 (d) For the purposes of this section, the following terms have
18 the following meanings:

19 (1) “Recording device” means a photographic, digital or video
20 camera, or other audio or video recording device capable of
21 recording the sounds and images of a motion picture or any portion
22 of a motion picture.

23 (2) “Motion picture theater” means a theater or other premises
24 in which a motion picture is exhibited.

25 (e)

26 (e) Nothing in this section shall preclude prosecution under any
27 other provision of law.

28 *SEC. 7. Section 653aa of the Penal Code is amended to read:*

29 653aa. (a) (1) Any person, except a minor, who is located in
30 California, who, knowing that a particular recording or audiovisual
31 work is commercial, knowingly electronically disseminates all or
32 substantially all of that commercial recording or audiovisual work
33 to more than 10 other people without disclosing his or her e-mail
34 address, and the title of the recording or audiovisual work is
35 punishable by a fine not exceeding ~~two thousand five hundred~~
36 ~~dollars (\$2,500),~~ *twenty-five thousand dollars (\$25,000),* by
37 imprisonment in a county jail for a period not exceeding one year,
38 or by both that fine and imprisonment.

39 (2) *For a second conviction under paragraph (1), the person*
40 *shall be punished by imprisonment in a county jail not exceeding*

1 *one year, by a fine not exceeding fifty thousand dollars (\$50,000),*
2 *or by both that fine and imprisonment.*

3 *(3) For a third or subsequent conviction under paragraph (1),*
4 *the person shall be punished by imprisonment in a county jail not*
5 *exceeding one year, by a fine not exceeding one hundred thousand*
6 *dollars (\$100,000), or by both that fine and imprisonment.*

7 (b) Any minor who violates *paragraph (1) of subdivision (a)* is
8 punishable by a fine not exceeding ~~two hundred fifty dollars (\$250)~~
9 *five hundred dollars (\$500)*. Any minor who commits a third or
10 subsequent violation of *paragraph (1) of subdivision (a)* is
11 punishable by a fine not exceeding ~~one thousand dollars (\$1,000);~~
12 *two thousand dollars (\$2,000)*, by imprisonment in a county jail
13 for a period not to exceed one year, or by both that imprisonment
14 and fine.

15 (c) Subdivisions (a) and (b) do not apply:

16 (1) To a person who electronically disseminates a commercial
17 recording or audiovisual work to his or her immediate family, or
18 within his or her personal network, defined as a restricted access
19 network controlled by and accessible to only that person or people
20 in his or her immediate household.

21 (2) If the copyright owner, or a person acting under the authority
22 of the copyright owner, of a commercial recording or audiovisual
23 work has explicitly given permission for all or substantially all of
24 that recording or audiovisual work to be freely disseminated
25 electronically by or to anyone without limitation.

26 (3) To a person who has been licensed either by the copyright
27 owner or a person acting under the authority of the copyright owner
28 to disseminate electronically all or substantially all of a commercial
29 audiovisual work or recording.

30 (4) To the licensed electronic dissemination of a commercial
31 audiovisual work or recording by means of a cable television
32 service offered over a cable system or direct to home satellite
33 service as defined in Title 47 of the United States Code.

34 (d) Nothing in this section shall restrict the copyright owner
35 from disseminating his or her own copyrighted material.

36 (e) Upon conviction for a violation of this section, in addition
37 to the penalty prescribed, the court shall order the permanent
38 deletion or destruction of any electronic file containing a
39 commercial recording or audiovisual work, the dissemination of
40 which was the basis of the violation. This subdivision shall not

1 apply to the copyright owner or to a person acting under the
2 authority of the copyright owner.

3 (f) An Internet service provider does not violate, and does not
4 aid and abet a violation of *paragraph (1) of subdivision (a)*, and
5 *paragraph (1) of subdivision (a)* shall not be enforced against an
6 Internet service provider, to the extent that the Internet service
7 provider enables a user of its service to electronically disseminate
8 an audiovisual work or sound recording, if the Internet service
9 provider maintains its valid e-mail address or other means of
10 electronic notification on its Web site in a location that is accessible
11 to the public.

12 For the purposes of this section, “Internet service provider”
13 means an entity, to the extent that the entity is transmitting, routing,
14 or providing connections for Internet communications initiated by
15 or at the direction of another person, between or among points
16 specified by a user, of material placed online by a user, storing or
17 hosting that material at the direction of a user, or referring or
18 linking users to that material.

19 (g) For purposes of this section:

20 (1) “Recording” means the electronic or physical embodiment
21 of any recorded images, sounds, or images and sounds, but does
22 not include audiovisual works or sounds accompanying audiovisual
23 works.

24 (2) “Audiovisual work” means the electronic or physical
25 embodiment of motion pictures, television programs, video or
26 computer games, or other audiovisual presentations that consist
27 of related images that are intrinsically intended to be shown by
28 the use of machines or devices such as projectors, viewers, or
29 electronic equipment, or a computer program, software, or system,
30 as defined in Section 502, together with accompanying sounds, if
31 any.

32 (3) “Commercial recording or audiovisual work” means a
33 recording or audiovisual work whose copyright owner, or assignee,
34 authorized agent, or licensee, has made or intends to make available
35 for sale, rental, or for performance or exhibition to the public under
36 license, but does not include an excerpt consisting of less than
37 substantially all of a recording or audiovisual work. A recording
38 or audiovisual work may be commercial regardless of whether the
39 person who electronically disseminates it seeks commercial
40 advantage or private financial gain from that dissemination.

1 (4) “Electronic dissemination” means initiating a transmission
2 of, making available, or otherwise offering, a commercial recording
3 or audiovisual work for distribution on the Internet or other digital
4 network, regardless of whether someone else had previously
5 electronically disseminated the same commercial recording or
6 audiovisual work.

7 (5) “E-mail address” means a valid e-mail address, or the valid
8 e-mail address of the holder of the account from which the
9 dissemination took place.

10 (6) “Disclosing” means providing information in, attached to,
11 or discernable or available in or through the process of
12 disseminating or obtaining a commercial recording or audiovisual
13 work in a manner that is accessible by any person engaged in
14 disseminating or receiving the commercial recording or audiovisual
15 work.

16 (h) Nothing in this section shall preclude prosecution under any
17 other provision of law.

18 ~~(i) This section shall become inoperative on January 1, 2010,~~
19 ~~unless a later enacted statute deletes or extends that date.~~

20 *SEC. 8. Section 1202.4 of the Penal Code is amended to read:*

21 1202.4. (a) (1) It is the intent of the Legislature that a victim
22 of crime who incurs any economic loss as a result of the
23 commission of a crime shall receive restitution directly from any
24 defendant convicted of that crime.

25 (2) Upon a person being convicted of any crime in the State of
26 California, the court shall order the defendant to pay a fine in the
27 form of a penalty assessment in accordance with Section 1464.

28 (3) The court, in addition to any other penalty provided or
29 imposed under the law, shall order the defendant to pay both of
30 the following:

31 (A) A restitution fine in accordance with subdivision (b).

32 (B) Restitution to the victim or victims, if any, in accordance
33 with subdivision (f), which shall be enforceable as if the order
34 were a civil judgment.

35 (b) In every case where a person is convicted of a crime, the
36 court shall impose a separate and additional restitution fine, unless
37 it finds compelling and extraordinary reasons for not doing so, and
38 states those reasons on the record.

39 (1) The restitution fine shall be set at the discretion of the court
40 and commensurate with the seriousness of the offense, but shall

1 not be less than two hundred dollars (\$200), and not more than ten
2 thousand dollars (\$10,000), if the person is convicted of a felony,
3 and shall not be less than one hundred dollars (\$100), and not more
4 than one thousand dollars (\$1,000), if the person is convicted of
5 a misdemeanor.

6 (2) In setting a felony restitution fine, the court may determine
7 the amount of the fine as the product of two hundred dollars (\$200)
8 multiplied by the number of years of imprisonment the defendant
9 is ordered to serve, multiplied by the number of felony counts of
10 which the defendant is convicted.

11 (c) The court shall impose the restitution fine unless it finds
12 compelling and extraordinary reasons for not doing so, and states
13 those reasons on the record. A defendant's inability to pay shall
14 not be considered a compelling and extraordinary reason not to
15 impose a restitution fine. Inability to pay may be considered only
16 in increasing the amount of the restitution fine in excess of the two
17 hundred-dollar (\$200) or one hundred-dollar (\$100) minimum.
18 The court may specify that funds confiscated at the time of the
19 defendant's arrest, except for funds confiscated pursuant to Section
20 11469 of the Health and Safety Code, be applied to the restitution
21 fine if the funds are not exempt for spousal or child support or
22 subject to any other legal exemption.

23 (d) In setting the amount of the fine pursuant to subdivision (b)
24 in excess of the two hundred-dollar (\$200) or one hundred-dollar
25 (\$100) minimum, the court shall consider any relevant factors
26 including, but not limited to, the defendant's inability to pay, the
27 seriousness and gravity of the offense and the circumstances of its
28 commission, any economic gain derived by the defendant as a
29 result of the crime, the extent to which any other person suffered
30 any losses as a result of the crime, and the number of victims
31 involved in the crime. Those losses may include pecuniary losses
32 to the victim or his or her dependents as well as intangible losses,
33 such as psychological harm caused by the crime. Consideration
34 of a defendant's inability to pay may include his or her future
35 earning capacity. A defendant shall bear the burden of
36 demonstrating his or her inability to pay. Express findings by the
37 court as to the factors bearing on the amount of the fine shall not
38 be required. A separate hearing for the fine shall not be required.

39 (e) The restitution fine shall not be subject to penalty
40 assessments authorized in Section 1464 or Chapter 12

1 (commencing with Section 76000) of Title 8 of the Government
2 Code, or the state surcharge authorized in Section 1465.7, and
3 shall be deposited in the Restitution Fund in the State Treasury.

4 (f) Except as provided in subdivisions (q) and (r), in every case
5 in which a victim has suffered economic loss as a result of the
6 defendant's conduct, the court shall require that the defendant
7 make restitution to the victim or victims in an amount established
8 by court order, based on the amount of loss claimed by the victim
9 or victims or any other showing to the court. If the amount of loss
10 cannot be ascertained at the time of sentencing, the restitution
11 order shall include a provision that the amount shall be determined
12 at the direction of the court. The court shall order full restitution
13 unless it finds compelling and extraordinary reasons for not doing
14 so, and states them on the record. The court may specify that funds
15 confiscated at the time of the defendant's arrest, except for funds
16 confiscated pursuant to Section 11469 of the Health and Safety
17 Code, be applied to the restitution order if the funds are not exempt
18 for spousal or child support or subject to any other legal exemption.

19 (1) The defendant has the right to a hearing before a judge to
20 dispute the determination of the amount of restitution. The court
21 may modify the amount, on its own motion or on the motion of
22 the district attorney, the victim or victims, or the defendant. If a
23 motion is made for modification of a restitution order, the victim
24 shall be notified of that motion at least 10 days prior to the
25 proceeding held to decide the motion.

26 (2) Determination of the amount of restitution ordered pursuant
27 to this subdivision shall not be affected by the indemnification or
28 subrogation rights of any third party. Restitution ordered pursuant
29 to this subdivision shall be ordered to be deposited to the
30 Restitution Fund to the extent that the victim, as defined in
31 subdivision (k), has received assistance from the Victim
32 Compensation Program pursuant to Chapter 5 (commencing with
33 Section 13950) of Part 4 of Division 3 of Title 2 of the Government
34 Code.

35 (3) To the extent possible, the restitution order shall be prepared
36 by the sentencing court, shall identify each victim and each loss
37 to which it pertains, and shall be of a dollar amount that is sufficient
38 to fully reimburse the victim or victims for every determined
39 economic loss incurred as the result of the defendant's criminal
40 conduct, including, but not limited to, all of the following:

- 1 (A) Full or partial payment for the value of stolen or damaged
2 property. The value of stolen or damaged property shall be the
3 replacement cost of like property, or the actual cost of repairing
4 the property when repair is possible.
- 5 (B) Medical expenses.
- 6 (C) Mental health counseling expenses.
- 7 (D) Wages or profits lost due to injury incurred by the victim,
8 and if the victim is a minor, wages or profits lost by the minor's
9 parent, parents, guardian, or guardians, while caring for the injured
10 minor. Lost wages shall include any commission income as well
11 as any base wages. Commission income shall be established by
12 evidence of commission income during the 12-month period prior
13 to the date of the crime for which restitution is being ordered,
14 unless good cause for a shorter time period is shown.
- 15 (E) Wages or profits lost by the victim, and if the victim is a
16 minor, wages or profits lost by the minor's parent, parents,
17 guardian, or guardians, due to time spent as a witness or in assisting
18 the police or prosecution. Lost wages shall include any commission
19 income as well as any base wages. Commission income shall be
20 established by evidence of commission income during the
21 12-month period prior to the date of the crime for which restitution
22 is being ordered, unless good cause for a shorter time period is
23 shown.
- 24 (F) Noneconomic losses, including, but not limited to,
25 psychological harm, for felony violations of Section 288.
- 26 (G) Interest, at the rate of 10 percent per annum, that accrues
27 as of the date of sentencing or loss, as determined by the court.
- 28 (H) Actual and reasonable attorney's fees and other costs of
29 collection accrued by a private entity on behalf of the victim.
- 30 (I) Expenses incurred by an adult victim in relocating away
31 from the defendant, including, but not limited to, deposits for
32 utilities and telephone service, deposits for rental housing,
33 temporary lodging and food expenses, clothing, and personal items.
34 Expenses incurred pursuant to this section shall be verified by law
35 enforcement to be necessary for the personal safety of the victim
36 or by a mental health treatment provider to be necessary for the
37 emotional well-being of the victim.
- 38 (J) Expenses to install or increase residential security incurred
39 related to a crime, as defined in subdivision (c) of Section 667.5,

1 including, but not limited to, a home security device or system, or
2 replacing or increasing the number of locks.

3 (K) Expenses to retrofit a residence or vehicle, or both, to make
4 the residence accessible to or the vehicle operational by the victim,
5 if the victim is permanently disabled, whether the disability is
6 partial or total, as a direct result of the crime.

7 (4) (A) If, as a result of the defendant's conduct, the Restitution
8 Fund has provided assistance to or on behalf of a victim or
9 derivative victim pursuant to Chapter 5 (commencing with Section
10 13950) of Part 4 of Division 3 of Title 2 of the Government Code,
11 the amount of assistance provided shall be presumed to be a direct
12 result of the defendant's criminal conduct and shall be included
13 in the amount of the restitution ordered.

14 (B) The amount of assistance provided by the Restitution Fund
15 shall be established by copies of bills submitted to the California
16 Victim Compensation and Government Claims Board reflecting
17 the amount paid by the board and whether the services for which
18 payment was made were for medical or dental expenses, funeral
19 or burial expenses, mental health counseling, wage or support
20 losses, or rehabilitation. Certified copies of these bills provided
21 by the board and redacted to protect the privacy and safety of the
22 victim or any legal privilege, together with a statement made under
23 penalty of perjury by the custodian of records that those bills were
24 submitted to and were paid by the board, shall be sufficient to meet
25 this requirement.

26 (C) If the defendant offers evidence to rebut the presumption
27 established by this paragraph, the court may release additional
28 information contained in the records of the board to the defendant
29 only after reviewing that information in camera and finding that
30 the information is necessary for the defendant to dispute the amount
31 of the restitution order.

32 (5) Except as provided in paragraph (6), in any case in which
33 an order may be entered pursuant to this subdivision, the defendant
34 shall prepare and file a disclosure identifying all assets, income,
35 and liabilities in which the defendant held or controlled a present
36 or future interest as of the date of the defendant's arrest for the
37 crime for which restitution may be ordered. The financial disclosure
38 statements shall be made available to the victim and the board
39 pursuant to Section 1214. The disclosure shall be signed by the
40 defendant upon a form approved or adopted by the Judicial Council

1 for the purpose of facilitating the disclosure. Any defendant who
2 willfully states as true any material matter that he or she knows to
3 be false on the disclosure required by this subdivision is guilty of
4 a misdemeanor, unless this conduct is punishable as perjury or
5 another provision of law provides for a greater penalty.

6 (6) A defendant who fails to file the financial disclosure required
7 in paragraph (5), but who has filed a financial affidavit or financial
8 information pursuant to subdivision (c) of Section 987, shall be
9 deemed to have waived the confidentiality of that affidavit or
10 financial information as to a victim in whose favor the order of
11 restitution is entered pursuant to subdivision (f). The affidavit or
12 information shall serve in lieu of the financial disclosure required
13 in paragraph (5), and paragraphs (7) to (10), inclusive, shall not
14 apply.

15 (7) Except as provided in paragraph (6), the defendant shall file
16 the disclosure with the clerk of the court no later than the date set
17 for the defendant's sentencing, unless otherwise directed by the
18 court. The disclosure may be inspected or copied as provided by
19 subdivision (b), (c), or (d) of Section 1203.05.

20 (8) In its discretion, the court may relieve the defendant of the
21 duty under paragraph (7) of filing with the clerk by requiring that
22 the defendant's disclosure be submitted as an attachment to, and
23 be available to, those authorized to receive the following:

24 (A) Any report submitted pursuant to subparagraph (C) of
25 paragraph (2) of subdivision (b) of Section 1203 or subdivision
26 (g) of Section 1203.

27 (B) Any stipulation submitted pursuant to paragraph (4) of
28 subdivision (b) of Section 1203.

29 (C) Any report by the probation officer, or any information
30 submitted by the defendant applying for a conditional sentence
31 pursuant to subdivision (d) of Section 1203.

32 (9) The court may consider a defendant's unreasonable failure
33 to make a complete disclosure pursuant to paragraph (5) as any of
34 the following:

35 (A) A circumstance in aggravation of the crime in imposing a
36 term under subdivision (b) of Section 1170.

37 (B) A factor indicating that the interests of justice would not be
38 served by admitting the defendant to probation under Section 1203.

1 (C) A factor indicating that the interests of justice would not be
2 served by conditionally sentencing the defendant under Section
3 1203.

4 (D) A factor indicating that the interests of justice would not
5 be served by imposing less than the maximum fine and sentence
6 fixed by law for the case.

7 (10) A defendant's failure or refusal to make the required
8 disclosure pursuant to paragraph (5) shall not delay entry of an
9 order of restitution or pronouncement of sentence. In appropriate
10 cases, the court may do any of the following:

11 (A) Require the defendant to be examined by the district attorney
12 pursuant to subdivision (h).

13 (B) If sentencing the defendant under Section 1170, provide
14 that the victim shall receive a copy of the portion of the probation
15 report filed pursuant to Section 1203.10 concerning the defendant's
16 employment, occupation, finances, and liabilities.

17 (C) If sentencing the defendant under Section 1203, set a date
18 and place for submission of the disclosure required by paragraph
19 (5) as a condition of probation or suspended sentence.

20 (11) If a defendant has any remaining unpaid balance on a
21 restitution order or fine 120 days prior to his or her scheduled
22 release from probation or 120 days prior to his or her completion
23 of a conditional sentence, the defendant shall prepare and file a
24 new and updated financial disclosure identifying all assets, income,
25 and liabilities in which the defendant holds or controls or has held
26 or controlled a present or future interest during the defendant's
27 period of probation or conditional sentence. The financial
28 disclosure shall be made available to the victim and the board
29 pursuant to Section 1214. The disclosure shall be signed and
30 prepared by the defendant on the same form as described in
31 paragraph (5). Any defendant who willfully states as true any
32 material matter that he or she knows to be false on the disclosure
33 required by this subdivision is guilty of a misdemeanor, unless
34 this conduct is punishable as perjury or another provision of law
35 provides for a greater penalty. The financial disclosure required
36 by this paragraph shall be filed with the clerk of the court no later
37 than 90 days prior to the defendant's scheduled release from
38 probation or completion of the defendant's conditional sentence.

39 (g) The court shall order full restitution unless it finds
40 compelling and extraordinary reasons for not doing so, and states

1 those reasons on the record. A defendant’s inability to pay shall
 2 not be considered a compelling and extraordinary reason not to
 3 impose a restitution order, nor shall inability to pay be a
 4 consideration in determining the amount of a restitution order.

5 (h) The district attorney may request an order of examination
 6 pursuant to the procedures specified in Article 2 (commencing
 7 with Section 708.110) of Chapter 6 of Division 2 of Title 9 of Part
 8 2 of the Code of Civil Procedure, in order to determine the
 9 defendant’s financial assets for purposes of collecting on the
 10 restitution order.

11 (i) A restitution order imposed pursuant to subdivision (f) shall
 12 be enforceable as if the order were a civil judgment.

13 (j) The making of a restitution order pursuant to subdivision (f)
 14 shall not affect the right of a victim to recovery from the Restitution
 15 Fund as otherwise provided by law, except to the extent that
 16 restitution is actually collected pursuant to the order. Restitution
 17 collected pursuant to this subdivision shall be credited to any other
 18 judgments for the same losses obtained against the defendant
 19 arising out of the crime for which the defendant was convicted.

20 (k) For purposes of this section, “victim” shall include all of
 21 the following:

- 22 (1) The immediate surviving family of the actual victim.
- 23 (2) Any corporation, business trust, estate, trust, partnership,
 24 association, joint venture, government, governmental subdivision,
 25 agency, or instrumentality, or any other legal or commercial entity
 26 when that entity is a direct victim of a crime.
- 27 (3) Any person who has sustained economic loss as the result
 28 of a crime and who satisfies any of the following conditions:
 - 29 (A) At the time of the crime was the parent, grandparent, sibling,
 30 spouse, child, or grandchild of the victim.
 - 31 (B) At the time of the crime was living in the household of the
 32 victim.
 - 33 (C) At the time of the crime was a person who had previously
 34 lived in the household of the victim for a period of not less than
 35 two years in a relationship substantially similar to a relationship
 36 listed in subparagraph (A).
 - 37 (D) Is another family member of the victim, including, but not
 38 limited to, the victim’s fiancé or fiancée, and who witnessed the
 39 crime.
 - 40 (E) Is the primary caretaker of a minor victim.

1 (4) Any person who is eligible to receive assistance from the
2 Restitution Fund pursuant to Chapter 5 (commencing with Section
3 13950) of Part 4 of Division 3 of Title 2 of the Government Code.

4 (5) Any governmental entity that is responsible for repairing,
5 replacing, or restoring public or privately owned property that has
6 been defaced with graffiti or other inscribed material, as defined
7 in subdivision (e) of Section 594, and that has sustained an
8 economic loss as the result of a violation of ~~Sections~~ Section 594,
9 594.3, 594.4, 640.5, 640.6, or 640.7 of the Penal Code.

10 (l) At its discretion, the board of supervisors of any county may
11 impose a fee to cover the actual administrative cost of collecting
12 the restitution fine, not to exceed 10 percent of the amount ordered
13 to be paid, to be added to the restitution fine and included in the
14 order of the court, the proceeds of which shall be deposited in the
15 general fund of the county.

16 (m) In every case in which the defendant is granted probation,
17 the court shall make the payment of restitution fines and orders
18 imposed pursuant to this section a condition of probation. Any
19 portion of a restitution order that remains unsatisfied after a
20 defendant is no longer on probation shall continue to be enforceable
21 by a victim pursuant to Section 1214 until the obligation is
22 satisfied.

23 (n) If the court finds and states on the record compelling and
24 extraordinary reasons why a restitution fine or full restitution order
25 should not be required, the court shall order, as a condition of
26 probation, that the defendant perform specified community service,
27 unless it finds and states on the record compelling and
28 extraordinary reasons not to require community service in addition
29 to the finding that restitution should not be required. Upon
30 revocation of probation, the court shall impose restitution pursuant
31 to this section.

32 (o) The provisions of Section 13963 of the Government Code
33 shall apply to restitution imposed pursuant to this section.

34 (p) The court clerk shall notify the California Victim
35 Compensation and Government Claims Board within 90 days of
36 an order of restitution being imposed if the defendant is ordered
37 to pay restitution to the board due to the victim receiving
38 compensation from the Restitution Fund. Notification shall be
39 accomplished by mailing a copy of the court order to the board,
40 which may be done periodically by bulk mail or electronic mail.

1 (q) Upon conviction for a violation of Section 236.1, the court
2 shall, in addition to any other penalty or restitution, order the
3 defendant to pay restitution to the victim in any case in which a
4 victim has suffered economic loss as a result of the defendant's
5 conduct. The court shall require that the defendant make restitution
6 to the victim or victims in an amount established by court order,
7 based on the amount of loss claimed by the victim or victims or
8 any other showing to the court. In determining restitution pursuant
9 to this section, the court shall base its order upon the greater of the
10 following: the gross value of the victim's labor or services based
11 upon the comparable value of similar services in the labor market
12 in which the offense occurred, or the value of the victim's labor
13 as guaranteed under California law, or the actual income derived
14 by the defendant from the victim's labor or services or any other
15 appropriate means to provide reparations to the victim.

16 (r) (1) In addition to any other penalty or fine, the court shall
17 order any person who has been convicted of any violation of
18 Section 350, 653h, 653s, 653u, ~~or 653w~~, or 653aa that involves a
19 recording or audiovisual work to make restitution to any owner
20 or lawful producer, or trade association acting on behalf of the
21 owner or lawful producer, of a phonograph record, disc, wire, tape,
22 film, or other device or article from which sounds or visual images
23 are derived that suffered economic loss resulting from the violation.
24 For the purpose of calculating restitution, the value of each
25 nonconforming article or device shall be based on the aggregate
26 wholesale value of lawfully manufactured and authorized devices
27 or articles from which sounds or visual images are devised, ~~unless~~
28 ~~a higher value can be proved in.~~ In the case of ~~(1)~~ (A) an unreleased
29 audio work, or ~~(2)~~ (B) an audiovisual work that, at the time of
30 unauthorized distribution, has not been made available in copies
31 for sale to the general public in the United States on a digital
32 versatile disc, *the order of restitution shall also include either*
33 *proven economic loss incurred from lost profits or no less than*
34 *five times the aggregate value of each nonconforming article or*
35 *device.* The order of restitution shall also include reasonable costs
36 incurred as a result of any investigation of the violation undertaken
37 by the owner, lawful producer, or trade association acting on behalf
38 of the owner or lawful producer. "Aggregate wholesale value"
39 means the average wholesale value of lawfully manufactured and
40 authorized sound or audiovisual recordings. Proof of the specific

1 wholesale value of each nonconforming device or article is not
2 required.

3 (2) *As used in this subdivision, “audiovisual work” and*
4 *“recording” shall have the same meaning as in Section 653w.*

5 SECTION 1.

6 SEC. 9. Chapter 5.8 (commencing with Section 13849) is added
7 to Title 6 of Part 4 of the Penal Code, to read:

8

9 CHAPTER 5.8. INTELLECTUAL PROPERTY PIRACY PREVENTION
10 AND PROSECUTION ACT OF ~~2009~~ 2010

11

12 13849. (a) This act shall be known and may be cited as the
13 Intellectual Property Piracy Prevention and Prosecution Act of
14 ~~2009~~ 2010.

15 (b) The Legislature finds and declares the following:

16 (1) According to a 2007 study by the Institute for Policy
17 Innovation, intellectual property piracy, meaning the theft of
18 movies, music, software, and video games, costs the United States
19 economy fifty-eight billion dollars (\$58,000,000,000) each year.

20 (2) The problem of intellectual property piracy continues to
21 grow worse. A 2005 Gallup study found that 5 percent of
22 Americans had purchased, copied, or downloaded counterfeit music
23 in the preceding year. By 2007, this number had jumped to 9
24 percent. The percentage of respondents that admitted buying a
25 pirated movie rose from 3 percent in 2005, to 6 percent in 2007.
26 At the same time, once robust DVD sales have flattened over the
27 past few years, while CD shipments to retailers have plummeted.

28 (3) The effect of intellectual property piracy on California and
29 its citizens is particularly dire. Intellectual property piracy
30 adversely affects the California economy, eliminates jobs, and
31 damages industry. According to the Business Software Alliance,
32 in 2003, software piracy alone cost the California economy more
33 than 13,000 jobs, over eight hundred two million dollars
34 (\$802,000,000) in wages and salaries, over one billion dollars
35 (\$1,000,000,000) in retail sales of business software applications,
36 and roughly two hundred thirty-nine million dollars (\$239,000,000)
37 in total tax losses.

38 (4) *Intellectual property piracy poses a significant threat to*
39 *consumers, who, through no fault of their own, are often deceived*
40 *or deliberately misled, or both deceived and deliberately misled,*

1 *as to the nature of purchased products, whereby pirated goods*
 2 *are palmed off, including in electronic form, as legitimate*
 3 *authorized goods.*

4 ~~(4)~~

5 (5) A growing number of criminal organizations worldwide are
 6 involved in intellectual property piracy.

7 ~~(5)~~

8 (6) This act will send a strong signal that California is committed
 9 to protecting the intellectual property created by California’s
 10 innovation and entertainment industries.

11 ~~(6)~~

12 (7) Funds provided pursuant to this act will be used to foster
 13 innovation and to provide local law enforcement and prosecutors
 14 the tools they need to effectively fight intellectual property piracy.

15 ~~(7)~~

16 (8) Finally, by safeguarding the legitimate sale of intellectual
 17 property, California will increase its tax base, and stimulate the
 18 economy.

19 (c) Funds provided pursuant to this act are intended to ensure
 20 that law enforcement and prosecutors are equipped with the
 21 necessary personnel and equipment to combat successfully
 22 intellectual property piracy, which includes piracy of movies,
 23 music, software, and video games.

24 13849.1. (a) There is hereby created, within the Bureau of
 25 Investigation and Intelligence of the Department of Justice, the
 26 Division of Organized Crime and Intellectual Piracy—~~(OCIP)~~
 27 *(DOCIP)* to investigate and prosecute organized crime in
 28 connection with crimes involving intellectual property theft, with
 29 an emphasis on intellectual property theft within the motion picture
 30 industry.

31 (b) ~~The OCIP~~ *DOCIP* shall prepare and submit to the Legislature
 32 an annual report with information on the number and types of
 33 investigations and prosecutions funded by the Intellectual Property
 34 Piracy Prevention and Prosecution Fund.

35 (c) For purposes of this chapter, “organized crime” shall have
 36 the same meaning as is specified in subdivision (d) of Section
 37 186.2.

38 (d) For purposes of this chapter, “intellectual property” means
 39 property that results from original creative thought, *such* as patents,
 40 copyright material, and trademarks.

1 13849.2. (a) There is hereby established the Intellectual
2 Property Piracy Prevention and Prosecution Fund to provide total
3 or partial reimbursement for costs incurred by local law
4 enforcement agencies assisting the ~~Division of Organized Crime~~
5 ~~and Intellectual Piracy (OCIP) in the Department of Justice~~ *DOCIP*
6 in ongoing investigations or prosecutions, or both, of organized
7 crimes involving intellectual property theft.

8 ~~(b) All funds collected pursuant to Section 6225 of the Revenue~~
9 ~~and Taxation Code shall be deposited in the fund. Notwithstanding~~
10 ~~Section 13340 of the Government Code, moneys in the fund are~~
11 ~~continuously appropriated for the purposes specified in this chapter.~~

12 ~~(c) The~~

13 ~~(b)~~ *Upon appropriation by the Legislature, the Controller shall*
14 *make payments from the fund, upon the approval of the Attorney*
15 *General, to local law enforcement agencies that provide substantial*
16 *assistance to the ~~OCIP of the Department of Justice~~ *DOCIP* in*
17 *connection with open investigations or court proceedings, or both,*
18 *against organized crime involving intellectual property theft,*
19 *including, but not limited to, all of the following:*

20 (1) Counterfeit goods.

21 (2) Copyright infringement.

22 (3) Trademark infringement.

23 (4) Pirated CDs.

24 (5) Pirated DVDs.

25 (6) Pirated computer software.

26 ~~(d)~~

27 ~~(c)~~ *Investigations of intellectual property theft related to motion*
28 *pictures shall receive the highest priority in making disbursements*
29 *from the fund.*

30 ~~(e)~~

31 ~~(d)~~ *Notwithstanding Section 1463.001, all fines resulting from*
32 *prosecutions by the ~~OCIP~~ *DOCIP* shall be deposited in the fund.*

33 ~~13849.3. This section shall become operative only if Assembly~~
34 ~~Bill 711 of the 2009–10 Regular Session is enacted.~~

35 *SEC. 10. No reimbursement is required by this act pursuant*
36 *to Section 6 of Article XIII B of the California Constitution because*
37 *the only costs that may be incurred by a local agency or school*
38 *district will be incurred because this act creates a new crime or*
39 *infraction, eliminates a crime or infraction, or changes the penalty*
40 *for a crime or infraction, within the meaning of Section 17556 of*

1 *the Government Code, or changes the definition of a crime within*
2 *the meaning of Section 6 of Article XIII B of the California*
3 *Constitution.*

4 ~~SEC. 2.~~

5 *SEC. 11.* This act is an urgency statute necessary for the
6 immediate preservation of the public peace, health, or safety within
7 the meaning of Article IV of the Constitution and shall go into
8 immediate effect. The facts constituting the necessity are:

9 In order to ensure public peace against the accelerating problem
10 of intellectual property piracy, it is necessary for this act to take
11 effect immediately.

O