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AMENDED IN ASSEMBLY MAY 6, 2009
AMENDED IN ASSEMBLY APRIL 15, 2009

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, 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.~~

This bill would double the fines that may be imposed for a violation of any of the above provisions.

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~~ *would double the fines that may be imposed for a violation of those provisions.* 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 (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 DOCIP to submit a report to the Legislature with information on disbursements from the Intellectual Property Piracy Prevention and Prosecution Fund.

The bill would establish the Intellectual Property Piracy Prevention and Prosecution Fund to provide funding for costs incurred by local law enforcement agencies that provide assistance to the DOCIP, as specified.

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: no. Fiscal committee: yes.
State-mandated local program: 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, sells, uses,~~
2 ~~displays, advertises, distributes, transports, offers for sale, or~~
3 ~~knowingly possesses any goods, services, labels, patches, fabric,~~
4 ~~stickers, wrappers, badges, emblems, medallions, charms, boxes,~~
5 ~~containers, cans, cases, hangtags, documentation, or packaging or~~
6 ~~any other component of any type or nature that are designed,~~
7 ~~marketed, or otherwise intended to be used on or in connection~~
8 ~~with any goods or services bearing, or identified by, a counterfeit~~
9 ~~mark registered with the Secretary of State or any other state or~~
10 ~~registered on the Principal Register of the United States Patent and~~
11 ~~Trademark Office, shall, upon conviction, be punishable as follows:~~

12 ~~(1) If the person is an individual, he or she shall be punished~~
13 ~~by a fine of not more than two million dollars (\$2,000,000), or by~~
14 ~~imprisonment in a county jail for not more than one year, or by~~
15 ~~both that fine and imprisonment; or, if the person is a business~~
16 ~~entity, by a fine of not more than five million dollars (\$5,000,000):~~

17 ~~(2) Upon a second or subsequent conviction, if the person is an~~
18 ~~individual, he or she shall be punished by imprisonment in a county~~
19 ~~jail not to exceed one year, or in the state prison for 16 months, or~~
20 ~~two or three years, or by a fine not to exceed five million dollars~~
21 ~~(\$5,000,000), or by both that imprisonment and fine; or, if the~~
22 ~~person is a business entity, by a fine not to exceed fifteen million~~
23 ~~dollars (\$15,000,000):~~

24 ~~(b) Any person who has been convicted of a violation of~~
25 ~~subdivision (a) and who, by virtue of the conduct that was the basis~~
26 ~~of the conviction, has directly and foreseeably caused death or~~
27 ~~great bodily injury to another through reliance on the counterfeited~~
28 ~~item for its intended purpose shall, if the person is an individual,~~
29 ~~be punished by a fine of not more than five million dollars~~
30 ~~(\$5,000,000), or by imprisonment in the state prison for two, three,~~
31 ~~or four years, or by both that fine and imprisonment; or, if the~~
32 ~~person is a business entity, by a fine of not more than fifteen~~
33 ~~million dollars (\$15,000,000):~~

34 ~~(c) (1) Except as provided in paragraph (2), in any action~~
35 ~~brought under this section resulting in a conviction or a plea of~~
36 ~~nolo contendere, the court shall order the forfeiture and destruction~~
37 ~~of all of those marks and of all goods, articles, or other matter~~
38 ~~bearing the marks, and the forfeiture and destruction or other~~
39 ~~disposition of all means of making the marks, and any and all~~
40 ~~electrical, mechanical, or other devices for manufacturing,~~

1 reproducing, transporting, or assembling these marks, that were
2 used in connection with, or were part of, any violation of this
3 section.

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

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

17 (A) A community property asset of a person other than the
18 defendant.

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

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

24 (d) For the purposes of this section, the following definitions
25 shall apply:

26 (1) When counterfeited but unassembled components of
27 computer software packages are recovered, including, but not
28 limited to, counterfeited computer diskettes, instruction manuals,
29 or licensing envelopes, the number of "articles" shall be equivalent
30 to the number of completed computer software packages that could
31 have been made from those components.

32 (2) "Business entity" includes, but is not limited to, a
33 corporation, limited liability company, or partnership. "Business
34 entity" does not include a sole proprietorship.

35 (3) "Counterfeit mark" means a spurious mark that is identical
36 with, or confusingly similar to, a registered mark and is used, or
37 intended to be used, on or in connection with the same type of
38 goods or services for which the genuine mark is registered. It is
39 not necessary for the mark to be displayed on the outside of an
40 article for there to be a violation. For articles containing digitally

1 stored information, it shall be sufficient to constitute a violation
2 if the counterfeit mark appears on a video display when the
3 information is retrieved from the article. The term “spurious mark”
4 includes genuine marks used on or in connection with spurious
5 articles and includes identical articles containing identical marks,
6 where the goods or marks were reproduced without authorization
7 of, or in excess of any authorization granted by, the registrant.
8 When counterfeited but unassembled components of any articles
9 described under subdivision (a) are recovered, including, but not
10 limited to, labels, patches, fabric, stickers, wrappers, badges,
11 emblems, medallions, charms, boxes, containers, cans, cases,
12 hangtags, documentation, or packaging, or any other components
13 of any type or nature that are designed, marketed, or otherwise
14 intended to be used on or in connection with any articles described
15 under subdivision (a), the number of “articles” shall be equivalent
16 to the number of completed articles that could have been made
17 from those components.

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

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

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

28 (7) “Sale” includes resale.

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

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

34 (B) When counterfeited but unassembled components of
35 computer software packages or any other articles described under
36 subdivision (a) are recovered, including, but not limited to,
37 counterfeited digital disks, instruction manuals, licensing
38 envelopes, labels, patches, fabric, stickers, wrappers, badges,
39 emblems, medallions, charms, boxes, containers, cans, cases,
40 hangtags, documentation, or packaging, or any other components

1 of any type or nature that are designed, marketed, or otherwise
 2 intended to be used on or in connection with any articles described
 3 under subdivision (a), the “value” of those components shall be
 4 equivalent to the retail price or fair market value of the number of
 5 completed computer software packages or other completed articles
 6 described under subdivision (a) that could have been made from
 7 those components.

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

12 (e) This section shall not be enforced against any party who has
 13 adopted and lawfully used the same or confusingly similar mark
 14 in the rendition of like services or the manufacture or sale of like
 15 goods in this state from a date prior to the earliest effective date
 16 of registration of the service mark or trademark either with the
 17 Secretary of State or any other state, or on the Principal Register
 18 of the United States Patent and Trademark Office.

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

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

29 (h) When a person is convicted of an offense under this section,
 30 the court shall order the person to pay restitution to the trademark
 31 owner and any other victim of the offense pursuant to Section
 32 1202.4.

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

34 653h. (a) Every person is guilty of a public offense punishable
 35 as provided in subdivisions (b), (c), and (d), who:

36 (1) Knowingly and willfully transfers or causes to be transferred
 37 any sounds or audiovisual work that have been recorded on a
 38 phonograph record, disc, wire, tape, film, or other article on which
 39 sounds are recorded, with intent to sell or cause to be sold, or to
 40 use or cause to be used for commercial advantage or private

1 financial gain through public performance, the article on which
2 the sounds are so transferred, without the consent of the owner.

3 (2) ~~Transports for monetary or like consideration within this
4 state or causes to be transported within this state any such article
5 with the knowledge that the sounds or audiovisual work thereon
6 have been so transferred without the consent of the owner.~~

7 (3) ~~Offers for sale or resale, or sells or resells, or causes the sale
8 or resale of, or rents, or possesses for these purposes, any article
9 described in paragraph (1) with the knowledge that the sounds or
10 audiovisual work thereon have been transferred onto that article
11 without the consent of the owner.~~

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

18 (c) ~~Any person who has been convicted of a violation of
19 subdivision (a), shall be punished by imprisonment in the county
20 jail not to exceed one year, by imprisonment in the state prison for
21 two, three, or five years, or by a fine not to exceed two hundred
22 fifty thousand dollars (\$250,000), or by both that imprisonment
23 and fine, if the offense involves the transfer or transportation, or
24 conduct causing that transfer or transportation, of not less than
25 1,000 recordings or of at least 65 audiovisual works as described
26 in subdivision (a).~~

27 (d) ~~Any person who has been convicted of any other violation
28 of subdivision (a) not described in subdivision (b) or (c), shall be
29 punished by imprisonment in the county jail not to exceed one
30 year, or by a fine of not more than twenty-five thousand dollars
31 (\$25,000), or by both that imprisonment and fine. A second or
32 subsequent conviction under subdivision (a) not described in
33 subdivision (b) or (c) shall be punished by imprisonment in the
34 state prison, or by a fine not to exceed one hundred thousand
35 dollars (\$100,000), or by both that imprisonment and fine.~~

36 (e) ~~As used in this section, "person" means any individual,
37 partnership, partnership's member or employee, corporation,
38 limited liability company, association or corporation or association
39 employee, officer or director; "owner" means the person who owns
40 the original master recording embodied in the master phonograph~~

1 record, master disc, master tape, master film, or other article used
2 for reproducing recorded sounds on phonograph records, discs,
3 tapes, films, or other articles on which sound is or can be recorded,
4 and from which the transferred recorded sounds are directly or
5 indirectly derived; “master recording” means the original fixation
6 of sounds upon a recording from which copies can be made; and
7 “audiovisual work” and “recording” shall have the same meaning
8 as in Section 653w.

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

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

16 (h) This section does not apply to any not-for-profit educational
17 institution or any federal or state governmental entity, if the
18 institution or entity has as a primary purpose the advancement of
19 the public’s knowledge and the dissemination of information
20 regarding America’s musical cultural heritage, provided that this
21 purpose is clearly set forth in the institution’s or entity’s charter,
22 bylaws, certificate of incorporation, or similar document, and the
23 institution or entity has, prior to the transfer, made a good faith
24 effort to identify and locate the owner or owners of the sound
25 recordings to be transferred and, provided that the owner or owners
26 could not be and have not been located. Nothing in this section
27 shall be construed to relieve an institution or entity of its
28 contractual or other obligation to compensate the owners of sound
29 recordings to be transferred. In order to continue the exemption
30 permitted by this subdivision, the institution or entity shall make
31 continuing efforts to locate such owners and shall make an annual
32 public notice of the fact of the transfers in newspapers of general
33 circulation serving the jurisdictions where the owners were
34 incorporated or doing business at the time of initial affixations.
35 The institution or entity shall keep on file a record of the efforts
36 made to locate such owners for inspection by appropriate
37 governmental agencies.

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

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

1 ~~653s. (a) Any person who offers for sale or resale, or sells or~~
2 ~~resells, or causes the sale or resale of, or rents, or possesses for~~
3 ~~these purposes, or transports or causes to be transported for~~
4 ~~monetary or other consideration within this state, any article or~~
5 ~~audiovisual work containing sounds of a live performance with~~
6 ~~the knowledge that the sounds thereon have been recorded or~~
7 ~~mastered without the consent of the owner of the sounds of the~~
8 ~~live performance is guilty of a public offense punishable as~~
9 ~~provided in subdivision (g), (h), or (i).~~

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

11 ~~(1) “Live performance” means the recitation, rendering, or~~
12 ~~playing of a series of musical, spoken, or other sounds in any~~
13 ~~audible sequence thereof.~~

14 ~~(2) “Article” means the original disc, wire, tape, film,~~
15 ~~phonograph record, or other recording device used to record or~~
16 ~~master the sounds of the live performance and any copy or~~
17 ~~reproduction thereof which duplicates, in whole or in part, the~~
18 ~~original.~~

19 ~~(3) “Person” means any individual, partnership, partnership~~
20 ~~member or employee, corporation, association, or corporation or~~
21 ~~association employee, officer, or director, limited liability~~
22 ~~company, or limited liability company manager or officer.~~

23 ~~(4) “Audiovisual work” shall have the same meaning as in~~
24 ~~Section 653w.~~

25 ~~(e) In the absence of a written agreement or operation of law to~~
26 ~~the contrary, the performer or performers of the sounds of a live~~
27 ~~performance shall be presumed to own the right to record or master~~
28 ~~those sounds.~~

29 ~~(d) For purposes of this section, a person who is authorized to~~
30 ~~maintain custody and control over business records reflecting the~~
31 ~~consent of the owner to the recordation or master recording of a~~
32 ~~live performance shall be a proper witness in any proceeding~~
33 ~~regarding the issue of consent.~~

34 ~~Any witness called pursuant to this section shall be subject to~~
35 ~~all rules of evidence relating to the competency of a witness to~~
36 ~~testify and the relevance and admissibility of the testimony offered.~~

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

1 ~~(f) This section shall not apply to persons engaged in radio or~~
 2 ~~television broadcasting or cablecasting who record or fix the sounds~~
 3 ~~of a live performance for, or in connection with, broadcast or cable~~
 4 ~~transmission and related uses in educational television or radio~~
 5 ~~programs, for archival purposes, or for news programs or purposes~~
 6 ~~if the recodation or master recording is not commercially~~
 7 ~~distributed independent of the broadcast or cablecast by or through~~
 8 ~~the broadcasting or cablecasting entity to subscribers or the general~~
 9 ~~public.~~

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

16 ~~(h) Any person who has been convicted of a violation of~~
 17 ~~subdivision (a) shall be punished by imprisonment in the county~~
 18 ~~jail not to exceed one year, or by imprisonment in the state prison~~
 19 ~~for two, three, or five years, or by a fine not to exceed two hundred~~
 20 ~~fifty thousand dollars (\$250,000), or by both that imprisonment~~
 21 ~~and fine, if the offense involves not less than 1,000 articles or not~~
 22 ~~less than 65 audiovisual works as described in subdivision (a).~~

23 ~~(i) Any person who has been convicted of any other violation~~
 24 ~~of subdivision (a) not described in subdivision (g) or (h) shall be~~
 25 ~~punished by imprisonment in the county jail not to exceed one~~
 26 ~~year, or by a fine not to exceed twenty-five thousand dollars~~
 27 ~~(\$25,000), or by both that imprisonment and fine. A second or~~
 28 ~~subsequent conviction under subdivision (a) not described in~~
 29 ~~subdivision (g) or (h) shall be punished by imprisonment in the~~
 30 ~~county jail not to exceed one year or in the state prison, or by a~~
 31 ~~fine not to exceed one hundred thousand dollars (\$100,000), or by~~
 32 ~~both that imprisonment and fine.~~

33 ~~SEC. 4. Section 653u of the Penal Code is amended to read:~~
 34 ~~653u. (a) Any person who records or masters or causes to be~~
 35 ~~recorded or mastered on any article or audiovisual work with the~~
 36 ~~intent to sell for commercial advantage or private financial gain,~~
 37 ~~the sounds of a live performance with the knowledge that the~~
 38 ~~sounds thereon have been recorded or mastered without the consent~~
 39 ~~of the owner of the sounds of the live performance is guilty of a~~

1 public offense punishable as provided in subdivisions (d), (e), and
2 (f):

3 (b) ~~In the absence of a written agreement or operation of law~~
4 ~~to 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 (e) ~~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 (d) ~~Any person who has been convicted of a violation of~~
16 ~~subdivision (a) shall be punished by imprisonment in the county~~
17 ~~jail not to exceed one year, or by a fine not to exceed one hundred~~
18 ~~fifty thousand dollars (\$150,000), or by both that imprisonment~~
19 ~~and fine, if the offense involves at least 100, but less than 1,000;~~
20 ~~articles or at least seven, but less than 65, audiovisual works.~~

21 (e) ~~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 imprisonment in the state prison~~
24 ~~for two, three, or five years, or by a fine not to exceed two hundred~~
25 ~~fifty thousand dollars (\$250,000), or by both that imprisonment~~
26 ~~and fine, if the offense involves the recording, mastering, or~~
27 ~~causing to be recorded or mastered of at least 1,000 articles or at~~
28 ~~least 65 audiovisual works as described in subdivision (a).~~

29 (f) ~~Any person who has been convicted of any other violation~~
30 ~~of subdivision (a) not described in subdivision (d) or (e), shall be~~
31 ~~punished by imprisonment in the county jail not to exceed one~~
32 ~~year, or by a fine not to exceed twenty-five thousand dollars~~
33 ~~(\$25,000), or by both that imprisonment and fine. A second or~~
34 ~~subsequent conviction under subdivision (a) not described in~~
35 ~~subdivision (d) or (e) shall be punished by imprisonment in the~~
36 ~~county jail not to exceed one year or in the state prison, or by a~~
37 ~~fine not to exceed one hundred thousand dollars (\$100,000), or by~~
38 ~~both that imprisonment and fine.~~

1 ~~(g) As used in this section, “article” shall have the same meaning~~
2 ~~as in Section 653s and “audiovisual work” shall have the same~~
3 ~~meaning as in Section 653w.~~

4 ~~SEC. 5. Section 653w of the Penal Code is amended to read:~~

5 ~~653w. (a) A person is guilty of failure to disclose the origin~~
6 ~~of a recording or audiovisual work if he or she knowingly~~
7 ~~advertises or offers for sale or resale, or sells or resells, or causes~~
8 ~~the rental, sale or resale of, or rents, or manufactures, or distributes,~~
9 ~~including electronic dissemination, or possesses for these purposes,~~
10 ~~any recording or audiovisual work, the cover, box, jacket, or label~~
11 ~~of which does not clearly and conspicuously disclose the actual~~
12 ~~true name and address of the manufacturer thereof and the name~~
13 ~~of the actual author, artist, performer, producer, programmer, or~~
14 ~~group thereon. This section does not require the original~~
15 ~~manufacturer or authorized licensees of software producers to~~
16 ~~disclose the contributing authors or programmers.~~

17 ~~As used in this section, “recording” means any tangible medium~~
18 ~~upon which information or sounds are recorded or otherwise stored,~~
19 ~~including any phonograph record, disc, tape, audio cassette, wire,~~
20 ~~film, memory card, flash drive, hard drive, data storage device, or~~
21 ~~other medium on which information or sounds are recorded or~~
22 ~~otherwise stored, but does not include sounds accompanying a~~
23 ~~motion picture or other audiovisual work.~~

24 ~~As used in this section, “audiovisual works” are the physical~~
25 ~~embodiment of works that consist of related images that are~~
26 ~~intrinsicly intended to be shown using machines or devices such~~
27 ~~as projectors, viewers, or electronic equipment, together with~~
28 ~~accompanying sounds, if any, regardless of the nature of the~~
29 ~~material objects such as films or tapes on which the works are~~
30 ~~embodied.~~

31 ~~(b) Any person who has been convicted of a violation of~~
32 ~~subdivision (a) shall be punished as follows:~~

33 ~~(1) If the offense involves at least 25, but less than 100,~~
34 ~~recordings or at least seven, but less than 65, audiovisual works~~
35 ~~as described in subdivision (a), the person shall be punished by~~
36 ~~imprisonment in a county jail not to exceed one year, or by a fine~~
37 ~~not to exceed one hundred fifty thousand dollars (\$150,000), or~~
38 ~~by both that imprisonment and fine. If the person has a prior~~
39 ~~conviction under this paragraph or paragraph (2), the person shall~~
40 ~~be punished by imprisonment in a county jail not to exceed one~~

1 year, or in the state prison, or by a fine not to exceed two hundred
2 fifty thousand dollars (\$250,000), or by both that imprisonment
3 and fine.

4 (2) If the offense involves at least 100 recordings or 65
5 audiovisual works described in subdivision (a), the person shall
6 be punished by imprisonment in a county jail not to exceed one
7 year, or by imprisonment in the state prison for two, three, or five
8 years, or by a fine not to exceed two hundred fifty thousand dollars
9 (\$250,000), or by both that imprisonment and fine. If the person
10 has a prior conviction under this paragraph or paragraph (1), the
11 person shall be punished by imprisonment in a county jail not to
12 exceed one year, or in the state prison for two, three, or five years,
13 or by a fine not to exceed five hundred thousand dollars (\$500,000),
14 or by both that imprisonment and fine.

15 (3) Any other violation of subdivision (a) not described in
16 paragraph (1) or (2), shall, upon a first offense, be punished by
17 imprisonment in a county jail not to exceed one year, or by a fine
18 not to exceed fifty thousand dollars (\$50,000), or by both that
19 imprisonment and fine.

20 (4) A second or subsequent conviction under subdivision (a)
21 not described in paragraph (1) or (2), shall be punished by
22 imprisonment in a county jail not to exceed one year or in the state
23 prison, or by a fine not to exceed one hundred thousand dollars
24 (\$100,000), or by both that imprisonment and fine.

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

26 653z. (a) Every person who operates a recording device in a
27 motion picture theater while a motion picture is being exhibited,
28 for the purpose of recording a theatrical motion picture and without
29 the express written authority of the owner of the motion picture
30 theater, is guilty of a public offense and shall be punished by
31 imprisonment in a county jail not exceeding one year, by a fine
32 not exceeding twenty-five thousand dollars (\$25,000), or by both
33 that fine and imprisonment.

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

38 (c) For a third or subsequent conviction under subdivision (a),
39 the person shall be punished by imprisonment in a county jail not

1 exceeding one year, by a fine not exceeding one hundred thousand
2 dollars (\$100,000), or by both that fine and imprisonment.

3 (d) For the purposes of this section, the following terms have
4 the following meanings:

5 (1) "Recording device" means a photographic, digital or video
6 camera, or other audio or video recording device capable of
7 recording the sounds and images of a motion picture or any portion
8 of a motion picture.

9 (2) "Motion picture theater" means a theater or other premises
10 in which a motion picture is exhibited.

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

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

14 653aa. (a) (1) Any person, except a minor, who is located in
15 California, who, knowing that a particular recording or audiovisual
16 work is commercial, knowingly electronically disseminates all or
17 substantially all of that commercial recording or audiovisual work
18 to more than 10 other people without disclosing his or her e-mail
19 address, and the title of the recording or audiovisual work is
20 punishable by a fine not exceeding twenty-five thousand dollars
21 (\$25,000), by imprisonment in a county jail for a period not
22 exceeding one year, or by both that fine and imprisonment.

23 (2) For a second conviction under paragraph (1), the person
24 shall be punished by imprisonment in a county jail not exceeding
25 one year, by a fine not exceeding fifty thousand dollars (\$50,000),
26 or by both that fine and imprisonment.

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

31 (b) Any minor who violates paragraph (1) of subdivision (a) is
32 punishable by a fine not exceeding five hundred dollars (\$500).
33 Any minor who commits a third or subsequent violation of
34 paragraph (1) of subdivision (a) is punishable by a fine not
35 exceeding two thousand dollars (\$2,000), by imprisonment in a
36 county jail for a period not to exceed one year, or by both that
37 imprisonment and fine.

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

39 (1) To a person who electronically disseminates a commercial
40 recording or audiovisual work to his or her immediate family, or

1 within his or her personal network, defined as a restricted access
2 network controlled by and accessible to only that person or people
3 in his or her immediate household.

4 (2) If the copyright owner, or a person acting under the authority
5 of the copyright owner, of a commercial recording or audiovisual
6 work has explicitly given permission for all or substantially all of
7 that recording or audiovisual work to be freely disseminated
8 electronically by or to anyone without limitation.

9 (3) To a person who has been licensed either by the copyright
10 owner or a person acting under the authority of the copyright owner
11 to disseminate electronically all or substantially all of a commercial
12 audiovisual work or recording.

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

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

19 (e) Upon conviction for a violation of this section, in addition
20 to the penalty prescribed, the court shall order the permanent
21 deletion or destruction of any electronic file containing a
22 commercial recording or audiovisual work, the dissemination of
23 which was the basis of the violation. This subdivision shall not
24 apply to the copyright owner or to a person acting under the
25 authority of the copyright owner.

26 (f) An Internet service provider does not violate, and does not
27 aid and abet a violation of paragraph (1) of subdivision (a), and
28 paragraph (1) of subdivision (a) shall not be enforced against an
29 Internet service provider, to the extent that the Internet service
30 provider enables a user of its service to electronically disseminate
31 an audiovisual work or sound recording, if the Internet service
32 provider maintains its valid e-mail address or other means of
33 electronic notification on its Web site in a location that is accessible
34 to the public.

35 For the purposes of this section, "Internet service provider"
36 means an entity, to the extent that the entity is transmitting, routing,
37 or providing connections for Internet communications initiated by
38 or at the direction of another person, between or among points
39 specified by a user, of material placed online by a user, storing or

1 ~~hosting that material at the direction of a user, or referring or~~
2 ~~linking users to that material.~~

3 ~~(g) For purposes of this section:~~

4 ~~(1) “Recording” means the electronic or physical embodiment~~
5 ~~of any recorded images, sounds, or images and sounds, but does~~
6 ~~not include audiovisual works or sounds accompanying audiovisual~~
7 ~~works.~~

8 ~~(2) “Audiovisual work” means the electronic or physical~~
9 ~~embodiment of motion pictures, television programs, video or~~
10 ~~computer games, or other audiovisual presentations that consist~~
11 ~~of related images that are intrinsically intended to be shown by~~
12 ~~the use of machines or devices such as projectors, viewers, or~~
13 ~~electronic equipment, or a computer program, software, or system,~~
14 ~~as defined in Section 502, together with accompanying sounds, if~~
15 ~~any.~~

16 ~~(3) “Commercial recording or audiovisual work” means a~~
17 ~~recording or audiovisual work whose copyright owner, or assignee,~~
18 ~~authorized agent, or licensee, has made or intends to make available~~
19 ~~for sale, rental, or for performance or exhibition to the public under~~
20 ~~license, but does not include an excerpt consisting of less than~~
21 ~~substantially all of a recording or audiovisual work. A recording~~
22 ~~or audiovisual work may be commercial regardless of whether the~~
23 ~~person who electronically disseminates it seeks commercial~~
24 ~~advantage or private financial gain from that dissemination.~~

25 ~~(4) “Electronic dissemination” means initiating a transmission~~
26 ~~of, making available, or otherwise offering, a commercial recording~~
27 ~~or audiovisual work for distribution on the Internet or other digital~~
28 ~~network, regardless of whether someone else had previously~~
29 ~~electronically disseminated the same commercial recording or~~
30 ~~audiovisual work.~~

31 ~~(5) “E-mail address” means a valid e-mail address, or the valid~~
32 ~~e-mail address of the holder of the account from which the~~
33 ~~dissemination took place.~~

34 ~~(6) “Disclosing” means providing information in, attached to,~~
35 ~~or discernable or available in or through the process of~~
36 ~~disseminating or obtaining a commercial recording or audiovisual~~
37 ~~work in a manner that is accessible by any person engaged in~~
38 ~~disseminating or receiving the commercial recording or audiovisual~~
39 ~~work.~~

1 ~~(h) Nothing in this section shall preclude prosecution under any~~
2 ~~other provision of law.~~

3 *SECTION 1. Section 350 of the Penal Code is amended to*
4 *read:*

5 350. (a) Any person who willfully manufactures, intentionally
6 sells, or knowingly possesses for sale any counterfeit mark
7 registered with the Secretary of State or registered on the Principal
8 Register of the United States Patent and Trademark Office, shall,
9 upon conviction, be punishable as follows:

10 (1) When the offense involves less than 1,000 of the articles
11 described in this subdivision, with a total retail or fair market value
12 less than that required for grand theft as defined in Section 487,
13 and if the person is an individual, he or she shall be punished by
14 a fine of not more than ~~five thousand dollars (\$5,000)~~ *ten thousand*
15 *dollars (\$10,000)*, or by imprisonment in a county jail for not more
16 than one year, or by both that fine and imprisonment; or, if the
17 person is a business entity, by a fine of not more than ~~one hundred~~
18 ~~thousand dollars (\$100,000)~~ *two hundred thousand dollars*
19 *(\$200,000)*.

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

31 (b) Any person who has been convicted of a violation of either
32 paragraph (1) or (2) of subdivision (a) shall, upon a subsequent
33 conviction of paragraph (1) of subdivision (a), if the person is an
34 individual, be punished by a fine of not more than ~~fifty thousand~~
35 ~~dollars (\$50,000)~~ *one hundred thousand dollars (\$100,000)*, or by
36 imprisonment in a county jail for not more than one year, or in the
37 state prison for 16 months, or two or three years, or by both that
38 fine and imprisonment; or, if the person is a business entity, by a
39 fine of not more than ~~two hundred thousand dollars (\$200,000)~~
40 *four hundred thousand dollars (\$400,000)*.

1 (c) Any person who has been convicted of a violation of
2 subdivision (a) and who, by virtue of the conduct that was the basis
3 of the conviction, has directly and foreseeably caused death or
4 great bodily injury to another through reliance on the counterfeited
5 item for its intended purpose shall, if the person is an individual,
6 be punished by a fine of not more than ~~fifty thousand dollars~~
7 ~~(\$50,000)~~ *one hundred thousand dollars (\$100,000)*, or by
8 imprisonment in the state prison for two, three, or four years, or
9 by both that fine and imprisonment; or, if the person is a business
10 entity, by a fine of not more than ~~two hundred thousand dollars~~
11 ~~(\$200,000)~~ *four hundred thousand dollars (\$400,000)*.

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

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

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

35 (A) A community property asset of a person other than the
36 defendant.

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

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

4 (e) For the purposes of this section, the following definitions
5 shall apply:

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

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

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

38 (4) “Knowingly possess” means that the person possessing an
39 article knew or had reason to believe that it was spurious, or that
40 it was used on or in connection with spurious articles, or that it

1 was reproduced without authorization of, or in excess of any
2 authorization granted by, the registrant.

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

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

8 (7) “Sale” includes resale.

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

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

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

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

32 (f) This section shall not be enforced against any party who has
33 adopted and lawfully used the same or confusingly similar mark
34 in the rendition of like services or the manufacture or sale of like
35 goods in this state from a date prior to the earliest effective date
36 of registration of the service mark or trademark either with the
37 Secretary of State or on the Principle Register of the United States
38 Patent and Trademark Office.

39 (g) An owner, officer, employee, or agent who provides, rents,
40 leases, licenses, or sells real property upon which a violation of

1 subdivision (a) occurs shall not be subject to a criminal penalty
2 pursuant to this section, unless he or she sells, or possesses for
3 sale, articles bearing a counterfeit mark in violation of this section.
4 This subdivision shall not be construed to abrogate or limit any
5 civil rights or remedies for a trademark violation.

6 (h) This section shall not be enforced against any party who
7 engages in fair uses of a mark, as specified in Section 14247 of
8 the Business and Professions Code.

9 (i) When a person is convicted of an offense under this section,
10 the court shall order the person to pay restitution to the trademark
11 owner and any other victim of the offense pursuant to Section
12 1202.4.

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

14 653h. (a) Every person is guilty of a public offense punishable
15 as provided in subdivisions (b) and (c), who:

16 (1) Knowingly and willfully transfers or causes to be transferred
17 any sounds that have been recorded on a phonograph record, disc,
18 wire, tape, film or other article on which sounds are recorded, with
19 intent to sell or cause to be sold, or to use or cause to be used for
20 commercial advantage or private financial gain through public
21 performance, the article on which the sounds are so transferred,
22 without the consent of the owner.

23 (2) Transports for monetary or like consideration within this
24 state or causes to be transported within this state any such article
25 with the knowledge that the sounds thereon have been so
26 transferred without the consent of the owner.

27 (b) 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, by imprisonment in the state prison for
30 two, three, or five years, or by a fine not to exceed ~~two hundred~~
31 ~~fifty thousand dollars (\$250,000)~~ *five hundred thousand dollars*
32 *(\$500,000)*, or by both, if the offense involves the transfer or
33 transportation, or conduct causing that transfer or transportation,
34 of not less than 1,000 of the articles described in subdivision (a).

35 (c) Any person who has been convicted of any other violation
36 of subdivision (a) not described in subdivision (b), shall be
37 punished by imprisonment in the county jail not to exceed one
38 year, or by a fine of not more than ~~twenty-five thousand dollars~~
39 ~~(\$25,000)~~ *fifty thousand dollars (\$50,000)*, or by both. A second
40 or subsequent conviction under subdivision (a) not described in

1 subdivision (b) shall be punished by imprisonment in the state
2 prison or by a fine not to exceed ~~one hundred thousand dollars~~
3 ~~(\$100,000)~~ *two hundred thousand dollars (\$200,000)*, or by both.

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

9 (1) A violation of subdivision (d) involving not less than 100
10 of those articles shall be punishable by imprisonment in a county
11 jail not to exceed one year or by a fine not to exceed ~~ten thousand~~
12 ~~dollars (\$10,000)~~ *twenty thousand dollars (\$20,000)*, or by both.

13 A second or subsequent conviction for the conduct described in
14 this paragraph shall be punishable by imprisonment in the county
15 jail not to exceed one year or in the state prison, or by a fine not
16 to exceed ~~twenty-five thousand dollars (\$25,000)~~ *fifty thousand*
17 *dollars (\$50,000)*, or by both.

18 (2) A person who has been convicted of any violation of this
19 subdivision not described in paragraph (1) shall be punished by
20 imprisonment in the county jail not to exceed six months or by a
21 fine not to exceed ~~five thousand dollars (\$5,000)~~ *ten thousand*
22 *dollars (\$10,000)*, or by both. A second conviction for the conduct
23 described in this paragraph shall be punishable by imprisonment
24 in the county jail not to exceed one year or by a fine not to exceed
25 ~~ten thousand dollars (\$10,000)~~ *twenty thousand dollars (\$20,000)*,
26 or by both. A third or subsequent conviction for the conduct
27 described in this paragraph shall be punishable by imprisonment
28 in the county jail not to exceed one year or in the state prison, or
29 by a fine not to exceed ~~twenty-five thousand dollars (\$25,000)~~ *fifty*
30 *thousand dollars (\$50,000)*, or by both.

31 (e) As used in this section, “person” means any individual,
32 partnership, partnership’s member or employee, corporation,
33 limited liability company, association or corporation or association
34 employee, officer or director; “owner” means the person who owns
35 the original master recording embodied in the master phonograph
36 record, master disc, master tape, master film or other article used
37 for reproducing recorded sounds on phonograph records, discs,
38 tapes, films or other articles on which sound is or can be recorded,
39 and from which the transferred recorded sounds are directly or
40 indirectly derived; and “master recording” means the original

1 fixation of sounds upon a recording from which copies can be
2 made.

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

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

10 (h) This section does not apply to any not-for-profit educational
11 institution or any federal or state governmental entity, if the
12 institution or entity has as a primary purpose the advancement of
13 the public's knowledge and the dissemination of information
14 regarding America's musical cultural heritage, provided that this
15 purpose is clearly set forth in the institution's or entity's charter,
16 bylaws, certificate of incorporation, or similar document, and the
17 institution or entity has, prior to the transfer, made a good faith
18 effort to identify and locate the owner or owners of the sound
19 recordings to be transferred and, provided that the owner or owners
20 could not be and have not been located. Nothing in this section
21 shall be construed to relieve an institution or entity of its
22 contractual or other obligation to compensate the owners of sound
23 recordings to be transferred. In order to continue the exemption
24 permitted by this subdivision, the institution or entity shall make
25 continuing efforts to locate such owners and shall make an annual
26 public notice of the fact of the transfers in newspapers of general
27 circulation serving the jurisdictions where the owners were
28 incorporated or doing business at the time of initial affixations.
29 The institution or entity shall keep on file a record of the efforts
30 made to locate such owners for inspection by appropriate
31 governmental agencies.

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

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

35 653s. (a) Any person who transports or causes to be transported
36 for monetary or other consideration within this state, any article
37 containing sounds of a live performance with the knowledge that
38 the sounds thereon have been recorded or mastered without the
39 consent of the owner of the sounds of the live performance is guilty

1 of a public offense punishable as provided in subdivision (g) or
2 (h).

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

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

7 (2) “Article” means the original disc, wire, tape, film,
8 phonograph record, or other recording device used to record or
9 master the sounds of the live performance and any copy or
10 reproduction thereof which duplicates, in whole or in part, the
11 original.

12 (3) “Person” means any individual, partnership, partnership
13 member or employee, corporation, association, or corporation or
14 association employee, officer, or director, limited liability
15 company, or limited liability company manager or officer.

16 (c) In the absence of a written agreement or operation of law to
17 the contrary, the performer or performers of the sounds of a live
18 performance shall be presumed to own the right to record or master
19 those sounds.

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

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

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

31 (f) This section shall not apply to persons engaged in radio or
32 television broadcasting or cablecasting who record or fix the sounds
33 of a live performance for, or in connection with, broadcast or cable
34 transmission and related uses in educational television or radio
35 programs, for archival purposes, or for news programs or purposes
36 if the recordation or master recording is not commercially
37 distributed independent of the broadcast or cablecast by or through
38 the broadcasting or cablecasting entity to subscribers or the general
39 public.

1 (g) 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 imprisonment in the state prison
4 for two, three, or five years, or by a fine not to exceed ~~two hundred~~
5 ~~fifty thousand dollars (\$250,000)~~ *five hundred thousand dollars*
6 *(\$500,000)*, or by both, if the offense involves the transportation
7 or causing to be transported of not less than 1,000 articles described
8 in subdivision (a).

9 (h) Any person who has been convicted of any other violation
10 of subdivision (a) not described in subdivision (g) shall be punished
11 by imprisonment in the county jail not to exceed one year, or by
12 a fine not to exceed ~~twenty-five thousand dollars (\$25,000)~~ *fifty*
13 *thousand dollars (\$50,000)*, or both. A second or subsequent
14 conviction under subdivision (a) not described in subdivision (g)
15 shall be punished by imprisonment in the county jail not to exceed
16 one year or in the state prison, or by a fine not to exceed ~~one~~
17 ~~hundred thousand dollars (\$100,000)~~ *two hundred thousand dollars*
18 *(\$200,000)*, or by both.

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

25 (1) A violation of subdivision (i) involving not less than 100 of
26 those articles shall be punishable by imprisonment in a county jail
27 not to exceed one year or by a fine not to exceed ~~ten thousand~~
28 ~~dollars (\$10,000)~~ *twenty thousand dollars (\$20,000)*, or by both.
29 A second or subsequent conviction for the conduct described in
30 this paragraph shall be punishable by imprisonment in the county
31 jail not to exceed one year or in the state prison, or by a fine not
32 to exceed ~~twenty-five thousand dollars (\$25,000)~~ *fifty thousand*
33 *dollars (\$50,000)*, or by both.

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

1 ~~ten thousand dollars (\$10,000)~~ *twenty thousand dollars (\$20,000)*,
2 or by both. A third or subsequent conviction for the conduct
3 described in this paragraph shall be punishable by imprisonment
4 in the county jail not to exceed one year or in the state prison, or
5 by a fine not to exceed ~~twenty-five thousand dollars (\$25,000)~~ *fifty*
6 *thousand dollars (\$50,000)*, or by both.

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

8 653u. (a) Any person who records or masters or causes to be
9 recorded or mastered on any article with the intent to sell for
10 commercial advantage or private financial gain, the sounds of a
11 live performance with the knowledge that the sounds thereon have
12 been recorded or mastered without the consent of the owner of the
13 sounds of the live performance is guilty of a public offense
14 punishable as provided in subdivisions (d) and (e).

15 (b) In the absence of a written agreement or operation of law
16 to the contrary, the performer or performers of the sounds of a live
17 performance shall be presumed to own the right to record or master
18 those sounds.

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

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

27 (d) 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 imprisonment in the state prison
30 for two, three, or five years, or by a fine not to exceed ~~two hundred~~
31 ~~fifty thousand dollars (\$250,000)~~ *five hundred thousand dollars*
32 *(\$500,000)*, or by both, if the offense involves the recording,
33 mastering, or causing to be recorded or mastered at least 1,000
34 articles described in subdivision (a).

35 (e) Any person who has been convicted of any other violation
36 of subdivision (a) not described in subdivision (d), shall be
37 punished by imprisonment in the county jail not to exceed one
38 year, or by a fine not to exceed ~~twenty-five thousand dollars~~
39 ~~(\$25,000)~~ *fifty thousand dollars (\$50,000)*, or by both. A second
40 or subsequent conviction under subdivision (a) not described in

1 subdivision (d) shall be punished by imprisonment in the county
2 jail not to exceed one year or in the state prison or by a fine not to
3 exceed ~~one hundred thousand dollars (\$100,000)~~ *two hundred*
4 *thousand dollars (\$200,000)*, or by both.

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

6 653w. (a) A person is guilty of failure to disclose the origin
7 of a recording or audiovisual work if, for commercial advantage
8 or private financial gain, he or she knowingly advertises or offers
9 for sale or resale, or sells or resells, or causes the rental, sale or
10 resale, or rents, or manufactures, or possesses for these purposes,
11 any recording or audiovisual work, the cover, box, jacket, or label
12 of which does not clearly and conspicuously disclose the actual
13 true name and address of the manufacturer thereof and the name
14 of the actual author, artist, performer, producer, programmer, or
15 group thereon. This section does not require the original
16 manufacturer or authorized licensees of software producers to
17 disclose the contributing authors or programmers.

18 As used in this section, “recording” means any tangible medium
19 upon which information or sounds are recorded or otherwise stored,
20 including any phonograph record, disc, tape, audio cassette, wire,
21 film, or other medium on which information or sounds are recorded
22 or otherwise stored, but does not include sounds accompanying a
23 motion picture or other audiovisual work.

24 As used in this section, “audiovisual works” are the physical
25 embodiment of works that consist of related images that are
26 intrinsically intended to be shown using machines or devices such
27 as projectors, viewers, or electronic equipment, together with
28 accompanying sounds, if any, regardless of the nature of the
29 material objects such as films or tapes on which the works are
30 embodied.

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

33 (1) If the offense involves the advertisement, offer for sale or
34 resale, sale, rental, manufacture, or possession for these purposes,
35 of at least 100 articles of audio recordings or 100 articles of
36 audiovisual works described in subdivision (a), the person shall
37 be punished by imprisonment in a county jail not to exceed one
38 year, or by imprisonment in the state prison for two, three, or five
39 years, or by a fine not to exceed ~~two hundred fifty thousand dollars~~
40 ~~(\$250,000)~~ *five hundred thousand dollars (\$500,000)*, or by both.

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

6 (3) A second or subsequent conviction under subdivision (a)
 7 not described in paragraph (1), shall be punished by imprisonment
 8 in a county jail not to exceed one year or in the state prison, or by
 9 a fine not to exceed ~~one hundred thousand dollars (\$100,000)~~ *two*
 10 *hundred thousand dollars (\$200,000)*, or by both.

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

12 653z. (a) Every person who operates a recording device in a
 13 motion picture theater while a motion picture is being exhibited,
 14 for the purpose of recording a theatrical motion picture and without
 15 the express written authority of the owner of the motion picture
 16 theater, is guilty of a public offense and shall be punished by
 17 imprisonment in a county jail not exceeding one year, by a fine
 18 not exceeding ~~two thousand five hundred dollars (\$2,500)~~ *five*
 19 *thousand dollars (\$5,000)*, or by both that fine and imprisonment.

20 (b) For the purposes of this section, the following terms have
 21 the following meanings:

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

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

28 (c) Nothing in this section shall preclude prosecution under any
 29 other provision of law.

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

31 653aa. (a) Any person, except a minor, who is located in
 32 California, who, knowing that a particular recording or audiovisual
 33 work is commercial, knowingly electronically disseminates all or
 34 substantially all of that commercial recording or audiovisual work
 35 to more than 10 other people without disclosing his or her e-mail
 36 address, and the title of the recording or audiovisual work is
 37 punishable by a fine not exceeding ~~two thousand five hundred~~
 38 ~~dollars (\$2,500)~~ *five thousand dollars (\$5,000)*, imprisonment in
 39 a county jail for a period not exceeding one year, or by both that
 40 fine and imprisonment.

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

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

9 (1) To a person who electronically disseminates a commercial
10 recording or audiovisual work to his or her immediate family, or
11 within his or her personal network, defined as a restricted access
12 network controlled by and accessible to only that person or people
13 in his or her immediate household.

14 (2) If the copyright owner, or a person acting under the authority
15 of the copyright owner, of a commercial recording or audiovisual
16 work has explicitly given permission for all or substantially all of
17 that recording or audiovisual work to be freely disseminated
18 electronically by or to anyone without limitation.

19 (3) To a person who has been licensed either by the copyright
20 owner or a person acting under the authority of the copyright owner
21 to disseminate electronically all or substantially all of a commercial
22 audiovisual work or recording.

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

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

29 (e) Upon conviction for a violation of this section, in addition
30 to the penalty prescribed, the court shall order the permanent
31 deletion or destruction of any electronic file containing a
32 commercial recording or audiovisual work, the dissemination of
33 which was the basis of the violation. This subdivision shall not
34 apply to the copyright owner or to a person acting under the
35 authority of the copyright owner.

36 (f) An Internet service provider does not violate, and does not
37 aid and abet a violation of subdivision (a), and subdivision (a) shall
38 not be enforced against an Internet service provider, to the extent
39 that the Internet service provider enables a user of its service to
40 electronically disseminate an audiovisual work or sound recording,

1 if the Internet service provider maintains its valid e-mail address
2 or other means of electronic notification on its Web site in a
3 location that is accessible to the public.

4 For the purposes of this section, “Internet service provider”
5 means an entity, to the extent that the entity is transmitting, routing,
6 or providing connections for Internet communications initiated by
7 or at the direction of another person, between or among points
8 specified by a user, of material placed online by a user, storing or
9 hosting that material at the direction of a user, or referring or
10 linking users to that material.

11 (g) For purposes of this section:

12 (1) “Recording” means the electronic or physical embodiment
13 of any recorded images, sounds, or images and sounds, but does
14 not include audiovisual works or sounds accompanying audiovisual
15 works.

16 (2) “Audiovisual work” means the electronic or physical
17 embodiment of motion pictures, television programs, video or
18 computer games, or other audiovisual presentations that consist
19 of related images that are intrinsically intended to be shown by
20 the use of machines or devices such as projectors, viewers, or
21 electronic equipment, or a computer program, software, or system,
22 as defined in Section 502, together with accompanying sounds, if
23 any.

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

33 (4) “Electronic dissemination” means initiating a transmission
34 of, making available, or otherwise offering, a commercial recording
35 or audiovisual work for distribution on the Internet or other digital
36 network, regardless of whether someone else had previously
37 electronically disseminated the same commercial recording or
38 audiovisual work.

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

4 (6) “Disclosing” means providing information in, attached to,
5 or discernable or available in or through the process of
6 disseminating or obtaining a commercial recording or audiovisual
7 work in a manner that is accessible by any person engaged in
8 disseminating or receiving the commercial recording or audiovisual
9 work.

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

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

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

15 1202.4. (a) (1) It is the intent of the Legislature that a victim
16 of crime who incurs any economic loss as a result of the
17 commission of a crime shall receive restitution directly from any
18 defendant convicted of that crime.

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

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

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

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

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

33 (1) The restitution fine shall be set at the discretion of the court
34 and commensurate with the seriousness of the offense, but shall
35 not be less than two hundred dollars (\$200), and not more than ten
36 thousand dollars (\$10,000), if the person is convicted of a felony,
37 and shall not be less than one hundred dollars (\$100), and not more
38 than one thousand dollars (\$1,000), if the person is convicted of
39 a misdemeanor.

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

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

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

34 (e) The restitution fine shall not be subject to penalty
35 assessments authorized in Section 1464 or Chapter 12
36 (commencing with Section 76000) of Title 8 of the Government
37 Code, or the state surcharge authorized in Section 1465.7, and
38 shall be deposited in the Restitution Fund in the State Treasury.

39 (f) Except as provided in subdivisions (q) and (r), in every case
40 in which a victim has suffered economic loss as a result of the

1 defendant's conduct, the court shall require that the defendant
2 make restitution to the victim or victims in an amount established
3 by court order, based on the amount of loss claimed by the victim
4 or victims or any other showing to the court. If the amount of loss
5 cannot be ascertained at the time of sentencing, the restitution
6 order shall include a provision that the amount shall be determined
7 at the direction of the court. The court shall order full restitution
8 unless it finds compelling and extraordinary reasons for not doing
9 so, and states them on the record. The court may specify that funds
10 confiscated at the time of the defendant's arrest, except for funds
11 confiscated pursuant to Section 11469 of the Health and Safety
12 Code, be applied to the restitution order if the funds are not exempt
13 for spousal or child support or subject to any other legal exemption.

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

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

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

36 (A) Full or partial payment for the value of stolen or damaged
37 property. The value of stolen or damaged property shall be the
38 replacement cost of like property, or the actual cost of repairing
39 the property when repair is possible.

40 (B) Medical expenses.

1 (C) Mental health counseling expenses.

2 (D) Wages or profits lost due to injury incurred by the victim,
3 and if the victim is a minor, wages or profits lost by the minor's
4 parent, parents, guardian, or guardians, while caring for the injured
5 minor. Lost wages shall include any commission income as well
6 as any base wages. Commission income shall be established by
7 evidence of commission income during the 12-month period prior
8 to the date of the crime for which restitution is being ordered,
9 unless good cause for a shorter time period is shown.

10 (E) Wages or profits lost by the victim, and if the victim is a
11 minor, wages or profits lost by the minor's parent, parents,
12 guardian, or guardians, due to time spent as a witness or in assisting
13 the police or prosecution. Lost wages shall include any commission
14 income as well as any base wages. Commission income shall be
15 established by evidence of commission income during the
16 12-month period prior to the date of the crime for which restitution
17 is being ordered, unless good cause for a shorter time period is
18 shown.

19 (F) Noneconomic losses, including, but not limited to,
20 psychological harm, for felony violations of Section 288.

21 (G) Interest, at the rate of 10 percent per annum, that accrues
22 as of the date of sentencing or loss, as determined by the court.

23 (H) Actual and reasonable attorney's fees and other costs of
24 collection accrued by a private entity on behalf of the victim.

25 (I) Expenses incurred by an adult victim in relocating away
26 from the defendant, including, but not limited to, deposits for
27 utilities and telephone service, deposits for rental housing,
28 temporary lodging and food expenses, clothing, and personal items.
29 Expenses incurred pursuant to this section shall be verified by law
30 enforcement to be necessary for the personal safety of the victim
31 or by a mental health treatment provider to be necessary for the
32 emotional well-being of the victim.

33 (J) Expenses to install or increase residential security incurred
34 related to a crime, as defined in subdivision (c) of Section 667.5,
35 including, but not limited to, a home security device or system, or
36 replacing or increasing the number of locks.

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

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

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

20 (C) If the defendant offers evidence to rebut the presumption
21 established by this paragraph, the court may release additional
22 information contained in the records of the board to the defendant
23 only after reviewing that information in camera and finding that
24 the information is necessary for the defendant to dispute the amount
25 of the restitution order.

26 (5) Except as provided in paragraph (6), in any case in which
27 an order may be entered pursuant to this subdivision, the defendant
28 shall prepare and file a disclosure identifying all assets, income,
29 and liabilities in which the defendant held or controlled a present
30 or future interest as of the date of the defendant's arrest for the
31 crime for which restitution may be ordered. The financial disclosure
32 statements shall be made available to the victim and the board
33 pursuant to Section 1214. The disclosure shall be signed by the
34 defendant upon a form approved or adopted by the Judicial Council
35 for the purpose of facilitating the disclosure. Any defendant who
36 willfully states as true any material matter that he or she knows to
37 be false on the disclosure required by this subdivision is guilty of
38 a misdemeanor, unless this conduct is punishable as perjury or
39 another provision of law provides for a greater penalty.

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

10 (7) Except as provided in paragraph (6), the defendant shall file
11 the disclosure with the clerk of the court no later than the date set
12 for the defendant’s sentencing, unless otherwise directed by the
13 court. The disclosure may be inspected or copied as provided by
14 subdivision (b), (c), or (d) of Section 1203.05.

15 (8) In its discretion, the court may relieve the defendant of the
16 duty under paragraph (7) of filing with the clerk by requiring that
17 the defendant’s disclosure be submitted as an attachment to, and
18 be available to, those authorized to receive the following:

19 (A) Any report submitted pursuant to subparagraph (C) of
20 paragraph (2) of subdivision (b) of Section 1203 or subdivision
21 (g) of Section 1203.

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

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

27 (9) The court may consider a defendant’s unreasonable failure
28 to make a complete disclosure pursuant to paragraph (5) as any of
29 the following:

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

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

34 (C) A factor indicating that the interests of justice would not be
35 served by conditionally sentencing the defendant under Section
36 1203.

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

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

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

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

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

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

33 (g) The court shall order full restitution unless it finds
34 compelling and extraordinary reasons for not doing so, and states
35 those reasons on the record. A defendant's inability to pay shall
36 not be considered a compelling and extraordinary reason not to
37 impose a restitution order, nor shall inability to pay be a
38 consideration in determining the amount of a restitution order.

39 (h) The district attorney may request an order of examination
40 pursuant to the procedures specified in Article 2 (commencing

1 with Section 708.110) of Chapter 6 of Division 2 of Title 9 of Part
2 2 of the Code of Civil Procedure, in order to determine the
3 defendant's financial assets for purposes of collecting on the
4 restitution order.

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

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

14 (k) For purposes of this section, "victim" shall include all of
15 the following:

16 (1) The immediate surviving family of the actual victim.

17 (2) Any corporation, business trust, estate, trust, partnership,
18 association, joint venture, government, governmental subdivision,
19 agency, or instrumentality, or any other legal or commercial entity
20 when that entity is a direct victim of a crime.

21 (3) Any person who has sustained economic loss as the result
22 of a crime and who satisfies any of the following conditions:

23 (A) At the time of the crime was the parent, grandparent, sibling,
24 spouse, child, or grandchild of the victim.

25 (B) At the time of the crime was living in the household of the
26 victim.

27 (C) At the time of the crime was a person who had previously
28 lived in the household of the victim for a period of not less than
29 two years in a relationship substantially similar to a relationship
30 listed in subparagraph (A).

31 (D) Is another family member of the victim, including, but not
32 limited to, the victim's fiancé or fiancée, and who witnessed the
33 crime.

34 (E) Is the primary caretaker of a minor victim.

35 (4) Any person who is eligible to receive assistance from the
36 Restitution Fund pursuant to Chapter 5 (commencing with Section
37 13950) of Part 4 of Division 3 of Title 2 of the Government Code.

38 (5) Any governmental entity that is responsible for repairing,
39 replacing, or restoring public or privately owned property that has
40 been defaced with graffiti or other inscribed material, as defined

1 in subdivision (e) of Section 594, and that has sustained an
2 economic loss as the result of a violation of Section 594, 594.3,
3 594.4, 640.5, 640.6, or 640.7 of the Penal Code.

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

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

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

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

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

35 (q) Upon conviction for a violation of Section 236.1, the court
36 shall, in addition to any other penalty or restitution, order the
37 defendant to pay restitution to the victim in any case in which a
38 victim has suffered economic loss as a result of the defendant's
39 conduct. The court shall require that the defendant make restitution
40 to the victim or victims in an amount established by court order,

1 based on the amount of loss claimed by the victim or victims or
2 any other showing to the court. In determining restitution pursuant
3 to this section, the court shall base its order upon the greater of the
4 following: the gross value of the victim's labor or services based
5 upon the comparable value of similar services in the labor market
6 in which the offense occurred, or the value of the victim's labor
7 as guaranteed under California law, or the actual income derived
8 by the defendant from the victim's labor or services or any other
9 appropriate means to provide reparations to the victim.

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

1 recordings. Proof of the specific wholesale value of each
2 nonconforming device or article is not required.

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

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

7

8 CHAPTER 5.8. INTELLECTUAL PROPERTY PIRACY PREVENTION
9 AND PROSECUTION ACT OF 2010

10

11 13849. (a) This act shall be known and may be cited as the
12 Intellectual Property Piracy Prevention and Prosecution Act of
13 2010.

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

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

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

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

37 (4) Intellectual property piracy poses a significant threat to
38 consumers, who, through no fault of their own, are often deceived
39 or deliberately misled, or both deceived and deliberately misled,
40 as to the nature of purchased products, whereby pirated goods are

1 palmed off, including in electronic form, as legitimate authorized
2 goods.

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

5 (6) This act will send a strong signal that California is committed
6 to protecting the intellectual property created by California's
7 innovation and entertainment industries.

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

11 (8) Finally, by safeguarding the legitimate sale of intellectual
12 property, California will increase its tax base, and stimulate the
13 economy.

14 (c) Funds provided pursuant to this act are intended to ensure
15 that law enforcement and prosecutors are equipped with the
16 necessary personnel and equipment to combat successfully
17 intellectual property piracy, which includes piracy of movies,
18 music, software, and video games.

19 13849.1. (a) There is hereby created, within the Bureau of
20 Investigation and Intelligence of the Department of Justice, the
21 Division of Organized Crime and Intellectual Piracy (DOCIP) to
22 investigate and prosecute organized crime in connection with
23 crimes involving intellectual property theft, with an emphasis on
24 intellectual property theft within the motion picture industry.

25 (b) The DOCIP shall prepare and submit to the Legislature an
26 annual report with information on the number and types of
27 investigations and prosecutions funded by the Intellectual Property
28 Piracy Prevention and Prosecution Fund.

29 (c) For purposes of this chapter, "organized crime" shall have
30 the same meaning as is specified in subdivision (d) of Section
31 186.2.

32 (d) For purposes of this chapter, "intellectual property" means
33 property that results from original creative thought, such as patents,
34 copyright material, and trademarks.

35 13849.2. (a) There is hereby established the Intellectual
36 Property Piracy Prevention and Prosecution Fund to provide total
37 or partial reimbursement for costs incurred by local law
38 enforcement agencies assisting the DOCIP in ongoing
39 investigations or prosecutions, or both, of organized crimes
40 involving intellectual property theft.

1 (b) Upon appropriation by the Legislature, the Controller shall
2 make payments from the fund, upon the approval of the Attorney
3 General, to local law enforcement agencies that provide substantial
4 assistance to the DOCIP in connection with open investigations
5 or court proceedings, or both, against organized crime involving
6 intellectual property theft, including, but not limited to, all of the
7 following:

8 (1) Counterfeit goods.

9 (2) Copyright infringement.

10 (3) Trademark infringement.

11 (4) Pirated CDs.

12 (5) Pirated DVDs.

13 (6) Pirated computer software.

14 (c) Investigations of intellectual property theft related to motion
15 pictures shall receive the highest priority in making disbursements
16 from the fund.

17 (d) Notwithstanding Section 1463.001, all fines resulting from
18 prosecutions by the DOCIP shall be deposited in the fund.

19 SEC. 10. No reimbursement is required by this act pursuant to
20 Section 6 of Article XIII B of the California Constitution because
21 the only costs that may be incurred by a local agency or school
22 district will be incurred because this act creates a new crime or
23 infraction, eliminates a crime or infraction, or changes the penalty
24 for a crime or infraction, within the meaning of Section 17556 of
25 the Government Code, or changes the definition of a crime within
26 the meaning of Section 6 of Article XIII B of the California
27 Constitution.

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

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

O