

AMENDED IN SENATE APRIL 19, 2012

SENATE BILL

No. 1177

Introduced by Senator Leno

February 22, 2012

An act to amend *Sections 3602 and 3754 of the Labor Code, and to amend Section 1202.4 of the Penal Code*, relating to restitution.

LEGISLATIVE COUNSEL'S DIGEST

SB 1177, as amended, Leno. Restitution for crime victims.

Existing law requires the court to order a person who is convicted of a crime to pay a restitution fine, as prescribed, and restitution to the victim or victims for the full amount of economic loss, unless the court finds compelling and extraordinary reasons for not doing so and states them on the record.

Existing law requires every employer except the state to secure the payment of compensation by being insured against liability, or by securing a certificate of consent to self-insure. Under existing law, payment, in whole or in part, of compensation by either the employer or the insurer is a bar to recovery against each of them of the amount paid.

This bill would prohibit, in cases where an employer is convicted of a crime against an employee, a payment to the employee or the employee's ~~kin~~ dependent that is made by the employer's workers' compensation insurance carrier from being used to offset the restitution owed unless the court finds substantial evidence that all premiums for that insurance coverage have been ~~made~~ paid in full accordance with the law as of the date of the crime.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

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

1 SECTION 1. Section 3602 of the Labor Code is amended to
2 read:

3 3602. (a) Where the conditions of compensation set forth in
4 Section 3600 concur, the right to recover ~~such~~ compensation is,
5 except as specifically provided in this section and Sections 3706
6 and 4558, the sole and exclusive remedy of the employee or his
7 or her dependents against the employer, ~~and the~~. *The* fact that either
8 the employee or the employer also occupied another or dual
9 capacity prior to, or at the time of, the employee's industrial injury
10 shall not permit the employee or his or her dependents to bring an
11 action at law for damages against the employer.

12 (b) An employee, or his or her dependents in the event of his
13 or her death, may bring an action at law for damages against the
14 employer, as if this division did not apply, in the following
15 instances:

16 (1) Where the employee's injury or death is proximately caused
17 by a willful physical assault by the employer.

18 (2) Where the employee's injury is aggravated by the employer's
19 fraudulent concealment of the existence of the injury and its
20 connection with the employment, in which case the employer's
21 liability shall be limited to those damages proximately caused by
22 the aggravation. The burden of proof respecting apportionment of
23 damages between the injury and any subsequent aggravation
24 thereof is upon the employer.

25 (3) Where the employee's injury or death is proximately caused
26 by a defective product manufactured by the employer and sold,
27 leased, or otherwise transferred for valuable consideration to an
28 independent third person, and that product is thereafter provided
29 for the employee's use by a third person.

30 (c) In all cases where the conditions of compensation set forth
31 in Section 3600 do not concur, the liability of the employer shall
32 be the same as if this division had not been enacted.

33 (d) (1) For the purposes of this division, including Sections
34 3700 and 3706, an employer may secure the payment of
35 compensation on employees provided to it by agreement by another
36 employer by entering into a valid and enforceable agreement with
37 that other employer under which the other employer agrees to
38 obtain, and has, in fact, obtained workers' compensation coverage

1 for those employees. In those cases, both employers shall be
2 considered to have secured the payment of compensation within
3 the meaning of this section and Sections 3700 and 3706 if there is
4 a valid and enforceable agreement between the employers to obtain
5 that coverage, and that coverage, as specified in subdivision (a)
6 or (b) of Section 3700, has been in fact obtained, and the coverage
7 remains in effect for the duration of the employment providing
8 legally sufficient coverage to the employee or employees who
9 form the subject matter of the coverage. That agreement shall not
10 be made for the purpose of avoiding an employer's appropriate
11 experience rating as defined in subdivision (c) of Section 11730
12 of the Insurance Code.

13 **Employers**

14 (2) *Employers* who have complied with this subdivision shall
15 not be subject to civil, criminal, or other penalties for failure to
16 provide workers' compensation coverage or tort liability in the
17 event of employee injury, but may, in the absence of compliance,
18 be subject to all three.

19 (e) *As provided in paragraph (12) of subdivision (f) of Section*
20 *1202.4 of the Penal Code, in cases where an employer is convicted*
21 *of a crime against an employee, a payment to the employee or the*
22 *employee's dependant that is paid by the employer's workers'*
23 *compensation insurance carrier shall not be used to offset the*
24 *amount of the restitution order unless the court finds substantial*
25 *evidence that all premiums for that insurance coverage have been*
26 *paid in full accordance with the law as of the date of the crime.*

27 *SEC. 2. Section 3754 of the Labor Code is amended to read:*

28 3754. ~~Payment~~ *Except as provided in paragraph (12) of*
29 *subdivision (f) of Section 1202.4 of the Penal Code, payment in*
30 *whole or in part of compensation by either the employer or the*
31 *insurer shall, to the extent thereof, be a bar to recovery against*
32 *each of them of the amount so paid.*

33 ~~SECTION 1.~~

34 *SEC. 3. Section 1202.4 of the Penal Code is amended to read:*

35 1202.4. (a) (1) It is the intent of the Legislature that a victim
36 of crime who incurs an economic loss as a result of the commission
37 of a crime shall receive restitution directly from a defendant
38 convicted of that crime.

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

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

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

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

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

15 (1) The restitution fine shall be set at the discretion of the court
16 and commensurate with the seriousness of the offense. If the person
17 is convicted of a felony, the fine shall not be less than two hundred
18 forty dollars (\$240) starting on January 1, 2012, two hundred eighty
19 dollars (\$280) starting on January 1, 2013, and three hundred
20 dollars (\$300) starting on January 1, 2014, and not more than ten
21 thousand dollars (\$10,000). If the person is convicted of a
22 misdemeanor, the fine shall not be less than one hundred twenty
23 dollars (\$120) starting on January 1, 2012, one hundred forty
24 dollars (\$140) starting on January 1, 2013, and one hundred fifty
25 dollars (\$150) starting on January 1, 2014, and not more than one
26 thousand dollars (\$1,000).

27 (2) In setting a felony restitution fine, the court may determine
28 the amount of the fine as the product of the minimum fine pursuant
29 to paragraph (1) multiplied by the number of years of imprisonment
30 the defendant is ordered to serve, multiplied by the number of
31 felony counts of which the defendant is convicted.

32 (c) The court shall impose the restitution fine unless it finds
33 compelling and extraordinary reasons for not doing so and states
34 those reasons on the record. A defendant's inability to pay shall
35 not be considered a compelling and extraordinary reason not to
36 impose a restitution fine. Inability to pay may be considered only
37 in increasing the amount of the restitution fine in excess of the
38 minimum fine pursuant to paragraph (1) of subdivision (b). The
39 court may specify that funds confiscated at the time of the
40 defendant's arrest, except for funds confiscated pursuant to Section

1 11469 of the Health and Safety Code, be applied to the restitution
2 fine if the funds are not exempt for spousal or child support or
3 subject to any other legal exemption.

4 (d) In setting the amount of the fine pursuant to subdivision (b)
5 in excess of the minimum fine pursuant to paragraph (1) of
6 subdivision (b), the court shall consider any relevant factors,
7 including, but not limited to, the defendant's inability to pay, the
8 seriousness and gravity of the offense and the circumstances of its
9 commission, any economic gain derived by the defendant as a
10 result of the crime, the extent to which any other person suffered
11 losses as a result of the crime, and the number of victims involved
12 in the crime. Those losses may include pecuniary losses to the
13 victim or his or her dependents as well as intangible losses, such
14 as psychological harm caused by the crime. Consideration of a
15 defendant's inability to pay may include his or her future earning
16 capacity. A defendant shall bear the burden of demonstrating his
17 or her inability to pay. Express findings by the court as to the
18 factors bearing on the amount of the fine shall not be required. A
19 separate hearing for the fine shall not be required.

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

25 (f) Except as provided in subdivisions (q) and (r), in every case
26 in which a victim has suffered economic loss as a result of the
27 defendant's conduct, the court shall require that the defendant
28 make restitution to the victim or victims in an amount established
29 by court order, based on the amount of loss claimed by the victim
30 or victims or any other showing to the court. If the amount of loss
31 cannot be ascertained at the time of sentencing, the restitution
32 order shall include a provision that the amount shall be determined
33 at the direction of the court. The court shall order full restitution
34 unless it finds compelling and extraordinary reasons for not doing
35 so and states them on the record. The court may specify that funds
36 confiscated at the time of the defendant's arrest, except for funds
37 confiscated pursuant to Section 11469 of the Health and Safety
38 Code, be applied to the restitution order if the funds are not exempt
39 for spousal or child support or subject to any other legal exemption.

1 (1) The defendant has the right to a hearing before a judge to
2 dispute the determination of the amount of restitution. The court
3 may modify the amount, on its own motion or on the motion of
4 the district attorney, the victim or victims, or the defendant. If a
5 motion is made for modification of a restitution order, the victim
6 shall be notified of that motion at least 10 days prior to the
7 proceeding held to decide the motion.

8 (2) Determination of the amount of restitution ordered pursuant
9 to this subdivision shall not be affected by the indemnification or
10 subrogation rights of a third party. Restitution ordered pursuant to
11 this subdivision shall be ordered to be deposited to the Restitution
12 Fund to the extent that the victim, as defined in subdivision (k),
13 has received assistance from the victim compensation program
14 pursuant to Chapter 5 (commencing with Section 13950) of Part
15 4 of Division 3 of Title 2 of the Government Code.

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

22 (A) Full or partial payment for the value of stolen or damaged
23 property. The value of stolen or damaged property shall be the
24 replacement cost of like property, or the actual cost of repairing
25 the property when repair is possible.

26 (B) Medical expenses.

27 (C) Mental health counseling expenses.

28 (D) Wages or profits lost due to injury incurred by the victim,
29 and if the victim is a minor, wages or profits lost by the minor's
30 parent, parents, guardian, or guardians, while caring for the injured
31 minor. Lost wages shall include commission income as well as
32 base wages. Commission income shall be established by evidence
33 of commission income during the 12-month period prior to the
34 date of the crime for which restitution is being ordered, unless
35 good cause for a shorter time period is shown.

36 (E) Wages or profits lost by the victim, and if the victim is a
37 minor, wages or profits lost by the minor's parent, parents,
38 guardian, or guardians, due to time spent as a witness or in assisting
39 the police or prosecution. Lost wages shall include commission
40 income as well as base wages. Commission income shall be

1 established by evidence of commission income during the
2 12-month period prior to the date of the crime for which restitution
3 is being ordered, unless good cause for a shorter time period is
4 shown.

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

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

9 (H) Actual and reasonable attorney’s fees and other costs of
10 collection accrued by a private entity on behalf of the victim.

11 (I) Expenses incurred by an adult victim in relocating away
12 from the defendant, including, but not limited to, deposits for
13 utilities and telephone service, deposits for rental housing,
14 temporary lodging and food expenses, clothing, and personal items.
15 Expenses incurred pursuant to this section shall be verified by law
16 enforcement to be necessary for the personal safety of the victim
17 or by a mental health treatment provider to be necessary for the
18 emotional well-being of the victim.

19 (J) Expenses to install or increase residential security incurred
20 related to a violent felony, as defined in subdivision (c) of Section
21 667.5, including, but not limited to, a home security device or
22 system, or replacing or increasing the number of locks.

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

27 (L) Expenses for a period of time reasonably necessary to make
28 the victim whole, for the costs to monitor the credit report of, and
29 for the costs to repair the credit of, a victim of identity theft, as
30 defined in Section 530.5.

31 (4) (A) If, as a result of the defendant’s conduct, the Restitution
32 Fund has provided assistance to or on behalf of a victim or
33 derivative victim pursuant to Chapter 5 (commencing with Section
34 13950) of Part 4 of Division 3 of Title 2 of the Government Code,
35 the amount of assistance provided shall be presumed to be a direct
36 result of the defendant’s criminal conduct and shall be included
37 in the amount of the restitution ordered.

38 (B) The amount of assistance provided by the Restitution Fund
39 shall be established by copies of bills submitted to the California
40 Victim Compensation and Government Claims Board reflecting

1 the amount paid by the board and whether the services for which
2 payment was made were for medical or dental expenses, funeral
3 or burial expenses, mental health counseling, wage or support
4 losses, or rehabilitation. Certified copies of these bills provided
5 by the board and redacted to protect the privacy and safety of the
6 victim or any legal privilege, together with a statement made under
7 penalty of perjury by the custodian of records that those bills were
8 submitted to and were paid by the board, shall be sufficient to meet
9 this requirement.

10 (C) If the defendant offers evidence to rebut the presumption
11 established by this paragraph, the court may release additional
12 information contained in the records of the board to the defendant
13 only after reviewing that information in camera and finding that
14 the information is necessary for the defendant to dispute the amount
15 of the restitution order.

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

30 (6) A defendant who fails to file the financial disclosure required
31 in paragraph (5), but who has filed a financial affidavit or financial
32 information pursuant to subdivision (c) of Section 987, shall be
33 deemed to have waived the confidentiality of that affidavit or
34 financial information as to a victim in whose favor the order of
35 restitution is entered pursuant to subdivision (f). The affidavit or
36 information shall serve in lieu of the financial disclosure required
37 in paragraph (5), and paragraphs (7) to (10), inclusive, shall not
38 apply.

39 (7) Except as provided in paragraph (6), the defendant shall file
40 the disclosure with the clerk of the court no later than the date set

1 for the defendant’s sentencing, unless otherwise directed by the
2 court. The disclosure may be inspected or copied as provided by
3 subdivision (b), (c), or (d) of Section 1203.05.

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

8 (A) A report submitted pursuant to subparagraph (C) of
9 paragraph (2) of subdivision (b) of Section 1203 or subdivision
10 (g) of Section 1203.

11 (B) A stipulation submitted pursuant to paragraph (4) of
12 subdivision (b) of Section 1203.

13 (C) A report by the probation officer, or information submitted
14 by the defendant applying for a conditional sentence pursuant to
15 subdivision (d) of Section 1203.

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

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

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

23 (C) A factor indicating that the interests of justice would not be
24 served by conditionally sentencing the defendant under Section
25 1203.

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

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

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

35 (B) If sentencing the defendant under Section 1170, provide
36 that the victim shall receive a copy of the portion of the probation
37 report filed pursuant to Section 1203.10 concerning the defendant’s
38 employment, occupation, finances, and liabilities.

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

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

23 (12) In cases where an employer is convicted of a crime against
24 an employee, a payment to the employee or the employee's ~~kin~~
25 *dependent* that is made by the employer's workers' compensation
26 insurance carrier shall not be used to offset the amount of the
27 restitution order ~~under subdivision (a)~~ unless the court finds
28 substantial evidence that all premiums for that insurance coverage
29 have been ~~made~~ *paid* in full accordance with the law as of the date
30 of the crime.

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

37 (h) The district attorney may request an order of examination
38 pursuant to the procedures specified in Article 2 (commencing
39 with Section 708.110) of Chapter 6 of Division 2 of Title 9 of Part
40 2 of the Code of Civil Procedure, in order to determine the

1 defendant's financial assets for purposes of collecting on the
2 restitution order.

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

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

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

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

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

19 (3) A person who has sustained economic loss as the result of
20 a crime and who satisfies any of the following conditions:

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

23 (B) At the time of the crime was living in the household of the
24 victim.

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

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

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

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

36 (5) A governmental entity that is responsible for repairing,
37 replacing, or restoring public or privately owned property that has
38 been defaced with graffiti or other inscribed material, as defined
39 in subdivision (e) of Section 594, and that has sustained an

1 economic loss as the result of a violation of Section 594, 594.3,
2 594.4, 640.5, 640.6, or 640.7 of the Penal Code.

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

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

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

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

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

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

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

9 (r) (1) In addition to any other penalty or fine, the court shall
10 order a person who has been convicted of a violation of Section
11 350, 653h, 653s, 653u, 653w, or 653aa that involves a recording
12 or audiovisual work to make restitution to an owner or lawful
13 producer, or trade association acting on behalf of the owner or
14 lawful producer, of a phonograph record, disc, wire, tape, film, or
15 other device or article from which sounds or visual images are
16 derived that suffered economic loss resulting from the violation.
17 For the purpose of calculating restitution, the value of each
18 nonconforming article or device shall be based on the aggregate
19 wholesale value of lawfully manufactured and authorized devices
20 or articles from which sounds or visual images are devised, unless
21 a higher value can be proved in the case of (A) an unreleased audio
22 work, or (B) an audiovisual work that, at the time of unauthorized
23 distribution, has not been made available in copies for sale to the
24 general public in the United States on a digital versatile disc. The
25 order of restitution shall also include reasonable costs incurred as
26 a result of an investigation of the violation undertaken by the
27 owner, lawful producer, or trade association acting on behalf of
28 the owner or lawful producer. “Aggregate wholesale value” means
29 the average wholesale value of lawfully manufactured and
30 authorized sound or audiovisual recordings. Proof of the specific
31 wholesale value of each nonconforming device or article is not
32 required.

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

O